

"Strategies for Improvement of the Quality of Bills and Legislative Drafting in Nigeria"

By

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Abstract

"...a systematized,...developed approach"¹ or framework for legislative drafting is a necessity for the production of quality Bills or legislation which in turn contributes to the overall national development of any democracy. In the field of legislative drafting the Seidmans² are among "some experts [who] have developed a whole theory about how [legislative] drafting can help third world development"³

Conversely, an unorganised or "unsystematic approach"⁴ to legislative drafting is often identified as one of the major reasons for poor quality legislation in Nigeria and other transitional and developing countries as is established. Another authoritative study in legislative drafting, has established that "...a near complete lack of unified methodology in the drafting of legislation nationally" "especially in the third world and emerging democracies"⁵ is the single most important cause for poor quality Bills and legislation.

The focus of this research is to persuade and make a case for the key actors and stakeholders within Nigeria's legislative process to adopt a holistic strategy for the improvement of the quality of Bills and legislation in Nigeria through legislative drafting and other related strategies.

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¹ See T.Drinoczi, Quality Drafting-The Case of Hungary (2010) *Legisprudence*, 4 (2) pp.157-170 at p.158

² See generally Ann and Robert B.Seidman, 'Drafting Legislation for Development: Lessons from a Chinese Project' (1996) *American Journal of Comparative Law*, 1-44

³ See Constantin Stefanou, The Policy Process and Legislative Drafting in C.Stefanou and H.Xanthaki (eds) *Manual in Legislative Drafting* (Department for International Development, 2005), p. 3

⁴ Svetlana Pisarenko, *The Drafting of Laws* (Canada-Ukraine Legislative Drafting Programme, 1999) 7

⁵ See.Constantin Stefanou and.Helen Xanthaki (eds) *Manual in Legislative Drafting* (Department for International Development, 2005) 4

The quality of Bills and legislation which is at the centre of this research is important and significant considering that: "...The quality of legislation can strongly influence economic development and the well-being of the citizen"

The relationship between "quality legislation and economic development", and the idea that quality legislation can promote economic development is applicable to Nigeria and other countries whose primary national goal is to achieve development as enshrined in section 16(2) (a) (b) of the Constitution of the Federal Republic of Nigeria, (CFRN), 1999 (as amended) which provides that one of the objectives of Nigeria's economic policy and legislation is to "promote economic development".

Keywords: *good quality legislation, Bill and legislative drafting.*

Introduction

One of the major arguments and key recommendations of this research paper is that professionals with expertise in legislative drafting ought to be engaged for the development of such a national strategy for the improvement of the quality of Bills and legislation in Nigeria. The rationale for seeking specialist textual quality reforms as stated by Patchett is:

"Governments may not have the time or the expertise to carry out an overall review as to the form in which legislation is generally drafted, and particularly of textual and structural improvements that may make legislation easier to use and understand. There may be advantage in drawing on external resources, e.g. from academic institutions, lawyers and judges, to make recommendations for changes that will raise the textual quality of law-making instruments generally"⁶

The key criteria that can be distilled from the above are: (1) specialist must have expertise in law [legislative] drafting, and (2) the specialist must be an external resource person.

On this point, all the legal studies on legislative drafting in Nigeria unanimously admit that the use of "private legal practitioners"⁷ is a current drafting practice to fill the need for a specialist other

⁶ SIGMA PAPERS NO.18, 29

⁷ See Kevin N. Nwosu (ed) *Law and Practice of the Legislature in Nigeria* (Nayee Publishing Company Limited, 2003), p.279.

than the government employed Nigerian drafters and legislators. Esegbabon⁸ calls them “experts”; Okon and Essien⁹ describes their function to Nigerian drafter or legislator thus: “the help of a professional legal draftsman to polish up the draft...”

As Opeibi¹⁰ has rightly demonstrated in his recent study, Nigeria is in dire need of an “official policy” that defines and elevates the quality of language used in the texts of legal documents, especially legislation.

The national strategy to be developed by such legislative and legislative drafting experts will be characterised by robust consultations, inter-dependence (synergy) amongst all the major stakeholders that are involved in the production of Bills and legislation, it will also involve deliberate strategic thinking that features the “...introduction of procedures and practices that would make it more likely that *properly thought out answers* will be provided on fundamental questions of policy and approach, especially for complex and difficult reforms”¹¹.(italics and bold mine).

Such a strategy or systematic approach would be different from the major current and prevalent approach(es) that is often adopted by Nigerian government officials and institutions that are involved in the production of Bills and legislation in Nigeria is due to the lack of *properly thought out answers* or strategy, the policy and legislation development process is mainly reactive (as

⁸ R. Esegbabon, *Nigerian Legislative Process-Bills, Budget and Committee System* (Abuja: Law Links Ltd., 2005),p. 72.

⁹ Emmanuel Okon and Aquaowo Essien, *Law-Making Processes in Nigeria-At the National and State Houses of Assembly* (Spectrum Books Limited 2005), P.117

¹⁰Tunde Opeibi, ‘Between Obscurity and Clarity in Nigerian Legal Discourse: Aspects of Language Use in Selected Written Texts’ in Anne Wagner and Sopia Cacciaguiddi-Fahy (eds.) *Obscurity and Clarity in the Law-Prospects and Challenges* (Ashgate, 2008) p. 216

¹¹ *ibid*

opposed to proactive) and unsystematic characterised by: “...feverish and ejaculatory response from a government accustomed to adopting a ‘fire-fighting approach’...”¹²

As a long term strategy, this research study found that of all the prevalent models of legislative drafting, Patchett’s strategy for the improvement of legislative drafting is the most relevant functional, beneficial and appropriate model that Nigeria could adopt and adapt to achieve its twin goals of improving the quality of the “ingredients” and the “key actors” involved in Bills and legislative drafting. Patchett’s model, is a tried and tested method, considering that it was successfully applied in achieving improvement of quality legislation in all the Eastern and Central European Countries from the date of its publication in the year 1997 till the date of their full membership of the European Union in the early and mid-200s. In a nutshell,

The seven strategies within Patchett’s framework are:

- (i) creating and enforcing a regulatory framework for law drafting;
- (ii) improving policy development prior to drafting;
- (iii) setting and maintaining law drafting standards;
- (iv) making fuller use of consultations;
- (v) applying equivalent procedures and standards to parliamentary initiatives;
- (vi) applying equivalent procedures and standards to secondary law-making; and
- (vii) improving access to legislation.

¹² See Oluseye Arowolo, ‘Nigeria’s downstream sector deregulation crisis: what are the unresolved issues’ (2005) I.E.L.T.R. 10, 16

In the short and medium term, this research paper found that the Acts Authentication Act, 1961 of Nigeria, unwittingly contains the twin elements namely “the key ingredients” and identifies “the firm of bakers” or the key actors which can be applied as an interim measure for the improvement of the quality of Bills, the “ingredients and “key actors” in the legislative process.

Statement of the Problem/Case Studies of some poor quality Nigerian Bills and Legislation

Regardless of the fact that it is acknowledged that quality legislation is an important tool for achieving national and economic development, the reality is that in Nigeria since the inception of our nascent democracy in the year 1999, there is a persistent failure with regards to the production of good quality Bills and legislation that are capable of translating into national economic development of Nigeria.

As evidence of the above fact, one recent study of the Nigerian National Assembly by the National Institute for Legislative Studies, cited in one of the most recent and authoritative textbooks on legislative drafting in Nigeria rightly stated that “over 50% of the Bills received” at the National Assembly are poor quality Bills, that emanate not out of the desire to promote national economic development but instead are “submitted by the desire of legislators to be listed as having sponsored bills”¹³.

¹³ See S. Imanobe, *Principles of Legal and Legislative Drafting in Nigeria* (Abuja:Imhanobe Law Books Limited, 2014) p. 239

As we acknowledged in the Abstract of this research study, the major root cause of the problem is the absence of a concrete or documented strategy for production of good quality Bills and legislative drafting in Nigeria that governs or guides the key actors involved in the process of production of legislation.

In the field of legislative drafting, it has been established that ideally the rules that govern legislative drafting, and the production of good quality Bills and legislation, ought to be clearly and “unequivocally” stated and specified within the provisions of the constitution (the supreme law) of any democratic society that upholds the rule of law. It is further stated, whenever the constitution is silent, there ought to be either a primary legislation, subsidiary legislation or a manual that could stipulate the rules that govern legislative drafting and production of good quality legislation. This approach to legislative drafting was first expressed by Lord Henry Thring in his 1902 treatise on legislative drafting and re-echoes in the 2009 study by Professor Bates, thus:

“...I found that the subjects of Acts of Parliament, as well as the provisions by which the law is enforced, would admit of being reduced to a certain degree of uniformity; that the proper mode of sifting the materials and of arranging the clauses can be explained; and that *the form of expressing the enactments might also be made the subject of regulation*”[italics mine]¹⁴

In a nutshell, Lord Thring implies that the drafting of legislation should be undertaken in accordance with laid down rules, principles or guidelines that are “applicable to Acts of

¹⁴ Lord Henry Thring, First Parliamentary Counsel of the United Kingdom, 1869-1901, cited in Henry Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* (John Murray, 1902) 4

Parliament” and with “little adaptation may, be applied to every sort of composition...” including delegated legislation.¹⁵

Contrary to Lord Thring’s recommendation, this research found that neither the 1999 Constitution of the Federal Republic of Nigeria (hereinafter referred to as the 1999 CFRN) nor any existing legal framework stipulates in any clear detail the procedure for drafting or improvement of law drafting and the quality of legislation. This gap in the Constitution serves as a justification for the relevance and application of Patchett’s framework (specifically strategy no.1) which recommends the establishment of a regulatory framework for law drafting consisting of rules and standards contained in both primary and secondary legislation. In addition, another justification is derived from the fact that the gap in the 1999 CFRN is an exception to the assertion by Bates that separate rules of legislative drafting are “legally unnecessary as they do no more than reiterate”¹⁶ the rules and principles of drafting already contained and “unequivocally stated in the constitution”. In other words, there is the presumption that the legal framework or body of rules for legislative drafting must be already “unequivocally stated in the constitution” or another primary legislation, which is not the case in Nigeria.

According to Lord Thring, the regulation of legislative drafting is an “essential requisite” to ensure that legislation “...accomplishes the design of the law giver”¹⁷ .

¹⁵ Lord Thring Ibid

¹⁶ T.St.J.Bates, ‘Legislating for Drafting: The Moldavian Experience’, (2009) Statute Law Rev 30 (2): 123-139 at p. 134.

¹⁷ In this respect Thring quotes John Austin: “I will venture to affirm that what is commonly called the technical part of legislation is incomparably more difficult than what may be called the ethical. In other words it is far easier to conceive justly what would be useful law, than to construct the same that it may accomplish the design of the law giver”-Thring, Henry Thring, First Parliamentary Counsel of the United Kingdom, 1869-1901, cited in Henry Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents* (John Murray, 1902) p.3

This research study found that the above presumptions do not apply in Nigeria and this is one of the reasons for poor quality Bills and legislative drafting, the absence of a concrete documented legislation or guide for legislative drafting which results in lack of uniformity in the content and structure of Bills in Nigeria. This is evident by the fact that a mere cursory examination of the Bills that are drafted by lawyers employed at the Legal Drafting Departments of the Federal Ministry of Justice and the Legal Services Directorate of the National Assembly of Nigeria respectively reveals fundamental differences in style and structure. For example, whereas the Interpretation (Definition) Clauses are amongst the preliminary provisions of the Bills drafted by lawyers of the Federal Ministry of Justice. The Interpretation (Definition) Clauses are placed as part of the Final provisions in the Bills that are drafted by the lawyers of the National Assembly. This often results in lawyers of the National Assembly having to expend time and other resources in re-drafting of the Executive Bills that are drafted by the lawyers of the Federal Ministry of Justice whenever such Bills are submitted to the National Assembly for enactment.

Another problem that this research study found is that the involvement of non-professionals, i.e. lawyers with cognate experience, formal qualifications and expertise in legislative drafting, is one of the major causes for poor quality Bills and legislative drafting in Nigeria.

This is admitted by a former clerk (Dr. Adamu Fika) of the Nigerian National Assembly thus:

“Lawyers who draft legislation engage in a highly technical aspect of law that requires competence. A failure to properly translate the substantive policy into the appropriate law

adversely affects the policy, the lawyers are like *midwives* in the birth of laws and so it behoves them to strive hard to help bring forth laws that are *effective, clear, precise, intelligible and capable of only one interpretation, which is the true purpose and intent of the policy as envisaged by the policy initiators*”-Clerk, National Assembly of Nigeria. *The Nation newspaper of September 2, 2014.*

In the statement above, the former Clerk of Nigeria’s National Assembly used the analogy of the critical role of “midwives” to describe the highly important role (life-and-death) and competence thereof that legislative drafters must possess if they are to play any role in delivery of effective legislation that achieves the desired results.

The first issue that Dr. Fika’s statement acknowledges is that *“Lawyers who draft legislation engage in a highly technical aspect of law that requires competence”*.

Elsewhere, this view point is also expressed thus: *“Legislative drafting is an area of specialist legal practice*¹⁸...A country that wishes to improve the quality of its legislative drafting...cannot assume that, because an officer has legal qualifications, he or she is competent to undertake law drafting at every level required. More than in the past, quality [legislative] drafting calls for

¹⁸ It now recognised that legislative drafting is a “new sub-discipline of law” or the legal profession, see generally H.Xanthaki, Legislative Drafting: A New Sub-Discipline of the Law is Born (2013) *Institute of Advanced Legal Studies, University of London, IALS Student Law Review* , Volume 1, Issue 1, Autumn 2013, pp. 57-70, available online: <http://sas-space.sas.ac.uk/5234/1/1706-2278-1-PB.pdf> accessed 10/04/2015

persons who have systematically prepared themselves for this kind of specialist legal work”-

Keith Patchet¹⁹

As stated at the onset of this research paper, the problem of poor quality Bills and legislation in Nigeria exists because there has not been a deliberate and formal effort to identify, define, formulate and apply the “key ingredients” and “the roles of the key actors” as part of an overall national strategy for improvement of Bills and legislative drafting in Nigeria.

For example, Nigeria does not yet have a national policy, or legislation or any elaborate and adequate provision(s) within the 1999 Nigerian Constitution which clearly defines the criteria for what constitutes good quality Bills or legislation. Without such a clear definition of what constitutes good quality legislation, it is difficult if not impossible for the legislative drafters and other key actors within Nigeria’s legislative process to produce any

Although it is now generally agreed that in the field of legislative drafting, it is trite that “effectiveness” is the key criterion of good quality Bills and legislation. In the field of legislative

¹⁹ See Law Drafting, SIGMA Paper No.18, 1997, p.42: Keith Patchett, OECD (1997), “*Law Drafting and Regulatory Management in Central and Eastern Europe*”, SIGMA Papers , No. 18, OECD Publishing, p.42 available online: <http://www.oecd-ilibrary.org/docserver/download/5kml618wrlg7.pdf?expires=1425023249&id=id&accname=guest&checksum=BB018D2A25486AF3E984713A9897ECFD> accessed 10/04/2015. Late Professor Keith Patchett was of the School of Law, Cardiff University, U.K.

drafting, “effectiveness” means that the legislation “manages to introduce adequate mechanisms capable of producing the desired regulatory results”²⁰.

It is not just failure to achieve national economic development in Nigeria that is the only consequence and symptom of poor quality legislation and Bills, resort to litigation to interpret the provisions of such poor quality Bills or legislation, which in itself involves diversion of scarce financial resources to fund such litigation is another consequence and indicator of poor quality Bills/legislation drafted is acknowledged by one of the notable studies in the field of legislative drafting:

“Poorly drafted statutes are a burden upon the entire state. Judges struggle to interpret and apply them, attorneys find it difficult to base any sure advice upon them, and the citizen with the earnest desire to conform is confused. Often, lack of artful drafting results in failure of the statute to achieve its desired result. At times, totally unforeseen results follow. On other occasions, defects lead directly to litigation. Failure to comply with certain constitutional requisites may produce total invalidity”²¹ Professor Albert R. Menard, Jr.,

Although there are a plethora of examples that illustrate this issue, this research shall provide three representative examples and case studies of poor quality Bills, legislation and legislative drafting in Nigeria, as examined below:

²⁰ See H.Xanthaki, ‘Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules?’(2010) *Legisprudence*, Vol.4, No.2, pp.111-128 at p.115.

²¹ *Legislative Bill Drafting*, 26 *Rocky Mountain Law Review* 368 (1954)

- (i) Failure to undertake robust consultations during the legislative, legislative drafting processes and the attendant wastage of national resources is evident in the cost of paying and re-paying legislative drafting staff and legislative drafting consultants to draft and re-draft Bills. For example, the Petroleum Industry Bill (PIB) has at least five (5) versions. Each of these five (5) version was drafted by a different team of legal/legislative drafting consultants.

The first version 2007 version was drafted as an Executive Bill by the legislative drafters at the Federal Ministry of Justice based on instructions provided by the Oil and Gas Implementation Committee inaugurated by former President of Nigeria-Mr. Olusegun Obasanjo in the year April 24, 2000.

The second version of the PIB, the 2008²² version was drafted by a team of lawyers headed by Prof.Yinka Omorogbe, the then Company Secretary and Legal Adviser of the Nigerian National Petroleum Corporation (NNPC). This Legal Team was a sub-committee of the re-constituted OGIC which was on September 7, 2007, the federal government administration under President Umaru Musa Yar'Adua appointed Dr. Riwlanu Lukman to chair a reconstituted OGIC.

The 2009 version²³ of the PIB was drafted by an international legal consultant Dr. Pedro van Meurs who was hired by the Ministry for Petroleum Resources. Due to complaints of non-inclusion of

²² Available online: <http://www.iaee.org/documents/newsletterarticles/408wumi.pdf> accessed 29 March 2017

²³ Available online: <http://petrocash.com/documents/free/65184056.pdf>

the interests of the concerns of the international oil companies (IOC), a 2010 version of the PIB was drafted.

Due to the failure of the Seventh National Assembly in May 2015 to enact the PIB before expiration of their tenure, with the beginning of the Eighth National Assembly in June 2015, a new 2015 version of the PIB was drafted which sought to harmonise and consolidate the provisions of the House of Representatives and Senate's versions of the PIB.

As of the time of writing this policy paper (May 2018), it is reported that:

“...PIB as it is today has been split into four parts by the National Assembly as follows - the Petroleum Industry Governance Bill (PIGB), the Host Communities, Fiscal Reforms and the Administration Bill”²⁴.

- (ii) Failure of the legislative drafters to undertake pre-legislative scrutiny and in-depth research of existing laws when drafting instructions are issued resulting in the loss of federal government revenue due to drafting of legislation that creates federal government agencies (statutory corporations) that duplicate the functions of already existing federal government agencies. For this reason, it was report in February 2018, that President Buhari withheld assent²⁵ to a Bill for the Establishment of the Peace Corps of Nigeria, stating that the said agencies is a duplication of the functions of existing security agencies.

²⁴ Available online at: <http://saharareporters.com/2018/05/04/national-assembly-will-conclude-work-pib-2018-nnpc-gmd-assures> accessed 04/05/2018

²⁵ Available online at: <http://www.punchng.com/breaking-buhari-withholds-assent-on-peace-corps-bill/> accessed 04/05/2018

Ideally, when a legislative drafter receives legislative drafting instructions to draft a Bill to establish a federal government agency, such a legislative drafter ought to conduct preliminary legal research to ensure that the existing laws of the Federation of Nigeria do not contain an existing government agency that is already performing the same or similar functions. However, in practice, it is evident that legislative drafters at the House of Representatives do not follow this procedure.

This is evident by the fact that it was recently reported²⁶ in January 2017 that legislative drafters and legislators still drafted legislation for the establishment of twenty-five additional federal government agencies. This is alarming considering that a simple preliminary research by the legislative drafters would have revealed that creation of additional federal government agencies is not consistent with the current economic reality and the direction of the Federal Government in line with the recommendations of the Stephen Orosanye Report, 2011.

According to the Stephen Orosanye Report on the Rationalisation of Federal Government Agencies and Parastatals, 2011. According to the Report: “There are 541 government parastatals, commissions and agencies (statutory and non-statutory) in the country,”²⁷ Mr. Orosanye said. “Going by the recommendations of the Committee, the figure of statutory agencies is being proposed for reduction to 161 from the current figure of 263.”

²⁶ Reported by DAILY TRUST NEWSPAPER: <https://www.dailytrust.com.ng/news/general/national-assembly-to-create-25-new-agencies/183118.html> accessed March 2017

²⁷ Reported in PREMIUM TIMES NEWSPAPER, available online: <http://www.premiumtimesng.com/news/top-news/4678-presidential-committee-asks-government-to-scrap-102-agencies.html> accessed 29 March 2017

As evidence that this problem is not abating, it was recently reported on May 3, 2018, that there are forty (40) Bills²⁸ seeking the establishment of forty (40) new universities within Nigeria listed for enactment by the House of Representatives of the Nigerian National Assembly.

(iii) Ignorance or failure to apply the basic rules of legislative drafting regarding inclusion of “Interpretation (Definition) Section or Clauses” within Bills and legislation that impose penalties. A very fundamental rule of law and legislative drafting as stipulated within Section 36 (12) of the 1999 Nigerian Constitution (as amended) is that there must be a “definition” or “statement” of what constitutes any offence or “the prohibited act or omission”²⁹ that is mentioned within any Bill or legislation as a precursor before prescription of the penalty or “sanction”. However, majority of Nigerian Bills and legislation have often flouted this basic rule. For example, section 24 of the Cybercrimes (prevention and prohibition) Act, 2015, mentions the word “cyberstalking” without providing a definition of what are the elements of the said offence, this has resulted several law suits such as *Solomon Okedara v. Attorney-General of the Federation*³⁰ seeking the court to provide an interpretation of this particular section of the said legislation. This researcher has recently drafted an amendment of the said legislation that is currently undergoing debate and consideration on the floor of the House of Representatives of the National Assembly.

²⁸ <http://www.punchng.com/40-bills-seeking-creation-of-new-varsities-before-reps/>
Accessed 7 May 2018

²⁹ See G. Thornton, *Legislative Drafting* (London: Butterworth, 1996) p.349

³⁰ <http://thewillnigeria.com/news/lawyer-files-suit-against-cybercrime-act/solomon-okedara-v-attorney-general-of-the-federations-suit0004/> accessed 7 May 2018

(iv) Another problem that creates poor quality Bills and legislation in Nigeria, is the failure or neglect to undertake thorough scrutiny of Bills to prevent the allegation of mischievous and fraudulent insertion of “new” clauses by legislators or staff of the legal departments of legislatures when they are assigned to “clean-up” a Bill before the stage of third reading and final enactment of the Bill. This illegal practice which is often commonly practiced with regards to Appropriation (Budget) Bills/Legislation has new notoriety in Nigeria and led to the coinage of a new phrase and addition to Nigerian legislative lexicon as “budget padding” phenomenon. For example, in February 2018, it was alleged that there was a “fraudulent” insertion of a 0.5%³¹ tax on companies as a source of funding the operations of the proposed Federal Competition and Consumer Protection Commission, which was undergoing enactment at the National Assembly as the Federal Competition and Consumer Protection Bill, 2017. It was alleged this 0.5% tax was not contained in the original version of the said Bill, nor was it mentioned during the debates and public hearing (consultations) stages of the legislative process, it only appeared in the final version of the Bill that was submitted to the President for assent.

Ideally, under section 5 of the Acts Authentication Act, 1961, it is the duty of the Clerk of the National Assembly to scrutinize the Bills (to confirm that the contents are accurate reflection of the versions as enacted by both chambers of the National Assembly) before they are submitted to the President for his assent. However, in actual practice, the Clerk of the National Assembly as a matter of tradition delegates this responsibility to the Legal Services Directorate of the National Assembly which is established by Section 14 of the National Assembly Service Act, 2014.

³¹ <https://www.lawyerd.ng/neca-rejects-additional-tax-inserted-in-federal-competition-and-consumer-protection-bill/> accessed 7 May 2018

Ideally, the general rule of law is that a legislative drafter cannot and is not at liberty to change the substance of a Bill or legislation on his own volition but must draft to reflect only the express instructions, intentions of the legislators or whosoever is instructing the drafter with a view to translating policy into legislation. The duty of loyalty and confidentiality³² to legislators and the officials providing drafting instructions are core ethical and professional responsibilities of legislative drafters which every drafter is under

Furthermore, after, the Public Hearing and after Committee Report of a Bill (which is before the third and final reading stage of the legislative process), no new item ought to be included in a Bill. However, in actual legislative drafting practice in Nigeria, a former Nigerian senator and lawyer has alleged that:

“There is the common practice that after bills may have been passed by the Senate and the House of Representatives, the legal department now re-drafts the bills, perhaps, changing certain words to give them a presentation in a legal draftsman’s perfect legislative draft. This, in my view, is inconsistent with the provisions of the law.”³³

(v) Lack of adequate time and resources devoted to the research, debate and consultations on Bills by the National Assembly of Nigeria.

As we mentioned at the Abstract of this research study, it is the norm and not the exception that adequate time and resources is not expended on conducting research and consultations before

³² C. Stefanou, Ethics and Legislative Drafting in C.Stefanou and H. Xanthaki (eds.) *Manual in Legislative Drafting* (London: IALS & Department of International Development, 2005) pp.6 & 7

³³ <https://www.vanguardngr.com/2016/08/budget-padding-occurs-ita-enang/> accessed 7 May 2018

enactment of Bills. In June 2015, it was reported that within ten (10) minutes the Senate of the 7th National Assembly of Nigeria enacted forty-six (46) Bills, the said Senate “deemed all the bills as having passed first, second and third readings and passed them”³⁴. One of the senators alleged that it was not in violation of any laws but in accordance with “Order 1 (b) of the Senate Standing Order 2011, as amended and also suspended Order 79 (1) of its Standing Orders.” However, majority of lawyers condemned the said action as “legislative recklessness and laziness”

(vi) High turn-over and low educational qualifications of legislators as one of the underlying causes of persistent poor quality Bills legislative drafting by the National Assembly.

The Rt. Hon. Speaker of the 8th House of Representatives of Nigeria has alleged that there is a very high rate of turn-over³⁵ which occurs during elections that take place every four (4) years undermines the quality of Bills and “legislation” that is enacted by the National Assembly.

Furthermore, it has also been alleged that due to low educational qualifications³⁶ of a large percentage of some legislators, limits their ability to contribute to debates which in turn undermines the quality of Bills and legislation that are enacted by the National Assembly.

(vii) Failure of the wordings of certain Bills and legislation to conform to the provisions of the 1999 Nigerian Constitution (as amended).

Although, Section 1 (3) of the 1999 Nigerian Constitution (as amended) expressly stipulates that the wordings of every Bill or legislation must be consistent with the provisions of the 1999

³⁴ <http://thenationonline.net/passage-of-46-bills-its-legislative-recklessness-say-lawyers/> accessed 7th May 2018.

³⁵ <http://www.nta.ng/news/politics/20170420-turnover-national-assembly-legislation-dogara/> accessed 7 May 2018.

³⁶ <https://www.dailytrust.com.ng/news/general/revealed-40-reps-5-senators-parade-o-level-certificates/174424.html> accessed 7 May 2018.

Nigerian Constitution (failing which such Bills and legislation are deemed illegal and void to the extent of such inconsistency), this study has found that some Bills and legislation, fail this basic constitutional requirement. It implies that either the legislative drafters or the legislators themselves and even the President whose responsibility it is to provide assent to legislation, do not undertake adequate scrutiny to ensure this very important constitutional test.

For example, Section 3 (1) of the Treaties (Making Procedure, etc.) Act, 1993 provides for a classification of treaties and states that certain category of treaties do not require the National Assembly to ratify and enact them. This provision is in direct conflict with the provisions of section 12 of the 1999 Nigerian Constitution (as amended). Sections 15 of the National Commission for Refugees (Establishment) Act, Chapter N121 Laws of the Federation of Nigeria, 2004 and section 5 of the National Human Rights Commission (Amendment) Act, 2010, which contains self-executing provisions of treaties by reference, are contrary to the provisions for direct enactment of treaties by the National Assembly as a pre-requisite before their application within Nigeria as stipulated under section 12 (1) of the 1999 Nigerian Constitution (as amended).

From the foregoing, although the problems, causes and symptoms of the poor quality Bills and legislative drafting in Nigeria are legion, the focus of this research is not to dwell on a discussion of the problems but to undertake a research that reveals the solution(s). A key to uncovering the solution lies in identifying an appropriate research methodology and theoretical framework that will be applicable for this research as is discussed hereunder.

Methodology

This policy brief research is essentially a desk library research. As a legal research study, it adopts the doctrinal legal research methodology as its major methodology.

However, as a complement, the case study and comparative legal research methodologies are also applied for the purpose of identifying strategies for improvement of Bills and legislative drafting in Nigeria that are not explained by the current prevalent doctrines of legislative drafting that are relevant or provide explanations of the different approaches to improvement of the quality of Bills, legislation and legislative drafting by defining the “ingredients” and “key actors” which is the focus of this research.

The doctrinal approach will be combined with the comparative law method, and the case study methodology, the possibility of combining these is confirmed according to Hutchinson:

“A modified case study approach is very possible 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”³⁷

Literature Review

³⁷ See T. Hutchinson, *Researching and Writing in Law* 2nd edn (Lawbooks/Thomson Reuters, 2006) p.104

At the epicentre of this research is the question: “what constitutes “quality legislation”? In other words “what are the ingredients of good quality Bill/legislation and legislative drafting?”. To find the answer, it will be necessary to examine the relevant literature in the field of legislative drafting.

The quest for a definition of quality legislation or achievement of quality legislation in the field of legislative drafting has generated different initiatives,³⁸ criteria³⁹ and approaches to drafting among drafters in different jurisdictions. For example under European Union law, the definition of quality legislation has resulted in the enunciation of such principles as “subsidiarity”, “proportionality”, “impact assessment”, “cost/benefit analysis”, “accessibility”, “transparency in decision-making”⁴⁰etc, in relation to legislation. Efforts to improve the quality of legislation resulted in the adoption of certain guidelines on how Community legislation is to be drafted, namely, the EU Inter-Institutional Guide for persons involved in the preparation of legislation within the EU Community (IAG) 2003.⁴¹ In the United Kingdom, which is the archetype of common law drafting, the Renton Committee of 1975 tended to define quality legislation as accessible legislation in simple, clear, plain English. However, evidence suggests the Committee’s recommendations are yet to be followed⁴².

This research study asserts that the criteria or definition of “quality legislation” must depend on the objective of the legislation. As Vanterpool rightly stated:

“...the pursuit of quality in legislation therefore advocates a certain balance arising from the foundation that legislation achieves its highest quality when it has attained its true function. This essentially means that as legislation is intended to govern and impact upon wide audiences, the texts should be accessible, in that they are unambiguous and simple to comprehend but yet precise and most *effective* [italics mine] in achieving the desired intention of the sponsors”⁴³

³⁸ See H.Xanthaki, The SLIM Initiative (2001) Statute Law Rev.. 22(2) 108 According to Xanthaki, the concern for quality in EU legislation was influenced by the call for greater accessibility of legislation and the principle of direct effect of EU legislative text respectively.

³⁹ Luzius Mader. Evaluating the Effects: A Contribution to the Quality of Legislation (2001) Statute Law Rev. 22(2): 119-131

⁴⁰ See J.C.Piris, The Quality of Community Legislation: the viewpoint of the Council of the Legal Service, in A.Keller, et al (eds) *Improving the Quality of Legislation in Europe* (1998) 25-38

⁴¹ Available online at: eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0770:FIN:EN:DOC · DOC file accessed on 17 October 2011

⁴² See R.Thomas, Plain English and the law, (1995) Statute Law Rev. 139, 148

⁴³ Vareem Vanterpool, A Critical Look at Achieving Quality Legislation (2007) EJLR 167-204 at 170

Flowing from the above, it is discernible that “effectiveness” is the defining element of “quality legislation” in the field of legislative drafting. Xanthaki has rightly defined effectiveness thus: “effectiveness” means that the legislation “manages to introduce adequate mechanisms capable of producing the desired regulatory results.”⁴⁴ In other words, “effectiveness” focuses on the “effects produced by legislation and the purpose [objective] of the statute passed...”⁴⁵ Accepting effectiveness as the key criterion of quality legislation in legislative drafting, inevitably leads to acceptance of “...clarity, precision and unambiguity...as tools of effectiveness”.⁴⁶ Xanthaki has further observed that “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...”⁴⁷

However, it must be noted that “...while the drafter will significantly contribute to the overall quality of legislation, the final achievement of *quality legislation* [effectiveness] is not one which the drafter can achieve alone”. To the contrary, “...the quality of the legislative product can only be achieved through collaborated efforts of the legislative sponsors or the relevant Ministry or Department, the drafter and the Legislators”.⁴⁸

The relevance of quality legislation to this current thesis is that Patchett apparently suggests that a regulatory framework for law drafting is a strategy (indeed the first strategy) for improvement of

⁴⁴ See H.Xanthaki, *Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules?* (2010) *Legisprudence*, Vol.4, No.2, , pp.111-128 at p.115

⁴⁵ See H.Xanthaki, *On Transferability of Legislative Solutions: The Functionality Test in C.Stefanou and H.Xanthaki (eds.) Drafting Legislation: A Modern Approach* (Ashgate Publishing, 2008) pp.1-18 at p.6

⁴⁶ *Ibid* p.12

⁴⁷ See H.Xanthaki, ‘Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in law or Impediment to the Necessity of Dynamism of Rules’ (2010) *Legisprudence* Vol. 4, No.2 pp.111-128 at pp.111, 116.

⁴⁸ Varem Vanterpool, *A Critical Look at Achieving Quality Legislation* (2007) *European Journal of Law Reform*, 167-204 at 170

the quality of legislation, considering that the seven strategies for improvement of law drafting will inevitably result in improvement of the quality of legislation in CEE countries and, by extension, to Nigeria as proposed in this thesis. The analogy is that improving the quality of the foundation is likely to improve the quality of the building (final product). In this equation the regulatory framework is the foundation, whereas the legislation is the final product.

Previous legal studies on legislative drafting in Nigeria have a tendency to concentrate on the procedure for producing a legislative draft (Bill) and the drafting process with insufficient consideration of such important issues as improving policy development; making fuller use of consultations and improving access to legislation which are key elements of Patchett's framework.⁴⁹

The first comprehensive study on legislative drafting in Nigeria is Azinge (1994)⁵⁰. He examined law-making and legislative drafting under military regimes in Nigeria. He analysed the procedure for policy formulation, law making and drafting of legislation. He further analysed the role of the Attorney-General as the personnel with responsibility for drafting federal legislation.

However, considering that Azinge (1994) dwells on law drafting under military regimes, its relevance to improving law drafting in a democracy is limited. Nonetheless, his work provides a background understanding of the underlying problems or constraints for law drafting in Nigeria.

Azinge's work was followed shortly by Adesiyani (1996)⁵¹ which dwelt entirely on the procedure for composition of legislative drafts (bills). In that short work there is no reference to policy

⁴⁹ See generally D.O. Adesiyani, *A Handbook on Legislative Drafting* (Tefton Books, 1996); R. Esegbabon, *The Nigerian Legislative Process* (Law-Link Consults, 2005)

⁵⁰ Epihany Azinge, *Law-Making under Military Regimes-The Nigerian Experience* (Oliz Publishers 1994)

⁵¹ D.O. Adesiyani, *A Handbook on Legislative Drafting* (Teton Books 1996)

development, or access to legislation, just to mention a few or other important aspects of drafting that are relevant for improvement of law drafting as Patchett's framework has provided. This thesis is of the view that Adesiyani's work by not discussing the role of policy development in the drafting process does not provide the reader with a complete picture of drafting. Whereas the prevailing view in the field of legislative drafting is that the "drafter alone"⁵² cannot achieve that goal of effective and quality legislation but must collaborate with policy developers, a "multiplicity of actors" and other members of a drafting team. The modern view is that "...drafters play a more significant policy development role after drafting instructions have been issued. They identify policy gaps and arrange for consultations with relevant advisors..."⁵³ In turn this approach to drafting, wherein drafters are regarded as "active partners and not merely scribes"⁵⁴ ties in with another important view in the field of legislative drafting that achievement of effectiveness of legislation and quality legislation ought to be undertaken in a systematic manner that involves the drafter on the one hand and "an interrelationship between actors in policy process",⁵⁵ the implementation, enforcement and compliance process on the other hand.

Nwosu (2003)⁵⁶ provides an introductory or rudimentary understanding of legislative drafting in Nigeria. The majority of chapters in the book are dedicated to a discussion of aspects of the law-making process in Nigeria such as "the relevance of committees and committee system in the exercise of legislative powers"; "dispute resolution in the legislature" just to mention a few. Indeed only one chapter out of eighteen chapters is dedicated to a discussion of legislative drafting in

⁵² Xanthaki, p.5,

⁵³ Pisarenko, supra, p. 48

⁵⁴ ibid 35

⁵⁵ Xanthaki, p.7

⁵⁶ Kevin N. Nwosu (ed) *Law and Practice of the Legislature in Nigeria* (Nayee Publishing Company Limited, 2003)

Nigeria in the strictest sense which is at the core of this thesis. However, its major contribution with respect to the seven strategies of Patchett's framework, is that the only mention of checklist as a tool for improving law drafting in Nigeria is made by Nwosu (2003)⁵⁷.

Esebagbon (2005)⁵⁸ is a major contribution to knowledge in the field of legislative drafting in Nigeria, therefore out of all the literature reviewed this thesis makes more references to it. It provides a discussion of the taking of instructions as part of the drafting process which is part of the policy development process (Patchett strategy no.2) although, it fails to identify the personnel or the government department that is charged with this responsibility. This does not assist the reader in the analysis of co-ordinating authorities which is a sub-element of Patchett's framework. Esebagbon also provides valuable information on "explanatory memorandum" which is analysed under Patchett's strategy no.3.

Some of the latest published studies in the field of legislative drafting in Nigeria that have also been analysed include those by Onwe⁵⁹, Imhanobe⁶⁰, and Jaja⁶¹.

References have also been made to other foreign texts by Thornton⁶², Seidman and Abeyesekere;⁶³ Salembier⁶⁴ and McLeod⁶⁵, this is in addition to academic publications in the

⁵⁷ *ibid.*, p.280

⁵⁸ Ray Esebagbon, *The Nigerian Legislative Process-Bills, Budgetary Control, Committee System* (Law-Links 2005)

⁵⁹ See generally H. Onwe, *Groundwork for Legislative Drafting* (Enugu: Snaap Press Ltd., 2009)

⁶⁰ See generally S. Imhanobe, *Principles of Legal and Legislative Drafting* (Abuja: Imhanobe Law Books Ltd., 2014)

⁶¹ T.C.Jaja, *Legislative Drafting and Statutory Interpretation: An Introduction* (Lagos: Malthouse Law Books, 2017)

⁶² G. Thornton, *Legislative Drafting* (London: Butterworths, 1996)

⁶³ Ann Seidman, Robert B.Seidman and Nalin Abeyesekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law Publishers, 2001)

⁶⁴ Paul Salembier, *Legal and Legislative Drafting* (Ottawa, LexisNexis, 2009)

⁶⁵ Ian McLeod, *Principles of Legislative and Regulatory Drafting* (Hart Publishing Limited, 2009)

leading law journals on legislative drafting namely the *Statute Law Review* and the *International Journal of Legislative Drafting and Law Reform*.

Comparative Law Analysis/Cross Country Experience

As we mentioned in the Abstract of this research, a “...a systematized,...developed approach”⁶⁶or framework for legislative drafting is a necessity for the production of quality Bills or legislation which in turn contributes to the overall national development of any democracy.

The comparative law analysis under this section, is to examine the “systematic” approaches and strategies that some selected countries have adopted to improve the quality of their legislation.

Although, this research argues that Patchett’s seven strategies is the most appropriate (as a holistic and long-term strategy) for improvement of the quality of Bills and legislative drafting in Nigeria, the purpose of this comparative law analysis is to identify appropriate (short-term) strategies that other countries have successfully applied that Nigeria could adopt and adapt.

There are two categories of countries that have been selected for comparative law analysis in this research paper. The first category (France, United States of America, and United Kingdom) is the comity of countries with high level of economic development considering that they are

⁶⁶ See T.Drinoczi, *Quality Drafting-The Case of Hungary* (2010) *Legisprudence*, 4 (2) pp.157-170 at p.158

ranked amongst the top ten economies in the world⁶⁷. The high rate of economic development in these selected countries is relevant to the analysis in this research study considering in the Abstract of this research study, we already initially adapted a prevailing theory and thesis in the field of legislative drafting that there is a nexus between good quality Bills, legislative drafting and economic development wherein [legislative] drafting can help third world development”⁶⁸

Although it is not a country, the European Union (EU) has been selected considering that it provides an example of providing a concrete, documented definition of the “elements of good quality legislation” as a guide for legislative drafters. Also, some elements of the EU approaches to improving quality of Bills and legislative drafting is instructive for Nigeria considering that Nigeria is a member of the Economic Community of West African States (ECOWAS) whose legal, administrative structure and legislative and legislative drafting system is modelled after the EU institutions.

Also, the EU was deliberately selected as a comparative case study considering that the Patchett’s seven strategies which this research study advocates has already been successfully tried-and-tested as an EU initiative for certain central and eastern European countries as a prerequisite for their enrolment as full-fledged members of the EU.

⁶⁷ <https://www.investopedia.com/articles/investing/022415/worlds-top-10-economies.asp> accessed 7 May 2018

⁶⁸ See Constantin Stefanou, The Policy Process and Legislative Drafting in C.Stefanou and H.Xanthaki (eds) *Manual in Legislative Drafting* (Department for International Development, 2005), p. 3

The second category of countries (South Africa and Kenya) are amongst the top ten economies in Africa⁶⁹, the successful application of “systematic” strategies for improvement of their Bills and legislative drafting would provide examples and inspiration for Nigeria.

Below are some details of the strategies for improvement of the quality of Bills and legislative drafting that are applied by the case studies selected, the details are not exhaustive but rather a representative samples, they are as follows:

1. United States of America (USA)-For the purposes of drafting all Federal legislation, the USA Congress (the federal legislature) has put in place some strategies that improve the quality of Bills and legislation as listed below:

(i) an institutional arrangement for legislative drafting that is encapsulated within a legal/legislative framework which consists of the Offices of Legislative Counsel for the Senate and House of Representatives respectively. According to the establishment legislation, the Office of Legislative Counsel of the Senate of the US Congress was established in the year 1919. Section 1 of the said legislation reads: “There shall be in the Senate an office to be known as the Office of the Legislative Counsel, and to be under the direction of the Legislative Counsel of the Senate”, a brief information of the Office is provided on the website as follows:

“The Office of the Legislative Counsel was established in 1919 to assist "in drafting public bills and resolutions or amendments thereto" upon the request of any Senator, committee, or office of the Senate. The Legislative Counsel of the Senate was appointed by the President pro tempore of the Senate solely on the basis of his or her qualifications to perform the duties of the position. The

⁶⁹ <https://answersafrica.com/largest-economies-africa.html> accessed 7 May 2018

Legislative Counsel was authorized to appoint Senior Counsels, Assistant Counsels, support staff, and other employees, to establish salaries, and to otherwise administer the Office. All appointments were made without regard to political affiliation and were subject to the approval of the President pro tempore of the Senate.”⁷⁰

(ii) The Offices of Legislative Counsel of the US Senate and House of Representatives are at the forefront of improving and maintaining high quality of Bills and legislation in the USA considering that the Legislative Counsel who is the Head of the Office, has the responsibility of scrutinizing all Bills and legislation before their enactment and publication. Each of these two offices have published a **“Legislative Drafting Manual”** which serves a drafting guide/manual and tool for undertaking scrutiny of legislation. These legislative drafting manuals are available online on the websites of both offices⁷¹.

(iii) In addition, to the legislative drafting manual, a tailor-made bespoke computer legislative drafting software and laptop computer is made available to each legislative drafting lawyer of both Offices for undertaking Bill and legislative drafting assignments.

As of 2012, it is on record that at least 33 state legislatures out of the legislatures of the 50 States of the USA have their own tailor-made legislative drafting software that is used by the Offices of legislative Counsel of the State legislatures. Also as of April 2018, it is reported that 33 state

⁷⁰ <https://catalog.archives.gov/id/10534712> accessed 7 May 2018

⁷¹ <https://www.slc.senate.gov/Drafting/drafting.htm> accessed 7 May 2018

legislatures out of the 50 State legislatures in the USA have published their own Bill/legislative drafting manuals⁷².

(iv) Also, staff of both Offices of Legislative Counsel of the USA Congress undertake periodic formal training programmes in legislative drafting. The Legislative Counsel of the US Senate informed this researcher that a two week induction training in legislative drafting is a mandatory training programme for all newly recruited staff and he was gracious enough to grant opportunity for two staff of NLS and the National Assembly to attend the 2016 version of this training. In the field of legislative drafting, a combination of both formal training programmes and “mentorship-through-on-the-job-training” respectively are the two methods for redress the “worldwide shortage of legislative drafters...”⁷³

(v) High Remuneration as a strategy for staff retention. During a formal interview, his researcher was informed by the Head of the Legislative Counsel Office of the US Senate, that his salary and the salary of other legislative drafting lawyers of that Office was higher than the salary of any senator of the USA Congress. The said Head of the Legislative Counsel Office retired in March 2018 after thirty-seven (37) years of employment in the Office of Legislative Counsel, USA. This is due to the high remuneration which prevents high turnover.

(vi) Ratio of legislative drafting lawyers (30)⁷⁴ per senator/legislator (100)⁷⁵ is good and workload is manageable. This is not the case in Nigeria where there are only eleven (11) legislative drafting

⁷²<http://www.ncsl.org/legislators-staff/legislative-staff/research-editorial-legal-and-committee-staff/bill-drafting-manuals.aspx> accessed 7 May 2018.

⁷³ S. Markman, Training Legislative Counsel: Learning to draft without Nellie” *Commonwealth Law Bulletin* (2010) Vol. 36, Issue 1, available online at: <https://www.tandfonline.com/doi/abs/10.1080/03050710903573431> accessed 7 May 2018

⁷⁴ <https://www.gpo.gov/fdsys/pkg/CDIR-1997-06-04/pdf/CDIR-1997-06-04-SENATECOMMITTEES-3.pdf> accessed 7 May 2018

⁷⁵ https://www.senate.gov/reference/reference_index_subjects/Senators_vrd.htm accessed 7 May 2018

lawyers and staff of the Legal Drafting Unit of the Legal Services Directorate of the National Assembly to attend to one hundred and nine (109) senators.

(vii) Division of labour between the Office of Legislative Counsel and the Congressional Research Service (CRS). Unlike the situation in Nigeria, wherein legislative drafting lawyers have to combine the tasks of drafting Bills as well as scrutiny of Bills, in the US Congress the lawyers in the Offices of Legislative Counsel are completely devoted and dedicated to drafting of Bills while the staff of the CRS are dedicated to providing in-depth scrutiny and analysis of Bills for legislators. During a study visit to the CRS by a delegation of NILS in the year 2015, it was noted that the CRS receives an average of 30 to 50 requests per week. It is estimated that the CRS has about 600⁷⁶ staff/employees.

(viii) Format of Bill scrutiny/analysis Report

During the 2015 NILS study visit⁷⁷ to the CRS it was reported that the CRS has a tradition of providing a two page CRS Bill scrutiny and analysis report that “captures all the relevant information and makes it easier for legislators to read”. This is not the case in Nigeria, wherein the prescribed format of Bill Scrutiny and Analysis Report by National Institute for Legislative and Democratic Studies makes it susceptible to wordiness and lengthiness.

2. United Kingdom-The United Kingdom also applies similar strategies for improvement of Bills and Legislative Drafting considering that there is an Office of Parliamentary Counsel consisting of over seventy lawyers, the said office was established in the year 1869 and its sole responsibility

⁷⁶ https://en.wikipedia.org/wiki/Congressional_Research_Service accessed 7 May 2018.

⁷⁷ L. Hamalai, Report of the Visit to the United States Congress and the UK Parliament by the National Assembly and NILS Delegation, 20-23 October 2015.

is to draft Bills and legislation for the UK Parliament. Just like its counterpart Offices in the USA, it has published its own legislative drafting manual.

The additional measures for improving the quality of Bills and legislative drafting in the UK are:

(i) the Legislative and Regulatory Reform Act, 2006. In a nutshell, this legislation prescribes the procedures to be applied for enactment of legislation and Regulations (secondary legislation). For examples, it stipulates that holding consultations with citizens and others who are likely to be affected by prospective legislation or Regulation is a mandatory part of the legislative and regulation process and documented evidence of undertaking such consultations must be provided by government officials. This piece of legislation is significant considering that it demonstrates a keen understanding of the fact that as a supplement or complement to legislation, regulation (secondary legislation and other alternative tools) could be applied to solve certain problems. This is the equivalent of “alternatives to legislation” as it is called under Patechett’s seven strategies. This is one of the problems that Nigeria is yet to address, namely the over-reliance on legislation as a tool for solving all of its problems.

(ii) pre-legislative scrutiny (primary and secondary legislation) committees of the UK Parliament: Since the year 1998, the UK Parliament established two standing committees to undertake scrutiny of any and every Bill, primary and secondary legislation as a pre-requisite before its consideration and enactment by the UK Parliament. More recently in the year 2013, the UK Parliament established the Political and Reform Committee which advocated five key reforms with a view to improving the quality of legislation in the UK.⁷⁸ Publication of a draft Code of Legislative Standards and Pre-and post-legislative scrutiny are part of the reforms advocated. Also, the UK

⁷⁸ A. Samuels, Ensuring Standards in the Quality of Legislation , *Statute Law Review* (2013) Vol. 34, Issue 3, pp. 296-299 at 296

Office of Parliamentary Counsel, published its own GOOD LAW Initiative⁷⁹ as a statement of the principles that would guide legislative drafters in addition to its legislative drafting manual.

(iv) Financial Memorandum and cost-benefit analysis of proposed Bills/legislation

Beginning from the 1998/1999 Parliamentary Session, the UK Parliament made it a mandatory requirement that every Bill that is submitted for debate and legislative consideration must be accompanied by a Financial Memorandum that states the financial implications that are involved in implementation of the proposed Bill or legislation. Historically, this was as a result of UK's membership of the EU which made it a requirement amongst EU member states to undertake and publish a "rudimentary cost-benefit analysis"⁸⁰ of proposed Bills/legislation.

It is noteworthy, that this strategy is already been adapted and applied in Nigeria since the year 2011, when the Senate of Nigeria's legislature blazed a trail when it enacted Order 77 (3) of the Standing Orders of the Senate, 2011, this provision made it a mandatory requirement for any senator who sponsors a Bill to submit an accompanying document named a Compendium of Financial Implications of any proposed legislation (Bill).

⁷⁹ <https://www.gov.uk/guidance/good-law> accessed 7 May 2018

⁸⁰ See C. Stefanou, Drafters, Drafting and the Policy Process in C.Stefanou and H. Xanthaki, (eds) *Drafting Legislation-A Modern Approach* (Aldershot, UK: Ashgate Publishing, 2008) pp.321-346 at p.327, its rightly stated: "One point to note here is that in some small jurisdictions (or in jurisdictions where drafting takes place inside a ministry) the drafters are even expected to complete relevant Regulatory Impact Assessment (RIA) checklists or even (for minor bills) a rudimentary cost-benefit analysis.²⁰ This is not the case in large common law jurisdictions where RIAs are prepared by specialists in the relevant ministries."

(3) France: In a seminal article published in the *International Journal of Legislative Drafting and Law Reform*⁸¹, (this researcher is the Editor-In-Chief of the said law journal) a foremost legislative drafting lawyer from France⁸² outlined the major strategies that France has adopted to improve the quality of its legislation as follows:

(i) application of a legislative drafting manual (legistique⁸³) and other legislative drafting circulars of 7th July 2011 issued by the Government of France;

(ii) use of alternatives to legislation;

(ii) application of cost-benefit analysis (regulatory impact assessment-RIA);

(iv) legislative drafting by non-lawyers, civil servants and staff of the various Ministries of government;

(v) scrutiny of Bills by the conseil d'etat (Council of State comprised of lawyers, retired judges and other experts) before submission to parliament of France

(4) South Africa- There are several initiatives for promoting good quality Bills, legislation and legislative drafting in South Africa, some of them are:

(i) “Tagging” of Bills as a mechanism of the Parliament of South Africa to scrutinize and ensure good quality Bills. Tagging⁸⁴ occurs “as soon as a Bill is introduced in Parliament it needs to be classified into one of the 4 categories mentioned above by the Joint Tagging Mechanism (JTM). This is called “tagging” and will determine the procedures the Bill must follow to become law. The JTM consists of the Speaker and Deputy Speaker, and the Chairperson and permanent Deputy Chairperson of the Council. These office-bearers are assisted by the parliamentary legal advisors”.

⁸¹<http://www.cambridgescholars.com/international-journal-of-legislative-drafting-and-law-reform> accessed 8 May 2018.

⁸² <http://www.montin.com/documents/legistics.pdf> accessed 7 May 2018

⁸³ <http://www.guide-legistique.fr/guide.pdf> accessed 8 May 2018

⁸⁴ <https://www.parliament.gov.za/how-law-made> accessed 8 May 2018

(ii) certification of Bills and legislation by the Office of the Chief Law Adviser⁸⁵, Department of Justice, Government of South Africa. Other legislative drafting duties of the Office of the Chief Law Adviser include: (a) Assist municipalities in drafting by-laws & training in drafting of by-laws; (b) Legislative drafting training internally and in other departments (c) Translation and drafting in indigenous languages.

(iii) Legislative drafting training programmes at three South African universities: University of Pretoria⁸⁶, University of Cape Town⁸⁷ and the University of Johannesburg⁸⁸. South Africa represents the country with the highest number of number of formal legislative drafting programmes by law schools of Universities.

(5) Kenya-“A Guide to the Legislative Process in Kenya”⁸⁹ published in the year 2015 by the Law Reform Commission of Kenya is the official publication and guide for the procedure(s) and the officials responsible for pre-legislative scrutiny of legislation and legislative drafting. The Legislative Drafting Division⁹⁰, Office of the Attorney-General of Kenya is responsible for drafting of Bills and legislation.

(6) EU- In broad terms, this thesis found that it is possible to deduce that there are two prevalent models for quality of legislative and legislative drafting within the EU.

⁸⁵<http://www.justice.gov.za/ocsla/services.html> accessed 8 May 2018.

⁸⁶ <http://www.ce.up.ac.za/Course?tabid=58&Course=733593e7-b8f2-df11-9e88-0050569b0004> accessed 8 May 2018.

⁸⁷ <http://www.lawatwork.uct.ac.za/legislative-drafting> accessed 8 May 2018.

⁸⁸ <https://www.uj.ac.za/faculties/law/Documents/Legislative%20Drafting.pdf> accessed 8 May 2018.

⁸⁹ <http://www.klrc.go.ke/images/images/downloads/klrc-a-guide-to-the-legislative-process-in-kenya.pdf> accessed 8 May 2018.

⁹⁰ <http://www.statelaw.go.ke/legislative-drafting-division/> accessed 8 May 2018.

The first model, which is contained in the Inter-Institutional Agreement for persons involved in drafting EU legislation of 2003 (IAG), applies to the institutions of the EU involved in the drafting of EU legislation as well as to the institutions involved in transposing and domesticating EU legislation within the founding older and existing EU member states.

In terms of the application of the first model by EU institutions, according to Robinson, the drafting of EU Acts or legislation is generally the responsibility of the European Commission“ divided into over 20 technical departments or Directorates General (DG) dealing with the different sectors of the EU activities. Each DG is responsible for preparing and drafting the legislative acts and implementing the acts in its sector.”⁹¹

The first model set out in the Inter-Institutional Guide for persons involved in the preparation of legislation within the EU Community (IAG) 2003⁹² and other relevant EU directives on drafting legislation. Generally, it is characterised by non-legally binding rules or drafting manuals. The norms are generally couched in the form of guidelines and principles such as “subsidiarity, proportionality”⁹³, impact assessment, cost/benefit analysis, accessibility, transparency in decision-making” etc. It is noted that only 9 out of the older 15 EU member states have introduced drafting manuals⁹⁴.

⁹¹ William Robinson, ‘Drafting of EU Acts: A View from the European Commission’, in Constantin Stefanou and Helen Xanthaki (eds.) *Drafting Legislation-A Modern Approach* (, Ashgate Publishing Limited, 2008) 177-197 at 193

⁹² Available online at: <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0770:FIN:EN:DOC · DOC file> accessed 20 August 2010

⁹³ See J.C.Piris, The Quality of Community Legislation: the Viewpoint of the Council of Legal Service, in A.Kellerman et al (eds.) *Improving the Quality of Legislation in Europe* (1998) 25-38 cited in V.Vanterpool, A Critical Look at Achieving Quality in Legislation, (2007) EJLR, 167-204 at p.170

⁹⁴ See P.V.Lochem and P.Westerman, Rules on Rulemaking-Introduction, (2010) *Legisprudence, International Journal for the Study of Legislation*, 107-109 at p.108

The second model on the otherhand is based on Pactchett's framework and other subsequent SIGMA and OCED models⁹⁵ such as the SIGMA Paper No.15 (SIGMA Paper No. 15 *Checklist on Law Drafting and Regulatory Management in Central and Eastern Europe*)⁹⁶ specifically designed for the application by those transitional Eastern and Central European countries seeking EU ascension and membership. One of the requirements for the second model is the requirement for approximation of the national legislation with the legislation of the European Union (EU), which is undoubtedly one of the basic criteria of the membership of an aspirant country within the European Union. The core of this process constitutes the adoption of the European legislation, *acquis* of the EU (*acquies communautaire*)⁹⁷ in the domestic legal system.

In view of the commonality or similarity in terms of the level of development between Nigeria and CEE countries, this research is of the view that the first model which applies to developed EU member states is not appropriate considering that Nigeria is currently not at the same level of development as these developed and industrialised EU countries and does not yet possess the tools to operate such principles. For example in recent times and in recent surveys of level of development, transparency⁹⁸ and corruption among public government institutions, Nigeria rates very poorly on transparency in terms of its institutions of government whereas the EU states rate higher.

⁹⁵ A full list of SIGMA and OECD papers can be found at the website: <http://www.oecd-ilibrary.org/governance/sigma-papers_20786581> Accessed 8 January 2013

⁹⁶ Available online at: <http://www.oecd.org/site/sigma/publicationsdocuments/39543130.pdf> Accessed 8 January 2013

⁹⁷ The *acquis communautaire* refers the legal corps of the EU, which is composed of primary legislation (Treaties) and secondary legislation (regulations, directive etc), as well as the jurisprudence of the Court of Justice of the European Union which is able to interpret European Union law. The term *acquis communautaire* will be used as result of the legal acts of that time.

⁹⁸ See generally M.J.Trebilcock and R.Daniel, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar Publishing Limited, 2008)

(i) The Patchett Framework for Transitional Countries (SIGMA NO.18)

In a nutshell, considering that Patchett's model was inspired by the twin fundamental objective(s) of promoting the rule of law and promoting socio-economic development for CEE countries which incidentally is also listed as one of the fundamental objectives of the Nigerian government in sections 1 (3) and Chapter 2 of the 1999 CFRN it is logical that Patchett's Framework⁹⁹ or the second EU model is the most suitable model for Nigeria given the fundamental similarities between Nigeria and CEE countries.

The seven strategies within Patchett's framework are:

- (i) creating and enforcing a regulatory framework for law drafting;
- (ii) improving policy development prior to drafting;
- (iii) setting and maintaining law drafting standards;
- (iv) making fuller use of consultations;
- (v) applying equivalent procedures and standards to parliamentary initiatives;
- (vi) applying equivalent procedures and standards to secondary law-making; and
- (vii) improving access to legislation.

Furthermore, as demonstrated earlier, Patchett's framework is appealing relevant and suitable to Nigeria, considering that Patchett's framework embodies such modern, universal and international

⁹⁹ "common standards and uniform practices for preparing and drafting legislation are set most effectively through the provision of a single set of directives, which have behind them the authority of Government and, as needed Parliament. In the present circumstances of many Central and European countries, the essential elements are most likely to be regulated by law. Not only is this the most powerful means by which reforms can be effected, but for the time being it may be the only sure way by which a single set of standards can be set to bind both Government and the Parliament. Those provisions can be amplified by secondary instruments, such as Standing Orders, made by Government or the Parliament to deal with matters that are of separate concern to them" See K.Patchett, 'Setting and Maintaining Law Drafting Standards: A Background Paper on Legislative Drafting' in C.Stefanou and H.Xanthaki (eds) *Manual in Legislative Drafting* (Department of International Development, 2005) pp.44-60 at pp.46 and 47

good practices in law drafting such as impact analysis of legislation¹⁰⁰ derived from a combination of principles of legislative drafting derived from common law, civil law and European Union law jurisdictions. This is important when viewed in the commercial context considering that both CEE countries and Nigeria are interested and recipients of the “... rapid expansion of international trade and technological advances...related to doing business in a global marketplace”¹⁰¹ fraught upon them by the “growth of multinational corporations and when viewed in the context of the current trend of internationalisation and globalisation to It was specifically designed from a blend or a combination of legislation and subsidiary legislation as a framework for promoting effectiveness in drafting legislation in transitional countries in Eastern and Central European. Details of how the Patchett model can apply to Nigeria would be discussed hereunder.

Recommendations/way forward

Short Term options and “quick wins”/interventions

The quickest method(s) to improving the quality of Bills and legislative drafting in Nigeria is for the Clerk of the National Assembly to undertake a diligent implementation of the responsibilities assigned under the provisions of the Acts Authentication Act, 1961 in the following ways:

¹⁰⁰ See page 12 of the thesis, See Raul Narits, Good Law Making Practice and Legislative Drafting:Conforming to It in the Republic of Estonia, (2004) *Juridica International*, Vol.IX, 4-10 at p.6 Law Journal of the Faculty of Law, University of Tartu, Estonia available online at <<http://www.juridicainternational.eu/?id=12615>> Accessed 7 January 2013

¹⁰¹ See the Editorial: Anthony A. Tarr, Globalisation, Comparative Law and Law Reform (2003) *EJLR*, Vol.5,Issue1/2, pp.1-5 at p.1

1. issuance of a certificate of accuracy for Bills as prescribed under Section 2 (1) of the Act, this could serve as a quality assurance or scrutiny mechanism considering that the Clerk will be required to compare the final version of the Bill enacted to ensure that it is consistent with the debates as contained in the Hansard.
2. publication of a Register/Schedule of Acts with their numbers in accordance with sections 2 (2), 4 and 5 of the said Act.
3. appointment of a Legal Editor, Engrossment and Enrollment Clerk for the National Assembly by the National Assembly Service Commission based on the recommendation of the Clerk of the National Assembly in accordance with Section 6 (1) (viii) of the said Act which states: “holders of other offices that shall be created by the Commission on the recommendation of the Clerk to the National Assembly.”
4. publication of a Legislative Drafting Manual by a joint committee of lawyers from the Legal Departments of the Federal Ministry of Justice and the Legal Services Directorate of the National Assembly and National Institute for Legislative and Democratic Studies (NILDS).
5. publication of a checklist for scrutiny of the quality of Bills and legislation by the Office of the Clerk of the National Assembly. This checklist must contain a statement or definition of the elements of good quality legislation as internationally recognized namely: “effectiveness” is the defining element of “quality legislation” in the field of legislative drafting. Xanthaki has rightly defined effectiveness thus: “effectiveness” means that the legislation “manages to introduce adequate mechanisms capable of producing the desired regulatory results.”¹⁰² In other words, “effectiveness” focuses on the “effects produced by legislation and the purpose [objective] of the

¹⁰² See H.Xanthaki, Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in the Law or Impediment to the Necessity for Dynamism of Rules? (2010) *Legisprudence*, Vol.4, No.2, , pp.111-128 at p.115

statute passed...”¹⁰³ Accepting effectiveness as the key criterion of quality legislation in legislative drafting, inevitably leads to acceptance of “...clarity, precision and unambiguity...as tools of effectiveness”.¹⁰⁴ Xanthaki has further observed that “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...”¹⁰⁵.

(6) publication of format for DRAFTING INSTRUCTIONS: The Office of the Clerk of the National Assembly in collaboration with NILDS would publish a format for submission of Drafting Instructions by legislators. It is important for the Drafting Instruction to contain a section that asks whether the problem could be addressed by the use of “Alternatives to Legislation”.

This idea of “alternatives to legislation” was advocated by Professor Keith Patchett in his work: “Law [Legislative] Drafting in Central and Eastern Europe ” wherein he listed the alternatives to legislation thus:

Alternatives to Legislation

Legal traditions in many CEE countries may mean that considerable emphasis is placed on dealing with social, economic and administrative issues through legislation (primary or secondary) — the so-called "command and control" approach. In many OECD Member countries, attempts are being made to control the tide of legislation by wider use of alternative devices. These may involve more frequent use of administrative directives of various kinds, often issued in the form of circulars, i.e. instruments do not lay down normative rules that are directly enforceable through courts, but are

¹⁰³ See H.Xanthaki, On Transferability of Legislative Solutions: The Functionality Test in C.Stefanou and H.Xanthki (eds.) *Drafting Legislation: A Modern Approach* (Ashgate Publishing, 2008) pp.1-18 at p.6

¹⁰⁴ Ibid p.12

¹⁰⁵ See H.Xanthaki, ‘Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in law or Impediment to the Necessity of Dynamism of Rules’ (2010) *Legisprudence* Vol. 4, No.2 pp.111-128 at pp.111, 116.

intended to be made effective by other means, e.g. by administrators or by superior officials. The following are the kinds of documents that may be issued:

- (i) administrative directives
- (ii) Instructions,
- (iii) Practice Directions,
- (iv) Codes of conduct”¹⁰⁶ just to mention a few.

From the list above the most commonly used “alternatives to legislation” in Nigeria is the use of Practice Directions and Code of Conduct.

For example, in October 2016, the Chief Judge of the High Court of the Federal Capital Territory (F.C.T), signed into law the Practice Direction For Enforcement Of Judgment And Orders Of Magistrates And Judges In The FCT. The Nigerian Securities and Exchange Commission which is the regulator of the Nigerian Stock Exchange also enacted its own Code of Corporate Governance for Public Companies, 2008

Medium and Long Term Legislative Approaches

1. creation and establishment of Offices of Legislative Counsel for the House of Representatives and the Senate of the National Assembly respectively through an enactment of a legislation. Also, the establishment of the Office of the Legislative Counsel of the Federation under the supervision of the Office of the Attorney-General of the Federation, this Office would be responsible for drafting of all Executive Bills.
2. enactment of a legislation that prescribes the personnel, format, and structure of Bills and legislative drafting in Nigeria.

¹⁰⁶ Available online at the OECD website:
[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD\(97\)176&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(97)176&docLanguage=En)
accessed 04/10/2018

3.amendment of the Acts Authentication Act, 1961 to include the requirement for the Clerk of the National Assembly to maintain a Register of all Secondary Legislation in Nigeria similar to the Office of the Registrar of Regulations¹⁰⁷, Office of Legislative Counsel, Department of Justice, Government of the Province of Yukon, Canada.

Conclusion

Synergy and robust consultations is the common thread that contributed and still contributes to the successful implementation Patchett's model in Eastern and Central European Countries and other models for the improvement of the quality of Bills and legislation that were examined in this research.

Similarly, the proposals in this research will not be successfully implemented unless and until there is synergy and cooperation from the Nigerian Law Reform Commission, the Federal Ministry of Justice and the Office of the Attorney-General of the Federation even though the Office of the Clerk of the National Assembly and NILDS would be the coordinators of the projects.

Finally, unless and until professional legislative drafters with cognate experience and formal qualifications are involved in this project from inception to completion, the successful outcomes desired will be doubtful.

¹⁰⁷ <http://www.justice.gov.yk.ca/general/index.html> accessed 8 May 2018.