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THE IMPERATIVE OF EMPRICAL RESEARCH METHODOLOGY IN LEGISLATIVE DRAFTING AND CONDUCT OF RESEARCH IN LAW

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THE IMPERATIVE OF EMPRICAL RESEARCH METHODOLOGY IN LEGISLATIVE DRAFTING AND CONDUCT OF RESEARCH IN LAW

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*[**Abstract**: As the role of empirical methods in traditional legal scholarship and practice grows, new forms of education are needed for today's lawyers. All lawyers asked to present or assess empirical arguments need to understand the fundamental principles of social science methodology that underpins sound empirical research. This paper examines the imperative of empirical research methodology in legislative drafting and conduct of research in law. It explains how empirical research can inform legislative drafting and conduct of research in law; legal arguments; how lawyers and drafters can set about framing empirical questions, conducting empirical research, analyzing data, and presenting or evaluating the results of drafts and empirical research. The fundamentals of understanding data, statistical models, and the structure of empirical arguments are explained in a way accessible to legislative drafters and lawyers with or without formal training in statistics and social science research methodology. Understanding empirical research in law can be a daunting task, one for which current legal education does not provide a great deal of preparation. Yet the ability to undertake such research is valuable in legislative drafting and conduct of research in many areas of law. In discussing this, the paper adopts doctrinal and empirical/ socio-legal research methodology. It utilized primary and secondary data such as textbooks, journals legislative manuals, reports and the internet as well field study on the effect of law in its social context. The paper argues that evidence-based legislative drafting and empirical evidence that supports the aims of the proposed bill is important in evaluating the effect of law in its social context. The paper concludes that the benefits of empirical legal research in legislative drafting and conduct of research in law are both programmatic and useful in informing the impact of law in the society.]*

***Keywords**: Empirical research, legal education, Legislative Drafting, social science methodology etc.*

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I

Introduction

Increasingly, lawyers are encouraged to undertake empirical research in pursuit of a doctorate or research master degree in law. However, they may frequently have little or no training or experience in undertaking social research, and generally, there is a lack of education and training in empirical research methods for undergraduate and postgraduate students in law. This leads to a corresponding dearth of academicians qualified to undertake or supervise such projects. Yet empirical methodologies also hold many attractions for legal scholars, legislative drafters, and for the practice of law whether in relation to understanding evidence, basing policy decisions on sound research, or having a deep and critical understanding of law's impact on the society. With the current development toward interdisciplinary studies, it is more important than ever that legislative drafters, undergraduate and postgraduate students in law including lawyers be provided with opportunities to train in, and undertake empirical legal research.

Empirical research in law has a long history. Legal realists such as John Austin and Roscoe Pound[1] were thinking about law's social implications in the early 1900s. Today, it is possible to find a multitude of examples of empirical methods in law. While criminal law and family law are perhaps the most abundant sources,[2] in Australia empirical legal research has been conducted in areas as diverse as bankruptcy, legislative drafting and law-making. However, even with access to training and supervisors experienced in conducting empirical research, embarking on such a project can be a daunting task as empirical legal research throws up various unique hurdles.[3]

This paper discusses the importance of legislative drafters, academicians, law students, and lawyers to embark on empirical research methodology training through workshops, conferences, and seminars. It goes on to suggest that empiricism in law holds out many possibilities, both in academic research and practice. To discuss the importance of empiricism furthermore, the paper is divided into six sections. Section one is the introduction, section two is the conceptual clarification of empiricism, section three is the explanation of methods of empirical research in law, section four discusses the imperative of training in empirical methods for legislative drafters and legal scholars, and section five discusses empirical research methodologies in some selected sectors of the economy such as electricity, education, corporate organizations and stock exchange/ capital market performance. In this section, empirical research methodology in legislative drafting, proportionality principle and research question in legislative

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1 J. Austin, THE PROVINCE OF JURISPRUDENCE DETERMINED (1954).

2 P. Brandy and A. Hutchinson, EMPIRICAL LEGAL RESEARCH IN MODERN TIME, 1025 (2010).

3 K. Burns and T. Hutchinson, THE IMPACT OF EMPIRICAL FACTS ON LEGAL SCHOLARSHIP AND LEGAL RESEARCH TRAINING 16 (2010).

drafting as well as lesson from Australia are discussed. Finally, section 6 concludes the paper with recommendation.

What is Empirical Research in Law?

Empiricism refers to a basis in experience or experiment. The word 'empirical' denotes evidence about the world based on observation or experience.[4] Harrington and Merry explain: 'Empirical legal scholars approach what is taken to be the law… as a social construction to be explained by empirically testing causal and non-causal hypothesis.[5] On a broad approach, case studies, case analysis and argument for law reform are all empirical methods, as they refer to the real world. These methods may, however, be limited in terms of the empirical insights they can provide into the law's operation. Moreover, Bradney notes that 'most definitions of empirical legal research are much more restricted'.[6] Perhaps the most obvious goal of empirical research in law is to contrast the law in books with the law in action in the legal realist tradition. Kruse has explained the necessity for this type of project as follows:

> 'Missing from the law in books are the myriad ways the meaning of law shifts as it filters down from appellate opinions to lower court cases; as it spreads from lower court cases to local practices; as local practices influence the information and advice about the law transmitted by lawyers, court clerks, social workers, probation officers and others; and as it ultimately shapes the lives of people who receive information or advice from the multiple sources of legal authority'.[7]

The variance between legal doctrine and its enactment in everyday life led to the need for empirical legal studies. Hutchinson explains that social science research is looking at the context in which the law operates with an aim to providing reasonably reliable data regarding human behaviour.[8] Testing the effect of law in an empirical fashion allows its impact to be measured against its purpose, thus, studies may be motivated by the desire to understand how the law actually functions. This study involves sending questionnaires to judges, asking them to describe how they decided a particular case or cases with a particular fact or evidence, and how they would have decided it with a different fact or evidence; doing a field study to ascertain the true situation of electricity supply in different locations of a city; and conducting personal interviews among the selected populace to know the reasons for falling standard in education, why there is mass failures in public examinations or while there are corporate failures in Nigeria.

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4 Harrinton and Merry, *The Impact of Empirical facts on Legal Scholarship and Legal Research Training*, 25(2) JOURNAL OF EMPIRICAL LEGAL RESEARCH 1045 (2010).

5 *Supra* note 1.

6 *Supra* note 2 at 21.

7 R. Kruse Katherine, *Getting Real About Legal Realism, New Legal Realism, and Clinical Legal Education*, 56 NEW YORK LAW SCHOOL LAW REVIEW 660 (2011-2012).

8 *Supra* note 3 at 97.

Data generated through these methods of research remains the most reliable empirical method of analyzing the case(s).

Sometimes scholars advocate for socio-legal studies in empirical legal research. This perhaps may be attributed to the law and economic movement as interchangeable phenomena and development of economic law as a discipline. This describes the traditional empirical legal studies as that which uses statistical techniques and analyses; that is, studies that employ data to describe or support inferences to a larger sample or population. The strongest continuing influence, however, comes from the law and society movement responsible for a great deal of socio-legal empirical scholarship. However, in 1983, Harris wrote:

> 'There is no agreed definition of socio-legal studies: some use the term broadly to cover the study of law in its social context, but this study prefers to use it to refer to the study of the law and legal institutions from the perspectives of the social sciences'.[9]

Empirical research is also called qualitative research which is defined as a market research method that focuses on obtaining data through open-ended and conversational discourse. This method is not only about what people think but also why they think so. Therefore, the qualitative research methods allow for in-depth and further probing and questioning of respondents based on their responses, where the interviewer/researcher also tries to understand their motivation and feelings. Qualitative research methods are designed in a manner that help reveal the behaviour and perception of a target audience. Qualitative research methods that are frequently used are:

a. *One-on-One interview:* Conducting in-depth interviews is one of the most common qualitative research methods. It is a personal interview that is carried out with one respondent at a time. This purely a conversational method and invites opportunities to get details in depth from the respondent.
b. *Focus groups:* A focus group is also one of the commonly used qualitative research methods, used in data collection. The main aim of the focus group is to find answers to the why what and how questions.
c. *Ethnographic research:* Ethnographic research is the most in-depth observational method that studies people in their natural occurring environment. This method requires researchers to adapt to the target audiences' environments which could be anywhere from an organization to a city or any remote location. Here geographical constraints can be an issue while collecting data. This research aims to understand the cultures, challenges, motivations, and settings that occur.
d. *Case study research:* The case study research has evolved over the past few years and developed into a valuable qualitative research method. As the name suggests it is used for explain an organization or an entity. This type of research

[9] D. J. Harris, *The Development of Socio-Legal Studies in the United Kingdom*, 3(3) THE JOURNAL OF THE SOCIETY OF LEGAL SCHOLARS (1983).

is used within a number of areas like education sector, power sector, health sector, or transport sector. It is one of the simplest ways of conducting research as it involves a deep dive and through understanding of the data collection methods and inferring the data.

e. *Record keeping research method:* This method makes use of the already existing reliable documents and similar sources of information as a data source. This data can be used in a new research. This is similar to going to a library. There one can go over books and other reference material to collect relevant data that can be used in the research.

II

Methods of Conducting Empirical Research in Law

The actual methods chosen may include quantitative or qualitative analysis of interview material, observation or survey responses. This may also involve statistical analysis, but in legal research methods might include what Harrington and merry refer to as archival such as analysis of court files or court records, as well as survey, interviews and observation, including of lawyers interacting with their clients, a typical day in lawyer's practice, or courtroom proceedings. There are many mixed method studies involving the law. Keeley's study, for example, involved observation of the courtroom, combined with the quantitative analysis of court cases; McCann's study of labour activism utilized ethnographic observation, interviews, quantitative analysis of media reporting, as well as more traditional analysis of case law.

At the other end of the scale, methods in which the researcher is more implicated in interaction with participants, such as naturalistic observation in the tradition of ethnography, have also been used in legal projects. Ethnography may refer both to fieldwork and to writing, to a practice and a genre. Darian-Smith describes it as 'an in-depth study of one culture involving firsthand, detailed, description of a living culture based on personal observation.'[10] Learning about empirical research involves understanding of what methodologies exist; that is, the idea of choosing a method implies an understanding of other potential methods, their strengths and drawbacks. It is necessary to think carefully about whether the research questions posed are answerable by the method chosen. Kritzer has noted that 'it is very easy to ask questions or collect some data, but frequently we fail to explicitly ask ourselves what we might find in the responses or in the data that will help us answer our own questions.'[11] Perhaps even more importantly, it is necessary to consider the limits and assumptions

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[10] Smith Darian, ETHNOGRAPHY AND LAW (2017).

[11] A. Kritz, *et. al., A Discipline-Spanning Overview of Action Research and its Implications for Technology and Innovation Management*, 9(4) TECHNOLOGY INNOVATION MANAGEMENT REVIEW (2019).

implied by the very questions framed. Trubek and Esser argued, in advocating a 'critical' approach:

> 'In the context of this epistemology, 'empiricism' does not mean the accurate description of the external world through careful observation. Rather, it means the imperative to construct new perspectives through (a) the study (if not observation and description) of meaningful activity in (b) locales that are defined as unorthodox and trivial from the point of view of the dominant perspective'.[12]

In other words, there must be awareness of the partiality and subjectivity of scientific methods, even if the goal of empiricism remains rigor and reality. Whatever the proposed method, undertaking an empirical research project is not a choice made lightly. Empirical research can be expensive, frustrating, time-consuming, and demanding. Whitehouse and Bright identify four key challenges for the empirical legal researcher: lack of training, funding constraints, accessing data and respondents, and ethics.[13] Atop of these practical constraints come more pervasive and unavoidable theoretical challenges: interpretation, generalization, subjectivity situatedness. Differing conceptions of what is meant by empiricism and validity of results, and multitude of disciplinary and analytical frameworks, contribute to the arduousness of any project. Moore and Maher, discussing ethnography in drug research, have suggested that it is not possible to cleanly separate a method from a theoretical origin:

> 'For the nature of one's relationship to research subjects, one's inter-subjective engagement, fundamentally determines what is possible analytically, through the production of certain kinds of data'.[14]

The Need for Training Legal Scholars in Empirical Methods

Presently in the academia, there is serious concern that the number of researchers able and willing to do empirical research in law is not growing sufficiently to meet the growing demand for changes needed in the law. Some law schools in the Commonwealth countries including the United States generally do not teach courses in survey methodology, statistical analysis, or research design. Importantly, law in the real world found that poor capability in conducting skilled socio-legal empirical research begins at law school where the imperatives of professional practice constrain both curriculum and the qualities considered desirable in law teachers. Hillyard explained that this can create a self-fulfilling prophecy:

> 'There is little or no room for research training courses similar to those in other social sciences and rarely are law undergraduates required to complete a dissertation. Even if they do one, it is

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[12] D. Trubeck, & E. Esser, ENCYCLOPEDIA OF SOCIOLOGY (1989).

[13] Lisa Whitehouse, and Susan Bright, *The Opportunities and Challenges of Empirical Work: Housing Possession in Theory and in Practice, Oxford Legal Studies Research Paper No.50/2013*, UNIVERSITY OF OXFORD FACULTY OF LAW AND UNIVERSITY OF HULL LAW SCHOOL (May 9, 2013).

[14] S. Moore, and E. Maher, THE DRUG EFFECT, HEALTH, CRIME AND SOCIETY (2011).

> unlikely to involve empirical research. There is, therefore, an absence of scholars who are competent to supervise empirical work…'.[15]

In other words, if undergraduate students are not exposed to empirical research in law, this has a flow on effect to Masters and Doctorate students, and ultimately legal academics. Vick commented in 2004 that 'most present-day legal academics received their undergraduate education in law departments concerned primarily with training their students to be solicitors, barristers, advocates, and judges, not academic lawyers'.[16] Hillyard suggested that undergraduate law students emerge with a corresponding tendency toward 'theoretical and textual analysis,'[17] or what Burns and Hutchinson describe as the 'established traditional territory' of doctrinal research.[18]

The lack of opportunity for undergraduate students to engage in empirical legal research is, Hillyard suggests, also an effect of the neo-liberal university and the job market to which law students are often seeking entry.[19] That is, to put it in simpler words, the sight of many undergraduate law students are firmly focused on attaining gainful employment and practice of law to make money as legal practitioners. In Nigeria as well as in some other Commonwealth countries, the curriculum's consequent focus on technical legal skills and doctrine, at the expense of critical, interdisciplinary and socio-legal analysis has been the impediments to empirical legal research. Yet, given the large number of law graduates who will not actually enter legal practice, and may well end up in fields where training in empirical methods is valued, such a focus may be misplaced. Of course, students may already have a background in research methods gained from earlier degrees or work. The increasing availability of post-graduate law degrees required for teaching and research predominantly the PhD and Juris Doctor in Nigeria, Australia, Britain, and United States and elsewhere, may also herald a positive change, as greater numbers of law students has other degree and training to draw upon. Nevertheless, despite having already completed another degree, not all students would have extensive experience in empirical methods or conducting a research project.

While a lack of exposure to empirical methods in the undergraduate curriculum may be explicable, the absence of training for higher degree research students is perhaps more surprising. This lack of training is the primary barrier to Masters and PhD students embarking on an empirical research projects. Since it has been observed that this gap exists in Nigeria for instance, it is necessary to expose undergraduate and higher degree

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[15] S. Hillyard, BIG DATA? QUALITATIVE APPROACHES TO DIGITAL RESEARCH (STUDIES IN QUALITATIVE METHODOLOGY) (2014).

[16] Vick Maurice, *Qualitative Analysis and Analytical Chemical Separation*, 38(9) JOURNAL OF CHEMICAL EDUCATION (1961).

[17] *Supra* note 15.

[18] *Supra* note 3.

[19] Paddy Hillyard, *Law's Empire: Socio-Legal Empirical Research in the Twenty-First Century* 34(2) JOURNAL OF LAW AND SOCIETY 266 (2007)

students to qualitative research. Noting the prevalence of double degrees (combined law and other disciplines), Economides argued that a relatively small injection of resources, socio-legal research could be better supported in the curriculum:

With relatively modest investment in interdisciplinary modules to act as 'bridges' spanning disciplinary divides, not only could the full potential of the double degree be realized but, more importantly, stronger foundations could be laid for the research skills and working collaborations needed for socio-legal projects in higher degrees and beyond.[20]

Similarly, providing students with exposure to empirical methods in the undergraduate law curriculum could provide a 'foundation' through encouraging some students to consider empirical work as part of postgraduate study, and at the very least, exposing students to the idea of empirical research in law and providing some understanding of methodology. However, a historical dearth of opportunities has perhaps naturally impacted, in turn, on the number of legal academics able to undertake (and supervise) these type of projects. Burns and Hutchinson subsequently commented on the importance of such training for students:

> 'Research training must include a broader non-doctrinal methodology component…There is a need to introduce students to the existence and nature of interdisciplinary research. That is, to the extensive work of anthropologists, sociologists, political scientists, criminologists, economists, humanities and international relation that impinge on law'.[21]

III

Empirical Research Methodology in Selected Sectors of the Economy in Nigeria

Financing Higher Education in Nigeria: The Role of Internally Generated Revenue

Not so much was known of internally generated revenue in Nigerian higher educational circles about two decades ago. Universities have usually relied on Government Grants for their activities which over time is no longer sustainable. Hence the fall back on internally generated revenue. The research methodology employed in this study includes both primary and secondary sources. The primary sources comprise mainly of purposively selected case study of some Federal Universities year by year. There were

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[20] A. A. Economides, ANALYTICS AND EDUCATIONAL DATA MINING IN PRACTICE: A SYSTEMATIC LITERATURE REVIEW OF EMPIRICAL EVIDENCE (2014).

[21] *Supra* note 3 at 168.

qualitative interviews with top managers of the Universities. Tertiary Education Trust Fund. There were also some materials obtained from Tertiary Education Trust Fund (Trust fund).

The disbursement of funds by ETF started in the year 1999, that is, six years after its establishment.

Table 1
Presents the total amount of money disbursed across some federal universities based on the executed intervention projects between the years 2014 and 2019.

Institutions	*Total Allocation*	*Disbursement*	*Outstanding*
ABU	26439877960.12	15705503511.93	10734374448.19
UI	25505479288.13	15169512231.45	106335967056.55
UNILAG	274786524631.16	16154523452.25	12723687634.65
UNN	289775532451.13	13253212423.30	15633678524.63
UNIBEN	237886543123.74	14354214265.31	17544673423.71
UNIJOS	256772656233.61	13432221252,43	16733474221.40
Total	108099430995.77	72037296204.02	36062134791.75

Source: ETF (2019)

The qualitative interviews with key officers of these selected universities provide the following findings:

a. Federal Universities depend on Internally Generated Revenue (IGR) for a minimum of ten percent of their total budget funding each school year.
b. The Federal Universities do not have tuition or school fees as an option for IGR generation as this is prohibited by the federal government.
c. The most common IGR sources disclosed by the interviewees are commercial activities such as supermarkets, bakery, table water, and local transport. Others are seminars, workshops, consulting services, farming and tree planting.

Challenges Facing the Nigerian Power Sector

Empirical research method was employed to examine the problems electricity supply and consumption in Nigeria. Here, field survey and personal interviews were conducted among residents of some areas of Abuja. These areas include: Buwari, Gwarinpa, Lugbe, Kubwa, and Gwagwalada. Some residents of these areas interviewed responded as follows:

Location	*No. Interviewed*	*Problem of Power Sector*	*Solution*
Bwari	20	Shortage of gas supply	Increase the quantity of gas
Gwarimpa	15	Outdated and poorly maintained transmission network	Regular maintenance of plant and machineries
Lugbe	21	Private management of power sector by corrupt people	De privatize power sector
Kubwa	30	Importation and use of generator by enemies of power sector	Ban of the importation of generator in Nigeria
Gwagwalada	25	Insensitivity of government over problems of electricity in Nigeria	Increase the budget of the power sector and remove corrupt officials of the power sector.

Source: Field Interview (2019)

This qualitative research revealed that two segments of Nigeria's power sector (generation and distribution) is saddled with myriad problem. The transmission of the energy into houses is the major problem of the federal government. Nigeria approximately 5,000 MW of power for the population of over 150 million people. Electricity consumers in Nigeria are aggrieved for the high tariff, estimated billing and being forced to pay for what they did not consume. Some respondents said that they are often in darkness for weeks if not months even when they struggle to pay estimated bills. Some influential people are out to sabotage government's efforts to improve electricity supply to Nigerians.

The Stock Exchange/Capital Market Performance

In most cases, lawyer are involved in assessing the performance of companies to ascertain if they are going concern or in danger of corporate failure. This takes the empirical method of research in which lawyers are briefed or required to visit the companies head office, the stock brokers or the Registrars with a view to ascertain the true state of affairs of companies or the Capital Market. In this case, the lawyer's task may be well accomplished by empirical research methods. Some empirical methods which the lawyer can employ to ascertain the value of the company include:

a. Looking at the cash flow of the company to determine the financial health of the company. This studies the movement of cash through the business (cash-in-flow and cash-out-flow). The formula to analyze cash flow of a company also called cash flow analysis is: Cash inflow/ Cash out flow. The result obtained will show the financial status of the company.
b. Inquiring about the dividend policy of the company to determine whether the company pays regular dividend, stable dividend, irregular dividend or no

dividend at all. This will help inform the researcher about the financial position of the company.

c. Examination of audited account and financial statement of the company by an independent auditor. The purpose of this for the researcher is to ascertain the credibility to the reported financial position and performance of a business.

d. Thorough examination of the company's balance sheet to ascertain the value of the company. A balance sheet is a statement of the financial position of a business that lists the assets, liabilities, and owner's equity at a particular point in time. In other words, the balance sheet illustrates the business's net worth. To determine the liquidity of the company, the legal researcher will weigh the proportion of the company's debt to its equity from the disclosures in the balance sheet. This is to determine whether the company is a going concern or in danger of corporate failure. This mathematically represented as follows:

    i) Current Asset/Current Liability = CA/CL (Liquidity Ratio). The accepted ratio here is 2:1. Any ration below this means that the company is in danger of corporate failure.

    ii) Current Asset – Stock/ Current Liability = CA-Stock/CL (Acid Test Ratio). The acceptable ratio here is 1:3. Any ratio below this shows that the company is in danger of corporate failure.

    iii) Debt/ Equity = D/E. This is the proportion of company's debt to its equity. If the equity is higher, then the company is healthy. If the proportion of debt is higher than equity the company is in danger of failure. All these are revealed through the thorough examination of the balance sheet.

The result of these financial analysis will inform the legal researcher to advice on the financial status of the company, and whether it should be acquired by another company, or go into merger with another similar company or be liquidated to avoid losses before it finally goes down with a lot of economic consequences.

Julius Berger Nigeria Limited Balance Sheet as on 31st December, 2018

	Notes	*2018*	*2017*
		N000	*N000*
Fixed Assets	1	37,514	45,674
Current Assets	2	167,382	190,890
Total Assets		204,896	236,564
Deduct: Current Liabilities	3	180,602	213,189
Net Assets		24.294	23,375
Represented by:			
Share Capital	5	12,000	12,000
Retained profit	12,294	11,375	
	24,294	23,375	

Julius Berger Nigeria Limited, Profit and Loss Account for the Year Ended 31st December, 2018

	Notes	*2018*	*2017*
		N000	*N000*
Turnover		86,770	122,158
Trading profit for year	6	3,639	5,476
Taxation	7	1,400	2,626
Profit after taxation		2,239	2,850
Proposed dividend	8	1,320	1,704
Retained profit for the year		919	1,146
Retained profit at 1st January		11,375	10,229
Retained profit carried forward		12,294	11,375

Source: Office of the Company Secretary Julius Berger Nigeria Limited, 2019.

To compute for the value of a company, the researcher needs to look at the balance sheet and profit and loss account (P&L) and identify tangible and intangible assets, and the amounts posted for the two years business of the company. From the total assets, deduct the total value of intangible assets. From what is left, deduct the total value of the liabilities. What is left are the net tangible assets or asset valuation.

Consider the following simple example:

- Balance sheet total assets: N5 million
- Total intangible assets: N1.5 million
- Total liabilities: N1 million
- Total tangible assets: N2.5 million

In the example above, the total assets of a company ABC equal N5 million. When the total intangible assets of N1.5 million are deducted, that leaves N3.5 million. After the total liabilities are deducted, which is another N1 million, only N2.5 million is left, which is the total value of the tangible assets.

Performance of Companies at the Stock Market

Companies whose shares are quoted on the Nigerian Stock Exchange trade their shares on the capital market (market for trading on shares and stocks). To ascertain the value of companies' shares, the legal researcher needs to do a field survey by going to Stock brokers or market makers to examine their records. The records normally show the performance of companies at the stock market on a trading day or periods. All share index, the volume of shares, the value, and market capitalization of shares of companies are always displayed. Critical examination of the gainers and losers will inform the researcher about the performance of companies.

Stock Index (As on November 2019)

All Share Index (ASI)	26,739.44
Deals (Numbers)	4,405
Volume (Numbers million)	394.35
Value (Billion)	N6.54
Capitalization (CAP)	N12.9

Stock Index (As at November 2019)

Gainers			*Losers*		
Symbols	*CP*	*% Change*	*Symbols*	*CP*	*% Change*
EKOCORP	10.00	4.07	ABCTrans	0.41	-8.89
Conoil	16.90	9.97	UCap	2.18	-5.22
Learn Africa	1.16	9.43	Aiico	0.73	-5.19
Neimeth	0.48	9, 09	CHIPLC	0.37	-5.13
Academy	0.37	8.82	Livestock	0.50	-3.85

Source: Arisco Stock Brokers Lagos, 2019

IV

Application of Research Methodology in Legislative Drafting

Increasingly, traditional legal research and legislative drafting are confronted with the challenge of making their methodology explicit. Academics of different disciplines point at the lack of reflection on empirical methodology research in most traditional legal research and drafting as they compare this with what is common in their own disciplines. This argument makes sense in a way because drafting new rules for a court proceedings, for example, only makes sense if the legislative drafter has a thorough knowledge of the practices of court proceedings, of the court's management, of how advocates participate in proceedings, of the obstacles faced by ordinary persons assessing court proceedings and so on.

Empirical Research Methodology in Legislative Drafting

The importance of empirical research methodology in legislative drafting in the National Institute for Legislative and Democratic Studies (NILDS). Perhaps this could be the reason for the approval of request made by the Academic Matters Committee (AMC) 2016. This approval by the management of NILDS led to the introduction of Master's Degree Programme in Legislative Drafting (MLD) in the UNIBEN/NILDS Postgraduate School. It is understandable that most legislative drafters in NILDS and in

deed the whole of Nigeria have a predominantly doctrinal perspective on law and legislation. This is because their training from the University to the Nigerian Law School mainly focused on the role of judiciary and doctrinal textual research methods. Therefore, to adopt empirical research methodology in legislative drafting in NILDS and in the whole of Nigeria, there is the need for a trainee programme in empirical legislative drafting for drafters. In NILDS in particular, there is the need for more attention to be directed to the relationship between law and policy and for sociological research and interdisciplinary research between the legislative drafters and the staff from other departments. [22] This is because while the legislative drafters by their training in law have no background on empirical research methodology other researchers from social sciences by their training are well equipped to conduct empirical research. Collaboration between the two will expose the legislative drafter to understanding how to go about doing empirical legislative drafting.

Even in the curriculum of Universities and the Law School, there is little or no attention of how to interpret and use empirical data in designing new laws and regulations,[23] even though the ability to translate policy into law is seen as one of the most important talents that drafters should possess. According to Rob van Gestel in Peyter van Lochem, one of the most difficult things for draftsmen to master is the analytical capacity to transform the objectives, logic and structure of what policymakers intend into a legislative language that is comprehensible, executable and enforceable.[24] The importance of designing laws that will actually work is underlined by an increasing emphasis in both theory and practice on ex ante evaluation of legislation and evidence-based lawmaking.[25] Ex ante evaluation is a way to investigate whether the assumptions underlying a legislative draft are based on facts and empirical evidence that support the aim of the proposed bill.[26]

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[22] N.A. Florijin, THE NEED FOR SCOCIO-LEGAL RESEARCH METHODOLOGY IN THE CONDUCT OF RESEARCH IN LAW (2015).

[23] F. Leeuw, *Empirical Legal Research: The Gap between Facts and values and Legal Academic Training*' 11(2) UTRECHT LAW REVIEW 19 (2015).

[24] Rob van Gestel and Peter van Lochem, *Evidenced-Based Regulation and the Translation from Empirical Data to Normative Choices: A Proportionality Test*, 2 Erasmus Law Review (2018), *available at*: http://www.erasmuslawreview.nl/tijdschrift/ELR/2018/2/ELR-D-17-00021 (last visited 22 Nov., 2021).

[25] E. Page, *Their Word is Law: Parliamentary Counsel and Creative Policy Analysis*, 4 PUBLIC LAW REVIEW 797 (2009).

[26] J. Verschuuren, (ed.) THE IMPACT OF LEGISLATION: A CRITICAL ANALYSIS OF EX ANTE EVALUATION (2009); S. Naundorf, and C. Radaelli, *Regulatory Evaluation Ex Ante and Ex Post: Best Practice, Guidance and Methods*, in LEGISLATION IN EUROPE 187-213 (U. Karpen and H. Xanthaki, eds., 2007).

Proportionality Principle and Research Questions in Legislative Drafting

According to Rob and Lochem, an interesting way to study the 'transition' from the empirical to the normative is to view legislative drafts through the lens of the proportionality principle, which is one of the principal standards for assessing the quality of legislation.[27] Proportionality review is part of the directives on legislative drafting, which require that proposals for new legislation are suited to accomplish the aims of legislation, do not require more instructive measures than strictly necessary to reach these aims and not produce excessive burdens for particular addresses of the rules. The proportionality principle has two faces. It concerns the relationship between means and ends in law and policymaking (e.g. a certain policy measure suitable to accomplish a regulatory goal), but, it also contains normative considerations. Suppose, for example, that a proposed piece of legislation limits the rights and freedoms of certain citizens, which are protected by the Constitution or the African Charter on Human and People's Rights (ACHPR), drafters will need to make sure that the intrusion on fundamental rights is both lawful and proportionate. If they do not succeed in doing so, there is a risk that courts will later on strike down this national piece of legislation because it conflicts with supranational law. Important to know is that proportionality is not only used as a criterion for the ex ante evaluation of legislative drafts. It also functions as a standard for the ex post review of legislation by courts.[28]

This paper has examined the importance of empirical research methodology in legislative drafting and the conduct of research in law in order to learn whether there is a difference in how legislative drafters deal with (qualitative and quantitative) empirical research in justifying the proportionality of regulatory interventions. It simply wants to explore if the proportionality lens, could be a useful tool to analyze the way in which quantitative or qualitative empirical research is translated into normative legislative decisions. However, the overarching question the paper tries to answer is:

a. To what extent is available empirical research used in explanatory memoranda of legislative drafts?
b. How would evidence-based research be useful in drafting establishment bill?
c. Does drafting amendment of existing legislation require empirical research?
d. Is empirical research methodology useful in alteration of the Constitution by the drafter?

The Answers to these questions suggest that on the basis of what is known about how legislative drafters are educated, and how the legislative process works, one would expect that explanatory memorandum does not contain evidence-based research. The

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[27] *Supra* note 25.

[28] D. Harvey, *Towards Process-Oriented Proportionality Review in European Union*, 23(1) EUROPEAN PUBLIC LAW 93 (2017).

main reason for this gap is that legislative drafters usually do not have a background in social science research methods, but are trained in law school in conducting doctrinal (textual interpretation) methods.[29] However, drafting bills of the nature outlined in the above questions no doubt, require empirical research especially drafting establishment bill. Drafting bills require investigation into the economic political and social implications of the bill. In other words, the impact of the draft bill in the society should be of paramount consideration by the legislative drafter. This can only be done by the drafter through conducting empirical research rather than using doctrinal method. Therefore, the legislative drafter while embarking on drafting any of the bills outlined above should adopt empirical research method so as to understand the effects of the draft as they affects the society at large. Therefore, the legislative drafter must take cognizance of socio-economic implication of the bill before embarking on the drafting exercise to perfect the instruction of the policymaker of the legislator. All these can only be achieved by the use of empirical research methodology in legislative drafting.

Empirical Research Methodology in Legislative Drafting: Lesson from Australia

The Parliamentary Counsel's Office of the Australian Parliament draft legislation for the parliament. Before embarking in drafting a bill, the drafters conduct a survey of the facts as presented by the instruction of the government or the legislator. The survey takes the form of evidence-based research to support the information contained in piece of the draft legislation.[30] Before using Australia as subject of lesson, this paper conducted a research of Australian drafting office, covering their institutional roles, management, and arrangements for legislative drafting styles. One of the reasons for choosing Australia is to get a broader sense of the methodology of research used by the legislative drafters in drafting a bill. This to give this work the baseline from which to make comparisons.

The general conclusion the paper would draw from the survey is that within Australia and between Australia, there is a broadly set of institutional and professional standards of drafting bills utilizing empirical research methodology. This is strongly corroborated by further research carried out on the Charter of Rights and Freedoms incorporated in the Australian Constitution. The drafting process, and to a large extent the methodology used in the drafting, is significantly influenced by the requirement for a draft bill to have social, economic and political content that reflects the trend and realities of the society at the moment.

It is important for the Australian experience to be replicated in Nigeria since both counties are Common law countries. In all cases in Nigeria, legislation is drafted on

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[29] V. Jackson and M. Tushnet (eds.), PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES (2017).

[30] Nick Horn, *Legislative Drafting in Australia, New Zealand and Ontario: Notes on an Information Survey*, Consultant, Office of Legislative Council, Toronto, Ontario (2016).

instruction from the policymakers or the legislators in the National Assembly or the State House of Assembly. In this situation unlike what obtains in Australia, there is little evidence of significant use of empirical research methodology in the draft bill or evidenced-based research involving the private sector or socio-economic indicators. Thus, In Australia, these factor must be taken into consideration by the legislative drafter. It is therefore recommended that the Australian style and method be adopted by Nigerian legislative drafters in tandem with modern methods of legislative drafting.

V

Conclusions and Recommendations

Conclusion

This study examined the imperative of empirical research in law. A number of empirical legal researches have demonstrated that empiricism can be useful in facts finding research. In this paper, empirical facts is defined as assertions of facts about society, the world and human behaviour which are hypothetically able to be proved by social or empirical methodologies. The empirical methodology is used in this paper to examine the problems in educational sector (the allocation of funds to some federal universities in Nigeria), the power sector, and the liquidity of companies and stock market performance. Statements of empirical fact sometimes merge into statements of legal or social values. As Paddy Hillyard pointed out, 'Parliament, businesses and NGOs' all appreciate the importance of evidenced-based research to inform the development of law, the administration of justice, and practice of law.'[31]

Traditionally law has been viewed as a closed system. What does this mean? In terms of conducting legal research and legislative drafting research methodologies, it has meant that lawyers and legislative drafters have looked at the law in isolation. The sources of law have been the primary materials, the doctrine of the law, the case law and legislation. Thus doctrinal research is the established traditional territory of the lawyer-researcher and legislative drafter. As a result, where legal research has been taught in the law schools, the methodology taught has been doctrinal research neglecting empirical research methodology.[32] What is evident from this study on the use of empirical facts in the courts is that lawyers and legislative drafters need to look at the law from a much broader angle than previously. This is quite concrete examples of how the law does not work within a vacuum. Therefore, as researchers, legislative drafters, and lawyers there is need for everyone in the legal academy to be totally cognizant of

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[31] *Supra* note 19.

[32] Kyle Burns and Terry Hutchinson, *The Impact of Empirical facts on legal scholarship and legal research training*, 43(2) THE LAW TEACHER 153 (2009).

the parameters of empirically based knowledge and research methodologies. The paper concludes finally that there are advantages and benefits in adopting empirical research methodology in conducting research in law and legislative drafting as this method informs the impact of law and draft legislation in society.

Recommendation

Based on the findings of this research, the following recommendations are made:

a. More extensive training needs to be offered in fundamental research especially to legislative drafters. This research designed is to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law;
b. Research training must include a broader non-doctrinal methodology component. There is a wealth of general social data that is used to some extent by the legislature but that also impinges on legislative drafting and legal decision-making. There is a need to introduce legislative drafters and students to the existence and nature of interdisciplinary research; that is the extensive work of anthropologists, sociologists, criminologists, economists and sociologists that impinge on the law;
c. Law schools and Research Institutes need to introduce a wider range of research methodologies into their research training particularly those based in the social sciences. Students and bill drafters must be aware of the basic principles of social investigation, where to source publicly available information, and how to critique empirical research from the perspective of validity and reliability. They must be able to distinguish valid empirical research from anecdotal evidence. This means that empirical research methodologies must be introduced into the law curriculum so that law students can deal with empirical facts in a knowledgeable fashion;
d. In doing this, legal academics have a role to play in ensuring that bill drafters and students are aware that there are various components in the judicial reasoning process including the evidence and legal principle, but also facts based in the judge's view and information based in the social sciences.