

**CHALLENGES OF A DRAFTSMAN IN CONTEMPORARY  
DEMOCRATIC NIGERIA**

**BY**

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## **CERTIFICATION**

I certify that this independent L.L. M. research work was undertaken by MR JOHNNIE UCHENNA EJIUGU of the Akinola Aguda Post Graduate School of Studies Nigerian Institute of Advanced Legal Studies, University of Lagos Campus Akoka Lagos in satisfaction for the award of the Master Degree of Laws in Legislative Drafting under my supervision for the 2010/2011 academic session.

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## **DEDICATION**

This research project (dissertation) is dedicated to Almighty God who made all things possible.

To the management of Federal Road Safety Commission under the command and control of Osita Chidoka (ike obosi)

And to the memory of my late mother Edith Adaure Ejiogu nee Okoronkwo for laying a proper foundation.

To my wife and children for enduring the pains.

To God is the Glory.

## **DECLARATION**

I HEREBY DECLARE THAT THIS WORK IS A PRODUCT FROM MY PERSONAL EFFORT. THIS RESEARCH WORK HAS NEITHER BEEN PRESENTED IN WHOLE OR IN PART FOR THE AWARD OF THE MASTER OF LAWS DEGREE (IN LEGISLATIVE DRAFTING) ELSEWHERE.

AUTHORS CITED HAVE BEEN DULY ACKNOWLEDGED.

.....

**JOHNNIE UCHENNA EJIUGU.**

**2009/2010 SESSION**

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I humbly accept originality of all the views expressed in this work except where credit is given to specific person(s). I do not need courage to equally accept full responsibility for all the errors and omissions possibly contained in this dissertation.

**JOHNNIE UCHENNA EJIUGU**

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## ABSTRACT

Legislation is the framework by which government achieves its purposes.

To politicians and administrators, legislation is a means to attain their economic, cultural, political objectives and certain particular public policies.

The Draftsman and his challenges in contemporary democratic Nigeria can be best appreciated when you picture this;

You have some urgent photocopying to be done, but the machine has run out of paper, the only other copier in the building is being repaired. You try to use the computer printer, but that has run out of ink. Your e-mail connection to the outside world is suspended because the satellite has shifted its position. Then the draft Bill you have spent all week on, disappears from the computer screen; with the words “unrecoverable disk error” posted on your scanner. That evening there was a heavy tropical rainstorm and the next day you come to the office to find the roof has leaked and most of your papers have got soaked. This is a pictured summary of the Draftsman physical challenges, just a tip of the iceberg.

Or this: You are in your rather small office without windows or computer, trying to draft a Bill in pencil, legibly enough for the copy typist. You are summoned to the Attorney General’s office and asked to take on a case in the court next day for which a defense must be filed today.

The Solicitor General has just resigned, the Special Adviser is on leave and the only other Government lawyers are the DPP and a trainee. The file is incomplete and the witnesses are off the island. The judge has already refused one adjournment and the plaintiffs will be asking for judgment in default if the defense is not filed. You point out to the AG that

you have not appeared in court or done litigation for over 20 years; he says “Well—you’re a lawyer, aren’t you? This is almost a daily experience in Ministries of Justice in Nigerian states and even the Attorney General’s chamber in Abuja. The above scenes are parts and parcel of the psychological and physiological challenges the draftsman is faced with in a contemporary Democracies like Nigeria.

## **LITERATURE REVIEW**

In Vol, 1 of his work legislative drafting, **Vcrac Crabbe** posits that legislation has become a necessity. We need legislation to effect changes in law; we need legislation to interfere with vested rights and interest <sup>5</sup> these implies first, that legislation is a sine qua non to our aspirations, intentions and understanding of government and public policies in a our societies. Dictators and tyrants hate the restraints which law imposes upon them, yet they enact legislation which strengthens their hold on society.

It is the Draftsman that puts these intentions down to form.

**Thornton G C** argues that this society has a peculiar cant and jargon of their own that no other mortal can understand and wherein all their laws are written, which they take care to multiply. The condition of the statute book is at any time undoubtedly a matter of very considerable social concern in a society. Statute books contain at the present much that is unsatisfactory and much that is difficult to understand.

The need to communicate appears not infrequently to have been overlooked. The language of the law has for centuries been the subject of intermittent attack and most of the worthwhile adjectives of opprobrium have at some time or other been applied to it. He

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<sup>5</sup> Vcrac Crabbe, *Legislative drafting* , vol 1 Cavendish publishing ltd London (1993) p.vii

concludes the need to communicate laws to members of the society is entirely a practical one.<sup>6</sup>

The bottom-line here is that the onerous task of putting down intentions, interest, policy, rights and interest of any piece of legislation lies with the legislative drafter and these he must do, not only by determining the law but also to communicate it.

It is instructive to note here that the word draftsman as used here refers to legislative drafters. Not all lawyers are draftsmen but everybody that has knowledge of putting down their intention on paper can draft.

The purpose of this research work is basically to identify the challenges posed to a legislative draftsman with the aim to equip the legislative draftsman with the conceptual tools and techniques they need to draft legislations to foster good governance and development as well as provide practicable tips, guide and encouragement to the legislative draftsman by stimulating need for precision and accuracy which are acknowledged as axiomatic by all with legal training and experience, while emphasis is laid here on the further need for the draftsman to develop an obsession to draft so as to be readily understood.

The challenges associated with tools of drafting, career development, culture of law breaking, expertise, experience, training process just to mention but a few, can be overcome by dint of more hard work especially in the advent of emerging full scale democratic experience which our country Nigeria is experiencing now.

The prospects are quite high in legislative consultancy, continuous legal education and with firm entrenchment of true federalism there exist the tendency for decentralization of

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<sup>6</sup> Thornton GC, *Legislative drafting*, Butterworth & co (publishers) London (1970) p v

formal training institution and establishment of new institutions which will enhance expertise and experience.

Most works in drafting can be classified into two broad headings thus general drafting and the more specific legislative drafting, while the two aforementioned authors dwelt on legislative drafting.

**Soetan** focused on legal drafting, which he described as the precise formulation of rules or principles whereby, or by reference to which a particular matter is to be regulated or administered. The rules or principles usually have the force of law or are regarded as binding by the persons concerned; they are in essence addressed to human beings by another being or collection of human beings. Whatever may be the guise in which they are operating, when the exercise concerns Legislation exclusively, it is often referred to as Legislative Drafting<sup>7</sup>. He concludes by postulating that ‘it is trite to say that arising from their physiological or psychological make up, human beings do not often see things from the same perspective, yet the rules or principles have to be consulted and interpreted by them with identical results in each case.’ The purpose of legal drafting therefore is communication in a manner that does not admit of ambiguity.

**Dick**<sup>8</sup> argued that legislative drafting is an aspect of legal drafting. In his words ‘legal drafting is legal thinking made visible, the visible legal thinking is to precipitate legal rights, duties, privileges and function in definitive form, it is the formulation and preparation of legal documents such as deeds, contracts, leases, Wills, and Trust. In effect preparing legal documents is like drafting statutes between parties, setting out

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Olusuji A S, *Elements of Drafting*; Lagos Dredew Publishing (1997) p 1.

<sup>8</sup> Dick RC *legal drafting*. Toronto carswell prints (1972) p445.

relationship and ground rules in a codified form.’ Legislative drafting is therefore an aspect of legal drafting; statute is the end product of legislative drafting.

Whether legal drafting or legislative drafting there are rules and need for perfection, there must be a constant research aimed at improving the skill, the challenges, tools, laws need to be mastered. I believe the legislative drafter has a bigger challenge in expertise, experience and development, which is the focus and essence of this work.

*A modern drafter must have the following objectives*

1. To facilitate a systematic development and strengthening of Legislative practice and procedures in Nigeria
2. To make the law drafted certain in words and communicable to the society.

## **CHAPTER ONE**

### **1.1 INTRODUCTION**

This research work argues from the perspective that legislative drafting is not just a game of skill, but basic skills must be acquired.

It is not an all lawyer’s affair because every lawyer is not a legislative drafter. The magic is not in drafting the law but also communicating the law to the society.

Legislative drafting is not a science but an art which flows from the skill, like all skills and craft, drafting legislation cannot be learned completely from a book.<sup>9</sup> While Drafting is the synthesis of law and fact in language form, it is the art of legal writing,<sup>10</sup> Legislative drafting is the process by which the intention of the lawmakers or Government is put down in writing into a legal document.

Because drafting is an art, the skill is to a greater extent developed by practice. Legislation is of primary significance in the management of any country's economic, political, social, administrative and legal affairs, government activities are largely dependent on statutory powers, there are very few aspects of an individual's life or affairs of private organizations that are not regulated by statute. These are the more reasons why the legislative drafters whose duty it is to put the intention of both parliament, National and state Houses of Assembly, government at all levels into a bill or draft, must be properly grounded in law, basic knowledge of drafting, good command and use of language and give meticulous attention to details and above all have a flair for drafting.

As a general rule, draftsmen must always follow accepted norms while drafting. However, the drafting environment may sometimes impose some constraints to make the drafter deviate from the accepted drafting convention; it is that peculiarity in the Nigerian democratic context that is the focus of this work with occasional voyage into other jurisdictions.

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<sup>9</sup> Thornton G.C. *Legislative drafting* London Butterworth (1970) p v

<sup>10</sup> Adubi C.O. *Drafting, Conveyance and Wills*, Lagos Lighthouse Publishing Coy ltd (1995) p 1.

Legislative drafting has been likened to a child's game of snakes and ladders. Snakes and ladders is a game of chance. Legislative drafting is a game of skill. How is the skill acquired and sustained?<sup>11</sup> Are of paramount interest here. Legislative drafting simply means the drafting of Laws (legislation), it is a form of advanced legal writing. An Act of the National Assembly (Nigeria's equivalent of British parliament) expresses legal relationship; it lays down our rights and obligation, our powers, our privileges and our duties.

See for the instance the Electoral Act of Nigeria, wherein the commission is mandated to include the names of ALL persons entitled to vote in any federal, state or local government or Area council election.<sup>12</sup> The question may arise as to whether the failure of the Electoral commission to capture ALL persons entitled to vote is incompatible with the intention of the drafters of that Law or the intention of the law makers?

In CAMINETTI v United States wherein the Appellant married, with a child was dating Lola Norris a single lady who lived with her parents in Sacramento California.<sup>13</sup> They took long rides outside the city wherein the registered in a hotel as husband and wife falsely and finally found themselves in NEVADA where they planned to live together. Upon a charge and conviction of violating the White Slave Traffic Act which provided thus:-

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<sup>11</sup> Vraac Crabbe, *Legislative Drafting*, Cavendish Publishing LTD (1993) Vol 1 p vii.

<sup>12</sup> Electoral Act 2010 part iii section 9(1).

<sup>13</sup> Caminetti V U S 242 U S (1947). P1372

Any person who shall knowingly transport or cause to be transported...in interstate or foreign commerce...any woman or girl for the purpose of prostitution or debauchery or for any other immoral purpose...shall be deemed guilty of felony...

No one claimed that Caminetti brought Norris across state lines for prostitution, but who could doubt that he had an immoral purpose in making this trip being a married man with a child sleeping with an unmarried lady.

A review of this SIMPLE case revealed that the courts did not properly fulfill their role in applying the statute of the legislature on the following premise: is it true that there is no more than one meaning of the phrase Debauchery or any other immoral purpose?, to this day many believe that they did not.<sup>14</sup>

In another case the age 17 as prescribed by law has been wrongly interpreted to be age upon conviction contrary to the lawmakers and drafter's intention of age upon commission of crime.<sup>15</sup>

The task before the legislative drafter is communicating the message he seeks to convey. His draft should not admit of a misunderstanding as to the message he seeks to convey.

## **1.2 OBJECTIVES, SCOPE AND METHODOLOGY OF ESSAY**

The objective of this paper is to identify the challenges of the legislative drafter and examine means of improving and simplifying the task (challenges) of a legislative draftsman in contemporary democracies with emphasis on Nigeria.

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<sup>14</sup> William P S *Legislative analysis and drafting* 2<sup>nd</sup> edition West Publishing Co. Minnesota USA (1984) p 3.

<sup>15</sup> C.O.P V Obidiuzo and others (1984) NWLR PT 78 P 9.

The techniques of legislative drafting are the careful outline and modalities that are applied by the drafters in carrying out the task.

The drafter is an important link between the executive, the legislature and the judicial arms of government of a country. His duty is primarily to transmit the legislative policies of government into draft legislation which is then introduced to parliament for debate and passed as an ACT.

Our aim is that Acts of parliament should be drafted in accordance with the principles that govern language as a means of communication in our respective jurisdiction.

The tools, techniques, methods of training draftsmen, manpower development, career prospects, motivations, expertise and experience associated with modern day legislative draftsmen is our focus (scope) .

The doctrinal approach using documented works is employed in organizing materials for this research, information from primary and secondary sources, such as statutes, decided cases, relevant textbooks and journals, the choice is predicated in the context of all legislative drafting being traced and found in the works of text writers as well as legislation thus a consideration of some of the text writings and legislations would be inadvertent and relevant to this project.

The term legislation used in a narrow sense connotes Acts of parliament, Orders, Regulations, Orders-in-Council, statutory instruments and rules, in a wider sense legislation covers various shades of normative rules and practices as of professional, social or religious groups and societies; customary laws and behaviors; departmental orders and circulars for implementing statutory regulations and rules as well as

gazettes. All these must translate into the concept of the rule of law, every public action must ultimately have authority in an existing law-statute, common or prerogative.<sup>16</sup> Legislative drafting herein is in the main form of translating these policies into enforceable practicable laws contained in a document.

### **1.3 LEGISLATIVE DRAFTING AND SERVICES**

The art of translating policy into law is the main duty of legislative drafting, not primarily concerned with the right and wrongs embodied in the legislative proposals; the drafter is not in a position to wash off his hands.

The local response to any complaint about lack of instructions, etc, is likely to be, *“You are the drafter, so just get on and draft.”*

No doubt most drafters would enjoy such a challenge. It means that whatever you put into a Bill is likely to become law, such is the service required of a legislative draftsman

To grapple effectually with every material problem, this requires more serenity of mind and more lofty courage than people generally imagine.

There appears to be basically five recognizable areas of the process of legislative drafting namely:-

- 1 Understanding the purpose of legislation.
- 2 Analyzing the instruction in relation to existing law, potential danger areas and the practicability of the legislation.
- 3 Designing the legislation

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<sup>16</sup> Vcrac Crabbe, *Legislative Drafting* supra at p 2.

4      Composition and

5      Scrutiny

The conceptual framework of a draft normally consists of;

1.     long title
2.     preambles
3.     enacting formula
4.     short title
5.     commencements
6.     Sections and subsections
7.     applications
8.     duration
9.     definitions

We shall discuss each of this heading later on in this work; let's understand why legislative draftsman and office was required in the first instance;

*“To establish an official department, at the head of which should be a parliamentary counsel of great experience, to whom all the government departments in England should have a right to go, so that there should be some person directly responsible for all there Bills if anything went wrong”.*

The basic concept of a legislative draftsman is to write the intentions of the lawmaker or government. The early pioneers in the field were compelled to learn by their own efforts. There are established today a great number of legislative drafting department. In the past Acts of parliament were drafted by judges and Privy councilors, many of

whom were members of parliament. By 1487 barristers in private practice as well as counsel in government departments were draftsmen of Bills. It was William Pitt who attempted to organize the preparation of statutes by standing counsel.

1869 the office of parliamentary counsel was formed as a result of Treasury bill dated 8<sup>th</sup> February, a select committee was appointed in 1875 to consider the means that could be adopted to improve the manner and language of legislation.<sup>17</sup> Perhaps the modern style of legislative drafting owes its origin to *scribae*. In Rome the juris prudentes of Rome drafted legislations with the help of the *scribea*. The jurist left the drafting of statutes to the *scribae* who involved style. But long before Rome and Greece, we had the Laws of Manu which is described as *written in verse and is divided into twelve chapters, in most parts the rules are so clearly and concisely stated that nothing can be gained by attempting to summarize or condense*<sup>18</sup>

We may never know the hand that wrote the Ten Commandments but we remember the Codes of Hammurabi, the complete and most perfect monument of Babylonian Law<sup>19</sup>. Of all these the concept is basically clarity, conciseness, statutory and completeness.

The functions of the legislative draftsman is the drafting of new Bills and amending legislations, the preparation of statements of objects and reason for such Bills, the revision of all proclamations, notifications, orders-in-council, by-laws, rules and regulations forwarded by initiating ministry, agencies and relevant authorities,

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<sup>17</sup> Allen S. *The Evolution of Government Laws* (1916) p.1005.

<sup>18</sup> Encyclopedia Britannica (1968) Vol 11, p 411.

<sup>19</sup> Buckland, *a text book on Roman law*, (1964) oxford press London 2<sup>nd</sup> edition p 39.

conducting of interviews with heads of department, and attendance of meetings of the legislative council and at select committees of council when Bills were being discussed

*Today the following conceptual framework is generally recommended:*

**Long title:** every legislation must have a long title e.g.

“An Act to establish the National Health the National Health Insurance Scheme with the objectives of ensuring access to good health care services to every Nigerian and protecting Nigerian families from financial hardship of huge medical bills; and for matters connected therewith”<sup>20</sup> this gives a brief overview of the Act, and by reading it, the main focus, general purpose and intention of the legislation are captured and understood at a glance.

Long titles are part of the legislation and offer very useful aid in interpreting an enactment and its provisions in any given legislative draft.

The practice is to draft long titles in terms wide enough so as to embrace the whole of the contents of a bill. It communicates the spirit and scope of the legislation and has the potential effect of limiting the debate on or amendment of the bill during legislative process.

The challenge here is for the draftsman to avoid the use of loose and vague expressions.

In Nigeria; the standards for the legislative titles are not prescribed by the constitution but are left to the good judgment of the draftsman.

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<sup>20</sup> National Health Insurance Scheme Act 1999.

It has been suggested that use of long title should be abolished because any statement of the objects of the Act considered valuable should be included in a section of the Act.<sup>21</sup>

It is useful and herein suggested that a final review of the title must be made, when the Bill is in final form to ensure that the development of the draft has not rendered the long title inaccurate or inadequate.

Customarily we use larger print or heavier type to distinguish the long title from the statute, but the use of capital letters to begin the more important words are not recommended for modern day practice.

**The Preamble:** the traditional function of preamble is to explain the object of an Act, or to explain the reasons why the enactment is considered desirable.

Lord Normand in *A.G v Prince Ernest Augustus of Hanover* stated thus *“it is only when it conveys a clear and definite meaning in comparison with relatively obscure or indefinite enacting words that the preamble may prevail”*

from the foregoing, this part of the enactment may be used as an aid to construction, it has the potential of either extending or restricting the general language. Present day practice discloses the use of preamble in the following circumstances:-

- 1 where the subject matter of the legislation is of constitutional or international importance.

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<sup>21</sup> Thornton GC on *legislative drafting (supra)* argued at chapter 8 that the title nowadays usually referred to as the “long” title in order to distinguish it from the short title is no longer practiced in some jurisdiction as the formal use of the word ‘title’ unqualified by ‘long’ .

- 2 where the legislation is of a formal or ceremonial character, intended to mark a noteworthy event such as the death of a statesman, royal visit or an anniversary of a historic occasion.
- 3 Where the legislation, although consisting of a public Act, has something of the nature of a private or local enactment, being intended to remedy an exceptional local problem of such complexity that an explanatory preamble is necessary to an understanding of the Act.
- 4 Where the purpose of the legislation is to ratify or otherwise approve an agreement entered or intended to be entered into by the government.

### **Enacting Formula:**

An Act has an Enacting Formula which gives the Act its jurisdictional identity and constitutional authenticity.<sup>22</sup>

Legislation is not enacted in a vacuum; there is usually an authority which gives efficacy to the law. The enacting provision follows directly the introductory headings. The appropriate form of enacting formula depends on the constitution, the requirements of which must be followed strictly.

A typical enacting formula in Nigeria goes thus:

‘there is hereby established for Nigeria a Federal Road Safety commission  
(“hereinafter in this Act referred to as “the commission”) .....

In Britain the formula at present except for money Bills run as follows:

‘Be it enacted by the queen’s most Excellent Majesty, by and with advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of same as follows: -

### **Short title:**

An Act usually has a short title which runs as follows “*this Act may be cited as the Federal Road safety Act....*”<sup>23</sup> In the words Lord Moulton in *Vacher v London society of compositors*, It was stated thus that:-

“*the short title is a statutory nick name to obviate the necessity of always referring to the Act under its full and descriptive title.*”<sup>24</sup>

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<sup>22</sup> Holds worth, *A history of English law*, (1909) Cando publishing coy, Vol 11, p 366.

<sup>23</sup> Federal Road Safety Commission Act CAP F19 LFN 2004.

<sup>24</sup> *Vacher and sons Ltd V London society of Compositors* (1913) AC 107 at 128.

When an Act is an amending Act, the short title in some jurisdiction has the expression (Amendment) for instance

*“the Electoral Act 2010 (Amendment)”*<sup>25</sup>

Each amendment other than the first carries the number of the Amendment<sup>26</sup> it usually comes with the calendar year of enactment as a section of its own<sup>27</sup>.

### **Commencement:**

The commencement of legislation and the passing of it are not the same.

Commencement of an Act means the date the Act comes into operation. In Nigeria the usual practice is to insert the word [commencement] and the date e.g. “1<sup>st</sup> February 1959”.<sup>28</sup>

On the other hand an Act is passed when all the necessary legislative steps have been taken which includes assent by the president.<sup>29</sup>

### **Sections and subsections:**

An Act of parliament is divided into sections and subsections, while a section contains only an idea and therefore one enactment which should be self explanatory, lucid, short and simple, no ambiguity as to meaning and readable.

The subsection is provisions in the section which emphasizes on the idea so as to avoid ambiguity and to achieve clarity. Where the composition of a section turns out to be long, it is broken into subsections. All the subsections should be read together.

The practice is to number the sections are numbered consecutively throughout the

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<sup>25</sup> Preamble of the Nigerian Electoral Act 2010 (Amendment) LFN

<sup>26</sup> See the Nigeria Constitution Amendment No 2 of 2010.

<sup>27</sup> Verac Crabbe supra p121.

<sup>28</sup> Firearms Act CAP F28 LFN 2004.

<sup>29</sup> Olisa Agbakogba (SAN) V NASS, FRN (2010) LLRN Vol 4 p 2078.

Act, Arabic figures in parenthesis are used for subsections however they must jointly deal with the same idea and subject matter.

**Applications:**

This can be to circumstances existing at commencement of legislation; or geographical application; or application to specific persons and things; or application to crown, or in a Republic to Government. Application sections may give an indication of initial area of application of a statute. Such is to serve to remove uncertainties and solve problems as to the manner in which a new law is to affect the varieties of complete or incomplete situation.

Sometime around November 2009 the President of the Federal Republic of Nigeria in the person of Umaru Musa Yar'adua fell sick and was unable to transmit a letter to the National Assembly within the contemplation of the constitution of Nigeria, these lacuna gave rise to series of unanticipated situation leading to the invocation of the doctrine of necessity by the senate<sup>30</sup>.

The application of a statute to a part of a territory under a legislative jurisdiction may be declared either affirmatively or negatively. For example see the state of emergency proclamation on Plateau and Ekiti states of Nigeria by President Olusegun Obasanjo 1999-2007<sup>31</sup>

Application to specific persons and things could be expressed by the language of legislation, whether the legislation is presumed to relate to the conduct of all persons,

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<sup>30</sup> The Punch Newspaper Vol 17 November 2009 front page reported the health of the president is a constitutional issue and it is only a health board of enquiry that can determine the fitness or otherwise of the president .

<sup>31</sup> Presidential letter to the NASS dated 28<sup>th</sup> Nov 2004.

whether aliens or citizens, within the area to which the legislation applies. This presumption may be displaced by the language of the statute. For instance ‘this Act only applies to...’

In some legislations provisions such as ‘the judicial powers... shall not, except as otherwise provided...extend to any issue or person in the service of the state security service of the union.’ Or this Act shall not apply to anything done by or on behalf of the crown.

**Duration:**

In the absence of special provision to the contrary, legislation is perpetual, it is in force until repealed.

**Definitions:**

Definition provisions are also called interpretation provisions words ordinarily bear there dictionary meaning, where by the nature of the word concerned or the context used there is any doubt as to the meaning of the word used, the drafter puts the matter beyond doubt by defining it for instance ‘in this constitution, unless it is otherwise expressly provided or the context otherwise requires –“Act” or Act of the National Assembly means any law made by the National Assembly and includes any law which takes effect under the provisions of this constitution as an Act of the National Assembly.’<sup>32</sup>

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<sup>32</sup> Part IV Section 318 CFRN 1999.

#### 1.4 ESSENTIALS OF A LEGISLATIVE DRAFTSMAN

The first prerequisite for a legislative draftsman is that he must be a lawyer with knack for language use, research drafting skill and communicating abilities and meticulous attention for details and criticism.

I had abinitio admitted that the essence of drafting in whatever form is to communicate to the targeted audience or parties to a contract.

For a legislative draftsman the challenge of communicating to the society and more so, the fact that the piece of legislative draft is subject to judicial interpretation makes the task more Herculean. The warning herein is '*do not gloss the statute.*'

The essentials of the legislative draftsman here will focus on the essence of the draft, the essential ingredients of the draft and the tools for the draft.

The preceding may be summarized in what is called the seven Cs of legislative drafting, these are:

- Communication; the essence of the work of a legislative drafter is to communicate the policy makers intentions to those who will use the legislation; this is achieved by remaining objectives.
- Clarity; the legislative intention should be very clear to those whom it is directed this is achieved through the use of direct and modern language free from ambiguity.
- Comprehensiveness; the legislative intention ought to and must be comprehensible to those whom it is directed. This is imperative so that they can grasp its meaning quickly as possible.
- Concise; a bill should be concise with no unnecessary or repetitious words or phrases. Therefore, omit needless language. If a word has the same meaning as

phrase, use the word. Use the shortest sentence that conveys the intended meaning.

- Completeness; it should cover all reasonable foreseeable circumstances likely to arise.
- Consistency; the drafter should use the same style throughout and with the same words or expression used to mean the same things. Do not use different language to convey the same meaning.
- Certainty; the legislative intention being communicated should be certain of that those to be affected are left in no doubt as to the extent of their duties, obligations, powers, directions, rights, or the procedures required to be followed in any given circumstances.

The bottom-line of these seven Cs is that the drafter should make his or her draft as intelligible as possible, this is imperative particularly because of those to whom the legislation is intended.

The draftsman skill, choice and use of language, structure, and syntax are his basic tools.

In Nigeria the lingua franca is English language whereby the majorities of the countries populace neither speaks nor write the lingua-franca, thus drafting in English language should be understood the same way as language of the jurisdictions.

Austin is of the view that the ability to communicate depends on the ability to think. One is of the essence of the other, hence he concludes by stating that ‘what is

commonly called the technical part of legislation, is incomparably more difficult than what may be styled the Ethical.’<sup>33</sup>

succinctly put it’s easier to conceive justly what would be useful law, than to construct that same law that it may accomplish the design of the law giver or maker. The preoccupation of a legislative draftsman is ‘how will this draft be interpreted?’

**Kennedy** posits that ‘Bill drafting must have accuracy of engineering, for it is Law engineering; it must have the detail and the consistency of architecture, for the law architecture.’<sup>34</sup>

The important idea according to **Stasky** is to say what you mean accurately, cohesively, clearly and economically.<sup>35</sup> He further opined that Substance comes before Form, but the two run together, you start by determining the needs to be filled, look for specific answers, arrange the answer in a coherent plan and express the results as clearly and as simply as the complexities of the plan allows.

In conclusion he submitted that ‘Form is important to substance because ambiguity and confused expression tend to defeat the purpose of legislation.

Taking instructions may appear to be the first step in drafting a piece of legislation and as such the challenge here is that: - the legislative drafter must understand his instructions very clearly.

In Nigeria statutes are used to guide, regulate the conduct and affairs of those to whom it is addressed.

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<sup>33</sup> Austin M, *the preparation of legislation*, London Sweet and Maxwell (1975) p 82.

<sup>34</sup> Kennedy, *Drafting Bills for the Minnesota Legislature*, cover press Minnesota (1946) p.78.

<sup>35</sup> Stasky P W *Legislative analysis and drafting*, Bridge publication and publishing London 2<sup>nd</sup> edition (1984) p 162.

Let's take a case scenario here in Nigeria on 25 DECEMBER 2009 a young Nigerian Muslim was reported to have attempted suicide bombing of an American Airline, Nigeria was Blacklisted by the American Authorities as a Travel risk Nation (Terrorist- Friendly),<sup>36</sup> embargo was placed on issuance of Visas to would be travelers from the country and as a condition to lift this classification there was an urgent need to legislate on terrorism as a response to the world outcry.

Drafting a bill for Anti/Terrorism was in issue, what practicable tools and steps is a Legislative draftsman expected to take in the circumstance?

Upon receiving the instructions from the government, the Draftsman is to embark on a BACKGROUND RESEARCH, these will result to:-

*Finding the provision of the constitution on the subject matter*

*Any statute on the issue of terrorism*

*Most recent authorities on the subject matter*

*Every regulation on terrorism and related offences*

*Scholarly comments on the issue*

How the issue has been handled in other jurisdictions etc. from all these reading, study and contact the legislative draftsman is now in a better position to advise whether there ought to be a law or an amendment to an existing law. The outcome of the research study gives the legislative draftsman a BACKGROUND KNOWLEDGE, an essentially basic tool to work on. It is pertinent for the drafter to know and never to forget that the draft once it becomes an Act, it becomes an instrument subject to interpretation by various individuals and bodies such as lawyers, courts, international institutions, parliamentary committees etc.

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<sup>36</sup> Guardian Vol 1147 Published on 26<sup>th</sup> December 2009 p 45.

The drafts therefore needs to be in an excellent form and in order to achieve the excellence that is needed, the drafter must be equipped with certain necessary tools and learn certain techniques to be able to produce a draft legislation which will be generally acceptable by the parliament, National Assembly, the government and the society at large.

Crabbe summarized it thus;<sup>37</sup> to achieve this, the parliamentary counsel (legislative draftsman) has to:-

- (a) *understand fully what is required*
- (b) *study the instructions well*
- (c) *analyze the proposal critically in terms of their practicability and the existing laws;*
- (d) *fill in the gaps where necessary and*
- (e) *Have good knowledge of existing legislation, common law or customary law;*

From the above it can be rightly summarized that the drafter before understanding the task of preparing the draft legislation must

- Acquire thorough knowledge of the constitutional law of the country.
- Have complete familiarity with the statute books of the country
- Be well versed in the precedents with reference to anatomy of financial, corporate or socio-economic legislation
- Get acquainted with Interpretation Act

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<sup>37</sup> Vcrac Crabbe ibid page 2.

- Give meticulous attention to details and a clear systematic approach to the problem at hand
- Acquire an analytical mind which is very much essential to good drafting.

The benefit of interpretation provisions of Interpretation Act or the General Clause Act cannot be lost sight of by the drafter and for appropriate and definite interpretation of the provisions of the statute; he should always make use of the country's Interpretation Act.

### **1.5 THE ROLE OF THE LEGISLATIVE DRAFTSMAN**

I had postulated that the magic is not in drafting the law but communicating the law to the society. Flowing from the above submission;-

The first role of the legislative draftsman is to communicate the law to the society through his drafting. This can be best achieved by his STRUCTURE AND ORDELINESS of his draft; an orderly approach is an invaluable aid to intelligibility. If the material is dealt with in a planned manner and a logical sequence is adhered to, drafting will flow better and invariably readability and comprehensibility will be enhanced.

The peculiarity of the Nigerian Draftsmen role and his challenges are determinant on where he finds himself, that is either at the state level, federal or local government or consulting in a private capacity.

The fact that the Nigerian federation consist of a bicameral legislative house at the centre and a unicameral house at the states and local government must be borne in mind.

Elsewhere in this work it has been submitted that the legislative draftsman is a link between the executive, legislative and judicial arms of government. The implication here is that the draftsman is a liaison (go between) in the sense that when a judicial pronouncement is made on any statute, the draftsman offers suggestion on possible amendment

To the executive he should be in a position to advice on the workability of the proposed policy draft.

The legislative draftsman is also the custodian of all Bills, Enactments, Legislations, Regulations and Rules of the National Assembly and the Government.

## **1.6 CONSTITUTIONAL FRAMEWORK**

An enactment is void from the beginning if it is inconsistent with the constitution. These much was emphasized in *A.G BENDEL v A.G FEDERATION*.<sup>38</sup>

If any other law is inconsistent with the provision of the constitution, this constitution shall prevail and that other law shall to the extent of its inconsistency be void.<sup>39</sup>

in Nigeria the courts will always question the way and manner a law was made whether it is ultra-veers or intra-vires. This is not the position in United Kingdom which operates on the doctrine of parliamentary supremacy.

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<sup>38</sup> Attorney General Bendel state V Attorney General Federation (1982) All NLR 114.

<sup>39</sup> Section1(3)CFRN 1999.

Under the Nigeria constitution the second schedule provides for the exclusive legislative list in part 1, the concurrent legislative list.<sup>40</sup>

This constitutional framework poses the first challenge to the legislative draftsman, who must as a basic tool know the items within the particular legislative jurisdiction.

A state law will only apply to the particular state while federal law will apply to the whole of the federation. This was held in *A.G OGUN v A.G FEDERATION*<sup>41</sup> wherein the state law on inter state commerce was held to be invalid to the extent the federal law has legislated on the subject matter (liquor).

Chapter one of the constitutions of Nigeria provides for the supremacy of the constitution. By this provision even the National Assembly can not legislate on the validity, supremacy or otherwise of the constitution.

Chapter two provides the fundamental objectives and directive principles of state policy. By necessary implication a draft proposal on any of this provision must be non justiciable.

Chapter IV on fundamental rights of citizen is practically the most important constitutional framework which every legislative draftsman must try not to infringe upon in an enactment.

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<sup>40</sup> Second schedule part I and 2 of the CFRN 1999.

<sup>41</sup> *A.G OGUN V A.G Federation* [2002] All F LR 20 .

## CHAPTER TWO

### 2.1 CHALLENGES OF A LEGISLATIVE DRAFTSMAN

Legislative draftsmen perform an extremely difficult task. There is much that is beyond their control. The pressures on them are many. They have to think of the past, present and the future. The biggest of these challenges is probably that of pressure. Because in Nigeria's emerging democracy where the legislator have suffered from long term military intervention under which the legislative arm is always in a limbo, there seem to be a lot on institutional variables that the legislators and the legislative draftsman have to grapple with<sup>42</sup>.

A Legislative draftsman in the National Assembly is first and foremost an employee of the Government. With the civil service rules and regulations, policy of government and above all, the need to satisfy his employer and master at the back of his mind against the standard principles of practicability, societal expectation<sup>43</sup>.

The challenge of the economy, family, pressure groups, are enough pressures on their own. However the challenge of the writing from conduct of the society in the past, writing in the present to deal with present particular problem for the future, makes the draftsman a tool of social engineering.

They speak to the future by laying down rules of conduct for the guidance of society.

They have to think of the problems involved from an many perspectives as possible. It is not just a question of changing a few ideas around. They have to think of the legal

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<sup>42</sup> Akintola AJ, *Law Practice and procedure of Legislature*, Learned Publishments Ltd (1999) p.6

<sup>43</sup> Akintola AJ Ibid p. 125.

practitioners who will read the law-even in bad faith-to suit a particular case and who will take advantage of a loophole.

Then there are judges who critics legislative draftsman for ambiguities or complexities of an Act of parliament.

More often there is insufficient time to draft a piece of legislation. The task requires hours of intellectual concentration, planning and strategy.

Far reaching constitutional amendment may be done over the counter, as was witnessed in the amendment of constitution of the Federal Republic of Nigeria to accommodate the necessity to transfer power to an Acting President in the absence of the President who fell sick suddenly and was rushed out of the country for medical attention abroad without fulfilling any of the constitutional safeguards provided therein.<sup>44</sup>

Ministerial request for legislation often come with urgent, immediate attention. In times of emergency, orders, directive, notifications affecting life and liberty are drafted at top speed.

The drafters may work round the clock and with heavy heart for fear of a hasty, rash draft. The work is urgent; it has to be done at any cost during the limited time available. The thought of the social crusader who may condemn the Act based on radical or reactionary views as it appears to them.

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<sup>44</sup>Section 145, 146 CFRN provided for an Acting President only if the president transmits to the NASS a letter of his absence or unable to perform his duties, or resignation, or impeachment which the sudden collapse of the president prevented him from doing any of the stipulations.

The consolation is that the work has been done, even if imperfectly done. The agony, the tension is over and time the enemy becomes a friend <sup>45</sup>. But when a particular draft is cumbersome, with hundreds of provision requiring careful, patient and minute examination, time is the enemy.

The tools used by draftsmen in Nigeria are not among the best practices. Laptops ultramodern air-conditioned offices conducive for research and high level concentration. Rich and state of the art library with modern library facilities such as photocopiers, internet browsing machines. Current textbooks, research facilities.

If we must continue to attract the best brains for excellence, there are basic tools that must be provided for the legislative draftsman to work. The most primary of which is his environment; he needs all the comfort in the world comparable to the comfort of an engineer working in an oil drill site in the Niger-Delta. The library must be rich and constantly updated with modern primary and secondary materials from within and outside his jurisdiction, and he must constantly be allowed to attend both local and international conferences to share experience and he should be considered for a remuneration that is commensurate with the task with which he is engaged.

## **2.2 CAREER AND MANPOWER DEVELOPMENT**

How is drafting skill acquired? When acquired, how is it sustained? The training programs at the universities and law school are the sufficient to guarantee the demands of our democratic institutions, legislator, and government at all levels for

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<sup>45</sup> Hutton N. *the mechanics of Law Reform* (1961) 24 MLR 18 quoted at p. 11 Vcrac C, *Legislative Drafting*.

qualitative legislative draftsmen? Are there prospects, motivation for the legislative draftsman?

It appears that only the Nigerian Institute of Advanced Legal Studies (NIALS) has expressly provided:

*“To conduct courses of instruction in Legislative Drafting leading to the award of post-graduate diploma or a post graduate degree..”<sup>46</sup>*

Basically the Nigerian Universities undertake Legal Drafting and Conveyance with some schools making it optional (elective), the Nigerian Law School makes Legal Drafting course compulsory. In summary a legislative draftsman in Nigeria can only formally be produced after attending any of the courses at the institute.

Tangentially the skill of drafting is formally acquired in the Universities where it is elective otherwise it is the Law school that is the first point of contact of the average Nigerian Lawyer with Legal Drafting as against Legislative Drafting. The question then arises as to whether every lawyer with knowledge of legal drafting can adequately be said to be a legislative draftsman? The answer to my mind is in the negative because we have seen that legislative drafting is more specialists in nature and requires much more rudimentary credentials than legal drafters.

So legislative drafting is a specialist career with brighter prospects where the understanding is appreciated.

But the reverse is the case in practical reality of the Nigerian context and to an extent most developing democracies.

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<sup>46</sup>Section 4 Nigerian Institute of Advanced Legal Studies Act CAP N112 LFN 2004.

### **2.3 LEGAL DRAFTING DEPARTMENTS AND UNITS IN ORGANIZATIONS AND MINISTRIES**

The National Assembly of the Federal Republic of Nigeria has a Drafting department just like most statehouses of Assembly in the federation, while the Federal ministry of justice has drafting unit as a section. It is imperative to distinguish two related but commonly confused concepts in the field of legislative drafting; they are 'legislative processes and drafting processes'.

Kole Abayomi<sup>47</sup> explains the difference thus:

The drafting process begins when the formal instructions are given by the sponsor of the legislative proposal to the legislative draftsman and ends when he puts them in the usual form under our jurisdiction usually called bills before the legislative body in context called the National Assembly.

The legislative process then begins upon the receipt of the bill by the appropriate body through the various stages it must go through, beginning from the first reading to the second reading when the purpose of the general policy of the bill are given full debate to the committee stage when clauses of the bill are looked into line by line to the formal third reading and then sending the same to the other chamber to go through its own procedure which is often similar to the sending chamber. And finally it receives the Assent of Mr. President and the bill becomes Law or an Act.<sup>48</sup>

While the drafting process requires basic drafting skills, the legislative process is more related to constitutional law<sup>49</sup>.

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<sup>47</sup> Kola Abayomi, *the law making and drafting process*, being a paper presented at the legal drafting workshop held in Abuja on the 6<sup>th</sup> day of December 1999.

<sup>48</sup> Agbakoba v NASS (2010) LLRN supra.

<sup>49</sup> Akintola AJ Ibid.

In the ministry of Justice the legislative draftsman is charged with the responsibility of putting policies in a bill form for the consideration of parliament, this practice historically originated from the British office of the parliamentary counsel<sup>50</sup>.

As part of colonial apparatus of administration in Nigeria the office of the Attorney General under the governor-General was responsible for the drafting of bills. This arrangement was carried over to the post independence Nigeria and it has been convenient for the legislative draftsman to belong to the executive arm of government because the bulk of the bills before the legislature originate from the executive<sup>51</sup>.

Owing largely to the advent of democracy in Nigeria today and the importance of legislation as a source of law, all the legislative houses in Nigeria now have In-house legislative draftsmen to serve individual members and the entire house.

The advantage of this is that the Houses no longer depend on the Ministry of Justice to draft its bills.

This is a departure from the previous experience where only the Attorney-General's office was engaged in drafting bills.

### **Organizational Challenge**

I mentioned earlier the lack of government legal personnel in developing countries. One reason for this is economic: it is often better for a lawyer to work in a private firm or abroad than be in the government employment, even when the desire to work for government exist the extra requirement of cognate experience where vacancy exist is to his disadvantage.

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<sup>50</sup> A hand book on legislative practice and procedure of the NASS chapter 4 (2004) p.4.

<sup>51</sup> Akintola AJ Ibid.

For a law drafter this means that there may be few other lawyers to consult on a drafting proposal; few doors you can knock on for a bit of friendly advice (so to speak). Even if there are other government lawyers, they probably have little grasp of legislative technique or even parliamentary procedure. So even more than in a developed jurisdiction.

A drafter in a developing country needs to be a Jack or Jill (Jane?) of all trades.

This is stimulating, but the challenge is compounded by the difficulty of keeping up with developments in the law, in the world outside.

There might be old copies of *The Times* around the office, but the library budget probably doesn't extend to any magazine subscriptions, let alone updates of textbooks.

Fortunately, there are nowadays websites where legal texts can be found – the LexisNexis set up, and the PaCL II websites. Assuming, of course, that you have access to a computer.

Where there is computer, in order to avoid misuse, the password to the internet is not made generally available so research after hours is not possible.

Another challenge of drafting in a some jurisdiction like state ministries is that the people one needs to consult on a piece of legislation are often out of the country on conferences or negotiations. If in the country, they might well be at a training workshop, out in the village explaining government policy, or off sick or on leave.

The fact is that government in small and developing countries are too few and too busy. They are trying to meet the country's international obligations, deal with aid donors, formulate budgets and deal with personnel matters, while at the same time pleasing their political masters.

They are quite likely to be running a business or looking after a small-holding, and will have their own domestic and financial problems to deal with. It is not surprising that it is sometimes difficult to get instructions on a piece of legislation.

### **Lack of Scrutiny**

Assuming you manage to produce a draft Bill, it's often difficult to get much critical input from the Cabinet or legislature in states or even the National Assembly. Cabinet are concerned mostly with policy, and legislators are more concerned with making speeches to impress their constituents than with the detailed wording of a Bill. (No doubt this also applies to developed countries, but there are usually committees to sort out the details.

In our jurisdiction it is rare to find a legislature with much continuity of membership, so that the knowledge of drafting conventions and legislature style is just not there. For example, it might be necessary to explain to legislators that there is an Interpretation Act which says that 'person' includes a body corporate. (And the male gender embraces the female?)

Knowing that there will be little scrutiny of a Bill puts a considerable onus on the drafter to get things right first time round. But it makes it difficult to know, for example, whether to give powers to the Minister or a civil servant; whether to require consultation with the private sector; what rules to put in the Bill and what to leave to regulations; what level to pitch the penalties at; how much 'plain English' to adopt.

## **2.4 LEGISLATIVE DRAFTING AS A PART-TIME OR CONSULTANCY**

A legislative draftsman is a person who is engaged in drafting bills for the legislature at whatever level of government. Legislative drafting is a special calling that requires

a lot of concentration, discipline and dedication and at secrecy in the formulation stage.

This expertise in skill has made the business more demanding and challenging to be left just for the draftsman in the civil service. Apart from the challenges of the working environment, the ingenuity of the draft, its patency and originality which are completely missing in the ministry and drafting units are major variables in a democracy to attract proficiency and consultancy.

Moi Idigo<sup>52</sup> explained his method of drafting thus:

*“I first learnt it by practicing it on the job as people say, I learnt drafting by doing it in the ministry, for many years. I did so under the guidance of trained legislative draftsmen...”*

Ea Dreidger<sup>53</sup> is quoted as saying:

*“one can learn all the rules of swimming but that does not make one a swimmer; one has to get into water. That is where the test is”<sup>54</sup>.*

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<sup>52</sup> Moi Idigo, Legislative Drafting, Varitas Printing and Publishing Co Anambra State Nigeria (1995) p. 68.

<sup>53</sup> Quoted in Bakshi PM, An Introduction to legislative drafting (1992) pp 4-5

<sup>54</sup> Kola Abayomi Ibid.

## 2.5 TRAINING AND APPOINTMENT

The impression now might be that legislative drafting is a “no-go” area, the reverse indeed is the case because in the words of Kola Abayomi:<sup>55</sup>

*“Those who slug it out get the rewarding accolade. Some of the Chief Justices of the country- late Sir Alexander Darnley, Justice Fatayi Williams, M.L Uwais, are worthy example Justice Kayode Eso left a lucrative practice in Jos for Ministry of Justice of the Western region of Nigeria at its Headquarters in Ibadan in the legislative drafting unit. Justice (MRS) Cudjoe nee mohammed, the Chief Judge of Kaduna State was for many years in the legal drafting unit of the then Northern Nigeria and was seconded to the House of Assembly Kaduna as the legislative draftsman. The list is long”.*

The bottom line is that with the ever improving democratic experience legislative draftsmen are in for better appointments and training program especially with the array of program at the Nigerian Institute of Advanced Legal Studies which recently introduced Doctorate degree in Legislative Drafting in the 2010/2011 academic session.

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<sup>55</sup> Kola abayomi ibid.

## CHAPTER THREE

### 3.1 INTERPRETATION ACT

The practical relevance of interpretation of statutes in our jurisprudence and most commonwealth countries manifest itself each time there is a dissenting or when the courts depart from its earlier decisions.

Interpretation problems are treated with utmost care because of the doctrine of judicial precedent and its binding effects .The tool needed to solve the riddle of interpretations includes the interpretation Act, definitional clauses, law dictionary and decisions of superior courts of records defining a word or phrase.

These chapter focuses on the Interpretation Act as a tool of legislative drafting, and the challenges associated with its' usage in contemporary practice.

Judicial notice need be taken of the fact that in almost every legislative jurisdiction, Interpretation Act is designed not only for the interpretation of statutes but also for their preparation, therefore the provisions of Interpretation Act or Law should always be kept in mind by draftsmen and unless there is a special reason for not doing so, he should prepare a statute in accordance with the provisions of Interpretation Act; this is because the Act contains basic rule about form, language, syntax and operations of legislation.

Legislative draftsman must be in a position to know exactly when the provisions of the Act will or might apply; he must take relevant provisions of the Act fully into account and ensure that its' requirement is precisely followed.

In BLUE METAL IND LTD v RW DILLEY<sup>56</sup> the privy counsel said thus about the Interpretation Act:-

*“The interpretation Act is a drafting convenience, it is to be expected that it would be used so as to change the character of legislation...”*

In other words an interpretation Act does not operate to change the essential effect of an enactment to which it applies. Interpretation Act does not apply if the contrary intention appears from the Act in which the term question is used.

The principle role of Interpretation Act to a drafter is to provide standard rules for efficient communication; to assist in achieving precision of the meaning of a word; to shorten the length of legislation; to exclude a meaning that otherwise would or might be taken to be included in the term defined; to attract a meaning already established by law. It is good practice for a draftsman to adopt for a particular legislation, the Interpretation Act in defining the words used in the legislation. However where the legislation does not apply generally to the entire country, in addition to the Interpretation Act, it may be necessary for a legislation to contain its own interpretation clause. For instance during the amendment of the 1999 constitution of the Federal Republic of Nigeria, the National Assembly erroneously believed that having received two-third endorsement from the states of the federation, the requirement of assent of the president was not required for validity. The court in *AGBAKOBA v NASS*<sup>57</sup> relying on the Interpretation Act held that:

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<sup>56</sup> AC USA (1946) p. 7

<sup>57</sup> 2010 vol4 LLRN page 2078.

*“An Act of the National Assembly becomes Valid after the Assent of the President”.*

The issue of interpretation of the provisions of our legislation is a recurring decimal in our juris corpus. The court in *ATIKU v INEC*<sup>58</sup> had this to say:

*“it is settled principle of interpretation that a provision of the constitution or the statute should not be interpreted in isolation but rather in the context of the constitution and the Electoral Act as a whole shall be read together in order to give effect and meaning to the rights and obligation of individuals”.*

No matter how brilliant and experienced a draftsman may be it is important for him to read through very thoroughly the Interpretation Act each time he is getting ready to draft a legislative proposal or Bill.

### **3.2 CULTURE OF LAW DEVIANCE, ECONOMIC, SOCIAL INFLUENCES AND PRESSURE**

Culture and custom are often used interchangeably to connote the accepted way or means of a people in doing things. Does that imply that Nigerians have deviance from law as an accepted way or culture? The tendency is to answer in the negative as a good citizen but can empirical logic substantiate otherwise?

Picture a chaotic traffic congestion caused by a motorist using the opposite direction just for his convenience, only to be accosted by an oncoming vehicle that actually has a right of way. The argument of this wayward driver is that he is just close to his house and it will cost more in terms of fuel consumption to take the right way to his

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<sup>58</sup> 2007 I SCNJ pg 1

house, which will entail him to drive for about two hundred meters to make a U-turn to his house.

In a bank, an official with full knowledge of the ethics, implications of giving an unsecured loan to a customer proceeds to lend a sum far above his authorization. Recently the chairman, Nigerian Independent Electoral Commission Prof Jega announced that prominent Nigerians registered more than once despite repeated warnings against it and the fact that double registration is an electoral offence<sup>59</sup>. The point being made here is to the effect that our society has a subtle way of disobeying the provisions of the law just to prove that the law does not work. It was widely reported that an ex-convict was celebrated after serving almost two years jail term for corrupt charges.

A military regime once tried to reform all aspect of the Nigeria society through the instrumentality of law thus Structural Adjustment Programme for economic restructuring, Electoral decrees which mandated for just two political parties; MAMSER decree for mass mobilization for social economic reform and even the War Against Indiscipline crusade all came to nothing. The Obasanjo anti-corruption law establishing the EFCC and ICPC has not fared better. The reason is basically a combination of economic and social factors. A society without strong economy to sustain the living standard of its citizen cannot be in conformist position to law and order.

The controversy between those who believe that law should essentially follow, not lead and that it should do so slowly, in response to clearly formulated social

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<sup>59</sup> The Guardian Vol. 351 Feb. 20 pg 2

sentiment-and those who believe that the law should be the determining agent in the creation of new norms is one of the recurrent themes of the history of legal thoughts. The interactions of legal and social change which develops from the social life of the 'people' living as a nation, church congregation, business communities or families and a limited sphere of state norms created for purposes of organization and protection that has lost its validity and meaning in the increasingly industrialized and articulate society of our time.

### **3.3 LAW AND ORDER, LAW REFORM AND POSSIBILITY OF PERFECT LAWS**

Law is a system of rules a society sets to maintain order and protect harm to persons and property. Law is ancient, dating back at least to the *Code of Hammurabi*, written by an ancient Babylonian king around 1760 BC<sup>60</sup>.

Today, most countries have tens or hundreds of thousands of pages of law. Laws are enforced by the police, supported by the court and prison systems.

Laws are written by legislators, such as senators or congressmen. In America, just like Nigeria and many other countries, laws must uphold and not contradict the Constitution, a document outlining the most basic rules of the country.

Aside from law being a set of rules, the word also refers to the law as practiced by lawyers, who either prosecute or defend a client from an accusation of violating the law. Becoming a lawyer requires attending law school and passing *bar exam*. These

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<sup>60</sup> Code of Hammurabi 1760 B.C ENCYCLOPEDIA.

entitle the lawyer to a law license. Only lawyers with a law license are allowed to practice law.

There are many categories of law. These include contract law, *property law*, *trust law*, *tort law*, *criminal law*, *constitutional law*, *administrative law* and *international law*.

Each of these sets the rules for distinct area of human activity. Without laws, there is lawlessness, which historically led to a general breakdown in society, sometimes to the point of a near-standstill in the economy. Those that advocate the abolition of all law called anarchists<sup>61</sup>.

Depending on one's political orientation, one will generally favor more or less law. At one end of the spectrum are libertarians, who advocate minimal law or government intervention into the affairs of the public. At the other end are fascists, who seek to create law regulating practically everything, generally under the assumption that a disciplined nation will be a powerful nation. Historically, most fascist governments have collapsed.

Savigny<sup>62</sup>, opponent of the rationalizing and law making tendencies, spurred by the French Revolution, posits that law was '*found*' not made. Only when popular custom, in part articulated by lawyers had fully evolved, could and should the legislature take action.

In our contemporary Nigeria, the Companies and Allied Matter Act<sup>63</sup> is a typical example of law crystallizing from practice and conventions.

Savigny particularly deprecated the trend toward the codification of law which is spreading all over the world as illustrated by Napoleonic codes.

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<sup>61</sup> Kropotkin *Anarchist Theory* 5 Pinks (1800) p. 358.

<sup>62</sup> Savigny *law and economy* oxford press (1904) p.56

<sup>63</sup> CAMA LFN 1990.

By contrast Bentham<sup>64</sup> believes in the efficiency of rationally constructed reforming laws. He devoted a great part of his life to the drafting of codes for large number of countries. While most of these efforts are not immediately successful; his philosophy became increasingly influential as the times come.

It was Bentham's philosophy which turned the British parliament and similar institutions in other countries into active legislative instruments effecting social reforms, partly in response to and partly in stimulation of felt social needs. In the Nigeria of today, the need arises for legislative draftsman in the Legislature and government at every level to take a holistic reform of our law to reflect the social, economic, political and cultural needs of the citizenry.

The National Assembly shall have power to make law for the peace, Order and good governance of the federation or any part thereof<sup>65</sup>...The import of this provision in the Nigeria constitution appear simple but one may ask what is the Order being referred to here; unlike the British parliamentary system, under the Nigerian constitution, the constitution and not the legislature is Supreme. Order in this contest connotes the objective of any legislation. The overall challenge for a legislative draftman and the legislature is to ensure that every piece of legislation has the ultimate goal of securing peace and order in the society.

In the apartheid regime in South Africa there was law and Order to a very large extent but the level of disobedience to those laws was higher than compliance.

In other words are there perfect laws? If there are no perfect laws what is the legislative draftman responsibility?

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<sup>64</sup> Benthamy anotal by Osy NWEBO Law & Society (2000)p67

<sup>65</sup> Section 4 (1) (2) CFRN 2010

I shall attempt this thesis from dual perception;

The first being a direct rebuttal of perfectionism in law formulation. Since the society is dynamic (transient) it follows that a law made for a particular mischief today may become grossly inadequate tomorrow. For instance in Nigeria there is criminal code which provides for Kidnap, Armed Robbery, and Stealing offences<sup>66</sup>. Today the provisions for those crimes in face of cybercrimes, terrorist attacks, politically motivated kidnap and high corruption in government and banking sectors have necessitated new piece of legislations on those crimes such that even kidnap now attracts death penalty in some states<sup>67</sup>.

The second approach to the question is affirmative, in the sense that certain basis for legislation remains static. For instance thou shall not kill<sup>68</sup> has remained a law frowned at from Adam, and all positive laws are in concordance such that the law, even though of Natural school origin has remained in static condemnation.

the point being made here is that after being a draftsman for years in the employ of the ministry the next level is to be a consultant in the field, because the knowledge acquired over this years of practice on the job can not be laid to rest. Bearing in mind the Nigerian government policy on retirement age being sixty-five or thirty-five years working experience.<sup>69</sup>

The essence of practice exercises is to sharpen drafting skill because the handicap of most legal practitioners in Nigeria today is that this generation has been under military rule for most part of the post independence Nigeria experience. Under the

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<sup>66</sup> Criminal Code LFN 2004.

<sup>67</sup> Imo State Law No. 10 2010.

<sup>68</sup> Deuteronomy Number 12.

<sup>69</sup> Pencoms act 2007 LFN

system, the legislative process is undemocratic and drafting process is not allowed to take its full course, consequently the development of law is slow. Today, several statute books are obsolete and begging for review. Where the system is democratic, the legislature is active; the draftsman will have better opportunity to learn.

The situation is better now that democracy is restored, but the fear now is that not many practitioners have the concentration and discipline required of a legislative draftsman. In a society where glamour, nouveau riche syndrome is the order of the day, it is difficult to find willing hands groomed to handle this delicate aspect of law. The requirement of this calling are extra zeal and dedication to work; the legislative draftsman must be ready to bury his head unheard and unnoticed (unlike his counterparts who enjoy the theatrical of court room advocacy or others the opulence of boardroom meetings) for several week to achieve result. He should be a man of integrity and should be able to handle confidential information that will come his way in the course of his duty with maturity. He should have the patience and tolerance to work with others as a team. There is no other branch of drafting that requires careful scrutiny of a draft than legislative drafting.

The need to work as a team is necessitated by the possession of the ability of understanding of the society, knowledge of the principles of law on a wide range of issues, joint personal understanding of socio-cultural influences in the society will be added advantage to the quality of draft presented to the society.

The challenge for the legislative draftsman is to originate reforms of the legislations in the society. With the advent of steady democratic culture in Nigeria we now have Electoral Reform of Justice Uwais, Constitutional Reform of Ike Ekwerenmadu.

Police Reform, Civil Service Reform and even Labor Law Reform. All these reforms are encouraged and more efforts in the area of Evidence Law reform, Electronic Banking reform, Judicial Reform etc should be of special interest to the legislative draftsman in his effort to foster good governance and development.

## CHAPTER FOUR

### 4.1 FINDINGS

From the literary work evaluated in the course of this research project, the following were deduced.

That the challenges of a legislative draftsman in contemporary Nigerian democracy can be broadly classified into viz:- Physical, Psychological and Physiological challenges.

Physical challenges connote his working environment, building/office, obsolete office machines, e.t.c.

While Psychological and Physiological challenges will include his employer's attitude, remunerations, job prospects, manpower development.

Our finding also revealed that Legislation is a necessity to all strata of government in a democracy as well as tyrants, dictators and other manners of government.

Misinterpretation of legislations could arise either from poor drafting or lack of understanding of the Intentions of the legislation, these defects can be cured if the legislative draftsman adhere to the rules of 7C's and other rules of drafting outlined in this work.

The bottom-line of our finding is that the onerous task of putting down intentions, interest, policy, rights of any piece of legislation lies with the legislative draftsman and these he/she must do not only by determining the law but also to communicate the law to the society.

Near absence of motivation for a legislative draftsman especially in government employ, has made that aspect of career development almost uninspiring and unencouraging.

The fact that legislative drafting is an art flowing from the skill and craft does not depreciate the need for constant practice.

## 4.2 CONCLUSION

The need to communicate laws to members of the society is entirely a practical one.

Many a times the courts are saddled with the interpretations of statutes. To avoid them importing external and intrinsic aid, the legislative draftsman must draft in clear and unambiguous terms this much was highlighted in the case of *TEXACO v SHELL*.<sup>70</sup>

A notable pronouncement by *EJIWUMI JSC* in *AG Ogun State v AGF*<sup>71</sup> is that:

*“A careful perusal of the provisions of s162(1)(10) of the CFRN 1999 in my humble view reveals that those sections of the CFRN appear to be general in nature, while those of s163(b) which deals particularly with capital gain Act are specific. It is VERY CLEAR from the reading of the provisions of S163(b) that the proceeds from collection of sum tax or duty....”*

Contrast this with

A Federal High Court Lagos division decision to void S140 (2) of the Electoral Act 2010 for being inconsistent with the CFRN 2010.

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<sup>70</sup> (2002)3 MJSC 4.

<sup>71</sup> (2003)2 MJSC 117.

Justice Okechukwu Okeke held that the section be **struck off** the Act and for being at variance with the provisions of the constitution in relation to the powers of the court or tribunal as contained in S4(8) 6(1) and (2), 6(6)(a) and (b), 239 (1) 246 and 286 CFRN 2010.<sup>72</sup>

The point being made here is that a legislative draftsman who is not at his peak in the contemporary Nigerian Democratic conception is a big clog in the wheel of development, because his draft will continue to embarrass not just the government but his person and personality.

To avoid the aforementioned pitfall he/she must have a very good grasp of the provisions of the constitution and other relevant laws to his draft at his finger tips.

#### **4.3 RECOMMENDATIONS**

This research project is of the view that the following tips by way of recommendation, if practically and carefully implemented by any legislative draftsman and Government will achieve uplift in drafting skills and production of qualitative legislative draftsman who can produce a near perfect legislative draft that can usher in good governance and development in Nigeria:

##### **(1) Decentralization of drafting skill acquisition institutes.**

At the moment it appears to this research that only the Nigerian institute of Advanced Legal Studies run full formal professional courses on legislative drafting.

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<sup>72</sup> The Nation vol 6 No 1807 July 1, 2011 page 4.

In a true federalism such important institution of democratic cultural development should be decentralized such that every state or geo-political region can boast of such a specialist institute.

This is exactly what is obtained now at the Nigerian Law School.

(2) To foster good governance and development should be the fulcrum of any legislative draft and not to dance to the whims and caprices of the government of the day which defeats the societal expectations.

(3) Government at all levels should provide the conducive working environment for the legislative draftsman to perform at his optimum. Good incentives like career progression, up to date library facilities, information and communication technology facilities to aid his research and skill enhancement should be prioritized.

(4) For the legislative draftsman to be very relevant, he/she must know all the modern basic principles and tools of drafting to communicate. Constant reading and updating of his skills and knowledge of the laws and constitution of his country as well as the interpretation Act.