Chapter VII:
Particular Qualities of Certain Rules (Including Facilitating Parts)

Section I. Facilitating Legal Materials

7.1.1 Preambles, Head Title (long title)…[1]

The Preamble of a statute like the Head Title is a part of the Act. Although not an enacting part, the preamble is expected to express the scope, object and purpose of the Act more comprehensively than the Head Title.

It is to the Preamble more specially that we are to look for the reason, objective, purpose or spirit of every statute: rehearsing these, as it ordinarily does, and evidencing the same in the best and most satisfactory manner, the object or intention of the legislature is making or passing the statute itself. It is a key part to clearly reflect the minds of the makers of the Act.

The Preamble, being a part of the statute, must be crafted in such a way as to be read along with other provisions of the Act. Referring to the questing as to how far the enacting provisions may be made to be controlled or restricted by the preamble, the fact is that it is in the preamble that the reason for restriction is to be found. Hence, the principle is that enacting provisions should not be more general than the preamble would suggest. The principle could be better stated in such a way that the purpose of the Preamble is not to influence the meaning otherwise ascribable to the enacting part.

There may be no exact correspondence between Preamble and the enactment, and the enactment may go beyond, or it may fall short of, the indications that may be gathered from the Preamble.
One of the cardinal principles of drafting is that a preamble is meant to provide a beacon to guide drafters, first, and then, users; i.e. judges, lawyers etc, but never to stifle the enacting provision.

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[1] G.P. Singh, Principles of Statutory Interpretation, (Wadhwa and Company, Law Publishers, New Delhi, India, 6th Ed., 1997) pp. 107-.110.

If, however, having drafted the Act as a whole, including the preamble, if any enacting provision clearly negates the objective which the preamble sought to attain, then there is a clear problem. An enacting provision cannot be allowed to cover a wider scope than that contemplated by the preamble. Usually, it is the enacting provision that has to be restricted. But, where the enacting provision sounds appropriate, a drafter will be compelled to narrow down the scope contemplated by the Preamble.

7.1.2 Headings Acts[2]

The Head Title of an act is undoubtedly part of the Act itself, and it is legitimate to use it for the purpose of clearly delimiting the scope of such legislation. This is not the case with other titles. A Head Title, although part of the act, is not in itself an enacting provision. Though useful in case of an ambiguity of the enacting provisions, it is ineffective in providing of controlling weight to the actually enacting provision. In many cases, the Head Title may supply the key to the meaning. The principle is that where something is doubtful or ambiguous the Head Title may be resorted to resolve the said doubt or ambiguity. The Head Title of the Act on which many learned lawyers place considerable reliance as an appropriate place for the determination of the scope of the Act and the Policy underlying the legislation, no doubt, indicates the main purposes of the enactment but cannot obviously be used for supplying meaning to the operative provisions of the Act. So, drafters should try to frame Head Title with all caution but should not rely, shape it in a way to replace the function of the operative parts of legislation.

7.1.3 Headings of Chapters and Sections[3]

The Heading(s) or Title(s) prefixed to chapters and sections or group of sections can be taken "as preambles to the provisions following them." Such heading(s) prefixed cannot be shaped for the purpose of limiting the plain meaning of the words in the provision. Only in the case of ambiguity or doubt the heading or sub- heading are meant to supply help in understanding the provision; even in such a case it could not be used for restricting the wide application of the clear words used in the provisions.

[2] Id., p. 105-107.

[3] Id., pp. 115-117.

The heading prefixed to chapter's sections or sets of sections in some modern statutes are regarded as preambles to those parts. They cannot control the plain words of the statute, but they may help explain the general purpose of the set of articles assembled or enumerated under it. Care, therefore, should be taken when a drafter chooses Headings.

One other thing worth taking note of relates to the function that may be attached to headings of an Article. In short they are of little guise. Actually they are treated as "nick names" of the provision, in question. Yet, these doses not mean that a drafter should be care-free, rather make sure such titles readily supply the essence of the Article, in question.

7.1.4 Definition Provision[4]

It is common to find in a statute 'Definitions' of certain words and expressions used else where in the body of the statute. The object of such a definition is to avoid the necessity of frequent repetitions in describing all the subject–matter to which the word or expression so defined is intended to apply. Such a provision may borrow definitions from an earlier act and the definitions thus borrowed might not necessarily be found in the definition provision of the earlier act, but inserted as mere legal proposition.

> *"In stipulating a meaning for a word, a [drafter]… demands that his reader shall understand the word in that sense whenever it occurs in that work. The writer thereby lays upon himself the duty of using the word only in that sense, throughout the text.*
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> *"..The second thing to remember about definitions, and this is one of the most important things in the whole field of legal drafting, is that you shouldn't define a word in a sense significantly different from the way it is normally understood by the persons to whom the legislation is primarily addressed. This is a fundamental principle of communication and it is one of the shames of the legal profession that draftsmen so flagrantly violate it."*[5]

[4] Id., pp. 124-125.

[5] Reed Dickerson, op cit, Note No. 20, pp. 220 and 222.

A definition may be borrowed by incorporation or reference. It may be some times found in the rules made under the referred statute. But in the absence of incorporation or reference, it is difficult even it may prove hazardous to craft definition all by yourself. It becomes more hazardous when such statute is not dealing with any cognate subject. For all purpose, refer to the chapter on Language and meaning before you start formulating one for yourself.

A. Restrictive and extensive definitions[6]

The definition of a word in the definition section may either be restrictive of its ordinary meaning or it may be extensive of the same. When a word is defined to 'mean' such, the definition is prima facie restrictive and exhaustive, where as, where the word defined is declared to include' such and such, the definition is prima facie extensive. When by an amending Act, the word "includes" was substituted for the word 'means' in a definition section, it was held that the intention was to make it more extensive. Further, a definition may be in the form of means and includes, where again the definition is exhaustive. On the other hand, if a word is defined '*to apply to and include'*, the definition is understood as extensive. A definition which defines a word to mean A, and to include B and C can not in its application be construed to exclude A and to include only B and C.

The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of the of words or phrases occurring in the body of the statute; and when it is so used those words or phrase must be construed as comprehending, not only such things, as they signify according to their natural import, but shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions used. It may be equivalent to 'mean and include' and in that case it may afford an exhaustive explanation of the meaning which for the purpose of the Act must invariably be attached to those words or expression.

It is obvious that the words used in an inclusive definition denote extension and cannot be reacted as restricted in any sense. Where we are dealing with an inclusive definition, it would be in appropriate to put a restrictive interpretation upon term of wider denotation.

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[6] Id., pp. 125-129.

There can be no doubt that in some cases the language of an inclusive definition considered with the general context, can have the effect that the ordinary general meaning of a word or expression is to some extent cut down.

A definition section may also be worded in the form 'is deemed to include' which again is an inclusive or extensive definition and such a form is used to bring in by a legal fiction something within

A definition may be both inclusive and exclusive i.e. it may include certain things and exclude others. Limited exclusion of a thing may suggest that other categories of that thing which are not excluded fall within apparently wide or inclusive definition. But the exclusion clause may have to be given a liberal construction it the purpose behind it so requires.

B. Ambiguous Definitions[7]

Although it is normally presumed that the legislature will be specially precise and careful in its choice of language in a definition section, at times the language used in such a section itself requires interpretation. As pointed out by Sir George Rankin: *"A phrase having been introduce and then defined the definition primafacie must entirely determine the application of the phrase; but the definition must it self be interpreted before it is applied, and interpreted, in case of doubt in a sense appropriate to the phrase defined and to the general purpose of the enactment".*

The definition section may itself be ambiguous and may have to be interpreted in light of the other provisions of the Act and having regard to the ordinary connotation of the word defined. A definition is not to be read in isolation. It must be read function of a definition is to give precision and certainty to a word or phrase which would otherwise be vague and uncertain but not to contradict it or supplant it altogether.

It is true that an artificial definition may include a meaning different from or in excess of the ordinary acceptation of the word which is the subject of definition; but there must then be

[7] Id., pp. 130-132.

compelling words to show that such a meaning different form or in excess of the ordinary meaning is intended.

C. Definitions: Negation of the Rule According to Context[8]

Courts are not the only responsible organ for creating the need for interpretation. Some amount of responsibility must be shared by the legislature, particularly by legislation drafters. So, drafters have to take in to account meanings given to words and phrases by court, particularly those settled ones, in drafting future legislation.

The word construction, unlike interpretation, is the drawing of conclusion, in respect of matters that lie beyond the direct expression of the text or drawing conclusions, which are within the spirit but not within the letter of the law. Why don't drafters try to harmonize the letters with the spirit, goal, purpose…of the law?

Hereunder the word "construction" is used to signify the effort that should be made by a drafter, not only of legislations, but also of any other instrument.

Section II. Provisos

7.2.1 Its Real Nature[9]

The normal function of a proviso is to except something out to the enactment or to quality something enacted there in which but for the proviso would be within the purview of the enactment. When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso. The proper function of a proviso is to except and to deal with a case which would otherwise tall within the general language of the main enactment, and its effect is confined to that case.

[8] Id., pp. 133-134.

[9] Id., pp. 136-137.

The proviso may be a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment. Ordinarily it is foreign to the proper function of proviso to shape it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment. Further, a proviso should not normally be shaped as nullifying the enactment or as taking away completely a right conferred by the enactment. As a consequence of the aforesaid function of a true proviso certain rules follow.

7.2.2 Guide to Formulation of Proviso [10]

If the enacting portion of a section is not clear, a proviso appended to it may give an indication as to its true meaning. The rule thus: there is no doubt that where the main provision is clear its effect cannot be cut down by the proviso.
Since the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso, the proviso should be shaped in such a way it serves this purpose.

It is a familiar principle of statutory formulation that, when it is necessary to make an exception, a proviso forms the operative part of the section.

7.2.3 At times, added to allay fear[11]

The general rule in formulating an enactment containing a proviso is to go in line with the enacting provision, without making either of them redundant or otiose. Even if the enacting

[10] Id., p. 142-144.

[11] Id., p. 145.

part is clear, effort should be made to bring it close to the meaning of the enacting provision, with the view to justify its necessity. This is done only for abundant caution.

7.2.4 Hardly, a Fresh Enactment[12]

The normal rule is that it is *"a very dangerous and certainly unusual course to import legislation from a proviso whole-sale into the body of the statute, as to do so will be to treat it"* as it were an independent enacting clause instead of being dependent on the main enactment. To read a proviso as providing something by way of an addendum or as dealing with a subject not covered by the main enactment or stating a general rule as distinguished from an exception or qualification is ordinarily foreign to the proper function of a proviso. So, students are advised not to use a proviso as to serve a fresh enacting clause.

7.2.5. Distinction Between Proviso, Exception, and Saving Clause[13]

Distinction is said to exist between and among 'proviso', 'exception' and 'saving clause', as 'exception' is intended to restrain the enacting clause to particular cases, while proviso is used to remove special cases from the general enactment and provide for them specially. And 'saving clause' is used to preserve from destruction certain rights, remedies or privileges already existing. Savings means that it saves all the rights the party previously had, not that gives him new rights.

Saving clauses are introduced into Acts which repeal others to safeguard rights which, but for the savings, would be lost and these clauses are seldom used by drafters.

Section III. Explanations, Schedules and Transitional Provisions [14]

[12] Id., pp. 146-147.

[13] Id., pp. 148-149.

[14] Id., pp. 151-152.

An Explanation is at times appended to a section to explain the meaning of words contained in the section. It becomes a part and parcel of the enactment. The meaning to be given to an 'Explanation' should depend upon its terms, and *"not theory of its purpose can be entertained .."*. But, if the language of the explanation shows a purpose and a formulation consistent with that purpose, it can be reasonably place upon it.

When a section contains a number of clauses and there is an Explanation at the end of the section, it should be seen as to which clause it applies and the clarification contained in it applied to that clause.

An Explanation may be added to include something within or to exclude something from the ambit of the main enactment or the connotation of some word occurring in it. Even a negative explanation which excludes certain types of a category from the ambit of the enactment may have the effect of showing that the category leaving aside the excepted types is included within it.

Schedules[15] Schedules appended to statutes form part of the statute. They are added to wards the end and their use is made to avoid encumbering the sections in the statute with matters of excessive detail. They often contain details and forms for working out the policy underlying the sections of the statute and at times they contain transitory provisions which remain in force till the main provisions of the statute are brought into operation.

Occasionally they contain such rules and forms which can be suitably amended according to local or changing conditions by process simpler than the normal one required for amending other parts of the statute. The division of a statute into sections and schedules is a mere matter of convenience and a schedule therefore may contain substantive enactment, which may even go beyond the scope of a section to which the schedule may appear to be connected by its heading. In such a case a clear positive provision in a schedule may be held to prevail over the primafacie indication furnished by its heading and the purpose of the schedule contained in the Act.

[15] Id., pp. 152ff.

Transitional Provisions At times a statute contains transitional provisions which enacts as to how the statute will operate on the facts and circumstances existing on the date it comes into operation. However, it is not possible to give as definitive description of what constitutes a transitional provision. Therefore, the construction of such a provision must depend upon its own terms.

One feature of a transitional provision is that its operation is expected to be temporary, in that it becomes spent when all the past circumstances with which it is designed to deal have been dealt with although it may be envisaged that could take a considerable period of time while the primary legislation continues to deal indefinitely with the new circumstances which arise after its passage.