

ANNEXURE I

COMMON ERRORS IN DRAFTING¹

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My dear colleagues in the field of legislative drafting, the subject I have chosen for today's lecture is Common Errors in Drafting. Since all human efforts involve making some mistakes or other and a draftsman is also a human being, very often he ends up with making mistakes. The draftsman is not God and has to labour under very difficult conditions. He is required to produce a draft at a very short notice which at the same time will please different kinds of audiences. The draft must satisfy the officers of the administrative Ministry. When the Bill is introduced in the Parliament, the Members of Parliament should be able to understand it. When it is passed by the Houses of Parliament and becomes the law of the land, it may be taken to court for interpretation since it affects the lives of the citizens. This means that the draftsman has to cater to different audiences while at the same time taking care to see that the draft he has produced, conveys what he intended to convey. This indeed is the task of superman and all this is expected to be done in a very short time and that too at a very short notice. There have been instances where we were called upon to draft Constitution Amendment Bills within 54 hours. There have been instances of other kinds of legislation for which we have been given hardly 6 hours time. Since there was hardly any time to give the draft a second reading, it is no small wonder that errors creep into the draft. Mistakes do occur and this is so all over the world. After all to err is human.

2. Difficulties of the draftsman increase by reason of the very nature of the legislative process. Renton Committee observed that "they (the draftsmen)

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have to work under pressure and constraints which make it very difficult for them, with the best will in the world, to produce simple and clear legislation. They are inadequately staffed and are often given gigantic tasks to perform in race against time. They are required to resolve conflicting attitudes which cannot always be reconciled”. A draftsman working under these conditions should devise various methods and prepares some sort of a check list to ensure that he does not commit the obvious type of mistakes.

3. It is common knowledge that what type of mistakes creep into the draft on account of speed and accuracy with which the draftsman has to prepare the draft. The draftsman will find himself in a very embarrassing position in Parliament when a mistake of this nature is detected. Though it may be a very simple mistake, some Members of Parliament are not charitable enough to understand and forgive, little realizing that the draft is finalized in a great hurry. Though there may not be any difficulty in interpretation of the draft by reason of such mistake, the draftsman nevertheless is put in a very embarrassing situation on account of such common mistakes. To avoid this, drafting must be entrusted to team of two or more persons. Scrutiny of the draft at a number of stages will also be of help. If we have more opportunities of detecting the mistakes and more stages at which such mistakes can be detected, common errors can be avoided. Scrutiny of the draft at the stage of obtaining proofs; at the stage of introduction of the Bill; at the stage after being passed by one House; at the stage after being passed by the other House; at the stage of preparation of the assent copy, will provide ample opportunity for the detection of common errors which might have crept into the draft. Further, under rule 95 of the Rules of Procedure and Conduct of Business in Lok Sabha, the Presiding Officer is empowered to correct the patent mistakes in the draft. The following are some of the common sources of error.

4. The first source of error is the language itself because language is the medium of drafting. Mistakes of language arise mainly because of the failure of the draftsman to understand what is required to convey through the draft. If he has not done his home work or research with regard to the subject matter of the proposed Bill or has not discussed thoroughly all the aspects of the subject matter with the officials of the administrative Ministry, he will not be clear about what he has to convey. Hence, the draftsman must have done some research into the subject matter of the proposed legislation and should have acquired some background about it. Since a draftsman cannot be conversant with every subject and Bills pertain

to different branches of knowledge, he has to familiarize himself with the subject matter by means of discussions with the officials of the administrative Ministry. He can sharpen his understanding by putting proper questions and eliciting the required information from the officials of the administrative Ministry. This will enable him to visualize his various situations which the legislation which he is drafting has to cover and the manner in which it has to cover these situations.

5. The second source of error is due to the defective style. The most common type of errors in style may be described as looseness, obscurity, shabbiness and over-elaboration to mention a few. Errors by loose drafting occur when a draftsman attempts the first draft in which he may not be able to cover the matter precisely and exactly. Since beginning has to be made whatever ideas that may occur to him are added on to the draft. The draft so prepared will obviously be too general and loose. Having prepared the first draft he must put the question whether whatever is contained in the draft, covers all the points or does it cover anything more. If it covers anything more, then it is a loose draft. If any provision is going to impose any obligation or hardship, the draftsman has to be absolutely précised. He cannot afford to indulge in loose drafting.

6. Obscurity is the third source of error. It is always necessary to see that right words are used and too many words are not used and also not too few words. The test lies in writing and making officers read what you have written. Generally every draft must be read by at least two persons. Since a draftsman will not be in a position to judge the draft prepared by him immediately, it is always better that some other person reads it and offers his comments on the draft. In fact, the other person can be anybody. In this connection it is worth recollecting the device resorted to by the English writer John Bunyan, author of the work *Pilgrims Progress* who wanted to write in a style which can be understood by everyone. To achieve this purpose he used to read out his draft to his washerwoman and questioned her to find out whether he has succeeded in conveying to her what he wanted to convey. This technique a draftsman should follow. A draftsman should always proceed on the assumption that there is a defect in his draft. This will enable him to get information from the other side.

7. Fourth source of error is lack of uniformity of language. In the Anglo-American Jurisprudence the general tendency is to proceed on the assumption when a particular set of words has been used in one place and different words are used in another place the draftsman had intended to

convey two different meanings. If the same set of words is used, the intention is that the same meanings are conveyed. It is from this point of view that uniformity in language assumes great importance. If a draftsman conveys the same concept through one set of words at one place and through another set of words at another place, there is every reason for the courts to construe the two sets of words as two different meanings. This error every draftsman should avoid. If a draftsman wants to convey the same concept at more than one place, the same set of words should be used. The lack of uniformity occurs because of the speed with which a draftsman has to do his work. To avoid this after the preparation of the draft, he should read it and go on underlying wherever same words have been used to convey different meanings.

8. Another type of mistake which occurs specially in the case of Private Members Bill is the failure to provide for a sanction for violation of an obligation imposed under the proposed legislation.

9. Fifth source of error is the failure to choose the correct words. It is not as if the draftsman does not know what is the correct wording. But it just happens because of the hurry. It might have happened at the stage of typing or at the stage of printing. It is also possible grammatical mistakes might creep. It is not because of the ignorance of the draftsman. Even the best person may commit a mistake because after all writing is a creative activity which depends on a form, mood etc. However, most of these mistakes can be detected easily at the second reading or third reading and still can be rectified.

10. Sixth source of error is the use of long sentences. It is always better to have one sentence in each section or sub-section. But sometimes it is impossible to do that for various reasons. One reason for this is due to the fact that once a draftsman starts drafting in small sentences one after the other, then their connection becomes very difficult. Sometimes it becomes unavoidable to convey complex sentences or long sentences. Longer the sentences more is the modifier more is the qualifier. More the exception, greater is the scope for committing mistakes. The method I have devised I do not claim originality for it, to avoid this kind of errors is to split the sentences or break the sentences. How to break it. Catch hold of the verb; stop at the verb; find out what is the subject and see whether there is agreement between the subject and the verb, then see whether the pronoun is connected with the nouns then if it is a phrase, see what it modifies. This exercise should be a sort of analysis of the sentences. If you break a

sentence, you will be able to find out what is superfluous, whether the form of the verb is correct and so on.

11. Seventh source of error is the failure to make consequential changes in the draft. The need for making consequential changes arises not only when an amendment is made, but also at the various stages of drafting. Consequential changes may be with reference to the cross-references to the section or may be with reference to the subject matter.

12. Eighth source of error is the mistake which occurs when a precedent is followed. When a precedent is followed, care has to be taken to ensure that all the necessary adaptations are made. Obviously, if a draftsman is called upon to prepare a Bill in a short time, he has to depend upon the accumulated experience of the past. After all human conduct is something which has not changed fundamentally and radically over the course of time.

13. If you see and analyze legislation over a period of time, you will find that the methods through which human conduct can be regulated or limited. So the pattern of legislation is also of a definite character. So it is possible for a draftsman to use the Bill which had been drafted for one purpose for preparing a draft for another purpose. Every good draftsman should be able to X-ray a statute. By x-raying what I mean is asking the question, what is the structure. By x-raying a statute one can find that there are similarities. If a draftsman follows some known pattern which has stood the test of time, then he can move with greater confidence. In addition if he is asked to prepare a draft which runs into more than hundreds of pages within five or six hours, he needs some crutches on which he can walk. It is here the precedents can be of help. However, the danger lies in the fact that sometimes the draftsman tends to copy it without keeping in mind the difference. A draftsman should be careful when he makes use of a precedent so that he can adopt it for the purpose he needs it.

14. Ninth source of error is the error of the undistributed middle. This occurs when a draftsman deals with cases pertaining to different periods. He may classify cases which have occurred before a particular date and cases which have occurred after that particular date. But what is the rule applicable to the cases which have occurred on that particular date may not have been mentioned. The draft will be silent as to what will happen to those cases occurring on that particular date. This error is known as the error of undistributed middle.

15. Tenth source of error is the error of inaccurate references. This happens in spite of the best efforts of the draftsman for various reasons. Since the Bill undergoes many changes, inaccurate references creep in. To avoid these inaccurate references, a draftsman should meticulously verify with reference to the context of the provisions referred to.

16. The above sources of error are merely illustrative and not exhaustive. In this connection, it will be worth mentioning that a study of the Repealing and Amending Bills which are passed at periodical intervals in all Commonwealth countries will give a clue to some of the more common type of errors in drafting and will also reveal how the draftsman could have, with a little bit of care, avoided such errors.