

LEGISLATIVE DRAFTING

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**Class-room live lectures edited, enlarged
and updated**

LEGISLATIVE DRAFTING

....Nomography

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Text Book:

P.M. Bakshi. : An introduction to Legislative
Drafting.

INTRODUCTION

The subject 'Legislative Drafting' is like grammar and rules of composition, difficult to remember, but when followed by the individual inspires him to develop creativity and skill to pen drafting and in particular **Legislative Drafting**. Intelligence, memory and judgment may be the assets of an Advocate, but a draftsman should have skill and art with a sense of good drafting.

The Statutes get their proper chiseling and trimming in the hands of the Judges whose interpretations play a leading role in this regard The draftsman should be closely following these;

There is no limitation to his knowledge of the subjects-science, art, literature ,history, logic etc, apart from law. The students should make attempts to draw up hypothetical drafts on certain chosen subjects. It is true to say with Sri. Bukshi that **a perfect draftsman is not born yet**. But to aim at reaching higher standards should be the objective of a good draftsman.

QUESTIONS BANK

1. What is Legislative Drafting. Explain its main contents.
2. What are the materials and preliminaries that might help to develop the draft.
3. State the conditions that must be borne in mind in drafting Subordinate Legislation.
4. What are the Rules of Composition for Legislative Drafting.
5. What are the Rules of Composition for drafting Municipal bye laws.
5. Write Explanatory notes on :
 - i) Title & Preamble,
 - ii) Commencement Clause,
 - iii) Definitions,
 - iv) Precision & clarity,
 - v) Flaws in Drafting,
 - vi) Kind's English,
 - vii) 'As if enacted in this Act'
 - viii) Conclusive Evidence,
 - ix) Classification of Statutes.
7. Delegatus non potest delegare - Discuss its relevance in Legislative Drafting.
8. Draft the bye-laws of a Municipality or Educational Institutions or college.

CHAPTER 1

NOMOGRAPHY

Ch. 1-1 Legislative Drafting.

'Nomography' is the name given to the subject that deals with the drafting of laws. It is, in other words, Legislative Drafting in a broad sense. The objective of 'Legislative Drafting' is to attain beauty and utility, and, the draftsman's major responsibility is to attain these two or strike a harmony between them.

Legislative Drafting is both a Science and an Art. It is a science inasmuch as certain rules can be laid down which are of universal application.

It is an art as it consists of *a sense of the use of language*, together with a knowledge of the technical interpretation. Efficiency can be reached by getting mastery of the rules, coupled with skill or natural gift.

Just like an artist, who decides on colour, or like a musician striking at a particular tone, the draftsman should secure his 'sense' of good drafting. His knowledge of law speaks to his intelligence memory and judgment but, drafting is a **skill and an art**.

The draftsman is in reality a '*creative artist*'. He gives form or shape to ideas, converts vague ideas into concrete words, and reduces proposals: social, economic, political legal, reform etc. into writing.

He collects ideas from several sources and his process is synthetic and not analytical.

Legislative drafting mainly deals with the drafting of bills intended to become a part of statute law.

But in a broader sense, it includes the drafting of statutory orders, rules and other instructions issued by the Goyt.,

It also includes the drafting of bye-laws of corporations, municipalities and other forms of subordinate legislation.

'A perfect draftsman is not born yet'. Sri Bhakshi has rightly pointed out in his book : An introduction to Legislative Drafting.

But, to aim at perfection should be the aim of all draftsmen. The subject legislative drafting, shows the avenue to reach this perfection.

Ch. 1-1. Materials used in drafting.

As Legislative drafting is both a Science and an Art, the draftsman requires certain materials to prepare his draft. The materials, inter alia, are

i) Analogous legislation that might exist on the subject in other countries, or in other parts of India.

There is little in legislation that is original. Legislatures imitate each other.

ii) Legislation that already exists on the subject.

iii) Instructions received from the department or agency that sponsors the file. These instructions require to be examined carefully.

iv) The draftsman should carry out a preliminary scrutiny of the proposed legislation in order to see whether it would be in order.

The proposed legislation should not offend or conflict with any fundamental provisions of the **Constitution of India**, i.e., it must not be ultra vires of our Constitution. It should fall within the field assigned to the legislature by the Constitution. (Legislative lists-VII schedule).

Also obtaining prior consent of the President, or special formalities if any should be fully observed.

v) If there are special requirements to be followed as per the Constitution, they are to be followed in penning the draft.

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CHAPTER 2

CLASSIFICATION

Ch. 2. Classification of Statutes.

Statutes have been classified under various heads, but for the purpose of legislative drafting they are classified as follows :

i) Statutes affecting the Constitution may require, observance of special formalities of Constitutional requirements.

ii) Statutes providing for taxation, iii)

Penal statutes dealing with crimes, iv)

Statutes dealing with local governments.

v) Statutes dealing with Statutory bodies including principal bodies or other Corporations.

vi) Statutes dealing with and affecting family laws and personal laws,

vii) Statutes dealing with the reformation of the law itself.

viii) Statues dealing with the general administration of justice and various procedures of the courts and the Tribunals.

x) Statutes dealing with miscellaneous matters. As regards the relationship with the existing body of law on the subject, statutes may be classified as follows.

a) When there is no existing legislation on a subject, the proposed measures would be enacted for the first time which will be entirely a new piece of legislation on the Statute Book on the subject.

b) When there is already a statute on the subject and only modification or alteration is brought about by a legal instrument, it is called 'Amending Statute'.

c) A statute which aims at collecting into one Act provisions scattered in several Acts. This is called Consolidating Statute. Eg. Indian Succession Act.

d) Codifying Statute. A new statute with new measures.

e) Repealing Statutes. An earlier statute is repeated.

f) Declaratory Statutes. The existing law is declared by a statute.

CHAPTER 3

C COMPOSITION

Ch. 3. Rules of Composition for Legislative Drafting.

Certain rules are to be followed if the draft should read well and achieve the desired object.

The rules of composition follows in literary work would be inadequate. Beauty in expression, may be achieved by following.

- i) Purely literary rules intended to achieve beauty of expression,
- ii) Rules peculiar to composition and
- iii) Rules of Grammar.

Here (i) & (iii) are to be invariably followed.

In addition the following are the points touching the rules peculiar to legal composition.

i) Legislation is normally intended to be a command for future obedience. Sometimes it might contain statement of fact dealing with the past which should be called 'Preamble',

And the part of the draft which deals with the future intended to produce the desired legal consequences is called the body of the Statute.

ii) The simple sentence structure should be preferred to a compound or a complex sentence. If it is inevitable to employ compound or complex sentence, care should be taken at least to ensure that reader would not get lost. It is for this reason that it is always desirable to number the various clauses of lengthy sentences.

iii) The operative portion of a section should come first, and, exceptions, reservations or qualifications should be placed thereafter.

. iv) The choice of words used shall be appropriate to the circumstances.

It is not the function of the draftsman to make his draft learned he has to make it **easy of reading**. Duplicating of words like 'null and void', 'authorised and empowered' can be replaced by 'void' and 'authorised'.

v) An ideal sentence is a sentence that does not read wrongly if the punctuation marks, are marked. The 'stop' should not appear more than once in a sub-section; 'Provide that' should be preceded by a colon and not by a stop; coma should not be used where one can do without it; putting a dash has been described as 'the most feminine of all the points' and as such should be avoided.

vi) The style or good legal composition should be free from all **emotion and rhetoric**. It must be impersonal , consistent and not contradictory and free from metaphors and figures of speech; embroidery not needed. The texture should be firm, useful and durable, '**A noble simplicity is its most beautiful characteristic**' (Bentham).

CHAPTER 4

DELEGATION

Ch. 4. **Delegation of Legislative Powers.**

Whether legislative powers could be delegated is a question of great relevance to the draftsman. The rule is 'delegatus non potest delegare'. But, delegation has become a present day necessity owing to the pressure of time and the complexities of modern life.

The legislature cannot bring out a self-contained and a complete act and as such delegation becomes a practical necessity. However, delegation within proper limits is permissible. What are proper limits ?

According to our Supreme Court **only the essential functions**

are not to be delegated. These are functions non-delegable in nature and the legislature alone should make the law. They are :

- i) Policy making cannot be delegated to any other authority : that shall be done by the legislature itself.
- ii) The legislature cannot abdicate its functions, and vest them in other authorities.
- iii) The power given to the delegatee should not be unconfined and vagrant.
- iv) The time for which the Act may remain in force must be mentioned in the Act itself. A power with the executive to extend the Act from time to time would not be favoured.
- v) Taxation : Power to fix rates of tax should not be delegated.
- vi) Penal law-defining offences & prescribing punishments, are non-delegable.
- vii) To provide for exemptions, is non-delegable. viii) To repeal or amend an Act etc. is an essential function.
- ix) When Tribunals are constituted in a Statute, to specify • their Jurisdiction is non-delegable.

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CHAPTER 5

MISCELLANEOUS

Ch. 5-1. Title

An act generally contains two titles called the 'long title' and the 'short title'. The long title appears at the very beginning of the act before the preamble. It generally begins with the words, 'An Act to provide for

The main object of this is to indicate in brief the purpose of the Act and to provide an introduction to strangers a brief summary of the main provisions. The **short title is the 'Lable of the Law'** to facilitate citation of the Act in future enactments and other instruments.

E.,g Indian Penal Code [I P C], C P C., T P Act etc

Act begins with the words '**This act may be called**' It should not be a misnomer or misleading. The Indian Succession Act has a misleading title. It does not apply to majority of Indians.

Long title does not restrain the plain meaning of the statute but it may aid in resolving a difficulty, e.g. in case of ambiguity.

Ch. 5-2. Preamble.

A Preamble is usually inserted to serve as a preface to the Act. It is a key to open the minds of the makers of Act and the mischief which

they intended to redress. It is an excellent aid to construction and can be resorted to to unlock the mind of its makers. It would serve as a useful purpose where the act introduces a measure of social or economic reform

Preamble must be consistent with the body of the act. It usually begins with the word 'whereas.....' ⁵. It tries to justify its reasonableness before the courts, to avoid a challenge under Ultra Vires doctrine.

The preamble is not part of the Statute; it is a mere recital of the intentions of the framers, and, if the text is clear, the preamble is ignored.

It is pressed into service only to solve an **ambiguity**. Lord Halsbury opines that preamble should not be interpreted to cut down the text or to control it.

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Ch, 5-3, **Commencement Clause,**

An Act may be made to commence at once in which case it comes into force as soon as the assent of the 'President' (or the 'Governor') is given. Where the printing and publication of the act is likely to take time, the commencement clause should not be drafted so as to make the act come into force at once.

In such a case the commencement clause should be 'This Act shall come into force on its publication'. The hour of commencement of an Act is not usually mentioned.

As the law does not take into account the fraction of a day, an act comes into force on the first moment of the day, on which it takes effect. The court should have no hesitation, in fixing the exact minute the law comes into force, where such action will promote substantial justice.

It may provide for partial commencement with reference to area, subjects etc.

Eg.: a) This Act may come into force on such date as the Govt. may by notification in the official gazette -fix.

b) This Act shall come into force at once.

c) This Act shall be deemed to have come into force on (Retrospective effect) (Not for criminal law).

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Ch. 5-1 **Definitions.**

In England, the definitions are kept at the end of the act. In India they are inserted at the beginning. Definitions have been described by Samuel Butler as a '**Wall of words round a chaos of ideas**'

. They try to define the boundaries of the denotation of a word and are meant to keep the application of the word with proper limits.

They must be **neat, well understood, clear and unostentatious**. They should not be pompous or abstruse or circumlocutory. Words which are not used in the body. of the Act should *not be defined*,

Definitions generally begin with the word '**means**' or '**includes**'. Where the word 'means' is used, the definition excludes all things that are not covered by the words that follow. It is exhaustive.

Where the word 'includes' is used, the definition is not exhaustive and the word defined is necessarily intended to have a wider application than the things mentioned in the defining words. The words 'mean' and 'includes' should not be used together in the same definition.

Utility of definition :- Definitions help to shorten the body of the Act, assist in the explanation of difficult words of a Statute ; also to limit and define the scope.

- e.g. i) 'Dishonestly' Sn. 24 I.P.C.
ii) 'Fraudulently' Sn. 25 I..P.C.
iii) 'Good faith' Sn. 521 I.P.C
iv) 'mesne profits of property means' Sn. 2(12). C.P.C.

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Ch, 5-5. Proviso.

The proviso, whenever necessary can be inserted below a section, sub-section, clause or sub-clause as the case may require. The proviso should always be printed separately from the main part of the section,

The main functions of the proviso should always be printed separately from the main part of the section. The main functions of the proviso are as follows :-

i) To create an exception in respect of certain matters which would otherwise come within the section.

ii) To qualify or restrict the operation of the main part of the section.

iii) To exclude some possible mis-interpretation of the section.

A pro vise should never be used to extend the scope of the section.

CHAPTER 6
, MUNICIPAL BYE LAWS

Ch. 6. Drafting of Municipal bye - laws.

Municipal Byelaws are one of the forms of 'subordinate Legislation', and are to be drafted carefully keeping in view the amplitudes of the subject. While preparing Municipal Bye-Laws, the following requirements shall be kept in mind :

- i) The matter and purport of the bye-laws should be strictly within the scope of the Parent Act (Municipalities Act) which confers power to make bye-laws.
- ii) The manner of making and publication of bye-laws as prescribed by 'the Parent Act should be strictly adhered to.
- iii) The bye-laws should be certain, clear and unambiguous.
- iv) The bye-laws should not be repugnant to
 - (a) the Parent Act provisions
 - (b) To the provisions of any other statute,and iii) the General principles of law.

v) The bye-law will become void if it is **unreasonable**. Of course, the modern trends adopted by the courts of law is to take a liberal view in favour of bye-laws and not to declare them void on the ground of unreasonableness unless the bye-laws are patently **absurd or manifestly unjust**.

They become void if :they put undue **hardship on the citizens** to whom they apply.

Since local self governments are constituted by the popular majority 'of the locality, the support and co-operation of the people shall be secured for the smooth and peaceful functioning of the local self governments.

CHAPTER - 8

FLAWS

Ch. 8. Flaws in Drafting

Legislative drafting should be free from flaws. These are,

- i) **Looseness** : is the most usual flaw to be found, and its peculiarity is that it might creep in, in spite of the best possible attention,

ii) **Repetition:** should be avoided for the reason that apart from being bad style, it might lead to many problems in interpretation. It may result in redundancy and inconsistency.

iii) **Obscurity:** is a fault that might arise either by reason of too many words or by reason of too few words, or wrong words. Incoherence in thought naturally leads to unintelligible expression.

iv) **Shabbiness** or slovenliness sometimes results from a carefree attitude towards words.

v) To be **very clear** and specific, the use of the words like 'Ditto' should be avoided.

vi) **Vagueness:** apart from constitutional objections, it might make the whole labour of the draftsman futile,

vii) Providing no provision for the **sanction in a statute is a flaw to be avoided.**

Ch. 5-6. 'As if enacted in this Act'.

One of the cardinal principles of legislative drafting is to avoid such phrases 'As if enacted in this Act'.

The reason is that these words have no purpose at all to serve, according to the Court.

The context in which this phrase is used is as follows. The Parliament or legislature makes an Act

It provides therein provisions for subordinate authority to make rules, schemes, etc. and it provides further that such rules etc. Shall have effect 'as if enacted in this Act'.

The question in England is whether such rules etc. are exempted from judicial review 'as an Act'. (In England Acts of Parliament are not subject to judicial review but **Lord Dunedin has held that the rules must give in, to the Act.**

On the face, the phrase 'as if ... Act' looks to be a blank cheque but in view of the decisions of the Supreme Court in the United States and India, **where there is judicial review this phrase serves no purpose.**

The reason is that even the Acts, are subject to judicial review in India. Hence the subordinate legislation is also subject to judicial review as violative of the Parent Act.

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Ch. 5-7. The King's English.

If the authors of 'The King's English' were allowed to express their view on the legislative drafts, they would criticize the legal jargon (confused language).

Eg: 'Aforesaid', 'notwithstanding anything', 'hereinbefore' etc. The draftsman has become used to them.

Apart from the above, the other faults that are noticeable are those that 'mar the chastity of style & grammatical accuracy'.

Sri Bakshi, the author of 'Legislative Drafting' rightly puts a test through the masters of the Kings English. What is expected of by the draftsman is **clarity, precision and 'noble simplicity'**.

Hence, **happy language** should be the objective of the draftsman.

The appropriation Act. (English), uses the words anything 'expressly stipulated in a will,. Judge Lindley wonders how one can talk about stipulations in a will !

CHAPTER 9 SUB_ LEGISLATION

Ch. 9. Subordinate Legislation.

Legislation as a source is fertile. The 'Act' is made by the Parliament or State Legislature. This 'Act' gives birth to a number of subordinate legislation: Rules, regulations, orders schemes, bye-laws etc. These are technically the delegated legislation.

The validity of the rules, orders bye-laws etc. is judged by the courts on certain grounds. The draftsman should be shrewd enough to avoid such grounds & save them from being declared ultra vires.

Grounds :

- i) Defect in the manner of exercise of power,
- ii) Defect in the form of the rules etc.
- iii) Defect of Substance.
- i) Defect in the manner of exercise of power.

This arises as a result of non-observance of a formality by the concerned administrative authority.

- a) Previous publication.
- b) Previous approval by the Legislature as per the Act.
- c) Previous sanction of executive authority.
- d) Previous consultation with some defined authority.
- e) Inquiry which should be conducted
- f) Laying the rules etc. before the Legislature.

- ii) Defect in form :
 - a) Not referring to the section or quoting a wrong section while making the instrument.
 - b) Not referring to the conditions to be fulfilled as per the Act.
 - c) Combining provisions made under two different statutes.
- iii) Defect in substance :
 - a) The delegatee should not re-delegate.
 - b) Power should not be exercised mala fide.
 - c) Levy of fees, corporation penalty, or excluding judicial remedy etc. should not be done by Rules etc.
 - d) Retrospective effect should not be given to Rules, Orders etc.

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CHAPTER 10

DRAFTING OF RULES OF AN INSTITUTION OR COLLEGE

Ch. 10. A.B.C. Educational Institutions Rules 2012 : [Framework]

Art 1 : These Rules shall be called "The ABC Educational Institutions Rules 2012"

Art 2: Registered Office : The Registered Office of the Institution shall be at Mysore.

Art 3 : Objects : The objects of the Institution shall be :

- i) to establish schools and colleges in the fields of Science, Arts, Commerce, Engineering and Medicine, to secure recognition or affiliation from University or other bodies thereof, and, to manage, run and to administer them.
- ii) to enter into agreement or arrangement with the Government, Municipal or other local authorities to further the objectives of the Institutions.
- iii) to acquire, hold and dispose of movable and immovable properties.
- iv) to receive charities and gifts.
- v) to take all steps or measures necessary and proper to promote the objects of the Institution.

Art 4 : The Institution shall have :

- i) Patrons, who contribute a sum of Rs. 5 lakhs, ii) Members who contribute a sum of Rs. 5,000/-- to the funds of the institution.

Art 3: Membership: Membership is open to any person, who has attained the age of 25 years and, not otherwise disqualified under the Contract Act. The membership ceases on resignation, on a member becoming insolvent or of unsound mind or on his removal for grave misconduct or on conviction of a criminal offence.

Art 6: Rights of the Members: Every member has a right to participate, to contest for election, to vote in the General Body; to receive all notices, copy of balance sheets, profit and loss accounts and reports of the Institution.

Art 7: Meetings: The Patrons, and the members shall meet in the General Body once a year, after 21 days notice to the members of the Institution, to transact any business consistent with these Rules and objects of the Institution and to appoint auditors etc. A special General Body may be convened to transact any business of urgency, after 7 days notice. The quorum in any meeting shall be at least 40% of the total membership Voting may be by ballot or by show of hands.

Art 8: Governing Council: The administration and management of the Institution shall be vested in the Governing Council which shall consist of 15 members who shall among themselves elect one President, one Vice President, one Hon. Secretary as office bearers.

2. Powers and Functions :

The Governing Council shall have the powers to manage and administer the affairs of the schools and colleges, to acquire, hold and to dispose of movable and immovable properties, to co-opt members, to constitute sub-committees, to consider and dispose of membership applications, to appoint auditors, and, to exercise all and necessary powers consistent with these rules and objects of the Institution.

The Governing Council shall convene monthly meetings with at least 7 days notice, to transact the business of the Institution.

Art 9: (i) President: The President is the Head of the Institution and shall have all the general powers of administration and management. In emergency, he may take necessary action and report to the Governing Council.

(ii) Secretary: The Hon. Secretary is the Chief Administrative Officer of the Institution and shall conduct and deal with all the official correspondence, convene monthly meetings, carry out the

decisions of the Governing Council, to deal with the funds of the Institution as per these rules, to open Bank Accounts to be operated by the President and Hon. Secretary jointly, to enter into contract on behalf of the Institution, and, to exercise all and necessary powers as are conducive to benefit the Institution.

Art 10: Suits: The Institution may sue and be sued in the name of the Hon. Secretary.

Art 11: **Winding Up** : The General Body has the powers to wind up the Institution by a 2/3 majority and in such an event, the funds of the Institution shall be transferred to any Educational institution, which is similarly dedicated to the cause of Education.

Art 12: Miscellaneous: In all other matters, the Societies Registration Act and Rules shall apply.

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