

Best Practices in legislative Drafting-Explanatory notes

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Best Practices in Legislative drafting

Anne Temple Peters, Ten best Practices for Drafting Legislation, Journal of Nursing Regulation vol 3 Issue 1

USAID, Best Practices and Procedure in Operating and Managing Legislative drafting units (LDU's) In Parliament

Statutory drafting is a specialised area of legal writing and Drafters should be recruited, trained and retained. He/she must possess extensive knowledge of the Constitution and laws, a thorough knowledge of general principles, terminology, practice and methods of legal research, extensive knowledge of legislative procedure, knowledge of standard English including grammar, spelling, word usage and punctuation.

Drafting Manual

The legislative drafting manual is country's description of best legislative drafting practices. The manual explains how to conduct legal research, how to write provisions in legislation such as definitions, purpose statements, grant of authority, prohibitions and penalties, and how to organise a draft.

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Enacted law is made by the legislature. Judges do also make law by laying down broad principles. Much of the principles of torts law has been developed by judges. The law on negligence, rule in Rylands vs Fletcher are some examples. Custom as a source of law has been in vogue in some parts of India notably in North-Eastern states and Punjab. The law of pre-emption is part of customary law.

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Governor-General council after the Charter Act 1833 acted as central legislative body with the inclusion of Macaulay as fourth member as law member. The Charter Act also created a Law Commission under the chairmanship of Macaulay. Other prominent Law members were Fitzames Stephen, Henry Maine, Barnes Peacock.

Governor-General's council as a legislative body included more members as additional members. All bills were preceded by the study of the subject matter by the Law Commission. In succession Law Commission's were created in 1833, 1853, 1869 and 1886. All bills were also referred to the Select Committee's.

The lawmaking by a legislative council for provinces was created comprising of nominated and elected members. The Government of India Act 1935 created a central legislative council and provincial legislative council. The Indian Independence Act 1947 created a dominion legislature and after independence the constituent assembly drafted not only the constitution of India but enacted

as provisional Parliament laws for India till the First Lok Sabha was constituted after general election in 1952.

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The number of rules, regulations and other variety of subordinate legislation is so large that any attempt to catalogue them would require volumes after volumes of books. However, a large number of them are available on the websites of the ministries/departments and on the websites of regulatory bodies (Reserve bank of India, Securities Exchange Board of India, Telecom Regulatory Authority of India and other around thirty regulatory bodies in different sectors.

Regulatory bodies create regulations for the specific sector. Except in the Reserve Bank of India, the Securities Exchange Board of India and the Telecom Regulatory Authority of India, in other regulatory bodies the structure of the legal department is weak. Theoretically, all subordinate legislation is required to be laid on the table of both the Houses of Parliament and scrutinised by the Committee of Subordinate Legislation but only a small fraction of rules and regulations are scrutinised by the Committee on Subordinate legislation and rarely a change is made in a rule laid down on the table of Houses of Parliament. There have been occasions when the legislative power has been exercised by the central government. The Demonetisation was done three times in India. On first two occasions (1947 and 1978) it was done by the promulgation of Ordinance but in 2016 it was done by a notification issued under a provision of the Reserve Bank of India Act 1934. It seems expediency prevailed over other considerations which are essential for the preservation of rule of law.

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A law creates a norm or rule of behaviour followed generally by the people. The creation of a new norm or rule is to achieve the good of the community. Thus, a policy which requires the approval of legislature to create a new law is called legislative policy. Legislative policy is determined by the union Cabinet and it has to pass through the Parliament. The legislative policy is drawn by the individual ministries/departments and a very little research is done to measure the cost and benefits of a new policy empirically. Instead ministries/departments prepare a draft bill on a subject. Niti Aayog- a centralised policy making body also puts on its website draft of a legislation on a given subject.

Good governance requires good policy first. How to prepare a good policy on a given subject ought to be the first priority of the government. International best practices on policy formulation, development and finalisation are available and it is time to prepare a manual on good legislative policy.

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It is easier to describe what is not a policy than to describe what is policy. First, a policy is rarely by itself a specific action or inaction. Second, a policy is different from collection of data. Third, a policy is not rhetoric. Fourthly, policy is not same as a principle. A policy is about obtaining an outcome which otherwise would not be obtained but for that policy in place.[see, David Allen Green, What is a policy- and what is good policy making?blog.ft.com Nov 25,2014]. Other publications include the Institute for Government's publications [Better Policy Making, Making Policy

Better]. Centre for Public Impact, a foundation, feature case studies on impact of policies. These case studies include (a) The Canada Consumer Protection Safety Act; (b) on 'Reducing Child Mortality in India' (c) India's Electoral Reforms- A Model code Of Conduct .

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Legislative drafting converts legislative policy into a legal text. A legal text may be a constitutional provision, provision of an Act, provision of a rule or provision of a regulation. A legal text first creates a norm or rule and also communicates the norm or rule so created to its users. Communication of a legal rule is as important as its contents and application. A legal text is communicated using English language and a translation in Hindi is accompanied with it and both texts in English and Hindi are published in the Gazette of India. Communication of a legal text in English language is a challenging task as the author of a legal text must be well versed in law and also proficient in use of language. In common law jurisdictions the author of a legal text is a parliamentary counsel/legislative draftsman- a full time civil servant trained in the drafting of legal texts. The preparation of a good legal text requires a good policy and clear and comprehensive instructions to the parliamentary counsel/legislative draftsman by the departmental lawyers. A ministry/department must not send a prepared draft of legal text to the parliamentary counsel/legislative draftsman. The preparation of a legal text requires joint efforts of departmental lawyer and parliamentary counsel/legislative draftsman.

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A legislative proposal for a new legislation or an amendment of existing legislation requires the preparation of a draft Note for the Cabinet under the signature of an officer not below the rank of the Joint Secretary to the Government of India of the concerned ministry/department. It is secret and confidential. It is circulated to all the concerned ministries/departments. Ministry of law and justice is consulted on all legislative proposals. Department of Legal Affairs examines each legislative proposal from the constitutional and legal angle and the draft of the proposed legislation is prepared by the legislative draftsman of the legislative department. The Office Memorandum from the administrative ministry/ department shall contain the following documents-

(i) complete details of the legislative proposal [the department concerned will formulate the legislative proposals in consultation with all the interests and authorities concerned, essentially from administrative and financial point of view including the necessity of the proposed legislation.]

(ii) the entire background material (placed on the file for reference)

(iii) all other details relevant to the proposed Bill; and

(iv) Draft Note for the Cabinet.

The administrative Ministry will not attempt a draft of the Bill

[9.2(d) Manual for Parliamentary Procedure]

The duties of a legislative draftsman include drafting of bills/Ordinances, amendment to the Bill , appearance before the department related parliamentary standing committee/joint

committee/select committee and ensure his/her presence at the time of the introduction, consideration and passing of the Bill.

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The Constitution of India is the supreme law of the land and all other laws including an amendment to the Constitution must fall in line with the expressed and implied constitutional provisions. Constitution amendments were struck down as violative of the basic structure of the Constitution- an implied limitation on the power of the parliament to amend the Constitution. The right to equality, freedom of speech and expression, the protection of life and liberty and other fundamental rights are inviolable and no law can be enacted violative of fundamental rights. No tax can be imposed except by the authority of law and freedom of trade and commerce throughout the territory of India is a guaranteed constitutional right. A central Act applies to the state of Jammu and Kashmir as per Application of laws to Jammu and Kashmir Order 1954. A central law may extend to its citizens and other entities outside India also. A State legislature may enact a law on a subject falling in the state list and concurrent list of the seventh schedule to the Constitution. State Acts may be sent to the President for his assent if any of its provisions are in conflict with a central Act.

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The types of Bills are-the constitution amendment bill, money bill, financial bill and an ordinary bill. A constitution amendment and an ordinary bill may be introduced in either Lok Sabha or Rajya Sabha. On money bill the members of the Lok Sabha who are directly elected by the people have more powers than the members of the Rajya Sabha. A money bill is to be introduced in Lok Sabha and Rajya Sabha can only discuss the money bill without the power to reject a money bill. Other bills may be rejected by the Rajya Sabha. A Money Bill amends a tax law and other laws which contain a provision relating to imposition, reduction or exemption of a tax such as Indian Stamp Act. However, if a bill is certified as a money bill by the speaker it can amend non-tax law and introduce a non-tax law. The Aadhar Act and the Bankruptcy and Insolvency Code of India were certified as a money Bill depriving the Rajya Sabha an opportunity to move amendments to the Aadhar Act. This practice is contrary to rule of law.[see, Chaturvedi, K.N. The Dangerous Trends in Law Making in India, Statute Law Review, October 11,2016]

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The preparation or drafting of a Bill(a constitution amendment Bill, a new Bill, a Bill to amend an existing Act, a repealing and amending Bill or a validating legislation) is undertaken by a team of legislative draftsman headed by a joint secretary and legislative counsel and in consultation with an officer of the rank of joint secretary and above of the concerned ministry/department. Ordinarily, a new Bill implements an International Convention or recommendations of the Law Commission of India or the recommendations of an expert committee constituted by the government. The new Companies Act 2013 and its amendments were preceded by the reports of the Committees. To bring the law relating to formation, functioning and regulation of the companies in India in line with the current global scenario of corporate regulation the Companies Bill,2009 was introduced. A revised Companies Bill 2011 was introduced based on the report of the Standing Committee of Parliament (Twenty-First Report) and incorporating the recommendation of Fifty-seventh Report, the Companies Act 2013 was enacted. The Companies Act 2013 was amended by the Companies

(Amendment) Act 2015 and the Companies (Amendment) Bill 2016 based on the companies Law Committee Report was introduced and referred to the standing Committee.[The Report of the Companies Law Committee, February 2016, CLC 2015, Bankruptcy Law Reform committee, High Level committee on CSR, Law Commission recommendations, Thirty-Seventh report of the Standing Committee of Parliament]The Thirty-Seventh Report states the objective/guiding principle behind amending the Companies Act 2013 as under-

(i) addressing the difficulties in implementation owing to undue stringency of compliance requirements;

(ii) facilitating ease of doing business for companies, including start ups, in order to promote growth and development;

(iii) harmonisation with accountancy standards, and other financial/economic legislation;

(iv) rectifying omissions and inconsistencies in the Act; and

(v) carrying out amendments in provisions relating to qualifications and selection of members of NCLT and NCLAT in accordance with Supreme Court decisions.

From the objectives and general principles stated above, the legislative policy of the new Companies Act 2009, 2011, 2013, 2015 and 2016 seems to be the facilitation of ease of doing business in order to promote growth and development. This purpose could have been stated in the long title of the Bill. In U.K. the practice is to start a bill with a purpose clause. In India, the rules of procedure of Lok Sabha and Rajya Sabha do not contain a requirement as to inclusion of a purpose clause in a new Bill.

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A bill has similarities to a human being. An enacted law is permanent and repeal is the death of an Act. The structure of an Act is similar to a human being the head is short title and the foot is the repeal and savings. A bill contains legal rule and principles and also ornamental aids(marginal notes Divisions, Parts, Heading). A bill is expressed in a language used by the human beings and converts the legislative policy into a legal text for easy understanding of its users. Thus structure of a Bill is as under-

A.Traditional

Short Title, Long title, Enacting Formula, Preamble

Extent, Commencement and Application.

Definitions/Interpretation.

Illustrations.

Schedule.

Repeal and Savings.

B. Power and Protection to executive

Power to exempt

Power to delegate

Power to make rules

Power to remove difficulties

Protection for action taken in good faith

Previous sanction for prosecution

C. Special provisions

Ousting the jurisdiction of courts

Offences by companies

The remaining provisions of a Bill depends upon the subject-matter of the proposed legislation. For example, a tax law is to contain provisions relating to –person liable to tax, basis of liability, computation of tax, exemption from tax, tax authorities-appointment, powers, collection of tax, recovery of tax, anti-tax avoidance measures, anti-tax evasion measures, appellate authorities, double tax avoidance treaties, taxation of non-residents, taxation of companies.

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The Rules of Procedure and Conduct of Business in Lok Sabha have been made by the speaker in exercise of the powers conferred upon Speaker by article 118(2) of the Constitution. Chapter X and XI contain rules as to legislation.

Chapter X on legislation contains following rules-

Introduction and publication of Bills(rules 64 to 73)

Rule 64 reads as under-

The Speaker, on request being made, may order the publication of any Bills(together with the Statement of Objects and Reasons, memorandum regarding delegation of legislative power and the financial memorandum accompanying it) in the Gazettee...

Motions after introduction of Bills and scope of debate(rules 74 to 76)

Motions after presentation of Select/Joint Committee Reports and scope of debate(rules 77 and 78)

Amendments to clauses etc and clause by clause consideration of Bills(rules 79 to 92)

Passing of Bills(rules 93 to 97)

Bills other than Money Bills returned by the Council(rules 98 to 102)

Money Bills returned by the Council(rules 103 to 108)

Adjournment of debates, withdrawal and removal of Bills(rules 109 to 113)

II

Bills originating in Council and transmitted to the House(rules 114 to 127)

III

Authentication and Assent of the bills passed(rule 128)

IV

Reconsideration of bills returned by the President(rules 129 to 153)

Authentication of Bills again passed by the House(rule 154)

Chapter XI

Bills seeking to amend the Constitution(rules 155 to 159)

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Latin and French were used in legal documents till 18th century. Latin terms are used in legislation (mutates mutandis, ad hoc). The French word 'execute' has been adapted and adopted by the vocabulary of law and the phrase 'force majeure' is used in contracts. Lawyers use Latin terms because they are convenient shorthand. The language of law has certain features that make it different from everyday English. A technical legal term cannot be replaced by another term without being aware of the consequences. Certain technical legal terms have been judicially determined and has acquired the status of 'term of art' such as negligence. The word 'deemed' is quite often used without understanding its consequences. The use of the word 'deemed' may create a legal fiction or it may create presumption.

Definitions of an Act are specific to that Act. However, to shorten language of an Act, rules , regulations a number of legal terms(words and phrases) have been defined in the General Clauses Act 1897.Sixty-six legal terms have been defined in the General clauses Act,1897 which need not be defined in any Act, rule or regulation. Definitions clause defines words for the sake of convenience to shorten the language of an Act such as the words-Act, prescribed, notification.

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The involvement of all stakeholders is ensured from the stage of the formulation of policy to the preparation of the draft Note for the Cabinet and then in the parliamentary committees (Department-related Parliamentary standing Committee, Select Committee and Joint Committee).

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Retrospective operation of any law is contrary to rule of law. In some circumstances retrospective operation may be justified in validating legislation.[see, Chaturvedi,K.N., Legislative Retrospectivity and Rule of Law, Statute Law Review (2013) 34(3) 207-220 and Chaturvedi ,K.N. Validating Election Law 2013: A Bad Precedent(2014)35(2) 133-138

Committee on subordinate Legislation(2012-2013)Fifteenth Lok Sabha, Thirty-First Report on Information Technology (Intermediaries Guidelines)Rules 2011. Certain words used in rule 3(2)(b) such as grossly harmful,harassing,blasphemous,defamatory,obscene,pornographic,paedophilic,libellous, invasive of another privacy, hateful, or racially ,ethnically objectionable. were debated in the committee.