

## LEGISLATIVE DRAFTING

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Legislative drafting, in itself, is a subject for serious study, but unfortunately, it appears that in India, required attention commensurate to the importance of the subject, has not yet been given to it. By and large, drafting of statute is generally in the hands of those who do not have specialized training and experience in drafting, so to say, in the hands of law-knowing "laymen in drafting". In England, the job of drafting is done professionally by those who have adequate training and expertise, but in America, the position seemed to be no better as compared to India, as would be apparent, from the fact that draftsmen were also employed from outside the public service, on bills in the government legislative programme, and from what has been said by Professor Reed Dickerson- "Whereas in London the typical bill is drafted by a full-time professional, in Washington it is drafted by an inexperienced lawyer or a partly experienced lawyer whose drafting duties are a mere incident to his other duties. Certainly the most fertile single source of confused, difficult-to-read, overlapping and conflicting statutes is the lack of uniformity in approach, terminology and style. The ravages of heterogeneous authorship appear to be large in Washington and small in London."<sup>1</sup>

Professor Dickerson further wrote: "Most legislation in the United States is drafted by people who, however good they may be in their substantive specialities, have only fleeting acquaintance with the expertise required for good drafting."

The Judicial Training and Research Institute U.P. deserves to be congratulated for recognizing the need of skilful drafting by trained and expert draftsmen and it has already held a few similar short but successful courses in last five years. Such a course, I am informed, has not been undertaken by any other Institution so far, Legal draftsmen though occupy the rear seat or they may be called the pillion-riders, being in the background, yet they are the real persons who propel the machinery by preparing a legislation to meet a required need to combat any social evil or may be for social welfare or to meet any challenge or menace posing threat to the society. In a society governed by rule of law, the only method to meet any kind of problem and odds or to achieve any social goal is only through law, the law which is essentially framed by the legislative draftsmen.

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\* Elevated to Hon'ble Supreme Court subsequent to publication of this Article.

<sup>1</sup> Legislative Drafting in London and Washington (1959) Cambridge Law Journal, p. 49, as quoted in The Preparation of Legislation-Renton Committee Report.

It is said that legislative drafting is both, science as well as art. The job is undoubtedly creative in nature. It appears to be very much akin to the 'job of an architect'. An architect is provided with a site and the requirements. He prepares the whole project, even the minutest details right from foundation designing to front elevation. Similar is the situation with a legislative draftsman. Social requirement to have law to meet any given situation, is reflected in the Legislature. The Legislature indicates the purpose to the draftsmen, which is sought to be achieved by the Legislation and the draftsmen are set at work doing the whole exercise of drafting the legislation. Any defect in designing, foundation or other important arches etc. may result in crumbling of the structure; similarly any serious loophole or defect in the legislation may render it ultra vires, ineffective and void.

These are the days of statutory laws. In past, unwritten laws held more and more of the field. In England, the common law and in India, ancient scriptures, schools of thoughts, usages and customs and unwritten laws mostly governed the conduct of the society. The codification of laws was started in England a few centuries ago. The laws initially were drafted by the Judges. When the job was taken over by the Legislature, it was resented to. However, what was felt was that the laws drafted by the Judges did suffer no less drawbacks, with which the laws drafted by the Legislature suffered. The emphasis is that legislation needs expertise and specialized skill in drafting. The present day situation is that there is over-burden of written laws all around. With increasing complexities in day-to-day life, each activity is governed by one or the other legislation. Different States and the Center have their own enactments which must be several thousands in number, if put together. In these circumstances, it becomes all the more necessary that due attention is given to the proper drafting of laws and also for the reason that a common man now comes in direct touch with the statutes which are no more a matter confined to Courts of Law alone.

A legislative draftsman has to be a very knowledgeable person. He must have a grip over the Constitutional provisions. He must have good knowledge of substantive laws as well, previous legislations and current pronouncements of the Courts of Law. He must also have in mind the likely future need and how to provide some play in the provisions to cover such future exigencies without impairing the present purpose for which the legislation has been sought. The scope of the provisions cannot be too much narrowed down, nor too much expanded. He has to strike a balance on the whole. There are so many technical things which are involved; it is difficult to enumerate all of them. A few to mention are: the arrangement of the provisions, their sequence and then to have proper exceptions, explanations and provisos etc. and at times a non obstante clause too. This all has to be done skillfully and to my mind, the lesser the use of these, the better it is. To begin with, he must ascertain about the legislative

competence first. It is true that it would be ideal to have legislation with simple language and short sentences with clarity, but it all is not so simple. Different situations are to be met, making it necessary to make use of ifs and buts, exceptions, explanations and provisos etc. In any case, if due care is taken, use of these things can certainly be minimized. One would often find that a provision is so lengthy that by the time one reaches the last line or clause, he would forget how it had started.

In the legal world, the words acquire special meaning. Their use becomes technical. Choice of words is thus a very important matter. The Statute Law Society<sup>2</sup> of England had raised its criticism against the use of language before Sir David Renton Commission saying- about the language used, "Legalistic, often obscure and circumlocutions, requiring a certain type of expertise in order to gauge its meaning. Sentences are long and involved, the grammar is obscure; and archaisms, legally meaningless words and phrases, tortuous language, the preference for the double negative over the single positive, abound". The Commission no doubt found that general condemnation was not supported by evidence, but was quite impressed by the evidence given by the Society and found legislative out-put of Parliament even incomprehensible to those who are most familiar with the subject- matter of Legislation.

Lord Denning M.R. said, "If you were seeking to see what different principles should be applied, the first would be to recommend simpler language and shorter sentences. The sentence, which goes into ten lines, is unnecessary. It could be split up into shorter ones anyway, and couched in simpler language. Simplicity and clarity of language are essential."

But over-simplification of things may not do and the legal draftsmen may also have some difficulties. Quarrels about the meaning of the words perhaps may never end. Whatever may be the language used, disputes would still crop up, but certainly they can be minimized by careful drafting. However, it was observed by Roxburgh J, "Language draws a series of mental pictures in the mind of the person hearing the words spoken. These pictures are sometimes fairly well defined and sometimes blurred in outline, but they are never very precise. Language is a medium which disdains mathematical rules."<sup>3</sup>

Lord Thring quoted Mr. Austin in his book "Practical Legislation", "I will venture to affirm that what is commonly called the technical part of legislation is incomparably more difficult than what may be called the ethical. In other words, it is far easier to conceive justly what would be useful law, than to construct that same law that it may accomplish the design of the law giver."

An Act Is thoroughly scrutinized and critically examined by the lawyers and the Judges. It has to stand a very hard test. It makes the job of draftsmen more and more important as well as difficult. While drafting legislation, a

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<sup>2</sup> A Voluntary Organisation of Statute Users.

<sup>3</sup> Trustees of the City of London Parochial Charities V. The Attorney General and others, (1955) 1 All E.R.I.

draftsman has to be vigilant about whatever is connected with the matter, he is dealing with. He is very often criticized and ridiculed also. This is what often he gets, hence it has been said by some of known draftsmen that this is a thankless job. But that is not so. This is a job which requires carefulness, awareness, thorough knowledge of law, procedural as well as substantive, the latest trend in the matter of interpretation of the statutes by the Courts etc. He cannot have the liberty to be even slightly loose in use of words and language. It is indeed a tight rope-walk.

I feel if there is more organized and long-duration training course in legislative drafting as a regular feature, it will do a lot of good and possibly there may be better legislation. It may help in avoiding a good amount of litigation and may bring better understanding to a common man as to where he stands in law, if the laws are such which he can well read and understand.

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