General Academic Report

Joint UNDP-MRC Project

International Co-Operation With The Islamic Consulatative Assembly

2000-2002

(5)

Majlis Research Center (MRC)

Human Resource Capacity Building Project

6814

UNDP Office

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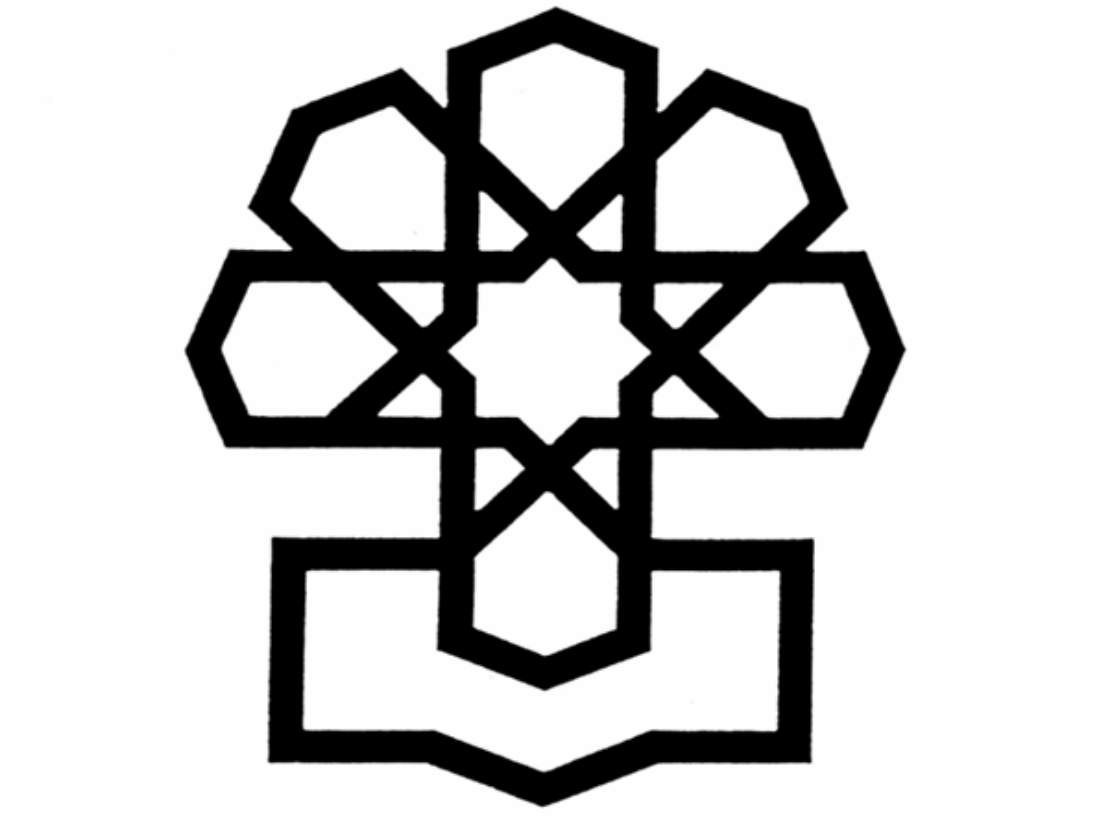

شماره مسلسل: ٦٨١٤ کد موضوعي: ٤١٠

کار: دفتر معاونت پژوهشي

معاونت پژوهشي
آذر ماه١٣٨٢

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Introductory note

The project, following several major administrative developments, was conducted during three separate workshops. The first workshop, dealing with legal research and methodology was primarily conducted for the benefit of experts and staff of MRC. The workshop, though focusing on legal research, had to deal with other general research methods to assist the legislators in evaluating the content of legislative bills presented to legislature. Apart from transcripts of lectures and debates several specialized papers were also handed to MRC in Farsi and English, which are attached to this General Report. Presenting, debating and legal criticism of specialized issues of drafting civil, commercial, economic and constitutional laws of Iran in a view of lifting institutional barriers and presenting a restructuring plan of such laws and regulations may be deemed the main contribution of the project.

Formulating a proposal

Scholarly research papers and discussion papers have been submitted during the implementation of the study regarding process of budget preparation in Iran. This General Report is not intended to deal with such issues which are dealt with under the sister project. In discussing the issue of checks and balances and the relationship between executive and legislature a particular aspect of the topic was separately studied. In order for legislature to exercise properly its power without interfering or disturbing the administration of government several legal criteria needs to be elaborated.

1. Morteza Nassiri (Ph.D).

The first and most important guideline is that the duly committed obligations of the executive branch may not be disregarded by the legislature. The process of legislative approval of budget serves the purpose of public disclosure and transparency of government expenditures. However, in most cases the legislature will have a chance of checking the authority of the executive in allocating fresh funds for incomplete programs. This control is separate from auditing powers of Auditing Tribunal, an independent judicial body established under the Constitution of the Islamic Republic of Iran for the purpose of auditing the detailed accounts of expenses made by different government agencies. Auditing Tribunal is required to audit the government's financial activities on the basis of appropriations legally approved or authorized. At the same time the Tribunal proceeds with prosecution of cases involving violation of public accounting laws and regulations.

In order to comply with transparency rules governing budget preparation appropriations for each separate public entity needs to be clear and distinct. The legislature will then have a chance to take informed decisions in appropriating funds to the project during the years to come. While this legislative control system may be effective for checking public expenditures the government needs to enter into long term contracts with third parties for the purpose of implementing its development projects. In this regard the main issue is the extent of the obligations of the government and the authority of the concerned government agency to enter into such long term commitments. Public accounting law of Iran in accordance with Article 63(2) has delegated such authority to Management and Planning Organization. While the authority to enter into such long term contracts and obligation the government to scheduled contractual payments are based on an agreements signed between the Organization and the relevant government agency, disbursements are made on account of future annual allocations to the project. The procedure hardly leaves a chance for legislature to disapprove annual appropriations for development projects, due to the fact that by the time of their submission to legislature such commitments have already been made on behalf of the government.

Therefore, legislative guidelines need to be introduced to allow the legislature to control such commitments before being made by the executive.

A noticeable feature of the annual budget of the country is the fact that bulk of public expenditure is made by independent government companies. Although the government share of the income of such corporations are reported government companies like other commercial enterprises prepare their own budgets and decisions as to the scope of their investments and expenses are likewise made by themselves. The process is another way of isolating the legislature from controlling public expenses. At the same time itemized figures of investments and purchases by such enterprises are not made public and consequently rules of transparency are not followed by such entities. Since the annual budget according to the Constitution needs to include over all budget of the country statutory guidelines need to be implemented regarding public expenditures through such independent instrumentalities.

The above proposals require actual contribution of the representatives through their specialized committees during the whole yearlong. MRC may have to be equipped to assist the deputies in fulfilling their legislative function in this regard. Otherwise the representatives once caught in the middle of legislative politics may hardly play a significant role in delicate process of budget preparation.

Process of law drafting

Laws are submitted to Majlis either by executive branch or by fifteen deputies. At the same time the Constitution under Article 158 (2) specifies that "law drafting regarding judicial matters compatible with Islamic republic" is one of the duties of the Chief of the Judiciary branch. Under sections (1) and (3) of the same article drafting laws related to organization of judiciary and employment of the judges are also reserved to judiciary. Therefore, all three branches of the government are entrusted with the function of law drafting. However, law drafting both as to substance and form is indeed a technical process. While judiciary is presumed to be well equipped in law drafting the two other branches need to be coordinated in this regard. A study the volume and substance of the laws passed during

the past two decades reveals the fact that due to lack of coordination and in times hurried preparation of the drafts the rights and duties arising from such statutes are subject to diverse interpretation. The practitioner will have hard time applying conflicting regulations and in time partially repealed laws; not to mention the time consuming task of locating legal provisions included in bills submitted for different purposes such as budget bills. Thus, serious work needs to be done for restructuring Iranian legal system. The effort particularly needs to be concentrated towards restructuring and even repealing technical, administrative, financial, trade related and functions and authorities of different departments of the executive branch.

The project adapted the suggested priority due to following reasons.

First and foremost being the fact that technical and administrative laws of the country while reviewed by several committees of experts before submitting to the Council of Ministers and Majlis, receives the stamp of approval of such committees, due to initiating ministry's particular exigencies and concerns. The management of the project therefore, decided to invite heads of legal and parliamentary departments of different government agencies and legal experts of MRC to participate in discussions regarding the form and substance of Iranian technical laws.

The other reason being that most of the time technical bills are drafted by experts of the particular field without lawyers being involved or interested in substantive significance of such drafts and necessity of incorporating them in overall legal system of the country. In other words such technical laws are trying to resolve and isolate their particular technical problem without a legal research as to interrelation of such bill with other existing laws of the country. The result being that we will be facing with laws which are hard to coexist with other legal codes and most of the times create concurrent agencies, competing for jurisdiction in a particular issue. Many such bills while creating new administrative agencies would fail to achieve their goals due to the fact that no attempt has been made to prepare a justifying report for Majlis. The bills sometimes contain introductions, which are either over broad or self-serving and hardly qualified as a justifying report.

The prime characteristic of a statute is its concise mandatory terms. In other words the law will be drafted for the purpose of regulating an issue which was not otherwise regulated or the executive branch lacks authority to deal with the issue. Most experts who are not familiar with the overall body of the country's legal system may sometimes come up with a technical proposal and at the same time draft a law for implementation of such proposal by the particular agency which has retained their service. They may not be aware of the fact that required tools are at their disposal by using other existing laws; or to achieve their purpose no legislative initiation is needed at all. The concerned government agency rather needs to draft a by-law or administrative circular to achieve the same purpose. The lawyer's lack of enthusiasm in involving themselves with the substantive issues of technical laws may be the reason for such deficiencies. For this reason the project made an attempt to look at the merits of such technical laws from the point of view of Iranian legal system. Research papers were submitted by experienced legal scholars in main areas of Iranian law, with a goal to familiarize the audience of the workshops with legal tools under Iranian law to effectively assist technical experts in law drafting within Iranian legal environment.

Due process of law further justifies scrutiny in drafting technical statutes, which their enforcement may be left at the sole discretion of the executive branch. Enforcement of laws in general is the function of courts and control through judicial review. The judges and eventually the general assembly of the Supreme Court will have to address their deficiencies and incompatibilities. Eventual judicial interpretation will declare the actual rights and obligations of people. Quite to the contrary a statute which is intended to be enforced by executive itself hardly falls under any judicial scrutiny. Such laws tend to create arbitrary powers for executive, leaving the general public without any effective recourse.

Drafting by-laws in statutory form tend to bypass another important judicial control of the powers of executive by Court of Administrative Justice. While the Court under Iranian Constitution assumes jurisdiction to annul government regulations and by-laws which are contrary to the provisions of the statutes, no such authority is entrusted to the Court in

annulling the statutes. Thus, once a by-law was turned into a statute the powers of executive branch in discretionary interpretation of such laws will remain unchecked. Also it is accessable to nullify the regulations those approved by government in contrast of law under Art 85 of Iranian constitution.

In order for the Project to be able to achieve its purpose in a manageable and effective manner, different issues were selected and offered for research and presentation to several scholars. The issues may be divided into three categories. The first category was the subjects related to draftsmanship, wording and justification of statutes. The second one designed to deal with substantive nature of technical statutes and legal tools available under Iranian Constitution to turn such goals into a legislative draft, compatible with Iranian legal system. The third category addressed the deficiencies and failures of technical statutes in achieving their own goals, which hinder economic growth of the country. The purpose of the study was to show the significance and urgency of restructuring technical laws of the country. The workshop finally addressed the methods of restructuring the statutes and practical proposals to speed up the process of restructuring Iranian statutes; which has been the concern of the government for decades.

Effective participation by experts in charge of preparation and review of draft statutes in workshop (2) was indeed a unique opportunity for legal experts of different ranks to test and appreciate application of scholarly researches and theories in practice. Thus, the practical output of the Project turned out to be very noticeable. The General Report tries to combine scholarly researches and debates into a coherent and independent legal paper. Research papers, transcripts of lectures and discussions as well as references to primary sources are attached for those who are interested in details of discussions and positions taken by lecturers and participants.

The workshop dealing with issues of drafting and restructuring technical laws of the country consists of sixteen separate reports of lectures and debates and scholarly papers submitted by well known experts on different fields of Iranian law. (The reports and papers are attached to this General Report.)

In re-examining the assignments of the initial project it was concluded that remaining issues may easily be studied and conveniently debated under the general heading of "relation between the executive and legislative branches of the government". Therefore, the last academic workshop consisting of five lecture and debate sessions was successfully conducted during the months of November and December 2002. (Legal papers relating to the sessions are also attached to this General report.)

The purpose of this General Report is presentation of the ideas, different legal researches, position papers and interventions by participants, legal criticism and debates, topics of future legal researches to be conducted by MRC and workable solutions and legal analyses.

In an effort to submit the General Report in a coherent and consistent manner chronological sequence of the lectures and papers presented during the workshops will not be followed. In fact the General Report, while reflects the legal contents of the attached documents, is by itself an independent legal paper, dealing in an appropriate and logical sequence with the issues contemplated to be searched and analyzed by scholars and distinguished lawyers participating in the Program.

Powers of legislature and the role of executive branch

The assignment of the project was not a thorough study of Iranian constitutional law. Rather to improve capabilities of MRC in assisting the legislature in fulfilling its main function of law drafting. Since the laws are mainly drafted and submitted by the executive branch the legal relation between the two branches of the government needed to be explored both from Iranian and comparative law perspective. Judiciary is another separate branch of the government. However, an study of the powers of judiciary seemed outside the scope of the assignment, due to the fact that under Article 158 of the Constitution of the Islamic Republic of Iran drafting appropriate legislative bills concerning judiciary branch is delegated to the judiciary itself.

By large the most sweeping powers of the legislature under different styles of democracies are its law making and taxing and powers. However, another constitutional mandate is the doctrine of separation of powers.

Unless legal mechanism is built under the constitution to prevent encroaching on powers of other branches of government the doctrine of separation of powers hardly operates. Thus, depending on method of appointment of the head of executive branch, constitutional laws need to envisage legal solutions designed to prevent unfair competition of powers. Such legal remedies are called "checks and balance of powers". Under parliamentary method of appointing the head of the executive branch the prime minister who is the leader of the political party holding the majority of the seats in parliament will be appointed as the head of executive branch. In this system the parliament is the superior branch and cooperation of executive and legislative branches are in theory easier to be achieved. In presidential systems where the president of the republic would separately and directly be elected the powers of executive and legislative branches need to be checked and controlled by the other branches to avoid encroaching and assuming overlapping authorities. Iranian system is presidential whereby the head of the executive branch is directly elected. It is true that under the Constitution of the Islamic Republic of Iran the President is the second in command of the government, under the authorities of the leader; but other independent branches of the government should operate under the auspices of the leader, as well. (Article 57 of the Constitution) Therefore, three separate sessions of workshop # 3 were assigned to elaborate checks and balance of the two competing powers of executive and legislative branches under Iranian constitution. The controversial issue which was dealt with both under the discussions related to doctrine of separation of powers and responsibilities of the President in supervising due implementation of the laws of land and the Constitution was the extent and implication of such power. Regarding the powers of the President two distinct positions were elaborated. One was that since the President is vested with the responsibility of safeguarding and implementing the Constitution an enabling law needs to be passed by legislator, delegating him with necessary vehicles to fulfill such responsibilities. This position is based on the plain language of the Constitution and the legislative history. The position further argues that in absence of such enabling legislation the President

may hardly be able to effectively perform his duties in safeguarding the Constitution.

The other position based on doctrine of separation of powers advocated that the President is vested with specific and enumerated power under the Constitution and delegating other powers to him runs contrary to the Principe of separation of powers and the powers entrusted to judiciary. In more specific terms the position is based in part on interpretation of the Constitution. According to Article 156 (3) of the Constitution the duty of due implementation of the laws which according to this interpretation includes the Constitution is vested with judiciary. The argument, in an effort to reconcile competing duties of the President and judiciary regarding implementation of the Constitution, suggests that the President's duty in this regard is limited to supervising implementation of the Constitution by executive branch and does not extent to implementation of the provisions of the Constitution by judiciary in prosecution of crimes and judicial settlement of disputes. The argument further justifies the position by giving examples of potential violations of the Constitution by executive branch, where the President needs to act. In such cases due to authorities of the President upon executive branch there would be no conflict of authority between the President and judiciary.

Law drafting by executive branch and legislature

General law making power of the legislature is expressly envisaged under article 71 of the Constitution. However, the Constitution realizing the significance of law making, both in form and substance, has entrusted the process of law drafting to the executive while reserving the right of deputies to draft laws and submit it to Majlis when at least 15 of them had signed the draft. Researches by MRC thus, needs to be oriented towards assisting Majlis in fulfilling its law making function. On one hand MRC is expected to submit independent research or study papers for the benefit of specialized committees of Majlis and on the other hand it needs to address issues of public concern and submit reports to be used as substantive contents in law making process by deputies; in cases where the executive would not take the initiative. Thus, assisting Majlis in proper fulfillment of its legislative

function happens to be the main goal of MRC. Therefore, the project devoted its contribution towards the issue of law drafting and restructuring Iranian laws. The General Report will address the outcome of the studies conducted in this regard under appropriate headings.

Powers of Legislature concerning Budget

The purpose of annual budget is to obtain the authorization of Majlis for allocation of funds for different government programs. Another purpose of submitting the annual budget to Majlis is legislative authorization to obtain loans or other financial facilities to meet the commitments of the government during the term of the budget.

Indeed the most important legislative power is the power of purse. Government revenues from different sources including taxation, government properties, natural resources and obtaining loans by the government are subject to legislative approvals and authorizations by Majlis. Based on available sources of income then the executive branch needs to come up with an economic plan for the country according to Article 43 of the Constitution. Economic plans are prepared for five years terms and approved by Majlis as a general directive to the executive for implementation of development projects and the extent of government expenditures during the term of the plan. However, the government still needs to prepare and submit annual budgets to Majlis, obtaining approval for allocations in actual figures for different government expenses. According to Article 52 of the Constitution "Annual budget of the country shall be prepared by the government in compliance with the law and needs to be submitted to Islamic Consultative Assembly for its examination and approval. Any modification to the budget figures are also subject to the provisions of law." In order to understand the scope of powers of Majlis one needs to look at other provisions of the Constitution which in fact limits the powers of Majlis in modifying the figures submitted by the government.

The first inherent limitation is the legal nature of annual budget itself. Although in Iranian legal literature the annual budget is sometimes referred to as the "law" but in technical terms annual budget is simply a prediction of income and allocation of such income to different government

plans. Neither income prediction is a mandatory legal prescription nor automatic allocations of funds are authorized by law in default of realization of income. Thus, allocations are contingent on income realization as the first limitation of the powers of legislature in allocating the funds.

The second limitation of the powers of legislature is the existing commitments of the government in relation with administrative expenses, capital investments, unfinished development projects and its contingent plans for fulfilling government responsibilities to defend the country and national security. In fact allocation of funds for government plans had already been approved by Majlis when ratified laws related to establishment of government ministries, organizations and corporations. In this connection the powers of legislature is limited to minor adjustment of the figures submitted by the government and controlling achievements of the original plans which despite its limitation is the main power of control of executive branch by legislature.

The third constitutional limitation of legislature is the provisions of article 75 of the Constitution. It provides that: "legislative drafts, proposals and amendments to government bills by deputies that require the reduction of the public revenue or increase of public expenditure may be introduced in the Assembly only if means of compensating for the decrease in revenue or allocating the new expenditure are also designated." This is of course, a logical limitation compatible with process of preparation of annual budget by the government. Budget preparation is mainly an executive function. The President as the chief executive needs to propose allocations for the government expenditure to secure his command on administration of the government. Therefore, Article 126 of the Constitution has conferred to the President direct authority over Management and Planning Organization of the country which is responsible to prepare the annual budget in line with development plans and government commitments, contingencies and proposed allocations. Therefore, the huge burden of budget preparation and reliable assessment of income and expenses of the government is conferred to the office of the President.

Despite such inherent limitations the powers of legislature in allocating the public funds and authorizing collection of taxes and approval of loans

are the basic means of controlling the executive by the representatives of the people. The study detects several legal deficiencies in process of budget preparation, which further limits the scope of legislative involvement and public awareness of administration of the government. While separate papers are attached explaining in detail the views of experts regarding budget drafting process this report tries to present the main legal and formal deficiencies, and a proposal to remove such handicaps, by means of a law required to be passed as the directive for budget preparation.

Legislature and its power of purse

Despite its limitations power of approval of the annual budget remains the most significant legislative control power on the executive. It is at the same time the main source of public awareness of administration of government. Thus, the budget allocations need to be clear and generally understandable by public. The rules of transparency require that apart from a global allocation for different programs each item allocated to a particular government or non- government organization be made public. The budget should also be specific as to any increase or decrease in appropriations compared to previous years. Allocations to development projects need to be specific as to the original estimate of the cost and duration of the project as well as any cost over run. In other words the budget should include a report of achievements or failures of the projects and a justification as to how fresh allocations would contribute towards remedying the shortcomings, if any. Once such itemized balance sheet was prepared by the executive then parliamentary committees and commissions may be able to discuss item by item and to render an intelligent decision regarding approval of the budget.

Publication of itemized allocations is at the same time the most significant vehicle of public accountability and fair dealing in public procurements. Once procurement needs of different government agencies were made public suppliers of the goods and services all over the world will be in a position to compete with each other in supplying to the government and its affiliated instrumentality's the best deals in terms of quality and quantity. From strict legal point of view publication of itemized allocations is at the same time a legal requirement. Since budget is prepared in the

form of a legislative authorization itemized allocations are the basic component of the budget, which needs to be published. It is true that general public may not be interested to examine such figures but the same is true as to the most official publications. The purpose of such publication is public accessibility and accountability towards interested groups.

Budget bill is not in the nature of a law to be enforced literally. It is rather an estimate of government revenues and expenses during a particular year. In most cases the government faces the situation that the revenues may be short of the expected expenses. Thus, the budget bill needs to obtain authorizations from legislature as to how to meet such deficit. The authorizations may not be even needed due to changed economic circumstances. A sound legal procedure under the Constitution would be to require the government to submit separate legislative bills for the approval of the legislature once it was felt necessary to implement such authorizations. For example an authorization to increase taxes, government charges and levies of any nature needs

to be introduced in the form of amendments to such tax laws unless the authorization is granted for a particular budget year.

Since government corporations and independent agencies are the main spending instruments of the government their annual budget should also made public and subject to approval of legislature. Major decisions regarding government expenditures are made by non-elected directors of government corporations, without public knowledge and scrutiny. The practice amounts to delegation of legislative power of purse to executive branch.

While non- governmental public entities are exercising some of the most significant functions of government and therefore, are financed through public funds and government grants decision making as to their budgets are left to their directors and trustees. The practice also amounts to curtailing the legislative power of purse. The budget of such entities need to be part of the global budget of the country. One should

bear in mind that Article 52 of the Constitution provides that the annual budget of the country needs to be submitted to Majlis. Annual budget of the country by definition include the budget of not only the executive branch but

also all public entities and even private companies established by government banks. In this regard a reexamination of public accounting law of the country needs to be considered as well.

The practice of including notes to annual budget which are in reality amendments to other laws and regulations in force is another short coming of the annual budget bill. The problems had been identified by executive itself but introducing a law designed to collect all such notes into one particular bill is not an appropriate remedy. The notes need to be introduced as amendments to the relevant laws of the country and carefully reexamined by legislature.

Chapter I
Preparatory Works

Legislative bills regarding administrative, technical, financial, welfare, education, employment, transfer of technology and economic development of the country while pursue a particular political goal may not be submitted to legislature without exhaustive preparatory work in substance and form. Lawyers' contribution is more towards compliance with overall system of law, legal terminology, avoiding potential conflict with existing laws and regulations, sanctions and effectiveness, transparency, organization and avoiding concurrent jurisdiction with other government agencies. It is true that lawyers involved in preparatory works need to be quite familiar with the nature of technical bills but their responsibility is limited to form rather substance of a bill.

At the same time preparatory works are the main sources of judicial and administrative interpretation of a bill. Therefore, an agency in charge of preparation of a bill needs to keep a complete file and record of all such preparatory works. The report of such works will be used for an official document required to be submitted with the bill to legislature. This official document which is referred to under Majlis Internal By-Law (Article 134) as the justification report will be discussed in more details in this Chapter. Preparatory works are divided into technical researches and legal research.

1-Technical Researches:

Methods discussed in workshop (1) need to be followed depending on the nature of the project. At this stage no particular position should be adhered to. In other words researches at initial stage are conducted to explore the feasibility of the project and present pros and cons in scientific manner. A judgment as to proceed either way shall be taken after the consequences of any such proposal have been tested. Technical legislation's are in most part based on a system already in operation in other countries. In order for preparatory works to be quite beneficial different systems need to be compared and compatibility of each system with overall administrative procedure in Iran shall be tested. The research should particularly address the success and failure of the foreign system and explore its viability in

Iran. Most of the time a technical research, if properly conducted, will be considered of utmost academic value and will be used as a directive for the agency in charge of the implementation of the bill.

Such exhaustive researches will also be used in drafting the Justification Report. Of course, a justification report is designed to persuade the representatives of the parliament to ratify the bill. Therefore, contrary to academic researches conducted at the stage of preparatory works a justification report normally avoids or tries to play down the failures of the project in other countries.

II- Legal research:

Methods of legal research which include library and Internet search, including search engines have been one of the topics of discussion in workshop (1). While Internet search for the purpose of locating materials relevant to technical bill is a must and the necessary part of a reliable legal research it is noticeable that Farsi language materials are for the most part found through library search. A library search is not limited to study of the books and official publications but careful attention needs to be paid to researches done on the issue by other organizations, universities and independent research institutes. Sometimes papers and dissertations presented to universities and other academic centers are valuable sources of study. Preparatory works at the same time are official government documents and one should be quite cautious in reporting from or citing secondary materials. Indeed no citation is allowed from secondary materials for the purpose conducting researches submitted as a preparatory work for submission of a legislative bill. Another requirement of a legal research is that it needs to be updated until the time of submission of the bill to Majlis. Sometimes technical legislative proposals are belatedly submitted or will take a long time to be reviewed by specialized commissions before being sent to the floor of Majlis. In fact most technical bills do not qualify for priorities under Internal Regulations. Thus, old preparatory searches will lose their reliability unless periodically be updated.

A reliable legal search must include careful extraction of all laws, regulations and even official administrative procedure which have direct or

indirect effect on implementation of the legislative bill. Once a complete file was prepared the overall interaction of such regulations with the proposal needs to be studied. While conflicting laws and regulations may then be specifically repealed the practice of leaving non-conflicting but overlapping laws is the source of administrative confusion and barriers to economic development of the country. The main purpose of legal search at the stage of preparatory works is to mention such regulatory bottlenecks and persuade the drafters of the bill to specifically repeal archaic, overlapping, parallel, unnecessary, ambiguous, nontransparent or over broad regulations. It is true that rules of interpretation are at the disposal of lawyers and judges to try to harmonize and apply compatible regulations but such trouble shooting devices are legal mechanism to be used at the time of implementation of the law. During the process of drafting every effort should be made to remove institutional bottlenecks and parallel administrative agencies with concurrent jurisdiction.

While sometimes the legislature itself allows compromises and parallel administrations for political reasons legal research is not intended to propose compromises and advise tolerance.

Another purpose of legal research is to make sure that the proposed bill will be implemented within the expectations offered through technical searches. Appropriate legal sanctions and mechanism needs to be built in a legislative bill in order for the bill to achieve its purpose. Sometimes statutes lack sufficient teeth to expect their due performance and in times severe sanctions are provided under the statute which may be counter productive. Judges are reluctant to impose harsh penalties for insignificant infringements. A comprehensive legal research most of the time includes a draft legislation, which may or may not be adapted by the submitting government agency. However, the draft is mainly intended to provide guidelines to drafting committee. The main purpose of such preliminary draft is to present the idea in a transparent legal framework in order to help understanding enforcement technicalities of the project.

One particular study that needs legal research during preparatory works is the issue of whether or not a law needs to be passed for the implementation of the project. The fact of the matter is that in many

circumstances economic problems may not be resolved by simply passing a law. The more appropriate remedy may be an administrative action. The executive may then be directed to change some of its administrative procedures rather than a legislative initiative. Sometimes the purpose may be achieved through regulations to be passed by Council of Ministers. In such cases it may be more appropriate to propose a ministerial decree. Such decrees in Iran to the extent that are not contrary to the provisions of laws are equally effective and enjoy the force of law.

III- Publicity and presentation:

Once preparatory works were accomplished the legislative bill needs to be openly discussed with members of affected professions. In some countries legislative committees will organize hearings for that purpose. Experts and professional will then be invited to attend the hearing and express freely their own ideas and criticism. A multitude of goals may be served through this process. First of all inviting outside scholars and experts is the best way to test the government researches conducted during preparatory works. The second goal is to allow the affected businesses to gradually adjust their own business practice within the framework of the proposed bill. Last but not the least lobbyists will get an opportunity to explain to the representatives their own concerns and complains regarding the bill.

Democracy would be best served by such open debates and technical and in times complicated projects would be grasped by lay persons.

Chapter II
Technical Law Drafting

Drafting technical statutes is a logical and some times lengthy process. The first step in drafting statutes of public concern is assessment of public opinion through research vehicles designed for this purpose. Workshop (1) and the papers presented for discussions in the workshop deals with issues of assessment of parliamentary bills with public concern. In drafting technical laws a different methodology needs to be pursued. A decision as to whether to draft a technical statute is nonetheless a political one. In most cases the minister in charge of a particular department of the executive branch needs to take that decision. Once such a decision was made the preparatory works will have to be assumed by experts of the field. The preparatory works would then be used for drafting a justification report, as a prerequisite of submission of a legislative bill to the parliament.

A committee of legal experts then would assume the actual task of drafting the wordings of the statute. Once the seal of approval of the Council of Ministers was obtained the minister in charge or his parliamentary deputy will have to defend the bill before specialized committees of the parliament. The role of the government representative would be to defend the text of the law on the basis of preparatory works. He shall particularly be careful to watch for amendments introduced both by members of specialized committees and the representatives themselves at the floor of the parliament. There are instances that an amendment may turn out to be defeating the goals of the statute. The government representative, armed with researches done in preparing the justification report, will then have to explain the reasons for his objection to such proposal. The government representative some times need to obtain outside assistance in order to defend the proposed bill properly. In many cases an amendment obviously contributes to improvement of the statute and the government representative should understand the situation and welcome the amendments. In times a political compromise needs to be reached with members of the specialized committees and the representatives to speed up the process of ratification of a bill. In such cases the government representative after exhaustive consultations with experts at his service

need to be convinced that the amendment would not affect the basic goal of the proposed bill. The purpose is not just to pass a bill but to obtain ratification of the parliament for implementation of a program of public concern. When obstructive amendments are likely to be approved by the parliament the representative will have to decide to withdraw the proposed bill. In this chapter we are dealing the process of law drafting and legal researches need to be done for each step separately.

1- Justification Report:

As discussed above preparatory works are neutral researches of different nature designed to gather data, scientific theories, political positions, legal researches and expert opinions expressing pros and cons of the proposed legislative bills. Such researches will assist the government to decide whether or not to proceed with the process of drafting the statute. Once a decision was made the drafting committee, closely cooperating with the lawyer in charge of drafting the text of the statute will have to prepare a Justification Report for Majlis, in accordance with Article 134 of the Internal Regulation of Islamic Consultative Assembly. The difference between preparatory works and justification report is quite noteworthy. First of all a justification report is part of the proposed statute. In interpretation of the statute one needs to look at the report first and only in rare circumstances when the report itself is ambiguous or unhelpful one should look at the preparatory works. The other characteristic of the justification report is that it will be prepared much like a memorandum of law in support of the proposed statute. It will not present opposing views and researches, which tend to argue against passage of the statute. However, a justification report as an official document must contain reliable information and plausible explanations.

A justification report should contain the goals of the proposed bill. There is a difference between goals and aspirations. The goals need to be substantiated on the basis of researches done and data extracted from preparatory woks. Aspirations are, on the other hand, thoughts prompted the government agency to decide on the need for preparatory works. Such researches may objectively show that some of the aspirations may hardly be

realized through legislative bill. The researches may even suggest that legislative initiative will be counter productive and/or alternative measures need to be adapted to achieve such broad objectives. The goals are normally explored in the preamble of the Report, followed by a section by section explanation as to how particular provisions of the statute would contribute towards achievement of the goals. Researches already done during preparatory works should be referred to corroborate the conclusions.

The second section of Justification Report needs to deal with definitions and technical terminology. Laws need to be understood by general public, even though are dealing with technical issues. While a complete alphabetic list of words and technical phrases is most helpful at least definition of such words and phrases that are used for the first time by legislature should be clearly defined. In case a word is used in a different context then it has to be defined too. Careful attention to avoid use of different terminology in different statutes; unless the old statute have used archaic terms that was then changed and defined by official Farsi language academy. In drafting a technical statute one may face with the situation that Farsi equivalent of a foreign language word has not yet obtained widespread recognized. In such cases Justification Report may mention the foreign language equivalent to help the text be easily understood by professionals.

The third section should deal with interrelation of the proposed statute with other laws of the country. This section is significant as to how the drafters were expecting to implement the statute within the overall legal system of the country. Technical statutes most of the time create an agency to implement or supervise implementation of the statute. In order to avoid bottlenecks and administrative rivalry every effort needs to be done to delineate the jurisdiction of the agency created by the statute. In particular the statute needs to emphasis the requirement of giving good reasons in denying or approving any application. Discretionary powers should be granted to the concerned agency only in special justifiable circumstances. Last but not the least the statute needs to lay down a time limit for rendering decisions by administrative agencies. In most cases the drafters of a statute would notice that it is more advisable to restructure the constitutions and functions of an existing administrative agency rather than

creating another bureaucracy with lack of harmony with other existing agencies. In this section an effort needs to done to list relevant statutes which are intended to remain effective. The list obviously may not be an exhaustive one but shall contain such other statutes, which grant jurisdiction to other administrative agencies to regulate issues of similar nature.

The fourth section of the Justification Report needs to deal with the statutes, which are in conflict with the proposed bill and/or specifically intended to be repealed. The list must be exhaustive. In case of failure to mention a particular conflicting statute another legislative proposal needs to be submitted to Majlis. The practice of repealing all laws and regulations contrary to the proposed statute is a drafting escape, which is the source of confusion and never ending legal discussions amongst administrative agencies, judicial authorities and academic scholars.

Justification Report may consist of other sections dealing with particular political, social and economic issues which motivated the proposal of the bill. In such cases the Report need to pin point other laws and regulations which have been proved to be the reason for public grievances and mechanism adapted to remedy such failures through citing particular sections of the proposed bill.

II- The Text of the Statute:

The art of communication through language is indeed the most significant achievement of human being. The goals of communication are either ordering or persuasion or information. Human being needs to share its knowledge with others. The purpose of divulging information is to attire the respect and social status. It is the beginning of the process of persuasion. Therefore, information is the source of power and people are after obtaining information in order to be able to persuade others to follow their wishes. Persuasion is some times achieved through emotive language, which is not based on information either. Expressing oneself in emotive language is an artistic endeavor. Persuasion through artistic language is outside the scope of our study. However, in most cases persuasion is made through discursive language, which is based on communicating data and sharing information.

The justification Report needs to be drafted in discursive language to achieve its purpose. However, the text of law is neither drafted in discursive or emotive language. It is rather in plain order language, due to the authority entrusted to legislature. In other words the legislature does not need to use persuasive words in order to express its authority. The words of a statute shall be obeyed strictly and without any persuasion. In order for drafting a statute in such in a proper form the following guidelines need to be observed:

1. Avoiding use of narrative expressions and justifications and conclusive statements.

2. Avoiding redundancy and repetitive expressions.

3. Avoiding emotive or persuasive expressions.

4. Avoiding usage of ambiguous words and expressions.

5. Avoiding usage of words or phrases, which are either not defined under Justification Report or outside common knowledge.

6. Avoiding words with different meanings in different contexts.

7. Consistency of the wording of the statute with other laws and legal literature.

8. Consistency with other laws and regulations in force.

9. Incorporating all relevant objectives of legislature in one consistent document.

10. Usage of short and concise sentences.

The essence of the above guidelines is the issue of transparency. In fact the rule of law should not leave any room for dubious or alternate meaning.

Rule of transparency is derived from the nature and characteristics of law. Law is a social convention needs to be observed by members of the society. The source of this social convention is the customs or common wishes of the community consistently observed by individuals without reservations or objection. It is true that social customs when consistently observed are laid down or endorsed by prevailing religious institutions. However, due to change in social and economic structure of the society, different interpretations may be offered by different authorities to cope with particular practical problems. In such cases the legislature needs to step down and adapt a particular pattern of practice. Even when legislature

takes the initiative of expressing in clear terms the rule of law it may hardly avoid religious mandates. In other words the authority to express the law in matters already regulated by religion needs to be reserved by religious authorities. The legislature itself needs to express general rules of law in terms compatible with religious institutions. While Iranian constitution delegates the authority to legislate to Majlis, Article 4- of the Constitution limits the authority to principals of Islamic law, as determined by Islamic law jurist members of the Council of Guardians. The reason for this constitutional mandate is clear. Most social customs are based on religious orders and are followed voluntarily by a great majority of people. In order to preserve the sanctity of law such statutes designed to codify religious legal institutions needs to be endorsed by religious authorities. Indeed the task of legislator in countries with strong religious institutions is much easier. The sanctity of law and voluntary compliance with its terms is the most important characteristics of the law. In order for a statute to preserve this characteristic the wordings of law needs to be clearly and unambiguously selected. Its provisions need to be transparent to avoid discretionary and selective application by law enforcement agencies.

The wordings of a statute would need to ensure due process of law. Although due process is the main task of judiciary branch but in most cases lack of due process of law is based on awkward drafting and inappropriate selection of legal terminology. A non-transparent statute implicitly allows law enforcement officers to evade due process.

Transparency further requires the statute to be clear as to sanctions for non-compliance. Law without a sanction most of the time turns into a moral decree. It is not the function of legislature to assume such roles. In fact since most fundamental laws of the country are deep rooted in customs and accepted social and religious values the purpose of law drafting is to express such respected values in clear and unambiguous terms and to prescribe sanctions for its infringement. Unless the statute is drafted in clear terms the violations may not be easily detected and sanctioned.

Law is a mandate with general application. Any exception needs to be clearly laid down. The exceptions should not be worded in such terms to give room for inclusion of non-specified cases. Use of words such as for example,

including but not limited, etc., are the source of non-transparency and confusing interpretations, which need to be avoided. It is true that sometimes the legislator would not wish to specify all cases of application of statute; due to the fact that future technical developments may introduce new and similar devices. In such situations an specialized government agency needs to be designated for the purpose of determining the scope of application of the law to future novelties.

Legislative tasks are not limited to ratification of statutes. Another example is legislative task of approving annual budget. Approval of international treaties, model laws, resolutions and specific authorizations are other examples of legislative initiations. Rules of transparency need to be observed in such cases too. Nonetheless drafting procedure is less complicated and burdensome. Most such works have already been done by organizations, which have presented the project to the government. For example: international conventions and model laws have undergone through extensive preparatory works, designed for literal approval by legislature. Such preparatory works are the result of extensive comparative law studies, which are intended to be used for interpretation of international treaties and model laws by administrative agencies and courts all over the world. In translation of such documents in Farsi however, careful observance of legal Farsi terminology needs to adhere to. Since Farsi text of such legislative authorizations are the wording of law in translating the model laws and international conventions the rules of legal text drafting and use of proper Farsi terminology, compatible with Iranian legislative initiations in the past needs to be followed.

An important legal problem in translating international documents for approval of the legislator is the issue of legal characterization. Needless to mention that a through discussion of the issue is outside the scope of this General Report. However, foreign legal terms are the most sensitive issues of translation. Definition of such legal terms need to be found in foreign legal codes, which sometimes are contrary to customary meaning of such terms as understood under Iranian law. The translator needs to look at preparatory works to understand the extent of potential conflict between such foreign law terms and their customary and usual meaning in Farsi. In

extreme cases where no proper Farsi equivalent was suggested the foreign word may be mentioned.

One other drafting rule is to avoid submitting laws, which are in the nature of bill of attainder. A statute may not penalize any particular person. Punishment is the function of judiciary and in cases where the legislator encroaches on judicial authority the law should not technically be enforced. In cases of public pressure the text of law needs to be drafted in general terms with retroactive application. Then the courts need to apply the statute to such particular cases, after due process had been satisfied. A good example of careful draftsmanship of such laws is Article 49 of the Constitution of the Islamic Republic of Iran. The intention of the legislator is clear but the law is drafted in general terms, with instruction to the judge to apply rules of evidence under Islamic law before rendering any judgment against any particular accused person. Nonetheless when legislator is intending to grant particular benefit to a person in appreciation of his services drafting it in general terms is no longer required.

Chapter III
Substantive Issues

Technical statutes need to be carefully studied as to their effect and interactions with other general codes of the country. In order to draft technical statutes such as a statute which is designed to regulate banking business in Iran we need to coordinate its substantive provisions with Iranian Commercial Code, regarding the establishment and operation of businesses in general. General concepts of Iranian contract law, torts, procedural laws and even penal codes needs to be studied. In order to explore the significance of substantive issues in law drafting workshop (2) devoted several sessions to study of substantive issues. At the same time compatibility of technical laws with principles of Islamic law had to be tested and alternative solutions be introduced. A report of the discussions of the sessions devoted to different topics of substantive laws, which are relevant to law drafting task, constitute the content of this Chapter.

I- Contract laws in Iran

General theory of law of contracts is the minimum standard of voluntary compliance in every system of law. Since technical laws are intended to regulate and promote trade in line with common goods the general rules regarding voluntary obligations and compliance need to be observed. The basic structure of Iranian contract law is quite in harmony with other civilized systems of law. Thus, theory general of Iranian contract law shall equally be applied in enforcing Iranian statutes and international obligations of the country, according to the Statute of International Court of Justice.

According to Iranian Civil Code (Article 10) the autonomy of the parties to enter into any contractual obligation is recognized, to the extent that obligations arising out of the contract are not against express provisions of law. On the other hand most provisions of civil and commercial laws of the country are in the nature of supplementary laws, which are to be followed in absence of failure of the parties of supplementary laws, which are to be followed in absence of failure of the parties to stipulate other wise. Accordingly in drafting technical statutes one does not need to go into

details of the transactions by private parties. The law needs to specify the rule to be followed by individuals with no operative detail. For example great deal of efforts by drafters of the statute concerning "interest free banking" and regulations laid down there under deal with Islamic law contracts. One may hardly understand the purpose of a legislator to repeat the terms and conditions of other laws in force into another statute or by-laws. It was logically sufficient to state that the law recognizes designated Islamic law contracts as banking transactions. The terms and legal conditions of such transactions are clearly laid down in Civil Code of Iran.

Iranian Civil Code is based on traditional rules of liberal and private regulation of the parties' common objectives within mandatory legal framework. It is a unique effort to reconcile principles of Islamic law with universal rules of contract law.

World turning into a global village every effort needs to be done to subject every day transactions, whether concluded between the nationals of a particular state or amongst persons dealing with each other across political boundaries, to one generally acceptable legal standard. In this connection apart from valuable efforts of United Nations Commission on international Trade law (UNCITRAL), which amongst its other contributions adopted in 1980 Vienna Convention on International Sale of Goods, a study of UNIDROIT principles governing International Commercial Contracts is very valuable. UNIDROIT is the result of decades of comparative studies by prominent international jurists to achieve codification of lex mercatoria. In drafting laws that are intended to affect liberalization of international trade and economic development objectives such principles need to be taken into consideration. Lex Mercatoria is based on two principles of fair dealing and autonomy of contracts. Both of them are recognized under Iranian Civil Law. However, UNIDROIT has expressed in detail ramifications of such principles. It plays the role of gap filling provisions, which help harmonizing the content of a legislative proposal with exigencies of contemporary trade practice.

UNIDROIT deals with issues of formation, validity, interpretation, performance and hardship, termination and damages arising out of non-fulfillment of the contract. While rules adopted by UNIDROIT are designed

to be compatible with most systems of law it also recognizes the *public policy* exception to be easily acceptable by most systems of law.

Generally acceptable rules of interpretation of contracts are recognized under UNIDROIT. A more modern rule is also introduced under this model law to the effect that in interpretation of a contract when different meanings are at issue the one, which is against the interest of the drafting party should be followed. This rule is particularly important in drafting laws or regulations. One should bear in mind that law drafting is a clear and transparent expression of the intention of legislature. When it signifies different meanings or lacks transparency its provisions will be interpreted less burdensome to they who are subject to its mandates. Since laws are mostly drafted by the executive branch government policies need to be clearly expressed under the bill. This is particularly true when a statute is intended to replace the old one. It is not sufficient to use the ordinary escape clause of repealing contrary statutes. The old statute needs to be repealed expressly. Otherwise a claimant before a court of law may argue that several other provisions of the old statute are still in force. Thus, the legislative purpose of replacing the old law by introducing the new one was defeated due to ill drafting technique.

Hardship is another significant concept of contract performance under UNIDROIT. The difference between the concept of force major and hardship seems clear under the law. While force major amounts to absolute impossibility of performance and relieves the obligor from its contractual and legal duties of performance hardship is more an equitable relief, which tends to take into consideration the changed circumstances as from the time of conclusion of the contract and the time of performance. While traditional contract law theories were reluctant to accept this equitable relief the customary law recognizes the concept as a requirement for expecting due performance of the contract. Application of the rule of hardship in law drafting is nonetheless universally recognized. Performance of legal obligations are not only prevented due to force major but no intention may be attributed to a legislator to expect the subjects of a statute to comply with its provisions when faced with hardship. Law needs to be voluntary complied with. Otherwise no police force may be employed to control law

enforcement at any cost. People will think of any loophole to evade laws, which are unreasonably hard to be performed. Islamic law principle of substitute laws, as will be discussed in this General Report, is based on building mechanism for law enforcement in cases where the primary law seems hard to be performed. Thus, a major function of law drafting is to think of changed circumstances and introduce mechanism for easing the regulations in case of hardship.

Mitigation of damages as a duty of a beneficiary of contractual performance is another feature of UNIDROIT. The principle, which is based on fair dealing in contractual relations requires an obligee to try to decrease the volume of damages of the obligor in case of his non- performance. It is a rule of law that any obligor in case of non-performance shall compensate the beneficiary for all damages arising out of his default. However, when it is clear that the obligor is unwilling or unable to perform the beneficiary needs to reduce the extent of damages by trying to seek substitute performance and thereby reduce the amount of damages to be demanded from the obligor. The rule again is based on the principle of fairness and public policy. The public policy justification behind the rule of mitigation of damages is even more emphatically available in drafting a statute. Legislature is more concerned with preventing waste of public resources than a private individual. It is true that legislative mandates are sanctioned by law, but it is equally unreasonable to wait for full non-compliance and then demand reparation from an obligor. The statute shall grant authority to law enforcement officers to arrange for compliance on behalf of an obligor in case of his default. The result would be to prevent the social evil that the statute is trying to cope with. Otherwise it would be a waste of public resources to wait for the damages to occur in full and then to seek reparation. This case in most type of statutes which are designed to prevent monopoly or unfair trade practices. Public policy prefers prevention rather than reparation.

The rule of anticipatory non-compliance is another reasonable policy adapted under UNIDROIT. In the context of contractual performances the rule is in line with the policy under the rule of mitigation. Of course, this rule is adapted to accommodate the obligor rather than the beneficiary.

There is no policy justification to expect an obligee to wait for the time of performance before being able to sue the obligor, when the obligor has made it clear that he is not willing to perform. In drafting a statute one should be careful to build mechanism authorizing law enforcement agencies to intervene when ultimate non-compliance has already been established.

In short UNIDROIT is a workable model designed to ensure compliance by the parties to an agreement to the terms of their contract. Since the main goal of the legislature is securing voluntary compliance of the subjects of a statute, the same rules need to be observed in law drafting. Needless to add that the framework of contract rules not only under UNIDROIT but also all other laws regulating people's transaction on the basis of reasonableness. There is of course, no definition for reasonableness. It is nonetheless, a concept readily available in each circumstance. The main test of enforceability of a statute is reasonableness and understandable social goals which are the reason d'être of the statute.

The world of business has turned into a closed circuit zone. Not only lex mercatoria, as reflected under UNIDROIT, needs to be followed in drafting a statute other terms of trade such as definitions accepted under INCOTERM and other international commercial obligations of the country needs to be consulted at the time of drafting a technical statute. It is not a reasonable approach for legislature to use different terminology in the context of municipal and international tasks. In the context of treaty interpretation Vienna Convention, recognizing the need for consistency adapts most rules of municipal interpretation to international treaties, as well. The same consistent approach needs to be followed during the process of law drafting, due to the fact that both statutes and treaties are to be ratified by the same legislative body.

II-Iranian Commercial Laws:

Technical law drafting requires in depth knowledge of Iranian commercial codes. There are ample reasons for this proposal. The most important one being the economic law environment of the country. Article 44- of the Constitution recognizes the government sector of the economy as the dominant one, but government corporations play a major role in Iranian

economy, while public non- government entities are managed on the basis of commercial law, in particular company laws of Iran. The trend towards privatization and offering the stock of government companies to public is another main reason for the need to understand Iranian commercial laws in dealing with regulating Iranian economy.

While civil laws are predominantly rooted in Islamic law, commercial codes are drafted on the basis of European and French system. Amazingly the two codes managed to coexist very well with each other as a result of some eight decades of interaction between civil and commercial codes in Iran. The reason may have been the fact that basic legal theories applicable to commercial and civil laws are harmonized to form the body of universal law labeled as lex mercatoria.

Under Article 4- of the Constitution all laws including commercial laws of the country should be compatible with Islamic law principles. Thus, a serious study had to be conducted to test commercial codes on the basis of Islamic laws. Development of commercial laws of Iran and their compatibility with modern business requirements was one of the topics of discussion in Workshop 2. The study in particular explored the following issues, which at the same time proved to be very helpful in understanding the legal structure of Iranian public enterprises.

1- Dual legal system:

Iranian Commercial Code in this respect follows the French approach. While civil law transactions are governed by general civil law regulations, commercial transactions which cover most customary commercial activities; including acquisition and sale of any type of personal property for profit, is subject to rules of the commercial codes. The Code also defines a merchant as a person engaged in commercial activities. The code then defines the duties of a merchant such as maintaining accounting books and records, followed by introducing into Iranian legal system customary standards governing commercial papers as well as several recognized types of commercial contracts such as the contract of transportation, commercial representation and brokerages. The original Iranian Commercial Code also regulated all types of commercial companies. However, the section dealing

with joint stock companies was later amended and a statute passed for the purpose of introducing the concept of public joint stock companies in Iran in 1969.

However, no amendment was introduced regarding other types of companies or the issue of bankruptcy of the corporations in Iran. It is noteworthy that in Iran many types of companies regulated under Commercial Code turned out to be obsolete, remaining only on the books of statute. The two types of companies recognized under amended Iranian commercial code (private and public joint stock companies), are however, the most significant type business enterprises in Iran. However, the limited liability Company, as a less regulated enterprise is also used mostly for the purpose of shielding personal liability of the stockholders. At the same time cooperative companies in Iran are wholly regulated by a particular code ratified for this purpose. As to corporate organization the pattern of joint stock companies was proved to be the most workable one. For this reason government corporations are made subject to commercial code regulations, within the provisions of their statutory charter.

Commercial laws of Iran had been subject of academic criticism and even were blamed as an institutional barrier of economic development of the country. However, judicial and academic interpretations have successfully coped with their shortcomings. The commercial community itself does not see antiquities of the code as the reason for economic failures. While an overall redrafting of Iranian commercial codes as an ambitious project had since decades dad been the concerns of the government a more practical and feasible approach would be the task of redrafting amendments regarding more urgent needs of the country. The study pinpoints particular issues of the codes, which deserve urgent redrafting work as follows:

a- As studied above particular model laws has been adapted to cover important issues of commercial law. Such model laws regarding sale of goods, commercial papers, carriage of goods, commercial representations and general theories of contract needs to be adopted by Iranian legislature. Since the purpose of offering model laws for ratification by different municipal legislators is unification of laws governing commercial transactions no particular drafting effort or expense needs to be incurred by

the government. They simply need to be submitted to legislature as model laws. Ratification of such laws, which are the result of decades of comparative studies, does not seem to be contrary to any rule of Islamic law too. Their ratification would be a less burdensome effort by legislature and will contribute towards the goal of lifting development barriers in Iran.

b- One of the privileges of a merchant under Iranian law is legal recognition of commercial records as evidence before courts of law. Antiquity of the provisions of commercial law regarding books and records of the merchant has long been the source of disputes between taxing authorities and merchants. This in turn has caused a subsidiary problem of requiring the merchants to keep two sets of records, which cast doubt on the reliability of commercial records as evidence in Iran. Book keeping and accounting in the modern world is subject to new accounting methods and procedures, such as computerized book keeping and electronic trade. A particular drafting attempt needs to be made to modernize this important section of Iranian commercial law.

c- In today's economy financing is the most urgent need of business enterprises. At the same time, an efficient and workable corporate financing structure shall be worked out to protect the interests of small businesses and investors who, have risked their limited resources to buy shares or bonds in a company. Iranian corporate law is drafted in liberal terms, covering stock issuance, capital increases, preemptive rights, derivative suits and corporate bonds. However, due to the magnitude of powers of government banks and non- government public entities, a whole set of rules and regulations regarding fiduciary obligations of corporate directors need to be introduced in order to persuade the general public to invest in Iranian public companies.

d- Bankruptcy laws in Iran need to be adjusted to the modern needs of business development and investors' trust. While the issue of bankruptcy is an economic problem, the law needs to regulate such eventualities in a less costly and workable situation. Fresh life and opportunities shall be offered to honest merchants who have suffered from economic disasters. At the same time harsh treatments need to be prescribed for fraud and dishonesty.

Laws related to commercial securities and collateral need to be revitalized in line with modern needs of business enterprises.

e- The traditional concept of commercial activities excludes transactions relating to construction, real estate, agriculture and professional activities from the scope of commercial law. In reviewing Iranian commercial laws relating to joint stock companies, the legislator has provided under Article 2 that " A joint stock company is considered, commercial company even though it is engaged in non-commercial activities". While this is a modern concept of doing business, other corporate forms may not be used for engaging in businesses that are not considered commercial under the Iranian Commercial Code. For example professional activities, while being compatible with provisions of law related to limited liability companies, may not be incorporated into this corporate form. They still need to follow less practical patterns of non-commercial associations. On the other hand, the most appropriate corporate form for contracting and constructing management business happens to be a solidarity (tazamoni) or proportionate solidarity (nessbi) company in order to maintain personal and professional responsibility of the shareholders. However, due to commercial law restrictions they are normally formed in the form of private joint stock companies. Needless to add that the shareholders of such joint stock companies need to assume personal liability in order to obtain credits and even enter into contracts with third parties. The result is never ending litigation amongst contracting companies, their shareholders, banks, government agencies and third parties, for the purpose of establishing the extent of personal liability of the original shareholders of contracting companies, whose stocks were transferred to third parties or expropriated. The problem becomes more acute when the government tries to persuade the original private investors to regain control of their companies, as a step towards privatization of government companies. Private investors are normally reluctant to assume responsibility, due to the heavy volume of debts created by government appointed directors, and secured by original personal assets mortgaged to lending institutions.

Other complicated legal problems have been created as a result of civil partnership contracts used by individuals for non- commercial activities.

Some of the enterprises created under such civil partnership contracts or joint venture agreements are prominent business institutions, which operate under tailor made contracts with no consistency. Such associations do not have legal personality under Iranian law, and consequently, their management lacks legally defined authorities. The result is litigation before courts, tax and custom authorities, regulatory agencies and arbitrators to establish the extent of liability of the principals and proxies operating in the name of such non-incorporated organizations.

f- Government and public corporations are the most significant economic institutions in Iran. The management of such companies are unless (otherwise expressed by law) subject to the provisions of the commercial codes. The experience has proved that broad powers and a liberal management style adopted under the commercial codes are not compatible with financial responsibilities and fiduciary liabilities expected from the management of public entities. On the other hand, government initiatives to encourage private sector to invest in such public entities have not been successful. The reason has obviously been the maintenance of government control for such entities, even in cases when a majority of the stock was offered to the private sector. While under the Public Auditing Law of Iran, for the purpose of investing in stocks of corporations, government banks and insurance organizations are considered as private. The reality is that banks and government financial organizations exercise public influence in the management of companies. This is another contributing factor in public reluctance to invest in companies, even if they are legally deemed private. The natural solution is to draft a whole separate body of regulations, applicable to government and public corporations.

Lifting legal barriers towards privatization of public entities was thus a major part of the discussions of Workshop 2.

2- A proposal for unification of commercial and civil laws in Iran.

Unification of the principles governing municipal and international business law has been the basis of most contemporary legal efforts, as discussed above. The trend towards such unification naturally requires

worldwide unification of municipal private law. Swiss code does obligations happens to be an example towards achieving this goal.

In common law systems, the artificial barrier between civil and commercial laws are less significant. It is true that transactions relations to real property are subject to written evidence and recording but such evidentiary rules do not change the legal requirement of the contract as basis for concluding any transactions. Business transactions conducted by merchants are also made subject to less complicated legal formalities. For example in the United States a unified law called Uniform Commercial Code has been drafted and ratified for the benefit of merchants. But the word merchant covers everyone who is engaged in a lawful business, including service businesses. Thus, UCC applies to almost every transaction. Under Iranian law however, the scope of commercial activities are quite limited under the law. The result is that in many instances contemporary service businesses do not fall under the traditional definition of "sale of goods" and are excluded from provisions of commercial codes. The Code needs to be amended in order to encompass all types of business including service businesses.

At the same time, universally accepted legal rules pertaining to business transactions need to be adapted in Iran. As was discussed such customary rules are not contrary to the principles of Islamic law.

III- Financial Institutions and banking laws in Iran:

Banking and financial institutions in Iran have been made subject to dramatic changes after the revolution. As a first step and in an effort to gain the confidence of the general public, Iranian banks were nationalized and then regrouped into several amalgamated banking institutions. The government then had to deal with the issue of riba (interest) under Islamic law. Most borrowers were taking advantage of Islamic law principles, which made it unlawful for lenders and borrowers to pay interest and even late payment damages. The law entitled "*Interest free banking transactions"* was able to save banking organizations in Iran. Islamic law contracts, which were recognized in Iranian traditional society, were legally recognized as the basis of Iranian banking business. It is however, a matter of legal

characterization that Islamic law contracts are based on the concept of partnership between the lending institution and the borrower rather than lending in its legal meaning. In other words under customary banking operations the bank assumes the role of the principal owner of the fund who is entering into a direct loan agreement with a borrower. Thus, the beneficiary of the investment is the bank not the depositor, who is not a party to the loan agreement. While Islamic law contracts are based on the legal principles of investing or managing the funds of depositors, who are eventual beneficiaries of the investment. In fact the bank under Islamic law contracts is playing the role of an investment bank. In order to enable the banks to offer normal banking services to their clients, relieving them from investments risks and following general principles of Islamic law, sophisticated legal forms were introduced and implemented by the Iranian banking system. In practice the forms serve the purpose of offering customary banking services within the framework of interest free banking laws and regulations. Due to the fact that until recently banks were operating as publicly owned institutions, the Central Bank was deemed to be the ultimate guarantor of the commitments of the banking system. However, with the introduction of private banking in Iran and efforts to privatize government banks, a major overhaul of the system seems to be imminent.

As the basic step clearly defined criteria need to be laid down, distinguishing publicly owned versus privately owned corporations sponsored by banking institutions. In this regard despite the government being the ultimate obligor of investment risks taken by banks and insurance companies, Iranian Public Auditing Law grants private legal status to corporate entities sponsored by banks and insurance companies. It is elementary that companies engaged in commercial activities need to be subject to laws and regulations governing private business. However, Iranian commercial laws are designed for regulating strictly private enterprises. In order for commercial operations of public entities be made subject to liberal and unchecked provisions of the commercial code a complete and workable code, of conduct needs to be laid down first to ensure

that fiduciary liabilities of directors of such corporations are observed and sanctioned.

Needless to say that in absence of such laws, those who are entrusted with managing companies may use corporate opportunities and their discretionary powers directly or indirectly to their own advantage. They may even serve undisclosed principals that need to be reached to them through legal mechanisms not so far recognized under Iranian law.

Supervising the operations of publicly held corporations and civil or even criminal prosecution of those who have abused their fiduciary authorities is indeed a daunting and serious function. The laws and regulations regarding the establishment of Tehran stock exchange and the powers and constitution of the supervisory board are no longer compatible with the present structure of corporate organizations in Iran. Laws related to financial markets in Iran need to be amended with a view of giving the supervisory board an independent status from banks, investment companies and non- government entities that are in charge of business activities in Iran.

Law enforcement in this particularly technical area needs to be entrusted to private attorneys who are certainly willing to prosecute such infringements of law as a way of engaging in public service and increasing their professional income. Contingent attorney fee arrangement, coupled with serious legal sanctions to protect scrupulous directors and officers of these companies may be laid down under the law. The main criteria as laid down under Article 49 of the Constitution, will have to disgorge unlawful profits and gains and reach the principal perpetrators.

Last but not least, an overhaul of Iranian commercial codes related to:(a) merchants' books and records, (b) public offering of securities, (c) personal liabilities of corporate directors, (d) valuation of non-cash contributions, (e) increase and decrease of capital, (f) conversion of debts to stock, (g) derivative suits and (h) protection of the interests of small shareholders in every stage of corporate restructuring deserve priority.

While managerial discretion in granting loans and facilities to clients needs to be preserved and liberalized, laws and regulations concerning commercial liens and collateral need to be modernized. The purpose should

be to enable banks to accept non-tangible assets, moving inventories, commercial instruments, good will, collectible claims and in general all kinds of income producing assets or claims as collateral. This proposal needs introducing provisions regarding creditors' rights and secured transactions in Iran.

Bankers at the same time are in possession of very valuable information about the financial transactions and credit worthiness of their clients. The bankers are also in privy with assets and liabilities of their own bank and maturity and extent of their commitments. Such information may easily be misused or even abused against the interests of the banking and credit system of the country and more specifically against the interests of the clients of the bank. Bankers may even be able to assist corrupt organizations that will be willing to endanger economic interests of the country for their own unlawful gains. In short corrupt banking practice as a scheme of international money laundering and facilitating criminal activities has actually turned into a political problem. In order to cope with the situation, a special code of conduct needs to be adapted and strictly enforced. At the same time modern computerized programs and central command systems should be introduced for future banking development of the country.

Exchange restrictions and compliance with regulations of the central bank, allocating scarce foreign exchange reserves in commercial transactions and other acceptable needs of the clients, are another source of manipulation of banking operations. In this regard the stabilization of such regulations for a considerable amount of time, coupled with technical procedures which would ensure transparency and a non- discriminatory treatment of clients become the main concern. A complete restructuring of foreign exchange regulations in Iran and abolition of non- relevant or outmoded red tape and contradictory circulars must be an urgent work plan of the country.

Chapter V
Avoiding in Compatibility With Islamic Law

Within the context of technical law drafting, the issue of compatibility with Islamic law principles would hardly be an overwhelming concern. Most legal problems may easily be handled by applying contract law principles or lex mercatoria which, as already been discussed, which very well fit under the liberal contract law of Islam. On the other hand technical legislation is related to novel financial, business, regulatory, environmental, natural resources, industrial, economic and social planing of the country, with little relevance to religious legal institutions. However, in accordance with Article 4 of the Constitution, technical statutes which are laid down in areas of financial, economic, administrative and cultural affairs of the country need to be compatible with Islamic standards, as determined by Foghahas (Islamic jurists) members of the Council of Guardians. This constitutional mandate needs to be observed at the stage of law drafting by experts who are assigned to the task of drafting a particular technical statute.

Needless to mention that the provisions of article (4) of the Constitution is well rooted in Iranian contemporary legal structure. Article 2, Amendment of the Iranian constitution of monarchy, contained the same mandate. However, due to the forces of modernization and lack of serious interest on the part of leading religious authorities to participate in legislative process, the provisions of the said amendment was not directly and institutionally relied upon in process of law drafting in Iran. Of course, in every instance of potential inconsistency lawyers with Islamic law experience presented their own justification as to legitimacy of such technical statutes with Islamic law principles. The justifications were based on a vague concept of differences between laws related to religious matters and statutes concerning non- religious affairs (Orfieh). The distinction was based on several provisions in the constitution of the monarchy, including Articles 27 and 73 of the Amendments. In cases that the statute was considered non-compatible with Islamic laws such as the Iranian penal code of 1925, the practice was to be submitted as a law with limited duration and for experimental implementation.

Soon after the establishment of the Islamic government in Iran the issue of compatibility of ordinary statutes with Islamic law turned into the main concern of the revolution. This time distinction between religious and non-religious legal institutions had completely been wiped out with the leadership of the country strongly believing that religious authorities had to assume all aspects of the administration of the State and diligently enforce Islamic law, as was laid down under the Constitution. Obviously the late Imam's mandate was based on the role of religious authorities in a reasonable interpretation of the laws of Islam in accordance with the needs and interests of the nation or *ejtehad,* as one of the sources of Shiite law. In order to institutionalize the concept, the late Imam himself took several decisive steps in cases where laws with significant public policy goals, approved by Islamic Consultative Assembly, were found incompatible with Islamic principles by the Council of Guardians. One good example of such statutes was the law related to land ownership in Iran. While the Council was hesitant to approve the proposed statute, complying with Imam's religious verdict, finally the Council of Guardians endorsed the revised statute. At issue was the taking of private property against the will of their owners in cases where public interests and exigencies was required. The same was true in a case of delinquent borrowers of banks who were trying to take advantage of the religious prohibition against interest or late payment charges *"riba",* to avoid paying their debts to government banks. The issue was eventually resolved by the Exigency Council. The clash between strict compliance with Islamic law and modern exigencies of administration of government had to be resolved under an institutional and constitutional guideline. Amendments to the Constitution established a unique institution under Iranian Constitution. The main function of this institution under the amendments to the Constitution was to assume the responsibility of resolving a disagreement between the Majlis and the Council of Guardians, in case a statute being passed by the Majlis was found against the principles of Islam. In such cases the Exigency Council, exercising its discretionary authority may, based on the exigencies and interests of the State, allow the law to be enforced. Thus, the constitutional deadlock of laws passed by legislature but found against the rules of Shariat by the Council of

Guardians was institutionally resolved. Nonetheless with strict constitutional mandates of following Islamic principles, as determined by the Council of Guardians, the authority of the Exigency Council also needs to be tested according to Islamic law. Discussions related to this particular issue were conducted during lectures and debates of workshop #2 and #3. The main justification was the concept of secondary legislation under Islamic law principles, which is worth further elaboration in the context of this General Report.

There are two types of legislation in Islamic Jurisprudence: primary and secondary. The concept of secondary legislation has been adopted from Islamic Jurisprudence: the Sharia. For purpose of clarification, we shall first embark upon some introductory issues and then discuss the afore-mentioned terms.

It is almost a common agreement among jurists and theologians that a divine act enacted by God is in fact directed against and, legislated in relation to a specific subject matter. In other words, if we assume a statement in which the predicate is a ruling or a mandate, the subject of the predicated would be the subject of that ruling. We take the provision "a contract of sale is compulsory", as an example. This statement or provision is composed of a predicate and a subject. "The contract of sale" is the subject and "is compulsory" is the predicate.

Having clarified the above points it is now pertinent to deal with the two issues we raised at the beginning, i.e. the primary and secondary legislation's.

Primary Legislation:

The relation between the predicate or in our case the mandate and its subject in this type of legislation is a direct one: there is no restriction or condition or any intermediary in between this form of affinity. Whatever is explained or mandated or ruled is mainly due to the nature of the subject *per se*. In other words, it is the very essence of the subject itself that engenders the mandate. For instance, performing ablution is a requisite and essential requirement for paying. This requirement or mandate is mainly due to the nature of praying. That is, the praying for what it is (i.e. for its

nature) that entails the performance of ablution. Because of the very feature, that this type of legislation is referred to as Primary Legislation.

However, if the subject (i.e. praying) for, say, change of circumstances (or involvement of an additional element) falls into a specific legal situation, then, its ruling or mandate will change accordingly and a new rule will follow. It is this new rule or mandate that is known as Secondary Legislation. Secondary legislation's are therefore applicable to subjects, which have their own mandates in the previous, primary and specific conditions, but due to a change of circumstances have a given cause to the introduction of a new mandate. An example may clarify this point: the consumption of intoxicants (e.g. wine) is prohibited. This is a primary mandate; i.e. a primary legislation. However, the mandatory nature of this prohibition may change if a new circumstance or condition takes place. For example, the consumption of the intoxicant was under duress: that is, the person in question was forced to consume it. In this new circumstance the prohibitive rule will not apply and accordingly a new rule applying to this new situation and exonerating the forced consumer is enacted. This new rule is a secondary legislation.

To understand the role, which these secondary legislation's can play on the development of substantive law, we need to know the following point:

First: we need to learn of those elements, which change the primary legislation and lay the grounds for the enactment of the secondary legislation. Knowledge of these elements will also help understand factors, which constitute the foundation of the latter.

Second: we need to know the co-relation between primary and secondary legislation's and the kind of primary legislation that the latter would be attributable to.

Third: what we need to know is whether all primary rules are subject to change and, whether they lead to the introduction of a new legislation.

The circumstances, which give rise to changes in the primary legislation and the introduction of secondary legislation are as follows: need and necessity, hardship, and loss and damage to oneself or to others. With regard to the co-relations between primary and secondary rules, if examined, one may conclude that there has never been a primary rule that has not been the subject of changed circumstances; in consequence of which a secondary rule has been legislated.

Loss and damage do not lead to the invalidation (or annulment) of all primary rules. This applies to situations where the primary rule is by and in itself a cause for loss and damage to its performer (i.e. paying tax or following and acting what is required in a Jihad (Crusade)). In such circumstances, secondary rules will not be resorted to, and the duty inflicted upon is, under whatever conditions, to be fulfilled; except, however, in situations where the Holy Koran explicitly stipulates otherwise. For example, the duty of following Jihad is not required from some one who is blind or crippled or ill.

It is pertinent to point out that the loss and damage referred to above may be upon the performer himself or upon others. An example of the latter is a situation where someone is using his property or good in a way that it causes loss and damage to others. Since, this is not allowed by law, such behavior is very limited.

For the purpose of serving public interests (e.g. in cases where private interests contrast with public interests) many rules are modified by secondary rules. It is a matter of fact that Islamic law is a society oriented legal system and as such it prefers public interests to private ones.

For example, there is a principle (the Dominion Principle) in Islamic law whereby as a landowner, you are entitled to construct any building in your land if you deem it appropriate and can also prevent any trespassing or illegal repossession of your land. However, if it was felt that there was a need for installing a spot (in your land), so that electricity could be provided for a given community, installing the relevant post would not require any permission from you as a landowner. This is subject however, to the qualification that you would be paid in return for that part of land that had been allotted for the electricity post. All in all, the ambit within which

secondary legislation's would, in such circumstances, be applied is limited to those situations where the public interest would be served. To put it differently, the application of a secondary rule at the expense of limiting a primary rule are not without limits and it is confined to only those situations where the implementations serves public interests.

Islamic law is a society oriented legal system. Unlike the West it does not approve of individualism. It seems that western individualism differs deeply from Islamic law. The supremacy of public rights over individual rights is considered as an Islamic legal principle. It is therefore because of this principle, that if, someone opposes the anatomy of his father's body (since this may set a precedent for future cases) which as a result, may act as a hurdle to medical research activities (which are vital for humankind), then the National Committee for Ethics in Medicine, may renounce such an opposition.

Some literatures compare individualism of the West with collectivism of Islam and unfairly accuse the latter of oppression and despotism. As history testifies, this is in contrast with the collectivism that the Prophet Mohammed (peace be upon him), the Prophet, and his disciple, Imam Ali (peace be upon him), and other great leaders represented and accordingly run their lives.

The crucial point, here, is that how one can interpret the concept of public interests [for public welfare] and more specifically, in the context of individual rights, how it can be applied?

History provides us with many examples of cases where individual rights had given way to public rights. In our country, during the period when industrial development was still in its preliminary stages, and where industrial factories had not yet been built, there were no workers groupings (e.g. trade unions). Nor was there any labor law. The relationship between the employer and the employee or the master and the worker was based on the contract, which were concluded between the two parties. The free will concept was the prevalent principle. The parties were at liberty to formulate and conclude their agreement in a fashion they deemed appropriate. Working hours, salary, workplace and the type of work needed were all negotiated and determined by the parties.

However, when the Labor Law was legislated in 1339 (1960), everything changed. There was no more complete freedom in the context of employee-employer relations. In other words the free-will principle, as a primary rule, was restricted. That is, the parties were no longer able, or were at liberty to determine the number of working hours, wages, and the provision of security means themselves. Rather, all these things including the question of insurance were already determined and stipulated in the labor law. The prime purpose was to serve the interests of both the employee and the employer. All these were imposed upon the parties, in consequence of which a unified and uniform legal system, in which the employer-employee relationship had been stipulated, was established. This is exactly a secondary legislation in contrast whit the free will principle, which acts as a primary rule. It is secondary because restricting the free will rule gives priority to public interests over individual ones. Although in this process some people might lose, it is justifiable by the fact that in civilized societies governments tend to intervene in the domain of individual rights and confine these rights, so that public interests are served. In Islamic Law, labor law is classified as public law.

It must, however, be pointed out that public interests and welfare are dynamic and change with the passage of time. New needs and problems emerge. Society has to confront these new phenomena and find necessary means and ways to overcome them. Likewise, rules and regulations are dynamic and flexible. They have to meet the needs and conditions of the time. This is just like the rites and proceedings that are required for praying in normal situations, but which during unconventional times the need for their performance fades away and renders unnecessary.

With regard to the issue of contracts, one may refer to the principle of *Pact Sunt Servanda***.** According to this principle the contracting parties must give effect to their obligations that have been stipulated in their contract. This is one of the main principles that has been stipulated in the Koran.

There is a principle in Islamic jurisprudence, known as the “frustration doctrine”, which implies that if performance of the subject matter of a contract becomes impossible or inapplicable, the contract will be terminated

(or frustrated). This should not, however, be confused with the hardship principle. The latter refers to a situation where the applicability of the contract becomes difficult but not impossible. This condition, i.e. the difficulty of performing a contract, will not lead to the immediate and direct termination of the contract. Rather, depending on the circumstances, it gives the option to the contracting parties to choose any one of the measures they have formulated in their contract.

The Holy Koran respects private property and to this end, one can refer to the following statements that have been stipulated therein: give back the people's property, however little or worthless might it be (not an even Fatil: an old Islamic measurement for weight, which means a thin string of a date). Do not hold any one's property in your possession. Do not remain financially indebted to anyone. Ask, as reimbursement, for the same amount that you have lent. Neither oppress nor submit to oppression. You must get back your credit from the indebted. However, in cases where the indebted, due to hardship … etc, is not able to reimburse you, then grant him some grace period". This is one of the lenient rules of Koran, which is a secondary rule. And as such it is intended to limit the primary rule, whereby the creditor is entitled to claim his money back.

If a tenant, (for example due to the termination of the tenancy arrangement) has to evacuate the property, but due to hardship fails or is unable to find another accommodation, this eviction is deferred to another date or to a time that he/she would be able to find an accommodation. Thus, this, by no means, implies that the rent for the additional period should not be paid. In such a situation, a rental value has to be paid.

In our country, the legislative system respects not only individual rights but also public ones. This means that when the legislator intends to serve the public, or to protect the high interests of a country as a whole, or to prevent infliction or occurrence of any social loss and damage, a measure is sought, that institutes may enact a secondary rule. However, to legislate such a secondary rule, the following conditions need to be satisfied:

First: the secondary rule has to be limited and confined to a point where the public welfare would be served.

Second: the rule must be provisional. For a secondary rule cannot be permanent. For instance, it is a secondary rule that in case of necessity, eating the meat of a dead animal is permissible. The question, here, is whether, in terms of duration, the applicability of this rule would be for good. That is, if a certain person for reason of necessity was once compelled, and the secondary rule in question has allowed the consumption of a dead animal's meat, does this imply that she/he can take such meat for an indefinite period? The answer is certainly no.

Chapter VI

Law drafting and the issue of legitimacy

Law is a term of art used in different contexts to include both written and unwritten mandates. The main characteristic of law is its demand for strict compliance and its generality. To ensure the proper function of a legal system, its legitimacy is the main criterion. In the absence of legitimacy a law would need constant police power to supervise its enforcement and despite using force for its enforcement would in the long turn change into a non- binding document. Thus, search for legitimacy of law is at the heart of legal philosophy. In order for law to be a legitimate mandate, irrespective of its source, it needs to be based on a recognized social institution. Of course, morality is one of the main social institutions, which would justify the existence of law. There is however, a difference between morality and law. While all laws should reasonably be laid down for protection of a legitimate social interest, morality may very well be more broad and overwhelming. To the extent that a moral concept falls under the sanctions of personal conscious and privacy, society is not concerned with its sanction. Only to the extent that the rights of third parties are affected, a police force should be used to enforce such moral exigency. In such cases, morality needs to be turned into a law and be declared as such by a legitimate authority.

The source of law is another element of legitimacy. Many laws, whether written or unwritten, emanate from social forces and institutions and are called customary laws. Such laws are usually enforced spontaneously by people themselves. The function of enforcement organizations is simply to prosecute those who are violating such social mandates. Due to inherent legitimacy of customary laws, there is close cooperation between individuals and government in supervising their enforcement. Law enforcement agencies are simply complying with public wishes in prosecuting the violators. The jury system and their extensive powers to allow punishment of culpable persons is based on the presumption that such laws are laid down by society itself and complying with a jury verdict is the easiest way to follow with the wishes of the society.

Likewise religious laws are complied spontaneously by people themselves, due to their sanctity of origin. To the extent that law is based on social

mandates including moral and religious institutions, public order will be maintained peacefully and smoothly under a civilized administration, which is entrusted with the power of maintaining social justice. The problem arises when the authorities try to vindicate their wishes under the guise of law enforcement, when no such social or religious force is behind the law.

Legitimacy was not an issue under the positive doctrine of law. The source of law was deemed to be the authority of the State. Once the authority expressed its wishes in terms of law, its legitimacy could not be questioned. The role of the judge was simply to enforce the law as was drafted. Under this theory the absolute power of the government had to be preserved and the role of a judiciary as the law enforcement agency was to ensure compliance with law as an instrument of public order. Judges under both Nazi and communist regimes took refuge behind the positive theory of law to justify their decisions. The experience shows that once the power behind such statutes faded, law also disappeared due to its lack of legitimacy. While even after the Iranian revolution, those laws and regulations which were based on religious or cultural values of the country remained in force.

Another concern regarding the enforcement of law is arbitrary judicial process. Judges are presumed to be in charge of law enforcement rather than law making. It took decades of political discourse and the French revolution to recognize the principle of the separation of powers by governments as the basic means of judicial abuse prevention and discretionary law enforcement by judges who quite often pronounced the law themselves. Traditionally under the common law system, it was the judges who made the law and the process even turned to be successful. However, both the jury system and adherence to judicial precedents are safeguards. A common law judge is bound to observe the precedent and at the same time follow the decisions of a jury in questions of fact. Thus, there is less chance of arbitrary and capricious decisions by a judge. Since the precedents are themselves based on social and religious values, judges were not faced with a crisis of legitimacy.

In a civil law system, the legislature assumes the main task of pronouncing the laws of land. Therefore, the statute needs to follow the

rules of legitimacy and reasonableness both to serve the purpose of spontaneous compliance of law by the people and control arbitrary tendencies of judges. In drafting technical laws, the legislature even faces a more pressing concern. While judges are bound to reasonable interpretation of law and their decisions are normally checked by higher judicial authorities and even the general public, the official authorities working for the executive are merely subject to rules of administrative hierarchy. Thus, arbitrary tendencies are the rule rather than the exception. It is true that quite often scrupulous public servants exercise their discretionary powers to achieve major social goals by arbitrarily enforcing laws, but in other instances abuse of discretion negates respect for the law. In order to avoid such circumstances in drafting technical laws, the legislature needs to follow the rules of reasonableness and transparency and to limit executive powers. In other words while laws with general application which are under judicial control may leave room for judicial interpretation, technical laws need to be drafted in such elaborate forms that leave less chances of administrative discretion. The main features of law drafting techniques are therefore, revisited in this General Report.

1- Generality of law

The main rule of law drafting is based on the concept that no law may be laid down for a particular purpose. Rather laws need to be drafted to resolve particular issues. There are of course, instances where a legislative act is designed to encompass a particular situation. Most legislative authorizations are not laid down in general terms but such authorizations are not called statutes. They are authorities with specific application which, are not designed to be applied in similar cases by a judge. However, one particular act of legislature, which is called "Bill of Attainder" may hardly be justified. A bill of attainder by definition is a legislative decree, which penalizes a particular person or deprives him of his property or civil rights. The reason being that such actions require due process of the law and an open trial. The doctrine of separation of powers actually prevents legislature from intervening in the business of the judiciary.

2- Express and clear terms of law

Law needs to be drafted in express and clear terms. This issue was further elaborated during our discussions regarding legal terminology. In fact there should not be archaic and unfamiliar terms used by the legislature. Laws are designed to be observed by the general public and as such could not be drafted in a language, which is mainly understood by a particular group of the society. In drafting technical laws other concerns are to be achieved as well. Sometimes the legislative intention is not to lay down statutes to be implemented by the general public. It is rather a group of professionals who need to comply with its terms. In such cases, the legislature needs to add a list of terminology or particular terms in an effort to avoid differences of opinion in the process of its implementation.

3- Law needs to be publicized

This is an essential element of legislation. Subjects of law need to know the content of the law before being asked to enforce it. While in every country there are legal provisions for the publication of law, such as publishing it in an official gazette, the rule of publicity requires more than that. Official publications are for lawyers and judges to rely on during legal process. the general public needs to be educated with the mandates of law and its effects on their daily life and business, even before official enactment. On the other hand technical laws must be discussed with businesses and professionals who are not affiliated with the government. As we already discussed, the process is actually part of preparatory works before submitting a statute.

4- Lack of contradiction

The statute needs to be drafted without any contradiction in terms or its implications. A thorough check also needs to be conducted to verify that not only the statute does not contain any contradictions with its own provisions but also it is not inconsistent with other laws of the country. The main task of restructuring the legal system is to determine the laws which are not compatible with each other. A suggestion as to which ones need to be repealed will be discussed under this General Report.

5- Non-retroactive

Laws with retroactive application even in cases where public policy so requires must be strictly interpreted. It is a matter of common sense that people would organize their life in accordance with existing laws and regulations. Their expectation is that the law protects the rights acquired by them. Laws, without a serious public policy mandate, try to retroactively intervene in people's acquired rights lack legitimacy. Such statutes hardly survive and normally repeal soon after the political force behind them achieve its purpose.

6- Stability of law

Laws are implemented by their subjects until expressly repealed. Since people organize their life in accordance with directions of the statutes, it is one of the main barriers of economic development to change laws after a short period of time.

7- Not to be burdensome

Laws need to be drafted in a view to facilitate and regulate the life of the people. It is therefore, against the rules of legitimacy to lay down burdensome laws. Under Islamic law strict prohibition is laid down against imposing burdensome obligations.

The law needs to be coordinated with the actions of law enforcement agencies. A statute, which faces resistance by the executive branch and law enforcement agencies gradually loses its legitimacy and turns into an obsolete instrument.

8- Transparency Legitimacy is the essence of the rule of law and due processes. In order for the statute to be legitimate, it needs to be transparent. People should not only accept and comply with it spontaneously, but also need to be confident of its proper enforcement. Unless the law is transparent and clear in its terms, there is always the chance of disguised implementation. When a statute is subject to different interpretations, public distrust in the administration of law creates a gap between law enforcement agencies and the people. Thus, people would gradually become disinterested in law enforcement processes. Lack of public

participation in the law enforcement process is the most serious social evil. It is elementary that no law may be enforced against the will of the people and their assistance and collaboration with law enforcement agencies.

In order to secure public collaboration in the business of law enforcement, the process needs to be transparent. Democratic experience supports the idea of open forums, public hearings and open proceedings. At the same time the state has created the office of public prosecution to watch proper law enforcement. However, no public prosecutor may be able to operate unless private lawyers and interested public extend their helping hand to them. The mere fact that public prosecutors normally rely on complaints and information supplied to them by the general public shows that the whole process needs public assistance and cooperation.

The question of transparency in technical and administrative law enforcement processes is a more sophisticated issue. Technical statutes are designed to regulate some of the most complicated transactions, which are to be conducted in accordance with the state of the art technology. In many instances, people are either ill equipped to understand the concepts or lack interest in following their performance. They rightly believe that the administration of such statute hardly affects their day to day life and wish to trust institutions to protect their interests. The institutions which are assigned to the administration of such laws run by individuals with their own personal interests and ambitions. The danger then would be the misuse of public trust by such public servants.

Unless a no nonsense system of law is in place to indiscriminately prosecute any suspicious activity on the part of public servants, who would administer the property of others as trustee or director, no public trust and public participation may be expected. For example, it is hardly conceivable to expect a small unsophisticated investor to risk his limited resources in the hands of corporations that run by a dominant shareholder or government agency; unless fiduciary obligations are well defined under the law and a transparent process of administration of law would allow private attorneys to look at the business of such directors.

It is true that public participation in law enforcement through private attorneys also may be an intrusive suggestion. However, abuse of the

process by lawyers and other professionals may also be legally regulated and punished.

In short transparency not only means clear terms of law but also signifies seeking assistance of the general public in law enforcement. In case of technical laws the general public may rely on private attorneys and other professionals such as auditors and consultants. Provided that laws are in place to recognize the principle of fiduciary obligations of public servants and allow such professionals to watch for infringement of fiduciary obligations by they who are entrusted with the business of running the rights and properties of others.

Chapter VII
Legal and institutional barriers

A major topic of discussion during implementation of the program was to identify institutional barriers of economic development in Iran. It is an elementary presumption that laws related to the administration of justice and respect for private ownership are major elements of public policy and economic development in every country. In this regard constant legal research needs to be done by legal scholars affiliated to the judiciary itself. The goals of the program are however, more limited. In evaluating the laws and regulations which were mainly drafted by the executive branch, one needs to watch for institutional barriers that statutes have created. At the outset, the proposition seems contradictory. Laws are passed to promote social and economic goals. To suggest that certain laws are creating barriers in the process of economic development, contradicts with the main objectives of the law. However, the fact is that many technical laws and regulations are themselves amongst the most important institutional barriers. The reasons may be identified as follows:

1-In drafting and submitting technical statutes every government agency is concerned with its own functions and goals. Zealous pursuits of departmental concerns often results in delays and lack of coordination with overall economic programs of the country.

2- Most government agencies in proposing regulations tend to create special administrative bodies for the purpose of supervising due enforcement of such regulations. Such administrative bodies quite naturally will have to see that legal duties entrusted to them are properly handled. The result is delays and lack of attention to general needs of economic development in a country.

3- Technical laws are not usually drafted by legal experts. Thus, an overall coordination of the proposed laws with the legal system of the country is not taken seriously. The result is that one may identify several government agencies assuming responsibilities to approve or regulate one particular issue. Diversity of administrative authorities and conflicting decisions resulting from lack of coordination between different agencies are

thus, the main administrative barrier in the economic development of the country.

4- Volumes of legal literature passed by legislature during the past several decades are sometimes in the nature of regulations that should have been approved by the Council of Ministers rather than the Majlis itself. Nonetheless overzealous government agencies turned such administrative regulations into acts of Parliament. The unfortunate result is that such regulations will stay in law books of the country for years to come even after their purpose no longer exists. However, they deserve the respect of law and the executive is required to enforce them although they no longer serve any meaningful purpose.

5- The fact is that due to public ownership of major industries and natural resources of the country the government needs to regulate the economy and expand the bureaucracy in an effort to be able to supervise publicly owned assets and resources. The most important goal of liberalizing the economy also needs to be followed by the government at the same time. The dilemma is in fact breath-taking for an administration trying to ensure social justice and to prevent corruption at the same time. Liberalizing the economy requires lifting controlling regulations while without in absence of such regulations corruption may hardly be controlled. Privatization is suggested to be the solution but it tends not to be successful where government ownership of the resources is a legal mandate.

6- Lack of consistent economic policies and administrative procedure is also the reason behind incoherent and overlapping laws and regulations in Iran. The law for implementation of the third economic plan lays down the objectives of a harmonized economic plan for the country through weeding out redundant administrative institutions and enforcement agencies. However, tendencies to maintain the *status quo* and administrative prerogatives are amongst good examples of institutional barriers defeating the objectives of the law.

7- Many technical laws of the country are partial translations of laws enforced in other countries. Comparative studies are the best and the most workable process of drafting technical laws, in case the administration wishes to be mindful of developments and amendments of such laws in other

countries. However, the effort should be concentrated towards modernizing and improving technical statutes in the light of contemporary needs of the country. It is elementary that when a law loses its original purpose, it will turn into a barrier towards economic development of the country.

8- Social and cultural elements also need to be taken into consideration. Public officers in Iran tend to implement laws in a very discretionary manner. Their interpretation of the law differs from time to time. Favoritism is another institutional barrier in Iran. While laws are deemed to be enforced duly and with equal treatment of the subjects of law, discretionary powers granted to law enforcement officers create an atmosphere of unpredictability in the process of law enforcement. Thus, measures need to be taken to abolish most unnecessary government agencies and regulatory authorities. The proposal would face social and administrative resistance, which would slow down the process of reforming technical laws of the country.

9- Uncontrollable volume of statutes, many of which are inconsistent and contradictory, takes a heavy toll on industries, recently established and trying to adapt themselves with the exigencies of modern economic patterns. The problem was created due to a lack of coordination amongst different government agencies and incoherent methods of law drafting by different government agencies.

10- Law enforcement agencies themselves may be considered as part of the problem. They are created to enforce the laws of land. But in cases where the statutes are not properly drafted, the relevant agency would turn into a barrier itself. Legally speaking a decision as to whether a particular statute needs to be enforced shall be taken by the legislature. However, in case of technical statutes, where the role of the legislature is limited to the approval or disapproval, law enforcement agencies need to enforce such statutes in a less costly manner to the social and administrative system.

Thus, law enforcement agencies would be in a better position to decide whether a particular technical law needs to be abolished or not. A genuine effort to correct the situation by proposing amendments to laws, which prove to have created barriers towards economic development of the

country, rests upon the shoulder of the executive rather than the legislature.

During the following discussions, we shall, try to elaborate in general terms, the reasons why and to what extent technical laws tend to build barriers against economic development and what remedies need to be adapted in each particular situation.

A- Administrative versus judicial process:

The main difference between an administrative decision and a judicial one is in the process rather than the nature. Administrative and judicial agencies are responsible for law enforcement, while judiciary is tries to resolve disputes. Administrative decisions are in the nature of requiring the general public to comply with their decisions, often without justifying them. But a judicial decision needs to be legally reasoned so that a higher judicial rank would be in a position to endorse or vacate the decision. The mere fact that a judicial decision needs to be well reasoned and based on the wording of the statute will serve the purpose of public control of judicial decisions. The judgments are carefully scrutinized and criticized by members of the profession, law students and scholars. The result is that the transparent process allows the legislature to modify or amend any statute which has created a social harm. In fact the best way to challenge a statute is its literal enforcement. In most cases creation of social resistance against unreasonable or unjust statute would lead to legislative action of repealing such statutes.

Administrative decisions, by their nature, lack justifications. The result is that they are not liable to public scrutiny. They also could not be challenged or reviewed through appeal or other methods of recourse. Most of the time administrative decisions are made without public debate and transparency. The result is that voluntary compliance with such regulations is not always achieved.

Since technical laws and regulations are in most part administered by the executive branch, their discretionary application leaves the general public with less room and remedy to complain. In many instances regulations, whose approval is essentially under the jurisdiction of executive branch, are

submitted to the Majlis and turned into a statute. The process during several decades of legislative history brought about the most complicated and unintelligible system of technical laws in Iran. Volumes of administrative regulations, which were not compatible with each other, had to be enforced by entrusting concurrent jurisdiction to government agencies, delegating competing authorities to administrative bodies, creating complicated and obsolete red tapes and conferring regulatory powers to incompetent civil servants. In short institutional barriers have turned the due process of law into a daunting task. Regarding such regulations, the easiest suggestion is to lift their legislative sanction allowing the executive branch to gradually repeal them.

Complaints may very well be submitted to administrative courts by independent public servants. Administrative tribunals in the modern era have been turned into the most effective organs of investigating grievances of the people. It is undisputed that ordinary courts of law are not properly equipped to entertain complicated grievances against enforcement of technical laws of the country. For such issues which requires technical experience, a drafter of the statute should set up an independent administrative court to hear the grievances of the people against administrative decisions. It is true that a court of administrative justice is established in the country but the problem is that most statutes deem decisions of administrative agencies as final and without recourse. This undue approach to law drafting needs to be changed by an overhaul of most technical laws of the country. At the same time there is only one single court of administrative justice that is established to hear grievances against government agencies. Once as a general rule of law drafting, the government was receptive to the idea of administrative due process, such special administrative courts may effectively operate as courts of the first instance with the Court of Administrative Justice turned into a supreme administrative court in the country.

The easiest procedure would be to draft a general administrative procedure law, which should be followed by all administrative courts and internal hearings in every government organization. Such administrative procedure needs to recognize the basic rules of due process; including

impartiality of judges, right to be heard, opportunity to defend, right to appoint attorneys and right to appeal against the decision of administrative courts.

In this connection another significant matter needs to be recalled. Once a general statute is passed, as a result of public scrutiny though judicial interpretation, the legislature will get a sense of public opinion during the implementation of law. In such circumstances a piece of legislation which no longer serves its purpose or causes undue barriers will be repealed or modified. In case of administrative and technical regulations, which are disguised as an act of legislation, two main obstacles are created at the same time. First of all no complaint may be filed against the enforcement of such regulations before the Court of Administrative Justice, due to the fact that the jurisdiction of the court is limited to review of regulations passed by the Council of Ministers not regulations disguised as law and passed by the parliament. The second problem is that technical laws are hardly subject of judicial litigation. They are enforced by the executive and in most cases would not affect directly the interests of private litigants. As a result a technical law will remain in full force without scrutiny. Such laws are even the source of discriminatory enforcement and undue prejudice. The fact is that they gradually would lose their significance and r*aison* d'être with no genuine interest on the part of the executive to enforce them. However, since they are on the books of law a public servant may unreasonably rely on them for the purpose of capricious and discretionary enforcement of such laws.

In fact the mere existence of laws which are in the nature of ordinary regulations is one of the barriers of economic development.

Once an administrative organization was established it would take a strong will for the executive to order its dissolution. Budgetary appropriations would automatically be made, personnel are employed, service contracts would concluded and in short vested rights and prerogatives are created for government officials. Such personnel would at the same time try to retain their powers and exercise their discretion in an effort to give legitimacy to their service. Their efforts to maintain their administrative prerogatives in most cases would turn into administrative

barriers. In view of the above facts it would be counter productive to submit unnecessary legislation's to the Parliament where the same goals may be achieved through executive regulations.

B- Dominant economic powers of the government:

In countries where the government is in charge of the main economic sectors, the need for sophisticated bureaucracy is more pressing. Officers who are appointed to run the business of the government act in fiduciary position. The fact is that acting in fiduciary capacity limits the authority of the officers and forces them to follow the procedures of obtaining approvals for every step they need to take. In order to keep appropriate record for each individual transaction, the officer in charge also needs to exercise his/her own discretion. There fore, a whole body of time consuming and mostly preventive regulations, in place in every government administration, which ventures into economic intervention. In order to lift such barriers there is no other reasonable solution except privatization of the government sector. However, privatization itself is a very difficult process in countries where no private resources are readily available.

An attempt to adapt private sector management style by government has been introduced. The idea is to assign government originated businesses and works to companies which are created in form of private entities. There are however, several set backs to smooth functioning of the process. The main problem is the lack of strict rules and regulations regarding fiduciary obligations of directors of such companies. Although the company is formed as a private entity, being a government contractor imposes fiduciary obligations which needs to be regulated. One such obligation is lack of favoritism and discrimination on the part of the private company which has assumed the contracting work. Otherwise the general economic development of the country would be disrupted. On the other hand such magnitude of work needs to be assigned to private companies created by the government itself in accordance with regulations and safeguards which would ensure fair competition and lack of influence paddling. Following such process itself is a source of confusing and overlapping government transaction laws in most economies which are dominated by the

government. In fact the only solution is to gradually attract direct and private investment in form of capital contribution. In order to attract private funds to contribute effectively in the country's economy, a whole body of laws concerning corporate financing and the protection of interests of small investors need to be drafted and implemented in Iran.

C- Legal bureaucracy:

The most complicated and time consuming effort that should be taken is restructuring technical laws of the country. The issue will be discussed thoroughly under another chapter. Needless to submit that unless a systematic and legally viable process of restructuring is conducted the actual legal basis of the government bureaucracy may not be identified. There are government agencies and organizations, which are no longer legally require to operate and are simply operating under the guise of continuing with their unfinished functions, conducting similar functions which are legally assigned to another government department. A good example of such organizations is government corporations, which are legally dissolved but are continuing to operate as "the company in process of dissolution." In other instances were the functions of a government agency is assigned to another agency by law without repealing the original authority to establish an agency, dissolved agencies continue to operate on the ground that there are remaining functions that need to be conducted by them under their legal authority. A noticeable unwanted bureaucracy is that personnel continue to operate presumably to assume custody of the government properties purchased for a discontinued government project. Once technical statutes are legally restructured one may easily decide to permanently dissolve and weed out unwanted or redundant agencies.

Legal restructuring may resolve part of the problem. The fact of the matter is that even many government agencies, despite their legal standing, may be proved to be an economic barrier. A decision as to the identification of unwanted organizations and their effect on economic development, needs to be taken by the executive. Once such trimming of the bureaucracy was conceded by the government itself, relevant statutes need to be drafted by a

committee of experts with due respect of the guidelines adapted for technical law drafting.

D- Distinction between regulating and intervention:

In drafting technical laws one will have to bear in mind that the purpose of such technical laws is to regulate a particular section of the economy. While reasonable regulation of economy will contribute to economic development and social justice, any unreasonable intrusion in free trade will have adverse economic effects. The border line between regulation and intrusion is a matter which needs to be considered in each case. However, the main criteria are whether or not the authorities granted to a regulatory agency are formulated on the basis of prior approval or subsequent sanction. While regarding issues of significant public policy such as foreign exchange transactions, during periods of limited foreign currency resources, the authority needs to be direct and preemptive in most other cases such as the prevention of unfair competition after fact supervision sufficiently serves the purpose of the statute.

One obvious barrier of economic development in Iran is the fact that for establishing most businesses one needs to obtain several approvals from different regulatory agencies. One good example is to obtain prior approval of the water and power authorities. Regulating water and power resources of the country and its fair and economic distribution is the main function of the regulatory agency and the purpose of the legislator. But in order to fulfill this regulatory function the agency does not need to approve a project in advance. It could simply notify the general public as to the availability of such resources and terms and conditions of connecting the utilities to particular premises so that an investor will be on notice in advance as to how to implement the project and formulate the feasibility report. Water and power authorities are not bound to connect the utility in case the project is not designed according to their regulations.

Risk is an inherent factor in a business decision, which may not be attributed to regulatory authorities unless such authorities, by their prior approvals of the project, turn themselves into the position of a project sponsor. Therefore, statutes, which require prior government approvals,

turn such regulatory barriers into an indication of government involvement in failure of the project. In restructuring technical laws of the country every effort needs to be done to avoid granting power of prior approval to administrative agencies. The agencies simply need to lay down regulations and supervise their enforcement. Obviously infringements of regulatory directives are subject to civil, and in extreme cases, to penal sanctions. Such sanctions may be enforced against a violator, subject to due process.

In order to limit the extent of intervention and intrusion in economic affairs, a thorough examination of all technical laws of the country is needed. The purpose would be to identify such limited areas, which requires prior approval of the government and to what extent public policy may best be served by regulating and supervising the enforcement of such regulations. In process of such an overhaul, most of the statutes which grant intrusive authorities to particular government agencies need to be amended or abolished.

E- Administrative due process:

Our study suggests that law drafting should be quite concerned with the issue of spontaneous enforcement of the law. One of the requirements of voluntary compliance is the existence of an administrative due process. The public should have effective recourse against undue administrative decisions or capricious enforcement of law by the executive. Of course due process is not limited to judicial due process, in case of technical statues, administrative due process more significantly needs a whole body of laws to be passed.

F- Constitution Process

Legislative power is a rather new phenomenon. Because, nearly until the late Eighteenth century, the will of the kings and emperors were regarded as law. That was, whatever an individual decided was treated as law, which would be applicable to society and to which people would have to respect. It must, however, be pointed out that the eighteenth Century has been regarded as the century of the most important changes in the history of mankind. This is, because during this period many philosophers and

lawyers challenged rulers and did their utmost efforts to restructure the legal system. In this period Europe witnessed the birth of new thoughts and ideas: thoughts that undermined the traditional, medieval and inhumane values of the time. It is because of this, that the period is known as the "Enlightenment Century". The dark ages faded away and the concepts of national sovereignty and legitimate government were born. In that period the individual's will was superseded by the will of the people and gave way to the principle of democracy.

Today, the most important document in this respect is the Declaration of the Rights of Man and of the Citizen which was approved by the National Assembly of France in 1789. The Declaration consists of a Preamble and 17 Articles. It embodies significant principles. In its Article 3, it declares: "The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation." And this, reflects under Article 6 which defines law. A definition, which is valid and has legal force today. Accordingly, "Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation…". In its Article 8, it refers to the principle of the legitimacy of punishment and states: "The law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense." This is a significant principle because it prevents the legislative power (i.e. the Parliament) from punishing those behaviors, which are not actually a crime.

There is a more interesting point in Article 16: by virtue of the Article, "Any society in which rights are not guaranteed, or in which the separation of powers is not defined, has no constitution." Therefore, to claim or declare the existence of a constitution in a society, where the scope and separation of power has not been defined, will be unreasonable and untrue.

A century passed until the principles of the Declaration were incorporated in our constitution. In other words, our previous constitution and the current one both embody the Declaration's principles. And this implies that we can claim that the principle of democracy is embodied in

both constitutions. The title of Article 56 of the current constitution is "the Nation's Right of Sovereignty" and Article 58 stipulates: "The legislative power shall be exercised by the Majlis (the Islamic Consultative Assembly), which shall consist of elected members of the people, and its approvals after passing through the proceedings set forth in the following articles shall be notified to the Executive and Judiciary for implementation." Therefore, those principles, which at the end of the eighteenth century took root in the political system of the Western Countries, are completely incorporated in our legal system.

As a point of departure in understanding the Iranian Constitution, we may refer to Article 4 of the Constitution. According to this Article: "All laws and regulations… shall be based on Islamic principles." The Article, with minor modification, is in fact a replica of Article 2 of the previous constitution. The Council of Guardians is entrusted with the task of guarding the principles enshrined in the Article.

Since, during the legislation of the constitution no accurate assessment of the implication and framework of the Islamic principles was made, the problems of their application were not recognized. Nevertheless, this should by no means imply that we did not encounter any problem. By contrast, after coming into force of the Constitution, many problems (some of which were to a great extent complicated and critical) regarding the Islamic rules and regulations came to light.

Another peculiar aspect of Iranian constitution concerns The Expediency Council. This problem goes back as far as 1987 when a dispute over the legitimacy of some drafted bills between the Parliament and the Council of Guardian arose. To resolve these sort of disputes in that year, the late Imam issued a decree under which the establishment of an entity to that effect was stipulated. Following upon this, the Expediency Council was set up. In the event of controversy between the Parliament and the council of Guardian over the legitimacy of a bill, the Council is empowered to assess the subject matter of the dispute and pass the final judgment. Of the regulations which was enacted during the first session of the Expediency Council is the Government Discretionary Punishment Act of 23/12/1367,

which was published in the Official Gazette of 17/01/1368 (Tazierat: discretionary punishment awarded by the judge.).

Nevertheless, in 1367 the Constitution was re-examined and as a result a new article, *Article 112*, was added to it. For example, if the Assembly decides to enact a new law which the Guardian Council rejects because it sees it against the principles of the Sharia, the Nation's Exigency will interfere by re-examining the proposed bill and approve or disapprove the Guardian Council ruling.

Working until 1368, the council dealt with 50 to 60 draft bills. Half of these were intended to settle the disputes between the Assembly and the Guardian Council. The remaining half concerned other problems, which the system as a whole was faced with. (Etalaat Daily paper, 20th Farvardin, 1376). In other words, half of these cases were actually law making endeavors (i.e. legislation).

By virtue of this Bill (i.e. the Discretionary Punishment Bill) all discretionary punishments, governmental and non-governmental (including commercial, control, investigation and examination, passing and executing judgment) would be the task of the Government (i.e. the executing power). According to Article 61 of the constitution: "The functions of the judiciary are to be performed by the courts of justice…". Yet, the Nation's Exigency Council's Bill states that all discretionary punishment must be performed by the Government. Proviso 2 of the same Bill stipulates: "Organizations, organs, vetting and inspecting bodies, modes of investigation and adjudication and execution, appellation and the manner in which suing is conducted, receive and examine and shall be determined by a Procedural Rule which shall be approved by the council of ministers.

This mandate is given more force in Proviso 4 of the Bill. Accordingly "the Judiciary Power, national police force, notary organization, prisons organizations, and all the executive organs of the Country are under duty to give effect to the mandate of this Bill."

Traditionally, the question of the private ownership and the right to exploit it and also respect to the rights of neighbors has a long history in Islamic jurisprudence. These questions or principles are incorporated in Volume 1 of the Civil Code of Iran. The rights of possession and enjoyment

are stipulated in Article 30 of the Civil Code. The possession and enjoyment of the right of ownership are not without limit, and basically they are confined to a point where their application would not encroach upon other people's rights. In this regard, Article 132 of the Code provides: No one can use his/her property in a manner that it may hinder or infringe the neighbor's rights, unless, such usage is reasonable or necessary for either meeting the owner's needs or avoiding any loss. These principles have laid down the foundation of legal and religious basis of the civil building construction.

With the expansion and development of cities, the need for creations new organizations was felt. Hence, in an endeavor to improve the management of the cities the Municipality Act was approved by the Parliament in 30th Ordibehesht of 1309 (20 May 1930). This was followed by the establishment of the Ministry of Development and Accommodation in 1343 (1964) and the setting up of the High Council for the Development of Cities by the latter in 1346 (1967). In 1351 (1972) the Act for the Institution of the High Council for the Development and Architecture of Cities was approved. This Act, in terms of urban development and the control over city expansion was very comprehensive and multi-facet. This Act was one of the most useful regulations of the time A significant achievement, which the former regime was proud of. It was an Act, wherein firm and globally popular criteria were incorporated. Civil engineers and lawyers were conscious of the significance of such regulations for urban development. And the Administration of the time, by enacting and executing this Act and also approving the plans which were designed and drafted by the High Council of Urban Development for Tehran and other cities, was able to regulate urban development businesses.

The provision of water, electricity, telephone and the protection of the environment were also ensured. The High Council of Urban Development (hereinafter the High Council) has so far approved two development plans for Tehran; the second of which was formulated in 1370 and which is still valid. By virtue of Article 7 of the 1351 (1972) Act for the Institution of the High Council for the Development and Architecture of Cities, the Municipalities are under obligation to give effect to decisions of the High Council. Nevertheless, when in 1369 (1990) plans and regulations

concerning urban development increasingly became the subject of infringement and violation.

To sum up, two deviations must be highlighted: first, is the agonizing fact that the act of legislation has been done by government agencies. Second is that there is no single organization or legislative power in charge of law making, Multitude of laws and regulations are passed by different and separate institutions which complicates the task of technical law drafting and restructuring the Iranian legal system.

Chapter VIII

Restructuring the statutes

The project had to deal with two interdependent goals. The main goal obviously had to go through in depth discussion of the problems of law drafting. Bearing in mind that law drafting is a very peculiar technique, which needs to be formulated within the framework of national legal systems, the project had to explore the roots and sources of the Iranian law, relationship between the executive branch and legislature and the actual law drafting process in Iran. The concern was to propose drafting plans for technical laws in Iran. To achieve those purposes, a good deal of discussions devoted to the issue of inconsistent, contradictory, redundant, vague, over lapping, anti-development, discriminatory and bureaucratic statutes under the general topic of short comings of the Iranian legal system. Discussions led to the conclusion that while every effort needs to be done in adapting a sound law drafting system for the country, equal attention needs to be shifted to the direction of restructuring Iranian technical laws and regulations.

In this connection, for almost three decades the task began with the introduction of a particular statute and implementation regulations establishing an office under the auspices of the government. While initial works were underway, after ratifying the Constitution of the Islamic Republic, due to jurisdictional limits of the office of restructuring the statutes, efforts were mainly concentrated on classification of the statutes and compiling them. Parallel organizations were later created under the auspices of the Islamic Consultative Assembly, Judiciary branch and the Exigency Council, Apparently without close cooperation with each other. The publications of the said organizations, while reliable and helpful, are in line with private compilations of Iranian statutes by private authors and publishers. At the same time different government agencies in charge of implementing technical statutes, each started publishing a compilation of the laws and regulations which are related to their particular function. The Majlis Research Center itself worked on a reliable software containing classifications and texts of laws and regulations of the country. Thus, it is reasonable to conclude that the first step towards compilation of Iranian

statutes and their classification has been successfully conducted, beginning with the Central Bank's enormous publication of an alphabetic list of all laws and regulations since the very beginning of parliamentary legislation in Iran.

Obviously the initial stage taken with the collaboration of both public and private organizations, has only led the scholars to be convinced in their belief that an overhaul of Iranian technical statutes is a prerequisite of successful challenges of modern life. It is true that (thanks to compilation and classification of the statutes) lawyers are now relieved from the painful chore of locating laws; but to comply with such inconsistent (and most of the times unnecessary) laws and regulations is a heavy burden on private and public institutions of the country.

Restructuring plans

Thanks to private and public endeavors, the initial stage of classification and locating laws has been accomplished. Now one needs to turn to the issue of identification of the laws. For this purpose and in compliance with computerized programs, key words and code numbers need to be assigned to each individual statute. Through this action proper identification of the nature, subject, date of ratification and its relation with other laws and regulations could be done. A numerical system is the most convenient procedure. One should bear in mind that most statutes are intended to regulate several subjects, one of which is the central or dominant issue. At the same time the statutes may contain particular penal provisions, procedural issues, as well as civil sanctions. Thus, no single key number would be sufficient for the purpose of identification. The government agency in charge of restructuring the statutes should be vested with the legal authority to assign key numbers for each general subject and to determine the dominant nature of the statutes. Unless uniform rules are adapted, the ensuing confusion will block the process of restructuring statutes. A good example of confusion in law drafting is the notes incorporated in annual budgets. The notes are collections of laws concerning fund raising, obtaining loans, granting facilities to particular sectors, disposing government assets, employment authorizations, regulating loans and subsidies granted by the

government, allowing participation in companies and establishing government entities and a variety of many other administrative and procedural devices disguised in the form of notes to annual budgets.

No effort in restructuring laws of the country may be meaningful without classification, characterization and determination of the actual legal status of the notes. Assigning key numbers to statutes is a highly sophisticated legal research task, which needs to be handled by lawyers with experience in most legal disciplines. Unless the work was properly handled, the result would be misleading and counter productive. To give an example monetary and banking laws of Iran are mainly regulating banking business; but they also contain penal provisions, regulations related foreign trade, regulations related to contract drafting, establishment of companies, notarization of contracts, government representation before international financial organizations, and even corporate merger and consolidation as well as dissolution of banking organizations. While a key code number needs to be assigned to the statutes, defining the basic nature of the statute, it should be followed by other key numbers related to other subjects the statute deals with. A determination of the priority of other key numbers also needs legal scrutiny. The key numbers then need to be followed by a citation of the official gazette which would clearly lead to the actual text of the officially published law.

Once the task of classification of statutes was successfully performed, several independent working committees need to be assigned to the work of determining which parts of the statutes have been repealed and what are the existing and enforceable provisions of the law. Regarding the laws concerning administration of civil and penal justice, the task needs to be performed by the judiciary itself. However, technical and administrative statutes may be studied by several committees of experts consisting of different government agencies under the supervision of MRC, as authorized by the Majlis. In each committee an attorney nominated by the Council of Guardians also needs to participate. The reason being that the final report, as to the status of existing laws, also needs to be submitted to the Majlis and the Council of Guardians. Therefore, participation of a lawyer

experienced in the basic principles of Islamic law would help ease and shorten the process.

The huge task of restructuring Iranian technical laws may not even be accomplished by submitting the reports of the working committees to the Majlis. One of the main goals of the task is to determine which laws need to be amended and which ones should be specifically repealed. On the other hand any proposal regarding repeal of a particular statute implies curtailing administrative authorities of a particular government agency or the dissolution of agencies assigned to implementation of the statute. This is the most delicate and complicated part of the process, which requires a strong will on the part of the Executive, to proceed with weeding out unnecessary agencies or reorganizing those and vesting those with functions compatible with economic plans of the country.

Organizational plan

The law empowering the office of the Prime Minister (the President) has defined the function and organization of the a special government agency called " the Organization of Drafting and Restructuring the laws of the Country." Nonetheless technical statues need to be amended and the task may be assigned to the same organization, in co-operation with MRC. Much debates took place after the ratification of the Constitution of the Islamic Republic regarding how to proceed with abolishing statutes passed before the Constitution, which may be deemed against Islamic principles. Under its last decision in this regard, the Council of Guardians rightly decided that all laws passed before enactment of the Constitution are to be enforced according to their terms unless otherwise declared incompatible with Islamic principles by the Council of Ministers. Any inquiry in this regard needs to be submitted to the Council by heads of the three powers of government. The process has so far been followed by the government. In compliance with this function restructuring organizations have been established by legislature and judicial powers, as well. Due to large volumes of proposed statutes and regulations submitted daily to the President's office, the progress of restructuring has been slowed down. One of the functions of the organization which was created by law happens to be

submitting a report to the Majlis regarding laws that need to be repealed or, due to their inconsistency with other laws of the country, need to be trimmed. This is the most significant step in restructuring laws, with little or no significant attention devoted to it by the government, due to the assumption of parallel authority by other branches of the country.

In order to propose a workable plan, we need to clear several points. First of all our area of concern is limited to technical laws of the country, most of them were either amended or initiated after approval of the Constitution. Thus, the issue of compatibility of such statutes with Islamic principles is not the problem. In restructuring these statutes working committees need to determine their inconsistencies and redundancies. In case a statute needs to be repealed, the executive is vested with sufficient legal authority to submit the bill to the Majlis. It is hardly conceivable that repealing an unnecessary statute would be deemed as against Islamic principles. Even if such doubts were raised, the readily available response is that legislative bills including restructuring plans should likewise be endorsed by the Council of Guardians, for the purpose of compliance with Islamic principles.

On the other hand restructuring of general laws of the country which affect the work of the judiciary, needs to be conducted by the judiciary itself. Thus, the government is relieved from the huge task of restructuring such laws, which obviously need serious legal scrutiny. Therefore, the work of restructuring technical laws of the country may be handled properly by the President's office with co-operation of MRC. However, the process of restructuring leads to the conclusion that particular existing agencies need to be merged or their duties assigned to other parallel agencies. Decisions in this regard are not by their nature legal or academic rather than administrative ones. Since the Organization for Management and Planning is also operating under the auspices of the President, it seems logical to assign the restructuring organization with sufficient administrative powers and experts to fulfill its statutory duty.

Legal aspects of the work

A thorough legal research and study was presented and discussed duri ng workshop #2. The purpose of this general Report is not to repeat such

sophisticated legal studies but rather to elaborate on critical matters and conclusions.

Thanks to scholarly Islamic law precedents and their incorporation in the Iranian legal system logical and acceptable rules of law through which the legal task may properly be handled. Of course, in cases where the legislature itself has specifically repealed a particular statute, no further legal work needs to be done. The repealed statute ceases to exist as from such date. The only remaining issue would be to regulate the rights acquired and legal status created by a repealed statute. The Iranian legal system contains rules and accepted judicial precedents to handle such issues. Resolution of such legal matters is not a legal concern for the organization entrusted with legal restructuring.

A particularly trouble making phrase which is used most of the time by Iranian legislature is that " contrary legal provisions to the extent that are incompatible with the present statute are repealed." This provision is even added to a statute, which expressly repeals particular statutes. This conservative approach by drafters of the statutes has created a legal problem of deciding which provisions of the repealed statutes are incompatible with the present statute. To make the problem even more acute, one should bear in mind that when legislature is using the above phrase, it does not intend to repeal old statutes relevant to the subject matter all together. The unfortunate legal conclusion would then be that in case of technical laws most organizations and red tape created under the old statutes may, continue to operate provided their work would not be deemed contrary to the provisions of the latter statute. Many unwanted or parallel organizations continue to exist presumably because their operation is not deemed contrary to the new law. It is true that one may argue that the legislature was intending to replace the old laws by the new one and thus, the mere existence of the organization created to implement the old statute is contrary to the provisions of the spirit of the new statute. The practical solution would then be to obtain specific legislative authorization to repeal all old statutes and regulations, which deem to have been replaced by a new legislation.

There are cases where the subject matter is dealt with under the provisions of the new statute without repealing the old ones or providing that contrary laws are repealed. In such cases legal techniques are more appropriately applied. Of course, the general rule of law is that once a new law is passed, the old one covering the same issue, will be deemed as repealed with no further force and effect. However, the proposition is not easy to be adapted in actual cases. The complicated legal issue is the rule of lex specials which mandates that laws covering specific matters may not be repealed under a general law.

It is argued that the intention of the legislature had been to authorize application of the general law to cases outside the scope of the old special statute. There are even situations where a special law covering a particular situation is enacted without being readily determinable as to which law is special and which one is general. In such situations also a cautious lawyer may tend to argue that both laws continue to exist.

Legal tools to determine the state of a particular statute are most helpful in resolving judicial matters or legal issues facing government bureaucracy regarding inconsistent laws. However, the process of restructuring the laws should not necessarily follow the legal rules of interpretation. Once a decision was made as to replacing the old laws by a later statute, a legislative bill needs to be submitted in this regard. The report of the committees which are assigned to restructuring particular areas of technical laws need to mention in their reports as to what extent -in proposing the restructuring plan- they have considered and applied legal rules regarding the application of specific laws. The reports should clarify to what extent the committees have managed to resolve the issues of inconsistency of the underlying statutes through resort to legal rules of restructuring and what are the remaining issues, which need to be resolved through legislative intervention. In other words the reports should state the legal status of the laws and their enforceability according to standard rules of interpretation; and propose amendments to existing laws in order to satisfy the economic and social policies of the country. Of course, the latter determination is a matter of administrative and economic policy, that needs to be initiated by the Executive power of the country.

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