

# The Challenges of Rwandan Drafters in the Drafting Process for Good Quality Legislation

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## Abstract

*Rwanda is a country in search a stable legal system, which includes the drafting of quality legislation. Following the events of the 1994 genocide the lack of experienced drafters and the civil law method of decentralized drafting the Rwandan legislation tends to be of bad quality mainly because of the bad quality drafts provided by the various, often unidentifiable sources of drafting. This article spells out the specific problems that the Rwandan drafter faces and offers solutions by means of a case study. The article concludes by making some specific recommendations.*

**Keywords:** quality of legislation, Rwanda, drafting process, drafting instructions, language and drafting, precision, clarity.

## A. Introduction

### I. Background

Rwanda has been a civil law country since the colonial period. During colonialism, all legislation governing the country was made by Belgian authorities, and after independence, Rwanda continued to be governed by the civil law legal system based on German and Belgian civil law systems and customary law.<sup>1</sup> Its legal system fell into disrepair after the 1994 genocide that saw the death of an estimated 800,000 people,<sup>2</sup> including the majority of the country's lawyers.

To rebuild the legal system, one of the most important challenges for the country was the certainty that there is a fair and just judicial system. Thus, the most important issue to achieve that was to have laws of good quality. Nevertheless, to achieve the quality of legislation in Rwanda, the drafter faced some challenges in the drafting process due to the legal system in place, which has not developed a system of providing written instructions.

Until recently Rwanda was still a country with a civil law system inherited from the colonization, and this system has influenced the drafting of legislation. However, it is important to note that in Rwanda, a civil law legal system is now undergoing a transformation from purely civil law to a merger between civil law and common law. The hybrid system came after Rwanda joined the EAC in 2005,

1 E. Musiime, 'Rwanda's Legal System and Legal Materials', April 2007, <[www.nyulawglobal.org/globalex/rwanda.htm](http://www.nyulawglobal.org/globalex/rwanda.htm)>.

2 *Ibid.*

and the transformation speeded up with the adherence of Rwanda to the Commonwealth Community in November 2009, in which community most of the countries have a common law system. The evolutionary process has led to the reform of several laws such as the penal code, the law of evidence, and commercial laws, among others.<sup>3</sup>

Before dealing with the challenges that the Rwandan drafter faces in the drafting process, which include the non-involvement of the drafter in the drafting process, it is important to underline the quality of legislation. Professor Xanthaki defined legislation of good quality as one that produces the types, extent, and level of regulation required by the government. In other words, legislation of good quality is synonymous with effective legislation, namely one that leads to the efficacy of legislation.<sup>4</sup> Thus, concerning the quality of legislation, Luzius Mader points out that evaluation is concerned with the effects of legislation. They are its main object, an object that presents different aspects that can be considered from various points of view and that can be assessed against different criteria. The most frequently mentioned evaluation criteria are effectiveness, efficacy and efficiency.<sup>5</sup>

To achieve the efficacy of the legislation, the drafter has to bear in mind that the proposed solution leads to the achievement of its regulatory aim. Thus, efficacy is defined as the ability to produce a desired or intended result.<sup>6</sup> In his definition of efficacy, Delnoys<sup>7</sup> draws the link between efficacy and quality in legislation as the achievement of the least degree of litigation as a result of laws passed. With this view, to produce legislation of good quality based on efficacy, the drafter has to ensure that the legislation being produced does not conflict with other existing laws or has no deficiencies.

For this purpose, the drafter has an important role to play in finding what goals are to be achieved and helping a client decide on the best means of achieving them.<sup>8</sup> Hence, the quality of the bill depends in large measure upon the competence of the draftsman. But his task is, in a sense, impossible to fulfil. According to Driedger, the perfect bill has never been written, and never will be.<sup>9</sup> He further stated that the most a draftsman can do is to try to reduce doubt, ambiguity and foreseeable problems to a workable minimum and that his success will depend upon the extent to which he has done so.<sup>10</sup>

Some arguments have been advanced by Salembier that the goal of legislation and legal drafting is to produce documents that are absolutely precise and per-

3 Musiime, 2007, p. 7.

4 H. Xanthaki, 'On Transferability of the Legislative Solution: The Functionality Test', in C. Stefanou & H. Xanthaki (Eds.), *Drafting Legislation: A Modern Approach*, Ashgate Publishing Limited, London, 2008, p. 4.

5 L. Mader, 'Evaluating the Effects: A Contribution to the Quality of Legislation', *Statute Law Review*, Vol. 22, No. 2, 2001, pp. 119-131.

6 Xanthaki, 2008, p. 4.

7 *Ibid.*

8 R.C. Dick, *Legal Drafting* (2nd edn), Carswell, Toronto, ON, 1985, p. 29.

9 E.A. Driedger, *The Composition of Legislation: Legislative Forms and Precedents*, The Department of Justice, Ottawa, ON, 1976, p. xx.

10 *Ibid.*

fectly clear, but this goal can never be attained.<sup>11</sup> For the author, even the best drafting cannot produce absolute certainty; the best that a drafter can do is to minimize the risk of misapprehension by understanding how ambiguity arises and by using proper drafting techniques to avoid it.<sup>12</sup> To achieve the quality of legislation, as has been confirmed by Driedger and Salambeir above, the role of the drafter is very important in converting a developed legislative policy to a legislative scheme. Thus, this should be possible with the involvement of the drafter in Thornton's five stages of the drafting process. It is important to note that the involvement of the drafter in all the stages of the drafting process will help him to understand the policy, and, where necessary, to fill in the gaps in the instructions.

To achieve the efficacy of the law, the drafter should ensure that he puts into the law precisely what the client intends. Not only the efficacy but also the quality of legislation is attached to the effectiveness. Once again, Delnoy confirmed that it is widely accepted that drafters aim to be effective and efficient, 'effective' meaning that the norm produces effects, and that it does not become a dead letter, and 'efficient' in the sense that the norm should produce the desired effects, and not have perverse effects, and should so guide conduct as to achieve the desired objective.<sup>13</sup> The relationship between effectiveness and efficacy is that effectiveness seems to reflect the link between the effect produced by the legislation and the purpose of the law passed while efficacy relates to the effect of the statute and not to the effect of the policy that the statute sets out to achieve.<sup>14</sup>

In summary, effectiveness may include the effects of legal norms and the implementation of such norms. Nevertheless without the involvement of the drafter with in-depth analysis of the existing law to ensure the constitutionality of the new law as any new law is considered as amending the nature. The knowledge of existing law by the drafter will contribute in achieving the quality of legislation in the sense that it will help to avoid producing an anti-constitutional law whose implementation will be impossible. Legislation that is of good quality is legislation that is clear and unambiguous. To achieve certainty, the design and composition stages are very important as the draftsman's concern for concepts is with ascertaining and perfecting the substantive policies of his client, and with selecting the most appropriate means of carrying out those policies. Drafting, therefore, is first, thinking and, second, composing.<sup>15</sup>

The third virtue of the quality of legislation is efficiency, which can be defined as direct financial costs of implementation and compliance with legal norms, non-material factors, and all negative effects of the legislation and the extent to which its goals have been achieved.<sup>16</sup>

This article will focus on the challenges that Rwandan drafters face in achieving the quality of legislation and on proving that quality of legislation in Rwanda

11 P. Salembier, *Legal and Legislative Drafting*, Lexis Nexis, Markham, ON, 2009, p. 20.

12 *Ibid.*

13 Xanthaki, 2008, p. 4.

14 *Ibid.*, p. 6.

15 R. Dickerson, *The Fundamentals of Legal Drafting*, The American Bar Foundation, Boston, 1965, p. 7.

16 Xanthaki, 2008, p. 7.

is adversely affected by the lack of good written instructions, the non-involvement of the drafter in the initial draft and the use of three languages in drafting. In Rwanda, the drafting system has not developed a proper system of preparing written instructions to allow the drafter to understand the policy and its aim to be achieved by drafting a piece of legislation as the drafter has the role of converting the policy into a legislative shape. Better legislative drafting instruction permits the drafter to understand the background of the proposal, principal objects, how the objectives are to be achieved and the implications of the proposals.<sup>17</sup> The lack of proper instruction can lead the drafter to misunderstand the policy for which the legislation is required and consequently failed to solve the social problem raised by the policy maker.

As stated by Elliot, if the drafter receives good instructions, this will contribute to good quality of legislation. He argued that one way of improving the quality of legislation is for legislative counsel gets better drafting instructions in a timely manner, and another is by removing as many of the obstacles to drafting quality as possible.<sup>18</sup> Furthermore, as outlined by Thornton, the instructions should contain enough background information to allow the drafter to be familiar with the context, the facts and the problems that the legislation proposal is intended to meet. Good instructions will help the drafter to have enough background information, the principal object of the legislation, how to achieve these objectives and the implications for other laws.<sup>19</sup>

In Rwanda, the quality of legislation is affected by the fact that in the legislative process the drafter has rarely been involved from the beginning of the process. Owing to the colonial background of civil law, the drafting was done in each institution by the lawyer, but with the new hybrid system of civil and common law, the country has created a Legislative Drafting Services (LDS) which is under the Attorney General's Office/Ministry of Justice and has the mandate of coordinating the national legislation as provided by the Prime Minister's Order No. 18/03 of 10 September 2007 Establishing the Mandate and Structure of the Attorney General's Office/Ministry of Justice.<sup>20</sup> Even though this service has been created, the involvement of the drafter from the beginning of the legislative drafting process has not been progressing and, in most of the cases, the drafter receives a first draft already done by a consultant or other lawyers in different institutions.

The earlier involvement of the drafter in the process has its importance because as an architect, the legal draftsman must be brought into the picture long before he picks up his pencil, and he must find out as much as possible about what his client's particular problem is and then help the client bring about the

17 D.C. Elliott, *Getting Better Instruction for Legislative Drafting*, 21 October 1992, Pre-Conference Clinic on Writings Laws, Victoria, British Columbia, <[www.davidElliott.ca/legislativedrafting.htm](http://www.davidElliott.ca/legislativedrafting.htm)> (Accessed on 12 July 2011).

18 *Ibid.*

19 G.C. Thornton, *Legislative Drafting* (4th edn), Butterworths, London, 1996, p. 130.

20 Art. 2 of the Prime Minister's Order No. 18/03 of 10 September 2007 Establishing the Mandate and Structure of the Attorney General's Office/Ministry of Justice, in *Official Gazette of Rwanda* No. 18 Bis of 15 September 2007, Year 46.

desired result.<sup>21</sup> Finally, this article will look at the challenge of drafting in three languages in Rwanda and how it affects the quality of legislation. The language is very important in drafting; therefore, the drafting of normative texts should be precise and easy to understand. Thus, the drafter has a fundamental obligation to ensure that the legislation is carefully composed, clearly expressed and of consistently high quality in its language as a whole.<sup>22</sup> Nevertheless, the issue of drafting in two or more languages, as in Rwanda, where laws are drafted in three official languages (Kinyarwanda, English and French) with equal status, as provided by the Constitution of Rwanda in its Article 93 which states that “each law shall be considered and adopted in Kinyarwanda or in the language of preparation in respect of any of official languages”. Also the improvement of the linguistic quality of drafting in three languages constitutes a big challenge in the country where, most of the time, the drafter may have sufficient knowledge of one or two languages but not of all three languages; consequently, the translation will be the solution to have all laws drafted in the three languages as provided by the Constitution. In practice in Rwanda, laws are drafted in one initial language and then translated into the two other languages, often in literally, owing to the lack of linguist in the Central Legislative Service at the Attorney General’s Office.

As stated by Thornton, the process of drafting legislation may be said to begin with the receipt of drafting instructions and end with completion of an agreed draft.<sup>23</sup> By analyzing the challenges of the drafter, the outcome of that will be the quality of the legislation.<sup>24</sup>

## II. Methodology

To prove the hypothesis, this article examines first the available literature related to the legislative drafting process to surround the theoretical basis of the quality of legislation. The theoretical analysis deals in depth with the challenges that the Rwandan drafter faces in the drafting process, namely the lack of proper written instructions, the non-involvement of the drafter in the drafting process and the drafting in three languages. This analysis helps to prove how these challenges affect the quality of legislation in Rwanda. Furthermore, the theoretical part will be supported by the analysis of a case study.

As the article concerns the challenges of the Rwandan drafter in achieving good quality of legislation, the leading criterion for selecting a case study was to know whether repetitive amendments of a certain law was a sign of bad quality of that particular law. The reason for that question came from the fact that the Constitution of Rwanda, which is the highest in the hierarchy of norms, has been amended four times since 2003 when it was adopted.

The second criterion for choosing the case study, in relation to good quality of legislation in Rwanda, was to analyze two different laws, for which the first

21 C.B. Nutting & R. Dickerson, *Legislation: Cases and Materials*, West Publishing Company, St. Paul, MN, 1977, p. 672.

22 S. Lortie & R.C. Bergeron, ‘Legislative Drafting and Language in Canada’, *Statute Law Review*, Vol. 28, No. 2, 2007, pp. 81-86.

23 Thornton, 1996, p. 124.

24 *Ibid.*

draft was made by a Rwandan drafter from the Ministry of Justice, and another law that was drafted by a consultant and handed to the Ministry of Justice for comments, to analyze the final result in terms of quality.

The third criterion was to compare two different laws, for which one with written instructions and the other without written instructions, that were drafted during the process of reforming the legal system in Rwanda in the hybrid system, to align it with the East African Community and the Commonwealth system, and be able to analyze the importance of proper written instructions in the Rwandan drafting process for good quality of legislation.

In the final analysis of the two laws, emphasis will be laid on the translation by finding out in which one there are inconsistencies in the three languages.

The analysis of the case study will help to conclude this article by affirming whether proper written instructions are the only element determining the quality of legislation or whether the role played by the drafter in the drafting process is the essential element of good quality of legislation or whether both can lead to the quality of legislation.

I also interviewed and corresponded via emails with some expert in the Legislative Drafting area. For this article, the two laws that will constitute the case study are the Organic Law No. 01/2010 of 9 June 2010 establishing the National Law Reform Commission, which was drafted by a drafter from the Ministry of Justice and the Law No. 07/2009 of 27 April 2009 relating to companies, which has been drafted by the International Law Institute-Uganda African Centre for Legal Excellence (ILI) that has already been amended by the Law No. 14/2010 of 7 May 2010 modifying and completing the Law No. 07/2009 of 27 April 2009 relating to companies.

The structure of this article is related to the methodology. This article is divided into five sections. Section one is the Introduction, which gives background of the topic and the methodology. Section two, concerning the drafting process, combines the drafting instructions and Thornton's five stages. As stated by Thornton the process of drafting legislation may be said to begin with the receipt of drafting instructions and end with the completion of an agreed draft.<sup>25</sup> Subsection one analyzes how the instructions are drafted and their development from the policy until hand-over to the drafter. Subsection two analyzes the involvement of the drafter in the drafting process. This section focuses on the involvement of the drafter in the five stages of Thornton. Section three concerns the language and the drafting process. In this section, the analysis proves that the language helps to draft a law that is clear and precise and how the drafter faces challenges, in the Rwandan context, while translating laws into three languages to ensure clarity and unambiguity in the Rwanda drafting system. Section four is the case study that leads to the last section, which is the conclusion in which we make recommendations on how to resolve the challenges that the Rwandan drafter faces in the drafting process.

This work will demand enough time in the library, researching through relevant literature concerning the topic, research on the Internet and interview with

25 *Ibid.*

practitioners in the drafting domain. The research from the literature and the Internet and the result of interviews will help me to cover the challenges of drafters in the drafting process and to come up with recommendations for good quality of legislation in Rwanda.

## B. The Drafting Process

The process of drafting legislation may be said to begin with the receipt of drafting instruction and end with the completion of an agreed draft.<sup>26</sup> This section is very important for this article as the role of the drafter in this process begins even before the instructions are drafted; as for the good quality of legislation, the drafter is called to be part of the development of the policy throughout the entire process. Moreover, the main challenges of the Rwandan drafter in the drafting process are basically the lack of proper written instructions and the non-involvement of the drafter in the process. This section is crucial for this article as it concerns Thornton's five stages of the drafting process that also include the analysis of drafting instructions. For good results of the drafting process, the drafter is required to move in a logical progression from stages 1 to 5.

Thornton suggested that the drafter begin by trying to fully understand the instructions and their background, continue by analyzing the implications of the instructions, and then design the legislative scheme, proceed to draft and revise, and finally have his draft scrutinized by at least one other draftsman.<sup>27</sup> This article will illustrate that the involvement of the drafter at an earlier stage is essential in achieving the quality of the legislation and much better if he is involved from the stage of policy development, as stated by Stefanou,<sup>28</sup> namely that the role of the drafter is confined to just one stage of the policy process but spills over to other stages. It is true that the drafter has very little responsibility in the early stage of legislation, *i.e.*, in policy determination. But his major task begins after the legislative policies of the government are finally determined and ready to be expressed in legislative form.<sup>29</sup>

### I. Drafting Instructions

Drafting instructions are data provided to the legislative drafter by the policy makers as a means of assisting the drafter to draft effective legislation within the parameters detailed by the policy makers of the government.<sup>30</sup> Depending on the size of the jurisdiction and on the system, the drafter might receive written or verbal instructions. In the common law system where written instructions have been developed, instructions come from the lawyers in different institutions or ministries. In the civil system as it is in Rwanda, often the drafter does not

26 *Ibid.*

27 G.C. Thornton, *Legislative Drafting* (2nd edn), Butterworths, London, 1979, p. 102.

28 C. Stefanou, 'Drafter, Drafting and the Policy Process', in C. Stefanou & H. Xanthaki, *Drafting Legislation: A Modern Approach*, Ashgate Publishing Limited, London, 2008, p. 321.

29 Driedger, 1976, p. xv.

30 H. Xanthaki, *Drafting Instructions*, Legislative Drafting Course, IALS, London, 2010, p. 1.

receive written instructions; instead, he receives verbal instructions from the policy maker. Good or bad drafting instructions depend on the quality of the ministry's lawyer. Drafting instructions are very important because they provide the drafter with the necessary background information for the comprehension of the policy to proceed with legislation and the choice of the proposed legal means for the achievement of government policy. Thus, drafting instructions provide comprehensive information that enables the drafter to draft the legislation.<sup>31</sup>

### 1. *Function of Drafting Instructions*

The primary function of drafting instructions is to provide comprehensive information that enables the drafter to draft the legislation.<sup>32</sup> It should be noted that among other roles, the drafter has the responsibility of translating policy into legislation; thus, drafting instructions are very important and will enable the drafter to understand the policy or broad ideas from the government. Because the drafter's role is to translate policy decisions into effective law, it is not enough to simply copy down whatever the client or sponsoring official wants to say.<sup>33</sup> However, depending on the jurisdiction, the drafter might have detailed instructions or very broad instructions. The essential issue is that they must provide the drafter with the necessary background information for the comprehension of all aspects of the political decision to proceed with legislation and the choice of the proposed legal means for the achievement of government policy.<sup>34</sup>

Good instructions lead to good quality of legislation, and the drafter, by analyzing the instructions, plays an important role in advising the client whether the prescribed policy is capable of being implemented. In Rwanda, with the influence of the civil law system, there are no written drafting instructions for most cases, and the policy maker will merely give verbal instructions to the lawyer in the ministry. However, contrary to the PCO in the United Kingdom, which receives instructions from the initiating institutions and drafts all the government bills on the basis of those instructions, in Rwanda the only requirement to produce written instructions is provided by the Instructions of the Minister of Justice No. 01/11 of 20 May 2005 on the procedure to be followed when drafting bills and orders, in its Article 4, 2 which stipulates that "where a Ministry does not have the expertise required to draft a bill or an order, it gathers all ideas it wants to include in the bill and expresses them clearly in a written document".<sup>35</sup> Considering Article 4, 1 of the Ministerial Instructions, which stipulates that "each Ministry prepares a bill or a draft order relating to its sphere of activities, and technicians in the area concerned by a given bill should be associated to play a key role in this exercise". Also Article 5, 1 which stipulates that "any bill or draft order of interest to the population in general or any document containing ideas to be

31 T.St.J.N. Bates, 'Instructions and the Response', in C. Stefanou & H. Xanthaki (Eds.), *Manual in Legislative Drafting*, University Press, Cambridge, 2005, p. 38.

32 *Ibid.*

33 Salembier, 2009, p. 347.

34 Xanthaki, 2010, p. 2.

35 Instructions of the Minister of Justice No. 01/11 of 20 May 2005 on the Procedure to be followed when drafting bills and orders, in Official Gazette No. 12 of 15 June 2005.



included in the said draft should be discussed between the Ministry which initiated the draft and any other interested Ministries or other institutions before transmission to the Ministry of Justice". As the final draft in Rwanda has to be checked by the Legislative Drafting Service in the Ministry of Justice, it will be quite challenging for the drafter to analyze the draft bill without written instructions that allow the drafter to understand the policy, as mentioned by Crabbe, that instruction must state precisely what the problem is, at least to the administrator, what had given rise to the problem and what attempts had been made to solve the problem without the assistance of legislation.<sup>36</sup>

Furthermore, as pointed out by Thornton,<sup>37</sup> the process of drafting legislation may be said to begin with the receipt of drafting instructions and end with the completion of an agreed draft. In the Rwandan context, as the final draft is checked by the Ministry of Justice, it will not be easy for the drafter to analyze the final draft without having the instructions that contain all the necessary information related to the policy and the problem to be solved by the legislation. To emphasize the role of the drafter in fine-tuning instructions, Driedger mentioned that "legislative proposals usually come in the form of broad statements of policy, leaving a multitude of minor details still to be worked out and the drafter makes a contribution in rounding out the policy and filling in the details".<sup>38</sup>

To add to what Driedger has mentioned above, once instructions have been received, it is important that the drafter find as much information about the subject matter of the deed or contract as possible.<sup>39</sup> This task will be almost impossible for the Rwandan drafter as he receives verbal instructions. As Dick pointed out, the client simply cannot give instructions or brief oral instructions by telephone and ask the drafter to prepare a sufficient draft unless the document is a very simple one. In addition to written instructions, the drafter must have the chance to explore the problem with a client in a two-way conversation in order to elucidate matters that are the subject of the draft.<sup>40</sup>

## 2. *Content of Drafting Instructions*

Legislative drafting involves the attempted solution of problems faced by governments, and by society as a whole. An understanding of the problems will help in finding the solution.<sup>41</sup> Therefore, the instructions will help the drafter to analyze the problem and look for the appropriate response to the problem. By understanding the problem, the drafter must know what it is that the client wishes to achieve and must consequently understand the transaction fully, both in its business relations and in its effects in law, before beginning to state these on paper.<sup>42</sup>

36 V.C.R.A.C. Crabbe, *Legislative Drafting*, Cavendish Publishing Limited, London, 1993, p. 14.

37 G.C. Thornton, *Legislative Drafting* (3rd edn), Butterworths, London, 1987, p. 110.

38 Nutting & Dickerson, 1977, p. 681.

39 J.H. Sinclair, *Legal Drafting in Scotland*, W.Green/Sweet & Maxwell, Edinburgh, 2001, p. 34.

40 R.C. Dick, *Legal Drafting in Plain Language* (3rd edn), Carswell, Toronto, ON, 1995, p. 34.

41 Crabbe, 1993, p. 12.

42 E.L. Piesse, *The Elements of Drafting*, 9th edn, The Law Book Company Limited, Sydney, 1995, p. 1.

For analysis of the content of drafting instructions, it is necessary to consider the following four principles:<sup>43</sup>

- (a) The instructions should contain sufficient background information to enable the draftsman to see in perspective and in context the facts and problems that the legislative proposal is intended to meet.

As stated by Professor Hilton McIntosh, the goal of a legislative drafter is not to draft a provision that a reasonable person would understand. Rather, the goal is to draft a provision that an unreasonable person cannot possibly misunderstand.<sup>44</sup> To achieve precision in legislative drafting and to easily draft what anyone might understand, the drafter himself has to gather all necessary information concerning the social problem to be solved and to draft in an easy and simple language understandable by all. Thornton describes drafting instructions as 'an essay in communication' whose sole aim is to communicate information to the drafter. Proposed legislation often has a history that contributes to the solution proposed by the instructing department. The drafter needs to know of this so that it can be kept in mind during the drafting process.<sup>45</sup> To have all the information, the drafter needs to be aware of all consultations done in the process and get all references to any papers, documents or other desirable reading concerning the proposed legislation. In the context of Rwanda, where there are no proper written instructions, depending on how the drafter will be able to gather all information related to the policy, the quality of legislation might be questionable for the want of written instructions that provide necessary information to the drafter.

- (b) The principal objects of the legislation should be clearly and fully stated.

The draftsman must be introduced to the very heart of the proposals so that he is in no doubt as to their 'spirit and intent'. He must know exactly and comprehensively what the legislation is intended to achieve.<sup>46</sup> Otherwise, when the drafter has received his instructions for the preparation of legislation, his first step will be to obtain a clear understanding of the law as it stands.<sup>47</sup> Thus, to achieve the objective of the legislation, while analyzing instructions, the drafter must also attempt as far as possible to foresee the context in which the legal rules being drafted will be applied and the types of situations that they must address.<sup>48</sup> Often drafting instructions are not clear enough and fully stated as required, and the role of the drafter becomes very important to fill in the gaps. As pointed out by Nzerem, drafting instructions have been known in some cases to be notoriously

43 Thornton, 1987, p. 113.

44 Salembier, 2009, p. 2.

45 Elliott, 2011, p. 7.

46 Thornton, 1987, p. 113.

47 A. Russell, *Legislative Drafting and Forms* (3rd edn), Butterworths, London, 1931, p. 11.

48 Salembier, 2009, p. 3.

imprecise.<sup>49</sup> He continued arguing that filling in the details that have not been provided by the instructor therefore inevitably involves the drafter sometimes in substantive 'decision-making'.<sup>50</sup> Thus, the principal task in drafting is to refine and analyze the policy to the state of clarity in which the words for its expression suggest themselves naturally.<sup>51</sup> In the context of Rwanda, where written instructions are not compulsory for all new legislation as mentioned above in the ministerial instructions in its Article 4, the risk of missing the point by the drafter for lack of instruction has a negative impact on the quality of legislation.

(c) The means whereby the principal objects are to be achieved should be set out.

To achieve the purpose of the legislation, instructions should provide the draftsman with a picture of how the legislation will actually work in practice.<sup>52</sup> To be sure that the instructions contain all necessary information to allow the drafter to achieve the purpose of the legislation, the drafter must be aware not only of all the main issues concerning the proposal but also of all major administrative details. The important thing at this stage is for the drafter to gain a thorough understanding of the practicalities of the proposals.<sup>53</sup> At this stage, the instructions are very important for the good quality of the legislation to be achieved because they will allow the drafter to determine whether the prescribed policy is capable of being implemented.<sup>54</sup> Furthermore, the drafter, by analyzing instructions, helps to find what goals are to be achieved and advises a client on the best means of achieving them.<sup>55</sup> As mentioned above, in the drafting system of Rwanda where there are no written instructions most of the time, the drafter has a tough task to achieve quality of legislation. As Elliot argued, when departmental aims are well stated, the drafters' task is easier; when the aims are unclear, or incomplete, those inadequacies are reflected in the drafting.<sup>56</sup> The quality of legislation depends on good instructions, among other elements. This has been emphasized in the guide of OPC in the United Kingdom, namely that in an ideal world the policy needs to be thoroughly thought through and analyzed and then presented in a coherent and structured way to the OPC team. The better the instructions are the better the Bill will be, the more value Counsel will be able to add and the less time will be needed for the drafting stage.<sup>57</sup>

49 R.C. Nzerem, 'The Role of Legislative Drafter in Promoting Social Transformation', in C. Stefanou & H. Xanthaki, *Drafting Legislation: A Modern Approach*, Ashgate Publishing Limited, London, 2008, p. 132.

50 *Ibid.*

51 D. Greenberg, *Craies on Legislation: A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation* (9th edn), Sweet & Maxwell, London, 2008, p. 336.

52 Thornton, 1987, p. 114.

53 Thornton, 1996, pp. 131-132.

54 Driedger, 1976, p. xv.

55 Dick, 1995, p. 33.

56 D.C. Elliott, 'Preparing Drafting Instructions for Legislation', 1997, <[www.davidelliott.ca/legislative/drafting.htm](http://www.davidelliott.ca/legislative/drafting.htm)>, (Accessed on 5 August 2011).

57 Working with the Parliamentary Counsel, 29 January 2009, <[www.cabinetoffice.gov.uk/secretariats/economic\\_and\\_domestic/legislative\\_programme/guide\\_html.aspx](http://www.cabinetoffice.gov.uk/secretariats/economic_and_domestic/legislative_programme/guide_html.aspx)>, (Accessed on 5 August 2011).

- (d) The instructions should refer to all known implications and difficulties whether legal, social or administrative.

Instructions are guidelines for the drafter, allowing him to stay focus, with the proposal but bearing in mind the full context of the existing laws. Thornton pointed out that no new law can stand alone. It must be crafted to fit into the whole fabric of law, both the statute law and the common law.<sup>58</sup> At this stage of preparing instructions, the client is preoccupied with his objectives and proposals and may not focus on how the proposed law will fit into existing circumstances. Thornton advises that all anticipated difficulties and problems, whether legal, social or administrative, should be discussed. In addition, if there are any legal problems arising from the client's instructions, these should be pointed out.<sup>59</sup> Thus, the analysis of the drafter is important in the sense that if he believes that a proposed bill would result in a particular difficulty or unconstitutionality, he is duty bound to point out and may, in an extreme case, refuse instructions to draft such a bill.<sup>60</sup> In the context of Rwanda, it is very important to develop a drafting system based on written instructions to help the drafter produce laws that are not useless and with a good quality because while analyzing the instructions, the drafter should consider whether legislation is actually required, or whether it might not be possible to attain the desired end by rules made under an existing ordinance.<sup>61</sup>

### 3. *Form of Drafting Instructions*

In Rwanda, when required within the conditions specified in Article 4, 2 of the drafting instruction as well in the United Kingdom, the convention is for instructions to take the form of a narrative description of the desired outcomes.<sup>62</sup> However, instructions have to be written in a clear style and in straightforward language, allowing the drafter to have all the necessary information concerning the policy. Also, instructions permit the drafter:

- To analyze what is needed to effect to the instructions.
- To devise a structure for the new provisions, which is consistent with the policy objectives of the instructing team and which facilitates Parliamentary debate of what is proposed.
- To produce provisions that make the legal objectives clear to users of the statute book, as well as to Parliament, and which are effective when tested in the courts.<sup>63</sup>

Driedger emphasized that a draftsman does not like to receive his instructions in the form of a draft bill; he prefers them in the form of a plain statement of what

58 Thornton, 1996, p. 132.

59 Dick, 1995, p. 33.

60 Nzerem, 2008, p. 133.

61 Russell, 1931, p. 12.

62 S. Laws, 'Drawing the Line', in C. Stefanou & H. Xanthaki, *Drafting Legislation: A Modern Approach*, Ashgate Publishing Limited, London, 2008, p. 23.

63 *Ibid.*

is intended, supplemented by oral discussion.<sup>64</sup> The drafter considers himself as an architect, and for that reason he wants to involve himself in the elaboration of the bill and does not want to receive a draft already done, as his job is to help his client put in legal form<sup>65</sup> what the latter wants in substance, and to help him accomplish it as smoothly and effectively as possible. The consequence of receiving instructions in the form of a draft is that if he receives a draft, he must construe and interpret what may be an imperfect statement, and he may misunderstand what is intended.<sup>66</sup> However, contrary to what has been agreed by other authors and what is the practice in the United Kingdom where the drafter receives written instructions often supplemented by verbal additions, Van den Bergh stated that in South Africa, as in the colonies, a drafter receives a 'lay draft'. For the drafter, this represents merely the client's idea of what sort of law he would like.<sup>67</sup>

#### 4. *The Quality of Drafting Instructions*

As stated by Xanthaki, concerning the quality of legislative instruction, drafting instructions should set out the requirements in plain language. They should give the purpose and background of the Decree as fully as possible and should state what existing legislation affects the subject. They must not take the form of a layman's Draft Decree.<sup>68</sup> In addition, legislative counsel in the preparation of instructions especially for their good quality has to consider some questions that will help to produce instructions of quality. Thornton suggested that legislative counsel needs to know these things in formulating drafting instructions:

- (a) what is,
- (b) what will be, and
- (c) why.

Elliott reinforced that the 'what will be' and 'why' are both important elements of legislative drafting instructions. In writing them down, in thinking them through and in discussions about them, the 'what is to be' and 'why' help sharpen the issues from different points of view and often help create new ideas for better legislative solutions.<sup>69</sup> Good drafting instructions are instructions that give the whole picture of the legislative proposals. The aim is to communicate to the drafter what is to be achieved by legislation and how the legislation is to achieve it. Hence, as formulated by Thornton, instructions should be written in narrative form in clear, straightforward language that is as free from jargon and technical language as the substance allows.<sup>70</sup> The narrative form of instructions including all necessary information is one of the criteria for quality of drafting instruction,

64 Driedger, 1976, p. xix.

65 R. Dickerson, *Material on Legal Drafting*, West Publishing Company, St. Paul, MN, 1981, p. 91.

66 Driedger, 1976, p. xix.

67 N.J.C. Van Den Bergh, *Aspects of Legislative Drafting*, University of Zululand, South Africa, 1987, p. 64.

68 Xanthaki, 2010.

69 Elliott, 1997.

70 Thornton, 1996, p. 129.

in the sense that most drafters do not favour drafting instructions in the form of draft legislation, and there are good reasons why straightforward, clear prose is preferable.

Thornton continued arguing that a draft law is an artificial creation that is likely to be less successful as communication than straightforward prose.<sup>71</sup> A draft bill prepared by a non-drafter confuses the role of instructor and drafter and is almost certain to raise difficulties of construction and to mislead.<sup>72</sup> Eminent authors in legislative drafting such as Driedger and Thornton pointed out that good instruction needs to contain sufficient background information to enable the drafter to see in perspective and in context the circumstances and problems that the legislative proposals are intended to meet.<sup>73</sup> Thus, background information is very important because drafting is primarily a task of legal problem solving, and the compositional aspects of drafting, though of great importance, must be based not only on sound policy instructions, but also on a sound understanding of the issues to be solved.<sup>74</sup>

It is obvious that good written instructions are among key elements in the legislative process leading to good quality of legislation even though they can be supplemented by oral discussions between the drafter and the client. Another way in which the quality of legislation can be improved is if legislative counsel gets better drafting instructions in a timely manner, another is by removing as many of the obstacles to drafting quality as possible. However, in Rwanda where there are no proper written instructions for most new legislation, to achieve good quality of legislation will require putting together other elements as meetings and discussion sessions to help the drafter to get enough information related to the policy, but also special knowledge of the drafter will play an important role in achieving the quality of legislation.

## *II. The Involvement of the Drafter in the Drafting Process*

As the drafter is the translator of the government policy into legislation and, at the same time, the adviser of the policy maker on the right approach to solving the social problem, the involvement of the drafter at the earlier stages may be useful in the sense that sometimes his advice will show that no new legislation is in fact needed in order to deal with the problem, or that the problem can be adequately dealt with by means of subsidiary legislation made under existing law.<sup>75</sup>

The choice of a proper solution is crucial as legislation is thus the framework by which governments of whatever persuasion seek to achieve their purposes. For politicians, as well as for administrators, legislation becomes the means by which they attain their cultural, economic, political and social policies.<sup>76</sup> In this process of drafting legislation, the drafter has an important role to play in order to a-

71 *Ibid.*, p. 130.

72 *Ibid.*

73 *Ibid.*

74 Dickerson, 1981, p. 28.

75 R.M.M. King, *Manual on Legislative Drafting*, Commonwealth Secretariat, London, 1976, p. 2.

76 UNITAR, *The Role of Parliamentary Counsel in Legislative Drafting*, Sub Regional Workshop on Legislative Drafting for African Lawyers (Kampala, Uganda, 20-30 March 2000), p. 3.

chieve good quality of legislation. In the civil law system such as those in France, Belgium and Rwanda, the drafting of law is done in the ministry originating it, by an officer in the section responsible for the topic with which the law deals. He may or may not be a lawyer, but he is never a 'draftsman',<sup>77</sup> while in the United Kingdom, all the government laws are drafted by the Parliamentary Counsel with experienced drafters. Moreover in the United Kingdom, when the government has approved proposals for legislation and allotted a place in the legislative programme for those proposals, the draftsman is authorized to prepare the bill on the instructions of the department or departments concerned.<sup>78</sup>

In practice in Rwanda, even the lawyer in ministry rarely participates. In the preparation of the first draft, the task of preparing the first draft is given to a consultant while the involvement of the drafter plays an important role in the quality of legislation. As stated by Driedger, the quality of a bill depends in large measure upon the competence of the draftsman.<sup>79</sup> This section will look at the involvement of the Rwandan drafter in the five stages of the drafting process, which has been defined by Thornton as whereby an idea or concept concerning the framework of the society becomes government policy, is transformed to legislative shape by means of the drafting process, and eventually passes through the legislative machinery to reach the statute book as law.<sup>80</sup> This long process from the government policy to the law involves many changes because the concept at each stage is developed, refined and tested, and the role of the drafter is very important to have a fine-tuned result. In this section, the involvement of the drafter in the drafting process will be analyzed through Thornton's five stages of the legislative process, namely the understanding, analysis, design, composition and development and finally the scrutiny and testing.

### 1. *Understanding the Proposal*

The understanding stage helps the drafter to have a general picture of the problem and to finally seek a proper solution to it. Patently, it is vital for him to gain a thorough and complete understanding of the purposes of the legislation he is instructed to draft.<sup>81</sup> The understanding stage might be easily compared to the foundation of a house as the drafter is compared to an architect. Dickerson, by comparing the drafter to an architect, pointed out that an architect does not design the house for a client until he knows exactly what his client is trying to accomplish. Similarly, the legal draftsman must be brought into the picture long before he picks up his pencil, and he must find out as much as possible about what his client's particular problem is and then help the client bring about the desired result.<sup>82</sup> When receiving the instructions, the main concern of the drafter will be to find out what the client wants to accomplish and what specific problems

77 W. Dale, *Legislative Drafting: A New Approach*, Butterworths, London, 1977, p. 86.

78 *The Legislative Work of Parliament* (Halsbury's Laws of England/Parliament (Vol. 34 (Reissue) paras 728-947/6), Lexis Library.

79 Driedger, 1976, p. xx.

80 Thornton, 1996, p. 124.

81 *Ibid.*, p. 105.

82 Nutting & Dickerson, 1977, p. 672.

it involves.<sup>83</sup> In trying to understand the instructions, the drafter needs to know his client's underlying motives for introducing the legislation so as to ascertain whether they have validity and if they do, so that he can be sure that the new bill will adequately fulfil these needs or wishes in every way.<sup>84</sup>

In Rwanda, the lack of written instructions is one of the challenges of the drafter in achieving quality of legislation as the content of drafting instructions is a matter of vital importance for the quality of legislation, and the drafter will often find himself faced with vague or incomplete instructions and will need more information before he can understand all the implications of the proposed legislation.<sup>85</sup> By understanding the instructions, the drafter plays an important other role of advising the client on how the policy can be improved so as to achieve the desired result. The importance of good instructions has been confirmed by Thornton as he agreed that good instructions are a pearl beyond price and not only improve the quality of the bill but also reduce drafting time.<sup>86</sup> Finally, in addition to having full background information on the problem to be resolved, the drafter should thoroughly understand the intended and achievable aims of the project, the mechanisms selected to achieve those objectives and the foreseeable consequences of implementation.<sup>87</sup>

## 2. *Analysis of the Proposal*

The analysis stage is the response of the drafter to the instructions. It involves a summary report of the drafter of key elements of the drafter's response to the drafting instructions. With all the background information that the drafter gathered in the understanding stage, the analysis for the response report will focus on three important issues, namely the existing law, special responsibility areas and practicality.<sup>88</sup>

### i. *Legislative Proposal and Existing Law*

In the process of drafting a new law, the drafter has to bear in mind that to resolve a problem it is necessary to understand it, to know as much as possible about the condition or situation that gives rise to it. But it is also necessary to know as much as possible about the existing law that has addressed or failed to address the issue.<sup>89</sup> In addition, the drafter has to make a deep analysis of the existing law as any new law has a link with another one, and this analysis will also help the drafter to avoid the overlapping of different laws. The same idea has been confirmed by Thornton, who argues that if the written law and common law in force at a particular time in a society are regarded as a coherent whole, every

83 *Ibid.*, p. 673.

84 Van Den Bergh, 1987, p. 64.

85 King, 1976, p. 2.

86 Thornton, 1996, p. 129.

87 K. Patchett, 'Setting and Maintaining Law Drafting Standards: A Background Paper on Legislative Drafting', in C. Stefanou & H. Xanthaki, *Manual in Legislative Drafting*, University Press, Cambridge, 2005, p. 53.

88 Thornton, 1996, p. 133.

89 Dickerson, 1981, p. 28.



additional new law is properly regarded as amending the nature.<sup>90</sup> Also, Russell added that every act is made for the purpose of making a change in the law or for the purpose of better declaring the law, and must be considered with reference to the state of law subsisting when it is to come into operation.<sup>91</sup>

In Rwanda, this analysis will present a big challenge for the drafter because most of the time, he does not receive written instructions that give him necessary information of the context in which the new law has been proposed. Another challenge for the drafter is that he is not involved in the drafting process and receives the draft already done by a consultant who may not have a knowledge of the existing law of Rwanda. This will impose on the Rwandan drafter the dual task of first trying to understand the draft law without the instruction and then applying it to the existing law. The non-involvement of the drafter at this crucial stage will affect the quality of the legislation to be produced. Nevertheless, the reform of the legal system, which is being undertaken in Rwanda of moving to a hybrid system mixing the civil and the common law would help to strengthen the legislative drafting service at the Attorney General's Office with the involvement of the drafter in the initiation of new law as the Ministry of Justice has the mandate of coordinating the national legislation. As mentioned above, this stage is important because it combines the understanding with the analysis of existing legislation as formulated that the drafter, besides making himself fully aware of all facts in the problem with which he has to deal, must study all the relevant laws that have any bearing, whether directly or indirectly, on that problem.<sup>92</sup>

The involvement of a national drafter for this analysis of the existing has a great importance as the drafter must have a thorough knowledge and understanding of all provisions of the Constitution of his country to deal easily with the legal basis of the new law but also to avoid the drafting of possible anti-constitutional law. Moreover, the drafter should not confine his legal research to the law of his own country. Many problems will not be unique to his own country, and his research should be extended to the law of other countries where similar problems may have already been dealt with and where valuable precedents may be found.<sup>93</sup> In Rwanda, the involvement of the drafter for this stage is essential for the control of the constitutionality of the law as Rwanda has only the post control after laws are passed by the Parliament. This control is done by the Supreme Court. As stipulated in Article 145, 3 that, the Supreme Court has jurisdiction of hearing petitions on the constitutionality of the organic laws, laws, decree-laws and international treaties and agreements.<sup>94</sup> Hence the Rwandan drafter, if involved in the process, will be able to make this analysis easily as he is familiar with the system instead of giving the task to the consultant who does not have enough knowledge of the existing law in general and the constitution in particular.

90 Thornton, 1996, p. 108.

91 A. Russell, *Legislative Drafting and Form* (4th edn), Butterworths, London, 1938, p. 18.

92 King, 1976, p. 2.

93 *Ibid.*, p. 4.

94 Art. 145, 3, Constitution of the Republic of Rwanda of 04 June 2003, Official Gazette No. Special of 4 June 2003, p. 119, <[www.amategeko.net/display\\_rubrique.php?information\\_ID=1434&Parent\\_ID=30694645&type=public&Langue\\_ID=An](http://www.amategeko.net/display_rubrique.php?information_ID=1434&Parent_ID=30694645&type=public&Langue_ID=An)>, (Accessed on 1 January 2011).

In summary, the advice of Thornton to the drafter for the analysis of existing law is very relevant. He stated that once every new law is regarded as an amending law, the need to be aware in every case of all relevant existing law becomes very clear. The draftsman must take pains to know what it is he is amending. Relevant written law, common law and case law must be studied.<sup>95</sup>

#### ii. Legislative Proposals and Special Responsibility Areas

As the translator of the government policy into legislation, the drafter's primary task is to put that policy into legislative shape but also sometimes to advise the policy maker on the right approach to solving the social problem. Thus, the drafter has a professional duty to approach each task with objectivity.<sup>96</sup> Moreover, Maurice Kirk<sup>97</sup> agreed that the drafter has a superior ability in advising clients on their intended actions and a superior ability in putting the plans in a form that is both clear and dependable. It is really important for the drafter to get into his task with objectivity for choosing the right solution to the problem. His objectivity will be useful in the sense that sometimes his advice will show that no new legislation is in fact needed to deal with the problem, or that the problem can be adequately dealt with by means of subsidiary legislation made under existing law.<sup>98</sup> Even in Rwanda, where the drafter is not much involved in the drafting process from the earlier stages, and receives the draft already done by other people, he cannot escape his responsibility once he gets the draft and has to check on it. Driedger emphasizes the drafter's responsibility, arguing that a draftsman who is presented with a draft measure would not be discharging his duties if he assumed that a proper legislative plan had been conceived and that proper provisions had been chosen to carry it out; he cannot be expected to confine himself merely to a superficial examination of the outward form of the measure.<sup>99</sup> The drafter should pay attention to his responsibility, especially in certain areas of potential danger where the individual right of people must be protected while drafting new law. Among such areas are proposals affecting personal rights, proposals affecting private property right, and proposals for retrospective legislation.<sup>100</sup>

#### iii. Legislative Proposal and Practicality

The drafter's task, Thornton said, is not only to 'determine' the law but also to 'communicate' it.<sup>101</sup> This dual task for the drafter requires making a deep analysis of the instructions on how the law will work in practice and also ascertain whether the scheme set out in the instructions is really feasible. While drafting a new legislation, as Nzerem stated, the drafter has to bear in mind the reason for the legislation and undertake an in-depth study of the issues involved and has to

95 Thornton, 1996, p. 108.

96 *Ibid.*, p. 134.

97 Dickerson, 1981, p. 79.

98 King, 1976, p. 2.

99 Driedger, 1976, p. xix.

100 Thornton, 1996, p. 134.

101 Nzerem, 2008, p. 132.

interact with policy makers, relevant experts, politicians as well as other stakeholders in order to keep abreast of developments past, present and future.<sup>102</sup> The analysis stage is of great importance for the drafter because by analyzing the instructions in which the problem to be resolved is stated, the drafter will be able to decide what next and if the solution of a new legislation is workable, go ahead with the drafting of it. Again, the practicability of the solution will depend on the analysis of the drafter on how the problem was managed in the past and in the present and how it will be resolved for the future. Thornton's view<sup>103</sup> is that at this early stage a drafter needs to study most rigorously the practical aspects of the legislation proposed and be satisfied that the scheme will work, that the machinery proposed is practical and that the legislation will be capable of enforcement. The context of the drafting process of Rwanda which does not involve the drafter in the earlier stage of the drafting, will not guarantee the easy implementation of any new legislation owing to the fact that in the analysis of the practicality of the law, the drafter plays an important role in how the law will work in practice.

### 3. *The Design of the Law*

Seidman said that only rarely do they study the role of those who translate the law's generalized objectives into detailed legislative prescriptions, *i.e.*, broadly conceived, that of the legislative drafter.<sup>104</sup> He further argued that the role of the drafter is the design of the detailed substantive rules that 'bridge the gap' between policy maker and 'boots-in-the-mud' tasks of implementing policy.<sup>105</sup> This statement shows that this stage of designing the law is important but also insists on the role of the drafter at this crucial moment of translating what has been developed in the instructions into concrete substance.

After acquiring a thorough understanding of the proposal and the problem raised, and after assessing the implication of the proposal for the existing law, the next question in the drafter's mind will be whether further legislation will be suitable to solve the problem or whether other means will be necessary to achieve the desired result. If the drafter reaches the step where a new legislation is needed, it is essential that its structure should be designed before the textual drafting begins.<sup>106</sup> In other words, before the drafter can begin the actual composition of a draft bill, he must make a rough outline of the framework of the bill and he must decide on a scheme or arrangement that will bring together, in the clearest and most logical form, the essential provisions needed to deal with the problem.<sup>107</sup>

The role of the drafter is very important for the final result in terms of the quality of the legislation to be drafted. Again, the Rwandan drafter is not much

102 *Ibid.*, p. 133.

103 Thornton, 1996, p. 113.

104 A. Seidam & R.B. Seidam, 'Between Policy and Implementation: Legislative Drafting for Development', in C. Stefanou & H. Xanthaki, *Drafting Legislation: A Modern Approach*, Ashgate Publishing Limited, London, 2008, p. 287.

105 *Ibid.*

106 Thornton, 1996, p. 138.

107 King, 1976, p. 5.

involved in the process, although his role is crucial at this stage because he is well conversant with the system and the existing law. He will easily outline a structure that is fitting and facilitates the communication of the content at the same time as it achieves the objects of the instructions. Instead of hiring a consultant who will work without involving the Rwandan drafter and producing a draft that will be fully inconsistent with the existing law, it may be useful to work with the local drafter who knows very well, for example, all the ministerial instructions that contain basic principles of drafting in Rwandan jurisdiction.

If involved at the design stage, the Rwandan drafter will pay attention to the Instructions of the Minister of Justice relating to the drafting of the texts of laws that, for example, deal with the structure of law in its Article 2, which stipulates that any draft legislation must

- (1) Be subdivided, as far as possible, into Parts, Volumes, Titles, Chapters, Sections and Subsections according to its dimensions or its contents;
- (2) Have a single idea by article, and not include more than one article, even if this idea would have several components;
- (3) Indicate before each article a heading reflecting the idea that is developed in it.<sup>108</sup>

With this article, the wise and informed drafter will be aware that apart from having titles on the part of the law, each article too should have a separate heading. After the drafter has produced the legislative plan, he must discuss it with the sponsor to ensure that all the issues have been raised. At this stage, the plan is open to any modification by inserting new provisions or dropping some others or changing them. This stage is very important and the involvement of the drafter who is conversant with the existing law will play a great role in the quality of the law to be produced. As stated by Thornton, time spent on designing a structure is time well spent. And a sound structure lays the foundation for a draft that is understandable.<sup>109</sup>

#### 4. *Composition and Development*

Following the development of the legislative plan, which is the summary of the analysis done by the drafter from the instructions received, the composition stage marks really the beginning of producing a drafting work of the drafter in the drafting process. This stage concerns more the form and the style of the bill and especially the professional competence of the drafter. The role of the drafter at this stage, as Driedger pointed out, is to know what he wants to say before he can write a sentence, and to find out what he wants to say is his most important and difficult problem.<sup>110</sup> The drafter at this stage is the only one who will decide how many sentences it should be or what each should say. The legislative purpose of the statute is dictated by the policy instructions, but the specific ideas or rules to

108 Art. 2 of the Instructions of the Minister of Justice No. 01/11 of 14 November 2006 relating to the drafting of the texts of laws in Official Gazette No. 22 Bis of 15 November 2006, p. 5.

109 Thornton, 1996, p. 138.

110 Driedger, 1976, p. 1.

be expressed must, for the most part, come from the draftsman's own mind, and for his inspirations he must draw on his own mental capacity, on his own talents, ingenuity, training, education and experience.<sup>111</sup> The involvement of the drafter in the previous stage has enormous importance in the composition stage in the sense that the drafter completed the understanding stage with a thorough comprehension of the instructions with the full picture and background of the policy and the problem to be solved, went through the analysis stage especially by seeing if the new law is in harmony with the existing law as a whole, paying attention to special responsibility areas and the practicality of the new legislation and if the legislative plan is well done, the composition stage will be facilitated to the drafter as he knows what he wants to achieve and how the legislation will resolve the problem. According to Martineau, if the drafter is concerned initially with substance, postponing attention to style until the substance is agreed upon, the result will be legislation or a rule that is neither well thought out nor well expressed.<sup>112</sup>

As far as the composition stage, the substance and the style are concerned, if the design stage has been well developed by the drafter by including all the issues to be resolved, then the drafter will focus on the style with the result of good draft legislation. Nevertheless, like any good communicator, drafters must have the ability to convey the requirements of a legislative scheme clearly, concisely and precisely. In Patchett's opinion, to achieve this, those engaged in the composition of legislation require special legal skills.<sup>113</sup> He added that those skills derive, in part, from a clear understanding of legislative methodology and, in part, from the experience in using proven drafting techniques.<sup>114</sup> The involvement of the government drafter is very important for this composition stage as the mode and style of writing legal rules vary from one country to another. Here the Rwandan drafter will play a crucial role in the quality of legislation as he has the required knowledge of the form and style of the Rwandan jurisdiction instead of hiring a consultant to produce the first draft and leave the small task of just checking the consistency of the draft to the Rwandan drafter. Even where the special skills are necessary, a good approach to improve quality of legislation in Rwanda will be to associate the Rwandan drafter with the consultant in producing the legislation.

The other reason for why the Rwandan drafter must be involved in the composition stage is the requirement of Article 3 of the Ministerial Order relating to the drafting of the texts of laws, which stipulates that "all draft legislation shall be prepared and submitted to Cabinet in three official languages so that on each page article by article appears the three texts in parallel".<sup>115</sup> As legislative drafting requires more definite, more exacting qualities of language, and demands greater

111 *Ibid.*

112 R.J. Martineau, *Drafting Legislation and the Rules in Plain English*, West Publishing Company, St. Paul, MN, 1991, p. 6.

113 Patchett, 2005, p. 44.

114 *Ibid.*

115 Official Gazette No. 22 bis of 15 November 2006, 'The Instructions of the Minister of Justice No. 01/11 of 14 November 2006 relating to the drafting of the texts of laws'.

skill in composition than other writing,<sup>116</sup> to produce a draft of quality the drafter should be open to submitting his draft to others for comments and amendments because, as stated by Thornton, there is no need to feel embarrassed about mistakes and oversights that are discovered in the course of composition. Every draftsman produces his full share of these.<sup>117</sup> However in the context of Rwanda, it is the mere task of checking the first draft that is left to the attention of the drafter as in most cases, the first draft is produced by the consultant instead of the government drafter. This non-involvement of the government drafter in the composition stage constitutes a big challenge for the quality of legislation in Rwanda, compared with the output of this stage reflected in the house style of the drafter. This statement has been supported by Patchett,<sup>118</sup> by advocating that when writing normative provision, the drafter must adopt the drafting conventions in use in his system relating to the form and the style of legislation ('the house-style'), so that the draft is consistent with the treatment given to other laws. To achieve this, the involvement of the government drafter is required.

##### 5. *Scrutiny and Testing*

Finally the drafter reaches the stage where the work that he produces has to be checked by others in order to verify the consistency. The simple reason for giving the draft to others is that during the composition stage, the drafter, his sponsor and the instructing officer carried out many revisionary works on the draft and reached the level where they can no longer see the wood for the trees. The draftsman at this stage has a much reduced capacity to detect errors in the bill.<sup>119</sup> As the goal of legislative and legal drafting is to produce documents that are absolutely precise and perfectly clear, it is a goal that can never be attained,<sup>120</sup> further, after the composition stage, the drafter's capacity is reduced by having been involved from the beginning and by having revised the draft many times. Hence, to achieve precision and clarity, it is important that someone who was not part of the process have a fresh look at the draft. But, very often, the drafter manifests some resistance to criticism, because he believes that his work is perfect, given the time and energy he devoted to it to reach this stage of producing the first draft. For the concern of the drafter, Russell suggested that a draftsman should, so far as possible, cultivate a detached attitude towards his drafts. Every draftsman knows what a painful experience it is to listen to an amendment being suggested, which spoils the symmetry of his draft.<sup>121</sup> Finally, Russell advocates that the draftsman consider such an amendment with patience, and, unless it is clearly destructive, accept it with good grace.<sup>122</sup> Ideally, as mentioned above, at this stage, the drafter needs the input of a drafting colleague to check his work and to

116 Nutting & Dickerson, 1977, p. 667.

117 G.C. Thornton, *Legislative Drafting*, Butterworths, London, 1970, p. 106.

118 Patchett, 2005, p. 55.

119 Thornton, 1996, p. 116.

120 Salembier, 2009, p. 20.

121 Russell, 1938, p. 23.

122 *Ibid.*

give him comments on improving the quality, but curiously in Rwanda, it is at this stage that the government drafter intervenes for the first time in the drafting process, not to check, as such, but to play the role of the drafter in the five stages of the drafting process. This late involvement of the Rwandan drafter in the process is a major challenge for the quality of legislation in Rwanda. Scrutiny of the legislative text should be a continuous process throughout the drafting process at each stage, particularly to improve its clarity and check its practicality.<sup>123</sup>

### C. Language and the Drafting Process

The drafter's fundamental aim is as easy to describe as it is difficult to achieve: to produce legislation that is as clear and simple as possible, while achieving a reasonable level of certainty. Thus, language is of considerable importance in the drafting of law, and calls for language skills on the part of the drafter, especially in Rwanda where the legislation is drafted in three languages, as required by Article 3 of the Ministerial Instructions, stipulating that all draft legislation shall be prepared and submitted to the Cabinet in three official languages so that on each page article by article appears in three parallel texts. In addition to a sound knowledge of the general language, a drafter must also have knowledge of the language of the law, its terms of art, its rules of interpretation and its writing conventions. It is this knowledge and its application that make for the highest consistency across the whole body of the law.<sup>124</sup> Even though the requirement of drafting in Rwanda is drafting in three languages, in practice, laws are drafted in one language and then translated into two others.

The guideline of translation is provided by Article 4 of the ministerial instruction on drafting, which states that the translation of the texts of bills must be made with necessary technicality and with due diligence owing to the fact that the three official languages mentioned in the Constitution of the Republic of Rwanda (namely Kinyarwanda, English and French) have equal value, even if the project has been conceived in only one language. Therefore, the Rwandan drafter has to be cautious while drafting and translating laws because certain words carry limited meaning. Not only in Rwanda but elsewhere too the wording of legislation is especially difficult when more than one language is involved in conveying the legislator's message.<sup>125</sup>

Hence, persons who draft legal documents have difficulties unless they have a mastery of the principles of writing legal documents and an understanding of the language of law and of generality of expression.<sup>126</sup> For Sullivan,<sup>127</sup> it is not the

123 Patchett, 2005, p. 56.

124 D.L. Revell, 'Enhancing the Legislative Process: The Value of the Legislative Drafter', *Statute Law Review*, Vol. 32, No. 2, 2011, pp. 149-160.

125 W. Voermans, 'Styles of Legislation and Their Effects', *Statue Law Review*, Vol. 32, No. 1, 2011, p. 38.

126 S. Robinson, *Drafting: Its Application to Conveyancing and Commercial Documents*, Butterworths, London, 1980, p. 3.

127 R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th edn), Butterworths, Markham, ON, 2002, p. 156.

drafter alone who is required to have special language knowledge but also the legislature. In jurisdictions where legislation is drafted in more than one language, the legislature is presumed to express itself competently, and to the same purpose, in each of the languages in which it drafts. However, this concern raised by Sullivan has been sorted out in Rwanda by the Constitution because based on the history of Rwanda where people came back in the country after the 1994 war from different countries with different speaking languages, the legislator to be conversant in all the three official languages is not easy for everyone, even though most effort has been put in place for officials to have at least a basic knowledge of all the three official languages. In fact Article 93, 4 of the Rwandan Constitution stipulates that “all laws shall be considered and adopted in Kinyarwanda or in the language of preparation in respect of any of the official languages”.

### *I. Clarity and Language*

Professor Helen<sup>128</sup> defined clarity as the state or quality of being clear and easily perceived or understood. While drafting, the drafter has to bear in mind the audience for which the law will be applied, ranging from the lawyer to the judge, but also to the layman; therefore, the law must be easily understood by all and be as clear as possible. To achieve this purpose, language has major role to play in the legislative process. Crabbe argued that in legislative drafting, language is a means of communication. Though, it lays down our rights and our obligations, our powers, our privileges and our duties. It tells us what to do and what not to do.

For the purpose of clarity in drafting legal documents, Asprey outlined that legal drafting is another form of communication and for his clarity it is possible to write any legal document in the sort of language we use every day.<sup>129</sup> Therefore, the drafter, while drafting, should pay attention to the language to avoid any misunderstanding in the message sought to be conveyed.<sup>130</sup> In Rwanda, the drafter faces the challenge of achieving clarity in drafting as the law is drafted in three languages, where there is one original language and the other versions come from translation, while Article 4 of the Ministerial Instruction stipulates that the translation of the texts of bills must be made with necessary technicality and with due diligence owing to the fact that the three official languages mentioned in the Constitution of the Republic of Rwanda (namely Kinyarwanda, English and French) have equal value, even if the project has been conceived in only one language.

When it comes to the translation of laws, the fact that the translated versions have the same value is hypothetical because no translation is perfect. As outlined by Lortie and Bergeron,<sup>131</sup> it was claimed that even an excellent translation of a piece of legislation rarely constituted a version equal in linguistic or cultural value to the original text. Even if the drafter used everyday language to achieve clarity,

128 Xanthaki, 2008, p. 9.

129 M.M. Asprey, *Plain Language for Lawyers* (2nd edn), The Federation Press, Sidney, 1996, p. 2.

130 Crabbe, 1993, p. 27.

131 S. Lortie & R.C. Bergeron, 'Legislative Drafting and Language in Canada', *Statute Law Review*, Vol. 28, No. 2, 2007, p. 83.



as in legal context clarity requires simplicity and precision, the translation in drafting would constitute a big challenge to achieve clarity. To overcome this challenge, Asprey suggested writing in plain language, which is just writing in clear, straightforward language, with the needs of the reader foremost in mind.<sup>132</sup>

Plain language is a good suggestion for achieving clarity, even in Rwanda, where legislation is done in three languages, but, again, when it comes to translation, the question will be, is it possible to translate in plain language and to have all versions perfectly translated? The translation and the use of plain language while drafting will rarely much in many countries, depending on the languages used as it has been pointed in Malta that single words in English or Italian were translated into complex phrases, which tended to overrule any law of brevity.<sup>133</sup>

## II. *Precision and Language*

Legislative drafting as a means of communication requires more definite, more exacting qualities of language and demands greater skill in composition than other writing.<sup>134</sup> The professional skill of the drafter is very crucial in avoiding vagueness and ambiguity in legislation. Ambiguity arises where there is a double meaning, when the expression is capable of more than one meaning and vagueness connotes an uncertainty of meaning. It is distinguished from ambiguity by the fact that there is no equivocation, yet all is not clear.<sup>135</sup> The drafter should bear in mind that the bill is supposed to be read and understood by the layman. In any case, he may be sure that if he finds he can express his meaning in simple words, all is going well with his draft, while if he finds himself driven to complicated expressions composed of long words, it is a sign that he is getting lost, and he should reconsider the form of the section.<sup>136</sup> This occurs often in jurisdictions where legislation is drafted in more than one language, as it is in Rwanda.

The drafter met the problem of getting the right words while translating a piece of legislation, as mentioned above in the case of Malta, where the drafter is obliged to translate a word into a full sentence owing to lack of a corresponding word in the other language. This situation may lead to vagueness and ambiguity of a certain law as long as all versions are not well translated even when the original version was well drafted. Consistency and precision in legislative drafting are very important for legislation to be understood by everyone. This can be achieved, therefore, if the draftsman uses the same words and expressions whenever he means the same thing and different words and expressions whenever he means different things. Lack of consistency is almost sure to create ambiguity or obscurity.<sup>137</sup>

132 Asprey, 1996, p. 12.

133 European Commission, *Study on Lawmaking in the EU Multilingual Environment*, Directorate for Translation, 2010, p. 53, at <<http://bookshop.europa.eu/en/study-on-lawmaking-in-the-eu-multilingual-environment-pbHC3110678/>>.

134 Nutting & Dickerson, 1977, p. 667.

135 Crabbe, 1993, pp. 45-47.

136 Greenberg, 2008, p. 339.

137 Driedger, 1976, p. 106.

Pozzo and Jacometti<sup>138</sup> proposed that the favoured solution to precision therefore appears to be to opt for language that is as simple, common, and therefore non-technical as possible. This solution is not easily applicable in countries where legislation is done in many languages without being coupled to alternative mechanisms of facilitation. In the European Union, where legislation is drafted in over 20 languages, the translation is facilitated by the fact that each country has its own translators who can easily deal with their national language, contrary to Rwanda, where most of the drafters know one or at least two languages and are asked to work on a draft in all three languages. The drafter, while translating, will sometimes translate literally, and this will make it difficult to be precise and clear.

#### D. Analysis of Case Study

The case study concerns, first of all, the analysis of the instructions received by Sindikubwabo Emmanuel, a drafter in the Ministry of Justice of Rwanda, to draft a law putting in place a law reform commission. From these instructions, I will analyze the process taken by the drafter to produce the required draft bill. Also, in the case study I will analyze the law related to companies in Rwanda that was drafted by a consultant firm from Uganda, for which there are no written instructions apart from different meetings between the consultant firm and the Business Law Cell of Rwanda.

In the interview with Sindikubwabo,<sup>139</sup> when asked what kind of instructions a drafter may receive for drafting a new law, he said that the instructions may be in most cases oral, and rarely written, especially from the Minister. He said that in general, when asked to draft a law or a regulation, you are given different instructions (terms of reference) in line of national policy in the subject matter. He pointed out that in general, the policy encourages the drafting of laws that promote the rule of law, respect for human rights, etc. ... for a country with good quality of law (in terms of drafting, use and implementation) and constantly adapted to the evolution of the country in all matters concerned.

Specifically for drafting the law establishing the Law Reform Commission, he received the following instructions from the Minister of Justice, and he was asked to

- Consider the work of the previous commissions in Rwanda (Constitutional Commission, Judicial Reform Commission ...) and decide on the opportunity of creating a Permanent Law Reform Commission.
- Consider the work to be done by the commission in order to determine the scope of the commission to be created (commission set up for a specific work? A small group of people who would work together for a specific task? A

138 B. Pozzo & V. Jacometti, *Multilingualism and the Harmonisation of European Law*, Kluwer Law International, The Netherlands, 2006, p. 5.

139 Interview with S. Emmanuel on 18 August 2011, Principal State Attorney in the Legislative Drafting Service (Ministry of Justice, Rwanda).

permanent institution for short, medium or long term? A commission as provided by the constitution or not?).

- Consider the professional expertise of the future commissioners and whether the commission would be permanent, temporary or both.
- Consider the functioning of commission, its internal organization and the structure to be assigned.
- Do some research to find elsewhere a model that can match with what we want the commission to do.

Compared with what Driedger stated about legislative proposals usually coming in the form of broad statements of policy, leaving a multitude of minor details still to be worked out<sup>140</sup> and that many of these details can be pointed out by the draftsman when he first examines his instructions, in my opinion, what the Rwandan drafter received were not instructions, and there was no specified policy in what he received. I think these can be considered as guidelines for research in terms of finding out what would be the objectives of the Law Reform Commission and how it would work.

Contrary to what has been pointed out by Professor Bates, namely that instructions give background information that include presentation of the law, history of legislative proposals, legislative models from other jurisdictions and consultation undertaken,<sup>141</sup> the instructions given to the Rwandan drafter for drafting the law establishing the Law Reform Commission are empty and do not contain much information that can help the drafter to understand the policy and the proposals. Good instructions help the drafter to achieve the quality of law to be drafted; however, good instructions are not the only element that guarantee the quality of the legal, the involvement of the drafter in the entire drafting process makes a difference to the quality, and especially the good drafting skills of the drafter will determine the final result even if the drafter did not receive good instructions. Not only that, the knowledge of the existing laws and the legal system in general by the drafter will be instrumental in producing a law of good quality.

For example, Article 11 of the law establishing the Law Reform Commission provides that the Commission will have seven commissioners at least 30% of whom shall be females. This percentage is stipulated in the Constitution of Rwanda in Article 9, and this shows that the involvement of the Rwandan drafter is reflected in his knowledge of the existing laws and the legal system in general; therefore, this will help to avoid the drafting of unconstitutional laws. In the drafting of the law establishing the Law Reform Commission, even though the instructions are not clear, the experience and personal skills of the drafter are very important to achieve the quality of legislation. When it comes to translation of the law into the three languages, this is facilitated by the Rwandan drafter, who makes the first draft in Kinyarwanda and then translates it into French and English. It is easier to translate from Kinyarwanda to French and English than

140 Nutting & Dickerson, 1977, p. 681.

141 Bates, 2005, p. 38.

from English or French to Kinyarwanda because it is easy to find the right word in French and English, while to find the word in Kinyarwanda sometimes requires having to explain the word.

Analysis of the translated version shows a few inconsistencies in the language; for example, in Article 8 of the law establishing the Law Reform Commission, the term 'amasezerano yerekeye gahunda y'ibikorwa' in Kinyarwanda is not the equivalent of 'Performance contract' in English or 'Contract de performance' in French. The right translation of 'amasezerano yerekeye gahunda y'ibikorwa' is 'the contract of planning activities'. And the right translation of 'performance contract' in Kinyarwanda would be 'amasezerano y'imihigo'. Another example is in Article 11, where 'commissioners' is translated in Kinyarwanda by 'Abagize Komisiyo' instead of 'abakomiseri,' as it is shown in other articles.

The second case study concerns the company's law. This law was drafted by the International Law Institute-Uganda in the context of the Rwandan Commercial Laws Reforming Project for promoting investment and harmonizing the Rwanda legal system with the East African Community and Commonwealth system. This consultancy consisted in drafting 16 laws including the Company's Law. The Consultant received instructions from the Business Law Reform Cell that was put in place by the Government to follow up the reforming process. The first task of the Consultant was to examine what was in existence and what was lacking in order to create an enabling environment for local and foreign business and investment in Rwanda. The Business Law Reform Cell (the 'Cell') instructs the Project Team, in the first instance, as to what is required, and will keep the Project Team informed of all relevant activities in Rwanda such as relevant research or parallel efforts.<sup>142</sup>

In my research, I did not find written instructions given to the Consultant, and I think the 'Cell' gave verbal instructions in different meetings, as stated above. Even that the Government of Rwanda put in place the Law Reform Cell, as to coordinate the consultant work and to act as the instructing office, the final result of the consultant did not reflect the involvement of the 'Cell' in the drafting process of the company's draft bill. The existing company's law in Rwanda was law No. 06/1988 of 12 February 1988, which had 260 articles. In my opinion, the consultant would depart from the existing law and try to harmonize it with the context in which Rwanda was going in. However, the Consultant came up with a new draft completely different from the existing law which had 1,021 articles compared with 260 of the existing company's law. This situation can be explained by the lack of proper instructions given to the consultant with clear objectives of the law to be drafted. In addition, it may be noted that the 'Cell' failed to act as the instructing officer, which Thornton stated is of immense benefit to the drafter and, perhaps more importantly, to the smooth progress and timely completion of a high-quality draft, if the sponsors of proposed legislation nominate one suitable person as instructing officer for the project.<sup>143</sup>

142 International Law Institute-Uganda, *The Rwanda Commercial Law Reform Project*, Concept papers, at <[www.iliacle.org](http://www.iliacle.org)>.

143 Thornton, 1996, p. 126.

Moreover, the involvement of the Rwandan drafter in the process working with the consultant would be of much importance to the quality of the final draft as with his knowledge of the existing law and the legal system in general he could guide the consultant to stay in the Rwandan context, even though harmonization was the aim of reforming the company's law. However, as mentioned above in this article, even when the drafter receives a draft bill already done, he has to restart the whole drafting process from the understanding step to the scrutiny, and this is what happened with the draft handed out to the Ministry of Justice by the consultant. The drafting team from the Ministry of Justice went through the draft bill from the first step of the drafting process, and finally the law that was promulgated had 388 articles only instead of 1,021 from the consultant.

Another issue of this law is the translation, as the consultant was asked to submit the draft in English and French, with translation of the Kinyarwanda to be done by the Ministry of Justice. The translation of the Kinyarwanda showed some inconsistencies as the field of companies is very technical, and sometimes it was very difficult for the Rwandan drafter to find the equivalent word in Kinyarwanda. The big concern is when, for example, two versions are in conflict and one has to decide which one will prevail as Article 387 of the Law No. 07/2009 of 27 April 2009 relating to Companies stipulates that "this Law was prepared in English and was considered and adopted in Kinyarwanda". Here the situation is very sensitive compared with Article 93, 4 of the Constitution, which stipulates that in case of conflict between the three languages, the prevailing language shall be Kinyarwanda or the language that was used in the drafting of the law.

This second case study shows that even though the expertise of the drafter is needed in the drafting process, if the consultant is not working closely with the local drafter and if the instructing officer is not playing his role well, the final draft will not be of good quality and that further, it is a waste of time and double work if the local drafter has to start the process all over again to finalize the draft bill.

## **E. Conclusion and Way Forward**

Two decades after the genocide, Rwanda is still working towards restructuring its legal system to be able to deal with the consequences of the genocide, including the judgment of thousands of people who took part in the mass killing of the Tutsi during the genocide. To overcome this problem, Rwanda needed a strong judicial system, and the main challenge has been the drafting of laws of good quality. However, the lack of experienced drafters after the genocide and the influence of the civil law system, where drafting is done by lawyers or legal advisors in different ministries, have been the main reasons for this poor quality. Specifically in Rwanda, the lack of proper written instructions that give the background information of the proposal to the drafter and allow him to understand the policy, the non-involvement of the drafter in the drafting process and finally the drafting in three languages when most of the drafters have knowledge of only

one or two languages have been the major challenges in Rwanda as regards good quality of legislation.

In regard to the lack of proper instructions and following the first case study, I think that the Rwandan drafter does not receive proper written instructions; for this reason, it is very important that the legislation be drafted by the Rwandan drafter in order to fill gaps in the instructions that he receives, considering that he has at least the required knowledge of the legal system and the existing law. It would be easier for the Rwandan drafter to do in-depth research in order to complete missing details concerning the policy and the instructions, in general. Thus, as elsewhere, the involvement of the Rwandan drafter in the drafting process from the earlier stages of the process is needed to achieve quality of legislation even if the drafter does not receive proper instruction. The drafter plays an important role in achieving quality, as writing legislation is a complex task that requires an extensive knowledge of the law and an understanding of the adoption of law processes, together with mastery of language, intellectual rigor and an organized mind.<sup>144</sup> In my interview of 6 July 2011 with Greenberg concerning the quality of drafting instructions, he expressed the view that the importance of written instructions is a question of size of the jurisdiction and the system. Whether the instructions are good or bad depends on the quality of the Ministry lawyer, but the essential element for the good quality of legislation is to sensitize policy makers that if the drafter is involved early in the drafting process, the result will be a bill of good quality.

For the second case study, the outcome is that it is obviously necessary that the involvement of the Rwandan drafter in the drafting process is very important for the final quality of legislation. Even in the case in which the work is done by a consultant, the collaboration between the two is very important. The consultant's expertise may be required but definitely the involvement of the Rwandan drafter has its importance for the quality of the bill, especially in a system based on specialization, where the essential role of the drafter is to convert general political aims into a specific and workable legal scheme.<sup>145</sup> Based on Driedger's view<sup>146</sup> that the quality of the bill depends in large measure upon the competence of the drafter, and on Stefanou's view<sup>147</sup> that where there are no proper instructions, the drafter faces the problem of converting broad statements made by government into specific statutes, I think that in the drafting process, the reception of good instructions by the drafter is not the only factor that produces a bill of good quality. However, even if the instructions are not good, the personal skills of the drafter, his experience coupled with his involvement in the process and the research he does to fill the gaps in the instructions to understand the policy, and his knowledge of the existing law and the legal system would lead the drafter to produce a bill of good quality.

144 Robinson, 1980, p. 3.

145 S. Lortie, 'Providing Technical Assistance on Law Drafting', *Statute Law Review*, Vol. 31, No. 1, 2010, p. 6.

146 Driedger, 1976, p. xx.

147 C. Stefanou & H. Xanthaki, *Manual in Legislative Drafting*, University Press, Cambridge, 2005, p. 4.

The involvement of the government drafter from the earlier stages of the drafting process by receiving the instructions even if they are verbal throughout the five stages will contribute to producing a bill of good quality, as shown in the two case studies. The draft prepared by the consultant did not consider the legal context of Rwanda by lack of knowledge of the existing laws and the legal system in general, and required the involvement of the government drafter to go back throughout the same drafting process.

The language in the legislative process as a means of communication is very important for clarity and precision of the legislation. In reality, the requirements of certainty and clarity do not conflict. If the meaning of a law is not sufficiently clear for it to be possible to assume that the same meaning will be ascribed to it by each of its likely readers, the law cannot be said to be in a state of certainty.<sup>148</sup> The certainty of the legislation became more complicated in the system like in Rwanda where the legislation is drafted in three languages. Language is an essential tool in achieving clarity and precision in the drafting process because inconsistencies in law may lead to misinterpretation of the law and miscarriage of justice, as the aim of Rwanda in drafting legislation of good quality is to improve the judicial system. As confirmed by Lord Bridge of Harwich, the drafter must use language techniques with the utmost precision to express the legislative intent of his political masters, and it remains the golden rule of construction that a statute means exactly what it says and does not mean what it does not say.<sup>149</sup>

To overcome these challenges in the drafting process in Rwanda and achieve good quality legislation some recommendations may be addressed. With regard to the quality of drafting instructions, as Rwanda is moving in a hybrid system combining the civil and common law system, the drafting of all government bills can be attributed to the Legislative Drafting Service at the Attorney General's Office and develop a system where each institution prepared the drafting instructions to be sent to the Ministry of Justice for drafting. This will also resolve the issue of the exclusive involvement of the drafter in the drafting process. Bilika believed that in many jurisdictions, the training of officials on how to prepare drafting instructions and the dynamics of the legislative process allow output to increase by up to 50%.<sup>150</sup>

Concerning the language and the translation in three official languages in Rwanda, the adoption of the co-drafting system of each law with two drafters, one with a knowledge of English and another with a knowledge of French, will share the responsibility of drafting a bill as they are both supposed to have knowledge of Kinyarwanda. Also for the consistency of the translation, the development of a glossary of legal terms will help the drafter in his task of translating the legislation. Further, Bilika advised that for the issue of translation, it seems necessary from the start for drafters to have the support of language specialists, similarly to the case of Canada whose 'Jurilinguists' are linguistic specialists in law.

148 Greenberg, 2008, p. 340.

149 *Ibid.*, p. 336.

150 B.H. Simamba, *The Legislative Process: A Handbook for Public Official*, AuthorHouse, Bloomington, IN, 2009, p. xxvii.

Their chief role is to help drafters achieve the highest quality possible of language in different languages when drafting bills.

It is also important to answer the question raised in the methodology before concluding that the repetitive amendments in the law of Rwanda, especially the Constitution, is a sign of bad quality of legislation. Sindikubwabo, in our interview, pointed out that certainly many amendments of the law can be diagnosed as signs of bad legal quality. But this is not a principle, and it is not always the case. Indeed for the case of Rwanda, it is quite different. For a country coming out of genocide, the transition period was not sufficient for a systematic organisation of the country. Further, the time available to develop a new Constitution was very limited. The country had to deal with this constraint. But meanwhile the country and the world at large are changing very fast. However, it is necessary to keep the pace and be dynamic as the world. Thus, amendments and adjustments required are necessary to avoid obsolescence, inconsistency, incompatibility or inapplicability to situations that were not significantly better before.

In conclusion, the challenges of achieving the quality of legislation in Rwanda are really significant, but could be overcome if all officials are trained to produce proper written drafting instructions. The drafting process is left exclusively to the Ministry of Justice with the earlier involvement of the drafter in the drafting process, and the support of linguists for good translation or the co-drafting system of the legislation could contribute to produce legislation that is capable of achieving its objectives. As Greenberg pointed out in the interview, the general principle is that there is not good or bad legislation. It is important to know what you are trying to achieve. Is it possible to achieve what you aim to implement?