

CHAPTER VI
THE PREPARATION AND PASSING OF BILLS
THE INDIAN SCENE

Legislative Department

The Legislative Department of the Ministry of Law, Justice and Company Affairs, Government of India, exists primarily for the purpose of drafting all Government Bills. Bills sponsored by private members in Parliament are for the time being drafted by the members themselves, but, if any Bill is acceptable to the Government, care is generally taken by the Government draftsman to see that it is in proper form.¹

The need for a Bill may arise from an infinite variety of causes, social, economic or political. Some Bills are almost a permanent feature of the Parliamentary scene, cropping up year after year as a matter of routine, such as the Appropriation and Finance Bills. Many Bills originate in the ordinary course of administration and are the result of accumulated experience in the administration of existing laws. Further, Governments, like all mankind, are creatures of circumstances and a large proportion of the Bills that come up before Parliament can neither be foreseen nor forecast.

The constitutionality of the provisions sought to be enacted as law and the form, arrangement and wording of Bills must, no doubt, demand the primary attention of the legal draftsman, but the preparation of a Bill involves many other considerations as well which are no less important. The legislative scheme must be sound and workable. It must fit into the general pattern of the statute book.² The draftsman

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1. For the procedure obtaining in Australia, see J.Q. Ewens, *Parliamentary Drafting in the Commonwealth of Australia*, *International and Comparative Law Quarterly*, p. 363 (1952). In the U.S.A. where the drafting of the nation's laws are in the hands of gifted or not so gifted amateur lawyers, serious consideration is being given for employing specialised agencies for the purpose because "in legislative drafting, as in legal drafting generally, amateurism is no longer enough". see Reed Dickerson, 'Professionalising Legislative Drafting: A Realistic Goal?' *60 American Bar Association Journal* p. 562 at 564 (1974).
 2. According to Sir Courtenay Ilbert: Legislation is obviously referential in the widest sense. No statute is completely intelligible as an isolated enactment. Every statute is a chapter, or fragment of a chapter, or a body of law. It involves references, express or implied, to the rule of common law, or to the provisions of other statutes on the same subject.

should try his best to anticipate and provide for all problems and situations that are likely to arise. He must express the legislative scheme in clear, concise and unambiguous language. He must see that the Bill carries out the intentions of the sponsors which is not always an easy task. Exigencies connected with Parliament and its procedure may require that the Bill should be couched in a particular form so that its passage through Parliament is made easy. All these indicate that the closest co-operation is essential between the Ministry in charge of the Bill and the legal draftsman.

The first stage in the preparation of a Bill is the formation of the legislative policy. At this stage administrative, financial or political considerations are more likely to be involved than legal considerations and these have to be sorted out by the officials in the administrative ministries concerned. Once these are settled, rules of business framed under article 77(3) of the Constitution require that proposals for legislation be referred to the Ministry of Law for advice as to their feasibility from the legal and constitutional points of view. Such proposals are considered by the Ministry of Law in its Advice Section and advice is also tendered on the necessity or desirability of such legislation in the light of existing laws. The competency of Parliament to legislate on the subject under the Constitution is also considered at this stage, and the broad lines on which legislation may be undertaken are likewise often indicated. From the very nature of things, however, the advice tendered at this stage will have to be of a general character and it is reserved for the legal draftsman to examine the various provisions in greater detail at the drafting stage. Incidentally, the Ministry of Law itself plays the part of an originating Ministry in respect of certain types of Bills, like those dealing with marriage, divorce, succession, personal laws, civil procedure, limitation, evidence, repeal of obsolete laws and the like which from their very nature are appropriately assigned to that Ministry.

Under the rules of business, cases involving legislation have to be brought before the Cabinet for decision, and consequently, where a Minister in charge of an administrative Ministry decides, after consulting the Ministry of Law as stated earlier, that legislation on a specified topic should be undertaken, he causes to be prepared a self-contained summary setting out the facts of the case and the legislative measures proposed. This summary, after being seen by the Ministry of Law in both the advice and drafting wings is submitted to the Cabinet for approval. Sometimes a draft Bill is attached to the summary, but this practice is to be deprecated because it creates problems for the draftsman in more ways than one. If the proposal is not accepted, much of the time spent in drafting the Bill would have been wasted. If the Cabinet modifies the proposal in any essential feature, the work of drafting has to begin afresh. The draftsman

man should also have opportunities till the very last moment to improve upon the language of the Bill and this may not be possible if by reason of Cabinet approval it is felt that some sanctity gets attached to the Bill thereby giving the impression that the draftsman's hands are tied even in the matter of drafting improvements.

After obtaining Cabinet approval, the administrative ministry is expected to prepare an office memorandum setting out in precise terms the lines on which it has been decided to legislate on the basis of which the Ministry of Law in the Legislative Section will draw up a Bill. A great deal depends upon the care and skill with which instructions to the draftsman are drawn. The summary to the Cabinet in most cases would be no substitute for this office memorandum for the summaries are invariably general in character. Unfortunately, the practice of furnishing detailed memoranda is seldom adhered to either because of want of time or because of lack of experienced personnel in the administrative ministry.

Sometimes draft Bills prepared by the administrative ministries are sent to the Ministry of Law under the impression that all that would then be necessary is to get them formally "vetted".

OFFICE MEMORANDUM CONTAINING INSTRUCTIONS This is a mistaken notion. Bills drafted by non-administrative draftsman are bound to be defective and the draftsman will have to spend much time in undoing what has been done. Further, attempts to redraft the Bill, however necessary, may also be resisted by the administrative ministry on the ground that the draft Bill has already been accepted by their own experts.

A draftsman cannot be expected to be an expert in every field of knowledge and therefore he has to be educated up to a point where he will become qualified to deal with the subject matter from the legislative point of view. The substance of the law, the policy behind it, the machinery to implement it, the form it should take and so on are all matters so inextricably interconnected that conferences will have to be held by the draftsman at various stages before the Bill can be finalised. The chief draftsman looks after the distribution of work among his juniors, himself undertaking the drafting of Bills of greater complexity or importance. The desirability of a draft being prepared by two draftsmen sitting together or a senior draftsman supervising the work of a junior draftsman has often been emphasised. It has sometimes been suggested that drafting committees may be better suited for the purpose. The suggestion is neither feasible nor would it result in the production of satisfactory drafts.

In the case of long and complex Bills, the process of drafting may be a prolonged one extending over several months. The process of revising the earlier drafts must continue until the sponsors of the Bill and

the draftsman are both satisfied with the form and contents of the Bill. Bill drafting is a laborious process and is essentially a task that ought to be carried on under conditions which allow sufficient time for deliberate thought and research upon the many points that arise. It is a co-operative process in which many persons take a hand, but very few people realise how much time is required for the purpose with the result that the work of drafting has invariably to be done under exactly the opposite conditions and this necessarily reflects on the quality of the work produced.

When a Bill is finalised and is approved by the Ministry sponsoring it, that Ministry attaches to the Bill a statement of objects and reasons relating thereto which is signed by the Minister in charge of the Bill. This statement has to be drawn carefully so that it does no more than indicate the intention behind the Bill and the reasons which have led up to it in a calm and judicial tone ; very often such statements are drawn in consultation with the draftsman or is shown to him for approval.

In respect of certain types of Bills, the Constitution requires a few formalities to be complied with before their introduction in, or consideration by, Parliament. They are—

1. Under article 3 of the Constitution, no Bill for the formation of new States or for the alteration of areas, boundaries or names of existing States can be introduced in either House of Parliament except on the recommendation of the President.

2. Under article 117(1), no Bill which makes provision for any of the matters specified in sub-clauses (a) to (f) of clause (1) of article 110 shall be introduced in the House of the People (*Lok Sabha*) except on the recommendation of the President. These matters are—

- (a) the imposition, abolition, remission, alteration or regulation of any tax ;
- (b) the regulation of the borrowing of money or the giving of any guarantee by the Government of India or the amendment of the law with respect to any financial obligation undertaken or to be undertaken by the Government of India ;
- (c) the custody of the Consolidated Fund or the Contingency Fund of India, the payment of moneys into, or the withdrawal of moneys from, any such Fund ;
- (d) the appropriation³ of moneys out of the Consolidated Fund of India ;

3. The word "appropriation" occurring in article 110(1)(d) is a term of art. In the case of a service to be set up, it involves two things ; first the naming of the

- (e) the declaring of any expenditure to be expenditure charged on the Consolidated Fund of India or the increasing of the amount of any such expenditure ;
- (f) the receipt of money on account of the Consolidated Fund of India or the Public Account of India or the custody or issue of such money or the audit of the accounts of the Union or of a State.

It is however provided in article 117(2) that a Bill shall not be deemed to make provision for any of such matters by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for licences or fees for services rendered, or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes.

If a Bill contains any of the matters enumerated in sub-clauses (a) to (f) above or in sub-clause (g) of article 110(1), that is to say, any matter incidental to any of the matters specified in sub-clauses (a) to (f) aforesaid, *and nothing else besides*, it would be a money Bill. In other words, if a Bill contains matters referred to in clause (1) of article 110 and other matters as well, it will not be a money Bill unless it be that the other matters are really incidental to any of the matters specified in sub-clauses (a) to (f) of article 110(1) and therefore fall within clause (g) of that article. For instance, the insertion of a definition or a commencement clause in a Bill which is otherwise a money Bill will not remove it from the category of money Bills.

Apart from the fact that a money Bill can only be introduced in the *Lok Sabha* on the recommendation of the President, certain other considerations apply in relation to the passing of such Bills which are discussed later.

3. Under article 117(3), a Bill which if enacted and brought into operation, would involve expenditure from the Consolidated Fund of India shall not be passed by either House of Parliament unless the President has recommended to that House the consideration of the Bill⁴.

service, and secondly, the exact allotment of money to be spent on that particular service. A Bill making provision for training for employment and for establishing a comprehensive youths' establishment service does not fall within art. 110(1)(d) when it seeks merely to give directions to the Government that this is a service on which money may be spent which Government may or may not spend. (Dr. Ambedkar's speech on the Youths Training and Improvement Bill, *Lok Sabha Debates*, dated 12th April 1951).

- 4. Where the effect of accepting an amendment to a Bill already introduced would be that the Bill if enacted and brought into operation with the amendment would involve expenditure from the Consolidated Fund of India, the Bill will require the recommendation of the President.

4 Under article 274, no Bill which imposes or varies any tax or duty in which States are interested shall be introduced in either House of Parliament except on the recommendation of the President. A recommendation obtained after introduction and before passing will obviously not satisfy this article.

The object behind these requirements is not far to seek. By these devices, Government would be enabled to ensure that sufficient attention is paid to Bills involving expenditure, that money Bills are considered first by the directly elected representatives of the people in the *Lok Sabha*; that in a scheme involving distribution among the different States of taxes collected by the centre, sufficient attention is paid to the consequences flowing from the Bill if accepted and passed.

Whenever a Bill falls within one or the other of the categories aforesaid, it is for the Ministry in charge of the Bill to obtain such recommendation. In the case of Government sponsored Bills there can be no question of withholding or refusing such recommendation for such a contingency cannot possibly arise.

The Rules of Procedure of either House of Parliament require that—

- (a) a Bill involving expenditure shall be accompanied by a financial memorandum inviting particular attention to the
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| FINANCIAL | clauses involving expenditure and giving an estimate of |
| MEMORANDUM | the recurring and non-recurring expenditure involved |

It is for the appropriate ministry to determine whether a Bill, if enacted and brought into operation, would involve expenditure from the consolidated Fund of India. There are no hard and fast rules which will help in determining whether a Bill is a Bill falling within art. 117(3) or not. Speaking broadly, if a Bill on the face of it contains provisions, say, for the appointment of officers or other authorities or for the payment of money or for setting up an institution by the Government involving expenditure and so on, it would obviously be a Bill within this clause. In 1951, a Bill by a private member seeking to impose a liability on Government to undertake a service for the relief of unemployment was held to come within this clause. In 1956 a Bill which placed the Railway Protection Force on a statutory footing, expenditure in relation to which was formerly being incurred through appropriations made by Parliament in that behalf, was held to come within art. 117(3). Appropriation Bills which are money Bills may not fall within this clause although the practice appears to be to obtain the President's recommendation under this clause also.

This article would require the President's recommendation to be obtained separately in respect of the passing of the Bill by each of the two Houses; the prohibition in this clause is against the passing of the Bill by either House unless the President has recommended to that House the consideration of the Bill. Although the recommendation of the President is with reference to the actual passing of the Bill, it would be advisable for a proper understanding of the financial and other implications underlying the Bill that the recommendation is obtained even before the Bill is taken up for consideration.

in case the Bill is passed into law ;⁵

(b) clauses or provisions in Bills involving expenditure from public funds shall be printed in thick type or in italics ;

(c) a Bill involving proposals for delegation of legislative power shall be accompanied by a memorandum

MEMORANDUM REGARDING explaining the proposals and drawing attention
DELEGATED LEGISLATION to their scope and stating also whether they are of a normal or exceptional character.⁶

character.⁶

The memorandum regarding delegated legislation has to be drawn with some care. While the practice of delegating law-making power in certain circumstance is both justifiable and inevitable, Parliament would like to be satisfied that the delegated legislative power does not extend beyond justifiable limits. In fact, there is a Committee on Subordinate Legislation constituted by Parliament which scrutinises and reports to the House whether the powers to make rules, regulations, bye-laws and the like are being properly exercised within the limits of such delegation. Parliament would ordinarily require that unless the subject matter of a Bill is of a special nature, exceptional types of delegated legislative power are confined within the narrowest possible limits.⁷

A draftsman, no doubt, would keep all these general principles in mind when including provisions in a Bill for delegating legislative power. Where the delegation is of an exceptional nature, care has to be taken to explain why it is so.

In the case of Government Bills containing more than 20 clauses, the practice generally is to have a table at the beginning showing the arrangement of clauses to facilitate reference to the clauses in the Bill. But the arrangement of clauses is not put to the vote. A practice has also developed of annexing to amending Bills a copy of the provisions sought to be amended. Both the arrangement of clauses and the annexure are prepared in the Ministry of Law.

The choice of the House in which a Bill (other than a Bill to which clause (1) of article 110 applies) is to be introduced is often a matter of convenience depending upon the state of parliamentary business or a matter of tactics. But more often than not, a Minister in charge of a Bill

5. Financial Memoranda are prepared by the ministries sponsoring the Bills and the Ministry of Finance (if it is not the sponsoring Ministry) is always consulted at the appropriate stage. These memoranda outline the objects on which expenditure is likely to be involved and furnish an estimate, wherever possible, of the annual expenditure

6. Rules 69 and 70 of the *Lok Sabha Rules* and Rules 52 and 53 of the *Rajya Sabha Rules*.

7. See Chapter IX, Delegated Legislation; see also *The Report of the Donoughmore Committee on Ministers' Powers*, p. 67, (1932).

may feel that the Bill which he is sponsoring is of such a nature that it should be considered in the first instance by the directly elected representatives of the people in the *Lok Sabha*. Barring Bills coming within articles 109 and 117 (1), which may conveniently be referred to as financial Bills⁸, all other Bills may originate in either House of Parliament.

Once the proof copies of Bills to be introduced in either House of Parliament are sent to that House by the Ministry of Law, the House takes charge. On the day the Bills are put down on the agenda for introduction, the Minister in charge of the Bill makes a formal motion for introduction which is seldom opposed⁹. The next motion in respect of the Bill may be (a) that it be taken into consideration, (b) that it be referred to a Select Committee of the House, (c) that it, (not being a financial Bill) be referred to a Joint Committee of both Houses with the concurrence of the other House or (d) that it be circulated for eliciting public opinion.

If a Bill is referred to a Select or Joint Committee, the draftsman who prepared the Bill attends all meetings thereof and is responsible for revising the Bill in the light of the decisions taken at those meetings. Although not a member of the Committee, he is often permitted to explain the legal issues involved. The report of the Select or Joint Committee is prepared in the Parliament Secretariat but from the very nature of things that Secretariat has to work in close collaboration with the draftsman concerned¹⁰.

When a Bill (whether it has been examined by a Select or Joint Committee or otherwise) comes up before either House for consideration, it is in its second reading stage and it is open to the members to move amendments which are within the scope of the Bill and relevant to the subject matter of the clause to which they relate. There are rules regarding admissibility of amendments and also notices thereof in order to afford the Minister concerned an opportunity to consider them. The draftsman is generally

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8. The question whether a Bill is a money Bill or not is of some complexity; but the Speaker's decision on the question is final. In the case of money Bills, the powers of the Upper House are somewhat restricted.
 9. It may be possible for a Bill to be published in advance in the *Gazette of India* with the permission of the presiding authority of the House of Parliament concerned, in which case, no formal motion for introduction of the Bill is necessary.
 10. After the presentation of the Report to Parliament, the Minister in charge may move that the Bill as reported be taken into consideration or that the Bill be recommitted or that it be recirculated for the purpose of obtaining public opinion or further public opinion as he may decide having regard to the circumstances.

available in the official lobby during the progress of the Bills with which he is concerned to advise the Minister in charge as to whether any amendment may or may not be accepted and, if it is to be accepted, in what form and so on. In spite of the rules relating to notice of amendments, very often the progress of a Bill is so rapid that the draftsman obtains no opportunity of examining the effect of a proposed amendment or repairing any damage done by the hasty acceptance of an illdrafted amendment. Moreover, a hastily drawn up amendment during the course of an excited debate in the House may not always come right even if prepared or vetted by the official draftsman.¹¹

The last motion in respect of a Bill is that it be passed with or without amendment as the case may be. This is the third reading stage.

Discussion at this stage is confined to arguments in support of or against the Bill as amended or otherwise. As soon as a Bill is passed by one House it is transmitted to the other House for concurrence with a message to that effect. Under article 107, a Bill is deemed to have been passed by both Houses if it has been agreed to by them, either without amendment or with such amendments only as are agreed to by both Houses. Article 108 provides for a joint sitting of both Houses in certain cases for resolving differences, while article 109, as already discussed, prescribes a special procedure for money Bills.¹²

When a Bill is finally passed by both the Houses, the Secretariat of the House last in possession of the Bill (it will be the *Lok Sabha* in all cases of money Bills) sends a copy of the Bill as finally passed to the

11. What a former Parliamentary Counsel in the United Kingdom (Sir William M. Grahame Harrison) said in the present context may be of interest.

The most dangerous, perhaps, are those adding some *ex abundanti cautela* provision, or intended to make clear what was a matter of law already abundantly clear; such amendments are almost certain to come back like a boomerang sooner or later and give trouble. It is amendments of this kind which Ministers often find very difficult to resist—either the mover is playing the game of pure obstruction, or neither of the law officers is on the Bench and the mover refuses to take the law from a lay Minister.....

Again there are the amendments drafted under the Gallery by the Government draftsman, possibly at 2 a.m. or even later, or in great haste during the confusion of a discussion in a Standing Committee. Many an amendment so drafted has come out all right, but there is always a risk of disaster.

Sir James Stephen: "It is almost impossible, unless you have time to think over the effect of a proposed amendment upon the other provisions of a Bill, to say in an instant what it will be. I cannot conceal from myself the fact that there is some degree of conflict between the independence of Parliament on the one hand and the symmetry of legislation on the other. You must be content, more or less, to sacrifice the one to the other".

12. A member in charge of a Bill may withdraw his Bill at any stage with the leave of the House. In such a case, a statement giving reasons for the withdrawal is circulated to the members in advance.

draftsman for formal scrutiny. At this stage, all that the draftsman may be able to do would be to point out errors relating to printing, spelling, punctuation, numbering of sections or clauses, cross references and marginal headings. Under a rule made by either House, the presiding officer has the power to correct patent errors and make such other changes in the Bill as are consequential on the amendments accepted by the House.¹³

The Bill is then reprinted by the Parliament Secretariat in its final form and two copies thereof on thick paper authenticated by the presiding officer of the House concerned are sent to the Ministry of Law for submission to the President for his assent. A Bill becomes law as soon as it is assented to by the President. The Ministry of Law then gives it a number and the Act is published in the official Gazette as an Act of Parliament.

The procedure described in the preceding paragraphs (except in so far it relates to anything to be done in Parliament) applies also, generally speaking, to the drafting of Ordinances which may be promulgated by the President under article 123 of the Constitution and to Regulations made by the President under the Constitution.

Whenever a Bill seeking to replace an Ordinance by a Bill is introduced in either House, a statement explaining the circumstances which necessitated immediate legislation by Ordinance has to accompany it.¹⁴

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14 Modern Law Review, p. 279 (1950).

13. According to Sir Mackenzie Chalmers :

It is commonly said that a well-drafted Bill goes into the House of Commons Committee like a well-dressed young lady going into a grass field. It emerges from the Committee like the same young lady when she has been chased by an angry bull and has been dragged through a quick-set hedge to escape from him.

For an interesting article on the subject, see J.A.G. Griffith, *The Place of Parliament in the Legislative Process*, *14 Modern Law Review*, p. 279 (1950).

14. See Rule 71, *Rules of Procedure of the Lok Sabha*.