

The Role and Efficacy of Legislation

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Abstract:

This article considers the role of law in society and contrasts legislation with customs, traditions and natural justice in terms of its efficiency in a democracy. Written laws should provide certainty, solidarity and stability in the society. Legislative counsel have a crucial role in the whole exercise of legislation and its making, particularly in terms of making it a most efficient legal document.

Introduction

One of the most efficient public documents is legislation, the law made by a competent Legislature. Being the most appropriate way of communication between the elected and the elector, it ought to be efficient too. While electors choose to elect acceptable candidates as their representatives, they reasonably expect in return

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effective legislation that governs the elector's conduct. Brevity, clarity and precision play a very important role, while reducing the commands of the Legislature, by way of legislative drafts.

Being the prime source of law, legislation and the legislative counsel who writes it assume unprecedented importance in the modern civil society. Legal history reveals that law in its evolution came in the form of natural justice and developed and enriched by its customs and traditions. It is intriguing to determine which came first: customs for protecting human rights or principles of natural justice for protecting them. Nonetheless, it is very obvious and acceptable to all that the law in the form of legislation came into existence and gave definitive expression to principles of natural justice. It binds the people of a civilised State for their governance and is made on their behalf by the sovereign.

Historically, the law in India passed through stages of Shrutis (by listening) and Smritis (by remembering) to the development of the written laws.

Manusmriti is generally known in English as the Laws of Manu. Manu was the author who laid down the rules for the King, the State and the Judicial Procedure relevant to ancient India. Manusmriti, which is in the ancient Indian language namely, Sanskrit, is the discourse by Manu, the ancestor of rishis or saints. It is the utterance of 'the laws for the mankind' and is the ancient source of rules to govern the conduct of human beings. According to Indian mythology, Manusmriti is regarded as the words directly passed on from 'The Bhrahma', God Almighty. There are numerous commentaries written by many, as the original version of Manusmriti was only by oral pronouncements. The competent Legislature here is the Almighty. According to German philosopher Friedrich Nietzsche, Manusmriti is as an "incomparably more intellectual and superior work".²

Natural justice

The principles of natural justice are the dictate of reason and conscience existing in the human beings and the customs and traditions developed by long and constant observance in the society. The courts recognise the principles of natural justice in forms of customs and traditions when the written law is not available and they develop the principle of natural justice as the law known as equity and good conscience. The written laws should provide certainty, solidarity and stability in the society and leave little scope of interpretation to the courts in comparison to the application of new principles of equity by courts. The effect of legislation has a far-

² Friedrich Nietzsche, *The Antichrist* (1888), 56.

reaching consequence. As observed by L.H Fuller, “the strength of law lies in public acceptance”.

The role of law in governing the civilised society is very efficacious in comparison to customs and traditions as well as principles of natural justice. The nomadic and primitive societies were governed by their customs and traditions. Civilised societies always consider providing law to their people in the form of legislation considering mainly, its efficacy and utility. Hence, while translating the policy, a legislative counsel needs to check if the directive is in consonance with the principles of natural justice. His job is not just transcription or typing but to uncover pitfalls that might trap the Government as well as the Legislature if these principles are ignored or escape his attention.

Judges

The purpose of judgement by application of law is to secure justice. When the general public thinks of the law as just and fair, it is a high mark of confidence in the judiciary.

Written Law acts as a protection for Judges themselves. No judge who applies it can be accused of partiality. For the law does and ought to embody the collective wisdom. A judge who has to reach his conclusion without the guidance of law puts his personal reputation and the confidence of public at stake. This is one of the major roles the law plays while guiding Judges. However, there are several instances of judges complaining that it is difficult to understand a certain provision or to know the mind of the Legislature. Legislative counsel has, therefore, a responsibility to put things in a straightforward and understandable manner. If the legislative counsel does not explain the subject matter simply, he or she probably does not understand it as well. Leaving certain details to the judges to interpret is an injustice the justice seeker. The legislative counsel, while transforming the policy into legislation, has to foresee what the policy makers have failed to see.

Citizens

The law instructs the citizens how to behave justly. This, you may say, is a simplistic statement. Ordinary people do not need to read the law to know how to behave. They generally behave well because they are brought up in a society to accept the same standards of conduct as those that form the basis of the law. The persons who regulate their activities by the law are more likely to be on the right side of it and usually never take advantage of loopholes, if any.

A well-drafted piece of legislation will always come to the rescue of the individuals it is addressed to. It would save an ordinary citizen from untold misery. Citizens

sometimes have to pay for the actions of the legislative counsel. For this reason, legislation-making attracts the most serious attention of the people at large. Clarity is important for effective communication between the body that pronounces the law and the audience. For this reason alone, statutes will definitely continue to dominate in terms of their importance among all other written documents in our society. Efficiency of a Legislature is invariably reflected upon the official pronouncement that it makes by way of legislation, which is written by the legislative counsel.

Lawyers

If there were no law, there would be no lawyers to consult. However, the existence of law helps lawyers provide a solution to legal problems. The lawyers may in the course of their work enormously reduce the number of cases going to court if the legislation diminishes the areas of uncertainty. Legislation should enhance the possibility of a settlement, which, when negotiated by lawyers, is always the best solution to a dispute. Moreover, a great deal of the administration of justice is simply harmonising, ensuring rights, and making adjustment in accordance with law.

Sometimes, lawyers who bank upon legal provisions for the benefit of their clients find it difficult to present the case due to the ambiguous nature of a legal provision. The administrator of the legal provision is also sometimes in a fix as to how to apply it on a certain occasion.

In any democratic country, developed, semi-developed or developing, the Government is the respondent in most law suits. The reason, sadly, is that all legislation is either drafted by the Government counsel or touched by them by way of vetting or otherwise. A great chunk of Government money could be saved by a Government counsel, especially a legislative counsel, who applies their knowledge and expertise in drafting or rendering proper advice leaving no room for ambiguity in the language of law they resort to.

Litigants

A perplexed citizen, sometimes a litigant, approaches a court expecting the final determination of their rights in their favour. The citizen expects rights to be adjudged in accordance with the law or its appropriate interpretation. When the law is vague and has the effect of no law or unclear law or an inapplicable law, it results in miscarriage of justice.

If a law is in existence, the citizen expects a determination on the basis of it; and if the existing law does not make out what it ought to, the litigant loses faith in the

machinery involved in the process, including the person who wrote the law. Litigant expects a judge to decide with the help of the law, to apply the law, and to blend law and facts that result in justice. The expectation of the litigant is justice, which is possible only with the existence of clear law. Sometimes, legally meaningless phraseologies and archaic expressions add insult to the already injured user of the law.

Reasonableness and rationality

A reasonable law abiding citizen is one who uses reason sensibly and arrives at fair and moderate results. What is reasonable and unreasonable is laid down by the law. Law here, very effectively guides the citizen to arrive at reasonableness. If we think that, a decision has been reached without reasoning at all, purely emotional or impulsive, we say that it is irrational. If we think that the reasoning power is applied wrongly, has failed to detect what is relevant, we use the word unreasonable. The act has to be caught by the spirit of the words and to be within their scope as well as within their reasonable meaning. There have been many examples of legislation that judges have shaped to their purposes. They did this by ruling on question of facts and question of law.

Injustice

Legislation as discussed is that which advances the policy of the Government, throws some light on injustice. There is a difference between a good citizen as an individual and in the society to which he or she belongs. The good citizen practises justice as a virtue for its own sake. The State, which is the administrative organ of the society, has till recently been regarded as provider of justice through legislation. Nevertheless, when our legal system was in a developmental stage, what motivated the State was maintenance of order.

If three good citizens in three different parts of the country reach in a matter of domestic justice three different decisions because they apply three different principles for the determination of the responsibility or the assessment of compensation, the probability is that none of the three individuals involved will know anything about the other two cases. Because there will be no comparison, there will be no sense of injustice. Each individual will, if accepting that he or she has been treated fairly and reasonably as an individual, be satisfied with the result. Even if there is a comparison, it does not give rise to a sense of injustice. That must depend on whether the individuals think of themselves as belonging to the same group, i.e., as being members of the same society. If they do not, the unsuccessful would shrug it off, thus, if English, Indian, and a German judge deliver three

different judgements on the same set of facts because each judge applies a different principle, no one is upset; each judge is right according to their own wisdom.

Therefore, we allow that each community may have its own ideas of what is just. As we reach out towards a world community, we begin to formulate general principles, which we say all communities should adopt. Subject to that and in the application of the general principles, we accept that the results may differ. However, within a single community, they must be the same and this can be ensured only by the existence of the legislation that caters to the society in general.

Legislative Counsel

To enhance the efficacy of legislation, the legislative counsel needs to be alert to the dangers of negligence, oversight and overzealousness. The utility or harmfulness of a legislative counsel often times becomes known a long time after the legislation he or she prepared starts rolling out. Then, sometimes the legislative counsel would have moved on to a different assignment or retired.

Legislative counsel contributes to maximising the efficacy of legislation by providing their expertise to make available every scientific tool for the best pronouncement of Legislature.

Legislative drafts were believed to be drafted for lawyers and judges once upon a time. In the modern democratic legislative process, a legislative provision is people-oriented. The idea is to serve the masses by extending legislative benefits to them in the most palatable manner. Every legislative Counsel should strive to achieve this.

As correction or improvement of a statute entails cumbersome procedural hurdles, legislative communication needs to be prepared with utmost care and caution unlike many other documents. Statute making is not merely a transcription or translation of administrative or executive guidelines, but is the command of legislative intent. Legislation-making is a mixture of vision, mission and craft. Legislative counsel are master artisans whose handicrafts are applied to bring out a workable proposition considering the background of a problem and foreseeing the ramifications of the legislative action. Efficacy always presupposes precision, brevity and clarity.

To conclude, legislative counsel have the most crucial role in the whole exercise of legislation and its making, particularly in terms of making it a most efficient legal document. It is said, "if the law is good, praise the person who brought it and if it is bad, condemn the legislative counsel". Nevertheless, let us continue to strive to make the best.