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JUDICIAL INTERPRETATION OF LEGISLATION AS A SOURCE OF RULES OF LEGISLATIVE PROCEDURE AND LEGISLATIVE DRAFTING: A COMPARATIVE STUDY OF UNITED KINGDOM AND NIGERIAN COURT CASES ON LEGISLATIVE DRAFTING

Abstract

*The quotations above encapsulate the essence of this research study. The underlying purpose of this research study is born out of the understanding that: "drafting style and practices are always capable of improvement"*¹.

However, the traditional view is that legislators and legislative drafters are the major authors of legislative drafting conventions.

*This research study applies a novel approach to the study of legislative drafting considering that it examines "[s]ome (...) [legislative drafting] conventions [that] have statutory or case-law origins" such as the judgments in the cases of Bulmer v. Bollinger [1974] EWCA Civ. 14 and Pepper (Inspector of Taxes) v. Hart*².

*This novel approach is based on "Tetley's three themes of comparative analysis in legislative drafting namely: rules of (statutory) interpretation, stare decisis and [legislative] drafting conventions and techniques"*³. *These themes of analysis are relevant when undertaking a study of comparative legislative drafting*⁴ *such as in this present study which is a comparative study of case studies in the United Kingdom and Nigeria.*

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¹ G.C. Thornton, *Legislative Drafting*, London: Butterworths 1996, preface, p. v.

² [1993] AC 593.

³ See W. Tetley, *Interpretation and Construction of the Hague, Hague/Visby and Hamburg Rules*, *Journal of International Maritime Law* 2004, no. 10, p. 30.

⁴ See H. Xanthaki, *Comparative Legislative Drafting*, [in:] H. Xanthaki, *Drafting Legislation – Art and Technology of Rules for Regulation*, Oxford: Hart Publishing 2014, p. 202.

Unlike others, the legislative drafting conventions that originate from case law have the advantage of carrying the authority of law based on the common law doctrines of precedent and stare decisis.

Besides case law, this research examines some modern theories, and innovations in the field of legislative drafting that common law judges may not be familiar with. It is hoped that "[t]his guide examines some legislative drafting conventions, the knowledge of which may help judges with statutory interpretation"⁵.

This study also examines the common law rules of judicial precedent, stare decisis, and statutory interpretation that apply in Nigeria and the United Kingdom.

*The purpose is that such an examination will prove instructive to legislators and legislative drafters themselves when they prepare legislation. For example, by providing an analysis of the judgement in *Bulmer v. Bollinger* [1974] EWCA Civ. 14, this study makes a case for the inclusion of Purpose Clauses in common law legislation and the application of a purposive style of statutory interpretation.*

*Collectively, the case law examined demonstrates that both United Kingdom and Nigerian Courts are **"capable of endogenous (homegrown) development (...) to meet new technical problems or social needs"**. The role of the Courts in this regard is "inevitable because it would be humanly impossible for the drafter or the legislator to draft legislation that would cover every situation".*

Keywords

statutory interpretation – legislative drafting – legislative procedures – common law

"there are a variety of sometimes little-known [legislative drafting] conventions that will ease the way of a federal judge through the sometimes opaque world of legislation. Some of these [legislative drafting] conventions have statutory or case-law origins (...). This guide examines some legislative drafting conventions, the knowledge of which may help judges with statutory interpretation"⁶.

*"In the United Kingdom, highly trained legislative drafters draft statutes and legislation tends to be stylistically detailed. Nevertheless, **there are many problems of statutory interpretation. This is inevitable because it would be humanly impossible for the drafter or the legislator to draft legislation that would cover every***

⁵ M.D. Bellis, *Statutory Structure and Legislative Drafting Conventions: A Primer for Judges*, Washington D.C.: Federal Judicial Center 2008, p. 1, available at: [http://www.fjc.gov/public/pdf.nsf/f385048e0431aa3c8525679e0055d35c/80a5e59799892a9a852574cd005a594c/\\$FILE/DraftCon.pdf](http://www.fjc.gov/public/pdf.nsf/f385048e0431aa3c8525679e0055d35c/80a5e59799892a9a852574cd005a594c/$FILE/DraftCon.pdf) [last accessed: 22.02.2015].

⁶ Ibidem.

situation that might arise (...). The principles of statutory interpretation are not codified. They are governed by the common law and are therefore capable of endogenous development by the courts to meet new technical problems or social needs”⁷.

[all bold and italics mine]

Rt. Hon. Lady Justice Mary Arden DBE,

Member of the Court of Appeal of England and Wales

1. BACKGROUND

In December 2014, the National Institute for Legislative Studies (NILS) organised a Conference on Standardisation of the Rules of Legislative Procedure. During the conference the Reports of Experts were presented. The consensus of experts who were engaged by NILS found that there were gaps in the 2011 Standing Orders of the Senate, 2014 Standing Orders of the House of Representatives, of the National Assembly. This is not surprising considering that despite the best intentions of legislators and legislative drafters, it is “humanly impossible for the drafter or the legislator to draft legislation that would cover every situation”⁸. For example, the legislators and legislative drafters did not envisage the uncertainty that would arise in relation to section 58(5) of the 1999 Nigerian Constitution (as amended) which deals with the legislative procedure for the enactment of a legislative Bill that has being vetoed by the refusal of the assent by the President. The judgment in the case of the *National Assembly v. President of the Federal Republic of Nigeria* CA/A/15/2003⁹ laid down the correct legislative procedure when it stated that the National Assembly ought to re-enact such a legislative Bill *de novo* (afresh).

⁷ The Rt. Hon. Lady Justice Mary Arden DBE, *The Impact of Judicial Interpretation on Legislative Drafting. Keynote Address Presented at the Commonwealth Association of Legislative Counsel Conference, Nairobi, Kenya, September 2007*, The Loophole – Journal of Commonwealth Association of Legislative Counsel 2008, p. 2, available at: www.opc.gov.au/calc/docs/Loophole_papers/Arden_Aug2008.rtf [last accessed: 20.02.2015].

⁸ Supra note 2.

⁹ Reported in Legislative Law Reports [2002-2003] 2 LLRN 897 at 903.

This research study is a continuation of the research on rules of legislative procedures by the NILS experts. However, unlike the Report by NILS Experts, this research report examines judicial case law as a potential source of rules of legislative procedures. It also makes a case for the inclusion of legislative drafting rules within the rules of legislative procedure.

Another difference is that this research report applies an *endogenous (homegrown)* approach in the search for solutions, whereas the NILS experts made a case for application of international best practices. It is notable that the NILS experts found that a major gap in the existing Rules of both Chambers of the National Assembly is their failure to vest the Speaker or Senate President with authority to interpret the Rules and make Rulings in situations where the Rules are silent. Citing international best practices and comparative legislative practices in India, Kenya, South Africa, and Australia, the international legal consultant engaged by NILS argued that the existing Rules ought to be amended with the inclusion of a provision that such Rulings made by the Speaker ought to serve as precedents to “assist future Speakers should similar situations arise”¹⁰.

It is hoped that the outcome of this research report that will be useful to the National Assembly Rules and Business Committees of the Senate and the House of Representatives for the purposes of amending their existing Rules to incorporate legislative drafting rules. It is hoped that this would trigger a call for the amendment of the Interpretation Act 1964 to incorporate legislative drafting conventions. It is also hoped that this research study will be of benefit to judges and other legal scholars.

¹⁰ See D.W. Ogalo, *Report of the Review of the Standing Rules of the 2011 Senate and the 2014 House of Representatives, National Assembly of Nigeria* being a paper presented at the 2nd Annual Conference on Standardisation of Legislative Rules of Practice and Procedure, organised by the National Institute for Legislative Studies (NILS) held at the Rockview Hotel, 17.12.2014, p. 1.

2. STATEMENT OF THE PROBLEM(S)

Considering that legislative drafters¹¹ and the legislative drafting process are regarded as an integral part of the law-making process¹², this study identified it as a fundamental gap that the relevant United Kingdom and Nigerian Rules on Legislative Procedure do not contain provisions on legislative drafting conventions and methodology. For example, in Nigeria, there is no mention of legislative drafting within the Tables of Contents of the 2011 Standing Orders of the Senate, 2014 Standing Orders of the House of Representatives, of the National Assembly, and the 2013 Standing Rules of the Yobe State House of Assembly respectively. The situation is the same when one examines the Table of Contents of the United Kingdom's Rules on Parliamentary Procedure viz *Erskine May's*¹³ *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, edited by Sir Malcolm Jack, 24th ed. (London: Butterworths LexisNexis 2011).

This gap provides one of the justifications for resort to judgments of the Courts to ascertain the relevant legislative drafting conventions, which is the approach of this present study.

¹¹ See C. Stefanou, *Drafters, Drafting and the Policy Process*, [in:] C. Stefanou, H. Xanthaki (eds), *Drafting Legislation – A Modern Approach*, Aldershot: Ashgate Publishing 2008, pp. 326-327 stated: “[t]he Legislative Process and the Drafter – Irrespective of the size of the jurisdiction the drafter is at their most active during this period (...). Although drafters obviously do not take active part in the actual decision-making they are involved with most aspects of the Legislative Process”.

¹² As E. Azinge rightly stated: “[l]egislative drafting is a critical aspect of law-making in any organized society. In our constitutional democracy wherein the organic law is the Constitution of the Federal Republic of Nigeria 1999 (as amended). Legislative drafting is a veritable instrument for distilling and ventilating policies and ideas of government both at the Federal and State levels”; see foreword of the book: E. Azinge, V. Madu (eds), *Fundamentals of Legislative Drafting*, Lagos: Nigerian Institute for Advanced Legal Studies (NIALS) 2012; available at: <http://www.nialsigeria.org/Editedbookcovers/Fundamentals%20of%20Legislative%20Drafting.pdf> [last accessed: 11.02.2015].

¹³ “Erskine May was the Clerk of the House of Commons between 1871 and 1886. He wrote a book called «Treatise on the Law, Privileges, Proceedings and Usage of Parliament». This is now in its 24th edition. It is considered the authoritative source on parliamentary procedure”. Available at: <http://www.parliament.uk/about/how/role/customs/> [last accessed: 24.02.2015]. It provides details of observed “rules” within the House, whether they relate to Standing Orders (and are therefore regulated by the House), traditional practice, or whether they derive from “Speaker’s Rulings”. It is not available on the internet, but will be in public libraries.

In the field of legislative drafting, this difficulty with ascertaining legislative drafting conventions and methodology is part of a wider problem.

The reason is aptly acknowledged by two major studies on legislative drafting thus:

“Caution should be exercised, however, in automatically applying any given convention precisely *because the drafting of legislation is not the careful academic exercise we might hope for*. Not only do various political imperatives bring in legislative language written by persons unfamiliar with the usual conventions, but the conventions themselves change over time to reflect changes in public thinking and legal trends”¹⁴.

“For most [legislative] drafters, especially in the third world and emerging democracies, the main problem has long been the attempt to satisfy as many stakeholders as possible. Thus compromise bills are drafted, laws are copied from elsewhere, there’s criminalisation of behaviour based on dominant party/government interests and *there is a near complete lack of unified methodology in the drafting of legislation nationally*”¹⁵.

Furthermore, even in instances when there is available legislation that specifies the legislative drafting conventions, the inherent limitations of legislation are another problem that serves as justification for resorting to the study of relevant court judgments on legislative drafting. As earlier admitted: “*there are many problems of statutory interpretation. This is inevitable because it would be humanly impossible for the drafter or the legislator to draft legislation that would cover every situation that might arise*. Sometimes legislation is passed in a hurry or an amendment is inserted at a late stage that has not been fully considered”¹⁶. For example, the Nigerian Interpretation Act of 1964, is the relevant legislation that prescribes some legislative drafting rules and conventions. However, one of its inherent problems that legislators and legislative drafters failed to envisage is that

¹⁴ Bellis, *supra* note 5.

¹⁵ See C. Stefanou, *The Policy Process and Legislative Drafting*, [in:] C. Stefanou, H. Xanthaki (eds), *Manual in Legislative Drafting*, London: Department for International Development 2005, p. 4.

¹⁶ *Ibidem*.

“the traditional legislative style” of the language of legislation which this legislation prescribed is no longer generally accepted. This has necessitated “in recent times, the calls for laws to be drafted in «Plain English»”¹⁷ that is easily understood by non-lawyers, and other users of legislation. Another example: it is obvious that none of current Rules of Legislative Procedures envisaged that the legislative procedure for enactment of a legislative Bill that is vetoed by the President would be a source of problem and controversy. This problem was later resolved by the court in the case *National Assembly v. President of the Federal Republic of Nigeria* CA/A/15/2003¹⁸. However, ever since that judgment, the relevant Rules of Legislative Procedure have not been amended to incorporate the judgment in this case as recommended by this research study.

It is notable that the NILS experts also found that a major gap in the existing Rules of both Chambers of the National Assembly is their failure to vest the Speaker or Senate President with authority to interpret the Rules and make Rulings in situations where the Rules are silent. Citing international best practices and comparative legislative practices in India, Kenya, South Africa and Australia, the international legal consultant engaged by NILS argued that the existing Rules ought to be amended with the inclusion of a provision that such Rulings made by the Speaker ought to serve as precedents to “assist future Speakers should similar situations arise”¹⁹.

As commendable as this suggestion maybe, it poses a challenge: how is the Speaker to be guided in the exercise of his discretion in this regard. Is he to be bound by the Rule of Law, by the Constitution, or is this a licence to indulge in his whims and caprices? To fill this gap, this research study advocates resort to the relevant judgments of courts of law as a guide for the Speaker.

Another problem or gap that this research seeks to address arises from the fact that: “[t]he principles of statutory *interpretation* are not codified. They are governed by the common law”²⁰. This means: “that *judges approach the task of interpreting statutes in a variety of ways*. There is no single

¹⁷ Thornton, *supra* note 1, p. 49.

¹⁸ Reported in Legislative Law Reports [2002-2003] 2 LLRN 897 at 903.

¹⁹ See Ogalo, *supra* note 10, p. 1.

²⁰ [1993] AC 593.

technique which they use, or manual which they have. However, there are a number of basic themes”²¹. The non-codification of the Rules and Principles of statutory interpretation, the fact that “judges approach the task of interpreting statutes in a variety of ways” presents both a problem and an opportunity. The problem is that more newly employed judges may not have a manual or document to guide them in their task of interpreting legislation. However, this research identifies an opportunity in the very possibility of approaching the “task of interpreting statutes in a variety of ways” as evident from lessons learnt by applying methods of statutory interpretation derived from non-common law jurisdictions as illustrated by the judgment in the United Kingdom case of *Bulmer v. Bollinger*²². As shall be discussed in fuller details this case law and its implications within the United Kingdom established a precedent and illustrate the possibility of applying civil law legislative drafting style within common law jurisdictions.

3. RESEARCH QUESTIONS

It is important to commence by stating some caveats, in other words, the limitations of this research study.

It is important to state from the outset that the findings of this research are limited to rules of statutory interpretation and legislative drafting styles within the United Kingdom and Nigeria respectively. Generally, the findings should serve to be illustrative to other common law jurisdictions with similar legislative drafting challenges to those of Nigeria and the United Kingdom. In event that these jurisdictions are desirous of transferring and applying the findings within their national jurisdictions they ought to apply the prerequisite comparative law methods. Details of this will be discussed under the heading of research method. This is the recognised approach for transferability in the field of legislative drafting²³.

²¹ Ibidem.

²² [1974] EWCA Civ. 14.

²³ See generally H. Xanthaki, *On Transferability of Legislative Solutions: The Functionality Test*, [in:] C. Stefanou, H. Xanthaki (eds), *Drafting Legislation – A Modern Approach*, Aldershot: Ashgate Publishing Limited 2008, pp. 1-16.

Also, this research study is an introductory research study; it does not provide an exhaustive list of case law or judgments that impact on every aspect of legislative drafting or the Rules of legislative procedure. The reason is because in reality very few case law decisions or judgments touch on certain aspects of legislative drafting. For example, out of the over twenty (20) case law decisions and judgments examined within this research study *vis-à-vis* the five (5) stages²⁴ of legislative drafting process, only one case law decision is identified as relevant to stage one of the drafting process namely: *Pepper (Inspector of Taxes) v. Hart*²⁵. As is with the case with compendiums of this nature, a future update would be necessary to incorporate future case law that has an impact on legislative drafting.

Notwithstanding the limitations, there are six (6) research questions that this research attempts to answer. These six research questions are deliberately made to match the major headings in this research study as follows:

1. How does the literature review justify this present study on the subject of statutory interpretation and legislative drafting?
2. What is/are the research method(s) applied in this research study?
3. What is the theoretical framework? What is the common law doctrine of Precedent and *Stare Decisis*? What are the implications for legislative drafting?
4. What are the common law Rules and Principles of Statutory Interpretation? What is the major civil law principle of statutory interpretation in the case of *Bulmer v. Bollinger*? How is this applicable to legislative drafting in the U.K. and Nigeria?
5. What are the traditional conventions and techniques of legislative drafting? What are the modern concepts of legislative drafting such as gender neutral drafting, plain language, etc.?
6. What is the direction for future research on the subject of the intersection between statutory interpretation and legislative drafting?

²⁴ Thornton, *supra* note 1, p. 128 identifies the five stages of the drafting process as: 1. understanding; 2. analysis; 3. design; 4. composition and development; 5. scrutiny and testing.

²⁵ [1993] AC 593.

Below is an attempt to provide answers to the six (6) questions.

RESEARCH QUESTION (1): LITERATURE REVIEW

As earlier observed, the study of the intersection between judicial interpretation and legislative drafting is a relatively new area of research in law that is still developing considering that there are very few published studies devoted entirely to the topic.

At the national level, this study identified Rt. Hon. Lady Justice Mary Arden DBE's²⁶ study, as the major published United Kingdom legal study on the subject. To the best of the knowledge of this researcher, there is currently no published legal study on the subject that focuses the subject of statutory interpretation from the perspective of legislative drafting in Nigeria.

Although having said that, among Nigerian authors, this study found that it is notable that all of the existing Nigerian textbooks on legislative drafting²⁷ have cited case law and judicial interpretation as sources of some "important legislative drafting concepts"²⁸ that are discussed in their published studies. For example, T.C. Jaja²⁹, rightly identified *Pepper (Inspector of Taxes) v. Hart*³⁰ as the case law that established the common law rule that "the intentions of Parliament can be discerned from the drafting instructions"³¹. Drafting instructions is the first stage of the legislative drafting process. As Jaja rightly put it: "in the case of *Pepper (Inspector of Taxes) v. Hart* (...) the court held that if primary legislation is ambiguous or obscure the courts may in certain circumstances take account

²⁶ Arden DBE, supra note 2, p. 2.

²⁷ Some of the Nigeria textbooks are: 1. T.C. Jaja, *Legislative Drafting – An Introduction to Theories and Principles*, Oisterwijk, Netherlands: Wolf Legal Publishers 2012; 2. S.S. Shikyil, *Practical Guide on Legislative Drafting*, Abuja, Nigeria: PARP/National Institute for Legislative Studies 2006; 3. H. Onwe, *Groundwork of Legislative Drafting*, Enugu, Nigeria: Snaap Press (Nig.) Ltd. 2009; 4. Azinge, Madu (eds), supra note 12.

²⁸ Onwe, supra note 27, pp. 48-57 itemises these as follows: "1. long title; 2. the preamble; 3. enacting formula; 4. short title; 5. commencement; 6. application; 7. duration; 8. marginal notes; 9. schedules; 10. interpretation".

²⁹ Jaja, supra note 27, p. 119.

³⁰ [1993] AC 593.

³¹ F. Bennion, *Statutory Interpretation*, Edingburgh: LexisNexis 2008, p. 469 cited in Stefanou, supra note 15.

of statements made in Parliament by Ministers or other promoters of a Bill in construing that legislation. Until that decision, using Hansard in that way would have been regarded as a breach of Parliamentary privilege”³².

Another Nigerian author that makes significant contributions in this regard is Onwe. In his treatment of the topic of “legislative history”³³ as an aid to statutory interpretation, he provides details of at least three judgments and case law by Nigerian courts that corroborate the decision in *Pepper (Inspector of Taxes) v. Hart*. The cases are *Bronik Motors v. Wema Bank Ltd.*³⁴, *Attorney-General of Kaduna State v. Hassan*³⁵ and *Bishop Okogie v. Attorney-General of Lagos State*³⁶.

Onwe’s study on legislative drafting is a significant contribution to the field of legislative drafting considering that it provides recent Nigerian case law to illustrate the legislative drafting concepts. For example, Onwe³⁷, in discussing the use of the word “and” in legislation, cites the recent case law of *Yusuf v. Obasanjo*³⁸.

Shikyil’s study is another significant contribution considering that he aptly identified the importance of case law on legislative drafting. In his view, it is of the utmost importance that the legislative drafter should consult case law in analysis of drafting instructions. As he rightly put it: “[u]pon receipts of drafting instructions, the drafter must of necessity subject these instructions to critical analysis and examination (...). More importantly, a drafter must be satisfied that the drafting instructions are not in conflict with the constitutional provisions and ***judicial decisions***”³⁹. [bold and italics mine]

From the international and comparative law perspective, there appears to be a plethora of published studies that demonstrate an understanding of the nexus between legislative drafting and statutory interpretation. In the English speaking world, it appears that Dale’s ground-breaking study was the first that demonstrated the interconnectedness and

³² Stefanou, *supra* note 15.

³³ Onwe, *supra* note 27, pp. 84-85.

³⁴ [1983] NSCC 226.

³⁵ [1981] 2 NCLR.

³⁶ [1981] 1 NCLR.

³⁷ [1981] 2 NCLR.

³⁸ [2005] 18 Nigeria Weekly Law Reports (NWLR) (pt. 956) 96 CA.

³⁹ [1993] AC 593.

the impact of statutory interpretation on legislative drafting style. In a nutshell, Dale's study: "describes the drafting process and the rules of statutory interpretation in the four countries concerned and concludes with suggestions for reforms in Britain"⁴⁰.

It is significant that Dale initially limited his study to a comparative study of the legislative procedures of the four countries. However, this approach failed to provide the results he sought. The results only manifested when Dale introduced a study of the rules of statutory interpretation as a criterion for studying the comparative legislative drafting styles.

Dale rightly concluded that owing to the purposive approach to statutory interpretation by judges in civil law jurisdictions, the legislative drafters were influenced into drafting legislation that aimed at brevity⁴¹. According to Dale, one of the prominent features of legislative drafters in the civil law countries which he studied, was their "willingness to leave more to the courts" to interpret.

It is also worth noting that prior to Dale's study, the doctrinal approach was the predominant approach to legislative drafting. In a nutshell, the earliest writers on legislative drafting were content to lay down doctrines of legislative drafters based upon their legislative precedents without bothering to incorporate legislative drafting rules derived from case law.

Rynearson has ventured an explanation for this traditional view or philosophy of statutory interpretation thus: "why be so fussy about how the law is written when judges, especially intentionalist judges, will say what the law is based on their philosophy of statutory interpretation"⁴². This view is aptly expressed thus: "[i]t is emphatically the province and duty of the judicial department to say what the law is", Marshall C.J., writing for the court in *Marbury v. Madison*⁴³.

⁴⁰ F.A.R. Bennion, *Review of "Legislative Drafting: a New Approach" by Sir William Dale* KCMG, Statute Law Review 1980, no. 1, p. 61, available at: <http://www.francisbennion.com/pdfs/fb/1980/1980-007-dale-review.pdf> [last accessed: 20.02.2015].

⁴¹ See W. Dale, *Legislative Drafting – A New Approach: A Comparative Study of Methods in the United Kingdom, France, Germany and Sweden*, London: Butterworths 1977, p. vii.

⁴² A.J. Rynearson, *Legislative Drafting: Step-by-Step*: Washington, D.C./Durham: International Law Institute/Carolina Academic Press 2013, p. 161.

⁴³ U.S. 137, 177 (1803).

This traditional view is reflected in the content of some of the earliest works on legislative drafting that were bereft of any statutory interpretation on legislative drafting. The two are as follows:

- H. Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents*, London: John Murray 1902;
- Sir C. Ilbert, *Legislative Methods and Forms*, Oxford: Clarendon Press 1901.

These earliest works on legislative drafting provided the original “Canons of Style” of legislative drafting. These “Canons of Style” are the basis for the common law legislative drafting style. As far back as 1919 the American Bar Association of the United States of America established a Special Committee on Legislative Drafting, commissioned to produce a uniform standard method for drafting of legislation in the United States of America. In its Report, this Special Committee admitted that the Rules on legislative drafting were based entirely on the works of C. Ilbert thus: “[n]ote: The rules stated under «Canons of Style» are taken almost entirely from two standard treatises: Sir C. Ilbert, *Legislative Methods and Forms*, and Willard, *Legislative Handbook*”⁴⁴.

It is worthy of note that both Ilbert and Thring served as United Kingdom Parliamentary Counsel (legislative drafters for the United Kingdom Parliament).

However, subsequent studies recognised the importance and interrelationship between statutory interpretation and legislative drafting. In other words, it seems that they understood that statutory interpretation provided a source of legislative drafting rules and precedents and *vice-versa*. For example, this is apparent even from the titles of some texts such as: L.-P. Pigeon, *Drafting and Interpreting Legislation*, Toronto/Calgary/Vancouver: Carswell 1988; M.D. Bellis, *Statutory Structure and Legislative Drafting Conventions: A Primer for Judges*, Washington D.C.: Federal Judicial Center 2008.

Other notable works in the field of legislative drafting that incorporated a perspective from statutory interpretation include:

⁴⁴ See W. Draper Lewis, H.C. Hall, E. Freund, S. Williston, G.B. Rose, *Report of the Special Committee on Legislative Drafting (July, 1919)*, American Bar Association Journal 1919, vol. 5, no. 3, pp. 416-439, available at: <http://www.jstor.org/stable/25700605> [last accessed: 28.01.2015].

- E.A. Driedger, *Legislative Drafting*, Ottawa: Department of Justice 1949;
- E.A. Driedger, *The Composition of Legislation – Legislative Forms and Precedents*, Ottawa: Department of Justice 1953;
- G.C. Thornton, *Legislative Drafting*, London: Butterworths 1970;
- W. Dale, *Legislative Drafting – A New Approach: Comparative Study of Methods in United Kingdom, France, Sweden and Germany*, London: Butterworths 1977; and
- F. Bennion, *Understanding Common Law Legislation-Drafting and Interpretation*, Oxford: Oxford University Press 2001.

Out of the list Thornton's is now regarded as the authoritative text for legislative drafting in Nigeria⁴⁵, while Dale's work was significant considering that it formed the basis for the reform of legislative drafting in the United Kingdom. This is in addition to the 1975 Report of the Renton Committee on Reform of the Process of Preparation of Legislation which presented 121 recommendations to improve the form and drafting of legislation⁴⁶.

Other significant published studies on the subject in chronological order are listed below:

- P. Delnoy, *The Role of Legislative Drafters in Determining the Content of Norms*, the International Cooperation Group, Department of Justice of Canada 2005. This author argued that legislative drafters ought to “adopt a new approach to the reading of judicial decisions” with a view to discovering the defects in legislation with a view to suggesting reforms. “In other words, we would ask ourselves whether the litigation arose because the statute was not written according to the canons of legislative drafting”⁴⁷;
- M. Arden, *The Impact of Judicial Interpretation on Legislative Drafting*, keynote address presented at the Commonwealth Association

⁴⁵ G.C. Thornton was cited as the authority on legislative drafting in the Nigerian Court of Appeal in the case of *Dr. Joseph Amedu v. Federal Republic of Nigeria* [2009] Law Pavilion Electronic Law Reports-8212.

⁴⁶ See Chapter 2 – *Background*, Good Law Initiative of the United Kingdom's Office of Parliamentary Counsel, available at: <https://www.gov.uk/government/publications/when-laws-become-too-complex/when-laws-become-too-complex> [last accessed: 24.02.2015].

⁴⁷ *Idem*, pp. 14, 15 and 16 available at: www.justice.gc.ca/en/ps/inter/delnoy/index.html.

of Legislative Counsel conference, Nairobi, Kenya, September 2007. In this work, she argues that amongst other tools such as use of legislative history the use of explanatory notes by legislative drafters “is an important tool of statutory interpretation”;

- V. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, Yale Law Journal 2012, no. 122, pp. 70-152. In this work the author proposes a new theory of statutory interpretation that would apply to rules of legislative procedures. She calls “a decision theory of statutory interpretation that aims to make the reading of legislative history empirically sound, normatively appealing, and far easier, because it defers to Congress’s own rules”;
- J. Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, Columbia Law Review 2014, vol. 114, no. 4, pp. 807-878. “This Article uses this better understanding of the evolution of Congress’s institutional competence to explain how the rise of judicial textualism over the last few decades should be viewed at least partially as a response to Congress’s improved drafting process. And not only do these practical findings provide a descriptive account of judicial behavior, they also provide a basis from which to *make normative judgments about how to undertake statutory interpretation based on the era in which a statute was drafted, a method that this Article terms “inter-temporal statutory interpretation”*⁴⁸. [bold and italics mine].

However, considering that most of the articles listed above are based on analysis of the statutory interpretation and legislative drafting within the United States of America, it is not directly applicable to this research study. Also, the only relevant United Kingdom study, by Arden, does not include an analysis of the judgement in *Bulmer v. Bollinger* [1974] EWCA Civ. 14 as is treated in this present research.

⁴⁸ J. Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, Columbia Law Review 2014, vol. 114, no. 4, p. 807, available at: <http://columbialawreview.org/wp-content/uploads/2014/05/May-2014-6-Article-Shobe.pdf> [last accessed: 22.02.2015].

RESEARCH QUESTION (2): RESEARCH METHOD(S)

Essentially, document analysis of primary and secondary sources is the research methodology employed throughout this research study.

This document analysis is complemented with information gleaned from telephone and personal interviews with the Director of Legislative Drafting Unit, Legal Services Directorate, National Assembly of Nigeria, and the Clerk, Rules and Business Committee of the Yobe State House of Assembly. These telephone and personal interviews were necessary to fill the gaps wherein there were no available documents.

The relevant legislation, case law, judgements, and Standing Rules of the National Assembly constitute the primary sources, whereas journal articles, monographs comprise the secondary sources.

In undertaking the document analysis methodology, the doctrinal legal research method is applied throughout this research study. The doctrinal legal research method is applied to provide analysis of the major legal doctrines that occur in this research study.

There are two broad categories of legal doctrines that occur throughout this research study. On the one hand are the legal doctrines that apply to statutory interpretation such as: the common law doctrine of judicial precedents; the common law doctrine of *stare decisis*; the common law principles of statutory interpretation. On the other hand are the legal doctrines that apply to legislative drafting such as the doctrine of plain language in legislative drafting just to mention a few.

It has rightly been admitted that the doctrinal legal research method is identified as the major and preferred research method by lawyers in general and legislative drafters, as described by Adekunle: “[d]octrinaire research is the primary research option of the legal practitioner as it directly enquires into the state of the law shorn of arguments, or value factors. It is, in this sense, practical research as distinct from pure or applied research”⁴⁹.

⁴⁹ D. Adekunle, *Research Methodology in Legislative Drafting*, National Open University of Nigeria 2008, p. 2. Course Textbook for the Postgraduate Diploma in Legislative Drafting is available at: http://www.nou.edu.ng/NOUN_OCL/pdf/law%20600.pdf [last accessed: 11.02.2015].

However, it has been admitted that one of the limitations of the doctrinal legal method is that: “law and legal doctrine clearly have their geographical limitations, so that there is no claim to «general validity» outside the geographical borders of the legal system concerned”⁵⁰.

In an effort to provide in-depth answers to its six (6) research questions, the doctrinal legal research method will be combined with the comparative law method and the case study method respectively. For example, an analysis of the relevant comparative law method would be necessary to provide an answer to research question (4) of this research study. The relevant question (d) is: “[w]hat are the common law Rules and Principles of Statutory Interpretation? What is the major civil law principle of statutory interpretation in the case of *Bulmer v. Bollinger*? How is this applicable to legislative drafting in the United Kingdom and Nigeria respectively?”.

Such an analysis of comparative law methods is necessary in order to identify the method or methods which could be successfully applied to transplant the civil law principle of statutory interpretation and legislation to legislative drafting in the United Kingdom and Nigeria.

Suffice it to state that in the field of legislative drafting, it is now generally accepted that the Functionality Method is the most relevant comparative law method whenever it is necessary to transplant legal, judicial and legislative drafting solutions. This is expressed thus: “[t]he prevailing view in the theory of comparative law is expressed by Jhering, Zweigert and Kötz, who view the question of comparability through the relative prism of functionality. «The reception of foreign institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn’t grow in his back garden»”⁵¹.

Based on Jhering, Zweigert and Kötz’s “functionality” theory the relevant litmus test questions to apply to this present comparative study of United Kingdom and Nigeria, can be framed thus:

⁵⁰ See M. Van Hoecke, *Legal Doctrine: Which Method(s) for What Discipline*, [in:] M. Van Hoecke (ed.), *Methodologies of Legal Research*, Oxford: Hart Publishing 2011, p. iv, 1.

⁵¹ Cited in Xanthaki, *supra* note 23, p. 3.

1. Is there any basis for comparing the common law doctrines of statutory interpretation, precedent *stare decisis* and legislative drafting conventions that are applicable in the United Kingdom and Nigeria? Are there any similarities between the United Kingdom's and Nigeria's judicial and legislative drafting systems? Such similarities would provide justification for comparison;
2. In the event that the answer to question 1 is in the affirmative, the next question is which of these two countries is the borrower and which is the lender;
3. Finally, is there a "need" within Nigeria's system that justifies borrowing and legal transplant from United Kingdom? In the event that the legal transplant is legally successful, would the concepts be "useful" in Nigeria? In other words, would it be functional in Nigeria?

Query No. 1: It is trite and axiomatic, owing to historical antecedents; Nigeria and United Kingdom share a lot of similarities in terms of the judicial and legislative drafting systems. This much is admitted by Onwe thus: "[t]he British [legislative] drafting style and methodology, as a colonial legacy, was bequeathed to most commonwealth countries, especially Nigeria. Thus the history of legislative drafting in Nigeria could be said to have been generally influenced by the advent of colonial rule (...). The British Parliament legislated for the area now called Nigeria, and British drafters drafted Nigerian Laws even up to 1960 when Nigeria attained self-rule"⁵².

Query No. 2: The United Kingdom is the lender. As Onwe has rightly noted the United Kingdom "bequeathed" the common law to most commonwealth countries including Nigeria. Even after its independence, Nigeria has continued to apply the common law doctrines of precedents, *stare decisis* and legislative drafting conventions borrowed from the United Kingdom. So it is obvious that Nigeria is the borrower whereas the United Kingdom is the lender.

Query No. 3: Is there within Nigeria's judicial and legislative drafting system something that warrants a legal transplant from the United

⁵² Onwe, *supra* note 27, p. 3.

Kingdom? And if there is would the resultant legal transplant be “functional” in Nigeria?

The answer to both questions is in the affirmative. And it is best illustrated by the case of *Pepper (Inspector of Taxes) v. Hart*⁵³.

In this instance, the specific need of courts was how to devise a method of discerning the intention of Parliament in the event that the words of legislation were not clear and were ambiguous.

In *Pepper (Inspector of Taxes) v. Hart* the United Kingdom courts established the common law rule that “the intentions of Parliament can be discerned from the drafting instructions”⁵⁴ that formed the basis of the legislation such as the debate by the legislators as contained in the Hansard or official journal of the Parliament. Drafting instructions are the first stage of the legislative drafting process. This is significant considering that before this, case law laid down this legislative drafting rule that was not in existence before. As Jaja rightly put it: “in the case of *Pepper (Inspector of Taxes) v. Hart* (...) the court held that if primary legislation is ambiguous or obscure the courts may in certain circumstances take account of statements made in Parliament by Ministers or other promoters of a Bill in construing that legislation. Until that decision, using Hansard in that way would have been regarded as a breach of Parliamentary privilege”⁵⁵.

This case was decided in the year 1993. The question is: whether since then has it been transplanted or applied in Nigeria and has it proved functional when applied in Nigeria? Having analysed the subject of “legislative history”⁵⁶ as an aid to statutory interpretation, Onwe confirmed and provided details of at least three judgments and case law by Nigerian courts that successfully applied the decision in *Pepper (Inspector of Taxes) v. Hart*. The Nigerian cases are *Bronik Motors v. Wema Bank Ltd*; *Attorney-General of Kaduna State v. Hassan* and *Bishop Okogie v. Attorney-General of Lagos State*.

It is a recognised approach in legal research method, as postulated by Hutchinson thus: “[a] modified case study approach is very possible

⁵³ [1993] AC 593.

⁵⁴ Bennion, supra note 31, p. 469 cited in Stefanou, supra note 15.

⁵⁵ Jaja, supra note 27, p. 119.

⁵⁶ Onwe, supra note 27, pp. 84-85.

within a legal research project. It can be combined with a doctrinal study and allow typical examples to be explored according to varied legal outcomes”⁵⁷.

This is the justification for the application of the above combined method, considering that because of the differences in the level of development between the case studies (United Kingdom and Nigeria), it is expected that application of similar legal doctrines of statutory interpretation and legislative drafting would produce “varied legal outcomes”.

The case study research method involves “wise choice of examples”⁵⁸, in this instance, the United Kingdom as the archetype of the common law is a wise choice of case study as opposed to Nigeria. The practical application of research methods to the research questions will now become evident in the succeeding sub-headings below.

RESEARCH QUESTION (3): WHAT IS THE THEORETICAL FRAMEWORK? WHAT IS THE COMMON LAW DOCTRINE OF PRECEDENT AND STARE DECISIS? AND WHAT ARE THE IMPLICATIONS FOR LEGISLATIVE DRAFTING?

Does it make a difference whether the theory or theoretical framework of legislative drafting is applied to this research study?

The answer is in the affirmative. Choice of a wrong theoretical framework (premise) in legislative drafting would inevitably lead us to reach the wrong conclusion that there is no nexus between the rules of legislative drafting and statutory interpretation.

To illustrate: in the field of legislative drafting there is a debate as to whether legislative drafting is an “art” or a “science”. Some authors in legislative drafting support the theory (theoretical framework) that “legislative drafting is a *pure* art”⁵⁹ as opposed to a “science” or better still an admixture of both an “art” and a “science”. The view that legislative drafting is an art implies that it is and which means “[a]rt: The expression

⁵⁷ See T. Hutchinson, *Researching and Writing in Law*, Pyrmont, N.S.W: Australia, Lawbooks/Thomson Reuters 2006, p. 104.

⁵⁸ Ibidem, p. 62.

⁵⁹ See generally G. Bowman, *The Art of Legislative Drafting*, European Journal of Law Reform 2005, no. 1/2.

or application of creative skill and imagination". This view is supported by some Nigerian authors on legislative drafting such as Onwe who stated thus: "[l]egislative drafting is the *art* of putting the intention of the legislature or law-making organ of the state; parliament, congress of National Assembly or House of Assembly, however called, into proper written form for the guidance of private and public actions"⁶⁰.

This view of that legislative drafting is a pure art form, implies that the legislative drafter is a creative artist who applies only his creative imagination when called upon to draft legislation. In other words, such a drafter does not rely on any precedent or prescribed set of rules on legislative drafting. This view would lead to the conclusion that each legislative drafter as an artist would draft legislation according to their own personal taste or creative imagination. The implication for statutory interpretation is that it could create a chaotic system as each legislation would have to be interpreted according to the personal rules of the legislative drafter. In other words, such a situation would imply the complete non-adherence to the rules of legislative drafting by drafters and judges who are called upon to interpret legislation.

On the contrary, the modern and prevailing view is that legislative drafting is a combination of an art form as well as a science and even as a discipline of the legal profession, as Markman rightly put it: "[l]ooking at [legislative] drafting through all three of the lenses of Art, Science, and Discipline, instead of just any single one, allows us to see the profession in all of its dimensions"⁶¹.

The view that legislative drafting is a science implies that: "[s]eeing drafting as a science – "a systematically organized body of knowledge" – pushes us to recognize that the knowledge base a legislative counsel puts to use with every draft extends far beyond a list of *drafting conventions*"⁶².

In other words knowledge of "a list of [legislative] drafting conventions" (science) must be combined or complemented with

⁶⁰ Onwe, supra note 27, p. 1.

⁶¹ S.C. Markman, *Legislative Drafting: Art, Science or Discipline*, The Loophole – Journal of Commonwealth Association of Legislative Counsel 2011, p. 11, available at: http://www.opc.gov.au/calc/docs/Loophole_papers/Markman_Nov2011.pdf [last accessed: 24.02.2015].

⁶² Ibidem, p. 9.

an infusion of the personal “knowledge base” or creative imagination of the “legislative counsel” or legislative drafter.

Ultimately, this is the middle ground approach that views legislative drafting as a combination of art and science wherein a drafter must combine knowledge of legislative drafting conventions with a personal creative style.

And what are the implications for legislative drafting?

This modern view of legislative drafting as a combination of art and science is evident in the attitude of the Courts towards the interpretation of legislation.

As a general rule, in the interpretation of legislation, Courts recognise that adherence to the relevant legislative drafting conventions (science) is a necessity.

However, as with every general rule there are exceptions. Therefore, it is the attitude of the Courts to make exceptions to strict adherence to legislative drafting conventions (science) in instances where such non-compliance with legislative drafting conventions would not result in substantial injustice. This approach demonstrates that the Courts give regard to the fact that in certain instances, when drafting legislation, the drafter of legislation might apply his personal judgment (art) to depart from the legislative drafting conventions.

In the event that such resort to personal style (art) by the drafter results in what the Courts regard as inelegant drafting, the Courts have held that this is not sufficient grounds to pronounce the legislation as illegal or ineffective.

The mere fact that the Court still regards such legislation as legal and enforceable is proof enough that the Courts recognise that there is an element of art that is applied to legislative drafting.

This line of reasoning is illustrated by evidence from the judgements that touch on legislative drafting issues.

Judgments that illustrate the general rule – legislative drafting as a science

Some of these judgments illustrate the fact that as a general rule courts insist on compliance with legislative drafting conventions (science). Some of these cases are summarised below:

The fact that the Courts regard as serious the conventions and rules of legislative drafting is evident by the judgements in the Nigerian case of *Dr. Gabriel O. Omowaiye v. Attorney-General of Ekiti State and Another*⁶³. In this case the Court of Appeal was invited to provide an interpretation of section 208 of the 1999 Constitution of Nigeria (as amended) which vests the Governor with powers to make appointments of certain categories of staff. It was held that: “[a]bove all, even if we, take the humble view that counsel's submission was borne out of a superficial reading of the drafting technique employed in section 208(5). ***He glossed over two devices in legislative drafting which adorn that subsection, namely, the punctuation mark «colon» and the proviso.*** An intimate reading of subsection 5 of section 208 (supra) would reveal that a full colon precedes the proviso therein. This indicates that it [the proviso] illustrates or explains the appointments contemplated in subsection 5 only” [*per* NWEZE, J.C.A., pp. 39-42, paras. F-B].

The decision of the Nigerian Court of Appeal in the case of *Dr. Joseph Amedu v. Federal Republic of Nigeria*⁶⁴, more aptly demonstrates the fact that the Court of Appeal did not gloss over the wrong use of a legislative drafting expression by the counsel for the Appellant. In this instance, the Court held that: “what the Appellant described as supercession is generally referred to in drafting parlance as substitution”. Both the Counsel for the Appellant in this case and the Judge that delivered the lead judgment had to make reference to the leading authoritative textbook on legislative drafting, namely: G.C. Thornton, *Legislative Drafting*, 3rd ed., London: Butterworths 1987 thus: “[d]welling on the word «deemed» as used in section 61 of the ICPC Act, the Appellant submitted that the same was ambiguous and in this regard referred to legislative drafting

⁶³ [2010] Law Pavilion Electronic Law Reports-4779 (CA).

⁶⁴ [2009] Law Pavilion Electronic Law Reports-8212 (CA).

by G.C. Thornton 3rd ed. at pages 86-87 as showing the position of the law when the word «deemed» is used in a statute. It was submitted by the Appellant that the purported «deemed» power to prosecute under section 61 of the Act had been rebutted by Exhibits «A» and «B» which exonerated him, since the word «deemed» as used under section 61 of the ICPC Act is presumption of law that can be rebutted by facts”⁶⁵.

The Courts in the United Kingdom also adopt a similar approach considering that they pay great attention to legislative drafting conventions. For example in the case of *Onu v. Akikwu*⁶⁶ it is reported⁶⁷ that the Court of Appeal revealed a legislative drafting error inherent in the UK’s Equality Act 2010, considering that section 106 of the Act did not apply the legislative drafting technique of providing a definition for the use of a new word.

Judgments that illustrate the exception to the general rule – legislative drafting as an art

On the other hand the judgments that demonstrate the exception to the general rule are: even the Courts of law have taken the modern view that makes room for the personal drafting styles of individual drafters even though these may represent a departure from the legislative drafting conventions provided that the wordings do not completely obscure the substance of the law and the intention of Parliament is clear.

As demonstrated by the decision of the United Kingdom’s Supreme Court in *Scottish Power (Scotland) v. Morrison Sports Limited and Others*⁶⁸: “[a]gainst that background, while criticisms might be levelled at the **style of drafting** (in particular the apparent introduction of an important private right of action for damages by reservation in section 29(3) of the 1989 Act), we consider that the plain meaning of section 29(3) is that Parliament intended any member of the public who suffers «any damage or injury

⁶⁵ Ibidem.

⁶⁶ [2014] EWCA Civ. 279, available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2014/279.html> [last accessed: 24.02.2015].

⁶⁷ H. White, *Drafting Error Revealed by Case Law*, available at: <http://www.cipd.co.uk/pm/peoplemanagement/b/weblog/archive/2013/06/17/drafting-error-in-equality-act-revealed-through-case-law.aspx> [last accessed: 18.02.2015].

⁶⁸ [2010] UKSC 37.

which may have been caused by the contravention» of the 1988 Regulations to be entitled to raise an action for damages against the person who contravened the regulations, founding the action upon that breach of statutory duty”.

Even when the legislative drafter’s resort to their personal style results in inelegant drafting, the Nigerian Courts have taken a similar view that to the effect that: “[t]he courts have moved away from reliance on technicalities in favour of substantial justice. I am of the view and do hold that *notwithstanding the inelegant manner in which the grounds of appeal are drafted*, they are valid grounds of appeal”⁶⁹.

A word of caution is necessary; there are limits to the extent that Courts of law can go to correct legislative drafting errors. As a general rule, Courts would not usurp the function of the Legislature through what it describes as “judicial legislation” in an effort to correct a legislative drafting error. This view is well expressed in the case of *Enviroco Limited v. Farstad Supply A/S*⁷⁰: “[t]here is therefore no clear basis on which «the court must be abundantly sure» that there is a drafting error of the nature which the Court can correct: *Inco Europe Ltd v. First Choice Distribution* [2000] 1 WLR 586 at 592. The exercise which Enviroco would require from the Court would be an impermissible form of judicial legislation”.

Generally, while making allowances and exceptions for personal styles, the general rule remains that, in their task of interpreting legislation, it is part of the primary duty of the Courts themselves to point out instances when there is failure to comply with legislative drafting rules when these failure would result in substantial injustice.

The meaning of judicial precedent and *stare decisis* is examined hereunder as an answer to the research sub-question:

⁶⁹ *Alhaja Ayo Omidiran v. Etteh Patricia Olubunmi*, [2010] Law Pavilion Electronic Law Reports-9610.

⁷⁰ [2011] Law Pavilion Electronic Law Reports- 17800, UK Supreme Court.

What is the common law doctrine of precedent and stare decisis?

The Nigerian Supreme Court in the case of *Clement v. Iwuanyanwu*⁷¹ defined it thus: “a precedent is an adjudged case or decision of a higher court considered as furnishing an example or authority for an identical or similar question afterwards arising on similar question of law”. *Stare decisis* (an abbreviation of the Latin phrase, *stare decisis et non quieta movere*) meaning to abide by a former decision where the same crops up again in litigation.

“The doctrine of judicial precedent or *stare decisis* is hinged on the fact that the principle of law on which a court bases its facts, or issues before it must be followed by courts lower in hierarchy and may be followed by a court of coordinate jurisdiction or a court which is higher in hierarchy in future similar cases. Thus, when a court is bound by a previous decision, the precedent is said to be binding. On the other hand, when a court has discretion whether or not to follow a previous decision, the precedent is said to be persuasive”⁷².

It is worth noting from the onset, that it is only the legal principles forming part of the *ratio decidendi* (reasons for the decision) of the case⁷³ is what is binding and not the *obiter dictum*.

The overall objective of this research is to identify relevant rules and conventions of legislative drafting with a view to promoting consistency and legal certainty in the drafting and interpretation of legislation. This view is consistent with purpose of the doctrine of precedent and *stare decisis* thus: “[t]he purpose of *stare decisis* is to give uniformity, continuity and predictability to the law. In the common law world the principle is well established and traditionally it was considered one of the main characteristics of common law”⁷⁴.

However, it has been rightly noted that in the United Kingdom and in Nigeria respectively, there are exceptions to the operation

⁷¹ [1998] 3 Nigerian Weekly Law Report-NWLR (Pt. 107), 54 Oputa JSC.

⁷² E.A. Ikegbu, S.A. Duru, E.U. Dafe, *The Rationality of Judicial Precedent in Nigeria's Jurisprudence*, American Journal of Contemporary Research 2014, vol. 4, no. 5, p. 149.

⁷³ See the House of Lords in a “Practice Statement (Judicial Precedent)”, (1966) 1 WLR 1234 (1966) 3 All ER 77 (HL), proposed “while treating former decisions of this house as normally binding, to depart from a previous decision when it appears right to do so”.

⁷⁴ See Xanthaki, *supra* note 4, p. 206.

of the doctrine of precedents and *stare decisis*. In the United Kingdom, it is noted that: “the doctrine of precedent does not remain absolute or indeed purist in its *stare decisis* format. Nowadays decisions made in higher courts are binding upon courts below them, and to a certain extent on courts on the same level”⁷⁵.

In Nigeria, it has been established that there are circumstances wherein the doctrine of precedents and *stare decisis* would not apply. For the avoidance of doubt these conditions are reproduced below:

“Obilade observes that there is a general rule under the doctrine of *stare decisis* of which a court is bound to follow the decision of a higher court in the hierarchy. On the contrary, a lower court is not bound to follow the decision of a higher court which has been overruled. Thus, in the circumstances where the decision of a higher court is in conflict with a decision of another court which is above such high court in the hierarchy, a lower court is not bound by such decision. Again, in principle, a lower court is entitled to choose which of the two conflicting decisions of a higher court or of higher courts of equal standing it would follow (Obilade, 115). Furthermore, Ndifon has put forward the standard conditions for the smooth operation of *stare decisis* as follows: 1. There must be in operation a hierarchy of courts; 2. The issue of fact and law in prior decision must be similar to the precedent case; 3. The decisions of the higher courts must bind the lower courts; 4. Law report should be available (Ndifon, 212-213). The above cataloguing posture by Ndifon was aimed at ensuring the smooth operation of judicial precedent in our judicial system. The Principle of Distinguishing states that the decision of a court does not constitute a binding precedent for any subsequent case if the cases differ with regard to material facts”⁷⁶.

For a better understanding of the doctrine of precedent and *stare decisis*, it would be necessary to summarise the hierarchy of courts in Nigeria as stipulated under Chapter Seven of the 1999 Constitution of the Federal Republic of Nigeria (as amended) thus:

- Supreme Court of Nigeria;

⁷⁵ Ibidem.

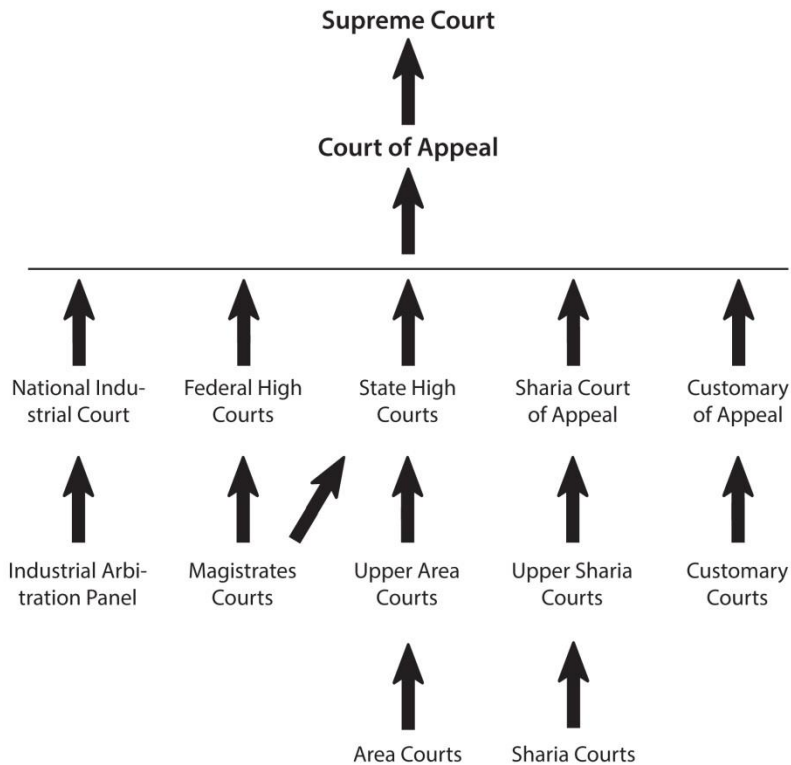
⁷⁶ [1993] AC 593.

- The Court of Appeal;
- The Federal High Court;
- The High Court of the Federal Capital Territory Abuja;
- The Sharia Court of Appeal of the Federal Capital Territory;
- The Customary Court of Appeal of the Federal Capital Territory;
- The State High Court;
- The Sharia Court of Appeal;
- The Customary Court of Appeal;
- The Election Tribunal.

“The jurisdiction or powers to hear and determine the cases coming before them were also stated in the Constitution. Indeed the above listed Courts are referred to as Superior Courts.

The order of the list above represents the hierarchy of these courts. However, the Federal High Court, the High Court of the Federal Capital Territory Abuja, and the State High Court are of coordinate jurisdiction (...). Please note that in some exceptional instances under the Constitution, the Court of Appeal serves as the last place where appeals terminate, especially in election petition matters, (see section 246(3) of the 1999 Constitution of Nigeria as amended). The only notable exception to the above is electoral matters concerning the office of the President or Vice President of the Federal Republic of Nigeria. In this case, the Court of Appeal has original jurisdiction and appeals go from there to the Supreme Court. See section 239 of the Constitution. Apart from the Courts mentioned earlier, the Constitution empowers States to create other Courts”⁷⁷. Below is a diagram:

⁷⁷ *Paralegal Toolkit on Improving Women’s Access to Justice in Northern Nigeria*, Abuja: Global Rights 2010, pp. 15-17, available at: http://www.globalrights.org/Library/Access%20to%20Justice/Paralegal_toolkit_for_Northern_Nigeria_English_Website.pdf [last accessed: 24.02.2015].

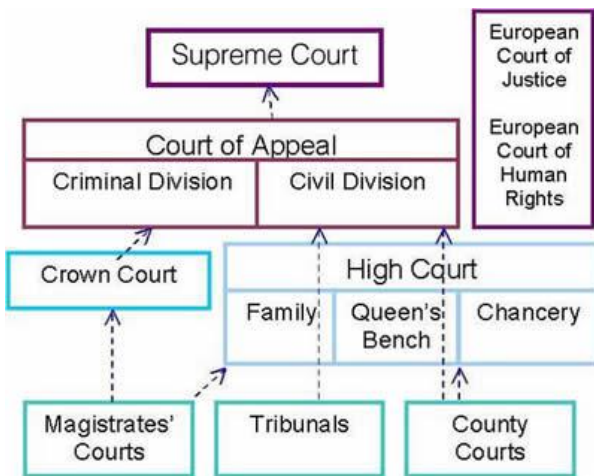


In the United Kingdom, the hierarchy of courts is as follows:

“Magistrates’ Courts and County Courts are bound by decisions of the High Court, the Court of Appeal and the Supreme Court, but they are not bound by their own decisions and they do not bind other courts. The Crown Court is bound by decisions of the Court of Appeal and the Supreme Court, but its judgments have mere persuasive value for the other courts, especially if the judgment is made by High Court judges sitting in the Crown Court. The High Court is bound by the Court of Appeal and the Supreme Court, and its judgments are binding on inferior courts, but not upon High Court judges. Moreover, High Court judgments are not always binding upon Divisional Courts (civil or criminal). The Divisional Courts of the High Court are bound by their own judgments, by the judgments of the Court of Appeal, and by the Supreme Court. Their judgments are binding upon inferior courts (except the Employment Appeal Tribunal) and High Court judges sitting alone. The Court of Appeal

(Civil Division) is bound by the Supreme Court, and its own decisions, unless there was a serious omission flawing the decision, the decision conflicts with an earlier contradictory decision, or the previous Court of Appeal decision was overruled by the Supreme Court. Its judgments are binding on the Divisional Courts of the High Court, individual High Court judges and the inferior courts including the Employment Appeal Tribunal. The Court of Appeal (Criminal Division) is bound by the Supreme Court and its own judgments, and is binding on lower courts. Finally, Supreme Court judgments are binding on all courts. The Supreme Court is persuaded by, but not bound by, inferior courts and, since 1966, is not bound by its own decisions. Moreover, in practice the Supreme Court may have to bow to the European Court of Justice *via* the principles of supremacy and indirect effect, and the European Court of Human Rights by virtue of the [UK] Human Rights Act⁷⁸.

Below is a simplified diagram of the hierarchy of courts in the United Kingdom⁷⁹:



Notes: "This diagram shows the hierarchy of the UK courts in a simplified form. Note that the Court of Justice of the European Union and the European Court of Human Rights stand alongside the UK courts hierarchy. Reference can be made to the Court of Justice from any court in the system.

The European Court of Human Rights enforces the European Convention on Human Rights. The Supreme Court replaced the Appellate Committee of the House of Lords in October 2009. The Supreme Court is housed in Middlesex Guildhall on Parliament Square in London".

⁷⁸ See Xanthaki, *supra* note 4, p. 206.

⁷⁹ Based on the Faculty of Law, University of Oxford, Legal Research and Mooting Skills Programme, available at: http://www.law.ox.ac.uk/lrsp/overview/law_reports.php [last accessed: 24.02.2015].

Judicial precedent and stare decisis – what are the implications for legislative drafting?

Traditionally, strict adherence to the common law doctrines of precedent and *stare decisis* would have implied that the Courts would always insist on strict compliance with legislative drafting conventions.

However, as demonstrated by the judgments in the cases of *Scottish Power (Scotland) v. Morrison Sports Limited and Others*⁸⁰, *Alhaja Ayo Omidiran v. Etteh Patricia Olubunmi*⁸¹ the modern view is that when strict adherence to legislative drafting conventions would result in substantial injustice, the Courts would not insist.

In addition to application of distinguishing cases, this demonstrates that the “principle of precedent which has, in common law, its modern facet (...) is inherently limited”⁸².

This modern approach in itself presents a series of opportunity for legislative drafting.

In the first instance, as stated at the outset of this study, the judgments relating to exceptions to strict adherence to traditional legislative drafting conventions demonstrate that “drafting style and practices are always capable of improvement”⁸³.

A list of these judgments ought to serve as the evidence that would accompany any memorandum or document calling for reform of the relevant legislation that prescribes the rules for the drafting and construction of legislation. Apart from the Rules of Legislative Procedure of the Senate (2011) and the House of Representatives (2014) of the National Assembly, the Interpretation Act 1964 and the Acts Authentication Act 1962 have never undergone amendments since their enactment.

The opportunity to apply modern approaches, innovations and conventions in legislative drafting, is another opportunity that is offered by the common law doctrine of precedent and *stare decisis*. By applying the principle of the distinguishing of cases the Courts have

⁸⁰ [2010] UKSC 37.

⁸¹ [2010] Law Pavilion Electronic Law Reports-9610.

⁸² See Xanthaki, *supra* note 4, p. 206.

⁸³ Thornton, *supra* note 1, preface, p. v.

the opportunity to introduce novel legislative drafting conventions to new cases. And on the basis of the doctrine of precedent and *stare decisis* lower courts are bound to comply with such new legislative drafting conventions introduced by superior courts of law.

For example this research study shows that one instance wherein the Court of Appeal introduced a novel legislative drafting convention is the judgment in the case of *Orija & others v. the Chairman National Population Commission & Others*⁸⁴. Hon. Justice Yahaya, J.C.A. held that: “[i]t is an acceptable and modern method of legislative drafting, to make provisions for procedural rules, in a schedule to the law, and not in the main body of the law itself”⁸⁵. This case will be discussed in fuller details under the section on modern legislative drafting conventions.

This presents opportunities on two fronts for legislative drafters. On the one hand, when they appear in court as counsel, legislative drafters have the opportunity to introduce these new legislative drafting conventions in their brief of arguments. According to the Director of the Legislative Drafting Unit⁸⁶, Legal Services Directorate, National Assembly of Nigeria, there is an unwritten rule that every lawyer employed in this Directorate must undertake litigation on behalf of the National Assembly at some point during the course of their employment regardless of whether they are assigned to the Legislative Drafting Unit. Such periods of appearances in court, present an opportunity for legislative drafting lawyers to present novel legislative drafting conventions in their brief of argument or during oral advocacy. This view is confirmed as a practice by the Director of Legal Services⁸⁷, Yobe State House of Assembly. In the case of Yobe State, legislative drafting lawyers are compelled to undertake litigation in addition to their legislative drafting duties as a matter of necessity. This is due to the fact that there are only five (5) lawyers in this Department to serve over twenty (20) legislators.

⁸⁴ [2013] Law Pavilion Electronic Law Report-20835(CA).

⁸⁵ *Ibidem*, p. 16, para. A.

⁸⁶ Personal interview with M.D. Hassan NILS Office, Abuja on 18.02.2015.

⁸⁷ Personal interview held on 5.12.2014 with the Director when he attended the Legislative Drafting training workshop organised and held at NILS office, Abuja, 1-5.12.2014.

On the other hand, while undertaking legal research, legislative drafters ought to scour the judgments of courts of law to identify such new legislative drafting conventions and find innovative methods to bring to the attention of judges, legislators and other officials who have responsibility for enacting or amending legislation or administrative rules governing legislative drafting. This will be demonstrated under the research question 4 discussed below.

RESEARCH QUESTION 4: WHAT ARE THE COMMON LAW RULES AND PRINCIPLES OF STATUTORY INTERPRETATION? WHAT IS THE MAJOR CIVIL LAW PRINCIPLE OF STATUTORY INTERPRETATION AS STATED IN THE CASE OF *BULMER V. BOLLINGER*? HOW IS THIS APPLICABLE TO LEGISLATIVE DRAFTING IN THE U.K. AND NIGERIA?

Statutory Interpretation is one of the three of Tetley's themes of analysis in comparative legislative drafting which is discussed under this heading.

The actual meaning of statutory interpretation is best understood by Lord Reid's statement in the case of *Black Clawson International Ltd. v. Papierwerke Aschaffenburg*⁸⁸ thus: "[w]e often say that we are looking for the intention of parliament, but that is not quite accurate. We are seeking the meaning of the words which parliament used, we are seeking not what parliament meant, but the true meaning of what they said".

From the outset, it is obvious that the focus of statutory interpretation which is to discern "the true meaning of what is said" has direct legislative drafting implications. This is because what Parliament says is often expressed in the wordings of a piece of legislation which is itself written by legislative drafters. Therefore, it is of the utmost importance that legislative drafters use clear and unambiguous words in expressing the intention of Parliament in legislation that they draft.

This view finds support in a long line of decided cases such as the case of *Karsha v. Commissioner of Police*⁸⁹, in which the Court stated that: "what the legislature intended to be done or not be done can only be legitimately ascertained by express words or by reasonable or necessary implication".

⁸⁸ [1975] AC at 613.

⁸⁹ [1991] 2 NWLR (pt. 172) 2002.

This view finds further support in the case of *Abioye v. Yakubu*⁹⁰: “if the words of a statute are clear and unambiguous, it is the words that govern and the courts must give effect to it because the words must give effect to it because the words speak the intention of the legislature”.

Discerning the intention of Parliament – What are the implications for legislative drafting?

(a) Definition of “clear and unambiguous words of a statute”

Since the Courts have established that it is the “words of a statute” that constitute the litmus test and essential elements in determining the intention of the legislation, it logically follows that the legislative drafters whose primary task involves “putting the intention of legislature (...) into proper written form” must choose the most effective “words of a statute”.

In accordance with the decisions of the Courts, in their choice of “the words of a statute” legislative drafters must choose words that are “clear and unambiguous”.

The implication is that legislative drafters must themselves have a clear cut definition of what constitutes “clear and unambiguous words” when they are framing the “words of a statute”.

Coincidentally, in accordance with the criteria (clear and unambiguous words) laid down by the Courts of law, in the field of legislative drafting, the same criteria (clear and unambiguous) are recognised as part of the definition “effective” legislation.

“Clarity, precision, and unambiguity” are identified as the key pillars of “effective” legislation the highest goal that legislative drafter pursue when drafting legislation. The definition is as follows: “*effectiveness* of legislation means that the legislation manages to introduce adequate mechanisms capable of producing the desired regulatory results (...) this includes but is not limited to implementation, enforcement, impact and compliance”⁹¹. Furthermore, “*clarity, precision and unambiguity* are

⁹⁰ [1991] 5 NWLR (pt. 190) at 130.

⁹¹ See Xanthaki, *supra* note 23, p. 6.

the tools of effectiveness (...) clarity, or clearness, is the quality of being clear and easily perceived or understood. Precision is defined as exactness of expression or detail. Unambiguity is certain or exact meaning”⁹². “Ambiguity occurs when words can be interpreted in more than one way”. Closely related tools are *gender-neutral drafting* and *plain language* (avoid legalese).

Under Research Question 5, a fuller examination of the concepts of gender-neutral drafting and plain language will be discussed as some of the modern and innovative legislative drafting conventions and techniques.

(b) Implications for legislative drafters when taking drafting instructions – discerning the intention of Parliament

In the field of legislative drafting, the receipt of drafting instructions by the legislative drafter is identified as the first step out of the five stages of the legislative drafting process⁹³.

It is extremely important that at this stage of the drafting process that the legislative drafter pays attention considering that the drafting instructions received from the legislator would eventually form the basis of the “words of a statute”. This is based on the principle of communication represented by the acronym: “GIGO (where GIGO stands for Garbage in, Garbage out). Drafting instructions should be clear, comprehensive and coherent.

Holding interviews and consultations with legislators is a recognised method that the legislative drafter may employ to discern the intentions of the legislature as well as to seek clarifications on the drafting instructions. Public hearings of the Committees of the National Assembly are one of the legally recognised methods of seeking clarification on drafting instructions. At such members of the public and others (including legislative drafters) are permitted to seek clarification or make

⁹² See H. Xanthaki, *Drafting Manuals and Quality in Legislation*, *Legisprudence – Journal of the Theory of Legislation* 2010, vol. 4, no. 2, pp. 111, 116.

⁹³ Thornton, *supra* note 1, p. 128 identifies the five stages of the drafting process as: 1. understanding; 2. analysis; 3. design; 4. composition and development; 5. scrutiny, and testing.

written and oral submissions on legislative Bills that are currently undergoing the law-making process. The holding of public hearings is done by virtue of the powers conferred upon Committees of the National Assembly by section 62 of the 1999 Constitution of Nigeria (as amended).

(c) Implications for judges and legislative drafters – methods of discerning the intention of Parliament

The use of Hansard is another method of discerning the intentions of Parliament. Hansard is a written verbatim record of the debates that are conducted by legislators in the legislature. It is the official record and journal of any legislature. As we earlier demonstrated through a long line of decided cases, such as *Pepper (Inspector of Taxes) v. Hart* the United Kingdom courts established the common law rule that “the intentions of Parliament can be discerned from the drafting instructions”. Nigerian courts have consistently successfully applied the decision in *Pepper (Inspector of Taxes) v. Hart*. The Nigerian cases are *Bronik Motors v. Wema Bank Ltd*; *Attorney-General of Kaduna State v. Hassan* and *Bishop Okogie v. Attorney-General of Lagos State*.

Having established that there is a nexus between statutory interpretation and legislative drafting, it is necessary to examine the rules of statutory interpretation. Such an examination would reveal gaps and the need to apply a new approach.

What are the common law rules of statutory interpretation?

As stated at the outset of this research study one of the major shortcomings of the common law rules or principles of statutory interpretation is that: “[t]he principles of statutory interpretation are not codified”. According to Onwe, these rules are not strict rules of law. They are more or less tendencies and approaches which the courts have developed over the years to guide statutory interpretation”⁹⁴.

⁹⁴ Onwe, *supra* note 27, p. 74.

One of the disadvantages is that due to its unwritten nature it is difficult to ascertain with certainty what constitutes the rules of interpretation because the courts are always developing new rules.

However, there is a positive side to the unwritten nature of common law rules of statutory interpretation. It provides room for the ability to develop new rules of interpretation to deal with new situations that are not addressed by the current rules.

This is the basis upon which the Courts in the United Kingdom have developed the rule of purposive approach to statutory interpretation as highlighted in the case of *Bulmer v. Bollinger* [1974] EWCA Civ. 14.

It is necessary to re-state the general rules of statutory interpretation considering that the purposive approach advocated in the case of *Bulmer v. Bollinger* [1974] EWCA Civ. 14 represents an exception and a departure from the general rules of statutory interpretation.

Generally, there are three recognised rules of statutory interpretation: (1) the literal rule; (2) the mischief rule, and (3) golden rule. Some authors have added several other rules, maxims, presumptions, and principles of interpretation which the courts have developed over the years. However, for the purposes of this research study we are limited to the three major rules.

In a nutshell, “the literal rule as evident in the *Sussex Peerage* [1844] 11 Cl & F 85 case demands adherence to the natural and ordinary sense of words. The mischief rule, as evident in *Heydon* [1584] 3 Co Rep 7a requires the identification of the problem that invited legislative intervention, and the suppression of this mischief. The Golden rule, evident in Lord Atkinson in *Victoria (City) v. Bishop of Vancouver Island* [1921] AC 384, requires the application of the literal rule where possible and engagement of the mischief where necessary”⁹⁵. In Nigeria, these rules of statutory interpretation have been applied as follows: (1) the literal rule – in the case of *Awolowo v. Shagari* and others [1979] 6-9 Supreme Court (SC) 31, the exception to the literal rule was expressed as *per* the dissenting judgment of Kayode Eso, to the effect to the effect that: “where the words are used in special contexts in connection with a usage

⁹⁵ See Xanthaki, *supra* note 4, p. 203.

of trade or profession, the literal rule may not be applied”⁹⁶; (2) *National Assembly v. The President of the Federal Republic of Nigeria* [2003] 9 NWLR (pt. 824) 104 “for a vivid dissection of the operation of the mischief rule of statutory construction”⁹⁷; (3) the golden rule – “[f]or the import of the golden rule of interpretation, see the case of *ADH Ltd. v. V.A.T. Ltd.* [2006] 10 NWLR (pt. 989) 635. See also the classical *dictum* of Idigbe JSC in the earlier case of *Bronik Motors Ltd. & another v. Wema Bank Ltd.* [1983] Nigerian Supreme Court Constitutional Cases-NSCC 226 at 260⁹⁸.

The traditional approach – Implications of the statutory interpretation of rules on legislative drafters and judges

In the case of *Bulmer v. Bollinger* [1974]⁹⁹ Lord Denning has provided a classic exposition of the consequences and implications on legislative drafting and judicial interpretation. Owing to the limitations of the common law approach, he admonished common law judges to adopt the purposive interpretation which is the prevalent: “European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose or intent”¹⁰⁰.

According to Lord Denning when delivering the lead judgment in *Bulmer v. Bollinger*, there common law judges and legislative drafters are trapped in a sort of “rat-race” or “circle” wherein the common law legislative drafting style greatly impacts and determines the approach of the judges when applying the common law rules of interpretation and *vice versa*. This is evident in his judgement especially the italicised portions: “[t]he draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee

⁹⁶ Xanthaki, *supra* note 92, p. 75.

⁹⁷ *Ibidem*, p. 77.

⁹⁸ *Ibidem*, p. 78.

⁹⁹ EWCA Civ. 14, available at: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWCA/Civ/1974/14.html&query=Bulmer+and+v+and+Bollinger+and+%281974%29&method=boolean> [last assessed: 26.02.2015].

¹⁰⁰ *Per* Lord Denning in *Bulmer Ltd. v. Bollinger SA* (1974) 4 ch 401 at 411 cited in: W. Robinson, *Drafting of EU Acts: A View from the European Commission*, [in:] C. Stefanou, H. Xanthaki (eds), *Drafting Legislation – A Modern Approach*, Aldershot: Ashgate Publishing 2008, p. 193.

all possible circumstances that may arise and to provide for them. They have sacrificed style and simplicity. They have foregone brevity. They have become long and involved. *In consequence, the Judges have followed suit.* They interpret a statute as applying only to the circumstances covered by the very words. They give them a literal interpretation. If the words of the statute do not cover a new situation – which was not foreseen – the Judges hold that they have no power to fill the gap. To do so would be a «naked usurpation of the legislative power», see *Magor and St. Mellons R.D.C. v. Newport Borough Council* [1952] A.C. 189.

The gap must remain open until Parliament finds time to fill it”¹⁰¹.

[Original:

“The draftsmen of our statutes have striven to express themselves with the utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them. They have sacrificed style and simplicity. They have foregone brevity. They have become long and involved. In consequence, the judges have followed suit. They interpret a statute as applying only to the circumstances covered by the very words. They give them a literal interpretation. If the words of the statute do not cover a new situation – which was not foreseen – the judges hold that they have no power to fill the gap. To do so would be a «naked usurpation of the legislative function». (...) The gap must remain open until Parliament finds time to fill it.

How different is this Treaty? It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. An English lawyer would look for an interpretation clause, but he would look in vain. There is none. All the way through the Treaty there are gaps and lacunae. These have to be filled in by the judges, or by Regulations or directives. It is the European way”].

¹⁰¹ Ibidem, para 10.

The modern approach – Implications of the statutory interpretation of rules for legislative drafters and judges

It has rightly been admitted that: “[t]here are limits and restrictions inherent in the UK system of statutory interpretation”¹⁰².

As a solution to the limitations of the traditional approach, Lord Denning in *Bulmer v. Bollinger* recommended adoption of the European (civil) law style of legislative drafting characterised by laying down “general principles (...) aims and purposes. All sentences of moderate length and commendable style (...) with gaps and *lacunae* (...) to be filled by the judges or Regulations”¹⁰³.

a) Implications for legislative drafting and judges

Traditionally, in drafting common law legislation, common law legislative drafters do not include a statement of the purpose or a statement of general principles of the legislation as one of the provisions.

However, following the decision in *Bulmer v. Bollinger*, Thornton rightly stated that: “[n]ow that a purposive approach to statutory construction is routinely taken by the courts in many jurisdictions, there is increased obligation on drafters to make the aim and object of legislation clear on the face of it”¹⁰⁴.

Sir William Dale described the purpose of purpose provisions, thus: “[a]n enunciation of principle gives to a statute a firm and intelligible structure. It helps to clear the mind of the legislator, provides guidance to the Executive, explains the legislation to the public, assists the courts when in doubt about the application of specific provision”¹⁰⁵.

Thornton argues that Purpose Provisions should appear in the preliminary portions of the legislation and he cites the examples of purpose provisions that appear in sections 3 and 4 of the New Zealand Sugar Loaf Islands Marine Protected Area Act, 1991, which provides:

¹⁰² Thornton, *supra* note 1, p. 205.

¹⁰³ *Ibidem*.

¹⁰⁴ *Ibidem*, p. 154.

¹⁰⁵ [1988] *Statute Law Review* 15 cited in Robinson, *supra* note 100, p. 155.

“Purpose of Act

The purpose of this Act is to ensure that the scenery, natural features, and eco-systems of the Protected Area that should be protected and conserved by reason of their distinctive quality, beauty, typicality, or uniqueness are conserved.

Principles

The Protected Area shall be administered and maintained so as to ensure that, so far as is practicable,

- a. The area, and its scenery, natural features, and eco-systems are protected and conserved in their natural state;
- b. The value the area has in providing natural habitats is maintained;
- c. Members of the public have access to the area for recreational purposes and for the purpose of studying, observing, and recording any marine life in its natural habitat;
- d. The provisions of any relevant management plan for the time being in force under the Fisheries Act 1983 or the Conservation Act 1987 are complied with”¹⁰⁶.

It appears that there is a reluctance to embrace the practice of inclusion of purpose provision from the point of view of legislative drafting in the United Kingdom and Nigeria. This is evident from a cursory reading of the Laws of the Federation of Nigeria, 2004. It is observed that there is no legislation that employs this approach by including a purpose provision. Also, from Thornton’s in-depth study of purpose provisions within the common law jurisdictions, there is only one example of a legislation that mentions purpose thus: “[t]he provisions of Schedule 2 shall have effect for the purpose of reducing stateliness”¹⁰⁷.

However, in other commonwealth jurisdictions such as Thailand, the courts and judges are already applying purposive interpretation as is evident in the judgment in the case of *Medical Council of Hong Kong v. Chow Siu Shek*¹⁰⁸, in which it was held that: “it is necessary to read all of the relevant provisions together and in the context of the whole

¹⁰⁶ Robinson, *supra* note 100, pp. 156-157.

¹⁰⁷ *Ibidem*, p. 158.

¹⁰⁸ [2000] 2 HKLRD 674.

statute as a purposive unity in its appropriate legal and social setting [and] to identify the interpretative considerations involved and then, if they conflict, to weigh and balance them”¹⁰⁹.

In conclusion on this sub-heading, Xanthaki rightly provides an explanation for the limited application of purpose provisions and purposive interpretation in the United Kingdom (and by extension Nigeria) as follows:

“There are limits and restrictions inherent in the UK system of statutory interpretation whose legal value and consequent application in practice remains unaffected and continues to qualify rules of statutory interpretation, including purposive interpretation. First, interpretation is only invited when the meaning of words is unclear and disputed. So purposive interpretation is not needed and therefore not invited to tolerate for the purposes of everyday construction and application of the law. [Purposive] interpretation is therefore limited to the extraordinary, albeit frequent, cases where there are either problems of [legislative] drafting arising from the words of the statute alone”¹¹⁰.

With regards to the application of the principles of European civil law purposive interpretation in legislative drafting and statutory interpretation, this research recommends a cautious approach on a case-by-case basis. The legislative drafter must decide whether a purpose provision is required depending on the nature and content of each piece of legislation. Also, courts of law and judges must decide based on the “words of a statute” whether a purposive interpretation is required. For example, it does appear that purpose provisions would be ideal when drafting legislation that are long, windy and made up many different parts such as the Petroleum Industry Bill, 2012¹¹¹ that is undergoing legislative enactment process in Nigeria’s National Assembly since the year 2012.

¹⁰⁹ Cited in Hon. Mr Justice Bokhary PJ, *Legislative Drafting: A Judicial Perspective*, The Loophole – Journal of Commonwealth Association of Legislative Counsel 2010, pp. 26-40, available at: https://www.opc.gov.au/calc/docs/Loophole/Loophole_Jan10.pdf [last assessed: 26.02.2015].

¹¹⁰ EWCA Civ. 14, *supra* note 99, p. 205.

¹¹¹ Available at: <http://www.nigeria-law.org/Legislation/LFN/2012/The%20Petroleum%20Industry%20Bill%20-%202012.pdf> [last accessed: 26.02.2015].

RESEARCH QUESTION (5): WHAT ARE THE TRADITIONAL CONVENTIONS AND TECHNIQUES OF LEGISLATIVE DRAFTING? WHAT ARE THE MODERN CONCEPTS OF LEGISLATIVE DRAFTING SUCH AS GENDER NEUTRAL DRAFTING, PLAIN LANGUAGE, USE OF PICTURES IN LEGISLATION?

This section examines drafting conventions and techniques are listed as the third and final of Tetley's themes of analysis.

It is helpful to begin with a statement of the meaning and importance of legislative drafting conventions and techniques.

Adem, in his article on "techniques of legislative drafting" defines "techniques of legislative drafting as the "careful outline and modalities that are applied by the drafter in carrying out this task"¹¹². Adem goes on to provide a list of legislative drafting techniques as follows: "1. grammar; 2. clear expression; 3. gender sensitivity; 4. definition; 5. punctuation; 6. voice; 7. tense; 8. authority; 9. consistence; 10. economy; 11. enumerations; 12. precision; 13. examples; 14. acronyms; 15. references; 16. proviso; 17. notwithstanding, subject to etc.; 18. neologisms; 19. negatives; 20. numbers; 21. synonyms; 22. foreign language; 23. legalese/legislative sentence; 24. paragraphing; 25. structure and orderliness"¹¹³.

On the importance of legislative techniques Bennion stated: "if you would understand statutes you need to know the technique employed by the people who draft statutes"¹¹⁴.

Although, it was admitted at the outset of this research that "[s]ome of these [legislative drafting] conventions have statutory or case-law origins"¹¹⁵.

This research study found that with regards to the formulation of legislative drafting conventions and techniques there has been an interplay between the role of judges and legislative drafters, although legislative drafters remain the authors of the majority of the legislative drafting conventions and techniques.

¹¹² D.T. Adem, *Techniques of Legislative Drafting*, The Jurist – Journal of the Law Students Association of Nigeria, University of Abuja 2013, no. 14, p. 222.

¹¹³ Ibidem, pp. 221-239.

¹¹⁴ F. Bennion, *Understanding Common Law Legislation-Drafting and Interpretation*, Oxford: Oxford University Press 2001, p. 57.

¹¹⁵ Bellis, *supra* note 5, p. 1.

The examination under the section reveals that the majority of the legislative drafting conventions were originally formulated by legislative drafters themselves. Although over the years judges through case law have participated in refinements and development of such legislative drafting conventions.

For example, whereas the consensus of legislative drafters had stated that punctuation constitutes an important part of legislation, during the 1960s it appears that the UK courts took an opposing view based on the judgment in the case of *Duke of Devonshire v. O'Connor*¹¹⁶ where it was stated by Lord Esher M.R. thus: “[i]n an Act of Parliament there is no such things as brackets any more than there are such things as stops”.

However, it does appear that during the 1960s the courts refined this view by taking the view that punctuation constitutes an important part of legislation as *per* the judgment in *Director of Public Prosecutions v. Schildkamp* where Lord Reid stated:

“It may be more realistic to accept the Act as printed as being a product of the whole legislative process, and to give weight to everything found in a printed Act (...) it is not very meaningful to say that the words of the Act represent the intention of Parliament but that punctuation, cross headings and side note do not. Punctuation then forms a part of legislation. The language of the law is a part of the language of a people. That language comprises also the writings, the value of which lies in the beauty of form or emotional effect. Legislation is part of literature. The law is part of the literature of a people, punctuation plays its part – a useful role in legislation as it does in language as a whole”¹¹⁷.

During the 1970s, following this court judgment, a leading author in the field of legislative drafting formulated the four legislative drafting conventions regarding punctuation thus: “[e]xact principles cannot be prescribed for punctuation practice, but four rules should normally be followed: 1. Punctuate sparingly and with purpose (every punctuation mark must serve a purpose); 2. Punctuate for structure and not for sound;

¹¹⁶ [1890] 20 QBD 468, p. 478.

¹¹⁷ [1969] (11) TMI 44 available at: <https://www.taxmanagementindia.com/tax-updates/?p=95877> [last accessed: 26.02.2015].

3. Be conventional (although a measure of individuality is permissive);
4. Be consistent (avoid haphazard and inconsistent approach to the use of punctuation marks especially the commas"¹¹⁸.

While the focus of this section is to dwell on modern legislative drafting conventions and techniques that have evolved, it is worth mentioning some traditional legislative drafting conventions and techniques that formed the foundation of the common law drafting style. For example the structure of common law legislation was laid down by the main source of by Lord Thring, former First Parliamentary Counsel of the United Kingdom, who expressed his prioritisation of provisions in 5 rules:

“Rule 1: Provisions declaring the law should be separated from, and take precedence of, provisions relating to the administration of the law: “[c]onvenience demands a clear statement of the law as distinct from its administration. One must know the law before questions of administration can arise hence the precedence of the statement of the law over its administration.

Thus the advice is:

- state the law, and then
- state the authority to administer the law, and then
- state the manner in which the law is to be administered”.

An example is the setting up of the office of Coroners. It is advisable to establish the office of Coroner before stating the law of inquest. In such cases the law, as it were, emanates from the authority rather than the other way round.

Rule 2: The simpler proposition should precede the more complex and, in an ascending scale of propositions the less should come before the greater.

Thus, in principle, assault should be provided for before aggravated assault.

Rule 3: Principal provisions should be separated from subordinate provisions.

The subordinate provisions should be placed towards the end of the Act, while the principal provisions should occupy their proper

¹¹⁸ Thornton, *supra* note 1, p. 34.

position in the narrative of the occurrence to which they refer. Principal provisions declare the material objects of the Act. Subordinate provisions are required to give effect to the principal provisions. They may deal with details, and thus complete the operation of the principal provisions.

Rule 4: Exceptional provisions, temporary provisions and provisions relating to the repeal of Acts should be separated from the other enactments, and placed by themselves under separate headings.

Rule 5: Procedure and matters of detail should be set apart by themselves, and should not, except under very special circumstances, find any place in the body of the Act.

This will explain the use of Schedules and sometimes of Regulations. In company legislation model Regulations could be set out in a Schedule. Procedural and administrative matters can also be delegated to subordinate legislation. Thus Parliament deals with the substantive law, and the procedural law is settled by departmental officials¹¹⁹.

In practice, the structure of legislation is as made up of four major parts as follows¹²⁰:

1. Preliminary provisions:
 - preamble;
 - enacting statement and title;
 - purpose provision¹²¹;
 - commencement;
 - definitions;
 - interpretation;
 - duration/expiry;
 - application;
 - application to the Crown.

¹¹⁹ V.C.R.A.C. Crabbe, *Legislative Drafting*, London: Cavendish Publishing 1998, pp. 148-150.

¹²⁰ *Legislative Manual: Structure and Style*, New Zealand Law Commission Report 1996, no. 35, Wellington, available at: http://www.lawcom.govt.nz/sites/default/files/publications/1996/05/Publication_39_102_R35.pdf [last assessed: 26.02.2015].

¹²¹ New Zealand seems to have adopted the application of purpose provisions as an in-house style, which is not the case with the United Kingdom and Nigeria.

2. Principal provisions – substantive & administrative provisions

Substantive provisions introduce rights, powers, privileges, and immunities of persons to be benefited or regulated. These provisions are drafted as prescriptions, prohibitions, regulations or combinations. They are used to establish statutory corporations, licensing and registration schemes for the appointment of a licensing authority, the manner of application for the licence, the sanctions for breach or fraudulent behaviours in the procedure, appeals procedures, inspection issues, subsidiary legislation and any transitional regimes.

3. Miscellaneous and supplementary provisions, including: enforcement provisions; offences and provisions ancillary to offences such as time limit for prosecution, continuing offences, offences by corporations, and vicarious responsibility; miscellaneous and supplementary provisions such as evidentiary provisions, a power to make subordinate legislation, service of notices, powers of entry and search, seizure and arrest.

4. Final provisions – savings and transitional provisions:

- savings and transitional (these may also be placed in a schedule if they are long);
- repeals;
- consequential amendments (these may be placed in an annex especially if the repeals and consequential amendments are numerous and can conveniently be presented in a tabular form).

5. Schedules

Other important traditional legislative drafting conventions include, the five stages of the legislative drafting process, which is credited to: G.C. Thornton, *Legislative Drafting*, 4th ed., London: Butterworths 1996, p. 128, identifies the five stages of the drafting process as: 1. understanding; 2. analysis; 3. design; 4. composition and development; 5. scrutiny and testing”.

Patchett¹²² provides a summary of the traditional common law principles of legislative composition as follows:

- express normative rules as prescriptions rather than in narrative form;
- express norms directly, avoiding circumlocution, and include only those norms that perform a necessary legal function;
- avoid long sentences;
- follow word order in conventional usage;
- use expressions in every day usage, wherever possible; avoid unnecessary legal jargon, but use legal terms to express legal concepts;
- omit unneeded words;
- use terminology consistently throughout a bill and in all secondary legislation implementing it; use the same term for the same case, and a different term for a different case;
- avoid ambiguous expressions and terms that are vague and lack clear definition;
- limit cross-referencing to other norms as a method of providing the content to norms;
- make amendments to other laws by express alteration of specified provisions.

This comparative study of legislative drafting will not be complete without examining the legislative drafting personnel and institutions within the United Kingdom and Nigeria. The details appear below.

It is important for judges and even legislators to gain an understanding of the legislative drafting personnel in the common law tradition of legislative drafting because they are all team players in the pursuit of effectiveness of legislation. Legislative drafters alone or single-handedly cannot achieve the objective of legislation, as rightly stated by Ulrich Karpen: that the achievement of the objective of any legislation: “is not the sole task of the legislative drafter. It involves interrelation

¹²² K. Patchett, *Law Drafting and Regulatory Management in Central and Eastern Europe*, SIGMA Papers, no. 18, OECD Publishing 1997, p. 39, available at: <http://www.oecd-ilibrary.org/docserver/download/5kml618wrlg7.pdf?expires=1425023249&id=id&accname=guest&checksum=BB018D2A25486AF3E984713A9897ECFD> [last accessed: 27.02.2015].

of actors in the policy process and legislative drafting process. It is a multi-level effort of policymakers, drafters, legislators, interpreters (judges), and enforcers of legislation”¹²³.

In contrast with legislative drafting tradition within civil law jurisdictions such as France, the general rule is that legislative drafters are distinct from the officials that provide drafting instructions. In other words, legislative drafters do not get involved in policy development.

However, McLeod has writing identified an exception to this general rule thus: “[t]he exceptions are most likely to be those [legislative drafters] working in developing countries, who may even sometimes be instructed simply to draft a Bill on a specific, with issues of both policy and content being left entirely to them”¹²⁴.

Legislative drafting personnel in the United Kingdom

“In the UK, for much of the Government primary legislation this is undertaken by the Office of Parliamentary Counsel (OPC), which is formally within the Cabinet Office. The OPC also drafts government amendments to the legislation which are introduced during the parliamentary process. In addition, when instructed to do so, it drafts some secondary legislation, and reviews secondary legislation which amends primary legislation to ensure the consistency of primary legislation. However, this division between the formulation of policy and the drafting of implementing legislation can be over-emphasised, as once the instructions have been received there is, for obvious practical reasons, liaison between the instructing ministry and the lawyers in the OPC drafting the legislation, with the ministerial committee of the Cabinet that considers draft Government legislation and, after the draft legislation is introduced into Parliament, with officials of the Parliament on procedural matters.

In the UK there are some very limited exceptions to this exclusivity. There was also a brief experiment in the 1990s of contracting

¹²³ Legislation – U. Karpen, *The Norm Enforcement Process*, [in:] Karpen, Delnoy (1996), p. 51, cited in Xanthaki, *supra* note 23, p. 5.

¹²⁴ I. McLeod, *Principles of Legislative and Regulatory Drafting*, Oxford: Hart Publishing 2009, p. 34.

out the drafting of elements of legislation to the private sector¹²⁵, which was widely regarded as unsuccessful as it resulted in errors and inconsistency.

The OPC does not have a comprehensive style book, although it does have a Drafting Techniques Group which produces a variety of recommendations and papers on various drafting issues from time to time¹²⁶. It is worth noting that the OPC, does not draft primary legislation promoted by individual parliamentarians¹²⁷.

The “use of Independent Drafting consultants”¹²⁸ is identified as one of the commonalities between drafting offices in the UK and Nigeria.

However, the institutional arrangements for legislative drafting in the United Kingdom are somewhat different from Nigeria because Nigeria is a federal state and operates a decentralised legislative drafting office system. The details are provided below:

Legislative drafting personnel in Nigeria

“In Nigeria, the drafting office is usually attached to both the Legislature and the Executive (Ministry of Justice). Where the drafting department is attached to the Federal Ministry of Justice, it is only responsible for drafting executive bills. In the case of the Legislature, the drafting office attached to the National Assembly and is responsible for putting finishing touches to the government (executive) bills for onward transmission to the president for his members¹²⁹. It also drafts

¹²⁵ See T.St.J.N. Bates, *Contracting out Drafting: a British Experience*, Statute Law Review 1996, vol. 17, no. 2, p. 152.

¹²⁶ These recommendations and papers are available on the OPC website (http://www.cabinetoffice.gov.uk/parliamentarycounsel/drafting_techniques.asp); however, as the drafting of secondary legislation is largely decentralised in the UK, there is a general guide to its drafting, Statutory Instrument Practice, although this largely addresses technical rather than stylistic issues.

¹²⁷ T.St.J.N. Bates, *Legislative Drafting in the United Kingdom*, paper presented at the Workshop: *Different Approaches to Legislative Drafting in the EU Member States*, OECD Publication 2009, pp. 4-5, available at: <http://www.sigmaweb.org/publicationsdocuments/44577527.pdf> [last assessed: 27.02.2015].

¹²⁸ Onwe, *supra* note 27, p. 65.

¹²⁹ D.T. Adem, *Organising a Drafting Office*. Paper presented at the intensive Course on Legislative Drafting at the Nigerian Institute of Advanced Legal Studies (NIALS), 26-30.05.2008.

members and private member's bills. In the Ministry of Justice, the Legal drafting departments are headed by a Director who reports to the Attorney General of the State at the state level and the Solicitor General/Permanent Secretary at the national level. Nigeria has a federal system of government with 36 states and the Federal Capital Territory and this practice is replicated throughout the state executive and legislature"¹³⁰.

Modern legislative drafting conventions and techniques

In recent times, there is the trend of innovations in the field of legislative drafting, characterised by departure from the traditional approaches and legislative drafting conventions.

This research study will only focus on two of such modern legislative drafting conventions that have "statutory or case law origins"¹³¹.

In the United Kingdom, there is a requirement for supporting documents to accompany Bills and legislation submitted to Parliament. This has now been a statutory requirement since the 1998/1999 Parliamentary Session, and all bills or legislation submitted to Parliament must be accompanied by two supporting documents namely an Explanatory Memorandum and Financial Memorandum. The Explanatory Memorandum provides justification(s) for the Bill and explains the drafting rules that are applied in preparation of the Bill or legislation. The Financial Memorandum contains a cost-benefits analysis statement. In addition, under the UK Legislative and Regulatory Act 2006, there is the recent mandatory requirement to undertake consultations and impact assessment when drafting Bills or legislation that is likely to affect or impact the third sector (the charities or non-governmental organisations). The requirement for supporting documents was based on the recommendations of the UK Parliament's "Select Committee on the Modernisation of the House of Commons HC 389 1997/98"¹³².

¹³⁰ S. Onyeka Ofuani, *Organisation of a Legislative Drafting Office*, NIALS International Journal of Legislative Drafting (NIJLD) 2012, vol. 1, no. 1, p. 93.

¹³¹ Bellis, *supra* note 5, p. 1.

¹³² See Editorial, *Legislative Scrutiny and Supporting Documents*, Statute Law Review 2000, pp. v-vi.

Other innovations in the UK are identified thus: “[a]nd so any drafting innovations now present in the laws of the UK, such as gender neutral drafting, the use of explanatory memoranda, the placement of definitions at the end and probably in a schedule, the increased use of Keeling schedules to name but a few”¹³³.

In Nigeria, this study found only one instance wherein the Court of Appeal introduced a novel legislative drafting convention is the judgment in the case of *Orija & others v. The Chairman National Population Commission & others*¹³⁴ as per Hon. Justice Yahaya, J.C.A. held that: “[i]t is an acceptable and *modern method of legislative drafting*, to make provisions for procedural rules, in a schedule to the law, and not in the main body of the law itself”¹³⁵.

CONCLUSION AND RESEARCH QUESTION (6): WHAT IS THE DIRECTION FOR FUTURE RESEARCH ON THE SUBJECT OF THE INTERSECTION BETWEEN STATUTORY INTERPRETATION AND LEGISLATIVE DRAFTING?

Inspired by the knowledge that “drafting style and practices are always capable of improvement”¹³⁶, this research has examined the important role that judges have played.

So far the efforts of judges in the improvement of legislative drafting has been remedial, reactive, and has not been deliberate, has been uncoordinated or not well thought out.

This research recommends a more proactive, planned, direct role for judges in the legislative drafting process. The justification is that legislative drafting itself is a highly “specialist” task that requires “special legal skills”¹³⁷.

Judges by virtue of their training and job description are identified as one of the category of specialists who are capable of making

¹³³ H. Xanthaki, *Legislative Drafting: a New Sub-discipline of Law is Born*, Institute of Advanced Legal Studies (IALS) Student Law Review 2013, vol. 1, no. 1, p. 69.

¹³⁴ [2013] Law Pavilion Electronic Law Report-20835(CA).

¹³⁵ Ibidem, p. 16, para A.

¹³⁶ Thornton, *supra* note 1, preface, p. v.

¹³⁷ K. Patchett, *Law Drafting and Regulatory Management in Central and Eastern Europe*, SIGMA Papers 1997, No. 18, OECD Publishing, p. 34, available at: <http://www.oecd-ilibrary.org/docserver/download/5kml618wrlg7.pdf?expires=1425023249&id=id&accname=guest&checksum=BB018D2A25486AF3E984713A9897ECFD> [last accessed: 27.02.2015].

“recommendations for changes that will raise the textual quality of law-making instruments generally”¹³⁸ by acting as “external resource persons” or proof readers before Bills are submitted to the Parliament. This is somewhat similar to the role played by judges in France, who play a fundamental role in legislative drafting by acting as scrutinisers of all legislation before submission to Parliament. In this capacity, judges are constituted as the “*Conseil d’Etat*”¹³⁹.

The recommendation is part of a more holistic system for improvement of legislative drafting based on Patchett’s model of seven strategies. Patchett’s model is founded on the understanding that the improvement of legislative drafting should be undertaken in a systematic manner recognising that “law drafting calls for special legal skills. Those skills derive, in part, from a special understanding of legislative methodology and, in part, from distinctive experience in drafting techniques. Drafting legislation calls for a systematic, often painstaking, application of a particular expertise in a range of analytical and writing skills”¹⁴⁰.

It is hoped that subject to the availability of funding future research would apply Patchett’s model to undertake a comparative study of legislative drafting from a European and civil law perspective with a view to identifying the methods for the beneficial application of technology, the norms of traditional African laws and norms of Islamic law for the improvement of legislative drafting in Nigeria.

¹³⁸ Ibidem, p. 29.

¹³⁹ See generally J. Massot, *Legislative Drafting in France: The Role of the Conseil d’État*, *Statute Law Review* 2001, vol. 22, no. 2, pp. 96–107.

¹⁴⁰ [2013] Law Pavilion Electronic Law Report, supra note 134, p. 34.

