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Max Planck Manual
on
Legislative Drafting on the National Level in Sudan

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I. Introduction

Legislative drafting is one of the most difficult tasks a lawyer can be asked to do.¹ It is a “highly technical discipline, the most rigorous form of writing outside of mathematics”², and it can be considered the most difficult form of legal writing. This is true not only because the legislative problems are technically more complicated and socially more relevant than other problems in legal writing, but especially because the range of application of a law is much broader than that of any other legal document. Therefore, in case of a statute, the legislative drafter has to take into consideration many more contingencies than in case of a contract or will.

Furthermore, it is a common misconception to assume that the task of a legislative drafter starts with the writing of concrete clauses. Rather, the drafter needs to get involved at a much earlier stage. The drafter needs to help the policy maker to develop ideas on a sound policy and to make informed decisions, to point out the boundaries in which drafting takes place, to research all the necessary information, to discuss upcoming difficulties and highlight the impact of the draft legislation to the policy maker/the responsible ministry.

In this respect, a legislative drafter is often compared to an architect (“the classic analogy”³):

- which also has to be called at an early stage, long before he/she can start drawing blueprints for the house
- who also needs a lot of background information: what is the foundation, the environment, how much may the project cost?
- who also needs to help the client (in case of the drafter: official in the line ministry) to develop his/her ideas, amongst others by finding out for what reasons the client wants the house (purpose: business/private/family/alone),
- who also needs to gather all the relevant information (size, number of rooms, costs, purpose etc.), not being able to rely that the client (in case of the drafter: official in the line ministry) will bring all these information without being asked.

Furthermore, the task of a legislative drafter comprises the job a builder at the same time, since the drafter also has to execute the planned ideas.

¹ Dickerson, How to Write a Law, 31 Notre Dame L. 1955-1956, p. 15.

² Dickerson, Legislative Drafting, p. 3.

³ Dickerson, Legislative Drafting, p. 11.

In more detail: It is the function of the drafter to ensure that the draft is compatible with other legislation, especially that it does not violate constitutional law, that the methods it uses will be practical and legally effective (requires more than *legal* understanding), that it follows conventional forms and uses appropriate and comprehensible language and terms. The final draft must communicate the legislative requirements with clarity and certainty.

II. Part I: Necessary setting for the successful drafting of a bill

A. Framework for legislative drafting in Sudan

The following questions are supposed to highlight the types of procedures that favour the successful drafting of a bill that will have the desired effects.

Policy analysis: Does a procedure exist in Sudan for the development of new policies? Is there a standard procedure to check alternative policy options? Is it a standard procedure to reconsider whether legislation is really required to reach the policy objective? E.g. because the matter: (1) is or can be dealt with under an existing law, or (2) can be dealt with without legislative action (e.g. by administrative directives, such as contract or negotiation and agreement with affected parties)

Administrative procedures: Is it standard practice to carry out a check in relation to each new legislative project to establish:

- (1) that the organisational structures and administrative procedures necessary to make a new scheme fully operational already exist and will be adequate for the purpose, or
- (2) if they do not exist or are considered to be inadequate, that the additional requirements needed can be provided to the level necessary for effective implementation?

Resources: Is it checked that the necessary human and financial resources for the implementation of the new act are available? And if not available yet, does a scheme ensure that they will be provided?

Is a cost assessment for the new legislation made?

Is it checked what kind of financial impact the legislation will have on other governmental authorities, i.e. in case of the national level on the level of Southern Sudan, the state or local level?

Do regulations require the cost assessment to encompass the financial and administrative impact of the legislation on private actors or concerned communities?

Is there any *ex post* evaluation whether projected costs were realistic?

Implementation: a) Is specific consideration given to the methods by which compliance with the legislation will be secured and to determining the:

(1) legal provisions that will be required to ensure the effective implementation of the legislative scheme, and

(2) human, institutional and financial resources that will be needed to give effect to the selected method of enforcement?

Institutional framework:

(1) How are drafting resources organized: Does Sudan follow the approach of establishing a single government unit which can develop the special legislative drafting competence required? Or did Sudan adopt the integrated approach of assigning drafters to the various ministries so they can develop expert knowledge in the subject matter? A *third* way of setting up the available drafting resources is that in general, every ministry has drafting experts, but a central drafting committee of experts exists which can be assigned to different ministries as required.

In this respect, the discussion with officials from the Department of Legislation of the Ministry of Justice has shown that Sudan follows the approach of a centralized drafting service: the Department of Legislation is situated within the Ministry of Justice and is responsible for the drafting projects of all ministries.

(2) Who is responsible within a given ministry to prioritize drafting projects? (i.e. who decides on which of the urgent drafting projects the drafters are supposed to start working first). The prioritization is a purely political decision - which does by no way mean that it should be taken arbitrarily. This decision should be taken before various drafting projects of varying urgency are handed in to the Ministry of Justice. Otherwise the decision of prioritization will have to be taken by the Ministry or the drafters themselves. The ministry from which the different projects originate is however in a much better position to evaluate which project should be implemented first.

(3) Who decides on the priorities between drafting projects from different ministries? Is there a central committee (often called Cabinet Committee on Legislation) which prioritizes drafting projects? From the discussion with the officials from the Department of Legislation of the Ministry of Justice, it is understood that currently prioritization takes place to a certain extent through the development of 5year/10 year Plans. These Plans outline on a broad scale which legislative projects are planned in a certain time period, thereby mainly serving as a time schedule. However, they do not yet answer the question which drafting project the drafters are supposed to give priority over another in a certain month. In Sudan, such a Cabinet Committee on Legislation might be well located as a sub-committee of the Council of Ministers, as a body in which all the ministries are represented.

(4) Are there any regulations according to which criteria those decisions should be taken? (E.g. number of persons affected by the intended legislation, special urgency because existing legislation or lack of such legislation has detrimental effects on certain group, special vulnerability of group even though not high in numbers, etc.)

B. Creating and enforcing a regulatory framework for law drafting

The following points are considered of special importance in the regulatory framework for legislative drafting.

1. Legislative programme

In order to create such a regulatory framework, first of all a legislative programme is needed.

A legislative programme requires:⁴

- allocation to a body at the head of Government of the responsibility for developing the programme on behalf of, or for approval by, the Council of Ministers;
- a process to enable that body to decide legislative priorities, i.e. which of the possible legislative projects are to be part of its next programme (since there are invariably more projects than there is time or resources for Government to prepare and for Parliament to consider, if those functions are to be satisfactorily performed);

⁴ Law Drafting and Regulatory Management in Central and Eastern Europe SIGMA PAPERS: No. 18, OCDE/GD(97)176, Section 3.1.1.

- stipulated procedures (e.g. as to the information to be provided in relation to proposed legislative projects) and an annual timetable for this process, so that ministries may plan ahead and prepare their positions in good time;
- working out the programme for a long enough period ahead to give ministries adequate time to complete larger, more complex legislative projects (which, if policy development and consultations are to be properly undertaken, may take more than, e.g. a year, the usual programming period);
- procedures for dealing with urgent legislative projects that arise after the legislative programme comes into effect;
- acceptance that ministries should not start to develop a legislative project until approved by Government collectively as part of the legislative programme (thereby saving resources from being used on projects that may not be proceeded with).

However, even though coordination within government, i.e. between the different ministries seems desirable, please note that according to Art. 106(1) INC also an individual minister – that is to say without the prior consent of the Council of Ministers – may table a bill. Thus, coordination and a joint approach of all the ministries are favorable, but not legally required.

2. Legislative timetables

One of the most important commodities for good law-making is time. Those preparing legislation must be afforded adequate time to complete properly the range of tasks arising from policy development through to the drafting of the legislative text before the legislation is introduced into Parliament. At the same time, law-makers have an interest in ensuring that new legislative projects become operational law as quickly as possible. In some cases, great speed is essential to deal with an urgent need. But undue hurry driven by short-term political objectives is a significant factor contributing to defective law. The question of how much time to allocate to a legislative project deserves special attention.

Further, the human resources that can be made available for preparation and drafting are usually limited, sometimes scarce. So, it is equally important that their time is not wasted by unnecessary procedures, by delays caused by the inability of others to deliver their input on time, or by having to repeat a process carried out inadequately earlier. In particular, there is little value in ministries carrying out extensive work on legislative projects only to find, when

these are submitted to the Council of Ministers, that they are not acceptable in principle or cannot be given any priority for presentation to Parliament.

These considerations make clear that the processes for developing and drafting a piece of legislation must be *planned*. Timetables and deadlines should be set for all persons involved, and co-ordinated with the similar arrangements made for all the other legislation that is in preparation at the same time. Of equal importance, there must be some authority in government that has the capacity to ensure that the planned arrangements are complied with.

Timetables for legislative projects are necessary to make a legislative programme effective, and should be set centrally.⁵ They enable Government to plan ahead for their consideration and approval of the legislative drafts and for staging their subsequent submission to Parliament. They facilitate the planning of the work of the Legislative Assembly. They also enable the body in Government co-ordinating the legislative projects to set deadlines for them and to monitor and secure the orderly progress of their preparation. They are necessary to enable ministries to set internal work plans and detailed timetables and to allocate the resources that are needed to complete their projects by the given deadlines.

Necessary features of a functioning timetable are:⁶

- a preliminary assessment of the steps that need to be followed for the particular project (e.g. the extent to which external consultation will be used);
- realistic and careful estimations of the time that will be needed for completing those steps;
- periodic reconsideration of the timetables, e.g. in the light of difficulties encountered, and a procedure for altering them.

Ideally, the timetables for primary legislation should relate also to the preparation of the secondary legislation which is essential for its implementation and enforcement⁷. In any case, individual timetables for the preparation of important secondary legislation are desirable.

⁵ Law Drafting and Regulatory Management in Central and Eastern Europe, SIGMA PAPERS: No. 18, OCDE/GD(97)176, Section 3.1.2.

⁶ Law Drafting and Regulatory Management in Central and Eastern Europe, SIGMA PAPERS: No. 18, OCDE/GD(97)176, Section 3.1.2.

A difficult issue for the drafters is to estimate how long they will need for a certain bill. Naturally, this depends much less on the length of the bill as far as pages are concerned, but on the difficulty of the task. Here, only experience will enable drafters to arrive at a realistic estimation. The question how many drafts are enough can hardly be answered in general either. The only possible answer is “as many as necessary to do the job properly”. In very few cases, this might be 1 or 2, in complicated cases a lot more will be required.⁸

3. Drafting resources and their organization

Within Europe, two systems of organizing drafting resources exist:

- a) The Continental system: the substantive/line ministries dispense of drafting resources of their own (e.g. the Ministry of Transport has drafters for transport-legislation, the Ministry of Agriculture has special drafters dealing with legislation related to agriculture etc.).
- b) The British tradition, which the Sudan follows as well, favors a central drafting office. This office can be located either within the Ministry of Justice or be independent of *all* the line ministries which it serves.

It might be of importance to consider the advantages and disadvantages of both systems in order to make an informed choice and to be able to balance out the disadvantages of the chosen system in practice.

Advantages of a centralized drafting service⁹

- Constitutes a standing resource of high quality lawyers with expert knowledge of existing legislation and extensive experience in solving legislative problems
- Contains collective experience and know-how in relation to drafting procedures and techniques, that can be handed on to new entrants
- Ensures that standard procedures will be followed by Ministries
- Leads to consistent standards and greater uniformity in legislation and legislative approaches
- Facilitates management of Government’s legislative programme
- Makes the best use of limited numbers of experienced drafters.

⁷ See, e.g. Bulgaria, *Regulation on the Structure and Organisation of the Work of the Council of Ministers and its Administration*, Article 25(2).

⁸ Dickerson, *Legislative Drafting*, p. 40.

⁹ Keith Patchett, *Preparation, Drafting and Management of Legislative Projects*.

Disadvantages of a centralized drafting service

- Usually is restricted to drafting Government bills, leaving secondary legislation to Ministries and Parliamentary projects to Parliamentary officials and members
- Has little specialist knowledge of substantive law (which rests with Ministries)
- Is rarely involved at the stage of policy formation
- Is, therefore, dependent upon Ministries for instructions as to the policy content, which may vary widely in quality
- May become an elitist cadre of specialists who perpetuate outmoded practices
- Tend to be subjected to tight timetables and extreme pressures to complete a legislative project.

4. Legislative handbook¹⁰

Common standards and uniform practices for preparing and drafting legislation are set most effectively through the provision of a single set of directives, which have behind them the authority of Government and, as needed, the Legislative Assembly. Ideally, all the directives concerned with legislative preparation should be collated into a single source (e.g. a Legislative Handbook) that is thoroughly known and used by everyone involved in preparing legislation. Such a legislative handbook is currently still lacking in Sudan. The drafters themselves might want to call the attention of the policy makers within the Ministry of Justice to the desirability of uniform standards, proposing as a starting point to make those practices which can be widely agreed upon obligatory through executive or statutory regulations.

Even when basic standards are set by such an instrument, there is an additional value in developing a supplemental *manual* or style guide for law drafters. Such a document can build upon the basic standards by demonstrating how to deal with particular drafting difficulties that often occur. It can be used to illustrate how legislative language can be made more accessible to ordinary users, and to support plain language drafting. It is a simple device for showing how to avoid past practices which have unduly relied upon, e.g. unduly legalistic language. These documents are also valuable as a means of informing drafters from outside Government (e.g. parliament or external experts) of current practices, and as a training aid.

¹⁰ Law Drafting and Regulatory Management in Central and Eastern Europe, SIGMA PAPERS: No. 18, OCDE/GD(97)176, Section 3.1.3.

5. Prioritizing drafting projects

Are there always sufficient drafters for the drafting projects? It is understood that Sudan at the national level does not face a lack of experienced drafters. However, once drafters get involved in carrying out research with respect to the existing legal situation, the policy background and its potential legislative solutions, and start writing comprehensive explanatory notes in order to give the legislative assembly a solid base on which to decide on the passing of the legislation in question (all of which this Manual will suggest in the following parts), drafting resources might also become scarce in Sudan. Adding some comparative research on legislative solutions in other countries and their effectiveness might make timing and prioritization even more important.

Once time becomes of the essence, it is necessary to start with one or the other legislative project and delay the rest.

Now, who takes the decision which project should be drafted first?

You as a drafter? Your head of department? Your minister? It is understood that the Comprehensive Peace Agreement and its Schedules of Implementation provide some guidance in certain areas by determining deadlines for the implementation of certain legislative projects. Furthermore, legislative programmes (5-year-plan, 10-year-plan) exist in certain areas which provide some broad guidance. However, they do not yet prioritize individual drafting projects.

If there is no regulation at all in this respect, there are usually the following outcomes to be expected:

The prioritization takes place haphazard. A drafter might favor the drafting project that seems the easiest to him/her; a minister might prioritize a drafting project that some lobbyists push most; someone might put a certain project on top of the list because he/she was induced by special benefits from a certain interested group. All kinds of interests become involved, none of which lead automatically to a prioritization that is in the interest of the public at large, much less in the interest of the most vulnerable parts of the population.¹¹

The drafting projects should therefore be coordinated centrally. This could be done by the Ministry of Justice or by a “legislative committee” attached directly to the Council of

¹¹ Compare Seidman/Seidman/Abeyesekere, *Legislative Drafting for Democratic Social Change – A Manual for Drafters*, p. 51 ff.

Ministers. In respect of the most essential questions of prioritization, the decision might have to be taken by the Council of Ministers directly.

In any case, the competences involved here need to be regulated. Ideally, if the original competence should lie with the Ministry of Justice, regulations should also include ways of dispute resolution for inter-ministry disputes. These might have to involve the Council of Ministers as a “higher”/impartial authority.

6. Setting up a bill team and cooperation within such a team

Never draft alone! Collaboration is necessary in large, complicated jobs, and it is desirable for most lesser ones.

Drafting of legislation involves too many technical, stylistic, AND substantive questions for one person. It is hardly possible to always have in mind all formal requirements plus all the policy considerations.

Therefore, the habit of many lawyers to work alone is very dangerous in the area of legislative drafting. It is significant to have other lawyers review the own work: Every piece of legislation of a certain size can always be improved by a second lawyer. Therefore, it qualifies you as a good drafter to seek such advice and to incorporate it where useful, instead of refusing such reviews because of the understanding that it would undermine your own competence.

Depending on the size of the project, the review by another drafter might not be enough. In case of more complicated legislation, it is advisable to set up a “bill team”: the assignment to such a team needs to be undertaken by a superior of the legislative department; teams cannot form themselves *ad hoc*.

If such a team consists of drafters only, 2 or 3 persons will be sufficient. However, especially in those more complicated projects, it makes sense to have experts on the policy substance involved. Ideally officials from the concerned ministries should be involved. This way, all the existing knowledge on a specific social problem can be collected. An adequate mixture of the involved persons guarantees that the last discrepancies in a bill are discovered.

In order for such a team to cooperate effectively, a clear distribution of responsibilities is required: who does what when? Who assumes the overall responsibility/coordinates the work? This distribution of responsibilities should be conducted BEFORE the team starts working.

This greatly improves the chance of achieving internal coherence and consistency, while failure to focus responsibilities causes delays and friction.

Such a team does not serve the purpose of having several people involved in the process of producing the clauses of the bill at the same time: Such “group drafting” is rather time consuming and ineffective. Within the team different sections or problems that need to be resolved can be divided between the team members; the necessary research work (on different areas of existing legislation, foreign legislation, social impact studies, calculations of costs etc.) can be assigned to different team members.

The results of the individual’s research or the drafts should then be circulated for suggestion or comment – first within the team. Later such possibility to comment should include those who will have to live under the bill or administer it. This can be accomplished through public hearings, involving civil society organizations. It is advisable to set up a general procedure allowing

Another advice in this context is to always pass the draft bill UP in the hierarchy: First of all, a bill should always be developed by an official of the drafting service and then, once a draft is finished (ideally after circulation in a bill team) be passed on to a supervising official, not the other way around. Otherwise the risk that the drafting official does not dare to correct/improve his/her supervisor’s bill is too great. On the other hand, even though a higher ranking official with more experience might always find issues that could be improved, he/she should never change the bill without first consulting the original drafter because he/she will be the only one having the complete overview over all the technical issues involved and might be able to explain certain points in the draft bill that at first sight appear odd.

C. Policy development

1. Overview

What decisions need to be taken to develop a sound policy?

And why do you as a drafter need to know about it?

At the **first stage**, key decisions are needed on such matters as¹²:

- (1) Is the problem correctly defined?
- (2) which of the possible policy options is to be preferred;
- (3) whether this option should be realized through legislation, rather than by non-legislative means;
- (4) Is there a legal basis for regulation?
- (5) What is the appropriate level (or levels) of government for this action?/which authorities should put the legislation into effect; and
- (6) what is the basic approach to be adopted in the legislation, and what legal and administrative mechanisms are necessary to put that approach into effect and make it workable.
- (7) Do the benefits of a regulation justify its costs of implementing it? Is the distribution of effects across society transparent?
- (8) How will compliance be achieved?

Decisions on questions such as these should be provided before effective work can be done on the legislative text. Providing them is properly the task of policy-makers who are expert in the particular subject matter, including those with specialist legal expertise.

Second stage: key policy decisions to be converted into legal text. At the latest, here the theoretical division between policy development and drafting of the text ends: detailed expert policy advice and legal inputs on substantive matters will continue to be required.

Depending on the organization, the same ministry officials are involved in both stages – in others they are kept formally separate. In the first case, drafters are involved in policy development anyway from the beginning; in the second case, they should, ideally, get the key policy decisions BEFORE starting to draft. However, in practice this might not always be the case. (One Kenyan drafter reported that once, she was asked to draft a “prohibition of mini-skirts” statute – without any further information than that.)

For this reason, the policy development issues are of relevance to the drafter.

A **second** reason is that even if the official of the line ministry/the person primarily responsible for the bill’s substance is of the opinion to have the whole policy in place, if your

¹² SIGMA Paper No. 15 – Checklist on Law Drafting

goal is to draft effective legislation for the development of your country, you might sometimes have to question these policy decisions: possibly the official has not conducted adequate research – this will also fall back on you, if the bill is a complete failure (either doesn't pass parliament or fails in practice) because it was not built on a solid foundation of information.

Thirdly, in many countries drafters are asked to provide “justifications” or a research report for the legislation they have drafted. In Sudan, this concept is known as “explanatory notes”. In this, they do not only have to justify the wording, but should also be able to explain the policy. Why we consider comprehensive explanatory notes so important will be dealt with below. But it is important to keep in mind that the drafter has to thoroughly understand the policy.

2. The policy decisions

The two decisive preliminary questions that the policy maker and the drafter have to answer are

- a) *which of the possible policy options is to be preferred; and*
- b) *whether this option should be realized through legislation, rather than by non-legislative:*

Is new legislation needed? What do existing laws regulate in this area?

Possibly, the existing statutes are fully adequate in substance. If the social problem that should be addressed lies solely in the lack of implementation of existing statute, a different approach needs to be taken than if no substantive rules exist yet. In any case, it is important that you are aware of the alternatives that exist in order to advise the official of the responsible ministry comprehensively.

What non-legislative means/instruments does the State have?

Normative instruments:

- *Procedural rules*: governing the steps officials are expected to follow in carrying out specified administrative processes.
- *Practice rules*: stating the practices that are to be followed by officials in order to make a statutory scheme operative or effective.
- *Instructions* (from a more senior level of the official hierarchy): indicating by whom and how particular administrative powers are to be exercised.

- *Interpretative guides*: indicating how persons affected by statutory powers can expect those powers to be exercised.
- *Prescriptive directions*: indicating the actions that persons affected are expected to take in order to comply with statutory rules.
- *Recommendations*: providing advisory guidance as to appropriate action in order to implement specified policy objectives.
- *Codes of conduct*: prescribing guidelines or standards for action or behaviour in specified contexts.
- *Voluntary codes* (adopted by private sector bodies): providing for self-regulation on specified matters.

Alternatives options to induce a certain behavior among citizens besides drafting laws: (“Government Tool Kit”)¹³

1. Information – The Power of Influence		
Advice Guidance Directions Data and information Persuasion Agreements	<i>by means of</i>	Wide dissemination Selective distribution Advertisement & publicity Targeting operators Responding to requests
2. Economic measures – The Power of Money		
Bargains Incentives Negotiated benefits	<i>by means of</i>	Government contracts Tax inducements Grants, loans, subsidies
3. Administrative action – The Power of Government Resources		
Provision of a specialist service Use of official human resources Administration through existing Government agency Monitoring and inspection Policing and corrective intervention		

¹³ Patchett, Preparation, Drafting and Management of Legislative Projects, p. 6.

4. Inaction – The Power to decline to intervene
Reliance on market forces Reliance on social controls / Reliance on self-regulation

D. Necessary information

1. What do you need to know?

One of the important tasks of a legislative drafter is to gather all the important information. Usually, the officials in the respective line ministries will not be aware of which kind of information the drafter needs and will leave many gaps that the drafter has to fill.

As a drafter, you should therefore:

- Get the relevant facts BEFORE starting to draft.

How to get the relevant information even if the policy decision is not yet sufficiently clear, and possibly, lacks the factual background needed for an informed policy decision:

- o Phone calls, personal conferences (in and outside the Ministry)
- o Use material, if available from hearing/studies conducted on the policy questions prior to the drafting
- o use all available facilities to get the relevant information on the subject of the bill (the administration regarding practical issues of implementation; libraries; other ministries)
- o ask *concrete* questions, especially ask the official of the responsible ministry
- o require background information
- o use your judgment as to how far to check the opinions of others (cross-checking is always preferable and advisable, but might not be possible on all details for lack of time).

What do you need to know?

What constitutes the nature and extent of the social problem the bill aims to resolve in your country's specific circumstances? Since law can only resolve a problem by changing behaviors, whose and what behaviors comprise that problem? What facts can you as a drafter find to describe the problem and the behaviors that comprise it?

You need to know the desired result in order to draft legislation which is supposed to bring it about. Only by this you can check whether the envisaged legislative solution makes any sense and has chances of solving the social problem. Do not hesitate to go back to the official in the responsible ministry in order to ask further questions whenever you discover new gaps in your informatory background.

2. What do the officials in the responsible ministry need to know?

What do the officials you work with (in the concerned ministries) need to know?

Educate them on why you need such a solid policy and factual background. Explain to them the risks involved if you are not given all the information you need or sufficient time for drafting.

Ideally, the official in the responsible ministry should have a solid background in legal interpretation in order to understand your drafts, to be able to check its implications and to understand how it relates to the policy goal, and to criticize it knowledgeably. He/she should be willing to be in a constant dialogue with the drafters, since substance and form are too closely interrelated for the drafter to be left alone with the substance.

E. Tools for drafting

The following equipment is needed in a legislative drafting service:

- pencil/paper, ideally computer (makes constant changes easier)
- telephone (to contact the official in the responsible ministry or other experts to gather information, to coordinate with responsible ministry)
- all statutes currently in force in Sudan, especially the Interim National Constitution, the Interim Constitution of Southern Sudan, international treaties to which Sudan is a party
- Indexes in an up-to-date form are needed for all current legislation
- English/Arabic dictionaries, books of synonyms, grammar and style
- Library: books on legislative drafting, constitutional law, international law, the respective area of national law, foreign statutes for comparative research.

It is understood that up-to-date publications on legislative drafting practices as well as a comprehensive collection of all statutes that is easily accessible to the drafter are still lacking. However, it is suggested that the drafters support the setting up of these materials, since first of all, they know best what is needed, and secondly several drafter might already have materials that they can contribute from courses, workshops or studies.

F. Writing of the explanatory notes

Explanatory notes are also called “justifications”, “research report” or “Memorandum of Law”. In the following, the Sudanese term of “explanatory notes” will be used. The purpose of explanatory notes is to assist readers to understand and interpret the proposed laws and to highlight the drafters’ intention.

1. Reasons for writing comprehensive explanatory notes

a) Democratic governance

Parliament, i.e. the National Assembly and the Council of States in Sudan, is the body that ultimately needs to decide on laws as representation of the citizens (compare Art. 91(1) INC). For this decision to have some value, i.e. in order for this decision not to shift in practice to the executive branch, it is of vital importance that parliament can make an informed decision. The parliamentarians need to understand

- the policy: its aims, reasons etc.
- the intended impact
- the reasons why government assumes that the law will have the intended impact
- costs of the law
- necessary changes in administration etc.

in order for them to get the whole picture and then to be able to form their own opinion on the proposed bill.

At the same time, these explanatory notes should also enable the public to assess the facts (because the explanatory notes should name the sources of data collected) and the logic on which the bill rests.

b) Effective legislation

Where thorough policy analysis exists, it is a mere matter of including its substance into the explanatory notes. However, where no such comprehensive policy analysis has been carried out, it is not safe anyway to proceed with a law of which nobody can estimate the results to be expected and the costs etc. That means that the information has to be gathered at some point. Explanatory notes warrant an informed decision-making process based on logic and facts.

Whether a new law will lead to the desired results does not depend on the bill’s specific wording and its technical form only. Non-legal factors play an important role: the relevant social actors and the reasons upon which they act, physical circumstances etc.

Example: If the policy goal is that all children in Sudan should accomplish at least primary education because this is thought important for their later economic prospects and the economic development of the country as a whole, a perfectly well drafted bill making primary education obligatory (including sanctions for the parents who do not comply and don't send their children to school) might be completely inadequate to solve the problem.

As seen in the policy development part: First, it needs to be assessed the magnitude of the social problem (how many parents do not send their children to school and how many children drop out of school during primary education),

Secondly, the factors that lead to the undesired behavior of the parents (not sending their kids to school) have to be researched. A variety of factors might lead to this behavior – and all of them might have to be addressed differently:

- There might not be sufficient schools or not sufficient teachers/rooms in the school.
- Schools might not be close enough (in walking distance) and no public transport might be available for the children.
- School fees (or public transport, if available) might be too expensive for a number of parents.
- Parents might have cultural reasons for not sending their children to school (esp. with respect to girls – or because they want to educate their children themselves in their traditional life style and don't want public schools to interfere).
- Parents themselves might lack the education to see the additional value that education might bring to their children.
- Parents might need children as “work forces” at home: to look after younger children, to help on the fields etc.

You might be able to think of a number of other factors that lead to the undesired behavior. Against most of these factors, the establishment of the obligation to send the kids to school will not be of much use.

Thus, forming the policy already requires some research before the legal aspects of a bill can be developed.

c) Enables drafters to structure the available evidence and the facts logically

The explanatory notes serve as a map for the drafters for gathering and structuring the relevant evidence. Having included them into the explanatory notes (and ideally having

understood them), you already have all the facts that need to be considered in the bill. It helps you to organize the facts logically, and to use them as basis to determine the bill's substantive measures.

2. Risks

Certain risks are involved in the use of such explanatory notes: They relate to the bill only and do not yet take into account subsequent changes to the bill in parliament. Therefore, they cannot as such be used for interpretative purposes after the law was passed. If it should be possible to make reference to them for a better understanding of the law, it is necessary to implement procedures that adapt the explanatory notes to the final statute (taking into account changes made in parliament). However, in this case, it is still necessary to clarify the legal status of the material for purposes of interpretation by the courts.

3. Problem solving methodology¹⁴

In order to develop a policy that effectively addresses a certain social problem, a *four step approach* is recommended:

1. Identifying the problem

Provide facts to substantiate the difficulty's/ superficial manifestations: e.g. school drop out rates in primary school are 60 %, or the illiteracy rate is 50 %- or high unemployment rates, low income because no qualified jobs etc.

Then the explanatory notes must identify in whose behavior the social problem lies (as seen, laws can only change behavior, not the weather conditions or statistics). In the example given, it will mostly be the behavior of the parents (since children themselves can usually not yet decide whether or not they go to school). However, at this stage, even this remains a hypothesis (an educated guess): Without further research, one cannot know whether the parents can take any decision in this matter at all: e.g. if no school exists in the area, one cannot even say easily that the parents have acted by not sending their kids to school.

2. Researching explanations/causes

As already discussed, a law can only alter behaviour of social actors. It will only reach this aim of doing so by altering or eliminating the causes for this behaviour. Therefore, a policy

¹⁴ This chapter is based on Seidman/Seidman/Abeyesekere, *Legislative Drafting for Democratic Social Change – A Manual for Drafters*, p. 88 ff.

maker or law drafter must systematically research and test alternative causes, explanations for the social actor's behaviour. Here, it is especially important that the researcher compiles and structures all the available evidence and identifies the **country-specific factors** that cause the behavior. Since the reasons that lie behind certain ways of behaviour will usually differ from one country to another, the research of the **local** factors is of special importance. Here you also find the reason why it is extremely **dangerous to copy legislation from other countries** or even to use it as a blueprint: This may only be done, if the circumstances in both countries have been carefully considered. Thus, it can never save you the research work; it even adds to it since you have to research the background in two countries! Nevertheless, it might give you valuable information whether a certain policy works or why it didn't work in other countries. So, you may use it as additional information – as long as you are cautious and don't copy it into a completely different setting.

3. Proposing a solution

Before the laws enactment, a drafter cannot know the consequences of it in reality, since no experience exists with regard to how exactly the statute will influence the addressees behavior. However, having provided warranted explanations of the problematic behaviour's causes, you can draft solutions that are at least likely to overcome those causes.

a)Content of the explanatory notes

The following checklist is a suggestion regarding the contents of comprehensive explanatory notes. Naturally, this structure should be adapted to the needs of the Legislative Department and to the respective bill.

Checklist for explanatory notes¹⁵

I. Introduction

- A. Brief statement of the problem and the bill's proposed solution
- B. Fitting the social problem addressed by the bill into the larger context. Frequently, the problem constitutes a small part of a larger one – then, the research report should indicate the relationship to that larger problem and the larger legislative program addressing it.
- C. Optional: History of the general problem

¹⁵ From Seidman/Seidman/Abeyesekere, *Legislative Drafting for Democratic Social Change – A Manual for Drafters*, p. 118 ff.

D. Brief statement of the problem solving methodology

II. The Difficulty the Bill Will Address

A. Mini-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

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

i. [Frequently, the social problem manifests itself as a problem in resources allocation, for example, as underground water pollution, unemployment, inadequate public transportation or insufficient rural clinics. If the social problem appears first as a question of resources allocation, the drafters should here describe the nature and the scope of the resources' misallocation.]

ii. Under this heading, as under most of the headings

C. Behaviors that constitute the difficulty

i. [Law can only address behaviors. Having identified the misallocation of resources, this section of the report should describe the relevant primary addressees and implementing agencies and the aspects of their behaviors that prove problematic.]

ii. [In describing the addressees and their behaviors which comprise the social problem, drafters should differentiate between the several sets of addressees. The explanations for each of these sets of addressees' behaviors and 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 addressees 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.]

D. Comparative law and experience

E. History of the difficulty

F. Analysis of the impact of the existing law on different groups of the society

G. Mini-conclusion: Summarize this section; indicate the connection between the statement of the difficulty and the explanations section that follows

III. Explanations: including “opportunity and capacity”

- A. Mini-introduction: Describe the function of explanations in the logic of problem-solving and outline this Part’s contents
- B. Optional: history and comparative law as possible sources of hypotheses as to explanations
- C. First role occupant (A) and first behavior (1)

Group together the explanatory hypotheses and the evidence relating to each set of behaviors

- i. State of the existing law (‘rule’) as it presently bears on the behavior or role of addressee A as identified in the difficulty part

[Take care to discover all the legislation that bear on their particular problem (not just the laws that have a name similar to the title of the social problem in question).]

- ii. The non-legal factors that may affect the problematic behaviors

- i. Objective factors

- (1) Opportunity

- (2) Capacity

- (3) Communication of the law

- (4) Effect of the addressees’ decision-making process on their decisions

- ii. Subjective factors

- (1) The addressees interest (‘incentives’), including the effect of potential sanctions

- (2) Ideology (values and attitudes) as it affects the addressees’ behavior

- iii. [where relevant, the foreign experience as to possible causes of the behaviors at issue]

- D. Possible further addressees or problematic behaviors (repeat ‘C’ for each successive set of role occupants and their behaviors)

- E. Possible problematic implementing agency behaviors (repeat the steps suggested in ‘C’ for the implementing agency)

[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]

F. Optional: Foreign Law

G. Mini-Conclusion: Summarize this section and reiterate the connection between explanations and solutions. List possibly the explanation for each set of behaviors identified in the difficulty section and summarize the causal factors which the preferred solution – the proposed bill’s detailed measures – must alter or eliminate to induce more desirable behaviors

IV. Proposed Solutions: weighing alternative measures’ social costs and benefits

A. Mini-Introduction: Note the requirements that problem-solving’s logic imposes on the proposed solutions and outline this Part’s contents

B. List of alternative potential proposals for solutions that logically seem likely to alter or eliminate the causes of existing problematic behaviors

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

ii. [Drafters may obtain ideas for alternative solutions from three principal sources: comparative law and experiences; scholarly books and journals; the drafter’s own ideas]

C. Description of the details of the bill’s major provisions

i. [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.]

ii. [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 participants, accountability and transparency.]

D. Demonstration of how the preferred solution addresses the causes of the difficulty as revealed in the explanations sections

[in effect, use the problem solving methodology as a device to predict the behavior of the bill’ addressees]

E. Analysis of the costs and benefits of the bill

- i. Economic costs and benefits
- ii. Non-quantifiable social costs and benefits
- iii. Social impact statement
 - i. Impact of the bill of different social groups, especially on the poor, women, children and minorities
 - ii. 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

F. Monitoring performance

- i. Demonstration of how the bill provides for monitoring and evaluating its implementation
[alternatively: list monitoring of devices and give reasons for one(s) included in the bill]
- ii. [Foreign experience in monitoring implementation of analogous laws]

G. Mini-Conclusion

V. Conclusion

b) Sources

In your research, it is of special importance that you have consulted all the relevant sources.

Example¹⁶: The government is calling for a change in the law of the insanity defense in criminal cases. A defendant who attempted to kill the President has just been found not guilty by reason of the insanity defense. The acquittal is followed by widespread criticism.

What do you need to research?

For a comprehensive overview over the issue, and in order to be able to write the aforementioned explanatory notes, you should research:

- every provision in the applicable constitution(s) on the subject,
- every applicable statute on the subject,
- every major court opinion on the subject,
- every opinion of state attorneys on the subject,
- every regulation on the subject by administrative agencies,
- every major scholarly commentary on the subject in treatises, law reviews, bar association journals,

¹⁶ Statsky. *Legislative Analysis and Drafting*, Second Edition, p. 163 ff.

- every major study on the subject from agencies, bar associations, interest groups such as unions, police associations, medical societies, social scientists, the academic community, lobbyists,
- every major proposal on the subject from groups that have proposed legislation.

Additionally – if not already done in relation to your research on possible policy options – you ought to research what other legislatures have done in the area. What statutes do they have on the subject? What are the differences among them? Why were they passed? What has the experience been under those statutes? What strengths or weaknesses have been identified? What has been the response to the law from the courts, the enforcement agencies, the public?

III. Part II: Legislative drafting in Sudan

A. The drafting process

1. The established praxis in Sudan

It has been the well established praxis in Sudan to center the early stage of the drafting process around the Council of Ministers. In line with a general strategic plan covering ten years, each ministry submits its projects to the Council of Ministers (CoM) where it is generally discussed. Other ministries are then invited to give their comments in more detail. The department of legislation within the Ministry of Justice is mandated to prepare a first draft in cooperation with the concerned ministry, putting the political content into legal language, thereby considering the limits set by existing law including sources of Sharia law. If additional expertise is required at that stage, experts from other ministries and/or from outside the executive branch are consulted. The first draft is then presented to the Council of Ministers that might or might not agree to table the bill before the Assembly.

2. Initiating and tabling a draft bill according to the INC.

Tabling of Bills

Art. 106 INC

(1) The President of the Republic, the Presidency, the National Council of Ministers, a national minister or a committee of the National Legislature may table a bill before either Chamber of the National Legislature subject to their respective competences.

(2) A member of the National Legislature may table a private bill before the Chamber to which he/she belongs on a matter that falls within the competence of that Chamber.

(3) A private member bill shall not be tabled before the appropriate Chamber save after being referred to the concerned committee to determine whether it involves an issue of important public interest.

In contrast to this established praxis in Sudan, the Council of Ministers has now lost its exclusive right to table a bill within the executive branch. According to Art. 106 INC, the President, the Presidency, a single Minister, or the Council of Minister has the competence to table a bill. Hence, the established praxis is still an option, but only *one* possibility among others. E.g., a single Minister is authorized to table a bill without prior approval of the Council of Ministers may also be tabled by that has the competence to table a bill.

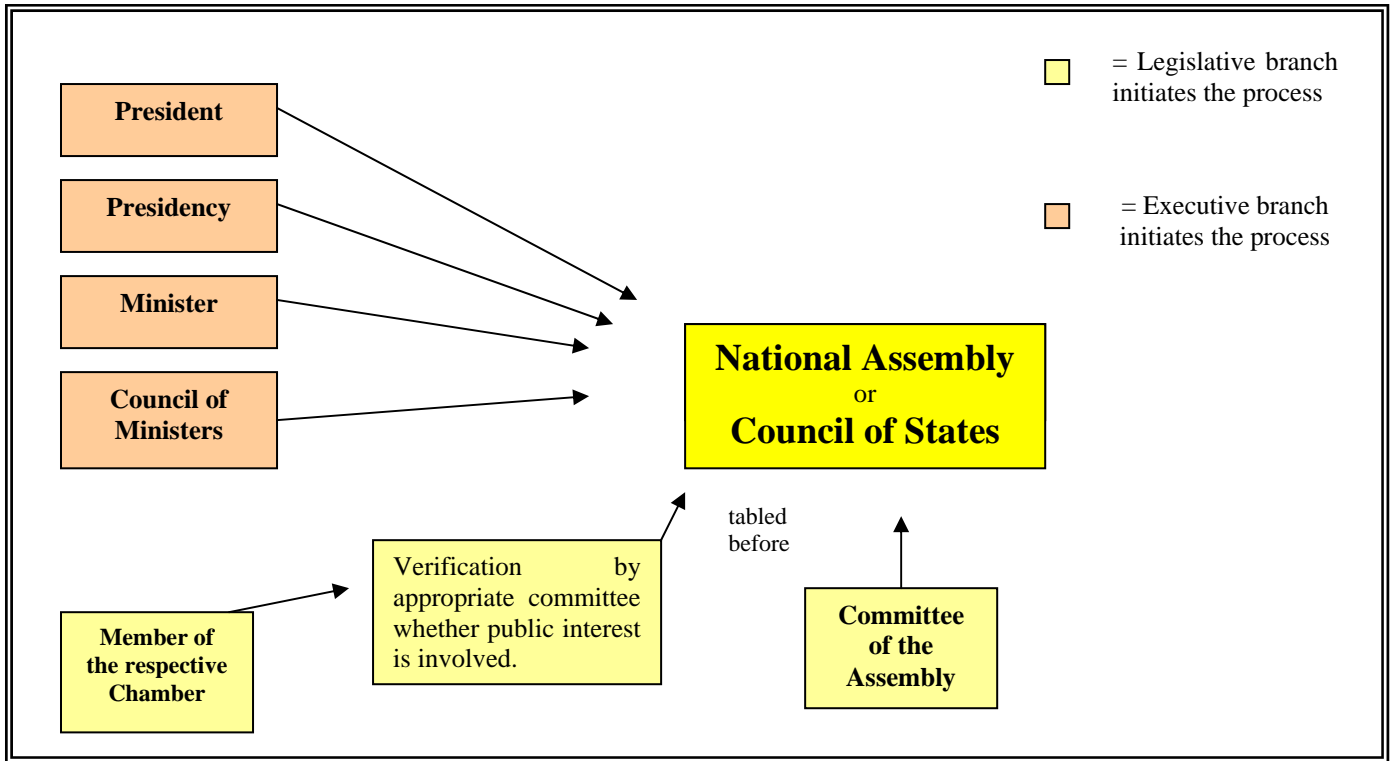


Table 1

3. Procedures for presentation and consideration of bills

Procedures for Presentation and Consideration of Bills

Art. 107 INC

(1) Bills presented to either Chamber of the National Legislature shall be submitted for the first reading by being cited by title and thereby deemed to be tabled with the appropriate Chamber. The bill shall then be submitted for a second reading for general deliberation and approval in principle. Should the bill be passed in the second reading, there shall be a third reading for deliberation in detail and introduction of, and decision upon, any amendment. The bill shall then be submitted in its final form for the final reading, at which stage the text of the bill shall not be subject to further discussion and shall be passed section by section and then passed as a whole.

(2) After the first reading, the Speaker shall refer the bill to the appropriate committee which shall make a general evaluation report for the purpose of the second reading. The committee shall also present a report on the amendments that the committee might or might not have endorsed in the third reading; the Speaker may also refer the bill once again to the appropriate committee to prepare a report on the final drafting in preparation for the final reading.

(3) The Speaker or the appropriate committee, may seek expert opinion on the viability and rationale of the bill; an interested body may also be invited to present views on the impact and propriety of the bill.

(4) The Chamber may by a special resolution, decide on any bill as a general committee or by summary proceedings.

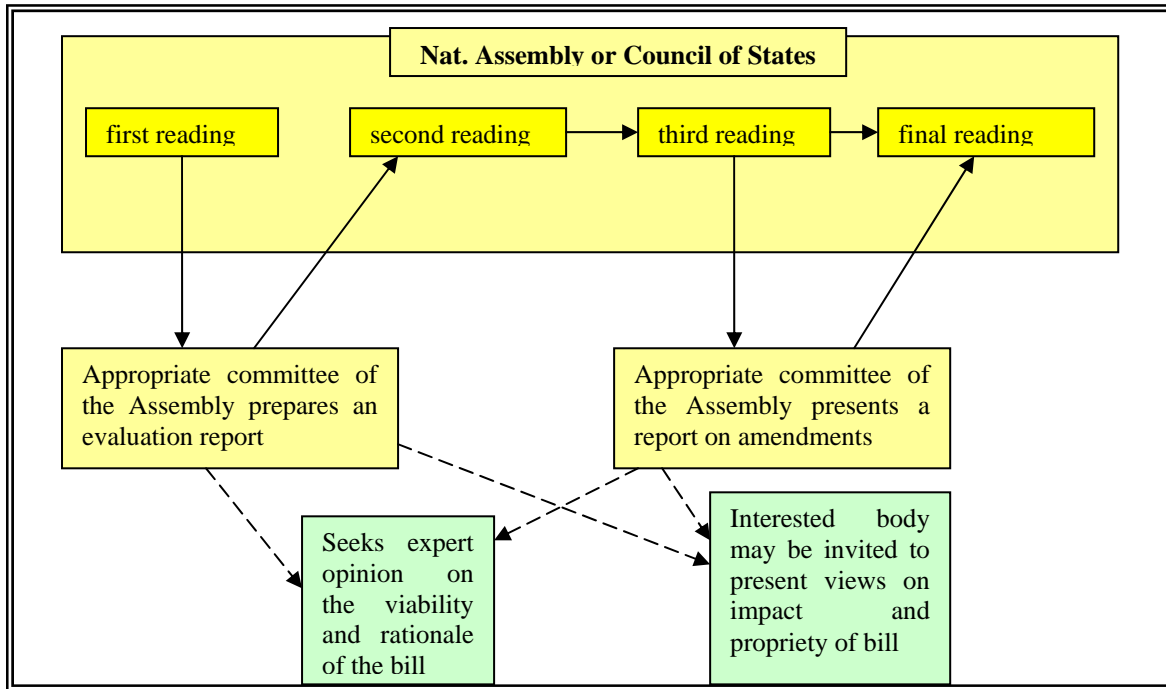
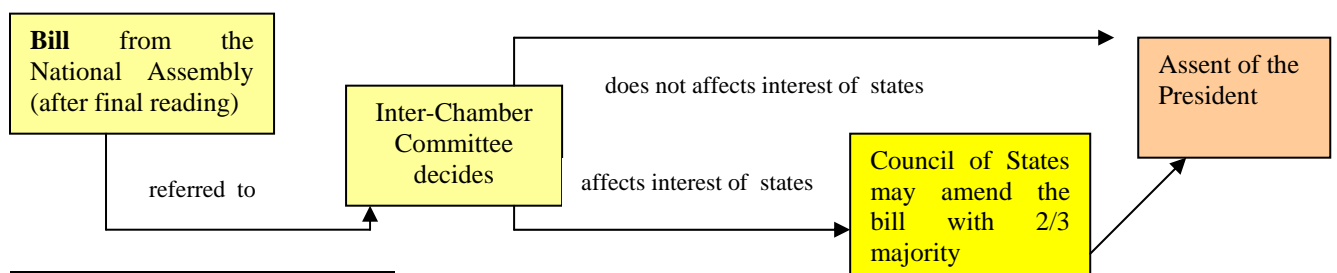


Table 2

The INC does not clarify in how far the expertise of the drafting department will be involved in the parliamentary process. Art. 107 (3) INC at least permits the consultation of external experts in the drafting process and therefore does not preclude that option.

The procedures of Art. 107 INC apply to both Chambers respectively. The questions, which Chamber has the authority to draft which law and in how far the other Chamber has to be involved is answered by another provision, Art. 91 INC. The National Assembly shall be competent to assume legislation in all national powers (Art. 91 (3) (a) INC).¹⁷ However, after the final reading, the bill has to be referred to a standing Inter-Chamber Committee for scrutiny and decision on whether it affects the interests of the states. If the Inter-Chamber Committee decides that it does, the bill has to be referred to the Council of States. The Council of States may introduce any amendments in the referred bill by a 2/3 majority of the representatives (or pass it as it is). The (amended) bill is then sent to the President for his/her assent without being returned to the National Assembly.



¹⁷ However, if legislation refers to “the decentralized system of government and other issues of interest to the states” (Art. 91 (4)(a) INC, the Council of State is competent to enact it.

4. Delegation of powers of subsidiary legislation

Legal drafters may also be involved in drafting secondary legislation. But even with regard to secondary legislation, the final saying whether or not a subsidiary regulation may have the force of law rests with the Assembly. Art. 115 INC underscores that subsidiary legislation is subject to adoption by a resolution of the Assembly.

115. Delegation of Powers of Subsidiary Legislation

The National Legislature or any of its Chambers may, by law, delegate to the President of the Republic, the National Council of Ministers or any public body, the power to make any subsidiary regulations, rules, orders or any other subsidiary instrument having the force of law, provided that such subsidiary legislation shall be tabled before the concerned Chamber and be subject to adoption or amendment by a resolution of that Chamber in accordance with the provisions of its regulations.

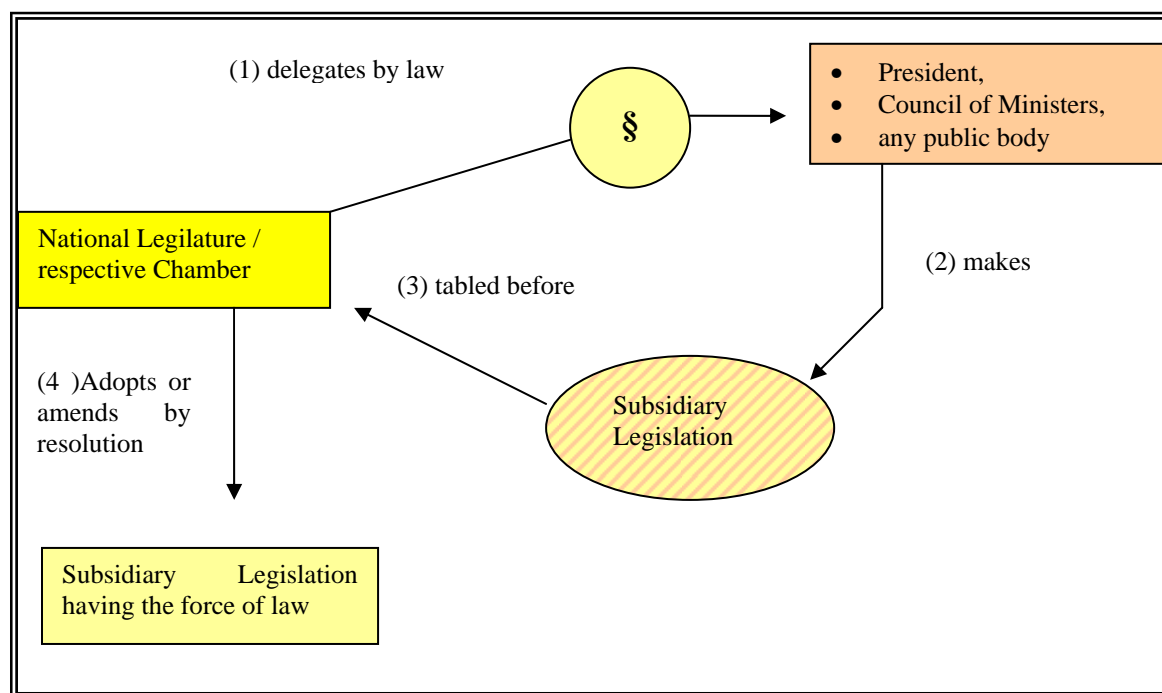


Table 3

It is important to be aware that Art. 115 INC deviates from § 13 (c) of the The Interpretation of Laws and General Clauses Act, 1974.¹⁸ According to the INC, the National Legislature / respective chamber has to adopt each subsidiary regulation. A mere non-action of the Legislature for a specific period of time is not sufficient any more.

¹⁸ § 13 (c) states: “such regulations, rules or orders shall be deposited before the People’s Assembly as soon as they are made and the People’s Assembly may within one month of such deposit, by resolution, revoke the same, but without prejudice to the validity of any prior application thereof of the right of the delegated authority to make new regulations, rules or order”.

B. Legal impacts on drafting legislation in Sudan

While preparing a bill, drafters at the national level shall be guided by the “sources of legislation” as set out in Art. 5 (1) and (2) INC.

5. Sources of Legislation

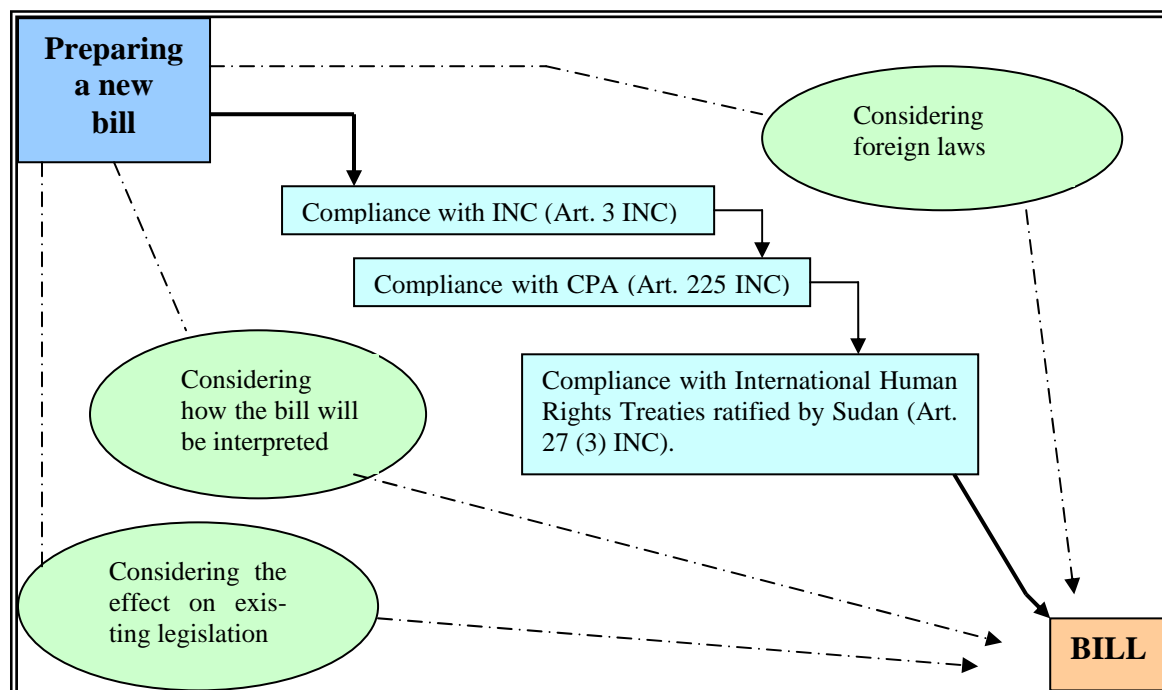
(1) Nationally enacted legislation having effect only in respect of the Northern states of the Sudan shall have as its sources of legislation Islamic Sharia and the consensus of the people.

(2) Nationally enacted legislation applicable to Southern Sudan or states of Southern Sudan shall have as its sources of legislation popular consensus, the values and the customs of the people of the Sudan, including their traditions and religious beliefs, having regard to Sudan’s diversity.

However, above all, drafters have to respect the limits set by the INC, which is considered the supreme law of the land (Art. 3 INC). Constraints for drafters do not only derive directly from the INC, but also from those legal documents that have been incorporated in the constitution. Art. 225 INC incorporates those provisions of the Comprehensive Peace Agreement (CPA) as part of the INC that did not expressly become part of the INC. The same is especially true for all human rights treaties ratified by Sudan (see Art. 27 (3) INC), and may partly also apply for other international treaties ratified by Sudan as well as customary international law. In addition, it may be helpful for legal drafters to consider the following: Although by no means obligatory for Sudan, some foreign regional or national laws might be of specific interest, especially those that regulate trade in areas of interest for Sudan. Hence, a legal drafter has to be aware of the content of the following documents:

- The new bill shall be in compliance with the INC
- The new bill shall be in compliance with the CPA.
- The new bill shall be in compliance with international human rights treaties ratified by Sudan.
- The new bill shall consider its effect on existing legislation.
- In specific cases, the new bill should consider foreign laws / regional laws.
- The new bill shall consider the general practice of interpretation.

Table 4



1. Compliance with the INC

As already mentioned above, pursuant to Art. 3 INC, “*The Interim National Constitution shall be the supreme law of the land. The Interim Constitution of Southern Sudan, state constitutions and all laws shall comply with it*”. The INC contains several provisions that are of highest relevance for the drafters of Sudanese law. Some of these constitutional provisions refer rather to *procedural or formal requirements* others refer more to the *subject matter* of the new bill.

a) *Procedural / formal constitutional requirements*

- *Does the level of government have the authority to enact a specific law?*

Living in a federal system, there is not only a horizontal separation of powers between the executive, legislative and judicial branch but also a vertical one between the different levels of government.

Executive Power	Legislative Power	Judicial Power		
	National Level (Schedule A, D, maybe E)			
	<table border="1"> <tr> <td></td> <td style="text-align: center;"> Southern Sudan Level (Schedule B, D, maybe E) </td> </tr> </table>		Southern Sudan Level (Schedule B, D, maybe E)	
	Southern Sudan Level (Schedule B, D, maybe E)			
	State Level (Schedule C, D, maybe E)			

Table 5

Therefore, the authority to enact law in Sudan is divided between the national, the southern Sudan and the state level. In other words: The Laws in Sudan are composed of three different sets of law: National laws, laws of GoSS and states laws. National laws applying throughout the Sudan are to be enacted by the national legislature, GoSS laws are to be enacted by the Legislative Assembly and state laws by the state legislatures. The vertical separation into different set of laws in parallel to the different levels of government does not yet determine which areas of law shall be regulated by which level. This allocation of legislative powers to the three different levels is put into effect through the Schedules A-E of the INC.

<h1>Laws of Sudan</h1>		
<u>National Laws</u>	<u>Laws of GoSS</u>	<u>State Laws</u>
<ul style="list-style-type: none"> • according to Schedule A (exclusive powers) • according to Schedule D (concurrent powers) • according to Schedule E (residual powers) 	<ul style="list-style-type: none"> • according to Schedule B (exclusive powers, inc. competence for framework-legislation) • according to Schedule D (concurrent powers) • according to Schedule E (residual powers) 	<ul style="list-style-type: none"> • according to Schedule C (exclusive powers, but for the Southern States see also Annex B) • according to Schedule D (concurrent powers) • according to Schedule E (residual powers)

Table 6

Hence, the drafting team in the Ministry of Justice has to check right at the beginning whether the authority to regulate a specific area falls within their field of legislative powers. The Schedules are partitioned in exclusive, concurrent and residual powers.

Exclusive powers

Schedules A – C list the legislative powers that are **exclusively allocated to one of the three levels of government**. Once an area of legislation falls into the competence of the states, the national level is exempted from regulating an issue in that area. To be more specific: A law regulating the registration of marriage falls into the competence of the states (Schedule C, para. 16). So, even if asked by the National Council of Ministers (NCoM) to prepare a bill in that area, drafters should make the NCoM aware of its limited competences in this respect. A slightly different situation occurs in the southern states. Here, the exclusive powers listed in Schedule C are not exclusively reserved for the state level. Instead, pursuant to Schedule B, para. 9,¹⁹ GoSS is vested with the authority to enact a kind of **framework legislation** with regard to the issues listed in Schedule C. Consequently, legal drafters of a southern state also have to consider GoSS laws, even if they are going to draft a bill within the limits of Schedule C.

¹⁹ B, para. 9 reads: The co-ordination of Southern Sudan services or the establishment of minimum Southern Sudan standards or the establishment of Southern Sudan uniform norms in respect of any matter or service referred to in Schedule C or Schedule D, read together with Schedule E, with the exception of Item 1 of Schedule C, including but not limited to, education, health, welfare, police (without prejudice to the National Standards and Regulations), prisons, state public services, such authority over civil and criminal laws and judicial institutions as is specified in the Schedules, lands, reformatories, personal law, intra-state business, commerce and trade, tourism, environment, agriculture, disaster intervention, fire and medical emergency services, commercial regulation, provision of electricity, water and waste management services, local Government, animal control and veterinary services, consumer protection, and any other matters referred to in the above Schedules;

Concurrent powers

With regard to the topics listed in **Schedule D** (concurrent powers) no restriction applies to any of the three levels.²⁰ Instead, Schedule D clearly states that all three levels of government have the authority to legislate within the listed areas. Only if several levels of government have made use of their competence and enacted a law and only if those laws at the different levels conflict with each other, the provision of Schedule F applies. Hence, **Schedule F** is not a provision that allocates legislative authority to a level, but it is a provision of resolving existing conflicts. Since the implementation of laws in most cases is also linked with administrative costs that have to be considered in the respective budgets, the final determination of the prevailing law is a burdensome and costly undertaking that should be avoided by all means. However, having a closer look to Art. 72 (f) INC), it becomes obvious that the parents of the INC were well aware of that problem and designed a provision that should prevent conflicts at an early stage:

72. Functions of the Council of Ministers

The National Council of Ministers shall have the following functions: [...]

(f) receiving reports on matters that are concurrent or residual and deciding whether it is competent to exercise such power in accordance with Schedules E and F herein. If it so decides, it shall notify the other levels of government of its intention to exercise such power. In case of any other level of government objects thereto, a committee shall be set up by the two levels concerned to amicably resolve the matter before resorting to the Constitutional Court;

According to Art. 72 (f) INC, the Council of Ministers has the obligation to clarify the question of a potential conflict with regard to concurrent (or residual) powers as soon as it becomes aware of it. As long as the CoM is directly involved in the process of tabling a bill within the area of Schedule D, its awareness is guaranteed. However, since there are options of tabling a bill without the involvement of the CoM available (see I.2. above), the CoM is insofar reliant on reports from others. Hence, legal drafters should inform the CoM immediately, whenever they are working on a bill within the area of Schedule D.

²⁰ The National Government, the Government of Southern Sudan and state governments, shall have legislative and executive competencies on any of the matters listed below:-

Residual powers

Whenever drafters on the national level are confronted with a topic that is not yet listed in one of the other Schedules, they have to reconsider whether the national level is the most appropriate one to deal with the issue at hand (see **Schedule E** – residual powers). For drafters on the level of Southern Sudan, however, the question of being the appropriate level of government has only to be answered with regard to the National Legislature. With regard to the relation of GoSS and the southern states, Schedule E clearly allocates residual powers to the GoSS level.

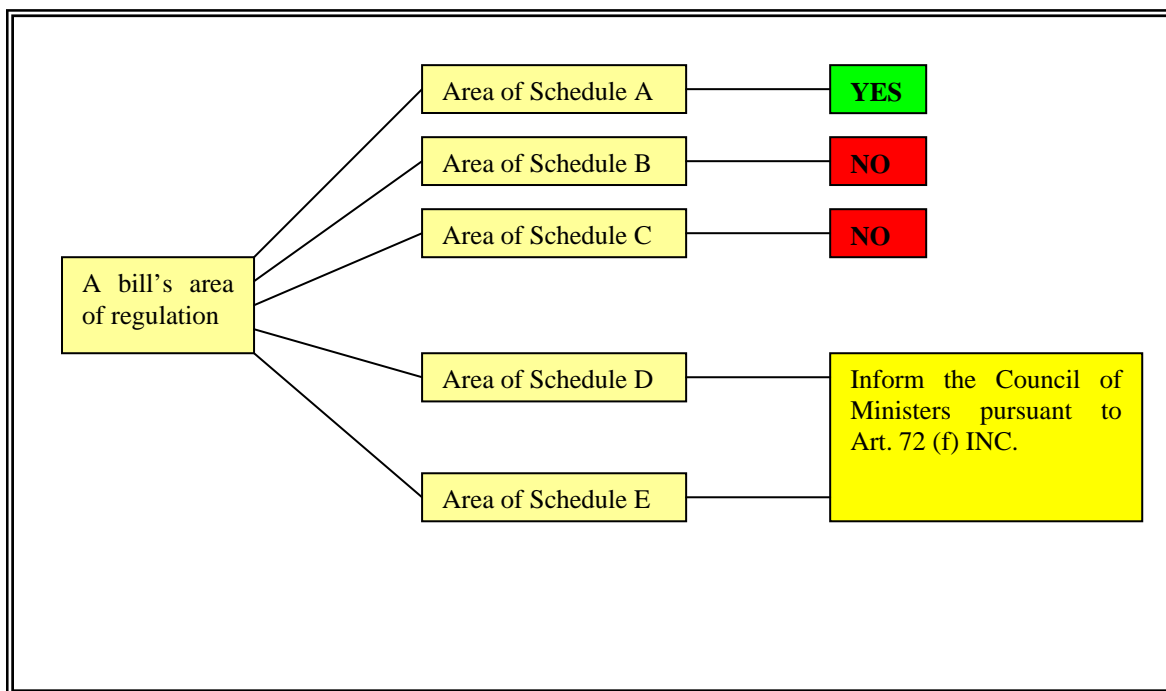


Table 7

- Consideration of the appropriate language

Art. 8 (5) INC states that there shall be no discrimination against the use of either Arabic or English at any level of government or stage of education. As a consequence laws of Southern Sudan do not only are to be available in Arabic and English, but both versions are also equally official and authentic. Hence, at court, you may refer to the Arabic *or* the English version to enforce your rights. If both versions contradict, no one is supreme over the other since a constitutional clarification similar to that of Art. 205 (1) ICSS with regard to the Constitution

of Southern Sudan is missing for ordinary laws.²¹ A general constitutional right of non-discrimination of languages may only be adapted by a more specific constitutional provision but not by an ordinary law. Therefore drafters need to have a close eye on the two linguistic versions of a law that in the best of all worlds should be drafted in parallel by the drafters and not translated afterwards.

b) Constitutional requirements with regard to the subject matter

- **Bill of Rights (Part II INC).** For two reasons, drafters should familiarize themselves with constitutional human rights provisions. First, they may furnish justification for bills that fall within their injunctions. Secondly, opponents use those provisions to attack a bill, even one purporting to enlarge a human right (in order to protect the human right to practice one's own culture, for example, some critics have attacked bills to enlarge women's participation in civic, political, cultural and economic affairs). The Bill of Rights that have to be taken into consideration in Sudan is not limited to those rights explicitly listed in articles 28 – 48 INC. According to Art. 27 (3) INC also all human rights treaties ratified (explanation later on) by Sudan “*shall be an integral part of this Bill*”. Hence, in order to avoid unconstitutionality of a law, someone in the drafting team has to be familiar with all the human rights treaties ratified by Sudan.²² The provisions in those treaties are of the same legal value as the explicitly mentioned rights in the constitution.
- **Guiding Principles and Directives (INC)** Drafters have to adhere to them in the same manner as to the Bill of Rights. Art. 22 INC states: “... *basic to governance and the State is duty-bound to be guided by them, especially in making policies and laws.*” It looks as if the term “*to be guided by*” leaves some margin of appreciation to the drafter to what extent a guiding principle has to be completely implemented. However, if the wording of a guiding principle is strict, no real space for being guided remains left (see, e.g., Art. 13 (1)(a) and Art. 11 INC). The mere lack of enforceability –as stated in Art. 22 INC - does not affect the legal quality of the principles.
- **Laws limiting or giving away legislative power.** The INC endows the legislature with the legislative power, while giving the executive departments the power to implement that legislation. However, by passing laws that provide an implementing

²¹ Art. 205 (1) ICSS states: This Constitution shall be cited as the Interim Constitution of Southern Sudan, 2005; its English and Arabic versions are equally official and authentic. In case of any contradiction between the English and Arabic texts, the English text shall be authoritative as English was the language of the drafting of this Constitution.

²² The Max Planck Institute for International Law has published a Compilation of Human Rights Treaties ratified by Sudan in Arabic and English language which is available under http://www.mpil.de/shared/data/pdf/human_rights_reader_arabic_final.pdf (Arabic) or http://www.mpil.de/shared/data/pdf/international_human_rights_treaties_sudan_english.pdf (English).

agency some power to formulate and enact regulations (secondary or subsidiary legislation), an executive agency is also somehow involved in the legislative process to enact subsidiary legislation. However in order not to violate the idea of the separation of powers by delegating legislative competences to the executive branch, Art. 115 INC provides a protection shield (see Table 3): Subsidiary legislation has to be counterchecked by parts of parliament again. Hence, within the frame of Art. 115 INC, drafters are permitted to insert provisions delegating subsidiary legislation to other institutions.

2. Compliance with the CPA

Drafters do not only have to consider the constitutional limits, but also those of the CPA. Articles 225 INC states: *The Comprehensive Peace Agreement is deemed to have been duly incorporated in this Constitution; any provisions of the Comprehensive Peace Agreement which are not expressly incorporated herein shall be considered as part of this Constitution.* Hence, although large parts of the CPA have been translated into provisions of the INC, drafters always have to countercheck their proposed bills with regard to the conformity with the CPA.

Legal Drafting – Exercise 1

QUESTIONS

- 1.) In Sudan, how should drafters on the national level respond to an instruction asking them to draft a bill that would deny bail in cases of armed robbery?
- 2.) In Sudan, how should drafters at the national level respond to the instruction asking to draft a bill that foresees the exploitation of natural resources (oil) directly within a habitat of birds, who are threatened by extinction.
- 3.) The President of Sudan asks your drafting team to draft a Presidential Decree to establish the Assessment and Evaluation commission. A colleague presents you the following proposal (see below) for proof reading. What is your comment on it?

In the Name of God, The merciful

The Compassionate

The Presidency

Presidential Decree No. (36), 2005

The Establish the Assessment and Evaluation Commission (AEC)

The President of the Republic

In accordance with the provision of Article 221 of the Sudan Interim National Constitution read with the Rules of the Presidential Decree no (34), 2005 and with the consent of the First Vice President of the Republic, I issue the following Decree:

Title and Commencement

1. This Decree may be cited as the "Presidential Decree No (36), 2005 establishing the Assessment and Evaluation Commission and shall come into force as of the date of signature.

Functions of the Assessment and Evaluation Commission

2. The Assessment and Evaluation Commission shall assume the following functions:

- a) Monitor and evaluate the implementation of the Comprehensive Peace Agreement during the pre-interim and interim period;
- b) Evaluate the unity arrangements established under the Comprehensive Peace Agreement;
- c) Submit the mid-term evaluation and any other periodic reports to the Presidency provided that copies thereto shall be sent to the international institutions and the countries represented in the Assessment Evaluation Commission;
- d) Advise to the Presidency with a view to improving the institutions and arrangements created under the Comprehensive Peace Agreement and make the unity of the Sudan attractive to the people of Southern Sudan;
- e) Evaluate fulfilment of the obligations and the international support for the implementation and encouragement of the Comprehensive Peace Agreement;
- f) Establish investigation teams to look into any matter pertaining to the implementation of the Comprehensive Peace Agreement;
- g) Publish the Assessment and Evaluation Commission's report or parts thereof with the consent of the Presidency;
- b) Build its own capacities and seek the assistance of the relevant experts from independent institutions as it deems suitable;
- i) Attract and magnetize the direct international financial support to carryout its functions.

Constitution of the Assessment and Evaluation Commission

3. The Assessment and Evaluation Commission shall be constituted as follows:

- | | |
|--|---------------------------------------|
| a) Representative of the Kingdom of Norway | Chairperson for the Commission |
| b) Representative of Kenya | Deputy Chairperson for the Commission |
| c) Representative of Ethiopia | Member |
| d) six (6) representatives of the Government of the National Unity (three (3) from the National Congress and three (3) from SPLM | Members |
| e) Four (4) representatives for the UK | Members |
| f) Arab League, the African Union and the European Union | Observers |

Location and Secretariat of the Assessment and Evaluation Commission

4. The Assessment and Evaluation Commission shall establish offices in Khartoum and Juba and shall have an Executive Secretariat. [...]

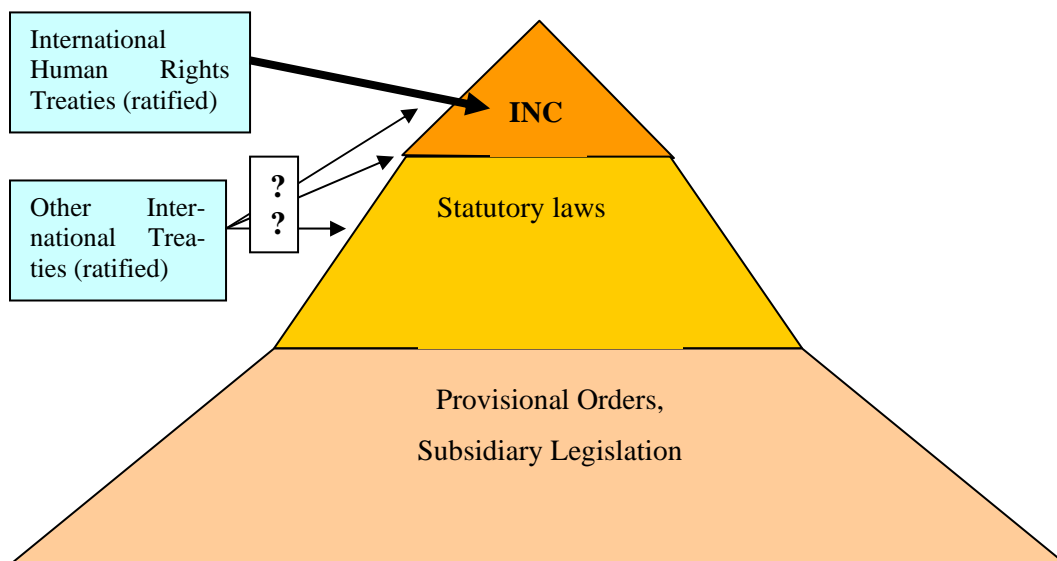
Answers to the exercises contained in this manual can be found in the annex at the end of the document.

3. Compliance with International Human Rights Treaties ratified by Sudan

As stated above, those international human rights treaties that have been ratified by Sudan are part of the INC, incorporated through Art. 27 (3) INC.

The rank of other international treaties within the legal hierarchy in Sudan is not clear. However, for legal drafters it is of specific relevance to know at what rung of the “legal ladder” it is situated. Different countries have chosen a different ranking of international norms within their legal system. In some countries, all ratified international treaties have the rank of constitutional provisions; other countries rank international treaties between the constitution and statutory law; and the largest group of countries provide international norms with the same rank as statutory law. The INC does not provide an explicit statement. However, the competences of the National Assembly encompasses the authority to “ratify international treaties, conventions and agreements”. One may therefore suggest that -since this internal process that transforms international treaties into national provisions parallels the legislative process- those national provisions have the rank of national statutory law.

Hierarchy of norms in Sudan (national level)



4. The new bill's effect on existing legislation

“One of the worst sins a draftsman can commit is to take inadequate account of existing laws”²³ – the same is true for draftswomen.

a) Does the new law affect existing legislation directly?

- Does it repeal an existing law?
- Does it amend an existing law?

The effect on existing legislation needs to be clarified in advance; otherwise difficult problems of interpretation arise: The addressee of a statute might not know which statute regulates the issue. Do existing laws continue in force?

“**Repeal by implication**” cannot be the answer to the problem: It is a *drafters* task to avoid legal uncertainty, not to create it! Therefore, also the legislative savings clause: “all laws inconsistent herewith are hereby repealed” ought to be avoided: It only tells the reader to figure it out him-/herself...

Tell the reader exactly how the new legislation fits into the existing system.

Expressly amending existing laws requires a thorough understanding of WHAT is being changed. As a drafter, you therefore need to know the legislation's objectives, its basic concepts, its terminology. Otherwise, the result might be confusing patchwork.

Here, again, **gather the relevant facts!** If possible (in case of more recent laws) talk to the drafter who wrote the statute to be amended! Or speak to the expert in the respective Ministry.

b) Does the new law cover the same subject as an existing law?

Especially difficult in this transitional period to figure out which law applies, whether a law on the subject is in place.

Art. 226(5) INC stipulates “All current laws shall remain into force, ... unless new actions are taken in accordance with this constitution.”

208(3) ICSS “All current laws shall remain into force, ... unless new actions are taken in accordance with this constitution.”

²³ Dickerson, Legislative Drafting, page 29.

What are *current laws*? Does the definition of law require its adoption by a state authority (in a democracy, the parliament) or is it wider? In the latter case, it could also comprise the laws adopted by the SPLM prior to the Peace Agreement and the INC.

What are *actions taken in accordance with this constitution*? Does that require the Assembly to act? Or is it also an action taken in accordance with this constitution when the Supreme Court of Southern Sudan or the Constitutional Court declare a law void because it is in violation of the ICSS or the INC? (If the latter was not comprised, old laws in violation of basic human rights or the distribution of competences could theoretically continue in force forever.)

5. Consideration of regional / foreign laws

There is no obligation for legal drafters to consider regional / foreign laws. However, especially in the area of trade, it may be of some benefit if drafters are aware of foreign sanitary measures or product-standards for those Sudanese goods that are to be exported. This is of specific relevance for Sudan as an AKP country thereby enjoying preferential treatment of their goods exported into the European Union. In order to ensure the full benefit out of that treatment drafters should be aware of the relevant EU-law.

6. The new bill shall consider the general practice of interpretation

a) Drafting within the Interpretation Act

Almost every country has in force an Interpretation Act, usually applying to every law in the jurisdiction. Drafters must know and conform to its provisions. However, a prerequisite of that obligation is the constitutionality of the Interpretation Act.

In Sudan, the The Interpretation of Laws and General Clauses Act, 1974 is still the pertinent law and is to be applied in accordance with Art. 226 (5) INC. This provision states that

“All current laws shall remain in force and all judicial and civil servants shall continue to perform their functions, unless new actions are taken in accordance with the provisions of this Constitution.”

Since the drafting of new bills is considered to be a new action, drafters cannot blindly implement the instructions of the old Interpretation Act, but have to check their compatibility

with the INC first. And indeed, many terms defined in that Act are outmoded and do not fit into the present context any more. In addition, some of the provisions does not correspond to the regulations of the INC and are therefore unconstitutional (e.g. § 13 (c) of the Interpretation of Laws and General Clauses Act).

Due to the fact that an Interpretation Act is one of the most important laws in the legal system, it is highly advisable to revise that Act as soon as possible in order to bring it in line with the INC.

An Interpretation Act usually includes three sorts of provisions, dealing with (1) definitions of individual words and expressions; (2) broad rules concerning statutory construction; and (3) miscellaneous rules concerning the publication of rules, the assignment or imposition of powers and duties, and others.

b) Drafting within the rules for the judicial interpretation of statutes

Once a bill becomes enacted into law, a host of lay persons, officials and judges will read it. That bill will fail its purpose unless its readers understand the law in the sense that the drafter intended. In most legal systems, especially those adhering the common law approach, it is not the drafters' meaning, but the judges' interpretation which determines a law's final meaning. Drafters should therefore indeed draft with an eye on the judges:

In drafting a statute, drafters shall follow the "rules of interpretation" also commonly called.

Rules of interpretation:

The methods of interpretation recognized vary greatly from legal culture to legal culture and from one legal scholar to another. Nevertheless, some basic methods shall be introduced here:

1. **Textual or grammatical (Plain meaning Rule).** The decision is based on the actual words of the written law, if the meaning of the words is unambiguous. It should be noted that already the dictum that a word is unambiguous constitutes an interpretation. If a clear and unambiguous meaning can be deduced from the text itself, there is no room for the other methods of interpretation: The wording limits any interpretation. At the same time, even if the wording is ambiguous, any interpretation reached by other methods must still be reconcilable with the wording.
2. **Teleological (Mischief Rule / Golden Rule).** This method looks at the objective of the statute or the Constitution, at its overall aim. This approach is mostly used by the

highest courts rather than the lower courts. It is preferable when other methods of interpretation fail because the text is old or the legislature has not expressed its reasoning. The approach is related to the structural and historical interpretation since, first of all, the object and purpose of a provision may not be determined on a stand-alone basis, but by inquiring the purpose of the statute as a whole, and, secondly, the reasoning of parliament in the drafting process is an important source in determining the object and purpose of a law. E.g., the INC stresses in several Articles (Art. 1(2), 27 seq., 61, 78, 122(1)(d)) that the Constitution intends to protect the individual's rights and freedoms. This objective needs to be regarded when interpreting other provisions regarding court access or powers of the government.

3. **Structural.** This method of interpretation is also called *functional*. It is based on the analysis of the structures of the law and how they are apparently intended to function as a coherent, harmonious system. A Latin maxim states that no one can properly understand a part until he has read the whole. A structural interpretation is, for example, important in order to determine whether a certain provision is the only one regulating a certain issue or whether it constitutes an exception to a general rule laid out in another part of the law. In case of an exception, it needs to be construed narrowly, and especially no conclusions by analogy may be drawn because the general case is regulated by another norm. (An analogy requires that the statute does not regulate a certain situation at hand and thus contains a gap, but regulates a comparable situation which then may be extended –if the same considerations apply – to the unregulated situation.) E.g., the INC assigns all legislative competences to the National Legislature (the National Assembly and/or the Council of States). By way of exception, the President may, under certain, very limited circumstances (compare Art. 109 INC), legislate via provisional orders. The latter constitutes an exception to the general rule. Therefore, it may not be interpreted widely and no analogy for similar circumstances may be drawn (e.g. the National Legislature is in session, but cannot agree on a certain urgent matter): Any such interpretation would ignore the general rule as established in Art. 91(3)(a) and 91(4)(a) INC and thus violate the powers of the legislator.
4. **Historical.** The interpretation is based less on the actual words than on the understanding revealed by analysis of the history of the drafting and ratification of the law. A textual analysis for words whose meanings have changed therefore overlaps with historical analysis. It arises out of such Latin maxims as *Animus hominis est anima scripti*. Intention is the soul of an instrument. For example, the U.S. constitution contains no reference to the air force. This is due to the fact that no air force existed at the time when this constitution was drafted in 1787. Nevertheless, it is evident that the war power of the President (Article 2, Section 2 of the U.S. Constitution: “*The President shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States*”) includes nowadays the air force.

IV. Part III: Writing/ producing the clauses of a bill

A. Established praxis in structuring a bill

There is a well established praxis in Sudan how a bill is structured. First, with regard to the nomenclature of different levels and, second, concerning a system for structuring bills.

1. The division of a bill into different levels

Note: Especially when dealing with smaller bills not all levels are applied in the process of structuring the bill. On some levels, the name differs depending on whether the bill is a constitutional bill or a bill of statutory law.

Part	→	conventionally, parts constitutes a bill's largest division (example from the INC: Part Three – The National Executive).
Chapter	→	chapters are introduced to designate the grouping of articles within each part. (example from the INC: Chapter I – The National Executive and its powers).
Article (in the Constitution) Section (in statutory laws)	→	the bill's basic building block; it comprises a single legislative idea and generally has its own headline (example from the INC: Article 58 – Functions of the President of the Republic).
<i>Sub-article</i> (in the Constitution) <i>Sub-section</i> (in statutory laws)	→	subdivision of articles / sections (example from the INC: 58 (1) – The President of the Republic[...] shall perform the following functions).
<i>Letter / paragraph</i>	→	subdivision of a sub-article / sub-section

(example from the INC: 58 (1) – The President of the Republic[...] shall perform the following functions: - **(a) preserve the security [...]**).

2. The system of structuring bills

Generally, the skeleton of a bill in the Sudanese practice adhere to the following default system for structuring bills that might be classified in *preliminary provisions / operational provisions / final provisions*:

Preliminary provisions generally contain: title of the law / application of the law / general objective of the law / amendment procedure / definitions / entry into force / saving clause.

Operational provisions generally contain: a law part that translates the general objective of the bill into several rules of how the addressees should behave in order to accomplish the law's purpose / a law part that focus on the implementation of the law by addressing the assigned agency which is responsible for implementing / enforcing the measures designed to induce the primary addressees to conform to the described norms.

Final provisions generally contain: sanctions / transitional provisions

Within this broad division, the bill can be further subdivided into:

- provisions addressed to the primary addressees,
- provisions addressed to implementing agencies,
- provisions prescribing “conformity-inducing measures” (e.g. sanctions),
- provisions prescribing dispute-settlement system,
- provisions concerning technical matters,
- provisions stating the funding provisions.

In any case, such an outline can be only tentative; it needs to be updated regularly during the drafting process in order not to lose an overview over the whole drafting project.

Furthermore, the following rules of thumb can be taken into account when structuring a bill²⁴:

- General provisions come before special provisions,
- More important provisions come before less important provisions,
- Permanent provisions come before temporary provisions,
- Technical “housekeeping sections” normally come at the end.

Where certain actions regulated by the law have a temporal dimension, e.g. where the law regulates a certain sequence of events, such as an application procedure (first, an application has to be filed, then this application has to be dealt with by one or more governmental authority within a certain time limit, possibly consultations of other governmental agencies or stakeholders have to be conducted at a prescribed stage, a decision has to be issued to the applicant, the applicant has a specific time limit in which he/she must challenge a negative decision etc.), the provisions should follow the chronology of successive actions or events. This is certainly the most logical sequence and therefore also what the addressees expect.

In certain cases, the aforementioned principles will contradict each other, and then, there is no mathematical formula to determine the correct sequence, but a good and logical structure depends on the personal judgment of the drafter, his understanding of the facts and the law, his understanding of the administrative processes involved, and his experience in drafting.

It is important that substantive provisions are dealt with under the heading under which they fit best as this is the place where the addressees will expect them. Often, subjects will fit under and belong to several headings. Here, nevertheless a decision has to be taken. The drafter should never state the same rules of law in more than one place. Sometimes, the problem can be tackled by narrowing the scope of one of the headings, but sometimes a given subject will simply fall wholly under two headings. Then, the drafter has to take a decision: he/she should deal with the issue under the heading which has the strongest “logical pull”. If possible, cross-references should be developed under the other matching headings to enable the reader to find the relevant rule.

²⁴ Dickerson, Legislative Drafting, p. 56.

An example for a typical order of sections is the following:²⁵

1. short title
2. effective date, if different from the date of enactment.
3. expiration date, if any
4. specific repeals and related amendments
5. saving clauses
6. statement of purpose or policy, if any
7. definitions
8. most significant general rules and special provisions
9. subordinate provisions and exceptions large and important enough to be stated as separate sections
10. penalties, if applicable
11. temporary provisions
12. severability clause, if any

B. Purpose of a law/addressees

What are laws made for? Their ultimate goal of a statute can only be to change the behavior of human beings. A statute cannot order a disease to disappear, nor can it order agricultural production to increase. It can only regulate behavior of the people involved in those processes.

1. Understandability

Therefore, a successful law is one that reaches its goal of changing a certain behavior to reach the ultimate policy goal. This is important to keep in mind when drafting laws.

The more specific people are addressed and the more understandable and clear the language of the law is, the more likely that it will have the intended effect.

Thus, don't speak to judges and other lawyers only: your primary addressees (whose behavior you need to change in order to reach the policy result) are ordinary people (in their function as farmers, pastoralists, tailor, building constructor etc., depending on the subject of the legislation) and agency officials (not all of them lawyers either). Therefore, avoid legal terms, wherever the same content can also be explained in ordinary language. Economic planning legislation, legislation to set up new institutions, universities etc. are rather unlikely to be ever

²⁵ Dickerson, Legislative Drafting, p. 57, adapted to the Sudanese practice.

tested in court. They need to be useable by decision-makers in the public and the private sector, university staff, government officials etc.

Only in the case that a law has lawyers or judges as its *primary* addressees (e.g. in case of a law regulating the legal profession), this rule does not apply.

2. Drafting in terms of behaviors, not in terms of rights and duties²⁶

Make as explicit as possible what the addressees of the statute are to do. In order to change a certain behavior, a statute has to tell its addressee what exactly he or she is to do or to refrain from doing. A declaration of rights or duties does not yet explain *who* does *what*.

Therefore:

Don't say: An employee has a right to join a labor union.

Say: An employer may not discipline nor impede an employee from joining a labor union.

The granting of a right is a disguised use of the passive voice (which is recommended not to use either, compare below C.6): By saying that someone who requires emergency treatment has a right to receive such treatment, it is still not clear who is obliged to provide that treatment. Therefore, it should rather be stated that "A hospital shall give emergency treatment to a person who requires it and who appears at the hospital's emergency room".

Rights and duties only indirectly regulate behavior: They regulate how a court has to decide if the duty holder does not fulfill his or her duty. In this case, the court will, for example, award the right holder compensation. Because of this consequence, the prescription of a duty also regulates the duty holder's behavior. However, laws should not address their primary addressees in such an indirect fashion.

By regulating *behavior*, the drafters address their addressees much more directly. This serves the aim of solving a specified social problem. By drafting in terms of rights, in case of two conflicting rights, nothing is won: The provisions do not tell anybody which right will prevail over the other.

This is especially true in case of human rights: To grant someone an inalienable human right can sometimes backfire. Since human rights never prove absolute; they will be balanced against other – supposedly equally important – human rights. By drafting in terms of rights, in

²⁶ This chapter, including all the examples given, derives from Seidman/Seidman/Abeyesekere, *Legislative Drafting for Democratic Social Change – A Manual for Drafters*, p. 242 ff.

the end you grant the judges the discretion to decide which right will prevail. And you can hardly ensure that their decision will be based on rational reasoning.

Furthermore: by regulating *who* shall do *what*, you are forced to make substantive choices; by drafting in rights and duties language, you permit yourself to surrender this legislative function – at the end of the day to the official or the judge who will have to take a concrete decision between competing rights.

Example: Forestry Bill

Don't say: (in terms of rights) “A person who has, or whose family or community has, a long continued right to use particular forest resources has an inalienable human right to continue to do so.”

How would the judge decide a concrete dispute in which one person holds the “inalienable human right”, the other holds a permit granting “*the exclusive right to take timber from the forest*”.

Say: “Notwithstanding section 9 (*prohibiting a person without a permit from using forestry resources*), a person who has, or whose family or community has, used particular forest resources for a long, continuous period may continue to use those resources.”

Properly stated, most section of a bill will forbid, authorize or require behavior.

In order to impose an obligation use *shall* or *must* – and do not use them for other purposes (see later, consistency). Therefore, use “will” for future action, not “shall”.

Legal Drafting - Exercise 3

Different concepts, different words

Rewrite the following sentences, having special regard to the italicized words

(1) “Every person who, being *employed* upon any railroad, as engineer, motorman, gripman, conductor, switch tender, fireman, flagman, signalman, or having charge of stations, starting, regulating or running trains upon a railroad, or being *employed* as captain, engineer or other officer of a vessel propelled by steam, shall be intoxicated while engaged in the discharge of such duties, shall be guilty of gross misdemeanor.” (Was the captain who owned the vessel also “employed”?)

(2) The engagements and contracts of a person under the age of sixteen shall be null and void.

(3) An existing statute reads as follows: “A driver of a motor vehicle who drives recklessly shall be guilty of a misdemeanor”. A draft bill reads: “The Motor Vehicle Department may determine the maximum speed for automobile traffic on a portion of the state highways”. Critique the draft bill.

(Example from Seidman/Seidman/Abeyesekere, *Legislative Drafting for Democratic Social Change – A Manual for Drafters*, p. 266, Exercise 10.3.)

When reading the suggested solutions to this exercise and the following exercises in the annex, please note that there is always more than one way of changing the problematic wording. So your solution might be just as adequate. When rewriting the provisions in the exercises, try to take into consideration as many suggestions contained in this Manual as possible.

C. Style and grammar recommendations

1. Focus on addressees

This recommendation is closely related to the last recommendation, namely to draft in terms of behavior: Since legal norms can only regulate the behavior of human beings, they do not become effective by themselves, but require some sort of conduct by the persons which they address. The norm might require either a certain action or the refraining from an act.

For this reason, a norm's likelihood to be implemented increases enormously with its understandability. Primary addressees who understand the content of the norm are much more likely to act in accordance with it than addressees who misinterpret the norm or simply do not understand it at all. Only if this hurdle is taken, the norm has a chance of being applied in every day life of either the citizens or the officials in the implementing government agency, and not only by legally trained judges in the courts.

Therefore, it is recommended to use easily understandable language, short sentences (see below), a clear structure, clear references to related laws etc. On the other hand, legalistic terms should be avoided wherever possible. In determining the type of language to apply, the drafter should consider the level of education of the primary addressees and the terminology prevailing in certain communities. Thus, a statute regulating the legal profession may use a different terminology from a statute regulating the standards for opening and operating restaurants. Furthermore, definitions should not deviate from the ordinary meaning of terms if avoidable (see below, E.1).

The recommended "drafting in terms of behavior" (see above, B.2) serves the same purpose: to focus on the addressees, thereby generating a greater likelihood that the law will be applied and be applied correctly.

2. Write consistently: no elegant variations!²⁷

While not repeating the same word or term over and over might be good practice in creative writing, this is not the case in legislative drafting. Use your terms consistently! Don't speak of an "individual" once, a "person" the next time, and later on in the bill, you suddenly speak of "users", "applicants", or "citizens", although you are always referring to the same addressees.

²⁷ Dickerson, *Legislative Drafting*, 1954, p. 62; Statsky, *Legislative Analysis and Drafting*, Second Edition, p. 177.

Examples for the “same word, same meaning-rule”²⁸

Don’t say: Each motor vehicle owner shall register his or her car with the Automobile Division of the Police Department.

If you mean: Each automobile owner shall register his or her automobile with the Automobile Division of the Police Department.

This will confuse the reader/addressee. He/she will think that you intended to make a difference in substance.

Make sure the first time you use a term that it covers what you mean to say (use a dictionary, check synonyms etc), and then keep repeating it as often as necessary. Even the replacement by pronouns (“they”, “he/she”) as a means of variation/to avoid repetition, may sometimes sacrifice clarity (because the reader may not know to which noun the pronoun refers).

Also be consistent in your organization of the bill: If two sections are similar in substance, arrange them similarly.

Recommendation: Reserve time for a lateral check on the consistent use of words. Even better: persuade a colleague to conduct this check for you. (Drafters are said to easily fall in love with their own drafts which makes them blind for this type of mistake).

Corollary to the “same word, same meaning” rule: different word, different meaning – Because different words or terms are presumed to refer to different things, don’t use two different words that are supposed to mean the same thing. Logic tells the interpreter of the law that you used the two different words for a reason: you wanted to refer to two different things.²⁹

Thus, don’t use redundant words.

Don’t say:

- null and void
- Lot, tract, or parcel of land
- Building or structure
- authorize and empower
- by and with

²⁸ Example from Statsky, *Legislative Analysis and Drafting*, Second Edition, p. 177.

²⁹ Compare Dickerson, *Legislative Drafting*, 1954, p. 62 and 75.

- final and conclusive
- from and after
- full and complete
- full force and effect
- made and entered into
- order and direct
- over and above
- sole and exclusive
- type and kind
- unless and until
- each and all
- each and every.

There is a historical reason for those repetitions that are by now seen as inextricable parts of the legal language: Scriveners in the late 18th century in England were paid by the word and developed many of the redundancies in the English legal language in order to generate higher profits. Nevertheless, since they run contrary to the principles of interpretation (compare above, rules of interpretation,), it is recommended to abandon these terms.

Consistency should, if possible, also cover companion statutes³⁰

Even if the language of a related statute covering a similar issue seems outdated, a drafter should think twice before using different words in the new bill than used in the earlier bill for the same concepts. (Important: **put yourself in the position of the addressees of the statutes: How would you interpret those statutes?** You would have to assume that because of the different wording, both statutes do not refer to the same concepts.)

If you cannot work any longer with the wording, with definitions etc. contained in the old law, the new law should contain a consequential amendment to make the earlier law conform to the new law.

³⁰ Compare Seidman/Seidman/Abeyesekere, *Legislative Drafting for Democratic Social Change – A Manual for Drafters*, p. 265.

3. Write in the present tense³¹

The operation of a law is continuous and therefore always in the present tense.

Don't say: A permit shall not be granted until the applicant has filed an organization report.

Say: A permit shall not be granted until the applicant files an organization report.

Where possible **avoid the future tense:** Use “shall” for requirements and prohibitions. If you cannot avoid using the future tense, use “will”, not “shall” – since the latter is reserved for commands.

Use past tense to express facts precedent to the operation of the law, and present tense for facts concurrent with the law.

Example: If an applicant has qualified for worker's compensation on the date specified in § 34, the applicant **is** entitled ...

4. Use the imperative only for commands³²

“Shall” or “shall not” imply that to accomplish the purpose of the provision, someone must *act* or *refrain from acting*. However, drafters often use these words to merely declare a legal result, rather than to prescribe a rule of conduct. In these instances, the word “shall” is not only unnecessary but involves a circumlocution in thought because the purpose of the provision is achieved by the very act of declaring the legal result. In such declaratory provisions, therefore, it is preferable to use the indicative rather than the imperative mood:

Don't say: The equipment shall remain the property of the Republic of the Sudan.

Say: The equipment remains the property of the Republic of the Sudan.

Don't say: No person shall be entitled to ...”

Say: No person is entitled to ...

³¹ Cf. Statsky, *Legislative Analysis and Drafting*, Second Edition, p. 179; Seidman/Seidman/Abeyesekere, *Legislative Drafting for Democratic Social Change – A Manual for Drafters*, p. 247.

³² Cf. Statsky, *Legislative Analysis and Drafting*, Second Edition, p. 179; Dickerson, *Legislative Drafting*, p. 66.

Don't say: The term “vehicle” shall mean ...”

Say: The term “vehicle” means...

That means that the term “shall” is regularly superfluous in definitions. Definitions do not prescribe rules of conduct; they are declaratory and need no further execution (see below, E.1).

This recommendation relates to the “*same word, same meaning*” rule: If “shall” normally imposes an obligation to act, use it always in that way. Not simply to state a legislative result.

Don't say: The commission shall have the following powers/functions...

Say: The commission has the following functions, the following powers.”

Examples common in Sudanese legislation:

Don't say:

“The Act shall come into force the day of its signature.”

“Section XY shall be repealed”;

“This Act shall apply to all officers...”;

“The regulations made therein shall remain valid”;

“The arbitration award shall be binding.”

Rather say:

“The Act comes into force ...”

“Section XY is repealed...”

“This Act applies to all officers...”

“The regulations made therein remain valid.”

“... is binding ...”

Furthermore, do not use “shall” for granting a **discretionary power**. For granting discretion, always use the verb “may”.

Legal Drafting - Exercise 4
Granting a discretionary power

Rewrite the following:

- (1) “The Minister shall in his or her discretion provide textbooks for students in private schools.”

- (2) “If the Minister deems it desirable, the Minister shall promulgate regulations concerning the subject-matter of this Act.”

(Example from Seidman/Seidman/Abeysekere, *Legislative Drafting for Democratic Social Change – A Manual for Drafters*, p. 246, Exercise 9.6.)

5. Avoid the subjunctive voice³³

The reason for this recommendation is once again to make the statute easier understandable. This recommendation also serves you in the task of making sentences as short as possible.

Don't say:

... if it be damaged

If it be determined that ...

Say:

... if it is damaged...

If it is determined that...

³³ Statsky, *Legislative Analysis and Drafting*, Second Edition, p. 180; Dickerson, *Legislative Drafting*, 1954, p. 66.

6. Avoid the passive voice³⁴

By using the active voice instead of the passive, you make sentences shorter and therefore also more understandable; avoids vagueness because active voice requires you to name the person who shall act or refrain from acting.

Don't say:

“The chief of each branch shall be appointed by the President from officers who fulfil the following criteria:...”

Say:

“The President shall appoint the chief of each branch from officers who ...”

Don't say: “...the chairperson, to be appointed by..., shall act ...”

Don't say: A written examination shall be passed by an applicant for a license.

Say: An applicant for a license shall pass a written examination.

Name the subject that is supposed to act. Remember that you want to regulate behavior. However, objects will not be able to follow your commands. So name the human being!

Don't say: The vehicle shall be returned in good working order.

Say: The chief maintenance officer shall return the vehicle in good working order.

Don't say: Consultations shall be made with the state governors.

WHO shall hold these consultations?

Say: “The president of Southern Sudan shall consult the state governors.”

³⁴ Statsky, Legislative Analysis and Drafting, Second Edition, p. 180; Dickerson, Legislative Drafting, 1954, p. 66.

Legal Drafting - Exercise 5

Avoiding the passive voice

Rewrite the following. If the sentences do not specify an actor, invent one.

(1) “No citizen shall be discriminated against on the grounds of race color, sex, or origin.”

(2) “The accounts of the small claims court shall be audited at least twice a year.”

(3) “It shall be unlawful for any woman to be excluded from an authorized apprenticeship programme on the ground of her being a woman.”

(Example from Seidman/Seidman/Abeyesekere, *Legislative Drafting for Democratic Social Change – A Manual for Drafters*, p. 238, Exercise 9.3.)

7. Use action verbs³⁵

Action verbs are shorter and more direct, support clear and concise wording and understandability.

Don't say

Give consideration to

Give recognition to

Have knowledge of

Have need of

In the determination of

Is applicable

Is dependent on

Is in attendance at

Make an appointment of

Make application

Make payment

Make provision for

Say

consider

recognize

know

need

determine

applies

depends

attends

appoints

apply

pay

provide

³⁵ Statky, *Legislative Analysis and Drafting*, Second Edition, p. 182; Dickerson, *Legislative Drafting*, 1954, p. 69.

8. Avoid negative wording³⁶

Where the same idea can be accurately expressed either positively or negatively, express it positively.

Examples:³⁷

Don't say: This section does not apply to officers under 60 years of age.

Say: This section applies only to officers who have become 60 years of age.

Don't say: Army officers other than those with no children may...

Say: Army officers with children may...

It has fewer words and is easier to understand for the addressee.

Legal Drafting - Exercise 6

Drafting in the positive

Rewrite the following:

(1) "Indigent persons, other than those with no children, may be sheltered in hotels at the expense of the Department of Welfare."

(2) "This section does not apply to farmers who at any one time during the preceding twelve months have not employed more than fifty employees."

(3) "No person who is not a citizen may fail to register annually as such."

(Example from Seidman/Seidman/Abeyesekere, *Legislative Drafting for Democratic Social Change – A Manual for Drafters*, p. 273, Exercise 10.7.)

9. Prefer singular³⁸

To the extent that your meaning allows, use the singular instead of the plural. Thereby, you avoid the question whether the plural applies to each individual member of the class or to the class as a whole.

Don't say:, requires the consent of the parents or legal guardians of a minor.

³⁶ Dickerson, *Legislative Drafting*, 1954, p. 68.

³⁷ Statsky, *Legislative Analysis and Drafting*, Second Edition, p. 183.

³⁸ Statsky, *Legislative Analysis and Drafting*, Second Edition, p. 181.

Say: ..., requires the consent of a parent or a legal guardian.

Unless you mean that the consent of BOTH parents of more than one legal guardian is required.

Don't say: *Civil servants* may not publicly support a candidate for elected public office.

Say: *A civil servant* may not publicly support a candidate for elected public office.

Otherwise the reader could understand that civil servants as a group may not support candidates for public office, and the question whether this also applies to the individual civil servant remains open. On the other hand, by using the singular, you also prohibit a group of civil servants to support a candidate for public office, since this group consists necessarily of individual civil servants.

10. Pronoun reference³⁹

Use pronouns only where the nouns to which they refer are unmistakably clear. The use of pronouns with ambiguous referents can confuse the meaning of a sentence.

If the pronoun could refer to more than one person or more than one object in a sentence, repeat the name of the person or object to avoid the ambiguity.

Don't say: After the Administrator appoints a Deputy Assistant, he or she shall supervise the ...

Say: After the Administrator appoints a Deputy Assistant, the Deputy Assistant shall supervise...

³⁹ Statsky, *Legislative Analysis and Drafting*, Second Edition, p. 183.

Legal Drafting - Exercise 7

Avoiding ambiguous modifiers

Rewrite the following sentences.

- (1) “A person may not enter a bathhouse suffering from a contagious disease.”
- (2) “After the first day of each calendar month, the Housing Authority shall require each tenant promptly to pay his rent.”
- (3) “A claimant shall give notice of intention to hold the city liable upon his claim within two weeks after the accident.”
- (4) “Once a valid collective bargaining agreement has been entered, neither employer nor union may rescind the contract because of hardship.”

(Example from Seidman/Seidman/Abeyesekere, *Legislative Drafting for Democratic Social Change – A Manual for Drafters*, p. 267, Exercise 10.4.)

11. Avoid long sentences and articles comprised of several sentences⁴⁰

Research has shown that sentences longer than 17 words begin to cause difficulty to people with as much as 8 years of education.

Thumb rule for drafting: No more than 40 to 50 words /approximately 4 – 5 lines. Try to break any sentence longer than that into a series of shorter sentences. It might be of help to keep in mind that one legislative sentence should contain only *one* idea and no more. If a section must contain several related ideas, include them as individual subsections.

⁴⁰ Dickerson, *Legislative Drafting*, 1954, p. 63; Seidman/Seidman/Abeyesekere, *Legislative Drafting for Democratic Social Change – A Manual for Drafters*, p. 269.

Legal Drafting - Exercise 8

Using shorter sentences¹

Rewrite the following excerpt from South Africa Public Services Regulations 1996:

“If dependent children of a sessional official attend a school or institution for higher education in another place than Cape Town or environs, such children should travel from the sessional official’s headquarters to Cape Town and from Cape Town to the place where they are educated, if the school or institution of higher education commences at such late state that it is essential and inevitable (or, in the case of a sessional official who takes leave prior to sessional duty, would have been) that such children and the rest of the household accompany the sessional official on his or her departure for Cape Town for sessional duty or such other official duty as immediately precedes sessional duty (or would have had to accompany if he or she had not taken leave).”

(Example from Seidman/Seidman/Abeyesekere, *Legislative Drafting for Democratic Social Change – A Manual for Drafters*, p. 269, Exercise 10.5.)

Additional recommendation: Don’t start a sentence with an exception if you can avoid it⁴¹: In general, it is desirable to rather define precisely the conditions and limits of a certain rule than to include too much and then add a number of exceptions.

D. Suggestions on specific wording

1. The use of and/or⁴²

And: conjunctive - both

Or: disjunctive – either one or the other

In case of overlapping: X or Y, or both

In the use of “and” and “or”, also pay attention to the categories that you combine. If they already overlap, the use of “and” can cause confusion.

Example: “Husbands and fathers shall provide reasonable support for their children”: Does that phrase enumerate two different categories (husbands must support their children *and*

⁴¹ Dickerson, *Legislative Drafting*, p. 63.

⁴² Statsky, *Legislative Analysis and Drafting*, Second Edition, p. 184.

unmarried fathers must support their children) or do the words have to be read conjunctively, meaning that only those fathers who are also husbands must support their children, thereby exempting unmarried fathers from the duty. ?

If the former should be the case (two categories), the statute should simply read “A father shall provide reasonable support for his children.” (includes both: married and unmarried)

-> Assess carefully whether you mean to express a conjunctive or disjunctive or an overlap.

2. Avoid any, each, every, all⁴³

Those “pronominal indefinite adjectives” cause many difficulties, but rarely add meaning. Rather simply omit them.

Don’t say: All qualified state officers shall ...

Say: A qualified state officer shall...

Don’t say: each building inspector shall send a letter

Say: A building inspector shall send a letter.

Legal Drafting - Exercise 9

Avoiding “each”, “any”, “all”, and “every”

Rewrite the following (keeping the style and grammar recommendations in mind):

- (1) Every police officer shall carry a pistol when on duty.
- (2) All police officers shall carry a pistol while on duty.
- (3) Each qualified state official shall be permitted to enroll in the pension plan.
- (4) Each arrested person shall be booked at the police station immediately upon arrival thereat.
- (5) No arrested person shall be searched unless probable cause for a search exists.
- (6) The Minister shall provide notice of hearing to all persons who have made applications.

(Example from Seidman/Seidman/Abeyesekere, Legislative Drafting for Democratic Social Change – A Manual for Drafters, p. 240, Exercise 9.4.)

⁴³ Seidman/Seidman/Abeyesekere, Legislative Drafting for Democratic Social Change – A Manual for Drafters, p. 240; Statsky, Legislative Analysis and Drafting, Second Edition, p. 184.

3. Avoid the verb “to be”⁴⁴

Try to avoid the verb “to be” in all of its forms: In English, this verb contains systematic ambiguities: it can mean “to exist”, it may mean “shall be considered as”, sometimes it means “has the characteristics /or qualifications of”. Many other possible meanings and uses exist. In most cases you can find another verb that will produce a more precise and shorter sentence.

Legal Drafting - Exercise 10¹

Avoiding the verb “to be”

Rewrite the following:

- (1) “There are seven classifications of criminal homicide in this Code.”
- (2) “Provincial officials, for purposes of the pension scheme, are national officials.”
- (3) “Each such officer shall be a college graduate.”

(Example from Seidman/Seidman/Abeyesekere, *Legislative Drafting for Democratic Social Change – A Manual for Drafters*, p. 273, Exercise 10.8.)

4. Avoid use “such” and “said”⁴⁵

Generally, do not use the words “such” and “said”. These words are rarely used in every day language and might therefore make the statute less “accessible” to its addressees. Rather use the more common articles or pronouns, “the”, “that”, “those”, “it”, or “them” to refer back to something.

Don’t say: The agency head shall file a report within 24 hours. Such report shall include ...

Say: The agency head shall file a report within 24 hours. The report shall include ...

Only if you mean “**for example**”, use the phrase “such as” or “such a”.

⁴⁴ Seidman/Seidman/Abeyesekere, *Legislative Drafting for Democratic Social Change – A Manual for Drafters*, p. 273.

⁴⁵ Statsky, *Legislative Analysis and Drafting*, Second Edition, p. 183.

Don't say: The contractor shall insure against any loss caused by blasting. The contractor shall purchase said insurance from a reliable insurance company.

Say: The contractor shall insure against any loss caused by blasting. The contractor shall purchase the insurance from a reliable insurance company.

Annex to D: Choice of language⁴⁶

1. Forbidden words

Avoid the following terms altogether:

- above (as a adjective)
- aforesaid
- afore-mentioned
- and/or (say “A or B, or both”)
- before-mentioned
- provided that
- said (as a substitute for “the”, “that”, or “those”)
- same (as a substitute for “it”, “he”, “him”, etc.)
- to wit
- whatsoever
- whensoever
- wheresoever

2. Circumlocutions

Avoid expressions such as:

- none whatever
- make application, make a determination
- shall be considered [or deemed] to be, may be treated as, have the effect of (unless a fiction is intended)

3. Preferred Expressions

Unless there are special reasons for the contrary:

	<i>Don't say</i>	<i>Say</i>
(1)	accorded	given
(2)	adequate number of	enough
(3)	admit of	allow
(4)	afforded	given
(5)	all of the	all the
(6)	a person is prohibited from	a person shall not
(7)	approximately	about
(8)	at least	not less than (when referring to two or more)
(9)	at such time as	when
(10)	attains the age of ____	becomes ____ years of age

⁴⁶ Statsky, Legislative Analysis and Drafting, Second Edition, p. 186ff..

(11)	attempt (as a verb)	try
(12)	at the time	when
(13)	by means of	by
(14)	calculate	compute
(15)	category	kind, class, group
(16)	cause it to be done	have it done
(17)	contiguous to	next to
(18)	corporation organized under the laws of Ohio	Ohio corporation
(19)	deem	consider
(20)	does not operate to	does not
(21)	during such time as	while
(22)	during the course of	during
(23)	endeavor (as a verb)	try
(24)	enter into a contract with	to contract with
(25)	evince	show
(26)	expiration	end
(27)	for the duration of	during
(28)	for the purpose of holding (or other gerund)	to (or comparable infinitive)
(29)	for the reason that	because
(30)	forthwith	immediately
(31)	in accordance with	pursuant to, under
(32)	in case	if
(33)	in cases in which	when, where (say “whenever” or “wherever” only when you need to emphasize the exhaustive or recurring applicability of the rule)
(34)	in order to	to
(35)	in sections 2023 to 2039 inclusive	in sections 2023 to 2039
(36)	in the case of	[see (33) above]
(37)	in the event of	if
(38)	in the event that	if

(39)	in the interest of	for
(40)	is able to	can
(41)	is applicable	applies
(42)	is authorized to	may
(43)	is binding upon	binds
(44)	is directed to	shall
(45)	is empowered to	may
(46)	is entitled (in the sense of “has the name”)	is called
(47)	is entitled to	may
(48)	is hereby authorized and it shall be his duty to	shall
(49)	is hereby authorized to	shall
(50)	is not prohibited from	may
(51)	is permitted to	may
(52)	is required to	shall
(53)	is unable to	cannot
(54)	it is directed	shall
(55)	it is his duty to	shall
(56)	it is the duty of	shall
(57)	it shall be lawful	may
(58)	it shall be unlawful for a person	a person shall not
(59)	no later than June 30, 1981	before July 1, 1981
(60)	on or after July 1, 1984	after June 30, 1984
(61)	on or before June 30, 1985	before July 1, 1985
(62)	on the part of	by
(63)	or, in the alternative	or
(64)	paragraph (5) of subsection (a) of section 2097	section 2097(a)(5)
(65)	per annum	a year
(66)	per centum	percent
(67)	period of time	use period <i>or</i> time
(68)	provision of law	law
(69)	render (in the sense of give)	give

(70)	State of Massachusetts	Massachusetts
(71)	subsequent to	after
(72)	suffer (in the sense of permit)	permit
(73)	under the provisions of	under
(74)	until such a time as	until

4. Sexism in Language

Avoid gender-specific language when the intent is to refer to both sexes. If neutral language is not available, rewrite the sentence to try to avoid the problem.

	Gender –Specific Language	Gender-Natural Alternatives
(1)	business man	executive, member of the business community
(2)	chairman	chairperson, chair
(3)	draftsman	drafter
(4)	husband, wife	spouse
(5)	man (noun)	person, human, humankind
(6)	manhours	worker hours
(7)	mankind	humanity
(8)	manpower	work force, personnel
(9)	workman’s compensation	worker’s compensation

E. Specific drafting difficulties

1. Definitions⁴⁷

Avoid unnecessary definitions: a definition serves the purpose of clarity without needless repetition.

There are three kinds of definitions:

(1) **Nominal**: e.g. the term “fracture” means “break”. One term is equated with another more familiar term. This is not strictly a definition, but may often be useful in conveying the meaning of a term.

(2) **Connotative**: e.g., The term “grade” means a step or degree, in a graduated scale of department rank, which is established or designated by law or regulation. Here, you define the subject in terms of (A) a broader class into which it falls (i.e., a step or degree *in a graduated scale of department rank*), and (B) the features that distinguish the subject from all other subjects in that class (i.e. established and designated by law or regulation). This is a true definition.

(3) **Denotative**: e.g., The term “Army” includes the Regular Army, the National Guard, the Organized Reserve Corps, ... Here you explain the subject by listing some or all of its component parts.

Such a denotative definition should clearly state whether it is intended to be exhaustive or partial. If exhaustive, it should read “*the term means*”; if partial, it should read “*the term includes*”. But **never** use the ambiguous expression “*means and includes*”. You leave the reader completely in doubt as to whether or not other components exist.

Rule: A true definition must not contain, directly or indirectly, the word or phrase being defined. Compare New Sudan Interpretation Act, section 3, definition of common law.

Mood: Use the indicative, not the imperative mood.

Don't say: the term “desk” *shall mean*...;

Say: the term “desk” *means*...⁴⁸

You are the one giving the definition and once you have given it, it becomes a fact for that specific law: The purpose of a definition is achieved in the very act of defining the term.

⁴⁷ According to Statsky, *Legislative Analysis and Drafting*, Second Edition, p. 174.

⁴⁸ Compare above, C.4.

Therefore, don't use a command! Reserve them for real commands: *shall* or *shall not* implies that someone must act or refrain from acting. Don't use them to merely declare a legal result.

Option: If you cannot make a connotative definition sufficiently unambiguous or concrete, you may strengthen it by listing the components that are in doubt. But do not make the list itself an exhaustive definition: This would make the first part of your definition superfluous. So, **don't say** "*The term "grade" means a step or degree, in a graduated scale of department rank, which is established or designated by law or regulation. It means(or consists of) the steps of colonel, lieutenant, sergeant, and cadet.*" Concurrent definitions are likely to become conflicting definition: Once you tell the reader that the term means this; and then, through such a second part, you would tell the reader that the very same term also means that. Such conflicting definitions are not of use.

Use "include" instead: e.g., *the term "grade" includes such steps as those of colonel, lieutenant, sergeant, and cadet.*

Do not define a term in a sense that conflicts with accepted usage. Use the word in its normal sense and make the provision in which it appears directly say the substantive results you want. (Avoids confusion, when either you or a colleague later amending that law forget their own definition and fall back into common usage of the word. Further, definitions contrary to common usage make the law much more difficult for the user (especially for lay addressees) to understand. Not being legally trained or in a hurry, many of them might turn directly to the section of interest to them, skipping the part of the definitions. As long as a term gives the impression of being completely understandable, since it is commonly used, no one will bother to check for a differing definition.

E.g., **Don't say:** *for the purposes of this law, the term "attorney" means judges, prosecutors, and attorneys.*

Say: Judges and prosecutors have the same rights, privileges, and duties as this law provides for attorneys.

Or: *In this law, judges and prosecutors shall be treated as if they were attorneys.*

Do not insert substantive rules in definitions! Strictly separate them from substantive rules requiring the addressees to act. Definitions are not commands:

Don't say: "Daytime" means the hours between 7 a.m. and 10 p.m. and service of process shall occur during daytime.

Say: § 2. “Daytime” means the hours between 7 a.m. and 10 p.m.

§ 2 (a). Service of process shall occur during the daytime.

However, if you need this definitions only ONCE, say directly “*Service of process shall occur in the hours between 7 a.m. and 10 p.m.*” Definitions are only of use, if they make the reading of the law easier.

Place of definitions: Place tem where they are most easily found! A word or phrase that is only used in one section should be defined in this section. (“In this section, the word “fraction” means ...)

If the term is used throughout a chapter, define it at the **beginning** of the chapter (your reader needs to know in advance, what the term means). A term used throughout the statute should be defined at the beginning of the entire statute (In this act, “reasonable” means ...).

The Interpretation Act: Definitions contained in the Interpretation Act do not need to be repeated elsewhere in a statute. However, make sure that the Interpretation Act you base your definitions on is still in force and that the provision you want to base your definition on is not unconstitutional.

Examples from the Interpretation Act: Art. 4 of “The Interpretation of Laws and General Clauses Act 1974” reads:

“In this Act and in all other laws the following words and expressions shall have the meaning respectively assigned before each of them unless the context otherwise requires or a meaning inconsistent therewith is expressly provided:

“**Gazette**” means the official Gazette of the Democratic Republic of the Sudan or the Regional Gazette and includes all their supplements;

“**Government**” means the Sudan and the high executive Council established in the Southern Region in accordance with the Southern Province Regional Self Government Act and any Regional Government established in accordance with the Regional Government Act, 1980;

“**Constitution**” means the Permanent Constitution of the Democratic Republic of the Sudan;

“**Year and month**” means respectively a year or a month reckoned according to the Gregorain calendar.

“**Person**” means any natural person and includes any company or association or body of persons whether corporate or not;

“**Commencement**” when it is used with reference to any law means the date on which such law comes to force;

“**Law**” means any legislative enactment, other than the Constitution and includes acts, provisional orders and any regulations, rules, subsidiary legislations or orders issued under Acts and includes Acts, provisional orders, regulations, rules, by law and orders made in accordance with the Southern Provinces Regional Self Government Act 1972 or any other Act made by the People’s Regional Assembly and the People’s Regional Assemblies;

“**Writing**” includes printing, lithographing, typewriting, photographing and other means for representing, or reproducing words in visible form. Words importing the masculine gender include the females. Words in the singular include the plural and vice-versa;

“**Prescribed**” means prescribed by the law in which any company or association or body of persons whether corporate or not;

“**Sign**” with its grammatical variations and cognate expressions whenever it occurs with reference to a person who is unable to write includes affixing a mark or a fingerprint;

“**Financial year**” means the twelve months commencing from the first of July and ending on the thirtieth day of June or any other two dates fixed by the Minister of Finance and Economic Planning. “

In this “Interpretation of Laws and General Clauses Act 1974”, the definitions of “government”, “constitution”, and the reference to the Southern Provinces Regional Self Government Act of 1972 do not seem up to date. Several other provisions are not only not adapted to the new Constitution, but in contradiction of the Interim National Constitution, and therefore unconstitutional and null and void. For example, § 7.2 of “The Interpretation of Laws and General Clauses Act”, establishing that the Arabic version of laws shall be deemed the authentic one, is most likely not reconcilable with Art. 8(5) INC. Furthermore, § 13(c) of the Interpretation Act contradicts the concept for the adoption of subsidiary legislation chosen by Art. 115 of the INC.

Finally, the definition establishing that “Words in the singular include the plural and vice-versa” might cause difficulties for the drafter: on the one hand it creates the problem that the drafter does not have the option to refer only to the plural or only to the singular; on the other hand, the definition might be easily forgotten by the drafter, thereby leading to difficulties in interpretation.

2. Incorporation by reference

An often used, but always dangerous device is to apply already existing provisions to the situation at hand without restating them (incorporation by reference). The incorporation by reference appears in two different ways, a static one and a dynamic one. Whereas the static reference refers to the content of a provision in its current form only, independently of future amendments, the dynamic reference also includes future changes of the law referred to.

The Interpretation of Laws and General Clauses Act 1974 seems to consider an incorporation by reference in a written law generally as a dynamic reference:

Section 12.1 reads: *“Where any law repeals and re-enacts with or without modification any provision of a former law, reference in another law to the provision repealed shall, unless the contrary intention appears, be construed as reference to the provision so re-enacted.”*

The advantages commonly associated with such an incorporation by reference is the guarantee of getting parallel results where they are desirable. Additionally, it saves space and sometimes the drafter’s time. However, already the last advantages seems to be somehow ambiguous: The very pressure and time constraints that lead the drafter to incorporate existing materials often prevent him from making sure that what look at first like parallel situations are in fact so.

In contrast, the dangers that come along with the incorporation by references may be enormous, especially with regard to dynamic references: If the incorporated language was not enacted by the legislature which the draftsman is serving, the unintentional inclusion of future changes may jeopardize the constitutionality of the incorporating provision. But also static reference may be rather burdensome than helpful: References may be orphaned by future changes in the incorporated law, making it necessary to exhume dead law to find out what the live law means.

Hence, as a general rule, the draftsman should not try to incorporate material by reference from other statutes and sources, unless he or she has made sure that it fits the case at hand.

3. Amendments⁴⁹

As already explained under “Exploring the existing legal situation” (compare above, III.B.4, page 40), it is recommended strongly *not* to use any implied repeals or amendments.

a) New Act

If the revision of an existing law requires extensive amendments to an old Act, you should repeal the old Act completely and draft an entirely new Act. The chances that this new Act will not be inconsistent with existing legislation or ambiguous are much higher. Keep the addressees in mind who will have to make sense of dozens of amendments patched together in a lengthy bill.

b) Prefer an exception clause to a proviso

Do not amend a statute by adding a proviso.

Example: Art. 3 of the Forestry Law requires a person who uses forestry resources to obtain a permit from the Forestry Department.

The minister assigns a lazy drafter to prepare an amendment to exempt from the permit requirement local people with long-continued customary rights to use forest resources.

The lazy drafter will take the following way out by using a proviso: Article 3 of the Forestry Law (*requiring a permit for the taking of forest resources*) is amended by adding the words, “provided, that this section does not apply to individuals with long-continued customary rights to take forest resources.”

Modern drafting practice requires simply stating the amendment as an exception. For example, the amendment would read better as follows:

“Article 3 of the Forestry Law (*requiring a permit for the taking of forest resources*) is amended by adding the following:

“2. Notwithstanding section 9 (*prohibiting a person without a permit from using forestry resources*), a person who has, or whose family or community has, used particular forest resources for a long, continuous period may continue so to use those resources””.

⁴⁹ According to Seidman/Seidman/Abeyesekere, *Legislative Drafting for Democratic Social Change – A Manual for Drafters*, p. 327ff.; Dickerson, *Legislative Drafting*, 1954, p. 100.

c) Do not use a deeming provision to amend a statute

Deeming provisions like provisos create more problems than they solve. You are recommended not to use them as an easy way to amend a law.

Example: The Forestry law should **not** be amended like this

“Article 3 of the Forestry Law (*requiring a permit for the taking of forest resources*) is amended by adding the following:

“2. A person who has, or whose family or community has, used particular forest resources for a long, continuous period shall be deemed a person holding a permit for the taking of forestry resources.””

d) Do not make blind amendments

A blind amendment is one which only tells the reader the words of the new law, but not what it really changes.

Examples: E.g.: It only states which parts of the law are deleted: Art. 14 of the Banking Law is amended by deleting all words after the words “banking system”.

Or: the original Cooperative Societies Act reads as follows: 37. A person over the age of seventeen who meets the requirements for membership as mentioned in section 36 may become a member of a cooperative society”. To change the age to sixteen, the drafter might simply make a deletion plus an insertion: “Section 37 of the Cooperative Societies Act is amended by deleting “seventeen” and inserting in its place “sixteen”.

Consider that most members of the public – and often not even members of the legislature will not look up the existing law (possibly not even because of mere laziness, but because they do not have easily access to it): they fly blind. Such blind amendments defeat participation and thus good governance. This is the reason why “blind amendments” are unconstitutional in several states of the U.S..

e) Do not make indirect amendments

They are extremely user-unfriendly and only create confusion.

Example: “The power conferred by subsection (1) of section 4 of the Historic Buildings and Ancient Monuments Act 1953 to make grants for the purposes mentioned in that subsection shall include power to make loans for those purposes, and reference to grants in subsections (3) and (4) of that section shall be construed accordingly.”

f) Methods of amending a statute

Option 1: Repeal and re-enact an entire article chapter or part.

(“Art. 14 of the Banking Law is repealed, and the following substituted in its place: ...)

Problems:

- might open debate on once already consented parts of the statute again, and might not be acceptable politically for this reason
- does not focus on changes (partly blind because reader still doesn't know what exactly the old statute said); however, this could and should be addressed in the research report by either accompanying the existing law to the draft bill or by using “strike outs”.

Option 2: Strike outs and additions

Provide the full text of the old Act, cross out the words/phrases/sentences that the new Act would cut out (strike outs), and include the new bill's material in capital letters (additions).

g) Further details

- First always state name and the section of the old act that the new bill will amend.
- Try not to renumber the articles of the old act: users have become familiar with the articles. Rather leave the old numbers unchanged and - when inserting a new section - try instead to use letters, e.g. insert section 14A between sections 14 and 15 of the old act. The same applies to chapters or parts.
- Put consequential amendments into schedules/tables at the end of the act, in order not to confuse the reader regarding the real purpose of the bill.

4. Repeals and comparable amendments

As already stated, it is not good legislative drafting to simply include a saving clause stating that “all laws inconsistent with this statute are hereby repealed”. This does not really help the addressees because the task to figure out whether or not the two (or more) statutes conflict or whether they can be reconciled still remains with them. The section about the automatic repeal does not make this task any easier. Therefore, as in case of amendments, state exactly which section of which statute is repealed. It is your task as a drafter to check the existing legal situation and to fit any new statute in that body of laws.

V. Annex: Suggested answers

A. Suggestion to Exercise 1:

Ad 1.)

a) According to the Schedules, the “penal law power” rests with the states if no penalization of national laws relating to national competencies is concerned (§ 20 of Schedule C). Hence, national drafters have no authority to draft a law in this case. The denial of a bail for certain crimes is a procedural provision, which also are to be regulated by the states according to Schedule C. Art. 181 (2) INC as well as the exception in § 20 of Schedule C do not apply, since “robbery” is a crime in itself and not an annex to the breach of a national law.

Ad 2.)

a) procedural part: competence of drafters at the national level:

Economic planning is listed under § 28 Schedule D (concurrent powers); economic aspects of natural resources are listed under § 19 (2) Schedule B (GoSS powers). Hence, in a first step and with regard to the concurrent power, there should be clarification on which level of government fits best to regulate the issue at hand (see Art. 72 (f) INC).

b) with regard to the subject matter:

While drafting a bill, drafters are to be guided by the guiding principles of the INC (Artt. 10-21 INC). The relevant provisions is Art. 11 (2) INC:

11 (1) The people of the Sudan shall have the right to a clean and diverse environment; the State and the citizens have the duty to preserve and promote the country’s biodiversity.

(2) The State shall not pursue any policy, or take or permit any action, which may adversely affect the existence of any species of animal or vegetative life, their natural or adopted habitat.

(3) The State shall promote, through legislation, sustainable utilization of natural resources and best practices with respect to their management.

Hence, the instruction given to the legal drafters cannot be implemented by them, since Art. 11 (2) INC clearly prohibits an action that adversely affects the existence of a specie. And since the INC is the supreme law of Sudan, the rather open wording of the ICSS can not be applied in a deviating manner.

Ad 3.)

The relevant provision to the question is Art. 221 INC referring to the Assessment and Evaluation Commission (AEC):

221 (1) An independent Assessment and Evaluation Commission shall be established by the President of the Republic with the consent of the First Vice President to monitor the implementation of the Comprehensive Peace Agreement during the interim period.

(2) The Commission shall conduct a mid-term evaluation of the unity arrangements established under the Comprehensive Peace Agreement.

The Parties to the Comprehensive Peace Agreement shall work with the Commission during the interim period with a view to improving the institutions and arrangements created under that Agreement and to make the unity of the Sudan attractive to the people of Southern Sudan.

Presidential Decree No. (36), 2005 seems to comply with that provision. However, it is not sufficient to rely on the INC only, but also recourse to the CPA has to be taken. And indeed, the Machakos Protocol has a provision on the composition of the AEC:

2.4 An independent Assessment and Evaluation Commission shall be established during the Pre-Interim Period to monitor the implementation of the Peace Agreement and conduct a mid-term evaluation of the unity arrangements established under the Peace Agreement.

2.4.1 The composition of the Assessment and Evaluation Commission shall consist of equal representation from the GOS and the SPLM/A, and not more than two (2) representatives, respectively, from each of the following categories:

* Member states of the IGAD Sub-Committee on Sudan (Djibouti, Eritrea, Ethiopia, Kenya, and Uganda);

* Observer States (Italy, Norway, UK, and US); and

* Any other countries or regional or international bodies to be agreed upon by the parties.

2.4.2 The Parties shall work with the Commission during the Interim Period with a view to improving the institutions and arrangements created under the Agreement and making the unity of Sudan attractive to the people of South Sudan.

The Machakos Protocol mentions in Art. 2.4 an explicit number of members for the AEC and even specified their provenance. § 3 of the decree deviates from envisaged composition in the Machakos Protocol (see especially Art. 3 (e)) and is therefore in violation of the CPA.

B. Suggestions to Exercise 2: Imposing an obligation to act

- (1) A foreign or domestic carrier who carries a passenger between parts of the Hawaiian Islands shall also carry the passenger's accompanying baggage, not to exceed seventy pounds in weight.
- (2) The Director-General of Police shall instruct police officers in the constitutional rights of accused persons.
- (3) A father who has abandoned his child shall pay the child's mother an allowance for the child's support.
- (4)
 - i. A director shall exercise reasonable business judgment in managing the corporation.
 - ii. A person aggrieved by the director's mismanagement may recover reasonable damages from the director.
- (5) To become a party to a lawsuit, a person whom a court permits to intervene shall file a notice of appearance within thirty days.

C. Suggestions to Exercise 3: Different concepts, different words

1. "(1) While intoxicated, a person may not serve on a railroad as engineer, motorman, gripman, conductor, switch tender, fireman, flagman, signalman, or have charge of a station, or of starting, regulating or running trains upon a railroad, or serve as captain, engineer or other officer of a vessel propelled by steam.
- (2) A court that finds that a person has violated subsection (1) shall convict that person of a gross misdemeanor."
2. "A court or tribunal may not enforce an engagement made by a person under the age of sixteen." OR "An engagement made by a person under the age of sixteen is void."
3. Draft reaches different set of vehicles than the reckless driving statute.

D. Suggestion to Exercise 4: Granting a discretionary power

- (1) "The Minister may provide textbooks for students in private schools."

(2) “The Minister may promulgate regulations concerning the subject-matter of this Act.”

E. Suggestion to Exercise 5: Avoiding the passive voice

(1) “A state or state official may not discriminate against a citizen on grounds of race, color, sex, or origin.”

(2) “At least twice a year, the Auditor General shall audit the accounts of the small claims courts.”

(3) “An authorized apprenticeship programme may not exclude a woman from the programme on grounds of her gender.”

F. Suggestion to Exercise 6: Drafting in the positive

(1) “At the Department’s expense, the Department of Welfare may shelter in a hotel an indigent person with a child.”

(2) “This section applies to farmers who at any one time during the preceding 12 months have employed more than 50 employees.”

(3) “An alien shall register annually.”

G. Suggestion to Exercise 7: Avoiding ambiguous modifiers

(1) “A person suffering from a contagious disease may not enter a bathhouse.”

(2) “The Housing Authority shall require each tenant to pay his rent promptly after the first day of each calendar month.”

(3) “Within two weeks of an accident, a claimant shall give to the city notice of intention to hold the city liable upon his or her claim.”

(4) “When an employer and a union enter upon a valid collective bargaining agreement, neither may on grounds of hardship rescind it.”

H. Suggestion to Exercise 8: Using shorter sentences

“(1) Under the circumstances stated in subsection (2), at the rate stated in Section XX, the Government shall reimburse an official for travel of an official’s dependent children from the sessional official’s headquarters to Cape Town, and from Cape Town to a school or an institution of higher learning that the children attend.

(2) The Government shall make the reimbursement mentioned in subsection (1) if the school or the institution of higher learning opens so much later than the day on which the official’s duties require him or her to remove to Cape Town that the children and the official’s household reasonably must accompany the official to Cape Town.”

I. Suggestion to Exercise 9: Avoiding “each”, “any”, “all”, and “every”

(1) While on duty, a police officer shall carry a pistol.

(2) While on duty, a police officer shall carry a pistol.

(3) A qualified state official may enroll in the pension plan.

(4) Upon an arrested person’s arrival at a police station, the duty officer shall book that person.

(5) Unless probable cause for a search exists, a police officer may not search an arrested person.

(6) The Minister shall provide notice of hearing to a person who has made an application.

J. Suggestion to Exercise 10: Avoiding the verb “to be”

(1) “This Code contains seven classifications of criminal homicide.”

(2) “With respect to the pension scheme, the Director of Pensions shall accord provincial officials the same rights, duties, immunities, powers and privileges that the Director accords national officials.”

(3) “An officer shall hold a college degree.”