

P.A SANGMA FELLOWSHIP

FOUNDATIONS OF GOOD DRAFTING SESSION-I

COMPLETE NOTES ON DAY OF THE TRAINING-1

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MEGHALAYA

The key agenda that was highlighted in the beginning of the training are:

- What are key legislative drafting virtues?
- What are the stages of drafting a legislation?
- What are drafting instructions?
- What is a Legislative Plan?

A question was put forward by ma'am relating to how the process of drafting of Meghalaya takes place?

Wherein, Marientina ma'am replied to it that the Administrative Department gives an outline to the Law Department. The outline is termed as cabinet memo, Administrative skeleton etc. The clear intention of the Administrative Department is sometimes unknown to the Law Department which creates a problem.

As soon as the outline is received by the Law Department it is the priority of the Department to check which list it falls under whether it be Concurrent or State list.

The agenda which followed thereafter was to understand

- Clarity, Precision and Unambiguity

To understand the terms, it requires understanding of the said key points which includes:

- Ambiguity and Vagueness
  - May, Shall, And/Or
  - Terms conveying numbers, days, dates and age
  - Gender Neutral Drafting
- Plain Language
    - What is plain language drafting?
    - Knowing your audience
    - Easy Communication

The ideas are further explained broadly through the presentation.

A question was again placed to the audience precisely to the law department as to what types of person are involved in drafting legislation?

The answer to it included the weakness of the strength in the law department unlike other State cadres but was inclusive of law officers, nodal officers etc.

Thereafter, ma'am moved forward to explain,

**WHAT TOOLS OF REGULATION DOES THE STATE HAVE?**

Firstly, to command through the Legal Authority backed by sanction.

She mentioned that the State lays down standard of norms, standard for entry, curb insider trading.

Secondly, to deploy wealth – tax deduction, grant loans, subsidies

Thirdly, to harness markets—structure competition to ensure consumer benefit, franchise,

contract, trade-able permits

She focused on explaining to create incentive to pollute less and trade it with money

Fourthly, to inform—Transparency to lead to specific desired goals or disclosure regulation

She discussed that there should be mandatory disclosure by private or public institution with a regulatory intent which has become an important frontier of government innovation. An example of FSSAI was also included while explaining it.

Fifthly, to confer protected rights—allocate public resources or create rights to resources

Herein, the polluter's pay principle was highlighted.

## LEGISLATIVE DRAFTING VIRTUES

The presentation had a pyramid which was of Helen Xanthaki.

The top of the pyramid to the bottom of it was divided as follows:

At the top-

- Efficacy

Ma'am termed it as the goal of regulation. To achieve regulatory aims and redress it.

An example of including the question of limits in the extreme use of plain language: do we need to substitute the term "mens rea" in modern English in rules of criminal procedure or criminal evidence? If one refers to the hierarchy of principles in drafting, then plain language is clearly a tool for clarity: thus, since the term "mens rea" is clear to lawyers and judges as the main users of rules of criminal evidence or criminal procedure, plain language bows down to clarity, and there is no need for a substitution of the term with its plain language equivalent.

Moreover, the introduction of a new term may distort clarity and hence effectiveness of the new legislation. Another example of another question: what happens in the event of a clash between clarity and precision? Simply, in application of the pyramid, the criterion of choice is effectiveness: since clarity and precision are in the same grade of the pyramid, the drafter will need to select whichever one of these two principles serves effectiveness best.

- Effectiveness

In a search for a qualitative definition of quality in legislation, one can resort to functionality. If legislation is a mere tool for regulation, and indeed a tool only to be used if everything else will fail, then a good law is simply a law that, if it enjoys support and cooperation from all actors in the legislative process, is able of producing the regulatory results required by policy makers. In other words, a good law is simply a law that is capable of achieving the regulatory reform that it was released to effectuate or support. A good law is one that is capable of leading to efficacy of regulation.

There is nothing technical at this level of qualitative functionality: what counts is the ability of the law to achieve the reforms requested by the policy officers. And, in view of the myriad of parameters that are unique in each dossier, there are no precise elements of quality at this level. If anything, this qualitative definition of quality in legislation as synonymous to effectiveness respects and embraces the subjectivity and flexibility of both drafting rules and conventions and, ultimately, of phronetic legislative drafting.

- Efficiency

Clarity

Precision

Unambiguity

Here, ma'am gave the exact keywords of each such as clarity to be transparent, precision to be exactness, unambiguity to mean clear definition. Gender neutral laws and plain language

are tools to help in promotion of the law. If the laws are not drafted keeping all these yardsticks at bay then the law may be challenged in the Court.

- Efficacy- the capacity of a legislation to achieve regulatory aims that it set out to address
- Effectiveness- no exact definition. Scholars define it varyingly. Extent to which legislation introduces adequate mechanisms capable of producing desired regulatory results.
- Effectiveness can be addressed through efficiency and Clarity, precision and unambiguity.

- Simplicity/plainlanguage  
Gender neutral Language

Complex legalese and jargons need to be avoided and it should cater to the audience properly. Plain language and gender neutral language help to achieve Clarity, precision and unambiguity

- FIVE STAGES OF LEGISLATIVE DRAFTING

It is of Thornton's rule.

- 1<sup>st</sup> stage: Understanding the proposal. It includes drafting Instructions
- 2<sup>nd</sup> stage: Analysing the proposal. Designing a legislative plan
- 3<sup>rd</sup> Stage: Designing the law
- 4<sup>th</sup> Stage: Composing and developing the draft
- 5<sup>th</sup> Stage: Verifying the draft

## WHAT ARE DRAFTING INSTRUCTIONS?

- Collection of Data including the request to draft legislation, background materials.
- These are normally prepared by policy and legal officials and handed over to the drafting team.
- In the UK, the Office of the Parliamentary Counsel specializes in legislative drafting
- They can be brief or detailed, oral or written or in the form of a ministerial order

## WHAT SHOULD BE IN THE DRAFTING INSTRUCTION?

- There should be sufficient background information
- Objects of the legislation must be clear
- The means of achieving the objects
- What legal implications and difficulties could arise by introducing the law?  
(addressed by substantive law experts)

## WHAT ARE THE QUESTIONS THAT NEEDS CONSIDERATION FOR CREATING DRAFTING INSTRUCTIONS?

- What is the precise problem? What is the harm that we want to prevent? Who is being harmed?
- What is the nature and scale of risk from the harm? How frequently and how many people are being affected?
- What are various regulatory options for dealing with the problem?
- What is the likely impact of each regulatory option? Are there any benefits or risks

resulting from these options?

- What is the monetary value of expected benefits from each option
- What are the expected costs of each option? To both the private sector and the government in implementing each option
- How do the costs compare to the benefits?
- What are public perceptions about the risk and the need to eliminate it?

## DESIGNING A LEGISLATIVE PLAN

- The legislative plan or scheme or research report helps the drafter organise thoughts and solutions.
- It is report on the drafter's response to the drafting instructions.
- It includes an analysis of all elements of a proposed legislation.
- It ensures clarifications of doubts and can lead to fewer errors in drafting of legislations.

## WHAT INCLUDES IN LEGISLATIVE PLAN?

- It will typically include:
- Analysis of existing law
- Analysis of the need for legislation
- Analysis of potential danger areas
- Analysis of policy options and preferred solution

## DRAFTING DISEASES

- Clarity, Precision and Unambiguity are techniques for achieving effectiveness in drafting.
- Clarity means lucidness as to perception or understanding.
- Unambiguity is part of clarity.
- Ambiguity results if:
  - a word can be interpreted/ understood in more than one way
  - two or more meanings can be admitted
  - could refer to two or more things
    - Eg- “light”, “shall

## VAGUENESS

- Vagueness means inadequate communication resulting from use of generic words and can lead to numerous meanings or any meaning at all.
- For eg “blind”, “vehicle”,
- “line”- vagueness for surrounding context
- Loathsome- subjective emotional response
- Can over-precision lead to effective legislation?

Ma'am said over precision may lead to under regulation. The trick is to strike a balance. It shouldn't be too vague nor too precise. Toleration of some amount of vagueness is required. Understanding the audience is important.

## 2 TYPES OF AMBIGUITY

### 1. SEMANTIC AMBIGUITY

Single word has more than one meaning Egs- “may” (only for discretionary action), “shall” (obligation), “and/or” (conjunction or disjunction?)

Question

“A doctor and/or nurse may conduct an HIV test with or without the subject’s consent.”

Here in the statement, the use of punctuation was stressed by ma’am.

## NUMBERS AND DATES

- If number is more than 10 than use figures, for abstract quantity
- For dates use figures, use % for percentage
- For ordinal numbers, use first, second, upto and including tenth. Figures start from 11<sup>th</sup> onwards (this does not apply to dates)
- For dates, use figures without st, nd, th

## DICKERSON'S RULE ON DATES

- Don't scale indicators
- From July to... (not to be used)
- Use after June 30,2000 and before
- Between July 1, 200) to...(not to use)
- After June 30,2000 and before (to be used)
- To or until or by June 30 (not to be used)
- Use Before July 1,2000
- Not to use who is more than 17 years old
- Do's who has passed his 17 years or old or older is covered under the scheme
- Mon to Friday- don't but do it will be Monday through Friday inclusive

## 2. SYNTACTIC AMBIGUITY

- Arises from the way in which meaning of a sentence is influenced by intended relationship between words and phrases.
- It could happen because of grammatical/ sentence structure that gives rise to uncertainty; poor placement of phrases/ use of modifiers.
- For eg: store credit only after 90 days
- Immigration officers may deny entry to the country to persons who come from countries with swine flu
- "Charitable and educational institutions"

Herein, to understand it has to be learnt as single entity. A charitable institution and an educational Institution.

- PUNCTUATIONS

- Use of punctuation inside quotes for clarity
- Period or commas inside quotes mean they are part of the matter being quoted.
- Crucial in drafting amendment to Acts.
- Eg- 'This Act is the "Air Pollution Control Act".'

- GENDER NEUTRAL DRAFTING

- It is a tool to achieve clarity, precision and unambiguity and effectiveness.
- Language which includes both sexes and treats men and women equally.
- Also called non-sexist, non-gender specific, inclusive language
- It means a) avoiding gender-specific pronouns (such as "he") for a person who is not necessarily of that gender; b) avoiding nouns that might appear to assume that a person of a particular gender will do a particular job or perform a particular role (eg "chairman")

#### HOW TO AVOID GENDER SPECIFIC DRAFTING?

- Repeat the noun
- Change into a pronoun (use "he, she or it"; "they")
- Rephrase to avoid need for noun or pronoun
- Use passive voice
- Use "who" instead of "he"
- Use "the" or "that". Avoid gender specific pronoun. Eg use chairperson, chair, convenor, president, member, person etc

## CAN PLAIN LANGUAGE DRAFTING BE EFFECTIVE AT ALL TIMES?

- Usually legalese must be avoided even in specialist legislation.
- In rules of evidence, audience may be lawyers and judges. For eg, “mens rea”
- Individual taxation law- audience is lay person.
- Corporate taxation laws- non lawyer professions
- Remember: generally it is believed that audience is an average person

## HOW DO WE KNOW OUR AUDIENCE?

- Avoid long sentences. Not more than 30 words per sentence.
- The draft must have a logical structure
- Legal or professional jargons are generally to be avoided. However, they can be used if legislation is specialist and meant for members of a close professional circle. For eg, “mortgage”, “lease”
- By not using abstract words. They lead to vagueness.
- Plain language is a tool for clarity. However, if in clash with clarity, precision and unambiguity plain language takes a lower hierarchy
- Avoid superfluous words. It can lead to over-drafting and under-regulation.
- Use Active Voice because it is better understood. Eg The secretary must give a notice.
- Avoid negative style of drafting. Eg, “Persons other than the primary beneficiary may

not receive these dividends” or “Appeal may proceed only if the tribunal has not certified that the appeal has not been validly made”.

Later, Ma’am also mentioned about the IDBI rules to be one of the best drafted rules.

And lastly mentioned,

#### THE DRAFTING OF LAW IN PLAIN LANGUAGE BILL, 2018

Section 6 was mentioned in the said bill.

“The Legislative Drafting Manual shall have guidelines on the following aspects but not limited to:— (a) restricting the usage of long winding paragraphs and superfluous language; (b) promoting the drafting of gender-neutral laws; (c) avoiding the usage of Latin legal maxims and other foreign language terms and promoting the usage of the plain English equivalents terms; (d) drafting accessible clause which encompasses only one legal idea....”