

MANDATORY AND DIRECTORY PROVISIONS IN A STATUTE

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There are various tests to determine whether a particular provision of statute is “mandatory” or “directory” in nature. Some of the tests are:

- (a) Examining the consequences provided for non-compliance by the statute itself. If the statute itself provides for a punishment or a penal consequence implying that the act so done or done otherwise would be invalid, naturally the provision of the statute is mandatory in nature.⁽²⁾
- (b) The examination of language of a statute is also a big criterion. The language of a statute, whether it is in affirmative language or negative language also gives guidance in determining whether a provision of a statute is “mandatory” or “directory” in nature;
 - i) For example the selection by the legislature of the words “may” or “shall” is definitely a guideline but not a definitive test.
 - ii) To read a provision a, “**word**” “**term**” or “**phrase**” in its true contextual parameters is another test relating to the examination of language of the statute as to whether it is “mandatory” or “directly”
- (c) The results of the compliance or non-compliance of a statutory provision will also determine the question. A mere lapse in procedure as compared to negation of a substantive right, the later will be deemed as a mandatory provision.
- (d) A mandatory provision has to be followed in order to validate the act done

1. *This Lecture was delivered to Second Twelve Week Service Training Course to Additional District & Sessions Judges at the Punjab Judicial Academy at Lahore on October 29, 2009.*

(e) 2 S.G.G.Edger “*Craies on Statute Law*”, (London, 7th ed., Sweet & Maxwell 1971).

while non-compliance of a directory provision will require rectification of the procedure merely.

- (e) Non-compliance with a mandatory provision is fatal while the non-compliance of a directory provision is not fatal.

As a general principle, non-compliance of a mandatory provision would make an act as illegal, however, there is an exception to this general rule, that is, if the aggrieved person waives the requirements of the mandatory provision⁽³⁾. This principle is known as “quilibet potest renuntiare juri pro se introduc to”⁽⁴⁾.

There is a view that in case a provision represents a combination of mandatory and directory provisions, compliance with the mandatory portion regardless of the non-compliance with the directory portion, may be said to constitute substantial compliance⁽⁵⁾. Statutory provisions specifying that a certain provision is to be carried out in the prescribed manner and in no other manner, would be mandatory even if no penalty has been provided⁽⁶⁾. The use of the words “shall” and the “negative” or “prohibitive” language of the provision is generally seen as a strong, not ultimate, indicator of the fact that the intention of the legislature was to make the rule mandatory. No hard and fast rule can be laid down as a final criterion to know whether certain provision is “directory” or “mandatory” in nature⁽⁷⁾.

3. F.A.R Bennion, “Statutory Interpretation: A Code”, (London 4th ed. Butterworths, 2002) at 396

4. *Ibid.*

5. E.t. Crawford, “The construction of Statutes”, Lahore, Pakistan Law House, 1998 at 109.

6. *Ibid* at p.523.

7. F.A.R. Bennion, *Loc Cit* at p.34

8. P.St. j.Langan, “Maxwell on the Interpretation of Satutes”, Bombay, 12th ed. N.M.Tripathi Ltd, 1976 at p.315-316.

It is, however, imperative on the courts to make deep effort to understand the intention of the legislature with regard to determining the "directory" or "mandatory" nature of the provision⁽⁸⁾. The real intention of the legislature has to prevail even if the "shall" have to mean "may" and the "may" have to mean "shall" by interpretation⁽⁹⁾.

It is pertinent to note that while giving a contextual interpretation to the word "shall" in a provision, in addition to the facts and circumstances of a case, the related provisions of the statute may also be considered in order to gain a comprehensive understanding about the nature of the provision.

The principle that procedural statutes must be construed strictly, for example proper service upon the parties or the cases of arrest and detention, such principles are guarded very strongly⁽¹⁰⁾. However, there are exceptional exceptions, because procedural prescriptions should not be allowed to act as obstructions to justice, but should instead, aid justice. Besides the procedural rules, the rules with regard to the interpretation of tax statutes is that the statutes that regulate the assessment of taxes must be largely, construed as "mandatory", if they aim at protecting the taxpayers.

Following examples may help in understanding the concept:-

- (i) Statutes conferring/vesting rights on persons, which require fulfilment of certain pre-conditions, must be deemed as mandatory.
- (ii) Statutory provisions dealing with the exercise of judicial judgment or discretion would usually be deemed to be "directory" regardless of the "must" or "shall" because holding them "mandatory" would negative the judicial discretion and power of judgment.
- (iii) Statutes imposing public duty to be performed in a certain specified manner should be held "directory" because "mandatory" nature would cause them rigid, inconvenient and unjust.
- (iv) There may be instances where certain formalities and requirements are laid for making contracts. These are usually mandatory. Formalities for the transfer of shares under the Companies Ordinance 1984 are mandatory.

9. See e.g. V.P. Sarathi, "Interpretation of Statutes", (Lucknow, 4th ed. Eastern Book Company 2003) at 585. Also see A. Singh, "Introduction to Interpretation of Statutes (Nagpur, Wadha & Co. 2001) at 109-110.

10. G.P. Singh, "Principles of Statutory Interpretation" (Nagpur 17th ed. Wadha & Co 1999) p.290.

A provision in a statute, rule of procedure, or the like that is a mere direction or instruction of no obligatory force and involves no invalidating consequence for its disregard, as opposed to an imperative or mandatory provision, which must be followed. The general rule is that the prescriptions of a statute relating to the performance of a public duty are so far “directory” that, though neglect of them may be punishable, it does not affect the validity of the acts done under them, as in the case of a statute requiring an officer to prepare and deliver a document to another officer on or before a certain day⁽¹¹⁾.

Generally, statutory provisions that do not relate to the essence of a thing to be done, and as to which compliance is a matter of convenience rather than of substance are “directory”, while provisions that relate to the essence of a thing to be done, that is, matters of substance, are mandatory.

11. *West’s Encyclopaedia of American Law ed.2 copy right 2008, (The Gale Group, Inc))*