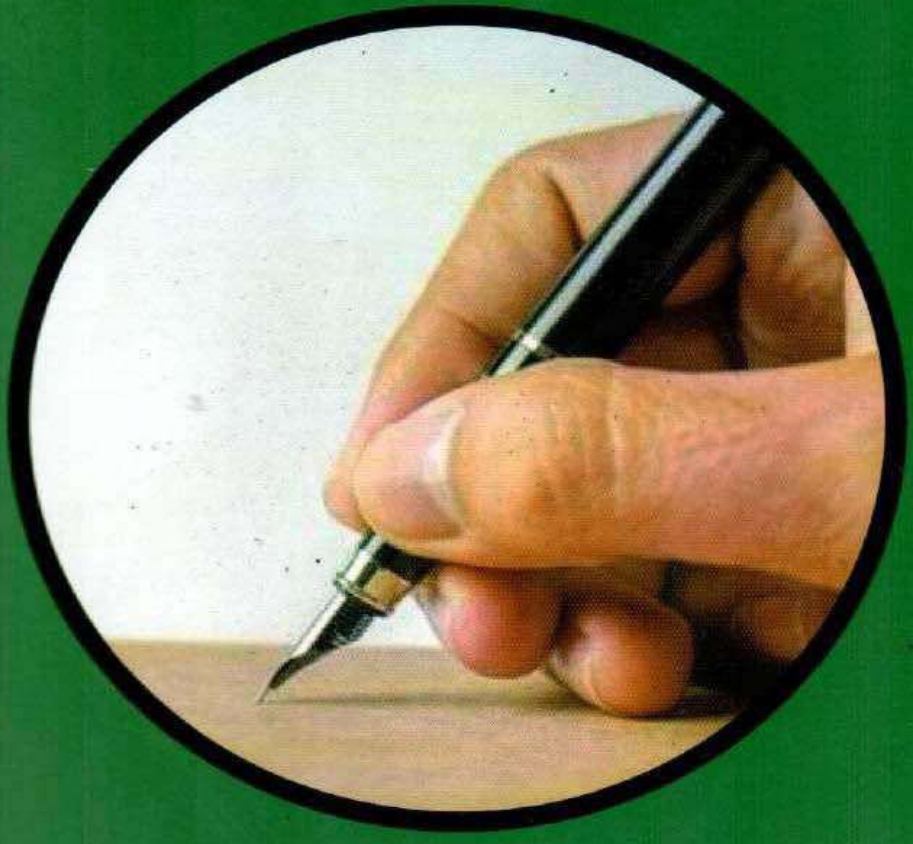
LEGISLATIVE DESK BOOK



Legislative Research and Reform for Promoting and Enforcing Non-discriminatory Laws and Policies Project
Legislative and Parliamentary Affairs Division

First Edition Published by :
Legislative Research and Reform for Promoting and Enforcing
Non-discriminatory Laws and Policies Project
Legislative and Parliamentary Affairs Division
Ministry of Law, Justice and Parliamentary Affairs
Phone : 8802-223390653

Second Edition Published by :
Strengthening Legislative Capacity and Legal Awareness Building Project
Legislative and Parliamentary Affairs Division
Ministry of Law, Justice and Parliamentary Affairs
Phone: 8802-223390653

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First Edition :
October, 2021

Second Edition :
May, 2024

Cover Design : ICT Cell
Legislative and Parliamentary Affairs Division

Printed By :
Tisha Enterprise
32 Narinda Road, Narinda, Dhaka-1100
Mobile : 01819299430
E-mail : t.enterprise2012@gmail.com

LEGISLATIVE DESK BOOK

CONTENTS: PAGE

PREFACE **I**

PART WISE CONTENTS **i-xxix**

PART I: INTRODUCTION TO LEGISLATIVE DESK BOOK **1**

PART II: LEGISLATIVE HISTORY, BACKGROUND AND SOURCE **5**

PART III: LEGISLATIVE PROCESS IN BANGLADESH **51**

PART IV: PRINCIPLES AND MATERIALS OF LEGISLATIVE DRAFTING **93**

PART V: LEGISLATIVE POLICY FORMULATION ANDDRAFTING INSTRUCTIONS182

PART VI: THE BASICS OF LEGISLATIVE DRAFTING **247**

PART VII: LEGISLATIVE DRAFTING: GENERAL AND TECHNIQUES **316**

PART VIII: DRAFTING SUBORDINATE LEGISLATION **431**

PART IX: LEGISLATIVE INTERPRETATION **465**

PART X: PERFORMANCE OF CONTRACT **505**

BIBLIOGRAPHY

LEGISLATIVE DESK BOOK

PART I

INTRODUCTION TO LEGISLATIVE DESK BOOK

1. Purpose of Legislative Desk Book
2. Interpretation of this Legislative Desk Book
3. Scope of Legislative Desk Book
4. Relationship to other documents
4.1. Drafting Directions
4. 2. Drafting Notes (including Instrument Drafting Notes)
4. 3. LPAD Secretary Emails

PART II

LEGISLATIVE HISTORY, BACKGROUND AND SOURCE

CHAPTER 1
LEGISLATIVE HISTORY OF BANGLADESH

1. Legislative History of Bangladesh
1.1. Legal History of the ancient Bengal
1.1.1 The sources of ancient Law
1.1.1.1The Vedic epoch
1.1.1.2 The era of Dharmashastras
1.1.1.2.1 The Sutra Period
1.1.1.2.2 The Smriti Period
1.1.1.3 The Post Smriti Period
1.2 Legal History of the Medieval Period (Muslim Rule)
1 .2.1 Fiqh-e-Firoz Shahi
1.2.2 Fatwa-i-Alamgiri

1.2.3 The Sultanate of Delhi: Civil Administration
1.2.4 The Sultanate administration of Justice
1.2.5 Judicial Reform of Sher Shah
1.2.6 The Administration of Justice during the Mughal Period
1.3 Legal History of the British Regime
1 3.1 Charter of East India Company
1.3.2 Mughal Forman (Order) to East India Company
1.3.3 Charter of 1661
1.3.4 Charter of 1668
1.3.5 Charter of 1683
1.3.6 Administration of Justice in Calcutta
1.3.7 Administration of Justice in East Bengal
1.3.8 Charter of 1726
1.3.9 Charter of 1753
1.3.10 Charter of 1774
1.3.11 Warren Hastings' Plan of 1772
1.3.12 Regulating Act, 1773
1.3.13 Charter of 1774 and Supreme Court of Calcutta
1.3.14 Reorganization of Adalats in 1780
1.3.15 Reforms of 1781
1.3.16 The First Civil Code
1.3.17 Reforms in the Administration of Criminal Justice
1.3. 18 Act of Settlement, 1781
1.3.19 Pit's India Act, 1784
1.3.20 Judicial Plan of 1787
1.3.21 Judicial Plan of 1793
1.3.22. Act of 1797
1.3.23. The Indian High Courts Act, 1861
1.3.24 Indian High Courts Act of 1865 and 1911
1.3.25 The Government of India Act, 1915
1.3.26 The Government of India Act, 1935
1.3.27 Law Commissions during the British Regime
1.4 Legislation on and after Partition
1.4.1 Indian Independence Act, 1947
1.4.2 Constituent Assembly of Pakistan

1.4.3 Constitution of Pakistan, 1956

1.4.4 Constitution of Pakistan, 1962

1.4.5 Martial Law of 1958

1.4.6 Martial Law of 1969

1.4.7 Legal Framework Order (LFO), 1970

1.5 Legislation of Independent Bangladesh

1.5.1 The Proclamation of Independence

1.5.2 Laws Continuance Enforcement Order, April 10, 1971

1.5.3 Provisional Constitution of Bangladesh Order, 1972

1.5.4 The Bangladesh (Adaptation of Existing Laws) Order, 1972

1.5.5 The Constitution of the People's Republic of Bangladesh, 1972

1.5.6 President's Orders before Constitution and after Constitution

1.5.7 Constitutional Amendments-First to Seventeenth

1.5.8 Bangladesh Parliament-First to Eleventh

1.5.9 Land Mark Cases in the Constitutional History of Bangladesh

1.5.9.1 A.K.M. Fazlul Hoque v. State, 26 DLR (SC) 11, decided on August 22, 1973

1.5.9.2. DulichandOmarlal vs. Bangladesh, 33 DLR (AD) 30, decided on June 18, 1980

1.5.9.3. Mullik Brothers vs. Income Tax Officer, 31 DLR (AD) 165

1.5.9.4. ANWAR HOSSAIN CHOWDHURY VS. BANGLADESH, 1989 BLD (SPL) 1, 41 DLR(AD) 165

1.5.9.5. Constitution13th Amendment Case

CHAPTER 2

BACKGROUND OF ENACTMENTS

2.1 Background of enactments

2.1.1 Election Manifesto of the Ruling Party

2.1.2 Civil Society/ Pressure Group

2.1.3 Observations of the Supreme Court in Judgments

2.1.4 Bureaucracy/ implementing bodies

2.1.5 Reports of Parliamentary Standing Committees;

2.1.6 Academic Research

2.1.7 International Treaties/ Agreements

2.1.8 Bilateral treaties/Agreements

2.1.9 Imposed Conditions of Development Partners

2.1.10 The Role of Administrative Ministry

2.1.11 The Role of Core Ministries and Cabinet Division

CHAPTER 3
LEGISLATIVE SOURCE

3.1 Legislative Source
3.1.1 Constitution
3.1.1.1 Constitution in a material and a formal sense
3.1.1.2 Determination of the content of general norms by the Constitution
3.1.2 Custom
3.1.3 Precedent
3.1.4 Law enacted by the Parliament with the consent of the President
3.1.4.1 Substantive and adjective Law
3.1.5 Ordinances
3.1.6 Conventional Law evolved from the agreement or unwritten wisdom
3.1.7 Creation of Law and application of Law
3.1.7.1 Parliament (also called House of the Nation)
3.1.7.2 Executive
3.1.7.3 Judiciary
3.1.8 Determination of the Law-creating function
3.1.9 Subordinate Legislation
3.1.10 The principal object of legislations
3.1.10.1 How the objects are to be achieved
3.1.10.2 Deciding whether a law will work or needed
3.1.10.3Direct and Indirect motivation
3.1.10.4 Transcendental and socially organized sanctions
3.1.10.5 Punishment and reward
3.1.11 Law as a coercive order
3.1.12 Law, morality, religion
3.1.13 Monopolization of the Use of force
3.1.14 Law and peace
3.1.15 Psychic compulsion
3.1.16 The motives of lawful behavior
3.1.17 Arguments against the definition of Law as coercive order

3.1.18 Validity and Efficacy

3.2 Limitations on Legislation

PART III

LEGISLATIVE PROCESS IN BANGLADESH

CHAPTER 1

AN OVERVIEW OF BANGLADESH LEGISLATION

1 An overview of Bangladesh legislation

1.1.1 Introduction

1.1.2. Principal Legislation

1.1.3. Subordinate Legislation

1.1.4. Important laws to consider when drafting legislation in Bangladesh

1.1.4.1.1. Constitution

1.1.4.2. General Clauses Act 1897

1.1.4.3. Rules of Business 1996

1.1.4.4. Public Money and Budget Management Act, 2009

1.1.4.5. Public Service Act 2018

1.1.4.6. Code of Criminal Procedure, Penal Code and other special penal laws

1.1.4.7. Comptroller and Auditor-General (Additional Functions) Act 1974

1.1.4.8. Locating the laws of Bangladesh

1.1.5. Language of Legislation

1.2. Legislative competency

1.2.1. Legislative competency

1.2.2 Principal Legislation

1.2.2.1. The Parliament:

1.2.2.2. The President:

1.2.3 Subordinate Legislation

CHAPTER 2

LEGISLATIVE PROCESS IN BANGLADESH

2. Legislative Process in Bangladesh

2.1. Introduction

2.1.1. Constitutional position relating to principal legislation

2.2. Principal Legislation

2.2.1 Stages of law making

2.2.2 Executive procedure

2.2.2.1 Initiating legislation

2.2.2.2 Provisions relating to executive procedure:

2.2.1.1. Provisions relating to legislative policy formulation

2.2.1.2. Initiation of Legislative proposal

2.2.1.3. Reference to the Legislative and Parliamentary Affairs Division (LPAD)

2.2.1.4. Preparation of drafting Bill

2.2.1.5. Examination of the draft Bill by the administrative Ministry/ Division

2.2.1.6. Approval of the Bill by the Cabinet for introduction in the Parliament

2.2.1.7. Recommendation of the President

2.2.1.8. Preparation of Statement of Objects and Reasons and Notes on Clauses

2.2.1.9. Amendments

2.2.1.10. Supply of List of Individuals and Associations to be consulted

2.2.1.11. Custody of signed copy of Ordinance

2.2.2. Parliament Procedure

2.2.1.2. INTRODUCTION OF BILLS

2.2.1.2. 1. Government Bills

2.2.1.2. 1. Introduction of Government Bills

2.2.1.2. 2. Private Member's Bills

2.2.1.2. 2.1. Notice of Private Member's Bill

2.2.1.2. 2.2. Mode of obtaining and communicating recommendation of the President (For Private Member's Bill)

2.2.1.2. 2.3. Introduction of Private Member's Bills

2.2.1.2. 2.4. Publication of Bills.-

2.2.1.2. 2.5. Motions after introduction and time for Consideration of Bills.-

2.2.1.2. 2.6. Discussion of Principles of Bills

2.2.1.2. 2.7. Persons whom motions in respect of Bills may be made

2.2.1.2. 2.8. Procedure after presentation of report of Select/ Standing committee.-

2.2.1.2. 2.9. Scope of debate on report of Select/Standing Committee

2.2.1.2. 2.10. Mode of moving amendments

2.2.1.2. 2.11. Notice of amendments

2.2.1.2. 2.12. Conditions of admissibility of amendments

2.2.1.2. 2.13. Arrangement of amendments

2.2.1.2. 2.14. Order of amendments

2.2.1.2. 2.15. Withdrawal of amendments

2.2.1.2. 2.16. Submission of Bill Clause by Clause

2.2.1.2. 2.17. Clause one, Enacting formula, Preamble and Title of Bill

2.2.1.2. 2.18. Passing of Bills

2.2.1.2. 2.19. Scope of debate

2.2.1.2. 2.20. Correction of patent and clerical errors

2.2.1.2. 2.21. Withdrawal of Bills

2.2.1.2. 2.22. Voting

2.2.1.2. 2.23. Authentication of Bills

2.2.1.2. 2.24. Publication of Bills assented to by the President

2.2.1.2. 2.25. Message of the President and reconsideration of the Bill

2.2.1.2. 2.26. Authentication of Bills passed again by the House

2.2.1.3. Amendment to the Constitution

2.2.1.3. 1. Special provisions for amendment of the Constitution.

2.2.1.3. 1. Provision of the Rules of Procedure of Parliament:

2.1.2. Subordinate Legislation

2.1.2.1. Executive procedure: Subordinate law making functions

3.1.2.1.1.1. Pre publication of draft proposal of rule and regulation

3.1.2.1.1. 2. Consultation with certain Ministries, Divisions and Departments for the preparation of Rules, Regulations, Agreements and other documents having the status of legal instruments:

3.1.2.1.1.3. Providing vetting or opinion on rules, regulations, contracts, other legal documents by the Legislative and Parliamentary Affairs Division (LPAD)and keeping its copies :

2.1.2.2. Parliament procedure

2.1.2.2. 1. Constitutional provision:

2.1.2.2.2. Present situation:

CHAPTER 3

LEGISLATIVE DRAFTING PROCESS IN BANGLADESH: AN OVERVIEW

3. I. Introduction:

3.2. Background:

3.3. Current Situation: Problem Statement

3.3.1. Lack of Diversity of Policy Tools

3.3.2. Inadequate Emphasis on Policy Development Phase

3.3. 3. Quality of the Legislative Product

3.3. 4. Deficiencies in the Legislative Process

3.3. 5. Inadequate Public Participation Provisions

3.3.6. Inadequate Budgeting Procedures and Skills

3.4. Policy Recommendations

3.4.1. Formal Reform: Reform of the legislative process (law drafting)

3.4.1.1Improving the development of policies prior to law drafting

3.4. 1.2 fuller use of consultation and consensus building

3.4. 1.3. Introducing inter-ministerial reviewing process in the development stage

3.4. 1.4. Setting and maintaining law drafting standards

3.4. 1.5. Setting a clear role of the Legislative Drafter

3.4. 1.6. Applying equivalent standards to parliamentary initiatives

3.4. 2. Institutional Reform

3.4. 2.1 Improving the use of policy tools, implementation, monitoring and evaluation, and communication strategy

3.4. 2.2 Improving the institutional arrangements for substantive and legislative departments

3.4. 2.3 Audit and improvement of financial flows, budgeting processes and responsibility assignments

3.4. 2.4 Audit and improving records management system

3.4. 2.5 Use of working groups as a consultative body rather than drafting body

3.4. 3. Capacity Building

PART IV
PRINCIPLES AND MATERIALS OF LEGISLATIVE DRAFTING

CHAPTER 1
GOALS, CHALLENGES AND CONSTRAINTS

1. Goals, challenges and constraints

1.1. The goals

1.2. The challenges: more readable law takes longer to draft

1.3. The constraints

CHAPTER 2
PRINCIPLES AND MATERIALS OF LEGISLATIVE DRAFTING

2.1. The Legislative process should start with setting objectives and establishing policy:

2.1.1. Introduction

2.1.2. Where Do Policies Originate?

2.1.3. How should policies be made, and what are the key steps?

2.1.3.1. Identifying the problem

2.1.3.2. Analysing and explaining the causes of the problem

2.1.3.3. Proposing multiple solutions to the problem

2.1.3.4. Selecting the best solution(s) to the problem

2.1.4. How Can Laws be drafted to implement policy Objectives and Legislative Solutions?

2.1.5. How can policy objectives be secured during the legislative process?

2.1.6. How can policy making be evaluated?

2.1.7. Conclusion

2.2. Legislation should be Harmonisation with national and International Requirements:

2.2.1. Introduction

2.2.2. What is a Harmonisation with national standard?

2.2.3. What is Harmonisation with international Standards?

2.2.4. How is Harmonisation performed?

2.2.5. How are laws Harmonised during the drafting process?

2.2.6. Conclusion

2.3. Legislation should be practical and Effective:

2.3.1. Introduction
2.3.2. What is practical and effective legislation?
2.3.3. How can Legislation be made practical and effective?
2.3.4. What are sunset provisions, and how should they be utilised?
2.3.5. Conclusion
2.4. Legislation should be Normative, Not Aspirational
2.4.1. Introduction
2.4.2. Drafting normative provisions
2.4.2.1. Provisions which create prohibitions
2.4.2.2. Provisions which create obligations
2.4.2.3. Provisions which authorise and create rights
2.4.2.4. Exceptions to Normative drafting
2.4.3. Conclusion
2.5. Legislation Should Establish Appropriate Sanctions
2.5.1. Principal categories of sanctions
2.5.2. Implementable
2.5.3. Cost Effective
2.5.4. Proportionate
2.5.5. Flexible
2.5.6. Aligned with public interests
2.5.7. Deterrent
2.6 Legislation should be technically Sound/Correctly Structured
2.7. Legislation should be technically sound/well drafted
2.8. Legislative drafting should reflect the type of act and intended audience
2.9. Legal clarity should be promoted through sound sentence structure
2.10. Legal Clarity should be promoted through sound word choice
2.11. The repeal or amendment of existing Legislating must be precise
2.12. Definitions should be correctly used
2.13. Negative formulations should be avoided
2.14. Legislation should be gender neutral
2.15. References should be accurately drafted
2.16. Legal drafting and terminology should respect linguistic differences
2.17. The Legislative Drafting process should be open and participatory:

2.17. 1. Introduction
2.17.2. Which parliamentary procedures should be open and participatory?
2.17.3. Why should legislative drafting be open and participatory?
2.17.4. What are the pre-requisites for open and participatory legislative drafting?
2.17.5. How can non-Governmental parties improve laws?
2.17.6. Have all interested parties had the opportunity to present their views?
2.17. 7. When should consultation with non-governmental parties take place?
2.17.8. How can legislative drafting be made more open and participatory?
2.17.8.1. Legislative working groups
2.17.8.2. Specialised drafting Institutions
2.17.8.3. Information management, communications, and outreach
2.17. 8.4. Open Hearings
2.17. 8.5. Electronic governance
2.17.9. Conclusion

PART V
LEGISLATIVE POLICY FORMULATION
AND
DRAFTING INSTRUCTIONS

INTRODUCTION
1. Preliminary
2. Purpose of this Part
3. Scope of this Part

CHAPTER 1
THE NATURE OF LEGISLATION

1. The nature of legislation

1.1. Legislation might not be appropriate

1.2. Non-legislative options

1.3. Types of legislation

1.4. Types of Bill

1.5. Effective, fair and transparent legislation

1.6. Precedents

CHAPTER 2
THE LEGISLATIVE PROCESS

2.1. Constitutional position

2.2. Stages of law making

2.3. Initiation of legislation

2.4. Flowchart for processing of Government Bill

2.5. Stages of legislation of all Bills

2.6. Publication and Introduction

2.7. First Reading

2.8. Committee Stage

2.9. Report stage

2.10. Second Reading

2.11. Third Reading and passing

2.12. Authentication of Bills

2.13. Assent

2.14. Publication

2.15. Commencement

2.16. Implementation

2.17. Contents of a Bill

2.18. Additional material

2.19. Schedules

2.20. Subordinate legislation

2.21. Explanatory material

2.22. Legal report

2.23. Responsibilities of Secretaries

CHAPTER 3

THE ROLE OF THE LEGISLATIVE DRAFTER

3. The role of the legislative drafter

3.1. Role and functions of the legislative drafter

3.2. Continuing role of the legislative drafter

3.3. Institutional framework

3.4. Role of the LPAD

3.5. Role of the instructing officer

3.6. Relationship between instructing officer and drafter

3.7. Time needed for drafting

CHAPTER 4

CABINET SUBMISSIONS

4. Cabinet submissions

4.1 Cabinet approval of drafting: Cabinet Submission 1 (See Appendix 1)

4.2. Before presenting Cabinet Submission to Cabinet

4.3. Contents of Cabinet Submission

4.4. Presentation of Cabinet Submission

4.5. Approval of introduction of a draft Bill: Cabinet Submission 2

4.6. Subordinate legislation

4.7. The Cabinet directive

CHAPTER 5

POLICY CONSIDERATIONS

5. Policy considerations

5.1. Policymaker's role

5.2. Statutory interpretation

5.3. The formulation of policy

5.4. Resources/implementation

5.5. General policy issues

5.6. Constitutionality of proposal generally

5.7. Good governance

5.7.1. Natural justice
5.7.2. Transparency
5.7.3. Accountability
5.7.4. Rule of law
5.8. Powers
5.9. Sanctions and penalties
5.10. Adjudication
5.11. Other issues
5.12. Other legislative policy matters
5.13. Timetable

CHAPTER 6

DRAFTING INSTRUCTIONS: GENERAL

6. Drafting instructions: General
6.1. Need for drafting instructions
6.2. The role of the instructing Ministry/Division
6.3. Supplementary instructions

CHAPTER 7

DRAFTING INSTRUCTIONS: CONTENTS

7. Drafting instructions: Contents
7.1. General principles
7.2. Detailed contents
7.2.1. The identity of the sponsoring Ministry
7.2.2. Contact details
7.2.3. Policy approval
7.2.4. General background and legislative environment
7.2.5. Scope of the legislation
7.2.6. Background material
7.2.7. Precedents
7.2.8. Related proposals
7.2.9. Government context
7.2.10. Practical implications
7.2.11. Legal issues

7.2.12. Legal advice
7.2.13. Any unresolved issues
7.2.14. Substantive provisions
7.2.15. Offences and penalties
7.2.16. Subordinate legislation
7.2.17. Repeals
7.2.18. Saving provisions
7.2.19. Transitional provisions
7.2.20. Consequential amendments
7.2.21. Timetable
7.2.22. Commencement
7.2.23. Amendment Bills

CHAPTER 8

DRAFTING INSTRUCTIONS: FORMAT

8. Drafting instructions: Format
8.1. Source
8.2. Instructions should be in writing
8.3. Narrative form
8.4. Departmental drafts
8.5. Attachments
8.6. Formalities

CHAPTER 9

SUBORDINATE LEGISLATION

9. Subordinate legislation
9.1. Nature of subordinate legislation
9.2 Quasi-legislation
9.3. Power to make Subordinate legislation

9.4. Cabinet approval
9.5. Processing

9.6. Approval by the legislature
9.7. Validating of Subordinate legislation
9.8. Commencement

CHAPTER 10

TIMETABLE FOR LEGISLATION

10. Timetable for legislation
10.1. Introduction
10.2. Time involved in processing a Bill
10.3. The legislative program (legislative calendar)
10.4. Time needed to draft a Bill

CHAPTER 11

CONSULTATIONS

11. Consultations
11.1. Introduction
11.2. Policy or drafting
11.3. Within the government
11.4.Outside the government

CHAPTER 12

SUMMARY AND CONCLUSION

12.1. DRAFTING INSTRUCTIONS: SUMMARY LIST
12.1.1. Before issuing Drafting Instructions (DIs)
12.1.2. Issuing office
12.1.3. Title
12.1.4. Policy authority
12.1.5. Background
12.1.6. The mischief aimed at
12.1.7. Existing law
12.1.8. Amendment Bills
12.1.9. Legal issues
12.1.10. Application and scope

12.1.11. Substantive provisions
12.1.12. Powers
12.1.13. Administrative machinery
12.1.14. Offences and penalties
12.1.15. Adjudication
12.1.16. Subordinate legislation
12.1.17. Repeals
12.1.18. Transitional provisions
12.1.19. Consequential amendments
12.1.20. Consultations
12.1.21. Timetable
12.1.22. Precedents and reference material
12.1.23. Miscellaneous
12.1.24. Conclusion

PART VI

THE BASICS OF LEGISLATIVE DRAFTING

CHAPTER 1

WHAT IS LEGISLATIVE DRAFTING ALL ABOUT?

1.1. What is legislative drafting all about?
1.2. Communication of Legislation
1.3. The Legislative Drafters

CHAPTER 2

WORDS AND THE MEANING OF LANGUAGE

2. 1. The meaning of Words
2.2. Vagueness of Words
2. 3. Ambiguity of Words
2.4. Instability of Words

CHAPTER 3

WRITING LEGISLATIVE SENTENCES

3.1. What do we need to know about grammar?

3.2 Why is grammar important for drafting?

3.3. The significance of Syntax

3.4. What common grammatical mistakes we watch for?

CHAPTER 4

WHAT ARE THE BASICS OF WRITING LEGISLATIVE SENTENCES?

4. 1. Starting to write

4.2 Basic components of legislative sentences

4. 3. Types of legislative sentence

CHAPTER 5

HOW DO WE PUT TOGETHER THE COMPONENTS OF LEGISLATIVE SENTENCES?

5.1. Introduction

5.2 Subject Predicate relationship and Elements of the Sentence

5.3 Sentence Problems-Modifiers, Incomplete and fused sentences, Subject/Verb disagreement,Negatives

CHAPTER 6

HOW DO WE PUNCTUATE LEGISLATION?

6.1. Punctuation

6.2. Full Stop

6.3. Colon

6.4. Dash

6.5. Colon+dash

6.6. The Semi-Colon

6.7. Brackets

6.8. The Comma

6.9. Inverted commas
6.10. Hyphen
6.11. Apostrophe

CHAPTER 7

LEGISLATIVE STYLE

7. Legislative Style
7.1 Introduction
7.2 What do we mean by good legislative style?
7.3 How do we decide what is good style?
7.4 How are style standards set for legislative drafter?
7.5 Why is style important?
7.6 What style practices get in the way of communication?
7.7 What is the aim of the clear language style?
7.8 How can we improve clarity?
7.9 How can we make legislation more readable?
7.10 How can we make legislation more concise?
7.11 Gender –neutral Drafting
7.12 Some Additional Matters of Style

CHAPTER 8

SPECIFIC MATTERS OF STYLE AND TECHNIQUES

8. Specific matters of Style and Techniques
8.1. SECTIONS
8.2. PARAGRAPHING
8.3. Numbering, lettering and Indentation
8.4. Reference, Cross- reference to dates, numbers and legislation (Linking devices)

PART VII
LEGISLATIVE DRAFTING: GENERAL AND TECHNIQUES

CHAPTER 1
LEGISLATIVE DRAFTING: GENERAL

1. DRAFTING: PREPARING AND SETTLING DRAFTS
1.1 Preliminary
1.2 What does drafting involve?
1.3 Duration of drafting process (Overview)
2 DRAFTING: SOME DRAFTING AND LEGAL CONSIDERATIONS
2.1 Structure of Bills
2.2 Long title
2.3. Preambles
2.4. Enacting formula
2.5. Short title
2.6. Commencement
2.7. Interpretation provisions
2.8. Offences and penalties
2.9. Automatic repeal of amendments
3. DRAFTING: SOME PROCEDURAL CONSIDERATIONS
3.1 Administrative Ministry to deal only with assigned drafting wing/group of LPAD
3.2. Communicating with assigned drafter
3.3. Variation from Cabinet Decision
3.4. Confidentiality
4. FINAL PREPARATION
4. 1 Quality Assurance checking
4. 2. What happens after quality assurance checking?
4. 3. Final copies (Approval, endorsement and printing)
5. BILL DRAFTING GENERALLY
5.1. Policy and the Bill Drafter
5.2. Constitutionality — Statutory Provisions

5.3. Hill District Issues
5.4. Research and Drafting
5.5. Organization
5.6. Preparation of Bill Drafts
5.7. Drafting Aid
6. STYLE AND LANGUAGE
6.1. Introduction
6.2. Word Choice
6.3. Tense
6.4. Shall, Must, and May
6.5. Negatives
6.6. Voice
6.7. Number
6.8. Articles and Such
6.9. Pronouns
6.10. Gender
6.11. Redundant Adjectives and Adverbs
6.12. Consistency
6.13. Provisos
6.14. The Exception

6.15. Use of "That" or "Which"
6.16. If, When, Where, or Whenever
6.18. Use of "This Act"
6.19. Citations
7. FORM GUIDE
7.1. Capitalization
7 2. Punctuation
7.4. Numbers
7.5. Classes, Grades, Etc.
7.6. Dates — Fiscal Years
7.7. Bill Titles and Catch lines
7.8. Amending Text

7.9. Striking and Adding Subsection References

8. THE BILL AND ITS PARTS

8 1. Introduction

8 2. Bill Arrangement:

8.3. Bill Identification

8.4. Title

8.5. Preamble

8.6. Enacting Clause

8.7. Short Title

8.9. Definitions

8.10. Organization of Provisions

8.11. New Sections

8.12. Amendatory Language

8.15. Outline Style

8.16. Penalty

8.17. Repeal

8.18. Transition

8.19. Applicability — Directions relating to Bangladesh Code

8.20. Coordination Instructions:

8.21. Saving Clause

8.22. Effective Date

8.23. Applicability Date

8.24. Termination

9. REQUIREMENTS FOR SUBSIDIARY LEGISLATION

9 .1 Preliminary Requirements

9 .1.1. The Title

9 .1.2. The Table of Contents

9.1.3. Enacting words

10. FORMATTING, STYLE, GRAMMAR, AND OTHER PRINCIPLES OF GOOD LEGISLATIVE DRAFTING

10.1: Formatting

10.2. Drafting Rules.

10. 2. 1. Clarity and Readability

10. 2. 2. Brevity and Simplicity.
10. 2. 3. Consistency.
10. 2. 4. Sentence Structure
10. 2. 5. Subject of Sentence
10. 2. 6. Tense, Voice, Number, and Mood.
10. 2. 7. Gender.
10. 2. 8. Choice of Words and Phrases.
10. 2. 9. Use of “And,” “Or,” and “And/Or.”
10. 2. 10. Use of “Shall,” “Must,” “May,” and Substitutes.
10. 2. 11. Use of “Shall Not,” “May Not,” and “Must Not.”
10. 2. 12. Use of “Which” and “That.”
10. 2.13. Use of “Who” Versus Use of “That” and “Which.”
10. 2.14. Use of “Such.”
10. 2.15. Use of “If,” “When,” “Whenever,” and “Where.”
10. 2.16. Use of “Only” and Other Modifiers.
10. 2.17. Abbreviations.
10. 2.18. Capitalization.
10. 2.19. Numbers.
10. 2.20. Plurals.
10. 2.21. Possessives.
10. 2.22. Prefixes.
10. 2.23. Punctuation.
10.2.24. Compounding Words and Hyphenation
10.2.25. Definitions: Generally.
10.2.26. Definitions: Use of “Means” and “Includes.”
10. 2.27. Parallel Construction.
10.2.28. Limitations, Exceptions, Qualifications, and Conditions
10.2.29. Series and Tabulations
10.2.30. Maintaining the Stability of the statute
10.2.31. Order of Arrangement of Provisions of Legislation
10.2.32. Proofreading
11. OBSERVANCE OF FUNDAMENTAL RIGHTS
12. PLAIN LANGUAGE

12.1. Description of plain language
12.2. Write easily understandable text
12.3. Sentence Length
12.4. Minimise cross references
12.5 Avoid sub-subparagraphs
12.6. Avoidance of certain terminology
13. INDEMNITY PROVISIONS
14. EXPLANATORY MEMORANDUM
15. SPELLING AND TERMINOLOGY
15.1 Spelling
15.1.2 Standardised spelling
15 .1.3 Capitalising words
15.2. Use of Synonyms
15.3 "If"…" then"…constructions
15.4 E-Terminology
15.5 References to the Government of Bangladesh
16. REFERENCES TO ENACTMENTS AND PROVISIONS
16 .1 References to parts of a section
16 .2 References to parts of a subsection
16 .3 References to specific provisions
17. AMENDING ENACTMENTS
17 .1 Amendments must be made directly
17 .2 Language of new text
17 .3 No re-numbering of existing provisions
17.4 Reusing numbers of repealed or omitted provisions
17 .5 Arrangement of clauses – amending Bills
17.6 Arrangement of amending provisions – delegated legislation
17 .7 Amendments to be in consecutive order
17 .8 Amendments to be noted in long title
17 .9 One subclause, one amendment
17 .10 Substantive amendments to be in main body
17 .11 Multiple consequential amendments
17.12 Savings and Transitional Provisions

17.13 Special Provision in Amending Legislation

CHAPTER 2

LEGISLATIVE DRAFTING: TECHNIQUESLEGISLATIVE DRAFTING MANUAL TECHNIQUES OF LEGISLATIVE DRAFTING

PART VIII

DRAFTING SUBORDINATE LEGISLATION

CHAPTER I

HOW DO WE DELEGATE POWERS TO LEGISLATE?

1. Introduction:

1. 2.1. When should delegated powers be conferred?

1. 2.2. How should matters be divided between primary and subordinate legislation?

1.2.3. When is an instrument subordinate legislation?

1. 2.4. How do the courts approach powers to make subordinate legislation?

1.2.5. What are your objectives when drafting enabling provisions?

1.2.6. When are delegated powers needed?

1.2.7. How widely should enabling provisions be drafted?

1.3.1. What are the basic steps?

1.3 .2. Are there matters that should be expressly authorised?

1.3.3.

1.3.4. What general legislation may affect the drafting of subordinate legislative powers?

CHAPTER 2

HOW DO WE DRAFT SUBORDINATE LEGISLATION?

2.1 Introduction:

2.2 General Considerations

2.2.1 How does drafting Subordinate legislation differ from drafting Bills?

2.3. Drafting Approach

2.3.1 How should we approach the drafting of Subordinate legislation?

2.3.2. How do we check to prevent unauthorised subordinate legislation?

2.4. Drafting Details

2.4.2.What headings are required?

2.4.3.What authorising words should be used?

2.4.4. How should the title be drafted?

2.4.5.When should provision be made for commencement?

2.4. 6.When should definitions be included?

2.4.7.What special factors should be borne in mind in drafting substantive provisions?

2.4.8. Should section or marginal notes be provided?

2.4.9.Are there special features for amending, repealing or re-enacting provisions?

2.4.10.What authenticating words are needed?

2.4.11.How should an instrument be dated?

PART IX
LEGISLATIVE INTERPRETATION

1. Legislative Interpretation

1.1 Historical

2 Jurisprudential

2.1 The subject-matter of statutory interpretation

2.2 The intention of the House of the Nation

2.3 ‘Ordinary meaning’ and ‘purpose’

2.4 The canons of interpretation

2.5 Common law methods in statutory interpretation

4.1 Context

4.2 Evidence

4.3 The different kinds of meaning

5 The basic rules illustrated

5.1 Choice between ordinary meaning in the context

5.2 Choice between an ordinary and a technical meaning

5.3 Fringe meaning and the extent of general words

5.4 Choice between primary and secondary meaning

5.5 Reading words in and out of a statute

6 How Precedent Operates: Ratio Decidendi and Obiter Dictum

7 Internal aids to constructions

7.1 Preamble

7.2 Long and Short Titles

7.3 Headings

7.4 Side notes or marginal notes

7.5 Punctuation

7.6 ejusdem generis rule

7.7 Definition Cluses

7.8 Illustrations

7.9 Proviso

7.10 Distinction between Proviso, Exception and Saving Clause

7.11 Explanation

7.12 Schedules

7.13 Transitional Provisions

8.1 Dictionaries

8.2 Text Books

8.3 Practice-Judicial, conveyancing, administrative and commercial

8.4 Foreign Decisions

8.5 Parliamentary History

8.6 Historical facts and surrounding circumstances

8.7 Subsequent social, political and economic developments and scientific inventions

8.8 Reference to other statutes

8.9 Parimateria

8.10 Legislation by incorporation

8.11 Consolidating Statutes

8.12 Codifying Statutes:

8.13 Contemporanea expositio

8.14 Stare decisis

8.15 Construction imposed by statute

9 Presumptions

9.1 Presumption against impairing obligation or permitting advantage of one's wrong

9.2 Legislature does not intend alteration in existing law except what is expressly provided

9.3 Legislature does not make mistakes: Casus Omissus

9.4 Presumption against ousting established jurisdiction

9.5 Presumption against creating new and enlarging existing jurisdictions

9.6 Jurisdiction of regular courts are not enlarged not ousted except by express enactment or by necessary implication

9.7 Territorial application of statues

9.8 Statute affecting properties

9.9 Statutes do not violate the principles of international law

10 Interpretation of subordinate legislations

10.1 Limitations of delegated legislation

11 Commencement and operation of statutes

11.1 Mandatory and directory provision

11.2 Retrospective Operation

12 Expiry and repeal of statutes

12.1 Effect of Repeal

13 Ambiguities and equivocations

14 Alterations and erasures
14.1 Effect of Alteration
14.2 Material alteration
15 Rules as to time and date
16 Names and misdescriptions
17 Illustration of How to Analyze a Case on Statutory Interpretation
18 Departure from Common Law or established interpretation
19 Judicial Review of Administrative Action
20 Rule of Lenity
21 Remedial Statutes
22 Saving Clauses
23 Notwithstanding Any Other Provision of Law
24 Conclusion

PART X

PERFORMANCE OF CONTRACT

Introductory:

CHAPTER 1
PERFORMANCE OF INTERNATIONAL CONTRACTUAL OBLIGATIONS

1.1 International Law and National Obligation in General
1.1.1 In General: Introduction to International Law Sources, Treaties in Particular
1.1. 2 Nexus between International Law and Domestic Law
1.1.2.1 Theories of International Law: Monism and Dualism
1.1.3 Bangladesh Constitution and International Law
1.1.4 Domestic Law of Bangladesh and International Law
1.2 International Treaties and Their Domestication in Bangladesh
1.2.1 Application of Treaties in Bangladesh
1.2.2 Procedure of Treaty Domestication
1.2.3 Relevance of Treaties in Filling the Gaps and Interpretation of Domestic Law

CHAPTER 2

PERFORMANCE OF CONTRACTS UNDER DOMESTIC LAWS: BANGLADESH, COMMON LAW, CIVIL LAW (AND ISLAMIC LAW)

1. INTRODUCTORY:

1.1 The Concept of Performance

1.2. An Approach to this Chapter:

1.3 Theoretical Basis of Performance of Contract:

2. PERFORMANCE UNDER BANGLADESHI LAW:

2.1 In General

2.2 Actual performance:

2.2.1 Who Must Perform the Promise?

2.2.2 Joint Promisors and Promisees and their Liability

2.2.3 Devolution of Joint Liabilities

2.3 Attempted Performance or Tender of Performance:

2.3.1 What?

2.3.2 Conditions for Valid Tender of Performance:

2.3.3 Reciprocal Promises

2.3.4 Rules of Appropriation of payment?

2.3.5 Exemptions from performance under Bangladeshi law

3. PERFORMANCE UNDER CIVIL LAW AND COMMON LAW

3.1 Introductory

3.2 Civil Law:

3.2.1 In General: Performance as the Rules of regular remedy

3.2.2 Impossibility

3.3 Performance under Common Law:

3.3.1 Damages and Specific Performance

3.3.2 Impossibility:

3.4 Unforeseen Circumstances

3.4.1 English Law

3.4.2 Civil Law

LEGISLATIVE DESK BOOK

PART I

INTRODUCTION TO LEGISLATIVE DESK BOOK

1. Purpose of Legislative Desk Book

1 .1 Confucius said, "*When the State of Zheng formulates a law, Pi Chen first makes a draft, and Shi Shu gives his comments. Then the draft will be edited by Zi Yu and finally the draft will be polished linguistically by Zi Chan. The documents of law formulated by these four wise officials seldom contain mistakes.".*

1. 2. This is apparently a simple and concise way of achieving perfect legislation. But it hides a number of questions, which need to be answered before legislation can emerge, in the context of Bangladesh. The questions include-who is the policy maker; the drafter; the enactor; the enforcer?
It must be borne in mind in broad terms –

- whether to introduce a new or amending legislation is the policy decision of the executive authority;
- the enacting of legislation is a matter for the legislature;
- the application and implementation of legislation is the responsibility of the civil service;
- the enforcement of legislation is the responsibility of the police or other enforcement agencies and the courts;
- the drafting of most legislation is the responsibility of the Legislative and Parliamentary Affairs Division (LPAD) or drafting officials.

1. 3. The Purpose of this Desk Book is therefore to look at –

- the nature of legislation;
- the legislative process from the administrative Ministry/Division's (hereinafter referred to as Ministry's) viewpoint;
- the respective roles of the policymaker and the drafter in preparing the draft bill;
- policy making for new legislation;
- the need for drafting instructions;
- the topics that should be covered in such instructions and the form they should take.

1. 4. This Desk Book is to help government officials with the legislative process by-

- explaining what they need to do to have a law drafted;
- giving them an understanding of what the drafting of a law involves and some practical pointers on how to facilitate that task;
- giving them some useful information about draft laws and their enactment;

- explaining the role of the LPAD and other Ministries, Divisions and Statutory Public Authorities.

2. Interpretation of this Legislative Desk Book

The Desk Book has 10 Parts. A reference in the Desk Book to a Part, Chapter or Schedule by number is a reference to the Part, Chapter or Schedule with that number.

3. Scope of Legislative Desk Book

3.1. The Legislative Desk Book looks at the law-making process mainly from legislative policy making and drafting perspective and focuses on the role of the administrative ministry/sponsoring ministry and the LPAD.

3.2. Note that the Desk Book only deals with routine drafting of laws. It does not deal in much detail with what happens to a draft law after it passes or made into Act of Parliament, or with its commencement.

4. Relationship to other documents

4.1. Drafting Directions

4.1.1. The Drafting Directions are an authoritative series of pronouncements on a range of drafting issues. Drafting Directions are issued, after consultation with all drafters and the editorial team, by LPAD Secretary with the approval of the Law Minister.

4.1.2. The Drafting Directions are available on different folio/documents. They are organised on a topic basis (although they may deal only with some specific points on the topic) and numbered accordingly.

4.1.3. Some other documents are described as having the "status of a Drafting Direction". This means that they contain standard format that should be followed by drafters unless they obtain different instruction given from time to time by the LPAD secretary in a particular case.

4. 2. **Drafting Notes (including Instrument Drafting Notes)**

4. 2. 1. The Drafting Notes are a collection of papers written (mostly) by LPAD drafters. Some have been subject to some form of peer review but they have not been subject to consultation within LPAD and do not have the "approval" of LPAD Secretary.

4. 2. 2. The Drafting Notes are made available as a research tool for all drafters and as a way of recording and sharing drafting knowledge.

4. 2. 3. The Drafting Notes are available to all drafters through Folio Office Documents (Guard Files).

4. 2. 4. Drafting Notes can be updated by the author editing the document and arranging for the version on Folio to be updated.

4. 3. **LPAD Secretary Emails**

4. 3. 1. From time-to-time, the LPAD Secretary may send (issue) emails on drafting issues. These are similar to Drafting Directions but have generally not had the same consultation and approval process.

4. 3. 2. It is intended that these emails will be quickly incorporated into a Drafting Direction, but before they are incorporated, they can be found under drafting emails from LPAD Secretary in the Folio Office Documents database.

PART II

LEGISLATIVE HISTORY, BACKGROUND AND SOURCE

CHAPTER 1

LEGISLATIVE HISTORY OF BANGLADESH

1. Legislative History of Bangladesh

The legislative history of Bangladesh consists of five phases, namely:

i. Ancient History;
ii. Mughal Period/ Muslim Period;
iii. British Regime;
iv. Pakistani Regime; and
v. Bangladesh Period.

1.1. Legal History of the ancient Bengal

The Bengal Delta (Bangladesh and Indian part of Bengal) is the largest in the world. With its unique fertility and natural resources, riverine Bangladesh attracted different ethnic groups, religious believers from time immemorial. "Different archaeological records indicate that religion was a central institution in socio-cultural structure in Bengal since prehistory. Consequently, every political change brought a certain religious transformation in the Delta as well as heavily influenced and transformed social institutions and the life pattern of mass people. The Aryan tribal states could not bring considerable religious change in a major part of Bengal (Chowdhury, 2011) as pre-Aryan norms were rich in humbleness and strong in their roots. While the social system was experiencing its optimum pressure, disorders and divisions because of gradual expansion of different Aryan tribal estates in the later Period, it was Mauryans who first brought genuine peace and prosperities in a common ground with the help of their centralized administration as well as the teaching of tolerance, equality and middle way of Buddhism. The major ancient archaeological remains in Bengal Delta still do not represent pre or post Mauryan Brahmin culture originated from Aryan tribes, but Mauryan and post Mauryan reigns when Buddhism was the central religion in the formation of Bengali society and culture."[1] In ancient Bengal, the Law was treated as part of Dharma. Its old framework is the Law of the Smritis.

[1] *See Abu Bakar Siddiq and Ahsan Habib,'The Formation of Bengal Civilization: A Glimpse on the Socio-Cultural Assimilations Through Political Progression in Bengal Delta', Artuklu Human and Social Science Journal*, *2*(2), 1-12.

Smritis are institutes that enounced the rules of Dharma. Dharma is an expression of complete import and means the aggregate of duties and obligations religious, moral, social, and legal.[2]

1.1.1 The sources of ancient Law

The origins of the ancient Law of Bangladesh have the following stages:
(a) The Vedic epoch or pre-Sutra Period;
(b) The era of Dharmashastras; and
(c) The Post-Smriti Period.

1.1.1.1The Vedic epoch

Indian jurists and scholars believe that the Vedic Samhitas's age and other works of the Pre-Sutra Period was approximately 4000-1000 B.C.[3]Hindus treat Shrutis as the primary source of their Law and religion; the Shrutis do not contain much that amount as positive or lawyers' law. The Smritikars agreed, and shared traditions have always accepted that the earliest exponent of Law was Manu. The ancient Brahminical society had formed several groups called Charanas. Each of these Charanas had its branch of the Veda and had its own ritualistic and legal codes.[4]

1.1.1.2 The era of Dharmashastras

The era of Dharmashastras was the golden age of traditional (Sanatana) Law. It consists of the following periods:

(a) The Sutra Period;
(b) The Smriti Period; and
(c) The post-Smriti Period.

1.1.1.2.1 The Sutra Period

Several Sutra-works compiled during the later part of the Vedic epoch dealt with legal injunctions and customs. Rules of Dharma traditionally regarded as promulgated by Manu and Sutra-works containing aphorism on Law.

1.1.1.2.2 The Smriti Period

The principal Smritis blends religious, moral, social, and legal duties. They contain some metaphysical speculations, matters sacramental, and also ordain rules of legal rights and obligations.[5]Manu compiled the extant Code in about 200 B.C. The Code is divided into twelve

[2] See Sunderlal T. Desai, *Mulla Principles of Hindu Law*, Fifteenth Edition, P1, Bomby, N.M. Tripathi Private Limited, 1982.
[3]Mahamahopadhyaya Kane, History of Dharmashastra-Vol. II, Pt. I, p. XI.
[4] Ibid FN 2, p 7.
[5] Ibid FN2, P 9.

chapters. The eighth chapter states rules on eighteen subjects of law-intitule titles of Law, including civil and Criminal Law. The eighteen titles are as follows[6]:

(a) Recovery of Debts;
(b) Deposit and Pledge;
(c) Sale without ownership;
(d) Concerns among partners;
(e) Resumption of gifts;
(f) Non-payment of wages or hire;
(g) Non-performance of agreements;
(h) The recession of sale and purchase;
(i) Disputes between master and servant;
(j) Disputes regarding boundaries;
(k) Assault;
(l) Defamation;
(m) Theft;
(n) Robbery and violence;
(o) Adultery;
(p) Duties of man and wife;
(q) Partition (of inheritance);
(r) Gambling and betting.

1.1.1.3 The Post Smriti Period

The ancient Law and jurisprudence of Bangladesh reached a remarkable progress and assimilation stage in the post-Smriti Period. This Period was of critical inquiry, expansion, and consolidation. Many commentaries and Digests were from time to time written during this post-Smriti Period. Over time the Law came to be ascertained and accepted in the main stream from the Commentaries and Digests, of which the leading ones acquired almost ex-cathedra character. Two principal schools of Law, Mitakshara and the Dayabhaga, sprang into existence based on the geography and commentaries followed in the particular area.

1.2 Legal History of the Medieval Period (Muslim Rule)

Muslim Period introduces a new era in the legal history of Bangladesh or ancient Bengal. The Muslim polity was based on the conception of the legal sovereignty of the Sharia or Islamic Law. The whole Muslim Period in India may get divided into the Sultanate of Delhi and the Mughal Period. The Sultanate of Delhi starts at the end of the twelfth century by Mohammad Ghor. This Period existed for three hundred years, beginning from 1206 to 1526 A.D. In 1526 A.D. Delhi Sultanate came to an end when Jahir Uddin Mohammad Babur captured Delhi and thereby established the Mughal Empire, which continued till 1857 AD.

[6] Ibid FN 2, p 44.

1 .2.1 Fiqh-e-Firoz Shahi

Fiqh-e-Firoz Shahi or Fawayid Feroz Shahi got prepared during Sultan Feroz Shah Tughlaq (i.e., 1351-1389) by Shaikh Sharaf Muhammad' Atai.[7]Fiqh-e-Firoz Shahi is one of the two codes those state judicial procedure for the courts during the Muslim Period.

1.2.2 Fatwa-e-Alamgiri

Fatawa 'Alamgiri, also known as Al-Fatawa al-'Alamgiriyya or Al-Fatawa al-Hindiyya, is a sharia-based compilation on statecraft, general ethics, military strategy, economic policy, Justice, and punishment, that served as the Law and principal regulating body of the Mughal Empire during the reign of the Mughal emperor Muhammad Muhiuddin Aurangzeb Alamgir.[8]Fatwa-e-Alamgiri is one of the two codes those prescribed judicial procedure for the courts during the Muslim Period.

1.2.3 The Sultanate of Delhi: Civil Administration

The Sultan and his Chief Minister (Wazir) headed the civil administration of the Sultanate. Sultanate consists of administrative divisions from the province to the village level. The provinces (Subahs) consist of Districts (Sarkars). Each District has Parganahs. A group of villages constituted a Parganah.

1.2.4 The Sultanate administration of Justice

The Judicial system under the Sultan got organized based on administrative divisions of the Sultanate. A systematic classification and gradation of the courts existed at the seat of Capital, in Provinces, Districts, Parganahs, and villages.

1.2.5 Judicial Reform of Sher Shah

Sher Shah ruled India only for five years, 1540-1545. His significant judicial reforms are as follows[9]:

(a) Separate civil and criminal courts at Parganahs;
(b) Police regulations got drawn up for the first time in India;
(c) The duty of Munsif (Civil Judge) and Shqahdhar (Magistrate) got explicitly enumerated;
(d) The Judicial officers below the Chief Provincial Qazi got transferred after every two or three years;
(e) The duties of the Governor and their deputies regarding the prevention of Law and order got emphasized;

[7]MohammedullahQasmi, 'Hanafi Fiqh in India During Delhi Sultanate (1206-1526), in 2nd National Seminar of Research Scholars, Hamdard University, New Delhi, 5-6 November 2013.
[8]Jamal Malik (2008), Islam in South Asia: A Short History, Brill Academic, ISBN 978-9004168596, pp. 194-197.
[9] M.B Ahmed, The Administration of Justice in Mediaeval India, p. 129.

(f) The Chief Qazi of the Province could report directly to the Emperor on the conduct of the Governor.

1.2.6 The Administration of Justice during the Mughal Period

During the Mughal Period, the Emperor was considered the "Fountain of Justice." The Emperor created a separate department of Justice (Mahukma-e-Adalat) to regulate and oversee that Justice got correctly administered. Based on the administrative divisions, at the official headquarters in each Province, District, Parganah, and Village, separate courts were established to decide civil, criminal, and revenue cases.[10]

The Mughal established three necessary Courts at Delhi:

(a) The Imperial Court-The Emperor's Court, presided over by Emperor, was the Empire's highest Court. It has original civil, criminal, and appellate jurisdictions. The Emperor got assisted by a Darogha-e-Adalat, a Mufti, and a Mir Adl.[11]

(b) The Chief Court of the Empire-Chief Justice (Qazi-ul-Quzat) presided over this Court. The Court had the power to try original, civil, and criminal cases, to hear appeals from the Provincial Courts.

(c) The Chief Revenue Court-It was the third important Court established in Delhi. It was the highest Court of Appeal to decide revenue cases. The Court was presided over by the Dewan-e-Ala.[12]

Apart from the courts mentioned above, there were two more courts in Delhi. The Court of Qazi of Delhi, who enjoyed the status of Chief Qazi of a Province, decided local civil and criminal cases. The Court of Qazi-e-Askar was specially constituted to determine cases of the military area in the Capital.

Provincial Courts- In each Province (Subah), there were three courts: the Governor's Court and the Bench, the Chief Appellate Court, and the Chief Revenue Court.[13]

District Level Courts- In each District (Sarkar), four courts: The Chief, Civil and Criminal Court of the District, Faujdari Adalat, Kotwali, and Aglguzari Kachehri.[14]

Pargana Level Courts-Each of the Parganas had three courts, namely, Adalat-e-Parganah, Kotwali, and Kachehri.[15]

[10] M.B. Ahmed, The Administration of Justice in Mediaeval India, pp. 143-166.
[11] Alamgir Namah, p. 1077.
[12] B.M Gandhi, V.D. Kulshreshtra's Landmarks in Indian Legal and Constitutional History, p. 23, Seventh Edition, 1995, Eastern Book Company, Lucknow.
[13] Ibid F.N.12, p. 23.
[14] Ibid F.N. 12, p. 23.
[15] Ibid F.N. 12, p. 24.

1.3 Legal History of the British Regime

The British entered India in the garb of trade and commerce, which later transformed into State power-grabbing. The Mughal Emperor granted the right of self-government to the English. It proved to be a turning point in the legal history of India.

1 3.1 Charter of East India Company

On December 31, 1600, Queen Elizabeth I granted a Charter to the Company which incorporated the London East India Company "to trade into and from the East Indies, in the countries and parts of Asia and Africa…for a period of fifteen years…."[16]

1.3.2 Mughal Forman (Order) to East India Company

The Mughal Emperor granted the right of self-government to the English by issuing a Forman (Order), which proved a turning point in India's legal history. The English Company secured various privileges from the Mughal Emperor, like regulating the disputes among the Company's Servants by their tribunals, English People will enjoy their religion and laws in the administration of the Company, and so on.[17]

1.3.3 Charter of 1661

On April 3, 1661, Charles II granted a new Charter to the Company. The Charter authorized the Company to empower the Governor and Council of each of its factories or trading centers at Madras, Bombay, and Calcutta to administer, concerning the persons employed under them, both civil and criminal justice under the English Law.[18]

1.3.4 Charter of 1668

Charter of 1668 was a step that further helped transition the trading body into a territorial power. Charles II transferred in 1669 the Island of Bombay, which he got as a dowry from Portugal to the East India Company. The Charter authorized the Company to make laws, orders, ordinances, and constitutions for the good Government of the Island of Bombay. The Charter also empowered the Company to establish the Courts of Judicature.[19]

1.3.5 Charter of 1683

The Charter of 1683, granted by Charles II, was the next step. It authorized the Company to raise military forces. It allowed the Company to establish a court of judicature at the places of the

[16] Ibid F.N. 12 p. 30.
[17] William Foster, The Embassy of Sir Thomas Roe to the Court of the Great Mughal, (1615-1619), Vol II, pp. 506-514.
[18] Ibid F.N. 12, p. 32.
[19] Ibid F.N. 12, p. 33.

Company's choice. Under the Charter, the East India Company got authorization to establish Admiralty Courts at its choosing.[20]

1.3.6 Administration of Justice in Calcutta

In 1698, the Prince of Azim-Ush-Shan, Subedar of Bengal and grandson of Emperor Aurangzeb, granted Zamindari rights of three villages-Calcutta, Sutanati, and Govindpur to the English Company.[21] In 1869, Calcutta became a Presidency, and its Governor and Council became entrusted with all the necessary administrative and judicial powers.

Justice in Criminal Cases-The Collector decided the criminal cases summarily by adopting the existing Mughal pattern.

Justice in Civil Cases-The Collector presided over a civil court or the Court of Cutchery. The Collector decided the cases in a summary way based on the country's prevailing customs and usages. According to natural Justice and equity, the Collector decided the case in the absence of such native traditions.

The introduction of English Laws-Charters of 1668 and 1726 made it possible for the Company to introduce English laws side-by-side with Hindus and Muslims' personal laws.

1.3.7 Administration of Justice in East Bengal

The Mughal Emperor Shah Alam in August 1765 granted the Diwani of Bengal, Bihar, and Orissa to the East India Company. Earlier the Nawab exercised Diwani, which consisted of two main functions-(i) Diwani, i.e., collection of revenue and Civil Justice, and (ii) the Nizamat, i.e., military power and criminal Justice.[22]On getting Diwani rights, the Company became the real possessor of executive and judicial control over the Bengal, including Bihar and Orissa. However, criminal Justice still left with the Nawab.

1.3.8 Charter of 1726

Establishment of Corporation- The Charter of 1726 established a corporation in each presidency town, i.e., Bombay, Calcutta, and Madras.[23]

Mayor's Court-The Charter of 1726 also constituted a Mayor's Court for each of the presidency towns consisting of a Mayor and nine Aldermen.[24]

Procedure- The Charter laid down the Procedure of the Mayor's Court. A sheriff got entrusted to serve the process of the Court. The Court issued summons to the defendant on the written

[20] See Keith, Constitutional History of First British Empire, pp. 26-32.
[21] W.K. Firminger: Affairs of the East India Company, Report V, Vol. I, Ch. IV.
[22] Ibid F.N. 12, p. 76.
[23] The Cambridge History of India, Vol. V. Ch. IV, p. 113.
[24] Ibid.

complaint of the aggrieved party. The Sheriff's duty was to execute the warrant if the defendant failed to appear on the summons.

Right to Appeal-The Charter conferred a right to appeal to the Governor-in-Council from the mayor's Court's decision.

Legislation- The Charter empowered the Governor and the Council of each Presidency town to make by-laws, rules, and ordinances and prescribe punishments for its breach, which should not be contrary to English Law but agreeable reason.[25]

1.3.9 Charter of 1753

This new Charter re-established the Mayor's Courts at Madras, Calcutta, and Bombay. The Charter established the following courts[26]:

(a) The Court of Requests, to hear civil suits up to Rs. 15, one for each presidency town;
(b) The Mayor's Court to hear civil suits for more than Rs. 15, one for each presidency town;
(c) The Courts of the President and Council;
(d) The King-in-Council (the Privy Council), as the highest Court of Appeal.

1.3.10 Charter of 1774

"The Charter of 1774 provided for the Court of Requests' continuance and made it subordinate to the Supreme Court of Calcutta. Referring to the Court of Requests' effectiveness, in his letter to the Earl of Rochford, Impey observed that the Court of Requests' jurisdiction should be extended to Rs. 100."[27]

1.3.11 Warren Hastings' Plan of 1772

Warren Hastings chaired the Committee of Circuit, which prepared the first Judicial Plan on August 15, 1772. This Plan was famous as the Warren Hastings' Plan 1772.

Salient features of the Plan:

(a) The Collector -The District was the unit for collecting revenue and administering civil and criminal Justice. An English Collector got appointed in each District for collecting revenue.
(b) Moffusil Diwani Adalat-The District collector presided over the Moffusil Diwani Adalat to administer civil justice in each of the Districts. It dealt with all civil cases on real and personal property, inheritance, caste, marriage, debts, disputed accounts,

[25] Auber: Analysis of the Constitution of East India Co.,23, quoted in Jain: Indian Legal History, 1972, pp. 48-49, FN 4 of B.M Gandhi, V.D. Kulshreshtra's Landmarks in Indian Legal and Constitutional History, Seventh Edition.
[26] Ibid FN 12, p. 66.
[27] Ibid FN 12, p. 71.

contracts, partnerships, and rent demands.[28]The valuation of the suits was up to Rs. 500.

(c) Sadar Diwani Adalat- At Calcutta, there was one Sadar Diwani Adalat as the appellate Court of all Moffusil Diwani Adalat. The valuation of the suit was more than Rs. 500.

(d) Small Cause Adalat- The Head Farmers of Parganas were authorized to decide petty disputes relating to property valuation up to Rs. 10.

(e) Moffusil Faujdari Adalat- There was a Moffusil Faujdari Adalat in each District headed by the Collector to render Criminal Justice under the Plan.

(f) Personal Laws Safeguarded- Article 27 of the Plan (1772) provided a safeguard to Muslims and Hindus' personal laws.

(g) Procedural Safeguards- The Plan prescribed the procedure for the trial of civil suits by framing definite rules. [29]

1.3.12 Regulating Act, 1773

The Regulating Act, 1773, established a partial control of the Crown and Parliament over the management and control of the Company and its servants in India and England.

Salient features of the Act[30]:

(a) Election of Directors- The effect of the Act was to secure stability and continuity in the Company's policy. The voting qualification for the Court of Properties raised from holding a stock of £ 500 to £ 1000.[31]

(b) Control over correspondence- For civil and military affairs, the Directors were to keep informed the Secretary of State and for revenue matters to the Treasury in England.

(c) The Governor of Bengal, Warren Hastings, obtained the first Governor-General's appointment. His councilors were to be removed by the King on the Court of Directors of the Company's recommendations.

(d) The extent of Governor General's Power- He had all the powers to govern the Company's territorial acquisitions in India, administer Bengal, Bihar, and Orissa's revenues, and supervise and control the general civil and military Governance of the Presidency.

(e) Establishment of the Supreme Court of Judicature- Section 13 of the Regulating Act empowered the Crown to establish by Charter a Supreme Court of Judicature at Fort

[28] G.W. Forrest, Selections from the State Papers of Governor-General Warrant Hastings, Vol. II, pp. 371-72, FN 25 of B.M Gandhi, V.D. Kulshreshtra's Landmarks in Indian Legal and Constitutional History, Seventh Edition.

[29] M.E. Monckton Jones, Warren Hastings in Bengal, p. 312, F.N. 30 of B.M Gandhi, V.D. Kulshreshtra's Landmarks in Indian Legal and Constitutional History, Seventh Edition.

[30] Ibid F.N. 12. Pp. 94-95.

[31] A.B. Keith, A Constitutional History of India, p. 71, FN 13 of B.M Gandhi, V.D. Kulshreshtra's Landmarks in Indian Legal and Constitutional History, Seventh Edition.

William in Calcutta. The Supreme Court was to consist of a Chief Justice and three Puisne Judges. The Charter of 1774 appointed Sir Elijah Impey as the Chief Justice of the Supreme Court of Calcutta.

(f) Legislative Power under the Act-The Governor-General and Council were authorized to make and issue rules, ordinances, and regulations for the right order of civil Government of the Company's settlement at Fort William and other subordinate factories and places. The legislative powers were subject to the following significant restrictions:

(i) They were required to be just and reasonable and not repugnant to the laws of England;

(ii) They were not valid or of any force until they got duly registered in the Supreme Court with its consent and approbation;

(iii) The rules and ordinances got registered only after the expiration of twenty days from their open publication;

(iv) Any person might appeal against the Regulation before the King-in-Council within 60 days from its publication;

(v) The Supreme Court of Calcutta had the power to entertain an appeal against the Rules and Regulations within 60 days from the Registration of such Rules and Regulations;

(vi) The King reserved the power to disapprove of them within two years from the date the Governor-General and Council passed them.

1.3.13 Charter of 1774 and Supreme Court of Calcutta

George III issued a Charter on March 26, 1774, which established the Supreme Court at Calcutta. The Charter of 1774 constituted the Supreme Court and elaborately defined its jurisdiction and powers.[32] The Charter granted civil jurisdiction to the Supreme Court. Where the valuation exceeds Rs. 500, the Supreme Court was authorized to hear in the first instance. While exercising its criminal jurisdiction, the Supreme Court was to be a Court of Oyer and Terminer and Gaol Delivery in and for Calcutta, the factory, and Fort William. The Supreme Court was empowered to superintend the Court of Collector, the Court of Sessions, and the Court of Requests. It authorized these Courts to issue the writs of certiorari, mandamus, error, or *procedendo*.[33]

1.3.14 Reorganization of Adalats in 1780

Warren Hastings brought a new Judicial Plan with effect from April 11, 1780. At each of the Provincial Divisions, i.e., Calcutta, Murshidabad, Burdwan, Dacca, Dinajpur, and Patna, a Provincial Court of Diwani Adalat to be established independent of the Provincial Council of

[32] Elijah Impey, Speech, p. 26, F.N. 27 of B.M Gandhi, V.D. Kulshreshtra's Landmarks in Indian Legal and Constitutional History, Seventh Edition.

[33] Ibid F.N. 12, p. 98.

Revenue. It had jurisdiction to decide all property cases, inheritance, and succession to Zamindaris and Talukdaries with pecuniary jurisdiction upto Rs. 1000.[34]

1.3.15 Reforms of 1781

Chief Justice Impey prepared a series of Regulations to improve the administration of Justice in the Diwani Adalat. Some of the significant reforms introduced by Impey are as follows[35]:

(a) The Mofussil Diwani Adalat would decide facts while only Personal Law items would get referred to the native law officers, i.e., Maulvies, Pandits.
(b) In the petty civil cases, the Zamindars jurisdiction retained on condition of submitting the record of proceedings to the respective Moffussil Court.
(c) It initiated the preparation of the first Civil Code.
(d) It retained the separation of revenue and Judicial functions.

1.3.16 The First Civil Code

The Governor-General and Council adopted the first Civil Code on July 5, 1781. The Code contributed three crucial development in the legal history of India, namely[36]:

(a) The administration of civil justice centralized;
(b) It devised a better mode of governing the Hindu and Mohammedan laws;
(c) Recognizing the principles of separation of judiciary and revenue made efforts to ensure the independence and impartiality of the judiciary. The Zamindars, Talukdars, and farmers employed in collecting revenue were placed under the Civil Courts' jurisdiction.

1.3.17 Reforms in the Administration of Criminal Justice

Under the Judicial Plan of 1772, Warren Hastings established a Sadar Nizamat Adalat at Calcutta in Moffussil Faujdari Adalat in the Districts. But the criminal justice was administered in the name and under the seal of the Nawab. Mahomed Reza Khan was the Naib Nazim of the Sadar Nizamat Adalat. He prepared a plan to improve the administration of criminal justice. The Plan was adopted in January 1776 and continued till April 1881. Twenty-three Faujdari Adalat were established as per the Plan, amongst which Chittagong, Dacca, Dinajpur, Jessore, Rangpur, and Sylhet of Bangladesh are noteworthy.[37]

1.3. 18 Act of Settlement, 1781

[34] Ibid, p. 82.
[35] Ibid, pp. 84-85.
[36] Ibid, p. 86.
[37] Ibid, pp. 87-88.

The Act of 1781 was passed to explain and amend the provisions of the Regulating Act of 1773. Some important provisions of the Act of 1781 were as follows[38]:

(a) The Act granted immunity to the Governor-General and Council from the Supreme Court's Jurisdiction for all things done or ordered by them in their public capacity and acting as G.G. and Council.
(b) Revenue matters and matters arising out of its collection were excluded from the jurisdiction of the Supreme Court.
(c) English Law did not apply to the natives.
(d) The Act granted immunity to the Judicial Officers.
(e) The Parliament recognized the existence of Civil and Criminal Provincial Courts.
(f) It authorized the Governor-General and Council to frame Regulations for the Provincial Councils and Courts.

1.3.19 Pit's India Act, 1784

The Act introduced vital changes by setting up a Board of Control and recognizing the Court of Directors. Salient features of the Act were as follows[39]:

(a) Board of Control- A Board of six Commissioners constituted the Board of Control. It consisted of the Secretary of State, the Chancellor of Exchequer, and four other Privy Council members.
(b) The Board was authorized to superintend and control all the revenue and civil activities and the British's military forces in the East Indies.
(c) Court of Properties sacked of its power.
(d) For the first time, all the Company's possession in India was stated as the "British Possessions.
(e) Measures for checking corruption.
(f) The Company was placed under the dual governance of the Board of Control and the Board of Directors.

1.3.20 Judicial Plan of 1787

The Directors instructed Lord Cornwallis to make the judicial system simple, economic, and practical. The existing separation of the revenue and judicial functions was removed, and both the functions were united. Again, the Collector has become the revenue collector and the head of the civil Justice of a District.[40]

1.3.21 Judicial Plan of 1793

[38] Ibid, pp. 123-124.
[39] Ibid, pp. 134-135.
[40] Ibid, pp. 136-137.

Cornwallis attempted to codify the existing laws and procedures into the form of Regulations under the Judicial Plan of 1793. The salient features of the Plan were as follows[41]:

(a) Separation of judicial and revenue functions;
(b) Reorganization of Civil Courts by establishing four Circuit Courts as Provincial Courts of Appeal having headquarters at Patna, Dacca, Calcutta, and Murshidabad;
(c) It provided for native law officers;
(d) Courts were to control administrative machinery;
(e) The Judges of Civil Courts were empowered with Magisterial Power withdrawing from Collectors;
(f) It created the profession of Law;
(g) It introduced the Permanent settlement of Zamindari to ease the collection of revenue.

1.3.22. Act of 1797

The British Parliament introduced specific reforms in the administration of Justice in India by passing the Act. The Act reduced the Supreme Court's judges at Calcutta to three, i.e., Chief Justice and two Puisne Judges. The Act also recognized and confirmed the preparation of a Code of Regulations. The Courts were to administer justice according to those Regulations.[42]

1.3.23. The Indian High Courts Act, 1861

After the first war of independence in 1857, the British Parliament passed the Indian High Courts Act, 1861, on August 6, 1861.[43]The Act of 1861 empowered the Crown to establish, by Letter Patent, High Courts of Judicature at Calcutta, Madras, and Bombay. The Letters of Patent empowered the High Court to enroll and remove Advocates, Vakeels, and Attorneys-at-Law. It was constituted to be a Court of Record.

1.3.24 Indian High Courts Act of 1865 and 1911

The High Courts Act of 1865 authorized the Governor-General-in-Council to make necessary alterations in the territorial jurisdiction of the Chartered High Courts. The Indian High Courts Act, 1911 empowered to establish High Courts in any territory within the Indian dominions.[44]

1.3.25 The Government of India Act, 1915

The Government of India Act, 1915, was passed by the British Parliament to consolidate and re-enact the existing statutes concerning the Government of India and the High Courts. High Courts of Patna and Lahore were established under the Act.[45]

[41] Ibid, pp. 139-142.
[42] Ibid, p. 147.
[43] Rama Jois: Legal & Constitutional History of India, 1984, Vol. II. Ch. 9. 200-201, F.N. 3 of B.M Gandhi, V.D. Kulshreshtra's Landmarks in Indian Legal and Constitutional History, Seventh Edition.

[44] Ibid, F.N. 12, p. 168.

1.3.26 The Government of India Act, 1935

The British Parliament enacted the Act to provide a new constitution to regulate the Legislature, Executive, and Judiciary of India. The Act contained detailed provisions regulating the High Court's establishment, constitution, jurisdiction, and powers. The salient features of the Act were as follows[46]:

(a) The King-in-Council was to determine the number of Judges of the High Courts;
(b) The Privy Council only on the ground of misbehaviour or on the infirmity of mind and body before the superannuation of a judge on completion of 60 years of age could remove a High Court Judge;
(c) Qualifications of Judges of the High Courts were determined as ten years standing barristers or advocates or ten years experienced Indian Civil servants;
(d) Administrative control of the High Courts was placed in the provincial Government with sufficient safeguards to ensure the judges' independence.

1.3.27 Law Commissions during the British Regime[47]

(a) The First Law Commission, 1834-Section 53 of the Charter Act, 1833, provided the First Law Commission appointment. T.B. Macaulay (as Chairman) and four members, namely, C.H. Cameron, J.M. Macleod, G.W. Anderson, and F. Millett. The critical contributions of the First Law Commissions are as follows:

(i) Penal Code-The Code was drafted and submitted on May 2, 1837, to Lord Auckland, the Governor-General. It became Law in 1860.
(ii) Code of Civil Procedure- The Commission drafted a Code of Civil Procedure and suggested various reforms in the Civil suits' procedure.
(iii) Law of Limitation-It prepared a valuable report on the Law of Limitation with a draft Bill on it and submitted the Report to the Government on February 26, 1842.
(iv) Stamp Law-The Commission submitted its Report on Stamp Law on February 21, 1837.

(b) The Second Law Commission, 1853-The Charter Act of 1853, empowered Her Majesty to appoint a Law Commission in England for India. Her Majesty appointed the Second Law Commission in England on November 29, 1853. The contributions of the Commission:

(i) The Commission submitted four Reports to the Indian Government.
(ii) The First Report was on a plan for the reforms in the judiciary and courts' procedures.
(iii) The Second Report agreed with the Lex Loci Report of the First Law Commission.
(iv) The Third Report contained a plan for establishing a judicial system and procedure in the North-Western Provinces.

[45] Ibid, p. 169.
[46] Ibid, pp. 170-171.
[47] Ibid, pp 247-254.

(v) The fourth Report contained the judicial Plan for the Presidencies of Bombay and Madras.

(c) The Third Law Commission, 1861- The Third Law Commission was appointed in India under the Chairmanship of Lord Romilly on December 14, 1861. The valuable contributions of the Commission were as follows:

(i) It submitted seven reports to the Government.
(ii) The Commission submitted the First Report in 1864 on the Indian Succession Bill.
(iii) It submitted the Second Report in 1866 on the Contract Bill.
(iv) It submitted the Third Report in 1867 on the Negotiable Instruments Bill.
(v) The Fourth Report was submitted in 1868.
(vi) The Fifth Report was submitted in 1868 on the Evidence Bill.
(vii) The Commission submitted the Sixth Report in 1870 on the Transfer of Property Bill.
(viii) It submitted the Seventh Report in 1870 on the revised draft of Criminal Procedure.

(d) The Fourth Law Commission, 1879-The Government of India appointed the Fourth Law Commission on February 11, 1879. Some critical recommendations of the Commission are as follows[48]:

(i) The process of codification of substantive laws should continue.
(ii) The English Law should form the basis of future codes in India.
(iii) Uniformity in legislation should be aimed at with great respect for local and special customs.
(iv) The laws relating to Negotiable Instruments, Transfer of Property, Trusts, Alluvion, Easements, and Master-Servant should be codified, and Bills already presented should be passed subject to suggested amendments.
(v) Concurrently the laws relating to insurance, carriers, and lien should be codified.
(vi) The law of actionable wrongs should be codified.

1.4 Legislation on and after Partition

Lord Mountbatten succeeded Lord Wavell in India on March 24, 1947. In the wake of the Quit India movement, he declared power transfer within the next few months. Indian major political parties All India Congress and the Muslim League accepted Lord Mountbatten's Plan of June 3, 1947. The British Parliament passed the Indian Independence Bill on July 18, 1947.

1.4.1 Indian Independence Act, 1947

The main object of the Act of 1947 was to give legal effect to the Plan of Lord Mountbatten. The Act provided for India's partition and the establishment of two Dominions of India and Pakistan from the appointed day (August 15, 1947). Some salient features of the Act[49]:

[48] Ibid, pp. 253-254.
[49] Ibid, p. 337.

(a) Territories of the two Dominions were defined, but they could include and exclude a part themselves.
(b) The Act made the existing Constituent Assemblies the Dominion Legislatures for the time being.
(c) The Government of India Act, 1935, kept operative until framing the new Constitutions for the Dominions.
(d) Each Dominion would have its own Governor-General.
(e) In the two Dominions on August 15, 1947, all laws in force would remain so until amended or reenacted by the respective Legislatures.
(f) The Office of the Secretary of State for India was abolished.

1.4.2 Constituent Assembly of Pakistan

The First Constituent Assembly of Pakistan came into existence under the Indian Independence Act 1947 at independence. Under the Indian Independence Act Constituent Assembly of Pakistan was given two tasks – to prepare a Constitution and to act as the federal legislature. The central legislature's functions under the Government of India Act 1935 were granted to the Constituent Assembly. As a Constitution-making Body, it was completely independent.[50]

Pakistan Constituent Assembly passed the Privy Council (Abolition of Jurisdiction) Act1950, which abolished the system of appeal to the Privy Council from the Federal Court of Pakistan. In 1947 as an independent state, immediately by order of the Governor-General of Pakistan, a new Federal Court was established at Karachi, according to the Government of India Act 1935. By another order of the High Courts (Bengal) order1947, a High Court was established out of constitutional necessity in Dhaka. The Federal Court appeared as the highest court in Pakistan till 1956. The high courts in the provinces and the Supreme Court of Pakistan in the centre were established under the new Constitution of 1956.

1.4.3 Constitution of Pakistan, 1956

The Constitution of 1956 contained 234 articles divided into thirteen parts and six schedules. The Constitution of 1956 provided for a federal system with the principle of parity between East Pakistan and West Pakistan. The Constitution of 1956 provided for the parliamentary form of government, where real executive authority was vested in a Cabinet, collectively responsible to the legislature. The Cabinet was presided over by the Prime Minister. The Constitution declared that there would be only one house of parliament known as the National Assembly, and equality between the two Wings (i.e. East Pakistan and West Pakistan) was maintained in it. The Governor-General was replaced by a President, who was to be elected by the Electoral College of Pakistan composed of members of the National Assembly and Provincial Assembly.

Familiar democratic rights and freedoms such as freedom of speech and expression, of assembly and association, of movement and of profession were all provided in the Constitution, with the usual qualifications. With regards to civil rights, familiar rights such as rights of life, liberty and

[50] Available at https://historypak.com/first-constituent-assembly-of-pakistan-1947-1954/ , accessed on October 7, 2020.

property were granted, again with the usual qualifications and safeguards. The judiciary was given power to enforce the fundamental rights and the courts were to decide if a law was repugnant to any provisions of the fundamental rights. As per the Constitution, Urdu and Bengali were made national languages.[51]

1.4.4 Constitution of Pakistan, 1962

In January 1962, the Cabinet finally approved the text of the new constitution. It was promulgated by President Ayub Khan on 1 March 1962 and finally came into effect on 8 June 1962. The Constitution contained 250 articles divided into twelve parts and three schedules. With the enforcement of this Constitution after 44 months, martial law came to an end.[52]

1.4.5 Martial Law of 1958

The 1958 Pakistani coup d'état refers to the events between October 7, when the President of Pakistan Iskander Mirza abrogated the Constitution of Pakistan and declared martial law, and October 27, when Mirza himself was deposed by General Ayub Khan, the Commander-in-Chief of the Pakistan Army.[53]

1.4.6 Martial Law of 1969

The imposition of martial law by General Agha Muhammad Yahya Khan on 25 March 1969 brought the military back to power unimpeded by any constitutional or popular check.[54]Yahya Khan, like Ayub Khan before him, assumed the role of Chief Martial Law Administrator (CMLA). In accepting the responsibility for leading the country, Yahya Khan said he would govern Pakistan only until the national election in 1970. Yahya Khan abolished Ayub Khan's basic democracies system and abrogated the 1962 constitution. He also issued a Legal Framework Order (LFO) that broke up the single unit of West Pakistan and reconstituted the original four provinces of Pakistan—i.e., Punjab, Sind, North-West Frontier Province, and Balochistan. The 1970 election therefore, was not only meant to restore parliamentary government to the country, it was also intended to reestablish the provincial political systems. The major dilemma in the LFO, however, was that in breaking up the one-unit system, the distribution of seats in the National Assembly would be apportioned among the provinces on the

[51] Available at https://en.wikipedia.org/wiki/Constitution_of_Pakistan_of_1956 , accessed on October 7, 2020.
[52] Available at https://en.wikipedia.org/wiki/Constitution_of_Pakistan_of_1962#:~:text=The%20first%20document%20that%20served,Government%20of%20India%20Act%2C%201935.&text=In%20January%201962%2C%20the%20Cabinet,effect%20on%208%20June%201962. , accessed on October 7, 2020.
[53] Available at https://en.wikipedia.org/wiki/1958_Pakistani_coup_d%27%C3%A9tat#:~:text=The%201958%20Pakistani%20coup%20d,Chief%20of%20the%20Pakistan%20Army. Accessed on October 7, 2020.
[54] Hasan-Askari Rizvi, The Second Military Regime, available at https://link.springer.com/chapter/10.1057/9780230599048_7 , accessed on October 7, 2020.

basis of population. This meant that East Pakistan, with its larger population, would be allotted more seats than all the provinces of West Pakistan combined.[55]

1.4.7 Legal Framework Order (LFO), 1970

The Legal Framework Order was issued as President's Order No. 2 of 1970 by the President and CMLA, General A. M. Yahya Khan on March 30, 1970 in Rawalpindi. The Order provided for the principle of adult franchise to promote direct election of legislature and executive.[56]

1.5 Legislation of Independent Bangladesh

Bangladesh emerged as an Independent Country on the 26th March 1971 when Banga Bandhu Sheikh Mujibur Rahman, the undisputed leader of 75 million of people of Bangladesh, in the fulfilment of the legitimate right of self-determination of the people of Bangladesh, duly made a declaration of independence at Dacca, and urged the people of Bangladesh to defend the honour and integrity of Bangladesh. The declaration of independence got legal basis and the legislative journey of Bangladesh begun on the Proclamation of Independence at Mujibnagar, Bangladesh issued by the authority of the Constituent Assembly of Bangladesh on April 10, 1971 deemed to have come into effect from 26th day of March, 1971.[57]

1.5.1 The Proclamation of Independence

The salient features of the Proclamation of Independence are as follows:

(a) It declared and constituted Bangladesh to be a sovereign People's Republic, and confirmed the declaration of independence already made by Banga Bandhu Sheikh Mujibur Rahman.
(b) It affirmed and resolved that Banga Bandhu Sheikh Mujibur Rahman as the President of the Republic and Syed Nazrul Islam as the Vice-President of the Republic.
(c) The President was made the Supreme Commander of all the Armed Forces of the Republic.
(d) The President was vested with the all the Executive and Legislative Power of the Republic.
(e) The President was also vested with the powers of appointing a Primes Minister, Ministers, levy taxes and expend monies, summon and adjourn the Constituent Assembly and to do all other things that may be necessary to give to the people of Bangladesh an orderly and just Government.
(f) It expressed allegiance to the Charter of the United Nations.

1.5.2 Laws Continuance Enforcement Order, April 10, 1971

[55] Available at https://www.britannica.com/place/Pakistan/Military-government , accessed on October 7, 2020.
[56] Available at http://pakistanspace.tripod.com/archives/70lfo.htm , accessed on October 7, 2020.
[57] See, the Proclamation of Independence.

The Order was made on April 10, 1971 by the Vice-President of Bangladesh by exercising the power conferred by the Proclamation of Independence. The Order stated that all laws that were in force in Bangladesh on 25th March, 1971, shall subject to the Proclamation of Independence continue to be so in force with such consequential changes as may be necessary on account of the creation of the sovereign independent State of Bangladesh.[58]This Order was repealed by article 151 (a) of the Constitution of the People's Republic of Bangladesh.

1.5.3 Provisional Constitution of Bangladesh Order, 1972

Sheikh Mujibur Rahman, President of the People's Republic of Bangladesh promulgated this Order on the 11th January 1972. The Order referred to as the Constituent Assembly as the body comprising of the elected representatives of the People of Bangladesh returned to the National Assembly (N.A.) and Provincial Assembly (P.A.) seats in the election held in December, 1970, January, 1971 and March, 1971 not otherwise disqualified by or under any law. The Order was repealed by article 151 (b) of the Constitution.

The Constituent Assembly of Bangladesh Order 1972 (P.O. No. 22 of 1972)-A brief History of the Constitution[59] the Provisional Constitution of Bangladesh Order 1972, issued by Sheikh Mujibur Rahman, provided for the parliamentary form of government. It says in its Preamble that it is the manifest aspiration of the people of Bangladesh that a parliamentary democracy shall function in Bangladesh. It further says "There shall be a Cabinet of Ministers with the Prime Minister as the Head and the President shall in the exercise of all his functions act in accordance with the advice of the Prime Minister. It looked contradictory. So the establishment of the parliamentary form of government was challenged at the Apex Court in Fazlul Hoque V State [26 DLR (AD)] as being contrary to the Proclamation of Independence, but the Supreme Court turned down the challenge stating that the Proclamation of Independence invested the President with the "Legislative powers of the Republic" which empowered him to make any law or legal provision, even of a constitutional nature."

The total Members elected as MNAs and MPAs in December 1970 and January 1971 elections were 469 (169 MNAs and 300 MPAs). Among them 12 died in the meantime before the Constituent Assembly was formed, two became Pakistani citizens, five were arrested under the Collaborator's Order, 46 were declared disqualified under the Constituent Assembly (Disqualification of Membership) Order and one went to Foreign Service. The remaining 403 Members formed the Constituent Assembly. Out of them, 400 Members belonged to the Awami League, one (Surenjit Sen Gupta) belonged to the National Awami Party (NAP) and two [Manbendra Narayan Larma commonly known as Santu Larma was one of them] were Independents.

[58] See, the Laws Continuance Enforcement Order.

[59] Available at https://de-de.facebook.com/1577216372527096/posts/1708599189388813/ , accessed on 11 October 2020.

The Constituent Assembly had its first meeting on 10 April 1972. The Speaker and the Deputy Speaker were Mr. Shah Abdul Hamid and Mr. Mohammed Ullah [who later became President] respectively. In this session, a Constitution Drafting Committee consisting of 34 members (including Syed Nazrul Islam, Tajuddin Ahmed, and AHM Kamruzzaman) was formed under the Chairmanship of Dr. Kamal Hossain (the then Law Minister). The only woman member of the Constitution Drafting Committee was Razia Banu, whereas the only opposition member was Mr. Suranjit Sengupta. The Drafting Committee had its first meeting on 17 April 1972. In that meeting, a resolution was adopted inviting proposals and suggestions from all sections of the people. In response to this invitation, 98 memoranda were received. However, the final report of the Drafting Committee did not mention at all whether any of those memoranda was accepted. The Drafting Committee had 74 meetings to draft the Constitution and on 10 June 1972, it approved the Draft Constitution. With a purpose of observing the practical working of the parliamentary constitutional system, the Chair of the Committee Dr. Kamal Hossain went to the UK and India. A foreign expert on drafting Constitution was reported to have brought to Dhaka and his assistance was taken in drafting the Constitution. In fact, the Constitution of Bangladesh was drafted in the light of [impliedly] British and [heavily relied on] Indian Constitution. On 11 October 1972, the last meeting of the Committee was held where the full Draft Constitution was finally approved.

The Draft Constitution of 72 pages containing 103 Articles was presented to the Constituent Assembly on 12 October 1972, in its second session. On this day, Dr. Kamal Hossain introduced the Draft Constitution as a Bill. The Constituent Assembly did have a general discussion for seven days, from 19 October 1972 to 3 November 1972. At the first phase of general discussion, Cabinet Members Syed Nazrul Islam Tajuddin Ahmed, Khodker Mushtaq Ahmed, Monsur Ali, Professor Yousuf Ali, AHM Kamruzzaman, Abdul Malik Ukil, Mizanur Rahman Choudhury took part. The only opposition Member Suranjit Sengupta and independent Member Manbendra Narayan Larma also took part in the discussion. During this discussion, 163 amendments were proposed. Among those, 84 amendments were adopted of which 83 were moved by Awami League Members and one was by Suranjit Sengupta. Interestingly most of the amendments were relating to linguistic and grammatical errors of the Bill. The Third Reading on the Bill was held on 4 November 1972 and on the same day, the Assembly adopted the Constitution of Bangladesh. To commemorate this historic day, 4 November is observed as the ‘Constitution Day.’ It was given the effect from 16 December 1972, on the first anniversary of the ‘victory day’of Bangladesh.

The original hand written Constitution was of 93 pages. The main writer of the original Constitution was Mr. Abdur Rouf. The handwritten Constitution was decorated by prominent Artist Joynul Abedin. The hand written Constitution, both Bengali original one, and its corresponding English translated one, was signed by the Members of the Constituent Assembly on 14 December 1972. The then only opposition Member, Suranjit Sengupta [later on Awami League MP], did not sign the original hand written Constitution. At the time of the Constitution being adopted, the President and Prime Minister were Justice Abu Sayeed Chowdhury and Sheikh Mujibur Rahman respectively.

1.5.4 The Bangladesh (Adaptation of Existing Laws) Order, 1972

The Laws Continuance and Enforcement Order provides that all laws which were in force on the 25th day of March, 1971, in the territories now comprised in the People's Republic of Bangladesh shall continue to be in force in Bangladesh subject to such consequential changes as may be necessary. The Order was promulgated on 22nd May 1972 with effect from 26th March 1971.

1.5.5 The Constitution of the People's Republic of Bangladesh, 1972

Constitution of the People's Republic of Bangladesh was adopted by the Constituent Assembly on 4 November 1972 and came into force on 16 December of the same year, marking the Victory Day. The Constitution has 153 Articles arranged under eleven parts and 4 schedules entitled the Republic, Fundamental Principles of State Policy, Fundamental Rights, the Executive, Prime Minister and the Cabinet, the Legislature, Legislative and Financial Procedure, Ordinance Making Power, Judiciary, Elections, Comptroller and Auditor General, Services of Bangladesh, Public Service Commission, Emergency Provisions, Amendment of the Constitution, and Miscellaneous.

The Constitution has declared Bangladesh a Republic committed to the principles of democracy and human rights; rule of law; freedom of movement, assembly and association; freedom of religion and international peace and harmony. Since 1972, the Constitution has undergone certain amendments and changes, some by way of constitutional amendments and some under Martial Law Proclamation Orders. The form of government has also undergone changes quite a number of times. Bangladesh began its constitutional journey with an ad hoc constitution under the Proclamation of Independence Order (10 April 1971) vesting the president (of the mujibnagar government) with all executive and legislative authority and the power to appoint a prime minister. This proclamation order was replaced by the Provisional Constitution of Bangladesh Order, 1972 which declared the members elected to the National Assembly and Provincial Assemblies of Pakistan in the elections held in December 1970 and March 1971 as the Constituent Assembly of the Republic. The Order changed the form of government to a parliamentary system with a cabinet of ministers headed by the Prime Minister.[60]

1.5.6 President's Orders before Constitution and after Constitution

The President's Orders were promulgated by the President before the Constitution of 1972 in pursuance of the Proclamation of Independence of Bangladesh read with the Provisional Constitution of Bangladesh Order, 1972 and in exercise of all powers enabling him in that behalf. Three laws were promulgated by the Acting President's Order during 16th December to 29th December 1971. Another three laws were promulgated by the Acting President's Order during 3rd January to 7th January of 1972. Till 15th December 1972 President's Orders were promulgated in pursuance of the Proclamation of the Independence of Bangladesh read with the Provisional Constitution of Bangladesh Order, 1972. From 16th December 1972 rest of the President's Orders were promulgated in pursuance to the provisions of paragraph 3 of the Fourth Schedule to the Constitution of the People's Republic of Bangladesh and in exercise of all powers

[60] Available at http://en.banglapedia.org/index.php?title=Constitution#:~:text=The%20Constitution%20has%20declared%20Bangladesh,and%20international%20peace%20and%20harmony. Accessed on 14 October 2020.

enabling him in that behalf. On 5th January 1972, Acting President promulgated the Bangladesh (Adaptation of University Laws) Ordinance, 1972 (Ordinance No. I of 1972) in pursuance of the Declaration of Independence of Bangladesh and in exercise of all powers enabling him in that behalf.

1.5.7 Constitutional Amendments-First to Seventeenth

Constitutional Amendments- The Constitution of the People's Republic of Bangladesh has been amended several times. The following is a brief account of these Acts and Orders.

First Amendment Act- The Constitution (First Amendment) Act 1973 was passed on 15 July 1973. It amended Article 47 of the Constitution by inserting an additional clause which allowed prosecution and punishment of any person accused of 'genocide, crimes against humanity or war crimes and other crimes under international law'. After Article 47 it inserted a new Article 47A specifying inapplicability of certain fundamental rights in those cases.

Second Amendment Act- The Constitution (Second Amendment) Act 1973 was passed on 22 September 1973. This Act resulted in the (i) amendment of Articles 26, 63, 72 and 142 of the Constitution; (ii) substitution of Article 33 and (iii) the insertion of a new part ie IXA in the Constitution. Provisions were made through this amendment for the suspension of some fundamental rights of citizens in an emergency.

Third Amendment Act- The Constitution (Third Amendment) Act 1974 was enacted on 28 November 1974 by bringing in changes in Article 2 of the Constitution with a view to giving effect to an agreement between Bangladesh and India in respect of exchange of certain enclaves and fixation of boundary lines between India and Bangladesh.

Fourth Amendment Act- The Constitution (Fourth Amendment) Act 1975 was passed on 25 January 1975. Major changes were brought into the constitution by this amendment. The presidential form of government was introduced in place of the parliamentary system; a one-party system in place of a multi-party system was introduced; the powers of the Jatiya Sangsad were curtailed; the Judiciary lost much of its independence; the Supreme Court was deprived of its jurisdiction over the protection and enforcement of fundamental rights. This Act (i) amended articles 11, 66, 67, 72, 74, 76, 80, 88, 95, 98, 109, 116, 117, 119, 122, 123, 141A, 147 and 148 of the constitution; (ii) substituted Articles 44, 70, 102, 115 and 124 of the Constitution; (iii) amended part III of the Constitution out of existence; (iv) altered the Third and Fourth Schedule; (v) extended the term of the first Jatiya Sangsad; (vi) made special provisions relating to the office of the president and its incumbent; (vii) inserted a new part, i.e. part VIA in the Constitution and (viii) inserted articles 73A and 116A in the Constitution.

Fifth Amendment Act- This Amendment Act was passed by the Jatiya Sangsad on 6 April 1979. This Act amended the Fourth Schedule to the Constitution by adding a new paragraph 18 thereto, which provided that all amendments, additions, modifications, substitutions and omissions made in the Constitution during the period between 15 August 1975 and 9 April 1979 (both days inclusive) by any Proclamation or Proclamation Order of the Martial Law Authorities had been validly made and would not be called in question in or before any court or tribunal or authority on any ground whatsoever.

Sixth Amendment Act- The Sixth Amendment Act was enacted by the Jatiya Sangsad with a view to amending Articles 51 and 66 of the 1981 Constitution.

Seventh Amendment Act- This Act was passed on 11 November 1986. It amended Article 96 of the Constitution; it also amended the Fourth Schedule to the Constitution by inserting a new paragraph 19

thereto, providing among others that all proclamations, proclamation orders, Chief Martial Law Administrator's Orders, Martial Law Regulations, Martial Law Orders, Martial Law Instructions, ordinances and other laws made during the period between 24 March 1982 and 11 November 1986 (both days inclusive) had been validly made, and would not be called in question in or before any court or tribunal or authority on any ground whatsoever.

Eighth Amendment Act- This Amendment Act was passed on 7 June 1988. It amended Articles 2, 3, 5, 30 and 100 of the Constitution. This Amendment Act (i) declared Islam as the state religion; (ii) decentralised the judiciary by setting up six permanent benches of the High Court Division outside Dhaka; (iii) amended the word 'Bengali' into 'Bangla' and 'Dacca' into 'Dhaka' in Article 5 of the Constitution; (iv) amended Article 30 of the Constitution by prohibiting acceptance of any title, honours, award or decoration from any foreign state by any citizen of Bangladesh without the prior approval of the President. It may be noted here that the Supreme Court subsequently declared the amendment of Article 100 unconstitutional since it had altered the basic structure of the Constitution.

Ninth Amendment Act- The Constitution (Ninth Amendment) Act 1989 was passed in July 1989. This amendment provided for the direct election of the Vice President; it restricted a person in holding the office of the President for two consecutive terms of five years each; it also provided that a Vice-President might be appointed in case of a vacancy, but the appointment must be approved by the Jatiya Sangsad.

Tenth Amendment Act- The Tenth Amendment Act was enacted on 12 June 1990. It amended, among others, Article 65 of the Constitution, providing for reservation of thirty seats for the next 10 years in the Jatiya Sangsad exclusively for women members, to be elected by the members of the Sangsad.

Eleventh Amendment Act- This Act was passed on 6 August 1991. It amended the Fourth Schedule to the Constitution by adding a new paragraph 21 thereto which legalised the appointment and oath of Shahabuddin Ahmed, Chief Justice of Bangladesh, as the Vice President of the Republic and the resignation tendered to him on 6 December 1990 by the then President Hussain M Ershad. This Act ratified, confirmed and validated all powers exercised, all laws and ordinances promulgated, all orders made and acts and things done, and actions and proceedings taken by the Vice President as acting President during the period between 6 December 1990 and the day (9 October 1991) of taking over the office of the President by the new President Abdur Rahman Biswas, duly elected under the amended provisions of the Constitution. The Act also confirmed and made possible the return of Vice President Shahabuddin Ahmed to his previous position of the Chief Justice of Bangladesh.

Twelfth Amendment Act- This Amendment Act, known as the most important landmark in the history of constitutional development in Bangladesh, was passed on 6 August 1991. It amended Articles 48, 55, 56, 57, 58, 59, 60, 70, 72, 109, 119, 124, 141A and 142. Through this amendment the parliamentary form of government was re-introduced in Bangladesh; the President became the constitutional head of the state; the Prime Minister became the executive head; the cabinet headed by the Prime Minister became responsible to the Jatiya Sangsad; the post of the Vice President was abolished; the President was required to be elected by the members of the Jatiya Sangsad. Moreover, through Article 59 of the Constitution this Act ensured the participation of the people's representatives in local government bodies, thus stabilising the base of democracy in the country.

Thirteenth Amendment Act- The Constitution (Thirteenth Amendment) Act 1996 was passed on 26 March 1996. It provided for a non-party Caretaker Government which, acting as an interim government, would give all possible aid and assistance to the Election Commission for holding the general election of members of the Jatiya Sangsad peacefully, fairly and impartially. The non-party caretaker government, comprising the Chief Adviser and not more than 10 other advisers, would be collectively responsible to

the President and would stand dissolved on the date on which the Prime Minister entered upon his office after the Constitution of the new Sangsad.

Fourteenth Amendment Act- The Constitution (Fourteenth Amendment) Act 2004 was passed on 16 May 2004 providing, among others, the following provisions : Increase in the number of reservation of seats for women in the Jatiya Sangsad from 30 to 45 on a provisional representation basis for the following ten years; increase in the retirement age of Supreme Court judges from 65 to 67 years; and displaying of portraits of the President and the Prime Minister at the offices of the President and the Prime Minister, and the Prime Minister's portrait in all government, semi-government and autonomous offices and diplomatic missions abroad were made mandatory.

Fifteenth Amendment Act -The Constitution (Fifteenth Amendment) Act 2011 was passed on 25 June 2011 having amendment to the Constitution restoring secularism and freedom of religion, incorporating nationalism, socialism, democracy and secularism as the fundamental principles of the state policy. The Constitution now also acknowledges the country's liberation war hero Sheikh Mujibur Rahman as the Father of the Nation. The Amendment scrapped the system of Caretaker Government, increased number of women reserve seats to 50 from existing 45 and inserted Articles 7(a) and 7(b) in the Constitution after Article 7 in a bid to end takeover of power through extra-constitutional means. [Emajuddin Ahamed]

Sixteenth Amendment Act-16th amendment of the Constitution was passed by the parliament on September 17, 2014 which gave power to the Jatiyo Shangshad to remove judges if allegations of incapability or misconduct against them are proved. This amendment was set aside by the judgment of the Appellate Division Pronounced in Civil Appeal No. 06 of 2017. Now a review petition against the said judgment is pending before the Appellate Division.

Seventeenth Amendment Act: 17th amendment of the Constitution was passed by the parliament on 8 July 2018 increases the tenure of 50 lawmakers who are elected in the women reserved seat to 25 years.

1.5.8 Bangladesh Parliament-First to Eleventh

The Constitution of the People's Republic of Bangladesh gives the legislature the name Jatiyo Shangsad in Bangla and House of the Nation in English. It is commonly known as Parliament.
Parliament of Bangladesh is a unicameral legislature consisting of 350 members of which 300 Members from 300 territorial constituencies that is one from each constituency, on the basis of adult Franchise. The remaining 50 seats are reserved for women who are elected by the aforesaid elected Members in accordance with law on the basis of procedure of proportional representation in the Parliament through Single Transferable Vote. This provision for 50 reserved women seats continues for ten years from the beginning of the 9th Parliament. According to 17th Amendment, the tenure of 50 reserved women seats will increase for another 25 years from the beginning of the 10th Parliament.

Unless sooner dissolved by the President, Parliament stands dissolved on the expiration of a period of five years from the date of its first meeting. In the extra-ordinary situation of the country being engaged in a war, this period of five years may be extended by an Act of Parliament by not more than one year at a

time. The period cannot, however, be extended beyond six months after the termination of the war. The actual terms of the 11 Parliaments are shown in the table below[61]:

Parliament	Date of First Sitting	Date of Dissolution	Actual Term
11th Parliament	January 30, 2019	Ongoing	
10th Parliament	January 29, 2014	October 29, 2018	5 years
9th Parliament	January 25, 2009	November 20, 2013	5 years
8th Parliament	October 28,2001	October 27,2006	5 years
7th Parliament	July 14, 1996	July 13, 2001	5 years
6th Parliament	March 19,1996	March 30,1996	12 days
5th Parliament	March 05,1991	November 24,1995	4 years 8 months
4th Parliament	April 15,1988	December 6,1990	2 years 7 months
3rd Parliament	July 10,1986	December 6,1987	1 year 5 months
2nd Parliament	April 2,1979	March 24,1982	2 years 11 months
1st Parliament	April 7,1973	Nov.6, 1975	2 years 6 months

1.5.9 Land Mark Cases in the Constitutional History of Bangladesh

1.5.9.1 A.K.M. Fazlul Hoque v. State, 26 DLR (SC) 11, decided on August 22, 1973

In this case the Bangladesh Collaborators (Special Tribunals) Order, 1972, was challenged for not being promulgated by a competent authority. It was held that "the impugned clauses or the Provisional Constitutional Order, namely, clauses (5) to (8) thereof, in our view of the court in excess of the powers conferred on the President designated by the Proclamation. The validity of the appointment of the second

[61] Available at http://www.parliament.gov.bd/index.php/en/about-parliament/tenure-of-parliament , accessed on 14 October 2020.

President which was under clause (8) cannot be disputed. The Collaborators Order was thus promulgated by an Authority competent to do so."[62]

1.5.9.2. Dulichand Omarlal vs. Bangladesh, 33 DLR (AD) 30, decided on June 18, 1980

The principal issue in the case was whether the Enemy Property (Continuance of Emergency Provisions) Ordinance, 1969 was continued by Laws Continuance Enforcement Order, 1971. The Appellate Division decided the issue in the affirmative.

1.5.9.3. Mullik Brothers vs. Income Tax Officer, 31 DLR (AD) 165

The crux of issue in the case whether Martial Law Authority of Pakistan could legislate for Bangladesh inconsistent with the Proclamation of Independence. The Court declared the action taken in terms of the Income Tax (Correction of Return & False Declaration) Regulation, 1969, M.L.R. No. 32 of 1969 to be without lawful authority.

1.5.9.4. ANWAR HOSSAIN CHOWDHURY VS. BANGLADESH, 1989 BLD (SPL) 1, 41 DLR(AD) 165

In this case the Appellate Division finally set aside the 8th Amendment of the Constitution regarding setting up six permanent Benches outside the Capital based on the basic structure theory in disposing of Civil Appeal No. 42 of 1988.

The implications of the case are as follows[63]:

- Amendment of the Constitution is declared as ultra vires for the first time.
- The Judiciary has got a final say over the power of the parliament to amend the Constitution.
- Concept of basic structures of the Constitution has been introduced in Bangladesh.
- The people have seen a brave instance of constitutional supremacy.
- The Judiciary for the first time in clear conflict with the Parliament.

1.5.9.5. Constitution13th Amendment Case

In CIVIL APPEAL No. 139 of 2005 with CIVIL PETITION FOR LEAVE TO APPEAL NO.596 OF 2005, the Appellate Division on hearing the case passed the following short order:

"(1) The appeal is allowed by majority without any order as to costs.

(2) The Constitution (Thirteenth Amendment) Act, 1996 (Act 1 of 1996) is prospectively declared void and ultra vires to the Constitution.

(3) The election of the Tenth and the Eleventh Parliament may be held under the provisions of the above mentioned Thirteenth Amendment on the age old prinicples, namely, quod alias non *estlicitum*,

[62] See, Justice Mustafa Kamal, Bangladesh Constitution: Trends and Issues, pp. 7-10, Second Edition, August 1994, University of Dhaka.
[63] Available at file:///C:/Users/Asus/Downloads/On_Bangladesh_Constitutional_8th_Amendme.pdf , accessed on 14 October 2020.

necessitaslicitumfacit (That which otherwise is not lawful, necessity makes lawful), *salus populi suprema lex* (safety of the people is the supreme law) and *salusrepublicaeest suprema lex* (safety of the State is the Supreme law).

The parliament, however, in the meantime, is at liberty to bring necessary amendments excluding the provisions of making the former Chief Justices of Bangladesh or the Judges of the Appellate Division as the head of the Non-Party Care-taker Government.

The Judgment in detail would follow.

The connected Civil Petition for leave to appeal No.596 of 2005 is accordingly, disposed of."

After a considerable period of time the Appellate Division declared the written judgment with the following order:

1. By majority judgment, the appeal is allowed. The impugned judgment and order of the High Court Division is set-aside.

2. The Constitution (Thirteenth Amendment) Act, 1996 (Act 1 of 1996), is ultra vires to the Constitution and hereby declared void prospectively.

3. The Civil Petition for Leave to Appeal No.596 of 2005 is accordingly disposed of.

4. The Government is hereby directed to pay honorarium of Tk.20,000/- to each of the Junior Advocates of the learned amici curiae.

5. There shall be no order as to costs.

The Author judge was A.B.M. KHAIRUL HAQUE, C.J.

F. Constitution 5th Amendment Case

In CIVIL PETITION FOR LEAVE TO APPEAL NOS. 1044 & 1045 OF 2009 (From the judgment and order dated 29TH August passed by the High Court Division in Writ Petition No. 6016 of 2000) [**62 DLR (AD) 298]** it was held:

"Accordingly, though the petitions involve Constitutional issues, leave, as prayed for, cannot be granted as the points raised in the leave petitions have been authoritatively decided by superior Courts as have been reflected in the judgment of the High Court Division. We, therefore, sum up as under:

1. Both the leave petitions are dismissed;

2. The judgment of the High Court Division is approved subject to the following modifications:-

> All the findings and observations in respect of Article 150 and the Fourth Schedule in the judgment of the High Court Division are hereby expunged, and the validation of Article 95 is not approved;

3. In respect of condonation made by the High Court Division, the following modification is made and condonations are made as under:

(a) all executive acts, things and deeds done and actions taken during the period from 15th August 1975 to 9th April, 1979 which are past and closed;

(b) the actions not derogatory to the rights of the citizens;

(c) all acts during that period which tend to advance or promote the welfare of the people;

(d) all routine works done during the above period which even the lawful government could have done.

(e) (i) the Proclamation dated 8th November, 1975 so far it relates to omitting Part VIA of the Constitution; (ii) the Proclamations (Amendment) Order 1977 (Proclamations Order No. 1 of 1977) relating to Article 6 of the Constitution. (iii) the Second Proclamation (Seventh Amendment) Order, 1976 (Second Proclamation Order No. IV of 1976) and the Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) so far it relates to amendment of English text of Article 44 of the Constitution; (iv) the Second Proclamation (Fifteenth Amendment) Order, 1978 (Second Proclamation Order No. IV of 1978) so far it relates to substituting Bengali text of Article 44; (v) The Second Proclamation (Tenth Amendment) Order, 1977 (Second Proclamation Order No. 1 of 1977) so far it relates to inserting Clauses (2), (3), (4), (5), (6) and (7) of Article 96 i.e. 184 provisions relating to Supreme Judicial Council and also clause (1) of Article 102 of the Constitution, and

(f) all acts and legislative measures which are in accordance with, or could have been made under the original Constitution. While dismissing the leave petitions we are putting on record our total disapproval of Martial Law and suspension of the Constitution or any part thereof in any form. The perpetrators of such illegalities should also be suitably punished and condemned so that in future no adventurist, no usurper, would dare to defy the people, their Constitution, their Government, established by them with their consent. However, it is the Parliament which can make law in this regard. Let us bid farewell to all kinds of extra constitutional adventure forever. C. J.

The Author Judge was Mr. MD. TAFAZZUL ISLAM, CJ.

1.5.9.6. Constitution 16th Amendment Act Case

In CIVIL APPEAL NO.06 OF 2017. (From the judgment and order dated 05.05.2016 passed by the High Court Division in Writ Petition No.9989 of 2014.), BLR 318/2017, the Appellate Division held as follows:

"Since all but one wrote separate judgments expressing their separate opinions, we unanimously dismiss the appeal, expunge the remarks made by the High Court Division as quoted in the judgment of the learned Chief Justice and also restore clause (2) (3), (4), (5), (6) and (7) of article 96 and also approve the Code of Conduct formulated in the main judgment. C.J."

CHAPTER 2

BACKGROUND OF ENACTMENTS

2.1 **Background of enactments**

Legislative history is used for discovering sources of information about a legislature's intent in enacting a law, although jurists disagree widely about the extent (if any) to which a statute's legislative history has bearing on the meaning of its text.[64] In Bangladesh, the normal trend is that the concerned administrative Ministry/ Division develops a legislative proposal based on the administrative requirement, election manifesto of the ruling party, advocacy of civil society/pressure group, judicial decisions, and so on.

2.1.1 Election Manifesto of the Ruling Party

Election manifesto of the Ruling Party plays a vital role in enacting new law or amending existing laws. "A manifesto is a published verbal declaration of the intentions, motives, or views of the issuer, be it an individual, group, political party or government, 1 through which a candidate or political party try to win an election. When elected to power, a party will often claim that the contents of its manifesto constitute a mandate to introduce legislation to bring these policies into effect. Thus election pledges in manifestos give an overview of plans and policies of parties. The election manifestos create substantial public interests in the election time, as both media and concerned citizens had taken great interests in the manifestoes of the prominent political parties."[65]

2.1.2 Civil Society/ Pressure Group

"Civil society organisations strategically and effectively use opportunities for political participation and influence. They participate in the development of laws and constitutional reform, influence government policy at local and national levels, participate in planning and implementing state and communal budgets, and monitor governance and the adherence to human rights laws."[66]

In Bangladesh International NGOs and Domestic NGOs play a pivotal role in advocating legal reforms and creating pressure on Government to legislate addressing need of the society.

"Civil society organisations in various Asian countries have helped draft and pass legislation related to environmental protection, food rights, land rights, right to information rights, right to decent and adequately paid work, laws against child abuse/child pornography, revisions to anti-terror legislation, implementation of decentralisation laws, debates on new NGO legislation, and constitutional reform processes."

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[64] Available at https://en.wikipedia.org/wiki/Legislative_history , accessed on 15 October 2020.
[65] See Governance and Integrity in Election Manifestos of Political Parties in Bangladesh, p. 3, TIB Working Paper, 17 September 2018, available at file:///C:/Users/Asus/Downloads/Political_Parties_Full_EN.pdf , accessed on 15 October 2020.
[66] See, Civil Society-A Strong Pillar of Democracy: The Commitment of Civil Society to Justice and Political Participation Around the World, Bread for the World, Berlin, February 2013, available at http://www.xn--brotfrdiewelt-0ob.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analyse_38_civil_society.pdf , accessed on 15 October 2020.

2.1.3 Observations of the Supreme Court in Judgments

As per the verdict of the Appellate Division, the special provisions of constitutional protection 'constitutional entrenchment 'was included in the 15th amendment of the Constitution in 2011. According to the provisions of paragraphs 7a and 7b, Article 150 and the 4th schedule, there remains no legal opportunity to legalize any illegal steps taken beyond the Constitution, or against the Constitution, and validating those later on.

Constitution 15th Amendment repealed paragraph 19 of the 4th Schedule of the Constitution, and in Civil Appeal No. 48 of 2011, the Appellate Division declared the Proclamation of 24th March, 1982 unconstitutional by declaring the 7th Amendment of the Constitution void. Therefore, all the ordinances stated in the paragraph 19 of the 4th Schedule became inoperative. Consequentially, through Act No. 7 of 2013 some of the said Ordinances were kept operative. In 2018 the Parliament started legislating new laws considering the necessity of the Ordinances stated in Act No. 7 of 2013. In such laws, in the preamble of the enactments, the Parliament stated the decision of the Appellate Division along with the Constitution 15th Amendment Act, i.e. by repealing Bangladesh Rural Development Board Ordinance, 1982, the Parliament enacted "Bangladesh Rural Development Board Act, 2018".

2.1.4 Bureaucracy/ implementing bodies

Executive branch, law enforcers or government agencies while implementing laws in field level sometimes find policy vacuum on a particular affair of the Republic or conflicting provisions of laws or inadequate legal measures. In these circumstances the administrative Ministry or Division takes steps to fill the legal vacuum by introducing a new law or amending the existing law.

The following statement gives an idea on the bureaucratic role in legislative process:

"Public policy formulation and policy implementation are two distinct but closely interrelated functions of the government. Public policy is laid down by the legislature or the political authorities, who are vested with the power of giving policy the requisite legal authority i.e. legitimacy. The policy implementation aspect is supposed to be in the domain of the executive, i.e., the bureaucracy or the administrative arm of the government. This distinction is in line with the traditional Wilsonian politics administration dichotomy. Public administration, in theory, at least, maintained this distinction till the advent of the New Public Administration movement launched at the Minnowbrook Conference in 1968. In the 1970s, it was asserted that the dichotomy between politics and administration was unreal, as the legislature and the executive collaborated closely in policy making, and that policy process was multi-actor-centric."[67]

2.1.5 Reports of Parliamentary Standing Committees;

In Bangladesh Parliamentary Standing Committees derive their mandate from Article 76 of the Constitution, and the rules of Procedure of Parliament of the People's Republic of Bangladesh. Article 76 of the Constitution provides for the following mandates to the Standing Committees:

(a) examine draft Bills and other legislative proposals;

(b) review the enforcement of laws and propose measures for such enforcement;

[67] Available at http://egyankosh.ac.in/bitstream/123456789/25302/1/Unit-12.pdf , accessed on 16 October 2020.

(c) in relation to any matter referred to it by Parliament as a matter of public importance, investigate or inquire into the activities or administration of a Ministry and may require it to furnish, through an authorised representative, relevant information and to answer questions, orally or in writing;

(c) perform any other function assigned to it by Parliament.

Rule 246 of the Rules of Procedure of Parliament Provides the constitution of Standing Committees on each Ministries and their functions:

(a) examine draft Bills and other legislative proposals;

(b) review the enforcement of laws and propose measures for such enforcement; and

(c) examine any other matter referred to them by Parliament under Article 76 of the Constitution.

Under rule 248 of the Rules of Procedure for making recommendations by a Standing Committee on the matters referred to it by the Parliament and on any other matters fall within its jurisdiction.

A Standing Committee presents its report to the House under rule 211 of the Rules of Procedure.

A Standing Committee may recommend making a new legislation or amending an existing legislation to address the situation stated in its report prepared under the above-mentioned mandates.

2.1.6 Academic Research

A research article published in an academic journal or a doctoral thesis on contemporary legal issues, public policy, conflict of laws, gray areas of laws or vacuum of laws may play a significant role to influence the policy makers to initiate a proposal for an enactment on the subject. Say for example TRIPS Agreement brings a substantial change on the regime of intellectual property. Bangladesh has already reenacted its copy right law and trade mark law, and needs to change its patent law based on the provisions of the TRIPS Agreement. The published research article and doctoral thesis on this issue may play a significant role in making new legislation on patent law. The following findings in the research article best explains the issue:

“Research may also influence policymakers’ preferences and priorities (Birkland, 2016). Some research may improve policymakers’ general understanding of a policy issue, whereas other research may advance a policymaker’s political or tactical purposes by validating or confirming preferred approaches (Landry, Amara & Lamari, 2001; Ness, 2010; Rigby, 2005; Weiss, 1977, 1979). Research-based information may be supplied by academic researchers as well as by think tanks, state agencies, legislative research agencies, foundations, advocacy organizations, and other intermediary organizations. Academic researchers are asserted to be “good sources of information and ideas for research on important policy issues,” especially issues that involve complex social problems with multiple potential solutions (Birkland, 2016, p. 170). Unlike interest groups and overtly ideological think tanks, academic researchers

are said to offer perspectives that are independent from a larger political agenda and based on fair and rigorous examinations of data (Verger et al., 2018)."[68]

2.1.7 International Treaties/ Agreements

In the Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities, the issue explained as follows:

"It is a basic principle of international law that a State party to an international treaty must ensure that its own domestic law and practice are consistent with what is required by the treaty. In some cases, the treaty may give general guidance on the measures to be taken. In others, the treaty includes specific stipulations. The Convention on the Rights of Persons with Disabilities contains both kinds of provisions. Parliament thus has a critical role in ensuring that the legislative measures required by the Convention are adopted.

Many of the provisions contained in the Convention are similar in either wording or substance to the provisions of other human rights treaties to which a State is a party. It might be useful to examine how those treaties are put into effect in order to determine the steps required to implement the Convention on the Rights of Persons with Disabilities."[69]

The UN Handbook gives the following guidelines in examining legislative measures to implement the Convention:

- There is no time limit between signing the Convention or Optional Protocol and ratifying either instrument;
- Signing the Convention or Optional Protocol obliges the State to refrain from acts that would defeat the object and purpose of either instrument; and
- Ratifying the Convention or Optional Protocol indicates at least an obligation to be bound by these instruments and to perform such obligations in good faith.

  One of the fundamental obligations contained in the Convention is that national law should guarantee the enjoyment of the rights enumerated in the Convention. Members of Parliament should thus consider the best way of giving effect to the rights guaranteed by the Convention in domestic law. The method selected will vary according to the constitutional and legal systems of individual countries:

- In some countries, once it is ratified at the international level, the Convention may automatically form part of national law. In other words, the Convention would be directly enforceable by national courts and other implementing authorities.
- In some other countries, the legislature might have to adopt an act of ratification at the national level. This may have the effect of incorporating the Convention into domestic law. However, even when parliaments ratify the Convention (national ratification), many provisions might still require legislative action before they come into force. This depends, in part, on how specific the Convention's obligations are: the more specific the obligation, the less likely that implementing legislation will be needed.

[68]Perna, L.W., Orosz, K., & Kent, D. (2019). The role of educational research in Congressional hearings. P. 6. American Educational Research Journal, 56, 111-145

[69] Available at https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-five-national-legislation-and-the-convention.html , accessed on 16 October 2020.

- In other cases, including many common-law countries, only those provisions of the treaty that are directly incorporated into national law will give rise to enforceable rights and duties.

Prominent Jurist, and International Law Expert, a former Member of the Law Commission of Bangladesh, Dr. M. Shah Alam opined as follows:

"Bangladesh needs constitutional or statutory stipulation on conclusion, ratification and implementation of treaties as well as on application of international customary norms within domestic jurisdiction. Universally recognised customs and treaties to which Bangladesh is a party need to be declared part of the law of the land."[70]

2.1.8 Bilateral treaties/Agreements

"A bilateral treaty (also called a bipartite treaty) is a treaty strictly between two state entities. It is an agreement made by negotiations between two parties, established in writing and signed by representatives of the parties. Treaties can span in substance and complexity, regarding a wide variety of matters, such as territorial boundaries, trade and commerce, political alliances, and more. The agreement is usually then ratified by the lawmaking authority of each party or organization."[71]

Glaring example of a legislation based on a bilateral treaty or agreement is the Constitution (Third Amendment) Act, 1974. The Parliament amended the Constitution to give effect to the Agreement entered into between the Government of the People's Republic of Bangladesh, and the Republic of India entered into on the 16th day of May, 1974 concerning the demarcation of the land boundary between Bangladesh and India, and related matters.

2.1.9 Imposed Conditions of Development Partners

OECD guide on a successful partnership provides an idea why a sovereign State changes its legal framework to accommodate a development partner:

"We are living in complex societies where the policy frameworks in place often seem to be fall short of providing satisfying solutions to a growing number of problems. But this does not necessarily mean that the frameworks as such are to be changed, as a) existing frameworks are a result of historic development and reflect a balance of different interest groups within the society; they are therefore not easy to alter, and b) it is hard to predict whether changing a policy framework will lead to a higher level of satisfaction. So naturally there is some resistance to large scale reforms. But while we may have to live with given policy settings, partnerships can be a great help in improving their performance: area based partnerships provide a mechanism for local organisations, in particular, to work together and adapt their policies to better reflect the needs of people and the economy at the local level. Partnerships are thus a key instrument of local governance."[72]

2.1.10 The Role of Administrative Ministry

[70] See M. Shah Alam, Enforcement of International Human Rights Law by Domestic Courts, p. xxiv, New Warsi Book Corporation, Dhaka, November, 2007.
[71] *"Definition of TREATY"*. www.merriam-webster.com. *Accessed 16 October 2020.*
[72] Available at https://www.oecd.org/cfe/leed/36279186.pdf , accessed on 16 October 2020.

Each of the Ministry or Division is assigned with its business under the Schedule I of the Rules of Business, 1996 i.e. Allocation of Business Among the Different Ministries and Divisions, which is a Constitutional Instrument framed under Article 55 (6) of the Constitution. The Allocation of Business provides all laws on subjects allotted to each Ministry and Division to the respective Ministry and Division. Therefore, a proposal of legislation normally comes from the administrative Ministry or Division which governs the subject.

Instruction no. 227 of the Secretarial Instructions, 2014 states that administrative Ministry or Division must submit each of the proposal of draft legislation to the Cabinet for its approval.

2.1.11 The Role of Core Ministries and Cabinet Division

On getting the policy approval of the Cabinet on legislative proposal, the concerned administrative Ministry or Division is to submit the same to the Legislative and Parliamentary Affairs Division with a request to provide the policy a legal structure of a Bill or of an Ordinance as the case may be. The instruction 232 of the Secretarial Instructions, 2014 provides that for the Bill or any proposal for amendment of a Bill for which President's recommendation under Article 82 of the Constitution is necessary, the administrative Ministry or Division must get such recommendation through the Ministry of Finance.

CHAPTER 3

LEGISLATIVE SOURCE

3.1 Legislative Source

Sources of law are the origins of laws, the binding rules that enable any state to govern its territory. The term "source of law" may sometimes refer to the sovereign or to the seat of power from which the law derives its validity.[73]

3.1.1 Constitution

Written Constitution is the apex law, grand norm from which all laws of a country derive their validity.

Article 7 of the Constitution of the People's Republic of Bangladesh provides as follows:

"7. (1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of, this Constitution.

(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.".

The Appellate Division terms this article in its Judgment on the famous 8th Amendment Case as the Pole Star.

3.1.1.1 Constitution in a material and a formal sense

Hens Kelsen explained the issue of material and a formal sense of constitutions as follows:

"The hierarchical structure of the legal order of a State is roughly as follows: Presupposing the basic norm, the Constitution is highest level within national law. The Constitution is here understood, not in a formal, but in material sense. The Constitution in the formal sense is a certain solemn document, a set of legal norms that may be changed only under the observation of special prescriptions, the purpose of which it is to render the change of these norms more difficult."[74]

3.1.1.2 Determination of the content of general norms by the Constitution

Hens Kelsen opined, "The material constitution may determine not only the organs and the procedure of legislation, but also, to some degree, the contents of future laws. The constitution can negatively determine that the laws must not have a certain content, e.g. that the parliament may not pass any statute

[73] Austin's "command theory of law" asserts that to be effective, law must have a sovereign and a sanction to back it up.

[74] Hens Kelsen, General Theory of Law and State, p.124, New York, Russell and Russell, 1961.

which restricts religious freedom."[75]The constitution also can determine the future statutes by positive prescriptions. As for example Article 35 (2) of the Constitution of the People's Republic of Bangladesh provides "No person shall be prosecuted and punished for the same offence more than once." This provision determines the future criminal laws' contents.

3.1.2 Custom

Sir Carleton Kemp Allen Notes, "Blackstone's "general customs" and "customs of the realm" are those fundamental principles in legal relationships which for the most part are not be found in any express formulation, but are assumed to be inherent in our social arrangements. They are in short, the Common Law itself."[76]The definition of law provided in article 152 of the Constitution of Bangladesh includes "custom or usage, having the force of law in Bangladesh" in the definition of law.

A legal custom is the established pattern of behavior that can be objectively verified within a particular social setting. A claim can be carried out in defense of "what has always been done and accepted by law". Related is the idea of prescription; a right enjoyed through long custom rather than positive law.[77]

Customary law (also, consuetudinary or unofficial law) exists where:

1. a certain legal practice is observed and
2. the relevant actors consider it to be law (opiniojuris).

Prescriptive rights as provided in section 15 of the Easements Act, 1882 is an example of customary law of Bangladesh.

3.1.3 Precedent

"Precedent" has been defined as follows:

"Precedents are prior decisions that function as models for later decisions."'[78] Marry Garvey also opined "Modern legal systems, whether generally labeled "common law systems" or "civil law systems," employ different doctrines to determine the value placed on precedent, among other differences. Typically, common law legal systems have been associated with the doctrine of stare decisis, under which courts are bound by precedent, and civil law systems have been associated with doctrines such as the French doctrine of jurisprudence constante, which, in simple terms, recognizes that a line of prior, consistent decisions may be persuasive evidence of the proper interpretation of the law"[79]

Article 111 of the Constitution of Bangladesh provides, "The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it." This Constitutional Provision substantiates the legal basis of precedent in our legal system.

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[75]Ibid, p. 125.
[76] C.K. Allen, Law in the Making, p. 70, 6th Edition (1958).
[77]Available at https://en.wikipedia.org/wiki/Customary_law , accessed on 20 October 2020.
[78] Mary Garvey Algero, The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation, 65 La. L. Rev. (2005), available at https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=6083&context=lalrev , accessed on 20 October 2020.
[79]Ibid, p. 783.

3.1.4 Law enacted by the Parliament with the consent of the President

"Acts of parliament, sometimes referred to as primary legislation, are texts of law passed by the legislative body of a jurisdiction (often a parliament or council). In most countries, acts of parliament begin as a Bill, which the legislature votes on. Depending on the structure of government, this text may then by subject to assent or approval from the executive branch."[80] Article 65 of the Constitution of Bangladesh expressly vested legislative powers of the Republic on the Parliament. Article 80 of the Constitution provides for legislative process, and article 80 (5) states, "When the President has assented or is deemed to have assented to a Bill passed by Parliament it shall become law and shall be called an Act of Parliament."

3.1.4.1 Substantive and Adjective Law

"Substantive law and Adjective law are dependent on one another. Substantive rights could not be enforced if adjective law did not exist for this purpose. Adjective law is accessory to substantive law since it is dependent on the existence of substantive law - Criminal procedure enforces the substantive principles of criminal law just as civil procedure enforces the rules and provisions of civil law - Rules of substantive law define the rights and duties of persons in their ordinary relationship with each other; describes the nature of these rights and duties, the manner in which they are est., what their legal effect is and how they are terminated - Adjective law – 'procedural law'. Law of procedure enforces the rules and provisions of substantive law; deals with procedure to be adopted in order to enforce a right or duty; is accessory to substantive law; existence of substantive law creates the need for rules of procedure to enforce substantive provisions; provides the procedures through which the courts may enforce compliance with the provisions of substantive law."[81] In Bangladesh Code of Civil Procedure, 1908 is a procedural law which enforces the Easements Act, 1882, Specific Relief Act, 1887, and Code of Criminal Procedure, 1898 is a procedural law which enforces the Penal Code, 1860.

3.1.5 Ordinances

Article 93 of the Constitution of Bangladesh provides for Ordinance making power of the President, and article 93 (1) provides:

"93. (1) At any time when Parliament stands dissolved or is not in session, if the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate such Ordinances as the circumstances appear to him to require, and any Ordinance so made shall, as from its promulgation have the like force of law as an Act of Parliament:

Provided that no Ordinance under this clause shall make any provision –

(i) which could not lawfully be made under this Constitution by Act of Parliament;

(ii) for altering or repealing any provision of this Constitution; or

[80] See, https://en.wikipedia.org/wiki/Act_of_Parliament , accessed on 20 October 2020.
[81] See, https://lawblogsa.files.wordpress.com/2013/10/civil_procedure_summary.pdf , accessed on 20 October 2020.

(iii) continuing in force any provision of an Ordinance previously made."

Article 93 (3) empowered the President to promulgate an Ordinance authorizing expenditure from the consolidated fund only when the Parliament stands dissolved. "The expression 'cease to have effect' does not mean that the Ordinance on expiration of the period or on disapproval by Parliament shall become void ab initio. Like any other temporary laws, an Ordinance on expiry or disapproval shall be deemed never to have existed except for the past and closed transactions. A mere disapproval by Parliament cannot revive a closed and completed transaction."[82]

3.1.6 Conventional Law evolved from the agreement or unwritten wisdom

> "A convention is a set of agreed, stipulated, or generally accepted standards, norms, social norms, or criteria, often taking the form of a custom. In a social context, a convention may retain the character of an "unwritten law" of custom (for example, the manner in which people greet each other, such as by shaking each other's hands). Certain types of rules or customs may become law and regulatory legislation may be introduced to formalize or enforce the convention (for example, laws that define on which side of the road vehicles must be driven)."[83]
>
> "Public international law" is either "conventional" or "customary": conventional international law, or treaty law, is based on international agreements, conventions and treaties: it is binding only on ratifying nations. Conventional Law is governed by the Vienna Convention on the Law of Treaties. Customary international law is a kind of international common law based on widespread state practice and acknowledgment of obligation; on the judgments of domestic and international tribunals; and on "the general principles of law recognized by civilized nations" and "the teachings of the most highly qualified publicists of the various nations." It is binding on all nations and on non-state actors.
>
> Conventional law can become customary, if it is widely perceived to embody fundamental laws. Needless to say, the content of customary international law is far from settled."[84]

Article 73 of the Constitution of Bangladesh provides for President's address at the first session of every year. But the provision is silent about who should write the address and what should be the contents of the address. In the UK Queen's address is conventionally written by the Ministers outlining the policy of the Government. Bangladesh follows the same convention. This is a glaring example of constitutional convention.

3.1.7 Creation of Law and application of Law

Hans Kelsen opined "Legislation is creation of law, but taking into account the constitution, we find that it is also application of law. In any act of legislation, where the provisions of the constitution are observed, the constitution is applied. The making of the first constitution can likewise be considered as application of the basic norm."[85]

In Bangladesh law is proposed, applied and enforced by government. The President, the Prime Minister, cabinet ministers, government departments, Parliament, the Police, and the judges and judicial officers in our courts and tribunals all play a role in our system of government.

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[82] See, Mahmudul Islam, Constitutional Law of Bangladesh, Third Edition, pp. 425-426, Mullik Brothers, Dhaka.
[83]See, https://en.wikipedia.org/wiki/Convention_(norm) , accessed on 20 October 2020.
[84] See, https://www.brooklynpeace.org/brooklynforpeace/committees/international-law/fact-sheet-downloads/conventional-and-customary-international-law.pdf , accessed on 20 October 2020.
[85] Ibid, F.N. 74, p. 133.

Bangladesh's system of government has 3 branches based on the separation of powers concept:

- Parliament (also called House of the Nation)
- Executive
- Judiciary

3.1.7.1 Parliament (also called House of the Nation)

- Parliament is made up of elected members, also called MPs. They make laws by examining and debating bills (proposed laws, prepared by the executive).
- Because Parliament is elected by the public, it is accountable to the public. This accountability happens through General Election and Parliamentary Committees.
- Parliamentary Standing Committees are small groups of members of parliament (MPs) who specialise in certain subject areas. They examine and debate bills and hear what the public has to say about them. The Parliamentary Standing Committees may recommend amendments in Government Bills through their reports, and on accepting the amendments by the House, the Bill get passed with the amendments suggested by the Parliamentary Standing Committees.
- Parliament will then vote on the Bill and it might pass into law. When Parliament passes a law, it receives President's Assent and becomes a statute or an Act.

3.1.7.2 Executive

The executive is made up of the President, the Prime Minister, cabinet ministers and government departments. They are accountable to Parliament and to the people, who exercise their voting right in General Election. The executive:

- develop policy
- draft Bills
- publish laws, and
- administer all legislation.

Developing policy is the process of working out an idea for a new law (Bill) or turning a new law into action once it has received President's Assent.

Drafting a Bill means writing down a proposal for a new law after the policy has been developed and submitting it to Parliament.

Publishing laws means to formally announce new laws – this is usually done in a publication called the Bangladesh Gazette.

Administering all legislation is making sure that everything that is written down in a statute or Act gets done. This might mean designing new services for citizens and putting processes into place to deliver these. The Minister of Law, Justice and Parliamentary Affairs, for instance, administers all legislation relating to courts – it is their responsibility that all processes involved in running the courts comply with relevant law.

3.1.7.3 Judiciary

The judiciary is made up of Supreme Court judges and judicial officers of lower subordinate judiciary. All judges and judicial officers are appointed by the President.

The judiciary keep the balance between the power of the government and the rights and responsibilities of Bangladesh. They are independent in their decision making and cannot be influenced by Parliament (the legislature) or the executive. Judges interpret and apply the law through the court system by hearing and deciding cases.

3.1.8 Determination of the Law-creating function

Hans Kelsen stated "Every law-creating act must be a law-applying act, i.e., it must apply a norm preceding the act in order to be an act of the legal order or the community constituted by it. Therefore, the norm-creating function has to be conceived of as a norm-applying function even if only its personal element, the individual who has to create the lower norm, is determined by the higher norm. It is this higher norm determining the organ which is applied by every act of this organ."[86]

In Bangladesh, the Parliament makes law under the powers vested and limitations imposed on it by the Constitution. While making law, Parliament creates a body and its functions, both subordinate to the

[86] Ibid, F.N. 74, p. 133-134.

constitution and the Act. The higher norm is the Constitution, and the Act of Parliament is the lower norm.

3.1.9 Subordinate Legislation

The proviso of article 65 of the Constitution of Bangladesh provides for subordinate legislation or delegated legislation, which runs as follows:

"Provided that nothing in this clause shall prevent Parliament from delegating to any person or authority, by Act of Parliament, power to make orders, rules, regulations, bye laws or other instruments having legislative effect."

The accepted view of Parliament's power to delegate is that it cannot delegate essential legislative functions to another agency, which means that Parliament should formulate the policy before leaving it to any person or authority to fill up the details. Pakistan Supreme Court accepted the view in East Pakistan v. Sirajul Huq.[87]

In Ghulam Zamin v. A.B. Khandker, Murshed C.J. determines the ambit of the delegation of legislative power to other agency in the following terms:

(i) Legislation being the exclusive function of the Legislature, it cannot abdicate such function.
(ii) On determining the essential legislative principles and standards, the Legislature is, however, entitled to delegate to outside agencies such functions, which are necessary to an effective exercise of the legislative power with which the Constitution has endowed it.
(iii) The Legislature, however, cannot efface itself and delegate all its functions to an outside agency.[88]

There should be parliamentary control over delegated legislation in Bangladesh. Mahmudul Islam opined, "The rules of procedure of Parliament should provide for a standing committee to examine subordinate legislation and the delegating statute should provide for the approval of the delegated legislation by such standing committee.[89] The delegated authority also should have an obligation to exercise its power of making delegated legislation within a certain period and publish the same for giving it notoriety.

A delegated legislation may be challenged in court on any of the following grounds[90]:

(i) The delegated legislation is void because the delegating statute is not constitutionally valid.
(ii) The delegated legislation is not constitutionally valid.
(iii) The delegated legislation is ultra vires to the delegating statute[91].
(iv) The delegated legislation is arbitrary or unreasonable[92].

Objective and Scope of Legislation

[87] See, 19 DLR (SC) 281, para 122.
[88] See, 16 DLR 486, 495.
[89] See, F.N. 82, p. 503.
[90] See, F.N. 82, p. 503.
[91] See, AIR 1990 SC 334.
[92] See, 15 BLC 91.

Legislation is law which has been enacted (or "promulgated) by a legislature or other governing body or the process of making it. Before an item of legislation becomes law it may be known as a Bill, and may be broadly referred to as "legislation", while it remains under consideration to distinguish it from other business. Legislation can have many purposes: to regulate, to authorize, to outlaw, to provide (funds), to sanction, to grant, to declare or to restrict. It may be contrasted with a non-legislative act which is adopted by an executive or administrative body under the authority of a legislative act or for implementing a legislative act.[93]

The scope of legislation in Bangladesh is determined by articles 7, 26, 65 (1), 80, 82, and 142 of the Constitution, and the case laws pronounced in the land mark decisions of the Supreme Court of Bangladesh.[94]

3.1.10 The principal object of legislations

Article 8 (2) of the Constitution of Bangladesh provides the principal object of legislation. It states that the principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh. Though it is not judicially enforceable but the State has pronounced the objectives of making laws are to realize the principles set out in Part II of the Constitution, e.g. socialism and freedom of expression, democracy and human rights, secularism and freedom of religion, public health and morality, and so on.

3.1.10.1 How the objects are to be achieved

The objects of law are to be achieved by securing rule of law for all citizens of the State. The Preamble of the Constitution of Bangladesh expressly pronounced that It shall be a fundamental aim of the State to realize through the democratic process a socialist society, free from exploitation-a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens.

The concept of rule of law implies not only that (i) the powers exercised by State functionaries must have a legal basis, but also that (ii) the law should conform to certain minimum standards of justice, both substantive and procedural.[95]

3.1.10.2 Deciding whether a law will work or needed

G.C. Thornton noted, "It is not unknown for sponsors of legislation to be more interested in pushing for rapid legislation than in considering the capacity of the proposed legislation to be administered effectively and equitably. A drafter needs at this stage to study most rigorously the practical aspects of the legislation proposed and be satisfied that the scheme will work, that the machinery proposed is practical and that the legislation will be capable of enforcement. This last question is one the drafter will have to come back to

[93] See, https://en.wikipedia.org/wiki/Legislation , accessed on 21 October 2020.
[94] For case laws see, 1989 BLD (Spl) 1, 62 DLR (AD) 298, 15 BLT (AD) 206, 44 DLR 14,
[95]Ibid, F.N. 81.

when drafting the penal provisions. At that stage, if it should arise that an offence is to be created which is patently incapable of proof, this must be strenuously resisted."[96]

Regarding need of a new legislation Thornton noted, "The first step is to consider whether further legislation is in fact necessary or whether the desired ends might not be capable of achievement wholly or in part either by administrative means or under existing legislation. If legislation is enacted that is not needed, that is a clear waste of time and money and therefore swells the volume of the statute book unnecessarily."[97]

3.1.10.3 Direct and Indirect motivation

Kelsen found, "It is function of every social order, of every society-because society is nothing but a social order-to bring about a certain reciprocal behavior of human beings: to make them refrain from certain acts which, for some reason, are deemed determined to society, and to make them perform others, which, for some reason, are considered useful to society."[98]

3.1.10.4 Transcendental and socially organized sanctions

Kelsen viewed, "The sanctions provided by the social order itself may have a transcendental, that is, a religious, or a social-immanent character."[99]

He further opined, "In the first case, the sanctions provided by the order consist in advantages or disadvantages that are to be applied to the individuals by a superhuman authority, a being characterized more or less as God-like."

3.1.10.5 Punishment and reward

"Informal controls reward or punish acceptable or unacceptable behavior (i.e., deviance) and are varied from individual to individual, group to group, and society to society. For example, at a Women's Institute meeting, a disapproving look might convey the message that it is inappropriate to flirt with the minister. In a criminal gang, on the other hand, a stronger sanction applies in the case of someone threatening to inform to the police of illegal activity. Social control by use of reward is known as positive reinforcement. In society and the laws and regulations implemented by the government tend to focus on punishment or the enforcing negative sanctions to act as a deterrent as means of social control."[100]

3.1.11 Law as a coercive order

"Hart himself recognizes that the distinctive structure of a legal system cannot consist in its being simply a system of rules. Accordingly, in order to account for the distinguishing features of a legal system, Hart introduces a number of additional elements into his analysis. The first addition is the assertion that law is a union of two distinct types of rules, which Hart terms "primary" and "secondary." "Rules of the first type concern actions involving physical movement or changes.'" Rules of the second type specify how

[96] See, G.C. Thornton, Legislative Drafting, p.138, Fourth Edition, Butterworths, 1996.
[97] See, ibid.
[98] See, F.N. 102, p. 15.
[99] See, F.N. 102, p.17.
[100] Available at, https://en.wikipedia.org/wiki/Social_control , accessed on 22 October 2020.

rules of the first type are to be created, amended, abolished, interpreted, and applied. Thus, while primary rules regulate behavior, secondary rules regulate or inform other rules. The two types of rules operate upon logically distinct subject matters. Consequently, the conceptual assimilation of one to the other is impossible. Hart makes what is for him the unusually sweeping assertion that "in the combination of these two types of rules lies what Austin wrongly claimed to have found in the notion of coercive orders, namely, 'the key to the science of jurisprudence.' ""[101]

3.1.12 Law, morality, religion

Law, morality, and religion all three forbid murder. Law provides certain measure of coercion against the murderer. Whereas the moral reaction against the immoral conduct is neither provided by the moral order, not if provided, socially organized. For religious norms threaten the murderer with punishment by a superhuman authority.[102]

3.1.13 Monopolization of the Use of force

Law is an organization for force. For the law attaches certain conditions to the use of force in relations among men, authorizing the employment of force only by certain individuals and only under certain circumstances.[103]

3.1.14 Law and peace

Hens Kelsen stated, “Peace is a condition in which there is no use of force. In this sense of the word, law provides for only relative, not absolute peace, in that it deprives individuals or the right to employ force but reserves it for the community. The peace of the law is not a condition of absolute absence of force, a state of anarchy; it is a condition of monopoly of force, a force monopoly of the community.

3.1.15 Psychic compulsion

Kelsen opined, “However, those speak of the “enforcement” of law usually have in mind rather in behavior of the subject: the fact that the subject is compelled to obey the rule of law. They are referring, to the coercive measures which the organ actually executes, but to subject’s fear that the measures will be taken in case of non-obedience.”[104]

3.1.16 The motives of lawful behavior

Kelsen observed, “That a legal order is “efficacious,” strictly means only that people’s conduct conforms with the legal order. No specific information is thereby given about the motives of this conduct and, in particular, about the “psychic compulsion” emanating from the legal order.”[105]

3.1.17 Arguments against the definition of Law as coercive order

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[101] See, Hart, Austin, and the Concept of a Legal System: The Primacy of Sanctions, The Yale Law Journal, Vol. 84: 584, 1975.
[102] See, Hens Kelsen, General Theory of Law and State, p. 20, Russel&Russel, 1961, New York.
[103] See, ibid, p. 21.
[104] See, ibid, p.23.
[105] See, ibid, p. 24.

Kelsen noticed, "The law is an order which assigns to every member of the community his duties and thereby his position in the community by means of a specific technique, by providing for an act of coercion, a sanction directed against the member of the community who does not fulfill his duty. If we ignore this element, we are not able to differentiate the legal order from other social orders."[106]

3.1.18 Validity and Efficacy

Kelsen viewed, "The element of "coercion" which is essential to law thus consists, not in the so-called "psychic compulsion," but in the fact that specific acts of coercion, as sanctions, are provided for in specific cases by the rules which form the legal order. …The rules which constitute a system of morality do not have any such import. Whether or not men do actually behave in a manner to avoid the sanction threatened by the legal norm, and whether or not the sanction is actually carried out in case its conditions are fulfilled, as issues concerning the efficacy of the law. But it is not the efficacy, it is the validity of the law which is in question here."[107]

3.2 Limitations on Legislation

Limitations on legislation are as follows:

(i) When legislation has been entrusted by the Constitution to some other functionary. Parliament cannot pass any law relating to appointment of the staff of the Supreme Court and appointment of Judicial Officers, and magistrates exercising judicial functions.[108]

(ii) Parliament cannot make any law inconsistent with the Part III of the Constitution of Bangladesh.[109]

(iii) Parliament cannot make laws contrary to other provisions of the Constitution of Bangladesh.[110]

(iv) A legislature cannot by legislation bind its successor, and thus Parliament cannot pass any unamendable or irrepealable law.[111]

[106] See, ibid, p.28.
[107] See, ibid, p. 30.
[108] 2000 BLD (AD) 104.
[109] Article 26 of the Constitution of Bangladesh.
[110] Article 7 of the Constitution of Bangladesh.
[111] 1998 BLD (AD) 155, para 54.

PART III

LEGISLATIVE PROCESS IN BANGLADESH

CHAPTER 1

AN OVERVIEW OF BANGLADESH LEGISLATION

1 An overview of Bangladesh legislation

1.1.1 Introduction

This part provides an introduction and brief overview of laws, the legislative process in Bangladesh as well as a guide as to where laws may be located. Laws in Bangladesh are divided into principal legislation and subordinate legislation.

1.1.2. Principal Legislation

Laws or Acts as they are titled in Bangladesh are enacted by the legislature known as the Bangladesh Parliament under Article 65 of the Constitution. Articles 80-92 and the Rules of Procedure of the Parliament of the People Republic of Bangladesh provide for that legislative role. Article 80 (5) of the Constitution provides that "*When the President has assented or is deemed to have assented to a Bill passed by Parliament it shall become law and shall be called an Act of Parliament*". Article 93 of the Constitution empowers the President to make and promulgate Ordinance (principal legislation) when the Parliament is dissolved or not in session.
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1.1.3. Subordinate Legislation

Article 65(1) of the Constitution empowers the Parliament to delegate to any person or Authority, by Act of Parliament, power to make orders, rules, regulations, bye-laws or other instruments having legislative effect. This system of Subordinate legislation empowers Ministers and other authority to regulate administrative details under the authority of a particular Act of Parliament. The powers conferred in this way are normally delegated to the authorities directly responsible to the Parliament, that is, Ministers, Government Departments for which Ministers are responsible or to organizations whose regulations are subject to confirmation or approval by Ministers who thereby become responsible to the Parliament for them.

1.1.4. **Important laws to consider when drafting legislation in Bangladesh**

1.1.4.1.1. ***Constitution***

The Constitution of the People's Republic of Bangladesh contains important Provisions. All Legislative Drafters must bear in mind when drafting legislation as any draft law that is inconsistent with the Constitution is considered void to the extent of the inconsistency. Important provisions of the Constitution include those on fundamental human rights and Articles relating to the legislature and law making in Bangladesh.

1.1.4.2. ***General Clauses Act 1897***

1.1.4.2.1. The General Clauses Act, 1897 is an important law that legislative drafters should consult in the context of carrying out their work. In addition to the common law rules of statutory interpretation, the General Clauses Act, 1897 plays a significant role in determining how legislation is interpreted and, consequently, how it is written. The general principle, established by section the General Clauses Act, 1897 is that every provision of that Act applies to every enactment "unless a contrary intention appears". Among other things, the General Clauses Act, 1897-

- defines words that used throughout our legislation,
- determines how to calculate periods of time that are set by legislation,
- gives general direction on how court are to approach statutory interpretation,
- establishes when legislation comes into force, and
- Provides transitional rules that apply when one provision is repealed and another enacted in its place.

1.1.4.2. Legislative Drafter takes the General Clauses Act 1897 into account in many ways, including the following:

- they will avoid using a word that is defined in the interpretation Act in a sense that differs from that Act's definition;
- they will draft in the present tense, relying on the Act's direction that this means the law continues to apply through time;
- They will generally draft in the singular, relying on the Act's direction that the singular includes the plural.

1.1.4.3. ***Rules of Business 1996***

This Rules of Business 1996 set out which Ministry is in control of which legislation. It is very useful for legislative drafters in understanding the Government infrastructure and who to target in the consultation phase of the legislative drafting process.

1.1.4.4. ***Public Money and Budget Management Act, 2009***

This Act is important for reference in the context of drafting legislation that will impact financial implications on the Consolidated Fund or Public Accounts of the Republic.

1.1.4.5. ***Public Service Act 2018***

This Act is important for reference in the context of drafting legislation that will impact on the organizational structure of certain Government Departments.

1.1.4.6. ***Code of Criminal Procedure, Penal Code and other special penal laws***

For the purposes of drafting offense, penalty, investigation and other related substantive and procedural provisions, these Acts are important references to avoid duplication of offences, penalty and procedure already in existence in Bangladesh.

1.1.4.7. ***Comptroller and Auditor-General (Additional Functions) Act 1974***

This Act is important as it provides the framework on keeping government accounts, preparation of appropriation and finance account, audit of accounts of statutory public authorities, etc and preparation of commercial accounts by the CAG. Therefore, in the context of drafting legislation for a body corporate, it is important to take this law into account if there are impacts on the implementation of this Act.

1.1.4.8. ***Locating the laws of Bangladesh***

There are at times numerous difficulties in locating the full range of laws applying in Bangladesh, and may assist in overcoming the problems of accessing current and true copies of the laws. A problem related to the accessing of legislation is due to legislation not being printed and although there have been printed versions of legislation in the past there has not been an updated reprint of these laws. This has largely been overcome with the publication of *Bangladesh Code* and establishment of the official Government website *Laws of Bangladesh* where all principal legislations may be found. It is the responsibility of LPAD to maintain the website which contains all the principal legislations.

1.1.5. Language of Legislation

Although according to Article 3 of the Constitution of Bangladesh, Bangla is the Official State language of the Republic. English was the principal language of legislative drafting before the enactment of Bangla Bhasha Prochalan Ain, 1987 (The Bangla Introduction Act, 1987) (Act No. 2 of 1987). Section 3(1) of the said Act states that "Bangla must be used everywhere; that is, in government, semi-government, autonomous organizations and law courts; and except in communication with foreign countries, official notes and correspondence, cross-examination in law courts, and other activities under the law must be written in Bangla". Since this enactment, all Bills have been prepared in Bangla. There is English-language translation of laws drafted in Bangla and, for all intents and purposes, in some cases a bilingual system is recognised as a method for drafting and framing the laws. Under the Constitution, if there is an inconsistency between the two language versions, the Bangla text prevails.

1.2. Legislative competency

1.2.1. Legislative competency

The Constitution prescribed the competent authorities to exercise the law making power under it. The Bangladesh Parliament and the President of Bangladesh are the competent authorities to make principal legislation. Beside that the Parliament is authorized to delegates its power to any person or authority, by an Act of Parliament, to make orders, rules, regulations, bye-laws or other instruments having legislative effects.

1.2.2 Principal Legislation

1.2.2.1. The Parliament:

Article 65(1) of the Constitution conspicuously states that "*there shall be a Parliament for Bangladesh (to be known as the House of the Nation) in which, subject to the provisions of this Constitution, shall be vested the legislative powers of the Republic:*

Provided that nothing in this clause shall prevent Parliament from delegating to any person or authority, by Act of Parliament, power to make orders, rules, regulations, bye-laws or other instruments having legislative effect".

The President shares this power in two ways, first, a Bill passed by the Parliament becomes an Act of Parliament only after the President has assented, or is deemed to be assented under Article 80(5): secondly, the President can make laws called Ordinances, which have life limited by constitution, when the Parliament is dissolved or not in session.

1.2.2.2. The President:

The Constitution has given ample power to the President of the Republic to make laws in the following circumstances:-

(a) Article 55(6) of the Constitution empowers the President to make rules for the allocation and transaction of the business of the Government;

(b) Article 92(3) of the Constitution empowers the President to make Presidential Orders relating to the authorizations of the withdrawal from the consolidated fund moneys necessary to meet expenditure;

(c) Article 93 empowers the President to make Ordinances when Parliament stands dissolved or is not in session;

(d) Article 115 empowers the President to make rules for appointment of persons to offices in the judicial service or as magistrates exercising judicial functions.

1.2.3 Subordinate Legislation

Subordinate legislation refers to a situation in which the Legislature lays down the policy in more or less wide terms and gives to some external authority the power to carry out, by framing rules and regulations, the legislative policy so specified in the Act. This is always a section technically called ' Rule making Power Provision' in the Act passed by the Legislature that says generally that some extraneous authority, charged with the duty of administering the Act, should frame rules and regulations not inconsistent with the provisions of the Act for the purpose of carrying out objects of the Act. The only requirement of law in such situations is to insist that the authority or body charged with the duty of making rules and regulations must strictly confine itself within the sphere of its authority for the exercise of the delegated legislative power.

Article 65(1) of the Constitution of Bangladesh empowers the Parliament to delegate to any person or Authority, by Act of Parliament, power to make orders, rules, regulations, bye-laws or other instruments having legislative effect. This system of Subordinate legislation empowers Ministers and other authorities to regulate administrative details under the authority of a particular Act of Parliament. The powers conferred in this way are normally delegated to the authorities directly responsible to the Parliament, that is, Ministers, Government Departments for which Ministers are responsible or to organizations whose regulations are subject to confirmation or approval by Ministers who thereby become responsible to the Parliament for them.

CHAPTER 2

LEGISLATIVE PROCESS IN BANGLADESH

2. Legislative Process in Bangladesh

2.1. Introduction

The law, both statutes and common law, provides the framework within which a society functions. The rights and obligations of individuals and organisations in a society are determined by it. The making of legislation is the most democratic means by which a Government is able to govern. By legislation, policies are transformed into enforceable written law through an elected legislature. The translation of policy into law is a vital part of promoting good governance and the rule of law in society. Properly managed and executed, the process, amongst other things, serves to –

(a) build public confidence in the legal system; and
(b) transform institutions or institutional frameworks.

Legislation is a statement of rules to alter the way that people behave i.e. stop them doing something, or make them do something, or it might be

(a) to raise revenue for the government;
(b) to state a principle that society agrees on; or
(c) to create and confer rights on a statutory body.

The purpose of most statutes is to change the behaviour of people. A successful law is one that changes certain behaviour to reach a policy goal. The more clearly identified the people who are addressed and the more understandable and clear the language of the law, the more likely it will be to have the intended effect.

2.1.1. Constitutional position relating to principal legislation

The Constitution of Bangladesh provides for a legislature with authority to make laws '*for the peace, order and good government'* of the country. Bangladesh has only one legislative chamber (unicameral). The legislative process in Bangladesh is governed by its Constitution, the Rules of Procedure of Parliament, Rules of Business, 1996 and conventions of the legislature. It is important that policymakers familiarise themselves with the Constitution and with the procedures.

Article 80 of the Constitution provides that

"(1) Every proposal in Parliament for making a law shall be made in the form of a Bill.

(2) When a Bill is passed by Parliament it shall be presented to the President for assent.

(3) The President, within fifteen days after a Bill is presented to him, shall assent to the Bill or, in the case of a Bill other than a Money Bill, may return it to Parliament with a message requesting that the Bill or any particular provisions thereof be reconsidered, and that any amendments specified by him in the message be considered; and if he fails so to do he shall be deemed to have assented to the Bill at the expiration of that period.

(4) If the President so returns the Bill Parliament shall consider it together with President's message, and if the Bill is again passed by Parliament with or without amendments by the votes of a majority of the total number of members of Parliament, it shall be presented to the President for his assent, whereupon the President shall assent to the Bill within the Period of seven days after it has been presented to him, and if he fails to do so he shall deemed to have assented to the Bill on the expiration of that period.

(5) When the President has assented or is deemed to have assented to a Bill passed by the Parliament it shall become law and shall be called an Act of Parliament."

Article 76 of the Constitution provides Standing committees of Parliament as follows:

"(1) Parliament shall appoint from among its members the following standing Committees, that is to say-

(a) a public accounts committee;
(b) Committee of privileges; and
(c) Such other standing committees as the rules of procedure of Parliament require.

(2) In addition to the committees referred to in clause (1), Parliament shall appoint other standing committees, and a committee so appointed may, subject to this Constitution and to any other law-

(a) examine draft Bills and other legislative proposals;
(b) review the enforcement of laws and propose measures for such enforcement;
(c) in relation to any matter referred to it by Parliament as a matter of public importance, investigate or inquire into the activities or administration of a Ministry and may require it to furnish, through an authorized representative, relevant information and to answer questions, orally or in writing;
(d) perform any other function assigned to it by Parliament.

(3) Parliament may by law confer on committees appointed under this article powers for
(a) enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise;
(b) compelling the production of documents."

2.2. Principal Legislation

2.2.1 Stages of law making

Although the passage of a Bill through the legislature is the most public part of the legislative process, there are several other steps involved in getting a new statute enacted. They can be identified as –

(a) Policy making: This is a matter for the sponsoring Ministry and the Cabinet.

(b) Drafting: This is the task of the legislative drafter on the instructions of the sponsoring Ministry.

(c) Consultation: Consulting with interested parties ('stakeholders') both within and outside government is the responsibility of the sponsoring Ministry

(d) Enacting the Bill: This is the responsibility of the legislature on the initiative of the relevant Minister and the leader of the House.

(e) Publication: The task of having the statute formally published in the Gazette and publicised in the media usually falls on the Parliament Secretariat and Legislative and Parliamentary Affairs Division (LPAD).

(f) Administrative implementation: The primary responsibility for ensuring effective administrative processes such as finance and staffing, making appointments, issuing licences, etc. falls on the sponsoring Ministry.

(g) Enforcement: Enforcing the law is a matter for the police, or of inspectors and enforcement officers appointed for the purpose.

(h) Adjudicating: The adjudication of disputes arising out of the statute, and if necessary interpreting it, is a matter for the courts, or for tribunals created for the purpose.

(i) Commenting: Once a statute has been enacted – and even during the enactment stages – it is open for discussion and comment by the media and by academics and the public at large. This might continue for several years in the case of a complex statute, and might result in amendments to the law at a later stage.

2.2.2 Executive procedure

2.2.2.1 Initiating legislation

Most Bills originate in the Government, with few if any private members' Bills. The legislative process by which Bills are introduced and enacted is usually starts at the Cabinet level with a decision to have a policy implemented through legislation. The Ministry sponsoring the legislation therefore needs to seek approval and authorisation from Cabinet to draft the

legislation proposed. Before that the Ministry holds inter-ministerial meeting and circulates the proposal in raw draft form to interested parties for comment. There after the Ministry goes for Cabinet approval and once Cabinet approves it on principle the LPAD drafter will draft the Bill. At this stage in few cases Bills are circulated again to stakeholder for their comment until a final draft is agreed to by the sponsoring Ministry. The Bill then goes back to Cabinet for final approval. If the Bill is approved, the Minister serves a notice to the Parliament Secretariat to introduce the Bill in the House and there after it goes through the necessary stages in the legislature. (Note that sometimes the procedural rules can be suspended to allow all stages of a Bill to be completed at the same time.)
The drafting of the Bill is the responsibility of the LPAD, on the basis of drafting instructions issued by the sponsoring Ministry.

2.2.2.2 Provisions relating to executive procedure:

Preparation for legislation (Secretariat Instructions, 2014)

- Initiative for legislation (Instruction 227).
- Sending Proposal to the Ministry of Law, Justice & Parliamentary Affairs for Preparing the Draft Bill (Instruction 228).
- Preparation of the Draft Bill by LPAD (Instruction 229).
- Examination of the Draft Bill by the administrative ministry/division (Instruction 230).
- Approval of the Bill by the cabinet for introduction in the Parliament (Instruction 231).
- Recommendation of the President (Instruction 232).
- Preparation of Statement of objects, reasons and notes on clauses (Instruction 233).
- Private Members Bill (Instruction 234).
- Amendments (Instruction 235).
- Supply of list of person, authorities to be consulted (Instruction 236)
- Supply of list of legislative proposal before 7 days of every session of Parliament (Instruction 237)
- Ordinance making and preservation of copy of Ordinance(Instruction 238)
- Subordinate legislation making process (Instruction 239).
- Consultation with certain ministries/division/office in respect of formulating rules/regulations, etc. (Instruction 240).
- Vetting/opinion and preservation of copy of subordinate legislation by LPAD (Instruction 241)

2.2.1.1. Provisions relating to legislative policy formulation

The relevant provisions for policy formulation procedures are enumerated below:

(a) Under Article 55(6) of the Constitution, the President has made Rules of Business, 1996 for the allocation and transaction of the business of the Government. The Secretariat Instructions, 2014 made under rule 4(vii) of the Rules of Business, 1996 provides that a Ministry or Division is responsible for the formulation of policies of the government within its jurisdiction, and also for the execution and review of those policies. The Rules of Business and Secretariat Instructions also require that any

legislative proposal shall be initiated at the administrative Ministry to which the law or a subject matter is assigned, generally prepare policy papers. Experts within the Ministry or, in some cases, outside lawyers usually draft a preliminary Bill, interdepartmental consultation is often done while drafting the Bill, but widespread public consultation is currently not the norm.

(b) Rule 16(i) of the Rules of Business, 1996 provides, cases involving legislation, including the promulgation of Ordinances, are to be brought before the Cabinet for consideration. Furthermore, Rule 4(ii) of the Rules of Business provides that no important policy decision shall be taken without Cabinet approval. Therefore, the administrative Ministry initiates the legislative process by preparing a Summary to the Cabinet. Rule 19 of the Rules of Business prescribes the format of the summary. The Secretary of the Ministry concerned transmits to the Cabinet Secretary a concise and clear memorandum that gives the background and relevant facts, the points for discussion and the recommendations of the sponsoring minister. The summary shall be self-contained as far as possible and shall include as appendices such relevant papers as may be necessary for proper identification of the case. The number of copies of the summary to be supplied for cabinet consideration will be specified by the Cabinet Division;

(c) In cases of proposals involving expenditure or abatement of revenue, the views of the Finance Division must also be obtained and recorded in the summary. Where the issues are related with other Ministries as per Allocation of Business, it may require the recommendations of all concerned Ministries. At least four clear days are normally needed in advance of the Cabinet meeting for a summary to be placed on the agenda. No matter will generally be discussed unless the summary relating to it has been circulated;

(d) The summary is strictly confidential. The preliminary draft Bill generally accompanies the summary. The draft Bill facilitates easier understanding of the summary by the Cabinet;

(e) Cabinet in its meetings considers each and every Bill. But if it appears to the Cabinet that a Bill involves some important and complicated issues it may form a Cabinet Committee headed by a Minister along with a few other members who are also Ministers;
(f) If the Cabinet Committee approves the proposal, it will prepare a report for consideration of the Cabinet. The Cabinet after consideration of the report may approve the Bill on principle. The Law Secretary is asked to attend all Cabinet meetings where proposed Legislation is discussed;

(g) After approval of the proposal, the Cabinet Secretary prepares a brief record of the discussions and records the decision taken. This file is then submitted to the Prime Minister for ultimate approval;
(h) Once approval is obtained, it is then circulated to Cabinet Ministers. Relevant extracts of the decisions are provided to the sponsoring Minister and ministerial Secretary for necessary action;
(i) At this point the administrative/ sponsoring Ministry, also called the Ministry-in-Charge, is authorised to go ahead with the preparation of a final draft Bill for Cabinet consideration.

2.2.1.2. Initiation of Legislative proposal

All proposals involving legislations are initiated by the administrative Ministry/Division concerned and required to place before the Cabinet for approval and, if it receives approval, referred to the LPAD with the request to give the proposal a legislative shape in the form of a Bill or an Ordinance, as the case may be. No legislative Bill will ordinarily be referred to the LPAD and nor the LPAD undertakes the preparation of a draft of the legislative measure unless the proposal has been approved by the Cabinet.

2.2.1.3. Reference to the Legislative and Parliamentary Affairs Division

Every reference of legislative proposal to the LPAD for preparation of a draft legislative measure must accompanied by all the papers connected with the proposal including the precise or summary placed before the Cabinet and also by a separate memorandum of instructions indicating with sufficient precision the contents of the proposal as approved by the Cabinet and setting out clearly in the form of a series of propositions all matters of substances which are to be included in the draft legislation.

2.2.1.4. Preparation of drafting Bill

Upon a reference to it of a legislative proposal, the LPAD examines it and if it finds that the proposal contains no measure which is ultra-vires of the Constitution or inconsistent with the Fundamental Principles of State Policy, it prepares draft to fully reflect the proposal. If upon examination of the proposal, the LPAD, finds that it contains measure which is ultra-vires of the Constitution or inconsistent with the Fundamental Principles of State Policy, it returns the case to the administrative Ministry/Division concerned fully recording its opinion with the advice:

(a) in the case of any measure being ultra-vires of the Constitution, to modify the proposal omitting those measures; and

(b) in the case of inconsistency with the Fundamental Principles of State Policy, to reconsider the measure for bringing the proposal in conformity with those principles.

After the case is received back from the LPAD the administrative Ministry/ Division concerned re-examines and modified the proposal in the light of advice of the LPAD and refer the proposal as so modified to the LPAD for preparation of a draft of the legislative measure; and the LPAD prepares the draft to reflect the proposal as modified. The LPAD, while returning a case with a draft of a Bill, also records whether the Bill is required the prior recommendation of the President under Article 82 of the Constitution.

2.2.1.5. Examination of the draft Bill by the administrative Ministry/ Division

The draft Bill is then examined by the administrative Ministry/ Division which is satisfied itself that the draft Bill correctly represents their legislative proposals.

2.2.1.6. Approval of the Bill by the Cabinet for introduction in the Parliament

When the draft Bill as prepared by the LPAD is finally agreed by the administrative Ministry/Division concerned, it is submitted to the Cabinet for approving the introduction of the Bill in the Parliament.

2.2.1.7. Recommendation of the President

(1) If any Bill or amendment of a Bill requires the recommendation of the President under Article 82 of the Constitution, the administrative Ministry/Division concerned must obtain the recommendation of the President through the Finance Division to the introduction of the Bill or, as the case may be, the moving of the amendment in the Parliament; and

(2) After obtaining the recommendation of the President, it is communicated to the Parliament in the notice of the motion for leave to introduce the Bill or where no motion for introduction is necessary, before the date on which the Bill is introduced, or in case of amendment before the date of moving the amendment.

2.2.1.8. Preparation of Statement of Objects and Reasons and Notes on Clauses

(1) On completion of action under the preceding Instruction, the administrative Ministry/Division concerned, in consultation with the Ministry of Law where necessary, prepares a Statement of Objects and Reasons and such notes on the clauses of the Bill as may be considered desirable so as to explain the substance and origin of the clauses of the Bill.

(2) The administrative Ministry/Division concerned formulates the line of action to be adopted in regard to the Bill, and prepare a brief for the use of the Minister-in-Charge to assist the substance and origin of the clauses of the Bill.

2.2.1.9. Amendments

(1) Where, after a Bill is introduced in the Parliament, the Government contemplates any amendment therein the administrative Ministry/Division concerned, in consultation with the LPAD, prepares a draft of the amendment contemplated and causes necessary notices to the Parliament after obtaining, where required, the recommendation of the President in the manner laid down in the Rules of Procedure of the Parliament.

(2) Where any Private Member proposes any amendment to a Bill introduced in the Parliament, the Parliament Secretariat must forward copies of the amendments to the administrative Ministry/Division concerned as well as the LPAD; and the administrative Ministry/Division concerned, after examining the amendments in consultation with the LPAD, submits the same to the Minister-in-Charge with its observations and the comments of the LPAD, if any.

(3) If any amendment is proposed by a Private Member on the floor of the House and is admitted by the Speaker, the Minister in Charge ordinarily asks for postponement of the consideration of the amendment to a later date and, if such postponement is granted must cause the amendment to be examined in the manner laid down in sub- paragraph (2).

(4) Where any amendment proposed in a Bill is of such a nature as to affect or likely to affect the principle of the Bill or the expenditure of Government, the Minster in Charge must not commit himself to the acceptance of the amendment before seeking and obtaining the concurrence of the Cabinet.

2.2.1.10. Supply of List of Individuals and Associations to be consulted

When a motion is carried for circulation of a Bill for the purpose of eliciting opinion, the administrative Ministry/ Division concerned, on request, supplies to the Parliament after consultation with the Government Whip a list of individuals, associations and public bodies whose opinion should be invited.

2.2.1.11. Custody of signed copy of Ordinance

Where an Ordinance is made and promulgated under clause (1) of Article 93 of the Constitution, the original copy of the Ordinance signed by the President is kept in the custody of the LPAD and must not pass out of the Ministry without permission of the Secretary.

2.2.2. Parliament Procedure

Legislative process in the Parliament
(Rules of Procedure of the Parliament)

Private Members Bills-

(a) Notice of Private Member's Bills (Rule 72);
(b) Mode of obtaining and communicating recommendation of President (Rule 73);
(c) Introduction of Private Member's Bills (Rule 74).

Introduction of Governments Bills (Rule 75).
Publication of Bills (Rule 76).
Consideration of Bills-

(a) Motions after introduction and time for consideration of Bills (Rule 77);
(b) Discussion of principles of Bills (Rule 78);
(c) Persons by whom motions in respect of Bills may be made (Rule 79);
(d) Procedure after presentation of report of Select/Standing Committee (Rule 80);
(e) Scope of debate on report of Select/Standing Committee (Rule 81);
(f) Mode of moving amendments (Rule 82);
(g) Notice of amendments (Rule 83);
(h) Conditions of admissibility of amendments (Rule 84);
(i) Arrangements of amendments (Rule 85);
(j) Order of amendments (Rule 86);

(k) Withdrawal of amendments (Rule 87);
(l) Submission of Bill Clause by clause (Rule 88);
(m) Clause one, Enacting formula, Preamble and Title of Bill (Rule 89).

Passing of Bills Etc.-

(a) Passing of Bills (Rule 90);
(b) Scope of debate (Rule 91);
(c) Correction of patent and clerical errors (Rule 92);
(d) Withdrawal of Bills (Rule 93);
(e) Voting (Rule 94);
(f) Authentication of Bills (Rule 95);
(g) Publication of Bills assented to by the President (Rule 96).

Reconsideration of Bills Returned by the President-

(a) Message of the President and reconsideration of the Bills (Rule 97);
(b) Authentication of Bills passed again by the House (Rule 98).

Amendment of the Constitution-

- Amendment of the Constitution (Rule 99).

2.2.1.2. INTRODUCTION OF BILLS

2.2.1.2. 1. Government Bills

2.2.1.2. 1. Introduction of Government Bills

(1) A Minister may move for leave to introduce a Bill after giving to the Secretary (to the Parliament) seven day's written notice of his intention to do so, unless the Speaker for sufficient reasons suspends this rule and allows the motion to be made at a shorter notice.

(2) The notice shall be accompanied by two copies of the Bill together with a statement of objects and reasons, and if the Bill is one that under the Constitution requires the previous recommendation of the President for its introduction, the notice shall contain a certificate by the Minister that the Bill has been recommended by the President for introduction.

(3) The motion for leave to introduce the Bill shall be entered in the Orders of the Day, meant for Government business.

(4) When the item is called, the Member-in-Charge shall move for leave to introduce the Bill. Thereafter, the procedure laid down in sub-rules (2) and (3) of rule 74 (Rules of Procedure of Parliament) shall be followed. [Rule 75 of Rules of Procedure of Parliament]

2.2.1.2. 2. Private Member's Bills

2.2.1.2. 2.1. Notice of Private Member's Bill

(1) Subject to the provisions of these rules, (Rules of Procedure of Parliament), any member, other than a Minister, desiring to move for leave, to introduce a Bill, shall give to the Secretary (to the Parliament) fifteen days written notice of his intention to do so and shall together with the notice submit three copies of the Bill along with an explanatory statement of objects and reasons which shall not contain arguments.

(2) If the Bill is one which under the Constitution requires the previous recommendation of the President for its introduction, the notice shall also be accompanied by a copy of such recommendation conveyed through the Minister concerned, and the notice shall not be valid until this requirement is complied with.

(3) If the Bill is one which involves expenditure from public moneys, it shall be accompanied by a financial memorandum which shall invite particular attention to the clauses involving expenditure and shall also give an estimate of the recurring and non- recurring expenditure involved in case the Bill is passed into law. [Rule 72 of Rules of Procedure of Parliament]

2.2.1.2. 2.2. Mode of obtaining and communicating recommendation of the President (For Private Member's Bill)

(1) A member other than a Minister, desiring to obtain the previous recommendation of the President for introduction of a Bill shall arrange to obtain it through the Minister concerned.

(2) If the member cannot obtain the recommendation under sub-rule (1), he may send or deliver a copy of the Bill to the Secretary (to the Parliament), along with a request in writing that action for obtaining such recommendation be taken, and the Secretary shall cause a copy of the same to be transmitted to the Minister concerned for obtaining President's Order thereon.

(3) The Order of the President granting or withholding recommendation to the introduction of a Bill shall be communicated to the Secretary (to the Parliament) by the Minister concerned in writing, and on receipt of the President's Orders, the Secretary shall intimate the decision of the President to the member concerned.

(4) If any question arises whether a Bill does or does not require the previous recommendation of the President, the question shall be decided by the Speaker. [Rule 73 of Rules of Procedure of Parliament]

2.2.1.2. 2.3. Introduction of Private Member's Bills

(1) Motions for leave to introduce Private Member's Bills shall be set down in the Orders of the Day, meant for Private Members' business.

(2) If a motion for leave to introduce a Bill is opposed, the Speaker, after permitting, if he thinks fit, a brief explanatory statement by the member moving for leave and by the member opposing it, may without further debate put the question.

(3) If leave is granted, the Member-in-Charge, when called, shall formally move forthwith to introduce the Bill, and on the motion being made, the Bill shall stand introduced. [Rule 74 of Rules of Procedure of Parliament]

PUBLICATION OF BILLS

2.2.1.2.2.4. Publication of Bills.- (1) Subject to the provisions of sub-rule (2), the Secretary (to the Parliament) shall cause every Bill that has been introduced to be published in the Gazette as early as possible together with the statement of objects and reasons and the financial memorandum, if any, accompanying it.

(2) As soon as may be after a Bill has been introduced, the Bill, unless it has already been published, shall be published in the Gazette. [Rule 76 of Rules of Procedure of Parliament]

CONSIDERATION OF BILLS

2.2.1.2.2.5. Motions after introduction and time for Consideration of Bills.-When a Bill is introduced, or on some subsequent occasion, the Member-in-Charge may make anyone of the following motions in regard to his Bill, namely :-

(a) that it be taken into consideration by the House either at once or on some future day to be specified in the motion; or

(b) that it be referred to a Standing Committee; or

(c) that it be referred to a Select Committee; or

(d) that it be circulated for the purpose of eliciting opinion of expert or public thereon:

Provided that no such motion shall be made until after copies of the Bill have been made available for the use of members, and that any member may object to any such motion being made unless copies of the Bill have been so made available for three days before the day on which the motion is made, and such objection shall prevail unless the Speaker, in exercise of his power to suspend the rules, allows the motion to be made. [Rule 77 of Rules of Procedure of Parliament]

2.2.1.2.2.6. Discussion of Principles of Bills

(1) On the day on which any of the motions referred to in rule 77 is made, or any subsequent day to which discussion thereon has been postponed, the principles of the Bill and its general provisions may be discussed, but details of the Bill shall not be discussed further than is necessary to explain its principles.

(2) At this stage no amendments to the Bill may be moved, but-

(i) if the member-in-charge moves that his Bill be taken into consideration, any member may move as an amendment that the Bill be referred to a Select Committee, or to a Standing Committee, or be circulated for the purpose of eliciting opinion thereon by a date to be specified in the motion; or

(ii) if the member-in-charge moves that his Bill be referred to a Select Committee, any member may move as an amendment that the Bill be referred to a Standing Committee or be circulated for the purpose of eliciting opinion thereon by a date to be specified in the motion; or

(iii) if the member-in-charge moves that his Bill be referred to a Standing Committee, any member may move as an amendment that the Bill be circulated for the purpose of eliciting opinion thereon by a date to be specified in the motion.

(3) Where a motion that the Bill be circulated for the purpose of eliciting opinion thereon is carried, and the Bill is circulated in accordance with that direction and opinions are received thereon, the member-in-charge, if he wishes to proceed with his Bill thereafter, shall move that the Bill be referred to a Select Committee or to a Standing Committee unless the Speaker in the exercise of his power to suspend this rule, allows a motion to be made that the Bill be taken into consideration. [Rule 78 of Rules of Procedure of Parliament]

2.2.1.2.2.7. Persons whom motions in respect of Bills may be made

No motion that the Bill be taken into consideration or be passed shall be made by any member other than the member-in-charge and no motion that the Bill be referred to a Select Committee or to a Standing Committee or be circulated for the purpose of eliciting opinion thereon shall be made by any member other than the member-in-charge except by way of amendment to a motion made by the member-in-charge:

Provided that if the member- in -charge is unable, for reasons considered adequate by the Speaker, to move the next motion in regard to his bill at any subsequent stage after introduction, he may authorise in writing any other member (or any Minister in the case of Government Bill) to move that particular motion with the approval of the Speaker.

Explanation.- Notwithstanding the provisions contained in the proviso the member who introduced the Bill shall continue to be the member-in-charge. [Rule 79 of Rules of Procedure of Parliament]

2.2.1.2.2.8. Procedure after presentation of report of Select/ Standing committee.- (1) Where a Bill has been referred to a Select Committee or a Standing Committee, the member-in-charge may after presentation of the final report by the Committee, move –

(a) that the Bill, as reported by the Select Committee or Standing Committee, as the case may be, be taken into consideration at once; or

(b) that the Bill, as reported by the Select Committee or Standing Committee, as the case may be, be recommitted to same committee or, to a new Select Committee either-

(i) as a whole, or

(ii) with respect to particular clauses or amendments only, or

(iii) with instructions to the Committee to make some particular or additional provisions in the Bill; or

(c) that the Bill, as reported by the Select Committee or Standing Committee be circulated or re- circulated, as the case may be, for the purpose of eliciting opinion or further opinion thereon:

Provided that any member may object to any such motion being made if a copy of the report of the Select Committee or Standing Committee, as the case may be, has not been made available for the use of the members at least three days before the motion is made, and the objection shall prevail unless the Speaker allows the motion to be made.

(2) If the member-in-charge moves that the Bill, as reported by the Select Committee or Standing Committee, as the case may be, be taken into consideration, any member may move as an amendment that the Bill be recommitted to the same Committee or be circulated or re-circulated, as the case may be, for the purpose of eliciting opinion or further opinion thereon. [Rule 80 of Rules of Procedure of Parliament]

2.2.1.2. 2.9. Scope of debate on report of Select/Standing Committee

The debate on a motion that the Bill as reported by the Select Committee or Standing Committee be taken into consideration shall be confined to consideration of the report of the Committee and matters referred to therein or any alternative suggestions consistent with the principles of the Bill. [Rule 81 of Rules of Procedure of Parliament]

2.2.1.2.2.10. Mode of moving amendments

Subject to the provisions of rules 80 and 81 when a motion that the Bill be taken into consideration has been carried, any member, when called upon by the Speaker, may propose an amendment to the Bill:

Provided that in order to save time and repetition of arguments, a single discussion may be allowed to cover a series of inter-dependent amendments. [Rule 82 of Rules of Procedure of Parliament]

2.2.1.2.2.11. Notice of amendments

(1) If notice of a proposed amendment has not been given three clear days before the day on which the Bill, the relevant clause or the Schedule is to be considered, any member may object to the moving of the amendment, and such objection shall prevail unless the Speaker suspends this sub-rule and allows the amendment to be moved at shorter notice.

(2) The Secretary (to the Parliament) shall, if time permits, cause a copy of every proposed amendment to be made available for the use of every member.

(3) If the proposed amendment is one which, under the Constitution, cannot be moved without the previous recommendation of the President, the notice shall be accompanied by a copy of, or a certificate about, such recommendation conveyed through a Minister, or given by a Minister, as the case may be, according as the Bill is a Private Member's Bill or a Government Bill, and the notice shall not be valid until this requirement is complied with:

Provided that no such recommendation shall be required for moving an amendment which seeks to abolish or reduce any tax. [Rule 83 of Rules of Procedure of Parliament]

2.2.1.2.2.12. Conditions of admissibility of amendments

The right to move amendments to clauses or Schedules of a Bill shall be governed by the following conditions, namely:-

(i) An amendment shall not be irrelevant to the subject matter or beyond the scope of the Bill, or the clause or Schedule under consideration.

(ii) An amendment shall not be inconsistent with, or contrary to any previous decision of the House on the same question at the same stage of a Bill.

(iii) An amendment shall not be moved which has merely the effect of a negative vote.

(iv) An amendment shall not be vague, meaningless or frivolous.

(v) An amendment shall not be admissible if it is dependent upon an amendment which has already been negative by the House.

(vi) An amendment shall not be such as to make the clause it proposes to amend unintelligible or ungrammatical.

(vii) If an amendment refers to, or is not intelligible without, a subsequent amendment or Schedule, notice of the subsequent amendment or Schedule shall be given before the first amendment is moved so as to make the series of amendments intelligible as a whole.

(viii) An amendment may be moved to an amendment which has already been moved in the House.

(ix) Amendments to the preamble and title of the Bill shall be admissible where amendments have been made to the Bill which render them necessary.[Rule 84 of Rules of Procedure of Parliament]

2.2.1.2.2.13. Arrangement of amendments

Amendments of which notices have been given shall, as far as practicable, be arranged in the list of amendments, issued from time to time, in the order in which they may be called. In arranging amendments raising the same question at the same point of a clause, precedence may be given to an amendment moved by the member-in-charge. Subject as aforesaid, amendments may be arranged in the order in which notices thereof are received. [Rule 85 of Rules of Procedure of Parliament]

2.2.1.2. 2.14. Order of amendments

Amendments shall ordinarily be considered in the order of the clauses of the Bill to which they respectively relate:

Provided that the Speaker may put as one question similar amendments to a clause. [Rule 86 of Rules of Procedure of Parliament]

2.2.1.2. 2.15. Withdrawal of amendments

An amendment moved may, by leave of the House, but not otherwise, be withdrawn, on the request of the member, moving it. If an amendment has been proposed to an amendment, the original amendment shall not be withdrawn until the amendment proposed to it has been disposed of. [Rule 87 of Rules of Procedure of Parliament]

2.2.1.2. 2.16. Submission of Bill Clause by Clause

(1) Notwithstanding anything contained in these rules of Procedure of Parliament, the Speaker shall, when a motion that the Bill be taken into consideration has been carried, submit the Bill or any part of the Bill, to the House clause by clause or Schedule by Schedule, as the case may be. The Speaker may call each clause or Schedule separately, and, when the amendments relating to it have been disposed of, he shall put the question "that this clause or Schedule (or this clause or Schedule as amended, as the case may be) do stand part of the Bill ":

Provided that consideration of the Schedule or Schedules, if any, shall follow consideration of clauses, and consideration of new clauses shall follow consideration of original clauses, and Schedules may be amended in the same manner as clauses:

Provided further that the Speaker may, if he thinks fit, put clauses and/or Schedules, or clauses and/or Schedules as amended, as the case may be, together to the vote of the House in which case the result of the voting shall be taken as applicable to each clause or Schedule separately and so indicated in the proceedings.

(2) The Speaker may, if he thinks expedient, postpone the consideration of a clause or a Schedule. [Rule 88 of Rules of Procedure of Parliament]

2.2.1.2.2.17. Clause one, Enacting formula, Preamble and Title of Bill

Clause one, the Enacting formula, the Preamble, if any, and the Title of a Bill shall stand postponed until the other clauses and Schedules (including new clauses and new Schedules) have been disposed of and the Speaker shall then put the question; "that clause one, or the Enacting formula, or the Preamble or the Title (or that clause one, the Enacting formula or the Preamble or the Title as amended, as the case may be) do stand part of the Bill".[Rule 89 of Rules of Procedure of Parliament]

PASSING OF BILLS, ETC.

2.2.1.2. 2.18. Passing of Bills

(1) When a motion that a Bill be taken into consideration has been carried, and no amendment of the Bill is made the member-in-charge may at once move that the Bill be passed.

(2) Where a Bill has undergone amendments, any member may object to a motion being made, on the same day, that the Bill as amended be passed, and such objection shall prevail, unless the Speaker suspends this sub-rule and allows the motion to be made.

(3) Where such objection as aforesaid prevails, a motion that the Bill as amended be passed may be made on a subsequent day.

(4) At this stage no amendment to the Bill may be moved except verbal amendments which are merely of a formal or consequential in nature.[Rule 90 of Rules of Procedure of Parliament]

2.2.1.2. 2.19. Scope of debate

The discussion on a motion that the Bill or the Bill as amended, as the case may be, be passed shall be confined to the submission of arguments either in support of the Bill or for the rejection of the Bill. In making his speech a member shall not refer to the details of the Bill further than is necessary for the purpose of his arguments which shall be of a general character. [Rule 91 of Rules of Procedure of Parliament]

2.2.1.2. 2.20. Correction of patent and clerical errors

(1)Where a Bill is passed by the House, the Speaker shall have power to correct patent errors and make such other changes in the Bill as are consequential upon the amendments accepted by the House.

(2) Where amendments are made in the Bill, the renumbering or relettering of the clauses, sub-clauses and all references there in, the numbering or lettering of clauses and sub- clauses as required by such renumbering, relettering or amendments and any clerical errors may be rectified by the Secretary (of Parliament).[Rule 92 of Rules of Procedure of Parliament]

2.2.1.2. 2.21. Withdrawal of Bills

The member-in-charge may at any stage of a Bill move for leave to withdraw the Bill introduced by him, and if such leave is granted, no further motion shall be made with reference to the Bill.[Rule 93 of Rules of Procedure of Parliament]

2.2.1.2. 2.22. Voting

Subject to the provisions of clause (2) of Article 75 of the Constitution regarding quorum, each clause or Schedule of a Bill shall form part of the Bill if it is passed by a majority of the votes of the members present and voting. [Rule 94 of Rules of Procedure of Parliament]

2.2.1.2. 2.23.. Authentication of Bills

(1) When a Bill is passed by the House, the Bill shall be signed in triplicate by the Speaker and presented to the President for assent:

Provided that in the absence of the Speaker from Dhaka, the Secretary (of Parliament) may, in case of urgency, authenticate the Bill on behalf of the Speaker.

(2) One copy of the Bill assented to, or deemed to have been assented to, by the President shall be preserved for verification and record and shall not be allowed to pass out of the custody of the House without the permission of the Speaker. [Rule 95 of Rules of Procedure of Parliament]

2.2.1.2.2.24. Publication of Bills assented to by the President

When a Bill passed by the House is assented to, or is deemed to have been assented to by the President under clause (3) or clause (4), as the case may be, of Article 80 of the Constitution, the Secretary (of Parliament) shall immediately publish the Bill in the Gazette as an Act of Parliament. [Rule 96 of Rules of Procedure of Parliament]

RECONSIDERATION OF BILLS RETURNED BY THE PRESIDENT

2.2.1.2.2.25. Message of the President and reconsideration of the Bill

(1) When a Bill passed by the House is returned to the House by the President with a message requesting that the Bill or any particular provisions thereof be reconsidered and that any amendments specified by him in the message be considered, the Speaker shall read the message of the President to the House, if it is in session or if the House is not in session, cause it to be published in the Bulletin for information of members.

(2) The Bill as passed by the House and returned by the President for reconsideration shall then be laid on the Table.

(3) At any time after the Bill has been so laid on the Table, any Minister, in the case of a Government Bill, or, any member, in the case of a Private Members' Bill, may give notice of his intention to move that the message of the President or the amendments recommended by the President, as the case may be, be taken into consideration.

(4) On the day on which the motion for consideration is set down in the Orders of the Day which shall, unless the Speaker otherwise directs, be not less than two days from the receipt of the notice, the member giving notice may move that the amendment be taken into consideration.

(5) The debate on such a motion shall be confined to consideration of matters referred to in the message of the President or to any suggestion relevant to the subject-matter of the amendment recommended by the President.

(6) If the motion that the amendments recommended by the President be taken into consideration is carried, the Speaker shall put the amendments to the House in such manner as he thinks most convenient for their consideration.

(7) Amendment relevant to the subject matter of an amendment recommended by the President may be moved, but no further amendment shall be moved to the Bill unless, it is consequential upon, incidental or alternative to, an amendment recommended by the President.

(8) When all the amendments have been disposed of, the member giving notice of the motion under sub-rule (3) may move that the Bill as originally passed by the House be passed again, or passed again as amended, as the case may be.

(9) If the motion that the amendments recommended by the President be taken into consideration is not carried, the member giving notice of the motion under sub-rule (3) may at once move that the Bill as originally passed by the House be passed again without amendment. [Rule 97 of Rules of Procedure of Parliament]

2.2.1.2. 2.26. Authentication of Bills passed again by the House

When a Bill is again passed by the votes of a majority of the total number of members of the House, with or without amendments, the Bill shall be signed in triplicate by the Speaker and presented to the President for assent in the following form:-

> "The above Bill has been passed again by Parliament in pursuance of clause (4) of Article 80 of the Constitution.
>
> Dated ----------, Speaker":

Provided that in the absence of the Speaker from Dhaka, the Secretary of Parliament may, in case of urgency, authenticate the Bill on behalf of the Speaker. [Rule 98 of Rules of Procedure of Parliament]

2.2.1.3. Amendment to the Constitution

2.2.1.3. 1. Special provisions for amendment of the Constitution.

The relevant provisions for amendment of the Constitution are enumerated below:

Article 142 gives power to Parliament to amend any provision of the Constitution by way of addition, alteration, substitution or repeal. Addition, alteration, substitution or repeal are merely modes of amendment and if the act done does not come within the meaning of 'amendment', it will not be valid, notwithstanding that all the procedural requirements have been fulfilled. Article 142 of the Constitution confers power on Parliament to amend the Constitution. For such amendment there are some procedural requirements. A Bill for amendment of the Constitution must contain a long title expressly stating that it will amend a provision of the Constitution. No such Bill shall be presented to the President for his assent unless it is passed by the votes of not less than two-thirds of the total number of members of parliament. The President shall within seven days of the presentation of the Bill after being passed in Parliament with the requisite majority assent to the Bill and if he fails to assent within that time he shall be deemed to have assented to the Bill. But if the Bill seeks to amend the Preamble or any of the provisions of

articles 8, 48, 56 or 142 the President shall within seven days of presentation of the Bill for his assent cause it to be referred to a referendum and if the majority votes in the referendum are in favour of the amendment the President shall be deemed to have withheld his assent from the bill. The procedural requirements are mandatory and non-compliance of the requirements will render the amendment void. Article 142 of the Constitution read as follows:

*"**142. Power to amend any provision of the Constitution**.-(1) Notwithstanding anything contained in this Constitution–*

(a) any provision thereof may be amended by way of addition, alteration, substitution or repeal by Act of Parliament:

Provided that–

(i) no Bill for such amendment shall be allowed to proceed unless the long title thereof expressly states that it will amend a provision of the Constitution;

(ii) no such Bill shall be presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of members of Parliament;

(b) when a Bill passed as aforesaid is presented to the President for his assent he shall, within the period of seven days after the Bill is presented to him assent to the Bill, and if he fails so to do he shall be deemed to have assented to it on the expiration of that period.

(1A) Notwithstanding anything contained in clause (1), when a Bill, passed as aforesaid, which provides for the amendment of the Preamble or any provisions of articles 8, 48 or 56 or this article, is presented to the President for assent, the President shall, within the period of seven days after the Bill is presented to him, cause to be referred to a referendum the question whether the Bill should or should not be assented to.

(1B) A referendum under this article shall be conducted by the Election Commission, within such period and in such manner as may be provided by law, amongst the persons enrolled on the electoral roll prepared for the purpose of election to Parliament.

(1C) On the day on which the result of the referendum conducted in relation to a Bill under this article is declared, the President shall be deemed to have–

(a) assented to the Bill, if the majority of the total votes cast are in favour of the Bill being assented to; or

(b) withheld assent there from, if the majority of the total votes cast are not in favour of the Bill being assented to.

(1D) Nothing in clause (1C) shall be deemed to be an expression of confidence or no-confidence in the Cabinet or Parliament.

(2) Nothing in article 26 shall apply to any amendment made under this article.".

2.2.1.3. 1. Provision of the Rules of Procedure of Parliament*:*

Rule 99 of Rules of Procedure of Parliament deals with Amendments of the Constitution**.** Rule 99 provided as under **–**

*"**Amendment of the Constitution.-** In respect of a Bill seeking to amend any provision of the Constitution, the following special rules shall apply in addition to the rules relating to other Bills in so far as they are not inconsistent with any provisions of these rules, namely-*

(a) no Bill seeking to amend any provision of the Constitution shall be allowed to proceed unless the Long Title thereof expressly states that it will amend a provision of the Constitution;

(b) no such Bill or any part thereof shall be declared as passed and presented to the President for assent unless it is passed by the votes of not less than two-thirds of the total number of members of the Parliament;

(c) voting on the Bill shall be by division only;

(d) each clause of Schedule, or clause or Schedule as amended, as the case may be of a Bill seeking to amend the Constitution shall be put to the vote of the House separately and shall form part of the Bill if it is passed by a majority of not less than two thirds of the total number of members of Parliament:

Provided that the Speaker may, with the concurrence of the House, put clauses and/or Schedules, or clauses and/or Schedules as amended, as the case may be, together to the vote of the House in which case the result of the voting shall be taken as applicable to each clause of Schedule separately and so indicated in the proceedings;

(e) amendments to clauses or Schedules shall be decided by a majority of the votes of the members present and voting in the same manner as in the case of any other Bill;

(f) subject to the provisions of clauses (1A), (1B) and (1C) of Article 142 of the Constitution, when a Bill passed by the House as aforesaid is presented to the President for his assent but the President does not assent to it within a period of seven days after its presentation to him, the Bill shall be deemed to have been assented to by the President on the expiration of that period.

Explanation.- *The expression "total number of members" referred to in these rules means the total number of members comprising the House under clause (2) of Article 65 of the Constitution irrespective of the fact whether there are vacancies or absentees on any account.".*

2.1.2. Subordinate Legislation

2.1.2.1. Executive procedure : Subordinate law making functions

3.1.2.1.1.1. Pre publication of draft proposal of rule and regulation

Instruction 239 of the Secretariat Instructions,2014 runs as follows-

239 (1) If the Government decides to pre-publish a draft proposal or proposal for the preparation or amendment of any rule or regulation, that rule or regulation shall be published in the official gazette as well as on the website of the concerned ministry or department soliciting opinion or suggestions at least within three weeks. The Ministry or the Department shall send notices to at least three dailies for publication of pre-publication rules or regulations published on the website with their website address.

(2) If any opinion is found in the light of this rule, that opinion shall be taken into consideration and, if necessary, the draft rules or regulations shall be amended or changed.

3.1.2.1.1. 2. Consultation with certain Ministries, Divisions and Departments for the preparation of Rules, Regulations, Agreements and other documents having the status of legal instruments:

Instruction 240 of the Secretariat Instructions,2014 provides that *If there is a provision / obligation to make rules, regulations, ordinances in the constitutional directives, laws and ordinances, the administrative ministry / division will immediately take initiative to formulate such rules and regulations. In that case, the Administrative Ministry / Division must take advice, where applicable, from the Public Service Commission, the Legislative and Parliamentary Affairs Department, the Ministry of Finance and the Ministry of Public Administration.*

3.1.2.1.1.3. . Providing vetting or opinion on rules, regulations, contracts, other legal documents by the Legislative and Parliamentary Affairs Division (LPAD)and keeping its copies :

Instruction 241 of the Secretariat Instructions,2014 runs as follows-

241. (1) In order to send to the Legislative and Parliamentary Affairs Division (LPAD) for vetting or opinion on various rules, regulations, agreements and other documents having the status of law, it shall be sent with the approval of the Minister in charge of the Administrative Ministry concerned .

(2) The Administrative Ministry / Division shall, if it wishes to seek the vetting or opinion of the Legislative and Parliamentary Affairs Division on any matter, send it to that Division with a self-explanatory summary, ancillary documents and necessary information.

(3) If any question arises during the vetting or giving an opinion on an agreement or related matter, on which it is not possible to give an opinion on behalf of the Legislative and Parliamentary Affairs Division alone, the Division may convene an inter-ministerial meeting if necessary. Such meetings may also be called by telephone. Convening the meeting, discussion and decision related matters should be recorded in the relevant documents of the Legislative and Parliamentary Affairs Division and the matter should be settled as far as possible as per the decision of the said meeting.

(4) In general, the opinion given by the representative of the Legislative and Parliamentary Affairs Division in the inter-ministerial meeting organized by the administrative ministry / division on any subject shall be deemed to be the opinion of that Division subject to final vetting. If there is any inconsistency in the vetting of the Legislative and Parliamentary Division, the Administrative Ministry / Division may reconvene an inter-ministerial meeting in case of any need for further clarification.

(5) In case of issuance and publication of any rule, regulation as Statutory Rule and Order (S.R.O.), the Administrative Ministry / Division shall, after giving due consideration to the vetting of the Legislative and Parliamentary Affairs Division and with the approval of the appropriate authority, send 3 (three) signed copies of the notification without mentioning date to LPAD for allocating S.R.O. number by the LPAD and at the same time the concerned Ministry / Division shall mention how many copies of the published notification are required by it.

(6) The Legislative and Parliamentary Affairs Division shall preserve a sufficient number of copies of the published notification in which S.R.O. number is assigned by it, and by 31st January of each year it shall intercept the notifications issued in the preceding year in book form and permanently store the required number of constrained books in its library.

(7) The Legislative and Parliamentary Affairs Division shall, from time to time, on its own initiative or at the request of any other Ministry / Division, print and publish the rules, regulations, notifications or other documents in force (updated with latest amendments).

2.1.2.2. Parliament procedure

2.1.2.2. 1. Constitutional provision:

Article 76 (2) of the Constitution provides that "*in addition to the committees referred to in clause (1), Parliament shall appoint other standing committees, and a committee so appointed may, subject to this Constitution and to any other law*

(a) examine draft Bills and other legislative proposals;

(b) review the enforcement of laws and propose measures for such enforcement;

(c) in relation to any matter referred to it by Parliament as a matter of public importance, investigate or inquire into the activities or administration of a Ministry and may require it to furnish, through an authorized representative, relevant information and to answer questions, orally or in writing;

(d) perform any other function assigned to it by Parliament."

2.1.2.2.2. Present situation:

At present the Parliament, by Act of Parliament, delegates its law making power to any person or authority to make orders, rules, regulations, bye-laws or other instruments having legislative effect.

The Constitution of Bangladesh commanded Parliament to appoint standing committees to examine *draft Bills* and *other legislative proposals*. But no committee is appointed by any Parliament (1^{st} to 11^{th}) to perform such duties till today. There are differences between a *Bill* and a *draft Bill*. A Bill is a complete form of legislative proposal noticed to introduce in the Parliament by a minister in charge or a member of parliament. On the other side *a draft Bill* is purely a raw draft may need to accommodate new policy ideas by re- arrangement such as addition, deletion in it or by re draft it. The expression *other legislative proposals* include *orders, rules, regulations, bye-laws or other instruments having legislative effect.* Our parliament is duty bound to examine *draft Bills* and *other legislative proposals* through its appointed standing committees which is absent at present.

CHAPTER 3

LEGISLATIVE DRAFTING PROCESS IN BANGLADESH: AN OVERVIEW

3. I. **Introduction:**

Establishing principles, institutions and procedures of good governance is one of the greatest challenges facing the countries of the South East Asia. This challenge includes the development of professional policy making. The concept of 'good governance' – not readily translatable to most of the languages in the region has become increasingly associated with the capacity to develop and deliver public policies based on participatory principles as well as respecting the principles of effectiveness and efficiency. In other words, professional and high quality public policy making is transparent and open to broad societal participation but, at the same time addresses societal problems timely and with a minimum waste of available resources.

It is revealed potential areas for change in the public policy process in Bangladesh that would reflect the needs of this country and would lead to a gradual change of the policy making practice (and culture) into a professional one, adhering to the principles of good governance. It is also revealed the public policy and reform decision making and legislative processes in three concrete areas identifies the main driving forces and main impediments to reforms, including the capacity constraint in policy making in the executive government. The suggestions contained in this chapter are intended for decision makers. It focuses primarily on the changes and amendments to the legislative process that constitutes a central part of the formal policy making process.

3.2. **Background:**

In the early years of transition from monarchy to republic and there after autocracy to a democracy and from a controlled economy to a free market, public administration reform was viewed as a marginal element of the institutional reform process. The legacies of the past regimes were reflected in a highly politicized system. As a result, the reforms in the period of transition largely focused on the enactment of new laws and regulatory frameworks. The transition is thus a period of great legislative activity in order to establish the rule of law, ensure the protection of individual rights and freedoms, introduce political and public service reforms and lays the legal and regulatory foundations for a functioning market economy.

3.3. **Current Situation: Problem Statement**

A close survey of the policy making processes in Bangladesh revealed some strengths and weaknesses in the process. The following is the enumeration of the most profound problems that affect either the final outcome, the quality of the public policy, or the efficiency of the whole process.

3.3.1. **Lack of Diversity of Policy Tools**

Legislation remains the key policy instrument applied in Bangladesh (90% of all policies developed in the ministries have a legalistic nature). Only few programs and projects use other than legislative tools. This trend is apparent not only by the frequent use of legislative and administrative directives of various kinds, but also by the formalization of the legislative process and procedure. Thus, the only formal rules on policy making, the *Secretariat Instructions, 2014 made under the Rules of Business,*1996 recognize only legal tools; do not recognize other public policy tools. Similarly, the civil servants in the line ministries are not acquainted with the variety of the tools available and of their use in the practice. The only support department in each Ministry is that of legal wing, legal sub-wing or section, as the case may be. Naturally, laws and legislation are needed for the government to set certain regulatory frameworks. Regulations generally operate through command and control: directives are given, compliance is monitored, and noncompliance is punished. Therefore, regulation is usually costly. Moreover, sometimes formal rules and regulations can produce policies that fail to take into account local needs and changing circumstances and that are highly unpopular and so carried out by use of force or directives. As a result, citizens may get alienated to the regime and its policy products may be undermined. Some solutions may include increased use of contracting out, delegated legislation and creation of laws which deal with standards, conventions and guidelines rather than with precise rules. The use of mixed or voluntary policy instruments is a trend that can be observed not only in the countries with Common Law tradition but also in traditionally legalistic countries such as Germany, France, Italy or Sweden. Particularly, the OECD countries increasingly use a range of alternative mechanisms to formalizing every policy in legislation. For transition countries, where governments change with each election cycle and coalitions are usually not very stable, one has no choice than to rely on legislation as the main instrument of public policy, in the hopes that legislation is more stable and has greater authority than alternative tools of public policy. Now, that Bangladesh will soon be achieved as midlevel economy country, it is advisable to initiate the process of combining the traditional legislative tools of public policy with more innovative ones (such as information tools, economic measures for greater incentives, administrative action to increase efficiency and effectiveness, reliance on market forces and civil society, etc.).

3.3.2. **Inadequate Emphasis on Policy Development Phase**

There is currently no formal framework for the development of policies that underlie the drafting of legislation in Bangladesh. There are no formal rules or guidelines on the broader policy process that encompasses the formulation of problem, design of concepts, strategies and policy analyses or design of action plans, regulatory impact studies, budgetary considerations, and draft on implementation, monitoring and evaluation. Although individual ministries have internal methodologies on policy development, they consider the technical aspect of the final product in the formal legislative process as stated in the Rules of Business (e.g. parts of the cover page, number of copies to be submitted) rather than techniques of policy analysis, concept drafting or drafting of non-legislative policies. It is revealed that the understanding of civil servants of the policy development phase, i.e. analytical definition of the problem, reasoning and possible ways of tackling an issue prior to legal drafting is minimal. Most of the time, Ministries do not even develop a concept paper or action plan informally prior to drafting legislation, Even if there is

any reasoning present for a development of a certain pilot project or program it is rarely put on paper and it is usually discussed orally. As a result, most of the draft laws submitted to the Cabinet for approval do not rely on any concept paper or legislative intention. The proposal must be supported by certain type of a concept paper or legislative intention preceding a draft law. Moreover, there is no mechanism during the policy development phase that would facilitate reaching policy agreements among the individual Ministries, let alone with outside stakeholders. In other words, there is no formalized process that would urge the line ministries to seek or build consensus on often controversial piece of legislation at the time when the process can be best affected – in the policy formulation phase. Formal "ok" from other ministries takes place at the end of the process when a law has already been drafted. At this stage it is often too late to settle major discrepancies and the following scenarios are not unseen: either the commenting line Ministry does not have its valid (and often useful and important) concerns taken into account; or the commenting Ministry blocks the passage of certain legislation. The lack of a consensus building mechanism in the policy formulation stage can backfire also in the parliamentary approval process because of the coalition nature of the government.

3.3. 3. **Quality of the Legislative Product**

The actual drafting of legislation needs more expertise than is usually recognized. First, the lack of the policy development and formulation phase where the philosophy of a policy should be set up and discussed has profound consequences. There is a tendency among Ministries to concentrate on producing a legislative draft, with insufficient prior consideration of the policy which it should reflect. Thus, instead of converting a concept paper into legally enforceable normative rules, the law is being drafted from scratch without clear vision and picture what the law is supposed to tackle and in what way. Such an approach can lead to a completion of a draft that e.g. incorporates the policy choices of some expert (sometimes even from outside the public service as the process is done via working groups). Also, law drafting should be undertaken by the drafting officers at LPAD or the drafting officers deputed to the different Ministries who are principally engaged in legislative drafting work. However, the evidence shows that the huge numbers of legislative policy instructions are sent to LPAD in raw draft form. These are prepared by the officers of the sponsoring Ministry. The relations between the administrative department and legal wing of a certain ministry are often less than cooperative. As a result, law drafting is either done by administrative department with no specialized law drafting practice or by legal wing that do not have the actual substantive knowledge on a particular subject. Moreover, formal specialist trainings are rarely available and the skills have to be learned on the job.

A particular problem of law drafting in Bangladesh is the low quality of drafts that are adopted through the accelerated procedure – in the Cabinet and the Parliament. This Procedure has been designed to allow for an exception from the full Parliamentary procedure requiring three readings in the Parliament. This has had a negative impact on the quality of legislation. This situation results in draft laws of various qualities that vary in compatibility, uniformity (e.g. legal terminology) and applicability. Although the LPAD (Advisory body to the Government) may improve the standard of the laws, it is not clear to what extend is this Division supposed to deal with substantive or legislative-technical issues of the draft law. As a result, new laws have frequently severe inconsistencies and shortcomings and they need to be amended shortly after they come into force and sometimes even before. Inevitably, this increases the burden on policy development within Ministries and the Parliament, but also makes the subsequent

implementation phase difficult. Low quality laws are extremely difficult to interpret (the aim of the legislation is not clear or even contradictory) and thus to implement. Due to the internal lack of capacity, some ministries rely on external consultants to draft laws. However, this practice has a danger of 'state capture' as the consultants employed come from the interest groups and the low capacity of the state officials disables them to detect the wording that may be beneficial solely to this interest groups.

3.3. 4. **Deficiencies in the Legislative Process**

Law making system must be a planned and coordinated process that is deliberately devised to provide adequate time for preparation, consultation inside and outside the Government and Parliamentary consideration. Although, the *Rules of Business and the Rules of Procedure of the Parliament include* requirements that support regulatory framework, still certain deficiencies can be identified. It is clear that the processes for developing and drafting a piece of legislation must be planned ahead. This is the reason for the introduction of a ***Legislative Calendar (****Plan of legislative tasks)* that is prepared annually on the basis of the Government program and that is followed by individual Ministries in the creation of the draft Bills. However, the Plan is not prepared in such a way that it can serve as a human management tool. The timetables and deadlines in the Plan are set separately for individual Ministries and the schedules are set at random, usually towards the end of the year so that the Ministries look good if they submit draft Bills ahead of the time. If a ministry does not follow the timetable, there are no consequences or sanctions. Naturally, on the one hand serious delays occur, on the other if not sufficient time is granted the outputs lack the quality. Law development and law drafting is usually undertaken by working groups at a particular Ministry. Although this arrangement to a certain degree deals with the problem of low policy development capacity of the civil servants and has a consultative nature there are still lots of dangers and problems associated. First, too heavy reliance on outside actors (many times representatives of interest groups) in policy and law drafting creates a potential risk of capture of the policy-making by special interests. This is particularly true if civil servants do not check (or do not have the capacity to check) the final output or its content. Second, it is unrealistic to expect the members of the working group to deliver high quality product while they are maintaining their main job and participating in several working groups. Often, participation in these working groups is not remunerated and it is a voluntary activity. Also, the process of creating of the working groups and their composition are often not transparent and effective enough. This has influence on the quality of the output (both in terms of contents and timeliness). Problems also occur because of poor workload distribution within the working group, poor cross-sectoral coordination which in turn results in time delays. There are serious coordination problems in actual legal drafting of the draft Bill. As noted above, there is little or no coordination among legislative expert and substantive specialists in separate departments of individual Ministries or of the departments. Consequently, some laws are drafted only by the specialist in the substance of a particular area, with little input from the legal experts. Conversely, other laws are drafted by the law experts who draft in a policy vacuum. In the first case, a draft law has difficulties to pass the Legislative Drafter due to its legal inadequacies and deficiencies, and major delays occur when the draft law is returned for rewriting for several times. In the latter case, the philosophy of the law and its purpose might be lost or compromised. The **inter-ministerial consultation** and review of new legislative projects that takes place once a draft law is prepared is a wide-spread practice in Bangladesh. However, once a legislative text

is in an advanced state of preparation, it is often too late to review the policy premises on which it has been structured. At the same time, a draft of legislation itself can be a valuable consultative instrument, since it sets out, in precise terms, the requirements with which affected persons will have to comply. But it is often much more difficult to make fundamental improvements when a draft policy has reached this stage. The **Legislative Drafter** is extremely overloaded with legislative policy documents (Legislative intentions and raw draft laws) that it cannot effectively absorb. The evidence shows that some issues have to wait for months or more to be placed on the agenda. The criteria for putting a certain issue on the agenda (i.e. to be dealt with in the Legislative Drafter) are not transparent and there is ample room for political bargaining. Moreover, it is not clear what the exact role of the Legislative Drafter is to tackle this situation. Although technically it should check the technical-legislative drafting of the Bill, the practice shows that it also affects the contents of the Bill.

3.3. 5. **Inadequate Public Participation Provisions**

In 2009 major progress has been made in Bangladesh with the adoption of Right to Information Act that came into effect from 1 July 2009. Right to Information Act in Bangladesh gives citizens greater access to documents discussed by the Government.Thus, the Act provides a revolutionary framework for the participation of public in decision-making. This is particularly important, because certain interest groups (judges, teachers and others) have privileged access to decision-making process, being consulted at an early stage of the policy development or even initiating proposals. Decisions may be based on figures and data supplied by these interest groups but are withheld from others who may be able to identify weaknesses in the data. By the time proposals are formally announced it may be too late for such biases to be correctedor for others to make their voices heard. In addition, current provisions require a certain level of legal literacy in order to make any substantive comments as it is draft laws thatare publicly available. Thus, although Right to Information Act is a revolutionary step forward, the provision of information is still rather passive, difficult to understand for a non-lawyer and too late in the process as majority of the materials is ready for the governmental approval and the willingness of civil servants to deal with the public comments is low. There is currently a lack of clarity about how consultations are run and to whom an authority listens. There are a lot of ad hoc consultation bodies, working groups and advisors on a wide range of policies. This unwieldy system should be rationalized to make the consultation more effective and accountable both for those consulted and those receiving the advice.

3.3.6. **Inadequate Budgeting Procedures and Skills**

The issue of financial resources allocation in government needs more attention than this Book allows. The following is only the enumeration of the most problematic areas. First, the official switch to output-based budgeting (“program budgeting”) and medium-term budget framework has not been given much attention by the Ministry of Finance and its relationship with the process of policy preparation has not been thought through by anyone. Second, at every stage budgeting is severely neglected and reduced to impact calculations on state budget only. Costs and benefits in total or even total income and holistic picture about the benefits of a particular draft law (or project and program for that matter) is lost. Finally, responsibility for budgets rests

with the administrative wing rather than with substantive wing or department, which seriously jeopardizes the successful development and implementation of individual policies.

3.4. **Policy Recommendations**

In the following paragraphs, we suggest certain concrete steps aimed at improving the quality of the policy and legislative process in the Bangladesh. Naturally, cultural change can be achieved only by constant effort at improving human resources and the training and development of staff as well as by focused leadership and change in management. The following are the main strategies for improving policy making process that should be considered:

3.4.1. **Formal Reform: Reform of the legislative process (law drafting)**

3.4.1.1 **Improving the development of policies prior to law drafting**

The most important prerequisite to improve the policy development stage is the actual recognition that policy development is an essential part of law drafting. In doing so, the introduction of procedures and practices on the development of policies is essential and should be part of the *Secretariat Instructions*. It should be made obligatory for every department in a line ministry to prepare a policy in writing prior to starting the drafting of an individual piece of legislation. Certain type of studies ("concept" and "legislative intention") already exists in the current legislative process and these are being carried out in certain cases. They, however, do not meet the criteria of an analytical paper. It is advisable to develop a new name for the paper/study that provides such an analysis to void the negative connotations associated with the existing types of studies which may make it more difficult for the adoption of the analytical policy development paper. The **analytical study** should incorporate such basic elements as:

(a) the background of the current legal provisions and their main problems/shortcomings (what is the main problem, how it has been addressed up to now by legislative or by other means, what were the results);

(b) the reasons for adopting a new law and its objectives (the philosophy of the law, detailed structure of approaching the problem, how to get from current status to the set objectives);

(c) the anticipated results (regulatory impact analysis, assessment of potential economic, social and environment impact as well as overall costs and benefits of that particular approach);

(d) draft of implementation scheme (who is going to take implementation forward and what resources are necessary. It might be useful to prepare an action plan outlining how and when the proposed changes should be introduced together with the draft legislation, what administrative arrangements need to be done, what other policy tools are to be employed, including any public education and training efforts etc.); and

(e) possible problems to arise in implementation.

Manual on Regulatory Impact Assessment

Errors in legislation can be expensive and can lead to a wide variety of problems in its future implementation. Through examining the consequences of legal provisions, the need for and impact of a regulation can be better covered and compared to alternatives. As part of the improvements in the legislative process, a Manual on regulatory impact assessment should be developed, together with guidelines for everyday user requirements should be developed and introduced into the everyday life. We recommend to pilot test the manual and guidelines on a selected sample of legislative projects in various departments prior to their obligatory implementation.

Currently, the Bangladesh civil servants are not trained in using most of the analytical methods regularly utilized in most of the developed countries. Therefore, trainings, workshops, handbooks and practice are needed to fully implement the above mentioned changes. Also, there is a problem in obtaining reliable statistical data and other quantitative and qualitative information to support the draft legislation. In the long term, special attention (and resources) needs to be provided for the collection and provision of the data necessary. In the short term, it is advisable to train civil servants in making the use of existing reports and analyses provided by the think-tanks and independent institutions. Also, the adoption of a checklist of the impacts that have to be examined by policy developers and reported in the study can be developed. Again, there exists a number of publications on the steps to be conducted in the policy development stage, on the methods and techniques for conducting relevant analyses and impact studies that should be consulted.

3.4. 1.2 **Fuller use of consultation and consensus building**

Consultation of the public and affected groups (both passive and active) should take place at each stage of policy making: development, adoption, implementation, monitoring and evaluation. There are many benefits of broad public consultation at an early stage. Example, lists among others the following:

(a) it may broaden the range of policy alternatives;
(b) it may facilitate the collection of some categories of data needed;
(c) it may be used to verify the results of completed analyses;
(d) it may make the law making process, and the reasons for policy choices, more transparent to affected groups;
(e) it may give rise to a better understanding of the activities to be regulated and the problems to be solved;
(f) it may result in more informed choices as to the appropriate;
legal mechanisms;
(g) it may result in legal solutions more likely to encourage compliance;
(h) it may lead to improvements in the legal text, ensuring clearer communication of requirements;

(i) it may enable government to be more responsive to the needs and interests of affected persons.

These considerations suggest that in most respects consultation is likely to have its greatest impact if conducted while policy development is still under way.
Currently, if consultation is used, it is mostly *passive* (provision of information and passive reception of comments). This does not allow for the input of useful public comments into the draft policy papers. In order to generate inputs from the larger public, several improvements in the provision of information are recommended:

(a) providing abbreviated version for the public rather than full legal text – version that would summarize the main points of the prepared legislation;
(b) outlining of information in asystematized topical division rather than in chronological sequencing;
(c) advertising the provision of information, to encourage citizens to use the system;
(d) providing guidelines for the public on how the consultation will be carried out;
(e) prior notification to affected citizens in order to voice opinion; and
(f) **avoidance of using formal rules of "reviewing"** with the public (e.g. not to require to use legal language, to categorize comments as "significant", etc.).

Active consultation and provoking of public debate on all range of issues of concerns are still relatively rare. Each ministry should examine how to improve its consultative process. In this connection, there are several useful techniques and procedures that can be used and that are described in handbooks of OECD, and countries like United Kingdom, Germany, the Netherlands, etc. It is necessary to train the civil servants in both the philosophy of public consultation and in individual techniques. It is useful to adopt **minimum standards for consultation** and publish them in a code of conduct. This code of conduct would focus on what to consult on, when, whom and how to consult. Those standards will reduce the risk of the policy-makers just listening to one side of the argument or of particular groups getting privileged access on the basis of sectoral interests, which is a clear weakness with the current method of *ad hoc* consultation. These standards should improve the representative nature of certain interest groups. Also, the relationship between the ministries and the civil society should be reviewed and build on the minimum standards for consultation.

3.4.1.3. **Introducing inter-ministerial reviewing process in the development stage**

It is extremely important to include obligatory inter-ministerial and non-governmental (public) consultation in the preparatory (policy development) phase. This device will make it possible to obtain the informed views prior to the technical legal drafting. In addition, more communication and consulting among ministries should take place at this stage. Currently, the ministries are linked through a computer network, which allows a more comprehensive communication among the individual ministries without the need for any additional resources. Therefore, it is advisable to have a ministry's work plans, the related timetables and working groups accessible to all other ministries. This enables all ministries interested in a particular legislative or non-legislative project to signal their interest in it, with a view to being represented on the working group or being consulted. Of course, the prerequisite is careful maintaining and regular up-dating of

material and databases available on the computer network. This would also allow the Office of the Government or any other central co-ordination body to monitor progress and to intervene, if necessary deadlines are not being respected.

3.4. 1.4. **Setting and maintaining law drafting standards**

Currently, any draft Bill is an anonymous product of a particular ministry and no acknowledgment to the author / group of authors is given. This may be a reason contributing to the reported low quality of the final product as the responsibility for it is lost and anybody can add or remove parts in it without the agreement of the author.
Therefore, it would be advisable to **acknowledge the authors** of any document or draft. It will increase the transparency and restore 'ownership' that in turn increases responsibility, and thus quality of the product.

3.4. 1.5. S**etting a clear role of the Legislative Drafter**

In order to increase the uniform standards of the new laws going for reviewing to the Government, it is advisable to set up a **two-tier Legislative Drafter** that would

(a) check the contents in respect to policy options and
(b) check the technical-legislative drafting.

The former one (policy review) would consider: general regulatory requirements, review administrative requirements, review of costs and impact, efficiency review, practicability review, and implementation review. The latter one (technical-legislative review) would consider issues that are already set in the *Legislative Rules*: constitutional and legal compliance, review of approximation to laws of Bangladesh, review of compliance with international treaties, review of secondary legislation, review on the legal form, clarity, terminology and comprehensibility. Currently, the LPAD is not equipped for this purpose in terms of human resources. If time limits are to be followed and the burden that is put upon this body is to be lessened, additional human resources should be trained and added as a permanent staff. Therefore, procedures for registering the incoming legislation need to be put in place, so as to establish clear criteria for their selection. No room should be left for political negotiations among the heads of the ministries and the head of the LPAD.

3.4. 1.6. A**pplying equivalent standards to parliamentary initiatives**

The possibility of MPs or parliamentary committees to initiate bill is in accordance with the principles of the rule of law. This is the mechanism through which opposition may intervene. However, through the legislative process in the Parliament there is a considerable risk of 'state capture' and of low quality legislative products. Therefore, similar **considerations of evaluation or checking** both in terms of policy and technical legislative drafting should be applied as for the Bills initiated by the government or individual member.

3.4.2. **Institutional Reform**

3.4.2.1 I**mproving the use of policy tools, implementation, monitoring and evaluation, and communication strategy**

Legislation is often only a part of a broader solution combining formal rules with other non-binding tools of public policy, such as recommendations, guidelines, etc. This highlights the need for a closer coordination and coherence between the use of different policy tools; more thought needs to be given to their selection. The recommendation deals in detail with instruments to be used for introducing and improving the use of policy tools. It is crucial to assign responsibility to a particular civil servant for the implementation of a specific policy or a specific legislation; to form an implementation team. Ideally, this will be the same team that was set up for the development of a certain policy. It is of paramount importance to ensure that momentum for change is sustained via this person or the team. In this way, if some budget constraints occur, the implementation team may on an on-going basis make changes into the implementation proposal or to prioritize specific implementation steps. Also, the implementation team should maintain continuous and close contact with both public and mass media. This would ensure transparency and communication with the public. It is however crucial to sustain a channel of communication open for the stakeholders and public to raise any concerns with the implementation. Thus, regular public discussion will enhance the credibility but also outcome focus. It is very important that *agencies responsible for the implementation* should be *involved and consulted* in the preparation of the particular public policy.
Otherwise, it will not be realistic, and implementation is likely to be difficult. Monitoring of the implementation should become a permanent strategic process focused on a regular observation and evaluation of its effectiveness and efficiency. Ideally, monitoring is carried out by the implementation team. It is crucial that the monitoring would reflect any changes in the conditions or environment that could affect the final outcome. Thus the monitoring should focus on:

(a) the implementation of the measures proposed;
(b) the impact of these measures upon the beneficiaries and other stakeholders;
(c) the level of satisfaction of citizens.

The implementation team or responsible institution should conduct (or let an independent institution to conduct) regular evaluation whether the public policy is achieving the set objectives, and, subsequently, whether these objectives are being carried out efficiently. A key element of the monitoring and evaluation is the reporting system. Thus, key figures gathered through the monitoring and evaluation, provide the necessary information for the analysis of strengths, weaknesses and permits comparisons with the original goals. The permanent comparison of the actual situation with targets enables the implementation team and the developers to develop proposals for improvement measures. The government and individual authorities also need to communicate more actively with the general public on issues of concern. The communication policy should promote efforts to deliver information and where possible information should be presented in a way adopted to local needs and concerns. Information and communication technologies have an important role. The aim should be to create space where citizens can find and discuss what they perceive as important. This should help policy makers to stay in touch with public opinion, and could guide them in identifying problems and mobilize

public support. Thus, providing information and more effective communication are a precondition for better governance.

3.4. 2.2 **Improving the institutional arrangements for substantive and legislative departments**

Civil servants dealing with substantive issues (policy development) should be primarily concerned with the development of policies. Law drafters, on the other hand, should be primarily concerned with converting policy into a clear and coherent body of normative rules. Thus, these two functions call for different backgrounds, skills and expertise, whether analytical or writing skills. At the same time it is beneficial for these two functions to cooperate at all stages of the preparation of a draft bill. The law drafter (usually from the lPAD) has to understand the philosophy (the "big picture") of the policy if he/she is going to draft and follow a logical progression contained in the policy paper. Therefore, it is crucial that the law drafters are involved in policy development and, vice versa, the substantive officials are consulted during the drafting process. Thus, the LPAD has to be informed on the background data and information on the problem to be addressed by the draft legislation, on the intended and achievable objectives of the policy proposal, on the mechanisms selected to achieve those objectives, and on the foreseeable consequences of the future implementation. For that purpose it is advisable to create teams consisting of representatives of both substantive ministry /division/ department and LPAD for each law drafting effort.

3.4. 2.3 **Audit and improvement of financial flows, budgeting processes and responsibility assignments**

Modern management requires, among other things, a clear allocation of finances tied to the responsibility for a particular policy. All arrangements, such as accrual accounting, program budgeting, responsibility tight with budgeting decisions and programs must follow this principle.

3.4. 2.4 **Audit and improving records management system**

As many cases of a lack of coordination and mismanagement occur because of the poor records management system, it is advisable to audit the current system of records management and take necessary steps for its improvement. Several countries are taking steps to use electronic databases for the purpose of records management. This system then can be used both internally and externally to improve the access to the documents. In both cases registers of all documents created should be available both to the civil servants internally and to public externally. Of course, considerations on the availability of the documents themselves will follow the principles of Free Access to Information Law.

3.4. 2.5 **Use of working groups as a consultative body rather than drafting body**

External advisors in the process of both developing and drafting a certain policy are used all over the world. However, the civil servants in these cases act as

(a) providers of general direction and vision;
(b) a final check and monitoring mechanism.

Until this capacity can be built within the Bangladesh civil service certain guidelines should be prepared, particularly in regard to the setting up of the working group (representation principle, selection mechanism, optimal size and structure etc.), facilitation of working groups (workload division; keeping records, effectiveness of the meetings, motivation of the members) as well as trainings in this regard. It is crucial to provide the information on the existence of any working groups, advisors or consultative bodies at least internally in the network of government authorities and in long-term also externally.

3.4. 3. **Capacity Building**

(a) Handbooks/manuals on policy development stage, policy implementation and policy evaluation, handbook on policy tools and their application;

(b) regular training and education on Free Access to Information Law, analytical tools, policy development techniques, project managements skills, etc.;

(c) regular meetings and trainings for policy officers from all ministries/divisions/ departments and law drafters from LPAD to develop policy formulation and legal drafting skills.

Legislative Hand Books that deal with formal and technical aspects of law drafting should be accompanied by Hand Books on policy development stage. Thus, the essential elements of policy development should be regulated by law and be part of the legislative Hand Books, accompanied by set of standards and practical examples. Even when basic standards are set by this instrument, there is a value in developing supplemental Handbooks and manuals for civil servants on tools and techniques of analysis, monitoring and evaluation, implementation, etc. These documents can be made available not only for civil servants but also to inform external advisors working in the working groups and thus enable the creation of uniform standards. For this matter, external advisors and consultants should be employed who would help in preparing such a set of materials. However, it is extremely important to balance the number of foreign and domestic external advisors with internal experts on legislative and policy making.
Another tool that can be usefully developed for use of both analysts and law drafters are checklists (on policy development, implementation, monitoring, etc.). These typically set out issues or matters that should be kept in mind during the whole process. It may be useful for both as a starting point for a systematic approach or as an aid in reviewing the work done. Some checklists have been developed by SIGMA (and by other OECD bodies and published) or other countries that can be used as model checklists to be adapted to Bangladesh circumstances.

PART IV

PRINCIPLES AND MATERIALS OF LEGISLATIVE DRAFTING

CHAPTER 1

GOALS, CHALLENGES AND CONSTRAINTS

1. Goals, challenges and constraints

1.1. The goals

In drafting legislation, legislative drafters might set 2 goals:

(i) to construct legislation that gives legal effect to government policy.

(ii) to communicate the law clearly to the people who are affected by it, the officials who administer it and the judges who interpret it.

Satisfying both the goals is often difficult.

Legislative drafter writes law based on the drafting instructions they receive from the sponsoring ministry. The meaning of that law, in the end, is not necessarily the meaning the sponsoring ministry or drafter intended, nor the meaning the average reader might give it. Rather, the meaning of the law is what the courts determine it to be by applying the substantial body of legal rules known as the principles of statutory interpretation.

To put this in a constitutional context, the role of our courts as the final authority on the meaning of legislation is one of the most important components of the rule of law. Because the courts, independent from the executive government, determine the meaning of the law, that meaning does not change simply because of a different executive government is in power. That keeps the law sufficiently certain to enable the people who are subject to it to know their rights and obligations.

In drafting legislation, legislatives drafter are not merely putting words to proposed government policy, they are also giving a legal opinion, based on the application of the principles of statutory interpretation, that the words they are writing will have the intended legal effect.

At the same time, the office of Legislative drafter is committed to a drafting style that makes Bangladesh legislation as understandable as possible to the people who use it. It has adopted modern language, improved formats and a plain language writing style, all with the goal of making the law more accessible to both the courts and the general public.

1.2. The challenges: more readable law takes longer to draft

As discussed at the start of this part, the goals of a legislative drafter are, first, to create legislation that gives legal effect to government policy and, second, to communicate the law clearly and effectively. The first goal must always be given priority-legal effectiveness cannot be sacrificed for improved readability. This means that the drafter must initially focus on understanding all elements of proposed legislative scheme. Often the pressures of a legislative session are such that almost all of a drafter's time is consumed in getting to this point, leaving little opportunity to revise in light of the second goal. This extra time for revision is vital to produce more readable legislation.

1.3. **The constraints**

Statutory interpretation is the domain of the courts. This imposes a number of direct and indirect constraints on the style of legislative drafting.

(1) **Legal principle**: The legal principles of statutory interpretation must always be considered. (A few of the most important principles are discussed below under the heading key principles of statutory interpretation).

(2) **Historical style**: While legislative drafters are committed to improving the readability of statutes, changes in style must be approached cautiously. The historical drafting style used is the style on which the principles of statutory interpretation were developed. Changes in style must be carefully considered to ensure as much as possible that they do not imply changes in meaning.

(3) **Drafting conventions**: The drafting conventions established by the historical practice have been largely adopted in Bangladesh. Consistency in style facilitates consistency in judicial interpretation. This is particularly important for legislation in relation to commercial activities that operate in an increasingly global environment so that differences between jurisdictions are minimized.

CHAPTER 2

PRINCIPLES AND MATERIALS OF LEGISLATIVE DRAFTING

2.1. The Legislative process should start with setting objectives and establishing policy:

2.1.1. Introduction

Laws are tools for ordering economic and social activities in a country. They are designed to solve or prevent problems. Or to promotes welfare. Policy making or formulation is the process whereby the objectives of governmental action and laws are established. It involves selecting and prioritizing the objectives of governmental action and law are established. It involves selecting and prioritizing the issues to be addressed and deciding how to handle them.

Once it has been decided what needs to be done, it is possible to determine how to most effectively do it. This could involve legislation or another form of governmental initiative. Thus, the first question to ask is whether a law is necessary, or whether an alternative measure (or a combination) would work best. If a legal instrument is warranted, the correct form must be selected (treaty, law, regulation, decree, administrative order, etc.). It must then be determined whether new legislation is required, or if it is sufficient and possible to amend existing legislation.

If a legal instrument is not necessary, the alternatives such as manuals, circulars, opinion letters, guidelines, voluntary agreements, codes of conduct, self-regulation, performance-based initiatives, informational campaigns, etc. can be considered. These mechanisms can be very cost-effective, and they establish a more cooperative relationship between the government and the governed.

But the traditional approach is to pass “command and control” legislation, which creates legal obligations and imposes sanctions for violations. This approach is believed to-

(a) provide standardized solutions to problems;

(b) be relatively easy to enforce;

(c) establish clarity for target groups; and

(d) enable legislators/regulators to express their intent.

However, legislation can be rigid (difficult to amend and adapt to changing circumstances), costly for the government and governed, adversarial with respect to target groups, overly complicated and detailed, and ineffective at the end of the day. Setting objectives and defining policy must be practical exercises, directed towards successful implementation and actually solving problems. Sometimes legal instruments are not required, and sometimes they work best when accompanied by other kinds of measures. Generally Laws solve or prevent problems by implementing policies in the form of norms. Norms are rules concerning what specific target

groups must not do, must do or may do, under carefully defined circumstances. Thus, laws contain prohibitions, obligations, and rights (authorisations). In order to be effective, laws and the policies which they implement must define the relevant target group(s) and carefully specify what their behavior should be (or how it should change). Remedial or preventive measures must be based on a sound understanding of the targeted behaviour and the circumstances under which it occurs, realistic planning concerning how to make changes, and policies must be based on accurate information, a sound understanding of the real situation, and clear planning concerning what authorities can and should do.

The initiators or proponents of laws have a crucial role to play in developing policy and laying the foundation for its proper implementation. They are responsible for-

(a) determining what the new law should do;

(b) demonstrating that this is necessary and appropriate;

(c) building consensus; and

(d) ensuring that the final version of the new law and the implementing mechanisms are sound, practical, and viable.

Once the initiators or proponents determine that a new law is indeed require, they should guide the legislative drafting process, collaborating with legislative drafters and parties who will mark up the law. This requires effective communication, meaningful consultation, sound information management, and constant attention to the structure and content of the law. The goal is to combine sound policies, accurate drafting, and productive review, to produce a good law.

However, policy making is not a neutral or objective exercise. Electoral and political processes determine who will lead a country, and establish the ideology and methodology for identifying and formulating legislative solutions. Rules of procedure and the institutional structure of the government create a framework (processes and mechanisms) for identifying and codifying legislative solutions. Nonetheless, policies must be professionally designed, through problem solving exercises, and seek practical solutions. Further, they must be subjected to informed debate. Policies which are excessively influenced by political or ideological objectives or parochial interests are less likely to meet their objectives, and more likely to undermine governance.

2.1.2. Where Do Policies Originate?

Objectives of the major legislative initiatives usually originate in a government programme i.e. policies. This is customarily developed and elaborated through electoral and political processes. Thus, it reflects the positions and interests of the governing party (or parties if there is a coalition) and starts with party platforms, In many countries, the Government also formulates and issues a legislative agenda, which identifies and priorities the subject matters to be addressed, and indicates the timing for doing so. This agenda may be prepared annually, or correspond to the legislative session. In commonwealth countries, the Head of state usually opens the first session of parliament by reading the annual legislative programme. It serves as a

reference point and calendaring mechanism for institutions and parties which prepare and review draft laws.

The Government programme or policy should be based on a meaningful assessment of the long term and general needs of the society. It should not focus on special interests or parochial positions of powerful or narrow sectors of society. Unfortunately, in many countries policy making (and legislative drafting and review) are greatly affected by interest groups, powerful parties, and lobbyists. It is important to set limits on this, and ensure transparency; there must be a distinction between the provision of information and the exercise of undue influence.

Nonetheless, the Government programme is not and can never be "neutral". It is developed through political and ideological processes, and it is elaborated by executive and legislative institutions managed by individuals with defined interest. And the line between facts and values is not always crystal clear. Still, the government programme has to be professional, and not excessively based on ideology or partisan interests. After all, it will eventually be judged, through electoral and political processes (at the times and under the circumstances established in each country). In fact, overly ideological or partisan approaches and haphazard legislative prioritization are major causes of poor governance and governmental inefficiency.

The Ministries have a key role to play in formulating and implementing the government programme. They should contribute to policy development on the basis of circumstances in their areas of competence, and to resolve problems relating to existing policies and their implementation. They should contribute to policy implementation through design of legislative solutions and participation in the legislative drafting process. Sound lines of communication with constituents, and other ministries are crucial for this work.

Even if the governing party or parties have the political strength to impose policies, legislative solutions are more likely to be sound when subjected to honest and transparent debate. Public discourse in a pluralist setting is one of the best ways to test legislative solutions. For this purpose, there must be adequate access to information concerning the government programme and what is being proposed, and how it will be implemented. Institutions which play a key role in this process include the media, trade unions, think tanks, professional associations, the legal profession, the academic community and civil society (Non-Governmental Organisations).

2.1.3. How should policies be made, and what are the key steps?

The parameter or degree of separation between policy making and legislative drafting varies between countries. In some countries there is excessive demarcation. This can turn policy making into an extremely theoretical exercise. In other countries the tasks are merged, and drafters have too much discretion concerning policy. This makes legislative drafting unfocused and variable, and is counterproductive; it is clearly best practice to take fundamental decisions regarding policy before a law is drafted. Ministries, ministerial committees, and the government office can be responsible for this process, based upon the government programme. However, as discussed below, it is natural and indeed necessary to engage legislative drafters in refining policy, and determining the most effective ways to achieve policy objectives. Parties which draft and mark up legislative and from working groups to parliamentary committees, are invariable engaged in this process?

There are four key steps in the policy making process:

1. Identifying the problem
2. Analysing and explaining the causes of problem
3. Proposing multiple solution to the problem
4. Selecting the best solution(s) to the problem

Making policy through this four step process treats legislation as a means to designated ends. It does not make value judgments about those ends, but seeks to test their likely success through rational analysis. Each of these four steps needs to be carefully considered, in turn.

2.1.3..1. Identifying the problem

Identification of problems should be precise in order to find ways to solve it. When a problem is defined and stated accurately and concretely, it is much easier to find a coherent solution. Far too often, causes and symptoms are confused, and the core nature of the problem is not identified. In order to avoid this problem, it is important to ask a number of poignant questions, and assess how well the answers lay the groundwork for designing solutions.

The following questions exemplify this approach:

(1) What kinds of conditions or circumstances are causing this problem?

(2) What types of behaviour (action or inaction) are causing the problem?

(3) Who (which target groups, individuals, legal persons, institutions) is responsible for the problem, or is engaged in problematic behaviour?

(4) Where, when, how, and under what circumstances is this begaviour taking place?

(5) What parties or institutions are contributing to the problematic behaviour?

(6) Who is affected by this problem or problematic behaviour, and in what ways?

The last question is crucial often there are complex inter-relationships between the parties who are responsible for problems and the parties who are affected by them. These inter relationships need to be explored in order to design targeted and lasting solutions.

2.1.3.2. Analysing and explaining the causes of the problem

Once we have clearly identified the problem, we need to determine why it exists. Clear formulations of a problem can illuminate intermediate causes. But solutions can only be developed by carefully identifying the ultimate or root causes.

Different circumstances cause socio-economic problems. Seven major categories can be identified:

(1) The legal framework. Laws and regulations may be poorly drafted, ambiguous, outdated, impractical, counterproductive, or even contradictory. Many socio-economic problems have their origins in laws or regulations which lack cogently formulated objectives, or which are not soundly designed to meet their objectives.

(2) Implementation of the law. Laws and regulations may be difficult to implement. Juridical or administrative institutions may not be able to fulfill designated roles, due to management difficulties or lack of resources (financial, capital, technical, human, or informational). Capacity constraints may be compounded by the absence of a clear mandate, or excessive administrative discretion. Corruption may be an issue.

(3) Capacity of Target Groups. Target groups may lack the necessary skills, resources, and technical capacity to take appropriate actions or comply with legal requirements. There are both individual and institutional aspects to capacity requirements.

(4) Information Management. Parties may be unable to effectively access, analyses, organise, utilise, and/or share information. Indeed, information management problems often contribute to or compound socio-economic problems.

(5) Communication issues. Lack of communication between parties who need to work together often causes socio-economic problems. Technology limitations, obstacles to mobility and transportation, and geographical distance create communication problems. This can cause target groups to be unaware of their legal obligations, or applicable working procedures. There may be barriers between official institutions and target groups, particularly those which are marginalised or disadvantaged.

(6) Procedural obstacles. Ineffective procedures for making decisions, performing and documenting work, or engaging in collective action can cause socio-economic problems. Bureaucratic procedures often create obstacles, alone or in combination with the circumstances indentified above.

(7) Incentives and ideologies. It is extremely important to understand the motivation and ideology of target groups, in order to solve socio-economic problems. What are their goals? How do they perceive and rationalise their behaviour? How do they evaluate costs and benefits? Sometimes target groups do not actually know what is in their own interests, due to disincentives, inconsistent reward structures, or confusion between material and non-material rewards. There may be social motivational factors (like protecting cultural heritage, natural resources, or group interests).

It is necessary to evaluate any institutions which are charged with handling, controlling or solving the problem or problematic behaviour. What are they doing? Why can't they solve the problem? What can be done to help them work better? Official institutions are often part of the

problem, or part of the reason the problem is not being solved. Understanding why this is the case can help indentify solutions to socio-economic problems.

2.1.3.3. Proposing multiple solutions to the problem

Once the problem is fully analysed and the causes are understood, it is time to identify potential solutions. They should be carefully directed towards root causes (not symptoms), and be based on the latest and most accurate information possible.

The first step in designing solutions is establishing the rationale and mechanism for governmental action. The following questions need to be addressed:

(a) Why should the government solve this problem?

(b) What level of government should address the problem? Is it national, regional, or municipal?

(c) What is the optimal form of governmental action? Is a legal instrument necessary, or will some other mechanism, such as an informational campaign, suffice?

(d) If a legal instrument is necessary, what kind is most appropriate? Is a law necessary, or can the problem be addressed through secondary legislation (such as an administrative regulation), or by some other kind of normative act (such as a decree or by-law)?

(e) How can the policy making and legislative drafting processes establish the legitimacy of the governmental action?

This analysis is important, because a new law is not always the answer, or the best answer.

To design sound solutions for socio-economic problems, it is necessary to-

(a) identify the most appropriate actions and mechanisms;

(b) determine who should carry them out; and

(c) specify when and where and how.

In other words, we should determine what should be done, who should do it, and under which circumstances.

To solve a problem of assigning tasks to an administrative or executive agency should follow the customary mechanism. It is also possible to rely on autonomous agencies, public corporations, courts, or private institutions, or a combination thereof. Sometimes there are multiple candidates, and it is necessary to perform comparative analysis. When an existing institution is assigned new tasks, the issues raising above and the following questions need to be addressed:

(1) What is the current mandate of the institution?

(2) How is the current mandate being fulfilled? Is there sufficient capacity? If not, what is lacking?

(3) How will the new tasks relate to the existing tasks?

(4) How will the new tasks be assigned? Will organic documents need to be changed?

(5) How will the new tasks be integrated into the work of the institution? Will organizational restructuring, business reengineering, and/or change management be required? How will managerial difficulties be overcome? Will strategic planning be required?

(6) How will management (leadership) respond to new tasks? What decisions will be made? What will be the incentive structure for the new tasks?

(7) How will existing employees respond to the new tasks? What will be the relationship between existing and new employees?

(8) What should be done to enhance capacity, and perform new tasks? What additional resources (financial, capital, technical, human, or informational) are required?

(9) How will other institutions respond to the changes?

(10) How will the relationship with other institutions be affected?

The above mentioned questions constitute a "mini-functional review". Clearly, careful analysis of institutional functions is pre requisite to the design of viable legislative solutions. Further, if there is more than one candidate institution, comparative functional review is in order. Comparative assessment of existing and required capacity is necessary in order to identify the best candidate.

By utilizing the techniques outlined above, it should be possible to identify a number of potential solutions to the socio economic problems being addressed. At this stage, the idea is to assemble several potential solutions, and categories them on the basis of approach, without ranking them or determining which is best. Having done this, we are ready to move on to the fourth and final stage of the problem solving process, and select the optimal approach.

2.1.3.4. Selecting the best solution(s) to the problem

Once a selection of sound and viable solutions has been assembled, it is time to assess them and rank them, and thereby decide which is most efficient and effective. The question is which potential solution (or combination of solutions) will work best. This may sound easy to figure out, but it is not. Many variables affect results during policy implementation results are always time bound, and it is not always possible to reach consensus concerning the optimal timeframe.

Political considerations often mitigate in favour of shorter term perspectives, with rapid benefits and displaced or delayed costs. Finally, and perhaps most importantly, ideological predispositions colour the analytical process, and impede objectivity. As a result, it is not always possible to precisely determine the most likely results of policies in advance.

Nonetheless, there are a number of valuable and viable techniques for determining whether proposed solutions are likely to be effective, and for selecting the best advances.

The following questions can help prepare a checklist which ranks potential solutions:

(1) Which policy approach is most likely to lead to required behavioral changes of the target groups? Behaviour is influenced by the letter of the law, expectations concerning enforcement, and subjective socio-cultural rectors.

(2) During which time frames will different policy approaches yield results?

(3) During which time frames will the costs of different policy approaches be incurred?

(4) Which policy approach addresses all (or the most important) causes of the problem?

(5) Which policy approach can be most effectively implemented by existing institutions?

(6) What needs to-be done to make sure that each policy approach is implementable?

(7) Which policy approach is least likely to face political or administrative opposition?

(8) Which policy approach is most likely to be accepted by the target groups?

(9) How will different policy approaches be viewed by the international community?

To perform a simplified cost benefits analysis for each of the proposed solutions is advisable. This is the only way to identify which solution is most “efficient”. Efficiency is a function of effectiveness and cost. The question to ask is which solution provides the most advantageous ration between effectiveness and cost. It is not always advisable to select the most effective solution. Another solution may be only slightly less effective, but significantly less expensive. To take a look at the likely results of the proposed solutions is also important. Regulatory impact analysis can be utilised to identify political, economic, social, humanitarian, and environmental consequences, and to minimize the chances of unintended results.

Even if it is not possible to conduct a quantitative analysis, a qualitative approach can still be useful. Qualitative approaches are based on comparisons between factors, and assessments of relative costs and benefits. The following examples illustrate a qualitative approach:

(1) Since it is usually more expensive to establish a new institution than to expand an existing one, the former can only be more efficient if it is considerably more effective.

(2) Even without exact figures concerning salaries for new employees, it may be possible to determine the least costly legislative solution by comparing the numbers and types of employees which will be required for each.

(3) Informational campaigns are generally less costly than enforcement campaigns.

(4) Incarceration is a very expensive solution, especially compared to fines. Fines are less expensive to administer when procedures are streamlined, and courts are not involved.

(5) Technological solutions utilising existing facilities are less expensive than additional human resources (even though all technological solutions require some human support).

At the time of performing cost benefit analysis, it is always necessary to consider the cost of doing nothing. Sometimes it is more efficient to let a problem be, or solve only part of it. For example, it would not be efficient to impose rigorous safety measures with major costs on businesses if they only marginally enhance public welfare. The solutions should never be more expensive than the problems.

When finalising legislative solutions, it is very important to remember that the best approach may combine elements of several solutions. In other words, different tactics may be combined into a single solution. Or multiple solutions may be combined into an overall policy. Thus, the best way to hit the target may be to combine prohibitions and incentives, or conduct an informational campaign prior to an enforcement campaign, or improve both information management and bureaucratic procedure at the same time. In addition, it may be best to combine approaches to achieve incremental improvements over time, rather than tackling every aspect of a problem at once.

2.1.4. How Can Laws be drafted to implement policy Objectives and Legislative Solutions?

Once policy objectives and legislative solutions are identified, the next step is to make sure that they are codified into implementable laws. Two key factors must be managed:

(1) **The structure and content of the draft law:** this is a substantive and technical exercise, and initially the responsibility of legislative drafters;

(2) **Review and approval of the law:** this is a procedural matter, involving all of the parties who consider, amend, and finally enact the draft law.

Both aspects are closely related, and significantly affect each other. However, for analytical purposes, this section deals with codification and procedures.

Legislative drafters must create optimal text and wording in order to convert policy goals into legal reality. This is an art and a science, requiring highly specialised skills.

In order to perform tasks duly, legislative drafters should have:

(1) A sound understanding of policy objectives, and access to policy makers if clarifications are required.

(2) Accurate information about the problem and actual socio economic conditions.

(3) Knowledge concerning different approaches to the problem which have already been attempted, particularly in other jurisdictions.

(4) Access to outside and independent parties who can provide information assist in the drafting process, and analyses possible consequences of selected approaches and legal text.

(5) Sufficient time and resources to perform their work.

The exact role of the legislative drafters and their involvement in policy making process varies between different legislative systems. There are two major approaches:

(1) Legislative drafting is primarily a technical exercise, which involves converting established policies and legislative objectives into a legal document;

(2) Legislative drafters play an active role in establishing legally binding nous/instructions that effectuate policy objectives and create implementable legislative solutions.

The first approach is more likely to be applied in a system where policy making and legislative drafting are somewhat separated. The countries of the Commonwealth, with parliamentary systems based on British common law system often have specialised institutions (such as a parliamentary council office) tasked with drafting laws covering a wide range of subjects.

The second approach is more likely to be applied in a system where policy making and legislative drafting are combined. In continental legal systems, and countries following civil law traditions, ministries and other governmental bodies often carry out these two functions more or less simultaneously. Officials having both substantive expertise and drafting skills combine their efforts, often in working groups, which may include representatives of different institutions having jurisdiction over the subject matter.

So, determination of the most advantageous timing for starting the drafting work is much important. In some countries, drafters are involved from the start of the legislative process. They provide advice to initiators or proponents about how to best formulate the law to meet policy objective and what to include in a statement of legislative intent or the explanatory memorandum or note which will accompany the law. In other countries, drafters wait for instructions before starting their work.

The information of concerning legislative intention sometimes included in the preliminary provisions of laws. In some jurisdictions, preambles provide background information or explain objectives. Citations (“Having regarded to....”) and recitals (“Whereas....”) may be used to explain the legal basis, rationale, and goals, but they are mare commonly found in treaties and

conventions. In any event, preliminary provisions are not part of a law and cannot create enforceable norms. The body of the law must contain all of the required normative provisions.

It is important to note that all laws have policy objectives, whether they are stated or not. Policy objectives are the substance/content of the law, which is actually a vehicle for implementation.

Legislative drafting also occur a linguistic exercise. In some countries, linguistic issues (multiple official or working languages) complicate legislative drafting and the conversion of policy into law. One language may be more suitable for legal purposes and terminology, or have longer legal process, and may necessitate translation services.

One of the key issues which legislative drafters regularly face is the degree of specificity required in primary legislation, and the extent to which technical and administrative issues can be left to secondary legislation (regulations, by-laws, and decrees). In some jurisdictions, particularly under a civil law approach, laws can serve as statements of policy, with details provided in regulations prepared and implemented by administrative agencies. This has been denominated "General principles drafting" It is distinguished from the more detailed and prescriptive "Traditional approach", customarily followed in common law jurisdictions.

However, in modern practice, the two approaches often converge, particularly in certain areas of law. Secondary legislation is almost always required, and plays an important role. Therefore, legislative drafters must determine the respective roles of their law and subsequent secondary legislation, and the appropriate degree to which regulatory authority should be delegated.

It is best practice to address as many of the issues raised above as possible in organic documents which regulate-

(a) the structure and content of different kinds of legislative acts, and

(b) the procedures for drafting or approving them.

Examples include parliamentary rule of procedure, protocols, Executive decrees, or a law on normative acts these organic documents can also establish principles for normative legislates drafting, to make sure that laws clearly specify what target groups must do must not do, or may do, under carefully defined circumstance. Finally they can specify how to make laws practical and effective, by requiring regulatory impact analysis and related ex ante analytical exercises.

2.1.5. How can policy objectives be secured during the legislative process?

Sound legislative solutions start with setting appropriate policy objectives and enabling legislative drafters to create practical and implementable normative legal documents. But this is not enough laws are the final result of the legislative process. Unfortunately laws can start well but end up otherwise, after being marked up by different parties in various institutions.

The procedures for reviewing and approving draft laws are established in the constitution, legal acts, and rules of procedure, naturally, the government (or council of ministers), parliament governmental organization should exercise their functions according to law. However, the process must be well managed and coordinated. Otherwise ad hoc changes to a draft law can

alter or compromise it policy objectives, make it less practical and more difficult to implement, reduce internal consistency, or adversely affect its legal sufficiency and quality.

To prevent this from happening, the initiators or proponents to draft laws should:

(a) Document and communicate their policy objectives and proposed legislative solutions;

(b) Utilise technological and IT solutions to facilitate rational marking up of draft laws;

(c) Help provide required information to parties engaged in making up draft law;

(d) Facilitate legal scrutiny and expertise for amendments to draft laws;

(e) In jurisdictions which separate policy making and legislative drafting, the initiators or proponents of draft laws usually prepare a statement of legislative intent. This provides policy instructions for legislative drafters, and guides their work.

In many jurisdictions, an explanatory memorandum or explanatory note accompanies draft laws, and is circulated widely. Its contents and use are usually specified in organic documents, such as parliamentary rules of procedure, protocols, executive decrees, or a law on normative acts. Typically, the explanatory memorandum provides background information concerning the draft law, statements of policy objectives, information concerning legal conformity, lists of related laws or those being amended, analysis concerning expected consequences (including its Benefit analysis and regulatory impact analysis), and other relevant details.

Sometimes the explanatory Memorandum is treated as a pro forma exercise, or only used to provide perfunctory details, without really explaining the rationale for legislative action. In such cases, it is up to the parties who review and amend laws to demand a more serious approach. There is really no excuse of failing to justify legislative action. As Albert Einstein said, “If you can’t explain something simply, you don’t understand it well”.

2.1.6. How can policy making be evaluated?

Legislators and government officials typically spend far more time making policy and converting it into law then reviewing and assessing the results of their previous work. In some ways this is to be expected, given the extent of their obligations, and the number of laws and subjects which require their attention. However, in another sense this is unfortunate. Only through the review of results and consideration of feedback can the pricy making process be improved. In the absence of monitoring and evaluation, mistakes and inefficient practices are much more likely to be perpetuated. The inevitable result is an increasing quantity of laws which do not solve socio economic problems or achieve their objectives, and disillusionment on the part of the populace.

The success of policy making is best judged by evaluating the results of laws, and whether problems have been prevented or resolved. But this is a difficult and amorphous process. Results only become clear over time, and vary with time. Extraneous factors and circumstances, and the

absence of direct cause and effect relationships, make it difficult to precisely determine what a specific law has changed or accomplished. There are obstacles to exact measurement. Indeed, defining a baseline for what the situation would have been without a law is conjecture.

For these reasons, political leaders often neglect post implementation (ex post) regulatory impact analysis, and avoid quantitative methodologies. It is much more expedient to employ "subjective" descriptions and "politicised" conclusions. Nonetheless, the results of laws are always assessed by affected target groups. And eventually, the entire country will present a verdict, through the electoral process or other means. If policy making is inaccurate or inadequate, laws are more likely to be wasteful and ineffective, and the populace is more likely to conclude that its representatives and legislators have squandered their chance to make positive socio economic changes.

The second best solution is a qualitative review of the policy. Although not as rigorous, it can still be useful. And it is less threatening. Parties involved in policy making and drafting can answer these questions:

(1) Has the policy making stage received sufficient attention?

(2) Was there enough time for policy making?

(3) Was a serious effort made to perform all of the steps required for indentifying the most effective legislative solutions? Or were there too many assumptions and shortcuts?

(4) Which institutions most effectively carried out their obligations for policy making?

(5) Did key individuals have the required technical skills? Or is further training required.

(6) Were policy objectives adequately documented and communicated?

(7) Was modern computer technology utilised to promote communication and information sharing, and avoid complications during the process of marking up the draft law?

2.1.7. Conclusion

Policy making is the first step in the legislative drafting process, and one of the most important. Laws must be designed from the start to solve or prevent problems, by implementing policies in the form of norms (concerning what target groups must do, must not do or may do, under carefully defined circumstances). While policies originate in the government programme, they must be refined in the context of specific laws. This is a complex process, with four stages: identifying the problem, analysing and explaining its causes, proposing alternative solutions, and selecting the optimal ones. The initiators or proponents or legislation have a crucial role to play in the process, in close cooperation with legislative drafters, who are responsible for converting policy into law.

Policy making does not always receive the attention it deserves, and is not sufficiently monitored and evaluated. This is unfortunate, since insufficient attention to policy making is short sighted, counterproductive, and likely to have negative consequences both during and after the drafting process. If policies are not fully developed or consistent with the best interests of the society, or if legislative solutions are not well founded, it is not possible to draft sound legislation that can be properly implemented. If policy makers do the right things, then policy implementers can do things right.

Thus, taking extra time and devoting sufficient resources to develop and communicate policies and objectives before laws are drafted is actually a very sound investment, which pays off greatly in the long run. This significantly increases the chances that laws will accomplish what they are supposed to, and yield positive results for the populace. Also, laws that effectuate sound policies are easier to enforce, and do not require frequent amendment. Therefore, sound policy making results in considerable savings of time and resources, as it helps laws to efficiently and effectively do what they are supposed to, from the start.

2.2. Legislation should be in Harmonisation with national and International Requirements:

2.2.1. Introduction

Laws do not exist in isolation. They are part of a legal system and legal framework, and they are applied and adjudicated through administrative procedures. Therefore, laws must properly "relate" to each other, taking account of applicable legal requirements and institutional arrangements. Harmonisation refers to the inter relationship between different laws.

Laws can be considered harmonised with each other when they-

(a) meet all requirements for legality,

(b) do not contradict each other in any way, and

(c) are sufficiently complementary.

Legality means that a law complies with all substantive legal requirements (including formatting rules and the typology of legal acts) and has been enacted according to the rules of procedure. The absence of contradiction means that the law does not violate constitutional rights or international law, and does not prohibit or authorise behviour which is elsewhere permitted or not authorised. Complementarily goes to the next level, referring to reasonable coordination of policy objectives and normative requirements, so that laws achieve their objectives.

There are two fundamental conditions for establishing and maintaining a harmonised and coherent legal system and legal framework:

(a) New laws must be harmonised with those which already exist.

(b) Existing laws must be harmonised with subsequent enactments having superior force.

The first condition is far more common, since most countries produce a large volume of new laws and legal acts every year. However, the second condition should not be overlooked. It arises every time an international treaty is ratified to the constitution is amended. Both conditions must be met, because the rule of law starts with an internally consistent body of laws fulfilling all legal requirements, which can then be applied and adjudicated in an objective and timely fashion.

Broadly speaking, there are two categories of standards that apply to both new existing laws:

(1) National legal instruments and obligations. These include the constitution, codes, laws, regulations, administrative orders, decrees, by-laws, and court ruling which change law.

(2) International legal instruments and obligations. These include treaties, conventions, multilateral agreements, rules of trans-national organizations, and applicable decisions of international tribunals and commissions.

Both sources must be reviewed. Generally speaking, the supreme source of law comes first; this could be international law, if the hierarchy of legal acts under national law gives it supremacy. Or, it could be national law, if the subject matter is not covered by international obligations.

It is important to understand that harmonisation is much more than an intellectual exercise. Contradictions between normative requirements create predicaments for the target groups of of laws, complicate enforcement, and compromise adjudication. Insufficient coordination between normative requirements undermines implementation and makes laws less sound and effective. Thus, shortcomings in harmonization-

(a) crate confusion and uncertainty in the legal system;

(b) make laws less effective and prevent them from achieving their objectives;

(c) cause socio economic harm;

(d) reduce confidence in the legal system; and

(e) undermine the rule of law.

2.2.2. What is a harmonisation wiht national standard?

Harmonisation on the national level starts with the principle of supremacy (hierarchy of law). This is usually set forth in the constitution (organic law). Additional requirements and details concerning the “categories of laws” in the form of a typology are often found in special legal acts. It could be in a law on normative acts, or parliamentary rules. The basic principle of supremacy is that each and every different kind of law must be in conformity with other laws which are equal to or above it in the hierarchy.

Thus, if a contradiction between laws arises, it must be resolved by rescinding or amending the law of inferior status in the hierarchy. In the context, it could be a law, regulation, administrative order, decree, by law or any other normative act authorized under the legal system. In addition, court decisions have to be taken into account, to the extent that they modify law.

The following chart demonstrates a sample hierarchy of laws on the national level (not indicating the position of international law):

(1) The Constitution.

(2) Legal codes.

(3) Laws.

(4) Regulations.

(5) Decrees and Normative orders.

(6) By-laws of official National Institution.

(7) Acts of regional and local authorities (such as municipal ordinances).

There are three requirements for harmonisation in the national context:

(a) **Firstly:** New laws must comply with preexisting laws of superior status. Therefore, laws must be constitutional; regulations must comply with laws, etc. any not compliant provisions of new laws of inferior status are void ab initio, and should not exist. It ensures that new laws respect the principle of supremacy with reject to existing laws.

(b) **Secondly:** New laws should not contradict pre existing laws of equal status. While the most recent law is given priority, as a principle of legislative interpretation, the best practice is to avoid contradictions or discrepancies or discrepancies in the first place. This requirement ensures the laws of equal status respect each other.

(c) **Thirdly:** New laws should rescind or amend any non compliant pre existing laws of inferior status. If this requirement is not met, for any reason, then the non compliant provisions of pre existing laws must be eliminated or modified directly. This requirement ensures that existing laws respect the principle of supremacy with respect to new laws of superior status.

First and foremost, new and existing laws must comply with the constitution (supreme organic law). This includes both the text of the constitution and all decisions which interpret it, in some jurisdictions, there are mechanisms for securing advisory opinions or expedited decisions from Supreme Court or constitutional court. The parties which can exercise this right are made by legal experts involved in the legislative drafting process. These experts have a more difficult task in countries which are in "transition", or, in the process of establishing democratic and representative institutions. This is because the constitutions are new, have not been interpreted yet and may be subject to request amendment.

Second, new laws must properly relate to existing laws. This starts with "procedural" requirements concerning the structure and format of laws and their normative typology. It includes "substantive" requirements found in specific laws that deal with the same subject

matters in this regard, many different aspects of laws need to be harmonised. This includes specific legal provisions, definitions and the usage of terms, and transitional provisions (covering jurisdictional issues and entry into effect).

In a practical sense, harmonisation between laws includes "negative" and "positive" aspects. The former refers to the absence of contradictions. Which in a purely legal sense is the most important requirement? The letter refers to the existence of actual harmony between laws. It includes commonality of purpose, based upon compatible policy objectives and practical goals. Laws which meet only the first aspect of hamonisation will not be legally incompatible, but may still fail to effectively serve socio economic interests. In other words, they may pass the legal test for harmonisation, but fall short of the practical requirements.

One exception to the above requirements should be mentioned. Under the hierarchy of laws, there can be legal acts with limited scope or application for example; certain institutions may be empowered to adopt acts which apply only to their own operations, or self governance. These include parliamentary rules of procedure, ministerial by laws, resolutions, etc.

Third, although not strictly required under the principle of supremacy, new laws should comply with and fit into the legal system and legal framework. This is a broader question than constitutionality or the relationship between specific laws, since there are numerous requirements with diverse origins, for example, the structure and roles of governmental and juridical institutions must be respected, key characteristics of the administration and enforcement of justice must be accounted for and the functions/competencies of different legal professionals must be respected. These issues can only be addressed though respect for the "big picture".

The following chart summaries the requirements for harmonising national legal standards:

(1) Has it compliance with the constitution? Has it compliance with standards in all legal acts with superior status?

(2) Has it compatibility with all other laws and legal acts of equal or inferior status?

Negative	Positive
No contradictions, legal gaps, or inconsistent use of terms (legal compliance)	Complementary policies and objectives, coordinated implementation (practical compliance)

Finally, it should be understood that the above principles do not in any way limit or retract the power of the legislature to rescind or amend existing laws. Rather, they require that rescission and amendment be carried out in a deliberate and thorough manner. Provisions which rescind or amend existing laws should be express, complete, and legally precise. The provisions being altered must be explicitly identified. And the changes must be very clearly set forth. There should never be any inconsistencies or legal gaps. Legal certainty must be insured.

2.2.3. What is harmonisation with international Standards?

Harmonisation of law with international standards is conceptually similar to harmonisation on the national level. However, the analysis and application of international standards takes on an entirely new dimension. Harmonisation with national standards involves the internal consistency of unitary legal system. Further, there are limited and defined sources of law, and a finite number of juridical institutions. Harmonisation with international standards involves the relationship between two entirely different systems; further the international arena presents multiple sources or diverse kinds of laws, creating dynamic and developing standards of constantly increasing complexity. As an affects many different interests and requires the evaluation of many different factors.

In the current format, international legal harmonisation has its origins at the end of the nineteenth century, when the nation state system began to take shape, and the first truly international institutions were created. International harmonisation accelerated significantly after the second world war, with the creation of the United Nations system and the first global financial institutions (such as the worked band and international monetary fund). The information revolution and the fall of the Berlin wall served as major catalysts. The result is a truly global economy and international legal system.

But international legal harmonisation is not a new process! In fact, sharing law is a recurrent and inherent feature of human development. Most legal systems throughout human history have borrowed, copied, ratified or been forced to accept codes of law or individual laws originating elsewhere. Most great civilizations expanded the jurisdiction of their legal systems, through force or persuasion. Many "law givers" created and influenced legal systems and institution. Prominent examples include mosses, Hammurabi, solon, Justinian, last Prophet of Islam, Confucius, and Napoleon.

This process is called "Legal Borrowing". Here are few of the may be historical examples:

(1) The Ten Commandments are perhaps the most concise and disseminated of all legal tests.

(2) Roman law extended throughout the empire, and served as a major unifying force.

(3) The re-introduction of Roman law (as codified by Justinian in the sixth century) was at the heart of the European Renaissance.

(4) After independence, the American colonies followed British law and procedure (as codified in Blackstone's "Commentaries", and handy two volume compilation owned and regularly consulted by most lawyers).

(5) Modern maritime law can be traced back to ancient Greece, particularly Rhodes.

(6) The French code civil has been applied of utilize in dozens of countries, in Europe and throughout the world.

Legal Borrowing is often carried out by prominent or charismatic leaders. Examples include the post-independence leaders in Latin America, the Meiji in Japan, and Mustapha Kemal Ataturk in behind legal borrowing. They are naturally motivated by the desire to introduce prestigious, coherent, and accessible laws that have proven effective in other jurisdictions.

These examples show that while cultural factors impose some limits on legal borrowing, the most important factors are the quality and consistency of the law being borrowed, and the strength and motivation of the catalysts for their introduction.

Full harmonisation is challenging. A country which joins the council of Europe and ratifies the European convention for the protection of human rights and fundamental freedoms must import and extend to its citizens a complete regime of legal rights, developed over decades. These rights can be enforced through national courts, which must modify their practices, or at the European court of human rights in Strasbourg, which has appellate jurisdiction. Membership in the European Union entails transposition of the entire acquits communautaire. The historic accession of ten new countries in May 2004 showed how difficult this process can be. Membership in the world trade organization requires the application of many principles (such as most favored national and national treatment) and the expeditious compliance of national law with the agreements on technical barriers to trade (TBT) and sanitary and phytosanitary measures (SPS). This requires amending existing laws, establishing new institution with cross-border functions, creating a new regulatory regime for accreditation and conformity assessment, and modifying commercial practices to promote product standardisation and safety.

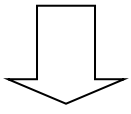
2.2.4. How is Harmonisation performed?

With an understanding of the nature of harmonisation and its historical antecedents, we can now look into how it is performed.

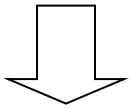
Conceptually speaking, the methodology for harmonising laws can be divided into four distinct stages:

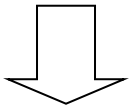
THE FOUR STAGES OF HARMONISATION

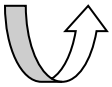
Information generation, review of conditions, and legal research



1. Generation of Information Resources	legal analysis by legislative drafters, or review of existing legal acts
2. Analysis and Review	
3. Consultation	Consultation with legal experts and interested parties, through open and transparent procedures
4. Dissemination/application of results	dissemination of conclusions and their application to legal texts







Generation of Information Resources

Several different kinds of information are required for carrying out the analytical work which forms the backbone of legal harmonisation. First of all, it is necessary to have copies of all relevant legal texts, and in the appropriate languages. Next, it is necessary to have first hand information concerning actual conditions, including the application of laws in practice and the functions of institutions which are responsible for administration and adjudication. Finally, it is helpful to have access to juridical materials such as expert analysis, explanatory articles, assessment reports, and model laws. All of this information should be organized in a user friendly manner, preferably in electronic databases that facilitate rapid and comprehensive research.

Analysis and Review

Legal experts who review and analyses draft or existing laws need to start out with solid knowledge of and experience with the subject matter. This can be acquired through legislative drafting, scholastic work (teaching and research), the practice of law, and business or social

activities. In addition, strong analytical skills are required, in order to assess whether there are actual or potential inconsistencies between different laws. Practical experience is very important. Since it is necessary to consider how laws actually function in the real world.

In order to properly and systematically conduct legal analysis and review, it is a best practice to have checklists to fill in and questionnaires to answer.

The following chart presents eight questions which can be used to guide the process of harmonising legislation with national standards:

EIGHT QUESTIONS TO ANSWER DURING THE ANALYSIS OF DRAFT LAWS TO ENSURE HARMONISATION WITH NATIONAL STANDARDS

1. Is a new law necessary at all, in light of existing laws and conditions? or is a different type of normative act or official initiative more appropriate?

2. Will policies, goals, or provisions of the new law be affected by existing law?

3. Does the new law replaces, amend, or affect existing law?

4. Are the definitions and usage of legal terms in the new law consistent with existing law and administrative practice?

5. Will any new terms conflict with those in existing law or cause confusion?

6. Are all provisions in the new law that repeal or amend existing law carefully drafted and technically correct?

7. Are all provisions concerning the timing and effective dates of the new law correct, or will there be contradictions or gaps that create uncertainty?

8. Will complications arise concerning interpretation, implementation, or adjudication of the new law, in conjunction with existing law and institutional practice?

International standards present particular challenges, particularly when they automatically have superior status under the hierarchy of laws. Both draft and existing laws must comply with actual requirements.

The following chart presents four questions which can be used to guide the process of harmonising legislation with international standards:

FOUR QUESTIONS TO ANSWER DURING THE ANALYSIS OF DRAFT LAWS TO ENSURE HARMONISATION WITH INTERNATIONAL STANDARDS

1. Does the draft law comply with the text of ratified international agreements?

2. Does the draft law comply with the standards established by tribunals in applicable cases, decisions, or rulings?

3. Does the draft law comply with the prevailing approach to implementing international standards, as elaborated by scholars and legal experts?

4. Does the draft law comply with the rules of any international institutions that have jurisdiction over the subject matter?

Consultation

Legal analysis is not generally considered to be a collective activity. However, harmonisation is much more complete and accurate when legal experts with different backgrounds share their opinions and experience. Specific expertise which should be brought into the process can be solicited from legal experts who work with:

(1) Governmental institutions.

(2) Social services providers.

(3) Private companies.

(4) Non-governmental organizations.

(5) Professional associations.

(6) Trade Unions.

(7) Think tanks.

(8) Law faculties and universities.

(9) Institutions which train judges, prosecutors, and lawyers.

(10) The media.

It should be remembered that it is precisely these legal experts who are most likely to challenge a non-compliant law after it is approved or when it is being implemented. Therefore, it is both logical and expeditious to secure their legal expertise before the law is final, instead of combating their legal expertise after the law is passed.

Suitable techniques for consultation include:

(a) The circulation of legal texts for written comments;

(b) Conferences, seminars, and workshops;

(c) Informal meetings;

(d) Communication through the media;

(e) Open hearings.

This can be done through reports, informational presentations, electronic communication, and effective use of various media. During the legislative drafting process, the key parties who should be fully informed include Government officials, members of legislative working Groups, members of parliament, and representatives of legal departments. When the legislative drafting process is open and consultative, it is much more likely that sound legal analysis will reach the attention of parties who can influence the structure and content of laws.

2.2.5. How are laws Harmonised during the drafting process?

The harmonisation of draft laws takes place within the specific context of the legislative drafting process. Therefore, the role of different parties depends upon the nature of the system, including the institutional structure and the procedural rules. Still, there are a number of general principles and best practices which are universally applicable, in order to enhance the quality of draft laws.

SEVEN GENERAL PRINCIPLES FOR PROMOTING HARMONISATIN AND COMPLIANCE DURING THE LEGISLATIVE DRAFTING PROCESS

1. Harmonisation and compliance issues should be fully dealt with before laws are passed

2. Harmonisation should be carried out from the start of the legislative drafting process

3. Harmonisation should be carried out systematically, and at all appropriate stages of the legislative drafting process

4. Legal expertise should be secured from all knowledgeable and involved parties

5. Analysis and conclusions concerning compliance issues should be fully documented

6. Analysis and conclusions concerning compliance issues should be disseminated and applied

7. There should be sufficient time for legal analysis

Each of these seven principles will be considered in turn:

(1) The first guiding principle is that harmonisation and compliance issues should be fully dealt with before laws are passed. This sounds elementary, but the fact of the matter is that mistakes do occur. And there is no such thing as a small mistake during the legislative drafting process. As a consequence, amendments and revisions are required. Legal certainty is sacrificed, target groups become confused, time and money are lost, and the rule of law is undermined.

(2) The second guiding principle is that harmonisation should be carried out from the start of the legislative drafting process. Indeed, it is important to secure preliminary advice concerning compliance issues during the policy making phase, when the law is designed, Sound elaboration of the objectives of a law sets the stage for accurate drafting of provisions. Further, proponents and drafters of new laws have initial and primary responsibility for ensuring that the comply with legal requirements.

(3) The third guiding principle is that harmonisation should be carried out systematically, and at all appropriate stages of the legislative process. Expertise is regularly required by all parties who draft, assess and approve laws, whether they work in specialised institutions, the Government, Line ministries, or parliament. Further, laws are often changed during the process which creates them. All amendments must be evaluated, to assess their relationship to the rest of the draft, existing laws, and international standers. It does not make sense for legal experts to perfect for an early version of a draft law, only to have an amended/legally incorrect version passed by parliament. The legislative process must be structured and timed to facilitate legal review of increasingly finalised versions of draft laws, and to take account of supplemental legal expertise.

(4) The fourth guiding principle is that legal expertise should be secured from all knowledgeable and involved parties. Consultation is crucial for ensuring compliance (justifying its place as the third step in the harmonisation process). Full opportunities to provide legal expertise should be extended to members of working groups, specialists at ministries, legislative drafters, and staff in legal departments (attached to the government, ministries, parliament, and /or office of the president, depending on the legal system) legal experts outside governmental institutions should also be fully included in this work.

(5) The fifth guiding principle is that analysis and concerning compliance issues should be fully documented. The most appropriate place to do this is in the explanatory memorandum which accompanies draft laws.

Information which should be documented includes how the new law interacts with existing laws, whether existing laws need to be amended or revoked, how the new law fits into the existing legal framework, and how implementation will be secured.

Unfortunately, even when it is mandatory to place this kind of information and analysis in the explanatory memorandum, the task is often handled in a perfunctory or pro forma manner.

It is important to emphasise that the special legal expertise described above is not required by all parties engaged in drafting or approving laws.

It is sufficient if non experts:

(a) Fully respect constitutional requirements and coherence of the legal framework;

(b) Understand the principle of supremacy, and the need to coordinate new and existing laws;

(c) Obtain, share, and accept legal expertise regarding compliance issues.

(6) The sixth guiding principle is that analysis and conclusions concerning compliance issues should be disseminated and applied. This corresponds to the forth step in the harmonisation process. Unfortunately it is not sufficient for the work to be inclusive and documented. Analysis/results must be shared with all interested parties, considered, and utilised, in an atmosphere of cooperation and transparency. Modern information and communication technology can play a key role, at minimal cost, and should be put to full use.

(7) The seventh and final guiding principle is that there should be sufficient time for legal analysis. The pace of the legislative drafting process can significantly affect compliance; many countries produce numerous laws on a strict and aggressive timetable, set to serve political objectives. But accelerated legislative calendars place excessive pressure on legal experts, and cut the consultation process short. They fail to acknowledge the fact that correctly performed compliance checks take time. Countries in transition are notorious for expediting the legislative drafting process, and producing too many new laws in too little time.

Finally, it is very important to note that full legal harmonisation involves much more than simply conventions. Harmonisation also depends upon implementation. Therefore:

(1) There must be political and administrative support at all levels of government for ensuring that laws are implemented in accordance with applicable standards.

(2) There must be sound implementing regulations, whenever required.

(3) Administrative institutions need commitment and capacity to carry out their mandates and supervise compliance, this concludes-

(a) an effective, professional, and well trained civil service;

(b) necessary facilities, equipment, and resources;

(c) sufficient inter institutional linkages; and

(d) sound communication and information sharing practices.

(4) Courts must adjudicate and facilitate the enforcement of all applicable legal standards. This requires good facilities/equipment, qualified personnel, and sound procedures.

(5) There must be businesses, legal professionals, civil society, and the general public.

In other words, legal harmonisation is more than a criterion for legislative drafting. It is part of a complicated and extended process that only begins with passing a law. Indeed, the realisation of national and international legal standards is ultimately a question of implementation. Therefore, making laws practical and effective are a key component of harmonisation.

2.2.6. Conclusion

For laws to harmonisation with other, and meet national and international legal requirements and standards, all precisions must fulfill the conditions for legality, and be free from contradiction. In addition, all provisions should be compatible, to promote the objectives of laws. The two fundamental conditions for establishing and maintaining a harmonised and coherent legal system and legal framework are:

(1) that new laws be harmonised with those which already exist, and

(2) that existing laws be harmonised with any subsequently enactments which have superior force.

For laws to be fully sound, all provisions must be both necessary and correct. Legal provisions which require harmonisation are amongst the most important to get right, the first time. This is because any error will inevitably affect other laws, and conflict with national requirements and international obligations. In addition, failure to harmonise creates confusion on the part of parties charged with administering, enforcing, adjudicating and complying with laws. This results in legal uncertainty, and undermines the rule of law.

Therefore, it is necessary for all parties involved in the legislative drafting process to seek legal expertise. In addition, legal experts should have every possible opportunity to ensure that the typology of laws is followed, the principle of supremacy is respected, the provisions of draft laws are compared to existing laws, and all relevant international standards and obligations are fulfilled. In addition, when a legal act of superior force affects pre existing laws all aspects of this relationship should be addressed. Otherwise, pre existing laws have to be thoroughly reviewed, to determine the need for and draft any required amendments.

2.3. Legislation should be practical and Effective:

2.3.1. Introduction

Good governance depends upon sound legislation. When laws are practical and effective, the administrative machinery of the state and the legal system can function properly, and help meet societal needs. This indicates that leaders, government officials, and legislators are performing their jobs well, and that the legislative drafting process is working.

Practical and effective legislation is also a key requirement for the rule of Laws. To support the rule of law, legislation must be:

(1) Accessible, intelligible and reasonably acceptable to the governed.

(2) Straightforwardly and impartially administered.

(3) Objectively, fairly, and properly adjudicated.

(4) Impartially, uniformly, and correctly enforced.

(5) Compatible with the knowledge, skills, and experience of the legal profession.

When these conditions are met, legislation (a term which includes primary laws, secondary regulations, by laws, decrees, ordinances, and any other kind of legal act) is more likely to serve the interests of society, promote development and economic growth, and protect human rights. Further, it can play an active and positive role in daily life.

However, even in the most developed countries, with longstanding legislative drafting traditions supported by expertise and information resources, legislation can be of questionable quality, and not work well in practice. This raises a number of crucial questions:

(1) Why is it so difficult to produce practical and effective legislation?

(2) Why is there often disagreement concerning the best ways to achieve policy objectives?

(3) How does legislation become politicised, or based on ideological or pecuniary interests?

(4) Why does impractical/ineffective legislation remain in force, long after results are clear?

(5) What can be done to improve the quality of legislation and the drafting process?

These questions demonstrate that there are many challenges and obstacles to setting up a good legislative drafting process. Nonetheless, it is important for all countries, and especially those which are in transition or reforming their legal systems, to identify and put in place measures which make legislation practical and effective.

2.3.2. What is practical and effective legislation?

Legislation is practical and effective when it successfully implements policy, and meets its intended goals in the most viable and cost-effective manner.

Practicality is a measure of how well legislation takes account of and corresponds to the actual situation in the "real world". When legislation is practical, it can be implemented without interference from foreseeable obstacles. Obstacles to be avoided include lack of funding or capacity for implementation or enforcement, constraints in human resources or information resources, natural and environmental conditions, resistance from target groups, etc.

Effectiveness in a measure of law is how promptly legislation meets its goals, and how efficiently resources are targeted towards achieving results. Resources are always required for achieving policy objective though legislation. Legislation must be published/publicised, administered, adjudicated, and enforced. Numerous institutions (from ministries to courts) and individuals (from bureaucrats to policemen and judges) are exclusively dedicated to effectuating legislation. In addition, target groups must spend their time and money to comply. Even penal laws which impose fines may end up costing more money than they bring in. Clearly, there has to be a balance between what is achieved, what is spent, and how much time is required.

Legislation which is practical, effective, aligned with societal interests, and seen to be legitimate is also more likely to be obeyed. Legislation is always more successful and less costly when target groups exercise self compliance, and minimize the need for supervision and enforcement. It is cumbersome and expensive for the state to enforce legislation which is unsound, unlikely to achieve its intended results, or contrary to the interests/practices of target groups. Further, such legislating dermises confidence in governance and the legal system, and compromises the rule of law.

Practicality and effectiveness are somewhat independent of policy. Of course, it is harder to draft implementing legislation for a policy which is counterproductive, saves narrow interests, or lacks legitimacy; still, regardless of the policy selected, legislation must be sound to be implemented. Legislative drafters are responsible for finding the best way to implement policy.

Impractical and ineffective legislation has a ripple effect throughout the economy, society, and legal system, causing harm to the governors and governed alike.

2.3.3. How can Legislation be made practical and effective?

Legislative drafting is not pure science, Nonetheless, government officials, Members of parliament, and legislative drafters have many procedures, mechanisms, and tools at their disposal to improve the quality of draft legislation, and make it more practical and effective.

What are the key factors which enhance the quality of legislation?

(a) Professional and de-politicised policy making;

(b) A will structured drafting process;

(c) Juridical institutions and individuals fulfilling properly defined roles;

(d) Legal and substantive expertise;

(e) Accurate, comprehensive, and accessible information resources;

(f) Open and participatory mechanisms which facilitate input from all interested parties;

(g) Transparency and accountability.

Optimal analytical approaches and decision making techniques for drafting practical and effective legislation must answer two key questions:

(1) Which pre existing conditions and circumstances will affect the success of draft legislation? This question needs be answered through substantive knowledge and accurate empirical information.

(2) What impact/effect will the draft legislation actually have, in light of these conditions and circumstances? This question is best answered through regulatory impact analysis (RIA).

EXISTING CONDITIONS TO ASSESS WHEN DRAFTING LEGISLATION

- The structures and roles of governmental and juridical institutions
- Institutional and administrative capacity
- Roles and procedures of governmental officials legal professionals
- Resources (financial, material, capital, and human)
- Information management (including access, utilisation, and dissemination)
- Law enforcement capacity and practices
- Legal jurisprudence (the state of the law and existing legislation)
- Adjudication, the work of the judiciary/courts, and enforcement of judgments
- Environmental factors and natural resources
- Communications and transportation
- Cultural and linguistic issues

Any one of these conditions and circumstances can dramatically affect and alter the degree of practicality and efficiency of legislation, and thereby its ultimate success for this reason, accurate information, substantive knowledge, and practical expertise are required.

Equipped with knowledge and information concerning actual conditions and circumstances, and taking account of the policy objectives of the draft legislation, it is possible to move on to the second question, and analyses the likely results of draft legislation. This is best accomplished through RIA.

Policy making and legislative drafting are invariably base on a wide range of assumptions, concerning a) actual conditions and circumstances, b) how they will change over time, and c) how they will be affected by new legislation. These assumptions concern economic cycles, technological development, government resources, international affairs, natural phenomena, human behaviour, etc. However, legislation (and RIA) are only as good as these assumptions.

If correct information is available, there are two main causes of incorrect assumptions:

(1) Faulty analysis, probably due to inadequate skills and techniques or wishful thinking.

(2) An erroneous presumption that the world is static rather than dynamic.

To avoid the first cause of incorrect assumptions, it is necessary to-

(a) develop analytical skills;

(b) put them to optimal use though collaborative working practices;

(c) challenge them through consultation with a range of interested parties; and

(d) professionalise (de-politicise) the legislative drafting process.

To avoid the second cause of incorrect assumptions, it is necessary to understand that conditions are always changing. taking the examples of assumptions listed above: economic trends are unpredictable, technological development alter our lives in unforeseen ways, government resources are rarely in line with predictions, international relations are affected by a multitude of changing variables, and nature always surprises us (variable rainfall, heat/cold, earthquakes, agricultural pests, epidemics, etc.).

In addition, assumptions about the behavior or target groups and how they will respond to new legislation are often inaccurate; Target groups are dynamic actors who adjust their behaviour according to incentives and penalties (and their probability). They routinely utilise services of a wide range of professionals and experts (from lawyers to accountants to tax planners), who instruct them on how to maximise results by changing behaviour in response to new legislation. This makes predicting the future behaviour of target groups a default exercise. And when those predictions are incorrect, the results of the legislation will be different from what is expected.

In this context, drafting legislation for an ever-changing world is like trying to hit living and moving target. Indeed, circumstances may change while legislation is being drafted. Therefore, government officials, members of parliament, and legislative drafters must obtain the latest and most accurate information, and make full use of all of the analytical skills and tools available to them, especially RIA.

Legislation based on an inaccurate assessment of conditions/circumstance or faulty assumptions is likely to miss its mark and have unintended consequences. And RIA bases on the same information and assumptions cannot save as a useful tool for making corrections or improvements. Therefore, access to and full utilisation of accurate empirical information, and the development of sound assumptions, is indispensable pre-requisites for drafting practical and effective legislation, and for properly performing RIA.

2.3.4. What are sunset provisions, and how should they be utilised?

“Sunset provisions” are one of the best mechanisms for ensuring the continuing viability of legislation, and prevention it from outliving its usefulness. Sunset provisions can either limit the amount of time which legislation remains in force, or set a specific expiration date. In either case, the legislation has a limited lifespan, after which it automatically expires. In order to re authorise the legislation or extend its validity, positive action must be taken, through the regular

legislative drafting process. Thus, sunset provisions make it mandatory to assess and analyses the actual results of legislation. Extensions or amendments must take full account of what has been achieved, what has worked best, and any shortcomings.

Obviously, Sunset provisions only have an ex post facto effect. They cannot directly guarantee that specific legislation is practical and effective before it is passed.

Unfortunately, while government officials, members of parliament, and legislative drafters devote considerable time to preparing and passing new legislation, they are much less engaged in assessing the results of previous work. New problems are pressing. Time is short. Mechanisms for obtaining accurate and unbiased feedback are underdeveloped. Reviews of the results of prior legislation tend to be general or political, rather than technical and professional. Finally, due to turnover, the parties responsible for previous legislation may not be around.

The fact that legislation is usually approached in a prospective manner, and rarely analysed in a retrospective manner, is one of the greatest obstacles to quality control.

Sunset provisions can automatically alter this dynamic, by mandating subsequent review of specific legislation. And they are not difficult or complicated to put in place.

2.3.5. Conclusion

Good governance and the rule of law require practical and effective legislation, which can be implemented, enforced, adjudicated, and obeyed. But it is not easy to draft and pass legislation which takes account of and corresponds to the actual situation in the real world, and which meets its goals in an efficient, cost effective and timely manner. Far too often, impractical and ineffective legislation fails to meet its own objectives, and undermines the legal system, while imposing un-necessary costs for implementation and compliance.

General measures to correct this situation, by improving the legislation drafting system, include professionalising and de politicising policy making and legislative drafting, rationalising the drafting process, ensuring that juridical institutions and officials are able to fulfill properly defined roles, effectively incorporating legal and substantive expertise into the drafting process, ensuring the availability of comprehensive and accurate information resources, and putting in place open and participatory mechanisms which ensure transparency and communication, and facilitate impute from all interested parties.

Specific measures to correct this situation, by improving the quality of draft legislation, start with access to solid empirical information concerning pre existing conditions and circumstances, and careful analysis of the likely impact of draft legislation, based on sound assumptions. Regulatory impact analysis can play a major role in this process, and help legislation make decisions and act on the basis of reason and knowledge.

Finally, it is necessary to highlight the crucial and cross-cutting role played by transparency and open/consultative legislative drafting processes. When legislative drafting is left to officials and insiders, there are severe limits on information resources, expertise, analytical sills, and practical experience. Open processes direct legislative drafting towards the big picture and the long run, challenge assumptions, point out obstacles, place limits on political influence, and promote

accountability. Public participation significantly enhances the overall quality of legislation, and makes it much more practical and effective.

2.4. Legislation should be Normative, Not Aspirational

2.4.1. Introduction

The function of legislation is to achieve policy goals by controlling the behaviour of target groups, in this context, legislation can be defined as legal act which establishes prohibitions, obligations, and rights for defined target groups within a specific jurisdiction.

It is helpful and illustrative to separate this formula into five distinct and concrete components. For legislation to establish prohibitions, obligations and rights it must indicate:

(1) Who (the target group or subject).

(2) Must not, must, and/or may (the prohibitions, and/or rights).

(3) Do what (targeted behaviour).

(4) When and How (under what conditions and circumstance, with what exceptions).

(5) Where (the jurisdiction).

Note that it is not always necessary to specify where, since jurisdiction may be clear from the context. For example, national legislation normally applies throughout the territory of the country, while provincial/state /municipal legislation has defined territorial application. However, exceptions to this general principle of jurisdiction must always be specified (for example, if national legislation applies to conduct performed abroad or only within a certain part of the territory).

According to the above scheme, legislation must coherently forbid, require, or authorise something in order to be substantively sound, implementable, and effective, this approach can be called normative legislative drafting. Because it has focuses on the creation and enforcement of defined norms.

When drafting diverges from a normative approach, the resulting legislations more difficult to implement, obey, enforce, and adjudicate. This is because legal professionals, legal institutions, and citizens can only work with well defined norms concerning their behaviuor. When legislation contains goals that are general, indefinite, ill defined, ambitious, political, unrealistic, or unachievable, it is the result of what can be denominated inspirational legislative drafting.

Legislation that proclaims goals rather than establishing norms is actually less likely to achieve those goals. Further, such legislation compromises and “dilutes” the value of all legislation. This is because parties which implement, enforce, adjudicate, and obey legislation cannot act accordingly, and end up losing respect for the legal system. Legislation is not the place for policy pronouncements or aspirations, no matter how positive, beneficial, or laudatory they might be.

2.4.2. Drafting normative provisions

Sound normative legislation starts with clear policy objectives. The initiators or proponents of legislation must set forth exactly what they hope to achieve, and then communicate that information to the legislative drafters. It is then up to the legislative drafters (whether part of a formal institution/department or an informal working group) to formulate the appropriate legislative and executive bodies.

Legislative drafters sometimes utilise preliminary provisions to set the context for legislation, identify its policy objectives, state its legal basis, and/or explain its rationale. The preamble, citations, or recitals at the beginning of legislation are most appropriate for this purpose. This practice more common in international and multilateral legal instruments, which require a demonstration of consensus concerning legal approach, in any event, preliminary provisions are purely for explanatory purposes, and do not have legal effect. The body of legislation the only component with legal effect must contain all required normative provisions.

2.4.2.1. Provisions which create prohibitions

Provisions which create prohibitions prevent target groups from taking actions which they might otherwise take. Provisions which create prohibitions are properly considered first. This is because prohibitions are usually the most serious type of rule to break. Criminal or at the very least administrative sanctions are likely to be imposed for failure to heed a prohibition.

This provision clearly identifies the target group, states what this target group cannot do, and specifies an exception to the prohibition. Note that it may be necessary to define the term “actual danger”, and specify who takes this decision, in order to make this provision legally certain.

The following Three formulations are optimal for prohibitions:

(a) Must not;

(b) Shall not;

(c) Is/are prohibited from.

While “shall not” is regularly employed by drafters, and treated as an historical tradition, the fact of the matter is that the word “shall” is-

(a) used in many different contexts;

(b) used inconsistently; and

(c) sometimes subject to divergent interpretations.

In addition, it cannot really be considered part of Standard English. For this reason, it is disfavored and even avoided in certain jurisdictions, where “must not” is deemed to be the most appropriate formulation.

It is recommended that prohibitions employ strong formulations, such as those identified above weaker formulations make prohibitions aspiration, or unenforceable. Consider the following:

(1) Should not;

(2) Cannot;

(3) Is/are not authorised to;

(4) Is/are not permitted to;

(5) Is/are not allowed to;

(6) Is/are not to.

What does it mean when target groups are "not authorise" to perform an act? Is there a difference between a prohibition and a lack of authorisation? It clearly sounds as though the target groups are not encouraged to take some positive action, but this is not the same as a categorical prohibition against that action.

Certain formulations turn provisions into suggestions, lacking legal force, and are not recommended:

(1) Should avoid;

(2) Should try not to;

(3) Are advised against;

(4) Must be discouraged from;

(5) Will not.

With prohibitions, it is superfluous and potentially counterproductive to add qualifiers like:

(1) Strictly;

(2) Absolutely;

(3) Expressly;

(4) Under any circumstances.

What is the difference between actions which are "prohibited" and actions which are "strictly prohibited"? What is the difference between actions which "must not be performed" and actions which "must not be performed under any circumstances"? Drafter(s) may be trying to make a point, that certain conduct is more serious, but this actually makes the opposite point, that other conduct is less serious. Any prohibited conduct is (by definition) serious! Prohibitions, s a class

of normative provision, are undermined by the use of qualifiers indicating degrees/levels of seriousness.

The better approach is to-

(a) prohibit that which is prohibited, and

(b) indicate seriousness exclusively through the degree of sanction or penalty that is applied.

Exceptions to prohibitions can employ the following formulations:

(1) Unless;

(2) Provided that;

(3) If;

(4) Except.

Exceptions, particularly if they are formulated using any word other than "unless" are best placed in a separate sentence.

Properly drafting prohibitions according to the principles outlined above increases the chances of affecting the behaviour of target groups to realise the objectives of the legislation.

2.4.2.2. Provisions which create obligations

Provisions which create obligations require garget groups to take actions which they might not otherwise take. This category of normative provision is considered second, after prohibitions. There may be very important reasons for requiring target groups to take actions, for example to protect national security or save lives. However, the majority of obligations relate to administrative requirements, which are technical or financial in nature.

Here is a sample obligation:

"Every citizen must file an annual tax declaration in the prescribed format with the department of revenue by the fifteenth day of the fourth month of the subsequent calendar year."

Let's beak this down into the component parts:

(a) Every citizen (who, the target group or subject);

(b) Must (obligation);

(c) File an annual tax declaration in the prescribed format with the department of revenue (do what);

(d) By the fifteenth day of the fourth month of the subsequent calendar year (when).

This provision clearly identifies the target group, states what this target group must do, and specifies one circumstance (timing).

The following two formulations are most frequently used and considered optimal for obligations:

(a) Must;

(b) Shall.

However, it is important to be aware of potential difficulties with the "shall", discussed above with respect to prohibitions.

The following formulations are generally acceptable and often utilised, but not optimal:

(a) Is/are required to;

(b) Has/have to.

Certain formulations turn obligations into suggestions that lack legal force, and are not recommended:

(a) Should;

(b) Need(s) to;

(c) Ought to;

(d) Is obliged to;

(e) Is/are requested to;

(f) Is/are to.

What does it mean to say that target groups "should perform an act"? It has the connotation that it would be better if they do, and that they are requested to do so. But this is not the same as saying that they absolutely must.

When drafting obligations, it is superfluous and potentially counterproductive to add qualifiers like:

(a) Definitely;

(b) Absolutely;

(c) Positively;

(d) Certainly;

(e) Under all circumstances.

What is the difference between actions which "must" be taken and actions which "absolutely must" be taken? What is the difference between actions which "shall be taken" and actions which "shall be taken under all circumstances"? As with prohibitions, when drafters qualify obligations they undermine obligations as a class of normative provision. Once again, it is preferable to treat all obligations as obligations, and distinguish their importance through the application of different degrees of penalty or sanction in the case of violations.

Properly drafting obligations according to the principle outlined above increases the chances of affecting the behaviour of target groups to realise the objectives of the legislation.

2.4.2.3. Provisions which authorise and create rights

Provisions which create rights present options to target groups, authorising and enabling them to take actions which they might not otherwise be allowed to take. It is important to emphasise that the exercise of tights is discretional. Target groups can elect to exercise the rights or forego them. Thus, only normative provisions which create rights contain an element of choice.

Thus, normative provisions which create rights may not actually change anything. There are many reasons that target groups might choose to forego rights. In fact, provisions which create rights are sometimes drafted cynically, without adequate provisions or mechanisms for facilitating their exercise. For example, legislation might grant citizens the right to peacefully protest in public places, provided that they obtain a permit in advance from local authorities. If local authorities do not in fact grant such permits, then the right cannot be exercised in practice, and no target groups will actually try to do so.

Here is a sample right:

> "Companies registered as state enterprises under section 301 of the state enterprise act are entitled to relocate to another location within the state without payment of the business Relocation tax specified in section 223 above, provided that they advise the department of revenue in writing at least six months in advance".

Let's break this down into the component parts:

(a) Companies registered as state enterprises under section 301 of the state enterprise act (who, the subject);

(b) Are entitled and authorised to (right);

(c) Relocate to another location within the state without payment of the business relocation tax specified in section 223 above (do what);

(d) Provided that they advise the department of revenue in writing at least six months in advance (condition precedent).

This provision clearly indentifies the target group, states what this target group is entitled to do, and specifies the conditions required for exercising this right.

The following formulations are optimal for rights:

(a) Is/are authorised to;

(b) Is/are entitled to;

(c) Is/are permitted to;

(d) Is/are allowed to;

(e) May;

(f) Can.

It is preferable not to use the conditional formulations or qualifiers for rights:

(a) Might;

(b) Would be allowed to;

(c) Could be authrised to;

(d) Can be permitted to.

What does it mean to say that target groups "might be permitted" to perform an act? Does this mean that they can act, or that another party must take prior action to permit them to act?

Exceptions to rights can employ the following formulations:

(a) Unless;

(b) Provided that;

(c) If.

Note that provisions creating rights can also be structured as obligations for parties that must accommodate those rights. Thus, a provision granting citizens the right to assemble in public could be drafted as an obligation on the part of municipal authorities to permit citizens to exercise their right to assemble in public.

2.4.2.4. Exceptions to Normative drafting

In order to be enforceable, legislation should always provides sufficient information to target groups so that they can-

(a) identify who they are;

(b) determine what they must not, must, or may do; and

(c) under which circumstances.

However, it is not necessary for every single provision or article to contain all of these elements. Consider the following circumstances:

(a) In complex legislation, required information concerning scope, applicability, and/or exceptions can be placed in a separate section.

(b) Definitions can be used to provide information of general applicability, so that it does not need to be repeated.

(c) Amendments to existing legislation can address only the changes in normative rules, relying upon the main legislation to cover the remaining provisions which are unchanged.

Take a look at the following articles:

Article 1: passive income from the rental of real estate is subject to taxation at the rate of 20%

Article 2: passive income from the sale of real estate owned for at least five years is subject to taxation at the rate of 15%.

One common technique for avoiding the stringent requirements of normative drafting is use of the passive voice. The passive voice results from the designation of something other than the target group as the subject of a sentence. Usually this is an inanimate object, an action (verb), or a circumstance (if). The active voice can be identified by a designation of the subject at the start of the sentence. The subject is often designated later when the passive voice is used. Look at the following examples:

"Applications for an extension must be filed at least thirty days is advance."

"Homeowners must file applications for an extension at least thirty days in advance"

"License taxes are due and payable before the first day of the following fiscal year."

"Owners of retail establishments, as defined in section 12, must pay all license fees before the day of the following fiscal year."

"Entry into restricted areas by unauthorised personnel is prohibited, and can result in a fine equal to twenty times the standard minimum wage."

"Unauthorised personnel are prohibited from entering into restricted areas. Violators are subject to a fine equal to twenty times the standard minimum wage."

In other words, laws should not address objects or actions when they really apply norms of people. Exceptions should be carefully screened. Thus, for example, laws can use the passive voice when they actually apply to inanimate objects (if they specify product standards or the contents or the contents of documents). In addition, laws can apply to actions if they are universally applicable, and there is no doubt concerning this point. For example:

"Smoking in public places is prohibited".

"Fishing in national parks without a license is prohibited."

In these cases, the normative provisions clearly apply to everyone, so it is acceptable to start by indentifying the action that is prohibited, thereby making the action into the subject.

Therefore, the passive voice should not be used in legislation. It should be restricted to informational documents, announcements, or signs. Laws should present norms that facilitate enforcement.

2.4.3. Conclusion

Failure to comply with the principles of normative legislative drafting is one of the most common mistakes in the drafting process. This is unfortunate, since the consequences can be extremely significant. Legal professionals and target groups are unable to apply, enforce, adjudicate, or obey legislation which does not clearly formulate normative obligations.

This is also an entirely avoidable problem. Normative legislative drafting is a relatively straightforward technique, based on the consistent application of clear linguistic formulations in the language of legislation.

2.5. Legislation Should Establish Appropriate Sanctions

2.5.1. Principal categories of sanctions

To properly impose sanctions, legislation must clearly:

(a) Identify who is responsible or liable for taking an action or failing to take an action; and

(b) Directly connect actions and oversights to specific and clear sanctions or penalties.

The sanctions should be cogently structured and explained. They should clearly indicate under what conditions they will be applied.

There are three principal categories of sanctions:

(a) Criminal (fine or imprisonment or both);

(b) Civil (civil penalty, civil liability, injunctive relief, presumption of negligence);

(c) Administrative (revocation of license or permit, adverse publicity).

However, these categories tend to overlap in current practice. For example, in some countries payment may be imposed for a violation of penal laws, civil laws, or administrative regulations. In addition, administrative detention may be applied to individuals who are not charged with any crime (such as immigrants or migrant workers). It is important to exercise caution, however, since legal soundness may be compromised when the category of sanction does not match the category of legislation.

It is important to make sure that sanctions are appropriate for the objectives of the legislation. The type of sanction that will prove most effective and implementable depends upon:

(a) The type of legislative act;

(b) The authorities responsible for implementation and enforcement;

(c) The kind and degree of harm caused;

(d) The resources that is available;

(e) The capacity for administration and surveillance;

(f) The capacity for enforcement and prosecution;

(g) Public policy and public values;

(h) Technology.

In order for legislation to meet its objectives, sanctions must be implementable, cost effective, proportionate, flexible, aligned with public interests, and have dissuasive/deterrent effect.

2.5.2. Implementable

To be implementable, sanctions have to be within the capacity of the institutions which apply them or carry them out. These include administrative agencies, the court system, and penitentiary services. Capacity involves practical and logistical issues, which relate to institutional mandates, human resources, information resources, physical facilities, space, equipment, etc.

2.5.3. Cost Effective

Cost effectiveness involves the relationship between the objectives which are served and the expenses which are incurred. For example, civil and administrative sanctions are sometimes used to raise revenue. It they cost more to implement than they bring in, then they are not cost effective. Cost should be calculated in a comprehensive fashion, to include intangible items such as time spent and opportunity costs.

Penal sanctions are always costly to apply, but they are usually considered warranted for other purposes. For example, cost may be deemed less important than protecting society, punishing offenders, or discouraging conduct. But if the costs of incarceration vastly exceed the harm being done by perpetrators, then the sanctions may be excessively cost ineffective. An example of this would be incarceration for victimless crimes.

Legislative drafters should also consider the cost relationship between harm and enforcement. In other words, the amount of resources devoted to prevention, prosecution adjudication, and castigation should correspond to the level of harm and danger to society. This may not be the case when significant resources are devoted to enforcing “morality”. If too many resources are devoted to preventing and prosecution action which causes relatively little damage, sanctions are

not cost effective, and there may be a case for using those administrative resources in a different fashion. In addition, such circumstances can lead to selective prosecution and corruption.

2.5.4. Proportionate

Proportionality involves the relationship between the offense and the sanction. Clearly, the seriousness of the sanction should reflect the nature of the offense. In other words, the punishment should fit the crime. Factors to be considered include the intent of the perpetrator, the harm caused, the nature of the issues involved, the conditions of the target groups, and public interest/welfare.

When considering harm, it is important to identify:

(a) Who/what is harmed,

(b) The nature of the harm (seriousness and duration), and

(c) Reparability (potential for restitution)

In an effort to respond aggressively to particular situations, legislative drafters often establish unduly severe or inappropriate sanctions. This is particularly associated with the "command and control" approach to legislation. Of course, common sense establishes limits. It would hardly seem appropriate to impose incarceration for a parking offense. But sanctions are often not proportional.

Consider the following actual provision:

> "In the event that an association or foundation fails to file an annual report in the format required by this law and according to the timing required by this law, its registration and certificate of operation can be revoked".

The dissolution of a juridical person is an extremely harsh penalty for failure to comply with an administrative obligation. While many authorities might like to have such means at their disposal, it actually prevents them from responding in a manner which reflects the actual nature and seriousness of the issue being addressed.

2.5.5. Flexible

In many instances, a rage of sanctions is available. This makes it possible to take specific circumstances into account, such as intention (mens rea), previous conduct, extenuating circumstances, etc. to limit the discretion of judges; mechanisms such as sentencing guidelines are sometimes applied. Very often, legislators carelessly neglect to establish an appropriate range of sanctions. This can be counterproductive.

Let's take the example of the NGO reporting requirement above. This type of provision is designed to demonstrate a serious official attitude. However, in addition to being disproportionate, it is inflexible. Instead of establishing a range of viable sanctions, it provides for only one, namely dissolution, which is the ultimate sanction. Instead of empowering authorities, it actually limits their range of action. Seeking dissolution of an NGO is likely to be a

relatively complicated procedure, especially compared to other sanctions (such as administrative fines).

2.5.6. Aligned with public interests

Sanctions should reflect and be in accordance with public values and mores. This does not imply that they should be dictated by the whims of public opinion or manipulated by media. Instead, it highlights the importance of not offending or contravening important norms. Further, if sanctions become controversial, this distracts attention from their important role.

2.5.7. Deterrent

The deterrent value of sanctions is hotly debated by experts. Some parties maintain that punishments set an example, and that target groups (whether regular citizens or criminals) are attuned to the potential repercussions of their actions. Other parties argue that criminals or individuals with little too lose have different decision making processed, and that potential punishment (particularly if it is in the distant future and only follows lengthy court proceedings) does not have any major impact. Regardless of how this debate is resolved, the fact remains that the potential deterrent effect of sanctions should be considered. May target groups will be concerned about sanctions, particularly if they are carefully selected to reflect their interests, vulnerabilities, and fears.

It is important to address all of these issues in a rational and practical manner. Legislative drafters should have a good understanding of the administrative, adjudicative, and penal systems, and how target groups are likely to respond to legislation and different sanctions.

2.6 Legislation should be technically Sound/Correctly Structured

To achieve its objectives, legislation must be technically sound. Technical soundness refers to the way legislation is written, its structure, content, and the way that words are formulated.

There are two aspects of technical soundness:

(a) Structural, organisational, and formatting requirements for the specific kind of legislation;

(b) Drafting techniques and accurate linguistics.

This section addresses the first aspect of technical soundness. Subsequent sections address the second aspect.

Laws, manuals, or guidelines in most countries address the technical requirements for legislation. They usually contain criteria pertaining to different types of legislation (which helps to select the correct and most appropriate legal instrument), address structural issues, and provide instructions concerning content. Basic guidelines may be found in the constitution. But details are usually contained in a law on normative acts, similar framework law, or parliamentary statutes.

Why are the structure and format of legislation important?

In order to be technically sound, legislation must be correctly and accurately organised, structured, and formatted. This should be considered a primary objective of the legislative drafting process. In addition, it is a major responsibility of all parties engaged in preparing legislation.

There are four basic principles or requirements concerning the organisation, structure, and format of legislation. Simply stated, legislation must:

(a) Include all required components;

(b) Place all components in the correct (established) order;

(c) Distinguish different components and separate them completely;

(d) Exclude extraneous material.

To summaries: "put the right things in the right place and the right order".

What are the key components of legislation?

Legislation customarily has the following basic components, in approximately this order:

(1) Title.

(2) Table of contents (to set forth the structure, and make it easy to locate subjects of interest).

(3) Preliminary provisions. Typical examples include preambles, enacting clauses, statements of purpose, citations, recitals, summaries, or statements of scope.

(4) Delineation of subject matter and scope.

(5) Definitions.

(6) Substantive and normative provisions. These can set forth a) prohibitions, b obligations and/or c) rights. They can be formulated as major rules, secondary rules, and exceptions.

(7) Procedural and administrative requirements, generally relating to implementation.

(8) Sanctions or penalties.

(9) Appropriations and financial requirements.

(10) Transitional provisions. Typical examples include transitional clauses, effective dates, applicability clauses, publication provisions, savings provisions, and technical provisions (such as the repeal or amendment of existing legislation).

(11) Annexes (only if extremely important and absolutely required).

Not all of these components are found in every legislative act. The inclusion of specific components depends upon the rules in the jurisdiction, the applicable jurisprudence, and the type of legislation.

While different options are available concerning certain components, legislation must contain:

(1) A Title.

(2) Normative provisions (prohibitions, obligations, and/or rights).

(3) Sanctions or penalties (if the normative provisions establish prohibitions or obligations, but not if they only create rights or entitlements that do not have to be exercised).

There are limited exceptions to this rule:

(1) Legislation may omit normative provisions if it only changes the sanctions for normative provisions which are pre existing or specified elsewhere.

(2) Legislation may omit sanctions if it only changes the normative provisions for sanctions which do pre exist or specified elsewhere.

In other words, it is possible for legislation to change only normative provisions or sanctions, by making reference to other legislation. However, this is actually a special circumstance more than an exception to the rule. Legislative drafters should normally consider normative provisions and sanctions to be indispensable components of legislation, and indeed partners whose relationship needs to be carefully settled.

As indicated above, each component of legislation should be handled completely in one location. Thus, for example:

(a) Normative obligations and rights should not be established in the preliminary provision or the transitional provisions;

(c) Sanctions should not be included in the preliminary provisions or definitions;

(c) Definitions should not be placed amongst the normative provisions (unless their application is extremely limited, say to a single article or paragraph);

(d) Terms should not be defined in the transitional provisions.

One of the most common mistakes concerning the intermingling of components involves norms and sanctions. Look at the following example:

> "Natural persons must consent to investigative actions even when this results in the disclosure of personal or private information. If the natural person does not

consent, an investigative action may be carried out pursuant to judicial order, and administrative sanctions may be imposed for non compliance."

The first sentence creates a norm/rule with respect to privacy rights during investigative action. The second sentence addresses procedures and sanctions in the event of non compliance. These are two separate issues, which should be addressed in their own right. Therefore, this provision should be divided into three separately numbered articles. Further, the first provision might preferably be placed in a different component or section from the second and third provisions, which more naturally belong together, the revised version is as follows:

(1) Natural persons must consent to investigative actions even when this results in the disclosure of personal or private information.

(2) If the natural person does not consent, an investigation action may be carried out pursuant to judicial order.

(3) Non compliance with a judicial order can result in the imposition of administrative sanctions.

What is the optimal order for components of Legislation?

In spite of differences between legal systems, the order of components in legislation must follow certain basic rules dictated by internal logic, consistency, the basic principles of legal reasoning, and usefulness for target groups and interested parties. Therefore,

(a) Preliminary or introductory provisions should be placed at the beginning of legislation;

(b) Definitions with general application to terms in normative provisions should precede those normative provisions, in order to make them more intelligible;

(c) Sanctions should follow normative provisions.

These principles should be considered mandatory, and part of sound practice. Of course, it could be argued that order is not as important as including all of the necessary components, since interested parties can always read sections in the order they choose. Nonetheless, for reference purposes, to create uniform approach to legislation, and to assist legal professionals and target groups alike, following a logical and appropriate order is important, in addition since almost everyone starts reading laws at the beginning, putting components in the wrong order is practically guaranteed to generate confusion.

On the other hand, certain components of legislation may be covered in different places without compromising internal consistency or enforceability. For example, it would be possible to:

(a) Reference the laws being amended or repealed at the start of legislating, instead of at the end (as long as the information is accurate);

(b) Discuss financing arrangements before normative sanctions, instead of afterwards.

(c) Principles concerning the ordering of these components should be consider voluntary, and therefore be subject to customary practice in the jurisdiction. No problems should arise (as long as these systems are consistently followed).

What is the optimal internal structure of components or provisions?

Components and provisions of legislation (as well as chapters and parts) normally have subdivisions. They may include sections/subsections, articles/sub articles, paragraphs/ subparagraphs, and clauses/sub clauses. The total number is not usually specified or limited. Subdivisions of legislation must be properly denominated, consistently organised, and correctly numbered, according to standard practice.

The particular requirements for different jurisdictions are often set forth in laws (such as law on normative acts), rules (such as parliamentary rules) and manuals or guidelines (often issued by institutions or departments dedicated to legislative drafting). The basic premise is that categories and their order and numbers should be logical, sequential, and not unduly complicated. If paragraphing, numbering, indenting, and other formatting practices are confusing, the validity and application of substantive legal provisions may be compromised. Every effort should be made to prevent formatting issues from interfering with legislative intent and reducing legal certainty.

The following sample shows how components or provisions of legislation can be efficiently organised:

Subsection (lower case letters in parentheses)-

(1) Paragraph (Arabic numerals in parentheses)-

(a) Subparagraph (upper case letters in parentheses);

(i) Clause (lower case roman numerals in parentheses);

(ii) Clause (lower case roman numerals in parentheses);

(b) Subparagraph (upper case letters in parentheses);

(2) Paragraph (Arabic numerals in parentheses)-

(a) Subparagraph (upper case letters in parentheses);

(b) Subparagraph (upper case letters in parentheses);

(1) Subsection (lower case letters in parentheses);

(i) Paragraph (Arabic numerals in parentheses);

(ii) Paragraph (Arabic numerals in parentheses);

(c) Subsection (lower case letters in parentheses)-

(1) Paragraph (Arabic numerals in parentheses);

(2) Paragraph (Arabic numerals in parentheses).

It would be possible to extend this schema to include subclasses, denominated by upper case roman numerals in parentheses: Section 101 (a)(1)(A)(i)(I). However, this is likely to lead to confusion, and is not recommended.

Another alternative, untilised in some jurisdictions, involves the following sequence:

Chapter I

Article

Paragraph

Paragraph

Article

Paragraph

Subparagraph

Clause

Clause

Subparagraph

Paragraph

Normally, the sequence alternates between numbers and letters (starting with small case)

Laws should follow an "outline" format, and apply the following principles:

(1) Numbering should be consecutive.

(2) Proper paragraphing and indenting should be used to make laws readable and intelligible, and enable users to identify provisions that interest/affect them.

(3) Subdivisions at the same level should have the same indentation.

(4) Subdivisions on a lesser level should have greater indentation.

(5) Parentheses should be used consistently (Not 2a in some places and 2(a) in others).

Headings can be used to describe major components (such as chapters, parts, and sections/Articles). They should provide guidance concerning the subject matter of the component.

They can also highlight the logical sequence of the legislation, and help reader to locate subjects of interest. Headings should not be utilised with subdivisions. It is important to remember that headings are not part of substantive law. They should not establish normative requirements, and they should be disregarded for purposes of interpreting legislative provisions. Headings are only for purposes of identification and categorisation.

Subdivisions with dubious legal states, or which complicate the format of legislation, should be strictly avoided. For these reasons, footnotes should not be utilised in legislation.

How should legislative provisions be prioritised?

Proper order and sequencing should be applied within each component, provision, or subdivision of legislation, naturally, the specific principles may vary according to the nature of the component. For example, while definitions are placed in alphabetical order, substantive provisions are grouped on the basis of priority and logic. For transitional provisions and technical provisions, it is most appropriate to mention legislation which is repealed before legislation which is amended.

With regard to substantive provisions, the following principles apply:

(1) Primary (major) provisions should precede subsidiary (explanatory or less important) provisions.

(2) Provisions concerning scope and application (to target groups) should precede details concerning specific cases.

(3) Universal and general provisions should precede specific provisions.

(4) Universal and general provisions should precede exceptions and special cases.

(5) Permanent provisions should precede temporary provisions.

(6) Normative or substantive provisions (Rules of essence) should precede administrative, procedural, and technical provisions.

(7) Provisions creating bodies should precede provisions covering their activities and functions.

(8) Provisions that will be subject to frequent reference should precede those having less salience.

(9) Provisions concerning issues having stages should be placed in chronological order.

(10) Substantive provisions should precede the delegation of powers to make secondary legislation.

These principles are not merely stylistic. They are logical, and can also affect the substance and application of legislation.

How should Legislation be titled?

Legislation should be correctly and succinctly titled. Generally speaking, titles should be concise, grammatically correct, and no longer than necessary for purposes of identification and categorisation. While using words efficiently, titles should also be sufficiently descriptive to comply with requirements for adequately identifying their subject matter. Some jurisdictions impose limitations on the scope of legislation, and thus the titles. For example, it may not be permitted for one legislative act to deal with two distinct subjects. However, in many cases it is not as easy as it sounds to determine what constitutes multiple subjects. In some jurisdictions, legislation has both a long and formal "Descriptive Title" and an informal "short title". The short title, which is set forth in the legislation itself, facilitates and is commonly used for identification and reference.

What are the basic principles for preliminary provisions?

Preliminary provisions may include preambles, citations, and recitals.

(1) Preambles are the optimal place for introductory, preliminary, and background information.

(2) Citations (Having regard to..") Set forth the legal basis for legislation and identify important procedural issues.

(3) Recitals ("whereas..") explain the background, rationale, and goals, and send messages regarding administration and adjudication.

These components of legislation are most common in treaties and conventions. They are also found in European Union directives. Their most common purpose is to demonstrate consensus amongst different parties for the rationale and purpose behind legislation. In other words, they set the stage for a multilateral approach.

In light of the above, preliminary provisions are usually considered unnecessary or even unhelpful in the context of national legislation since they are not part f legislation, and do not create enforceable norms, they cannot contribute to the legal impact. On the other hand, they might detract from the normative provisions or even create confusion. Therefore, national legislation usually focuses on the body (enacting terms), which alone can achieve objectives and implement policy.

What are basic principles for definitions?

Definitions should be grouped together in one section. This facilitates reference and is convenient for parties who utilise the legislation. The only exceptions are-

(a) When there are very few definitions; or

(b) When a term has extremely limited application (is used infrequently or in only one place), in such cases, it makes sense to use and define the term(s) in the same place.

When definitions are grouped together, they should be placed in alphabetical order according to the first letter of each term, regardless of their relative importance or the number of times they are referred to.

What are the basic principles for special clauses?

Certain special clauses are routinely included in legislation, in accordance with national requirements. They address issues relation to scope, application, adjudication, and entry into effect. These clauses are sometimes denominated enacting terms. The principle categories are as follows:

Applicability clauses: specify who and what is covered by legislation. They may be accompanied by exclusions and exemptions. Applicability can refer to categories of target groups, specific geographic locations, certain events or occurrences, particular dates, etc. For example: this act applies only to naturalise citizens who are not born within the state, " Or: "this law takes effect on July 1, 2006, and applies to all offences committed on or after that date". Sometimes application (scope) is addressed in preliminary provisions. However, it is best to avoid general statements of principle, in favour of concrete and specific provisions.

Saving Clauses: ensure that new provisions apply only after a certain point in time or under certain circumstances, thereby partially preserving select provisions of existing legislation. In other works, previously existing legislation continues to have limited application to prior event/transaction. For example: "nothing in this article affects any right, duty, or liability arising under the law in effect prior to 1 January 2006". Sometimes it is helpful to explicitly clarify the relationship between new and existing provisions. For example: "the administrative sanctions established in this act are cumulative and supplementary or those previously in effect, and are not to be construed to alter or repeal those existing administrative sanctions."

General saving clauses: are applicable to all laws in a legal system, and reduce the instances where such clauses are required in specific legislation. They might be specified in codes or even in constitutional provisions. For example: "the repeal or amendment of a law does not alter or eliminate any penalty, liability, or right under that law, unless the repealing or amending act expressly so provides. The previous law shall remain in force for purposes of any proper action or prosecution for enforcement of the penalty, liability, or right".

Grandfather clauses: are a type of saving clause that excludes certain pre existing circumstances or specific target groups from coverage. They are generally used to protect the status of existing members of target groups having long standing legal rights, while changing the status for new members. In other words, they prevent legislation from having retroactive effect. For example: "the additional licensing requirements for attorneys required under this act do not apply to individuals licensed to practice law prior to 1 January 2005. Nothing in this act shall be construed to affect the licensure of such attorneys." or: "businesses registered with the appropriate authority prior to the date upon which this law enters into effect are not required to submit the certification specified in section 213 above".

Severability clauses: ensure that even if one portion of legislation is invalidated, the remainder is not affected. They can be general (affecting the entire legal system) or specific (applying only when included in legislation, and only for that legislation).

General severability clauses: Is often part of the legal system, or included in a law on normative acts. For example: "if any provision of a statute is found by a court of competent jurisdiction to be unconstitutional or unenforceable, the remaining provisions of the statute are valid, unless: (1) it appears to the court that the valid provisions of the statute are so essentially and inseparably connected with and dependent upon the void provision that it cannot be presumed the legislature would have enacted the valid provisions, or (2) the court determines that the valid provisions, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent".

Specific severability clauses: may be justified in particular legislation, even if there is a general severability clause. For example: "if any provision of this act or this act or the application thereof is held unconstitutional or invalid, this shall not affect other provisions or applications of this act that can still be given effect without the invalid provision or application. For this purpose, the provisions of this act are declared to be severable."

Non severability clauses: are utilised when all parts of legislation are considered indispensable and mutually interdependent, and it is deemed necessary to prevent the validity of remaining provisions in isolation. For example: "if any provision of this act is held invalid, this will invalidate the act in its entirety. For this purpose, the provisions of this act are declared to be non severable."

Effective date clauses: specify when legislation takes effect. Normally there are fixed principles for when legislation takes effect, in the absence of a specific provision in legislation for example, legislation may automatically take effect upon passage, or a set period of time after official publication. Most European Union legislation takes effect twenty days after publication. Under certain circumstances, fixing a future effective date is good practice, since it gives interested parties time to learn about the legislation and make appropriate arrangements, fiscal and tax measures often some into effect at the start of a new fiscal or calendar year. Sometimes different sections of legislation become effective at different times. If this is the case, details must be explicitly stated. The effective date should not normally depend upon the occurrence of a contingency, or condition precedent, since this makes it variable, and impossible to ascertain from the legislation itself. If there must be a condition precedent for entry into effect, it should be clearly and objectively described, to avoid uncertainty. Finally, the entry into effect of legislation or part thereof may depend upon subsequent legislation.

Expiry date clauses: specify the duration of legislation. They are also called "sunset clauses" or "Drop dead provisions" in different jurisdictions. Expiry date clauses can set a specific termination date ("this act will expire on 1 January 2013"). These clauses are particularly useful for requiring legislators to evaluate and re authorise legislation, or in cases where legislation is expected to achieve its objectives within a set time frame. For example: "this act will expire five years after it enters into effect. At that time, the minister of labour must evaluate its effectiveness, and the results achieved by the workplace safety division, and submit a report to the parliament".

Terminations of authority provisions: withdraw a grant of authority at a specific time. For example "The authority granted to the minister of justice under section 302 of this law will expire on 1 January 2013". This has the same value as a sunset clause, but it applies to the powers of a specific institution.

Reporting provisions: require an individual or institution to submit a report concerning specified subjects at an indicated time. For example: "the minister of justice must submit an annual report concerning compliance with the provisions of section 302 of this law". Reporting provisions should indicate who submits the report, to whom it is submitted, when and how often it is prepared, and what the contents should be.

Transitional Provisions: regulating the changeover from existing to new rules, the repeal or amendment of other legislation acts, and entry into effect are

usually placed into the effect are usually placed at the end of legislation. This simplifies numbering and references, and facilitates future amendments.

How can the structure of laws facilitate secondary legislation?

Primary legislation must set the framework and establish the authority for secondary legislation. It is important that the respective roles of primary and secondary legislation be clear, and respected in practice. Laws must provide appropriate guidance concerning normative requirements and their implementation, to prevent excessive regulatory discretion and the infringement of legislative power by executive institutions. Therefore, legislative drafters must pay attention to substantive provisions, procedural provisions, financial provisions, and structure/format, to set the stage for subsequent regulations.

The organisation and format of laws can greatly affect secondary legislations. When laws are properly and clearly organised and formatted, it is easier to draft and implement effective regulations. Legislative intent can be correctly determined, and cross referencing can be accurately carried out. a well organised law creates a good framework for regulations, and facilitates coordination between the two. When a law is poorly organised, the chances of difficulties with regulations increase significantly.

The use of special clauses in laws can also greatly affect secondary legislations. Confusion regarding the scope of legislation, the "grandfathering" of specific target groups, and entry into effect, for example, will significantly complicate implementing regulations. This issue highlights the close relationship between substantive and technical requirements for sound laws. While the inclusion and proper placement of clauses that provide regulatory guidance can be considered technical requirements, the content of these clauses is a crucial aspect of substantive soundness. For this reason, the quality of legislation is enhanced when technical expertise concerning structure and format is combined with substantive expertise concerning the specific are of law being addressed. Indeed, these two kinds of expertise need to be integrated at several key stages of the legislative drafting process.

What are the best ways to improve structure and format?

There are four main factors that affect the structure and format of legislation:

(1) The legal framework.

(2) Institutions engaged in the legislative drafting process.

(3) Human resources and expertise (particularly involving the legal profession).

(4) The legislative drafting process.

The legal framework sets the stage for the structure and format of legislation. It is extremely important to have principles, guidelines, and materials concerning how legislation should be structured and formatted. They should be in accordance with legal requirements, coherently formulated, well drafted, comprehensive, distributed, accessible, and utilised. The source of this guidance is not determinative. While a law or legislation is most authoritative, and has the widest

scope/application, it is not indispensable. The key issues are whether the source is authoritative, and whether the guidance is applied in practice. This depends upon institutions and individuals.

Legal institutions are responsible for implementing guidance concerning the structure and format of legislation. This should be done as a matter of policy. The main institutions engaged in drafting legislation are in a unique position to standardise the technical aspects of legislation, and ensure that sound principles are followed. When institutions such as ministries, executive bodies, departments for regulative drafting, and legislatures diverge in their approaches, fail to follow them consistently, or jockey for advantage, the legal certainty of legislation is compromised.

Legal professionals and legislative drafting experts are the parties who can most directly affect the structure and format of legislation. Legal professionals should know the principles and rules pertaining to the structure and format of legislation. They should consistently apply these rules, and work with each other to promote compliance. Legal professionals must also try to encourage non legal professionals who are involved in the drafting process to support their goals. Finally, legal professionals should work closely with parties providing technical assistance, such as international organisations and donors, to promote consistent approaches and standardisation. Expertise should effectively combine substantive law and technical aspects of legislation, since both are required for legal certainty.

The structure and format of legislation need to be addressed throughout the legislative drafting process. This is particularly challenging as different parties and institutions draft and amend legislation. Generally speaking, the structure and requirements should be settled early in the process, by the working group or initial drafters, and in accordance with the type of legislation and its objectives. Care needs to be exercised as the legislation is worked up, and for this purpose it is important for expertise to be applied regularly. This includes both substantive and technical issues.

In conclusion, it should be stated that correctly structured and formatted legislation is easier to interpret, apply, enforce, and adjudicate, and therefore directly promotes legal certainty. It is the responsibility of legal professionals and parties engaged in the legislative drafting process to pay attention to this subject, and ensure that appropriate mechanisms are put in place. Otherwise, the structure and format of legislation varies according to the identity of the drafters and circumstances of the drafting process. Therefore, it is important to develop consensus concerning principles, standards, and guidelines for the structure and format of legislation, and ensure that they are consistently applied in practice.

2.7. Legislation should be technically sound/well drafted

Accurate drafting is the fundamental or basic requirement for making legislation technically sound. If legislation is not well drafted, then constructive objective, excellent policy analysis, legal expertise to ensure compliance with national and international legal requirements, legal expertise concerning the subject matter, regulatory impact analysis to ensure effectiveness and practicality, and attention to organisational and formatting requirements serve no purpose. In other words, substantive expertise enables legislative drafters to know what must be accomplished, but technically sound drafting is the key to how they do it.

A number of basic principles apply to well drafted legislation in any jurisdiction. The handling of many subjects is becoming increasingly standardised in our modern and inter connected world. International laws, treaties, conventions, trading rules, and commercial practices increasingly set limits on national jurisdiction. Finally, while some acts in civil law jurisdictions apply "General principles drafting", specificity and detail must be and are eventually supplied through implementing secondary legislation or regulations. This secondary legislation is often just as detailed as its common law counterparts.

The following principles are fundamental to sound legislative drafting. Some have been addressed in previous sections, and the remainder will be discussed in greater detail in subsequent sections.

(1) Legislative provisions should be drafted in normative fashion, clearly identifying the obligations, rights, and prohibitions that apply to specific parties under specified circumstances.

(2) Norms and rules should be directly and explicitly stated. All required information should be presented. Special knowledge on the part of target groups should not be presumed or assumed. Recourse to supplemental sources of information should not be required.

(3) Normative provisions should always complement each other. There should never be contradictions, gaps, or unanswered questions. This applies both within a legislative act and between different legislative acts.

(4) Legislation should clearly specify its scope, applicability, and timing. It should be possible to quickly and accurately determine to whom and under that circumstances it applies.

(5) Legislative drafting style should reflect the type of legislation and intended audience.

(6) Language should be clear, precise, and coherent.

(7) Grammar, punctuation, and syntax should be standard and correct. Grammatical rules apply to paragraphs, sentences, phrase, and individual words.

(8) Sentences should be short and to the point, and express a single idea. Separate sentences should be utilised whenever possible. Sentence structure should be straightforward, without subordinate clauses, extraneous phrases, extra punctuation, or excessive parentheses.

(9) Long sentences that include a series of items should be restructured into numbered or lettered lists.

(10) There should not be redundancies, repetitive statements, or unnecessary phrases or words.

(11) Imperative and permissive words such as “must”, “shall”, and “may” have to be accurately used.

(12) Legislation should not have slang, vernacular, archaic words, trite comments, colloquial phrases, or idiomatic expressions.

(13) Abbreviations and acronyms should be used sparingly, and defined or written out when first used.

(14) Key terms should be defined, when necessary, and consistently used in accordance with a single definition. Definitions should not deviate from standard meanings or usage in prior legislation. Definitions should be placed in a single convenient location, preferably at the beginning of legislation, in alphabetical order.

(15) Transitional clauses and final provisions concerning issues such as timing, entry into force, and duration should be clear and correct.

(16) Negative formulations should be avoided, in favour of positive statements, which are less confusing.

(17) Legislation should be gender neutral whenever possible.

(18) Amendments or revocations of existing legislation should be accurately written, follow the correct format, and explicitly state their legal implications.

(19) References to other legislation or different sections of the same legislation should be clear, accurate, and correctly structured.

(20) Annexes and supplemental materials should be correctly and sparingly used.

(21) Linguistic differences should be respected. Multilingual laws should not contain any terms or legal concepts specific to only one language.

2.8. Legislative drafting should reflect the type of act and intended audience

Legislative drafting must take account to-

(a) the type of the act;

(b) who it is written for; and

(c) how it will be enforced and adjudicated.

The traditional approach was for legislative drafters to target officials who implement laws, and judges, prosecutors, and lawyers who interpret and apply them. However, the current trend is towards the “plain use” of language whenever appropriate, so that laws can be understood by all interested parties, including the general public. This reflects the complexity of modern life,

where a large body of law affects almost every sphere of human activity, and where people enter into numerous legal relationships with a variety of parties on a daily basis.

Questions concerning drafting approach need to be resolved at the start of the legislative process. They are part of the preliminary analysis concerning the most appropriate form of legislative act and the intended target groups. Further, drafting approach greatly affects the application of legislation. Implementation and enforcement depend upon legal certainty, which requires drafting in a manner that balance precision and simplicity, determining the appropriate level of regulatory discretion, identifying the role of key parties, etc.

The following key principles apply to drafting style:

(1) Drafting style should take account of the category of legal act, in accordance with the established typology and respective standards and requirements.

(2) Drafting style should take account of the level of sophistication of the intended target enable them to determine who they are.

(3) Drafting style should take account of the nature of the subject, and whether it is highly technical or archaic, of greater interest to specialists, or more applicable to the daily life of citizens.

(4) Legislation requires less specificity when it is designed to establish guidelines and delegate regulatory authority. However, regulations always require sufficient detail.

(5) The level of discretion granted to administration and enforcement should be carefully controlled, particularly when institutions are in transition or there is a danger of arbitrary conduct on the part of officials.

In any event, when it is possible, and when it does not compromise legal precision and certainty, the objective should be to draft legislation in plain, non technical language, and in a clear and coherent manner, using words with standard meanings, which are understandable to important target groups. To those who argue that legislation is most important for and usually read by legal specialists, it is necessary to point out that more people would read legislation if it were more widely accessible and intelligible. Particularly, at the time of when it deals with topics of everyday and general interest.

2.9. Legal clarity should be promoted through sound sentence structure

Legislation should be clear, concise, and straightforward in order to promote legal certainty. The following principles are designed to make phrases used in legislative drafting more accurate, straightforward, and intelligible, and thereby enhance legal certainty. Of course, sentence syntax is to a certain degree language specific. In other words, while there are general principles that should be observed, certain issues that arise in one language may not necessarily arise in others, or may need to be addressed in a different manner.

(1) Sentences should be correctly structured and as short, concise, and precise as possible. The meaning is often lost when too many ideas or points are covered in a single sentence.

Complicated sentences are more likely to confuse than impress. Simple sentence structure is an effective means for communicating ideas. Compound sentences, with subordinate clauses and parentheses, are particularly confusing and difficult to apply. It is best practice to divide complicated sentences into two or more simple and clear sentences, or utilize a list.

> "Vehicles will only qualify for tax exemption if their purchase price is less than 50,000.00 Taka. And they are not used as demonstration vehicles by an authorised dealer in the business of selling, and they are not used primarily for farming purposes." this provision is clearer when structured as tabulation or list:

"Vehicles will qualify for tax exemption if they meet the following three conditions:

(a) The purchase price is under 50,000.00 Taka;

(b) They are not used as a demonstration vehicle by an authorised dealer in the business of selling that vehicle;

(c) They are not used primarily for farming purposes.".

One of the most effective methods for making long provisions more straightforward is placing clauses containing exceptions or conditions in separate sentences, key words to look out for include "unless", "if", "provided that", "however", etc.

(2) Rules of grammar should be respected, in order to make sentences more clear. Compound sentences, dependent clauses, and parentheses should be avoided. The correct use of punctuation is particularly important.

(3) Verb forms (modals) should not be split. Conditions should be stated separately, in a fashion that minimizes the need for commas.

> "The employer must, within two weeks of a written demand by the employee, state the reasons for denial of the application." This should be: "the employer must state the reasons for denial of the application within two weeks of a written demand by the employee."

(4) Modifiers should be used correctly. Modifiers that limit or qualify a statement need to be accurately placed, so that it is clear what they apply to look at the modifier "only in the following provision, and notice how its placement changes the meaning:

(a) "The chief financial officer only is authorised to certify the annual financial statement";

(b) "The chief financial officer is only authorised to certify the annual financial statement";

(c) "Only the chief financial officer is authorised to certify the annual financial statement".

2.10. Legal Clarity should be promoted through sound word choice

Legislation often contains words that are incorrectly used or simply not necessary. This makes it difficult to understand, and creates legal uncertainty. Legal drafters should carefully consider the meaning, need for, and importance of every single word. For legislative drafting, correct word choice, simplicity, and clarity are the signs of genius. The following principles can help drafters achieve more accurate and intelligent wording, and thereby promote legal clarity.

(1) Terminology in legislative acts should be consistently utilised. The inconsistent use of terminology is one of the most common mistakes in legislative drafting. It sometimes results when different sections are assigned to different parties, or when working groups distribute tasks. There are two general categories of mistakes:

(a) Different words are used to convey the same meaning; or

(b) The same word is used in a different manner with different intended meanings.

Often, this is simply a matter of carelessness, or inconsistent proof reading. For example, different sections of a law might refer to "contracts" and "agreements", or "deliver" and "supple", or "child" and "minor", without intending to make a distinction. If there is no distinction, then the same terminology should be used. The use of different terminology raises legal doubts concerning whether in fact there is a distinction, and whether a distinction is intended.

(2) Legislation should not contain superfluous words. Brevity is achieved by omitting needless words and using a word instead of a phrase whenever possible. Clarity is enhanced when all words are necessary, and there are no repetitive or unwieldy word combinations. Look at the unnecessary words *(in Italics*) in the following examples:

(a) Any contract that violates *this* law is *completely and utterly* null and void;

(b) The agency has *full* authority to issue administrative orders requiring *complete* compliance with this regulation, and these orders are final *and conclusive*;

(c) The authorised time period for filing an appeal is fourteen days from the date of the decision, *and no longer*;

(d) This regulation can be amended or modified only in accordance with provisions of paragraph 3, *which have full force and effect*;

(e) If required, an action may be brought in a court of first instance *with jurisdiction over the subject matter and parties*;

(f) This sanction can be applied inter alia, to parties who support or facilitate illegal criminal activity *on the part of others*;

(g) In the absence of the owner, the designated agent is the sole *and exclusive* representative;

(h) Under no circumstances *whatsoever can* the deadline be extended;

(i) This contact is made and entered into force on the first day of September, 2007, *pursuant to and under the power and authority of the commissioner*;

(j) Payment can be effected by the chief accountant or, *in the alternative,* the chief book keeper;

(k) The importation of unlabeled packages is *strictly* prohibited.

(3) Complicated or archaic phrases reduce clarity, and should be replaced by fewer or even single words. Look at the following examples:

(a) "In the event that" can be replaced by "if";

(b) "In close proximity" can be replaced by "near";

(c) "At the time of" can be replaced by "when";

(d) "Is entitled to" can be replaced by "may";

(e) "Be deemed to be" can be replaced be "is";

(f) "Due to the fact that" can be replaced be "because";

(g) "Notwithstanding" or "anything to the contrary notwithstanding" can be replaced by "despite" or "although";

(h) "Constitutes" can be replaced by "is";

(i) "Full and complete" or "true and correct" can be replaced by "full" "true", or "exact";

(j) "Provided that" or "provided, further that" can be replaced by "if";

(k) "Shall be construed to mean" or "shall mean" can be replaced by "means";

(l) "Hereunder" can be replaced by "under this section";

(m) "In those cases which" can be replaced by "when";

(n) "Is hereby authorised to" or "is hereby empowered to" can be replace by "may";

(o) "A person who has attained the age of 18 years" can be replaced by "a person who is 18 or over";

(p) Member of a partnership" can be replaced by "partner";

(q) "Cease and desist" can be replaced by "stop";

(r) "Until such time as" cab be replaced by "until";

(s) "During such time as" can be replaced by "while";

(t) "Each and every" can be replaced by "each";

(u) "A corporation organised and existing under the laws of England" can be replaced by "An English Corporation";

(v) "Includes but is not limited to" can be replaced by "includes";

(w) "Is defined as and shall be construed to mean" can be replaced by "means";

(x) "Not later than" can be replaced by "by";

(y) "A period of time not less than" can be replaced by "for at least".

(4) Certain confusing and archaic words should not be utilised at all. Examples include:

(a) Hereby;

(b) Henceforth;

(c) Herein, hereinabove, heretofore, hereafter, hereinafter, hereunder;

(d) Whatsoever, whosoever, wheresoever's;

(e) Aforementioned, aforesaid, afore-indicated, afore-specified;

(f) Irrespective of whether, irregardless;

(g) forthwith;

(h) Thereof, therewith, thereto.

(5) Common words should be utilised whenever possible and appropriate. Legal terms are useful, and may be necessary to accurately convey a legal concept. However, it is often possible to more clearly convey a concept or instruction using basic vocabulary. This is especially true when there is too much legal terminology in a single sentence or paragraph. The use of basic language is particularly important when legislation is directed towards and must be understood by non-professionals. In such cases terms in foreign languages (such as Latin) are particularly unhelpful. Finally slang, vernacular, and idiomatic expressions should be avoided.

(6) Prohibitions need to be clearly stated. They should be authoritative and imperative. The most appropriate terms for prohibitions are "must not". "Shall not" and "is prohibited from". "May not" and "is not authorised to" are less authoritative. "Must not" is generally utilised with the active voice, whereas "may not" is generally used with the passive voice. Terms such as

"should not", "will not", or "cannot", are not sufficiently authoritative. Compare the following acceptable choices:

(a) "Manufacturers shall not distribute merchandise that lacks the required safety warnings." This provision is extremely authoritative;

(b) "Manufacturers are prohibited from distributing merchandise that lacks the required safety warnings." this provision is extremely authoritative;

(c) "Merchandise without the required safety warnings may not be distributed" This provision is acceptable, but not preferable, since merchandise is the subject, and it is less authoritative.

The following are not recommended:

(a) "Manufacturers will not be allowed to be allowed to distribute merchandise that lacks the required safety warnings". This provision incorrectly utilises the future tense (see below);

(b) "Manufacturers should not distribute merchandise that lacks the required safety warnings." this provision is not sufficiently imperative.

Prohibitions should leave no doubt as to their intended effect.

(7) Imperative words are applicable to absolute duties and obligations. The terms "must" and "shall" are most commonly used and preferable, and clearly apply to the active voice and animate subjects. Animate subjects are distinguished by their ability to comply with a command. For example:

(a) "Individuals earning any income within the state shall file the appropriate tax forms". This provision contains a normative instruction for a concrete target group, indicating an obligation that absolutely has to be fulfilled. The use of "shall" is appropriate;

(b) "The advisory committee shall include the directors of departments and financial officers." this provision simply defines the members of a committee, and is therefore a "false imperative". Use of the word "shall" is not appropriate. It should be drafted as follows: "the advisory committee consists so ...." or "Members of the advisory committee include..";

(c) "Each member of the regional council shall be entitled to nominate a representative." This provision concern a right that can be exercised. Therefore, the imperative "shall" is inappropriate; it should be redrafted as follows: "Each member of the regional council is entitled to nominate a representative";

(d) "The court shall consider the following factors when determining which conditions of release shall reasonably ensure the appearance of the defendant in court." This provision correctly uses "shall" the first time, referring to an obligation of the court. Whoever, the second use is inappropriate, since it refers to a circumstance. It should be drafted as follows:

"The court shall consider the following factors to determine which conditions of release reasonably ensure the appearance of the defendant in a court.";

(e) Whoever shall violate this act is subject to administrative sanction." in this provision, the word "shall" is simply unnecessary. It should be drafted as follows: "parties that violate this Act [violators of this act] are subject to administrative sanction".

Imperative terms are also useful for denoting a condition precedent. For example: to be eligible for this programme, individuals must have a permanent residence in the state".

However, note that imperative words are most applicable to legislation. Contracts, for example, indicate that parties "agree to". Therefore, the terms "shall" and "must" are less appropriate in contracts, and are sometimes not used at all.

(8) The term "may" is applicable when conferring a power, authorisation, entitlement, privilege, discretionary power, or possibility that does not have to be exercised. While "may" is preferable, it is also possible to use the formulation "is entitled to" or "is authorised to" look at the following three examples:

(a) "The executive director may call an additional meeting of the board between the regular scheduled meetings it the executive director deems this appropriate";

(b) "The executive director is authorised to request additional information from the chief financial officer";

(c) "The executive director shall be authorised to issue invitations to the meeting of the board."

The first example correctly uses the term "may" and the second example correctly uses the term "is authorised to". The third example incorrectly uses the imperative "shall" instead of may, and is best written as follows: "the executive director may issue invitations to the meeting of the board".

(9) The future tense, including the term "will", should only be utilised for future contingencies.

Choice of verb and tense can vary between different types of acts, and even between different sections of the same act (for example between recitals and normative provisions). However, the general rule is that the present tense should be used, unless there is a specific reason for using the past or future tense.

Great care should be taken in using the term "will", which either denotes a definitive consequence or a future contingency. In normative provisions, the term "will" should never be used in place of "shall" or "must". In addition, it should never be used to denote present obligations. "Will" should be reserved for definitive results or circumstances that arise in the future.

> "Employees must notify their employer if they reasonably believe that a working condition will cause serious damage to health." this provision correctly uses "will" to denote a circumstance that has to be certain and can only occur in the future. However, it restricts the notification provision to conditions that are going to prove harmful in future. It is probably better to focus on working conditions that cause harm, rather than ones that will cause harm;

(10) The active voice is more authoritative and clearer than the passive voice. The active voice clearly identifies the subject matter, and more accurately indicates who, what, when, and where. The passive voice is more descriptive and literal, and provides more flavour. Thus, provisions using the passive voice tend to present a scenario, instead of issuing instructions. To use the active voice, make the party having the obligation or right the subject matter, and identify this party at the very start of the sentence.

(a) "A notice shall be sent by the commission via mail to all concerned parties within fifteen days of the issuance of an administrative order". This formulation makes the notice the subject of the provision, and describes what happens to it. Normative provisions should make the target group the subject. This should be: "the commission shall send notice by first class mail to all concerned parties within fifteen days of the issuance of an administrative order.";

(b) "Receipts for business expenses should be kept for a period of five years by taxpayers." again, the target group is taxpayers, not their receipts, and the objective is to tell taxpayers how to handle their receipts. This should be: "taxpayers must keep all receipts for business expenses for at least five years" (the word "should" is not correctly used, and the words "a period of" are unnecessary).

In addition, provisions drafted in an "if...than" fashion are literal and less authoritative.

(a) "If a taxpayer claims business expenses, then receipts shall be retained for five years". While not legally incorrect, this provision should be: "taxpayers who claim business expenses shall retain receipts for five years.";

(b) "If notice is provided in written form, then the licensees shall reply within five business days of receipt". While not legally incorrect, this provision should be: "Licensees shall reply to written notice within five business days of receipt".

(11) Action (base) verbs should be used instead of auxiliary verbs. Legislative drafters sometimes change the format of an action verb and precede it with an auxiliary verb. The result is still legally correct, but it complicates sentence structure, dilutes the impact of the provision, and involves additional or unnecessary words.

(a) "The commission shall make a determination whether the applicant is qualified within thirty days of receipt of the petition." "Determine" is an action verb, and it is sufficient for the garget group to determine, rather than make a determination. This should be: "the commission shall determine whether the applicant is qualified within thirty days of receipt of the petition.";

(b) "The committee shall give consideration to the qualifications of the applicant." "Consider" is already an action verb, and it is sufficient for the target group to consider something, rather than to give consideration to something. This should be: "The committee shall consider the qualifications of the applicant.";

(12) Pronouns should clearly indicate to whom they refer. When two or more parties are mentioned in a provision, the use of one pronoun can create confusion. Consider the following example:

"After the chief executive officer appoints arbitrator, he or she must file the required documents with the arbitration committee." it is not clear in this example which party is responsible for filing the documents. This provision should be redrafted to clarify this point: "after the chief executive officer appoints an arbitrator, [the arbitrator] or [the chief executive officer] must file the required documents with the arbitration committee". If the arbitrator is responsible, the provision could be drafted as follows: "Following appointment by the chief executive officer, the arbitrator must file the required documents with the arbitration committee".

(13) Care should be taken when using "that" and "which". "That" qualifies or limits the word it modifies, and distinguishes it from other categories. "Which" provides a supplemental description of the word it modifies? Notice the difference between the following:

(a) This act does not apply to any business that has less than ten employees;

(b) The mediation procedure, which is carried out by the department of immigration, must be completed within ninety calendar days from filing of the notice.

(14) It is best not to use the term "and/or", but rather "A, or B, or both". For example:

"The penalty for violating this article is 2 (two) years imprisonment and/or a 20 (twenty) thousand Taka fine. This should be: "The penalty for violating this article is 2 (two) years imprisonment, or a 20 (twenty) thousand Taka fine, or both."

(15) Clarity is imperative when specifying numbers, dates, times, and ages.

(a) Numbers should be written out, and may also include numerical forms: "10,500 (ten thousand five hundred) Taka". Carefully consider whether it is necessary to place numerals in parenthesis after the number is written out in words. This practice was designed to prevent forgery, and traditionally applied to financial instruments. It may not be necessary or appropriate for legislation;

(b) Dates should present the day/month/year, or month/day/year in the clearest form. Commas are traditionally used. However, the clearest way to write dates without any commas is by separating the day and year with the written word for the month: "25 October, 2020";

(c) Times should indicate am or pm: "9:00 am, 12:00 noon, 1:00 pm, or 12:00 midnight";

(d) Ages should be stated succinctly: "A person who is twenty-one years of age or older".

(16) Names of institutions and job titles should be used consistently throughout legislation. Different formulations should never be utilised when referring to the same institution or functionary. If an abbreviated formulation is used, it should be clearly spelled out when presented the first time.

(a) "The department of natural resources, referred to in this article as the "department" shall ....";

(b) "Chief financial officers registered with the department of state, further referred to as "Registered officers", are entitled to ....".

(17) Acronyms and abbreviations should be used sparingly, and only when readily understood. The excessive use of acronyms and abbreviations destroys the flow of legislative provisions, and obfuscates important points. Provisions with several acronyms and abbreviations are extremely confusing. Acronyms and abbreviations should always be written or defined when first used. A table of acronyms and abbreviations can be presented if this is helpful or required.

(18) Use of the singular form of nouns promotes clarity. Legislation should apply to each and every member of the target group. Use of the plural form can cause confusion, because it might make the provision appear applicable only to two or more members of the target group.

For example:

> "Employees may apply for coverage under the wage and hours act by submitting the appropriate forms to their supervisor".

Does the provision apply to every employee, or only to groups of employees?

(19) Formulas and calculations need to be simplified. This can be accomplished through the use of examples, explanatory notations, and words instead of symbols. Careful diction and word

choice, in accordance with the standards specified above makes a major contribution to the quality of legislation.

2.11. The repeal or amendment of existing Legislating must be precise

Mistakes regarding the repeal or amendment of prior legislation can have very serious consequences. Such mistakes can be substantive, relating to the subject of the legislation and the legal issues involved, or technical, relating to the procedures and formulas required for making the changes.

Complete repeal of legislation refers to its total revocation or abrogation, meaning that no part of it has any further legal validity. Partial repeal of legislation involves the deletion of specific sections, without affecting the remainder, which continues to be valid. To amend legislation is to alter parts of it (while preserving the validity of the remainder) or to add new parts. Amendments can also have an overall effect (of example by changing only the scope or applicability of legislation).

Provisions that repeal or amend legislation must be extremely precisely designed and formulated, to ensure legal certainty. The provisions being altered must be explicitly identified, and the changes must be very clearly set forth. Legislation may serve the single purpose of repealing or amending previous legislation. More often, repeal or amendment is necessary in the course of making new law. In the latter case, provisions covering repeal or amendment are often placed in a single section or article towards the end of the new legislation (after normative provisions but before transitional provisions). In some jurisdictions and types of legislation, the grounds for repeal or amendment are specified in recitals.

The following principles and practices should be observed in repealing or amending legislation:

(a) Legislation should be repealed or amended by a similar category or type of legislation;

(b) Legislation that completely replaces previous legislation should explicitly repeal it, and not be denominated or structured as an amendment;

(c) Amended provisions should fit into the legislation, with complementary objectives and application, consistent structure and terminology, etc.;

(d) General clauses should not be used to repeal or amend legislation (for example: All acts or provisions of acts that are in conflict with this section are hereby repeal or amended"). Provision being repealed or amended must be precisely indentified and expressly changed. Repeal or amendment cannot be performed "by implication";

(e) When legislation is amended several times, it should be re-codified or consolidated. Having a single complete and authoritative text including or incorporating all amendments minimises confusion. It also facilitates access by

interested parties. Codification also refers to combining and replacing several separate legislative acts;

(f) When legislation is amended, the affect upon any legislation that relies upon or refers to the amended legislation must be taken into account;

(g) Legislation intended solely to amend previous legislation should not contain new provisions;

(h) Supplementary provisions may be utilised for temporary amendments or short-term derogations, but permanent amendments require the replacement of existing provisions;

(i) When legislation is amended, it may be necessary to change the title. However, this should be done sparingly and carefully, since complications can arise;

(j) Amendments should not be utilised simply to renumber or reorganise existing legislation;

(k) Provisions that are expired, no longer in effect or irrelevant may be excluded from amended legislation. This promotes clarity and simplicity. Whoever, such provisions still apply to circumstances that existed while they were in effect;

(l) Where a large number of provisions or articles are being amended, it is appropriate to number the amendments separately.

Formatting and procedures for replacing, adding, and insertions test should be carried out according to the rules and practice in the jurisdiction.

For example, it may be preferable to show the exact changes to existing law, as follows:

(a) Indicate deleted material by or by [placing it in brackets];

(b) Indicate inserted material by underlining or by using italics.

In addition, attention should be paid to:

(a) Whether it is acceptable to “repeal and re-enact”, by merging existing law and new law, or amended law and new law;

(b) Procedures for numbering and re-numbering;

(c) How distinguishing formatting, numbering, or lettering can be used to indicate amended provisions.

2.12. Definitions should be correctly used

Terms that are not commonly used or that have a special meaning in a legislative context should be defined. Definitions are especially necessary when particular meanings of terms are required for correct application of the legislation, when terms are not employed according to common usage, and when terms are subject to differing interpretations.

Terms should not be defined or used in a manner that is contrary to their general or ordinary meaning. In such cases, a different term should be used, to avoid confusion. Terms that have an established usage, legal basis, or body of jurisprudence should not be defined, unless it is necessary to alter this established definition.

Definitions may be exhaustive, complete or partial. “Means” is used for exhaustive or complete definitions (X means....). “Includes” is used for partial definitions, illustrative purposes, and for the provision of certain examples (X includes...). Partial definitions are particularly important when a term applies or does not apply to categories that would not normally be included or excluded. “Excludes” or “does not include” is used to remove certain specific categories or examples.

Definitions are generally grouped together in a specific location towards the beginning of legislation, after the preliminary provisions but before the substantive or normative provisions. This draws attention to them and makes them easy to find. In certain jurisdictions, and when definitions are very limited in number and apply only to terms in one section, they can be placed in that section. It is appropriate to place the definition of a term used in only one section of legislation in that section. The best practice is to group definitions in one location, before the normative provisions. It is better not to place definitions at the end of legislation, although this can be done.

There are three basic practices concerning the order of definitions:

1. **Alphabetical order:** The best practice is to list defined terms in alphabetical order, base upon the first letter. This is straightforward, and it makes all terms easy to locate.

2. **Order of importance:** Sometimes terms are listed in order of “importance”. But importance is difficult to assess, and subject to different interpretations. Therefore, this makes the terms harder to locate, as the reader tries to decide on how the drafter ranks importance. if there are certain terms that must be defined first because they are very special (such as references to royalty), the best practice is to list those terms first, separately, and then list the remainder of the terms in alphabetical order.

3. **Order of usage:** Sometimes terms are listed in the order that they arise in the legislation. This is confusing if they appear in different sections, even if their location in the law is indicated. It also causes difficulties for those who are consulting only certain sections of a law.

Definitions should be phrased in a manner which makes it possible for them to be substituted for the term itself in the text of legislation. Indeed, one of the most effective means for testing the

accuracy and sufficiency of definitions during the drafting process is to actually place them in the text and evaluate the result.

The following additional key principles apply to the definition of terms:

(a) Terms should be defined only when necessary, to promote clarity, consistency, and precision;

(b) Definitions should provide information and clarification, not merely restate the obvious;

(c) Unnecessary definitions should be avoided. Terms that do not need definition should not be defined;

(d) Terms which are not used should not be defined;

(e) Terms which are used only once should be defined in the same location they are used;

(f) The absence of a definition of a term should not be given legal significance;

(g) Terms and definitions should be used consistently throughout a legislative act;

(h) Terms and definitions should be used consistently with other legislative acts;

(i) Definitions in other legislative acts should be incorporated by reference, not restated;

(j) Definitions should not include the term itself, or rely upon circuitous or faulty logic;

(k) Definitions should never include normative provisions or rules.

Particular care should be given to using definitions from another existing law. The general principle is that it is preferable to refer to the other law if the definition should change in the event of a change in that other law. Conversely, it is preferable to copy the definition from the other law and insert it into the new law if the definition in the new law should remain fixed, regardless of what happens to the other law.

2.13. Negative formulations should be avoided

Provisions that use the negative form are often confusing and difficult to apply. Look out for the word “not” or the prefixes “in” or “un”. It is generally preferable to use positive or affirmative statements.

Look at the following examples:

(1) Public announcement of the disposal of property cannot be omitted, unless the property has potential military use. This should be: public announcement of the disposal of property is mandatory, unless the property has potential military use.

(2) Manufacturers, other than those who do not have mortgages on their factory, are eligible for benefits under this section. This should be: all manufacturers who have mortgages on their factory are eligible for benefits under this section.

(3) Vehicles will not quality for tax exemption as business expenses unless their purchase price is not over 50000 Taka or if they are not used as demonstration vehicles by an authorised dealer in the business of selling that vehicle. This should be: vehicles will not quality for tax exemption if their purchase price is over 50000 Taka. This rule does not apply to demonstration vehicles used an authorised dealer in the business of selling that vehicle.

Negative formulations constitute a significant violation of the principle of plain legislative drafting. In addition, they are regularly cited as a cause of confusion on the part of target groups.

2.14. Legislation should be gender neutral

Legislation should be drafted in a gender neutral fashion, to the greatest extent possible. It should not use gender references in a discriminatory or offensive manner. Legal terminology, phrases, and definitions should not make unnecessary or unintended distinctions between men and women.

Of course, there men and women are different. Thus, there may be legitimate policy and legal justifications for differential treating under certain circumstances. Indeed, certain kinds of legislation can only achieve their objectives by acknowledging differences. However, such circumstances should be reflected in the substance of legislation, not in terminology that is needlessly gender oriented.

In many countries, the traditional practice has been to use male-oriented terminology in legal texts. This may derive from traditional views concerning legal personality. In addition, gender bias is sometimes reflected in language structure. For example, in certain languages the masculine plural form is applied to groups containing both genders. And in some languages, nouns in the masculine form are applied to both genders. curiously, in English the third person singular is gender oriented (“he” and “she”, “his” and “her”), while the third person plural is gender neutral (“they” and “their”). In addition, many professions, positions, and practices are traditionally gender oriented (“businessman”), “chairman”, “Fireman”, policeman, “bell-boy”, “fellowship”, “husbandry”, etc.).

To correct gender specificity, some jurisdictions are redrafting antiquated legislation. Other jurisdictions are empowering legislative institutions to carry out technical revisions. Legislation may contain a “disclaimer” concerning gender neutrality, or addresses the issue in definitions.

The key principles for gender neutrality are:

(a) There should not be any substantive changes to legislation. Technical revisions cannot be used to modify substantive rights or legal effects, even if there is real or perceived bias;

(b) The least intrusive method to correct gender specificity should be utilized;

(c) Historic usages should be respected if this is necessary to preserve legal meaning. For example, it is acceptable to use established terms such as "landlord" or "manslaughter" or "Ombudsman";

(d) New or revised terminology should not be created simply to achieve gender neutrality;

(e) Awkward phrases and word patterns should not be utilised simply to achieve gender neutrality.

Here is a list of gender specific terms and their gender neutral equivalent:

(a)	Brother, Sister:	Sibling;
(b)	Chairman:	Chairperson;
(c)	Congresswomen, Congressman:	Member of congress;
(d)	Crewman:	Crew member;
(e)	Son, daughter:	child, children, offspring;
(f)	Draftsman:	Drafter;
(g)	Father, mother:	parent, parents;
(h)	Female, male:	person, individual;
(i)	Fireman:	Fire fighter;
(j)	Foreman:	supervisor;
(k)	Grandfather, Grandmother:	Grandparent;
(l)	Lawman:	Law enforcement officer;
(m)	Maid:	Domestic worker;
(n)	Maiden name:	Birth name;
(o)	Mailman:	Mail carrier or postal worker;
(p)	Man hours:	Hours worked;

(q) Mankind: Humanity, human beings, people;

(r) Manmade: Artificial, synthetic, manufactured;

(s) Manpower personnel, worker: human resources;

(t) Middleman: Intermediary;

(u) Policeman, policewomen: police officer;

(v) Salesman or tradesman: Salesperson or merchant;

(w) Seaman: Sailor, crew member;

(x) Spokeswomen, spokesman: Spokesperson;

(y) Statesman: Diplomat;

(z) Stepdaughter, stepson: Stepchild;

(aa) Wife, husband, or widow: widower Spouse or surviving spouse;

(ab) Workmanlike: Skil/ful, efficient.

In addition, terms with the special endings "ess" or trix" should be avoided, in favour of the standard form. These include "administratrix", "executrix", "heiress", "stewardess", "testatrix" "waitress", etc.

Look at the following formulas for correcting gender specific terminology:

(a) Removing the possessive. "The director shall hold his office until a successor is appointed". "The director shall hold office [holds office] until a successor is appointed";

(b) Changing the possessive to an article. The designated individual shall submit his application" this should be: "the designated individual shall submit an application.";

(c) Changing a nominal to an active verb form. "A person who imports or in his has possession an unlicensed chemical product". The should be: "A person who imports or possesses an unlicensed chemical product";

(d) Using the plural form. "If an applicant is licensed in another country, he shall submit evidence of licensure" this should be: "applicants licensed in another country shall submit evidence of licensure" Or: "any applicant licensed in another country shall submit evidence of that licensure." However, it is

generally preferable to draft legislation using the singular form, since the singular form always includes the plural;

(e) Using "who", "which", or "that". "If an employee is eligible, he must submit the required application in writing." This should be: "An eligible employee must submit the required application in writing";

(f) Changing "if" or "when" to "on" or "upon". "If the inspector finds evidence of intoxication, he must notify the committee.". This should be "Upon finding evidence of Intoxication, the Inspector must notify the Committee.";

(g) Using the gerundial form. "An employer must provide three weeks advance notice before he fires an employee". This should be "An employer [Employers] must provide three weeks advance notice before firing an employee".

Formulations that respect both genders include:

(a) his or her;

(b) his/her;

(c) he/she;

(d) s/he.

While preferable to gender bias, these formulations should be avoided if possible.

It can be argued that failure to respect gender neutrality does not undermine the clarity or intention of legislation, since the meaning is still clear. However, if certain parties or genders are offended or distracted by practice in this regard, then the quality of the legislation is indeed undermined. Further, as a matter of principle, due process is gender neutral and justice is supposed to be blind. So, Laws should not raise even the slightest suspicion when it comes to neutrality and objectivity.

2.15. References should be accurately drafted

Cross-reference between the sections of a legislative act (internal references) or between different legislative acts (external references) have to be meticulously and correctly constructed. In addition, they should be used sparingly and only when required. Unfortunately, there is a tendency to use cross-reference excessively, incorrectly, and/or in association with archaic language. This can severely undermine the clarity, soundness, and effectiveness of legislation.

The following key principles apply to references:

(a) Reference should be used sparingly, since it is preferable to make legislative provisions intelligible without them;

(b) References should be used to enhance legal clarity, and should never make legislation more difficult to read or understand;

(c) If possible, references should be structured so that the provision to which reference is made does not need to be consulted (see example below);

(d) If it is necessary to consult the provision to which reference is made, the reference should be precise enough for it to be easily identified and consulted;

(e) References should only be made to sources that are published and accessible;

(f) References should follow the formulas set forth in drafting guidelines and principles;

(g) Sections from other legislative acts should not be repealed unless absolutely necessary, since this can result in error or confusion;

(h) References to the title of previous legislation should state the full title, at least the first time;

(i) Previous legislation to which reference is made can be listed or summarised in the recitals of new legislation;

(j) References should not be used to make non-binding provisions enforceable;

(k) Cross-reference should avoid unnecessary and archaic words and phrases, such as “heretofore”, “aforementioned”, “henceforth”, etc.;

(l) Cross-references should avoid vague formulations such as “above”, “below”, “foregoing”, previous”, “subsequent”, etc.;

(m) Circular references (to an act or article which refers back to the initial provision) should be strictly avoided;

(n) Serial references (to provision which refers to another provision) should be strictly avoided.

(o) It should be understood that consequences can arise from the subsequent amendment of legislation to which reference is made;

(p) Care should be taken when making dynamic references, which automatically include revisions of the provision to which reference is made;

(r) References to clauses concerning dates, times, extensions, exceptions, derogations, applicability, and entry into effect should be carefully reviewed.

Legislative drafting should take account of the fact that laws are also written for target groups which are supposed to comply with them. References may be easily handled by lawyers who are trained to compare and contrast laws, and who have access to a law library or computerised database. But they can cause confusion on the part of citizens who are unaccustomed to obtaining and juggling different texts. In this regard, the use of references can depend on who legislations is written for. For example, nonetheless, even lawyers can become confused by complicated provisions with excessive references.

2.16. Legal drafting and terminology should respect linguistic differences

Legislative provisions and legal terminology are not always directly translatable or transposable from one language to another. Particular care must be taken when legislation is drafted in more than one language, or translated into other language. Many courtiers have more than one national or official language. Many international treaties and conventions (such as the European convention on Human rights and fundamental freedoms) are translated and then given legal effect in numerous jurisdictions. The provisions of the world trade orgainisation are applied in one-hundred and fifty countries.

In Bangladesh, legislative drafting takes place simultaneously in both national languages and English. This requires the drafters to overcome linguistic differences from the start, and obliges all parties engaged in drafting to critically appraise their work. It also avoids difficulties that arise when legislation is finished in one language and only subsequently translated into another. Typical problems which are encountered include procedural drafting issues, timing (particularly delays caused by backlogs), substantive differences between language, and undue reliance upon unofficial translations.

2.17. The Legislative Drafting process should be open and participatory:

2.17. 1. Introduction

Open and participatory parliamentary procedures are the key feature of representative democracy. Parliaments are natural focal point for communication and interaction between non-governmental parties and representatives and leaders. Indeed, this has been their role for centuries, in many different countries and societies throughout the world. The key lesson to be learned from this experience is that after the elections, a meaningful ongoing relationship between the governors and the governed is required to make democracy work in practice.

Many different non-governmental parties have an important role in democratising and supporting the work of parliament. They include citizen groups, businesses representatives, Non-Governmental Organisations, professional bodies, and independent experts. It does not matter whether members of parliament carry out their work through political parties or blocs, or are elected by constituents (defined geographically or by characteristics/interests). In any case, members of parliament have concrete obligations to promote the interests of their constituents and the general welfare, and in transparent manner. This means working closely with non-governmental parties.

2.17.2. Which parliamentary procedures should be open and participatory?

Many different aspects of the work of parliament should be as open and participatory as possible, and benefit from being carried out in this fashion. These include:

(1) Oversight of the executive Branch of Government.

(2) Investigations.

(3) Approval of nominations and withdrawal of confidence.

(4) The work of committees.

(5) The drafting, review, and approval of new laws.

Provisions concerning which aspects of the legislative drafting process are open and participatory, and under which circumstances, can be found in:

(1) The Constitution.

(2) Major laws such as a law on normative acts.

(3) Codes, such as Administrative procedure Acts.

(4) Procedural rules for parliaments and executive authorities.

(5) Regulations, By-laws, protocols, Executive orders, and other forms of secondary legislation.

Naturally, Parliaments have to set limits upon transparency. Requirements for access depend upon the type of proceeding and the content/subject matter. Appropriate measures are customarily taken to protect:

(a) National security;

(b) Confidential information;

(c) Personal safety and property rights.

In these cases, access is obtained through qualification, and by opening the right doors.

It is important to carefully define and limit the circumstances under which parliamentary work is conducted behind closed doors. There should be very sound justification, beyond a routine desire for secrecy; closed parliamentary procedures should be rare and exceptional. Furthermore, procedures for deciding to close parliamentary activities should be carefully structured, strictly followed, and fully documented. Lack of transparency in the work of parliament or procedures for deciding to close the work of parliament undermine public confidence and create suspicion.

One parliamentary function which has to be extremely open and transparent, due to its nature, is constituent relations. Members of parliament have several obligations to their constituents, such as:

(1) Conducting outreach, to inform and explain about parliamentary activities and affairs.

(2) Investigating and monitoring actual circumstances, to know and understand the situation on the ground.

(3) Facilitating communication, in both directions, through diverse channels and media.

(4) Providing opportunities to observe and participate in governmental processes.

Members of parliament should have appropriate staff, to conduct and support interface with their constituents. They also require local offices, so that contact with constituents takes place on their own ground. This improves communication, shows respect, and complements the rights of constituents to observe their representatives in action at parliamentary sessions.

By working with and listening to constituents in an atmosphere of transparency, member of parliament-

(a) strengthen democracy;

(b) perform their duties more successfully;

(c) provide better services to the people; and

(d) increase their prospects for re-election.

2.17.3. Why should legislative drafting be open and participatory?

There are two main justifications for opening the legislative drafting process to non-governmental parties, and making the work participatory and inclusive:

(1) This is sound democratic practice. Open and participatory legislative drafting processes-

(a) build links between the government and the governed;

(b) bring government officials closer to the people;

(c) generate respect for governmental processes and laws;

(d) reduce alienation on the part of the governed; and

(e) strengthen all democratic institutions.

(2) This improves the quality of laws. Open and participatory legislative drafting processes lead to better results, and improve both the legal framework and specific laws.

Experience shows that open and participatory legislative drafting processes effectively:

(a) Define and refine governmental policies, and facilitate their implementation;

(b) Make laws more practical, effective, and implementable;

(c) Make laws more legally correct and technically sound;

(d) Promote respect for an eventual compliance with new laws.

This is because open and participatory legislative drafting processes obtain and take advantage of input from an incredibly valuable resource; namely the people who are most familiar with, most interested in, and most affected by a law. Simply stated, specialists and organisations dealing with particular issues are in an excellent position to inform and advise officials and drafters about key issues before laws are passed. When it comes to avoiding mistakes in draft legislation, an ounce of prevention is definitely worth a pound of cure.

2.17.4. What are the pre-requisites for open and participatory legislative drafting?

Open and participatory legislative drafting processes do not just happen by themselves. They require time, energy resources, and commitment from many sources. At first glance, it may seem more comfortable and expeditions to draft laws in a closed environment. After all, there will be fewer parties to consult, fewer comments to consider, and less criticism; indeed, experts working in a closed room seem to get their work done more rapidly when there isn't any "interference" from outside parties who have different ideas and opinions.

However, this contravenes the basic premises of participatory government, and undermines everything leaders do. Furthermore, and most importantly in the current context, this reduces the quality of laws. Laws are less likely to meet the goals of their proponents when outside access to the drafting processes is limited. The future consequences of a proposed law are best analysed through exchanges between drafters and parties who know the subject and will deal with the law.

Prerequisites for open and participatory legislative drafting processes include:

(1) Political will on the part of leasers and key officials. Ideally, this should start from the very top levels of government.

(2) Effective and well established communication channels linking key institutions involved in drafting laws and the non-governmental parties who should be involved.

(3) Laws on Freedom of information (FOI).

(4) Efficient information management. In particular, this includes the organization, updating, and dissemination of information about the legislative calendar ant specific draft law.

(5) Effective utilisation of information and communication technology (ICT). This includes computers, database, telephones, faxes the internet (websites and email). etc.

(6) Sufficient resources. There should be appropriate budgetary allocations to cover expenses for skilled personnel, ICT and office equipment, office supplies, utilies, and operations.

2.17.5. How can non-Governmental parties improve laws?

Non-governmental parties can play a crucial role in making laws practical and effective. They can do so by helping conduct regulatory impact analysis (RIA), which determines the likely results and consequences of draft laws. Government may allow non-governmental parties to play direct or indirect role in legislative drafting process, i.e. even in parliamentary standing committee. Unfortunately, due to tight deadlines, government officials and legislative drafters often abbreviate their legal analysis, and do not spend enough time consulting others. This ignores the significant difference between passing a law and implementing it. It is also a short-term response to a long-term challenge, which is likely to be inefficient and counterproductive.

Government officials and legislative drafters need to realise that they face an inherent disadvantage compared to the target groups who will live and comply with their laws. Passage of a law is the end of the legislative drafting process. But it is only the start of a much longer period of time, during which different institutions and officials try to enforce the law, and different target groups react to it. Target groups have incentives, time, and resources to figure out how to respond to the law. They always look for loopholes and means to advance their own interests.

Therefore,

(a) Every new tax law is an opportunity for good tax lawyers to serve their clients by reducing their taxes;

(b) Every new commercial law is an invitation for businessmen to figure out how to increase their profits;

(c) Every new criminal statute is an invitation to clever outlaws to find a way to get what they want without legal complications and, compared with people who draft and pass laws; those who live with them have all the time in the world.

The only way for government officials and legislative drafters to resolve this dilemma is by consulting outside parties or nonstate actors who will provide an honest assessment of what will really happen with a law after it is passed. These parties include representatives of NGOs, legal experts, law professors, lawyers, representatives of commercial enterprises and chambers of commerce, lobbyists, trade unionists, scientists, specialists, leaders of professional associations, community leaders and activists, expatriates living abroad, and other parties who are knowledgeable about the issues being addressed.

2.17.6. Have all interested parties had the opportunity to present their views?

This question highlights the importance of full consultation with non-governmental parties and non-state actors for making legislation substantively sound, practical and effective, and technically sound. It also emphasizes the need for transparency in the legislative drafting process, in order to promote legitimacy accountability, and enhance respect for laws and the rule of law.

Simply stated, non-governmental parties are in an excellent position to provide information, analysis, counsel, advice, ideas, and recommendations concerning:

(a) Implementation and enforcement (costs, impediments, institutional and administrative capacity, technical resources, human resources, possibilities for corruption, etc.);

(b) The financial impact on state and local authorities;

(c) The distribution of effects (who wins and who loses);

(d) How human health and welfare will be affected;

(e) Environmental impact and the protection of natural resources;

(f) How local and community interests will be affected;

(g) Communication requirements and obstacles;

(h) Information resources (collection, management, dissemination);

(i) How target groups will determine their obligations and comply;

(j) Loopholes and difficulties which might arise over time;

(k) Unintended consequences.

Finally, it is important to point out that meaningful dialogue concerning draft laws depends upon happen, parliaments must promote their development. This can only be done by facilitating their work, and giving them opportunities to gain experience defining policy, analysing draft laws, preparing comments, networking, and testifying. Through experience, non-governmental parties enhance their level of expertise, and become more adapt at their roles. Increased skills and professionalism make them more valuable for members of parliament and legislative drafters, and strengthen their contribution to the drafting process.

2.17. 7. When should consultation with non-governmental parties take place?

The optimal timing for consultations with non-governmental parties depends upon the substantive issues being addressed and the type of input which is required. Sometimes it is extremely advantageous to involve outside parties early in the process, at the policy development stage. Mistakes in policy and design of a law compromise the entire drafting process, and render the ultimate product counterproductive and incapable of serving the interests of the society. Different institutions might conduct different kinds of regulatory impact analysis at different stages of the drafting process. Outside parties should always be given a chance to review laws before final deliberation by parliament. But at this stage, it is usually too late to make major changes, and special measures may be needed to ensure that input is fully considered.

The best practice is for parliamentary committees and members to consult non-governmental parties-

(a) when they start work on draft laws submitted by the executive; and

(b) at different stages of the drafting process when they initiate their own laws.

This approach is most likely to make laws practical and effective, and avoid the need for corrective amendments.

2.17.8. How can legislative drafting be made more open and participatory?

Many different procedures and mechanisms are available for opening the legislative drafting process, and making it more transparent and participatory. The choice amongst them depends on actual circumstances and requirements, and what is most feasible, appropriate, and beneficial.

The first step is to carefully consider the roles and functions of the, executives, legislature and different committees, and how they are inter-related with other governmental institutions.

The following formal mechanisms, which are regularly utilised in a number of jurisdictions, should be given the fullest possible consideration and application. While the mechanisms are directed towards primary legislation, and the term "law" is used, they can and should be often be applied to secondary legislation (regulations, by-laws, decrees).

2.17.8.1. Legislative working groups

Working groups are ad hoc bodies which are formed with the specific purpose of drafting legislation, or carrying out a similar governmental function. They can be established by one or more ministries having jurisdiction over a proposed law.

The best way to diversify input to working groups is by including non-official experts. Their participation could be formal (as official members, with drafting and voting rights) or informal (as counsel, entitled to attend meetings, review drafts, group should carefully consider hoe to diversify membership. Legal experts, professors, representatives of think tanks or NGOs, and former officials can participate, in addition, experts working on development projects financed by international organisations and multi-lateral or bilateral donors can provide technical assistance to working groups, and help at other stages of the legislative drafting process. The objective is to produce the best possible law, by-

(a) accessing high-quality independent expertise; and

(b) putting this expertise to the best possible use at the most appropriate times.

2.17.8.2. Specialised drafting Institutions

Members of parliament need technical support from the legislative support wing of the parliament for analysing and revising draft laws submitted by the executive, and for preparing their own laws. In either case, this includes-

(a) drafting provisions;

(b) making sure the draft law is technically sound;

(c) assessing compliance with the constitution, legal framework, and international requirements; and

(d) determining how to make the law practical and effective.

When exercising their right of legislative initiative, members of parliament also require support for policy development, and design and structure of the law.

The Executive receives this support from Legislative and Parliamentary Affairs Division of the Ministry of Law, Justice and Parliamentary Affairs. In some countries, most particularly members of the commonwealth having "common law" traditions, there are specialised legislative drafting institutions attached to the parliament. Prominent examples include the parliamentary counsel offices in the United Kingdom, Australia, New Zealand, and Canada. In the United States, both the Senate and House of representatives have an office of legislative counsel, as do legislatures in almost all of the individual states. Provincial legislatures in India, Pakistan, Canada and Australia also have their own specialised drafting institutions.

2.17.8.3. Information management, communications, and outreach

Cooperative information management and sound communication procedures are important for opening the legislative drafting process and standardising good practice. Other steps can be taken by the parliament as an institution. In addition, geographical outreach is extremely important, to bring in expertise and input from the regional, municipal, and local governmental units, including local officials and NGOs. The media has key role to play in these processes.

The following steps improve information management, communications, and outreach:

(1) Publication and widespread dissemination of the government legislative programme. Non-governmental parties need to be fully apprised if the legislative agenda, so that they can track draft laws in their areas of interest from the earliest stages.

(2) Publication and dissemination of the legislative calendar. All interested parties should be able to track the schedule for drafting and passing laws, the general parameters of drafting assignments, deadlines for completing laws, and dates of readings and hearings.

(3) Dissemination of draft laws. Full access to the latest versions of draft laws is a sine qua non for the participation of non-governmental parties in the legislative drafting process; ideally, there should be access before the first reading. Then it is necessary to establish procedures for dissemination the latest or current version of draft laws, even when different parties are working on them. Websites, electronic communication, publications, and the media can all be recruited into this process. Automatic dissemination of draft laws through emails to non-governmental parties who register for this service greatly facilitates and systematizes outside participation in the legislative drafting process.

(4) Preparation and dissemination of the minutes of plenary sessions, committee meetings, and hearings. The minutes of all non-confidential business meetings need

to be carefully taken and made available to all interested parties. It promotes transparency, and ensures accountability for the final text or contents of draft laws.

(5) Full use of explanatory memoranda. Explanatory memoranda are descriptive documents which accompany draft laws. they are designed to standardise and disseminate crucial information concerning the objectives, affects on existing laws, obstacles to implementation, potential costs and benefits, etc. their use is routinely required by parliamentary rules of procedure, and sometimes by law.

(6) Geographical outreach. The work of parliaments should not be completely centralized. Meetings in localities are particularly appropriate for addressing issues which mostly affect local interests. Some countries use innovative mechanisms to bring representatives of provincial and municipal governmental entities and local experts to the parliament.

(7) Video conferencing. Input from non-governmental parities, particularly those in different geographic locations, can be secured through voice over internet protocol and Video conferencing. It is easy to hold virtual meetings over the internet. The time and costs of travel are eliminated, and there are no security concerns.

(8) Comment periods. Natural and legal persons can be given a defined period of time to provide feedback on draft laws, before they are enacted. Procedures should be settled, known, and followed. In some country, regulations cannot receive final approval until comments have been collected, summarised, and published.

(9) Media Relations. Parliaments should have special services from media experts with all of the tools and equipment required to carry out their work. Detailed information concerning the legislative drafting process should be provided to all interested parties. Newspapers, television, radio, and other media can promote public awareness by publishing the calendar and schedule of legislative activities, and tests or summaries of important draft laws. It is also possible to use special mechanisms like websites and social media to establish outreach to an obtain feedback from NGOs.

2.17. 8.4. Open Hearings

The most prominent example of an open legislative process is the open or public hearing. Open hearings are formal and structured events arranged by a governmental body to give official and non-governmental parties an opportunity to present their views. This is done through testimony and written statements. Open hearings can be used by all levels of government to solicit input from different parties concerning any important issue. But they are most frequently employed by parliamentary committees, and are most effective for evaluating draft laws. Open hearings allow many aspects of an issue to be addressed simultaneously, by a variety of informed parties. Through interactive exchanges of information, the presentation of diverse opinions, and question and answer sessions, officials and participants can learn what they really need to know.

NGOs can play a special role in open hearings. Parliamentary oversight of the executive and testimony from government officials on draft laws are important for democracy. But they are exercises in “inter-governmental” relations; NGO participation in open hearings is a direct

exchange between the governors and governed. NGOs fulfill their mandate go give input on public affairs, and their work and representatives get the spotlight. Transcripts of open hearings serve as a permanent record o their involvement and expertise.

2.17. 8.5. Electronic governance

Open legislative drafting processes are intimately related to "Electronic Governance". This involves the use of electronic communication, automated computer functions, and databases to speed up governmental operations and reduce paperwork. The term "electronic governance" sounds "futuristic", and even intimidating. However many of the applications are essentially informational exchanges using basic computer functions.

Indeed, many of the communications and outreach mechanisms outlined above can be categorised as electronic governance. Interactive websites, electronic mailing lists, video-conferencing, and computerised databases are basic components of electronic governance. These mechanisms are already being employed by many governments around the world, to expedite and facilitate the exchange of information with governmental departments, regulatory agencies, tax authorities, court systems, etc.

For this purpose strategic planning is required. It is not sufficient merely to automate governmental functions as they are currently being performed. Instead, it is necessary to consider how electronic governance can change and improve governmental operations, and how funding can best be utilised. After all, no matter how effective, rapid, and inexpensive electronic communication becomes, it cannot be used to replace or avoid personal contact.

2.17.9. Conclusion

Open legislative drafting process is an important aspect of good government, particularly for parliaments. This is because of its crucial role in promoting democratization, the rule of law, and economic development. Open legislative drafting processes build links and dialogue between leaders and citizens, inform citizens, enable citizens to better understand how government works, empower citizens to participate in governance, increase confidence in all democratic institutions, and enhance transparency. Of most importance in the current context, they are also one of the best ways to improve the quality of laws.

It is necessary to take a strategic and systematic approach to opening the legislative drafting process. This includes:

(a) Fulfilling all pre-requisites;

(b) Determining how to best engage the most appropriate non-governmental parties;

(c) Identifying optimal types of input and expertise;

(d) Arranging for the most advantageous timing of consultations;

(e) Putting in place the most suitable mechanisms (such as working groups, specialised drafting institutions, open hearings, and electronic Governance);

(f) Setting up sound information management, communication, and outreach practices;

(g) Monitoring and evaluation the results being achieved, to strengthen what works will and take remedial steps to correct what does not work so well.

By proceeding as suggested herein, it is possible to make significant progress in opening the legislative drafting process, and thereby improve the quality of laws.

PART V

LEGISLATIVE POLICY FORMULATION AND DRAFTING INSTRUCTIONS

INTRODUCTION

1. Preliminary

The translation of policy into law is a vital part of promoting good governance and the rule of law in society. Properly managed and executed, the process-

i) builds public confidence in the legal system;
ii) makes institutions and institutional frameworks more efficient and transparent.

It is a process which poses various challenges for those involved, from formulating policy and issuing the drafting instructions, to the actual drafting of the legislation.
This Part therefore sets out –

i) what constitutes proper drafting instructions,
ii) how and by whom they should be communicated to the drafter and the interaction needed between the drafter and the administrative / sponsoring Ministry.

Legislative and Parliamentary Affairs Division (LPAD) does not draft/vet a Bill on any matter unless the government, by means of a Cabinet decision, has authorized it to do so. The requirement can only be waived if the Prime Minister directs the LPAD to draft the Bill in advance of the Cabinet decision. Such directions are rarely issued, being reserved for Bills of the very highest political sensitivity and urgency.

It is a Part rather than a set of rules and is therefore not designed or intended to cover every challenge that the instructing Ministry or legislative drafter might encounter.

This Part mostly deals with the drafting of new primary legislation, but its principles apply equally to amendment legislation, and to Subordinate legislation, although the process for making rules, regulations etc. will be different.

2. Purpose of this Part

This is an apparently simple and concise way of achieving perfect legislation. But it hides a number of questions, which need to be answered before legislation can emerge, at least in the context of Bangladesh. The questions include - which is the policy maker; the drafter; the enactor; the enforcer?

It must be borne in mind those in broad terms-

i) the decision whether to introduce new or amending legislation into the legislature is for the executive authority to make;
ii) the enacting of legislation is a matter for the legislature.
iii) the application and implementation of legislation is the responsibility of the civil service;
iv) the enforcement of legislation is the responsibility of the police or other enforcement officers and the courts;
v) the drafting of most legislation is the responsibility of the drafting officials.

Senior Secretaries/Secretaries of the Ministries/Divisions and others involved in new or amending legislation need to understand all these stages.

The purpose of this Part is therefore to look at-

i) the nature of legislation;
ii) the legislative process from the instructing officer's of the administrative ministry viewpoint;
iii) the respective roles of the policymaker and the legislative drafter in preparing the legislation;
iv) policy making for new legislation;
v) the need for drafting instructions;
vi) the topics that should be covered in such instructions and the form they should take.

3. Scope of this Part

Legislative drafting has two aspects-

i) the conceptual aspect, where the policymaker issues instructions, and
ii) the literary aspect, where the drafter selects the best means of expressing the policy concept.

This Part deals with the first aspect – the formulation of policy and the issuing of drafting instructions.

CHAPTER 1

THE NATURE OF LEGISLATION

1. The nature of legislation

The law provides the framework within which a society functions. The rights and obligations of individuals and organisations in a society are determined by it.

The making of legislation is the most democratic means by which a Government is able to govern. By legislation, policies are transformed into enforceable written law through an elected legislature. The translation of policy into law is a vital part of promoting good governance and the rule of law in society. Properly managed and executed process, amongst other things, serves to –

i) build public confidence in the legal system; and
ii) transform institutions or institutional frameworks.

Legislation is a statement of rules to alter the way that people behave i.e. stop them doing something, or make them do something. Or it might be to raise revenue for the government; to state a principle that society agrees on to create and confer rights on, for instance, a statutory body.

The purpose of most statutes is to change the behaviour of people. A successful law is one that changes certain behaviour to reach a policy goal. The more clearly identified the people who are addressed and the more understandable and clear the language of the law, the more likely it will be to have the intended effect.

1.1. Legislation might not be appropriate

Changes in the law generally require legislation. However, any proposal for new legislation must be examined and analyzed against existing legislation and other laws to see whether it is necessary, and how it can be implemented.

The policymaker should look at the existing statute book to see whether new legislation is really needed to give effect the policy objective or whether an amendment to an existing law would suffice. It might be the case that there is a disregarded law lying little used on the statute book. Legal advice on this aspect should be sought from the LPAD.

If there is an existing law, it might need updating and revising to make it fit for purpose. This might be possible by an amendment Bill, or it might require a complete rewrite of the existing law. A consolidation exercise involving the updating and combining of several statutes might even be appropriate.

In considering whether to bring forward a proposal for new legislation, a policymaker should obtain legal advice at as early a stage as possible. This is because existing legislation might already cover the point, or there might be some legal reason why legislating in the proposed manner would not be appropriate (e.g. because it infringes standards of human rights or the Constitution). It is recommended that a memo to the LPAD seeking such advice be despatched as early as possible so that agreement can be reached at an early stage on whether legislation is appropriate.

Consulting the LPAD regarding any policy which is intended to be translated into legislation is critical in ensuring that the resultant legislation will be legally sound. The LPAD will, amongst other things, be able to assist in determining whether the proposals for new legislation comply with the Constitution or international obligations. The LPAD will also be able to offer other legal advice in respect of other legal matters which the proposals may raise. Where there are court decisions which will influence the provisions of the proposed legislation, the LPAD is able to bring them to the Ministry's attention.

This consultation early on in the process benefits the Ministry by revealing what areas, in its policy, might require adjustment or refinement and can make the Sponsoring Ministry's writing of its Cabinet Summery easier than it would otherwise have been. In seeking that advice, the Sponsoring Ministry must communicate briefly and succinctly –

i) the reasons for wishing to enact the new legislation or to amend existing legislation;
ii) what the policy is;
iii) how it is proposed to carry the policy into effect;
iv) whether other Ministries, if any, who are or will be affected by the policy, or who are interested parties, have been consulted, and what their reactions to the proposed legislation are.

The LPAD will, after studying the Ministry's proposal, advise whether or not new legislation is indeed required, whether any suggested amendment to existing legislation is necessary, or suggest other ways in which the Ministry's policy proposals can be effected.

Once that process is over and the LPAD has agreed that indeed legislation is necessary, the relevant Ministry can proceed to the next step: the drafting of its Cabinet Memorandum.

1.2. Non-legislative options

A policymaker considering how to deal with an issue should not assume that legislation is the only or best answer. Indeed, given the time normally taken to enact legislation, the amount of paperwork involved, and the political imponderables of the legislative process, introducing legislation is sometimes the last resort. On the other hand, Ministers of government often like to have a statute enacted as part of their record of achievement while in office, and introducing legislation is often the best way to test public opinion on a policy.

Policymakers should not assume that a written law will solve every problem. There is a saying that, "If it is not necessary to legislate, it is necessary not to legislate". A policymaker should therefore think creatively about non-legislative approaches and, if legislation is necessary, should aim for a legislative approach that minimises the regulatory burden while achieving the required policy outcome and being consistent with the principles of good governance.

Some of the non-legislative approaches that policy makers can consider or employ include –

i) administrative action, such as change in policing policy;
ii) the use of economic measures such as tax incentives or other benefits;
iii) self-regulation by means of a voluntary code by e.g. a professional body;
iv) use of market forces, by altering prices etc.;
v) education, by way of changes to the school syllabus etc.; and
vi) publicity by way of a press campaign, Ministerial speeches, etc.

1.3. Types of legislation

If legislation does appear to be the best solution, the policymaker should consider the various types of legislation that can be employed. Should it be by way of new primary legislation, by amending existing law, or by Subordinate legislation under an existing statute?

All that is needed is for regulations or some other subordinate legislation to be made under an existing law.

There are various types of Subordinate legislation, such as regulations, rules or orders. Fees are usually prescribed by rule or regulation, though they are sometimes in a schedule to the Bill. Forms are often prescribed by rules or regulations, but they could simply be 'approved' and might not need Subordinate legislation.

There are also other types of instrument which can be described as 'quasi-legislative.' They include codes of practice, which set standards but do not result in a prosecution for a breach. Other such instruments might be procedural rules, directions, instructions and guidelines, or an interpretative guide to existing law. None of these are legislative but they help achieve the purpose of the law.

1.4. Types of Bill

Some Bills might be simple and in standard form and can be drafted quite speedily. Others might involve major new legislative areas and take months or even years to draft.

Appropriation Bills or other Bills involving public money usually have to go through a different process. Bills involving State powers might need to be approved by a body established for the purpose by the Constitution.

Note that there should be no 'intermixing': distinct matters which have no connection to each other should not be dealt with in the same Act.

The majority of Bills that go to a legislature are Public Bills, introduced by the government to deal with issues that affect the population at large. Another type of Bill that is not initiated by the Cabinet is the Private Member's Bill, which will also generally be drafted outside government. It will usually be on a matter of public importance, but limited to a particular constituency, or a specialist interest. The government might adopt a Private Member's Bill as a government Bill.

1.5. Effective, fair and transparent legislation

If legislation is the preferred option, there needs to be implementing arrangements in place to make the new scheme fully operational. The policymaker should consider –

i) whether organizational structures and administrative procedures are in place to make the scheme work;
ii) what legal and other mechanisms are required to make it workable;
iii) whether the benefits of regulation justify the cost of implementing it;
iv) who would be affected by the legislation;
v) how compliance will be achieved by the government and by the general public; and
vi) how people will know about the law i.e. how it will be publicized.

In considering whether to introduce new legislation, the policymaker also needs to consider whether –

i) the proposed law will work fairly in all areas of the country;
ii) the law is appropriate for the political and geographical needs of the country (a law for Hill Districts, Costal Districts or Border Districts might work differently from other area);
iii) distribution of its effects across society will be equal and transparent;
iv) anyone's human rights will be infringed;
v) avoidable opportunities for corruption are created;
vi) decision-making will be fair and transparent;
vii) the law will be appropriate for the country's transport and communication system; and
viii) generally, the law will be appropriate to help develop the country's economy.

1.6. Precedents

Precedents for legislation can be found in a number of sources readily available to instructing/sponsoring Ministries. They include –

i) A Codification of Bangladesh Statutes titled as *BANGLADESH CODE* and *LAWS OF BANGLADESH* produced by LPAD. See the website at www.legislativediv.gov.bd;

ii) Year wise compiled Books of statutes and Subordinate legislation preserved by LPAD in its library and also in the libraries of Cabinet Division, Parliament and all other Ministries/ Divisions;

iii) Legislative handbooks on the implementation of UN conventions, which are available on the websites of the respective UN agencies, such as WHO, FAO, IMO and ICAO.

CHAPTER 2

THE LEGISLATIVE PROCESS

This Chapter deals in nutshell with the steps involved in enacting new primary legislation or Acts. For Subordinate legislation (rules, regulations, etc.) see the Part on Subordinate Legislation.

2.1. Constitutional position

The Constitution of Bangladesh provides for a legislature with authority to make laws '*for the peace, order and good government'* of the Republic. The legislative process is governed by the Constitution, the Rules of Procedure of the Parliament, Rules of Business, 1996 and Secretariat Instructions. Reference can also be made if necessary to textbooks on legislative procedure.

2.2. Stages of law making

Although the passage of a Bill through the legislature is the most public part of the legislative process, there are several other steps involved in getting a new statute enacted. They can be identified as –

i) Policymaking: This is a matter for the sponsoring Ministry and the Cabinet.

ii) Drafting: This is the task of the legislative drafter on the instructions of the sponsoring Ministry.

iii) Consultation: Consulting with interested parties ('stakeholders') both within and outside government is the responsibility of the sponsoring Ministry

iv) Enacting the Bill: This is the responsibility of the legislature on the initiative of the relevant Minister and the leader of the House.

v) Publication: The task of having the statute formally published in the Gazette and publicised in the media usually falls on the sponsoring Ministry.

2.3. Initiation of legislation

In Bangladesh, most Bills originate in the Government, with few if any private members' Bills. The legislative process by which Bills are introduced and enacted is usually starts at the Cabinet level with a decision to have a policy implemented through legislation.

The Ministry sponsoring the legislation therefore needs to seek approval and authorisation from Cabinet to draft the legislation proposed. Before that the Ministry holds inter-ministerial meeting and circulates the proposal in raw draft form to interested parties for comment. There after the Ministry goes for Cabinet approval and once Cabinet approves it on principle the LPAD drafter will draft the Bill. At this stage in few cases Bills are circulated again to stakeholder for their comment until a final draft is agreed to by the sponsoring Ministry. The Bill then goes back to Cabinet for final approval. If the Bill is approved, the Minister serves a notice to the Parliament Secretariat to introduce the Bill in the House and there after it goes through the necessary stages in the legislature. (Note that sometimes the procedural rules can be suspended to allow all stages of a Bill to be completed at the same time.)

The drafting of the Bill is the responsibility of the LPAD, on the basis of drafting instructions given by the sponsoring Ministry.

2.4. Flowchart for processing of Government Bill

A typical flowchart for the processing of a Government Bill is –

i) Policy formulated in Ministry
ii) Policy approved by Cabinet
iii) Drafting instructions to legislative drafter of the administrative ministry
iv) Bill drafted – consultations – Bill re-drafted
v) Cabinet finally approves introduction
vi) Bill to Parliament
vii) Bill published with Explanatory Note or Memorandum
viii) Bill amended if necessary
ix) Bill enacted
x) Assent, publication, commencement
xi) Implementation.

2.5. Stages of legislation of all Bills

The stages of the legislative process are usually –

i) introduction and first reading;
ii) second reading debate;
iii) committee stage;
iv) third reading and passing of the Bill;
v) assent; and
vi) commencement.

Under the Cabinet system the government usually has a majority and it can be assumed that most Bills introduced by the government will be passed, subject to amendments during their passage through the legislature.

2.6. Publication and Introduction

The Bill is published in the *Gazette* as a Bill and placed on the Order of the Day of the Parliament in the name of the responsible Minister. The Bill will usually have attached to it an Explanatory Note or Memorandum setting out the purpose and policy (or objects and reasons) of the Bill.

2.7. First Reading

At this stage, the Minister responsible for the Bill moves that the Bill be introduced and read the first time. Any Member of Parliament may raise objection against such introduction. If any objection raises at this stage, the House votes to resolve it. There is no debate on the Bill at this stage.
The Bill is, after the First Reading, usually referred to the Standing Committee on relevant Ministry for scrutiny and report. This practice is adopted by 7th Parliament of our country.

2.8. Committee Stage

The Bill is scrutinized clause by clause and amendments are accommodated at this stage. A major or controversial Bill is usually referred to a select committee set up for the purpose. At this stage, interested persons may make submissions to the Committee stating objections or suggestions in relation to the Bill.

2.9. Report stage

Here the Bill, as amended during Committee Stage, is reported to the House by the Chairperson of the concerned Committee. Usually, the Parliament Secretariat prepares and prints a report summarizing the deliberations and providing a clause by clause statement of any amendments proposed by the Committee.

2.10. Second Reading

The Minister responsible for the Bill moves the second reading of the Bill. A debate follows in which the focus is on the overall aims and policy of the Bill. Amendments are usually permitted at this stage, and the debate can become very wide-ranging. The House resolves the fate of amendments proposed by the MPs.

2.11. Third Reading and passing

Amendments are usually not permitted at this stage. The Minister moves that the Bill be passed as decided in the House or, where no amendment is accepted by the House, proposed by the Committee. The motion is put to the vote and passed or, possibly, rejected.

2.12. Authentication of Bills

When a Bill is passed by the House, the Bill is signed in triplicate by the Speaker and presented to the President for assent. In the absence of the Speaker, the Parliament Secretary may, in case of urgency, authenticate the Bill on behalf of the Speaker.

2.13. Assent

The Bill is sent to the President for assent. By convention the President always consents to legislation and cannot refuse assent, although the President is entitled to send a Bill back, except money Bill, to the House with a message for reconsideration. When a Bill is returned to the House by the President with a message, the Speaker reads the message of the President to the House, if it is in session or if the House is not in session, cause it to be published in the Bulletin for information of members. The Bill is then usually laid on the Table and considered by the House. When the Bill is again passed by the votes of a majority of the total number of members of the House, with or without amendments, the Bill is signed in triplicate by the Speaker and presented again to the President for assent.

2.14. Publication

It is a normal requirement for an Act or Ordinance to be published in the *Gazette*, with a legislative or calendar year and number.

As with other notices sent for Gazettal, the Government Printer should not accept a Bill or Act for publication unless it is sent officially by the Parliament Secretariat or the LPAD with instructions to publish.

2.15. Commencement

The general rule is that an Act comes into force on the date it is published in the *Gazette*. However, if the Act so provides, it comes into force on a date specified by notification published in the *Gazette*.

2.16. Implementation

It is the responsibility of the sponsoring Ministry to ensure that the Act is implemented. This might require action such as –

i) making Subordinate legislation;
ii) creating the necessary administrative machinery;
iii) making appointments;
iv) setting up of a Board, commission or other agency; and
v) issuing of licences.

2.17. Contents of a Bill

In order to be able to issue drafting instructions, it is helpful for a policymaker to know the general structure of legislation.

A typical sequence of provisions in a Bill is –

i) Long title
ii) Preamble
iii) Short title
iv) Commencement
v) Interpretation (definitions)
vi) Overriding to other laws
vii) Main provisions
viii) Administration
ix) Offences and penalties
x) Miscellaneous provisions (appeals etc.)
xi) Rule-making power
xii) Regulation –making power
xiii) Repeals & savings
xiv) Transitional provisions
xv) Consequential amendments (if required).

The short title might be a 'catchy' one that the Ministry has chosen for political reasons. The long title will usually be decided by the drafter, as it will need to reflect the contents of the Bill.

2.18. Additional material

In addition to the text of the Bill itself, the policymaker must be aware of other parts of the Bill that must be checked for consistency and clarity.

2.19. Schedules

These are part of the Bill and are to be interpreted and applied in the same way. They are usually used to set out material that is too detailed, complex or unwieldy for inclusion in the main body of the Bill. A Schedule might include e.g. a list of endangered species, or the institutions that are approved for certain purposes.

These items are put in a Schedule rather than in Subordinate legislation because a Schedule can usually be amended only by the legislature. Sometimes it can be amended by the Government, with or without express approval of the legislature, but on the authority of the primary statute. A Schedule might have one or more Appendices, with further details on some items.

2.20. Subordinate legislation

Sometimes the key to a legislative scheme is in rules, regulations or other Subordinate legislation, as mentioned in the previous Chapter. Subordinate legislation must be prepared and scrutinised with the same care as is given to the Bill itself.

2.21. Explanatory material

It is usual for a Bill to have attached to it the Objects and Reasons. This is usually drafted by the sponsoring Ministry, but sometimes by the drafter. It can be looked at by the courts in interpreting the Bill, and therefore needs care in its drafting.

2.22. Legal report

It is necessary to prepare a technical report on Bill passed by the House. These documents require care in their drafting as they should accurately reflect the contents of the Bill and set out its policy and legal implications. The sponsoring Ministry should take responsibility for them jointly with the LPAD.

2.23. Responsibilities of Secretaries

It is the responsibility of a Secretary to assist Minister in the passage of a Bill through Parliament. This may include, as agreed with the Minister –

i) drafting press briefings;
ii) drafting second reading speeches;
iii) attending in the legislature during the first and second readings debate;
iv) attending meetings of relevant standing committee (if the Bill is referred to a committee); and
v) instructing the LPAD drafter on the drafting of any amendments needed in the light of the second reading debate or the committee stage report.

If the amendments are substantial or controversial, they should be agreed by Cabinet or the Prime Minister before being tabled by the Minister.
The Secretaries to the Government should note that the time needed for passage of a Bill through the legislature includes –

i) time for a committee to consider and report on the Bill. This will usually be the following meeting but may be a later one; and
ii) obtaining the assent of the President and publishing the Bill. This can only happen when all amendments to the Bill during its passage have been incorporated and may take several weeks.

CHAPTER 3

THE ROLE OF THE LEGISLATIVE DRAFTER

3. The role of the legislative drafter

For a legislative proposal to be introduced into the legislature it needs to be converted into legislative language in the form of a Bill. This is the task of the legislative drafter, who must devise a legislative scheme that will give effect to the proposal and communicate it to a diverse group of statute users. It is therefore important for government departments and policymakers and instructing officers to fully understand the role of the drafter, who is often the 'hidden face' of the legislative process.

3.1. Role and functions of the legislative drafter

The legislative drafters of LPAD should be prepared to do all or any of the following –

1. Advise on the structure and title of a Bill. However, if the sponsoring Ministry has a policy reference in relation to these matters, it should be stated in the drafting instructions and the drafter should take account of it.

2. Consider the "legislative package" i.e. the need for possible amendments to existing laws, repeal of laws, consolidating with other laws, etc. Legislative proposals often involve a mix of new law, amendments to existing law, and the repeal of law. The form of the legislative package should be considered in collaboration with the instructing Ministry.

3. Consider the distribution of provisions between the proposed Act or Ordinance and Subordinate legislation. If Subordinate legislation is required, the legislative drafter should advise the Ministry of the need for drafting instructions on it, the drafting resources available and the time needed to draft it.

4. Maintain an orderly statute book. This includes maintaining a consistently modern style of drafting; avoiding unnecessary renumbering; using the Interpretation Act appropriately; making appropriate consequential amendments; avoiding conflicts between one Act and another; making proper use of any statute governing legislation, such as law revision.
5. Ask questions. A proposed law can be tested in many ways but one of the most valuable is by asking "What if?" Instructing Ministries should expect pertinent questions, which might well point out flaws and improve the legislative scheme.

6. Raise issues of legal principle. Constitutional requirements, human rights issues etc. might arise in the drafting of a Bill. For example –

   i) the Constitution might require independent institutions and commissions to have a proportion of women members, and the drafter needs to be alert to this requirement; and

   ii) a legislative proposal might offend fundamental principles of fairness e.g. making the law retroactive, powers of entry, search, and seizure, interference with individual rights, expropriation without compensation, etc.

7. If Ministries are aware of the need to consider such issues, they are more likely to be cleared up early in the drafting process. If they cannot be satisfactorily resolved with the Ministry concerned, the drafter should raise such issues at a political or other level.

8. Refer unusual offence or penalty provisions to the LPAD for comment. This would include e.g. double jeopardy provisions, retrospective provisions, provisions putting the burden of proof on the defendant, etc.

9. Alert the instructing office to the need for repeals, savings provisions, transitional provisions, and consequential amendments to other laws. These matters are often overlooked and can take up as much time as the main body of the Bill.

10. Identify possible implementation problems, e.g. financial and other resource implications. If a drafter sees significant financial implications for a Bill, the matter should be referred to finance officials. If the Bill is likely to have a significant impact on staffing, or the court system, the appropriate Ministry officials should be alerted.

11. Draw attention to significant policy changes made to the instructions. It is common for instructions to change during the drafting process. If the change in policy is significant, approval may be required from the Minister, the Cabinet or a Cabinet committee.

12. Ensure that the draft reflects the government's policy aims and intentions, that it does not contain ambiguities or lend itself to different interpretations, and that it will be clearly understood by the audience for whom it is intended.

The drafter will therefore need to –

i) receive and review instructions from the instructing Ministry;
ii) raise any issues with the instructing Ministry that arise out of the instructions;
iii) seek further clarification of matters that are not clear, or identify gaps;

iv) advise, if necessary, on matters of policy that may not comply with constitutional or legal principles;
v) produce drafts that are clearly drafted and that give effect to the policy intent;
vi) devise solutions to problems that arise during the drafting process; and
vii) assist in resolving conflicts between Ministries over the policy or provisions in a draft.

3.2. Continuing role of the legislative drafter

The legislative drafter's role does not end with the preparation of the draft, but continues in a number of ways. These might include –

i) attending press briefings if required (but not as the main spokesperson for the Ministry/ Division /Department);
ii) attending at parliamentary committees and advising the legislature during the Committee Stage deliberations;
iii) drafting any amendments to the Bill needed at committee stage;
iv) ensuring that the assent copies of enactments passed by the legislature are accurate;
v) preparing the Technical Legal Report (if required) for submission to the Speaker to certify the constitutionality etc. of the law;
vi) drafting a commencement notice;
vii) advising on legislative implementation of the Act or Ordinance; and
viii) drafting any Subordinate legislation that is required.

The legislative drafter should be given the opportunity to draft any amendments that are required as a result of the Second Reading debate or the Committee Stage in the Parliament. During the course of the debate in the Parliament, it may become apparent that some revision of the Bill will be appropriate before it is enacted.

3.3. Institutional framework

Drafting resources of a government are best organised as a single government unit, LPAD, which can develop the specialised legislative drafting competence required. Legislative drafters are usually assigned to subject ministries so they can develop expert knowledge in the subject matter.

Common standards and uniform practices for preparing and drafting are most effectively achieved through the provision of a single set of directives, which have behind them the authority of the government and, as needed, the legislature. Ideally, all the directives concerned with legislative preparation should be collated into a single source (e.g. a Legislative Handbook) that is known and used by everyone involved in preparing legislation.

3.4. Role of the LPAD

In LPAD there are usually several legislative drafters, with support staff and administrative support. References in this Desk Book to a drafter include the LPAD where appropriate, but the division of responsibility between an individual drafter and the LPAD or its head is not spelled out as they are matters for internal decision.
LPAD is usually *inter alia* entrusted with to –

i) advise on statute law revision and codification;
ii) maintain adequate personnel resources for the drafting programme;
iii) advise on the practicality of the government's legislative timetable;
iv) maintain consistency of legislative style among its members;
v) train instructing officers in the legislative process and the issuing of drafting instructions.

The LPAD should ensure that conflicting legislative proposals are not initiated and should notify other Ministries of legislative proposals that may affect laws under their administration. This is to avoid conflict if one Ministry objects to the proposals or if there might be consequential amendments to consider.

3.5. Role of the instructing officer

Effective legislation requires a partnership between the legislative drafter and the instructing officer. Providing comprehensive instructions and understanding the roles and responsibilities of the legislative drafter in advance of a drafting scheme mean that it is more likely the scheme will proceed smoothly.

The instructing officer should therefore –

i) provide adequate and clear drafting instructions;
ii) have in mind a clear legislative timetable;
iii) understand the continuing role of the drafter after introduction of a Bill; and
iv) be able to work with those whose task it is to draft legislation.

When a draft of a Bill or item of Subordinate legislation is sent to the instructing officer, he or she should –

i) ensure that the drafting instructions are correctly reflected;
ii) check references to sections, subsections, regulations and other laws;
iii) check for consistency of language;
iv) consult other Ministries affected by the legislation;
v) send written comments to the legislative drafter;
vi) if necessary, convene a meeting with the legislative drafter and others concerned.

The instructing Ministry must be satisfied that the draft meets the policy objective and should comment on issues of precision, consistency and clarity, as well as ensuring the draft meets their policy objective.

3.6. Relationship between instructing officer and drafter

The instructing officer and the legislative drafter are both key players in the drafting process. The time required to draft, and the quality of the drafting, depend on the quality of the drafting instructions and the communication skills of the instructing officer. On the other hand, there might be legislative and implementation issues that the instructing officer has not considered, that the drafter identifies in the drafting process and that must be thought through more fully.

The relationship between the legislative drafter and an instructing officer is in some ways similar to that of a barrister and a solicitor. The legislative drafter provides advice and drafting services in a professional and impartial manner. The legislative drafter not only converts the instructions into legislative language but if necessary guides instructing officer in identifying and exposing weaknesses in a policy or its implementation or the proposed legislative scheme generally.

The legislative drafter provides a specialist form of legal service i.e. the preparation of legislation, but also has a greater role to play. The drafter is an advisor to the Government in its legislative role and should advise on proposals for legislation as well as the interpretation of statutes. The drafter therefore needs to work with the administrative ministry/division to ensure that, so far as possible, legislation is based on sound constitutional and legal principles, achieves the policy aim and is capable of being implemented and enforced.

The legislative drafter is not concerned with policy formulation, but as the person who is probably the most conversant with the statute book, is able to identify legislative gaps which influence policy formulation. The drafter should bring these gaps to the attention of the instructing Ministry. In fact, the drafter is the policymaker's best friend during the exercise of turning policy into law.

Sound legislation is the product of collaboration between a skilled drafter and knowledgeable instructing officers. Sometimes instructing officers are reluctant to criticise drafts in the mistaken belief that the legal text is up to the drafter, and not of real concern to them. Or, they might have difficulty seeing the effects of drafts: they see the words but not the deficiencies or ramifications. It is therefore important that the instructing officer is able not only to prepare instructions and answer questions, but to view drafts with a critical eye to see that they do what is wanted.

The respective roles of the instructing department and the drafter can be summarised as follows:–

(i) The instructing Ministry develops a policy involving a legislative proposal: the drafter comments on the proposal from the point of view of its legislative appropriateness and practicability.

(ii) The instructing Ministry bids for or obtains a slot in the legislative timetable and sets a target date for commencement: the drafter says whether the proposed timetable is realistic.

(iii) The instructing Ministry prepares a Cabinet submission seeking approval for the drafting to commence: the drafter might be asked to comment on the memo and to advise on its legal implications.

(iv) The instructing Ministry prepares drafting instructions: the drafter expresses the policy in legislative language as clearly as possible on the basis of the instructions. If the drafter does not understand any aspect of the instructions he or she asks for clarification.

(v) The instructing Ministry checks drafts as sent by the drafter for internal consistency and for articulation of the policy. It also checks the drafts for ease of comprehension and presentation to the public, and for practicality of implementation.

(vi) The instructing Ministry consults internally and externally on the drafts and reports the result of the consultations to the drafter: the drafter might attend the consultations at the request of the department, but would not normally answer queries.

(vii) The drafter amends the drafts in accordance with further instructions.

(viii) The instructing Ministry ensures that the draft once agreed goes to Cabinet in sufficient time for it to be introduced into the legislature in accordance with the timetable.

(ix) The drafter writes the explanatory material and advises on the Cabinet submission as required.

(x) The instructing Ministry watches the progress of the Bill through the legislature and liaises with the drafter on any resulting amendments.

(xi) The drafter might be invited to attend the Second Reading or Committee Stage on the Bill.

(xii) The instructing Ministry ensures that the Bill, once passed, goes for assent to the President, with any necessary report: the drafter advises on any report if it involves explanation of amendments etc.

(xiii) The instructing Ministry ensures that the Act or Ordinance is published in the Gazette and other media.

3.7. Time needed for drafting

One of the issues that can sour the relationship between a legislative drafter and an instructing Ministry is the time taken to prepare and draft and respond to comments. The legislative drafter is of course expected to start work on a draft as soon as reasonably practicable once drafting

instructions are received, and to respond to comments speedily. However, there are considerations that affect the speed at which the drafter can work, and these need to be understood by the instructing officer.

CHAPTER 4

CABINET SUBMISSIONS

4. Cabinet submissions

Cabinet approval is usually required whenever a major policy initiative is contemplated, or any other matter of political significance is proposed.

The main functions of the Cabinet Division are:

(i) bringing together issues which relate to the Government's strategy and presenting them to the Ministers via the Prime Minister for collective decision;
(ii) providing logistical support to Cabinet and Cabinet Committees to ensure that the business of Government is conducted in a timely and efficient manner;
(iii) providing policy support to Cabinet and Cabinet Committees to ensure that proper collective consideration takes place before policy decisions are taken;
(iv) taking lead responsibility for determining the size, structure and functioning of the Civil Service; and
(v) developing and supporting the modernisation of Government which includes identifying and prioritising key reform issues and evaluating the overall performance of government.

Cabinet approval is obtained by way of a Cabinet submission made by the Ministry seeking such approval.

In particular, a Cabinet submission is usually required –

(i) when there is a need for new or amending legislation;
(ii) if it is proposed to enter into new international obligations;
(iii) if a matter will have a significant impact on public or private sector employment, finances, welfare, etc.;
(iv) if a matter is likely to impact on a particular group or have political implications;
(v) for appropriations from the Consolidated Fund and estimates of expenditure;
(vi) for appointments to boards of statutory corporations; and
(vii) if public property is being acquired or divested.

Assuming that legislation is the preferred option for achieving a policy initiative, it is the responsibility of a Secretary –

(i) to decide, in conjunction with the Minister, what legislation to bring forward;
(ii) to provide drafting instructions for the person who is to draft the legislation;
(iii) to ensure the draft legislation meets the policy requirements of the Ministry;
(iv) to arrange for consultation on the draft legislation with private and public bodies as appropriate;
(v) to assist the Minister in steering the draft legislation through the legislative process; and
(vi) to oversee the implementation of the legislation once it is passed.

The Cabinet needs to be involved in all these steps and for this purpose there are two types of Cabinet submissions that need to be prepared –

(i) a submission seeking approval in principle for the policy position and issue of drafting instructions to the LPAD; and
(ii) a submission with the draft Bill attached seeking approval of the introduction of the draft Bill into the legislature.

The first of these may be called in this Chapter Cabinet Submission 1; the second is Cabinet Submission 2.

It might also be necessary for the Cabinet to be involved at the Committee Stage of the Bill, if significant amendments are proposed which affect the policy of the Bill.

Cabinet papers, being confidential documents, should generally not be shared with persons or agencies outside the government. It is, however, sometimes necessary for the government to consult outside the government once a Cabinet paper has been drafted. What can appropriately be shared with outside agencies will be determined by the subject matter of the proposals.

The Cabinet is usually less involved in the making of Subordinate legislation. Subordinate legislation might be included as a package with the first submission; or submitted separately by the Minister after the Bill has been enacted. Generally, the need for a Cabinet paper does not apply to Subordinate legislation unless it raises particularly difficult or sensitive issues. It is usually the Minister and department responsible to decide whether to raise a Cabinet paper on an item of Subordinate legislation.

4.1 Cabinet approval of drafting: Cabinet Submission 1

The general rule is that LPAD should not draft a Bill until Cabinet approval is given for it. This is because an item drafted without Cabinet approval may be subsequently rejected by Cabinet or may need extensive amendment during the drafting and legislative process. This wastes time and effort on the part of the legislative drafter and uses up drafting resources.

In the case of a simple or urgent Bill, drafting instructions can sometimes be issued without obtaining approval in principle from Cabinet.

As already indicated, Cabinet approval is usually obtained by way of a Cabinet Submission (by whatever name called) submitted by the relevant Secretary. This is Cabinet Submission 1 which –

(i) forms the basis for the preparation of drafting instructions;
(ii) informs the Cabinet of the action which the instructing Ministry proposes to take regarding a particular matter;
(iii) prompts Cabinet to examine the proposal and express an opinion on it.

Except for legislation which falls within the responsibility of the LPAD, it is the responsibility of the Ministry wishing to put in place new legislation or amend existing legislation for which it is responsible, to write and circulate its own Cabinet Submission 1.

4.2. Before presenting Cabinet Submission to Cabinet

The Ministry will usually circulate a draft of its proposal to other Ministries and to the LPAD for comments before finalising the memo and presenting it to Cabinet for approval. Before a Cabinet Submission is send, the legislative and timetable aspects of the scheme should be cleared or commented on by the legislative drafter. If there is any legal question to be resolved before drafting instructions are issued it should be taken up with the LPAD at an early stage. Questions on a legislative scheme or legislative procedure should also be directed to the LPAD in the first instance.

The Cabinet Submission is in fact a miniature version of the drafting instructions, and should alert the Cabinet to the key policy and legal issues of the proposal.

4.3. Contents of Cabinet Submission

The policy matters that have to be considered by the policymaker before making a submission to Cabinet are essentially the same as those that apply to the issuing of drafting instructions. The Cabinet Summery will not usually need to be as detailed as the drafting instructions, but must give the Cabinet a full picture of what is proposed with a draft Bill.

The Cabinet Summery should therefore state –

(i) the purpose of the proposed legislation, i.e. the problem to be dealt with and the proposed legislative solution;
(ii) alternative courses of action and the reasons for rejecting them;
(iii) the factual and political background;
(iv) any constitutional or human rights or community relations implications;
(v) any international or regional obligations of the State that will be affected;
(vi) the financial and staffing and other administrative implications;
(vii) any unusual legal implications such as a reverse burden of proof, etc.;

(viii) what consequential amendments, if any, will be needed to other legislation;
(ix) the proposed timetable: this timetable should have been first agreed with the legislative drafter.

It should ask Cabinet to agree on –

(i) the session of the Parliament at which the Bill is to be introduced;
(ii) a proposed date for commencement of the resulting Act or Ordinance;
(iii) how the legislation is to be implemented;
(iv) what legal advice has been received on the proposal (including any advice from the LPAD);
(v) what consultation is intended, both in and outside Government, on the proposed legislation.

4.4. Presentation of Cabinet Submission

Rules of Business, 1996 provides about submissions to Cabinet, which must be followed, but it is common for a Cabinet Submission to –

(i) be in writing and in a format that facilitates proper consideration;
(ii) be based on agreed facts on which discussions can proceed;
(iii) show evidence that consultations were held with all relevant Ministries and agencies;
(iv) indicate realistic policy options and their implications; - cite previous Cabinet decisions;
(v) ensure that recommendations are clear;
(vi) be self-contained and cover all major issues on which decisions are to be made;
(vii) be treated as confidential; and
(viii) be limited to a length specified in the rules.

4.5. Approval of introduction of a draft Bill: Cabinet Submission 2

Once a Bill is drafted, it must go to Cabinet for approval and of its introduction. A Bill should only go to Cabinet for approval if it is drafted (or vetted) and cleared by the LPAD. The approval should be sought in another Cabinet submission i.e. Cabinet Submission 2 (so there will usually be two submissions to Cabinet.) This should explain –

(i) the purpose of the Bill,
(ii) set out the financial implications,
(iii) the staffing implications,
(iv) any human rights implications, and
(v) any international law implications of the Bill.

A Cabinet Submission 2 seeking approval for introduction of a Bill should draw the attention of the Cabinet to the commencement provision and its implications for the administration. It should

be in a similar format to a Cabinet Submission 1 and is subject to the same rules about confidentiality, etc.

4.6. Subordinate legislation

Subordinate legislation does not always require the approval of the Cabinet, but the principle of collective responsibility means that a Ministry proposing to make Subordinate legislation normally deserves a submission to Cabinet. If an item of Subordinate legislation imposes a fee or a charge, the usual rule is that it should be submitted for Cabinet approval. The submission will be different from Cabinet Submission 1 or 2 described in this Chapter, but the rules about format etc. will be the same.

4.7. The Cabinet directive

Once Cabinet has approved the proposals presented by a Ministry, it will issue a written directive.

In the case of Cabinet Submission 1, the decision will authorize the issuing of drafting instructions and the drafting of the proposed legislation, or not so authorize. If authority is given, the drafting instructions can then be issued and drafting can commence. In the case of Cabinet submission 2 , the decision will authorize the introduction of a Bill in to the Parliament or not so authorize. Ensuring that Cabinet decisions are implemented is not the task of the legislative drafter but of the Cabinet Division and each Ministry or Division.

CHAPTER 5

POLICY CONSIDERATIONS

5. Policy considerations

This Chapter seeks to indicate some of the considerations which should inform the making of policy, seen from the point of view of the legislative drafter. It looks at some of the issues that the drafter will have in mind when drafting a law so that it will stand up to scrutiny by the courts and by the international community. The policy in question is policy that is intended to be expressed in legislation. The Chapter does not purport to be an exhaustive statement about policymaking generally either for political parties or for governments.

5.1. Policymaker's role

When considering the introduction of new or amending legislation, the policymaker (that is to say, the Minister and head of a department and other officials working as a team) should keep several considerations in mind, as well as the main policy aim. The same considerations apply –

(i) whether writing a Cabinet Submission 1 or issuing drafting instructions;
(ii) to both primary legislation and Subordinate legislation.

The policymaker must ensure that effective drafting instructions are issued by the instructing officer. That officer must have sufficient understanding, and full authority, to give instructions that will enable the drafter to draft legislation that reflects the policy intention. The policymaker and the instructing officer (if different) both need to understand –

(i) what legislation is, and how it differs from other forms of writing;
(ii) the relationship between policy and law;
(iii) principles of good policy making;
(iv) the role of the drafter;
(v) what policy and legal issues the drafter will be concerned with;
(vi) the stages of the legislative process.

The policymaker and the instructing officer should be familiar with the procedural rules of the Parliament, any Cabinet instructions on preparation of Cabinet submissions, public service regulations and financial regulations. They should also be familiar with –

(i) the Constitution;
(ii) the Interpretation Act or the General Clauses Act;
(iii) the Statute Law Act if any (we don't have such law);
(iv) the Bangladesh Laws (Revision and Declaration) Act ;
(v) the procedures for publish notification in the official Gazette;
(vi) basic legislative principles;

(vii) current legislative style and practices .

In addition, an instructing officer must be –

(i) able to explain the aims and policy of a legislative proposal to the drafter;
(ii) familiar with the political and administrative considerations and the legislative context of the proposal;
(iii) able to make decisions on issues arising during drafting;
(iv) in a constant dialogue with the drafter.

5.2. Statutory interpretation

Ideally, the instructing officer should know something of the rules of statutory interpretation in order to understand the draft, to be able to check its implications, to understand how it relates to the policy goal, and to be able to criticise it knowledgeably.

There are a number of so-called 'rules' of interpretation, but in essence they mean that the courts must give meaning and effect to a statute if they can; they must look at the words of the text as the primary source of the meaning; but they can look to the purpose or 'mischief' to assist in understanding what the law is saying. This last point is significant in relation to explanatory material, which is the responsibility of the instructing department.

There are presumptions that –

(i) the law is not intended to produce an absurd result;
(ii) the law is not meant to have retrospective effect;
(iii) the law is meant to be consistent with human rights and international law; and
(iv) the burden of proving any allegation will be on the person putting forward the allegation.

These presumptions, except the first, can however be displaced by explicit words in the statute.
There is also a principle of interpretation that tax laws and criminal offences will be strictly construed.

Some of these presumptions and principles are in fact contained in the Constitutions, as discussed below.

5.3. The formulation of policy

As legislation is the result of policy being translated into legislative form, before any legislation can be drafted, the underlying policy must be determined. The formulation of policy in government takes place in Ministries according to their portfolio responsibilities.
The steps in the formulation of policy are usually as follows –

(i) identify the problem or issue;
(ii) decide the goals and objectives of the policy;
(iii) analyse the options available to the government;
(iv) consult interested persons and bodies ('stakeholders') both within and outside government;
(v) recommend which option will most effectively achieve the goals and objectives; and
(vi) set out how the policy is to be implemented, monitored and evaluated.

At the policy development stage, ideas are usually expressed in very general terms. This general expression of ideas will not, however, suffice for the purpose of giving adequate drafting instructions later on. A sufficient amount of detail in the policy to facilitate the eventual preparation of adequate drafting instructions is essential.

Practical problems can arise if sufficient detail is lacking in the policy, for example –

(i) delays could arise during the drafting process as a result of unresolved policy issues while the drafter seeks clarification from the instructing Ministry;
(ii) an additional Cabinet Submission might be required to deal with issues that were not covered in the original Submission 1 seeking approval of the issue of drafting instructions; and
(iii) more amendments might be needed to the Bill in Committee Stage than would otherwise be needed.

In formulating legislative policy, a policymaker must consider some fundamental administrative and legislative principles, as discussed below.

5.4. Resources/implementation

The Instructing Ministry will need to consider how the legislation will be implemented i.e. the administrative arrangements to make it work. They will need to consider –

(i) whether the Ministry has the capacity to implement the proposed legislation;
(ii) whether finance will be available to implement the legislative scheme; and
(iii) whether staffing resources within government will be available.

The Ministry will also need to consider –

(i) the likely effect of the proposal on the financial and staffing resources of other Ministries, and of private business; and
(ii) the likely long-term effects of the proposed legislation on the economy generally, and on the moral fabric of the society, etc.

5.5. General policy issues

The policymaker must consider –

(i) the effect of the proposal on existing laws such as financial legislation;
(ii) who is to be affected or bound; whether they include, for example corporate bodies;
(iii) the needs of indigenous persons or other similar sections of people of the country;
(iv) the appropriateness of the proposed legislation in terms of the local culture; and
(v) the need for consultations both within and outside government.

The policymaker must also have regard to any constraints imposed by –

(i) the Constitution, which is the supreme law of the land;
(ii) international obligations on human rights, the environment, etc., accepted by the State;
(iii) customary international law;
(iv) rules of interpretation (as discussed above); and
(v) existing legislation.

There is no obligation for policymakers to consider regional or foreign laws as such. However, especially in the area of trade, it may be of some benefit if policymakers are aware, for example, of foreign sanitary measures or product standards for goods that are to be exported. This is of particular relevance for Bangladesh which enjoys preferential treatment of goods exported to the European Union.

5.6. Constitutionality of proposal generally

In addition to the presumptions and principles mentioned above, the policymaker must be aware of any specific requirements or limitations imposed on legislation by the Constitution. Most constitutions state some principles about legislation, such as that –

(i) as a general rule, strict liability offences should not be created;
(ii) legislation should not be retrospective unless benefits are being conferred;
(iii) legislation should not be extra-territorial, especially if international community does not allow for it;
(iv) there should be no deprivation of rights without compensation; and
(v) there should be no 'double jeopardy' i.e. a person should not be punished twice for the same offence or breach.

5.7. Good governance

An obligation on all policymakers is to promote principles of good governance. This is especially the case in developing countries which depend to any extent on international partner, as 'good governance' is usually part of the partnership agenda, whether the partners are governments or NGOs. The elements of good governance can be summarised as natural justice, transparency and accountability, and the rule of law generally.

5.7.1. Natural justice

The common law has long incorporated requirements of 'natural justice', namely –

(i) hearing the other side (or giving each party an opportunity to be heard);
(ii) being impartial in decision-making; and
(iii) any deprivation of rights being proportionate to the intended result.

5.7.2. Transparency

This means that –

(i) decision-making should be an open and informed process;
(ii) the results should be publicly available; and
(iii) opportunities for corruption should be kept to a minimum.

5.7.3. Accountability

This means that –

(i) reasons for decisions should be given;
(ii) decisions should be in writing;
(iii) there should be a channel of appeal against executive decisions; and
(iv) there should be a reporting requirement for the work of the relevant office.

5.7.4. Rule of law

This means that –

(i) the opportunity for arbitrary exercise of power should be removed or reduced;
(ii) the right of the courts to rule on the exercise of executive powers should not be removed; and
(iii) powers of search, entry and arrest should be strictly controlled.

If, for instance, the legislation contemplated is for a scheme which involves a licensing process, the legislation should –

(i) not involve a prohibitive fee for the application or the licence;
(ii) not impose the licensing obligation before the law comes into force;
(iii) not include a wide exempting power;
(iv) not include a strict liability offence for failing to have a licence;
(v) not include a provision ousting the jurisdiction of the courts to decide on the legality of the decision;
(vi) include a requirement for technical and public inputs into the decision-making process;

(vii) include an opportunity for the applicant to support the application;
(viii) include an administrative appeal mechanism, with an opportunity for the applicant to be heard; and
(ix) require the relevant official to report on the number of licences, issued, revoked, etc.

Similar considerations would arise in, for example, a registration scheme, and whatever the legislation, the principles of good governance should be observed.

5.8. Powers

The policymaker must decide who, in relation to a legislative scheme, is to be given what functions. For example –

(i) Is the level of decision-making to be the Minister, the Secretary or the Head of a Department?
(ii) What is to be the role of the Cabinet/Legislature/Head of State in the scheme?
(iii) Should the functions be those of a government department or of a separate body?
(iv) If a separate body, should it be a statutory corporation or just a statutory body?
(v) Should any of the powers be delegated?
(vi) Should there be a power to issue directions about the working of the scheme?
(vii) Should there be an exempting power?
(viii) What reporting obligations should there be?

5.9. Sanctions and penalties

The legislative scheme should not be overloaded with proposals for provisions that can be dealt with administratively. The purpose of legislation is to make rules which require compliance, not to set out every administrative detail or to give illustrations.

If the proposed legislation will prohibit an activity, the policymaker must decide what sanction to propose e.g. by creating an offence, providing for cancellation of a license, or for civil recovery etc.

If criminal offences are to be created, the policymaker should have a view on the relative gravity of the respective offences in relation to each other and in relation to similar offences in other laws. A decision is therefore needed on the level of penalty to propose. Usually, the final decision on maximum penalties will be made by the LPAD in order to achieve consistency. (In the case of a Bill, of course, the final decision rests with the Parliament.)

The policymaker should consider the various types of penalty available. These might include-

(i) fines and/or imprisonment;
(ii) destruction of items;
(iii) forfeiture/confiscation of assets;
(iv) restitution/compensation; and
(v) customary sanctions.

The policymaker should consult the LPAD, the police and the judiciary on these matters before issuing a Cabinet submission or drafting instructions.

5.10. Adjudication

If the proposal involves any decision of an administrative character, the question whether the decision is to be reviewable, and if so, by whom, must be addressed. In the case of administrative appeals, it might be sufficient to provide for an appeal to the Secretary or the Minister, with rights of appearing, etc. Usually, it is preferable to provide for an appeal to an impartial tribunal, which might be a standing body, or might be set up *ad hoc* to hear individual cases.

In some legislative schemes it might be appropriate to provide for administrative penalties, which are imposed by technical officers. Care must be taken, however, to ensure that such mechanisms do not provide opportunities for corruption and that they provide a right to be heard and a right of appeal. The penalties must also be proportionate to the contravention.

Whatever a scheme is established, it should not displace the role of the courts to review the administrative decision.

If the scheme might confer on the courts a new form of jurisdiction, i.e. involve them in a different capacity from normal, the Chief Justice or rules committee should be given the power to make rules of court on the topic.

5.11. Other issues

Other issues that the policymaker needs to consider before writing Cabinet Submission 1 or sending drafting instructions include-

(i) The scope and application of the legislation e.g. who it is to apply to, whether it is to bind the State , whether it should be extraterritorial, etc.

(ii) Local appropriateness of the legislation i.e. whether it should adopt special rules of customary or religious law; the role of village/district/upozila / union councils, etc.; whether it has environmental and gender implications.

(iii) The method of service of documents; whether to include electronic service, etc.

(iv) Publication of decisions and other notices – whether they should be in the *Gazette*, or in more accessible media such as press, TV and radio; whether they should be notified in district offices etc.

(v) Retrospective legislation. Generally speaking, new laws should not be given retrospective operation. If this is desired, the advice of the LPAD should be obtained beforehand and the Cabinet Submission 1 and drafting instructions should state the justification.

(vi) Need for consultation with any advisory body before decisions are made.

5.12. Other legislative policy matters

In the Cabinet Submission 1 seeking approval for the drafting of a Bill, and in the drafting instructions in due course, certain other legislative matters must be considered and dealt with by the policymaker They include –

(i) The implications of the legislation on existing law. This is usually dealt with in what are known as the 'final clauses' or provisions. They are –

-repeals of existing statutes or, rules or regulations, etc.;
- savings of some of the provisions of existing laws;
- transitional provisions to preserve existing rights and allow for the law to be smoothly implemented; and
- consequential amendments to other legislation, either merely nomenclature, if a new body is created, or more substantive.

(ii) Whether material should be included in the main body of the Bill or in one or more appended Schedules.

(iii) Whether material should be in the main Bill or in regulations, rules or orders made under it, and whether, for example, codes of practice or similar items are required.

5.13. Timetable

The Cabinet Submission 1 and drafting instructions should always indicate the proposed timetable for the drafting of the legislation and the target date for it to come into force. Cabinet should be made aware of how long it is likely to take for the drafting to be done, and for the legislative process to be completed. These matters should also be clearly set out in the drafting instructions.

CHAPTER 6

DRAFTING INSTRUCTIONS: GENERAL

6. Drafting instructions: General

Legislative drafters draft Bills and statutory instruments (Subordinate legislation) in response to the requirements of a Government Ministry/Division/Department.

6.1. Need for drafting instructions

Some Bills might be simple and in standard form and can be drafted quite speedily. Others might involve major new legislation and take months or even years to draft. Whatever the nature of the legislation, the drafting of it can only be effectively done on the basis of written instructions from the government Ministry with policy responsibility for the subject.

The time required to draft and the quality of the drafting both depend on the quality of the drafting instructions. They tell the drafter what is to be achieved by legislation and how the legislation is to achieve it. When a Ministry's aims are well stated, the drafter's task is easier; when the aims are unclear, or incomplete, those inadequacies are reflected in the drafting.

Drafting instructions describe and limit the content of the proposed legislation and also serve as a benchmark to determine whether the Bill to be drafted does what was authorised by Cabinet.

Properly prepared drafting instructions –

(i) assist the drafter to understand what is required in the draft legislation;
(ii) achieve speedier production of a first draft;
(iii) reduce the number of drafts needed and thus save drafting time;
(iv) reduce the number of issues needed to be resolved during the drafting process;
(v) minimise the number of meetings needed to clarify ambiguities; and
(vi) reduce possible tension between the Minister, the Secretary and the drafter caused by misunderstandings as to what is required.

The drafter needs to know what the present state of the law is, what the law is to be, and why. Thinking these points through, writing them down, and discussing them help sharpen the issues from different points of view and often help create new ideas for better legislative solutions.
Once authority has been given for legislation to be initiated, therefore, the policymaker, or an instructing officer in the Ministry, needs to issue instructions to the drafter to draft the necessary legislation. The purpose of the following two Chapters is to indicate the topics that should be covered in such instructions and the form they should take.

6.2. The role of the instructing Ministry/Division

Few undertakings for a government Ministry/ Division are more challenging than preparing legislative drafting instructions and shepherding a large Bill or complex regulations through the legislative process.

Political issues add to the practical difficulties of researching and designing a regulatory scheme. Short time frames, limited resources, inadequately planned legislative programs, and policy changes in the middle of a project all tend to be the norm, adding to the complexities and challenges of a legislative drafting scheme.

For these reasons, any significant legislative proposal should have a strategic plan for the scheme, and an officer assigned to it full-time, with sufficient dedicated resources.
The issues requiring consideration include the following –

(i) whether any of the proposed provisions constitute unnecessary repetitions of provisions in Acts of general application such as the Interpretation Act(General Clauses Act);

(ii) whether the proposed provisions vary from those in an existing Act of general application, and whether there is a good reason for the decision to depart from the latter. Conflicting provisions must then be identified and properly dealt with;

(iii) whether the proposed legislation deals with matters that are also dealt with by another Bill that is being drafted or which has been introduced into the legislature. If so, the relevant Ministry should be consulted about the overlap; and

(iv) whether the proposed legislation is intended to respond to a court decision, legal opinion or international convention the Member State is party to. If so, the instructing Ministry should supply a copy of the court decision, etc. to the drafter.

The instructing Ministry should be aware that preparing draft legislation is an interactive and collaborative process and should at an early stage give the drafter the contact particulars of the officer with direct responsibility for the legislation. It is also a good idea for an instructing officer, before preparing drafting instructions, to have a meeting with the drafter to establish a relationship, find out anything the drafter needs to know and be guided by the drafter's advice.
The instructing Ministry should also be prepared to be consulted from time to time by the drafter for information and clarification on the instructions.

6.3. Supplementary instructions

If consultations with the legislative drafter result in a change of policy on the Bill or other item, the instructing Ministry might have to consult other Ministries, and even refer the matter back to the Cabinet for approval. Once approval for the change is given, formal amended drafting instructions should be issued.

Once the drafter has completed the final draft of the legislation requested, and the instructing Ministry is satisfied that its instructions have been adequately reflected in the draft, the Ministry should seek the approval of Cabinet to introduce the Bill into the legislature, by way of Cabinet Submission 2. Any amendments made to the Bill in Cabinet should be communicated in writing to the LPAD drafter by the instructing Ministry. This will usually be treated as instructions to amend the draft Bill.

If, during the Committee Stage of the Bill, amendments are made to the Bill, the instructing Ministry should send written instructions to the Legislative Support Unit of the Parliament to ensure that the amendments are incorporated in the Bill before it goes for assent.

Once the drafter has started work on an item, any further instructions sought by him or her should be supplied without delay. These supplementary instructions should also be in writing.

CHAPTER 7

DRAFTING INSTRUCTIONS: CONTENTS

7. Drafting instructions: Contents

The drafting instructions should cover all aspects of the scheme from the big picture to matters of relatively minor detail. They should tell the legislative drafter what is to be achieved by legislation and how the legislation is to achieve it.

In addition, instructions should identify, at least in general terms, rules or objectives that are proposed to be implemented using subordinate legislation. This allows the legislative drafter to bring to the instructing officer's attention at an early stage any possible concerns about the proposed split of matters between the statute and subordinate legislation under it.

7.1. General principles

The drafting instructions should –

(i) be consistent with the instructions for related legislative proposals; and
(ii) be expressed in simple, non-technical language.

The instructions should set out –

(i) the problem to be addressed or the object to be achieved by the legislation, i.e. what the Ministry wishes to happen (the desired outcome);
(ii) why it cannot happen without legislation (the mischief);
(iii) how the Ministry thinks the law should be changed in order for it to happen (the remedy);
(iv) whether Cabinet has already considered the matter;
(v) the existing law on the subject;
(vi) any legal issues that need to be taken into account;
(vii) how the legislation will be implemented;
(viii) what consultation has taken place inside and outside Government and the outcome of that consultation;
(ix) proposals for further consultation; and
(x) the target date for the enactment of the Bill or the making of the regulations and for implementation of the scheme.

The instructions should set out in relation to each main feature of a Bill exactly what the drafter is required to achieve. They should therefore –

(i) indicate any administrative provisions considered necessary to give effect to the proposal;

(ii) if the proposal would result in some activity being prohibited or regulated, indicate the sanction proposed for the enforcement of the provision;
(iii) suggest the penalties to be imposed for any offence arising under the provision;
(iv) indicate existing legislation that will require amendment or consideration to give effect to the proposal;
(v) indicate any transitional or saving provision required to be included in the law;
(vi) state whether any provisions of the law are to have a retroactive or retrospective effect;
(vii) in the case of instructions for amending legislation, indicate the provisions of the principal legislation which the Ministry considers should be amended to give effect to the proposal;
(viii) if the Ministry has a view on either the form or position of the legislative provision in the statute book, give particulars;
(ix) provide references to any decided cases or copies of any legal opinions available to the Ministry that might affect the proposal;
(x) provide any model legislation or precedent the Ministry wishes to adopt and indicate how it should be adapted;
(xi) state any specific regulation-making powers that might be required; and
(xii) provide copies of reports, etc., or if the reports are not readily available, references to reports that deal with the proposal.

7.2. Detailed contents

The drafter may assist by suggesting solutions or giving legal advice if necessary, but the primary burden for the contents of the Bill lies on the instructing Ministry. The instructions should therefore include the following matters, as appropriate-

7.2.1. The identity of the sponsoring Ministry

Title
The instructions should include –

(i) the name of the proposed legislation;
(ii) a proposed short title for the Bill or a topic title.

The choice of short (and long) title should generally be left to the drafter, but the instructing Ministry might be committed to a particular name.

7.2.2. Contact details

The instructions should give the name and contact information (office, phone, e-mail, etc.) of the official in the Ministry responsible for giving instructions and answering questions. It is desirable, if possible, for two officers to be nominated, so that in the absence of one, the other

can give instructions and respond to queries. These officials must be able to confirm whether drafts meet the Ministry's requirements and provide any clarification needed. The instructing officer should tell the drafter if he or she is likely to be absent for significant periods of time; the drafter should do the same for the instructing officer.

7.2.3. Policy approval

Whatever the requirement for approval may be, the legislative drafter must be informed when policy approval has been given for the drafting to commence. A copy of any approval, or approval application, should be attached to the instructions. (*See Chapter 4)* [Note that different considerations may apply to e.g. statute law revision or other technical amendments.]

7.2.4. General background and legislative environment

The instructions should contain sufficient background information to enable the legislative drafters to understand the problem or initiative, how it has arisen, and why it is being proposed. Proposed legislation often has a history which contributes to the solution proposed by the instructing Ministry. The legislative drafter needs to know this, but care should be taken to distinguish between background information and the actual legislative proposal.
The instructions should –

(i) mention any alternative remedies that have been considered;
(ii) identify any other legislation that is relevant to the proposed legislation; and
(iii) explain the relationship between the proposed legislation and existing legislation.

7.2.5. Scope of the legislation

The instructions should identify the persons or things to which the legislation is to apply. They should say whether the legislation is to bind the State (i.e. the government) and whether they are to have extraterritorial application.

If the legislation is to bind the State the instructions should say so. If the legislation is for the control of, for example, building standards, labour practices, environmental pollution etc., it is not appropriate for the Government to be exempted, and the drafter should be asked to include a clause binding the Government.

7.2.6. Background material

The instructions should give a brief history of the working of the existing law. They should give information about relevant background material e.g. reports of UN committees, law reform bodies, laws of other countries, etc. on which the proposals are based.

They should attach copies of discussion documents, texts or articles and any relevant Government report, court decision, legal opinion, international agreement, etc., or state where they can be found.

They should also mention any legislation in other countries that might provide useful guidance and that is known to the department.

7.2.7. Precedents

The instructions should not in general submit a lay or departmental draft or a precedent from another jurisdiction or even from a consultant in place of proper instructions. Such drafts may however be referred to and annexed to instructions, if agreed by the drafter.

If the instructions are to draft a Bill based on a Model Law or to implement the government's obligations under a Treaty or Convention, a copy of the Model Law, Treaty or Convention should be attached.

7.2.8. Related proposals

The legislative drafter should be told if the proposal is part of a package of legislative proposals. The instructions should therefore mention any other proposals that relate to the main proposal. They might be matters that have already been given effect to in other legislation, or that are being drafted in parallel, or that are proposed for future legislative action e.g. a tax proposal related to a land ownership proposal.

7.2.9. Government context

The related proposal might be one being dealt with by another Ministry. If the proposed legislation affects legislation of other Ministries, the instructions should mention those other Ministries and say whether they have been or will be consulted.

7.2.10. Practical implications

The instructions should mention any politically sensitive aspects of the proposal. They should also –

(i) state whether other Ministries and agencies are affected by the proposals;
(ii) indicate the main financial and human resource implications for the government; and
(iii) explain the effect the proposed legislation will have on existing legislation, if any.

7.2.11. Legal issues

The instructions should –

(i) state the existing law on the subject, including common law, case law and statute law, its application in practice; and the proposed changes:
(ii) mention any constitutional or devolution issues that are likely to arise and any significant human rights, gender, environmental or regional issues the legislation might give rise to;

(iii) say whether there are any other legal aspects to be considered e.g. deprivation of rights, evidentiary rules, displacement of presumption, retrospective effect, exclusion of court review, etc.; and
(iv) if appropriate cite relevant case law e.g. on tax liability in the case of a revenue statute.

7.2.12. Legal advice

The instructions should mention any advice on the proposal received from the LPAD, Attorney General or other specialist section, or from outside consultants.
They should include information about relevant court cases (including any pending litigation known to the Ministry) legal opinions and research; also relevant court decisions and legislation in other jurisdictions that might provide assistance. Instructing officers should not assume that the legislative drafter will be aware of such matters.

7.2.13. Any unresolved issues

The instructions should mention any unresolved issues which have a bearing upon the matters to be included in the legislation, accompanied by any opinion, legal or otherwise, and the views of the instructing Ministry on the opinion.

They should indicate any gaps in the instructions or particular areas where advice is being sought or is required. The instructions should mention areas of concern on which the advice of the drafter is sought.

7.2.14. Substantive provisions

The instructions should include instructions as to the substantive provisions required. These would include powers and duties and the level of decision-making generally. Thus, for instance, if a licensing or registration body or authority is to be set up under the proposed legislation, the instructions should set out, among other things –

(i) the name of the body or authority;
(ii) the number of members and how they are to be appointed, etc.;
(iii) the qualifications and terms of office of members;
(iv) the functions, powers and duties of the body and how they are exercised; and
(v) the main procedural rules (which can be in a Schedule).

The instructions should include any incidental or supplemental provisions needed to support the remedy or that need to be considered during the drafting process.

7.2.15. Offences and penalties

The instructions should state clearly what acts or omissions are to be offences and what the maximum penalties for those offences are to be. Advice on maximum penalties will usually be a matter for the LPAD and any advisory body, but the instructions should indicate the level that is

aimed at. The instructions should mention any provision that is required for administrative appeal, etc.

7.2.16. Subordinate legislation

The instructions should say whether any Subordinate legislation is contemplated, so that the legislative drafter can include the necessary powers in the Bill. If a power to make rules, regulations or notification is envisaged, the instructions should identify the kinds of things that are intended to be dealt with by the rules, regulations and notifications.

7.2.17. Repeals

The instructions should mention any Act or Ordinance or Subordinate legislation that is to be repealed. Note that repeal may be whole, partial or implied.

7.2.18. Saving provisions

The instructions should mention anything done under a repealed law that needs to be saved i.e. to remain in effect. Examples would be existing appointments, licences, etc.

7.2.19. Transitional provisions

These deal with the period between existing legislation ceasing to be of effect and the coming into force of the new legislation. The need for them will in any event be considered by the legislative drafter, but the instructions should mention any requirements for transitional or transitory provisions needed to cover the transition from the old law to the new e.g. appointments, prosecutions etc. Note that time for conforming to the new law might be required.

7.2.20. Consequential amendments

New legislation sometimes affects provisions in other legislation. If that happens, consequential amendments to the legislation affected are necessary. The consequential amendments should be set out in the drafting instructions.

Searching an electronic database is a useful, though not infallible, way to find these. Such a search might reveal problems with the main proposal, for example, that the strategy proposed will not work properly in relation to other legislation.

7.2.21. Timetable

The instructions should indicate the priority that has been given (or that is being sought) to the proposed legislation, and the target date for its introduction. They should set out the proposed timetable for the enactment and implementation of the Bill and or making of the Subordinate legislation.

They should indicate whether there are any matters that may affect the timetable for the Bill (e.g. whether consultations on the draft are required; whether the Bill is to be prepared only as an indicative or exposure draft).

7.2.22. Commencement

The instructions should include instructions regarding commencement (i.e. the coming into force) of the Act or Ordinance or Subordinate legislation.

It might be appropriate to phase in the new legislation, and the legislative drafter should be given instructions on this. Care should be taken in such a case that all relevant provisions are brought into effect at the same time.

In some cases, the commencement might need to be synchronised with the commencement of another piece of legislation, either one already enacted, or one being drafted in parallel.

Note that –

(i) different dates can be appointed for different provisions; a complex statute might even require a schedule of commencement dates;
(ii) the Interpretation Act usually gives the government power to do some things pending commencement e.g. make appointments, make regulations, etc.; and
(iii) retrospective application of legislation is not generally encouraged, so there must be a good reason if it is proposed.

The instructions should therefore state the ministry's intentions regarding the date of coming into force of all or part of the legislation, or information about the law is to come into force, and the reasons for suggesting different dates for different provisions.

7.2.23. Amendment Bills

If dealing with amending legislation, the instructions should indicate –

(i) the legislation being amended;
(ii) the sections to be amended;
(iii) how they are to be amended; and
(iv) an explanation of why previous amendments (if any) were made.

If in doubt about what to include in the drafting instructions or how to tackle a problem, the legislative drafter's advice should be sought.

Occasionally, time constraints mean that drafting must start while some facets of the policy are still being developed. In those circumstances, matters still undergoing consideration or subject to change should be clearly identified.

CHAPTER 8

DRAFTING INSTRUCTIONS: FORMAT

8. Drafting instructions: Format

There is no standard format for the way in which drafting instructions should be given, provided they tell the legislative drafter what has to be done, why it has to be done and when it has to be done. However, there are certain formalities in relation to the instructions which should be observed for better legislation to be achieved.

8.1. Source

The policy instructions should come from a government Ministry or Division or even a Minister personally. They should come from the head of a department. Normally a Cabinet minute approving the drafting of legislation does not itself constitute drafting instructions. However, it is accepted practice for the Cabinet Submission 1 to be treated as drafting instructions, if it is approved and includes the matters mentioned in the previous Chapter.

8.2. Instructions should be in writing

The instructions should be in writing. This protects the legislative drafter if a dispute arises as to whether the draft reflects the government's policy. It is also useful if there is a change of personnel, either in the instructing Ministry or in the LPAD. It also provides an institutional memory, so that anyone who picks up a file will be able to appreciate the historical background of the instructions and be able to advance work on the proposed or draft legislation.
Oral instructions can easily be misunderstood, forgotten or miscommunicated. Follow-up action then becomes difficult or impossible, and unnecessary delays can also occur. Oral instructions might be acceptable in exceptional or emergency circumstances. But even then, an e-mail record should be kept if possible, for the reasons just stated.

Policy instructions should normally be signed by the Secretary or an officer authorized by the Secretary.

8.3. Narrative form

Drafting instructions-

(i) should normally be in memorandum form in ordinary narrative prose, though they may be partly in tabular form if that is more convenient;

(ii) should normally be written in plain Bangla to enable the instructing officer's intentions to be readily understood;

(iii) should be in non-technical language as far as possible. If technical terms are used, they should be explained.

Words should be used consistently throughout the instructions to avoid misunderstanding or misinterpretation. Any conventions that have been adopted in the instructions (e.g. acronyms or abbreviations) should be explained.

8.4. Departmental drafts

The drafting instructions should not be in the form of draft legislation, unless the LPAD legislative drafter has expressly consented to instructions in that form or it is a very straightforward item. This is because it might be difficult for a legislative drafter to think a legislative scheme through properly if presented with an existing draft; it can tend to produce 'tunnel vision'.

The legislative drafter will need to ensure that a departmental or 'lay' draft is constitutional, deals with any legal issues arising from the proposed legislation, and is consistent with the rest of the statute book. Trying to redraft or re-arrange someone else's draft can be very time consuming and is not always a simple task, so that sending a lay draft might actually slow down the drafting process.

Another consideration is that the legislative drafter might interpret the words used in the lay draft in a way different from that intended and might misunderstand the policy and purpose of it. Without clear explanation, the legislative drafter may not fully appreciate the precise nature and extent of the legislative proposal. If a draft produced in the Ministry is submitted, therefore, it should be annotated with explanations, and accompanied by written instructions.

In exceptional circumstances, such as where the subject matter of the proposed legislation is particularly complex or technical, instructions in the form of a draft, supplemented with an explanatory memorandum, may be forwarded to the legislative drafter. Precedents from other jurisdictions can also be useful where the subject matter is complex or technical, or if the particular jurisdiction has no legislation of its own dealing with new situations which other jurisdictions have dealt with successfully.

The legislative drafter is not, however, under any obligation to adhere to the language, form or content of the lay draft or of any precedents (unless judicial decisions have been based on their language). Lay drafts are instructions only and instructing officers should avoid committing to any particular form of words or expression, because these may not survive the drafting process. For this reason, it is not desirable for a Ministry to consult stakeholders on a lay draft, as significant differences might arise between that draft and the draft introduced into the legislature. If the Ministry wishes to consult before a formal draft has been drafted, it should involve the drafter early to get the drafter's input on the proposals.

A lay draft is usually inappropriate for minor amendments to existing legislation or for apparently straightforward documents, such as commencement notices because the issues may appear deceptively simple. However, if the drafter agrees, and there is no possibility of misunderstanding, an instructing Ministry may provide instructions in the form of a marked update of existing legislation. An example would be if all that is involved is an update of fees in a fee schedule. However, normally there is no substitute for comprehensive instructions in narrative form.

There are some recognized exceptions to the above principles –

(i) A Bill drafted by or for the Law Reform Commission or Committee by the LPAD might be acceptable as drafting instructions if the background of the draft is explained.

(ii) Instructions can refer to precedents for the kind of scheme the Ministry has in mind, but should include copies if they are not likely to be readily available to the drafter.

(iii) Instructions can include examples, illustrations and other aids to comprehension.

8.5. Attachments

The instructions should have attached any report of consultations already held and the conclusions of any committee set up to advise on the proposal. Attachments should include copies of directly relevant background material e.g. texts, articles, Government reports, court decisions, legal opinions, the law of other countries, a regional model law on which the proposals are based which are not likely to be readily available to the drafter. Alternatively, the location of these materials may be given.

If the Ministry would like the legislation to be modelled after a foreign legislative precedent, a copy of that precedent should accompany the instructions.

The following guidelines are recommended for both the LPAD and other Ministries and Government Departments:

(i) before engaging a consultant, seek advice from the LPAD as to whether it is in fact necessary to do so. Engaging consultants is extremely expensive and unless the LPAD is unable to assist Government to prepare proposed legislation, it is probably better to have the LPAD do the job;

(ii) where a consultant *is* engaged, the instructing Ministry should ensure that the terms of reference for the consultancy are clear;

(iii) since the LPAD's clients are the instructing Ministries, the legislative drafter should deal directly with consultants when a relevant Ministry official is also present. This is to avoid, amongst other things, any misunderstandings regarding instructions. Interaction between the consultant and the legislative drafter is usually through a Task Force or Committee of some sort set up specifically to deal with a project;

(iv) once the consultant completes their task, they should forward their recommendations, in the form of a report, to the instructing Ministry. It is the latter's responsibility to forward the report to LPAD for endorsement;

(v) only when Cabinet approves the consultant's report (including any lay draft which may be part of or attached to, the report) can the instructing Ministry forward instructions to the LPAD for the vetting or other finalisation of a consultant's draft; and

(vi) all legislative drafts prepared by consultants must be vetted by the LPAD legislative drafter and must be endorsed by the law Minister before they go to Cabinet for final approval.

8.6. Formalities

To make it easier to refer to particular provisions in the instructions when issues are being discussed, it is helpful if instructions are –

(i) given a reference name or number;
(ii) dated;
(iii) set out in numbered paragraphs; and
(iv) set out on numbered pages.

If instructions are incomplete, or are subject to possible change, this should be pointed out in the instructions.

CHAPTER 9

SUBORDINATE LEGISLATION

9. Subordinate legislation

9.1. Nature of subordinate legislation

Much legislation is contained in rules, regulations or other types of written law made by a person or authority under powers delegated by the legislature. For that reason, it is sometimes called 'delegated legislation' or 'subsidiary legislation' but in this Desk Book it is called 'subordinate legislation''.

Subordinate legislation includes regulations, rules, orders and other written instruments which have legislative effect i.e. make law for the community at large. They contain details needed to 'flesh out' the Act; the administrative or procedural matters relating to the implementation of an Act. Subordinate legislation usually, but not always, takes less time to draft and make than primary legislation, and it is easier to amend than an Act.

9.1.1. Rules, regulations or orders are the most common form of Subordinate legislation and can cover a wide range of topics. They are made in exercise of a power conferred **by any enactment**. They might include things that are going to be changed regularly, such as fees (but not fines.) Fees are sometimes in a schedule to the Bill. Forms are often prescribed by regulations, but they could be simply 'approved' and might not need Subordinate legislation. **Orders** are usually made for single matters such as designating a prohibited area, designating times for certain actions, etc.

All the above items will usually be published in the *Gazette* as Statutory Rules and Orders, and are sometimes known as 'SROs.' They become part of the statute law of the jurisdiction.

9.1.2. Note that the **Rules, Regulations or Orders** made by any person or authority empowered **under any constitutional instrument** and in force in Bangladesh is a principal legislation, not subordinate legislation.

9.1.3. By-laws (or bye-laws) are made by local authorities, universities and other statutorily incorporated bodies. They are legislative in nature, but the process for making and publishing them will be governed by the statute conferring the power and they might not appear in the statute book.

9.1.4. Proclamations are usually made by the President, for example to prorogue or convene the Parliament. As such, they are not legislative in nature and do not need incorporating in the statute book.

9.2 Quasi-legislation

There are various types of instrument made under powers conferred by primary legislation that are not strictly legislative instruments. Sometimes what is required might be quasi-legislative, such as a code of practice, which would set standards but would not result in a prosecution for a breach. Other examples of such instruments are –

(i) Procedural rules, governing the steps officials are expected to follow in carrying out specified administrative processes.

(ii) Practical rules, stating the practices that are to be followed by officials in order to make a statutory scheme operative or effective.

(iii) Instructions, indicating by whom and how particular administrative powers are to be exercised.

(iv) Interpretative guides, indicating how persons affected by statutory powers can expect those powers to be exercised.

(v) Prescriptive directions, indicating the actions that persons affected are expected to take in order to comply with statutory rules.

(vi) Recommendations, providing advisory guidance as to appropriate action in order to implement specified policy objectives.

(vii) Guidelines or standards for action or behaviour in specified contexts. These normally have no statutory effect, but failure to follow them would be evidence of failure to comply with the primary legislation.

(viii) National Policies.

Notes

1. Codes of Practice and similar instruments are not Subordinate legislation but give guidance in setting standards against which conduct can be judged. Whether they are published in the *Gazette* or incorporated in the statute book is a matter for each jurisdiction and should be stated in the primary legislation.

2. Advice on whether a particular instrument is legislative in nature can be obtained from the LPAD. Advice on the most appropriate type of instrument should also be sought from the LPAD.

9.3. Power to make Subordinate legislation

Most Subordinate legislation is made under powers conferred by primary legislation i.e. an Act or Ordinance. Some Subordinate legislation is made under powers conferred by the Constitution. The power to make Subordinate legislation (known as '*vires*') is usually given to a Government, or sometimes to a head of a technical department. Power may also be given to a public body, or, for example, to the Chief Justice to make rules of court. A corporative society that is not a public body cannot make regulations, although it might have the power to make by-laws for the conduct of its own members or on its own premises.

The power is usually limited to specified objects. A person proposing to make Subordinate legislation should ensure that the necessary power exists. Sometimes an Act or Ordinance needs to be amended just to provide the necessary regulation-making power. This is something on which a Ministry needs to be satisfied before issuing drafting instructions, and advice, if needed, should be sought from the LPAD. The power can be circumscribed by for example, a requirement to consult or obtain advice from some other body.

9.4. Cabinet approval

Subordinate legislation does not always require the approval of the Cabinet, but the principle of collective responsibility means that a Minister proposing to make Subordinate legislation will normally take a submission to Cabinet. Generally, the need for a full Cabinet submission does not apply to Subordinate legislation unless it raises particularly difficult or sensitive issues. Where any Subordinate legislation imposes a fee or a charge, the usual rule is that it should be submitted for Cabinet approval.

The decision whether or not to make a full Cabinet submission in respect of Subordinate legislation usually rests with the Ministry responsible.

If Subordinate legislation is to be made by a person or body other than Government, it does not need to be submitted to the Cabinet. However, if such an item has to be endorsed by a Minister, and if it imposes a fee or a charge, or creates offences, or is politically sensitive, the Minister would normally seek Cabinet approval before endorsing it.

9.5. Processing

In the case of Subordinate legislation, there are no three readings, Committee Stage or enactment in the legislature. In other respects, the same principles apply to the drafting of Subordinate legislation as apply to the drafting of primary legislation, i.e. –

(i) it should be on the basis of drafting instructions, which have taken into account all the relevant policy and administrative considerations;
(ii) time should be allowed for consultations and re-drafting.

Sometimes the Subordinate legislation may be more complex than the Act. Adequate drafting instructions are therefore as important for major items of Subordinate legislation as for Bills.

Drafting instructions for Subordinate legislation should normally have been expressly approved by the relevant Minister. However, in the case of routine Subordinate legislation, the instructions can usually be issued by the relevant officer in accordance with established precedents. In the case of routine items of Subordinate legislation, a draft can usually be prepared by the Secretary (or his or her delegate) or by the relevant statutory officer, in accordance with current drafting style, and sent to the LPAD for vetting.

A Minister should not be asked to approve a Subordinate instrument that has not been drafted or vetted by the LPAD.

If the necessary powers ('*vires*') already exist, Subordinate legislation can be made at any time, subject to any statutory requirement for consultation and to any need for a Cabinet submission. However sufficient time should be allowed for the drafting of the subordinate legislation.

Subordinate legislation might be –

- included as a part of a package with the first submission seeking approval for the drafting of a Bill;
- included with a submission seeking approval for the introduction of a Bill; or
- submitted separately by the Minister after the Bill has been enacted.

It may sometimes be necessary to amend an Act before rules or regulations can be made under it, in order to provide the requisite powers. In this case, the drafting instructions should instruct the drafter to draft an amending Bill, as well as the draft rules or regulations. The draft rules or regulations can then be considered by Cabinet when the Bill is considered, so that the whole legislative scheme can be seen together. Once the Bill has been enacted, the Minister or other person empowered to do so can make the rules or regulations.

Care should be taken by the instructing Minister to ensure that any rules or regulations to be made under an Act are made in time. Instructions for the drafting of rules or regulations should therefore be given to the drafter as soon as possible following enactment of the Act. It is better to give the instructions at the same time as the instructions for the Bill, if possible.

9.6. Approval by the legislature

Because legislative power is vested in the Parliament, the General Clauses Act requires that all Subordinate legislation be published in the *Official Gazette*; and in few cases be laid before the Parliament.

The laying is usually done by 'laying on the table' of the House for a period, typically 30 sitting days after publication, to enable the members, either individually or as a committee on relevant ministry, to scrutinise the item. The item may then be subject to either a 'negative resolution procedure' or a 'positive resolution' procedure depending on what the enabling Act (or the Constitution or Interpretation Act) provides. An enabling Act can override the Interpretation Act provision (but not a constitutional provision) by specifying which of these methods applies to Subordinate legislation made under it. Under the 'negative resolution procedure' the rules,

regulations etc. are valid unless disallowed by the legislature within the specified period, typically 30 days. Under the 'positive resolution procedure' they have to be approved by the legislature before they can come into force.

'Laying on the table' can be facilitated by appointing a scrutiny committee to report to the Parliament on any amendments needed etc.; it does not require scrutiny of all rules or regulations by the whole House.

9.7. Validating of Subordinate legislation

In the jurisdiction where Subordinate Legislations have to be approved by the legislature before they can come into force, the Subordinate legislations need to lay before the legislature; and when not laid as required, the legislation is technically invalid, and anything done under it has no effect. This can be an embarrassment if action has been taken – sometimes for years – on invalid Subordinate legislation. Therefore, it needs, from time to time, to enact a Validating Act or similar legislation to give effect to Subordinate legislation that has not been laid on the table of the House.

9.8. Commencement

Subordinate legislation usually comes into force on publication (i.e. in the *Official Gazette*), but the commencement might be deferred to a date appointed by the maker of the item e.g. to a date appointed by the Minister by notice in the *Gazette*, or published in the legislation itself. The same considerations about multiple commencement notices, etc. apply as with primary legislation. Subordinate legislation cannot come into force before the enabling statute comes into force.

CHAPTER 10

TIMETABLE FOR LEGISLATION

10. Timetable for legislation

10.1. Introduction

Allowing enough time for the drafting to be done is one of the most important requirements for a smooth working relationship with the LPAD, but is often overlooked. The instructions should state the priority to be given to the item in the legislative programme (if any) and the expected time frame for its completion. They should set out any deadlines that are likely to apply to the project as a whole.

The drafting instructions should state the target date for the enactment of the Bill or the making of the regulations, and should be provided in sufficient time for the Bill to be introduced, or for the rules or regulations to be made in accordance with the intended timetable.

The LPAD is entitled to refuse to accept instructions that do not include a timetable, as the LPAD might have many items to work on and needs to prioritise them.

The time needed for drafting will obviously vary, depending on the complexity of the legislation, but if the job is to be done properly, enough time must be allowed. A first draft may need to go through several revisions before it is ready to be introduced or made. There may also need to be consultation with outside bodies.

The instructions should set out the time expected to be taken for each step in the legislative process. The instructing officer therefore needs to consider not just the desired date for a first draft, but the intended date for the Bill or Subordinate legislation to come into force. This in turn requires the instructing officer to work out a realistic timetable, not only for the drafting of the item, but for its enactment or making and its coming into effect.

10.2. Time involved in processing a Bill

The following are the steps typically involved in the processing of legislation. Some of them might be omitted or combined, if a Bill is very minor or urgent, but in setting a timetable, the instructing officer should bear in mind the need for all the following steps:

- First policy draft completed; consultations inside and outside government

- Second and subsequent drafts; consultations
- Referred to other Ministries if they are affected
- Referred to Cabinet for policy approval
- Referred to LPAD for drafting
- Referred to Cabinet for final approval

- Notice to Parliament secretariat for introduction
- Publication of Bill, with any explanatory material by parliament Secretariat
- Introduction of Bill and First reading
- Committee Stage (Select Committee or Committee on relevant ministry)
- Second reading and policy debate and consideration of Bill (clause by clause)
- Third reading and passing
- Certification of Bill by Speaker
- Assent by the President
- Publication of Act by Parliament secretariat
- Press conferences etc. to explain the Act
- Making of rules or regulations to implement the Act, if required
- Other action might also be needed, such as making appointments to Boards etc.
- Commencement (coming into force) of the Act or Ordinance (if not immediately come into force).

Note that a Bill intended for introduction to the Parliament on a particular date normally needs to be submitted to the Cabinet Division several weeks before that date. This is to enable the Bill to be processed after the Cabinet meeting in accordance with the rules of procedure. These typically require –

(i) notice of the Bill to be send several days before the day on which the Bill is to be introduced; and

(ii) copies of the Bill to be published in the *official Gazette* and distributed to Members several days before the day nominated for its introduction and first reading.

10.3. The legislative program (legislative calendar)

The drafting instructions should state the priority to be given the proposed legislation, as well as the expected time frame for its completion. They should state the Ministry's understanding of the current status of the project in the legislative programme and its importance to the Government.

The decision on what Bills to introduce to the Parliament is one for Cabinet to take. Normally, an indication of the Bills to be introduced each year will be given in the speech by the President at the start of the legislative year. More important, however, is the question of what Bills are to be introduced during each session of the Parliament, since a Bill cannot be introduced until it has been drafted. It is therefore essential to have close liaison between every Ministry/Division/ Department that has legislation in mind and the LPAD on this question.

A legislative programme (legislative Calendar) requires –

(i) a process to enable LPAD to decide legislative priorities, i.e. which of the legislative projects are to be part of its next program and in what order;

(iii) a timetable for Ministers to make the policy decisions that will enable drafting to progress.

The programme should be worked out far enough ahead to give Ministries time to complete larger, more complex legislative projects. There should also be a procedure for dealing with urgent legislative projects that arise after the legislative program comes into effect. The timetable for drafting should recognise that it takes time to develop policy and if policy involves agreement with other Ministries (e.g. the Ministry of Justice on the creation of criminal offences and the imposition of criminal or civil penalties) extra time will be needed. Time also needs to be allowed for securing collective agreement to the policy through the relevant Cabinet committee.

To work out a legislative programme and co-ordinate drafting projects, it is a common practice to have a Cabinet committee or sub-committee on which all Ministries of the Government are represented. It is also useful to have guidelines setting out the criteria for making the necessary decisions.

10.4. Time needed to draft a Bill

The time needed to draft an item of legislation depends on its length and conceptual complexity and the progress of the discussions and consultations. Many issues, including policy issues, will need to be addressed during the drafting process and the time required to draft legislation may be much longer than the instructing Ministry and the drafter anticipated.

The time available for the drafting might be reduced by the need to meet policy demands, but the time needed for drafting might be increased by legal complications. The task of the drafter and the instructing officer is to reconcile these requirements. There might be a need for periodic reconsideration of the timetable in the light of difficulties encountered and changes to the legislative programme.

It must be appreciated that there might be emergency situations that call for urgent legislative action. If legislation is required so urgently that a Ministry considers it should be given priority by the LPAD drafter over other Bills already in progress, the Secretary of the Ministry should write to the LPAD Secretary giving reasons for requesting priority.

Once the LPAD legislative drafter receives approved drafting instructions, the drafting should commence as soon as possible. The drafter will need to review the instructions and undertake legal and factual research before actually drafting, which takes time. Once a first draft is complete it will be sent to the instructing Ministry for its comments in writing, and this also takes time. Note that several versions of the draft Bill or other instrument may be required before it is finalised.

The instructing Ministry should bear in mind that –

(i) the drafter often has several drafting projects in hand at the same time;
(ii) complex laws benefit from reflection and the drafter should be given adequate time to reflect on key provisions;
(iii) consultation with other Ministries and outside bodies might be needed during the drafting process; and
(iv) editing of the draft once completed also takes time (grammar, numbering, checks for clarity, logic, compliance with the instructions, etc.).

If the legislative drafter is unable to deliver within the agreed time frame, he or she should say so, giving the instructing Ministry reasons for the delay, and suggesting a reasonable alternative completion date.

LPAD legislative drafters work in teams, with an experienced drafter taking the lead in drafting of a Bill. This serves the dual purpose of ensuring quality control and facilitating on the job training or mentoring of the less experienced drafters in the LPAD.

What all this means is that, even if the instructing Ministry only wants a simple Bill or item of Subordinate legislation, the drafting instructions should be sent to the drafter several weeks before the intended commencement date. If the Bill or item is complex, the time needed might well be several months.

CHAPTER 11

CONSULTATIONS

11. Consultations

11.1. Introduction

Consultations by an instructing Ministry are usually required at some stage during the process of getting a Bill drafted and enacted. The consultations might be –

(i) with other Ministries within the government;
(ii) with relevant stakeholders outside the government; or
(iii) with the legislative drafter.

Consultations might be needed –

(i) before issuing the drafting instructions;
(ii) during the drafting process; or
(iii) during the passage of a Bill through the legislature.

There is sometimes a statutory requirement for consultation before Subordinate legislation is made.

11.2. Policy or drafting

Consultations might be –

(i) about policy, before a proposal for legislation is submitted to the Cabinet; or
(ii) about the drafts that emerge from the administrative ministry.

They might also be needed if amendments to the draft are required in committee stage. Consultations on policy can do much to assist the instructing Ministry to clarify and better define its policy, and will feed into the Cabinet Submission 1 and, eventually, the drafting instructions. They might be with other government Ministries, or with outside bodies such as NGOs and UN agencies or other civil societies.

Consultations on policy are the responsibility of the instructing Ministry not of the legislative drafter, although it might be appropriate for the legislative drafter to attend such consultations.

Consultations on actual drafts are usually confined to within the government or even within LPAD, but consultations outside the government might be appropriate in the case of a major Bill.

11.3. Within the government

Consultation with other Ministries is needed if, for instance, the proposed legislation assigns duties or powers to another Ministry. (The grant of a licence might, for instance, be conditional upon an applicant satisfying a condition under a revenue statute.)
Such consultation early on in the process benefits the instructing Ministry by revealing what policy areas might require adjustment or refinement and thus facilitate the writing of the Cabinet Submission 1.

A Ministry that is considering introducing new or amendment legislation should at an early stage, in writing, consult the LPAD as the Government's principal legal Division. In seeking advice from the LPAD, the instructing department should explain –

(i) the reasons for wishing to enact the new legislation or to amend existing legislation;
(ii) what the policy is;
(iii) how it is proposed to carry the policy into effect; and
(iv) what other Ministries have been consulted, and what their reactions to the proposed legislation are.

The LPAD will advise on –

(i) whether new legislation is in fact required;
(ii) whether any amendment to existing legislation is needed;
(iii) other ways in which the policy proposal can be achieved;
(iv) whether the proposal complies with the Constitution, human rights, natural justice and international and regional obligations; and
(v) any relevant court decisions or precedents in other jurisdictions.

The LPAD will also advice on a realistic timetable for the drafting of the legislation and its passage through the Parliament.

11.4. Outside the Government

Consultations with persons and bodies outside Government can be useful in assisting the instructing Ministry to gauge the probable reaction, by persons and bodies outside Government, to the policy proposal or the draft, as the case may be. Comments from external sources can also help the government refine the policy by providing fresh insight from a different perspective. They also foster good relations between the government and the public, and demonstrate the principle of transparency.

With whom and for how long consultations should be held will depend on the subject matter and complexity of the policy issues. They might be with a specialised group having a particular interest in the proposal, e.g. accountants, doctors, or farmers. They might be with the public at large on the basis of a 'White Paper' or similar policy document put out by the government. Alternatively, there might simply be a press announcement about a proposed legislative

initiative. A 'White Paper' might have attached to it a draft Bill prepared by a Law Commission or the LPAD. If the LPAD prepares such a Bill, it should be on the basis of drafting instructions and sufficient time for the drafting needs to be allowed.

Consultations outside the government usually invite public response and set a deadline for responding. They will usually involve liaison with the press and media. Public consultations might be held in different areas of the country and involve regional or district administrative officers.

The time likely to be needed for public consultations should be included in the timetable for the proposed legislation to come into effect. Patience may be required, and it is necessary to strike a balance between the urge to 'get on with it' and the necessity to 'hear the other side'. The legislative drafter might be invited to attend consultations outside government, but should not be expected to be a spokesman for the government on policy. Nor is it the legislative drafter's job to contact stakeholders directly.

CHAPTER 12

SUMMARY AND CONCLUSION

12.1. DRAFTING INSTRUCTIONS: SUMMARY LIST

A good working relationship between the legislative drafter and the instructing officer is essential to good legislation, and thus to good government. It is hoped that this Part and the following summary of the contents of good drafting instructions will help achieve that.

Summary List

Below is a summary of items discussed at greater length in the *Chapter on Drafting Instructions: Contents* and reference should be made to that Chapter for a fuller discussion of each item.

12.1.1. Before issuing Drafting Instructions (DIs)

• Consider impact on other Ministries and on the public at large
• Consult as necessary – Other Ministries, the LPAD, stakeholders
• Consider legislative timetable
• Ensure finance will be available
• Consider staffing implications
• Prepare Cabinet Submission 1
• Obtain Cabinet approval

12.1.2. Issuing office

-State the Ministry or Ministry issuing DIs.
- Give a contact name and phone number and e–mail address.

12.1.3. Title

Propose a short title for the Bill, or a topic title for the project.

12.1.4. Policy authority

Give details of the policy authority i.e. the Cabinet decision (including whether there are matters for which policy authority has not yet been given)

12.1.5. Background

- Outline the factual and political context in which legislation is being proposed.
- Indicate any international or regional issues involved.

12.1.6. The mischief aimed at

- Describe the problem that the Ministry wishes to address.
- Summarise the proposed legislative solution.
- State the reasons for choosing legislation as the option.

12.1.7. Existing law

- Describe the relevant existing law and its application in practice.
- Mention any problems in the application of the existing law.

12.1.8. Amendment Bills

If the proposed legislation is an amendment Bill, identify the Act to be amended, the sections to be amended and the manner in which they are to be amended.

12.1.9. Legal issues

- Mention any legal issues that need to be taken into account.
- Summarise any LPAD advice that has been given on the proposal and any other legal advice to or within Government or pending litigation that could be relevant.

12.1.10. Application and scope

Say whether the legislation is to apply to whole of the State or its intended territorial scope, etc.

12.1.11. Substantive provisions

- Indicate the main provisions that the legislation should include.
- If the proposal is to set up a regulatory body such as a Board or a Commission, suggest the name of the body; the number of members and how they are to be appointed, etc.; the qualifications and terms of office of members; the functions, powers and duties of the body and how they are exercised; the main procedural rules; and any other relevant matters.

12.1.12. Powers

In all proposals involving the exercise of powers, say who is to have what powers, how they are to be exercised, whether they can be delegated, whether there is to be a power of direction, etc.

12.1.13. Administrative machinery

State any requirements about publication of notices, issuing of licences, inspection of premises, service of documents, etc.

12.1.14. Offences and penalties

Indicate what behaviour is to be an offence and what penalties should apply. Indicate any proposed alternative enforcement machinery.

12.1.15. Adjudication

State whether the courts need any special jurisdiction, or rule-making powers, and what the appeal mechanism is to be, if any.

12.1.16. Subordinate legislation

State whether any regulations, orders or other items of Subordinate legislation are contemplated, and if so when they are to be drafted.

12.1.17. Repeals

State whether any repeal of existing laws is required, and if so whether there is to be any saving provision.

12.1.18. Transitional provisions

State what should happen during the period between existing legislation ceasing to be of effect and the coming into force of the new legislation?

12.1.19. Consequential amendments

Mention any existing legislation that will or might require amendment to give effect to or as a consequence of the proposal.

12.1.20. Consultations

Indicate what consultations, within and outside Government, have been held on the proposal and what further consultations are anticipated.

12.1.21. Timetable

- State the priority in the legislative programme allocated to the proposal, or the priority for which the department is bidding.
- State the desired date for introduction of the Bill or making of the regulations, etc.
- State the intended date for coming into force of the Act or regulations, etc.

12.1.22. Precedents and reference material

- If there is a lay draft or a precedent, or a model law, or treaty, that the Ministry wishes the drafter to refer to, attach it to the written instructions.

- Also attach any relevant government report, legal opinion, court judgments, etc., or state where they can be found.

12.1.23. Miscellaneous

The drafting instructions should –
- state if the proposal is related to other legislative proposals by the instructing Ministry or other Ministries;
- say if the instructions are contingent (e.g. on collective agreement) and if they might change;
- include other relevant information about the current state of the project;
- mention any convention that has been adopted in the instructions (e.g. acronyms or abbreviations.)

12.1.24. Conclusion

This Part is based on the following premises –
- Good government requires good laws.
- Good laws are laws that are not only clear to the well-disposed, but that cannot be misunderstood by the ill-disposed.
- Clear and unambiguous laws require clear drafting instructions.
- Those giving drafting instructions need to be familiar with the legislative process and with the requirements of good governance.

It is hoped that this Part, though not exhaustive, will be of assistance to all those involved in the processing of legislation and issuing of drafting instructions.

If a drafting exercise involves unusual provisions, such as the implementation of a treaty, some additional considerations may arise. There may also be urgent cases which require some of the steps to be omitted. But urgency should never be allowed to be the enemy of legislative integrity, and although drafters are used to performing miracles, they cannot achieve the impossible. Enough time should therefore be allowed for the legislative drafter to do his or her job properly.

PART VI

THE BASICS OF LEGISLATIVE DRAFTING

CHAPTER 1

WHAT IS LEGISLATIVE DRAFTING ALL ABOUT?

1.1. What is legislative drafting all about?

The law, both statutes and common law, provides the framework within which a society functions. The rights and obligations of individuals and organizations in a society are determined by it.

The making of legislation is the most democratic means by which a Government is able to govern. By legislation, policies are transformed into enforceable written law through an elected legislature. The translation of policy into law is a vital part of promoting good governance and the rule of law in society. Properly managed and executed, the process, amongst other things, serves to –

- build public confidence in the legal system; and
- transform institutions or institutional frameworks.

Legislation is a statement of rules to alter the way that people behave i.e. stop them doing something, or make them do something. Or it might be to raise revenue for the Government; to state a principle that society agrees on.

The purpose of most statutes is to change the behaviour of people. A successful law is one that changes certain behaviour to reach a policy goal. The more clearly identified the people who are addressed and the more understandable and clear the language of the law, the more likely it will be to have the intended effect.

1.2. Communication of Legislation

Communication is the essence of every society. Unless its members can communicate with one another, a society cannot exist as social community. The Legislation is the most important medium of communication between members of society, particularly so far as the regulation and control of the society itself is concerned.

Legislation deals with legal rights, liabilities, duties and powers - that is, with legal relationships between various classes of persons in the community and between the State and the members of the community.

1.3. The Legislative Drafters

Legislative Drafters are pivotal players in the legislative process. If legislative drafting is important, those who practise it must play a central role. If legislation of high quality is essential, those who have the capacity to produce it must be crucial figures.

In one sense, drafting is a technician's job, because it involves practical writing skills. But it is far more than that. It is creative work of the kind that makes demands on the intellect and analytical skills rather than functional talents or artistic flair. It depends upon a foundation of legal knowledge and ability and a capacity to use and develop legal concepts and to foresee and counter legal problems.

CHAPTER 2

WORDS AND THE MEANING OF LANGUAGE

2.1. The meaning of Words

Simeon Potter defines the word as a conventional or arbitrary segment of utterance, a minimum free from, consisting of one or more morphemes. By minimum free from he means a form which can stand by itself and yet act as a complete utterance.

Our usual concept of the word is as a unit of meaning, a distinct unit in the pattern of language. Although words usually perform their function of communication through an arrangement of words in a structural pattern, they do enjoy a measure of independence on the printed page and in dictionary. Stephen Ullmann wrote:

> *The vocabulary thus gives the impression of a vast filing system in which all items of our experience are docketed and classified.*

The filing system yields a meaning or meanings for which word stored in the mind. Words are units of language and language is a system of symbolism for communication. Words are therefore symbols for things or ideas but they are only symbols. The only connection between the word and the thing or idea which that word symbolizes is our knowledge of connection.

Symbols must be interpreted or they fail to communicate; and so the concept of meaning is important.

The traditional view is that meanings are ideas or concepts capable of being transferred in the form of language from the mind of source to the mind of receiver.

To speak the vocabulary as filing system containing words and mental images all neatly docketed and classified is helpful in one sense but misleading in another for its conception is of words in a pure state, unadulterated and untarnished by contact with one another. Words like men, however, are gregarious and tend to be found together influencing and changing one another by the company they keep.

2.2. Vagueness of Words

The vagueness and instability of word meanings is the conclusion that no two words have identical significations. Meanings generally overlap. It is said that complete synonymy does not exist and in the general use of language this is true although in technical language there are exceptions, few words have exact synonyms. The overtones are almost all ways different. A distinction also exists between words considered independently and words association with other words in particular context. In the first case there may be other words which approximate in meaning and these are the kinds of approximations to be found in the dictionaries of synonyms.

2.3. Ambiguity of Words

Ambiguity is of two kinds. The first may be termed grammatical or syntactical ambiguity and results from combining words which are unambiguous taken separately in such a way that the meaning of words together is ambiguous.
The second kind of ambiguity arises from the word itself and not from its use with other words.

Where one word has two or more distinct meanings, this is known as *polysemy*.
Where two or more words have the same sounds (although not necessarily the same spelling), this is known as *homonymy*.

A moment's thought or a glance at a dictionary serves as a reminder that polysmey, or multiple meaning of words is common in our language. The legislative drafter must exercise a continuing care to ensure that the potential ambiguity of words with a multiple meaning is nullified by the context in which they are used.

2.4. Instability of Words

Language is sometimes referred to as it had life and people tend to talk loosely of " our living language". By this they mean language of yesterday is not that of today and will not be that of tomorrow. New words come in to use, words change their meanings and words fall into disuse.

Every age is of course different from those which preceded it. Its needs for communication are different and to meet those needs its system of symbols must change. Language does not change because it has life, but because those who use it have life and because their society is constantly changing. Semantic change and coining of new words are the ways whereby language keeps up with the progress of civilization.

Words may change their meaning in variety of ways. The two most obvious of these are specialization or narrowing and its converse, extension or multiplication of meaning. "Science" is an example of narrowing of meaning from its former meaning of knowledge in general. "Paper" is example of a word which has extended its meaning to cover newspapers, documents, learned dissertations and examination questions.

There are other categories of semantic change. The metaphorical use of words leads to such terms as "black" market and "cold" war. Semantic change is one aspect of the fluidity and instability of the vocabulary we use. The practical application for legislative drafter is twofold.

First, the etymology or history of a word is a totally unreliable guide to word meaning. Etymology may be as fascinating as it is misleading and the drafter must resist seductive but fallacious arguments that the original meaning of a word is its " correct" meaning and therefore to be preferred to deviant later meaning.

Secondly, a word which appears to be in a fluid state should be avoided if possible. The obsolescent word may be obsolete when the law comes to be interpreted. The word of the moment, the vogue word of today, may not signify the same meaning tomorrow. Indeed it may not signify any meaning at all.

Where a word is used in a popular and not a technical sense, the presumption arises that the word is intended to bear the current meaning during the life of the legislation and not the meaning at the time of enactment- all the more reason to avoid patently unstable words.

CHAPTER 3

WRITING LEGISLATIVE SENTENCES

3. 1. What do we need to know about grammar?

Legislative drafting, like any other form of official writing, must respect the standard conventions relating to grammar and usage. There is no special grammar for legislation. The way legislative sentences are structured and the way that words, expressions and parts of speech are used in them must reflect what is generally considered to be correct written English.

At the same time, as we saw in the previous discussion, particular approaches have developed as to the way legislative sentences are written. If we are to examine these, we must use the accepted grammatical terminology to describe what is involved (for example noun, verb, adjective, adverb, subject, object, modifier, and so on), and be familiar with the way the concepts they refer to operate in a sentence.

3.2 Why is grammar important for drafting?

The central component of all legislative text is the sentence. Legislative drafter must have a sound understanding of how sentences are correctly structured (the principles of syntax) in order to compose legal propositions that avoid ambiguity and convey their intended meaning.

Legislative drafter must master the grammatical practices that are conventionally followed for official documents and avoid those that are considered to be errors in that context. Because legislation is especially formal, these conventions tend to be less flexible than in other settings, or at least compliance with them is routinely insisted upon. The requirements are commonly those we associate with traditional grammar.

To write grammatically, we need to understand grammatical principles as well as *why* we should write in the particular ways dictated by those principles. Accordingly, we must be comfortable with the function of subjects, predicates and objects, of nouns and pronouns, of modification (by adjectives and verbs), of phrases and clauses, of subordinate clauses, and their correct incorporation into sentences. These Materials assumes that you are familiar with standard grammar and that you already use grammar in your professional work.

If you need to extend or refresh your understanding of what sound grammar entails, make the effort to consult an authoritative text on grammar. However, you should be sure to consult materials that relate to your locality since language varies in some respects across different linguistic communities.

3.3. The significance of Syntax

When writing legislative sentences, we need to take account of features of grammar that are of particular relevance to legislative drafter. We need to know the terms in general use to describe those features.

3.4. What common grammatical mistakes we watch for?

It describes the most common mistakes that junior legislative drafters tend to make. Use Grammar Checklist given in this Chapter to check your drafts, at least until you are confident that these mistakes are not occurring in your drafts.

Verb in a predicate is missing or incomplete.

Every legislative sentence must have a principal predicate that states what the subject of the sentence may, must or must not do, or how the subject is otherwise affected. Without a verb phrase to state this, the sentence is incomplete.

Example

A person who in a public park
sells newspapers, journals or other publications;
lights a fire;
rides a bicycle; or
damages any property belonging to the park.

There is no principal predicate in this sentence. All the verbs in the paragraphs belong to the dependent clause having “who” as its subject. There is no verb stating how the subject ("A person") is affected when engaging in any of the listed activities. The subject requires a verb phrase, for example “commits an offence”.

In the same way, if the sentence contains a subordinate clause (for example "who rides a bicycle"), that clause too needs its own verb phrase to form the predicate in the clause.

Example

When a police officer about to search a person, the police officer must conduct the search at a police station if requested by that person.

A verb is missing from the introductory subordinate clause ("is" should be added before "about"). However, the omission of a verb from the concluding *phrase* is acceptable because it is an adjectival phrase rather than a clause, which needs a subject and its own predicate. The word “requested” can be either adjectival or verbal (the past participle of a compound verb). In this case, it is adjectival.

Verb does not agree with its subject in number

When the sentence subject is in the singular, the verb must be in the singular too. In the same way, a plural subject needs a verb in the plural.

Example

> A transcript of the shorthand notes that have been taken of the proceedings at the trial of a person before the High Court Division*are* to be made if the court so directs.

The subject “transcript” is in the singular, as should be the related verb (“is”, not “are”). The relative clause (“that have been taken....”) modifies “shorthand notes” and therefore has a verb in the plural.

But certain words, though in a singular form, refer to collective cases (for example, "committee", "Board", "Force", "Government"). Properly, these are linked to a singular verb, but the grammatical practice varies across different English-speaking communities. For example, in the UK, a plural verb is used to emphasise that an action concerns the component parts, rather than the unit. This practice is not followed in other countries such as Bangladesh.

Example

> If the Board *reaches* a unanimous decision, the Secretary must inform the Registrar immediately, but if the Board *are* not in agreement after one hour of deliberation, the Chairman must adjourn the meeting.

A case that commonly causes inaccuracy concerns the word "none", when used as a subject. This word, which is a contraction of "no-one", is a singular word that requires a singular verb. A singular verb is needed too when "either ..... or" or "neither ..... nor" are used to distinguish two subjects both in the singular.

Similarly, the modifier “any” is properly attached to a singular noun that is accompanied by a singular verb.

Example

> 1. Members of the Committee are to receive an attendance allowance, but *none is* entitled to the allowance if the meeting is adjourned for want of a quorum.
> 2. Neither the owner nor the occupier of land is liable to pay compensation.
> 3. No payment is to be made to any member of the Board who resigns from that office.

Note that in the last example, as in many cases, the indefinite article (here “an”) is usually preferred to “any”.

Pronoun is vague or ambiguous or missing.

Pronouns (for example "he", "she", "him", "her", "it") refer back to a specific noun that appears in an early part of the sentence or in an earlier sentence. Uncertainty can arise if a pronoun is not provided when it is needed or if the pronoun does not clearly relate back to the noun intended. A pronoun is generally treated as referring back to the nearest appropriate noun, but that may not be quite what the legislative drafter intended.

Example

1. The police officer may require the driver to produce *his* or *her* driving licence at a police station, which *he* or *she* must designate.

"his or her" clearly relates to the driver; but does "he or she" refer to the driver or the police **officer?**

2. A person commits an offence who, having come into possession of information that has been unlawfully acquired, fails to report *it* to the Commissioner.

What precisely is the person required to report - the fact of having come into possession of the information or the information itself?

Modifier is misplaced or ambiguous.

English is such a flexible language that is possible to put a modifier in several places with a definite, but different, meaning in each. Inappropriate placing can produce unintended or even ambiguous results. Avoid two particular cases:

when, because of its position in the sentence, the precise effect of the modifier is unclear (it could modify more than one expression);

when the modifier could equally well apply to an expression before or after it.

Example

1. The Board may make a grant to any person from its general fund or from any of its other funds *with the approval of the Government*.

Does the modifier "with the approval of the Government" relate only to the second type of grant or to both types? It is ambiguous.

2. The police officer may request the driver *within 24 hours* to produce his identity card and driving licence.

Does "within 24 hours" qualify the request or the production? It too is ambiguous.

Preposition is incorrect or missing.

English has many prepositions. Some of them by convention are linked to particular verbs (for example to comply *with,* rather than *to,* a regulation).

Several prepositions need to be used with precision; otherwise, ambiguous or unexpected consequences may follow. So, *before,* in relation to a date, covers any time *up to,* but **not including**, that date. Similarly, *after,* in relation to a date, covers time *subsequent to,* but **not including**, that date. Again, *between,* in relation to two numbers, means that both those numbers must be **left out of** the calculation.

In a legislative sentence that attaches a verb to a series of nouns by a preposition, it may necessary to repeat the preposition before each noun to avoid ambiguity.

Example

1. Each Council is responsible *with* providing street lights *at* its area.

The correct prepositions are "for" and "in".

2. Applications for a dealer's licence are to be made *after* 1 January 1994.

This means that applications cannot be made earlier than 2 January.

3. A record is to be kept of all property belonging *to* the Police Force or a member of the Police Force or the Prison Service.

Does this apply to property of the Prison Service, or to the property of their members? Either "of" or "to" is required before that term.

Article (definite or indefinite) is wrong or missing.

Most nouns are accompanied by an article. "The" (the definite article) is specific, usually indicating that the noun has already been mentioned earlier or is unique. The indefinite article "a" (or "an" before a word beginning with a vowel) is used when the noun is not specific. If the article is missed out altogether, it may be unclear whether the noun is intended to be specific or unspecific.

However, the article is left out before a singular noun that is used unspecifically in the abstract (for example "food", "drink") or before plural words that refer to a class that is described in the plural (for example "cattle", "men").

Example

An authorised officer may order a person to leave an area designated as *a designated area* under section 10 if the officer finds the doing anything that, in the officer's opinion, may harm or disturb *an endangered animal* may order the person to leave *the designated area* for the purposes of protecting endangered animals in *designated areas*,

An indefinite article is needed for the first occurrence of *designated* area because it does not refer to a specific area. But a definite article is required for the second one because it refers back to the previously mentioned area. No article is needed for the last occurrence because it refers to a class expressed in plural terms.

Punctuation is incorrect.

Accurate punctuation in legislative sentences is important. Not only does it make sentences easier to read, but punctuation wrongly used may confuse or even result in an unintended result. The following punctuation mistakes are among the most common. (An incorrect mark is shown by "[ ]"; a correct mark by "{ }").

Comma dividing subject from verb in a predicate

Example

A person who contravenes this section, commits an offence.

No punctuation mark should be used; the subject must not be separated from the predicate.

Comma omitted after an introductory clause or phrase

Example

In this Act, "dog" includes wolf.

A comma marks off an introductory adverbial phrase from the principal clause.

Punctuation for dividing a compound sentence is omitted.

Example

A person aggrieved by the decision of a council may appeal to the Government; the Government's decision is final.

A semi-colon indicates where two linked principal clauses in the same sentence are to be separated.

Second comma omitted at the end of a parenthetical phrase

Example

A person who drops litter, except into a litter bin, commits an offence.

The second comma indicates the end of a parenthetical phrase in a sentence, here a qualifying phrase between the subject and predicate.

Apostrophe in the possessive "its"

Example

The Chairman of the Board is to convene the meetings of its [it's] members.

"it's" is a contraction of "it is", not a possessive; contractions are not used in legislation.

No comma, or an unnecessary comma, in a series of words

Example

In this Act, "animal" means a cat{,} dog{,} sheep{,} goat[,] or cow.

A comma is not usually provided immediately before the conjunction (here “or”) in a series. However, this practice varies among linguistic communities.

Grammar Checklist:

This Checklist summarises the common grammatical mistakes we have just examined. Use it as a reminder of things to avoid.

Is the verb in every predicate complete?

Does every verb agree with its subject in number?

Are all required pronouns present, and are they unambiguous?

Are all modifiers placed accurately in the sentence so that none can give rise to ambiguity?

Are all prepositions correct and in the places they should be?

Are the articles (definite and indefinite) all present and correct?

Are all the punctuations correct? In particular:

(a) have you ensured that no comma separates[,] the subject from its verb?

(b) if there are introductory clauses and phrases, have you added a comma at the end of each?

(c) have you added a comma between the principal predicates of compound sentences, or did you use a semi-colon?

(d) have you included a comma at the end of a parenthetical expression that begins with a comma?

(e) is the third person singular possessive (its) in its correct form (without an apostrophe)?

have you added commas after each word, term or expression in a series, except immediately before the final conjunction?

Grammatical Terms and Usage:

The following notes are designed to remind you about the terms commonly used in relation for English grammar and their proper usage.

A. Some basic terms

grammar: the rules and practices governing the use of language and the relation between words as they are used in speech and writing in a language.

sentence: a set of words, grammatically complete, expressing a statement of some kind. It always has a grammatical **subject** and a **predicate**. A legislative sentence always begins with a Capital letter and ends with a full stop (period).

syntax: the arrangement of words in sentences.

subject: the person or thing about which the sentence makes a statement. It takes the form of a **noun** or **pronouns**, to which descriptive **modifiers** may be added.

predicate: makes a statement to state about the subject (for example what the subject does, is or may or must do). It therefore contains a **verb**.

noun: a word that names or identifies a person, place, concept, act or thing.

pronoun: a single word that refers to a noun (often the **subject** or a person or thing) that has been earlier mentioned, and is used as a substitute for it.

adjective: a word that modifies a noun.

verb: a word or group of words that expresses the action or state of a noun.

adverb: a word that modifies a noun.

clause: a distinct part of a **sentence** that contains a **subject** and a **predicate**. A clause can be either a **principal clause** conveying the main subject and action of the sentence or a **subordinate (or dependent) clause** conveying a subject and action that modify the principal clause.

phrase: a group of words that includes a noun or a verb and may also contain modifiers of the noun or verb.

modifier: an **adjective, adverb**, **phrase** or **clause** that limits the scope of the word, phrase or clause it modifies.

Some of these grammatical features are contained in the following example:

B. Terms used for sentences

principal clause: a **clause** that contains the main **subject**/**predicate** of the sentence.

compound sentence: a **sentence** that contains two or more **principal clauses** that are linked by a **conjunction** (for example "and" or "or").

dependent or subordinate clause: a **clause** that supplements and is subordinate to a **principal clause**. It modifies the principal clause by setting out conditions, circumstances, limitations, exceptions or qualifications describing when the **principal clause** takes effect.

C. Terms used for nouns

article: a form of **adjective** to particularise a **noun**. The most common are the **definite article** "the" and the **indefinite article** "a" or "an" (before a word beginning with a vowel).

relative pronoun: a **pronoun** linking a **subordinate clause** to the rest of the **sentence** (for example "which" or "who").

D. Terms used for verbs

active voice: a **verb form** that indicates that the **subject** is acting rather than being acted upon. It often has an **object (**the thing that the **subject** acts upon).

passive voice: a **verb form** that indicates that the **subject** is acted upon rather than acting. It is often followed by a **preposition** and a **noun**, for example stating the person or thing *by* which the subject is acted upon. It is always made up by an auxiliary verb from the verb *to be*, followed by the past participle of the main verb.

object: a **noun** or **pronoun** that is affected by the action in an **active verb**.

infinitive: the basic form of the **verb** which is not attached to any **subject**. It normally begins with "to".

tense : the form a **verb** takes to indicate the time when it has effect (for example in the past, present or future).

Auxiliary verb: a **verb** that combines with the basic form of another **verb** to express the **tense** of the latter. (for example "may", "shall", "is", "has").

participle: an adjective made from a **verb**. It may be a **present** or a **past participle** (for example “receiving”; “received”). It can be added to an auxiliary verb from *to be* to make a verb in the **present** or **passive voice** (for example “is receiving”; “has received”).

E. Terms used for modifiers

adjective: a word that explains, describes or qualifies a **noun**, giving it a more precise or limited meaning.

adjectival phrase: a **phrase** that explains, describes or qualifies a noun.

adjectival clause: a **clause** that explains, describes or qualifies a **noun**.

adverb: a word that explains, describes or qualifies how a **verb** takes effect, giving it a more precise or limited meaning.

adverbial phrase: a **phrase** that explains, describes or qualifies a verb.

adverbial clause: a **clause** that explains, describes or qualifies a **verb**.

F. Miscellaneous terms

preposition: a term which links a **noun** (or **pronoun**) with another expression, indicating a particular relationship (for example of time or space) between them.

conjunction: an expression that links words, **phrases**, **clauses** or **sentences** (for example "and"; "or").

number: the form of a **noun**, **pronoun** or **verb** which indicates whether it is in the singular or the plural.

Example

> An award of compensation or damages to a complainant under this Act releases the defendant from all other civil proceedings for the same cause.

In this Example :

the following are **prepositions**: *of, to, under, from, for*;

the following is a **conjunction**: *or*;

and the form of the **subject** of the sentence ("*an award of compensation or damages"*) is in the same **number**(singular) as the **verb** by which it is affected (*"releases*").

CHAPTER 4

WHAT ARE THE BASICS OF WRITING LEGISLATIVE SENTENCES?

4. 1. Starting to write

How should we begin the process of writing a legislative sentence?

The question of how to start writing individual sentences is one to which an experienced legislative drafter rarely gives thought, having long ago established a largely subconscious routine for themselves. In contrast, those with little drafting experience often find difficulty in deciding what to write down first. For them, starting to write involves a much more conscious effort.

We should keep in mind two preliminary points:

1. **Every one develops their own approach**

   Every legislative drafter in due time discovers ways of getting started that most suit his or her personality. All that these materials can do in this respect is to offer some guidelines to help us find the ways that best suit us. The more we write the more the problem of how to begin is reduced. By analogy, we may recall that, when learning to ride a bicycle or to swim, the problem of how to start was pre-eminent in our mind - until we in fact were riding or swimming. After we have acquired the basics, we give the matter very little further thought.

2. **We already have an approach to writing**

   We already have much experience in writing a wide range of sentences for other types of documents. Most people tend to see legislative drafting as a different form of writing with its own distinct syntax. In fact, it involves standard writing practices and follows standard rules of grammar. Yet, legislative writing differs from most other forms of writing, for example, letters, memoranda, fiction, essays or monographs, in at least two ways:
   it is more formal, and
   it is subject to more restrictive conventions.

We have already established a largely subconscious routine for ourselves for getting started on sentences in a range of other documents. What we need to do is to work out how to incorporate into our present approach to writing the distinctive features and conventions that apply to legislative sentences.

Are there any guidelines to help us get started?

For any form of writing, there are four essential processes involved:

(i) knowing what you want to say ("analysis");

(ii) deciding how you want to express what you want to say ("design");

(iii) writing down what you have decided ("composition");

(iv) checking what you have written against your analysis and design ("scrutiny")

Different people approach these processes in different ways. For example:

(i) some are very systematic, beginning each of these stages only when the previous one has been completed.

(ii) others like to tackle the first three together, writing down ideas for what needs to be said, how to say it and writing out some of what will appear in the first draft.

(iii) yet others start writing at apparently random points, working on the other processes as they go along..

When writing individual sentences, we cannot proceed quite so freely. We should begin with analysis and then proceed to design and composition.

Analysis first

You cannot really begin writing a sentence until you have largely completed the process of analysis. Before writing, you need to know what to write about. Decisions about whether a single sentence or a group of sentences is required and what you are to deal with in each sentence may, for example:

(i) result from your earlier decisions about the detailed contents of the document, or

(ii) be suggested by something in a sentence you have just completed.

You must have a clear idea of what to say in the particular sentence (or group of linked sentences) before writing anything.

Then design and composition

Your approach to design and composition may depend upon your personality. For example:

(i) if by nature you are a planner (you like first to think out your way forward), you may prefer to work out (design) and make notes on how to express that idea before you compose anything;

(ii) if you are an executive (you like to dive in straight away), you may prefer to start at once on composition, trying different designs for the rule until you settle on one which meets the case satisfactorily;

(iii) if you are a conceptualist (you like to work out key ideas before you begin), you may prefer to work out a central element of the sentence first, and then design and compose around that until the contents are fully provided.

No one approach is better than another. The best is the one that works for you. But whatever your preferred approach to design and composition, it must always take fully into account:

(i) the basic principles of legislative expression; and

(ii) the ways in which particular types of provisions are written in our jurisdiction.

In other words, we must know how legislative sentences are conventionally written in our jurisdiction; this is the common ground upon which all approaches to design and composition must be built.

4.2 Basic components of legislative sentences

The basic principles of legislative expression in parliamentary jurisdictions still bear the imprint of George Coode's recommendations. This is particularly true for legislative syntax (the grammatical principles upon which legislative sentences should be written). You can take a conscious lead from these principles in developing your start-up approach.

What are the basic components of a legislative sentence?

The most legislative sentences typically have:

(i) *core components* (a legal person as grammatical subject and a predicate stating the main legal effect of the rule on the subject);

(ii) *optional components* (typically, context clauses that establish the circumstances or conditions in which the rule in the sentence has its effect).

Today greater use is made of sentences expressed as declarations of the law, rather than to direct the behaviour of persons. Such sentences enable you to state a legal proposition or principle, the purpose or application of a provision, the meaning of an expression, the consequences of behaviour, and the like. Unlike a Coode-style sentence, the subject is often not a legal person and the verb in the predicate does not contain an auxiliary that gives an instruction as to behaviour. Instead, typically, it uses a wider range of subjects, including inanimate subjects and the present tense to declare what the law is on a particular matter.

How should we decide on the components of a legislative sentence?

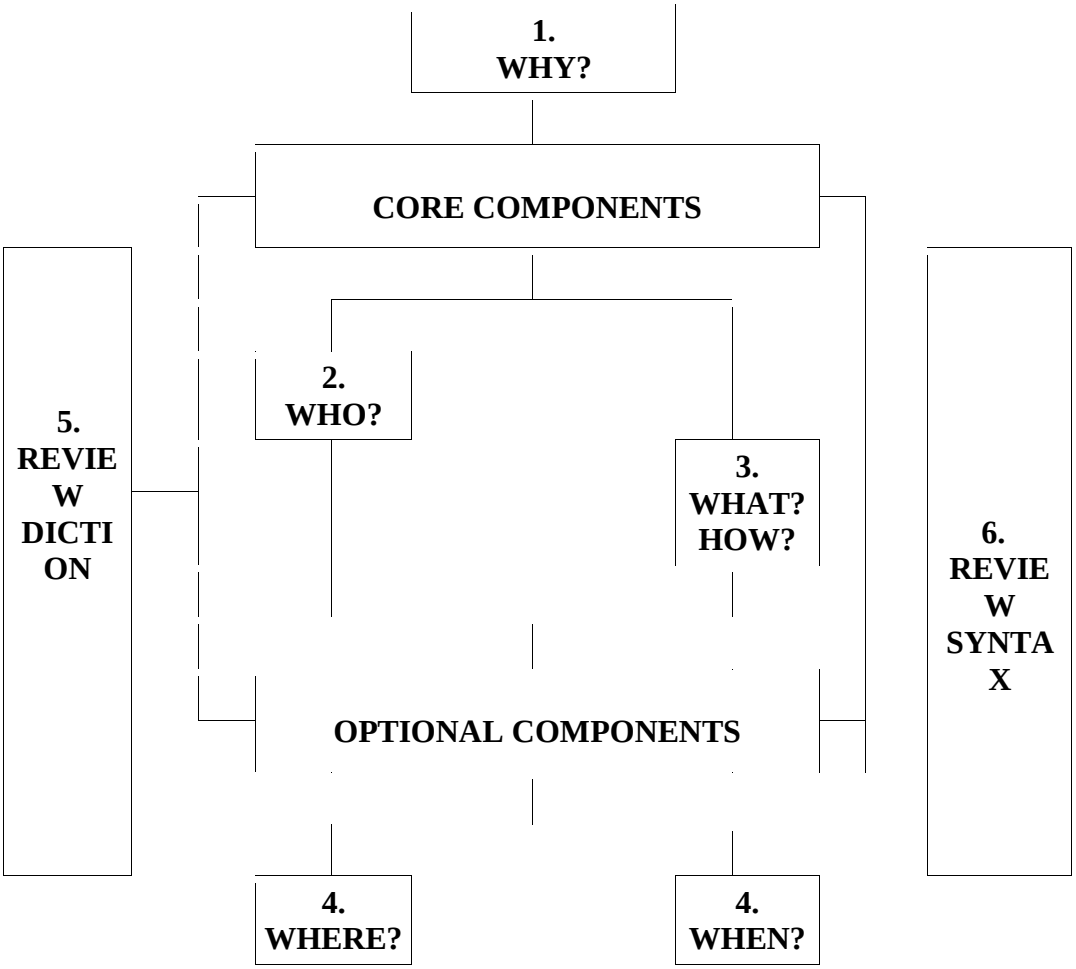
We need to ask ourselves a number of questions about the nature of provision we are to write. The answers will point us towards the sentence components. When writing sentences that direct behaviour, Coode's analysis suggests a framework for these questions. The answers may help you carry out the task of writing the sentence, at least while you are in the initial stages of acquiring experience.

In thinking of the questions to ask, you may find the following verse a useful reminder:

I keep six honest serving men.
(They taught me all I knew).
Their names are What and Why and When
And How and Where and Who.

- Rudyard Kipling (1902).

The diagram below shows how we may approach the task of deciding on the sentence components in 6 stages.



This may suggest that the process is complex and protracted. That is rarely the case for long. But at this stage it may help to have a structured way to perform this task. It quickly becomes a routine and, in practice, is much less formal than this may suggest.

Stage 1: WHY?

Before you start writing, you must have a broad notion of what you want to say in the particular sentence. That requires a clear idea of what the provision is to achieve. Ask yourself what a sentence on the particular topic is to bring about in the scheme of the legislation. This will help establish what the sentence must cover.

Be clear for what purpose this sentence is to be enacted.

Stage 2: WHO?

Typically, when a provision is directed to a legal person, that person, in the singular, should be the grammatical subject of the principal predicate. If you are drafting a declaratory sentence, the thing that the sentence is about should be made the grammatical subject.

> Identify in precise terms the legal person who, or thing which, is to be the subject of the provision and make that person or thing the grammatical subject of the principal predicate.

Stage 3: WHAT and HOW?

The principal predicate should state how the grammatical subject is to be affected by the rule, for example, whether the legal person is to be vested with a right, power, privilege, duty, or liability and the nature of it. In such a case, this is expressed by a verb with the appropriate auxiliary (for example, "shall" "must" or "may"). If the sentence is declaratory, choose a verb that states the legal effect required.

> Choose a verb for the principal predicate, with the correct auxiliary if required and any grammatical object that it controls, to state what is required of the subject or how the subject is affected by the rule.

Stage 4: **WHERE and WHEN?**

The principal predicate will usually be modified by a clause or phrase that places it in a particular context or fact situation. Circumstances that trigger the action in the predicate should also be stated.

> Add dependent clauses or phrases that indicate the context in which the provision operates or the events that cause it to take effect.

You should also consider whether:

(i) there are any territorial limits to the provision or any qualifications to indicate the place or places where it is to have effect;

(ii) the provision, or any elements in it, is to be subject to some requirement as to timing (for example, whether it must be performed within, before or after a stated time or event).

> Add phrases that indicate any qualifications as to place or time. If these are detailed or significant, consider dealing with them in their own sentences.

Stage 5: REVIEW DICTION

If the provision is to be precise and exact, expressions used must be precise and the modifiers attached to them, in the principal predicate and in dependent clauses, must be exact.

> Revise the components of the sentence, by replacing, adding or removing nouns or modifiers until the provision is accurately stated.

Stage 6: REVIEW SYNTAX

The initial word order in the sentence may obscure the communication of the provision or may produce ambiguities (for example, uncertain modifiers).

> Reconsider the word order in the sentence, and re-arrange the components to produce the version which is easiest to read and fully intelligible and is without ambiguity.

Few legislative drafters proceed consciously and systematically through these six stages. But all the matters covered in those stages need to be dealt with in the course of composing the provision. However you may find it helpful to follow the six stages more deliberately. The process becomes routine and automatic the more sentences you write. You can adapt them to your preferred approach to writing by deciding at which points they should be carried out.

Keep these questions in mind when you scrutinise the contents of a draft sentence.

4. 3. Types of legislative sentence

Another factor that makes starting easier is familiarity with the way other legislative drafter write particular types of sentence. There are two aspects of this:

> Legislative drafters tackle particular types of provisions in conventional ways; it is helpful to be aware of how other legislative drafter has done it.
>
> English is such a flexible language that it is possible to write the same provision in several different ways; it can be very helpful to be aware of alternative ways in which legislative drafter may treat the same material.

Both aspects:

(i) widen the choice of approach open to you;

(ii) enable you to focus more quickly on the possible options for expressing a particular rule; different approaches may be needed to achieve continuity with other sentences.

To acquire this familiarity:

(i) make a point of reading as much legislation as you can;

(ii) pay special attention to sentence treatment, as well as to the substance of the provision.

How does legislative drafter write particular kinds of sentences?

The following are examples of the way in which simple sentences can give effect to particular kinds of provisions. After being faced with the task of producing a provision for any of these purposes, you may find the precedent suggests a way to start. In each sentence the verb is highlighted as the feature that produces a distinctive result.

Conferring a right

A person employed in the public service of Bangladesh *is entitled to* receive a pension as provided by law.

Note: the highlighted words are often replaced by "shall receive". This sentence uses terminology more commonly adopted to create a duty. But the sentence is not primarily concerned with the duty-bearer. The formula in the example puts the emphasis on the subject's claim to a pension that must be honoured.

Conferring a power

The President may issue a Proclamation of a State of Emergency in Bangladesh, or in a part of Bangladesh, by an instrument published in the Gazette.

Conferring permission

A person holding a fishing licence may fish in a lake in any public park.

Conferring immunity

The President may not be proceeded against in any court for any act done in the performance of the functions of the office of President or in a personal capacity during the term of office.

Imposing a duty

The President must transmit a copy of the instrument containing the Proclamation of a State of Emergency to the Speaker of Parliament immediately after it is published under subsection (2).

Note: The importance of the duty emphasised by drafting as a command.

Creating a liability

A person who fails to answer a witness summons *is liable to* be proceeded against for contempt of court.

Note: the highlighted words are often replaced by "may".

Creating an administrative requirement

An allegation that a public officer has contravened the Code of Conduct for Public Officers is to be made in writing to the Cabinet Secretary to the Government.

Note: this provision directs persons as to the proper procedure; non-compliance is unlikely to have any automatic legal consequences. Again, "must" is an accepted alternative. Many jurisdictions use "shall" rather than "is to".

Creating a prohibition

No person under the age of 16 years shall take part in any gaming, unless -

(a) the gaming takes place in a private dwelling-house; and
(b) the participation is with the permission of a parent or guardian of that person.

Note: prohibitions can also be created using the form "A person … must not…". Prohibitions that apply universally can be created using the form "It is forbidden to …".

The sentences that follow are written in the declaratory form.

Creating an offence and penalty

A person who escapes from lawful custody, or assists another to escape, or to attempt to escape, from lawful custody, commits an offence and is liable to imprisonment for seven years.

Declaring legal consequences

A person subject to air-force law who is assigned to serve on board a Bangladesh Navy ship remains subject to air-force law.

Declaring legal effects

The presence or participation of a person not entitled to be present during, or to participate in, the proceedings of Parliament does not invalidate those proceedings.

Note: this rule clarifies, rather than stipulates, the legal effects of the behaviour.

Providing a definition

In this Constitution, "sitting day" means a day on which Parliament actually meets.

Providing an explanation or interpretation

In this Act, discrimination refers to the treatment of different persons in different ways wholly or mainly because of their different races, places of origin, gender, political opinions or religious beliefs, with the consequence that one such person receives more favourable or less favourable treatment than another such person.

Stating purposes

The objects of this Part are to protect the fundamental rights and freedoms of everyone in Bangladesh as set out in this Part, subject to the limitations on them as are prescribed by law that:

are designed primarily to protect the rights and freedoms of other persons; and
are reasonably justifiable in a democratic society.

Stating the application of rules

This Part applies to any person who holds an office in the public service of Bangladesh.

Constituting a body

An office of Attorney-General is established by this section as an office in the public service of Bangladesh.

Making a rhetorical statement

The People's Republic of Bangladesh is a Sovereign State governed by the principles of democracy, social justice and respect for human dignity.

The Republic shall actively promote a social order that secures the ideals of Freedom, Equality and Justice.

Note: statements of this kind, rarely found outside constitutional legislation, are likely to have more political than legal significance.

Are there different ways to express the same provision?

It is often possible to state a provision in a variety of ways. Which to adopt is partly a matter of style, but:

(i) your choice should take account of the drafting practices in your jurisdiction;

(ii) one way may be better than another for emphasising a particular feature of the provision or to make it easier to connect the theme of the sentence with sentences that come before or after it.

The following Example demonstrates how the same rule can be written in 5 different ways.

Example

1. If a person in lawful custody escapes or is rescued, the person from whose custody he or she escapes or is rescued may immediately pursue and arrest the person in any place in Bangladesh.

2. A person from whose lawful custody another person escapes or is rescued may immediately pursue and arrest the escaped or rescued person in any place in Bangladesh.

3. A person may immediately pursue and arrest, in any place in Bangladesh, a person who escapes or is rescued from his or her lawful custody.

4. A person having the lawful custody of another person may immediately pursue and arrest that person in any place in Bangladesh if that person escapes or is rescued from that custody.

5. A person who escapes or is rescued from the lawful custody of another person may be immediately pursued and arrested by that person in any place in Bangladesh.

CHAPTER 5

HOW DO WE PUT TOGETHER THE COMPONENTS OF LEGISLATIVE SENTENCES?

5.1. Introduction

We look at the three main components found in legislative sentences: the principal subject, the principal predicate and various kinds of sentence modifiers. The combination of these components produces the legislative sentence. The sentence components are treated separately to make their study easier. Of course, in writing a particular sentence, you cannot separate these features as your decision in relation to one necessarily influences your decisions on the others.

You will learn a good deal by careful study of the examples. Make sure that you understand precisely how they illustrate the point made in the accompanying text.

A principal subject and a principal predicate constitute the central elements of a legal provision and are typically at the heart of a legislative sentence.

The principal subject typically is a legal person; it is that person's behaviour with which the provision is principally concerned.

The principal predicate states how the behaviour or position of the legal subject is to be affected or makes a declaration about legal effects or consequences.

5.2 Subject Predicate relationship and Elements of the Sentence

How do we select the grammatical subject of the sentence?

The main body of provisions in a legislative text is concerned to influence human activities and affairs. It has to be directed to those who have the legal capability to adjust their activities or affairs as the provisions intend. Consequently:

(i) the provisions should be directed towards those whom the law recognises as having legal personality or standing- a legal person.

(ii) we select these subjects from human beings, corporate bodies, statutory entities, and associations of persons recognised by law; other things, such as animals and other property should not be chosen as they are not responsive to law.

(iii) for each sentence we select as the subject the legal person, or class of legal persons, whose conduct or legal position is to be affected by its contents.

Typically the subject of a sentence is a noun or pronoun that describes or refers to a precise legal person or class of legal persons.

How do we decide which legal person is to be the grammatical subject?

Many provisions simultaneously affect two categories of persons:

(i) those upon whom a benefit is conferred, in the form of a right, power or privilege;

(ii) those who can be affected by the exercise of another's right, power or privilege.

The provisions can be written having either of these as the grammatical subject.

Example

The Government may appoint any number of film censors that the Government considers expedient.

Any number of film censors is to be appointed as the Government considers expedient.

In the second version, the Government's power of appointment has to be implied.

It is a matter of judgment in each case as to which to choose. But the following legal persons have a good claim to be made the grammatical subject of the sentence:

(i) persons whose actions can be described in an active verb in the predicate;

(ii) persons responsible for taking the action;

(iii)recipients of a new power or duty;

(iv)persons whose activities are curtailed or regulated.

Each of these is discussed next.

(i) Persons whose actions can be described by an active verb

A sentence is generally more effective if expressed in the active voice, rather than in the passive voice. In a choice between two clearly identifiable legal persons, select as the subject the person whose required conduct can be written in the active voice.

Example

Compare the following. The second, in the active voice, is a more direct statement of the same rule.

If a person is released on bail on the authority of a police officer, the nearest magistrate must be informed of the release by that police officer as soon as reasonably practicable.

If a person is released on bail on the authority of a police officer, the police officer must inform the nearest magistrate of the release as soon as reasonably practicable.

(ii) Persons responsible for taking action

The sensible focus of a sentence is the person who has to take the initiative under the provision.

Example

Compare the following versions of the same provision. The second one directs the provision to the person who is to take the action it authorizes.

A person who is observed by a police officer committing a summary offence is liable to be arrested by the officer.

A police officer may arrest a person whom the officer observes committing a summary offence.

(iii)Recipient of a power, duty or function

The person who has the function of dealing with matters of the kind mentioned in the sentence is likely to be a suitable subject.

Example

In a legislative text that requires second-hand car dealers to hold a licence, sentences concerned with the issue of the licence should have the licensing authority as the grammatical subject.

If the aim of the sentence is to confer a function implementing an aspect of the legislative scheme, the person or persons who are to perform the function are likely to be the appropriate grammatical subject.It is generally unnecessary, and may not be possible, to identify the persons who may be affected sufficiently precisely for them to be made the grammatical subject.

Example

A provision conferring a power to search all aircraft landing in the country for drugs should be directed towards those who will use the power, rather than to the legal persons whose aircraft could be affected.

In provisions that determine the range and limits of the functions of specified persons or of those who derive their powers from them, sentences can be expected to focus on those persons, who should be considered as suitable grammatical subjects.

Example

A Bill regulating the prison system is concerned mainly with the extent and the exercise of the authority to detain individuals. Though the provisions may be intended to protect those in detention, most sentences will be directed to the officials of the system whose functions are being regulated.

(iv) Persons whose activities are curtailed or regulated.

Although the sentence may create a provision for the benefit of the general public or some class of persons, the grammatical subject should refer to those who have to govern their conduct by the provision rather than its beneficiaries.

Example

In legislation relating to prisons, sentences prescribing the responsibilities of prisoners will typically make those persons the grammatical subject.

Of course, the above are guidelines only. The decision as to the subject must be dictated by the needs of the particular sentence and the context of the sentences that surround it.

How should the principal subject be described?

You should keep in mind the following guidelines when deciding how to describe the principal subject:

Use the singular so that the provision is seen to apply to each legal person

If the sentence has alternative subjects, each should be expressed in the singular.

Example

A trustee or receiver must not receive remuneration for providing a service under this Act.

Consider the statutory context in which the term is to be used.

Since a legislative sentence is construed in the context of the language of the legislative text overall and in particular the surrounding sentences:

(i) use the same term as you use elsewhere to express the same class of person;

(ii) use a different term if you are referring to a different class;

(iii) if you need to indicate that your provision applies to the precisely same person as is referred to in an earlier sentence, add appropriate linking words.

Example

(1) An executive officer ceases to hold office if convicted of an offence punishable by imprisonment for 12 months or more.

(2) An executive officer ceasing to hold office under subsection (1) is not entitled to receive superannuation under this Act.

The same result can be achieved by using the definite article for the subject of subsection (2):

(2) The executive officer is not entitled to receive superannuation under this Act.

Consider the legal context in which the term is to be used.

The general law contains provisions that apply automatically to particular categories of legal persons. For example, it imposes privileges or disabilities upon certain classes of persons, as in the case of children in respect of criminal prosecutions or the mentally incompetent in respect of certain kinds of civil transactions.

The term for the subject specifically does not need to exclude these persons from the sentence; that occurs by operation of law.

Use terms that clearly identify the legal person who is the subject

Legislative drafters express the subject in a wide variety of ways. The form of words that is most appropriate typically depends upon the scope of the provision. As you will have recognised, some of the following devices are interchangeable. Choose the term to describe the subject that best suits the structure of the sentence.

A provision of universal application

In a sentence that applies to everyone, use:

- "a person";
- "any person", "each person", but only if emphasis is needed;
- "no person", in a negative rule, such as a prohibition.

Note: "person" is commonly given an extended meaning to cover non-human legal persons, such as corporations,

Example

"court" (to refer to judicial officers); "judge", "police officer", "owner", "trustee".

A provision directed to a particular office-holder

In a sentence applying to a specific office-holder, use the title or name given to the office or to the body.

A provision applying to limited categories

In a sentence that applies to a limited group of persons, or to specific members of a class, who share a common characteristic, use the relevant universal or class term with the addition of an appropriate modification.

A general provision applying with exceptions

In a sentence that applies to everyone, or to everyone in a class, except for specific persons, use the relevant universal or class term with the addition of the appropriate qualification.

Example

Any person other than a public officer

A trustee, except a trust corporation

A provision containing the legal person in the context clause

If the principal clause applies to a person mentioned in an earlier context clause in the same sentence, consider using a pronoun to refer back, but:

- the legal person must be precisely identified in the context clause;
- the pronoun must relate back to that legal person without ambiguity.

Example

When the court has reason to believe that the accused lacks mental capacity so as to be incapable of making a defence, it must hold an inquiry into that matter.

Also consider the following practices to simplify the expression of a subject:

(i) using a term for which a definition is provided (either by the Interpretation legislation or in your legislation).

(ii) using an application provision to indicate a class of persons to which the legislation or section or Part does or does not apply.

How do we choose the subject of a declaratory sentence?

A declaratory sentence may have a subject that is not a legal person, but an impersonal noun. These sentences generally make statements about the law, rather than prescribing rules that direct behaviour. The subject of the sentence is the matter to which the statement attaches legal effects or consequences. It may be a thing, a legal term or a statutory feature.

When composing a sentence to make a legal statement, choose as the main subject the principal matter to which the legal statement relates.

Legal statements that have general effect

If the rule in the sentence has a general legal effect that is to be universally recognised, no particular persons are specially affected. These provisions are commonly used for stipulating procedures that are to be followed or their legal consequences.

Example

An original certificate that is signed by the maker and that complies in other respects with this section may be used in a trial or enquiry as prima facie evidence of the facts and opinions stated in it.

When the legal person is obvious

An action or activity can be made the subject if:

i) it is already referred to in an earlier sentence;

ii) it can only be performed by specific legal persons already referred to in earlier sentence.

This is a useful device for providing for continuity between sentences in the same section, without repeating too many words. But make sure that there is no ambiguity as to the legal persons whose action or activity is referred to.

Example

(1) A person must not carry on the business of dealing in second-hand motor vehicles unless that person holds a licence issued under this Act.

(2)*An application for a licence* is to be made to the local government council for the area in which the applicant proposes to carry on the business.

The highlighted words connect the sentence with the preceding one, and avoid the repetition of the legal person comprising its subject.

When the provision has universal application

An action or activity may also be made the subject if it must or may be performed by anyone falling within the terms of the rule. This too may be used in a sentence that is one of a series of sentences (for example, in a section), when the action or activity is elaborated upon in the other sentences. The full context removes doubt as to who may be affected by the sentence.

Example

Gaming is lawful if, and only if, it is conducted in accordance with the conditions specified in this Act.

This sentence lays the foundations for an Act that provides a complete set of conditions that determine when gaming is lawful. It is clearly of universal application, though later sentences impose conditions that determine when particular persons may rely upon the authorisation.

Interpretation provisions

Sentence containing statements that explain how written legal rules or expressions are to be used or interpreted have universal force, and are not focused on particular persons. The subject is the term to which the definition relates.

Example

In this Act, the expression "animal" does not include a domesticated animal.

Application of referential provisions

Sentences stating cases to which specific parts of the written law are to be applied or are linked are intended to be given effect by whoever uses the legislation. The subject is the term used to refer to the relevant part.

Example

This Part applies only to legal practitioners not holding a current practising certificate.

Principal Predicate

The principal predicate states the effect of the provision on the subject of the sentence. The verb in the predicate specifies that effect. The verb typically includes an auxiliary that indicates how the subject is affected. However, declaratory sentences contain statements rather than directions, so auxiliaries are not needed. The predicate is commonly in the active voice to command the principal subject to do or not to do something or to give, limit or withdraw authority to do something.

Example

A person under the age of sixteen years must not drive a motor vehicle.

The magistrate's court, on a remand, may admit the accused person to bail.

Less commonly, the predicate may be:

in the passive voice to state how the subject is affected by a requirement that is to be carried out by someone else;

in the present tense to state a legal position or general legal consequences when specific action is taken, particularly in declaratory sentences.

Example

The person receiving a majority of the votes cast in the election is elected.

A person under the age of sixteen years may not be sentenced to imprisonment.

Every magistrate is a commissioner of oaths.

A member of the council who is declared insolvent ceases to hold office.

How do we determine the principal predicate?

Decide on the purpose of the rule in the sentence by considering how the principal subject's behaviour is to be affected or whether a statement of the law is what is required.

Is the purpose to prescribe how a legal person, the subject of the sentence, is to be affected in any of the following ways:

command the subject to do, or not do, something (with stated legal consequences for failure) ;

empower, permit or enable the subject to do something, not otherwise lawful;

deny the subject the legal authority to do something;

entitle the subject (confer a right) to something or to do something;

qualify (or disqualify) the subject for something;

impose on the subject some legal disability or burden, or remove one from the subject;

give directions to the subject to do, or how to do (or not do), something?

Is the purpose to make a declaratory statement as to some aspect of the law in any of the following ways:

declare legal effects or consequences

make a statement of law

state a principle or purpose

apply the legislation to specified cases

explain a term or feature of the legislation?

Answers to these kinds of questions put you in a position:

to select for the main verb the most suitable term to describe the action or activity;

where needed, to choose the right auxiliary to accompany that verb.

How should we write the principal predicate?

Keep the following considerations in mind when formulating the principal predicate:

legislation should always be speaking;

sentences in the active voice are generally more effective;

several subject/predicates in the same sentence are confusing;

the verb must include an appropriate auxiliary, except in declaratory statements.

These considerations are discussed below.

Legislation should always be speaking.

Legislation generally applies in the present to circumstances as they happen rather than to those existing at the time when it was originally written.

Compose sentences to be read as applying to actions or activities as they occur from time to time. This consideration particularly affects dependent clauses which set the context in which the principal predicate operates.

Example

We could write:

A person who has driven a motor vehicle without holding a valid driving licence has committed [*or* has been guilty of] an offence.

A person who shall drive a motor vehicle without holding a valid driving licence shall commit [*or* shall be guilty of] an offence.

However, a context clause should be in the present tense when the requirements in the principal predicate are to take effect immediately as the events described in the clause occur.

A person who drives a motor vehicle without holding a valid driving licence commits [or is guilty of] an offence.

Sentences in the active voice are generally more effective since the usual word order in an English sentence is:

subject;

verb;

object.

This states actively what the subject is to do or not do. Sentences that reverse this order (object, verb, subject) state the effect on the subject passively. They are less favoured for several reasons.

they obscure the subject

Readers of legislative texts are looking for the legal person who is responsible for taking action; the passive voice puts this person last and is more cumbersome since an auxiliary verb (from the verb "to be") has to be added (for example, "may be ordered").

the legal person may be overlooked

In a passive construction, it is easy to miss who is responsible for taking the action described in the verb. This cannot happen when the person is the subject of the sentence. A sentence in the passive voice has to be clarified by adding in the person in an extra phrase beginning with "by".

Example

A person who is diagnosed as suffering from the illness must be given a copy of the diagnosis on request.

Who does the diagnosis? Who is to give the copy and to whom is the request to be made? A sentence using the active voice would answer these questions:

If a medical practitioner diagnoses a person as suffering from the illness, the practitioner must give a copy of the diagnosis to the person when the person so requests.

they can be clumsy and lead to false subjects

Example

In section 12(1), there shall be added, after the word "proceedings", the words "under Section 125 of the Companies Act".

The grammatical subject is “there”. It is false as it has no substance. A simple command is shorter and more effective:

In section 12(1), "under section 125 of the Companies Act" is added after ”proceedings”.

However, the passive voice can be useful, even preferable, in certain circumstances:

if the provision is of universal application to all legal subjects

Example

Operating a motor vehicle on a pedestrian walkway is prohibited.

if the action is to be performed by a member of an organization, but it does not matter which one

Example

A person arrested under a warrant of arrest must be taken without unnecessary delay before a magistrate's court.

if the provision declares the legal status of a person or thing

Example

Property deposited with the building authority and not claimed within 30 days after its deposit is forfeited to the building authority.

to achieve greater continuity in a series of provisions

Example

(1) The Authority may require the occupier of the premises to carry out measures required to ensure the safety of the premises.

(2) The expenses of carrying out the measures are to be borne by the occupier of the premises.

in a series of provisions if the first one makes it clear who is responsible for the action

Example

1. A person who operates a motorcycle in the park must comply with the following rules.

(a) the speed of the motorcycle must be kept under 30 km per hour.
(b) the motorcycle must not make excessive noise.
(c) the motorcycle must be operated only on roadways.

The passive voice avoids having to repeat "a person who operates a motorcycle in the park". Once it is clear who is responsible, the focus should be on the motorcycle. This also helps produce cohesive sentences.

Multiple principal subjects and predicates in the same sentence are confusing.

Readers can be confused by sentences that contain more than one subject when each of them is followed by its own predicate. If you need to confer distinct functions on different subjects, deal with each case in a new sentence.

Example

A police officer executing a warrant of arrest must notify the person to be arrested of its substance, and a person arrested under a warrant of arrest must be taken without unnecessary delay before a magistrate's court.

This sentence contains two distinct rules; the second appears to have wider application (extending to arrests made by other persons in addition to police officers).Separate sentences would ensure that the second is not to be construed as limited to the first case.

However, confusion is less likely in a sentence that:

imposes a series of distinct requirements on the same subject

imposes a series of requirements on several subjects, when all the subjects are affected by all the requirements

Example

A director, a manager and an employee of a company must:

(a) provide information as required by this Act;
(b) answer all written questions communicated under section 25; and
(c) make available all company documents containing information that appears to be relevant to proceedings under this Act, whether requested or not.

provides for two closely linked actions that arise in the same circumstances.

Example

A police officer executing a warrant to arrest a person must notify the person of its substance; the person must be taken without unnecessary delay before a magistrate's court.

How should we select the appropriate verb for the principal predicate?

The verb is a critical element in describing what is required of the principal subject of the sentence. To select the verb, start by deciding precisely what action or result is required and the way that the subject is to be affected. It may help to ask questions such as the following:

(i) what kind of action or activity is needed in order to produce the desired result?

(ii) does it involve one or a series of actions?

(iii)is the action to be a continuing one?

Example

A police officer may, without a warrant, arrest and detain, a person whom the officer reasonably suspects to have committed an indictable offence.

The predicate contains two powers; both are available at all times to police officers. The first, "arrest", involves a single act; the second, "detain", involves action of a continuing nature.

To signify an arrest, a police officer must touch or restrain the body of the person being arrested, unless that person submits to the custody by word or by action.

This predicate describes, in the form of duties, how a police officer indicates the making of an arrest.

Is the auxiliary required in every principal predicate?

The nature of the action described in the principal predicate is a critical element. It indicates whether a legal person is to perform the action or not or whether they have a choice about performing it. The nature of the action can be indicated by using a compound verb with an auxiliary. The choice of the auxiliary is particularly important in differentiating the nature of the action.

The auxiliaries most often used are:

must,

shall,

may.

Reserve these auxiliaries for use in the principal predicate only. They are generally recognised as words of command and authorisation (although there is ambiguity about “shall”). This may be reinforced by the meanings attached to "shall" and "may".

Example

(1) When in a written law the word "may" is used in conferring a power, that word is to be interpreted to imply that the power may be exercised or not, at discretion.

(2) When in a written law the word "shall" is used in conferring a function, that word is to be interpreted to mean that the function so conferred must be performed.

Legislative drafter now recognises that these terms are not necessarily the most suitable for sentences that do not command or authorise. They dispense with an auxiliary or use other auxiliaries in the principal predicate to state or declare a legal position or consequence. The following are now in common use in some jurisdictions as auxiliary to other verbs:

is [not] liable to,

is [not] entitled to,

is [not] eligible to,

is [not] to,

is [not] required to.

Not all legislative provisions state actions in relation to legal subjects. Some of them:

state a legal consequence or effect;

declare a legal status.

These provisions state a legal result after some occurrence or action, or the legal position that is created by the provision. The language of command or permission is inappropriate for making a statement.

Example

A member of the Council ceases to be a member if convicted of an offence punishable by imprisonment.

A fund, to be known as the Motor Accidents Fund, is established by this Act.

The functions of the Authority are as prescribed in this section.

How do we choose the appropriate auxiliary?

The choice of auxiliary is dictated by the nature of action to be ascribed to the subject. Different auxiliaries prescribe different responses from the subject, and therefore have different impacts. Accordingly, different auxiliaries may be needed to provide for the following:

a command (including a prohibition)

a power or permission

a competence

a right

a qualification or disqualification

a liability

a privilege

a direction.

Each of these is discussed in turn below.

Commands

If the sentence is to require the subject to act or not to act, with some adverse legal consequence for failure, the predicate must create an unqualified duty. Legislative drafter have conventionally used "shall" for this purpose. However, some jurisdictions have discontinued the use of “shall” for this purpose, largely because of the ambiguity that has developed in this term. “Must” is now frequently (although not always) uses as an alternative.

"**Shall" or “Must"?**

Driedger has argued that "shall" *creates* a duty while "must" merely asserts the existence of a duty. However, he concedes that a provision using “must” would almost certainly be construed by a court as the source of the obligation. For that reason, he advocated using "must" only if no penal consequences follow on a breach of the duty.

Example

Driedger gives the following as an example of where "must" might be suitable:

An agreement must contain the prescribed particulars.

These duties are sometimes referred to as “soft obligations”, largely because they are ancillary to some other obligation and do not themselves attract a legal sanction for non-compliance.

Driedger’s view is not universally held. The choice between "shall" and "must" has become a matter of differing drafting practices in different jurisdictions. The terms are increasingly seen as interchangeable. At the same time, take care not to use both in the same instrument, as this may suggest differences in meaning.

Example

A person may not carry on a business of dealing in second-hand motor vehicles without a dealer's licence.

On its face, this auxiliary has the same effect as an unqualified duty. But strictly, the provision is negativing or denying the holding of a power, permission or right, rather than commanding that the person refrain from doing the act. Accordingly "may not" is more useful to emphasise that some power, permission or right provided for by law is withdrawn.

Example

(1) A trustee may apply to a Judge for directions with respect to the investment of trust funds.

(2) trustee of a trust established outside Bangladesh may not apply under subsection (1).

Alternative approaches

There are cases when a term other than “shall” or “must” can be used to express a mandatory requirement. Verb phrases like “is required to” or “is to” also create obligations. These phrases can be used when the context of a provision suggests that “shall” or “must” is too strong because no penal sanction is involved to enforce the obligation.

Example

The inspector is required to give prior notice of any inspection under the Act.

A person who is exempted under section 5 is not required to notify the Registrar of any change in personal information.

Universal prohibitions

If the sentence is to create a universal prohibition (one that affects everyone or everyone in a specific class), the conventional practice is to negative the person rather than the verb: "No person shall .....".This is both more emphatic and, strictly, the correct converse of the rule that requires everyone to do something.

Example

Of the following, the first version makes the stronger impact:

No person shall drop litter in a public place.

A person shall not drop litter in a public place.

Can we use "no person must ....." instead? In fact, this does not work in quite the same way. Strictly, it is a statement that no one is under an obligation to act in the prescribed way. That is not the same as commanding persons not to act in that way.

Example

No person must walk on the grass in a public park.

This means that no one is under a duty to walk on the grass, although they may if they wish! This is precisely what is not required.

The conventional practice is:

introduce a universal prohibition by "No person shall".

if you wish to use "must", adopt the following : "A person must not .....".

if you wish to emphasise that a particular person is not under an obligation (for example, but other persons are), use "No police officer is required to ....."

Powers and Permissions

In a sentence that gives the subject a power or permission to act or not to act, the predicate must confer the necessary authority. Although power and permission are distinct concepts, they are often dealt with by the same auxiliary "may".

Powers

A power is an authority to do something that would otherwise be illegal or tortious or legally ineffectual. It states the type of action that the subject can legally choose to initiate or is permitted to take if deciding to act. Typically, in conferring a power four questions need to be answered:

(i) Is the person to have a discretion to decide whether or not to exercise the power, or must the power be exercised when specified circumstances occur?

(ii) Are grounds to be specified that must be fulfilled before the power is exercised? If so, is the person to have a discretion to decide whether those grounds are fulfilled?

(iii) Is the person to have discretion to decide the means by which the power is to be exercised or are these to be specified?

(iv) Is the power to be coupled with a duty, for example as to how discretion is to be exercised or as to conditions to be attached when permission is granted? If so, what are the consequences if the duty is not complied with?

In conferring a power, legislative drafter generally use "may" as the auxiliary.

Example

The Government may make rules for carrying this Act into effect.

The Government is authorised to make any necessary rules.

A power expressed in this way is usually taken to give the holder discretion as to whether or not to exercise it. It is not usually necessary to add words to confirm the discretion. However, it is sometimes necessary to couple a power with a duty to exercise it in prescribed circumstances. This can lead to problems of interpretation if "may" rather than "shall" or "must" is used.

Example

The Government may issue a licence on payment by the applicant of the prescribed fee.

Is the Government under a duty to issue a licence when the payment is made (does the applicant have a right to a licence merely by paying the fee? If so, "shall" or "must" is the appropriate auxiliary. Or can the Government refuse the licence even though payment is tendered (is the Government to have a discretion)?

The simple use of "may" is not conclusive, since it can leave unclear whether the power is discretionary or whether its exercise is obligatory. The context in which the term is used may provide the answer. For example, if the holder has to make a judgment before exercising the power, it is clearly discretionary. At the same time, the courts will insist that the holder is under a duty to go through the process of making the judgment. A statement of the factors to be considered before exercising the power allows the courts to draw such a conclusion.

Example

The following provision gives councils a general authority to act in this way. But it is unclear whether councils are to have a power to issue permits in their unfettered discretion.

Every local government council may issue parking permits to owners of private motor vehicles who are resident in its area.

Can a council refuse permits if it thinks proper? Further provision is needed to set the framework within which the power is to be exercised.

If the power is to be exercised only when specified conditions exist, make clear whether those conditions are to be established objectively or whether the holder is to make a judgment in that respect. Similarly, if the way the power is to be put into effect is to be determined by the holder, make clear that this feature of the power is discretionary.

Example

If the Registrar is satisfied that a registered person is contravening any of the provisions of this Part, the Registrar may serve that person with an enforcement notice requiring him or her to take such steps as are specified in the notice for complying with this Part.

The Registrar may arrange for the publication of such information about the operation of this Act as appear to him or her expedient to give to the public. The information is to be published in the form and manner that the Registrar considers appropriate.

In drafting a power:

use “may” as the standard auxiliary when a person is authorised to act but need not do so, and especially where an element of discretion is involved;

if (but only if) there is any danger that a duty will be implied when that is not intended, add an appropriate modifier, for example "in the Government's discretion"; "if the Government considers expedient" or “thinks fit”; "if the officer is satisfied that there are grounds for doing so";

if a duty to act is intended, consider using "shall" or "must" in the predicate.

Permissions

Rules are often needed to regulate previously uncontrolled activities by giving permission for them to be carried on in the future, for example if prescribed conditions or requirements are met or complied with. This can be dealt with in two ways:

(i) by permitting the activity (using "may") if the prescribed circumstances are fulfilled;

(ii) by prohibiting the activity (for example using "must not") unless the prescribed circumstances are fulfilled.

Legislative drafters generally prefer the second of these approaches (a "qualified prohibition") even though it uses a negative form to authorise a positive activity. Although a positive form is more quickly understood, the negative states categorically that permission is wholly dependent upon fulfilling the condition. If a positive form is used, make clear that fulfilling the condition is a pre-requisite of having permission.

Example

A person may carry on a business of dealing in second-hand motor vehicles only if that person holds a dealer's licence issued under this Act.

No person shall carry on a business of dealing in second-hand motor vehicles unless that person holds a dealer's licence issued under this Act.

A person must not carry on a business of dealing in second-hand motor vehicles unless that person holds a dealer's licence issued under this Act.

Denial of authority

In a rule that precludes the subject from exercising a power or denies permission to act, the predicate must be drafted to withhold or withdraw the authority. Legislative drafter generally achieve this by using "may not". However, if you are seeking to prohibit behaviour rather than prevent the exercise of a power, it is sensible to use “shall not / must not”.

Example

12. An inspector may enter any premises at any time to inspect electrical installations, but may not enter a residence on a Sunday.

20. A person contravening any provision of this Act commits an offence.

Is the inspector under a duty not to enter on Sundays, in which case a breach can be punished under section 20? Or is the purpose of the auxiliary to withhold the power of entry (breach of which might give rise to civil consequences only)?

If the former, it is clearer to write:

..... but an inspector must not enter a residence on a Sunday.

Competencies

Legislation that, for example, establishes a new body typically must state the competencies of that body: its jurisdiction, responsibilities and functions (the general activities that enable it to carry out the purposes for which it was created.

"May" generally used to confer competencies

Example

The Commission may investigate complaints about judges subordinate to the High Court.

This sentence both designates the Commission as the body to carry out this activity and authorises it to do so. However, it gives the impression of a power, making the decision to investigate a matter of discretion, when its purpose is to state an activity that the body is obliged to carry out. The extent to which the body is to have discretion in performing the function is better dealt with as a distinct issue.

If the objective of a provision is to confer responsibility for a particular activity, more specific words can be used, especially if it involves a duty to act.

Example

The Commission has the function of investigating complaints about judges subordinate to the Supreme Court.

A Court of SeniorAssistant Judge has jurisdiction to hear and determine actions founded on contract or tort if the debt, demand or damage does not exceed Taka 500,000.00.

"Shall" to confer competencies

Legislative drafters in the past have also used "shall" to make an authority responsible for some activity. That auxiliary gives the impression of a legally enforceable duty to act when what is needed is to confer capacity to act with respect to the activity.

An acceptable alternative that gives a less unqualified obligation is to use:

is [are] to,

is [are]not to,

is competent.

Example

Compare the two versions of each of the following sentences. The second removes any notion of compulsion in conferring competence to act.

1. The members of the Board shall be appointed by the Government.

The members of the Board are to be appointed by the Government.

2. The Family Court shall hear and adjudicate upon petitions for the dissolution of marriage.

The Family Court is competent to hear and adjudicate upon petitions for the dissolution of marriage.

Rights

If the provision is to confer a right on the subject, legislative drafter conventionally achieves this by using "may". Although this does not differentiate a right from a power, in most circumstances this is of little importance. A right to do things carries with it the power of action.

Right to a benefit

But the power of action may not be intended if you are conferring a right to receive something or be benefited in some respect. To write "may receive", for example, leaves quite uncertain whether there is some person who is under a duty to pay or merely whether the subject is capable of being made a beneficiary of another's power, if it is exercised. A need for such an approach can arise:

(i) automatically on the happening of some stated event;

(ii) following the exercise of another's discretion.

In cases of this kind, a right is better conferred by "is entitled".

Example

A child under the age of ten years is entitled to receive free school education if the Social Welfare Officer considers that the parents of the child are unable to pay the costs of school education.

If a farm animal trespasses on land, the occupier of the land may be paid compensation, as prescribed, by the owner of the animal.

Although the second example would be construed as creating a right in the occupier, it is better stated as:

..... is entitled to be paid compensation .....

Alternatively, the sentence could be drafted in the active voice to impose a duty to pay upon the owner of the animal, but that might not fit with a legislative context that is concentrating on the legal position of occupiers of land.

Disentitlement

In a sentence that sets out to deny a particular class of person a right that is available to others, "is not entitled" is more effective than "may not".

Example

If the owner or occupier of land kills or injures a dog in the course of protecting a farm animal threatened by that dog, the owner of the dog is not entitled to be paid compensation for the death or injury of the dog.

Qualifications

If the rule is to state that the subject is a proper person to perform a particular function, the predicate must declare the subject to be qualified. Conventionally, legislative drafter use "may". In practice, this rarely causes confusion with powers or rights. But “is eligible” is a better auxiliary.

Example

The second version of the following is more explicit:

The following persons may be appointed directors of the corporation ...

The following persons are eligible to be appointed directors of the corporation ...

Disqualifications

In a sentence that excludes the subject from some receiving a benefit or performing a function, "is not eligible" or "is not qualified" can be used instead of "may not".

Liabilities

If the provision is to make the subject vulnerable to legal actions by others, the predicate must declare this liability. Conventionally, legislative drafter use the passive form "may be" or "shall be liable to be". But this use of "shall" suggests some form of obligation, which is not the case. Those cases are better dealt with by "is liable to be".

Example

A person found trespassing on land belonging to the Railway Authority is liable to be [may be] prosecuted.

Privileges

If the purpose of the rule is to prevent the subject from being liable, the predicate must create a privilege (it must negative any liability to the action of others).Some legislative drafter use "shall not be [liable]".This implies a duty in unspecified persons not to act against the subject, when in fact the case is one of absence of power or competence. It is preferable to use "is not liable to be".

Directions

If the provision is to give the subject directions to do or not do something, or as to how to do something, the predicate must give an instruction to the subject. Some legislative drafter use "shall" or "shall not" in these cases. But, again, this suggests that the subject is under some duty enforceable by a penalty. In many instances, that is not the aim of the sentence. Three types of direction can be distinguished, to which different auxiliaries are suited.

Direction as to composition or persons to perform a function

The purpose of the sentence is to indicate how a body is to be composed or which person is the competent authority. As we have seen, you can use the present tense for this case, or "must", or "is to", or similar phrases.

Example

14. (1) The Councils listed in the Schedule are established by this Act.

(2)The Councils are to be [must be] composed of the numbers of members as are respectively specified in that Schedule.

Direction as to how the subject is to perform a function

The purpose of the sentence is to indicate how the subject, having decided to exercise a power, is to proceed. To use "shall", as has often been the practice, gives the impression that the subject is under a sanctionable duty to act in the particular way. This may be caught by a general penalty clause that provides punishments for contraventions of the Act. This is rarely required. Yet, to use "may" suggests that the process is discretionary, rather than one to be performed in the manner directed.

Example

25. (1)A prospector who, in the course of prospecting for minerals in accordance with section 21, discovers minerals in commercial quantities may apply to the Government for a mining licence.

(2)The applicant must apply in the prescribed form within two months after discovering the minerals.

Subsection (2) intends that the set method of application should be followed, but “must” creates a stronger form of obligation than is needed. An effective redraft would add the procedural direction as to how to apply to the words creating the power to apply.

Consider focusing the direction as to how to act on the resulting action (the “application”) into an adverbial phrase which modifies the verb stating the action itself.

(2)The application must be made in the prescribed form within two months after discovering the minerals.

General direction as to procedure

A sentence may prescribe the procedure to be followed in given circumstances. In many cases, the procedure is intended to be obligatory and some form of imperative language has to

be used. Some drafters use “shall” or “must”. Some use “is to”, especially when setting out routine administrative procedures. However, from a legal standpoint, the important factor is the consequences that flow from failure to observe the obligation.

These can take a variety of forms. Non-compliance can have penal consequences or invalidate the procedure or render void the outcome to which the procedure was leading. Alternatively, the procedure may be no more than the administratively convenient way of taking a matter forward without any consequences flowing from non-compliance.

Such matters are not determined by the choice of auxiliary.

Example

All summons, warrants, orders, convictions, recognisances, and all other processes, whether civil or criminal, must be issued or made, and be signed, by a magistrate or, if authorised by this Act, a justice of the peace.

> Proceedings before a magistrate's court are to be instituted either by the making of a complaint or, in the case of a person arrested without a warrant, by bringing the arrested person before the court.

Here the drafting practices in our jurisdiction should provide guidance. But do not expect the courts to treat these terms as conclusive. Courts generally decide these cases by taking account of such matters as the importance of the procedure in the legislative scheme, the interests that are affected, and who will be prejudiced by non-compliance, and to what extent.

If the consequences of non-compliance are important, but may be unclear from the context, do not rely on the choice of auxiliary to make this distinction clear. State expressly what the consequences are. For example, does failure to follow a particular procedure invalidate the action or merely permit the person to whom the procedure is directed to disregard the action if they so wish (for example refuse to consider an application not made in the correct form)? .

Example

> No summons, warrant, order, conviction, recognisance, or other process, whether civil or criminal, is valid unless issued or made, and signed, by a magistrate or, if authorised by this Act, by a justice of the peace.

Unlike last preceding example, this draft makes clear that non-compliance renders the processes void.

5.3 Sentence Problems-Modifiers, Incomplete and fused sentences, Subject/Verb disagreement, Negatives

Predicate modifiers

Few provisions are intended to apply to all persons everywhere in the jurisdiction, at all times, and in all circumstances and under all conditions; most provisions must be modified to restrict their operation to a particular context.

Many legislative sentences must contain clauses or phrases to modify the main clause containing the principal subject and predicate for this purpose; the modification may be adjectival or adverbial.

This modification is typically done by adding into the predicate one or more modifiers that either:

- *particularise* or limit the effect of the main clause or create exceptions to it;
- provide *context* by determining the fact situation in which the main clause is to take effect, typically through conditional or relative clauses.

There is no fixed line between these two techniques; they can often be used interchange-ably. Both are used to ensure that the sentence states precisely when the rule applies or does not apply.

Example

The following sentences demonstrate the use of these techniques:

unlimited sentence:

A court may issue a warrant.

adjectival modification:

A court may issue a warrant for the arrest of a person.

(not a warrant for any purpose, only for the purpose of arrest)

modification by relative clause:

A court may issue a warrant for the arrest of a person who refuses to attend as a witness.

(not a warrant for the arrest of any person, only for a person who refuses to attend)

adverbial modification:

In response to a request by the State, a court may issue a warrant for the arrest of a person who refuses to attend as a witness.

(The court may not issue warrants whenever it likes; only in response to a State request)

modification by conditional clause:

A court may issue a warrant for the arrest of a person who refuses to attend as a witness if the court is satisfied that the person's attendance is necessary.

(The court may not issue warrants every time a witness refuses to attend, only if their attendance is necessary)

How should we particularize predicate?

Predicates can be given a precise focus in a variety of ways:

by adding adjectives (including adjectival phrases or clauses) to provide clearer descriptions of nouns;

by adding adverbs (including adverbial phrases or clauses) to provide clearer indication of how verbs take effect.

Limitations and exceptions are two forms of modifiers commonly required. Both restrict the ambit of the main clause in some way.

Limitations

Expressions added to the sentence to limit the effect of a subject/predicate need to be positioned in the sentence where they perform that function without the possibility of ambiguity. Complex provisions may need several modifiers of this kind. If the modifiers are not well positioned, confusion may be added to the complexity. Typically:

place an adjective (whether a single word or an expression) as close as possible to the noun which it modifies;

place an adverb (whether a single word or an expression) as close as possible to the verb which it modifies.

This leads to the word order that is used in standard English. Deviate from the standard order only if a different order is necessary:

to avoid ambiguity; or

to enable all the necessary components to be contained within the sentence.

You will have noticed many legislative sentences in which the adverb to the verb is inserted between the auxiliary and the main verb. This practice (sometimes referred to as "embedding") is rarely found outside legislation; in most cases it is not necessary. Only consider using this device if that is the only way to prevent uncertainty or ambiguity.

Example

Here is an example of an unnecessary embedding of modification:

> An appointed member of the Commission shall, on revocation of the appointment by the Government, but without prejudice to re-appointment in accordance with this Act, cease to be a member of the Commission.

In addition, this version conceals the fact that 2 different types of modification are present. The first modifies the verb, but the second limits the ambit of the entire rule .A better draft would be:

> An appointed member of the Commission ceases to be a member if the appointment is revoked by the Government; but the person may be re-appointed in accordance with this Act.

Exceptions

The purpose of an exception is to remove specified cases from the generality of the provision. These may be cases that are dealt with in other law. Exceptions modify the sentence through added words that exclude from the ambit of the rule the cases in which the rule is not to apply. This can be achieved:

by modifying the subject or the object or other nouns (to exclude persons or things), beginning the modifier with, for example: "other than"; "except";

Example

Any member of a trade union, other than [except] a member under suspension, may apply to the court of a declaration under this section.

by modifying the verb, especially in the principal predicate (to exclude cases which would otherwise be covered by it), beginning the modifier with, for example: "unless".

In composing an exception, take steps to provide that:

the principal predicate contains the new law; the exception provides for the situation that is being preserved or excluded;

the exception is concerned with the minority of cases; the principal predicate deals with the standard case.

A sentence that provides only for an exception may obscure the nature of the main rule, as that has to be deduced by implication. If it is drafted in that way, ensure that no-one can be in doubt as to what that rule may be.

Example

A summons or a warrant may be issued and served on any day except Sunday.

A summons or a warrant may not be issued or served on a Sunday.

In the first example, both the general case and the exception are clear. In the second, the sentence is silent on the general case, though it is not too difficult to deduce it.

If a long exception is required to modify the whole sentence, consider converting it into an explanatory clause, with its own subject and predicate, at the end of the sentence and introduced by a conjunction such as "but" or "however". This brings out strongly the relationship between the rule and the exception.

If the exception is detailed or in any way complicated to understand, convert it into a separate sentence to follow the main rule, as a further subsection.

Example

A local authority may cause the body of a child who has died while in its care to be buried or cremated; but the body may not be cremated if cremation is not permitted in the practice of the child's religion.

(1)The Trading Corporation of Bangladesh shall purchase all salt and all coconut products, other than salt and coconut products specified by the Government under section 3, that are produced in Cox's Bazar District of Bangladesh and offered and delivered to the Corporation.

(2)Subsection (1) does not apply in respect of salt or coconut products produced in a part of Cox's Bazar District designated by the Government by order for the purposes of this section.

In the second example, the exception in subsection (1) modifies an element in the sentence. Subsection (2) creates an exception to the entire sentence.

Relative clauses

A relative clause may be used to modify any noun (or pronoun) that is a component of the subject or predicate. It is adjectival in that it defines qualities or activities of the noun to which it is attached, typically by a relative pronoun (for example "who"; "whom"; "which"; "that").

Example

A mental health authority may transfer the guardianship of a patient who is for the time being subject to the guardianship of a person to another person with that other person's consent.

A person who fails to comply with an enforcement notice commits an offence.

In drafting a relative clause:

make sure that the relative pronoun can only refer to the intended noun, and no other;

do not attach to the same noun relative clauses of both types (one that describes qualities and another that defines an action) since they perform different functions.

Conditional clause

As the term implies, a conditional clause may be added to the predicate to state the conditions that must exist or be fulfilled before the action has effect. As a result, they are used adverbially, to modify the verb.

Example

The Social Welfare Officer must inform the nearest relative in writing of his reasons if the officer decides not to make an application under this section.

A Social Welfare Officer may not make an application for admission of a patient to a mental health hospital unless:

(a) requested to do so by a medical practitioner who is attending the patient; and
(b) two medical recommendations have been made in accordance with subsection (2).

In these examples, the clause is incorporated into the main predicate to provide continuity in the way the proposition is expressed. However, such clauses are often positioned as a subordinate clause at the opening of the sentence. This practice is discussed next.

How should we write context clause?

Context clauses are subordinate clauses containing their own subject and predicate. They give additional meaning to the principal clause by creating the context or legal setting in which that clause is to operate. They typically determine such matters as:

the fact situation in which a provision is to operate (for example: the time, place, circumstances);

the action taken by some person that triggers the application of a provision;

a condition that is to be met before a provision can take effect;

the event that brings the rule into operation.

Example

Fact situation:

(1) Where [or if] persons wish to dissolution of marriage, one of the parties to the intended marriage dissolution must give notice in the prescribed form to the marriage registrar of the district in which the dissolution of marriage is intended to take place.

Prior action:

(2) When notice of an intended dissolution of marriage is given under subsection (1), the marriage registrar must cause the particulars of the notice to be entered into a register, to be called the "Register of Dissolution Marriage Notices".

Condition:

(3) If, at the end of 100 days after the date of the notice, the registrar has received no objection in writing to the intended dissolution of marriage, the registrar must issue a certificate of dissolution of marriage in the prescribed form to the notice giver party.

Event:

(4) If any objection is raised by other party against the dissolution of marriage within the period specified in subsection (2), the notice ceases to have legal effect.

Context clauses must have a subject and predicate, but the conventions concerning these components are more flexible than they are for the principal clause.

Subject of a context clause

Unlike the principal clause, a context clause need not focus on specific legal persons. It is generally descriptive in content, and so it may relate to persons or things, activities or events. Therefore:

the grammatical subject may be a legal person or an animate or inanimate thing, or an action or activity (in the singular or plural);

if the grammatical subject is a person, it may refer to the person who is the legal subject of the sentence or to a different person.

Let the grammatical subject of the clause be dictated by what enables you to describe the subject-matter best. If you are following up an aspect of the previous sentence, the grammatical subject may be suggested by the contents of that sentence.

Example

13. When a notice is given under section 12, the Registrar-General must file it and enter the particulars of it in the register kept for the purpose and must post a copy of it in a conspicuous place in the registry.

The context clause builds upon section 12, which laid down rules about the giving of notices. Its grammatical subject (a "notice") relates back to the matter in that section.

Verb in a context clause

In context clauses we see most clearly the impact of the convention that legislation is always speaking. These clauses continuously describe the circumstances and conditions in which the provision operates. Therefore:

use the present tense if the verb describes a state of affairs that has to coincide with the operation of the principal clause (this is by far the most typical case);

use the present tense when the provision is to operate immediately once the circumstances described arise.

Example

If a person who is over the age of 21 years and a resident outside Bangladesh wishes to marry in Bangladesh, he or she may apply to the Registrar-General for permission to marry by proxy.

The power to apply is available to anyone who fulfils the requirements of the context clause as soon as they are fulfilled, and continues as long as they continue to be fulfilled.

When a marriage is solemnised by a marriage registrar, the marriage registrar must enter immediately the particulars of the certificate of marriage in a register kept for the purpose (to be called the "District Marriage Register").

Although the marriage is solemnised before the registrar can act, the duty to register arises as soon as the marriage has taken place.

use past tense or the present perfect tense if you wish to emphasise that a state of affairs or an action must have occurred or have been completed before the principal clause can take effect. This is likely to be the case when:

- the context clause provides for the happening of a single event, rather than events of a kind that are likely to be frequently arising;

- the context clause lays down a pre-condition that must be fully met before the rule can operate.

Example

When a marriage was solemnised outside Bangladesh, either party to the marriage may petition the High Court for dissolution of that marriage under this Act.

If a person is recommended by the District Select Committee for an specified area, the Government may appoint that person to be a marriage registrar for that area.

When drafting context clauses:

never use "shall" (either as a future tense or as a command) or "may" in a context clause: these should be confined to the principal predicate;

prefer the active voice to the passive voice (as in a principal clause); at the same time, passives with impersonal subjects are a useful way to connect the sentence with a previous sentence.

Introducing a context clause

The terms that legislative drafter typically uses to begin context clauses are:

if,

when,

where.

These are especially favoured when the context clause is at the beginning of the sentence. But:

these terms tend to be used a little differently from the ways in which they are used in non-legislative writing;

they are not always used in exactly the same way by all legislative drafter;

they are frequently used interchangeably.

Legislative drafters have traditionally tended to use "where" in cases when "if" and "when" are more consistent with day-to-day use. In a number of jurisdictions, “if” is now used to begin both clauses that express the contingency that activates the main predicate (as in the past) and for clauses that describe recurrent or habitual circumstances in which the main predicate operates (in substitution for “where”).

When writing a context clause, ask yourself which of the three terms best introduces the matter in the clause. However, you must give due regard to the drafting practices in our jurisdiction.

Let us look how these terms are conventionally used and when they might be used.

	Common practices	**Better practices**

"where"	to introduce circumstances that: are likely to arise frequently; are of a continuing nature or describe the factual setting in which the provision operates.	to introduce an adverbial clause that refers to a physical place; to introduce an event or action: when time or timing is a factor; or about which greater certainty is required than is offered by "if".
"when"	to introduce circumstances that: are unlikely to arise frequently; or can only occur on one occasion.	to introduce an event or action: when time or timing is a factor; or about which greater certainty is required than is offered by "if".
"if"	to describe a prior condition that triggers the application of a provision.	to introduce: a condition that is a prerequisite to the operation of the main predicate; or a fact situation in which the main predicate is to operate.

Other terms are used to introduce context clauses, though usually where the clauses are placed later in the sentence, especially at the end. They include:

unless,

until,

after,

before,

as soon as.

Legislative drafters use these terms in the same way as they are used in other forms of writing. They typically introduce a full clause (with a subject and verb), but you may be able to use shortened versions.

Example

Shorter versions are achieved by leaving out the words in brackets.

> The registrar must not issue the certificate of marriage unless [he is] satisfied that there is no legal impediment to the marriage.

> The registrar must not issue a certificate of marriage before notification [is made] under section 12.

Placing a context clause

Many legislative drafters still follow Coode's advice to place context clauses at the very beginning of the sentence (before the principal clause). There are several benefits:

- it indicates to the reader at once that the provision is not of universal application;
- it allows readers to discover whether the context of the provision applies to their case before looking in depth at the entire sentence;
- it can be used to provide a link with an earlier sentence, by building upon information already known to the reader;
- it frequently conforms to the time frame for the operation of the provision by putting a pre-condition or circumstance before its consequences.

Example

> (2) If a certificate of a marriage cannot be issued under subsection (1) by reason of the residence outside Bangladesh of one of the parties, a magistrate's court may dispense with the issue of the certificate of marriage and issue an order authorising the solemnisation of the marriage.

The condition in the context clause in this example must be satisfied before the provision can have effect. The rest of the sentence is relevant only if the condition is satisfied.

But this order may make the sentence unnecessarily difficult to understand, particularly if the context clause covers several alternatives or embraces both circumstances and conditions. Readers generally find sentences that are “front-loaded” in this way difficult to work with. For example:

- they have to read the entire sentence to find the core subject and predicate so as to understand the purpose of the context clause;
- they are asked to carry information forward in their short-term memory until the rest of the sentence has been understood.

Example

> 12.If a marriage has been solemnised by a person who is not a marriage registrar or if either of the parties to the marriage married under a false name or if the marriage has been solemnised without the authority of a certificate of marriage, the marriage is void.

The entire section has to be read and the various alternatives considered before its full import is clear. (This would, of course, be eased by a helpful section note, for example: "Void marriages.").

A sentence is easier to understand if it begins with the subject and predicate followed by the context clause. Legislative drafter now tends to avoid front-loading unless they have a good

reason, such as making a link with a preceding provision. Accordingly, context clauses should occupy the place in the sentence that best contributes to communicating the provision. Choose a sentence order that leads to the most effective expression. For example:

a conditional clause may be more effective if it follows the main clause (this is usually the case when it is to begin with "unless");

a series of conditional clauses (beginning with "if") can follow the main predicate in a series of paragraphs.

We may find it easier to determine the order of the sentence components if we use a different kind of modifier instead of a full context clause, for example:

a phrase introduced by a preposition;

a relative clause introduced by a relative pronoun (for example: "who", "which" or “that”).

A context clause can often be easily converted into one of these forms without a change of meaning or loss of effect.

We can make a context clause more prominent by putting it either at the beginning or at the end of the sentence. But bear in mind the draw-backs of front-loading. For example, do not transfer the essential elements of the principal clause to a front-loaded context clause to achieve that prominence. This was a common practice with offence provisions in the past. Consider rather whether the prominent position at the sentence start should be occupied by the main clause (the core subject and predicate) with the modifying clause at the end.

Example

If a person at a public gathering behaves in a noisy or disorderly manner or uses or distributes a document containing threatening, abusive or insulting words with intent to provoke a breach of the peace or by which a breach of the peace is likely to be occasioned, that person commits an offence and is liable to imprisonment for 12 months.

This draft requires the reader to wade through a detailed context clause containing the forbidden behaviour before finding out that it is that behaviour that is made a crime.

CHAPTER 6

HOW DO WE PUNCTUATE LEGISLATION?

6.1. **Punctuation**

We often take punctuation in writing but legislation does not have special punctuation. Its features place special demands on punctuation and legislative drafter are expected to follow conventions as to preferred usages for legislation, often dictated by the drafting practices in our jurisdiction.

Once you are familiar with what standard practice is, and why it is, you should readily recognise the places where punctuation is needed and the form it should take. Your aim is to make this second nature, so that you can provide what is needed automatically without need for thought.

What is the function of punctuation in legislation?

The role of punctuation in a legislative text is the same as in any written document. It assists the reader to draw inferences about the intended meaning.

It has little importance in interpreting legislation. Judges does not always agree about the extent to which they may take punctuation into account in interpreting legislation. However, in some jurisdictions, the Interpretation Act deals with the matter explicitly, usually by giving judges authority to take account of punctuation.

Even without such authority, no judge completely ignores punctuation. Its presence inevitably influences our reading. The sense of the sentence and its meaning are easier to discover because of the guidance provided by punctuation marks.

Punctuation is part of syntax. Its functions in a sentence are:

to reinforce the sentence structure;
to make more apparent the way that the sentence components relate to each other.

However, too much reliance should not be placed on punctuation for a number of reasons:

the rules and practices relating to its use are based on conventions that may vary from place to place;
practices continue to change, not least because of technological developments (for example, word processing has made a number of marks more accessible);
punctuation mistakes occur more easily and tend to be over looked more frequently than other features of syntax (for example, typographical errors).

Judges on occasion call punctuation in aid to *support* a particular construction indicated by the syntax and by the general purpose of the provision itself. Less commonly, they have disregarded punctuation, for example because:

it has been used in an unconventional way; or
other features of the sentence are stronger indicators of a meaning.

Sound punctuation facilitates reading and understanding. Since legislative sentences may be complex in their content, any aid to accessing their structure and contents takes on particular importance. It is not surprising that good legislative drafters take the task of punctuation seriously.

Punctuation marks help us to see the individual components of a sentence and how they relate to each other and to the sentence as a whole.

Do legislative drafters use punctuation differently from other writers?

As in the case of syntax generally, there are no special rules of punctuation for legislation. Good drafting calls for punctuation according to the same standard conventions that apply to all writing. At the same time, punctuation of legislation has some characteristic features because:

legislation is formatted in a distinctive way, for example, in the way it uses paragraphing; in response to this, legislative drafters have adapted standard practices on punctuation to these formats;
most jurisdictions develop drafting practices concerning the places in which particular punctuation marks should be used, with a view to consistency, especially where alternative marks could properly be used for the same purpose;
certain punctuation marks are almost never needed in legislation, for example: exclamation marks(!).

As a result,

when punctuation is called for, practices in general usage are followed;
the choice of punctuation mark is often settled by the drafting practices, though some of these may be rather unorthodox.

How should we approach the punctuation of legislation?

Try to include punctuation automatically as you write. Follow what you do when you are writing other formal text, drawing from your general experience of writing. At the same time, accommodate the distinctive requirements of legislative text. Make a practice of the following:

punctuate your sentences as you compose them in accordance with the standard conventions applied to writing in English;
use punctuation as a means to clarify the sentence structure and the relationship of the sentence components;
only use punctuation when it serves an identifiable purpose;
unnecessary and, in particular, excessive punctuation is an obstruction to communication;
if you have an ambiguity in syntax, don't rely on punctuation to resolve it.

Example

The police officer must request the driver↑ within 24 hours↑ to produce his identity card and driving licence.

The ambiguous ("squinting modifier") "within 24 hours" does not cease to be ambiguous if a pair of commas are added in the places indicated.

follow the drafting practices in our jurisdiction as to when particular punctuation marks are to be favoured over others;
scrutinise your sentences to check that the punctuation is complete and correct.

Punctuation marks

We consider the punctuation marks that drafters put to specific use or that need special attention in legislation. These are:

- **full stop** or "period" .
colon:
dash-
colon+dash:-
semi-colon;
brackets or "parenthesis" () or []
comma,
inverted commas or "quotation marks""" or "
hyphen linking words -
apostrophe with an "s" '.

6.2. Full Stop

Full stop

Full stops are needed:

to indicate the end of a sentence;
in abbreviations (but not acronyms).

Example 3

The following abbreviations are used in some jurisdictions, although the full stops may be omitted:

a.m.
p.m.
m.
km.
U.N. (abbreviation for United Nations)

When the abbreviation constitutes an acronym (initial letters pronounced as a word), full stops are typically omitted.

UNESCO (acronym for United Nations Educational, Scientific and Cultural Organisation)

6.3. Colon

A colon may be added at the end of a phrase to introduce a series of propositions that follow on that one phrase. It is itself a visual form of *introducer*. The colon is typically used:

to conclude the enacting formula in an Act;
to conclude a phrase that ends with, for example "the following" or "as follows";
to introduce a series of paragraphs or a list of numbered items.

Example

Enacted by the Bangladesh Parliament:

The Government may make rules for all or any of the following purposes**:**

(a) prescribing anything that is required to be or may be prescribed under this Act;
(b) the manner in which applications may be made under this Act;
(c) the fees to be paid in respect of any matter or thing done under this Act;
(d) the returns to be made in respect of fees collected under this Act.

6.4. Dash

The dash is the preferred alternative to the colon in many jurisdictions. It is used for precisely the same purposes, except that it is rarely found by itself at the end of the enacting words. Like the colon, it is an introducer. It has the merit of appearing to point forward, and is therefore a clearer introducer than the colon.

Unfortunately, in word-processing, a space is commonly inserted between the last word and the dash. As a result, when the text goes right to the end of the line, the dash is consigned, as an orphan, to the beginning of the next line. For that reason, the colon is often preferred.

Example

The Government may, on the advice of the Right to Information Commission, make rules for the following purposes --

prescribing anything that is required to be or may be prescribed under this Act;
the manner in which applications may be made under this Act;

the fees to be paid in respect of any matter or thing done under this Act;
the returns to be made in respect of fees collected under this Act.

6.5. Colon+dash

A colon and a dash are sometimes used together (:-). Some legislative drafters say "Never! "There are several reasons for this advice:

such a punctuation mark is not used in other forms of writing;
it combines two different marks, both performing precisely the same function; at best, it is an emphasised form of an introducer;
there is no need for its use as these are two well accepted alternatives.

Yet the colon+dashis still part of our drafting practices.

Check and note, whether, in our jurisdiction, the colon, the dash or the colon+dash is used for the following purposes:

at the end of the enacting formula;
after, for example, "as follows";
to introduce a series of paragraphs or a tabulation.

6.6. The Semi-Colon

Semi-colon

Semi-colons are used within a sentence to separate text that deals with distinct but closely linked matters. They perform a similar function to conjunctions such as "and". In legislation, the semi-colon is used to mark off separate but linked clauses or paragraphs.

Linked clauses

Two legal propositions, each with its own subject and predicate, may be placed in the same sentence because their contents are closely connected. The technique is usually used when the second proposition follows immediately from the first. The semi-colon suggests the link between the two, and that equivalent weight should be given to both propositions.

Example

A person aggrieved by the refusal of a licence may appeal to the government**;** the decision of government is final.

This presentation is an exception to the typical practice by which distinct propositions are to be treated in separate sentences. But the semi-colon can be used in this way to join in a single sentence two propositions:

that are interdependent;

that are of no great length; and
the second of which is legally no more important than the first.

In practice, this device is not widely used. Legislative drafter generally prefers to use a conjunction, paragraphing or separate subsections.

Linked paragraphs

Legislative sentences commonly use semi-colons at the end of paragraphs or subparagraphs that are listed in tabular form. It indicates the co-ordination between the items in the paragraphs.

Example

If a person arrested or detained under this section is not tried:

a) in the case of a person who is in custody or is not entitled to bail, within 2 months from the date of arrest or detention; or
b) in the case of a person released on bail, within 3 months from the date of arrest or detention;

he or she shall be released either unconditionally or upon such conditions as are reasonably necessary to ensure appearance for trial at a later date.

In the previous example a semi-colon is used at the end of the last paragraph. However, in many jurisdictions, it is more common for a *comma* to be used there. This uses the mark as it is used in unparagraphed sentences, to indicate the end of the introductory subordinate clause.

Paragraphing is used not just to list or tabulate a series of items or alternatives. It may also be used to present the internal components of the sentence in a more readable form. For example, a context clause that contains several elements can be structured in paragraphs. In that case, a comma, rather than a semi-colon, at the end of each paragraph is the appropriate mark. The punctuation then is the same as in the sentence if it were not paragraphed.

Example

A police officer who:

a) reasonably suspects a person of having committed a summary offence, and
b) is unable to ascertain the name and address of that person,

may arrest that person and take him or her to the nearest police station.

This is not universally followed. There is a case for treating all paragraphing as a form of listing, and for using semi-colons distinctively at the end of every paragraph. Follow the drafting practices in our jurisdiction.

Note whether in our jurisdiction a semi-colon or a comma is used:
i) at the end of the final paragraph of a series;
ii) at the end of paragraphs used to make the sentence easier to read and understand.

6.7. Brackets

Brackets (usually in rounded form when used in legislation) may be used to enclose parenthetical words into the text of legislation:

i)to add further information or an explanation;
ii)to provide an incidental clarification; or
iii)to create a short definition.

Example

Further information:

Section 64 (*which provides for appeals to the Government*) does not apply in respect of licences issued under this section.

Clarification:

A person commits an offence who, with intent to extort a valuable thing from another person, publishes or threatens to publish a libel upon any other person (living or dead).

Definition:

An application may be made to a court by or on behalf of a person for whose benefit maintenance order has been made (in this section referred to as "the applicant") for an order under this Act against a person who is liable to maintain the applicant under that order (in this section referred to as "the defendant").

A parenthesis (bracketed words) adds secondary or incidental material to a sentence that is already grammatically complete. As a result:

i) the sentence must make grammatical sense when it is read without the words in brackets;
ii) brackets should not be used around material that is legally essential.

Inserted material that is essential to the legal proposition is best marked by a pair of commas.

Example

Brackets instead of the commas would be unsuited to the following sentence. The matter is essential to the rule.

A person commits an offence who**,** with intent to extort a valuable thing from another person**,** publishes or threatens to publish a libel upon any other person (living or dead).

6.8. The Comma

Commas

The comma is the most difficult and misused punctuation mark. Its effect is to cause the reader to pause. Consequently, it can be used to encourage the reader to take pauses that contribute to understanding the sentence structure. However:

i) don't use the comma to resolve uncertainties in syntax;
ii) don't use it excessively: it should always perform some worthwhile function in reinforcing the structure of the sentence.

Generally, a comma is used at the end of a complete clause or a self-contained phrase.

The comma is useful in the following cases:

After an introductory element

Sentences frequently begin with a proposition that stands apart from the provisions that follow. A comma points up where the proposition ends. Typical cases to place a comma:

i) at the end of a context clause;
ii) at the end of a limiting phrase.

Example

When the High Court Division decides a case on appeal**,** it must certify its judgment or order to the court that made the order appealed from.

Except as provided in subsection (2)**,** no prosecution is to be commenced without the written consent of the Government.

Divide a compound sentence

A legislative sentence may be made up of two fully independent clauses joined by a conjunction (such as "and/but"). It is usual to put a comma at the end of the first clause, immediately before the conjunction.

Example

If a surety to a recognisance dies before the recognisance is forfeited, the estate of the surety is discharged from all liability in that respect, but the party who gave the recognisance may be required to find a new surety.

A semi-colon can also be used, in place of the comma.

Separate items in a series

A comma is used after *each* of the items in a series of three or more words, expressions or phrases. But if the last item is joined to the rest by a conjunction ("and" or "or"), the comma is typically omitted at that point.

Example

In this Act, "animal" means cow**,** goat**,** horse**,** pig or sheep.

Mark off insertions

As with brackets, commas can be used to enclose material that adds to or clarifies or explains some aspect of the sentence. Use them, in the form of two matching commas, in preference to brackets where the inserted information is legally important.

Example

The court or a police officer**,** as the case may be**,** must take the recognisance of the person to be released on bail and of his sureties, if sureties are required**,** conditioned for the appearance of that person at the time and place specified in the recognisance.

Set off non-restrictive modifiers

Clauses, phrases or words that limit the meaning of the words they modify ("**restrictive**" modifiers) are coupled to those words without a comma. But clauses, phrases or words that are *not essential to the meaning* of the words to which they are attached ("**non-restrictive**" modifiers) are set off from those words by a pair of enclosing commas.

Example

If the seat of a person *who is an elected member of the council* becomes vacant, that person**,** *if qualified under this Act***,** may again be elected as a member of the council.

The first italicised clause is a restrictive modifier, since it limits the meaning of "person"; it is an essential part of the expression. The second phrase, though an essential component of the rule as a whole, does not restrict the meaning of "person". It is a further element of the rule and has to be set off by a pair of enclosing commas.

Facilitate understanding

Commas sometimes help the quick understanding of the rule, although they are not strictly needed for any of the purposes just set out. Two such cases are the following:

i) in long sentences, a single comma can indicate the completion of an element of the sentence that might otherwise not be obvious;
ii) a pair of commas can make clear that two expressions are *both* linked to another expression.

Example

A person who**,** without lawful authority**,** exports from Bangladesh**,** or puts on board any ship for the purpose of being so exported**,** an aircraft or vehicle commits an offence.

The first pair of commas marks off an important insertion.

The second pair of commas is used to enclose the second of two expressions so that both are seen to be linked to the same object ("an aircraft or vehicle").

When considering whether to use commas, bear two working practices in mind:

i) keep commas to the minimum necessary: too many can interfere with the easy reading of the sentence and a ready understanding just as much as too few;
ii) when reading through your drafts, ask yourself whether the commas you have used in fact perform a useful function. You may find that you can manage with fewer than you had originally supplied.

6.9. Inverted commas

Inverted commas or "quotation marks" are used for precise purposes in legislation. In most jurisdictions, they take the form of two pairs of marks (opening and closing), rather than a pair of single marks.

Look at recent legislation in your jurisdiction that contains an interpretation section and also makes textual amendments. Note whether double or single quotation marks (or both) are used. If both, note when.

Inverted commas are used to identify words or phrases that are to be subject to some legislative action. There are three main uses:

Defined terms

In definition sections or other interpretation provisions, an expression that is to be given a particular meaning or construction is identified by quotation marks.

Example

In this Act, "complaint" means a complaint made under section 25.

In this section, "sentence" includes an order or decision of a court consequent on a conviction for an offence or a finding of guilt in respect of an offence.

Names assigned to offices

Sentences that create an office or institution commonly designate the official name which it is to bear. The sentence assigning that name can state the name within a pair of inverted commas.

Example

A commission is constituted by this Act to be called the "Law Reform Commission of Bangladesh".

Words being amended

Word to be repealed, amended or added are identified by inverted commas in the sentences that direct their repeal, amendment or addition.

Example

In section 1 of the Judicial Officers Protection Act,1850 the comma and the word "**,** Collector" mentioned twice are deleted.

After section 1 of the of the Judicial Officers Protection Act, 1850, the following new section 2 is added:

"2. Notwithstanding anything contained in section 1, a person who acts negligently in discharging his duties mentioned in section 1 is not entitled to protect himself on the ground of good faith. ."

6.10. Hyphen

Hyphens

Hyphens are used for two main purposes:

i) to divide words at the end of a line that are too long to be completed on that line and must run on to the next line;
ii) to join two words that together have a compound meaning.

End of line

Hyphens splitting a word typically are inserted by printers when setting up the text or automatically by word-processing software. The text should be edited to ensure that:

the hyphen is not used for one-syllable words;
the break in the word made by the hyphen does not make the word awkward to read;
the word is complete when the two parts are joined.

Join words

Hyphenation may aid in establishing the grammatical and semantic relationships among words in compounds. In many instances, a dictionary determines whether to use a hyphen for this purpose. A small number of cases have particular legislative relevance, when the usage may be dictated by the drafting practices of the jurisdiction. These relate to:

fractions when stated as words (for example: "two-fifths");
specific official titles (for example: "Governor-General"; "Attorney-General"; "Vice-President");
specific legal words (for example, "bye-law"; "court-martial"; cross-examine"; "sub-lease").

6.11. Apostrophe

Apostrophes

Apostrophes are rarely needed in legislation. They are used widely in other documents to indicate contracted words and possessives, which are uncommon in legislation.

Contracted words

The apostrophe indicates a missing letter (for example: "doesn't" for "does not"). But as these colloquial forms are not appropriate for legislation, this is rarely needed. One such case where it is found is in "o'clock" (although this term has largely been replaced by "a.m." and "p.m.").

possessives

The apostrophe is added with the letter "s" at the end of a word to indicate possession. In most legislation, possessives are typically shown by the words "of the". So, this mark is not much used. Two cases where you will need it are:

i) in descriptive phrases, such as "a dealer's licence", where no particular person is referred to;

ii) where the expression refers to some item or matter belonging to a person already referred to in the same sentence.

Example

Illustrations of the two cases are:

A person aggrieved by an order under this section may appeal to the magistrate's court of the area in which the person resides.

A person aggrieved by an order under this section may appeal to the Government; the Government's decision is final.

Note that "it's" is a contraction of "it is", and is unsuitable for legislative drafting. That form is *not* the possessive form of "it"; the correct possessive form of "it" is "*its*" (*without an apostrophe*).

CHAPTER 7

LEGISLATIVE STYLE

7. **Legislative Style**

7.1 Introduction

Though syntax and style are independent concepts, in drafting we cannot treat them separately. How a sentence is composed and structured may significantly affect how well it expresses the subject matter. Legislative drafters make most of their decisions about syntax and style together, as part of the same process.

7.2 What do we mean by good legislative style?

In the context of legislative drafting, style is about the way we express ideas in writing. Style is about making choices whether to express the subject matter in one way or another. As should now be clear to you, the same idea can be conveyed in a variety of ways.

Good style is concerned with the way we can communicate ideas most effectively and efficiently. It involves choosing that mode of expression most suited to the particular drafting task.

In all writing, each of us approaches the task of making style choices in our own way. Good writers develop a distinctive style, often to the point that their readers can recognise who wrote the text from the way in which it is written. Many writers, such as novelists, set and follow their own standards of literary style, which can be very personal. This is true for legislative to some extent. Experienced legislative drafters have their preferred ways of expressing themselves in their drafts, mostly acquired through learning what has proved to be the most effective for them in the past.

Legislative drafters have much less freedom. Their work is constantly judged by those who use their legislative texts. To a considerable extent, legislative drafters must follow standards of style that respond to external expectations. Typically, a body of standards has been collectively developed in their jurisdiction. It is only within those standards that they can exercise some freedom of choice. Consistency in this respect is an important consideration.

7.3 How do we decide what is good style?

We must never lose sight of what we are here to do. Legislation is a medium for:

fixing requirements of law in a form that permits people to act with security, and
communicating those requirements to persons affected by them or concerned in carrying them out.

A *good legislative style* is one that contributes to the fulfillment of those tasks. It furthers the objectives for effective legislation.

A number of drafting practices still in use are inconsistent. Many of the recent criticisms of drafting relate to questions of style. They are connected with a wider concern about poor intelligibility of legal documents generally, especially those intended to be used directly by the public and others with little knowledge of law.

7.4 How are style standards set for legislative drafter?

Legislative drafters are generally expected to work to the common body of standards, often referred to as the "Jurisdictional-style". This develops in a variety of ways:

by following the style used in past legislation, in particular in the local statute book;
through a sharing of experience, particularly between senior and junior legislative drafter in the process of training and working together;
by following guidelines formulated by senior legislative drafter for the use of the drafting office.

Some jurisdictions produce a style manual and issue a set of guidance notes for this purpose. By contrast, in others rapid and frequent changes of legislative drafter have made it difficult to maintain the desired consistency in style. In those jurisdictions in particular, individual legislative drafter set their own standards pragmatically (sometimes by trial and error).

Inexperienced legislative drafter should avoid making style innovations of their own. But many style improvements are being made in countries with a wealth of drafting expertise. You should be aware of them, even if they are not current practice in our jurisdiction. This incorporates many of them. Most will prove to be non-controversial. But expect to be challenged about others. In such a case, these materials should provide you with the reasons for following a particular practice (and the knowledge that they are followed without controversy elsewhere). On the other hand, your senior officers have the authority to dictate style requirements; it is your duty to follow the prevailing Jurisdictional-style if you are so directed.

7.5 Why is style important?

Style is concerned with choices about the words used in legislation and the way that they, and the sentences containing them, should be arranged and related to each other. Style is involved when we ask the following kinds of questions:

what are the best words to express our requirements?
what form should a sentence take to communicate its messages most effectively?
how long or short should sentences and sections be?

how detailed should provisions be?
can we compose provisions in language that is in everyday use?
what features will ensure that the document is as readable and usable as possible?

As has been noted, syntax and style are inter-related. Since choices must be consistent with the conventions of syntax and grammar, it is inevitable that decisions on syntax matters influence style, and the other way round. From working with legislative syntax in the earlier, you should already be familiar with a considerable number of issues of style:

preference should be given to writing in the present tense;
the active voice is to be preferred to the passive;
a wider range of auxiliary verbs than "shall" and "may" should be used in the principal predicate of a sentence;
related words should be kept as close together as possible (for example, subject and its modifier; subject and predicate; verb and its object);
a sentence should deal with a single idea only;
adverbial phrases should not be embedded between a verb and its auxiliary;
a conditional clause is frequently more effective towards the end, rather than at the beginning, of a sentence;
paragraphing within a sentence makes the component parts of a long sentence much clearer;
the same expression should be used for the same meaning; a different expression should be used for a different meaning;
sentences can be shortened by using definitions for terms used in them.

Of course, none of these propositions is a hard-and-fast rule. They are guidelines for making choices. Whether they are adopted or not in any particular case depends upon what you are trying to achieve.

7.6 What style practices get in the way of communication?

A number of common features of legislation that make it difficult for users to understand it easily are as follows:

No statement of the underlying principles

Concentrating on the rights and obligations of the persons affected, without stating the underlying principle, may obscure the purposes for which they are conferred.

Long sentences

Sentences that run to many lines and use too many words are difficult to work with, especially when formatted as a single slab of text.

Overloaded sentences

A sentence requires complex structures if it contains not only a statement of a rule but also the circumstances and conditions, and procedures, for its operation, as well as exceptions to it.

Illogical organisation of the legislative text

Readers find a document easier to use if it follows a logical sequence. Systematic structure reveals the thinking behind the legislation. Too often, legislation allocates materials that are closely related to widely separated parts of the statute.

Unusual syntax

Sentences that use an unnecessarily artificial word-order or that are inconsistent with usual grammatical practice defeat the expectations of the reader.

Excessive cross-referencing

Heavy use of cross-references to other statutory provisions (for example, by citing the section reference) makes text difficult both to read and to understand, as they require readers to search out and piece together the two sets of provisions before they can be sure of the total effect of the provisions.

Superfluous words

Readers can be held back by text that uses more words than are strictly needed.

Archaic expressions

Similarly, users are distracted by old-fashioned terms that are only used by lawyers when there are satisfactory alternatives in common use.

Legalistic and pretentious expressions

Although alternative words in common use may be available, lawyers' jargon (including Latin terms) obstructs communication. It unnecessarily separates legal documents from other writings in common use.

Common words or expressions used in unexpected ways

Readers may misunderstand a sentence that uses terms in general use in an unusual way (for example, an artificial definition for a common term; provisions that "deem" an expression to cover circumstances that it normally does not).

Special concepts created solely for the ease of drafting

An unfamiliar concept introduced to make the drafting easier (for example, because the matter is complex) may obscure the intent of the new rules. Readers have to work out what the concept entails before they can discover how it relates to the provisions in which it is used.

Complex concepts or details are written out in detail

It is said that a picture is worth a thousand words. Although pictures are seldom found in legislation, maps are used in legislation dealing with land and diagrams are used in technical legislation to express technical concepts. In addition, numerical information is often better presented in the form of a table.

Difficult to understand the overall structure of lengthy pieces of legislation

A long, complex piece of legislation may be well organised, but without navigation aids such as tables of contents, notes and explanatory material, the reader must work much harder to understand and use it.

If we are to develop a good legislative style, we must adopt practices that answer these criticisms.

7.7 What is the aim of the clear language style?

The essential aim of plain language (also known as *clear* language) is to simplify writing by removing unnecessary obscurity and complexity, and generally to make texts as easy as possible to understand, even those that deal with complicated matters. Plain language drafting of legislative texts is not concerned with producing "simple" provisions (ones that overlook the complexity of the issues with which they deal). It is concerned with composing provisions, especially those concerned with complex ideas, in ways that enable users to understand them.

In many respects, plain language is a re-assertion of standards that were advocated and practised by the pioneers of common law drafting. Those who are committed to its objectives are determined to retain the features of drafting that contribute to certainty, but to eliminate unnecessary practices that get in the way of easy communication.

We can improve communication with a logical structure, finding aids and a clear lay-out and format.

Create a logical overall structure

A logical structure for legislation is one that:

groups related provisions together;
arranges them in an order that makes sense to the reader, by making it easy to find, understand and refer to different aspects of the subject matter.

Related provisions are those that deal with a common subject matter or contain concepts that inter-connect. The user expects to be able to find the requirements on any major feature of the legislative scheme without having to skip around the statute. In the mind of readers sequence implies connection, as suggested by Professor Crabbe, *Legislative Drafting* (1993, Cavendish Publishing, London).

An order makes sense when it follows a pattern that is familiar or if it has some obviously rational basis. The following are guidelines for settling the sequence of provisions:

primary (or basic) provisions come before those subsidiary provisions that develop or expand or depend upon them;
in particular, general propositions come before a statement of exceptions to them;
provisions of universal or general application come before those that deal only with specific or particular cases;
provisions that create bodies come before those that govern their activities and the performance of their functions;
provisions that confer rights, duties, powers or privileges ("rules of substance") come before those that state how things are to be done ("rules of administration or procedure");

provisions that will be frequently referred to come before those that will not be in regular use;
permanent provisions come before those that will be in force or have application for only a limited time (for example, during a transitional period);
provisions affecting a series of related events or actions follow the chronological order in which those events or actions will occur.

Provide finding aids

Typically, legislation is short on editorial devices that make it easier for the reader to travel around the text or to pin down some feature of it that is of immediate interest. In long or complicated legislation particularly, the following aids are valuable:

explanatory note or memorandum,
table of contents (or "Arrangement of Sections"),
headings and section (side / shoulder / marginal) notes,
reader's guide,
road-map clauses, which give directions as to where or how the main provisions of an Act, or a Part in an Act, are placed and arranged.

Here Jurisdictional-styles and local practice determine whether and when to employ these aids. We will see how these ideas can be applied.

Use a clear layout and format

Good layout can make legislation much easier to work with when printed or on a screen. The size and kind of the font, the range of fonts used, spacing between words and lines ("white space"), indents at beginning of lines, and the use of italics or bold type to draw attention, significantly increase the ease with which we can read text.

One of the greatest obstacles to readability is a lengthy slab of unbroken text. There are ways you can introduce more "**white space**" by breaking the text up into much smaller units. The following will help create more white space:

shorter sentences,
more subsections,
paragraphing.

7.8 How can we improve clarity?

To be clear a text must convey precisely what the writer intends without undue effort on the part of the reader. Unnecessary difficulties are created by legislation that uses complicated forms of expression or needlessly elaborate words, or tries to do too much in too short a space. You can improve clarity by:

writing directly,
avoid unnecessary or double negatives,
avoiding complex and elaborate expressions,

avoiding long sentences,
limiting the front-loading of sentences,
avoiding nominalisation,
avoiding embedding.

Writing directly

Legislative Drafters are often accused of using roundabout ways of creating rules. Instead of coming directly to the point, the provisions work around the requirements, using more words than are strictly necessary to achieve the objectives. This approach is equivalent to entering a house by going by the side of the house, via the garden gate and through the back door, rather than straight into the front door. Writing directly can lead to economy in the number of words used and a less complicated structure.

The precise extent of the powers conferred and the circumstances in which they may be used (though simple enough) are evident only after study. They are lost in a thicket of words, which have been poorly organised. More direct drafting would have revealed a number of substantive defects in the powers conferred by the section.

Accordingly, ask yourself:

have you adopted the most immediate way to achieve the aims of the provision?
are any expressions superfluous or replaceable by more straight-forward ones?
can the provision be better structured to highlight the central elements?

Negatives

You should avoid **unnecessary negatives.** They can cause confusion. Readers are more comfortable with statements made in positive terms. Legislative drafters commonly use the device of "**not ..... unless**", not to prohibit behaviour but to state an essential pre-condition of behaviour. That can often be stated just as well by authorising the behaviour "**only if**" the condition is met.

But:

use the usual prohibition when the forbidden behaviour is to be the basis of a criminal offence;
take care to use "only if" when the aim of the sentence is to lay down an essential pre-condition.

Bear in mind sometimes that a negative sense can be conveyed by choosing words that carry a negative connotation rather than by negativing the verb. In particular, some adjectives and adverbs may take on a negative form by the addition of the prefix “un” or “in”, and some verbs imply inaction or omission that is equivalent to negativing a verb describing positive action.

More serious difficulties may be experienced with double and triple negatives. Readers are frequently confused about what precisely is expected.

Unfortunately, legislative drafters have to use negatives in cases such as those just illustrated. They are needed to negative the effect of particular rules in particular cases; a provision stated in entirely positive terms may require a great deal of repetition and could go far further than is intended.

But two negatives do not always produce the right legal positive. A rule that requires persons *not* to behave in particular ways when they are subject to a *negative condition* is not the same as a rule that requires people *to* behave in those ways if they are *positively* subject to a condition.

Example

***A person must not practise* as a lawyer if he or she *has not been admitted* as an advocate.....**

A person must practise as a lawyer *if he or she has been admitted* as an advocate.....

The statements in this example do not mean the same. A positive version of the first sentence (but one that loses the feature of prohibition) would have to read:

A person *is entitled to practise* as a lawyer *if he or she has been admitted* as an advocate.... .

That said, wherever possible:

prefer the positive to the negative.
avoid double and triple negatives.

Complex and elaborate expressions

English has a vast vocabulary. It is often possible to find a word that exactly meets the case better than any other word, even though it may not be one that is in everyday use. When a word is precisely right, use it.

Many words, or expressions, are synonyms of each other (they mean the same). Legislative drafter have been inclined to select those that are more formal sounding (which are usually longer), perhaps to give a more authoritative feel to the text. This can take several forms:

a noun and verb is used instead of a simple verb
a complicated, or wordy, verb-form is used instead of a simple one
a descriptive verb is used instead of an action verb
a long noun is used instead of a simple noun or even an adjective.

As a result, provisions are less direct than they need be.

Example

Prefer a simple verb

"begins", rather than "commences"

"cannot be", rather than "is incapable of being"

"send", rather than "despatch" or "forward"

"wishes to", rather than "is desirous of"

Prefer an action verb

"binds", rather than "is binding on"

"if [he] does not appear", rather than "in default of appearance"

Prefer a simple noun or adjective

"end", rather than "expiration"

"[is] complete", rather "[has reached] completion"

Another shortcoming, nominalisation (using a verb as an abstract noun instead of a simple verb) is considered later.

In summary:

use short words in preference to long ones;
use familiar word forms in preference to those not commonly used;
use simple verbs and nouns in preference to longer or pretentious sounding ones;
use action verbs in preference to descriptive statements (which usually require some form of "is").

Long sentences

Sentences become complicated if the legislative drafter crams too much information into it. A particular case is the single sentence that states not only what must be done and how, but also when the provision applies, and the exceptions to it. The provisions are so tightly inter-twined that particular aspects cannot be altered without breaking the entire structure.

You can reduce complication in the following ways:

limit each sentence to one thought;
if the procedural features of a rule, or the context in which it is operate, or the exceptions to it, are detailed or themselves complex, treat each in separate sentences in the same section;
highlight the sentence components by *paragraphing*.

Long sentences present problems for the user, especially if the text is densely packed. Such sentences make it difficult to discover the grammatical structure (and in particular the principal predicate) and to obtain a quick overview of the matters dealt with there. Introducing white space makes the provision appear less uninviting. This may be achieved in a number of ways:

dividing separate aspects of a legal proposition into separate sentences set as distinct subsections;
keeping individual sentences as short as the subject matter permits;

separating elements of longer sentences by *paragraphing* them.

Front-loaded sentences

Complex sentences (those that contain both a main clause and one or more subordinate clauses) are easier to understand when the main clause comes *before* the modifying clause. The same is true for a string of adjectives or lengthy clauses or phrases containing a detailed modifier.

Example

> Where, in any civil proceedings by or against the Government or in any proceedings in any court in connection with any arbitration to which the Government is party, any order (including an order for costs) is made by any court in favour of any person against the Government, the court must issue, at the request of the person, a certificate containing particulars of the order.

The text in the Example, front-loads in two respects: first, by placing the context clause before the main noun and predicate and secondly, in that clause by placing a prepositional phrase *before* the noun and predicate to which it relates. This requires the information to be carried forward before the nature of that relationship can be discovered.

This can be redrafted without any front-loading:

> The court must issue, at the request of a person, a certificate containing particulars of an order (including an order for costs) made by the court in favour of the person against the Government in civil proceedings by or against the Government or in proceedings in connection with an arbitration to which the Government is party.

Front-loading requires us to hold information in our memory as we move forward in the sentence to find out the later components to which it is linked. This may be an additional obstacle to prompt understanding if the subject-matter itself is complicated or unfamiliar to the typical reader. For that reason, legislative drafters try to limit the use of front-loading, by moving modifying features to later in the sentence, often as its final provisions. It is worth remembering than that rear-loading contribute to clarity, and may sometimes simplify the draft.

In addition to front-loading, this sentence breaks up natural phrases by other interpolated phrases (sometimes called "embedding" and discussed below). A much more understandable draft reads as follows:

> A magistrate hearing an application under this Act may direct that all persons be excluded from the court who are not members or officers of the court or parties to the case, or their advocates, or directly concerned in the case, during the taking of any evidence that, in the opinion, of the magistrate, is of an intimate or indecent character, if he or she thinks it necessary in the interests of the administration of justice or of public decency.

However, it can be helpful to begin a sentence with a context clause or a modifying phrase, for example,

to accommodate other modifications later in the sentence;
to highlight or contrast the context in which the provision is to take effect;
to make an effective link with a preceding provision.

Nominalisation

Nominalisation is the practice of using a phrase containing an abstract noun instead of a simple verb, for example, "make an application" *rather than* "apply". It is an over-used feature of bureaucratic writing, and very tempting.

Consider the following sentence:

> Although it may give a more formal and authoritative sound to sentences, it is often causes a loss of directness and obstructs ease of understanding.

This can be restated more clearly as:

> Although it may make sentences sound more formal and authoritative, they are often less direct and easy to understand.

Example

The following are typical examples of nominalisation and ways to avoid it:

enter into an agreement [to do]:	agree [to do]
bring [institute] an appeal:	appeal
make a claim:	claim
reach a conclusion:	conclude
give consideration to:	consider
cause a disturbance:	disturb
give notice:	notify
make provision for:	provide for
is in possession of:	possess
make a recommendation:	recommend

Embedding

Embedding is the practice of inserting clauses or phrases between parts of speech that are typically linked closely. It conflicts with expectations about sentence structure that derive from standard patterns of expression

Embedding may occur when clauses or phrases are inserted between, for example,

the subject noun and the verb;
the verb and its auxiliary;

the verb and its object ;
a noun and a prepositional phrase that modifies it;
a clause and its adverbial modifier.

Embedding makes sentences more difficult to read. Standard patterns of expression are to be preferred.

7.9 How can we make legislation more readable?

Readers find text easier to understand if they have a general idea of what the text will be about before they start reading. They are also helped if the text is written without using unusual forms or language. So, make your drafts more readable by:

providing overviews,
following standard writing practices,
using standard language,
using formulas, diagrams and similar modes of communicating information.

Headings and section notes

Short indicators of the subject matter in a text can give the gist of the topic about to be examined. When carefully devised, they supply help in understanding what is about to be covered in a section or a group of sections. These include:

headings giving guidance as to the contents of Parts or other divisions;
section (side/shoulder / marginal) notes describing the gist of individual sections or subsections to which they are attached.

Standard writing practices

Readers find text easier to manage if they meet familiar ways of presenting information.

Here are some additional suggestions.

Use the present tense and the active voice

We have already seen the advantages of expressing verbs to indicate that the provisions are always speaking. This accords with the reader's expectation and is in line with much of modern communication, both oral and written.

Similarly, the benefits of drafting in the active voice contribute to understanding. Not only does this identify the actor before the action, so that we see quickly to whom the provision is directed, but it reminds the legislative drafter of the importance of identifying in the text the person who is to perform the action.

Avoid provisos

Provisos have been much used in the past for two purposes:

to create a particular exception or qualification to a general proposition, to which it is attached:
to expand, or elaborate upon, the general proposition to which it is attached

Avoid artificial concepts

Legislative drafters sometimes devise concepts (for example, in the form of a definition) with the objective of shortening or simplifying the text. It allows an expression to be used throughout the legislation to refer to an (often important) element of the legislative scheme. But if the definition takes an artificial form, this device may operate at the expense of understanding. The reader has to discover and then remember a meaning that the legislative drafter has given to the idea that may not be conveyed by the expression used. A particular practice is to add the word "relevant" to a common word and then assign a special meaning to the phrase.

Standard language

Lawyers generally have the reputation of unnecessarily using words that are not in common use, in particular, archaic words, Latin or other foreign expressions and legalisms. If your legislative text is to be intelligible to as wide a group as possible, wherever practicable, choose words in general use.

Avoid archaic words

Legal documents still contain too many expressions that date back to earlier times. They are particularly common as linking words. Modern writing has equivalents that are in common use or treats them as superfluous. Here are examples of archaic words used to make links with other parts of a statute that can readily be replaced by more up-to-date expressions.

Avoid Latin and other foreign expressions

Lawyers are inclined to use Latin expressions, even when there are satisfactory English alternatives. This gives the unfortunate impression that the text is intended only for lawyers.

Even so, certain technical terms in Latin (mainly as names of writs) have been accepted into standard legal use. They include *caveat, certiorari, fieri facias, habeas corpus, in rem, in personam, mandamus, prima facie, subpoena*. These are terms of art that describe things created by the legal system. Legislation reforming the legal system often replaces them with English terms, but until that happens, legislation must generally continue to use them.

If a Latin phrase is not a term of art for a legal concept, the trend is to use English language alternatives. Those that have been used in the past in legislation include the following.

Avoid legalisms

Lawyers are also prone to use expressions that are part of their jargon though not technical legal terms. The equivalent words in common use are intelligible to both lawyers and non-lawyers.

“Deem” is used to create a legal fiction - to provide that the legislation is to be applied as if some fact were different from what it is in reality.

“Deem” has also been used for a variety of other purposes, including

- to change the meaning of terms, for example by "deeming" a word to mean something,
- to alter the application of legislative provisions, for example by providing that they apply in ways that they would not otherwise apply,
- to confer discretion, for example by authorizing a public official to do something that they "deem" necessary,
- to create a presumption, for example by providing that something is "deemed" to have happened.

"Deem" presents two sorts of drafting problems:

- it is a legal expression that does not have any clear meaning in ordinary discourse,
- its use often results in leaving important details of the legislation to be worked out by the reader and, if not used carefully, it can lead to undesired results.

"Deem" should be used only when it is necessary to create a legal fiction. It should not be used for definitions or application provisions or for the creation of presumptions or discretionary powers. But take care when creating a legal fiction. The effect is to apply legal rules to a case to which they would not otherwise apply. But what about those rules that ordinarily applies? Are these replaced or do both sets of rules apply?

Make clear in creating a legal fiction the extent to which the "deemed" rules replace those which ordinarily apply.

7.10 How can we make legislation more concise?

Long-winded provisions take two forms in legislation:

compressing too many words into a single sentence;
putting in a sentence words than are not needed.

Good style avoids long sentences, using instead linked short sentences, each dealing with distinct items of information. Legislative drafters are tempted to use too many words for two reasons:

the need to make absolutely sure that the intended meaning is not in doubt, and especially that particular cases are covered by the rule;
a belief that more elaborately phrased expressions appear more authoritative.

Circumlocution, as this is sometimes termed, leads readers away from understanding. Good style in this respect requires that:

you express yourself in a **direct way with the minimum words necessary**;
when **one word will do**, you do not use more.

In particular, avoid:

unnecessary detail;
superfluous words;
unnecessary reinforcement.

Unnecessary detail

Excessive detail was a common feature of 19th century legislation. Its influence is still seen in many collections of legislation.

There are 3 main ways to reduce excessive detail:

replace a string of words by a single expression that is then **defined** either in the interpretation section or in the section where it is used, if it is used only there;
if the sentence repeats matter contained in an earlier section, a **cross-reference** may allow you to use fewer words, as well as to link the two sets of provisions;
replace detailed provisions, particularly strings of words, by a single expression that uses general terms.

Example

This Act applies to premises where food for human consumption is sold to the public.

The general description of kinds of premises removes a need to itemise many cases that are covered (from restaurants to supermarkets), similarly the description of the food. Yet both impose clearly understood limits.

Such broad "indeterminate" expressions as these catch the essence of the cases, instead of setting the cases out individually. It is easy to overlook particular cases or to fail to foresee new ones. This kind of expression prevents that. It puts the onus on users to decide whether their particular cases satisfy the description. If there is any dispute in a marginal case, the courts ultimately will decide. We look at other features of broad terms below.

But when using generalising expressions:

make sure that the description is wide enough to cover all intended cases, but not too wide as to catch unintended ones.
give clear guidance to users as to its coverage; if you use *too generalised* terms, you lose precision and make recourse to the courts a necessity.

Superfluous words

Always keep looking to use the minimum number of words for the purpose. Superfluous words occur because the legislative drafter is following outdated practices or lack confidence in his or her language skills.

There are a number of ways to avoid superfluous words.

Avoid unnecessary internal references

References to other provisions in the same legislative text or the same legislative provision (for example, section or subsection) can be made without additional words stating that the reference is to the one *in the legislative text* or *in the same legislative provision.*

Use expressions identifying an instrument (for example, an Act) or provision only when referring to *some other instrument* or *provision* than the one in which the expression is used (for example, "of section 12 of the Animals Act").

Example

Subsection (1) *of this section* has effect without prejudice to *the provisions of* section 12 of this Act.

This can be expressed much more succinctly as:

Subsection (1) *does not affect* section 12.

Avoid duplicating words

Lawyers have a habit of using phrases made up of two words that mean much the same. The explanation is found from English legal history. Early writings used both Latin/French and Anglo-Saxon; so expressions came to be used that contained equivalent words that had their roots in the two language sources. Today, one or the other is usually enough. Those in most common legislative use are:

aid and abet	null and void
fit and proper	terms and conditions
just and reasonable	null and of no effect.

At the same time, give thought to whether twin terms differ in meaning. In that case, use the term that is more general in effect.

Avoid false subjects

A clause contains a false subject if it begins with such a phrase as "there is" or "there are". Not only does this use unneeded words (because often the false subject must be followed by a relative clause), but it obscures the true subject of the clause.

Example

If *there is* a person *who* makes frivolous complaints, persistently and without reasonable grounds, about authorised officers, the Commission may declare the person to be a vexatious complainant.

The highlighted words can be omitted. However, a better draft reads:

The Commission may declare as person to be a vexatious complainant who makes frivolous complaints about authorised officers persistently and without reasonable grounds.

A number of expressions can be found in legislation with this shortcoming. We can omit or replace all by more direct terms.

It is declared that	*omit*

It is lawful/unlawful	*state the subject and use* "may"/"may not"
It shall be the duty of	*state the subject and use* "shall"/"must"

Use numerals instead of words

Older legislation used words rather than numerals to express numbers, presumably in the interests of certainty. In fact, numerals are more prominent and easier to register than words. They are also much shorter. Today most legislative drafters use them in the body of their sentences for the following purposes (as well as for section numbering):

units of measurement;
dates (for the day and the year) and times;
sums of money (including fines);
length of imprisonment;
ages;
percentages and mathematical formulae;
statistical data in tables and Schedules;
fractions or decimals (for example, "4¼"; "4.25").

On the other hand, numerals should not be used if they could be a source of confusion, as in the following cases:

when the numerical reference is used as a modifier: for example, third party;
for ordinal numbers (except in dates): for example, first, tenth;
for the month in a date: for example, "1 January 1995" (*not* 1.1.1995)
when the number begins a section or subsection: for example, (2) Two directors....;
when two types of numbers come close together: for example,100 two-heeled vehicles....;
when fractions are used to describe proportions of for example, membership: for example, two-thirds of the members;
when "one" is used not as a numerical quantity: for example, transfer from one to another.

Unnecessary reinforcement

Legislation cannot express emphasis in the same way as other writings. Some legislative drafters try to overcome this by using extra words to add a stress. We can mention two forms:

Using a phrase when a word will do

Lawyer's English is full of expressions that use a number of words to say something simple. In these cases, we can usually substitute a word for the expression without loss of effect.

Including words of emphasis

Similarly, some legislative drafters add words to give emphasis. They are often superfluous, as the section should make clear the extent of the application without the need for emphasis. They may also cause a problem of interpretation as to their function.

Here are some examples:

absolutely

fully
completely
never
excessively
utterly
extremely
very

The following should also be used with care:

already/**now**: both express a point of time but is it calculated as at the time of enactment or the time of use or some other time? If you need to stress a particular time, it is usually better to indicate it specifically (for example, "at the date this Act comes into force").

any/**all**/**each**/**every**: Some legislative drafters use these systematically before a noun to reinforce its universal application. They can be used, but sparingly, to *emphasise* that universality. For almost all cases, a simple indefinite article ("a") is enough.

Use "**each**" or "**every**" only if you have a good reason to point up that a rule applies to *all* members of a class.

Example

1.(1) *Any* person who keeps *any* place for the purpose of fighting or baiting *any* animal (whether of a domestic or wild nature) commits an offence and is liable to a fine of Taka five thousand for *each* day that the person keeps the place for such a purpose.

(2) *Every* person who receives money for the admission of *any* other person to *any* place kept for *any* of the purposes specified in subsection (1) is to be regarded as a person who keeps that place.

In subsection (1) "any" is not called for. A simple article produces the same effect in each case. In particular, in the third use, emphasis comes from the bracketed words. On the other hand, "each" does provide some needed stress.

In subsection (2), "every" is not required to show that all those meeting the description come within the rule. The first use of "any", with "other" can be replaced by “another”.

The second use is superfluous; the third is necessary to singularise the case.

2. The owner must pay *all* reasonable expenses incurred by the Controller for *all* necessary food and water supplied to *any* animal impounded under this section; all such expenses are recoverable by summary proceedings.

There is no need to use "all" in any of these cases. No emphasis is required; "the" is enough. ("such" too is superfluous, and "any" can be replaced by "a").

Considerations of style must accommodate or give way to the search for as much certainty as can reasonably be looked for in the particular matter. Precision in the choice of words and their context to settle as clear-cut provisions as possible is an overriding factor.

In particular, strive to:

use the **precise word or expression** required in the context;
avoid **over-vague expressions**;
avoid **ambiguity**.

Precise words or expressions

Precision in the choice of words or expressions must not be sacrificed. Our aim remains that of regulating as exactly as possible the particular matter in hand. This calls for a careful and considered choice that covers the foreseeable circumstances that fall within the ambit of the provision. So, make sure that the words and expressions we use:

are not narrower or wider in effect than the provision requires;
do not introduce imprecision or ambiguity as to their meaning or application in the context in which they are used.

Words do not have an independent existence; they acquire their meaning from the context in which they are used. It is not enough to find a suitable term. In choosing the most appropriate word or expression from the wide range available, be prepared to consider whether alternative terms might work better when used in a particular sentence.

The exact term may be dictated by the subject matter of the legislation. In dealing with **technical matters** (including technical legal topics), use the terms that are appropriate to the subject, even if those are specialist and not in common use.

Technical terms

Specialist legislation needs the correct specialist terminology. Except when dealing with legal matters, for this you generally have to rely upon your instructions and advice from those with technical knowledge. You should not attempt to find alternatives in more common use, as this will not convey the precision intended.

Technical terms are needed not only in scientific or technological legislation (for example, radio-communications and the measurement of radioactivity or water quality); they may also be required for most specialist fields which have developed their own terminology (for example, banking, insurance, as well as the law).

In these cases:

do not use a term that is capable of carrying technical connotations in the legislation if that is not your intention;
make sure (by definitions, for example) that it is obvious to the reader that a particular word is used in a technical manner.

Legal terms

Certain broad terms are typically found in connection with legal concepts. Some are notoriously troublesome as they have come to be overlaid with judicial constructions that differ according to the subject matter in respect of which they are used. They have shifting elements as a result of legal decisions as to their meaning in different contexts.

Example

Among the many broad legal terms are "fraud; "intentional"; "negligent"; "possession"; "public interest"; "public policy"; "recklessly". If you use one of them,

take care to find out whether it has been used in a similar context and whether the courts have consistently maintained a meaning that is appropriate for the present case.
If not, look for a different term or make the intended meaning of the term clear by additional words.

Vagueness

We have seen that broad terms, carefully used, are a valuable device for legislative drafter. However, as we have seen, many terms have fuzzy edges. Used without care they can introduce an unwelcome element of imprecision (they are too vague). Although it may be convenient to use them in a legislative text, particularly because they are in common use, they may lack the precision the legislation requires unless qualified in a more precise way by the context or other surrounding words.

Consider the range of possible meanings that can be given to the following words:

"building"; "child"; "day"; "family"; "goods"; "mother"; "vehicle".

These words are commonly used in legislation. But as Bennion (*Statute Law* at240) points out, they often have a solid core of meaning about which there is no doubt, but surrounding that core is an area of uncertainty.

Example

The example is "**vehicle**". That term obviously includes cars, buses, motor cycles, and lorries / trucks. But does it extend also to a horse-drawn cart, an army tank or a pedal bicycle? Even less certain, does it extend to trains, derelict cars or wheel-chairs used by the disabled? The precise coverage may differ from one piece of legislation to another, depending on its purpose.

Sound drafting requires you to use phrases whose uncertainty is as small as possible. Otherwise, they may introduce too great a vagueness as to their application. This you can do, for example:

by the process of modification
through definitions
by making clear the statutory context in which the expression is used.

This involves an exercise of judgment in selecting and satisfactorily modifying the term. Try to keep the detail to a minimum.

It is also point out that terms may not retain a constant meaning but may change its meaning with the passage of time or according to the different cases to which they apply.

Example

Expressions such as "consent" or "accident" are unlikely to change their essential meaning, although they apply to a great range of circumstances.

But terms such as "cruelty", "disorderly house", "fit for human habitation", "moral", are likely to change meaning as standards and values, or circumstances to which they are applied, change.

In using particular terms, make yourself aware of the way judges tend to interpret particular terms. But past judicial decisions on words with shifting meanings may not provide sound guidance as to the way in which they may be construed in future legislation. At the same time, deliberate use of terms of this kind may permit the courts and others who use the legislation to take account of changing circumstances.

In cases of this kind, if you need to avoid unwanted results consider whether to stipulate how you are using a term, for example, by a definition, rather than merely relying upon past interpretation of the term in a different statutory context.

Some words are too open-ended for legislative use, since they involve sliding standards or require individual assessments, on which a wide variety of different, and legitimate, views are possible. These **relative terms** implicitly require comparisons to be made with variable circumstances or conditions. They often lack the degree of objective guidance that we look for in legislative provisions. If you use them, you introduce a vagueness that a court cannot cure since the terms are inherently imprecise.

As a result, in choosing terms:

make sure that you do not introduce unacceptable vagueness either in the words themselves or from the context in which they are used.
consider whether reliance on the following interpretation practices provide the required element of certainty:

- the expression is to be construed in the light of words used in association with them ("their colour may be derived from their context"; this is known as the "associated words" or *noscitur a sociis* interpretive assumption).
- in an expression containing a series of specific words followed by a broad word, the broad word may be construed as restricted to matters of a similar character (this is known as the "limited class" or*ejusdem generis*interpretive assumption).

Example

***Associated words*:**

In the expression "riotous, violent or indecent behaviour in a public place", the term "indecent" does not carry sexual overtones but refers to behaviour that creates a disturbance in a public place.

Limited class:

> a police officer may arrest without a warrant a person whom the officer finds in possession of a firearm, knife or *other offensive weapon*.

The italicised phrase will be construed to cover only articles that have been made or adapted for causing injury. It does not extend to a piece of broken glass that is used in a fight.

Ambiguity

Words or expressions that are capable of two or more meanings introduce serious uncertainty. In considering syntax, we saw a number of ways in which sentence construction can produce ambiguity (*syntactic* ambiguity). It may also arise from a word itself (*semantic* ambiguity) or from the context in which a word is used (*contextual* ambiguity).

Example

> No person shall damage plants in a public park.

Thesentence in this example has ambiguities of all three kinds:

> **Syntactic ambiguity** arises from the ambiguously placed modifier "in the public park". Does it apply to the plants or to the act of damaging?
> **Semantic ambiguity** arises from "plant". Is this limited to items that have been put in the ground (for example, flowers) or does it apply to items that have grown there without human intervention (for example, trees)?
> **Contextual ambiguity** arises from "plants in a public park". Does this apply to items carried into the park or only to those growing there?

Check that you have not opened the way to more than one intended construction:

by the term you select;
in using the term in the context created by surrounding words;
in the place it occupies in the syntax of the sentence.

7.11 Gender –neutral Drafting

Interpretation legislation invariably includes provisions that say:

> words importing the masculine gender include the female gender.

In reliance on this kind of provision, the long-standing practice is to draft using the masculine gender.

Example

> The Mayor may delegate, by notice signed by *him* or on *his* behalf, to another person the performance of any function vested in *him* by this Act.

A number of jurisdictions have adopted a policy of gender-neutral drafting. The principal drafting challenge comes from personal pronouns used in the singular. These are limited to "he", "she" and "it", (in the possessive, "his", "hers" and "its"). In ordinary usage, their use is

determined by whether the pronoun or adjective refers to a male person, to a female person, or to a thing. But drafting is typically concerned with classes of persons that include males, females and artificial persons, who are referred to in the *singular*. Standard pronouns are inadequate to deal with all three categories simultaneously.

English has evolved or adopted many words that are intended to point up gender differences, for example, "actor" and "actress"; "author" and "authoress"; "waiter" and "waitress"; even "executor" and "executrix". Interestingly, the terms that relate to females only appear to be dying out, and a gender-neutral term is becoming standard usage.

How can we draft in gender-neutral terms?

In essence, gender-neutral drafting requires that we do not use male or female terms unless the substance calls for the distinction to be made. The following are ways in which this can be achieved:

use gender-neutral terms
repeat the noun instead of using a pronoun
use "he or she" (or "him or her", "his or hers")
use plural, instead of singular, pronouns
omit offending possessive pronouns
use a passive form
restructure the sentence.

Use gender-neutral terms

Many terms that have a male connotation can be replaced by gender-neutral terms. The dictionary or a thesaurus usually offers a perfectly satisfactory alternative. Here are some examples:

Preferred term	*Replaced term*
fisher	fisherman
head/head-teacher	headmaster/headmistress
human beings, or humanity	mankind
husbands and wives	men and their wives
legislative drafter or drafter	draftsman
lessor	landlord
police officer	policeman
postal worker	postman
reasonable person	reasonable man
sailor	seaman.
chairperson or chair	chairman
juror	juryman

athlete sportsman

Repeat nouns to avoid gender-specific pronouns

Rather than use "he" to refer to a person of either sex, consider repeating the noun to which the pronoun referred.

Use "he or she" to avoid gender-specific pronouns

Example

The Mayor may delegate, by notice signed by, or on behalf of, *the Mayor* [rather than *him*], to another person the performance of any functions vested in *the Mayor* [rather than *him*] by this Act.

A tenant may renew a lease if *he or she* gives the lessor notice and if *he or she* is not in arrears of rent.

The repetition of a noun may make for a clearer expression of the rule. On the other hand, if references are needed in the same sentence, repetition of the noun can lead to a proposition that is both inelegant and difficult to read. A mix of repeated nouns and combined pronouns is usually the appropriate solution for lengthy cases.

Use plural, instead of singular, pronouns

Legislative sentences are typically written in the singular. Some jurisdictions, however, have begun to use plural pronouns (“they”, “their” “them”) to refer to singular indefinite persons (for example, “a person”), though not to specified or identified persons.

Alternatively, a sentence can sometimes be written in the plural, for example, where the rule provides for a group of persons, all of whom are in the same position and are intended to receive the same treatment.

Example

(2) A person who purchases alcohol for *their* own use or consumption is exempt from the levy under subsection (1).

Directors are entitled to receive bonus shares proportionate to *their* shareholdings.

Trustees are entitled to receive remuneration in respect of the performance of *their* duties.

Omit or replace possessives

A reference back to a noun may be obvious even without a possessive "his" or "hers". Alternatively (and perhaps better), consider substituting "**the**" for "his". But make sure that this does not create ambiguity as to whether a link with the relevant noun has been achieved.

Example

The Council must enter in the register, in relation to every registered dentist:

the date of [*his*] registration; and
particulars of the qualifications in respect of which [*his*] registration was granted.

But this will not always work:

The inspector must send a copy of *his* or *her* report with *its* recommendations.

Omission of the first possessive would remove the required emphasis on the inspector's responsibility, but an impersonal possessive in the second case does away with the need to repeat the double personal possessive.

Use a passive form

Repetition of a pronoun can sometimes be avoided by turning the sentence around so that the particular noun is no longer the subject of the sentence. But a passive form creates a risk that the person upon whom the right, duty or power is conferred may be left unidentified. Avoiding those risks remains your overriding consideration.

Restructure the sentence

A different sentence structure can usually be adopted if you have the objective of avoiding gender-specific language in mind when starting composing the sentence.

Example

1. When a lessor has prepared a statement of the grounds of complaint, *he* must send it to the lessee...

can be replaced by:

A statement of the grounds of complaint prepared by the lessor must be sent to the lessee [by the lessor]...

2. Where a person receives notice under this Act, he shall send a reply to the Controller...

can be replaced by:

A person receiving notice under this Act shall send a reply to the Controller ...

3. The Controller must consider the report....and *he* must lay it before the Committee.

can be replaced by:

After considering the report....the Controllermust lay it before Committee.

Unless directed to do so, don't adopt a rigid policy to avoid gender-specific language at all costs. Doing so may diminish the quality of the draft, especially if it then reads in an artificial and strained way. This contradicts other objectives. Some changes in style that gender-neutral drafting requires are to be encouraged, but not if they lead to ambiguity or to less well expressed propositions.

7.12 Some Additional Matters of Style

Three style features are frequently criticised in any writing:

splitting infinitives
finishing a sentence with a preposition
beginning a sentence with "and" or "but".

These are no longer as frowned upon as in the past. Today, all can be found in even quite formal documents. But should these be avoided in legislation?

Can we split infinitives?

Most split infinitives (for example, "to easily avoid") can and should be avoided, since they serve no purpose. Just as some legislative drafter make a habit of putting an adverb between an auxiliary and a verb, so some writers make a habit of breaking up an infinitive in this way. But it often sounds awkward. In most cases, we can write without a split, by placing the adverb before or after the infinitive, instead of inside it - and that is the usual drafting style.

make it your practice to *avoid splitting an infinitive*, unless necessary to make the provision read less awkwardly;
do not hesitate to use a split infinitive if that is the surest way to *avoid ambiguity*, as for example, as with an ambiguous adverb.

Example

The following may be cases in which a split infinitive has value:

1. A person commits an offence who encourages another person *to* ill-treat, abuse, torture or *cruelly treat* an animal.

The split is not apparent here; any other position for "cruelly" would be even more awkward.

2. The trustee shall require the tenant *to promptly pay* the rent.

The split removes any doubt as to which verb "promptly" modifies; any other position leaves a doubt or reads awkwardly.

Can we end a sentence with a preposition?

Most writers end sentences with prepositions when they need to. But in drafting formal legislative sentences, you are not likely to find any such need. Readers usually take particular notice of beginnings and ends of sentences. Finishing with a preposition creates a very weak sentence. Good writing practice is to *avoid finishing* your sentence *with a preposition*.

Can we begin a sentence with “and” or “ but”?

In the past, legislative drafters have used neither word at the beginning of sentences. As each sentence is treated a separate legal proposition, linking them with these conjunctions, suggests that the propositions are not separate. For that reason, legislative drafters do not use "*and*" to begin a sentence, as that implies a second element of the same proposition, the first of which is contained in the previous sentence.

But some legislative drafters are happy to use "But" in this way. At the beginning of a *sub*section that contains a qualification or exception, it indicates that the subsection qualifies the contents of the subsection immediately before it. So, it performs two valuable functions:

it links two connected, but distinct, propositions;

it indicates in a very direct way that the sentence contains a modification to what has just gone.

Consider using "But" to begin a *subsection* that introduces a modification to the subsection that immediately precedes it. But take care when amending provisions that use this device. The addition of a new subsection (1A) in next **Example** might introduce doubts as to what subsection (2) now qualifies.

Example

(1) A resolution under section 4 remains in force for the period specified in the resolution (which cannot to be more than 6 months).

(2) *But* a resolution may be extended on one occasion by a further resolution under section 4.

CHAPTER 8

SPECIFIC MATTERS OF STYLE AND TECHNIQUES

8. Specific matters of Style and Techniques

Legislative drafter needs to be able to structure and link both sentences within a single section and sections within a single legislative text.

It deals with the ways in which legislative texts may be formally divided and how provisions in other legislation may be linked or incorporated to provide consistency in the general body of law.

Why is structuring important?

Most legislative texts are composed of units each dealing with a particular aspect of the subject-matter. In this context, we mean a complete legal proposition, put into force by legislation, from which specified legal results follow when the facts to which it relates arise.

Bills and the statutes enacted earlier are generally divided into separate sections, each containing a distinct substantive enactment. When this practice was first introduced in 1850 (by Lord Brougham's *Interpretation of Acts Act*), a section had to contain a single sentence. Since each section contained an enactment, it had to hold a complete legal proposition. So, all elements of the proposition, including qualifications and exceptions to it, had to be contained in the single section and so expressed as a single sentence.

However, such sentences tended to be lengthy and packed with details that made the text complex and difficult to use. As a result, in the interests of better communication, legislative drafters have adopted structuring techniques designed to make enactments clearer and easier to understand. In particular, current forms of structuring allow shorter sentences to be used and introduce “white space” on the page, both of which make the text easier to read. At the same time, the section remains the basic legislative unit.

These structuring techniques include:

dividing sentences into sections and subsections;

paragraphing and sub-paragraphing within sentences to point up their grammatical parts;

spreading the effects of the legal proposition, or modifications or exceptions to it, over more than one section, especially if they are extensive or complex;

grouping the sections that containing related features of the legislative scheme into separate parts or divisions;

labelling sections (section notes), parts and divisions (headings);

adopting numbering systems that enable readers to identify where they are in the text and to refer to particular elements with precision;

assigning matter of secondary or incidental importance to Schedules.

What are the basic characteristics of structuring?

The basic characteristics of legislative structuring include:

a section or a subsection (if the section is divided) typically contains a single sentence (although multiple sentences may be used to avoid long sentences);

"a unity of purpose" or common theme or idea runs through a section, whether it comprises a single or several sentences;

the contents of a section are accordingly linked by the fact that they comprise one or more legal propositions dealing with the same theme or idea;

legislative sentences that do not contain the complete legal proposition must be linked in some manner with the sentences that contain the other parts of the proposition;

paragraphs are used to point up parallel grammatical elements of a sentence and how the different elements relate to each other; they also reduce repetition and avoid ambiguity;

lengthy legislative texts, and especially those dealing with a complex and detailed subject, are divided into distinct parts in which related sections are grouped together in a logical order.

What guidelines should we follow in structuring legislation?

The account we have just considered suggests certain guidelines for structuring legislation:

the main focus of composition is the individual legislative units that together make up the full legislative scheme;

the principal vehicle for expressing each of these units is the *section*;

the section may comprise a single sentence, or a series of sentences, in which case they are usually set out as individual subsections;

the sentences in a section are linked by a common theme;

collectively the sentences in a section constitute one or more legal propositions complete in themselves or linked with other sections;

sections that are not complete legal propositions are linked with the sections that complete them, either through a common subject-matter or by formal devices (for example, cross-references);

paragraphs and subparagraphs may be used within a sentence to present its contents in a more accessible form or to prevent ambiguity or repetition;

in substantial legislative texts, sections containing related matter are grouped together into separate parts;

Schedules are used to remove secondary or incidental material from the main body of the text, particularly if it may obscure

8.1. SECTIONS

How should we approach individual sections?

In analysing drafting instructions, your task is to identify, as far as is possible at that stage, the particular matters that must be made the subject of a legal provision. Your aim should be to treat each of the matters needing its own legal proposition as a candidate for a separate section (or in a Bill often referred to as a "clause" for the purposes of parliamentary procedure). A legal proposition is a statement of a concept that is necessary to the legislative scheme, much as a single idea is the unifying factor for a paragraph in prose writing.

The actual length of the proposition varies according to its complexity, or to the amount of detail that must be included to make it complete, or to the number of qualifications or exceptions or other modifications required. The main theme of the proposition has to be expanded upon to include all the cases or circumstances to which the proposition applies. This typically calls for several sentences, and corresponding subsections.

Confining a proposition to a single section is often not possible. The longer or more complex the proposition the greater the case for breaking it up into linked sections.

How can we tell which matters should be covered by the same section?

Each sentence in a section must throw some light upon the common theme of the section. You should be able to describe that theme in five or six words in answer to the question. It is recommended that, in analysing the proposed legislative scheme, you describe each matter calling for a separate enactment in the form used for section notes. This represents the common theme. A provision that does not fall within that summary is likely to be unsuitable for inclusion in that section. So, test whether a provision is appropriately included in a particular section by whether you can provide a note for the section that covers the provision. If you cannot do that, the section needs reconsideration.

How long should a section be?

Generally speaking, a section that contains more than 6 subsections should be reconsidered, especially if each subsection is a substantial sentence. One test is whether the section, when printed, will take up most of the page. Readers find text intimidating if there are no breaks of the kind made by section notes. As a rule of thumb, if there are fewer than 2 section starts on each page, you should consider whether you have too many subsections, even though they are linked thematically. Most long sections have a major theme and several sub-themes. It should be possible to divide these between linked sections.

How should the section note be selected?

Notes are attached to sections to help users find provisions easily and not to interpret. They have a variety of names, including “shoulder notes”, “side notes” and “marginal notes”. They perform the role of topic indicators, that is, they give the reader a foretaste of what is in the section. Readers comprehend the meaning of individual provisions, and their relationship to each other, much more easily if they have an idea of their main thrust before turning to the details. When collated at the beginning of a legislative text, section notes also provide a useful table of contents and a quick guide to its structure and coverage.

Although you may have made a note as a guide to yourself as to the matter to be dealt with in a particular section, reconsider each case from the standpoint of the user. Good section notes:

fairly describe the main and common theme of the section;

provide guidance to the readers as to the general subject matter of the section;

highlight terms that a user may be looking out for, particularly terms for the main concepts used in the legislative text;

are short and to the point (rarely more of than 5 or 6 words), use a note form (omit definite and indefinite articles and active verbs) and, as an exception to the strict drafting convention, may use "etc." to save listing similar items or concepts;

Opportunities arise for more imaginative notes. You can form some into questions. This is eye-catching but it is restrictive, since the contents of the section must then contain no matters other than the answer to the question.

Practice varies as to the position of the section note:

on the line immediately above the first line of the section, in emboldened type (sometimes referred to as a "marginal note" or "section heading");

in the margin, beside the first lines of the section, in a smaller type-face (generally referred to as a "marginal note" or "side note");

as part of the first line of the section, in emboldened type, immediately after the section number and before the first words subsection.

The first of these is increasingly preferred. As a heading, it takes the most prominent position; it is emphasised by being in bold type; it is less complicated than a marginal note to produce in a word-processing system.

When you are scrutinising your final draft, check:

whether any section note needs to be altered as a result of changes you have made to the section in the course of drafting;

that any collation of the notes in an Arrangement of Clauses (however called) exactly reproduces the individual section headings. (These can usually be produced automatically by a word-processing package.

How long should a sentence in a section be?

The length of a section is perhaps less important than the length of the sentences in it and its overall structure. The length of the section is dictated by the amount of detail required by the topic being covered. But the length of the individual sentences and the section structure should be dictated by the needs of logical and orderly communication.

What can be done to keep sentences as short as possible?

Legislative sentences frequently try to do too much at the same time. Long and complex sentences are used in some jurisdictions for tactical reasons. It is easier and quicker to steer a Bill through a legislative chamber or assembly and its committees if it comprises a few long clauses rather than many short ones. If the elements of a legal proposition are compressed together and tightly linked in their syntax, opponents have difficulty in formulating amendments to elements of the sentence. The trend is away from these practices, since they lead to continuing problems for the ultimate user.

Try to keep a balance between providing a coherent legal proposition, which requires an unavoidable minimum of information, and the desire for an acceptable length. Considerations of length are less important than communicating unambiguously and grammatically what has to be said. In particular, do not obscure the core of a sentence - the subject-predicate - by excessive modification or by a confusing word order. Elaborate context clauses at the beginning of a sentence ("front-loading") make for difficulty in finding the way to the heart of the proposition.

If a long sentence is necessary to state features of a legal proposition that should be kept together, so be it. But ask yourself whether it is organised so that:

the basic theme of the sentence is prominent;

the syntactic structure of the sentence is both obvious and uncomplicated;

the physical appearance of the sentence assists communication and understanding.

8.2. PARAGRAPHING

How can paragraphing help?

Paragraphing can make a sentence easier to understand in a number of ways:

- it separates features of the sentence that grammatically are distinct elements;
- because paragraphs are indented on the page their contents and separateness are immediately apparent;
- distinct features in the sentence syntax are physically highlighted, allowing the reader to gain an immediate insight into the sentence structure;
- it indicates certain of the components of the sentence that can be absorbed one at a time as we read; it helps us pace our reading of the sentence;
- it can be used to mark out alternatives or cumulative elements, enabling us to see, at a glance, how these features fit into the structure of the sentence.

It also offers other benefits:

- *reducing repetition*: the same words can be made to apply to all the paragraphs by placing them either as part of the introductory phrase to the paragraphs or immediately after the series;
- *eliminating ambiguity*: you can avoid dangling modifiers by incorporating the modifier into the paragraph to which it belongs or, if it applies to each of the paragraphs, by placing it with the words introducing or following the series.

Finally, it is worth noting that a legislative drafter experienced in using paragraphs thinks about composing the sentence in that way from the start. If you can break the material into distinct components as part of your thinking about the contents, you will automatically set them down in paragraphs when actually composing. Paragraphing becomes a tool for effective analysis, as well as a device for clearer presentation. Try to think in paragraphs.

When might paragraphing be used?

Paragraphing is a flexible device that can be used in several different ways. Here are examples of its use.

Tabulating or enumerating

Paragraphs may be used to tabulate (or enumerate) a series of alternatives or a list of cases or a number of requirements or a set of conditions (which may be cumulative or alternatives).

Stating a sequence of events in an orderly manner

Paragraphing may be used to set out a sequence of events or circumstances, for example, in the order in which they are likely to occur. This makes it easier to follow the theme of the section.

It is particularly useful in a context clause to describe the circumstances in the order in which they are likely to occur before the rule applies, or to prescribe the series of actions in the order that the subject must or may follow in specified circumstances.

Reducing repetition

Provisions that deal with related matters may be brought together into a single sentence. You can avoid some repetition by attaching to the paragraph that contains the individual items the element common to them all.

Avoiding ambiguity

Paragraphing can overcome ambiguities in syntax such as dangling modifiers.

What factors should be borne in mind when drafting paragraphs?

Respect the conventions of syntax and grammar when using paragraphs. They are only a way of presenting some components of the sentence in a more convenient way. As Driedger advises (*Composition of Legislation*, p.73):

> All words when read from the beginning to the end without regard to the paragraph designations must be a complete and correct sentence.

The following considerations then are important:

> Ensure that each paragraph has exactly the same relationship with the rest of the sentence in its grammar, function and type of matter covered.
>
> Link each paragraph with the words introducing them (the "umbrella words") both in substance and grammatically.
>
> Each paragraph when read with the umbrella words must produce a correct grammatical statement so that all the paragraphs have the same grammatical construction.
>
> Include in each paragraph all the words necessary to link it with the umbrella words.
>
> Make sure that you have not included words in the umbrella words that properly belong to the paragraphs. In particular, do not split words that grammatically should be kept together in a paragraph merely to avoid repetition.
>
> Indicate how the paragraphs are related to each other including a conjunction ("and" or "or") or indicating the relationship in the opening words.
>
> When a legislative text sets out a series of items (a “list”) in two or more paragraphs, the reader needs to know what the logical relationship between the list elements is. Generally speaking, there are three possible logical relationships: (1) *all* of the elements in the list; (2) *one* of the elements in the list; and (3) *any* of the elements in the list in any combination.

The conjunction “and” is used to indicate the first relationship. The conjunction “or” is used to indicate the second relationship. But both conjunctions are used to indicate the third relationship, which is usually better indicated by opening words such as “any of”. Opening words can also be used to avoid any ambiguity about the first to relationships (“all of” / “one of”).

No conjunction is needed if the paragraphs comprise a simple list that is added into a sentence that is otherwise grammatically complete.

When there are more than two paragraphs, a conjunction is generally included only at the end of the second last paragraph. It is redundant to put it after the preceding paragraphs. However, the practice in some jurisdictions is to include it after these paragraphs to make their relationship absolutely clear.

Format the paragraphing correctly, according to local conventions.

Formatting involves indentation, punctuation and numbering. These features vary across jurisdictions.

indentation

Paragraphs are printed as indented text to distinguish them from the rest of the sentence (which should then not be indented). Sub-paragraphing within a paragraph requires further indentation.

punctuation

Typically, a punctuation mark is used at the end of the umbrella words as an introducer. This may be a colon or a dash. (It should not be both). Some legislative drafter advocate that no mark is needed unless it is used in ordinary writing (for example, before a simple list). But others object that this leaves a naked space. Follow your Jurisdictional-style here as elsewhere.

Typically, too, each paragraph except the last ends with a semi-colon; the last concludes with a comma unless it is the end of the sentence. Some legislative drafters finish every paragraph including the last with a semi-colon, to emphasise where each paragraph ends.

However, commas can be used at the end of all the paragraphs if paragraphing has been used to facilitate the reading of a continuous piece of text, rather than creating a list of items. This is said to emphasise the continuity in the sentence.

paragraph numbers and initial letters

Each paragraph or subparagraph must have its distinctive numbering according to the sequence to which it belongs. The first word after the number typically does not begin with a capital letter (unless that is required by the particular word), as paragraph contents are internal elements of the sentence.

What can go wrong with paragraphs?

Paragraphing ceases to be a useful device if it is misused. We have already seen in earlier Example Boxes cases in which you need to take particular care. Here are some other cases where paragraphing is incorrect or inappropriate:

"sandwich" clauses

A sandwich clause is one in which a series of paragraphs is preceded and followed by other text. Non-lawyers in particular are unfamiliar with this practice, although it has been a common drafting device. It is easy to overlook the fact that words before and after the paragraph series have to be read together to ascertain the complete clause. The problems are accentuated when the concluding words of the clause, as well as the umbrella words, have to be read as belonging to each of the paragraphs.

This practice can usually be overcome by restructuring the clause to eliminate one slice of the sandwich loaf, typically the piece that follows the paragraph series.

Text that belongs to another part of the sentence must not be incorporated into a paragraph.

The italicized clause does not belong to the paragraph series.

including matter in paragraphs that is not part of the paragraphing sequence

Do not interpolate matter which does not fit with the grammatical structure of the paragraph sequence as a whole.

including words in paragraphs that repeat or belong to the umbrella words

The umbrella words are intended to be read as part of each of the paragraphs. Take care not to repeat words that perform the same function in both the umbrella words and the paragraphs: this is ungrammatical.

slicing phrases or expressions

Because a word is repeated at the beginning of each paragraph does not automatically make it a candidate for inclusion in the umbrella words. Words that are part of a phrase or constitute an expression should not be broken up by paragraphing. So, an article or adjective shared by all the nouns (for example, "any") starting the paragraphs should be repeated with each noun in the paragraph.

Words in one paragraph cannot be treated as part of any other paragraph. If they apply to all, they must be included in the umbrella words or the following words or repeated in each paragraph.

obscuring the principal subject-predicate

Paragraphing is an aid to understanding. Try to make it easy to find the heart of the sentence (the principal subject-predicate). Knowing that, the reader can better understand how the paragraphs fit with it. Try not to separate the sentence subject from its predicate by a long series of paragraphs.

How can we find flaws in paragraphs?

Keep in mind Driedger's excellent words of advice (*Composition of Legislation*, p.76):

Read the provision aloud without referring to the paragraphing or subparagraphing. If it does not make sense without speaking words that are not there, or if the provisions cannot be read

without stumbling and hesitating or without going back and re-reading portions of it, there is something wrong with it.

8.3. Numbering, lettering and Indentation

How should legislative provisions be numbered?

Numbering is an essential feature of legislative texts that allows provisions to be located, identified and referred to with precision. Numbering requires a sequential series of characters that is known to the reader. Because children are taught numerals and letters from an early age, they are the two most popular choices.

More than one series of characters is usually needed to differentiate the various units of text (parts, divisions, sections, subsections, paragraphs, subparagraphs, clauses, subclauses). This differentiation is especially important for simplifying cross-references. For example, a reference to subparagraph (i) of paragraph (a) of subsection (2) of section 4 can be stated in compounded form as "paragraph 4(2)(a)(i)".

Letters are used for a series of that is unlikely to exceed 26 units. They can be used for longer series by doubling or further multiplying them (aa), but there is no universal consensus on the order of multiple letters: does (aa) go between (a) and (b) or after (z)? Also, the more letters in a multiple, the harder it is to read and the greater the risk of reading error.

Numerals do not produce the same problems as letters because they are infinite. However, Arabic numerals (1, 2, 3, 4, ...) should be used because they are easier to understand than Roman numerals (I, II, III, IV, ...), particularly for large numbers (MIM — 1999).

Numeric systems accommodate approaches that can indicate levels in a hierarchy of provisions. For example, if a text contains Parts, the sections in each Part can be numbered with the first digits corresponding to the Part number as follows:

Part 1 contrains sections 101, 102, 103, ...

Part 2 contains sections 201, 202, 203, ...

These approaches help readers navigate through long pieces of legislation.

The following is an example of a numbering convention commonly used to differentiate units of text:

Sections: Arabic numerals	1, 2, 3 …
Subsections: Arabic numerals in parentheses	(1), (2), (3)…
Paragraphs: lower case letters in parentheses	(a), (b), (c)…
Subparagraphs: lower case roman numerals in parentheses	(i), (ii), (iii)…

Sub-subparagraphs/clauses: upper case letters in parentheses (A), (B), (C)…

You will have noted that these divisions are only to five levels. As a rule of thumb, reconsider the contents of any section that needs to be divided beyond *four*. Almost certainly, you are trying to do too much in too short a space.

How should we number new provisions inserted into existing ones?

One of the greatest numbering challenges is how to number new units that are to be inserted between existing units. There are two basic approaches: alpha-numeric numbering and decimal numbering.

Alpha-numeric Numbering

This approach involves combining characters from two different series. For example, if sections are numbered using Arabic numerals and a unit is to be added, for example, after section 5, the letter A is added to 5 to create 5A for a new section between 5 and 6. If another section is to be added between 5A and 6, it is given labelled 5B. Similarly, if a series of units is labelled with letters, numerals can be added to them to accomplish the same thing. For example, a new paragraph between (a) and (b) would be (a.1).

The alpha-numeric approach works will for the first round of amendments, but if later amendments add more units among those that have already been added, the result can be quite cumbersome if not confusing. For example, does 5AA go between 5A and 5B? What goes between 5 and 5A? In these cases, the best approach is often to renumber the provisions, although this is not ideal.

8.4. Reference, Cross- reference to dates, numbers and legislation (Linking devices)

Ordering and Linking Sentences in a Section

How should sentences in a section be arranged?

The first sentence should contain the most important feature of the proposition. If there are variations or conditions, qualifications or exceptions to the proposition that you intend to deal with in several subsections, try to cover the essential idea in the first subsection. If readers have the basic idea clear, then modifications or elaborations of it fall into place more readily. Indeed, it is also easier to draft the later provisions, since the foundations are set by the first sentence.

When drafting the subsequent subsections, keep the following considerations in mind:

> sentences containing modifications and elaborations should follow as closely as possible the provision on which they depend;

sentences containing qualifications and exceptions should follow, as closely as possible, the provision they affect;

if the section deals with a series of actions (for example, procedural steps), the sentences prescribing the actions should follow the chronological order of the events;

sentences dealing with minor and consequential details (for example, particulars of administration) should follow the substantive provisions they expand;

procedural requirements that apply in every case should be set out before those that will be used only occasionally;

procedures that will be more regularly used should come before those that will be rarely needed;

definitions or interpretation provisions (limited to the section) should come at the beginning of the section, if central to its understanding, or as the final subsection.

Similar considerations apply to paragraphs. If the paragraph contains a tabulation, the matters should be set out in order of importance; lists of items can often be dealt with alphabetically according to the first letter of each item.

When should sentences in a section be linked?

Enactments have historically been considered self-contained propositions of law. This has resulted in very precise language to indicate relationships among different components of a legislative text. In modern drafting practice this formalism has given way to the recognition that enactments are generally intended to work together to achieve a common legislative purpose. However, in complex legislative texts, care must still be taken to ensure that the relationships among their various provisions are clear. This is particularly true when the related provisions are contained in different parts of the legislative text.

In the past, legislative drafter made frequent use of devices to link sentences in the same section. But today good practice makes far less use of linking devices for this purpose. This is particularly true of provisions within a single section, which are to be treated as parts of the same proposition. In addition, the order of a series of provisions can be used to indicate their intended relationship. :

How can sentences in a section be linked?

The following are useful linking words for referring back when that is necessary.

[a person] "referred to in subsection (1)", when subsection (1) incidentally directs attention to the person;

[a person] "mentioned in subsection (2)", when subsection (2) makes provision with respect to the person;

[a person] "specified in subsection (3)", when subsection (3) expressly designates or lists persons;

[a person] "described in subsection (4)", when subsection (4) lays down characteristics of a person that are relevant in the section making the back reference.

The following are conventionally used (typically at the beginning of the sentence) to indicate priority between subsections:

"subject to subsection (2)", when subsection (2) is to take priority over the sentence containing the back reference;

"despite" (or, in older forms, "notwithstanding") subsection (3)", when subsection (3) is to give way to the subsection using the phrase;

"without prejudice to subsection (4)", when the sentence containing the phrase is not to diminish the effect of subsection (4);

"except as provided in subsection (5)" when subsection (5) creates an exception to the sentence containing the phrase;

"subsection (6) does not apply if [or to]", when the sentence containing the phrase states circumstances in which the effect of subsection (6) is to be diminished.

We will look at these linking words further in the next part dealing with linking sections. In that part we will consider how to make cross-references and look at an additional linking technique: a labeling definition. This technique is also occasionally used to link sections within a section.

Linking devices are needed within a section only if the relationship between subsections could be misunderstood. In most cases, that relationship can be made clear by the words used in the later subsections and by the order in which the subsections are arranged.

Should we use a proviso as a linking device?

From as far back as Coode, legislative drafters have been advised to avoid provisos. Yet they are still used and remain a source of uncertainty as to the intended relationship with the sentence to which they are attached. The legislative use of the proviso is unique to the law - and totally unnecessary.

How have provisos been used?

Conventionally, the proviso is used in two different ways:

Create a particularised exception to the proposition in the sentence to which it is attached.
Elaborate the proposition in the sentence to which it is attached.

Driedger (pp.93-95) suggests that the legal usage derives from a contraction of enacting words once used in the English statutes "and it is further provided that". He concludes that the proviso "is an all-purpose conjunction invented by lawyers but not known to or understood by grammarians". Accordingly, avoid provisos altogether.

What alternatives should be used?

Provisos link sentences in the same subsection. The order of the sentences and the way you express the particular matter may be enough to show how the qualification fits with the earlier sentence.

exceptions or qualifications

An exception or a qualification to a previous (more general) proposition can be stated in a few words, making it part of the sentence it qualifies:

in the case of a true exception, beginning with the expression "except that";

in the case of a qualification, in a separate clause at the end of the sentence, beginning with "nevertheless" or "but";

But if the exception is lengthy, place it into a separate subsection immediately after the subsection it qualifies, if necessary beginning with appropriate linking words in one or other of the subsections (or exceptionally both) to indicate their relationship.

elaboration

If the additional matter develops or adds to the general proposition in some way, consider the following:

if you can express the matter shortly, add it at the end of proposition, linking it with appropriate words such as "and" or, if it makes a contrast, "but".

if it is rather long, place it in a separate subsection later in the section, with suitable linking words where needed.

Can we dispense with linking words in a section?

Linking words should only be included to perform a useful function: connecting sentences that might not otherwise be treated as linked. If it is clear that the sentences are linked, then linking words are not needed. Often the connection is obvious from the fact that the sentences appear in the same section. The continuity of the contents of the sentences that follow each other may well be enough.

Linking Sections

What is different about linking sections?

The contents of a section are bound by their unity of purpose. A careful ordering of the sentences and a narrative style is usually enough to provide continuity among the various provisions of a legislative text. You can also rely on the interpretive approach that prevails in the courts of reading a statute and any subsidiary legislation as a whole. Accordingly, the meaning given to particular provisions is influenced by their statutory surroundings.

In short and uncomplicated legislation, you may need little linking or cross-referencing between sections. But more may be needed in lengthy or complicated legislation. You must make sure

that a matter referred to in one context is the same matter referred to in another if that is the intention.

A complex statute may impose the same or different obligations on the same or different persons, or regulate a series of similar matters in different ways. Your draft must leave no doubt as to which of the provisions apply to which of the persons or matters. In cases of this kind you may need to refer specifically to the principal provision that identifies a particular person or case intended.

Linking is required when two different sections are capable of applying to a particular case if certain circumstances occur, for example, if a broad provision applies to a wide range of cases and another narrower one applies to one of those cases. Can both be relied on when those circumstances happen? If not, which is to have priority in the case of such an overlap? Linking provides the answer.

How can sections be linked?

There are two ways to link sections.

Labelling definitions

Consider using a labelling definition for a term that appears in several sections. This ensures that each use of the term refers to the same case without saying so each time.

The definition not only permits the shortened defined term to be used; it also removes the need to refer to the section from which the concept is derived.

Linking words

Legislative drafters generally use linking words as follows:

“subject to section 12", when section 12 is to take priority in an overlap with the section containing the phrase

"despite” (or, in older forms, "notwithstanding") section 15", when the section containing the phrase is to have effect even though overlapping with section 15

"without prejudice to section 20", when both the sentence containing the phrase and section 20 may be relied upon in circumstances when they overlap

It is sufficient to include the linking words in only one or the overlapping provisions. It is not necessary to include “subject to” in one and “notwithstand” in the other.

Some legislative drafters also use "subject to this Act" to indicate that the particular section is not self-contained, but is subordinate to several other sections. This practice may technically serve this purpose, but it provides little guidance and typically states the obvious since the section must be read in its statutory context. Don’t use these words as a way of escaping from one of your principal responsibilities of drafting clearly. As part of the planning of your legislative text and of scrutinising the various drafts, pay particular attention to the question of

overlapping provisions to ensure that they do not contradict each other. Be aware of possible contradictions of these kinds so that you can add the specific linking words as necessary.

Linking words are useful

to draw attention to an earlier or later section which overlaps the matters covered in the present section, especially when they are widely separated in the legislative text;

in the case of inconsistency in the application of two or more sections, to establish which takes priority;

to indicate which of two or more sections applies, or whether both or either may apply.

How should cross-reference be drafted?

Make your cross-references as precise as possible, setting out the number of the section or subsection and the citation of the legislation that contains it. Current practices, sometimes supported by Interpretation Acts, enable you to express these references in a compounded form

Cross-references to paragraphs give rise to different considerations. Typically, paragraphs contain only one component of a sentence. Most cross-references need to include other parts of the sentence to make the reference complete. It is only if the reference is to an item as described fully in the paragraph that you should refer to the paragraph number alone.

Incorporation by reference

When can we incorporate provisions from one part of a text to another?

In a text of some size, you may find that two classes of cases require to be treated in essentially the same way in one or more of their features, but because, in other respects, the two matters are distinct, they are best dealt with in separate parts of the text. Should the common ground be covered by repeating the same provisions in each case? The alternative is to provide for the common matters in respect of one of the cases and then rely upon a cross-reference to them in the other place. This device of incorporation by reference (or referential legislation) should have a place in your drafting kit.

When you use the device, make sure, as with all referential provisions, that the cross-references are precise and complete and incorporate only those provisions that are required.

When can we incorporate provisions from other legislation?

In principle, similar justifications can be made for incorporating provisions from existing law into a new piece of legislation. You may receive instructions that a case in your legislation is to be dealt with in the same way as another under existing legislation. In those circumstances, incorporation by reference is the most straightforward way of giving effect to the policy.

There are cases where Government does not wish to reopen for debate a matter that is already well settled by existing legislation. This may occur if the same provisions are repeated in new

legislation. Referential legislation helps ensure the implementation of a common policy in the treatment of related matters. It is a particularly valuable way of applying tried and tested legal requirements or procedures to new matters or similar circumstances (for example, procedural rules for tribunals; standard court processes).

Referential incorporation is also useful for linking two pieces of legislation that, in some particular respect, are concerned with the same subject matter. This may be achieved by an appropriate definition referring to a concept in another legislative text. But there is no point in incorporating a definition from another text unless it brings with it the sense of the defined term in the context of its application in that other text (as in the next example). If this is not intended,

Using referential legislation calls for caution:

- two separate pieces of legislation must be consulted to understand the effects of the incorporation;
- there must be common ground or equivalence between these pieces of legislation, but the underlying policy and circumstances regulated may actually be different in the two cases;
- the more the original provisions need to be modified for the new circumstances, the weaker the case for incorporation;
- the incorporated provisions become part of the new legislation as they stood at the time of incorporation and amendments made subsequently do not take effect automatically unless the incorporating provision otherwise provides;
- this also means that repeal of the original legislation does not affect the incorporated provisions and that, if the original provisions are amended or repealed, the legislation into which they are incorporated must be amended to incorporate the same changes;
- it is often easy to overlook the existence of incorporated provisions once they have been incorporated.

Accordingly, great care is needed in deciding whether incorporation by reference is desirable and feasible and whether the same result can be better achieved by amending the original legislation to extend to the new case. The advantages and disadvantages of incorporation by reference should be considered at the research and planning stage and discussed with the instructing officer, when the advantages and disadvantages can be weighed.

When using incorporation by reference, you should do the following:

check the terms of the original provisions (including any amendments) as they will operate in the new context, in order to ensure their consistency with both that context and the language of the legislative text;

if you find inconsistencies, provide express modifications that state how the inappropriate terms in the original are to be treated in the new context;

include a full citation of all the provisions to be incorporated and the correct citation of the legislation that contains them);

provide a short note, in parenthesis, after the reference, to guide readers as to the contents of the incorporated provisions (as in Example Box 44);

if the incorporated provisions rely on definitions in the original legislation, include them among the provisions you incorporate;

when scrutinising your draft, compare and check the original text and of the incorporating text, especially the incorporating provisions, to ensure that the two can be easily read together and the effects understood and that they are consistent in law and language;

confirm that the incorporation will achieve the intended aims in using the device.

Can provisions be incorporated from the legislation of another jurisdiction?

If you believe, after careful research, that a precedent from another jurisdiction suits your needs, use its contents as a precedent for drafting your legislation. In general, it is only in exceptional circumstances that incorporation of external legislation by reference can be justified, especially if it is to have ambulatory effect. However, different considerations may apply in two situations.

The first involves the drafting of legislation intended to facilitate intergovernmental cooperation in matters that concern them jointly, for example international trade or the regulation of private law disputes involving parties from more than one jurisdiction. In these cases, incorporation by reference makes great sense and is usually ambulatory.

The second situation involved dependent territories where consistency with the local legislation is required for a subject matter that has transnational effect (for example, shipping, communications) and for which the country has international responsibility.

Grouping Sections

When should we have formal groupings of sections?

Short legislative texts rarely need to be separated into formal divisions. Legislation with a small number of short sections is easy to use. Its coverage and structure are unlikely to be complicated; readers should be able to gain an overview from a quick glance at the section notes.

But as the number and length of sections increase, consider ways of assisting users to find out how the legislation is organised, what range of matters it deals with and where in the legislation they can be found. One way is to provide topic indicators at frequent intervals throughout the legislation. They enable readers to grasp much more quickly the nature of the items that identified by the indicator and the relationship between the principal topics covered by the Legislation. Headings perform this function well. The more headings you can introduce, the more readily that users will see the overall picture.

This means that provisions must be grouped together when they have subject matter in common. The groups can then be placed into Parts or Chapters or other subdivisions to each of which you can add an informative heading. It is a matter of judgment, in each case, whether to divide in this way. Ask yourself whether dividing will contribute to easing access to the content and structure of the legislation. The longer the legislative text, the more likely your answer will be positive.

What groupings are conventionally used?

The following is a typical hierarchy of groupings and the names associated with them:

Part:

a group of sections, each group comprising a distinctive segment of the legislative scheme, and numbered appropriately.

Division (or Chapter):

A group of sections within a Part, comprising a distinctive component of that Part, and numbered appropriately.

Subdivision (sometimes called "fascicule"):

a group of sections within a Division or Chapter, each dealing with one or more of its features; or

alternatively in a shorter legislative text a group of sections when more formal divisions are not suitable. These are not numbered.

The headings for each of these groupings are printed in distinctive fonts and may be centered or left justified, depending on the jurisdictional practice.

In terms of numbering, the use of Roman numerals (for example, "IV" or "IX") has given way to more familiar Arabic numerals (for example,"4" or "9").

When might groupings be of particular value?

Bills are debated following a formal procedure. The introduction and the debates and committee examination can be easier to structure if the distinctive segments of the Bill can be considered separately. Groupings may secure your clients' interests in the facilitating passage of the Bill through the legislative chamber or assembly.

Formal groupings may also be helpful in dealing with drafting problems. When legislation is formally divided into Parts and Divisions, courts assume that this is a deliberate decision by the legislative drafter to treat the various items within them separately and exclusively from others. In consequence, they assume that a section in one division is not intended to be read into another division, though it may appear to deal with a similar matter. They will do this only if driven to conclude that the section has been misplaced. (Informal divisions are not seen as creating exclusive divisions; they are merely topic indicators.) Dividing into Parts then is a valuable

device if you wish to ensure that groups of sections intended to be exclusive of others will be treated in that way.

You should consider using separate groupings of sections for matters that:

deal with a particular stage in an administrative scheme;

regulate the activities of a particular group of persons affected by the scheme;

create a new legal entity and confer its functions;

determine the membership and rights and duties of the membership of a new body;

deal with part of an administrative scheme that is to come into effect at a later stage than the rest of the statute;

apply to special cases only;

apply to limited categories of persons or places.

When should the decision be made about grouping sections?

Decisions on grouping sections should be carefully considered.

Formal divisions

Whether or not to make formal divisions should be part of the designing of your initial legislative outline (which is considered in the next Section). You are likely to see a need to make them as a result of your analysis, because, for example:

the legislation will be of some length;

there are features of the scheme which appear to fall into distinct segments;

alternatively, the legislation deals with a number of separate subjects that are largely unrelated and should therefore be kept apart.

Informal groupings

Whether or not, or where, to introduce informal groupings generally emerges in the later stages of composing a legislative text, when your systematic ordering of the sections is well advanced. Assigning an informal heading can help break up provisions that covers many pages. It is a useful reminder to you to group together provisions that are concerned with aspects of the Part that are closely related in their substance.

What should be borne in mind in grouping sections?

The contents of formal groups are treated as exclusive of others. So take care not to include in one group a provision that properly belongs to another. It may be construed as confined to the context in which it is placed, and not as applying more broadly. However, if a section in one

Division or a Part is to have effect in the context of another Part, link them by appropriate cross-referencing.

Alternatively, move the section to another Part that contains general provisions that are to apply to the entire legislative text, unless the section is integrally linked with others in the original Part.

Parts and Divisions are devices for providing a rational and orderly structure for the content of the legislation that is likely to accord with users' expectations and needs. They must be planned with that as a prime objective. Provisions should be grouped, as far as possible, with others with the same subject theme. It is there that the reader will look.

How should group headings be expressed?

Give both formal and informal divisions a helpful heading that indicates the gist of the provisions they cover. Remember that they are intended to be topic indicators.

In drafting them you should:

choose a short set of words (a part or a whole of one line is, typically, sufficient; never more than 2 lines);

describe the contents by a general expression, yet one that provides an accurate guide (it can never be comprehensive);

align the heading in accordance with our jurisdictional practice.

Accuracy is an important consideration.

If a heading appears not to cover all sections, it is possible that there is insufficient common ground to join them in the same grouping. You should consider whether:

any section should be placed in a different group;

the group should be confined to some only of the present group of sections;

a different heading can be devised that will cover all sections.

Headings tend to be added and altered as the drafting proceeds. Check them all again as the final stage in completing the final draft. Changes in the contents of divisions commonly require some modification to the heading.

Conclusion:

This chapter has been concerned with the techniques we need in order to produce properly structured legislation. We have considered how to form sections and subsections, when and how to use paragraphs, how to arrange and link sections within a legislative text and with other legislation and how and when to introduce formal groupings of sections.

may be needed, and how to apply them when they are needed. Do not expect to remember every detail of what you have worked on. Use your Checklist (if you have developed one) and the Books/ materials to refresh your memory when you have an opportunity to make use of a particular technique.

Practice will confirm your knowledge.

PART VII

LEGISLATIVE DRAFTING: GENERAL AND TECHNIQUES

CHAPTER 1

LEGISLATIVE DRAFTING: GENERAL

1. DRAFTING: PREPARING AND SETTLING DRAFTS

1.1 Preliminary

On receiving the file for a proposed Bill the concerned officers of the LPAD:
• read the Cabinet Decision and the accompanying minute;

• note any critical factors like deadlines or political commitments;

•if the instructions are adequate and possible to work up a draft within a reasonable time, simply start working on the file with proper consideration;

• if the matter is not especially urgent and the assigned wing/group is unable to start working on the file within a reasonable time, inform the administrative ministry of that and indicate when work may be able to get under way;

• if there is likely to be a long delay, the assigned wing/group should inform the administrative ministry of that as soon as practicable;

• if the assigned wing needs more information or clarification before drafting gets under way, they will contact the administrative ministry for that purpose.

1.2 What does drafting involve?

Timing issues aside, the key feature of the drafting part of the process is that the LPAD will prepare a draft of the Bill and then revise it in consultation with the administrative ministry until –

• both are satisfied that they have a draft that will give legislative effect to the required policy; and

• the LPAD is satisfied that draft is in accordance with the constitution and laws of the land and confirms to legislative drafting standards and style of Bangladesh.

1.3 Duration of drafting process (Overview)

By way of drawing together some of the previous material, the duration of the drafting process for a Bill will depend on such factors as –

• the quality of the instructions;

• the size and complexity of the job (legally and technically);

•LPAD's overall workload and drafting priorities (which may change frequently); and

• The assigned drafter's own workload and drafting priorities (which may also change frequently).

2 DRAFTING: SOME DRAFTING AND LEGAL CONSIDERATIONS

2.1 Structure of Bills

For the purposes of preparing instructions and settling drafts, administrative ministry should note that Bills and Acts are subdivided as follows:

Bills:

1. Clause
(1) subclause
(a) paragraph
(i) subparagraph

Act:

1. Section
(1) subsection
(a) Clasue
(i) subclause
(a) paragraph
(i) subparagraph

LPAD does not favour the division of subparagraphs unless it is absolutely unavoidable. In the rare cases where such division is necessary the resulting components are called sub-subparagraphs and they are "numbered" (A), (B), (C) and so on.

Sections of a similar kind in an Act can be grouped into Chapter/Parts, Divisions and Subdivisions as necessary or appropriate.

A clause or sub-clause of a Bill should be self-contained and comprise a single grammatical sentence.

A Bill may contain one or more schedules. If so, they should be numbered sequentially. Schedules may be subdivided into Parts, Divisions and Subdivisions. These may be subdivided into clauses, sub-clauses, paragraphs and subparagraphs, or, if it is more appropriate to do so in the circumstances, subdivided into items. Items, in turn, may employ paragraphs. Schedules are part of the law.

The "legislative machinery" provisions of a Bill – short title, commencement, interpretation, application – will be placed at the front of the Bill. The rule or regulation-making power and

administrative provision of a non-amending Bill will be placed at the end, as will any consequential amendments to, or repeals of, other legislation and transitional and savings provisions.

Note that Bangladesh generally uses forward (major to minor) referencing when referring to legislative provisions – eg section 6(1), subsection (3)(a). If reference needs to be made specifically to a minor component it must be set out in full – eg clause (a) of subsection (1) of section 9.

A bare reference in an Act to a Part, Division, Schedule or other provision is, in the absence of a contrary indication, a reference to a provision within the Act itself. The same rule applies to the internal references of any provision or schedule.

Note that Bills have clauses, Acts have sections. In other words, the clauses of a Bill only "mutate" into sections if the Bill is enacted.

A little care is needed here, when speaking of Bills and Acts, because some Bills contain schedules which will often be subdivided into clauses (and sub-clauses). These will still be called clauses (and sub-clauses) if the Bill is enacted.

2.2 Long title

A Bill is required to have a long title encompassing all matters included in the Bill. In the case of a Bill for a new Act the long title should indicate the general purpose and scope of the Act. If the Act is to cover matters that cannot be conveniently included in the long title further general words are added (usually the expression "and for related matters").

In the case of a Bill for an amending Act the long title should, except in very special cases, be expressed to be for "an Act to amend the … Act".

The long title is critical to the Parliamentary process because, among other things it is the only thing read out at each reading stage.

The long title can be a critical factor in determining legislative intent in judicial proceedings.
It is essential that Bill in a package do not have the same long title.

If a Bill is amended – for example by the omission of clauses or Schedules – the long title may also need to be amended.
The formatting of the long title is governed by certain drafting conventions that are really only of concern to LPAD. Briefly though –

- the standard relative expression used is "relating to", as in "Bill for an Act to consolidate the law relating to public finance"
- the terminology should not be at odds, either as to form or usage, with that of the actual Bill
- the long title should not contain any full stops unless they are technically necessary.

2.3. Preambles

Preambles are used in legislation to explain its origins or rationale. A statute usually speaks for itself and needs no "introduction".

2.4. Enacting formula

In Bangladesh the enacting formula (used for all Bills) is: “It is enacted as follows:”.

2.5. Short title

For citation purposes, each Act is given a short title. The name of the Bill for the Act will always reflect that title. There are certain drafting conventions that govern the naming of Acts and they are numbered according to the calendar year in which they pass. If a Bill introduced in one year is not dealt with and passed until the following year of the same Parliament the title or the short title of the proposed Act, will need to be updated (unless the Bill is withdrawn and recommitted).

An Act's short title is determined by its subject matter. If an Act is an amending Act, its status will nearly always be signified in its short title – eg Bangladesh Bank (Amendment) Act, 2020.

Administrative Ministries should note, however, that LPAD takes a conservative and neutral approach to the naming of Acts. So, while an Act can be given a distinctive and informative short title to distinguish it from other Acts.

2.6. Commencement

Generally all Acts contain a section specifying when they commence.

The usual commencement options are –

- on a specified day (either prospective or retrospective)
- on a day proclaimed by the Government
- on a day the Act is published in the official Gazette by the Government
- on the commencement of some other piece of legislation.

The provisions of an Act do not have to commence all at the same time. Different sections, or even sub-sections – or clauses or sub-clauses in the case of Schedules – may be given different commencements. However, except in rare cases, lower-ranked legislative provisions like paragraphs, subparagraphs and items cannot.

If the provisions of an Act are not intended to commence all at the same time, LPAD should be informed of that intention at the start – not the end – of the drafting stage.

Where any legislative provision is expressed to commence on a specified day it comes into force at the very beginning of that day. The same applies if the Act is expressed to be repealed on a specified day.

Note that if an Act is expressed to expire or cease to have effect on a specified day – as opposed to being repealed on a specified day – it expires or ceases to have effect at the very end of that day.

2.7. Interpretation provisions

Many Acts contain definitions to aid readability and compression.

Although the definitions are certainly part of the law, they are ancillary in nature and should not really be regarded as an operative component of the Act. An Act should contain as few definitions as possible. It is a safe rule when drafting a Bill to consider and insert definitions first (according to strict need) rather than last (according to expectation).

The general underlying interpretative framework for laws of Bangladesh may be found in the General Clauses Act, 1897 (Act No. X of 1897).

2.8. Offences and penalties

In drafting a statutory offence there are many issues to consider. These include the nature of the wrongful Act or omission, the identity of the offender, the requisite mental element, potential third-party liabilities, the nature, scale and proportionality of the penalties, the onus of proof and possible defences, placement in the legislative scheme, the time for instituting proceedings and possible alternative sanctions (like infringement notice schemes). If LPAD is instructed to include an offence or a crime (an offence punishable on indictment as provided for in the Penal Code) in a Bill, these issues will be carefully considered in the course of drafting.

2.9. Automatic repeal of amendments

It is now standard practice to include an automatic repeal clause in most amending Bills. Once enacted, such a clause repeals the amendment legislation after a specified time, thereby keeping the legislative database – and thus the Website of LPAD – as lean and user-friendly as possible. This does not affect the substantive amending actions contained in the Bill as these will have been incorporated into the law by the time of repeal. It is also standard practice for a Bill to provide for the repeal of any related spent legislation.

3. DRAFTING: SOME PROCEDURAL CONSIDERATIONS

3.1 Administrative Ministry to deal only with assigned drafting group of LPAD

Once the Ministry knows that its instructions for a proposed Bill have been assigned to a particular drafters group of LPAD, it should, as regards that matter, deal with that assigned group. LPAD officers are legally permitted to provide legal advice or exercise legislative drafting responsibilities. LPAD drafters exercise a high degree of individual and group control over their own files so, if asked to advise on the files of others, there is generally some professional uneasiness.

If the assigned drafter is for any reason unavailable when the Administrative Ministry needs some advice or assistance on the file, it should contact the wing chief. If the need is genuine and urgent it may be possible to arrange for another legislative drafter to help the Administrative Ministry.

3.2. Communicating with assigned drafter

While a Bill is being drafted, the instructing officer/assigned drafter will generally communicate by such methods as they may from time to time agree or as may be called for by circumstance.

3.3. Variation from Cabinet Decision

As indicated the terms of a Cabinet decision for a Bill – being the expressed will of the lawfully constituted executive arm of government – are prima facie binding and must be followed to the letter. But sometimes it will be found through the drafting process that –

• additional legislative measures need to be included or unnecessary legislative measures need to excluded in a Bill;

• a legislative proposal sanctioned by Cabinet cannot be implemented quite as it intended

• there are obstacles to a legislative proposal; or

• there are better legislative solutions than those which were apparent when the decision was made.

In such cases it is understood that LPAD and the Administrative Ministry may need to exercise a modest degree of discretion in working up the legislation even if this involves some slight deviation from the strict terms of the Cabinet decision.

This enables a better Bill to be drafted whilst still ensuring that the Cabinet decision is not frustrated as to its essentials. It also ensures that the government's legislative agenda does not get bogged down, as it would if, during the drafting process, formal endorsement had to be obtained from Cabinet for each and every deviation from the strict terms of its decision.

Ordinarily, when a Minister approves a Bill and refers it back to Cabinet, he or she is effectively certifying that it reflects government policy and implements the Cabinet decision.

So where a Bill does not exactly match the Cabinet decision, it is up to the Administrative Ministry to ensure that the deviations have been cleared with the Minister and that the Minister is advised to bring them to Cabinet's attention for endorsement or approval.

Note that if LPAD apprehends that the provisions of a Bill may need to deviate from the strict terms of the Cabinet decision in major respects, the assigned drafter will probably seek some kind of interim clearance from the Minister before proceeding to draft those provisions.

Sometimes it is quite apparent that Cabinet is resolved on prescriptive legislative action. In such cases –

• it is not appropriate for LPAD or the Administrative Ministry to deviate from the strict terms of the Cabinet decision in working up the legislation; or

• any policy, legal or legislative drafting concerns could only be raised with Cabinet by means of separate advice.

3.4. Confidentiality

LPAD treats all draft legislation as prima facie privileged and confidential. Accordingly, it will not directly release a draft Bill to anyone but the Administrative Ministry unless, for example –

• it has been directed to do so by Cabinet or the responsible Minister;

• it has been asked to do so by the Secretary or Head of the Administrative Ministry; or

• it needs to obtain expert government advice to advance its work (for example, an opinion from the Attorney-General).

Draft Bills are, of course, sometimes circulated within government or publicly released for regulatory impact, industry consultation and other purposes, but responsibility for arranging that lies with the Administrative Ministry. Even so, Administrative Ministry that proposes to circulate a draft Bill outside government circles would be well advised to liaise with LPAD beforehand so that it can ensure that the draft is in a suitable form for public release.

Draft Bills should only be publicly released if –

- they are in a reasonably clean and polished form;
- they contain any necessary warnings as to their draft status;
- the confidentiality endorsement has been removed; or
- they require public consultation.

This will prevent public misunderstanding. In particular, rough notated working drafts should not be posted on official or government websites.

4. FINAL PREPARATION

4. 1 Quality Assurance checking

Once an Administrative Ministry has approved the draft of a Bill, the assigned officer will have it checked by LPAD officer. This quality-assurance check is compulsory. The idea of the Quality Assurance (QA) check is to have the settled draft of the Bill independently vetted to ensure that as far as possible it is free of grammatical, formatting and other blemishes. The officer also checks that the settled draft of the Bill generally conforms to the approved style for the legislation of Bangladesh and that the assigned drafter has followed any relevant "in-house" drafting instructions.

The officer also double-checks that any proposed legislative amendments will be capable of being correctly incorporated into the relevant principal legislation and that there are no competing prospective amendments. The QA check is, however, only a safeguard; it does not relieve the assigned drafter or instructing officer of responsibility for the draft. The time needed for the QA check will depend on such factors as the length and complexity of the draft and the amount of work that the QA officer has on hand at the time. QA priorities can fluctuate daily or even hourly. A Ministry that wishes to find out how long a given QA check is likely to take should consult the assigned drafter or the QA officer.

4. 2. What happens after quality assurance checking?

Once the Q A officer has checked the settled draft of a Bill, it will be given back to the assigned drafter together with a completed checking report. If the draft is given the "all-clear", the assigned drafter can proceed to the next stage of the drafting process. If the Q A check throws up any concerns, the QA officer will note them on the draft. It is then up to the assigned drafter to evaluate each of those concerns and exercise his or her professional judgment, firstly, as to whether the draft needs to be changed in any way and, secondly, whether any such change needs to be cleared with the Administrative Ministry.

If the QA check only identifies the need for a few minor corrections that do not affect the meaning of the draft, the assigned drafter is likely to make those corrections without further reference to the Administrative Ministry.
For anything more serious the assigned drafter may have to consult the instructing officer. Depending on the circumstances, it may be possible to settle the necessary changes informally – perhaps by telephone or a short meeting – or it may be necessary to prepare a revised, corrected draft of the proposed Bill.
It is important that the Administrative Ministry would understand that, because of the QA process, the draft that they sign off on will not necessarily be exactly the same as the draft that finally emerges from LPAD.

4. 3. Final copies (Approval, endorsement and printing)
As per the provisions of the Secretariat Instructions, once a draft Bill has been settled and QA-checked, LPAD will, if everything is in order send the copies of the draft Bill to the Administrative Ministry for approval and submission to the Cabinet for its final endorsement.

If the Minister requires any revision of the draft Bill, LPAD will make those revisions in conjunction with the Ministry and repeat the above process. If the Bill is approved by the Minister and endorsed by the Cabinet, the Ministry will send a notice with required copies of Bill to the Parliament Secretariat for introduction into the Parliament.

5. BILL DRAFTING GENERALLY

5.1. Policy and the Bill Drafter

Bills are mainly drafted by the Administrative Ministry for policy approval of the Cabinet; some are drafted by officers, panel lawyers or legal consultant of the Ministry or by private individuals or groups. The officers of the LPAD redraft each submitted draft Bill to meet the standards after policy approval or in some cases final approval of the Cabinet.

The drafter's function is to translate the objectives and policies of the person or group for whom the Bill is drafted into clear, concise language. The drafter may not express personal thoughts or promote self-interest but must remain an impartial technician.

5.2. Constitutionality — Statutory Provisions

A Bill is, in essence, a proposed statute. A statute is the vehicle by which the Legislature exercises its lawmaking power. The Constitution of Bangladesh is the fundamental law upon which our government is based and any statute enacted by the Legislature must conform to it.

Equal protection of the law is the basic precept that state policy should be made to apply evenhandedly to all persons. These provisions, however, are not absolute prohibitions of all forms of discrimination. The courts will apply various standards under these provisions, depending upon the purpose of the statute and its relationship to the type of discrimination proposed, whether the discrimination involves a suspect classification (e.g., race), or whether a fundamental right (e.g., free speech) is adversely affected or upon other considerations. Whenever a requested Bill draft would, if passed and approved, confer a benefit or impose a burden on certain individuals, groups, or classes of persons to the exclusion of others, the drafter should consider the constitutional implications.

5.3. Hill District Issues

The Bill drafter should consider whether the new legislation could affect the Chittagong Hill Districts areas and its people. If so, a declaratory provision in legislation is needed to give such affect.

5.4. Research and Drafting

Research and organizing are steps inherent in all writing. Bill drafting is no exception. Occasionally, a drafter will have the facts and law sufficiently well in mind so that drafting can be done with little research. However, the precision and complexity of the law usually require research. The extent of research required depends on the complexity of the drafting problem. The drafter must define that problem and then determine how to achieve the purpose of the Bill. Analysis of the problem to be solved will enable the drafter to determine the sources to consult for more information. Sources of information that must be considered by the drafter include the Constitution.

Research preparation must be as thorough as time allows. A thorough understanding of the legal and practical factors involved in a Bill is necessary to ensure production of a Bill that will accomplish the purpose of its requester. The drafter has a professional obligation to advise the proponent of possible legal or practical problems of which the drafter is aware. No one can tell the drafter when enough research is done. The drafter must determine when to stop gathering information and start writing. Legislative timeframes and workload preclude excessive research.

5.5. Organization

Organize the information at hand. Develop an outline that places the elements of the problem in a logical pattern. A Bill for only a simple amendment to existing law will present no organizational problem. A major new body of law will require considerable effort to guarantee clarity. Some Bill parts are so common that their placement in a Bill has been standardized. Begin to draft the Bill when the work is outlined. Rewrite the Bill as often as is necessary to

achieve clarity, coherence, and unity. Revise the organization of the Bill if revision contributes to clarity.

5.6. Preparation of Bill Drafts

5.7. Drafting Aid

The following serve as aids in drafting Bills:

(1) Existing statutes

A Bill may be patterned after or organised following the existing statutes. For example, when drafting a Bill creating a board to license a particular occupation, the drafter should examine various licensing laws for a suitable model. The drafter, however, must be very careful to make all necessary adjustments to the model language. Not only is it a rare case that allows near verbatim use of existing law in a Bill draft, but existing statutes are sometimes poorly organized and unclearly worded; this is particularly true of very old statutes.

(2) History and Final Status
Similarly, Bills introduced in past sessions may be helpful. The History and Final Status may be used to determine whether a Bill on a particular topic was introduced in a previous session and, if so, the Bill's number.

(3) Laws in Other States
Examination of laws from other states on the same subject is usually very beneficial. When using a law from another state, the drafter must be very careful to make the Bill language conform to laws of Bangladesh and to drafting practice and style. (Be especially careful to check the Constitution of Bangladesh. What is constitutional in another state may not be constitutional in Bangladesh.)

(4) Consultation
If time permits, the drafter should consult with experts on the subject matter addressed by the Bill. If the Bill affects government or statutory body, a discussion with an appropriate authority is very helpful.

6. STYLE AND LANGUAGE

6.1. Introduction

Bills must be written in a simple, clear, and direct style using complete sentences and proper grammar. A poorly drafted, ambiguous Bill will waste the time of citizens affected, confuse those charged with its administration, lead to litigation, and likely fail to accomplish the purpose.

Good drafting requires concise wording that is understandable by a person who has no special knowledge of the subject.

In Bangladesh, the common-law tradition manifested itself in the timeworn, nonessential phrases and rhetorical flourishes found in our older legislative enactments. The suggestions contained in this chapter are designed to help the drafter to avoid similar archaic style and language.

6.2. Word Choice

The objective in legislative drafting is to make the final product as precise and understandable as possible. There are hundreds of expressions, legal and otherwise, that can be simplified.
In general:

(1) never use a long word if a short one will do;
(2) if it is possible to omit a word and preserve the desired meaning, always omit it;
(3) never use a slang;
(4) try to avoid the use of a foreign phrase, a scientific word or a jargon word if there is an everyday word equivalent.

Remember that the Bill must be both precise and clear. While striving for unstilted, clear, natural expression, the drafter must avoid becoming conversational. In conversation, the speaker reserves the right to explain what is meant. The drafter is not granted such a right. The entire meaning of a Bill could be determined by the choice of one key word, so words must be chosen carefully.

6.3. Tense

Use the present tense. The law speaks in the present, and each law is designed to give a rule for the continuing present. The present tense is a simple and natural form of expression. The present tense includes the future as well as the present.

preferred The powers conferred in this part **are** in addition and supplemental to the powers conferred by any other general or special law.
avoid The powers conferred in this part **shall be** in addition and supplemental to the powers conferred by any other general or special law.

6.4. Shall, Must, and May

Do not use will, should and ought to.

(1) Shall

Use "shall" when imposing a duty on a person or entity.
Examples:

1. The licensee **shall** give the debtor a copy of the signed contract.

2. Each member **shall** serve a term of 5 years.
3. An applicant **shall** pass an examination approved by the board.

(2) Must
Use "must" when the subject is a thing rather than a person or entity. (Passive voice)
preferredThe information **must be** set forth in the application.
avoidThe information **shall be** set forth in the application.
preferred The application **must** contain the applicant's name.
avoid The application **shall** contain the applicant's name.

Use "must" when the subject is a person or entity that is acted upon. (Passive voice)
preferred The judge **must** receive the application by the deadline.
avoid The judge **shall** receive the application by the deadline.

Use "must" to express requirements about what a person or an entity must be or have rather than what a person or entity must do.
preferred A candidate **must** be designated by the board and must be 18 years of age or older.
avoid A candidate **shall be** designated by the board and shall be 18 years of age or older.
preferred The nominee **must** meet the requirements .
avoid The nominee **shall** meet the requirements.
preferred The applicant **must** have a master's degree.
avoid The applicant **shall** have a master's degree.
preferred The committee **must** include four physical therapists.
avoid The committee **shall** include four physical therapists.

(3) May
Use "may" to confer a discretionary right, privilege, or power.
examples The applicant **may** renew the application. The department **may** adopt rules to implement this section.

(4) May not
Use "may not" to express a prohibition.
Use "may not" if the verb that it qualifies is in the active voice.
preferred The applicant **may not** submit more than one application.
avoid The applicant **must not** submit more than one application.
preferred The applicant **may not** be a convicted embezzler.
avoid The applicant **shall not** be a convicted embezzler.

(5) Mandates and prohibitions
When qualifying a verb in the active voice, "shall" is used as mandatory and "may not" or "may only" as prohibitory.
preferred The applicant **shall** sign the application.
avoid The applicant **must** sign the application.
preferred The applicant **may not** submit more than one application.
avoid The applicant **must not** submit more than one application.
avoid The applicant **shall not** submit more than one application.

preferred Proceeds of the fund **may be** used only to pay claims under this chapter.
avoid Proceeds of the fund **must be** used only to pay claims under this chapter.
avoid Proceeds of the fund **shall be** used only to pay claims under this chapter.

Use "shall" only in an imperative or mandatory sense and "may" in a permissive sense. When a right, privilege, or power is conferred, "may" should be used.Do not use "shall" to confer a right because that implies a duty to enjoy the right.
preferred The officer is entitled to an annual salary of TK 40,000.
preferred The officer **must** receive an annual salary of TK 40,000.
avoid The officer **shall** receive an annual salary of TK 40,000.
preferred The annual salary is TK 40,000.
avoid The annual salary **shall be** TK 40,000.

6.5. Negatives

"Nor" may be used alone as a conjunction or with "neither". Do not use "nor" in the same clause with any other negative; use "or" instead.
correct There are no pens or pencils in the storeroom.
incorrect There are no pens nor pencils in the storeroom.

6.6. Voice

It is preferable to draft in the active voice rather than in the passive voice.
preferred The board shall appoint a director. (active voice)
avoid A director must be appointed by the board. (Passive voice)
Because the subject does or "acts upon" the verb in a sentence, the sentence is in the "active voice".

6.7. Number

Use the singular instead of the plural when possible. The singular includes the plural.
preferred A defendant in a civil action who prevails in that action is entitled to the defendant's reasonable costs. (Singular)
avoid Defendants in civil actions who prevail in those actions are entitled to their reasonable costs.(Plural)

6.8. Articles and Such

"A person who violates" is preferred to "any person who violates", "each person who violates", or "all persons who violate". Consistent use of the articles "a" or "an" results in smoother writing and more precise expression. "Such" or "said", as in "such person" or "said board", should also be avoided. "Said" is archaic and should never be used. Usually "such" can be avoided by referring to "the board", "an institution", "a person", "these laws", etc., or by employing the appropriate pronoun, such as "it". However, "such" may be needed occasionally to identify the thing to which it refers and should be used if necessary to avoid ambiguity or to avoid an excessive amount of language.

6.9. Pronouns

Use a pronoun only if its antecedent (the word for which the pronoun stands) is unmistakable. A pronoun must agree with its antecedent in number and person.
Use a plural pronoun when the antecedent consists of two nouns joined by "and" and a singular pronoun when the antecedent consists of two singular nouns joined by "or" or "nor". When "or" or "nor" joins a singular noun and a plural noun, a pronoun should agree in number with the nearer noun.
preferred A director, officer, or agent of a bank may not purchase any obligation of the bank for **the person's** own personal benefit.

avoid A director, officer, or agent of a bank may not purchase any obligation of the bank for **their** own personal benefit.

6.10. Gender

All Bills be drafted using gender-neutral terms. For example, in referring to a person who writes a statute, refer to the "drafter", not the “draftsman". An example of this type of gender neutrality can be found in the General Clauses Act, 1897, in which it is a general rule to interpret that "He" includes "She". Creating an artificial gender-neutral term is unacceptable. Referring to a presiding officer as a "chair" or “chairperson" is an example of the use of an artificial designation. Use "presiding officer" instead.

The use of a combination of gender-specific pronouns is not an acceptable method of using gender-neutral language. For example, a drafter may not use "he or she", "his or her", or "he/she".

There are two easy methods that the drafter may employ to avoid using gender-based pronouns. The first method omits the use of the pronoun. For example, instead of writing "A board member is entitled to TK 50 for each day that **he** attends a board meeting", write "A board member is entitled to TK 50 for each day of attendance at a board meeting". The second method is to repeat the noun instead of the pronoun. For example, instead of writing "If the director determines that the plan does not meet statutory requirements, **he** shall adopt a temporary plan", write "If the director determines that the plan does not meet statutory requirements, **the director** shall adopt a temporary plan".

6.11. Redundant Adjectives and Adverbs

Avoid adjectives such as "real", "true", and "actual" and adverbs such as "duly" and "properly". Because these ideas are normally implied, expressing them in some instances may create doubt that they are implied elsewhere.
Preferred The applicant shall write the applicant's age in the appropriate blank.
avoid The applicant shall write the applicant's **actual** age in the appropriate blank.

6.12. Consistency

To avoid confusion, the drafter must be consistent in word usage. For instance, if the drafter uses "employee" in one section, "worker" should not be used in another section merely for the sake of literary variety. Also, the drafter should not use the same word to denote different things.

6.13. Provisos

Provisos are clauses introduced by "provided, however", "provided that", and "provided further". They should be avoided. The word "provided" has been so overworked in legislative drafting that it has no definite meaning. It must be defined by the court before it can be interpreted. The word 'provided', when used in a legislative enactment, may create a condition, limitation, or exception to the Act itself, or it may be used merely as a conjunction meaning 'and' or 'before', and as to what sense the word was used must be determined from the context of the Act. Introduce an exception or limitation with "except that", "but", or however" or, better yet, simply start a new sentence. If there are many conditions or exceptions, they should be placed in a separate sub-section or in an outlined list following the introductory sentence.

6.14. The Exception

The exception is used to exempt something from the application of the law and should be stated precisely in order to describe only those persons or things intended to be excepted. The direct statement should include all persons and things to be covered by the rule. If there is a simple exception to the rule, the exception may be placed at the end of the rule.
example A license must be obtained by each person except a person who:
(1) is 65 years of age or older;
(2) has resided in Bangladesh for less than 1 year; and
(3) claims . . . .
An alternative is to place the exception in a separate subsection and incorporate it by reference into the subsection stating the rule.
example (1) Except as provided in subsection (2), the board may . . . .
(2) The provisions of this section do not apply to . . . .

6.15. Use of "That" or "Which"

The word "that" begins a restrictive clause that:
(1) restricts, limits, or describes the word modified; and
(2) is necessary to the meaning of the sentence.

The clause is essential rather than parenthetical, so commas **should not be** used to enclose the clause.
The word "which" begins a nonrestrictive clause that:
(1) does not restrict the word modified; and
(2) gives additional, supplemental, or descriptive information about the word modified.
The meaning of the sentence is complete without the "which" clause, so commas **should be** used to enclose the clause.

6.16. If, When, Where, or Whenever

The word "where" denotes place only.
If the application of a provision of an Act is limited by the single occurrence of a condition that may never occur, use "if" to introduce the condition, not "when".
example If the suspect resists arrest, the officer may use force to subdue the suspect.
If the condition may occur more than once with respect to the object to which it applies, use "whenever", not "if", or "when".
example Whenever the officer receives a call, the time must be noted in the officer's report.
If the condition is certain to occur, use "when", not "if" or "whenever".
example When the statute takes effect, all pending proceedings must be dismissed.

6.18. Use of "This Act"

Use of the words "this Act" is not acceptable except in non-codified sections or when used in brackets with "[the effective date of this Act]". The use of "this Act" often creates a problem because the word "act" must be changed to an appropriate term, such as "title", "chapter", "part", or "section" when the law is codified. References to "this Act" may be avoided by substituting references to specific Bill sections that will be codified. It is particularly important to avoid use of "this Act" if a Bill contains amendments to existing sections because technically the Act includes only the deletions or additions, or both, to the amended sections and not the remainder of those sections.

6.19. Citations

The statutes of Bangladesh are codified as "Bangladesh Code". It is arranged chronologically by the year of enactment and number of Act in Volumes.

Reference to another Act is presumed to refer the updated Act. In citation, reference to an amending Act is not preferable.

7. FORM GUIDE

7.1. Capitalization

Capitalization rules for Bill drafting represent an exception to standard usage. In drafting Bills, capitalize as little as possible. Capitalization has no legal significance, and the lower case is easier to read and write.
(1) Capitalize the first word in a sentence.
(2) Capitalize months and days of the week.
(3) Capitalize names of specific publications.
(4) Capitalize names of specific persons or places, such as Capitalize geographic names.
(5) Capitalize references to a statute compilation.
(6) Capitalize scientific names.
(7) Capitalize names of races, citizens, and languages.
(8) Capitalize words referring to a deity, such as "an act of God".
(9) Capitalize the name of a particular Act, such as "The Company Act, 1994".

7.2. Punctuation

In addition to striving for clear expression through the proper use of words, the drafter must employ correct punctuation to support the words and avoid ambiguity.

(1) Comma (,)

If a sentence consists of two independent clauses, each with a subject and predicate, use a comma before the conjunction.

example The Commission shall report annually to the Government, and it must have the report printed for public distribution.

An exception to this rule occurs when a sentence starts with a dependent clause that applies to both independent clauses that follow. No comma separates the independent clauses because it would make the introductory dependent clause seem to apply only to the first independent clause.

example The commission **shall report** annually to the Government and **must have** the report printed for public distribution.

Set off a parenthetical phrase or clause with two commas.

example Any affected person, including but not limited to a representative of the news media, has standing to contest a final order.

Words, phrases, or clauses in a series are separated by commas.

example The Department shall provide the committee with reasonably necessary supplies, equipment, and clerical services.

A comma is used before the conjunction connecting the last two items in a series.

example wheat, corn and barley

Do not set off an essential clause with a comma. An essential clause is one that is necessary to the meaning of the sentence and cannot be omitted.

correct Application must be made by July 1 if a permit is wanted.

incorrect Application must be made by July 1, if a permit is wanted.

correct An insurer may not disburse Taka 100 or more unless a signed voucher is received.

incorrect An insurer may not disburse Taka 100 or more, unless a
signed voucher is received.

(2) Semicolon (;)

Use a semicolon between two main clauses not joined by one of the simple coordinating conjunctions (and, but, or, nor).

example Letters and other private communications in writing belong to the person to whom they are addressed and delivered; however, they cannot be published against the will of the writer.

A semicolon is used at the end of subsections that do not contain complete sentences.

(3) Colon (:)

A colon is used in legislative drafting to introduce a series in outline form.

example Each policy must contain:

(1) the names of the parties to the contract;
(2) the subject of the insurance; and
(3) the risks insured against.

(4) Parentheses and Brackets "(), {}, []"

Do not use parentheses or brackets as punctuation. Parentheses are used to enclose numerals or letters in outline designations. Use brackets to enclose internal references, such as "[section 3]", to enclose "this Act", and to enclose references to the effective date of a section or an Act. In rare instances, brackets may be inserted during the codification process to denote erroneous language or language that becomes effective or that terminates on the occurrence of a contingency or a particular date.

(5) Quotation Marks (“...”) (‘...’)

In Bill drafting, a period or a comma should be placed outside quotation marks if it does not belong to the quoted matter. In drafting, always use double quotes.

In legislative drafting, quotation marks are used only to enclose titles or texts of laws referred to or incorporated by reference, to enclose defined words or phrases, or to enclose amended sections. In addition, quotation marks are used to enclose text following terms such as entitled, the word, the term, marked, designated, classified, named, endorsed, cited as, referred to as, known as, or signed.

example (1) "Agency" means an authority, board, bureau, commission, department, or other public authority or local government.

Abbreviations and Acronyms

7.3. Numbers

Except as listed below, numbers one through nine are spelled out, and numbers 10 and over are written in numerals. Numbers at the beginning of a sentence should be spelled out.

(1) Measurements

2 inches (feet, yards, meters, acres, etc.)
8 feet 2 inches
2 feet x 3 inches
15 x 30 feet (but a "15-foot by 30-foot room")
7.5 milligrams
1.5 liters
5 pounds (barrels, gallons, etc.)
3 ounces
3 acres (horsepower, etc.)
35 degrees F
1 megawatt-hour unit
one-half mile
0.5% of alcohol by volume

(2) Age

6 years old (not people)
52 years, 10 months, 6 days
a 3-year-old child
65th birthday
"a person who is 18 years of age or older" (not "over 18 years of age")
"a person who is under 6 years of age"

"a person who is 18 years of age or older and under 66 years of age" (not "between the ages of 18 and 65")

(3) Time
3 days
5th and 20th days
2 weeks
1 month
2 1/2 months
4 calendar quarters
3 fiscal years
6 credit hours
noon (not "12 noon")
midnight (not "12 midnight")
9 a.m. (not "9:00 a.m." or "9:00 o'clock a.m.")
1:30 p.m.
one-half hour before sunset

(5) Percentages
0.3%
3%, 25%
3/4 of 1%
1/2 of 1% or 0.5% (not "1/2%")
57.5%
2 percentage points
An irregular fraction should not be expressed as a decimal — 1/3 of 1% (not 0.333%) and 8 1/3% (not 8.333%).

(5) Unit Modifiers
5-day week (measurement)
10-year sentence (measurement)
1-year term (measurement)
five-person board (not unit of measurement)
1-year, 2-year, and 3-year terms (but "term of 5 years")
four-wheel-drive vehicle
4.0 cumulative grade point average

(6) Ordinals
First through ninth are spelled out; 10th and over are numerals.
first term
fifth tax year
fourth amendment
15th amendment
4th and 15th amendments
15th birthday
35th day

(7) Fractions

Fractions standing alone or followed by "of a" or "of an" are spelled out, such as "one-half day", "one fifty-sixth", "two-thirds vote", or "three-fourths of an inch".

(8) Numbers in Series
Figures are used in a group of two or more numbers when any one is 10 or greater: "The farm has 3 cows and 12 sheep."

7.4. Classes, Grades, Etc.

The drafter should search the existing rules to determine if there are references to certain classifications and should follow the capitalization used in current law.
Examples:
property tax classification — class one, class twelve
compensation plan No. 2
school grades are expressed: "1st grade", "2nd grade", "12th grade"
contractor licenses — Class 1, Class -2
fishing license — Class A, Class B.

7.5. Dates — Fiscal Years

(1) Dates should be expressed as follows:
December 31 (not "December 31st" or "31st day of December")
December 31, 2021, (with comma following year in a complete date, unless at the end of a sentence)
December 2021
October, November, and December 2021
202-2021 interim
(2) A period of time is expressed as follows:
For the fiscal year beginning July 1, 2021,

(3) If statutory language takes effect on July 1, it should be written as "tobacco settlement proceeds received after June 30, 2020" or "Effective July 1, 2020, a member who completes. . .". ("From July 1, 2020", "after July 1", or "between July 1 and" might be construed to mean a beginning date of July 2 and should be avoided.)
(4) It is better to refer to a day rather than to the time that an event will occur, such as "90 days after the day on which judgment is delivered", not "90 days after the time". Usually, a period is measured in whole days, not the time of day.

7.6. Bill Titles and Catch lines

In Bill titles and catch lines, follow the above rules.
All title provisions must be drafted so that they are easy to understand basic subject matters of Bill.

“A Bill to provide……;", “A Bill to amend……”,.

7.7. Amending Text

(1) Strike before adding, and keep blocks of striking and adding together whenever possible.
preferred The information contained therein shall not be an official accounting in the certificate is not a public record.
avoid The information contained in the certificate is not a public record therein shall not be an official accounting.
avoid The information contained therein in the certificate shall is not be an a official public accounting record.
(2) Do not strike a portion of a "unit", whether it is a single word, a hyphenated word, a parenthetical phrase, a quoted word or words, or a number with a symbol.

To change a capitalized word to a lower case word
incorrect Except as otherwise provided, the vehicle . . .
correct The Except as otherwise provided, the vehicle . . .

To change a plural term to a singular term
incorrect The persons shall . . .
correct The person shall . . .

To change a quoted word or phrase
incorrect "Book" value"
correct "Book value" "Book" value.

7.8. Striking and Adding Subsection References

The following form must be used when striking or adding subsection references in a section:
Striking, Adding, and Changing Subsection References in
Section Text
Striking subsections:
Sub-sections (3), (4)(a) and (5) (b) (i)
Adding subsections
Sub-sections (3), (4)(a) and (5) (b) (i).

8. THE BILL AND ITS PARTS

8.1. Introduction

A Bill is a proposed law as introduced in the Legislature. The Bill does not become a law (an "Act" or "Act/statute") until passed by the Legislature and it is assent by the President. If the President does not assent or return a Bill within 15 days after receiving it, it becomes a law without formal assent of the President.

8.2. Bill Arrangement:

8.3. Bill Identification
Bill Draft Number/ Designation and Number
The number appearing at the top of a Bill, such as "Bill No,……of 2021", is the number assigned by the Parliament Secretariat . The number is used to identify the Bill during the Parliamentary process.

8.4. Title

The Title identifies the Bill to the legislators and the public and must clearly summarize the contents of the Bill. The drafter should be familiar with the substantial body of case law that has developed over defects in titles. The main purpose is to ensure that the title of a Bill gives reasonable notice of the content to legislators and the public.
It is a fundamental statement for the enactment of the law and begins with the word "A BILL TO PROVIDE…….".

8.5. Preamble
The preamble follows the title and precedes the enacting clause. Because of its placement, it is not part of the text of the Act and does not become a part of the law. It is a preliminary statement of the reasons for the enactment of the law and begins with the word "WHEREAS". A preamble may be used as an extrinsic aid in construing a law.

8.6. Enacting Clause
The enacting clause separates the identification portion of the Bill from the body of the Bill.
example IT IS HEREBY ENACTED AS FOLLWS:

8.7. Short Title

A section creating a short title for a significant new area of law is suitable if an Act creates new law in a definable area. A short title enables quick future identification.

8.8. Definitions
(1) To avoid repetition and to ensure clarity, a well-drafted Bill often contains a definition section that precedes the basic provisions of the Bill. A definition section is of definite advantage to:

(a) define a general term in order to avoid frequent repetition of explanatory language;
(b) avoid repeating the full title of an officer or of an office;
(c) give an exact meaning to a word that has several dictionary meanings;
(d) define a technical word that has no popular meaning in commonly understood language; and
(e) limit the meaning of a term that, if not defined, would have a broader meaning than intended.

(2) Do not define a word if it is used in the sense of its ordinary dictionary meaning.
(3) Definitions must be arranged alphabetically, in word-by-word order.
(4) Do not include substantive provisions in definition sections.
(5) After a word is defined, use the defined word, not the description or a synonym.
(6) Do not define a word that is never used in the Bill.
(7) If a Bill deletes all references to a defined term, the definition of that term must also be deleted.

8.9. Organization of Provisions

A Bill that only amends or repeals existing laws may not present any organizational problem. However, an Act that creates a new body of law must be thoughtfully organized.

(1) One Main Provision

Most new legislation is concerned with just one main idea. Generally, the substantive provisions of an Act will be followed by subordinate provisions, including the authority to administer it and the means to make it effective.

(2) Several Related Main Provisions

Each main provision with its related subordinate provisions should be separate from the other main provisions and drafted in detail as if it constituted the entire Bill.

(3) Series of Related and Equal Provisions

Bills containing equal provisions relating to a common subject are arranged in a logical order. A Bill may address the same provisions as they relate to several public authorities. In this case, the new material should be organized so that the sections that apply to a particular authority appear adjacent to one another in the Bill.

8.10. New Sections

Sections creating new provision in an area not covered by existing statutes are referred to as "new sections". The basic provisions of a new section should be divided into sub-sections, each of which contains one idea or thought.

8.11. Amendatory Language

Amendments to an existing section may not strike all of the substantive language in the section and replace it with new language. This procedure has the effect of repealing existing provision and enacting new provision.

8.12. Outline Style

There is no rule fixing the length of a section. Generally, a section should include only a single idea. The shorter the section, the more quickly it may be understood and the easier it is to amend if amendment is needed. Each paragraph in a Bill must be given a section designation. Although a large amount of text in a single section that contains numerous ideas is difficult for the reader to comprehend and should be outlined or broken into separate subsections.

8.13. Penalty

If a violation of an Act is to result in a penalty, a separate section or a subsection may be arranged to setting the penalty. Penalty language uses the words "shall be liable " or “is liable”.

8.14. Repeal

It may be necessary to repeal one or more Acts that conflict with a new Act. Each Act to be repealed must be listed separately. A statement that "all Acts or parts of Acts in conflict herewith are repealed" is improper and ineffective.

The entire text of a section of existing law may not be stricken and replaced by new language because doing so would, by implication, repeal the existing law.

Whenever a Bill repealing a section is drafted, the same Bill must amend any other section in the **existing law** containing a reference to the section being repealed.

8.15. Transition

A transition section sets out provisions for the orderly implementation of legislation. A transition section can help avoid problems that may result from an abrupt change in law. A transition section usually has a continuing effect for a temporary period of time.

8.16. Applicability — Directions relating to Bangladesh Code

(1) Applicability of Existing Law

Often it is not enough merely to suggest where a statute should be applicable. In most instances, it is vital that the drafter express the intent to apply existing law to the new law. Existing law may be incorporated by reference into a Bill by use of a applicability provision.

(2) Codification Within/Outside of Existing Part or Chapter

If a codification provision specifies that the Act be codified in an existing part or chapter, there may be references to "this part" "this chapter" within the new Act. If not, the internal references should be to "[sections 1 through 5]" rather than "this part".

8.17. Coordination Instructions:

8.18. Saving Clause

It is presumed that changes in the law are in full force beginning on the effective date of the Act, new laws could disrupt transactions already in progress. The saving clause preserves rights and duties that already have matured or proceedings are already begun.

8.19. Effective Date

(1) Subject to subsection (1)(d), every Act providing for appropriation by the legislature for public funds for a public purpose takes effect on the first day of July following its passage and approval unless a different time is prescribed in
the enacting legislation.

(2) Subject to subsection (1)(d), every Act providing for the taxation of or the imposition of a fee on motor vehicles takes effect on the first day of January following its passage and approval unless a different time is prescribed in the enacting legislation.

8.20. Applicability Date

Do not confuse an applicability date with an effective date. An Act may apply retroactively or prospectively. To apply reactively, a law must expressly state that act. In order for a Bill or sections of a Bill to apply retroactively, the Bill or sections should have an immediate effective date.

8.21. Termination

If substantive provision in a Bill is to terminate after a certain period of time, termination is accomplished by use of a termination section.

The sections of the Bill that are to terminate are listed in the termination section.

9. REQUIREMENTS FOR SUBSIDIARY LEGISLATION

Subsidiary legislations are common in Bangladesh in the form of regulations, rules, orders and notices. The power to make these is usually given to the Minister who administers the Act or to Cabinet. It is important that any subsidiary legislation drafted is consistent with the primary legislation they are made under as well as complying with any other law of Bangladesh. Subsidiary legislation most often commence when they are published in official Gazette. There are some exceptions to this commencement date. The General Clauses Act, 1897 makes further provision for subsidiary legislation and drafters must be aware of these.

9 .1 Preliminary Requirements

9.1.1. *The Title*

When giving a subsidiary legislation a title, it is important for the drafter to give a title that reflects the parent legislation under which the subsidiary legislation is being made. For example, any subsidiary legislation made under the *Motor Traffic Act,* 2014 must reflect this in the title. Titles should also be specific if they are dealing with a specific part of the Act.

9.1.*2. The Table of Contents*

Table of Contents are not used in subsidiary legislations. In the case of codification, this may appear at the beginning of every subsidiary legislation and care should be taken to ensure that the headings within the subsidiary legislation corresponds with the table of contents.

9.1.*3. Enacting words*

The enacting words for all Subsidiary Legislations in Bangladesh are:
'In exercise of power conferred under section…. of the …….. Act, 2010,'

This will differ when it comes to notices and orders, but the important point is to ensure that the authority empowered to make the subsidiary legislation and the empowering section is clearly stated at the very beginning.

10. FORMATTING, STYLE, GRAMMAR, AND OTHER PRINCIPLES OF GOOD LEGISLATIVE DRAFTING

In 1955, Reed Dickerson pointed out that "legislative drafting is the most difficult form of legal drafting. The basic problems are the same but legislative problems are technically more complicated and socially more important."

The principal functions of legislation are:
(1) to *create* or *establish*;
(2) to *impose* a duty or obligation;
(3) to *confer* a power, *create* a right or *grant* a privilege; and
(4) to *prohibit* conduct.

The clarity and precision of legislation is enhanced by plain and orderly expression of these functions. This is the focus of this Part, to improve the accuracy, clarity, and uniformity of the Parliament's legislative product.

10.1: Formatting

In drafting legislation, "formatting" is used to describe the layout of the legislation. All legislation, particularly Bill, should be drafted to reflect the formatting found in the Bangladesh Code. This promotes uniformity with the Code and between existing legislation, accuracy in the process of amending or codifying legislation, and readability.

10.2. Drafting Rules.

Legislative drafting is an art, not a science.
The Drafting Rules establish the conventions for style and grammar in drafting legislation. The purpose of the rules is to promote accuracy, clarity, and uniformity, with the goal being the best possible legislative product that is in harmony with the existing format. This goal is important, not only because it is statutorily required, but also because laws should be written with the understanding of their place within the existing Bangladesh Code and an eye toward the future of the Code. This can be accomplished if drafters adhere to these conventions.

10.2.1. Clarity and Readability

The purpose and effect of legislation should be evident from its language. So-
(a) Choose words that are plain and commonly understood.
(b) Use language that conveys the intended meaning to every reader.
(c) Omit unnecessary words.
(d) Use correct grammar.
(e) Use references, citations, lists, formulas, and tables to promote clarity and readability.

10.2.2. Brevity and Simplicity.

(a) Use the shortest sentence that conveys the intended meaning.
(b) Omit needless language.
(c) If a word has the same meaning as a phrase, use the word.
(d) Avoid archaic words or legalese.

10.2.3. Consistency.

(a) Be consistent in the use of language throughout the legislation. Do not use the same word or phrase to convey different meanings. Do not use different word or phrase to convey the same meaning.
(b) Be consistent in the arrangement of comparable provisions; arrange in the same way as sections containing similar material.
(c) When a choice must be made between following the rules of drafting and maintaining consistency with earlier Acts, or between rewriting an entire section or chapter or amending a section or chapter by adding an awkward sentence, consult with the client about how to resolve the issue.

10.2. 4. Sentence Structure

In the 16th Century, [England's] King Edward VI requested that statutes be "more plain and short, to the intent that men might better understand them."

Use short and simple sentences. Complex sentence structure often makes an Act ambiguous or its meaning obscure. A sentence that expresses a single thought is easier for the reader to understand. Avoid excessive use of dependent clauses, parallel clauses, compound sentences, or other complex sentence structures. Several short, simple sentences are preferable to one long, involved sentence.

10.2.5. Subject of Sentence

Unless it is clear from the context, use as the subject of each sentence the actor (the person or entity) to whom a power, right, or privilege is granted or upon whom a duty, obligation, or prohibition is imposed. Again, be consistent. If you use "person," do not switch to "individual," "party," or "body."

10.2.6. Tense, Voice, Number, and Mood.

(a) Use the present tense, for the law speaks when it is read.

(b) Use the active voice instead of the passive voice, unless the actor cannot be identified or the statement is intended to be universal.

Do: An officer may arrest a person who is wanted by the CID.
Do not: A criminal who is wanted by the CID may be arrested by an officer.

(c) Prefer the singular to the plural. A statute is intended to speak to each person who is subject to it and should be drafted that way. The singular form is not limiting,

Do: The applicant shall submit the required fee.
Don't: The applicant or applicants shall submit the required fee.

The singular is clearer than the plural.

Do: A reversionary interest is subject to a limitation in the document that creates the interest.
Don't: Reversionary interests are subject to limitations in the documents that create the interests.
However, do not say "one" when "one or more" is intended.

Do: Notice must be posted on the person's website, if the person maintains one or more.
Don't: Notice must be posted on the person's website, if the person maintains one.

(d) Draft in the indicative mood whenever possible. The English language has three moods. The indicative mood expresses act or declaration. The imperative mood expresses a command. The subjunctive mood expresses a hypothetical situation or contingency.

Relatedly, seek to avoid "false imperatives," which are expressions that seem to direct behavior but do not. These expressions often include the use of "shall" or "shall not," which are used to declare a legal result rather than to prescribe a rule of conduct, as in the following example.

Do: The Authority is a City Corporation.
Don't: The Authority shall be a City Corporation.

Avoiding false imperatives like the one above ensures that "shall" is used only to command (as a duty). This avoids the weakening of "shall" through interpretation by the courts.
(e) State a condition precedent in the perfect tense if its happening is required to be completed.

Example*:* A person who has been honorably discharged from the military service is eligible for the benefit.

Comment:
A statute is regarded as speaking in the present and constantly. The use of "shall" in imposing a duty or prohibition does not violate this convention as it does not indicate the future tense. Even if an action is required on a specified future date, the form of expression is not in the future tense.
In speaking in the present, a circumstance putting a provision of legislation in operation, if continuing to exist, is in the present tense.
Example: A victim who is injured may bring an action.

If the triggering circumstance is completed, it is expressed in the perfect tense, but never in the future or future perfect.

Example: If the issue has been litigated, the claimant is not eligible for the program.

Active v. Passive Voice
In the Active voice, the subject of the sentence does the Action. A sentence in the Active voice can be identified by the typical doer of the Action.

Example: The committee reached a decision.

In the passive voice, the subject receives the Action. A sentence in the passive voice reverses the structure of the sentence so that the receiver of the Action is first, then the Action itself, then the doer of the Action usually preceded by the words "by" or "by the."
Example: A decision was reached by the committee.

As indicated by the rule, use the Active voice instead of the passive voice. Using the Active voice identifies more clearly who is to do what. Avoiding vagueness as to the required actor is especially important when the sentence grants a power or a privilege or imposes a duty.
There may be times, however, when drafting legislation that using the passive voice is appropriate. For example, penalty provisions are often drafted in the passive voice. And, it may be appropriate to use the passive voice in a later sentence or provision if the actor and the action have already been identified.

Example:
(a) A person who receives a grant under this section shall submit a report to the Secretary.
(b) The report submitted under subsection (a) is due by March 1 each year.

10.2.7. Gender.

Avoid using gender-based personal pronouns and using "they" in place of gender-based personal pronouns.

Comment:
Consider drafting the sentence so as to minimize the need for gender-based pronouns. These pronouns can be avoided by repeating the noun. Do not use the phrase "he or she," "his or her," or "his/her." However, "himself or herself" is acceptable for the sake of clarity. The passive voice may be used if the actor remains clear.

Guide to Gender-Neutralizing Statutory Terms

Avoid the Gender-Based Term	**Use the Gender-Neutral Term**
brother	sibling
chairman	chair
clergyman	member of the clergy, minister
craftsman	artisan, craftsperson
committeemen	committee members
draftsman	drafter
enlisted man	enlisted person
ex servicemen	veterans
fireman	fire fighter
husband	spouse
layman	layperson
mailman	mail carrier

man	individual
mankind	humanity
manmade	artificial, synthetic
manned	staffed
manpower	personnel
policeman	police officer, law enforcement officer
salesman	salesperson
servicemen	personnel
sister	sibling
unmanned	unstaffed
watchman	guard, security person
widow, widower	surviving spouse
wife	spouse
woman	individual

10.2.8. Choice of Words and Phrases.

(a) Select short, familiar words and phrases that best express the intended meaning of the legislation according to common and approved usage. Avoid jargon, slang, overly technical language, legalese, and foreign phrases (including Latin legal terms) unless the word or phrase is a term of art or is often used in case law.

Examples:

1. Use "after" instead of "subsequent to".
2. Use "before" instead of "prior to".
3. Use "during" instead of "for the duration of".

(b) Do not use redundant couplets, such as "null and void," "power and authority," "sole and exclusive."

(c) Use a pronoun only if its antecedent is unmistakable and its use is gender neutral. Repeat the noun rather than use a pronoun unless the antecedent is a series of nouns. If the sentence structure is so complex that a possessive pronoun seems necessary, consider redrafting the sentence rather than using a possessive pronoun.

(d) Do not use "pursuant to," "said," "aforesaid," "above," "below," "hereinbefore," "herein," "hereinafter," "aforementioned," "whatsoever," or similar words of reference or emphasis. Instead, refer to the relevant statutory or non statutory unit with language like "by" or "under" as discussed in paragraphs (e) and (f).

Example: . . . *under* subsection (b) of this section.

(e) If the result being sought is to be achieved through the operation of that provision itself without the necessity of an administrator taking a particular action, use "by."

Example: . . . the reduction required *by* this section.

(f) If a provision of law is cited to indicate the source of a power, right, or duty, use "under."

Example: A lessor's right to restitution *under* subsection (a) is subject to . . . .

(g) Do not use "same" as a pronoun; use "it" instead.

Do: I have received your notice and acknowledge *it*.
Don't: I have received your notice and acknowledge *same*.

(h) Do not use the modifiers "any," "each," "every," "all," or "some" if the articles "a," "an," or "the" can be used with the same result.
Example:
Each owner attending the meeting shall sign a registration card.
In this example, "each" should be used only if the failure of an owner to attend the meeting has a legal consequence other than to an individual owner, such as the validity of the meeting. If the only legal consequence is to the owners as individuals, "an" should be used.

(i) Do not use "any and all" because the phrase is self-contradictory.
(j) Do not use "deem" for "consider." Use "deem" only to state that something is to be treated as true, even if contrary to act.
(k) Do not use "duly." The word adds nothing to text that is designed to have a legal effect. It may, however, be appropriately used in resolutions, where more eloquent language is permissible.
(l) Avoid rhetorical flourishes such as "of any kind," "of any nature," or "under any circumstances." You may, however, use them in resolutions expressing praise or condolences.
(m) Try to avoid indefinite words such as "frequently," "untimely," "unseasonable," or "temporarily," except in resolutions. Instead, use precise references.
(n) Do not use "different than." Instead, use "different from."
(o) In a section without subsections, and in each subsection of a section, use the indefinite article "a" or "an" to impart particularity or specificity to the first mention of a noun indicative of a member of a class or group. Use the definite article "the" for further references to that noun. If the noun is compound, even if defined, use the complete term in the first mention of the term. In later references to that term in a section, subsection, or paragraph, use only the principal noun of the term.

Example:
A *qualified patient* may make decisions regarding life-sustaining treatment so long as *the patient* is able to do so
(p) Do not include "the provisions of" when referring to a provision of an Act. For example, do not say "subject to the provisions of this [Act]" or "subject to the provisions of Section 2." Instead, say "subject to this [Act] or "subject to Section 2." The phrase "the provisions of" adds nothing to the phrase "this [Act]." However, it is correct to say, "the procedural provisions of this [Act]," because the phrase refers to a subset of the provisions of the Act.
(q) Do not begin a sentence with the word "no."

Do: A person may not claim a credit more than once.
Do not: No person may claim a credit more than once.

10.2.9. Use of "And", "Or", and "And/Or"
(a) Use "and" when you mean "in addition to" and want to connote togetherness.
(b) Use "or" when you mean "as an alternative to" and the reader must not choose more than one of the two listed alternatives

(c) **Do not ever use "and/or."** Decide whether "and" or "or" is appropriate and use the proper word, or recast the statement like a penalty provision using the phrasing "A" or "B," or both. If there are three or more options, consider rephrasing the text preceding the options to include the language "one or more of the following:".

Comment

"And" and "Or" are conjunctions. Conjunctions join words, phrases, or clauses, and they indicate the relation between the elements joined. "And" is conjunctive and means in addition to and connotes togetherness. "Or" is disjunctive and means as an alternative to and tells the reader to "take your pick." Recognize that these words can have different senses depending on the surrounding context and draft to ensure the context fits the desired use of the word.

"And," based on context, can mean:

(1) **Joint.** In this sense, "A" and "B" are considered together as one unit.

(2) **Several.** In this sense, "A" and "B" are considered separately.

(3) **Joint or several.** In this sense, "A" and "B" are considered together as one unit or separately.

(4) **Joint and several.** In this sense, "A" and "B" are considered together as one unit and separately.

"Or," based on context, can mean:

(1) **Inclusive.** In this sense, "or" tells the reader "A" but not "B," "B" but not "A," or both "A" and "B." This is the sense in which drafters often use "and/or."

(2) **Exclusive.** In this sense, "or" tells the reader "A" but not "B," "B" but not "A," but not "A" and "B."

10. 2.10. Use of "Shall," "Must," "May," and Substitutes

(a) "Shall" means that a person has a duty. Consider the following when using "shall":

(1) Use "shall" if the verb it qualifies is a transitive verb in the active voice and the subject is animate.

(2) A transitive verb is a verb that takes, or precedes, a direct object. In sentences in the active voice, a direct object is the part of the sentence receiving the transitive verb's action.

(3) A subject is animate when it can respond to a statutory command. For example, an individual, a corporation, and a court are animate.

Example of the proper use of "shall":

The court shall enforce the collection of a tax judgment.

Consider using the following substitute words instead of shall---

Use	**To Mean**
must	is required to
must not	is required not to
may	is permitted to, has discretion to, has a right to, is authorized to
is entitled to	has a right to
will	(to express a policy or a future contingency in the manner of normal English)
can	is legally or physically capable

cannot	is legally or physically incapable

(b) "Must" means that a person or thing is required to meet a condition for a consequence to apply. "Must" does not mean that a person has a duty. Consider the following when using "must":
(1) Use "must" if the verb it qualifies is an active verb in the passive voice, or is an inactive verb, or if the subject is inanimate.
(2) An active verb expresses meaning more emphatically and vigorously than its weaker counterpart, an inactive verb. Furthermore, an active verb is "in the passive voice" when it is preceded by a form of the verb "be," examples of which include "is," "was," "has been," "had been," and "will have been."
(3) An inactive verb is one that expresses no action, but simply expresses a state of being. Inactive verbs are also known as "linking verbs". Some of the most common inactive verbs are: "is," "are," "was," "were," "am," "be," "being," "been," "became," "become," "remains," "appears," or "seems."
(4) A subject is inanimate when it cannot response to a command. For example, a contract, a record, and an order are inanimate.

Examples of how to use "must":
1. ***Active Verb in the Passive Voice.***
Any prior convictions *must* **be set forth** in the application.
2. ***Inactive Verb.***
The applicant *must* **be** an adult.
3. ***Inanimate Subject.***
The order *must* state the time and place of the hearing.

(c) "May" means a person is permitted, has discretion, has a right, or is authorized to do something. Use "may" to confer a power, privilege, or right.

Examples:
1. ***Power.***
The applicant *may* demand an extension of time.
2. ***Privilege.***
The applicant *may* renew the application.
3. ***Right.***
The applicant *may* appeal the decision.
(d) Do not use "shall" or "may" to state a rule of law. Instead, rewrite the sentence using the present tense.
Do: All agents are bound by the decision of the Director.
Don't: All agents shall be bound by the decision of the Director.

(e) Do not use "will," "should," or "ought" as a substitute for "shall" or "must" and do not use "can" as a substitute for "may."
Note: "Should" is properly used in legislative drafting to state a duty to take an action or to have knowledge.
Example:

If payment is due and demanded on the delivery to the buyer of the goods, the seller may reclaim the goods delivered upon a demand made within a reasonable time after the seller discovers or should have discovered that payment was not made.

10.2.11. Use of "Shall Not", "May Not" and "Must Not"

(a) Use "may not" or "must not" to express a prohibition.

(1) Use "may not" if the verb it qualifies is in the active voice. "May not" means a person is not permitted, does not have discretion, does not have a right, or is not authorized to do something.

Example: The applicant *may not* **submit** more than one application.

(2) Use "must not" if the verb it qualifies is an inactive verb, or an active verb in the passive voice. "Must not" means a person is required not to do something.

Examples:

1. *Inactive Verb.*

The applicant *must* not **be** a convicted felon.

2. *Active Verb in the Passive Voice.*

The application *must* not **be filed** before the end of the reporting period.

(b) Do not use "shall not" in legislative drafting.

Comment

When a drafter of legislation or a rule wishes to prohibit an action, the most common method is to combine the mandatory *"shall"* with the negative *'not'* and say the actor "*shall not . . "'* (*a person shall not discharge a toxic substance into the air*). This form is incorrect . . . . Technically the words "*shall not"* only mean that a person does not have a duty to engage in the action. The use of "*no person shall"* is just as incorrect because the phrase means only that there is no one who has a duty to engage in the action.

The proper way to express a prohibition to act is to say *'may not'* in connection with the action prohibited (*a person may not discharge a toxic substance into the air*). The effect of the words "*may not"* is to deny the actor the power or the authority to engage in the action. The denial of the power or authority accomplishes all that is necessary to establish the legal prohibition against a person performing an act. It also provides the legal basis for imposing a sanction for a violation of the prohibition.

10.2.12. Use of "Which" and "That"

(a) Use "which" to introduce a nonrestrictive relative clause

Example:

The application, *which* need not be verified, must be signed by the applicant.

(b) Use "that" to introduce a restrictive relative clause that is intended to modify the nearer of two possible antecedents.

Example:

An application to renew a *license that* has been revoked . . . .

(c) Use "which" to introduce a restrictive relative clause that is intended to modify the remote antecedent, rather than the nearer of two possible antecedents.

Example:

An *application* to renew a license, *which* has been rejected . . .
(d) If the antecedent is not clear, the drafter should consider rewording the sentence to avoid any misconstruction.
Example:
If an *application* to renew a license has been rejected, the applicant . . . .
Comment
"Which" is non-defining. It prefaces a relative clause that explains or gives a reason, or adds a new act, but does not limit or restrict the antecedent. It is almost always preceded by a comma. It is used when the relative clause is informative only and the thought would be complete without it. It is used in a series of terms when one of those terms must be stated prepositionally.

"That" is defining. It prefaces a relative clause that limits or restricts its antecedent. It is almost never preceded by a comma. It is used when the relative clause is needed to complete the thought being expressed.

10.2.13. Use of "Who" Versus Use of "That" and "Which"
(a) Generally, use "who," "whom," or "whose" to refer to people.
(b) Generally, use "that" and "which" to refer to objects or animals.
(c) There are two notable exceptions:

(1) "Whose," the possessive form of "who," may be used to refer to both people and objects because the English language lacks a possessive form of "that." This use of "whose" avoids an awkward sentence constructed using "of which."
Do: Look, it is the horse whose name I have forgotten.
Don't: Look, it is the horse the name of which I have forgotten.

(2) "That" may be used instead of "who" to refer to a group or class of people.

Example:
The two teams that win the most games will go on to the championship round.

10.2.14. Use of "Such"
(a) Do not use "such" as a substitute for "the," "that," "it," "those," "them," or other similar words
Example:
The [not *such*] application must be in the form the court prescribes.
(b) Use "such" only to express "for example" or "of that kind."
Examples:
1. *"For example."*
A public park must include an area for games *such as* football and basketball.
2. *"Of that kind."*
Such a person is guilty.
Comment
The problem with the use of "such" is that it may be used in both ways described in this rule. Lawyers typically use the word in both ways and this is a source of confusion for the non-lawyer, as the non-lawyer typically only expects it to be used to mean "of that kind."

There may be situations where it is advisable to break this rule and use "such" in place of "the" or similar words. If "the" fails to identify the antecedent unambiguously, for example when the word being referred to has multiple modifiers, use "such" for clarity. Additionally, if "that" would be confusing or awkward because the provision contains too many "that's" being used in other senses, use "such" instead. However, seriously consider if clarity would be better aided by redrafting the sentence to avoid the need to use "such" in this way.

10.2.15. Use of "If", "When", "Whenever" and "Where"

(a) Use "if" regarding a condition based on the existence or nonexistence of an act or on the occurrence or nonoccurrence of an event. These conditions may never occur.

Example:

An appeal may be made to district court *if* it is filed within thirty days.

(b) Use "when" regarding a condition that is certain to occur.

Example:

A court may order opening of the safety deposit box *when* the owner of the box dies.

(c) "Whenever" is appropriate usage if the condition may occur more than once.

Example:

Whenever an offense is brought to the attention of the Attorney General, the Attorney General shall prosecute the offender.

(d) Do not use "where" as a replacement for "if," "when," or "whenever." It expresses a condition as to place. For the purposes of drafting, "place" may be stretched to allow "where" to be used as a synonym for "in which" in phrases like "in any case in which."

10.2.16. Use of "Only" and Other Modifiers

Ensure that "only" and other modifiers are placed immediately before what is modified. "Only" is misplaced more often than any other modifier and can have dramatic results, as these examples indicate:

Examples:

The Department may place traffic-control devices **only** at intersections. ***["Only" modifies "intersections" and commands the Department to placing traffic-control devices at intersections and not elsewhere.]***

The Department may place **only** traffic-control devices at intersections. ***["Only" modifies "traffic-control devices" and prohibits the Department from placing other items at intersections.]***

The Department may **only** place traffic-control devices at intersections. ***["Only" modifies "place" and limits the Department to placing traffic-control devices as opposed to operating or maintaining them.]***

Comment

Modifiers are words, phrases, and clauses that can bring life to a sentence when used appropriately. Modifiers are as important to legislative drafting as to other forms of writing; the need for accurate use increases, however, due to the harm a misplaced modifier can cause in legislation.

Misplaced modifiers occur frequently in writing and are perhaps the main contributor to ambiguity in statutes.

10. 2.17. Abbreviations
Generally, abbreviations should be avoided.
Do: United States
Don't: U.S.
Do: Legislative and Parliamentary Affairs Division ("Legislative Division" is appropriate if the context will support its usage)
Don't: LPAD

10. 2.18. Capitalization
(a) Generally, capitalize:
(1) The first word of a sentence.
(2) The first word in a new line indented as a paragraph, regardless of whether it follows a colon, except within the Uniform Commercial Code.
(3) The first word after a colon, regardless of whether what follows is a complete sentence.
(4) The first word of a quoted sentence, unless the quoted material is incorporated into the sentence that introduces it.
(5) Proper nouns or words derived from proper nouns.
(6) Calendar divisions or names of holidays.
(7) Names of organized bodies.
(b) Capitalize defined terms only in the definition.

10.2.19. Numbers
(a) Generally, use the numerical form rather than the word for the number. When a number begins a sentence, however, use the word instead of the numerical form.
Examples:
Eighteen members constitute a quorum.

(b) Do not express a number as both its word and numerical form in parentheses
Do: After reaching 65 years old, an individual is exempt from all vehicle registration fees.
Don't: After sixty-five (65) years old, an individual is exempt from all vehicle registration fees.

(c) Write fractions as numerals, including half a year when drafting an age.
Do: The tax rate increase for 2014 is 3/4 of a percent.
Do: "17½ years old" not "17 and one half" or "17.5."
Don't: The tax rate increase for 2014 is three-fourths of a percent.
Don't: The tax rate increase for 2014 is 3/4ths of a percent.
(d) Write measurements as numerals:

12 inches
400 feet
4,000 pounds
30 miles per hour
20 degrees
(e) Write money as numerals:
Values over Taka 999.99 include commas as appropriate: ex. "TK 1,000."

Note: The plural form of money is "moneys" not "monies"
(f) Percentages should generally be expressed as the style of the unit of the Statute (title, chapter, section, etc.) dictates. However, when drafting a new Act or amending an existing Act with no existing style, the preference is to express percentages by using numerals with the percent symbol (%). For example, write "95%", not "ninety-five percent."
(g) Express dates as numerals for the day and year.
Do: June 30, 2014
Don't: June 30th, 2014
(h) Express time as numerals in all forms (clock time and when writing hours or minutes), except for midnight or noon, which should be expressed as words.
Do: 8 p.m.
Don't: eight o'clock at night.

(i) When creating a numeric or temporal sequence, use "through" instead of a dash to connect the first and last items in the sequence.

Note: In sequences connected by "through" the reference intended is that the sequence includes the first and last number mentioned. Thus, in the example, 1,001 is the first, or lowest, weight covered by the fee and 5,000 is last, or highest, weight covered by the fee.
(j) When writing an ordinal number, a word representing position or rank in a sequential order (first, second, third, etc.), use the word for the ordinal number, not the numerical expression for the ordinal number.
Do: The Commissioner shall mail all responses by the twenty-first of each month.
Don't: The Commissioner shall mail all responses by the 21st of each month.

10.2.20. Plurals
(a) Follow the general grammatical rule of adding "s" or "es" to a noun to form its plural.
(b) An exception to the general rule in (a) is words borrowed from another language that lack an Anglicized plural form.
(c) For titles of two or more words, make the important word plural.

Singular	**Plural**
Director General	------- Directors General
General Practitioner	-------- General Practitioners
Notary public	---------- Notaries public

(d) Remember that the subject and verb should agree. Plural subjects require plural verbs. However, remember that collective nouns are singular unless the meaning of the sentence indicates the members are functioning as individuals; they are plural.

10. 2.21. Possessives
(a) To form the possessive of a singular noun, irregular plural noun, or indefinite pronoun, add an apostrophe (') and an "s" to the word.

Examples of Possessive Forms:
Singular Noun: One month's worth
Irregular Plural Noun: The women's hammers

Indefinite Pronoun: Someone's raincoat

(b) To form the possessive of a plural noun that ends in "s," add an apostrophe (') to the word.

Examples of the Possessive Form of a Plural Noun Ending in "S":
Six days' worth
The cats' noses

10. 2.22. Prefixes
Join a prefix to a noun without a hyphen in most cases.
Examples of Prefixes Without Hyphens:
anti, co, de, extra, hyper, hypo, infra, inter, intra, macro, micro, mid, mis, multi, non, over, post, pre, pro, pseudo, re, semi, sub, super, supra, un, under
Comment
A hyphen is added between a prefix and a noun if the omission may cause confusion about the meaning of a word, it seems awkward, or it affects the pronunciation. A hyphen is also added when a proper noun has a prefix.
Do: re-creation, re-present, co-owner, intra-agency, mid-Atlantic
Don't: recreation, represent, coowner, intraagency.

10. 2.23. Punctuation
(a) **Generally.** Punctuate carefully.

(b) **Brackets.** Brackets are most commonly used to enclose words or phrases inserted into a quotation. Do not use brackets as a form of punctuation in legislation.

(c) **Colons.** Colons can be used after an independent clause, usually introductory language, to direct attention to a list; an appositive, a noun or noun phrase that explains, identifies, or renames another noun right beside it; or a quotation or between independent clauses where the second summarizes or explains the first.

(d) **Commas.** Commas are the workhorse of the punctuation world and are drafted into service to assist the reader's understanding.
(1) **Dates.** Use commas to set off the year of a date when month, day, and year are given. Do not use commas when only the month and year are given.

(2) **Numbers.** Use a comma in numerals of 1,000 or more.

(3) **Series.** Use the serial, comma to separate words in a series.
Use a comma followed by "or" to separate the last of a disjunctive series of three or more words, phrases, or clauses in a sentence.
Use a comma followed by "and" to separate the last of a conjunctive series of three or more words, phrases, or clauses in a sentence.

(4) **Parenthetically.** Use commas to set off clauses that describe a subject already identified or provide supplemental information or to set off appositives.

(5) **Coordinating Conjunctions**. Use commas before a coordinating conjunction ("and," "but," "or," "nor," "for," "so," and "yet") when the coordinating conjunction connects two or more independent clauses.

(e) **Dashes.** Dashes, formed by typing two hyphens next to each other (--) are used to set off parenthetical material deserving emphasis, to mark appositives that contain commas, or to prepare for a list.

(f) **Ellipses.** The ellipsis mark consists of spaced periods and indicates that words have been deleted from a quotation. Three periods are used to delete from within a quoted sentence. Four periods are used when what is deleted comes at the end of the sentence; the fourth period is the period ending the sentence. Ellipses are rarely used in legislation.

(g) **Parentheses.** Use parentheses only if necessary to make clear a reference to another statutory provision by indicating the nature of the referenced provision.

Otherwise, do not use parentheses in statutes. Parentheses are often used by inexperienced drafters in place of commas in a descriptive, nonrestrictive clause, to give an example, or to provide an alternative restatement of language used. If it is needed, reconsider the language are attempting to explain.

(h) **Quotation Marks.** When drafting legislation, many grammatical conventions regarding quotation marks are ignored:

(1) Use quotation marks to indicate text either being deleted from or inserted into a Bill by an amendment or used within the instructional language of an amendment.

(2) In drafting an amendment, ignore the grammatical convention regarding punctuation placed within or outside of quotation marks. Instead, place punctuation marks within quotation marks only when the punctuation mark either appeared in the existing source material or must appear in the Bill to properly amend the existing source material.

For consistency sake, comply with this rule even when drafting something that does not amend the Code, Constitution, or other codified language, such as a resolution or synopsis.

(i) **Semicolons**

(1) Use semicolons between items in a series containing internal punctuation, such as commas.

(2) Use semicolons between closely-related independent clauses not connected by a coordinating conjunction.

Comment:

Because clarity is especially important when drafting legislation, use the Oxford (or serial) comma.

Always put a comma before the *'and'* or *'or'* in a series when the last two words in the series are intended to be separate (*a brief must contain a statement of issues, statement of the case, statement of facts, argument, and conclusion*). In this example, the comma before the *'and'* is necessary to show that the argument and conclusion are each a separate part of the brief. If there were no comma, it would be possible to read the words *'argument and conclusion'* to mean that the last section of the brief would include both an argument and a conclusion. The comma before the *'and'* eliminates the possibility of confusion and misinterpretation. Although this principle

was once a standard rule of grammar, it has fallen into disfavor. W. Strunk, Jr., and E. B. White, *The Elements of Style*, however, still recommend it.

10.2.24. Compounding Words and Hyphenation

(a) Consult a reputable dictionary to determine how to treat a compound word.
(b) When two words are combined to form an adjective, the two words are typically hyphenated.
(c) When in doubt, use a hyphen in words when doing so will aid clarity and readability by avoiding confusion, awkwardness, or pronunciation problems.

10.2.25. Definitions: Generally

(a) Define a term, whether a single word or phrase, if any of the following apply:

(1) The term has several meanings and it is necessary to preclude any unintended construction of the legislation supported by a contradictory meaning.
(2) The term is used in a sense that is broader or narrower than its common or dictionary usage.
(3) Use of the defined term will avoid repetition of a lengthy phrase and improve the clarity of the legislation.

Note: Do not formally define a term that is familiar, clear, and used in its dictionary sense.

(b) Do not include substantive provisions in a definition.

Example:

In a definition of "termination," for example, it is incorrect to add the following sentence: "On 'termination' all obligations that are still executory on both sides are discharged and any rights based on prior breach of performance survive." The sentence is substantive law, not definitional.

(c) Arrange all defined terms in alphabetical order and place them at the beginning of the chapter if they are used generally in the chapter. If a defined term is used in only a single section or subchapter, locate the definition at the beginning of the portion of the Code highest in rank in which the term is used.
(d) Begin the definitional sentence with the defined term. This requires the defined term to be capitalized. However, when the term is repeated within the text, it should not be capitalized unless the capitalization rules set forth in Drafting Rule demand it.
(e) Use the defined term in the substantive provision, rather than its definitional language.
(f) The definition of a word or phrase should not contain the word or phrase being defined.
(g) Once a word or phrase is defined, do not change the manner in which it is used; the specific definition should remain constant throughout the Bill.

(1) Use "person" to apply a law to human beings and to nonhuman entities, such as corporations or governmental bodies.
(2) Use "individual" to limit the application of a law to human beings. Avoid using the term "natural person" in place of "individual."
(3) Whether using "person" or "individual," use the same form of reference in statutes relating to the same subject matter.

(h) If a definition of "person" is necessary, consider using the following definitions:

"Person" includes an individual, corporation, business trust, estate trust, partnership, Limited Liability Company, association, joint venture, or any other legal or commercial entity.

10.2.26. Definitions: Use of "Means" and "Includes"

The word "means" is seldom misused, but the word "includes" is frequently found where it should not be or is accompanied by language that prevents it from playing its part as the dictionary intended.

(a) Use "means" if a definition is intended to exhaust the meaning of a term. In an exhaustive definition, avoid using the term itself in the definitional language. If the term embraces more than one meaning, close the series with "or".

Example:

"Tribunal" *means* a court *or* other entity authorized to establish, enforce, or modify a child-custody determination.

(b) Use "includes" if a definition is intended to make clear that the term encompasses only some of the specific matter. If the definition embraces more than one additional meaning, close the series with "and."

Example:

"Animals" *includes* fish, reptiles, *and* birds.

The meaning of a defined term, or an undefined term having an ordinary meaning, may be expanded to embrace one or more additional meanings, by using "includes" in the qualifying language.

(d) **Do not use "includes but is not limited to."** This phrase is redundant, as "includes" is not a term of limitation. Its use weakens the meaning of the term "includes" and invites misinterpretation by the courts.

(e) Unless the intent is otherwise, use "means" rather than "includes."

(f) The meaning of a defined term, or of an undefined term having an ordinary meaning, may be narrowed by adding qualifying language.

Examples:

The term "wages" *does not include* birthday gifts and rewards for suggestions to enhance efficiency.

"Instrument" *means* a negotiable instrument.

Comment:

If a word or phrase is to be explicitly defined with no exceptions, the definition must use the word "means." In the example, "'water' means a river," the term "water" does not include lakes or streams or bays. If the definition is intended to be partial only, the best practice is to use the word "includes." In the example, "'water' includes rivers," the term "water" might also include lakes, streams, and bays. Therefore, using "includes" allows a court or administering agency to adopt additional meanings; using "means" restricts them to reasonable constructions of wording.

10.2.27. Parallel Construction

Sentences, paragraphs, subsections, sections, and other units of the Code that serve a parallel function should be organized and written in a parallel fashion.
Do: The Department shall collect fees for renewing a license, amending a license, and *inspecting* a license holder's premises.
Don't: The Department shall collect fees for renewing a license, amending a license, and an inspection of a license holder's premises.
Comment
Parallel construction is another technique employed to ensure accuracy, clarity, and uniformity within the legislation.

10.2.28. Limitations, Exceptions, Qualifications, and Conditions

(a) Place a limitation, condition, or qualification to the applicability of a provision of legislation at the beginning of the subordinated provision, so that it will be readily noticed. The subordinated provision should reference the dominant provision.

Use "except as otherwise provided" to indicate that the dominant provision referred to, at least in some situations, limits or qualifies the rule stated in the subordinated provision. Use "subject to" to indicate that the dominant provision, though not inconsistent with the subordinated provision, provides other criteria that should be considered in construing the subordinated provision

(b) If a provision is limited in its application or is subject to an exception or condition, it promotes clarity to begin the provision with a statement of the limitation, exception, or condition or with a notice of its existence.

Example: (a) Except as otherwise provided in subsection (3) . . .

(c) Avoid using "notwithstanding" to generally override an existing law.
Don't: (b) Notwithstanding anything in the existing laws to the contrary . . .

(d) Do not use "provided that" or "provided, however, that," or a similar proviso. Use "but" instead of "except that."
(e) Negate only unintended and reasonably inferable implications of a provision of legislation.
Examples:
"Person" includes an individual, corporation, business trust, estate trust, partnership, association, joint venture, or any other legal or commercial entity. The term *does not include* a government; a government agency or a public corporation.

10.2.29. Series and Tabulations

(a) Break a sentence into its parts and present them as a series in tabular form – in other words, in a list – if the meaning is made substantially clearer or if doing so makes it easier to cite to a part of the sentence.
(b) Following standards applied in drafting a tabulated list:
(1) Capitalize the first word in each item.
(2) End each item with a period.

(3) In lieu of using "or" or "and" to indicate the disjunctive or conjunctive in a tabulated series, a phrase in the introductory language of the tabulation more clearly expresses how many of the items in the tabulation are to be required, such as: "the following," "any of the following," "one of the following," "all of the following," or "one or more of the following," followed by a colon.

Do:
(a) A fruit is any of the following:
(1) A banana.
(2) An apple.
(3) A bunch of grapes.
Do not:
(a) A fruit is:
(1) A banana**;**
(2) An apple**;** and
(3) A bunch of grapes.
Do:
(a) A patron may bring one of the following into the theater:
(1) A banana.
(2) An apple.
(3) A bunch of grapes.
Do not:
(a) A patron may bring into the theater:
(1) A banana**;**
(2) An apple**;** or
(3) A bunch of grapes.

(c) Do not include in the last item of a tabulation language meant to qualify all of the items.
(d) Do not place an undesignated sentence or paragraph after a tabulated list. If the sentence or paragraph is not a part of the tabulated series, draft it as a separate provision. If it is part of the tabulated series, reformulate the introductory language to encompass it.
Comment
Tabulation is useful for lists. Tabulation is especially appropriate if the context precludes the use of short sentences. Consider using tabular form if a number of rights, powers, privileges, duties, or liabilities are granted to or imposed upon a person and in other situations if tabulation makes the meaning substantially clearer.
Constructing a tabulated list in conformity with this rule also simplifies future amendments to the tabulated series and avoids improper interpretation by courts of the disjunctive or conjunctive nature of the series.

10.2.30. Maintaining the Stability of the statute

Use the accepted names for the units of the Bill when drafting legislation.
Units of the Statute:
Title
Part
Chapter
Subchapter

Section
Subsection
Paragraph
Subparagraph
Sub-subparagraph

10.2.31. Order of Arrangement of Provisions of Legislation

Organize legislation in the most useful and logical format for the reader. Avoid an organization that requires an understanding of a later section in order to understand an earlier section.

10.2.32. Proofreading

(a) One of the most important steps in drafting legislation is to proofread the legislation before releasing it**.**
(b) Have someone who has not been involved in the drafting proofread it before releasing it.
(c) Proofreading must consist of checking the legislation for conformity with the formatting, style, and grammar rules of this manual and other generally accepted rules for style and grammar. Additionally, read the legislation for obviously missing words or wrong words; spell check will not catch either.
(d) Check every reference, internal and external, for accuracy.
(e) When amending the Constitution or Act, ensure that the context language accurately reflects the current version of the Constitution or Act.
(f) Proofreading entails checking the draft for conflicts with introduced but not yet enacted legislation, and correcting those conflicts if possible. Also be aware of other legislation subsequently introduced, which may cause a conflict with the legislation you drafted.

Comment

Proofreading is the last substantive step performed before releasing the legislation to the public, and it is the most important. Proofreading serves as a final check to ensure accuracy, clarity, and uniformity of the legislative product. Proofreading also enables the drafter to correct mistakes that may slow down or even kill legislation.
It is essential that someone other than the drafter review the legislation before release. An independent proofreader may better be able to focus on what the draft legislation actually says, rather than on what it is intended to say.
Do not skim the legislation. Skimming is not proofreading. Missing or extraneous words or nonsensical phrases will not be caught by skimming the legislation.

11. OBSERVANCE OF FUNDAMENTAL RIGHTS

All laws must be consistent with the requirements of the Constitution. Copies of the Constitution are available through the official website of LPAD at bdlaws.gov.bd.

The guaranteed basic rights and freedoms in Part II (Protection of Fundamental Rights and Freedoms) of the Constitution relate to the following matters:

(i) right to life; right to liberty, security of the person, the enjoyment of property and the protection of the law;
(ii) freedom of conscience, freedom of expression, freedom of peaceful assembly and association, respect for private and family life;

(iii) freedom from forced labour.

The Constitution provides for restrictions to some of the rights and freedoms and this must be taken into account when drafting a law to advance or restrict a certain right or freedom.

12. PLAIN LANGUAGE

12.1. Description of plain language

Laws are often highly complex and technical documents that are intended to apply and be understood by both lawyers and non-lawyers. The goal of plain language drafting is to make the final product simple and clear while still maintaining the substance of the law.

Some techniques of plain language writing include the use of words and expressions familiar to everyone, short sentences rather than complex syntax and a clear and meaningful organisation of the legislative provisions. It is essential that only plain language be used for the drafting of all laws.

12.2. Write easily understandable text

Although the text of laws may be quite technical in nature, it cannot be emphasised enough the need to make that text understandable. It may be helpful to employ the following technique:

(i) Organise clauses into logical and simple provisions.
(ii) Present one topic per clause and one subtopic per sub-clause.
(iii) If possible, try to limit one clause to a maximum of 6 sub-clauses.
(iv) Short sentences with a simple structure are easier to understand.
(v) Avoid double or triple negatives.
(vi) Avoid jargon and unfamiliar words.
(vii) Use short words and short sentences whenever possible.
(viii) Use the active rather than the passive voice.
(ix) Use the positive rather than the negative.
(x) Avoid nominalisation by using a base verb to show the action.

12.3. Sentence Length

Readers may find it difficult to follow long sentences that contain a lot of information. It is recommended that the maximum length of a sentence that is not divided into paragraphs should usually be about 50 words or 5 lines of unbroken text. A sentence of more than 5 lines of unbroken text should be a warning bell to the drafter to consider using 2 or shorter sentences in order to make the text more readable.

12.4. Minimise cross references

Cross references often have the effect of interrupting sentence flow and a reader's chain of thought. It may also force readers to constantly check the references before proceeding with the text. Only use cross references if the absence of it creates an ambiguity. If a drafter is able to draft a clause and avoid the use of a cross reference, then they should do so. This is especially useful if the drafter knows that the particular clause only deals with a particular subject.

12.5 Avoid sub-subparagraphs

Any sentence that requires the use of sub-subparagraphs is definitely too complex and should be avoided. An example of this is below:

Heading

(1) First provision

(2) Second provision

(a) an element for the second provision;

(b) another element relating to the second provision; and

(c) yet another element on the second provision:

(i) sub element of third element of second provision; and

(ii) second sub-element of third element of second provision:

(A) first element within second sub-element of third element of second provision; and

(B) second element within second sub-element of third element of second provision.

The above example is from the outset too complicated and drafters should consider converting the subsection into a section.

12.6. Avoidance of certain terminology

Use of "shall" and "may"

"Shall" and "may" were words used extensively in the past to impose an obligation or a prohibition, but it has become practice today for drafters to replace them with more appropriate words.

Although "must" is often regarded as the plain language equivalent of "shall", "must" may not be appropriate in every situation in which "shall" was formerly used. To find an appropriate alternative for "shall", the drafter should first consider the purpose of the provision, in some cases to consider whether it is to create an offence or a statutory duty or to make a declaratory statement, as some examples. The word "may" can be used to indicate that a discretion is vested in relation to the exercise of a power or function. When amending legislation or subsidiary legislation, do not use the word "shall" even if the legislation uses "shall".

Avoid nominalisations – making verbs into nouns

A nominalisation is a noun derived from a verb. In formal writing, strong verbs are often replaced by a nominalisation plus a weak verb and the result is often more wordy and less direct. A drafter should remove nominalisations to make the provisions less wordy, shorter and crisper. See the table below for examples that should be avoided and alternative words that could be used:

Avoid (Nominalisation plus weak verb)	**Use (Strong verb)**
To make application	To apply
To ensure compliance	To comply
To effect/make delivery	To deliver
To conduct a hearing	To hear

To give consideration to	To consider
To undertake consultation	To consult
To conduct an investigation	To investigate

Other words and expressions which should be avoided

The table below provides in the second column some alternatives for the words and expressions in the first or left column:

Avoid	Use
aforesaid	under
construed to mean	means
during such time as, during the time that	while
during the course of	during
each and all	each, or all
each and every	each, or every
foregoing	under
forthwith	immediately
for the duration of	during
Hereby, thereby, therefrom therewith, thereafter	then
herein	in this
in the case of	for or when
in the course of	during
in the event that	if
is binding upon	binds
means and includes	means or includes
notwithstanding	despite/as an exception
Notwithstanding the fact that	although/even if
On own motion	on own initiative
Preceding provision	section
Such	“or”, “a”, “the”
Shall be deemed	is taken/ is treated/ is regarded
Shall mean	means
“Shall be” paid	“must be” or “is to be” paid
“shall be” sufficient	“is” sufficient
“shall be” liable	“is” liable
“shall be” guilty of an offence	“is guilty” of an offence
“shall be” entitled	“is” entitled
Shall have the powers	“may have” or “has” the powers
That is to say	namely
Thereunder	under
thereof	of
thereon	on

therein	in
Where *(condition*	

Avoid explanatory provisions in the text of laws

Explanatory provisions should not be used within the law itself. This is why it is important to have an explanatory memorandum to accompany the law. One such example of an explanatory provision is the use of the phrase, "for the avoidance of doubt". This should be avoided at all times. Good and concise drafting ensures that there is no room for doubt.

13. INDEMNITY PROVISIONS

In many cases an indemnity is given to enforcement agencies and their officers, and in some cases the indemnity is given for the protection of Government generally from liability. This must be considered and inserted in all appropriate cases. In our country, we generally use "Protection of action taken or act done in good faith".

Example:
A police officer or an authorised officer is not liable in any civil or criminal proceedings for anything done in the exercise or the purported exercise of a power under this Part if the thing was done in good faith on reasonable grounds.

14. EXPLANATORY MEMORANDUM

When a law is drafted and submitted to Cabinet and ultimately to Parliament, there is a requirement that it must be accompanied by an explanatory memorandum setting out the contents and objects of every Bill that must be written in non-technical language. This shall apply to principal legislation, amending legislation, repealing legislation and regulations and rules. The purpose of this memorandum is to assist members of parliament and the public to understand the law, especially if it is a technical area of law. It should state in clear and understandable language what the Bill does and why.
The explanatory memorandum must be accurate and must not take the law further than the legislation does. Explanatory memorandums are important also when it comes to the interpretation of the law in court. Although not law itself, it is often relied on to assist the court in ascertaining the purpose of the law.

15. SPELLING AND TERMINOLOGY

It is important when drafting laws that the spelling and use of certain terminology is consistent throughout the legislation and other laws in force in Bangladesh. The drafting style in Bangladesh has also begun moving away from the use of archaic language to using more modern language.

15.1 Spelling

15.1.1 *British Spelling*

When conflicted between the use of American and British spelling, drafters are to regard the British spelling of any word as the preferred spelling in Bangladesh.

15.1.*2 Standardised spelling*

The words "subsection", "subclause", "subregulation", "subparagraph" and "subdivision" are spelt without a hyphen. The "ise" spelling (as opposed to the "ize" spelling) is used in legislation.

15 .1.*3 Capitalising words*

A capital letter is used at the beginning of titles, such as "Commissioner of Police" and "Auditor General". However, for generic terms such as "authorised persons" and "assistant commissioners", capitals are not used.
The words "Bill", "Chapter", "Part", and "Schedule" should always begin with a capital letter. Except when referring to a specific instrument, the words "notice", "rule", "order", "regulation" etc. should be in lower case.

15.2. Use of Synonyms

In order to avoid interpretation issues it is recommended that different words or expressions should not be used to denote the same thing.

15.3 "If"…" then"…constructions

Although it is grammatically correct to use:
A person commits an offence if: (a) …; (b) …; or (c) …, and is liable upon conviction to a fine of TK 50. It is preferred in drafting to put the main clause first as in the following example: A person commits an offence and is liable upon conviction to a fine of TK 50 if the person:----------.

15.4 E-Terminology

The standard spelling that should be used for e-terminology is:
the Internet (as a proper noun) as used to refer to the global network of interconnected computers that is popularly known as the "Internet". It is no longer necessary to preface this with "commonly known as".
"online"- the spelling "online" instead of "on-line"; "email" – the spelling "email" instead of "e-mail" is used. It may also be appropriate to use the expression "electronic mail"; "intranet" – the spelling "intranet" (not capitalised);
"website" – the standard spelling "website" is used as opposed to "web-site".

15.5 References to the Government of Bangladesh

It is appropriate in legislation when referring to the Government of Bangladesh to use the phrase "the Republic".

16. REFERENCES TO ENACTMENTS AND PROVISIONS

16 .1 References to parts of a section

Parts of a section are referred to as follows:

(a) section 5(1) and not subsection 5(1);
(b) section 5(1)(a) and not paragraph 5(1)(a);
(c) section 5(1)(a)(i) and not subparagraph 5(1)(a)(i).

16 .2 References to parts of a subsection

Parts of a subsection are referred to as follows:

(a) subsection (1)(a) and not paragraph (1)(a);
(b) subsection (1)(a)(i) and not subparagraph (1)(a)(i).

16 .3 References to specific provisions

Generally, a provision should be referred to simply by its number. This would of course depend on the context. For example, to refer back to a previously cited provision, it may be appropriate to use "that section", "that subsection", "the section", "the subsection" etc.

Do not use "the preceding section" or "the section next following" or similar expressions.

The following can be used to refer to other provisions depending on the situation:
(a) Use "this section" to refer in a section to the same section; similarly use "this subsection" to refer to the same subsection;
(b) Use "this Part", "this Division" or "this Subdivision" to refer in a Part to the same Part, Division or Subdivision;
(c) To refer to another section (e.g. "section 1") say "section 1"; to refer to a subsection say "section 5(1)";
(d) To refer in one subsection to another subsection of the same section, say "subsection (3)", "subsection (3)(b)" and so.

17. AMENDING ENACTMENTS

17 .1 Amendments must be made directly

All amendments must be made directly and textually rather than indirectly or non-textually. This means that an amending enactment must alter the text of the principal law by expressly adding, repealing or substituting words or provisions.

17 .2 Language of new text

The general rule to be followed in drafting is that the language of an amending enactment must be consistent in style and language to the principal law. In some circumstances though, this might not be so practicable if the principal law does not comply with current drafting practices. Some examples include the use of "shall" as opposed to "must", the use of gender inclusive or gender neutral language, the use of archaic language and the non-use of standardised language. The general rule is that the drafter should adhere to the drafting guidelines in this manual that promotes the use of simple, clear, gender neutral and standardised language.

17 .3 No re-numbering of existing provisions

Existing provisions should not be renumbered when adding new sections or other whole provisions (including Schedules) to an enactment. The same applies when repealing sections or provisions. One exception to this rule is that an existing section without subsections may be renumbered as a subsection if new subsections are being added to the section.

17.4 Reusing numbers of repealed or omitted provisions

A number of a repealed provision, or a provision that has been omitted as spent, can be used for a new provision in a subsequent exercise. This applies to a section, a part of a section and also to Parts, Divisions, Subdivisions and Schedules. However, this is a matter for the drafter to decide.

17 .5 Arrangement of clauses – amending Bills

The clauses of an amending Bill are usually arranged in the following order:
Long title, Enacting words, Short title, Commencement, Amending provisions, Savings and transitional provisions, if any Consequential amendments, if any, Schedules, if any as with a primary Bill, an amending Bill must be accompanied by an explanatory memorandum and the same rules apply to how the memorandum should be written.

17.6 Arrangement of amending provisions – delegated legislation

Enabling section/enacting provision or words
Commencement provision
Amending provisions
Savings and transitional provisions, if any
Consequential amendments, if any
Schedules, if any
Name, title/designation and signature of the enacting authority or person signing on behalf of the enacting authority.

17 .7 Amendments to be in consecutive order

The sections of an amendment are to be in consecutive order with one clause for each section amended in the order in which they appear in the primary legislation. In certain limited cases, one clause may be used to amend two or more sections in the same way.

A clause that amends different words in different parts of a section should be organised so that words are amended in the order in which they appear in the section. This makes the Bill easier for the reader to understand.

17 .8 Amendments to be noted in long title

The long title of a law that is intended to amend another law should be wide enough to encompass the amendments.

17 .9 One subclause, one amendment

If two or more amendments are made to the same section, the amending clause should be divided into subclauses, with one subclause for each individual amendment. However, consecutive repeals within the same section can be effected by the same clause or subclause.

17 .10 Substantive amendments to be in main body

Previous drafting practice in Bangladesh was to use Schedules for amendments but this practice is being slowly phased out with the requirement that amendments be included in the main body. A Schedule may be used only for technical amendments to a large number of provisions to substitute a new term for an existing term and for terminological amendments to replace a title consequent on the change of title or transfer of functions, of a public officer.

17 .11 Multiple consequential amendments

It is permissible to make a range of consequential amendments to more than one law in the text of a new Act. It is not necessary in such cases to prepare individual amending laws for each of the laws that are to be subject to consequential amendments.

The relevant section will usually be given the title of "Consequential amendments to other laws", or alternatively a separate section can be inserted to amend each separate law.

If the drafter is of the view that it would be more appropriate to include consequential amendments to other laws in a Schedule then this should be done.

17.12 Savings and Transitional Provisions

When a new law is proposed to replace an existing law which makes provision for a regulatory system or regime, careful consideration must be given to the need for savings provisions, and provisions which make arrangements for the transition from one law or legal regime to a new one.

The exact nature of the former system, and its component elements and procedures, needs to be determined and appropriate provision must be made for previous regulatory Acts or processes to be saved, where appropriate. In some cases it is preferable to deem existing regulations to be made under the proposed new law. Other provisions may enable a phased implementation of the new processes in the place of the previous arrangements.

17.13 Special Provision in Amending Legislation

Sometimes special provisions are used in the Amending Legislations. But this may create problem when there is a need to amend that provisions. It is better to insert specail provisions in the original legislation by amendment so that those provisions may be changed if necessary by amending the legislation again.

CHAPTER 2

LEGISLATIVE DRAFTING: TECHNIQUES
LEGISLATIVE DRAFTING MANUAL

TECHNIQUES OF LEGISLATIVE DRAFTING

Legislative drafting is the finest piece of composition and it is only possible when you have command over the language whether drafting in Bangla or English. To command over language is the first step to be achieved by a legislative drafter before plunging into the depth of legislative drafting techniques. With this prelude, following are the points which will be of immense help to a legislative drafter in drafting of a Bill and a Bill for amending an existing law:-

(1) A legislative drafter must be able to conversant with the past, present and future. He shall always keep in mind that whatever he is drafting will have effect on the existing legislation in the form of Bills and when his Bill is passed whether it will replace and repeal an existing Act of the past in totality or to the extent of certain provisions. Furthermore, one day his Bill/Act will have to be amended in future for which he will be requiring suitable references for the provisions, Tables, Forms, Schedules, etc. to be amended.

(2) Extent clause may be subject wise or territorial. For instance, it may say that this Act extends to whole of Bangladesh or it may say that this Act applies to all civil servants of the Government, wherever they may be.

(3) If the extent clause is subject wise there may not be any need of application clause because on whom the law is applicable, they have already been indicated as subjects of extent.

(4) Very few instances are available in Bangladesh where in the extent clause it has been written that this Act extends to the whole of Bangladesh (including Chittagong Hill Tracts).

(5) There may be a question whether or not it could be written that this Act extends to whole of Bangladesh including Chittagong Hill Tracts. The answer is yes. If it is not written in that case for application of that law in Chittagong Hill Tracts area, a notification is needed under Chittagong Hill Tracts Regulations, 1900.

(6) In legislative drafting parlance, the headings of sections are called marginal notes so it is appropriate to use the same expression. If section 1 of the Act i.e. commencement clause uses the marginal note "Short title, extent, commencement and application" then the sub-sections of section 1 should follow the same sequence, that is to say, sub-section (1) giving title, sub-section (2) giving extent, sub-section (3) giving commencement and sub-section (4) giving application.

(7) Very often the commencement is at once or immediate but sometimes it states that this Act shall come into force on such date as the Government may specify in this behalf and different dates may be appointed for coming into force of different provisions of this Act. Hence the commencement of Act is contingent upon the notification. Such notification once issued cannot

be withdrawn because Act has come into force and withdrawal of notification would amount to repeal of the law and repeal is the prerogative of Parliament.

(8) In the case of drafting a new law, the number to be given to that law is unknown till the time it is passed by Parliament. Hence the space for number is left and is filled in by the Secretariat of Parliament which last passes the Bill. Their omission to do so can be made good by the Government at the time of obtaining assent of the President. In case no number has been inadvertently allotted at the time of sending to President for assent then after the assent, at the time of its publication in the official Gazette, number must be entered. It is useless to give number when the Bill is being made because too many Bills are introduced in Parliament and one never knows that which Bill will be passed first.

(9) While amending an Act, the number of the Act to be amended is essential to write in the short title.

(10) When an Act say Evidence Act, 1872 is amended through a Bill for the first time in a year, it is sufficient to be called it as Evidence (Amendment) Act, 2021, but if in the same year it is amended again then the second amendment would read as Evidence (Second Amendment) Act, 2021. If both amendments are passed in year 2021 then same nomenclature shall continue but if first amendment is passed in 2019 and second amendment is not passed till the time year 2019 comes then it shall not be called as Second Amendment and it will be named as Evidence (Amendment) Act, 2019 because the first amendment and the second amendment have two different years to make them distinct from each other.

(11) Repetition of the same word is not weak expression in law because change in language means change in intention. Unlike an English composition, where lack of vocabulary and use of same words is a negative point, same is not the case in legislative drafting. The terms “attach, confiscate, impound, freeze, seize, forfeit, etc.” may be synonymously used in English language to show the strength of vocabulary but in legal parlance they would carry different meanings assigned to them by internal and external sources of law.

(12) Remembering dates of enactments including Constitutional enactments, emergency periods, martial law periods is very important. In addition to this, knowing the sunset dates of a few laws having such dates is also important. When say some Presidential Order was issued for a particular law, it is not necessary that it is amended by Presidential Order because it was to be made by Parliament but at that time Constitution was suspended or held in abeyance. Now when Parliament exists and the subject is borne on legislative list of Constitution that Order will have to be amended as an Act of Parliament.

(13) Technique of amending a single law and two or more laws is different. In the former case, each clause of the amending Bill speaks of a distinct amendment of that single law but in the latter case, the title of laws to be amended form parts or chapters of amending Bill and the sections of those laws to be amended are enlisted as the respective clauses of the amending Bill. For instance, Finance Bill of a financial year.

(14) It is a common blunder that while substitution a section, the marginal note of that section is not amended. Sometimes, an amendment to a section also requires amendment in its marginal note.

(15) The provisions of Constitution and Presidential Orders are called articles whereas provisions of Acts and Ordinances are called as sections. However, if any Presidential Order calls its provisions as paragraphs, then while amending that Order through a Bill, the provisions shall be referred to as paragraphs and not articles and also in the substituted provisions, the term paragraph shall be used otherwise when the Amendment Act gets incorporated in the principal Order, it would erroneously contain two nomenclatures, that is, both paragraphs and articles.

(16) Sometimes a principal Bill, later becoming an Act, pairs itself up with an existing Act and almost every provision speaks of the existing Act. In this case, the existing Act shall be defined in definition clause with its full title and then in the body of the Bill, the distinction between the two will be made as “the Act” and “this Act”. This hairline difference shall be carefully carried along throughout the Bill. “the Act” would mean the Act so defined and “this Act” would mean the Act being enacted. For instance, while drafting law on futures trading, one might have to repeatedly refer to the Companies law.

(17) In an amending Bill, again the terms “the Act” and “this Act” may be frequently used but in an absolutely different connotation than is discussed in the preceding paragraph. Many a times, to amend an Act is difficult than to draft a new law. It is probably because it is difficult to run the electricity wires, gas and drainage pipes in a house if they were not initially catered for various reasons when the house was built for the first time or else it is always easier to buy a new sofa set than to replace foam in the existing one. These colloquial examples deliberately give idea to readers that a legislative drafter has to be a keen social observer. While drafting an amending Bill, immense care shall be taken in using the terms 'the Act' and 'this Act'. It is very confusing and painstaking for a beginner to get accustomed to the difference between the two. Amending legislation contains both substantive provisions as well as amending provisions. For substantive provisions which would remain in the amending Act, the expression “this Act” will be used and the expression “the Act” will be used while referring to the Act which is being amended and for this reason the term “Act” is defined while drafting an amending Bill. The provisions which have to be incorporated in the principal Act will use the term “this Act” only when the purpose is to refer to the principal Act and if the purpose is otherwise then the title of the amending Act will be used in place of the term “this Act”.

(18) Referential legislation, as far as possible, shall be avoided. It is not fair to expect from a reader that he takes the pain of finding the copy of Acts referred to in a Bill for reading certain definitions or provisions which could easily have been reproduced in the Bill. There may be exceptions for long provision like definition of “public servant” in Penal Code which is a lengthy one. When legislation is done by reference, one has to keep a record of such and when the referred legislation is amended sometimes in future, the legislation referring to it is also required to be amended which is a cumbersome process.

(19) While amending an Act, the consequences of the amendments on the Act shall be kept in view. Sometimes, a provision which is the soul of the law and prevailing over the whole law is

omitted by a legislative drafter. For instance, if the provision of making scheme (a special nomenclature used for a legislative instrument of delegated legislation) for dockworkers is omitted from a social welfare law, it would render the whole law meaningless no matter there would be hundred other sections left in the law.

(20) Bringing consistency in the provisions of a Bill is necessary. Same goes for uniformity in the use of words, case, etc. A Bill or an Act is a woven fabric and the knit of the law should not be loose from any point so as to make it clumsy or unintelligible.

(21) Overriding courts judgments and ousting court's jurisdiction are two different types of provisions. The judgments of courts may be overridden where necessary by a non obstante provision, which may again come under judicial scrutiny. The jurisdiction of court even if ousted will not have much effect as writs will be entertained or superior judiciary will declare it as unconstitutional. Whatever the case may be, both the overriding and ouster provisions shall be sparingly used to make the law court friendly rather than one raising confrontations.

(22) A legislative drafter shall not leave room for arbitrariness or discretion in his Bill. The discretion should be a structured one. If rules are to be made by the Government for efficient working or enforcement of the provisions of a law then that rule making power may be stipulated with a period of one year or so to state that the rules shall be made within one year of the date of commencement of this Act.

(23) If the descriptive or controlling sentence is followed by a number of clauses and after the last clause it is intended to add a proviso, the basic question of the reader would be whether the proviso stands for all the clauses or only the last clause. In this case, the correct use of punctuation is very important. If the proviso is intended to go only with the last clause then a colon shall be added at the end of the last clause and if the proviso is intended to be read with all the clauses then the last clause shall bear comma at the end.

(24) Brackets shall not be used in a Bill unless extremely inevitable. Instead of brackets, commas shall be used. Brackets disturb the flow of reading a provision and also something written in brackets is deemed to have come out of the context and may be regarded as not substantial. But the brackets may be used in the title of the law or used for roman numbers of the law.

(25) It is a misconception that since law likes commas so commas shall be lavishly used in a law. Commas shall be used wherever necessary and the basic principle shall be kept in mind that the part of a sentence before the first comma should find a fluent connectivity with the part of the sentence after the second comma.

(26) These days legislative drafting demands gender-neutral terms like Chairperson for Chairman, etc. The manuals of legislative drafting on a lighter note very interestingly state that even if it is taken care of, the allegation would be that while using the pronouns “he/she”, 'he' still precedes 'she'. The designations should be gender-neutral and in a provision instead of using the pronoun 'he' for a designation, the gender-neutral designation shall be repeated. For instance, while referring to “Director General” which is a neutral term, one destroys it later by using the

pronoun 'he' or 'him'. “The Director General shall pass an order and in case of violation he shall impose penalty”. This provision if read without “he” makes an equally good sense.

(27) Always avoid saying “in the provision or section below or above” or “in the proceeding or preceding provision or section”. The proper method is referring to the section by its number because in future if the section below or above is omitted or substituted, the purpose will be defeated.

(28) When the term “prescribed” has been defined in the definition clause of a law to mean as prescribed by rules or regulations then it shall be carefully used in the body of the law because wherever it will be used, the implementing agency will have to make rules or regulations though the rules or regulations making may not be possible or required for that purpose. Hence where necessary, the synonyms of “prescribed” as “determined” or “specified” may be used to emancipate oneself from the clutches of making rules or regulations in a case where only an office memorandum or circular or executive order may be sufficient.

(29) If section 10 refers to section 25 for excluding or including certain conditions or for giving exceptions or granting exceptions then section 25 should also refer to section 10 so that the readers reading section 10 or section 25 in isolation have a clear understanding of the co-relation of the two sections.

(30) If an amendment is to be incorporated in an existing law and that amendment is intended to run through the whole law then it shall be made as definition and also be included in the body of law at suitable places. Inclusion in any one section would mean exclusion for the purposes of other sections. For instance, if ample rights are to be given to a transgender under Penal Code then the inclusion of the term “transgender” in the section of acid throwing would wrongly confine transgender rights to that provision.

(31) Sometimes for a small amendment, the whole provision is substituted instead of amending that provision. This thing has its benefits as well as problems. The benefit is that one at once grasps the substituted provision without referring to the text of provision desired to be substituted. The problem is that sometimes it raises hue and cry because the provision is sensitive and people assume that the provision is being substituted for certain ulterior motives. It all depends upon the nature of provision and the sensitivity and utility of the law in which that provision is present but generally the amendments shall be made in long provisions and if provision is small and number of amendments are more than two then it shall be wholly substituted.

(32) All clauses following a preposition should be compatible with that preposition. When there is a list of items or sub-clauses, all those items and sub-clauses shall be compatible with opening/descriptive/main sentence. For instance,-

“A swimmer must wear the swimming costume at the time of,-

(i) entering the pool area;
(ii) waiting for his turn for shower; and
(iii) queuing up for a high jump in the pool.

Here we see that the first word of each clause goes accurately with the preposition "of" at the end of opening sentence.

(33) While amending an Act, certain provisions are to be substituted, added, inserted or omitted, but the words "inserted" and "added" are often confused while giving the command in an amending Bill. The golden rule is that if something is sandwiched in the same genre then it would be inserted and if genre is not same then added. For instance, if one more sub-section is added after the last sub-section then it would be added because after last sub-section, new section starts hence the genre changes.

(34) While amending a law, if a certain provision is amended to add e.g. a sub-clause (iii) and in the next command if this sub-clause (iii) is to be referred, only then use the phrase "added as aforesaid". This phrase is often unnecessarily used even by expert drafters. The purpose of this phrase is to tell the reader that for the instant amendment, he must take into consideration the development that has taken place in the same Bill.

(35) If in a section containing proviso, only the segment governing the proviso is to be substituted then the colon at the end may determine the fate of the proviso. Say if full stop is added at the end instead of colon, it will be an indication that the proviso stands omitted and if colon remains there then it is an indication that the proviso would remain there. In order to weed out the possibility of any controversy arising out of it, the proviso may be re-written or reproduced in the substituted provision if the intention is of retaining the proviso of a section.

(36) Foreign language words are to be written in italics. If the Bill is being drafted in Bangla then the words not of Bangla language used in the Bill will be termed as foreign language words and their font in italics will indicate such. This is done with the purpose of telling the reader that in case of true, ordinary or literal meanings of these words; recourse shall be had to that foreign language in which they are being used.

(37) Non obstante clause should be sparingly used. The clauses starting with 'Notwithstanding' are called non obstante clauses. Instead of repeatedly using this clause in a Bill, the provisions shall be harmonized without its use. Since the Bills are often made in haste which results in excessive use of "Notwithstanding" because its avoidance requires harmonization which is time consuming.

(38) When a provision is struck down by Court, it remains part of the statute but is ineffective hence not enforceable. A legislative drafter must keep this fact in mind while drafting an amending Bill.

(39) Whenever drafting a Bill, always keep in mind the fate of existing employees, existing Chairman, Director-General, Members, etc. and when their qualifications.

(40) Section 24 of the General Clauses Act protects the existing subordinate legislation under the repealed Act if the existing subordinate legislation is not inconsistent with the provisions of the Act re-enacted. It is for this reason that sometimes the Act is of the year 2018 but its rules or regulations are of year 2010.

(41) If a particular section (say 10) is omitted at some point of time and later it has to be restored verbatim, it can be numbered as section 10 again but if not restored verbatim then numbering it as section 10 may have serious legal consequences because it may have been used at other places in the law or its reference may be present in certain other laws. Even if it is restored verbatim, it is always safe not to number it as section 10 because it may mislead the reader as regards the cut-off date of transition. So it is always safe to insert it as section 10A.

(42) Difference between rules and regulations is to be kept in mind while drafting a Bill. The distinction between the two expressions can only be made on case to case basis as per the language used in various Acts and Ordinances containing provisions of making rules and regulations. This viewpoint is supported by the definition of 'rule' contained in the General Clauses Act, 1897,

(43) Whenever in a statute both the 'rules making' and 'regulations making' powers are given then the distinction and similarity between the two is on the following grounds:-

(i) The rule making authority is different from the regulation making authority;
(ii) The rules are made for the external working of the organization and regulations are made for the internal working of the organization and for this reason the rule making authority is superior to the regulation making authority;
(iii) Owing to the distinction made in clauses (i) and (ii) above, always regulations are made on service matters and not rules because service matters of employees pertain to the internal working of the organization.
(iv) Both the rules and regulations are issued under some enabling power conferred under a statute hence both 'Rules' and 'Regulations' are statutory instruments.
(v) Rules will be superior to regulations when the Act is silent on this point or expressly states that regulations shall not be inconsistent with the rules.
(vi) If an Act contains only rule making power then for all purposes of the Act, whether external or internal, rules shall be made.
(vii) If an Act contains only regulation making power then for all purposes of the Act, whether external or internal, regulations shall be made.

(44) It is said that the mission with which a legislative drafter ought to work is to minimize litigation. On lighter note it is also said that the drafters' faults are just the things that keeps the courts in work. Drafting a Bill with the mission to minimize the possibility of any future litigation arising out of the interpretation of any provision will definitely lead to quality draft.

(45) There is concept of “previous publication” in General Clauses Act, 1897. The concept is based on the point that whenever on an important legislative issue public opinion is required then the draft of subordinate legislation will be published in the official gazette as previous publication to elicit public opinion. This provision of previous publication if not present in the law, cannot be invoked. Hence at the time of drafting of law it has to be decided as to whether the provision of previous publication has to be incorporated in the enabling provision of delegated legislation or not. Caring for consequential amendments is very important. If a section is repealed then the Schedule which is governed by that section also requires to be repealed. If that section is amended then Schedule may also require amendments.

(46) The case and structure of the word has to be mentioned verbatim while referring to it as a reference for omission or substitution, etc. For instance, if the words "TAX RETURN" appear in this capital case then they shall not be referred to as "tax returns".

(47) Sometimes a word say "authority" is present in a provision twice but with different cases i.e. "Authority" and "authority". In this case when this word is referred to for omission or substitution then it shall be made as case sensitive and also there is no need of writing, occurring for the first time, or occurring for the second time, etc. The difference in case is enough to draw a distinction.

(48) A legislative drafter, being meticulous, names every word, comma, brackets, and symbols separately while omitting or substituting the contents of a provision. This is ideal but for complex contents and when time is too short, the term
"expression" for the whole content may be used.

(49) Never interfere with "full stop" at the end. If certain words before the full stop are to be substituted then just substitute those words. The full stop will remain at its place to serve its purpose after the words so substituted. In case proviso is to be added thereafter then, of course, the full stop has to be substituted for a colon.

(50) When an Ordinance is laid in the form of a Bill, the carefree substitution of the expression "this Ordinance" or "the**1** Ordinance" with "this Act" or "the Act" may sometimes lead to glaring consequences.

(51) If a section contains a proviso or an explanation and the body of the provision is intended to be amended then unless the proviso or explanation are categorically referred to, they will not be amended.

(52) Whenever any sub-division of a provision is to be referred to, it shall always be referred to in expanded form. Say never write section 27(3)(a), but write clause (a) of sub-section (3) of section 27. This formal way may be exempted in Schedules, Forms, etc.

(53) The symbols and numerical shall be avoided in the body of the law. For instance, instead of '%' write 'percentage', instead of '10' write 'ten', instead of '3rd' write 'third'. This formal way of writing may be exempted in Tables, Schedules, etc.

(54) If a section is to be substituted as a whole then it will be substituted along with its provisos and explanations.

(55) While amending a particular expression or word in a provision, it is important to know the number of times that expression or word is occurring in that provision. In case, all such expressions or words are not intended to be amended then their identification shall be made as "occurring for the first time", or "occurring for the second time", or "occurring at the end", if the provision is too long for the reader to take him time to reach at the end.

(56) If the expression to be amended in a provision is intended to be amended throughout the provision then if it is occurring two times, use the term “occurring twice”; if occurring three times, use the term “occurring thrice”; and if occurring more than three times, use the term “wherever occurring”.

(57) If a certain law to be amended contains Parts, Chapters, sub- Chapters, etc and certain provision of that law is intended to be amended then directly refer to the section purported to be amended because every section is distinct from the other by its number. Reference to Part or Chapter is immaterial.

(58) The positive tone or negative tone of a law depends upon the nature of the provision and the consequences of its violation provided in the law. For instance, “dogs shall be dropped while entering the bus” and “don't bring dogs along in the bus” have different tones.

(59) If any clause is to be added before clause (a) in an Act then re-lettering the existing clause as clause (aa) will give reader the impression that it was inserted sometimes later not knowing that the actual situation is reverse of it. In this case it may be wise to re-letter all the clauses or compromise on the principle of lexical/dictionary order and insert the clause as clause (aa) even if according to dictionary it has to precede the existing clause (a).

(60) In making a reference to an existing Table, use the expression “tabular form” if heading of 'Table' is missing. Same goes for columns of the Table. If columns are missing then they shall be referred to as first, second column, etc. but if they are numbered as (1), (2), (3), then use the expression “in column (1)”, in column (2), etc.

(61) In definition clause, the phrase “unless the context otherwise requires” is not redundant and has great value when the words defined are intended to be used in a different meaning than is expressed in the definition clause. Sometimes instead of “means”, it is written “means and includes”. The word 'includes' broadens the restrictive meaning put forward by the word “means”.

(62) Sequence of terms given in the definition clause should be in the order in which they would appear in the dictionary for the convenience of the reader.

(63) Case of terms used in definition clause is important. The terms should carry the same case in which they appear in the body of the draft Bill.

(64) It doesn't matter whether the naming of clauses is alphabetical or numerical but if more than 26 in number or close to 26 then numbering should be numerical as (i), (ii), (iii), otherwise (a), (b), (c) may be used.

(65) The terms defined should also appear in the body of the draft Bill otherwise they will be standing in isolation and will likely to become substantive provisions and will trigger a debate that substantive provisions cannot be part of definitions.

(66) Acronyms occurring in the definition clause should be written in their full form and then the acronyms in bracket. For instance, "Bangladesh Investment Development Authority (BIDA)" means xyz.

(67) If a word say "transform" has to be defined and in the body of the law, the word "transform" has been used as transformatory, transformation, transformed, transforming, etc. then instead of defining all these separately, in the definition clause write: ["transform" with all its cognate expressions or derivatives means such and such].

(68) Some drafters define the term "section" to mean as "section of this Act". This definition is absolutely unnecessary because it is settled principle of legislative drafting technique that section 20 say would always mean section 20 of the Act in which it is present.

(69) A sub-section of a section referring to another sub-section of the same section shall only refer to the sub-section instead of saying e.g. sub-section (3) of section 20.

(70) While amending an Act, an umbrella amending provision should be avoided. Even if same word is used in different sections then those different sections shall be separately amended rather than amending by an omnibus provision.

(71) In principal legislation, the term "repeal" shall be used. Sometimes a drafter uses the term rescission or rescinded which is appropriate for subordinate or delegated legislation.

(72) The repeal clause has to be carefully drafted. The repeal clause shall categorically state that the xyz Act shall be repealed to the extent of ICT.

(73) Sometimes saving clauses have to state something different from the savings provided in the General Clauses Act. These different intentions shall be provided in the law otherwise the general provisions will apply. In case of inconsistency between an Act and General Clauses Act, the provisions of the Act would prevail.

(74) The Statement of Object and Reasons are drafted at the time of introduction of the Bill, but later at Standing Committee stage in the Parliament some amendments are made in the Bill but the Statement of objects and reasons are not accordingly revised. Although Statement of Objects and Reasons cannot control the provisions of the body of law, in case of inconsistency still they have their significance in understanding the objects of the law.

(75) This is the computer age but some features of the computer shall not be utilized while drafting a Bill. Auto-numbering of clauses shall be deactivated because the computer does not understand the legislative scheme and without giving you a caution, the auto-numbering changes the number of your clauses, sub-clauses, paragraph, sub-paragraph etc.

(76) Similarly it is not good to replace any word or expression throughout the law by a single command of "find and replace" in the computer. This non use of couple of computer features may apply to lengthy and complex laws having so many divisions and sub-divisions of clauses in the body of the law or in the schedule, etc.

(77) It is a common confusion that if some clause is to be inserted after clause (a) whether it should be named as clause (aa) or (ab). In this regard it is stated that it is the prerogative of drafter but he has to take into account the fact whether the provisions of the law are likely to be amended or inserted or added frequently or once in a blue moon. In the laws amended frequently, the insertion of clause (aa) would mean that the next insertion would be clause (aaa) and the next one clause (aaaa).

(78) While amending an Act, it shall be kept in mind that provisions of the Act shall be amended in the sequence in which they appear in the body of the Act. Since the Schedule is at the end so it has to be amended after all the provisions have been amended.

(79) While amending a single Act, the marginal note of amending Bill shall clearly state whether the provision is being amended or substituted or inserted or omitted. It has often been seen that a drafter makes a mistake that even in substitution and insertions, he uses the word "amendment" in the marginal note of an amending Bill.

(80) The schedules are very much integral part of the Act but still it shall be kept in mind that sometimes in a social welfare law or in a law imposing, tax fee, fine, etc. the schedule and form has to be affixed by the relevant authorities at certain conspicuous places for the convenience of public. Hence the use of words "this Act" used repeatedly in the body of the law shall not be used in the schedules and forms. In other words, the schedules and forms should be complete in themselves so that if they have to be segregated and pasted somewhere, the reader is not troubled by looking for the body of the Act.

(81) Since the schedule, form, annexure are integral part of the law, therefore, it shall be looped into the law by cross referencing. Meaning thereby that say if section 3 refers to the contents of the Schedule then in the Schedule under its heading it shall be written "see section 3". Similarly if under the Schedule, "see section 3" is written, the body of section 3 should also refer to the Schedule thus showing that it is the governing section of that Schedule.

(82) It is often asked by drafters to indicate the sequence of division of a Schedule into sub-divisions of annexure, appendix, form, table, etc. It shall be kept in mind that it all depends upon the nature of material to be divided. If material is in the shape of a Form, it shall be called as such. Appendix may be sub-division of an annexure, of a Form or of a Table.

(83) In a Bill, if Schedules are not attached then they do not form part of the Bill. Since they are an integral part of the law so the clause by clause reading should also refer to Schedule.

(84) The purpose of the Schedule, form, annexure, etc. is to remove clutter from the body of the law so that the flow of the law and the reader is not disturbed.

(85) The other reason of making a Schedule is to make it separate from the body of law because its amending authority is not legislature but the Government. If it is not written in the law that Government has the powers to amend the Schedule then these powers will not be assumed by the Government and Schedule will have to be amended by the legislature.

(86) Always define schedule, form, annexure, etc. as schedule, form, annexure "to this Act". In this way, one will not have to repeat the phrase "in this Act" whenever reference is made to schedule, form, annexure, etc. in the body of the Bill.

(87) While amending an Act, attention is normally paid to the provision sought to be amended but the legislative drafter should always care for the consequential amendment not only in that particular law but also if required in other laws. For instance, if Penal Code is being amended then amendments may also be required in the Code of Criminal Procedure. Within the law if a section is substituted or omitted, its cross referencing in other provisions of the law including the schedule shall be catered for.

(88) Index, glossary and footnotes are not part of the law, therefore, while amending a law, provisions for the amendment in the index, glossary and footnotes shall not be made in the Bill. However, index, glossary, footnotes are significant for the reader, therefore, the publisher or a person assigned the duty of updating the law shall definitely amend the index, glossary and footnotes accordingly.

(89) In a law when a certain provision has been amended in the past, the amended or substituted content is written in parenthesis with or without the use of asterisks. Later, when that provision is amended again, the beginner of legislative drafting includes those parentheses in the text of the law and also refers to omit or amend those parentheses.

(90) When amendment is made at Committee stage, parliamentary drafter should have already read the law at least thrice so that he is attentive to every amendment and can respond on the spot. Even in an amending Bill, he shall not limit his scope to the proposed amendments but should have read the principal Act thrice in order to assist the Minister on the floor whether to oppose or support any new amendment or an amendment to a proposed amendment.

PART VIII

DRAFTING SUBORDINATE LEGISLATION

CHAPTER I

HOW DO WE DELEGATE POWERS TO LEGISLATE?

1. Introduction:

Subordinate legislation is extensively used in parliamentary systems to supplement primary legislation. It is employed for a wide range of purposes and may be made by a variety of bodies. For those affected by legislation it may have more important implications than the primary legislation under which it is made.

Subordinate legislation can only be made if primary legislation has delegated the necessary enabling authority by means of enabling provisions, and it may only be made within the limits laid down by the enabling provisions. Accordingly, particular attention must be paid to the drafting of enabling provisions for subordinate legislation. They must be sufficiently wide to permit the delegate to provide subordinate legislation for all the matters that are contemplated as requiring it. At the same time, the delegated powers should be only those needed to enable the legislative scheme to be given full effect. As process for making subordinate instruments does not involve parliamentary debate, consideration may need to be given to ways in which there can be parliamentary oversight without impairing the convenience of this form of law-making.

This Chapter is designed to enable you to develop a systematic approach when preparing enabling provisions and to draft them in line with best practices and the practices of our jurisdiction. Although the Chapter focuses on legislative powers, some of the techniques under discussion are also relevant when you are conferring executive powers.

Objectives

By the end of the Chapter, you should be able to do the following:

- determine the matters for which delegated powers to legislate are needed and should be authorised;
- draft provisions that delegate legislative powers to make subordinate legislation in keeping with the practice in your jurisdiction;
- in particular, draft provisions requiring external consultation about proposed subordinate legislation or providing for parliamentary scrutiny.

This Chapter is organized in terms of the following questions:

General Considerations

When should delegated powers be conferred?
How should matters be divided between primary and subordinate legislation?
When is an instrument subordinate legislation?
How do the courts approach powers to make subordinate legislation?
What are your objectives when drafting enabling provisions?
When are delegated powers needed?
How widely should enabling provisions be drafted?

General Approaches to Drafting Subordinate Legislative Powers

What are the basic steps?
Are there matters that should be expressly authorised?
What other factors can influence the drafting of subordinate legislative powers?
What general legislation may affect the drafting of subordinate legislative powers?

1.2. General Considerations

Primary legislation often has to be supplemented by additional written laws made by a body more closely connected with their implementation than parliamentary bodies. In common law systems:

- Acts frequently delegate legislative powers to executive or other authorities;
- legislation made under these delegated powers is generally called "subordinate legislation" which is the term used throughout these Materials, though it may be referred to by a variety of other terms such as "subordinate legislation", "delegated legislation", "secondary legislation", "statutory instruments" and "legislative instruments";
- the term to be used is often prescribed in Interpretation Acts or other general legislation dealing with the matter;
- subordinate legislation can only be made if enabling legislation expressly confers the power to make it.

1.2.1. When should delegated powers be conferred?

In a modern society, the law has to regulate complex and rapidly changing activities. It must address a wide range of matters. Legislative provisions may be required to regulate the substantive rights, powers and duties of those engaging in the activities. Provisions may also be directed towards those administering or enforcing a regulatory scheme, providing for their powers and duties, or for procedures to be followed.

Some of these provisions are more important and enduring than others and deal with matters with which the parliamentary bodies should engage. However, others may be more detailed or of a technical nature, for example regulatory provisions affecting a specialised industry, or deal with aspects of the legislative scheme that are routine or consequential. These may be more appropriately provided for in subordinate legislation.

If subordinate legislation were not used in these cases, Bills would have to contain far more provisions, many of which are of little relevance to the principal users of the legislation. This could have adverse effects on the legislative process:

- the parliamentary bodies would have to spend more time on the Bills as a result of the increase in their size;
- they would have to concern themselves with provisions which, though legally necessary, do not raise policy issues (which is their prime concern), or are consequential upon the policy;
- changes to those provisions could only be made by (possibly frequent) amending Bills, for which parliamentary time must be found.

Saving parliamentary time is a prime justification for subordinate legislation, so that parliamentary attention can be concentrated on those matters with which a representative body should be concerned:

- policy and principles;
- alterations in the substantive rights and duties of those affected by the legislation;
- taxation and public expenditure;
- the powers of the Executive;
- the creation, or dissolution, and competence of public authorities and administrative bodies.

In addition, Governments favour powers to make subordinate legislation because they can be exercised more quickly through processes that are generally less demanding than for primary legislation, and parliamentary scrutiny may be minimized. For these reasons, proposals to delegate substantial powers have to be looked at critically.

1.2.2. How should matters be divided between primary and subordinate legislation?

The rational for delegating legislative powers suggests that primary legislation should contain the principal substantive provisions of a legislative scheme that gives effect to a new policy and should settle its core features. In particular, it should deal with:

- matters that involve significant questions of policy;
- provisions that will have a significant effect on individual rights and duties;
- significant criminal offences and penalties;
- taxes and significant fees and charges;
- procedural matters that go to the essence of the legislative scheme;
- significant amendments and repeals of existing legislation.

In turn, subordinate legislation should build on the policy and principles established by the enabling Act, and deal with matters of less significance or with the detail of the legislative scheme, filling it out and supplementing the core features of the Act. Only exceptionally should it deal with matters of major substance and principle. Thornton puts it this way (*Legislative Drafting*, 4th ed. at329-330):

… there are undoubtedly factors which in certain circumstances make delegated legislation on matters of substance both legitimate and desirable. These include:

- legislative schemes, such as those involving economic controls, that demand a high degree of flexibility for their successful operation;
- circumstances where considerable flexibility may be needed to modify a legislative scheme to meet local or exceptional circumstances requiring special treatment;
- circumstances where the technical content of laws is such that they are incomprehensible to anyone without knowledge in the field;
- schemes of a kind that several tiers of legislation are necessary to make it work. Matters such as town and country planning, public health, merchant shipping and civil aviation fall into this class;
- the necessity to cope with emergencies of various kinds.

Delegated powers may be useful in the following cases:

- many provisions are needed to put legislative flesh on the structures and procedures set out in the enabling Act and to provide for the detail of the policy behind it (for example, work safety in factories or in the building industry or management of a public health scheme);
- operational features of the statutory scheme are likely to require frequent adjustment, for example because the subject matter is in the process of constant change or when modifications to the scheme are likely to be numerous and detailed, though individually of minor importance (for example, price controls or the regulation of minimum wages of different groups);
- provisions of a technical nature are required that are to be used principally in a specialist area of Government (for example, provisions relating to internal financial procedures) or by a specialist body or group in the community (for example, civil aviation);
- a body of provisions is required for the operation of the Act that is entirely procedural or concerned with administration (for example, under an Act setting up a public corporation or a university);
- ancillary fees, notices or forms, or detailed lists of items to which the Act is to apply must be stipulated from time to time (for example, under an Act imposing import controls on a range of commodities);
- a legislative scheme requires a body of distinct provisions in which a parliamentary body is unlikely to have a substantial interest since they raise no issues of policy and do not directly affect the rights and duties of members of the public (for example, prescribing procedures and standards to be complied with in a regulated industry or how advertising is to be carried out in the vicinity of public roads);
- the legislative scheme requires a series of provisions that apply its general principles to different bodies or circumstances, and the differences between them can best be reflected by providing a separate set of provisions for each (for example, regulating conditions of employment);
- urgent or rapid law-making will be required to adapt the general principles of the Act to fast-changing circumstances that cannot wait on parliamentary action (for example emergency powers to deal with disasters).

1.2.3. When is an instrument subordinate legislation?

In the common law tradition, an instrument can only be subordinate legislation if it is made under enabling powers in primary legislation that authorises a delegate to make legislation. In most instances, the terms of the enabling power, and the type of instrument to be used (for example, "regulations", "rules", "bylaws") make clear that the delegated power is to make an instrument that has legislative effect. But this is not always obvious. The enabling power may authorise action of a very specific nature to be applied to particular cases or circumstances. The power to act may be by "order" or, less formally, by "notice" (terms that could relate to administrative action). Is the authorised action legislative or executive?

Example 1

The following cases could be construed as legislative or executive.

> The Government may, by order published in the official Gazette, declare an area to be a prohibited area for the purposes of this Act to which sections 8 to 12 apply.
>
> The Government may, by notice published in the Gazette, require every public utility service provider to keep any books, records and accounts of the conduct of its business that the Government specifies in the notice.

Fortunately, the distinction is not often of concern. The action, whatever its nature is legally valid if the enabling power has been correctly complied with. But in two circumstances, the distinction can become important.

Example 2

Legislative instruments may be required to be:

> published in a different part of the Gazette from other executive instruments (for example as Legal Notices, rather than as Government Notices) and collated annually in separate collections; or
>
> formally registered and numbered as a distinct series.

Application of the General Clauses Act

> Typically, General Clauses Acts apply only to written laws, and therefore not to executive instruments. Provisions of the Act as to form, operation and interpretation of instruments apply to subordinate legislation only.

1. 2.4. How do the courts approach powers to make subordinate legislation?

The courts treat subordinate legislation as an ancillary device to further the objectives of the primary legislation under which it is made. It is not a mechanism for widening or altering the scope of that legislation. As Bennion (*Statutory Interpretation* at 167) says:

> The delegate is not intended to travel wider than the object of the legislature. The delegate's function is to serve and promote that object, while at all times remaining true to it. That is the rule of primary intention.

The nature and extent of the delegate's powers are construed in the context of the policy and overall legislative scheme, and not merely by reference to the form in which the power is conferred. Accordingly, the courts may treat the exercise of a power as ineffective if the instrument goes beyond what they interpret the enabling Act as authorising (the *ultra vires* principle). Although Supreme Court presumes that subordinate legislation is valid, its validity can be challenged on that basis that the subordinate legislation:

- was made by an unauthorised person or body;
- was made by a procedure that failed to comply with a statutory requirement;
- went beyond the scope of the enabling power;
- was made for an improper purpose (one not authorised by the enabling Act);
- contradicts or is incompatible with the objectives of the enabling Act;
- was made in bad faith or is arbitrary, discriminatory, disproportionate or unreasonable in effect.

1.2.5. What are your objectives when drafting enabling provisions?

In drafting an Act that needs to be supplemented by subordinate legislation, you must:

- include provisions expressly authorising subordinate legislation to be made; and
- draft the enabling provisions so that the delegate has the power to make subordinate legislation on all the matters for which it may be needed.

However, always keep in mind the *ultra vires* principle. Since the Supreme Court can rule that subordinate legislation has no legal effect if it is beyond the authority of the body that made it, you have a particular responsibility to ensure that the enabling provisions gives all the necessary authority to that body. This requires you to indicate expressly and precisely in the enabling Act:

- the person or body to whom the power is given, and any other bodies that are to be formally associated in the making of the subordinate legislation;
- any procedures that are to be followed before, during or after the making;
- the extent of the power (the matters on which subordinate rules can be made, and the purposes for which the power can be used) in terms that enable all contemplated matters to be dealt with.

An enabling provision not only authorises the making of subordinate legislation, it also sets limits on the use of the power, which in principle can be enforced by judicial or parliamentary review.The limits can be drafted so tightly that the delegate's power is strictly confined. The delegate may then be left with little flexibility. Contrariwise, the power can be drawn in such wide-ranging terms that it may be very difficult to establish that subordinate legislation is beyond the authority conferred (*ultra vires*).The way the enabling provision is drafted can have profound consequences on the application of the *ultra vires* doctrine.

Legislative Drafter may sometimes be instructed to draft an enabling provision in such a way as will reduce the possibility of successful legal challenge. Case law has shown that this may be achieved by conferring the power in broad terms that give wide scope for action, or by making the exercise of the power dependent upon the subjective judgment of the delegate. However, many courts have also evolved principles of review that enable them to set limits to powers used to restrict rights and freedoms, particularly those that are fundamental

Example 3

1. The Government may make regulations, as the Government considers appropriate, controlling the open hours of shops and the hours of employment of those employed in shops.

The Government has a wide discretion as to when and for how long shops are to be or may be opened and as to the number of hours, and on which days, employees may or are to be employed.

2. The Government may prescribe, by order, the hours of duty for outsourced employees.

This power is much more limited.

Broad and subjective terms (as in the first example in Example 3) generally broaden the scope of powers. They may be justified in some legislative schemes, but they should not be used as a matter of course. Legislative Drafter's function is to draft provisions in such a way that the delegate can make provisions that are likely to be needed to complete the legislative scheme and to keep it operational. In principle, wide-ranging executive powers are better dealt with directly by the Bill, which is subject to parliamentary review, rather than in subordinate legislation over which political controls are generally less effective.

1.2.6. When are delegated powers needed?

Good instructions may suggest matters for which the administrative Ministry believes that subordinate legislation will or may be required. More often, the need for subordinate legislation emerges as you analyse the instructions and devise a legislative outline. Matters suited to subordinate legislation also become apparent as you draft the provisions of a Bill.

In planning a Bill, we can assume that ancillary matters of little significance can be delegated (rather than, for example included in a Schedule). But authorising subordinate legislation for matters that affect issues of substance or principle should only be done with clear instructions from the Administrative Ministry. Decisions on the use of subordinate legislation to deal with substantive matters are for the Ministry. It is helpful if these can be taken before the actual composition of the Bill starts.

Ancillary matters

The most common cases for which subordinate legislation is used are:

- procedures for putting into effect the methods of administration and enforcement in the enabling Act;
- listing cases to which provisions of the Act do or do not apply;

- specifying forms to be used when statutory steps are taken;
- fixing fees or charges.

However, give thought to whether a matter might better be dealt with in the Bill itself (for example a Schedule). There may be advantages to some users in having all the provisions in the same instrument. A case can be made for this, if-

- the provisions, or fees or charges, are not likely to need alteration in the foreseeable future;
- they are few and not excessively detailed, and will not increase the length of the Bill disproportionately;
- they deal with matters that concern or affect the likely principal users of the Act who may need to consult them regularly;
- no other similar matters will be dealt with by subordinate legislation made under the Act.

Ask yourself whether this legislative scheme calls for flexibility and ease and frequency of alteration, the typical justifications for subordinate legislation.

Substantive matters

Subordinate legislation is sometimes used to provide for substantive matters. It may deal with matters of substance that are only incidental to the scheme in the Act; it may also supplement the substantive provisions in the Act with similar provisions of less significance; and it may deal with substantive matters of genuine importance to the legislative scheme.

Example 4

25.(1)The Government may make rules as to:

(a) the conduct of elections for the return of elected mayors; and
(b)the questioning of such elections and the consequences of irregularities.

(2) The rules:

(a) may make different provisions for different cases; and
(b) may include supplementary, incidental, consequential and transitional provisions and savings.

A power in these terms enables subordinate legislation to be made on a substantive topic of importance, as well as supporting matters having a substantive content.

Incidental matters

Subordinate legislation may be used to adapt features of a legislative scheme to different cases or different circumstances. Powers can be given to the delegate to modify the basic arrangements when flexibility is needed or new cases need to be brought within the scheme at a later date.

Example 5

> The Board may, by notification published in the Gazette, make regulations prescribing the categories of its workers and their dependants to whom allowances may be paid out of its funds under section 12.

This power deals with the payment of a relatively minor aspect of employee compensation (allowances). It allows flexibility in terms of which employees are eligible to receive them.

Supplementary matters

On occasion an Act has to be expanded upon or developed to provide certainty in its application. Broad provisions or terms in the Act may need to be amplified so that its precise area of operation is clear. Enabling powers are useful when the specialist knowledge required for this purpose lies with a body to whom the power to make subordinate legislation can be delegated.

Example 6

A *Medical and Dental Council Act* requires a person applying to be registered as a practitioner to be, among other things, "a fit and proper person to practise medicine". It also provides that a practitioner who commits "professional misconduct" may be disciplined. The appropriate professional body can be given delegated power to make regulations:

> The Council may make regulations as to:
>
> (a) the standards of professional conduct expected of registered practitioners; and
> (b) their fitness to practise medicine.

Subordinate legislation is also used to supplement the main body of provisions in the enabling Act by providing for secondary matters that are likely to occur in a wide variety of forms and in varied circumstances. Inclusion of those in the Act may distract unnecessarily from its central purpose; but not having the provisions would leave a gap in its requirements.

These matters may involve minor issues of policy. Rather than deal with them in the Act, it may be more appropriate to leave the decisions both on such issues and on the contents of the instrument to the body that has the necessary competence and expertise.

Example 7

A *Diseases of Animals Act* has as its purpose the eradication of diseases among farm animals, providing for such matters as the compulsory treatment or slaughter of diseased or suspect animals and the control of animal movement in specified circumstances (including import and export). But the Act would be overloaded if it dealt with all aspects of treatment and action needed. So, a power may be given to the expert body (for example the Director General of Agriculture Department) to make regulations:

> 31.The Director General of Agriculture may make regulations:
>
> a. prescribing modes of cleansing and disinfection;

b. regulating the seizure, detention and disposal of diseased or suspect animals carried or kept in contravention of this Act;
c. regulating the destruction or disposal or treatment of the carcases of animals dying while diseased or suspect;
d. prescribing and regulating the disinfection of the clothes of persons coming into contact with diseased or suspect animals;
e. regulating the payment and recovery of compensation for the destruction of diseased or suspect animals.

Principal provisions

Some subjects are so complicated that it is not possible for a Bill to cover all the primary provisions needed to settle the main policy matters. This may arise because of the range and variety of issues, their technical complexity, specialist requirements calling for expert knowledge and the probability of having to adapt policy to rapidly changing circumstances. In these cases, subordinate legislation of considerable importance is increasingly common in such areas as telecommunications, civil aviation, shipping, public health, regulation of monopoly services and environmental planning.

Example 8

Civil aviation legislation typically confers powers upon the expert body administering the system (for example a Civil Aviation Authority) to make regulations:

The Civil Aviation Authority may make regulations for

(a) securing the safety, efficiency and regularity of air navigation and the safety of aircraft and of persons and property carried on aircraft;
(b) preventing aircraft endangering other persons and property.

1.2.7. How widely should enabling provisions be drafted?

Controversy occurs over powers as wide as those in Example 8 when the subject matter is less specialized. Given the typical lack of parliamentary control over the making of subordinate legislation, powers of this kind derogate from the functions of the parliament to approve the policy and the principles of legislation. This is all the more so if the matters evoke legitimate differences of political judgment as to policy or approach. Parliament are generally prepared to allow a competent delegate to decide the policy on technical questions of air safety.

In jurisdictions with parliamentary bodies having a heavy workload wider use may be sought for powers of this kind, through "skeleton" or "framework" Bills:

- these contain only the bare bones of the law, sometimes no more than the authority to do whatever that the delegate considers appropriate to achieve a purpose stipulated in the Bill;
- the subordinate legislation contains the principles and details of a policy option selected by the delegate only after the Bill is passed.

In such cases, legislative drafters have to draft without knowing what policy will be adopted; the powers have to be drawn in sufficiently wide terms to enable subordinate legislation to be made whatever the policy chosen.

It is not for legislative drafters to decide to draft in this way, or to propose this approach, on their own initiative. Await explicit instructions and be prepared to question whether the approach is justified in the particular case.

Exceptionally this approach may be justified in the following circumstances:

- the matter is of a complex technical nature, calling for the special expertise on which there are unlikely to be political differences of opinion.
- the scheme is wholly regulatory and needs a range of alternative provisions to deal with different circumstances at different times or places.

Example 9

3.The Government may make rules for the control, prohibition and removal of advertisements of any kind that are situated outside the boundaries of the cities and are visible:

(a) from a street or other place to which the public have access; or
(b) from land or buildings not belonging to or in the possession of the owner or occupier of the land or building on or in which the advertisements are exhibited.

The delegate needs legislative powers to complement its governmental responsibility for a particular area (for example a local or municipal government authority) or service (for example a statutory corporation). Typically, these bodies are given sufficient bylaw-making powers to enable them to carry out their functions.

Example 10

121. General functions of Council.- A Council is responsible for promoting the health and welfare of the inhabitants of the local government area and for managing local services.

122. Council bylaws.- (1) A Council may make bylaws that appear to the Council to be necessary or convenient for the peace, good order and government of the local government area or for effectively carrying out its functions under this Act or any other law.
(2) The Council may also make bylaws prescribing forms, fees, matters and things which are contemplated by this Act or are required or permitted by this Act to be prescribed.
(3) Bylaws made by a Council under this Act or another written law have no effect until they are approved by the Government.

1.3. General Approaches to Drafting Subsidiary Legislative Powers

1.3.1. What are the basic steps?

As has been noted elsewhere, legislative drafters develop their drafting approach with experience in light of local practice. Typically, it covers the following three steps:

Step 1

Satisfy yourself that subordinate legislation is needed to provide a complete body of provisions for the subject-matter of the Bill.It may become clear that enabling powers are needed after analysing the instructions or when working out a legislative outline. However, the need may emerge only as you draft the provisions, when some appear to be better suited to subordinate legislation.

Step 2

Work out which matters require subordinate legislation and draw up as complete a list as possible. As you draft individual provisions, keep a separate note of the items that arise from them for which subordinate legislation is required. This becomes a valuable starting point when you draft the enabling powers themselves.

Step 3

When drafting enabling provisions, cover all the matters you have identified. Check back that the powers are wide enough to achieve all that may need to be done by subordinate legislation. As a matter of good practice, the powers should be no wider than is necessary for the requirements of the scheme. Conversely, make sure that they are wide enough for that purpose.

1.3 .2. Are there matters that should be expressly authorised?

When interpreting enabling provisions, courts apply presumptions as to legislative intent as they do when interpreting provisions generally. Parliamentary bodies are presumed not to authorise the making of certain types of provisions in the absence of clear enabling authority. These concern cases in which the use of subordinate legislation is likely to be controversial. If you are instructed to draft provisions to authorize any of the following, you should address the matter in the clearest words:

1. **Repeal or amend the enabling Act or other Acts**

Instruments of this kind enable the Executive to repeal or amend primary legislation that was enacted by the parliament. Some critics regard this practice as an unacceptable interference with a function that is their prerogative. This is implied in the convention of calling these provisions "Henry VIII clauses", referring to the tendency to absolute power associated with this King. From a legal standpoint, such a power may be conferred as long as it is done expressly. In fact, it is widely used for minor or incidental amendments and repeals (for example to items in a Schedule of the enabling Act).

Example 11

7. Government may amend schedules.- The Government may, by notification in the Gazette, amend Schedule 1 or 2 by adding or deleting goods or classes of goods.

The following are examples of specifically authorised powers of this kind that may be helpful:

- to enable emergency action to be taken which is inconsistent with the enabling Act (for example an Act that deals with a hazardous activity);
- to bring Acts of local application into line with the enabling Act that is to have general application;
- to alter the enabling Act that implements an international treaty to reflect subsequent revisions of the treaty;
- to alter specific provisions in a wide range of Acts to give effect to a generalised change in the law introduced by the enabling Act (for example metrication of measurement);
- to adjust an Act that affects a broad class of persons to take account of unforeseen circumstances that affect a part only of that class;
- to provide for transitional or saving matters consequential on the enactment of the enabling Act·

Even here, ask for confirmation of the power to make such subordinate legislation, especially if you are asked to provide the power to make major amendments or repeal. You should also ask whether the making of instruments of this kind subject to a requirement for express approval by resolution of the Legislature before it takes effect.

2. Exempting from the operation of the enabling Act

A power to remove cases specified in an instrument from the operation of the provisions in the enabling Act is tantamount to amending it. Similar criticisms may be made here as for Henry VIII clauses. But here too authorising exemptions can be valuable if the need is likely to arise in the course of administering the legislative scheme.

Example 12

Exemption from section 14

15.The Government may prescribe, by order, classes of persons to whom, by reason of a physical disability, section 14 (which deals with access to aircraft) is not to apply.

3. Retrospective or retroactive effect

It includes authority to make subordinate legislation that is likely to be needed for a particular purpose that affects activities already concluded or started but incomplete. Although a court may imply the power as part of a general delegated power to implement the Act because the legislative scheme as set out in the Act contemplates those cases, deal with the matter expressly if you foresee that the need will arise. Interpretation legislation sometimes confirms this requirement.

Legislation of this kind is not common; it may be required for benefits or allowances that are to be backdated or where the matters to be regulated already exist.

Example 13

50. Power to make regulations.- (1) .....

(2) The regulations made under this section may have effect from a date earlier than the making of the regulations.

4. Creating offences or penalties

Courts may be prepared to imply a power to proscribe behaviour from general words authorising subordinate legislation to "prohibit", "control", regulate", "restrict" certain activities. But these powers do not themselves imply that the proscribed behaviour may be punished through the criminal law. If the client foresees that the delegate may need to deal with behaviour or activities through the use of the criminal law, deal with the matter expressly. Give the power in terms that:

- enable the delegate to specify that breaches of the instrument constitute offences;
- set upper limits to the penalties that may be attached by the delegate.

Example 14

(2) The regulations made under this section may:

(a) provide that contravention of a provision of the regulations constitutes a summary offence; and
(b) prescribe penalties for the offence, which must not exceed a fine of Taka 500 and imprisonment for 3 months.

5. Bind the State

The interpretive presumption against binding the State applies to subordinate legislation as well as to Principal Legislations. However, if the enabling Act binds the State, then it can be assumed that subordinate legislation will too. An express power to make subordinate legislation with this effect is essential if the enabling Act does not bind the State but it is foreseen that regulations may need to extend to some State authority.

6. Impose taxes or make fees or charges

Authority to levy taxes requires the authority of an Act. Express authority is required if this is to be done by subordinate legislation. However, fees and charges are not treated as taxes as long as they are commensurate with the services for which they are demanded. In those cases, a court may be prepared to imply a power to provide for them from a general power to make subordinate legislation to give effect to the provisions of the Act. However, good practice suggests that it is better done expressly if foreseeable.

Authority may be given:

- in the form of a power to impose the tax or fee, so allowing the delegate to decide whether or not to act in this way (but this is very unusual in respect of taxes); or
- alternatively, to fix the level of a tax or fee required or permitted by the enabling Act.

Example 15

12. The Government may make rules prescribing the fees to be paid in respect of matters arising under or provided for by the rules.
14.(1). Subject to subsection (2), the tax is to be charged at the rate of 15 per cent.
(2)The Government may, by order, increase or decrease the rate of tax to not less than 10 per cent or not more than 20 per cent.

7. Further delegating (sub delegating) legislative power

Although they may have recourse to a presumption that a delegate of Parliament cannot delegate further (sub delegate), courts may be prepared to imply from general enabling words a power in the delegate to authorise another person to make the subordinate legislation, especially if that appears to be necessary in order to make the legislative scheme work.

This power is most likely to be called for in regulations creating a body of substantive provisions that itself is likely to require supplementation by an authority more closely connected with the administration than the original delegate.

Example 16

Road Traffic Act:
(2) The rules under this section may authorise a local government council designated by order of the Government to make rules regulating the speed of vehicles on the routes of travel within the area of the council.

In this example, rules are to be made by the Government or, if the Government makes the appropriate sub-delegating order, by the designated councils.

8. Providing for matters of evidence

A court may imply from the general authorising words the power to deal with evidentiary questions in subordinate legislation. But again, if you foresee that the subject matter to be dealt with by that legislation may call for substantive provisions settling particular issues of taking or admitting evidence, say so expressly in granting the power.

Example 17

24.(1)The Government may make rules

(a) requiring any information or document required under this Act to be verified by statutory declaration;
(b) with respect to the proof, in legal proceedings, of a disqualification imposed under this Act.

1.3.3. What other factors can influence the drafting of subordinate legislative powers?

In our jurisdiction, parliamentary committees have been set up to monitor the clauses of Bills that authorise the delegation of legislative power. Typically, the committees keep a check on the balance between the substance in the Bill and what is to be dealt with by subordinate legislation. They comment on clauses that permit unexpected uses of delegated powers. Their reports become a source that guides a legislative Drafter as to powers that may attract criticism, although specific guidelines are not usually issued. As a result, a policy may emerge as to acceptable practice on, for example Henry VIII clauses or sub-delegation.

1.3.4. What general legislation may affect the drafting of subordinate legislative powers?

General provisions of law concerning subordinate legislation, and the way it is to be made, are found in many jurisdictions. Almost certainly you will find some in the interpretation legislation of your jurisdiction. But in some jurisdictions there is legislation concerned specifically with this type of legislation. Such legislation typically contains provisions that affect the following:

- the terms to be used for describing particular types of instrument;
- the procedures for their making and coming into effect;
- their relationship with the enabling Act, in particular the effects on the one in construing the other;
- the interpretation of enabling provisions, including presumptions as to what is to be implied;
- the effects of repealing them;
- the registration, numbering and publication of subordinate legislation;
- tabling subordinate legislation in a parliamentary body and requirements for approval or disallowance.

APPINDIX

Checklist for Drafting Delegated Legislation

1. What type of instrument?

   Regulations
   Rules
   Bye-laws
   Order
   Proclamation
   Notice
   Standing Orders

2. Who is to be the delegate?

   Minister - which?
   local government authority?
   statutory authority - which?
   relevant professional body?

3. Is any person or body to be linked with the making? If so, how?

   consent/concurrence - by another Ministry?
   approval/confirmation -by a Authority?

4. What powers are to be delegated?

   general powers
   for particular purposes/subjects
   on a specific matter
   combination of these powers

5. Are the powers adequate to cover all intended matters?

6. What procedures are required to make the instrument?

   signatures
   bringing into force
   tabling in Legislature in draft

7. Should external interests be involved in making the instrument?

   consultation with specific/representative bodies
   consultation with the public

8. What procedures are required after making?

   publication
   numbering/registration
   tabling in the Legislature; for information/ approval/disallowance.

CHAPTER 2

HOW DO WE DRAFT SUBORDINATE LEGISLATION?

2.1 Introduction:

In our jurisdiction, the legislative drafter who drafts the enabling legislation also drafts the Subordinate legislation. This can bring efficiencies to the drafting process because the legislative drafter already has an understanding of the legislative context. However, the preparation of this type of legislation is undertaken by the officers of the executive authority on which the legislative power is conferred. Even when LPAD deals with both primary and subordinate legislation, Subordinate legislation is often not drafted by the same legislative drafter who drafted the enabling legislation. Those who draft the Subordinate legislation come to this task with a fresh perspective. This calls for a distinct approach.

Subordinate legislation has its own forms and has to comply with distinctive conventions, which vary a little from one jurisdiction to another. You must be able to prepare instruments according to the local style in your jurisdiction.

Objectives
By the end of this Chapter, you should be able to do the followings:

- to determine what matters may need to be dealt with in a simple Subordinate instrument;
- to prepare and draft the main types of Subordinate legislation in keeping consistence with the practice and style in our jurisdiction.

This Chapter is organized in terms of the following questions:

General Considerations

- How does drafting Subordinate legislation differ from drafting Bills?

Drafting Approach

- How should we approach the drafting of a Subordinate legislation?
- How do we check to prevent an unauthorised Subordinate legislation?

Drafting details

- What forms can Subordinate legislation take?
- What are the characteristic features of Subordinate instruments?
- What type of instrument is required?
- What headings are required?
- What authorising words should be used?
- How should the title be drafted?
- When should provision be made for commencement?
- When should definitions be included?
- What special factors should be borne in mind in drafting substantive provisions?

- Should section notes be provided?
- Are there special features for amending, revoking or re-enacting provisions?
- What signifying words are needed?
- How should the making of the instrument be dated?
- Should an Explanatory Note be added?

Drafting Executive Instruments

- What should we bear in mind when drafting executive instruments?

2.2 General Considerations

Drafting subordinate legislation is sometimes a simpler exercise than drafting primary legislation. Many of the instruments are short and straight-forward in their objectives and contents and can be modelled on earlier precedents. However, it can also be a more challenging exercise because it involves additional attention to whether the Subordinate legislation is authorized by its enabling legislation.

2.2.1 How does drafting Subordinate legislation differ from drafting Bills?

In most respects, preparing Subordinate legislation does not differ very much from Bills. The tasks that we may have to undertake over a range of instruments are very similar: providing preliminary and final provisions, substantive rules, penal provisions, amending and repeal provision. The approaches we have developed for Bills are likely to be much the same in these cases. But there are two distinctive legal constraints applying to Subordinate legislation that can have an effect on the way we go about drafting them. These are:

- it must be authorised by the enabling legislation;
- it must be drafted to be fully consistent with the enabling legislation.

These constraints deserve closer examination.

Authorised by enabling legislation

Provisions in instruments that are outside the scope of the delegated powers to legislate are invalid. Although the court will sometimes sever invalid provisions to enable the remainder to continue in force, this is not always possible, particularly when the valid and invalid provisions are closely intertwined. Removal of the invalid provisions can alter the substantive effect of the instrument, for example by leaving a gap in the scheme or by changing its operation or application in a material way. If that is likely to occur, the courts treat the whole instrument as void.

Do not rely on the courts to rescue defective Subordinate legislation by severance or interpretation. It should be no concern of yours as to whether a legal challenge will in fact be brought. It is your responsibility to ensure that the Subordinate legislation is authorized by the delegated powers. Make sure that it:

is made by the correct authority (the body to which the power to legislate was delegated);

is made in accordance with any procedural requirements that may apply before, during or after its making;
covers only those matters authorised by the enabling legislation and is within the limits prescribed by that Act;
deals with those matters in a way that does not contradict the policy, principles or provisions of the enabling legislation.

Consistency with enabling legislation

Not only must the provisions of a Subordinate legislation be consistent with the policy, principles and substantive requirements of the enabling legislation; as a matter of sound drafting, they must also be consistent with the structure, concepts and language used in that legislation.

In a large part, your choice of terms for a Subordinate legislation must be dictated by this factor. Although it is subordinate to the enabling legislation; it is nevertheless a part of the full statutory scheme, the key features of which are found in the enabling legislation.

2.3. Drafting Approach

2.3.1 How should we approach the drafting of a Subordinate legislation?

As with Bills, how we undertake the task of preparation and drafting is the way that we find most comfortable and effective. With experience, we all develop our own preferred approach. But the constraints we have just considered suggest a number of steps that at some stage should be part of your approach.

Step 1:Understand the enabling legislation

Make yourself thoroughly conversant with the enabling legislation and with any associated legislation (including any Subordinate legislation already made under it or any statutes linked to it referentially).Read the legislation carefully:

- to understand the policy objectives and the legislative scheme;
- to make yourself familiar with the structure of the legislation and the terminology it uses (paying particular attention to any terms that are defined);
- to discover how and to what extent the Subordinate legislation is intended to supplement the provisions of the enabling legislation.

Step 2: Analyse the delegated power

Pay particular attention to the enabling provisions. But do not read them in isolation; they are part of the legislative scheme and so must be construed in the context of the enabling legislation as a whole. This is especially the case if the powers are expressed as given for "carrying out the purposes of this Act " or for similar general purposes or are to be used to deal with specified matters that the Act states are to be "prescribed". Pay particular attention to:

- the type of instrument that is to be made;
- the person or body by whom it is to be made;
- the subject matter covered by the power to legislate and any stated purposes for which it may be used;
- any procedures that must be followed in making the instrument or after it is made.

Step 3:Analyse the instructions

As with Bills, master the instructions and clarify or research specific matters that require further information. But throughout keep in mind that you are working within the framework of the law set by the enabling legislation. Typically, the instrument is needed to elaborate upon this legislation, especially by providing detailed provisions that fill in the scheme. Your analysis should be aimed at identifying those aspects that must be developed in this way in order to secure the objectives set out in the instructions.

You may be given instructions merely to provide subsidiary provisions that seem to be needed to permit the enabling legislation to operate as originally intended. This often happens with the first subsidiary instrument made after its enactment. Well-drafted delegated powers may indicate specifically what matters have to be provided for. Even so, work through the enabling legislation systematically asking whether particular features need to be supplemented (and whether there is a power to do so). Make a list of all the matters with a note of the sections of the enabling legislation to which they relate.

On occasions when new substantive matters are required, your instructions will (or should) be more specific. Here you are in much the same situation as with proposals for a Bill, since you are asked to give effect to policy in a particular way determined by the concerned authority. In these cases, consult as necessary with the instructing officer from the administrative Ministry to confirm your understanding of what is required.

As with a Bill, you are likely to finish your analysis with a detailed list of items to be dealt with in the instrument.

Step.4: Check that the subordinate legislation is authorised

Carry out a series of checks on the matters you are asked to cover and your list of items to ensure that there is power in the Act to deal with them as instructed. This is the corollary of the exercise that the drafter of the Bill undertook in formulating the delegated powers .

2.3.2. How do we check to prevent unauthorised subordinate legislation?
These are the kinds of questions to ask:

Authority to deal with the matter by subordinate legislation

Is there power in the enabling legislation to deal with all the matters contemplated?
If not, are there powers in any other Act to deal with the matters?
Are the powers under which the subordinate legislation is to be made still in force?

Is the client in fact the authority authorised to "make" the instrument under the power that has to be relied upon?

If not, has the proper authority formally consented to the preparation of the instrument?

If a purpose of the instrument is to repeal or amend earlier subordinate legislation, is there power to do so, for example in the Interpretation Act?

Timing

- Is the enabling legislation, and in particular the delegated legislative power, in force?
- If not, is there power to "make" the instrument in anticipation of the Act or the power coming into force, or are you confined to preparing the instrument in draft only?
- If the subordinate legislation cannot be made before the power comes into force, what is the anticipated time-frame for bringing it into force, and is it to be brought into force at the same time as the legislation containing the power or at a later date?
- Because of factors such as these, is it necessary to include in the instrument a provision setting a specific date for it to come into force?
- Must any conditions prescribed in the enabling legislation be met before the instrument can be made? If so, are you satisfied, from your instructions, that these conditions are met?
- Can the delegated power be exercised only once or can it be used whenever needed?

Enabling legislation

- Are the substantive rules requested in the instructions fully consistent with the underlying policy of the enabling legislation as well as falling within the express terms of the delegated power?
- Is each item needed to fulfil the drafting instructions within the express terms of the delegated power?

Remind yourself of the consequences that flow from the following different types of delegated powers (discussed in Chapter 1 of this Part):

a general power to legislate;
a power to legislate for a particular purpose or subject only;

a power to legislate on a specific matter.

- If the matter requires an offence or penalty, is this covered by express authority or does the enabling provision use terms (for example, "control"; "regulate") that imply that power?
- If not, is there power to do what is required under other legislation (for example, the Interpretation Act)?
- If the matter requires a compulsory financial charge to be provided (especially if it can be construed as a tax), does the enabling legislation or other legislation authorise this? (No tax can be imposed unless there is the clearest authority in the enabling legislation).
- If the instructions require the amendment of substantive provisions in the enabling legislation, do the delegated powers extend to those matters?

- If the instructions require retrospective or retroactive changes in the law, is there clear authority in the enabling legislation to use subordinate legislation in this way? (If provisions of the Act make such changes, subordinate legislation in support of those provisions also do so.)
- If the instructions require the imposition of binding obligations on the State or Government, does the Act authorise this expressly or by necessary implication?
- If the instructions require sub-delegation of the legislative power to another authority, is there express or implied authority in the enabling legislation?

Sub-delegation of a legislative power may be involved if an instrument authorises another body to specify a set of standards that are to be enforceable under the subordinate legislation. It may also arise when the subordinate legislation incorporates by reference provisions contained in non-statutory documents as made from time to time.

The decision to authorise the sub-delegation of legislative powers rests with the body that authorized the making of the subordinate legislation. The clearest words are needed in the enabling legislation if this is to be authorised.

If any item is not expressly covered by any of the enabling powers, can it be dealt with as "fairly incidental" to one of the powers?

What needs to be dealt with

- Are any of the items in the instructions already dealt with by other legislation, including the enabling legislation or subordinate legislation made under it?
- Is there any item that need not be provided for by legal provisions at all (for example, because they could be dealt with by administrative directions or other procedures internal to Government)?

Procedural steps for making subordinate legislation

- Does the enabling legislation require another body, in addition to the delegate, to be concerned in the making of the instrument (for example, by giving approval, consent or confirmation)?
- If so, what steps must be taken, and by whom, and what has to be done to ensure that the necessary action occurs at the right time?
- Does the enabling legislation prescribe any procedures to be followed during the process of making (for example, consultation or publication or tabling in the Legislature in draft)?
- If so, at what stage are these procedures to be followed (for example, in respect of the proposals or of the draft instrument)?
- If the procedures relate to the proposals, have they been duly completed (for example, has a required consultation taken place) and have the proposals been reconsidered by the client in the light of the information obtained?
- If the procedures relate to the draft instrument, has the client decided when they are to be instituted and how they are to be conducted?
- If no procedures are required under the enabling legislation but the instrument is likely to have a considerable impact on a class of people, has the client considered whether consultation with representatives of the class might be beneficial?

Procedural steps after making subordinate legislation

- Does the enabling legislation contain express requirements as to printing or publication or are the standard procedures (for example, for Gazetting) to be followed?
- Are you responsible for assigning the number (or other classification reference) to the instrument, or is this done routinely by the LPAD?
- Must the subordinate legislation be tabled in a parliamentary assembly? If so, within what period after it is made?
- Is the subordinate legislation subject to affirmative or negative parliamentary resolution? if so, within what period after it is tabled?

whether tabling of instruments is routinely required;
who is responsible for transmitting the subordinate legislation for tabling.

A Legislative drafter must be prepared to bring to the client's attention any procedural requirements that are prescribed by the enabling legislation for the making of instruments. Although it is not strictly your function to monitor compliance, draw attention to them, especially if they appear to have been overlooked. It is good practice to find out whether the required action has been taken or will be taken at the relevant time.

2.4. Drafting Details

Read a subordinate legislation before looking at the features described in this Chapter. The numbers on the example refer to the items discussed below:

There are variations, some of them considerable, in the formats used in. To an extent the format is influenced by those used locally for Acts, but there are usually distinctive features with which you should make yourself familiar.

Look at a few (short) subordinate instruments, preferably containing regulations or rules, recently made in your jurisdiction.

Compare their standard features with those in the subordinate legislation described in this Chapter.

Make a short note of any distinctive differences you notice.

2.4.1. What are the characteristic features of subordinate instruments?
The task of actually composing the text of legislative instruments is very much like that for a Bill. Similar considerations apply with respect to drafting for them penal provisions, amending and revoking provisions, savings and transitional provisions.
Remember to use the same terms in the subordinate legislation to express the same ideas found in the enabling legislation (and to use different terms from the Act if expressing a different idea).
Treat the subordinate legislation as an extension of the enabling Act and as containing provisions that could well have been part of the original Bill.

The major differences from primary legislation lie in the treatment of specific technical features. Look at the following features (the letters in the text refer to the feature as illustrated in the model instrument):

1. type of instrument
2. headings
3. authorising words
4. title
5. commencement
6. definitions
7. substantive provisions
8. section notes
9. amendments, revocation and re-enactment
10. signifying words
11. dating
12. explanatory notes.

But in examining these features you should pay full regard to the style used in our jurisdiction.

1. What type of instrument is required?

The enabling section should indicate the type of instrument you are to prepare (whether it is to be an order, regulation or rule, etc.). The type of instrument may affect the draft in the following ways:

- the type has to be referred to in the title and any heading that cites the title;
- in the case of orders, regulations, rules, notification and bylaws, a provision in an Act that is called a "section" is often referred to as a " article " "regulation", "rule", " paragraph "or "bylaw", as the case requires.

As far as the style of our jurisdiction permits, set out to achieve consistency in these features, at least between instruments of the same kind.

The following grid suggests terms typically used for different types of instrument:

Regulations	Order	Rules	Notification
1	2	3	4
regulation	article	rule	paragraph
sub regulation	sub article	sub rule	subparagraph
paragraph	paragraph	paragraph	
subparagraph	subparagraph	subparagraph	
Bylaws		Ordinances/Orders (under university laws)	
5	6	7	8
bylaw		section	
sub-bylaw		subsection	
paragraph		paragraph	
subparagraph		subparagraph	

2.4.2.What headings are required?

The following formal features should be included:

Instrument number

A classification number is typically assigned to the instrument when printed in the *Gazette*(usually by the Government Printer).In this case, it would be abbreviated in future citations to, for example, SRO No 200/1992.

Heading identifying the enabling legislation

The main heading to the instrument indicates the principal enabling legislation under which the instrument is made.

Heading giving the title or citation

A heading is also given to the instrument referring to its title or citation (*not* "short title", as there is no "long" title).

An instrument is easier to find if it sets out prominently:

the number assigned to it, that it will carry when printed in the annual collection and by which it may be cited;
the short title and reference of the enabling legislation under which it is made:
the title of the instrument by which it may be cited.

2.4.3.What authorising words should be used?

Authorising words are typically included. These are the equivalent of enacting words in a Bill. They refer to the delegate authorised to make the instrument and state that the instrument is made in exercise of the stated statutory powers.

The formula is rarely set by law; it is one conventionally followed in our jurisdiction. Some have remained unchanged for decades, still using the verbose language of the past, which serves no legal purpose.

The function of authorising words is to indicate:

the maker of the instrument:
the statutory source of the legislative power that is being exercised;
that a mandatory procedure (where one is prescribed) has been complied with.

These matters may be important if an issue of authority arises. They can be addressed by an uncomplicated formula.

Wide-ranging subordinate legislation may have to be made under enabling powers found in more than one Act. Identify all these, as far as possible. To prevent courts from construing the accidental omission of a source of authority as a deliberate intention not to rely on it, some jurisdictions make a practice of adding safeguarding words. Protection may also be given by an Interpretation.

2.4.4. How should the title be drafted?

A title or citation is typically included**.** A regulation or sub-regulation (the equivalent of a subsection) designates the title or citation to the instrument.

Typically a title or citation is needed for all instruments except proclamations and notices. It facilitates citation and retrieval. (A "*short*" title is not appropriate in this context; there is no long title.)Its position in the instrument (as the first or last provision) generally follows the practice for Acts in this respect.

Similar considerations apply to selecting a good title as for selecting short titles for Bills. But it is good practice to include the first words of the short title of the enabling legislation as the first words of the title of the subordinate legislation. This offers benefits:

- the title clearly shows the link with the enabling legislation;
- in an alphabetic index of legislation, the enabling legislation and all the subordinate legislation made under it will be gathered together, since they share the same beginning words.

If a series of subordinate legislative instruments is likely to be made under the same enabling legislation, the title can also include after the first words the gist of the subject matter of the instrument (in a parenthesis).This gives a distinctive character to each, without losing the common element.

But approach the matter differently if

- the title is becoming too long;
- the short title of the Act already includes words in brackets; or
- the subject matter is important enough to deserve special recognition.

2.4.5.When should provision be made for commencement?

The subsidiary instrument may require a commencement provision**.**

Provisions fixing the date of commencement may be necessary if a special date is called for or if it is not local practice to tie commencement in with publication in the *Gazette*.

Users find it helpful if the date of commencement is set out in the instrument itself. But if the instrument is to come into force on the date that it is published in the *Gazette*, that date cannot be inserted in the instrument when you are drafting it. There are two possible solutions:

- arrange for the date to be inserted in the instrument editorially by the Government Printer when it is received for publication; or
- include a provision in the instrument itself setting a precise date for its commencement (which can be the expected date of publication or one shortly after).

In principle, the date of commencement can be postponed to a date to be fixed by subsequent order, as in the case of Bills. But keep postponement for instruments that make substantial legal changes and that require public or administrative preparations of uncertain duration to be put in hand first.

2.4. 6.When should definitions be included?

Definitions may be needed to perform the same functions as in a Bill. Use the same techniques to find out when they are needed and how they should be expressed. But bear in mind several special considerations:

definitions of terms provided by the enabling legislation are treated as applying to those terms when used in the subsidiary instruments made under it, unless you show a contrary intention in the subordinate legislation. This is typically confirmed by the Interpretation Act.

the authority to make subsidiary instruments does not import the same latitude to create definitions as you have when drafting primary legislation. You must draft them consistently with the language and the context of the enabling legislation.

Strictly, a definition provided by the enabling Act need not be repeated in the instrument. There are dangers in doing so. If the definition in the Act is altered by amendment, the need to make a similar alteration to the definition may be overlooked, especially if the drafting of subordinate legislation is not the responsibility of legislative drafter preparing the amendment to the Act.

Yet many users of instruments are unaware that the definitions in the enabling legislation apply or in any case they may have difficulty in consulting that legislation quickly. If the instrument contains a body of provisions that depends upon important definitions in the enabling legislation and is likely to be used independently of the Act (for example, a set of procedural rules):

consider repeating the definitions in the instrument; or
draw attention in the instrument to the existence of the definitions in the enabling legislation.

2.4.7.What special factors should be borne in mind in drafting substantive provisions?

Substantive provisions are placed after those dealing with preliminary matters (for example, interpretation; application).In most respects drafting of them is little different from drafting substantive provisions for a Bill. However, take particular care:

not to duplicate provisions in the enabling legislation or to include matters that are already adequately dealt with there;

not to contradict the provisions of the enabling legislation (which in any case takes legal precedence), especially those allocating functions to particular authorities;

to use the same terminology as the enabling legislation when you are dealing with the same matters.

Example

The enabling legislation stipulates that:

> **24.** Contravention of a provision of regulations made under this Act constitutes an offence under this Act and is punishable by the penalty prescribed in the regulations; but the penalty may not exceed a fine of Taka 1000 or imprisonment for 3 months.

Regulations must not then state that contraventions of any of its provisions are offences, as doubts arise as to their legality, as well as to whether the offence should be charged under the Act or the regulations. The regulations must do no more than describe the requirements that must be complied with and state the penalties that attach to violations up to the specified maximum.

The enabling legislation stipulates:

> **24.** Contravention of a provision of regulations made under this Act constitutes an offence under this Act and is punishable by a fine of Taka1000 or imprisonment for 3 months.

Regulations may only describe the requirements that must be complied with; they must not stipulate that violations are offences or prescribe any penalty.

When cross-referencing provisions of the enabling legislation, makes sure to identify them as being provisions of *the Act*. This is made easier by providing a definition in the instrument of "the Act" (as meaning the enabling legislation) and using that short phrase where needed. Some Interpretation Acts provide for the general application of this practice.

2.4.8. Should section or marginal notes be provided?

Notes attached to individual regulations or rules can be just as useful as those attached to sections in Acts, especially in instruments that are long or complex. In drafting subordinate legislation, consider whether the interests of its likely users would be served by adding these. The same principles apply as for Bills.

2.4.9.Are there special features for amending, repealing or re-enacting provisions?

The approach on these matters for subordinate legislation is largely the same as for Bills. Similar rules apply as to the effects of repeals and the same requirement to consider whether saving and transitional provisions are needed in consequence of the change .

As we have seen earlier, the power to make subordinate legislation is typically treated as including the powers to amend or revoke earlier instruments. But these powers are to be exercised "in the same manner and subject to the same conditions" as apply to the making. So check whether:

any mandatory procedures must be followed (for example, consultation);
any requirements as to the circumstances in which the power may be exercised are fulfilled.

Differences may be found in the terms used for repealing subordinate legislation. Sometimes:

"revoke" is used for repealing regulations and rules:
"cancel" is used for repealing notification, bylaws and orders.

2.4.10.What authenticating words are needed?

Subsidiary instruments typically include the signature and title of the authorised delegate**.** Without the signature of the authorised delegate (who is formally identified by office title the instrument is not duly made. The signature may be accompanied by signifying words (for

example, in case of the Government and Board "By order of the President" and " On behalf of the Board).

An instrument is formally made when it is signed. A place must be made in the instrument for that signature and, as appropriate, signifying words added. If other action is required to make the instrument valid, such as some consent, approval, or confirmation, signatures are required to indicate that this has been duly given.

If the required signature is that of a person formally acting for the authorised delegate, for example during an absence, add "acting" before the office title. If the instrument is to be signed by any officer of a Ministry, include the office of the signatory and the fact of acting for the authorised delegate in signing.

2.4.11.How should an instrument be dated?

The instrument must bear the date of signature. This is the date on which the instrument is treated as having been made (when it becomes an instrument with legislative effect).

A date must be added to indicate when the making takes place. Indicate a place with the signifying words for the date to be added. If other actions are linked to the making (for example, approval or consent of another body),those too must be dated. Indicate places for those dates too. A simple formula is enough.

2.5. Drafting Executive Instruments

Legislative drafter may be instructed to draft instruments of an executive nature to be made under the authority of an Act, especially in the early stages of their career. These can take a wide variety of forms:

- orders giving commands or instructions to particular persons or classes of persons, often in connection with the performance of their statutory functions;
- orders giving authority to a particular person or classes of persons to act in a particular way (for example, as specified in a statute) or to perform particular functions or in particular offices (for example, as an acting holder or by delegation);
- notices announcing that action has been or is to be taken, usually under some statutory power;
- directions indicating how particular functions (again often derived from statute) are to be performed.

2.5.1 What should we bear in mind when drafting executive instruments?

Drafting these instruments should follow the lines suggested for subordinate legislation. Here too, bear in mind the question of authority. But, typically, fewer technical features have to be observed.

Bear in mind that the provisions of the interpretation legislation relating to written laws do not necessarily apply to executive instruments. On occasions, you may need to include in them matters that are provided for by the Interpretation Act for subordinate legislation. However, these

Acts typically contain provisions relating to statutory powers generally, and so may be relevant to the exercise of powers authorising the making of an executive instrument.

Many of the technical features of subordinate legislation are not included in executive instruments. Typical exclusions are a title, authorising words, definitions, formal sectioning and section or marginal notes and explanatory notes.

Executive instruments are typically written in the form of prescriptive statements, each in a separate paragraph. In much the same form as used in subordinate legislation, they should:

indicate the statutory source under which they are made:
be of the type authorised:
include the date when they come into force;
start with appropriate headings that identify the subject matter;
finish with signifying words and the date the instrument is made.

Many executive instruments are of a routine nature, dealing with frequently repeating matters. .

APPINDIX

Checklist for Drafting Subordinate Legislation

In drafting a subordinate legislation, concerned officer should keep in mind the following guidelines:

1. Statutory Authority

- ✓ Make sure the authorizing statute for the subordinate legislation provides the authority to regulate the activity the agency proposes to regulate.
- ✓ Make sure there is specific statutory authority if the subordinate legislation
  - Imposes fines, penalties, fees, suspension or revocation of a license,
  - Affects a party's right to appeal to the court, or
  - Makes public documents confidential or otherwise exempt from the Freedom of Information Act.
- ✓ Draft the subordinate legislation to implement the provision as intended by the statute.
- ✓ Address each area the statute requires the subordinate legislation to specify.
- ✓ Do not exceed the scope of authority delegated in the statute.

2. Current Subordinate legislations, Statement of Purpose, Effective Dates

- ✓ Before amending a subordinate legislation, check that you are using the most current subordinate legislation in effect.
- ✓ Make sure the statement of purpose follows the proposed provision of the subordinate legislation, and that it states the purpose of the subordinate legislation, including the problems, issues or

circumstances that the subordinate legislation proposes to address, a summary of the main provisions of the subordinate legislation, and the legal effects of the subordinate legislation.

- ✓ Check that effective dates, if included in a subordinate legislation, are not retroactive.

3. Drafting

- ✓ Use clear, unambiguous language.
- ✓ Use active voice.
- ✓ Properly define technical terms and words used in a sense other than their ordinary meaning.
- ✓ Check that defined terms appear in the subordinate legislation.
- ✓ Use terms consistently throughout the subordinate legislation.
- ✓ Use introductory language that corresponds to the language in the section or the specific subunit of the subordinate legislation.
- ✓ Do not repeat or paraphrase language in the authorizing statute.

4. Proofreading

Prior to submitting the subordinate legislation to the concerned for approval, **carefully proofread** the subordinate legislation for:

- ✓ Technical errors;
- ✓ Grammar;
- ✓ Proper spelling;
- ✓ Accurate internal references; and
- ✓ In the case of a repeal, check throughout the concerned and other relevant subordinate legislations for any references or citations to that number or word, and amend those references or citations accordingly.

PART IX

LEGISLATIVE INTERPRETATION

1. Legislative Interpretation

"By interpretation or construction is meant the process by which the courts seek to ascertain the meaning of the legislation through the medium of authoritative forms in which it is expressed."[112]

According to Cooley-

"Interpretation differs from construction in that the former is the art of finding out the true sense of any forms of words; that is, the sense which their author intended to covey; and of enabling others of derive from them the same idea which the author intended to convey. Construction, on the other hand, is the drawing of conclusions, respecting subjects that beyond the direct expression of the text from elements known from and given in the text; conclusions which are in the spirit though not within the letter of the law."[113]

Article 8 of the Constitution of the People's Republic of Bangladesh provides a binding provision of interpretation on the courts apart from the rules of interpretation pronounced by the judges, and the statutory laws provided by the General Clauses Act and the Evidence Act. Article 8 (2) provides that the principles set forth in Part II of the Constitution "shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of the laws, shall be a guide to the interpretation of the Constitution and of other laws of Bangladesh …but shall not be judicially enforceable.".

1.1 Historical

In the long past the courts adopted a strict-constructionist view of interpretation which required them to adopt the literal meaning of the language. It was observed in 1992 by Lord Griffiths in Pepper v Hart, a case in which the House of Lords accepted for the first time that judges could refer to the Parliamentary debates reported in Hansard in order to ascertain the meaning of an Act of Parliament.[114]

In the 16th century, Plowden reports Stradling v Morgan, a case in which a statute of Edward VI's reign referring to receivers and treasurers without any qualifying words was held to be

[112] See, Salmond, Jurisprudence, 12th Edition, p.132.
[113] See, Cooley, Constitutional Limitations,1927, vol. 1, p.97.
[114] See, Rupert Cross, Statutory Interpretation, p 10, third edition, Butterworths, London, 1995.

confined to such officials appointed by the King and not to extend to receivers and treasurers acting on behalf of private persons.[115]

In modern terms Stradling v Morgan was an example of restrictive interpretation. Heydon's case, which was decided in 1584, on the other hand, could be said to be an instance of extensive interpretation where it was settled that four things are to be discerned and considered[116]:

i. What was the common law before the making of the Act,
ii. What was the mischief and defect for which the common law did not provide,
iii. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth, and
iv. The true reason of the remedy.

In R v Harris (1836) it was held that an accused who bit off the end of his victims' nose was not guilty of wounding within the meaning of a statute of George IV which punished anyone who 'shall unlawfully and maliciously stab, cut, or wound any person'. [117]

Tindal CJ when advising the House of Lords on the Sussex Peerage Case (1844) made the following remarks on the plain meaning rule or literal rule:

'The only rule for the construction of the Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary case. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always ground and cause of making statute, and to have recourse to the preamble, which according to Chief Justice Dyer,[118] is a "key to open the minds of the makers of the Act, and the mischiefs which they intend to redress".'[119]

[115] Ibid, pp 10-11.
[116]Ibid, p 11.
[117]Ibid, p12.
[118]Stowe v Lord Zouch (1569), ibid, p 15.
[119]Ibid, p 15.

In Mitchell v Torup (1766) Parker CB said:[120]

'In expounding Acts of Parliament, where words are express, plain and clear, the words ought to be understood according to their genuine and natural signification and import, unless by such exposition a contradiction or inconsistency would arise in the Act by reason of some subsequent clause, from whence it might be inferred that the intent of the Parliament was otherwise.'

2 Jurisprudential

Cross opined, "In common law systems, the attitudes and practices of the judges provide a model of authoritative interpretation, which constitutes a standard to be followed. In relation to judicial approaches, it is necessary to ask what the judges are seeking to interpret, and especially what is the relationship they conceive between a statute and the intention of Parliament. It is also necessary to analyse what concepts such as 'interpretation', 'ordinary meaning' and 'purpose' involve in this context. With regard to the canons and methods, it is necessary to analyse the character and status of the various 'rules' and 'principles' which are often invoked by judges in explaining their decisions."

2.1 The subject-matter of statutory interpretation

Interpretation of statute is the process of ascertaining the true meaning of the words used in a statute. When the language of the statute is clear, there is no need for the rules of interpretation. But, in certain cases, more than one meaning may be derived from the same word or sentence. It is therefore necessary to interpret the statute to find out the real intention of the statute. Interpretation of statutes has been an essential part of English law since Heydon's Case in 1854. We can say, interpretation of Statutes is required for two basic reasons viz. to ascertain[121]:

• Legislative Language - Legislative language may be complicated for a layman, and hence may require interpretation; and

• Legislative Intent - The intention of legislature or Legislative intent assimilates two aspects:

(i) the concept of 'meaning', i.e., what the word means; and

[120]Ibid, p 16.

[121]

(ii) the concept of 'purpose' and 'object' or the 'reason' or 'spirit' pervading through the statute.

Necessity of interpretation would arise only where the language of a statutory provision is ambiguous, not clear or where two views are possible or where the provision gives a different meaning defeating the object of the statute.

If the language is clear and unambiguous, no need of interpretation would arise. In this regard, a Constitution Bench of five Judges of the Supreme Court of India in R.S. Nayakv A.R. Antulay, AIR 984 SC 684 has held:

"… If the words of the Statute are clear and unambiguous, it is the plainest duty of the Court to give effect to the natural meaning of the words used in the provision. The question of construction arises only in the event of an ambiguity or the plain meaning of the words used in the Statute would be self-defeating." (para 18)

2.2 The intention of the House of the Nation

The 'intention of parliament' with regard to a particular Act cannot mean the intention of all those who were members of the House when the presidential assent was given, for many of them might have been out of country at all material times and never have heard of the Bill. Equally plainly the phrase cannot mean the intention of the majority who voted for the statute as this will almost certainly have been constituted by different persons at the different stages of the passage of the Bill and, in any event, it has been pointed out that, in a debate on what became the Statute of Westminster 1931, Winston Churchill and the Solicitor-General agreed that there was no obscurity in the provisions concerning the Irish Free State, although they took diametrically opposite views concerning their effect.[122]

"Lord Simon of Glaisdale has suggested that:

'The court sometimes asks itself what the drafter must have intended. This is reasonable enough: the drafter knows what is the intention of the legislative initiator (nowadays almost always an organ of the executive); he knows what canons of constructions the courts will apply; and he will

[122] See, G Marshall Constitutional Theory (1971), p76.

express himself in such a way as accordingly to give effect to the legislative intention.' But the drafter is not the agent of the Parliament itself."[123]

2.3 'Ordinary meaning' and 'purpose'

Cross stated, "Thus, the 'ordinary meaning' or 'grammatical meaning' to the words of a statute independently of their context or of the purpose or the statute, but rather that he adopts a meaning which is appropriate in relation to the immediately obvious and unresearched context and purpose in and for which they used."[124]

The scheme and purpose of an Act is to be gathered from a reading of the enactment a whole.[125]To arrive at the real purpose behind an enactment it is necessary to get an exact conception of the aim, scope and object of the whole Act and to consider-

i. what was the state of the law before the Act was passed;
ii. what was the mischief or defect for which the law had not provided;
iii. what remedy Parliament has appointed; and
iv. the reasons for the remedy.[126]

No unreasonable or absurd result should be spelt out from legislation.[127]

2.4 The canons of interpretation

There are three important preliminary steps a legislative drafter should take before attempting to interpret a given statute[128]:

1. Read the statute. The primary language of the statute should always serve as the starting point for any inquiry into its meaning. To properly understand and interpret a statute, you must read

[123] See, Sir Rupert Cross, Statutory Interpretation, p 25, third edition, Butterworths, London, 1995.
[124] Francis and Francis (A Firm) v Central Criminal Court [1988], Ibid, p 32,
[125]37 DLR 117.
[126] 17 DLR (SC) 26.
[127]PLD 1967 Dac 648.
[128]The original handout was written in 2006 by Katharine Clark and Matthew Connolly consulting WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (3d. ed. 2001). The handout was revised in 2017 by Suraj Kumar and Taylor Beech.

the text closely, keeping in mind that your initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one.

2. Understand your client's goals. Make sure that you have a firm grasp of your client's goals and the underlying facts of your client's legal problem so that you will be able to determine which statutes are relevant to your case.

3. Confirm the statute is still good law. Be sure to Shepardize or KeyCite the statute to determine: (a) whether the statute or parts of the statute have been repealed or otherwise invalidated; (b) whether the statute has been amended; and (c) whether there are any court decisions that can guide your analysis of the statute.

There are several tools that can help the drafter to determine the meaning of an ambiguous statute or to choose between multiple plausible interpretations of the same statute. These tools fall into the following categories:

(A) the text of the statute;

(B) legal interpretations of the statute.

The literal interpretation rule is also known as the "Golden rule of interpretation" which stipulates that the words of a Statute must prima facie be given their ordinary meaning. Broadly speaking the rules of interpretation can be classified in two heads namely: -

i) Literal or Grammatical interpretation or Golden Rule; and

ii) Logical interpretation.

Golden Rule-In literal or grammatical interpretation; the words used in the Statute must be given their ordinary and natural meaning. The very words used in the Statute constitute a part of the law as the law is found in the words used. When the words used are clear, unambiguous and capable of one and only one interpretation, the courts are bound to give an interpretation consistent with the ordinary and natural meaning irrespective of the results of such interpretation. It is not permissible for the court to give any other meaning.[129]The literal interpretation rule is

[129] See the decision in Narayana Swami Vs. G.Paneerselvan AIR 1972 SC P.2290.

also known as the "Golden rule of interpretation" which stipulates that the words of a Statute must prima facie be given their ordinary meaning.[130]

Logical Interpretation-The Golden rule of interpretation has to be departed from in cases, where the letter of the law is logically defective and fails to give a definite coherent and complete idea. Again, the departure is made from the Golden rule, where the text leads to a result so unreasonable, that it becomes clear that the legislature could not have meant what it has said. This type of situation exists where there are clerical errors in the texts, or reference to a section by the wrong number or the omission of a negative in some passage where it is clearly required.[131]

Logical defects as pointed out by Salmond[132] may be as follows: -

(i) Ambiguity: The Statute instead of meaning one thing may mean two or more different things. In such cases, the court has to look beyond the letter of law and ascertain the meaning from other sources and construe in order to give effect to the intention of the legislature. In cases, where more than one construction is possible that which is closer to the intention of the legislature must be preferred.

(ii) Inconsistency: It relates to a case where the law, instead of having more than one meaning, may have none and different parts being repugnant or inconsistent with each other, as to make a part of it void. In these cases; "casus omissious" can be supplied or words read in an extended sense.

Incompleteness: The law may be logically defective by reason of its incompleteness. The Statute may contain some "lacuna" which prevents it from expressing any logical complete idea, though it is neither ambiguous or suffers from any inconsistency. Where the words used are self-contradictory due to some confusion or repugnancy in the intention itself,[133] courts must correct and supplement the defective "sententialegis" as well as "defective, literalegis" to avoid patent injustice.[134] Courts must avoid an interpretation which renders the system unworkable in

[130]NoakerVs. Don-caster Collieries Ltd., (1940)3 All ER 549 (HL) 5531.
[131] See M.P.Tandon's Interpretation of Statutes P.19.
[132]Salmond "Jurisprudence" 11th Edition P.154 as edited by Glanvilla Williams.
[133]Salmond "Jurisprudence" 11th Ediction P.136-137.
[134]Bhog Mal Vs. Ch. Prabhu Ram & Others (1985)1 SCC P.61.

practice.[135] An interpretation which is likely to defeat the purposes of the Act should be ignored.[136] Justice Story emphasized the mischief rule which says that the mischiefs are to be remedied and objects which are sought to be achieved by the Statute[137] should be advanced.

2.5 Common law methods in statutory interpretation

Cross stated that Roscoe Pound suggested that there are four different ways in which the courts might deal with legislative innovation. First, they might incorporate it fully into the body of the law and treat it as source of principle higher than the common law. Second, they might receive it fully into the law to be reasoned from by analogy as of equal status to common law rules and principles. Third, they might both refuse to accept it fully into the body of the law and refuse to reason by analogy, but might give it a liberal interpretation. Fourth, they might give statutes a strict construction and refuse to reason by analogy from them.[138]

3 Application of General Clauses Act

The objects of the General Clauses Act, 1897 are several, namely[139]-

1. To shorten the language of the Bangladesh Law[140];
2. To provide, as far as possible, for uniformity of expression in the Bangladesh Law, by giving definitions of series of terms in common use;
3. To state explicitly certain convenient rules for the construction and interpretation of the Bangladesh Law;
4. To guard against slips and oversights by imposing into the Bangladesh Law certain common clauses, which otherwise ought to be inserted expressly into the Bangladesh Law.

4 The basic rules stated

Cross stated following basic rules of English statutory interpretation:[141]

[135] Maharashtra State Board of Secondary and Higher Secondary Education Vs. Paritosh Bhupest Kumar Sheth, (1984) GOC (SC) P.57.
[136]K.V.Muthu Vs. Angamuthu Ammal (1997) SC FBRC P.156.
[137] Justice story: Commentaries on the Constitution of United States 5th Edition P.350.
[138]Ibid, FN 12, p 43.
[139] The concept of the objects of the General Cluses Act, 1897 is expressed in modified form based on the 6oth Report of the Indian Law Commission.
[140]" 'Bangladesh Law' shall mean any Act, Ordinance, Regulations, rule, Order or bye-law in force in Bangladesh"- section 3(8aa), The General Clauses Act, 1897.
[141]Ibid, FN 12, p 49.

i. The judge must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he must also determine the extent of general words with reference to that context.

ii. If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statue, he may apply them in any secondary meaning which they are capable of bearing.

iii. The judge may read in words which he considers to be necessarily implied by words which are already in the statute; and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute.

iv. In applying the above rules, the judge may resort to the aids of constructions and presumptions.

4.1 Context

According to Cross, the context of statutory words is both internal and external. The internal context requires the interpreter to situate the disputed words within the section of which they are part and in relation to the rest of the Act. The external context involves determining the meaning from ordinary linguistic usage (including any special technical meanings), from the purpose for which the provision was passed, and from the place of the provision within the general scheme of statutory and common law rules and principles.[142]

4.2 Evidence

Cross stated, "Evidence had been called on the difference between lopping and topping, but was said to be unnecessary because every countryman is familiar with the distinction. It may therefore, be assumed that evidence of the ordinary meaning of statutory words is theoretically inadmissible,[143]although it may be received in practice comparatively frequently. When it is agreed or contended that statutory words have a technical meaning, evidence with regard to that meaning is gleaned from other sources such as dictionaries.[144]Expert evidence may well be admissible to determine the meaning of a statute giving the force of law to the provisions of a

[142]Ibid, FN 12, p 50.

[143]Eg R v Staniforth, R v Jordan [1977] AC 699. The difficulty is that the distinction between an ordinary and technical meaning is not all that easy to draw.

[144]Prophet v Platt Bothers & Co Ltd [1961] 2 All ER 644.

treaty originally written in another language.[145]Where words have changed their meaning, their original sense will be determined principally from dictionaries based on historical principles."[146]

4.3 The different kinds of meaning

According to Cross, "The distinction between the different usual meanings of words and phrases is important for interpretation of Statutes because they have to decide which sense is most appropriate in the particular context. The distinction between usual and ordinary meaning on the one hand, and secondary meaning on the other hand, is important for interpreters of statutes because, from time to time, they have to opt for a secondary meaning on account of the inconvenience, injustice or absurdity of applying any of the primary meanings to the situation before them. The question whether a particular 'interpretation' gives the words a meaning they will not bear is crucial, because to do that is not interpretation; but there is a no-man's land between interpretation and making statutory provisions not made by the legislature where words are 'read in' to a section of a statute."[147]

5 The basic rules illustrated

The above-mentioned basic rules are illustrated in the following sub-sections:

5.1 Choice between ordinary meaning in the context

Cross stated[148]-

i. The decision on the appropriate ordinary meaning depends on consideration of the language used within the context of the provision, taking account particularly of the purpose of the enactment.
ii. A word may be capable of more than one ordinary meaning. In such a case, the court will have to decide whether they are all admissible, or whether one particular interpretation is to be preferred.[149]

5.2 Choice between an ordinary and a technical meaning

The choice how to be made between an ordinary and a technical meaning was best expressed in Unwin v Hanson [1891][150], which is as follows:

[145]See egFothergill v Monarch Airlines Ltd [1981] Ac 251, pp 162-163.
[146] See, ibid FN 12, p 61.
[147] See, ibid FN 60, p 66.
[148] Ibid, pp 70-71.
[149]For a good example see, Bromley London Borough Council v Greater London Council [1982] All ER 129 (CA & HL).

"If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business or transaction knows and understands to have a particular meaning in it then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."

5.3 Fringe meaning and the extent of general words

The maxim *generalia specialibus non derogant* (general words do not derogate from special words) expressing the rule, that general words in a later statute do not repeal an earlier statute dealing with a special subject, is a further illustration of the cautious approach adopted by the courts to the interpretation of broad provisions. The leading case is The Vera Cruz in which Lord Selborne said:[151]

'Now if anything be certain it is this, that where there are words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with the earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.'

5.4 Choice between primary and secondary meaning

If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning which they are capable of bearing. Lord Reid further held, "In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in that statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other permissible meaning of the word or phrase."[152]

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[150]2 QB 115 at 119, pp 60-91, 1 All ER 113.
[151] (1884) 10 App Cas 59 at 68.
[152]Pinner v Everett [1969]3 All ER 257 at 258.

5.5 Reading words in and out of a statute

Cross has given the following explanations of the basic rule:[153]

i. The judge may read in words which he considers to be necessarily implied by words which are already in the statute; and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute.

ii. Words may be said to be necessarily implied by other words when their express statement merely clarifies a secondary meaning of those other words.

iii. In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.[154]

6 How Precedent Operates: Ratio Decidendi and Obiter Dictum

Article 111 of the Constitution of People's Republic of Bangladesh provides the binding effect of the precedent or case laws in Bangladesh. It runs as follows:

"The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it."

According to Dr. Hamiduddin Khan "In order to secure certainty of law, decisions of High Courts and of Superior Courts are reported and cited as authority in future cases where an identical question of law comes up for determination. A Court may be bound by the decision of a Superior Court in the same way as it is bound by a statute."[155]

Dr. Hamid further stated, "The grounds on which precedents are so authoritatively followed are that it is presumed that a judicial decision is always correct. It is an application of the maxim, '*Res judicata pro veritate accipitur'* (a judgment must be taken for accepted truth) …when a

[153] See ibid FN 12, p 93.
[154] Ibid p 103.
[155] Dr. Hamiduddin Khan, Jurisprudence & Comparative Legal Theory, p 126, First Edition, 1993.

question has once and been judicially considered and answered, it must be answered in the same way in all subsequent cases in which the same principle arises again."[156]

According to Salmond, "A precedent is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it but it is the abstract ratio decidendi which alone has the force of law as regards the world at large."

Rupert Cross says that a ratio decidendi is a rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion.

V.D. Mahajan opined "All that is said by the court by the way or the statements of law which go beyond the requirements of the particular case and which laid down a rule that is irrelevant or unnecessary for the purpose in hand, are called *obiter dicta*.

7 Internal aids to constructions

The internal aids to construction are the enacting parts of the statute (its sections, and schedule), other parts of the same statute (the preamble, long and short titles, headings, side-notes/marginal notes and punctuations), and rules of language, (such as the *ejusdem generis* rule). Each of these contributes to the interpretation of the text, but they are not all of equal status.[157]

7.1 Preamble

The preamble of a statute is a part of the statute and it is admissible as an aid of construction of the statute.[158]Many statutes begin with a preamble or purpose clause, which can be helpful in discerning the intent of the legislature with respect to ambiguous terms of the statute. Thus, when choosing between multiple plausible interpretations, one might refer to the statute's purpose in deciding which interpretation is superior. However, be aware that if a court determines that the terms of the statute are clearly expressed in the part of the statute to be interpreted, the preamble or purpose clauses may not persuade a court to adopt a contrary interpretation.

[156]Ibid, p127.
[157]Ibid, FN 12, p 113.
[158]See Bangladesh v Misfor Ali, 34 DLR (AD) 304 (Preamble may be referred to, it cannot be made the basis of constructing the provisions of a statute. Islam Mahmudul, Interpretation of Statutes and Documents, p. 163, 2009.

7.2 Long and Short Titles

- The Long Title describes the Act and does not merely identify the Act like Short Title.
- Long Title is part of the Act.
- Long Title can be used to ascertain the scope and purpose of the Act.
- Long Title is admissible as an aid to Construction.
- Long title cannot override the clear meaning of the Act.[159]

7.3 Headings

Headings may be prefixed to a section or to a set of sections. These are regarded as preambles to those sections or set of sections.[160]It is also common to have separate headings for each chapter. Though these headings may be considered while constructing some provisions of a statute, these headings cannot in any way control the clear and unambiguous language of the provision[161], not can they be used to cut down the clear meaning of any provision or to give a different effect to clear words in the section, where there cannot be any doubt of ordinary meaning.[162]Heading of one group of sections cannot be used to construe another group of sections.[163]

7.4 Side notes or marginal notes

Marginal notes or side notes appended to each section are inserted by the drafters and not by the legislatures. There is considerable difference of opinion as regards admissibility of the marginal notes in constructing a provision of a statue. It was held that marginal note is not a substantive part of the section of a statute; it is merely an indicator as to the contents of the section for the convenience of the reader.[164]

7.5 Punctuation

The punctuation canon has assumed at least three forms: (1) adhering to the strict English rule that punctuation forms no part of the statute; (2) allowing punctuation as an aid in statutory construction; and (3) looking on punctuation as a less than-desirable, last-ditch alternative aid in statutory construction. The last approach, based upon Justice Baldwin's thesis that punctuation is

[159]Available at https://ca-intermediate.in/wp-content/uploads/2018/08/Chapter-4-Interpretation-of-Statutes-Deeds-and-Documents.pdf , accessed on 20 December 2020.
[160]Fletched v Birkenhead Corporation.[1907] 1 KB 205.
[161]54 DLR 625.
[162]PLD 1992 SC 342.
[163]Shelly v L.C.C., [1949] AC 56.
[164]See Faizuddin Ahmed v BKMC, 56 DLR 202.

"a most fallible standard by which to interpret a writing," seems to have prevailed as the majority rule. Courts in most states view punctuation as a genuine part of legislative enactments but regard it as subordinate to text.[165]

7.6 *Ejusdem generis* rule

Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned. In other words, you should use the specific objects or things explicitly set forth in the statute to determine what other objects or things the legislature intended to include. For example, if a statute lists "dogs, cats, horses, cattle, and other animals," this canon would suggest that the catchall phrase other animals refer to other similar animals. This might include animals like sheep, but not include protozoa.[166]

7.7 Definition Cluses

The rules of statutory interpretation on definition are summed up as follows[167]:

- Definitions are normally given in the statute to explain the meaning of certain words or phrases used in it.
- When a definition to a particular word or phrase is given in the Act, then such meaning alone shall be considered in interpreting any section of the Act which uses that word or phrase.
- Courts cannot ignore the statutory definition and try to extract true meaning of the word in some other way.
- It is only when a statute does not contain the definition of a particular word or phrase, it becomes the duty of court to ascertain the meaning of such words.

Purpose of Definitions

1. To provide a key to the proper interpretation of the Act;
2. To shorten the language of the Act by avoiding frequent repetitions of the meaning of

[165]Raymond B. Marcin, Punctuation and the Interpretation of Statutes, 9 CONN. L. REV. 227 (1977).

[166]The original handout was written in 2006 by Katharine Clark and Matthew Connolly consulting WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (3d. ed. 2001). The handout was revised in 2017 by Suraj Kumar and Taylor Beech.

[167]Available at https://www.scribd.com/document/456832904/Interpretation-of-Statutes-Notes , accessed on 23 December 2020.

same words.

A. Restrictive Definition

When the definition of a word starts with 'MEANS', it is said to be restrictive.

Such definition is exhaustive that is to say, scope of such definition cannot be enlarged beyond what is expressly stated in such definition.

A definition which begins with the words "means and includes" can also said to be exhaustive.

B. Extensive Definitions

i. When the definition of a word starts with 'INCLUDES', it is said to be extensive.

ii. The scope of such definition is not restricted to what is expressly stated in it.

iii. The word 'include' is generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute.

iv. Definitions which start with the phrases 'to apply to and include' or 'is deemed to include' are also said to be extensive.

v. The words 'deemed to include' are used to bring something within the word so defined, which according to its ordinary meaning is not included within it.

C. Ambiguous Definitions

i. Normally definitions are used in the Act to clarify meaning of certain words used.

ii. But sometimes, the definition section may itself be ambiguous and may have to be interpreted in the light of other provisions of the Act and having regard to the ordinary meaning of the word so ambiguously defined.

iii. A definition is not to be read in isolation. It must be read in the context of the phrase which it defines.

iv. Sometimes the ambiguity in the definition arises because of its bad drafting and the court may have to recast it to bring out its clear meaning.

D. Definitions contrasting with context

i. When a word has been defined in the interpretation clause that definition governs whenever that word is used in the body of the statute.

ii. But where the context makes the definition given in the interpretation clause inapplicable, a defined word when used in the body of the statute may have to be given a meaning different from that contained in the interpretation clause.

E. Therefore, all definitions given in an interpretation clause are normally enacted

subject to the qualification i.e., 'unless the context otherwise requires'.
Even in the absence of an express qualification to that effect, such a qualification is always implied.
F. Definitions with multiple meanings – When a word is defined to bear a number of inclusive meanings, the sense in which the word is used in a particular provision must be ascertained from the:

a. Context of the scheme of the Act;
b. The language of the provision;
c. The object intended to be served.

7.8 Illustrations

The legislature sometimes appends illustration in some section of the statute to demonstrate the application of the section to particular facts. These illustrations are part of the sections and are relevant in understanding the meaning of the words employed in the section and they should not be readily rejected as repugnant to the section.[168]Illustrations are part of the section to which they are appended and help elucidate the support of the section. Nevertheless, illustrations cannot curtail or extended the ambit of the section which alone forms the enactment.[169]

7.9 Proviso

A proviso is a clause added to an enactment to qualify or to create an exception to what is in the enactment.[170]It has an overriding effect on the provision to which it is appended.[171]

The normal function of a 'proviso' is[172]:

a. To remove something from the main provision; or

b. To qualify something contained in the main provision.

- A proviso is not interpreted as a general rule. Where the main provision is not clear, a 'proviso' can be looked into to ascertain the meaning and scope of the main provision.
- When the main provision is clear, a 'proviso' cannot expand or limit it.
- A 'proviso' to a particular section is applicable only to the filed covered by such section but not to any other field.

[168]AIR 1916 PC 242.
[169]10 DLR 510.
[170] 17 DLR (SC) 392.
[171]45 DLR 70.
[172]Available at https://www.scribd.com/document/456832904/Interpretation-of-Statutes-Notes , accessed on 23 December 2020.

7.10 Distinction between Exception, Proviso and Saving Clause

A. Exception - It is intended to restrain main provision to particular case(s).

B. Proviso – It is used to remove special cases from the general provision and deal with them separately.

C. Saving Clause – It is used to preserve certain rights or privileges already existing. It does not give any new rights.

7.11 Explanation

Sometimes an explanation is added to a section to explain the meaning of the words used in the section.[173]

Objects of adding an Explanation to a Statutory Provision[174]:

1. To explain the meaning and true intention of the Act.
2. To clarify any vagueness in the main provision.
3. To provide additional support to the dominant object of the Act.
4. To fill up the gap, if any, in the main provision in order to suppress the mischief and advance the remedy.
5. Not to take away a statutory right given by main provision.
6. Not to act as a hindrance to the interpretation of the Act.

7.12 Schedules

Schedules are appended to an enactment towards the end and they form part of the enactment to which they are appended.[175]

Salient features of schedules[176]:

- Schedules attached to the Act form part of the Statute.
- Schedules often contain details and forms for working out the policy underlying the sections of the statute.
- Schedules are used to avoid excessive details to being included in sections of the Act.

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[173]AIR 1985 SC 582.
[174]Available at https://www.scribd.com/document/456832904/Interpretation-of-Statutes-Notes , accessed on 23 December 2020.
[175]52 DLR 72.
[176]Available at https://www.scribd.com/document/456832904/Interpretation-of-Statutes-Notes , accessed on 23 December 2020.

- Schedules can be used for construing the Act.
- Schedules cannot over-ride plain provisions of the Act. In case of conflict between schedules and the main provisions of the Act, the main provisions shall prevail.

7.13 Transitional Provisions

Sometimes a statute contains at the end a transitional provision which is meant to operate on the facts and circumstances existing on the date of coming into operation of the statute.[177] The construction of such a provision depends on its own terms.[178]

8 External aids to constructions

In order to find out the intention of the legislature as expressed in the language used, certain things outside the text of the statute are called external aids. External aids are considered to remove ambiguity in language.[179] External aids are as follows:[180]

i. Dictionaries
ii. Text Books
iii. Practice-Judicial, Conveyancing, administrative and Commercial
iv. Foreign Decisions
v. Parliamentary History
    a. Bill
    b. Statement of objects and reasons
    c. Report of the Standing Committees
vi. Historical facts of surrounding circumstances
vii. Subsequent social, political and economic development and scientific inventions
viii. Reference to other statutes
    a. Parimateria
    b. Reference to earlier statutes
    c. Reference to statutory instruments
    d. Legislation by incorporation
    e. Consolidating statutes
    f. Codifying statutes

[177] 2 All ER 726.
[178] 7 SCC 288.
[179] Ashok Kumar v India, AIR 1991 SC 1792.
[180] See, Islam Mahmudul, Interpretation of Statutes and Documents, p 183, Published in 2009, Dhaka.

g. Contemporanea expositio

ix. Stare Decisis

x. Construction imposed by statute

8.1 Dictionaries

In the words of Lord Coleridge, "dictionaries are not be taken as authoritative exponents of the meanings of word used in Act of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books."[181]

Important features of Dictionaries in statutory interpretations[182]:

1. When a word is not defined in the Act, then it is permissible to refer dictionaries to find out the general sense in which a word is understood in common parlance.
2. In selection one meaning out of several meanings given in a Dictionary, consideration shall be given to the context in which the words appear in the Act.
3. Meaning of technical and legal words shall be construed in technical and legal sense.
4. Dictionary meaning cannot be adopted if it will make some existing words redundant or will require reading of some additional words.
5. Meaning of a word given in judicial decisions, on statutes of same or similar subject, have more weight than the meaning furnished by dictionaries.

8.2 Text Books

Courts often refer to text books in order to find the meaning of particular expression in the statute. However, the courts are not in any way obliged to accept the views of the author of the text book and the court has the discretion to come to the views of the authors of text books.[183]

8.3 Practice-Judicial, conveyancing, administrative and commercial

"The practice which has been followed in a manner in the past may influence the interpretation to be placed on legislation."[184]The English Judges have always paid great regard to the uniform opinion and

[181] R v Peters, (1886) 16 QBD 636, 641, see Maxwell, p. 55, where he has given a list of documents in which the court consulted dictionary for the meaning of ordinary words like park, rubbish, document, practicable, machinery, hardware, and cartilage, Islam Mahmudul, Interpretation of Statues and Documents, p. 184, 2009.
[182]Available at https://www.scribd.com/document/456832904/Interpretation-of-Statutes-Notes , accessed on 23 December 2020.
[183] See Islam Mahmudul, Interpretation of Statues and Documents, p. 185, 2009.
[184][1961] 1 Ch. 100.

practice of eminent conveyancers.[185] But the administrative practice does not, however, carry such weight.[186] On the other hand, commercial usage may be relevant in the interpretation of words in a statute.[187]

8.4 Foreign Decisions

Though foreign decisions on the subject under consideration are frequently cited and relied upon by the courts of Bangladesh, the question remains how far it is permissible. The Privy Council repeatedly gave warning and cautioned against reliance on foreign decisions.[188]

However, when a foreign decision is in consonance with our law, our courts may borrow and have often borrowed the principles laid down in the foreign decision keeping in view the changing global scenario.[189]

8.5 Parliamentary History

Traditional English view was that the intent of Parliament which passed the Bill is not to be gathered from Parliamentary history of the statute.[190] Subsequently it was held in Black Clawson International Ltd. v Papeirwerke Waldhof Aschaffenburg A.G.[191] that the report of the Committee presented to Parliament preceding the legislation could be seen for finding out the then state of the law and the mischief sought to be remedied.

Bill-Though the speeches of the members of the legislature are not admissible,[192] the speech by a member of the legislature or a Minister introducing a Bill were admitted as evidence of circumstances which necessitated the passing of the Act.[193]

Statement of objects and reasons- A Bill introduced in the legislature contains the statement of objects and reasons for the legislative exercise. The Indian Supreme Court refused to treat it as an aid to construction on the main reason amongst others that it does not form a part of the Bill and is not voted upon by members.[194]

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[185] [1944] 2 All ER 491.
[186] See, however, Craies-Statute Law, 6th Edition, p. 131-132.
[187] [1966] 2 QB 431.
[188] AIR 1924 PC 60.
[189] (2004) 9 SCC 512, ibid FN 72, p. 187.
[190] *[1957] 1 All ER 49.*
[191] [1975] 1 All ER 810.
[192] PLD 1966 SC 559.
[193] AIR 1951 SC 41.
[194] 4 DLR 104.

8.6 Historical facts and surrounding circumstances

In construction of statutes it is permissible to have regard to historical facts or to the state of things existing at the time the statute was passed and to the evils it was designed which influenced the Legislature.[195] "The subject-matter with which the legislature was dealing and the facts existing at the time with respect to which the legislature was legislating are legitimate topics to consider in ascertaining what was the object and purpose of the Legislature in passing the Act."[196]Reference to legal history serves as a good guide for appreciating legal development and changes.[197]But an argument based on history is not to be pushed too far as the inferences to be drawn therefrom are exceedingly slight.[198]However, inferences from historical facts and surrounding circumstances cannot influence the act of construction when the language employed in the statute is clear.[199]

8.7 Subsequent social, political and economic developments and scientific inventions

Generally, statutes are of "always speaking variety" and the court is free to apply the current meaning of the statute to present day conditions.[200]The Court must apply a statute as it exists today interpreting it in the light of the legal system as it exists today.[201]

8.8 Reference to other statutes

The basic features of reference to other statutes are summed up as follows[202]:

A. Analogous Acts

Where there are different statutes dealing with same or similar subject, they shall be taken and construed together as one system and as explanatory of each other.

The above rule applies:

a. Even if such different statutes are made at different times;

b. Even if some of such different statutes are expired;

c. Even if one statute is not referring to other statute.

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[195][1911] AC 641.
[196][1892] AC 498.
[197](2004) 9 SCC 512.
[198][1906] KB 676.
[199]PLD 1980 SC 84.
[200] 4 All ER 225.
[201][2000] 4 All ER 913.
[202]Available at https://www.scribd.com/document/456832904/Interpretation-of-Statutes-Notes , accessed on 23 December 2020.

- If two Acts are to be read together then every part of each Act has to construed as if contained in one composite Act.
- If there is some clear discrepancy then it is necessary to hold that later Act has modified the earlier Act.

B. Later Act Explained by Earlier Act

- When a Statute is repealed and re-enacted and words in the repealed statute are reproduced in the new statute, such words should be given same meaning in the new act as that of the meaning given by judiciary to such words in repealed Act.
- However, when the new legislation, although re-enacting many provisions from earlier statutes, contains a good deal of fresh material and deals with a subject on which social views have drastically changed, it may not be proper to rely on the earlier authorities for construing the new legislation.
- Further, when there is no ambiguity in the re-enacted statute, it may not be permissible to refer the previous legislation or decisions rendered there under.

C. Earlier Act explained by Later Act

Not only Later Act be construed in the light of Earlier Act, sometimes Later Act also furnishes some insights to interpret the earlier Act, if:

a. They both deal with same or similar subject; and

b. The Earlier Act is ambiguous.

8.9 Parimateria

Parimateria means when two provisions of two different statutes deal with the same subject matter and form part of the same subject matter. It is a latin word. Use of parimateria is well established by the Judiciary. In District Mining Officer and others v Tata Iron & Steel Co. and another[203], it was established that *parimateria* can be used as an external aid of interpretation.[204]

In constructing a statute, the court often takes into consideration the provisions of other statutes dealing with any cognate subject.[205]All statutes made in *parimateria*should be construed together

[203] (2001)7 SCC 358, p 3

[204] International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 Volume 1 Issue 8.

[205]AIR 1970 SC 1173.

as one system[206]and as explanatory of each other, so that when there is an ambiguity in one, it may be explained by reference to another statute in the same system.[207]

A. Need for parimateria:

It is important to know the need of parimateria. The reason behind Judiciary to use this principle is to avoid contradiction or conflict between/ among statutes dealing with the same subject matter. It helps to interpret the words of the later statute in the light of earlier statutes in the same context. If the words of a statute have been recognized and interpreted by the Judiciary in a particular way and it has already gained an authoritative value, then it is obvious that the statue(s) having similar words/ context will be dealt in the same manner.[208]

B. Situations where parimateria is applicable:

i. Different Acts having same subject matter- Similar language in statutes with common purpose is interpreted in the same way. Different Acts having same subject matter has to be read together. In Board of trustees of the Port of Bombay v Sriyanesh Knitters the Supreme Court read the Major Port Trust Act, 1963 along with the Indian Contract Act, 1872 are held to be in *parimateria* with each other.[209]

ii. Assistance of an earlier statute: It is a well-established principle that the later statutes are constructed in the light of earlier statutes. When same words are used in similar context in a later statute, it is presumed that they have same meaning as in the earlier statute. When the words of an earlier statute have got an authoritative exposition by a superior court, use of same words in similar context in a later Act gives rise to a presumption that Parliament intends that the same interpretation should also be followed for construction of those words in later statutes.[210]

iii. Different statutes are in parimateria- Where there are different statutes are in parimateria though made at different times, or even expired, and not referring to each other, they shall be taken and constructed together, as one system, and as explanatory of each other.[211]

[206]PLD 1967 kar 191.
[207]29 DLR (SC) 17.
[208]Ibid FN 93.
[209]Ibid FN 93.
[210]International Journal of Law and Legal Jurisprudence Studies :ISSN:2348-8212 Volume 1 Issue 8.
[211]Ibid FN 99.

iv. Statutes having not exactly same subject matter: It is not necessary that the referring statute and the referred statute will have exactly same subject matter for calling them as parimateria with each other. Subject matter of the two Acts should not be identical for application of this rule. In State of Madras v A Vaidyanath Aiyer1, section 4 of Prevention of Corruption Act 1947 was held parimateria with the Indian Evidence Act 1872. The phrase "shall presume' of Indian Evidence Act was utilized to construe the meaning of "it shall be presumed" of section 4 of Prevention of Corruption Act 1947. Both the phrases were given same meaning.[212]

v. Later statutes in parimateria with earlier Acts: Subsequent laws are regarded as supplementary or complimentary to the earlier enactments. Generally, an earlier Act which is in parimateria with the later Act is used to interpret the later statute. In Smaje v Balme to construe the phrase "any dangerous or offensive weapon or instrument" of section 28(1) of the Larceny Act 1916 reference was made to the Prevention of Crimes Act 1953 and section 23(5) of the Firearms Act 1937.[213]

vi. Statute is in parimateria with delegated legislation- Not only statutes are used to construct statutes which are in parimateria with other statutes, but also delegated legislations are referred.[214]

C. Situations where Acts are not in parimateria[215]:

i. When a new statutory provision is used in the text of existing statute, it should be read as one. But problem may arise when terminology used are not identical with the original Act.

ii. When the new legislation although re-enacting many provisions from earlier statutes, contains a good deal of fresh materia and deals with a subject on which social views have drastically changed, it may not be proper to rely on the earlier authorities for construing the new legislation. Change of interpretation should be seen as the changed intention of the Legislature.

[212]Ibid FN 99.
[213]Ibid FN 99.
[214]Ibid FN 99.
[215]Ibid FN 99.

iii. Use of one state legislation to construe another state legislation on the same subject matter is not commendable because there can be variation in the language.
iv. When the two Acts are not in parimateria, then decision rendered with reference to one Act cannot be applied with reference to the provisions of another Act.

8.10 Legislation by incorporation

Legislation by incorporation is a device whereby the legislature without repeating a provision of an earlier statute, applies that provision by making reference to the earlier Act.[216] Definition of 'bank' in s. 2 (b) of the Securities and Exchange Ordinance, 1969 as meaning "a banking company as defined in the Banking Companies Ordinance, 1969 as meaning "a banking company as defined in the Banking Companies Ordinance, 1962" is an illustration of legislation by incorporation.[217]

8.11 Consolidating Statutes

Consolidating statutes are those which present the whole body of statutory laws on a particular topic in a complete form, embodying them in a single Act of Parliament and repealing the former statutes.[218]

8.12 Codifying Statutes:

The purpose of a codifying statute is to present an orderly and authoritative statement of the leading rules of law on a given subject, whether those rules are to be found in statutory law or common law. [219]

8.13 Contemporanea expositio

It is a rule of construction of old statutes and it is said that the best exposition of a statute is one which it has received from competent authority at the time it was passed or soon thereafter.[220]

8.14 Stare decisis

The principle of stare decisis based on the position that law must be certain and for that purpose the earlier decisions of the highest courts of the country should be followed unless the

[216]AIR 2002 SC 3499.
[217] See Islam Mahmudul, Interpretation of Statutes and Documents, p. 206, 2009 edition.
[218]22 I.A. 107.
[219]ILR 29 Cal 707 (PC).
[220]See Islam Mahmudul, Interpretation of Statutes and Documents, p. 212, 2009 edition.

circumstances and the legal position demand that it should be departed from. The rationale behind the principle is that many people have shaped their conduct in good faith reliance on such decision.[221]

8.15 Construction imposed by statute

Often Parliament inserts a definition section defining particular words requiring the court to construe those words as indicated in the definition section even though it may not square up with the ordinary or popular meaning. In such case the court cannot go for the ordinary and plain meaning. Such definition section often starts with the expression "unless repugnant to the context" as a result of which the court can depart from the meaning assigned by Parliament in the definition clause if the context requires otherwise.[222]

9 Presumptions

The presumption is used with different shade of meaning in different branches of law, its use always relates to the burden of proof. A legal presumption is a rule of law by which the courts and judges draw a particular inference from particular facts or from particular evidence unless and until the truth of that inference is disproved. Presumptions are of two kinds, viz., presumption of law and presumption of fact. [223] Following are the important legal presumptions:[224]

(i) Presumption against impairing obligation or permitting advantage of one's wrong;

(ii) Legislature does not intend alteration in existing law except what is expressly provided;

(iii) Legislature does not make mistake: *Casus Omissus;*

(iv) Presumption against ousting established jurisdiction;

(v) Presumption against creating new and enlarging jurisdiction;

(vi) Jurisdiction of regular courts are not ousted except by express enactment or by necessary implication;

(vii) Territorial application of statutes;

(viii) Statutes affecting properties;

[221] Ibid FN 109.
[222] Ibid FN 109 p. 215.
[223] See, V. D. Mahajan, Principles of Jurisprudence and Legal Theory, p 184, Fourth Edition.
[224] See FN 48, p 50.

(ix) Statutes do not violate principles of international law.

9.1 Presumption against impairing obligation or permitting advantage of one's wrong

"On the general principle of avoiding injustice and absurdity, any construction will, if possible be rejected (unless the policy of the Act requires it) if it would enable a person by his own act to impair an obligation which he had undertaken, or otherwise to profit by his own wrong."[225]A man cannot take advantage of his own wrong.[226]He may not plead in his own interest a self-created necessity.[227]

9.2 Legislature does not intend alteration in existing law except what is expressly provided

The legislature is presumed to have been aware of the existing law[228] and there is a presumption that the legislature does not intend to make a change in the existing law beyond what is expressly provided or which follows by necessary implication form the language of the statute in question.[229]A statute is prima facie to be construed as changing the law to no greater extent than its words or necessary intendment requires.[230]The presumption applies to both procedural and substantive laws.[231]

9.3 Legislature does not make mistakes: Casus Omissus

There is a presumption that the legislature does not make mistakes. It has been held that even if the mistake is obvious, the court cannot correct it as it would amount to legislation which is outside the domain of interpretation. A court is not at liberty to make laws however strongly it may feel that Parliament has overlooked some necessary provision.[232]One of the basic rules is that the court should not take upon itself to supply omissions as by doing it the court would usurp the function of the legislature.[233]DennigL.J, took a dissenting view against the presumption by observing that if the legislature has by mistake overlooked something, the judges should do their best to smooth it out.[234]

[225]Maxwell-Interpretation of Statutes, 12th ed. P. 21.
[226]1981 BLD (AD) 91.
[227][1911] 1 KB 625.
[228]29 DLR 320.
[229]PLD 1974 SC 210.
[230]AIR 1938 PC 191.
[231][1968] 2 WLR 465.
[232][1914] AC 379.
[233] 17 DLR (SC) 147.
[234][1950] 2 All ER 1126.

9.4 Presumption against ousting established jurisdiction

The well-known principle is that a statute should not be construed as taking away the jurisdiction of the court in the absence of clear and unambiguous language to that effect.[235]Any provision ousting jurisdiction of courts must be strictly construed.[236]

9.5 Presumption against creating new and enlarging existing jurisdictions

"It is also presumed that a statute does not create new jurisdiction or enlarge existing ones, and express language is required if an Act is to be interpretated as having this effect."[237]When law has conferred jurisdiction expressly, no amount of consent by the parties can invest the court with jurisdiction which is not given by law.[238]

9.6 Jurisdiction of regular courts are not enlarged not ousted except by express enactment or by necessary implication

The courts are reluctant to hold their jurisdiction enlarged unless this is clear from the express words of the enactment.[239]An exclusion of jurisdiction of the civil court is not be readily inferred[240] and statute ousting the jurisdiction must be strictly construed.[241]

9.7 Territorial application of statues

In the absence of an intention clearly expressed or to be inferred either from its language, or from the object or subject-matter or history of the enactment, the presumption is that the legislature does not design this statutes to operate on the individuals beyond the territorial limits of the country.[242]

9.8 Statute affecting properties

The general principle of private international law is that land is subject exclusively to the laws of the State in whose territory it lies[243], nationality, residence, and domicile of the owner of the land being all irrelevant.

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[235]1981 BLD (AD) 488.
[236]AIR 1995 SC 2001.
[237] Maxwell-Interpretation of Statutes, 12th ed. P. 159.
[238] 36 DLR (AD) 179.
[239]1981 BLD (AD) 488.
[240]45 DLR 46.
[241]AIR 1966 SC 1718.
[242][1909] 2 KB 61.
[243]Chesire& North-Private International Law, 11th ed. P. 777.

9.9 Statutes do not violate the principles of international law

It is presumed that municipal legislation does not violate international law and a municipal legislation does not violate international law and a municipal legislation should, as long as the words of a statute do not clearly militate against a provision of international law, should be construed in conformity with the relevant provision of international law.[244]

10 Interpretation of subordinate legislations

The subordinate legislations of Bangladesh have the basis in the proviso to the article 65 (1) of the Constitution of Bangladesh which runs as follows:

"Provided that nothing in this clause shall prevent Parliament from delegating to any person or authority, by Act of Parliament, power to make orders, rules, regulations, bye laws or other instruments having legislative effect."

Since Article 65 (1) of the Constitution expressly vested the legislative power of the Republic on the Parliament therefore, like Indian Parliament as settled in Tata Iron & Steel Co v Its Workmen[245]our Parliament also cannot abdicate the essential legislative function. However, the question of excessive delegation should be dealt with based on the following principles-

1. Essential legislative functions to enact laws and determine the legislative policy cannot be delegated;
2. In the context of modern conditions and complexity of situations, it is not possible for the legislature to envisage in detail every contingency and make provision for them; and
3. If the power is conferred on the administration in a manner which is lawful and permissible, the delegation cannot be held excessively merely on the ground that it was possible for the legislature to make more detailed provisions.[246]

The doctrine of *ut res magis valeat quam pareat* is applicable in case of delegated legislation also.[247]Hence, the court should try to construe a delegated legislation in a manner which will bring it in conformity with the provisions of the Constitution and the delegating statute. Where two interpretations are possible and one of them renders the legislation ultra vires, the court

[244] 10 DLR (SC) 136.
[245]AIR 1972 SC 1917.
[246]Joti Prasad v Administrator, Union Territory, AIR 1961 SC 1605.
[247] See in re Hindu Women's Right to Property Act, AIR 1941 FC 72.

should adopt the one which will render the legislation valid. Where it is not possible, the court will have to declare the delegated legislation ultra vires the Constitution or the delegating statute.[248]

10.1 Limitations of delegated legislation

A delegated legislation may be challenged in court on any of the four following grounds:[249]

a. The delegated legislation is void because the delegating statute is not constitutionally valid;
b. The delegated legislation is not constitutionally valid;
c. The delegated legislation is ultra vires to the delegated statute;[250]
d. The delegated legislation is arbitrary or unreasonable;[251]or
e. Unless permitted by the parent statute, it is repugnant to the other laws of the land.[252]

11 Commencement and operation of statutes

Commencement of an Act is governed by the provisions of the General Clauses Act, 1897.In terms of the provisions of s. 5 of the General Clauses Act, 1897, generally, an Act of the Parliament comes into operation when it receives assent of the President and is construed as coming into operation immediately on the expiration of the day preceding its commencement, e.g., at the first moment of the day the statute received the assent of the President. [253]

11.1 Mandatory and directory provision

Where consequence of an imperative provision of a statute is provided in that case the provision is construed as a mandatory provision.[254]"No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute."[255]

[248] See FN 48, P 129.
[249] See Islam Mahmudul, Constitutional Law of Bangladesh, p. 503, Third Edition.
[250]Supreme Court Employee Welfare Assn. v India, AIR 1990 SC 334.
[251] One Bank Ltd. v Bangladesh (2010) 15 BLC 91
[252]T.N. v P. Krishnamurthy, AIR 2006 SC 622.
[253] See Islam Mahmudul, Interpretation of Statutes and Documents, p. 237, Published in 2009.
[254]RashorajSarker v State, 52 DLR 598.
[255]Per Lord Cambell in Liverpool Borough Bank v Turner, (1861) 30 LJ C 379.

11.2 Retrospective Operation

Despite the Parliament's plenary power of legislation under article 65 of the Constitution to affect rights and impose obligation prospectively as well as retrospectively, it cannot pass a law to create or increase penal liability retrospectively.[256]It is a cardinal principle of construction that law is *prima facie* prospective in operation and it cannot have retrospective operation except in certain cases unless the intention of the legislature in favour of retrospective operation is evident from express words or necessary implication.[257]

12 Expiry and repeal of statutes

A statute is temporary when the legislature fixes the period during which it remains in operation and unless extended ceases to have operation on the expiry of the period fixed by the legislature.[258] A statute whose operation has not been limited to a specified period and continues to have operation unless it is repealed by the legislature is a perpetual legislation.[259]

12.1 Effect of Repeal

So far with respect to transaction past and closed there is no difference between temporary and perpetual legislation. Repeal of an Act does not affect past and closed transactions under the provisions of the repealed Act. In such cases the rights accrued and liabilities incurred will be operative as if the relevant law has not been repealed. Normally repeal of a statute would have the effect of obliterating the repealed statute from the statute book as if it never existed.[260]Section 6 of the General Clauses Act, 1897 provides as follows:

"Where this Act, or any [Act of Parliament] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

[256]Article 35 of the Constitution of Bangladesh.
[257] Assessing Officer v Burma Eastern Ltd., 34 DLR (AD) 29.
[258] Jtaindranath v Bihar, AIR 1949 FC 175.
[259]Ibid.
[260]Keshovan v Bombay, AIR 1951 SC 128.

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) after any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

13 Ambiguities and equivocations

Mahmudul Islam states, "Very often ambiguities and equivocations are found in written instruments which create difficulties in giving effect to those documents. Ss. 93 to 98 of the Evidence Act deal with admission of extrinsic evidence to remove such ambiguities in a document.[261]

Ambiguities are of two types, e.g., patent and latent. "If the document is on the face of it ambiguous, e.g., unintelligible or uncertain, the ambiguity is 'patent'. If the document is not uncertain or unintelligible on the face of it, but is ambiguous when read in the light of external circumstances, the ambiguity is 'latent'."[262]

14 Alterations and erasures

It sometimes happens that a document is presented before the court with interlineations, erasures or other alternations in it. Except in case of a will, a document cannot be altered unilaterally after it has been executed.[263]

[261] Islam Mahmudul, Interpretation of Statutes and Documents, p. 368, published in 2009.
[262] M Monir-Principles and Digest of Law of Evidence, 13th Edition, P. 980.
[263] Ibid, FN 67, p. 382.

14.1 Effect of Alteration

As early in the seventeenth century, it was held in Pigot's Case[264] in England that all alterations in a deed made after execution rendered the deed void, no matter whether the alteration be material or not.

14.2 Material alteration

It is settled law that in order that an alteration affect the validity of a document, it must be material one. What alteration is material depends upon facts of each case. An alteration in a document made in good faith to carry out the original intention of the parties is no material alteration to render the document void.[265]Any alteration in some essential part of a document which alters the right or liability under, or the subject-matter of, the document will be material.[266]

15 Rules as to time and date

Month, and year are defined in the General Clauses Act, 1897 as follows:

""month" shall mean a month reckoned according to the British calendar: and

"year" shall mean a year reckoned according to the British calendar."

A day is a period of 24 hours from midnight to midnight. A tenancy granted from July 20 commenced at midnight of July 20.[267]

'By' or 'on or before'. When the buyer says "I will not complain if I have the goods by Monday next" it means 'on, but not earlier than Monday', but for seller it gives him the option to supply the goods on Monday or at an earlier date.[268]

From, On. When this expression is used, such as 'from today for seven days', it means the day of the date or the date of the deed or any fixed day is to be excluded in the computation.[269]

Till: Until. These expressions may be inclusive or exclusive depending on the context in which they are used.

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[264] *(1615) 11 Rep. 266.*
[265] AIR 1978 Cal 153.
[266] Islam Mahmudul, Interpretation of Statutes and Documents, p. 385, published in 2009.
[267]Meggeson v Groves.[1971] 1 Ch. 158.
[268]Dagger v Shepherd, [1946] KB 215.
[269]Goldsmith's Co. v West Metropolitan Railway [1904] 1 KB 1.

Time. When the time generally stated is in conflict with the specific statement of time, the latter is to prevail.[270]

16 Names and misdescriptions

Evidence may be given to correct any mistake or imperfect description of any party to the document and the court has power to correct misnomers in the names of the parties.[271]

17 Illustration of How to Analyze a Case on Statutory Interpretation

Macagno, Walton and Sartor (2012) compiled a list of eleven interpretive arguments identified by MacCormick and Summers (1991), which are as follows:[272]

(a) Argument from ordinary meaning requires that a term should be interpreted according to the meaning that a native speaker would ascribe to it.

(b) Argument from technical meaning requires that a term having a technical meaning and occurring in a technical context should be interpreted in its technical meaning.

(c) Argument from contextual harmonization requires that a term included in a statute or set of statutes should be interpreted in line with whole statute or set.

(d) Argument from precedent requires that a term should be interpreted in a way that fits previous judicial interpretations.

(e) Argument from analogy requires that a term should be interpreted in a way that preserves the similarity of meaning with the term's occurrences in similar provisions of other statutes.

(f) Argument from a legal concept requires that a term should be interpreted in line with the way it has been previously recognized and doctrinally elaborated in law.

(g) Argument from general principles requires that a term should be interpreted in a way that is most in conformity with general legal principles already established.

(h) Argument from history requires that a term should be interpreted in line with the historically evolved understanding of it.

[270]1982 BLD 134.

[271]Alexander Mountain & Co. v Rumere, [1948] 2 KB 436.

[272]Walton, Douglas; Sartor, G.; and Macagno, F. (2016).Contested Cases of Statutory Interpretation. Artificial Intelligence and Law, 24 (1), 51-91.

(i) Argument from purpose requires that a term should be interpreted in a way that fits a purpose that can be ascribed to the statutory provision, or whole statute, in which the term occurs.

(j) Argument from substantive reasons requires that a term should be interpreted in line with a goal that is fundamentally important to the legal order.

(k) Argument from intention requires that a term should be interpreted in line with the intention of the legislative authority.

Illustration-An interpretive argument from precedent requires that if a term has a previous judicial interpretation, it should be interpreted to fit that previous interpretation. In the case of Norton Tool Co. v Tewson, it had been ruled that "loss" was to be interpreted as signifying exclusively financial loss following a precedent.[273]

18 Departure from Common Law or established interpretation

"Congress is presumed to legislate with knowledge of existing common law. When it adopts a statute, related judge-made law (common law) is presumed to remain in force and work in conjunction with the new statute absent a clear indication otherwise. Thus, when Congress established civil actions for harms "by reason of" violations of antitrust laws and the Racketeer Influenced and Corrupt Organizations Act (RICO), the courts incorporated common law principles of "proximate cause" to determine liability. Establishing that a harm would not have occurred "but for" the violation is insufficient; as is the case under common law actions, a more direct and immediate connection between violation and harm must be shown.

Similarly, when Congress adopted the common law on abandonment of property as part of the Bankruptcy Code, it was deemed to have adopted all the judge-made corollaries and exceptions that attended the abandonment law: "The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." In another bankruptcy case the Court declared that "we will not read the Bankruptcy Code to erode past ... practice absent a clear indication that Congress intended such a departure."[274]

[273]Ibid, FN 78.

[274] See, Statutory Interpretation: General Principles and Recent Trends, September 24, 2014, Congressional Research Service, Available at www.crs.gov ,accessed on December 18, 2020.

19 Judicial Review of Administrative Action

Article 102 of the Constitution of Bangladesh vested the power of Judicial review on the High Court Division of the Supreme Court of Bangladesh in terms of powers to issue certain orders and directions, etc. Five types of writs are issued under the writ jurisdiction by the High Court Division. Writs of certiorari and prohibition are intended to prevent pubic functionaries or local authorities to refrain from doing that which it is not permitted by law to do, and declaring that any act done or proceeding taken, has been done or taken without any lawful authority and is of no legal effect. Certiorari is issued before the action and prohibition is issued after the action. Mandamus is issued to compel the public functionaries or local authorities to do what it is required by law to do. Habeas corpus is issued to ensure that no person is detained or confined in custody without any lawful authority or an unlawful manner. Quo warranto is directed to ensure that no one occupies a public office without any lawful authority.

Under the writ jurisdiction the duty of the High Court Division is to confine itself the issues whether the public functionaries or local authority has-

a. exceeded its powers;
b. committed an error of law;
c. failed to consider all relevant factors or taken into consideration irrelevant factors;
d. failed to observe the statutory procedural requirements and the common law principles of natural justice or procedural fairness;
e. reached a decision which no reasonable authority would have reached; or
f. abused its powers.[275]

20 Rule of Lenity

Ambiguity in a statute defining a crime or imposing a penalty should be resolved in favor of the defendant. For example, in one case, a criminal statute prohibited the use of "proceeds" of criminal activities for various purposes, and the meaning of "proceeds" could reasonably be construed to mean both "receipts" and "profits." The Court adopted the defendant-friendly "profits" definition of "proceeds" rather than the "receipts" definition because the rule of lenity

[275] See Tata Cellular v India, AIR 1996 SC 11.

required the statute to be interpreted in favor of the defendant. Be aware, however, that application of this rule is vague and it is often the subject of controversy.[276]

21 Remedial Statutes

"According to the definition of Corpus Juris Secundum,' a remedial statute "is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good." American Jurisprudence, while agreeing with these views, extends the term to statutes which provide practical means for obtaining relief. First of all, then, we should note that "remedial" covers two different meanings: substantive and operational."[277]

22 Saving Clauses

In a statute, an exception of a special item out of the general things mentioned in the statute. A restriction in a repealing act, which is intended to save rights, while proceedings are pending, from the obliteration that would result from an unrestricted repeal. The provision in a statute, sometimes referred to as the severability clause, that rescues the balance of the statute from a declaration of unconstitutionality if one or more parts are invalidated. [278]

23 Notwithstanding Any Other Provision of Law

Legislative drafters often resort to "notwithstanding" clauses when they are concerned that the application of existing statutes could, in some way, interfere with the new statutory rights or responsibilities they are creating. Drafting the bill so as to refer to the specific provisions that are of concern is one option, and Congress sometimes uses "notwithstanding" clauses that refer to particular statutes, rather than "any other provision of law." However, in other cases, the drafters may have difficulty in identifying or listing all current statutes whose application could impede implementation of the proposed legislation. In such cases, they may employ the phrase

[276]See, A Guide to Reading, Interpreting and Applying Statutes. The original handout was written in 2006 by Katharine Clark and Matthew Connolly consulting WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (3d. ed. 2001). The handout was revised in 2017 by Suraj Kumar and Taylor Beech.

[277] Rudolph H. Heimanson, Remedial Legislation, Marquette Law Review, Vol 46, Issue 2, Fall 1962.

[278]Read more: Saving Clause - Statute and Rights - JRank Articles https://law.jrank.org/pages/10009/Saving-Clause.html#ixzz6gztVdhjq, available at https://law.jrank.org/pages/10009/Saving-Clause.html , accessed on December 18, 2020.

"notwithstanding any other provision of law" despite the view of some commentators that this phrase represents "sloppy" drafting since it leaves Parliament's intent unclear.[279]

Depending upon the context in which the phrase is used, courts may construe "notwithstanding any other provision of law" broadly as "superseding all other laws," or more narrowly as overriding only "previously enacted conflicting provisions."

24 Conclusion

In the context of statutory interpretation, the legislative drafter's position has been aptly figured out by Lord Denning in his following comments:

"It is because the judges have not felt it right to fill in the gaps and have been giving a literal interpretation for many years that the drafter has felt that he has to try and think of every conceivable thing and put it in as he can so that even the person unwilling to understand will follow it. I think the rules of interpretation which the judges have applied have been one of the primary causes why the drafter has felt that they must have a system of over-detailed, over-long sentences, and obscurity."[280]

Legislative Drafters by way of drafting legislations clear, simple, concise, and understandable as possible may help to avoid misinterpretation of law, and thereby substantially reduce backlogs of cases in both subordinate and superior judiciary. The European Community in 1993 issued the following important guidelines for Drafters which may be useful:[281]

(i) the wording of the Act should be clear, simple, concise, and unambiguous;
(ii) excessively long sentences should be avoided;
(iii) the various provisions of the Acts should be consistent with each other;
(iv) the same term should be used throughout to express a given concept;
(v) the rights and obligations of those to whom the Act is to apply should be clearly defined;
(vi) the preamble should justify the enacting provisions in simple terms;
(vii) provisions without legislative character should be avoided (e.g., wishes, political statements);

[279] See, CRS Reports and Analysis, at https://fas.org/sgp/crs/misc/notwith.pdf , accessed on December 18, 2020.
[280] See, Sir Rupert Cross, Statutory Interpretation, p. 199, Third Edition.
[281] Ibid, p. 203.

(viii) any amendment, extension or repeal of an Act should be clearly set out.

PART X

PERFORMANCE OF CONTRACT

Introductory:

Contextualization of Performance of Contracts to Legislative Drafting

The rule of law is the essence of good governance. And the essence of the rule of law is that the legal rules of both of national and international origins and their associated values are obeyed. To ensure the observance of the rule of law, legislation (which is a primary source of law) must be well drafted. And the drafters should have the knowledge of the law on which the legislation is to be made.

International legal obligations primarily arise from international treaties or cross-border agreements. The obligation of performance of international treaties and conventions is governed by international law of treaties. The Constitution of Bangladesh provides for the manner of implementation of the treaty obligations within the national jurisdiction. On the other hand, the performance of cross-border agreements is regulated by the law chosen by the parties. The chosen law chiefly can be an international convention or a national law or a mixture of both. For example, the parties to an international sale of goods agreement may choose the *United Nations Convention on the Contract of Sale of Goods 1980* or they may choose a national law or both. If the chosen law is an international convention and Bangladesh is a party to it, she has to implement it within the national jurisdiction according to her constitution. Besides, her contractual relations may be governed by international customary law, general principles and soft laws. For example, parties to an investment agreement may be subject be customary law or general principles. Again, as already said, international contractual obligations may be governed by Bangladeshi law, if it is so chosen by the parties. Besides, any local contract will be automatically regulated by the Bangladeshi law.

This Part of the Book will give a basic outline of the international treaty obligations with special focus on their performance and domestication. It will also briefly mention how Bangladesh has to implement international customary law, general principles and soft laws. Next, it will state, in short, the provisions of Bangladesh contract law relating to the performance of contract.

CHAPTER 1

PERFORMANCE OF INTERNATIONAL CONTRACTUAL OBLIGATIONS

1.1 International Law and National Obligation in General

1.1.1 In General: Introduction to International Law Sources, Treaties in Particular

Generally, "international law" is understood as the body of rules and principles that regulate the conduct of nations or states. In this sense, states are the only subject of this law. In reality, however, the subjects include additionally international organisations, other non-state entities like corporations and even individuals. Thus, in an all-inclusive sense, the following definition seems to be appropriate: (International law is) 'that body of law which is composed for the greater part of the principles and rules of conduct which states feel themselves bound to observe and therefore, do commonly observe in the relation with each other and which includes also:

(1) the rules of law relating to the functioning of international Institutions or Organisations, their relation with each other and their relation with the states and individuals; and

(2) certain rules of law relating to individuals and non-state entities so far as the rights or duties of such individuals community.'[282]

As enumerated in Article 38(1) of the Statute of International Court of Justice, the rules of international law are received from the following main sources: international conventions, international customs and general principles of law recognised by civilised nations. Besides, judicial decisions and the teachings of the most highly qualified publicists are treated as a subsidiary means of determining such rules.

In the above enumeration, it looks like that the sources should be applied in their chronological order. In reality, that was not the intention of the drafters of the *Statute.*[283] As such, the first three sources, being the main sources, do not have any priority over one another. Thus, for example, treaties and customs are of the same rank the former being created by states through express will and the latter by their long standing practice to regulate their inter-state relations.[284] Of course, treaties constitute *jus speciale* (special law) and may as such derogate from *jus generale* (general

[282] Starke's *Introduction to International Law,* 10th ed. 1994, p. 3.
[283] See D.J. Harris, *Cases and Materials on International Law,* 7th ed. (London: Thompson Reuters, 2010), pp. 16-17.
[284] L. Condorelli, 'Custom' in M. Bedjaoui, *International Law: Achievements and Prospects* (Paris and Dordrecht: UNESCO and Martinus Nijhoff, 1991), 179-211, p. 184

law, i.e., customary law) in a given circumstance.[285] In deciding a case, the International Court of Justice (ICJ) looks into whether such a situation exists.

Now, let us have some brief idea of the specific sources.

Treaties:

Treaties are written agreements between or among states on any matter, such as international trade, control of nuclear weapon or human right, etc. They are also known as conventions, a statute, a protocol, or a covenant or charter. They govern the mutual relations of the states that have signed and ratified them. The fact of states' signing and ratifying the treaties indicates their consent to obey the treaty provisions. In other words, their consent obliges them to obey the treaties. This is based on the principle of *pacta sunt servanda* (promise must be kept), a customary principle of international law, which posits that an agreement consented to must be obeyed. Thus, an essential character of a treaty is that it is binding. If an instrument is not binding, it is not a treaty. For example, the *Charter of Paris* (1990), which established the Organization for Security and Co-operation in Europe, is not a treaty as it is not binding. In the same way, declarations' that are adopted by the United Nations General Assembly do not have any binding effect and hence are not treaties, e.g., *Universal Declaration of Human Rights 1948.*

Treaties are of two types:

(1) Law-making treaties (also called multilateral treaties) that apply to states universally or generally.

(2) Treaty-contracts made between two or a few states.

However, a strict and inflexible division is very difficult to uphold, as there is no clear-cut line between these two categories.[286]

(1) Law-making treaties

Law-making treaties are a source of international law, which is not the case with treaty-contracts as they create obligations for the member states only. "A treaty may be *law-making* in that it is the declared intention of the signatories to make or amend their internal laws to give effect to the treaty. A treaty is of no force or effect anywhere except within and binding upon those

[285] *Ibid.*
[286] M. Fitzmaurice and A. Quast, *Law of Treaties* at https://london.ac.uk/sites/default/files/uploads/study-guide-postgraduate-laws-law-treaties.pdf accessed on 8 October 2020.

jurisdictions that have formally adhered to it, usually by domestic statute that refers or incorporates it."[287]

When a law-making treaty is open for signature by interested states, the states may sign it subject to later ratification unless this requirement is expressly waived. It is not binding on a signing state until it is ratified. The treaty is binding on those states that are parties to it. And it comes into effect after a specified number of ratifications has been received. The states that did not sign and ratify the treaty may be its members by a process called accession.[288]

The Law-making treaty cannot always be a universal source of international law. Some of them lay down general rules for states. As such, law-making treaties are classified into two:

(a) treaties that lay down universal rules of international law, such as the United Nations Charter;

(b) treaties that enunciate general rules, e.g., International Convention for the Prevention of Pollution by Ships (MARPOL) (London 1973 and 1978) (MARPOL 1973/1978) and Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (Washington 1973) (CITES 1973).

(2) Treaty-contracts made between two or a few states.

These treaties create a particular law between the parties or signatories thereto as mentioned in paragraph 1a of article 38 of the *Statute of International Court of Justice*, such as a transboundary movement of specific hazardous waste. They do not make any general rules of international law and as such are not a direct source of it.[289] A country's signature is often sufficient to manifest its intention to be bound by the treaty.

Customs:

In essence, it refers to a common and constant practice of States, which may be manifested in the actual words, actions and omissions of States.[290] In 1950, the International Law Commission prepared a report (known as Hudson's working paper) that enumerated a non-exhaustive list of sources of international custom, which are as follows: (i) texts of international instruments, (ii) decisions of international court, (iii) decisions of national courts, (iv) national legislation, (v) diplomatic correspondence, (vi) opinions of national legal advisers, and (vii) practice of international organizations.[291]

[287] http://www.duhaime.org/LegalDictionary/T/Treaty.aspx accessed on 6 October 2020.
[288] https://www.britannica.com/topic/treaty accessed on 6 October 2020.
[289] Starke, above, pp. 44-45.
[290] A.G. Hamid, *Public International Law: A Practical Approach,* (Selangor: Prentice Hall, 2007), p. 30.
[291] *Yearbook of the International Law Commission 1950,* vol. II, p. 368-372.

There are two essential elements of an international custom. There must be a continuous, general, uniform and consistent practice of states. Second, that practice must be carried out by states out of the belief that they are obliged to do so. In other words, states must accept the practice as a law and thus act upon it as a part of fulfillment of a legal duty.[292] The performance of an act being "motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty" does not amount to a custom.[293]

General principles of international law:

Here, "general principles" may refer to those general principles that are common to all systems of law. For example, principle of good faith, which has direct relevance to the law of treaties. To quote Article 26 of the *Vienna Convention on the Law of Treaties 1969,* "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." The International Court of Justice (ICJ) has applied this principle in many cases. For example, in Nuclear Tests Case (Australia v. France)[*294*], the ICJ says, "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith." Another example may be the Principle of Equity[295], which is used "in the sense of consideration or fairness, reasonableness, and policy often necessary for the sensible application of more settled rules of law."[296] . As to its importance in international law, in the ICJ case of *Gabcikovo-Nagumaros Project (Hungary v. Slovakia)* (25 September 1997), Judge Koroma cited, in a separate opinion, Judge Hudson as follows,

> [What (*sic*) are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals, . . .[297] (Judgment, ¡937, P.C.I.J., Series A/B, No. 70, p. 76)].

Judicial Decisions and Writings of Eminent Lawyers:

These two are auxiliary means for determining the rules of international law. Of them, the former (judicial decisions) play an important role in laying down the rules of international law, in

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[292] I. Brownlie, *Principles of Public International Law,* 4th ed. (Oxford: Clarendon Press, 1990), p. 3-11.
[293] *North Sea Continental shelf* cases, ICJ Rep 3(1969), para. 77.
[294] Judgment (20 December 1974) para. 46 at https://www.trans-lex.org/380700/_/nuclear-tests-judgment-icj-reports-1974-p-253-et-seq/
[295] However, "(s)trictly, it cannot be a source of law and yet it may be an important factor in the process of decision. Equity may play a … role in supplementing the law or appear unobtrusively as a part of judicial reasoning." I. Brownlie, Principles of Public International Law, sixth edition, page 25.
[296] I. Brownlie, Principles of Public International Law, sixth edition, page 25
[297] http://www.worldcourts.com/icj/eng/decisions/1997.09.25_gabchkovo.htm accessed o

particular the judgments and advisory opinions of the International Court of Justice. Despite the fact that the judgments are binding in the particular case and only on the parties thereof, the authority of the pronouncements of the ICJ is enormous. The Court helps to trace and shape up the rules of international law. At the same time, the pronouncements of other international courts and tribunals are also important. They help us identify the relevant rules of international law. Although the writings of renowned jurists are of lesser importance in today's world, the lawyers rely upon them in the proceedings before national courts.

1.1. 2 Nexus between International Law and Domestic Law

1.1.2.1 Theories of International Law: Monism and Dualism

According to the Monist Theory, international law is considered to be part of the national legal order of a state. According to the dualist theory, international law is distinct from national law, and hence is required to be domesticated through legislative process to impact the rights and obligations in the national sphere. The former theory attaches priority to the formal international legal order and seeks to establish the rule of law among the nations, whilst the latter favours precedence of individual state sovereignty over the international legal regime.

The monist theory is a contribution of Austrian Professor Hans Kelsen propounded in his famous work, *Peace Through Law* (1944). He considered international law as a derivative of natural law instead of merely a choice by states to follow certain customary practices at the international level. It is an integrated system of law of states with vertical effect of application in the municipal system law. As such, a treaty, once ratified or acceded to, becomes a part of the national law and may be applied and enforced directly by domestic courts without any requirement of being internalised through the legislative process. In this way, international law and municipal law constitute one single and unitary legal system where the former occupies the superior and the latter subordinate positions.

According to the Dualist legal theory, international law separate from domestic law. There is no integrated relation nor hierarchy between. International law is, according to German scholar Heinrich Triepel, an expression of "common will" of sovereign. It is not a binding law for the states nor is the municipal law subject to it. International law, to be relevant to the domestic law, has to be approved and executed by the concerned national authority. For example, a treaty to be applicable to inter-state relation needs to be ratified after completion of certain legislative and executive procedure under the national constitution.

Both the theories have their own merits. For example, under monist theory, international law being an integral part of a state law applies directly and instantly without the need of any intermediary process of domestication. It saves times and can help meet any immediate international obligation owed by a state. On the other hand, dualist method is a bit time consuming as it has to go through certain legislative and executive processes. Of course, in this method, state can exercise its sovereign power and make a "pick and choose" judgment. Perhaps considering the benefits of both, most of the states adopt a mixed approach. The United States of America (USA) is a typical example, where both existing and prospective treaties together with

the national constitution are considered the supreme of the country. To quote Article VI of the United States Constitution,

> "Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Customary international law is considered part of the national law as well as evidenced in *The Paquete Habana* case[298] where the capture of fishing vessels as prizes of war is held to be a violation of customary international law, which is assimilated with US law and hence binding. At the same time, there is trend in the US adopting the dualist approach side by side of the monistic practice. For example, in *Medellin v. Texas*[299], the Supreme Court holds that even if an international treaty amounts to an international commitment, it is not a binding domestic law unless the treaty itself is "self-executing or the Congress has implemented it by any legislative enactment. It also holds that the judgments of the International Court of Justice (ICJ) do not have any binding effect in the US domestic law. It reasons the judgment that without authority from the United States Congress or the Constitution, the US President does not have any power to enforce international treaties or decisions of the International Court of Justice.

1.1.3 Bangladesh Constitution and International Law

International law itself does not determine how international law should be applied at the national level. National constitutions define the position of customary and treaty law within the legal boundaries of a country. In this context, relevant provisions of the Constitution of Bangladesh may be mentioned. First of all, attention should be paid to the Preamble to the Constitution that transpires the State's obligation to make "full contribution towards international peace and co operation in keeping with the progressive aspirations of mankind". Article 25 specifically bases Bangladesh's international relations on the principles of international law in the following words:

> The State shall base its international relations on the principles of respect for national sovereignty and equality, non interference in the internal affairs of other countries, peaceful settlement of international disputes, and respect for international law and the principles enunciated in the United Nations Charter,...

The above article goes on further to base the State's actions on international law in the following maters:

- ✓ respect for national sovereignty and equality,

[298] 175 U.S. 677 (1900)
[299] 552 U.S. 491 (2008)

- ✓ non-interference in the internal affairs of other countries,
- ✓ peaceful settlement of international disputes, and
- ✓ respect for the right of self-determination of oppressed people.

According to Article 8(2), even though the principles enshrined in Article 25 like other principles of State policy are not enforceable in the court of law, they are fundamental to the governance of Bangladesh, applicable in the making of laws, a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and the basis of the work of the State and of its citizens.

1.1.4 Domestic Law of Bangladesh and International Law

Bangladesh is a common law country. As such, we practice dualism in determining the priority between the domestic law and international law. In other words, when there is clear provisions of domestic law, they will prevail over international law. This is established by the Supreme Court of Bangladesh in Bangladesh v Sombon Asavhan[300] that where domestic law exists in any international matter, the function of the domestic court is to enforce it in accordance with the clear meaning of domestic statutory law. In another case it is said that Ershad v Bangladesh and ors[301] where the domestic law is clear but inconsistent with the international obligations of the state, the domestic court will be bound to abide by the domestic law. However, it may be noted that in case of peremptory norms of international law (*jus cogens*), there is no question of hierarchy. Such norms shall prevail over other international and domestic laws.

1.2 International Treaties and Their Domestication in Bangladesh

1.2.1 Application of Treaties in Bangladesh

It is the general practice in Bangladesh that international treaties do not automatically become part of the internal law unless they are incorporated into the domestic legislation. For example, if a treaty requires alteration of an existing law, the Parliament needs to pass an Act to effect such a change. Otherwise, the law courts have no power to enforce the treaty rights and obligations at

[300] 32 DLR (1980) p 198
[301] 2I BLD (AD) (2001) p.69

the behest of the government or any individual.[302] In the same vein, international human rights declarations or treaties are not directly applicable in Bangladesh. If, however, they are incorporated into domestic law, national courts will enforce them.[303] Likewise, it was further held that international covenants do not form part of the *corpus juris* of the State and so not enforceable by our courts unless they are incorporated into domestic law.[304]

1.2.2 Procedure of Treaty Domestication

As said above, international treaties are not automatically applicable within the national jurisdiction of Bangladesh. There are specific procedures to incorporate them into the domestic law. Article 145A of the Bangladesh Constitution lays down the following procedures in this regards,

> All treaties with foreign countries shall be submitted to the President, who shall cause them to be laid before Parliament :
> Provided that any such treaty connected with national security shall be laid in a secret session of Parliament.

It is relevant to mention that "Only those agreements, whether called treaty, convention, covenant, protocol, charter or exchange of notes, concluded with foreign countries in written form and governed by international law are treaties within the meaning of art. 145A."[305] "All other agreements with foreign countries may be treated as executive agreements."[306] A treaty is characterized by the fact that it must create a legal obligation governed by international law and not by municipal law.[307] Thus, an agreement on military and technical cooperation between Bangladesh and Russia governed by their respective domestic laws was held to be an executive agreement and not a treaty.[308]

However, even though Article 145A quoted above appears to mean that it is obligatory to place a treaty before the National Parliament for approval, the High Court Division of the Supreme

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[302] *Chief Election Commissioner* v. *Comptroller and Auditor-General*, (2005) 57 DLR 113.
[303] Ershad v. Bangladesh and ors, 2IBLD (AD) (2001) 69.
[304] BNWLA v. Government of Bangladesh and Others, 14 BLC (2009), HCD
[305] Mahmudul Islam, *Constitutional Law of Bangladesh*, (Dhaka: Mullick Brothers, 2019), at p. 1025.
[306] *Ibid.* citing Schwartz Redlich and Attanasio, *Understanding Constitutional Law,* 1995, p. 140.
[307] *Major (Retd) Akhtaruzzaman* v. *Bangladesh,* W.P. No. 3774 of 1999 (unreported) cited in Mahmudul Islam, *ibid.*
[308] *Ibid.*

Court of Bangladesh held that failure to do so would not invalidate a treaty.[309] Thus, in Bangladesh, treaty making is an executive matter and not a concern for the legislature. Article 145A requires submitting a treaty to Parliament for discussion only, not of ratification. It may be mentioned that only one treaty, namely Ganges Water Sharing Treaty with India is known to have presented before the Parliament.[310]

1.2.3 Relevance of Treaties in Filling the Gaps and Interpretation of Domestic Law

Since Bangladesh is a dualist country, no treaty can be directly enforced in its internal jurisdiction. However, treaties may be used supplement the local laws or fill their gaps. They may also be used to interpret laws within the domestic jurisdiction. Thus, in Bangladesh National Women Lawyers Association (BNWLA) Vs. Bangladesh And Others,[311] the Supreme Court of Bangladesh makes this clear with regard to the application and interpretation of the fundamental rights provisions of the national constitution as follows:

> *The Fundamental Rights guaranteed in Chapter III of the Constitution of Bangladesh are sufficient to embrace all the elements of gender equality including prevention of sexual harassment or abuse. Independence of Judiciary is an integral part of our constitutional scheme. The international conventions and norms are to be read into the fundamental rights in the absence of any domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction to interpret municipal law in conformity with international law and conventions when there is no inconsistency between them or there is a void in the domestic law.*

With the above approach, based on *1979* ***the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),*** the court lays down certain directives concerning no-abuse and harassment of women at workplaces and educational institutions in Bangladesh in view of the inadequacy of safeguards under national laws in these fields.[312]

Again, international law may be used to interpret Bangladeshi laws on similar subject matters. For example, for the interpretation of fundamental rights provisions of the Bangladesh Constitution, it would be pertinent to refer to the Universal Declaration of Human Rights (UDHR)1948 and their interpretation because most of the rights enshrined in the Declaration are in some form or other included in Part III of our Constitution and recognition has been given to some of them in Part II.[313] The UDHR was followed by the following two covenants- 1966 Covenant on Civil and Political Rights and 1966 Covenant on Economic, Social and Cultural

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[309] *Ibid.*

[310] Shiekh Hafizur Rahman Karzon and Abdullah Al Faruque. 'Status of International Law under the Constitution of Bangladesh: An Appraisal'. *Bangladesh Journal of Law,*vol.3 No. I (1993), p. 42 n. 44.

[311] 14 BLC (2009) 694

[312] 14 BLC (2009) 694, para. 55.

[313] Mahmudul Islam, above, p. 127.

Rights. As mentioned earlier, Bangladeshi courts do not enforce these Covenants because treaties and conventions are not considered part of the *corpus juris* of the State unless they are not incorporated in the municipal legislation. "However, the court can look into these conventions and covenants as an aid to interpretation of the provisions of Part III, particularly to determine the rights implicit in the rights like the right to life and the right to liberty, but not enumerated in the Constitution. It is only when it is contrary to the municipal law that international conventions have to be ignored."[314]

[314] Mahmudul Islam, p. 127-128.

CHAPTER 2

PERFORMANCE OF CONTRACTS UNDER DOMESTIC LAWS: BANGLADESH, COMMON LAW, CIVIL LAW (AND ISLAMIC LAW)

1. INTRODUCTORY:

1.1 The Concept of Performance

A contract is said to be discharged when the obligations created thereby come to an end. A contract may be discharged in a number of ways. **First,** it can be discharged by performance, which takes place when the parties to the contract complete their obligations that arise under the contract within the time and in the manner prescribed thereby. **Second,** a contract may be discharged by mutual agreement of the parties to substitute a new contract for it, or to rescind or remit or alter it. In that case, the original contract need not be performed. **Third,** a contract may be impossible to be performed from the very beginning (impossibility *ab initio*) or due to factors arising subsequent to its making (supervening impossibility), such as change in law, destruction of the subject-matter essential to its performance, non-existence or non-occurrence of particular state of things and declaration of a war. **Fourth,** a contract may be discharged if it is not performed within a specified period as prescribed by *The Limitation Act, 1908*. If the contract is not performed by time and if no action is taken by the promisee within the prescribed time limit, he is deprived of remedy at law. **Fifth,** law may operate to discharge a contract, such as death or insolvency of the promisor. **Last,** breach of contract by its parties discharges it. The breach may be actual or anticipatory. If one of the parties defaults in performing his part of the contract on the due date, he is said to have committed breach thereof. If, on the other hand, a party repudiates it before the stipulated time for its performance, he will be said to have committed anticipatory breach. If one of the parties to a contract breaks the promise, the party injured thereby, has a right of action for damages and at the same time he is also discharged from performing his part of the contract.

1.2. An Approach to this Chapter:

There are three main legal families each including a group of countries whose legal systems are distinguished with the sources of law, law making process, and legal cultures and traditions. They are Common Law, Civil Law and Islamic Law families. Common law families include those countries that inherited the legal systems from the British. Civil law families mainly include the continental European countries. And Islamic law family encompasses the countries that are members of the Organisation of Islamic Countries (OIC). Some of the Islamic jurisdictions have a mixed system of law. For example, Malaysian legal system is a mixture of common law and Islamic law traditions. Indonesia has a combined system of civil law and Islamic law. Besides, the socialist countries like Russia, China, Cambodia, Vietnam and North Korea maintain civil law traditions. It may be mentioned that the members of these three legal families, despite the basic unity, have differences among them. For example, even though they all are civil law systems, Chinese law is different from German law, and German law is different

from French law. Again, the British law differs from US law despite both of them are members of the common law family.

It is true that Bangladesh is a small economy. But is an active and important partner of international trading nations, even the advanced ones. As such, the foreign trading companies, government-owned companies (GLCs) like Petro Bangla, various department of the government, and the government as a whole trade with business partners from all the three legal systems. That is why, considering that it would be expedient for the users of this Desk Book, the rules of contract performance under these three legal traditions are highlighted below from a comparative perspective with special focus on the Bangladesh law.

1.3 Theoretical Basis of Performance of Contract:

In general, a contract creates legal obligations between two parties and is enforceable by law. The parties agree upon something and thereby create obligations for themselves, which the law requires them to fulfill. To quote Salmond, "A contract is an agreement creating and defining obligation between the parties."

The basis of an agreement is the mutual consent of the parties. Their own consent binds themselves to complete their respective obligations in order to comply with the terms and conditions contained in the contract. In other words, they are bound to fulfill their promises. This is based on the fundamental principle of contract law -the principle of *pacta sunt servanda* (promise must be kept), which is common in all three legal systems. The place of the principle both in the civil and the common law systems is underlined as follows:

> *Both (civil and common law) reactions, however, are evidence of the principle that a contract must be upheld. No one is forced to enter into a contract, but if one does, one is bound by it in the same way as if the rules therein had been made by the legislator.*[315]

Hugo Grotius (1583-1645) claimed in that 'the duty to keep promises flows from the very nature of eternal justice.' Under the Islamic legal system, the binding effect of contract is linked to the Qur'anic command to it followers, 'Fulfill you contracts.'[316]

2. PERFORMANCE UNDER BANGLADESHI LAW:

2.1 In General

A contract creates obligations for the parties thereto, which they are bound to fulfill in general. Section 37 of *The Contract Act 1872* provides in this context as follows:

> The parties to a contract must either *perform*, or *offer to perform (*emphasis added*)*, their respective promises, unless such

[315] Jan A. Smits, *Comparative Contract Law: An Introduction,* (UK and USA: Edward Elgar, 2014), p. 12.

[316] Qur'an, 5:1. See Noor Mohammad, ...

> performance is dispensed with or excused under the provisions of this Act, or of any other law.
>
> Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.

As highlighted above, a party has two options of performance. He/she may perform it or may offer to perform it. The former type of performance is called actual performance and the latter attempted performance or tender of performance. In the following these two types of performance are discussed under separate heads.

2.2 Actual performance:

2.2.1 Who Must Perform the Promise?

- Actual performance takes place when a party completes his obligation under the contract. For example, A & A Company Limited made a contract with Y & Z Limited to sell five tons of rice and promised to supply the same in two weeks time. If the former delivers the goods by the agreed time, it has actually performed the contract. In this way, its liability under the contract comes to an end.

- The contract may be performed by the following persons:

✓ In the first place, the **promisor himself** is required to perform the contract that involves the exercise of personal skill or diligence, or which are founded on personal confidence between the parties himself (Section 40).

Example: A promises to paint a picture for B. A must perform this promise personally.

✓ In other cases, the promisor or his representatives may employ a competent person (**agent/third person**) to perform it (Section 40)

Example: A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

✓ It is noted that when a promisee accepts performance of the promise from a **third person**, he (third person) shall perform the contract. The promisee cannot enforce it against the promisor after taking such a promise (Section 41).

✓ As cited above, section 37 of *The Contract Act 1872,* requires the **legal representatives** of the deceased promisor to perform the contract. Of course, their liability under a

contract is limited to the extent of the value of the property they inherit from the deceased.

- ✓ Lastly, **joint promisors** must fulfill their promise, as detailed below.

2.2.2 Joint Promisors and Promisees and their Liability

- When two or more persons have made a **joint promise**, they must jointly fulfill the promise unless a contrary intention appears by the contract. If any of them dies, his legal representatives must, jointly with the surviving promisor(s), and after the death of last survivor, the representatives of all jointly, must fulfil the promise (Section 42).

- When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise (Section 43).

- Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract. As such, if one of the joint promisors is made to perform the whole contract, he can call for a contribution from others (Section 43).

- If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares (Section 43).

- Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors, neither does it free the joint promisors so released from responsibility to the other joint promisor or promisors (Section 44).

Illustrations:

(a) A, B and C jointly promise to pay D 3,000 Taka. D may compel either A or B or C to pay him 3,000 Taka.

(b) A, B and C jointly promise to pay D the sum of 3,000 Taka. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 Taka from A's estate, and 1,250 Taka from B.

(c) A, B and C are under a joint promise to pay D 3,000 Taka. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 Taka from B.

(d) A, B and C are under a joint promise to pay D 3,000 Taka, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

2.2.3 Devolution of Joint Liabilities

- When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

Illustration:

A, in consideration of 5,000 Taka lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

2.3 Attempted Performance or Tender of Performance:

2.3.1 What?

> "Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract." (section 38 of *The Contract Act 1972)*

Now, let us say that under a sale of goods contract, A & A Company Limited (promisor) promised to sell and supply five tons of rice to Y&Z Limited (promisee). By the agreed time of supply, the promisor offered to supply the contacted goods, but the promisee refused to accept the offer. Here, the former made an attempt to perform the contract, but failed to successfully perform it because of the latter's refusal. It is not liable for non-performance. Nor can it be considered to have performed the contract. However, the rejection of the offer by the latter does not affect former's rights under the contract. The former can sue the latter for non-performance of the contract. If the latter sues the former for no-performance, it (former) can use the rejection as a defence.

2.3.2 *Conditions for Valid Tender of Performance:*

Tender or offer of performance to be valid must satisfy the following conditions laid down under section 38:

- It must be unconditional. Thus, if in a loan contract the borrower offers the lender to accept the principal amount of loan, that will not be a valid offer because the whole amount of principal and interest is not offered.

- It must be made at a proper time and place. Let us say, in a sale of goods contract both parties agree that goods will be delivered on 1st January 2020. The seller offers to supply them on 2nd January 2020.
- Reasonable opportunity to examine the contracted goods. Thus, in the case of a delivery of goods to the buyer by the seller promise must give reasonable opportunity to the latter to inspect.

Illustration:

A contracts to deliver to B at his warehouse, on the 1st March, 2020, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

2.3.3 Reciprocal Promises

When, as in most of the cases, two or more parties promise to perform certain obligations vis-à-vis each other, such promises are of reciprocal nature. Reciprocal promises form part or the entire consideration of the contract for each other.

- **Requirement of Reciprocal performance of promises**

  Section 51 of *The Contract Act 1872* provides that "When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise."

  Illustrations:

  (c) A and B contract that A shall deliver goods to B to be paid for by B on delivery.
  A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.
  B need not pay for the goods, unless A is ready and willing to deliver them on payment.

  (d) A and B contract that A shall deliver goods to B at a price to be paid by installments, the first installment to be paid on delivery.
  A need not deliver, unless B is ready and willing to pay the first installment on delivery. B need not pay the first installment, unless A is ready and willing to deliver the goods on payment of the first installment.

- **Order of performance of reciprocal promises**

  The reciprocal promises are to be performed in the order fixed expressly by the contract.

  When, however, the order is not so fixed, they shall be performed in that order which the nature of the transaction requires (Section 52).

  Illustration:

  (a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

(b) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

- **Liability of party preventing event on which the contract is to take effect**

When one party to a contract that contains reciprocal promises prevents the other from performing his promise, the party so prevented may avoid the contract and claim compensation from the other party for any loss he may incur as a result of the non- performance of the contract (Section 53).

Illustration

A and B contract that B shall execute certain work for A for a thousand Taka. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

- **Effect of default as to that promise which should be first performed in contract consisting of reciprocal promises**

If one of the promises cannot be performed, or its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise. He must compensate the other party to the contract for losses, if any, resulting from the non- performance of the contract Section 54).

Illustrations:

(a) A hires B's ship to take in and convey, from Chittagong to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b) A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

- **Performance of Reciprocal Promises and the Essence of Time of Performance**
  - ✓ When one of the parties fails to do a certain thing that he promised to do at or before a specified time, the promisee may avoid the contract, or so much of it as has not been performed, if the intention of the parties was that time should be of essence of the contract (Section 55). In business matters, time is generally of

essence. For example, in *United Commercial Bank v. Jawaharlal Mill,* (1989) 2 Cal LJ 246, where a builder promised a bank that he would make their building ready in six months' time and failed to do so, the time specified was considered essential and so the bank was allowed to terminate the contract.

- ✓ If, however, it was not the intention of the parties that time should be of essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure (Section 55). It is said in *D.S. Thimmaappa v Siddaramakka,* (1996) 8 SCC 365; AIR 1996 SC 1960, that "Unless the contract prescribes a time for performance, there is no question of any particular moment of time being regarded as of essence of the contract." The mere mention of the fact that delay would have to be compensated does not of itself make the time of essence (*Thakorlal V, Patel v. Col. Syed Badruddin, (1993)* 1 Guj LR 28).

- ✓ Again, if the promisee accepts the performance of contract at a time other than the agreed time, he cannot claim compensation for non-performance of contract at the agreed time unless at the time of such acceptance he gives notice to the promisor of his intention to do so (Section 55).

Note:
Time as the essence of contract may be understood from the language used in the contract or from the circumstances. This may be understood from the following words , "Time is generally considered to be of the essence of the contract in the following three cases:
(1) Where the parties have expressly agreed to treat it as of the essence of the contract;
(2) Where delay operates as injury;
(3) Where the nature and necessity of the contract requires it to be so construed, for example, where a party asks for extension of for performance" (See R.K. Prasad J. in *Orissa Textile Mills Ltd. v. Ganesh Dash, AIR 1961 Pat. 107*).

- **Performance of Reciprocal Promises Involving One Thing Legal and Other Thing Illegal**

Where there are two sets of reciprocal promises, one being legal and other one being illegal, the first set of promises is a valid contract while the second one is a void agreement (Section 57). Thus, where the buyer and the seller agree that the seller shall sell a house to the buyer for 50,00,000 Taka, but the buyer uses it for gambling purpose, he shall pay the seller 200,000,00 Taka.

The first set of reciprocal promises is a valid contract, but the second set involving an unlawful object is a void agreement.

- **Alternative promise, one branch being illegal**

  In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced (Section 58).

  Illustration:

A and B agree that A shall pay B 50,000 Taka for which B shall afterwards deliver to A either rice or smuggled opium. This is a valid contract to deliver rice, and a void agreement as to the opium.

2.3.4 Rules of Appropriation of payment?

A debtor may owe several debts to the same creditor and make insufficient payment to discharge all the debts. In such cases, the payment is appropriated as follows:

- **Application of payment where debt to be discharged is indicated:** Where a debtor, owing several distinct debts to one person, makes a payment to him either with express intimation or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly (Section 59).

  Illustrations:

  (a) A owes to B, among other debts the sum of 5067 Taka. B writes to A and demands payment of this sum. A sends to B 5067 Taka. This payment is to be applied to the discharge of the debt of which B had demanded payment.

  (b) A owes B, among other debts, 50,000 Taka upon a promissory note which falls due on the first June. He owes B no other debt of that amount. On the first June A pays to B 50,000 Taka. The payment is to be applied to the discharge of the promissory note.

- **Application of payment where debt to be discharged is not indicated:** Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, where its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

- **Application of payment where neither party appropriates (Section 61):**
  Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payments shall be applied in discharge of each proportionately.

2.3.5 Exemptions from performance under Bangladeshi law

According to section 37(quoted above), the parties to a contract are not required to perform or offer to perform a contract if such performance is *dispensed with, for example, by agreement (s. 62)* or *excused* under the provisions of *this Act (supervening impossibility under s. 56)*, or of *any other law.*"

Section 56 deals with the doctrine of frustration under which a promisor is excused from liability under a contract when there is a breach of contract and contract is deemed to be void. Frustration and impossibility- these two terms are used interchangeably to refer to some unforeseen circumstances or any event which make the performance of a contract impossible.[317] It is based on the maxim- *les non cogit ad impossibilia* (law will not compel a man to do what he cannot possibly perform).

Illustration:

A & A Company Limited, a Bangladeshi company, made a contract with an American company to supply locally made baby garments. Before the supply of goods, A& A Company Limited has been declared insolvent by the High Court Division of the Supreme Court of Bangladesh. Under this circumstance, the contract is impossible to be performed insolvency being a supervening impossibility.

When does the doctrine of frustration apply?

It applies in one of the two cases:

1. Where the object of the contract becomes impossible to perform.

2. A circumstance takes place rendering the performance of the contract impossible beyond the capacity of the promisor.

Types of frustration:

Frustration of contract may take place in the following various shapes.

1. **Death or incapacity of a party:** Where, after making the contract, a party thereof dies or becomes unable to perform it (Robinson v Davison)**.**
2. **Subsequent legislation:** Where, a law passed subsequent to the formation of the contract, stultifies its performance and thereby renders it void (Rozan Mian v Tahera Begum).
3. **Fundamental change of circumstances:** Where the change in circumstances defeats the purpose of the contract.

[317] Satyabrata Ghose vs Mugneeram Bangur & Co., 1954 AIR 44, 1954 SCR 310

Conditions for the application of Section 56:

- There must exist a valid and subsisting contract between the parties.
- There must be some part of the contract yet to be performed without which the ultimate purpose of the contract is not fulfilled.
- The contract, after it has been entered into, becomes impossible to perform and, as such, stands void.

3. PERFORMANCE UNDER CIVIL LAW AND COMMON LAW

3.1 Introductory

In civil law jurisdictions, performance of contract is a right of the creditor. So, the creditor can take recourse to the court and force the debtor to perform his duties. In the same way, the principal who engages the contractor to build a house can ask the court to order him to build the house. And an employer can seek an order from the court that employee must refrain from business competition. Thus, the jurisdiction of civil law treats a contract from moral approach, which means that the promise must be kept.

Performance of contract is the normal duty under common law. Damages for non-performance is the normal remedy. If that is not sufficient to do justice, specific performance is an available remedy as an exception. Thus, if A agrees to sell1000 barrels of oil to B, and A fails to deliver, then A is bound to pay compensation to B for the costs he incurred in concluding the contract as well as for the lost profits. This justifies A not having to supply B with any substitute goods. However, if there is a contract for supplying a specific good (like a rare painting) in which promisee has an especial interest to obtain, that will be different case where that specific product can satisfy the promisee, not any monetary compensation.

This difference between the civil law and the common law approach to performance is reflected in the following discussion on-

3.2 several civil law jurisdictions with focus on performance as the normal rules of remedy and the rules of impossibility as exceptions;
3.3 English law- both normal rules of damages, specific performance and impossibility as exceptions;
3.4 the doctrine of unforeseen circumstances;
(3.5 the European solution in the PECL).

3.2 Civil Law:

3.2.1 In General: Performance as the Rules of regular remedy

In civil law jurisdictions, the principle that the contracting parties can claim performance of contract is well established. That is why, except a few, the civil codes do not clearly contain this principle. The German Code, for example, provides that the creditor may demand execution of the contract from the debtor (BGB, Section 241(1)).

At what point of time or event a party can claim performance of a contract depends upon its terms. Thus, if a contract sets a date of performance, at any time from this its performance can be claimed. If no time is fixed, its performance can be demanded immediately, which means within a reasonable time limit (e.g., German Civil Code (BGB),§ 271 (1), and Dutch Civil Code (BW), Art. 6:38, and Article 7:102, *Principles of European Contract Law - PECL*).[318]

The above principle of general availability of performance creates difficulties for the debtor to argue that the creditor has very little interest in the performance of the contract compared to the disproportionate hardship that the debtor may have to undergo. Of course, the performance must be in full agreement with what the parties have agreed upon. Thus, for example, In a Dutch case (*Multi Vastgoed v Nethou,* 2001), where the tiles of the front part of newly built building had cosmetic defects through corrosion, which were hardly visibly from the street, the court still allowed replacement of the tiles, even though it cost the debtor Fl. 6 million (€2,730,000).[319]

3.2.2 Impossibility

Despite the above principle, the claim of performance of contract may be denied by the court of law where the contract is impossible to perform. For example, if a house is destroyed by fire the day before it was supposed to be delivered to the buyer, it would be meaningless to for the court to order the seller to perform. In that case, a claim for damages or termination may be a better remedy. Lawyers distinguish between different types of impossibility.

[318] Jan M. Smits, *Contract Law A COMPARATIVE INTRODUCTION* , Second ed. (2017) , Cheltenham, UK and Northampton, USA (Edward Elgar) , pp. 184-195.

[319] *Ibid.,* 195.

Impossibility is of various types, such as- absolute impossibility, relative impossibility, practical impossibility, moral impossibility and legal impossibility, which are discussed below.

Absolute Impossibility:

First, the most obvious type of context where contract execution is impossible is absolute impossibility. This means that performance is 'logically' impossible. For example, when the lead singer of a group dies immediately before the band show takes place. Another example may be a contract the time for whose performance has elapsed.

However, in case of a contract of sale of **generic goods** the absolute impossibility principle may not apply. This is based on the rule *'Genus non perit'*, which means that absolute impossibility can never occur when so-called racist products are sold. Generic products are products that are only defined on the basis of their quantity, type, quality or weight, e.g., ten tons of potatoes. In this case the seller is always expected to find similar products, even if the specific products intended for sale no longer exist. Products like bananas, oils, seeds, wheat and stone are found elsewhere. Again, if you promise to transport goods from Barcelona to Warsaw, you are expected to find alternative means of transport even if Catalan Air controllers go on strike. Thus, the *genus non perit* rule is thus one instance of exception to a more general principle, namely that the impossibility of performance only exists if *any type* of performance has become impossible.

The above rule respecting **generic goods** does not apply where the goods are specific. For example, if a contract is made that a house shall be constructed by firm X and that firm is unable to perform the contract, that will be hit by the impossibility principle.

Relative Impossibility:

Only absolute impossibility was accepted by law as a reason for not being able to claim performance a hundred years ago. This was consistent with the liberal situation of the nineteenth century, when the obligation of the contract was absolutely binding and if the execution of the treaty became unreasonably difficult, the creditor would have more interest than the debtor in abandoning the treaty. That has changed. The second type of impossibility of performance is recognized today, which called 'relative impossibility'.[320] If Samantha's ring slipped from her finger during a boat trip in the North Sea, the jeweler to whom she sold the ring in Paris could not claim the ring. The amount of time and money that will be spent on finding the ring will be so disproportionate with the value of that ring that it cannot be expected that it would be reasonable for her to do so. It may be that this loss of the ring is due to her negligence, but it only allows the jeweler to claim for compensation and not for performance.[321]

Practical Impossibility:

The above mentioned relative impossibility has been given formal shape under the laws of different countries/region(s). For example, Dutch Civil Code (Explanatory Memorandum) demands 'a so exceptional effort or sacrifice that performance is practically impossible.' Under § 275 (2) of the German BGB, the debtor may refuse performance if that involves expense and effort of the debtor, which is 'grossly disproportionate' to the interest of the creditor in performance. Article 9:102 of the Principles of European Contract Law(PECL) allows relative impossibility if the performance causes the debtor 'unreasonable effort or expense.' Art. 7.2.2 of **Principles of International Commercial Contracts** (PICC) excuses performance if it is 'unreasonably burdensome." However, Smits alleges that "these are all necessarily imperfect formulations that only beget their true meaning when applied to real cases. These cases show that there is a thin line between performance that is difficult and performance that is too difficult."[322]

[320] Jan M. Smits, *Contract Law A COMPARATIVE INTRODUCTION* , Second ed. (2017) , Cheltenham, UK and Northampton, USA (Edward Elgar) , p. 198.
[321] *Ibid.*
[322] *Ibid.*

The court does not accept purely financial difficulties as a reason to avoid contract performance. The rationale behind is that such difficulties may be used as an alternative by which benefits will be received by the contract creditor and other creditors together.[323]

Moral Impossibility:

The performance of moral impossibility by the debtor is not possible without causing unreasonable danger to his own (or others) life, health or liberty. For example, an opera singer who refused to sing at a recitation ceremony because his child was seriously ill. Similarly, an employer cannot force his employees to work if an epidemic spreads out. In *Liston* v *SS Carpathian (Owners)* (1915)[324], the claimants sailed from England to Port Arthur. When they arrived at the port in Texas, the sailors heard that the First World War had broken out. As such, they were allowed not to sail back to Europe. In the same way, in *Weatherdest emet Ausland* 1983 (a German case) 1983 a Turk who lived and worked in Germany was allowed to refrain from work due to his obligation to carry out military duties imposed on him in Turkey. Failure to do so he would mean that he could face trial or even death penalty.[325]

Legal Impossibility:

Sometimes, the performance of a contract is forbidden by statute, public policy or good morals. As such, in such circumstances, the debtor cannot be expected to perform his contract. The act, by nature, may not be impossible to do; legal prohibition makes it impossible· This does not render performance absolutely impossible, but it does make it prohibited. Also in this case, performance cannot reasonably be expected from the debtor.

Personal Services

The terms of a contract sometimes call for the provision of services by a particular party who alone can provide them. For example, a famous photographer can agree to create a photo series of a wealthy business woman. Can such a contract be enforced in the court of law? All the legal

[323] *Ibid.* pp. 198-199.
[324] 2 KB 42.
[325] Cited in Smits, above, at p. 199.

systems of the world answer the question in the negative. There are three reasons for this. First, forcing the debtor to perform personal services or work is seen as a very serious interference with his personal freedom. Second, high quality work may not be expected from him if he is so compelled. Last, it would be difficult for the court to determine the appropriateness of the work.[326]

3.3 Performance under Common Law:

3.3.1 Damages and Specific Performance

It has already been discussed that English Law takes a separate position on matters relating to the performance of contracts. Such a claim does not exist in English Common Law. In equity, however, the court has the discretionary power in exceptional cases to grant a claim for so-called specific performance. In this case, the criterion is whether the remedy provided under the Common Law (especially in the case of compensation claims) would be appropriate for the establishment of justice. Thus, where the creditor can easily find other goods that can be the replacement for the performance of the contract(as in the case of generic goods), no specific performance can be claimed. This is, however, different in case of unique goods because the interest of the creditor can then not be estimated in terms of money.

Section 52 of the *Sale of Goods Act* 1979 summarizes the English law as follows: 'In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the plaintiff's application, by its judgment or decree direct that the contract shall be performed specifically.'

3.3.2 Impossibility:

English law also recognizes that no claim is acceptable in the case of any personal services (such as a contract of employment) and if performance is impossible. Impossibility is a form of

[326] Smits, p. 200.

frustration and it exists if an event occurs after the completion of the contract, which makes the performance of the contract impossible. The English doctrine of frustration includes not only impossibilities, but also events which may be considered as unforeseen circumstances in civil law. Of course, English courts seldom may allow avoidance of contract on the ground of unforeseen circumstances.[327] An illustrative case of impossibility is Taylor vs. Caldwell (183), where the parties to the contract entered into an agreement to use London's Surrey Music Hall for several concert purposes. The music hall was destroyed in a fire just a few days before the scheduled date of the first concert, which clearly led to the impossibility of performance of the contract and consequently to frustration.

Practical impossibility:

Like civil law, the impossibility in carrying out tasks has become too difficult due to practical impossibility, just because it does not lead to frustration. In the case of *Tsakiroglou Co Ltd* v *Noblee Thorl GmbH* (1962), an agreement was executed to transport 300 tons of Sudanese peanuts from port Sudan to Hamburg. Both sides assumed the ship would be able to navigate the Suez Canal, but the canal was closed in 1958 during the Second Arab-Israeli War. As a result, the only way to deliver peanuts within the time frame stipulated in the agreement was to pass through the Cape of Good Hope, basically three times farther than the prescribed route or distance. The debtor argued that the deal had been thwarted by frustration and that he had refused to supply the goods. However, the court found that it was possible to perform the contract. The fact that it was more difficult and costly did not lead to despair.

Continuous Impossibility:

Even if the claim for compensation is not the appropriate and personal services are not required for the performance and it is not impossible, still English law is reluctant to issue a specific performance order. In this connection, Society Ltd v Argyll Stores (Holdings) Ltd (1997) may

[327] Smits, *ibid.*,

be mentioned. In this case, the court refused to force the supermarket to pay the rent. In 1989, the co-operative leased the main unit of Hillsborough Shopping Center in Sheffield to Argyle for 35 years of use as a safeway supermarket. This provision (a "keep-open agreement") was inspired by the desire to have a large 'anchor' shop in the co-operative shopping center which could attract many customers and thus create good business opportunities for the small shops in the center. When Argyle decided to close the store in 1955 because it was no longer profitable, the co-operative sought a court order for the specific execution of the "Keep-Open Agreement". Unlike the Court of Appeal, the House of Lords did not pass the order. It has been observed here that no specific performance order has been granted to compel someone to continue the business as it would require regular supervision by the court.

3.4 Unforeseen Circumstances

3.4.1 English Law

In the above, we discussed "practical impossibility". It presents the performance of a contract as justifiably impossible (e.g., the gold ring fell to the bottom of the sea). On the other hand, the unforeseen situation only makes the task more difficult or costly (when the gold market rises unexpectedly). However, in reality, it is difficult to make the difference. This explains why English law usually combines the two situations under the heading of "frustration" because in both cases purpose of the contract frustrated either because of impossibility or excessive hardship. Of course, English courts are hesitant to apply the doctrine of frustration to a situation unless it amounts to an impossibility. It may invoke the doctrine to a supervening event if it has made a fundamental change to the nature of performance. For example, in Krell v Henry (1903) 2 KB 740, Henry rented a room for two days to watch the coronation procession of King Edward VII as Queen Victoria's successor. Within a few days of his accession to the throne, Edward fell ill and as a result his coronation was postponed. Krell claimed payment, but the court held that the purpose of the contract was frustrated because of 'the cessation or non- existence of an express condition or state of things, going to the root of the contract, and essential to its performance.'

It may be noted that frustration, impossibility and supervening events are all default rules. The parties can set aside them by adding a force majeure clause, which may read like this: 'A party to this contract shall not be liable in the event of non-performance of any obligation under this contract by reason of strikes, fire, disease, Act of God, and any other incident of any nature beyond the control of the relevant party.'[328] Parties may also add a hardship clause that allows renegotiation of the contract in the event of any unforeseen circumstance over which they have control, such as increase in the price of raw materials. Such an event does not end the contract unlike frustration.[329]

3.4.2 Civil Law

Distinguished from the English law, French, German and Dutch law all allow termination of contracts under unforeseen circumstances or their adaptation next to the impossibility to perform. Below, the relevant provisions of French, German and Dutch laws are quoted below:

Art. 1195 Codice Civile (French) : 'If a change of circumstances unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation. In case of refusal or failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine or by a common agreement ask the court to adapt the contract. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine.'[330]

§ 313 BGB (German) : '1. If circumstances upon which a contract was based have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it upon different terms if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to continue to be bound to the contract without

[328] Smits, above., p. 203-204.
[329] Smits. *ibid.*
[330] Quoted from Smits, *ibid.*, p. 204.

adaptation. 2. It is equivalent to a change of circumstances if material assumptions that have become the basis of the contract turn out to be incorrect. 3. If adaptation of the contract is not possible or cannot reasonably be imposed on one party, the disadvantaged party may terminate the contract. In the case of a contract for the performance of recurring obligations, the right to terminate with notice takes the place of the right to terminate.'[331]

Art. 6:258 BW (Dutch): '1. Upon the demand of one of the parties, the court may adapt the effects of the contract or terminate the contract in whole or in part on the basis of unforeseen circumstances which are of such a nature that the other party, according to criteria of reasonableness and fairness, may not expect that the contract be maintained in an unmodified form. The court may give retroactive effect to the adaptation or termination. 2. The adaptation or termination of the contract is not granted to the extent that the party invoking the circumstances, in view of the nature of the contract or common opinion, should come for account of the party who invokes them. (…).[332]

The great advantage of the civil law approach is that it allows the court not only to terminate, but also to amend the contract. Frustration in English law automatically ends the contract, no matter whether the parties want this or not. The new French Art. 1195 CC (inspired by Articles 6:111 PECL and 6.2.3 PICC) goes even further and requires that the parties first enter into negotiations about the adaptation or termination of the contract. The court is only allowed to step in if they do not reach agreement about new conditions.

Regardless of the parties' desire, English law allows the court to terminate the contract on the ground of frustration. On the other hand, the civil law system allows the court not only to cancel the agreement, but also to amend it.

[331] Quoted from Smits, *ibid.*, p. 204.
[332] Quoted from Smits, *ibid.*, p. 204-205.

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