



NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LED 650

COURSE TITLE: Legislative Forms & Arrangement of Provisions

COURSE GUIDE

Course Code:	LED 650
Course Title:	Legislative Forms & Arrangement of Provisions
Adapted From:	Commonwealth of Learning
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1.0 Introduction

At the beginning of a Bill, drafters conventionally include a number of provisions to perform mainly technical functions. Most of these do not contain substantive rules of law. They play important functions in establishing the authenticity of the instrument, in supporting its operation and use; and ensuring that the new law is compatible with existing legislation.

LED: 602 (Legislative Forms and Arrangement of provisions), deals with a series of provisions that usually are found at the beginning of a Bill. It also deals, separately, with matters that are closely connected with two of the topics examined in the preliminary provisions - interpretation provisions and application provisions.

2.0 Course Aims

The aim of this course is to help you become familiar with the way preliminary provisions are dealt with in Nigeria and to compare our local practice with developments elsewhere. The course contains a small number of illustrative precedents, which you should examine in addition to the Examples in the text and the materials you gather in the course of your Exercises. The Exercises are designed to enable you to consolidate what you learn.

3.0 Course Objectives

By the end of this course, you should be able, when drafting a Bill to:

- (i) Draft provisions that appear as the preliminary provisions in Bills in Nigeria;
- (ii) Provide appropriate definitions or other interpretation provisions for a Bill;
- (iii) Draft appropriate application provisions.

There are a number of Self Assessment Exercises. You will need a number of study sessions to complete it. The text is written so that you can make a convenient break after completing any of the Units.

4.0 Working through this Course

To complete this Course, you are advised to read the study units, read recommended books and other materials provided by NOUN. Each unit contains Self Assessment Exercises, and at points in the course you are required to submit assignments for assessment purposes. At the end of the course, there is a final examination. The course should take you about 15 weeks to complete. You will find all the components of the course listed below. You need to allocate your time to each unit in order to complete the course successfully and on time.

5.0 Course Materials

The major components of the course are:

1. Course guide
2. Study units
3. Textbooks
4. Assignment File
5. Presentation schedule

6.0 Study Units

We deal with this Course in 12 study units divided into 3 modules as follows:

Module 1

- Unit 1 Drafting preliminary provisions
- Unit 2 How to draft long titles and preambles
- Unit 3 How to draft words of enactment and short title
- Unit 4 How to draft commencement and duration provisions

Module 2

- Unit 1 Interpretation clauses and use of definitions
- Unit 2 Composing labeling and stipulative definitions
- Unit 3 The syntax of definitions & drafting interpretation provisions

Module 3

Unit 1	Purpose clauses
Unit 2	Application clauses
Unit 3	Temporal application
Unit 4	Provisions binding the state
Unit 5	Extra-territorial extension

Each study unit consists of one week's work and includes specific objectives; directions for study, reading material and Self Assessment Exercises (SAEs). Together with Tutor Marked Assignments, these exercises will assist you in achieving the stated learning objectives of the individual units and of the Course.

7.0 Textbooks and References

Certain books have been recommended in the course. You should read them where you are so directed before attempting the exercises.

8.0 Assessment

There are two aspects of the assessment of this course; the Tutor Marked Assignments and a written examination. In doing these assignments, you are expected to apply knowledge acquired during the Course. The assignments must be submitted to your tutor for formal assessment in accordance with the deadlines stated in the presentation schedule and the *Assignment file*. The work that you submit to your tutor for assessment will count for 30% of your total score.

9.0 Tutor Marked Assignment (TMA)

There is a Tutor Marked Assignment at the end of every unit. You are required to attempt all the assignments. You will be assessed on all of them but the best 3 performances will be used for assessment. The assignments carry 10% each.

When you have completed each assignment, send it together with a (Tutor Marked Assignment) form, to your tutor. Make sure that each assignment reaches your tutor on or before the deadline. If for any reason you cannot complete your work on time, contact your tutor before the assignment is due to discuss the possibility of an extension.

Extensions will not be granted after the due date unless under exceptional circumstances.

10.0 Final Examination and Grading

The duration of the final examination for LED 650 – Legislative Forms & Arrangement of Provisions, is three hours and will carry 70% of the total course grade. The examination will consist of questions, which reflect the kinds of self-

assessment exercises and the tutor marked problems you have previously encountered. All aspects of the course will be assessed. You should use the time between completing the last unit, and taking the examination to revise the entire course. You may find it useful to review your Self Assessment Exercises and Tutor Marked Assignments before the examination.

11.0 Course Score Distribution

The following table lays out how the actual course marking is broken down.

Assessment	Marks
Assignments 1-4 (the best three of all the assignments submitted)	Four assignments, marked out of 10% Totaling 30%
Final examination	70% of overall course score
Total	100% of course score

12.0 Course Overview and Presentation Schedule

Module 1 Unit	Title of Work	Week's Activity	Assessment (End of Unit)
	Course Guide	1	
1	Drafting preliminary provisions	1	Assignment 1
2	How to draft long titles and preambles	1	Assignment 2
3	How to draft words of enactment and short title	1	Assignment 3
4	How to draft commencement and duration provisions	1	Assignment 4
Module 2 Unit			
1	Interpretation clauses and use of definitions	1	Assignment 5
2	Composing labeling and stipulative definitions	1	Assignment 6
3	The syntax of definitions & drafting interpretation provisions	1	Assignment 7
Module 3 Unit			
1	Purpose clauses	1	Assignment 8
2	Application clauses	1	Assignment 9
3	Temporal application	1	Assignment 10

4	Provisions binding the state	1	Assignment 11
5	Extra-territorial extension	1	Assignment 12
	Revision	1	
	Examination	1	
	Total	15	

13.0 How to get the most from this Course

In distance learning, the study units replace the lecturer. The advantage is that you can read and work through the study materials at your pace, and at a time and place that suits you best. Think of it as reading the lecture instead of listening to a lecturer. Just as a lecturer might give you in-class exercise, your study units provide exercises for you to do at appropriate times.

Each of the study units follows the same format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with other units and the course as a whole. Next is a set of learning objectives. These objectives let you know what you should be able to do by the time you have completed the unit. You should use these objectives to guide your study. When you have finished the unit, you should go back and check whether you have achieved the objectives. If you make a habit of doing this, you will significantly improve your chances of passing the course.

Self Assessment Exercises are interspersed throughout the units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each Self Assessment Exercise as you come to it in the study unit. There will be examples given in the study units. Work through these when you have come to them.

14.0 Tutors and Tutorials

There are 12 hours of tutorials provided in support of this course. You will be notified of the dates, times and location of these tutorials, together with the name and phone number of your tutor, as soon as you are allocated a tutorial group.

Your Tutor will mark and comment on your assignments, keep a close watch on your progress, and on any difficulties you might encounter and provide assistance to you during the course. You must send your Tutor Marked Assignments to your tutor well before the due date. They will be marked by your Tutor and returned to you as soon as possible.

Do not hesitate to contact your tutor by telephone or e-mail if you need help. Contact your tutor if:

1. You do not understand any part of the study units or the assigned readings;
2. You have difficulty with the self assessment exercises;
3. You have a question or a problem with an assignment, with your Tutor's comments on an assignment or with the grading of an assignment.

You should try your best to attend the tutorials. This is the only chance to have face-to-face contact with your Tutor and ask questions which are answered instantly. You can raise any problem encountered in the course of your study. To gain the maximum benefit from course tutorials, prepare a question list before attending them. You will gain a lot from participating actively.

15.0 Summary

Although you have come across most of the matters discussed here in earlier courses and Drafting Projects, LED: 602 contains much that is new. This offers an opportunity both to put your present knowledge into a more systematic framework and to look in detail at some of the finer points.

We wish you success with the Course and hope that you will find it both interesting and useful.

This course deals with a series of provisions that usually are found at the beginning of a Bill. It also deals, separately, with matters that are closely connected with two of the topics examined in the preliminary provisions - interpretation provisions and application provisions. The aim of this course is to help you become familiar with the way preliminary provisions are dealt with in Nigeria and to compare our local practice with developments elsewhere.

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Module 2

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Module 3

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- Unit 4 Provisions binding the state
- Unit 5 Extra-territorial extension
- Annex Model Interpretation Act of 1992

MODULE 1

Unit 1	Drafting preliminary provisions
Unit 2	How to draft long title and preambles
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Unit 4	How to draft commencement and duration provisions

UNIT 1 DRAFTING PRELIMINARY PROVISIONS

CONTENTS

1.0	Introduction
2.0	Objectives
3.0	Main Content
3.1	What matters are usually contained in preliminary provisions?
3.2	The order in which preliminary provisions are typically set out
3.3	What is a road map clause?
3.4	The purposes a road map clause serves
3.5	Other preliminary information that may be printed with a Bill
4.0	Conclusion
5.0	Summary
6.0	Tutor Marked Assignment (TMA)
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1.0 INTRODUCTION

This unit describes shortly the conventional arrangement of preliminary provisions and technical apparatus that commonly appears at the beginning of legislation. Some of these are features that you must provide as a matter of course; others you can introduce to facilitate the use of the instrument.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- (i) Determine what matters are included in preliminary provisions in Nigeria;
- (ii) Familiarize yourself with the kinds of editorial material that may accompany legislation.

This is a short introductory unit that you should be able to complete quickly. The legislative features described are developed in the main in the subsequent units. However, one topic, “road map clauses”, introduces an innovative device that is used in legislation in some jurisdictions to help readers find their way around substantial or complex instruments.

The material on non-legislative information may require a little more attention as this is not elaborated elsewhere. In both cases, it is important to familiarise yourself with local practice.

3.0 MAIN CONTENT

3.1 What matters are usually contained in preliminary provisions?

Drafting conventions about the use and style, of preliminary provisions differ between Acts and subsidiary legislation. The following units are mainly concerned with Acts. We look at which preliminary provisions are typically found in subsidiary legislation in LED: 606 (Particular cases in Drafting).

Certain provisions, typically treated as preliminary, must always be included in a Bill:

- the long title
- words of enactment
- the short title.

In some jurisdictions (including Nigeria), commencement provisions and purpose or objects clauses have also become standard. The other provisions discussed in this unit are used only when the circumstances of the particular Bill require, although the great majority of Bills today contain interpretation provisions.

3.2 The order in which preliminary provisions are typically set out

When all the matters in this unit are included as preliminary provisions in a Bill, they are typically set out in the following order:

- the long title
- preamble
- words of enactment
- the short title
- commencement provisions
- interpretation clauses
- purpose clause
- application clauses
- duration provisions
- road map clauses (in some jurisdictions).

The long title, any preamble and the words of enactment come first and in that order, but the actual order of the others is dictated both by local convention and the needs of the particular instrument.

However, in some jurisdictions, some or all of the following are, by local convention, included as final, rather than preliminary:

- the short title;
- commencement provisions;
- interpretation clauses;
- application clauses.
- duration provisions.

The order of these too has to comply with the local house practice.

Self Assessment Exercise 1

In the spaces provided, note whether the listed provisions are placed in the preliminary or final provisions in Nigeria, and the order (1 to 5) in which they are usually used.		
Provisions	Bills	Subsidiary legislation
Short title/title*		
Commencement		
Interpretation		
Application		
Duration		

* This term is used with respect to subsidiary instruments, as typically, they have no long title.

3.3 What is a road map clause?

A road map clause is a statutory provision designed to help users find their way around legislation. It describes the organisation of the statute, or specific provisions, and where particular matters are dealt with. The expression is new to legislation (it may have been first applied in Australia).

It is different from a Table of Arrangement or an index. Those help a reader track down where particular provisions are to be found. The road map gives directions where to go in the legislation for particular matter and so makes the travelling easier. A similar function is performed by a Readers' Guide. As a new drafter, you

are unlikely to have occasion to use this device as it is not in use in Nigeria. But you may find it useful to collect precedents for the future.

3.4 The purposes a road map clause serves

A clause of this kind is designed to help readers:

- (i) understand how the Bill is structured;
- (ii) find provisions that deal with important features of the legislative scheme;
- (iii) learn how particular parts of the scheme fit into the overall framework of the Bill.

It is useful, therefore, for legislation of considerable length and complexity (in general, this means Bills, rather than subsidiary legislation). Examples are the Companies and Allied Matters Act and Income Tax Acts. Road maps can help readers find connected provisions that are not immediately identifiable as such. They can be used to draw attention to definitions that are distributed between a series of interpretation clauses in a long Act. However, this feature is not yet in use in Nigeria.

Example Box 1

Location of definitions

3.-(1) Section 4 contains definitions of expressions used throughout the Act (including Part IX).

(2) Section 56 contains definitions of expressions used only in Part IX.

(3) Some sections also contain, at the end, special definitions for the purposes of those sections.

What are the entry controls for goods?

6. In brief outline, the entry controls for goods are as follows:

- (a) section 15 renders goods arriving from overseas subject to quarantine control;
- (b) incoming goods are subject to inspection under section 31 before they leave the ship or aircraft on which they arrived;
- (c) all movement of goods that are subject to quarantine control is under the control of quarantine officers;
- (d) section 37 provides for the release from quarantine of goods that are not found to be quarantinable;

3.5 Other preliminary information that may be printed with a Bill

Four types of introductory material may be provided at the beginning of a Bill. None has legislative effect. When provided, they precede the preliminary legislative provisions.

(i) **The date of commencement or assent**

Conventionally, preliminary provisions include a date, on a separate line, immediately below the long title. The entry typically appears in square brackets. In some jurisdictions, this is the date of assent; in others, it is the date of commencement. If the date of commencement is the date of assent, it is known when the Act is printed and can be included. If the Act comes into force at a later date, the space has to be left blank. If Act is reprinted, e.g. in a Revised Edition, the commencement date is inserted then.

(ii) **An Explanatory Memorandum**

This sets out the objects and reasons for the Bill and is presented to the Legislature to inform the members about the aims of the Bill and its individual clauses. It is not typically printed as part of the published *Act*. However, in some countries it is published, either separately or alongside the Act, and may be referred to in order to help interpretation. But its principal function is to enable users to gain a fuller understanding of what the legislation is about. There is a trend to provide, by means of “Explanatory Notes”, very much fuller explanations than in the past.

(iii) **An Arrangement of Sections**

This lists, in their legislative order, the headings, section numbers and section notes used in the Act. It is typically provided only for those Bills of some length. It is in effect a table of contents, though it is variously described: alternative headings are "Table of Provisions" or "Analysis". Its preparation is likely to be your responsibility when drafting the Bill. These tables can be constructed automatically using appropriate word-processing software, thereby reducing the possibility of discrepancies between the entries as they appear in the text and as they appear in the table.

(iv) **A Readers' Guide**

This is a recent innovation pioneered in Australia. Such a guide is typically provided in a long and complex Bill, to give guidance about its structure and organisation. This enables users to find their way more rapidly through its provisions. These aids to understanding are not statutory provisions. They are editorial features. But as part of your drafting duties you must check them before the Bill finally goes for printing both as a Bill and later as an Act.

Self Assessment Exercise 2

In the space provided,

1. Note down the kind of date that is inserted in your legislation as preliminary information, and how it is written:

2. Tick if the following are used in primary legislation in your jurisdiction:

Explanatory memoranda:

Arrangements of sections:

Readers' Guides:

4.0 CONCLUSION

Road maps though useful are not a feature of Nigerian legislation. But use of parts and sub-headings (arrangement of sections) could be utilized as road maps.

5.0 SUMMARY

In this unit, you have been introduced to a range of preliminary provisions and editorial information that may accompany Bills. You also have seen that the one of some of them is still developing, road map clauses. At the end of the unit, you need to feel confident that you have achieved the stated objectives. You should now be able to:

- (i) Determine what matters are included in preliminary provisions in Nigeria;
- (ii) Familiarize yourself with the kinds of editorial material that may accompany legislation.

The following units look more closely at provisions that conventionally appear at the beginning of legislation, and in particular how they might be drafted.

6.0 TUTOR MARKED ASSIGNMENT

In what order are preliminary provisions typically set out in Nigeria? Use a recent statute as a guide.

7.0 REFERENCES/FURTHER READINGS

Soetan, Olusiji A. (1997) *Elements of Legal Drafting*, Lagos: Dredew Publishers.

Thornton, G.C. (1996) *Legislative Drafting* 4th ed., London: Butterworths.

UNIT 2 HOW TO DRAFT LONG TITLES & PREAMBLES

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- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
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 - 3.2.3 Drafting a preamble
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment (TMA)
- 7.0 References/Further Readings

1.0 INTRODUCTION

This unit deals largely with technical features of bills that appear at the beginning of legislation. The bill must carry a long title that describes the effect of the instrument. We also look at preambles, though these are less used today in most places than in the past.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- (i) Draft long titles;
- (ii) Draft preambles.

Your aim in this unit is to become familiar with these devices and in particular how they are dealt with in Nigeria. It is important that you follow the local practice correctly. These are not difficult issues, so it should be possible to complete this unit fairly speedily.

3.0 MAIN CONTENT

3.1 Long titles

A long title is an essential feature of any Bill being drafted for introduction into the Legislature. They are not found in subsidiary legislation, or in decrees or similar instruments made by the legislative authority in non-Parliamentary systems (e.g. a Military Council).

3.1.1 What purposes do long titles serve?

(a) As a procedural device

The long title was originally devised for Legislators' benefit when considering the Bill. This is still one of its purposes in a number of jurisdictions. For it sets the bounds to the Bill; amendments "beyond the scope" of the long title will be ruled out of order. Before any such amendments may be considered, Parliament must formally agree to the amendment of the long title. As a result, the long title can be used to restrict the range and, therefore, the number of amendments that may be introduced. You may be asked to do this where a Bill is likely to excite a lot of opposition. But as a matter of drafting routine, make sure that all the provisions of *every* Bill are within the scope of its long title.

Not all countries apply procedural rules of this kind. Amendments are generally allowed even though they are not strictly within the scope of the long title. In that case, long titles serve a different purpose.

Self Assessment Exercise 1

Check the Standing Orders of your Legislature, and note in the space provided any procedural rules in connection with long titles and their effect upon debates.

(b) As an explanatory and interpretative device

The long title is more typically used as a way of informing both the Legislators and the ultimate users what the Act sets out to do. But since it is enacted, and subject to amendment, courts treat it as an intrinsic interpretative aid. It provides a guide to the scope of the Act, when there is ambiguity or uncertainty in the meaning of its substantive provisions.

The drafter's prime objective is not to provide an aid to deal with ambiguity, but rather to:

- (i) describe the principal ways in which the Bill will have effect upon existing law;
- (ii) indicate the central features, or legal mechanisms employed, in the legislative scheme underlying the Bill.

The policy objectives underlying the Bill are not usually stated in the long title; they are to be inferred from the nature of the changes in the law that the long title says are to be made. Long titles set out "the purposes" of legislation only in this limited sense of stating the ways in which the Act will have effect upon existing law.

Example Box 1

An Act to make further provision for the tenure of judicial office; to constitute a Judicial Commission for Nigeria, to confer on the Commission functions with respect to judicial education and complaints against Judges and other judicial officers; to provide for their suspension, removal and retirement in certain circumstances; and for connected purposes.

The *purpose* of this Act appears to be to strengthen the independence of the judiciary, at the same time making it more accountable for the way it carries out its functions. But the long title concentrates upon the major legal changes instituted by the law that will achieve that purpose.

Complete Self Assessment Exercise 2. Compare your Answer with that provided at the end of this unit.

Self Assessment Exercise 2

Read the following typical long titles. In the spaces provided, note down what you think the *underlying policy* or *purpose* of the Act to be.

1. An Act to enable effect to be given in the Federal Republic of Nigeria to the African Charter on Human and People's Rights made in Banjul on the 19th day of January 1981 and for purposes connected therewith.

2. An Act to provide for the establishment of a Court to deal particularly with firearm offences and for purposes connected therewith.

(c) **As a descriptive device**

Some jurisdictions have gone further in limiting the long title, by using it merely to state succinctly the general subject matter of the Act. This approach assumes that there is a homogeneous theme throughout the Act.

Example Box 2

An Act relating to Gun Courts

An Act respecting the tenure of judicial office

An Act to give effect to the African Charter on Human and Peoples' Rights

The drawback of this style is that the long title serves no distinctive purpose in the Act. It offers little more than a repetition of the short title (see below). But long titles in this form could become more common if greater use is made of purpose clauses.

However, this style is used, almost universally, for one type of legislation - Acts that have as their sole purpose the amending, consolidating, repealing, or repealing and re-enacting, of earlier legislation (or any combination of these). The long title then merely states that existing law is affected by one or other of these processes.

Example Box 3

An Act to amend the Judicial Officers Act 1987.

An Act to repeal and re-enact, with amendments, the Employment Act 1980.

An Act to consolidate the Housing Act 1976, and certain related provisions, with amendments to give effect to the recommendations of the Law Commission.

An Act to repeal the Gun Court Act 1974.

If any of these Acts contained other substantive matters, e.g. transitional provisions, the title might continue:

An Act to repeal the Gun Court Act 1974, and *for connected purposes*.

3.1.2 How a long title should be drafted

Self Assessment Exercise 3

Examine carefully how long titles are printed in our legislation. In particular check the format, the font size and the use of capitals, semi-colons between different purposes and a final full stop.

Add a typical precedent illustrating these features to your collection of documents.

You may draft a title when you start on the Bill, though it can equally well be left until your work is more advanced. Treat this as a working draft only. The final version can be finalized only after the contents of the Bill are settled.

Include all the principal innovations that the Bill makes, and do so in generalised terms, as "an Act to [do something]". Use generic terms (i.e. refer to classes of case - which means that plurals without "any" or "the" are appropriate), unless referring to specific matters.

Example Box 4

An Act to licence second-hand dealers.

An Act to provide for the rules of evidence in courts; to authorise the administration of oaths, and the performance of notarial acts, by representatives of overseas countries and by representatives of the Crown overseas; and for connected and incidental purposes.

A number of expressions are in common use (in addition to those for amending or repealing Acts (**Example Box 3**) for indicating the new arrangements which the Act will make:

"to provide for [as to] [regarding] [with respect to]";
"to make further [better] provision for";
"to authorise";
"to enable";
"to establish";
"to prohibit";
"to restrict";
"to regulate by".

Precedents can be very helpful in extending your repertoire of expressions.

Choosing the most appropriate term should confirm in your own mind the principal legislative devices that your substantive rules use to give effect to the legislative proposals. Choice of words is as important here as elsewhere. Although long titles do not comprise complete sentences:

- (i) they must still be grammatically correct;
- (ii) they should not use abbreviations (e.g. "etc.");
- (iii) they should not use superfluous, inaccurate or misleading expressions.

Since long titles are part of the Act, its interpretation provisions (and the Interpretation Act) apply and can be relied upon. But in the interests of clear communication, always consider whether a fuller form than a definition term may make a purpose in the long title clearer. It will be read before the definitions have been looked at.

Example Box 5

Even though the Bill contains a definition of "Commission" to mean "the Commission for Refugees", the long title should state:

An Act to establish the Commission for Refugees.

Where the Bill has several main functions:

- (i) identify each of them in the long title;
- (ii) start with the principal one, and then follow the order in which the Bill deals with them (which is typically the descending order of importance).

If your Bill has several Parts, consider whether each has a distinctive function that should be stated in the title. In that case, their order should follow the order of the Parts.

If there are *subsidiary* matters included in the Act not directly covered by the statement of the principal purposes, refer to them by some catch-all phrase as:

"for related [connected] [incidental] purposes".

In some jurisdictions, the practice is to add "for other purposes". However, this suggests that there may be a matter of importance in the Bill that has not been referred to, which is not the case if you use one of those just mentioned. In any case, avoid archaic phrases such as "connected therewith" or "with the matters aforesaid".

Since the structure and the contents of the Bill may change as the drafting progresses, your initial draft of the long title may require modification. Confirm it or revise it in the final stages of drafting.

3.2 Preambles

Preambles are found less frequently; but you need to understand when they can be of value.

3.2.1 What purposes does a preamble serve?

A preamble is a preliminary statement that explains why legislation is needed, in contrast with the long title which states the main legal changes the Bill is to make to fill that need. It typically contains a "recital" of the circumstances that made legislation necessary (i.e. the mischief which it is designed to remedy) and reasons why it is considered expedient to enact the legislation now and in this form. Preambles are used today rather less than in the past; many drafters consider them to be redundant. These matters can be better dealt with by purpose clauses.

See the 1999 Constitution for example of a preamble.

3.2.2 When to use a preamble

The kinds of matters for which preambles are still found from time to time are the following:

(a) Private Bills

In countries that have special procedures for private legislation, the Standing Orders of the Legislature may require a preamble to be used. This legislation is based on a petition, which the Bill uses the preamble to cite. The promoters of the

Bill may also be called upon to "prove the preamble", that is, to adduce evidence and be examined in the Legislature on the expediency of enacting the Bill for the reasons given in it.

(b) **Public Bills**

In public legislation, preambles may be useful for the following:

(i) **Bills of constitutional importance**

Preambles are still to be found in the Constitution, or in Acts making major amendments to the Constitution, in Acts of significance in the governance of the country, or in Proclamations inaugurating major changes or decisions of moment. They typically contain high-sounding and rhetorical language, and little of legal importance.

Self Assessment Exercise 4

Remind yourself of the preamble, in the 1999 Constitution. Does it match the description just suggested?

However, in some systems (e.g. Canada), they are used commonly to support the constitutionality of legislation when they are more explanatory than mere rhetoric. Since they are admissible in court, they may be accorded presumptive value and may influence judicial conclusions. They may also be used for political purposes as justifications for the legislative change.

(ii) **Bills of international importance**

A preamble may record that the Bill is enacted to give effect to a named international agreement, in particular, legislation implementing multilateral treaties. See for example, the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

(iii) **Bills of a historic nature**

A preamble may be used to record some notable event which has led to the enactment. They provide a record for posterity.

(iv) **Bills concerned with personal or private interests only**

Again, the preamble may explain the reasons for the enactment, pointing out that it is enacted to deal with a matter affecting a particular interest group, in that way, e.g. giving effect to an agreement with Government.

There are three main reasons why preambles are less used today than in the past:

1. Since the preamble is concerned with policy considerations, it could become a focus of Parliamentary debate, which the promoters of the Bill would rather have directed to the substantive rules which give effect to the policy. Drafters are usually discouraged by their clients from providing further opportunities for general debate on the aims and policy of the Bill. At the same time, drafters have been asked to provide a preamble precisely so that debate can be deflected from the substantive provisions.

2. The legislature can be provided with the background and reasons for the Bill by other means, for example, an **Explanatory Memorandum**.

3. If policy objectives need to be articulated in the Bill itself, it can be better done by a purpose clause in the body of the instrument. As an aid to interpretation, the preamble is reluctantly invoked by the courts since it stands outside the substantive rules. It is generally not referred to when the substantive rules are seen to be plain and unambiguous. A purpose clause is a better bet in this respect.

Preambles are even rarer in subsidiary instruments everywhere. But many jurisdictions have in practice stopped using preambles in legislation altogether, though they are still common in international instruments or may still be used by lawyers in legal practice.

If preambles are in use, there should be a special reason for inserting one in the particular Bill. Provide one, not as a device to assist in interpretation of the legislation, but because there is a convincing need to explain in the legislation the setting in which the legislation came to be enacted. As Thornton concludes (p.197), they are better preserved for exceptional Bills.

3.2.3 Drafting a preamble

Typically, preambles contain a recital of the principal reasons for enacting the Bill:

(a) the first reason prefaced by "Considering that" or "Recognising that" or (more archaically) "Whereas", and those that follow by "and considering that" or "further recognising that" (or "and whereas");

(b) the last stating the conclusion to which the previously stated reasons lead, e.g.:

and recognising that [whereas] it is expedient to [give effect to the Convention on Endangered Species]: .

(c) draft the reasons in the recital in descriptive terms that clarify the circumstances leading up to the legislation.

But you may be expected to use a rather more formal and ceremonial style for instruments of high importance (such as the Constitution) or when recording some noteworthy event. However, the rather pretentious styles of the past, which make much use of archaic words, such as "aforesaid", "said", "divers" and "desirous", are not necessary to produce a memorable sounding introduction to the Bill.

4.0 CONCLUSION

Long title is an essential feature of any Bill. It informs users what the Act sets out to do. It is an intrinsic interpretative aid. Preamble however is a preliminary statement that explains why legislation is needed, in contrast with the long title which states the main legal changes the Bill is to make.

5.0 SUMMARY

In this unit, you have learnt about long titles and preambles. You should now be able to:

- (i) draft a long title;
- (ii) list the purposes a long title serves;
- (iii) explain when a preamble is needed;
- (iv) draft a preamble.

6.0 TUTOR MARKED ASSIGNMENT

Explain the purposes long titles serve.

7.0 REFERENCES

African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act cap A9 Laws of the Federation of Nigeria 2004.

1999 Constitution of the Federal Republic of Nigeria.

Thornton, G.C. (1996) *Legislative Drafting* 4th ed., London: Butterworths.

Answer to Self Assessment Exercise 2

The underlying policy or purpose of the legislation appears to be:

1. to increase and improve the ways in which the people of Nigeria can seek and obtain the protection of the law in their enjoyment of a wide range of human rights.

2. to reduce the number of crimes committed by persons using firearms.

In neither case are the policy objectives stated in the long title. They merely describe the technical reasons for legislating.

UNIT 3 HOW TO DRAFT WORDS OF ENACTMENT & SHORT TITLE

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 The purpose words of enactment serve
 - 3.2 How words of enactment are dealt with
 - 3.3 The purposes a short title serves
 - 3.4 How a short title should be selected
 - 3.5 How to draft a short title
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment (TMA)
- 7.0 References/Further Readings

1.0 INTRODUCTION

This unit deals with short title by which a Bill may be cited and an enacting formula that indicates its origin and authenticity.

2.0 OBJECTIVES

By the end of this Unit, you should be able to:

- (i) Explain the purposes words of enactment serve;
- (ii) Describe how words of enactment are dealt with;
- (iii) Explain the purposes a short title serves.

3.0 MAIN CONTENT

3.1 The purpose words of enactment serve

Precise words are required in Bills to show the authority by which the legislative power is exercised. These are known as "words of enactment", "the enacting formula" or "enacting provisions". The forms used in Acts are different from those

in subsidiary legislation. The equivalent authorising words in subsidiary legislation are dealt with later.

This formula states that the Act has completed the proper law-making process. It is an essential element in all common law jurisdictions, each of which has its own distinctive words of enactment. These may be simple or elaborate. The required formula is frequently prescribed by law, e.g. in the Constitution or the Interpretation Act.

Alternative words of enactment may be specified for use for specified classes of Acts (usually to indicate that a special Parliamentary procedure has been followed for Bills of constitutional significance, e.g. amendment of the Constitution). In cases where legislation is silent, the words are a matter of convention, and new forms may be more easily adopted.

Example Box 1

ENACTED by the Parliament of Fiji -

BE IT ENACTED by the National Assembly of the Federation of Nigeria and by the authority of the same as follows:-

The Legislature of New South Wales enacts:

Self Assessment Exercise 1

Note down the precise words of enactment used in Nigeria.

3.2 How words of enactment are dealt with

The words, by convention, are placed immediately before section 1, that is, after the long title, the commencement date, and the preamble, if any. Follow the exact formulae in use. If different formulae are used for different purposes, make sure that you are using the correct one. Typically, words of enactment are omitted from Acts reprinted in a Revised Edition, as they have performed their function.

3.3 The purposes a short title serves

Naming titles are found in all Acts (“short title”) and subsidiary legislation (“title”) that consists of regulations, rules or similar legislative instruments. (They are not usual in proclamations or orders merely declaring, applying or exempting cases from the parent Act). The title may appear in a separate section, but it is often contained in the first subsection of a section that also deals with commencement.

The short title is a *label* for the Act. Like any label, it is used both to indicate the contents and to make the container easy to find and to refer to.

Example Box 2

Short title.

1. This Act may be cited as the Firearms Act 1993.

Title and commencement.

1.-(1) These regulations may be cited as the Elections (Local Government) Regulations 1975.

(2) These regulations come into force on 1 January 1976.

Exceptionally, a short title can be referred to for the purposes of interpretation, but as a drafter, see it rather as serving to facilitate:

- (i) **citation** (e.g. in other legislation, in legal documents and writings, and in court);
- (ii) **reference and retrieval** (e.g. from tables of legislation or an index).

3.4 How a short title should be selected

Your instructions may well contain a title under which the matter has been approved by the client Minister or the Executive. Although the choice of title is that of the Minister (or Executive) in the last analysis, typically Legislative Counsel’s advice will carry considerable weight. Try to choose one that will be both convenient and helpful. Put yourself in the place of users. They will be grateful if your short title shows these characteristics:

- (i) it is *short*, even snappy;
- (ii) it provides an *accurate*, though generalised, indication of what they can expect to find in the instrument;
- (iii) it is *distinctive* and *unique*, and there is no likelihood of confusing it with titles to other legislation;
- (iv) it is *easy to speak aloud* (e.g. in court), and to remember.

Example Box 3

Avoid a tongue-twisting title, such as the following:

Seaside Sale of Seashore Shells Act 2004

(a) **Single subject Bills**

If you are drafting a Bill that is to contain all the principal provisions on a general subject, use a simple expression, even single word that describes that subject. If the subject concerns a class of persons, do not add an apostrophe (') after the person, unless it is to be followed by an item that *belongs* to the person. Otherwise, you give the impression that the *Act* belongs to the person!

Example Box 4

Customs Act 1994; Housing Act 1995; Motor Vehicles Act 1996; Road Traffic Act 1997;
Marriage Act 1998; Firearms Act 1999.

Second-hand Dealers Act 2002 (which must not have an apostrophe)

Second-hand Dealers' Premises Act 2003 (where an apostrophe is essential)

(b) **Amending and repeal Bills**

Most short titles for single subject Acts have now been pre-empted (as your Revised Edition of Laws will show). But you will often be asked to prepare legislation that amends (or repeals and re-enacts) the Acts bearing those titles. Reflect the language of the original short title in the short title of your Bill, so that:

- (i) users know that they are dealing with the same subject;
- (ii) all the legislation will be indexed together, by reference to the first word.

A Bill to repeal and re-enact should have the same short title as the Act it replaces except for the necessary change of the year.

Example Box 5

Marriage (Amendment) Act 1981
Marriage (Amendment) Act 1995
Marriage (Amendment) (No.2) Act 1995

Marriage (Repeal) Act 2004

(c) **Bills on the same subject**

If the legislation on a general topic is divided between a series of Acts, the same title for two or more Acts is not helpful, even if the titles include different years. In such a case, provide:

- (i) distinctive, but linked, titles for each new Bill;
- (ii) an indication in them of the aspect of the subject with which they deal.

Beginning with the same substantive word conveys the common element and ensures that these Acts will be indexed together.

Example Box 6

Evidence (Criminal Proceedings) Act 1980
Evidence (Civil Proceedings) Act 1981
Evidence (Computerised Records) Act 1997

However, in one category of case, using much the same title is advisable. Certain legislation is enacted at regular intervals, often annually, for much the same purposes each time. Using the same title, differentiated by the date only, brings out clearly the common element.

Example Box 7

Appropriation Act 2004
Supplementary Appropriation Act 2004
Finance Act 2004
Finance(No.2) Act 2004

3.5 How to draft a short title

Local house-style governs most of the practices to adopt. Follow it consistently in all new legislation. The following are guidelines for good practice:

- (a) the year must be the year of *enactment*, not the year when the legislation is drafted or introduced into the legislature.
- (b) the title actually begins after the definite article "the"; so do not give that word a capital letter.

- (c) make the first substantive word of the title, if possible, a distinctive one which enables users to recognise the subject matter of the legislation. (This helps to track it down in a subject index).
- (d) begin each word of the title (other than an article or preposition) with a capital letter.
- (e) punctuation, other than the final full stop, is rarely needed. As we have seen, do not add an apostrophe to the word immediately before "Act". A comma between "Act" and the date is unnecessary.
- (f) bracketed phrases as parts of short titles are generally not needed. Use them only if they serve a useful purpose, as in **Example Boxes 5** and **6**. Confine them to the following cases, where:
 - (i) the Bill solely amends or repeals an earlier Act;
 - (ii) the Bill deals with a matter already the subject of other legislation, but is concerned with a specific aspect only;
 - (iii) the subject matter is of a general nature but is confined to a limited geographic area or group of people;
 - (iv) the legislation is one of a series of subsidiary instruments made under the same Act, but dealing with a different aspect.

Example Box 8

Rented Housing (Capital Territory) Act 1990.
Evidence (Forensic Examination) Act 1987
Bankers (Northern Ireland) Act 1928
Contracts (Married Women) Act 1945

Pool Competitions Act 971
Pool Competitions (Fee for Registration) Order 1971
Pool Competitions (Licence Fees) Order 1971
Pool Competitions (Fees for Licence Renewals) Order 1971

- (v) use a double set of brackets only when it is necessary to reproduce brackets from linked legislation.

Example Box 9

Rented Housing (Capital Territory)(Amendment) Act 1993

In some jurisdictions, distinctive printing is used for the short title (e.g. italics or bold) to draw attention to it. Again, follow house-style.

Example Box 10

This Act may be cited as the *Second-hand Dealers Act 1971*.

This Act may be cited as the **Second-hand Dealers' Premises Act 1990**.

Self Assessment Exercise 2

Copy down *exactly* an example of a short title used recently in Nigeria for each of the following types of legislation. Check punctuation as well as words and figures.

1. An Act:

2. an amending Act:

3. an Appropriation Act (i.e. an Act granting public funds for designated heads of public expenditure):

4. a subsidiary instrument containing regulations:

4.0 CONCLUSION

In conclusion, precise words are required in bills to show the authority by which the legislative power is exercised. The forms used in Acts are different from those

used in subsidiary legislation. The short title is a label for an Act. It is used in citing the Act.

5.0 SUMMARY

In this unit, you have learnt how to draft words of enactment and short titles. You should now be able to:

- (i) Explain the purposes words of enactment serve;
- (ii) Describe how words of enactment are dealt with;
- (iii) Explain the purposes a short title serves.

6.0 TUTOR MARKED ASSIGNMENT

How should a short title to a bill be selected?

7.0 REFERENCES/FURTHER READINGS

Interpretation Act, Cap.192 Laws of the Federation of Nigeria 1990.

Thornton, G.C. (1996) *Legislative Drafting* 4th ed., London: Butterworths.

Soetan, Olusiji A. (1997) *Elements of Legal Drafting*, Lagos: Dredew Publishers.

UNIT 4 HOW TO DRAFT COMMENCEMENT AND DURATION PROVISIONS

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Commencement provisions
 - 3.1.1 What purposes do commencement provisions serve?
 - 3.1.2 When commencement provisions are needed
 - 3.1.3 Good reasons for providing commencement provisions
 - 3.1.4 How commencement provisions should be drafted
 - 3.2 Duration provisions
 - 3.2.1 The purposes duration provisions serve
 - 3.2.2 How duration provisions should be drafted
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment (TMA)
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1.0 INTRODUCTION

This unit deals with two components commonly found among preliminary provisions, both relating to timing factors. First, we look at the steps that may be needed to prescribe the date or dates on which legislation is to come into force. Secondly, we consider provisions that set limits to the length of time that the legislation may have effect - provisions that are required much less often. Although they have direct effect upon the application of the instrument, these features support, rather than are a source of, substantive rules.

2.0 OBJECTIVES

By the end of this Unit, you should when drafting be able to:

- (i) Make provision for the commencement and duration of legislation where necessary.

This unit is designed to enable you to:

- find out local practice on these matters;

- examine when these provisions may be needed and to put into practice techniques for dealing with them satisfactorily.

Your aim in this unit is to become familiar with the way these preliminary provisions are dealt with in Nigeria and to gain an understanding of when they are needed (since neither is necessarily required) and how they are drafted.

3.0 MAIN CONTENT

3.1 Commencement provisions

3.1.1 What purposes do commencement provisions serve?

Commencement provisions are used in both primary and secondary legislation to prescribe the date when the legislation is to come into force or, if that date is not settled at the time of making, the mechanism by which that date is to be fixed.

There are rules in every jurisdiction setting standard commencement dates, usually in the Interpretation Act. You need not repeat them, so long as the standard provision is suitable. They have effect by operation of law unless specific provision is made.

The usual ones are:

Acts:

the date on which the Act receives the President's assent. (See section 2 (1) & (2)(a) of the Interpretation Act).

Subsidiary legislation:

the day it is made. (See section 2(2) (b) of the Interpretation Act).

In some jurisdictions, the standard rule is repeated in each Act, if it applies, so that it is apparent, on the face of the Act, that, e.g. it comes into force when assented to. This is particularly useful if some provisions only are to come into force then, the remainder being dealt with in another way. But in any case where these automatic rules are unsuitable, provide expressly for the matter.

3.1.2 When commencement provisions are needed

They are needed in four principal cases:

- (i) a specific day (or days) is to be fixed by the legislation;
- (ii) the legislation is to come into force at the end of a specified period of time;
- (iii) it is to come into force on some day to be selected by Government;
- (iv) different days are to be fixed for different provisions of the legislation.

Typically, the Interpretation legislation will support all these practices. The Act also contains another standard rule that legislation takes effect on the first moment of the day that it comes into force, which also you need not repeat. (See section 2(3) of the Interpretation Act).

New drafters are inclined to authorise Ministers to fix the commencement date almost as a matter of course. This is not a sensible practice, as it may impose, usually on a Minister, an unnecessary additional burden, which experience shows can easily be overlooked. There are many instances where commencement orders were not made when required, but the legislation even so was assumed to be in force, probably because there was no obvious reason for its postponement. These cases usually have to be cured by validating legislation having retroactive effect (Module 3 (*Application provisions*) below).

Satisfy yourself that there is a good reason why the legislation should not come into force at once, i.e. on assent. If your instructions do not deal with the matter, ask for confirmation from your client before introducing a commencement provision.

3.1.3 Good reasons for providing commencement provisions

(a) Retroactive legislation

Such a provision is essential if you are instructed to give the Bill retroactive effect, so that it is to be treated as having come into force at a particular date *before* in fact it was passed (Module 3 below).

(b) Problems of immediate implementation

Provide them too if, for practical reasons, the legislation cannot be put into immediate operation, e.g. because:

- (i) a Government Department needs time to set up new administrative arrangements;
- (ii) explanatory material has first to be prepared and published for the guidance of users;
- (iii) subsidiary legislation must be drafted to implement the scheme (and interested parties may need to be consulted about it);
- (iv) the commencement is to be dependent upon the happening of some awaited event (e.g. the coming into force of other linked legislation or a treaty).

(c) Political considerations

Specific provision is needed if the commencement is to be delayed to a later date for the convenience of Government or its principal users, e.g. because:

- (i) Government wishes, for reasons of its own, to select the most appropriate time at which new legislation should begin to have its effect;
- (ii) Government wants to look at the legislation again before it comes into force, so that it can be amended if that proves to be necessary;
- (iii) the public, or a section of the public, should be given time to re-arrange their affairs in accordance with the new law.

If you can find no reasons of these kinds in your instructions, rely on the standard commencement rules. If provision is required, work out with your instructing officer whether a precise date can be established. An exact date in the Act removes the uncertainty that attaches to a date that has to be fixed by Ministerial order.

Complete Self Assessment Exercise 1. Compare your Answer with that provided at the end of this unit.

Self Assessment Exercise 1

Read again the discussion under the question "*Good reasons for providing commencement dates*"

Note down in which of the cases mentioned there you think that a *fixed* (i.e. *specific*) date for commencement should be provided (in consultation with the client Ministry).

3.1.4 How commencement provisions should be drafted

Again, these provisions are likely to be in standard form. So, check your house-style and conform to that. The following guide-lines contain good practices:

- (i) write these provisions in the most direct terms.

Example Box 1

This Act comes into force on 1 January 2005.

This Act comes into force 3 months after the date on which it is passed.

- (ii) use the same terms to express commencement as are used in the sections of the Interpretation Act dealing with commencement.

Example Box 2

For example, **section 2** of the **Interpretation Act** uses:

"comes into force", in preference to "shall come into operation"

This is a case where a declaratory present tense can be used, rather than the imperative or future "shall".

"on a day fixed", in preference to "on a date to be appointed"

- (iii) gather commencement provisions in one place, preferable in a single section. But if the Bill is lengthy and different commencement dates may need to be set for different Parts, consider setting them out in a Schedule, to which attention must be directed by the commencement section.

Example Box 3

This Act comes into force as set out in the Schedule.

- (iv) place the provisions in their own subsection in the section containing the short title, rather than combining them in the same subsection. As these provisions are usually omitted when the Act is reprinted in Revised Laws, do not use a separate section for them, since its omission would require renumbering of almost the whole Act.
- (v) make sure that the section note includes the word "commencement".
- (vi) whenever possible, fix commencement by giving either a specific date or one from which it can be precisely calculated. This saves users having to search for subsidiary instruments containing the commencement order.

Example Box 4

These Regulations come into force 10 days after the date on which they are published in the *Gazette*.

In this case, four particular points need to be watched:

- (i) if a specific date is given in a Bill, it may need to be changed as the Bill goes through the legislature because of an unexpected delay that affects your original calculations;
- (ii) do not select a specific date randomly; it should be convenient or memorable, e.g. at the beginning of a month or year;
- (iii) if a period or interval of delay is specified, it should be of a reasonable length that allows sufficient time for whatever has to be done (for a Bill, a period expressed in months is appropriate);
- (iv) if commencement is linked to the occurrence of some specific event, knowledge of the event must be made public in a way that continues to be accessible well after it occurs (e.g. by publication of a notice in the *Gazette*).

If the commencement is to be postponed until Government decides:

- (i) state that a Minister or, in a case of constitutional significance, the President is the body to make the order;
- (ii) identify the Minister, unless the Interpretation Act covers the matter (cp. **section 18(1)** of the **Interpretation Act**);
- (iii) state how the fixing is to be done and made public;
- (iv) confer this in terms of a power, rather than a duty, since there will be a judgment about timing to be made;

Example Box 5

This Act comes into force on a date fixed by the Minister by order in the *Gazette*.

- (v) in principle, it is undesirable to postpone commencement without setting time limits. Governments should not be free to delay for excessive periods.

Some jurisdictions make a practice of specifying the maximum time for which commencement can be postponed.

Example Box 6

Commencement.

2.-(1) This Act, other than sections 24 to 33, comes into force on 1 March 2004; sections 24 to 33 come into force on a date or dates fixed by the Minister by order in the *Gazette*.

(2) If a provision of this Act does not come into force within 6 months commencing on the day that this Act is passed, it comes into force on the first day after the end of that period.

(vi) if an Act is of some length and complexity, it may need to be brought into force by stages. For this, provide for the making of a series of commencement orders, unless general authority is given in the Interpretation Act (cp. the **model Interpretation Act 1992, s.18(5)**). But:

- use this device sparingly, as readers have difficulty in finding all the orders, or knowing how many to look for, in order to discover whether all or only some provisions are in force (and which those are);

- use it only in relation to distinct Parts or groups of provisions in the Act that are capable of operating without the support of other provisions that are not in force;

- the commencement provisions themselves, and the short title, must be brought into force on the passing of the Act; if not, the power to make the commencement orders is not in force.

3.2 Duration provisions

At common law, legislation is perpetual; it does not cease to be law merely by the passage of time. Although, in practice, a statute may have had its effect or is not longer used, in strict theory, it remains part of the law. For this reason, obsolete and spent legislation should be periodically cleared out by a law revision.

Typically, the life of an Act is brought to an end by repealing it when it is no longer required. It is possible, however, to include in the Bill provisions setting a term on its life, at the end of which it ceases to be in force (that is, *expire*), by operation of law.

3.2.1 The purposes duration provisions serves

In only a few circumstances need you state that a Bill is temporary. Governments are reluctant to put a time limit on legislation, as its future usefulness is difficult to predict. You are likely to be asked to provide duration clauses only rarely, though they can be used in both Bills and subsidiary legislation.

Expiry provisions may be useful in the following cases:

(i) **Experimental Bills**

Bills that involve an innovation, the benefits of which are speculative or may possibly lead to unpredictable consequences.

(ii) **Controversial Bills**

Bills that have serious consequences for human rights or interfere substantially with private economic activity.

(iii) **Limited life Bills**

Bills that will have fulfilled their purposes in a given period, for example, because they deal with a short term need (e.g. temporary interruption of some resource) or with a one-off situation.

(iv) **Restricted life instruments**

Bills that limit the period within which subsidiary legislation may be made, usually when providing for short term emergencies, the instruments being permitted to have effect only until the end of the emergency

In the first two cases, an automatic expiry provision in the Bill may reduce Parliamentary opposition, as it ensures that Parliament must be invited to review the impact of the legislation after a fixed period and approve its continuation.

But do not supply duration provisions automatically even in the cases mentioned above. Whether to include them should be a matter for consultation and instructions.

Example Box 7

Emergency powers

(1) During a period of emergency, the President may make orders providing for the supply and distribution of food, water, fuel, light and electric power and other necessities.

(2) An order must be laid before Parliament as soon as practicable after it is made, and does not continue in force after the end of 7 days from the day on which it is laid, unless Parliament passes a resolution providing for its continuance.

(3) The expiry of an order does not affect its previous operation or the validity of any action taken under it.

3.2.2 How duration provisions should be drafted

A duration provision can be attached to the entire instrument or to specified provisions of it. In either case, state its application precisely. State precisely too the time at which expiry takes place. The terms by which to do this have much in common with those for commencement provisions. The duration can be expressed in several ways:

- (a) specify the date to which the legislation is to run, and state that it then expires;

Example Box 8

This Part continues in force until 31 December 2006, and then expires.

- (b) specify a period of time after the commencement of the Bill, at the end of which the legislation is to expire. The commencement and duration periods can then be linked in the same clause carrying an appropriate section note.

Example Box 9

Commencement and duration.

(1) This Act comes into force on 1 January 2004 and has effect for 3 years from that date, at the end of which it expires.

- (c) state that the date of expiry is to be fixed by Government order;

Example Box 10

This Act ceases to be in force, and expires, on a day to be fixed by the President by order in the *Gazette*.

- (d) make the expiry date dependent upon the happening of some specified event. As with commencement provisions, make sure that the occurrence of the event will be public knowledge that remains accessible well after the event takes place.

Example Box 11

This Act expires 3 months after the commencement of the first session of the House (of Senate or Representatives) in 2004

If the aim of the expiry clause is to ensure that the National Assembly must review the legislation before it can continue, provide for the method of continuing it:

- (i) it can be continued in force by the Legislature, e.g. by a resolution, for a further fixed period stated in the resolution:
- (ii) it can be made perpetual unless the Legislature takes formal action.

Example Box 12

..... and then expires, unless the National Assembly, by resolution, directs that this Act is to continue in force until a date, not later than 31 December 2006, specified in the resolution.

..... and expires on 31 December 2007, unless, before that date, the National Assembly resolves that it is not to expire.

Consider also whether you need to provide for the legal effects that follow upon the expiry of the Act, unless there is a standard provision that the effects of repeals apply also where an Act expires. If your Interpretation Act so provides, you need not deal with the effects of expiry listed there. (See section 6)

Complete Self Assessment Exercise 2. Compare your Answer with that provided at the end of this unit.

Self Assessment Exercise 2

Draft a clause that makes the provisions of the Interpretation Act that deal with the effects of repeals apply also to cases where legislation expires.

Try also to work out whether other matters governed by the Bill may need to be provided for when the Act expires, e.g. through transitional or savings provisions. A useful device is to empower the Government to make regulations for those matters in the event of expiry.

Example Box 13

- (1) The President may make, by regulations, transitional and savings provisions consequential on the expiry of this Act.
- (2) The power to make regulations may be exercised during a period of 3 months immediately following the expiry, although this Act has ceased to be in force.

Two other types of expiry provision may be noted. Neither is widely used. If you need to consider the possibility, look at, e.g. Thornton (pp.216-217).

A) Sunset clauses:

These expiry provisions fix the life, e.g. of a statutory body or scheme and provide for ways in which the obvious consequences of it coming to an end are to be dealt with (cp. The example in **Example Box 13**). The term is also used by some writers to refer generally to provisions that set a fixed term.

B) Review clauses:

These require legislation to be reviewed and formally reported on, without providing for their expiry. A repeal Act is needed to bring that legislation to an end.

4.0 CONCLUSION

In conclusion, commencement provisions are used in both primary and secondary legislation to prescribe the date when the legislation is to come into force. Legislation is perpetual, it does not cease to be law merely by passage of time.

5.0 SUMMARY

This unit has dealt with commencement provisions and duration provisions. We have seen that general rules determine when legislation comes into operation if no specific ones are set out in the instrument itself, and that only exceptionally does legislation need to determine when it is to cease to have effect. In consequence, on both matters it is important to know when you should include provisions of this kind, as well as how to draft them. The matter of commencement is one that should always engage your special attention.

You should now be able when drafting to:

- (i) make provision for the commencement and duration of legislation where necessary.

Make sure that:

- you are familiar with local practice on these matters;
- you know when these provisions may be needed and how to put into practice techniques for dealing with them satisfactorily.

6.0 TUTOR MARKED ASSIGNMENT

Draft commencement provisions for each of the following cases. Use precedents.

1. The Act is to come into force at the end of a specified period [*of your choice*].
2. The Act is to come into force when a named treaty ("the Convention") comes into force.
3. The President is to authorise the date, but it must not be less than 3 months after the assent.
4. Sections 1 and 2 are to come into force on a specified date [*of your choice*], but the rest of the Act is to be brought into force by the Minister, on different dates if the Minister chooses.

7.0 REFERENCES/FURTHER READINGS

Interpretation Act, Cap.192 Laws of the Federation of Nigeria 1990.

Driedger E.A, (1976) *The Composition of Legislation*, Ottawa: Dept of Justice.

Soetan, Olusiji A. (1997) *Elements of Legal Drafting*, Lagos: Dredew Publishers.

Thornton, G.C. (1996) *Legislative Drafting* 4th ed., London: Butterworths.

Answer to Self Assessment Exercise 1

The following cases of those mentioned are likely to be ones where a precise commencement date could be settled upon.

- retroactive legislation.
- where new administrative arrangements have to be put in place.
- where explanatory material has to be prepared and published.
- where the public is to be given time to rearrange their affairs.

The client Ministry should be able to work out how much time is required for these purposes. In the other cases, setting of dead-lines is impractical.

Answer to Self Assessment Exercise 2

Section 6 of the Interpretation Act (*which relates to the effects of repeals*) applies on the expiry of this Act, as if the Act had been repealed and had not expired.

This follows a general provision in the **model Interpretation Act 1992, section 35(2)**, which is not found in all Interpretation statutes.

MODULE 2

- Unit 1 Interpretation clauses and use of definitions
- Unit 2 Composing labeling and stipulative definitions
- Unit 3 The syntax of definitions & drafting interpretation provisions

UNIT 1 INTERPRETATION CLAUSES AND USE OF DEFINITIONS

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 What purposes does an interpretation clause serve?
 - 3.2 Difference between a definition and as interpretation provision
 - 3.3 Where interpretation provisions should be placed in a Bill
 - 3.4 Shortcomings of interpretation clauses
 - 3.5 What purposes do definitions serve?
 - 3.6 The relationship between statutory definitions and dictionary meaning
 - 3.7 How a clause containing definitions should be drafted
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment (TMA)
- 7.0 References/Further Readings

1.0 INTRODUCTION

A standard practice in Commonwealth drafting is to include definitions and other provisions that explain how expressions and terms used in the Bill are to be construed. Many of the benefits that were mentioned in LED: 605 as offered by Interpretation legislation can be gained by these devices. They may also be helpful in solving certain problems facing the drafter. Mastering the techniques of drafting them is both important and necessary. If sensibly and correctly used, they can materially improve the entire statute, not least because they may affect the meaning of many of the substantive rules.

Drafters in common law systems make great use of interpretation devices when drafting both primary and subsidiary legislation, usually providing a clause that deals exclusively with the matter. This is the focus of this unit.

2.0 OBJECTIVES

By the end of this Unit, you should be able to:

- (i) Differentiate between a definition and an interpretation provision;
- (ii) Describe where interpretation provisions should be placed in a Bill;
- (iii) Explain the use of definitions.

Your aim is to be able to distinguish the different uses of definitions and interpretation provisions, and be familiar with the effect that those uses have upon the way you must draft.

3.0 MAIN CONTENT

3.1 What purposes does an interpretation clause serve?

Interpretation clauses stipulate how expressions used in legislation are to be understood by its users. They supplement or amplify the provisions of the Interpretation Act, particularly those that contain definitions. Provisions of interpretation clauses in an Act apply also to subsidiary legislation made under it (section 19(1) **Interpretation Act**).

These clauses are found in two forms:

- (i) clauses that assign definitions to terms used in the legislation;
- (ii) clauses that explain how particular expressions used in the legislation are to be interpreted.

Example Box 1

definition clause:

In this Act, "Commission" means the Commission for Refugees.

interpretation provision:

In this Act, a reference to the use or operation of a motor vehicle includes a reference to the parking of the vehicle.

3.2 Difference between a definition and an interpretation provision

In essence, the distinction is this:

- (a) **Definition:**

A provision that gives a specified meaning (the "**definition**") to a specific word or expression (the "**definition (or defined) term**") used in the substantive rules.

(b) **Interpretation provisions:**

Provisions that explain how a particular word or expression, or group of words, is to be construed when the reader meets it in the legislation.

By far, the most common use is to provide definitions. In fact, both perform similar functions; both state how words or expressions in the legislation are to be understood. In principle, the two are interchangeable. However, be prepared to use interpretation provisions to overcome some problems of presentation that you may meet in writing a conventional definition.

All drafters find, from time to time, that the conventional type of definition is not a very satisfactory way of explaining how particular expressions are to be interpreted. There are a number of reasons why this happens:

- (i) the matters to be covered are too complex or detailed to be set out in a definition;
- (ii) the subject matter is too important to be submerged in a list of other definitions;
- (iii) grammatical considerations require something a little more flexible than the definition;
- (iv) a fuller explanation of an expression is called for than can be provided by a definition;
- (v) a direction has to be given that a specified case is to be treated in the same ways as the one that is specifically mentioned in the substantive provisions.

If you meet any of these difficulties, consider whether interpretation provisions might be a useful alternative.

3.3 Where interpretation provisions should be placed in a Bill

Gather both definitions and interpretation provisions together in one place. The best place is a clause in the preliminary provisions. But if very lengthy and detailed, they can be placed in a separate Part at the beginning of the Act, or in a Schedule to which you should direct users by a section in the preliminary provisions.

Example Box 2

Interpretation.

2. Schedule 1 has effect for the purposes of the interpretation of this Act,

There are good arguments for putting the interpretation section at the beginning of a Bill:

- (i) it draws immediate attention;
- (ii) users always know where to look for it; so it is easier to find.

However, if you are defining or explaining a term that appears in only one place in the Bill (e.g. in one section or in a group of sections), place the interpretation provision in the same place where it is needed. Inclusion in the interpretation section might suggest that it has wider application than the one case. In these cases, the provision may be set out:

- (i) in the first or final subsection of the section to which it relates; or
- (ii) if the term used appears in several grouped sections, in its own section immediately before those sections.

In this last case, consider dividing the Bill into Parts; this enables you to attach a specific interpretation section to the Part. The most useful place for these provisions in this case is as the first section of the Part or division to which they relate.

Example Box 3

(7) In this section, "authorised officer" means a person authorised by the Commissioner of Police for the purposes of this section.

Interpretation of Part 3.

22. In this Part, "motor vehicle" means a mechanically propelled vehicle intended or adapted for use on the roads.

Interpretation clauses are principally devoted to defining terms; they may also include interpretation provisions that do not lend themselves to definitions. Typically, then, they carry the section note "*Interpretation*", though some drafters use the more precise "*Definitions*" if the clause contains only that type of matter.

In an interpretation clause containing both definitions and interpretation provisions, set out:

- (i) the definitions in the first subsection;
- (ii) the interpretation provisions in the next subsections in descending order of importance.

3.4 Shortcomings of interpretation clauses

Interpretation clauses can be very useful in solving drafting problems. They can contribute to simpler, clearer and shorter sentences, which are generally easier to read and to work with. We look in more detail later in this Module at these benefits.

However, definitions, in effect, fragment the legislative text, since that cannot be taken at face value if particular expressions have to be read in the specific way indicated by the interpretation clause. The more definitions there are, the more their application to individual provisions may be lost sight of, or their effect overlooked. It is irritating to have to keep referring to the clause to see if a term is defined or to understand the substantive rules (which is what interests users). The more complex and elaborate the interpretation provisions, the more this can happen.

Bear in mind the following general guidelines:

- (i) only provide interpretation provisions if there is a good reason to do so;
- (ii) provide definitions and interpretation provisions principally for the benefit of the user, rather than to ease your task as the drafter;
- (iii) do not use them to create substantive rules;
- (iv) do not draft them in such a way that the user will only discover that substantive rules are subject to important qualifications or exceptions when applying the definitions;
- (v) avoid interpretation provisions that are unduly artificial or elaborate.

3.5 What purposes do definitions serve?

Definition can be used for more than one purpose. The purpose for which you create the definition will influence the way you draft it. For that reason, have a clear picture of why you are creating a definition before starting to compose it. Essentially, definitions can perform two different functions:

(a) Labelling definitions

The purpose of a labelling definition is to allow a shorter term to be used instead of the longer expression that is set out in the definition, rather than to confer a

specific meaning on that term. By this means, it is possible to avoid lengthy expressions that would otherwise have to be repeated in several places in the Bill.

Example Box 4

"licence" means a licence issued by the Minister under section 5.

This allows the simple term "licence" to be used throughout the Bill without repeating the longer expression contained in the definition or attaching to it the (archaic) forms "issued under the preceding section" or "issued as aforesaid". But the definition is not intended to give substantive meaning to the term (i.e. "a formal grant of permission"); we have to look to the dictionary for that. Section 5 tells us what the licence gives permission to do.

(b) Stipulative definitions

These direct what is to be taken as the specific meaning of the definition term when it is used in the legislation.

Example Box 5

"motor vehicle" means a vehicle propelled wholly or partly by volatile spirit, steam, gas, oil or electricity or by any means other than human or animal power.

The definition tells us the substantive meaning of the term. It, rather than the dictionary meaning, has effect in the legislation. In this case, it contributes to certainty in the application of the enactment.

However, you may find that you can use a definition to perform both a stipulative and a labelling function at the same time.

Example Box 6

"Judge" means a Judge of the Supreme Court",

This definition performs a labelling function, but it *may* also be stipulative, e.g. its purpose is also to exclude Magistrate Court or Court of Appeal Judges. But in a jurisdiction where Supreme Court Judges are the only kinds of "Judge", this would be a labelling definition only.

Make yourself comfortable with the distinction between labelling and stipulative definitions. Be clear in your own mind which is required for a particular context. Then, make it clear to users by the way you draft them, the function that each definition is to perform. So ask yourself:

- (i) is the definition to stipulate a meaning that the user will find from the definition?
- (ii) is it merely providing a convenient way of shortening an expression, the substantive meaning of which is found elsewhere?
- (iii) is the definition to perform both functions?

3.6 The relationship between statutory definitions and dictionary meanings

Definitions make use of ordinary (dictionary) meanings of the words they contain, as do all statutory provisions. A dictionary offers the meanings in common usage (as well as historical meanings). There are several consequences:

(a) In relation to the defined term

- (i) if the dictionary meaning of a term is the one you need, don't provide a definition for it or try to reproduce the dictionary meaning; indeed, if you do, you may cause uncertainty about why it is there.
- (ii) if the dictionary meaning of a term is not precise enough, or more than one such meaning could equally well apply, supply a definition that *stipulates* which is intended.
- (iii) if you stipulate a definition, the *term* itself no longer carries the meaning given in the dictionary. The term means what *you say* it means.
- (iv) if you are drafting a *stipulative* definition, in theory, you could choose *any* term for the defined term (or any definition for a term). But in practice, your defined term should convey, or at least be consistent with, your stipulated meaning.

Example Box 7

A definition of the following kind would not meet these standards.

"cat" includes dog.

The definition contradicts the definition term.

"relevant matter" means an article or money enclosed in a container by the Post Office for conveyance by post.

The definition term conveys nothing of the meaning in the definition. A better term might be "**postal matter**".

- (v) if you are drafting a *labelling* definition, your definition term must be consistent with the expression in the definition. Both are in essence referring to exactly the same circumstances, and so carry the same meaning, which has to be derived from outside the statutory definition (e.g. from their ordinary dictionary sense), since none is stipulated.
- (b) **In relation to the definition**
 - (i) individual words in the *definition* (as distinct from the defined term) generally carry a dictionary meaning, unless you indicate otherwise.
 - (ii) if a word in the definition carries more than one such meaning (as many English words do), ensure that it is clear which is intended; usually, that can be made apparent by the other words in the definition in which you use the word.
 - (iii) you can clarify the meaning of a definition by using in it another definition *term* which is defined elsewhere, e.g. in the interpretation clause or in the Interpretation Act (it then becomes a "*compound definition*"). (This may be given legislative support in your Interpretation Act (cp. the **model Interpretation Act 1992, section 21(1)**). However, this practice of “nesting” definitions can add to the complexity of the text, and should be used with caution.

Example Box 8

"**action**" means a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court, but does not include a criminal proceeding by the Attorney-General;

"**cause**" includes any *action, suit* or other original proceeding between a plaintiff and defendant, and any criminal proceeding by the Attorney-General;

"**matter**" includes every proceeding in court not in a *cause*;

"**suit**" includes *action*.

3.7 How a clause containing definitions should be drafted

Follow the local conventions in the format and print style, though there is much that is common in Commonwealth styles.

Start the clause with words indicating the purpose for which the definitions are to be used. This is a standard formula, though it may differ from country to country.

Example Box 9

2. In this Act:

2. For the purposes of this Act, the expression:

2 In this Act, unless the context otherwise requires:

Many formulae include safeguarding words such as "unless the context otherwise requires". Strictly, you need not use the phrase (which courts will imply if it is not there), especially if the Interpretation Act provides for this (cp. the **model Interpretation Act, section 21(2)**).

Typically, clauses of this kind have the following characteristics:

the definition (where there is more than one in the subsection):

- starts a new line;
- concludes with a semi-colon (except for the last one, which finishes with a full stop);
- is formatted with indented text;
- is placed, with the others, in alphabetic order;
- uses the present tense to introduce the meaning (e.g. "means" or "includes").

If there is only one definition, it continues on the same line as the introductory words.

the defined term (or "definition term", i.e. the term which is being defined):

- is in quotation marks;
- may be emboldened or put in italics;
- is not usually given a capital letter, unless one is normally used for that word;
- has no article ("a" or "the").

Example Box 10

2.-(1) In this Act:

"**fault**" means negligence or any other tort;

"**injured person**" means a person who suffers injury caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle;

"**motor vehicle**" has the meaning given by section 2 of the Road Traffic Act 1988.

Unless it is of central importance to your Bill, do not restate a definition that appears in the Interpretation Act if that is the meaning you need. If you use an expression defined there, and that definition is *not* suitable, make sure to provide your own definition of the expression in the Bill.

Self Assessment Exercise 1

Compare the style used in the following provision with that in your legislation. In the space provided, restate the provision adopting the style and lay-out conventional in Nigeria. Take note of the differences.

Interpretation

2. In this Act:

"*court*" means a magistrate's court;

"*firearm*" means a lethal barrelled weapon of any description from which shot or a bullet or other missile can be discharged;

"*imitation firearm*" means any thing that has the appearance of a firearm, whether or not it is capable of discharging shot, a bullet or other missile.

4.0 CONCLUSION

To conclude, interpretation clauses stipulate how expressions used in legislation are to be understood by its users. They contribute to simpler, clearer and shorter sentences. However, definitions fragment the legislative text.

5.0 SUMMARY

In this unit, you have considered interpretation clauses and the use of definitions. You should now be able to:

- (i) describe where interpretation provisions should be placed in a Bill;
- (ii) explain how definitions are used in legislation.

6.0 TUTOR MARKED ASSIGNMENT

i. Convert the following interpretation provision into a conventional definition (i.e. providing both a definition term and its definition).

In this Act, a reference to the use or operation of a motor vehicle includes a reference to the maintaining or parking of the vehicle.

ii. Why do you think an interpretation provision was preferred?

7.0 REFERENCES/FURTHER READINGS

Soetan, Olusiji A. (1997) *Elements of Legal Drafting*, Lagos: Dredew Publishers.

Thornton, G.C. (1996) *Legislative Drafting* 4th ed., London: Butterworths.

UNIT 2 COMPOSING LABELING AND STIPULATIVE DEFINITIONS

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 When are labeling definitions settled?
 - 3.2 How a labeling definition should be drafted
 - 3.3 When are stipulative definitions settled?
 - 3.4 How a stipulative definition should be drafted
 - 3.5 Points we should watch for in writing stipulative definitions
 - 3.6 Pitfalls to look out for
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment (TMA)
- 7.0 References/Further Readings

1.0 INTRODUCTION

Labelling definitions enable you to write text that is shorter and easier to read and understand. Fewer words are needed to convey your meaning, and without any loss in legal precision. If a long expression is or could constantly recur in the draft, consider providing a labeling definition term that can be substituted for it.

Stipulative definitions enable you to:

- (i) give greater precision to the meaning of an expression than is provided by the dictionary;
- (ii) remove potential uncertainties about the limits of the meaning of the expression;
- (iii) prevent ambiguity inherent in particular expressions.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- (i) Draft a labeling definition;
- (ii) Compose stipulative definition.

This unit requires you to put considerable emphasis upon *doing*, that is, completing the Self Assessment Exercises. You should spend most of your time on those matters, as they will provide greater insight into how to proceed than you will gain from the Course material and the examples alone.

3.0 MAIN CONTENT

3.1 When are labeling definitions settled?

A number of the cases where labelling definitions would be useful may be obvious from early in the composition. You can use these in writing clauses from the outset. But these definitions tend to emerge as the process of composition proceeds. It usually becomes apparent that one should be used when lengthy expressions occur frequently in your draft and their repetition obstructs the free flow of the text. If you find yourself using the same cumbersome phrase in several places, a labelling definition may allow you to transfer the detail to the definition.

3.2 How a labelling definition should be drafted

The task is usually straight-forward. Set out the repetitive words in the definition and choose an appropriate short label, as the defined term, that can be substituted for them. Both the term and the contents of the definition should be suggested by the original expression for which the label is being provided.

The defined term itself has no meaning of its own; it is merely a substitute for the words in the definition. But try to choose one that includes an important term that is used in the definition.

The usual formula is:

"[defined term]" means [term] + explanatory or additional words from the original expression.

Example Box 1

"arrestable offence" means an offence for which a police officer may arrest without a warrant;

"marriage officer" means a person appointed under this Act to be a marriage officer;

"medical practitioner" means a medical practitioner registered under the Medical Practitioners Act 1980.

Sometimes, however, the words of the original expression offer little guidance as to an appropriate label. In that case, select a term that suggests to a reader the essence of the expression for which it is substituted. Readers should not be ambushed by a definition that has little connection with what the label suggests (as when finding that a can marked "sardines" contains tuna fish).

Example Box 2

"penal institution" means:

- (a) a prison;
- (b) a detention centre;
- (c) a remand centre; or
- (d) a Borstal institution.

The defined term here gives a feel of the definition; a term such as "institution" does not.

Complete Self Assessment Exercise 1. Compare your Answer with that provided at the end of this unit.

Self Assessment Exercise 1

In the space provided, draft a clause 2 to provide a labelling definition containing a defined term to replace any expression that appears in *all* the following sections. Underline the words that it will replace.

3. No person shall carry on the business of a second-hand dealer unless that person is the holder of a licence for that purpose issued under the provisions of this Act.
4. An application for a licence referred to in the last preceding section shall be made in the prescribed form to the licensing authority.
5. The licensing authority may issue a second-hand dealer's licence, on the payment of the prescribed fee.
6. A person aggrieved by the refusal of the licensing authority to issue a licence under the provisions of section 5 may appeal to the Minister.

3.3 When are stipulative definitions settled?

These definitions develop in two main ways:

- (i) during *the planning* of the legislation, you can select defined terms and attach carefully crafted definitions to them as part of the key concepts in the

legislative design. It is easier both to work out and to write legal rules if you build them around important terms that already have precise meanings. In turn, this makes construing the legislation easier.

- (ii) in the *course of drafting*, you may find particular expressions that must be explained because they are inherently or potentially uncertain or ambiguous in some or all the contexts in which you are using them.

Example Box 3

This is an example of definitions that are likely to have developed during the planning stage of a Motor Vehicle (Compulsory Insurance) Act.

2.-(1) In this Act -

"insured person" means a person insured under a third-party policy;

"third-party policy" means a third party policy of insurance under this Act.

(2) A third-party policy under this Act is a policy that:

- (a) insures the owner of the motor vehicle to which the policy relates, and any other person who at any time drives the vehicle, against liability in respect of the death of, or injury to, a person caused by the fault of the owner or driver of the vehicle in the use or operation of the vehicle; and
- (b) is in the terms of the Schedule.

A central concept of the Act is third-party insurance. This is referred to in many contexts. So the drafter has devised a definition "third-party policy". But this is too detailed to form a conventional definition. It appears, therefore, as an interpretation provision, and "third-party policy" provides a convenient **label**. "Insured person" puts beyond doubt that the only insurance intended is this kind of policy.

3.4 How a stipulative definition should be drafted

Much depends on your objective. For different considerations apply with respect to the different forms of stipulative definition. Such a definition can take a variety of forms:

1. comprehensive definitions
2. restricting definitions
3. enlarging definitions
4. excluding definitions
5. clarifying definitions
6. referential definitions.

1. Comprehensive definitions

A comprehensive definition contains a complete statement of what the defined term must be taken to mean. The usual formula is:

"[*defined term*]" **means** [*the definition* = the complete statement of all the elements of the meaning]

This may be given greater precision by *adding* either or both:

and **includes** [*the extension* = words that extend the limits of the stated components of the definition or remove uncertainty as to those limits]

but **does not include** [*the limitation* = words that confine the limits of the stated components of the definition or remove uncertainty].

Example Box 4

"motor vehicle" *means* a motor car, motor carriage, motor cycle or other vehicle propelled wholly or partly by volatile spirit, steam, gas, oil or electricity or by any means other than human or animal power, and *includes* a trailer, but *does not include* a vehicle used on a railway or tramway.

2. Restricting definitions

Restricting definitions confine the use of a term, as it is defined in the dictionary or in this or other legislation, to a specified context. The usual formula is:

"[*defined term*]" **means** [*the term* + *the restriction* = words that restrict the dictionary meaning of the term].

Note that the defined term itself is not defined.

Example Box 5

"*agricultural land*" *means land* held under a lease issued under the Agricultural Holdings Act.

"*senior police officer*" *means a police officer* of the rank of inspector or above.

In these definitions, the meaning of "land" and "police officer" will be found elsewhere (e.g. in the Interpretation Act).

3. Enlarging definitions

Enlarging definitions make clear that the usual (dictionary) meaning of a term is extended to take in a specified matter that would, or might be taken to, fall outside it. The usual formula is:

"[*defined term*]" **includes** [*the enlargement* = words that add additional cases to the usual meaning]

Note that the term itself is neither used in the definition nor defined.

Example Box 6

"oath", in the case of a person allowed by law to affirm or declare instead of swear, *includes* an affirmation or declaration.

The literal meaning of "oath" is extended as in no way can it cover cases not involving swearing in the name of a divine or holy entity.

"University" *includes* a College of a University.

This removes doubts as to whether a reference to a collective body is to be read as covering a largely autonomous branch of such a body.

4. Excluding definitions

Excluding definitions remove from the usual (dictionary) meaning of a term a meaning that it would otherwise have or might be taken to have. The usual formula is:

"[*defined term*]" **does not include** [*the exclusion* = words that prevent specified cases being within the usual meaning]

alternatively:

"[*defined term*]" **means** [*the definition* = a precise statement of the cases covered]

Note that in neither case is the defined term used in the definition.

Example Box 7

"vessel" *does not include* a ship or boat used exclusively for navigation on inland waters;

"vessel" *means* a ship or boat used for navigation at sea.

These definitions, though not precisely identical in effect, both have the aim of excluding the same cases.

5. Clarifying definitions

Clarifying definitions remove doubts as to whether a term in its usual (dictionary or legal) meaning does or does not extend to specified matters. The following formulae are used:

"[*defined term*]" **includes** [the *clarification* = words adding the specific cases in doubt]

"[*defined term*]" **does not include** [the *clarification* = words excluding the specific cases in doubt]

"[*defined term*]" **means** [the *clarification* = words stating particular cases + general words to catch other similar cases that are within the intended meaning of the term].

Example Box 8

"offer for sale" *includes* an invitation to treat, or exposure or advertisement for sale or barter.

The defined term "offer", if given its usual common law meaning, would not extend to these cases.

"intellectual property" *means* a patent, trade mark, copyright, registered design, technical or commercial information *or other intellectual property*.

The concluding general words mean that other similar types of "intellectual property" (as a legal dictionary would define the term) are included. The specific items are in effect illustrations.

6. Referential definitions

Referential definitions specifically draw to the legislation a meaning already conferred on the defined term by other legislation, or the common law, thereby linking them. They are useful for Bills that are to be read in conjunction with legislation using similar concepts and terms or with the principal statute that deals with the matter defined. The usual formulae are:

"[defined term]" *has the same meaning as in* [the source = words providing the exact reference]

"[defined term]" *has the meaning given by* [the source = words providing the exact reference].

Example Box 9

"arbitral award" *has the same meaning as in* Article 2 of the Scheduled Convention;

"motor vehicle" *has the meaning given by* section 2(1) of the Road Traffic Act 1988.

Note that referential definitions can make it difficult for readers to ascertain the precise meaning of the text using the defined term as they must find the actual definition in other legislation. Use them only when a deliberate link with that other legislation is necessary.

Complete Self Assessment Exercise 2. Compare your Answer with that provided at the end of this unit.

Self Assessment Exercise 2

Read the following definitions and note below each why you think it was created.

1. "coin" means a coin that is legal tender in Utopia.
2. "mother" includes the adoptive mother of an adopted child, but does not include a stepmother.
3. "Public Service Commission" means the Public Service Commission established by section 92 of the Constitution.
4. "personal injury" includes damage to limbs, eyes or teeth, that are artificial.
5. "firearm" has the same meaning as in section 2(1) of the Firearms Act.
6. "child" means an individual who is under the age of 14 years.

7. A reference to a motor vehicle does not include a reference to a motor vehicle that is operated on a railway or tramway.

3.5 Points we should watch for in writing stipulative definitions

The following factors should be borne in mind when developing definitions:

- (i) if you combine features from different forms of stipulative definition, keep the aims and effects clearly in mind, if contradictions are not to happen.
- (ii) a comprehensive definition must always contain "*means*", since the stipulated definition has to displace any other meaning. (This does not prevent you from adding "*includes*" and "*does not include*", to extend or clarify).
- (iii) "*includes*" by itself does not make a comprehensive definition; reserve it for those cases where a standard meaning of the definition term is to be *altered* in some way.
- (iv) in consequence, do not state that matters are to be "*included*" if they are obviously already within usual meaning of the term. That could lead a court to believe that you intended a comprehensive definition. (Why else include the obvious?)

Example Box 10

The following is an example of this uncertainty.

"vehicle" *includes* any cart, wagon, cab, carriage, aircraft, motor car, caravan, trailer, motor lorry or motor cycle or other cycle.

Does this also include, e.g. a motor bus (which is not mentioned)? Doubts must arise because the list is so extensive and covers many obvious examples of vehicles as well as marginal cases (e.g. aircraft). It has many of the signs of a comprehensive definition. If that is what it is, the definition should use "*means*". If it was intended to cover other forms of transport too, add at the end "*or other similar vehicle*".

- (v) avoid the composite, and contradictory, expression "*means and includes*".
- (vi) **comprehensive definitions** frequently have to cover a wide range of items. Traditionally, this was done through a long series of particularised expressions. But those can easily miss out a particular case that should be covered. Today, drafters tend to use general words in the definition to describe the *class* of case wherever possible.

Example Box 11

Instead of:

"museum" means a place permanently used for the storage and exhibition of antiquities, sculpture, models, casts, carvings, paintings, drawings, photographs or films.

try:

"museum" means a place permanently used for the storage and exhibition of objects illustrating antiquities, science, natural history, the arts or of educational interest.

The latter is coming close to the dictionary meaning.

- (vii) in writing a **stipulative definition** for matters of a broad or general kind, you may find that precision is impossible if you are to cover all the matters intended. Consider using broad terms or catch-all phrases in the definition that pass the responsibility for their interpretation and application to the court.

Example Box 12

"charity" means a body of persons, or trustees of a trust, established *for charitable purposes* only.

"subsistence" means such subsistence as is reasonable in the circumstances of the employment in question, and does not include accommodation.

"racial group" means a group of persons defined by reference to race, colour, nationality (including citizenship), or ethnic or national origins.

In each case, the italicised words will be given meaning by the courts, in the event of a dispute.

3.6 Pitfalls to look out for

Stipulative definitions can sometimes cause more problems than they solve. If you follow the principles we have just worked with, you should avoid them. But it may be helpful to look a little more closely at the most common errors. These involve definitions that:

1. contain rules of law
2. are unnecessary
3. state the obvious
4. are incomplete
5. are inapplicable
6. are artificial
7. are open-ended.

1. Definitions that contain rules of law

A court is entitled to treat a definition as a guide to the meaning of words and to decline to use it as the source of rule. (They may even conclude that no rule has been specifically provided.) Place substantive rules in substantive sections, not in definitions.

Example Box 13

This following definition (in fact a labelling definition) should not be used to *confer* the power to issue licences on a Council.

"licence" means a licence issued under this Act by a Council.

The consequences of making rules through definitions can be seen from an excellent, but tricky, example from Dickerson (*op. cit.*, **para.7.6.5**), given as **Self Assessment Exercise 3**.

Complete Self Assessment Exercise 3. Compare your Answer with that provided at the end of this unit.

Self Assessment Exercise 3

The following appear in local authority bye-laws.

1. In these bye-laws, "parking space" means a space, no larger than 3 metres by 7 metres, for off-street parking of the motor vehicle.
2. No person may have more than *one parking space* on the forecourt of his premises.

Underline the part of the definition that ought to have been in a substantive rule and, in the space provided, note down why.

2. Unnecessary definitions

What is the point of a definition that merely repeats what the dictionary says? Courts expect definitions to do more than that, and therefore may try to read into a definition of this kind something you perhaps did not intend.

Example Box 14

The following definition is superfluous:

"canine" means a dog or any other animal of the canine species.

Similarly, confusion may arise if you repeat a definition that is in the Interpretation Act, exactly as it appears there, or worse, differently written when no difference in meaning intended. Rather use a definition referring to the definition in that Act.

On the other hand, it is often sensible to reproduce such a definition in your Bill if there is a strong reason to focus on the meaning given by that Act (for example, because it is a central or important concept in the Bill (e.g. "public place" in a Public Order Act).

3. Definitions that state the obvious

Again, courts are likely to look for a deeper meaning from such definitions, as they expect definitions to do more than merely state what is plain or self-evident.

Example Box 15

"dog" means any animal of the canine species *and includes a bitch or puppy*.

The first part of the definition may be needed so that "dog" will cover other canine types (e.g. wolf, dingo). But the expanding words (as highlighted) are obviously covered by the rest of the definition.

4. Incomplete definitions

When writing a definition that enlarges or excludes, make clear the extent to which it does that. This is particularly true of definitions that contain a list of items. A court may be in a dilemma if faced with a list that appears to be incomplete because it omits items that the court expects to be mentioned:

- (i) do they interpret the term to cover a case not specified in the definition, because the term could carry that meaning?
- (ii) do they refuse to read the case in because it is not mentioned, even though it is not significantly different from those that are included?

Example Box 16

Consider the following definition:

"cattle" *includes* sheep, horses, buffaloes and camels.

A dictionary meaning of "cattle" is "beasts of pasture" and clearly covers cows, bulls and oxen. But, in this "clarifying" meaning, it is difficult to be sure whether the omission of "goats" and perhaps "pigs" was deliberate or accidental. Neither strictly is a beast of pasture, since they do not graze.

In this context, that the interpretive canon *ejusdem generis* can be useful.

Complete Self Assessment Exercise 4. Compare your Answer with that provided at the end of this unit.

Self Assessment Exercise 4

Remind yourself about the *ejusdem generis* canon, by looking at the course LED: 605 (Constitutional Perspectives).

In the space provided, show how that canon could be used to improve the definition in **Example Box 16**.

By adding a catch-all phrase after a group of specific cases (e.g. "or other similar..."), you show:

- (i) that a list of cases is not intended to be exhaustive;
- (ii) the extent to which unspecified cases must have characteristics in common with those listed, in order to be included.

Example Box 17

"art gallery" means a place permanently used for the exhibition of paintings, drawings, sculpture, casts *or other similar artifacts*;

"art gallery" means a place permanently used for the exhibition of paintings, drawings, sculpture, casts *or other artifacts, whether of a similar nature or not.*

Complete Self Assessment Exercise 5. Compare your Answer with that provided at the end of this unit.

Self Assessment Exercise 5

Examine the second definition in **Example Box 17**. Do you think that the highlighted words throw doubt on the choice of the definition term "art gallery"? Suggest an alternative defined term to overcome the objection.

5. Inapplicable definitions

Two particular cases cause problems:

- (a) a definition provided for a term that is used nowhere in the legislation. Don't forget to remove definitions when you remove or replace the defined terms that they were designed to support.
- (b) the definition is not intended to have effect in every instance in which the term is used. Although the definition applies "**unless the context otherwise requires**", *when* the context requires a different meaning may not always be obvious. Users then have this dilemma:

- (i) is the definition meaning intended to be replaced by another that the defined term can bear? or
- (ii) should the definition meaning be applied even though it may have to be strained?

Example Box 18

A definition of the word "marry" as "contract a marriage" would not be acceptable in this case:

A person, being *married*, commits bigamy who, during the lifetime of the person's spouse, *marries* another.

The second reference must be to a purported marriage, as a bigamous marriage is void.

Use a term that has been defined only in the sense defined. If another meaning is required at some point in the Bill:

- (i) choose a different word for that case; or
- (ii) give an express indication that, in this instance, the term carries a different meaning, e.g. by providing a further definition confined to this context.

6. Artificial definitions

The defined *term* (which the user comes across most often) should convey something of the sense in which it is used, if at all possible. Otherwise the rules in which it is used may have no immediate meaning to the reader. Don't introduce into a *definition* wholly unexpected elements that are inconsistent with the defined term. Your definitions should make it easier to use legislation. They should help, not obstruct, understanding.

Example Box 19

Here is a striking example from a Carriage of Nuclear Material Act of artificial definitions that not only get in the way of understanding, but are likely to irritate readers.

Interpretation.

2. In this Act,

"relevant carriage", in relation to nuclear material, means carriage on behalf of a *relevant operator*;

"relevant country" means a country for the time being bound by a *relevant international agreement*;

"relevant installation" means an installation to which a *relevant international agreement* applies;

"relevant international agreement" means an international agreement with respect to third- party liability in the field of nuclear energy to which Utopia is a party;

"relevant operator" means a person who, for the purposes of a *relevant international agreement*, is the operator of a *relevant installation*.

Application.

3.-(1) This Act applies in the case of nuclear material which:

(a) is in the course of carriage on behalf of a *relevant operator*; or

(b) is in the course of carriage to such an operator's *relevant installation*, with the agreement of that operator, from a place outside the *relevant countries*; or

(c) having been on such an operator's *relevant installation* or in the course of a carriage on behalf of such an operator, has not subsequently been on any *relevant installation* or in the course of any *relevant carriage* or (except in the course of *relevant carriage*) within the territorial limits of a country which is not a *relevant country*.

Even so, the drafter has still used "such an operator" three times, instead of the relevant definition term!

7. Open-ended definitions

Definitions are of limited value if they give so little guidance as to meaning that they themselves need to be interpreted. This merely substitutes one uncertainty for another.

Example Box 20

The following definition gives no guidance at all as to the matters likely to be covered by it.

"art gallery" means any place used for the exhibition of objects of artistic distinction.

You have already seen a clearer version in **Example Box 17**.

4.0 CONCLUSION

Referential definitions make it difficult for readers to ascertain the precise meaning of the text using the defined term, as they must find the actual definition in other legislation. So use them only when a deliberate link with that other legislation is necessary. Your definitions should make it easier to use legislation. They should help, not obstruct understanding.

5.0 SUMMARY

In this unit, you have learnt how to compose labeling and stipulative definitions. You should now be able to:

- (i) Draft labeling definitions;
- (ii) Compose stipulative definitions.

6.0 TUTOR MARKED ASSIGNMENT

1. Note down why, on the principles you have just been working with, the composite expression "means and includes" is to be avoided.
2. Why is "*highway obstruction*" an unsatisfactory defined term for the following definition? Suggest a better alternative.

"highway obstruction" means a motor vehicle that has been abandoned and is interfering with the free flow of traffic on a highway.

7.0 REFERENCES/FURTHER READINGS

Dickerson R. (1986) *The Fundamentals of Legal Drafting*, (2nd ed.) Boston: Little, Brown & Co.

Soetan, Olusiji A. (1997) *Elements of Legal Drafting*, Lagos: Dredew Publishers.

Thornton, G.C. (1996) *Legislative Drafting* 4th ed., London: Butterworths.

Answer to Self Assessment Exercise 1

With the definition in clause 2, the sections could read:

2. In this Act, "*licence*" means a second-hand dealer's licence issued under section 5.
3. No person shall carry on the business of a second-hand dealer unless that person is the holder of a *licence*.
4. An application for a *licence* shall be made in the prescribed form to the licensing authority.
5. The licensing authority may issue a second-hand dealer's licence, on the payment of the prescribed fee.

6. A person aggrieved by the refusal of the licensing authority to issue a *licence* may appeal to the Minister.

This saves 22 words. A substitution is not appropriate in clause 5, as this, in conferring the function of issuing licences on the authority, contains the provisions on which the definition depends.

Answer to Self Assessment Exercise 2

Definitions were used, in relation to the following terms for these reasons:

1. To *restrict*, or particularise, the normal meaning of the term "coin".
2. To *clarify* the application of a potentially ambiguous term in two specific cases involving persons who are not natural mothers.
3. To allow a shorter expression (a *label*) to be substituted for the precise, but lengthy, legal expression.
4. To *enlarge* the normal meaning of the term "personal injury" to include connected matters not otherwise within it.
5. To incorporate (*by reference*) a meaning already established by law, and thus to link the two statutes.
6. To provide a *comprehensive* meaning to a term that could otherwise have a variety of meanings.
7. To *exclude* cases that otherwise are likely to fall within the literal meaning of the term "motor vehicle" (i.e. a vehicle driven by a motor).

Answer to Self Assessment Exercise 3

The term "parking space" means a space, *no larger than 3 metres by 7 metres*, for off-street parking of a motor vehicle.

The highlighted words are intended to *fix the maximum dimensions* of a parking space. Appearing as part of a definition, they have to be construed as merely *descriptive* of the kinds of spaces that are the subject of the rule.

When applied to the section, their effect is to permit persons to have as many parking spaces as they like, so long as they are in excess of the size described! But they may only have one *of the kind described*.

By contrast, what is intended is that no one should have more than one space, and that the space must not exceed these maximum dimensions. That calls for a substantive rule to that effect, which cannot be achieved by a definition.

Answer to Self Assessment Exercise 4

1. If other animals, except goats and pigs, are to be included, the following definition will help:

"cattle" *includes* sheep, horses, buffaloes and camels *and other similar beast of pasture*.

2. If the original list is to be exhaustive, it would be better to provide a *comprehensive* definition:

"cattle" *means* cows, bulls, oxen, buffaloes, camels and sheep.

Answer to Self Assessment Exercise 5

The highlighted phrase suggests that a place is an "art gallery" if *any* kind of artifact is exhibited there. So, a place where weapons or postage stamps or toys are exhibited becomes an art gallery under this definition. This is contrary to standard usage.

A better term might be: "museum" or "exposition".

"*exposition*" means a place permanently used for the exhibition of any kind of artifact.

UNIT 3 THE SYNTAX OF DEFINITIONS & DRAFTING INTERPRETATION PROVISIONS

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
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 - 3.2 When to use an interpretation provision
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 - 3.4.1 Practical hints you should bear in mind
 - 3.4.2 Final checks you should make
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- 5.0 Summary
- 6.0 Tutor Marked Assignment (TMA)
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1.0 INTRODUCTION

Although definitions are largely guides to the meaning of words in legislative sentences in which the definition term is used, they must still be written with an eye to their grammatical relationship to those sentences.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- (i) Explain the syntax of definitions;
- (ii) Draft interpretation provisions.

3.0 MAIN CONTENT

3.1 Grammatical considerations you should bear in mind

Keep five features particularly in mind:

1. Definitions are to be read into sentences.
2. Words in a definition must not be duplicated by words in the sentence.
3. The definition must be grammatically consistent with the defined term.
4. Definitions apply, with the necessary modifications, to the other grammatical forms of the defined term.
5. Typically, definitions should be expressed in the form of a verb or a noun.

1. Definitions are to be read into sentences

Users have to read definitions together with the legislative sentences in which the defined term is used. Prepare them with that in mind. It is good practice to read the sentences, substituting your draft definition for the defined term, to test its suitability.

If a definition does not fit, it may need changing.

Of course, if you include an unsatisfactory definition, the courts have to do their best to make it fit, even if the syntax is defective. We should try to prevent this.

Complete Self Assessment Exercise 1. Compare your Answer with that provided at the end of this unit.

Self Assessment Exercise 1

Look again at the definition of "*highway obstruction*" as set out in **TMA No. 2 of the last unit**. Read it into the following sentence.

A local government council shall take such action as, in the circumstances, is necessary to ensure that *a highway obstruction* is not interfering with the free flow of traffic on a highway.

Although its purpose is clear enough, technically the definition is defective. Note down how this might be put right.

2. Words in a definition must not be duplicated by words in the sentence

In drafting a substantive provision, use the defined term, and do not include words already part of the definition. Otherwise, you say the same thing twice. It is easy to overlook this when trying to bring out the essentials of the rule in the sentence. If you feel it necessary to include the words in the rule to help the definition to be understood, this is an indication that you should give the definition more thought.

Example Box 1

In the following sentence, substitute, for the term "highway obstruction", the original definition of that term given in **TMA 2 of the last unit**. You should readily see this defect.

A highway authority shall, as soon as practicable, remove a highway obstruction *that is interfering with the free flow of traffic on a highway*.

The rule is clear, but the highlighted phrase is already part of the definition.

3. The definition must be grammatically consistent with the definition term

The same part of speech must be used for the definition as is used in the defined term (e.g. noun matched by noun, verb by verb, adjective by adjective, singular by singular, plural by plural). The examples in **Example Box 32** show the conventions in operation.

Example Box 2

Verb:

"sell" means sell, offer for sale, expose for sale, advertise for sale or have in possession for sale.

Singular noun (which is the typical form):

"animal" means a dog, cat or pony.

Plural or a collective noun:

"livestock" includes horses, cattle, sheep and goats, but does not include buffaloes or camels.

Where, as in these examples, the definition contains several items, the last two items should be joined:

- by "or", after "means" and "does not include";
- by "and" or "but", after "includes".

Complete Self Assessment Exercise 2. Compare your Answer with that provided at the end of this unit.

Self Assessment Exercise 2

Note down, in the spaces provided, the grammatical flaw in each of these examples (from trainee drafters).

1. "sell" includes invitation to treat.

2. "domesticated animal" means horse, sheep, cattle or goat, but does not include cats or dogs.

3. "signature" includes applying a mark or a chop.

4. **Definitions apply, with the necessary modifications, to the other grammatical forms of the definition term**

Definitions are given in one part of speech only (e.g. as a verb or a noun). Literalist judges in the past were disinclined to give equivalent meanings to other grammatical forms of that part. Drafters have countered this in two ways:

- (i) by adding appropriate words to the definition;

Example Box 3

"absent without leave" means absent from any hospital and liable to be returned there under this Part, *and kindred expressions are to be construed accordingly.*

- (ii) under general authority conferred by the Interpretation legislation to extend the definition to grammatical variants of the defined term.

The effect of these devices is to allow you to use in substantive provisions:

- (i) all other variations to the part of speech in which the definition is expressed (e.g. in relation to a verb definition ("sell"), all other verb forms, past, present or participle ("has sold", "sells" or "selling").

- (ii) other parts of speech derived from the same word (e.g. a noun ("sale"; "seller").

But check this effect as it may not work the way you intend in every context.

Example Box 4

The following definition:

"sell" includes agree to sell,

may not be suitable in respect of a rule that requires a record to be kept of "sales" in a "sales-book", if that is to be a record of transactions in which the property in the item has been transferred (i.e. "sold" in a restricted sense).

5. Typically, definitions should be in the form of a verb or a noun

As we have just seen, other parts of speech derived from nouns and verbs are given their equivalent meaning. These include adjectival forms of the term. However, a definition in the form of an adjective can cause difficulties in drafting. For an adjective cannot stand alone. It must always be linked with another term, which it modifies. So, in order to understand, and indeed to write, an adjectival definition, you must take account of the other terms with which it will be linked.

Example Box 5

The following might be a definition of the term "confidential", which is to be used to modify various kinds of materials (e.g. document or information), listed in the legislation:

"confidential" means entrusted to, and held in confidence by, a person.

But this gives no indication of the matters with which the definition is to be linked and little guidance as to how they are to be linked. This is not the only difficulty; see further, **Self Assessment Exercise 3**.

Complete Self Assessment Exercise 3. Compare your Answer with that provided at the end of this unit.

Self Assessment Exercise 3

The following adjectival definition does not work correctly when used in the section that follows. In the space provided, note down why.

"*confidential*" means held in confidence by a person to whom the matter has been entrusted.

12. A person who is in possession of *confidential* matter commits an offence if he or she communicates that material to another person who is not a person entitled to receive that matter under this Act.

There are several ways in which you can write the definition in order to link with the term that it modifies:

(a) Define an adjective and noun together

Make a definition for a defined term that includes both an adjective and a noun. This is particularly appropriate where the noun:

- (i) is always modified by that adjective; and
- (ii) is the **only** noun to be modified by that adjective.

Example Box 6

"charitable institution" means a charity, or an institution, other than a charity, that is established for charitable, benevolent or philanthropic purposes.

(b) Define both the noun and the noun as modified

Provide two definitions, one for the noun alone, and the other for the noun as modified. For the second, use the same defined term but with a suitable adjective.

Example Box 7

"marriage" means a marriage contracted in accordance with the Marriage Act;

"voidable marriage" means a *marriage* that may be declared void by a court, at the instance of one of the parties, on any of the grounds set out in this Part.

(c) Use a relational definition

You can define an adjective "in relation to" the noun that it is intended to modify. This is particularly useful, where the same adjective is to be used with a series of such nouns.

Example Box 8

Taking the case in **Self Assessment Exercise Box 3**:

"confidential", *in relation to a document or matter*, means that the document or matter is held in confidence by the person to whom it was entrusted.

You can also use a relational definition in combination with a noun and adjective jointly defined (as in **(a) above**).

Example Box 9

"confidential document" or "confidential matter", *in relation to a person in possession of a document or matter*, means that the document or matter has been entrusted to, and is held in confidence by, that person.

This definition has effect wherever the draft refers to a person in possession of a confidential document or confidential matter, but *only* in those cases.

3.2 When to use interpretation provision

As we have seen earlier, interpretation provisions allow explanations to be set out in the form found in substantive rules when it is impracticable or cumbersome to use a definition. They can perform all the functions for which stipulative definitions are used.

Example Box 10 illustrates formulae that may be used to achieve the same results as stipulative definitions.

Example Box 10

comprehensive provision:

1. For the purposes of this Act, a building is a listed building if it is for the time being included in a list compiled or approved by the Minister under section 1 of the Heritage Protection Act 1990.

restricting provision:

2. For the purposes of this Part, a road is to be regarded as affected by works if the effect of the works is to prevent or restrict access to the road.

clarifying provision:

3. References in this Act to quotation on a stock exchange in Nigeria are to be construed as references to listing in the Official List of the Nigerian Stock Exchange.

enlarging provision:

4. For the purposes of this Act, a person employed by a company that is a wholly owned subsidiary of any company or other body mentioned in any provision of this Act is to be regarded as employed by that company or body.

excluding provision:

5. For the purposes of this Act, a mechanically propelled vehicle used for cutting grass and controlled by a pedestrian is not to be treated as a motor vehicle.

referential provision:

6. References in this Act to a married woman living with her husband are to be construed in accordance with section 282 of the Taxes Act.

3.3 How a clause containing interpretation provisions should be drafted

The clause must show clearly that the provisions are there to guide users as to the way expressions are used in the Act. There are two common forms:

- (i) an explanation of what a reference in the Act to, e.g. a stated item or activity, means or includes;
- (ii) a statement that a person, item or activity "is to be read", or "is to be treated", or "is to be taken to be" as the explanation goes on to state.

These clauses often create a legal fiction; they require that one case must be equated with another for legal purposes, even though, in fact, they do not fall within the same meaning. Avoid archaic words such as "deemed" when providing an explanation of how an expression is to be treated. The words suggested in the next **Example Box** bring this out more clearly.

Example Box 11

--

(2) In this Act, a reference to the use or operation of a motor vehicle includes a reference to the maintenance of the vehicle.

(3) For the purposes of this Act, a person *is to be regarded as* the owner of a motor vehicle if:

- (a) the vehicle is registered in that person's name;
- (b) where the vehicle is not registered, that person is entitled to its immediate possession;
- (c) where a trader's plate is attached to the vehicle, the plate has been issued to that person.

Don't use provisions of this kind to create substantive rules of law. These provisions explain how expressions used in the Act are to be construed; they are not places to look for rules of law.

3.4 Hints and checks

3.4.1 Practical hints you should bear in mind

1. Don't start the drafting of a Bill by devising all the definitions before working on the substantive provisions. Definitions should, in the main, evolve as the text develops.
2. Keep a separate sheet of paper upon which to note suitable places for definitions and your ideas for their contents, as you compose the substantive rules.
3. Keep a note of the places in your draft in which defined terms are used, as, for example, by underlining them or putting them in **CAPITAL LETTERS**. This will help you find them again, when you are checking your draft.
4. Test whether your definitions work by reading them into the text of the substantive provisions in place of the defined term.
5. In each place where a defined term is used, check that the definition produces the desired effect and fits grammatically.

3.4.2 Final checks you should make

1. Remember that the final version of a definition may not be that with which you started. So, make sure that your final version is suitable for *every* case in which you intend to use the defined term.
2. Make sure that you have not created a definition for a term that is not used in the draft.

3. Check that the statute does not use a defined term in any other sense than that prescribed by the definition.

4. Check that your defined terms and the definitions themselves do not use artificial expressions that can confuse rather than assist the reader.

5. Make sure that you have not overloaded your draft with complex definitions. Keep in mind that users are often not conversant with all the ways in which definitions are used.

6. Check that your definitions are listed in alphabetic order.

4.0 CONCLUSION

When drafting a substantive provision, use the defined term, do not include words already part of the definition. Do not start drafting a Bill by devising all the definitions before working on the substantive provisions. Definitions should evolve as the text develops.

5.0 SUMMARY

In this unit, you have learnt the syntax of definitions and how to draft interpretation provisions. You should now be able to provide appropriate definitions and other interpretation provisions for a Bill.

6.0 TUTOR MARKED ASSIGNMENT

Read the following interpretation provisions. Why do you think they may have been used in preference to conventional definitions?

1. A reference in this section to sailing a ship includes a reference to taking off or landing a sea-plane or flying a hovercraft.

2. For the purposes of this Act, a document or matter in the possession of a person is to be treated as a confidential document or confidential matter if it has been entrusted to, and is held in confidence by, that person.

3. Public Officers (Disciplinary Proceedings) Act

For the purposes of this Act, serious misconduct is conduct that, if proved:

- (a) constitutes a criminal offence punishable by imprisonment; or
- (b) constitutes a threat to the security of the Republic; or
- (c) renders the officer charged liable to dismissal from the public service under Part II.

7.0 REFERENCES/FURTHER READINGS

Soetan, Olusiji A. (1997) *Elements of Legal Drafting*, Lagos: Dredew Publishers.

Thornton, G.C. (1996) *Legislative Drafting* 4th ed., London: Butterworths.

Answer to Self Assessment Exercise 1

If the obstruction is defined as a vehicle that *is causing* interference, an obstruction must always have that feature. It is impossible for it *not* to interfere with traffic, yet the sentence refers to the case where an obstruction is *not* interfering with the traffic flow!

If you read the sentence aloud with the words of the definition in place of the term, that contradiction is evident.

The problem is compounded when the council comes to take action. From that moment, the obstruction no longer fulfills the definition since it no longer interferes with traffic. It would not meet the requirements of a subsequent section that says what is to happen to the highway obstruction *after* it has been moved.

A better definition might be:

"[highway obstruction]" means a motor vehicle that has been abandoned in a manner that it is likely to interfere with the free flow of traffic on a highway.

Interference here becomes part of the description of a quality of the vehicle at the time it is abandoned, not a distinct, and continuing, characteristic.

Alternatively, the substantive rule could be rewritten:

A local government council shall take such action as, in the circumstances, is necessary to ensure that a highway obstruction *is removed so as to permit* the free flow of traffic on a highway.

Answer to Self Assessment Exercise 2

1. A verb is used in the defined term; the definition uses a noun.
2. The defined term is in the singular; the definition uses "cattle, and "cats or dogs", which are plural forms.

3. The defined term, "signature, is a noun: the definition uses a participle (i.e. a verb adjective).

Answer to Self Assessment Exercise 3

If the definition is substituted for the term, the extract reads:

A person who is in possession of any matter held in confidence by *a person* to whom the matter has been entrusted

It is not as clear as it should be that "*a person*" in both cases refers to the same person. It could be construed as if *two different persons* were contemplated.

What the rule intends, but does not quite say is:

A person who is in possession of any matter that has been entrusted to, and is held in confidence by, *that* person

MODULE 3 WHEN TO USE PURPOSE CLAUSES & APPLICATION PROVISIONS

Unit 1	Purpose Clauses
Unit 2	Application Clauses
Unit 3	Temporal Application
Unit 4	Provisions binding the State
Unit 5	Extra-territorial extension

UNIT 1 HOW TO COMPOSE LEGISLATIVE SENTENCES

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1.0 INTRODUCTION

This unit deals with a type of preliminary provision that is not yet widely used in most jurisdictions (including Nigeria). However, the value of a purpose or objects clause is increasingly recognised. This unit explains when these may contribute to a better understanding of the aims of legislation and how they may be used.

This unit is designed to enable you to:

- (i) Find out local practice on this matter;
- (ii) Examine and put into practice the techniques for producing sound and well drafted purpose clause.

2.0 OBJECTIVES

By the end of this unit, you should be able to:

- (i) Provide a purpose clause when one is required.

Your aim in this unit is to find out whether purpose clauses are or might be used in Nigeria and to compare any local practice with developments elsewhere. As the topic may be unfamiliar, make sure that you fully understand how these clauses differ from other provisions that give an indication of what a bill is about (e.g. long titles and preambles) and when they may be of particular value.

3.0 MAIN CONTENT

3.1 What is a purpose (or objects) clause?

A purpose, or objects clause is appropriate only for a Bill. For it is used to state the policy objectives of the Act and **all** subsidiary legislation made under it. In most jurisdictions, these clauses are still rarely used, if at all. Recently, their inclusion is becoming more common; indeed, in Australia, they are now a standard feature of Acts of any substance.

Example Box 1

The objects of this Act are:

- (a) to eliminate, as far as possible, discrimination against persons on grounds of physical or mental disability, in the areas of work, accommodation, education, and the provision of goods, facilities and services;
- (b) to promote equality of opportunity between persons with, and persons without, a physical or mental disability;
- (c) to improve access and facilities for persons with a physical disability in respect of public places and places of public entertainment.

A purpose clause can be used:

- (i) to apply to the whole Act and so to set out the objectives of the entire legislation;
- (ii) attached to each or some of its individual Parts, to state the aims of that part of the legislative scheme;
- (iii) as a preliminary subsection of a particularly long and complicated section to indicate the objectives for which the section is to be used.

3.2 What purposes does a purpose clause serve?

As we can see from **Example Box 1**, a purpose clause performs a different function from both the long title and the preamble. It is principally to make explicit the *policy objectives* that the Bill, when implemented, is intended to bring about (rather than indicating the legal means it uses to produce those results (as a long title), or explaining the mischief to be remedied and the origins of the Act (as a preamble)). It performs a number of functions in this respect:

(a) **As context indicator**

As **Example Box 1** also shows, a major value is in giving the reader an immediate overall picture of what the Bill sets out to achieve. Having read it, users should find it easier to master the details of the substantive rules, since they have the context in mind when they come to read those rules. You will know from your own experience that we understand points that others are making more readily if we start with a clear view of the overall issues.

(b) **As an aid to interpretation**

The clause also provides authoritative guidance on the legislative policy to which the Judges may be expected to have regard when interpreting the Act, instead of having to work it out from their reading of the substantive rules. For example, it can be used to indicate an objective to codify the law on a particular subject, which discourages the courts from looking outside the Act to previous case-law.

Since these sections are enacted explicitly to state the policy behind the Act, in principle, they should command greater respect than preambles or long titles. But they are unlikely to be treated by the courts as either conclusive or comprehensive (however hard a drafter may try to make them that). But as a legislated aid when a provision is claimed to be obscure or ambiguous, they can assist the courts by:

- (i) establishing the statutory context;
- (ii) confirming that particular provisions can be treated as clear and unambiguous since they carry forward the stated policy objectives.

3.3 Why drafters do not use them often

Many drafters have reservations about the value of these clauses. Their reasons are worth bearing in mind.

- (i) they can cause problems when considered at the committee stage in the Legislative Houses, as they focus discussion again on issues which Government likes to have concluded by the vote at the end of the Second Reading;

- (ii) as typically they are agreed to early in the legislative process (being preliminary provisions), they may not state the policy accurately if major amendments are subsequently made to the substantive provisions;
- (iii) they are considered to be unnecessary, and may even be counter-productive, since the policy is implicit, and can be deduced, from the way the substantive rules are drafted;
- (iv) they are no substitute for properly structured legislation which gives actual effect to the policy;
- (v) if a legislative plan has been properly worked out, the policy will be fully implemented by the legislation, and a statement of policy adds nothing of use;
- (vi) if the plan has not been carefully worked out, the courts are unlikely to remedy defects by resorting to a purpose clause;
- (vii) it is not easy to draft them so as to provide a sufficiently full statement of objects that enables courts to reach satisfactory answers on difficult marginal cases of interpretation;
- (viii) if the Act is amended by subsequent legislation, the amendments must be consistent with the purpose clause, unless that too is appropriately amended;
- (ix) they may be no more than a manifesto of entirely *political* objectives, quite unsuited to inclusion in a legislative instrument. Dickerson (*Fundamentals of Legal Drafting*, para.13.5) suggests that:

most general purpose clauses wind up as pious incantations of little practical value, because what little information they contain is usually inferable from the working text.

- (x) if written in very broad, loose or too generalised terms, they can be a positive disadvantage, by leading the reader down a speculative or unhelpful track.

These criticisms suggest that we should take care about how we use purposes clauses, rather than that we should not use them at all.

Self Assessment Exercise 1

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Read through these criticisms again. In each case, ask yourself what steps you might take to meet the points made.

3.4 When a purpose clause can be used most profitably

Their real value lies in the help they can give to readers in construing (that is, in understanding) the legislation. This is particularly the case for complex or wide-ranging legislation, or Bills that make innovatory changes or will be difficult to work with. There is less value in using them for the following:

- (i) Bills with narrow or obvious aims that can be made evident in the long title or even by the short title;
- (ii) Bills that are short (where the policy can easily be seen from a reading of the substantive provisions);
- (iii) amending Bills (especially where the principal Act contains a purpose clause), unless to indicate major policy changes that it is making to the Act;
- (iv) Bills that make a large number of unconnected changes in the law (since there is no unifying policy).

They gain in value the more specific they are, since they then become more useful as an aid to interpretation. For that reason, they have particular value:

- (i) at the beginning of those individual Parts of a Bill that deal with matters central to the legislative scheme;
- (ii) at the beginning of individual sections that are particularly long or complicated.

3.5 How a purpose clause should be drafted

Drafting any legislation calls for a thorough understanding of the policy objectives. They are vital to the planning of the Bill, and provide a unifying factor in making decisions about which provisions should be grouped with which. (We looked at this in detail in **LED: 609** (*How might we design a legislative plan?*). So if the analysis and planning have been done thoroughly, you should be well placed to articulate those objectives whether for the whole Act or for a Part.

In drafting a purpose clause:

- (i) state the objectives in precise and concise terms, using the same kinds of expressions you use elsewhere in the Bill;

- (ii) express the individual purposes in terms of what is to be achieved, that is, the *results* that are intended, rather than the means of achieving them;
- (iii) cover the essentials of all the principal objectives of the Bill;
- (iv) focus each purpose on a precise objective, so that collectively the objectives cover the required ground;
- (v) don't try to deal with several different aims in a single, very generalised proposition;
- (vi) if there is more than one purpose (as there usually will be), set out each of them in a separate lettered paragraph;
- (vii) avoid grandiose claims or absurd statements of the obvious which have no place in a statute.

The language of a purpose clause must be appropriate to a legal document that has to be applied and interpreted. Don't use the kind of clause illustrated in **Example Box 2**.

Example Box 2

Purposes of this Act.
2.-(1) Methylated spirit is a dangerous poison, yet some foolish people still drink it.
(2) The purpose of this Act is to prohibit the drinking of this poison, and for that purpose to strictly control its importation, sale, possession and use.

Subsection (1) is unsuited to legislation; subsection (2) says no more than what is contained in a typical long title.

If the purpose clause would be too long and detailed if every aspect of policy were to be itemised, concentrate on the major objectives and begin with, e.g.:

The principal purposes [objects] of this Act are [*or* include]:

This leaves ancillary or incidental purposes to be inferred.

You can express the purpose either by using a noun (e.g. "the elimination of ") or a verb (e.g. "to eliminate"). Compare the example in **Example Box 1** with the different form in **Example Box 3**.

Example Box 3

The objects of this Act are:

- (a) the elimination, as far as possible, of discrimination against persons on grounds of physical or mental disability, in the areas of work, accommodation, education, and the provision of goods, facilities and services;
- (b) the promotion of equality of opportunity between persons with, and persons without, a physical or mental disability;
- (c) the improvement of access and facilities for persons with a physical disability in respect of public places and places of public entertainment.

Attaching purposes to Parts, or individual sections, may be particularly effective. In Dickerson's words, such an approach can "focus on specific uncertainties". Further, as the Renton Committee (*Report on the Preparation of Legislation*, para.11.8) recommended:

statements of purpose should be used when they are the most convenient method of delimiting, or otherwise clarifying, the scope and effect of legislation.

Example Box 4

25. Every local authority, in performing its functions under this Part, shall have due regard to the principal purposes of this Act, that is to say -
- (a) the elimination of unlawful racial discrimination; and
 - (b) the promotion of equality of opportunity, and good relations, between persons of different racial groups.

Check your first version of a clause at the conclusion of the drafting of the Bill, to ensure that the purposes cover all the matter contained in the substantive rules. As the Bill passes through the Legislature, monitor the amendments, so that the clause itself can be amended if major changes are made in the legislative scheme.

Self Assessment Exercise 2

Write down an example of a purpose clause from a recent Statute in Nigeria.



4.0 CONCLUSION

A purpose clause is only appropriate for a Bill. It performs a different function from both the long title and the preamble. It is principally to make explicit the policy objectives that the Bill when implemented, is intended to bring about. So the language of a purpose clause must be appropriate to a legal document.

5.0 SUMMARY

The discussion in this unit should have shown the potential usefulness of purpose clauses and should have provided an opportunity for you to discover the extent to which they are used in Nigeria. In consequence, if the occasion arises for using this device either of an entire instrument or for a part of it, you should be in a position to know how the drafting might be approached. You should now be able to provide a purpose clause when one is required.

6.0 TUTOR MARKED ASSIGNMENT

Explain the criticisms of purpose clauses.

7.0 REFERENCES/FURTHER READINGS

Dickerson R. (1986); *The Fundamentals of Legal Drafting*, (2nd ed.) Boston: Little, Brown & Co.

Renton Committee, (1975) *Report on the Preparation of Legislation* Cmnd 6053, London: HMSO.

UNIT 2 APPLICATION CLAUSES

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 What assumptions underlie the application of legislation?
 - 3.2 When should an application clause be used?
 - 3.3 When application provisions are most commonly used
 - 3.4 How an application clause should be drafted
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment (TMA)
- 7.0 References/Further Readings

1.0 INTRODUCTION

In this unit we look at general features of application clauses. Drafting application provisions on three important specific matters (provisions to bind the State, extra-territorial application and temporal application) is considered in more detail in the following units. These three particular topics are the subject of important interpretation presumptions about the application of legislation, with which you must be familiar.

2.0 OBJECTIVES

By the end of this Unit, you should be able to:

- (i) Determine when an application provision is needed;
- (ii) Draft application clauses.

3.0 MAIN CONTENT

3.1 What assumptions underlie the application of legislation?

The Constitution generally confirms that the Legislature has full competence to make law for the "peace, order and good government" of the jurisdiction over which it has authority. This recognises a principle shared by all countries that the territorial Parliament and Government are the bodies that have the responsibility for regulating the territory's inhabitants and affairs. This doctrine has resulted in a number of interpretative presumptions about the application of written law (which we considered in **LED: 605** (*How do we work under interpretation rules?*)).

These legislative presumptions typically state that, *unless there is a contrary indication* (e.g. by an application provision), statute law applies to:

- (i) all natural persons within the territorial limits, including those who do not hold its citizenship;
- (ii) all artificial persons created in that territory according to its law;
- (iii) all acts and omissions, and activities, that take place (in whole or part) in that jurisdiction after the statute comes into force;

but does not apply to facts that are already past when it came into force.

Other laws contain *general* exceptions or qualifications to some of these presumptions. It is presumed, in the absence of a specific application provision, that the cases covered by these exceptions and qualifications and occurring in the jurisdiction apply. These arise where the general law:

- (i) confers privileges as to the application of the law to specified classes of persons (e.g. diplomats and others who enjoy immunities under international law);
- (ii) imposes disabilities on specified classes of persons (e.g. aliens who are denied certain benefits; the mentally ill, the insolvent, minors and, in some countries, married women).

3.2 When should an application clause be used?

If these presumptions and legal exceptions adequately cover your purposes, specific application provisions are unnecessary. But they are called for where such matters need to be modified to meet your requirements (e.g. the Bill concerns only a section of the population, or is to apply outside the territorial limits or is to extend to the mentally ill).

Even then, you may find it more satisfactory to provide for the application of a legislative scheme by different means. You may be able to draft the substantive rules in a way that makes their limited application clear. Indeed, our standard method of drafting is to impose rights or duties on particular classes in particular circumstances, which effectively limits the legislation to those cases.

Example Box 1

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1. A Bill that deals with the powers of police officers need not state that it applies to police officers; the rules themselves will be expressed as conferring the powers on them.

2. Similarly, rules in a Bill to control dealing in all types of second-hand goods will refer throughout to goods of that description. There is no need for the Bill to be *applied* as such to those goods. If the nature of those goods is unclear, the term can be clarified by a definition or interpretation provision.

There is no need to provide an application clause if the rules themselves leave no doubt as to the persons, behaviour or cases that is within their ambit. On the other hand, an application clause is valuable, often necessary for the following. To:

- (i) clarify the scope of the Bill if it is not fully apparent from the contents or might be seen to be ambiguous in this respect;
- (ii) stipulate limits to the operation of all, or a specified part, of the substantive rules in the Bill;
- (iii) exempt cases from, or to extend, its presumed coverage;

By so doing, an application clause gives prominence to these features in the Bill itself.

Complete Self Assessment Exercise 1. Compare your Answer with that provided at the end of this unit.

Self Assessment Exercise 1

1. Draft a clause limiting the operation of a Bill to your capital city.

2. Draft a clause excluding police officers who have a rank below that of Inspector from a Part of a Bill.

One of the main uses of these clauses is to stipulate that the general body of rules in the Bill is to operate in a specific context (only or in addition to what would be presumed). Similarly, they can be particularly effective to explain the coverage of a group of provisions, say, in a Part. In that case, they should be placed prominently at the beginning of the Part, most effectively as the first section or immediately after any purpose clause.

If the application of an individual rule needs explanation, it is usually possible to draft the rule in such a way as to make that clear without specifically applying it to a particular case. On the other hand, an application provision is sometimes useful to break a long and detailed set of requirements in a section into more manageable components.

Example Box 2

(1) This section applies where a tenant assigns premises held by him under a tenancy.

This sets the context for subsection (2) to deal with the case where the tenant assigns the whole of the premises, and subsection (3) with cases where the tenant assigns part only of the premises.

Application clauses are equally useful in Bills and subsidiary legislation. The Interpretation Act (See section 12(1) of the Interpretation Act) typically authorises subsidiary instruments to be made for more restricted circumstances than those covered by the parent Act or differently for different classes of the cases to which the parent Act applies. Bills may contain delegated powers similarly expressed. In these cases, an application clause in the subsidiary instrument is a sensible way of giving effect to those powers.

3.3 When application provisions are most commonly used

Application clauses are most frequently used to:

- (a) extend or restrict the persons or things affected;
- (b) settle the geographic operation of the legislation;
- (c) restrict an activity in specified circumstances;
- (d) add a time factor.

(a) **Application to persons or things**

Legislation is presumed to apply to all persons and all things in the jurisdiction (but not elsewhere) who satisfy the description in the substantive rules. So, if a class in the jurisdiction is to be excluded or any class outside it is to be included, the legislation should say so expressly. (The matters of extraterritorial legislation affecting those outside the jurisdiction and of application to Government are looked at in more detail in the following units.)

One valuable use is in legislation that makes new rules for an existing class of cases. It is often necessary to designate which are to be the *first* cases to which new rules must be applied.

Complete Self Assessment Exercise 2. Compare your Answer with that provided at the end of this unit.

Self Assessment Exercise 2

Note down why you think that the following matter was dealt with in an application clause.

Companies (Audit) Act 1992:

3. This Act has effect in relation to company accounts submitted for audit on or after 1 January 1993.

But take care when applying a Bill to a specified class of persons. For this can give rise to the following problems:

(i) **To which class does it apply?**

You may use words intending to extend the legislation to an *additional* class to those who will be presumed to be subject to it, but the words may be read as applying to that class *only*. Similar considerations arise if the clause is to apply to a specific category of things. You can usually prevent these difficulties by adding modifying words, such as "only" or "also", or "as they apply to [the standard case]".

Example Box 3

The following application clause is found in a *Legal Practitioners Act* -

This Part applies to registered conveyancers.

Does this *restrict* the Part to this class or does it *extend* the Part (which already applies, as part of the Act, to fully qualified legal practitioners) to this class also?

Further words are needed at the end of the clause, e.g. "only" or "also" or "as it applies to legal practitioners".

Complete Self Assessment Exercise 3. Compare your Answer with that provided at the end of this unit.

Self Assessment Exercise 3

The following provision in an Offences against the Person Act describes its application ambiguously. Draft two clauses that set out the alternative versions, each without ambiguity.

This Act applies to citizens of Utopia when on board a ship registered in Utopia that is on the high seas.

1.

2.

Which version is more likely to have been intended?

(ii) **Does it exclude cases that should be included?**

An application clause can inadvertently exclude classes of persons who ought to be subject to only some of its provisions. For example, although the principal provisions are intended to be limited to a specified class, the Bill may also contain other rules that are intended to be binding on *everyone* (e.g. offence provisions). An application clause that limits the entire Bill to a specific class contradicts the second purpose. Thornton gives a good illustration, which we may adapt.

Example Box 4

A Bill requires young persons to register for and perform national service. It is to be confined to citizens. Yet it should not include an application clause in this form:

This Act applies only to citizens of Nigeria.

For the Bill also contains offence provisions, e.g. making it an offence to incite national service soldiers to desert. These clearly must apply to everyone, citizen or non-citizen. The offence provisions should be placed in a separate Part of the Bill and the application clause modified to read:

This Act, except Part 5, applies only to citizens of Nigeria.

This difficulty does not arise in quite the same way with things. Limiting the *subject matter* of the rules does not lead to uncertainty about *who* is bound by them - which is the cause of this difficulty.

(b) **Application to a geographic area**

Legislation is presumed to apply to the entire jurisdiction within the authority of the Legislature. (We look at the question of areas outside the territorial limits in more detail below). To restrict it to a part, or to extend it beyond those limits, requires an express provision. This can usually be done in one of two ways, i.e. by a clause that:

- (i) confines the legislation to a specified area; or
- (ii) excludes those areas to which it is not to extend.

Example Box 5

This Act applies to Lagos and to such other cities in Nigeria as the Minister may designate by order in the *Gazette*.

This Act does not apply to the Federal Capital territory.

This type of clause is of particular importance in Federal jurisdictions like Nigeria, when the National Assembly has authority to legislate both for the entire Federation and, on certain matters, for any part of it (sharing legislative power in this respect with the States' House of Assembly). Legislation of the National Assembly is assumed to apply to the entire Federation. If an Act is not to do so, the precise application must be provided for.

Complete Self Assessment Exercise 4. Compare your Answer with that provided at the end of this unit.

Self Assessment Exercise 4

Draft a clause making a Federal Act applicable to just one named State in a Federation (select suitable names).

Take care not to limit the entire legislation to a particular area, if some of its provisions ought to be part of the general law applying everywhere. Extension *outside* the specified area may be necessary so that the scheme can be fully enforced.

Example Box 6

A Bill that regulates a National Park is to include provisions for arrest of those engaging in prohibited activities *within* that area. But consideration must be given as to whether the power should be confined to that area or should be available *throughout the jurisdiction*. An application clause that limits the Bill to the Park would, perhaps impracticably, exclude the second possibility.

(c) Restrictions on activities

Legislation is presumed to apply to all acts, omissions and activities (in the jurisdiction, but not elsewhere) that satisfy the description in the substantive rules. It is necessary, then, to provide for general circumstances that are to take a class of

activity *outside* the ambit of the legislation. The most common cases are those to which a limiting time factor is attached (see below).

If a class of activities is to be excluded from the Bill, give prominence to that in an application clause. Again, you can do this in two ways:

- (i) by describing the cases to which the Bill is to apply so that the class is not caught; OR
- (ii) by an express statement that the Bill does not apply to the class.

Example Box 7

Cinematographic Films Act

This Act applies in relation to the exhibition of cinematographic films *in places of public entertainment*.

Fisheries (Management) Act

This Act does not apply in relation to fishing at sea using only a fishing rod and line.

A case occurs commonly in Bills giving domestic effect to an international treaty where those benefits or privileges are conferred in respect of transactions involving, e.g. citizens of other signatory states. It may be important to make clear that these cannot be claimed by people from countries that are not party to the treaty.

Example Box 8

This Act does not apply in relation to a transaction if one or more of the parties to it is not a citizen of, nor domiciled nor habitually resident in, a Convention country.

(d) Time factors

Legislation is usually drafted to cover all cases that arise after the legislation comes into force (i.e. *prospectively*). But some provisions may have to be applied to cases that began *before* that time. Where these are incidental or consequential to the scheme, they are commonly dealt with by transitional provisions. If this question is a central feature of the legislative scheme, give prominence, by an application clause, to exactly which cases are covered.

Example Box 9

This Act applies in relation to the probate of estate of persons dying *before or after this Act comes into force*.

This involves different issues from those arising in connection with the commencement of the legislation (i.e. when it becomes part of the law). Applying new rules to matters that were completed before the new legislation is enacted are discussed below.

The application clause determines the *range of matters* covered by the legislation. So, you can use an application clause to clarify which are the first cases that are to be affected by the new rules, when that is not self-evident. Such a clause can, therefore, be equally useful to introduce Parts of a Bill, especially where different classes of case are dealt with by each.

3.4 How an application clause should be drafted

Put application provisions in a separate clause, with an appropriate section note, such as "Application", "Exemptions". Place this clause prominently in the preliminary provisions. Typically, it appears immediately after the interpretation clause, but putting it next after the *commencement* clause can point up the different time effects of the two clauses.

Example Box 10

Commencement.

2. This Act comes into force on 30 November 2006.

Application of this Act.

3. This Act applies in relation to motor vehicle licences issued on or after 1 January 2007, regardless of when the application for the licence was made.

You may use the expression "extend" instead of "apply"; the effect is the same, though it is obviously a less direct way of providing for application. A distinction is sometimes made between "applies to" and "applies in relation to". Legislation usually applies "to" persons and places but makes rules about ("in relation to") activities and cases. Such stylistic distinctions are unlikely to have legal consequences.

Your overriding consideration, in drafting an application clause, should be to ensure certainty as to the scope of the Bill, and not to introduce ambiguity. So, a provision that is intended to be restrictive must clearly convey that message.

Example Box 11

Legal Practitioners Act:

35. This Part *applies* to licenced and unlicenced legal practitioners.

Factories Act:

3. This Act *does not apply* to factories at which explosives are manufactured for use in weapons.

You can authorise questions of application to be determined by executive instrument, but in that case, prescribe with precision the circumstances when such an order can be made. Wide powers in the Government to dispense with the application of Acts may give rise to constitutional challenge. There should be clear reasons for any such provision.

Example Box 12

Wages Councils Act:

7. The Minister may extend, by order, the provisions of this Act to such class or classes of workers and their employers as are specified in the order and, from the date set by the order, the Act applies to those workers and employers as if they had been included in the Act.

Recruiting of Workers Act:

9. The Minister may exempt from this Act, by order:

- (a) the recruiting of workers by or on behalf of employers who do not employ more than such number of workers (not being greater than 15) as is fixed from time to time by order of the Minister;
- (b) the recruiting of non-manual workers or personal or domestic workers.

4.0 CONCLUSION

In conclusion, there is no need to provide an application clause if the rules themselves leave no doubt as to the persons, behaviour or cases within their ambit. They generally stipulate how a general body of rules in a Bill is to operate.

5.0 SUMMARY

In this unit, we have considered application clauses. You should now be able to:

- (i) explain when an application clause is needed;
- (ii) draft application clauses.

6.0 TUTOR MARKED ASSIGNMENT

Draft clauses applying Bills to the following cases:

1. Marriages contracted next year and onwards
2. Maternity benefits payable after 1 July next year
3. Motor vehicles registered after 2006

7.0 REFERENCES/FURTHER READINGS

Interpretation Act, Cap.192 Laws of the Federation of Nigeria 1990.

Driedger E.A, (1976) *The Composition of Legislation*, Ottawa: Dept of Justice.

Soetan, Olusiji A. (1997) *Elements of Legal Drafting*, Lagos: Dredew Publishers.

Thornton, G.C. (1996) *Legislative Drafting* 4th ed., London: Butterworths.

Answer to Self Assessment Exercise 1

This Act applies to the city of Abuja *only*.

This Part *does not apply* in relation to police officers below the rank of Inspector.

Answer to Self Assessment Exercise 2

It is of central importance to users to know to which accounts the new legislation is to apply. There would be serious problems if it were intended to deal with 2002 accounts, as the year is well advanced.

This matter is best dealt with by an application provision, rather than by adding a qualification to the substantive rules. Those rules contain general law, whereas this provision has a once-for-all effect only.

Answer to Self Assessment Exercise 3

1. This Act *also* applies to citizens of Utopia who are on board a ship registered in Utopia that is on the high seas.

2. This Act applies *only* to citizens of Utopia who are on board a ship registered in Utopia that is on the high seas.

It is likely that the purpose of the clause in an Act of this kind would be to *extend*, not limit, the ambit of the Act to citizens on the high seas. In all probability the Act applies to citizens on ships within the territorial limits. The first of these drafts then is the more probable.

Answer to Self Assessment Exercise 4

This Act applies to Lagos State *only*.

The addition of "only" is essential to remove any doubt as to whether the Act is extended in addition to application to federal territory or applied to this one place only.

UNIT 3 TEMPORAL APPLICATION

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- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
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 - 3.2 How these concepts are generally treated in law
 - 3.3 How the presumption against retrospectivity operates
 - 3.4 Prior cases when the presumption will not be applied
 - 3.5 In what circumstances are these concepts important?
 - 3.6 The consequences of the distinctions
 - 3.7 When back-dated provisions are likely to be needed
 - 3.8 How back-dated provisions should be drafted
 - 3.9 When retrospective provisions are likely to be needed
 - 3.10 How retrospective provisions should be drafted
 - 3.11 When provisions should be made for on-going circumstances
 - 3.12 How might we draft provisions relating to on-going circumstances?
- 4.0 Conclusion
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- 7.0 References/Further Readings

1.0 INTRODUCTION

This unit considers provisions that settle the temporal application of legislation, especially those that are to have retrospective operation. New legislation obviously applies to events or cases that occur after it has been enacted. We have seen in discussing commencement provisions that it may be necessary to provide for those rules to begin applying at some date to some of those cases later than to others or for some of those rules to begin to apply later than others. Essentially, these matters are best dealt with by drafting appropriate commencement provisions.

However, the application of new rules to events or cases that have already occurred before their enactment, or began before then and are still on-going, raises different issues. These are often referred to as “retrospective” matters. Unfortunately, as Ruth Sullivan has pointed out (*op. cit.*, Chapter 19), this term, and to lesser extent the related term “retroactive”, are used inconsistently, and indeed often interchangeably.

2.0 OBJECTIVES

By the end of this Unit, you should be able to:

- (i) Apply provisions to circumstances that are already in being when the legislation comes into force;
- (ii) Draft retrospective provisions;
- (iii) Draft saving provisions.

3.0 MAIN CONTENT

3.1 Meaning of retrospective legislation

Sullivan (who prefers to use the term “retroactive” rather than “retrospective”) draws a distinction between two types of cases:

- (i) where the legislation is applied to facts that are already past when the legislation comes into force and changes the law that was applicable to the past events or conduct;
- (ii) where the legislation applies new rules to conduct or events that are still on-going when the legislation comes into force.

Only the first case can be truly described as “retroactive/retrospective”. The second is an example of a prospective rule, one that has immediate and general application.

However, drafters need to bear in mind a further distinction:

1. Retrospective (or more accurately retroactive) changes to the law as it affects specified past circumstances from a date *before* the date on which the legislation containing the alteration comes into force.

Although there was a period during which the former law actually had full force, it must now be *treated as if* that had never happened and *as if the new law has always been in force from the earlier date*. In essence these provisions are back-dated.

Example Box 1

During the period 1 January 2004 to 31 December 2004, marriages were solemnized in a particular district before a person not authorised to conduct marriage ceremonies. Under the Marriage Act, this renders such marriages void.

A validation Act is passed on 1 January 2005 to render such marriages valid from the date of the marriage. This acts *retroactively* since it alters the effect of the

Marriage Act on each of those marriages, *from the date of that marriage*, i.e. from a date *before* the validation Act became law.

2. Retrospective changes to the law as it affects specified past and completed events but effective *from the date of commencement* of the legislation containing the alteration.

Matters that have been governed by some earlier law until the new law is enacted are made subject to the new law *from the date that the new law comes into force*.

Example Box 2

Under the Criminal Act, the maximum compensation that can be awarded for certain personal injuries is set at ₦200,000 in “full and final payment”. The level of awards is not subject to appeal.

An amending Act comes into force on 1 January 2004 authorising appeals with respect to the level of awards. This rule is to apply to settled cases as well as to those made after this date. In so far as this affects awards made *before* that date, this is *retrospective* since it changes the law in relation to past cases that were finalised under the former law.

3. Prospective changes to the law as it affects specified events that began in the past but are *still on-going*. The effect is that matters that were governed by earlier law until the new law is enacted are made subject to the new law *from the date that the new law comes into force*.

Example Box 4

Under the Criminal Act, the maximum compensation that can be awarded for certain minor personal injuries is set at ₦250,000.00. There are a number of cases outstanding for which claims for the maximum have been entered but not settled.

An amending Act comes into force on 1 January 2004 setting the maximum in these cases at ₦100,00.00 from that date. The Act also provides that this increase applies to the cases instituted, but not settled, before that date, as well as after. This is not a *retrospective* provision since the change in the law applies to ongoing cases.

4. Prospective changes in the law that only affect specified cases that arise *after* the legislation comes into force.

The law attaches new consequences only to those cases that occur or start *after* that time. It has no application to matters completed or begun *before* that time.

Example Box 4

A statute creates a new criminal offence and associated penalties for conduct that has not been criminal to that time. Only those who behave in the proscribed way *after* the enactment of the statute will be subject to it.

As the result of the Constitutional prohibition on retrospective criminalisation and the presumption against retrospectivity, such legislation as this will be treated as having *prospective* application only. See section 36(8) of the 1999 Constitution.

3.2 How these concepts are generally treated in law

It is hardly surprising that both the courts and the Constitution have reservations about retrospective legislation.

(a) The presumption against retrospective legislation

Courts give much credence to a presumption against retrospective legislation, requiring a statute to show clearly if it is intended to alter legal consequences for cases that occurred before it came into force. Drafters need to know precisely when that presumption is likely to be applied, especially to prevent its application when some retrospective provision is required.

(b) Constitutional prohibition of retrospective legislation

A matter of even greater substance is the prohibition in many Constitutions on the enactment of certain kinds of retrospective legislation. Drafters have a particular responsibility to ensure that those provisions, which are designed to protect basic individual rights, are fully complied with.

Self Assessment Exercise 1

In the space provided, note down, with the references, any provisions that expressly prohibit the enactment of retrospective legislation:

1. in the Constitution:

2. in other legislation:

3.3 How the presumption against retrospectivity operates

In summary, Courts:

- (a) take the view that the Legislature does not alter the legal basis upon which people have entered into lawful activities, without good reason;
- (b) presume, therefore, that statutes are not intended to change the law from some prior date to cause the rights of parties to be different from what they were conceived to be when they acquired or exercised them;
- (c) apply the presumption to any legislation that can be construed as extending to cases that occurred before, as well as after, the new legislation takes effect.

In substance, they presume that legislation does not apply to events described in it if they occurred before it came into force. Prior cases are not to be treated as subject to the new law. There are sound arguments for this position. The New Zealand Law Commission (NZLC R17 1990) put forward the following:

- (i) **effectiveness**
much law will work in practice only if the people subject to it know in advance what it requires and can organise their actions in accordance with it.
- (ii) **justice**
it may be unjust to apply new law to old situations; in particular no one should be subject to a criminal penalty for some act that was not a crime at the time of the alleged offence.
- (iii) **reasonable expectations**
individual may enter into continuing legal obligations (e.g. in contracts) on the basis that the law will have a particular impact which they intend or accept.

This is, of course, a presumption or rule of construction. It can be displaced by express words or clear implication (unless the Constitution prohibits such legislation altogether). But this remains one of the stronger presumptions. Courts have often ruled that the new law does not apply in relation to action already taken, even though inconvenience or hardship follows. The conclusion for the drafter is obvious:

- if legislation is to apply retrospectively, say so in express terms.

3.4 Are there prior cases when the presumption will not be applied?

The following are cases when the courts are likely to treat the presumption as having no application, i.e. where they are prepared to treat a provision as applying to past as well as present and future cases, even though the legislation is silent.

(a) Wholly beneficial legislation

Statutory provisions that confer benefits, without imposing any direct burdens on anyone, are usually treated as applying equally to those who have already qualified under prior law, as well as those who will qualify in the future under the new law. There is no case for restricting the largesse of the law. There are, however, cases in which a countervailing burden falls on other legal persons. In that case, the presumption may be applied in the interest of those persons.

For the presumption to apply, then, the legislation must attach some new duty, new penalty, new liability or new disability (or remove some existing benefit or defence) with respect to prior cases.

(b) Prejudicial legislation intended for public protection

Legislation may add new disabilities to those incurred in the past, not by way of punishment but in order to provide greater public protection. Although such legislation may add further adverse consequences to those applied to misconduct before the new legislation comes into force, these cases are not subject to the presumption.

Example Box 5

Legislation introduces special penalties for anyone who is an "habitual criminal". This requires account to be taken of past convictions in determining who is an habitual criminal. This has the appearance of retrospectivity in so far as the convictions were previous to the new legislation.

However, the presumption is unlikely to be applied to this kind of case, since its purpose is to penalise past offenders for a *continuing* character fault that is evidenced by past actions. This rule is not retrospective.

(c) **Declaratory provisions**

Provisions that declare or interpret the meaning or effect of another Act are generally treated as effective retroactively from the date of that Act (as no new law is being made). These provisions too are rare. Clarification is more likely to be made by amending the defective legislation, when the presumption may be applied.

(d) **Validation legislation**

By its very nature, validation legislation must operate retroactively, since it corrects defects in the law from the time they occurred. The presumption has no relevance to these cases.

(e) **Procedural provisions**

Changes in procedure, in rules of evidence, are designed to improve the ways things are done, and should therefore be equally suitable for both pending and future matters. Courts have often treated these as applying to cases that began before the new legislation, even when the legislation has given no clear indication. For procedural legislation usually provides better methods, e.g. for obtaining a remedy, and, in principle, those improvements should be made available to those already seeking the remedy, as well as to those who will do so in the future. Since the past events are on-going, this is strictly not a case to which the presumption applies.

But a few words of caution on this conclusion:

- (i) although the presumption may not apply, the question may still arise as to whether procedural changes are to be applied to on-going cases or whether these are to be dealt with in accordance with the former law;
- (ii) the courts have approached such procedural matters very much case-by-case. It is difficult to predict how they might be decided.

So, if you are drafting legislation that makes changes in legal procedures, it is often safer to deal with its application to continuing or pending matters in express terms:

- (a) if the new procedures are to apply to those cases, state that in transitional provisions;

- (b) if the new procedures are to apply only to matters arising after the legislation comes into force:
 - (i) state as much in the relevant provisions; or
 - (ii) save the existing procedural law for the continuing and pending cases.

3.5 In what circumstances are these concepts important?

There are several legal settings where the law may have to deal with existing rights, obligations, transactions, and the like, that have come into being or have already been started upon. These may be because Government and the Legislators conclude that the public interest requires the law to be changed to affect existing circumstances. Alternatively, it may be necessary to make such changes as part of the transition to new legal arrangements. You may, then, need to think about these concepts in the following cases:

(a) Acquired rights

On occasions you will be given instructions to provide substantive rules that change the law in relation to matters that were completed in the past, from which rights have already been acquired. Far from being transitional and ancillary to a new law, these may be the prime purpose of the legislation. Validation legislation may be required to correct some past legal error. These cases are typically dealt with in application provisions or in the substantive rules.

(b) Saving and transitional provisions

The most common case in which you need these concepts is when dealing with the transition from the existing law to new and different statutory arrangements. Saving and transitional provisions often have to apply retrospectively, that is, to deal with past matters or events as well as those that are incomplete at the time the new legislation comes into force. (These provisions are examined in the next course **LED: 604**.)

3.6 The consequences of the distinctions

Merely because a statutory provision *refers* to matters in existence when the new legislation comes into force does not necessarily make that provision retrospective. Two particular cases of this should be borne in mind:

(a) Acquired rights

Most law, even when it is prospective, affects situations that have already come into existence. Obviously, it lays down how such matters are to be regulated *in the future*. Legislation is only retrospective if, in some way, it *reaches into the past*, e.g. by changing the legal basis upon which transactions were concluded, as from some prior date. So, where legislation affects, for the future, the benefits that can

be enjoyed in respect of rights that have fully vested before that time, it is *prospective*, not retrospective. Nothing in the past has been altered. Such legislation clearly interferes with the enjoyment of vested rights in the future, but it does not affect the enjoyment or acquisition of those rights in the past. Such future interference may offend against the Constitution's protection of acquired property rights. But it does not breach those provisions in the Constitution concerned with retrospectivity.

Example Box 6

1. Legislation stating that persons who have convictions for specified offences cannot hold a particular office does not impose *retrospective* penalties, if it applies to those who offended before its enactment, as well as to those who offend after. It attaches disqualifications on anyone who fulfils that description, whenever the office is to be filled in the *future*.

2. An Act that imposes new duties on leaseholders does not operate retrospectively, even though it affects those who became lessors before its enactment. Starting from the date of the legislation, new legal consequences attach to everyone who has then, or thereafter acquires leasehold rights, i.e. is a lessor. The law governing leases in being is not altered for any time *in the past*.

(b) Current state of affairs

Similarly, there is nothing retrospective in a law that:

- (i) regulates activities of a continuing nature or that have continuing legal effects;
- (ii) applies to a class of person or objects that have a specified status, characteristics or propensities.

It makes no difference that some of those activities were begun or a status acquired before the new law was made. What the legislation is regulating, in these cases, is a *present state of affairs* and not a past one. The circumstances that activate the new legal rules are not prior events, but current ones.

Example Box 7

1. A Bill that introduces a new requirement that dealers in second-hand goods are to hold a licence applies to those already in the business, as well as to those who start one after the Bill comes into force.

2. A Bill that imposes tax burdens in the coming year upon all married persons is not retrospective in relation to those who entered marriage before the legislation came into force.

In both cases, the statute is providing prospective rules for persons who fulfill prescribed conditions or hold a prescribed status. It does not change the law as to the acquisition, or the past consequences, of those conditions or that status.

Complete Self Assessment Exercise 2. Compare your Answer with that provided at the end of this unit.

Self Assessment Exercise 2

Following the distinctions between retrospective, on-going and prospective legislation made in the text, indicate in the spaces provided how you classify the following:

1. A provision that amends licensing legislation by prescribing a new ground for cancelling a licence, i.e. the holder has been convicted at any time of an offence in breach of the licence.

1. A Bill that increases the levels of social security benefits for specified disabilities backdated 6 months.

3.1 A Bill that imposes a duty upon persons purchasing a firearm, or who have purchased a firearm within the 6 months before the Bill comes into force, to register it with the police.

3.2 What difference, if any, would there be if the Bill was stated to apply to persons owning a firearm?

4. A Bill that extends the period, from 6 months to 12 months, within which an appeal may be brought against executive decisions made under a particular statutory provision.

3.7 When back-dated provisions are likely to be needed

There has to be a strong case in the public interest for legislation to alter the basis upon which persons have concluded past activities, to be effective from some time in the past. The Constitutional provisions prohibiting retroactive criminal law emphasise the threat that such provisions pose to the rule of law. If a case of this kind arises:

- (i) include such provisions only on clear instructions;
- (ii) explore fully the Constitutional implications, especially the human rights provisions protecting vested property rights.

The following are cases when their use may be justified:

- (a) **To confer a general benefit, or a benefit for a specified group, in the public interest**

Example Box 8

Legislation backdating a financial allowance or benefit paid under statute will generally advantage those to whom it is paid, without countervailing burdens for other individuals

- (b) **To impose burdens backdated to the date on which public notice was given of the proposals or the Bill containing them**

Example Box 9

Changes in customs duties announced in the budget may need to be made retroactive to prevent advantage being taken of the interval between the notice and the enactment.

Some jurisdictions have enacted special procedures that permit either the legislature to pass a provisional collection of taxes resolution or Government to make a provisional collection of taxes order (both of which have to be confirmed by the Appropriation Act).

- (c) **To validate some technical or unintentional illegality, by cancelling its legal consequences from the date of the occurrence**

Example Box 10

A statute to validate marriages solemnised by a person whose lack of essential qualifications as a marriage officer was unknown to the parties rectifies legal consequences which the parties could not have foreseen.

- (d) **To remove legal disabilities from individuals, that have arisen from the unexpected operation of the law, from the date they arose**

Example Box 11

Retroactive legislation is needed to remove an accidental disqualification of the holder of a public office as a result of a change in the law. This must have effect from the date that the disqualification first arose.

Retroactive validation of illegalities that were deliberate or were known to the parties at the time they occurred is sometimes sought, e.g. in order to excuse the offenders from the full application of the (criminal) law. Legislation of that kind:

- (i) contradicts the rule of law;
- (ii) may be treated by the courts as an unconstitutional interference with the judicial power, especially if it is designed to benefit a small number of identifiable people.

If you meet cases of this kind:

- (i) do not initiate the drafting of provisions that validate deliberate breaches of the law;
- (ii) be prepared to present formal written arguments why they may offend against the Constitution and the rule of law.

3.8 How back-dated provisions should be drafted

The serious nature of this legislation requires that you:

- (a) state the exact dates when the retroactive provisions are to be treated as having taken effect;
- (b) include a precise indication of the extent and limits of the effects of retroactivity.

The legislation should not go further than is strictly necessary for the purpose.

Example Box 12

1. Judges' Remuneration (Amendment) Act 1977 (in force 11 February 1977)

3. *With effect from 1 January 1976*, section 2(1) of the Judges' Remuneration Act 1974 is amended by substituting:

- (a) ~~₦~~200,000.00 for ~~₦~~150,000.00 in subparagraph (i);
- (b) ~~₦~~170,000.00 for ~~₦~~14,000.00 in subparagraph (ii).

2. Validation (Indian Marriages) Act 1959 (in force 9 October 1959)

4. A marriage celebrated by an Indian Marriage Officer in the Central Division *in the period beginning on 15 January 1957 and ending on 1 September 1959* is not void by reason that the Marriage Officer was not validly appointed to that Division under section 44 of the Marriage Act.

In this case, the validation is drafted to correct the particular defect only; it must not catch a marriage that is void for other reasons.

3.9 When retrospective provisions are likely to be needed

These provisions are needed if new legislation is to apply to cases that have already occurred when the legislation comes into force. If the legislation is drafted to apply to prospective cases, without these provisions the legislation would be presumed not to apply to past circumstances. Here, again, a change in the law alters the expectations of parties; again, there should be good and practical reasons for making the change applicable to them. The following are some cases in which their use may be justified:

- (a) **To confer a general benefit, or a benefit on a specified group, in the public interest.**

Example Box 13

An Act that removes, from its commencement, legal disabilities of persons born outside marriage is retrospective in so far as it affects disabilities that have already attached to people under the previous law.

- (b) **To make new legal remedies or rights available in addition to those already provided under the previous law.**

Example Box 14

A replacement Matrimonial Causes Act applies retrospectively if it extends to parties to maintenance orders made under the replaced Act the new right under the replacement Act to apply to a High court for variation of maintenance orders.

3.10 How retrospective provisions should be drafted

In writing retrospective provisions, two alternative approaches may be possible.

- (a) **Provide provisions that focus upon the prior cases expressly**

Make explicit provision for the precise past cases to be covered. Use expressions that indicate that they came into existence "before the commencement of this Act" (or equivalent terms). On occasion, your Bill may also have to include modifications to the new arrangements to accommodate the cases. This is discussed in the next course (under *Transitional Provisions*).

Example Box 15

11. This Part applies only to goods imported into Nigeria and placed in a warehouse *before the commencement of this Act*.

14. The amendments made by this Act apply with respect to the estates of persons who died *before 1 January 2004* [= the date of commencement].

27. A party to a marriage, *whether contracted before or after the commencement of this Act*, may apply to a High Court for financial relief under this Part.

- (b) **Apply the new law to a current class**

A single description may be drafted that covers both past and future cases. The Act will then apply to all cases that currently satisfy the description regardless of when that came about. The Act does not operate retrospectively since it deals with a state of affairs that is current at the time it is applied. This takes advantage of the

rule that provisions regulating current states of affairs are not retrospective (which we looked at earlier in this unit).

Example Box 16

A Bill is to make provision restricting rights of appeal by persons seeking asylum. It is to cover those who have already made a claim for asylum as well as new claimants.

An express provision might read:

A person who has made a claim for asylum, *whether before or after the commencement of this Act*,

But it may be possible to state this rule differently:

An asylum claimant

The second version describes a *status* or *description* that applies when the new legislation is invoked.

By using this device, you can cover retrospective and prospective cases together. It has the advantage of dealing with the matter as part of the substantive rules. It is, of course, unsuitable where the law applying to retrospective cases is to be different from that for prospective ones.

3.11 When provision should be made for on-going circumstances

Although the presumption does not apply with respect to cases that were begun but are incomplete at the commencement of a new law, the question may still arise whether the new legislation is or is not to regulate the way that the matter is to be completed. It is sensible to put that beyond doubt by express provision one way or another.

Such provisions are most needed in *replacement* legislation, when such matters need to be dealt with in a saving or transitional clause.

Example Box 17

1. A new statutory requirement that documentary evidence must be produced in support of specified claims should make clear that it applies to claims of that kind

that are pending, having been instituted under the previous law that contained no such requirement.

2. A tax Act grants capital allowances with respect to expenditure, incurred in the tax year before it came into force, on the construction of buildings commenced in that year but completed in the first tax year after the Act comes into force. The expenditure has been incurred in the past, but the allowance is in respect of tax liabilities arising under the new Act.

3.12 How might we draft provisions relating to on-going circumstances?

If you consider that readers may be uncertain as to whether on-going matters are to be covered by the new rules, deal with the case expressly. As with retrospective provisions:

- (i) make clear the past cases to which your provisions apply;
- (ii) make clear too that these must be continuing or on-going at the date of commencement of the new law,
- (iii) indicate the cut-off date either specifically or by referring to the commencement of the new legislation.

Example Box 18

18. All legal proceedings in matrimonial causes that are pending in the High Court at the commencement of this Act shall be decided by the High Court as if the proceedings had been instituted under this Act.

25. Every person, who immediately before 1 January 2007 was employed by the Drafting Institute becomes, on that date, an employee of the Institute for Legislative Studies on the same terms as applied to that person immediately before that date.

If the new law is not to apply to past circumstances, but that will not be obvious from the legislation, consider using a saving provision to make clear that the former law continues to apply to them.

4.0 CONCLUSION

To conclude, matters that have been governed by some earlier law until a new law is enacted are made subject to the new law from the date that the new law comes into force. Where legislation affects the future, the benefits that have fully vested before that time, is prospective and not retrospective.

5.0 SUMMARY

In this unit, we have considered provisions to settle the temporal application of legislation, especially those that are to have retrospective effect. You should now be able to apply provisions to circumstances that are already in being when the legislation comes into force.

6.0 TUTOR MARKED ASSIGNMENT

Draft a short section for each of the following matters.

1. The Animal Diseases (Control) Act 2004 requires the making and publication of a Presidential order to bring it into force. The order was made on 31 December 2004, setting the date as 1 January 2005. But it was never published in the *Gazette*, as required. You are asked to remove doubts that the Act was properly brought into force.

2. The Marriage Act is to be amended to provide that persons, who have been granted a divorce decree, and remarry, cannot apply for a financial order under section 5 of the Act against their former spouse. The provision has to apply retrospectively.

Note down too whether any hardship could flow from giving this amendment retrospective effect.

7.0 REFERENCES/FURTHER READINGS

Sullivan R, (2002) *Driedger on the Construction of Statutes*, 4th ed., Canada: Butterworths.

Sullivan R, (1997) *Statutory interpretation*, Canada: Irwin Law.

1999 *Constitution of the Federal Republic of Nigeria*.

Answer to Self Assessment Exercise 2

1. This is *prospective*. It gives a power that can only be exercised in future cases where a cancellation is sought. But the fact that past conduct before the provision came into force may be relied upon in assessing culpability means that account has to be taken of past events. But this is not a case that would be treated as *retrospective* so that the presumption applies. Decisions will be made on the basis of the current unsuitability of the licence holder as evidenced by past conduct.

2. This is *retroactive*. The law stating the entitlement as it stood from 6 months ago must now be treated as if it had always been in the amended form.

3.1 This is *prospective* and *retrospective*. It imposes a new obligation upon two categories of persons, one of them identified by prior completed actions taken under law that carried no such obligation at the time.

3.2 The alternative is *prospective* only. It is irrelevant to this rule when the firearm was purchased.

4. This is *prospective*, but whether it is intended too to apply to past cases (i.e. is an *on-going* provision) is not clear. As this involves alteration of rights, clearer guidance is needed to indicate whether persons whose right to appeal accrued before the Bill comes into force are to benefit.

UNIT 4 PROVISIONS BINDING THE STATE

CONTENTS

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1.0 INTRODUCTION

This unit deals with provisions that bind the state. It considers provisions making the state bound by legislation.

2.0 OBJECTIVES

By the end of this Unit, you should be able to:

- (i) Decide when to use provisions that bind the state;
- (ii) Draft appropriate provisions binding the state.

3.0 MAIN CONTENT

3.1 Relevant presumptions

At common law, a statute is treated as *not binding* on the State or the Government ("the Crown", in the Monarchies), unless it so provides, either expressly or "by necessary implication". This rule of construction may be repeated in legislative form in the Interpretation Act.

The rule (or strictly, presumption) derives from the traditional immunity of the Crown from legal process in the Westminster system, and has survived the introduction of Crown liability.

The continuance of this presumption has been affected in a number of Commonwealth jurisdictions by judicially and statutorily created rules. A few have enacted a statutory presumption to the effect that all legislation is to be treated *binding* on the State, unless there is a specific or express provision to the contrary.

On one constitutional argument, the common law presumption no longer applies if the Constitution provides a guarantee of equal protection of the law (*State of West Bengal v. Corporation of Calcutta* [1967] AIR 997 - Supreme Court of India). For the presumption gives effect to different treatment of state and citizen. It is, as yet unclear, to what extent other jurisdictions, outside India, will follow this line of argument.

Self Assessment Exercise 1

Find out to what extent this presumption may have been modified by case law in Nigeria.

3.2 In what respects does legislation "bind" the State?

The legal effect of the common law presumption needs to be understood, as some uncertainties to which it gives rise can affect how you draft provisions for this purpose.

The presumption is concerned only with whether legislation imposes *obligations* on the State that require State authorities to act or refrain from acting, or conversely, whether those authorities can claim exemption from burdens imposed by legislation.

3.3 Can the State benefit from legislation if it is not bound by it?

A companion presumption states that the State can *take advantage* of any statute, even though *not bound* by it, as it is in the public interest that the State should be able to rely upon legislation in the same ways as other persons. This rule can, of course, be displaced by provisions to the contrary. This is recognised in some jurisdictions in legislation based on the Crown Proceedings Act 1947 (UK), section 31(1). That provision also declares that the State can claim the same defences in civil proceedings as any citizen.

Self Assessment Exercise 1

Note down whether any Act in Nigeria confirms that the State (Government) has the right to take advantage of an Act even though not referred to in it (as in section 31(1) of the Crown Proceedings Act 1947-UK).

3.4 Entities that are within the presumptions

The presumption benefits the Government, and all bodies and persons who act as servants or agents of the State, or that are instrumentalities of the State, as well as to the State itself. In a Federal system (e.g Nigeria), it applies not only to the Federal authorities, but also to those in the States in right of the government of those parts.

In systems where the Monarch is Head of State, the doctrine also applies to the Monarch personally. Elsewhere, the Head of State enjoys immunity conferred by other law.

3.5 Entities that are treated as part of the State

Ministers, government departments, civil servants, members of the armed forces, the police and other bodies established by or under the Constitution, when discharging their official functions, are usually within the term. But many other entities created by law perform public functions. Some are linked with Government, which exercises control or has invested or allocated public funds for their functioning.

The status of national corporations, e.g. statutory entities running shipping or air lines or public utilities, or engaged in trade or industrial production can be unclear, especially if the statutes creating them have not dealt with the matter. Most are not treated as emanations of the State. Doubts about the application of legislation to these cases are best removed by express provision as the need arises.

3.6 The legal effects of the presumptions

Unless your Bill indicates differently, none of the instrumentalities of the State can be required by legal process to:

- (i) carry out statutory obligations;
- (ii) refrain from action even though it is prohibited or regulated by the statute.

In particular, these bodies are exempt from the duty to pay tax or charges. The privilege attaches both to the activities of the bodies affected and to their property.

But once an enactment is found to be binding on the State, it binds *all* the State instrumentalities that come within its terms, to the full extent of the enactment.

The question of whether the State, or its instrumentalities, is bound by an Act is quite distinct from the questions whether or what legal proceedings can be instituted against it. That the State can (or cannot) be sued does not tell us whether a particular statute imposes obligations on it.

3.7 How express words can affect the presumptions

A simple statement that the State is bound by the Act requires all State instrumentalities to comply with it. On the other hand, a section stating that only specified provisions are to bind can still leave the matter of the application of the other provisions uncertain. Courts have sometimes treated such a section as merely putting the matter beyond doubt for the specified provisions, leaving the position as to the rest of the statute to be tested under the presumption.

An express provision that the State is *not bound* by the Act is conclusive. Such a provision is essential in those jurisdictions where the State is presumed to be bound by legislation.

3.8 When a statute becomes binding by necessary implication

It is here that real difficulties arise. In the past, courts have been reluctant to *imply* that a statute is binding. For that to happen, they required (e.g. *Bombay Province v Bombay Municipal Corporation* [1947] AC 58 (PC)):

- (i) the legislative intent to be "manifest from the terms of the statute"; or
- (ii) a clear indication from the Act that "its purposes would be wholly frustrated unless the State were bound".

Recent cases suggest that courts may be less ready to apply such stringent tests, now that State activity has become so wide ranging. In Australia, the High Court has observed (*Bropho v Western Australia* (1990) 64 ALJR 374, at 379):

there are not infrequent occasions where it is the legislative intent to bind persons indifferently but where the legislature has not adverted to the possible need to single out the Crown or those acting on its behalf for distinct mention.

The High Court made it clear that, in the future, legislative intent is a matter to be settled by construing the statute in its context, as in other cases. Then, the strength of the presumption:

will depend upon the circumstances, including the content and purpose of the particular provisions and the identity of the entity (p.380).

These considerations suggest that any Bill that is capable of being applied to bind the State should state explicitly:

1. whether or not the State is bound by it;
2. which State instrumentalities are bound (when the Bill is to apply to some, but not all, in the State);
3. on what matters the Bill is binding, if it is to have limited application to the State;
4. which provisions are binding, if some but not all, are to bind.

This advice was given by Lord Keith in *Lord Advocate v Dumbarton District Council* [1990] 1 All E R 1 (HL).

3.9 How to decide when express provisions are needed

Consider these issues first when you are working out the scheme for the legislation. Consult and ask for instructions from Government. Reconsider your early conclusions when you have completed the substantive provisions.

In planning your legislation, it may help to ask the following questions:

- (i) as a matter of fact, does the subject matter of the legislation relate to or be likely to affect operations owned or run by the State or State instrumentalities, or does it involve activities by persons in their service?
- (ii) does the legislation regulate or otherwise impose duties in any of these respects?
- (iii) if so, to what extent?
- (iv) will the individual substantive rules make clear the extent to which they extend, or do not extend, to State activities, without providing a general application clause?
- (v) if not, should the entire Bill be made to bind the State by an application clause?

In principle, these questions can be applied to a wide range of matters, especially in a long statute. In practice, drafters concentrate upon those matters of significance in the context of the particular legislation, e.g. those that are likely to arise frequently. On other peripheral matters, their relationship to the principal matters expressly dealt with, and the overall context, are likely to establish whether or not the presumption takes effect.

Example Box 1

Assume that a Bill is in preparation for the registration of aircraft. Let us ask the 5 questions to ascertain whether, and in what ways, the Bill should bind the State and State instrumentalities.

The following are likely answers:

1. The Bill could affect planes owned or leased by State airlines (if those are treated as State instrumentalities) and by Government, the defence forces and the police.

2. & 3. Since registration is an essential feature of the international arrangements for regulating aircraft, the legislation should apply to State planes. But military aircraft must be exempted.

4. Although the substantive rules (supported by appropriate definitions) could deal with the matter when they affect cases in which the State has an interest, this is a matter of considerable significance, and is better addressed by a clause dealing with the matter as a distinct issue. The exemption for military aircraft needs to be dealt with in the latter way.

5. The following draft may serve:

3.-(1) Subject to subsection (2), this Act applies in relation to aircraft belonging to or exclusively employed in the public service of the Republic [or the service of the Utopia National Airlines Corporation], as it applies in relation to other aircraft.

(2) This Act does not apply in relation to aircraft belonging to or exclusively employed by any of the defence forces [*as defined*] of the Republic.

3.10 How to draft these provisions

Three propositions summarise the approach that you may adopt:

1. If the entire Act is to apply to the State and all its agents and instrumentalities, make the application provisions simple and direct.

Example Box 2

1. This Act binds the State.
2. This Act is binding on the Republic.
3. This Act binds Lagos State.

2. If, on reading your draft Bill, you consider that it might be construed as applying to every State entity, when that is not the intention, a simple non-application provision will put the matter beyond doubt.

Example Box 3

If a Bill is to regulate the planning of land areas and those land areas include land owned by the State that is not to be subject to planning controls, either of the following clauses should be enough:

This Act does not bind the State.

This Act does not apply in relation to land owned or occupied by the State.

The second clause is appropriate if other obligations are imposed on State authorities by the Act.

3. If the Bill is to apply to some, but not all, State instrumentalities, give precise indication as to which are affected.

Example Box 4

Road Traffic Act:

(1) Part I (*which deals with road safety*) applies to motor vehicles and persons in the public service of the State.

(2) Part II (*which deals with registration of motor vehicles*) applies to motor vehicles in the public service of the State unless exempt under section 25.

(3) Part III (*which deals with the testing of motor vehicles*) applies to motor vehicles in the public service of the State only if they are registered, or liable to be registered, under Part II.

4.0 CONCLUSION

In Nigeria, an enactment does not bind the State except expressly provided for by the statute or it applies by necessary implication.

5.0 SUMMARY

In this unit, we have considered provisions binding the state. You should now be able to:

- (i) Decide when provisions bind the state;
- (ii) Draft appropriate provisions.

6.0 TUTOR MARKED ASSIGNMENT

1. An Occupiers Liability Bill is to amend the law as to the liability of occupiers of land for injury or damage to persons or goods lawfully on the land resulting from dangers due to the state of the property or things done or omitted to be done there. The aim is to give better protection and improved remedies (in the form of compensation).

Is this a case when express provision should be included to provide for the State's position? Draft an appropriate clause to give effect to your conclusions.

2. Should provisions binding the State be included in a Bill that authorises the Government to issue conservation orders on land owners to prevent soil erosion and similar damage?

7.0 REFERENCES/FURTHER READINGS

Interpretation Act, Cap.192 Laws of the Federation of Nigeria 1990.

1999 Constitution of the Federal Republic of Nigeria.

UNIT 5 EXTRA-TERRITORIAL EXTENSION

CONTENTS

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 - 3.4 Drafting implications of the presumptions
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1.0 INTRODUCTION

We are concerned here with legislative provisions that bring persons or activities outside the territorial limits of the jurisdiction within the ambit of its legislation. Here too, presumptions are applied in their interpretation.

2.0 OBJECTIVES

By the end of this Unit, you should be able to:

- (i) Decide when to give legislation extra-territorial force;
- (ii) Draft appropriate provisions giving legislation extra-territorial effect.

3.0 MAIN CONTENT

3.1 Relevant presumptions

At common law, all statutes are presumed:

- (i) to apply to persons, property, acts or omissions, and activities within the geographical area over which the Legislature has jurisdiction.
- (ii) conversely, *not* to apply to such cases that are *beyond* or *outside* those limits.

The Interpretation Act may contain a legislative form of these presumptions.

Self Assessment Exercise 1

Note down, with the reference, if the Interpretation Act contains a provision in this regard.

3.1.1 Legislative competence to make extra-territorial legislation

Application of the presumption is separate issue from whether the Legislature is *competent* to enact legislation that has extra-territorial effect.

As a general rule, a sovereign Legislature has power to make law for the peace, order and good government of the area over which it has authority. That is usually taken to include the power to enact any legislation that has extra-territorial effect. But this proposition needs two important qualifications:

- (a) the powers of a subordinate legislature (e.g. of a dependent territory) are more limited. Although a competence is accepted, it extends only to matters that are necessary for the operation of the legislation *within* the territorial limits.
- (b) in a Federation:
 - (i) the division of legislative authority in the Constitution usually places within the exclusive competence of the *Federal* Legislature many areas of legislation for which extra-territorial provisions may be needed (e.g. maritime matters);
 - (ii) the power of the individual Legislatures in the Federation to legislate for persons or activities in other States is likely to be restricted in the way described in respect of subordinate legislatures.

Make yourself conversant with the constitutional limitations upon the competence of the Legislature. One of your tasks is to watch out for cases that may fall outside its legislative authority, as they can give rise to questions of the validity of the legislation.

3.2 Do the presumptions relate to the law of other countries?

The presumptions do not affect the law or legal system of any other jurisdiction. They are concerned with the questions of whether your local law applies in relation to events that occur in an external place and whether your legal system has jurisdiction over them. In practice, these questions are likely to arise only if the persons affected come, or can be brought, within the jurisdiction of your courts.

However, provision may be made in your law to support the law or legal system of another country, especially for the purpose of giving effect to international treaties. Such relaxations of sovereignty are kept within limited bounds.

Example Box 1

The Misuse of Drugs Act 1971 (UK) includes the following section as one step in giving effect to the Single Convention on Narcotic Drugs, New York, 30 March 1961.

20. A person commits an offence if in the United Kingdom he assists in or induces the commission in any place outside the United Kingdom of an offence punishable under the provisions of a corresponding law [*i.e. for the control of narcotics*] in force in that place.

Under the rules of private international law, certain matters may have to be regulated in accordance with a foreign law. The common law courts presume that the Legislature respects this rule and that legislation does not deal with them. This presumption too can only be overridden by clear provision.

Example Box 2

Typically, the law governing immovable property is that of the place where the property is situated. Accordingly, legislation affecting immovables is presumed not to apply to any situated abroad.

There is little point, in any case, in providing such rules as, e.g. those regulating conveyancing, to those cases. On the other hand, legislation imposing a tax on the sale of overseas land between nationals is feasible; but it requires clear words.

3.3 Geographic limits are envisaged

The presumptions apply with respect to persons, property, acts or omissions, and activities within the territorial bounds of the jurisdiction. That area typically comprises:

- (i) the land mass;
- (ii) the internal waters of that jurisdiction (i.e. water on the landward side of the territorial waters);
- (iii) the territorial waters and the seabed beneath them, and the islands within the territorial limits of the waters;
- (iii) the airspace over the land and the internal and territorial waters.

If jurisdiction is to be exercised over the sea or sea bed *outside* these territorial limits (e.g. on the continental shelf), the nature and the extent of the powers must be settled by legislation and accord with international law. (Full sovereign rights are rarely claimed in common law jurisdictions). Unless a general statutory provision in the law explicitly equates such areas with the territory of the country, they remain subject to the presumption against extraterritorial application, and particular legislation must be expressly extended to them if that is intended.

Example Box 3

Such an extension is needed to confer enforcement powers over activities in or on the sea outside the territorial limits (in accordance with international law).

e.g. licensing vessels fishing in an Exclusive Economic Zone; searching vessels on high seas for evidence of piracy, protection of ships involved in submarine cable-laying, etc.

Self Assessment Exercise 2

1. Note down the references to provisions of our legislation that prescribe territorial limits.

2. Note also any other areas outside the territorial limits that are treated as part of our territory (including non-mainland territories or dependencies or waters):

3.4 Drafting implications of the presumptions

A court is likely to *imply* extra-territorial effect from general words in the legislation only if it is persuaded that the operation of the legislation would be seriously impaired if it did not have that effect. So, your drafts must contain the clearest indications if the legislation is to be taken as dealing with persons or property, or acts, omissions or activities beyond the territorial limits.

3.5 How to decide when extra-territorial extension is needed

Extra-territorial extension can cause clashes with the law and the sovereign authority of other countries and conflicts of jurisdiction. International repercussions can occur if an extension appears to invade another country's authority, especially if the benefits derived by the legislating country are few in comparison.

The following are the kinds of case where this kind of legislation might be called for:

1. To control or regulate activities of nationals or national transport or communication systems in places outside the jurisdiction of *any* State.

Regulation of these activities is typically called for when it is to be carried out on the high seas, or airspace over high seas, or recently in outer space.

The right of a State to exercise jurisdiction in these areas over its ships, aircraft, satellites or artificial installations (such as oil rigs), and everyone on them, is not contested. In principle, these vehicles or places might be treated for all purposes as part of the territorial authority, but in practice, authority is extended explicitly for particular purposes. The most commonly occurring cases are extensions of criminal law or standards of security or safety.

Legislation may also lay down general extensions for the purposes of the particular subject matter. These are often found in the Criminal Code, legislation relating to merchant shipping, civil aviation and aircraft security.

Example Box 4

(1) The provisions of this Act creating offences apply to acts taking place on board a vessel registered in Nigeria while on the high seas as they apply to acts taking place in Nigeria.

(2) Subsection (1) does not apply where the act is expressly or impliedly authorised, under the law in force in Nigeria, when taking place outside Nigeria.

Always check existing legislation in case general extension provisions of this kind already exist for a particular subject matter.

2. To regulate activities of nationals in other countries.

Typical cases here relate to the criminal law and to taxation. In both, extension may be needed to ensure that persons subject to local jurisdiction cannot evade the operation of legislation by moving their property or activities outside the country.

States are generally regarded as having some responsibility for the activities of their nationals abroad, particularly those performing functions for the State, such as diplomats or military personnel.

Again, criminal cases are often provided for under the general rules of the criminal law, which typically contain specific rules for a range of these matters (e.g. crimes against the State, such as conspiracies, subversion, economic crimes, or serious crimes against other nationals, such as murder).

Example Box 5

25. A citizen of Utopia employed in the service of the Republic commits an offence who, when acting or purporting to act in the course of that employment outside Utopia, does any act which would constitute that offence if done within Utopia.

3. To regulate foreign nationals or their property abroad.

These cases give rise to the greatest risk of clashes with other systems and the lowest chance of enforcing the law. A country's legislation is usually more acceptable if directed against those foreigners who have legally recognised links with it, of a kind that is likely to bring them back there (e.g. domicile or habitual or ordinary residence).

A Bill may have to extend to foreign nationals if it is to give effect to a treaty which itself provides for such extensions of jurisdiction (e.g. in connection with international crimes, such as hijacking or drug trafficking) or which confers some benefit or privilege on foreign as well as local nationals (e.g. under copyright law).

The most controversial area is taxation in respect of, e.g. non-resident foreign companies that trade in the jurisdiction, but whose administration and major assets are outside it. Extension of legislation in cases of this kind requires the clearest of instructions.

In cases of these three kinds, ask yourself:

- (i) whether the aims of the Bill will be frustrated or seriously impaired if persons or their property, for the time being outside the country, are not made subject to it;
- (ii) whether there is a realistic chance of enforcing the legislation against such people.

3.6 What does extra-territorial extension involve in criminal cases?

At common law, national courts have jurisdiction to try offences only if the conduct constituting the offence takes place within the territorial limits. If conduct outside the territory is to be prosecuted, legislation must both designate the conduct as criminal and confer jurisdiction on the national courts to try the matter.

Different elements of a regulated activity may occur in different territorial areas. At common law, activities constituting a criminal offence are treated as committed *within* the territory if the *final* element of the offence occurs within the territory. But the converse case, where the final element occurs *outside* the territory, is not an offence. If that case is to be punishable, legislation must expressly provide for the extension. This is increasingly necessary as criminal schemes are carried out across international borders.

Example Box 6

Some Criminal Codes make general provision on the matter:

14. Where an act which, if wholly done within the territorial limits of Utopia, would be an offence against this Code is done partly within and partly beyond those limits, every person who does any part of the act within those limits may be tried and punished under this Code in the same manner as if the act had been done wholly within those limits.

18. For the purpose of jurisdiction, where any act or omission forming part of an offence, or any event necessary to the completion of any offence, occurs in New Zealand, the offence shall be deemed to be committed in New Zealand, whether the person charged with the offence was in New Zealand or not at the time of the act, omission, or event.

The question of jurisdiction may also be dealt with by general provisions of the Penal Code. In the absence of such provisions, individual statutes must clearly show the intention to vest jurisdiction in the national courts to deal with conduct which *would have been an offence* if it had been committed in the territory.

Example Box 7

8. Except where otherwise expressly provided in this Code or any other Act, the courts of Utopia have jurisdiction in all cases:

- (a) where an act that constitutes an offence occurs in Utopia; and
- (b) where an act occurs outside Utopia and the act is expressed by this Code or any other Act to constitute an offence whether or not it occurs in Utopia or when it occurs in Utopia.

12. An act or omission taking place on an installation on the continental shelf that would have constituted an offence under the law of Utopia if it had taken place in Utopia is to be treated for the purposes of the law as taking place in Utopia.

3.7 How extension provisions should be drafted

1. When preparing legislation involving cases of the kind described, explore the possibility of extra-territorial effect *at the research stage*. Consider whether to include express provisions for this purpose if you foresee that cases involving elements of extra-territorial activity are likely to be a significant or recurring feature in the operation of your Bill.

2. If questions arise as to the competence of the Legislature and to international relations issues, ask for instructions on the extent of extra-territorial application, if they have not already been provided.

3. If extension is called for, provide for that in the clearest possible terms:

- (a) identify the class, or classes, of persons or property affected; and
- (b) if necessary, state in what respects they are affected.

You can provide for the extension:

- (i) in the form of an application clause;
- (ii) alternatively, you may be able to tie in the application with particular substantive rules, as part of those rules.

Example Box 8

3. This Act applies in relation to -

- (a) acts, matters and things outside Nigeria; and
- (b) all persons irrespective of their nationality or citizenship.

25. A person on board an aircraft in flight commits the offence of hijacking who, unlawfully by the use of force or by threats of any kind:

- (a) seizes the aircraft; or

(b) exercises control of the aircraft,
whatever the person's nationality, whatever the State in which the aircraft is registered and whether the aircraft is in Nigeria or elsewhere.

12. A public official, or person acting in an official capacity, *of whatever nationality*, commits the offence of torture if, *in Nigeria or elsewhere*, that person, in the performance or purported performance of official duties, intentionally inflicts severe pain or suffering on another.

It is common practice to require the consent of the Attorney-General to prosecution of extra-territorial offences, so that any potential international repercussions of prosecuting may be first assessed.

Example Box 9

Attorney-General's consent

20. No proceedings in respect of an offence under this Act may be instituted except with the prior consent of the Attorney-General.

4. An extension, in the form of an application clause, is usually best done by *positively applying* the legislation to the class or case, rather than by excluding cases. Exclusion is better used to *prevent* the legislation being construed as extending, by implication, to the specified case.

4.0 CONCLUSION

The Legislature has power to make laws for the peace, order and good government of Nigeria. This is usually taken to include the power to enact legislation that has extra-territorial effect.

5.0 SUMMARY

In this unit, we have considered extra-territorial application of legislation. You should now be able to:

- (i) Determine when to extend legislation beyond the territorial limits of a State;
- (ii) Draft the appropriate provisions when necessary.

6.0 TUTOR MARKED ASSIGNMENT

Draft a clause for the sole purpose of giving a Bill creating certain criminal offences extra-territorial operation in respect of citizens and public servants abroad.

7.0 REFERENCES/FURTHER READINGS

Interpretation Act, Cap.192 Laws of the Federation of Nigeria 1990.

1999 Constitution of the Federal Republic of Nigeria.

BELOW IS THE MODEL INTERPRETATION ACT

INTERPRETATION ACT 1992

No.2 of 1992

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SCHEDULE 1 - *Words of enactment*

SCHEDULE 2 - *Commonwealth countries*

INTERPRETATION ACT 1992

No.12 of 1992

AN ACT to provide for the application, construction, interpretation and operation of written law; to provide with respect to the exercise of statutory powers and duties; and for connected purposes.

[Commencement: 1 January 1993]

ENACTED BY THE PARLIAMENT OF UTOPIA:

PART I - PRELIMINARY

Short title and commencement.

- 1.-(1) This Act may be cited as the Interpretation Act 1992.
- (2) This Act comes into force on 1 January 1993.

Application.

2.-(1) This Act applies to every enactment, whether enacted before or after the commencement of this Act, unless, in relation to a particular enactment:

- (a) express provision is made to the contrary by a written law; or
 - (b) the context of the enactment is inconsistent with that application.
- (2) This Act applies to the provisions of this Act.

Act to bind the Republic.

3. This Act binds the Republic.

PART II - GENERAL PROVISIONS RELATING TO WRITTEN LAWS

Style of statutes.

4. All statutes in Utopia are to be styled Acts.

Citation of written laws.

5.-(1) In referring to a written law, it is sufficient for all purposes to cite or refer to the written law by:

- (a) the short title or the citation by which it is expressed that the law may be cited; or
- (b) the year in which the law was passed or made and the number among the Acts or subsidiary legislation, as the case may be, for that year; or
- (c) the Chapter number, or other reference number, given to the law in the revised edition of the laws.

(2) The citation or reference to a written law must relate to a copy of that law printed, or purporting to be printed, by the Government Printer.

Words of enactment.

6. Every Bill presented to the President must contain words of enactment which must precede the individual clauses of the Bill and be as set out in Schedule 1.

Acts to be public Acts.

7. Every Act is, and is to be judicially noticed as, a public Act.

Application of written law.

8. Every written law applies to the whole of Utopia unless the contrary intention appears.

When written laws bind the Republic.

9.-(1) A written law does not bind the Republic unless it is expressed to do so or unless it appears to do so by necessary implication.

(2) Subsidiary legislation does not bind the Republic unless made under an Act that binds the Republic or unless the Act under which it is made authorises it to do so.

Provisions to be substantive enactments.

10. Every provision of a written law has effect as a substantive enactment without introductory words.

Acts may be amended in the same session.

11. An Act may be amended or repealed in the same session of Parliament as that in which it was passed.

Preambles and Schedules.

12.-(1) The preamble to a written law forms part of that law and is to be construed as a part intended to assist in explaining its purport and object.

(2) A Schedule, appendix or table in a written law, together with any notes to it, forms part of that law.

Headings, notes, etc.

13.-(1) The headings to the Parts, divisions or sub-divisions into which a written law is divided form part of that law.

(2) The marginal or shoulder notes, or footnotes, to any provision of a written law are not to be taken as forming part of that law.

(3) Words in or attached to an enactment that are descriptive of the contents of a provision of that or another enactment are not to be used as an aid to construction but are to be taken as intended for convenience or reference only.

Punctuation.

14. Punctuation forms part of a written law, and regard may be had to it in construing that law.

Use of extrinsic materials in interpretation.

15.-(1) Subject to subsection (3), in the interpretation of a provision of an Act, consideration may be given to any material, not forming part of the Act, that is capable of assisting in ascertaining the meaning of the provision:

- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
- (b) to determine the meaning of the provision when:
 - (i) the provision is ambiguous; or
 - (ii) the ordinary meaning so conveyed leads to a result that is manifestly absurd or unreasonable.

(2) Without limiting the generality of subsection (1), the material that may be considered under that subsection includes:

- (a) any relevant report of a State Commission, law reform commission, committee of inquiry or other similar body that was laid before Parliament before the time when the provision was enacted;
- (b) any relevant report of a committee of Parliament that was made to Parliament before the time when the provision was enacted;
- (c) a treaty or other international agreement that is referred to in the Act;
- (d) an explanatory memorandum relating to the Bill containing the provisions, or any other relevant document, that was laid before, or supplied to members of, Parliament by a Minister before the time when the provision was enacted;
- (e) the speech made to Parliament by a Minister on the occasion of the moving by the Minister of a motion that the Bill containing the provision should be read a second time in Parliament;
- (f) a document that is declared by the Act to be a relevant document for the purposes of this section; and
- (g) any relevant material in the official record of debates of Parliament.

(3) In determining whether consideration should be given to any material under subsection (1), or in considering the weight to be given to any such material, regard must be had, in addition to any other relevant matters, to:

- (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and
- (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

References in written law

16.-(1) A reference in a written law to an enactment is to be construed as including a reference to that enactment as it may be amended from time to time.

(2) A reference in a written law by number or letter to two or more Parts, divisions, sections, subsections, paragraphs, Schedules or other portions of a written law is to be construed as including the references first and last mentioned.

(3) Where in a written law:

- (a) a reference is made to a Part, division, section, Schedule, appendix or form; but
- (b) nothing in the context indicates that a reference to a Part, division, section, Schedule, appendix or form in another written law is intended,

the reference is to be construed as a reference to a Part, division, section, Schedule, appendix or form in the written law in which the reference appears.

(4) Where in a provision of a written law:

- (a) a reference is made to a subsection, paragraph, sub-paragraph or other division; but
- (b) nothing in the context indicates that a reference to a subsection, paragraph, sub-paragraph or other division of some other provision is intended,

the reference is to be construed as a reference to a subsection, paragraph, sub-paragraph or other division of the provision in which the reference appears.

(5) Where in a Schedule to a written law:

- (a) a reference is made to a paragraph, subparagraph or other division; but
- (b) nothing in the context indicates that a reference to a paragraph, sub-paragraph or other division of some other provision is intended,

the reference is to be construed as a reference to a paragraph, sub-paragraph or other division of the Schedule in which the reference appears.

(6) Where in a written law:

- (a) reference is made to subsidiary legislation; but
- (b) nothing in the context indicates that a reference to subsidiary legislation made under some other written law is intended,

the reference is to be construed as a reference to subsidiary legislation made under the written law in which the reference appears.

PART III - COMMENCEMENT OF WRITTEN LAWS

Date of passing, etc, of written laws.

17.-(1) The date on which an Act is passed is the day on which the President signifies on the Bill for the Act the giving of the President's assent to the Bill.

(2) The date on which subsidiary legislation is made is the day when it is signed by or on behalf of the person having the authority to make it.

(3) Where a date appearing on a written law printed or purporting to be printed by the Government Printer, purports, as the case may be, to be:

- (a) the day on which the President assented to it; or
- (b) the day it was signed by or on behalf of the person having authority to make it,

the apparent date is to be received as evidence that it was the date that it purports to be and is to be judicially noted accordingly.

Coming into force of written laws.

18.-(1) An Act comes into force on the day that it is passed, unless the contrary intention is expressed in the Act.

(2) Subsidiary legislation comes into force on the day that it is published in the *Gazette*, unless the contrary intention is expressed in the subsidiary legislation or in the Act under which it is made.

(3) The provision of an Act providing for the coming into force of the Act, or a specified provision of the Act, on a day to be fixed by an instrument, and the provision of the Act providing for the short title, come into force on the date the Act is passed, unless it is otherwise provided.

(4) Where an enactment comes into force on a particular day, it is to be treated as coming into force at the first moment of that day.

(5) Where an Act provides that it is to come into force on a day to be fixed by an instrument, such an instrument:

- (a) may apply to the whole or to any provision or provisions of that Act; and
- (b) may be issued at different days in respect of different provisions,

but it may not fix a day prior to the date on which the instrument is published in the *Gazette*, unless the Act makes express provision to that effect.

(6) Where subsidiary legislation provides that it is to come into force on a day to be fixed by an instrument, the instrument may not:

- (a) fix different days for different provisions; or
- (b) fix a day prior to the date on which the instrument is published in the *Gazette*,

unless an Act makes express provision to that effect.

(7) A reference in a written law, in whatever terms, to the day of the coming into force of a written law, where different provisions come into force on different days, is to be construed as a reference to the day of the coming into force of the appropriate provisions of the written law.

Exercise of powers before commencement.

19.-(1) Where a provision of written law does not come into force on the date that it is passed or made, and that provision confers power:

- (a) to make subsidiary legislation;
- (b) to make an instrument or issue or serve a document or notice;
- (c) to hold an election for, or make an appointment to, a specified office;
- (d) to establish a specified body of persons;
- (e) to prescribe forms or give directions; or
- (f) do anything for the purposes of the written law,

that power may be exercised at any time after the date the written law is passed or made, to the extent appropriate for the purpose of bringing the written law into force or of making it effective upon it coming into force.

(2) Where the power exercised is of a kind mentioned in subsection (1)(a), (b) and (e), it does not take legal effect before the date on which it could have legal effect following the coming into force of the provision conferring the power.

(3) Where the power exercised is of a kind mentioned in subsection (1)(c) and (d), the person elected or appointed to the office or the body established, as the case may be, may perform his, her or its functions, but only to the extent specified in subsection (1); but the term of office or membership of the body is to be treated as beginning on the coming into force of the provision conferring the power.

PART IV - CONSTRUCTION OF WRITTEN LAWS

Law always speaking.

20.-(1) A written law is to be considered as always speaking.

(2) Where, in a written law, anything is expressed in the present tense, it applies to the circumstances as they occur, so that effect may be given to every provision according to the true spirit, intent and meaning.

Application of interpretation provisions in written laws.

21.-(1) Definitions or rules of interpretation in a written law apply to the construction of the provisions of the law that contain those definitions or rules, as well as to the other provisions of the law.

(2) An interpretation section or provision in a written law is to be read and construed as applying only if a contrary intention does not appear in the law.

Corresponding meanings of parts of speech.

22. Where a word or expression is defined in a written law, other parts of speech and grammatical forms of that word or expression, and cognate expressions, have corresponding meanings in that law.

Rules as to gender and number.

23.-(1) In an enactment:

- (a) words and expressions importing the masculine gender include the feminine gender; and
- (b) words and expressions importing the female gender include the masculine gender.

(2) In an enactment -

- (a) words and expressions in the singular include the plural; and
- (b) words and expressions in the plural include the singular.

Construction of "shall" and "may".

24. In an enactment:

- (a) the expression "shall" is to be construed as imperative; and
- (b) the expression "may" is to be construed as permissive and empowering.

PART V - GENERAL INTERPRETATION PROVISIONS

Definitions for legislative purposes.

25.-(1) For the purposes of every written law, the expression:

"Act" means an Act of the Parliament of Utopia;

"amend", in relation to an enactment, means modify, vary or add to, or replace or substitute, in whole or in part, the enactment by another written law;

"commencement", in relation to an enactment, means the time when that enactment comes or came into operation;

"enact", in relation to a written law, includes pass, make or issue the law;

"enactment" means an Act or subsidiary legislation, or a provision or a portion of an Act or subsidiary legislation;

"Parliament" means the Parliament of Utopia;

"prescribed", when used in a written law, means prescribed by the written law, or by subsidiary legislation made under the written law;

"repeal", in relation to an enactment, includes revoke, rescind, cancel or delete the enactment by a written law;

"sitting", in relation to Parliament, means a period during which Parliament is sitting continuously without adjournment, and includes a period during which the House is in Committee;

"sitting days", in relation to Parliament, means the days on which Parliament is sitting;

"Speaker" means the member of Parliament from time to time elected to be Speaker of Parliament;

"subsidiary legislation" means a proclamation, regulations, rules, rules of court, bye-laws, order, notice or other instrument made under a written law and having legislative effect;

"written law" means the provisions of the Constitution, an Act or subsidiary legislation, for the time being in force.

(2) An instrument made under a written law has legislative effect if:

- (a) it determines the law or alters the content of the law, rather than stating how the law applies; and
- (b) it has the direct or indirect effect of imposing an obligation, creating a right, or varying or removing an obligation or a right; and
- (c) it is binding on its application..

(3) The expression "subject to affirmative resolution", when used in relation to subsidiary legislation, means that:

- (a) the legislation is to be tabled in Parliament; and
- (b) if, at the end of the statutory period next after it has been tabled, Parliament has not passed a resolution that it is to come into force or to continue to have effect, the legislation does not come into effect or ceases to have effect from that date, as the case may be;

but its ceasing to have effect does not affect the validity of anything previously done under the legislation.

(4) The expression "subject to negative resolution", when used in relation to subsidiary legislation, means that:

- (a) the legislation is to be tabled in Parliament; and
- (b) if, within the statutory period next after it is tabled, Parliament passes a resolution that it is disallowed, the legislation ceases to have effect from the date of the resolution,

but its ceasing to have effect does not affect the validity of anything done previously under the legislation.

(5) For the purposes of subsections (3) and (4), the expression "statutory period", means a period of 40 days or such other period as may be prescribed, in the enactment in which the expression is used; but in reckoning the period, the time that Parliament is dissolved or prorogued is to be disregarded.

Definitions for judicial purposes.

26. For the purposes of every written law, the expression:

"Chief Justice" means the Chief Justice of Utopia appointed under section 62 of the Constitution;

"court" means a court of Utopia of competent jurisdiction;

"Court of Appeal" means the Court of Appeal established by section 60 of the Constitution;

"court of summary jurisdiction" means a court exercising a statutory summary jurisdiction;

"Director of Public Prosecutions" means the Director of Public Prosecutions appointed under section 85 of the Constitution;

"Judge" means the Chief Justice or a Judge or an acting Judge of the Supreme Court;

"Judicial Service Commission" means the Judicial Service Commission established by section 65 of the Constitution;

"magistrate" means a magistrate appointed under the Magistrates Courts Act, and includes a senior magistrate;

"magistrate's court" means a magistrate's court established under the Magistrates Courts Act;

"rules of court", in relation to a court, means rules made by the authority having for the time being power to make rules regulating the practice and procedure of that court;

"summary conviction" means conviction of a summary offence by a court of summary jurisdiction;

"summary offence" means an offence triable otherwise than on indictment;

"Supreme Court" means the Supreme Court of Utopia established by section 58 of the Constitution.

Definitions for official purposes.

27. For the purposes of every written law, the expression:

- "Auditor-General"** means the Auditor-General appointed under section 94 of the Constitution;
- "Cabinet"** means the Cabinet established by section 45 of the Constitution;
- "Commonwealth country"** means an independent sovereign state that is a member of the Commonwealth;
- "Consolidated Fund"** means the Consolidated Fund established by section 87 of the Constitution;
- "Constitution"** means the Constitution of Utopia;
- "financial year"** has the meaning given by section 33(2);
- "Gazette"** or **"Official Gazette"** means the *Official Gazette* printed and published by the Government Printer, and includes a supplement to the *Official Gazette*;
- "Government"** means the Government of Utopia;
- "Government Notice"** means an announcement, whether or not having a legislative character, made in the *Official Gazette* by or with the authority of the Government;
- "Government Printer"** includes a printer authorised by the Government to print and publish written laws or other documents of the Government;
- "Minister"** means a Minister appointed under section 44 of the Constitution, and:
- (a) in relation to an Act, means the Minister for the time being having responsibility for the administration of the Act;
 - (b) in relation to subsidiary legislation, means the Minister for the time being having responsibility for the Act under which the subsidiary legislation is made;
- "Police Force"** means the Police Force of Utopia constituted and maintained under the Police Act;
- "police officer"** means a person appointed a police officer or special constable under the Police Act;
- "Police Service Commission"** means the Police Service Commission established by section 103 of the Constitution;
- "President"** means the President of Utopia appointed under section 28 of the Constitution;
- "Prime Minister"** means the Prime Minister appointed under section 73 of the Constitution;
- "public office"** means any office of emolument in the public service;
- "public officer"** means the holder of a public office and includes a person appointed to act in such an office;
- "public service"** means the service of Utopia in a civil capacity in respect of the government of Utopia;
- "Public Seal"** means the Public Seal of Utopia;
- "Public Service Commission"** means the Public Service Commission established by section 92 of the Constitution;
- "Republic"** means the Republic of Utopia;
- "statutory board"** means a board, commission, committee, council or other similar body established by or under a written law.

Definitions for local government purposes.

28. For the purposes of every written law, the expression:

- "Council"** means a Local Government Council established under the Local Government Act;
- "local government area"** has the meaning given by section 2 of the Local Government Act;
- "Local Government Service Commission"** means the Local Government Service Commission established by section 94 of the Constitution.

Miscellaneous definitions.

29. For the purposes of every written law, the expression:

- "act"**, where used in reference to an offence or civil wrong, includes an omission, a series of acts or omissions or a series of acts and omissions;
- "affidavit"**, in the case of a person permitted by law to affirm or make a declaration instead of swearing, includes an affirmation and declaration;

"coin" means a coin that is legal tender in Utopia;

"contravene", in relation to a provision of a written law, includes a failure to comply with a requirement or condition in that provision;

"definition" means the meaning or interpretation given to a word or expression by a written law;

"document" includes:

- (a) a publication; or
- (b) any matter written, expressed or described on any substance by means of letters, figures or marks (or more than one of those means), which is intended to be used or may be used for the purpose of recording any matter;

"function" includes a power, duty, responsibility or jurisdiction;

"individual" means a natural person;

"land" includes buildings and other structures and land covered with water;

"month" has the meaning given by section 33(3);

"oath", in the case of a person permitted by law to affirm or declare instead of swear, includes affirmation and declaration;

"penalty" means a fine, imprisonment or other form of punishment;

"perform", in relation to a function, includes to exercise a power, duty, responsibility or jurisdiction;

"person" includes a company, corporation, and association or body of persons, corporate or unincorporate;

"power" includes a privilege, authority or discretion;

"publication" means:

- (a) written or printed matter; or
- (b) record, tape, disk or wire, or cinematographic, television or video film; or
- (c) other medium by means of which information may be produced, reproduced, represented or conveyed, mechanically, electrically, electronically or optically;

and includes a copy or reproduction of a publication as defined in paragraph (a), (b) or (c);

"public holiday" means a day appointed as a public holiday under the Public Holidays Act;

"public place" means a place to which, at the material time, members of the public have, or are permitted or entitled to have, access, whether on or without making payment;

"service by post" means service in accordance with section 56(2);

"sell" includes exchange, barter, offer to sell or expose for sale;

"ship" means a vessel used or capable of being used for transport by sea;

"sign" includes affix or make a mark or fingerprint, or to affix a seal or chop;

"standard time" has the meaning given by section 30;

"statutory declaration" means:

- (a) a declaration made in Utopia under the Statutory Declarations Act; or
- (b) a declaration made outside Utopia but effective in Utopia under that Act;

"surety" means sufficient surety;

"swear", in the case of a person permitted by law to affirm or declare instead of swear, includes to affirm and to declare;

"under", in relation to a written law or a provision of a written law, includes "by", "in accordance with", "pursuant to", "in pursuance of" and "by virtue of";

"vessel" means a ship, boat, lighter or other floating craft used or capable of being used for transport by water;

"will" includes a codicil and every writing making a voluntary posthumous disposition of property;

"word" includes a figure or symbol;

"writing" includes printing, photographing, filming, photocopying, type-writing, electronic processing and any other mode of representing or reproducing words in a visible form;

"year" has the meaning given by section 33.

PART VI - PROVISIONS RELATING TO TIME AND DISTANCE

Standard time.

30.-(1) In an enactment, an expression relating to time and references to a point of time shall be determined by reference to standard time.

- (2) In an enactment, the expression "standard time" means:
- (a) exactly 4 hours later than Greenwich mean time; or
 - (b) such other time as the President declares by proclamation to be the standard time of Utopia.

Provision where no time fixed.

31. Where in a written law no time is fixed or allowed within which anything must be, or is to be, or may be, done, the thing must be, or is to be, may be, done, as the case may be, with all reasonable speed and as often as due occasion arises.

Expressions relating to time.

32.-(1) The following provisions have effect for the purpose of computing time under an enactment.

(2) Where a period of time is expressed to begin on a particular day, that day is to be included in the period.

(3) Where a period of time is expressed to be reckoned from, or after, a particular day, that day is not to be included in the period.

(4) Where a period of time is expressed to end on, or to continue to, or to be reckoned to, a particular day, that day is to be included in the period.

(5) Where:

- (a) the time for doing anything is limited, or a particular day is specified, by an enactment; and
- (b) that time expires on, or that time or day falls on, a Sunday or a public holiday,

the thing may be done on the next day that is not a Sunday or public holiday.

(6) Where a period of time set for the doing of anything does not exceed 6 days, Sundays and public holidays are not to be included in the computation of the period.

(7) Where a period of time is expressed as a number of "clear days", or as a number of days qualified by the expression "at least" or "not more than", both the first day and the last day expressed are to be excluded in the computation of the period.

Reckoning years and months.

33.-(1) A reference in an enactment to a year is to be construed as a reference to a period of 12 months.

(2) A reference in an enactment to a financial year is to be construed as a reference to a period of 12 months ending on 31 March.

(3) A reference in an enactment to a month is to be construed as a reference to a month as directed by the calendar.

Distance.

34. In measuring any distance for the purposes of a written law, the distance is to be measured in a straight line on a horizontal plane.

PART VII - REPEAL OF WRITTEN LAW

Repeal of written law as amended.

35. The repeal of a written law that has been amended by another written law includes the repeal of all provisions of the other law that made the amendments.

Repeal of a repeal.

36. Where a written law repeals a repealing enactment, that repeal does not revive any enactment, or rule of unwritten law, previously repealed unless words are added reviving it.

Repeal and substitution.

37. Where a written law repeals an enactment and substitutes provisions for the enactment repealed, the repealed enactment remains in force until the substituted provisions come into force.

Effect of re-enacted provisions.

- 38.** Where a written law repeals and re-enacts an enactment, with or without modification:
- (a) a reference in another enactment to the repealed enactment is to be construed as a reference to the enactment as re-enacted;
 - (b) all offices constituted, and appointments of officers made, under the repealed enactment, and in existence at the commencement of the re-enacted enactment, continue as if constituted or made under the re-enacted enactment;
 - (c) all councils, corporations, boards, tribunals, commissions or other bodies constituted, and all elections and appointments of their members made, under the repealed enactment, and in existence at the commencement of the re-enacted enactment, continue as if constituted or made under the re-enacted enactment;
 - (d) all proceedings taken under the repealed enactment are to be continued under and in conformity with the re-enacted enactment, so far as is consistent with that enactment;
 - (e) all subsidiary legislation or instruments made under the repealed enactment, and in force or having effect at the commencement of the re-enacted enactment, continue in force or to have effect as if made under the re-enacted enactment, so far as is consistent with that enactment; and
 - (f) all decisions taken, consents given, authorisations and directions issued, applications and requests made, and things done, under the repealed enactment, and having effect at the commencement of the re-enacted enactment, continue to have effect as if taken, given, issued, made or done under the corresponding provision of the re-enacted enactment, so far as is consistent with that enactment.

Effect of repealing provisions.

39.-(1) Where a written law repeals an enactment, that repeal does not, unless the contrary intention appears:

- (a) revive anything not in force or existing at the time at which the repeal takes effect;
 - (b) affect the previous operation of the repealed enactment or anything duly done or suffered under that enactment;
 - (c) affect any right, title, interest, status, privilege, obligation or liability acquired, accrued or incurred under the repealed enactment prior to the repeal;
 - (d) affect any penalty or forfeiture incurred or liable to be incurred in respect of an offence committed against that enactment;
 - (e) affect any investigation, legal proceeding or remedy in respect of any such right, title, interest, status, privilege, obligation or liability, or penalty or forfeiture.
- (2) An investigation, legal proceeding or remedy mentioned in subsection (1)(e) may be instituted, continued or enforced, and a penalty, forfeiture or punishment liable to be incurred may be imposed, as if the enactment had not been repealed.
- (3) Nothing in this section authorises the continuance in force after the repeal of an enactment of any subsidiary legislation or instrument made under that enactment.
- (4) The inclusion in the repealing provisions of an enactment of an express saving with respect to the repeals effected by it does not prejudice the operation of this section with respect to the effect of those repeals.
- (5) This section applies with respect to an enactment that expires or ceases to have effect as if that enactment had been repealed.

PART VIII - SUBSIDIARY LEGISLATION

Provisions relating to the making of subsidiary legislation.

40.-(1) Where subsidiary legislation purports to be made in exercise of or under particular powers, it is to be treated as to be made in exercise of or under all powers under which it may be made.

(2) Where a written law confers a power to make subsidiary legislation, it is to be treated as also including a power to amend or revoke that subsidiary legislation in the same way and subject to the same conditions, if any.

(3) Where an enactment confers power on a person to make subsidiary legislation for any general purposes and also for any special purposes incidental to those purposes, the enumeration of the special purposes does not affect the generality of the powers conferred with reference to the general purposes.

(4) A power in an enactment to make subsidiary legislation may be exercised:

(a) in relation to:

- (i)** all cases to which the power extends;
- (ii)** all those cases subject to specified exceptions; or
- (iii)** any specified cases or classes of case; and

(b) so as to make, as respects the cases in relation to which it is exercised:

- (i)** the full provision to which the power extends or any less provision (whether by way of exception or otherwise);
- (ii)** the same provision for all cases in relation to which the power is exercised;
- (iii)** different provision for different cases or classes of case;
- (iv)** different provision as respects the same case or class of case for different purposes of the written law; or
- (v)** any such provision either unconditionally or subject to any specified condition.

(5) Subsidiary legislation may provide:

- (a)** that contravention of a provision of the legislation constitutes a summary offence; and
- (b)** for the penalty for that offence, which must not exceed a fine of \$1000 and imprisonment for 3 months.

Expressions in subsidiary legislation.

41.-(1) Words and expressions used in subsidiary legislation have the same respective meanings as in the written law under which the subsidiary legislation is made.

(2) A reference in subsidiary legislation to "the Act" is to be construed as a reference to the Act under which the subsidiary legislation is made.

Relationship with parent legislation.

42.-(1) A reference in an enactment to a written law is to be construed so as to include a reference to any subsidiary legislation made under that written law.

(2) An act done under subsidiary legislation is to be treated as done under the written law under which the subsidiary legislation was made.

Rules of court.

43.-(1) Where an enactment confers jurisdiction on a court, or extends or varies the jurisdiction of a court, the authority having for the time being power to make rules of court for that court may make rules of court for the court in exercise of the jurisdiction conferred, extended or varied.

(2) The power of that authority to make rules of court includes a power to make rules of court for the purpose of any written law which directs or authorises anything to be done by or in accordance with rules of court.

Deviation in forms.

44. Where a form is prescribed or specified under a written law, deviations from it that do not materially effect the substance nor are likely to mislead do not invalidate the form used.

PART IX - STATUTORY POWERS AND DUTIES

Exercise of powers and duties.

45. Where an enactment confers a power or imposes a duty, the power may be exercised and the duty must be performed from time to time as occasion requires.

Incidental powers.

46. Where an enactment empowers a person or authority to do an act or thing, all such powers are to be regarded as given:

- (a) as are reasonably necessary to enable that person or authority to do the act or thing; or
- (b) as are incidental to the doing of the act or thing.

Provisions as to holders of offices.

47.-(1) Where an enactment authorises the appointment of person to any office and declares that this section applies to that appointment, it is to be treated as also conferring on the authority having the function of appointment:

- (a) power, at the discretion of that authority, to remove or suspend the office holder; and
- (b) power, exercisable in the like manner and subject to the like consent and conditions (if any) applicable on the appointment:
 - (i) to reappoint or reinstate the person to the office;
 - (ii) where the office holder is for any reason prevented from performing the functions of the office, to appoint another eligible person in the stead of the office holder, or to act in that stead, and to provide for the remuneration of the person so appointed;
 - (iii) to fix or vary the remuneration, to withhold the remuneration in whole or part during a period of suspension from office, and to terminate the remuneration on removal from office, of the office holder.

(2) Where:

- (a) an enactment authorises the appointment of a person to an office; and
- (b) that function is exercisable only upon the recommendation or subject to the approval, consent or concurrence of some other authority or person,

the powers in subsection (1) are exercisable only upon the recommendation or subject to the approval, consent or concurrence of that other authority or person.

Exercise of powers of holders of offices.

48. Where an enactment confers a power or imposes a duty on the holder of a public office, the power may be exercised and the duty must be performed by the person for the time being lawfully holding, acting in or performing the functions of that office.

Power of majority, quorum, etc. of statutory body.

49.-(1) Where an enactment confers or imposes a function upon a body or a number of persons consisting of not fewer than 3 persons, the function may be performed by a majority of those persons.

(2) Where a statutory board consists of 3 or more persons:

- (a) a quorum is constituted at a meeting of the board by a number of members of the body equal to:
 - (i) at least one-half of the number of members provided for in the written law establishing the board, if that number is a fixed number; and
 - (ii) if the number of persons is not so fixed but is within a range having a maximum or minimum, at least one-half of the number of members in office;
- (b) an act or thing done by a majority of the members of the board present at the meeting, if those members constitute a quorum, is to be regarded as having been done by the board.

Power of statutory board not affected by vacancy, etc.

- 50.** The powers of a statutory board are not affected by:
- (a) a vacancy in the membership of the board;
 - (b) any defect afterwards discovered in the appointment or qualification of a person purporting to be a member of the board or the deputy or alternate of a member;
 - (c) a minor irregularity in the convening or conduct of a meeting of the board;
 - (d) the presence or participation at a meeting of the board of a person not entitled to be present or to participate.

Exercise of powers to delegate.

- 51.-(1)** Where under a written law:
- (a) a function of a person may be delegated; and
 - (b) the performance of the function is dependent upon the opinion, belief or state of mind of that person,

the function may be performed by the person to whom it is delegated upon the opinion, belief or state or mind of the delegate in respect of that matter.

(2) Where a written law confers power upon a person to delegate the performance of a function conferred on the person under a written law:

- (a) that delegation does not preclude that person from performing the function delegated;
- (b) the delegation may be made subject to such conditions, qualifications, limitations or exceptions as that person may specify in writing at the time of the delegation;
- (c) the delegation may be made to a specified person or to persons of a specified class or to the holder or holders for the time being of a specified office or class of office;
- (d) the delegation may be amended or revoked by instrument in writing signed by the person delegating.

(3) Where a written law confers upon the holder of an office the power to delegate the performance of a function, that delegation does not cease to have effect by reason only of a change in the person holding, or acting in or performing the functions of, that office.

(4) The delegation of a power is to be treated as including the delegation of any duty incidental to that power, and the delegation of a duty is to be treated as including the delegation of a power incidental to, or connected with, that duty.

PART X - OFFENCES AND PENALTIES

Double jeopardy.

52. Where an act constitutes an offence under 2 or more enactments, or under an enactment and the common law, the offender is liable to be prosecuted and punished for any of those offences, but that person shall not be punished twice for the same offence.

Offences by corporate bodies.

53.-(1) Every enactment relating to an offence punishable on indictment or summary conviction is to be treated as referring to bodies corporate as well as to individuals.

(2) Where under a written law an offence is committed by a body corporate, every person who at the time of the offence:

- (a) is a director, manager or officer; or
- (b) is concerned in, or is purporting to be concerned in, the management of its affairs,

commits that offence, unless that person proves that the act constituting the offence took place without his or her consent or knowledge or that he or she took reasonable steps to prevent the commission of the offence.

(3) Where:

- (a) the penalty specified in a written law in respect of an offence does not consist of or include a fine; and
- (b) no different provision is expressly made,

the court convicting a body corporate of that offence may impose a fine, instead of the specified penalty, according to the following scale -

Specified maximum penalty of imprisonment	Maximum fine
not more than 6 months	\$5000
more than 6 months but not more than 12 months	\$7500
more than 6 months but not more than 2 years	\$15000
more than 2 years	\$50000.

(4) If at any time the Minister responsible for Justice and Legal Affairs is of the opinion that there has been a change in the value of money, the Minister may substitute, by order published in the *Gazette*, for the sums specified in subsection (3) such other sums the Minister considers appropriate to take account of the change.

Expressions prescribing penalties.

54.-(1) Where in a written law a penalty is specified in respect of an offence, that penalty is the maximum penalty that may be imposed for that offence.

(2) Where in a written law more than one penalty is specified in respect of an offence, the use of the word "and" between the respective penalties means that the penalties may be imposed in the alternative or cumulatively.

(3) Where at the end of a section or subsection in an Act a penalty is specified:

- (a) a contravention of that section or subsection, as the case may be, constitutes an offence under the Act; and
- (b) the specified penalty is the maximum penalty that may be imposed in respect of that offence; this subsection applies to subsidiary legislation with the necessary modifications.

Forfeitures and fines.

55.-(1) Every fine or pecuniary penalty imposed by or under a written law must be paid into the Consolidated Fund.

(2) Where under a written law anything is, or is ordered by a competent authority to be, forfeited, it is to be treated as forfeited to the Republic.

(3) Where under a written law anything ordered to be, or to be treated as, forfeited to the Republic is required to be sold, the proceeds of the sale must be paid into the Consolidated Fund.

(4) Nothing in this section affects an enactment under which a penalty or forfeited thing, or the proceeds of the sale of a forfeited thing, are recoverable or may be paid to any authority or person.

PART XI - MISCELLANEOUS

Service of documents.

56.-(1) Where a written law authorises or requires a document or notice to be served on, delivered, sent or given to, a person, without directing the manner in which that is to be done, the service, or delivery, sending or giving, is to be treated as having been completed:

- (a) in the case of an individual -
 - (i) by handing to the individual in person; or
 - (ii) by addressing to the individual and handing to an adult person at, or posting to, the person's usual or last known residential address, or, if a principal of a business, at or to the usual or last known address of that business;
- (b) in the case of a corporate body or of an association of persons (whether incorporate or not) by addressing to the body or association and handing to the secretary or another officer at, or posting to, its principal place of business or principal office in Utopia; or
- (c) in either case, if there is no person at the address to whom a document or notice can be handed, by affixing it, or a copy of it, to some conspicuous place at that address.

(2) Where a written law authorises or requires a document or notice to be served on, delivered, sent or given to, a person, by post, the service, or delivery, sending or giving, is to be treated as having been completed:

- (a) by properly addressing and posting by pre-paid post as letter to the last-known address of the person; and
- (b) at the time when the letter would have been delivered in the ordinary course of post, unless the contrary is proved.

Membership of the Commonwealth.

57.-(1) The Schedule has effect for the purpose of determining which countries are members of the Commonwealth.

(2) The President may amend the Schedule, by order, by adding the names of countries that have become Commonwealth countries or by deleting countries that have ceased to be Commonwealth countries.

(3) An order made under subsection (2) may declare the date from which the Schedule is amended in respect of a particular country, whether that date is before, on or after the date on which the order is made.

(4) In a proceeding before a court or a person or authority acting judicially:

- (a) a certificate signed by the Minister responsible for Foreign Affairs that on a date specified in the certificate -
 - (i) a specified country was or was not a Commonwealth country; or
 - (ii) that a specified territory was or was not one for whose international relations a specified Commonwealth country was responsible,

is conclusive evidence of the matters stated in the certificate; and

(b) if no certificate issued under paragraph (a) is produced:

- (i) the fact that a country is specified in the Schedule is conclusive evidence that the country is a Commonwealth country; and
- (ii) the fact that the country is not so specified is conclusive evidence that the country is not a Commonwealth country.

(5) Where a certificate is produced under subsection (4), the court or person or authority is to take judicial notice of the signature of the Minister on the certificate.

SCHEDULE 1

(section 6)

Words of enactment

1. In every Bill presented to the President for assent, other than a Bill mentioned in paragraph 2, the words of enactment must be as follows:

"Enacted by the Parliament of Utopia:".

2. In every Bill presented to the President for assent under section 35 (1) of the Constitution (which relates to the amendment of the Constitution), the words of enactment must be as follows:

"Enacted by the Parliament of Utopia in accordance with section 35(1) of the Constitution:".

SCHEDULE 2
Commonwealth countries

(section 56)

Antigua and Barbuda	Kenya	Seychelles
Australia	Kiribati	Sierra Leone
The Bahamas	Lesotho	Singapore
Bangladesh	Malawi	Solomon Islands
Barbados	Malaysia	South Africa *
Belize	The Maldives	Sri Lanka
Botswana	Malta	Swaziland
Brunei Darussalam	Mauritius	Tanzania
Cameroon †	Mozambique †	Tonga
Canada	Namibia	Trinidad and Tobago
Cyprus	Nauru	Tuvalu
Dominica	New Zealand	Uganda
Fiji ‡	Nigeria	United Kingdom
The Gambia	Pakistan	Vanuatu
Ghana	Papua New Guinea	Western Samoa
Grenada	St. Christopher-Nevis	Zambia
Guyana	St. Lucia	Zimbabwe
India	St. Vincent & the Grenadines	
Jamaica		

* *Added by the Interpretation Act (Commonwealth Countries) Order 1994, LN No.123.*

† *Added by the Interpretation Act (Commonwealth Countries) Order 1995, LN No.4.*

‡ *Added by the Interpretation Act (Commonwealth Countries) Order 1997, LN No.89.*