

**DUALITY OF THE BRUNEI LEGAL SYSTEM: EFFECTIVENESS OF  
LEGISLATIVE DRAFTING PROCESS OF *SYARIAH* LEGISLATION**

LLM in ADVANCED LEGISLATIVE STUDIES

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## 1. Introduction

Brunei's legal system has developed "along the lines of the English legal system"<sup>1</sup> due to its special relationship with Great Britain<sup>2</sup>. This relationship started in 1847 with the signing of Treaty of Friendship and Trade, followed by the signing of the 1888 Agreement which made Brunei a Protectorate State. The appointment of the British Resident in 1906 as well as the introduction of the Courts Enactment of 1906 has "brought in English common law and legislation in addition to that from the Indian Continent"<sup>3</sup>. As far as legal system is concerned, it was from this moment that Brunei's legal system becomes a dual legal system.<sup>4</sup> Prior to that, historical sources have shown that the legal system in Brunei mainly consist of customs, *syarak* and *kanun*.<sup>5</sup> Evidence of this could be seen in the *Hukum Kanun Brunei*, a 'digest' containing laws relating to customs, Islam and public.<sup>6</sup> The introduction of the British residential system therefore marks the start of the two legal systems, the Islamic legal system which is derives from the Islamic religion and the common law system which is derives from the English legal system, each having its own separate judicial systems.<sup>7</sup> In 1908<sup>8</sup>, an amendment to the Courts Enactment of 1906 brought about the constitution of five courts for the administration of civil and criminal justice into the country.<sup>9</sup> This resulted in

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<sup>1</sup> Ahmad Basuni Haji Abbas and Dy Hasnah Hassan, 'The Legal System of Brunei Darussalam' in ASEAN Law Association (ed), *ASEAN Legal Systems* (Butterworths Asia 1995)3

<sup>2</sup> Pengiran Bahrin bin Pengiran Haji Abbas, 'Perlembagaan Negeri Brunei' in *Sari Pembangunan* (Bil.1, Bahagian Penerangan, Jabatan Setiausaha Kerajaan, Brunei 1974)21; Awang Abas Bin Haji Serudin, *Hubongan Brunei/Great Britain* (Bahagian Penerangan, Jabatan Setiausaha Kerajaan, Brunei, 1982)2-3

<sup>3</sup> Haji Abbas and Hassan (n1)

<sup>4</sup> Yang Berhormat Datin Seri Paduka Hajah Hayati Binti Pehin Orang Kaya Shahbandar Dato Seri Paduka Haji Mohd Salleh, 'Ke Arah Pelaksanaan Undang-Undang Syariah Dari Perspektif Pelembagaan Negara Brunei Darussalam' (Seminar Antarabangsa Perundangan Islam *International Seminar On Islamic Law*, 12-14 Oktober 2011)4

<sup>5</sup> Siti Zaliha Haji Abu Salim, "Hukum Kanun Brunei" (1997) Bil.54 Beriga 19

<sup>6</sup> Matassim Hj. Jibah, "Chatatan Mengenai Hukum Kanun Brunei" (1980) Jilid 15 Bil.33 Bahana 45, 52

<sup>7</sup> Pehin Orang Kaya Shahbandar Dato Seri Paduka Haji Mohd Salleh, 'Ke Arah Pelaksanaan Undang-Undang Syariah Dari Perspektif Pelembagaan Negara Brunei Darussalam' (n4)

<sup>8</sup> Enactment No.1 of 1908 read together with Enactment No.VII of 1920

<sup>9</sup> Haji Abbas and Hassan (n1)

significant reduction in application of the Islamic laws from its previously wide application to those only concerning Islamic religion, marriage and divorce.<sup>10</sup>

The proclamation of the Constitution of Brunei Darussalam<sup>11</sup> is extremely important in this respect as it has raised the position of Islam as the official religion of the country. Though duality of the legal system is not expressly provided in the Constitution, by having specific provisions concerning the official religion and His Majesty the Sultan as the Head of the Islamic Religion<sup>12</sup> form an important basis for the duality<sup>13</sup>. The Constitution further provides that His Majesty may make laws in respect of matters relating to the Islamic Religion<sup>14</sup>. As such, the Religious Council<sup>15</sup> plays a vital role being the authority responsible for advising His Majesty the Sultan on all matters relating to the Islamic Religion and this includes its advisory role to His Majesty the Sultan when His Majesty exercises the power to make laws in respect of matters relating to the Islamic Religion.<sup>16</sup> Keeping that in mind it is essential to mention two essential provisions in the Constitution concerning authorities which have powers to make laws in Brunei. Firstly, the Legislative Council<sup>17</sup> and secondly, His Majesty the Sultan<sup>18</sup>. It should be noted that currently all laws except the Supply Bill are made by the latter and this include all *syariah*<sup>19</sup> legislation. For the purpose of this dissertation, my focus will be on the drafting process particularly of *syariah* legislation.

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<sup>10</sup> ibid 5

<sup>11</sup> Brunei Constitutional Documents, The Constitution of the State of Brunei, 1959, Government Press, Kuala Lumpur, 1960, 9

<sup>12</sup> Laws of Brunei, Constitutional Matters I, Constitution of Brunei Darussalam, Revised Edition 2011, Articles 3 (1) & (2) (Constitution)

<sup>13</sup> Pehin Orang Kaya Shahbandar Dato Seri Paduka Haji Mohd Salleh, 'Ke Arah Pelaksanaan Undang-Undang Syariah Dari Perspektif Pelembagaan Negara Brunei Darussalam' (n4)

<sup>14</sup> Constitution, Article 3(4)

<sup>15</sup> Constituted under Part II of the Religious Council and Kadis Courts Act (Chapter 77)

<sup>16</sup> Constitution, Articles 3(3)&(4)

<sup>17</sup> Constitution, Article 39

<sup>18</sup> Constitution, Article 83(3)

<sup>19</sup> '*shar'* (or *shariah*) literally means "the way to follow". It is one aspect of the Islamic religion where it specifies how Muslim should conduct himself in accordance with his religion without making any distinction in principle between duties towards others and those towards God. Rene David and John E.C. Brierley, *Major Legal Systems In The World Today: An Introduction To The Comparative Study Of Law* (2nd edn, The Free Press

Discussion on the legislative drafting process of *syariah* legislation is not complete without mentioning the Islamic Legal Unit, a department under the Ministry of Religious Affairs which is responsible amongst others to prepare draft proposals or drafts *syariah* legislation either upon its own initiatives or upon instruction or advice from the Religious Council.<sup>20</sup> The legislative drafting process of *syariah* legislation involve mainly the Religious Council and the Islamic Legal Unit as instructing authorities on one hand and the Attorney General's Chambers as drafters on the other hand.

When talking about effectiveness, although it usually refers to legislation as a product and not the process, there is undoubtedly a very close link between the two. In the sense of capable of producing effective legislation, it is imperative that the legislative drafting process for achieving this effective legislation is also effective. Thus, against the canvas of the duality of the legal system in Brunei, this dissertation examines how effectiveness of the process of drafting legislation is important in producing uniform and quality legislation particularly *syariah* legislation.

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1978)421; spelling of *syariah* is made consistent with the spelling used in legislation in Brunei see *Syariah Courts Act* (Chapter 184)

<sup>20</sup> Kementerian Hal Ehwal Ugama, '*Unit Perundangan Islam*' <[http://religious-affairs.giv.bn/index.php?ch=bm\\_about\\_div&\\_undang&ac=1428](http://religious-affairs.giv.bn/index.php?ch=bm_about_div&_undang&ac=1428)> accessed 16 July 2014

## 2. Hypothesis and Methodology

This dissertation asserts that effectiveness of process of drafting legislation in a country with dual legal system is important in order to achieve uniformity and quality of legislation with particular reference to the drafting of *syariah* legislation. It asserts that despite the duality in the legal system any instruction to draft *syariah* legislation which in the current practice comes in a form of draft is considered as a lay draft. It is considered as such even though it is received from the Religious Council which is the highest authority with regards to Islamic religious matters. It is therefore important that draft *syariah* legislation must go through the same five main stages of drafting as laid down by Thornton in order to achieve effectiveness in the legislative drafting process of the *syariah* legislation towards achieving uniformity in and quality of *syariah* legislation.

The five main stages of drafting as mentioned by Thornton's<sup>21</sup> will be used to achieve effectiveness in the process of drafting *syariah* legislation and so the five chapters in this dissertation contain those five stages. In the next chapter is the first out of the five stages of the drafting process which is understanding an instruction. Two main issues are usually encountered at this stage: firstly regarding good drafting instructions with particular focus on instructions to draft *syariah* legislation and secondly on consultation whereby communication barrier between drafter and policy maker is a unique issue when drafting *syariah* legislation. In this chapter I will discuss a common issue faced by drafters when drafting legislation which is to convince instructing authority in finding alternative solution, other than legislation, to deal with the problem they are trying to overcome. One of the difficulties is at the stage when a drafting instruction or an initial draft is submitted to the Attorney General's Chambers, the instructing authority usually would have made some kind of commitment, either to authority above them or to the public, of their plan to legislate on certain matters. It

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<sup>21</sup> Prof Helen Xanthaki (ed), *Thornton's Legislative Drafting* (5<sup>th</sup> edn, Bloomsbury 2013)145

would be hard for them to back out from that commitment thus forcing the drafter either to try harder to convince them or just follow the instruction. This issue is dealt with in Thornton's third stage of drafting however in an effort to achieve effectiveness of the drafting process of *syariah* legislation I believe this matter should be dealt with at the earliest possible stage hence I am putting it at this stage.

The second chapter will discuss the second stage of Thornton's drafting process. In order to achieve effectiveness of the legislative drafting process of *syariah* legislation analysis should be made in relation to: (1) existing law (2) special responsibility areas, and (3) practicality. Some issues relating to the above matters is discussed.

Upon understanding and analysing the proposal to draft legislation, the next chapter will discuss the third stage of the drafting process: design. One challenging issue is regarding the first step recommended by Thornton that is to consider whether legislation is necessary. On this issue, discussion from the first chapter with regards complexity faced by drafter to advise instructing authority against legislating due to external factors faced by the instructing authority themselves continue. After deciding that legislation is indeed necessary then the next step is to prepare an outline or framework of a draft and in doing so four main factors will be considered. Sharing and considering the basic framework of a draft, including matters problematic to the draft, with the instructing authority would give them an overall view of the draft in particularly its viability.

The fourth chapter is on composition and development which is the fourth stage of Thornton's drafting process. It is the stage where focus of a drafter is on essential substantive matters in giving effect to the drafting instructions. In this chapter some substantive issues such as definition, use of supplementary aids and use of precedents, which drafter of *syariah* legislation will develop in order to enhance the quality the legislation is discussed.



In the last chapter is the fifth and the last stage of Thornton's drafting process. At this stage a draft must be scrutinised and tested first by drafter, the instructing authority and in some circumstances by other interested parties. Like any other drafts, scrutiny and testing of *syariah* draft legislation is done to see whether it has achieved its objective, it forms an integral part of the statute book, it complies with the basic principles of both the legal systems, it has good and coherent structure which allows material to flow in logical sequence and the content and the language are clear and comprehensible in both the English and Malays versions of the texts. The advantage for a *syariah* draft at this stage is seen with regards to the position of the Religious Council as, what Thornton would say as, "users" who are the most appropriate persons for this task.

A conclusion will be drawn from all the discussions to my hypothesis that uniformity and quality of legislation, particularly *syariah* legislation, in a country with dual legal system are achievable through effectiveness of the legislative drafting process.

### 3. Chapter 1 - Understanding

The first step for a drafter in a drafting process according to Thornton is to have “a thorough and complete understanding of the purpose of the required legislation”.<sup>22</sup> This is equally important when drafting *syariah* legislation. In order to achieve such understanding drafter needs good drafting instructions from, and engage in consultation with, their client.

#### 3.1. Good Drafting Instructions

Good drafting instructions are important and deem to have been achieved if it enable drafters to identify four key information which are needed in order to understand the issue faced by the instructing authority. The key information required are: background knowledge of the problem, purposes of the proposed legislation, means of achieving that purpose and impact of the proposed legislation on existing circumstances and law.<sup>23</sup> In acquiring good drafting instruction, the drafter must not simply assume that instructing authority know what kind of instructions are expected particularly if they are not familiar with the process of drafting legislation<sup>24</sup>. Having said so it does not mean that a drafter needs to tell their client what information should be given rather it is sufficient to give them guidelines of what information are needed to understand their problem. In this regards, the Attorney General’s Chambers has published a Drafting Instructions Handbook<sup>25</sup> aimed to assist departments and ministries in preparing their instructions to drafters in the Chambers. Despite the argument for or against having a drafting manual<sup>26</sup>, it is nevertheless hoped that the Handbook will prove to be a useful for those concerned with the preparation of drafting instructions which “would

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<sup>22</sup> Xanthaki, *Thornton’s Legislative Drafting* (n21)146

<sup>23</sup> Ibid 148

<sup>24</sup> Xanthaki, *Thornton’s Legislative Drafting* (n21)146

<sup>25</sup> (Attorney General’s Chambers, Brunei Darussalam 2013)

<sup>26</sup> Ronan Cormacain, ‘An Empirical Study Of The Usefulness Of Legislative Drafting Manuals’ (2013) Vol.1 No.2 *The Theory and Practice of Legislation* 205

ultimately aid this Chambers' legislative draftspersons to draft legislation that are of the highest standard and quality.”<sup>27</sup>

As far as *syariah* legislation is concerned instruction to draft comes from the Religious Council. Unlike other non-*syariah* legislation where instruction comes from relevant ministry from amongst the ministries in Brunei, instruction to draft *syariah* legislation does not come from the Ministry of Religious Affairs. This arrangement is not at all unusual because although “policy initiation is usually the domain of the executive (government)” there are also other bodies which, depending on the jurisdiction, are specifically allowed to do so.<sup>28</sup> One such body in Brunei is the Religious Council due its position and that of the Islamic Religion as provided in the Constitution. The Religious Council is responsible in formulating policy to determine the course of the administration of Islamic Religion in the country whereas the Ministry of Religious Affairs acts as its implementing arm and supporter for such policy.<sup>29</sup> The Islamic Legal Unit plays a role which, as I will explain later when discussing about consultation, the Chambers will have more interaction with during the course of the drafting process. Since preparing draft proposal upon instruction and advise of the Religious Council is one of their main duties it is therefore not surprising that a drafter in the Chambers will receive a form of draft as an instruction to draft *syariah* legislation. This practice is actually uncommon considering most drafting instructions which the Chambers have received from other ministries are also in such form.<sup>30</sup> Although the Handbook does not specify a

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<sup>27</sup> Attorney General's Chambers 'Drafting Instructions Handbook' (n25) Foreword

<sup>28</sup> Constantin Stefanou 'Drafters, Drafting and the Policy Process' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008)321,324

<sup>29</sup> Ministry of Religious Affairs, 'Jabatan Majlis Ugama Islam' <[http://www.religious-affairs.gov.bn/index.php?ch=bm\\_muib&pg=bm\\_muib\\_profil&ac=1044](http://www.religious-affairs.gov.bn/index.php?ch=bm_muib&pg=bm_muib_profil&ac=1044)> accessed 17 July 2014; there are however instances where instructions come from the Ministry

<sup>30</sup> Brunei Darussalam is not the only jurisdiction which has encountered this see the Malaysian experience in Rosmizan Muhamad, 'Instruction to Draft Legislation: A Study on the Legislative Drafting Process in Malaysia' (2011) 13 E.J.L.R 236

single form in which drafting instructions must take<sup>31</sup>, a narrative form of drafting instruction which is accompanied with supporting documents are normally expected<sup>32</sup>. The Handbook emphasise on a written initial drafting instructions whilst the Privy Council Office of Canada asserts on clarity and conciseness.<sup>33</sup> Others however have a firm stance that “instruction should not be in the form of a bill”<sup>34</sup> that it is “not welcome”<sup>35</sup> nor should it be “tolerated”<sup>36</sup>. One of the main reasons why instruction in a form of draft is not preferred is because it conceal the problem and its remedy from the drafter<sup>37</sup> from finding the principal objective intended to be achieved as they are lost amongst the wordings of the proposed draft. The proposed draft would tell the drafter the means of achieving the objective but does not express the objective itself. A narrative form of instruction instead serve as a specification needed of the desired legal outcomes to test the draft (which the drafter will prepare later on) against.<sup>38</sup>

Despite the argument against using narrative instruction, the Attorney General’s Chambers does not prohibit instructing authority from submitting an initial draft as it is a helpful and coherent way for them to think of their policy and administrative details.<sup>39</sup> Prohibiting instructing authority from giving this kind of instruction “do not consider the department’s

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<sup>31</sup> Attorney General’s Chamber ‘Drafting Instructions Handbook’ (n25)9; see Privy Council Office Canada ‘Guide to Making Federal Acts and Regulations: Part2–Making Acts–2.3 Preparation and Cabinet Approval of Bills’ (12 May 2009)

<<http://www.pco.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=legislation/chap2.3-eng.htm>> accessed 4 November 2013;

<sup>32</sup> Attorney General’s Chambers ‘Drafting Instructions Handbook’ (n25)9

<sup>33</sup> *ibid*; Privy Council of Canada (n31); New Zealand Parliamentary Counsel Office, *Guide to working with the Parliamentary Counsel Office* (3<sup>rd</sup> edn, National Library of New Zealand Cataloguing-in-Publication Data 2013)

<sup>34</sup> Privy Council Office Canada (n31)

<sup>35</sup> UK Office of the Parliamentary Counsel *Working With Parliamentary Counsel* (6 December 2011)

<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/62668/WWPC\\_6\\_Dec2011.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62668/WWPC_6_Dec2011.pdf)> 34

<sup>36</sup> Xanthaki, *Thornton’s Legislative Drafting* (n21)147

<sup>37</sup> *ibid*

<sup>38</sup> Stephen Laws ‘Developing a drafting policy: Balancing the audiences’ (Class lecture for LLM in Advanced Legislative Studies class 2013-2014 at the IALS delivered on 6 December 2013)

<sup>39</sup> Attorney General’s Chambers ‘Drafting Instructions Handbook’ (n25)9

needs or the quality of the information provided as instruction”<sup>40</sup> particularly from instructing authority like the Islamic Legal Unit which are experienced in the legislative drafting process of *syariah* laws. By means of writing “...language is something more than the tool of thought. It is part of the process of thinking.”<sup>41</sup> As a proponent of writing as thinking, Dickerson observes an intimate connection between conceptualising and verbalising and sees it as a two way street.<sup>42</sup> In the course of writing, the draft sort of “talk back” to the instructing authority resulting in more questions to arise and these questions need deep thinking not necessarily to find the answers since some questions require expert opinions but rather to consider all aspects. In preparing draft *syariah* proposal, the Islamic Legal Unit will have opportunity to deeply think about the policy which the Religious Council has instructed them to incorporate into the draft and would be assumed to have the opportunity to raise any questions or issues directly to the Religious Council which initiated the policy.

### **3.2. Consultation**

The second important thing in gaining understanding of a legislative proposal after receiving a drafting instruction is to have “a thorough and wide-ranging discussion” concentrating on gaining comprehensive understanding of what the instructing authority “has in mind and wants”.<sup>43</sup> Consultation is even more important when such drafting instruction is in a form of draft because after reading it a drafter would usually have preliminary questions, need clarification and confirmation whether their understanding of the initial draft is the same as those understood and meant by the instructing authority. In particular, the policy objective

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<sup>40</sup> David C.Elliot, ‘Getting better instruction for legislative drafting’ (Pre-conference Clinic on Just Language Conference on Writing Laws, Victoria, British Columbia 21 October 1992)1, 11

<sup>41</sup> Ibid

<sup>42</sup> Reed Dickerson ‘Legal Writing: Writing as Thinking, or, Talk-Back from Your Draft and How to Exploit It’ in Reed Dickerson *Materials and Legal Drafting* (West Publishing Company 1981)99-100

<sup>43</sup> Xanthaki, *Thornton’s Legislative Drafting* (n21)151

and the intended changes in law.<sup>44</sup> Identifying the policy objective enables assessment of whether the requested changes in law will achieve the objective or if an alternative could be suggested instead. Assessment on the intended changes needs to concentrate first on the substance before considering the form.<sup>45</sup> This is quite challenging but prove to be an indispensable thing to do especially for instructions in a form of draft proposal because the form will obviously be the first thing a drafter will encounter. It is crucial that drafter be engaged so any difficulties in the policy which could be an impediment to proper understanding of the proposal could be trash out as early as possible hence the significance of consultation at this stage.<sup>46</sup> If drafting is a form of communication<sup>47</sup> then it is imperative that the policy and intended changes in laws are communicated through good drafting instructions and consultation. Consultation is defined as “1. The act of asking the advice or opinion of someone (such as a lawyer). 2. A meeting in which parties consult or confer. ...”<sup>48</sup> so for consultation to take place fruitfully instructing officers must be of “sufficient knowledge to help the drafters by clarifying issues and answering their questions in order to see the proposal from proper perspective and thus to ensure the bill will be right.”<sup>49</sup> The Handbook when emphasising on “effective instructing officer” states that without “sufficient understanding or seniority to give instructions, valuable time and resources may be wasted”.<sup>50</sup>

The above same rules applies to the legislative drafting process of *syariah* legislation for it to be effective. However, in order for a drafter to get understanding of the proposal to draft *syariah* legislation especially upon receiving drafting instruction in a form of draft, one issue

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<sup>44</sup> Cabinet Office ‘Guide to Making Legislation’ (Cabinet Office July 2014)60<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/328408/Guide\\_to\\_Making\\_Legislation\\_July\\_2014.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/328408/Guide_to_Making_Legislation_July_2014.pdf)> accessed 21 July 2014

<sup>45</sup> Ibid

<sup>46</sup> Joseph G.Kobba ‘Criticisms of the Legislative Drafting Process and Suggested Reforms in Sierra Leone’ 10 [2008] E.J.L.R 219,230

<sup>47</sup> Constantin Stefanou ‘Drafting as a form of Communication’ (2011) Vol.37, Issue 3, Commonwealth Law Bulletin 308

<sup>48</sup> Black A.Garner, *Black’s Law Dictionary* (4th Pocket Edition, West, 2006)

<sup>49</sup> Mico Augustin, ‘The Drafter’s Role in the Drafting Process’ [2013] 15 E.J.L.R 177, 185; see also Kobba(n46)

<sup>50</sup> Attorney General’s Chambers ‘Drafting Instructions Handbook’ (n25)7; see also Kobba (n46)231

which the drafter will encounter is the communication barrier between them and the policy maker. What is meant by barrier is more on layers of policy officers. A drafter normally only has access to the first or lower layer of the policy officer. Two examples of such layers will be given to illustrate this point. Before explaining further it is important to note that despite calling it barrier does not mean that it is a negative thing altogether, as explained later it could actually be a positive thing.

Example 1: drafter ↔ Islamic Legal Unit ↔ Religious Council

Example 2: drafter ↔ ad-hoc committee ↔ main committee ↔ Religious Council

The first example illustrates the most common pattern of consultation in the course of drafting *syariah* legislation. The barrier is the layer between the drafter and the Religious Council where there is no direct consultation between any of its members and the drafter. At this stage and throughout most of the drafting process the drafter would liaise with relevant officers from the Islamic Legal Unit because they are the ones who prepared the initial draft which was received as part of the drafting instruction from the Religious Council. The second example is an illustration of two layers of policy officers where a drafter would be liaising with an ad-hoc committee<sup>51</sup> which has been set up to deal specifically with a particular issue. The ad-hoc committee will work under the instruction of a main committee<sup>52</sup> which is established specifically for a particular task.

As mentioned earlier, this is not necessarily a negative aspects for the drafting process because direct consultation with these officers is undoubtedly beneficial to understanding the draft proposal from those who prepared the draft thus giving the drafter better understanding of the drafting instruction. Not having a direct contact might not necessarily be a negative

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<sup>51</sup> eg an ad-hoc committee which is set up to deal with proposed amendments to the Syariah Courts (Syar'ie Lawyers) Rules, 2002 (S 34/02)

<sup>52</sup> eg the Syar'ie Lawyers Committee established under r3 of the Syariah Courts (Syar'ie Lawyers) Rules, 2002 to deal with matters relating to Syar'ie Lawyers

thing because it would just mean giving both the Islamic Legal Unit and the Religious Council opportunity to resolve any policy issues which might arise without drafter's involvement. Similarly it is also beneficial for a drafter to have a direct consultation with the ad-hoc committee because the ad-hoc committee usually comprise not only officials which will actually implement the draft proposal but also other interested parties.

Drafters non-involvement do not mean they are only concern with form and not policy or substance because that would be as if enforcing an approach which some experts have exposed as 'myth'<sup>53</sup> with adverse consequences towards policymaking.<sup>54</sup> Instead it lets the drafter to 'stand back'<sup>55</sup> allowing discussion of purely internal policy matters to take place.

So what are the issues with having this barrier if it gives drafter direct access to the officers at the Islamic Legal Unit? One major problem would be, despite the Unit carries the responsibility of preparing the initial draft and has perhaps heavily influenced the input as Tommy Neal has clearly puts it, the ultimate policy decision is still in the hands of the elected officials.<sup>56</sup> In the context of the legislative drafting process of the *syariah* legislation even though members of the Religious Council are not elected they are indeed specially appointed by His Majesty the Sultan.<sup>57</sup> As such, as knowledgeable as the officers at the Islamic Legal Unit are, ultimately decision rests with the Religious Council which is rightly the Religious Adviser for matters concerning the Islamic Religion including policy formulation for *syariah* legislation. In that sense by having access to only the first layer and with the limitation which the Islamic Legal Unit has would be a slight hindrance for the drafter in understanding the policy objective behind the proposal. Another issue would be the inability to consult the

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<sup>53</sup> Stefanou 'Drafters, Drafting and the Policy Process' (n28)321

<sup>54</sup> Ann Seidman, Robert Seidman and Nadin Abeyeskere, *Legislative Drafting for Social Change* (Kluwer Law International 2001)32-34

<sup>55</sup> Geoffrey Bowman, 'Why is there Parliamentary Counsel Office?\*(2005) 26(2) Stat L.R 69, 72

<sup>56</sup> Stefanou 'Drafters, Drafting and the Policy Process' (n28)324

<sup>57</sup> Ministry of Religious Affairs, 'Jabatan Majlis Ugama Islam' <[http://www.religious-affairs.gov.bn/index.php?ch=bm\\_muib&pg=bm\\_muib\\_profil&ac=1043](http://www.religious-affairs.gov.bn/index.php?ch=bm_muib&pg=bm_muib_profil&ac=1043)> accessed 24 July 2014



relevant officer who did the research for reasons such as their transfer to other departments. There are definitely documentations in the office file concerning the draft however any officer taking over that matter would need some time to understand it. The time taken by the Islamic Legal Unit to confer any matter to the Religious Council in addition to perhaps the time needed for newly assigned officer to understand a drafting proposal would indeed cause unwanted delay.

Apart from these two main issues, there is another common issue faced by drafters when drafting either *syariah* or non-*syariah* legislation which is to convince instructing authority that there are other ways to deal with their problem other than legislation. One of the difficulties is that at this stage when an initial draft or a drafting instruction is submitted to the Attorney General's Chambers, the instructing authority usually have made commitment, either to their higher authority or to the public, about their plan to legislate as a way to solve the matter at hand. By making such commitment it is hard for them to back out from it thus making it harder for the drafter to convince them against legislating. Thornton has actually suggested for consideration on whether to legislate or not to be done during the third stage of the drafting process however in an effort to achieve effectiveness, particularly in the process of drafting *syariah* legislation, I believe this matter should be dealt at the earliest possible stage. It is in fact encouraged to be done "at an early stage in the policy chain"<sup>58</sup> as visualised in a workflow on law-making process in Brunei Darussalam<sup>59</sup> before it reaches a more advanced stage of the drafting process.<sup>60</sup> This matter however will be discussed again during the third stage of the drafting process.

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<sup>58</sup> Rob Van Gestel\* and Marie-Claire Menting<sup>†</sup>, 'Ex Ante Evaluation and Alternatives o Legislation: Going Dutch?' (2011) 32(3) Stat L.R 209, 213 (In regards to *syariah* legislation it would be at the stage when policy is being formulated by the Religious Council)

<sup>59</sup> 'Law-Making Process' <<http://www.agc.gov.bn/agc1images/stories/Publication/lmp.pdf>> accessed 2nd August 2014

<sup>60</sup> Gestel and Menting (n58)214

#### 4. Chapter 2 - Analysing

After understanding a draft proposal, the second stage of the drafting process is to analyse it. According to Thornton, in order to achieve effectiveness of the legislative drafting process analysis should be made in relation to: (1) existing law (2) special responsibility areas, and (3) practicality.<sup>61</sup>

##### 4.1. Existing legislation

Careful analysis of existing law is important because every new laws which are added to those existing ones are regarded as amendment since the “written law and common law in force at a particular time in a society are regarded as a coherent law”.<sup>62</sup> It is important to keep this in mind when drafting *syariah* legislation because coherence are asserted not only within existing *syariah* legislation but also with other laws of the country. Upon recognising its amending nature, four major considerations in drafting amending legislation come to mind.<sup>63</sup> One of those considerations are comprehensive acquaintance by the drafter of the whole of the Act that is to be amended and with other pertinent laws.<sup>64</sup> Applying that principle to the task of drafting new laws, relevant written laws, common laws and case law need to be studied.<sup>65</sup> How is that principle applicable to the process of drafting of *syariah* legislation? Studying relevant written laws might not be a major problem especially with available online database of laws<sup>66</sup> except drafters will encounter difficulty with regards to laws which are not up to date. Unlike the English legal system, the doctrine of judicial precedent does not play a binding role in *syariah* court instead it only plays a guiding role as there is no express

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<sup>61</sup> Xanthaki, *Thornton's Legislative Drafting* (n21)151

<sup>62</sup> Ibid

<sup>63</sup> Ibid 497-499

<sup>64</sup> Ibid 497

<sup>65</sup> Ibid 152

<sup>66</sup> Can be accessed on [www.agc.gov.bn](http://www.agc.gov.bn)

prohibition against using it.<sup>67</sup> A judge decides a case according to its merit. In this respect, comparison may be made to the civil law system where the “doctrine of stare decisis does not apply to civil law courts”. Having said that “it is generally recognized that courts should take into account prior decisions,...”.<sup>68</sup> As such, a drafter could refer to cases decided in *syariah* courts when analysing *syariah* draft proposal because whether precedents are binding or not “judges in all legal systems are aware that the need of reasonable certainty and predictability requires that like cases be treated alike.”<sup>69</sup> Unfortunately for drafters, it will still be quite challenging to do so due to the difficulty in accessing such cases because at the moment, Brunei’s *Syariah* Subordinate Courts cases are either not reported or if it is reported it is not publish.<sup>70</sup>

Another issue with analysing *syariah* draft proposal is ensuring as much “consistency of language”<sup>71</sup> as possible with existing legislation. The “authoring process”<sup>72</sup> for both non-*syariah* and *syariah* legislation are similar however the language used when negotiating and discussing the two types of legislation are quite the opposite because non-*syariah* legislation are often drafted in English whereas *syariah* legislation are “initially prepared, discussed and reviewed in the Malay language”.<sup>73</sup> Translation for both types of legislation (to the Malay or English language respectively) will be prepared after the draft legislation has been finalised. Translation is important because the Constitution provides that “An official version in the English shall be provided of anything which, by this Constitution or by any written law or by the Standing Orders, is required to be printed or in writing, and such version shall, in addition

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<sup>67</sup> Kyaw Hia Win@Md.Hassan Ahmed, Sa’id Adekunie Mikail and Dr.Mahamad Arifin, ‘Application Of Doctrine Of Judicial Precedent In *Shariah* Courts’ (2013) Issue 2 Malaysian Court Practice Bulletin

<sup>68</sup> Caslav Pejovic, ‘Civil Law And Common Law: Two Different Paths Leading To The Same Goal’ (2001) 32 VUWLR 817, 821

<sup>69</sup> Ibid 838

<sup>70</sup> Except for a few cases which are published by the Language and Literature Bureau in the *Jurnal Undang-Undang Syariah*.

<sup>71</sup> Xanthaki, *Thornton’s Legislative Drafting* (n21)152

<sup>72</sup> Donald L.Revell, ‘Bilingual Legislation: The Ontario Experience’ (1998) 19(1) Stat L.R 32, 34

<sup>73</sup> Norismizan Haji Ismail, ‘Bilingual Legislation: The Consistency Between Two Languages Of A Law’ (LLM thesis, Institute of Advance Legal Studies 2012)14

to the official Malay version, be accepted as an authentic text.”<sup>74</sup> It further provides that in case any doubt, conflict or discrepancy between the Malay and the English texts, the Malay text will prevail.<sup>75</sup> Even though the Malay language is the language of the *Syariah* Court<sup>76</sup>, English translation of *syariah* legislation must still be prepared because the relatively up-to-date version of the Laws of Brunei are only available in English text. Currently, anyone wishing to refer to any legislation including *syariah* legislation which have not undergone revision process will have to refer to the particular Order in the year in which it was published.<sup>77</sup>

#### 4.2. Special responsibility areas

Although policy is not of primary concern to drafters, it does not mean that they should just “wash their hands of it”<sup>78</sup> as they are the ones who will “translate instruction or broad ideas into actual draft”<sup>79</sup>. Talking about why is there a Parliamentary Counsel Office, Bowman wrote about the vital analytical function of the drafter in particular their capacity to stand back and question everything.<sup>80</sup> This is something which an instructing officer could not properly do, not because they are not capable but because of their close involvement with the policy that they would not be able to approach a draft with a fresh and independent eye.<sup>81</sup> A drafter on the other hand have this advantage but with it a special responsibility.<sup>82</sup> Though it is true that drafters ‘like other civil servants involved in policy work “have no formal existence independent of those they serve”’ one significant difference between drafters and

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<sup>74</sup> Constitution, Article 82(2)

<sup>75</sup> Constitution, Article 82(3)

<sup>76</sup> *Syariah Courts Act* (Chapter 184), s9(2)

<sup>77</sup> Both Act and Order have similar legal effect despite different names given to them due to the different authorities that made them

<sup>78</sup> Xanthaki, *Thornton’s Legislative Drafting* (n21)152

<sup>79</sup> Stefanou ‘Drafters, Drafting and the Policy Process’ (n28)325

<sup>80</sup> Bowman, ‘Why is there Parliamentary Counsel Office?’\* (n55)

<sup>81</sup> *Ibid*

<sup>82</sup> Xanthaki, *Thornton’s Legislative Drafting* (n21)152

‘departmental civil servants’ is that drafters do not directly serve a particular Minister.<sup>83</sup> Similarly, drafters in Brunei are under the Attorney General’s Chambers and are independent from any other ministries. In the process of drafting *syariah* legislation, the drafters are also independent from the Religious Council. This is quite the opposite of the Islamic Legal Unit, although not quite directly under the Religious Council the Unit does receive instruction from it. Hence, although it is good for drafters to be part of a drafting team the drafter’s need to retain their independence are usually valued by the instructing officers<sup>84</sup> especially when they want the drafters to support them in persuading the authority above them on certain matters.

Although drafters are not involved in policy pronouncement, at this stage critical analysis of draft proposal must be looked at within the following areas of potential danger listed by Thornton which affect personal rights of individual, the private property rights, the power of the executive to impose taxation, retrospective legislation, international obligations and standards, territorial or constitutional competence and prerogative or executive powers and bureaucracy.<sup>85</sup> Drafters, in Brunei which has dual legal system and Islam as the official religion, must have the same ability and shoulder the special responsibility to see this further in both the legal systems. The Handbook recognises the importance of this by listing among others, identification and resolution of constitutional and legal issues, raising questions of fundamental principles of fairness as well as spotting financial and other practical implications, as part of a general guide on the responsibilities of drafters.<sup>86</sup> For non-*syariah* legislation, drafters need to ensure provision in such legislation does not contravene *syariah* principle. On the other hand, for *syariah* legislation both drafters and instructing authority need to be concerned with these areas of potential danger particularly those peculiar to

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<sup>83</sup> Edward C. Page, ‘Their word is law: Parliamentary counsel and creative policy analysis’ (2009) PL 790,810-811

<sup>84</sup> Donald L. Revell, ‘Enhancing the Legislative Process: The Value of the Legislative Drafter’ (2011) 32(2) Stat L.R 149, 156

<sup>85</sup> Kooba (n46) 233; Xanthaki, *Thornton’s Legislative Drafting* (n21)153-156

<sup>86</sup> Attorney General’s Chambers, ‘Drafting Instructions Handbook’ (n25)16-17

*syariah* legislation. For example, proposal in which recourse is to be made to the *syariah* courts instead of the ordinary courts,<sup>87</sup> proposal of a discriminatory nature on grounds of religion,<sup>88</sup> sex<sup>89</sup>, age<sup>90</sup> and proposal which would grant power to acquire private property.<sup>91</sup> Provision affecting such rights is not wrong in principle however caution and necessary safeguards are needed when drafting such provision<sup>92</sup>.

### 4.3. Practicality

Lastly analysis of the draft proposal should be made in relation to its practicality. Unlike drafters in civil law jurisdictions, strictly speaking drafters in common law jurisdiction are not directly involved in policy implementation.<sup>93</sup> In addition to that, shortage of time, being one of the constraints in preparing legislation<sup>94</sup> and instructing authority's wish for "rapid legislation"<sup>95</sup> must not be an excuse for drafters not to be concerned with implementation of the draft proposal because one of the precursor of quality legislation is its effectiveness which includes though not limited to implementation, enforcement, impact and compliance<sup>96</sup>. Thus predictability<sup>97</sup> and practicability<sup>98</sup> of the legislative proposal have to be rigorously

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<sup>87</sup> eg provision regarding exclusive jurisdiction of Syariah Courts can be found in several *syariah* legislation eg s6 of the Pawnbrokers Order, 2002 (S 60/02)

<sup>88</sup> eg application provision in which at least one of the parties professes the Islamic religion which can be found in *syariah* legislation eg s5(1) of the Islamic Family Law Act (Chapter 217)

<sup>89</sup> eg restriction for adoption order where an applicant is a male and the child in respect of whom the application is made is a female or vice versa unless the applicant and the child have connections by *nasab* under which they are *haram* to marry forever provided in s8(9)(a) of the Islamic Adoption of Children Act (Chapter 206)

<sup>90</sup> eg restriction for adoption order to be given to applicant who has not attained the age of 25 years *qamariah* and is at least 18 years *qamariah* older than the child unless there is special circumstances for making that order provided in s8(3)(a) of the Islamic Adoption of Children Act (Chapter 206)

<sup>91</sup> eg power of legal guardian, with the leave of the court, over the sale of movable and immovable property provided in s96 of the Islamic Family Law Act (Chapter 217)

<sup>92</sup> Xanthaki, *Thornton's Legislative Drafting* (n21)153

<sup>93</sup> Stefanou 'Drafters, Drafting and the Policy Process' (n28)328

<sup>94</sup> George Engel, "Bills are made to pass as razors are made to sell": practical constraints in the preparation of legislation\*' (1983) Stat L.R.7, 11

<sup>95</sup> Xanthaki, *Thornton's Legislative Drafting* (n21)156

<sup>96</sup> Helen Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test' in Constantin Stefanou and Helen Xanthaki (eds) *Drafting Legislation: A Modern Approach* (Ashgate 2008)1, 6

<sup>97</sup> Kobba (n46)235

<sup>98</sup> David R.Miers and Alan C.Page, *Legislation* (London Sweet&Maxwell 1982)88

considered at this early stage. For instance, draft proposal which would involve significant financial implication must be approved by the Ministry of Finance preferably before drafting instruction is submitted to the Attorney General's Chambers or at least have been referred to the Ministry and are awaiting approval. The instructing authority should not wait until the actual drafting process has started as it would be problematic not just for the implementation of the law but perhaps for it to be enforced if matters as significant as this has not been settled. The instructing authority's understanding of these responsibilities is important as it will lead to the ability of producing sound legislation.<sup>99</sup> Another example would be a proposal to include a provision for appointment of person to a certain post which is to be created under a law, however such post does not exist yet. The problem is not so much in providing for the creation of that post under the law but more towards the nature to which such post is created. Before a post in the government could be created a certain procedure must be followed such as prior approval from the relevant authority and some other matters including finance. Similar to the first instance, it is more appropriate for the necessary procedure and approval to be sought before such provision is requested to be drafted. Lastly in terms of enforceability of the proposed draft it would be obvious to ensure that once it comes into force key factors such as human resources and the necessary subsidiary legislation are ready because otherwise the law could not be properly implemented. How would the instructing authority be able to assist? One valuable assistance is making available to the drafter research report or other form of empirical report (such as working paper) which are usually prepared earlier by the instructing officers for the purpose of acquiring principle approval from their respective authority.<sup>100</sup>

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<sup>99</sup> Attorney General's Chambers, 'Drafting Instructions Handbook' (n25)16

<sup>100</sup> Seidman, Seidman and Abeyeskere (n54)37

## 5. Chapter 3 - Design

Upon understanding and analysing draft proposal, drafters have reached the third stage of the drafting process that is design. As with other draft proposal including a draft *syariah* legislation, it is a common misconception on the part of the instructing authority to think that drafter at this stage has already started drafting. This is more so the expectation especially when the drafting instructions is in a form of draft.

### **Is legislation necessary?**

One important and quite challenging issue to overcome at this stage in view of the above expectation will be in relation to Thornton's proposed first step that is "to consider whether further legislation is in fact necessary or whether the desired ends might not be capable of achievement wholly or in part either by administrative means or under existing legislation."<sup>101</sup>. This matter has been briefly discussed during the first stage when discussing about the challenge faced by the drafter when advising the instructing authority to consider alternative ways other than legislation to achieve their policy. One of the difficulty lies in the fact that the instructing authority has given their commitment either to the authority above them or to the public about legislating. It would be difficult for the instructing authority when they realise that their proposed legislative solution is actually not needed or is not the best solution to their problem. The problem became tougher for the instructing authority if their authority above them is for some reason still adamant about legislating. This is true for any drafts including a *syariah* draft proposal where an initial draft or a policy decision has been decided by the Religious Council. Hence the reason why I have proposed for this to be dealt at the earliest possible opportunity which is during the first stage of the drafting process.

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<sup>101</sup> Xanthaki, *Thornton's Legislative Drafting* (n21)157



However as mentioned earlier and as proposed by Thornton this issue is to be considered at this stage.

### **preliminary design**

It is again worth to consider why legislation is needed because drafter at this stage would have prepared an outline or framework therefore the shape and broad contents of the draft could be visualised.<sup>102</sup> In preparing the preliminary outline or framework of a draft four main factors must be taken into account.<sup>103</sup> First, simplicity of design aimed at achieving the object of the legislative proposal. As much as simplicity of style in technique of drafting is important<sup>104</sup>, likewise is the simplicity of design. As recognised by witnesses to the Renton Committee, in some legislation it is difficult to use simpler words and reasonably short sentences as it is also inevitable to use complex structure. In such cases, drafters must strive to achieve the simplest design as possible in the interest of users of the legislation.

The second factor is in consistently complying with conventional structure of an Act within a jurisdiction. There is no question that *syariah* legislation must be arranged similar to any other Acts. Drafters dealing with *syariah* legislation however needs to be reminded because some of the initial drafts they received seems inclined towards arrangement or index in books particularly Arabic books. The problem with this kind of arrangement is it attract user's attention away from substantive matters which are the main message of an Act. As a general rule, substantive provisions which is 'the rules of law to be observed' must be laid down first and then 'to state the authorities by which they are to be administered' before proceeding with provision stating 'the procedure to be followed in administering' that substantive

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<sup>102</sup> Xanthaki, *Thornton's Legislative Drafting* (n21)157

<sup>103</sup> Ibid 158

<sup>104</sup> Report of a Committee Appointed by the Lord President of the Council, *The Preparation Of Legislation* (Cmnd. 6053, May 1975)61

provision.<sup>105</sup> What is conventional to a jurisdiction is different to another however the key is consistency within a jurisdiction<sup>106</sup> regardless of the legal system. A user of legislation whom might not be familiar with *syariah* legislation would be able to easily know where to look for particular provision due to the certainty in its layout afforded by the consistent design<sup>107</sup>. A simple example with regards to current design of *syariah* legislation in Brunei is the location of definition provision is at the beginning of an Act as oppose to the end as practiced in the United Kingdom.<sup>108</sup> As for arrangement of the definitions the normal practice is to arrange it alphabetically<sup>109</sup> in both the English and the Malay texts instead of the previous practice where the definitions in the translated version of an Act follows the arrangement of the definitions of the version which is being translated. The result is non-alphabetically arranged definitions in the translated version.<sup>110</sup>

The third factor is illustrated in the famous quote by Lord Thring “that Bills are made to pass as razors are made to sell”.<sup>111</sup> With regards to draft *syariah* legislation, even before its signification or assents by His Majesty the Sultan of Brunei Darussalam<sup>112</sup> any drafts prepared by the drafter will, first go through the Islamic Legal Unit for their consideration before going through the Religious Council, or first go to an ad-hoc committee and then to the Committee for consideration before it finally go through the Religious Council. In the current legislative process, after going through all those layers the drafts still have to go

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<sup>105</sup> Courtenay Ilbert, *Legislative Methods and Forms* (first published Oxford At The Clarendon Press 1901, Nabu Press 2011)245

<sup>106</sup> Kobba (n46)237

<sup>107</sup> Commonwealth of Australia, *Clearer Commonwealth Law* (September 1993)153

<sup>108</sup> Xanthaki, *Thornton’s Legislative Drafting* (n21)173; Daniel Greenberg (ed), *Craies On Legislation: A Practitioners’ Guide To The Nature, Process, Effect And Interpretation Of Legislation* (10th edn, Sweet & Maxwell 2012)843-844; see also see also three different techniques of possible placement of definitions in Peter Butt and Richard Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (2nd edn, Cambridge University Press 2006)188-189

<sup>109</sup> see Butt and Castle (n108)190 on avoiding long alphabetical lists

<sup>110</sup> An example of such Act can be seen by comparing the English version of the Religious Council and Kadis Courts Act (Chapter 77) to its Malay version *Akta Majlis Ugama Islam Dan Mahkamah-Mahkamah Kadi (Penggala 77)*

<sup>111</sup> Engel (n94)

<sup>112</sup> ‘Law Making Process’ (n59)

through the final stage of getting the approval and signature of His Majesty the Sultan. Lastly the fourth factor is not to contemplate a new separate statute if the proposed draft fits together with an existing legislation.<sup>113</sup> In that case amendment to that legislation must be considered. Time spent in designing a well-structured foundation for a draft will shed light on a number of appropriate matters to be discussed with the instructing authority. An initial draft *syariah* proposal prepared by the Islamic Legal Unit obviously would already have some sort of outline however the drafter must still prepare their own outline based on their understanding and analysis of the problem and the intended effect desired by the instructing authority. Having the initial draft could easily make the drafter go along with it but it would not necessarily make the process of preparing a draft any quicker because the drafter would then have to spend more time trying to extract the policy from amongst the words and thereafter subject it to rigorous analysis. The provision in the initial draft might have to be moved around or perhaps even struck out. In doing so the drafter would inevitably go into too much detail and this tend to obscure the fundamental structure of the draft and make the projection of a logical sequence more difficult.<sup>114</sup> Thus it shows the importance of designing an outline or framework even if there is already an initial draft prepared because to let the instructing authority consider the outline designed by the drafter will give the instructing authority an overall view of the draft particularly of its viability.

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<sup>113</sup> Xanthaki (n21)158

<sup>114</sup> Ibid 157

## 6. Chapter 4 – Composition and development

The composition and development stage is the stage where drafters are most active.<sup>115</sup> Saying that by no mean undermine their important efforts in the first three stages because those are the stages where drafters dominate in what Stefanou called as “policy formulation”<sup>116</sup> stage which forms a vital initial planning stage<sup>117</sup>. The only difference is that legislation in Brunei<sup>118</sup> at this stage does not involve the Legislative Council.

After coming up with a design of a draft in the third stage of the drafting process, the drafter is now at a stage where a first draft is produced where ‘much of the deliberations...concern the detail of legislation’<sup>119</sup>. Even in urgent cases, there would be at least one draft which the drafter will produce and submit to the instructing authority for their comment and consideration and then their approval. In normal circumstances of preparing draft *syariah* legislation, a first draft will be prepared and during this development stage discussion or correspondence between the drafter and the first layer of the instructing authority, usually the Islamic Legal Unit or in certain draft the ad-hoc committee, are most likely to occur. Discussion between these two sides would in turn necessitate the production of successive drafts, an opportunity which an urgently prepared draft will usually be deprived of. Accompanying each of these drafts is “a list of queries and comments”<sup>120</sup> by the drafters calling for response from the instructing authority.

One of the issues which arise with regards to submission of a first draft of *syariah* legislation and other drafts succeeding it is to whom does these drafts should be directed. Does the

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<sup>115</sup> Stefanou ‘Drafters, Drafting and the Policy Process’ (n28)327

<sup>116</sup> Ibid 325

<sup>117</sup> Keith Patchett, ‘Setting and Maintaining Law Drafting Standards: A Background Paper On Legislative Drafting’ in Constantin Stefanou and Helen Xanthaki, *Manual In Legislative Drafting* (Department for International Development 2005)44, 53

<sup>118</sup> With the exception of the Supply Bill currently the only Bill that is debated and passed by the Legislative Council

<sup>119</sup> Page (n83)809

<sup>120</sup> Xanthaki, *Thornton’s Legislative Drafting* (n21)164

drafter confer, the Islamic Legal Unit or the Religious Council? Conferring the Islamic Legal Unit or the ad-hoc committee being the first layer of the instructing authority is a sensible thing to do as it enables the drafter to consult directly with, the ‘drafter’ of or the group working behind, the initial draft. However at this stage the drafter’s work becomes more challenging because emphasis is now more on substantive matters. It is true that the instructing officers from both the Unit and the ad-committee would know more about the substance of the draft however their capacity to decide on matters involving major policy decision would be limited as it normally require crucial decision from the Religious Council. The issue is not with the process itself rather the delay that it would take to get that policy decision because correspondences and consultations are usually between the drafter and officer from the Islamic Legal Unit and not members of the Religious Council itself. Whilst it is useful for the drafter to discuss the first draft prepared by the drafter with the relevant officers from the Islamic Legal Unit or the ad-hoc committee, however when it comes to key policy decision it would usually need decision from the Religious Council. One way to overcome this is for the drafter to prepare alternatives versions of the provision concerned (upon discussion and advice from the Islamic Legal Unit) which the drafter’s think could be the solution. However the problem is the uncertainty of it which makes it difficult to proceed with the draft without making assumption on how the next provision would look like based on each alternative version of the draft. Bowman states that when analysing a draft the drafters role involves “suggesting workable solution” however at the same time he cautions them not to stray “too far into the process of making up the policy”.<sup>121</sup> This should be more so the case when it comes to actually composing and developing a draft. On the other hand, conferring the Religious Council, would have normally been done because the drafting instructions had come from them. Naturally it would have been right to refer the drafter’s first

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<sup>121</sup> Geoffrey Bowman, ‘The art of legislative drafting’ (2006) 64 *Amicus Curiae* 2, 3

and subsequent drafts with the accompanying queries and comments to them. However, as any drafters would have known that between the first and the final drafts there would be a lot of issues queried and comments made by them where some of which were meant to be examined and dealt with by this first layer of the instructing authority. This would not only ensure that minor issues would already been dealt with but would also enable the first layer of the instructing authority to do further research on the issues raised by the drafters in order for members of the Religious Council to base their decision on. It might perhaps accelerate the development of the draft since the Religious Council usually only meets at a certain time therefore it is necessary for the first layer of the instructing authority to have ironed out any issues within their power to decide and to leave ultimate policy resolution to the Religious Council. This process would normally be the case for most draft *syariah* legislation however it is not prescriptive because for some other drafting exercises<sup>122</sup> the approach will be different and would requires direct consultation with both the Islamic Legal Unit and members of the Religious Council.

At the earlier stage of producing a first draft, there are some substantive issues which drafters might encounter and should give attention to in order to achieve quality *syariah* legislation.

### **definition**

One of the issues is useful definitions. Definition must be used to explain the meaning that a term is intended to carry and should only be used when necessary and as full as necessary.<sup>123</sup>

A definition is useful when it serves the crucial purpose of determining and communicating the legislation.<sup>124</sup> As one of the most useful tools for drafter, it avoids repetition and

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<sup>122</sup> eg the process of drafting the Syariah Penal Code Order, 2013 (S 69/13)

<sup>123</sup> Reed Dickerson, *The Fundamental Of Legal Drafting* (Little Brown And Company 1965)98

<sup>124</sup> Xanthaki, *Thornton's Legislative Drafting* (n21)165

inconsistency by defining the word only once.<sup>125</sup> It encourages precision by not leaving it up to the reader to define the word and limit the meaning of a word by not leaving it up to a dictionary.<sup>126</sup> Seven essential principles that are listed by Martineau and Salerno is a valuable guide when drafting definition.<sup>127</sup> This same principles are applicable to *syariah* legislation in addition to other consideration for instance the order in which words in the definitions are arranged in both the English and Malay texts must be in alphabetical order<sup>128</sup> despite one text (usually the English) is a translation of the other; the use of parentheses particularly when using foreign words such as Arabic<sup>129</sup> or in order to make the meaning clearer<sup>130</sup>; on the issue of placement of interpretation provision, the current drafting practice in Brunei still follows the traditional practice of placing it at the beginning of the Act, unlike the practice in the United Kingdom of placing it in the end or in a Schedule<sup>131</sup>. It is quite common for definition in *syariah* legislation to be placed at the specific part<sup>132</sup>, paragraph or subsection<sup>133</sup> to which it is applicable. However there are also instances where definitions are not place together at the interpretation provisions instead they are placed at the beginning of the part<sup>134</sup> where they are applicable which make the definitions closer to the provision concerned but could be hard for users to know where they are located. As there has not been, to the best of my knowledge, any study been made about reader's experience in finding definitions it would be hard to tell whether the current arrangement of placing it at the beginning is effective or not. Until such

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<sup>125</sup> Robert J.Martineau and Michael B.Salerno, *Legal, Legislative, And Rule Drafting In Plain English* (Thomson West 2005)70

<sup>126</sup> Ibid

<sup>127</sup> Ibid 70-71

<sup>128</sup> Compare styles adopted in the Canadian bijural legal system where both the English and French texts of an Act, including the definition, are put side by side, Louise Maguire Wellington, 'Bijuralism In Canada: Harmonization Methodology And Terminology' 9 <[www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/hfl-hlf/b4-f4/bf4.pdf](http://www.justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/hfl-hlf/b4-f4/bf4.pdf)> accessed 12 August 2014

<sup>129</sup> eg: quarrels (*syiqaq*) in the Islamic Family Law Act (Chapter 217) s43(7); not valid (*fasid*) in the Syariah Penal Code Order, 2013 (S 69/13)

<sup>130</sup> eg marital obligation (*nafkah batin*) in the Islamic Family Law Act (Chapter 217) s46(1)(e)

<sup>131</sup> Xanthaki, *Thornton's Legislative Drafting* (n21)173

<sup>132</sup> eg Pt VA of the Islamic Family Law Act (Chapter 217)

<sup>133</sup> eg s208(4) of the Syariah Penal Code Order, 2013 (S 60/13)

<sup>134</sup> eg ss118,119,121,122 and 124 of the Syariah Penal Code Order, 2013 (S 60/13)

study is made perhaps the current convention will be maintained. This is where I believe the advancement of technology could help drafters and readers. Improved computer equipment and software have greatly enhanced document creation with its supreme contribution is their capacity to amend documents and revise them with ease.<sup>135</sup> Electronic access was proposed by the House of Representatives Standing Committee on Legal and Constitutional Affairs ‘as an efficient, inexpensive way of distributing legislation...’.<sup>136</sup> Database of legislation in Brunei is maintained by the Attorney General’s Chambers for free.<sup>137</sup> This database might be an inexpensive way of distributing legislation and perhaps an efficient way of looking at the list of current legislation. However it is currently not an efficient way of distributing an updated version of it. With regards to finding a particular definition, despite having the legislation available on online database some legislation are not in a format which enables readers to use the basic ‘find’ function which makes finding any definition similarly difficult as finding it on a hardcopy version of the legislation. Another challenging factor for *syariah* legislation is that majority of it have not been revised which means that user has to locate the Order in the respective year it was made and if there is amendment to it then it will have to be done manually.

### **supplementary aids**

*Syariah* legislation are amongst the best examples where supplementary aids are used to achieve clarity in legislation and enhance successful communication even though it is still not as many as those used in Australian legislation.<sup>138</sup> The use of those supplementary aids currently available to drafters in Brunei are believed to have made it ‘easier for readers of

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<sup>135</sup> J K Aitken, *Piesse The Elements of Drafting* (The Law Book Company Limited 1995)10

<sup>136</sup> Clearer Commonwealth Law (n107)

<sup>137</sup> Can be accessed on [www.agc.gov.bn](http://www.agc.gov.bn)

<sup>138</sup> Peter Quiggin, ‘A Survey Of Users Attitudes To The Use Of Aids To Understanding In Legislation’ (2011) *The Loophole* 96, 97-98



legislation to comprehend it'<sup>139</sup> as well as 'to find their way around and to use a statute'<sup>140</sup>. This is particularly potent when dealing with legislation such as *syariah* legislation where users particularly lay users whom are not used to the language of legislation are at the same time asked to comprehend unfamiliar concept in *syariah* principles. In order to consider whether the subject-matter of a draft is so complex or its sheer quantity would necessitate the use of supplementary aids drafters would have to put themselves in the position of non-legally trained users or of professional 'users'<sup>141</sup> seeing the draft for the first time.<sup>142</sup> Having worked on a draft for quite sometimes makes it challenging for the drafter to view the draft from the perspective of those users therefore it is beneficial to request assistance from other persons or at least other drafter not closely involved with the project. In the context of process of drafting legislation in Brunei a drafter is usually supervised by a senior drafter or otherwise any draft produce by such drafter will be checked by the Head of the Legislative Drafting Division and by the Legal Draftsman before a final or almost final draft is submitted to the instructing authority. Some instances of the supplementary aids that are currently being used in *syariah* legislation are graphics<sup>143</sup>, explanations<sup>144</sup>, examples or illustrations<sup>145</sup> or other types of aids normally found in *syariah* legislation such as the list of Arabic script of words and expressions<sup>146</sup>. There is another form of explanatory notes<sup>147</sup> which has not been used in *syariah* legislation but is useful to consider that is 'the provisions of explanatory

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<sup>139</sup> Ibid 96

<sup>140</sup> Xanthaki, *Thornton's Legislative Drafting* (n21)182

<sup>141</sup> Quiggin (n138)96

<sup>142</sup> Xanthaki, *Thornton's Legislative Drafting* (n21)183

<sup>143</sup> eg Halal Label are provided in the Second Schedule of the Halal Certificate and Halal Label Order, 2005 (S 39/05) utilises the aid of graphic in a form of a picture logo; form of receipts to be issued for every payment of *Zakat* or *Fitrath* as provided in Form A or Form B respectively of the First Schedule to the Religious Council and Kadis Courts Act (Chapter 77)

<sup>144</sup> eg explanation on evidence given of facts in issue and *qarinah* provided immediately after s8 of the Syariah Courts Evidence Order, 2001 (S 63/01); explanation on the value of *nisab* for *sariqah* provided immediately after s54 of the Syariah Penal Code Order, 2013 (S 69/13)

<sup>145</sup> eg Illustrations for s10 of the Syariah Courts Evidence Order, 2001 (S 63/01) (facts which are the occasion, cause or effect of facts in issue)

<sup>146</sup> Usually prescribed in the schedule to the legislation eg in the Schedule to the Islamic Family Law Act (Chapter 217), the First Schedule to the Syariah Courts Procedure Order, 2005 (S 26/05)

<sup>147</sup> Xanthaki, *Thornton's Legislative Drafting* (n21)186

material in the form of notes presented beneath sections...<sup>148</sup>. This form of explanatory notes for examples have been placed immediately after Articles 6(c) and 9(1) of the Constitution to explain about the function that has been conferred on the Privy Council by His Majesty the Sultan, and immediately after Article 8A of the Constitution to inform readers about its non-operation as a result of a suspension Order<sup>149</sup>.

Supplementary aids may or may not form part of the legislation and this depend to the manner and the position in which they are presented.<sup>150</sup> It is critical that drafter make this clear to users.<sup>151</sup> The position of some aids discussed above have been dealt in Brunei Interpretation and General Clauses Act (Chapter 4) where it provides that if an Act includes an example or illustration of the operation of a provision, the example or illustration is not exhaustive and if the example or illustration is inconsistent with the provision then the provision prevails. An equivalent provision found in Queensland the Acts Interpretation Act 1954 have further provisions in sections 14D (b) and (c) which provides that example does not limit but may extend the meaning of the provisions and cautions that the example and the provision are to be read in the context of each other and the provisions of the Act. As for Schedule, Table or other annexure to any written law including any notes to that Schedule, Table or other annexure, the Interpretation and General Clauses Act<sup>152</sup> provides that it be construed as having legislative effect. From the examples above, by looking at the manner and the position in which they are presented which are either included in the main body of the Act or are prescribed in the Schedule, those supplementary aids form part of the *syariah* legislation. As for the other form of explanatory notes used in Articles 6 and 9(1) of the Constitution, the asterisks symbol used might be useful though perhaps is too small compared

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<sup>148</sup> Ibid

<sup>149</sup> Constitution of Brunei Darussalam (Suspension) Order, 2006 (S 15/06)

<sup>150</sup> Xanthaki, *Thornton's Legislative Drafting* (n21)182

<sup>151</sup> Ibid

<sup>152</sup> (Chapter 4) s5(2)

to the use of both the asterisk symbol and the italic font used in Article 8A of the Constitution in attracting users attention to the information which the drafters tried to communicate. The notes on the other hand could, as preferred by Thornton, be printed differently from the text of the laws or perhaps use different typeface or else make the font slightly smaller<sup>153</sup> if using a different typeface would distract readers from the text itself. By highlighting the differences between the notes and the text and to present it in a consistent manner<sup>154</sup> would make readers aware of the fact that those notes are not part of the legislation because consistency of styles such as font size and typeface is something that drafters take seriously. A diversion from the norm is ordinarily done intentionally by drafters so even without express provision like what is provided in Queensland<sup>155</sup> about footnote, editor's note and endnote, readers might be able to tell that the notes do not have legal effect.

### **precedents: legal transplant**

Precedent is usually associated to past judicial decision and defined as 'A decided case that furnishes a basis for determining later cases involving similar facts or issue.'<sup>156</sup> The word precedent is also used by lawyers to describe 'model legal forms'<sup>157</sup> however for legislative drafters it means using 'existing legislation in other jurisdiction'<sup>158</sup> as model to draft legislation. By using precedent, it save the drafter's time and effort and most significantly it 'offer invaluable insight to the actual effectiveness of the legislation abroad, thus providing a sneak preview of the actual post-legislative scrutiny of the law before it is even enacted.'<sup>159</sup> However for the same reason form of draft is not encourage as a form of drafting instruction,

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<sup>153</sup> Xanthaki, *Thornton's Legislative Drafting* (n21)186

<sup>154</sup> New Zealand Law Commission, 'Legislation Manual Structure and Style' (NZLC R35, 1996) para 120

<sup>155</sup> Acts Interpretation Act 1954, s14 (7)

<sup>156</sup> Black's Law Dictionary (n48)

<sup>157</sup> Butt & Castle (n108)11

<sup>158</sup> Xanthaki, *Thornton's Legislative Drafting* (n21)190

<sup>159</sup> Ibid 190-191

drafter is also not encourage to use precedent as it might not save time and effort if the drafters have to go through the precedent to try to understand and analyse it in order to try find a way to fit the issues faced by their client into the existing legislation instead of trying to understand the problem itself and see whether it could be solved with the same solution used by the precedent. Stephen Laws called this a ‘precedent trap’ because the ‘process by which the solution to a problem is often sought first amongst solutions that have already been used for other problems. When that is done, the case to be dealt with may have to be manipulated to fit a solution that was originally intended for something else’<sup>160</sup>. This is what distinguish drafters at the drafting offices such as those at the Attorney General’s Chambers from instructing officers who prepare initial draft because drafters ‘are not concerned with finding a line’ instead their function is to ‘‘draw’ the line, and effectively to draw it on a blank piece of paper.’<sup>161</sup> However, similar to its stance on form of draft for drafting instruction drafters at the Attorney General’s Chambers do not refuse precedent altogether because by accepting form of draft in the first place drafter will normally ask for benchmarks referred to by the instructing officers<sup>162</sup>. If preparing initial draft helps the instructing officer think out their policy and administrative details, precedent’s main values is ‘as a source of ideas and as a means of checking whether drafting instructions have covered all matters that ought to be covered’ and to a certain extent might offer some assistance in the actual drafting.<sup>163</sup> Although the ‘practice of borrowing has always been a normal practice’<sup>164</sup> extreme caution must be exercised when using precedent because mere ‘legislative copying’ would only ‘cast many legislation in similar moulds, although sometimes the results of this

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<sup>160</sup> Stephen Laws, ‘Giving Effect to Policy in Legislation: How to avoid Missing the Point’ (2011) Stat L.R.1,7

<sup>161</sup> Stephen Laws, ‘Drawing the Line’ in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008)19, 22-23

<sup>162</sup> Attorney General’s Chambers, ‘Drafting Instructions Handbook’ (n25)15

<sup>163</sup> Xanthaki, ‘Thornton’s Legislative Drafting’ (n21)191; see also Martineau and Salerno (n125)98

<sup>164</sup> P.G. Monateri, ‘The “Weak” Law: Contaminations And Legal Cultures’ (Italian National Report To The Bristol Conference) <<http://www.jus.unitn.it/cardozo/Review/Comparative/weak.htm>> accessed 3 March 2014

process have not been too fortunate.<sup>165</sup> Upon receiving drafting instructions to draft *syariah* legislation, instructing authority would normally submit precedent upon which the draft is usually based upon. After understanding and analysing the drafting instruction, the drafter will start designing a first draft. By having a precedent the drafter will first make a comparative study between the precedent and the initial draft. This will take up some time to do not so much in doing the comparison but in understanding and analysing the drafting instruction and the solution offered by the precedent and trying to ‘localise the foreign law, taking into account the social, political, and financial conditions prevalent in the receiving society at the precise time.’<sup>166</sup> Drafters will also want to know the reasoning if the instructing authority decide to divert from the precedent because when only part of the precedent is relied on there might be danger of reducing the effectiveness of that retained provision.<sup>167</sup> In order to help drafters, the Attorney General’s Chambers has issued a guideline on the practical approach on the preparation of initial draft<sup>168</sup> where instructing officer are advised to study how other jurisdictions deal with similar issues they are facing, if legislation is proposed they have to carefully study the benchmark and prepare table of comparative legislation which is helpful in understanding the source of the proposed provisions.

One issue peculiar to substance in *syariah* legislation in a country which has Islamic legal system is to ensure that the legislation drafted is in accordance with established Islamic principles. The fact that Islam is recognised in the Constitution as the official religion gives the drafter a duty to ensure that when drafting other non-*syariah* drafts those drafts do not contradict with the Islamic principles. Since both legal systems runs in parallel it does not mean that there is no non-*syariah* legislation in Brunei, it just means that other legislation

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<sup>165</sup> Rodney L. Mott, ‘Uniform Legislation in the United States’ (1940) 27 American Academy of Political and Social Science 79, 80; see also Martineau and Salerno (n125)99

<sup>166</sup> Xanthaki, ‘Thornton’s Legislative Drafting’ (n21)191

<sup>167</sup> Ibid 192

<sup>168</sup> Attorney General’s Chambers <<http://www.agc.gov.bn/agc1/images/stories/Publication/english.pdf>> accessed 10 August 2014

must not contain provision contradictory to Islam. However, if it does contain such provision it does not mean that such legislation must be repealed, the current practice is to harmonise<sup>169</sup> those provision by either deleting or amending it to the extent of removing such inconsistency. As such, the notion of ‘drawing a line’ in drafting *syariah* legislation, either by using precedent or not, is not absolute as drafters must balance between this ‘creative function’ so much so that they must not ‘make up’ policy<sup>170</sup> which in *syariah* legislation are based on the established principle in Islam.

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<sup>169</sup> one of the functions played by the Islamic Legal Unit; harmonisation process is common particularly in country with dual legal systems see Abdul Gani Patail, ‘Harmonisation of Civil and Shariah: Effective Strategies For Implementation’ (3<sup>rd</sup> International Conference On Harmonisation Of Civil And Shariah, Palace of the Golden Horses Hotel, December 2007) < [www.agc.gov.my/pdf/speech/KEYNOTE%20ADDRESS.pdf](http://www.agc.gov.my/pdf/speech/KEYNOTE%20ADDRESS.pdf)> accessed 10 August 2014

<sup>170</sup> Bowman, ‘The art of legislative drafting’ (n121)3

## 7. Chapter 5 – Scrutiny and testing

This chapter discusses the last stage of Thornton’s drafting process that is scrutiny and testing. Despite the issues faced by drafters in previous stages due to some of the difficulties of communicating via intermediaries, at this stage that barrier has actually become an advantage to the legislative process of drafting *syariah* legislation.

Though hard it may be this is the stage where the drafter must critically scrutinise and test the *syariah* draft prepared to see whether –

- it has achieved the intended objective;
- it fit harmoniously into the general body of the law;
- it comply with the basic principles of the legal and constitutional systems;
- it form a coherent well-structured whole which material flow in logical sequence;
- its content and language of the draft are clear and comprehensible.<sup>171</sup>

Thus in the context of drafting *syariah* legislation in Brunei a drafter must “take a critical and objective gaze at the finished product” by reading the draft and consider it as a whole to see whether the *syariah* draft proposal has achieved the objectives intended by the Religious Council and that the draft fit harmoniously with the “general body of the law” which the context here is the Laws of Brunei as a whole. It is simply not enough for drafters to just concentrate on how it would fit into the other existing *syariah* legislation. Sullivan states that ‘each provision or part of a provision must be read both in its immediate context and in the context of the Act as a whole’.<sup>172</sup> In relation to the dual legal systems in Brunei, the drafter must keep in mind that the proposed draft *syariah* legislation must comply with the basic principles of the Islamic legal system and at the same time the constitutional system. Benefiting from the earlier stage of design followed by the careful development of the draft,

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<sup>171</sup> Xanthaki, *Thornton’s Legislative Drafting* (n21) 200

<sup>172</sup> Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes* (Fourth edn, Butterworths 2002)281

the drafter must make sure that it has a sound structure which enables the substance to flow in logical sequence. One quite important but easily forgotten thing to do is ensuring the content and language of the *syariah* draft is clear and comprehensible in both the working version, that is the Malay version in which the draft has initially been prepared, and its translation to the English texts. Comprehensibility will extend to the first and subsequent drafts prepared by the drafter in consultation with the instructing officers. For practical reason translation process is normally done when there is a final or an almost finalised version of a draft because preparing translation at development stage is not practical due to limited human resources. However it is beneficial for drafts containing numerous provisions to be submitted for translation as early as possible because translator needs ample of time to translate. When a final or at least a concrete draft is ready then the translation is amended to incorporate any changes which have been made since.

In any legislative drafting process, a final draft legislation would have undergone a number of revisions by the drafter during the composition and development stage. The drafter at that stage usually have been in correspondence and consultation with the instructing authority to discuss the draft. As mentioned earlier, during the drafting stage of *syariah* legislation the drafter would have been in close consultation with the first layer of the instructing authority. Despite the issues faced by the drafters arising from barrier in communicating in the previous stages, at this final stage however those barrier could actually be an advantage to the drafter and a benefit to the drafting process of *syariah* legislation. This is because members of the Religious Council, though themselves are not drafters, usually have seen an initial draft. As policy maker they are the best person to verify whether the drafting instructions have been complied with.<sup>173</sup> These members of the Religious Council might have seen a first draft prepared by the drafters and perhaps a revised draft however they could still be in a position

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<sup>173</sup> Kobba (n46)241



of what Thornton has called as “users”<sup>174</sup> or more of an informed users who are in a better position to critically and objectively scrutinise and comments a final draft. Additionally consultation at this stage could involve interested parties who will likely be affected by the legislation.<sup>175</sup> The use of consultation for testing draft legislation is valuable in order to get feedback from these parties particularly when the draft is ‘in a sufficiently advanced form to indicate clearly the nature and the detail of the project’.<sup>176</sup> Similar to other drafts legislation, draft *syariah* legislation is confidential therefore it is impossible for drafters to pass it to others for consultation however it can still be done but it would have to be by the instructing authority themselves. Since the proceedings of the Religious Council is also confidential<sup>177</sup> what the President of the Religious Council could do is invite any person who is not a Member of the Religious Council to any of its meetings if the business before the meeting requires the presence of such person.<sup>178</sup> Kobba’s emphasis on the importance of experience and qualification of the policy maker and the drafter<sup>179</sup> is therefore justified because otherwise the scrutiny and testing of draft legislation could not be done effectively. For this reason, I believe this should be extended to any person whom the Religious Council decide to consult.

During the correspondence or consultation with the instructing authority the drafter will prepare series of drafts to accommodate any changes in policy. Every version of the draft must be reviewed by the instructing authority in order to verify its legislative text.<sup>180</sup> After that the best practice for drafters would be to subject the draft to a specific scrutiny as the last step to check on legal form, clarity and comprehensibility and this extend to legal verification

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<sup>174</sup> Xanthaki, *Thornton’s Legislative Drafting* (n21)200

<sup>175</sup> Augustin (n49)198

<sup>176</sup> Patchett (n117)58

<sup>177</sup> Religious Council and Kadis Courts Act (Chapter 77), s34

<sup>178</sup> *Ibid* s19

<sup>179</sup> Kobba (n46)243

<sup>180</sup> Patchett (n117)56

to check compliance to constitutional, legal as well as international treaties.<sup>181</sup> Also included within the legal verification is on implementation of the legislation and subsidiary law-making powers.<sup>182</sup> All of these factors are crucial in order to achieve uniformity and quality of the legislation.

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<sup>181</sup> Patchett (n117)56-57

<sup>182</sup> Ibid 58

## 8. Conclusion

Effectiveness of legislative drafting process in a country with dual legal system is important towards achieving uniformity and quality of legislation because despite the difference in its sources<sup>183</sup> thus the difference in emphasis of the substance, the process of legislative drafting remain the same. I assert that the legislative drafting process of *syariah* legislation is effective when the five stages of drafting as suggested by Thornton are followed which therefore will result in the achievement of uniform and quality legislation.

In the introduction, I have shown how Brunei has transformed into a country with dual legal systems, that is the Islamic legal system and the common law system. The constitution of the courts for the administration of civil and criminal justice had resulted in significant reduction in application of the previously wide application of the Islamic laws. However, from the perspective of legislative drafting the intervention of the common law system by the British has given those involved with legislation the exposure to the aspect of legislative process in the common law system although with the great cost of limiting the application of Islamic laws only to personal matters. Things significantly changed with the declaration of Islam as the official religion. The Religious Council and the Islamic Legal Unit are the two key bodies which have played significant roles towards effectiveness of the drafting process of *syariah* legislation which eventually lead to the aim of achieving uniformity and quality in legislation.

A lot of weight are put on the first stage of the drafting process as proposed by Thornton. Upon receiving an instruction to draft *syariah* legislation, the first step which a drafter has to take is to have a complete and comprehensive understanding of the purpose why it is needed in the first place. In order to achieve this understanding a drafter needs two main things,

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<sup>183</sup> Sources of law in English legal system are not only judge-made law but also statute law, custom, legal writing and natural justice, whereas sources of *syariah* laws are the *Qur'an*, the *Sunna*, the *ijma* and the *kiyas*, David and Brierley (n19)339&422

firstly good drafting instructions and secondly to engage in consultation. Good drafting instructions are quite tricky to acquire due to the fact that most of the drafting instructions which drafters at the Attorney General's Chambers have received are in a form of draft thus making it difficult for the drafter to obtain from it the following four key information: the background knowledge of the problem, the purposes of the proposed legislation, the means of achieving that purposes and its impact on existing circumstance and law. However this should not be an excuse for drafter to ignore this vital stage hence the next approach to achieve this understanding that is by way of consultation with the instructing authority. One issue that have been discussed is with regards to the communication barrier which drafter will encounter when dealing with draft *syariah* legislation. This barrier is more on the layers of policy officer between the drafter and their immediate instructing authority from whom they received the drafting instructions. It means that drafter do not normally have direct consultation with the Religious Council. However as broadly discussed earlier this barrier is not a negative thing altogether depending on how it is approached for each particular drafting exercise. One solution that is currently being practised by drafters when drafting *syariah* legislation is to take the advantages of the knowledge obtained by the first layer of the instructing authority whom are usually 'drafter' for the initial draft and to gain from their extensive experience particularly concerning *syariah* matters. Drafters need to exhaust all information which they could gather from this first layer of the instructing authority and use it accordingly. By doing so would greatly minimise issues which they would need to raise with the Religious Council. Whatever issues that are pending could be left for the first layer of the instructing authority to solve either by themselves or by referring it to the Religious Council. The non-involvement of the drafters is not so much of not wanting to be involved with the substance rather to allow purely internal policy matters to be discussed between the first layers of the instructing authority and the Religious Council. This way that ultimate

decision could still be acquired from the Religious Council. Delay in acquiring that ultimate decision I believe would not be a major problem because as mentioned earlier each draft is different as such the manner in which the process of drafting *syariah* legislation to be effective is by accommodating the process to the needs of the draft concerned. Another thing which I believe need emphasis at this early stage of drafting *syariah* legislation are again discussed during the third stage that is consideration of whether to legislate or not.

The next thing for drafters to do in order to achieve effectiveness in the process of drafting *syariah* legislation is to analyse the *syariah* draft proposal. Analysis must be made in relation to the three following matters: (a) existing law, (2) special responsibility areas, and (3) practicality. Since every new laws are regarded as amendment, careful analysis of existing laws are therefore necessary so that the new proposed *syariah* draft will become a coherent law together with other *syariah* legislation and other non-*syariah* legislation forming part of the Laws of Brunei. One issue which arises is relating to consistency of translation between the Malay and the English versions of the text prepared. Drafters must not only make sure that the final draft of the *syariah* legislation is submitted for translation at the appropriate time but they also have a duty to check whether a correct and proper translation has been made having in mind that legal context as well as the *syariah* context of it. In analysing draft *syariah* proposal, drafters have an advantage over instructing officer because of their independence though it carries with it special responsibility of critically analysing the draft proposal particularly within areas of potential dangers. Practicality of the draft proposal also have to be carefully analysed as one precursor of quality legislation is its effectiveness in terms of implementation, enforcement, impact and compliance. Rigorous consideration towards predictability and practicability of a draft *syariah* legislation are a requisite as early as this stage. Drafters need to seek assistance from the instructing authority particularly from

the first layer because they are usually involved in the implementing of the legislation or in giving support to those officers who will be implementing it.

One quite important thing but could easily be ignored by the instructing authority particularly at this third stage of the drafting process is the fact that drafting has not taken place yet. This is particularly so when there is a form of draft which gives the impression that there is already a draft to work on. Even more difficult is to convince the instructing authority to consider whether legislation is in fact necessary or perhaps other non-legislative approach should be taken instead. That is why this matter has been highlighted earlier at the first stage of the drafting process. Nevertheless to consider it again at this stage is perhaps more practicable in a sense that at this design stage drafter would have prepared an outline or framework so the shape and broad contents of the draft could be easily visualised. The design must be simple and consistent with the conventional practice or order of the structure used throughout all legislation in Brunei. However uniformity of design should not stop drafters of *syariah* legislation in exploring other designs of legislation especially if it could enhance quality of the *syariah* legislation. Another factor when designing draft *syariah* legislation is that it must first pass the approval stage by the Religious Council before the ultimate approval by His Majesty the Sultan. The last factor which is also important is to consider fitting the proposal within the existing legislation before contemplating a new separate legislation. To prepare a well-structured foundation of a draft will shed some lights to certain issues. It goes a long way of letting the instructing authority to consider the complete view of the draft and its viability.

The composition and development stage in a legislative drafting process of *syariah* legislation is perhaps how others think of a drafter's job. It is partly true mainly because it is the time when drafters are most active. This is the stage when a first draft is ideally prepared after much ground works as well as a lot of deliberation during the previous stages. Like the

previous stage, similar issue is faced with regards to the layers of instructing authority. As discussed earlier, the issue is on the delay in acquiring the ultimate policy decision which is beyond the jurisdiction of the first layers of the instructing officer to decide. One proposed solution to this problem is by preparing alternative versions of the concerned provisions or even alternative versions of the whole draft<sup>184</sup> because in order for drafters to proceed to draft, one set of assumption must be made for one draft and another set of assumption is to be made for the alternative version. Both drafts will then be proposed and submitted to the instructing authority for their consideration and approval. However this could cause uncertainty which would then lead to a lot of assumptions being made and not to mention a lot of time needed to prepare different sets of drafts. This further proves the point that problem of policy development<sup>185</sup> should have been settled during policy formulation. Some substantive issues discussed during the development stage of the drafting process are just some examples of issues normally considered in drafting *syariah* legislation such as preliminary issues on definition, supplementary aids and issues on the use of precedent. This just demonstrates that *syariah* legislation indeed benefit from following this effective drafting process resulting in uniformity of definition throughout the whole statutes and quality of the *syariah* legislation through the use of both the supplementary aids and precedents.

After preparing a draft *syariah* legislation, a drafter's work is not finished yet as scrutiny of it has to be done. Although drafters are usually pressed into developing rapid drafts this last but not least important process must be done. Critical scrutiny and testing of *syariah* draft proposal are done to ensure that the proposed draft has achieved the intended objective, fit harmoniously into the general body of the law, complied with basic legal principle and constitutional system, is a well-structured coherent form which material flow in logical

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<sup>184</sup> As experienced when drafting legislations concerning compulsory religious education and the *syariah* penal code

<sup>185</sup> Serge Lorte, 'Providing Technical Assistance on Law Drafting' (2010) Stat L.R 31(1)1, 7

sequence and that the content and language are clear and comprehensible. In addition to all that it must be in compliance with the basic principles of Islam. For draft *syariah* legislation, the repeatedly mentioned issue of layers of instructing authority have eventually transformed into an advantage as members of the Religious Council could act as informed users whom are the best possible persons to criticise and scrutinise a *syariah* draft. The ability to call other persons to a proceeding of the Religious Council will enable consultation with interested parties. This shows that when scrutiny and verification is properly done by both the drafter and the Religious Council, the legislative drafting process of *syariah* legislation prove to be effective which in the end will result in a uniform and quality piece of *syariah* legislation.



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