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**A Comparative Review of Legislative Drafting Models in
Common Law and Civil Law Systems**

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Abstract

Purpose: The common law legislative drafting model is aimed at achieving precision and accuracy in a legislative text which is meant to encompass every detail on a subject matter.

Methodology: Contrarily, the civil law drafting system seeks to introduce the main legal concept addressing a social phenomenon, while issues of detail will be regulated by secondary forms of law. In spite of these differences, some scholars of legislative drafting have in recent years been of the view that there is a meeting point between the two drafting models. Until recently, the comparative analysis of legislative drafting models was not given serious attention by legal scholars in comparative analysis. In this connection, while doctrinal legal approach will be employed as a descriptive and analytical review of the topic, comparative approach will be used to examine the various legislative drafting models. The objective of

this paper is therefore to compare the common law and civil law legislative drafting models.

Findings: The findings show that while there are clear cut differences between the common law and civil law legislative drafting models. There has also been cross-fertilisation of styles particularly in drafting of international instruments involving drafters from common law and civil law jurisdictions.

Recommendations: This paper therefore recommends the need for legislative drafters in Nigeria to be properly trained with a view to learning the similarities and differences between common law and civil law legislative drafting models.

Keywords: *Civil Law, Common Law, Comparative Legislative Drafting, Drafting Model(S)/Style(S), Legislative Drafting*

1.0 INTRODUCTION

An important nature of legislative drafting is that there is no common theory of legislative drafting. Rather, majority of writers on the subject of legislative drafting usually focus their research on the practice of drafting within their jurisdictions; therefore, comparative study of legislative drafting is not so common. This results in limited literature that compares aspects of legislative drafting from different jurisdictions.¹ The root cause of divergent legislative models in Africa can be attributed to the legacy left by colonial administrations. In the Commonwealth countries, for instance, thousands of drafters were taught the English style of legislative drafting, which continues to dominate drafting styles in these countries.²

In 1869, the English style of drafting itself took a dramatic turn when the British Government decided to standardise legislative drafting, changing the way of drafting legislation by establishing the Parliamentary Counsel's Office with Henry Thring as its first Parliamentary Counsel.³ This decision seems to have influenced the British style of legislative drafting. Presently, many Commonwealth countries have their drafting office attached to the Attorney General's Office and have developed based on the British system, similar characteristics in their approach to legislative drafting.⁴

Drafting in civil law jurisdictions has a slightly different foundation in comparison with the common law jurisdiction. This is because the two main exporters of the civil law drafting styles, namely; Germany and France, did not develop distinctive styles of drafting. In France, for instance, drafters who may not be lawyers, drafted legislation in ministries, not necessarily based on their expertise in drafting legislation. This practice is justified on the reasoning that highly trained civil servants have the capacity to convey legislative intent in clear and exact language.⁵ However, one common feature in many civil law jurisdictions is that the initial draft is vetted by another body of lawyers, for instance, the Counsel d'Etat in France, the Law Council in Sweden and the Bundestag in Germany, though in most other jurisdictions it is the Ministry of Justice that scrutinises the drafts.⁶

The purpose of this paper is to set out some basic criteria for comparative research in legislative drafting in the two main families of legal systems. Comparative research in legislative drafting is rare.⁷ In fact, this is the result of a lack of a micro or a general theory of legislative drafting, which gives context to theoretical argumentation. An additional reason is the lack of comparative systematic scholarship in the field, each experts looking inwards into his or her jurisdiction and not branching out to examine other jurisdictions. Not that there is lack of work describing the various aspects of legislative drafting in many national jurisdictions. What we lack is work that compares similar aspects of legislative drafting in different jurisdictions.

But on which aspects of legislative drafting should one concentrate and on what basis? Drafting in different jurisdictions is, of course, based on the national policy process. Moreover, each jurisdiction has its own 'quirks' and idiosyncrasy. To add to the confusion, civil law and common law seem to have different starting points and even a different philosophy in their approaches to legislative drafting.

So, how should we compare the different aspects of legislative drafting in different jurisdictions, especially when they come from different families of legal systems? The obvious answer here is that

¹Constantin Stefanou 'Comparative Legislative Drafting: Comparing across Legal Systems' (2016) (18) *European Journal of Law Reform* p.124

²Ibid, p. 125.

³Henry Thring set the standard in the United Kingdom that bills have to be logical and divided into sequential parts and clauses. See Alec Samuels

⁴Henry Thring, the First Modern Drafter' [2003] (24) (1) *Statue Law Review* p. 91-92

⁵Stefanou (n 1).

⁶Sir William Dale *Legislative Drafting: A New Approach. A Comparative Study of Methods in France, Germany, Sweden and the United Kingdom* (London, Butterworth's, 1977) p. 8.

⁷Ibid Stefanou (n 1) p. 126.

⁸The publication by Lupo and Scaffardi concentrates on transplantation of legislation and the role of National Parliaments. N. Lupo & L. Scaffardi (Eds.), *Comparative Law in Legislative Drafting: The increasing Importance of Dialogue amongst Parliaments*. The Hague, Eleven International Publishing 2014.

all comparative work hinges on its comparative criteria. Without them there can be no meaningful comparison. But where do we find comparative criteria for legislative drafting? In the absence of a substantial body of comparative work – and, therefore, established avenues for comparison – it is difficult to test existing criteria. This means that there is a need to develop sets of comparative criteria, which will guide and aid future researchers in the complicated world (or even sub-discipline) of legislative drafting. This paper attempts to introduce sets of comparative criteria in both civil and common law jurisdictions and in doing so to establish a new avenue for scholarly research and debate in comparative legislative drafting.

From various existing positions on legislative drafting, there is a challenge that a wide gap exists between the common law and civil law drafting styles. While it is noted that there is no uniformity in the method, technique and style of legislative drafting in Nigeria and among the sub-national governments, there is a problem of lack of specific legal framework on legislative drafting in Nigeria as well. It is therefore imperative in this paper to consider the above issues and make findings, and ultimately outline recommendations on the how to close the gaps.

Common Law and Civil Law in Legislative Drafting

When looking at legislative drafting in two main families of legal systems, it becomes obvious that from the end of the 19th century onwards, the common law and more specifically the ‘English style’ of drafting legislation is the dominant one. There are three reasons for the dominance of the English style of legislative drafting. The first is the colonial legacy. As is often noted, about a third of the world’s population lives in jurisdictions which are strongly influenced by common law.

The colonies had English lawyers as drafters who, of course, were mainly familiar with the English drafting style and system. The story of Sir William Dale is quite revealing in the way he approached drafting in the various jurisdictions he worked for.⁸ Even after decolonization, drafters continued to come to London to train in ‘The Government Legal Advisers Course’, which Sir William Dale set up in 1964 initially with the Foreign and Commonwealth Office and later with the Institute of Advanced Legal Studies. Although, Sir William Dale himself believed that there were elements of legislative drafting which the civil law system offered that would be useful to common law drafters in the Commonwealth and beyond have been taught or exposed to the English style of legislative drafting.

The second reason for the dominance of the English style of legislative drafting is that Britain was the first country – indeed the first colonial power – to organize centrally its legislative drafting system. As is well known, faced with a ‘mosaic’ of legislation, in 1869 the British government took the decision to change – if not radically transform – the way of drafting legislation and created the Parliamentary Counsel’s Office with Henry Thring as its first head (first Parliamentary Counsel). This decision has influenced legislative drafting in practically all common law jurisdictions which have more or less copied or adapted the British model. For example, to this day, many Commonwealth jurisdictions have their drafting office attached to the Attorney General’s Office. From a practical point of view, this meant that drafting officers who followed the English style developed similar characteristics in their approach to legislative drafting.

The third reason is linked to the academic side of legislative drafting and the dominance of British and Commonwealth experts in the development of a body of bibliography in legislative drafting. In other words, most of the published work in legislative drafting come from common law jurisdictions. The efforts of the Australian drafters should be noted and so should the establishment of the first LLM in the field at the Institute of Advanced Legal Studies in 2004.

⁸See Sir William Dale, *Time Past Time Present: An Autobiography*, London Butterworth’s Law 1994.

Drafting in civil law jurisdictions has been slightly different in that the two main exponents of civil law, Germany and France, did not develop distinctive style of drafting. For example, in France, drafters – not necessarily with a legal background – drafted legislation in ministries on the strength of their expertise in drafting legislation. This French approach intrigued Sir William Dale, who noted:

“The assumption is that if you are a man of education, and have reserved the training and the high qualifications necessary to pass into the top division of the civil service, you are able to express what you have to convey to clear and exact language.”⁹

Perhaps the only common characteristic in many civil jurisdictions is that the initial draft is then vetted by another body, e.g. the *Conseil d’Etat* in France, the Law Council in Sweden but in most other jurisdictions it is the Ministry of Justice – although in Germany it is the Budesstag and Bundesrat Committees that scrutinizes the drafts.

Features of Common Law Legislative Drafting Model

Origin of the Common Law

The evolution of Common Law in England dates back to around the 11th century before it was subsequently adopted in the United States of America (USA), Canada, Australia, New Zealand and other countries of the British Commonwealth. The most common feature of common law is that it is created by means of legislation and case law and common law is usually very detailed in its prescriptions. Its principles appear for the most part in reported judgments of the higher courts, in relation to specific facts arising in disputes which courts have adjudicated¹⁰.

In this connection, earlier judicial decisions, usually of the higher courts, based on a similar case should be followed in the subsequent cases, meaning that precedents should be respected. This principle is known as *stare decisis* binding on the courts of inferior jurisdiction. In the field of legislative drafting, there is a view that the elaborate, detailed style of the legislation is explained by the common law origins⁸ of the English legal system. This is because in England, most statutes were originally enacted to counteract some mischief created by the case law, which made courts to be averse to enacted legislation, because the judges viewed same as upsetting the harmony of common law.¹¹ So, when English judges interpreted statutes, they applied them only to the precise situations which they categorically addressed, leading to a narrow and textual interpretation of legislation.¹²

Centralization

There is one central drafting unit (and in federal jurisdictions, there is one such unit in each state and federal government). All draft primary legislation and all final versions of primary legislation that had been through Parliament are written and edited by the same drafting unit (usually the Parliamentary Counsel’s Office). The team that has been assigned the drafting of a normative at stays with the draft and follows the draft till the day of the vote in Parliament.

The central drafting unit is located either at the Office of the Attorney General or by the Ministry of Justice or, as in the case in the United Kingdom, by the Cabinet. Rarely is it the office located by Parliament, although it is often the case that some drafters from the central drafting office are seconded to a small unit by Parliament. Ever since 1869, there has been centralization in the common law legislative drafting system even though, as we shall see later, in recent years there are often two centres as opposed to one.

⁹Sir William Dale, *Legislative Drafting: A New Approach. A Comparative Study of Methods in France, Germany, Sweden and The United Kingdom*, London Butterworth’s Law 1977, p. 87.

¹⁰Andrew Stranieri, John Zeleznilow, *Knowledge Discovery from Legal Databases* (Springer Science & Business Media, 2006) p. 22.

¹¹O. Lando ‘On Legislative Style and Structure’ [2006] (11) *Juridica International* p. 14

¹²Voermans (n 7) p. 51.

Exclusivity

All first drafts have the same source: the central drafting unit, whether it is called Parliamentary Counsel's Office or something else. I should point out here that in modern legislative drafting one cannot overstate the importance of the first draft. It is the main document in which all subsequent revisions are made. Although theoretically it can be completely and totally revised, in practice the first draft sets the tone of that piece of legislation and undergoes some revisions but rarely comprehensive enough to make it a completely different document. So, knowing who wrote the first draft, and what the terms were (i.e. what they were asked to draft) is very important.

There is a trend in recent years, especially in small jurisdictions, for draft legislation written by others, e.g. donor organizations, to be sent to the central drafting unit. In the past, drafters, especially in large jurisdictions, might have unceremoniously thrown in the bin such 'external' drafts to make a point. But in this day and age, time pressures on drafters might make them more receptive to help. A final point to make is that in some jurisdictions, e.g. the United Kingdom, even international agreements or European law is transposed into national law through the Parliamentary Counsel's Office, i.e. new legislation is drafted rather than taking an international agreement or a European Regulation through Parliament by attaching the translated document to a short bill. While this is time consuming, it ensures that these agreements become an organic part of the *corpus* of legislation in the United Kingdom. It also reaffirms the fact that all primary legislation is written by the same office.

The 'Instructions'

The Ministry that requires the drafting of legislation sends drafting instructions to the Central Drafting Unit (e.g. the Parliamentary Counsel's Office). These drafting instructions are the essential starting point for the drafter, and their purpose is to give the drafter all the necessary information to write a draft piece of legislation. The instructions are an interesting feature of drafting in common law jurisdictions because they tend to be the feature that drafters most often complain about. Each jurisdiction has its own style of drafting instructions. In some jurisdictions they tend to be short, while in some others they are quite extensive.

Some jurisdictions are quite open about how the instructions are structured¹³, while others are quite cryptic about them. The problem with instructions is that unless they contain the right information for the drafter they are unlikely to be effective. As the Queensland Government Legislative Handbook notes, "Both the time required to draft and the quality of the drafting depends on the quality of the drafting instructions and the communication skills of the instructing officer."¹⁴ In some jurisdictions, instructions tend to be broad and Spartan. Anecdotal stories of one paragraph instructions or the dreaded instructions via a phone call are often confirmed by drafters in small jurisdictions where such problems are usually found. In contrast, large jurisdictions tend to have better drafting instructions mainly because of the recent trend for drafters to give advice or offer training sessions to ministerial instruction officers on how to write good drafting instructions.

The 'Solitary' Drafter

Despite the fact that there is usually a team assigned to a draft, it is usually written by a single drafter – although the final version is usually 'combed' by the team. As Thornton himself noted, "Although drafting is inevitably a solitary occupation in many respects, it should not be wholly so."¹⁵ Indeed this point is also made by Webster: "In caricature, drafting is the epitome of the solitary occupation. The

¹³See, for example the 'Checklist for drafting Instructions' in the UK. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62670/working-with-parliamentary-counsel-checklist.pdf

¹⁴See, The Queensland Legislation Handbook Governing Queensland. The State of Queensland, Department of the Premier and Cabinet 2014, p. 16.

¹⁵See G.C Thornton, 'Reflections on a Career in Legislative Drafting' New Orleans, Louisiana, 20 June 2009, p. 5, available at www.law.tulane.edu/uploadedFiles/Institutes_and_Centers/International_Legislative_Drafting_Institute/Garth%20Reflections%20FullFull%20Text.pdf.

drafter receives instructions, nods sagely, departs for a secluded office, picks up a quill pen, performs the alchemy that transforms an idea into a legislative instrument and returns with a finished statute.”¹⁶ The ‘solitary’ drafter is one of the lesser known characteristics of drafting in common law jurisdictions but one that is often cherished by drafters.

Features of Civil Law Legislative Drafting Model

Origin of Civil Law

Civil law gained its origin from Roman law, as codified in the *Corpus Juris Civilis* of Emperor Justinian. Later on, the civil law developed in Continental Europe and in many other parts of the world. The main feature of civil law is that it is contained in civil codes,¹⁷ which are described as a “systematic, authoritative, and guiding statute of broad coverage, breathing the spirit of reform and marking a new start in the legal life of an entire nation.”¹⁸ The codes contain logically connected concepts and rules, starting with general principles and moving on to specific rules. Each country operating the civil law system has its own set of codes, even though the civil codes of different countries are not the same, there are certain common features of all civil codes.

In relation to legislative drafting, civil law is largely classified and structured and contains a great number of general rules and principles, often lacking details. One of the basic characteristics of the civil law is that the courts’ main task is to interpret the law contained in a code. The assumption is that the code regulates all cases that could occur and when certain cases are not regulated by the code, the courts are required to apply some of the general principles used to fill the gaps.¹⁹ In Germany for instance, precision in legislation was based on the desire for a coherent and consistent body of legislation on different levels in which expressions were applied universally for the same phenomenon. In France, it was felt that the task was to provide the general maxims of the law, to establish principles to determine their implications and not to provide details on provisions of a subject matter.²⁰

Multiple Sources of Drafting

There are drafting units in various places, usually by the Parliament and by the Cabinet of Ministers but very often also in individual ministries²¹ or even at the office of the President. It is even possible to have competing drafts from different sources, even within government. Classic example was the proposal of the French President for the refurbishment of the Louvre Museum – competing with the proposal of the Ministry of Culture (allegedly there was even a third draft from the Office of the Prime Minister). Each drafting unit does not necessarily produce a complete draft because all drafts tend to be vetted by either the Ministry of Justice²² or the drafting unit by Parliament but each of the ministries affected may have drafted parts (presumably those parts that affect it) of the draft bill. The drafting polyphony of civil law jurisdictions can be a blessing and a curse for the proposed bill.

The Drafting Committee

By passing the old joke that a camel is a horse designed by a committee, the drafting committee is one of the better known characteristics of legislative drafting in civil law jurisdictions. Drafting Committees are set up for larger, complex pieces of legislation and require months, or occasionally years, to

¹⁶R. Webster, ‘Teaching Legislative Drafting: Reflections on the Commonwealth Secretariat Short Course’, in A.Z. Borda (Ed.), *Legislative Drafting*, New York, Routledge 2011, p. 24.

¹⁷Caslav Pejovic ‘Civil Law and Common Law: Two Different Paths leading to the Same Goal’ [2001] (32) *Victoria University of Wellington Law Review* p. 9.

¹⁸R.B Sclesinger et al., *Comparative Law* (Mineola, New York 1998) p. 271.

¹⁹See Article 4 of the French Code Civil.

²⁰Voermans (n 7) p. 51.

²¹In Sweden, for example, legislation is drafted at the relevant ministry before it is submitted to Parliament. See ‘The Swedish Law-Making Process’, Factsheet, Ministry of Justice, June 2007.

²²In Germany, for example, the federal Ministry of Justice is responsible for the scrutiny of the legislation. See Section 46, Section 42 (4), Section 62 (2), first sentence, and Section 72 (3) of the Joint Rules of Procedure of the Federal Ministries (Gemeinsame Geschäftsordnung der Bundesministerien, GCO) which can be assessed in English and German at <www.bmi.bund.de>.

complete their work. There are variations in the composition of the Committees depending on the jurisdiction and the importance and complexity of the proposed bill. However, the Committee usually comprises civil servants from relevant ministries, an academic (usually a professor of law in a relevant discipline), a judge, a representative from Parliament and a ‘political’ representative of the party in power. Drafting committees are notoriously slow. However, because they gather together legal and technical experts, they produce very good reports and supporting documents even if their actual draft bills tend to be complicated documents that parliaments have to untangle.

Limited or No Instructions

In the majority of civil law jurisdictions, there are no ‘instructions’ in the common law sense of legislative drafting instructions. The civil law practice in some jurisdictions is for the ‘policy officers’ to proceed and draft the legislation or at least a version of it (although this is an oversimplification of the process as such drafts are then vetted by specialist drafters, usually by the Ministry of Justice). Some jurisdictions, though, do have their version of instructions. In Finland, for example, the Ministry of Justice has a special page for what is referred to as “instructions for legislative drafting”.²³ In reality, they are consultation guidelines, the legislative process guide (the very useful FINLEX),²⁴ bill-drafting instructions²⁵ (the Finnish legislative drafting manual) and Impact Assessment guidelines. None of these documents resembles the common law instructions but taken together they form a type of ‘general instructions on drafting’ that are useful, especially to drafters without a legal background. In most civil law jurisdictions, legislative drafting ‘instructions’ refers to legislative drafting manuals or guides or indeed their law on the drafting of legislation.

Unknown Origin of the First Draft

While in common law jurisdictions drafters are supposed to start with a blank page (an exaggeration, of course, as most drafters in most jurisdictions routinely revise existing legislation rather than start afresh), in civil law jurisdictions the drafting committee or the drafter at the ministry begins its work on a draft that the minister has forwarded. The origin or authorship of this first draft is often unknown. Sometimes it is translated from another jurisdiction, other times it is done by drafter who know the jurisdiction and still other times it is produced externally.

The problem with drafts that have not been drafted by national drafters is that, they contribute to the so-called mosaic²⁶ of legislation where each law looks different from the others – an issue that was at the epicentre of the 1869 reform in Britain and the creation of central drafting unit. More than merely not presenting an organic continuity to the domestic body of the legislation, the mosaic of laws made it difficult for the courts to interpret legislation. The usual practice in civil law jurisdiction of getting translated versions of international agreements through Parliament to give them legal effect exacerbates the mosaic of legislation.

The use of drafts that originate outside government of the civil service is particularly interesting because, from the drafters’ point of view, it requires skill in editing rather than drafting legislation, a skill that drafters tend to acquire on the job. Can the editing of legislation be considered ‘drafting’? I think it can, even though it requires slightly different skills. In fact, modern legislative drafting courses do take this into consideration in their training methods.

Summary of the Differences, Between Common Law and Civil Law Systems²⁷

²³See <http://oikeusministerio.fi/en/index/baiscprovisions/legislation/parempisaantely/saadostvalmisteluohje> et.html

²⁴See <http://lainvalmistelu.finlex.fi/>.

²⁵See http://oikeusministerio.fi/fi/index/julkaisut/julkaisuarkisto/20063billdraftinginstructions/Files/Omju_2006_3_Bill_Drafting_Instructions.pdf.

²⁶The word mosaic here used in the sense of pictures assembled by small and often heterogeneous pieces of materials.

²⁷Comparison: Common Law versus Civil Law Systems, ILLINOIS STATE UNIVERSITY, <https://my.ilstu.edu/~ewells/cjs102/CommonvsCivilLaw-Chart.pdf>.

Legal Aspect	Common law	Civil Law
Continuity of Legal System	Evolutionary	Arbitrary
Major Source of Law	Custom & Practice	Legislative Status
Reliance on Precedent	Yes (Strong)	No (Weak)
Stare Decisis	Yes	No
Legislative Drafting	Specific & Precise	General & Comprehensive
Legislative Interpretation of Ambiguous Statues	Look to standard rules of statutory interpretation	Look to relevant legislative history and surrounding provisions.
Judicial Role in Law-Making	Active & Creative	Passive & Technical
Role of Legal Scholarship	Secondary & Peripheral	Extensive & Influential

In practice, however, these differences are not always clear-cut. Common Law jurisdictions often make use of general application statutes, such as the Uniform Commercial Code in the United States.²⁸ Likewise, case law is generating precedential value in some modern civil law courts, and court decisions are increasingly published and cited.²⁹

2.0 CONCLUSION AND RECOMMENDATIONS

Conclusions

This paper essentially discussed the differences and similarities between the common law and civil legislative drafting models. From the comparison, it is clear that each drafting model has some unique features which seem to be the exact opposite of the other. For instance, while in common law jurisdictions legislative drafting is centralized in civil law jurisdictions it is decentralized. Also, civil law adopts holistic codification of laws, while this is not the practice in common law jurisdiction. Moreover, common law style of drafting remains a very detailed form of drafting with the aim of precision to provide for detailed provisions on a particular subject, while civil law style of drafting seeks to provide general principles in the context of broad legislative purposes in legislation.

Recommendations

The apparent challenges convey an impression that a wide gap exists between the common law and civil law drafting styles. Yet, as discussed in this paper, there is some level of convergence or meeting point, especially in international law; there is also cross-fertilization between the two styles or models. For example, common law jurisdictions have borrowed to some extent, the practice of codification of laws from civil law style of drafting. It is therefore recommended as follows:

- a) That there is a need for drafters in Nigeria to be trained in the comparison between the two drafting styles or models. This is against the backdrop of the fact that in a globalized world, many drafters in government ministries, departments and agencies are engaged in drafting and negotiation of

²⁸ Gillian K. Hadfield, *The Quality of Law in Civil Code and Common Law Regime: Judicial Incentives, Legal Human Capital and the Evolution of Law*, University of Southern California Law School, 1 (March 2006), available at http://www.law.yale.edu/documents/pdf/the_quality_of_law_in_civil_code.pdf ;

²⁹ Id.

international instruments involving different jurisdictions, as well as domestication of treaties in Nigeria.

- b) Nigeria should adhere to a specific but unique style of drafting so that it will promote uniformity in the drafting of her international instruments and legislation while taking into cognisance her legislative history.
- c) Legislation on method, techniques and style of legislative drafting should be enacted so that it will promote uniformity of legislative drafting in Nigeria, even among the sub-national governments, thereby reducing ambiguity.

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