NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF POSTGRADUATE STUDIES

FACULTY OF LAW

COURSE CODE: LED705

COURSE TITLE: DYNAMICS OF LEGAL DRAFTING (CONSTITUTIONAL PERSPECTIVE)

NATIONAL OPEN UNIVERSITY OF NIGERIA

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COURSE GUIDE

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Summary……..

Introduction

Legislative drafting is concerned with the governance of Nigeria. Its practice is influenced by the general legal context that prevails in the country. That context derives from the system of law and law-making, the requirements of the Constitution and method of government, and the legal and judicial values, of Nigeria.

This Course deals with four contextual features typically found in Commonwealth jurisdictions that are of particular relevance to drafters:

(i) Rules of interpretation, developed in the main by the judges, to help resolve uncertainties of meaning and application.

(ii) Interpretation legislation, which contains statutory rules about the construction, interpretation, application and operation of legislation.

(iii) The Constitution, which creates the institutional framework within which legislation is made and put into effect, and which imposes constraints upon the allocation and exercise of public power.

(iv) Fundamental Freedoms provisions guaranteeing basic rights and freedoms of individuals in the community, which is found in Chapter IV of the 1999 Constitution of Nigeria (the Constitution) or are protected under international treaties to which many Commonwealth States (including Nigeria) are party.

All these topics affect the way that drafting is carried out in Nigeria, and they may influence its form and content. But they also touch upon underlying values concerning the way that written law should be used in a democratic and law-governed society.

Learning Outcomes

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

(i) take into account, where relevant:

(a) unwritten rules of statutory interpretation applied by common law judges; and
(b) in particular, the important presumptions and canons of interpretation relied upon by judges;

(ii) apply the drafting practices authorised by the Interpretation Act, and generally to implement its other requirements;

(iii) work within the constraints imposed by the Constitution, and to take full account of its requirements so that the legislation is not vulnerable to legal challenge;

(iv) draw attention to legislative proposals or provisions that may be inconsistent with the Fundamental Human Rights provisions of the Constitution or with treaty obligations on human rights standards which Nigeria has assumed towards individuals and to find ways in which that consistency can be achieved.

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 17 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.

Course Materials

The major components of the course are:

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

Study Units

We deal with this Course in 8 study units broken into two modules of four units each as follows:

Module 1

Unit 1 – Working with the Rules of Interpretation
Unit 2 – Judicial Assumptions and Aids to Interpretation
Unit 3 – The Importance of and application of the Interpretation Act
Unit 4 – The effects of the Act on drafting practice

Module 2

Unit 1 – The Constitution and the drafter
Unit 2 – Particular Constitutional Constraints
Unit 3 – Drafting under a Bill of Rights
Unit 4 – Interpretation Standards

All these Units are demanding. They also deal with basic principles and values, which merit your attention and thought. Tackle them in separate study periods. You may require several for each.

We suggest that Module 1 be studied one after the other, since they are linked by a common theme. You will gain more from them if you have first carried out work on legislative expression. You will then have a clearer picture into which to paint these topics. Subsequent Courses are written on the assumption that you have completed these Units.

You should be familiar with many features of Units 1 & 2 of module 1 and for that reason may be able to complete it relatively quickly. But Units 3 & 4 of module 1 introduces many matters that are likely to be new to you and have important consequences for drafting. You will need to spend more time on these Units.

Module 2 deals with a different subject area, though they too are closely linked. Again we suggest that you study them in sequence. The matters examined in them are relevant to other Courses to a limited extent only. These Units are not concerned with developing particular drafting skills; they contain more descriptive material than many other Courses. So, work on them may make a welcome contrast with the Courses that are more skill-based.

Neither should be taken too quickly. Units 1 & 2 of module 2 calls for you to complete many exercises in order to gather relevant local information. Units 3 & 4 of module 2 contain much that is likely to be new, either from a legal standpoint or in terms of approach.

Each study unit consists of two weeks' work and includes specific objectives, directions for study, reading material and Self-Assessment Exercises (SAE). Together with Tutor Marked Assignments, these exercises will assist you in achieving the stated learning objectives of the individual units and of the course.

Textbooks and References

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

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.

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.

Final Examination and Grading

The duration of the final examination for LED 605 – Constitutional Perspective 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.

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, best three marks of the four count at 30% of course marks.

Final examination	70% of overall course score
Total	100% of course score

Course Overview and Presentation Schedule

Module 1	Title of Work	Weeks Activity	Assessment (End of Unit)
	Course Guide	1	
Units 1	Working with the Rules of Interpretation	1	Self-Assessment Exercise1
2	Judicial Assumptions & Aids to Interpretation	2	Self-Assessment Exercise 2
3	The importance and application of the Interpretation Act	2	Self-Assessment Exercise 3
4	The effects of the Act on drafting practice	2	Self-Assessment Exercise 4
Module 2 Units 1	The Constitution & the drafter	2	Self-Assessment Exercise 5
2	Particular Constitutional restraints	2	Self-Assessment Exercise 6
3	Drafting under a Bill of Rights	2	Self-Assessment Exercise 7
4	Interpretation Standards	1	Self-Assessment Exercise 8
	Revision	1	
	Examination	1	
	Total	17	

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.

Tutors and Tutorials

There are 15 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
3.
4. exercises;
5. 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.

Summary

This contains foundation material which we consider should be studied as a preliminary to working on drafting skills. This Course contains rather more descriptive material than most of the subsequent ones. It gives an account of what is entailed in legislative drafting in Commonwealth systems particularly in Nigeria, in order to provide a context for your future work on this Course. It also contains guidelines about how to proceed when drafting and the general approach that you may wish to develop. Later Courses concentrate on the actual tasks in connection with legislative writing and structuring.

Some of the material in this Course will already be familiar to you from your earlier legal studies and professional work. Those of you who have acquired a little experience of legislative drafting will find rather more with which you are already conversant. However, take this opportunity to confirm your knowledge and understanding. Much that follows in later Courses assumes that you are thoroughly comfortable with what is covered in this Course.

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

LED 705 DYNAMICS OF LEGISLATIVE DRAFTING
(CONSTITUTIONAL PERSPECTIVES)

MODULE 1

Unit 1 – Working with the Rules of Interpretation
Unit 2 – Judicial Assumptions and Aids to Interpretation
Unit 3 – The Importance of and application of the Interpretation Act
Unit 4 – The effects of the Act on drafting practice

Unit 1 WORKING WITH THE RULES OF INTERPRETATION

Contents

1.1 Introduction

Drafters must have a sound knowledge of the rules of interpretation that are likely to be applied when legislation comes to be construed and applied. Those rules are usually invoked when there is some uncertainty as to meaning or application - the very situation that you will be setting out to prevent. But if we are forewarned about the way judges are likely to approach our drafts, we can be forearmed when we are preparing them.

You will be better equipped to draft written rules that meet judicial expectations if you understand:

(i) How judges approach the task of interpretation
(ii) How particular linguistic practices and expressions are likely to be treated by the courts.

1.2 Learning Outcomes

At the completion of this unit, you are expected to be able to:

i. Understand the unwritten rules of statutory interpretation as applied by common law judges.
ii. Have general knowledge of legislation writing/drafting

This Unit is written on the assumption that, as a lawyer, you already have a basic knowledge of the ways in which legislation is interpreted and you are familiar with the approaches judges tend to follow when a question of interpretation arises before them. (We refer to these as rules of interpretation.)

If you need to refresh your memory, read one of the basic texts on the subject listed in the reference.

In this Unit, we consider rules of interpretation from the standpoint of the drafter (who writes the rules that fall to be interpreted), rather than, as is more common, from the standpoint of someone faced with a problem as to the meaning or application of a particular written rule.

The principal aim of this Unit is to enable you to adapt your present knowledge of statutory interpretation to the context of drafting. It is designed to encourage you to look for the relevance of the rules of interpretation to the composition of legislation, rather than to its application.

Throughout this Unit ask yourself when and how the particular matter under discussion might affect the drafting of legislation. The Example and Exercises should all be approached in that way.

In studying Units 1 to 4, you will need to refer from time to time to the Interpretation Act and to the model Interpretation Act 1992.

1.3 What do we mean by "rules of interpretation"?

Although lawyers tend to talk about "rules on interpretation" (as we do in this Course), in practice the process of statutory interpretation is not rule-governed. Judges do not give meaning to provisions by applying a prescribed requirement to a particular case. The process is more sophisticated and complex than that. The so-called "rules" comprise a range of guidelines that indicate considerations which judges should have in mind or can call in aid when applying a statutory provision to a particular case. In the last analysis, a decision as to the meaning of a provision

is a matter of judgment by which Judges make what they consider to be the best choice of possible meanings. The rules of interpretation indicate factors that judges should take into account, but relying on their experience and good sense, they determine what weight to give to those factors.

Self-Assessment Exercises

1. Identify the stages in the determination of the legal meaning of an existing enactment
2. What differentiates the mind or interest of a drafter from that of a lawyer in the interpretation of legislation?

1.3.1 How Drafters Should Look at Rules of Interpretation

(i) As a Lawyer

To an extent, of course, drafters have to interpret legislation much as other lawyers do. For example, in order to work out how a Bill is to link with existing law, you may have to arrive at the legal meaning of an existing enactment. This can involve you in:

a. Comprehension

Construing the enactment to understand what it provides, in particular what it states grammatically.

b. Application

Deciding that particular cases fall within its terms, with the consequence that specified legal results are produced.

c. Interpretation

Resolving doubts about meaning; overcoming ambiguities, obscurities or inconsistencies in the enactment, or uncertainty in its application.

Most of the time, the task of understanding and applying an enactment is straight-forward. But in fact all these activities involve interpretation, although it may sometimes be done subconsciously.

Lawyers typically study how to interpret legislation because they need to advise on the legal effect of enactments that are not straight-forward. To do that they must be able to predict how judges are likely to decide what the legislation means. For this, they should be conversant with:

1. Their Interpretation legislation, which usually contains some provisions on the matter;
2. The approaches and various guides to legislative intent that judges may use (and that the judges continue to develop).

(ii) As a Drafter

However, our interest in interpretation, as drafters, has a different emphasis. Our main concern in drafting an instrument is to create a body of legal rules to achieve a given policy, not to determine how a particular enactment should be applied in a particular case. Drafters try to prevent complicated questions of interpretation arising, by communicating their intentions as certainly and conclusively as they can, and rely on the basic approaches to interpretation for that purpose. However, those rules of interpretation concerned with, e.g. resolving ambiguity or obscurity, therefore, cannot be our *primary* consideration.

At the same time, questions of interpretation will always arise. In the end, the judges may be asked to decide whether or not there is uncertainty in meaning and how it should be resolved. For that reason, we must write in the ways which take into consideration judicial approaches to statutory language, and which, overall, help the judges to reach conclusions that are consistent with our legislative scheme.

As a drafter, your function is to draft legislation in ways that:

(a) Facilitate its application, by those who are affected by the legislation, to the cases they are intended to cover;
(b) Prevent uncertainty as to the legal meaning of the rules.

You can fulfill this function by:

(i) Working out, by using your imagination, the cases the legislation must cover, and by devising statutory provisions that deal with those cases with precision;

(ii) Writing provisions that are clear, unambiguous and consistent;

(iii) In so writing, taking account of the rules of interpretation, whenever they are relevant.

1.3.2 Drafters' Approach to the Rules of Interpretation

To communicate our intentions, we need to take into account:

1. Judicial Approaches –

How the judges are likely to go about the task of reading our legislation.

2. Common questions for Judicial Interpretation -

The cases that commonly give rise to questions of interpretation.

3. Judicial Assumptions -

The assumptions that the judges make about the way legislation is drafted.

4. Aids to Interpretation -

The aids that judges may call upon in ascertaining the meaning of legislation.

5. Interpretation legislation -

The requirements of the Interpretation Act, which invariably contains many provisions is of special concern to drafters. (The effects of Interpretation legislation are dealt with later.

1.3.3 Effect of Judicial Attitudes on Drafting

Drafting and interpretation have always been linked. Judges have developed their approaches to interpretation on the basis of the way legislation has been drafted; in writing statutes, drafters are influenced by judicial practice on interpretation.

The Report of the English and Scottish Law Commissions, *Interpretation of Statutes* (1969), para.5, makes an important point -

> If defects in drafting complicate the rules of interpretation, it is also true that unsatisfactory rules of interpretation may lead the draftsman to an over-refinement in drafting at the cost of the general intelligibility of the law.

The links are most clearly seen in many of the judicial assumptions about linguistic expression (see Unit 2, below). These put great weight upon the way particular words or expressions are used and are part of a tradition of literalism that has been a feature of common law interpretation. Judges have tended not to look beyond the

precise words used. The detail and particularity of common law legislation are partly the result, and partly the cause, of this tradition.

There is now a steady trend away from narrow literalism to a broader, more purposive, approach. This gives greater opportunity for words to be given meanings that reflect the underlying policy. Judges today are more ready than in the past to consider approaches that support purposive interpretation.

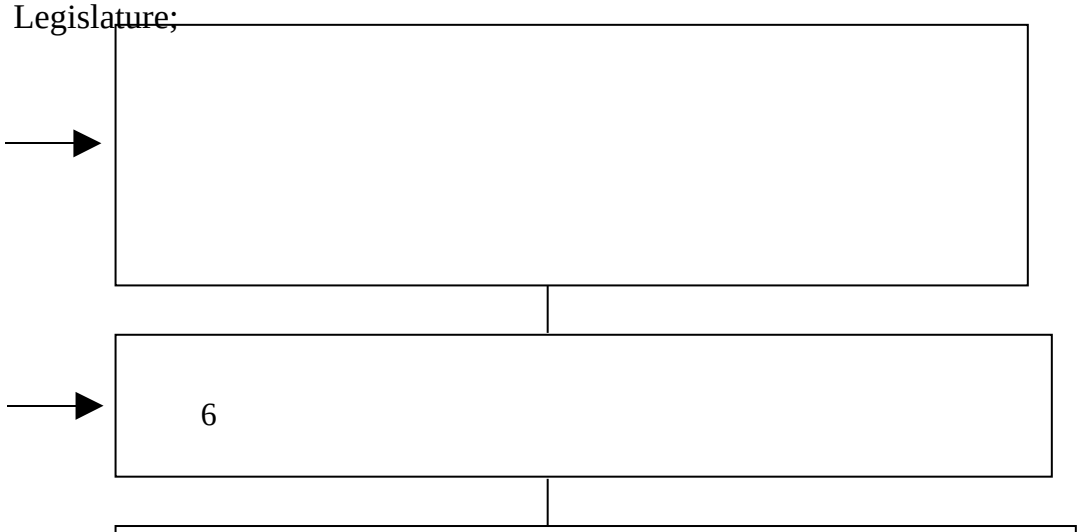
In the past, literalist interpretation may have encouraged drafters to try to cover all foreseeable circumstances by providing a mass of detailed rules. Today, drafters are developing techniques to support the trend towards purposive interpretation, for example, by including purpose clauses, and by discarding practices that lead to detailed, overlong sentences and dense and obscure text. Greater reliance on a plain language style makes it easier to construe statutes without giving rise to any increase in uncertainty. (This is discussed in a later Course.)

1.3.4 Prediction of the Judicial Approaches

We can outline the basic judicial approach to interpretation in the following flow-chart. It reflects the contemporary trend for purposive interpretation that favours the adoption of meanings consistent with or that advance the underlying legislative purpose over undue reliance on the legislative text. Ruth Sullivan in *Driedger on the Construction of Statutes* (4th ed, 2002) usefully suggests that an interpreter should start with the presumption that the Legislature intends the text to carry its ordinary or plain meaning, i.e. the meaning that would be understood by a competent reader when reading words in the provision in which they appear. However, that meaning should then be tested in the larger context of the instrument as a whole, against the purpose of the provision and that of the instrument as a whole, its place in the legislative scheme, its consequences and by reference to relevant extrinsic aids.

For our purposes, the following flow chart indicates the steps that might be taken to give meaning to statutory provisions.

Read the provisions in the context of the Act (both textual and external) and by reference to its *legislative purpose*, i.e.:
- the primary political, social or economic aims of the Legislature;



- the *policies and principles* underlying the Act; - the *scheme* created by the Act.

Stage 1

Read the individual provision in its textual context, in its grammatical and ordinary sense and in the light of its legislative purpose.

Stage 2

Stage 3

As required, read into the provision any words necessarily implied by the words actually used or from its context.

Stage 4

Is there a meaning of the words that is:

That meaning is to be given - clear and unambiguous, and - to those words

No

Stage 5

Are the words obscure or ambiguous, but not consistent with the legislative purpose?

Are the words clear and unamb- iguous?

A meaning may be given to the words that: - best accords with the ordinary meaning may be by them, and

A less grammatical or less - it can reasonably be carried by them, and

- can reasonably be carried given to the words if:

- it can reasonably be carried legislative purpose.

by

it is consistent with the legislative purpose

Words in a provision may be added to, altered or ignored to prevent it from being unintelligible or absurd or totally unreasonable or unworkable or totally irreconcilable with the rest of the Act.

1.3.5 Common Questions of Interpretation in the Courts

We can see the relationship between drafting and interpretation more clearly if we consider the kinds of case that commonly give rise to questions of interpretation for the courts. Professor W A Wilson has produced a helpful

analysis of these. Wilson suggests, from an analysis of case-law, that two principal types of questions typically face the courts, though these arise for several different, but regularly occurring, reasons.

1. Propositional Questions

This type of question occurs when construing an enactment to find out what exactly it provides, and before any attempt is made to apply it to particular facts. At this stage, we may experience difficulties in discovering precisely what legal results are intended to follow upon which factual situations. This may be because, e.g.:

i. of uncertainty as to whether the legislation has been validly made; ii. of ambiguities in syntax and expression; iii. of imprecise linking, or conflicts, between provisions;

iv. it appears that words could be substituted for, added to or subtracted from, those actually used;

v. of vagueness about the legal effects of provisions.

2. Semantic Questions

The second main type of question arises when the legal propositions derived from reading the legislation are actually applied to a particular set of facts. Doubt may exist whether the legislation extends to those facts because it contains, e.g.:

i. expressions the natural meaning of which is unclear, because they are too general, or ambiguous or obscure when they come to be applied;

ii. expressions the natural meaning of which is clear, but that appear too wide or too narrow when looked at in all the circumstances;

iii. uncertainty as to whether the physical requirements described in the legislation have been met in the particular case.

It will be evident that sound drafting techniques can reduce the likelihood of at least some of these questions arising for judicial consideration.

In conclusion, the process of statutory interpretation is not rule governed. Judges do not give meaning to provisions by applying a prescribed requirement to a particular case. The process is more sophisticated and complex than that. Drafters should therefore prevent complicated questions of interpretation

arising, by communicating their intentions as certainly and conclusively as possible.

1.4 Summary

In this Unit, you have examined the ways in which you should respond to the main rules of interpretation. Sound approaches to the task of drafting, and in particular sound drafting practices. Take into account many of the matters that give rise to problems of interpretation. You should now know the judicial approaches and common questions of interpretation. But you will develop them more effectively if you bear in mind how the courts deal with those matters. So the stress in this Unit has been upon understanding, from the viewpoint of a drafter, judicial expectations about legislation and its drafting.

1.5 Reference/ Further Readings/Web Sources

Cross R. (eds. Bell J & Engle, G) 1995, *Statutory Interpretation* (3rd ed.) London: Butterworths.

Sullivan R. (2002), *Driedger on the Construction of Statutes* (4th ed.), Canada: Butterworths.

Sullivan R. (1997), *Statutory Interpretation*, Canada: Erwin Law.

The Report of the English and Scottish Law Commissions, *Interpretation of Statutes* (1969).

1.6 Possible Answers to Self-Assessment Exercise

1. The stages in determining the legal meaning of an existing enactment are:
   i. Comprehension
   ii. Application
   iii. Interpretation

2. The differences in the mind or interest of a drafter and that of a lawyer in the interpretation of legislation lies in their objective. While a drafter is mainly concern in drafting an instrument just to create a body of legal rules to achieve a given policy, a lawyer is pre-occupied on determining how a particular enactment should be applied to cases on their merits.

UNIT 2 JUDICIAL ASSUMPTIONS AND AIDS TO INTERPRETATION

Contents

2.1 Introduction

Legislation is a form of communication between the drafter and the judge. Judges assume that it has been prepared on sound drafting principles by drafters who have full knowledge of the interpretation guides which the courts can call upon when construing it. For that reason, you need to be aware of those guides in order to:

(i) take advantage of them where appropriate; and
(ii) avoid creating the circumstances where judges will have to have recourse to them to settle unclear meaning.

These guides include:

1. Assumptions about linguistic expression

Which indicate how certain uses of language in legislation are to be interpreted.

2. Presumptions of legislative intent

Which state the premises upon which the Legislature is presumed to have legislated.

2.2 Learning Outcomes

It is expected that at the completion of this unit, you will be able to:

i. Gain good knowledge on legislative drafting.
ii. Understand the important presumptions and canons of interpretation
iii. Explain the various aids to interpretation of statutes

2.3 Judicial Assumptions and Aids to Interpretation

2.3.1 Assumptions about linguistic expression

Assumptions about linguistic expression which are usually referred to as ‘canons’ have been evolved by judges to deal with statutory language that is a source of uncertainty, especially when looked at in a literalist way. They contain guides to finding meanings, based upon rules of logic, grammar, syntax and punctuation. (They are sometimes expressed as Latin maxims - which we give here for reference rather than because you will need to use them regularly).

Drafters anticipate these assumptions by adopting sound legislative writing practices (of the kind you are learning in this Course). These practices reflect the underlying judicial expectations about how language will be used. They are relevant to all legislative text, and should be followed routinely by drafters, quite apart from their value in reducing the possibility of uncertainty arising. The most important canons concern:

(i) the construction of legislation
(ii) the meaning of expressions
(iii) legislative syntax.

Self-Assessment Exercises 1

1. How do assumptions about linguistic expression help judges?
2. In few lines, explain the term 'Cognate expressions'
3. What is expected of a drafter, if the overlap of provisions leads to conflict?

2.3.1.1 The Principal Canons on Legislative Construction

i) The legislative instrument is to be read as a whole so that the provision in question is interpreted in its full textual context.

Words and expressions must not be construed separately; they take their color from their context. Good drafting proceeds on this premise.

ii) Each word in an enactment should be given a meaning.

Accordingly, the drafter selects each word and expression because it has a linguistic function to perform. Omit the superfluous or unnecessary.

iii) The same words should be given the same meaning throughout an enactment, but different words concerned with the same matter should be given different meanings.

This is another premise upon which sound drafting rests. It places the onus on you constantly to strive for consistency in the choice and use of terms. So, for example, when drafting or amending legislation, adopt the same terminology as the drafter of the original used, even though you might not choose the expressions if you were preparing the legislation from first principles.

Example 1

Road traffic legislation should use a standard term, such as "motor vehicle", when the rules affect all types of motorised transport. Different terms (often defined), such as "motor cycle", "motor car", "tractor", though referring to classes of motor vehicles, should be used for more specialised rules.

iv) Cognate expressions (e.g. different parts of speech of an expression) are presumed to have the same meaning throughout the enactment in which they appear.

Again, consistency of this kind is at the heart of sound drafting and is routinely followed by a good drafter. This rule is often confirmed by Interpretation legislation (see the **model Interpretation Act 1992, section 22**).

Example 2

If an Act uses the term "sell" in a way that indicates that it extends also to "barter" (e.g. because there is a definition to that effect), a reference in the Act to "sale" will be construed as covering the act of barter.

v) Where a general provision and a specific provision in an instrument cover the same situation, the specific overrides the general.

This assumption is less self-evident than earlier ones. But it requires that particular attention be paid to the relationship between provisions that touch upon the same matter. That relationship has to be thought through when the legislation is planned and it should be made quite clear in the drafting.

Overlap of provisions is common, and typically all can be given effect. However, if the overlap leads to conflict or if one provision is intended to be exhaustive, use appropriate words to eliminate doubt as to which of overlapping provisions has priority. It is good practice when two provisions cover essentially the same ground to indicate whether both or only the specific provision can be relied upon. But you can rely upon the canon, if the two propositions, when read together, patently convey the intention that the specific is an exception to the general.

The canon can be expressed in two ways:

(i) the specific overrides the general (*generalibus specialia derogant*).

(ii) the general does not override the specific (*generalia specialibus non derogant*).

(iii)

Example 3

25. Subject to section 30 [**which contains the specific**], a person employed in a prohibited place may be arrested only on the production of a warrant.

30. A police officer may arrest a person found in the act of committing an offence under this Act in a prohibited place, without a warrant despite section 25 [**which contains the general**].

This is examined in more detail in the Course on Legislative structure.

2.3.1.2 The Principal Canons on the Meaning of Expressions

(i) Legislation is to be taken as always speaking. So, words are to be given their ordinary and current meaning, rather than confined to the meaning they had at the time of enactment.

This canon also encourages drafters to use the present tense for verbs, wherever possible. It is often restated in Interpretation legislation (see the **model Interpretation Act 1992, section 20**).

(ii) A non-technical word carries "its proper and most known signification" (i.e. the common dictionary meaning). If there is more than one such meaning, that which is appropriate to the context is to be adopted.

Make clear when you are using a word in a sense that is not the common dictionary meaning, either by using it in a context which indicates that special use or by stipulating your intended meaning, for example, in a definition.

(iii) An expression that has a technical or scientific meaning should be given its specialized meaning when used in their technical or scientific context.

Use the correct technical language when preparing legislation on a subject that has its own specialist vocabulary.

(iv) An expression that has a technical legal meaning in relation to a particular branch of law should be given that meaning when used in such a context.

Similarly, seek out for the correct legal terms. If you use those in the context where they are normally found, there is no need to define them further.

Example 4

In legislation dealing with commercial transactions, expressions such as "bill of exchange", cheque", "promissory note" will be given the technical legal meanings they normally carry (e.g. as conferred by a Bills of Exchange Act).

(v) An expression that has both an ordinary and a technical meaning should be given the technical meaning only when it is used in the relevant technical context.

Select technical expressions when (but only when) they are needed and make that evident by the context in which you put them to work.

Example 5

A requirement in an Act that a person wishing to become an advocate must pass a "course in Latin" is unlikely to be treated as having a technical meaning, although in Universities a "course" has to fulfil certain basic criteria. The statutory requirement may be met if the applicant has completed a short programme of quite elementary study, although that would not be treated as a "course" in internal University practice.

2.3.1.3 The principal canons on legislative syntax

(i) An expression containing broad (indeterminate) words that is linked to words of a more specific nature is to be construed as restricted to matters of the same specific character (*ejusdem generis*).

Drafters commonly use a series of terms followed by a general phrase intended as a catch-all. Courts construe that catch-all phrase as restricted to cases that share common characteristics with the specific terms to which it is linked. The key is to find a common denominator from the listed terms. This canon is less likely to be invoked where the phrase is linked, not to a series, but to a single term.

Example 6

In an Act dealing with the slaughter of animals for food for human consumption, the expression "cows, goats, sheep and other animals" will be construed as extending to other types of domesticated animals that may be a source of meat for human food in Nigeria. It does not extend to cats or dogs, as these are not commonly eaten, or to poultry, as these do not have the same physical characteristics as those listed, or to wild animals that are hunted for their meat. But in places where horse flesh is used for human food, it may be construed to cover horses.

(ii) An intention to exclude the *ejusdem generis* canon requires clear words that indicate that the general words are not intended to be limited to matters of a similar kind.

Put questions of this kind beyond doubt in the legislation itself, for example by stating explicitly whether or not general words are limited by the characteristics of other terms with which they are linked. In any case, this helps readers, as it avoids recourse to the canon.

Example 7

The italicised words make clear whether the broad term is to take the characteristics of the specific words or not.

cows, goats, sheep and other *similar animals*;

bottles, tins, cartons, packages, paper, glass, food, or *other* refuse or rubbish, *whether of a similar kind or not*.

(iii) The meaning of an expression may be derived from its context, especially from associated words (*noscitur a sociis*).

This canon is especially useful to give precision to broad terms (i.e. terms which, by themselves, are general or indeterminate).

The meaning can be confined by the context in which the term is used; it takes the characteristics suggested by the neighbouring words.

Example 8

A section prohibiting an activity in a "house, office, room or place" does not extend to a public lane. The context in which "place" is used indicates that it is confined to enclosed places.

Do not depend upon the context to provide characteristics for a term that are not expressly stated (e.g. by leaving out a modifier to make text more readable), on the grounds that they will be supplied by the neighbouring words.

Where a qualifying word is legally necessary, attach the appropriate adjective that indicates the required characteristic directly to the term. Otherwise, it may be unclear whether the term is intended to be modified in this way.

Example 9

In the following phrase: streets, lanes, roads or other public places or passages, it is not completely clear that the common characteristic ("public") in the neighbouring words applies to "passages" too. If it does, it is as well to repeat it before that word.

(iv) An express statement excludes the possibility that other alternatives can be implied (*expressum facit cessare tacitum*).

Bear in mind that a specific proposition may be taken to exclude unexpressed alternatives. It is always best to write in a way that makes clear whether alternatives are permissible.

Example 10

A provision stating that an instrument in writing is to be used to effect a transaction affecting immovable property excludes the possibility of carrying out the transaction orally.

(v) Matters are presumed to be excluded if they are not stated amongst specified matters that might have included them

(*expressio unius est exclusio alterius*).

This canon, a variant of the previous canon, requires you to give careful attention to the effects that your choice of words may have. Unstated matters are likely to be construed as outside your draft, unless you indicate otherwise. The canon can apply in a number of ways:

a. specifying a particular case excludes similar cases that are not specified.

Example 11

If a definition of "diplomatic premises" includes, as one specified case, "the residence of the head of the mission", the term is likely to be construed as showing an intention to exclude residences of other members of the mission, which are not mentioned.

b. terms used to clarify the classes of case to which provisions apply exclude cases belonging to the same class that are not referred to.

Example 12

If an Act on child care includes, in a definition of "parent", a reference to the mother of an illegitimate child, this may be construed as excluding the father of such a child.

c. a provision containing specific exceptions is not subject to other exceptions that could have been made.

Example 13

Road Traffic legislation allowing ambulances, fire service and police vehicles to disregard speed limits in emergencies may be construed as indicating that other traffic restrictions (e.g. traffic lights) cannot be ignored.

d. specifying particular remedies or penalties excludes others that might have been applicable.

Example 14

If an Act specifies a particular form of remedy for non-compliance with its provisions, this will generally be taken to be the sole mechanism for enforcement.

Do not depend upon the *expressio unius* canon. Judges do not apply it consistently. Try to ensure that all the cases that should be included are covered by the words you use. Unfortunately, when a court does not apply the canon, it necessarily includes some item that is not mentioned. If this possibility is foreseen, it may be possible to exclude expressly cases that are not to be included. But this may encourage the courts to look for such a device and, if they do not find it, to assume that was a deliberate technique to allow an item to be included. This is a dilemma of which drafters must be aware.

The best that can be done is:

(i) To carefully work out what cases are to be covered, and which not, by individual provisions; and
(ii) Include appropriate words that in the context go as far as possible to put that intention beyond doubt.

2.3.2 Presumptions of Legislative Intent

Courts presume that the Legislature intends to legislate on the basis of certain principles of legal policy or values. In some circumstances, certain of the common law presumptions may give way to similar principles that have been made law by express Constitutional provisions. In those cases, it is not a question of interpreting legislation consistently with the principles; legislation that does not comply with them may be invalid. The Constitution may also contain a statement of Principles of State Policy, which are to guide the making of legislation. (We discuss these matters in Units 5 & 6). However, the presumptions may still be used by the courts to interpret legislation to reach the same conclusion as would be achieved by a direct constitutional challenge. The presumptions that are important for our purposes concern:

i. general principles of legislative policy

ii. specific principles of legislative intent.

Self-Assessment Exercises 2

1. When do judges invoke Presumption of General Principles of Legislative Policy?
2. Identify any extrinsic matters or documentations that can help in solving problems of interpretation

2.3.2.1 Presumption of General Principles of Legislative Policy

Judges invoke these presumptions where they find uncertainty in the ordinary meaning of the legislation. They are examples of a general presumption that effect is not to be given to changes in the law that are unclear. They are a device by which the courts enforce common law norms that reflect the values we usually describe under the notion of Rule of Law. The courts assume that legislation will give the clearest indication of any intention to impinge upon individuals' rights. In Nigeria, some of the presumptions now take second place to constitutional safeguards, which offer legal remedies when rights are interfered with. (We examine Human Rights in Units 7 & 8). The list of presumptions continues to evolve, but the principal ones include:

i. **persons are not penalised except under clear law.**
ii. **the jurisdiction of courts is not ousted.**
iii. **individual liberties are not curtailed.**
iv. **law does not operate retrospectively when imposing burdens.**
v. **legislation does not interfere retroactively with vested or property rights.**
vi. **in taxing legislation, the taxpayer is to be given the benefit of a doubt.**
vii. **domestic law conforms to international law.**

Without clear indications to the contrary, judges generally continue to construe legislation consistently with these principles, on the assumption that if the legislation was intended to deviate from them, provisions could have been made to that effect, so that the Legislature could address the issue directly. If you are instructed to deviate from these principles, the constitutionality of your draft must be a prime consideration in cases where constitutional guarantees are involved. But in all cases where you are drafting a deviation, use express language that indicates the precise application and extent of the deviating provisions. Otherwise, the courts may well give a restrictive meaning to them by reference to these principles.

2.3.2.2 Presumption of Specific Principles of Legislative Intent

Judges have also identified more specific principles, which they presume the Legislature intends to follow. (You may recognise them in the form of Latin maxims). Unless your draft makes it plain that these principles are displaced, the courts are likely to read them in to resolve some perceived uncertainty in

meaning or application. Again, use the clear language to exclude or qualify their application.

> **No-one should judge his own cause** (*nemo debet esse judex in propria causa*).
>
> **Hear the other side** (*audi alteram partem*).

These two principles (often referred to as "rules of natural justice") are features of a wider principle of procedural fairness which the courts continue to develop and will imply if they conclude that the procedural safeguards for persons affected by administrative decision-making are inadequate.

> **All things are presumed to be correctly and solemnly done** (*omnia praesumuntur rite et solemniter esse acta*).

This presumption of correctness usually applies to administrative acts or to the formal law-making processes. An important form is the presumption that Acts are in conformity with the Constitution. This puts the burden of establishing that legislation is invalid for this reason upon the person so alleging.

> **The law does not concern itself with trifling matters** (*de minimis non curat lex*).

Trivial breaches of a statutory requirement are usually treated as outside the statute. Interpretation legislation usually provides that deviations from prescribed forms are to be disregarded if they are not material (See **Section 23 of the Interpretation Act, Cap. 192 Laws of the Federation of Nigeria 1990**). But if you foresee an obvious or frequently occurring case, it may be better to state expressly that it is not subject to the legislation.

> **A person acting through another does the act himself or herself** (*qui facit per alium facit per se*).

This presumption of agency generally means that a statutory reference to a person will be taken to include that person's duly authorised agent, without the need to make express provision. But express extension is sometimes needed to put the matter beyond doubt. Conversely, you may need express provisions, if a person is *not* to be permitted to act through an agent, but is to be personally responsible.

Example 15

If an Act requires a landlord to serve a notice on a tenant, it is generally unnecessary to authorise service to be made also by the landlord's lawyer or by some other person charged with the task by the landlord.

2.3.3 Aids to Interpretation

Judges may have recourse to two kinds of aids when faced by problems of interpretation:

(i) Intrinsic aids – these are aids derived from the form or technical apparatus contained in the legislation itself (e.g. titles, section notes, headings, punctuation, etc).

(ii) Extrinsic aids – these are documentation external to the legislation (e.g. related legislation, official reports, Parliamentary Debates, etc).

2.3.3.1 Intrinsic Aids Courts May Call Upon

The courts may claim to find help in resolving ambiguity or uncertainty from the form of the legislation itself. From time to time, they may call in aid:

i. the long title
ii. the short title
iii. any preamble
iv. any purpose clause
v. section notes (side, marginal or shoulder notes)
vi. headings to Parts or other divisions
vii. Schedules and tables
viii. punctuation
ix. any explanatory notes incorporated into the statutory text.

Whether, and when, these may be resorted to is partly dictated by judicial rulings and partly by the Interpretation Act. (Section 3 of the Interpretation Act which deal with these matters is considered in Unit 4).

While, as a drafter, you should be aware of judicial approaches on these matters, other than purpose clauses they are generally of little importance to drafters in asserting particular meanings. However, they do have considerable value as aids to reading and finding. Drafters should adopt sound drafting practices with respect to these legislative features for that reason, rather than to provide useful interpretative aids. We look at these practices from that standpoint later in another Course.

2.3.3.2 Extrinsic Aids Courts May Call Upon

Practice varies as to the extent to which courts are able to refer to other types of documentation to help in solving problems of interpretation. There are three types of matter:

(i) materials produced before the legislation is enacted
(ii) materials produced during the legislative process
(iii) materials produced after the legislation has been enacted.

2.3.3.3 Pre-Enactment Materials

In working out the contents of a Bill, you may have to consult a wide range of materials in order to inform yourself about such matters as:

(i) the legal context (including international law) in which the legislation is to operate;
(ii) the problems the Bill is to deal with;
(iii) work already done on the matter by commissions and committees;
(iii) the policy and mechanisms for dealing with those problems.

You may need, and should then seek, access to this material to solve your immediate drafting problems. In one sense, it is irrelevant to your work how far the courts are prepared to look at such material for purposes of interpretation. If courts do refer to any of them, it is usually because there is some obscurity as to the policy of a statute or as to the meaning of expressions. Those are shortcomings that you should be trying, in any case, to prevent.

In theory, the more that the courts are prepared to refer to these kinds of materials, the more drafters may feel free to write in broad principles (what is known as principled drafting), leaving it to the courts to develop them by reference to the underlying policy to be found in external documents. There are few signs yet that the common law courts are ready to go this far. Typically, courts use extrinsic materials in a much more limited way, to clarify technical words or general words of indeterminate meaning.

The drafter's concern should be to make sure that:

(i) all the relevant materials have been identified and consulted during the research on the legislative scheme
(ii) the legislation properly reflects the agreed policy and places it in its full legal context.

Pre-Enactment Materials the Courts Might Consult

The following are the kinds of materials that the courts may be prepared to consult, and the uses to which they may be put. Most are materials that you, as the drafter, should have considered when drafting.

1. **Legislation demonstrating the legislative evolution** - showing by means of successive versions of the enactment how the legislation on the matter has evolved to date, and so an aid to establishing the purpose of the new enactment (i.e. the significance of the change - whether formal or substantive, whether to clarify, correct or to alter the earlier legislation).

2. **Other legislation relating to the same subject matter -** as indicating some of the context of the new enactment.

3. **Other legislation using similar terms for dealing with the same subject matter** (*in pari materia*) - to assist in the meaning of expressions used in both.

4. **Judicial decisions on the subject matter -** especially those on statutory provisions that are being re-enacted, as an indication of the intended meaning of expressions.

5. **Dictionaries and other literary sources -** to suggest ordinary meanings of particular expressions.

6. **The practice of specialists -** as an aid to the meaning of technical expressions.

7. **Reports of commissions and committees, or documents published by Government showing proposed policy ("white papers") -** to ascertain the mischief with which the Act is concerned and the context in which it is enacted.

8. **Treaties implemented by legislation, and their preparatory documentation** (*travaux préparatoires*) - as an aid to resolving ambiguity and obscurity in the legislation.

9. **Explanatory memoranda published with the legislation -** to ascertain the legislative purposes for which the legislation has been enacted.

2.3.3.4 Legislative and Post-Enactment Materials the Courts Might Consult

Those most commonly called in aid are:

1.**Legislative debates**

Although you retain a responsibility for protecting, as far as possible, the integrity of the Bill when it is passing through the Legislature, there will be limited opportunity for you to influence what matters will be the focus of debate or the content of Ministerial explanations.

2.**Official statements or circulars**

It is rarely the drafter's responsibility to prepare Government circulars or publications made after the Bill has been enacted.

3.**Secondary legislation**

The fact that courts may refer to secondary instruments made under the parent Act as an aid to its interpretation is rarely your concern when drafting either. But this may be a consideration for you if you are instructed to prepare both the parent Act and its secondary instruments as a single legislative exercise. It points up the importance of your providing a coherent and logical design for the entire statutory scheme.

2.3.3.5 Possible conclusions on the drafter's approach to rules of interpretation?

The courts will always be faced by problems of interpretation, not least because of unforeseeable events or subsequent developments or unpredictable combinations of circumstances. Practising lawyers inevitably look for arguments about the meaning and application of legislation that are favourable to their clients, and then try to persuade the courts to decide in their favour. Drafters may draw comfort from Reed Dickerson (*The Fundamentals of Legislative Drafting*, 2nd ed, 1986, para.3.9) -

> For the draftsman, many rules of interpretation are irrelevant. These are the rules by which courts resolve inconsistencies and contradictions or supply omissions that cannot be dealt with by applying the ordinary principles of meaning. They are irrelevant because the draftsman who tries to write a healthy instrument does not and should not pay attention to the principles the court will apply if he fails. He simply does his best, leaving it to the courts to accomplish what he did not.

At the same time, remember that sound drafting practices are grounded in conventions that reflect the basic rules of interpretation. These can never be discounted. Your approach should be:

1. to be aware of the ways in which drafting techniques have been conditioned by the basic rules of interpretation, and to employ these techniques routinely in all your drafting work;

2. to recognise those occasions when your draft needs to be written in a way that removes or reduces the likelihood of a problem of interpretation arising;

3. especially when you anticipate difficulties in establishing a precise meaning, to write in ways that take account of likely judicial approaches to the task of interpreting your legislation.

In conclusion, judges generally continue to construe legislation consistently with these principles. On the assumption that if the legislation was intended to deviate from them, provisions could have been made to that effect. In which case, express language should be used to indicate the precise application and extent of the deviating provisions.

2.4 Summary

At the end of this Unit, you need to be confident that you have achieved the objective with which we set out. You should now be able, when writing legislation, to take into account the unwritten rules of statutory interpretation applied by common law judges. In particular, the important presumptions and canons of interpretation relied upon by judges.

If you are uncertain as to how drafters should take account of the answers to any of the questions, try to establish which features you are unclear about. Then, take another look at the relevant pages, and the related exercises. Re-work that part of the Unit once more before going any further.

You will find matters covered in Units 1 & 2 in other Courses. This is one feature of the general drafting context, which regularly impinges upon your work. Your study of later Courses should help to confirm what you have learned here. But if you come across any of the matters in your subsequent work about which you are unclear, refer back to these Units.

2.5 References/Further Readings/Web Sources

1. Cross R. (eds. Bell J & Engle, G) 1995, *Statutory Interpretation* (3rd ed.) London: Butterworths.

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

3. Dickerson R. (1975) *The Interpretation and Application of Statutes*, Little Brown & Co.: Boston.

4. Sullivan R. (2002), *Driedger on the Construction of Statutes* (4th ed.), Canada: Butterworths.

5. Sullivan R. (1997), *Statutory Interpretation*, Canada: Erwin Law.

6. The Report of the English and Scottish Law Commissions, *Interpretation of Statutes* (1969).

2.7 Possible Answers to Self-Assessment Exercises 1

1. Assumptions about linguistic expression which are usually referred to as 'canons' have been evolved by judges to deal with statutory language that is a source of uncertainty, especially when looked at in a literalist way. They contain guides to finding meanings, based upon rules of logic, grammar, syntax and punctuation.

2. Cognate expressions refer to different parts of speech of an expression and are presumed to have the same meaning throughout the enactment in which they appear**.** Such consistency is at the heart of sound drafting and is routinely followed by a good drafter. This rule is often confirmed by Interpretation legislation (see the **model Interpretation Act 1992, section 22**).

3. If the overlap of provisions leads to conflict or if one provision is intended to be exhaustive, use appropriate words to eliminate doubt as to which of overlapping provisions has priority. It is good practice when two provisions cover essentially the same ground to indicate whether both or only the specific provision can be relied upon.

Possible Answers to Self-Assessment Exercises 2

1. Judges invoke these presumptions where they find uncertainty in the ordinary meaning of the legislation.
2. There are three types of extrinsic matters that can help in resolving problem of interpretation. These include:
   i. materials produced before the legislation is enacted

ii. materials produced during the legislative process

iii. materials produced after the legislation has been enacted

UNIT 3: The Importance and Application of the Interpretation Act

Contents

3.1 Introduction

The Interpretation Act is of paramount importance in drafting. As the usual title implies, the Interpretation Act deals with how legislation is to be construed by the courts. But, in many of its features, it has been devised by drafters for drafters. Its purpose is to cause legislation to be interpreted as intended by the drafter. This is legislation that you must always have to hand, and that you need to know thoroughly. In particularly, you must be fully aware of all that it offers to the drafter.

3.2 Learning Outcomes

In this Unit, the objectives of the study are for you to be able to:

i. Highlight the importance of the Interpretation Act; and
ii. Implement the requirements of that legislation as to its form, application and presentation, when drafting legislation.

In the following two Units, you will be working out the ways in which to take account of the Interpretation Act in the drafting of legislation.

In studying these Units, you will need to refer constantly to the **Interpretation Act** (Cap. 192 Laws of the Federation 1990 or Cap. 123 LFN 2004) and to the **model Interpretation Act 1992**.

Make sure that you have both available before you start work on these Units.

The aim of this Unit is to make you familiar with the entire contents of the Interpretation Act and to put it most effectively to work when you are drafting legislation. To do this we propose that you compare the Act with a model statute we have prepared for the purpose. This model Interpretation Act 1992 has been drafted to draw attention to the rules most commonly found in this type of legislation. Our commentary in the Course is directed to this model. By comparing the individual provisions of our legislation with the model in the light of the commentary, and by undertaking the Self-Assessment Exercises, you will be able to develop a clear picture of how these matters affect drafting in Nigeria.

This Unit warrants your closest attention. It almost certainly includes many features that are new, especially in indicating what individual provisions enable drafters to do. Concentrate on finding out what is in the Interpretation Act, and so what it permits you to do.

Self-Assessment Exercise 1

Obtain a copy of the Interpretation legislation currently in force. As you study this Unit and the **model Interpretation Act 1992**, fill in the table in the Annex you will find at the end of this Unit.

1. In Column 2 of the table (which lists the sections of the Model Act), enter references to the equivalent provisions of your Interpretation Act;

2. In Column 3, note any significant differences between your Act and the Model Act;
3. On the last page, enter references to provisions of your Act that have no equivalent in the Model Act, with short reference to the substance and its effect on drafting.

3.3 The Importance and Application of the Interpretation Act

3.3.1 Why is the Interpretation Act important to drafters?

The Interpretation Act contains rules of law about matters that are central to drafting, for example, the form, language and syntax, and the application and operation, of legislation, as well as its construction and interpretation. In the main, these rules deal with frequently occurring matters in ways that are likely to accord with users' expectations. As a result, the Act enables drafters to adopt particular drafting practices in the clear knowledge that they are backed by the rules of law in the Act. Drafters are, perhaps, its principal beneficiaries.

Remember, however, that the Act is not the exclusive source of law on interpretation. Other provisions of general application and case law (some of which can contain parallel or even contradictory matter) may be relevant to interpretation.

As far as can be established, all common law systems have an Interpretation Act, though in some jurisdictions it is entitled the "General Clauses Act". The origins are found in legislation first introduced in the United Kingdom in 1850 and developed in the Interpretation Act 1889. Many jurisdictions now have much fuller legislation than that in force in the United Kingdom (Interpretation Act 1978), and there is a growing variety of provisions. But there is still much common ground. The **model Interpretation Act 1992** contains provisions in more general use.
If you take all the opportunities offered by the Act, you will:

(i) contribute towards **a common legislative form**;

(ii) **achieve greater standardisation** in legislative expression and language;

(iii) **achieve greater consistency** between instruments;

(iv) **reduce repetition in legislation** by using expressions that are defined in the Act;

(v) **shorten and simplifying** legislation;

(vi) **prevent doubts** of interpretation arising when you use particular provisions or expressions.

3.3.2 How Are the Benefits of the Act to Be Secured?

To take full advantage of your Interpretation Act, first:

(i) have a completely up-to-date version of the Interpretation Act always to hand;
(ii) be fully conversant with all its provisions;
(iii) know exactly when the provisions will or might apply to your drafts.

Secondly, remember that the provisions of the Act apply automatically by operation of law when the circumstances they refer to arise. So, be aware at all times what those circumstances are and when they arise in the course of drafting *and then*:

> *either* take the relevant rule fully into account and ensure that its requirements are precisely followed;
>
> *or*, if those requirements are not appropriate, make sure that the rule cannot apply, by expressly making a different provision.

3.3.3 How Well Do Users of Legislation Know the Act?

Many users of legislation are far less familiar with the Interpretation Act than you will be; some will never have heard of it. You may have drafted a clause intending them to read into your draft one of the substantive rules in the Act (e.g. the **model Act, S.49** on the quorum of a statutory body). But the provision may be overlooked, even by lawyers.

In a case where your draft relies on a particular provision of the Act of importance, always consider whether to indicate expressly that the provision applies. This you can do in two principal ways:

1. State specifically that the section of the Act applies for the purposes of the draft.

Example 1

The model Act, S.47 confers on the body that appoints an office holder a wide range of additional powers over the officer (e.g. to discipline). The section itself requires that its provisions must be *declared* to apply by the legislation conferring the power. See S.11 of the Interpretation Act, cap. 192 LFN 1990. Some Acts make this provision apply automatically, but where the provisions are important to a particular legislation, it can be useful to state that they are to apply.

2. Repeat the effects of a rule in your draft.

Example 2

S.42 (1) of the model Act gives to expressions in subsidiary legislation the same meanings as are given to them in the parent Act. In consequence, when drafting a subsidiary instrument, you need not repeat definitions that are to be found in the Act. See S.19(1) of the Interpretation Act.

But if the main users of the instrument might find access to the parent Act difficult, consider repeating in the draft of the instrument any definition in the parent Act that is important.

Fortunately, on most matters, users do not experience difficulties arising from the Act. Many of its provisions reflect the general approach to interpretation considered in **Units 1 & 2** and contain nothing unexpected. Nonetheless the Act provides the security of a statutory basis to their use.

The Act allows legislation to be written without using many of the words, phrases or expressions that in the past, under the literalist tradition, would have been regarded as necessary. Users now are generally familiar with, or can benefit from, the drafting conventions which the Act makes possible, without referring to the Act.

Example 3

Section 14(b) of the Interpretation Act, (*the singular includes the plural*) supports the practice of writing rules with the subject or an object expressed in the singular. Users find no problems in reading the rules as covering both singular and plural subjects and objects, without needing to look up section 14(b).

3.3.4 To What Provisions Does the Act Apply?

The Act itself typically states the classes of instruments, and the extent, to which it applies. In particular, its provisions are expressed to have effect "unless the contrary intention appears" or "unless the context otherwise requires", making clear that its provisions must give way if they conflict with provisions in the instrument itself to different effect.

The Act is invariably limited, in its application, to legislation, i.e. to Acts and subsidiary instruments that have legislative effect. Typically, those terms are themselves defined in the Act.

Note that where a new Interpretation Act has introduced major innovations, those new provisions may apply only in relation to instruments made *after* they take effect. Unexpected results may follow if they were made to apply to pre-existing legislation that has not been prepared relying on them. This restriction applies only to those innovations that effect on the construction or meaning of words or their application. Others that affect the form of legislation can usually be applied to existing legislation (e.g. when it is republished).

Self-Assessment Exercises 2

As a drafter, what is expected of you where, and if a rule in the Act which ordinarily should apply is not to do so?

3.3.5 What is the effect of the requirement that the Act applies "unless the contrary intention appears"?

The Act does not apply to legislation if a contrary intention is expressed or can be implied in that legislation. So, make that clear in your draft if a rule in the Act, which would otherwise apply, is not to do so. To do this for provisions in your draft to which the Interpretation Act would apply:

(i) work out whether the application of the Act will lead to a legal result that is contrary to the one you require;
(ii) if such a result appears likely, make it clear at that point in your draft that the relevant provision of the Act is not to apply.

You can make a contrary intention clear in a number of different ways:

1. **Use express words that deal with the case in the way you require, thereby displacing the application of the Act.**

Example 4

The Act usually contains a definition of "public Officer" (**Interpretation Act, S.18(1)**). If this is unsuitable (e.g. because the legislation is not to apply exactly as envisaged in that definition), provide a definition that is suitable (perhaps adapted from that in the section) for your draft.

2. Ensure that the substantive provisions are drafted in such a way as to indicate that a different case must have been intended.

Example 5

The **Model Act, Section 50(d)** states that the exercise of the powers of a board are not affected by the participation in a meeting of a person not entitled to be present. A provision that certain board decisions, of a confidential nature, are to be taken by a committee of specified members of the board would almost certainly displace the section.

3. Deal with the matter among provisions that make sense only if a different meaning from that required by the Act is given to the matter, i.e. the context displaces the Act.

Example 6

A section that is drafted in plural terms is usually treated as applying also to singular cases (**Interpretation Act, S. 14(b)**). This will not be the case if the associated provisions indicate that only a plural condition is contemplated. The context then indicates an intention to exclude the Interpretation provision.

4. Satisfy yourself that the context of your draft makes the provision of the Act wholly inapplicable or cannot sensibly support its application.

Example 7

The **Interpretation Act**, **Section 18(1)**, defines "person" so as to include a corporation. That definition can have no application to a section that penalises persons for sexual offences, as such offences could only be committed by natural persons.

But a provision penalising theft should use, e.g. "individual", rather than "person", if it is intended to apply only to natural persons, since corporations can commit theft.

So, if you are in any doubt whether the Act might be relied upon when it should not be, include words that remove that doubt.

In conclusion, the interpretation Act contains rules of law about matters that are central to drafting. The provisions of the Act apply automatically by operation of law when the circumstances they refer to arise, unless the contrary intention

3.4 Summary

In this Unit, you have looked closely at all the provisions of the Interpretation Act (Cap. 192 LFN 1990) in comparison with the model Act. You have seen the many opportunities the legislation offers drafters to produce a text that contains no unnecessary provisions and expressions and is somewhat easier to use. You should now be clear that it is essential for you to be fully acquainted with what is in the Act and how it can ease your task.

3.5 References/Further Readings/Web Sources

Interpretation Act 1992 (model Interpretation Act).

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

3.6 Possible Answers to Self-Assessment Exercise 2

Where that is the case, you should first of all:

(iii) work out whether the application of the Act will lead to a legal result that is contrary to the one you require;
(iv) if such a result appears likely, make it clear at that point in your draft that the relevant provision of the Act is not to apply.

ANNEX

Table of comparisons of Interpretation legislation

Model Act	Interpretation Act	Variations
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2. Application.		
3. Act to bind the Republic.		
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written law.		
17. Date of passing, etc, of written laws.		
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23. Rules as to gender and number.		
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29. Miscellaneous definitions.		
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49. Power of majority, quorum, etc, of statutory body.		
50. Power of statutory board not affected by vacancy, etc.		
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54. Expressions pres - cribing penalties.		
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SCHEDULE 1 - *Words of enactment*		
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Additional Interpretation provisions

Section	Subject	Drafting

Unit 4 THE EFFECTS OF THE INTERPRETATION ACT ON DRAFTING PRACTICE

Contents

4.1 Introduction

This Unit deals with the effects of the Interpretation Act on drafting practice. If the drafter complies with practices authorised by the Act, the relevant provisions will be given effect as the Act requires. So it offers useful rules about the form, application and presentation of enactments, many of which enable you to produce a text that is easier both to use and to draft. Various provisions of Interpretation legislation are referred to throughout this Course. You will need to refer to the legislation on many occasions, both when working with the text and in undertaking Drafting Projects. Keep it handy whenever you are

studying, and particularly when drafting. Constant recourse to it will increase your facility in using it.

4.2 Learning Outcomes

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

i. Apply drafting practices when drafting legislation
ii. Be thoroughly at home with the Interpretation Act
iii. Gain enough potential in drafting

4.3 The Effects of the Interpretation Act On Drafting Practice

1.3.1 How does the Act influence the drafting of legislation?

The Act facilitates drafting in a number of ways, by:

1. providing for the form and application of legislation;
2. creating general rules for the commencement of legislation;
3. prescribing standardised definitions;
4. enabling convenient short-hand expressions to be used;
5. supporting a common legislative style;
6. resolving uncertainties in interpretation;
7. specifying rules of substantive law that are to be implied into legislation.

4.3.2 The Form and Application of Legislation

The Act contains a series of standard rules describing or for referring to legislative instruments and generally on the form of written law (**model Act, SS. 4 & 25**).

4.3.1.1 References to Legislative Instruments

Standard terms are provided that drafters should use when referring to different types of legislative instruments and the methods of making them law.

Self-Assessment Exercise 1

1.What terms are used in Nigeria to refer to following:
a. All forms of legislation
b. Primary legislation
c. Secondary legislation

2. What are examples of secondary legislation?

4.3.1.2 Citation and Words of Enactment

Similarly, the way in which legislation may be cited and the correct enacting words that must appear in all Bills are commonly specified. You must comply with these.

4.3.1.3 Other Rules as to Form or Application

The Act contains a number of other rules about form and application that have particular relevance for the drafter. These are the ones in the **Interpretation Act**.

(i) Application of the Act (S. 1)
If the Act is not to apply to any provision of an enactment, this section requires you to make clear provision to that effect. See also Section 9.

(ii) Binding the State (S. 37(3)) The Act binds the State.

(iii) Intrinsic aids (S. 3)
This section set out the status of various features found in legislation as aids to interpretation.

4.3.2 Commencement of Legislation

The Act contains standard rules about the dates on which written law is to be treated as enacted and as coming into force (**Interpretation Act, Section 2**). This determines when you need to include a commencement section in legislation. **Sections 2(2) & 10(3) of the Act,** contains standard rules for commencement that take effect automatically if no other provision is made. Therefore, you need only provide for commencement when the date of coming into force is not dealt with by those standard rules as you intend or the result of the rules is unsatisfactory.

4.3.3 Standardised definitions

The Act creates standard meanings for expressions in frequent legislative use (**Section 18 (1)**). Unless you make different provision, these expressions carry the meanings assigned by the Act in any legislation in which you use them. In consequence, if you use any of these expressions in a draft:

(i) you need not provide a definition in your draft, if the standard definition meets your requirements; but

(ii) you must provide a definition of the expression, in appropriate terms, in your draft, if the meaning given in the Act is *not* the one you require.

4.3.3.1 What kinds of definitions are provided?

It is usual to find four main kinds of definitions in Interpretation Acts.

1. Definitions of official authorities, officers or public bodies or institutions.

Example 1

The following are examples of expressions for which **Section 18(1)** of the **Interpretation Act** provides definitions: "chief"; "consular officer "; "superior police officer"; "public officer".

2. Definitions of expressions that have no obvious meaning but are to be given a settled one for legal purposes.

Example 2

The following are examples of expressions for which **Section 18(1)** provides definitions: "financial year"; "public holiday".

3. Definitions of expressions that have a usual meaning, but are to carry a different legal meaning (usually an extended one), when used in legislation.

Example 3

The following are examples of expressions for which **Section 18(1)** provides definitions: "oath"; "person"; "to sell"; "will".

4. Definitions that are intended to give precision to commonly used expressions that are indeterminate or capable of more than one meaning.

Example 4

The following are examples of expressions for which **Section 18(1)** provides definition: "Minister"; "month"; "writing".

4.3.4 Convenient short-hand expressions

The Act contains a series of convenient short terms that you can use, knowing that the Act stipulates a precise meaning for each.

Example 5

Use the expression "prescribed" (**Section 18 (1)**) in an Act to indicate that the matter that it describes is to be regulated under the enactment in which it occurs. E.g. A person holding the prescribed qualifications....

4.3.6 Common Legislative Style

The Act contains a series of standard rules for construing written laws. When these are taken into account by drafters, a common legislative style is more likely to develop. **Example Box 6** contains three examples.

Example 6

To understand the effect of these examples read the cited sections of the **Interpretation Act.**

1. Sections 5 & 30:
These Sections are particularly valuable as they contain provisions on construction of references to portions of enactments and to the Act or Law itself.

2. Sections 12(1) (*Application of subsidiary legislation*):
A general power to make subsidiary legislation is treated as including a number of ancillary powers. You need only provide expressly with respect to these if you must deal with the matter in a different way.

This power should be read with **Section 10(1)**, which authorises the power to be used as often as it is needed. If you intended the power to be used, e.g. only once, or in the same way for everyone subject to the parent Act, you will have to say so.

3. Section 17(2) (*Cumulative penalties*):
Where an enactment provides imprisonment as punishment for an offence, it can be with or without hard labour at the Court's discretion, or with hard labour if no direction is given.

Now let us take a look at other provisions of this kind and work out how you can take full advantage of them.

4.3.7 Resolution of specific uncertainties in interpretation

Some sections of the Act are intended to remove judicial doubts about the ways in which particular kinds of provisions should be interpreted. They provide standard rules, which apply unless you make different provision.

They relate to:
(i) time;
(ii) the effects of repeals; (iii) powers and duties;
(iv) miscellaneous matters.

(i)Provisions relating to time (Section 15)

These rules are similar in most Interpretation legislation (**model Act, sections 30-33**). They enable you to write, e.g. time provisions, in ways that leave no uncertainty about when the time begins or ends.

Example 7

The **model Act, Section 32 (2) & (3)** indicates how a period of time that has a fixed opening and closing dates can best be drafted.

Applications may be made in the period *beginning on 1 April and ending on 31 May*.

Under the rules in this section, 1 April and 31 May are both included in the period.
But Section 15(2)(a) of the Interpretation Act is not very clear on this.

(ii)Provisions relating to the effects of repeal

Here too the rules (**Section 6 (1)**) follow standard lines. They set out standard ways in which transitional matters are to be dealt with when legislation is replaced or repealed.

Example 8

The **Interpretation Act, Section 6 (1)(e)** deals with the consequences of the repeal of an enactment that creates an offence.

Under this subsection, prosecutions for offences under an Act that were committed before its repeal came into effect can be started and completed, and the penalty applied, even after, and although, the Act has been repealed. You need not provide for that case in transitional provisions.

(iii) Provisions relating to powers and duties

As a result of provisions such as those in **Sections 10 & 11 of the Interpretation Act**, you need **not** state that:

(a) a function may be performed whenever the circumstances envisaged arise (**S. 10 (1)**);

(b) a power-bearer has, in addition to the specified power, all other necessary powers to enable that power to be carried out (**S. 10 (2)**);

(c) the person appointing an officer is the authority that has the power to dismiss and discipline the officer and to make acting appointments (**S. 11 (1)**);

(d) those acting in, or temporarily appointed to, an office may perform all the functions of that office, including any powers delegated to the office-holder (**S. 11 (2)**);

(iv) Miscellaneous

When you are requiring a prescribed form to be used, you need not add words stating that a form that is substantially the same (e.g. "in the form prescribed *or to like effect*") may also be used. This deviation in forms is permitted by the Act (**S. 23**).

Self-Assessment Exercise 2

Explain the relevance of 'double jeopardy' as one of the specific rules of substantive law

4.3.8 Specific Substantive Rules of Law That Are to Be Implied

The Interpretation Act contains a number of specific rules of substantive law that apply by implication. These must be read into legislation if the circumstances they describe arise in the legislation. Our earlier words of caution about a possible lack of awareness of other users have particular relevance to these provisions.

The most important of these rules are the following:

(i) Majority and quorum of statutory bodies (S. 27)

This section permits statutory bodies to reach decisions by a majority of the persons who comprise it, and establishes standard rules for determining when the body is quorate. However, it is good practice to include provisions on these matters in the legislation initially creating the body, where most users will look for them.

(ii) Double jeopardy (S. 25)

If you are drafting an offence provision that overlaps with the terms of an existing offence, this section ensures that the same act or omission cannot be punished under both provisions. It is a re-statement of the common law. Today

many Constitutions also contain rules that prevent a person being prosecuted twice in these circumstances.

(iii) Forfeitures and fines (S. 36)

This section provides for the standard ways in which fines and forfeitures are to be paid. It is only where you wish to make alternative provision (e.g. exceptionally, for the penalty to be paid to an informer or a victim), that these matters need specific attention.

(iv) Service of documents (S. 26)

This section contains provisions regarding service of documents by post and for determining when service is taken to have occurred. This however seems inadequate for normal purposes in this age of information technology. If different arrangements are called for, include express provisions in your draft.

Example 9

If relying on these provisions, it is usually enough to state: the defendant must *deliver* [*serve*] the notice *to* [*on*] the plaintiff; or the plaintiff must *send the document* by post to the defendant not later than.....

In conclusion, if the drafter complies with practices authorized by the Interpretation Act, the relevant provisions will be given effect as the Act requires.

4.4 Drafting Project

This short Project is designed to enable you to improve a piece of legislation by making full use of Interpretation legislation. For this purpose, give effect to provisions of the **model Interpretation Act 1992**, rather than your own statute. But keep in mind whether your legislation would enable you to make the same improvements.

Instructions

Redraft the following section of the Local Government (Miscellaneous Functions) Act (hypothetical), making those changes that are permissible or

authorised under the **model Interpretation Act 1992**. Do not alter the substantive effect of the section.

> **28.** Any person (other than a company, corporation, or association or body of persons, corporate or unincorporated) who, in the exercise of any power, authority or discretion, or in the discharge of any duty, responsibility, authority or jurisdiction, conferred on that person under section 27 of this Act by the Minister appointed under section 44 of the Constitution of Utopia with responsibility for local government, or by a Minister for the time being acting for or on behalf of that Minister:
>
> > (a) violates or fails to comply with any condition contained in a license issued to that person by any such Minister by virtue of or in pursuance of bye-laws from time to time made under this Act; or
> >
> > (b) otherwise than in accordance with the Local Government (Licensed Authorities) Act 1985, or any Act amending or replacing that Act, does, or omits to do, any act or series of acts required by or by virtue of that Act, or any regulations from time to time made under that Act as so amended or replaced, to be done or not done, as the case may be, by any such person,
>
> shall commit an offence triable otherwise than on indictment by a magistrate's court established under the provisions of the Magistrates' Courts Act for the time being in force in Utopia, and, on conviction by any such court, shall be liable, in the case referred to in paragraph (a) of this section, to such fine, term of imprisonment or other form of punishment as shall be specified, from time to time, in the bye-laws made under this Act, and, in the case referred to in paragraph (b) of this section, to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding three months or to both such fine and term of imprisonment.

If there is no equivalent in your Act, apply the section of the model Act.

(i) **S.16(1)** (*References to amended legislation*)
(ii) **S.16(2)** (*References to portions of written laws*)
(iii) **S.16(6)** (*References to subsidiary legislation*)
(iv) **S.20** (*Law always speaking*)
(v) **S.21(1)** (*Application of interpretation rules*)
(vi) **S.21(2)** (*Construction of interpretation provisions*)
(vii) **S.22** (*Corresponding meanings of parts of speech*)
(viii) **S.23(1)** (*Rules as to gender*)
(ix) **S.23(2)** (*Rules as to number*) (x) **S.24** ("*Shall" and "may*")

4.5 Summary

By the end of this Unit, you should know the effects of the Interpretation Act on drafting practice and how to implement the requirements of that legislation as to the form, application and presentation of legislation. You should now feel that you know what the Act contains and how to apply or, as necessary, exclude the application of its provisions.

Even more than the rules of interpretation considered in Unit 1, this is a feature of the general context with which drafters are constantly working. Your work on the later parts will confirm the understanding you have gained here. At this stage, it is important that you feel fully conversant with the Act and its potential. In subsequent courses, we will return to particular provisions, which influence the drafting practices in connection with particular topics. In that way, you will develop a full working knowledge of the Act. But do not hesitate to refer back to this Unit when you come across related matters in later parts of the Course.

4.6 References/Further Readings/Web Sources

Interpretation Act 1992 (model Interpretation Act).

Interpretation Act Chapter 192 Laws of the Federation of Nigeria 1990.

1999 Constitution of the Federal Republic of Nigeria.

4.7 Possible Answers to Self-Assessment Exercises

SAE 1

1. a. Written law
   b. Act
   c. Subsidiary legislation

2. Examples of secondary legislations include; regulation, rule, order, bye-law, etc.

SAE 2

The rule is relevant in the sense that, if why drafting an offence provision, there is overlap with the terms of an existing offence, this rule ensures that the same act or omission cannot be punished under both provisions. It is a re-statement of the common law. Today many Constitutions also contain rules that prevent a person being prosecuted twice in these circumstances.

INTERPRETATION ACT 1992

No.2 of 1992

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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.

(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 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 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 (section 56)

Commonwealth countries

Antigua and Barbuda
Australia
The Bahamas
Bangladesh
Barbados
Belize
Botswana
Brunei Darussalam
Cameroon †
Canada
Cyprus
Dominica
Fiji ‡
The Gambia
Ghana
Grenada
Guyana
India
Jamaica
Kenya
Kiribati
Lesotho
Malawi
Malaysia
The Maldives
Malta
Mauritius
Mozambique †
Namibia
Nauru
New Zealand
Nigeria
Pakistan
Papua New Guinea
St. Christopher-Nevis
St. Lucia
St. Vincent
& the Grenadines
Seychelles
Sierra Leone
Singapore
Solomon Islands
South Africa *
Sri Lanka
Swaziland
Tanzania
Tonga
Trinidad and
Tobago
Tuvalu
Uganda
United Kingdom
Vanuatu
Western Samoa
Zambia
Zimbabwe

* *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.*

MODULE 2

Unit 1 – The Constitution and the drafter
Unit 2 – Particular Constitutional Constraints
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UNIT 1: THE CONSTITUTION AND THE DRAFTER

Contents

1.1 Introduction

Legislative Counsel, it is often said, need not be specialists in any branch of law. This is not usually the case for constitutional law. Since much legislation deals with public law matters, Legislative Counsel have to be familiar with the principles of public law and have a sound working knowledge of administrative law. But overriding even this, you need to be thoroughly conversant with the Constitution and its associated legislation and with the ways in which the courts have developed and apply its provisions. Be prepared to work out the constitutional implications of legislative proposals and be on the lookout for any that may not be constitutional.

1.2 Learning Outcomes

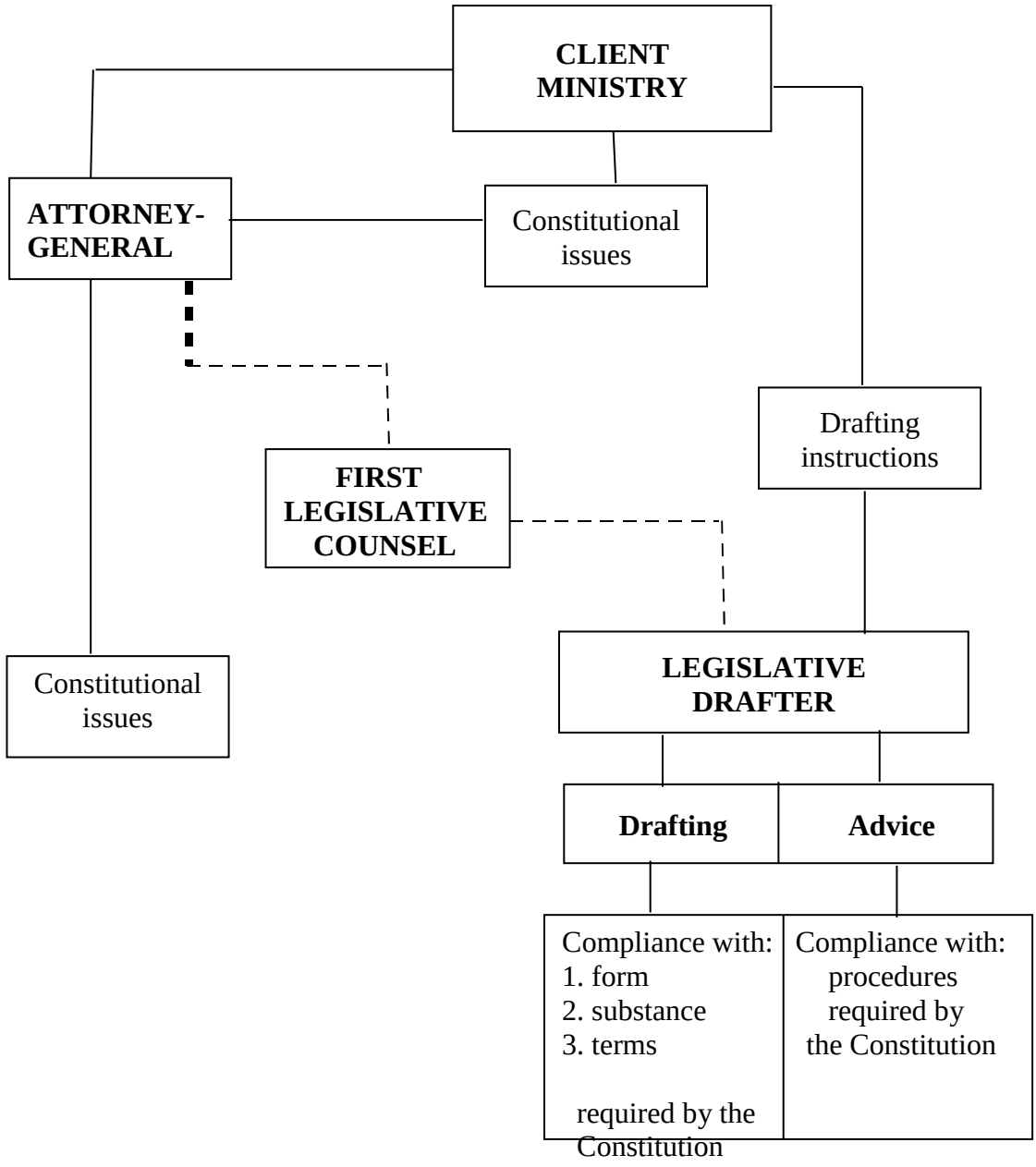
By the end of this unit, you will be able to:

i. Take full account of the constitutional requirements when drafting legislation.
ii. Explain the features of constitutional law as they relate to Nigeria.
iii. Exposed to other legislation that supplements the Constitution.

Make sure that you have a copy of the 1999 Constitution for your personal use. You will need to refer to it frequently during this Course.

1.3 Drafter's Responsibility

Legislation that is inconsistent with the Constitution or that fails to take constitutional requirements into account is open to both legal and political challenge. Even if it survives such a challenge, its status will have been the subject of controversy and expense, and almost certainly of delays in putting it into effect. Legislative Counsel has a professional responsibility to reduce the possibility of this happening, whether the fault lies in the policy or the form of the legislation or in the procedures followed in the making. How that may be done is shown in the flowchart and the text that follows.



1.3.1 Policy Matters

Constitutions typically impose restrictions on legislating for a wide range of matters (especially through a Bill of Rights). In planning legislation, then, these restrictions must be respected. For that purpose:

(i) look for any constitutional issues to which a legislative proposal can give rise and to consider their implications for your draft;

(ii) ensure that your legislation is not open to constitutional challenge either in the courts or the legislature;

(iii) if you find constitutional problems in the present form of the proposals, make Government aware of them so that they have ample opportunity to consider the implications and how to proceed.

The instructing Ministry may pick these matters up in the course of developing the proposals. In that case, they may be expected to *seek for* the advice of the Attorney-General (as principal legal adviser to Government), who may consult with Legislative Counsel.

But an instructing Ministry cannot be relied upon to spot the danger. In many countries, no legal officers are assigned to the Bill team; administrators "for want of legal expertise" may overlook, or treat as unimportant, features of the proposals that are of crucial significance to the constitutional lawyer. Some issues only become apparent as the legislative requirements are worked out, that is at the drafting stage. For these reasons, as a drafter, you always have a responsibility to:

(i) evaluate for yourself the instructions you receive from the constitutional standpoint (and not rely upon the client);

(ii) draw early attention of the client to any features of the proposals or scheme that appear to give rise to constitutional difficulty, with a view to their re-consideration after the client has taken the appropriate legal advice;

(iii) draft legislation so that obviously and beyond question it complies with the Constitution;

(iv) draw attention of the client (and therefore of the Minister steering the legislation through the Legislature) when constitutional requirements demand a particular choice of words.

Self-Assessment Exercises 1

1. Identify the need for legislative counsel in the draft of sound legislation

2. What is specifically required of the legislation in respect of the Constitution?

1.3.2 Formal Issues

Whether or not the contents give rise to constitutional questions, the form of legislation, its language and the methods it uses must accord with the Constitution and constitutional law. So, as a drafter:

(i) ensure that the formal features of legislation follow any requirements that the Constitution either explicitly or implicitly prescribes (e.g. enacting words);

(ii) adopt the terminology used in the Constitution when you are dealing with the same matters in the legislation;

(iii) when the legislation is concerned with activities that involve, e.g. entities or authorities created or regulated by the Constitution, ensure that your draft is completely consistent with the way the Constitution deals with those bodies.

1.3.3 Procedural Considerations

Constitutional instruments typically prescribe the procedures that are to be followed in enacting different kinds of legislation. Such requirements can affect the form of the legislation (e.g. legislation amending the Constitution may require special enacting words). In these matters, you are expected to:

(i) be completely conversant with the various legislative procedures;

(ii) be able to provide advice as to what they entail and how they should be applied;

(iii) take them into account in as far as they affect the form of legislation you are drafting.

1.4 How should a drafter deal with instructions that appear inconsistent with the Constitution?

Governments, in their determination to carry through their priorities, may become impatient with the restrictions that the Constitution appears to impose. They may decide to push ahead with a legislative proposal that is constitutionally questionable, or more rarely, that is evidently inconsistent with the Constitution. If Legislative Counsels receive instructions of that kind, what should they do?

Legislative Counsels are public officers, all of whom have a duty to uphold the Constitution. At the same time, you are a public officer appointed to serve the government of the day to whom you are responsible, and you are expected to carry out duties as directed by Government. Typically, General Orders (which regulate the activities of public officers) contain rules for the case where a public officer is in doubt about the legality of an instruction. For example, they may permit the officer to state the objection in writing to a superior officer. But in the last analysis, drafters, as other public officers, have the choice between

carrying out instructions given by the authorised superior officer or the responsible Minister, and resigning from the service.

However, Legislative Counsel are in a special position in cases of this kind. More than any other public officers perhaps, you should have an understanding of both the specific and the broader constitutional implications of enacting a piece of legislation that is constitutionally questionable. In a controversy of this kind, the expertise of Legislative Counsel needs to be asserted to the full before a final decision is taken by Government to proceed with the legislation. The possible consequences of a constitutional review by the courts, the likelihood of reversal by the court or of a successful defense, and the attendant costs and delay, must be made known.

Providing this advice is an aspect of the professional responsibility of the drafter to safeguard the statute book. No junior drafter should assume this alone. Issues of this kind must be under the direction of First Legislative Counsel. But the drafters primarily concerned should make sure that a full memorandum of their objections, with the supporting legal arguments, has been submitted to the First Legislative Counsel (and a copy kept on file in case later there are recriminations as a result of a constitutional challenge).

Faced with constitutional objections, Government has a number of alternative courses:

(i) drop the proposal altogether;

(ii) proceed with the proposal and take the risk that the challenger will be unable to rebut the presumption of constitutionality which the courts apply;

(iii) seek an amendment of the Constitution which will accommodate the legislative proposal;

(iv) if the Constitution permits, ask the legislature to enact the legislation by a special procedure (e.g. with a special majority), in which case the legislation becomes a valid exception to the Constitution;

(v) modify the proposal to a form that permits legislation to be drafted consistently with the Constitution.

It is rare for Governments to disregard strong legal objections by Legislative Counsel, especially if they are coupled with positive and constructive proposals that enable the Government to carry through its policies without contradicting the Constitution. It is here that your expertise can be valuable. Can you suggest modifications to the proposal which achieves all or most of the policy objectives while reducing the likelihood of any legal challenge to the minimum?

To discharge this responsibility, you need considerable ingenuity and drafting skill, in particular:

(i) a thorough understanding of how the courts are likely to interpret the relevant parts of the Constitution;

(ii) familiarity with the relevant case law both from your jurisdiction and from others with similar constitutional requirements;

(iii) access to legislative precedents, from any source, on similar legislation which has resisted constitutional challenge.

Self-Assessment Exercise 2

Supremacy of the Constitution, separation of power, rule of law and restricted powers of constitutional amendment are of the examples of _

1.5 Constitutional Instruments a Drafter Is Likely to Need

In Nigeria, a single instrument, formally described as "The Constitution", contains the basic and supreme law. It is concerned with the distribution of State power, executive, legislative and judicial, the establishment of the major institutions of the State that are to exercise that power and the relations between them. It sets limits, safeguards and, typically, guarantees as to the way that power can be used including fundamental standards governing the relationship between the individual and the State. But the ways in which the Constitutions distribute and regulate State power are by no means the same.

However, this instrument is by no means the sole source of such matters. Typically, the Constitution itself requires the enactment of legislation that supplements its provisions. Since this legislation puts much flesh on the bones of the Constitution, it is of considerable importance in constitutional terms, although it does not have the superior legal status of the Constitution.

You should be familiar with the contents of the following kinds of instruments and should keep those marked with * to hand, as you are likely to have to consult them regularly:

1. The Constitution* and all the current amendments (going on in the National Assembly) *.
2. Legislative Powers and Privileges Act.
3. Electoral Act.

4. Finance (Control and Management) Act*
5. Civil Service Rules.
6. Police Act.
7. Standing Orders of the Legislature*.

This is by no means a comprehensive list. Other legislation affects authorities established by the Constitution, though little of it has general constitutional significance. Examples are Acts which govern remuneration, allowances and pensions of the President, Ministers, Legislators, Judges and public officers or regulate the armed forces or statutory corporations.

1.6 Constitutional Principles That May Be Important to Drafters

Almost all Commonwealth countries have a written Constitution, but the way that state power is distributed and constrained is differently treated. Many still exhibit the influence of the Westminster model; others have drawn upon different precedents.

However, there are some constitutional doctrines that typically apply to these written Constitutions with which you, as a drafter, should be familiar. We shall not examine these in detail. (This is not a constitutional text). For the present purposes, it should be enough to draw your attention to the implications of these doctrines in the preparation of legislation:

1. Supremacy of the Constitution;
2. Restricted powers of constitutional amendment;
3. Separation of powers;
4. The rule of law;
5. Limitation of legislative authority;
6. Delegation of legislative power;
7. Principles of state policy;
8. Protection of fundamental rights and freedoms.

1.7 Supremacy of the Constitution

Constitutions typically contain a categorical statement that the Constitution is supreme law. See Section 1 (1) & (3) of the 1999 Constitution of Nigeria.

As subsection (3) expressly states, inconsistent legislation is void - the definitive decision to that effect will be made by the court charged with the function of constitutional review. However, the courts generally adopt a presumption of constitutionality. This places the burden of establishing a breach of the Constitution on those asserting it.

Further, wherever possible, courts seek an interpretation to questionable legislation that is consistent with the Constitution in order that it can be given legal effect. They assume that the Legislature does not intend to enact legislation that contravenes the requirements of the Constitution. If they can, courts try to save legislation by severing void provisions; but this is possible only if removal of those provisions does not alter the essentials of the scheme as enacted. This is known as the Doctrine of Severance and Curability. The Blue pencil rule is applied to delete the offensive provisions so as to save the remaining provisions of the Act.

See the case of ***Attorney-General of Abia State & 35 Ors. V AttorneyGeneral of the Federation*** (2002) 3 SC 107, where certain provisions of the Electoral Act 2001 that were inconsistent with some provisions of the 1999 Constitution was deleted by the Court. In this case, the Supreme Court was able to engineer with the aid of the blue pencil rule, a clever way of circumventing a total abrogation of a legislation on grounds of unconstitutionality. By deleting the offensive provisions and allowing the greater portion of the legislation to remain in force.

See also the case of ***Attorney-General of Ondo State V AttorneyGeneral of the Federation & 35 Ors.*** (2002) 6 SC (Pt.) 1, where the Court struck-out the provisions of Sections 26(3) & 35 of the ICPC Act for being inconsistent with the Constitution.

You should never rely upon the courts saving your draft by these means. It is not their function to correct a drafter's failure so as to provide legislation that is constitutional. Your responsibilities then, when dealing with any matter that is affected by the terms of the Constitution, are:

(i) to give effect to the distribution of authority, and any procedural requirements as to its exercise, prescribed by the Constitution;

(ii) to ensure that any constitutional requirements governing actions taken by public authorities are respected (and, if necessary, reflected) in any draft dealing with actions of that kind;

(iii) to check that what your draft authorises does not offend against restrictions on the exercise of state power contained in the Constitution;

(iv) when your draft deals with authorities or topics on which the Constitution makes provision, to follow the terminology adopted there. (Typically, many of the terms used there are supported by definitions in the Interpretation Act, which expressly link the terms with the Constitution).

It is worth remembering that Constitutions often create bodies that are not strictly concerned with the executive, legislative or judicial power to perform specific functions, sometimes exercising autonomous authority, e.g. an Ombudsman or an Independent Audit body.

Example 1

Many Constitutions contain a provision on the following lines:

In the exercise of the functions conferred upon the Director of Public Prosecutions by this section [*which regulates the institution, continuance and discontinuance of prosecutions*], the Director of Public Prosecutions shall not be subject to the direction or control of any person or authority.

In drafting legislation on criminal process, such a provision requires that you take care not to give powers to another person (e.g. the Attorney-General) which cut across the specified functions of the DPP, nor to permit another person to have the final say on the exercise of the powers in question. On the other hand, the provision does not prevent a requirement that the DPP *consult* with the Attorney- General on particular matters before reaching a final decision.

Self-Assessment Exercise 3

Cite the provision in the 1999 Constitution on Public Prosecutions and confirm its content, by copying it.

1.7.1 Restricted Powers of Constitutional Amendment

Constitutions typically contain a comprehensive statement as to the circumstances and procedures for their amendment. In addition, some Constitutions require any statute that makes a Constitutional amendment to make that fact clear on its face. Strict compliance is essential; a law that contradicts any of the requirements is void and will be struck down on a constitutional review.

Amendment can take a variety of forms:

(i) repeal of existing provisions (with or without their reenactment or replacement);

(ii) modification of existing provisions or addition of new ones;

(iii) suspension of the operation of existing provisions (or where legally suspended, ending the suspension);

(iv) making provisions that are inconsistent with the existing provisions.

The last of these can be important. A statute can escape from the constraints of the
Constitution if it is enacted by a prescribed amendment procedure (e.g. a special majority in the Legislature). The Constitution itself is not changed; the legislation constitutes a valid exception to its requirements. This device has particular relevance in relation to the fundamental rights. Typically, Constitutions prescribe the extent to which protected rights and freedoms may be restricted. Legislation within those specified restrictions is permitted by the Constitution (and so does not constitute an amendment). But a similar result may be achieved by amendment, i.e. by passing inconsistent legislation by a special process.

Example 2

Some Constitutions contain provisions such as the following:

47. (1) A Bill for an Act of Parliament that alters any of the following provisions [*the principal provisions are then listed*]..... shall not be passed in Parliament unless at the final voting thereon in Parliament it is supported by the votes of not less than two-thirds of all the members of Parliament.

(2) In this section:

.....

(b) references to altering this Constitution or any particular provisions thereof include references:

(i) to repealing it, with or without re-enactment thereof or making different provision in lieu thereof;

(ii) to *modifying* it (whether by omitting, amending or *overriding* any of its provisions or inserting additional provisions in it or *otherwise*); and

(iii) suspending its operation for any period or terminating any such suspension.

Self-Assessment Exercise 4

1. Check whether your Constitution allows inconsistent legislation to be made through constitutional amendment. Enter the references to the relevant provisions

To safeguard against this practice, a number of Constitutions treat certain provisions as sacrosanct (and these may include the fundamental freedoms); they are so essential to the structure of the Constitution that they may not be amended by any process.

Example 3

The Constitution of Namibia, for example, states: 131. No repeal or amendment of any of the provisions of Chapter 3 of this Constitution, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms created and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.

Even if the Constitution does not contain such a prohibition, it may be open to the courts to call in aid the "basic structure" doctrine, evolved in the constitutional courts of some Commonwealth countries. This states that some provisions of the Constitution are so basic to its integrity that any alteration of them would damage its essential structure; for that reason, the Legislature cannot amend them, even by following the amendment procedure. But see the provision of Section 9 (3) of the Constitution for the position in Nigeria.

The same procedure may not be needed for all amendments. Some provisions of the Constitution may be "entrenched" (i.e. their amendment requires a special, and demanding, form of legislative procedure), but not all (since some provisions are merely technical). Some may be subject to an even more demanding procedure than others; a non-Parliamentary procedure may be an additional requirement (e.g. a referendum). See Section 8 of the Constitution.

Make yourself familiar with the mechanisms for constitutional amendment. Three features are particularly relevant to your work:

(i) the sections stating which provisions are entrenched and the special procedures for amending them;

(ii) any requirement that an amending statute must state that purpose if it is to have constitutional validity;

(iii) any requirement that special enacting words must be used.

When drafting a Bill that amends constitutional provisions (and particularly one that amends by making inconsistent provisions), draw attention to that fact by:

(i) a memorandum to the client Ministry which indicates any special procedure that must be followed;

(ii) including words in your draft to indicate that its purpose is to amend the Constitution (e.g. in the long title, or an objects clause or, if appropriate, by express words altering the text of the Constitution);

(iii) using the correct enacting words if particular ones are required.

1.7.2 Separation of Powers

Many constitutions allocate, with some precision, the three basic powers of the State - Legislative, Executive and Judicial - among the major institutions of the State established by the Constitution. See Sections 4, 5 & 6 of the Constitution. The division of powers is a deliberate device to secure checks and balances between state authorities and to allow for specialization of functions.

Few Constitutions provide for an absolute separation. Governments typically enjoy a limited delegated power to legislate; Legislatures often contain members who make up the Government. But a high degree of separation is standard in democratic systems; particular emphasis is given to the independence of the judicial function as an essential safeguard for the Constitution itself.

The Legislative power rests with the Legislature; the Executive power with the President and State Governors; the Judicial power with the Courts. Particular categories of power may be assigned by the Constitution to other autonomous bodies created by the Constitution (e.g. the DPP, the Ombudsman, the Service Commissions).

Drafters must pay full regard to these divisions of responsibility; legislation which breaches the principle is likely to be struck down by the courts. You should ensure that legislation does not vest an authority with a function that

falls within the responsibility of another, unless the Constitution directly or indirectly permits.

The following are examples of the kinds of cases where the courts have found that legislation failed to respect the separation of powers under the Constitution:

1. ***Attorney-General of Abia State & 35 Ors. V. AttorneyGeneral of the Federation*** (Supra)
2. ***Lakanmi & Kikelomo V. Attorney-General (West)*** (1971) 1 UILR 201
3. ***Doherty V. Balewa*** (1961) AllNLR 630

In drafting legislation, then, you should check on the constitutionality of any draft provision that confers authority on a body, other than a court, the power to:

(i) make a conclusive ruling as to the existence or the limits of the legal rights of individuals;

(ii) give a binding decision as to a person's rights that involves interpretation or application of the law;

(iii) decide and impose penalties or to make binding orders on persons following a finding that they are in breach of legal requirements.

1.7.3 The Rule of Law

Three principles that typically underlie Commonwealth Constitutions including Nigeria can be brought under this head:

(i) authorities seeking to interfere with the activities of persons in the community can only do so if they derive their power from existing law;

(ii) those powers should not confer an unfettered discretion on the authority to do whatever it wishes; the powers should be proportionate to the achievement of the objectives for which they are needed;

(iii) the existence, and proper exercise of those powers, and due compliance with statutory duties, should be open to judicial review, which, in particular, should be able to invalidate the action on the grounds of procedural unfairness.

These principles provide the public with a reasonable opportunity to predict the limits of government action; they encourage executive bodies to carry out their functions with proper regard to the requirements of sound and fair administration.

Since most State authority derives from statute law, Legislative Counsel are well placed to assist in putting these principles into effect. When instructed to prepare legislation concerned with the powers of public bodies, in consultation with your instructing officer provide positive answers to the following questions:

(i) Are the proposed powers sufficient to secure the objectives of the legislation?

(ii) Do they extend only so far as is necessary for that purpose?

(iii) Are the purposes for which the powers are given evident either from their terms or from the overall statutory context?

(iv) Is the body which is to exercise the power identified without ambiguity?

(v) Are the circumstances in which the powers may be used made apparent?

(vi) Are the procedures to be followed in exercising the power sufficiently provided for?

(vii) In so far as the powers interfere with existing rights or legitimate expectations as to their exercise, should requirements of notice of the proposed exercise and of fair hearing be dealt with expressly, or are they to be left to be implied from the common law?

Self-Assessment Exercise 5

Identify the matters in respect of which the Constitution prohibits the use of the legislative power or imposes restrictions on the circumstances or way in which it may be exercised.

1.8 Limitation of Legislative Authority

Legislatures are generally treated as having the supreme legislative authority to make laws on whatever matters are required. Typically, this is stated in the Constitution to be a power to make laws for the peace, order and good government of the State (although courts decline to use this as a standard by which to measure particular legislation). But this supremacy is subject to any restrictions imposed on the legislative power by the Constitution. In addition to those relating to constitutional amendment, the following matters may also be entrenched, so that the Legislature may legislate on them only if the specified Constitutional constraints are observed (e.g. following a special procedure):

(i) legislation affecting the Fundamental Rights and Freedoms;

(ii) legislation regulating the rights of particular sections of the community (e.g. land rights of the indigenous people);

(iii) the core elements of the electoral systems as contained in electoral legislation.

Example 4

(3) In so far as it alters Chapter IV (*Fundamental Rights and Freedoms*), an Act under this section shall not come into operation unless:
(a) the provisions contained in the Act effecting the alteration have, in accordance with the Constitution being passed in both Houses of the National Assembly by votes of not less than fourfifths majority of all the members of each House; and also
(b) approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.

Federal Legislatures

In Federal States, the Constitution divides the responsibility for legislation between the federal and the unit legislatures, though each is treated as having full power to legislate on the matters exclusively allocated to them. The principal method of allocation is through Scheduled lists in the Constitution of legislative powers. See Parts I & II of the Second Schedule to the 1999 Constitution.

Typically, these assign certain matters exclusively to one or other class of legislature, the others being shared concurrently (with Federal legislation taking priority). It is usual also to state which class has the power to legislate on matters not covered in the lists ("residual matters"). The body of the Constitution may also contain specific provisions allocating responsibility for specified matters to a legislature (usually the national one). See the provisions of Section 4.

Example 5

(1) The National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purposes of implementing a treaty.
(2) A bill for an Act of the National Assembly passed pursuant to subsection (1) shall not be presented to the President for assent, and shall not take effect as law, unless it is ratified by a majority of all the Houses of Assembly in the Federation.

Drafters in a federal system have a particular responsibility for verifying that a legislative proposal falls within the power of their Legislature. The scope of the listed items is not always obvious given the sparse wording that is typically used. As a drafter, you have an important responsibility to:

(i) make yourself fully familiar with the Legislative lists and the other Constitutional allocations of specific legislative powers:

(ii) have a good understanding of how courts interpret those powers;

(iii) check that any legislative proposal is within the competence of the Legislature;

(iv) if there is any uncertainty about that matter, seek the opinion of the Government's Law Officers.

Self-Assessment Exercise 6

Note down (with references) how the Legislative power is divided (e.g. which class of legislature is given exclusive powers or the residual power):

Note down (with references) any *specific* legislative powers that are assigned to the Legislature by particular sections of the 1999 Constitution:

Exceptional powers

Constitutions may confer legislative powers on other bodies than the Legislature (e.g. the President) for use in exceptional circumstances (e.g. during emergencies, or when the Legislature is not in session). Such powers are strictly limited and typically require confirmation by the Legislature within a prescribed time. See Section 305 of the Constitution.

1.8.1 Delegation of Legislative Power

Legislatures are recognised as having power to delegate power to make legislation on specific matters to other bodies. Typically, they are bodies with the policy-making and executive powers for those matters (e.g. Ministers) or responsible for the administration of particular geographic areas (e.g. local government councils). A general authority to delegate may be conferred by the Constitution, though this is rare.

Example 6

Acts of Parliament may provide:
(a) for the delegation to any person or authority other than Parliament of power to make subsidiary laws; and
(b) for the control of the use of any power delegated under paragraph (a), whether:
(i) by means of a requirement of approval; or
(ii) by means of a power to disallow, or in some other prescribed way.

Self-Assessment Exercise 7

Note any provision of the Constitution which authorises the Legislature to delegate a power to legislate.

Even in the absence of an express provision, the practice is too well established to be challenged as inconsistent with the Constitution. But in both cases, what is authorised is *delegation*, not *transfer*, of power to another. A transfer breaches the separation of powers underlying the Constitution. It occurs if the Legislature hands over its responsibility for lawmaking for a general class of matters to another body, giving it a free hand to determine the policy it legislates, without being subject to restrictions imposed by the Legislature. The wider the delegation the greater the risk that it could amount to transfer. So for

example, transfer of the legislative power to impose taxes and duties to the Executive without limits or guidelines may be successfully challenged as unconstitutional.

Example 7

A statutory provision on the following lines is so wide that it might be regarded as an abrogation of power by the Legislature in favour of the Minister:

(1) The Minister may make regulations with respect to the maintenance and securing of public safety and public order and for providing, maintaining and securing such supplies and services as the Minister considers to be essential supplies and services.

(2) Regulations under subsection (1) may repeal, replace, add to or otherwise amend any enactment dealing with any of the matters set out in subsection (1).

You can reduce the risk, when drafting provisions in a Bill that delegate powers to make subsidiary legislation, by ensuring that:

(i) those provisions set out the limits on the delegated power;

(ii) the delegate's function is to elaborate on or supplement the basic scheme that is contained in the Bill.

(Delegated legislative powers are considered in greater detail in another Course).

Courts are reluctant to imply a delegated power to legislate. This arises more commonly where a delegate purports to delegate the power further (i.e. sub-delegated powers). Since the Constitution gives the legislative power to the Legislature, it is for the Legislature to decide which body is to be the recipient of any delegated power. Clear words are needed before the selected body is entitled to pass the power on to another.

You should always use express words to:

confer a delegated power to legislate on any person; authorise a

delegate to delegate further to another person.

Example 8

11-(1) A notice under section 10 must be in the prescribed form.

Subsection (1) by itself does not authorise anybody to exercise the power to prescribe. A court would have to imply that, e.g. the Minister has that power. If the section had dealt with a matter of greater significance, a court might decline to imply such power in the Minister.

The uncertainty is resolved by adding subsection (2).

(2) The Minister shall make regulations prescribing the form of the notices.

1.9 Principles of State Policy

Many Constitutions contain a series of provisions, which direct the State, and all its institutions, to give effect to stated objectives when carrying out their functions. In some instances, these principles are close to treaty undertakings, which the State has entered into (e.g. under the International Convention on Economic, Social and Cultural Rights). These can include:

(i) promotion of the health and welfare of the people, and the elimination of poverty;

(ii) pursuit of a particular form of economic order (e.g. a mixed economy);

(iii) development of educational opportunities, including for those who have been particularly disadvantaged in the past;

(iv) assertion of stated duties of citizens.

Typically, these principles are not directly enforceable by the courts. See Section 6 (6)(c) of the Constitution. But they are increasingly influential as to how legislation is to be interpreted. For the Legislature is presumed, as the Constitution requires, to give effect to the principles when legislating. They may also be called in aid by the courts when determining the scope of the Fundamental Freedoms and Rights.

Example 9

The Namibia Constitution provides:

101. The Principles of State Policy herein contained shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based upon them.

In working with legislative proposals, remember that the Courts may have recourse to these principles in interpreting your drafts. Draw the attention of the client Ministry to any proposal that contradicts one of the principles.

Self-Assessment Exercise 8

1. Note down, with the references, whether the Constitution contains principles (or directives) of social policy.

2. Remind yourself of the coverage of those principles by reading through them and noting any features that are likely to be of particular legislative significance.

3. Are the principles stated not to be legally enforceable?

4. May they be used in interpreting legislation?

1.9.1 Protection of Fundamental Rights and Freedoms (*We look at the implications of these in greater detail in Units 3 & 4*).

The Nigerian Constitution in Chapter IV sets out certain fundamental rights and freedoms that are legally guaranteed to individuals. They are founded on notions derived from principles and values that underlie the common law. In the main, these are designed to protect people from abuse of State power. As legislation is the primary authority for the exercise of that power, drafters have a particular responsibility to ensure that their drafts do not infringe those guarantees.

Fundamental Rights are written in the form of wide-ranging principles and are cast in very generalised language; their application is dependent upon the way in which the courts interprete their open-ended contents. There is much common ground in content between them and Human Rights treaties; in many cases they are designed specifically to give effect to international treaties such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights. Commonwealth courts have generally adopted a similar purposive and liberal approach to the interpretation of the provisions, which are taken to reflect the basic values of a democratic society by which all governmental action should be measured.

As a result, there is a fast-growing trend in Commonwealth courts to have regard to the jurisprudence and practice in other countries and institutions. This body of law is giving shape to many of the rights and freedoms, sometimes in unexpected ways. In any constitutional challenge to your legislation, you can expect that this case law will be influential. As it becomes widely known, it is likely to be taken into account in the scrutiny of your work during and after enactment (by members of the Legislature, public interest groups, lawyers and the courts). This places a heavy responsibility on drafters to keep in touch with the trends in comparative and international law on human rights standards and to take every step to keep drafts in line with these standards.

It is not just in cases where legislation directly contradicts the basic freedoms that a challenge may be made. Courts read into legislation certain minimum rights guaranteed by the Bill of Rights, for example in relation to arrest, detention, and fair trial, when those matters are relevant but absent from the statutory scheme. Drafters need to work out whether the ways by which the courts may apply those provisions is likely to be satisfactory, or whether it is better to deal with the matter explicitly.

As you will see in Units 7 & 8, the Constitution recognise that the rights and freedoms cannot be absolute but must sometimes give way to an overriding public interest or be restricted in order to protect the rights of others. Legislative proposals that are inconsistent with a basic right or freedom must be brought within the permitted qualifications to be constitutional. This calls for the most careful crafting to ensure that the legislation does not exceed the limits within which such qualifications may be made. Those limits are set by the Constitution as interpreted by the courts.

The presumption of constitutionality

Courts may have recourse to the presumption of constitutionality when considering a challenge to legislation for non-compliance with the Bill of Rights. Since the Legislature is to be taken to have acted constitutionally in

enacting the law, the onus lies on the challenger to rebut the presumption. This means that legislation is presumed:

(i) not to hinder the enjoyment or infringe any protected right or freedom; or

(ii) if it does, to do so only on a permitted ground and within the permitted limits.

Such a presumption rests on an unstated assumption that these issues have been addressed in the preparation of the legislation. This imposes a responsibility on the drafter; the Legislature is ultimately dependent on the drafter's analysis and expertise.

Application of several protected rights

The range of matters covered by the Bill of Rights is very wide. Having identified that a legislative proposal touches on a particular protected right, it is easy to overlook the possibility that other rights or freedoms may be affected during the implementation of the legislative scheme. To be consistent with the Bill of Rights, provisions may be needed to deal with issues covered by several of the protected rights and freedoms. The drafter, when analyzing the proposal, has the added responsibility of envisaging what effects the legislation may have which will impinge upon other rights and freedoms.

Example 10

A statutory provision that authorizes the summary deportation of a non-national male married to a wife who is a national, for having entered the country illegally, can give rise to other issues as well as freedom of movement, e.g.:

- the right to a family life;
- security of the person (in respect of arrest and detention);
- due process and a fair hearing;
- inhuman and degrading punishment;
- discriminatory treatment on grounds of national origin or sex.

Your responsibility as a drafter

More than to anyone else, it is likely to fall on you to:

(i) draw to the attention of Government, through your instructing officer, any proposal that appears to be a *potential* source of

constitutional challenge because of conflict with the Fundamental Freedoms provisions;

(ii) take the necessary action to make legislation compatible with the Fundamental Rights so that the risks of legal challenge are kept to the minimum.

In conclusion, legislative drafters have to be familiar with the principles of public law since most legislation deal with public law matters. They need to be thoroughly conversant with the Constitution.

1.10 Summary

In this Unit you have been working on basic features of the Constitution and constitutional law that you may have to take into account when drafting. You have also been establishing the constitutional concepts and terminology that your draft legislation must reflect. You should now be more confident of the kinds of matters that may give rise to constitutional issues and the main sources to refer to when deciding how to deal with these matters.

More specifically, by the end of this Unit, you should have achieved the objectives of your study, which were to enable you, when drafting legislation to take full account of Constitutional requirements so that the legislation is not vulnerable to legal challenge.

1.11 References/Further Readings/Web Sources

1999 Constitution of the Federal Republic of Nigeria.

Finance (Control and Management) Act. Vol. 7 Cap. F26 Laws of the Federation of Nigeria 2004.

1.12 Possible Answers to Self-Assessment Exercises 1

1. The legislative counsel is needed because he has an important role of ensuring reduction in chances of inconsistencies between legislation and the Constitution as well as the challenges these might bring.

2. It is required of legislation, both in its form, language and the methods to accord with the Constitution and constitutional law. This must be so even if the contents did not specifically give rise to constitutional questions.

SAEs 2

Constitutional doctrines/Principles

SAES 5

In the following matters, the Legislature may legislate on them only if the specified Constitutional constraints are observed (e.g. following a special procedure):

i. legislation affecting the Fundamental Rights and Freedoms;

ii. legislation regulating the rights of particular sections of the community (e.g. land rights of the indigenous people);

iii. the core elements of the electoral systems as contained in electoral legislation.

UNIT 2: PARTICULAR CONSTITUTIONAL CONSTRAINTS

Contents

2.1 Introduction

In this Unit, we concentrate on the constraints on drafting that arise from the Constitution and constitutional law. We are not concerned with drafting constitutional instruments. That is a specialist area of drafting that arises relatively infrequently and is generally undertaken by drafters with considerable experience. At the beginning of a drafting career, your first priority is to establish how constitutional instruments influence drafting practices and choices and the ways in which the Constitution can set limits within which you must work.

This Unit provides an opportunity for you to remind yourself of features of the constitutional instruments that have particular application in the preparation of legislation, by completing a series of Exercises. When you have found the relevant instruments, familiarize yourself with their general contents and note down the references in the Exercises for future use.

2.2 Learning Outcomes

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

i. When drafting legislation, work within the constraints imposed by the Constitution

ii. Familiarize and have a good understanding of the concepts or aspects of constitutional law of Nigeria

iii. Explain the main constraints with respect to judicial functions and procedures

2.3 The main constraints with respect to legislative functions and procedures

(i) Restriction on the legislative power in criminal cases

Self-Assessment Exercise 1

Does the Constitution expressly prohibit legislation that: i. makes conduct criminal retrospectively? ii. increases the penalties for criminal conduct already completed?

(ii) The mode of legislating

Self-Assessment Exercise 2

Does the Constitution contain any provision stating how the legislative power is to be exercised (e.g. by an Act)?

(iii) Restrictions on the introduction of legislation

Self-Assessment Exercise 3

Is there any provision in the Constitution or the Legislature's Standing Orders that restricts the categories of persons who may introduce Bills, either generally or of specified kinds (e.g. money Bills), into the Legislature?

(i) **Different categories of Bills**

Self-Assessment Exercise 4

Do the Constitution or the Standing Orders:

1. draw a distinction between Bills introduced by the Government and by members of the Legislature?

2. prescribe different procedures for these different categories?

3. create any special procedures for Bills dealing with private, rather than public, interests or that affect essentially private rights?

(ii) Intervention by legislative veto

Self-Assessment Exercise 5

1. Has the President a constitutional power to veto or refer back a Bill when presented for assent?

2. If so, are there any special procedures or actions that must be carried out?

(vi) Restrictions on Bills in a Two-Chamber Legislature

Self-Assessment Exercise 6

1. Are there any restrictions on the categories of Bills that may be initiated or dealt with in the Federal House of Representative?

2. Are there any restrictions on the powers of the Federal House of Representative when dealing with Bills?

3. In 10 or 12 words, note down the way in which the Constitution provides for the resolution of disagreements between the Senate and House of Representatives in respect of Bills.

(vii) Restrictions deriving from legislative procedures

Self-Assessment Exercise 7

Do the Standing Orders provide for:

1. how notice is to be given of the intention to introduce a Bill?
2. how notice is to be given of amendments to Bills?
3. the limits upon the scope of those amendments?
4. the stages through which Bills must pass?
5. the procedure to be followed in debates?
6. committal of Bills to committees and their procedure?
7. whether or not a Bill can be carried over from one legislative session to another?

(viii) Review of Bills before Assent

Self-Assessment Exercise 8

Does your Constitution require Bills to be examined formally by anybody, other than the Legislature, before they are presented for assent?

2.4 The main constraints with respect to judicial functions and procedures

(i) adjudication must be by independent and impartial courts

Self-Assessment Exercise 9

Does the Constitution (e.g. in the Fundamental Rights):

1. create a general right to have civil rights and obligations determined by an independent and impartial court, or is this limited to criminal cases?

2. require the rights to be determined by a fair hearing within a reasonable time?

3. permit other adjudicatory bodies (e.g. tribunals) to determine civil rights too?

(iii) **Restrictions on establishing courts**

Self-Assessment Exercise 10

Does the Constitution:

1. establish all the courts in Nigeria, or only the superior courts?

2. authorise the Legislature to establish any categories of courts?

3. stipulate the essential jurisdiction of the courts it establishes, or merely provide for jurisdiction to be provided for by the Legislature?

(iv) **Constitutional review**

Self-Assessment Exercise 11

1. Does the Constitution vest a particular court (or all superior courts) with a general power to review legislation for its constitutionality?

2. Are there special arrangements for dealing with infringements of the Fundamental Rights?

(iv) Restriction on ouster of judicial review

Self-Assessment Exercise 12

Does the Constitution expressly prohibit enactments that oust, or purport to oust, the jurisdiction of the courts or other judicial tribunals to determine questions of law or concerning a person's rights?

2.5 The main constraints with respect to executive functions and procedures

(i) Exercise of executive authority

Self-Assessment Exercise 13

1. In which body is the executive authority formally vested?

2. Who may exercise the executive authority?

(ii) Functions of the President

Self-Assessment Exercise 14

1. Does the President have substantial executive authority or is the office largely ceremonial?

2. When the President is a ceremonial figure, what modifiers does the Constitution use to describe the relationship with those who actually take the decisions (e.g. "acting on/in accordance with the advice of")? **(iii) Division of executive responsibility**

Self-Assessment Exercise 15

1. Is the Legislature expressly empowered to confer executive functions on persons in addition to those required to exercise the executive authority (e.g. on Commissions or Councils created by the Constitution)?

2. In addition to the members of the Government, which entities are given a specific executive responsibility by the Constitution (e.g., DPP, Auditor-General)?

(iii)Assignment of Ministerial responsibility

The Constitution provide for the assignment of responsibilities to the Ministers of Government. Typically, this is done on the installation of a new Government in a formal instrument, which is amended or replaced as responsibilities are changed. It is from this document that you should ascertain which Minister is responsible for any subject of administration with which the legislative proposals are concerned.

In drafting legislation, it is possible to refer to the relevant Minister in a number of ways:

(a) by the official name given to the Ministerial office to which the subject-matter of the legislation is assigned (e.g. "Minister of Agriculture");

(b) as the Minister "responsible for" the general area under which the subject-matter has been placed by the instrument (e.g. "Minister responsible for agriculture");

(c) as the Minister responsible for the particular subject matter (e.g."Minister responsible for fertilizers and animal feed").

However, all can give rise to problems. If there is a change in the names of Ministries or as to the Ministry that is to be responsible for a particular subject-matter, existing references in legislation may have to be amended. The Interpretation Act alleviate this by allowing the drafter to use the simple term "Minister", which is defined as, e.g. "the Minister of the government of the Federation charged in pursuance of the Constitution … with responsibility for the matter to which the context relates" (S. 18 (1) of the Interpretation Act).

Which Minister has the current responsibility can usually be found out from the instrument assigning responsibilities. In any case, make a practice of checking there that the Ministry identified in your instructions has responsibility for the subject.

(iv) Delegation of executive powers

Self-Assessment Exercise 16

1. Does the Constitution contain a general authority for executive powers of Government to be delegated to any other body (e.g. Public Service Commission, or other Commissions)?

2. Are any categories of functions expressed to be exercisable only by the person currently holding or performing the functions of the specified office?

2.6 The Main Constraints with Respect to Public Service Functions and Official Appointments

(i) Meaning of "public office" and "public officer"

Constitutions typically prescribe which offices are to be treated as "public offices". The term generally has application beyond the civil service. It may extend to other officers, such as the judges, members of the police or armed forces, the DPP and the Ombudsman. At the same time, the Constitution may contain provisions that apply to sections of the public service only. So the Public Service Commission may not have authority over legal officers who are within the jurisdiction of a Judicial Service Commission.

In preparing legislation, check carefully before using these terms, to avoid wider application than you intend. It may be sensible to state, expressly in an application clause, to which categories your draft does or does not apply.

Self-Assessment Exercise 17

1. Does the Constitution define "public office", "public officer" and "public service"?

2.Are these definitions repeated in the same form in the Interpretation Act?

(iii) Appointments to, and removal from, office

The Constitution (and the Interpretation Act) may confer general powers with respect to particular cases of appointment (e.g. temporary or acting) or departure from office (e.g. resignations). These remove the need to include provisions of this kind in legislation dealing with particular public offices.

Self-Assessment Exercise 18

Does the Constitution (or Interpretation Act):

1. authorise the appointing body to exercise powers to remove or suspend the appointee or make temporary or acting appointments?

2. extend the term "remove" to cover cases of compulsory retirement?

3. contain general provisions on the mechanisms for resignations?

4. explain who is considered to be the holder of an office?

5. recognise that office-holders are generally eligible for reappointment?

2.7 The Main Constraints with Respect to Financial Matters

Financial considerations are present in many Bills. Money has to be raised and spent in order that legislative schemes can be implemented. Issues of control and accounting arise wherever expenditure of public money takes place. A body of legislation on these matters rests on foundations set by the

Constitution. This reduces the need to deal with some or even any of these matters in drafting many Bills. Even so, you should be familiar with what this legislation provides, since:

(i) it may need to be modified for the purposes of a particular draft;

(ii) you should use the relevant financial expressions in your drafts in order to link them with that legislation.

2.7.1 Types of financial legislation

Constitutions commonly follow the Westminster classification:

Appropriation Bill: authorises expenditure from public funds on the basis of estimates previously presented to the Legislature;

Supplementary authorises additional expenditure, on the basis of a *Appropriation Bill:* supplementary estimate;

Finance Bill: authorises the imposition of taxation or other duties for the purpose of raising revenue for public expenditure;

Money Bill: is exclusively one of the foregoing, or requires public funds to be drawn upon to meet obligations set by legislation ("statutory expenditure").

In some jurisdictions, legislation of these kinds has to follow special procedures, sometimes designed to limit the powers of an unelected second Chamber or to deal with cases where two Chambers cannot agree. The Legislature may not be permitted to proceed with such legislation unless it is introduced by Government.

Self-Assessment Exercise 19

1. Does the Constitution make special provision with respect to any of the following types of financial legislation?

1. Appropriation Bill:

2. Supplementary Appropriation Bill:

3. Finance Bill:

4. Money Bill:

2. Are there any special procedures governing the enactment of Money Bills?

2.7.2 Taxing legislation

Constitutions do not usually state what constitutes taxation. It is usually taken to cover the compulsory demand for money, under the authority of an Act, that is to be used for expenditure for some public purpose made evident in the Act. Legislation frequently requires payments to be made to the State, e.g. as an incidental element of licensing or for documents in connection with an administrative scheme run by a part of the public service. Fees for licences may be treated as a form of taxation (and are often linked with "tax" in Constitutional references), as they are an element in a regulatory system created for the public interest. But a charge that does not exceed the cost of providing the particular service received arguably is not a tax since it is not a device for raising revenue for general public expenditure.

The issue of whether a payment is a tax or not has potential importance under the Fundamental Freedoms. For the compulsory taking of property in satisfaction of a tax does not constitute unconstitutional deprivation of property.

2.7.3 Requirement of Legislative Authority

Constitutions typically require that the Legislature must give its authority, in the form of a duly enacted Bill, for:

(a) the imposition of a tax or a duty;
(b) raising money for public purposes by way of loans; (c) payments out of public funds.

If taxation is to be imposed by a body other than the Legislature (e.g. by a statutory body or a Minister), your draft should contain express words authorising the power and prescribing its limits or the circumstances when it may be exercised.

In respect of payments, if the subject matter of the legislation is to be administered out of funds allocated annually to the Ministry, you need not include express authorisation. This will be provided by the Appropriation Act that authorises expenditure to give effect to the Ministry budget.

Self-Assessment Exercise 20

1. Does the Constitution expressly require legislative authority for:

   (a) the imposition of taxes and duties:

   (b) borrowing by Government for public purposes:

   (c) payments out of public funds:

2. Is there any single Act in force which governs Government borrowing?

2.7.4 The Consolidated Fund and Other Public Funds

The bulk of public revenue is typically required to be paid into a single central fund, called the Consolidated Fund, from which withdrawals can be made only on the authority of the Minister of Finance for purposes authorised by the Legislature. A Contingencies Fund for unforeseen emergencies, is also common. Other Funds can usually be established for specific public purposes, into which money allocated by the Legislature, or raised by loans or by specified payments by the public, is to be paid. These additional funds may be regulated by a general Act or by the legislation which created them.

Self-Assessment Exercise 21

1. Does the Constitution (or other legislation) establish (by the same or another name):

   (a) a Consolidated Fund:

   (b) a Contingencies Fund:

   (c) other types of public funds:

2. Is there any legislation that regulates the administration of public funds generally?

2.7.5 Payments from the Consolidated Fund

Two types of payment are typically made from the Consolidated Fund:

(i) expenditure that, under the Constitution (or other specific enactments), is "to be charged on the Consolidated Fund", and therefore does not need annual authorisation, e.g. salaries and allowances of the judiciary (sometimes called "statutory expenditure");

(ii) expenditure authorised annually by the current Appropriation Act (or Supplementary Appropriation Act).

The manner of withdrawal from the Fund is regulated by legislation. The general control and management of the Fund may be provided for by the same statute.

2.7.6 Control and Management of Public Finance

Legislation, rather than the Constitution, is the typical way of dealing with the control and management of public finances. General legislation covers such matters as:

(i) the investment of money held in funds;
(ii) the management of special funds;
(iii) duties of the public officers who must account for expenditure in any part of the public service;

(iv) money deposited with Government that has not been raised for the purposes of Government:
(v) audit and examination of public accounts.

Self-Assessment Exercise 22

Indicate where the legal provisions on the following are to be found: 1. investment of money held in funds: 2. management of public funds (other than the Consolidated Fund): 3. duties of accounting officers: 4. money deposited with Government: 5. mode of audit and examination of public accounts.

2.7.7 Terminology Used for Financial Provisions

In drafting financial provisions, use the same terms and expressions as are found in the provisions of the Constitution or in the Finance Act.

The Interpretation Act may contain definitions of terms that relate to financial matters. Use these wherever they are appropriate.

Self-Assessment Exercise 23

Does the Interpretation Act (or the Constitution) contain?

1. a definition of "financial year" (which applies to all public finance):

2. a definition of:

    (a) "Consolidated Fund":

    (b) "special fund":

    (c) "statutory expenditure":

3. provisions regulating the way in which fees may be fixed by subsidiary legislation:

2.7.8 Finances of Statutory Bodies

Legislation on public finances usually does not apply to autonomous bodies set up by statute, even when they are performing public functions. Typically, their financial arrangements (e.g. revenue, expenditure, borrowing, financial control and management, audit) are provided for in the legislation that sets them up. But as public money is often involved, the requirements may be similar to those for public finances and may be linked with the control and audit systems used for public finances.

If you are drafting legislation of this kind, you are sure to find several precedents. These should indicate the matters that call for inclusion and the prevailing practice.

To conclude, the main constitutional constraints with respect to legislative, executive and judicial functions are not absolute. You should therefore draft within these constitutional restraints to avoid an exercise in futility.

2.8 Summary

By the end of this Unit, you should have achieved the objectives of your study, which were to enable you, when drafting legislation to work within the constraints imposed by the Constitution. Test whether this is the case, by reminding yourself of the principal matters dealt with.

Do not expect to remember every detail of the information you have entered into your Exercises Boxes. You should feel satisfied that you know the kinds of matters that require your attention. Your working knowledge will steadily expand with experience. However, always check constitutional sources rather than trying to recall what they provide. It is for this reason; we advise that the principal constitutional documents should always be at hand. But of course you must know when to refer to them. That has been a main purpose of this Unit.

As soon as you are comfortable with this Unit, continue to Units 7 & 8 on Fundamental Freedoms. In those Units, you will explore a major constitutional constraint in greater detail. This should serve to confirm the general approach which this Unit has been designed to impart.

2.9 References/Further Readings/Web Resources

1999 Constitution of the Federal Republic of Nigeria.

Finance (Control & Management) Act Vol. 7 Cap. F26 Laws of the Federation of Nigeria 2004.

Standing Order of the Senate and House of Representatives.

2.10 Possible Answers to Self-Assessment Exercises

UNIT 3 DRAFTING UNDER A BILL OF RIGHTS

Contents

3.1 Introduction

In this Unit we are concerned with issues relating to Fundamental Rights and Freedoms, which you, as a drafter, should be prepared to deal with. We concentrate on questions of drafting to meet the requirements of a constitutional Bill of Rights. However, to approach this matter solely from the standpoint of the Constitution no longer suffices.

This Unit is written on the assumption that you are already reasonably familiar with the Fundamental Rights provisions in the Constitution and have a general understanding of how they are interpreted by the Courts. If you are not, refer to a standard text book. If you are well versed in this subject from previous work, you may be able to complete this Unit fairly quickly. The Unit is of great importance and merits your close attention.

3.2 Learning Outcomes

By the end of this unit, you will be able when drafting legislation to:

(i) Highlight legislative proposals or provisions that may be inconsistent with the Fundamental Rights provisions of the Constitution; and
(ii) Identify ways in which such inconsistencies can be prevented.

3.3 Rights and Freedoms Protected by the Constitution

For our purposes, it is enough to look at a short classification of rights and freedoms typically found in Constitutions.

(i) Absolute or unqualified rights

Some rights are guaranteed in absolute terms; the Bill of Rights prohibits the enactment of legislation that imposes any restrictions on the enjoyment of the right. The underlying value is too important to allow any dilution. These typically include rights that protect against slavery, torture and inhuman or degrading punishment or treatment, retroactive criminal law or retrial of the same offence.

(ii) Qualified rights

The majority of the protected rights and freedoms, however, are qualified; legislation may be enacted to impose restrictions on their exercise, within the limits prescribed by the Bill of Rights. These permitted qualifications are designed to allow the law to further some communal interest or to strike a balance where protected rights clash. These typically include freedom of expression, assembly, association, movement and conscience, and the rights to personal liberty, privacy of home and person, nondiscriminatory treatment, and compensation for compulsory acquisition of property.

(iii) Minimum rights

Certain rights are conferred by the Bill of Rights to ensure minimum standards of treatment in specific cases where interference by the State with individuals' rights is lawful. They are designed to ensure that individuals are fairly treated and that State action is taken only after due process. Typically, these arise on arrest, detention and trial, particularly for criminal violations. They are minimum rights because it is open to the law to provide more rigorous safeguards if that is thought proper.

(iv) Non-derogable rights

Constitutions generally allow specific rights and freedoms to be suspended or ignored in particular circumstances. The principal justification allowed is the existence of a state of emergency; but in some cases the general power is granted to enact inconsistent legislation by special procedures (which we looked at in **Module 2 Unit 1**). Certain rights, however, may not be derogated from, as they are regarded as relevant at all times. Typically, these include the

rights to life, equal treatment, and fair trial and to be protected against slavery, torture and inhuman and degrading punishment and treatment.

Self-Assessment Exercise 1

Read through the Fundamental Rights provision in the Constitution. Remind yourself as to which rights and freedoms are unqualified; qualified; minimum and non-derogable. In particular, take note of the limits imposed by the Bill of Rights upon the permitted qualifications. (See Cap. IV of the 1999 Constitution).

3.3.1 Do The Specified Rights and Freedoms Constitute a Comprehensive Statement of the Protected Rights and Freedoms?

Some Bills of Rights start with an introductory statement of the rights and freedoms that individuals enjoy, in what appears to be a preamble. The statement can be construed as covering a broader range than those specifically dealt with in the later provisions. Two cases can be mentioned:

(i) the statement may refer to the enjoyment of rights regardless of sex, although the provisions on equal treatment make no refer discrimination on that ground;

(ii) the statement refers to a general right to enjoy property, although only the right to protection against compulsory deprivation of property without compensation is specifically provided for.

Courts have been inclined to treat the statement as a source of protected rights on these matters, and not merely as a rhetorical preamble.

Self-Assessment Exercise 2

Check whether Chapter IV of the 1979 and 1999 Constitutions contain a statement of this kind. Note down any aspects in which they appear to guarantee rights not covered by the sections that follow it.

3.3.2 What other matters in the Bill of Rights are of particular interest to the drafter?

(i) Saving of existing law

Some Constitutions provide that legislation in existence at the date of the Bill of Rights is to be treated as consistent with its provisions; it may not be the subject of constitutional review for non-compliance. The restriction applies also to provisions of existing law that are re-enacted in the identical form in consolidation or revision legislation. These savings clauses may have been inserted on the assumption that the existing law reflected the same values as the Bill of Rights. But it is now clear that, but for these clauses, legal challenges to existing legislation might have been successful.

Example 1

26.-(1) Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of Chapter 2 (*Fundamental Freedoms*) to the extent that the law in question:

(a) a law ("an existing "law") that was enacted or made before Independence Day and has continued to be part of the law of Utopia at all times since that day; or

(b) repeals and re-enacts an existing law without alteration; or

(c) alters an existing law and does not thereby render that law inconsistent with any provision of Chapter 2 in a manner in which, or to an extent to which, it was not previously inconsistent.

Provisions of this kind specifically preserve types of punishment (e.g. capital and corporal punishment) that otherwise might have been vulnerable to challenge as conflicting with the rights to life and to be protected against inhuman and degrading punishment. In principle, extension of those punishments to new categories of case cannot be challenged on these grounds.

Example 2

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises:

(a) the infliction of any punishment; or

(b) the administration of any treatment,that was lawful in Utopia immediately before Independence Day.

But consider carefully whether to rely upon these provisions. Courts tend to construe them strictly and may allow challenges to new provisions modeled on them. Moreover, no such savings clauses exist under treaties, which may require all law, existing and future, to comply with their provisions.

The Nigerian Constitution however, does not contain savings provisions of this kind. Existing law, and any legislation modeled on it, is open to constitutional review in the same way as new legislation. (See Section 315.)

(ii) Restriction to state action

Some Constitutions make clear that the Bill of Rights provides protection from interference by private persons with the rights and freedoms of others, as well as by State and other public institutions and authorities. But most are silent on the matter. In those cases, the courts have tended to construe the Bill of Rights as offering protection from State and public bodies only.

However, this issue of "horizontal application" is now seen as potentially of great importance. For state action is involved in the processes of making law for private persons (including the provision of adequate arrangements for litigation) and of applying private law in the courts. Whether enacting legislation dealing with private or with public relationships, the Legislature is obliged to give effect to the Bill of Rights. A private individual in relying upon provisions of statute law is entitled to expect that the Legislature fulfilled the Bill's requirements. A statutory provision may be challenged if the way that it regulates private rights is inconsistent with the Bill. Similarly, the courts are tending to see it as their duty to apply private law, including the common law, in ways that achieve compatibility with the protected rights.

This is of some importance to Legislative Counsel. You must be on guard for provisions that authorise action to be taken, or that prevent activities, by private individuals that are incompatible with the Bill of Rights, as much as for cases involving public bodies. Your task includes assisting the State to abide by the Fundamental Rights when exercising the Legislative power.

Example 3

1. A statute that deals with defamation must meet the standards involved in the freedom of expression. A party to proceedings may be able to challenge the legislation on the ground that it restricts the freedom of the press or of speech or that it fails to strike a proper balance with the right to privacy or personal reputation. Any deficiencies in the law are traceable to State action.

2. A statute which enables a private landlord to discriminate as to the tenants to whom to rent private property could be challenged if it is in breach of the equal treatment requirements. The Legislature is responsible for permitting conduct that is inconsistent with the Bill of Rights.

(iii) Making qualifications to protected rights and freedoms

As we have noted, many of the rights and freedoms are qualified. The Bill of Rights permits restrictions on their enjoyment or exercise in specified circumstances. Broadly expressed powers to qualify them are found in the Constitution. However, qualifications tend to be set out in one of two forms:

(i) in subsections following the particular right or freedom to which they relate, where all the conditions to be met in drafting the restricting legislation are set out; (Sections 33 to 36)

(ii) in a single general statement in the Bill that applies to all the relevant rights and freedoms, laying down the conditions that must be met by any legislation that restricts them. (See Section 45)

Example 4

Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of this Chapter to the extent that the law in question makes provision that *is reasonably required*: (a) in the interests of defence, public safety, public order, public morality or public health; or (b) for the purposes of protecting the rights or freedoms of other persons; and except in so far as the provision, or as the case may be the thing done, is shown not to be *reasonably justifiable in a democratic society*.

However, in all cases, restrictions are permissible only if they are contained in legislation. So, Legislative Counsel have a particular responsibility for seeing that:

(i) intended qualifications are provided for expressly by legislation;
(ii) restricting legislation keeps within the limits set by the Bill of Rights.

3.3.3 Dealing with Qualifications

Bills of Rights necessarily impose constraints upon what the State and its agencies may do. Governments are inclined to ask for powers that come up

against those constraints. But the principal duty of the Legislature is to further, and to give the fullest effect to, the basic rights and freedoms. Drafters should work to the same end:

(i) by asking first whether the proposals can be achieved through legislative provisions that are consistent with the rights and freedoms;

(ii) and only if they cannot, by searching for ways in which they can be brought within a permitted qualification;

(iii) then, by making clear that the legislation is *intended* to restrict the protected right, using terms that show the restriction to be within the limits of the permitted qualification.

Permitted qualifications allow restrictions to be imposed on rights and freedoms so that:

(i) a reasonable balance is struck between the right in question and other rights the enjoyment of which may be infringed if the right were to be exercised to the full in the circumstances being regulated;

(ii) community needs are given priority over individual rights when it is in the general interest.

Remember that every enactment made under the qualifying provisions restricts the scope of the right or freedom. Therefore, limits upon reliance on the qualifications are essential if the basic right is not to be eaten away by particular restrictions. Bills of Rights contain standards which the qualifying legislation must satisfy. While it is for the courts in the last analysis to decide whether these standards have been met, it is clearly the function of those preparing the legislation to take every step to ensure that they do. Two general standards are typical; ***Example 4*** illustrates both (as highlighted). In some jurisdictions, only one or the other is used.

(i) Reasonably required/necessary in the public interest

A court may find that a restriction measures up to this standard only if it can be shown to be:

(i) *necessary* to achieve the particular head of public interest asserted or to protect the rights of others; and

(ii) the restriction is *proportionate* to securing its objective (i.e. *is no greater a restriction* than is required to achieve its purpose).

This has implications for drafting. For if courts are to be satisfied that this standard is met, the legislation must contain specific provisions from which they can assess that it is necessary and proportionate. Sound drafting uses terms that lead the court to that conclusion or, better, make it unlikely that such a challenge is made in the first place.

The following types of drafting may not meet these standards:

(a) Over-broad restrictions

A restriction is *over-broad* if it can be construed as authorising cases beyond those intended or necessary for producing the intended results. In particular, it may be over-broad if the term enables the administering or enforcing body to determine the general circumstances in which the restriction will apply or the entities that are entitled to invoke it. It is the function of the Legislature, not the Executive, to determine the scope of the restriction.

Example 5

1. A statutory restriction on the holding of "public gatherings" is overbroad if it is capable of extending to religious meetings, as well as to political meetings, when the aims in restricting the freedom of assembly are connected with elections. Consider issues raised on the Public Order Act.

2. A power conferred on the police to refuse police bail to those "using serious personal violence" is over-broad if it applies to persons arrested in the course of a domestic dispute when the intended objective of the restriction on the right to be protected by the law is to deal with violence in the course of property crimes.

(b) Vague restrictions

A restriction is *vague* if it uses terms that leave its scope uncertain or fail to indicate the conduct that it prohibits or permits, or its purpose. Users of the legislation should be able to ascertain from the language used whether they are covered or caught by the restriction. If that is not clear, courts are likely to give effect to the basic rights unlimited by the restriction.

The line between broad and vague restrictions is not clear-cut. Both are cases where the Legislature may be treated as failing to set out the restriction sufficiently precisely to show that it is within the limits authorised by the Bill of Rights.

Example 6

1. A power to impose restrictions on the right of a citizen to travel abroad that can be used when "the Minister is satisfied that the restriction is reasonably required in the interests of defence, public safety, public order, public health or public morality" is over-broad. It is not possible to know in what circumstances the power may be used; it leaves the Minister to decide both the scope of the right itself and whether it measures up to the required standards.

2. A requirement that the permission or consent of the AttorneyGeneral must be obtained before any action for damages can be instituted against the Government (which is intended to eliminate frivolous and vexatious actions) is too vague because it is not subject to any checks and controls and over-broad because it can be used to prevent the exercise of individuals' right to have access to court to determine their civil rights.

(ii) **Reasonably justifiable in a democratic society**

In some Constitutions this standard is used instead of the "reasonably necessary test"; in that case, you should apply considerations similar to those we have just looked at.

But where it is an additional standard (as in **Example Box 4**), its effect is to allow a court to strike down legislation because it goes beyond what is acceptable in a democracy, even though it is necessary and proportionate. Its objective seems to be to prevent provisions that use unusual, exceptional or extravagant methods to create restrictions. In practice, it is difficult to predict when a court might implement this test; there is little case law to provide guidance. There are unlikely to be many cases where legislation fails the second test without also failing the first.

In drafting legislation, then, work on that assumption. If a proposal meets the "reasonably necessary" test, it is unlikely to fall foul of the "reasonably justifiable test". The burden lies on those asserting that legislation does not measure up to that standard. This is likely to prove heavy in cases where the legislation has been enacted after consideration and approval by a democratically elected Legislature. We look at the actual drafting of qualifications below.

3.3.4 Dealing with Derogations

Constitutions typically authorize action that derogates from the protection the Bills of Rights are intended to afford, although, as we have seen, certain rights cannot be treated in this way.

(i)Derogations in emergencies

Additional restrictions on the exercise of rights and freedoms are unavoidable during natural or man-made emergencies. Constitutions permit the enactment of derogating legislation for that purpose. It is at these times that Governments seek wide-ranging powers that may seriously reduce the scope of the protected rights. For that reason, limits are placed upon the use of derogating legislation. Typically, the Constitution contains provisions that:

(a) indicate precisely when emergency derogations are permitted;

(b) restrict the categories of rights and freedoms that may be derogated from or suspended;

(c) prescribe a basic legal framework within which provisions for emergency detentions must be made.

(ii)Derogation by inconsistent legislation

Some Constitutions expressly permit the Legislature to enact legislation that is inconsistent with the Bill of Rights, so long as special procedures are followed. In others, a similar effect can be achieved by following the procedures for amending the Constitution. These devices permit legislation to be enacted that restricts protected rights and freedoms, even though the restrictions are not within the permitted qualifications. They enable a Government that has the necessary support in the Legislature to escape from the constraints of the Bill of Rights.

These devices should be resorted to only in the most exceptional circumstances if the system of basic rights is not to be devalued. It is not a course of action that Legislative Counsel should readily proffer when dealing with proposals that run up against the requirements of the Fundamental Rights. But, of course, you must respect unambiguous instructions to prepare legislation of this kind.

Some Constitutions, however, prohibit legislation that derogates from the Bill of Rights guarantees; the Bill contains the complete statement of the scope of the protected rights and freedoms and the permitted qualifications. In a case of this kind, if you receive instructions for legislation that is inconsistent with the Bill and goes beyond the permitted limits, you must draw the attention of the client Ministry to the Constitutional prohibition.

3.3.5 How Drafters Should Approach Issues In The Bill Of Rights

In principle, every legislative proposal should be examined to determine whether it may give rise to an issue to which the Bill of Rights applies. Such issues may arise in several ways:

(i) substantive rules giving effect to the policy may deal with matters covered by one or more of the protected rights and freedoms;

(ii) the procedures that are necessary to implement or enforce the substantive rules may attract the provisions of the Bill of Rights that relate to due process, fair hearing and other minimum rights;

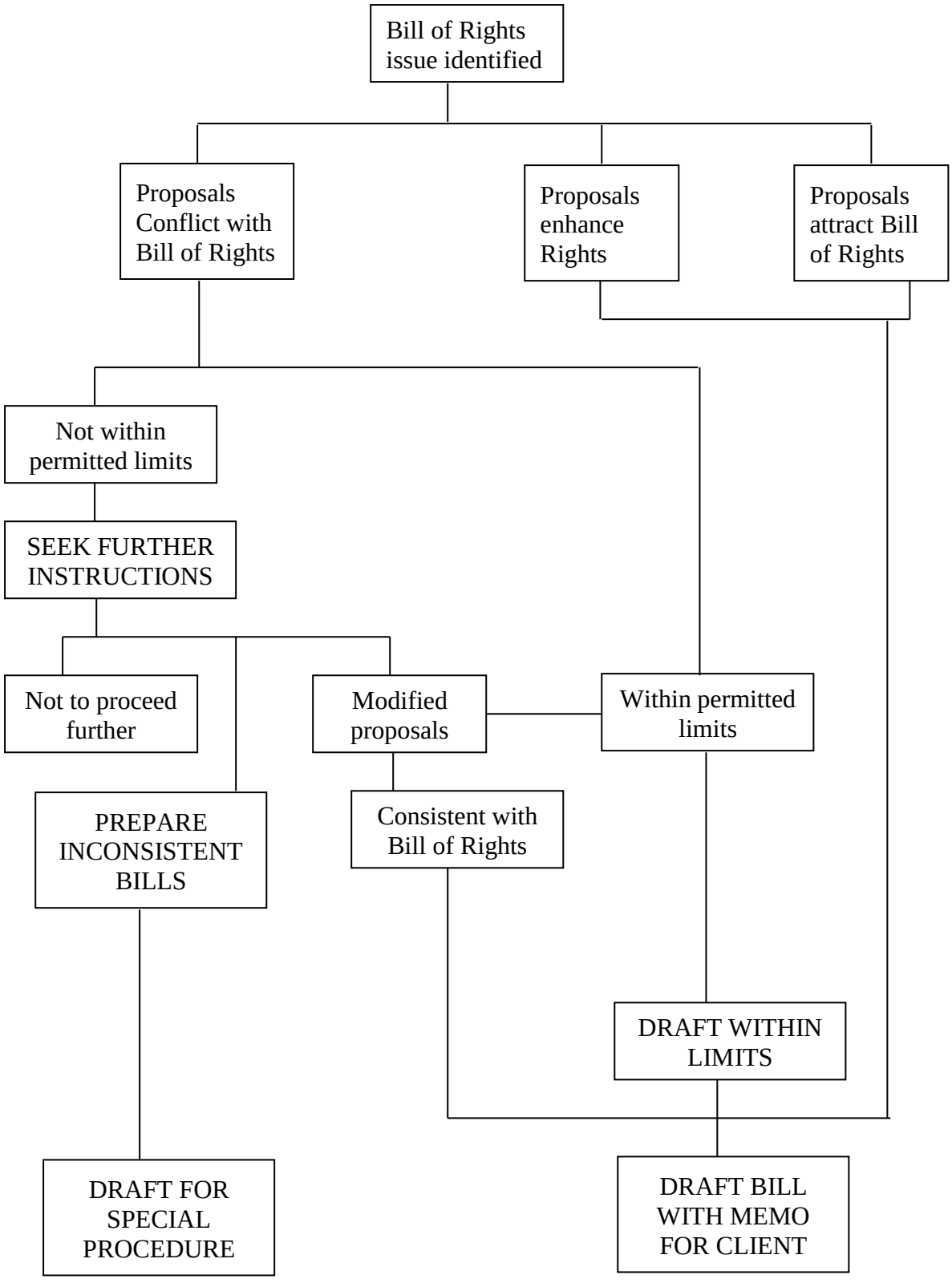
(iii) the legislation may authorise actions that, if implemented in particular ways, may conflict with one or more of the protected rights or freedoms.

Your instructions may well not tell you how you are to deal with some or any of these issues. Indeed, the need to comply with the Bill of Rights may not have been recognised. It is your task, when working out what must be dealt with by legal rules, to determine:

(i) the matters that may give rise to inconsistency with any requirement of the Bill of Rights;

(ii) the matters that will attract the application of requirements in the Bill of Rights.

The following flow chart and paragraphs explain how you might proceed.



(a) If the proposals are consistent with the Bill of Rights

You may not need to include provisions expressly concerned with the Bill of Rights if:

(i) the proposals do not restrict the exercise or enjoyment of the protected rights and freedoms (i.e. they enhance and support them); or

(ii) the minimum rights are either not applicable or are to apply without qualification or are to be improved upon in the legislation.

It may be enough to draw the attention of the instructing Ministry to the fact that the legislation, though concerned with issues within the scope of the Bill of Rights (which should be identified), is fully consistent with its guarantees. Should the question then arise in the Legislature, the Ministry is on notice that the issues have been considered and the Legislative Counsel is satisfied that a legal challenge for noncompliance is unlikely to succeed.

In some countries, the Attorney-General is required to certify, for every Bill, that it has been "proofed" for compatibility with the Bill of Rights and that no incompatibility has been found.

Self-Assessment Exercise 3

Note down whether in Nigeria there is a system for formally certifying to the Legislature that Bills have been checked for compatibility with the Bill of Rights.

(b) If the proposals appear to be inconsistent with the Bill of Rights

If the proposals are inconsistent with the protected rights or freedoms in some way, consider whether, in their present form, they can be expressed in a way that brings them within a permitted qualification. If they cannot:

(i) draw the matter to the attention of the instructing Ministry in a memorandum and seek further instructions;

(ii) consider suggesting ways in which, in your professional judgment, the incompatible features of the proposal might be modified to bring them within the protected rights or at least within a permitted qualification.

It is then for the Government to decide whether to proceed with the proposal at all, or whether it should be modified to bring it within a permitted qualification or whether the matter is sufficiently important for it to be enacted by a special procedure in its inconsistent form. These decisions have political implications

and are taken by Government and not by Legislative Counsel. Your subsequent actions will be dictated by your further instructions.

If the proposal can be brought within a permitted qualification, draft the Bill in a form that satisfies these constitutional requirements. Draw your client's attention specifically to the provisions that have been prepared for this purpose, and to your reasons for taking the particular approach. Again, these considerations may be relevant when the Bill is under consideration in Cabinet and in the Legislature.

3.3.6 How Should We Draft Legislation to Fulfill a Permitted Qualification?

This can make considerable demands on the drafter. Your function is to produce a draft that fully achieves what the policy instructions require, at the same time ensuring that the exception is shown by the draft itself not to exceed the limits imposed by the Bill of Rights on the particular qualification. Some Constitutions give explicit guidance, though in this respect they may state no more than is sound practice.

Example 7

The Constitution of Namibia contains the following Article: **22.** Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation: (a) shall be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual; (b) shall specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.

Example 7 shows clearly what your objectives should be:

i. to ensure that the restrictions on the exercise or enjoyment of a right or freedom:

ii. fall within the correct permitted qualification;

iii. are no wider than is necessary to allow the competing interest to be achieved;

iv. do not prevent the exercise of the right or freedom altogether;

v. show on the face of the legislation that its provisions unambiguously satisfy the relevant requirements of the Bill of Rights.

Your draft is likely to meets these objectives if:

i. it applies to a general class of persons and circumstances, and is not confined to a particular individual or case;

ii. it does not depend upon unusual or extravagant ways to restrict the right or freedom;

iii. it specifies the nature, and the extent, of the restriction in precise terms;

iv. it states the restriction in such a way that its purposes are either express or implicit from the context;

v. it identifies precisely the head of justification (e.g. the particular type of public interest) contained in the Bill of Rights which is relied upon, including the reference to the relevant section;

vi. the restriction can be seen, from the language used, to be no more than is necessary to achieve its purposes and to fulfill the stated head;

vii. it does not enable the Executive to determine the scope of the restriction, and therefore the scope of the protected right (e.g. by giving wide discretions to determine the classes of case to which the restriction is to apply);

viii. it avoids over-broad or vague terms which cause unintended and inappropriate cases to be covered by the restriction or uncertainty as its extent.

In conclusion, drafting under a Bill of Rights is of paramount importance to the drafter. Any law that infringes on any of the fundamental rights enshrined in Chapter IV of the Constitution will be declared null and void by the courts.

3.4 Summary

In this Unit, you have been considering the constraints imposed by the Bill of Rights in the Constitution. A main purpose of the Unit is to raise your awareness of both dimensions and the circumstances in which attention may have to be paid to their requirements. Your task as a trainee drafter is to be able

to detect issues that may present legal problems and to suggest ways of overcoming them. The final decisions are likely to be taken by more senior colleagues on the particular instructions of the client Ministry.

Remember that even minor legislation can touch upon individual rights and freedoms. Your task is to make sure that the matter is not overlooked and that steps are taken to check that Bills with which you are concerned do not conflict with the Bill of Rights and treaty obligations.

3.5 References/Further Readings/Web Resources

1999 Constitution of the Federal Republic of Nigeria.

3.6 Possible answers to Self-Assessment Exercises

UNIT 4 INTERNATIONAL STANDARDS

Contents

4.1 Introduction

Interpretation of the Bill of Rights is increasingly influenced by the standards that are set and are constantly being developed at the international level. For many countries, State action can be formally challenged for non-compliance with human rights commitments made under multilateral treaties.

Today, those preparing domestic legislation touching on human rights need to be aware that the practice of other courts and bodies may indicate how their legislation is likely to be judged in a legal challenge. So Legislative Counsel have a significant responsibility for ensuring that their drafts do not fall foul of either international or domestic human rights standards that are legally binding on the State.

In this Unit, as the last, Self-Assessment Exercises are provided to enable you to remind yourself as to the position in Nigeria. The material on international standards may be new. It is designed principally to heighten your awareness of this dimension and the approach that you may need to develop.

4.2 Learning Outcomes

By the end of this unit, you will be able when drafting legislation, to:

(i) Highlight legislative proposals or provisions that may be inconsistent with treaty obligations on human rights standards which Nigeria has assumed towards individuals; and

(ii) Identify ways in which such inconsistencies can be prevented.

4.3 Issues Concerning International Standards

Self-Assessment Exercise 1

1. Name any four body of customary international law that contain some protective rights.

2. Show how they make States observe human rights norms?

4.3.1 Where to Find the International Standards On Human Rights

Nigeria is subject to a body of customary international law that contains a number of protective rights, e.g. against slavery, genocide, torture, arbitrary detention and discriminatory treatment. Typically, this body of law is treated as part of our domestic law. In addition, we are party to a wide-ranging series of multinational and regional treaties that set general international standards on the rights and freedoms of individuals. These include:

(i) The Universal Declaration of Human Rights (1948);

(ii) The International Covenant on Civil and Political Rights (1966);

(iii) The International Covenant on Economic, Social and Cultural Rights;

(iv) Convention on the Rights of the Child;

(v) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;

(vi) International Convention on Elimination of All Forms of Racial Discrimination;

(vii) International Convention on the Suppression and Punishment of the Crime of Apartheid;

(viii) Convention on the Elimination of All Forms of Discrimination against Women;

(ix) Convention on the Political Rights of Women;

(x) The African Charter on Human and Peoples' Rights (1981).

There is much common ground between these treaties, which is reflected in the Fundamental Rights. The standards have been developed in a series of other multinational treaties on specific human rights. Because these create international obligations upon party States to give effect domestically to the rights they contain, most countries have enacted specific legislation as necessary for that purpose.

The treaties are themselves supplemented by:

(i) authoritative commentaries on the treaties provided by the international bodies set up to monitor their implementation (sometimes referred to as "soft law");

(ii) the case law of the international courts established by some of the regional treaties to adjudicate on allegations of infringements made in the main by individuals (the most active being the European Court of Human Rights).

4.3.2 How International Standards Affect Domestic Law

The international standards influence domestic law in three ways:

(i) Interpretation of Constitutional Requirements

Constitutional Bills of Rights are modeled on one or more of the principal treaties. As a result, their interpretation is increasingly influenced by the way the treaty standards are applied by the international bodies that deal with violations (e.g. the European Court of Human Rights; the UN Human Rights Committee) and by other domestic courts when applying their Bills of Rights.

(ii) Incorporation of Standards into Domestic Law

States are under a duty to comply with and give effect to customary and treaty standards through their domestic law. Some treaties give individuals a right to bring infringements of protected rights before an international tribunal or court if the domestic law fails to provide adequate redress.

(iii) Incorporation of international instruments into domestic law

A number of states give direct domestic effect to the treaties to which they are party, either by legislation or because under their Constitution the treaties are self-executing. As a result, the treaties themselves become a direct source of domestic rights, supplementing those contained in the Bill of Rights.

Self-Assessment Exercise 2

Take a moment to look at the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap.10 Laws of the Federation of Nigeria 1990. This is an example of a treaty that guarantees certain rights that are given domestic effect by the Act. The treaty supplements the Bill of Rights in the Constitution.

4.3.3 What Are the Implications for Law-Making?

The development of international obligations on the human rights of individuals has materially altered the impact of international law. It can no longer be seen as creating interlocking duties between States only. It has become a source of rights for individuals against the State. A State's failure to give effect to those not only contravenes its international obligations to other States, but can be a breach of legal responsibilities, which it has deliberately undertaken to discharge, to individuals in its community.

In making legislation, States are under international obligations, owed both to other States and to their own people, to ensure that it acts consistently with the internationally protected human rights. Accordingly, legislative proposals must be measured, not only against the requirements of the Bill of Rights, but also against the guarantees that the State has agreed to in international treaties. On occasions, tensions may arise between the protection afforded under the treaty and that under the Constitution, especially if the treaty is incorporated as domestic law:

(i) the interpretation of rights under treaties by international bodies may be more liberal and generous than is given by the local courts to the equivalent rights under the Constitution;

(ii) States may be able, by following special procedures, to derogate from their Constitutional obligations, when derogation from the treaty rights may not be possible under the terms of the treaty.

No State that has respect for democratic principles and the rule of law readily disregards its international obligations. So, it is just as important for this factor to be taken into account in the preparation of legislation as compliance with the Bill of Rights. But few Ministries have the expertise for this task. The Ministry most involved with these international instruments is likely to be the Ministry of Foreign Affairs; but that Ministry is rarely involved with the preparation of legislation. For that reason, the task is likely to fall upon Legislative Counsel, sometimes with the support of specialist legal officers in the Ministry of Justice/Attorney-General's Chambers.

4.3.4 What Are the Implications for The Drafter?

Your principal responsibility, of course, is to give full consideration to the constraints imposed by the Bill of Rights (since this is supreme law). But be prepared also to consider whether legislative proposals measure up to the international standards binding on your State. As we have seen, this means paying attention to:

(i) whether relevant provisions of the Fundamental Rights may have to be construed in the light of interpretations placed upon equivalent provisions by bodies applying international standards;

(ii) whether it is necessary to modify your draft, or to include additional provisions, in order to meet requirements of relevant treaties and to avoid international criticism and challenges;

(iii) if a treaty has been incorporated as domestic law, whether your draft falls short of its requirements (as likely to be *internationally* interpreted) or contradicts the implementing legislation and whether that draft may need changes to prevent domestic challenges on these grounds.

To carry out this task requires keeping in touch, as far as you can, with practice and trends in international human rights law, particularly under the treaties to which Nigeria is a party.

4.3.5 How Drafters Can Keep in Touch with International Developments

The literature on this subject is extensive; the case law of international bodies and of national courts is growing quickly. Few countries are able to acquire large holdings. The following are sources that can be made accessible, relatively inexpensively.

International Materials

Butterworths Human Rights Cases (selected judgments of international tribunals)

International Human Rights Reports (selected decisions and opinions of UN treaty bodies)

A useful digest of international case law, and background materials, prepared for practitioners is: *INTERIGHTS Bulletin* (3 times a year).

African Charter on Human and Peoples' Rights *Documentation* (decisions and reports) (periodic)

European Convention on Human Rights
European Human Rights Reports (up to 4 times a year)

Inter-American system
Annual Reports (summaries of decisions of the Court and Commission)

United Nations system
Annual Reports (decisions of UN Human Rights Committee).

International instruments can be accessed at www.un.org/law/.

Commonwealth Materials

A data base of Commonwealth decisions on Fundamental Rights and Freedoms prepared for the Commonwealth Secretariat is accessible at the INTERIGHTS website: www.interights.org.

A digest of the decisions (issued twice a year) is published by INTERIGHTS.

The following contain relevant case law (in the latter cases, in a digest form):
Law Reports of the Commonwealth: Constitutional and

Administrative Law - (annual)
Commonwealth Human Rights Law Digest (periodic)
Commonwealth Law Bulletin (3 times a year).

4.3.6 What International Human Rights Treaties Apply?

Nigeria is a party to multilateral treaties negotiated under the UN and to a regional treaty administered by a regional institution (ECOWAS). Some of these allow individuals a personal right to petition against the treatment they have received in their home State. That right is usually conferred under an optional treaty provision. Access to a court, provided for in some treaties, may be similarly optional. Many parties to these treaties have not ratified the relevant protocols. (See **3.0** above).

In conclusion, drafting under a bill of rights can no longer be approached solely from the standpoint of the Constitution. Interpretation of the Bill of Rights is becoming increasingly influenced by the standards that are set and continues to be developed at the international level.

4.4 Summary

In this Unit, you have been considering the constraints imposed by obligations that Nigeria may have assumed under international human rights treaties. So at the end of this Unit, consider whether you have fulfilled the objectives of your study.

The topic is likely to be relevant in relation to legislation that makes major changes to social or economic legislation or involves extension of State power. For that reason, you may not often meet these questions in the early stages of your drafting career, as more senior colleagues are likely to be charged with drafting that legislation.

You should now be aware of the potential importance of this topic in producing legislation that is not to give rise to legal challenge on these grounds, and that this dimension must be in the forefront of your mind when analysing legislative proposals and deciding on the legislative approach

4.5 References/Further Readings/Web Resources

1999 Constitution of the Federal Republic of Nigeria.

African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap.10 Laws of the Federation of Nigeria.

4.6 Possible Answers to Self-Assessment Exercise(s)

1. These include:

    a. The Universal Declaration of Human Rights (1948)

    b. The International Covenant on Civil and Political Rights (1966)

    c. The International Covenant on Economic, Social and

        Cultural Rights

    d. Convention on the Rights of the Child, etc.

2. These laws create international obligations upon party States to give effect domestically to the rights they contain, most countries have enacted specific legislation as necessary for that purpose.