

GENERAL ISSUES IN DRAFTING: REASONS FOR WITHHOLDING OR DECLINING OF ASSENT BY THE PRESIDENT TO BILLS.

By

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1.0 INTRODUCTION:

I wish to express my gratitude to the Promoters of this project for the opportunity given to me to share my thoughts on the subject matter, which I consider very timely and expedient in the development of our democratic process, particularly now the country is at the dawn of a new Administration and the emergence of the Tenth Assembly. There is no doubt that lawmaking is a critical factor in the success of any democracy and the Executive and Parliamentary Draftspersons are at the centre of ensuring the drafting of appropriate and implementable legislation that drives democracy.

Legislative drafting goes beyond the drafting of the law. It commences with the development of a well-researched policy on the subject and assessment of the socio-economic and political impact of the policy, as well as fiscal and financial concerns ensuing from the policy if adopted. It also considers the global trends and international dimensions on the subject. Policies further require the approval of relevant Government authorities at different levels of governance, particularly the Federal Executive Council, where it will be exposed to authorities operating the different sectors to analyse it from different angles including the National Development Plan. Legislation is subsequently developed along the policy considerations. Draftspersons take cognisance of all these in their preparatory research on the subject matter of a bill. The ultimate aim is to ensure that any bill drafted is Constitutional, fit-for-purpose, unambiguous, does not impose a huge financial burden on the populace, and avoids all the pitfalls that result in the decline of assent by the President.

This paper seeks to bring to the fore recurring reasons for withholding or declining assent to bills by the President. It is hoped that this paper will serve as a checklist for drafting bills, reduce the number of bills that declined assent and further the relationship between the Executive and the Legislature in the coming Administration. I see great benefits in this interaction for the nation.

This Paper does not intend to delve into the elementary of defining legislative drafting, however, to create a proper linkage between the way the mind of a legislative draftsperson works, permit I will briefly look at the keywords in this discussion and other preliminary issues in legislative drafting before going into the substantive issue for discussion.

BILL-

According to the Black's Law Dictionary, a Bill is simply a proposed law. It is a draft of what is hoped will become a law. In our Nigerian setting the 1999 Constitution requires that when a Bill is passed by our esteemed Legislature, it will not become law until it has been assented to by the President. We will return to this subsequently.

DRAFTING-

This is the writing of a text that is to become a law following some formal procedure. The ultimate intent is to communicate clearly to the readers who will use the law.

RETURN-**2.0 TYPES OF BILLS**

There are two types of bills; namely-

- (a) Executive Bills; and
- (b) Private Members' Bills

The executive Bills are legislative proposals initiated and presented to the legislature by the Executive for passage into law.

The Private members' Bills are legislative proposals sponsored by the members of the legislative House. It can be by a member or a group of members.

Requests from private or public groups such as professional bodies may lead to the introduction of a Bill. Also, judicial decisions may expose fundamental defects in a law leading to an amendment of the law. In either of these, such a Bill is either introduced as an Executive Bill or a Private Member's Bill. While Executive Bills are usually drafted by the Office of the Attorney-General of the Federation and Minister of Justice, the Private Members' Bills are drafted by the Parliamentary Counsel.

3.0 FUNCTIONS OF A BILL

Briefly, a Bill may-

- (a) Create a new law;
- (b) Amend an existing law;
- (c) Repeal an existing law; or
- (d) Appropriate money.

These are various types of Bills that have developed at different times as required.

4.0 THE LAW-MAKING PROCESS IN NIGERIA

The law-making process starts with the drafting of the Bill and proceeds to the readings at the floor of the House leading to the passage of the Bill into law and assent by the President.

The Law -making process starts with the legislative drafting process which I will group into five stages-

- (a) Understanding the drafting instructions- this is the request put up by the sponsor of the Bill. Good instruction must contain adequate information on the nature of the problem the law is seeking to resolve, the policy framework, objectives, and means of achieving them in a sustainable manner, and the socio-economic and political impacts of the law. It will be accompanied by relevant literature and document for the draftsman to study.
- (b) Analysing the drafting instructions- the draftsman is required to analyse the instructions to ensure there are no conflicts with the Constitution and other legislations and international treaties. That the Bill does not infringe on the rule of natural justice and whether a law is even needed.
- (c) Design of the legislation- it is also the draftsman who draws up the best structure for the Bill. This pattern is not sacrosanct but it is done in a way to ensure good understanding in a logical sequence.
- (d) Composition and development of the legislation- the draftsman develops the Bill and reviews it with the sponsor to ensure that the Bill captures its objective. The Bill undergoes several reviews.
- (e) Scrutiny and testing- At this final stage of the Bill, the Draftsman scrutinises the Bill against a checklist. Meticulously considers every aspect including punctuation marks, cross-referencing, textual composition, etc.

It is when the draftsman has completed the hard work of drafting that the Bill is passed on to the Private Members for their deliberation.

5.0 THE ROLE OF THE PARLIAMENTARIANS

Section 4 of the 1999 Constitution vests the legislative powers on the National Assembly. They are to make laws for the peace, order, and good governance of the country in any matter included in the Exclusive Legislative List and the Concurrent list up to the extent prescribed in the Second Column of Part II to the Second Schedule.

The Bill as drafted by the draftsmen goes through the Senate and the House, first and second readings, Committee stage, public hearing, and third reading for clause-by-clause consideration and passage before it is transmitted to the President for his assent.

6.0 THE ROLE OF THE PRESIDENT

Section 58 (4), gives the President power to assent or withhold his assent to a bill within thirty days of the passage of the Bill by both Senate and the House. By sub-section (5), where the President withholds his assent and the Bill is again passed by a two-thirds majority, the Bill shall become law and his assent will not be required.

The role of the President is summarised as –

- (a) Forward the Bill to the Honourable Attorney-General of the Federation, (and in recent times, to other relevant Ministers) for advice;
- (b) Grant of assent and communication of his decision to the National Assembly; and
- (c) Withholding or declining of assent and return of the Bill to the National Assembly.

7.0 REASONS FOR THE RETURN OF BILLS BY THE PRESIDENT

Now having looked at the preliminaries, let us consider the reasons for the withholding of assent and return of Bills by the President.

There are various reasons, ranging from conflict with the Constitution and other existing legislations, to duplication of responsibilities, financial considerations, administrative provisions, socio-economic impacts, timing, ambiguity in drafting, typographical errors that are fundamental, usurpation of functions of existing bodies, ousting the jurisdiction of the courts, usurpation of the powers of the President in appointments, and removals, ethical and public interest issues, inconsistencies, not in tandem with government policies, repugnant to natural justice, not comprehensive, controversial, similar proposal on-going that requires harmonisation, lacunas, wrong constitution of Boards, drafting issues, stakeholders' rejection, where it cannot cure the intended mischief, giving same powers and functions twice -to the Board and to the Chief Executive, self -appropriation by delving into an established Fund like Ecological Fund or Funds of other agencies, appropriating the prosecutorial powers of the Attorney -General of the Federation, poor textual constructions conveying wrong intentions of the law and so on.

Let us discuss some of these reasons.

7.1 Constitutional Issues.

The 1999 Constitution is the grand norm of all laws and by section 1(3) if any law is inconsistent with the Constitution, the Constitution shall prevail, and that other law shall be void to the extent of its inconsistency. Also, in this regard, the Second Schedule Part I, to the Constitution provides for the Exclusive legislative list and Part II prescribes the limits of the concurrent powers. The President will not assent to any Bill which he considers to be contrary to the Constitution. In the 2023 Bill altering the Constitution to grant powers to the NASS and State Assemblies to summon any person to answer questions on any matter within their respective legislative

competence, the President declined his assent as the word “person” could be interpreted to include the President or Governor of a State contrary to section 308 of the Constitution which grants immunity to the President. It would also constitute a distraction for him from focusing on governance were he to be summoned frequently by the NASS.

In the Bill repealing and establishing the Small and Medium Enterprises Development Agency of Nigeria, the President declined his assent for ambiguity in drafting and constitutional reasons. The Bill provided in s.13 (5) that the staff shall be public officers as defined in the Constitution. But what the Constitution interpreted is Public Service. Also, the Bill provided that parties shall set up an arbitral panel in line with the Arbitration Act, but Arbitration Act only allows parties to appoint arbitrators.

The Federal Audit Bill, 2018 was not assented to because it placed the Auditor General in the equivalent rank to the Head of Service of the Federation and this is contrary to Government Policy.

Initially, the Bill for the retirement age of teachers in 2021, was declined because there was no interpretation of “teachers” which would have created ambiguity and made it difficult to implement.

Interpretation of keywords in a statute is therefore crucial to their assent. Also ensuring that schedules are properly defined, particularly, technical schedules are crucial as a misrepresentation of any coordinates creates ambiguity.

Corporate Manslaughter Bill, 2018 was not assented to by the President because it was considered inconsistent with other laws including s.36 (5) of the Constitution which presumes an alleged offender innocent until proven guilty by a court of competent jurisdiction.

Assent was declined to the 2023 Constitutional alteration which seeks to reflect the establishment of the Nigeria Security and Civil Defence Corps in the Constitution on the ground that it would add no utilitarian value to their operation but would congest the Constitution and open up a barrage of similar requests by all para-military and security agencies to be included in the Constitution.

7.2 Corporate and Ambiguity Reasons

Where the provisions of the Bill are ambiguous, the President will decline his assent or withhold it until it is cured. In 2023, a Bill to alter the Constitution to compel persons to obey legislative summons seeks to create an offence and punishment that are futuristic. The President declined his assent because the provisions were contrary to section 36 (8) and (12) of the Constitution and also usurped judicial functions of trial, conviction, and sentencing.

The President takes cognizance of administrative/corporate provisions in a Bill. In the case of the Bill repealing and establishing the Small and Medium Enterprises Development Agency of

Nigeria, the President declined his assent because it provided in the composition of the Board that the *“Board shall consist of two part-time members appointed from the North and South”*. It was unclear whether it was two members from each region or one from each region.

Where there is an oversight of proper referencing to the appropriate sections in a Bill that will create ambiguity, the President will withhold his assent and if the defect is cured, will assent to the Bill.

Where also there is an inclusion of a wrong mandate that can be cured by deleting the offensive function, the President will withhold his assent and grant it when those aspects of the Bill have been deleted.

The President will also withhold his assent due to certain constructions in a Bill. In Public Procurement Amendment Bill, 2019. S. (1) (b) (iii) it was provided that a member of a Council shall cease to hold office in accordance with the regulations of the Council. It is considered that since the appointment is by substantive law, cessation should also be likewise.

In National Biotechnology Development Agency Bill, 2018, there was non-inclusion of key Ministries in the Board, so assent was withheld. The key Ministries would be able to bring their expertise to the agency and make it achieve its functions.

Where a Bill contains some inconsistencies that will lead to confusion, the President will withhold his assent. In the Court and Tribunal Standards of Scale Fine Bill, 2017, the Bill did not provide how each offence should fall under a category of fine. The Bill did not contain all the information required to make it clear. It was not comprehensive. It would also conflict with the existing legislation that have provided for penalties.

In recent times, the quest to become revenue generating agency has brought about the surge for hitherto non-regulatory agencies to attempt to amend their enabling instruments by expanding their scope or mandate to include regulation, collection of certain monies and penalties, and withholding of certain percentage of monies collected. Also, the latest trend in the effort to escape from the “envelope budget” style is that agencies currently seek to gain access to more funds by establishing one Fund or the other. Recently the National Assembly established the National Assembly Library Fund Act, 2023, composed of the present and serving Senate President and Speakers, all committee Chairmen, and their Deputies among others. The President would decline assent where the grant of his assent would constitute a deviation from the intendment of the establishment of agency as a non-regulatory body or where the establishment of a Fund is unnecessary.

7.3 Timelines and Timing of a Bill

Where timelines are critical in the provisions of a bill, it must be carefully considered and calculated to meet the intendment of the law. In the Bill for the alteration of the Constitution,

2023, which specifies the time within which the Executive should present to NASS, any treaty entered into by the Federation for enactment, it was considered that the timeline took away the discretion of the Executive to carefully consider the implications of a treaty before its domestication, assent was therefore declined.

The President also considers the timing of the Bill in deciding whether to give his assent especially where time is of the essence. In Electoral Act Amendment Bill, of 2010, the President felt it was too close to the elections and that it would be unfair to change the rules so close to the election.

7.4 State of the Nation Address.

In the Bill for the alteration of the Constitution, 2023, which provides for time for the President or Governor of a State to give a State of the Nation Address or the State equivalent, it was found to be impracticable, especially in an election year when a President or Governor would just be settling down in the office.

7.5 Financial Consideration.

Various considerations determine the President's assent. In recent times, the President started the wonderful process of forwarding Bills, not only to the Attorney-General of the Federation but to other Ministers covering the relevant sector covered by the Bill. This allows for expert advice as well as legal advice. Therefore, any Bill with financial implications also gets expert consideration from all the finance Ministry and relevant Departments and agencies. The revenue profile and expenditure profile must be matched and assessed before committing the country through any legislation, particularly in the form of creating new agencies or amendment that impacts the Government finance or in the domestication of treaties that impose financial obligations.

For instance, in the National Youth Service Corps Trust Fund (Estab.) Bill, 2022, it was provided that the Trust Fund shall consist of 2% of total revenue accruing to the consolidated Revenue Fund. And in yet another bill a certain government regulatory body sought to amend their sources of funds to change it from appropriation to collection of 10% of total revenues collected by all the revenue generating agencies it is supposed to be regulating, and during the covid-19 period. This would have impacted its independence as a regulating institution if it had to be collecting operating revenue from agencies it ought to regulate. In this case, there were financial, corporate, and timing reasons for the decline.

Also during, and post-Covid-19, the President was mindful of Bills that place huge financial burdens on the populace and corporate bodies.

The President declined his assent to Agriculture Credit Guarantee Scheme Fund Amendment Bill, 2018, on the ground that the increase of the fund to 50 billion Naira would not be feasible.

Similarly in the National Institute for Hospitality and Tourism Bill, 2018, there was no compelling reason for the requirement by the Institute for 25% revenue generated by the Government as provided in s. 5 (3) (k) of the Bill.

The President declined his assent for National Child Protection and Enforcement Agency Bill, 2018, because its scope is the same as the mandate of the Federal Ministry of Women Affairs and would result in the wastage of scarce resources.

7.6 Duplication of Responsibilities

Where there is a duplication of responsibilities, the President will decline his assent. This will prevent corporate problems and unnecessary waste of the fund of the Government. It will also prevent inter-agencies squabbles.

To avoid duplication of mandate and inter-agency rivalry, in 2023, assent was declined to a Bill altering the Constitution to empower the Revenue Mobilisation, Allocation and Fiscal Commission (RMAFC) to enforce compliance with remittance of accruals into, and disbursement of revenue from the Federation Account, because it would encroach into the mandate of the Federal Inland Revenue Service (FIRS). The RMAFC is to monitor accruals to and disbursement of revenue from the Federation Account and advise on fiscal efficiency while the FIRS maintains the collection of taxes.

In the Vigilante Group Bill, 2018, the President declined his assent because their proposed functions are covered by the mandate of the Nigerian Police and other security agencies. Likewise, in Nigeria Hunters and Forest Security Service (Est.) Bill 2022, assent was declined for encroaching into the mandate of the existing Nigerian Police Force. Assent was declined in respect of the Bill to alter the Constitution 2023, which seeks to remove transitional Law-making powers from the Executive as it is considered necessary for the sustainability of the country in times of extreme emergence and where great harm would be occasioned if due legislative process were to be followed.

The Chartered Institute of Transport and Logistics of Nigeria, Bill 2018 was found to conflict with the provisions of the Civil Aviation Act and that of the Institute of Transport Technology Act, and assent was therefore declined. The President declined his assent for National Child Protection and Enforcement Agency Bill, 2018, because its scope is the same as the mandate of the Federal Ministry of Women Affairs.

Also, Nigeria Aeronautical Search and Rescue Bill, 2019 was not assented to by the President because it appropriated the mandate of existing agencies to itself by repealing s. 6 (f) of the National emergency management Agency Act, s. 7 (r) of Nigeria Civil Aviation Authority and s.7(5) of Nigeria Airspace management agency.

7.7 Socio-economic/ impact or public interest consideration

Where there will be negative impact or the weight of the Bill will be much on the populace or Government, the President will withhold his assent. In the Constitution alteration Bill 2023, to make free compulsory education a basic and fundamental right of all citizens under chapter iv of the Constitution, assent was declined as it was aspirational and would overwhelm the Government with a class action. In National Housing Fund Bill, 2018 the President was concerned with the various levies and obligations imposed on banks and so withheld his assent.

In Ajaokuta Iron and Steel Completion Fund, the President withheld his assent as Nigeria could not commit such a huge amount at a time of competing priorities.

The President will consider strategic plans of the country and available resources in consideration of assent to a Bill.

7.8 The Scope of application and contents of a Bill.

The Content of a Bill must adequately make provisions for the resolution of the mischief it intends to cure. Where it has offences, it must also provide for penalties. In the Bill for Corporate Manslaughter, 2015, the President declined his assent as the Bill did not prescribe penalties for the offences that were created. Also, penalties must be certain and not futuristic.

The unwieldy composition of the Board and the non-inclusion of relevant institutions in the Board determined the non-assent of the Nigerian Council for Psychologist (Establishment) Bill, 2022.

Also, funding provisions must be drafted and must not be drawn from the funds of other existing agencies or sources earmarked for certain exigencies or sources belonging to the other tiers of Government.

Functions must be clearly stated likewise the body established must have its functions and powers.

The scope of application of a Bill, its objectives, and the general content needs to be holistic. Adequate drafting instructions must be provided to the draftspersons to avoid lacunas.

The unwieldy composition of Board or council members will weigh against the cost of governance and must be balanced against the non-inclusion of relevant institutions in the Board. In the Nigerian Council for Psychologist (Establishment) Bill, 2022, assent was declined to enable the inclusion of relevant institutions that would promote the operation of the law if passed.

7.9 Policies and Governance Issues of Government

The Government is reluctant to set up new agencies where the mandate of the existing ones can be expanded to incorporate emerging concerns. This is to reduce the cost of governance. In recent times, a number of higher institutions that sought to be established were declined assent as the courses they sought to offer could be subsumed into existing institutions.

Where an umbrella Act can accommodate new legislations on the same subject, piece-meal legislation on the same subject may be declined as was the case in the Medical Centres Bills until 2022 when the NASS passed a medical Centres Bill providing for all Medical Centers which can be altered as new centers are set up.

In a Bill to alter the Constitution to include the former heads of the NASS in the membership of the Council of State, the President declines his assent to the bill because it would create a conflict of interest as some former heads of the NASS may continue in politics and other ventures unlike the Presidents and retired Chief Justices of Nigeria and other members. It was noted that serving Chief Justice of Nigeria is not a member; therefore the membership proposed by the Bill would be incongruous with the functions of the Council of State.

In the Federal Colleges of Education Bill, 2023, assent was declined as its objective was to expand the scope of the Colleges to Degree awarding institutions while maintaining the Minister as the Visitor to the Colleges instead of the President as is the case in Degree awarding institutions. This is contrary to Government policy on education and would create confusion in the education sector if assented to.

Also, where the subject is outside the policies, priorities, and projections of the Government, having regard to the benefits of the Bill, the President may withhold his assent. For this purpose, a legislative calendar that is discussed and accepted by both the legislature and the Executive is suggested for a more focused legislative process in Nigeria.

7.10 Usurpation of the Powers of the Executive

Where the powers of the Executive are usurped the Bill will not be assented to. In the Bill for the amendment of treaty making process which required the approval of the Legislature before the Executive could enter into treaties, the President declined assent to it as it would amount to an interference with the functions of the Executive.

Where also, the power of the President to appoint the members of a Board or Council is given to another authority, the Bill will not be assented to by the president. It is the constitutional power of the President to determine the person to whom he should delegate some of his responsibilities.

Some Bills deny the President the power to remove the person he has appointed by providing onerous removal requirements different from the level of requirements needed for the appointment. In the Bill to amend the Economic and Financial Crimes Act, 2023 while the

appointment of the Chairman was by simple confirmation of the Senate, the removal sought the approval of a two-third majority of the Senate, if this is enacted into law it would make it more difficult to remove a Chairman that deserves to be removed and ours is a clime where the hunter of criminals sometimes becomes the hunted.

7.11 Drafting Issues

The President will withhold his assent where the functions and powers of an agency are not in consonance with the headings and objectives of the bill as it would be misleading.

He will also withhold his consent where there are inconsistencies that will frustrate the implementation of the Bill. For example, the functions of a council and that of the Chief Executive of an agency should be spelled out. A Bill which gives one power to superintend and another power to administer is defective as it has actually given both the same functions and will be difficult to implement. The Act establishing the Person with Disabilities Commission is replete with such drafting issues making it difficult to implement.

i. Lack of depth

There is a need for adequate drafting instructions for Bills dealing with finance and other technical issues. In this regard, stakeholders' opinions matter as they may have more information to enrich a Bill.

Where the Bill does not contain relevant provisions such as aspects of funding, offences, and penalties, where reference is made to treaties that have not been domesticated, the President will withhold his assent until the offensive provisions are deleted from the Bill. Therefore, where the Bill has lacunas that cannot be corrected, the President will decline his assent.

ii. Controversial Bills

Where a Bill is controversial particularly between Federal and States or by any association of persons, the President will withhold his assent for all the parties to come to an understanding.

iii. Stakeholders' opinions / ethical issues

The President will withhold assent where public interest and stakeholders are against the Bill. President will be unlikely to assent to a Bill supporting gay marriage in Nigeria because it is against our culture and may receive overwhelming opposition from the public.

Surely, the reasons for the return of a Bill by the President are varied and dependent on the content of each Bill and its peculiarities.

8.0 RECOMMENDATION

Continuous collaboration at local and international fora, exchanges, capacity building, and interaction between the executive and the Legislature will go a long way to enhance our legislative process.

A Legislative Standing Committee of the Executive and Legislature is proposed to establish an annual legislative calendar after considering the National Development Plan, Government Priority areas, sectorial plans, international obligations, revenue generated and projections, financial status and taking into consideration the legislative interest of the NASS and Federal Character Principles.

It will also help to consider the comments of stakeholders.

It is expedient for any proposer of Bill to conduct in-depth research and provide the Drafts persons with all the information to guide them.

The stampeding of draftspersons does not help in drafting legislation. They must be allowed adequate time to think things through and where they advise against legislation, their advice should be considered.

9.0 CONCLUSION

There is no end to what may result in the decline of assent to a bill by the President as each Bill is treated on its merit except that an articulate bill that takes cognizance of the above indicators will most likely gain the assent of the President.