Legislative Drafting

Teaching Material

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Course Introduction

The Course designated as Legislative Drafting should be viewed within the context of developing legal skill, which may consist of developing skills in legal writing, conveyancing, and in particular drafting that of legal instruments; and as such, Legislative Drafting is a species within the genus of all these. Developers can not yet claim the text is complete and in its final shape. It remains on you, Instructors and students, to contribute to its refinement.

Having said this, the teaching material consists of five essential parts: Part I is meant to supply the material with historical perspective (under Chapter I) and highlight the law making process involved at the federal level as viewed by the FDRE Constitution and the subsidiary legislations there under (Chapter II).

Part II begins with highlighting initial materials or inputs that have to be brought to bear upon any student of legal drafting which consists of throwing light on such matters as differentiating Legislative Drafting from other forms of writings, the utility as a tool for democratic change, and the technique required.

Parts III and IV are centers of the teaching material: the former attempts to bring the drafter's thinking to fit into the corpus jury, i.e. into the legal system. And then continuing this train of logic, it tries to expose the general and peculiar structures and features of any legislation, that of the Ethiopian, in particular. The latter comes down to the basic element of any legislation; i.e. problems connected with languages.

Part V, proceeding from the fact that legislation has to conform to the requirements established by experience for certain categories, first by looking at the internal aspect as well by appreciating the associational quality, developers have tried to show how one should approach drafting a Bill; as for instance, temporal from perpetual, remedial from penal.

Finally, Instructors should supplement the questions cited with concrete examples and help the Course become more grounded, for legal skills in general, and legislative drafting in particular, is a matter conscientious effort.

To elaborate, if a need arises of being clear on certain concepts, few annexes are attached at the end of the text.

Part I. History of Legislations and the Legislative Process in Ethiopia

Ethiopia constitutes geographically, the major portion of most of the eastern landmass of Africa, partly drawn towards the so-called *'Horn of Africa'*. It is connected with Nile Civilization just as Egypt and Sudan are. Through the '*Suez isthmus*', Ethiopia's history has ties with that of ancient Asia; i.e. Euphrates and Tigress (Babylon), India and China Civilizations.

East Africa's Great Africa Valley, which traverses Ethiopia from Southwest to Northeast, has proved to be the site of humankind's origins. In 1974 archaeologists excavating in this Awash River Valley enabled to discover 3.5 million-year-old fossils of a hominid, which is named Australopithecus Afarensis. Ever since, fossils of varying importance have been found in the same region, which seems to have convinced many to believe that this place is the cradle of modern humans – Homo Sapiens.

Modern Ethiopia is the product of several millennia of inward and outward interaction of peoples, who must have produced the looms and treads of cultures, whose substructure can be traced in the pluriformity of Ethiopian culture. One such a set of its culture constitutes its "Political Culture", to which its legal culture, in general, and constitutional culture, in particular, is found embodied, intertwined.

Chapter I:
History of Legislation

Section I. Documents of Public Law Nature (Axumite - Middle age)

1.1.1 Fewuse Menfessawi (Code of Cleansing the Sprit)[1]

According to available documents, the first ever attempt to compile a Law was made by Emperor Zar'a Ya'eqob (during 1434-1468). Desiring to govern his realm by written law rather than by none-written law of oral tradition, the Emperor ordered distinguished Ethiopian Orthodox Church scholars to compile one. The drafting submitted around 1450 was entitled "Fewuse Menfessawi," (meaning, *Remedy of the Spirit*), which reference has been made to in the Amharic version of the Fetha Negest. Regarding this document, *Liqe Saltanat Abba Habte-Mariam Workineh* wrote:-

> *"[a]bout this code, scholars of the Ethiopian Church held that it was compiled on the order of Atse Zar'a Ya'eqob to serve as a code of laity. Foreign scholars, on the other hand, state that it was compiled to bring the administration of the Church under a centralized canon law."*

The major sources of this code were religious precepts by the Ethiopian Orthodox Church. The rule that this embodied mainly governed matters that were more of a spiritual rather than of a secular nature.

The sources of this code are believed to have been the: (a) Old Testament, (b) Didascalia Apostolorum, (c) Epostle of Peter to Clement, (d) Synods, and (e) Canon of Hippolyptus (Abulidus).

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[11] Abera Jembere, An Introduction to the Legal History of Ethiopia,1434-1974 1st Edn (Roterdam, Erasmus Universiteit, Leiden: Africa-Studiecentrum, 1998), pp 183-84.

Concerning matters of law, the compilation had 62 Articles – mainly on criminal matters. Though the extent of its application still remains uncertain, it is presumed to have been for a short period of time, during the reign of Emperior Zar'a Ya'eqob. Since that document of law wasn't comprehensive enough and couldn't have resolved many of the legal problems that arose even at that period, it is presumed to not have been in use for long a time.

1.1.2 The 'Fetha Nagast' (since 15th Century)[2]

The *'Fetha Nagast'*, or the "Law of the Kings", is a collection of laws, orders which had been in use in the northern parts of Country's territories, which, mostly, used to have a populace worshiping the Christian faith for many centuries.

"Law of the Kings" was originally written in Arabic by the Coptic Egyptian writer Abu-1 Fada'il Ibn al-Assal (commonly known as Ibn al-'Assal), during the time, when Cyril III was Patriarch of Alexandria (1235-1243). Ibn al-'Assal divided his work into two distinct parts. The first dealt with religious matters and the second with secular matters. In compiling the first, he relied largely on the Old and New Testaments, writings supposed to be of apostolic origin, and the Canons of early Church Councils such as the Councils of Nicaea and the Council of Antioch, and the writings of a number of Fathers of the Church like St. Hippolytus and others. These sources were also consulted in the compiling process. The second part of this latter effort of Ibn al-'Assal relied most heavily on a collection of laws found in four books, known as "The Canons of the Kings".

C.A. Nallino and G.A. Costanzo have carried on the work begun by two German scholars, Sachau and Riedel, towards identification of these four books. According to them, the first book is the Procheiros Nomos, a handbook of Roman Byzantine Laws, enacted between 870 and 878 by the Byzantine Emperor Basilius the Macedonian. The second is an Arabic version of what is commonly known as "The Syro-Roman Law Book". This was originally written in Greek at about 480 A.D. as a handbook, probably of didactic character, intended to explain the ancient

[2] Abba Paulos Tzadua, "The Fetha Nagast, The Law of the Kings", (Faculity of Law, HSIU Addis Abeba Etiopia, 1968), Forward, pp. XV-XXI.

Roman *ius* civile in light of the ius novum. The third book has been identified as an Arabic version of another handbook of Roman-Byzantine Law, the Ecloge of the Emperors Leo-III (Isauricus) and Constantine-V (Copronimus), which was published in Constantinople in the year 726. The fourth book has been identified as the "precepts of the Old Testament", a compilation of ritual and moral precepts from the Pentateuch, together with some Christian interpolations.

Given the Roman background of three of the major sources of the secular part of Ibn al-Assal's work, it is no surprise to find it pervaded by principles of Roman law. Rules regulating various types of contract, guardianship, manumission and servitude, and many principles governing wills and succession are taken from Roman Law; i.e. of ancient pre-Justinian and Justinian principles. In particular the Family Law, especially that part which deals with the dissolution of marriage, is strongly influenced by Justinian's Novellae.

As might be expectable, these principles came down to the *Fetha Nagast* through the Roman-Byzantine earlier source document, mentioned. All the same, as it still might be appropriate to trace them back to their initial expression, this had been attempted through footnotes to their translation.

The Arabic version of the *Fetha Nagast* was originally entitled "Collection of Canons", which was compiled as a guide for the Christian Copts living at the time among the Muslim populace of Egypt. The Coptic Church of Egypt used it and regarded it as a very authoritative work. Some authors are of the opinion that it ought to be considered as one of the works prepared for use by the Episcopales Audientiae Church institutions of the time for purposes of judicial nature as they were permitted to adjudicate by the Moslem conquerors of Egypt over certain disputers among Christians and others from areas of the Middle East.

Although it is not possible to say at this time when exactly the Law of Canon of Ibn al-'Assal was introduced into Ethiopia, traditional hearsays hold that the *Fetha Nagast* was introduced into Ethiopia during the reign of Zar'a Ya'qob (1434-1468). The story relates that one day a certain Petros Abda Sayd, an Egyptian by origin, asked of his sadness, the latter replied that he has displayed that justice in his empire was still administered on the basis of the Old Testament,

although he and his people lived in the era of the New Testament. Then, Petros Abda Sayd notified the Emperor that there was a book of laws which had been compiled by the 318 fathers of the Council of Nicaea, which then was promulgated as law by the emperor Constantine. The book which Petros said had been translated into Arabic and could be found in Alexanderia resulted in to a call: "Why not send somebody to fetch a copy of it?" According to the story, Zar'a Ya'qob responded: *"You know the language of this country and that country. Go and bring me the book"*, and gave Petros 30 *'weqets'* of gold. Petros brought the book and subsequently translated it into Ge'ez.

If the above is taken at face value, then the *Fetha Nagast* was introduced into Ethiopia some time around the middle of the 15th Century. On the other hand, what is apparently the first record of use of the *Fetha Nagast* dates back from the time of reign of Sarsa Dengel, who reigned over Ethiopia from 1563 to 1597. The most ancient Ge'ez manuscripts of the *Fetha Nagast* conserved in European libraries and dates to the time of reign of Johannes-I (1667-1682). It has been suggested by Professor P. Sand that the few earlier references to the work may have been based upon the Arabic vision.[3]

The man who translated the *Fetha Nagast* from Arabic to Ge'ez gives his name at the end of the book as "Petros, the son of Abda Sayd". In Ethiopian history, this person is identified as the same man who brought the Arabic text to the Emperor Zar'a Ya'qob. In the same closing passage, there is a reference to the "Priest Abraham, the son of Hanna Natyjan" [who] has taken care of the Fetha Nagast. Those conserved in European libraries are from the time Johannes-I (1667-1682) reigned. Though European scholars offer a variety of other explanations, the most likely, traditional explanation in reference to this is that the book was originally written in Greek (by Ibn al-'Assal), which Abraham translated into Arabic and, thereafter, Petros translated into Ge'ez.

[3] Id., pp 17, quoted from P. Sand, Origins of the Fetha Nagast, (1968, unpublished, Library, Faculty of Law, Haile Sellasie I University), p. 5..

Since its introduction into Ethiopia, the Fetha Nagest has circulated in Ethiopia in two manuscript forms. The more common form contains the Ge'ez text with some marginal glosses in Amharic and Ge'ez, which is followed by an Amharic translation and comments.

Fetha Nagast has two parts – the entire first part consists of twenty-two chapters on the clearly and the laws of the divine service, such as the Church, fundamental books, baptism, patriarchs, bishops and the likes. The chapters of the second part dealing with secular matters are twenty-nine [in number]; i.e. together with the chapters of the first part it comprises fifty-one chapters. [4]

Chapter XXIII Food, clothing, habitations and trades
Chapter XXIV Betrothal, dowry and marriage
Chapter XXV Prohibition against concubines
Chapter XXVI Donation
Chapter XXVII Loan, guarantee, pledge and mandate
Chapter XXVIII Free loan, such as clothing, animals and other things
Chapter XXIX Deposit and similar things
Chapter XXX Mandate
Chapter XXXI Slavery, liberty and manumission of slaves
Chapter XXXII Guardians and the Guardianship of Minor in all their dealings
Chapter XXXIII Sale, purchase, and manumission of slaves
Chapter XXXIV Joint ownership and things similar to it
Chapter XXXV Coercion and violence
Chapter XXXVI Lease of house and land rent such as "gammata"
Chapter XXXVII Construction of buildings and related matters
Chapter XXXVIII Loan
Chapter XXXIX Admission of liability
Chapter XL Finding lost things, such as animals or similar things
Chapter XLI The making wills to dispose of property
Chapter XLII Succession

[4] Id., Preface, pp **9-10**.

Chapter XLIII Judges and those who sit with them
Chapter XLIV kings
Chapter XLV Provision from the old and the new testament
Chapter XLVI The punishment of apostates
Chapter XLVII Homicide
Chapter XLVIII The punishment for fornication
Chapter XLIX The punishment for thieves
Chapter L On various other faults
Chapter LI On other things in details

One might say that the *Fetha Nagast* has, in most cases, attempted to incorporate suitable legal principles conceivable to those days. It obviously lacks systematization and other qualities of modern codes such as differentiating the specific from the general, the exception from the rule.
The Fetha Negest was accessible to and understood by the clergy, only. Also, some aspect of that book is of a wider import; e.g. the already mentioned clauses on Commercial Law. The fact that it had ideological–political significance(s), a significance as being a kind of "Charter", buttressing the Ethiopian Monarchy (i.e. the Solomonic Dynasty) and the Orthodox Christian faith that underlay it, should, however, be kept in mind.

Questions

1. See the Serata Mengist. list of code of protocol, can you observe any reason on which the list of code of protocol must have been based upon?
2. How about Fetha Negast? See the division between list on Ecclesiastical matters. I
    a. Is this not one major step forward from that of Serat Mengist?
    b. See the list on secular matters. All the item are designated by chapters i.e. chapter 23-60: Are those listed in these chapters are independent to one-another? And are they of equal merit?

Section II. Legislations During Emperor Menilik II

If at all Emperor Menilik II is to be credited for modernizing the Ethiopian administrative system, he must also get a few credit for the role he played in the shaping of the future of Ethiopia's legislation.

1.2.1 Nomenclature[5]

In the "laws" issued by Menilik II we see different designations – Proclamation or *'Awaj'*, Regulations or *'Demb'* and Order or *'Ti-ezaz'*.

For example, a pronouncement made by the Emperor to the "soldier", *'Dejazmach'* Tessema, on 24th of June 1906, was captioned as Proclamation or *'Awaj'*. The pronouncement to oblige the people of *'Wag'* to pay their tithe faithfully was also given the same title.

On the other hand, the pronouncement issued to "Telegram Writers and Telephone Maintenance Workers" on 21 of May 1906 was issued as an order or *'Ti-ezaz'*, while the pronouncement on "Hot Springs" or *'Fil-weha'*, issued on12 January 1908 was captioned as Regulation – *'Demb'*.

Although the above examples indicate that different designations were used when issuing laws, all the same this does not seem to warrant any definite conclusion concerning the hierarchy of laws. This makes one be inclined to think, rather, that one form is in no way different from the other as we see the same person – that is, the Emperor – promulgate laws as *'Awaj'*, *'Demb'* and *'Ti-ezaz';* meaning, without first discerning, giving distinction of each. In fact, an examination of these legislations shows that the word Proclamation or *'Awaj'* means "pronouncement-notice for all" – and no more. It is also appropriate to note that all legislations issued during the reign of Menilik II sound as though they were issued by the Emperor himself, in person.

[5] Shiferaw Wolde Michael,Legal Drafting, (Unpublished, A/Ababa University, March, 1986), pp 3-.4.

1.2.2 Publicity[6]

In his own way, Menilik II tried to notify the public of the laws he issued. The following show these efforts.

a) The 'Negarit' and the 'Meleket'

During his reign, laws were to be read out to the people at places of where people usually gathered like in Churches, market places. This is evidenced by many of the letters Menilik II wrote to his officials concerning laws. One example is the following:-

> *"To Ras Bitwaded Mengesha.*
> *"I have hereby sent you a Proclamation (Awaj) letter. Make pronouncement of the same in market places and urban centers." "Written at Addis Ababa on 22nd January 1908."*

The picture of a soldier standing at the gate of the Grand Palace beating a drum or the *'Negarit'* and blowing at a horn-like instrument or the *'Meleket'* proclaiming the appointment of dignitaries, which can be seen on the cover of *'Zekre Neger'* is further evidence of the methods Menilik II employed to proclaim laws.

Berkley, in his book "The Campaign of Adwa and the Rise of Menilik", makes a statement on how a Proclamation (on the Declaration of War) was read out as follows.

> *"The method of raising an army is very simple. On the declaration of war, the* Negus*/King/ orders a Proclamation to be read out in the market and other public places, while the long rolls are beaten on the* 'Negarit' *or great war-drums, the date and place of assembly are also given out by the crier of the king, who can be seen by all, standing high on the upturned drum, with the lace and mantle insignia of his office, held at his side by a slave."*

[6] Id., pp. 5-7.

That this was the standard practice in issuing the *'Awaj' is* confirmed by Walter C. Plowden, who wrote:

> *".. the highest beat of forty-eight drums, others twenty-four, others twelve, all Proclamations are made by those in possession of the* Negarit *by beating the large drum, till a number of people are collected, when the order is repeated by the drummer, and those who hear, exclaiming* 'May it prosper'*, run to spread it from ear to ear. It is then law until he changes his mind, and no excuse of ignorance is admitted."*

The reader is also invited to read *'Zekre Neger'*, by *'Balambaras Maheteme Selassie Wolde Mesquel' for greater insight into the matter.*

At times, over and above the pronouncements in public places, the copy of the law proclaimed was given to the person or office directly concerned. An instance that shows this is the pronouncement made concerning *Sheik Zakaria and Associates* on May, 1906:

> *"Concerning Sheik Zakaria and Associates Proclamation"*
> *"You are hereby permitted to preach Islam wherever you want.". "Copy to Sheik Zakaria."*

In some cases that law itself was written and posted at appropriate places; for example in front of the Customs Offices (for laws concerning import and export) and matters concerning municipalities – at centers of towns. An illuminating example of this is the Addis Ababa Land Purchase Regulations (*'Demboch'*) issued on 27th October, 1907. The last part of these regulations was Article 32, which read: *".. posting in Public Places [t]hese regulations shall be written and posted in the city."*

Section III. Legislations from 1917 to 1931 Constitution[7]

On 11th February 1917, Princess Zewditu Menilik was formally crowned and became the Empress of Ethiopia and Ras Tefferi Mekonnen, the Crown Prince, (actually, it was as of September 27, 1916, that she took over the throne.) With very few exceptions, all laws issued during that period had been issued in the name of the Empress and the Crown Prince. Regulations (*'Demboch'*) that had been issued on 2nd of September 1918 by the Empress concerning her Advisory Council, *'Ye Amakariwoch Demb'*, and the Addis Ababa Municipality Land Ownership Notice (*'Mastaweqia')* that had been issued on 5th October, 1921 can be cited as illustrations of the said exceptions.

During this period, Order (*'Ti-ezaz'),* as a means of pronouncement of legislation can hardly be seen. Instead, the term "Notice" *('Mastaweqia')* and "Government Notice" (*'Yemengist Mastaweqia')* were used to designate laws. In fact, the law that appeared with the designation of "Notice" was the "Addis Ababa Municipality Land ownership Registration Notice" of 5th October, 1921 (*Meskerem 1914 EC).* And the first law that was designated as "Government Notice" was the "Issuance of Entry Visa into Ethiopia" issued on 10th December, 1928.

This period marks the beginning of issuance of legislations by Ministers, Mayors and other Government Officials. The first legislation issued by an official of the Ethiopian Government, other than those issued by Monarchs themselves, was the Flour Mills Law – *'Ye-Babur Bet Sira Hig'*. In all probability, this law was issued sometime between July and September 1917 (*'Hamle' 1909 – 'Meskerem' 1910 E.C.),* for this, an amendment to it was made on 13th September 1917 and no such law was issued prior to July 1917.

The other legislation that can be cited as an example of legislation issued by a low ranking official, a Division Head, was the regulations concerning "Bathing and Washing Clothes in and Taking Water from and Watering Cattle in the Addis Ababa *'Filwoha'*. This was how the legislation read in relevant part.

[7] Id., pp. 7-11.

"Filwoha Regulation issued by Ato Legesse Cheru with the concurrence of the Ministry of Agriculture.

NOTICE

Part One

Regulations issued for Bathing, Washing Clothes In and Taking of Filwoha Water and Watering Cattle in Addis Ababa Filwoha.

Imperial Ethiopian Government Ministry of Agriculture and Works, Head of Addis Ababa Filwoha Division."

It is also during this period that we start to see laws being published in a foreign language – French. The first Ethiopian law that had been published in a foreign language was the *"Reglement de l'Enregistrement"* of 20th January, 1923 (or '*Ttir 12 1915 EC).*

The first legislation issued in the form of "Supplement" (*'Techemari')* is the "Wool, Warp and Textiles' Proclamation"[8] (*'Dir, Mag-ina Cherq Awaj')*

1st Supplementary Notice.

The first Proclamation to ratify a treaty appeared (12 March 1931) on the 7th year, No. 11 issue of *'Aimero'* news paper printed by *Berhanena Selam.* This was how the relevant part of the law read.

"A Proclamation to ratify the Temporary Trade Agreement entered into between the Imperial Ethiopian Government and the Government of Egypt on 1st January 1931 ('Tahisas' 20, 1923 E.C.).

".. 6th We hereby proclaim that the Temporary Trade Agreement entered into between the Imperial Ethiopian Government and the Government of Egypt by the letter of 4th

[8] Id., p. 12.

December (1930) and 1st January 1931 ('Hidar' 25 and 'Tahisas' 20 1923 E.C.) shall come into force as of 1st January 1931.

"Any party wishing to annul this Temporary Trade Agreement has to give the other party three months prior notice."

1.3.1 Publications in Newspapers

'Aimiro', the first newspaper to be printed by the Country itself was established by Menilik II in 1903 E.C. It began with only 20 hand-written copies, weekly. By 1906, it started to weekly appear in the form of mimeograph, while the first printed copy of this paper appeared in 1914. The hand written and mimeographed copies of this paper do not seem to be available at all. From the printed copies available one can learn that laws were published in *'Aimiro'*.[9]

'Berhanena Selam', the second weekly newspaper of the country came out in January 1925. However, it is only as of the 24th of October, 1928 (4th Year, 43rd issue of *'Berhanena Selam')* that we see laws being published in this paper. This, we can say, set the standard practice, as there is clue that laws published earlier to this date of publication appeared on the next, Thursday issue. Some of the numbers of legislations thus published were:

- "Land Ownership and Education Proclamations", issued on 20th October, 1928 were published on the 24th October issue of *'Berhanena Selam'*.
- "Issuance of Entry Visas into Ethiopia, which appeared in the form of Government Notice and was issued on 10th December, 1928, was published on the 15th December, 1928 issue of *'Berhanena Selam'*.

Another phenomenon of that period worth mentioning is that laws that had applicability or relevance to foreigners and foreign trade was issued as well in French.

[9] Id, , Note. No. 5, pp. 12-16.

The laws that appeared during that period were neither numbered, nor was there any standardized form or category to legislations; i.e. all five names of pronouncements were inter-changeably used; i.e. *'Awaj', 'Ti-ezaz', 'Demb', 'Mastaweqia', 'Ye-Mengist Mastaweqia'* were used to Proclamations issued by the Emperor as well as His officials alike. There was also no particular designation of law used in specialized areas or any mechanism set to indicate hierarchy of importance to legal provisions issued.

1.3.2 From the Constitution of 1931 to the Establishment of the Negarit Gazetta[10]

This covers the time between 16 July, 1931 and 30 March, 1942. Ethiopia's first written Constitution was promulgated on 16th of July, 1931.

The laws that were issued during that period were, in many aspects, similar to those issued during the period immediately preceding it. The marked differences that one can note are:

A) Legislations began to have Preambles;
B) The Preambles contained statements to the effect that the draft laws were deliberated upon by the then existing Parliament and the Council of Ministers. The institution directly concerned with them sometimes gave its recommendations, too;
C) The relevant, enabling articles of the Constitution begin to be cited in the Preamble of laws;
D) Formal definitions are introduced in the legislations;
E) Laws emanating from the Emperor were made to bear the Seal of the Emperor and the same was made to be notified to the public by the *'Tsehafi Te-ezaz'* in compliance with Article 48 of the 1931 Constitution;
F) As of January 31, 1942, French was replaced by English as the foreign language in which laws were published.

Besides, the following facts may interest curious Ethiopian students of history of legislation.

[10] Id., pp. 16-18.

The word "Corrigenda" (*'Arem')* was used for the first time in the law that appeared on the 7th Year, 32nd issue of *'Berhanena Selam'*. The Translation of which read as follows:-

> *"Replace the phrase "Food items: Provision" in the column of line 16 page 2 of the Consumption Tax Proclamation issued on Hamle 9/1923 E.C. by the phrase "Paste Alimenther Provisions (like Macaroni)."*

The recommendation of the relevant Ministry for the issuance of legislation was for the first time mentioned in the Monetary Proclamation issued on 24th September, 1931. In that proclamation, it was stated in the Preamble that the law was issued upon the recommendation of the Ministry of Finance. Likewise, it was in the Administration of Justice Proclamation made on 10th December, 1931, that the fact that Parliament discussed the legislation before it was issued was mentioned.

The first law, on which deliberation by the Council of Ministers was made and that was mentioned was the one designated as "Administration of the Bank of Abyssinia Proclamation" that appeared on the 8th Year, 24th issue of *'Berhanena Selam'*, of January 9, 1932 E.C.

The word "Acid Pyroligneous" and "Acid Pyridine" were the first to be formally defined in the history of Ethiopia's legislation. These words appeared in the Regulations Relating to the Importation of Denatured Alcohol. These regulations were issued on May 10, 1934. Particularly, this law appeared in Amharic and French. Article 1(b) of the French version of this law is reproduced below:

> *"b) Pyridine (base Definition: La pyridine doi ètre claire on jaunatre et ne doit contenire plus que 10% de l'eau. En distillant 100cem. Doivent etre retombès a l'etat liquide si la tempèreature a atteint 140 Celsius ha pyridine melèa avec de la'equ dans tonte proportian ne doit pas se troubler de me elle doit etre libre d'amonisque."*[11]

The first law issued after liberation from Italian occupation was the Administration of Justice Proclamation issued on the 31st of January 1942. This Proclamation was also the first Ethiopian

[11] Id., p. 15.

law that was published in Amharic and English (as opposed to the practice of Amharic and French, of that time).

1.3.3 Establishment of the Negarit Gazetta

30 March, 1942 is an important date in the history of Ethiopian legislation. Before that date, laws were at best issued in ordinary, unofficial newspapers like*'Aemiro'* and *'Berhanena Selam'*. From 30th of March onwards, however, the *Negarit Gazetta*, the official Journal for publication of laws was established. The law establishing it is still valid, and since it is a milestone in the history of legislations in Ethiopia, it has been reproduced in full.

"ESTABLISHMENT OF THE *NEGARIT GAZETTA*
No. 1 OF 1942
CONQUERING LION OF THE TRIBE OF JUDHA
HAILE SELLASSIE I
ELECT OF GOD, EMPEROR OF ETHIOPIA."

"WE PROCLAIM AS FOLLOWS:-

1. This Proclamation may be cited as the Establishment of the *'Negarit Gazetta'* Proclamation, 1942.
2. There is hereby established the Official Gazetta which shall be called *'Negarit Gazetta'* in which shall be published:
    a) all Proclamations; Decrees, Laws, Rules, Regulations, Orders, Notices and subsidiary legislations,
    b) the notification of all senior appointments, dismissals from office, titles, decorations and honours,
    c) Notices concurring the establishment of Societies for promoting Education and Chamber of Commerce,
    d) Notices for general information concerning matters of public interest.
3. Our Keeper of the Great Seal, the Minister of the Pen, shall be responsible for publishing the '*Negarit Gazetta'* at least once a month.

4. The Official Gazette shall be referred to in all legislation as the '*Negarit Gazetta'* and shall include any supplement thereto or any Gazette extraordinary.
5. A Court shall take judicial notice of:
    a) All Proclamations, Decrees, Laws, Rules, Regulations, Orders, Notices and subsidiary legislations published in the '*Negarit Gazetta';*
    b) The accession to office, names, titles, functions and signatures of the persons filling for the time being and public office in any part of Our Empire, if the fact of their appointment to such office is notified in the *'Negarit Gazetta'."*

"Addis Ababa 10th March, 1942."
"TSEHAFI TE-EZAZ WELDE GIORGIS
Keeper of the Great Seal
Minister of the Pen"

From the day of the establishment of '*Negarit Gazetta'* all types of laws started from number 1 and continued to be given consecutive numbers. The number of Proclamation issued in the next year's issue of the *'Negarit Gazetta'* was a continuation of the number of the last Proclamation in the preceding year's issue. This statement equally applied to the other types of legislations, which continued so until 11 September, 1974.

From 12 September, 1974 onwards, however, all types of laws that were issued in the following new Ethiopian calendar year were made to begin all over again from number 1. By this, it was meant that the first law issued by the Provisional Military Government of Socialist Ethiopia, which happens to be the Proclamation Establishing the Provisional Military Government was made Proclamation No. 1/1974. The same was made applicable to all the other types of legislations

So far we looked into the numbering of the different legislations. Let us now consider the numbering of the *'Negarit Gazetta'* itself. The year in which the *'Negarit Gazetta'* appeared for

the first time was taken to be the first year of issuance. The numbers of *'Negarit Gazetta'* issued within one Ethiopian calendar year – from 11th September to 10th September the following year (A.C., Gregorian Cal.) – are always given consecutive numbers beginning from 1, for the first issue, and closing at the last number of the issue in that same year. For the next New Year, the numbering of the first issued *'Negarit Gazetta'* starts all over again from number 1. Thus, for example, in the 2nd year of the issuance of the *'Negarit Gazetta'*, 12 gazettes were published, while during the 20th year, 19 gazettes were published.

1.3.4 Remark: Drafting Styles[12]

During the formative years of Ethiopian Legislations, i.e. the first few years after the establishment of the Official Gazette, one notes that the drafting style follows English legislative drafting style. This was clearly exhibited by annotations on the side of the articles which can be taken to be the titles of the Articles or summary of the contents of the Article. This is typical English drafting style. No wonder this is so, because the British were allowed to exercise special powers on legal matters and had special privileges in Ethiopia by virtue of the treaty signed between Ethiopia and the United Kingdom on 31st of January, 1942 E.C.[13] According to Article 2 of that Treaty, the two Countries agreed that the British should act as advisors to the Emperor and to the Ethiopian Government and that British nationals would serve as judges in Ethiopia.

The Administration of the Justice Proclamation was the second proclamation issued by the Ethiopian Government after independence, was drafted by the British and given to the Emperor to be proclaimed. This can be easily inferred from Article 5 of the same Treaty and from the fact that the said Proclamation was issued as an annex No. 1 to same Treaty. The Public Security Proclamation No. 4 of 1942 is a good proof that the British acted as drafters of Ethiopia's legislation. (The style itself exhibits the British hand on it.)

[12] Id, pp. 19-22.

[13] Margery Perham, The Government of Ethiopia, (Faber and Faber Limited, London, 1969), pp. 153-155.

"PROCLAMATION No. 4 OF 1942"

"A PROCLAMATION TO PROVIDE FOR THE ARREST AND DETENTION OF PERSONS INCLUDING IN ACTIVETIES OF NATURE CALCULATED TO DISTURB PUBLIC SECURITY.

1. *This Proclamation may be cited as the Public Security short title. Proclamation, 1942, and shall be deemed to have come into force on 31st January, 1942.*
2. *The Commissioner of Police may order the arrest without warrant and Power of any person who in his opinion would by reason of the matters set out arrest and in the Schedule to this Proclamation, be danger to Public Security if he remained at large.*
3. *Any person so arrested shall without any delay be brought before the Persons High Court, arrested to be brought before the High Court.*
4. *If the High Court is of the opinion that the Commissioner of Police Powers of … was justified in arresting and detaining any person under the High Court.*
5. *Provisions of this Proclamation, the order for detention shall remain in force for three months and may be renewed for further periods not exceeding three months each on application being made to the High Court by the Commissioner of Police or by some person on his behalf.*
6. *The Commissioner of Police may at any time, with the permission of Powers of the High Court, order the release of any person so order to be detained."*

Another hint of the influence of English style of drafting over our drafting style is the famous phrase *".. unless the context otherwise requires"*, that we even today continue to use in our definition articles.

Article 2 of the Police Proclamation No. 6/1942 can be cited to demonstrate this;

> ".. 2. *In this Proclamation, unless the context otherwise requires:- "Commissioner" means the Commissioner of Police and includes the Deputy Commissioner of Police;*
> *"Constable" means any police officer below the rank of non-commissioned officer; .."*

Over the years, we see that the side annotations cease to exist, but the famous phrase *".. unless the context otherwise requires"* still hangs on. In fact, up until 1963, titles were given mostly to parts of a law as opposed to individual Articles. Looking at the Charter of the former University College of Addis Ababa, General Notice No. 185 of 1954 surely would be of an example. Similarly, even after 1963 the style of giving titles to each Article was not consistently adhered to; e.g. almost all the tax laws that appeared before 1963 have no given titles for individual Articles.

Section IV. The Written Constitutions of Ethiopia

Up to the writing of this book, Ethiopia had three written Constitutions. The first was promulgated in 1931, the 2nd about twenty four years later, and the third, in 1979.

Though, there were a lot of developments in the field of legislation between the first and the second Constitutions, it would be better here to treat the two constitutions together rather than following the consecutive dates of issue or chronology.

1.4.1 The Constitution of 1931

Ethiopia's first written Constitution was promulgated by Emperor Haile Selassie-I in July 1931. *Bejerond Tekle Hawariat,* the then Minister of Finance, was credited for the drafting of that Constitution. There are indications that, when drafting the Constitution, he relied heavily on the Meji (Japanese) Constitution of 1889. The draft Constitution was discussed by the nobility before its publication. The 1931 Constitution was divided into seven Chapters and had fifty-five Articles.

1.4.2 The Revised Constitution of 1955

The Revised Constitution of Ethiopia replaced the Constitution of 1931 after the latter remained in force for twenty four years without any amendment. It is said that the drafting of the Revised Constitution took six years, and the first completed draft appeared on 2nd February 1954.

The preparation of Constitution was carried out by a Constitutional Commission composed of three Ethiopians: *Tsehafe Tezaz Wolde* Giorgis *Wolde Yohannes*, *Aklilu Habte-Wold* and *Blatta Mersie Hazen Wolde-Qirqos* and three American lawyers, J.H. Spencer, Garretson, and Edgar Turlington. The research and the actual drafting were done by expatriate members of the Commission.

The draft had to be revised five times to incorporate the views of the Emperor, the Nobility and Church Leaders, before it was finally promulgated in June 1955.

One of the drafters of that Constitution – Mr. J.H. Spencer – said that the Articles on Human Rights that were put in the Constitution were based on that of the *"United States and European Constitutions, and the Universal Declaration of Human Rights"*.[14] (The U.S. Constitution was the most frequently used model.)

As can be concluded from what has been said so far, the Revised Constitution was drafted in English and was then translated into Amharic. The Constitution had one-hundred and twenty-two Articles. It was amended once by Proclamation No. 334/1954 and, as mentioned earlier, was suspended on 11th of September, 1974 by the first Proclamation issued by the Provisional Military Administrative Council.

Section V. Codification [15]

1.5.1 The Codes

The first Ethiopian "Modern" codified law is the Penal Code of 1931. This code is said to have been prepared by a French Jurist who lived in Djibouti. The Code is based on the *Fetha Nagast* as well as on the Siamese Penal Code. The drafter, whose name I could not find, lived in what used to be called French Indo-China, before he came to Djibouti, which was another French

[14] Shiferaw, ob cit., Note No. 5, p. 24.

[15] Id., pp. 24-29.

Colony. The Penal Code of 1931 contained 487 Articles. It was replaced by the more modern and sophisticated Penal Code of 1957.

Ethiopia's modern codes started to appear after 1957. These codes are:

a. The Penal Code;
b. The Civil Code;
c. The Commercial Code;
d. The Maritime Code;
e. The Criminal Procedure Code; and
f. The Civil Procedure Code.

The drafts of all these codes were submitted to a Codification Commission (the *'Fetha Negest Gubae'* in Amharic) established on 26 March, 1954 by the Emperor. The Codification Commission was composed of Ethiopians as well as foreign members.

The Codification Commission was actually divided into two main sub-commissions:

- The Commercial and Maritime Codes' Commission, and
- The Civil and Penal Codes' Commission.

The three professors who did the actual drafting were members of both Commissions.

We will now briefly examine the legislative histories of Ethiopia's modern codes.

The drafting of the Penal Code of 1957 began in 1954 by the Swiss Professor Jean Graven who was Dean of the Faculty of Law of the Geneve University. The draft was submitted to the Codification Commission (the *'Fetha Negest Gubae'* in Amharic) and after that to the Parliament. It was published in the special issue of the Negarit Gazeta as Proclamation No. 158/1957. It contains 820 Articles.

(a) The Civil Code of 1960.

Work on the drafting of the Ethiopian Civil Code started in 1954. The drafter was the well known French scholar, Professor Rene David. The draft was deliberated upon by the Codification Commission before it was finally approved by Parliament. The Civil Code was published in the special issue of the Negarit Gazetta as Proclamation No. 165/1960.

(b) The Commercial Code

The drafting of the Commercial Code was begun in 1954 by Professor Escara, who died before completing it. Professor Alfred Jaufferet took over the work, and like the Penal and the Civil Codes, it was first submitted to the Codification Commission and finally to Parliament. The Commercial Code was promulgated in 1960 in the special issue of the Negarit Gazetta as Proclamation No. 166/1960.

(c) The Maritime Code

It was Professor Escarra, who is credited for drafting the Ethiopia's Maritime Code, started drafting the Commercial Code in 1954. It also passed through the processes we discussed, till the Maritime Code was issued as Proclamation No. 164/1960.

(d) The Criminal Procedure Code

It is said that the Criminal Procedure Code was however referred to Sir Charles Mathew by the Codification Commission with specific instructions. Sir Mathew gave the Code the shape it presently has. The draft of Sir Mathew, who was advisor to the Ministry of Justice, was as well submitted to the Codification Commission and finally to Parliament.

The Criminal Procedure Code was issued in the Negarit Gazetta as Proclamation No. 185/1961. This code is a rather short and has only 224 Articles.

(e) The Civil Procedure Code

The Civil Procedure Code was prepared by a Codification Department of the Ministry of Justice, headed by Ato Nerayo Isaias, who at the time was Vice Minister with the Ministry. Unlike the other Codes, this draft was not submitted to the Codification Commission. It was rather submitted to the Council of Ministers and finally to Parliament. The Code was, however, issued as Decree No. 52/1965.

The source of the Civil Procedure Code is said to be the Civil Procedure Code of India of 1980.

1.5.2 The Consolidated Laws of Ethiopia[16]

Another unimportant development in the history of legislations in Ethiopia is the Consolidated Laws of Ethiopia. The purpose of the project of the Consolidated Laws *"is to provide a useful source and reference work on the laws of Ethiopia"*. The Consolidated Laws of Ethiopia initially contained laws which were, in effect, included at the end of the Ethiopian year 1961 (September 10, 1969). A supplement was issued in 1975 in which were included as laws which were, in effect, proclaimed at the end of the Ethiopian year 1965 (September 10, 1973). Since then, no supplement has been issued. Besides, the Consolidated Laws *"contains numerous tables. And other means of assisting the user to find the legal provisions he is searching for"*.[17]

This important work was begun by the former Institute of Public Administration of the Ethiopian Government but was later on turned over to the Faculty of Law of the Haile Selassie I University (now the Addis Ababa University). The work was completed in October by Mr. William H. Ewing, who was a member of the staff of the Faculty of Law and the project's head.

[16] Id., pp. 30-31.

[17] Ibid.

The other laws and regulations relating to Addis Ababa appeared in the Consolidated Legislations of Addis Ababa.[18]

1.5.3 Types and Hierarchy of Laws

The four major types of Ethiopian Law (Orders, Proclamations. Decrees and Legal Notices), which are the subjects of this monograph, although never so officially prescribed, are in accordance with the divisions of legislative authority set out in the Constitution of 1931 and the Revised Constitution of 1957. The first three (i.e. Orders, Proclamations and Decrees) are best known as Primary Legislations. Thus, under the title of "Order", the Emperor exercised His Prerogative under Article 27 of the Constitution of 1957 to determine the organization, powers and duties of all ministries, executive departments and the administration of the government. Expressed another way, an Order used to be the formation passed by Parliament and approved by the Emperor was entitled a "Proclamation". The Emperor, acting alone, was entitled to promulgate substantive legislation only in cases of emergency that might arise when the Chambers were not sitting and which come out as a "Decree".

The fourth - "Legal Notice" – was used mainly for the publication of Rules or Regulations, and Municipal Laws; i.e. legislations, authority for which has been delegated to various government officials. This can be best labeled subordinate legislation.

The two minor forms of law which are not discussed herein are "General Notice" and "Notice"; i.e. "General Notice" is mainly used to announce government appointments and awards of honour by the Emperor; "Notice" is the vehicle for the announcement of certain matters of public interest, such as Notice No. 10 of 1950 dealing with the encouragement of foreign investment in Ethiopia. In recent times, "Notice" has more or less dropped into disuse except for the publication of the periodic financial statements of the Development Bank and similar organizations.

[18] Ibid.

There used to be some inconsistencies or overlapping in the use of all of these terms in the early years of the *Negarit Gzetta*, but the above general description is now the established pattern of exercise.

Excepting a shift from

1. systematic, a lesser or sketchy type of drafting,
2. clarity to vagueness and ambiguity, and
3. Western to Eastern economy, which was reflected in the words, phrases in various legal instruments, there was not much difference in the style of legal drafting in general.

Having said this, it would be appropriate to see the legislative process under FDRE constitutional arrangement.

After having this birds seen of the legislative history of Ethiopia, it would be proper to observe the law making process under FDRE Constitution, before embarking onto the science and techniques of drafting in general.

Chapter II:
The Legislative Processes: FDRE Constitution

Rule of Procedure and Code of Conduct Regulation No.3/2006[19]

Section I. Introduction

In any modern legal system the power of enacting laws is one of the most important powers of any government. Understanding the legal framework that governs the procedure through which this power can be exercised is helpful to understand how a certain legal system functions. This seems to be the reason why first year law students take Introduction to Law and the Ethiopian Legal System course which has a chapter dedicated to the legislative process.

The exposition of the legal framework regulating the legislative process in the House of Peoples' Representative (hereinafter the HPR) of the FDRE will be divided in to five parts for the sake of convenience. In the first part, the author will identify the relevant law that governs the legislative process. Then the rules as to initiation of laws, deliberation on draft laws, adoption and promulgation of laws will be discussed in the subsequent parts. The exposition will be made through description and analysis of the relevant law. The interplay of the provision of the FDRE Constitution and the rules will also be touched upon, whenever appropriate.

The comment, needless to say, does not address a vexing or perennial issue and does not offer any groundbreaking insight. The purpose of this part of legislative draft is to provide students and any one interested, with a material that offers an overview of the basic steps involved in law making at the federal level in the Ethiopian legal system.

[19] Taken from a writer who I failed to know at the time of production of this material, an article contributed for Journal of Legal education. (unpublished, JLSRI, 2008).

2.1.1 Laws that Govern the Making of Laws

The HPR, the legislative house established by the 1995 FDRE Constitution, derives its legislative powers from Article 55(1) of the Constitution. The Constitution, in addition to conferring this power to the HPR, lays down some rules related to how the power to legislate could be exercised. Further more, it envisages the adoption of detailed rules governing the legislative process by the HPR. Consequently, the HPR has adopted a *"House of Peoples Representative of the Federal Democratic Republic of Ethiopia Rules of Procedure and Members' Code of Conduct Regulation No. 3/2006"* (hereinafter referred to as "the Regulation").

2.1.2 Initiation of Laws

The first step in the legislative process is initiation of laws. This is the stage at which the legislative machinery would be set in motion and the whole legislative processes begin. By initiation of laws, we mean the submission of draft laws for consideration by the legislator for enactment. While discussing this stage of the legislative process the important questions that needs to be raised are; who has the power to initiate laws, what formal requirements are put up on those who or which are privileged initiate laws and what are the limitations imposed on the power of initiation.

Section II. Who Initiates Law?

To begin with, as to the question who/which institutions/ has the right to initiate laws, according to "the Regulation" is reserved to members of the HPR, Committees of the House, Parliamentary Groups and other bodies authorized by law. Furthermore, "the Regulation" provides that initiating laws shall be mainly the duty of the government. The Regulation is meant to reinforce the prevalent practice in which the government plays the leading role in the initiation of laws.

Here, reference is made to "Parliamentary Groups" one might question what it means, in which respect one is to refer to Article 18(1) of "the Regulation". Under Article 18(2) of "the Regulation", it is provided that "Parliamentary Group" means *"a collection of members of a*

party or parties which have not competed against each other in electoral regions but which have competed in a political program and consists of a party or parties that have won not less that ten seats". This means that a single party having at least ten seats in the HPR or an electoral coalition formed among parties having at least ten seats in Parliament would be considered as "Parliamentary Group" and, as such, would have the right of initiating laws.

Under the previous law that dealt with the legislative process it was provided that the House of Federation, the Federal Supreme Court and other governmental bodies accountable to the government were entitled to initiate laws. However under "the Regulation" currently in force, these entities do not have such powers. This seems to be a peculiar development especially with regard to the House of Federation, since, if this House was to initiate laws while, at the same time, of resolving constitutionality of the same laws; it is to craft, empower this same body to determine the constitutionality of a law that it has initiated. Obviously this will bring the most undesirable outcome.

2.2.1 Procedural Requirements for Initiating Laws

Once the entities in Ethiopia's legal system that are entitled to initiate laws have been identified, the next question would be what procedures are required to be exhausted in order to exercise this power? In this regard, "the Regulation" lays down certain procedural requirements. Some of these requirements are general requirements applicable across the board to all entities that have the power of initiating laws, and hands some of the requirements, which are specific, to certain institutions or persons pertaining to certain categories.

To begin with, the general requirements under Article 8 of "the Regulation" provide that any draft law be submitted to the HPR should be accompanied by an explanation of its importance, having a document explaining the potential impact of the draft on government budget (see detailed content of the law both in Amharic and English). Therefore, one cannot simply initiate a law by communicating to the HPR an idea or suggestion for legislation. In addition to these requirements, under Article 50(1) (4), (6) and (7) of the Regulation it is provided that all draft laws should be submitted to the HPR through the Speaker of the House.

Coming to the specific requirements for initiation of laws by the various groups and bodies empowered with such power, “the Regulation” provides that, when members of the House initiate laws, these drafts should be accompanied by the signature of members. However, the regulation does not stipulate the number of signatures required although the use of the plural noun “members” indicates that just one Member of the House cannot initiate a draft law in her/him self. Under the Proclamation 470/2005 which had been in force before the enactment of “the Regulation”, it was stipulated under Articles 6(5) of the said repealed law that the number of signature required was at least 20, including the signature of the member who had initiated the law. So, a single member of the House desiring to initiate a law had to get his draft sponsored by at least another 19 members. “The Regulation” seems to be open to interpretation. One might even argue that a single member of the HPR can initiate a bill law without involving other members of the House.

As far as laws to be initiated by committees of “Parliament Groups” and other authorized governmental bodies authorized by the law to initiate laws are concerned, such a bill should have been submitted to, with the signatures of the party whip or group leader, by the chairperson of the committee or by the head of the institution, respectively. According to Article 50(3) of “the Regulation”, only the financial laws initiated by the government are expected to be so.

The HPR has been given by the FDRE Constitution the power to legislate on all matters falling within the jurisdiction of the Federal Government. Obviously, this will include finance of the Federal Government. So the question is, if the HPR has the power to legislate on financial matter of the Federal Government, doesn’t this power of legislation include initiating such a law? One might argue that the power of legislating, as provided in the Constitution includes not only the power to adopt laws, but also to initiate laws. One cannot help but see this is a self- imposed restriction, which can be construed as abdication of power, constitutionally legitimate.

2.2.2 Deliberation on Draft Laws

Once a draft law has been initiated and a bill is tabled before the HPR, the next step would be to deliberate on the draft law. Deliberation on draft laws according to "the Regulation" is to be carried out in three readings.

First Reading The first stage of deliberation on draft laws is the "first reading" of the bill. At this stage, the body that has initiated the law is required to give *"… a brief explanation as to the content and purpose of the draft law"*. So, despite the impression one might get from the term "first reading", actually the law will not be read for the members of the house. After the initiator of the law has explained what the purpose and content of the law is, the House will conduct a general debate on the content and the purpose of the law. At this stage there will not be a discussion on the specific provisions of the law.

The first reading could come to an end in two ways. The Speaker of the House could bring it to an end when he deems that sufficient debate has been conducted on the bill or a motion for ending the first reading could be made and approved by Members of the House. According to Proclamation 470/2005, the House seems capable to adopt a bill at the "first reading" without proceeding to a second reading. But as one can infer from Article 52, "the Regulation" makes it mandatory to undertake a second reading of a bill before adoption.

When the general debate over the content and purpose of the law ends, the House can directly proceed to a "second reading", or it can refer the matter to one or more of Parliamentary Committees.

Second Reading In the "second reading" of the bill, members of the House will get a chance to discuss the draft in detail. At this stage of the deliberation, the reports and recommendations of committees to which a draft has been submitted will be heard as well. So, the "second reading" is that stage at which the House will have a closer look at the content of the bill. The House is expected to have a thorough discussion of the provisions of the bill based on the reports and recommendations of the relevant committee(s), assuming that the draft had been referred to the

consideration of committees at the end of the “first reading”. It is also at this sage that Members of the House could propose amendments to the draft law. Finally, when members of the House feel that sufficient deliberation has been conducted, they should end the “second reading” by voting to this effect.

Third Reading Once the “second reading” is over, members of the House could proceed with the task of approving or rejecting the bill. However, under certain circumstances, the draft law might be referred back to the committee; i.e. when there is a compelling reason to undertake a “third reading”. One such reason could be where a proposal for amendment receives the approval of the House. The other instance is where the House is of the opinion that further investigation of the draft law is required. Otherwise, the deliberation will end at the “second reading”. In the “third reading”, the House will hear the reports and recommendations of the committee(s) and would deliberate on them.

Adaption of a Law After the deliberation on the bill has come to an end, members of the HPR will have to decide on whether or not the bill should be enacted as a law. “The Regulation” provides that *“.. the House shall approve the draft law Article by Article; at the end it shall vote upon the draft law as a whole to pass it as a law.”* So, the passing of a bill into law, after the deliberation stage, would involve two steps: the first step is to vote on enacting Article one by one. Then, the next step would be to vote on the draft in its entirety; i.e. on the totality of the draft law, as constituted by the provisions that have been approved by a majority vote where the House voted on the Articles one by one. The practicality of voting on a single provision is questionable, especially when one thinks of adopting codes which have hundreds of provisions if not thousands. Therefore, theoretically, it is possible to conceive of a bill that may be approved when each individual provision is voted upon, but may be rejected when it is voted upon in its entirety.

Enactment of Laws The last stage in the legislative process would be the enactment of laws that have been adopted by the House. Once a bill has been adopted as a law by the House, the Speaker of the House should pass the adopted law over to the President of the Republic for

signature in accordance with Article 57 of the FDRE Constitution. If the President fails to sign the law within 15 days, the law would be enacted and will have effect without his signature.

Finally, the process of legislation would end by the publication of the law on the Federal *Negarit Gazetta,* by the authority of the Speaker of the House. Here, it should be taken not of the fact that prior to the publication of the law on the *Negarit Gazetta,* the Speaker could make any necessary technical corrections; i.e. rectification of linguistic and related errors which in no way modifies the substance of the law.

After having seen the history and process of legislation in Ethiopia, it would be logical to focus on techniques and methodology on drafting in general, and legislative drafting, in particular.

Part II. Legislative Drafting: Initial Materials

Chapter III:
General Overview

It seems reasonable to start our discussion on legislative drafting by asking: *"Why is legislative drafting important to us at all?" "Where in the legal system is its place any way?"*

Most of us at this level are at least familiar with the principle of: *"Ignorance of the law is no excuse!"* Even if we can not argue every lay person has learned the principle by heart like most that have been to the gates of a law school, it would be safe to assume that, no sane person would go to a court of law and argue by claiming that, *"they killed because they did not know it was legally wrong!"* I am sure you're taught in earlier law classes: *"Every one is presumed to know the law!"* For that purpose, laws are made accessible. What remains for you to do is start to thoroughly learn the details of the available laws.

So it becomes clear that if we are to take a position that the laws are accessible and everyone is presumed to know them, it is but logical to require that they answer societal needs, clearly and properly. And that is exactly what a course in legislative drafting tries to do. Equip future legislators (and interpreters of the law), with the capacity to draft legislations that solve social problems in a structure and language that is understandable to them, including lawyers.

But not FOR lawyers ONLY as law is TO the people. Some might need representation by a lawyer, every now and then. But we do not have to put them in a position that they need to call a lawyer every time they turn a page in legislation for interpretation. We hope lawyers have better things to do! To do this clearly requires a clear knowledge of drafting techniques, which we are going to deal with, in later chapters. But even before that, it is important that future drafters recognize their role in the big picture – the impact the draft document they will be working on is going to have on the society.

The draft-law, first and for most, should not be considered as an answer to the needs of the project owner, which might either be the policy maker, a particular ministry or an organ of government. The draft-law is, but rather a solution facilitating document to a designed problem solving principle. Only after giving recognition to these facts can we ask the right questions in the process of drafting legislations. Accordingly, we should recognize legislation as a means of bringing the necessary changes.

So, our discussion in this Chapter will start by outlining what legislative drafting is, how it could be used to solve social problems and as to how it should be used as a tool for social change. In later chapters, we will outline the role of the drafter. Then we will deal with the specific aspects of the drafting process. Due consideration is given to the importance of language, *'legalese'* and translation, followed by some particular cases that require drafters' attention.

What Legislative Drafting is Legislative drafting is just one form of legal writing, which is considered as one of the most important part of legal writing, because of the number of people it affects as in drawing up of contracts or wills. Thus it needs independent discussion, because it also is one of the most highly regulated forms of writing. It is said that legislative drafting is one of the most rigorous forms of writing next to logic.

Any discussion on legislative drafting can not be seen independently of the primary actor, the person who actually does the job of drafting, the drafter. It is also important to discuss on the role of the legislative drafter not only because it is inseparable from the act of drafting but also because his/her duty is highly misunderstood. Some consider the drafter as a person merely given the duty of translating the ideas of other people in to legal language. This misunderstanding arises from the fact that the ideas for drafting are not raised by the drafter, but rather on instructions of a respective ministry or public office that require legislation. Therefore, based on this we are going to see what the real role of the drafter is and what it should be. At what point the drafter should be called in to the drafting process.

Section I. Distinguishing Legislative Drafting from other Forms of Legal Writing

Legislative drafting is one form of legal writing. The term legal writing in general includes all forms of writing in the legal field including the drafting of individual contractual agreements, wills and the like inclusive of legislative drafting. Legal writing had been, for example, defined as *"the crystallization and expression in definitive form of a legal right, privilege, function, duty or status [and] . . . the development and preparation of legal instruments such as constitutions, statutes, regulations, ordinances, contracts, wills, conveyances, indentures, trusts, and leases."*[20]

Legal writing, as any other form of writing basically adheres to most rules of grammar and punctuation. The biggest difference from other forms of writing however lies because it is a more formal form of writing. This formality being expressed in; avoiding first person pronouns, contractions, abbreviations, idiomatic phrases, and punctuation marks like exclamation marks that might suggest informality.[21]

Generally speaking, most people consider all forms of legal writing to be complicated, cumbersome and incomprehensible.[3] With in this category, legislative drafting is considered the most difficult form of legal writing. This difficult could be considered as having two aspects. From the point of view of the drafter the problems faced arise in trying to draft a comprehensive document and how the document would be understood by the lay person. Being able to present it in simple words, while, at the same time, being able to include all policy interests, following the rules of legal writing is necessary. These points raise the issues of ethics and language. They make us question what exactly the role of the drafter is. Who is responsible for and in what manner (what type of language) is to be employed to communicate the idea. This will be dealt with in detail later when looking at the difficulty of legal drafting.

[20] Reed Deickerson, Fundamentals of Legal Writing, Boston: Little Brown & Co.1965, pp. 20ff

[21] Ibid.

Section II. What is the importance of Legislative Drafting?

Even if there could be a difference on the following of codified laws or not exists we could all agree that it is important to have written proof of what we believe is right and wrong or our agreements and disagreements on the basis of which violators are to be held liable and face the consequences of their acts.

The importance of written law is highly associated with the idea: “ignorance of the law is no excuse”. The use of this idea necessarily leads to the primary obligation of the state to make the laws available (known) to its citizens. That is what we call giving prior notice. And the best way to do that is to publish the laws and this is where the topic of legislative drafting comes to existence.

Once we start talking about legislative drafting our focus would be the drafter. To talk about importance of legislative drafting is to talk about the importance of the role the drafter is to play. Usually the drafter is not himself/herself the authoritative arbiter or maker of the policies to be embodied in the provisions he/she draws. This division between the drafter's function and the ultimate authority in matters of policy has contributed to widespread misunderstanding of the nature of drafting itself. It has been assumed, for example, that the drafter's task is primarily a task of English composition. He/she is merely a scrivener, it is thought, and who is engaged in putting the ideas of others "into legal language". But this is to misjudge badly the work required of the drafter, the responsibility he/she normally carries, and the contribution he/she makes to the development of law. In fact, a very minor fraction of his/her time is spent in formal composition, while the overwhelmingly greater portion of endeavors is devoted to research and investigation clarifying and elaborating the intent of the policy-maker and assisting in the de- termination of the best means of achieving that intent. The drafter, in order to be effective, must participate closely and as early as possible in the policy-making process, not, to be sure, as a sponsor of policy, for a draftsman who would seek to substitute his judgment for that of the policy-maker on significant issues would not only run afoul of professional ethics but would also jeopardize his own effectiveness. Participation of the drafter in the policy-making process is that of a researcher and expert technical consultant, who can help the policy-maker arrive at sound decisions by

providing data to evaluate the effects of particular policies, by calling attention to policy alternatives, and by aiding him in weighing their relative merits. The phases of the drafting process are neither sharply distinguishable logically, nor are they strictly chronological, for each phase is likely to give rise to new policy issues, requiring research or additional policy consultation with the policy-maker.

The drafting process begins with the obtaining the objectives for a legislative proposal from either the legislator who is sponsoring the bill or from the legislator's authorized agent. The drafter then converts the sponsor's request into proper form, style and legal terminology and fits the proposal into the framework of existing statutory law. The drafter reviews pertinent provisions of the Constitution, existing laws, and other relevant sources and advises the legislator of any known problems or conflicts.

3.2.1 Legislative Drafting as a Tool for Social Change

Ann Seidman a renounced legislative drafting writer and educator whose lectures have been translated in so many languages and whose books has served as manuals for so many countries says the role of the drafter is to bring about social ,political and economic transformation. And she says to bring about development and social transformation our legislation should promote good governance. According to her poverty and riches aren't directly proportional to the availability of resources but rather their allocation and use. Hence if we are going to bring about development or/and social problem our law should be able to pin point the basic social problems and see how to resolve those and for this good governance is considered the most basic aspect. To quote directly from her,

> *"A country's institutions shape, not only its resource allocations, but the quality of that country's governance. The institutions of governance define a government's capacity to manage social and economic resources to facilitate development or transition. Poor governance consists of ineffective, arbitrary government decision-making processes – that is, ineffective decision-making by*

non-transparent, non-accountable, non-participatory (and frequently corrupt) processes."[22]

Good governance is defined as *"the manner in which power is exercised in the management of a country's economic and social resources for development."*[23]

Four elements characterize those processes:

1. Governance by rule: decision-makers decide, not pursuant to the decision-maker's intuition or passing fancy, but according to agreed-upon norms grounded in reason and experience;
2. Accountability: decision-makers justify their decisions publicly, subjecting their decisions to review by recognized higher authority, and ultimately by the electorate;
3. Transparency: officials conduct government business openly so that the public and particularly the press can learn about and debate its details; and
4. Participation: persons affected by a potential decision — the stakeholders – have the maximum feasible opportunity to make inputs and otherwise take part in governmental decisions.

Together, these characteristics tend towards maintaining the rule of law, and ensuring representativeness and predictability in state action.[24] Ann Seidman says the following about the definition of institutions:

Definitions of 'institution' differ. Some emphasize the rules that govern the behaviors of the people who constitute the institution, some the participants' mental orientation towards those rules. All include the concept of repetitive patterns of social behaviors. "Institution" means a set or interrelated sets of repetitive patterns of social behaviors. Defining an 'institution' as its constitutive

[22] Look for the interconnection between law and social change, Ann Seidman, etla, legislative Drafting for Democratic Social Change, Kluwer International London, pp. 7 – 19.

[23] Ibid.

[24] Ibid.

sets of repetitive patterns of social behaviors focuses attention on the central problem: through their society's repetitive patterns of behavior – their institutions – people shape the uses of their country's resources. Banks, schools, courts, family structures, prisons, farms, social clubs, legislatures, industries, welfare systems: these and a myriad of other institutions make up your country's political, social and economic system. Historically-shaped institutions define a country. Their institutions and how they work distinguish one country from the other. A country's institutions determine the relative wealth and income levels of its population, and of the groups and classes within it. They also determine the quality of its governance.

It is therefore under the definition given above that a country's legislative institution falls with all its elements. Hence legislators must devise ways to change the institutions that fasten poverty and vulnerability, and poor governance onto fellow-citizens. The kinds of laws that legislators enact can play a principal role in ensuring good governance that facilitates transition and development. Even if as a legislator you can not resolve all the problems that are present in the country, still you can enact laws to create an enabling institutional environment, one which facilitates the efforts of relevant social actors to develop and use resources in more desirable ways.

As a legislator, you may enact laws designed to facilitate development or transition by different kinds and degrees of state intervention:

- Direct government management of an agency – for example, the post office, prisons, the courts;
- Through indirect measures – for example, laws providing training for cooperative officers, changes in land tenure rules, or financing research in new products and markets;
- Through the creation of a framework of rules within which individual actors supply the moving force — for example, contract laws.

What degree of intervention the law should adopt in a particular circumstance depends not on ideology but the specific facts of the particular social problem the law attempts to solve.

To facilitate democratic social change, you as a legislator, must do more than pronounce inspiring policies. You must enact effective legislation.

That task requires you to perform three law-making jobs: enacting legislation, overseeing its implementation, and communicating with constituents. Whether you contribute to all three tasks depends on your capacity to assess a bill in the public interest.

To assess a draft in the public interest requires that you as a 'trustee for the public interest' assess it on the basis of reason informed by experience.

To do that – and thus to exercise the legislative power effectively – you must answer a central question: Why do people behave as they do in the face of a rule of law? This is a question we are going to answer in the next part of the problem solving approach. But even before we have to answer "Why must governments use law to induce deliberate change? Can it use the legal order to do so?"

"A law" means a rule promulgated by the state and implemented by officials. A law may take many forms: statutes, local ordinances, subsidiary legislation, ministerial rules, administrative regulations, a military junta's decrees;

"The legal order" means the entire normative system in which the state has a finger. It includes, not only the laws themselves, but also the institutions that make the laws (legislatures, independent agencies, ministries, and courts) and that implement the laws (courts, ministries, the police) (others sometimes call this 'the legal system').

> ***Contrarian's argument #1:*** Society makes law; law constitutes an artifact of society. How can society's artifact change the society that made it?
> ***Answer:*** 'Society' does not make law. Law-makers – like yourself – make law. Within the limits of law, law-makers can use law to bolster existing institutions, or to change them.

Contrarian's argument #2: The ruling class controls both the law-making system and the economy. The ruling class will never introduce laws that disadvantage the ruling class.

Answer: In every country's history, moments occur when opponents of the class that controls the economy control the lawmaking machinery. Immediately after the defeat of colonialism, giant colonial companies often still held controlling economic power. New, populist parties held political power. These new parties had an opportunity to use law to change the inherited economic institutions. (Too often they failed – but that is another story.)

Contrarian's argument #3: Many laws do not achieve their stated goals, not due to accident, or law-makers' inattention, but because using law to induce social change cannot work.

Answer: Sometimes, law works. Before an income tax law, nobody paid income taxes. Without a national election law, people cannot vote in national elections. Sometimes law does not work. In no country does a law forbidding sexual intercourse between unmarried people achieve 100% conformity to its commands. The problem is to discover what makes some laws work and others fail, and then to use that knowledge to write effective laws.

Contrarian's argument #4: Law's function concerns dispute settlement. The laws declare rights and duties to instruct judges how to decide cases. It has no function in behavioral change.

Answer: Law has many functions. Among them, it decides disputes. To facilitate development and transition, law serves as government's principal instrument to change problematic social behaviors.

Contrarian's argument #5: The post-modern school of literary criticism 'deconstructionism' – holds that a ''text' (the words on their face) has no inherent meaning. A reader's own perceptions and values shape its meaning. A law's readers – its addressees – similarly interpret its text to suit their convenience – and never mind what the law-maker intended.

Answer: Words constitute more than silly putty. Society exists because we can and do communicate with each other. We can draft a law sufficiently precisely to convey its core meaning to its addressees.

Contrarian's argument #6: Only the rule's underlying political decision counts, not the technical process of. stitching words together into a law. Design good policies, and legal technicians will draft good laws. Study policy, not law.

Answer: Of course a government must have sound policies. A policy, however, does not enforce itself. You must ensure that a bill sufficiently translates its generalities into the operative commands, prohibitions and permissions of the law.

Contrarian's argument #7: Behaviors reflect multiple causes. Of these, the law constitutes only one. These causes interact in ways so complex that nobody can say whether or how law causes behavior. Unless one can do that, one cannot use law purposively. The law and development project becomes a mission impossible.

Answer: Behavior never has a single, determinative cause. In addition to a law's words, other non-legal factors do influence behaviors (see Section E below). In assessing a bill, you must understand not only its words, but also the non-legal constraints and resources that will affect the behavior of its addressees. By changing the causes of problematic behaviors, however, law can induce more desirable ones.[25]

The contrarians overstate the case. Law works sometimes (income tax, election law); it does not work other times. The problem becomes to understand the factors that produce in one case effective law, and in another, merely symbolic law.

To help solidify the above arguments and the conclusion reached following is presented the idea of the problem solving approach to drafting. This idea of the problem solving approach in drafting is considered vital to developing nations like Ethiopia and makes a very good sense to take good note of.

[25] Id., pp. 21ff.

3.2.2 Problem Solving Approach to Drafting

The legislative problem-solving approach is a methodology that seeks to solve or prevent social problems based on reason (that is, looking at the facts as they are in the "real world") and the experience of those who are connected with the social problem. The legislative problem-solving approach is simply away to explain problematic behavior in order better to understand the behavior. By better understanding the behavior, we can begin proposing precise legislative policy responses to change this behavior. Thus, the legislative problem-solving approach is a step by step method of finding effective legislative solutions to social issues or problems. The basic steps are

A) To identify the problem as it exists,

B) To analyze and explain the problem and create hypotheses based on the causes of the problem,

C) To propose solutions based on the these hypotheses, and

D) To create a system to monitor and evaluate the chosen policy in order to understand which hypotheses were incorrect (and why) and to modify the policy accordingly.

Here are the steps in more detail:

Step 1—Identify and describe the social problem and the persons and institutions involved in the problem.

a) Identify and describe the main problem.

b) What is the problematic behavior and who is responsible? Identify the persons and institutions (including current implementing agencies) that may contribute to the problem).

c) What is the underlying problematic behavior? Identify the problematic behavior of these persons or institutions.

d) Identify other persons that are affected by the problem (usually in a negative way).

e) Identify possible implementing agencies: Any agencies that now have (or could in the future have) responsibility for implementing the legislative solutions to the problem.

Step 2—Analyze and explain the problematic behavior and create hypotheses (explanations) based on the causes of the behavior.

a) Analyze the problematic behavior of the persons and institutions (possibly including current implementing agencies) that contribute to the problem in order to create hypotheses about why these persons and institutions act, or fail to act, as they do.

b) Seven analysis factors to help determine the causes of problematic behavior, namely

- ☑ Rules.
- ☑ Opportunity
- ☑ Capacity.
- ☑ Communication.
- ☑ Process.
- ☑ Interest.
- ☑ Ideology.

c) There may be multiple and overlapping explanations for problematic behavior.

d) Create hypotheses or explanations as to the causes of the problem using the 7 analysis factors.

Step 3—Propose possible solutions based on these hypotheses.

a) Formulating solutions

- ☑ Finding solutions that address the causes of problematic behaviors.
- ☑ Explanations for problematic behavior dictate potential solutions.
- ☑ Where to look for solutions: (a) foreign law and experience, (b) professional literature, and (c) your own country's past experience.

b) Designing implementation provisions.

i. General categories of solutions:
   - direct measures,
   - indirect measures, and
   - educational measures.

ii. Choose an implementer from the following types of implementers:
   - courts and tribunals,
   - administrative agencies,

- public corporations, and
- private-sector organizations.

iii. Choose between using an existing implementer or establishing a new one.

c) Elaborating alternative solutions.

d) Assess the costs and benefits of each of the possible solutions and choose the solution most likely to solve the problem in the most effective way.

i. Purposes of cost-benefit analysis.
ii. Monetary and non-monetary considerations.
iii. Basic methods of analyzing costs and benefits.
   - Comparing the chosen policy with doing nothing ("status quo" analysis).
   - Comparing the chosen policy with alternative policies.

e) Judging between alternative solutions.

f) Combining the provisions into a comprehensive policy.

Step 4—Create a system to monitor and evaluate the chosen policy in order to understand which hypotheses were incorrect (and why) and modify the policy accordingly.

To further explain in detail the problem-solving approach to legislation, the essential job of a professional legislative drafter is to make sure that the legislation will solve the problem being addressed by the sponsor (proponent) of the legislation. It is very important to ask the right kinds of questions of the proponent of the legislation in order to understand the "actual" intent of the legislation, not just the "superficial" intent that may appear in the words of the draft. The problem-solving approach is a practical tool you can use to obtain (or seek) the information you and other policymakers will need to put together legislation that is actually effective in solving social problems in society.

Step 1—Identify and describe the social problem and the persons and institutions involved in the problem.

Identify the social problem.

Legislations should be designed to fix social problems. Therefore, drafting effective legislation requires the drafter to be able to precisely identify the social problem or issue to be addressed by legislation. You must ask yourself and others involved in drafting the legislation, what is the problem the legislation seeks to solve? What are ways not to state the problem? (e.g., *"There is no law on [topic]"*.) What is the best way to state the problem? (e.g., *"Rural farmers are unable to get their crops to market in a cost-effective way"*.)

If possible, state the problem as a specific action or omission on the part of the persons and institutions involved in the problem. In doing this, you must distinguish between causes and conditions. In order to do this, you must identify who may be responsible for behavior that contributes to social problems and what exactly the behavior is. That is, you must determine who — whether stakeholder or implementing agency (or both) — is responsible for what problematic behavior. Remember that, you are not blaming the persons or you are identifying. (So, for example, it is not the farmer's fault that he cannot get his crops to market.) That is what is meant by distinguishing between causes of the problem and the conditions of the problem. Here, you are describing the conditions. Later, you will seek to explain the causes. Finally, you must also identify the persons and institutions that are affected by the problem (usually in a negative way).

Who is responsible?

Identify the persons and institutions (including current implementing agencies) that contribute to the problem. Here, the first step in more precisely describing the social problem is to separate "symptoms" of the problem from actual problem behavior. That is, you must be able to distinguish between causes and conditions. This is not to say that you should disregard the symptoms. However, in order best to begin at this stage, we must move past the "symptoms" and search for the problematic behavior. When we find the problematic behavior we will also

discover the persons or institutions that either contribute to, or are affected by, the problem. At this stage you must ask, who is involved (generally) in the problem? (This can include individuals, organizations, and Government agencies.) More specifically, what persons (individuals, organizations, governmental agencies) and what behaviors (actions or inactions/omissions) of these persons actually contribute to (or cause) the problem? In other words, who is contributing to (or causing) the problem? And what are they doing (or not doing) that is contributing to (or causing) the problem?

What is the underlying problematic behavior?

Identify the problematic behavior of these persons or institutions.

Each social problem is caused by more than one problematic social behavior. Therefore, it is important to identify each of the problematic behaviors, even though the ultimate policy or law may not deal with all of them. You can use the checklist of questions below in order to help identify problematic behaviors.

Checklist of questions for identifying problematic behaviors:

- What are the overt manifestations of the problem?
- Who is directly affected by the manifestations?
- Where is it happening?
- When is it happening?
- Whose behavior causes or contributes to the problem directly?
- Whose behavior causes, contributes to, or permits the problem indirectly?

(NOTE: This checklist is not comprehensive. These are examples of the most basic types of questions that are generally applicable. Moreover, not all of the questions above may always be applicable in the examination of every social problem. The drafter should ask whatever questions are appropriate.)

Identify other persons that are affected by the problem (usually in a negative way).

Who is affected by the problem? In what way are these persons affected?

Identify possible implementing agencies.

Any agencies that now (or could in the future) have responsibility for implementing the legislative solutions to the problem.

What is an "implementing agency"? The term "implementing agency" means an organization or person assigned with the duty to implement a given rule. Usually, the implementing agency is one or more governmental organizations (or officials). But sometimes a pseudo-governmental or nongovernmental entity is given responsibility for implementing the law. When addressing a social problem through legislation, it is essential to choose an appropriate implementing agency (or agencies) to carry out the solution to the problem. It is also important not to exclude a potential implementing agency before an appropriate legislative solution has been chosen. This is because often the choice of solution will determine the choice of the appropriate implementing agency. And solutions are not chosen until a thorough analysis of the problem is completed.

Step 2—Analyze and explain the problematic behavior and create hypotheses (explanations) based on the causes of the behavior.

A) Analyze the problematic behavior of the persons and institutions identified in *'Step 1'* (above) that contribute to the problem in order to create hypotheses or explanations about why these persons and institutions act, or fail to act, as they do.
B) Seven factors to help determine the causes of problematic behavior.

The legislative problem-solving approach uses seven analytic factors to help explain why the problem is occurring. Each factor focuses on one aspect of a behavior and asks questions that will lead to a better understanding of the problem and helps to come up with more meaningful policy responses. The seven factors are described below.

1– ***Rules***. The term “rules” most often refers to law, rule, or social norm that affects a stakeholder (regulated person) and contributes to the problematic social behavior. Some examples of ways in which the rules contribute to the problem are the following:

a) Laws which are vague or ambiguous.

b) Laws that permit or require the problematic behavior.

c) Laws that do not address the causes of the problematic behavior.

d) Laws that do not provide for accountability in their implementation.

e) Laws that grant too much discretion in their implementation or that too greatly restrict discretion.

2– ***Opportunity.*** The term “opportunity” refers to the circumstances, occasion, chance, or probability that a stakeholder has to engage in the problematic social behavior, to obey or disobey a law, rule, or social norm. One possible example is the opportunity of governmental officials to engage in corrupt behavior (such as accepting or soliciting bribes).

3– ***Capacity (or ability).*** The term “capacity” refers to the ability (or inability) or capability that a stakeholder has to engage in the problematic social behavior, obey a law, rule, or social norm. Capacity also includes any obstacles that may impede or prevent the stake holder’s ability to engage in the problematic behavior or the inability to engage in desired behavior. (In practical terms, “capacity” often overlaps with “opportunity”.) Some possible examples that address the “capacity” factor are: inability to obtain credit, lack of expertise, or lack of transportation (for example, a farmer who cannot get produce to market).

4– ***Communication***. The term “communication” refers to the effectiveness with which a law, rule, or social norm is communicated to the stakeholders affected by the law, rule, or social norm. If people do not know what actions the law permits, requires, or prohibits, how can they possibly be expected to act in conformity with the law? It also includes communication between implementing agencies (regulators) and stakeholders and among different implementing agencies.

*5– **Processes and procedures***. The term “process” refers to criteria and procedures (or other pragmatic or logistical aspects) that

> a) explain the decision-making process that leads a stakeholder to decide whether to conform or not to conform to a law, rule, or social norm, and b) encourage or discourage a stakeholder in confronting the problematic social behavior. This factor is particularly important in the case of an institution (such as a governmental agency, a corporation, or other complex organization), in which the decision-making process is not vested on a single individual; how an institution’s complexity, structure, and procedures can affect the institution’s decision on its course of action — especially when it comes to obeying or disobeying the rules.

*6– **Interest and incentive (or disincentive).*** The term “interest” refers to the incentive or motivation (both material and non-material) for a stakeholder to engage in the problematic social behavior. This is the stake holder’s perception of the personal costs and benefits of complying with the law, rule, or social norm. Many types of personal incentives or motivations may constitute an interest that is sufficient to affect or contribute to the problematic social behavior. This factor also includes “disincentives” that discourage good behavior. Some possible material incentives (or benefits): Money or increased employee fringe benefits. Some possible non-material incentives (or benefits): Personal or political power or the esteem of family, friends, associates, and others.

*7– **Ideology***. The term “ideology” refers to the values and attitudes that shape how we look at the world and, therefore, shape our decisions. Ideology also encompasses any subjective motivations that do not constitute “interests”. These are the backgrounds and personal values each person brings to any set of circumstances, which, in turn, affect how the person behaves in the face of those circumstances.

> C) There may be multiple and overlapping explanations for problematic behavior.
>
> Remember that often more than one factor may interact to affect or contribute to the problematic behavior. For example, a rule affecting a person may require the person to do something that cannot be completed because the person lacks the capacity to do it. In this

example, the “rule” factor has combined with the “capacity” factor to explain the problematic behavior.

D) Create hypotheses as to the causes, based on the causes of the problem using the 7 analysis factors.

Step 3—Propose possible solutions based on your explanations.

In this session, we will discuss a) where to look for solutions, b) what to consider when deciding how to implement the solution, c) the importance of elaborating several alternative solutions, and d) how to test the possible solutions for adequacy, including how to conduct a basic cost-benefit analysis.

A) Formulating solutions.

The next step is to propose solutions for each of the causes of problematic behavior you have just identified, and then to combine the solutions into a policy that will address the social problem you originally identified.

1– Finding solutions that address the causes of problematic behaviors.

Now you must a) propose possible solutions to each of these causes, and b) use the individual solutions to build a comprehensive policy.

2– General categories of solutions. There are three general categories of solutions: direct measures, indirect measures, and educational measures.

(a) Direct measures address factors associated with interest or incentive. Direct measures include both punishments and rewards.

Some examples of direct measures might include

- a fine for violating a policy (punishment),
- tax benefits that encourage certain types of businesses or activities (reward).

(b) Indirect measures. Indirect measures address factors associated with opportunity, capacity, communication, and process. Such measures are generally not rewards or punishments.

(c) Educational measures. Educational measures are generally aimed at influencing ideology, but may also deal with capacity in situations in which the capacity factor involves a lack of information or expertise.

3– Explanations for problematic behavior dictate potential solutions.

It is important to think of the analytic factors not only as factors that affect or contribute to problematic social behaviors, but also as factors on to which new policy or law should focus on in order to change the problematic behavior. The table below shows the general types of solutions that are suggested by the particular category of problem they address. *(Problem, Factor, Possible Solution(s))*

Opportunity: Indirect measures that include a) eliminating opportunity to engage in the problematic behavior, or b) providing the opportunity to engage in the desired or preferred behavior.

Capacity: Indirect measures, educational measures that include

a) limiting the capacity of the stakeholder to engage in the problematic behavior, or b) capacity-building to improve or enhance the role occupant's ability to engage in the desired or preferred behavior.

Communication: Indirect measures that include provisions for informing those affected by the rule or law, so that they are aware of what the law or rule requires, permits, or prohibit and can, therefore, conform their behavior appropriately.

Process: Indirect measures that simplify or eliminate overly complicated processes or procedures.

Interest: Direct measures (reward and punishment) that include

a) eliminating or reducing the interest or incentive to engage in the problematic behavior, or b) introducing or increasing the interest or incentive to engage in the desired or preferred behavior.

Ideology: Educational measures that show the negative aspects of the ideology and the positive aspects of the solution.

4– Where to look for solutions.

Your own ideas, based on logic and your experience, are the first place to look for solutions. Other possible sources for solutions include a) foreign law and experience, b) professional literature, and c) your country's own past experience.

A) Foreign law and experience: Foreign law and experience — including both successes and failures — can be an important source for solutions.

B) Professional or academic literature.

Professional or academic literature may also provide a good source of ideas for proposing solutions.

C) Your own country's past experience.

Your country's own past experience can also provide ideas for solutions.

Designing implementation provisions

You must make it clear in your policy that "the implementation provisions" are responsible for implementation of the policy. You also must select, choose an implementer that has adequate structure, processes, and resources.

- Choosing an implementer. Once you have considered the types of measure you need, you must next choose an appropriate body to implement the measure. Who will be responsible for administering the provisions of the legislation? What governmental agency or official, or private organization or person, is responsible for oversight of the persons that are involved in the problem (identified above)? There are 4 basic types of implementers:
  - Courts and Tribunals,
  - Administrative Agencies,
  - Public Corporations, and
  - Private-sector Organizations.

  Each type of implementer has both advantages and disadvantages

  Courts are the most formal tribunals in a State for resolving disputes between various parties.

  Other tribunals are less formal types, which are sometimes established to deal with specific issues.

  Administrative agencies include governmental ministries, departments, and other public entities.

  Public corporations can also be important tools in carrying out public policies.

Private-Sector Organizations include hospitals, universities, research institutions, charities, and other non-governmental organizations.

b) Choosing between using an existing implementer or establishing a new one.

You may find that existing implementers are unable successfully to implement the measures called for in your policy. In such a case, you will have to weigh whether to establish an entirely new entity or to use an existing one. Is a new official or agency or an existing agency appropriate to administer the legislation? Does the administrator need additional powers, resources, or personnel? If an existing agency is appropriate to administer the legislation, does the agency need expanded authority, resources, or personnel?

c) Elaborating alternative solutions.

At this stage, it is important to include several possible solutions. Later, you will choose from among these possibilities to identify your final proposed policy solution.

d) Assess the costs and benefits of each of the possible solutions and choose the solution most likely to solve the problem in the most effective way.

In order to determine which of the various possible solutions will be most effective, you must ask the following questions:

Do the foreseen benefits of the policy outweigh the costs? If so, how does the ratio of costs and benefits compare to the current situation (the "status quo") and other policy alternatives? To answer these questions, you must conduct a basic cost-benefit analysis of each of the possible solutions.

- Purposes of cost-benefit analysis.

  The cost-benefit analysis provides a threshold for whether a particular legislative policy solution to a social problem will be more effective than the current state of affairs. That is, a chosen policy must provide more benefits than it costs. The cost-benefit analysis also helps to quantify the costs and benefits of each possible choice of policy solutions in a comparative way. This enables choosing the most effective among the alternative proposed solutions.

- Monetary and non-monetary considerations.

  It is important to consider in a cost-benefit analysis both monetary and non-monetary costs and benefits.

- Basic methods of analyzing costs and benefits.

  In order to determine the relative costs and benefits associated with your possible policy solutions, you must

  ask what would happen if there were no change in the current policy (that is, if you kept the "status quo"), At this point, it is probably relatively easy to determine the costs of taking no action. Also make sure to include in the analysis any benefits of taking no action (since someone is often benefiting from the current state of affairs).

  compare the costs and benefits associated with the alternative policy solutions. Here, analyze each of the alternative policy solutions to determine how they compare to each other in terms of how well they eliminate or reduce of the current social problem. Also make estimates of the relative monetary and non-monetary costs of implementing the alternative policy solutions.

5– Judging between alternative solutions.

After conducting a basic cost-benefit analysis of the various possibilities, you should choose the most effective solution to include as a part of the larger comprehensive policy.

6– Combining the provisions into a comprehensive policy.

After you have chosen provisions that deal effectively with each of the causal factors you have identified, you will combine the provisions into a comprehensive policy. You can use a checklist to "test" whether the comprehensive policy will be an adequate solution.

Following is a Checklist to Ensure Comprehensive Policy, which will provide an Adequate Solution:

- Does the policy actually induce the desired behavior?
- Alternatively, does the policy eliminate or reduce the problem behavior?
- Does the policy systematically address each of the causal factors you have identified?
- Does the policy prescribe appropriate implementing agency behaviors likely to result in :

  a) Effective implementation, and

  b) Implementation that is consistent with good governance?

- Can the government allocate sufficient resources to ensure effective implementation?
- Are there sufficient provisions for reviewing the law and making changes later if required?

Step 4—Create a system to monitor and evaluate the chosen policy in order to understand which hypotheses were incorrect (and why) and modify the policy accordingly.

Review Questions

1. What do we mean by legislative drafting?
2. How is legislative drafting from other forms of legal writing?
3. How could legislative drafting be used as a tool for social change?
4. State some of the basic steps in the problem solving approach.

Chapter IV:
The Research Process

The drafting process though seems to start when the legislator puts pen to paper, actually begins earlier as there are some other more important points prior to that. First the drafting process as in any other writing should start by planning. For effective writing one need to have outlines that are going to guide throughout the writing process as plans help order and list. But before we even start to talk about writing, we should set the time table, which is going to guide all the planned processes go through the actual writing process. Time tables give the drafter a clear program of action .Moreover, there are times when this time tables could be drawn by or between the drafter and the organ initiating and supervising the draft law. In such a case the time table not only serves as a guiding line for the drafter, but is also beneficial for the supervisor to plan ahead on the next processes of adopting the legislation. The time table shall take into account the following:

- The steps that need to be followed for that particular drafting and the time needed to complete each of the steps.
- Activities that need to be conducted to draft, like consultation.
- The length and complexity of the legislation.
- The level of the controversy of the issues involved.
- The scope of the law's potential impact.
- The urgency of the law.[26]

After we get our time table we follow through it and conduct different activities. The next step is impact assessment. The drafter needs to check the probable impact of the up coming legislation at different levels, based on which different consultations could be conducted. The assessment could be done at the level of:

- Various social strata,
- Different valued interests

[26] Id., pp. 85 – 126.

- o Human Rights,
- o Good governance

o Environmental protection, etc

- National economy, by cost assessment and/or cost–benefit analysis.[27]

Then follows conducting the research. How the research is conducted and how the research report is to be prepared is covered in the following section. Now we will look at the importance of outlining and writing plans once we are in the middle of the drafting process.

For a professional writer who must organize extensive and complex material, spending time creating an outline or writing plan almost always saves time in the end. An outline or plan will keep you from backtracking, repeating yourself, missing a key point, or finally discovering what it is you want to say after you have written the whole thing the wrong way.

But creating order in extensive and complex material is not an easy task; it takes the writer's complete attention. Consequently, it deserves a distinct block of time for just that task. Don't fall into the trap of trying to create order at the same time you are drafting sentences and paragraphs. That approach is needlessly stressful because it forces you to keep track of several big tasks all at once.

Writing a good outline or plan may also mean that you have to change some of your preconceived ideas about outlines. First of all, the out line or plan is for you[28] (this is one difference with time tables that could also be designed with the initiating organ) ,therefore try to design it as you feel comfortable and not as you are supposed to write in the final draft.

[27] Ibid.

[28] Ibid

Section I. The Role of the Drafter[29]

4.1.1 Ethical Responsibility of the Drafter

This Chapter tries to show how legislative policy could be used to deal with social problems. In the course of these Chapters, the author of this paper tries to use traffic jam as show case in legislating and drafting as problem-solving methodology.

This Chapter also tries to show how to make use of all afore mentioned steps while writing a formal *Research Report* in a manner that helps justify the proposal to be made.

4.1.2 Writing the Research Report

A *'Research Report'* is a tool to control the quality of a draft policy or law. This report gives the drafters and other parties the information required to review (or check the quality of) the proposed policy or law. It is also an advocacy document justifying and arguing for the solution the drafter proposes by relying on the drafter's a) quality of research, b) soundness of logic, and c) ability to make the reader see the benefits of the chosen policy solution over other alternatives, including doing nothing (that is, maintaining the "status quo").

Function of the research report

The research report serves several functions. First, it justifies the choice of policy by detailed and systematic analysis of the social problem using logic based on experience. Second, it provides information to the reader about the methodology used to arrive at the conclusion. Finally, it provides information and justification for the policy or law makers (in addition to the drafters) that they can use to influence other decision makers.

[29] Id., pp. 41 – 49.

Structure of the research report

The research report described here contains four parts: (1) identification of the characteristics and scope of the social problem, (2) explanations of the problematic behavior(s) that contribute to the social problem, (3) proposed solution(s) to the social problem, and (4) provisions for implementing, monitoring, and evaluating the proposed solution(s).

Part 1 — Identification of the characteristics and scope of the social problem identifies the scope of the social problem, includes identification of probable role occupants and implementing agencies.

Part 2 — Explanations of the problematic behavior(s) The ROCCIPI problem-solving methodology

The ROCCIPI problem-solving methodology is simply a way to explain repetitive problematic behavior in order better to understand the behavior. By better understanding the behavior, we can begin proposing precise policy responses to change this behavior. ROCCIPI is an acronym for the seven categories or factors that provide explanations for problematic behavior. Each factor focuses on one aspect of a behavior and asks questions that will lead to a better understanding of the problem and more meaningful policy responses. These factors are a) rules, b) opportunity, c) capacity, d) communication, e) interest, f) process, and g) ideology.

This part of the research report systematically examines each ROCCIPI factor for the identified role occupants and implementing agencies, explaining how each factor contributes to the problem. Make sure to acknowledge factors that do not contribute and briefly explain why.

Part 3 — Proposal(s) for solution

This part of the research report contains proposed solutions addressing every contributing ROCCIPI factor. These proposed solutions are then transformed from separate proposals into a single unified policy statement.

Part 4 — Implementation, monitoring, and evaluation

This part of the research report proposes implementation, monitoring, and evaluation provisions, as well as provisions for making future changes. First, it must include provisions for effectively implementing the proposed policy. Second, it must include provisions for monitoring the proposed policy after implementation. That is, it should have an adequate control and evaluation mechanism to measure the policy's effect and effectiveness. Finally, it must include a procedure for making necessary changes in areas in which the policy falls short of expectations.

Checklist for the research report

To recap: This outline should be treated as a flexible guide, not a straitjacket. Every *'Research Report'* constitutes a special case.

First try to attract the readers' attention to the social problem's importance and the necessity of considering a possible legislative programme to resolve it. If used, it should lead logically into the body of the report as here outlined.

1. Brief statement of the problem and the bill's proposed solution.
2. Fitting the social problem addressed by the bill into the larger context. Frequently, the problem constitutes a small part of a much larger one. The research report's introduction should indicate the particular problem's relationship to the larger social problem and that larger legislative programme.
3. History of the general problem.
4. The difficulty the bill shall address.

1. Brief-Introduction

Relate the specific difficulty to the larger context; indicate the difficulty statement's function in the logic of problem-solving, and outline the content of this section

2. The nature and scope of the difficulty's superficial manifestations as they affect human, physical, or financial resources

(a) Frequently the social problem manifests itself as a problem in resource allocation. If the social problem appears first as a question of resource allocation, the drafters should here describe the nature and scope of the resources' misallocation.

(b) Under this heading, as under most of the headings of this checklist, drafters should include the relevant descriptive hypotheses and the data that warrant them.

3. Whose and what behaviors constitute the difficulty?

a) Law can only address behaviors. Having identified the mis-allocation of resources, for example, this section of the report should describe the relevant primary role occupants and implementing agencies and the aspects of their behaviors that prove problematic. (Not infrequently, even the difficulty's superficial manifestations consist of problematic behaviors, like unfair trade practices, domestic violence, motor vehicle traffic problems or dishonest banking practices.)

b) In describing the role occupants and their behaviors which comprise the social problem, drafters should differentiate between the several sets of role occupants. The explanations for each of these sets of role occupants' behaviors undoubtedly differ, so to change those behaviors, the drafters will first have to identify the specific causes for each, and then draft measures to change those causes. Because the problem-solving methodology's solutions logically derive from explanations, to ignore these differences among role occupants and the different causes of their behaviors make it likely that the bill will not induce all the new behaviors needed to solve the problem.

4. Comparative law and experience

5. History of the difficulty

6. Who benefits and who suffers from the present situation.

A significant part of the social cost-benefit analysis of the preferred solution — that is, the social impact statement — should focus on the new law's probable impact on different groups in society. To articulate the impact of existing law on these groups constitutes a necessary predicate for that social impact statement.

7. Brief-conclusion.

Summarize the section; indicate the connection between the statement of the difficulty and the explanations section that follows by stating,

'Explanations to the Causes of the Behaviors that Comprise the Difficulty'

A) Brief-introduction. Describe the function of explanations in the logic of problem-solving; and outline contents.

B) Where relevant, discuss history and comparative law as possible sources of hypotheses as to explanations

C) Relate concepts, with respect of role occupant A and behavior 1:

The *'Research Report'* should group together the explanatory hypotheses and the evidence relating to each set of behaviors. Occasionally, a drafter may want to vary this practice. For example, if dealing with three role occupants and behaviors all subject to the same existing rules of law, a preliminary section on the law followed by three separate analyses of the ROCCIPI factors causing the three different behaviors might provide a more effective organization of the report.

- The state of the existing law ('rule') as it presently bears on the behavior or role occupant A as identified in the difficulty part. (Actors behave within a cage of laws. Almost invariably, by the time a law comes to the point of drafting, earlier laws have addressed the difficulty, although frequently under a title different from that under consideration. Usually, more than one law relates to any given social problem. Drafters must resist the temptation to search only for a law that has a name similar to the title of the social problem in question. Instead, they should take care to discover all the legislation (from the constitution through legislation enacted by national and provincial legislatures to administrative regulations) that bear on their particular problem.)
- The non-legal factors that may affect the problematic behaviors.

  A) Objective factors:

  - Opportunity;
  - Capacity;
  - Communication of the law;

- The effect of the role occupants' decision-making process on their decisions.

B) Subjective factors:

- The role occupant's interest ('incentives'), including the effect of potential sanctions;
- Ideology (values and attitudes) as it affects the role occupants' behavior.
- Where relevant, the foreign experience as to possible causes of the behaviors at issue

- If more than one role occupant or problematic behavior exists, repeat, for each successive set of role occupants and their behaviors.
- If implementing agency behaviors seem problematic, repeat, for the implementing agency. (The behavior of the imple-menting agency constitutes a factor in the primary role occupant's circumstances that to one degree or another the role occupant takes into account. An implementing agency's officials act in the face of a rule addressed to it.) An explanation for those officials' behavior in the face of a rule follows the same general structure as an explanation for any other role occupant's behavior in the face of a rule. To analyze the causes of the implementing agency's problematic behaviors, therefore, use the same checklist for non-legal factors mentioned above. (Because implementing institutions always comprise complex organizations, however, analysis usually requires focus on the implementing agency's decision-making processes. Almost invariably, the research report will have to review the causes of problematic behaviors of central agency decision-making officials.)
- Foreign law
- Brief-conclusion. (Summarize this section, and reiterate the connection between explanations and solutions. The brief-conclusion may contain a brief list of the explanation for each set of behaviors identified in the difficulty section. That list comprises a summary of the causal factors which the preferred solution — the proposed bill's detailed measures — must alter or eliminate to induce more desirable behaviors.)

Proposal for Solution

- Brief-introduction. Note the requirements that the logic of problem-solving imposes on the proposed solutions. List alternative potential proposals for solutions that logically seem likely to alter or eliminate the causes of existing problematic behaviors.

  a) The persuasiveness of a justification to a considerable degree depends upon whether you have convinced the readers that you have considered all the logically-possible potential measures for inducing the behaviors desired; and that, all things considered, your preferred solution (the specific measures in your bill) really does constitute the best available.

  b) Drafters may obtain ideas for alternative solutions from three principal sources: comparative law and experience; scholarly books and journals; the drafter's own ideas.

- Describe the details of your bill's major provisions.

  a) This section should describe and explain every important provision of your bill. If the bill seems unusually long and detailed, you may consider, in addition to the research report's more general analysis, using an annotated bill to explain specific provisions' details.

  b) This section should include a detailed description of the proposed implementing agency, with a special focus on its decision-making processes and the provisions for participation, accountability and transparency.

- Demonstrate how the preferred solution addresses the causes of the difficulty as revealed in the explanations section. (Use the ROCCIPI research agenda as a device to predict the behaviors of the bill's addressees.)

- Analyze the costs and benefits of your bill, by including

  (a) economic costs and benefits,

  b) Non-quantifiable social costs and benefits,

  c) Social impact statement, which, among other things should include:

  - Impact of the bill of different social groups, especially on the poor, women, children and minorities.
  - Impact of the bill on valued but poorly represented interests, especially on the environment, human rights, and the rule of law and the prevention of corruption.

- Monitoring performance:

- Show how your bill provides for monitoring and evaluating its implementation. (Here, list alternative monitoring devices and give reason for the one included in your bill.)
- Foreign experience in monitoring implementation of analogous laws.

- Brief-conclusion.

Section II. Notes on writing style for the research report

This section provides specific guidance about how to write the research report (that is, the style of the report).

Use clear and simple language

Keep the language of the report clear and simple. The depth of your analysis and quality of logic can easily be lost in an attempt to impress the reader with the size of your vocabulary.

You should use the following general rules in crafting clear sentences in your report.

Rule 1. Write brief sentences. These should generally be no more than about 17 words long. More words than necessary, are not likely to be understood by many readers. If a sentence is too long, break it into shorter sentences.

Rule 2. Place the most important concept at the end of the sentence.

Rule 3. Keep together the subject and the verb, the parts of a compound verb, and the verb and object. Thus, the sentence core should be as follows: subject – verb – object.

Rule 4. Use as few conjunctions (such as “and”, “or”, “but”) as possible.

Rule 5. Write sentences using nouns and verbs rather than using adjectives and adverbs.

Rule 6. Avoid connective words and phrases (such as “however”, “thus”, “therefore”, or “It is a fact that…”).

Rule 7. Avoid passive sentences. Instead, use active sentences.

Rule 8. Avoid the verb “to be”, in any form.

Use “signposts” to guide the reader through the problem-solving methodology. It is important to provide a brief explanation of the problem-solving methodology in your introduction to the research report and then to provide updates throughout the report on your progress in using the methodology. These updates are called “signposts” because they tell readers where they are, where they have just been, and where they are going next.

For example:

> *“The previous section identified the social problem of traffic jams in Merkato and, as a contributing behavior, careless drivers stopping at unmarked stops. The problem-solving methodology requires that next should be examined what factors influence the careless drivers to act as they do. Understanding this can create a policy that might efficiently and effectively deal with the problem.”*

Mention sources of information used in the research report

Provide references or citations to the sources of information you use in the research report (such as facts, data, and quotations) using

- footnotes,
- endnotes, or
- bibliographic references.

It is advisable to use a standardized format, if one exists, for citations, but any format that clearly identifies the source so that a reader may locate the information will be sufficient.

Rules for drafting policy

There isn't a particular formula to be used on the use of language, whether it is for the research report, for the draft document itself or for writing in general. However in the area of legislative drafting, as we have said in Chapter One earlier, there are a lot of "Dont's". And for the research report in particular, there are general rules that should be followed so that all the hard work you put into the research report is translated into an effective policy or law. These are for the most part principles that you will repeat in the body of the legislation you are working on. They are the following:[30]

Rule 1. Avoid vague language.
Rule 2. Avoid ambiguous words.
Rule 3. Cover the entire "domain".
Rule 4. Use rigorously consistent language.
Rule 5. Avoid redundancy.
Rule 6. Adopt words from related policies or laws.
Rule 7. Avoid ambiguous modifiers.
Rule 8. Use 'and' and 'or' carefully.
Rule 9. Keep sentences short.
Rule 10. Use tabulations freely.
Rule 11. Draft in the positive.
Rule 12. Avoid using the verb 'to be'.
Rule 13. Use vocabulary adapted to the policy's readers.
Rule 14. Put the most important concepts at the end of the sentence.
Rule 15. Avoid incorporation by reference.

In Chapter One, we have tried to introduce the idea of legislative drafting in general and have dealt with the approach that should be followed in designing policy and conducting the work of

[30] Id., pp. 187 – 198 & 262 – 278.

drafting, i.e. the problem solving approach. And the first part of this chapter has dealt with the first step in the drafting process i.e. preparing the research report. As has been said earlier, the *'Research Report'* does not only serve as a persuading instrument in place of the drafter and in the face of computing legislation, to be eye catching in the prioritization process, but also serves as a guideline for the drafter.

4.2.1 Role, Responsibility of the Drafter Substantiation

The early involvement of the drafter in the legislative process is highly essential. The drafter should not be considered and is not a person to change documents into legal language. But should be a person who advises in policy design, and then work in resolving the social problems, following if possible the problem solving approach discussed with in.

The drafter as the person bestowed with this duty owes the responsibilities of *'confidentiality'* and *'loyalty'*, declining inappropriate instructions are not in line with the Constitution and principles of Human Rights Ethiopia has already adopted.

4.2.2 Prioritizing Proposed Bills[31]

A recent workshop in a developing country illustrated many law-makers' difficulties in deciding which bills to draft first. Most of the country's inhabitants confront a grossly inequitable distribution of land, widespread unemployment, obscene gaps between rich and poor that reflect long-standing ethnic cleavages, and grossly inadequate schooling, health facilities and housing. A new, populist government had won elections, by promising to dramatically improve quality of life.

The workshop organizers had requested the participants from government ministries to bring with them their ministries' priority drafting projects. Senior officials from the Ministry of Trade and Industry — presumably responsible for planning transformation — brought three projects: to

[31] Id., pp. 51 – 72.

license highway tow trucks; to permit corporations to buy in their own shares; and to repeal the usury law (which prohibited charging interest of more than 29% per year). Surely no one could claim these as central social problems!

This section looks at:

A. How prioritization works in most countries, and your role as a drafter of legislations in the process;

B. General criteria as guides to prioritization of alternative legislative proposals; and

C. Prioritizing proposed laws likely to affect the people's job opportunities and quality of life.

Every day you hear demands for new laws. Governments never seem to have enough resources for drafting, enacting and implementing them all. To avoid wasting time and money on relatively unimportant bills, you as a drafter for the law-maker, the executive and the legislature, which work together, should understand the value vested on prioritization when it comes to drafting *transformatory legislations*.

4.2.3 Haphazard Prioritization

Decisions met over prioritizing proposed legislation in developing and transitional countries, often seem reached haphazardly. In reality, too often, those processes assist the beneficiaries of the existing *status quo* like, for example, gives them the opportunity to press for unimportant measures to be taken that leave intact the institutional causes; factors believed to be cause of a growing 'have-have not' gap. That seems to reflect the skewed nature of the need to prioritize from among legal issues and institutions of which primarily the executive body is cognizant.

4.2.4 Prioritization from Among Institutions: An overview

In most countries, most bills originate in the executive branch, mainly in the ministries, as government bills. While implementing existing laws, ministry officials frequently identify new problems that call for new legislation. Occasionally, parliamentary committees or staff members

or a legislator prepare the initial draft of the bill. Ministries usually submit their proposed legislative draft to some governmental body that prioritizes all the country's drafting proposals. In some countries, ministries submit their projects to a Cabinet Committee on Legislation, composed of senior ministers, which determines priorities. In others, ministries simply forward them to a Central Drafting Office, which allocates its scarce resources to bills its board considers more important. In effect, then, the Office determines the bill's priority. Whatever the institutional structure, in practice prioritizing frequently seems completely haphazard.[32]

Taking advantage of the unsystematic prioritization process, political leaders, not infrequently, press hardest for bills they prefer most. Those with the best channels to decision-makers – almost everywhere, those with power and privilege – usually win priority for bills that advance their interests.

In this regard there are generally two types of systems: the continental tradition, where a specific organ or ministry would have its own legislative office and would draft bills of its own interest. The other is that of the British tradition, which has a central legislative organ, where all legislations are drafted by an independent central organ. Both systems have their own advantages and disadvantages. The centralized system is mostly considered advantageous because it is economical, as it collectively uses the resource allocated for drafting as well as provides consistent standard. On the other hand, some criticize this system pointing to the fact that it employs specialized experts, while the continental system enables legislators to draft on particular areas, enabling them to become experts in areas of their concern. For example, drafters in the ministry of health would be well versed with the needs and interests of that specific area. Moreover, such central drafting offices get rarely involved in the policy devising stage, which, continental system proponents contend, is a crucial point for it to be up held.

[32] In the United States, a leading article on prioritizing practice bore the title, A Garbage Can Model of Organizational Choice.

4.2.5 How to improve prioritization of legislations

Law-makers must give answer to the question in light of their country's special circumstances. By setting the law-making agenda or prioritizing, the executive body's decision is actually shaping the direction of the government's exercise of power. As an important task, by giving preferential priority, the decision maker ensures that you and your colleagues get an opportunity to assess and approve the government's legislative program.

Here, we suggest a few factors that you might consider. Prioritization requires comparing the claims of the many bills that scream for legislative attention. The principal legislative opportunity to do that occurs where government presents its annual legislative program to the legislature for approval. In most Commonwealth countries, for example, the Head of State reads out the annual legislative program at the opening of the first session of Parliament for the year.
Whichever committee's issue dominates the legislative agenda, every bill is required to have substantial proponents to enable the appropriate legislative committee to wisely determine its relative priority. That could take the form of a memorandum that describes the social problem the bill will address, a timetable for drafting the bill, and an estimate of the order of magnitude of resources required to formulate and implement its provisions.

That memorandum should also specify the criteria, facts and logic that the proponents believe justifies granting the bill preferential priority treatment. It should also suggest the composition of the drafting committee and the mechanism for consulting stakeholders. By ranking proposed bills, the prioritizing body sets a plan of function. Like all plans, its decision would be open to flexibility, if, for example, in the course of that year, a new social problem emerges that seems to require urgently a new legislation; i.e. in light of available facts, reasons and clearly defined criteria, previously set priority gets revised.

A. Criteria for Prioritization

For prioritizing proposed legislation in a given country at a specific time, no one can provide a blue print. In 1994, as its first task, immediately after its first democratic elections, South

Africa's new government appropriately abolished state-enforced apartheid. In many countries, land reform held first place. In Afghanistan, after the Taliban's ouster, laws to establish the new government, to ensure security and protect women's rights, demanded immediate attention. No single, ready-made size fits to all.

Reason and experience, however, do suggest guidelines for questions you should ask ministers as to which bills to rank first for drafting legislation; that is, what criteria to use for prioritizing from among legislations. In prioritizing, as in all law-making processes, the discourse of power inevitably also presses for your attention. Here focus is only on considerations of the public interest as determined by logic and facts.

B. Getting Information for Prioritizing Legislation

To prioritize proposed legislation, you need to ask: “Will a proposed bill:

1. Improve the quality of governance? How?
2. Increase employment opportunities?
3. Increase the production of goods and services to meet the basic needs of the majority of the population?
4. Increase equity? How? In the short-, medium-, or long-term, who will win? Who would lose?

You should also ask:

5. Do the bill's detailed provisions seem do-able? At what cost? What possible social consequences would ensue?
6. What constitute the bill's likely social costs and benefits?
7. In light of available drafting resources, how difficult and how long a drafting task does the bill seem likely to present?
8. What other proposed legislation competes for priority?

As emphasized in Chapter 1, development comprises an on-going process of institutional change to ensure the use of national resources to improve people's quality of life. That process resembles

a chain. How law-makers act to change one link, inevitably will affect the others. In prioritizing needed legislation, you must decide which institutions require change NOW. Which key link should you, as legislators, grasp to pull forward the whole chain of development?

The third world's post-colonial experience holds valuable lessons. Immediately after independence, in many countries, populist law-makers voted to expand social services, especially education and health facilities. Within a few years, their countries' competitive expansion of crude exports to earn the revenues needed to finance these services led to falling world prices — and many fell deeply into debt. Currency devaluations, sky-rocketing inflation, and externally imposed financial constraints forced them to curb social service expenditures. Growing numbers – as much as 20 to 40 percent of the labor force – found themselves without paying jobs. Deepening poverty engulfed their populations. Economic inequality and destabilization, rampant corruption, mounting ethnic conflicts, and military coups fostered growing global demands for democratic social change and good governance.

As the new millennium opens, in what order of priority should you, as law-makers, enact laws to achieve sustainable, peaceful development? At the prioritizing stage, you likely have relatively little information. Working with whatever information you have, give higher rank to those proposals with the greatest potential, net economic and social benefits. Even at an early stage, ask for and weigh the facts as to a law's probable socio-economic costs and benefits. In weighing those facts, remember: existing national and global institutions, perpetuating dependence on crude exports and labor-intensive manufacturing mechanisms, have tended to aggravate unemployment and deepening poverty.

The rest of this Chapter focuses on the questions you should ask to decide the relative priority of legislation designed to restructure the institutions. List the criteria which, in your country, seem appropriate for prioritizing the drafting of legislative proposals.

C. Prioritizing Legislation for Economic Development

Development is not associated 'merely' to economic growth; social welfare and good governance, too, must remain high on the agenda. Without an adequate economic foundation, however, governments cannot finance projects likely to enhance social welfare. All the same, laws looking to strengthen the economy often fail to win priority. To help you understand the obstacles faced by developing and transitional countries in enhancing their economic development by means of enacting legislations for present day globalized era, this section presents first a model of the institutions that define the relationship between the industrialized and the other countries; second, the economists' debates over issues on development strategies as they bear on prioritization choices; and, finally, more detailed criteria for assessing the priority of legislation relating to agriculture, industry (including the informal sector), trade, finance and foreign investment.

Section III. Typologies of LDCs

To improve the quality of life of a country's population requires both increasing the total national pie – the sum total of available goods and services (essential economists' indicators like 'the Gross National Product', 'National Income'..) – and distributing it more equitably.

Laws to enhance good governance and social welfare, of course, deserve high priority. But, so do laws, too, especially those aimed at strengthening your country's economic foundations. A simple model shows the global resource allocations which reflect and perpetuate the underemployment of developing and transitional countries' human and physical resources.

Between nations, enormous disparities of wealth persist. The United Nations Development Programme (UNDP) estimated in 1998 that

"a fifth of the world's population, living in industrialized nations, consumes more than four fifths of the world's resources. That means that four out of five of the world's peoples, mainly in the third world and transitional nations, must struggle to survive on a bare fifth of the world's goods and services."

Within most developing countries, narrow ‘modern’ enclaves have emerged that are dominated by local elites, who, closely associated with transnational corporate enterprises, reap half to three fourths of the national income. Foreign- and domestically-owned enterprises employ low-cost labor – frequently, migrants seeking to escape from neglected rural hinterlands – to produce and export the countries' rich mineral and agricultural materials, mainly in crude form and at low prices, to first world markets.

In the new millennium, a few factories employ unskilled workers (at wages a fourth or less than those of first world factory workers). Mainly, they assemble and process imported parts and materials to make cheap consumer goods – shoes, TV sets, even computer parts – for sale in first world markets.

Typically, the value of most developing countries’ exports exceeds the cost of imports which are mostly machinery and parts for enclave firms, and luxuries for those few who can afford them. Nevertheless, most of these countries pay out, in the form of profits, interest, and dividends to global investors and financial institutions, more than they earn. Those payments and the flight of capital to 'safer' foreign havens leave precious little internally-generated savings for investment to spur domestic production and job creation.

4.3.1 The Institutional basis

No nation's raw materials are produced and sold by the nation itself to foreign countries. Historically-shaped institutions perpetuate these externally-dependent development patterns. Often rooted in the past colonial era, inherited institutions still channel local labor to work on the plantations, the mines, and, increasingly, to factories that produce crude, unprocessed materials and cheap consumer goods for export. Big wholesale trading firms purchase small farmers’ crops at low prices. Large industrial corporations employ unskilled workers for long hours at minimal wages to manufacture cheap consumer exports. Property and contract laws make it possible for transnational corporations and wealthy nationals to reap the profits of third world production and marketing facilities.

4.3.2 The Economists' Debates

Many economists teach that the quality of life of the population of a developing or transitional country depends on its productivity, the distribution of the fruits of its labor, and its ability to earn foreign exchange in order to purchase what the country cannot produce itself. The model above demonstrates that, too often instead, inherited institutions drain off funds, thwarting the inhabitants' efforts to accumulate and invest capital.

Economists agree to enjoy the good lives those economists promise. Nevertheless, now-a-days most economists agree that to increase a nation's productivity requires government legislative action to:

A) Provide social and economic infrastructure and conditions that enable nationals to obtain jobs and earn higher incomes in the context of more balanced, integrated, specialized national trade;

B) Systematic introduction of appropriate new technologies with the view to increase productive employment and productivity; and

C) Create institutional frameworks that empower a nation's citizens to work together increasingly, effectively; i.e. to increase their output and incomes as the essential foundation for improving their quality of life.

Debates about the kinds of laws likely to help attain these goals tend to degenerate into statements of dichotomies: *'Big Bang'* or incremental change; *'market-led'* or *'plan-led'*; *'export-led'* or *'internal demand-led'* development; private or state ownership. For a while, in the 1990s, many economists seemed bemused by the *'Washington consensus'*, a form of neo-liberalism that seemed to assume freeing 'the market's invisible hand' would, over time, ensure increased production, would trickle down benefits to those in need.

Those debates often generate disagreements as to whether, on the one hand, to enact legislation to encourage investment and support business, or, on the other, laws to meet people's socio-economic needs. Too often, proponents on both sides seem to ignore the facts of country-specific characteristics which logically should under gird a government's development strategy.

4.3.3 'Market-led' vs. 'Plan-led' Debates: Some basic issues

One cannot afford to speculate over state planed or market-led economy as an *'either-or'* dichotomy. Today, every country's economy exhibits some planning. Even in an archetypical free-market state like the United States, considerable planning takes place.

How else could firms – public or private – run an electrical supply system, a telephone system, or any other 'natural monopoly'? On the other hand, given scarcities of funds and of skilled personnel, market-driven solutions sometimes trump plan solutions. Studying your country's unique circumstances, you must determine the mix of plan and market each sector of the economy requires. Especially in small countries, where one or two large firms often dominate entire sectors – like mining and oil production, iron, steel, chemical or service industry – you should study the merits of alternative regulatory regimes for each sector. Whether a particular sector lends itself better to planning or market solutions depends on the facts, not abstract theory. For markets, as for every other aspect of life, no particular legal framework proves universally applicable.

4.3.4 Shaping a market's legal framework.

Most economists agree that, to function well, a market must operate within an appropriate legal framework; 3 laws to improve that framework deserve a high priority. To determine what constitutes an appropriate legal framework in your country's historically-shaped conditions, you may wish to ask two further sets of questions:

A) Ought business laws invariably to receive priority?

B) Do those kinds of laws exhaust the category of the laws that markets require?

As to the first question, citing Max Weber, some theorists claim that in every market economy, to ensure the predictability for investments that capitalists seek, law-makers should prioritize business laws, which an earlier generation called 'private law'.[33] These theorists call for

[33] Id., pp. 57 – 59.

legislation to privatize state-owned property, property laws generally, and contract and corporation laws in all their elaborate variations – principally enforced by private litigation in law Courts. Each country's transition to a market economy does tend to resemble that transition in other, relatively similar countries. (That explains why one country's law-makers can learn something about that transition from other countries' experiences.) Significant differences also inevitably exist.

To make a mature judgment as to whether a particular country should adopt a check law or a titling law, before enacting other kinds of laws it needs to undertake empirical studies of its specific state of conditions. As to the second question, some authorities insist that business laws exhaust the list of priority legislation a market economy requires.

An alternative view holds that markets work not merely because of business laws, but also because of the existence of an appropriate legal and institutional as well as infrastructure (physical). That includes laws to regulate the money supply and credit; to ensure government's fiscal responsibility for budget formation and budget discipline; to shape the educational system to provide an educated work force; to provide publicly-financed old age and disability pensions; to foster a mobile work force and social stability; to establish an agricultural extension service to stimulate a progressive agricultural sector; to establish effective environmental protection agencies to protect the environment against the ravages of private greed – the long list goes on.

This view suggests that, to prioritize laws in developing and transitional polities, you should weigh the claims not only for business laws, but also for the full range of legislation required to bolster the market's institutional infrastructure. Notwithstanding neo-liberal economists' advice, you should never blindly copy laws in a rush to privatize state-owned facilities. Typically, taxpayer funds originally financed those assets. To sell them to the wealthy few who happen to have capital, or to foreign investors, does not ensure their future development in the public interest. To maximize short term profits (and executive salaries), the buyers often lay off workers and strip production to the most profitable lines, aggravating unemployment and leaving unfilled essential economic functions, like building roads to remote rural areas; giving the poor access to water, housing, electricity and public transport; and establishing industrial plants to produce

parts, equipment and materials to facilitate growth of small scale enterprises. In short, nobody has a silver bullet that in one shot can vanquish the devils that plague the world's disinherited: poverty, vulnerability, poor governance. No easy short-cuts exist. You must assess your own country's realities to determine which laws require early drafting and enactment, and which to defer. In every case, you need to consider whether a proposed law seems likely to help shape the markets' essential institutional infrastructure, and facilitate production of the goods needed to improve productive employment and all people's quality of life.

4.3.5 Prioritizing legislation for economic transformation

Legislative theory argues that an appropriate legal framework can lead to significantly increased productivity, providing the basis for meeting the entire population's basic needs. This requires transforming legislation in each of the major areas of economic activity: agriculture; industry; wholesale trade; finance; and foreign, private investment.

This section asks what information you need, in order to decide which legislation will likely be helpful in strengthening the 'key links' that foster development in each economic sector.

1. Agriculture Over the past century, many countries in the developing world have seen a shift from subsistence and small scale agriculture to large scale agriculture and to cash crop production. Often, this induces the formation of small-scale agro-processing factories, at times even large-scale agro-industries. Large mechanized farms — whether owned by foreign firms, wealthy private farmers, state farms or cooperatives — use large areas, suitable for farming, and employ more capital, equipment, advanced know-how and machinery than in small-scale farming. As they employ more advanced and efficient technologies, they employ less labor per unit of output. At the same time, they often push small farmers off the lands, as a more competitive condition is created, forcing them to take up jobs with low-payment, hire them as farm-labors or conditions force them to migrate to cities or other areas. Given access to appropriate technologies, small-scale farmers (typically of family level with limited capital), can significantly improve the productivity of their farm. In order to enable such small-scale farmers

acquire advanced inputs, credits and access to better markets and, especially, facilitate to the desire to work together in cooperatives, law-makers could work out necessary provisions.

Legislation has played a key role in structuring as well as transformation of agricultural – both, in enhancing small-scale agro-processing factories as well as large-scale agro-industries, and ensuring the entitlement of small-scale farmers to better utilize the land they posses and labour they hire under ever changing circumstances. Most agricultural experts agree that, to increase agricultural productivity, legislation should facilitate farmers' efforts to gain access to six essentials:

(1) Sufficient arable and well-watered land;

(2) Farm inputs (fertilizers, appropriate machinery, seeds, water supplies, etc);

(3) Credit to purchase those inputs;

(4 Adequate technology;

(5) The necessary skills to maximize their use of these inputs; and

(6) Markets, including transport, storage, and marketing facilities they need to sell their increased outputs.

2.Industry Law and the legal order can and do change inherited institutions to give farmers access to these essentials. That may produce mixed results. The devil lies in the laws' details as laws determine which particular group of people may be affected, and how they will behave in the face of a new legislation.

United Nation’s assessments of agricultural assistance programs in Africa point out that although women comprise 80 per cent of the targeted farmers, three quarters of the credit provided goes to men. That makes it far less likely that women farmers can adjust to new economic conditions. Women subsistence farmers that wish to engage in cash crop production, rarely have access to credit for buying fertilizers or seeds, as regulations of financial institutions often require a (male) head of households to provide surety for credit.

Over time, increased agricultural productivity tends to reduce the demand for agricultural labor per unit of crop produced. As a legislator, you should ask for facts concerning each law's likely impact; not only on productivity, but also on agricultural employment and equity.

In recent years, trans-national corporations, together with locally based affiliates, have begun to invest in last-stage assembly and processing of imported parts and materials for export from developing countries to developed nations. While this seems will increase industrial production, it may aggravate not only dependence on imported parts and materials, but also induce an ever growing foreign debt of imported machines, parts and materials. Typically, those industries maximize profits by hiring low-cost national labor – often women, and even children – for long hours at very low wages. Their managers seldom, if ever, transfer to national entrepreneur skills and basic, essential technologies and know-how.

Most economists perceive industry as a mighty engine of development. By creating new jobs and manufacturing an expanding array of low-cost goods, it holds the potential for improving the material conditions of life throughout the population, as well as expanding exports. Widespread experience in many different developing countries suggests, however, that industrial growth may have a counterproductive social impact. Wealthy private (foreign or domestic) investors usually prefer to invest in the least risky, most profitable sectors. Typically, they shun investments in basic industries which might serve as poles of growth, and in small-scale enterprise that may provide job opportunities and produce low-cost tools and consumer goods to meet basic needs. Unable to obtain wage, employment, many working people struggle to earn whatever they can in the growing so-called ‘informal’ sector — micro-enterprises that operate on a catch-as-catch basis outside of the formal legislated framework. With little or no access to capital, credit, technology, and markets, informal sector entrepreneurs use low-cost, locally-available technologies — often only hand tools — to produce consumer goods for the nation’s poor majority. Although they pay employees very little, they do provide jobs for the otherwise unemployed. An alternative strategy might foster investment in more advanced industrial technologies to reduce the cost and increase the supply of nationally-manufactured machinery, equipment and consumer goods to raise national living standards.

In countries as different as Japan, South Africa, South Korea, the former so-called socialist countries and Brazil, law-makers enacted laws to give government a direct role in building basic industries like iron and steel, petrochemicals, electricity.

3. Telecommunications and transportation Appropriately drafted laws can strengthen a country's nationally (or regionally) oriented industrial growth, creating more productive rural and urban employment opportunities, more equitable income distribution, and expanding internal markets. To assess a particular law's impact on industrial development, you should ask two sets of questions:

(1) A reliable source of supplies;

(2) An adequately educated labor force, including managerial and technical personnel;

(3) Appropriate technology;

(4) Credit; and

(5) Access to markets.

Second, how will the resulting industry likely affect jobs and incomes of the rest of the economy, including the informal sector? For that, you should ask for evidence relating to that industry's potential contribution to:

A) Job-creation, especially to absorb displaced rural workers;

B) The foreign-exchange earnings needed to import new machinery and equipment to spur all sectors' productivity; and

C) The forward and backward linkages between manufacturing and the rest of the economy, including the informal sector; that is, will the resulting industry –

a) Process agricultural or mineral raw materials for domestic use as well as for export, contributing to increased domestic, including rural, incomes;

(b) Manufacture essential machinery and equipment to spur domestic productivity in agriculture or industry; or

(c) Produce low-cost consumer necessities to improve the majority’s quality of life?

First, how will it contribute to the provision of five factors essential for sustainable industrial growth.

Trade In short, to prioritize laws relating to industry, do not rely on abstract theoretical models. Instead ask for facts: will the proposed law foster sustainable industrial growth that contributes to increased productivity and employment in all sectors of the economy, leading to steady improvement in the majority's quality of life? Some transnational firms manipulate global markets and prices with little regard for their impact on third world peoples.

To illustrate: by the 20th Century's end, in many developing countries, HIV/AIDS had reached crisis proportions. Transnational pharmaceutical firms priced drugs that could protect against the disease at four to five times developing country workers' average yearly income. When developing countries sought to import or manufacture generic drugs at more affordable prices, the pharmaceutical companies brought suit in those countries' domestic courts, and pressured their home governments to block those countries' most favored nation status.

Developing countries have often inherited trading institutions that have perpetuated dependence on the export of crude and labor-intensive manufactured goods; import of machinery, equipment and parts for export-enclave industries, and consumer luxuries for the few who can afford them. Post-colonial experience, however, has demonstrated that overcrowded global markets cannot absorb developing countries' competitively expanding exports.

Many wholesale firms enjoy long-established links with overseas buyers and sellers with whom they share lucrative external trade profits. Investing capital to build warehouses, godowns, and transportation capacity, big wholesalers dominate internal trading channels. They charge high prices that squeeze, not only retailers, but also domestic farmers’ and local industries’ profit margins. These smaller enterprises must pay whatever prices the wholesalers charge for consumer goods, tools and equipment.

To become sustainable, increasingly integrated domestic industrial and agricultural growth requires new laws that facilitate the expansion of domestic and international trade.

4. Finance Everywhere in the developing and transitional world people experience great difficulty in accumulating and reinvesting capital to finance production and trade geared to their needs. Existing financial institutions — banks, insurance companies, and stock exchanges — tend to finance patterns of production and trade that perpetuate externally dependent development. Both foreign and domestically-owned banks collect and hold whatever savings the poor, as well as the wealthy few, may accumulate. These savings could become a major source to spur economic growth. For the most part, however, large financial organizations limit their loans to large-scale farmers, formal sector manufacturers, and to wholesale trading firms, primarily those engaged in foreign trade. Banks and financial institutions seldom lend money to small farmers to grow food crops. They rarely lend funds to domestic basic industries focused on increasing developing countries' national productivity and employment; even less often do they make loans to informal sector micro-enterprises and traders from the low income majority. Taking advantage of relaxed foreign currency rules, they often ship significant amounts of locally-generated surpluses for investment in more secure markets in industrialized countries.

Over the years, insurance companies and pension funds (both foreign and domestically-owned, often associated with banks), have accumulated a significant share of many developing countries' savings. Seeking protection against risks of accidents and old age, increasing numbers of individuals pay premiums that swell these institutions' funds. Insurance company managers may reinvest these in government bonds, and sometimes through the stock market, in large-scale business enterprises. Some governments permit insurance firms to ship the accumulated funds overseas for 'safe' investment in foreign industrialized economies — a further drain of national inevitable surpluses.

To prioritize legislation that can improve national financial institutions' stability and safety, request evidence as to the likelihood that proposed laws will facilitate the accumulation and reinvestment of national savings to:

• increase productive employment opportunities;
• contribute to a balanced, integrated domestic (and where possible regional) economy characterized by expanding production and trade; and
• improve the population's quality of life.

Legislation to help your country's retailers and manufacturers overcome these kinds of obstacles deserves a high priority. You should ask the relevant ministries to provide the factual information you need to propose and prioritize laws likely to help restructure your country's trading institutions. These restructured institutions should foster more balanced, integrated national, and where possible, regional trade directed to boosting national productivity and incomes and fulfilling people's needs.

5. *Foreign Investment*

A) Foreign private investment. Some development theorists argue that foreign capital inflows should constitute the *'be-all'* and *'end-all'* of proposed legislative programs. These theorists claim that foreign private investments will lead to expanded foreign exchange, employment, appropriate technology, marketing links, and skilled manpower — all in one package. So, they instantly award priority to any legislation likely to attract foreign investors and reject any legislation that might "scare" them away. If one assumes that the existing institutional structure will remain fixed, immutable, and unchanging, that advice might make some sense.

In contrast, this manual holds that through the wise use of the legislative power you can change institutions. That opens up a wide range of options, of which attracting foreign capital constitutes only one possibility. One counter approach would be to ensure that legislation specifies criteria to make it likely that foreign investments will – in fact – bring their heralded benefits.

Legislation can make tax relief and other benefits to foreign investors dependent upon their contribution to building basic industries, and tie them to the number of jobs and the amount of foreign exchange they generate for the host-nation. It can condition new foreign investments upon the introduction of new technologies and training local personnel, not merely to service or assemble an imported 'black box', but to design new versions to improve national productivity.

Say 'no' to prioritization of legislation that simply conforms to theoretically-determined Market or Plan priorities. Ask for the facts you need to assess how a proposed law to stimulate foreign investment in agricultural, industrial, trade, and financial sectors will affect your country's inhabitants.

1. A country's law-making institutions shape the prioritization process. You and your colleagues should critically review and, if necessary, restructure your country's law-making processes to ensure prioritization of legislation in the public interest.

2. In general, give precedence to legislation likely to strengthen the institutions required to ensure good governance, as well as the socio-economic institutions that shape the population's employment opportunities and quality of life.

SUMMARY

1. In practice, how does your country prioritize bills for drafting? In practice, what proposition best explains what bills get drafted first? What suggestions might you make to improve the prioritization process?

2. The text recommends prioritizing legislation that seems likely to strengthen the institutions of governance and to expand balanced, integrated domestic output to increase job opportunities and a better quality of life. What alternative criteria might a contrarian suggest? How might a contrarian justify those alternative criteria?

3. Pretend that you sit as a member of a committee of the Parliament charged with the duty to report on the government’s annual plan for legislation. The Secretary to Cabinet sits before you, ready to answer questions. State at least three different categories of questions that you might ask the Secretary about how the proposed annual legislation plan relates to issues of economic development. facts demonstrate that the expected benefits of proposed institutional changes will likely outweigh their probable costs.

4. When assessing the relative priority of legislation likely to affect your country's economic institutions in the fields of agriculture, industry, the informal sector, trade and finance,

- Base your decisions, not on abstract models or theories, but on the facts of your own country's specific circumstances; and

• Think carefully about the questions you should ask to assess their likely social impact, not only on the growth in the 'national pie', but on the people's productive employment opportunities and quality of life.

Questions

1. What is the importance of the research report to the legislative process?
2. Why is it important to involve the drafter at the early stage of policy design?
3. How is prioritization a political job? And what is the duty of the drafter to make sure socially beneficial legislation got prioritized?

4.3.6 Techniques in Drafting

A. Reading a Bill[34]

Here you are considered to see yourself as a reader ant try to find out what you want in the bill, by focusing on the difficulties that you might be faced in reading. Hence whether a drafter or a lawyer merely using the law books, or a lay person who has been confronted with a complex legislation, you are to walk through a reading of legislation.

Just as music is composed on staves with bars indicating timing, so should rules have a consistent framework for their component parts, divisions, sections, subsections, and other segments. Structural conventions, for music and for rules, provide a framework for both writers and readers. The framework aids in communicating the writer's musical or written message.

A bill’s printed pages look different from those of novels, magazines, or history and science texts. Most sentences begin with a number or letter. Some sentences seem to stop in the middle,

[34] Id., pp. 205 – 227.

followed by a new numbered subparagraph. They seem written in a strange language, with many almost unrecognizable words. Some appear so tangled that you can only try to puzzle them out.

To assess whether a bill will serve the public interest – and at what economic and social cost — you must read and understand the bill on its face.

As you examine a bill on its face, keep in mind these essential points:

1. For historical reasons, people used to believe that judges constituted the law's only important readers. Today, especially for development, transformatory law must change behaviors. Drafters must draft so that the people whose behaviors the law aims to change can read and understand what the bill says. If you do not understand a bill, neither will its addressees; the drafter has drafted it badly.

2. Do not listen to the drafter who says that, for 'legal' reasons, a bill requires hard to-comprehend words or sentences. If drafters cannot explain a section in simple terms, they themselves probably do not know its meaning. Nothing in the law defies explanation in simple terms. If a bill's addresses could not readily understand it, send it back for redrafting.

A law prescribes how a primary role occupant and designated implementing agency officials should behave. It consists of a series of rules.

Each legislative sentence specifies what someone must, may not or may do.

You might think of a bill as an onion. To get at its core meaning, you must peel back layer after layer. To help you peel back those layers, this chapter explains

A. Why drafters number practically every sentence, and formally organize a bill into Sections, Chapters, and Parts:

B. Why most lawyers (including drafters) frequently use a strange dialect

('Legalese');

C. The meaning of a bill's 'technical' sections; that the individual, numbered sections -- each composed of a single narrow command, prohibition or permission — constitute the bill's basic building blocks; and

D. In the context of the existing legal system, the bill's prescriptions of behaviors comprise the bill's substantive thrust: its legislative content.

B. Bill's Formal Elements

In a bill, numbers or letters denote titles, parts, divisions (or chapters), and sections.

The past 20 years has seen a growing interest in the format of legal texts. Part of this interest stems from public demand for more readable legal documents, part from legislative and policy initiatives (particularly in the United States and Australia), and in part from development in printing technology. Research knowledge about layout and spatial and typographical cues is slowly being considered and incorporated into legislation. These cues have been shown to improve readability and assist readers in finding their way around texts.

Another factor highly responsible for this change in the past decade is the Plain Language movement, which pushes for clearer language in legal documents and limiting the use of legalese for situations of necessity alone.

Clarity is now recognized as involving consideration of type-style, line length, typographical aids, white space, headings and the like. Several jurisdictions, research bodies, and individuals have undertaken research into improving the structure and format of legislation. The result of these inquiries commonly leads to recommendations

* for headings to sections in distinctive type
* for section numbers printed in a place and in a style that makes them easily identifiable without being intrusive

* for a modern readable typeface of appropriate size
* for print features to aid readers (for example, italicizing definitions, and to indicate the hierarchy of provisions in the text)
* for appropriate use of white space
* for limited line length and consideration of page size and colour.

Commentators have also considered the use of decimal numbering systems, the use of running headings to pages and the use of justified and unjustified text. The overall response to these proposals has been very positive.

Differences of opinion over decimal numbering:
Canadian legislative counsel considered and rejected a full decimal numbering system for legislation 20 years ago (although most Canadian jurisdictions use a decimal system for adding new sections or subsections to existing legislation). The Victoria Law Reform Commission recommended a decimal system in 1988. The New South Wales Parliamentary Counsel's Office has considered, and to date rejected, a decimal system.

Martin Cutts, of England, found a full decimal system ugly, but suggested subsections be decimally numbered (for example 3.1; 3.2; 3.3 instead of 3(1); 3(2); 3(3)). Fred Martin, a Canadian lawyer, has experimented with this system for some years. It has been well received. The difficulty is that new sections or subsections added by amendment could not then be added using a decimal system.

Though there exists no evidence as to whether there was even any question about its use in Ethiopia, the use of the decimal numbering is fully avoided in Ethiopian legislations.

An alternative:
Non-lawyers developing a National Building Code for Canada took a rather different approach to numbering rules. The Code explains and demonstrates its system as follows:
Section 1.1 Referencing
1.1.2. Numbering System

1.1.2.1. Nomenclature

(1) In the numbering system used in this Code the first number indicates the Part, the second number indicates the Section of the Part, the third number indicates the Subsection of the Section, and the fourth number indicates the Article of the Subsection.

(2) An Article in this Code may be divided into Sentences, which are indicated by numbers in parentheses, the Sentences may be divided into Clauses, which are indicated by lower case letters in parentheses, and the Clauses may be divided into sub-clauses, which are indicated by roman numerals in parentheses.

(3) A reference in this Code by number to two or more Sections, Subsections, Articles, Sentences, Clauses or Sub-clauses shall be read as including the number first mentioned and the number last mentioned.

(4) A reference in this Code to a Sentence, Clause or Sub-clause shall, unless a contrary intention is given, be read as a reference to a Sentence, Clause or Sub-clause of the Article, Sentence or Clause, as the case may be, in which the reference is made.

A bill's numbering system identifies the separate commands that together make up that bill. Drafters number sections (articles), so that, in legislative debates or in court, lawmakers and judges can refer to particular ones. Drafters group sections that deal with a single issue into a Chapter, and

Chapters that have some common attribute into a Part.

A bill's formal structure follows the form similar to that of any outline:

Part I

Chapter 1

Section 1

Section 2

Subsection (1)

Subsection (2)

Section 3

Chapter 2

Section 4

Section 5

Part II

Chapter 3

Section 6

Section 7

Bills everywhere follow that outline form, but different jurisdictions' drafting conventions assign different names to the outline's various levels. The Ethiopian system however follows the exact structure indicated above.

(The names of a bill's levels should conform to your country's practice.)

1. "Sections" (some jurisdictions call them Articles) constitute a bill's basic building blocks. A section should contain no more than one 'legislative' concept, that is, a single rule
2. "Chapter" (or "Division"). Some jurisdictions call a group of sections within each part, 'Chapters,' while others use 'Divisions'. Most jurisdictions number chapters (or divisions) consecutively throughout a bill. Many simple bills include no level higher than chapters, and even simpler ones, no level higher than sections.
3. "Part". Conventionally, usually numbered consecutively by a Roman numeral ("I" or "II"), Parts constitute a bill's largest divisions. If a bill contains a large number of parts, each of which might stand alone, you should consider whether its sponsors tried to resolve too many diverse problems in one law (called 'stuffing a bill,' see Chapter 5).
4. "Title". Only a few jurisdictions use the word "Title" to mark a division in a single bill.

Historically, law-makers published statutes in the order of the dates of their promulgation. Today, some jurisdictions codify their laws, putting them together in a single giant compilation. They insert each new law into that compilation, and use the label "Title" to cover all the laws concerning a particular subject, like "Education," "Transportation," or "Prisons."

Understanding the bill's numbering system should help you to peel back the bill's first layer.

The language in which drafters expresses commands in each section may appear as a second impassable layer.

C. The Law's Language

In most of the world, drafters write a strange, convoluted, unfathomable language. Some call it 'legalese'.

Complex legal words fall into two categories. Some reflect the requirements of law's specialized subject-matter. Others merely obscure plain meanings.

1. Law's specialized vocabulary. Like most professions, law sometimes requires elements of a specialized vocabulary. To illustrate: In different relationships, a person may promise to do something: To pay a debt, to complete a building pursuant to a contract, to deliver some promised goods. Another person may promise to perform if the first promissory does not. The law of guarantees uses specialized words for elements common to all those kinds of promises: 'Principal' means the debtor who promises to

If in your country's drafters write bills so the ordinary person can understand them?

To understand some bills' specific subject-matter, you have to learn the relevant specialized vocabulary. If you do not understand the words used, ask!

2. 'Legalese'. Often, however, drafters use unnecessarily complicated words, and long, tortuous sentences. Insist that they re-write them in plain language.

Conveyances (long paid by the word to write deeds and wills for landed interests) used the same language to draft bills. Central drafting office drafters adopted the same form and style. They taught it to drafters in the colonies, where obscure vocabulary and convoluted legalese gave colonial officials and judges broad discretion to rule pretty much as they wished. Unfortunately, not a few post-colonial and transitional government drafters still grant broad discretion by using hard-to-understand legalese.

If you recognize a bill's underlying pattern, however, you can understand it even when written in the densest legalese. To discover a bill's pattern, try to decode the words the drafter used to write it.

Thomas Jefferson, one of the authors of the United States' Declaration of Independence and the United States' second President, wrote that those authors decided: "to reform the style of the later British statutes and of our Acts of Assembly, which by their verbosity, their endless tautologies, their involutions of case within case and parenthesis within parenthesis, and their multiplied efforts at certainty, by said and aforesaid, by ors and ands, to make them more plain, do really render them more perplexed and incomprehensible, not only to common readers, but to the lawyers themselves.

"For many legalese words, drafters could easily find common-language equivalents. If at a meal I said, "Those oranges look delicious. Please pass the said oranges," my friends might well look at me with alarm. 'The said oranges' here only means' 'those oranges.' Words like 'said', 'such', 'heretofore', 'hereinabove', 'whereas', or 'provided that', serve no function useful to the law.

In many legalese phrases – 'to have and to hold', 'null and void', 'give, devise, bequeath, grant and bequest,' 'building or structure', 'lot, tract or parcel of land' – two words mean the same thing. The drafter could easily delete one.

If you do not understand a word in a bill, ask what it means. If, like 'surety' it constitutes a technical term, insist that the bill define it in lay terms. If a word like 'said' or 'hereinbefore' seems meaningless, insist that the drafter use plain English. If a bill includes redundant words or phrases, insist that the drafter use one or the other, not both.

3. Definitional clauses: Frequently, a statute begins with a section entitled 'Definitions.' In a long statute, the definition section may go on for pages.

A quick review of present U.S. drafting reveals that Jefferson and his colleagues failed to persuade all future U.S. drafters.

D. Definitions: Some Examples

"In this Act –

1. 'Television dealer' means a person who by way of trade or reader's failure to look up important words might lead to significant misunderstandings.

2. Stipulate an important word's definition in the text where that word first appears.

Then, at the end of the bill, list those words alphabetically in a glossary, specifying the page numbers where the reader can find their definitions.

business

(a) Sells television sets by retail;

(b) Lets such sets on hire or by hire purchase;

(c) Arranges for such sets to be sold or let as aforesaid by another television dealer; or

(d) holds himself out as willing to engage in any of the foregoing activities;

3. ‘animal’ includes whales and other mammals living in the sea.
4. ‘vehicle’ does not include a wheelchair.

Many people either

(a) assume that, since the list of definitions comes at the beginning, they must drag through it – and forget half the words; or

What purpose does this section serve?

(b) throw up their hands and retire — cursing the whole tribe of drafters.

A drafter might put a bill's definitions in one of two places in a bill:

- ☑ List the definitions of key words alphabetically in a glossary at the beginning or end of the bill (preferably the end) so readers can look up the meanings of words as needed. Unfortunately, a reader’s failure to look up important words may lead to significant misunderstanding.
- ☑ Stipulate an important word’s definition in the text where that word first appears. Then, at the end of the bill, list those words alphabetically in a glossary, specifying the page numbers where the reader can find their definitions.

Make sure that, whenever a word or concept appears more than once in a bill the drafter always uses the same definition for it. Throughout the (fictional) bill in the previous example, for example, the word ‘television dealer’ should always have the meaning given it in the bill’s definition section.

Bills use definitions for either of two reasons. In some statutes, drafters must use many, sometimes even a long list, of words to describe a complex concept. Using the word(s) as

defined in the bill's definitions section throughout the statute avoids tedious repetition and increases the bill's readability.

Second, a definition helps to avoid the vagueness inherent in every word. Consider the word 'vehicle' in legislation, "A person may not drive a motor vehicle in a city park." Plainly, the ordinance prohibits a person from driving an automobile in a city park. Yet reasonable speakers of English could disagree as to whether the bill prohibited motor-driven wheelchairs. To avoid disagreement, a drafter could expressly define the word 'vehicles' to exclude 'wheelchairs.' Occasionally, a drafter may intend a bill's reader to construe a word to include in its meaning items that, in ordinary language, that word might exclude. To avoid misunderstanding, the drafter should define the word in the bill, for example, by defining 'animals' to include whales and other sea mammals.

E. The Structure of a Section

As a bill's basic building block, a section constitutes a single rule, a prescription. Sometimes that prescription seems hidden behind an undergrowth of dense language. As you analyze a section's words, keep in mind that you need to identify the behaviors they prescribe.

With very few exceptions (usually less than 5 per cent) each section of a well-drawn bill commands, prohibits or permits a social actor to behave as it prescribes. (Even the remaining 5 per cent constitutes commands, although of a peculiar sort; below.) Always ask, does a section properly tell the reader, Who? What? When? And where?

Who?

To answer the question, 'Who?' look for the person whose behaviors the section prescribes? A language expert would tell you to identify the sentence's subject.

(Mistakenly using a passive voice, a drafter may fail to specify the rule's subject.

Take for example, a legislative sentence that states: *"The accounts of the Small Claims Court shall be audited at least twice a year."* (Does it state who will audit the accounts?) If you cannot discover the subject of a sentence, insist that the drafter redraft it.

What?

The question, 'What?' tells you to look at how the sentence commands the person (the 'subject') to behave. A language expert would tell you to look at the sentence's verb.

Does the section's prescription command, prohibit, or permit a subject to 'behave' as the verb indicates? For that, language experts would tell you to look at the section's auxiliary verb: by convention in English, drafters use 'shall' (in some jurisdictions,' must') for a command;' may not' (or 'shall not'), for a prohibition; and 'may' for a permission. If a bill's section does not limit the prescription, it applies at all times and under all conditions.

Where and when?

Most sections do specify where and when the command, prohibition or permission goes into effect. A section may limit the behavior prescribed – the When? and Where? — by stating a case, a condition, or an exception.

1. A case modifies either
    - a subject: "An individual who has passed that individual's eighteenth birthday may vote in a national election." This sentence limits the subject to an individual who has reached 18 years of age.
    - a verb: "[Under specified circumstances, a person] may vote by absentee ballot." This sentence limits the verb, 'to vote,' to voting by an absentee ballot.
    - the object of the verb: "[Under specified circumstances] a person may cast a paper ballot." This limits the object (the kind of ballot the voter may cast).
2. A condition states what must happen before the rule comes into force: "If an individual has passed that individual's eighteenth birthday, that individual may vote in a national election." (Usually the words 'if'' or 'where' precede a condition.)
3. In the exception, the prescription states a general rule applying to the whole domain, and then carves a portion out of it – the exception – limiting the prescription to only that part of

the whole domain not excepted. “Except when an individual’s eighteenth birthday has not passed, an individual may vote in a national election.” (Usually, the word ‘except’ precedes the ‘exception’.)

All three forms tell the reader the circumstances in which the permission granted (that is, to vote in a national election) comes into effect.

These four questions – the Who? the What ? and (where relevant) the Where? and the When? – focus attention on a section as a single prescription. Once you understand a bill’s formal structure of sections, chapters and parts, and what the individual words and sentences mean on their face, the answers to these four questions will give you a grasp on the meanings of about 95 per cent of that bill’s substantive commands.

F. Discovering The Bill’s Substance

After you have pealed back the layers of legalisms in which drafters couch their bill’s commands, after you understand its various prescriptions and its ‘technical’ provisions, you should find it easier to assess the bill as an integrated whole. Its prescriptions may aim either to change an existing institutional structure or, more rarely, to create a whole new institutional structure.

The bill’s text gives you no direct information to enable you to determine whether or how the new law, once enacted, will function. To make an estimate of the bill’s probable social consequences, you must understand the bill’s substantive core, the central purpose and thrust of all its commands.

If, in the context of existing law, the relevant actors behave as the new law ‘s rules prescribe, they will create or change eight different kinds of interrelated institutional sub-systems – an entire legislative system – embodied in the existing legal order.

Whether the new law will prove effectively implemented and achieve its stated purposes depends on whether and how each of those subsystems affects and becomes affected by the relevant actors' prescribed new behaviors.

A complete legislative scheme prescribes behaviors that institute eight subsystems. It consists of rules addressed to:

1. Primary role occupants.
2. Principal implementing agencies.
3. Sanctioning agencies.
4. Dispute-settlement agencies
5. Funding agencies.
6. Monitoring and evaluation agencies.
7. The agency that makes regulations under the law.
8. The personnel who keep the corpus of the law in order.

A simple bill, like one prohibiting spitting on the sidewalk, may expressly address only one aspect of one sub-system (see example on page 58). When enacted, however, the new law will exist in the context of other laws that provide for the on-going operation of the other seven sub-systems. Assuming the other seven sub-systems function reasonably well, you can assess a simple bill on its face.

A large and complex bill may incorporate rules affecting all sub-systems.

G. How a Bill Fits into the Existing Legislation

Consider a simple bill forbidding spitting on the sidewalk in urban areas. It contains only a few short sections.

- ☑ [Short title]
- ☑ Within the boundaries of an incorporated city, a person may not spit on the sidewalk.
- ☑ A Court shall convict a person of an offence whom after a hearing it finds violated section 2 and fine that person not more than 50 birr."

This bill, on its face, only prescribes part of the behaviors of two subsystems – the primary role occupants and the sanctioning agency. It assumes that elsewhere in the body of law exist other rules addressed to the relevant actors in other subsystems.

These implicit prescriptions include rules addressed to:

1. The implementing agency. The police, whom an existing Police Act usually commands to arrest a person they have reasonable ground to believe committed an offence (here, spitting on the sidewalk).
2. The sanctioning agency. The prosecutors and the judges for whom the existing Court Act and Criminal Procedures Act prescribe procedures for bringing an accused person to trial and deciding its outcome.
3. The dispute-settlement agency. Frequently (as here), the courts serve simultaneously as both the sanctioning agency and the dispute-settlement agency. Existing procedural laws prescribe how courts should hold criminal trials and settle disputes over guilt or innocence.
4. Funding agencies which, under existing budget and finance laws, provide funds for the police and the courts.
5. Monitoring and evaluating agencies. Existing law usually requires the elected legislature to oversee government's implementation of laws. The Chief of Police's annual report on the incidence of crime may list the number of people arrested for spitting on the sidewalk, an indication of whether the police enforce the new law.
6. The rule-making agencies. In many laws (particularly those that aim to transform an institution), some agency must make and promulgate detailed regulations. In complex legislative schemes, without detailed rules, the scheme will not work. Either in the bill proposing complex legislation, or elsewhere in the body of the law, authorization to make detailed rules must exist together with criteria and procedures for doing so
7. The people who keep the corpus of the law in order. The bill's section 1 constitutes a command to those concerned with the law.

In short, to understand a bill, you should take five steps:

1. Outline the bill, following its numbering system for Sections, Chapters, and Parts. Fill in the Chapter and Part headings from the bill.

2. Read each section carefully. Make sure that you understand the words it uses. Don't let legalese upset you. Insist that the bill's sponsors and drafters explain each word with which you have difficulty.

3. Analyze each section by asking who does what? Under what limits or circumstances? When?

4. Disentangle the 'technical' sections by interpreting them as commands, especially to government officials about how to fit the bill into the existing body of law.

5. Complete the outline you started in step 1 by putting each of the commands related to one of the subsystems into a separate group. Where, as frequently happens, the bill says nothing about a whole subsystem, ask whether another law will work to provide for that function. (For example, in the absence of a specific dispute settlement system, ask, will your country's court system adequately settle disputes arising under this bill?)

Having completed those five steps, you should understand the bill well enough to decide whether it merits your support – that is; you are at last in position to assess the bill.

1. Explain why outlining a bill constitutes the first step in assessing it.

2. You ask a drafter what a phrase in the bill means. He replies, "Don't worry about it. That's only technical language necessary to ensure the bill's legality. You have to be lawyer to understand that phrase." How would you reply to the drafter?

3. "In a well-drawn bill, almost every sentence commands, permits, or forbids." What does that proposition reveal about the nature of the law? Is it consistent with the proposition that almost every sentence in a bill must state who does what?

How might you use that proposition in asking questions about the meaning of a section of a bill?

4. Whether, in the bill itself, or in other, existing applicable legislation, a complete legislative scheme' contains some 'technical' provisions. Give some examples of these 'technical' provisions. Why does every legislative scheme include some of these?

5. “Whether contained in the bill before you or in other, existing legislation, a complete legislative scheme contains prescriptions addressed to eight sets of addressees.”
Who constitute those eight sets of addressees? How might you use that information to help you to assess a bill?

4.3.7 Specific Parts of a Bill

The earliest laws written in English had no parts, divisions, sections, or subsections. The text filled the page from margin to margin and top to bottom. In part, this was to prevent extra words or sentences being slipped into the text when authentication of original laws was problematic. But the practice of "wall to wall" text went on long after the reason for doing so had passed. More over the writers of rules as mentioned earlier used to be paid by the number of words and hence tried to include as many words as possible with repetition and legalese.

As rule-writers, our task is a dual one - to create a rule that is legally certain, and to do it in a way that is functional. When the subject-matter is complex, or a process is difficult to follow, drafters should seek additional ways of improving clarity, by a diagram, by an algorithm, by examples embedded in the text, or by using other techniques.

As a society, we really have not even started to invent ways of writing rules helpfully. Most of our energies are used up arguing over the need to try and improve clarity, rather than inventing new ways of doing so.

A great deal of very useful information is generated during the rule-writing process - but it is not used when the rule is finally adopted - a valuable resource is squandered, lost to the very people who could make most use of it.

We will move beyond the fruitless debate over the "right" drafting style (common law or civil law - both have their place and both can be drafted plainly) and move towards a capacity to draft in the style that best suits the readers' needs, with all the aids necessary to provide a useful rule.

For these endeavors a multi-disciplinary team is necessary, combining the skills of linguists, lawyers, computer experts, communications experts, and no doubt others. With the resources we now waste in drafting rules, and, more importantly, the time and resources others waste in reading unnecessarily complex rules, it is surely only a matter of time before we invest more resources in the way in which our rules are written for a more productive, effective, and efficient result. Now there is a task linguists and lawyers can really confront!

Hence as we have mention in the part earlier, if legislation are to be used as a means of resolving problems it is important that they are clear and in addition to the words that are used, about which we are going to say something, later in this chapter, it is important that we have a clear structure. We have said some about structure in the earlier portion, but it is important to specifically mention some of its parts and deal with the need for and the type of structure deeper.

* Title or Caption

The title is that portion of the bill that expresses the subject of the bill. A properly prepared title is essential to the validity of the law to be enacted. The title should briefly summarize in a general statement the subject of the proposed legislation so that the reading of it will be sufficient to indicate the general nature of the changes, which are embodied in the legislation.

It is not desirable to enumerate all the details and provisions of a bill in the title. If the title attempts to be a complete and detailed index of the contents of the bill, any addition to or deletion from the body of the bill will necessitate a corresponding change in the title which is unnecessary if the title is sufficiently broad to indicate the general purpose of the bill. When constructing a bill title, two purposes should be foremost. First, the title should be written so that the reader can understand what the enactment of the bill will accomplish without reading the body of the bill. Secondly, the title should be written so that minor amendments will not necessitate a title amendment. Direct citations to existing laws should not be made in the title. The keystone of the title is the selection of active verb forms, which will express the purpose of the bill. Some of the most useful of these are:

Add, appropriate, Authorize, create, declare, define, delete, direct, establish, exempt, extend, increase, limit, modify, permit, prohibit, provide, remove, rename, require, retain, revise, subject, transfer, etc

* Enacting Clause

A document without an enacting clause is not a bill; the enacting clause is the same in every legislation and may never vary. And in Ethiopia it reads as Enacted by the FDRE House of People's Representatives, and no other.

* Short Title

A short title is used to supply a convenient way of citing a cohesive body of law that deals comprehensively with a subject.

* Statement of Policy or Purpose

Statements of policy or purpose are rarely needed and generally should be avoided. This kind of provision may be useful, however, when a substantial body of new law is introduced .A purpose clause also may be helpful in a short bill if the operative provisions do not clearly indicate what the bill is intended to accomplish

* Definitions

(Refer to the discussion on the earlier part on the purpose and
kinds of definitions.)

* Principal Operative Provisions

A) Types of provisions.
Most statutory provisions may be classified under four major categories:

- ☑ general provisions, such as short titles, purpose sections, and definitions, which relate primarily to the text of the statute rather than to persons or agencies;
- ☑ administrative provisions, which relate to the creation, organization, powers, and procedures of the governmental units that enforce or adjudicate the law;
- ☑ substantive provisions, which give to or impose on a class of persons rights, duties, powers, and privileges; and
- ☑ enforcement provisions, which provide a particular kind of enforcement that is in addition to the remedial powers of the governmental unit.

The second and third of these categories constitute the principal operative provisions.

Not all bills will have all these types of provisions. Many will contain only one or two of them, relying by implication on the operative provisions of existing law. For example, a bill creating a penal offense will rely on other law to create courts and to empower peace officers to arrest offenders. It is generally best to organize a new law so that the operative provisions appear in the order indicated by this subsection.

b) Organizing operative provisions. Sorting the operative provisions of a bill into the categories indicated does not complete the task of organization: within each category, individual sections (and even smaller units) should be organized in a logical order to make the proposed statute as readable and easy to use as possible. The following general principles should be followed in organizing any draft:

• Assume that provisions will be read in the order in which they appear. Avoid arranging a bill in such a way that a provision makes no sense until a subsequent provision is read.

• Provisions should appear in the order of their importance, beginning with the most important. General provisions should precede special ones; the general rule should precede an exception.

• To the extent possible, provisions dealing with the same subject should be grouped together.

* Enforcement Provisions

The purpose of the law is to govern conduct. This is often accomplished by announcing a rule, which may be a mandate or prohibition, and prescribing a punishment for noncompliance or a reward for compliance. The announcement of a rule is referred to as a substantive provision, and the prescribing of a consequence is called an enforcement provision.

Repeals/Amendments

Each enacted bill affects, by addition, deletion, repeal or other alteration, the cumulative body of existing state law and is in that limited sense an amendment of existing law.

Amendments are an essential part of the legislative process because amendments allow the alteration of bills and resolutions after introduction. The principles of style and form that apply to bills also apply to amendments.

In drafting amendments, imagine giving instructions to a secretary for alterations in a bill. Although some amendments may be pages long and make dozens of changes, the basics of each amendment never change; identify the following:

* the legislation to be amended
* the place at which the change will occur
* the change itself[35]

. * Saving and Transition Provisions

Saving and transition provisions help to minimize the disruption and inequities that often attend the taking effect of legislation. A saving provision "saves" from the application of a law certain conduct or legal relationships that occurred before or existed on the effective date of the law. Transition provisions provide for the orderly implementation of legislation, helping to avoid the shock that can result from an abrupt change in the law. The most common transition provision is

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the effective date section, which provides for orderly implementation of a statute by delaying its effective date or by providing staggered effective dates for various provisions.

* Effective Date

In Ethiopia since there is no specific effective date on which legislation becomes functional, a particular date on which it will become effective is written. Here one point to be raised is that the date on which it is drawn may not necessarily be the date on which it will become effective. On the other hand to give time for change as has been mentioned earlier it rather might be effective at a later date. And next to that legislation is signed by the Head of State.

Part III. Drafting within the Frameworks of Constitution and International Instruments

Chapter V:
Structure of Laws

Section I. Conceptual Framework

5.1.1 Legal Materials

First and foremost, the term legislation refers to laws enacted by a law-making body. It is also used in a sense of making laws or as the process of making law. The law-making body itself is referred to legislature, whereas legislator actually pertains to individual member constituting the legislature. The word legislative is used as adjective and should always come before a noun. Legislation, in its first sense, refers to, therefore, laws made, enacted or promulgated by a legislature. The word promulgated emphasizes enacting law through publication and carries with it the connotation of royal or divine prerogative; as prerogative is distinguished from power or authority, for prerogative is *"[a]n exclusive or peculiar privilege. The special power, privilege immunity, right [and]/or advantage vested in an official person, either as generally or in respect to the things of his office, or in an official body as a court or legislature."*[36]

Under the present Ethiopian Legal System, legislation pertains to all proclamations enacted by the HPR and Regulations issued by the Council of Ministers. State laws made by the respective bodies are, likewise, legislations. Laws enacted by Federal or State executive organs, even before being endorsed by the respective legislatures, are laws pursuant to Emergence Power envisaged by Article 93 of the Constitution.

Legal materials also consist of laws properly enacted not yet repealed (not even tacitly), customary rules, moral etc. incorporated directly, indirectly or by reference in or by legislations.

[36] Henry Campbell Black, Blacks Law Dictionary , sixth Ed., (West Group, Bolton Massachusetts, 1990)

The other indispensable requirement for any *law* to become law is that it must be upheld by the principle of "Rule of Law", and as is enunciated by Article 71(2) of the FDRE Constitution, should be published in the Federal *Negarit Gazetta*, as that had been made a requirement for validity.

Structure of legislations, conceptually, relates primarily to legal system. Law itself is and presupposes a particular way of organizing what a socio-legal system considers to be its legal system; which quite often is called *sources of law*. Source of law, by itself, is an ambiguous reference as in one of its senses it connotes conceptual institutions from which the law is derived from such as *moral*, *custom*, *fad* and *fiction* and the like.[37] In its second sense, it refers to those laws which are used by the judges in cases of resolution. It is in this second sense that legal material is used in *this* text and as such legal materials are identified with reference to the word *law*, wherever and whenever this word is used by Courts. Laws identified thus are traditionally distributed under various labels such as contract, tort, crime, property, .. and so on and so forth, and new categories keep emerging such as Intellectual Property Law, Human Rights and Humanitarian Laws and the like. Reflection on the nature of this material, in whichever way it may have been presented, shows that these categories are not of uniform texture. One may still find different ways of classifying the texture. The one that will be adopted here is categorization on the basis of the functions performed by different kinds of provisions or parts of legislation.

With a view to *organize* and *strengthen* the recently issued Council of Constitutional Inquiry Proclamation No. 250/2001, which, among other things, defines law as constituting "*the Proclamations and Regulations issued by the Federal Government or the States as well as international agreements which Ethiopia has endorsed and accepted;..*", all and anyone of these start from single or series of provisions which one may designate as "Rule".

Roscoe Pound is credited for bringing home the vital connection between and among laws of different hierarchy and governing varied aspect of life. His method, as modified by one of the developers, are:

[37] R.W.M. DIAS, Jurisprudence, 5th Ed., (ADiTYA Books Private Limited, New Delhi, 1994), pp. 60-62.

1. rules are percepts, which attach definite consequences to definite factual situations, and as such, pointing to directions and delimiting the scope of application, as preambles, head titles, etc…
2. standards are rules that prescribe the limits of permissible conduct.
3. principles are authoritative points of departure for purpose of legal reasoning, wherever interpretation is required.
4. concepts are categories to which classes of situations can be referred to and on the bases of which a set of rules, standards or principles become applicable.
5. doctrines are the union of rules, standards, principles and concepts applicable in respect of particular situations; or on the bases of which a logical scheme of reasoning can be followed; on the bases of which the rational institution can be built; or pursuant to which reasonable resolution of disputed cases can be attained.

A rule may, therefore, constitute one single Article, or one composed of Sub-Articles or a series of Articles[38] connected by a certain system (logic). Let us take this as the smallest building block of structure of law: legislation, .. legal system.

5.1.2 Building Blocks: Rules, Concepts and Doctrines[39]

"Rule" connotes a standard by which to judge conduct, or on which to base one's own conduct. All the kinds of legal material that have been discussed share this rule-quality directly or indirectly. A duty is always a pattern of behavior that serves as a general standard with reference to which deviance is condemned as being wrong, not just incorrect. For this purpose or as means of achieving legal ends, certain *'standard'* procedures are found set for effective exercise of certain powers; the requirements stipulated in definitions are the basis on which those concerned profess when using terms; locations of jural relations similarly require such person to proceed on

[38] Look at for instance Articles 937, 938, 939, and 940. These are four Articles with their own Sub-Articles, excepting the last; and yet they are connected: dishersion -.1. express, special provisions regarding decent, tacit dishersion, prohibition of certain provisions, which can be considered as a single Article, these being Sub-Articles, and the Sub-Articles being the Sub-Sub Articles thereof, respective. .

[39] Id., pp. 47-48.

the basis that claims, duties, etc… vested in certain parties and not others. The *'rule-ness'* of principles, doctrines is self-evident.

Here, three questions arise:

1) How did the words *rule* and *law* come to be associated with *standard*?
2) What does "acceptance of standards" mean?
3) How does law presuppose as a legal system?

As regards to the association of *rule* and *Law* with *standard,* fascinating development lies in the history of Roman Law.

1) The story in broad outline is that *'lex'* (i.e. "Law") meant declared law (derived from *'lego'* - I declare.) as opposed to *'jus'*, which was Customary Law, that crystallized out of decisions. In the course of time, '*leges*' became expressions of popular will through enactment by the assemblies and their function was prescriptive like modern legislation and ceased being declaratory of *'jus*'.
2) The term *regular* (i.e. "Rule") came in to use via the Grammarians for whom it connoted *guide* or *standard*. One of the most distinguished jurists of the early Participate – Labeo – a Grammarian turned lawyer, pioneered the use of regular for certain legal axioms which had prescriptive function. The association of regular with *'lex'* evolved some time during the second Century A.D. via imperial decrees, which had taken over the role of '*lex'*. During this period "Rule Books", or *Regulars*, named after the jurist who had been commissioned to prepare them, were issued under imperial authority to subordinate officials as manuals for their guidance. These *Regulars* thus had the force of *'lex'*.
3) The *Regula*, which had been worked-out privately by certain of the great jurists during the Second and Third Centuries AD, the classical period of Roman Law, were later officially invested with the force of *'lex'* by the Law of Citation in the 4th AD. Finally, Justinian's Digest, which codified much of the writings of the classical jurists, was itself promulgated as a *'lex'* by the emperor. It is significant that the finale of this monumental work, <u>its concluding Title, Book 50,</u> consists entirely of a collection of *Regula*. The association of *rule*, *law* and *standard* was thus gradually completed and has formed the basis of legal thinking ever since.

Having seen this, one should recognized that first and for most there are facilitating legal materials as distinguished from legal materials proper. It is to this latter category we refer to as "rules" and "standards".

Rules and standards may embody categories of relations: (1). Jural relations whose each element has to be understood in terms of its correlative concept, and (2). other legal materials.

5.1.3 Component Parts of Law (Functionally)

A. Enacting Jural Relations

The first category (jural relations) consists of the following:

1. "Claims (rights)", prescribing how people ought or ought not behave with regards to others vis-à-vis "duty";
2. "Liberty (privileges)", to act or not to act vis-à-vis "no claim" (or "no right");
3. "Power", to alter existing legal situations vis-à-vis "liberty";
4. "Immunities" having existing legal situations be altered vis-à-vis "disability";

In terms of *correlativeness, oppositeness, contradictoriness*, jural relations are interrelated and categorized in the following manner.[40]

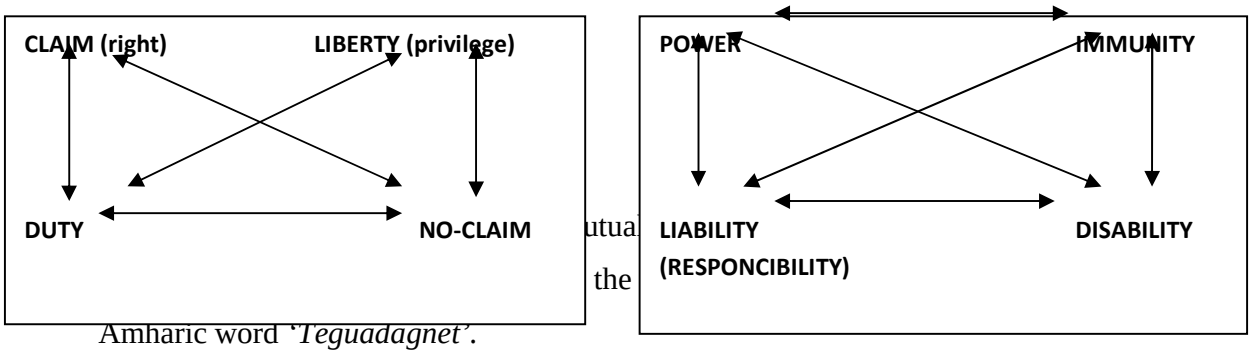
Jural Correlatives {	Right Privilege	Power	Immunity	
	Duty No-right	Liability	Disability	
Jural Opposites {	Right Privilege	Power	Immunity	
	No-right Duty	Disability	Liability	

[40] Id., pp. 24-25.

Claims, liberties, powers and immunities are haphazardly used so as to signify rights. For purposes of clarity and consistency in drafting, the following scheme of arrangement has been found useful by the developers.

An important preliminary point is that a jural relation between two parties should be considered only between them, even though the conduct of one may create another jural relation between him and someone else.

This can be expressed through a diagram as follows:



utua

the

Amharic word *'Teguadagnet'*.

b) ***oppositeness*** is taken as to mean a position confronting another or placing in contrast, or anti-thesis; in the sense of the Amharic word *'Teqaraninet'*.

c) ***contradictoriness*** is taken as to mean as *we* lawyers quite often refer to *"contradiction in terms",* or concepts, …, which cannot go together *–oxymoron–* like an innocent murder; in the sense of the Amharic word *'Tetsararinet'*.

When operating with this scheme, the following formulae would therefore be imperative;[41]

Jural Correlatives *(look at vertical arrows and read both ways)*:

[a] '… in one person, X, implies the presence of its correlative, …, in another person, Y'. Thus, claim in X implies the presence of duty in Y (but in so far as duties may exist) without correlative claims; the converse proposition is not always true).

[b] Again, liberty in X implies the presence of no-claim in Y, and vice versa.

[41] Ibid.

***Jural Opposites**, including what one might here call jural negations (diagonal arrows and read both ways):*

[a] '… in one person, X, implies the absence of its opposite, …, in himself'. Thus, claim in X implies the absence of no-claim in himself, and vice versa;

[b] Duty in X implies the absence of liberty in himself and vice versa.

***Jural Contradictories** (look at horizontal arrows and read both ways):*

[a] '… in one person, X implies the absence of its contradictory, …, in another person, Y'. Thus, claim in X implies the absence of liberty in Y, and vice versa.

[b] *In the case of duties which correlative claims, a duty in X (absence of liberty) implies the absence of no-claim in Y and vice versa.* [42]

As explained above, these four are concerned with legal relationships between persons and are referred to as "jural relations". The remaining can be characterized as "facilitating legal materials". So, any instrument, such as for instance a Proclamation, can be divided into two parts. One consisting of all provisions, which are normally characterized as *enacting provisions*, would often be provisions of jural relations. The second group consists of other variety of materials that can be designated as facilitating legal materials, which consist of Preambles, Title, definitions, which prescribe the legal and contextual use of words, phrases and clauses and the like. As regards Preambles, titles, etc.., explanations will be given later on.

B. Enacting non Jural-relations

The second category mentioned above as "other legal materials" (enacting non Jural-relations) consists of the following:[43]

1. "Means of achieving legal ends", are those rules and standards (provisions) which prescribes how certain ends are to be achieved.

2. "Principles", "concepts" and "doctrines" are rules and standards (provisions) which are respectively:[44]

[42] Id., pp. 23-43. Known as Hohfeld, who, an American Jurist, developed this scheme with incisive logic to make the distinction between this seemingly homonym and antonym. (See propositions, infra. Under this Chapter.)

[43] Id., pp. 44-46.

a) authoritative points of departure for legal reasoning in cases not covered by rules and standards.

b) classes of transaction and situations, which can be referred to and on the basis of which a set of rule, standard or principle become applicable.

c) the union of rules, principles and concepts, which ought to be applied so that the reasoning may proceed on the basis of the scheme (doctrine) and its logical implications.

4. "Location of legal relationships" are rules and standards (provisions) which determine the incidence of jural relations; i.e. on whom the right or duty actually applies.[45]

The concept of *rule* had been examined by Professor Hart whose explanation rests on the distinction between what he calls the *external* and *internal* points of view. The former is the point of view of an outside observer, who simply describes behaviour as he sees it; like *people do in fact behave in such a way* manner. The latter is the point of view of a person, who treats the behaviour as a prescriptive pattern of how he and others ought to behave. In other words, the latter *internalizes* it.

Internalized patterns of behaviour are expressed, not just descriptively as the external observer would do, but in terms of *ought*; i.e. in such a condition, the point is not whether people do or do not conform, but *that they ought to do so*. Internalization moves from the realm of the "is" (or *"sein"* in German) – or what happens in fact – into that of the "ought" (or *"sollen"*).[46]

As stated above, rules are, therefore, precepts; i.e. attaching definite consequences to definite factual situations. Standards, on the other hand, are prescriptions that limit permissible conduct. Hence, these two are complementary notions which should be used as a unit to become the building blocks of the first layer of law.

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[44] Id., p. 434

[45] Id., p. 45 and p. 434.

[46] Id., pp. 48-59.

The characteristics of a rule, says professor Hart, lies in internalization; i.e. acceptance of a pattern of behaviour as a standard. He distinguishes *rule* from *habit* in that habits only involve shared behaviour, which is not enough for rules to be; nor do habits serve as standards.

Acceptance of a standard according to which people *ought to act* leads to discerning between rightful and wrongful acts; i.e. leads ultimately to avoiding, and furthermore condemning deviations as wrong deeds.

A further distinction might be drawn between internalization of the rule by citizens and by officials. Citizens accept a pattern of behaviour as a standard for themselves, but stop short of making it their own duty to pass an official judgment of the conduct of others on the subject. On the other hand, officials should do both, simultaneously; they should accept it as a guide for their own conduct as well as accept a concomitant duty to apply it when judging the conduct of others, officially.

Section II: Rules, Laws and Legal System[47]

Rule, classically, did not consist of "a Law". This might be because "a Law" is only a particular way of organizing the "rule materials". This might as well be because its formulation presupposes to some extent a concept of legal system. The concept of "a Law" presupposes "Legal System".

Here, the point is a legal system shall be conceived as to being a *one* way or a two ways system; i.e. whether the legal system is an open or a closed system.

An *open* concept confines "the Law" to areas of specific regulation by authority. Areas not yet regulated are, then, outside "the Law"; which means that the concept of law remains open in these areas to be regulated in the future. On the other hand, a closed concept treats all areas as

[47] Id., pp. 59-60.

falling within "the Law" whether regulated positively or negatively in the sense that it is still "the Law" that allows or creates liberty.

The upshot of all this is that "Law" is part of the basic material, since in one way or another it reflects a legal system.

Bentham and Austin believed that law in the sense of legal system is only the sum-total of laws and that elucidation of "a law" is all that is necessary. Roscoe Pound classified the institution of law as follows:

> *"There are, first, rules, which are precepts attaching definite consequences to definite factual situations. Secondly, there are principles, which are authoritative points of departure for legal reasoning in case not covered by rules. Thirdly, there are conceptions, which are categories to which types or classes of transactions and situations can be referred and on the basis of which a set of rules, principles or standards becomes applicable. Fourthly, there are doctrines, which are the union of rules, principles conceptions with regard to particular situations or types of cases in logically interdependent schemes so that reasoning may proceed on the basis of scheme and its logical implications. Finally, there are standards prescribing the limits of permissible conduct, which are to be applied according to the circumstances of each case."*

5.2.1 Pattern of Interrelation[48]

A railway system, for example, is not just the sum-total of tracks and rolling stock stacked together; the system is the pattern of their linkage and distribution. In areas rich in coal and iron, of instance, and around major ports, the network of railways will tend to be thick and complex, but less so in areas of desert; and the lay-out will vary again in mountainous districts and over plains.

[48] Id., p.61.

With regard to a legal system, it may be stated that the pattern of linkage imparts unity to all its components, which can be discerned through the concept of validity and through the institutional structure.

Validity refers to the law's quality – quality of its proposition, whether its proposition is a valid proposition of law; if not, it is invalid. Validity, therefore, unifies legal material at its foundation; it is what makes it legal at all, thereby precluding it from non-legal material.

In reality, [t]he institutional structures of a [formidable] legal system pulls it together in a different way by assigning the various tasks to constituent institutions. Accordingly, there are law-making institutions.

Next, there are law-applying and law-enforcement institutions. Courts come into this category, and in addition to those that can make law, there are a number of subordinate courts and tribunals, all of which are defined. Likewise, the range of orders and punishments Courts can decree is defined. Enforcement through the use of organized force is institutionalized through bodies such as the Police and other governmental bodies and offices.

Finally, "the Law" conceptualizes the existence of certain institutions through which the law itself is pulled together; i.e. institutions which deliberate on factual situations, and those which deliberate on legal consequences. Meaning, instead of each situation being governed separately by its own regulation, a principle derived from a single but broad concept, applicable to a class of regulations is applied. This is accomplished through unifying concepts, like, such as possession, ownership, etc …

5.2.2 Purposes and Functioning[49]

The inclusion of the word system in the legal framework implies that the legal system consists of coordinated activities, as a system can never ever exist devoid patterned coordination.

[49] Id., p. 62.

Coordination, in turn, implies that activities more often are not haphazard, which, but purpose that they are directed towards achieving different objectives i.e. they are directed towards achieving collective objectives that are in line with the common goal.

Generally speaking, the activity of any phenomenon continues to exist till a necessary period passes, during which time its propellant *('inertia')* subdues. During that period of time, the way in which certain tasks are put into effect as well as the extent of their success or failure continue to invoke inquiry into their actual functioning. Similarly, the actual functioning of the various legal institutions during a period of adjustment invites attention.

To list the many tasks which a legal system sets out to achieve would be tedious. Broadly, it can be said that one of its crucial task is to provide a framework within which people conduct their affairs.

Thus, the legal framework, if properly and genuinely formulated and utilized, shapes many daily activities; e.g. buying and selling, giving credit, etc… can be shaped in a way that promises are surely enforced.

1. Naturally, the most crucial, important task of the "the Law" is, indeed, to achieve justice in society. As one of the main purposes of any legal system it is difficult to see how this could be doubted, whatever the problems and difficulties that beset the meaning of 'justice' and the practicalities of its achievement.
   Justice is integral to the concept of a legal system; the etymology of the word '*law*' itself derives from what is *'fitting and right'*.
2. Beside, "the Law" contributes to the conducts of citizen's. Another more difficult task of the *legal system*, which should be mentioned here, is its function in shaping people's perception; its contribution to citizen's *cognition* of the proper social order.
3. Even where injustices are practiced, and no one doubts that these do occur, the authorities contrive to hide them behind a veil of justice, however thin; and it is when such practices become intolerable to the masses and the veil becomes threadbare and transparent that revolution tears the system apart in the hope of

establishing a new and more just system in its place. This in away is also the attainment of justice.

The achievement of a minimum of justice is a condition *sine qua'non* of the continuity of a legal system. Taking Aristotle's approach as our own crucible of testing what justice is, it can be characterized as universal and particular justices. The universal aspect of justice would be too broad for this text to encroach into. The particular character of justice was dichotomized by Aristotle in to two, i.e. distributive and corrective (remedial).

1. Distributive, here, pertains to allocation of resources, advantages, entitlements, etc …
2. Corrective justice, as its name suggests, is remedial in nature; i.e. preventing the abuse of power as much as the abuse of liberty, and rendering just decisions with the view to compensate the victim and penalize the wrong doer.

The instruments of a legal system and a law are

1. in respect of distribution are those aspects of jural relations which fall in the upper horizontal line, i.e. claim (right), liberty (priviledge), power, and immunity.
2. Whereas the distributive aspect is achieved by those elements in the lower horizontal line, i.e. duties, no claim (no right), liability (subjection, responsibility), disability.

Any legal system should be constructed using these mentioned instruments, the final goal of which is attainment of justice with certainty. Also, it should go along with time, adjust to requirements of new conditions useful to modernity.

Taking note of the basic threads that are found in each and every pieces of legislation, if taken together (abstracted from each piece), would enable us erect (formulate a legal system). Thereafter, it would be proper to look into the basic structures of any typical, yet comprehensive legislation.

Questions

1. See Articles 842-847 of the C.C. (Succession). Are rules invoking the doctrine established by Roman Law in respect of inter state succession, which since then has developed without loosing its basic essence? The doctrine or principle here is that nature that determines who the successor is.
   a) Then, Articles 942-1059, what do they determine (i.e. jural relations *per se* or do they serve the functions of other legal materials?
   b) How about Articles 1060-1113?
2. How does the above conceptual framework – i.e. from simple rule-provision to legal system help you to formulate structure for your draft and maintain your bill within the *corpus juri* of Ethiopia?
   a) Understand claim/duty ("you ought") correlative relations, as they make distinction between:
      - Claim on one hand and liberty, previleges;
   b) Power/liability ("I can") correlations:
      - in claim and power;
      - duty and liability;
      - liberty and power.
   c) Immunity – Disability ("you can not"):
      - Claim and immunity;
      - Liberty and immunity.
3. Kinds of
   a) Liberties; b)Limits of liberties.
4. Rightful and wrongful powers.
5. Kinds of powers.
6. What are the merit and demerits of Hohfeld's scheme of analysis of jural relations? (Read Annex, first.)

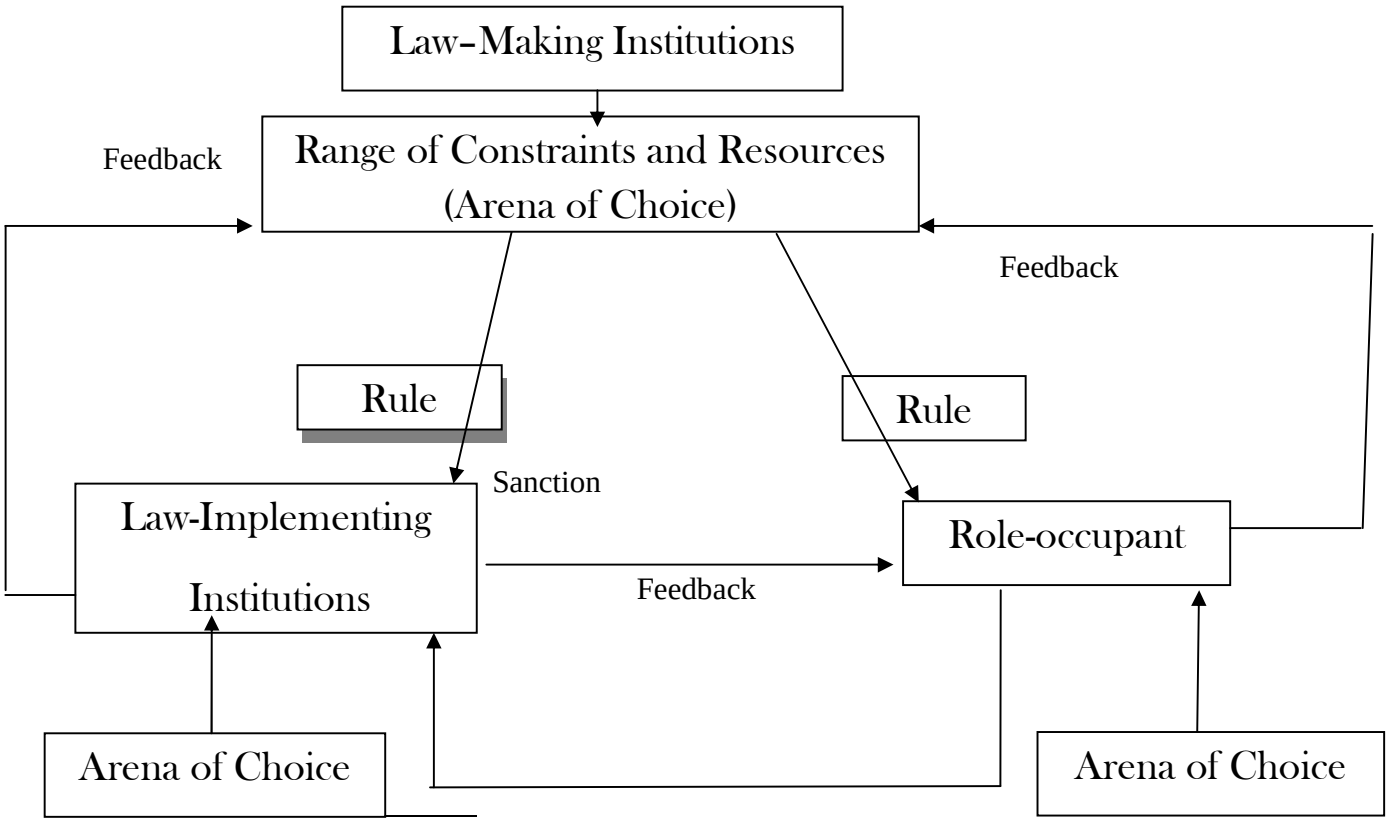
Chapter VI:

Basic Structure of Legislation

Section I. Theory and Techniques of Drafting[50]

Laws prescribe behaviours that change individual as well as institutional behaviours. Currently, "the Law" seems to have not yet triggered developmental processes. That signals that problems inherent in the law-making system exist. For one, drafters frequently draft laws that fail to bring about institutional changes.

Though a number of such examples can be mentioned, it is appropriate to address another concern of the public. Can a government change behaviours it



[50] Ann Sedman, 0p.cit., note no. 22, p. 17.

chooses through law? As not only the law, but also non legal constraints influence behaviour, to answer in the affirmative would be wrong. Moreover, the social arena within which the law acts contains elements beyond the government's capacity to change. (See diagram above.)

This part deals with practices useful in drafting draft-law or legislations from policies by conducting his/her researches (refer to Part II). First make artificial separation of form and substance in writing a *Research Report.* Formulating the substance simplifies choosing the form in which and how to write it. Secondly, this part aims at providing readers with sufficient knowledge of drafting techniques to enable them to participate competently not only in assessing, but also in actually drafting such documents.

Hence, an approach to the problem of legislative form rests on the following two propositions:

a. That substance has inextricable link with form; and

b. That the primary criterion for assessing alternative forms for a draft and its several components consists, primarily, in its usability.

Nobody disputes that form ought to follow substance; however, substance also follows form. Likewise, proposition holds for every aspects of form; i.e. structure of statute, sentence structure, choice of vocabulary, syntax, grammar and punctuation.

In making choices over structure, i.e. a question of form, a drafter can not avoid making choices concerning primary, secondary and periphery objectives.

Most lawyers perceive the principal task of laws is declaring rights and duties. And thus, they direct their efforts to judges for deciding cases, and indirectly to lawyers, for advising clients.

6.1.1 **Architecture** [51]

The outline of a draft forms its structure. Because of this, the drafter wrestles with the successive parts of the text; i.e. designs its form, as part of the structure. Here, the drafter clearly discerns the substance of the issue at hand. This part offers a guideline for developing the details of a draft's substance.

Here, one has to relate the architecture of the draft to the larger problem. This helps see how an unsuitable outline may hinder implementation. Secondly, it explicates the relationship between a draft document's structure with that of a legislative theory.

Some might wonder: Why one should begin with outlining the form of a draft-document? Why not begin instead with constitutional or other aspects that cage the drafter's task? What is the necessity of using clear, precise language? One approach considers that the architecture of draft should come first, because the approach gives recognition to its close relationship to the larger issues to be addressed.

The focus on drafting documents as an instrument of development underscores that, at the heart of all effects, lies institutional transformation; that is, bringing about positive behavioural change. In this view, a draft-law should primarily be sent to judges and lawyers. To prove useful to them, it must accommodate their professional culture and vocabulary; complete with quirks and foibles.

In contrast, another theory holds an alternative view that in conditions of transformation, the principal aim of law is to change behaviours. To change behaviour requires that law reaches not only judges and lawyers, but all its addressees. For that purpose, the structure and language of a draft-document should facilitate its use by those whom it purports to address.

[51] Id., pp. 207-210.

Perhaps no great harm will result if a drafter couches a draft concerning the procedure of Courts in a civil suit in a vocabulary and in a style familiar to be that of judges and lawyers. In writing a draft-law concerning local government, however, a drafter should employ a language that at least local government officials can easily comprehend.

A draft's form rests on the principle that a law influences behaviour most efficiently when its addressees understand it. That proposition underpins modern drafting practice which aims at achieving clarity and at facilitating understanding by the groups expected to use the law. However, that does not mean that drafts must be read as easily as a novel. Many drafts can not avoid complex subjects. Sometimes, drafters can not help but organize and draft those drafts in a way that requires careful reading and re-reading.

Nevertheless, drafters must organize their drafts and draft them in a way the users will find it as easy as possible. So they should avoid structural discrepancies as these constitute a significant aspect of poor drafting which many drafters stumble into.

> *"Most lawyers are familiar with the function of an outline, and yet they underestimate its utilities and forget how hard it is to make a good one. Without an adequate outline, the bill will hardly serve its purposes."*

Structure of a *transformatory bill* frequently contributes towards its ineffectiveness:

a. its organization dose not help its addressees to understand the law;

b. it dose not contribute to the easy use of the law in daily practice; and

c. it dose not serve to guide the drafter's tasks of gathering the facts needed to demonstrate the likelihood that the bill will solve the problem addressed.

In a draft-document, no less than in others, structure carries the primary burden of demonstrating the writing's underlying logic. The draft's hierarchy of ideas must reflect its logic. It must show the inter-relationship between important and auxiliary concepts, and the rules that they generate. A well constructed draft makes it easier for users to understand how the various actors involved ought to interact.

Finally, early development of a tentative structure of the draft facilitates not only writing it, but the research required to justify it. Drafting needs concentrating once mind. Drafting pushes the drafter to consider details that even writing the first draft of the *Research Report* he/she might not have done. By focusing attention on the draft's structure, the drafter can not avoid confronting issues of substance. Before dredging deeply into research, long before even beginning writing the *Report's* solution section, the drafter has already developed some notion about the draft's substantive issues. The process of structuring the *Report* again and again inevitably pressures the drafter to confront issues of decision about the draft's substance. Then, the drafter begins to test the appropriateness of substantive possibilities; in other words, he/she begins to concretize ideas.

6.1.2 **Interrelation of Theories and Structure**[52]

A draft-law embodies a legislative scheme devised to address an identified problem in away that enhances good governance. This requires six sorts of normative prescriptions.

The first tells the *primary role occupants* a) what they must do, b) what they may do, or c) what they may not do. The second gives the same commands to the implementing agency prescribing the kinds of conformity, inducing measures, they may or must implement. The third prescribes the criteria and procedures the officials must use in deciding how to implement those measures. A fourth set of prescription gives a similar set of commands to officials involved in *dispute settlement* practice.

In addition, a complete legislative scheme requires two other, usually shorter, sets of prescriptions. *Technical provisions* instruct the respective *role occupants* of the legal system as to how to fit a new law into the body of the nation's legislation, and how to interpret it.

[52] Id., p. 210-211.

6.1.3 **Principles of Ordering – Grouping**[53]

Outlining a bill involves grouping and ordering its provisions. This section first defines these terms, and then discusses criteria for using them in a bill's outline

After this, drafters must decide where to group the bill's provisions. The process of sorting the provisions into parts, chapters or sections constitutes grouping. Grouping requires discerning which subordinate matters shall be put together under a given heading; i.e. which chapters belong in a particular part, what sections belong in a particular chapter, etc ...

For example, why should part I include the particular subject matters of chapter 1 and 2 and not some other subject matter? or Why in part I, consider Chapter 2? Or which of the bill's sections should the drafter locate under that chapter's heading?

A drafter might easily devise alternative principles of allocating several sections of a bill. Grouping pertains determining which sections to be placed in the same chapter, which chapters in the same part, and, in a large bill, which parts to be placed under the same title.

Ordering pertains sequencing; i.e. parts to be included within the titles, sequence of chapters within part(s), sections within chapters, and sub-sections with in sections.

For example, part I might consist of three chapters: one dealing with the obligations, responsibilities of doctors under the law, the other with the obligations, .. of nurses, and the third referring to the obligations, responsibilities of the administrative/managerial staff that run, say, hospitals. The drafter must thoroughly think in which order they should appear in part I; the sequence by which particular sections come in each chapter.

[53] Id., pp. 215-216

On the other hand, conditions might necessitate that one or more regulations be devised to meet objective realities. For example, the following two regulations seem appropriate for, say, the health sector.

1) Public hospitals, no matter what the circumstance, should admit patients under emergency, requiring immediate treatment; and
2) Prohibiting regional public hospitals from admitting patients referred to district hospital by a local clinic.

By grouping and ordering a bill's parts, chapters and sections, drafters define that its architecture. Thus drafters should make their decisions as much as possible on principles they can articulate and justify on objective requirements.

Drafters may group objects or ideas in one of three principles:-

1) Looking for a *golden thread*;
2) Some notion of logical continuity ; or
3) The draft's usability to its users.

The *Golden Thread*[54] Sometimes, drafters organize their draft-law by looking for a *golden thread* that runs through the various parts. For example, in hospitals, many people have contact with patients, doctors and nurses as well as secretaries, telephone operators, emergency room orderlies, clerks, bill collectors, pharmacists and cleaning staff as well as. A drafter might see *contact with patients* as the *golden thread* that ties them together, and group the draft's provisions on that basis. In practice, un-explicated biases in the drafter's own mind should not be allowed to shape the *golden thread;* it rather should be based on decision-making process grounded on reason, on information and on experience.

Abstract Logic[55] Sometimes, drafters group a draft-law's provisions in terms of a preconceived principle or abstract. For example, it may seem *logical* to group together provisions concerning

[54] Id., p. 217.

[55] Ibid.

the duties of various institutions working in different offices. In that grouping the prescriptions concerning the people on the first category of agencies would appear in part I, the second, in part II, and so forth. However, the institutions so grouped should have rational differential.

Usability to the Bill's Prospective users[56] Finally, some people consciously classify objects or ideas in terms of the classification's usability to those who use the classification:

> (a) a used clothing salesman may sort out a pile of used clothing in terms of the different sorts of markets in which he might sell them (warm clothes to markets in cold climates, for example);
>
> (b) the director of a home for the homeless, by the size of the garments and whether for men, women, children or adults;
>
> (c) a paper manufacturer, in terms of the clothing's utility for grinding into pulp to make rag-type papers;
>
> (d) a laundry operator, in terms of their colors and the likelihood of their bleaching or coloring other cloths in the washing machine.

In the same way, drafters might group and order their drafts' provisions according to their probable users' convenience.

For a drafter, which system of grouping and ordering seems more desirable? For both grouping and ordering decisions, the general criterion of *usability* to the law's users seems preferable than any other. Drafters generally should consider at least three different sets of users – some with markedly different requirements: a) the law's *primary role occupants*, b) its implementing officials, and c) its dispute-settlement officials.

Usability does not prescribe a unique grouping; it hardly amounts to more than a general guide to grouping and ordering decision. Attention should be given as to the ease with which a user can find a relevant part and understand the relationship between the behaviour that part commands, prohibits or permits and other behaviours within the domain of the draft-law. To help the readers

[56] Id., p. 217-218.

to understand the draft's logic, a drafter should explicate the principles used for grouping as well as for ordering in the *Research Report*. Here, principles of ordering relates to hierarchy, whereas that of grouping pertains to the basis of creating the different categories of users.

The same principles – usability to the draft's primary addressees and the administrators – should govern the ordering of the groups' sequence. Too often, a drafter violates this rule by putting first the part that describe in detail the formation and structure of the implementing agency (the bodies, members, how chosen, what qualifications, the officers, etc), its internal operations (meetings, agendas, voting, quorums) and sometimes even provisions for the pay and reimbursement. [57]

Subject to overriding the command for considering the draft-law's probable user's needs, a few additional quid lines may prove useful in grouping a draft's provisions. The most significant ones are:

1. Order in terms of the general function first, followed by particular functions and exceptions.
2. Put provisions about permanent arrangements first, and transitional or temporary arrangements second.
3. Sometimes, it seems better to order in terms of time sequence. For example, according to the steps a person must take in creating a corporation or in applying for a mining license.

So long as drafters group and order according to articulated, defensible propositions, and explained in the *Research Reports*, they will rarely go wrong.

Grouping and ordering the items in the preliminary lists constitutes only the first approximation of the draft's architecture. As with all aspects of drafting, a drafter should never fall in love with his own draft outline. An outline, like every other aspect of a draft-law and *Research Report* becomes final only on the day the drafter submits it to the concerned officials. In the course of drafting and re-drafting, the drafter learns more about the kinds of detailed provisions to put in to

[57] Id., pp. 218-219.

the draft-law. In working back and forth between both documents, formulating new hypotheses and gathering new evidence, the drafter continually refines the draft's substantive provisions; constantly refines and improves their grouping and ordering. A drafter can never afford to view his draft as cast in concrete.

In structuring the draft-law, a drafter should simultaneously consider what to put into the part dealing with the technical aspects of the draft; identify which sections purport to help readers understand the draft's purposes, and where it fits into the existing body of law.

A draft-law invariably contains some essentially technical sections – usually in a *general* part or chapter at the beginning, and a *miscellaneous* one at the end, where those drafts vary from jurisdiction to jurisdiction.[58]

General provisions invariably come at the beginning of a draft-law; miscellaneous ones, at the end. Local practice determines their content. The general part or chapter at the beginning frequently includes.

- The short title;
- A general objectives' section;
- (Some times) an application (or general principles') section;
- the general definition's section (as in some jurisdictions, depending up on the local convention).

The miscellaneous part or chapter at the end frequently includes;

- Consequential amendments;
- Saving clauses;
- Transitional provisions;
- The general definition's section (in some jurisdiction)
- The short title (in some jurisdiction) ; and
- The coming–into–force provision.

[58] Id., p. 220.

Schedules To simplify a draft-law's architecture, drafters sometimes append schedules at its end. This generally consists of lists or details of organizational structure. They comprise an essential part of the draft, and a drafter should use them.

The next section offers a default outline which, if used flexibly as a guide rather than a blue print, may help drafters to integrate detailed provisions into their draft's architecture.

6.1.4 **A Default System for Ordering Bills**[59]

Many bills fall comfortably into a structure that tracks legislative theory (figure.1). That structure serves as a useful default, or fall-back outline for grouping and ordering a bill's provisions. It consists of six parts (in a smaller bill, six parts).

(1) A general part;
(2) A part of law that prescribes a behavior to *primary role occupants*,
(3) An implementation part that prescribes the behaviour to the *implanting agency*;
(4) A part that sets sanctions, penalties or other conformity-inducing measures with regard to the prescribed behaviours;
(5) A part for dispute-settlement;
(6) A part for appropriation; i.e. a part ensuring resource allocation for the implementation of the bill's provisions, outlines the means, terms and conditions of resource utilization, ...
(7) A miscellaneous part.

The default outline groups its significant *operative section* in conformity to underlying legislative theory (figure1). The provisions of the law include the prescriptions and sanctions directed towards the *primary role occupants*, as well as towards the *implementation agency*. Because of its general utility, the rest of this section discusses the default system in some detail.

[59] Id.,

Section II. Compiling and Organizing: Top to Bottom

Structuring is a practical discussion on steps to be taken for developing a draft-law's outline. First and for most, there are facilitating parts such as Preambles, Definition and the like. The preamble reflects the policy. Usually it consists of goals to be attained, the reasons to enactment and the source of authority pursuant to which the enactment is made. One may start the drafting exercise by defining basic concept that had to be enshrined in the bill, as well one can put the head title, for this to, in a way determine the scope of the bill. To avoid redundancy and the like, you may have to define some terms and phrases, that batter be done at the final stage of the exercise. Then try to locate and designate first the Parts (Title), if it is a large bill, continue to arrange chapters for the respective Parts. You may put your major sections which would be further developed. This is a way of generating a list of the subject matters of the draft-law's sections; describes good practice in grouping and ordering those elements according to stated principles, and discusses the appropriate location of the auxiliary section (general principle's, definitional clauses and short titles), and, if that particular legislation requires it, the dispute-settlement provisions.

A draft-law's outline follow the form typically used for all outlines; a sequence of points identified by either numbers or figures forming a list containing within it varying levels of sub-lists. While all drafts everywhere follow this typical outline in form, different jurisdiction drafting conventions give the various levels in the outline different names. Drafters should learn properly to confirm to the local practice[60].

Title Some jurisdictions have codified their laws. These jurisdictions publish their statutes not merely in the order of the dates on which the appropriate authority promulgated the statutes, but in a single giant compilation into which the law-makers slot each new law. Instead of "codification", some jurisdictions denote this process "consolidation'. Other jurisdictions, e.g. Sri-Lanka, use the word "consolidate" to indicate the process of putting into a single, concrete law the original legislation and its subsequent amendments, frequently scattered in annual

[60] Id., p. 212-214.

volumes of the laws over a long period. Jurisdictions with a system of consolidated laws frequently use the label *title* to cover all the laws concerning a particular subject like *Education*, *Transportation*, ... Most jurisdictions do not employ the word *title* to make a division within a single law.

The approach employed in the preparation of *Consolidated Laws of Ethiopia*, which is a better way of arrangement, was in two volumes and much alike with that of Sri-Lanka.[61]

Parts Conventionally, the parts constitute a law's largest divisions, the major heading that takes a roman numeral ('I'or 'II'). Invariably drafters number a law's parts consecutively, while some authorities do so only if that section could stand alone as a separate law. Such a dogmatic position seems unwarranted. Surely drafters should use whatever sub-divisions make the laws easier to read and use. If drafters find they have used a large number of parts in a law, each one of which might well stand alone, they probably should consider resolving too many diverse problems.

Chapters To designate the grouping of sections within each part, some jurisdiction use *chapter* while others use *divisions* most jurisdiction number chapters (Dr. Division) consecutively throughout a draft-law. Regardless of the part in which they appear, a few begin each part in a new chapter. Many simple draft-laws contain no level higher than chapters and some, no level higher than sections.

Sections Most jurisdiction use the word *section* to designate the law's basic building blocks, while a few use articles instead. Whether its name is *section* or *article*, it should contain only a single legislative concept. That is its essential feature underlying the section's/article's function as a draft-law's basic building block.

Well before completing the *Research Report*, drafters should begin to write down their ideas about the bill, usually as a list of its main points. That list will contain a series of direct

[61] Faculty of Law, H.S.I.U., Consolidated Laws of Ethiopia, Vol. I, II and Supplement, (Artistic Printers Ltd., Addis Ababa, 1972, and 1975 for the Supplement).

statements – usually not complete sentences, sometimes no more than a phrase – each holding the germ of an idea that the drafters think might go in to the bill. Those brief statements will become the basis for the bill's sections – its basic building blocks. Making the list will give drafters more ideas. Before long, they will start plundering about how most logically to group the various sections in light of the need to make the bills from as useful as possible to its users. Then, they can begin writing the bill's outline. In doing so, they will get ideas, not only about the bill's structure, but also about its substantive content.

What ought to go into a bill? Where to derive those ideas from?

As mentioned earlier, *statute* and *regulation* contain six different sorts of norms; each, usually, in separate section or subsection.

- Addressing *primary role occupants*,
- Addressing *implementing agencies*,
- Discerning and addressing *technical* matters,
- Prescribing conformity; i.e. inducing measures like *sanctions* ..,
- Prescribing dispute-settlement systems.
- Stating funding provisions if formidable and appropriate.

That list provides a convenient preliminary check list, telling drafters to make their minds to each sort of provisions; make up of their minds as to what the final bill ought to include.

Section III. The Enacting Part[62]

The *law part* relates to what we have earlier attempted to show under *jural relation; means of achieving legal ends; location of legal relationship; principles, doctrines and standards/rules.*
The *law part* contains prescriptions addressed to *primary role occupants*, while the *implementation part* contains prescriptions addressed to *actors* to be assigned in the implementation process. In many bills this distinction causes little difficulty. Usually, the

[62] Id., p. 222-224.

necessary implementation, funding and even most of the auxiliary provisions appear in other laws.

In bills aimed at transforming institutions, devising the *implementation part* is more difficult, as that part of the bill aims not only at changing the *primary role occupants'* behaviours, but also that of the *implementing agency*, which may as well include ensuring, enhancing of a behaviour of an existing agency, or establishing a new one. At times, changing behaviour might include that of an agency's official(s) – they, seen as *primary role occupants*.

Where the introduced new rules are directed towards the *implementing agencies*, a difficult case for using the default outline to order and group a bill's provisions arises.

Which groups of people constitute *primary role occupants*?

Within the state bureaucracy, low-ranking functionaries (employees with negligible *power*) might as well be considered as *primary role occupants*; like, for example, teachers in the Ministry of Education, or nurses and medical assistants in hospitals, etc ...

An even more difficult case arises when the *difficulty's section* of the *Research Report* identifies as problematic the behaviors of only senior agency officials. So, a bill should address all the actors; both *primary role-occupants* and the *implementing agency*. The provisions of the law's parts, then, should also prescribe them formidable behaviours.

When that is included, it may appear difficult to identify an authority [to whom could be relegated the necessary *state power*] that implements the appropriate rules over the officials as well as over those *implementing agencies* [here, an agency is considered as a body by its own] not in line with the prescribed, formidable behaviours.

It seems that this difficulty reoccurs as the insurmountable problematic factor in writing the *difficulty section*, on the basis of which agencies' problematic behaviours are reflected,

formidable behaviours devised and, ultimately, an authority responsible for monitoring and enforcing the rules is identified and empowered.

Long ago, the great Roman orator Cicero asked who will guard the guardians. The default outline requires a drafter ask the same question: who will enforce the bill's new rules which aim to change the implementers' problematic behaviors? In the same manner, a default outline forces the drafter to confront the question: Who will implement the new law?

That officials' behaviours may contribute to the difficulty suggests that whatever the desired goal may be, it might not become successful, as long as no guardian guards the guardians. This instructs the drafter that his/her bill's principal function may well consist of prescribing an agency to hold *implementing agency* officials accountable. Once again, form helps to shape content.

Section IV. The Implementation Part in Particular[63]

A bill's *implementation part* should contain the prescriptions addressed, primarily, to the *agency*, to which is directed the responsibility for implementing the measures designed to induce *primary role occupants* to conform to the prescribed norms of the law. The provisions of the *implementation part* should specify the agency's many responsibilities, including those which relate to the agency's directors or management personnel, by articulately expressing:

- how and by whose nomination, appointment is carried out, what are the requirements like qualification, .. to be met for each, major office, post;
- length of terms of office service relevant for ensuring continuity, acceptable reasons for termination of office service like for example reasons of physical impairment, misconduct;
- the powers and duties of *role occupants* and other employees (both to enforce the rules detailed in the law part and keep the agency itself functioning; eg to hire and fire personnel, to own and dispose the *agency's* property, to sue and be sued, etc ..);

[63] Id., pp. 225-226.

- requirements for holding meetings (i.e. permissible meetings, agendas for addressing the changes in *agencies)*;
- procedures at meeting (quorum; voting procedures; open or closed sessions; who has standing to be heard);
- power, duties and procedures for dealing with disputes.

N.B

To all these, drafters should identify and list its various elements, unless covered by others.

Legislation, a complex bill, is likely to prescribe behaviour to *primary role occupants*; how the responsible agency officials should implement conformity-inducing measures, sanctions; how to implement dispute-settlement, undertake miscellaneous measures.

Keeping all these elements in mind, drafters should group and order their bills' provisions; including the technical sections, according to specified principles. The chapter's default outline may help them in structuring. In some cases, however, drafters will undoubtedly need to organize the parts and sections in ways more suitable to their bill's particular subject matter.

In designing each bill's architecture, drafters should always consider the structure's usability to those who must follow its prescriptions as well as those who must interpret them to settle disputes (about disciplinary measures directed at agency employees; appeals by citizens against agency officials' rulings).

The *implementation part* should include the provisions describing the roundabout measures the agency may employ to induce primary role occupants' conformity with the *law part's* provisions. **Sanctions' Part**[64] As the principal conformity-inducing measure for *transformatory bills*, penal sanctions rarely seem appropriate. Most bills, however, necessarily contain some provisions for penal sanctions or civil liability for violation of specific duties imposed by an Act; especially

[64] Id., p. 227

when a perverse incentive appears as a significant cause of violation. (For example, many Acts, otherwise devoid of criminal provisions, contain provisions making it a crime to give false information in connection with the Act to the *implementing agency*.)

In development, most non-conforming behaviours arise for reasons other than perverse incentives or ideologies (like for example, lack of capacity or opportunity). Especially in a *transformatory bill*, penal sanctions to change non-conforming behaviours rarely serve to redirect problematic behaviours.

Proposition 1.

See Structural set-up of the 1st, 4 Parts of Labour Law Proclamation No. 377/003 is shown below:

Preamble

Part 1. General

Art. 1.1 Short Title

Art. 1.2 Definitions

Art. 1.3 Scope of Application

Part 2. Employment Relation

Ch. 2.1 Contract of Employment

2.1.1 Formation of Contract of Employment

2.1.2 Duration

2.1.3 Obligation of the Parties

2.1.5 Temporary Suspension of Rights and Obligations

Ch. 2.2 Termination of Employment

S. 2.2.1 Termination of Contract of Employment by Law or Agreement

S. 2.2.2 Termination of Contract at the Request of Parties

S.S 2.2.2.1 Termination of Contract by the Employer

S.S 2.2.2.2 Termination Contract by the Worker

Ch. 2.3 Common Provisions with Respect to Termination of Contract of Employment

S. 2.3.1 Notice to Terminate a Contract of Employment

S. 2.3.2 Payment of Wages and other Payments on

S. 2.3.3 Severance Pay and Compensation

S. 2.3.4 Effects of Unlawful Termination

Ch. 2.4 Special Contract

S.2.4.1 Hours' Work Contract

S.2.4.2 Contract of Apprenticeship

Part 3. Wages

Ch. 3.1 Determination of Wages

Ch. 3.2 Mode and Execution of Payment

Part 4 Hours of Work, Weekly Rest and Public Holidays

Ch. 4.1 House of Work

S. 4.1.1 Normal Hours of Work

S. 4.1.2 Overtime

Ch. 4.2 Weekly Rest

Ch. 4.3 Public Holidays

Part 5- 12

Questions

1. Insert the titles of provision in each chapter or section, as the case may be, then observe:
   1.1 The largest unit is what is designated as "Part" and the smallest is "Article" along with its sub- articles
   1.2 Part one consists of Articles only, whereas 2 of Part two consists of Sub- Sections, whereas Chapters 2 and 3 of Part four has no Section. Do you take this a logical arrangement? Why? Why not
2. Continue making similar structure from Part 5-12 of the Proclamation, then again ask yourself same question.
3. Read the Preamble

   1st Paragraph --- to bring about industrial harmony and all-round development,

   2nd - to actualize the right of association

   3rd - to determine the powers and liabilities of

government agency

4th -to meet the Ethiopian socioeconomic conditions and international standards

4. Are these the crux of the Preamble? Are they attainable by the scheme of arrangement you abstracted from the Proclamation?

Proposition 2.

You are a legal advisor in the Prime Minister office. You found a memo from his excellence that he is thinking of establishing a "Drug Authority", and that he has assigned you sketch outline, which should a direction for future research, and legislation.

Let us give you a rudimentary outline, form which you will come up with your own drafter after answering the questions you find at the end of the said draft.

Art 1. A. The title of the establishing legislation

B. The preamble

Art 2. The Definition

a) Illustration

Drug- an article for use in

a) Diagnosis
b) Cure
c) Mitigation
d) Prevention

- Natural or synthetic(psychotropic) material-depressant or relevant
- Nourishing material, vitamins, baby food
- Hygienic materials like soap, tooth paste etc
- Cosmetics

b) All words that have to be defined may not be discovered at the beginning stage of drafting. You better gather them later on.

3. The Object of the Law

3.1. Drugs for human use?

3.2. " " animals –farm? – wild? Pet?

3.3. " " Plants garden? wild?

3.4 pesticide

4. Lesson to be learnt

4.1. a) how does international instruments discriminate one form another

b. look at our drug Administration law

c. Take the law of any other state, say India

4.2. Which government agency has control over this sphere of activity?

a) Ministry of Health

b) " "Agriculture

c) how about

- Custom office
- Standard authority
- Institute of nutrition

5. The powers of the Agency- in matters of:

5.1. Importation

5.2. Production

5.3. Distribution

5.4. how about traditional medicine?

5.2. Control

5.2.1. Should the authority have its own laboratory

5.2.2. how auditing should be done

5.2.3. Entrance without warrant?. (in case of surprise visit)

5.2.4. The obligation to declare on the par of business

5.2.5. Who should have the power of licensing and revoking?

6. Measure

6.1. Administrative

- Fine, warning etc
- Seizure and confiscation
- Revocation of permit

6.2. Penal

- Should the Authority have its own specialized prosecutor
- How about investigation-by police? Special police
- How about courts

  Regular?

  Special court?

7. Status of Previous laws

   7.1. should they be Amendment

   7.2. Transitory

   7.3 Hule in Heydon's case:

   - What was the law before the making of the Act?
   - What was the mischief and defect for which the law did not provide?
   - What remedy the parliament would choose to cure the disease, so as to come up with a new solution?

   (What are to be included and what to be excluded from the ambit of the law.)

   8. How much power should the authority be given?
      - In matters of implementation/ enforcement,
      - Regulation and adjudication

Chapter VII:
Particular Qualities of Certain Rules (Including Facilitating Parts)

Section I. Facilitating Legal Materials

7.1.1 Preambles, Head Title (long title)…[65]

The Preamble of a statute like the Head Title is a part of the Act. Although not an enacting part, the preamble is expected to express the scope, object and purpose of the Act more comprehensively than the Head Title.

It is to the Preamble more specially that we are to look for the reason, objective, purpose or spirit of every statute: rehearsing these, as it ordinarily does, and evidencing the same in the best and most satisfactory manner, the object or intention of the legislature is making or passing the statute itself. It is a key part to clearly reflect the minds of the makers of the Act.

The Preamble, being a part of the statute, must be crafted in such a way as to be read along with other provisions of the Act. Referring to the questing as to how far the enacting provisions may be made to be controlled or restricted by the preamble, the fact is that it is in the preamble that the reason for restriction is to be found. Hence, the principle is that enacting provisions should not be more general than the preamble would suggest. The principle could be better stated in such a way that the purpose of the Preamble is not to influence the meaning otherwise ascribable to the enacting part.

There may be no exact correspondence between Preamble and the enactment, and the enactment may go beyond, or it may fall short of, the indications that may be gathered from the Preamble. One of the cardinal principles of drafting is that a preamble is meant to provide a beacon to guide drafters, first, and then, users; i.e. judges, lawyers etc, but never to stifle the enacting provision.

[65] G.P. Singh, Principles of Statutory Interpretation, (Wadhwa and Company, Law Publishers, New Delhi, India, 6th Ed., 1997) pp. 107-.110.

If, however, having drafted the Act as a whole, including the preamble, if any enacting provision clearly negates the objective which the preamble sought to attain, then there is a clear problem. An enacting provision cannot be allowed to cover a wider scope than that contemplated by the preamble. Usually, it is the enacting provision that has to be restricted. But, where the enacting provision sounds appropriate, a drafter will be compelled to narrow down the scope contemplated by the Preamble.

7.1.2 Headings Acts[66]

The Head Title of an act is undoubtedly part of the Act itself, and it is legitimate to use it for the purpose of clearly delimiting the scope of such legislation. This is not the case with other titles. A Head Title, although part of the act, is not in itself an enacting provision. Though useful in case of an ambiguity of the enacting provisions, it is ineffective in providing of controlling weight to the actually enacting provision. In many cases, the Head Title may supply the key to the meaning. The principle is that where something is doubtful or ambiguous the Head Title may be resorted to resolve the said doubt or ambiguity. The Head Title of the Act on which many learned lawyers place considerable reliance as an appropriate place for the determination of the scope of the Act and the Policy underlying the legislation, no doubt, indicates the main purposes of the enactment but cannot obviously be used for supplying meaning to the operative provisions of the Act. So, drafters should try to frame Head Title with all caution but should not rely, shape it in a way to replace the function of the operative parts of legislation.

7.1.3 Headings of Chapters and Sections[67]

The Heading(s) or Title(s) prefixed to chapters and sections or group of sections can be taken "as preambles to the provisions following them." Such heading(s) prefixed cannot be shaped for the purpose of limiting the plain meaning of the words in the provision. Only in the case of ambiguity or doubt the heading or sub- heading are meant to supply help in understanding the

[66] Id., p. 105-107.

[67] Id., pp. 115-117.

provision; even in such a case it could not be used for restricting the wide application of the clear words used in the provisions.

The heading prefixed to chapter's sections or sets of sections in some modern statutes are regarded as preambles to those parts. They cannot control the plain words of the statute, but they may help explain the general purpose of the set of articles assembled or enumerated under it. Care, therefore, should be taken when a drafter chooses Headings.

One other thing worth taking note of relates to the function that may be attached to headings of an Article. In short they are of little guise. Actually they are treated as "nick names" of the provision, in question. Yet, these doses not mean that a drafter should be care-free, rather make sure such titles readily supply the essence of the Article, in question.

7.1.4 Definition Provision[68]

It is common to find in a statute 'Definitions' of certain words and expressions used else where in the body of the statute. The object of such a definition is to avoid the necessity of frequent repetitions in describing all the subject–matter to which the word or expression so defined is intended to apply. Such a provision may borrow definitions from an earlier act and the definitions thus borrowed might not necessarily be found in the definition provision of the earlier act, but inserted as mere legal proposition.

> *"In stipulating a meaning for a word, a [drafter]… demands that his reader shall understand the word in that sense whenever it occurs in that work. The writer thereby lays upon himself the duty of using the word only in that sense, throughout the text.*
>
> *"..The second thing to remember about definitions, and this is one of the most important things in the whole field of legal drafting, is that you shouldn't define a word in a sense significantly different from the way it is normally understood by*

[68] Id., pp. 124-125.

the persons to whom the legislation is primarily addressed. This is a fundamental principle of communication and it is one of the shames of the legal profession that draftsmen so flagrantly violate it."[69]

A definition may be borrowed by incorporation or reference. It may be some times found in the rules made under the referred statute. But in the absence of incorporation or reference, it is difficult even it may prove hazardous to craft definition all by yourself. It becomes more hazardous when such statute is not dealing with any cognate subject. For all purpose, refer to the chapter on Language and meaning before you start formulating one for yourself.

A. Restrictive and extensive definitions[70]

The definition of a word in the definition section may either be restrictive of its ordinary meaning or it may be extensive of the same. When a word is defined to 'mean' such, the definition is prima facie restrictive and exhaustive, where as, where the word defined is declared to include' such and such, the definition is prima facie extensive. When by an amending Act, the word "includes" was substituted for the word 'means' in a definition section, it was held that the intention was to make it more extensive. Further, a definition may be in the form of means and includes, where again the definition is exhaustive. On the other hand, if a word is defined '*to apply to and include'*, the definition is understood as extensive. A definition which defines a word to mean A, and to include B and C can not in its application be construed to exclude A and to include only B and C.

The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of the of words or phrases occurring in the body of the statute; and when it is so used those words or phrase must be construed as comprehending, not only such things, as they signify according to their natural import, but shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of Act is sufficient to show

[69] Reed Dickerson, op cit, Note No. 20, pp. 220 and 222.

[70] Id., pp. 125-129.

that it was not merely employed for the purpose of adding to the natural significance of the words or expressions used. It may be equivalent to 'mean and include' and in that case it may afford an exhaustive explanation of the meaning which for the purpose of the Act must invariably be attached to those words or expression.

It is obvious that the words used in an inclusive definition denote extension and cannot be reacted as restricted in any sense. Where we are dealing with an inclusive definition, it would be in appropriate to put a restrictive interpretation upon term of wider denotation.

There can be no doubt that in some cases the language of an inclusive definition considered with the general context, can have the effect that the ordinary general meaning of a word or expression is to some extent cut down.

A definition section may also be worded in the form 'is deemed to include' which again is an inclusive or extensive definition and such a form is used to bring in by a legal fiction something within

A definition may be both inclusive and exclusive i.e. it may include certain things and exclude others. Limited exclusion of a thing may suggest that other categories of that thing which are not excluded fall within apparently wide or inclusive definition. But the exclusion clause may have to be given a liberal construction it the purpose behind it so requires.

B. Ambiguous Definitions[71]

Although it is normally presumed that the legislature will be specially precise and careful in its choice of language in a definition section, at times the language used in such a section itself requires interpretation. As pointed out by Sir George Rankin: *"A phrase having been introduce and then defined the definition primafacie must entirely determine the application of the phrase;*

[71] Id., pp. 130-132.

but the definition must it self be interpreted before it is applied, and interpreted, in case of doubt in a sense appropriate to the phrase defined and to the general purpose of the enactment".

The definition section may itself be ambiguous and may have to be interpreted in light of the other provisions of the Act and having regard to the ordinary connotation of the word defined. A definition is not to be read in isolation. It must be read function of a definition is to give precision and certainty to a word or phrase which would otherwise be vague and uncertain but not to contradict it or supplant it altogether.

It is true that an artificial definition may include a meaning different from or in excess of the ordinary acceptation of the word which is the subject of definition; but there must then be compelling words to show that such a meaning different form or in excess of the ordinary meaning is intended.

C. Definitions: Negation of the Rule According to Context[72]

Courts are not the only responsible organ for creating the need for interpretation. Some amount of responsibility must be shared by the legislature, particularly by legislation drafters. So, drafters have to take in to account meanings given to words and phrases by court, particularly those settled ones, in drafting future legislation.

The word construction, unlike interpretation, is the drawing of conclusion, in respect of matters that lie beyond the direct expression of the text or drawing conclusions, which are within the spirit but not within the letter of the law. Why don't drafters try to harmonize the letters with the spirit, goal, purpose…of the law?

Hereunder the word "construction" is used to signify the effort that should be made by a drafter, not only of legislations, but also of any other instrument.

[72] Id., pp. 133-134.

Section II. Provisos

7.2.1 Its Real Nature[73]

The normal function of a proviso is to except something out to the enactment or to quality something enacted there in which but for the proviso would be within the purview of the enactment. When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise tall within the general language of the main enactment, and its effect is confined to that case.

The proviso may be a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment. Ordinarily it is foreign to the proper function of proviso to shape it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment. Further, a proviso should not normally be shaped as nullifying the enactment or as taking away completely a right conferred by the enactment. As a consequence of the aforesaid function of a true proviso certain rules follow.

7.2.2 Guide to Formulation of Proviso [74]

If the enacting portion of a section is not clear, a proviso appended to it may give an indication as to its true meaning. The rule thus: there is no doubt that where the main provision is clear its effect cannot be cut down by the proviso.

[73] Id., pp. 136-137.

[74] Id., p. 142-144.

Since the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso, the proviso should be shaped in such a way it serves this purpose.

It is a familiar principle of statutory formulation that, when it is necessary to make an exception, a proviso forms the operative part of the section.

7.2.3 At times, added to allay fear[75]

The general rule in formulating an enactment containing a proviso is to go in line with the enacting provision, without making either of them redundant or otiose. Even if the enacting part is clear, effort should be made to bring it close to the meaning of the enacting provision, with the view to justify its necessity. This is done only for abundant caution.

7.2.4 Hardly, a Fresh Enactment[76]

The normal rule is that it is *"a very dangerous and certainly unusual course to import legislation from a proviso whole-sale into the body of the statute, as to do so will be to treat it"* as it were an independent enacting clause instead of being dependent on the main enactment. To read a proviso as providing something by way of an addendum or as dealing with a subject not covered by the main enactment or stating a general rule as distinguished from an exception or qualification is ordinarily foreign to the proper function of a proviso. So, students are advised not to use a proviso as to serve a fresh enacting clause.

[75] Id., p. 145.

[76] Id., pp. 146-147.

7.2.5. Distinction Between Proviso, Exception, and Saving Clause[77]

Distinction is said to exist between and among 'proviso', 'exception' and 'saving clause', as 'exception' is intended to restrain the enacting clause to particular cases, while proviso is used to remove special cases from the general enactment and provide for them specially. And 'saving clause' is used to preserve from destruction certain rights, remedies or privileges already existing. Savings means that it saves all the rights the party previously had, not that gives him new rights.

Saving clauses are introduced into Acts which repeal others to safeguard rights which, but for the savings, would be lost and these clauses are seldom used by drafters.

Section III. Explanations, Schedules and Transitional Provisions [78]

An Explanation is at times appended to a section to explain the meaning of words contained in the section. It becomes a part and parcel of the enactment. The meaning to be given to an 'Explanation' should depend upon its terms, and *"not theory of its purpose can be entertained* .. ". But, if the language of the explanation shows a purpose and a formulation consistent with that purpose, it can be reasonably place upon it.

When a section contains a number of clauses and there is an Explanation at the end of the section, it should be seen as to which clause it applies and the clarification contained in it applied to that clause.

An Explanation may be added to include something within or to exclude something from the ambit of the main enactment or the connotation of some word occurring in it. Even a negative explanation which excludes certain types of a category from the ambit of the enactment may

[77] Id., pp. 148-149.

[78] Id., pp. 151-152.

have the effect of showing that the category leaving aside the excepted types is included within it.

Schedules[79] Schedules appended to statutes form part of the statute. They are added to wards the end and their use is made to avoid encumbering the sections in the statute with matters of excessive detail. They often contain details and forms for working out the policy underlying the sections of the statute and at times they contain transitory provisions which remain in force till the main provisions of the statute are brought into operation.

Occasionally they contain such rules and forms which can be suitably amended according to local or changing conditions by process simpler than the normal one required for amending other parts of the statute. The division of a statute into sections and schedules is a mere matter of convenience and a schedule therefore may contain substantive enactment, which may even go beyond the scope of a section to which the schedule may appear to be connected by its heading. In such a case a clear positive provision in a schedule may be held to prevail over the primafacie indication furnished by its heading and the purpose of the schedule contained in the Act.

Transitional Provisions At times a statute contains transitional provisions which enacts as to how the statute will operate on the facts and circumstances existing on the date it comes into operation. However, it is not possible to give as definitive description of what constitutes a transitional provision. Therefore, the construction of such a provision must depend upon its own terms.

One feature of a transitional provision is that its operation is expected to be temporary, in that it becomes spent when all the past circumstances with which it is designed to deal have been dealt with although it may be envisaged that could take a considerable period of time while the primary legislation continues to deal indefinitely with the new circumstances which arise after its passage.

[79] Id., pp. 152ff.

Chapter VIII

Structuring a Bill with in the Framework of a Constitutional Order (as well vis-à-vis International Instruments, in case of Human Right Bills)

Any draft must conform to the original/official instructions, such as the bill's main substance. But, that does not mean that, upon receiving instructions, the drafter simply swallows the instructions as they are.

First and for most, one has to understand the social, economic and/or political problems that the concerned agency wants to resolve through the legislation it is to draft. Thus, if there are earlier studies made on the question at hand, the drafter should make use of them. The drafter should also consult with the concerned official(s) and, in particular, with experienced and authoritative, persons experts in the area.

In addition to this, reading neighboring laws, past and present, as well as governing legislations of other countries in the same area, is relevant. (Refer to *Requirements of Research.)*

In almost every country with a written Constitution, supremacy of the Constitution is the rule. This is achieved, primarily, through professionals of law, as, in their multiple roles as lawyers, as government officials, as civil service employees, etc.., are responsible for the maintenance of *"Rule of Law"*.

Aside from lawyers, which are obliged to be custodians of *"Rule of Law"*, the existing condition imposes a unique responsibility on drafters. Thus, drafters are particularly responsible for seeing to it that the spirit of the Constitution is kept in any legislation, legal instrument, etc.. being drafted; the drafter should, therefore, scrutinize ministerial instructions carefully so as to ensure that a requested bill falls within Constitutional limits.

Drafters should not forget that they also have professional responsibility to advise instructing officials of potential, Constitutional complications, and indicate possible mechanisms by which officials can accomplish set purposes within Constitutional limits.

So far as an official insists on following the same trial, the advising drafter should convince him/her how no less the desired objectives can be served by being flexible to meeting the same purpose. Furthermore, the drafter should point out how embarrassing it would be for an Ethiopian diplomat before his counterpart, worse before international forums, if such a trial is pursued.

Sensitive areas are abound – particularly in respect of certain basic principles upheld as norms of International, Customary Law. Concrete illustrations can be picked up from catalogues of Human Rights and Freedoms, for instance.

It was the treaty of Augsburg (1555) and the Peace of Westphalia that gave birth to the system of sovereign state.

Section I. Background Materials

1. It was U.D.H.R., which placed the human person squarely at the center of national and international values.
2. The core value of that declaration is upholding human dignity as being of ultimate value; woven as one which has been of the guiding threads throughout the fabric of the U.N. Charter.

There was no consensus

a) on the underlying philosophical base; and
b) on the weight it should receive.

The primary difference arose on the fact that the spirit and philosophy of U.D.H.R. is focused on the

- individuality,
- universality, and
- indivisibility

of the rights and freedoms incorporated therein. That was the reason for the reluctance and abstention of the former U.S.S.R. and other Socialist Countries at the time of its adoption. (Here, it seems appropriate to cautiously take note of new developments - the tension that previously existed between '*East'* and '*West'*, seems now to hover on relations that exist between countries of the '*North*' and '*South*'.)

It was only after enormous effort that the two major components – I.C.C.P.R. and I.C.E.S.C.R. – were to come out in a form of a binding instrument (Convention) in 1968. It is from this background that the Rights and Freedoms enunciated in the 1995 FDRE Constitution has to be appreciated.

First and foremost, the Constitution qualifies five provisions as constituting *fundamental principles*, of which the most relevant is Article 10, which stipulates the following two principles, namely:-

1. *Human Rights and freedoms, emanating from the nature of mankind, are <u>inviolable</u> and <u>inalienable</u>.*
2. *Human and democratic rights of citizens and peoples shall be respected.* (Emphasis added.)

These two provisions find their respective articulation in Chapter III of the Ethiopian Constitution – i.e. Part I Human Rights (14-28), pertaining sub-article one, and, Part II (29-44), which relate to Article 29 (Rights of Thought, Opinion and Expression) and Article 31 (Freedom of Association) fall in the domain of ICCPR, to Sub-Article 2. Hence, Article 10(1) *cum* Articles 14-28 find their inspiration from ICCPR; whereas Article 10(2) *cum* Articles 29-44 are taken from ICESCR. In general, some specific provisions of the second group of rights owe their inspiration from Child Control of Ethiopia's Human Rights Provisions.

From this picture, let us see the three bundles of rights enshrined under Article 14, which have been articulated by the three consecutive Articles.

Section II. Rights to life, the Security of Person[80]

> *Every person has the following inviolable and inalienable rights to life, security of person and liberty.* (Emphasis added.)

Here,

1. both Sub-Article One of Article 10 and Article 14 are qualified by *"inviolable"* and *"inalienable";*
2. the protection extended to these three-bundled rights [in] absolute terms should have read *"non-derogable"* - using this term as their qualifier.

Thus, a drafter, whenever he deals with a material, the subject-matter of which relates to life, security of person and liberty, has to take abundant caution.

In respect of the rights and freedoms, catalogued under ICCPR – i.e. Part I in Ethiopian Constitution – similar precaution has to be taken. Though less weight is given to Part II – i.e. ICESCR – caution has to be made, as well, for all are to be interpreted in light of the "*letter and spirit*" of their respective international instruments. (Here, refer to Article 13(2)).

In drafting any legislation, whose subject-matter wholly or partially is connected, or whose fringed areas board on Human Rights and Freedoms enshrined in the Ethiopian Constitution, one has got to get acquainted with the spirit and letters of the relevant:

a) international instrument; i.e. catalogue to which it belongs, its statute the particular provision, group of provisions; and
b) FDRE Constitution, Part I or II of the particular provision or group of provisions in question.

The drafter does this all with the view to determining three material facts, namely,

---

[80] Article 14, Proclamation No. 1/1995, A proclamation to Pronounce the Coming into Effect the Constitution of FDRE, Fed. Negarit Gazetta, Yr. 1, No. 1.

1. whether the protected right requires *positive act* (referring to it as *"right"* – suggested) or *negative act* (referring to it as *"freedom to"* – suggested) on the part of the Ethiopian Government.
2. the scope of the protected right(s).
3. the limitations, conditions and the like, put upon or connected with the particular rights or group (class) of rights.

In respect of the cluster of rights articulated by Article 14, and the succeeding three Articles (i.e. 15, 16, 17), a drafter should be well aware of

a) the spirit, the purpose of a principle or even a single rule can usually be found in that particular provision, which purports to declare the ultimate value sought to be attained.

Immediately after W.W.II, the need for forging an international Bill of Rights was felt necessary.[81]

> *The commissioner on Human Rights, which had been established by U.N. General Assembly convened in January 1947 and set up an eight man drafting Committee. The Committee further set up a small working group of three.*

The core value sought to be protected was *"the dignity of the human person"*, as shown above. For the attainment of this goal, the principle that was first proposed by the famous French drafter, Rene Cassin ran as follows:-

> Formulation *1) "All men being members of one family are free, possess equal dignity and rights, and shall regard each other as brothers"*

Cassin's preliminary draft was reformulated by the said working group in the following manner:-

> Formulation *2) "All men <u>are brothers</u>. Being <u>endowed with reason</u>, members of one family, they are free and possess equal dignity and rights."*

[81] Adopted from Tore Lindholm, "A new Beginning, in Asbjørn Eide, Gudmundur and *etla*, The Universal Declaration of Human Rights: A Commentary (Editors), (Scandinavian Univ. Press, Oslo, 1992) pp. 31-54..

Herein below are some recently legislated provisions reproduced here for your closer scrutiny. The respective proclamation and number are indicated as footnotes.

Questions 1

1. Look at the underlined "additions" and answer to the question:- What is the significance of the addition?
2. What is the fundamental *rationale* (justification) for the resultant quality rights?

The other formulation reads as follows:-

> *3) "All men are brothers. Being endowed with reason and <u>conscience</u>, they are members of one family. They are free and possess equal dignity and right."*

Look here also at the word,

1. in so far as the effect, there is agreement – being free and possessing equal dignity and rights.
2. as to the reason why there is one more element; i.e. being endowed with <u>*conscience*</u>. This word is read <u>[ˈkɒn ʃəns]</u> not <u>[ˈsaɪəns]</u>.
3. What makes conscience different from reason? Does it give additional quality to man?

All these changes took place within the period prior to the Commission's second session. The one voted by the Commission read as follows:-

> Formulation *4) "All men are born free and equal in dignity and rights. They are endowed with* by nature *with reason and conscience, and <u>should act towards one another like brothers</u>."*

Here also, look at the underlined words, as

a. there is a notable reversal of sequence of placing *".. be free and equal at the (being)"*
b. the reference to the unity of the human family being hailed in logical, additions were made such as *"born"* and *"by nature"* in relation to location of cause.

c. The reference to *"all men are brothers"* was hailed to be too religious and philosophic; and, thus, unfit to express the basic principles of the declaration.
d. Finally, *"the addition should act"* was made to make sure the existence of the duty of brotherhood between one another and among all.

Finally, one important thing was also added to effect gender neutrality, which gave to the draft its final formulation,

> *5) "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in the spirit of brotherhood."*

1. Consider the following formulation.

   "[t]he function of the preamble was to furnish a basis upon which the whole structure of the declaration could be erected, it was, consequently, the logical place for the insertion of fundamental principles, which would justify the existence of that international instrument."

Do you agree with this approach? Meaning:- Should principles be stated in preambles? or Should preambles be limited to showing only purpose, goal, objective and the like?

Look at the FDRE Constitution's Preamble (1995).

- What is the core objective of the Constitution?

Identify two means of stipulating in the Preamble that can be put in place.

Part IV. "The Meaning of Meanings"

Chapter IX: Language
Conceptual Framework

Section I. Language as a Convention

The main function of language is mostly considered to be communicating information. Aside from its main function language has:

- *scientific* use; i.e. when it is used simply in order to refer to a referend – citation, testimonial, …
- *emotive* use; i.e. when it is used to arouse an emotional attitude in the hearer/audience so as to influence him/it in any way other than giving him information.

As the Law extensively uses language, it would be wise to identify which of the above mentioned functions it makes use of. For that reason let us first discern the kinds of propositions a language can convey.

1) *Referential statements* or statements of fact are supposed to state past, present or future reality.
2) *Toutologies* are statements of identical or analytical propositions, equations and definitions.
3) *Value-judgements* are statements of approval or disapproval. Such statements neither purport to state past, present or future reality, nor are *toutologies.* [82]

Since the Law, like Ethics, either *affirms* or *denies* an "*ought"*, it thus consists of *emotive statements.* In other words, the whole of the law consists of statements which either *forbid* or *condone* an act. So, the law uses language to make propositions of *approval* or *disapproval*; i.e. statements of value-judgement.

[82] Reed Dickerson, Materials on Legal Drafting, st. Paul, Minn. West Publishing Co., 1981, p.32.

In *legal drafting* the law mostly makes use of language for stating the *permissable* and *non-permissable* acts under given circumstance or agreement; i.e. drawing the line between *"oughts"*. According to Reed Dickerson

> *"Although all definitive legal instruments are intended ultimately to influence conduct, they do not ordinarily serve (outside special "inducement-giving" clauses such as penalty provisions) as their own instruments of persuasion…The usual legal instrument is like the warden who merely points out to the new inmate where the prison barriers are located. Despite its form, it remains almost entirely a source of information."*

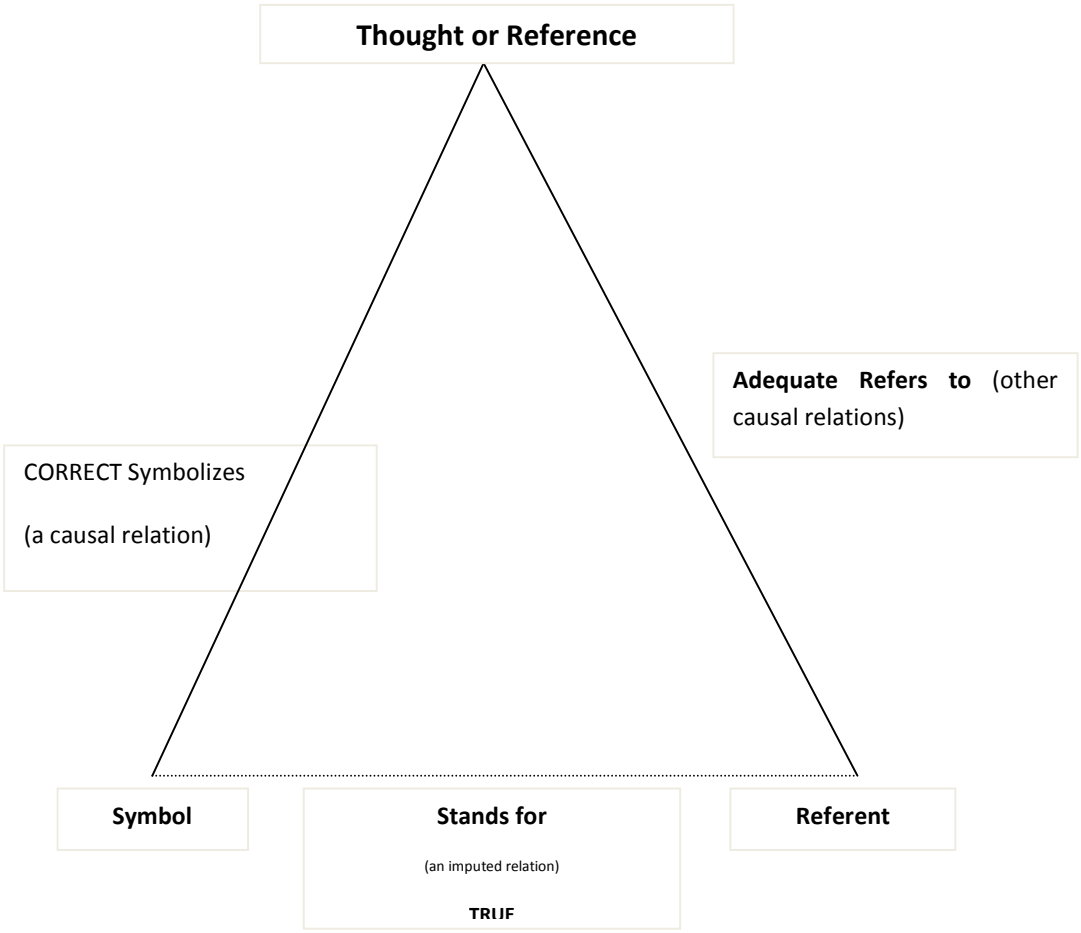
Any language makes use of symbols which are commonly referred to as *alphabets* and *words* in communicating message. Various propositions have been made as to what these *symbols* and the *real objects* and *real phenomena* they represent share. The popular assumption is that *words* refer to real objects and real phenomena. In contrast to this Susanne Langer observes that *"Symbols are not proxy for their objects, but are vehicles for the conception of objects… [I]t is the conceptions, not the things, that symbols directly 'mean'."* (Emphasis on original.)

In books dealing with *theories of meaning* it has become customary to include diagrams to show the relationships between symbols, thoughts, and real things, phenomena.

For that purpose, let us first briefly introduce hear Charles Morris' three aspects of *meaning* ("semiotic"), namely:-

1) *Semantics*, which deals with the relation between words and what they refer to; i.e. dictionary meaning of words.
2) *Syntactics*, which deals with the relations among words; i.e. syntaxes.
3) *Pragmatics*, which deals with the relation between words and their users or hearers; psychological consequences of the fact that established meanings constitute [to/in] verbal habits.

The first diagram constructed by Ogden and Richards tries to clarify, among other things, the relationship between *a word* and the *thing* it is assumed to refer to as follows.[83]



"This diagram has been useful in helping to make clear that the relationship between a word and the thing to which it is purported to refer is neither God-given nor inherent in nature. Rather, it is a relationship that exists only because the members of the speech community concerned have habitually used the word to refer,.., to that thing…

[83] Id., p..34.

"Despite its value for these purposes, the diagram appears to have serious inadequacies. First, it suggests that the relationship between symbol and thing ("referent") is as significant as the relationship between symbol and thought of the thing ("reference")…

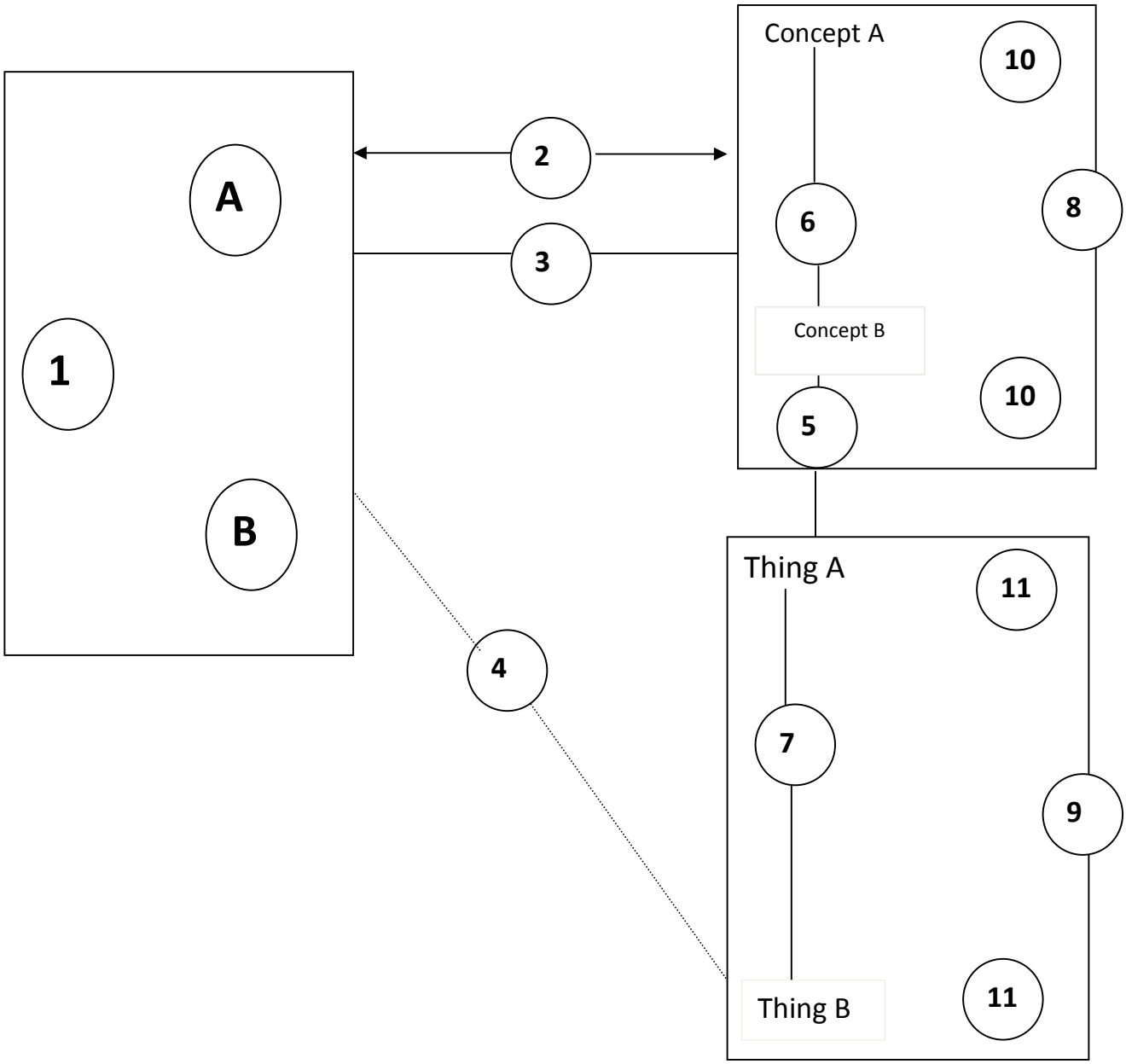
"Second, the left side of the triangle must, as a consequence, .., do double duty – once for the non-causal static relationship between symbol and thought .., and again for the causal. Unfortunately, the two cannot be differentiated in such a diagram.

"Third, the diagram suggests that the relationship between thought and symbol, .., is similar to that between thought and referent [or thing],… Whereas the relationship between thought and symbol is in one of its aspects a causal one whose direction depends on whether the thought is that of the sender or that of the receiver, the relationship between thought and thing is sometimes causal and sometimes not, and, where it is, it is a one-way relationship in which the thing provokes the thought .. whereas the thought does not normally provoke the thing.
"Fourth, the diagram takes no account of the relationships among symbols."

To better outline the relationships of *symbols* and *things* within the general theory of meaning ("semiotic") diagram-2 was proposed as an amplification of and possible improvement to the first diagram.

"*In the terminology of the revised diagram, "concept" (designatum) replaces "thought or reference" and "thing" (denotatum) replaces "referent".*

"Aspect 1 is the relationship between symbols. .. This is the "syntactical" dimension of semiotic. For example, the statement that "judge" is French for "judge" lies in the domain of syntactics. …



Static Meaning Diagram

(Revised Version)

"Aspect 2 is the subjective, two-way causal relationship between a symbol and its corresponding concept, the tendency of minds to use or respond to particular symbols in particular ways. The tendency of minds to use *a symbol in a particular way is based on habit. The tendency of minds to* respond to *a symbol in a particular way is based on a special kind of habit – the conditioned reflex. This is the "pragmatic" dimension of semiotic. …*

"Aspect 3 is the objective, non-causal relationship, resulting from habitual use in Aspect 2, that exists between a symbol and the concept that it refers to. This is the "semantical" dimension of semiotic, represented by the dictionary. …

"Aspect 4 is the purported relationship between a symbol and the existing physical object or activity (denotation), if any, corresponding to the concept that the symbol refers to in Aspect 3. …

"Aspect 4 is the one-way causal relationship between an existing object or activity ("denotation") and its corresponding concept. .. The relationship is described in the languages of psychology and philosophy (epistemology). …

"Aspect 5 is the relationship between two concepts. For example, the concept of default is closely linked with that of foreclosure. The mental relationship is described in the language of psychology. …

"Aspect 7 is the relationship between two existing objects or activities (denotata). ... The relationship is described in the object language. ...

"Where concept A and concept B .. are members of the same class (which is inherently conceptual), Aspect 8 is the range of characteristics that define the class. These comprise the subjective "connotation" or "intention" of the symbol designating the class. ..

"Where thing A and thing B (denotata) are members of the same class, Aspect 9 is the range of characteristics that define the class. They are the objective description of connotation or intension in the subjective sense.

"Aspect 10 consists of the particular concepts (designata) that comprise the total thought expressed by the communication. They are described in the language of psychology.

"Aspect 11 consists of the particular objects or activities (denotata), if any, that correspond to the particular concepts that comprise Aspect 10. …

"Whatever its possible merits, this diagram must not be viewed as portraying all the elements that control or affect meaning. … The language of current use, .., is not confined to words that name concepts that correspond to objects. Moreover, because the conveyance of meaning depends largely on the dynamics of particular use, we must add the factors of context and its integrating force of purpose. …"

The concept in which a message is read is highly significant in that it narrows the range of reference. It is also highly improbable that any document, considered entirely apart from the culture that shares some of the same elements. Thus, the "external context" in which a message is read is of crucial significance.

External context consists of two elements:-

1. The established patterns of ideas and values immediately underlying the language; and
2. The relevant collateral and usually tacit assumptions that are shared and taken account of by the great bulk of the speech community to which both the drafter and the audience belong.

The first of these two elements gives language primary meanings. The secondary element conditions or colors the primary meanings and provides the basis for the meanings known as

implications – 'silent language', like, for example, a telephone call at 3 AM carries emergency implications than a similar call at 3 PM.

In this respect,

> *"[a]n utterance taken out of the specific context that it presupposes is at best inadequately oriented and over general. …*
>
> *"Specific context always relates to a particular audience. ... For example, a botanist may call a tomato a "fruit" when talking with a colleague [botanist] but a "vegetable" when talking to his grocer. …*
>
> *"Comprehension and clarity, thus, often depend upon having enough context to hang the sentences on .."*[84]

Proper utilization of words/symbols is crucial in that *"[i]f we are strict in always connecting the same symbols with the same ideas, we speak well, keep our meaning clear to ourselves, and convey it readily and accurately to anyone who is also fairly strict. ..."*

Thus, the *law* must be strict in its utilization of *words,* formulation of *sentences* and making *statements* of value-judgment as it uses language as its essential vehicle for *conveying* message to the general public to the effect of *forbidding* acts or *condoning* them; i.e. utilizes a vehicle which, by its very nature, is prone to inducing misconception(s), is mostly unscientific. This becomes all the more evident as we further consider some of the problems one encounters in *legal drafting.*

[84] See Dickerson, pp. 36 -38.

Section II. Recurring Problems of Language[85]

As words, phrases and statements are the essential building blocks of any legal instrument, it is prone to reflect some language defect(s). To avoid such defects or diseases of language, the draftsman should be diligent in his word usage, have clarity in expressing policy issues or need of his client, creative in expressing new concepts and unambiguous or equivocal.

In drafting *".. your first duty is to be exact and clear and brief, and if that requires you to split an infinitive, or to do anything else that the books frown on, do so, .."*

To avoid ambiguity *".. the safest approach is to place the two elements next to each other, even this is not always possible… To take a simple example, the title 'Green Bay Tree' may be read, grammatically, as meaning either 'Tree in Green Bay,' or 'Bay tree that is green'.."*.

Among other precautions, care also should be made as

> *"[i]n legislation, it is important that a word that can be both participle and gerund should be clearly identifiable as one or the other, otherwise, difficulties in interpretation are bound to arise.*
>
> *"A gerund is a noun, and it must therefore have case – nominative, accusative or possessive; a participle used as an adjective must qualify a noun or a noun equivalent. In the sentence*
>
> *No person shall obstruct a Customs officer examining baggage.*
>
> *"The word examining, taken by itself, could be either gerund or participle.... [As] The action of the verb must be brought to bear on both the officer and the examination(.) .. to do so we must change the fundamental structure of the sentence. No person shall obstruct a Customs officer in examining baggage. .."*[86]

[85] Id., pp. 53-63.

[86] A thorough elaboration on matters related to Modifiers, Syntax, .. Gerund, etc.. included as Annex (20) taken from Dickerson, op cit, Note No.82, pp, 232-243. And Shiferaw Wolde Michael, op cit, Note No. , pp. 258-260 and 273-276.

Most laws of Ethiopia are published in Amharic and English, while some are being published in the Country's indigenous languages. *"Hence the inconsistencies that would come about from this situation have to be carefully considered by legal draftsmen."*

A skilled draftsman can minimize the language defects witnessed in a draft by deliberating to avoid the major recurring problems of language. These are:

9.2.1 Vagueness and Ambiguity [87]

A word/statement having *"different significations equally appropriate"* or is *"capable of double interpretation"*, which may include:

A) S*emantic ambiguity*:- "His rights depend on his residence," it is not clear whether they depend on place of abode or on legal home.

B) *Syntactic ambiguity:-* In the statement "charitable corporations or institutions performing educational functions",

- does *"charitable"* modify *"institutions"*? or,
- *does "performing educational functions"* modify *"corporations"*?

C) Internal or external types of *contextual ambiguities;* i.e. ambiguities within a statute, as between the Amharic and English versions of an issued law, or contradiction among two or more provisions of law.

9.2.2 Modifiers (Syntax)

One being the opposite of the other each could arise from *"semantics"*/word or expression, or the external/internal contexts a statement refers to.

Unlike ambiguity, vagueness is often desirable. Over-vagueness becomes a language disease when it creates more than required vagueness than the substantive policies of the legislature (or

[87] Id., pp. 232-249.

that of the client – if appropriate) call for. Likewise, a statute that is *less* vague than those policies call for is referred to as under-vague or *"over-precise"*.

9.2.3 System Designing: Tabulating, Charting…

One being the opposite of the other, each arises by the usage of *"general"* terms; like for example - *"brother-in-law"*.

Generality, like vagueness, is an indispensable tool of communication. The diseases rather are *over-generality* and *under-generality*, as the classes denoted in a statute should neither be broader nor narrower than those appropriate to carrying out the legislature's objectives.

Obesity, which means excessively corpulent or very fleshy, can be considered as *language disease* only if a legal instrument is filled with unnecessary words, phrases, articles or paragraphs leading to confusion.

As a matter of principle, any draftsman must see to it that every word used in a legal instrument discharges a specific, definite purpose*;* i.e. should avoid repetition.

Section III. Syntactic Modifiers, In Particular

There are two dimensions that affect the meaning expressed by a sentence: the semantic dimension and the syntactic dimension. I don't think anyone needs to say anything about the semantic dimension to legal educators. We in the law schools spend most of our time dealing with that. What is overlooked is the syntactic dimension.

9.3.1 Simples Modifiers

Modifiers are especially tricky ("the accused almost defended himself until he was dead"). They should be placed as close as possible to the words they modify.

1) "A person who only resides in this state may not * * *"
2) "No child may be employed on any weekday when the school is not open for more than four hours."
3) "No person may molest an animal on the highway

* * * The most common sources of actual ambiguity are:

* * *

* * * (a) Squinting modifiers that may refer to either of two words or constructions:

I said when the game was over * * * I would go. (When the game was over I said I would go. Or. I said * * * I would go when the game was over.)

I ask you, Sir, to put this man out * * * without interfering with his perfect freedom of choice between "to suddenly go", "to go suddenly" and "suddenly to go" * * *.

Unfortunately, it is often impossible to imbed a modifier in the term that it modifies. Although the safest approach is to place the two elements next to each other, even this is not always possible. For example, it is impossible (without repetition) when a modifier relates to multiple terms (e.g., "charitable institution or organization") or when there are multiple modifiers of the same term (e.g., "medical, hospital, or burial expenses"). Problems of multiple modification or reference are discussed in the next section.

Another common form of ambiguity is uncertainty of pronominal reference. Much of this can be avoided by putting the pronoun as close as possible to the word or phrase to which it refers, making certain that the two agree in number. However, the force of uncongenial context is often so strong that closeness is not enough. When context leaves a significant uncertainty, the pronoun should be replaced by the name of the person or thing to which it refers, or the context should be appropriately changed. Similarly, a simple reference to "the Corporation" is adequate in an instrument, or severable part of an instrument, in which only one corporation is involved. However, if several corporations are involved, it is safer to refer to the particular corporation by name unless the context makes clear which one is meant.

One of the most troublesome problems of ambiguity is that of determining the scope of the thing modified. When the two are juxtaposed, it is often hard to tell whether a particular word is part of the modifier or part of the thing modified. To take a simple example, the title “Green Bay Tree” may be read, grammatically, as meaning either “Tree in Green Bay,” or “Bay tree that is green.” Does “Bay” have the prior affinity with “Green” or with “Tree”?

It is unfortunate that English has so few symbols for showing that specific phrases form a unit. The hyphen has only limited utility for this purpose (e.g., “run-of-the-orchard fruit”). Mathematics has solved the problem largely though the use of parentheses and contiguity. To avoid the ambiguity in the expression “x plus y times z,” a mathematician would write either “(x+y)z” or x+yz,” depending on the substantive result intended. Although, in general, writing convention permits only a sparing use of parentheses, they are sometimes usable for this purpose. For example, in the phrase “active duty (other than for training) performed before July 1, 1964,” it is clear that the phrase “before July 1, 1964”, refers to “active duty (other than for training)” and not to “training.”

A pair of commas is sometimes useful for setting off a group of words as a verbal unit. Unfortunately, commas are a weak device for this purpose, because, unlike parentheses, they are non-directional. When used in the vicinity of other commas, it is often uncertain how they are to be paired.

Because clause, as terminal is often ambiguous in that it is not clear, for the clause applies to the entire statement or merely to the phrase immediately preceding. For example, in the sentence, “The union may not rescind the contract because of hardship, “it may not be clear whether the draftsman intends to say, “The union may not rescind the contract, because to do so would cause hardship” or “The union may not rescind the contract, using hardship as the justification.” The ambiguity lies in the doubt whether the word “not” negates the broad power to “rescind the contract” or the narrower power to “rescind the contract because of hardship.” If he intends the former, the draftsman should at least insert a comma after the word “contract.” Even better

would be to place the “because’ clause at the beginning. If he intends the latter, he might say, ”The union may not rescind the contract on the ground of hardship.

Ambiguity may also arise where there are tow successive prepositional phrases.

Every shareholder of a company in Canada

Does the phrase in Canada relate to shareholder or to company? The phrase relates to a noun, and there are two, namely, the subject shareholder and the object of the first preposition. One remedy is to convert one of the phrases to a clause.

A shareholder of a company who is in Canada

The pronoun who is personal and must refer to shareholder. Another remedy is to convert a prepositional phrase to a participial phrase.

A shareholder of a company incorporated in Canada

The word incorporated can reefer only to company; but domiciled, for example, could refer to both. Alternatively, both phrases could be converted to clauses.

A person who is Canada and is a shareholder of a company

A person who is a shareholder of a company that is resident.

(domiciled, incorporated, carrying on business) in Canada

No ambiguity arises where the second phrase is capable of application only to one of the nouns.

Director of a company in liquidation

Every person over the age of sixty year in necessitous

Circumstances.

In the foregoing examples in liquidation cannot apply to director and in necessitous circumstances cannot apply to sixty year.

9.3.2 Multiple Modifiers

To illustrate some typical problems involving “and” or “or”, I will now discuss four basic variations of phrase that are commonly used. The discussion of these variations is not intended to imply that either “and” or “or”, or the phrases in which they are used, can be interpreted in specific utterances apart from the contexts in which they respectively appear. Clearly, they cannot. Even so, we are not foreclosed from making appropriate generalization about the usual meanings of these phrases. Instead of disembodying them, such generalization imply useful generalizations about the kinds of contexts in which these phrases tend in legal experience to appear and, in part, recognize that even when read out of specific context particular words and phrases retain much of the flavor of their usual associations.

One of the normal functions of context is to provide the basis for implying limitation on otherwise overly broad general terms. There is, for instance, no risk in referring to “the Administrator” in a paragraph or section in which the official is otherwise identified. Context limits also in other ways. This, the following discussion recognizes that the grammatical alternatives are conditioned by whether the enumeration is assumed to appear in a mandatory or permissive sentence. It further recognizes that these alternatives are also conditioned by whether the connective in question links characteristics that are potentially cumulative or mutually exclusive.

More specifically, the examples dealing with the modifiers “charitable’ and “educational” must be appraised in the light of the fact that these terms are potentially cumulative in that the same institution can be both charitable and educational. On the other hand, those dealing with the modifiers “hospital” and “burial” must be appraised in the light of the fact that these terms are not potentially cumulative, but mutually exclusive. An expense can be a hospital expense or a burial expense, but the same expense cannot be both.

Phrase (1): “charitable and educational institutions”

Does this mean”

(a) “institutions that are both charitable and educational”; or

(b) “charitable institutions and educational institutions”?

If you tabulate phrase (1), remembering the fact that strings of adjectives are normally used cumulatively, rather than distributively, you get this:

“Institutions that are:

“(1) charitable; and

“(2) educational.”

Although sense (b) is sometimes intended by this phrase, it is believed that sense (a), as expressed in the tabulation, is the normal grammatical reading, that is, the way it is usually read in practice. This is true whether the sentence is mandatory or permissive.

Phrase (1) is therefore a proper way of expressing the idea of “institutions that are both charitable and educational”. If sense (b) is intended, it is better to express it as sense (b) is expressed above (see also phrase (3), below), or in some other way different from phrase (1).

Compare the phrase “hospital and burial expenses”, in which the modifiers are mutually exclusive. Because the same expense cannot be both “hospital” and burial”, only sense (b) is possible, and the phrase can mean only “hospital expenses and burial expenses”. Although the phrase “hospital and burial expenses” is shorter and has the sanction of usage, it would seem grammatically preferable to say “hospital expenses and burial expenses”, reserving the shorter form for use with potentially cumulative modifiers where sense (a) is both possible and intended.

Phrase (2): “charitable or educational institutions”

Does this mean:

(a) “institutions that are either charitable or educational, but not both”,

(b) “institutions that are either charitable or educational, or both”;

(c) “charitable institutions or educational institutions, but not both”;

Or

(d) “charitable institutions or educational institutions, or both”?

If you tabulate phrase (2) similarly to phrase (1) and infer the normal inclusive "or", you get this:

"Institutions that are:

"(1) charitable;

'(2) educational; or

"(3) both."

It is believed that sense (b) as so expressed is the normal grammatical reading. This is true whether the sentence is mandatory or permissive. Phrase (2) is therefore a proper way of expressing the idea of "institution that are either charitable or educational, or both". If sense (a), (c), or (d) is intended, it is better to express it differently form phrase (2).

On examination, it appears that sense (d), which is apparently different, is in most cases substantively the same as sense (b), because it is normally inferred that, if you may or must have institutions that are either charitable or educational or both, you may also have both charitable institutions and educational institutions, conversely, it is normally inferred that, if you may or must have both charitable institutions and educational institutions, you may also have institutions that are both charitable and educational.

Compare the phrase "hospital or burial expenses", in which the modifiers and mutually exclusive. Here, sense (b) is impossible. Sense (c) is also eliminated if you infer the normal inclusive "or". Instead, it is believed that sense (a) is the normal grammatical reading. Examination similarly shows that sense 9d) is substantively the same as sense (a) in most cases, because, if you may or must pay expenses that ate either hospital or burial, it is normally inferred that you may pay both kinds

Phrase (3): "Charitable institutions and educational institutions"

Does this mean:

(a) "both charitable institutions and educational institutions", which may include institutions that are both charitable and educational;

(b) “charitable institutions or educational institutions, that are both charitable and educational?

If the sentence is mandatory, you must have both kinds of institutions (i.e., a “package deal” is intended). Here, “and” is joint rather than several, and sense (a) is the normal grammatical reading.

If the sentence is permissive, it is normally inferred that you may have one kind without the other (i.e., no “package deal” is intended). Here, “and” is several rather than joint, and sense (b) is the normal grammatical reading.

Compare the phrase “hospital expenses and burial expenses”, in which the modifiers are mutually exclusive. Here the answer are the same, except that the possibility of including an expense that is both “hospital” and “burial” is excluded form both sense (a) and sense (b).

Phrase (4): “charitable institutions or educational institutions” Does this means

(a) “charitable institutions or educational institutions, but not both”, which may not include institutions that are both charitable and educational; or
(b) “charitable institutions or educational institutions, or both”, which may include institutions that are both charitable and educational.

If you infer the normal inclusive “or”, sense (b) is the normal grammatical reading. This is true whether the sentence is mandatory or permissive.

Compare the phrase, “hospital expense or burial expenses”, in which the modifiers are mutually exclusive. Here the answer is the same, except that the possibility of including an expense that is both ‘hospital” and “burial’ is excluded form sense (b).

It is interesting to note that for the cumulative modifiers ‘charitable’ and ‘educational” senses (b) and 9d) of phrase (2), sense (b) of phrase (3), and sense (b) of phrase (4), the normal grammatical ways of reading these receptive phrases, are substantively the same in any case in which the sentence is permissive. Thus, if you intend that the person covered by the statute is to

be free to have either, neither, or both, you may use any of these three sentences to express the idea:

(A) "He may contribute to charitable or educational institutions."

(B) "He may contribute to charitable institutions and educational institutions." Here, "and" is several, not joint.

(C) "He may contribute to charitable institutions or educational institutions." Here, "or" is inclusive, not exclusive.

Sentences (B) and (c) differ only in that the former uses 'and", whereas the latter uses 'or". Because both sentences mean the same thing, it follows that "and" and 'or" produce the same result in such a context. Stating the matter broadly, we can say that n a permissive sentence the inclusive "or" is interchangeable with the several 'and". (Again, this does not say that "and" means "or". It says that in such a context the two words are reciprocally related in that the implied meaning of one is the same as the expressed meaning of the other.)

Of the three ways of extending permission, sentence (B0 is to be preferred. Sentence (A) is open to the objection that its applicability to both charitable institutions and educational institutions is based on inference 9a strong one, however). Sentence (C) is open to the objection that it the wider context of the statute as a whole it is more likely that "or" will be read as exclusive than that "and" will be read as joint.

With respect to the alternative modifiers "hospital" and "burial', the same analysis applies, except that, because they cannot be cumulative, there is the fourth alternative of using phrase (1):

(D) "He may pay the hospital and burial expenses".

As pointed out in connection with phrase (1), sentence (D0 is not as desirable grammatically as sentence (B).

The reader is warned that many of the foregoing generalizations are based only on personal observation. So far as they have not (to my knoledge0 been confirmed by exhaustive scientific investigation they remain subject to honest skepticism. Even so, they may retain some value as potential conventions that, if adopted, would ultimately crystallize the very usages that I believe

them now to reflect. While I do not rest my analysis on this kind of bootstrap pulling, it is comforting to recognize its supporting effect.

The reader is also warned that, even if sound, the foregoing genralities on usage are valid only as observed tendencies. The value of relying on such generalities is not that they foreclose all possibility of ambiguity or other uncertainty (they are incapable of discharging this responsibility). Rather, it is that the establish probable meanings that, fortified in particular cases by general and specific context, are strong enough so that the incidence of uncertainty remaining after a careful reading of the whole statement in its proper setting is reduced to the point where and attempt to eliminate it altogether would cost more in prolixity and unreadability than would be gained by attaining the unattainable ideal of absolute certainty.

(1) Will of sir john Swale: "I do bequeath unto * * ** Matthew Stradling all my black and white horses." Swale died leaving 6 white horses, 6 black horses, and 6 horses mixed black and white. Which horses was Stradling entitled to?

(2) "Every child and teacher in the School * * *"

(3) "charitable institutions or organizations"

Does this mean:

(a) "Charitable institutions or any organization"?

(b) "Charitable institutions or charitable organizations"?

(4) "charitable institutions or incorporated organizations"

Does this mean:

(a) "1) charitable institutions; or

"(2) incorporated organizations"?

(b) "Charitable:

"(1) institutions; or

"(2) incorporated organizations"?

(5) "No pupil may, on the ground of religious belief, be excluded from any school, college, or hostel provided by the council.

(6) "In time of war or of national emergency declared by Congress or the president after January 1, 1980

(7) “No selection board may serve longer than one year and no member may serve on two consecutive boards for promotion to the same grade, if the second board considers any officer who was considered but not recommended for promotion by the first.”

(8) “Reasonable medical, hospital, and burial expenses”

(9) “No contract may be awarded under this section-

“(1) to an individual who is not a citizen of the United States;

“(2) to a corporation, unless 75 percent of its capital stock is owned by, and all its directors are, citizens of the United States; or

“(3) to an individual or a corporation that does not have a manufacturing plant within the United States.”

(10) “The Secretary of an executive department may buy designs, aircraft, aircraft parts, and aeronautical accessories that he considers necessary for experimental purposes * * *”

(11) “each seller of designs and each contractor furnishing or constructing aircraft * * *”

(12) “work clothing and textile materials may be sold * * *”

(13) Compare:

(a) “A person who owns real property and fails to pay the tax”

(b) “a person who owns real property and who fails to pay the tax”

(c) “A person who owns real property who fails to pay the tax”

(d) “A person who owns real property and a person who fails to pay the tax”

(14) “* * * to the person who is highest on the list and who can be found.”

(15) “* * *to the person who is highest on the list who can be found.”

9.3.3 Participles and Gerund, Modifiers

Participles and gerunds are both formed form verbs and, unfortunately perhaps, the same word frequently does for both. In legislation, it is important that a word that can be both participle and

gerund should be clearly identifiable as one or the other; otherwise, difficulties in interpretation are bound to arise.

A gerund is a noun, and it must therefore have case-nominative, accusative or possessive; a participle used as an adjective must qualify a noun or a noun equivalent. In the sentence

No person shall obstruct a Customs officer examining baggage.

The word examining, taken by itself, could be either gerund or participle. If it is participle, the sentence is ambiguous-at least grammatically. It could refer to person, and would mean.

No person, examining baggage, shall obstruct a Customs officer.

This construction would permit the obstruction of Customs officer at any time unless the other person is examining baggage. Qualifying officer the sentence is

No person shall obstruct a Customs officer, examining baggage.

Here the words examining baggage are only incidental information and they escape the action of the verb; the emphasis is not correct.

On the other hand, if examining is a gerund, what is its case? It could only be accusative- the object of obstruct. But that would leave Customs officer as an indirect object, which is hardly possible grammatically. We would come closer to the proper sense of the sentence if we made it a clear gerund.

No person shall obstruct a Customs officer's examining baggage.
But the Customs officer then escapes the action of the verb, and obstruct is hardly the word to use in relation to examining. The action of the verb must be brought to bear on both the officer and the examination. But to do so we must change the fundamental structure of the sentence.

No person shall obstruct a customs officer in examining baggage.

No person shall prevent a Customs officer from examining baggage.

In the above two examples a preposition has been inserted, thus clearly making examining a gerund, the object of a preposition, and leaving officer as the sole object of the verb. The meaning is clearer.

No person shall obstruct a Customs officer who is examining baggage.

In the above form there is an adjectival relative clause in which examining is a clear participle.

No person shall obstruct a Customs officer while the officer is examining baggage.

And in this form there is an adverbial relative clause where examining is agin a clear participle.

The master shall report his vessel entering the harbor.

In the above sentence we have the same difficulty, and also the vague feeling that entering is intended to qualify master so as to indicate the time when the report is to be made. There are three questions to be answered: who is to make the report, what shall it be, and when shall it be made. The sentence given is not a sufficient direction on these points Nor would be any of the following

The master shall report the vessel's entering the harbor.
The master shall report the vessel when entering the harbor.
The master when entering the harbor shall report the vessel.
The master shall report that the vessel is entering the harbor.
The master shall report while the vessel is entering the harbor.

What is required is more elaborate sentence along the following lines:

The master of a vessel shall, while his vessel is entering the harbor, report (to the harbor master) that the vessel is entering the harbor.

The master of a vessel shall, while his vessel is entering the harbor, report that fact to the harbor master.

A word that can be either gerund or participle should be used with caution and should be clearly identifiable as one to the exclusion of the other. Sometime the context is sufficient, but, if not, the sentence should be change.

* * *

The past participle when used as an adjective normally also precedes the noun it modifies. However, if the participle is qualified in any way the whole phrase must follow the noun. Thus, one can write convicted person, but not of an offence convicted person. This must be written person convicted of an offence. The placing of the phrase after the noun gives rise to an ambiguity, because it is not clear whether convicted is being used as an adjective or as part of the passive verb phrase form was convicted.

In the description

Every person who was imprisoned on the 1st day of January, 1970

There is doubt whether the verb is the passive of to imprison or the active to be plus an adjective as subjective complement. Does the description refer to persons upon whom a sentence of imprisonment was pronounced on the named day, or to a person who on that day was in a state of imprisonment. To avoid ambiguity one of the following expressions should be used:

Every person who was sentenced to imprisonment on the 1st day of January, 1970

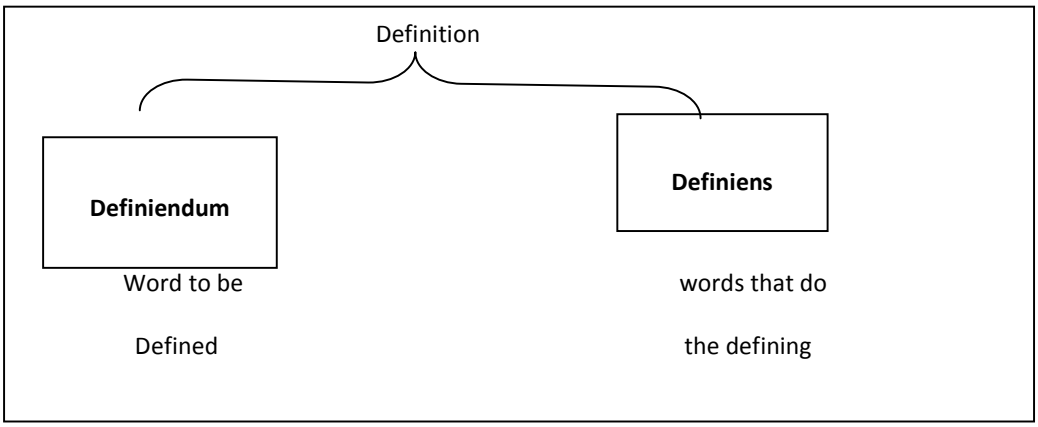
Every person who on the 1st day of January, 1970, was serving a sentence of imprisonment

Section IV. Definitions[88]

[88] Abridged from Patrick J. Harley, A Concise Introduction to Logic, 5th Ed. (wadsworth Publishing Company, Belmont, California, 1994.) pp. 87-93.

For most logicians today, definitions are intended exclusively to explicate the meaning of words. In conformity with this latter position, we may define definition as a group of words that assigns a meaning to some word or group of words.

Accordingly, every definition consists of two parts: the defined (definiendum) and the definiens. The definiendum is the word or group of that is supposed to be defined, and the definiens is the word or groups of words that does the defining.



Instead of beginning the analysis of definitions with a set of a priori criteria, many logicians take a pragmatic approach and begin with a survey of the various kinds of definitions that are actually used and of the functions that they actually serve. This is the approach taken here.

9.4.1 Stipulating Definitions

Assign a meaning to a word for the first time. This may involve either coining a new word or giving a new meaning to an old word. The purpose of a Stipulating definition is usually to replace a more complex expression with a simpler one. The need for a Stipulating definition is often occasioned by some new phenomenon or development. Another use for Stipulating definitions is to set up secret codes.

Because people are continually coming up with new creations, whether it be new food concoctions, new inventions, new modes of behavior, new kinds of apparel, new dances, or

whatever, Stipulating definitions are continually being used to introduce names for these things. Sometimes these definitions are only implicit and amount to little things. Sometimes these definitions are only implicit and amount to little more than the spontaneous association of the word with some action as was probably the case when the words “bop”, “twist,” “jerk,” and “chicken” came to be known as names of dances a few decades ago.

Because a Stipulating definition is a completely arbitrary assignment of a meaning to a word for the first time, there can be no such thing as a “true” or “false” Stipulating definition. Furthermore, for the same reason, subject matter of the definiendum.

9.4.2 Lexical Definitions

These are used to report the meaning that a word already has in a language. Dictionary definitions are all instances of lexical definitions. Thus, in contrast with a Stipulating definition, which assigns a meaning to a word for the first time, a lexical definition may be true or false depending on whether it does or does not report the way a word is actually used. Because words are frequently use3d in more than one way, lexical definitions have the further purpose of eliminating the ambiguity that would other wise arise if one of these meanings were to be confused with another.

At this point it is useful to distinguish ambiguity from vagueness. A word is vague if there are borderline cases such that it is impossible to tell whether the word applies to them or not. For example, words such as “love” “happiness,” “peace,” “excessive,” “fresh,” “rich,” “poor,” “normal,” “conservative, and “polluted” are vague. We can rarely tell with any degree of precision whether they apply to a given situation. A word is ambiguous, on the other hand, when it can be interpreted as having tow or more clearly distinct meanings in a given context. Many commonly used words have two or more relatively precise meanings. When, in a given context, it is uncertain which of these meanings in intended, ambiguity results. Some words that are subject to ambiguous usage are “light,” “bank”, “sound,” “right,” and “race”. “light” can mean, among other things, light in weight or radiant energy; “bank” can mean a financial institution or the slope bordering a river; and so on.

Because a lexical definition lists the various meanings that a word can have, a person who consults such a definition is better prepared to avoid ambiguous constructions of his or her own and to detect those of others.

The undetected ambiguity causes the most trouble. In many cases the problem lies not with the obvious differences in meaning that words such as “light” and “bank” may have but wilt the subtle shadings of meaning that are more likely to be confused with one another. For example, if a woman is described as “nice,” any number of things could be intended. She could be fastidious, refined, modest, pleasant, attractive, or even lewd. A good lexical definition will distinguish these various shadings and there by guard against the possibility that two such meanings will be unconsciously jumbled together into one.

9.4.3 Definitions for Precision

The purpose of a precision definition is to reduce the vagueness of a word. Once the vagueness has been reduced, one can reach a decision as to the applicability of the word to a specific situation. We have noted that the word “poor” is vague. If legislation were ever introduced to give direct financial assistance to the poor, a précising definition would have to be supplied specifying exactly who is poor and who is not. The definition “poor” means having an annual income of less than $4,000and a net worth of less than $20,000” is an example of a précising definition.

Whenever words are taken from ordinary usage and employed in a highly systematic context such as science, mathematics, medicine, or law, they must always be clarified by means of a précising definition.

Another example involves the practice of surgical transplantation of vital organs. Before a heart transplant can be conducted, the donor must be dead; otherwise the surgeon will be accused of murder. If the donor is dead for too long, however, the success of the transplant will be imperiled. But exactly when is a person considered to be dead? Is it when the heart stops beating, when the person stops breathing, when rigor mortis sets in, or some other time? The question

involves the meaning of term “moment of death.” The courts have decided that “moment of death” should be taken to mean the moment the brain stops functioning, as measured by an electroencephalograph. This decision amounts to the acceptance of a précising definition for “moment of death.”

A précising definition differs from a stipulating definition in that the latter involves a purely arbitrary assignment of meaning, whereas the great deal of care must be taken to ensure that the assignment of meaning in a précising definition is appropriate and legitimate for the context within which the term is to be employed.

9.4.4 Theoretical Definitions

A theoretical definition provides a theoretical picture or characterization of the entity or entities denoted by the definiendum. In other words, it provides a way of viewing or conceiving these entities that suggests deductive consequences, further investigation (experimental or other wise), and whatever else would be entailed by the acceptance of a theory governing these entities. The definition of the term “heat” found in texts dealing with the kinetic theory of heat provides a good example: “heat means the energy associated with the random motion of the molecules of a substance.” This definition does more than merely assign a meaning to a word. It provides a way of conceiving the physical phenomenon that is heat. In so doing, it suggests the effect of molecular speed up, i.e-the temperature of same increases. In addition, it suggests a number of experiments investigating the relationship between molecular velocity and the phenomena of radiation, gas pressure, molecular elasticity, and molecular configuration. In short, this definition of “heat” provides the impetus for an entire theory about heat.

Not all theoretical definitions are associated with science. Many terms in philosophy, such as “substance,” “form,” cause,” “change,” “idea, in philosophy, such as “substance,” “form”, cause,” “change,” “idea,” “good,” “mind”, and “God,” have been given theoretical definitions. In fact, most of the major philosophers in history have given these terms their own peculiar theoretical definitions, and this fact accounts in part for the unique character of their respective philosophies. For example, Gottfried Wilhelm Leibniz’s definition of “substance” in terms of

what he called “monads” laid the foundation for his metaphysical theory, and Jermy Isenthams definition of “good” as the greatest happiness of the greatest number provided the underpinnings for his utilitarian theory of ethics.

Like stipulating definitions, theoretical definitions are neither true nor false, strictly speaking. They may, however, be more or less interesting or more or less fruitful, depending on the deductive consequences they entail and on the outcome of the experiments they suggest.

9.4.5 Persuasive Definitions

The purpose of a persuasive definition is to engender a favorable or unfavorable attitude toward what is denoted by the definiedum. This purpose is accomplished by assigning and emotionally charged or value laden meaning to a word while making it appear that the word really has (or ought to have) that meaning in the language in which it is used. Thus, persuasive definitions amount to a certain synthesis of stipulating, lexical, and, possibly, theoretical definitions backed by the rhetorical motive to engender a certain attitude. As a result of this synthesis, a persuasive definition masquerades as an honest assignment of meaning persuasive definition masquerades as an honest assignment of meaning persuasive definition masquerades as an honest assignment of meaning to a term while condemning or blessing with approval the subject matter to a term while condemning or blessing with approval the subject matter of the definiendum.

The objective of a persuasive definition is to influence the attitudes of the reader or listener; thus, such definitions may be used with considerable effectiveness in political speeches and editorial columns. While persuasive definitions may, like lexical definitions, be evaluated as either true or false, the primary issue is neither truth nor falsity but the effectiveness of such definitions as instruments of persuasion. It should not the people to be used in the drafting of any legal instrument.

9.4.6 Definitional Techniques: Denotative and Connotative[89]

[89] Id., pp. 95-102.

In the last section we presented a survey of some of the kinds of definitions actually in use and the functions they are intended to serve. In this section we will investigate some of the techniques used to produce these definitions. These techniques may be classified in terms of the two kinds of meaning, intentional and extensional, discussed in section 2.2.

Extensional (Denotative) Definitions An extensional definition is one that assigns a meaning to a term by indicating the members of the class that the definiendum denotes. There are at least three ways of indicating the members of a class: pointing to them, naming them individually, and naming them in groups. The three kinds of definitions that result are called, respectively, demonstrative or ostensive definition, enumerative definition, and definition by subclass.

Demonstrative (ostensive) definitions differ from the other kinds of definitions in that the definiens is constituted at least in part by gesture of pointing. Since the definiens in any definition is a group of words, however, a gesture, such as pointing, must count as a word. While this however, a gesture,

If you were attempting to teach a foreigner your own native language, and neither of you understood a word of each other's language, demonstrative definition would almost certainly be one of the methods you would use. Enumerative definitions assign a meaning to a term by naming the members of the class the term denotes. Like demonstrative definitions, they may also be either partial or complete.

Complete enumerative definitions are usually more satisfying than partial ones because they identify the definiendum with greater assurance. Relatively few classes, however, can be completely enumerated. Many classes, for example the class of real numbers greater than one but less than 2, have an infinite number of members.

Then there are others – the class of insects or trees, fore example – the vast majority of whose members have no names. For terms that denotes these classes, either a demonstrative definition or a definition by subclass is the more appropriate choice.

A definition by subclass assigns a meaning to a term by naming subclasses of the class denoted by the term. Such a definition, too, may be either partial or complete, depending on whether the subclasses named, when taken together, including all the members of the class or only some of them.

As with definition by enumeration, complete definition by subclass are more satisfying than partial ones; but because relatively few terms denote classes that admit of a conveniently small number of subclasses, complete definitions by subclasses are often difficult ,if not impossible , to provide.

Extensional definitions are chiefly used as techniques for production lexical and stipulate definitions. Lexical definitions are aimed at communication how a word is actually used, and one of the ways of doing so is by identifying the members of the class at the world denotes. Dictionaries frequently include reference to the individual members (or to the sub classes) of the class denoted by the word being defined. Sometimes they even include a kind of demonstrative definition when they provide a picture of the project that the word denotes. Not all lexical definitions have to occur in dictionaries, how ever, how ever. A lexical definition can just as well be broken, as when one person attempts to explain, orally, to another how a word is used in language. Such attempts, incidentally, often have resources to all three kinds of extensional definitions.

Stipulate definitions are used to assign a meaning to a word for the first time. This task may be accomplished by all three kinds of extensional definition. For example, a biologist engaged in naming and classifying types of fish might assign names to the specific verities by opening to their respective ranks (demonstrative definition), and by assigning a class name to the whole group; by referring to the names of the specific verities (definition by sub-class). An astronomer might point via his telescope to a newly discovered comet and announce, “That comet will hence forth be known as Henderson’s Comet” (demonstrative definition).

Although it is conceivable that extensional definition could also serve as a technique for theoretical and persuasive definition (though this would be unusual), extensional definitions by themselves can not be properly served as précising definitions for the following reason. The function of précising definition is to clarify a vague word, and vagueness is a problem affecting intended meaning, because the intension imprecise, the intension is indefinite. To attempt to render the intension precise by exactly specifying the extension (as with an extensional definition) would be tantamount to having extensional determining intention – which can't be done.

Then principle that intention determines extension, where as the converse is not rue underlies the fact that all extensional definitions suffer serious deficiencies. For example, in the case of the demonstrative definition of the word "chair", if all the chairs pointed to are made of food, observers might get the idea that "chair" means "wood" instead of something to sit on. Similarly, they might get the idea that "Washington Monument" means "tall" or "pointed" or any of a number of other things. From the definition of "actor" readers or listeners might think that "actor" means "famous person", who would include Albert Einstein and Winston Churchill. From the definition of "tree" they might get the idea that "tree" means "firmly planted on the ground" which would also include the pilings of the building and they might think that "cetacean" means "fast swimmer" instead of "aquatic mammal." In other words it makes no difference how many individuals or sub classes are named in an extensional definition, definition, there is no assurance that listener or readers will get the intended meaning. Extensions can suggest intention, but they can not determine them.

Intentional or (Connotative) Definitions are one that assigns a meaning to a word by indicating the qualities or attributes that the word connotes. Because at least four strategies may be used to indicate the attributes a word connotes, there are at least four kinds of intentional definitions: synonymous definition, etymological definition, operational definition, and definition by genus and difference.

A synonymous definition is one in which the definiens is a single word that connotes the same attributes as the definiendum. In other words the definiens is a synonym of the word being defined. Examples:

"Physician" means doctor.

"Intentional" means willful.

"Voracious" means ravenous.

"Observe" means see.

When a single word can be found that has the same intentional meaning as the word being defined, a synonymous definition is a highly concise way of assigning a meaning that are not connoted by any other single word. For example the word "wisdom" is not exactly synonymous with either knowledge, or "understanding," or "sense"; and "envious" is not exactly synonymous with either "jealous" or "covetous."

An etymological definition assigns a meaning to a word by disclosing the world's ancestry in both its own language and other languages. Most ordinary English words have ancestors either in old or middle English or in some other language such as Greek, Latin, or French. And the current English meaning (as well as spelling and pronunciation) is often closely tied to the meaning (and spelling and pronunciation) of these ancestor words. For Example, the English word "license" is derived from the Latin verb *'licere'*, which means to be permitted, and the English word "captain" derives from the Latin noun *'caput'* which means head.

Etymological definitions have special importance for at least two reasons. The first is that the etymological definition of a word often conveys the word's root meaning or seminal meaning from which all other associated meanings are derived. Unless one is familiar fails to place other meanings in their proper light or to grasp the meaning of the word when it is used in its most proper sense. For example, the word "principle" derives from the Latin word *'principium'*, which means beginning or source. The English word "efficient" derives from the Latin verb '*officers*', which means to bring about. Thus, the "efficient cause" of something (such as the motion of a car) is the agent that actually brings that thing about (the engine).

The second reason for the importance of etymological definitions is that if one is familiar with the etymology of one English word, one often has access to the meaning of an entire constellation of related words. For example, the word "orthodox" derives from the two Greek words *'ortho'*, meaning right or straight, and *'doxa'*, meaning belief or opinion. From this, one might grasp that "orthopedic" has to do with straight bones (originally in children – '*pais*' in Greek means child), and that "orthodontic" has to do with straight teeth ('*odon*' in Greek means tooth). Similarly, if one is familiar with the etymological definition of "polygon" (from the Greek words poly, meaning many, and '*ganos*' meaning angle), one might grasp the meaning of polygamy (from '*gamos*', meaning marriage) and "polygraph" (from graphing, meaning to write). A polygraph is a lie detector that simultaneously records pulse rate, blood pressure, respiration and so on.

An operational definition assigns a meaning to a word by specifying certain experimental procedures that determine whether or not the word applies to a certain thing. Examples:

Each of these definitions prescribes an operation to be performed. The first prescribes that the two substances in question be rubbed together, the second that the electroencephalograph be connected to the patients' head and observed for oscillations, the third that the voltmeter be connected to the two conductors and observed for deflection, and the fourth that the litmus paper be placed in the solution and observed for color change. Unless it specifies such an operation, a definition cannot be an operational definition. For example, the definition "A solution is and 'acid' if and only if it has a pH of less than 7," while good in other respects, is not and operational definition because it prescribes no operation.

Operational definitions were invented for the purpose of tying down relatively abstract concepts to the solid ground of empirical reality. In this they succeed fairly well; yet, from the standpoint of ordinary language usage, they involve certain deficiencies. One of these deficiencies lies in the fact that operational definitions usually convey only part of the intended meaning of a term.

Within their proper sphere, however, operational definitions are quite useful and important. It is interesting to note that Einstein developed his special *Theory of Relativity* in partial response to the need for an operational definition of simultaneity.

A definition by genus and difference assigns a meaning to a term by identifying a genus term and one or more different words that, when combined, convey the meaning of the term being defined. Definition by genus and difference is more generally applicable and achieves more adequate results than any of the other kinds of intentional definition. To explain how it works, we must first explain the meanings of the terms "genus" "species" and "specific difference."

In logic, "species" means a relatively smaller subclass of the genus – i.e. sub-set of the genus. For example, we may speak of the genus animal and the species mammal, or of the genus mammal and the species feline, or of the genus feline and the species tiger, or the genus tiger and the species Bengal tiger. In other words, genus and species are merely relative classifications.

The "specific difference" – or "difference", for short – is the attribute or (attributes) that distinguishes the various species within a genus. For example, the specific difference that distinguishes tigers from other species in the genus feline would include the attributes of being large, striped, ferocious, and so on. Because the specific difference is what distinguishes the species, when a genus is qualified by a specific difference, a species is identified. Definition by genus and difference is based upon of group of words connoting a specific difference so that the combination identifies the meaning of the term denoting the species.

Let us construct a definition by genus and difference for the word "ice." The first step is to identify a genus of which ice is the sub-set (species). The required genus is water. Next we must identify a specific difference (attribute) that makes ice a special form of water. The required difference is difference in temperature - freeze. The completed definition may now be written out:

Species		**Difference**	**Genus**
"Ice"	is	frozen	water.

A definition by genus and difference is easy to construct. Simply select a term that is more general than the term to be defined. Then narrow it down so that it means the same thing as the term being defined.

Species		**Difference**	**Genus**
"Daughter"	means	Female	offspring.
"Husband"	means	married	man.
"Doe"	means	female	deer.
"Fawn"	means	very young	deer.
"Skyscraper"	means	very tall	building.

Other, more sophisticated examples are

> "Tent" means a collapsible shelter made of canvas or other material that is stretched and sustained by poles.
>
> "Tent" is the species, "shelter" is the genus, and "collapsible" and made of canvas. . . the difference.

Definition by genus and difference is the most effective of the intentional definitions of producing the five kinds of definition in simulative, lexical, precising, theoretical and persuasive definitions can all be constructed according to the methods of genus and difference. Lexical definitions are typically definitions by genus and difference, but they also often include etymological definitions. Operational definition can serve as the method for constructing simulative, lexical, précising, and persuasive definitions, but because of the limitations we have noted, it typically could not be used to produce a complete lexical definition. Other techniques would have to be used in addition. Synonymous definition may be used to produce only lexical definitions. Since, in a synonymous definition, the definiendum must have a meaning before a synonym can be found, this technique cannot be used to produce stipulative definitions, and the fact that the defines of such a definition contains no more information than the definiendum prohibits its use in constructing précising, theoretical, and persuasive definitions.

9.4.7 Rules[90]

[90] Id., (Reformulated) pp. 108-110.

Rules 1. Definition should not be circular

Sometimes the problem of circularity appears in connection with pairs of definitions. The following pair is circular:

"Science" means the activity engaged in by scientists.

"Scientist" means anyone who engages in science.

At other times a definition may be intrinsically circular. Of the following, the first is a synonymous definition, the second a definition by genus and difference;

"Quiet" means quietude.

"Silence" means the state of being silent.

Certain operational definitions also run the risk of circularity:

"Time" means whatever is measured by a clock.

Surely a person would have to know what "time" means before he or she could understand the purpose of a clock.

Rule 2: Definition should not be negative while it can be affirmative.

Of the following two definitions, the first is affirmative, the second negative:

"Concord" means harmony:

"Concord" means the absence of discord.

Some words, however, the intrinsically negative. For them, a negative definition is quite appropriate. Examples:

"Bald" means lacking hair.

"Darkness" means the absence of light.

Rule 3: Definitions should not be expressed in figurative, obscure, vague, or ambiguous language

A definition is figurative if it involves metaphors or tends to paint a picture instead of exposing the essential meaning of a term. Examples:

"Architecture" means frozen music.

"Camel" means a ship of the desert.

A definition is obscure if its meaning is hidden as a result of defective or inappropriate language. One source of obscurity is overly technical language. Compare these two definitions:

"Bunny" means an animal belonging to the mammalian family of the Leporidae of the order Lagomorpha whose young are born furless and blind.

"Bunny" means a rabbit.

The problem lies not with technical language, as such, but with needlessly technical language. Because "bunny" is very much a nontechnical term, no technical definition is needed.
On the other hand, some words are intrinsically technical, and for them only a technical definition will do. Example;

"Neutrino" means a non-charged, quasi-mass-less particle obeying Fermi-Dirac statistics and having one-half quantum unit of spin.

A definition is vague if it lacks precision or if its meaning is blurred; that is, if there is no way of telling exactly what class of things the definine refers to. Example: "Democracy" means a king of government where the people are in control.

This definition fails to identify the people who are in control, how they exercise their control, and what they are in control of.

A definition is ambiguous if it lends itself to more than one distinct interpretation. Example:

“Triangle” means a figure composed of three straight lines in which all the angles are equal to 180. Does this mean that each angle separately is equal to 180 or that the angles taken together are equal to 180? Either interpretation is possible given the ambiguous meaning of “all the angles are equal to 180.”

Rule 4: Definition should avoid affective terminology.

Affective terminology is any kind of word usage that plays upon the emotions of the reader or listener. It includes sarcastic and facetious language and any other kind of language that is liable to influence attitudes. Example:

“Communism” means that “brilliant” invention of Karl Marx and other foolish political visionaries in which the national wealth is supposed to be held in common by the people.

“Theism” means belief in that great Santa Claus in the sky.

The second example also violates Rule 5 because it contains a metaphor.

Rule 5: Definition should indicate the context which the definines pertains.

This rule applies to any definition in which the context of the definines is important to the meaning of the definiendum. For example, the definition “Deuce” means *a tie in points toward a game or in games toward a set* is practically meaningless without any reference to tennis. Whenever the definiendum is a word that means different things in different contexts, a reference to the context is important. Examples:

> “Strike” means (in baseball) a pitch at which a batter swings and misses.
>
> “Strike” means (in bowling) the act of knocking all the placed pins with the first ball of a frame.
>
> “Strike” means (in fishing) a pull made by a fish on a line, while taking the bait.

It is not always necessary to make explicit reference to the context. But at least the phraseology of the definines should indicate the context.

Section V. Synopsis

1. **Same Word Same Meaning**

When the legislature uses same word in different parts of the same section or statute, there is a presumption that the word is used in the same sense throughout. The presumption is, however, a weak one and is readily displaced by the context. It has been said that the more correct statement of the rule is that "where the draftsman uses the same word or phrase in similar contexts, he must be presumed to intend it in each place to bear the same meaning".[91]

2. **Use of Different Word**

When, however, in relation to the same subject-matter, different words are used in the same statute; there is a presumption that they are not used in the same sense.

3. **Rule of last Antecedent (Rules of syntactic ambiguity)**

The rule is framed in respect of the reference put under caption. Take for instance the this provision; i.e. *"[n]othing herein contained, which well affect the provision of any legislation, Act or Regulation, not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of this Act"*, The words "not inconsistent with the provisions of this Act' are not to be connected with the clause 'nor any usage or custom of trade'! Both, the reason of the thing and grammatical construction of the sentence, if such a sentence is to be tried by any rules of grammar, seem to require that the application of those words should be confined to the subject which immediately precedes them.

[91] Abridged and reformulated from Singh, op.cit., note no. 65, pp. 229 – 230.

Another example would be *"[u]nless otherwise provided by law, no Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force"*. The words 'according to usage and practice of the country or the law for the time being in force' qualified the words immediately preceding, viz. 'concerning any act ordered or done in the collection thereof', and not the words 'original jurisdiction in any matter concerning the revenue'.[92]

4. **Non Obstante Clause**

A clause beginning with 'notwithstanding anything contained in this Proclamation or in some particular provision or in any law for the time being in force', is sometimes appended to a section in the beginning, with a view to give the enacting part of the section in case of conflict an overriding effect over a provision or a proclamation mentioned in the non obstante clause. It is equivalent to saying that in spite of the provision or proclamation mentioned in the non obstante clause, the enactment following it will have its full operation or that the provisions embraced in the non obstante clause will not be an impediment for the operation of the enactment. The phrase 'notwithstanding anything in' is used in contradistinction to the phrase 'subject to', the latter conveying the idea of a provision yielding place to another provision or other provisions to which it is made subject. A non obstante clause must also be distinguished form the phrase 'without prejudice'. A provision enacted 'without prejudice' to another provision has not the effect of affecting the operation of the other provision and any action taken under it must to be inconsistent with such other provision. Ordinarily, there is a close approximation between the non obstante clause and the enacting part of the section and the non obstante clause may throw some light as to the scope and ambit of the enacting part.[93]

[92] Id., pp.232-234.

[93] Id., pp236-242.

5. **Legal Fiction**

After ascertaining the purpose, "full effect must be given to the statutory fiction and it should be carried to its logical conclusion", and to that end "it would be proper and even necessary to assume all those facts on which alone the fiction can operate". In an oft-quoted passage, it is stated that "[i]f you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it-. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs". Thus if A is deemed to be B, compliance with A is in law compliance with B and contravention of A is, in logic i.e. law contravention of B.[94]

6. **Mandatory (Restrictive) and Directory (Illustrative) Provisions**[95]

a) **General**

The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. But this does not mean that the language used is to be ignored but only that the prima facie inference of the intention of the legislature arising form the words used may be displaced by considering the nature of the enactment, its design and the consequences flowing from alternative constructions. Thus, the use of the words 'as nearly as may be' in contrast to the words 'at least' will prima facie indicate a directory or illustrative stipulation, where as negative words indicate a mandatory requirement. Therefore may indicate directory requirements and 'shall' mandatory requirements.

[94] Id., 242-243.

[95] Id., 250-292.

A directory provision may be distinguished from a discretionary power: the former gives no discretion and is intended to be obeyed, the latter, i.e., a discretionary power leaves the holder of the power free to use or not to use it at his discretion.

b) **When consequences provided by statute**

When consequence of nullification on failure to comply with a prescribed requirement is provided by the statute, then such provisions are mandatory.

c) **Use of negative words**

"Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative.

d) **Affirmative words may imply a negative**

Affirmative words stand at a weaker footing than negative words for reading the provision as mandatory; but affirmative words may also be so limiting as to imply a negative. When there are no negative words in the provision referred to, but affirmative words are absolute, explicit, and peremptory; and when you find in law only one particular mode of affecting the object, one train of formalities to be observed, the regulative provisions which the section prescribes, are essential and imperative. Prescribing, for instance, modes of transfer by sale, mortgage, lease or gift may be mentioned. The formalities prescribed by these provisions for affecting a transfer of the nature mentioned in them are mandatory and the language used although affirmative clearly imports a negative.

e) **Use of 'shall', 'may', 'must' and 'should'**

The words 'shall' separately used is understood as mandatory or imperatively. If it is used with a word 'may', in conjunctive sense i.e. as for instance it 'shall and may' be done, by such and such officer… then the word 'may' is held as to confer, a power but the word 'shall' is held to make

that power, or the exercise of that power compulsory". Similarly, the words 'shall and lawfully may', are in their ordinary import obligatory. The use of the word 'shall' with respect to one matter and use of word 'may' with respect to another matter in the same section of a statute, will normally lead to the conclusion that the word 'shall' imposes an obligation, whereas the word 'may' confers a discretionary power.

f) **'May'; 'It shall be lawful'; 'shall have power'**

Ordinarily, the words 'May and 'It shall be lawful' are not words of compulsion. They are enabling words and they only confer capacity, power or authority and imply discretion. They should both be used in a provision to indicate that something may be done which prior to it could not be done. The use of words 'shall have power' also connotes the same idea.

g) **As he deems fit; think necessary; consider necessary**

These too confer discretion but not an unfettered one.

h) **'Have regard to'**

The words only oblige the authority on whom the power is conferred. For instance "[t]o consider as relevant data material to which it must have regard". This must be taken as to mean, when some statutory power is to be exercised 'having regard to' certain specified provisions, it only means that those matters must be taken into consideration.

7. **Conjunctive and Disjunctive Words 'OR' and 'AND'**[96]

You do sometimes read 'or' as 'and' in a statute. But you do not do it unless you are obligate to because 'or' does not generally means 'and' and 'and' does not generally mean 'or'.

[96] Id., 292-298.

Speaking generally, a distinction may be made between positive and negative conditions prescribed by a statute for acquiring a right or benefit. Positive conditions separated by 'or' are read in the alternative. Negative conditions connected by 'or' are read in the alternative, but negative condition connected by 'or' are construed as cumulative and 'or' is read as 'nor' or 'and'.

For example 'any person who attempts to commit any offence under the principal proclamation or solicits or incites or endeavors to persuade another person to commit an offence, or aids or abet "and" does any act preparatory to the commission of any offence', the word 'and' printed in Italic should be read as 'or', for by reading 'and' as normal 'and' the result produced is absurd.

8. Formulation of General Words

a) General

The normal rule is that general words in a statute must receive a general formulation unless there is something restrictive in the proclamation itself or in respect of the subject-matter, which the proclamation is dealing with. Their import to have wider effect cannot be cut down by arbitrary addition or retrenchment in language. Since general words carry ordinarily a general meaning, the first task in drafting, is to give the words their plain and ordinary meaning.

General words may receive a restricted meaning only when used in association with other words by application of the rules of *noscitur asociis* and *ejusdem generis*.

b) Noscitur a sociis

(Black's Law dictionary defines this term as *"..known from its associates"*; i.e. words or phrases.) The rule of *noscitur a sociis* means "the meaning of a word is to be judged by the company it keeps". It is a rule wider that the rule of *ejusdem generis*; rather the latter rule is only an application of the former.[97]

[97] Id., pp. 298- 301. See also Campbell, op.cit., note no. 36.

This rule means that when two or more words which are susceptible of analogous meaning are coupled together, they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general. Associated words take their meaning from one another under the doctrine of *noscitur a sociis*, the philosophy of which is that the meaning of the doubtful word maybe ascertained by reference to the meaning of words associated with it; such doctrine is broader than the maxim '*ejusdem generis*'. In fact the latter maxim 'is only an illustration or specific application of the broader maxim *nosciture a sociis*.

When dealing with the expression 'manufacture beverages including fruit-juices and bottled waters and syrups etc.', it mast be held that the description 'fruit-juices' as occurring therein should be construed in the context of the preceding words and that orange-juice unsweetened and freshly pressed was not within the description.

Say the criminal code enables the accused to prove that 'publication of the article in question is justified as being for the pubic good on the ground that it is in the interest of science, literature, art or learning or of other objects of general concern'. Here, the general words 'other objects of general concern' operated in the same area which was converted by the words science, literature, art or learning and that these words did not fall in a totally different area of sexual behavior and could not enable the accused to prove that the articles seized, say pornography, had some psychotherapeutic value for various categories of persons e.g., for persons of heterosexual taste and perverts to relieve their sexual tensions.

c) **Rule of ejusdem generis**[98]

(Black's Law Dic. Defines it as *'of the same kind, class, or nature.. 'ejusdem generis rule' is, that… applying only to persons or things of the same general kind or class as .. specifically mentioned"*.) When particular words pertaining to a class, category or genus are followed by general words, the general words are construed as limited to things of the same kind as those

[98] Id., pp. 301-309. And Ibid., respectively.

specified. This rule which is known as the rule of *ejusdem generis* reflects an attempt "to reconcile incompatibility between the specific and general words. The rule applies when "(1) the statute contains an enumeration of specific words; (2) the subjects of enumeration constitute a class or category; (3) that class or category is not exhausted by the enumeration (4) the general terms follow the enumeration; and (5) there is no indication of a different legislative intent.

In construing the words, 'in all times of public procession, rejoicings or illuminations, and in any case when the streets are thronged or liable to be obstructed it must be held that the general words 'in any case' etc. were intended to be confined to cases within the genus or category of which public processions, rejoicings and illuminations were specific instances and they were limited to particular or extraordinary occasions. It was pointed out that the absence of the word 'other' before the word 'case' was immaterial although it commonly occurs before the general words following particular instances.

'Any other goods' to prohibit the importation of 'arms, ammunition, or gun powder or any other goods' must be shaped as referring to goods similar to 'arms, ammunition or gun power. By now, you 888should have understood *ejusdem generis*; they are words of wide import but the context may limit their scope.

The introduction of the words 'whatsoever' after the general words following particular instances of a genus does not exclude the application of *ejusdem generis* principle.

It is essential for application of the *ejusdem generis* rule that enumerated things before the general words must constitute a category or a genus or a family which admits of a number of species or members. It is requisite that there must be a distinct genus, which must comprise more than one species, and that the specific words must form a distinct genus or category. If the specified things preceding general words belong to different categories, this principle should not apply. Further, mention of a single species does not constitute a genus.

d) **Reddendo singular singulis**[99]

(Black's Law Dic. Defines this Latin phrase as *'[b]y referring each to each; referring each phrase or expression to its appropriate object'*.) The rule may be stated in the following words: "where there are general words of description, following an enumeration of particular things such general words are to be construed distributively, *reddendo singular singulis*; and if the general words apply to some things and to others, the general words are to be applied to those things to which they will, and not to those to which they will not apply; this rule is beyond all controversy".

An example of the application of the rule is furnished say by: "[a] person shall be disqualified for being elected or being a member of a local authority if he has within five years before the day of election or since his election been convicted of any offence and ordered to be imprisoned for a period of not less than three months without the option of fine".

The provision provides for two matters: first, as to what is to be disqualification for election; and, as to second, what is to be the disqualification for being a member after election. Two bases of disqualifications are provided: first, conviction within five years obvious that the second disqualification mentioned does not fit the second case. It is also obvious that the first disqualification mentioned fits the first case; and it does not seem at all apt to fit the second case. One may conclude that all difficulty can be avoided by applying the well-known method of formulation commonly known as *reddendo singular singulis*. It should, therefore, be held that a conviction prior to election, although a disqualification for the election was not a disqualification for continuing to be a member.

Section VI. Some Aspects of Translation

Translation is not replacing the words of the original language by similar words of the new or the receptor language.

[99] Id., pp. 310-311. And Ibid.

Example of an English text:- “The contribution of the foreign shareholder shall be paid in freely convertible currency.”

Amharic translation of the Above:- #**አስተዋጽኦ የውጪ ባለ አክስዮን በግድ መክፈል ውስጥ በነፃ በሚለወጥ የገንዘብ ዓይነት።።**$

In the example, effort has been made to replace the words of the source text (which is in English language) by similar words of the receptor language (which is Amharic).

A person is said to have translated one language into another, if he appropriately communicates the original message contained in the source text in that the receptor language; i.e. using the right words, expressions and, if necessary, accepted idioms as well as following the grammatical rules of the receptor language.

A good translation has to be faithful to the original language in which the source text is written. By this is meant that the exact message of the original language must be retold in the forth coming receptor language. Clarity is also a very important aspect of translation. The translator must avoid the use of any word or phrase whose meaning is unclear or confusing. A good translation, besides being accurate and clear should be natural. In other words, the translation should sound as if it were natural and not a translation; i.e. should be expressed in a way that sounds natural to a speaker of the receptor language.

The process of translation could involve:

1. two or more stages (or languages), and
2. a message to be communicated.

Translation Approaches[100]

From linguistic point of view, a translation can be classified as literal (where the translation closely follows the original language), and as idiomatic (where the translation is more faithful to the grammatical rules of the receptor language).

There are said to be four types of translation. These are:

1. highly literal
2. modified literal
3. idiomatic and
4. unduly free

Let us briefly examine the basic characteristics of each of the above mentioned types of translation.

1. *Highly Literal and Modified Literal Translations*

In highly literal type of translation the linguistic features of the original language are used to the maximum extent possible. This usually makes the message very difficult to be understood.

A) *Interlinear translation* i.e. where the order of the original language is followed word for word, is one type of highly literal translation. In this type of translation the grammatical rules of the receptor language is completely ignored.

B) Another type of highly literal translation is the one which *strictly follows the grammatical rules of the receptor language* such as markers and word order. There is also a tendency to match every in the original language with a single word in the receptor language.

The highly literal translation is of least importance in communicating messages. Hence, it is not an acceptable type of translation.

C) *The modified literal translation* is an improved form of the highly literal translation. The grammatical features of the original language are, to some degree, diverted from,

[100] Sheferaw op.cit., note no. 5, pp. 307-313. (Reformulated)

and lexical and grammatical adjustments are made to create better sense in the receptor language. Despite these improvements, one would find this type of translation lacking in clarity.

The modified literal translation is however put in the category of acceptable of translation.

2. *Idiomatic Translation*

Idiomatic translation is characterized by the use of the natural grammatical and lexical forms of the receptor language to convey the meaning of the original language. The translator, in this case, utilizes the receptor language in a way that properly conveys the right message contained in the source text/original language.

The following quotation makes this point very clear:

> Suppose a road is used to represent one language and a canal a different one. A car is needed to convey passengers by road; to convey the same passengers by water a different vehicle is needed, namely, a boat of some sort.
>
> The same is true with conveying meaning. One language will use a certain form to communicate a meaning; a different language will use a different form, even though it is the same meaning that is being communicated.
>
> Further, just as you would not attempt to transfer parts of the car to the boat when changing one vehicle with the other, likewise you should not attempt to transfer the grammatical and lexical forms of the original to the receptor language while translating. The forms are simply a "vehicle" with which to get the message across to the respective recipients of the two languages. If the correct meaning is not conveyed to hearers of that language, it may well be that the translator is not sufficiently familiar with the linguistic form of that receptor language or has an erroneous concept

of what translation is. It is like trying to run a boat on road, as if it were a car.

Idiomatic translation, like modified literal translation, is an acceptable type of translation.

3. *Unduly Free Translations*

In this type of translation the linguistic form of the original language is not followed. Here one finds distortions of content like substituting customs to that of the receptor language as well as names of places or even of people, title. Unduly free translation may include information unintended by the writer or author of the original language.

The unduly free translation, like the highly literal translation, is an unacceptable type of translation.

Translation and the Different Calendars

በኀብረተሰብአዊት ኢትዮጵያና በአንጎላ ሕዝባዊት ሪፐብሊክ መንግስት መካከል የንግድ ግንኙነታችንን ለማስፋፋት በማሰብ በሁለቱ እህትማማች አገሮች መካከል እ.አ.አ. ጥር 26 **ቀን፣** 1981 **ዓ.ም. የንግድ ስምምነት በአንጎላ ርዕሰ ከተማ፣ በሉዋንዳ ተፈርሟል።።**

Before we conclude this Chapter on translation, a word has to be said on translating text with different calendars. The following formulations are commonly used in treaties we have entered into and in some laws we have formulated.

Cross checking to the real date of signing of the mentioned agreement reveals the exact date to be January 26/1981, according to the Gregorian calendar. The corresponding date is Ttir 18/1973, according to the Ethiopian calendar.

Proposition-I: Drafting a Bill with the view to fit into Appropriate Regime of Law

International Property (IP)

Part I: Introductory Remark

1. IP is a kind of Property Right
   1.1 Property may be moveable or immoveable; or
   1.2 It may be corporeal (tangible) or incorporeal (intangible).
2. International Property is incorporeal property.
3. IP has the following sub-division:
   - 3.1. Copy Rights
     - 3.1.1 Literary, artistic works, music (fine arts) give rise to copy-right;
     - 3.1.2 Composers', directors', producers, broadcaster's, audio-visual creative works, etc.. are referred as "Neighboring Rights" and are another form of copy-rights;
   - 3.2. Innovations in technology give rise to patent rights.
     - 3.2.1 Industrial design is another type of patent right;
   - 3.3. Community Rights give rise to environment and agricultural innovations.
4. IP is governed by W.T.O., in particular by Treaty ___ (TRIPS) and bi-lateral treaties.
5. The justification for IP are
   5.1 Natural law;
   5.2 Incentive;
   5.3 Result of Bargaining.
6. The central idea in patentable IP is invention.
   - The Ethiopian Intellectual Office Establishment Proclamation No. 320/2003 stipulates, inter-alia, the power of administrating, implementing, three categories of incorporeal properties.
     a. Inventions, minor-inventions and industrial designs.
     b. Copy Right and Neighbouring Rights.
     c. Trade marks.

   A) See how inventions, minor-inventions and industrial designs are defined under the Procl. No. 323/1995.

B) See also how copy Rights and Neighbouring Rights are defined under Procl. No. 410/2004.

Question 1

Now the question is, should good-will, trade marks and labels etc.., be treated as incorporeal properties? Falling under Book two of the C.C., as species of proprietor right (right in rem) of whose genus the latter is. Or, do you treat good-will, trade mark and the like as creating rights in persona nature, whose infringement may entitle one remedies that are available by the law of obligations in general; i.e. contracts (general and special) or non-contractual obligations. See the following provisions in this respect.

[2.] *"12/ 'trademark' means any visible sign capable of distinguishing goods or services of one person from those of other persons; it includes words, designs, letters, numerals, colours or the shape of goods or their packaging or combinations thereof;"*[101]

[10.] "Right of Priority

1/ Where any applicant files his applicant in Ethiopia within six months from the date on which he first filed in a foreign country an application for the same trademark in respect of same goods or services, the date on which the application was first filed in the foreign country shall be regarded as the date of filing if the applicant claims the right of priority and furnishes within the prescribed time limit a copy of the earlier application certified as correct by the office with which it was filed and other documents and information as prescribed."

Proposition II

Environment, according to the Webster's Encyclopedic Unabridged Dictionary, is "*the aggregate of surrounding things, conditions, or influences, esp. as affecting the existence or*

[101] Trade Mark Registration and Protection Proclamation, Proclamation No. 300/2002, (Fed. Negarit Gazeta of the FDRE, 9th yr., No.12, Addis Ababa).

development of someone or something". A more exhaustive, professional kind of definition reads as follows.

> *" 'Environment' means the totality of all materials whether in their natural state or modified or changed by human, their external spaces and the interactions which affect their quality or quantity and the welfare of human or other living beings, including but not restricted to land atmosphere, weather and climate, water, living things, sound, odor, taste,, social factors, and aesthetics;"*[102]

A related legislation defines terms such as

> *" 'Environment Impact Assessment' means the methodology of identifying and evaluating in advance any effect, be it positive or negative, which results from the implementation of a proposed project or public instrument;.."*[103]
>
> *" 'Impact' means any change to the environment or to its component that may affect human health or safety, flora, fauna, soil, air, water, climate, natural or cultural heritage, other physical structure, or in general, subsequently alter environmental, social, economic or cultural conditions;"*
>
> *" 'Effluent' means waste water, gas other fluid, treated or untreated, discharged directly or indirectly into the environment;*[104]
>
> *" 'Hazardous material' means any unwanted material that is believed to be deleterious to human safety or health or the environment;*
>
> *" 'Pollutant' means any substance whether liquid, solid, or gas which directly or indirectly:*
>
> *(a) alters the quality of any part of the receiving environment so as to effect its beneficial use adversely; or*

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[102] A Proclamation Provided for the Establishment of Environmental Protection Organs, Proclamation No. 295/2002, (Fed. Negarit Gazeta of the FDRE, 9th yr., No. 7, Addis Ababa).

[103] Environmental Impact Assessment Proclamation, Proclamation No. 299/2002, (Fed. Negarit Gazeta of the FDRE, 9th yr., No.11, Addis Ababa).

[104] Environmental Pollution Control Proclamation, Proclamation No. 300/2002, (Fed. Negarit Gazeta of the FDRE, 9th yr., No.12, Addis Ababa).

(b) produces toxic substances, diseases, objectionable odour, radioactivity, noise, vibration, heat, or any other phenomenon that is hazardous or potentially hazardous to human health or to other living things;

"" 'Pollution' means any condition which is hazardous or potentially hazardous to human health, safety, or welfare or to living things created by altering any physical, radioactive, thermal, chemical, biological, or other property of any part of the environment in contravention of any condition, limitation or restriction made under this Proclamation or under any other relevant law;"

Questions 2

2.1 See the definition given to the concept of environment? Is it not all inclusive? What is the focus then?

2.2 Wouldn't it be batter be associated with impact i.e. modification, change etc. imparted on elements of or aspects of or even on the entire environment?

Questions 3

1. *Art. 2 (11) " 'Fixation' means the embodiment of works or images or sounds, or of the representations thereof, from which they can be perceived, reproduced of communicated through a device prepared for the purpose;"*
2. *Art. 2 (1) " 'Audio-visual work' means a work that consists of a series of related images, which impart the impression of motion, with or without accompanying sounds, susceptible of being made visible; by any appropriate device, and includes a cinematographic or other film."*[105]
3. Art. 2 (1)-

[105] Article 2, sub 1 & 11, Copyright and Neeigboring Rights Protection, Pro. No. 410/2004, Fed. Neg. Gaz., year 10th No. 55.

"Radio Wave" shall mean a radio wave assigned to users for a specific service in accordance with the radio regulations of International Telecommunication Union; "[106]

4. See definition Art. 2 (13)[107]

3.1 Which of these definitions do you think are "good"?

3.2 Read the Proclamation. Does the definition above under no. 2 do any service?

3.3 How about the definition under no. 4 above – see the 6 divisions and the sub divisions of Art. 2 (13) of Proclamation 285/2002 thereof. Again, does this way of stipulating serve the purpose set for definition? If not, come up with concrete solution (in view of tax laws).

Question 4

12 "Reproduction by Libraries, Archives and Similar Institutions

1) "Notwithstanding the provision of Article 7 (1) (a) of this Proclamation, the owner of copyright cannot forbid a reproduction of a work by a library, archive, memorial hall, museum or similar institutions whose activity directly or indirectly is not for gain

2) "A library or archive can make a reproduction of a published Article, short work or short extract of a work to satisfy the request of a physical person, provided that:

a) the library or archive is satisfied that the copy will be used solely for the purpose of study, scholarship or private research,

b) the act or reproduction is an isolated case occurring, if repeated, on separate and unrelated occasion, and

c) there is no available administrative organization which the educational institution is aware of, which can afford a collective license of reproduction"

[13] 1/" the reproduction in a newspaper or periodical, the broadcasting or other communication to the public of an Article published in a newspaper or periodical on current economic, political, social, (ro) religious or similar topics unless the right or authorize

[106] Broadcasting Proc. No. 178/1999, Fed. Neg. Gaz., year 5th no. 62.

[107] Value Added Tax Proclamation No.285/2002, Fed. Neg. Gaz. Year 8th no. 33.

reproduction or broadcasting or the communication to the public is expressly reserved on the copies by the author or owner of copyright or in connection with broadcasting or other communication to the public of the work;"

18. "Display of copies of works

"The public display of originals or copies of works, without the authorization of the author or owner of copyright shall be permitted, where the display is made other than by means of a film slide, television image or otherwise on screen or by means of any other device or process and the work has been published or the original or the copy displayed has been sold, given away or otherwise transferred to another person by the author or his successor."

[21] 6/ "Notwithstanding the provisions of Sub-Article (5) of this Article, the co-authors of the audiovisual work and the authors of the pre-existing works included in, or adapted for the making of the audiovisual work shall maintain their rights in their contributions or pre-existing works, respectively, to the extent those contributions or pr-existing work can be subject of acts covered by their economic rights separately from the audiovisual work."

[26] *4/ "The performer independently of his economic rights or even after the transfer of that right shall have the right:*

a) to be identified as the performer as regards his live performances, the performances fixed in sound recordings, except where omission is dictated by the manner of the use of the performance.

b) object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.

c) the provision of Article 8 (2) and (3) shall apply mutatis mutandis to the right of performers granted in this Article."

See the underlined part of the provision cited

4.1 Are they qualifiers? If no, what are they? If yes what kind of qualifiers are they?

4.2 Does any one (some or all) of them invite(s) interpretation?

4.3 How batter is they shaped?

Question 5

[2.] "In this Proclamation:-[108]

1) 'Condominium' means a building for residential or other purpose with five or more separately owned units and common elements, in a high-rise building or in a row of houses, and includes the land holding of the building,"

[21.] "Sale by the Declarant

1) The declarant may conclude the contract of sail of a unit before or after registration of the building."

[22.] "Lease of a Unit

1) The owner of a unit who leases or renews lease of a unit shall notify to the unit owners association the contract thereto, and shall provide a copy of the contract of lease or renewal."

5.1 Ownership understood as consisting of *usus, fructus and abuses.* How do you characterize the right one has over a condominium?

5.2 In here, you find collective group and individual ownership co-mingled. Try to identify these rights? Then, how do you protect the rights of these category of owners, say in case of disposition?

5.3 Right in condominium can be held in the form of shares. Do shares entitle one to right in rem? If so, how would it be possible for an individual owner to sale or mortgage/pledge his/her share with out the consent of members?

5.4 There is conceptual in consistency in these provisions, then present your own alternative draft with its justifications.

Proposition III

The definition given by the Proclamation to the notion of "Invention" can be broken in the following manners.

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[108] Condominium Proclamation, Proclamation No. 370/2003, (Fed. Negarit Gazeta of the FDRE, 9th yr., No. 95, Addis Ababa).

3. The object of the law

3.1 drugs for human use?

3.2 drugs for farm animals? –wild pets?

3.3 drugs for plants- garden? Wild free?

- should the Authority lave its own specialized prosecutor
- How about investigator –by police? Special police
- how about courts
    - Regular?
    - Special count

4. Lass on to be learnt

4.1 a. How does international instruments discriminate one from another

b. Look at us Drug administration

c. take the law on any other state, say India

4.2 Which government agency has control over this sphere of activity

a. Ministry of Health

b. Ministry of Agriculture

c. How about

- Custom office
- Standard authority
- Institute of food material

5. The powers of the Agency in matters of

5.1.1 Importation

5.1.2 Production

5.1.3 Distribution

5.1.4 How about traditional medicine? Would bring healers under the authority

5.2 Control

5.2.1. Should the authority have its own laboratory

5.2.2 How auditing should be hone

5.2.3 Entrance without warrant?

5.2.4 (Incase of surprise visit)

5.2.5 The obligation to declare on the part of business meat

5.2.6 Who should have the power of licensing and revoking

6. Measures

6.1 Administrative

-Find warning

- Seizure and confiscation

- Revocation of permit

6.2 Penal

Proposition IV

Suppose, you are a legal advisor in the Prime Minister's Office, you found a memo from his excellence that he is thinking of establishing a "Drug Authority" and that he has assigned you sketch outline, which show a direction for future research, and legislation.

Let us give you a preliminary outline, from which you will come up with your own drafter after answering the questions you will find at the end.

Art 1. A. The title of the establishing legislation

B. The preamble

Art 2. The definition

(a) illustration

Drug- an article for use in

(a) diagnosis

(b) cure

(c) mitigation

(d) prevention

- natural or synthetic material – depressant or relevant
- nourishing material vitamins baby food
- clearing material like soap etc
- cosmetics

(b) all words that have to be defined may not be discovered at begriming stage of drafting, you better gather them are on

7. Status of Previous lawn

7.1. Amendment

7.2 Transitory Provision

Question 6

6.1 What are to be included and what to be excluded from the ambit of the law.

6.2 What was or were the defects previous and existing laws that required new remedy

6.3 How much power should the Authority be given

- in maters of implement ice enforcement?
- regulation and adjudication?
- in maining lawn?

Question 7

Article 55 (16) of FDRE Constitution reads as follows: *"[i]t shall, on its own initiative, request a joint session of the House of the Federation and of the House of Peoples' Representatives to take appropriate measures when State authorities are unable to arrest violations of human rights within their jurisdiction. It shall, on the basis of the joint decision of the House, give directives to the concerned State authorities."*

7.1 As to the first underlined part, in terms of tone

a) is it better to read it as it is?

b) how about if it were reformulated as *"On its own initiative, it shall request .."*?

c) how about *"It shall request on its own initiative .."*?

7.2 As to the next underlined part

a) is it a qualifier? If not, what is it? If yes, what does it qualify?

b) which is preceeded by *".. to take appropriate measures .."* is taken as one measure. The other measure is *".. giving directives .."*, which is mentioned in the latter, thirdly underlined part. Would joining these two as follows: *".. to take appropriate measures and give directives when State .."* solve or create any syntactic ambiguity?

7.3 Sub-Article 16 as it is, is made up of two independent sentences. What is the quality of the second sentence? That is to ask whether it is Sub-Sub-Article or is it a *proviso*? Does it subtract or add to the first sentence?

Question 8

See Proclamation No. 359/2003?

7.1 Article 51 (1), (14), (16) and Art. 62 (9) of FDRE con. Is their substantive difference between:

a. These and the respective provisions of the proclamation?
b. The constitution and the proclamation (Amharic version)?

7.2 Identify inconsistencies between your state constitution English and state language version?

Part V. Operational Typologies of Bills: Interpretative Approach

Chapter X
Particular Aspects

Section I. Commencement [109]

10.1.1 In Respect of Jural Relations

'Commencement', used with reference to an Act, means the day on which the Act comes into force; i.e. the day when the assent of the Governor or the President, as the case may be, is first published in the official gazette of the State.

An Act cannot be said to commence or to be in force unless it is brought into operation by legislature enactment or by the exercise of authority by a delegate, empowered to bring it into operation.

Legislatures have plenary power of legislation within the field of legislation committed to them; and subject to certain Constitutional restrictions, they can legislate prospectively as well as retrospectively. It is, however, a cardinal principle of drafting that every statute is prima-facie prospective unless it is expressly or by necessary implication made to have retrospective operation. But, the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is "deemed to be prospective only *nova constitutio futuris forman imponere debet non praeteritis* (i.e. "A new law ought to regulate what is to follow, not the past").

As a logical corollary of the general rule, that retrospective operation is not taken to be intended unless that intention is manifested by express words or necessary implication, there is a

[109] G.P. Singh, op cite, Note No. , pp. 315-338..

subordinate rule to the effect that a statute or a section in it is not to be construed so as to have larger retrospective operation than its language renders necessary. It is not necessary for an express provision to be provided so as to make a statute retrospective. On the other hand, the presumption against retrospectively may be rebutted by necessary implication, especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole.

The rule against retrospective construction is not applicable to a statute merely because a part of the requisites for its action is drawn from a time antecedent to its passing. If that were not so, every statute will be presumed to apply only to persons born and things come into existence after its operation and the rule may well result in virtual nullification of most of the statutes. An amending Act is, therefore, not retrospective merely because it applies also to those to whom pre-amended Act was applicable, but because the amended Act came into force from the date of its amendment and not from an anterior date. But this does not mean that a statute, which takes away or impairs any vested right acquired under existing laws or which creases a new obligation or imposes a new burden in respect of past transactions, will not be treated as retrospective.

10.1.2 In Respect of Procedure

In contrast to statutes dealing with substantive rights, statutes dealing with merely matters of procedure are presumed to be retrospective unless such a construction is textually inadmissible. As stated by Lord Denning: The rule that an Act of parliament is not be given retrospective effect applies only to statutes which affect vested rights. It does not apply to statutes which only alter the form of procedure or the admissibility of evidence, or the effect which the courts give to evidence. If the new Act affects matters of procedure only, then, prima-facie, it applies to all actions in pending as well as future ones.

The classification of a statute as either substantive or procedural does not necessarily determine whether it may have a retrospective operation. For example, a statute of limitation is generally regarded as procedural but its application to a past cause of action has the effect of reviving or extinguishing a right of suit. Such an operation cannot be said to be procedural. It has also been

seen that the rule against retrospective construction is not applicable merely because a part of the requisites for its action is drawn from a time antecedent to its passing.

The principle is that parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned about them unless otherwise a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that parliament will make it clear if that is intended.

10.1.3 In Respect of Regulating Transfers

Statutes enacted for regulating succession are not applicable to successions which had already opened, as otherwise the effect will be to divest the estate from persons to whom it had vested prior to coming into force of the new statute. The material point of time, for applicability of a law altering the order of succession is the date when it opens thereafter.

Statutes prescribing formalities for effecting transfers are not applicable to transfers made prior to their enforcement, and similarly statutes dispensing with formalities which were earlier necessary for making transfer have not the effect of validating transfers which were lacking in these formalities and which were made prior to such statutes. A transfer made in contravention of a statutory prohibition is invalid and is not validated by repeal of the statute containing the prohibition and permission obtained to make a transfer, under a law which allows transfer or permission is of no avail if the law is amended before the transfer, prohibiting transfer completely.

10.1.4 In Respect of Limitation

Statutes of limitation are regarded as procedural and the law of limitation which applies to a suit is the law that came into force at the date of the institution of the suit, irrespective of the date of accrual of the cause of action. The object of a statute of limitation is not to create any right, but to prescribe periods within which legal proceedings may be instituted for enforcement of rights

which exist under the substantive law. But, after expiry of the period of limitation, the right of suit comes to an end. Therefore, if a particular right of action had become barred under an earlier limitation Act, the right is not revived by a later Act.

When the later Act provides a shorter period of limitation than that provided by the earlier Act, a right of suit, which is subsisting according to the earlier Act on the date when the later Act comes into operation, will not be taken to be extinguished. If there is still time even on the basis of the later Act within which such a suit can be filed, the right has to be availed of within that period, and the benefit of the earlier Act is not available. Condoning delay in such cases in filing the suit or claim will be governed by the provisions of the later Act and not by the provisions of the earlier Act. But if the shorter period provided in the later Act had already expired on the date of its enforcement, the suit can be filed within a reasonable time after the commencement of the later Act. Otherwise the effect of the later Act would be to extinguish a subsisting right of suit, an inference which cannot be reached except from express enactment or necessary implication.

To avoid these complications when a later limitation Act enacts shorter periods, it is usual to postpone its coming into effect for some reasonable time, or to make provision for a time gap within which the benefit of the earlier Act can be taken. Statutes of limitation are thus retrospective in so far as they apply to all legal proceedings brought after their operation for enforcing causes of action accrued earlier, but they are prospective in the sense that they neither have the effect of reviving a right of action which was already barred on the date of their coming into operation, nor do they have the effect of extinguishing a right of action subsisting on that date. But a statute may, expressly or implicitly by retrospectively extending limitation, revive a barred claim.

10.1.5 In Respect of Fiscal Matters

Fiscal legislation imposing liability is generally governed by the normal presumption that it is not retrospective and it is a cardinal principle of the tax law that the law to be applied is that in force in the assessment year unless otherwise provided expressly or by necessary implication. The above rule applies to the charging section and other substantive provisions and does not

apply to machinery or procedural provisions of a taxing Act which are generally retrospective and apply even to pending proceedings. But a procedural provision, as far as possible, will not be so construed as to affect finality of tax assessment or to open up liability which had become barred. Assessment creates a vested right and reassessment cannot be carried out unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective.

10.1.6 In Respect of Remedial and Declaratory Statutes

Just as the fact that a prospective disqualification under a statute results from anterior misconduct that renders the statute insufficient to be retrospective, so also the fact that a prospective benefit under a statutory provision is in certain cases to be measured by or depends on antecedent facts, does not necessarily make the provision retrospective.

A remedial Act is not necessarily retrospective; it may be either enlarging or restraining; and it takes effect prospectively unless it has retrospective effect by express terms or necessary intendment.

The presumption against retrospective operation is not applicable to declaratory statutes. For modern purposes, a declaratory Act may be defined as an Act to remove doubts existing as to the Common Law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective. The usual reason for passing a declaratory Act is to set aside what parliament deems to have been a judicial error, whether in the statement of the Common Law or in the interpretation of statutes. Usually, if not invariably, such an Act contains a Preamble, and also the words '*it is declared*' are not conclusive that the Act is declaratory; for these words may, at times, be used to introduce new rules of law and the Act in the latter case will only be amending the law and will not necessarily be retrospective.

Section II. Statutes Controlled by Issues of Constitution

10.2.1 Operation Controlled on Considerations of Constitutionality

A statute is controlled so as to make it effective and operative on the principle expressed in the maxim *ut res magis valeat quam pereat*. There is, therefore, a presumption that the legislature dose not exceeds its jurisdiction, and the burden of establishing that Act is not within the competence of the legislature, or that it transgresses other constitutional mandates, such as those related to fundamental rights, is always on the person who challenges its vires. *"Unless it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the constitution it must be allowed to stand as the true expression of the national will"*. The principle is, however, subject to the expression that once the citizen is able to establish that the impugned legislation has invaded his fundamental rights under Article 29 of the Constitution, Ethiopia should be capable to justify that the law is saved under Sub-Art (6) of the same Article. The onus shifts to the state to satisfy that the restrictions imposed are reasonable and in the public's interest.

> *"There is a general presumption that a legislature does not intend to exceed its jurisdiction, and there is ample authority for the prepositions that general words in a statute are to be construed with reference to the powers of the legislature which enacts it"*.

If the enactment cannot be saved by construing it consistent with its constitutionality, it may be seen whether it can be partly saved. When the Act is held to be in part inconsistent with the higher law in the Constitution can it partly be saved, if the test of severability is satisfied. The test is not of textual severability, but of substantial severability which permits even modification of the text in order to achieve severance.

10.2.2 Operation Controlled on Considerations of Territoriality[110]

(I) General — In case of legislatures which may for convenience be called non-sovereign legislatures like those of Colonies, Australian States or Canadian Provinces, it has been said that they are incompetent to legislate with extra-territorial effect. This is only a convenient mode of stating that a law made by such a legislature must bear a real territorial connection with the subject-matter which it is dealing. Before the statute of Westminster, 1931, the Dominion Parliaments were also subject to the same limitation. This principle or rule, forbidding extra-territorial legislation, has been characterized *"as a doctrine of some what obscure extent"*. The obscurity lies in defining by any exact formula the territorial nexus which will be sufficient for holding the legislation intra vires. "Any connection" which is "relevant" or "real" with the exercise of the power of the state concerned has been held to be sufficient. And at times, stress has been mainly laid on the topic of legislation committed to the legislature. But it is also equally well established by high authority that *"a connection is too remote"* or which is *"completely irrelevant"* will not be enough for holding the legislation intra vires.

Even when the legislative competence is not restricted on considerations of territorial nexus, it is presumed that statutes are not intended in the absence of contrary language or clear implication, to operate on events taking place or persons outside the territories to which the statutes are expressed to apply. Thus, there is a general principle applicable to Income-Tax Acts that either the source from which the taxable income is derived should be within the territorial limits of the country imposing the tax or the person whose income is to be taxed should be resident there.

10.2.3 Operation Controlled on Consideration of International Law

The presumption that a statute is not intended to apply to persons outside the territories of the State enacting it is particularly strong in case of foreigners; for as to them the normal presumption is further strengthened by another presumption that the legislature intends to respect the rules of International Law.

[110] Id., pp. 364-376.

Simply, if a term of a statute is clear and unambiguous, they must be given effect to whether or not they carryout the state's treaty obligations, for the sovereign power of legislation extends to breaking treaties and any remedy for a breach of an international obligation lies in a forum other than the state's municipal courts.

Chapter XI

Salient Features (Typologies) Major Types of Statutes

Section I. Perpetual and Temporary Statutes[111]

A statute may be either perpetual or temporary. It is perpetual when no time is fixed for its duration. Such a statute remains in force until its repeal, which may be express or implied. A perpetual statute is not perpetual in the sense that it cannot be repealed; it is perpetual in the sense that it is not abrogated by efflux or by non-age. A statute is temporary when its duration is only for a specified time, and such a statue expires on the expiry of the specified time unless it is repealed earlier. Simply because the purpose of a statute, as mentioned in its preamble, is temporary, the statute cannot be regarded as temporary when no fixed period is specified for its duration.

Example: The TG Charter's Accession of Transitional Legislative Power has no effect on the continuance of a perpetual Act enacted during the continuance of that power. The duration of a temporary statute expires; it cannot be made effective by merely amending the same. The only apt manner of reviving the expired statute is by re-enacting a statute in similar terms, or by enacting a statute expressly saying that the expired Act is herewith revived.

A question often arises in connection with legal proceedings in relation to matters connected with a temporary Act, whether they can be continued or initiated after the Act has expired. The answer to such a question is again dependent upon the construction of the Act as a whole. But in the absence of such a provision, the normal rule is that proceedings taken against a person under a temporary statute *ipso facto* terminate as soon as the statute expires. A person, therefore, cannot be prosecuted and convicted for an offence against the Act after its expiration in the absence of a saving provision; and if a prosecution has not ended before the date of expiry of the Act, it will automatically terminate as a result of the termination of the Act.

[111] Id. Pp. 380-387.

When a temporary Act expires, the normal rule is that any appointment, notification, order, scheme, rule, form or bye-law made or issued under the Act will also come to an end with the expiry of the Act and will not be continued even if the provisions of the expired Act are re-enacted.

Section II. Statutes Imposing Tax, Charges and Fees

Tax and fee are impositions made by a state for raising revenue. A tax is imposed for public purpose for raising general revenue of the state. A fee, in contrast, is imposed for rendering services and bears a broad correlation ship with the services rendered. [112]

Taxes are specifically named by a taxing statute. Taxing statutes are to be strictly formulated, for the well established rule is that tax payers are not to be taxed with out clear prescription. The provisions of law, which in particular levy and determine the manner of assessment and collection, should strictly be shaped to mean exactly that (those) the legislator intended to address. For, again there is no room to intendment, no equity and nor presumption. One should only look at the language used. Fiscal majors are not to be upon any theory of taxation i.e. theories may help to base the basic tax upon, not to read the tax law per se.

In fiscal legislation a transaction cannot be taxed on any doctrine of *"the substance of the matter"* as distinguished from its legal signification, for a subject is not liable to tax on supposed "spirit of the law" or " by inference or by analogy".

It was pointed out that "the true nature of the legal obligation" arising out of a genuine transaction "and nothing else is the substance". The above principle, which is known as Duke of Westminster principle, is subject to the new approach of the courts towards tax evasion schemes consisting of a series of transactions or a composite transaction.

[112] Id., pp. 487-507.

In constructing a section in a taxing statute, according to Lord Simonds, *"the question is not at what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits"*. This was called *"the one and only property test"*. It is, therefore not the function of a court of law to give towards a strained meaning to cover loopholes through which the evasive tax-payer may find escape or to tax transactions which, had the legislature thought of them, would have been covered by appropriate words.

The same rule applies even if the object of the enactment is to frustrate legitimate tax avoidance devices for moral precepts are not applicable to the interpretation of revenue statues.

It may thus be taken as maxim of tax, which although not to be overstressed, ought not to be forgotten that, *"The subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax on him."* The proper course in shaping revenue Acts is to relay on clear keeping in mind that no tax can be imposed without words clearly showing an intention to lay the burden and that equitable construction of the words is not permissible

Section III. Statutes Determining Jurisdiction[113]

The exclusion of jurisdiction of Civil Courts is not to be readily inferred. And such exclusion must either be *"explicitly expressed or clearly implied"*. *"It is a principle by no means to be whittled down"* and has been referred to as a *"fundamental rule"*. As a necessary corollary of this rule, provisions excluding jurisdiction of Civil Courts and provisions conferring jurisdiction on authorities and tribunals other than Civil Courts are not readily acceptable.

The existence of jurisdiction in Civil Courts to decide questions of civil nature being the general rule, while exclusion being an exception, the burden of proof to show that jurisdiction is excluded in any particular case is on the party raising such a contention. The rule that the exclusion of jurisdiction of civil courts is not to be readily inferred is based on the theory that

[113] Id., pp. 445-461.

Civil Courts are courts of general jurisdiction and the people have a right, unless expressly or impliedly debarred, to insist for free access to the courts of general jurisdiction of the state.
Indeed, the principle is not limited to Civil Courts alone, but applies to all courts general jurisdiction including Criminal Courts. Exclusion of jurisdiction of ordinary Criminal Courts can be brought about by setting up courts of limited jurisdiction in respect of the limited field; that, only if the vesting and the exercise of that limited jurisdiction is clear and operative and there is an adequate machinery for the exercise of the limited jurisdiction.

Section IV. Remedial and Penal Statutes[114]

11.5.1 Remedial Statutes

Every, modern legislation is supported with some policy and, speaking broadly, has some beneficial object behind it. But then there are legislations which are directed to cure some immediate mischief and bring into effect some type of social reform by amelioration the condition of certain class of persons who, according to present-day notions, may not have been fairly treated in the past.[1] Such legislations prohibit certain acts by declaring them invalid and provide for redress or compensation to the persons aggrieved. If a statute of this nature does not make the offender liable to any penalty in favour of the state, the legislation will be classified as remedial. Remedial statutes are also known as welfare, beneficent or social justice oriented legislation. Penal statutes, on the other hand, are those which provide for penalties for disobedience of the law and are directed against the offender in relation to the state by making him liable to imprisonment, fine, forfeiture or other penalty. If the statute enforces obedience to the command of the law by punishing the offender and not by merely redressing an individual who may have suffered, it will be classified as penal.

A remedial statute receives a liberal construction, whereas a penal statute is strictly construed. As now understood, the distinction between liberal and strict drafting has very much narrowed down and is only important in resolving a doubt which other canons of construction fail to solve when

[114] Id., 519-558.

two or more constructions are equally open. In case of remedial statutes the doubt is resolved in favour of the class of persons for whose benefit the statute is enacted; whereas in case of penal statutes the doubt is resolved in favour of the alleged offender.

Difficulty arises in classifying modern welfare legislations which are designed for the benefit of a class of persons such as workers, women and the like, but which quite often contain penal provision.

A statute, therefore, may in certain aspects be a penal enactment and in certain others a remedial one. In respect of those provisions, in such a complex statute, which are sanctioned on the pain of punishment for a crime the rule of strict construction in the limited sense now known may have to be applied. At any rate, an undue effort to construe such a provision liberally to promote the beneficent purpose behind it may be effectively counterbalanced on consideration that a breach thereof leads to penal consequences. It will be immaterial for application of the rule of strict construction whether the duty and the penalty are imposed by the same section, or by different section or the one by a rule made under the Act and the other by the Act itself.

11.5.2 Penal Statutes

If a statute laid a mandatory duty but provided no mode of enforcing it, the presumption in ancient days was that the person in breach of the duty could be made liable for the offence of contempt of the statute. This rule of construction is now obsolete and has no application to a modern statute. Clear language is now needed to create a crime. A statute enacting an offence or imposing a penalty is strictly construed. But this rule, as already stated, is now-a-days of a limited application. The rule exhibits a preference for the liberty of the subject and in a case of ambiguity enables the Court to resolve the doubt in favour of the subject and against the legislature which has failed to express itself clearly.

So when in a statute dealing with a criminal offence impinging upon the liberty of citizens, a loophole is found, it is not for Judges to cure it, for it is dangerous to derogate from the principle that a citizen has a right to claim that, howsoever much his conduct may seem to deserve

punishment, he should not be convicted unless that conduct falls fairly within the definition of crime of which one is charged.

11.5.3 Mens Rea in Statutory Offences[115]

Existence of a guilty intent is an essential ingredient of a crime and the principle is expressed in the maxim- *Actus non facit reum nisi mens sit rea*. The legislature may, however, create an offence of strict liability where *mens rea* is wholly or partly not necessary. Such a measure is resorted to in public interest and moral justification of law. Strict liability is well expressed by Dean Roscoe Pound: *"such statutes are not meant to punish the vicious will but to put pressure on the thoughtless and inefficient to do their whole duty in the interest of public health, safety or morals."* The offences falling under this class are known as "public-welfare offences".

"The absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent." Since a person is presumed to know the law, his ignorance does not normally afford in any manner whatsoever, to enable a person to find it out by appropriate enquiry, absence of *mens rea*. But it is no defense that the accused acted on a mistaken interpretation of the statute which he honestly believed to be correct.

When a statute creates an offence, the question whether the offence involves the existence of *mens rea* as an essential element of it or whether the statute dispenses with it and creates strict liability are questions which have to be answered on a fundamental principle that an offence cannot be made out without the existence of *mens rea, "unless from a consideration of the terms of the statute and other relevant circumstances it clearly appears that must have been the intention of parliament"*.

[115] Id., pp. 553-558.

11.5.4 Vicarious Liability in Statutory Offences[116]

It has already been seen that there is a presumption that *mens rea* is a necessary constituent of statutory offences and that presumption is not displaced except by clear words or by necessary implication. Further, the maxims "Respondent superior" and '*qui facit per a lium facit per se*' find no place in the criminal law. The normal rule, therefore, is that criminal liability in a matter that might result either as a principal or as an accessory, springs from authorization and not simply from the relationship of master and servant. The legislature may, however, in an infinite variety of ways provide that there is to be criminal liability in one act *us reus*, apart from cases where express provision is made to that effect. The question is one of shaping whether by enacting a particular provision the legislature, in the light of the object of the statute, has expressed itself by necessary implication so as to make a matter criminally liable for the acts of his servants or agents.

It may also be that the statutory provision is so drafted that it only makes the employer liable for the offence, but dos not make the employee liable for whose act or default the employer is made liable.

Section VI. Delegated Legislation[117]

Delegated legislation permitted by enabling Acts appears under different names, without there being any clear-cut demarcation between all of them. Regulation and Order are by far the most common names under which delegated legislation is permitted. R*egulation* may be made as a rule, whereby it partakes the character of delegated legislation, which confers on different executive authorities to make rules in respect of certain matters. Here, the expression *regulation* should be used to describe the instrument by which the power to make substantive law is exercised.

[116] Id., pp. 568-579.

[117] Id., pp. 581-627.

The expression *order* should be used to describe the instrument of the exercise of (A) executive power, (B) the power to take *judicial* or *quasi-judicial decisions*. This suggestion, however, has neither been adopted in England nor in India. For example, the word *order* has not been only used to signify the power of taking executive, judicial or quasi-judicial decisions, but has also been used to confer extensive power of making delegated legislation.

The words *directive* is also at times used to enable the making of delegated legislation. "Circulars" issued may also contain delegated legislation having the force of law.

The word *notification* is normally used in the context of conditional legislation; e.g. to bring into operation the enabling Act or to grant exemption from its provisions or to extend its operation to new persons or objects.

Delegated legislation, in the shape of 'bye-laws' is some what distinct. The power to make 'bye-laws', is conferred on privet interties within their areas or resorting to their undertaking", and the bye-laws are generally subordinated to the rules and regulations, if any, to be made under the enabling Act.

11.6.1 Constitutional Limits of Legislative Delegation

a) General principles[118]

Consistent with their sovereign character, the legislature in Ethiopia have been held to possess wide powers of delegation. This power is, however, subject to one important limitation. The legislature cannot delegate essential legislative functions which consist in the determination or choosing of the legislative policy and of formally enacting that policy into binding the legislative policy and of formally enacting that policy into a binding rule of conduct. The legislature cannot delegate "uncanalized and uncontrolled power", the power delegated must not be "unconfined and vagrant" but must be "canalized within banks that keep it from overflowing". The bank, that

[118] Id., pp. 584 591-.

set the limits of the power delegated, is to be constructed by the legislature by declaring the policy of the law and by laying down standards for guidance of those on whom the power to execute the law is conferred. So the delegation is valid only when the legislative policy and guidelines to implement it are adequately laid down and the delegate is only empowered to carry out the policy within the guidelines laid down by the legislature.

What is permitted, therefore, is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up the details. The legislature may, after laying down the legislative policy, confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of the policy. The legislature's ability to delegate these function is derived from an implied conferral of the authority for the effective exercise of the legislative power granted by the constitution on the principle that everything necessary to the exercise of a power is implicit in the grant of the power. The limit of this ability to delegate; i.e. the inhibition against delegation of essential legislative functions, is also impliedly derived from the provisions of the constitution which confer the power to make laws on the Legislature. It is reasoned that the Constitution entrusts the duty of law-making to Parliament and the legislature to States; and thereby impliedly prohibits them to throw away that responsibility on the shoulders of some other authority.

Thus, the area of compromise between these two implications determines the permissible limits of delegation. The question, whether any particular legislation suffers from excessive delegation, has to be decided by Courts having regard to the subject-matter, the scheme, the provisions of the statute including its preamble, and the facts and circumstance in the background of which the statute is enacted.

It is, however, settled that the Legislature, except when authorized by the Constitution, cannot create a parallel legislature or abdicate its functions in favour of some outside authority. Similarly, the Legislature cannot delegate its power to repeal a law or even to modify it in essential features. These are cases where the Legislature does not limit the delegation to ancillary or subordinate legislative functions but parts with its essential legislative functions and thereby transgresses the limits of permissible delegation. But this does not mean that if a power to extend

or apply laws to a territory is validly conferred on the executive, it can be given subject; the power can also be exercised when it supplements or modifies the existing law; but it cannot be exercised when it brings about an express or implied repeal or when it is in conflict with or repugnant to or modified is essential features while it is being extended but its impact may be to modify or restrict the existing law and yet the extension will be valid provided there is no express or implied repeal of or conflict or repugnancy with the exaction law as stated above. When the Legislature requires the delegated legislation to be laid before it, there is no abdication as the delegate is kept under the vigilance and control of the Legislature.

As already seen the legislature cannot delegate its power to repeal a law or even to modify it is essential features. But when the legislature gives power to make delegated legislation and further declares that the same shall have effect even if inconsistent with any existing law, the delegated legislation has that effect, for it is by the will of the legislature and not by the will of the delegate that the overriding effect is given to the delegated legislation. Similarly, when a statutory provision is in the form 'except as may be otherwise prescribed by regulation or when it is framed in the form of 'subject to the regulations, the above rules are made to prevail over the statutory provision.

b. Distinction between Conditional and Delegated Legislation[119]

A distinction is said to exist between what is called conditional legislation and delegated legislation proper. In case of conditional legislation, the legislation is complete in itself but its operation is made to depend on fulfillment of certain conditions and what is delegated to an outside authority, is the power to determine according to its own judgment whether or not those conditions are fulfilled.

In case of delegated legislation proper, some portion of the legislative power of the legislature is delegated to the outside authority in that, Legislature, though competent to perform both the external and ancillary legislative function, performs only the former and parts with the latter, i.e.,

[119] Id., pp. 591-604.

the ancillary function of laying down details in favour of another for executing the policy of the statute enacted. The distinction between the two exists in this that whereas conditional legislation contains no element of delegation of legislative power on some outside authority and is therefore open to attack on the ground of excessive delegation.

11.6.2 Delegated Legislation and Juridical Review[120]

Delegated legislation is open to the scrutiny of Courts and may be declared invalid particularly on two grounds; (a) violation of the Constitution; and (b) violation of the enabling Act. The second ground includes within itself not only cases of violation of the substantive provisions of the enabling Act, but also cases of violation of the mandatory provision of the enabling Act, but also cases of violation of the mandatory procedure prescribed. It may also be challenged on the ground that it is contrary to other statutory provisions or that it is so arbitrary that it cannot be said to be in conformity with the statute or Article 9 of the constitution. Compliance with the laying requirement or even approval by a resolution of Parliament does not confer any immunity to the delegated legislation but it may be a circumstance to be taken into account along with other factors to uphold its validity. As earlier seen a laying clause may prevent the enabling Act being declared invalid for excessive delegation. When reasons are required to be stated for making delegated legislation, e.g. grant of exemption from taxation, reasons must be stated and they can be examined for deciding whether the delegate has acted within limits of the power conferred.

But delegated legislation cannot be questioned for violation principles of natural justice in its making except when the statute itself provides for that requirement. A requirement to make such enquiry as it thinks fit, before the authority concerned makes delegated legislation, does not confer any right on any one of being heard. But it is possible that the same statutory power may be both quasi-legislative and quasi-administrative and requirement of natural justice may have to be followed when it is excised quasi-administratively although not when its exercise is quasi-legislative.

[120] Id., pp. 604-613.

11.6.3 Enabling Acts and Delegated Legislation[121]

A normal feature of enabling Acts is first to grant the power to make regulations etc., in general terms, e.g., to carry out the purposes of this Act' and then to say that 'in particular and without prejudice to the generality of the foregoing provision', such rule etc., may provide for a number of enumerated matters. If power is to be conferred to make subordinate legislation in general terms, the particularization of topics should be construed as merely illustrative and does not limit the scope of the general power.

Section VII. Amendment, Repeal and Designation

Amendment and repeal are, more often than not, interactive. A power to make a law with respect to the topics committed to parliament or state legislatures carries with it a power to repeal a law on those topics. Subject to any constitutional restriction, the general rule is that *"the power of a legislative body to repeal a law is con-extensive with its power to enact such a law,"* and a Legislature which has no power to enact a law on a particular subject-matter has also no power to repeal the same. A legislature, however, has no power to bind itself or its successor as to the course of future legislation, for to acknowledge such a power will mean that a Legislature can curtail its own or its successor's powers which are conferred by the Constitution and which cannot be restricted or taken away except by an amendment of Constitution. It is an axiom of British Constitutional Law that *"[a]cts of Parliament derogatory form the subsequent Parliament bind not. Because the Legislature, being in truth the sovereign power, is always of equal always of absolute authority: it acknowledges no superior unpin earth, which the prior Legislature must have been if its Ordinances could bind a subsequent parliament"*. It follows as a logical result that provision in a statue that it can not be repealed expressly or impliedly are of no legal effect. What parliament has done parliament can undo.

[121] Id., 627-636.

a. Express Repeal

The use of any particular form of words is not necessary to bring about an express repeal. The usual form is to use the words *'it is*' or '*are hereby repealed'* and to mention the Act sought to be repealed in the repealing section or to catalogue them as a schedule. The use of words *'shall cease to have effect'*, is also not uncommon. When the object is to repeal only a portion of an Act, the words *'shall be omitted'* are normally used. When repeal of an existing provision is accompanied by enactment of a new provision, which is the case when a new provision is *substituted* in place of, or is made in supersession of an existing provision, the declaration of invalidity of the new provision on the ground of want of competence will also invalidate the repeal. But, if the declaration of invalidity is on other grounds, e.g. arbitrariness or violation of fundamental rights, the repeal, speaking generally, will be effective, although the new provision is declared invalid unless from the totality of circumstances and the context is found that there was no intention to repeal in the event of the new provision being struck down.

b. Implied Repeal

There is a presumption against *repeal by implication*; and the reason of this rule is based on the theory that the legislature, while enacting a law, has a complete knowledge of the existing laws on the same subject-matter. And, therefore, when it does not provide a repealing provision, it gives out an intention not to repeal the existing legislation. When the new Act contains a repealing section mentioning the Acts which it expressly repeals, the presumption against implied repeal of other laws is further strengthened on the principle *expressio unius est exclusio alterius.*

Further, the presumption will be comparatively strong in case of virtually contemporaneous Acts. The continuance of existing legislative, in the absence of an express provision of repeal, being provisions of the later Act are so inconsistent with or repugnant to the provisions of the earlier Act *"that the two cannot stand together"*.

11.7.1 Principle of Amendment

As an application of the above principles, a *prior particular* or *special law* is not readily held to be impliedly repealed by later general enactment. The *particular* or special law deals only with a particular phase of the subject covered by the general law. And, therefore, reconciliation is normally possible between a *prior particular* Act and a *later general* Act. And so, the *particular* Act is construed as an exception or qualification of the *general* Act.

11.7.2 Effect of Repeal

A *prior general* Act may be affected by a subsequent *particular* Act, if the subject-matter of the *particular* Act prior to its enforcement was being governed by the general provisions of the earlier Act. In such a case the operation of the *particular* Act may have the effect of partially repealing the *general* Act, or curtailing its operation, or adding conditions to its operation for the particular cases.

11.7.3 Designation

If a later statute again describes an offence created by an earlier statute and imposes a different punishment, or varies the procedure, the earlier statute is repealed by implication, e.g. vagrancy.

Under the Common Law rule, the consequences of repeal of a statute are very drastic. Except as to transactions past and closed, a statute after its repeal is as completely obliterated as if it had never been enacted. The effect is to destroy all inchoate rights and all causes of action that may have arisen under the repealed statute. Therefore, leaving aside the cases where proceedings were commenced, prosecuted and brought to finality before the repeal, none other continue after the repeal. Another result of repeal is to revive the law in force at the commencement of the repealed statute. Thus if one statute is repealed by a second, which in turn is repealed by a third, the effect is to revive the first statute unless a contrary intention is indicated in the third statue. The confusion resulting from all these consequences gave rise to the practice of inserting saving clauses in repealing statutes, and so on.

As a consequence of the general principle that a statute, after its repeal, is as completely effaced from the statute book as if it had never been enacted. Subordinate legislation made under a statute ceases to have effect after repeal of the statute. This result can be avoided by insertion of saving clauses providing to the contrary.

11.7.4 Redesignation

Undeterred by ensuing chain reactions of error and mushrooming clouds of confusion, legislative draftsmen continue freely and frequently to renumber or relate the sections and other subdivisions of statutes. They have either been unaware of the results of such redesignation, or

1. Somewhat arbitrarily, perhaps, the term ‘’redesignation’’ is used in a limited sense in this paper to refer to situations in which an existing provision is given a new number or letter without relation to any concurrent change in the substance of the provision concerned. Typically such ‘’redesignations’’ are traceable to addition or deletion made elsewhere or to a simple effort to tidy the statute. The term as here used does not include (a) changes of a provision’s number or letter prompted by concurrent changes in its substance or (b) changes affecting substance but not the number or letter; such changes, involving special considerations, are not the center unwilling to recognize them. It is time to focus attention on some of these results and to call for a reappraisal of the practice.

References

Reed, D., Fundamental of Legal Drafting, 1969.

Peter, B., Modern Legal Drafting: A Guide to using Clearer Language, 2nd Edition, 2006.

Thornton, von G.C., Legislative Drafting, Butterworth's, 1979.

Wydick, Richard von C., Plain English for Lawyers, 4th Edition.

Peter, B. and Richard, C., Modern Legal Drafting: A Guide to a Clearer Language, Cambridge University Press.

Garner, von Bryan A., Legal Writing in Plain English: A Text with Exercises

Bernard, B. and Christo, B., Aspects of Legislative Drafting: Some South African Realities

An, Enquist and Laurel Currie Oates, Just Writing, Grammar, Punctuation, and Style for the Legal Writer, (2001)

Edward A. Nolefi and Pamela R. Tepper, Basic Legal Research and Writing, 1993

Martin, Cutts, Plain English Guide, How to Write Clearly and Communicate better, Oxford Quick References, (1999)

Dr. Markus, Boeckenfoerde, Max-Plank Manual on Legislative Drafting at the National level in Sudan, Heidlebrge (2006)

Massachusetts Senate, Legislative Drafting and Legal Manual, 3rd Edition, (2003)

Geoffrey Bowman, The Art of Legislative Drafting, (2002)

Glenn, Sarka, Legislative Drafting Manual, University of San Francisco, Center for Global Justice, (2003)

Ann, Seidman, Nalin Abeysekere and Robert Seidman, Assessing Legislation: a Manual for Legislators, (2003)

The Arizona Legislative Bill Drafting Manual, the Arizona Legislative Counsel (2007)

Paulos Tzadua, H. Scholler, The Fetha Nagast, (F.L., HSIU, A.A., Ethiopia, 1968)

Singh,P.J, Principles of Statutory Interpretation,6th Ed.(Wadhwa Law Pub, India, 1996)

Shiferaw W. Michael (Unpublished, A.A, 1986)

Reed, D., Fundamental of Legal Drafting, (1969) appended for use by Law Faculty students.

Additional Reference Materials

Abera Jembere, An Introduction to the Legal History of Ethiopia, (Amsterdam Univ., Phd Thesis, 1998)

Abba Paulos Tzadua, "The Fetha Nagast, The Law of the Kings", (Faculity of Law, HSIU Addis Abeba Etiopia, 1968)

P. Sand, Origins of the Fetha Nagast, (1968, unpublished, Library, Faculty of Law, Haile Sellasie I University)

Shiferaw Wolde Michael, Legal Drafting, (Unpublished, A/Ababa University, March, 1986)

Margery Perham, The Government of Ethiopia, (Faber and Faber Limited, London, 1969)

Reed Deickerson, Fundamentals of Legal Writing, (Boston: Little Brown & Co.1965)

_____, Materials on Legal Drafting, (St. Paul, Minn. West Publishing Co.)

Ann Seidman, etla, legislative Drafting for Democratic Social Change, (Kluwer International, London)

R.W.M. DIAS, Jurisprudence, 5th Ed., (ADITYA Books Private Limited, New Delhi, 1994)

Faculty of Law, H.S.I.U., Consolidated Laws of Ethiopia, Vol. I, II and Supplement, (Artistic Printers Ltd., Addis Ababa; 1972, and 1975 for the Supplement)

G.P. Singh, Principles of Statutory Interpretation, 6th Ed., (Wadhwa and Company, Law Publishers, New Delhi, India, 1997)

Tore Lindholm, "A new Beginning, in Asbjørn Eide, Gudmundur and *etla*, The Universal Declaration of Human Rights: A Commentary (Editors), (Scandinavian Univ. Press, Oslo, 1992)

Patrick J. Harley, A Concise Introduction to Logic, 5th Ed. (Wadsworth Publishing Company, Belmont, California, 1994.)

ANNEX I: Delegated Legislations

Council of Ministers Regulation no. 108/2004 customs Clearing Agents

This Regulation is issued by the Council of Ministers pursuant to article 5 of the Definition of power and duties of the executive organs of the Federal Democratic Republic of Ethiopia Proclamation No. 4/1995 and Article 90(1) of establishment and modernization of Customs Authority Proclamation No. 6/1997 as amended.

See the regulation, in then determine how is it “channelized” or guided by the proclamation?

ANNEX II: Ousting Jurisdiction

PROCLAMATION NO. 97/1998

Property Mortgaged or pledged with banks proclamation

Article 4 Claim on Mortgaged or Pledged Property

A creditor bank which, prior the effective date of this Proclamation has a claim on property mortgaged or pledged with it, may sell the property by auction upon giving a prior notice of at lest 30 days and transfer the ownership of the property to the buyer.

Is jurisdiction court ousted?

ANNEX III: Ratifying Statutes

PROCLAMATION NO. 284/2002 A PROCLAMATION TO RATIFY THE ETHIO-DJIBOUTI AGREEEMENT ON THE UTILIZATION OF PORT OF DJIBOUTI AND SERVICES TO CARGO IN TRANSIT

WHEREAS, an Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Republic of Djibouti, on the Utilization of the port of Djibouti and Services to Cargo in Transit, was signed in Djibouti on the 13th of April, 2002;

WHEREAS, it is stipulated in the Agreement that the Agreement shall enter into force when both contracting parties have notified each other that their legal requirements for the entry into force of the Agreement have been fulfilled;

WHEREAS, the house of peoples' Representatives has rarified said Agreement at its session held on the 4th day of July, 2002;

NOW, THEREFORE, in accordance with Article 55 Sub-Articles (1) and (12) of the Constitution, it is hereby Proclaimed as follows:

1. Short Title

   This Proclamation may be cited as the "Ehio-Djibouti Utilization of Port of Djibouti and Services to Cargo in Transit Agreement Ratification Proclamation No. 284/2002."

2. Ratification of the Agreement

   The Ethio-Djibouti Agreement on the Utilization of Port of Djibouti and Services to Cargo in Transit signed in Djibouti on the 13th day of April, 2002, is ratified.

ANNEX IV: Amendment

PROCLAMATION NO. 272/2002

A PROCLAMATION TO PROVIDE FOR THE RE-ENACTMENT OF LEASE HOLDING OF URBAN LANDS

WHEREAS, it is provided by the Constitution of the Federal Democratic Republic of Ethiopia that land is a property of the State and the people of Ethiopia and that its use is a subject of specific regulation by law;

WHEREAS, for the last few years lease has been in place as a cardinal land-holding system to transfer urban land to users to the extent possible and in accordance with Master Plan;

WHEREAS, it is believed that transferring urban land by lease for a fair price, consistent with the principles of free market, will help achieve overall economic and social development and to help build capacity enabling progressive urban development based on the life span that a landed property may have and the period it requires to recover investment costs, the special nature of the investment, and the land use specified in conformity with Master Plan;

WHEREAS, it has been found necessary, arising form these circumstances, to develop optimum conditions in which lease will become exclusive urban land-holding system and to remove obstacles of and to expedite the process of permitting and holding urban land by lease based upon investment plan made in conformity with Master Plan;

WHEREAS, it has conversely been found necessary to ensure that the order in which the claims of any one alleging infringement of one's legal rights and benefits is transparent and expedient;

NOW, THEREFORE, in accordance with sub-Article (2) (a) of Article 55 of the Constitution of the Federal Democratic Republic of Ethiopia, it is hereby proclaimed as follows:

What does reenactment mean? Is it any different from amendment?

ANNEX V: Statutory Offences

PROCLAMATION NO. 384/2004

A PROCLAMATION TO PROVIDE FOR CONTROLLING VAGRANCY

Article 4 Vagrancy

Unless it entails a heavier penalty under the penal Code, whosoever, being able-bodied, having no visible means of subsistence, and

1. is found, in a public place or a public utility area or a place open to the public, betting or gambling or playing other unlawful similar games involving money or material benefits;..
3. is found in or upon a premise under private ownership or possession, without the permission of its owner…
4. is found attempting to enter into a school compound by threatening or using force or deceiving….
5. Intentionally alarms the public or people in vicinity by intoxication himself with alcohol or psychotropic or narcotic substance;
6. is found loitering or prowling at a place, at a time, or in a manner not usual for a law-abiding citizen…
7. Attempts, at any place, to sexually harass or force a woman to gratify his sexual feelings;
8. demands payment for a service he has rendered without being authorized….
9. disturbs the tranquility of residents in vicinity by participating in organized gang brawls;
10. is a theft-recidivist who is found preparing himself to commit another theft….
11. receives or lets himself to be given money or other similar benefits by using his reputation for violent behavior or brutality….

Compare this proclamation with Criminal Code of Ethiopia? Is it creating a new regime of crime?

ANNEX VI: Creating Regime of Law

PROCLAMATION NO. 501/2006

TRADEMARKE REGISTRATIN AND PROTECTION PROCLAMATION

2. Definitions

12. **"**trademark' means any visible sign capable of distinguishing goods or services or one person from those of other persons; it includes words, designs, letters, numerals, colours or the shape or goods or their packaging or the combinations thereof;

10. Right of priority

Where any applicant files his application in Ethiopia within six months from the date on which he first filed in a foreign country an application for the same trademark in respect of same goods or services, the date on which the application was first file in the foreign country shall be regarded as the date of filing if the applicant claims the right of priority and furnished within the prescribed time limit a copy of the earlier application certified as correct by the office with which it was filed and other documents and information as prescribed.

26. Rights Conferred by Registration

1) The owner of a registered trademark shall have the right to use or authorize any other person to use the trademark in relation to any goods or services for which it has been registered.
2) Registration of a trade mark shall confer upon its owner the right to preclude others from the following
    a. Any use of a trademark or a sign resembling it in such a way as to be likely to mislead the public for goods or services in respect of which the trademark is registered, or for other goods or services in connection with which the use of the mark or sign is likely to mislead the public.

b. Any use of a trademark, or a sign resembling it, without just case and in conditions likely to be prejudicial to his interests and;
c. Other similar acts.

Does trade mark give rise to proprietary right (right in rem)? If not then what ? If yes, should it be placed along with patent, copyright,…etc?

Annex VII: Syntax Ambiguity – Tabulation

USES OF; GENERAL FORMAT

Any key, any identification card, identification tag, or similar identification device, and any other small article which the Postmaster General by regulation may designate, which bears, contains, or has attached securely thereto-

(1) A complete, definite, and legible post office address, including (if such exists) the street address or box or route number, and

(2) A notice directing that such key, card, tag, device, or small article be returned to such address, and guaranteeing the payment, or delivery, of the postage due thereon,

May be transmitted through the mails to such address at a rate of postage of 5 cents for each two ounces or fraction thereof.

Complete Tabulation of this

Any

(1) Key;

(2) Identification

a. Card;
b. Tag; or
c. Device that is similar; or

(3) Other small article that the postmaster General may by regulation designate;

That

(1) Bears;

(2) Contains; or

(3) Has attached securely thereto;

Both

(1) A post office address that is

a. Complete;

b. Definite; and

c. Legible;

Including (if such exists) any

A. Street address; or

B. Number of

(i) Box; or

(ii) Route; and

(2) A notice

a. Directing that the

i) Key;

ii) Card;

iii) Tag;

iv) Device; or

v) Small article

Be returned to that address; and

B) guaranteeing the payment, on delivery, of the postage due; may be sent through the mails to that address at the rate of 5 cents for

(1) each two ounces; and

(2) any remaining fraction of two ounces.

EXAMPLES

1201. Regulars and members on active duty for more than 30 days: retirement*

If the Secretary concerned determines that a member of a regular component of the armed forces entitled to basic pay, or any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training) for a period of more than 30 days, is unfit to perform the duties of his office, grade, rank, or rating because of physical disability

incurred while entitled to basic pay, the Secretary may retire the member, with retired pay computed under section of this title, if the Secretary also determines that:

(1) According to accepted medical principles, the disability is permanent;

(2) The disability is not the result of the member's intentional misconduct or willful neglect, and was not incurred during an unauthorized absence; and

(3) Either-

a. The member has at least 20 years of service computed under section 1208 of this title; or

b. The disability is at least 30 percent under the standard schedule of rating disabilities in use by the Veterans' Administration at the time of the determination; and

i) The member has at least 8 years of service computed under section 1208 of this title;

ii) The disability is the proximate result of performing active duty; or

iii) The disability was incurred in line of duty in time of war or national emergency.

Applicability of the chapter

(a) This chapter applies to the purchase, and contract to purchase, by any oft the following agencies, for its use or otherwise, of all property named in subsection (b), and all services, for which payment is to be made from appropriated funds:

(1) The Department of the Army.

(2) The Department of the Navy.

(3) The Department of the Air Force.

(4) The coast Guard.

(5) The National Advisory Committee for Aeronautics

(b) This chapter does not cover land. It covers all other property including-

(1) Public works;

(2) Buildings;

(3) Facilities;

(4) Vessels;

(5) Floating equipment;
(6) Aircraft;
(7) Parts;
(8) Accessories;
(9) Equipment; and
(10) Machine tools

Problem Materials

(a) General Rule. –if-

(1) An item was deducted from gross income for a prior taxable year (or years) because it appeared that another person held an unrestricted right to such item as a result of a court decision in a patent infringement suit (whether or not the taxpayer is a party to such suit); and

(2) Gross income is increased for the taxable year because it was established after the close of such prior taxable year (or years) that such other person did not have an unrestricted right to such item or to a portion of such item because of the subsequent reversal of such court decision on the ground that such decision was induced by fraud or undue influence; and

(3) The amount of such increase in gross income exceeds %3,00, then the tax imposed by this chapter for the taxable year shall be the lesser of the following:

(4) The tax for the taxable year computed with the gross income so increase; or

(5) An amount equal to-

(a) The tax for the taxable year computed without such increase in gross income, plus

DEFINITIONS

(a) Wages.- for purposes of this chapter, the term “Wages” means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid-

(1) For active service as a member of the Armed Forces of the United States performed in a month for which such member is entitled to the benefits as per Article -, or

(2) For agricultural labor (as defined in Article -); or

(3) For domestic service in a private home, local college club, or local chapter of a college fraternity or sorority; or

(4) For service not in the course of the employer's trade or business performed in any calendar quarter by a employee, unless the cash remuneration paid for such service is Birr 50 or more and such service is performed by an individual who is regularly employed by such employer to perform such service. For purposes of this paragraph, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if-

a. In each of some 24 days during such quarter such individual performs for such employer for some portion of the day service not in the course of the employer's trade or business; or

b. Such individual was regularly employed (as determined under subparagraph (a)) by such employer in the performance of such service during the preceding calendar quarter; or

(5) For service by a citizen or resident of the United States for a foreign government of an international organization; or

(E) TABULATION: "BASTARD" ENUMERATION

PROBLEM MATERIALS

(Computation of Net Income) Shall determine net income by combining

(a) The product of the property which passed to him by the will or by execution of a power of appointment, and any substitute for such property obtained by the executor by purchase, exchange, or otherwise, with

(b) The product of property used by the executor to discharge liabilities of the testator, or of the executor in his representative capacity including legacies and interest thereon, or of any done under the will,

(c) Insofar as such products are classed as income under the other sections of this act, and

(d) Insofar as such products remain in his hands at the time of distribution by him, after the deduction there-from of any income taxes paid thereon by

the executor and that share of the expenses of administration which the executor in his discretion shall determine should be paid out of income.

* * * the report shall include information regarding the following:

1) National historical importance of such a memorial;
2) Nature of burial site, identity of exact site of burial, and size and present-day conditions of site, including improvement thereon.
3) Complete cost for the establishment of such memorial;
4) Cost of maintenance of such a memorial and amount thereof that will be paid for by the Government; and
5) Recommendation

The COME hereby finds and declares that:

(a) As technology extensive, pervasive, and critical in their impact, beneficial and adverse, on the natural and social environment.
    1) Large and growing in scale; and
    2) Increasingly extensive, pervasive, and critical in their impact, beneficial and adverse, on the natural and social environment.

(b) Therefore, it is essential that, to the fullest extent possible, the consequences of technological applications be anticipated, understood, and considered in determination of public policy on existing and emerging national problems.

(c) The COM further finds that:
    (1) The federal agencies presently responsible directly to the COM are not designed to provide the legislative branch with adequate and timely information, independently developed, relating to the potential impact of technological applications, and
    (2) The present mechanism of COM do not and are not designed to provide the legislative branch with such information.

(d) Accordingly, it is necessary for the COM to:
    G) “AND” AND “OR”

One of the difficult problems in writing, particularly in a field such as legal drafting that calls for high precision, is to know when to use “and” and when to use “or”. I know several excellent draftsmen who say that they develop mental blocks whenever they meet a complicated situation involving this decision. The lawyers’ recent preoccupation with the mysteries of “and/or” has distracted attention from the broader difficulties here.

Fortunately for the courts and the other readers of definitive legal documents, a correct choice between “and’ and ‘or” does not always control the result. This is because the basic principle that language is to be read in its broadest appropriate context has laid bare intended meanings unsupported or denied by a grammatical word-for-word construction of the text. This being so, why discuss so pedestrian, grammatically technical, and almost minuscule a subject as choosing between ‘and’ and “or”?

The answer is partly that context, however valuable, does not resolve all doubts and correct all imprecision’s. Also, because a system of communication should be internally consistent, grammar should support, rather than subvert, intended meanings otherwise revealed. That the choice between “and” and “or” is of minor importance in the broad range of drafting problems is not significant because general clarity is usually the cumulative result of attending to many individually insignificant matters. But enough of apologies.

The reader will wonder why the following analysis ignores the many court decisions construing specific uses of ‘and” and “or”. The answer is that such decisions (being concerned for the most part with misused language1) are largely irrelevant to this discussion. Even where they are not irrelevant they carry no official weight. Although the courts are the final arbiters of the meaning of particular litigated documents, their pronouncements are directed in such cases toward extracting the meaning of the whole document when viewed in its proper setting, which means overriding any specific inconsistent wording. This is different from saying that courts speak authoritatively on the normal factual meanings of words and phrases when read out of their contexts. In determining current general usage, the courts have no official function or special competence beyond the fact that their duties offer a broad opportunity for acquiring sophistication is this field. There s, therefore, a vast difference between a court’s saying., “This is

what the word ‘vehicle’ officially means in this particular litigated document’ and its saying, “This is the normal and usual meaning of the word ‘vehicle’”,

The difference between “and” and “or” is usually explained by saying that “and” stands for the conjunctive, connective, or additive and “or” for the disjunctive or alternative. The former connotes ‘togetherness” and the latter tell you to “take your pick”. So much is clear. Beyond this point, difficulties arise.

One difficulty is that each of these two words is on some occasions ambiguous. Thus, it is not always whether the writer intends the inclusive “or” (A or B, or both) or the exclusive “or” (A or B, but not both). This long recognized uncertainty has given rise to the abortive attempt to develop “and/or” as an acceptable English equivalent to the Latin ‘vel’ the (the inclusive “or”)

What has not been so well recognized is that there is a corresponding, though less frequent, uncertainty in the use of “and”. Thus, it is not always clear whether the writer intends the several ‘and” (A and B, jointly or severally) or the joint “and” (A and B, jointly but not severally). This uncertainty will surprise some, because ‘and” is normally used in the former sense. Even so, the authors of documents sometimes intend things to be done jointly or not at all. This idea inheres in the purchase of pair of shoes (try to buy one shoes separately!) without, however, posing any grammatical problem. On the other hand, a reference to “husbands and wives” may create a grammatical uncertainty as to whether the right, privilege, or duty extends to husbands without wives, and vice versa, or whether it may be enjoyed or discharged only jointly. Where such a doubt exists, it is desirable to recognize and deal with it.

Observation of legal usage suggests that in most cases “or” is used in the inclusive rather than the exclusive sense, while “and” is used in the several rather than the joint sense. If true, this is significant for legal draftsmen and other writers, because it means that in the absence of special circumstances they can rely on simple “or’s” and “and’s” to carry these respective meanings. This, incidentally, greatly reduces the number of occasions for using the undesirable expression “and/or” or one of its more respectable equivalents, such as “A or B, or both”, “either or both of the following”.

Special circumstances in which it is unsafe to rely on general usage exist, on the other hand, wherever the courts have shown an unfriendly or biased attitude in ‘interpreting” language. Thus, in drafting a criminal statute, with respect to which the courts are inclined to legislate restrictively under the euphemism of “strict construction”, it is safer not to rely on the chance that “or” will be given its normal inclusive reading but to say expressly ‘shall be fined not more that %5,000 or imprisoned not more than three years, or both”.

Another and more perplexing difficulty in the use of “and” and “or” is that it is often uncertain, because of a possible conflict between grammar and immediate context, whether the draftsman has attempted an enumeration of people or institutions, on the one hand or of their characteristics or traits, on the other. Take the phrase ‘every husband and father”. If this is intended as an enumeration of two classes of persons, that fact can be less equivocally expressed by saying “every husband and every father” or, taking another approach, by saying “every person who is either a husband or a father”. If, on the other hand, it is intended s an enumeration of characteristics or traits necessary to identify each member to be covered, that alternative can be less equivocally expressed by saying “every person who is both a husband and a father”.

As the foregoing examples show, the former alternative meaning can be expressed, without changing substance, either by an enumeration of persons, using “and”, or by an enumeration of their identifying characteristics or traits, using “or”. This does not say that ‘and’ means ‘or”. It says that whether you use ‘and” or “or” in such a case depends upon whether you identify the affected persons by enumerating the several classes into which they may fall or by defining them as a single class by enumerating their qualifying characteristics. A corollary of this is that shifting from ‘and” to ‘or” without shifting from a “persons” approach to a “characteristics’ or “traits’ approach changes the grammatical meaning.

Because of the subtlety of the point, it may be desirable to clarify it with an example and explanation that I have used elsewhere.

* * * Compare, for instance, these two provision:

Provision A:

The security roll shall include-

(1) Each person who is 70 years of age or older;

(2) Each person who is permanently, physically disabled; and

(3) Each person who has been declared mentally incompetent.

Provision B:

The security roll shall include each person who—

(1) Is 70 years of age or older;

(2) Is permanently, physically disabled; or

(3) Has been declared mentally incompetent.

Although both provisions say exactly the same thing, "and' is necessary to provision A because it enumerates three separate classes of persons each of which must be included, whereas "or' is necessary to provision B because it names a single class of persons by enumerating its three alternative qualification for membership.

Whenever possible, the draftsman should arrange his sentences so as to make the fullest use of finite verbs instead of their corresponding participles, infinitives, gerunds, and other noun or adjective forms denting action.*

Annex VIII: Don’t say and say Column

Don’t say	Say
Give consideration to	Consider
Give recognition to	Recognize
Have knowledge of	Know
Have need of	Need
In the determination of	In determining
Is applicable	Applies
Is dependent on	Depends on
Is in attendance at	Attends
Make an appointment or	Appoint
Make application	Apply
Make payment	Pay
Make provision for	Provide for

Objectionable words

The draftsman should avoid the following terms altogether (they are pure gobbledygook):

Above (as an adjective
Above- mentioned
Afore –granted
Aforementioned
Aforesaid
Before-mentioned
Henceforward
Herein
Hereinafter
Hereinbefore
Here unto
Premises (I the sense of mat-
same (as substitute for “it”, “he,” “him”, etc.]
thenceforth
thereunto
therewith
to wit
under-mentioned
unto
whatsoever
whensoever
when so ever
whereof

ters already referred to]
Said (as a substitute for “the”, “that,” or those”]
Preferred expressing.

whosoever
within-named
within these

The draftsman should pay careful attention to the recommended language in the following list. However, the preferences expressed are not meant as absolute prescriptions. Individual tastes differ, usages vary, and terms of art often must be honored. The point is that following the “Say” column will in general produce a result that is easier to read that following the “Don’t’ say” column. Some of the items are suggested only as

Conventions for attaining uniformity for these, the individual draftsman may have an alternative that will serve as well or better.

Don’t say	
Accorded	adequate
number of	admit of
afforded	all
of the	approximately
attains the age of	
at the time	attempt
(as a verb]	by means of
	calculate
category	cause
it to be done	cease
	commence
	complete [as a verb]
	conceal
	contiguous to
corporation organized and existing under the laws of	
new Jersey	deem
does not operate to	
donate	during
such times as	during the course of
effectuate	
endeavor [as a verb]	

Say

Given

enough

allow

given

all the

about

becomes * * * years old

When try

by compute

kind, class, group have it

done stop

begin, start finish

hide result

next to New Jersey

corporation

Consider does not

give while

during carry out

try

Enter into a contract with	contract with
evince	show
excessive number of	too many
expedite	hasten, speed up
expend	spend
expiration	end
feasible	possible
for the duration of	during
for the purpose of holding [or other gerund]	to hold [or comparable infinitive]
for the reason that	because
forthwith	immediately
frequently	often
hereafter	after this * * *takes effect
heretofore	before this * * *takes effect
in case	if
in cases in which	when, where [say ‘whenever” or “wherever” only when you need to emphasize the exhaustive or recurring applicability of the rule]
indicate [in the sense of “show”]	show
Inform	tell
In lieu of	instead of , in place of
In order to to	
Inquire	ask
In sections 2023 to 2039, inClusive	in sections 2023-2039
Institutite	begin, start
Interrogate question	

In the event that	if
In the interest of	for
Is able to	for
Is able to	can
Is authorized	may
is binding upon	binds
is empowered	may
is entitled [in the sense of "has the name"]	is called
is unable to	cannot
it is directed	shall
it is the duty	shall
it shall be lawful	may
law passed	law enacted
manner	way
maximum	most, largest, greatest
minimum	least, smallest
modify	change
necessitate	require
negotiate [in the sense of "enter into" a contract]	make
no late than June 30, 1964	before July 1, 1964
obtain	get
occasion [as a verb]	cause
of a technical nature	technical
on and after July 1, 1964	after June 30,1964
on his own application	at his request
on or before June 30, 1964	before July 1, 1964
on the part of	by
or, in the alternative	or
paragraph (5) of subsection(a)	section 2097(a) (5)

of section 2097	
party of the First part	[the party's name]
per annum, per day, per foot	a year, a day, a foot
per centurm	percent
period of time	period, time
portion	part
possess	have
preserve	keep
prior	earlier
prior to	before
proceed	go, go ahead
procure	obtain, get
prosecute its business	carry on its business
provision of law	law
purchase [as a verb]	buy
pursuant to	under
remainder	rest
render [in the sense of "cause to be"]	make
render [in the sense of "give"]	give
require [in the sense of "need"]	need
retain	keep
specified [in the sense of "expressly mentioned" or "listed]	named
state of Kansas	Kansas
subsequent to	after
suffer [in the sense of "permit"]	permit
sufficient number of	enough
summon	send for , call
the Congress	Congress
the manner in which	how

to the effect that	that
under the provisions of	under
until such time as	until
utilize, employ [in the sense of "use"]	use
Within or without the United States	insider or outside the United States
With reference to	for
With the object of changing [or other gerund]	to change [or comparable infinitive]

The draftsman should not change a term of art merely because it contains words on the "Don't say" list.

Annex IX: Jural Relations

CLAIM-DUTY RELATIONS ('YOU OUGHT')

Hohfeld himself suggested the word 'claim' as a substitute for 'right', but continued to use 'right'. 'Claim', however, will be preferred in this book. He did not deal at length with this relation, believing that the nature of clam and duty was sufficiently clear. This was perhaps rather a facile assumption. He did, however, point out that the clue to claim lies in duty, which is a prescriptive pattern of behavior. A claim is, therefore, simply a sign that some person ought to behave in a certain way. Sometimes the party benefited by the pattern of conduct is able to bring an action to recover compensation for its non-observance, or he may be able to avail himself of more indirect consequences. At other times, he can do nothing.

The statement, 'X has a claim', is vacuous; but the statement, 'X has a claim that Y ought to pay him (10 is meaningful because its content derives from Y's duty. On the other hand, whether every duty implies a correlative claim is doubtful. Austin admitted that some duties have no correlative claims, and he called these 'absolute duties'. His examples involve criminal law. Salmond, on the other hand, thought that every duty must have a correlative claim somewhere. Allen supported Austin. Professor GL William treats the dispute as verbal. Duties in criminal law are imposed with reference to, and for the benefit of, members of society, none of whom has claims correlative to these duties. As far as their functioning is concerned, it is immaterial whether there are any claims. Statutory duties furnish other examples. It rests on the interpretation of each statute whether the duties created by it are correlative to any claims in the persons contemplated by the duties. It was held in Arbon v Anderson that even if there had been a breach of the prison Rules 1933, which had been made under the prison Act 1898, s 2, a prisoner affected by such a breach had no action since he had no claim. The decision in Bowmaker Ltd vs. Tabor creates a difficulty. The Courts (Emergency powers) Act 1939, I(2), forbade hire-purchase firms to retake possession of things hired without first obtaining leave of court. The claim to damages was conferred by the statute on any hire purchaser from whom goods were retaken without the necessary leave having been obtained. In this case the defendant purchaser consented to the plaintiffs retaking possession of the article hired, and they did so

without obtaining leave of court. The plaintiffs later sued the defendant for arrears of rent, which had accrued up to the time of the retaking, and the defendant counterclaimed for damages under the statute. The court of Appeal held that he was entitled to damages. This means that there was a duty to pay damages, which was correlative to the claim to receive them. The duty not to retake possession without leave of court was, as the Court pointed out, imposed in the public interest and not for the benefit of an individual. The defendant, therefore, could not absolve the plaintiffs from it. The inference is that the claim was not in him. The further question as to why the defendant's consent to the plaintiffs' course of action did not debar him from exercising his claim to damages was answered by the Court on the ground that consent, or *volenti non fit injuria*, is no defense to a breach of this kind of statutory obligation

Conduct is regulated by the imposition of duties. Claims may assist in achieving this end, but if it can be otherwise achieved, there is no reason why the mere fact that Y is under a duty with regard to X should confer upon X, or anyone else for that matter, a corresponding claim. There is nothing to prevent it being the law that every breach of duty, of whatsoever sort, shall be dealt with by the machinery of the state. Such a state of affairs, though possible, would be inconvenient, for it would stretch state machinery to breaking point. Where duties are of private concern, the remedies are best left to individuals to pursue in the event of their breach. Above all, it is expedient to give aggrieved persons some satisfaction, usually by way of compensation. Every system of law has to decide which breaches of duties shall be taken up by the public authorities on their own motion, and which shall be left to private persons to take up or not as they please. The distinction between 'public' and 'private' law is quite arbitrary. It would seem, therefore, that there is no intrinsic reason why claims should be a necessary concomitant of duties. Indeed, some modern writers, for different reasons reject the whole idea of claim as redundant'.

If non-correlative duties are accepted, they do not fit snugly into the Hohfeldian scheme.

LIBERTY-NO-CLAIM RELATION ('I MAY')

Hohfeld distinguished the freedom which a person has to do or not do something from claim, and called it 'privilege'; by the term liberty will be preferred. X's so-called 'right' to wear a bowler has consists, on hohfeld's analysis, of a liberty to wear the hat and another liberty not to wear it. The relationship between claim, duty, liberty and no-claim can be explained in the following way.

(I) Duty and liberty are jurally 'opposite'. If, for example, X were under a duty *to wear* a bowler hat, this would imply the absence in him of any liberty *not to wear* it, i.e. the Hohfeldian opposite of duty means that there is no liberty to do whatever is opposite to the content of the duty Similarly, if X were under a duty *not to wear* the hat, this would be the opposite of a liberty *to wear* it, i.e. there would be no liberty to do so. The jural opposition between duty and liberty does not mean simply that the one cancels out the other, but that they will only have that effect when the content of one is irreconcilable with the content of the other. For example, X normally has the liberty of wearing his hat. If he puts himself under a duty to wear it, his liberty and duty of *wearing* the hat are harmonious and co-exist. It is only when he puts himself under a duty *not to wear* it that his liberty to *wear* it and his duty conflict and are jurally opposite.

The opposition may be illustrated by Mills vs. Colchester Corp. The owner of an oyster fishery had, since the days of Queen Elizabeth I, granted licenses to fish to persons who satisfied certain conditions. The plaintiff, who satisfied them but was refused a license, brought an action alleging a customary claim correlative to a duty in the defendants to grant him one. The court held otherwise on the basis that the defendants had always exercised discretion in the matter. This implied not only a liberty to grant licenses, but also a liberty not to grant licenses, which implied the absence of a duty to do so. If, then, they were under no duty to grant licenses, the plaintiff could have no claim.

Sometimes it is held for reasons of policy that the liberty of doing a particular thing cannot be erased by a contrary duty. Osborne v Amalgamated society of Railway servants lays down that the liberty of a member of parliament to vote in any way he chooses on a given issue cannot be

overridden by a contractual duty to vote in a certain way. Similarly in Redbridge London Borough vs. Jacques the respondent had for several years stationed his vehicle on a service road in the afternoons of early closing days and had operated a fruit and vegetable stall from the back of it. The local authority was aware of this practice and had raised no objection. It then charged him with obstructing the highway. The justices dismissed the charge on the ground that the local authority had, in effect, given him a license is a public duty, created by statute, this prevents the conferment of a liberty to do what the duty forbids.

(2) If Y has a claim, there must be a duty in X. a duty in X implies the absence of a liberty in X. Therefore, a claim in Y implies the absence of a liberty in X, i.e. claim and liberty are 'jural contradictories'.

(3) Conversely, the presence of a liberty in X implies the absence of a claim in Y. Hohfeld calls this condition 'no-claim'. Therefore, a liberty in X implies the presence of a 'no-claim' in Y; i.e. liberty and no-claim are 'jural correlative'. On the opposition between claim and no-claim there is this to be said. The opposition here is different from that between duty and liberty. No question of content arose. No-claim is simply not having a claim, and having a claim is not being in the condition of no-claim, just as having a wife is not being in a state of bachelordom (no-wife). If it is thought necessary to distinguish between the opposition of duty and liberty on the one hand, and no-claim and claim on the other, the latter might be styled 'jural negation' instead.

Distinction between claim and liberty

A Claim implies a correlative duty, but a liberty does not. X's liberty to wear a bowler hat is not correlative to a duty in anyone. There is indeed a duty in Y not to interfere, but Y's duty not to interfere is correlative to X's claim against Y that he shall not interfere. X's liberty to wear the bowler hat and his claim not to be prevented from so doing are two different ideas. Thus, X may enter into a valid contract with Y where X gives Y permission to prevent him from wearing the hat, but X says he will nevertheless try to wear it. If X succeeds in evading Y and leaves the scene wearing the hat, he has exercised his liberty to wear it and Y has no cause for complaint. If, on the other hand, Y prevents him from wearing the hat, he cannot complain, for he has by

contract extinguished his claim against Y that Y shall not interfere. This shows that the liberty and the claim are separate and separable; the claim can be extinguished without affecting the liberty.

It is usual for liberties to be supported by claims, but it is important to realize that they are distinct and separate, and the distinction is reflected in case law. It was held in *Musgrove u Chun Teeong* Toy that at common law an alien has the liberty to enter British territory, but no claim not to the prevented; which was re-affirmed in Schmidt vs. Secretary of State for Home Affairs. Chaffers vs. Goldsmid shows that a person has the liberty of presenting a petition to Parliament through his representative member, by no claim against such member that the latter shall comply. Bradford Corp. vs. Pickles show that a landowner has the liberty of abstracting subterranean water, but no claim against anyone else who, by abstracting the water before it reaches the landowner, prevents him form exercising his liberty. In Cole vs. Police constable 443A, the court considered the position of a non-parishioner in extra-parochial churches, for example Westminster Abbey, which is a Royal peculiar. Although the language of the learned judges is open to criticism, their conclusion, translated into Hohfeldian terminology, was that a non-parishioner has a liberty to be in such a church, but no claim not to be prevented. Therefore, the plaintiff's ejection by the respondent, who acted under instructions from the Dean, gave him no cause for complaint. Again, in Piddington V Bates the defendant, a trade unionist, in the course of a trade dispute insisted on going to the rear entrance of certain premises at which two pickets were already standing. To do so would not have been wrongful, for he would merely have to exercise liberty. In fact, however, the complainant, a police officer, who had decided that two pickets were all that were needed in the circumstances, prevented the defendant from going to the rear entrance. The latter then 'pushed gently past' the complainant 'and was gently arrested' by him. The defendant was found guilty of obstructing a constable in the exercise of his duty, since his liberty to stand at the entrance was not supported by a claim not to be prevented.

The failure to distinguish between claim and liberty leads to illogical conclusions. Thus, a member of the public has only a liberty to attend public meetings, which is not supported by a claim not to be prevented. The attend was a 'right' and that, therefore, there was a duty not to prevent the person concerned, who happened to be a policeman. The conclusion is a *non*

sequiture, since it fails to perceive the distinction between the two uses of 'right' as established by case law. If, as was probably the case, it was sougnt to crate a claim-duty relation for reasons of policy, ore convincing reasoning should have been employed. Cases on trade completion, whatever the merits of the decisions, present an array of fallacious propositions, which would have been avoided had the distinction between liberty and claim been perceived. The claim not to be interfered with in trade corresponds to a duty not to interfere. There is indeed a duty not to interfere, e.g. by smashing up the plaintiff's shop; but no duty not to interfere by underselling him. So the question how far a duty not to interfere extends, i.e. how far the liberty of another person to interfere is allowed, is a delicate decision of policy. This is the real issue, which is thrown into relief when these situations are seen to involve confliction liberties, but which is masked by the language of duties and claims.

The exposure of faulty reasoning also helps in assessing the effect and worth of decided cases. In *Thomas v sawkings,* for example, the very demonstration that the conclusion was illogical when stated in terms of 'rights' and duties shows that the way to reconcile it with the established law is by saying that it has, in effect, created a new rule of law for policemen.

Finally, it may be observed that Hohfeld's analysis of claim, duty, liberty and no-claim is useful in may general ways. It way be used for drawing distinctions for purposes of legal argument or decision. It was held, for instance, in Byrne v Deane that to call a person an 'informer' was held, for defamatory. Suppose a case where the allegation is that the plaintiff is a conscientious objector'. Byrne v Deane is distinguishable. A 'informer' was not defamatory. Suppose a case where the allegation is that the plaintiff is a 'conscientious objector. Byrne v Deane is distinguishable. An 'informer' is a person who give information of crime there is in law a duty to do so, and Byrne's case decides that it is not defamatory to say that a man has performed a legal duty. There is only a liberty to be a 'conscientious objector', and Byrne's case is thus no authority for saying that it cannot be defamatory to allege that a person has exercised this liberty. Again, the analysis is useful in considering the relation between common law and equity; in particular, it helps to demonstrate the precise extent to which there was conflict. Thus, the life-tenant had at law the liberty to cut ornamental trees, in equity he was under a duty not to do so. The liberty and duty are jural opposite and the latter cancels out the former. At common law a

party had a claim to payment under a document obtained by fraud, in equity he had no-claim. Further, such a person had at law the liberty of resorting to a common law court on such a document, whereas equity imposed on him a duty not to do so (common injunction)

Liberty as 'law'

It has been shown that liberty begins where duty ends. Some have maintained that freedom is outside that law. Thus, Pound declared that liberty is 'without independent jural significance', and Kelsen said, 'Freedom is an extra-legal phenomenon. As to this, it is as well to remember that liberty may result (a) from the fact that legislator and judges have not yet pronounced on a matter, and represents the residue left untouched by encroaching duties, e.g. invasion of privacy; or (b) it may result from a deliberate decision not to interfere, as in. Bradford corp. v pickles, or (c) from the deliberate abolition of a pre-existing duty, e.g. the statutory abolition of the duty forbidding homosexuality between consenting adults, or an Act of Indemnity absolving a person from a penal duty. There is some plausibility in saying with pound and Kelsen that liberty in sense (a) lies outside law; but it seems odd to say that the liberty pronounced by a court in (b) ad the statutory provisions in (c) are 'without independent jural significance' and extra-legal'. Analytically, the resulting position in all three cases is the same, namely, no duty not to do the act.

Kinds of liberties

Some liberties are recognized by the law generally, e.g. liberty to follow a lawful calling. So, too, are 'parliamentary privilege' in debate and 'judicial privilege', which are liberties in the Hohfeldian sense in that both connote the absence of a duty not to utter defamatory statements. An infant's position (sometimes called in non-Hohfeldian language an immunity) in contracts for things other than necessaries is more complicated. In some cases it amounts to a power to repudiate the contract; in others it is not clear whether an infant has a liberty not to perform the contract, i.e. no primary duty to perform, or whether there is a sanctionless duty, i.e. a primary duty to perform, or whether there is a sanctionless duty, i.e. a primary duty which he ought to

fulfill, but no sanctioning duty to pay damages and instead an immunity from the power of judgment.

Other liberties are recognized by law on special occasions, that is to say, the normal duty not to do something is replaced in the circumstances by the liberty to do it, e.g. self-help, self-defense, the defenses of fair comment and qualified privilege. Lastly, liberty may be created by the parties themselves, e.g. consent, or *volenti non* fit *injuria*, one effect of which is that it absolves a defendant from his duty.

Limits of liberties

Some liberties are unlimited, even if exercised maliciously, e.g. 'parliamentary' or 'judicial privilege'. *Non omne quod licet honestum est*. In other cases, the exercise of liberties may be limited by the law of 'blackmail', by public policy or by malice, e.g. qualified privilege and fair comment in defamation, or by state.

POWER-LIABILITY RELATION ('I CAN')

Power denotes ability in a person to alter the existing legal condition, whether of oneself or of another, for better or for worse. Liability, the correlative of power, denotes the position of a person whose legal condition can be so altered. This use of 'liability' is contrary to accepted usage, but when operating the Hohfeldian table words have to be divorced from their usual connotations. X has a power to make a gift to Y, and correlatively Y has a liability to have his legal position improved in this way. A further point is that a person's legal condition may e changed by events not under anyone's control, e.g. an accumulation of snow on his roof. A distinction accordingly needs to be drawn between liability, which is correlative to power, i.e. the jural relation; and what for present purposes may be termed 'subjection', namely, the position of a person which is liable to be altered by non-volitional events. This is not a jural relation.

Distinction between clam and power

On the face of it the distinction is obvious; a claim is always a sign that some other person is required to conform to a pattern of conduct, a power is the ability to produce a certain result. The 'right', for example, to make a will can be dissected into a liberty to make a will (there is another liberty not to make one), claims against other people not to be prevented from making one, powers in the sense of the ability to alter the legal conditions of persons specified in the will, and immunities against being deprived of will-making capacity. The power itself has no duty correlative to it. It would be incorrect to describe this as a 'right' in the testator correlative to the duty in the executor to carry out the testamentary dispositions, for the will takes effect as from death and the executor's duty only arises that moment. When the testator dies his claims etc cease, so the duty cannot correlate to any 'right' in him.

The distinction between claim, liberty and power are important for much the same reasons as those considered above. A complex illustration is Bryce vs. Belcher. At an election the plaintiff tendered his vote to the defendant, the returning-officer, who refused to accept it. The plaintiff was in fact disqualified from voting on grounds of non-residence. It was held that he had exercised a power by tendering his vote, which imposed on the defendant the duty to accept it. The latter's refusal to do so was a breach of that duty, which might well have rendered him liable to a criminal prosecution. However, the plaintiff's power to impose such a duty did not carry with it either the liberty of exercising the power or a claim to the fulfillment of the duty. He, therefore, failed in his action against the defendant for the breach of his duty.

'Although a party in the situation of the plaintiff, has the power in this way compel the returning-officer under the apprehension of a prosecution, to put his name upon the poll, he has not the right to do so [liberty]; that, in doing so, he is acting in direct contravention of the Act of Parliament, the terms of which are express that he shall not be entitled to vote; and that the rejection of his vote cannot amount to a violation of any thing which the law can consider as his right.

In david vs. Abdul Cader the defendant refused to exercise a statutory power to grant the plaintiff a license to run a cinema. The supreme Court of Ceylon rejected the latter's action for damages on the ground that an action presupposes violation of a 'right' (claim) in the plaintiff and that until the power had been exercised the plaintiff acquired no 'right'. The fallacy is clear. The 'right' which the plaintiff would have acquired on the exercise of the power is the liberty to run his claim with a pertinent claims, powers, etc. The acquisition or non-acquisition of these is independent of the question whether the defendant was under a duty to exercise the power and whether there was in the plaintiff a claim correlative to this duty. The judicial Committee of the Privy Council reversed the Supreme Court on this very ground and remitted the case for trial on those issues. Failure to observe the distinction between power and claim results in confusion, though this occurs less often than in the case of liberty and claim. Also, analysis does help to assess the case law. An example is Ashby v white, where the 'right' to vote was held to import a duty not to prevent the person from voting. The 'right' to vote is a power coupled with a liberty to exercise it, ad the whole point was whether there was a claim, although the reasoning was fallacious. The Sale of goods Act 1893 (now the Act of 1979), s 12 (I), introduces an implied condition that a seller of goods 'has a right to sell the goods'. It is clear from the context, which deals with conditions as to title, that 'right' here means 'power' to pass title. It was held in Niblett vs. Confectioners' Materials Co that the defendant company had no 'right' to sell certain article because a third party could have restrained the sale for infringement of a trade mark. This is confusion between power and liberty. For, the fact that the defendant had power to pass title is independent of whether or not they had a duty not to exercise it (ie no liberty to do so).

Distinction between duty and liability

If x deposits or lends a thing to Y, there is no duty in Y to restore it until X makes a demand. Before such demand is made Y is under a liability to be placed under the duty. The demand itself is the exercise of a power. The distinction is important, for instance, in connection with the limitation of actions. Thus, in Re-Tidd, Tidd vs. Overell', where money was entrusted to a person for safe-keeping, it was held that the period of limitation only commenced from the time that a demand for restoration had been made. Again, a deposit of money with a bank amounts to a loan, and there is no duty to repay until a demand has been made. Foachimson v Swiss Bank

corp. shows that time only runs from demand and not from the time of the original deposit. A sum of money can be attached under a garnishee order if there is a duty to pay, even though the actual time for payment may be postponed. In Seabrook Estate Co Ltd v Ford, a debenture holder appointed a receiver, who was to realize the assets and then pay off any preferential claims and the principal and interest to the debenture holders, and having done that, to pay the residue to the company. The judgment creditors of the company sought to attach a certain sum of money in the hands of the receiver before he had paid these other debts and which was estimated to be the residue that would be left in his hands. It was held that this could not b done as there was as yet no duty owing to the company. From this kind of situation must be distinguished those where there is a duty owing, but the performance of which is postponed. Such a debt can properly be the subject of attachment.

Distinction between duty and 'subjection'

If X promises Y under seal, or for consideration, that he will pay Y 5 on the following day should in rain, there is clearly no duty in X unless and until that event occurs. In the meantime, X's position is simply that he is 'subject' to be placed under a duty. The distinction need not be elaborated further and may be dismissed with the comment that this is not liability to a power, but to a non-volitional event and, as such, forms the basis of much of the law of insurance.

An analytical problem arises with such a rule as Rylands vs. Fletcher (under which an occupier has to pay for damage cause by the escape of substance likely to do mischief) and the rule concerning animals (under which the 'keeper' has to pay for damage done by dangerous animals and trespassing cattle), both of which do not involve fault. There seems to be a distinction between these case, which are sometimes called 'strict liability' (but might preferably be styled 'strict subjection') and 'strict duties'. A duty prescribes a pattern of conduct, and by 'strict duty' (eg duty to fence dangerous machinery) is meant one to which the actor may not be able to conform no matter how reasonably he behaves in the circumstances. With Rylands vs. Fletcher and animals, the policy of the law is not to prevent people from keeping mischievous substances or animals, i.e. there is no duty not to keep them. It could be argued, perhaps, that there are duties to prevent escape, in which case they would be correlative to claims; but this is not how

the rules are framed. What they say, in effect, is that one keeps these things at one's peril, i.e. liability attaches in the event of escape, which makes the position analogous to X having to pay 5 tomorrow if it rains. If so, there is no way of accommodating cases of 'subjection' within the Hohfeldian scheme, except to say that they are not jural relations and therefore are not entitled to a place therein.

Distinction between liberty and power

Buckland disputes the need for any distinction.

'All rights [liberties] are rights to act or abstain, not to produce legal effects. To say that he has a right that his act shall produce that effect is to imply that if he liked it would not have that effect, and this is not true. The act will produce the legal effect whether he wisher it or not. If I own a jug of water I have a right to upset it, but it is absurd to say that I have a right that the water shall fall out.

It would appear that Buckland misunderstood the nature of the Hohfeldian power. It is not a 'right' that certain effects shall ensue. Acts that have certain effects are called powers, those that do not are not called powers. That s distinct from the liberty to perform or not to perform such an act. The distinction may be put as follows: the liberty to perform or not applies to all types of conduct, but considered with reference to their effects, it can be seen that some actions result in an alteration of existing legal relations while others do not.

Rightful and wrongful powers

The significance of the distinction between the nature of the act and the liberty to do it may be demonstrated in this way. Sometimes a power may be coupled with a liberty to exercise it and a liberty not to exercise it, while at other times it may be coupled with a duty to exercise it. In both situations the exercise of the power may be said to be 'rightful'. When a power is coupled with a duty not to exercise it, such exercise would then become 'wrongful'.

Where a power is coupled with a liberty, a party cannot be penalized for having exercised it, or for not having doe so. Thus, X may for no consideration at all give Y permission to picnic on his land. He may then change his mind with impunity and order Y to depart, i.e. exercise a power revoking Y's license and imposing on him a duty to leave. If Y fails to do so within a reasonable time he commits a breach of that duty and becomes a trespasser. In Clore vs. Theatrical Properties Ltd and Westby Co. Ltd, Y had a liberty to be on X's land. X assigned his interest to A and Y assigned his interest to B. A exercised his power to revoke B's liberty. It was held that he could do so; since there was no contract between A and B, A was under no duty not to exercise his power, i.e. he had a liberty to do so. Wood vs. Lead-bitter is not exactly in point, for the plaintiff's liberty to be on the defendant's premises was created by contract. The defendant ordered the plaintiff to leave and, after a reasonable time, expelled him with reasonable force. The plaintiff did not sue in contract, though there was undoubtedly a contractual duty not to exercise the power, byt sued for assault instead. It was held that, since he had become a tresspasser, he could be ejected with reasonable force. It was held in East Suffolk Rivers Catchet Board vs. Kent that the Board had a power and a discretion (liberty) as to its exercise. In Referees vs. Board of Referees, ex P. Calor Gas (distributing) Co Ltd., where a statutory power was coupled with a liberty to exercise it and also not to exercise it, the Divisional Court refused an application for an order of mandamus to compel the Board to exercise it. On the other hand, in David vs. Abdul Cader, the Judicial Committee of the privy Council thought that a malicious refusal to exercise a discretionary power might amount to a breach of duty; but this is a limit on the liberty.

Where a power is coupled with a duty to exercise it, i.e. no liberty not to exercise it, there is no question of any 'right' to do the act; the party 'must' do it. A simple example is the power and duty of a judge to give a decision. Generally the presumption is against there being a duty to exercise statutory powers. The word 'may' in an empowering statute is usually taken to confer a liberty to exercise a power and not a duty, so mandamus will not lie. At the same time, it was held in Trigg vs. Staines UdC that a local authority cannot contract not to exercise a power of compulsory acquisition, ie it cannot deprive itself of the liberty to use its power by an opposite contractual duty. Where, however, there is a duty to exercise a power, a remedy will lie for a breach of it. In Fereguson vs. Earl of Kinnoull damages were awarded for the refusal by the

presbytery to take a preacher on trial. In R v Somerset Justices ex p E'Cole and Partners Ltd, the divisional Court held that the statutory power of Quarter Sessions to state; a case was coupled vs. 17 of the Criminal Appeal Act 1968, the home Secretary has elapsed. Accordingly, in ex p Kinally the Divisional Court refused leave to move for an order of mandamus. Subject to certain other limits, mandamus generally lies where the duty is a 'public duty'. It is not easy to say what precisely a public duty' is.

Where a power is coupled with a duty not to exercise it, the party concerned has no liberty to do so. Thus, if a person has a liberty to be on premises by virtue of a contract, kerrison v Smith shows that the exercise of a power revoking the liberty is effective, although it amounts to a breach of the contractual duty. The case of Pryce v Velcher has already been considered. Another example is that of a thief who sells a thing in market overt to an innocent purchaser for value. He exercise a power in that he deprives the owner of his title and confers title on the purchaser, but he is under a duty not to exercise this power and commits a fresh conversion by so doing. The simplest example is the commission of a tort: it is a power in that the legal positions both of the victim and of the tort feasor are altered, but there is a duty, owed to the victim, not to commit the tort. Furthermore, the commission of a trot may operate as a power against a third party. This, a servant who commits a tort in the course of his employment alters the legal position of his master by imposing upon him the duty to pay damages vicariously and a liability to be sued therefore, but the servant concurrently owes a duty to his master not to exercise this power of imposing vicarious responsibility upon him for the breach of which the master can recover from the servant by way of indemnity what he has to pay to the victim of the tort In all these situations the act of the party concerned is power, for it alters the legal position, even though its exercise is a breach of duty. To call such powers 'rights' would be a misnomer, for it would amount to speaking of 'rights; to commit wrongs, i.e. breaches of duty. Though Hohfeld purported to distinguish between uses of the word 'right' , it is clear that not all powers, in the sense in which he used that term, can be called 'right'. This is hardly a criticism. The power concept is unobjectionable as power; it cannot always be brought under the umberella of 'rights' ; which only reinforces the case for the greater precision and scope of the Hohfeldian terminology.

Kinds of powers

Broadly, they may be divided into 'public' and 'private', but both involve ability to change legal relations. When a public power is coupled with a duty to exercise it, it is termed a 'ministerial' power; when it is coupled with duty to exercise it, it is termed a 'ministerial' power; when it is coupled with a liberty, it is termed 'discretionary'. Public powers, though numerous especially in administrative law, cannot compete with the profusion of private powers. The appointment of an agent, for instance, is a power, for it confers on the agent further powers to alter the legal position of the principal and creates in the latter corresponding liabilities. A married woman has power to pledge her husband's credit for necessaries, in contract there is a power to make an offer and a power to accept, and innumerable others in contract, property, procedure and, indeed, in every branch of the law. Private Powers may also be coupled with duties to exercise them, e.g. certain powers of trustees, or the may be coupled with liberties.

IMMUNITY-DISABILITY RELATION ('YOUY CANNOT')

Immunity denotes freedom from the power of another, while disability denoteds the absence of power. In Hurst v picture Theateres Ltd, it was held that where a liberty to be on premises is coupled with an 'interest', this confers an immunity along with the liberty, which cannot therefore be revoked. The relationship between power, liability, immunity and disability may be explained as follows.

(1) If X has a power, Y has a liability. They are therefore 'jural correlatives'. A liability in Y means the absence of an immunity in him. Therefore, immunity and liability are 'jural opposites' (more strictly, 'jural negations', as previously explained).

(2) Conversely, the presence of an immunity in Y implies the absence of a liability in him. The absence of a liability in Y implies the absence of a power in X. Therefore, an immunity in Y implies the absence of a power in X, i.e. power and immunity are 'jural contradictories'.

(3) The absence of power could have been styled 'no-power', in the same way as no-claim, by Hohfeld preferred to give it the term disability. Powers from this that

immunity in Y implies the presence of a disability in X, i.e. they are 'jural correlatives'.

Distinction between claim and immunity

An immunity is not necessarily protected by a duty in another person no to attempt an invasion of it. If X is immune from taxation, the revenue authorities have no power to place him under a duty to pay. A demand for payment is ineffectual, but X has no remedy against them for having made the demand. If immunity is the same as claim, there should be a correlative duty not to make a demand. In *Kavanagh vs. Hiscock* it was held that the relevant section of the Industrial Relations Act 1971 (since repealed) conferred on pickets an immunity from prosecution or civil suit, but no liberty to stop vehicles on the highway and no claim not to be prevented from trying to stop vehicles. Secondly, there may be immunity in X, which is protected by a duty in Y, but the claim correlative to that duty is not in X. Thus, diplomatic envoys are immune from the power of action or other legal process. Under an old law, since repealed, it used to be a criminal offence for any person 'to sue froth or prosecute any such will or process..' against them. As pointed out earlier, even if there are claims correlative to duties in criminal law, they are not in the persons for whose benefit the duties exist. Finally, immunity in X may be protected by a duty in Y and the claim correlative to the duty may also be in X, as n the case of the malicious presentation of a petition in bankruptcy. The failure to distinguish between 'right' in the sense of claim and immunity may be at the root of *Dowty Boulton Paul Ltd. vs. Wolverhampton Corporation.* In 1936 the corporation conveyed to the company a plot of land for 99 years for use as an airfield, and the corporation undertook to maintain it for use by the company. In 1970 the corporation purported to revoke the company's interest in the land. It was held that although the corporation was not entitled to override the company's interest in the land, the latter's only remedy lay in damages and not in an injunction. The effect of the 1936 conveyance would appear to have been top grant, *inter alia*, a liberty to the company; and if the corporation was unable to determine that interest, then that liberty seems to have been coupled with an immunity against revocation. The Court refused an injunction on the ground that to issue one would amount to compelling the corporation to fulfill its obligation to maintain the airfield; i.e. be equivalent to an order for specific performance. In this, then, is where lies that confusion. The

‘right’ of the company, which the Court held could not be overridden, was its liberty plus immunity; but the ‘right’ correlative to the duty to maintain the airfield was its contractual claim. Breach of this duty is remediable by damages, but the question whether an injection could be issued to support the immunity ought not to have been related to compelling performance of the contractual duty.

Distinction between liberty and immunity

The position of a diplomatic envoy illustrates this. Such a person is treated as being capable of committing a breach of duty and is under a duty to pay damages, although immune from the power of action or other legal process to compel him to do so. I other words, he has no liberty to do the act, nor a liberty not to pay damages for it, but he has an immunity from process all the same. It was held in Dickenson vs. Del Solar that the fact that an envoy was thus under a sanction-less duty to pay damages was sufficient to involve his insurance company in responsibility. If, on the other hand, he voluntarily pays the damages, he cannot recover them, since there is the duty to pay.

EVALUATION OF HOHFELD’S ANALYSIS

Hohfeld’s work has earned as much criticism as praise. One set of criticisms is to the effect that some of Hohfeld’s conceptions are without juridical significance, for instance, liberty, liability and disability. The answer, as Hohfeld’s editor has pointed out, is that liberty is necessarily related to the other concepts in the first square of the table, and liability and disability are similarly related to the other concepts in the second square. With regard to liberty the objection has been considered. With regard to liability and disability, it should be pointed out that once the concept of power is admitted, the others must follow. A power in X to alter the legal condition of Y implies that Y is liable to have his condition altered; if X has no power (disability), then Y is immune.

Kocourek objected to no-claim on logical grounds. That, which is not a claim, he observed, could be ‘an elephant, a star or an angel’. [So,] This is unfair of Hohfeld; no-claim simply

demoted the position of one who is not in a position to demand the performance of a duty. To allege that it could be ‘an elephant’ misses the point. Liberty, be it noted, is just as negative as no-claim, the gist of it being no-duty. So, too, immunity and disability might just as well be called no-liability and no-power respectively. Yet, Kocourek was prepared to accept these.

Secondly, various allegations have been made that Hohfeld’s analysis sees incorrect and incomplete in places. There is truth in this, and many critics have done constructive service in removing the errors. It should be remembered that Hohfeld himself would very likely have corrected these had he lived to revise his work. His premature death was a loss, for the form in which his work is to be found is not that in which he hoped to have left it. It has been pointed out that it requires some straining of language to bring wrongful powers under the label of ‘rights’ which is not an objection to Hohfeld’s analysis of power, but rather to the association of power with ‘right’. Non-correlative duties and ‘subjections’ (as distinct from liability) do not fit into the scheme, but these can be explained on the ground that they are not jural relations, which is what the scheme purports to portray. They reveal its limitation all the same. It has also been objected that the power concept needs greater refinement. On the one hand there is ‘capacity’ possessed by individuals, e.g. to ,make wills, contracts etc; on the other hand there is ‘authority’; conferred on specially qualified individuals or bodies in special circumstances. While it is true that the exercise of both results in changing jural relations, the categories are so different that they should not be grouped together.

Thirdly, there is the objection that the terminology is unusual and that it is unrealistic to expect the profession to make so radical a change in its vocabulary. The day when the House of Lords will be talking of no-claims is remote, but what is important is not the words, but the ideas which they represent one may think Hohfeld, without taking Hohfeld. One can utilize the analysis to keep one’s mind clear when grappling with problem, and may then state the result in any other terms. It is not unimportant to note that the American Restatements have adopted Hohfeld’s as their medium of expression.

Fourthly, there is the objection that the terminology is not unusual enough grlksitics, while applauding the effort to dispense with the homonym right have shown that some of the terms

which Hofeld chose are just as ambiguous. To use a homely phrase of Dr Oliver ‘earmarked for other conceptions’ the objection is not fatal. Hohfeld did his best to for other conception’ the objection is not fatal. Hohfeld did his best to provide synonyms for his terms, and other writers are free to improve the terminology as they think best.

Fifthly, valuable as Hohfeld’s work is in distinguishing between claims, liberties, powers and immunities, it is convenient and necessary to retain a general concept of ‘right’ to denote institutions, such as ownership or possession. Thus, an owner and his bailee have claims etc in relation to the thing bailed, but their interest of the former is distinguished from that of the latter by the ‘right of ownership’, which carries with it the claims tec. Also as will appear later such phrases as right to possess and better right in a thing expresses the general idea of entitlement, which cannot be conveyed adequately if it were reduced to specific claims etc,.., such expressions are convenient and do not mislead.

Lastly, the decisive question concerns the utility of the scheme. Cases which accord with Hohfeld’s analysis, so the argument might run, were in fact decided without the aid of his scheme. The scheme is therefore superfluous. If, on the other hand, a case is not in accord with the scheme, then the scheme should be altered; for is not case law the criterion by which any theory is tested? Only a superior tribunal can say that a case was wrongly decided. To this kind of argument the answers would be as follows. The first step is to see what justification there is for adopting the Hohfeldian distinctions. It is submitted that they are borne out by such an abundance of case law as to justify their acceptance as a basis for an appraisal of individual decision. Just as an established line of authority is not discarded as soon as the first aberrant decision turns up, so too the occasional decision not in accord with the Hohfeldian scheme should not of itself be taken as discrediting it. Secondly, it could be of use in assessing the precise effect of an aberrant decision without condemning it as wrongly decided. Thirdly, sometimes, however, it may be permissible to argue that such a decision was indeed wrongly decided as when an appellate court is invited to overrule it Hohfeld’s analysis may furnish reasons why it should be regarded as incorrect. Fourthly, the use of the analysis will enable the law to be developed more in accordance with existing principle and less through exceptions. Fifthly, the analysis is of value in understanding the law. Sixthly, it is an aid to distinguishing.

Finally, it is an aid to clear thinking and invaluable as a mental training. Although the hopes that were once entertained of starling achievement with the aid of the scheme have not been realized, yet its value and utility as an aid to clear thinking have been proved.

It is important to apply the Hohfeldian analysis to social and political slogans such as 'fundamental right', 'rights of Man', 'Women's rights', 'prisoners' rights, 'Animal right', worker' right' and so forth. As such these are ridiculous bases for serious action. Is a particular campaign launched for claims, liberties of action, powers, or immunities; in whom; in what circumstances; when;' where? The point may be illustrated by taking one of these, 'Workers' right'. On analysis, it can be seen that one aspect is the claim-right to be given jobs, correlative to a duty in the state to provide the state to provide them, which deserves sympathy in a climate of unemployment. Next, there is the assertion of an unrestricted liberty-right not to work at the jobs, which are claimed 'as of right', ie the liberty of strike. Side by side with this is the assertion of an unrestricted liberty-right to prevent other workers from working at their jobs by picketing. There is also the assertion of a power to drive worker out of their jobs through the closed-shop doctrine. There is the assertion of immunity form suits in courts of law and immunity from having these various liberties and powers curtailed or abolished. Finally, there is a claim-right to at least some kind of regular payment for workers through various welfare benefits. Any discussion of a legal framework for industrial relationships should surely begin with precise analysis of the different concepts that are involved.

TEMPORAL PERSPECTIVE OF THE HOHFELDIAN SCHEME

The difference between the first square and the second is that the former concerns jural relations at rest, the second with changing jural relations. Of the eight concepts in the scheme, two stand out as the key concepts, one in each square. They are duty and power, the others in their respective squares being only derivatives. Duties regulate behaviour, while powers create, repeal or modify duties and other relations. Professor Hart has unerringly fastened on these two to provide him with the centerpiece for his concept of law, which will be considered later.

A point of significance is the relationship between the squares. Each depicts jural relations of correlation, opposition and contradiction as they are to be found presently. The relationship between the squares requires a temporal perspective. Thus, a power and, e.g. the claim-duty relation created by its exercise, cannot co-exist; the former is anterior to the latter. It has been shown how a power may co-exist with a duty to exercise it, or not to exercise it, but this is the concurrence of two independent jural relations. The situation now being considered concerns the relationship between a duty and a power where the duty has been created by the power. If one focuses on the power, the claim-duty relation is in the future; if one focuses on the claim-duty relation, the power which created it is in the past. For instance, there is a power to make an offer and a power to accept it, and once they have been exercised they give rise to a contractual claim-duty relationship. When the contract comes into being, the offer and accep0tance are finished and done with. It would be incomplete to take account only of the power and lose sight of the claim-duty relation, or to take account only of the latter and lose sight of the creative power. In order to get both into focus a temporal perspective is necessary. Indeed, 'the law', as commonly understood, is an much concerned with powers as with the jural relations they create. Thus the 'law of contract' deals with powers to create claim-duty relations as well as the claim-duty relations themselves, which are labeled as different kinds of contracts. Accordingly, it submitted that in order to see the working of the Hohfeldian table a temporal perspective is essential.