

GENDER NEUTRAL LEGISLATIVE DRAFTING IN NIGERIA

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ABSTRACT

Legislative drafting has over the years emerged from being regarded simply as an aspect of Legal Drafting and Conveyancy to being recognised as a discipline of law with its own distinct rules and principles. With the growth of legislative drafting there has been a move away from the traditional style of drafting to the plain language style of drafting. One of the principles of legislative drafting that has emerged in the plain language movement is that of gender-neutral drafting which advocates the use of gender neutral terms in drafting. This paper examines the nature of legislative drafting, the various styles of Legislative drafting, the concept of gender neutral drafting and the various approaches that may be adopted to achieve gender neutrality in drafting legislation. It further examines some laws in Nigeria with a view towards determining how legislative drafters in Nigeria have responded to the principle of gender neutral drafting. The study reveals that there are limits and shortcomings to the application of this principle. Nonetheless, gender neutrality in legislative drafting is the internationally accepted style of drafting and should be adopted in line with international best practices.

KEYWORDS: Legislative Drafting has over the Years Emerged

INTRODUCTION

Legislative drafting is, simply put, the drafting of laws. It deals with the translation of policies into laws¹ and is an aspect of law that is still in its developmental stages in Nigeria. The role of the drafter in relation to the growth of the law is yet to be fully appreciated. Recent studies reveal that 'there is a paucity and dearth of legal studies on legislative drafting in Nigeria'.² This scarcity of professionally trained legislative drafters in developing nations such as Nigeria,³ has given rise to poorly drafted laws which consequently give rise to litigation that would otherwise have been avoided.⁴ There is, therefore, need for in depth research in the field of legislative drafting with the view of coming up with more effective laws.⁵

The role of the legislative drafter in a nation is critical. The legislative drafter drafts for a wide range of audience; from the highly educated to the barely literate. Drafters draft laws that are used by legislators, policymakers, lawyers and the judiciary. The drafter's audience is classified into three broad groups to wit; the lawmakers, the persons who are

¹ B.R, *Legislative Drafting (Principles and Techniques)* 3rdedn (New Delhi; Universal Law Publishing Co. Pvt Ltd., 2011)xiii; G C Thornton, *Legislative Drafting* 4thedn (London; Butterworths, 1996).

²T.C. Jaja, *Legislative Drafting-An Introduction to Theories and Principles* (The Netherlands; Wolf Legal Publishers, 2012)66.

³T.C Jaja, *ibid*, 169.

⁴*Ibid*, 1.

⁵ See generally, T.C Jaja, *ibid*, 101.

concerned with or affected by the law and the members of the judiciary.⁶ Unlike other writers, a drafter of laws is very much restricted in his work for he cannot wax eloquent in the laws he drafts. There is to be no unnecessary word in a statute. He cannot use emotive words in drafting. A drafter is simply to translate the policies of the policymakers or lawmakers, as the case may be, into law in a clear and precise manner. The legislative drafter does not express his personal wishes in the laws that he drafts because in the construction of statutes, it is the intention of the legislature that the courts aim to decipher. It has been rightly said that,

An Act has a precise and narrow object, which is to change the law. No more and no less. It is not designed to offer the things that other forms of writing offer (such as entertainment, information, explanation, argument or stimulation). So an Act cannot employ all the usual techniques of composition. For instance, it cannot say the same thing twice merely to emphasise it. If it did, the reader would wonder whether something stated only once was to have equal effect. Nor can an Act say something twice but in different words. If it did, the reader would wonder whether it was trying to get across one message or two different ones.

The consequence of all this is that the language of Acts is tight and spare, and every word will be assumed to have a purpose. So Acts can be approached only with an effort.⁷

It is, thus, apparent that words are the raw materials with which the drafter works. The drafter uses words to as much as possible ensure that the intentions of policy makers are translated into law with clarity and precision. According to Thornton, 'The regulation of society is the field in which the legislative drafter toils; the task is to frame the communication of policy decisions having legal consequences to members of society.'⁸ Victor Thuronyi⁹ identifies the criteria for a well drafted law as integration, understandability, effectiveness and organization. Therefore, in spite of the ambiguity inherent in language, the legislative drafter must aim for precision and clarity; for every ambiguity in a law is bound to be exploited by the users of the law to defeat the purpose for which the law was enacted. Hence, the chief goal of a draftsman should be the production of effective laws.¹⁰ Indeed, David Elliot opines that,

Unnecessarily complex language, redundant words, and language which fails to communicate, impose an enormous financial burden on all levels of society. Even minor improvements to the language of the law can bring substantial savings of time; time which can then be put to more productive use.¹¹

The above statement is unarguably true and drives at the importance of the legislative drafter to the legal community and the society at large. It is as a result of the above truism that this paper argues that legislative drafters in Nigeria need to draft laws that reflect international best practices.

⁶Thornton, *ibid*, 47.

⁷Geoffrey Bowman drawing from a discussion on the nature of legislation by Sir Christopher Jenkins (then First Parliamentary Counsel) in G. Bowman 'The Art of Legislative Drafting' Sir William Dale Memorial Lecture, 2005, p8; Also published in *Amicus Curiae*. (the journal of the Society for Advanced Legal Studies) and in the *European Journal of Law Reform* in 2006.

⁸Thornton, *ibid*, 1.

⁹V. Thuronyi, 'Drafting Tax Legislation', *Tax Law Design and Drafting* (Volume 1; International Monetary Fund: 1996; Victor Thuronyi, ed) 2.

¹⁰ See generally, T.C Jaja, *ibid*, Chapter 1.

¹¹ D.C Elliot, 'Legal Drafting: Language and the Law' (Canadian Institute for the Administration of Justice, Nov 1999, Ottawa) 3.

NATURE OF LEGISLATIVE DRAFTING

There is a quiet debate on whether legislative drafting is an art or a science. The principles of legislative drafting cannot be effectively discussed without delving into the arena of this debate. There are 3 major schools of thought on this issue. The first school of thought is firmly of the view that legislative drafting is an art rather than a precise science. Proponents of this view argue that if five different drafters were set on the same bill each drafter would likely come up with a different draft and none of the drafts would rightly be taken to be wrongly drafted. They further assert that the process of legislative drafting is not a mechanical process as individual drafters exhibit different levels of creativity in drafting.¹² Even where different drafters adhere to the same set of principles in drafting a particular bill, they would in all probability come up with dissimilar drafts of the bill. In line with this, B.R. Atre is unequivocal in his view that legislative drafting is an art. Significantly, the first sentence in Chapter 1 of B.R. Atre's book on Legislative drafting is, 'Good legislative drafting is an art rather than a science and the constraint imposed by the drafting environment many a times present situation that require deviation from accepted drafting conventions.'¹³

To take an informed position in this debate, it would be pertinent to know what qualifies a discipline to be referred to as either a science or an art. An art is 'an ability or a skill that you can develop with training and practice.'¹⁴ It involves 'the use of the imagination to express ideas or feelings.'¹⁵ An art involves a display of creativity hence, legislative drafting is seen in some quarters as a 'skill acquired by the drafter through years of experience obtained through painstaking labour and work.'¹⁶

The second school of thought argues that legislative drafting 'cannot legitimately be called either an art or a science.'¹⁷ Although it may be conceded that drafting involves some creativity, however, the nature of the creativity exhibited by a drafts person is hinged on the intellect as against artistic creativity which is hinged on emotions.¹⁸ This therefore is not a strong basis for referring to legislative drafting as an art. Against terming legislative drafting a science, it has been contended that the term 'craft' more appropriately describes the second stage of the legislative drafting process.¹⁹ In essence, it is argued that neither art nor science is adequate 'to describe such a complex process' as legislative drafting.²⁰

Proponents of the third school of thought, differing from the above positions, opine that drafting is both an art and a science.²¹ They view drafting and law as 'praxis... liberal disciplines with loose but prevalent rules and conventions whose application comes through knowledge and experience.'²² This seems to be the view that best captures what legislative drafting really is. For legislative drafting cannot indeed be fruitfully embarked on without a study of basic

¹² G. Bowman, 'The Art of Drafting', *Amicus Curiae*, Issue 64, March April, 2006, 2.

¹³ B.R. Atre, *Legislative Drafting*, 3rded (2011, Universal Law Publishers & Co, New Delhi, India) xiii, 1.

¹⁴ *Oxford Advanced Learners' Dictionary*, 7thed, 69.

¹⁵ *Ibid.*

¹⁶ B.R. Atre, *ibid.*

¹⁷ I. McLeod, *Principles of Legislative and Regulatory Drafting* (Hart Publishing, Oxford and Portland Oregon, 2009) 61.

¹⁸ *Ibid.*

¹⁹ I. McLeod explains that legislative drafting is a two staged process involving conceptualising a proposal and drafting an appropriate instrument.

²⁰ *Ibid.*, 62.

²¹ H. Xanthaki, 'Ducan Berry: A Visionary of Training in Legislative Drafting', *LOOPHOLE Journal of Commonwealth Association of Legislative Counsel*, February 2011, 18-26 in T.C. Jaja, *Legislative Drafting-An Introduction to Theories and Principles* (2012, Wolf Legal Publishers, The Netherlands)27.

²² *Ibid.*

principles of law²³ in general and legislative drafting in particular. To come up with a good draft a legislative drafts person would have to adhere strictly to some basic principles of law and legislative drafting. Nevertheless, a drafts person develops or hones certain legislative drafting skills with practice.

Legislations are not drafted according to the whims and caprices of the legislative drafter. From jurisdiction to jurisdiction, there are certain rules and principles that govern the drafting of legislation, although there are divergent views as to whether legislative drafting rules should be couched in the form of regulations or legislation. Where they are couched in the form of regulations, it presupposes that the drafting rules are simply to serve as guidelines to the drafter; they are not of 'a legally binding nature'²⁴. The couching of drafting rules in the form of regulations flows from the view of legislative drafting as an art²⁵ rather than a science and as a result of which the drafter is not to be constrained by binding rules in the practice of his art. On the other hand, where drafting rules are couched in the form of legislation it goes without saying that the drafter must adhere to the provisions of the legislation containing the drafting rules.

In certain jurisdictions,²⁶ there are Legislative Drafting manuals that set out a regulatory framework for the drafting of legislation. In a few other jurisdictions,²⁷ there are primary legislations that set out rules for legislative drafting thus establishing a legal framework for the drafting of legislation. Drafting practice in Nigeria is loosely governed by some provisions of the Interpretation Act²⁸ and the Acts Authentication Act of 1962²⁹. The relevant provisions set out, among other things, rules governing the construction of words used in an enactment. As a result of this it has been asserted that 'the Nigerian Drafting Practice is unwittingly modelled after the Moldovian Model Drafting practice which applies a legal framework in the form of primary legislation in setting out the rules of drafting legislation...'³⁰

DRAFTING TECHNIQUES OR STYLES

The phrase 'drafting technique' is sometimes used interchangeably with another phrase 'drafting principles'. According to I McLeod, 'These techniques (drafting techniques) may legitimately be called *general principles of drafting*'.³¹ The drafting techniques are at other times also referred to as drafting styles. Apparently, the exact meanings of these phrases are yet to be established in the field of legislative drafting.

It is clear that writers in the field of legislative drafting are not agreed as to the correct term to be used in this regard. There is therefore, the need to examine the dictionary meaning of the terms 'Principle' and 'Technique'. A principle is 'a law, a rule or a theory that something is based on'.³² A technique on the other hand, is 'a particular way of doing something, especially one in which you have to learn special skills; The skill with which somebody is able to do something practical.' These definitions illuminate the issues underlying the inter use of the words 'principle' and

²³Such as the constitutional law principle of covering the field and doctrine of consistency.

²⁴T.C Jaja, *ibid.* 31.

²⁵*Ibid.*

²⁶Such as the United Kingdom, T.C Jaja, *ibid.* See also the *Legislative Drafting Manual*, (Maryland: Department of Legislative Services, Office of Policy Analysis, 2012) Available at dls.state.md.us/data/legandana/...bildra/.../BillDraftingManual2011.pdf. See also *Legislative Drafting: A Commission Manual*, Available at ec.europa.eu/smart-regulation/better.../legis_draft_comm_en.pdf. Accessed 5th April, 2015.

²⁷ Such as Moldova and Estonia. See T.C Jaja, *ibid.*, 3, 56.

²⁸ CAP I23 LFN, 2004.

²⁹T.C Jaja, *ibid.*, 3.

³⁰*Ibid.*

³¹McLeod, *ibid.*, 61.

³²*Oxford Advanced Learner's Dictionary*, 7thed, 1153.

'technique' as they relate to legislative drafting. The question of what constitutes a technique of legislative drafting as against a principle of legislative drafting is closely linked with the question of whether legislative drafting is an art or a science. If legislative drafting were only an art, the drafter would simply be required to acquire drafting skills by learning the techniques of legislative drafting. On the other hand, if legislative drafting were a science, there would be little mention of skills as the focus of the drafter would be on learning the principles of drafting. Standard texts on legislative drafting reveal discussions on principles and techniques of drafting although no distinguishing line is drawn between the techniques and the principles. Thus, it is difficult for a reader of these texts to separate the drafting techniques from the drafting principles. The discussions on both legislative drafting techniques and principles found in these texts support the view that legislative drafting is both an art and a science.

For the purpose of this study, the phrase 'drafting style' will be adopted. There are three major drafting styles. They are traditional drafting, plain language drafting (also called 'Plain English') and drafting in general principles (also called the 'European style')³³. All three styles of legislative drafting may sometimes be found in one statute.

Traditional Drafting

This style of drafting is characterized by long and complex provisions ridden with archaic legal expressions. This style is also characterized by the use of latin expressions and numerous cross references in sections.

Legislative drafters are almost always lawyers. The language used by lawyers in drafting laws is influenced by legal texts and court judgments. Indeed,

Most drafting offices in the English speaking world inherited the traditional style of legislative language used in the United Kingdom in the 19th century. Not only were drafters trained in this style, but they were influenced by the language of existing statutes. Drafters learn their art from studying and amending existing laws and in this way the language of the 19th century continued its influence into the 20th century.³⁴

In a bid to avoid ambiguity in statutes traditional drafters are wont to resort to tautology; they use couplets such as "null and void", "alter and change", "each and every". These couplets and their likes which hitherto were fashionably used in drafting laws are now discouraged and have in fact been declared redundant. Furthermore, traditional drafters are verbose using complex phrases such as 'adjudged, ordered and decreed' where 'adjudged would simply have served the purpose; 'in the event that' where 'if' would have sufficed. Traditional drafters are wont to draft with 'extreme caution in the attempt to leave no room for misunderstanding or deliberate distortion of the meaning. They tried to avoid all possible ambiguity. This was often carried to extreme lengths.'

In spite of the above flaws, traditional drafting is hailed for its precision in expressing the exact wishes of the policy makers. Thus, traditional drafting is precise at the expense of clarity, for precision does appear to be paramount in the in the minds of the traditional drafters.

³³ I. Turnbull QC, 'Plain Language and Drafting in General Principles, 3. Available at www.opc.gov.au/calc/docs/Loophole_papers/Turnbull_Jul1995.doc. Accessed 5th April, 2015.

³⁴ *Ibid.*

Plain Language Drafting

Plain Language drafting, also referred to as Plain English drafting is characterized by short and simple sentences. Precision and clarity go hand in hand in this style of drafting. King Edward VI of Great Britain has been said to be the pioneer of the plain language movement in the field of Law in view of the fact that he advocated for the use of plain and short sentences in legislations. Plain language drafting has its followers not only among drafters but also among Judges; for there are judges who, against the general practice of writing judgments in the manner of traditional drafters, endeavor to write their judgments in plain English. In the United Kingdom, Justice Oliver Wendell Holmes and Lord Denning are known to favour plain language in writing their judgments.³⁵ In Nigeria, Hon Justice Niki Tobi is known for his adoption of plain language in judgment writing.

The rules for plain language drafting were laid down as far back as 1931.³⁶ These are;

Prefer the familiar word to the far fetched; Prefer the concrete word to the abstract; Prefer the single word to the circumlocution; Prefer the short word to the long and Prefer the saxon word to the romance.

The general principles of legislative drafting are rooted in plain language. Legislative drafting models in different countries such as the United States of America, Canada, Great Britain and Australia lay down rules along the lines of the plain language style of drafting. In pursuit of plain language some jurisdictions such as New South Wales have a 5 line rule; a provision should not exceed 5 lines. Other jurisdictions such as Australia make use of aids to understanding such as,

- Graphics;
- readers' guides;
- illustrations;
- purpose clauses at the beginning of Acts, Parts, Divisions and Sub Divisions;
- expressing calculations by directing the reader to take a series of steps as against just stating the formula;
- Explanatory notes in the text;
- Making algebraic formulas user friendly by using words instead of the traditional a,b,c symbols.

A sub style of plain language drafting is the loose plain language drafting which in plain terms is taking plain language too far. In this sub style of drafting, the drafter inadvertently leaves out details in a bid to draft plainly.³⁷ This arises from 'emphasizing simplicity at the expense of precision. In attempting to keep the text as simple as possible drafters take a more liberal view as to the words than can be dispensed with, so the remaining words become unclear. It is not precise so it is not true plain language drafting.'³⁸

³⁵ I. Turnbull QC, *Ibid*, 4.

³⁶ *Ibid*, 6.

³⁷ This is unlike Principles Based Drafting where details are deliberately left out of the provision.

³⁸ *Ibid*,

Drafting in General Principles

This style of drafting, also known as principles-based drafting,³⁹ is characterized by ‘extreme brevity and simplicity.’⁴⁰ Statutes where all the provisions are drafted in this style are referred to as Principle Based Legislation. Thornton refers to them as ‘Short Simple Acts’⁴¹. They are also referred to as ‘fuzzy laws’. It has been contended that drafting in general principles is the European style of drafting.⁴² In other words it is argued that drafting in general principles emanated from European countries just as the traditional style of drafting has its origin in the United Kingdom.

Generally, in this style of drafting, the drafter deliberately states the law in general principles and leaves the details to be filled in by subordinate legislation, the courts or any other means.⁴³ Drafting in general principles results in simple laws that would otherwise have been burdened with details. This style has, however, been criticized for encouraging litigation and consequently, burdening the judiciary with the role of law making.⁴⁴

There are 2 major approaches to drafting principle based legislation; the coherent principles approach, expounded by Greg Pinder⁴⁵ and John Avery’s approach involving higher level principles external to the statute. In the coherent principles approach, the principle is part of the statute and is regarded as ‘an operative high level legislative provision’⁴⁶. Elucidating this legislative provision Judith Freedman says, ‘It is a statement about the essence of all intended outcomes in a general field and not just a less-specific rule. It must therefore be comprehensive.’⁴⁷ In the coherent principles approach the operative high level legislative provision comes first and is then followed by the rules which contain exceptions or sub-exceptions.⁴⁸ The structure this approach creates is sometimes referred as a pyramid or cascade structure.⁴⁹ The rules are to be interpreted in line with the principles. A major criticism of this approach is that it places on the taxpayer a burden of showing that a particular case is specifically excluded from the statute.⁵⁰

John Avery⁵¹ rejects the general approach to drafting principles-based legislation on the ground that it would lead to a rapid increase in the number of subordinate legislation. He rather suggests another approach to drafting in general principles in which certain general and higher level principles found outside the legislation are to guide the drafting of rules which are in the body of the legislation.⁵² The provisions of the legislation are to be interpreted to be in line with the general and higher level principles. According to John Avery, this style of drafting would reduce the amount of detail in

³⁹ J. Freedman, ‘Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited’ in *Tax Review*, Issue 6, (London: Sweet & Maxwell, 2010) 717.

⁴⁰ I. Turnbull, QC, *Ibid*, 3.

⁴¹ Thornton, *Ibid*, 50.

⁴² I. Turnbull, *ibid*, 9.

⁴³ I. Turnbull, *ibid*, 8.

⁴⁴ Thornton, *Ibid*, 50; I. Turnbull QC, *Ibid*, 11, 12.

⁴⁵ G. Pinder, ‘The Coherent Principles Approach to Tax Law Design’ [2005] *Treasury Economic Roundup* (Autumn) 75 in J. Freedman, *ibid*, 725.

⁴⁶ G. Pinder, *Ibid*; Krever, ‘Plain English Drafting, Principles Based Drafting: Does Any of it Matter?’ in J. Freedman (ed.) *Beyond Boundaries: Developing Approaches to Tax Avoidance and Tax Risk Management* (Hereafter *Beyond Boundaries*) (Oxford: Oxford University Center for Business Taxation, 2008) in J. Freedman, *ibid*.

⁴⁷ *Ibid*.

⁴⁸ Krever, *ibid* in J. Freedman, *ibid*.

⁴⁹ *Ibid*.

⁵⁰ J. Freedman, *ibid*.

⁵¹ J.F Avery Jones, ‘Tax Law: Rules or Principles?’ [1996] BTR 580.

⁵² J. Freedman, *ibid*, 720.

the legislation. Unlike the coherent principles approach, the principles in John Avery's approach are external to the statute. Judith Freedman explains this style of drafting thus,

...the type of principle being described by John Avery Jones is something that is external to the rules and that helps one to construe the rules. A principle, under his definition, is intended to be something higher level than just a vague or broad rule. These principles can have exceptions and conflict with one another whilst rules cannot do this—one rule must always take priority over another but principles can have different weights depending on the circumstances. These principles do not conflict with rules but assist in deciding what the rules mean in the first place.⁵³

Some examples of these higher level and more general European Union principles referred to by John Avery are equality, proportionality, legal certainty and protection of legitimate expectations, fundamental rights and effectiveness.⁵⁴ The form of drafting in general principles proposed by John Avery has been criticized on the ground that if rules are to be read subject to principles, 'this transfers power to the courts and administrators and creates a degree of uncertainty.'⁵⁵ It has been further argued that the success of this form of drafting would depend on the 'ability and willingness of the administrative authority and the judiciary to apply the principles faithfully.'⁵⁶

The approach to drafting in general principles proposed by John Avery, while it may successfully do away with the need for subordinate legislation, is however, guilty of burdening the judiciary with a high degree of lawmaking powers. Furthermore, the argument that the judiciary and administrative authorities may not be faithful in interpreting the rules in the legislation subject to the higher level and general principles stands true. There is nothing in John Avery's proposal that effectively prevents the Judiciary or administrative body from employing other means of construing the rules.

In the United Kingdom 2 committees; the Renton and Hansard Committees, were set up to look into ways of improving legislative drafting. The Renton Committee⁵⁷ recommended the use of general principles thus,

The adoption of the 'general principle' approach in the drafting of our statutes would lead to greater simplicity and clarity. We would, therefore, like to see it adopted wherever possible. We accept, however, that this approach to a large extent sacrifices immediate - though not eventual - certainty and places upon the courts a heavier responsibility in identifying the intention of the legislature when applying legislation to particular circumstances. We recognise that this is unlikely to be acceptable to the executive and the legislature in certain types of legislation, particularly fiscal and other public law which defines the rights and obligations of individuals in relation to the State, and we consider that it would in any event be unreasonable to draft in principles so broad that the effect of the statute could not be assessed without incurring the expense of litigation to determine an issue.⁵⁸

⁵³ Ibid.

⁵⁴ Ibid, 721.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷I. Turnbull QC, 'Plain Language and Drafting in General Principles, 8, www.opc.gov.au/calc/docs/Loophole_papers/Turnbull_Jul1995.doc. Accessed 5th April, 2015.

⁵⁸The Preparation of Legislation, para 10.3.

The Hansard Commission⁵⁹, however, opined that,

We begin by rejecting the idea that the European style of drafting should be generally adopted in this country ... we would be strongly opposed - as we believe most Members of Parliament would be - to making statute law as general as it often is in other European countries, with the almost certain consequence that there would have to be much more recourse to the courts to settle disputed interpretations of Acts. Court proceedings are expensive for all concerned and the need for people to go to court should not be expanded ... We firmly believe that certainty in the law must be the paramount aim in the drafting of statutes.⁶⁰

Certain provisions in a Bill may require drafting in general principles while plain language drafting would suffice for other provisions in the same Bill. All the provisions in a Bill do not have to be drafted in one style.⁶¹ Plain Language drafting is generally, the most preferred style of drafting because it is simple and precise.⁶² However, where the policy to be translated into a Bill is 'so complex and there are so many detailed rules, exceptions and qualifications that even a plain language rendering of the policy results in the law being extremely complex or inordinately long, then the general principles drafting should be considered.'⁶³

Thus, plain language is not always the sole ideal style of drafting. Where a law is prone to frequent amendments, drafting in general principles may be a more ideal style as the general principles would be stated in the principal statute while matters of detail would be left to subsidiary legislation⁶⁴ which is more easily amended. For instance, as a result of the frequency in the amendment of tax laws in Australia, there is a move towards drafting in general principles.⁶⁵ The point should again be made that the fact that a statute is drafted in general principles does not preclude the drafter from also drafting the same statute in plain language.

Gender Neutral Legislative Drafting

It has been rightly stated that the object of legislative drafting is 'to set forth ideas clearly, succinctly and consistently.'⁶⁶ To this end, several principles on the drafting of legislation have, over the years, emerged. These principles are all geared towards producing more effective legislations and taken as a whole, they constitute a drafter's basic toolkit, equipping competent drafters and enabling them to avoid a multitude of vices, in relation to language, law and logic.⁶⁷

One of these principles is the use gender neutral terms in drafting legislation. Generally, it is presumed that words importing the masculine include the feminine. In the United Kingdom this presumption was extended so that words importing the feminine are presumed to include the masculine.⁶⁸ In Nigeria, Section 14(a) Interpretation Act⁶⁹ expressly

⁵⁹ I Turnbull QC, Ibid, 9.

⁶⁰ *Making the Law*, Report of the Hansard Society Commission on the Legislative Process, chaired by the Rt. Hon Lord Rippon of Hexham. (London: Hansard Society for Parliamentary Government, 1992) 60, recommendations 238-9, in I. Turnbull 'Plain Language and Drafting in General Principles' 10.Ibid.

⁶¹ I. Turnbull, QC, Ibid, 15.

⁶² Ibid, 16.

⁶³ Ibid, 14.

⁶⁴ Also known as Secondary or Delegated Legislation. See

⁶⁵ J. Freedman, 'Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited, ibid, 717.

⁶⁶ *Legislative Drafting Manual*, (...Department of Legislative Services, 2012) 26.

⁶⁷ I. McLeod, ibid, 61.

⁶⁸ Interpretation Act 1850, Section 6(a) and (b).

⁶⁹ CAP I23, LFN, 2004.

provides that ‘in an enactment words importing the masculine gender includes females’. This is not to say that Nigerian statutes should not be drafted in neuter. It only means that where these statutes are drafted in the masculine as is traditionally the case in Nigeria, the use of the masculine gender also refers to the feminine gender. An exception to this provision would be where the provision of the law apparently deals exclusively with the masculine gender.

The Enugu State House of Assembly Hotel Sales Tax Law, 2010 repeatedly makes use of the pronoun, ‘he’.⁷⁰ This mode of drafting is currently not in line with international best practices in this regard, which is gender-neutral drafting.⁷¹ Thornton suggests that ‘gender neutral legislation should become the general rule.’⁷² This suggestion has apparently been accepted by the international community of legislative drafters as drafting in gender neutral terms is now the general rule.⁷³ Thus, words importing gender are to be kept out of statutes except where the drafter intends the provision to apply specifically to members of one gender.⁷⁴ For instance a statute on widows may use gender specific terms. What is important is that a gender sensitive term should not be used in reference to both genders.

In drafting the Rivers State Social Services Contributory Levy Law, obvious attempts were made to comply with this principle of drafting. However, due care in adhering to this principle of gender neutrality was not taken as Section 5(a) of this Law provides that ‘The Board shall consist of a Chairman....’ The word ‘Chairperson’ is a more appropriate word as it is gender neutral. Thornton has however suggested ‘president’, ‘presiding member’, ‘convenor’, and ‘coordinator’ as alternatives to ‘Chairman’ and ‘chairperson’.⁷⁵ He further advocates that occupational references should be the same for men and women. For ‘by referring to a “lady doctor” or a “woman barrister” it is implied that the standard is male and that a female is the non-standard.’⁷⁶ Likewise, forms ending in –ess as in hostess should not be used in legislation as they are now obsolete. Furthermore, parallel language should be used when referring to women and men. For example: ‘Husband and wife, ladies and gentlemen’ Not ‘Man and wife, ladies and men’.⁷⁷

It may be argued that the above views on gender neutrality are petty issues. There are, however, a great number of persons who consider these issues as very germane. What is regarded as the sexist use of language is now unacceptable to a large section of the international community. ‘The use of language with a gender bias is out-dated and may even be viewed as discriminatory. Many consider that the use of gender specific language reinforces stereotypes.’⁷⁸

⁷⁰ See Sections 9(2), 12(b), 19.

⁷¹ I. McLeod, *ibid*, p76; Thornton, p75; BR Atre, *ibid*, p4; New Zealand Parliamentary Counsel Office in house Drafting Manual ‘Principles of Clear Drafting’ <http://www.pco.parliament.govt.nz/clear-drafting/> accessed 16/02/2013. Drafting in gender-neutral language has been the New Zealand Parliamentary Council Office practice since the mid-1980s. Similarly, the Law Drafting Division of Hong Kong has adopted a policy of gender neutral drafting. ‘Legislative Drafting: Drafting Related Initiatives for Improving the Quality of Legislation, Access to Legislation, Professional Development of Counsel’ available at <http://www.legco.gov.hk/yr09-10/english/panels/ajls/papers/aj1215cb2-512-4-e.pdf> p3 Accessed 16/02/2013

⁷² Thornton, *ibid*, 75.

⁷³ See generally, ‘Miscellaneous Further Drafting Difficulties’ Lecture handbook of RIPA Legislative Drafting Course held 14th September-30th October, 2009, 52.

⁷⁴ B.R Atre, *ibid*.

⁷⁵ *Ibid*, 76.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*.

⁷⁸ ‘Legislative Drafting: Drafting Related Initiatives for Improving the Quality of Legislation, Access to Legislation, Professional Development of Counsel’ <http://www.legco.gov.hk/yr09-10/english/panels/ajls/papers/aj1215cb2-512-4-e.pdf> p3 Accessed 16/02/2013

See also ‘The need for a Gender Neutral Pronoun’ <http://www.feld.com/wp/archives/2011/06/the-need-for-a-gender-neutral-pronoun.html> accessed on 16/02/2013

A perusal of Federal statutes enacted between 2004 and 2007, as contained in the Laws of the Federation, reveals a near absence of gender neutrality in these statutes. Out of 54 statutes identified within this period, only 5 statutes were clearly drafted in gender neutral terms.⁷⁹ It is worthy of note that all of these 5 statutes are Treaties domesticated in Nigeria using the direct method of incorporation of treaties. This method reproduces the exact provisions of the treaty in a schedule, stating that they are to have the force of law.⁸⁰ Also worthy of mention is the fact that, going through the Laws of the Federation, 2004, gender neutrality is not found in treaties drafted before the year 2000. Thus, it is clear that there is a deliberate move on the international plane to comply with the principle of gender neutrality in Legislative drafting. Whereas, on the national plane, there is no visible attempt by legislative drafters to comply with this internationally accepted principle of legislative drafting.⁸¹

In the growing debate on gender equality, the drafter is to remain neutral by drafting in gender neutral terms. For where a drafter uses gender specific terms in places where gender neutral terms would have served, it would amount to descending into the arena of the debate on gender equality. This descent would, in itself, do nothing to promote the effectiveness of the legislation in question.

At the risk of inelegance, below, are some modes of drafting that have been suggested to promote gender neutrality in drafting.

- Use the plural: legislation is generally drafted in the singular relying on the presumption that the singular includes the plural.⁸² However, where a drafter is trying to avoid using a gender specific term, he may draft in the plural.
- Combining masculine and feminine forms:⁸³ To avoid gender specific expressions in legislative drafting, Thornton had suggested, amongst other things, to draft using 'his' or 'her' in place of 'his'.⁸⁴ This mode of drafting can be seen in the Rivers State Social Contributory Welfare Levy. Section 15(3) provides that 'A self-employed person shall voluntarily pay his or her levy to the Board' This use of 'his' or 'her' has, however,

⁷⁹Extradition Treaty between the Government of the Federal Republic of Nigeria and the Government of the Republic of South Africa (Ratification and Enforcement) Act, 2004 Cap E26 Laws of the Federation of Nigeria (LFN), 2004; International Convention for the Safety of Life at Sea (Ratification and Enforcement) Act, 2004, Cap I26, LFN, 2004 (This treaty is not completely gender neutral as the gender specific term, 'master' is used, referring to the Master of a ship.); Treaty on Mutual Legal Assistance in Criminal Matters between the Government of the Federal Republic of Nigeria and the Government of the Republic of South Africa (Ratification and Enforcement) Act, 2004, Cap T24, Laws of the Federation of Nigeria (LFN), 2004; Treaty to Establish African Economic Relating to the Pan-African Parliament (Accession and Jurisdiction) Act, 2007, Cap T25, LFN, 2004; Treaty between the Federal Republic of Nigeria and the Democratic Republic of Sao Tome and Principe on the Joint Development of Petroleum and other Resources in Areas of the Exclusive Economic Zones of the Two States (Ratification and Enforcement) Act, 2005, Cap T27, LFN 2004.

⁸⁰ There are 2 methods of incorporation of treaties; the direct and indirect method. In the indirect method, the statute contains provisions to the same effect as the provisions of the treaty sought to be domesticated. For example the Child Rights Act, 2003 was domesticated using the indirect method of incorporation of treaties, whereas the African Charter on Human and Peoples Right (Implementation and Ratification) Act, Cap A..., LFN 2004 was domesticated using the direct method of incorporation of treaties.

⁸¹ Not even in relatively recent federal enactments such as the Evidence Act, 2011 and the Employees Compensation Act, 2010 is the principle of gender neutrality adhered to.

⁸² See Interpretation Act, Cap, I23, LFN, 2004.

⁸³ This form of drafting was adopted in the Extradition Treaty between the Government of the Federal Republic of Nigeria and the Government of the Republic of South Africa (Ratification and Enforcement) Act, 2004 Cap E26 Laws of the Federation of Nigeria (LFN), 2004.

⁸⁴ Thornton, Ibid,75.

given rise to further arguments on gender equality, to wit; which of the pronouns should come first?⁸⁵ As a solution to the issue of which gender sensitive pronoun should come first, it has been suggested that the drafter alternates between 'he' or 'she' and 'she' and 'he'. Drafting in terms of s/he has also been suggested. This solution is less attractive as it is unpronounceable, inelegant, does not resolve the debate over which gender sensitive word should be placed first and 'has no associated forms corresponding to his or her (or her or his).'⁸⁶ It has also been suggested that the terms be combined to include 'it' (he, she or it) to provide for non-human actors such as companies.⁸⁷ In view of the divergent views over combining masculine and feminine forms in drafting, it would be best for the drafter to avoid the use of these combined forms.

- Omit pronouns:⁸⁸ the following are some of the ways in which pronouns in a legislative provision may be omitted;
- **by repeating the noun in place of the pronoun. For example rather than,**

An authorized officer may at any time enter without warrant any premises upon which he has reasonable grounds to believe that a person is carrying on hotel business in order to ascertain whether this law is being complied with (whether on the part of the occupier of the premises or any other person); and on entry he may carry out such inspections as may be specified by the Board.⁸⁹

It may be drafted thus,

An authorized officer may at any time enter without warrant any premises upon which the authorized officer has reasonable grounds to believe that a person is carrying on hotel business in order to ascertain whether this law is being complied with (whether on the part of the occupier of the premises or any other person); and on entry the authorized officer may carry out such inspections as may be specified by the Board.

- **Use of passive form. For example**

Where a lessor has prepared a statement of the grounds of complaint, he must send it to the lessee within 7 days.

It may be drafted thus:

Where a lessor has prepared a statement of grounds of complaint, it must be sent to the lessee within 7 days.

- **The sentence could be recast using a relative clause. For example ...**

Limits to Gender Neutral Legislative Drafting

One of the principles of legislative drafting is the principle of consistency. It is a presumption of interpretation

⁸⁵ I. McLeod, *ibid*, 77.

⁸⁶ I. McLeod, *ibid*, 78.

⁸⁷ *Ibid*.

⁸⁸ This form of drafting was adopted in the International Convention for the Safety of Life at Sea (Ratification and Enforcement) Act, 2004, Cap I26, LFN, 2004.

⁸⁹Section 19, Enugu State House of Assembly Hotel Sales Tax Law, 2010.

that the same word is intended to have the same meaning throughout a statute.⁹⁰ Hence, drafters are to be consistent in their use of words in drafting.⁹¹ In the same vein, the terminology used in a subsidiary legislation or an amendment must not differ from that used in the principal legislation.⁹² This principle also extends to all legislation on the same area of activities.⁹³

This principle was not observed in the drafting of the Enugu State House of Assembly Hotel Sales Tax Law. Sections 11, 12, 14, 15 and 18 of the Law use the term 'fine' whereas Sections 13, 16 and 17 of the Law use the term 'penalty'. This inconsistency leaves the users of the law with the impression that the drafter intends that a fine should be treated as being different from a penalty. This practice is most undesirable as the use of one of both terms would have sufficed. 'In contexts where a choice must be made from a number of synonyms or near synonymous words, the choice must be adhered to once made.

Flowing from the legislative drafting principle of consistency, an amending legislation cannot be drafted in gender neutral terms if the principal legislation was not so drafted.

Where gender neutral drafting is a recent development, amendments to older instruments need to be drafted with particular care. More particularly, it may be preferable to continue to use the old style, rather than importing the new one which could bring with it the risk of inadvertently creating scope for arguments arising from internal consistency.⁹⁴

CONCLUSIONS

The principles of legislative drafting are fundamentally geared towards the production of effective laws. Laws in themselves are made generally to regulate the lives of members of the society irrespective of gender. In view of the indisputable fact that issues of gender parity are fast gaining recognition worldwide, legislative drafting should reflect the developments in the society at large. Gender equity is itself emerging as a field of law as much is being written on the need for gender balance by eschewing from the body of laws gender discrimination of any sort. There is therefore need to draft laws in Nigeria that are devoid of the slightest hint of gender bias.

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3. T.C Jaja, *ibid*, 169.

⁹⁰ I. McLeod, *ibid*, 73.

⁹¹ 'Different words are not to be used to express the same idea. The same word must not be used to express different ideas. In legislative drafting, monotony is a positive quality. A reader will always assume that the intention is different if different words are used. The Act is the drafter's only link with the wishes of the legislature. What is referred to as a 'permit' in one section may not be called a 'license' or an 'authorisation' elsewhere. Variations for pleasure or elegance are undesirable.' B R Atre, *ibid*, p4.

⁹² B.R Atre, *Ibid*; I McLeod, *ibid*, p22.

⁹³ B.R Atre, *ibid*.

⁹⁴ I. McLeod, *ibid*, 94.

4. Ibid, 1.
5. See generally, T.C Jaja, *ibid*, 101.
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