



LEGISLATIVE ISSUE BRIEF

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From Policy to Law: The Role of the Legislative Drafter

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1. Introduction

One area of the legal profession which has received limited attention in Nigeria is the role of the legislative drafter in the legislative governance arena, especially in drafting Bills and other legislative instruments. This contribution is an effort to give an insight into this exciting but little explored area of legal practice which has very decisive impact on the effective governance of any country. Next, after this introduction, I broadly discuss the distinction between policy and law, and the stages of the legislative process. I then examine the role of the legislative drafter in the effort to transform a policy into law. The contribution is concluded with a summary of how legislative drafting as a discipline may be strengthened for improved legislative governance.

2. Policy, Law and Stages in the Legislative Process

There is an inextricable connection between policy and law in the legislative governance arena. Whereas as a distinct, stand-alone category, policy is an

aspirational goal of government to achieve a stated objective, law is a culmination of the regulatory framework to give legalistic cover to a stated policy goal or objective. Thus, while a policy is non-regulatory, law is regulatory. Hence, it is said that each law has policy goal, but policy is not law. While law is required to be obeyed and therefore enforceable, policy is non-obligatory and unenforceable. Quite often, the decision to transform policy into law is inspired or necessitated by the inability of a public goal to be achieved through policy alone. Where this is the case, government would take the extra measure of transforming the public goal enunciated in the policy to law or legislation. The process of achieving this transformation is through presentation of a legislative proposal either by way of an executive Bill initiated, prepared and sponsored by the executive branch of government after an internal policy design and review exercise by the administration; or the legislative proposal or Bill may be sponsored through a private member Bill or one initiated at the instance of the leadership of the legislature after due



consultation with stakeholders within and outside the legislature.

The effort to turn policy into legislation undergoes a process. Nigeria's legislative branch at federal and state levels adopts the British tradition of legislative process. In particular, in the National Assembly, this is undertaken by the *First Reading* of the Bill at plenary session (where the title of the Bill is read out on the floor of the Senate or House of Representatives, without more). This is followed by the *Second Reading* of the Bill at plenary session, when the general principle of the Bill is disclosed and explained by its sponsor (if the Bill is a Private Member Bill), or by the majority leader (if the Bill is an Executive Bill). Members are given the right to comment on the Bill either for or against it. A vote is then taken whether or not to commit the Bill to *Committee Stage*. If the vote is positive, the Bill is subjected to all the processes of committee consideration including public hearing. The Bill is thereafter presented for *Third Reading* at plenary session, with the Committee to which it was assigned reporting on its deliberations and findings together with its recommendations. Members are yet again availed the right to comment on the Report of the Committee and to express their support for or against passing the Bill. If the prescribed majority of legislators decides to pass the Bill, it goes for Concurrence in the other chamber of the National Assembly, after which it is prepared in the usual form and presented to President for Assent. If the President Assents to the Bill, it becomes an

Act and is gazetted in the manner prescribed by the Acts Authentication Act. However, if the President declines Assent, the veto may be overridden by the National Assembly through the votes of two third majority of members of each chamber, and the Bill shall become an Act of the National Assembly.

3. Role of the Legislative Drafter

It is instructive to emphasize that the Bill which has been transformed from policy to legislation was drafted not by the legislators, but by legal experts working behind the scene. These are legislative drafters who are lawyers with specialised training to draft legislative proposals or Bills and other legislative instruments such as motions, briefs of debate among many others deployed in the legislative governance arena. With particular regard to Bills, the legislative drafter plays particular roles which are undertaken systematically in five stages; namely by: *understanding* the instruction, *analysing* the instruction, *designing* a draft, *composing* the draft, and *scrutinizing* the final output. This systematic approach to legislative drafting was first popularized by Garth Thornton (now reproduced in Helen Xanthaki, Thornton's *Legislative Drafting*, 5th edn. Bloomsbury 2013, pp. 145-162). The stages are as follows:

- a. *Understanding the instruction* – This stage commences with receipt of the instruction by the legislative drafter. The instruction may come through a senior responsible officer in the executive branch to a legislative drafter in the Ministry of Justice, or



from a legislator to a legislative drafter in the legislative bureaucracy or drafting institution, as the case may be; or it may be passed to an independent consulting legislative drafter by the sponsor of the legislative proposal. Whoever receives the instruction among any of these experts must exhibit the highest level of professional capacity to understand the proposal. Where there is any doubt, this must be cleared promptly with the sponsor. This clarification must continue throughout the various stages of drafting whenever it becomes necessary. It should not end only at this first stage of receiving the instruction.

- b. Analysis* – This is the stage when the legislative drafter undertakes extensive research of the subject matter of the proposal. If, for instance, the sponsor is a member of the National Assembly of Nigeria or the executive branch at the federal level, the legislative drafter must determine if the proposal is within the legislative powers of the federal government, or within the broad constitutional powers conferred on the National Assembly to make laws other than those in the lists of powers. In this regard, the legislative drafter must scrutinize the Exclusive and Concurrent Legislative Lists in the relevant schedules to Constitution where the powers of the federal

government are well stated. The legislative drafter must also look within the body of the Constitution to know if such power has been conferred on the federal government, assuming the lists do not specifically provide for the power. For instance, Chapter IV of the Constitution of Nigeria implicitly confers concurrent powers on the federal and state governments to make laws to adumbrate any of the fundamental rights contained therein or derogate from it. Yet, such powers are not contained within the framework of the exclusive and concurrent lists. If satisfied that the federal government can legislate on the subject matter, the legislative drafter must extend the research inquiry into many other issues such as whether there is an existing legislation on the subject matter or an existing legislation closely related to it; whether only an amendment of the existing legislation is needed instead of a fresh legislation; whether Nigeria is under a treaty obligation not to pass such legislation as proposed; and whether the superior courts, especially the Supreme Court, has made a final pronouncement on the subject matter of the proposal, one way or the other. The cost/benefit implication of the proposal should also feature in the research analysis, among many other considerations, to expertly actualise the instruction.



c. *Design* – This is when the legislative drafter begins to put down the framework of the draft Bill. Attention must be paid to the specific instruction of the sponsor. Cognize must also be taken of the constitutional limits of the power conferred on the federal government to make law on the subject matter. According to Lord Thring, the foremost authority on the appropriate way to design a legislative draft, a legislative draft must state the law, then state the authority to administer the law; and then state the manner in which the law is to be administered (see V.C.R.AC. Crabbe. *Legislative Drafting*, Cavenish Publishing, 1998, pp. 148-150). In practical terms, the structure of a draft Bill or legislative proposal may take the following shape – long title, preamble, enacting clause, short title, commencement, duration/expiry, application, purpose clause, definition/interpretation, substantive provisions, administrative provisions, miscellaneous provisions, and final provisions. This structure is not cast in iron. It may be subject to variation, depending on the subject matter of the legislative proposal.

d. *Composition* – This is the stage where, depending on the subject matter, the legislative drafter must take care to include the appropriate legislative language which must be plain, clear and regulatory, among

other considerations. Unnecessary words must be avoided. Words used must mean the same throughout the draft. Present tense must be used throughout. The text of the draft must not be densely packed. Short sentences, paragraphs to indicate component parts, etc are to be preferred, among other considerations.

e. *Scrutiny* – This is the final stage in legislative drafting. Here, the legislative drafter verifies the composition for quality assurance. This should cover the entire issues related to the proposal, from the instruction to whether constitutional and existing legislation have been considered, to the clarity, plainness of language and structure of the draft text; and to compliance with rules of punctuations, among many other issues of accuracy. The best practice is for the scrutiny to be undertaken by a different legislative drafter than who prepared the draft. At the end of the scrutiny and correction of any identified error, the legislative drafter who received the instruction and prepared the draft must have a sense of satisfaction with the draft text before transmitting it to the sponsor.

4. Conclusion

In this brief contribution, I have discussed the role of the legislative drafter, which is a rather obscure yet important aspect of legal practice. The obscurity of legislative



drafting as a legal discipline may be the result of the behind-the-scene nature of the role of the legislative drafter compared with other forms of legal practice such as advocacy and solicitor's work both of which expose the lawyer to a good measure of public visibility. In the Nigerian legal system, the obscurity seems to be compounded by the lack of systematic attention paid by the body of lawyers to the work of the legislative drafter and to legislative governance as a whole. This is particularly true as the Nigerian Bar Association (NBA), the Body of Benchers (BoB) and the Nigerian Association of Law Teachers (NALT), which are the core stakeholders in the legal profession, and others associated with legal education and practice, have demonstrated aloofness to this very decisive area of democratic governance

where members of the legal profession are expected to play leading roles.

Going forward, there is urgent need for more attention to be paid to the role of the legislative drafter in order to guarantee better quality of legislation. This can be achieved through frequent interface between the stakeholders in the legal profession and the legislature using different open platforms such as conferences, roundtables, symposia, training workshops and publications on legislative drafting practice and procedure. In addition, legislative drafting ought to be included as a compulsory course in the undergraduate legal education curriculum in Nigeria because of the increasingly pervasive nature of legislation in the public and private lives of the people.