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Editorial Policies

The Loophole is a journal for the publication of articles on drafting, legal, procedural and management issues relating to the preparation and enactment of legislation. It features articles presented at its bi-annual conferences. CALC members and others interested in legislative topics are also encouraged to submit articles for publication.

Submissions should be no more than 8,000 words (including footnotes) and be accompanied by an abstract of no more than 200 words. They should be formatted in MSWord or similar compatible word-processing software.

Submissions and other correspondence about *The Loophole* should be addressed to —

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Editor's Notes

This issue of the Loophole contains four articles dealing with quite distinct subjects, but all closely related to matters of interest to legislative counsel. In this sense, they exemplify the breadth of subjects involved in the preparation and enactment of legislation.

The first article deals with a subject that most of us hope is now behind us (at least for now): the COVID-19 pandemic. This global public health emergency has placed extraordinary demands on legislative drafting offices around the world. Legislation, particularly delegated legislation, has been a principal tool for managing public behaviour. Anna Logie and Jennifer Bucknall take us into their experience drafting health regulations for the Canadian Government. They describe the adjustments needed in terms of IT, office processes, drafting techniques, office structure, and training, and then go on to consider the impact of the COVID-19 pandemic generally on the role of legislative counsel and on drafting offices.

The second article takes us to Singapore and focuses on drafting offices as guardians or keepers of the statute book. Cheryl Seah describes the 2020 revision of Singapore's Acts, discussing the key features of the new revised edition, the methodology used in the revision (from conception to publication), the challenges encountered and the solutions developed to deal with them.

Next we turn to the constitutional framework for drafting legislation. Chijioke Nwoye examines recent decisions of the Supreme Court of Nigeria striking down legislation dealing with the judiciary on the basis of its inconsistency with the Constitution of Nigeria. He reviews not only the terms of the Constitution, but also basic constitutional considerations having a bearing on legislative drafting, including constitutional supremacy, the separation of powers, judicial review and the rule of law.

This issue concludes with an article of my own that I have presumed to include. It deals with a vital but often neglected aspect of legislative drafting: how to deal with the past when drafting laws for the future. It focuses on an unfortunate case in Canada involving an amendment to its *Criminal Code*, the divided judicial opinions that ensued and their eventual resolution in a split decision of the Supreme Court of Canada. Food for thought.

Two upcoming conferences on legislative drafting are noted on the next page. I would encourage readers to consider attending them (both offer online attendance) and look forward to publishing papers presented at them.

John Mark Keyes
Ottawa, June, 2022

Upcoming Conferences

CALC Conference 2022

Due to the ongoing effects of the pandemic, CALC is holding its next conference online rather than in person. While CALC members will miss the opportunity to get together in person on this occasion, one of the great benefits of the virtual conference is that there will be no cost for attendance.

The conference will be held over **2 half-days on 18 and 19 July** in 3 different time zone regions as follows:

> Zone 1 (Asia, Australasia and the Pacific) 11:00am-2:30pm, GMT/UTC + 8 (Perth time)
>
> Zone 2 (Africa and Europe), 9:00am-12:30pm, GMT/UTC (Accra time)
>
> Zone 3 (Americas) 9:00am-12:30pm, GMT/UTC – 7 (Vancouver time)

The conference program will differ for each time zone region, though some papers will be presented in more than 1 time zone region, and all presentations will be available after the conference in the members' section of the CALC website.

The conference will include sessions on legislation in the courts, innovation, rules as code, sunset and review provisions, dealing with invalid legislation, access to legislation, legislation and law-making in a global pandemic, and more. It will also include the CALC general meeting, and some virtual social activities.

The full conference program for each of the 3 time zone regions will be circulated to CALC members and posted on the website on 10 June.

CIAJ Legislative Drafting Conference / Conférence ICAJ sur la Rédaction législative

The Canadian Institute for the Administration of Justice (ICAJ) will hold its 21st Legislative Drafting Conference on **September 8-9, 2022**. Attendance will be both in-person at the Shaw Centre in Ottawa and on-line by videoconference.

The Conference fixes its gaze on the topic of change and the challenges it produces for legislative drafting. It looks at both the changing environment in which legislative counsel work and the resulting changes to their roles and the way they perform them. It begins with a historical lens and then turns to examine the shifting role of legislative counsel resulting from current environmental factors, including client expectations, the political world and the policy issues that drive legislative agendas. These factors will be considered in terms of how they can be managed and their ethical implications. The conference will particularly address

changing working conditions (working remotely and virtual meetings) and generational change (recruitment and training of legislative counsel).

The conference will also consider recent legislation to implement the UN Declaration on the Rights of Indigenous Peoples and its implications for drafting legislation to respect these rights. Not since the enactment of the *Canadian Charter of Rights and Freedoms* in 1982 has there been such a significant change in the Canadian legal landscape affecting the preparation of legislation. One session will consider the implications of the UN Declaration generally and a second session will focus on its implications in the field of family law.

Finally, the conference will include a practical drafting workshop on preparing legislation that amends or is based on existing legislation. The workshop will look at the scope for drafting improvements and deal with arguments against changing existing legislative texts.

Further details are available at https://ciaj-icaj.ca/en.

L'Institut canadien d'administration de la justice tiendra sa 21e conférence sur la rédaction législative **le 8 et 9 septembre 2022** en personne au Centre Shaw à Ottawa et en ligne par vidéo-conférence.

La Conférence a pour thème le changement et ses effets sur la rédaction législative. Elle traitera à la fois du contexte mouvant dans lequel les conseillers législatifs évoluent et de l'impact que cela peut avoir sur leur rôle et la façon dont ils s'en acquittent. Le programme s'ouvrira sur une perspective historique, puis se penchera sur l'évolution du rôle du conseiller législatif en fonction de différents facteurs, notamment les attentes des clients, le contexte politique et les différents enjeux qui déterminent le calendrier législatif. Ces différents facteurs seront abordés sous un angle pratique et éthique. L'évolution des conditions de travail (travail à distance et réunions virtuelles) et le changement générationnel (recrutement et formation des conseillers législatifs) feront l'objet d'une attention particulière.

La conférence examinera les lois récemment adoptées en vue de mettre en oeuvre la *Déclaration des Nations Unies sur les droits des peuples autochtones*, et leur incidence sur la rédaction de lois visant à faire respecter ces droits. Le Canada n'avait pas connu de changement aussi important affectant la préparation de la législation depuis la promulgation de la *Charte canadienne des droits et libertés*, en 1982. Les répercussions de la Déclaration en général feront l'objet d'une séance à part entière, tandis qu'une deuxième séance sera consacrée à ses répercussions dans le domaine du droit de la famille.

Enfin, la conférence comprendra un atelier sur la rédaction de lois modifiant ou fondées sur des lois existantes. Lors de cet atelier, les participants aborderont les moyens d'apporter des améliorations aux textes législatifs et de faire face aux objections quant à la modification de textes existants.

Pour plus de details, veuillez accéder à https://ciaj-icaj/fr/.

Reflections on Innovations and the Role of Legislative Counsel in Drafting *Quarantine Act* Emergency Orders during COVID-19

Anna Logie and Jennifer Bucknall[1]

Abstract

This article discusses innovations in a drafting office in the Department of Justice Canada during the first two years of the response to COVID-19, focusing on the drafting of Quarantine Act Emergency Orders (QA EOs) as a case study.

The first part looks at the innovations adopted during the drafting of QA EOs, particularly in terms of IT, office processes, drafting techniques, office structure, and training.

The second part reflects on the impact of the COVID-19 pandemic on the role of legislative counsel and on drafting offices.

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[1] Anna Logie, Legislative Counsel, Health Canada Regulations Section/Legislation Section & Jennifer Bucknall, Senior Counsel and Deputy Director, Health Canada Regulations Section, Legislative Services Branch, Department of Justice Canada. The article is written and published in an individual capacity and all views expressed are those of the authors alone. The authors would like to thank all those who reviewed this piece for their helpful and insightful comments, and in particular John Mark Keyes, Claude Lesage, Sandra Markman, Riri Shen and Sharlene Telles-Langdon. The article is based on a presentation given at a Legislative Services Branch Conference in January 2022.

Introduction

The ongoing COVID-19 pandemic constitutes a historic crisis that has led to millions of deaths, illnesses and lost jobs. It has profoundly affected the personal and professional lives of people around the world, including in Canada. During this crisis, new laws and regulations have been needed to respond to COVID-19 and its variants, putting the behind-the-scenes work of legislative counsel in the spotlight like never before.[2] As a manager and a legislative counsel, respectively, at the Health Canada Regulations Section (HCRS) of the Legislative Services Branch (LSB) at Justice Canada when the pandemic started, we found ourselves in a drafting section at the centre of Canada's legislative response to the virus. To meet the need for intense drafting on a long-term basis, the section adopted a number of "innovations" in the sense provided by Dr. Daniel Lovric: "innovation is any kind of conscious and novel change for the better. It involves experimentation and risk, which may sometimes result in failure."[3] The success in meeting the numerous challenges associated with the drafting of *Quarantine Act* Emergency Orders (QA EOs) earned the LSB the trust of those working within the government who relied on us to deliver these orders.[4]

[2] For more on the work of legislative counsel at Justice Canada during COVID-19, see the bilingual Jurivision video "Legal responses to COVID-19: The unsung work of legislative drafters", online: https://jurivision.ca/legal-response-covid-19-legislative-drafters/?lang=en; https://jurivision.ca/reponse-juridique-covid-19-redacteurs-legislatifs/.

[3] Dr. Daniel Lovric, "Legislative Counsel – Future Roles and Innovation", *The Loophole*, June 2020; See also Lucy Marsh-Smith, "Change and Innovation in a Small Drafting Office – the Jersey Experience", *The Loophole*, June 2020.

[4] The authors would like to emphasize the team effort involved in this success. The Headquarters Regulations Section, the Transport Canada Regulations Section and the drafting section of the Department of National Defense provided volunteer legislative counsel and a relief manager for some cycles, and revision services went above and beyond in adapting their practices and priorities to serve the unpredictable

Two years into the response to COVID-19, the authors think it is a good time to reflect on some of the innovations and changes that have happened at HCRS to adapt to evolving circumstances. The first part of this article examines the innovations adopted during the drafting of QA EOs under the headings of the five types of innovations identified by Dr. Lovric (IT, office processes, drafting technique, office structure, and training). The second part offers some reflections on the impact of COVID-19 on the role of legislative counsel and on drafting offices.

Background and challenges

In Canada, the federal government response to the COVID-19 pandemic has involved extensive use of delegated legislation, notably through legislative instruments made under the *Quarantine Act*, the *Food and Drugs Act*, and the *Aeronautics Act*.[5] Under the *Quarantine Act*, the Governor in Council can make Emergency Orders prohibiting entry of any class of persons into Canada or imposing conditions on entry in order to minimize the risk of introduction or spread of COVID-19 in Canada. Between January 2020 and the time of writing (January 2022), the Governor in Council has made 72 QA EOs. The QA EOs have effect for the period specified in them, which tends to be thirty days. Thus, drafting is done with a hard deadline for delivery because the existing orders expire on a monthly basis. There are generally three QA EOs in effect at all times, namely a QA EO concerning entry into Canada from the US ("the US Order"), another to address entry into Canada from countries other than the US ("the Non-US Order"), and another called the *Quarantine, Isolation and Other Obligations* order ("QIOO Order") which sets out a number of requirements for travelers, notably related to quarantine, isolation, testing, and the submission of electronic information.[6] In addition, an Emergency Order for Specified Countries was made to address the Omicron variant on November 27, 2021.

HCRS does the drafting for the Health Portfolio of the government of Canada, including for the Public Health Agency of Canada. This work is supported by revision services (editorial revisors, jurilinguists, and the informatics group) as well as advisory and bijuralism

time needs of QA EOs. Senior management of the Public Law and Legislative Services Sector and Department of Justice did everything they could to support these no-fail orders.

[5] Parliament also adopted a number of COVID-19 emergency response bills, notably to deal with the health crisis, economic recovery and extending time limits included in federal legislation: *An Act to amend the Financial Administration Act (special warrant),* S.C. 2020, c. 4; *COVID-19 Emergency Response Act*, S.C. 2020, c. 5; *COVID-19 Emergency Response Act, No. 2*, S.C. 2020, c. 6; *Canada Emergency Student Benefit Act,* S.C. 2020, c. 7*; An Act respecting further COVID-19 measures*, S.C. 2020, c. 11; *An Act relating to certain measures in response to COVID-19,* S.C. 2020, c. 12; *An Act to provide further support in response to COVID-19,* S.C. 2021, c. 26; *An Act to amend the Criminal Code and the Canada Labour Code*, S.C. 2021, c. 27.

[6] The versions of the US, non-US and QIOO orders that are in force at the time of writing (January 2022) can be found at the following links: *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)*, P.C. 2021-0961; *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from any Country Other than the United States)*, P.C. 2021-0962; *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Quarantine, Isolation and Other Obligations)*, P.C. 2021-1050.

services.[7] When the pandemic hit, HCRS pivoted to drafting both QA EOs made under the *Quarantine Act*, and COVID-19-related Interim Orders made under the *Food and Drugs Act* to improve access to COVID-19 drugs and devices, in addition to delivering priority regulations related to cannabis, vaping, tobacco, food, drugs, consumer products, and healthy environments. When legislative counsel started working on the first QA EO, there were few precedents to rely on; there had only ever been five Emergency Orders adopted under the *Quarantine Act* before COVID-19, and they were all related to Ebola, a virus that is quite different from COVID-19. In addition, throughout the drafting of QA EOs over the past two years, legislative counsel have faced a number of challenges, notably:

- intense drafting with extremely compressed timeframes,
- the sudden collapse of social supports such as the closures of schools and daycares,
- the sudden move from office-based work to a situation of telework from home for every team member,
- the increasing length of the orders and complexity of the regulatory scheme over time[8]

These challenges are not new and, indeed, many have been identified in articles from *The Loophole* in the past.[9] However, the intensity of the challenges over a two-year timespan arguably created a difference of degree sufficient to constitute a difference in kind. It also offered a unique opportunity for the drafting office to adopt "adaptive innovations"[10] in a supportive, real-time learning environment. As noted by Dr. Lovric, drafting offices in non-emergency times tend to be oases of stability within government, and much of their value comes from their reputation for reliability and following precedents. COVID-19 forced us to be more agile than ever, to "move fast and break things",[11] in order to meet the challenges listed above while maintaining the following:

[7] Editorial revisors' work includes suggesting corrections simplifications, format changes, punctuation and numbering improvements, and ensuring consistency of language use. Jurilinguists' work includes supporting the quality of legislative instruments in both of Canada's official languages (French and English) and comparing the two language versions to ensure consistency. Counsel at advisory services provide advice on legal, policy, and language matters related to the drafting, enactment, operation and interpretation of legislative texts. Bijuralists' work includes checking legislative instruments to ensure that they reflect the terminology, concepts, notions, and institutions of both of Canada's private law systems (common law and civil law).

[8] At the time of writing, the US, non-US and QIOO orders total 100+ pages and 200+ internal cross-references.

[9] See for example Don Macpherson (former legislative counsel of the Legislation Section, Justice Canada), "Instant Bills: The impact of information technology (IT) on legislative drafting in Canada", *The Loophole*, March 2005 at 33.

[10] The Observatory of Public Sector Innovation (OPSI) defines "adaptive innovation" as "testing and trying new approaches in response to a changing operating environment." Online: https://oecd-opsi.org/projects/innovation-facets/.

[11] Dr. Lovric refers to this motto, used by some start-up companies, in his article: above n. 3 at 10.

- client-driven services tailored to the evolving objectives of the instructing departments;
- the logical challenge function of legislative counsel, in order to independently assess the coherence of the ideas being presented;
- carefully producing two original and authentic versions of the same order, one in each official language, by drafting teams composed of one counsel responsible for the English version and another responsible for the French version;[12]
- care to reflect the terminology, concepts, notions, and institutions of both of Canada's private law systems (common law and civil law);[13]
- quality control; and
- plain language drafting, to simplify and clarify the orders in order to make them accessible to as wide a readership as possible.

Part 1 - Innovations in drafting Quarantine Act Emergency Orders (QA EO)

In his article entitled "Legislative Counsel – Future Roles and Innovation" (June 2020), Dr. Lovric identified five basic kinds of innovation in legislative drafting:

(1) innovation involving information technology;

(2) innovation in office processes;

(3) innovation in drafting technique;

(4) innovation in office structure; and

(5) innovation in training.[14]

In drafting QA EOs, we innovated in all five areas, often building on previous innovations.

Innovation involving information technology

In his article, published before the pandemic's full force had come to bear, Dr. Lovric suggested that there would be much IT-related innovation in the coming years, and stated that "in the future, there will also be a greater use of videoconferencing […] in the drafting process".[15] He could not have been more right.

[12] Lionel Levert (former Chief Legislative Counsel, Justice Canada), "Bilingual and Bijural Legislative Drafting: To Be or Not to Be?", (2004) 25 Stat. LR 151 at 155, online: https://www.researchgate.net/publication/310667416_Bilingual_and_Bijural_Legislative_Drafting_To_Be_or_Not_To_Be . In the mid1970s, the Canadian federal Department of Justice adopted a practice of co-drafting, except in the case of tax legislation. In a co-drafting environment, there are always two legislative counsel working on each file, one who is responsible for the French version and another responsible for the English version.

[13] In the mid-1990s, the Canadian Department of Justice adopted a policy on legislative bijuralism in which it committed itself to drafting both French and English versions of federal bills and regulations that pertain in some way to private provincial/territorial law in accordance with the terminologies and concepts inherent to both Canadian private law systems: ibid. at 158.

[14] Lovric, above n.3 at 10.

[15] Lovric, above n.3 at 11.

Before the COVID-19 pandemic, most drafting at HCRS was done "live" in the office, usually with the instructing client department officials and their legal services counsel in the room being able to see the screens of the drafting team. However, some processes at the LSB had already begun to be adapted in order to reduce the need for paper and physical presence in the office (for example, the flow of work was mostly electronic; new files were mostly electronic; final versions of regulations for making were sent electronically).

When the pandemic began, the use of IT in drafting, including videoconferencing, increased dramatically. Although the first seven QA EOs in January, February and March 2020 were drafted in person, the team quickly transitioned to remote drafting along with the rest of the HCRS and the LSB as a result of provincial stay-at-home orders and workplace occupational health and safety directives. The eighth order was the first QIOO Order and also the first QA EO drafted remotely.

All legislative counsel at HCRS had laptops and either had work cellphones, or were provided them quickly, which made the transition to telework easier. The LSB was deemed a critical service provider and thus given priority access to work tools and bandwidth. In the early days of drafting, a number of available tools were relied upon (Skype, phone, Webex), but now the dominant tool for drafting-related discussions is MS Teams, and it is used both for drafting-related video calls and for its messaging function. In addition, due to telework, editorial revisors and jurilinguists now generally provide edits using digital software rather than marking up a hard copy and scanning it.

Virtual drafting has benefits, notably in an emergency. In the context of 15-hour drafting days and drafting that regularly continues through weekends and statutory holidays, being at home allows legislative counsel to fold in small moments of personal connection with family and pets in the times when they are waiting for the next instruction or feedback. Another advantage of telework is that, unlike small drafting rooms that can fit only a limited number of people, virtual drafting rooms can accommodate a large number of participants. This is needed in the case of QA EOs because there are often several instructing departments involved.

Innovation in drafting office processes

The second area of innovation identified by Dr. Lovric relates to drafting office processes, such as quality control procedures, rules about standardizing provisions, and electronic storage of information. Along with innovation in IT and innovation in drafting technique, innovation in office processes is, in his words, a "volume-based" form of innovation, in the sense that it assists drafting offices in producing more legislation.[16] While he identifies certain risks in focusing only on volume-based innovations, for example in terms of quality, he also notes, in relation to the COVID-19 pandemic, the drafting experience has underlined

[16] Lovric, above n.3 at 11.

the value of volume-based innovation focused on processes, given the importance of producing large amounts of legislation quickly to respond to the pandemic.[17]

In the case of QA EO drafting, innovations in processes were key to successfully meeting tight drafting deadlines in a sustainable way. This is where the motto "move fast and break things" really came into play. Everyone was open to trying new ways of doing things throughout each cycle in order to find solutions as new problems arose. The first major innovation that we adopted was that the two-person drafting teams (made up of two legislative counsel, one responsible for each version) would often be assigned a third counsel (or, in the case of cycles with two drafting teams, a fifth counsel). This counsel would support the team in multiple ways, including by handling research tasks, communications with the instructing client officials and their legal services counsel, and comparing the three QA EOs for consistency.

A second innovation was to provide a version of the order at the start of the cycle that removed the delayed coming into force and transitional provisions and showed the client what the starting point would be for the next order. Any revision services comments that were not accepted due to time constraints in the previous cycle were offered in highlighting with a note so that the clients could consider them at an early point in the new cycle. This allowed the clients to keep the suggested changes in mind as they prepared briefing materials for ministers. These client-centric practices helped to improve the drafting quality each cycle despite the speed and intensity of the cycles.

A third innovation with regards to office processes was flexibility around work hours for legislative counsel. The nature of the QA EO drafting was such that it required working long hours, often on evenings, weekends, and holidays. The innovation adopted was that legislative counsel would exceed their normal work hours well before the end of the month in order to meet the drafting needs for the orders, and then switch with a new team so that the first team would have recovery time. This allowed full responsiveness to client needs and real recovery time for individuals after such intense cycles. As a legislative counsel, I (Anna) really appreciated this human-resources innovation because it helped to make the drafting more sustainable for legislative counsel.

Innovation in drafting techniques

The third drafting innovation identified by Dr. Lovric is with regards to drafting techniques, notably the development of new drafting devices such as tables, simplified outlines and diagrams. He notes that these innovations in technique have greatly improved the surface appearance and readability of legislation. They are also very scalable, ultimately increasing efficiency.[18]

[17] Lovric, ibid. at 12 and 15.

[18] Lovric, ibid. at 11.

Innovations in drafting techniques were often used in drafting the QA EOs. For example, in March 2021, the QIOO Order was reorganized through the addition of parts, tables in Schedules, and a decimal numbering system (and, later, a Table of Contents). The purpose of these changes was to make it easier to modify the QIOO Order in the future and to enhance the readability of that order, notably for travellers and enforcement agencies. The addition of the Schedules meant that over a dozen pages of the QIOO Order containing lists of exemptions could be moved to the end of the order. Also, although the use of a decimal numbering system is rare in Canadian federal legislation, its innovative use in the specific case of the QIOO Order reduced the amount of time-consuming renumbering of provisions and internal cross-references needed in each cycle, giving counsel more time to focus on substantive changes. During a June 2, 2021 hearing in the court case *Spencer v. Canada (Health)*, 2021 FC 621, Chief Justice Paul Crampton of the Federal Court noted orally that the structural changes had enhanced the readability of the order.

Innovation in office structure

The fourth type of drafting innovation identified by Dr. Lovric is in relation to office structures. He refers to drafting offices as slowly changing from having a structure a few decades ago that was something like barristers' chambers to more of the traditional management structure found in the public service. This change to a management structure accelerated reforms in the use of information technology, office procedures, and standardized and novel drafting techniques.[19]

In the drafting of QA EOs, office structure changed quickly. The QA EO drafting "team" was concentrated in three to five counsel per cycle so counsel and support staff were able to benefit from the efficiencies of being a smaller unit able to specialize in the orders and tailor its folder structures, processes and drafting techniques to them. The QA EO legislative counsel were freed from other files and duties. Tobacco and vaping files were similarly quickly concentrated in a small team of four counsel with one counsel, a senior practitioner, given an enhanced leadership role for that team's deliverables. The new role for senior counsel in tobacco files freed management attention for the demanding QA EOs. Similarly, multiple teams of HCRS counsel worked primarily on *Food and Drugs Act* COVID-19 Interim Orders and specialized in those complex instruments.

A second innovation in relation to office structure was to bring not only experienced counsel, but also, increasingly, newer counsel onto the complex QA EO files. Several newer counsel, who may not otherwise have had a chance to work on emergency instruments early in their careers, were assigned third counsel roles and then progressed to drafting roles. The LSB had been in a major hiring mode for both legislative counsel and revision staff in 2019 to deal with certain long-term legislative initiatives. Consequently, when the pandemic started, there was a significant proportion of drafting counsel with less than two years of

[19] Lovric, ibid. at 13.

experience. By partnering some of the newer counsel with experienced counsel on the QA EOs, it was possible to use everyone's strengths to the fullest. The experienced counsel brought deep knowledge of drafting practices and substantive legal issues to the files, and the newer counsel were able to contribute their energy and fresh ideas. This innovation meant that it was possible to avoid concentrating the experienced counsel on the QA EO files, so that other files could also benefit from their expertise.

A third innovation in office structure was the generous volunteering of counsel and managers from other drafting sections to deliver some of the QA EOs. Although it was a long-standing practice for counsel to volunteer temporarily in other sections experiencing high drafting needs, it was uncommon in the past to do so for the drafting of emergency instruments. Legislative counsel from other sections provided much-needed relief, and brought new ideas, perspectives and questions on the QA EOs, ultimately leading to changes that enhanced the readability of the orders. Sharing the management burden also allowed relief over the past two years.

Innovation in training

The fifth type of drafting innovation raised by Dr. Lovric is with regards to training. He notes that it is difficult to identify real innovations in on-the-job training for legislative counsel, as the gold standard of training still seems to be close supervision by an experienced legislative counsel involved in complex files, just as it was 100 years ago. He also notes that drafting training in the future will be a mix of practical experience and in-house or university courses.[20]

In the context of the QA EOs, the ability to include a third counsel in the drafting team was an important innovation with regards to training, as it would often be a stepping-stone for the third counsel to familiarize themselves with the QA EOs, and the cycle process and demands, so that they could hold the pen as a legislative counsel in a future cycle. Although Justice Canada holds in-house training sessions for its newly recruited legislative counsel, there was no time to develop formal training in relation to the QA EOs, and any training prepared would quickly become outdated, as the office processes and structures, as well as policy and substantive legal issues, were constantly evolving. Thus, on-the-job training of third counsel proved the most expedient way to train more legislative counsel on the QA EOs. Having myself (Anna) started as a third counsel before becoming one of the legislative counsel for the QA EOs, I found it extremely enriching, an experience that mirrors that of other newer counsel who worked on the QA EOs. It was, in many ways, like an accelerated training program, since a variety of legal issues arose in a short period of time and the third counsel would be able to work closely with experienced counsel and see that experienced legislative counsel "in action" with instructing officers.

[20] Lovric, ibid. at 14.

Another innovation was to create a peer buddy system, which paired a counsel on-boarded in the context of remote work with a "peer" counsel hired just before the pandemic. This was implemented in addition to the more established practice of pairing new counsel with a more experienced mentor. The peer buddy system made it possible to recreate some of the more informal interactions and information-sharing between peers that happened in the physical office pre-pandemic. HCRS has seven counsel who have never seen our office space. They are thriving as members of our team due in part to their peer buddy.

Part 2 - Impact of COVID-19 on legislative counsel and drafting offices

Understanding complex problems facing government

What does the COVID-19 pandemic mean for the role of legislative counsel? As noted by Dr. Lovric, even before the pandemic, understanding complex problems facing government was a growing part of the role of legislative counsel. Their ability to look beyond the analyses given to them by instructing departments and to have a deeper understanding of the relevant law and policy issues, in all their complexity, is needed. Dr. Lovric also noted that legislative counsel do not need to become policy experts (they have neither the time nor the training for that), but rather that they can improve their knowledge of the background to legislative proposals, including by reading case law as well as by scanning the media every day in a systematic way.[21]

During the QA EO drafting, it was more important than ever that legislative counsel understand the complex scientific, political, economic, legal and technological context in which decisions were being made, a context that was evolving. Reading COVID-19 pandemic-related news and reports often became an integral part of legislative counsel's role, allowing them to stay abreast of the evolving science, law, and policy in Canadian federal and provincial jurisdictions as well as internationally.[22] For example, they had to keep an eye on the development of new COVID-19 variants, tests, masks, vaccines, boosters, and contact-tracing technologies such as ArriveCan, and changing migration patterns and epidemiology, as those developments would impact policy and the provisions of the QA EOs. It was also important to stay abreast of court challenges and decisions related to the QA EOs.[23]

[21] Lovric, ibid. at 7-9.

[22] The COVID-19 pandemic has created a period of prolonged and high "legal dynamism", meaning that the law is in constant flux: Cary Coglianese and Neysun A. Mahboubi, "Administrative Law in a Time of Crisis: Comparing National Responses to COVID-19," Administrative Law Review 73 (2021) at 10, online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3841755.

[23] There have been very few court cases challenging QA authorities and their application; to date, none of them has been successful: *Monsanto v. Canada (Health)*, 2020 FC 1053; *Spencer v. Canada (Health)*, 2021 FC 621; *Canadian Constitution Foundation v Attorney General of Canada*, 2021 ONSC 4744. See Paul Daly, "Judicial Review and the COVID-19 Pandemic" (December 20, 2021), online: Judicial Review and the COVID-19 Pandemic | Paul Daly (administrativelawmatters.com)

A new standard for the pace of drafting?

What has been the main impact of the COVID-19 pandemic on drafting offices? We would argue that, just as the drafting of the *Anti-terrorism Act* in 2001 set a new standard for the pace of drafting at the federal level in Canada, so too did the drafting of QA EOs in response to COVID-19. As noted by Don Macpherson, although the pace of drafting federal legislation in Canada had already been increasing since Elmer Driedger's era,[24] the drafting of the *Anti-terrorism Act* in just three weeks in the aftermath of 9/11 was a turning point: "it set a new standard for legislative counsel to meet when faced with other high priority, urgent legislative assignments (regardless of their complexity) – the 'instant Bill'." The *Anti-terrorism Act* was a complex, "omnibus" piece of legislation, 186 pages long. Six teams worked concurrently to produce the draft Bill, which was assembled, together with the consequential and coordinating amendments, by additional teams of legislative counsel.[25]

We would argue that the drafting of QA EOs under extremely tight timelines also sets a new standard for the pace of drafting. Although the Emergency Orders are modified each month rather than drafted from scratch, the policy changes and complexity of the scheme are significant enough that the workload on the legislative counsel, the on-duty manager, and the support staff is arguably similar to that involved in the drafting of the 2001 *Anti-terrorism Act*. In addition, the very intense pace of drafting in the same emergency file every month over a 24-month period, rather than as a one-off occurrence, is unprecedented.

The value of redundancy

In addition to potentially setting a new pace for drafting, COVID-19 has also highlighted the value of redundancy in staffing for institutional resilience. Perhaps one of the most important drafting-related lessons of the pandemic was that, when an emergency strikes and legislative counsel are called upon to assist in the response, it is best to not be short-staffed and to have surge capacity of trained legislative counsel. This is particularly the case for long-term emergencies such as COVID-19, where it is important to be able to spread the work among enough counsel to make it sustainable over several years, despite the intense hours. It was very fortunate that HCRS had already started the process of staffing up and training counsel for regulatory modernization when the pandemic started, and that Health Canada prioritized its resources and efforts on the COVID-19 response instead.

[24] Driedger, in *The Composition of Legislation*, 2nd ed. (Minister of Supply and Services (Canada): Ottawa, 1976) at xviii estimated a short, ordinary Bill to take 36 working days to draft and incorporate comments from policy officials (after having taken approximately 6 months from its inception in the sponsoring department until Cabinet approval of the drafting instructions).

[25] Macpherson, above n. 9 at 34.

Concluding reflections

For HCRS, the first two years of the COVID 19 pandemic have been a time of major change, innovation, and growth in order to manage increasingly short timeframes and increasingly complex legislation. The full implications of the pandemic, including COVID-19 variants, long COVID, and the long-term economic and social impacts, remain unclear. In addition, scientists foresee an accelerating trend in the future in outbreaks of diseases with reverberations similar to COVID-19,[26] as well as the potential for overlapping crises, such as co-occurring public health and climate crises. Given the uncertainty of the current times, here are a few questions for legislative counsel to consider:

- What changes that arose during COVID-19 will become permanent?
- What work arrangements and technologies will become more common for legislative counsel in the future, including during emergencies?
- What can drafting offices do to prepare for the future, including the possibility of long-term and/or overlapping emergencies?

Postscript

Over the last two years, it has often seemed as though problems arrived so fast it was all we could do to keep coming up with solutions for each new problem. Writing this article has helped to organize our thoughts and put the experiences of the past two years in perspective. I (Jennifer) would like to thank Anna for proposing, researching, and structuring this article. It has been a useful exercise to organize our solutions under the headings of innovation that Dr. Lovric proposed.

We are deeply grateful for the efforts of many dedicated professionals in the department and our instructing clients in delivering these no-fail orders under difficult circumstances. Even at midnight after many long days of work, everyone is cooperative, kind, understanding, and professional.

Finally, dear readers, we wish you and your loved ones health and happiness.

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[26] According to some scientific models, there is a 47-57% chance of another global pandemic as deadly as COVID-19 in the next 25 years: Eleni Smitham and Amanda Glassman, “The Next Pandemic Could Come Soon and Be Deadlier”, Centre for Global Development Blog Post, August 25, 2021, online: https://www.cgdev.org/blog/the-next-pandemic-could-come-soon-and-be-deadlier.

Singapore's 2020 Revised Edition of Acts

Cheryl Seah[1]

Abstract

Singapore recently published a new 2020 Revised Edition of her Acts. The 2020 Revised Edition came into force on 31 December 2021. This is Singapore's largest universal revision to date and introduced a wide range of revision changes.

This article discusses the key features of the new revised edition, the methodology in revising the Acts from conception to publication, the challenges encountered and the solutions developed to deal with them.

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[1] Legislative counsel in the Legislation Division of the Attorney-General's Chambers. The views expressed in this article are her own and do not represent those of the Attorney-General's Chambers.

Introduction

On 31 December 2021, the 2020 Revised Edition of Acts of Singapore ("2020 Revised Edition") came into force.[2] Comprising 510 Acts with approximately 31,000 pages, this is Singapore's largest universal revision of legislation to date.[3] This is also the first revised edition that is published online and in hard copy simultaneously. A major reason why we were able to achieve both was the computer technology available today that was not available 35 years ago.

In 2013, we embarked on a project called the PLUS project (or **P**lain **L**aws **U**nderstandable by **S**ingaporeans) to modernise our legislative drafting practice and improve the readability of our laws. A survey of law readers was carried out for this purpose. The findings supported the removal of chapter numbers, gender-neutral drafting, the use of active voice over passive voice, the use of shorter sentences, simpler expressions and paragraphing, as well as moving away from using Roman numerals and ordinals etc. Many of these features have since 2016 been incorporated in our drafting, and the universal revision project gave us the opportunity to apply them across the Singapore Statute Book.

In Singapore, the revision of Acts is carried out pursuant to the *Revised Edition of the Laws Act 1983* ("RELA"). Under the RELA, Law Revision Commissioners ("LRCs") are appointed by the President of Singapore to carry out the revision of Acts. A revised edition must have a single revision date, and all Acts included in the edition must be revised up to that date (see sections 4(3) and 7(2) of the RELA).

[2] The Acts contained the law as at 1 December 2021 (our cut-off date) and remained up-to-date through 31 December 2021.

[3] This is Singapore's 9th universal revision of Acts (the first being the Harwood Edition (1886) and the most recent being the 1985 Revised Edition).

The revision powers of the LRCs are set out in section 4 of the RELA, the key principle being that they may make various changes to improve the readability of the Act and correct typographical and grammatical mistakes, but must not change the meaning of any provision in an Act.

This article gives a behind-the-scenes look at how this was achieved. It has 4 Parts:

- Part 1 – Key features of the 2020 Revised Edition
- Part 2 – Overview of the revision process;
- Part 3 – Other elements of the revision process
- Part 4 – Three challenges encountered, and how they were resolved.

Part 1: Key features of the 2020 Revised Edition

The 2020 Revised Edition has 4 key new features. We give an overview of these features below. A Guide accessible on the Attorney-General's Chambers ("AGC") website[4] explains the features in greater detail.

(1) Removal of chapter numbers

Chapter numbers are no longer used in the 2020 Revised Edition, because of their limited utility in organising the statute book.

Instead, the short title of each Act now bears its year of enactment to indicate its vintage. Citing the chapter number (together with the year of the revised edition) will only be necessary when citing a repealed Act, or a specific historical version of an Act.

(2) New language policies

To improve the readability of legislation, we applied current legislative drafting techniques to the revised Acts, wherever possible. This includes greater use of paragraphing as well as more plain English. Two of the most visible changes are the use of gender-neutral language, as well as the replacement of "shall" with "must" to more clearly convey an obligation or prohibition, or "is" to convey a declaratory provision.

We also took steps to remove redundant words (for example, "from time to time") and replace inappropriate descriptions of persons with disability (for example, "mentally disordered person" is replaced with "person with a mental disorder").

The *Interpretation Act 1965* was further amended (see new section 9B) to make it clear that a change of style in a provision made by law revision does not change its meaning.

[4] Available on the website of the Attorney General's Chambers of Singapore at https://www.agc.gov.sg/our-roles/drafter-of-laws/legislation-and-revisions.

(3) Different revision treatment for different categories of Acts

Singapore's written law has a rich legal history comprising English laws, Indian laws, laws from the Straits Settlement government and Malaysian laws, in addition to the laws enacted post-independence. To preserve the unique "voice" of vintage legislation, changes to vintage legislation were limited to stylistic changes, updates to cross-references and corrections of errors.

(4) Enhanced legislative history

Before the 2020 revision, each revised edition of an Act contained a legislative history to help users trace its development such as amendments, revisions and reprints. We decided to include more details in the legislative history of each Act in the 2020 Revised Edition. For example, information on predecessor Acts which were repealed are included (and not just information about the present enactment).

Diagrams are also provided for Acts with complex histories, showing repeals, consolidations of Acts or the incorporation of an Act into another during revision.

Lastly, more information about the progress of a Bill through Parliament is provided, such as any Select Committee report numbers and the date of any Notice of Amendments.

Part 2: The universal revision process from start to end

The project took about 5 years, starting in August 2017. The legislative history work started earlier, with research commencing in August 2015. Due to its scale, this project involved the whole Legislation Division of 66 officers apart from our Law Revision Unit ("LRU").

The project can be broadly divided into 3 stages.

Stage 1: Planning and laying groundwork

The first stage was to lay the foundations for the project.

This revision was unchartered territory. Though we were fortunate to have records from the 1985 Revised Edition to draw on, these were based on very different circumstances in a different era from what we were facing. We still had to experiment and chart our own course. The LRU team spoke with colleagues in the Legislation Division to find out about their processes (everything from transcribing to editing to quality control checks) and considered how they could be adapted for law revision.

The LRU team also sought directions from the LRCs headed by the Attorney-General on both operational issues and substantive revision content. Various guides were also created on the types of revision changes that could be made, as well as a manual setting out the steps to be taken from revision to publication.

In January 2019, we engaged a consultant, Mr Lionel Levert, to provide feedback on our internal processes in light of his experience with Canada's universal revision of Canadian Acts. Mr Levert also conducted a training session for us on pertinent issues in law revision.

Stage 2: Working on content

Once the foundations were laid, we started work on revising the contents of the Act.

First, a copy of the Act was downloaded from our online database of Acts. A 2-way reading of the downloaded copy was then carried out against the original Act in hard copy, to ensure that all legislative amendments to that Act have been accurately incorporated.

Next, the downloaded copy was reviewed by a law editor and a legislative counsel, applying a consistent set of revision policies. Cross-references were also checked for correctness. The revision changes were then transcribed into a master revised copy and sent to the responsible Ministry for their approval.

Finally, the revised copy with changes duly tracked was reviewed by a single LRC or, if it was identified as a "high-risk" Act, by at least 3 LRCs.

The process of review had to be repeated whenever new legislative amendments to an Act came into force, with approvals from the responsible Ministry and the LRC sought as needed.

Stage 3: Preparations for publication

Once an LRC approved the revision changes made to an Act, the tracked changes were accepted, and the revised copy formatted for ease of reading.

A 2-way reading of the revised copy against the copy reviewed by the LRC was carried out, with any discrepancies and further editorial suggestions flagged for review. External cross-references to other Acts were also adjusted for any renumbering of provisions in those other Acts.

Next, the text of the Act was merged with the new legislative history – the 2 were kept separate until the end of the project to reduce the risk of one introducing errors to the other.

Finally, we used PDF comparison software to compare the copy to be sent to the printer against the existing version online, to ensure that there were no accidental deletions or insertions.

After all checks were completed, the Act was sent to the Government Printer for printing, and to the President for approval, before being published online. After publication, we did a final check of the online version to ensure it displayed correctly.

Part 3: Other elements of the revision process

Tracing and developing the legislative histories

Tracing the history of each Act to the first enactment covering a similar subject matter required extensive research. Because the Acts could go very far back (sometimes to the 1870s), we had to visit the libraries of our Parliament, the National University of Singapore and the Supreme Court to research the source materials.

Research guides were created and policies developed to ensure coherent and consistent display of information uncovered by the research.

Publicity to stakeholders

It was important for us to reach out to our stakeholders early and to get their support to major changes like the removal of chapter numbers. We formally announced the commencement of the universal revision project to Ministries in early 2020, and requested that they appoint officers in their Ministry/Agency with whom we could liaise regarding the changes to their Acts.

A universal revision communications group was also formed to assist with communications to stakeholders and with media releases.

We further monitored commonly recurring queries from Ministries throughout the project. In partnership with the communications group, a set of FAQs was posted on the Government Intranet.

In the last quarter before the publication of the new revised edition, we conducted a talk for AGC colleagues on what to expect in the 2020 Revised Edition. To get the message out to the public, we prepared media releases with infographics. Announcements were posted on our public legislation website (Singapore Statutes online) on the impending launch of the 2020 Revised Edition.

To assist Ministries and public bodies who needed to update their systems and documents with the new numbering, we sent them advance copies of the Acts on request.

AGC has a directory of unique codes (called Legis Codes) for all provisions in our Acts to uniquely identify each provision. These codes are used by Agencies to update their online systems. AGC developed a computer programme to extract the codes after the publication of the 2020 Revised Edition and sent the codes to the Agencies so that their systems could be easily and promptly updated.

On 31 December 2021, a guide to the 2020 Revised Edition was published in tandem with the revised edition.

Part 4: Three challenging areas of universal revision, and how we addressed them

In this Part we discuss 3 challenges we encountered and share the steps we took to resolve them.

Challenge 1: Continuous stream of new legislative amendments

While the universal revision exercise was underway, new legislation continued to be enacted or become operational. We had to deal with the following challenges arising from this:

- do we have enough time to take in the amendments if they commence before the revised edition comes into force?
- if an amendment is not taken in, will it result in any part of the revised edition being obsolete when it comes into force?
- if an amendment (drafted against the pre-revision text of the Act) is to come into force after the revised edition, will it fit with the revised text of the Act?

In the end, we managed to ensure that all 510 of the Acts in the 2020 Revised Edition were up to date as of the in-force date of 31 December 2021, with 2 Acts being left out because they contained substantive amendments that became operative on dates that were too close to 31 December 2021.

We achieved this by doing 4 things. The first was exploring with client Ministries on the feasibility of having their amendments come into force before 31 December 2021 or deferring them to a later date.

The 2nd thing we did was to sort the 510 Acts into: (1) Acts with no pending amendment or amendments that would only come into force after the operative date; (2) Acts with pending amendments; and (3) Acts likely to have amendments coming into force between the cut-off date and the coming into force date of the revised edition). Acts were then prioritised for printing based on their status.

The 3rd thing we did was to keep the law revision coming into force date flexible so that we could take in as many of the amendments as possible. The cut-off date was extended a total of 3 times.

Finally, a revised Act and its un-commenced amendments were checked to ensure textual fit between the 2. Where new amendments were being drafted for an Act, the latest draft of the revised Act was provided to the legislative counsel. Drafting instructions were given to them to delete and substitute entire provisions as far as possible to avoid a mismatch between the amendment and any word or phrase that was up for change in the 2020 Revised Edition.

Challenge 2: Consistency across Acts

A combination of 4 methods were used to ensure consistency in expression throughout all the revised Acts.

Method 1: Guides on revision policies

Our first method was to develop clear policies on the revision changes to be made and set them out in guides which were disseminated to all editors, legislative counsel and LRCs.

3 checklists were also developed and disseminated – a list of standard changes[5] to be applied to all Acts, a list of non-standard changes application of which required the approval of an LRC, and a list of changes which must never be made on any occasion.

An entry on each list is accompanied by its rationale, guiding principles and examples of usage.

The revision policies and lists were not static but were updated throughout the course of the project, as we gained greater experience and expertise. For example, the LRCs highlighted that some of the early changes might result in a subtle change in meaning.

Method 2: Small team performed "gate keeping" role

A small team comprising 4 law editors was formed to act as a "gate keeper" through whom all revised drafts must pass. The team was responsible for:

- ensuring that revision changes complied with the revision policies;
- spotting trends across the revision changes made by different legislative counsel and raising these for discussion; and
- applying directions from the LRCs across all Acts.

Method 3: Multiple rounds of revisiting the same Act

Each Act was relooked at on multiple occasions so that the latest revision policies could be applied to it. Detailed records were kept on each occasion to ensure that nothing was missed.

Method 4: Grouping of Acts

We grouped Acts of a similar topic or nature to be reviewed or revisited together, so that adjustments could be made across them at the same time, thus saving valuable time and resources.

Challenge 3: Cross-references

Many of the Acts had their provisions renumbered during law revision. To address the challenge of keeping track of and amending other Acts with cross-references to those provisions, we created an Excel table to track all Acts with details of cross-references to other Acts. The table was in a searchable format and was updated regularly to take into

[5] Available on the website of the Attorney General's Chambers of Singapore at https://www.agc.gov.sg/our-roles/drafter-of-laws/legislation-and-revisions.

account new amendments which introduced or removed external cross-references. See an example below.

141	**Gas Act**	(1) Elec Act - s. 9(1)(c), (d) & (f)	**Business Trusts Act** Section 2	**Companies Act** Section 4(1) Section 76D(14) Section 210	**Electricity Act** Section 9(1)(a) Section 9(1)(c) Section 9(1)(d) Section 9(1)(f)	**Insolvency, Restructuring and Dissolution Act** Part 7 Section 125(2) Section 71	**Limited Liability Partnerships Act** Section 2(1)

We could see at a glance the external cross-references in each Act and could easily check these against a tracked-change copy of the external Act.

Next, to deal with the constant stream of new amendments, we did not renumber provisions inserted after a certain date – in this case 15 April 2021. This was to avoid a never-ending cycle of revisiting and counterchecking.

Conclusion

It has been exciting to see the fruition of our universal revision plan after 5 long years of hard work. We could not have done this without the support of the whole Legislation Division. With the lessons and experience acquired from this major undertaking, we will now be turning our attention to an even more ambitious goal – the revision of our subsidiary legislation.

The Law Revision Unit in January 2020 – our last group photo before COVID-19 safe-distancing measures came into force!

Law-making and Constitutional Supremacy: Lessons on Inconsistency

Chijioke Nwoye[1]

Abstract

The doctrine of constitutional supremacy places the Constitution above all laws, instruments, persons and authorities of government. All laws made by the legislature must conform to the letter and spirit of the Constitution. Due to its supremacy, any law that is inconsistent with the constitution is void to the extent of its inconsistency.

The doctrine of constitutional supremacy arose again in Nigeria in the case of Ude Jones Udeogu v The FRN & others, where the Nigerian Supreme Court struck down subsection 396(7) of the Administration of Criminal Justice Act, 2015 (ACJA) as being inconsistent with the 1999 Constitution of the Federal Republic of Nigeria.

One vital area which needs to be considered as an aftermath of the decision of the Nigerian Supreme Court is the need for both the lawmakers and legislative counsel to eschew in legislation any provision that will fail the validity test when placed side by side with a Constitution.

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Introduction

In 2019, the Supreme Court of Nigeria struck down subsection 396(7) of the Administration of Criminal Justice Act, 2015 (ACJA) because the provision indirectly altered some provisions of the Constitution of Nigeria.2 This subsection states:

> Notwithstanding the provision of other law to the contrary, a Judge of the High Court who has been elevated to the Court of Appeal shall have dispensation to continue to sit as a High Court Judge only for the purpose of concluding any part heard criminal matter pending before him at the time of his elevation and shall conclude the same within a reasonable time.
>
> Provided that this subsection shall not prevent him from assuming duty as a justice of the Court of Appeal.

The introduction of ACJA, no doubt, is a laudable innovation in our criminal justice system; its policy objective being to ensure an efficient management of the criminal justice institutions and to provide for speedy dispensation of criminal justice. But notwithstanding

[2] Constitution of the Federal Republic of Nigeria 1999, referred to throughout as "the Constitution".

the wonderful policy intent behind the enactment of ACJA, the introduction of subsection 396(7) raised serious constitutional issues in such areas as the supremacy of the constitution, the scope of judicial authority, the legislative competence of the federal legislature (the National Assembly) and the exercise of administrative powers within the court's hierarchy.

The judgment of the Supreme Court in the case of *Ude Jones Udeogu v FRN*[3] was so important to so many Nigerians because it was a high-profile criminal trial that involved a onetime governor of a State in Nigeria who, together with two other defendants, faced several criminal charges of money launderings. The outcome of the trial was so important to many who desired that the ex-governor was convicted for what they perceived to be a clear misappropriation of state funds. The decision of the Supreme Court was greeted with so much concern, mainly because it came at the time when the Federal High Court had already convicted the Defendants and sentenced them to prison to serve their various prison terms. Thus, the decision of the Supreme Court quashing their conviction raised a public outcry from the masses in what they termed a clear miscarriage of justice of letting someone who had stolen from his people to walk away freely.[4]

While the serious public uproar against the decision is understandable, the author is of the opinion that the decision of the Supreme Court is founded in law and laid down principles which are present in our case law. The Supreme Court, after considering subsection 396(7) of ACJA in line with some of the provisions of the Constitution, found that the subsection is inconsistent with the Nigerian Constitution and therefore struck it down and also quashed the conviction of the Defendants. Considering what many might have taken as a miscarriage of justice by the decision of the Supreme Court of Nigeria, the striking down of subsection 396(7) of ACJA re-echoes the importance of drafting laws that will be in harmony with the Constitution.

This article navigates through the constitutional doctrine of the supremacy of the Constitution which serves as a watch word for lawmakers and legislative counsel in the lawmaking process. It considers the case of *Ude Jones Udeogu* and the facts and circumstances leading to the striking down of subsection 396(7) of ACJA. The article goes on to consider the inconsistency of legislation in the aftermath of the striking down of subsection 396(7) of ACJA and in the light of the doctrine of constitutional supremacy, while also re-emphasizing the need for every provision in legislation to be constructed in a way that will conform to the provisions of the Constitution.

Law-making and the Doctrine of Constitutional Supremacy

The doctrine of constitutional supremacy, in relation to lawmaking, presupposes that every law made by the legislature must conform to the Constitution and must not be inconsistent

[3] *Udeogu v FRN* (2022) 3 NWLR (Pt. 1816) 41.

[4] However, the Supreme Court, while quashing the conviction, ordered a retrial which is currently going on at the time of writing this article.

with the Constitution. This doctrine is that aspect of constitutional law that recognizes and places emphasis on the supremacy of the Constitution. As a constitutional law principle, the Constitution is regarded as the *grundnorm*, the *fons et origo*; meaning that the Constitution is the source and origin of all laws enacted by any country which has set its Constitution to become supreme. For a country's Constitution to be supreme, there are basic features that it must contain. Such features include that the Constitution must be written, must be rigid and cannot be amended easily,[5] must declare itself as being supreme, must set out the inconsistency provision, must express that every arm of government, including the legislature, derives its power from the Constitution and is subject to it, must share government's power and set out its limitations, and must also establish the concept of judicial review by which every law, authority and action of the government must be tested for its constitutional validity. The Nigerian Supreme Court, while indicating the attributes of the supremacy of the Nigerian Constitution held, as expressed by Justice Ayoola in the case of *INEC v. Musa* as follows:

> I take as my starting point some interrelated propositions which flow from the acknowledged supremacy of the Constitution and by which the validity of the impugned provisions will be tested. First, all powers, legislative, executive and judicial must ultimately be traced to the Constitution. Secondly, the legislative powers of the legislature cannot be exercised inconsistently with the Constitution. Where it is so exercised it is invalid to the extent of such inconsistency. Thirdly, where the Constitution has enacted exhaustively in respect of any situation, conduct or subject, a body that claims to legislate in addition to what the Constitution had enacted must show that it has derived the legislative authority to do so from the Constitution. Fourthly, where the Constitution sets the condition for doing a thing, no legislation of the National Assembly or of a State House of Assembly can alter those Constitution in any way, directly or indirectly, unless, of course the Constitution itself as an attribute of its supremacy expressly so authorised.[6]

As explained earlier, the doctrine presupposes a written constitution that expresses the supremacy of the Constitution over all other laws which shall remain subject and subordinate to the Constitution. Unlike an unwritten Constitution, where the Parliament remains supreme and has no constitutional restriction, the doctrine sets some standards by which laws made by the lawmakers are tested for their validity. The Constitution by its provisions made it supreme above all laws, persons, authorities and government. Subsections 1(1) and 1(3) of the Constitution provides as follows:

(1) This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.

[5] Section 9 of the Nigerian Constitution sets out the stringent procedure by which the Constitution can be altered.

[6] (2003) LPELR-24927(SC) at 35-36

(3) If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

The above provisions which indicate the supremacy doctrines are in sharp distinction with the doctrine of parliamentary sovereignty or parliamentary supremacy typical of an unwritten Constitution. In a country that recognizes parliamentary supremacy, like in the United Kingdom, the lawmaking power of the Parliament is absolute in that the Parliament can make any law without any constitutional limitation. This is made possible because under such political and legal set up, there is no law which the Parliament cannot enact, change or alter; there is no distinction between constitutional law and ordinary laws; and there is no body that has the power to declare laws passed by the Parliament as illegal and unconstitutional.[7] This is not possible in any country where the constitution is fundamental, paramount and supreme above any other laws.

In Nigeria, the doctrine of constitutional supremacy presupposes that both the legislature - National Assembly and the State House of Assembly - must of necessity enact laws that will not be in conflict with the Constitution as such laws shall be declared by the court or tribunal as void. If such laws are made, then, bearing in mind the supremacy of the Constitution, such laws shall be void (to the extent of its inconsistency) as being in conflict with the Constitution and shall be declared as such whenever the court is called upon to do so. Such is the case of *Ude Jones Udeogu v FRN* where the constitutionality of subsection 396(7) of ACJA was tested for validity. The Supreme Court, after seeing the flaws in that subsection, wasted no time in striking down the provision as being inconsistent with the Constitution.

The Case of Ude Jones Udeogu

Facts

The Economic and Financial Crimes Commission (EFCC), an anti-corruption agency, on behalf of the Federal Republic of Nigeria (as the Prosecution), commenced criminal proceedings against Orji Uzor Kalu, Ude Jones Udeogu and Slok Nigeria Limited.

By a Further Amended Charge dated 16th May, 2016, the Defendants were arraigned at the Federal High Court sitting in Abuja, the Federal Capital Territory, where the Defendants' pleas were taken before Honourable Justice Anwuli Chikere. On the application of the Prosecution to the Chief Judge of the Federal High Court, the case was transferred to the Lagos State Division of the Federal High Court and assigned to Justice M. B. Idris. On 31st of October, 2016 the Defendants were arraigned before Justice M. B. Idris where the

[7] The above position is true as far as the classical UK position on parliamentary supremacy is concerned. Inroads into this supremacy were made by the UK joining the EU (which it has now left) and some inroads will continue so long as the UK remains a party to the European Convention on Human Rights 1950 and accepts the jurisdiction of the European Court on Human Rights.

Defendants both pleaded not guilty to all the charges against them. Trial thereafter commenced before Justice Idris and the Prosecution closed its case on the 11th of May, 2018. On the 28th of May, 2018, Ude Jones Udeogu (the Appellant before the Supreme Court), through his lawyers, entered a No Case Submission[8] which the Prosecution opposed.

On the 20th of June, 2018, Justice Idris was elevated to the Court of Appeal as a Justice of the Court of Appeal and he took his Oath of Office on the 22nd of June, 2018. On the 2nd of July, 2018, the President of the Court of Appeal, purporting to act under subsection 396(7) of ACJA, through a letter, issued a Fiat/Permission and purportedly granted a dispensation[9] to Idris J., now Justice of the Court of Appeal, to conclude the partly heard criminal matter still pending before the Federal High Court Lagos. The Fiat directed Idris, JCA to conclude the matter before the end of September 2018.Idris, JCA, acting under the Fiat, resumed his sitting in the criminal matter. Arguments on Ude Jones' No Case Submission were taken on 25th July, 2018 at the Federal High Court. In his Ruling delivered on the 31st of July, 2018, Idris, JCA dismissed Ude Jones' No Case Submission. Ude Jones, together with the other two Defendants, was thereafter called upon to enter upon his defence. Dissatisfied with the Ruling of Idris, JCA, the Ude Jones appealed the Ruling against his No Case Submission.

Court of Appeal

At the Court of Appeal, Ude Jones argued against the validity of subsection 396(7) of ACJA, which he submitted was inconsistent with the Constitution, and challenged the competence and jurisdiction of Idris, JCA to continue to sit and hear the criminal trial at the Federal High Court even when he had become a Justice of the Court of Appeal upon his elevation to the Court of Appeal. Ude Jones, through his lawyers cited judicial authorities involving facts which were the same as the fact in issue and which the Supreme Court had held as nullity situations where judges who once had presided over cases lacked the competence to continue with the case as a result of either elevation or creation of a new State.[10] The Prosecution (the EFCC) acting through its lawyers, submitted that the law had changed with the enactment of subsection 396(7) of ACJA, and a Justice of the Court of Appeal, despite his or her elevation, could continue with and conclude a criminal trial he or she had presided over prior to the elevation.

The Court of Appeal dismissed Ude Jones' Appeal. Justice Garba held as follows:

[8] A No Case Submission is a plea in the criminal justice system where upon the conclusion of the prosecution's case, a defendant applies to be acquitted on the basis that the evidence led by the prosecution is not enough to nail him or her with the crime so much so that there is no need for him to defend the allegation.

[9] By a thorough reading of section 396(7) of ACJA, the subsection did not actually provide that the President of the Court of Appeal or any person for that matter shall give the dispensation which from the provision ought to operate automatically.

[10] The two cases are *Ogbunyiya v Okudo* (1979) NSCC 77 and Our Line Ltd v SCC Nig. Ltd (2009) 17 NWLR (Pt. 1170) 382.

> Novel and even absurd as it may be, the provisions of Section 396(7) of the ACJA apparently vests the requisite power and authority to Hon. Justice M.B. Idris, JCA to sit and exercise the jurisdiction of the lower Court for the purpose of concluding the part heard criminal matters he had commenced but did not conclude as a Judge of the lower Court before his elevation to the Court of Appeal. The cases of *Ogbuniya v. Okudo* and *Our Line Limited v S.C.C. Nigeria* (*supra*), I agree with the learned counsel for the 1st respondent, were decided on the state of the law at the material time and in the absence of any statutory provisions such as Section 396(7) of ACJA, allowing, permitting or authorizing the affected Hon. Justice of the Court of Appeal and Supreme Court respectively, to go back to the Courts from which they were elevated, to conclude the matters they commenced, but could not conclude before election.[11]

Justice Garba went on further and concluded thus:

> The principle laid down and stated in the two cases that a Judge elevated or appointed to a higher Court would cease to be a Judge of the Court from which he was elevated and would therefore lack the requisite jurisdiction to sit in that Court in the absence of relevant and specific statutory provisions allowing, or authorising him to do so is still extant and applicable in appropriate cases. It is however not applicable in the appellant's case since the provision of Section 396(7) of the ACJA specifically permits and authorized the Hon. M. B. Idris to sit in the lower Court as a Judge of that Court for the purpose of concluding part heard criminal matters commenced but not concluded by him before his elevation to the Court of Appeal.[12]

Ude Jones, still dissatisfied, further appealed to the Supreme Court, which overturned the decision of the Court of Appeal.[13] While this Appeal was pending, the criminal trial continued as provided by ACJA. Before the Supreme Court could decide on the appeal against the Ruling, the criminal trial had been concluded and Idris, JCA delivered his judgment and convicted all the defendants whereupon they were imprisoned to serve their sentences. The Supreme Court, nevertheless, in a unanimous decision, struck down subsection 396(7) of ACJA as being unconstitutional and quashed the convictions of the defendants, while ordering for a new trial.

Supreme Court

The Supreme Court of Nigeria, while striking down the provision of subsection 396(7) of ACJA in its judgment delivered on the 8th of May, 2020, addressed so many issues relating to jurisdiction, the supremacy of the constitution, the scope of judicial authority, the

[11] Udeogu v FRN & Ors (2019) LPELR-47485(CA) at 34
[12] Ibid. at 35
[13] Above n. 3. It was an interlocutory appeal against the Ruling on No Case Submission.

legislative competence of the National Assembly and the exercise of administrative powers within the court's hierarchy.[14]

The Supreme Court noted that since section 494 of AJCA (the definition section) does not define "any other law to the contrary", subsection 396(7) sought to override any other written law or statute, including the Constitution, and as such it contradicted the Constitution.[15] The Supreme Court found that in view of the supremacy provision in section 1 of the Constitution, the National Assembly could not have intended to legislate a provision that would override the Constitution since the Constitution is the *grundnorm* from which the ACJA derived its legitimacy.

The Supreme Court also stated that the National Assembly, in enacting subsection 396(7) of ACJA, indirectly altered two other provisions of the Constitution: subsection 250(2) – appointment of judges of the Federal High Court[16] and section 253 – constitution of the Court.[17] By providing that a Justice of the Court of Appeal who had partly heard a criminal trial before his or her elevation is authorised to assume the duty of a Federal High Court Judge so as to conclude the trial, the National Assembly indirectly assumed the power of the President of the Federal Republic of Nigeria to appoint a Judge of the Federal High Court against the provision of subsection 250(2) of the Constitution.[18]

On the fiat/permission issued by the President of the Court of Appeal to Idris JCA to proceed to the Federal High Court to conclude the part-heard criminal matter, the Supreme Court held that subsection 396(7) of ACJA cannot be accommodated by section 252 of the Constitution which deals with the powers of the Federal High Court.[19] Subsection 252(2) of

[14] The Supreme Court relied on the cases of *Ogbunyiya v Okudo* (1979) NSCC 77 and *Our Line Ltd v SCC Nigeria Ltd* (2009) 17 NWLR Pt. 1170 Pg. 383 in arriving at its decision. In *Ogbunyiya v Okudo*, Nnaemeka-Agu, J. was on the 15th of June,1977 appointed a Judge of the Federal Court of Appeal. On the 17th of June, 1977 (2 days after his appointment), he gave Judgment on a matter he had already heard and reserved for judgment. In *Our Line Ltd v SCC Nigeria Ltd*, the then Chief Judge of Anambra State, Iguh CJ, after his appointment as a Justice of the Supreme Court, continued to preside as a Judge of Anambra State High Court. In both instances, the Supreme Court held that upon appointment or elevation to a higher court, a judge ceases to be a judge of the court from which he was elevated, and therefore lacked jurisdiction to continue sitting as a judge of that previous court.

[15] The Court considered the definitions section of ACJA and found out that "any other law" was not defined in the Act. Even if it the term has been defined to exclude the Constitution, the define would not have avoided the inconsistency in subsection 396(7).

[16] This subsection provides that the appointment of a person to the office of a Judge of the Federal High Court shall be made by the President on the recommendation of the National Judicial Council. The President here is the Executive President of Nigeria.

[17] Section 253 of the Constitution provides that the Federal High Court shall be duly constituted if it consists of at least one Judge of **that Court**. (emphasis added)

[18] The Supreme Court further held that by virtue of 253 of the Constitution, the Federal High Court is not duly constituted by Judge(s) who had ceased to be judge(s) of that Court by virtue of the elevation to the Court of Appeal.

[19] Section 252 of the Constitution provides as follows:

the Constitution cannot be envisaged as having permitted the National Assembly to alter the Constitution all in the name of exercising additional powers to enable the Federal High Court exercise its jurisdiction more effectively. It is not intended to confer power on the National Assembly to make law that will alter the Constitution. Since section 253 of the Constitution provided that the Federal High Court shall be constituted by at least a judge of that court, giving a Court of Appeal Justice dispensation to sit as a Judge of the Federal High Court after his or her elevation amounts to altering the Constitution by mere legislation. Such alteration should be done by constitutional amendment following the rigid procedure as set out in section 9 of the Constitution. As such, it becomes unreasonable to construe subsection 252(2) of the Constitution as having empowered the National Assembly to legislate subsection 396(7) of ACJA.

The Court further held that by the provisions of section 251 of the Constitution (which itemizes the areas upon which the Federal High Court can exercise jurisdiction) the Federal High Court is only a court of first instance without appellate powers or jurisdiction, and therefore the Court of Appeal (in reference to the Justices of the Court of Appeal), not being a court of first instance that is vested with jurisdiction to hear and determine criminal causes or matters, lacks jurisdiction to dabble into criminal trial.

The Supreme Court also held that even if the issuing of a fiat is permissible under subsection 396(7) of ACJA,[20] it is only the Chief Judge of the Federal High Court that has the powers to issue such fiat, and that the President of the Court of Appeal cannot usurp such administrative function of the Chief Judge of the Federal High Court. The Court pointed out that since subsections 19(3) and (4) of the *Federal High Court Act* clearly consign the Chief Judge of the Federal High Court the prerogative of assigning any judicial function to any Judge of that Court in respect of a particular cause or matter, the President of the Court of Appeal is not empowered to share that statutory function with the Chief Judge of the Federal High Court.[21] The Supreme Court continued in its judgment to hold that the President of the

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> 252 (1) For the purpose of exercising any jurisdiction conferred upon it by this Constitution or as may be conferred by an Act of the National Assembly, the Federal High Court shall have all the powers of the High Court of a State.
>
> (2) Notwithstanding subsection (1) of this section, the National Assembly may by law make provisions conferring upon the Federal High Court powers additional to those conferred by this section as may appear necessary or desirable for enabling the Court more effectively to exercise its jurisdiction.

[20] It is obvious that from a cursory look at subsection 396(7) of ACJA, the issuance of fiat is not permissible under that subsection. The dispensation given in that provision is to have effect by operation of law. But because such fiat was nevertheless given by the President of the Court of Appeal, the Supreme Court was of the view that even if a fiat should be given, the President of the Court of Appeal cannot assume the administrative role of the Chief Judge of the Federal High Court to order the performance of a judicial function in the Federal High Court.

[21] The Supreme Court also held that by virtue of section 1(2)(a) of the Federal High Court Act, the sole statutory authority and the overall control and supervision of the administration of the Federal High Court

Court of Appeal is not recognized by the ACJA or the *Federal High Court Act* as the appropriate authority to exercise any powers pursuant to either Act. Accordingly, the President of the Court of Appeal, when he issued a fiat to Idris, JCA acted *ultra vires* (even assuming the issuance of fiat was permitted under subsection 396(7)); and the President of the Court of Appeal lacked the competence to control and supervise the administration of the Federal High Court as envisaged by subsections 1(2)(a) and 19(3) and (4) of the *Federal High Court Act*.[22]

Coming to the Court of Appeal holding that the principle laid down in the cases of *Ogbunyiya v Okudo* and *Our Line Ltd v SCC Nig. Ltd*[23] was not applicable to the case, the Supreme Court noted that subsection 396(7) of ACJA was an unnecessarily gratuitous legislative interference with, and an outright usurpation of, the appointing powers of the executive arm of the government consigned specifically to the President of the Federal Republic of Nigeria by subsections 250(1) and 238(2) of the Constitution.[24] The Supreme Court therefore struck down subsection 396(7), set aside the conviction of Ude Jones and remitted the case to the Chief Judge of Federal High Court for re-assignment to another judge of the Federal High Court for a retrial.

Test of Inconsistency and Constitutional Validity of Legislation

In any country where the Constitution is supreme, it is looked upon for validation and justification of legislation. Constitutional validity of legislation is presumed as every law is expected to intrinsically have the support of the Constitution for its validity. Although there is always the presumption of validity of legislation, the presumption is rebuttable, meaning that it is overturned when any person who challenges the constitutionality of a law demonstrates the inconsistency of the law. The Constitution is therefore the standard of measurement for the validity of legislation.

In their article,[25] Keyes and Diamond explained that there are two presumptions related to the interaction of constitutional and legislative texts and which are often intertwined under the doctrine of presumption of validity in both constitutional and administrative law. In

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are vested in the Chief Judge of the Federal High Court and that the President of Court of Appeal does not share in that function.

[22] The Apex Court further stated that an exercise of any statutory power either outside the limits prescribed or by the person or authority not designated to exercise the power will certainly be ultra vires, null and void.

[23] The principles in the case of *Ogbunyiya v Okudo* and Our Line Ltd v SCC Nig. Ltd. is that a judge who is elevated to a higher court cannot conclude a case already part heard in the lower court.

[24] Section 238(2) is the provision for the appointment of Court of Appeal Justices by the President.

[25] John Mark Keyes and Carol Diamond, *"Constitutional Inconsistency in Legislation – Interpretation and the Ambiguous Role of Ambiguity"*, Ottawa Law Review, Vol 48 No. 2, 2017 CanLIIDocs 83, 315-355 p 321 where they also referred to the work of Ruth Sullivan, *"Sullivan on the Construction of Statutes",* 6th ed (Markham: Lexis Nexis, 2014) <https://www.canlii.org/en/commentary/doc/2017CanLIIDocs83> accessed 20 April 2022.

explaining this presumption, Keyes and Diamond also brought another presumption (presumption of compliance) and stated as follows:

> The first presumption, which Ruth Sullivan considers properly labelled as the *presumption of validity*, provides that those who contest the validity of legislation have the burden of demonstrating its invalidity. In terms of constitutional law, this means inconsistency with the Constitution, which explains why the presumption is sometimes labelled as the presumption of constitutionality. The second presumption, which Sullivan labels the *presumption of compliance*, is interpretive. It provides that, if the text of the legislation is capable of bearing a meaning that is constitutionally valid, then the courts will give it that meaning. This presumption can result in 'reading down' a legislative text to fit its constitutional limits.

The above aligns with section 1(3) of the Nigerian Constitution, which states that where any law is inconsistent with the provisions of the Constitution, such law shall be void to the extent of its inconsistency. Here comes the inconsistency rule for constitutional validity of legislation. Thus, where an entire legislation cannot be accommodated by the Constitution, the legislation is bound to be declared void and invalid; and if it is any part of the legislation cannot be accommodated, that part is liable to be struck down.

Subsection 396(7) of ACJA is a typical illustration of a law in conflict with the Constitution and it is instructive to consider the drafting flaws of the subsection in light of the supremacy of the Constitution and the inconsistency doctrine under the constitutional law.

Subsection 396(7) of ACJA provided as follows:

> Notwithstanding the provision of other law to the contrary, a Judge of the High Court who has been elevated to the Court of Appeal shall have dispensation to continue to sit as a High Court Judge only for the purpose of concluding any part heard criminal matter pending before him at the time of his elevation and shall conclude the same within a reasonable time.
>
> Provided that this subsection shall not prevent him from assuming duty as a justice of the Court of Appeal.

First is the introduction of the subsection by the use of a linking word 'notwithstanding'. Whenever 'notwithstanding any provision of this Act' is used in a statute, it suggests a clear statement of a legislative intent for the provision to supersede all other provisions in the Act. The court has interpreted the phrase as meaning to limit any other provision of the same Act or subordinate legislation made under it so as not to undermine the provision.[26] By introducing subsection 396(7) of ACJA with the phrase 'notwithstanding the provision of other law to the contrary', the National Assembly arguably intended to refer only to its own laws and not the Constitution. Sadly, the Court's construction of the phrase indicated

[26] See the case of *Saraki v FRN* (2016) 3 NWLR Pt. 1500 Pg. 531

otherwise and this was made worse without the definition of 'any other law' in the definition section of ACJA. Nevertheless, it is worthy of note that even if the Constitution was excluded by the introductory phrase, the content of the provision will be seen to be inconsistent with the Constitution.

The Supreme Court of Nigeria, in *Ude Jones Udeogu*, observed this flaw when it held as follows:

> The AJCA, 2015 in its 495 Sections, does not define 'law', or 'any other law', or the 'any other law to the contrary' that its provision in Section 396(7) purports to override. It appears 'any other law to the contrary' includes any other written law or statute, including the 1999 Constitution, as amended that contradicts Section 396(7) of the ACJA. The National Assembly, in view of the supremacy provision of the Constitution, in Section 1 thereof, could not have intended that audacious insubordination to the Constitution, or state of absurd fool hardiness of legislating into Section 396(7) of the ACJA, 2015 that the provision would also override any provision of the Constitution to the contrary of Section 396(7) ACJA. The Constitution is the *grundnorm* from which the ACJA, 2015 derived its legitimacy.[27]

The courts in Nigeria have been consistent in ensuring that laws made are consistent with the Constitution and have always tested the validity of any law that has been challenged by a party by reference to the Constitution. Two other cases that were decided contemporaneously with *Ude Jones Udeogu* need special mention here.

Immediately after the Supreme Court delivered the judgment on the case of *Ude Jones Udeogu*, the Court of Appeal again was called upon to consider the constitutionality of the *Taxes and Levies (Approved List for Collection) Act, 2004*.[28] In this case, the Appellant, Uyo Local Government, sought a determination as to whether the entire provision of the *Taxes and Levies (Approved List for Collection) Act, 2004* is *ultra vires* the Constitution and therefore null and void by reason of the ouster clause as contained in subsection 1(1) of the Act which provided as follows:

> Notwithstanding anything contained in the Constitution of the Federal Republic of Nigeria 1979, as amended, or in any other enactment or law, the Federal Government, State Government and Local Government shall be responsible for collecting the taxes and levies listed in Part I, Part II and Part III of the Schedule to this Act, respectively.

The Court of Appeal in its judgment delivered on the 22nd of May, 2020, observed that even though the Appellant was not contesting the overriding effect of subsection 1(1) of the *Taxes and Levies (Approved List for Collection) Act* on the entire legislation, this provision is an

[27] Above n. 3 at 62-63.

[28] See the case of *Uyo Local Government v Akwa Ibom State Government & Anor*, Appeal (2020) LPELR-49691 (CA).

ouster clause to the Constitution and therefore a nullity by reason of subsection 1(3) of the Constitution. While nullifying the entire legislation, the Court of Appeal held as follows:

> The supremacy of the Constitution is never in doubt and Section 1(3) above is to the effect that if any other law is inconsistent with the provisions of the Constitution, the Constitution shall prevail and that other law shall to the extent of its inconsistency be void. I am also of the view that having commenced its provisions with a clause that undermines the supremacy of the Constitution, there is nothing that can operate to save any part of that law. Thus, the virus in the introductory clause of the Act has infested the entire Act and thereby rendering it unconstitutional.[29]

Prior to the delivery of the above judgment, the Federal High Court sitting in Lagos had earlier on the 8th of May, 2020 declared the *Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015* as null and void in *Registered Trustees of Hotel Owners and Managers Association of Lagos v. Attorney-General of the Federation & Anor*.[30] This decision was reached following the consideration of section 1(2) of the *Taxes and Levies (Approved List for Collection) Act, 2004*, which provided that:

> The Minister of Finance may, on the advice of the Joint Tax Board and by Order published in the Gazette, amend the Schedule to this Act.[31]

The Court, in reaching its decision noted that the powers of the Minister of Finance under the *Taxes and Levies (Approved List for Collection) Act* to amend the Schedule to the Act is a violation of the powers of the National Assembly to make laws and is therefore unconstitutional, as such power to legislate resides with the National Assembly and cannot be shared with any other body.[32] The Court made it clear that a schedule to an enactment is part of the enactment and has the same legal effect as the enactment itself. Thus, an amendment of the schedule to the *Taxes and Levies Act* is an amendment of the relevant Act itself and the power to do so cannot be delegated by the National Assembly to any other person as doing so offends the Constitution.

The cases of Ude Jones Udeogu, Uyo Local Government v Akwa Ibom State Government & Anor and the *Registered Trustees of Hotel Owners and Managers Association of Lagos v.*

[29] Ibid. at 34.

[30] Suit No. FHC/L/CS/360/18 (unreported).

[31] But with the nullification of the *Taxes and Levies (Approved List for Collection) Act* in the case of *Uyo Local Government v Akwa Ibom State Government & Anor*, which was the enabling law to the *Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015*, the Order itself stood nullified as well.

[32] It has to be clarified that the Nigerian Constitution permits the making of subsidiary legislation (delegated legislation) by both the executive and the judiciary, but such subsidiary legislation must be authorized by a primary legislation enacted by the legislature. In this instance, section 1(2) of the *Taxes and Levies (Approved List for Collection) Act, 2004* imports the amendment of primary legislation (an Act) by the Minister of Finance who is a member of the Executive arm. Such amendment can only be made by the legislature that enacted the law and which has the competence to make such law under the Constitution.

Attorney-General of the Federation & Anor are good illustrations of the inconsistency doctrine and the constitutional validity of legislation. Again, those cases have shown the necessity for the legislature to consider the Constitution and the principles of constitutional law in its lawmaking process so that any law to be enacted must not just be within its legislative competence, but also a law that will be consistent with the letters and spirit of the Constitution.

The import of the supremacy of the Constitution is that no legislation or any of its provisions can be permitted to stand in the face of an inconsistency with the Constitution. By providing in subsection 396(7) of ACJA that a Justice of the Court of Appeal can sit as a Judge of the Federal High Court to conclude a criminal trial that was partly heard by the Judge before elevation to the Court of Appeal, the National Assembly attempted to override the judicature structure of the Constitution by allowing a judicial officer to sit simultaneously as both a judge of the Federal High Court and a justice of the Court of Appeal. It is true that a judge, while exercising his or her judicial function as a judge of a particular court, may be appointed to be a member of an administrative body or tribunal,[33] but this does not mean that in the hierarchy of courts, a judge, while being appointed, can sit as a judge of more than one court at the same time.[34] While all legislation is presumed to be valid, any legislation or any part thereof which has been assailed for inconsistency must be scrutinized by reference to the Constitution to confirm that it is in accord with the Constitution.

It is to be noted that the introduction of a subsequent Constitution or the alteration or amendment of the Constitution may cause previously valid legislation to fail the validity test of legislation and be rendered inconsistent. This is the major standout of the doctrine of the supremacy of the Constitution for countries under a constitutional democracy since it is the Constitution that is the source and origin of validity of legislation, and it is only the Constitution that can challenge itself and by reference to which it can be tested for validity.

Basic Constitutional Doctrinal Considerations during Drafting

Much as the case of *Ude Jones Udeogu* exposed the inconsistency of subsection 396(7) of ACJA, it is important that all the constitutional doctrines are very well considered during the legislative drafting stage to ensure that all the provisions of a draft bill are consistent with the provisions of the Constitution. It is of paramount importance that legislative counsel carefully studies instructions in relation to the Constitution.[35] From the issues addressed by the Supreme Court, there is a serious need for every legislative counsel to be well grounded

[33] See section 285 of the Constitution.

[34] Provisions of the Constitution creating the various courts specify that they consist only of judges of those courts, which excludes judges or justices of other courts (see, for example, subsection 230(2)). So when subsection 396(7) of ACJA provided that a Federal High Court (FHC) judge who is elevated to the Court of Appeal as a justice can have dispensation to sit as a judge of the FHC so as to conclude a criminal trial he or she was hearing, the provision indirectly altered the judicature as provided in the Constitution.

[35] DT Adem, *Legislative Drafting Manual*, (Lexis Nexis, 2014) at 26.

with the basic principles of constitutional law as every law enacted is subjected to the constitutional test for its validity.

It is very important that the legislative counsel understand they are key players in the lawmaking process. In this sense, they should know that while it is the duty of the government to formulate policies that address issues of public concern, some policy objectives cannot be achieved without proper legislation. Such policies are therefore translated into legislative texts in the form of bills that will subsequently be passed into law by the lawmakers. Legislative counsel do themselves and those who instruct them injustice if they do not recognise the value their expertise and experience are to the policy makers, particularly the value of their analytical skills and knowledge of the broad legal framework into which a proposed legislation must be shaped.[36] The legislative counsel's analysis of any legislative proposals presented to him or her and the legal implications and consequences are very crucial.

The lesson to be learnt from the case of *Ude Jones Udeogu* is that even though the mischief that subsection 396(7) of ACJA intended to cure is to avoid prolonging criminal trials, the drafters of the Act failed to take appropriate account of the Constitution. Had they or the National Assembly considered the relevant provisions of the Constitution and the case law on that subject, it would have found a way to enact subsection 396(7) of ACJA to achieve the same policy objectives without doing violence to the Constitution. Since that subsection was intended to avoid the long delays in criminal trials as a result of the elevation of a judge that has partly heard a criminal matter, there can be a provision empowering a judge of the same court to take over and conclude such partly heard criminal matter.[37] With this provision, the same policy objective will be achieved without offending the Constitution which will also extend to situations where long delays are caused by, not only the elevation of a judge, but the death, resignation, removal, retirement, or transfer of a judge, as well as when criminal cases are transferred to another judge of the same court. This type of provision will rather be at peace with section 36(4) of the Nigerian Constitution which guarantees a criminal trial within a reasonable time.

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[36] G. C. Thornton, *Legislative Drafting, 4th ed,* (Butterworths, 1996) at 125.

[37] This argument is supported by the fact that since each court (despite the judges that make it up) is considered as one court, the taking over of the same criminal trial by another judge of the same court ought to be deemed as a continuation of the trial by the same court. This sentiment was shared by Uwadineke C. Kalu and Odinakachukwu E. Okeke in their article: 'Trial De Novo and its Impact on the Constitutional Safeguard of Trial Within a Reasonable Time in Nigeria" (2020), available at https://www.nigerianjournalsonline.com/index.php/IRLJ/article/download/854/839 accessed on 30 April, 2022. The authors analysed the impact of trial *de novo* (trial afresh) on the constitutional right of fair criminal trial within a reasonable time as provided in subsection 36(4) of the Constitution. They posited that the starting afresh of a criminal trial as a result of the death, transfer, resignation, elevation, removal or retirement of a judge presiding over a criminal trial, or as a result of the transfer of the case to another judge, despite the stage of the trial jeopardizes the constitutional safeguard to trial within a reasonable time.

In a country where the Constitution is supreme, the first priority must be to establish how it influences the drafting practices and choices and also to understand the ways in which the Constitution can set limits within which legislative texts are constructed. One thing the decision in *Ude Jones Udeogu* illustrated was how legislative counsel should deal with instructions that appear to be inconsistent with the Constitution and constitutional doctrines that are of paramount consideration in the drafting process. These constitutional law doctrines include the supremacy of the Constitution, restrictions to constitutional amendments, separation of powers, judicial review, legislative competence and its limitation, delegation of powers and fundamental rights provisions.

Under the Nigerian Constitution, it is common knowledge, at least to lawyers, that any law that is inconsistent with the Constitution is void to the extent of its inconsistency. The implication of this constitutional provision under out adversarial legal system is that any legislation that is drafted and passed into law which offends the letter of the Constitution will definitely be open to legal challenge. A legislative counsel therefore has the professional responsibility to reduce the possibility of exposing legislation to such challenge by ensuring that it fits generally with the overall constitutional framework; it does not matter if the defect stems from the drafting instructions. By the doctrine of constitutional supremacy, the Constitution can only permit the enactment of laws that supplement its provisions and not those that will conflict with its provisions. Some of the constitutional law principles arising from the decision in *Ude Jones Udeogu* which should be of concern to a legislative counsel are described next.

The supremacy of the Constitution

Firstly, subsection 396(7) of ACJA failed to take adequate consideration of its effect on the supremacy of the Constitution, the hierarchy of courts and the constitutional separation of judicial functions. By the use of the phrase "Notwithstanding the provision of other law to the contrary," which was expressed without qualification, the drafters placed subsection 396(7) of ACJA higher and above every law, including the Constitution. Secondly, under Chapter VII of the Constitution (which is the chapter on the Judicature), by the combined effect of subsections 230(1), 237(2), 249(2), 254(A)(2) and 270(2) of the Constitution,[38] each court consists only of the justices or judges of that court. Thus, by providing that a judge who has been elevated to the Court of Appeal to return to the High Court to sit as a judge of that court, while at the same time permitted to assume duty as a justice of the Court of Appeal, the drafters placed the Constitution in an inferior position. This is in a sharp contrast to the principle of constitutional supremacy.[39]

[38] The above provisions are on the superior courts of record in Nigeria, which are the Supreme Court, the Court of Appeal, the Federal High Court, the National Industrial Court, and the State High Courts.

[39] Subsection 396(7) of ACJA is directly in conflict with sections 1(3) and 253 of the Constitution and these provisions are easily foreseeable red flags to the consistency of section 396(7) of ACJA.

It is the responsibility of legislative counsel to ensure that proposals presented to be drafted in the form of bills for onward legislative process are in accord with the provisions of the Constitution. Their responsibility extends to giving effect to all constitutional provisions that relate to the area of legislative drafting. Since any provision that runs contrary to the Constitution will be caught up by the inconsistency rule, it is the duty of legislative counsel to seek compliance with the Constitution. This is not to say that the drafters of ACJA might not have drawn subsection 396(7) of ACJA to the attention of the lawmakers which would be the much they could do within their professional duty.

Restrictions on constitutional amendments

As a follow up to the violation of the doctrine of supremacy of the Constitution, subsection 396(7) of ACJA in effect actually altered subsections 237(2), 249(2), and section 253 of the Constitution, which place limitations on the exercise of judicial functions.[40] By the above provisions and other relevant provisions in the Judicature, the Constitution is expressly averse to the exercise of dual or multiple judicial functions. If there can be a simultaneous exercise of judicial function, such must be effected by the National Assembly taking the necessary constitutional steps to alter the relevant provisions in the Constitution,[41] and not by an ordinary Act. It is therefore the responsibility of legislative counsel to see beyond the draft instructions to understand that a proposed legislation will have the effect of impliedly attempting to alter the provision of the Constitution.

Separation of powers

Every legislative counsel has a duty to understand the principle of separation of powers[42] so that they do not attribute a constitutional function to an arm of the government for which the Constitution does not so permit. The Supreme Court, while considering the legal effects of subsection 396(7) of ACJA in the case of *Ude Jones Udeogu*, held that by that provision, the National Assembly indirectly assumed the power of the President of the Federal Republic of Nigeria to appoint a Judge of the Federal High Court. This is in clear breach of the separation of powers under the Constitution. It is elementary that legislative power of the Federal Government resides in the National Assembly, and executive powers in the President as exercised either directly by him or through the Vice-President, the Ministers of

[40] Subsection 237(2) of the Constitution provides, inter alia, that that the Court of Appeal shall consist of a President and such number of Justices as, not less than 49 of which not less than 3 (each) shall be learned in Islamic personal and customary law, as may be prescribed by an Act of the National Assembly. Section 249(2) provides that the Federal High Court shall consist of a Chief Judge and such number of Judges as may be prescribed by an Act of the National Assembly. Section 253 provides that the Federal High Court shall be duly constituted if it consists of at least one Judge of that Court.

[41] Section 9 of the Constitution provided the mode of altering the provisions of the Constitution

[42] This is provided in sections 4, 5 and 6 of the Constitution

the Federation or officers in the public service of the Federation.[43] Finally, the judicial power vests in the courts as provided for in the Constitution.[44] It goes without saying that a legislative counsel has the onerous duty to understand these power distributions among the organs of government under the presidential system of government and the areas of overlap of the said powers.[45] Legislative counsel in their legislative drafting function must not allow the legislature to assign a function on any organ of government against the functions expressly and by implication assigned by the Constitution.

Legislative competence and its limitation

One of the consequences of federalism is the existence of dual legislatures. In Nigeria the legislature comprises the National Assembly and the State Houses of Assembly. In bringing the principles of federalism into the Nigerian political set up, the drafters of the Constitution defined the areas of legislative competence between the federal and state legislatures. Thus, the Constitution places mutual restrictions on the legislatures in the exercise of their legislative powers. By section 4 of the Constitution, the National Assembly is empowered to make laws on any matter included in the Exclusive and Concurrent Legislative Lists as set out in Part I and II of the Second Schedule to the Constitution. Under the same provisions, the House of Assembly of a State is empowered to make laws with the National Assembly on the items included in the Concurrent List and on any other subject not included in the Exclusive and Concurrent Legislative Lists.

Although this point did not arise in the case of *Ude Jones Udeogu,* it is also important, as an interim consideration before embarking on legislative drafting, that the legislative counsel considers the legislative competence of the particular lawmaking authority that intends to enact a proposed bill into law. If the National Assembly, for instance enacts a law that is on a subject not listed in the Exclusive or Concurrent Lists, such law shall be declared void for being *ultra vires* its power. This is the case in *Shugaba Darman v Minister of Internal Affairs*[46] where the then Federal Legislature established a Tribunal of Inquiry which tried the Applicant. It was held that since the Tribunal of Inquiry was not among the items listed in the Exclusive Legislative List of the 1979 Constitution, the Tribunal Decree of 1966, by which the Tribunal of Inquiry was established was not within the legislative competence of the Federal Legislature. The Court therefore declared unconstitutional and ultra vires the Tribunal established to determine the nationality of the Applicant.

In the same vein, the House of Assembly of a State is empowered to legislate on the items listed on the Concurrent Legislative List and on any other item not listed in the Exclusive

[43] See section 5(1) of the Constitution.

[44] See section 6(1) of the Constitution.

[45] One of the exceptions to the doctrine of separation of powers is that there is no absolute separation of powers as the said powers are not placed in a watertight compartment.

[46] (1981) 2 NCLR 459.

and Concurrent Lists which is commonly referred to as the residual items.[47] If any law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall, to the extent of the inconsistency be void.[48] This inconsistency rule as expressed in subsection 4(5) of the Constitution needs further elucidation.

Under the doctrine of covering the field,[49] if a State House of Assembly enacts a law which has been covered by an Act of the National Assembly, such law by the House of Assembly, as long as it is not inconsistent with the Act of the National Assembly, will only be kept in abeyance and becomes inoperative for such period within which the Act of the National Assembly is operational.[50] It is only when such law of the State House of Assembly is inconsistent with that of the Act of the National Assembly on the same subject in the Concurrent Legislative List that such law becomes void to the extent of its inconsistency.[51]

In *Attorney General of the Federation v Attorney General of Lagos State*, Mukhtar, JSC succinctly expressed the position of the law thus:

> In his exposition of the doctrine of covering the field Dixon J. in the case of *O'Sullivan v. Noarlunga Meat Ltd*, 1957 A.C.I. posited thus:
>
> > The 'inconsistency' does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of paramount legislature to express by its enactment, completely exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter.[52]

[47] See section 4(7) of the Constitution.

[48] Section 4(5) of the Constitution.

[49] See the case of Independent *National Electoral Commission (INEC) v Alhaji Abdulkadir Balarabe Musa* (2003) 3 NWLR (PART 806) 72, where Niki Tobi, JSC held as follows:

> "The doctrine of covering the field can arise in two distinct situations. First where in the purported exercise of the legislative powers of the National Assembly or a State House of Assembly a law is enacted which the Constitution has already made provisions covering the subject matter of the Federal Act or the State Law. Second where a State House of Assembly by the purported exercise of its legislative powers enacted a law which an Act of the National Assembly has already made provisions covering the subject matter of the State law. In both situations the doctrine of covering the field will apply because of the "Federal might" which relevantly are the Constitution and the Act. That doctrine would apply where both the Federal and State legislatures can legislate as in matters under the Concurrent Legislative List."

[50] *AG Lagos State v Eko Hotels Ltd* (2018) 7 NWLR Pt. 1619 Pg. 518

[51] It is common in Nigeria that many Acts of the National Assembly are duplicated by the States Houses of Assembly. One common example is the laws on the Administration of Criminal Justice which has been enacted by many States.

[52] [2013] 16 NWLR (Part 1380) 249

There may be inconsistency between the conducts and subject matters in all the laws i.e. the Federal Law (the *Nigerian Tourism Development Corporation Act*) and the Lagos State Laws on licencing, regulation, registration, classification of hotels etc. But then even if it is consistent, the heavy weather made that the case was predicated on the conduct or subject matter that came under the Exclusive list not Concurrent list is of no moment. In the case of *Attorney-General of Ogun State v. Attorney General of the Federation*, in which the question of inconsistency or otherwise was explored thus

> Where the doctrine of covering the field applies it is not necessary that there should be inconsistency between an Act of the National Assembly and a law passed by a House of Assembly. The fact that the National Assembly has enacted a law on the subject matter is enough for such law to prevail over the law passed by the State House of Assembly but where there is inconsistency, the State Law is void to the extent of the inconsistency.[53]

A legislative counsel therefore has the responsibility of keeping abreast with the different listed items in the Legislative Lists so as to identify which legislative body has the competence to legislate on any particular subject matter. Similarly, whenever a State proposal is brought for drafting, it is the duty of legislative counsel to check if such area of legislation has been covered by an Act of the National Assembly so that no energy or time will be lost or wasted in the making of a law which will be rendered inoperative under the doctrine of covering the field.

Judicial review and the rule of law

The doctrine of judicial review is a fundamental doctrine in any country that practices constitutional democracy. A legislative counsel must understand the principle of the rule of law and the power of the court to pronounce any law that is inconsistent with the Constitution as void. The concepts of the rule of law and judicial review played out in the case of *Ude Jones Udeogu* where the Supreme Court wasted no time in striking down the offending subsection 396(7) of ACJA for being in conflict with the Constitution. It is therefore important that legislative counsel instructed to prepare a bill bear in mind that such a bill when passed into law must conform to the letters and spirit of the Constitution, failing which it stands the chance of being declared unconstitutional. In *Marbury v Madison*, Justice Marshall expressed this important aspect of the Constitution and constitutional law when in his opinion in that case, he stated as follows:

> It is emphatically the province and duty of the Judicial Department [the judicial branch] to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law [e.g., a statute or treaty] be in

[53] (1982) 3 NCLR 166.

> opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.[54]

Delegation of powers

An issue which came up in the case of *Ude Jones Udeogu*, but which does not arise specifically from the provision of subsection 396(7) of ACJA is on the exercise of the administrative power of the Chief Judge of the Federal High Court by the President of the Court of Appeal. It must be stated that from a careful reading of subsection 396(7) of ACJA, the issuance of fiat/dispensation by the President of the Court of Appeal did not arise. The dispensation given to a Judge who was elevated to the Court of Appeal to sit as a Judge of the Federal High Court so as to conclude a partly heard criminal trial was to operate as a consequence of the elevation to the Court of Appeal and not by way of issuance of a fiat/ dispensation by any person. Having said that, the Supreme Court, while considering the fiat/dispensation given to Idris JCA, stated that the President of the Court of Appeal acted *ultra vires* when he issued the fiat as he lacked the competence to control and supervise the administration of the Federal High Court as envisaged by subsections 1(2)(a) and 19(3) and (4) of the *Federal High Court Act*. The administration and management of each court is conferred on the judicial head of the court.

Provisions delegating powers whether to make subsidiary law or to perform statutory function need to be drafted in a way that such powers so delegated are not *ultra vires* the delegated powers. It is therefore important that a legislative counsel who is instructed to draft legislation where some legislative or executive powers are to be delegated to other body or person should consider the following:

> Is there a delegation of power in the first place from the instruction?
>
> Is the power to be delegated by legislation delegable?
>
> Is the delegation intended to the appropriate officer or authority?
>
> Will the sub-delegation be by express or implied provision?
>
> Is the person giving the instruction authorized to make the instruction under the law or an enabling law?
>
> If not, has the proper authority consented to the making of the legislation?

[54] 5 US (1 Cranch) 137 (1803).

The consideration of these factors is crucial because, if powers are delegated to a person or authority that does not have the constitutional mandate to exercise the powers, any act or action taken by the person or authority will amount to a nullity. A case that readily comes to mind is *Registered Trustees of Hotel Owners and Managers Association of Lagos v. Attorney-General of the Federation & Anor*[55] where the Minister of Finance, acting under subsection 1(2) of the *Taxes and Levies (Approved List for Collection) Act, 2004* attempted to amend the schedule to that Act by the *Taxes and Levies (Approved List for Collection) Act (Amendment) Order, 2015*. The court declared the purported amendment void since the Minister, not being the National Assembly, lacked the legislative power to amend an Act of the National Assembly. A responsibility is therefore placed on a legislative counsel to ensure that while drafting legislation, powers are delegated to the appropriate persons and authorities.

Fundamental rights provisions

Finally, as part of the legislative counsel's responsibility, it is required that legislative counsel keep abreast with the provisions of the Constitution on the fundamental human rights. Usually, part of the Constitution which is mostly violated in the making of legislation is the fundamental human rights provisions. This might not be part of the issue that arose in the case of *Ude Jones Udeogu*, but it is also a part that bothers on the doctrine of constitutional supremacy. The Constitution, Chapter IV provided for the fundamental rights of the citizens. It is the duty of a legislative counsel that proposals made for legislation do not infringe on the constitutionally guaranteed rights of the citizens, be it right to life, to dignity of human person, to personal liberty, to fair hearing, freedom of movement, etc. it is expected that where any instructions or proposals seem to violate such rights as constitutionally guaranteed, the legislative counsel shall advise the instructors accordingly.

These constitutional law subjects considered in this paper are not exhaustive but are the major areas of the Constitution with which legislative counsel must be acquainted. If they do not take cognizance of the workings of the Constitution and the principles of constitutional law, they may fall into the same mistake as seen in subsection 396(7) of ACJA, which may at the end result to unbearable consequences. There is every need that legislative counsel be trained in constitutional law since the Constitution is the starting point of all legislation.

Conclusion

Ude Jones Udeogu v the FRN no doubt exposed the drafting flaws that overburden most of our legislation. The case brings the role of a legislative counsel to bear as it relates to giving legal opinions on legislative proposals and on drafting legislation. While *Ude Jones Udeogu* was met with significant public disapproval when the Supreme Court ordered the release of the Defendants (who many believed deserved to serve prison sentences) from prison, the

[55] Above n. 30

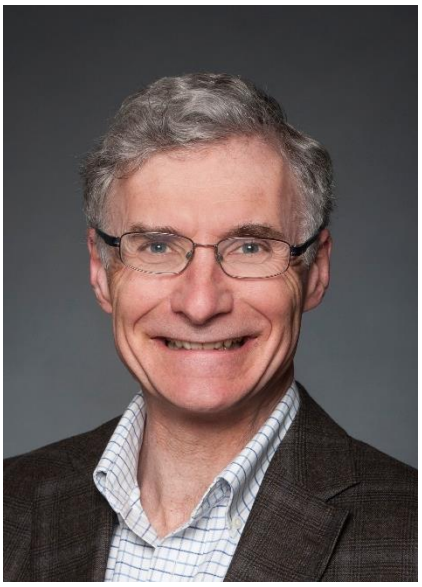
decision as it relates to subsection 396(7) of ACJA, is good law and the Supreme Court cannot be blamed for the outcome.

Nevertheless, due to the legal effect a defective law can have on the justice of a case, caution must be applied in drafting legislation. Research on the subject and on the relevant case law should be the preoccupation of the legislative counsel in terms of the workings and settings of the Constitution. Legislative counsel have the professional responsibility to reduce the possibility of legal challenge that may face the laws made by the legislature by drafting laws that are in harmony with the Constitution and other existing legislation. They have the responsibility of studying the Constitution and the basic provisions that may have effect on any proposed legislation. When a legislative proposal is constitutionally questionable, they need to bring these matters to the fore in their legislative expertise and advise the instructors accordingly. This does not undermine the limited compass in which legislative counsel operate in the law-making process; for their role is to translate proposals into a legislative draft; its enactment is, of course, within the prerogative of the legislature or the delegate of legislative function.

In any case, the decision in *Ude Jones Udeogu*, will always remain relevant in the Nigerian jurisprudence, not only because it struck down subsection 396(7) of ACJA, thereby quashing the convictions against the Defendants, but because it re-emphasized the supremacy of the Constitution and the relevance of the doctrine of constitutional supremacy in drafting and making legislation.

Transitional Provisions: A Cautionary Tale from Canada

John Mark Keyes[1]



Abstract

This article looks at an amendment to the Canadian Criminal Code dealing with the selection of juries and a recent decision of the Supreme Court of Canada considering its application in proceedings instituted before the amendment came into force. The article draws attention to the interpretive difficulties surrounding the temporal application of legislation and the importance of avoiding these difficulties with clearly drafted transitional provisions.

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Introduction

Few people outside the legislative drafting community know what transitional provisions are, much less when and how they should be drafted. Most people involved in the preparation and enactment of legislation focus on the future, the results the legislation is intended to achieve in circumstances arising after the legislation is enacted. They assume that legislation, once enacted, operates in a world with no past. All facts relating to its operation occur after it comes into force. However, very often the past creeps into the present when applying legislation, raising questions about how it is to apply in relation to facts rooted in the past.

Does a change in a law regulating employment contracts affect contracts entered into in the past? Does the repeal of an offence provision affect people serving sentences for previous convictions? There is no end to these sorts of questions when legislation changes the law. One of the most important functions of legislative counsel is to ask these questions at the drafting table where they can almost always be addressed with provisions that clearly answer them. This article recounts an unfortunate tale of such a question not being clearly answered when it could and should have been.

Peremptory challenges in jury selection

Before September 19, 2019, section 634 of the Canadian *Criminal Code* allowed the prosecution and the accused to peremptorily challenge the selection of jurors in a criminal jury trial.[2] Each was allowed to exclude a fixed number of potential jurors without providing any reason for doing so. These challenges were rooted in the common law and had been a feature of Canadian criminal law since its earliest days.[3] They were augmented by the right to challenge jurors for cause[4] and had more recently, attracted mounting criticism, largely on the basis of their "arbitrary and subjective" nature, their inconsistency with other jury-selection rules and their discriminatory use.[5] In 2018, a trial in Saskatchewan involving the prosecution of a white farmer in the shooting death of a young Indigenous man drew national attention when the farmer was acquitted by a jury that included no Indigenous members.[6]

In 2019, the Minister of Justice introduced Bill C-75 containing wide-ranging amendments to criminal justice legislation, including a provision repealing section 634 of the *Criminal Code*.[7] The bill provided that the repeal was to come into force 90 days after the bill

[2] RSC 1985, c. C-46.

[3] See *R v Chouhan* 2020 SCC 26 at paras. 10-17.

[4] Above n. 2 at s. 638.

[5] *Chouhan*, above n. 3 at paras. 19-24.

[6] See K. roach, "The Gerald Stanley Case" in the *Canadian Encyclopedia* (2020).

[7] *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess., 42nd Parl., 2019), s. 269. Enacted as SC 2019, c.25.

received royal assent (September 19, 2019).[8] It said nothing else about how the repeal was to operate.

Application of peremptory challenge repeal

There is little question that the repeal applied to any criminal proceedings instituted on or after September 19, 2019. But what about proceedings potentially involving jury trials instituted before that date, of which there were hundreds? How did the repeal apply to them? Was an accused in these proceedings entitled to peremptory challenges in jury selection occurring on or after September 19?[9] This question was answered in two different ways by courts across the country after September 19.

All courts agreed that juries chosen before September 19 could continue, but some courts concluded the repeal applied immediately to jury selection proceedings on or after that date such that the accused could no longer exercise peremptory challenges.[10] Other courts concluded that when proceedings had been instituted before September 19, the accused was entitled to peremptory challenges in jury selection occurring on or after that date.[11] These conflicting decisions effectively halted jury trials across the country and deepened the already substantial backlog in hearing criminal cases. To deal with this impending crisis, the Supreme Court of Canada agreed to hear an appeal of one of these cases on an expedited basis on October 7, 2020. It handed down a split decision on the same day with the majority deciding the repeal applied to jury selection taking place on or after September 19, 2019, regardless of when the proceedings were commenced. However, the Court took almost 9 months to render its reasons on June 25, 2021. The split decision and the delay in issuing reasons underscored the need for transitional provisions.

Temporal Operation of Legislation

To understand the reasoning of the Supreme Court, it is necessary to recall how legislation operates in time as a general matter.

An important aspect of the constitutional principle of the rule of law is that law must be accessible to those it applies to when they are doing things governed by the law. If a law

[8] Ibid., s. 406.

[9] Another question was whether juries selected before September 19 could continue after that date, however this does not appear to have been a contested issue.

[10] See, for example see *R v Chouhan*, 2020 ONCA 40; *R. v. Johnson*, 2019 ONSC 6754, 451 C.R.R. (2d) 167; *R. v. Muse*, 2019 ONSC 6119, 448 C.R.R. (2d) 266; *R. v. Lako*, 2019 ONSC 5362; *R. v. Khan*, 2019 ONSC 5646; *R. v. McMillan*, 2019 ONSC 5616; *R. v. Daniel*, 2019 ONSC 6920); *R. v. Cumberland*, 2019 NSSC 307; *R. v. Stewart*, 2019 MBQB 171.

[11] See, for example see *R. v. Dorion*, 2019 SKQB 266; *R. v. Raymond (Ruling #4)*, 2019 NBQB 203, 379 C.C.C. (3d) 75; *R. v. LeBlanc*, 2019 NBQB 241, 447 C.R.R. (2d) 227; *R. v. S.B.*, 2019 ABQB 836, 447 C.R.R. (2d) 63; *R. v. Bragg*, 2019 NLSC 235; *R. v. Simard*, 2019 QCCS 4394; *R. v. Kebede*, 2019 ABQB 858, 448 C.R.R. (2d) 102; *R. v. Subramaniam*, 2019 BCSC 1601, 445 C.R.R. (2d) 49; *R. v. Bebawi*, 2019 QCCS 4393; *R. v. Ismail*, 2019 MBQB 150, 447 C.R.R. (2d) 150; *R. v. Lindor*, 2019 QCCS 4232; *R. v. Nazarek*, 2019 BCSC 1798).

applies only in relation to things wholly occurring after it comes into force, it does not violate this aspect of the rule of law. However, legislation undermines this aspect if it changes the law after some or all the relevant facts have occurred, when people governed by the law cannot undo what they have done. A new law, or one that changes the existing law, erodes, if not negates, the ability to know what a law is at this time if it applies in respect of matters existing before its enactment. This temporal application is generally described as retroactivity or retrospectivity.

The distinction between these terms (at least in Canadian jurisprudence) has recently been described by the Ontario Court of Appeal as follows:

> [26] In a nutshell, a retroactive law is one that applies a new law to an event that happened in the past and to which the old law applied before the new law was enacted: see Elmer A.Driedger, "Statutes:Retroactive Retrospective Reflections" (1978), 56 Can. Bar. Rev. 264, atpp.268-269; Ruth Sullivan, *Statutory Interpretation*, 2nd ed. (Toronto: Irwin Law, 2007), at p.254.
>
> [27] In contrast, a retrospective law is one that has an effect for the future on a set of facts that occurred in the past: Driedger, at pp. 268-69; Sullivan 2007, at p. 254. As an example, the amendment in s. 129.1 clearly applies prospectively to events that cause losses in the future under new insurance policies entered into after the date of the amendment. However, for a court to find that the amendment has retrospective effect, it would apply to existing insurance policies entered into before the amendment, but for events that happen in the future.[12]

Although the usage of the terms "retrospective" and "retroactive" has not been universally accepted,[13] they both unquestionably denote the application of legislation in relation to facts occurring or existing before the legislation comes into force. The application of the repeal of peremptory jury challenges in proceedings instituted before September 19 is an example: new law (no peremptory jury challenges) applying in the present to proceedings begun in the past, which Canadian courts characterize as *retrospective* application.

Despite the rule of law, courts in Canada (and elsewhere in the Commonwealth) have recognized that parliamentary bodies, by virtue of another constitutional principle – parliamentary sovereignty – are capable of making retroactive or retrospective laws, subject only to the constitutional limits such as those in paragraphs 11(g) and (i) of the *Canadian Charter of Rights and Freedoms*.[14] These paragraphs prohibit findings of guilt for doing things that were not offences at the time they were done; they also require subsequent

[12] *Lin v. Weng,* 2022 ONCA 367 at paras. 26-27. See also R Sullivan, *Interpretation of Legislation*, 3rd ed. (Irwin Law: Toronto: 2016) at 346-350.

[13] For example, R Carter, *Burrows Statute Law in New Zealand*, 5th ed. (Lexis Nexis: Wellington, 2015), ch. 18 discusses only "retrospective" legislation and does not mention "retroactive" legislation.

[14] See *BC v Imperial Tobacco*, 2005 SCC 49 and *Régie des rentes v Canada Bread Company*, 2013 SCC 46.

reductions in penalties to be applied. The sovereign power to enact legislation dealing with the past is also qualified by common law rules of interpretation requiring it to be exercised in a way that makes clear any parliamentary intention of retroactive or retrospective application, subject to some exceptions.[15] One of these exceptions is a presumption that new procedural law applies immediately, regardless of when proceedings are instituted.[16]

Like many common law rules of interpretation, the rules about retroactive or retrospective application often give rise to debate. Some jurisdictions have attempted to provide more clarity by enacting generally applicable interpretive provisions about the temporal application of legislation, but these rules also give rise to debate since they are subject to a "contrary intention"[17] about which there may be considerable disagreement.[18]

In the case of the peremptory challenges repeal, the Government relied on one of these general interpretive provisions, paragraph 44(d) of the Canadian *Interpretation Act*:

> (d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto
>
> …
>
> (iii) in a proceeding in relation to matters that have happened before the repeal;

This provision, like the common law interpretive rule, applies to the "procedure" enacted by a new law, but it was not clear whether jury challenges were matters of procedure or whether the presumption of immediate application was overcome by a contrary intention. The right to be tried by a jury of one's peers is deeply rooted in the common law and tampering with it raised questions about the intention of Parliament. Courts across Canada, as well as the Supreme Court itself, divided on whether the presumption of immediate application applied in this case.

A majority of Supreme Court justices in *Chouhan* accepted that the jury challenges were matters of procedure. The Chief Justice articulated the distinction between procedural and substantive provisions as follows:

> Broadly speaking, procedural amendments depend on litigation to become operable: they alter the method by which a litigant conducts an action or establishes a defence or asserts a right. Conversely, substantive amendments operate independently of litigation: they may have direct implications on an individual's legal jeopardy by attaching new consequences to past acts or by changing the substantive content of a

[15] See *R. v. Dineley*, 2012 SCC 58 at paras. 10-11 and Sullivan, above n. 12 at 359-361.

[16] See *Chouhan*, above n. 3 at para. 87.

[17] See, for example *Interpretation Act*, RSC 195, c. I-23, ss. 43-44 and *Legislation Act*, SO 2006, c. 21, Sched F.

[18] See GC Thornton, "Contrary Intention" (1994), 15 *Statute Law Review* 182 and *Bank of Montreal v. Gratton*, 1987 CanLII 2436 (BC CA) at para 11.

> defence; they may change the content or existence of a right, defence, or cause of action; and they can render previously neutral conduct criminal.[19]

However, two members of the court concluded the jury challenges were not purely procedural because their elimination affected what they considered to be substantive rights to be presumed innocent and to be entitled to a jury trial. As such, the repeal of the challenges was not, for these justices, subject to the presumption of immediate application, and the repeal could apply only prospectively.[20]

What about a transitional provision?

Although the majority in *Chouhan* concluded that the repeal of the peremptory challenges was a procedural matter to which paragraph 44(d) of the *Interpretation Act* applied, the Chief Justice also noted with some dismay the absence of a transitional provision to address this matter in the amending legislation:

> [86] When Parliament abolished peremptory challenges in Bill C-75, it indicated that the abolition would come into force on September 19, 2019. Regrettably, and contrary to Parliament's own legislative drafting guidelines, the legislation did not include transitional provisions that set out whether and how the amendments would apply to criminal prosecutions pending in the system (Canada, Privy Council Office, *Guide to Making Federal Acts and Regulations* (2nd ed. 2001), at p. 91).
>
> [87] It thus fell to the courts to sort out the temporal application of the abolition of peremptory challenges. As is generally the case when Parliament fails to include transitional provisions in a legislative amendment, the temporal application of these amendments divided trial courts across the country.[21]

It is difficult to think of a clearer message from the bench about the importance of including transitional provisions in criminal legislation, if not legislation generally. Indeed, it is puzzling that Bill C-73 contained transitional provisions for other amendments,[22] but not for the repeal of the peremptory challenges. The reliance the Department of Justice placed on paragraph 44(d) in *Chouhan* suggests it did not consider a transitional provision to be necessary. However, that conclusion was surely misconceived given the ensuing litigation culminating in the decision of the Supreme Court.

How else might this matter have been addressed in drafting Bill C-75? Could a clear transitional provision have been drafted for the repeal of s. 634 of the *Criminal Code* by section 269 of the amending Act? How about this:

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[19] See *Chouhan*, above n. 3 at para. 92.

[20] Above n. 3 at paras 170-208 (per Abella, J) and 293 (per Côté, J).

[21] Ibid. at paras 86-87.

[22] Above n. 7 at sections 354 and 384.

269 (2) This section applies only with respect to trials in proceedings instituted after it comes into force.

or

269(2) This section applies with respect to trials in which jury selection begins after it comes into force.

Conclusion

Chouhan is hardly an isolated case of a missing transitional provision, as the recent Ontario Court of Appeal decision mentioned above illustrates.[23] There is a substantial body of case law dealing with the temporal application of legislation. It largely involves cases where there were no specific transitional provisions and courts were left to resolve questions of temporal operation on the basis of the common law or general provisions in interpretation legislation. Specific transitional provisions could have avoided much of the uncertainty and the ensuing litigation. There is clearly merit in legislative counsel taking an active role in proposing them.

[23] Above n. 12.