

“Legislative Style and Limit:-A Study in Indian Context”***Rahul Bhushan*****Himachal Pradesh National Law University,
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“Legislation should be the voice of the reason”

-Pythagoras of Samos

The Bentham was the one whose works are been considered as the starting point of the modern legislative drafting. He said that the legislation should be of such a nature that it maximizes the pleasure and minimizes the pain for the concerned one. For the functioning of a system in a smooth and effective way, the importance of laws and regulation is unparalleled. The law of a country decides who should be controlled, by whom, and in what manner. It tells peoples what they do or what they not do. That requires the law to be precise, accurate and effective, reasonable, simple and with no loop holes. The legislative drafting is permanent enactment and in a manner doesn't need any kind assistance. With more care and precaution it would be prepared, easier it will be in future in its implementation and interpretation. Legislation must use plain, easy, and concise language to be effective and scoopful. A law should also need to be dynamic and adjustable so that it can adjust itself with changing need of the society.

But the foundation of a good legislation can be determined by the approaches and method used during the legislative drafting. The process of drafting is an art rather than just being a technique. The drafting process of legislation needs much more experience, insight and futuristic approach. The main task is to transform the norms into the formalised bill. For this, the imagination and reality, both should align. As the former president of USA Barack Obama stated, “A good compromise, a good piece of legislation, is like a good sentence, or a good piece of music. Everybody can recognise it. They say, ‘Huh. It works. It makes sense.’”

A draft of legislation must be within the scope and as per the jurisdictional requirements. But when we talked about the India, the most of the important legislation that we have like IPC, Crpc, CPC, or Contract Act are made by the British ruler way back in 19th century and are still the most useful ones with just a few amendments. For example, IPC have only few minor amendments with some new entry and replacement in the history of 150 years. On the other side of this, our Indian Constitution till now has 104 amendments in the span of just 70 years. This is a matter of great concern for the sustainability and dynamicity of Indian Laws. The

past experience of judicial review of so many legislations is also a matter of concern. It all means that in India, we don't have a proper approach to prepare a bill and it needs some changes and modifications.

In this paper, through supportive evidence, we will try to find out the contemporary status of legislative drafting in India and issues that arises out of it. We will also try to find out the nearby reasons behind the condition of drafting legislation in India. It will be followed by the recommendations that can be practically put in use to make effective and scoopful legislation. The recommendation will also include some limits like general considerations and gender based drafting that are much needed to fulfil its own object and that of Constitution Of India as well.

2. LITERATURE REVIEW

This paper is an attempt to recommend the style of legislative drafting and its limit in Indian context. Before this many, many attempts have been made in this arena by Indians as well as foreign authors. Paper like "A Beginner Guide for Legislative Drafting" by Harvard University and Books like "Legislative Drafting -Shaping the Law for the New Millennium" by T.K Viswanatham are some of the finest works as of now in this field. They have provided a new path for the aspirants in this field. But there are not any specific works in the Indian context about which tells how legislation should be made by considering all the diversities in India –geographically, economically, sociology, and politically.

Any law that has to be made for a particular jurisdiction must take care of all the local issues it needs to addressed and have drafting style accordingly. This paper will be nothing but a concise and precise attempt to recommend the style in which legislation should be made by considering all the aspects of Indian society. In this paper, we will try to figure out the contemporary method of drafting a legislation and hence the problems and issues arising out of it. This paper will further move along to the points and problems a drafter must consider while framing laws for India. It will also discuss the limit that legislation must have in order to have meaningful purpose.

3. STATE OF PROBLEM

In India, every 2 of the 5 legislation is/was either under Judicial Review or been struck down. Many laws are such that they need amendment in every 1 or 2 year. This shows the condition of poor drafting style in India. This paper will see the condition and procedure of current legislative style in India and try to critically analyse it and further recommend some new methods and ideas.

Attempt will be to raise the areas of concern for the drafters that needs consideration before drafting any law. Limits like Gender -Neutral drafting and uphold of constitutional provisions also needs to be addressed.

4. OBJECTIVES

- To know the reasons behind so many amendments and judicial review
- To know the issues and concerns need to be addressed before any law to be made in India
- To recommend suggestions in legislative style in Indian context
- To suggest some limits of drafting and style that needs consideration

5. **RESEARCH QUESTIONS**

- A. Why and how many laws in India were/are amended or struck till now?
- B. How a poor style of drafting affects India?
- C. What different process or style Indian makers should adopt for Indian legislation?
- D. Why and till what extent legislation should limit itself?

6. **SIGNIFICANCE OF STUDY**

This paper will prove to be beneficial for the future legislation drafting especially in India. This paper will also be helpful for the lawmakers of other countries when it comes to analyse the jurisdictional situation. It will give a reason with idea that why law needs to be dynamic and futuristic.

Paper will also be useful for analysing the issues and local problems when a law has to be made for making it objective and purposeful at a maximum extent.

7. **RESEARCH METHODOLOGY**

- The purpose of this study to critically analyse the current legislative drafting style and to highlight the issues and defect in this. For example, why so many laws in India get amended and come under judicial review? Attempt is also to suggest some changes in style considering the jurisdictional context of India.
- The research will be in direction such that the solution or conclusion will be reached by firstly critically analysing the contemporary situation and then recommending some suggestion in this regard.
- This research will be of a Qualitative nature. It will only analyse the legal theories and procedures and will not look into the numbers.
- The research will be also of non- doctrinal type. It will try to solve the issue considering the socio-political approach.

8. **PLAN OF STUDY**

The focus will be on the critical analysis of the legislative style in Indian context and to recommend the best alternative suggestions.

This work is important because in India, we will have record of poor legislation that led to many amendments and judicial review.

In this field of legislative style and limits, many works have been done but they all are done in general context. None of the works particularly focus on how any legislation must be made as per the requirement of jurisdictional context.

Here in this paper, we will be going to analyse the present condition critically, then will try to know the reasons behind it. Then at last we will try to find some alternative style of drafting and will try to find the limitation in style which must need consideration.

9. AN OVERVIEW OF CURRENT STYLE AND SYSTEM

India is the largest democracy of world. It has population of about 1.21 billion.¹ With such a huge population and increasing at a higher rate, law and order must need to be very effective to maintain a harmonised society. In India, the responsibility to make law is under Legislative department of Ministry of Law and Justice.

Any law before its drafting needs some consideration. Either there would be some requirements in urgent for the particular law or it was order from judiciary to pass a particular law. The different considerations that would be needed are as follows:

1. Administrative Considerations
2. Economic and Financial repercussion
3. Socio-political considerations.²

Any bill's efficiency and effectiveness depends on its style of writing. In India, the style of writing a bill remains unchanged from the time of British rule. We use the same method of drafting a bill and use same approach for an every kind of bill. Our style and structure of the bill is either interpreted by either scrutiny department or by parliament during the discussion.

In India, any law has been decided to be made in two conditions:-

1. When anything happens and no law would be there to guide it.
2. When under any case, the court feels like any legislation is need for it, it orders the government to pass a law on the same.

The language in Indian legislation is English language and that is also the result of the English Dominated style of drafting here. Here the whole legislation is based on the Constitution in India. Many a times, the apex court of India guide the law making process in India like it did in the case of Lakshmi Narayan v. Union of India³. Here in this case Supreme Court of India strictly said that excessive delegation of legislation is not permitted. This give a shape to the legislative style that how much should legislation should contain within itself as to give minimum delegation.

¹ Population in India, available at: <https://www.mapsofindia.com/census2011/population.html> (last visited on May 25, 2020)

² O.P Motiwal, "Principal of Legislative Drafting" 16 Journal of Indian Law Institute 13 (1974)

³ AIR 1958 Pat 489

But these processes in India led to many problems and issues arising out of it. Many things need further consideration and change in style is what we need.

10. ISSUES IN PRESENT LEGISLATIVE STYLE

A. VERY LESS PUBLIC SCRUTINY:-

A law must take account of opinions of concerned persons. The public opinion for a particular law is very necessary for it to be effective. In India, the procedure is there for the scrutiny through public representatives in parliament. But it is now seems that quality of debate in the parliament has been went down. In the last decade, the average working days of parliament are approx. 70 days.⁴ This shows the failure of the public to take part in the law making process. The committees in parliament also seem like having a very low participation in law making procedures.

B. MORE IDEALISTIC APPROACH:-

“Indians today are governed by two different ideologies. Their political ideal set in the preamble of the Constitution affirms a life of liberty, equality and fraternity. Their social ideal embodied in their religion denies them.”

B.R Ambedkar⁵

This quote of Dr. Ambedkar shows how effective the constitution is in Indian society which is still dominated by religion that even after having different laws most of the affairs of the different religion are governed by their own personal laws. And since all statutes in India must be in accordance to the Indian Constitution they must be idealistic. The Indian society was very much bended with different caste, culture and religion. The sudden implementation of such a perfect and ideal constitution led to its ineffectiveness to a possible extent.

C. NOT IN FAMILIAR AND CONSISTENT LANGUAGE:-

Ignorance of law is not an excuse. That is the common rule that we heard commonly. But the pint is that how citizens of the country are expected to understand a law that are not understandable to most of them. In India, only 12.6% of population can understand the English language.⁶ And the English was the only language in which Indian laws are being drafted. This gives us an idea that why laws are not followed in India.

⁴ When Parliament meets, available at:- <https://indianexpress.com/article/explained/parliament-winter-session-delay-congress-november-december-assembly-elections-4951659/> (last visited on May 26, 2020)

⁵ Ambedkar's philosophy on Hinduism, Islam, and religion, available at:- <https://www.ambedkaritoday.com/2020/03/ambedkars-philosophy-on-hinduism-islam.html> (last visited on May 26, 2020)

⁶ List of countries by English speaking population, available at:- https://en.wikipedia.org/wiki/List_of_countries_by_English-speaking_population (last visited on May 26, 2020)

11. CONSEQUENCES OF HAVING A POOR STYLE AND NO PARTICULAR LIMIT:-

A. MORE JUDICIAL REVIEW AND AMENDEMENTS:-

In India, the constitution is amended 104th time in past 70 years. Every act in India at some time went through amendments. This seems like a common thing as law needs to be dynamic and must be synonyms with the changing nature of the society. But the poor style of legislation is also a reason for this. In India, laws are being made with reference to what is need at that point of time only. Laws in India are not futuristic. As for example, we made changes in section 375 of IPC only when that shameful nirbhaya incident happened. Also India despite being a socialist country made politically beneficial laws.

Judicial review of laws in such a large number is because of inability to interpret the constitution. The complexity or more plane style of writing also leads to complexity in interpretation.

B. LESS ACCEPTENCE BY COMMON PEOPLE:-

The matter of Sabrimala temple in the case:- Indian Young Lawyers Association v. The State of Kerala⁷ is a fresh example of how a law made by government went unaccepted by people. In India, people still believes in their religious supremacy than of Constitution. That types of freedom that constitution and subsequent acts talked about are still not enjoyed by a majority of population.

Laws with idealistic approach will always have to face such problem.

C. MORE COMPLEXITY IN INTERPRETATION:-

Poorer a law will be, more difficult and complex will be to interpret it. The Indian laws due to lack of own indigenous law faces the problem of interpretation. The law drafting are all based mostly on common law and interpretation will be needed in the local or native context. That is where the problem arises.

12. RECOMMENDATIONS

A. CONSIDERATION OF LOCAL CONTEXT:-

In the country like India, it is very difficult to control and guide a such large amount of population with so much diversity in almost every area be it language, dress, ethnicity, food preference and many others with a single law. It will result into the discriminatory practice among many of them.

⁷ Writ Petition (Civil) No. 373 of 2006

*“The worst form of inequality is to try to make unequal things equal”
~ Aristotle⁸*

Legislative style needs to consider the purpose of a particular law from local or grass root point of view. This can be done by the adopting the following measures:-

1. More power of delegated legislation
2. Giving law making powers to grass root level of administration

Both methods will be of great help in following ways:-

1. Use of native language:- If the laws are being made whose primary focus will be local problems, then they can be made using the local language and style and thus can be easily understandable.
2. Primary focus on local problem:- If law is made locally at grass root level, its main focus would be particular problems and not on the general problems. This will help to solve problems easily and to have a full time solution.

All these benefits will be sorted if legislative take concern of the local context either by delegating the power or transferring the power.

B. EASILY UNDERSTANDABLE AND COMMUNICABLE:-

For a law to be successful it is very important for it to be understandable and communicable for whom it is made. In India, we need the legislative style to be of such a nature that it can be easily interpreted not only by administration or judiciary but also by the common people.

For this there are many scholars who suggested many methods for an effective, understandable and communicable. They give insight on how a legislative style should be.

As per C.K Allen, “No perfect draft is possible, it is only an ideal. To demand the perfection of expression and sense is to expect infallibility, not only of human foresight but also of human language, and the fact is that it is unattainable is one of the serious draw-backs of Statute Law.”⁹

There are some suggestions for the Indian draftsman that he/she needs to consider:-

1. An intimate and full knowledge of the Indian Statute book;
2. Familiarity with legal principals as expounded by the Courts;
3. A full and intimate knowledge of the Constitution, particularly fundamental Rights and provisions relating to distribution of legislative powers between the Centres and State; and

⁸ Why Inequality Matters- Aristotle and the Middle Class, available at:- <https://underground.net/aristotle-and-the-middle-class/> (last visited on May 26, 2020)

⁹ Dr. Mukund Sarada, Principles of legislative drafting 5 Orient Journal of Law and Social Sciences 24 (2011)

4. Knowledge of procedure in Parliament or Legislative Assemblies, administration, Courts at work including societal living conditions.
5. Should be aware of the rule of interpretation adopted by the Courts.¹⁰

C. **MORE ENFORCEABLE AND EXECUTABLE**:-

Success of a law is best measured in its effectiveness in the society. Some of the material criteria are the clarity of the objectives, consistency and compatibility with the principles of legal scrutiny and equality of rights.

Some of the ideas are as follows:-

- Using consistent terminology (Legal)
- To have a look on suitability and unsuitability of certain expression
- Use of abbreviations.

A law can be made more enforceable when it accepted by public. In India only those laws are enforceable that are supposed to be compatible by the public. For this the style of legislation should have following components:-

1. Mixture of ethnic norms, morals and common law
2. Led to gradual development in any aspect of the society
3. Must not hurt the tradition and culture of the society directly.
4. Can be beneficial to the majority of the society but cannot neglect the marginalised section as well.

13. LIMITATIONS AND GENDER-NEUTRAL DRAFTING

Any style of drafting legislation cannot be ideal. As said, the Constitution was about the limitation of the power. Any law looks like an independent one but all the laws are interconnected and thus while making a law one must have to consider some limitations. These limitations really help a law to be struck down in the future or subject to the amendments. They are as follows:-

1. Not against the provisions of the constitution:-

Any law in India have a limit that it should not be against the any of the provisions of the Constitution of India. So a law should be drafted in such a way that it serves its own purpose as well and at the same time it must be according to the Constitution of India.

This provision really helped the laws to be accurate, purposeful and objective.

¹⁰ Dr. Mukund Sarada, Principles of legislative drafting 5 Orient Journal of Law and Social Sciences 26 (2011)

2. International standard:-

In the world of globalisation, a law can't be made only for the sole purpose of particular targeted citizens. In styling legislation, all the international standards corporate in all the different treaties and convention must be taken care of. This will enhance the level of legislation.

3. Means and End approach:-

Any law and the style involved in it must have a particular objective. Since it is not possible to have an only particular objective as in this time, any legislation is been made with some socio-political agenda. But still the approach should be to make legislation with a narrow objective but have a large scope and impact.

4. Neutrality:-

For a law to be effective and acceptable it needs to be unbiased towards any person, party, organisation, caste, religion, race, gender or any other kind of group. This neutral nature of legislation becomes very important when it comes to India because of such a great diversity.

Gender-Neutral Drafting:- It is a style of gender drafting where the gender specific pronouns and adjectives (she/her/hers/he/him/his), particularity showing nouns is being avoided to maintain the neutrality.

Following are the range of techniques to draft legislation gender-neutral:-

- a. Repeat the noun
- b. Change the pronoun
- c. Rephrase to avoid the need for a noun or pronoun.¹¹

14. CONCLUSION

In this paper, starting our research through the analysis of the legislative style in India, we have pointed out many problems in it regarding different aspects. Be it less public scrutiny, or more idealistic approach, we have raised the issue of drafting through the old British method.

We have also pointed out the various outcomes of the poor drafting like more amendments, judicial review and less acceptance by the people. We also came to know that these outcomes will have a great effect on the substantiality of the country laws.

We have raised some limits under which style of legislative drafting should work to make it compatible with the contemporary scenario. We also have to work unbiased so that legislation might not go unaccepted by the majority of concerned population because as said by Bentham in his theory of Legislation, "Legislation should be of such a nature and style that it maximizes the pleasure and minimizes the pain."

¹¹ Guide to the Gender-Neutral Drafting, UK, available at:- <https://www.interlawdiversityforum.org/guide-to-gender-neutral-drafting> (last visited on May 27, 2020)