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The Principle of Ultra Vires and the local authorities'  
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**THE PRINCIPLE OF ULTRA VIRES AND THE LOCAL  
AUTHORITIES' DECISIONS IN ENGLAND**

# **THESIS**

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## **DEDICATION**

*To my late parents, brothers and sisters- for being such a caring and loving family,*

*To my wife, INGABIRE Dance and our little daughter, AKHALIZA Chance- thanks for your perseverance. Sincere apologies for being away from you, during the time I was away from home. It wasn't easy, but with determination, I went through it!!*

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## CHAPTER ONE: INTRODUCTION

This thesis seeks to examine the principle of *ultra vires* and the local authorities' decisions in relation to the style of drafting of the enabling legislation in England. Local authorities are corporations established by a statute and are required to perform activities within the statutory powers.<sup>1</sup> Local authorities in England derive their powers from the Local Government Act 1972 and are required to act within those powers. Decisions taken by local authorities beyond their legal powers are declared invalid and *ultra vires*. The term *ultra vires* literally means 'beyond legal powers'. However, local authorities may be given powers which are incidental to the express powers provided in the legislation.<sup>2</sup>

The principle of *ultra vires* ensures that local authorities do not exceed their legal powers. Thus, in *Attorney General v Fulham*<sup>3</sup> it was held that a proposal to undertake a laundry service was outside the local authority's express powers to provide baths and wash houses. It may not be simple to differentiate between the decision that is declared *ultra vires* and the one taken outside jurisdiction. A decision that is *ultra vires* and a decision in excess of jurisdiction are sometimes given wide meanings.<sup>4</sup> A local authority which acts "outside jurisdiction" or "without legal power to act", acts beyond its statutory powers and its decisions are declared *ultra vires* and have no legal effect.<sup>5</sup> Consequently, administrative courts hear challenges on the basis that decision makers misinterpret legislation that govern certain aspects of their daily activities. For instance,

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<sup>1</sup> *Boroneess Wenlock v River Dee co.* (1885) 10 AC. 354 at 362

<sup>2</sup> Barbara Turner, *Law for Councillors* (Sweet and Maxwell 1986) 113.

<sup>3</sup> [1921] 1 ch. 440.

<sup>4</sup> Hugh Southey, *Judicial Review: A Practical Guide* (Jordan Publishing Limited 2004) 39.

<sup>5</sup> HWR. Wade and C.F Forsyth, *Administrative Law* (10<sup>th</sup> ed OUP 2009)30.

in criminal matters, challenges that argue that legislations that give rise to an offence or statutes that govern admission of evidence were wrongly interpreted.<sup>6</sup>

It is important therefore that the legislature prescribes detailed, express and relevant procedures for local authorities that should be followed in taking decisions. Legislatures are also required to determine the intention of the legislation to ensure the rule of electorate. However, the legislature may not legislate in details and in some cases local authorities' legislations confer wide powers and fail to indicate the scope of powers of the authorities. Consequently, local authorities may exceed their legal powers and take unlawful decisions due to insufficient legislative guidance. Nonetheless, the wide powers so provided to local authorities by legislature, although not specified in legislation, enable them develop their areas. It requires that the legislation provides detailed instructions to the audience.

However, when drafting, drafters also rarely provide express limits and sufficient guidance about which considerations that are properly relevant to the exercise of discretion and which are not. The prime responsibility of the drafter in drafting legislation is to draft laws that give precise effect to the intention of the initiators of the legislation.<sup>7</sup> Principles of judicial review on the other hand should be articulated or else be developed by the judiciary. Consequently, the presence of such drafting imperfections in legislation may provide sufficient grounds to justify the need for court intervention possibly for the development of common law principles to fill the legislative vacuum for purposes of good administration and to ensure that powers of public decision making bodies are exercised lawfully.

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<sup>6</sup> Southey (n4) 37.

<sup>7</sup> IML Turnbull, '*Clear Legislative Drafting: New Approaches in Australia*' (1990) Vol. 11 SLR 164.

Also, it is argued that the courts' intervention is required in order to apply the principle of *ultra vires*. This enables the local authorities perform other activities that are not expressly authorized but which are incidental to the express powers. This is illustrated in the case of *Attorney General v Crayford Urban District Council*.<sup>8</sup> Also, it is important to note that this is a common law rule that is clearly stated in *Hazell v Hammersmith & Fulham LBC*.<sup>9</sup> Additionally, in certain cases, such activities that are incidental to or consequential are *intra vires* provided they are undertaken under a relevant section of Local Government Act. The local authority legislation needs therefore to provide sufficient guidance to local authorities in order to take decisions that are free from judicial challenge. In addition, the local authority enabling legislations need to confer powers in express terms to authorize local authorities perform their activities within limits of those powers in order to guarantee validity of the resultant decisions.

The hypothesis of this thesis is that valid administrative decisions from local authorities are guaranteed via clear and precise enabling clauses in the primary legislation. The thesis argues that the style of drafting local authorities' legislations influences decisions taken by local authorities. First, legislations need to be drafted in a style that clearly and precisely spells out the limits of powers of the local authorities in order to provide sufficient guidance to local authorities' administrators to act lawfully. In attempting to exercise implied powers conferred by the imprecise enabling legislation, however, local authorities tend to go beyond intended legal powers and as a result take unreasonable, arbitrary and invalid decisions. More so, drafters rarely provide sufficient guidance about which considerations are properly relevant to the exercise of discretion and which are not.

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<sup>8</sup> [1962] 2 W.L.R 998.

<sup>9</sup> [1991] 1 All E.R. 545, H.L.

Secondly, obscure, wide and ambiguous enabling clauses in the primary legislations are substantial causes of courts' misinterpretation of legislation as understanding the limits of the powers of the local authorities is a challenge. On the other hand, it is questionable whether the whole range of activities performed by a local authority by invoking implied powers, while exercising discretion, under the umbrella of doing anything that is calculated to facilitate or is conducive to or incidental to the discharge of any of its functions can be regarded as lawful. This thesis attempts to respond to that question. Although the principle of *ultra vires* requires the strict observance of the limits of the powers conferred in legislation, local authorities tend to invoke widely drafted provisions to perform activities that are said to be incidental to the express powers of which courts may declare invalid.<sup>10</sup>

Therefore, in order to prove the above hypothesis, I will discuss briefly the notions of the validity and invalidity of local authority administrative decisions in relation to misuse of discretion conferred by the enabling legislation. The reason for making such a functional relationship is that there is need to prove whether invoking obscure, imprecise and ambiguous enabling clauses which confer wide powers is a substantial cause of misinterpretation of legislation, a leeway for local authorities to engage in improper purposes and a cause of performing unlawful acts.<sup>11</sup> Besides, judicial decisions that rendered invalid such acts performed on the basis of lack of clear and express clauses on limits of powers of local authorities will be identified.

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<sup>10</sup> *Attorney General v Wilts United Diaries (1921) 37 TLR 884, Hazell v Hammersmith and Fulham London Borough Council [1991] 2 WLR 372.*

<sup>11</sup> *Credit Suisse v Allerdale Borough Council (1994); see also John Alder, Constitutional and Administrative Law (8<sup>th</sup> edn Macmillan Publishers 2011) 376.*

Further, I will argue that clarity, precision and unambiguity are tools for effectiveness of the local authority enabling legislation.<sup>12</sup> I will discuss the relevancy of clarity, precision and unambiguity in effectiveness of local authority legislations in relation to determination of express or implied powers in relevant legislation. The reason for applying these criteria is to indicate their role in giving effect to the legislation. The local authority legislations which are widely or narrowly construed prove to be unpredictable, so, clarity, precision and unambiguity promote readability, certainty and predictability of the legislation, and give rise to no serious controversy and reduce subsequent judicial misinterpretation of the law.<sup>13</sup> And, therefore, unless the local authorities invoke clear, precise and unambiguous enabling clauses, they may be subject to constraints imposed by the principle of *ultra vires*.<sup>14</sup>

Additionally, prominent writers, jurists and legislative drafters have put forward useful literature on relevancy of clarity, precision and unambiguity in legislation and all this wealthy literature will be incorporated in the discussion. It is worth noting, however, that since it is a common practice for local authorities to rely on statutory implied powers and perform unlawful acts while circumventing central government's imposed controls, the need for an effective legislation with precise and express powers is a prerequisite for local authorities to act within legal limits in order to perform lawful acts.<sup>15</sup> Although, flexibility of local authorities' legislation is useful, at times express statutory powers will be applicable in their strict sense. This is based on the view that the legislature may not legislate for every detail. But also, it is unrealistic to say that the local authorities can always operate strictly within the limits of the legislation. However, the flexibility

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<sup>12</sup> Constantin stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate Publishing Co 2008) 12.

<sup>13</sup> *R. (Quintavalle) v Secretary of State for Health* [2003] 2 W.L.R 692, 697.

<sup>14</sup> Michael T Molan, *Administrative Law* (3<sup>rd</sup> edn Old Bailey Press 2001) 84.

<sup>15</sup> *Ibid* 83.

of local authority legislation may be invoked by local authorities to misuse their discretion and engage in improper purposes, in pretext of performing incidental functions. On the other hand, in certain instances, the legislation does not provide sufficient guidance on which considerations are properly relevant to the exercise of their discretion in performing incidental functions. In such instances, the local authorities are not provided with specific powers to perform valid acts.<sup>16</sup>

In relation to the above, when the local authority legislation confers discretion and it does not provide express control guide lines of such powers, courts may assume that the intention of the legislature is to legislate in accordance with the principle of the rule of law and thus the authorities are required to act in the parameters of the principle.<sup>17</sup> Therefore, one may not deny the court's justification for intervention to fill the legislative gaps if the legislature enacts legislation which confers wide discretion to the authorities. It should be noted, however, that courts should apply and interpret the widely drafted enabling clauses fairly and reasonably and set precise limits of the powers of the authorities.<sup>18</sup>

Further, in proving the hypothesis, I will analyze the drafting style of local authority legislations. Specifically, section 111 of the Local Government Act 1972 and section 2 of the Local Government Act 2000 will be analyzed. The reasons for selecting these sections are; firstly, the former seems to be imprecise and ambiguous in its definition of the functions of local authorities and confers wide discretion that may empowers to engage in improper purposes and perform unlawful activities, and secondly, the latter seems to be drafted in broad terms and enables the

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<sup>16</sup> Brian Thompson, *Textbook on Constitutional and Administrative Law* (2<sup>nd</sup> edn Blackstone Press Limited 1995) 386.

<sup>17</sup> Mark Elliott, Jack Beatson, Martin Mathews, *Administrative Law: Text and Materials*, ( Jack Beatson and Martin Mathews 4<sup>th</sup> edn, Oxford University Press 2005) 21.

<sup>18</sup> *Ibid*

authorities to indulge in performance of functions that are beyond their express limits. Also, along with the critic, various court cases that rendered invalid local authorities' decisions on the basis of the drafting style of those sections will be identified. The reason for this analysis is to find out whether invoking broad enabling clauses with wide discretion coupled with insufficient legislative guidance in the sections are a justification for judicial misinterpretation and thus a ground for invalidity of decisions taken. Finally, after the discussion and analysis of the above sections and after establishing my hypothesis I intend to use primary and secondary sources and from which I will draw the conclusion of my thesis.

This thesis is divided into five chapters. Chapter one introduces the overview of the principle of *ultra vires* and the local authorities' decisions in relation to the style of drafting of enabling legislation. Also, in the same chapter, the hypothesis and the reasons to defend it have been stated, followed by the methodology on how the hypothesis will be proved. The reasons on which the methodology is based are also highlighted, and the structure of the whole thesis is presented.

Chapter two comprises the discussion of the notions of validity and invalidity of local authorities' decisions in relation to exercise of express or implied powers conferred in the enabling clauses. The role of the judicial intervention in attempting to control the invalidity of the decisions of the local authorities is also discussed.

Chapter three examines the criteria of effectiveness of the local authority enabling legislation which is at times obscure, uncertain or is so widely drafted that misinterpretation of the clear

limits of the powers of the local authority is inevitable. The relevancy of the criteria in the local authority legislation in relation to exercise of express or implied powers is further discussed. Also in this chapter, court cases that rendered invalid local authority decisions on the basis of drafting imperfections of the local authority legislations are identified as well.

Chapter four analyzes the style of drafting of the local authority legislation. It analyzes two selected and widely drafted sections of two particular local authority Acts. The sections seem to have been drafted in a style that ambiguously or broadly defines the limits of the powers of the local authorities thus provoking the authorities to take decisions beyond their legal powers. Court cases that declared such decisions of the local authorities' invalid on the basis of invoking enabling clauses with such drafting imperfections are also identified to prove my hypothesis. Lastly, chapter five is the conclusion of my thesis and it is based on the discussion in the thesis and findings of my hypothesis.

## **CHAPTER 2: VALIDITY AND INVALIDITY OF LOCAL AUTHORITIES' DECISIONS AND CONTROL OF THE INVALIDITY OF DECISIONS**

To achieve validity of their decisions, local authorities are required to exercise their powers conferred by the enabling legislation. In case the legislation confers discretion to the authority, then the legislature ought to precisely state how the discretion of the authorities will be exercised. However, imposing restrictions on the local authorities' discretion would be limiting their performance and therefore unhelpful to the authorities' effectiveness and will hinder their innovative initiatives. This chapter examines the prerequisites of the validity of the decisions, reasons for the invalidity of authorities' decisions as well as the courts' intervention as a means to check on the invalidity as a result of excessive use of powers inherent in the legislation, to ensure the respect of the principle of *ultra vires*, set limits for the exercise of powers of the local authorities, ensure compatibility of the national legislation with the Human Rights Act 1998, to respect the right to appeal of aggrieved individuals, and to ensure that the intention of the legislature is upheld, powers not usurped, exceeded or abused to ensure the respect of the rule of law.

### **2.1 Validity of Local Authorities' decisions**

Local authorities acquire powers from the enabling legislation and must exercise such powers within the limits of the legislation.<sup>19</sup> There shall be either express authority provided by legislation for any action to be done or it may be reasoned from interpretation of the legislation.<sup>20</sup>

But reasoning from interpretation may mislead local authorities and take invalid decisions as

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<sup>19</sup> John Sharland, *A Practical Approach to Local Government Law* (2<sup>nd</sup> ed OUP 2006) 79; see also Mark Elliot, Jackson Beatson, Martin Mathews, *Administrative Law: Text and Materials*, (Jack Beatson and Martin Mathew 4<sup>th</sup> edn, Oxford University Press 2005) 11

<sup>20</sup> SH Bailey, *cross on principles of Local Government Law*(3<sup>rd</sup> edn Sweet and Maxwell 2004) 11

interpretations vary. In England, local authorities take their decisions on the basis of Local Government Act 1972 and they are required to act within the powers the Act confers. Nonetheless, the legislation is defined widely to provide excessive powers to the authorities. For instance, s111 of the Local Government Act 1972, enables local authorities to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions.<sup>21</sup> But the section contains loose expressions like “function” and “incidental”. They are not precisely defined. s2 of the local Government Act 2000 also gives powers to local authorities to do anything which they consider is likely to promote or improve the economic wellbeing of their area, the environment and the social wellbeing of their area.<sup>22</sup> The section, however, does not state any criteria to be applied in order to know what should be considered in terms of promoting or improving the economic or social wellbeing of the area. More so, the legislation is not designed in the style that defines the precise limits of the powers. It does not also indicate guide lines for exercising powers that are incidental to the express powers. However, not only the drafting style of legislation has a functional relationship with the validity of the local authorities’ decisions but also the use of powers conferred to the authorities in the discharge of their duties needs to be used as drafted in the legislation and duties imposed on the authority needs to be fully enforced.<sup>23</sup>

Nonetheless, there are certain procedural requirements that need not be regularly respected. For instance in *Coney v Choyce*<sup>24</sup>, failure to comply with legal procedures is not necessarily a reason

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<sup>21</sup> *Hazell v Hammersmith and Fulham London Borough Council* [1991] 1 All ER 545, see also Local Government Act 1972, s. 111(1).

<sup>22</sup> Local Government Act 2000, s 2.

<sup>23</sup> Martin Loughlin, *Legality and Locality: The Role of Law in Central-Local Government Relations* (Clarendon Press 1996) 390.

<sup>24</sup> [1975] 1 ALL ER 979.

to render a decision of the authority invalid and ineffective. The legislature's failure to expressly provide in legislation for the consequences of such a failure to comply is an assumption that the legislature guarantees discretion to courts to determine whether the procedure is mandatory, in which case a failure to comply with requirement will lead to invalidity of the decision taken by the authority, or if it is directory, the deviation or non compliance with the procedures may be considered as a mere irregularity and not affecting the validity of the decision. Importantly, the courts are required to assess the legislative intent and consequences of failure to comply before declaration of any decision.

In addition, validity of local authorities' decisions will be upheld until they are set aside. However, this would be compromising the operation of the principle of *ultra vires* because unlawful acts would be maintained. An individual who wishes to challenge the validity of the decisions must have appropriate *locus standi*. If such a challenge is initiated by a person who does not have standing and outside the time limit provided by the legislation, the court will treat the decision as valid.<sup>25</sup> However, failure to specify in legislation the consequences of such failure to respect the time clause is seen as a drafting defect in the legislation and the courts may indicate what the consequences are.<sup>26</sup> Such time limit clauses, however, do not preclude legal challenge per se but they are partial ouster clauses to provide for legal challenge in a specific time.<sup>27</sup> The courts, on the other hand, need to decide if the duty to specify whether the failure of the legislation to specify the consequences of failure to indicate results is mandatory or directory and determine if the decision is valid or invalid respectively. Importantly, in deciding such a

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<sup>25</sup> Bailey, Jones and Mowbray: *Cases, Materials and Commentary on Administrative Law* (4<sup>th</sup> edn Sweet and Maxwell 2005) 861.

<sup>26</sup> Jonathan Manning, *Judicial Review Proceedings: A Practitioner's guide to Advice and Representation* (2<sup>nd</sup> edn 2004) 192.

<sup>27</sup> Neil Parpworth, *Constitutional and Administrative Law* (2<sup>nd</sup> edn Oxford University Press 2010 ) 296.

case above, the courts are required to consider the purpose of the legislation, the rationale of the provision not respected, the relationship between the clause and the purpose of the legislation and consequences suffered by the applicant.<sup>28</sup>

The court may also decide not to intervene if the decision taken is partly lawful and partly unlawful. For instance a decision taken by an authority within its jurisdiction and partly in excessive powers; or partly for lawful purposes and partly for unlawful ones; or if certain procedural requirements are not respected. In such a case, the court may decide not to set aside such a decision and instead uphold its validity if the lawful part is dominant. This is what is called severance or partial invalidity. In *DPP v Hutchinson*,<sup>29</sup> it was held that the court should refrain from speculating about what the authority would have done if it had properly applied its mind to the nature of its powers. It should instead determine whether there has been a valid exercise of the legislative power in relation to the matter which is the subject of disputed enforcement. The issue is whether the invalid part of the by-law would be severable from the valid one.<sup>30</sup> This implies that if a legislative instrument is made with limited powers and it is challenged, the court will determine whether there is any valid decision made on the basis of the limited power of the instrument. The court, however, cannot modify an invalid legislation made in excess powers.

## **2.2 Invalidity of Local Authorities' decisions**

Deliberately thwarting the intentions of the legislation is considered by courts as unacceptable act. Any local authority that attempts to refuse to adhere to requirements of the legislation takes

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<sup>28</sup> Manning (n28) 194.

<sup>29</sup> [1990] 2 AC 783.

<sup>30</sup> Paul Craig, *Administrative Law* (6<sup>th</sup> edn Sweet and Maxwell 2008 )785.

an invalid decision. For instance, In *Taylor v Munrow (1960)*,<sup>31</sup> the council simply refused to respect an enabling clause that authorize rent increment, and in *Backhouse v Lambeth London Borough Council*, the council's attempt to bypass a general rent increase by increasing the rent on one unoccupied council house was not successful. Local authorities are required to exercise powers spelt expressly or by implication. Any decisions taken outside the powers spelt in legislation are subject to judicial challenge and declared invalid.<sup>32</sup> The *ultra vires* principle ensures that the legislation of the local authority should be respected and that it does not take on a role beyond that intention of the legislation.<sup>33</sup> However, if an enabling clause provides too much discretion and provides no guidelines to exercise it, uncertainty is expected. If it provides express limits of the powers to the local authority, its application should be merely an exercise of construing the statutory language and applying it to the facts.<sup>34</sup>

Also, the legislation which provides excessive powers gives rise to different interpretations and confusion. Therefore, any local authority action taken “outside jurisdiction” or “without power to decide” is declared invalid and *ultra vires*, has no legal leg to stand on and it is legally ineffective.<sup>35</sup> However, it is argued that such actions are said to have effects until they are set aside by a relevant court.<sup>36</sup>

Local authorities' legislations have provided extensive powers to local authorities to account for their activities, and it is argued that such wide discretion has been so granted due to two reasons:

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<sup>31</sup> [1960] 1 WLR 151; [1972] 116 SJ 802.

<sup>32</sup> O. Hood Phillips and Paul Jackson, *Constitutional and Administrative Law* (7<sup>th</sup> ed Sweet and Maxwell 1987) 600.

<sup>33</sup> Ian leigh, *Law, Politics, and Local Democracy* (OUP 2000) 38.

<sup>34</sup> Wade (n 5) 30.

<sup>35</sup> Ibid 31.

<sup>36</sup> [1997] QB 306.

Firstly, in order to effect wide controls and to delegate such wide powers in terms of delegated legislation in order to increase administrative powers while devising them since the increasing size and the complexity of regulation accompanied by legislature's lack of sufficient time and enough capacity to draft for every details. The legislature in this case creates various local authorities and delegates powers to them to enable them acquire specific powers to perform activities that best suit their areas; and secondly, that many issues are to be approached at a technical perspective.<sup>37</sup> But since local authorities are provided with insufficient guidance, the wide discretion is misused in performing unlawful acts. Also, the legislations present legislative complexities due to the style of drafting. Consequently, such legislations are uncertain and have frustrated the inherent intention and the courts have declared the decisions of the local authorities invalid and ineffective.

Local authorities' decisions may also be challenged on the grounds of misuse of its discretion. For instance, the decision can be challenged if the authority performs an illegal act that is to say, if the enabling clause does not provide powers to do it, or even if it provides powers to do it, and the authority performs it in an unlawful manner.<sup>38</sup> While discretion is necessary for the local authorities, the legislature does not provide sufficient guidance on the relevant considerations regarding the use of such discretion. But again, guidance on such discretion would imply limitations. Since local authorities are autonomous bodies, limiting their discretion would be interfering with their autonomy. Further, invalidity may be declared if the authority invokes a statutory power for a collateral purpose, one that is related to the purpose for which the power

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<sup>37</sup> D. J. Galliga, *Administrative Law* (Oxford University Press 1996) 275.

<sup>38</sup> David Foulkes, *Administrative Law* (8<sup>th</sup> edn Butterworths 1995) 199; see also Elizabeth Yates, *Local Authorities and outside organizations: A Legal Perspective* (Sweet and Maxwell 1996) 120.

was granted.<sup>39</sup> This may be due to the discretion that may be conferred by the enabling clause. However, the discretion conferred must be used in the interest of the public, and in conformity with the legislative intention.<sup>40</sup> The discretion must be inferred from the construction of the legislation and be read as a whole and not to be applied in purposes outside the intention of the legislation.<sup>41</sup> A decision made for an improper purpose, is contrary to law and it conflicts with express legislative language. The power should not be used for any other collateral purpose.<sup>42</sup> The analysis we can make here is that the discretion is required to promote, and not to fail, the policy and general objectives of the legislation.<sup>43</sup> However, a legislation that confers wide discretion, coupled with no guidance of its exercise, may fail the intention of the legislation because of lack of controls. However, if there exists no controls of the discretion and the local authority considers certain matters while taking decisions and the general interpretation of the statute are held by the court to be irrelevant, then this will amount to a drafting imperfection.

In a related context, in *R v Inner London Education Authority, ex. Parte Westminster City Council*<sup>44</sup>, it was held that the employment of an advertising agency to conduct a campaign against the government's rate capping policy was unlawful as one of the authority's purposes was that of persuading members of the public to its own views and this was a legally irrelevant consideration. However, this will depend on the language of the enabling clause and how it is drafted. If the enabling clause is drafted in a style that gives the decision an unrestricted, subjective discretion using such expressions that are vague or ambiguous in the legislation to the

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<sup>39</sup> Wade (n5) 42.

<sup>40</sup> *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

<sup>41</sup> *R. v Somerset County Council ex p Fewings* [1995] 3 ALL ER 20.

<sup>42</sup> *Galloway v Mayor and commonalty of London* (1866) L.R. 1 H.L. 34.

<sup>43</sup> *Bromley LBC v GLC* [1983] AC. 768, HL.

<sup>44</sup> [1986] 1 W.L.R. 28.

extent that the decision maker is motivated by an improper purpose, or is unable to consider relevant considerations while taking the decision, the decision may be declared invalid.<sup>45</sup> But also a decision maker may ignore relevant consideration on the basis of the construction of the enabling clause.<sup>46</sup> For instance, if the relevant consideration is spelt out in the legislation but with ambiguous phrases as ‘shall consider whether the so and so is fit and proper’, ‘if the Minister thinks fit’, ‘if the local authority considers it appropriate’, the decision maker, in this context may even go further and exercise discretion and consider other “relevant considerations” that are implied in the legislation.<sup>47</sup>

Although the decision maker has followed what is stipulated in the legislation, he acts illegally by putting into account an irrelevant consideration. In such a case courts get a leeway to impose their own view as to what is relevant and they may declare the decision invalid and *ultra vires*.<sup>48</sup> But such interference may be considered as usurping the powers of the local authorities by courts, and courts are not experts in what best suits the local areas inhabitants. Instead, the solution to what should be considered relevant or irrelevant considerations need to be identified through drafting of clear and express enabling clauses.<sup>49</sup> This means therefore that any deviation from such express limits of the provisions is a neglect of the legal obligation thus any decision taken on the basis of such a clause may be rendered invalid and declared *ultra vires*.

Local authorities’ decisions may also be declared invalid as a result of failure to comply with mandatory consultation. Consultation is a formal legal requirement for the authority to take valid

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<sup>45</sup> *Revision Work Book, Administrative Law, (2<sup>nd</sup> edn Old Bailey Press 2002) 103.*

<sup>46</sup> AP Le Sueur and J W Herberg, *Constitutional and Administrative Law* (Cavandish Publishing Limited 1995) 208.

<sup>47</sup> *Ibid*

<sup>48</sup> Alder (n11) 383.

<sup>49</sup> *Ibid*

decisions. Since consultation is a fundamental component of the exercise of the authority's functions, therefore the view that consultation as a statutory requirement is a prerequisite to the exercise of decision-making powers holds.<sup>50</sup> Consultation is mandatory.<sup>51</sup> However, failure to consult, unless there is a failure to respect a legal obligation does not render a decision invalid.<sup>52</sup> Where the enabling clause so requires, consultation should be conducted. If authorities fail to comply with this legal obligation, the subsequent decision will be invalid. But consultations on the other hand create delays in administrative procedures and may trigger expectations of the consulted parties even if the views of the consulted parties are not expressed.

### **2.3 Control of the invalidity of local authorities' decisions**

Local authorities are subject to judicial control if they take any decisions exceeding limits of their powers.<sup>53</sup> Such powers are intended to be exercised only for purposes authorized by the enabling legislation. Therefore, if courts declare invalid and *ultra vires* any decisions taken by the local authorities beyond its legislative powers, then this is not usurping the powers of the local authorities, it is instead controlling unlawful acts of the authorities.<sup>54</sup> And if in turn local authorities accept the obligation to justify their powers by reference to the enabling clauses, then courts intervention where local authorities exceed their powers is justified. However, the courts lack expertise, practical competence and do not sufficient knowledge in local authority related issues. And courts are not superintendents of local authorities. Nonetheless, local authorities' legislations are so broad that the authorities tend to stray beyond the intended powers and take

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<sup>50</sup> Arden Chambers, *A Guide to Greater London Authority* (Sweet and Maxwell 2000) 33.

<sup>51</sup> *R. Secretary of State for Social Services, ex p. Association of Metropolitan Authorities* [1986] 1 W.L.R. 1.

<sup>52</sup> *R. v Devon CC, ex p. Baker* [1995] 1 All ER 73, 85.

<sup>53</sup> Hilaire Barnett, *Constitutional and Administrative Law* (8<sup>th</sup> edn Cavendish Publishing Limited 2011) 336.

<sup>54</sup> *Ibid*

unlawful decisions;<sup>55</sup> therefore the rule of *ultra vires* must ensure that the authorities do not operate beyond their legislative powers.<sup>56</sup> In addition, any person affected by an action of the local authority may take an appeal to administrative tribunal, on a point of law, which includes error of law, unfair process, and unlawful exercise of discretion.<sup>57</sup>

Also, a person who claims that the action of a local authority is unlawful and in contradiction with the Human Rights Act 1998 may justify it before the courts and claim for damages. If the court finds that the decision taken under the enabling legislation is unlawful and in breach of any of the Human Rights Act provisions, on the basis of s3 of the Human Rights Act, it can declare the incompatibility of the enabling legislation with the Human Rights Act.<sup>58</sup> However, for the sake of protecting the declaration of the incompatibility of the earlier legislation with the Human Rights Act, and save it from the interpretation of article 3 of the Human Rights Act, inclusion of an express provision in the enabling legislation with an intention to disregard the operations of the Human Rights Act would be necessary. In case of lack of express provisions in the enabling legislation, the courts presume that even the most general words are intended to be in favor of the provisions of the Human Rights Act. In any case, judges in England are required to interpret any legislation consistently with the Human Rights Act 1998.<sup>59</sup> Therefore, since the judiciary is required to interpret any clause of the Human Rights Act in a manner that is consistent with any legislation in England, then the assumption that the court is seeking the parliamentary intention is untrue and instead the judge applies his judgment and see if the language in the legislation is

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<sup>55</sup> Richard Gordon, *Judicial Review: Law and Procedure* (2<sup>nd</sup> edn Sweet and Maxwell 1996) 208.

<sup>56</sup> *Ibid*

<sup>57</sup> Timothy Endicott, *Administrative Law* (2<sup>nd</sup> edn Oxford University press 2011) 356.

<sup>58</sup> *Ibid* 357.

<sup>59</sup> Human Rights Act 1998, s 3(1).

compatible with the Human Rights Act. As a matter of constitutional practice, significant power has therefore been transferred to the judiciary.

Further, an aggrieved person may file a claim against any local authority in courts.<sup>60</sup> The courts may hear appeals against such decisions where such a right to appeal is conferred in the legislation and issues a declaration that the action was unlawful.<sup>61</sup> The right to appeal against the decision depends on the enabling clause conferring the powers to appeal and the rights to appeal are inherent in the legislation.<sup>62</sup> Courts, in reviewing such cases, are concerned with only errors of fact.<sup>63</sup> The exception is however, if the legislation is construed in such a style that the legislature authorizes that an appeal shall lie on the merits or, that the error has caused the authority to act *ultra vires*. Nonetheless, the courts may intervene in normal circumstances in correcting errors of law if the legislation is express in providing such a right, the errors of law appear on the face of the record of proceedings and the error has caused the authority to act *ultra vires*.<sup>64</sup>

The essence of such judicial control of local authorities decisions' is to ensure that the legislative intent is upheld, statutory powers not usurped, exceeded or abused and that substantive or procedural duties owed to the individual are performed as legislation requires. But in certain instances, judges act as supervisors of local authority administrators and penetrate in the authorities' powers. But judges are not supervisors of the authorities instead they ensure respect

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<sup>60</sup> B.L Jones and K Thompson, *Garner's Administrative Law* (8<sup>th</sup> edn Butterworths 1996) 151.

<sup>61</sup> Bailey (n 21) 409.

<sup>62</sup> Jones (n 27) 162.

<sup>63</sup> Bailey (n 21) 409.

<sup>64</sup> Ibid

of the rule of law,<sup>65</sup> a context, in which Craig argues that when the legislature passes legislation, the courts will impose control mechanisms which are justified on grounds of justice and maintenance of the rule of law.<sup>66</sup> However, the legislature rarely provides sufficient guidance in legislation as to what constitutes the principles of judicial review. So if the legislature does not explicitly indicate procedures for control of the local authorities, then, it has to explicitly make it clear.<sup>67</sup> Therefore, if the legislature fails to clearly indicate the limits of judicial control on the local authorities, then the legislation will be ineffective and certainly courts are required to determine the procedural and substantive principles of judicial review or else invoke principles of common law to supplement the legislative intent. However, courts rely on presumptions of interpretation which may reflect perceptions of the community values, although this does not mean public opinion.<sup>68</sup> While interpreting legislation, however, in order to uphold the legislative intent and to enable the local authorities act within the scope of the legislation and ensure the respect of the rule of law, judges need to act reasonably. Moreover, an effective enabling legislation that is free from obscurity, imprecision and unambiguity is crucial. It is of practical significance that drafters, while pursuing effectiveness of legislation, pay much attention to clarity, precision and unambiguity which are discussed in the next chapter.

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<sup>65</sup> Jones (n 27) 162.

<sup>66</sup> Craig (n 32) 21.

<sup>67</sup> Ibid

<sup>68</sup> Alder (n 11) 376.

## **CHAPTER 3: SEARCH FOR EFFECTIVENESS OF LOCAL AUTHORITY ENABLING LEGISLATION**

Drafters are required to write clear and easily understood local authority enabling legislations. Effectiveness of the enabling legislation requires that the legislation be clear and plain to avoid equivocation, enhance transparency in governance of local authorities and for maintenance of the rule of law. The law must be formulated with sufficient precision to enable the local authorities take decisions within the limits of the enabling clause and to enable the audience of the legislation to clearly understand with certainty the requirements of the law and consequences of failure to comply with it. However, many local authority legislations are formulated with ambiguity, vagueness and in broad terms and their interpretation and application cause practical challenges. This chapter examines three criteria namely; clarity, precision and unambiguity, which drafters are required to apply in drafting legislation to avoid ambiguity and to ensure that intended purpose of the legislation is commonly understood, validity of decisions is embraced, courts relieved from the several case logs, intended interpretation of legislation is achieved, controversy among the litigants and the level of judicial applications are tremendously reduced, and that the law achieves credibility and effectiveness it deserves.

### **3.1 Clarity**

According to Compact Oxford English Dictionary, clarity is defined as the state or quality of being clear and easily perceived or understood.<sup>69</sup> Lord Denning recommended that for purposes of achieving effectiveness of legislation, the first principle is to adopt simpler language and

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<sup>69</sup> C Soanes (ed), *Compact Oxford English Dictionary* (2<sup>nd</sup> edn OUP 2003) 193.

shorter sentences; that simplicity and clarity of language are essential.<sup>70</sup> However, Miers rejects the view that the legislation that accurately expresses the government's intentions is the one whose provisions are clearly and precisely stated.<sup>71</sup> On the contrary, Daniel Greenberg argues that the use of clear language is not a luxury or a fad, but a fundamental necessity of legislative drafting.<sup>72</sup> Daniel also cautions of the constraints of the system in which a piece of legislation that is not clear as it might have been is produced, may account for clarity as well.<sup>73</sup>

Clarity in legislation is very important because it eliminates any other meaning that may compromise the purpose of the legislation. Keith argues that since the local authority legislation is drafted in broad terms, it may well be that its wording is wide and generous,<sup>74</sup> and therefore may lack clarity thus causing equivocation in the legislation and as a result any subsequent act performed by the authority is likely to be declared invalid and *ultra vires*. Local authorities in certain instances exceed the limits of the powers due to obscure legislation. As earlier noted, the legislature lacks sufficient time to legislate for every detail, and drafters rarely provide sufficient legislative guidance to demarcate the boundaries of the local authorities while taking decisions. A piece of legislation that is obscure, widely drafted and inconsistent is not easily understood. The legislation becomes uncertain and unpredictable. For instance, in *Staden v Tarjanyi*,<sup>75</sup> a by-law was quashed due to lack of certainty. The by-law made it unlawful to fly a glider "in a pleasure ground." It was stated that for a byelaw to be valid, it must be certain and clear in the sense that anyone engaged upon the otherwise lawful pursuit must know with reasonable

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<sup>70</sup> The Renton Report on *The preparation of Legislation* CMND 6053 (1975) p 27; see also JF Burrows and RI Carter, *Statute Law in New Zealand* (4<sup>th</sup> edn LexisNexis 2009) 116.

<sup>71</sup> D.R Miers and A C Page, *Legislation* (Sweet and Maxwell 1982) 90.

<sup>72</sup> Daniel Greenberg, *Craies on Legislation* (9<sup>th</sup> edn Sweet and Maxwell 2008) 337.

<sup>73</sup> *Ibid* 339.

<sup>74</sup> Keith Davis, *Local Government Law* (Butterworths 1983) 59.

<sup>75</sup> (1980) 78 LGR 614.

certainty when he is breaking the law and when he is not breaking the law. This means that an uncertain and obscure byelaw is invalid. Also, an uncertain and obscure bylaw does not provide sufficient guidance to the reader and hence it fails to demarcate between the legal act and the illegal one.

In the above context therefore, any person who may be penalized under the by-law cannot understand which act is unlawful. The by-law lacks certainty and does not clearly indicate when and where flying the glider becomes illegal. Many modern statutes, however, result not only from the use of obscure terminology, but also from the complexity of the subject matter, coupled with the fact that most changes in the law have to be knitted into the complex fabric of existing of statutory provisions; and the legislature is not always receptive to the best popular language, sometimes preferring lawyerly language.<sup>76</sup> However, a by-law cannot be struck down due to its uncertainty but it can be void if it is meaningless but not because it is uncertain. Even though, a statute is obscure, or has several meanings, the courts have to identify its meaning instead of nullifying it.<sup>77</sup>

Clarity in legislation enhances transparency in governance in local authorities. For this to be successful, the intention of the legislation needs to be expressed and communicated to the governed in a clear and direct manner. Cane argues that the requirement of clarity in legislation is a desideratum of valid law independent of any notion of reasonableness and that vagueness is, therefore, an independent ground of judicial review.<sup>78</sup> Thornton also supports the view that the

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<sup>76</sup> John Bell and George Eangle, *Statutory interpretation* (Butterworths 1995) 202.

<sup>77</sup> *Manchestership Canal v Manchester Racecourse Co* [1900] 2 360-361.

<sup>78</sup> Peter Cane, *Administrative Law* (4<sup>th</sup> edn Oxford University Press 2004) 261.

drafter needs to write legislation clearly and to be intelligible.<sup>79</sup> The drafting of clear and express enabling clauses to spell out the limits of the powers of the local authorities is a necessity for validity of decisions. However, Martin Loughlin argues that since local authorities have multiple functions of administration of the local population, their discretion is also necessary in policy innovative ways by providing the capacity to increase the nature of social and economic services they provide to the local population, who are, arguably the initiators of such innovation.<sup>80</sup> He further argues that although the policy is adopted by the central government, it is sent back to the Local level through policy guidance and clear legislation for the readers to understand it and hence acknowledging the relevancy of clarity in local authority legislation as a tool for effective legislation without which policy implementation would be ineffective.<sup>81</sup>

Clarity in local authority legislation is required for maintenance of the rule of law.<sup>82</sup> Anne Seidman and co-authors say that clear enabling clauses facilitate understanding of the law, communicate the requirements of the law, provide what the legislation grants to the local population and also determine how the authorities should behave as well. To achieve that, the legislation should be clear and plain. It should be expressed in terms that can be easily understood by those who have to apply it. On the other hand, absence of clarity undermines the rule of law and it is unfair to those who wish to preserve the rule of law. Drafters, while drafting, should respect circumstances which directly affect local authorities, and give much attention to clarity and simplicity of expression of enabling clauses. Drafters are expected to express the intention of the legislation accurately. In addition, drafting instructions submitted to the drafter

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<sup>79</sup> G.C Thornton, *Legislative Drafting* (4<sup>th</sup> ed Butterworths 1996) 52.

<sup>80</sup> Martin Loughlin, *Local Government in the Modern State* (Sweet and Maxwell 1986) 2.

<sup>81</sup> Ibid

<sup>82</sup> Anne Seidman, Robert B. Seidman and Nalin Abeyesekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafter* (The Hague: Kluwer Law International, 2001) 255.

need to be clear and precise to provide sufficient information and not to leave him with any other options.<sup>83</sup>

Clarity in legislation induces transformation. Loughlin believes that local authorities' clear legislation enables administrators to take valid decisions and this attracts investors. This leads to increased development of the local areas and thus realization of the betterment of the local population through various services offered by innovations of the local authorities.<sup>84</sup> However, clarity in legislation may be ignored due to the following reasons; firstly, if there is a need to utilize ambiguity for political disagreements among the groups that implement the legislation and those subject to it, secondly, if there is need to provide discretion to local authorities,<sup>85</sup> and thirdly, to reduce the opportunities to challenge the exercise of powers conferred.<sup>86</sup>

Nonetheless, such a drafting imperfection is a challenge to the respect of the rule of law since the readers of the legislation will not clearly understand what the legislation requires and what it grants to them. Also, the imperfection would not provide the courts with positive and sufficient guidance as to the purpose underlying a statutory provision since the legislation is vague and ambiguous.<sup>87</sup> Further, it would be unreasonable to draft so obscure a legislation that its effect could not be assessed without incurring the expense of litigation.<sup>88</sup> Indeed, the courts should be allowed to use notes on sections, explaining the purpose and intended effect of each section or schedule as an aid to understanding the legislation, but words contained in the legislation should

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<sup>83</sup> *Merkur Island shipping corp. v Laughton and others* [ 1983] 2 AC 570.

<sup>84</sup> Loughlin (n 84) 2.

<sup>85</sup> *Ibid* 257.

<sup>86</sup> Miers (n 75) 91.

<sup>87</sup> Bell (n 80) 201.

<sup>88</sup> *Ibid*

prevail unless they are not sufficient by themselves for determining its effect.<sup>89</sup> The drafter therefore has the responsibility to give effect to local authority legislation even if the consequence is a reduction of clarity and precision.

### 3.2 Precision

According to Shorter English Dictionary, precision is defined as the fact, condition or quality of exactness, definiteness, distinctness and accuracy.<sup>90</sup> Helen Xanthaki argues that precision is traditionally viewed as the main aim of common law drafters who make the greatest effort to ‘say all, define all; to leave nothing to the imagination; never to presume upon the reader’s intelligence’.<sup>91</sup> Precision however, emphasizes detail and tends to result in complexity.<sup>92</sup> Rick Bigwood emphasizes the necessity of precision in legislation so as to avoid ambiguity.<sup>93</sup> With precision in legislation, the drafter attempts to predict and to provide for every eventuality, the drafter deals with every small point, blocks every loop hole and ties up every loose end. However, precision is not suitable for all legislation. Precision in drafting may be required in criminal statutes, revenue law, business, commerce or when broad powers could infringe on basic human rights.<sup>94</sup> On the other hand, overwriting by the drafter in attempts to attain complete precision and unambiguity further obscures the legislation.<sup>95</sup>

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<sup>89</sup> *Westminster City Council v National Asylum Support Service* [2002] UKHL 38.

<sup>90</sup> H W Fowler and Jessie Coulson, *Shorter Oxford English Dictionary* (CT Onions ed, 3<sup>rd</sup> edn, OUP 1973) 1651.

<sup>91</sup> H Xanthaki, ‘On Transferability of Legislative Solutions: The Functionality Test’ in: C Stefanou and H Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate, Aldershot 2008) 10.

<sup>92</sup> Peter Goodrich, *Reading the Law: A critical Introduction to Legal Method and Techniques* (Blackwell Ltd 1986) 52.

<sup>93</sup> Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis 2004) 71.

<sup>94</sup> Xanthaki (n 95) 11.

<sup>95</sup> JF Burrows and RI Carter, *Statute in New Zealand* (4<sup>th</sup> edn LexisNexis 2009) 109.

Achievement of clarity and precision in legislation, however, requires specificity and drafters must pay special attention to writing their bills' details in clearly stated legislative sentences that use words accurately to achieve specificity.<sup>96</sup> Precision in local authority enabling clauses guides the local authority administrators to take valid and accurate decisions in the boundaries of the legislation. However, the proper degree of specificity may vary from one subject area to another and therefore it is the drafter to determine the best suitable level of specificity of the local authority legislation, and to consider the readers of the legislation including the judges who will need to interpret the legislation in order to declare valid decisions.<sup>97</sup> The reasons for using precision and accuracy in legislation are clear. This point was expressed by Sir Christopher Jenkins, a UK First Parliamentary Counsel in a report submitted to the Select Committee on the Modernization of the House of Commons. He said:<sup>98</sup>

“A Bill’s sole reason for existence is to change the law. The resulting Act is the law....A consequence of this unique function is that a Bill cannot set about communicating with the reader in the same way in which other forms of writing do. It cannot use the same range of tools. In particular, it cannot repeat the important points simply to emphasize their importance or safely to explain itself by restating a proposition in different words. To do so would risk creating doubts and ambiguities that would fuel litigation. As a result, legislation speaks in a monotone and its language is compressed. It is less easy for readers to get their bearings and to assimilate quickly what they are being told that it would be if conventional methods of helping the reader were freely available to the drafter”.

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<sup>96</sup> Seidman (n 88) 256.

<sup>97</sup> Jack Stark, *The Art of the Statute* (Littleton 1996) 25.

<sup>98</sup> First Report ‘The Legislative Process’, House of Commons Session 1997-98 (Cmnd. 190).

A closer analysis of the above quotation clearly shows that since legislation is not like other documents, therefore a drafter cannot use the same tools to communicate the intention of the legislation to its readers as any other writer would do in another document. To bring a positive consequence, repetition of important points is not advisable as it may cause doubt, rather clarity would be preferable. He also emphasizes that clarity makes legislation easier to read, understand and enables readers to do what they are required to do.

Brian Hunt also realizes the relevancy of precision in legislation by advising drafters to use terms or words that have well established meaning and which have been reinforced by judicial interpretation.<sup>99</sup> This avoids ambiguity, spells accurately the requirements of legislation and sets guidelines for taking the decisions. Such terms or words are chosen and used for their precise meaning and consistency of the meaning and readers of legislation are united in their understanding and interpretation.<sup>100</sup> However, there are exceptions of the requirement of specificity and these are based on the following reasons; firstly, a sponsor of the legislation may have the drafter cover disagreement between parties by vague or ambiguous language to which the parties can agree; secondly, imprecision in legislation may be required if for whatever reason, neither the drafters nor ministerial officials are unable to prescribe procedures and criteria for ministerial rule. The legislation can confer discretion to the local authority or to whoever has the responsibility to resolve that vagueness.<sup>101</sup> However, such discretion may be qualified to a greater or lesser degree, for example by requiring that it be exercised “reasonably”.<sup>102</sup> Thirdly, imprecision may be preferred if the drafter intends to introduce general principles in legislation

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<sup>99</sup> Brian Hunt, ‘Plain Language in Legislative Drafting: An Achievable Objective or A Laudable Ideal?’ (2003) 24 (3) SLR 114.

<sup>100</sup> Ibid.

<sup>101</sup> Sideman (n 86) 258.

<sup>102</sup> Miers (n 75) 91.

and to provide a space to courts to work out their detailed application on a case basis.<sup>103</sup> Nonetheless, precision in drafting is essential to improve on good governance and protect the rule of law, and therefore to achieve this, and for the improvement of the local authority, drafters are required to always be conscious in order to avoid ambiguity in legislation.<sup>104</sup>

### 3.3 Unambiguity

Ambiguity is defined as uncertain or inexact meaning.<sup>105</sup> Ambiguity exists when words can be interpreted in more than one way. Unambiguity on the other hand is defined as words or phrases without ambiguity.<sup>106</sup> It simply means that the meaning is clear, explicit and unequivocal.<sup>107</sup> Ambiguity is the legal drafting's chief curse and the drafter should strive to avoid it in legislation.<sup>108</sup> Ambiguity is of three kinds, and these are; semantic, syntactic and contextual.<sup>109</sup> The term is used to mean not only ambiguity itself but also vagueness, generality and total failure of the legislation to address the issue at hand.<sup>110</sup>

Semantic ambiguity arises when a word has more than one definition. For instance the term "residence". Does it mean physical, legal, voting or permanent residence? What about the word Tip? It could mean: a place where rubbish is dumped, apex of an object, tilt/incline, empty/pour,

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<sup>103</sup> Xanthaki (n 97) 11.

<sup>104</sup> Seidman (n 86) 258.

<sup>105</sup> Xanthaki (n 97) 9.

<sup>106</sup> Soanes (n 75) 1251.

<sup>107</sup> Kadija Kabba, 'Gender Neutral- Language: an essential language tool to serve precision, clarity and unambiguity' (2011) 37 (3) SLR 430.

<sup>108</sup> Peter Butt and Richard Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (2<sup>nd</sup> edn CUP 2006) 22.

<sup>109</sup> Robert J Martineau Michael B Salerno, *Legal, Legislative, and Rule Drafting in Plain English* (Thomson 2005) 77.

<sup>110</sup> Ibid.

to touch gently, a hint, a warning, or a gratuity/reward.<sup>111</sup> However, Martineau advises that this kind of ambiguity can be resolved by context, but not in all cases.<sup>112</sup> Syntactic ambiguity arises when there is uncertainty what a word modifies or refers back to in legislation. For instance, “when the governor nominates the head of a department, he shall appear before the committee that oversees that department”. While the requirement of the committee appearance probably applies only to the nominee, it could mean the governor as well. The potential confusion here can be eliminated by replacing “he” with “nominee”.

Contextual ambiguity arises when it is unclear which of the two alternatives is intended. The ambiguity can be explicit or implicit, and internal or external. It is an explicit internal ambiguity when a legislation imposing a duty refers in one section to “persons” and another to “residents” or in one section to filing a document within 30 days, without any obvious reason for the difference. The explicit ambiguity is external if the differences are in different legislations. It becomes more problematic if it becomes implicit contextual ambiguity. This is a situation when one or more but not all members of a class are mentioned, leaving it up to the reader to decide whether the omission was intentional or accidental. Drafters are required to strive to draft legislation with a clear and intended meaning in order to avoid ambiguity and to ensure a clear meaning of the legislation. This facilitates in taking valid decisions and effectiveness of local authority legislation in general. The relevancy of unambiguity in legislation is that it does not leave uncertainty to the addresses.<sup>113</sup> Instead it enhances certainty in legislation, minimizes judicial misinterpretation, and validity of legislation is embraced. In addition, courts will be

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<sup>111</sup> Hunt, (n 101)118.

<sup>112</sup> Martineau (n 111) 78.

<sup>113</sup> Ester Majambere, ‘Clarity, Precision and unambiguity: aspects for effective legislative drafting’,(2011) 37 (3) SLR 419.

deterred by clear, unambiguous and objective provisions of the legislation from intervening and exercising the usual measure of control in relation to discretion entrusted to local authorities.<sup>114</sup> However, courts will be unwilling to be deferential in relation to the exercise of discretion entrusted by a widely and ambiguously drafted provision,<sup>115</sup> or if it carries out a duty unreasonably or in bad faith.

Sandra Markman argues that unambiguity in legislation diminishes the risk of court's interpretation of the legislation in different meanings especially in common law jurisdictions.<sup>116</sup> Indeed, a drafter who intends to clearly express the intention of legislation to the readers of legislation must take into account what courts have said and the reasoning they have used.<sup>117</sup> The legislation drafted with broad powers is more likely to be subjected to several interpretations and a potential judicial challenge is inevitable, but again as earlier mentioned, the more a drafter tries to avoid ambiguity, the more vulnerable the legislation will be to omissions.<sup>118</sup> Although it is a challenge to the drafter, it remains the role of the drafter to strike a health balance between the two.

Hunt argues that if unambiguity and certainty reign, intended interpretation of legislation is achieved, controversy among the litigants and the level of judicial applications are tremendously reduced and the law achieves credibility it deserves.<sup>119</sup> Although Seidman supports the argument, he also adds that laws become ineffective if they speak ambiguously and vaguely, and that

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<sup>114</sup> Bailey (n27) 430.

<sup>115</sup> Ibid

<sup>116</sup> Sandra C Markman, 'Training of Legislative Counsel: learning to draft without Neille' (2010) 36 (1) SLR 25.

<sup>117</sup> Ibid

<sup>118</sup> Hunt (n105) 116.

<sup>119</sup> Ibid.

development and good governance thrive on clear, unambiguous and precise legislation.<sup>120</sup> Unambiguity is a tool for effectiveness of legislation as it contributes to clarity and intelligibility of legislation. Ambiguity and uncertainty in local authority legislation lead to invalidity of their decisions and thus good governance and transformation which are necessary for development of the local population cannot survive. Thus in *Kruse v Johnson*<sup>121</sup>, Mathew J said:

“From the many decisions on the subject it would seem clear that a by law to be valid must, among other conditions have two properties-it must be certain, that is, it must contain adequate information as to the duties of those who are to obey, and it must be reasonable.”

In *Scott v Pilliner*<sup>122</sup>, it was held that the by-law made by a local authority was bad and cannot be supported because of unreasonableness and uncertainty. It was also stated in the same case that it is desirable for the good government of a locality that by-laws should be clear and definite, free from ambiguity and should not be drafted in wide terms.<sup>123</sup> Further, non - parliamentary rules can be struck down if they are so vague that it is impossible to say whether they are properly related to the purposes for which the law-making power was conferred.<sup>124</sup> Also, in *Strickland v Hayes*<sup>125</sup> it was held that a by-law was not only uncertain because of the ambiguous words but also *ultra vires* because it conferred a power beyond the legal power of the county council. Nonetheless, the whole bylaw cannot be struck down. It may be argued that while one part of the bylaw can be rejected, the rest may remain good. It can therefore be severable.

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<sup>120</sup> Seidman (n88) 257.

<sup>121</sup> [1898] 2 Q.B 91 at 108.

<sup>122</sup> [1904] 2 K.B. 855.

<sup>123</sup> Ibid at 858.

<sup>124</sup> Cane (n82) 261 Peter Cane, *Administrative Law* (4<sup>th</sup> edn Oxford University Press 2004) 261.

<sup>125</sup> [1896] QBD.

It is fair to say that local authority legislation in England face enormous challenges ranging from lack of clarity, ambiguity and uncertainty as a result of the style of drafting which does not provide sufficient legislative guidance. Local authorities therefore stray beyond their legal limits and perform unlawful acts under the umbrella of performing incidental functions. A critic of such a drafting style is considered in the next chapter.

## **CHAPTER 4: THE DRAFTING STYLE OF LOCAL AUTHORITY LEGISLATION: A CRITICAL ANALYSIS**

Although local authorities use legislation as a tool to regulate activities within their areas, the legislature enacts legislation in a style that provides broad powers to local authorities. Occasionally, the legislature uses loose expressions in legislation and the authorities interpret them to cover something beyond what may be found in the intention of the legislature. Even though, it is a result of the drafting style, drafters need not be criticized for such a style of drafting as the drafting instructions may not be clear enough and may leave him with other options. While it is undeniable for local authorities to exercise powers that are incidental to express powers conferred by the enabling clause; and to do anything which they consider is likely to promote or improve the economic or social well-being of their areas, the style of drafting of the enabling clauses that empower the authorities to take such functions but which do not attempt to provide sufficient guidance on the procedures to exercise the discretion conferred deserves a critique. This chapter presents a critical analysis of two sections selected from two different Acts that empower local authorities to exercise such power.

### **4.1 Section 111 of the Local Government Act 1972**

The section provides:

*“(1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do anything (whether or not involving the expenditure, property or rights*

*which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions.....*

*(3) A local authority shall not by virtue of this section raise money, whether by means of rates, precepts or borrowing, or lend money except in accordance with the enactments relating to those matters respectively.”*

Firstly, in this section, the word “function” of the local authority is not precisely defined. In *Hazell v Hammersmith and Fulham LBC*, Lord Woolf said:<sup>126</sup>

“What is a function for the purpose of the subsection is not expressly defined but in our view there can be little doubt that in this context ‘functions’ refers to the multiplicity of specific statutory activities the council expressly or impliedly under a duty to perform or has power to perform under the other provisions of the Act of 1972 or other relevant legislation. The subsection does not of itself, independently of any other provision, authorize the performance of any activity. It only confers, as the side note to the section indicates, a subsidiary power. A subsidiary power which authorizes an activity where some other statutory provision has vested a specific function or functions in the council and the performance of the activity will assist in some way in the discharge of that function or those functions.”

Also, the word “function” was defined as ‘all the duties and powers of a local authority: the sum total of the activities Parliament has entrusted to it’.<sup>127</sup> Similarly, it may also refer to powers a local authority has to perform under dependence of other provisions of 1972 Act. This means

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<sup>126</sup>[1990] 2 Q.B. 697, 722-723.

<sup>127</sup> [1991] 1 All ER 545 at p. 554; see also Bailey (n 27) 396.

that the section does not confer powers to perform an activity that is independent of any other provision. It merely confers powers basing on other provisions. This lack of precise definition may be a justification to brand the section ambiguous and may mislead the local authorities in indulging in activities that are not their functions thus they may be subject to judicial scrutiny.

Secondly, the word “incidental” is not objectively defined as well to describe, beyond doubt, what activities are incidental to functions of the local authorities. This issue was identified in *Amalgamated society of railway servants v Osborn*, where Lord Macnaghaten said:<sup>128</sup>

“The learned counsel for the appellants did not, as I understand their argument, venture to contend that the power which they claimed could be derived by reasonable application from the language of the legislature. They said it was a power ‘incidental’, ‘ancillary’, or ‘conductive’...If these rather loose expressions are to cover something beyond what may be found in the language which the legislature has used, all I can say is that, so far as I know, there is no foundation in principle or authority for the proposition involved in their use,”

This implies therefore that local authorities may not gain sufficient guidance from s 111(1) of the Local Government Act 1972, on which acts they should consider incidental to their functions while invoking the implied powers conferred in the section. Lack of sufficient guidance, on the other hand may prompt local authorities to perform any act in the umbrella of incidental to their functions. In other words, the section disregards the otherwise necessary precise meaning of the words “incidental to” which may seem to mean in “connection with’. However, this may be questionable as to which activities qualify to be incidental to its functions; and whether all

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<sup>128</sup>(1910) A.C. 87.

activities performed as incidental are valid and lawful. Similarly, local authorities may engage in activities like borrowing or engaging in financial transactions, under the umbrella of performing incidental activities to its functions in exploitation of the imprecise language portrayed in the section.

Thirdly, the entire section is so widely drafted that it enables a local authority to perform, on “reasonableness”, almost any activity that it considers incidental to the express powers in the section.<sup>129</sup> It does not attempt to set the precise limits of the powers of local authorities. The section confers wide discretion to local authorities’ administrators. There is high likelihood that the wide drafting of the section provides escape routes to local authorities to misuse the powers and perform unlawful activities under the guise of performing its functions employing the test of “reasonableness”. But it should be noted that the word “reasonableness” is ambiguous and may attract subjective judicial interpretation.

Local authorities are empowered to perform their activities that are incidental to or consequential upon objects laid down under the statute, provided such activities are considered “reasonably incidental” and *intra vires*.<sup>130</sup> But the word reasonable itself is ambiguous. Sometimes, there is flexibility in the rule of *ultra vires* and courts will validate activities of local authorities, considered “incidental”, although not expressly permitted by the enabling legislation. Thus, in *Hazel v Hammersmith & Fulham*<sup>131</sup>, s 111(1) was found to be used incidentally to s 137 of the Local Government Act, but the section cannot be invoked due to its limitations. In *McCarthy &*

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<sup>129</sup> Neil Hawke and Neil, *Papworth, Introduction to Administrative Law* (Cavendish Publishing 1996) 43.

<sup>130</sup> *Attorney General v Eastern Railway* [1880] 5 A.C 473.

<sup>131</sup> [1992] A.C 1 at 29.

*Stone (Developments) Ltd v Richmond Upon Thames*,<sup>132</sup> it was held that s 111(1) empowers a local authority to impose a charge on a person for pre planning advice. The words in brackets in subsection (1) were interpreted as inclusive and not exclusive. The charges therefore, were calculated to facilitate, or conducive or incidental to the discharge of the functions of the authority. Further, subsection (3) made it clear that the raising money by rate, precept or borrowing was within the scope of subsection (1). However, restrictions in subsection (3), that raising money had to be in accordance with enactments relating to those matters applied only to the methods of raising money specified, and did not restrict the power to raise money by charges.

However, interpreting s 111(1) as an implicit authorization to a local authority to charge for performance of every function, in any event, instead of an express statutory authorization to charge is contrary to the principle identified in *Attorney General v Wilts United Dairies Ltd*.<sup>133</sup> The principle is that any authority to charge should be made clear and express by the Legislature. Further, it was held that charging such a fee was incidental to incidental because giving the advice was not a function by itself, but it was incidental to planning functions of the authority. So, charging for advice was incidental to incidental which was not in the scope of s 111(1). But in *Credit Suisse v Waltham Forest London Borough Council*,<sup>134</sup> it was held that the local authority does not act *ultra vires* and that it acts in the limits of s 111(1) of the Local Government Act 1972, when it guarantees the obligations of a company which it had helped to set up and to which it lent money with a view to fulfilling its obligations to house the homeless. At appeal, however, it was held that the authority was not entitled to discharge any of its

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<sup>132</sup> [1992] A.C 48, HL; see also Andrew Arden, Jonathan Manning and Scott Collins, *Local Government Constitutional and Administrative Law* (Sweet and Maxwell 1999) 73.

<sup>133</sup> (1921) 37 TLR 884.

<sup>134</sup> [1997] Q.B. 362.

functions by means of a partly owned company. Neither does s 111 guarantee that power nor the power to provide assistance in form of a guarantee or indemnity to such a company could be implied by reference of s 111 of the Local Government Act. Also, in *Akumah v Hackney LBC* [2005]<sup>135</sup>, although it was not expressly provided by the legislation, the House of Lords held that it was lawful to clamp cars in a car park attached to a block of the local authority at a fee. Clamping cars therefore was considered to be “incidental” to the express statutory powers of ‘management, regulation and control’ over the dwelling houses the council had, which was therefore interpreted broadly to include regulation of car parking.

Nonetheless, local authorities have escaped judicial challenge in respect to invoking s 111 on the basis of performing incidental functions and have continued to exploit the ambiguities, loopholes or uncertainties in s 111(1), and have taken ancillary activities in the name of incidental functions in order to increase their revenues.<sup>136</sup> What is incidental in a particular case, as distinct from what is being merely an implied power, are questions in respect of which different people may come to different answers.<sup>137</sup> However, it should be noted, that s111 of the Local Government Act 1972 cannot be invoked where there is another specific set of rules or legal provisions to govern such an area.<sup>138</sup>

However, in absence of a carefully and objectively drafted express provision, the courts have to look at the general legislation in order to determine the legislative purpose that need to be effected. When the Legislature enacts legislation that confers wide powers and which makes no

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<sup>135</sup>[2005] UKHL 17.

<sup>136</sup> John F. McEldowney, *Public Law* ( 2<sup>nd</sup> edn Sweet and Maxwell 1998) 411.

<sup>137</sup> *Ibid.*

<sup>138</sup> See *Hazell* (n132).

explicit reference to the controls which should regulate the exercise of the powers, the courts assume that the legislature delegated the powers to courts to control the exercise of powers by setting express provisions to bridge the legislative gap but in conformity with the principle of the rule of law.<sup>139</sup> However, a problem arises, where courts also fail, in absence of express provision in the legislation, to understand in which circumstance and to what extent should they intervene in order to review the decisions taken by local authorities in the exercise of their discretion provided in the enabling legislation. In any case, however, it should be emphasized that the courts have the right to determine what is lawful.<sup>140</sup>

In most cases a number of local authorities rely on the widely drafted s 111 in order to avoid central government controls on borrowing and expenditure and end up in committing invalid acts and which are declared *ultra vires* by courts. For instance, in *credit Suisse v Allerdale Borough Council*<sup>141</sup>, the council did not escape judicial disapproval. Although, local authorities were empowered to provide recreational facilities under other relevant statutory powers, they were not expressly empowered to create companies in order to raise capital outside the normal limits of the legislation under the umbrella of incidental function.<sup>142</sup> Nor could such a power be implied in s 111 of the Local Government Act 1972. Although, the flexibility of s 111 is important for local authorities, the style in which it is constructed does not provide sufficient guidance in express terms on limits in which the authorities may exercise their powers. Local authorities are therefore tempted to indulge in performing activities that neither fall within the express nor implied

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<sup>139</sup> Elliot (n17) 21.

<sup>140</sup> De Smith, Woolf and Jowell's, *Principles of Judicial Review* ( Sweet and Maxwell 1999) 154.

<sup>141</sup> [1996] 4 All ER 129.

<sup>142</sup> Molan (n9) 85.

powers of the local authorities.<sup>143</sup> The implied powers in the section do not provide an escape route from the statutory controls. However, it would be impossible to define precisely every purpose for which every function has to be performed in the day to day operations of local authorities which probably explains the very broad power inherent in s 111 of the Local Government Act 1972.

Thus, still, in *Hazell v Hammersmith and Fulham*,<sup>144</sup> the local authority invoked s 111(1) and although, the section empowered the local authorities with certain borrowing powers, “calculated to facilitate, or conducive or incidental to, the discharge of any of their functions”, the precise legality of such any investment was subject to doubt. It was held that the action of the authority was invalid and therefore *ultra vires* on the fact that section 111(1) conferred no express power to the local authority to be involved in any financial transactions, although the same section conferred implied power to do anything ancillary to discharge of its functions. In other words, the section does not provide in express terms any authority to do anything which is incidental to the discharge of its functions, which included borrowing, and in consideration of the limits of section 111, financial transactions were not calculated to facilitate, or conducive or incidental to the discharge of the council’s functions within the meaning of section 111 (1) of Local Government 1972.

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<sup>143</sup> Ibid.

<sup>144</sup> [1991] 2 W.L.R 372.

## 4.2 Section 2 of the Local Government Act 2000

Section 2(1) of the Local Government Act 2000 provides that:

*A local authority has power to do anything which they consider is likely to achieve one or more of the following objects: the promotion or improvement of the economic well-being of their area, the promotion or improvement of the environmental well-being of their area, and the promotion or improvement of the social well-being of their area.*<sup>145</sup>

Section 2(1) is drafted in broad terms that it may enable the local authorities to do anything they want under the guise of promoting or improving the well-fare of the inhabitants of their areas.

Thus, in *R v Enfield London Borough Council, ex parte J*,<sup>146</sup> Elias J said:

‘It is drafted in broad terms which provide a source of power enabling authorities to do many things which they could not hitherto have done. In my view, a ‘prohibition, restriction or limitation’ is one which will almost always be found in an express legislative provision. I do not discount the possibility that such might arise by necessary implication, but I would have that would be very rare’.

The above court case concerns an interpretation of the well-being power, in conjunction with other clauses concerning restrictions and prohibition in another Act. The section was broadly drafted to make a cross references to restrictions and limitations in other enactments. This may be a source of confusion and therefore an abuse of discretion, the court held that there was no

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<sup>145</sup> Local Government Act 2000, s 2(1).

<sup>146</sup> [2002] LGR 390.

need of making cross references to other legislations. While the section is drafted in broad terms to accommodate flexibility of the rule of *ultra vires* in order to confer discretion to local authorities, it fails to expressly define in clear terms the criteria to be applied to know what is likely to achieve the well-being of their areas, and to expressly accommodate restrictions and prohibitions in itself as to the exercise of its powers. More so, although the section is subject to the mentioned restrictions and limitations referred to in section 3 of the same Act, the cases on the use of the well-being power have confirmed its wide ranging nature.<sup>147</sup>

Although, it is argued that express restrictions of the limits of powers of the local authorities inherent in s 2(1) would undermine the innovative initiatives in the field of promoting or improving the well-being of the people of their areas,<sup>148</sup> the section fails to provide sufficient guidance to local authorities on how to incur its expenses and the amount of money it will spend. The implication is that local authorities may spend and fund any person and group of persons and invest in any activities, if the authorities consider that such financing and funding contribute to the well-being of their areas. However, it is argued again that if the section could be narrowly construed to provide a margin of discretion, then it would be ineffective in many cases, and it would be undermining the initiatives of local authorities in deciding what is best for their areas.<sup>149</sup>

Section 2(2) (b) provides:

*The power under subsection (1) may be exercised in relation to or for the benefit of...*

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<sup>147</sup> Sharland (n19) 96.

<sup>148</sup> *Encyclopedia of Local Government Law*, Vol 5, Par 6-1049 (R 54. February 2002).

<sup>149</sup> Molan (n14) 86.

*(b) all or any persons resident or present in a local authority's area.*

The subsection is also so broad that it provides maximum flexibility. For instance, the word 'persons' is not defined in the context of the Act. However, according to Interpretation Act 1978, the word 'person' includes 'a body of persons corporate or unincorporate'.<sup>150</sup> Therefore, the word includes individuals and particular groups in the community like the children, women, persons with disabilities, the elderly and other several and separate legal entities in a local authority area like the churches, police force, business organizations and voluntary groups.<sup>151</sup> Further, what does "any persons resident or present" in the local authority's area mean? The subsection does not differentiate between the residents of the local authority and non residents like visitors (tourists, foreign students and members of the business community from other areas) that are staying in a local authority's area at a given time. It is questionable, therefore, whether the residents or such other groups of non residents staying in the local authority's area may be entitled to the same benefit by invoking s 2 of the local government Act 2000. In consideration of the style of how the section is drafted, however, one may not rule out the view that a local authority that exercises such wide discretion conferred by the widely drafted s 2 would breed judicial misinterpretation and consequently becomes a source of litigation.

Section (2) (4) provides that:

*"The power under subsection (1) includes power for a local authority to*

*(a) incur expenditure,*

*(b) give financial assistance to any person,*

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<sup>150</sup> Interpretation Act 1978, Sched. 1.

<sup>151</sup> Encyclopedia (n 148) par 6-1053.

- (c) enter into arrangements or agreements with any person,*
- (d) co-operate with, or facilitate or co-ordinate the activities of, any person,*
- (e) exercise on behalf of any person any functions of that person, and*
- (f) provide staff, goods, services or accommodation to any person’.*

The subsection provides a list of activities in which the authorities exercise their powers. However, the list shows how broad still the section is. Sub paragraphs (a) and (b) give broad spending powers to local authorities.<sup>152</sup> Such broad powers conferred to the local authorities do not set precise limits of the authorities. This may act as a source of misuse of power and as a subsequent means of performing unlawful acts in the name of social-welfare of the inhabitants of the respective authorities. Consequently, the acts may be subject to judicial scrutiny and declared invalid. Also, neither does the subsection indicate what (a) incurring expenditure and (b) giving financial assistance mean, nor does it identify any difference between the two. Is not giving financial assistance to any person an expenditure of a local authority? It is. More so, both sub paragraphs could have been drafted together. However, the words ‘incurring expenditure’ make it clear that it is not a piece of guidance as to how a local authority should go about by its activities but as a funding power.<sup>153</sup>

The power to give financial assistance conferred in subparagraph (b) enables local authorities to make payments to persons. The word, ‘person’ according to statutory interpretation, has its meaning and it includes other public bodies, profit or nonprofit incorporated bodies. The

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<sup>152</sup> Ibid par 6-1053.

<sup>153</sup> Sharland (n19) 95.

subparagraph, however, does not make it clear if the assistance could be in form of grants, loans or guarantees. Further, the subparagraph is so wide that people can persuade courts that they can provide the services of which other statutory provisions could not prevent. Thus in *R( Theophilus) v Lewisham London Borough Council*,<sup>154</sup> the court held that s 2 (b) could be used to provide support to a student to enable him to pursue a degree course abroad although this was outside the existing regulations governing students support.

The above analysis clearly shows that both of the sections are drafted in a style that enables the local authorities to perform activities outside their legal limits. This implies that in certain instances, the authorities take invalid decisions. Although, both of the sections provide flexibility of the principle of *ultra vires*, their failure to expressly spell out the necessary guidance to the authorities on the proper use of their discretion is quite remarkable. It is also a fact that the use of loose expressions in the sections is also common. Court cases affirm that such expressions do not provide express limits of the exercise of local authority's powers but rather a leeway to cover something beyond what may be found in the language which the legislature has used. However, such flexibility is considered to be a foundation for initiatives of local authorities in deciding what is best for their areas. Nonetheless, the leeway is utilized as a misuse of the discretion of the conferred by legislation, it encourages application of judicial misinterpretation, leads to abuse of power and compromises the respect of the rule of law.

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<sup>154</sup> [2002 ] EWHC 1371.

## CHAPTER 5: CONCLUSION

This thesis attempted to prove that valid administrative decisions from local authorities are guaranteed via clear and precise enabling clauses in the primary legislation. From the above discussion and analysis, it is clear that local authorities in England require clear legislation which expressly defines the limits of their powers in order to take valid decisions. This serves two purposes; first the local authorities are enabled to exercise their statutory powers lawfully, and secondly, it facilitates judicial interpretation of the legislation and reduces subsequent litigation. The research conducted reveal that local authorities' enabling clauses are drafted in wide and ambiguous terms. It is true therefore, that since the clauses are drafted in broad terms and do not provide sufficient guidance on which considerations are properly relevant to the exercise of the discretion of local authorities; they provide a leeway to the authorities to perform unlawful acts.

However, such considerations would be a source of limitations to the authorities' powers. This would be creating limits of exercising their discretion in identifying and interpreting policies, initiatives and procedures of achieving what is best for the inhabitants of their areas. Since local authorities are autonomous, such control of their discretion would be interfering with their autonomy. This implies that local authorities will be deprived of a certain minimum level of freedom and autonomy to think of what is best for their areas. But again it was further discovered that where the local authorities' legislation confers unrestricted and subjective discretion to the local authorities through obscure and ambiguous expressions, the authorities tend to stray beyond their statutory powers and perform unlawful acts. However, in some contexts, where the flexibility of the principle of *ultra vires* is necessary, the use of discretion may be preferable.

Also, since the Legislature does not legislate for every detail for the implementation of the policy the legislation carries, but only sets out the general policy and principles on which it is to be operated, then the existence of discretion in the local authority legislation is paramount. But there are still situations in which discretion would not be welcomed but rather resort to clear, express and rigid rules and be respected accordingly. Nonetheless, it would be unfair to say that discretion is unnecessary in the local authorities' legislation but instead, discretion can be used properly and it should not be opposed. However, there is need for the legislature to determine the right degree of discretion in every particular case.

Despite the necessity of discretion, various judicial cases indicated in this thesis suggest that where local authorities invoke widely drafted enabling clauses; their decisions may be declared invalid and *ultra vires*. In some cases also local authorities tend to take decisions unreasonably or against the intentions of the legislation in question. Therefore, courts' intervention to control the invalidity of such decisions of local authorities is justified since local authorities exceed their powers conferred by the legislation. It therefore follows that when drafting enabling clauses, it is important to determine their precise purpose and what they are designed to achieve.

Although courts are primarily responsible for interpretation of legislation, their common law role of filling the legislative vacuum is recognized as well. However, this does not mean that courts can challenge the validity of legislation. Through the exercise of judicial powers, courts instead ensure that authorities do not exceed or abuse their statutory powers, but the concept of separation of powers is relevant here. The courts should not substitute their own decisions on the merits of the case for those of the local authorities on whom the power was conferred but instead

courts should ensure that decision makers operate within the rule of law. This implies that decisions taken are within the power conferred, they are not simply arbitrary, that the decision makers themselves are not above the law and that local authorities are accountable before the law for their decisions.

Research conducted also established that most of the local authorities' legislation are drafted in loose language reflecting the fact that the legislature accepted both the need for local variation in service provision, and the competence of local authorities' administrators to make valid decisions. Further, research has proved that absence of clear and express legal limits in the local authorities' legislation is common and leads to misinterpretation and misuse of the powers of local authorities. Consequently, the authorities take decisions outside the boundaries of their legal limits, and the courts might be reluctant to apply the principle of *ultra vires* to local authorities acting under such loosely drafted enabling legislations.<sup>155</sup> This remains a critical question as courts have repeatedly affirmed their reluctance to invalidate certain decisions of local authorities taken in the exercise of discretion which is not limited by the express enabling clauses.<sup>156</sup> Although, courts are ill- equipped to decide certain issues, they maintain the right to determine which decisions of the local authorities are valid and therefore it is of utmost importance that local authority enabling clauses are drafted clearly, simply and precisely. But as earlier mentioned the legislation of the local authority is unclear and drafted in broad terms. Drafters therefore should give as high a priority to clarity and simplicity of expression as to the purpose of the legislation. Policy makers, on the other hand, should at all times be asking

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<sup>155</sup> Ian Loveland, *Constitutional Law, Administrative Law and Human Rights: A critical Introduction* (5<sup>th</sup> edn Oxford University Press 2009) 321.

<sup>156</sup> De Smith (n 147)153.

themselves and the drafters whether enabling clauses are capable of expression in clear and express language.

Research has further established that local authority enabling legislation has been drafted in a style that accommodates flexibility of the principle of *ultra vires*. This enables Local authorities perform certain activities considered to be ‘reasonably incidental’ to the express powers although not expressly authorized by the legislation.<sup>157</sup> Research has indicated, however, that not all activities performed by local authorities under the umbrella of performing incidental functions are lawful. It has been established that certain activities are permitted by courts to be incidental to express powers on the basis of case by case because cases have different facts. It is therefore a matter of analyzing case by case and statutory powers. But courts do not have the expertise to know which incidental activities which are beneficial to the authorities, and the legislature does not provide sufficient guidance on what incidental activities are. However, where a local authority exercises discretion, it has to be done in accordance with rules of reason and natural justice not according to private opinion, but according to the purpose of the legislation and the interest of the public. It should not be arbitrary or in a vague manner but in a legal fashion.

Further, and more important, it has been established that the style of drafting of local authorities’ legislation has been subject to judicial criticisms in England. As a result, courts’ interpretation of the legislation has provided specific legal meaning to the words the drafter has used. Words such as “may” and “it shall be lawful” are prima facie to be construed as permissive, not imperative. However, they may be interpreted as imposing a duty to act in a particular manner.<sup>158</sup> In view of

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<sup>157</sup> Alder (n 11) 376.

<sup>158</sup> De Smith (n 147) 157.

the above, imprecision and ambiguity, on the other hand, inherent in the local authority enabling clauses raise questions concerning applicability, predictability and certainty of the legislation in certain instances. As has been highlighted, exercising powers conferred in such enabling clauses is a cause of judicial controversy and a basis of invalidity of local authorities' decisions. Consequently, this provides sufficient grounds to justify the need for courts' intervention to establish the overall purpose of the legislation and to maintain the rule of law.

Since it is an established fact that invoking broad and obscure enabling clauses with wide powers coupled with insufficient legislative guidance is a substantial cause of controversy, a justification for judicial misinterpretation, a leeway for local authorities to engage in improper purposes and thus a ground for taking invalid decisions, therefore, drafting of the local authority legislation that clearly and expressly determines its exact scope, through the interpretation of the legislation in its context, can be of great practical significance. Good drafting leads to simplicity and clarity in legislation. In addition to clarity and simplicity, the drafter must avoid ambiguity and ensure that the law is accurately stated to provide sufficient guidance to local authorities' administrators. Precision in the law amounts to certainty in the law, which is in fact the very function of written law. It would be unreasonable to draft in principles so broad that the effect of the legislation could not be assessed without incurring the expense of litigation. Drafters should always speak of clarity, simplicity and brevity in their drafting but certainty should be paramount. And since ambiguity is the most serious disease in legislation, therefore drafters, while drafting local authority legislation, should use a language which is clear, precise and unambiguous to avoid causing doubt to those the legislation applies. However, some experts assert that clarity in

drafting is paramount. Some stress accuracy. Others emphasize that both are essential.<sup>159</sup> All in all, drafters have a responsibility to pay much attention to clarity, precision and unambiguity as tools for effectiveness of local authority legislation because clarity, precision and unambiguity in legislation ensure intelligibility, predictability, certainty of the legislation and therefore pave a way for valid decisions.

Finally, local authority legislation needs to clearly and expressly spell out the limits of the local authorities to ensure that decision makers operate within the rule of law, take non arbitrary decisions and within the power conferred by the enabling clause of the primary legislation, that the decision makers themselves are not above the law, that the legislation give rise to no serious controversy and reduce subsequent judicial misinterpretation of the law and that the legislation provides equal access to participation in the implementation of the relevant policy for good governance of the local authorities. All these values are achieved through clear, precise and understandable legislation and it is from this point that one can assert that the statement that valid local authorities' decisions are guaranteed via clear and precise enabling clauses in the primary legislation.

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<sup>159</sup> Stark (n 99) 207.

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