



# Policy and the drafter: the role of the drafter in influencing the substance of policy

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## Abstract

Thring's approach that the drafter is not concerned with policy or substance but form has subsisted for long but modern realities which have made drafters' role to overlap from the policy formulation stage to other parts of the policy process, makes it glaring that this approach which is now considered a myth, cannot hold water in the modern day legislative drafting in the common law jurisdiction. This article uses Seidman's bill drafting process as criteria to compare the drafting process in UK and Nigeria and analyses how the role of drafters in both jurisdictions influence the substance of policy.

## 1. Introduction

The idea that drafters are only concerned with form not policy or substance is outdated, wrong and cannot be sustained in modern day policy process particularly because drafters are overtly sought to contribute to the substance of policy. The truth is, drafters have skills, experience and the authority to challenge policy which most often elicits policy refinement that enables greater certainty and practicability of the end product.

Seidman's *Bill drafting process* is used to prove the above and because this article is a comparative analysis of the role of drafters in the policy process in the UK and Nigeria, the comparison will be based on bill's origin, concept paper, prioritisation, drafting the bill, research and who has access which enables analysis of the role of the drafter. The first part of this essay is this *introduction*. The second part, *policy and the drafter*, will give the general background and define the basic concepts used. *Bill drafting process in the UK and Nigeria*, is the third part wherein Seidman's criteria is used to compare the two jurisdictions. The fourth is *the role of the drafter* which analyses ways in which the drafter's role influence the substance of policy. The fifth is the *conclusion*.

The UK is chosen as one of the countries to compare because, that is where the common law system originated from and by far, it is a large jurisdiction. Nigeria on the other hand, represents a small common law jurisdiction that inherited its legal system from UK with colonisation and that explains how the myth that 'drafters are not concerned with policy or substance but form' found its way into the common law system

## 2. Policy and the Drafter

To say, legislation is important for the existence of every society, is an understatement. Perhaps, this is better appreciated when one imagines what happens in a lawless society-chaos, jungle justice, survival of the fittest. The mere fact that, legislation exist, the citizens know, and machineries are established by it, law and order are easily maintained. Crabbe said, "Governments need legislation. The governed need well drafted, readable understandable legislation."<sup>1</sup>

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<sup>1</sup> VCRAC Crabbe *Legislative Drafting* (Cavendish Publishing 1993) 19.

Legislation commences by way of a policy, then translated into a bill by a drafter and presented to the Parliament where it is passed to law after royal or presidential assent. What then is policy?

## 2.1 Policy

Policy is the general principle by which a government is guided in its management of public affairs.<sup>2</sup> It is a means through which government usher in change of any kind therefore, policy is the starting point for government to adopt a line of action.<sup>3</sup>

Essentially, when government adopt a policy, it has no effect until it is implemented and one of the major means through which that is done is through legislation. As Crabbe noted, “government policy motivates legislation. The legislative policy expressed in an Act is first determined and settled by the government.”<sup>4</sup>

The policy process are stages a policy must go through to be complete.<sup>5</sup> The stages are policy initiation, policy formulation, policy implementation, policy evaluation and policy decision.<sup>6</sup> Traditionally, the role of the drafter was restricted to policy formulation which covers the drafting process<sup>7</sup> or drafting of legislation,<sup>8</sup> and the legislative process but because of the drafter’s skills, expertise and analytical mind, the need for a drafter outside the policy formulation stage has become increasingly necessary.

## 2.2 Drafter

A drafter is a person who drafts legislation for the Parliament and is called parliamentary counsel in the UK and Legal Draftsman in Nigeria. In the UK, drafting is centralised as drafters are employed by the Office of the Parliamentary Counsel (OPC) established in 1869 to draft government bills.<sup>9</sup> Today, all the bills are drafted by the OPC<sup>10</sup> with the same procedure for both government and members’ bills<sup>11</sup>

Nigeria like most of the common law jurisdiction, took to the UK system where the drafter is employed by the Ministry of Justice (MOJ)<sup>12</sup> who draft executive bills and guide Government agencies in law making. However, drafters are also employed in the National Assembly (NASS) and the private sector therefore, drafting is decentralised. It is important to distinguish between executive bills initiated by the *executive*, and drafted by MOJ on the one hand and members’ bills initiated by legislator or legislators and private members’ bills initiated by interest groups or NGO’s and drafted either by the drafting office of the NASS or by a private consultant,<sup>13</sup> on the other hand.

The drafter’s role and how it influences the substance of policy is considered later but here, comparison is made of the bill drafting process in UK and Nigeria on the bases of Seidman’s *bill*

<sup>2</sup> Black’s Law Dictionary (8<sup>th</sup> edn, Thompson West 2004) 1196.

<sup>3</sup> What is government policy < <http://www.indirect.gov.uk/what-is-government-policy> > accessed 15/12/15.

<sup>4</sup> Crabbe (n1) 19.

<sup>5</sup> C Stefanou ‘Drafter Drafting and the Policy Process’ in C. Stefanou and H. Xanthaki, *Drafting legislation: A Modern Approach*, (Ashgate Publishing, 2008) 319, 320.

<sup>6</sup> *ibid* 232.

<sup>7</sup> H Xanthaki, *Thornton’s Legislative Drafting* (5<sup>th</sup> edn, Bloomsbury Professionals 2014) 141.

<sup>8</sup> Stefanou (n5) 323.

<sup>9</sup> C Ilbert, *Legislative Methods and Forms*, (Oxford, 1901) 84.

<sup>10</sup> EC Page *Their word is law: Parliamentary counsel and creative policy analysis 2* < [studyonline.sas.ac.uk/pluginfile.php/6348/mod\\_resource/content/0/policy\\_process/parliamentary\\_counsel\\_and\\_creative\\_policy\\_analysis.pdf](http://studyonline.sas.ac.uk/pluginfile.php/6348/mod_resource/content/0/policy_process/parliamentary_counsel_and_creative_policy_analysis.pdf) > accessed 16/12/15.

<sup>11</sup> Patrick S and Sandford M, *House of Commons Background Paper: Public Bills in Parliament, Standard Note*, Library House of Commons, SN/PC/06507 Update 17/12/12.

<sup>12</sup> National Open University of Nigeria, *LED 601: Introduction to Legislative Drafting* (Goshen Print Media 2006) 4.

<sup>13</sup> SO Ofuani, ‘Organisation of a Legislative Drafting Office’ (2012) 1, NIALS Journal of Legislative Drafting 89, 93.

drafting process.<sup>14</sup> Though polities' law-making systems differ, all must provide answers to six questions<sup>15</sup> as set out below.

### 3. Bill drafting process in UK and Nigeria

#### 3.1 Bill's origin

Every bill owes its origin to a policy and policy may originate from departmental officials, political parties, non-governmental organisations, individual constituents,<sup>16</sup> treaties and agreements, members of Parliament, science and technology, emergencies and pressure groups.<sup>17</sup> To this extent, bill's origin are broadly similar in both jurisdictions.

In the UK, the dominant view of policy-making remains top-down.<sup>18</sup> Thus, a policy is made, approved and legitimised by leading politicians, bureaucrats, interest groups or judges before it is carried out (or not carried out) by those further down.<sup>19</sup> In Nigeria, like in the UK, policy making is top-down. Political leaders only state a broad policy objective and rarely outline the general means for accomplishing the goals.<sup>20</sup>

#### 3.2 Concept paper

The first step in translating a policy into legislation is by developing a concept paper.<sup>21</sup> In the UK, this stage which is part of policy initiation is the responsibility of the department sponsoring the bill.<sup>22</sup> Idea for a bill is streamlined in a discussion document called the Green paper<sup>23</sup> and sent to various organisations. Feedbacks are collected by civil servants and passed to the minister involved, with suggestions. Decision on this lies with the minister.<sup>24</sup> From these consultations the Department may produce a stronger proposal, the White paper which forms the basis of the drafting instructions.<sup>25</sup> Although, not all bills are subjected to this.<sup>26</sup>

In Nigeria, the scope and contents of executive bills are determined by the minister involved while the details are determined by civil servants.<sup>27</sup> But, the minister must first present the proposal by way of a cabinet memorandum for cabinet's approval<sup>28</sup> and if approved, the MOJ is instructed to draft the bill.<sup>29</sup> For members' and private members' bills, the drafting office of the NASS or a private consultant is directly instructed to draft the bill.

#### 3.3 Prioritisation

Without prioritisation, less important legislation may clog drafters' time.<sup>30</sup> So in the UK, the Parliamentary Business and Legislative Committee (PBL) manages the current government legislative programme on behalf of cabinet on strategic management of the forth coming programmes with the aim to ensure that government legislative programme reflects its overall priorities and smooth

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<sup>14</sup> A. Seidman, R.B. Seidman and N. Abeysekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International Ltd 2001) 21-25.

<sup>15</sup> *ibid.*

<sup>16</sup> *ibid.* 22.

<sup>17</sup> Constantin (n5) 322.

<sup>18</sup> Page (n10) 1.

<sup>19</sup> *ibid.*

<sup>20</sup> Seidman (n14) 22.

<sup>21</sup> *ibid.* 23.

<sup>22</sup> Parliament Explained 4, 'Making a law' Parliamentary Education Services, VLE, 4.

<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.*

<sup>25</sup> *ibid.*

<sup>26</sup> *ibid.*

<sup>27</sup> DT Adem, *Understanding Bills* (Lexis Nexis 2013) 8.

<sup>28</sup> *ibid.*

<sup>29</sup> *ibid.*

<sup>30</sup> Seidman (n14) 23.

passage of bills through Parliament.<sup>31</sup> The work of the PBL Committee presupposes that they work with the OPC in preparing suitable government legislative programme for the year.<sup>32</sup>

In Nigeria, there is no clear legislative programme. Once a cabinet approval is obtained, the ministry involved can directly instruct the MOJ to draft the bill,<sup>33</sup> so, there is no way the MOJ can tell at the beginning of the year the bills it would draft that year. As for members and private members' bills, a compendium of financial cost must be attached to the bill to ascertain that government will be able to accommodate it during the current or future budget.<sup>34</sup> However, scheduling all bills for legislative process is the responsibility of Rules and Business Committee in the case of House of Representatives and Rules and Procedure Committee in the case of the Senate.<sup>35</sup>

### 3.4 Drafting the Bill

This commences with the receipt of drafting instructions and ends with the completion of the agreed draft.<sup>36</sup> A drafter first receives instructions, understand and analyse it, then designs, composes, scrutinises and tests the Bill.<sup>37</sup> In the UK, once a slot has been secured, the OPC is instructed to draft.<sup>38</sup> With executive bills in Nigeria, once cabinet gives its approval, the ministry involved instructs the MOJ to draft. For members' or private member's bills, the member or senator initiating the bill may instruct the drafting office in NASS or a private consultant to draft.

### 3.5 Research

Research in the UK is conducted in two ways, first by civil servants of the Department involved and later by OPC. Same in Nigeria for executive bill, the civil servants in the ministry involved conduct their research and the drafter conducts further research at the drafting stage. In members' or private members' bills, initial research may be conducted by private consultant instructed to draft but when the bill gets to NASS, it may be treated as drafting instructions requiring further research. Drafting office of the NASS conduct all the research needed if it is instructed to draft.

### 3.6 Who has access?

In the UK, a department may, after a green paper is generated, consult with other departments, interested parties and stakeholders which gives them access to the policy. Again, OPC may produce an early draft or part of the bill which is passed to the Department with a covering letter explaining the draft, pointing out problems or other anticipated issues that may arise.<sup>39</sup> This early draft may also be used for pre-legislative scrutiny.

The practice is the same in Nigeria with executive bills as the ministry involved, may consult with other ministries, interested parties, stakeholders and the drafter before generating a cabinet memorandum. However, in all circumstances, when the drafter is instructed to draft, the drafter may consult with instructing officers for clarification and there is usually no limit to this.<sup>40</sup>

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<sup>31</sup> *ibid.*

<sup>32</sup> Page (n10) 3.

<sup>33</sup> Adem (n27) 8.

<sup>34</sup> The Official Website of NASS of FRN < <https://www.nassnig.org/page/the-legislative-process> > accessed 19/11/15.

<sup>35</sup> Adem (n27) 8.

<sup>36</sup> Xanthaki (n7) 141.

<sup>37</sup> *ibid* 145.

<sup>38</sup> Seidman (n14) 23.

<sup>39</sup> Page (n10) 7.

<sup>40</sup> Adem (n27) 23.

## 4. The role of the drafter

The approach that the drafter does not consider policy or substance but form is not only wrong but outdated as the drafter has some important role to play at the policy initiation stage as seen above. Today, it is doubtful if the assertion which is considered a myth<sup>41</sup> would hold water in the light of the developing world.<sup>42</sup> This topic discourses the role of the drafter in the process described above and how it influence the substance of policy.

### 4.1 Conception and birth of a bill

Experts have argued that the drafter has a role to play in the conception and birth of a bill. Dickerson said, the drafter makes policy in the sense that a midwife helps someone to have a baby, but he is not having it himself and that, “every draftsman makes a hell of a lot of small “p” policy while making the capital “P” policy work.”<sup>43</sup>

Dickerson however noted that the drafter often serves in policy making positions, but rarely does a drafter acting as such has the primary, unfettered responsibility for making policy.<sup>44</sup> Crabbe clarifies that, drafters do not initiate policy but are just technicians who translate policy into law and must not seek to initiate policy as “policy issues are the preserves of others.”<sup>45</sup> Driedger avers that it is not drafters’ function to either originate or determine policy but the dividing line between policy and law, between form and substance, is not a sharp one therefore drafters cannot escape being involved in policy discussion.<sup>46</sup>

From the foregoing, it is unanimous that initiation of policy is not the preserve of drafters but they do have roles to play in policy because, drafters are specialists, with analytical minds which enables them to look at proposals and tell if such proposals are effective or workable.

### 4.2 Creative and advisory role

Drafters have creative function<sup>47</sup> which allows them to offer suggestion that may change the policy where the instructions given will not work.<sup>48</sup> And, between policy and legislation there are open spaces which the drafter creatively contributes to filling.<sup>49</sup>

Much as drafters’ job is to offer a workable solution, the drafter must be careful not to make up policy.<sup>50</sup> Thornton agrees that drafters have skills and knowledge not generally possessed by policy makers and though not primarily responsible for policy, drafters do have important advisory responsibilities of a policy kind.<sup>51</sup>

Crabbe said, drafters’ training, vast knowledge of existing law, experience of the probable consequences of a piece of legislation, places them on a pedestal from which they need to advise and warn.<sup>52</sup> It is not every government policy that must be implemented by way of new legislation therefore, it is the duty of the drafter when advising at the bills origin stage to tell the policy initiators if a new legislation is necessary, an existing one should be amended or a legislation is not necessary

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<sup>41</sup> Constantin (n5) 319.

<sup>42</sup> *ibid* 331.

<sup>43</sup> R Dickerson, *Materials on Legal Drafting*, (West Publishing 1981) 92.

<sup>44</sup> *ibid* 88.

<sup>45</sup> Crabbe (n1) 18.

<sup>46</sup> EA Driedger *The Composition of Legislation: Legislative Forms and precedents* (2<sup>nd</sup> edn. revised, Department of Justice Ottawa 1971) xv.

<sup>47</sup> G Bowman, ‘The Art of Legislative Drafting’ (2005) 7 *EJLR* 3, 5. See also Xanthaki (n7) 143.

<sup>48</sup> Bowman *ibid* 5.

<sup>49</sup> Seidman (n14) 27.

<sup>50</sup> Bowman (n47) 5.

<sup>51</sup> Xanthaki (n7) 142-143.

<sup>52</sup> Crabbe (n1) 21.

particularly where the purpose would be achieved through means other than legislation which will save time and cost.<sup>53</sup>

Again, administrative officials in UK and Nigeria rarely avert their minds to legal aspects of legislation as it is usually left to drafters to indicate what sanction and other legal provisions are necessary.<sup>54</sup> Besides, the drafting stage may be the first place that the policy as a whole is subjected to a form of rigorous scrutiny with a high degree of legitimacy that is why, “if the drafter says a policy cannot work, it is taken extremely seriously”.<sup>55</sup> In the UK, there are evidence to show that through the exercise of advisory roles, drafters influence the thinking of the policy officials<sup>56</sup> and ultimately help in shaping legislation.<sup>57</sup>

#### 4.3 Prospective role

The drafter possesses the ability to carry out prospective evaluation. This presupposes the ability to see how the policy will work based on environment and the behaviour of the people who occupy it.<sup>58</sup> Because the drafter drafts from the conduct of the society in the past, drafting in the present to deal with the present particular problem for the future, the drafter is a tool of social engineering.<sup>59</sup> The drafter speaks to the future by drafting to regulate the conduct of the society. The drafter looks at the problem involved from many perspective, imagine every possible combination of circumstances the law might apply, every conceivable misunderstanding and misinterpretation that the law may be subjected to and take precaution.<sup>60</sup>

#### 4.4 Research

The task of drafters is to help resolve problems by legislative means<sup>61</sup> so, carrying the drafter along during a bill's origin is of immense benefit to both the drafter and the policy initiator as time will be saved. Indeed, the work of the drafter is grossly reduced at the drafting stage otherwise, the drafter must conduct fresh research which is focussed on existing laws, special responsibility areas and practicability<sup>62</sup> in order to ascertain the purpose of the legislation and identify issues likely to give rise to difficulties, affecting fundamental values, or of judicial concerns.<sup>63</sup>

#### 4.5 Consultations and conferences

The process of analysing instructions to bring out policy is an iterative one because it involves throwing ideas back and forth between the drafter and the instructing department.<sup>64</sup> This is not an intellectual game as the object is to produce a bill that will stand examination in Parliament and in courts therefore, “it is better that the ideas are tested and refined at the drafting stage than that they are torn apart later.”<sup>65</sup>

Usually, thorough analysis may reveal that a policy is not properly developed, thus, the drafter must ask questions, which presupposes consultations or conferences with the policy initiators,

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<sup>53</sup> Xanthaki (n7) 157.

<sup>54</sup> Driedger (n46) xvi.

<sup>55</sup> Page (n10) 2.

<sup>56</sup> *ibid* 3.

<sup>57</sup> Bowman (n47) 5; Stephen Laws, 'Giving Effect to Policy in Legislation: How to avoid Missing the Point' (2011) 32 Statute Law Review 1-16, 1.

<sup>58</sup> *ibid* 12.

<sup>59</sup> JU Ejiogu, *Challenges of a Draftsman in Contemporary Democratic Nigeria*, < <https://www.indabook.org/d/challenges-of-draftsman-in-contemporary-democratic-nigeria> > accessed 20/11/15.

<sup>60</sup> FN Dollo Tax legislation and the Lawyer's Training Need: An African Perspective [www.unitar.org/opg/dfm](http://www.unitar.org/opg/dfm) accessed 15/12/15.

<sup>61</sup> Dickerson (n43) 27.

<sup>62</sup> Xanthaki (n7) 151.

<sup>63</sup> KW Patchet, Nigerian Legislative Drafting Course-Course Notes (RIPA, 1992) 21; Driedger (n46) xvii.

<sup>64</sup> Bowman (n47) 6.

<sup>65</sup> Bowman (n47) 6.

subjecting the policy idea to rigorous intellectual analysis which is an interactive process<sup>66</sup> and an important policy function in practice that is done early in the policy process.<sup>67</sup> Seidman notes that if the drafter query the ministry, their very phrasing of the question inevitably involves them in substantive decision making.<sup>68</sup>

In the UK as well as executive bills in Nigeria, even after the drafting office has been instructed to draft, the Department may decide that it wants something changed (particularly if the bill is being drafted while consultation is still going on) and it will have to be returned to the drafter and a bill may go back and forth a dozen of times before the department is satisfied with it.<sup>69</sup> Such consultations between the drafter and a ministry or department, does clarify the content of the bill, bring up issues of conflict of laws or bring to the knowledge of the department or ministry other establishments that ought be involved which may bring about a change in policy.

Again, Seidman notes that drafters influenced by the myth, frequently claim that they perform only technical tasks, when in reality, most ministry officials formulate concept papers in a very general terms to which drafters must supply the details and drafters cannot avoid influencing a bill's substance.<sup>70</sup> This is more glaring in Nigeria in members' or private members bill where mostly, what the drafter gets as instructions is a legislator's idea or lay draft. To say in this circumstance that the drafter merely put into legal form the legislator's idea, is to assume that the legislator had a clear conception of the law the legislator wants drafted when in most cases the legislator may not have more than a vague idea of a problem, or a simplistic complaint from a constituent to which the drafter ends up defining, formulating, or even instilling such ideas of the legislator, then drafting them.<sup>71</sup>

## 5. Conclusion

This article proves wrong the approach that drafters do not consider policy or substance but only form because, the myth is now a thing of the past which will hardly be sustained in modern day policy process in both UK and Nigeria where drafters are proved to have some important role outside the drafting process which invariably influences the policy or substance.

The methodology used is definitely not perfect as it merely provides questions to be answered on rules and procedures a policy passes through to become law. But, it is useful as a platform for comparing the two jurisdictions regarding the origin, concept paper, prioritisation, drafting, research and access of a bill. To this extent, the criteria is relevant in comparing the UK and the Nigerian systems related by common law and thereby laying foundation for the bringing out of the role of drafters in both jurisdictions. However, the drafter's role in prioritisation may not influence the substance of policy as such but is vital because, the advice of the drafter in UK and Nigeria, on feasibility of a policy proposal is always important in the final decision to proceed with a particular policy or with the timing of introduction of a new policy.<sup>72</sup>

The drafter has been described as a midwife in the birth of laws, an architect of social structures, a social engineer, an expert in the design of frameworks of collaboration for all kinds of purposes, a specialist in the high art of speaking to the future and a wordsmith. These are just formidable words that shows the creative nature of the drafter's job and the many ways the drafter influences the policy or substance of legislation.

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<sup>66</sup> *ibid.*

<sup>67</sup> Laws (n57) 7.

<sup>68</sup> Seidman (n14) 29; see also TA Dorsey, *Legislative Drafter's Deskbook: A Practical Guide* (Capitol Net 2006) 7.

<sup>69</sup> Parliament Explained 4 (n22); Patrick (n13)

<sup>70</sup> Seidman (n14) 23.

<sup>71</sup> Seidman (n14) 23-24.

<sup>72</sup> Constantin (n5) 323.