

## Introduction to Legislative Drafting\*

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Drafting a law is writing a law. Can anybody and everybody write a law? A book on Legislative drafting in Hongkong mentions that it is generally agreed that it takes about seven years of training and practice for a qualified lawyers to achieve full competence as a drafter, capable of tackling any drafting assignment.

Legislative drafting is a unique form of writing. Legislative drafting is at the centre in lawmaking process. The first stage in law making is determination of policy. All policies for their implementation do not require legislation. Policy making in the government takes place in ministries and departments. Once a decision is taken to affect rights of citizens or to create an offence or to impose a tax it requires a new law or an amendment in an existing law. Ministries or departments concerned with the subject matter say on a new tax, the Ministry of Finance, prepares a draft note for the Cabinet. The proposal contained in the draft Note for the Cabinet, say for the imposition of Carbon Tax, identify the potential tax payers, the basis of tax liability i.e. emission of carbon, the authorities responsible for the collection of tax- all these issues and many other issues requiring a new law are examined in the Ministry of Law and Justice from constitutional and legal angle in the Department of legal affairs and thereafter for converting the legislative policy into legal text a draft bill is prepared in the Legislative department, Ministry of law and Justice.

The journey from policy formulation to the drafting of a bill is time consuming and it involves civil servant. Once a bill is introduced in the Parliament the journey from a bill to an Act is part of parliamentary process.

A policy may be simple say to repeal an obsolete or redundant law. It is easier to implement this policy by drafting a single clause bill. Recently, a large number of obsolete and redundant Acts were repealed by a single legislation containing the list of repealed Acts in

the schedule to the Act. These bills are passed quickly in the parliament. Similarly, passing of Appropriation Bills every year is an easy exercise as an Appropriation Bills contain only the amount shown in words and figures which are to be drawn from the Consolidate Fund of India in respect of each Ministry or department of the Government of India.

However, a constitution amendment bill or a new bill or an amendment of an existing Act may be simple or complex depending upon the subject-matter. A constitutional amendment bill may be simple as inclusion of a language as an official language in the eighth schedule of the Constitution or extension of reservation in parliament and state legislature for deprived social class for another ten years as the Constitution originally provided for reservation for ten years only . However, a constitutional amendment bill creating a new procedure for appointment of judges is a complex matter depending upon the policy of the government. Recently, a constitution amendment Act providing for inclusion of Minister of Law and Justice as a member of selection panel for judges of the Supreme court and High Courts was held unconstitutional by the Supreme Court of India as it affected independence of judiciary .

Amendment of an existing legislation in health, education and social sector may be simple but amendment in economic and fiscal legislation is always complex in nature. An amendment may involve a single provision or a multiple provisions depending upon the subject matter. The Benami Transactions Prohibition Act 1988 contained only 8 sections. But amendment of the principal Act by the Benami Transactions Prohibition(Amendment) Act 2016 contains 72 sections .

#### New Laws

Indian Statute book contains 1040 central enactments enacted from 1860 to 2016.Pre-independence Acts made by the Governor-General in Council and Central legislature under the Government of India Act 1935 continue to remain a valid law till such laws are amended or repealed by the Indian Parliament.

#### **Law Making by the Executive-**

During colonial period the laws were made for British India by the British Parliament directly and also by the Governor-General in Council and Imperial Legislature under Acts of

British Parliament. The Indian Contract Act, 1882, the Indian Evidence Act, 1872, the Transfer of Property Act, 1882, the General Clauses Act, 1897 and many more existing laws of India are the work of Legislative Council of the Governor General of India.

Charter Act of 1833 (Government of India Act, 1833 (3 & 4 Will. 4, c. 85) established a centralised law making body of which Macaulay was a law member (like Law Minister). Under the Charter Act, 1833 Governor General in Council passed Acts. Prior to that the regulations were made Charter Act of 1833 (Government of India Act, 1833 (3 & 4 Will. 4, c. 85) established a centralised law making body of which Macaulay was a law member (like Law Minister). Under the Charter Act, 1833 Governor General in Council passed Acts. Prior to that the regulations were made by the Governor-General of three presidency towns of Calcutta, Madras and Bombay.

Much of the present day law which codified substantive law and procedural law is of that period. During that period law members of the Governor-General in council were Barnes Peacock, Henry Maine, Fitzames Stephen, Lord Hobhouse and Whitley Stoaks.

Indian Penal Code was drafted by Macaulay but was enacted during the time of Barnes Peacock in 1860. The Indian Succession Act, the Companies Act, the General Clauses Act and the Divorce Act were enacted during the time of Sir Henry Maine. The Limitation Act, the Evidence Act, the Contract Act and Code of Criminal Procedure were enacted during the time of Fitzjames Stephen and the Specific Relief Act was enacted during the time of Lord Hobhouse.

Whitley Stoaks tenure first as Secretary to the Indian Legislative Department and then as Law Member of the Governor General in Council witnessed a large number of consolidating Acts which resulted in reducing the bulk and simplified the Indian Statute book.

Most of the laws were preceded by a careful scrutiny of the subject-matter by the Law Commission. The first Law Commission headed by Macaulay was constituted under the Charter Act 1833. Subsequently, the second, third and fourth Law Commission were constituted in 1853, 1861 and 1869, respectively. The practice of referring a bill to a Select Committee started during that period.

### **Law Making by Elected Representatives-**

The Government of India Act, 1909 and the Government of India Act, 1919 devolved powers on elected representatives. This process was further strengthened by the Government of India Act, 1935. During the period of the first half of the 20th Century eminent lawyers who advised the government on legislation included prominent Indians namely, Satyendra Prasanno Sinha, Sir Tej Bahadur Sapru, CP Ramaswamy Iyer and Muhammad Zafarullah Khan. This period witnessed the passing of the Indian Partnership Act, the Sale of Goods Act and the Insurance Act.

During this period also bills were circulated for public opinion prior to their consideration by the Select Committee.

### **Constituent Assembly as Lawmaker-**

The Constituent assembly not only drafted the Constitution but also acted as provisional parliament till the constitution of Lok Sabha (lower house of parliament) in May 1952. Many laws of provisional parliament are still in force most prominent of them being the Representation of People Act 1950 and the Representation of People Act 1951.

### **Parliamentary Law Making process-**

In independent India, the Parliament and State legislatures are law making bodies. A detailed law making process is provided in the Constitution of India and in the rules of procedure of both Houses of Parliament. Ministry of Parliamentary Affairs released long back a Manual of Parliamentary Procedure giving details including a check list for the user of the Manual. This manual is still in use by the Ministries and Departments of the Government of India.

Quite often an Act of Parliament lays down a broad policy and leaves the details to be filled up by subordinate legislation. This is called delegated legislation. There are various forms of delegated legislation i.e. rules, regulations, order, bye-laws, schemes etc.

### **I. Who initiates the legislative process?**

For government bills the legislative process is initiated in one of the Ministries/Departments of the Government of India. The Allocation of Business Rules and Transaction of Business Rules identify the Ministry/Department concerned with a particular subject matter in respect to which legislation is required.

## **II. The need for legislation-**

The first step in the legislative process is to identify the problem to be solved. The problem may be a social problem or economic problem or a political problem. The problem may have regional, national or international dimension.

Ideally, identification of a problem may be captured in a Concept Paper aimed at stating the background, the current law and the necessity of a policy to address a current problem by either change of policy or by enacting a new law or by amending an existing law. In other words, a Concept Paper could identify the problems and could suggest the end goal. It may be mentioned here that after a Concept Paper is deliberated upon with all the stakeholders only after that a Policy Paper could be prepared.

The purpose of a Policy Paper is to articulate a policy for achieving the desired goal articulated in the concept Paper. Sometimes, a legislative solution may not be appropriate.

After 1991 liberalisation of the economy the government took recourse to both statutory and non-statutory measures to achieve its policy objectives. For example, the Telecom Policy of 1994, 1999, 2004 and 2014 brought changes in the telecom sector without changing the Indian Telegraph Act, 1885. During these years, the Indian Telegraph Act, 1885 was amended once to codify universal service obligations of the operators. And, for providing level playing field to private operators the Telecom Regulatory Authority and the Telecom regulatory appellate Tribunal were established under the Telecom Regulatory Authority of India Act, 1997.

## **III. Preparation of a Policy Paper-**

A policy paper requiring legislation must be prepared by a team of persons having expertise and experience of the subject matter of legislation. The policy paper is to contain drafting instructions for the legislative counsel of the Ministry of Law and Justice, Government of

India. Quite often a proposal for a new law emanates from the Reports of a Committee or Commission. For example, the reports of the Law commission of India and of the Parliamentary Committees suggest amendment of the existing law or the enactment of a new law.

Some of the key issues as part of a Policy Paper could be-

i. What is the scope of the policy—to whom does it apply?

For example-Individuals, Companies, Firms, Government departments.

ii. Who will be responsible for carrying out the policy?

iii. Will people be encouraged to follow the policy through incentives or punished for violating it?

iv. If there are going to be penalties, should they be criminal or civil?

v. Questions of timing

a. Should the policy take effect on the date of enactment or at some later time?

b. How much lead-time will agencies or private actors need to prepare to implement the policy?

c. Should the policy apply to different persons or things at different times?

d. If the policy affects current programs or current behaviour, should there be any transitional rules?

e. What is the relation between the policy and existing law—Must existing law be amended to avoid conflicts with the policy?

#### **IV. Form of legislation: Primary and Secondary**

There are different forms of Bills. The Constitution Amendment Bills; Government Bills; and Private Members' Bills.

Government Bills introduce a new law or amend or repeal an existing law. All government Bills are drafted by a legislative counsel in the legislative department of the Ministry of Law and justice, Government of India.

Form of secondary legislation are rules, regulations, schemes and bye-laws. Rules are made by the government. Regulations are made by statutory bodies such as Securities Exchange Board of India (SEBI), Telecom Regulatory Authority of India (TRAI), Reserve Bank of India (RBI) and other statutory bodies and authorities.

#### **V. Organization within a bill: Broad Features**

The clause is the basic unit of organization of a bill and becomes a section of an enacted statute. A Bill containing more than 25 clauses is accompanied by a document titled- an arrangement of clauses, Statement of Objects and Reasons; Notes on Clauses; Financial Memorandum and Memorandum Regarding Delegated legislation.

An amendment Bill of less than 25 clauses is accompanied by Statement of Objects and Reasons; Financial Memorandum and Memorandum Regarding Delegated legislation.

A repealing Bill is accompanied by Statement of Objects and Reasons only.

A Bill also contains substantive provisions which create rights and obligations and procedural provisions which deal with the enforcement of the rights and obligations created by or under a Statute. Standard provisions in a Bill are-title of the Bill, short title, enacting formula, extent and commencement, definitions, power to make rules, power to make regulations, power to remove difficulties.

#### **VI. Structure of an Act: Detailed Features**

An Act contains substantive provisions which create rights and obligations and procedural provisions which deal with the enforcement of the rights and obligations created by or under a Statute. Standard provisions in an Act are-title and short title, enacting formula, extent and commencement, definitions, power to make rules, power to make regulations, power to remove difficulties.

General rule is that a section contains one idea or message. The general rule is stated in the form of a legal rule applicable to persons or things. The exceptions to the general rule are stated in the form of proviso appended to the general rule. Sometimes a section or a proviso to a section is followed by an Explanation. Depending upon the requirement of legislation sometimes special rules are made part of the scheme of the Act. These special rules describe the persons or things to which the main idea or message applies in a different way.

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