Drafting Conventions, Templates and Legislative Precedents, and their Effects on the Drafting Process and the Drafter

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Abstract

The aim of this article is to explore whether drafting conventions, templates and legislative precedents contradict or complement the drafter's style and if they complement the drafter's style, the various ways in which the use of these tools achieves it.

Keywords: drafting conventions, templates, legislative precedents, drafter's skill, necessary tools for effective communication of language of legislation.

A. Introduction

This article examines the use of drafting conventions, templates and legislative precedents in legislative drafting and their effects on the drafter and the drafting style.

The examination will be done within the context of legislation as a form of communication to those who are affected by the legislation.[1] Legislation affects every facet of human life, laying down the rights, obligations, powers, privileges and duties of people in society. It is important that the people who are affected by legislation in these various ways know what is required of them by the legislation. That knowledge can only be effectively acquired when the legislation is communicated to those affected by it. Communication occurs when the substance of the communication is transmitted to the persons to whom it is directed in a manner that ensures that the communication is clearly understood by those persons. The drafter therefore has a responsibility to communicate the substance of legislation in a manner that makes it easily understandable to the persons for whom the legislation is intended.

Various views have been expressed about the drafting of legislation. Peter Ziegler's view is that legislative drafting is the "process of applying knowledge structures to a legislative proposal that ultimately results in the language of the

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1 V.C.R.A.C. Crabbe, *Legislative Drafting*, Cavendish, London, 1993, p. 27.

legislation enacted".[2] He defines knowledge structure as "a general solution method able to be employed to solve a problem, and by which a drafter will regard specific pieces of legislation to be drafted as being particular examples that can be solved using the general solution method".[3] Also, the view is expressed that "the draftsman's functions begin with the substantive ideas he is called upon to address."[4] The foregoing views imply that the two factors that contribute to the drafting of legislation are policy that deals with the substance or content of legislation on the one hand and form or style on the other hand. Following from this, views have been expressed on whether the drafter deals with the substance or form of legislation. The prevalent view among drafters, especially in common law jurisdictions for most of the twentieth century, follows Thring's initial position "that the drafting office does not consider policy or substance, just form".[5] Thornton reiterates the view that "the drafter need know nothing about substance, but only how to use words to communicate what the person who designed the substance had in mind[6] because Parliamentary Counsel do not initiate policy"[7] but determine the form of legislation or its style. This means that drafters are concerned with matters of drafting of the text only, leaving matters of policy formulation to the proponents or sponsors of the legislation. Edward Caldwell regards drafters as technicians whose function is to translate policy into law and asserts that "the longer the two activities of, the formulation of policy and the production of the legislative text designed to achieve the policy could be kept separate, the more likely it is that the legislation will achieve the desired effect."[8]

However, the divergent views on this matter are to the effect that the drafter has responsibility not only for form but also for substance because form and substance remain inextricably linked.[9] This is because the policy ideas require the drafter to use an appropriate form of words to draft a bill, and also because the practical tasks to be undertaken in drafting compel a drafter to deal with the bill's contents. Moreover, issues such as inadequate drafting instructions arising from lack of clear policy formulation necessitate the involvement of drafters in policy formulation and also the use of legislative precedents to fill such gaps. The assumption that the drafter determines the form or style of legislation has, however, hardly been questioned or subject to any debate and has been treated as an incontrovertible truth. This article therefore seeks to subject to close scrutiny the assumption that the drafter determines the form of legislation.

2 P. Ziegler, 'The Status of Normalised Drafting: The Need for Theory Building and Empirical Verification', 27 *Osgoode Hall Law Journal* 1989, p. 355.

3 *Ibid.*, at 355.

4 J.K. Aitken, *Piesse: The Elements of Drafting*, 9th edn, The Law Book Company, Sydney, 1995, p. 1.

5 C. Stefanou, 'The Policy Process and Legislative Drafting', *in* C. Stefanou & H. Xanthaki (Eds.), *Drafting Legislation: A Modern Approach*, Ashgate, Aldershot, 2008, p. 321.

6 A. Seidman, R.B. Seidman & N. Abeyesekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters*, Kluwer, London, 2001, p. 25.

7 Crabbe, 1993, at 20.

8 E. Caldwell, 'Comments', *in* A. Kellerman *et al.* (Eds.), *Improving the Quality of Legislation in Europe*, Kluwer Law International, the Hague, 1998, p. 82.

9 Seidman *et al.*, 2001, at 26.

An understanding of the drafting process requires a "realisation that drafting involves seeking the right words and seeking the right concepts and that to verbalise the concepts in the policy, the drafter must ascertain and perfect the substantive policies of the client and also select the appropriate means for carrying out those policies."[10] Thus the drafter must fully understand the policies to be conveyed through legislation to facilitate the correct choice of words and their arrangement clearly and intelligently. Ruth Sullivan summarises the issue by saying that "in preparing legislation, drafters concentrate on identifying the legal messages to be enacted by the legislature, finding appropriate words to express those messages and anticipating how their words will be interpreted."[11]

The duties of the drafter include understanding the proposals, applying creativity to respond to the specific demands of the legislative proposal and in respect of the proposals expressing "thoughts in language that is as precise, clear and simple as the circumstances allow".[12] From the foregoing, one may presume that the drafter is at liberty to choose whatever form or style is considered appropriate in translating policy into legislation. Such a presumption may, however, be challenged since one may legitimately ask whether the drafter is free to convey the policy in any way that the drafter thinks appropriate bearing in mind the existence of drafting conventions specifying the instructions related to drafting.

The drafter needs to draft legislation that fits into the statute book, and that has uniform features and standard characteristics. This requires the adoption of similar methodologies and common conventions as to the mode of expression, format, structure and style.[13] To ensure uniformity of legislation and effective communication, drafting manuals containing drafting guidelines have been prepared for use in drafting offices in several jurisdictions, leading to the issue of conforming to the 'house style'. These drafting conventions, standards, policies and procedures are commonly issued through general instructions to drafters[14] to facilitate the correct choice and arrangement of words and provisions; organisation, logical sequencing and presentation of various parts of the draft, among others.

Furthermore, drafting clear, precise and unambiguous legislation requires an understanding of proposals and requires research that often leads drafters to templates and legislative precedents that have been prepared within and outside the drafter's jurisdiction. The constant pressure exerted by bill sponsors for the preparation of 'quick bills', inadequate policy instructions and the perceived ability of legislative precedents and templates to offer 'quick solutions' have contrib-

10 R. Dickerson, *The Fundamentals of Legal Drafting*, Little, Brown and Company, Boston, 1965, p. 7.

11 R. Sullivan, 'Some Implications of Plain Language Drafting', *Statute Law Review*, Vol. 22, No. 3, 2001, p. 177.

12 G. Bowman, 'The Art of Legislative Drafting', 7 *European Journal of Law Reform* (HeinOnline), 2005, p. 10.

13 W. Voermans, 'Styles of Legislation and Their Effects', *Statute Law Review*, Vol. 32, No. 1, 2011, p. 12.

14 K. MacCormick & J.M. Keyes, 'Roles of Legislative Drafting Offices and Drafters', unpublished paper presented at the 2002 Drafting Conference of the Canadian Institute for the Administration of Justice.

uted to the use of precedents by drafters. It may be noted that "legislative drafting techniques and styles in one jurisdiction may have a considerable influence on the development of legislative drafting in another jurisdiction,"[15] bearing in mind that the world is now a global village, making the sharing of such information relatively easy. Thus drafters rely on precedents, templates and model laws from other jurisdictions.

B. Background to Legislative Drafting in Ghana

Ghana, as a former British colony, has a legal heritage of the laws dating from her pre-Independence past. Ghana's legal institutions were thus modelled on those in England, and for very many years statutes of the United Kingdom and reports of cases decided in the superior courts of England were accessible and being applied, especially the binding force of precedents.[16]

In the field of legislative drafting, the colonial office issued model legislation throughout the empire. The practice then was for the colonial office to send drafts to the colonies for enactment into Ordinances by the respective Legislative Council.[17] Although the Attorney-General was technically the legal draftsman to the Governor, in substance there was a legal draftsman who was responsible to the Attorney-General for the drafting of bills and other statutory instruments. A succession of drafters from New Zealand, Westminster, Sri Lanka, Ireland and Canada drafted laws for the country until the establishment of the Legislative Drafting Division in the Attorney-General's Office to deal with the preparation of the country's legislation.[18]

The two broad approaches of the legislative drafting system are the "decentralised or centralised model".[19] Ghana, like other Commonwealth jurisdictions, operates the centralised model where bills emanate from the government, with the centralised body carrying out the drafting function. The drafter in Ghana, as in other jurisdictions, is primarily tasked with transforming policy into legislative form. In the process, drafting conventions, templates and legislative precedents are used. This article seeks to examine whether the use of these tools by the drafter limits the creativity of the drafter and in any way contradicts the widely held position that the drafter is solely responsible for determining the style and form of legislation.

This article will attempt to establish that the use of drafting conventions, templates and legislative precedents complement the drafter's style. To prove this hypothesis the article first needs to establish whether the use of drafting conven-

15 S.Y.-C. Fung, 'The Rise and Fall of the Proviso', *Statute Law Review*, Vol. 18, No. 2, 1997, p. 104.

16 E.S. Aidoo, *Conveyancing and Drafting: Law and Practice in Ghana*, Waterville Publishing House, Accra, 1994, p. 5.

17 V.C.R.A.C. Crabbe, 'Drafting in Developing Countries: The Problems of Importing Drafting Expertise', 4 *Afr. J. Int'l and Comp. Law* 1992, p. 645.

18 Interview with Crabbe on the history of the establishment of the Legislative Drafting Division in Ghana.

19 S. Lortie, 'Providing Technical Assistance on Law Drafting', *Statute Law Review*, Vol. 31, No. 1, 2010, p. 2.

tions, templates and legislative precedents complements the drafter's style and then examine the ways in which these tools complement the drafter's style.

The basis of this research is that in the drafting of legislation, several conventions spell out principles on the dos and don'ts of how legislation is to be drafted effectively. Similarly, legislative precedents for the drafting of specific types of legislation are provided for use by drafters. Added to these are in-house templates and model laws stored on the computer for use in various drafting offices in several jurisdictions within and outside the Commonwealth. The overall effect is that the drafter has little or no choice but to conform to what pertains in the office or the 'house style'. This contradicts the creative or innovative role that the drafter is expected to play in the preparation of legislation. Authorities have criticised the use of drafting conventions, templates and legislative precedents as contradictory to the creativity of the drafter.

C. The Concept of Legislative Drafting

A determination of the effect of drafting conventions, templates and legislative precedents on the creativity of the drafter requires a discussion of the concepts of legislative drafting and what constitutes style in legislative drafting. Legislative drafting is a means by which the written law is changed, either by repeal of an existing law, alteration of existing rules or the addition of new legal rules.[20] The description of legislative drafting as "a collaborative process, where the drafter consults with the client to discuss the result sought by the proposed change in the law, policy, and legal issues raised by that change, and alternative methods of achieving the intended result"[21] provides an insight into its nature. Frank Grad summarises legislative drafting as "primarily being a task of legal problem solving which requires an understanding of the problem, the situation that gives rise to the problem, the existing law that has addressed or failed to address the problem and finally the shaping of the policy and ideas into a textually rigid form that can be enforced and given legal effect".[22]

Drafting legislation "is not a literary exercise".[23] This makes the style of legislative drafting different from that in other forms of writing. This is because the aim of legislation, which is to give effect to the policies and principles in law, requires the language of legislation to be said in a few words without the use of exciting images available to writers of other kinds of literature. This inherent nature of legislation to be non-emotive and to seek a degree of precision and internal coherence means the drafter faces a problem of free expression of ideas.

20 G. Bowman, 'Legislation and Explanation', 2000 *Loophole*, p. 5.

21 R.J. Martineau & M.B. Salerno, *Legal, Legislative and Rule Drafting in Plain English*, Thomson West, St. Paul, 2005, p. 93.

22 F.P. Grad, 'Legislative Drafting as Legal Problem Solving-Form Follows Function in Drafting Documents in Plain English', pp. 481, 483. Quoted in Reed Dickerson, *Materials on Legal Drafting*, West Publishing Company, St.Paul, Minnesota, 1981, p.27.

23 B. Hunt, 'Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal', *Statute Law Review*, Vol. 24, No. 2, 2004, p. 113.

The drafter's choice of expression is limited by the problem of the complex concepts and ideas that are often incapable of being written in simple, clear language.

D. The Concept of Style in Legislative Drafting

Style in legislative drafting represents the way legislation is drafted, that is, the approach of the drafter towards the choice of words and the arrangement of the sentence structure of legislation. This means that legislative style constitutes a set of legislative features that are highly dependent on the language, culture, both legal and political of a society.[24] Thornton describes style as "not a gloss; not something applied at a late stage like icing on a cake; but an inherent quality".[25] Style is important in the determination of a bill's success as a vehicle of communication because the particular style adopted by the drafter can either confuse or make clear the public's understanding of the message of the legislation.

The factors that influence drafting style include the varying audience or users of legislation, and the aims of the legislation, that is, whether the legislation is coercive or not. Thus, Burrows points out that "detailed drafting is particularly appropriate to, indeed often necessary for, statutes regulating the criminal law, revenue law, business, and commerce", while "statements of general principle are suitable where it is desirable simply to chart directions and leave the courts to work out their detailed application on a case by case basis, as for instance in the New Zealand legislation on Contract."[26] Similarly, complex legislation on taxation or aviation for instance may require the use of technical and necessary detail peculiar to the subject and that will express the complexities of the subject matter in a manner that the experts on the subject will understand. The implication is that "the unnatural concision of legislative style means the drafter uses as few words as possible to state the law ensuring shorter text but one that is more difficult to read."[27]

According to Thornton, the characteristic of style to be relative to the particular document being drafted means one cannot draw an arbitrary line as to what constitutes good or bad style. In spite of this inherent limitation, Thornton's description of what constitutes good style shows how a good style can be achieved. In his view, a good style "fits the purpose of the communication and the degree to which the manner of expression achieves the purpose, is the sole measure of the quality of style".[28] Lack of a good style therefore hinders the preparation of legislation in clear language that ensures effective communication. A good style is steady, provides the predictability necessary for the drafter to reduce chaos to order and gives clearly defined, steady and predictable guidance for the

24 Voermans, 2011, at 41.

25 G.C. Thornton, *Legislative Drafting*, 4th edn, Butterworths, London, 1996, p. 46.

26 J.F. Burrows & R.I. Carter, *Statute Law in New Zealand*, 4th edn, Lexis Nexis, Wellington, 2009, p. 135.

27 R. Sullivan, *Statutory Interpretation*, 2nd edn, Irwin Law, Toronto, 2007, p. 14.

28 Thornton, 1996, at 46.

structure and expression of legislation.[29] If a good uniform style is to be maintained, the preparation of drafting manuals that specify the conventions to be used by drafting offices is a step in the right direction. In effect, legislative style is generally controlled by drafting conventions in a country since style is reflected in language and grammar.

E. The Concept of Drafting Conventions

Drafting conventions refer to the principles that have been "born out of experience"[30] and prescribe the principles upon which the legislative structure, form and style of legislation is based, enabling drafters to produce practicable, effective and clear legal rules.[31] In this article, the words 'conventions, guidelines, principles and standards' will be used interchangeably since they refer to the same thing.

Conventions are normally contained in drafting manuals that specify the broad but varying principles, depending on the particular jurisdiction. Sullivan says that "conventions govern the style in which legislation is drafted, the form and structure of legislative provisions, the arrangement of provisions within an Act, the use of headings, notes and other finders' aids, and the use of particular words. For example, to confer a power in legislation, the word 'may' is normally used; to express the idea of obligation, 'shall' or 'must' is used."[32]

Jack Stark observed that apart from the basic perceived function of conventions to cast light on the meaning of the statutes to which they apply, legislative drafters sometimes consciously or unconsciously develop their own conventions to aid their drafting, specifically to make it easier to think about the material that they are trying to fashion out.[33] To Douglass Beliss, conventions evolve through the development over time by drafters of the consensus as to how drafting is to be done. Also, the teaching and guidance given to new attorneys by experienced attorneys and the passing down of oral traditions that become conventions[34] constitute another way by which conventions develop.

Use of drafting conventions has arisen from the conventional nature of drafting and the elements of the drafter's environment that generates pressure on the drafter, hence making it difficult to draft. Spring Yuen Ching Fung and Anthony Watson-Brown observe that "drafting conventions were designed to ensure that the objective of clarity was achieved in the writing of legislation." They state that publication of these rules started in relatively modern times with the publication

29 *House Legislative Counsel's Manual on Drafting Style*, US Government Printing Office, Washington, 1995 edn, p. 7.

30 Crabbe, 1993, at 119.

31 K. Patchett, *Preparation, Drafting and Management of Legislative Projects*, Workshop on the Development of Legislative Drafting for Arab Parliaments, 3-6 February 2003, Beirut, p. 5.

32 Sullivan, 2007, at 14.

33 J. Stark, 'Understanding Statutes by Understanding Drafters', 85 *Judicature Law Report* 2001-2002, p. 193.

34 D. Beliss, 'Statutory Structure and Legislative Drafting Conventions: A Primer for Judges', Retrieved from <www.fjc.gov/public/pdf.nsf//lookupdraftco1>.

by George Coode in 1843 of his book *On Legislative Expressions* and continues up to today with the Victorian Law Reform Commission's publication of a Drafting Manual for Law Drafters as Appendix 1 to its 1987 Report on "Plain English and the Law".[35]

Indeed, drafting conventions have been established by Constitutions, statutes, legislative rules, court cases and standard practices of drafting offices. Thus, there are conventions that specify the ways of preparing the memorandum to a bill, the wording of enacting clauses of legislation and the "arrangement of clauses".[36] For instance, Section 4(2) of the Interpretation Act of Ghana, 2009 (Act 792) provides for the enacting formula to be used in all bills as follows:

> In a Bill presented to the President for the assent, the words of enactment shall be, "Passed by Parliament and assented to by the President."[37]

This provision provides greater force for the words to be used for the enactment of legislation and also ensures uniformity and consistency in the drafting of enacting clauses for all bills in Ghana. In the absence of the guidance provided by this provision, there will be as many formats and variations of enacting clauses as there are drafters, which will lead to inconsistency in enacting formats.

The object of developing and applying drafting standards, policies and procedures is to capture best drafting practices and also to bring coherence and consistency to the legislative system.[38] This is because any situation that requires the assessment of quality and the determination of whether set goals have been achieved requires set standards to enable the measurement to be done. The drafting standards, policies and procedures that make up the general instructions provide these standards to ensure that these best practices are observed and maintained by drafters.

Drafting conventions have distinguishing features, such as being definite and hence easily discovered or being abstruse or hidden.[39] They also "possess dynamism".[40] Thus, the current shift away from the use of 'shall' in drafting shows the dynamic nature of conventions to adapt to suit changes in language, culture and time. Although drafting conventions, as mentioned earlier, may be borne out of the pressures and limitations of the drafting environment, they can be seen as "opportunities to improve the drafter's work"[41] and make it easier as the conventions when followed will ensure that the drafter knows where to put what, and thereby lead to consistency and uniformity in legislation. Roger Rose therefore

35 S.Y.C. Fung & A. Watson-Brown, *The Template: A Guide for the Analysis of Complex Legislation*, Institute of Advanced Legal Studies, Research Working Papers, 1994, p. 11.

36 D.R. Miers & A.C. Page, *Legislation*, Sweet and Maxwell, London, 1982, p. 89.

37 Interpretation Act of Ghana, 2009 (Act 729), Section 4(2).

38 MacCormick & Keyes, *supra* n. 14, at 8.

39 J. Stark, *The Art of the Statute*, Littleton, Colorado, 1996, p. xi.

40 H. Xanthaki, 'Drafting Manuals and Quality in Legislation: Positive Contribution Towards Certainty in the Law Or Impediment to the Necessity for Dynamism of Rules?', *Legisprudence*, Vol. 4, No. 2, 2010, p. 111.

41 Stark, 1996, at xi.

notes that "the need for consistency and conciseness (in drafting legislation), leads to the adoption in modern Commonwealth drafting of certain conventions relating to the most common elements of legislative sentences."[42] For instance, the convention that governs the use of the same language to express the same idea each time the occasion arises helps the drafter to focus on the draft and avoid using different words or expressions to convey the same idea. This is because, as Ruth Sullivan notes, "a variation in wording signals a significant variation in the idea"[43] being conveyed, which is likely to confuse the audience as to the exact message being conveyed to them. To emphasise the point, the American House Legislative Counsel's Manual on Drafting Style provides that the "drafter should not use the same word in two different ways in the same draft."[44]

The purpose of legislation is to "impose rules that tell members of a society what they can and cannot do and what their rights, duties and obligations are as regards both society as a whole and as regards other specified members of society".[45] Where persons on whom obligations are placed are unable to fulfil those obligations as a result of the inconsistency in the words and expressions used in the legislation, it signifies a failure to effectively communicate the message of legislation.

Drafting conventions and precedents must be used with discrimination. "Drafting conventions are not mindless rules to be mindlessly followed"[46] as mechanical use blemishes their work. If the rules that govern the use of conventions suggest that "guidelines should not be seen as a final destination",[47] then one can safely infer that the drafter should combine adherence with analysis, thought and flexibility in the application of these tools in order to improve legislation, which is the aim of all drafters.

F. The Concept of Templates in Drafting Legislation

The word 'templates' has different meanings depending on the application of the particular template. In the field of computer usage, templates are considered as files (or skeleton documents) to help computer users to create a new file or document based on the information contained in the generic or skeleton file. Template is defined as "a piece of metal, plastic or wood cut in a particular shape and used as a pattern when cutting out material or drawing".[48] Templates are also referred to "as fixed portions of text together with precise instructions as to when

42 R. Rose, 'The Language of the Law: How Do We Need to Use Language in Drafting Legislation?', 2011 *Loophole*, p. 18.

43 Sullivan, 2007, at 14.

44 House Legislative Counsel's Manual cited in Comment on 'Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation', 2010-2011 *Yale Law Journal*, p. 191.

45 D. Berry, 'Audience Analysis in the Legislative Drafting Process', 2000 *Loophole*, p. 61.

46 Stark, 1996, at 5.

47 J. Redish & S. Rosen, 'Can Guidelines Help Writers', *in* E. Steinberg (Ed.), *Plain Language Principles and Practice*, Wayne State University Press, Detroit, 1991, p. 83.

48 M. Robinson & G. Davidson (Eds.), *Chambers 21st Century Dictionary*, Chambers Harrop Publishers, London, 1999, p. 1454.

given extracts should be used".[49] In this article, templates are used to refer to model laws or forms used as guides in drafting legislation.

Martineau and Salerno observe that in the field of legislative drafting model acts feature prominently, and give an example of the draft uniform acts prepared by the National Conference of the Commissions on Uniform State Laws founded in 1878,[50] which are used as templates. It is observed that "in using a template, the drafter must adapt the template to suit the case of his jurisdiction."[51]

The appropriate use of a template is as a skeletal document that guides the drafter and is capable of being adapted to suit the particular circumstances of the drafter's jurisdiction. This implies that they should not be copied, but rather applied as a framework or checklist into which the drafter fills the details through instrumentality and creativity. Thus, although a template may be used for several drafts, the actual content differs as the choice of words and their arrangement remain the drafter's responsibility.

G. The Concept of Legislative Precedents

Reliance on precedent is part of life in general, and the practice of following it is pervasive in our society, and not only in the legal realm.[52] Precedent, it has been said, "is the life blood of legal systems."[53] Thus, judges follow previous decisions, lawyers refer to earlier cases in their submissions and legislative drafters use earlier legislation in preparing drafts. In fact, William Robinson notes that in the drafting of European Community legislation, "drafters often use as a model their own drafts of earlier Acts."[54]

Precedents refer to the practice in legal systems where cases are decided "on the basis of decisions made in similar cases in the past".[55] Butt and Castle explain that "traditionally, the term 'precedent' is used to refer to court decisions of the past and is derived from the principle of stare decisis, meaning 'to stand by things decided', where lawyers defer to past judicial decisions, moving from them only reluctantly. They add that English and Commonwealth lawyers also use the term to describe model legal forms which are employed in every facet of legal practice."[56]

Traditionally, the doctrine of precedent is limited to the judicial sphere where judges are bound to follow decisions that are considered binding on them. In this

49 M.-F. Moens, M. Logghe & J. Dumortier, 'Legislative Databases: Current Problems and Possible Solutions', 10 *International Journal of Legal Information Technology* 2002, p. 15.

50 G. Grossman, *Legal Research, Historical Foundations of the Electronic Age*, Oxford University Press, New York, 1994, pp. 181-187.

51 Fung & Watson-Brown, 1994, at 17.

52 F. Schauer, 'Precedents', 39 *Stanford Law Review* 1986-1987, pp. 571-572.

53 C.K. Allen, *Law in the Making*, 7th edn, Oxford University Press, Oxford, 1964, p. 243.

54 W. Robinson, 'Polishing What Others Have Written: The Role of the European Commission's Revisers in Drafting European Community Legislation', 2007 (August) *Loophole*, p. 77.

55 L. Goldstein, 'Introduction', *in Precedent in Law*, Clarendon Press, Oxford, 1987, p. 1.

56 P. Butt & R. Castle, *Modern Legal Drafting: A Guide to Using Clearer Language*, 2nd edn, Cambridge University Press, Cambridge, 2006, pp. 9-11.

article, legislative precedents refer to pieces of legislation used by the drafter as an aid in drafting legislation, including laws already in existence within or outside the drafter's jurisdiction or model laws provided by international organisations.

The system of precedents connotes two closely allied but essentially different ideas, namely that a judge regards an earlier decision on more or less similar facts as a help to a decision and therefore not binding, and of persuasive effect or a helper; and the other view where precedents are seen as fixing the law applicable to the same or analogous facts and therefore of binding effect.[57] Invariably, these views underlie the approach adopted by drafters towards the use of precedents and determine how they apply precedents. Where a drafter recognises a precedent as a helper it means that it is regarded as persuasive. The drafter therefore has the freedom to either not use it or use it subject to modification or adaptation. However, where the drafter regards the precedent as authoritative the likelihood of its being copied without any modification is greater because it is seen as binding and authoritative.

To Butt and Castle the use of legislative precedents stems from the conservatism in the legal profession, which is allied to the common law tradition of precedent, and also familiarity and habit. They argue that the preference of lawyers to use documents that have been tested in operation, the preference for the established instead of the novel, the preference for the familiar to the new[58] may explain the leaning towards precedents by members of the legal profession, including legislative drafters.

Reasons for the use of a precedent vary and may include finding guidance on how to draft a particular piece of legislation, filling gaps in drafting instructions and also to meet stipulated deadlines. Also, the inherent need for extensive legal and factual research by the drafter to facilitate an understanding of policy proposals causes a drafter to use precedents within or outside the drafter's jurisdiction. Therefore, Hiranandani argues that "a draftsman's familiarity with the statute law at once suggests a precedent," and stresses that the "precedent should always be used with discrimination; since the wholesale borrowing without appreciating the points of difference between the precedent and the proposed law may prove dangerous and lead to disastrous results."[59] However, there are times when precedents do not serve, and the drafter has to use creativity in preparing the draft.

Precedents facilitate the drafter's task to an extent. However, the extent of its usefulness will depend upon the manner of application of the precedent by the drafter. R.M.M. King observes that in making use of precedents, the drafter must be careful to make the necessary adaptations in applying those precedents to the particular situation with which the drafter has to deal.[60] Precedent use requires dealing with the words used by the person who prepared the document and

57 Lent Term, 'Precedents', *University of Toronto Law Journals*, Vol. 4, No. 2, 1941-1942, p. 249.

58 Butt & Castle, 2006, at 6-7.

59 S.H. Hiranandani, 'Legislative Drafting: An Indian View', *Modern Law Review*, Vol. 27, No. 1, 1964, pp. 3-4.

60 R.M.M. King, *Manual on Legislative Drafting*, Commonwealth Secretariat, London, 1976, p. 4.

involves an assessment and extraction of the relevant and irrelevant similarities between the current situation and the precedent for adaptation into the current legislation.[61]

Having presented the concepts underlying the study, the arguments in favour and against the use of drafting conventions, templates and legislative precedents will be examined and analysed.

H. Supporting the Use of Drafting Conventions, Templates and Legislative Precedents in Drafting Legislation

I. Arguments Supporting Use of Drafting Conventions

Drafting conventions, templates and precedents are essential in drafting legislation. Arguments have therefore been advanced to support their use. As mentioned earlier, drafting manuals specify drafting conventions or principles that the drafter should use. The drafter's use of drafting conventions with caution and discretion helps the drafter to think and write effectively. Another argument is that conventions provide uniformity in laws.[62] It is said that drafting conventions ensure consistency of style needed to fit in the general corpus of the statute book. This is because adherence to the drafting conventions and principles spelt out in manuals ensures consistency of drafts prepared by the drafter and also ensures certainty in legislation. It is also argued that the "specific drafting principles provide the drafter with a readymade style for most problems faced in drafting legislation or a rule".[63] Johnson argues that drafting conventions also promote the logical layout of a law and clarity in legislative expression. He adds that the good overview of the drafting techniques and practices in use and the form, style and other technical features of the legislation in all jurisdictions in Canada is attributable to the adherence to the Drafting Conventions of the Uniform Law Conference of Canada since its adoption.[64]

II. Arguments in Support of Use of Templates in Drafting Legislation

As mentioned earlier, in the field of legislative drafting there are model Acts that are used as general forms and serve as templates for the preparation of drafts related to certain specific subjects. An example is the National Conference of the Commissions on Uniform State Laws founded in 1878, which drafts uniform acts and promotes them.[65] It is argued that the use of forms as templates "saves the drafter a considerable amount of time compared to starting from scratch",[66] and

61 Schauer, 1986-1987, at 577.

62 Z. Gondal, 'Drafting for a Post Conflict and Collapsed State: The Case of Afghanistan', 11 *European Journal of Law Reform* 2009, p. 401.

63 Martineau & Salerno, 2005, preface.

64 P.E. Johnson, 'Legislative Drafting Practices and Other Factors Affecting the Clarity of Canada's Laws', 12 *Statute Law Review* 1991, p. 3.

65 Grossman, 1994.

66 Martineau & Salerno, 2005, at 29.

if a drafter uses an initial form that has been drafted well, it expedites the drafting process.

Other arguments relate to the fact that use of forms as templates draws the drafter's attention to basic issues that should be addressed in the document as well as issues that had not been previously considered, and assists the drafter in creating a checklist or a legislative plan that guides the drafter in preparing the actual document,[67] ensuring that legislation is prepared in a coherent and logical manner with no gaps as all the relevant elements are included. This is because an initially well-prepared or redrafted form when used as a template for the actual draft would only require supplementing and adaptation to suit the particular drafting task that the drafter is confronted with.

III. Arguments in Support of the Use of Legislative Precedents in Drafting Legislation

Several arguments have been given for the use of legislative precedents in drafting. Crabbe states that the value of precedents is that they are the product of experience that is based on established principles and have stood the test of time; moreover, "the use of legislative precedents tends to discourage years of bad drafting turning into years of bad experience."[68] Thus, a novice drafter who has difficulty in preparing legislation may find a solution in a legislative precedent that provides a guide as to how to solve the problem. Crabbe further highlights that precedents, seen as signposts, provide guidance or a source of ideas or pointers as to the particular direction to be taken for the solution of the legislative problem at hand.[69] To Robinson, precedents "sow ideas in the minds of the draftsman".[70]

Additionally, precedents enable drafters to prepare drafts quickly to meet parliamentary deadlines. In other words, precedents provide solutions for problems that would otherwise require a drafter to spend a considerable amount of time researching as well as preparing. The use of precedents ensures timely and efficient delivery of legislation. It does not serve any purpose to spend time working out solutions for problems when solutions to those problems have already been found and are available. In other words, it is of no use reinventing the wheel anytime a problem comes up for solution.

Robinson supports and observes that the use of precedent books "provides a basis for drafters to elicit from their client the fullest information on all the points that presented themselves" and "provides the framework on which to hang their provisions".[71] Other arguments relate to the provision of consistency in

67 *Ibid.*, at 30.

68 V.C.R.A.C. Crabbe, *Legislative Precedents*, Vol. II, Cavendish, London, 1998, preface, p. vii.

69 *Ibid.*, at vii. The precedents provide a guide as to the direction in which the drafter is to go and do not constitute an end in themselves.

70 S. Robinson, 'Drafting: Its Substance and Teaching', 25 *Journal of Legal Education* 1972-1973, p. 515.

71 S. Robinson, *Drafting: Its Application to Conveyancing and Commercial Documents*, Butterworths, Sydney, 1980, p. 9.

style and quality and an opportunity to improve the substance, style and consistency of legislation with the caveat that they are used with discrimination.[72]

Precedents also serve as a checklist that helps ensure that all that needs to be covered in the legislation is contained in the draft and provides a framework around which words appropriate to the drafter's jurisdiction are placed.[73] Precedents ensure uniformity if correctly applied. In their absence a drafter will have to start from scratch creating his own format and arranging provisions in the drafter's own fashion with the consequence of having as many formats and variations of arrangement of provisions as there are drafters. It is worth mentioning that in every situation where assessment of quality and the determination of whether set goals have been achieved are required, measurement can be done only where there are set standards. Drafting of legislation presents an example of the importance of having set standards. Therefore, in the absence of set standards it will be impossible for the quality to be assessed. If precedents provide a standard against which an assessment can be made, then they complement the drafter's work to ensure quality in legislation.

I. Criticism of the Use of Drafting Conventions, Templates and Legislative Precedents in Drafting Legislation

Drafting conventions, templates and legislative precedents have been criticised with regard to the manner in which the manuals containing the drafting conventions, templates or precedents are used by drafters. The criticisms relate to the tendency to copy these documents in a careless manner without the necessary modification or adaptation by the drafter. The following sections will deal with the arguments against each.

I. Arguments against the Use of Drafting Conventions and Manuals

In criticising the use of drafting manuals, Greenberg observed that the use of drafting manuals "saps the will to innovate".[74] Another argument is that the use of "drafting manuals and office practices creates a difficulty in breaking new ground in the advancement of the compositional skills of drafters".[75] Following from the uniqueness of every proposal for legislation, the resort to a drafting manual instead of applying creativity to deal with the drafting task beclouds the drafter's imaginative skill, which is the basis of legislative drafting, thereby preventing innovation and contradicting the view that the drafter determines the style of legislation.

72 *Clearer Commonwealth Law*, Commonwealth of Australia, Australian Government Publishing Service, 1993.

73 R. Webster, 'Teaching Legislative Drafting: Reflections on the Commonwealth Secretariat Short Course', *Commonwealth Law Bulletin*, Vol. 36, No. 1, 2010, p. 50.

74 D. Greenberg, *Laying Down the Law: A Discussion of the People, Processes and Problems That Shape Acts of Parliament*, 1st edn, Sweet and Maxwell, London, 2011, p. 246.

75 J.W. Ryan, 'Legislative Drafting Course', *in* F. Alexis, P.K. Menon & D. White (Eds.), *Commonwealth Caribbean Legal Essays*, Faculty of Law, University of Cave Hill, Cave Hill, 1982, p. 246.

Greenberg argues that, to begin with, "the only rule of legislative drafting is that there are no rules of legislative drafting."[76] In refuting the argument that drafting conventions contained in manuals ensure consistency in drafting style, Greenberg argues that the dangers of setting down rules to govern how drafts are prepared prevent the kind of development that is necessary to keep legislative language in step with changes in language generally, and adds that there is difficulty in establishing that the approach imposed in the manuals will necessarily be better than any of the approaches variously preferred by individual members in an office. In effect, a strict adherence to stipulations in manuals without the liberty to be innovative in expressing oneself results in the stifling of creativity and lack of development in the institution. Greenberg further argues that "an office that indulges in written rules and manuals is unlikely to have an atmosphere that encourages innovation with the result that nobody notices the need to, or dares, challenge the existing practice, and it remains until it has well outlasted its fitness for the purpose."[77]

II. Arguments against the Use of Templates in Drafting Legislation

The arguments against the use of templates in drafting are similar to those made against the use of drafting conventions, manuals and legislative precedents. The basic argument against the use of templates is that they are not applicable in all cases because there are no model problems for which there can be model solutions. Martineau and Salerno argue that templates tend to be both over-inclusive and under-inclusive in the sense that they may contain elements that are not relevant and may not contain elements that are necessary. Thus, when used as forms, there is the likelihood that it will contain elements that have no application to the task at hand. Indeed, the template may contain errors that have been carried through from the time it was first prepared and perpetuated through subsequent versions. Moreover, templates from other jurisdictions tend to overlook and do not consider the special considerations of the drafter's jurisdiction, thereby leading to ineffectiveness.[78]

III. Arguments against the Use of Legislative Precedents

Notwithstanding the rationale for the use of legislative precedents and the benefits gained thereby, the use of precedents has its own challenges. Accordingly, arguments have been made against its use in drafting legislation. These criticisms have been directed at the manner in which legislative precedents are used by drafters and relate to the tendency to copy precedents blindly. Thornton relates his argument to the effects of careless borrowing, which he argues "may produce a law comparable in shape and efficiency to a motor vehicle running on wheels borrowed one each from the first four motorists to pass by [...] [thus] careless use of precedents produces inconsistencies in language and style".[79] Thornton also

76 Greenberg, 2011, at 224.
77 *Ibid.*, at 246.
78 Martineau & Salerno, 2005, at 28-29.
79 Thornton, 1996, at 167.

argues that the partial borrowing of legislative precedents has the potential or likelihood of inapplicability of the borrowed parts to the other parts of the legislation, leading to ineffectiveness of the borrowed provisions.[80] This is because the borrowed part may depend on some other provision of the parent legislation for effectiveness, which part may not have been borrowed. Thus the copied part becomes ineffective or 'hangs' without any support in the legislation being drafted.

Another argument is that blind adherence to precedents "is one cause of complexity of modern legal documents".[81] Dickerson adds that the unfortunate percentage of inadequately drafted provisions stems from the cautious manner in which matters of structure, form and style have been treated in precedents that lead to a perpetuation of drafting ineptitudes of the past.[82] This situation arises from the difficulty experienced by drafters in breaking free from the stylistic habits learned from studying and copying from laws expressed in the traditional drafting styles which pose a difficulty to understanding.

Dickerson, in comparing judges' use of judicial precedents, lawyers' use of forms and legislative drafters' use of legislative precedents, notes the similarities in values and pitfalls as well as the hazards posed by the blind adherence to precedents. He observes that "despite the similarities that make feasible the use of forms, new situations often present significantly different elements, and a drafter's failure to weigh the appropriateness of the precedent leads to ineffectiveness of the legislation."[83]

Stephen Laws argues that the use of precedents creates a situation where the case to be dealt with has to be manipulated to fit a solution that was originally intended for something else,[84] thereby leading to ineffectiveness.

The use of legislative precedent by drafters is further criticised as leading to a lack of progression in acquiring drafting skills by the drafter.[85] Robinson's view is that complete reliance on forms and precedent books does not develop drafting skill. He notes that when a drafter's study begins or is taught by precedent rather than principle, without knowing the rationale for the application of those rules, the drafter is led to expect all his information from precedents and by that fail to develop skill.[86] Thus, the slavish copying of precedent by a drafter without considering the problem at hand leads to a situation where the drafter fails to build up general principles from the precedent for later use and does not develop the skill required. J.K. Aitken argues that slavish copying of precedents is uncreative,[87] because it fails to provide the professional service of dealing with

80 *Ibid.*, at 167.
81 Butt & Castle, 2006, at 13.
82 Dickerson, 1965, at 53.
83 *Ibid.*, at 52-53.
84 S. Laws, 'Giving Effect to Policy in Legislation: How to Avoid Missing the Point', *Statute Law Review*, Vol. 32, No. 1, 2011, p 7.
85 Webster, 2010, at 50.
86 Robinson, 1980, at 10.
87 Aitken, 1995, at 9.

the particular problem at hand and which provides the legislation that deals with the mischief envisaged by the sponsors of legislation.

J. Analysis of Arguments of Use of Drafting Conventions, Templates and Legislative Precedents

I. Drafting Conventions

If the standards of quality of substance are to be achieved in the drafting of legislation, it is imperative that the drafter abide by the conventions or principles that govern legislative drafting. The design and use of drafting conventions and manuals have arisen from the requirement for internal consistency in the law. Levert's observation that establishing standards and precedents is necessary to ensure consistency and his call for "every drafting office to establish drafting standards collectively through discussions and participation by everyone"[88] are very relevant.

It is admitted that rules cannot be laid down for every conceivable situation. Also, the very nature of drafting legislation as a creative venture requires innovation for each problem that requires legislation. Similarly, each situation requires independent treatment without any rules dictating what should or should not be done, bearing in mind the limited scope for learning things from book s and manuals. In spite of all these tangible reasons, guidelines are important. It is therefore necessary that guidance is offered on how drafting of legislation is to be done to ensure consistency and clarity in legislation. It may appear that the ready-made style provided by the specific drafting principles contradicts the common view that the drafter determines the form or style of legislation. For instance, the specific principles that indicate the common format for the establishment of statutory bodies[89]; dealing with the standard provisions on financial, administrative or miscellaneous provisions in the legislation. Notably, it is the drafter who decides on the words to express the legislative text and arrangement. Moreover, the drafting instructions provide the substantive details of who is to do what while the drafter determines the style. The combination of creativity and application of the principles by the drafter ensures effectiveness of the legislation that is produced. The drafting conventions complement the drafter's work to ensure consistency in legislation. In other words, the flexible application of drafting conventions as a guide for the preparation of comprehensible legislation enhances communication and understanding.

The presentation of drafting conventions as standards instead of instructions to be followed ensures flexibility, individualisation and dynamism necessary to serve the role of determining the form and style of legislation.

88 L.A. Levert, 'Work Methods and Processes in a Drafting Environment', 2011 *CALC Loophole*, p. 36.

89 National Petroleum Authority Act 2005 (Act 691) and National Communications Authority Act, 1996 (Act 524). The two Acts have standard provisions for financial, administrative and miscellaneous matters.

II. Templates

A study of the arguments against the use of templates does not refute the arguments advanced for the use of templates. The objections emphasise what may go wrong when templates are used, and do not imply that templates are inherently bad or unacceptable. Further, all the objections are based on the assumption that the drafter who uses a template will not use them critically and modify them to suit the drafter's purpose, but will blindly copy them mistakes and all. However, if it is assumed that the average drafter is an intelligent and skilled lawyer who is aware of the fact that the legislation that is drafted must be fit for the intended purpose, all the objections pale into insignificance. In effect, there are really no arguments against the use of templates, but there are arguments against the uncritical use of templates.

It may be deduced that where a drafter uses templates the way they are supposed to be used – as guides or skeletal documents that are to be modified by the drafter to suit the drafter's intended purpose – they save the drafter time in the preparation of legislation and result in coherent, consistent, logically sequenced and comprehensive legislation.

III. Legislative Precedents

Legislative drafters are enjoined by the various authorities to use legislative precedents as a guide and not to copy them blindly. Thus, in the case of *Dunn v. Blackdown Properties Limited*[90] it was held that precedents are a guide and not a crutch. Crabbe says that in their presentation as "sign posts, they are not intended to control but to guide".[91] Notably, the word 'guide' is a key to the manner in which the precedent is to be used. The persuasive nature of precedents not to be coercive means the drafter is the master and not the precedent. The drafter therefore combines the use of the precedent as a guide with analysis and thought as to relevant matters to be included in the draft and expresses in the drafter's own words the substance of the legislation. This is because there are no two situations that are the same. The drafter is normally driven by necessity to search for a precedent to assist in the preparation of legislation. Invariably, a determination of the similarity of the precedent with the current problem facing the drafter, which has its solution in legislation, will be done by the drafter.

The drafter therefore considers issues such as the usefulness of the precedent in providing pointers on the solution of the problem then and its relevance in the present situation. The role of the precedent as a framework from which the drafter builds the structure of the legislation and its ability to provide ideas to the possible ways of preparing the legislation means the drafter has to use appropriate words and skill to draw up the legislation. In other words, the precedent is a legislative scheme by which the drafter draws up the legislation. As noted by Crabbe, the legislative precedent becomes "part of the legislative process essential to the solution of the problem that faces counsel",[92] with the onus on the drafter

90 1961 CH. p. 433; 2 All ER 62.

91 Crabbe, 1998, preface, at vii.

92 *Ibid.*, preface, at vii.

to use resourcefulness and creativity to effectively communicate the message of the legislation.

Taking into consideration the fact that carelessness always produces a corresponding result, the argument that the (careless) use of legislative precedents produces inconsistencies in language and style is not refuted. This is because inconsistencies in language and style are likely to arise from the careless copying of a precedent and the non-application of the basic principles to use the precedent as a guide. However, if precedents are used in the manner that they should be used, they complement the drafter's work. While the use of a defective precedent with the necessary modification will result in legislation that is devoid of such inconsistencies in language and style, the reverse will perpetuate the inconsistencies. It follows that if the precedents are used in the appropriate manner they complement the drafter's work.

In my view, legislative precedents ensure uniformity if correctly applied by the drafter. In their absence, a drafter will have to start from scratch, creating his own format and arranging provisions in the drafter's own fashion, resulting in the existence of as many formats and variations of arrangement of provisions as there are drafters. This will create inconsistency in language, style and hence the law, thereby leading to difficulties in the interpretation of the law. This stems from the fact that the same idea or message will be conveyed differently by different drafters, thus raising the question whether the different provisions mean the same thing.

The argument that ineffectiveness and inapplicability in legislation can arise from partial borrowing of legislative precedents if the drafter fails to subject the precedent to the necessary scrutiny and analysis required is in fact true in Ghana. One factor that contributes to this is the attitude of regarding the precedent as the finished product ready to be copied, or in the words of Butt and Castle, as a 'gospel' and not as a guide. The following example illustrates the bad use of precedent. The National Reconciliation Commission Act, 2002 (Act 611) and the Commission of Inquiry (Ghana At Fifty) Instrument, 2009 (C.I. 61)[93] were enacted in 2002 and 2009 respectively to establish commissions but with different mandates. The Commission established by Act 611 was for the promotion of national reconciliation and recommendation of appropriate redress for persons who had suffered injury, hurt or damage during periods of unconstitutional government; while that established under the Ghana At Fifty Commission Instrument was to inquire and determine whether there had been any malfeasance in the use of resources allocated to the Ghana At Fifty Secretariat for Ghana's 50th anniversary celebrations. Both pieces of legislation had the same provisions on privilege of witnesses and their indemnity. Section 14(2) of Act 611 and 8(2) of the C.I. 61, respectively, provided as follows:

93 National Reconciliation Commission Act 2002 (Act 611); Commission of Inquiry (Ghana At Fifty) Instrument, C.I. 61 of 2009.

(2) A person shall not be subject to any civil or criminal proceedings under any enactment by reason of that person's compliance with a requirement of the Commission under this Act.[94]

This provision in the Commission of Inquiry Instrument implied the ousting of civil or criminal proceedings against the witnesses appearing before the Commission in both instances. It is pertinent to note the following facts: (a) that the earlier Act was used as a precedent for the latter Instrument; (b) that the precedent was not adapted to suit the different circumstances calling for the latter legislation, which was to inquire into alleged acts of malfeasance and the possibility of prosecution of the witnesses; and (c) that the lack of modification and adaptation led to the ineffectiveness of the Commission Instrument to be used as a basis for prosecuting the witnesses who were believed to have mismanaged the resources allocated to the Commission.

Although both enactments dealt with the establishment of commissions, their different functions should have been borne in mind during the preparation of the legislation. It required the application of the 'rules of relevance'[95] to distinguish relevancies from irrelevancies and sift through the legal principles of each case to reach a personal conclusion as to the suitability or not of the precedent. Lack of adherence to this principle in this instance had a negative impact on the effectiveness of the legislation as a whole. This does not, however, erode the ability of legislative precedents to complement the drafter's work.

The argument that legislative precedents lead to complexity of modern documents is untenable. It is widely accepted that the stylistic hallmarks of traditional legal drafting with its dense prose and verbosity led to calls for drafting in plain language, which dates back to the late sixteenth century when King Edward VI urged Parliament to make statutes "more plain and short to the intent that men might better understand them".[96] The apparent reason for the complexity in legal documents and the wholesale copying by drafters may stem from the thinking that "patterns of drafting adopted in the past must of necessity be those required to be followed if they are to achieve the necessary clarity, certainty and completeness."[97] It is contended that even where legislation drafted in traditional style is used as a precedent, an intention to communicate clearly and precisely in accordance with plain language drafting principles would enable the drafter to make the necessary modification to remove the complexities. The adoption of a plain language method will ensure the avoidance of vocabulary that could cause stumbling and "becloud understanding." In such an instance the precedent complements the drafter's work.

The argument that the use of legislative precedents leads to a lack of progression in acquiring drafting skills does not hold. In my opinion, the criticism is

94 *Ibid.*, Sections 14(2) and 8(2).

95 Schauer, 1986-1987, at 578.

96 Debates of the Legislative Assembly, at 3837 (Comments of Mr. Connolly, quoting King Edward VI).

97 Rose, 2011, at 6.

dependent on the manner in which the precedent is used, that is, whether it is copied or not. By necessary implication, the correct use of a precedent to sow ideas, for instance on how provisions in a similar legislation can be arranged, will not deprive the drafter of the ability to progress in the acquisition of the necessary skills. It is only when there is copying without sifting of ideas that the criticism can arise.

The arguments made against the use of drafting conventions, templates and legislative precedents show that the complaints are against misapplication of these tools. The inference can be made that when applied appropriately, they serve to make the drafter's work relatively easier.

K. The Nature of Communication

Communication refers to the imparting or exchange of information by speaking, writing or some other medium, including expression of thoughts or ideas by means of symbols, Braille or sign language. The essence of communication is to transfer a message through the medium of language that is intelligible to the audience of the communicator.

The legislative drafter is no different in this regard. The drafter's concern with language arises from legislation being an instrument of social control and a form of communication. As a result of the fact that an Act of Parliament expresses legal relationships and lays down rights, obligations, powers, privileges and duties of members of society, prescribing what can or cannot be done, there should be no misunderstanding as to the message it seeks to convey. In that respect an Act of Parliament should be drafted in accordance with principles that govern language as a means of communication in that particular jurisdiction.[98]

Communication is effective when the message is received and understood by the recipient, presupposing that the message is in a form that will be understood by the recipient. Dickerson identifies the elements of written communication as the author, the audience, the written utterance and the relevant context or the environment.[99] The first element, the drafter, acts as the channel between the policymaker and the end-user of the law. The drafter does not express his private thoughts or even represent in legislative form the thoughts of another individual,[100] but the wishes of the policymaker. The third element of written utterance introduces the subject of substance and style in communication.

The audience of legislation is an important element of communication and typically refers to those persons on whom a legal burden is imposed or a benefit conferred and also those who must administer the law.[101] A legislative sentence thus needs to be intelligible to a wide range of people, namely, the legislators,

98 Crabbe, 1993, at 27.

99 Dickerson, 1965, at 19.

100 D.C. Pearce & R.S. Geddes (Eds.), *Statutory Interpretation in Australia*, 6th edn, Lexis Nexis, Sydney, 2006, p. 2.

101 Martineau & Salerno, 2005, at 34.

enforcement agencies, lawyers and judges to ensure obedience and implementation.

The principles of communication are not a matter of legal fiat to be changed at the will of the draftsman. Common to all human effort, they exist independently of the law. Communication is based on the language habits of particular speech communities. The core of sound communication, therefore, is the general adherence to the existing conventions of language.[102]

Effective drafting implies communicating the substance of the drafting instructions received from the sponsors of the legislation. The drafter, it has been presumed, neither originates nor directly influences policy. The determination or formulation of the legislative policy is generally accepted to be "the preserve of the policy maker".[103] The display of ingenuity through ability to understand, translate and convey policy into intelligible legal language depends on the drafter's command of language and on the drafting style acceptable in the drafter's jurisdiction. The drafter also often makes use of drafting conventions, model laws and legislative precedents.

A draft must, however, fit into the existing body of laws, and this requires consistency in style, form and expression, and therefore, the drafter has to bear in mind that consistency cannot be sacrificed for the sake of originality. In this regard, drafting conventions that specify, for instance, "the use of the same words to say the same thing and of different words to say different things"[104] are essential. A uniform style helps to communicate the message, ensures consistency and enables the ultimate user to concentrate on the important parts of the legislation without the distractions of mere stylistic differences. This is particularly important where the stylistic difference could be erroneously thought to have legal significance under the principle that differences within a law mean a different meaning is being conveyed.

L. Analysis of the Role of the Drafter in Ghana

In the process of legislation the drafter goes through each of the five stages of drafting identified by Thornton. This article seeks to examine how the drafter channels creativity of skill and expertise during the stages of the drafting process and to determine whether the use of drafting conventions, templates and legislative precedents has an effect on the drafter's role in the process. Thornton's five stages are: (1) understanding the proposal; (2) analysing the proposal; (3) designing the law; (4) composition and development; and (5) scrutiny and testing.[105] These stages, apart from indicating a coherent progressive movement, put to the test the skills of the draftsman as a lot of effort, time and creativity is involved.

102 Dickerson, 1965, at 19.

103 Crabbe, 1993, at 72.

104 R. Dickerson, 'Legislative Drafting and the Law Schools', 7 *Journal of Legal Education* 1954-1955, p. 478.

105 Thornton, 1996, at 128-174.

However, as Thornton notes, they are not watertight compartments; hence, there is an overlap between the stages.

I. Understanding the Proposal

As stated earlier, legislative drafting is basically an attempt to solve the problems of a country through the instrumentality of legislation. Receipt of drafting instructions signifies the start of the drafting process. The drafter's task is to understand the purposes of the legislation that he or she has been instructed to draft.[106] A sound and total understanding is vital for the development of the policy into legislative form and its quality as a whole. It entails obtaining a clear grasp of the facts that constitute the problem or have a bearing on the particular problem that calls for the drafting of the legislation. Achieving clear, simple and accessible legislation requires the preparation of adequate instructions by the policymaker. According to Thornton, the key elements that should form the basis of the instructions to the drafter to enable understanding of the purpose of legislation include the background information to the policy, the principal objects of the legislation, how the principal objects are to be achieved and by what means.[107] The essence of understanding is that a "draftsman who allows himself to be less than fully informed on both the underlying policies to be expressed and their background is not discharging his central responsibility".[108]

The drafter gains an understanding of the proposals through relentless questioning to clarify complex policy issues and through the conduct of a legal research to ascertain the existing laws on the subject, the statute law, and constitutional implications. The drafter also determines whether there is a need for the legislation or whether administrative mechanisms can solve the problem. The different and complex policy considerations that influence legislation imply that understanding and translating the policies will require creativity, intelligence and skill on the part of the drafter.

It is argued that "an understanding of prior law is often times helpful in understanding the purpose of the statute, and may well provide guidance on the interpretation of its language."[109] This creates the impression that drafting conventions, templates and legislative precedents play a role at this stage. However, in all these, drafting conventions are of no help. Markman rightly argues that "familiarity with drafting conventions is not the only legal knowledge that legislative counsel regularly applies on the job."[110] This is one occasion where skilful questions, constructive comments and suggestions of the drafter form a necessary part of fully appreciating and understanding the instructions.

Failure of the drafter to understand the policy instructions will result in the failure of the legislation that is produced to convey the intent of the policy in spite of all the drafting conventions in the world. Use of these devices at this

106 *Ibid.*, at 128-129.

107 *Ibid.*, at 128-174.

108 Dickerson, 1965, at 8.

109 W. Statsky, *Legislative Analysis and Drafting*, West Group, St. Paul, 1984, p. 36.

110 S.C. Markman, 'Training of Legislative Counsel: Learning to Draft Without Nellie', *Commonwealth Law Bulletin*, Vol. 36, No. 1, 2010, p. 28.

stage will negatively affect the drafter's ability to understand the intended objectives of the proposed legislation. Instead of being a help it will confuse, distract, cause loss of focus and becloud the unique features of the problem that should be understood by the drafter and "constrain the choice of answers"[111] ordinarily available to the drafter.

II. Analysis of the Proposal

Understanding the policy paves the way for the drafter to subject the legislative proposal to analysis in relation to the existing law, responsibility areas and practicality. The second stage of the drafting process provides the opportunity for the drafter to mentally test the effectiveness of the legislative policy in achieving its aims. According to Thornton, "every additional new law is properly regarded as amending in nature",[112] and therefore, knowledge of the existing legislation, the common law, statute, case law and even subordinate legislation or administrative law and regulation within the drafter's jurisdiction is vital at this stage.

During the analysis, the drafter determines the impact of the proposals on existing law and draws the attention of the policymakers to "proposals which affect personal rights and liberties",[113] among others. Additionally, the drafter determines the effectiveness of the legislative policy as to whether it is achievable or not. This, in my view, cannot be done by virtue of a drafting convention, template or legislative precedent. Search for factual background information which may be broader than that supplied by the sponsors may call for research. An existing legislation may provide guidance on how a similar legislation was done and how the current proposal may be handled. In this instance the precedent complements the drafter's work if it is used as a guide to provide an idea on handling the current problem.

It needs to be emphasised, however, that it is the drafter who carries out the required analysis as to whether the intended objectives can be satisfied by strengthening enforcement mechanisms, amendment of existing legislation or enacting a new law. These devices cannot carry out the required analysis for the drafter. Neither can they draw the appropriate conclusions fitting for each purpose. Every bill is different, and thus the use of analytical skills possessed by the drafter is the relevant input at this point and not the reliance on drafting conventions, templates and legislative precedents.

III. Designing the Law

Thornton's third stage is the designing stage, and, as Patchett noted, a legislative instrument, as any writing project, should be carefully planned before actual composition of its content is started. Accordingly, drafters need to create a legislative scheme for proposed legislation to reduce the likelihood of major restructuring and changes during the composition that may delay preparation and to provide a checklist for use during composition, of matters that require legislative

111 Greenberg, 2011, at 244.
112 Thornton, 1996, at 133.
113 Miers & Page, 1982, at 87.

solutions.[114] The use of the template as a form in the legislative scheme to guide the drafter at this stage is important as it provides the outline or structure for the proposed law. The legislative plan also represents the mental picture of what the legislation should look like in structure, quality, substance and form[115]; "it gives Counsel an opportunity for clarity"[116] and facilitates effective communication of the content of the law, thus achieving the objective of the instructions.[117]

Drafters in Ghana use the following plan as a format for the establishment of statutory corporations in Ghana, namely, establishment, functions, board of directors, finance, and administration.[118] It provides a ready-made structure for the drafting of statutory corporations or bodies, and its use as a template or a legislative precedent provides a checklist for the standard clauses to be included in similar legislation. The Ghana Maritime Authority Act, 2002 (Act 630) and the Ghana Institute of Management and Public Administration Act, 2004 (Act 676)[119] were drafted using this plan as a template. The standard provisions and their arrangement complement the drafter's work by providing guidance on the relevant issues to be included in the legislation. Also, it ensures efficiency, consistency and timely delivery of legislation as the drafter does not spend time working out solutions on the structure of provisions.

It may be argued that this ready-made structure inhibits the drafter's style. However, the drafter expresses creativity by choosing appropriate words to express the drafting instructions as well as to arrange the ideas logically.

IV. Composition and Development

After achieving the design, the drafter properly composes the draft clause by clause, (Thornton's fourth stage), paying close attention to the choice of words that best conveys the drafter's purpose to develop the sentence structure. Thornton emphasises the need to comply with conventional practice as to the position in the framework of a statute to be given to various provisions of a formal or technical nature.[120] One of the most important elements of simple drafting is the clear logical structure.[121] Although there is no hard and fast rule as to the right or wrong position of a particular provision, consistency of practice in logical arrangement ensures accessibility by users, with drafting conventions occupying a significant position at this stage. To ensure conformity and consistency with earlier laws, convention stipulates that the following enacting clause should be used in Ghana:

114 Patchett, 2003, at 17.

115 Crabbe, 1993, at 16.

116 V.C.R.A.C. Crabbe, *A Manual on Legislative Drafting*, Ghana Publishing Company Ltd., Accra, 2009, p. 18.

117 Thornton, 1996, at 138.

118 *Ibid.*, at 159-160.

119 Ghana Maritime Authority Act, 2002 (Act 630) and Ghana Institute of Management and Public Administration Act 2004 (Act 676), Laws of Ghana, Vol. 4, Lexis Nexis IV 2651 and IV 2251.

120 Thornton, 1996, at 190.

121 *Clearer Commonwealth Law*, 1993, at 161.

Passed by Parliament and Assented to by the President.

Additionally, the substantive and administrative provisions follow with the placement of interpretation, repeals and savings and commencement clauses at the end in accordance with the drafting principles. Compliance with conventional practice is also achieved by dividing provisions into sections, with each section containing one idea in as much as possible a short sentence and into subsections and paragraphs, where the sentences are unduly long or ambiguous. The division of provisions into sections, subsections and paragraphs is to help ensure the readability of the sentence and to avoid ambiguity.[122] The drafting conventions specified in the drafting manual used in the drafting division serve as an internal model to assist drafters and complement the drafter's role in providing consistent and uniform legislation.

However, composition of legislation has little of the mechanical about it because all bills are different.[123] Tanner notes that drafters normally follow the convention that the active voice should be used instead of the passive voice because of its shortness, directness and easy processing qualities; however, in situations where identification of the agent is unnecessary or withheld to keep the information impersonal, the use of the passive voice is adopted by the drafter.[124] Thus, while the convention provides general guidance on the use of the active voice, thereby complementing the drafter's style, it is the drafter who determines the actual words and when the use of the active or passive voice will be appropriate.

At the composition stage, drafting conventions, templates and legislative precedents complement the drafter's work. However, it is the drafter who determines the individual contents of each provision. The drafter must not blindly copy precedents irrespective of the nature of the legislation. In essence, knowing and having an ability to manipulate the legal principles that are relevant to a particular situation are essential.

V. Testing and Scrutiny Stage

The testing and scrutiny stage is Thornton's fifth stage. As the name implies, verification ensures that the necessary matters detailed in the policy have been included in the draft. Verification occurs throughout the drafting stages and is not restricted to the fifth stage. The drafter uses the legislative scheme as a checklist to ensure the inclusion of all the relevant details as well as consistency and coherence.

From the above, it is clear that the use of drafting conventions, templates and legislative precedents is not effective during the first two stages of the drafting process. However, drafting conventions, templates and legislative precedents are relevant at the design, composition and verification stages of the drafting pro-

122 Crabbe, 1993, at 112-114.

123 Bowman, 2005, at 4.

124 E. Tanner, 'Legislating to Communicate: Trends in Drafting Commonwealth Legislation', 24 *Sydney Law Review* 2002, p. 534.

cess. Even then it is important to note that they should not be blindly copied. At the stages where they are applicable, the drafter is expected to do so with creativity, skill and knowledge.

M. Conclusions

This article attempted to prove that drafting conventions, templates and legislative precedents play a complementary role in the drafting process and the style of the drafter in Ghana rather than contradicts it. To communicate the message of legislation through effective translation of the policy objectives to the governed, the Ghanaian drafter "ensures that the draft follows conventional forms for legislation, uses appropriate language and terms to define enforceable legal relationships and is compatible with other legislation, and that its normative requirements will be practical and legally effective".[125]

The achievement of these objectives requires drafters to "make a series of subjective choices of appropriateness that can only be assisted by compilations of drafting conventions that set the foundations for quality in legislation".[126] Drafting offices facilitate this by issuing drafting conventions and manuals. Templates or forms and legislative precedents in existence within and outside the jurisdiction are also utilised by the drafter.

This article has shown that although the drafter is presumed to determine the form and style of legislation and in that process exercise creativity, in almost all drafting offices there are conventions, templates and legislative precedents that are applied in the drafting of legislation. The application of these conventions forms the basis of the arguments made by critics, including Greenberg and Ryan, who oppose the use of drafting conventions and manuals because they seem to limit the drafter's freedom to determine the style and form in legislation and to inhibit the drafter's creativity.

There thus seems to be a contradiction between the widely held position that the drafter determines the form and style in legislation and the need for the drafter to conform to drafting conventions, templates and legislative precedents.

This work has also shown that authorities like Martineau and Salerno, and Sullivan approve the use of drafting conventions and have argued that when drafting conventions are used appropriately, they lessen the time taken for research on and drafting of legislation. They also ensure consistency, certainty and uniformity in legislation as well as providing a standard by which legislation can be assessed. Specific drafting conventions provide a ready-made style that lessens the time taken for research on and drafting of legislation. Legislative precedents reduce the drudgery of having to reinvent the wheel, especially by providing a guide on how similar proposals can be drafted, while templates help to pro-

125 K. Patchett, 'Setting and Maintaining Law Drafting Standards: A Background Paper on Legislative Drafting', *in* C. Stefanou & H. Xanthaki (Eds.), *Manual in Legislative Drafting*, Cambridge University Press, Cambridge, 2005, p. 44.

126 Xanthaki, 2010.

duce drafts quicker, saving time for the drafter and ensuring that deadlines are met.

By analysing the arguments for and against the use of drafting conventions, templates and legislative precedents this article has shown that the objection to their use is directed to their blind or indiscriminate application rather than to their being innately inappropriate. It can therefore be deduced that where they are used appropriately and with discrimination they all have the positive attributes ascribed to them without any disadvantages.

Considering that legislative drafting requires the application of skill and expertise to solve peculiar problems, every problem that arises should be dealt with on its merits. Besides, there are no model problems requiring model solutions, there is no one-size-fits-all approach to legislative drafting. The appropriate use of conventions, templates and legislative precedents, however, requires the skill and creativity of the drafter. Drafting conventions, templates and legislative precedents are not to replace thought and analysis. The drafter, it has been shown, has several opportunities before the composition stage of the drafting process to exercise creativity. For instance, the drafter exercises creativity by asking questions to gain a better understanding of policy proposals, by throwing ideas back and forth to the instructing department to achieve a workable solution, and through analysis of policy objectives to determine whether they are achievable by amendment of existing legislation or enactment of a new law. Similarly, in preparing a legislative scheme, for example, to establish a body to license persons who participate in a specified activity, the drafter determines the arrangement of the provisions relating to establishment, composition, method of appointment and its general responsibilities.[127]

Bearing in mind that the objections raised are not to the use of conventions, templates and precedents per se but rather to their blind copying, it follows, therefore, that if these are used appropriately, as they should be used, they will aid the drafting process. In other words, drafting conventions, templates and legislative precedents are useful tools for the drafter and cannot be done away with.

It must be noted that drafting conventions, templates and legislative precedents are helpers and not masters. This presupposes that flexibility, individualisation, open-endedness and dynamism[128] should be the guiding principle to ensure that they meet the constantly changing needs of society presented in legislation. Dickerson's view is that keeping conventions alive and growing fruitfully requires creative genius and constant manipulation to vivify them, to enlarge them, to keep them fresh and supple and capable of generating problems and producing their solution[129] because they are not static.

Drafters need to be educated on the appropriate use of these tools. The trainee drafter both in school and in the drafting office needs to be taught to use

127 Miers & Page, 1982, at 89.

128 Xanthaki, 2010, at 127.

129 R. Dickerson, 'Legislative Drafting and the Law Schools', 7 *Journal of Legal Education* 1954-1955, p. 478.

drafting conventions, templates and legislative precedents with caution. Therefore, it is strongly recommended that:

1. each drafting office and the various institutions that train drafters should educate drafters on how to use drafting conventions, templates and legislative precedents;
2. as part of the education, it should be particularly emphasised that drafting conventions, templates and legislative precedents are not intended to replace their skill, knowledge, intelligence and creativity, but to be used as guides and applied with skill and creativity;
3. the drafting manuals containing the conventions must indicate very clearly that their role is advisory rather than instructive; and
4. the drafting conventions should undergo regular revision to reflect the changes that occur in language, culture and with the passage of time.

When this is done, these tools will take the drudgery out of the drafting process and contribute to faster delivery of consistent legislation of very high quality.