

# Instructions to Draft Legislation

## A Study on Legislative Drafting Process in Rwanda

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### Abstract

*Drafting instructions are always difficult to discuss and evaluate because very often they depend on local traditions. Nevertheless, despite local traditions in drafting instructions their complete absence must be seen as a problem. This article tackles the issue of drafting instructions and their importance in the development of good drafts. And by good drafts the author means good quality drafts which will lead to good quality legislation. The article uses Rwanda as a case study and employs Thornton's five stages of the drafting process as its basic methodology.*

**Keywords:** drafting instructions, Rwanda, quality of legislation.

### A. Introduction

#### I. Background

Legislative proposals usually come in the form of broad statements, leaving a multitude of minor details still to be worked out, and it is clear that many of these details occur to the drafter when he/she first examines his/her instructions.<sup>1</sup> In preparing an initial draft, the drafter must consider the existing legal and factual framework and develop a draft that is consistent with it or that addresses any inconsistencies.<sup>2</sup> When legislation is being prepared under instructions from the Cabinet, it should state the intention and ask for the cabinet's agreement.<sup>3</sup> Of course, every law-making jurisdiction has its special needs and political demands. But there are common threads and themes for all legislative drafting projects. Government departments and legislative counsel would be helped if booklets were available, explaining the legislative process and what constitutes good drafting instructions.<sup>4</sup> However, one obvious area that needs to be addressed by instructing officers, who must understand the role of drafters and must know how they can facilitate that role by providing good drafting instruc-

1 E.A. Driedger, *The Composition of Legislation* (2nd edn), Department of Justice, Ottawa, 1957, pp. xv-xvi.

2 M.E. Matheson, 'Maine Legislative: Drafting Manual', 2009, p. 7 <[www.maine.gov/legis/ros/manual/Draftman2009.pdf](http://www.maine.gov/legis/ros/manual/Draftman2009.pdf)> (Accessed 20 June 2011).

3 D. Berry, *The Loophole: Journal of the Commonwealth Association of Legislative Counsel*, No. 3, 2010, p. 65, <[www.opc.gov.au/calc/docs/Loophole\\_Dec10.pdf](http://www.opc.gov.au/calc/docs/Loophole_Dec10.pdf)> (Accessed 20 June 2011).

4 D.C. Elliott, 'Just Language Conference: Getting Better Instructions for Legislative Drafting', 1992, p. 3, <[www.davidelliott.ca/legislativedrafting.htm](http://www.davidelliott.ca/legislativedrafting.htm)> (Accessed 20 June 2011).

tions, is the quality of drafting instructions.<sup>5</sup> Seemingly, obvious to the drafter is to understand what legislation is all about and the effects it has, the rights and obligations imposed and the distinction between law and policy – often not understood or misunderstood by others. Legislative policy planners should understand the various ways their objectives can be achieved because new law may not be the only, the best or the right way to achieve what the Government wants to do. A note on the ways in which the legislation can come into force may also be helpful.<sup>6</sup> The drafter must clearly understand the intended goal and must review the existing legal and factual framework that forms the background of the drafting request.<sup>7</sup> Only then can the drafter create a broad outline with which to work, carefully cover the significant details and add the fine touches to polish the draft.<sup>8</sup> In Rwanda, there is a need to address the question of substandard drafting instructions as this will facilitate drafters to fully appreciate their role, later on play it effectively by producing a good quality of legislation.

When we speak of quality of legislation, we refer to how the legislation is conceptualized, how plainly the ideas in it have been expounded, as well as the more mundane aspects of the editorial quality.<sup>9</sup> The lack of proper drafting instructions has hamstrung the legislative process in Rwanda in their attempt to improve the quality of legislation. Moreover, the matter has been addressed in various jurisdictions such as Australia and New Zealand, where they have introduced handbooks to deal with the issue extensively. Also, Zambia has introduced circulars laying out the basics of giving instructions.<sup>10</sup> Moreover, the constitution of Rwanda sets out the procedure applicable to the exercise of the legislative power of the Parliament.<sup>11</sup> Undoubtedly, such parliamentary procedure calls for the requirement of properly written instructions that are prepared according to the purpose outlined in the policy.<sup>12</sup>

## II. Hypothesis and Methodology

### 1. Hypothesis

In Rwanda, the instructions to draft legislation are mainly in the form of draft bills initiated by the Government. However, it is not common to find properly

5 B.H. Simamba, *The Legislative Process: A Handbook for Public Official*, Author House, Bloomington, IN, 2009, p. 13.

6 *Ibid.*

7 *Ibid.*, p. 2.

8 *Ibid.*

9 B.H. Simamba, 'Managing Increasing Government Expectations with Respect to Legislation While Maintaining Quality: An Assessment of Developing Jurisdictions', *The Loophole: Journal of the Commonwealth Association of Legislative Counsel* (Presented at the CALC conference, Nairobi Kenya, 13-15 September, 2007), p. 8.

10 *Ibid.*, p. 10.

11 Arts. 91-95 Constitution of the Republic of Rwanda of 04 June 2003, Official Gazette, Special issue of 4 June 2003.

12 Government of Canada, Privy Council Office, *Guide to Making Federal Acts and Regulations*, 12 May 2009, ch. 2.3, <[www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=legislation/chap2.3-eng.htm](http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=legislation/chap2.3-eng.htm)> (Accessed 19 June 2011).

written drafting instructions attached as a separate document. This makes the drafter's task rather difficult as he/she has to engage into long process that involves discussion and exchange of ideas with concerned parties. This, in turn, consumes much of the drafter's time, and is likely to affect the legislative proposal. Because the drafter tries to pick sense out of the language used during the discussion, there are risks that a particular legislative proposal will end up with tremendous potential for vagueness, ambiguity, nonsense, imprecision, inaccuracy and all the other horrors.<sup>13</sup> At the same time, the drafter has no choice as he/she must make sure that he/she has produced straightforward legislation as required using all possible means to make it so clear that the full intended meaning is conveyed in such a way that it cannot be misunderstood reasonably.<sup>14</sup> This article, therefore, proves that the lack of proper drafting instructions leads to poor quality of legislation in Rwanda. It looks at how the current practice in Rwanda is and establishes that it could undermine the quality of legislation.

The most practical view is press a request for a draft of legislation to be respected and, in all cases, be accompanied by a memorandum containing the fullest possible instructions for the assistance of the drafter, in the preparation of the draft, and upon the Cabinet making a determination on the government's programme of legislation.<sup>15</sup> Therefore, in order for the legislation to meet the needs of the citizens to whom it is intended to serve, it should contain properly drafted instructions that are straight forward, not written in complicated legal language, as this tends to dictate the wording of the bill.<sup>16</sup> In fact, drafting of legislation does not consist in polishing what others have written. More to that, drafters never like to receive instructions in the form of draft bills. They prefer them in the form of plain statement of what is intended, supplemented by oral discussion. Draft measures prepared by inexperienced persons are usually defective, and the drafter spends much time undoing what has been done.<sup>17</sup> For that reason, there should be good instructions to provide the drafter with a total picture of how the purposes are to be achieved and to know how the scheme will work in practice.<sup>18</sup>

## 2. Methodology

To prove the hypothesis, this article looks at the available literature in legislative drafting to identify the importance of properly written drafting instructions in the legislative drafting process. Secondly, this article examines Thornton's five stage drafting process to establish the link between properly written instructions and the actual drafting in Rwanda. Properly written instructions as a tool for quality legislation will be discussed to identify whether quality legislation can be achieved through with good instructions. The quality of drafting instructions is also examined to establish whether it leads to quality legislation. The article fur-

13 G.C. Thornton, *Legislative Drafting* (4th edn), Butterworths, London, 1996, p. 2.

14 *Ibid.*, p. 3.

15 Simamba, *supra* note 9, p. 8.

16 P. Salembier, *Legal and Legislative Drafting*, Lexis Nexis, Toronto, ON, 2009, p. 1.

17 Driedger, 1957, pp. xix-xx.

18 Thornton, 1996, p. 131.

ther discusses briefly and makes analysis of the case study on the law relating to the punishment of the crime of genocide ideology;<sup>19</sup> this analysis will try to prove how the lack of proper drafting instructions actually affected the quality of this particular legislation. The article intends to look on the way forward as to how proper written instructions can be achieved, and to achieve better responses, the main sources will be secondary and primary sources. Although the article focuses on how properly written instructions lead to quality legislation, it is hoped that this piece of work will be a tool to list other essential requirements that Rwandan drafters have used to improve the quality of legislation; such tools are participating in policy meetings, extensive research, knowledge of existing laws and consultations with proficient drafters.

## B. Thornton's Five Stage Drafting Process

As Thornton put it, the five stages that may be recognized in the drafting process are:

1. Understanding,
2. Analysis,
3. Design,
4. Composition and development,
5. Scrutiny and testing.<sup>20</sup>

Therefore, this subheading concerns how Thornton's five drafting stages can facilitate the drafter to apply drafting instructions to achieve good quality legislation.

### I. *Understanding*

It is important to note that the progress from stages 1 to 5 is neither smooth nor regular, as the drafter may imagine. Thus, it is necessary for the drafter to return frequently to an earlier stage and try again which gives him clearer understanding of instructions.<sup>21</sup> The main and most important task for the drafter is to have thorough and complete understanding of the purpose required for the legislation, and this requires patience, great care and guidance from those who prepare drafting instructions.<sup>22</sup>

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>23</sup>

19 Law No. 18/2008 of 23 July 2008 relating to the punishment of the crime of genocide ideology.

20 Thornton, 1996, p. 128.

21 *Ibid.*

22 *Ibid.*, p. 129.

23 P.P. Biribonwoha, 'The Role of Legislative Drafting in the Law Reform Process', 32 *CLB* 2006, p. 601.

Drafting instructions can be brief or detailed, but 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>24</sup> Moreover, to achieve the intended purpose of the legislation, the drafter has to have a complete understanding of the instructions given by the policy maker in order to decide whether drafting the legislation is the right solution to solve the problem revealed in the policy or if there is an alternative way to resolve the social problem.<sup>25</sup> Thus, drafting instructions need to contain sufficient background information to enable the drafter to understand the circumstances and problems that the legislative proposal is intended to achieve.<sup>26</sup>

What should be noted is that drafting instructions are taken from policy officials, and this is where the drafters need to insist on what they think will turn into a good policy. Therefore, the drafter should decide whether to get involved at an early stage in order not to lose the objectivity than getting involved later and fail to achieve the objectivity. As Stefanou rightly put it, bad drafting promotes all the problems that have plagued the third world, such as corruption and nepotism, ensuring bad government and bad governance.<sup>27</sup> Of course, drafting sounds terribly simple, but it is a hard-earned skill that can be learned only by experience.<sup>28</sup> So the first thing the drafter has to do is to ensure that the instructions are well understood, and it might be worthwhile having a look at the place concerned to see if there are any difficulties that might arise, and which would not necessarily be spotted by non-drafters.<sup>29</sup> As to the question of drafting instructions, Thornton observed two things:

1. The first one being the guidance that must be available to those who prepare drafting instructions in order to get the idea of what the drafter needs and the form in which it will be helpful.
2. Second is the question of consultation between the drafter and the instructing officer at an early stage after receipt and preliminary digestion of the drafting instructions.<sup>30</sup>

In fact, these are the best techniques that a drafter can apply in order to avoid being receptive, but rather talk to the officials and let them know what you would like to achieve. A draft law is an artificial creation that is likely to be less successful if the language used is not carefully and consistently looked at.<sup>31</sup> Bad drafting instructions add difficulties for the drafter especially with the common practice of cut and paste compilations comprising extracts from the laws of several juris-

24 *Ibid.*

25 *Ibid.*

26 Thornton, 1996, p. 130.

27 C. Stefanou & H. Xanthaki, *Manual in Legislative Drafting*, IALS, London, 2005, p. 3.

28 J. Sinclair, *Legal Drafting in Scotland*, Sweet & Maxwell, Edinburgh, 2001, p. 61.

29 *Ibid.*, p. 62.

30 Thornton, 1996, p. 129.

31 *Ibid.*

dictions or even several laws of the same jurisdiction.<sup>32</sup> Whatever challenge the drafter may encounter, he must ensure that he has understood the requirement of a particular legislation, which must be more definite as well as having more qualities of language.<sup>33</sup> This will enable the drafter to address the issue of doubts as to whether the legislation will work or not. In a nutshell, it is at this stage that the drafter should strive to have thorough understanding of the background information, the purpose of the proposed legislation, the means by which those purposes are to be achieved and the impact of the proposals on existing circumstances and laws.<sup>34</sup>

## II. Analysis

The analysis stage consists of response of the drafter to drafting instructions. It involves a brief or longer report on the basic elements of the drafter's response to the drafting instructions.<sup>35</sup> As put forth by Thornton,<sup>36</sup> this stage involves the analysis of the existing law, the special responsibility areas and the practicality. At this stage, the drafter's concern involves analysing the instructions contained within the legislation in place, as any new law must be linked to the existing one. The drafter must relate the document under preparation to other existing or proposed documents. The intention here is to avoid repetition or overlap.<sup>37</sup> Because from the statement it appears that the introduction of any new legislation implies a modification of the existing nature; thus, the drafter must make the analysis of the general law that relates to the instructions to the legal drafting assignment. Moreover, this knowledge should include more than the substantive and procedural aspects of the particular area of law.<sup>38</sup> For instance, if the proposal is intended to operate retrospectively to confer with a benefit on private persons without imposing a corresponding obligation, no substantial objection is likely to arise.<sup>39</sup>

The analysis of drafting instructions is very important, especially in Rwanda, where there is no control of anti-constitutionality of law before the laws are passed by the Parliament. In Rwanda, the Supreme Court has a jurisdiction of hearing petitions on the constitutionality of the organic laws, laws, decree-laws and international treaties and agreements.<sup>40</sup> Thus, the drafter who is familiar with the system can deal easily with the analysis of the existing laws, instead of

32 *Ibid.*, p. 130.

33 C.B. Nutting & R. Dickerson, *Legislation, Cases and Materials*, West Publishing Co., St. Paul, MN, 1978, p. 667.

34 Thornton, 1996 p. 130.

35 H. Xanthaki, *Designing a Legislative Solution: Constraints of the Drafter*, Course handout, Legislative drafting course, IALS, 2010.

36 Thornton, 1996, p. 133.

37 R.C. Dirk, *Legal Drafting* (2nd edn), Carswell, Toronto, ON, 1985, p. 34.

38 R.J. Martineau & M.B. Salerno, *Legal, Legislative, and Rule Drafting in Plain English*, St. Paul, MN, Thomson West, 2005, p. 17.

39 Thornton, 1996, p. 137.

40 Art. 145 (3), Constitution of the Republic of Rwanda of 04 June 2003, Official Gazette, Special issue of 4 June 2003, p. 119.

giving the task to the consultant who has little or no knowledge about the system and the Constitution.

Drafters have the responsibility to ensure that their bills conform to the Constitution. If only on pragmatic grounds, a drafter who writes potentially unconstitutional legislative provisions leaves the responsible implementing agencies subject to expensive litigation.<sup>41</sup>

At this stage, the drafter must take pains to know what is being amended, the relevant written law, common law as well as case law. Once every new law has been considered as an amending law, then the need to be aware of all relevant existing laws becomes very clear.<sup>42</sup> This process is necessary as it helps to avoid the possibility of perpetrating an unintended repeal by implication.<sup>43</sup> The drafter's major task at this stage is to communicate, then on the issues related to the instructions he/she must survey the relevant law as it exists and make his/her decision to the content and manner in which this is to be done.<sup>44</sup> Other than that if the drafter thinks that the instructions are wrong or there is something worthwhile to add, they should say so preferably in writing, and if their objections are not sustained, they should proceed only with a written record of their advice on the file, and in extreme circumstances should consider whether or not they wish to continue to act.<sup>45</sup>

Therefore, in order to achieve a good quality of legislation, it is better to make a proper analysis of the proposed legislation, and the instructions attached, thus, be able to get rid of all the potential dangers.<sup>46</sup> Of course, however seemingly neutral, no law affects society's diverse social groups equally; for instance, a regulation that requiring a police commissioner to appoint a policemen only six-foot tall or taller discriminates against women needlessly because only a rare policing job requires brawn.<sup>47</sup>

### III. *Designing the Law*

After gaining an understanding of the proposal and assessing their implications in relation to the existing law and the instructions to be followed, the drafter reaches the design or planning stage.<sup>48</sup> At this stage, the drafter's task is to decide whether the new legislation is really needed or not. If a new statute is necessary, it is essential that its structure should be designed before actual drafting begins. The principal purpose is to design a structure that will achieve the object of the

41 A. Seidman, R.B. Seidman & N. Abeysekere, *Legislative Drafting for Democratic Social Change, A Manual for Drafters*, Kluwer Law International, London, 2001, p. 22.

42 Thornton, 1996, p. 133.

43 *Ibid.*

44 Seidman, Seidman & Abeysekere, 2001, p. 26.

45 Sinclair, 2001, p. 31.

46 *Ibid.*

47 Seidman, Seidman & Abeysekere, 2001, p. 111.

48 Thornton, 1996, p. 138.

instructions.<sup>49</sup> In order to achieve this objective, there has to be a clear policy instruction, but the specific idea or rules to be expressed must, for the most part, come from the drafter's own mind.<sup>50</sup> Furthermore, the drafter needs to make an outline or framework, so that he can be able to first visualize the shape and broad contents of the finished product.<sup>51</sup> For the Rwandan drafter, this is very important because he/she is often involved in the process, and yet his/her involvement is of high crucial because he/she is well conversant with the system. It also helps to proceed in a consistent manner, which is more likely to result in a good quality of legislation.

For the Rwandan drafter, what should be considered at the design stage is the structure of the body of the draft law. In Rwanda, any draft legislation must be subdivided into parts, volumes, titles, chapters, section and subsections, according to its dimensions or its contents. Thus, this must have a single idea by article, and not include more than one article; even if this idea would have several components, the instructions stipulate that before each article there should be a heading reflecting the idea that has been developed.<sup>52</sup> This is very helpful for the drafter who is always anxious about how the final draft will look like in the face of poorly written instructions and the sustained pressure for legislation. Of course, this is a difficult task but as the legislative drafter is a provider of advice through legal research and opinions, it becomes easy to maintain a high standard and to take stock of the effectiveness of existing techniques.<sup>53</sup> Moreover, the design stage requires the drafter to identify the important legal aspects that will be the basis of the document. It also helps to ensure that there is a plan, which is the roadmap for the drafter, and this will help him/her to focus on all the aspects of the drafting task.<sup>54</sup> After making a plan for the draft, the drafter proceeds to develop his/her ideas at the composition and development stage.

#### *IV. Composition and Development*

Unlike the earlier stages where the drafter focuses on developing the first draft and minding a lot about the substance rather than the form, work at this stage is of necessity.<sup>55</sup> The drafter is preoccupied with the choice of words best suited to his purpose, and sentence structures are likely to be capable of improvement.<sup>56</sup> In order to maintain harmony, a drafter may suggest modification of the prescribed policy,<sup>57</sup> and this calls for the involvement of the drafter who is well informed

49 *Ibid.*

50 Driedger, 1957, p. 1.

51 G.C. Thornton, *Legislative Drafting* (3rd edn), Butterworths, London, 1987, p. 113.

52 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.

53 D.G. Brown, 'The Attorney-Client Relationship and Legislative Lawyers: The State Legislature As Organizational Client', *Journal of the American Society of Legislative Clerks and Secretaries*, <[www.ncsl.org/LegislativeStaff/ASLCS/1996SpringProfessionalJournal/tabid/15209/Default.aspx](http://www.ncsl.org/LegislativeStaff/ASLCS/1996SpringProfessionalJournal/tabid/15209/Default.aspx)> (Accessed 5 August 2011).

54 Martineau & Salerno, 2005, p. 21.

55 Thornton, 1996, p. 144.

56 *Ibid.*

57 Driedger, 1957, p. xvi.



about the government decisions. As Russell puts it, a secretariat instruction with which the attorney will become familiar is the request for a short bill.<sup>58</sup> There is a different scenario in Rwanda because each ministry prepares a bill or a draft order relating to its sphere of activities. Where a ministry does not have the expertise required in drafting a bill or an order, it gathers all ideas it wants to include in the bill and expresses them clearly in a written document and hires a consultant to make the first draft.<sup>59</sup> This kind of practice does not facilitate a positive liaison between the drafter and the instructing officer, which is an important necessity if the inadequacies and ambiguities of drafting instructions are to be detected and remedied.<sup>60</sup> At this stage, it is important, especially in the Rwanda scenario, for the drafter to work closely with instructing officer to deal with specific issues that normally appear in the first draft; for instance, a discussion with the Minister to settle the details of a bill with the drafter.<sup>61</sup> It is, however, important to note that there is no such a thing as a specialist in drafting who acquires and applies a particular technique for chaining words together to form a law.<sup>62</sup> Therefore, drafters must avoid major changes or extension to the drafting instructions because it may have a detrimental impact on the structure developed at the design stage.<sup>63</sup> In order to ensure that instructions are matching with the ideas in the draft legislation, it is necessary that the drafter revisits the structural design to make sure an appropriate balance and emphasis is maintained.<sup>64</sup>

Furthermore, it is at this stage that the drafter must ensure that he has understood the instructions very well, because a clearer statement of the overall purpose of an Act facilitates the communication of the detailed provision that follow.<sup>65</sup> The best way for the drafter when looking at the drafting instructions is by considering what not to do and the techniques he/she should avoid like being wordy and redundant, obscure language and foreign words and phrases.<sup>66</sup> In order for the drafter to deal with such issues, he/she should ensure that things such as foreign words are briefly explained in the preamble in popular language, the benefits that the legislation confers so that those who would be unwilling to read the legislation itself may appreciate the government.<sup>67</sup> Moreover, if the drafter has anything to say that he has anything to add to the instructions received, he can do so in the explanatory notes.<sup>68</sup> This is relevant particularly for the Rwandan drafter who receives the draft legislation without proper instructions and begins to inquire about the origin of the draft until he/she gets all the required guidelines to make sure that the composition of a particular legislation is

58 A. Russell, *Legislative Drafting and Forms* (3rd edn), Butterworths, London, 1931, p. 7.

59 Art. 4, Instructions of the Minister of Justice No. 01/11 of 20 May 2005, *supra* note 52.

60 Thornton, 1996, p. 144.

61 Russell, 1931, p. 8.

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

63 Thornton, 1996, p. 173.

64 *Ibid.*

65 *Ibid.*

66 P. Butt & R. Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (2nd edn), Cambridge University Press, Cambridge, 2006, p. 127.

67 Russell, 1931, p. 31.

68 *Ibid.*

effectively developed so that he/she proceeds to the final stage of the drafting process, which is scrutiny and testing.

#### V. *Scrutiny and Testing*

The process of scrutiny and testing requires a great deal of self-discipline as the drafter must take a critical and objective gaze at the finished product.<sup>69</sup> At this stage, the drafter is required to gather information on the methods of scrutiny adopted in other jurisdictions and be able to address a number of questions that may arise, such as whether the scrutiny function should be regulated by the standing rules of parliament or by legislation and what resources would be needed by such a scrutiny committee.<sup>70</sup> However, in the Rwandan context, there is a different scenario because it is the legal adviser instead of an experienced drafter who is the primary channel of this process.<sup>71</sup> This is a big challenge in the Rwandan legislative process as it is likely to compromise the intentions of policy makers.<sup>72</sup> What should be noted, however, is that such challenges are normally addressed by a disciplined drafter who takes a critical gaze at his finished product after reading the instructions and relates them to the draft at hand and considers it as a whole.<sup>73</sup> By doing this, the drafter is facilitating the client who in turn addresses instructions to others.<sup>74</sup> If, on the other hand, intended readers do not have such background knowledge, the drafting instructions must be relatively more explicit to make it more comprehensible.<sup>75</sup>

The principal functions of the Scrutiny of Legislation and Regulations are to consider any bill introduced into the Parliament and to report to the Parliament as to whether the Bill, by express words or otherwise.<sup>76</sup> This is clearly a focus for a scrutiny mechanism that has the potential to enhance constitutional values and principles, improve the quality of legislation and save legal costs and court time in the future, by anticipating challenges to the constitutional validity of such legislation.<sup>77</sup> It is a form of scrutiny that is widely practised in different ways in other constitutional democracies such as New Zealand.<sup>78</sup> With the help of the instructing officers in a jurisdiction such as Rwanda, the drafts are tested by applying various hypothetical circumstances such as discussing the draft instructions, thus creating a problem-solving environment.<sup>79</sup> At this stage, the drafter must ensure that the drafting instructions will be able to put the draft law into legal form,<sup>80</sup> hence, good quality legislation. Basing on the given instructions, the drafter must

69 Thornton, 1996, p. 173.

70 H. Corder, 'Final Report on Methods for Scrutiny of Legislation by Parliament', <<http://studyonline.sas.ac.uk/course/view.php?id=16>> (Accessed 6 August 2011).

71 Instructions, *supra* note 52.

72 Thornton, 1996, p. 133.

73 *Ibid.*

74 R. Dickerson, *Materials on Legal Drafting*, West Publishing Co., St. Paul, MN, 1981, p. 19.

75 *Ibid.*, p. 20.

76 Corder, 2011.

77 *Ibid.*

78 *Ibid.*

79 Thornton, 1996, p. 173.

80 Seidman, Seidman & Abeyesekere, 2001, p. 23.

survey the relevant laws and make his/her decision as to the content of what is to be communicated, and the manner in which it is to be done.<sup>81</sup> As Stefanou puts it; what matters is the speakers' meaning where the intended meaning of words may be reasonably presumed to reflect the intention.<sup>82</sup> However, this is problematic in the context of legislation,<sup>83</sup> in particular, for the Rwandan scenario where the drafter cannot rely only on the draft that has been submitted to him/her bearing in mind that the instructions attached are not well elaborated in Kinyarwanda, French and English.

### C. Proper Written Instructions: A Tool for Good Quality Legislation

#### I. Importance

It is uncommon that all the main instructions are settled and available to the drafter when he/she begins to draft.<sup>84</sup> This is common in the Rwandan legislative process where a draft may be so urgent and due to the pressure from the top officials that drafter has no other choice other than beginning to prepare the draft with no clear instructions, hence affecting the quality of legislation. However, Simamba rightly puts it, if a drafter produces a draft on one set of assumed instructions and the final instructions are different, he/she has to change his/her mindset and adjust the draft accordingly.<sup>85</sup> What should be noted, however, is that there is no magic formula for achieving quality in legislation. Each country has its own rules, which are affected by the type of its legal system. The most important thing with proper written instructions is that they help drafters to have a clear or accurate concept of the objectivity of a proposed law and to test their drafts adequately so that they do not do anything that is not wanted.<sup>86</sup> Moreover, in the search for higher functionality concept in legislative drafting, while looking at the instructions, the drafter cannot avoid to question the following:

1. Efficacy
2. Effectiveness
3. Efficiency<sup>87</sup>

#### 1. Efficacy

This concept is necessary because drafters tend to lack the ability to produce quality of legislation both at production and implementation levels due to lack of in-depth consultation when the legislation is being passed. Efficacy refers to the

81 *Ibid.*, p. 25.

82 C. Stefanou & H. Xanthaki, *Drafting Legislation*, Ashgate Publishing Company, Aldershot, 2008, p. 37.

83 *Ibid.*

84 Simamba, 2007, p. 18.

85 *Ibid.*

86 E.A. Driedger, *Manual of Instructions for Legislative and Legal Writing*, Department of Justice Canada, Ottawa, 1982, p. 70.

87 Xanthaki in Stefanou, 2005, p. 4.

ability to produce a desired or intended result.<sup>88</sup> And when efficacy is linked to quality in legislation, the result is the achievement of the least degree of litigation as laws are passed.<sup>89</sup> The concern for the quality of legislation consists a collection of ideas, actions and measures such as the assessment of draft legislation, the simplification of existing legislation, the strengthening of market forces and technical quality.<sup>90</sup> Thus, in order to transform a policy objective into good quality legislation, there is a need for a multi-level effort of policy makers, drafters, interpreters, applicators and enforcers of legislation.<sup>91</sup> In fact, efficacy is achieved when the statute does not conflict with any other norm of the same or higher hierarchical level and when the statute has no deficiencies.<sup>92</sup>

## 2. Effectiveness

Quality of legislation is commonly attached to effectiveness rather than to efficacy, and it is widely accepted that drafters aim to be effective when drafting legislation. Effectiveness of the law means that the norm produces effects so that it does not become a dead letter.<sup>93</sup> Therefore, drafters and those who instruct them would be doing themselves injustice if they do not recognize the value to the policy makers of their expertise and their knowledge and experience of their broad legal framework.<sup>94</sup> Despite modern drafters aiming at producing an effective legislation, in drafting legislations as they try to define clients' instructions,<sup>95</sup> it is argued that the most important thing with effectiveness is the attitudes and behaviours of the target population corresponding to the attitude and behaviours prescribed by the legislator.<sup>96</sup> However, the drafter must be able to identify among the two models of effectiveness which one can apply to a particular set of drafting instructions. The prevailing models of effectiveness are often described as the positivist model, which links effectiveness to implementation and compliance, and the social-legal model of effectiveness, which relates the statute to the social reform attained.<sup>97</sup>

But at the other extreme, the more one tries to be effective, the more vulnerable the legislation will be to omissions and potential challenge. So achieving a healthy balance between the two extremes represents a great challenge to any leg-

88 *Ibid.*

89 *Ibid.*

90 A.E. Kellerman, 'Proposals for Improving the Quality of European Legislation and National Legislation', *EJLR*, Nos. 1/2, 1999, pp. 7-30. <[http://rproxy.iii.com:9797/MuseSessionID=f2fc8fba9be4649c952f97d2bf87a34/MuseHost=www.heinonline.org/MusePath/HOL/Page?handle=hein.journals/waik15&div=5&collection=journals&set\\_as\\_cursor=6&xmen\\_tab=srch results](http://rproxy.iii.com:9797/MuseSessionID=f2fc8fba9be4649c952f97d2bf87a34/MuseHost=www.heinonline.org/MusePath/HOL/Page?handle=hein.journals/waik15&div=5&collection=journals&set_as_cursor=6&xmen_tab=srch results)> (Accessed 8 August 2011).

91 Stefanou & Xanthaki, 2008, p. 5.

92 *Ibid.*

93 *Ibid.*

94 Thornton, 1996, p. 125.

95 Sinclair, 2001, p. 12.

96 Stefanou & Xanthaki, 2008, p. 6.

97 *Ibid.*

islative drafter.<sup>98</sup> However, in order to address those challenges and be able to achieve quality legislation, it is important for the drafter to grapple with the problem at hand and help the client think it through step by step, this helps him/her to delineate the facts.<sup>99</sup> Of course, it is not proper and should not happen for the client to give written instructions or brief oral instructions by telephone and ask the drafter to prepare a sufficient draft, unless the document is a very simple one.<sup>100</sup> Rather, as a way to understand instructions proper, thus, achieve an effective legislation, the drafter should be present during the negotiations, from the start to understand the problem fully.<sup>101</sup> Whatever form the drafter may use, he must strive to produce an effective legislation free of any ambiguity, as some legal concepts are inherently complex.<sup>102</sup>

Because the drafter normally faces a number of constraints such as time pressure under which bills are required to be prepared,<sup>103</sup> but once the drafter has gone through those discussions with the stakeholders and the clients plainly address their instructions then, such a legislation will be effective because it will carry the same meaning to those who will execute it.<sup>104</sup> In Rwanda, these procedures are followed, but of course, the issue of drafting in three languages is a recurring complaint<sup>105</sup> about how legislations are difficult to give the same meanings as the parliament and client require.

For the legislation to be of effective, drafters must admit that legislation is both a crystallization and declaration of rights, privileges and communication.<sup>106</sup> There are times when drafting instructions are not proper and need clarification, and if the problem cannot be resolved by departmental legal officers and the drafters then there might be a scope for an intransitive bill that leaves way to ministerial regulation by delegation; when the drafter wishes to introduce a degree of discretion for officials.<sup>107</sup> For that reason, collaboration between two or more departments is necessary in the process of turning the instructions into quality legislation,<sup>108</sup> only then can the legislation be effective. It is therefore necessary for the drafter to ensure that the draft has been discussed between drafters and departments and meetings, involving Ministers are sometimes necessary on a particularly complicated bill until all are satisfied.<sup>109</sup> But before drawing the conclusion as to whether effectiveness is a common functionality sought

98 H. Xanthaki, 'Clarity and Ambiguity/Plain English in Drafting', Legislative drafting course, IALS, 2010 <<http://studyonline.sas.ac.uk/course/view.php?id=130>> (Accessed 9 August 2011).

99 Dirk, 1985, p. 30.

100 *Ibid.*

101 *Ibid.*

102 *Statute Law Review*, Vol. 23, No. 1, 2002, pp. 12-23, <<http://studyonline.sas.ac.uk/mod/resource/view.php?id=3532>> (Accessed 9 August 2011).

103 *Ibid.*

104 Dickerson, 1981, p. 19.

105 Salembier, 2009, p. 10.

106 Dickerson, 1981, p. 19.

107 *Ibid.*

108 D. Greenberg, *Craies on Legislation: A Practitioner's Guide to the Nature, Process, Effect and Interpretation of Legislation*, Sweet & Maxwell, London, 2008, p. 225.

109 *Ibid.*

and whether it is enough for the drafter to produce an effective legislation, it is necessary to explore the other virtues sought in legislative drafting.<sup>110</sup>

### 3. *Efficiency*

Efficiency is working productively with minimum wasted effort or expense. Also, efficiency means that the norm should produce the desired effects and should not perverse effects and should so guide the conduct as to achieve the desired objective.<sup>111</sup> Our intention in this subheading is to link efficiency to proper written instructions and finally prove that the end result is to achieve quality legislation. Moreover, the drafter must relate efficiency to costs and benefits of the legislative action as an economic analysis of what and how much input is required for an optimal output or as the extent to which perceived best practices are utilized in the process of development of legislation.<sup>112</sup> If we take the scenario where drafting instructions that come by e-mail, particularly in Rwanda, the drafter should consider if the e-mail writing is less formal and more flexible in tone than other forms of legal writing, and if it uses symbols, emotions and abbreviations to help get the message across, then does that make it necessary,<sup>113</sup> are they efficient either? If such instructions are not necessary, they are not even efficient because productive efficiency in relation to legislation occurs when a legislative choice achieves the lowest cost possible in comparison with the cost incurred by all other legislative choices. The legislative choice that is normally preferred is the one that improves the welfare of at least one person while not diminishing the welfare of another.<sup>114</sup>

As far as quality legislation is concerned, drafting instructions should involve more than questions of tone and formality,<sup>115</sup> as this may lead to efficiency, hence good quality of legislation. In other jurisdictions such as Rwanda, where drafters often meet challenges of receiving draft legislations from other ministries with no attached instructions, efficiency has been a difficult goal to attain. Therefore, to achieve efficiency, drafters have had to start from scratch to plan, redraft, scrutinize, check and double-check in the given instructions to avoid the disastrous effects of inefficient drafting instructions.<sup>116</sup> Moreover, in the hierarchy of values set for the drafter, efficiency is one of the considerations that must be taken into account in the search for effectiveness as part of efficacy.<sup>117</sup> Moreover, to be effective requires that once the drafter has adopted a pattern of reference to represent an idea, he/she must stick to it.<sup>118</sup> Therefore, irrespective of the

110 Stefanou & Xanthaki, 2008, p. 7.

111 *Ibid.*, p. 5.

112 Stefanou & Xanthaki, 2005, pp. 7-8.

113 M.M. Asprey, *Plain Language for Lawyers* (3rd edn), The Federation Press, Annandale, NSW, 2003, p. 234.

114 Stefanou & Xanthaki, *supra* n. 27, p. 8.

115 Asprey, 2003, p. 234.

116 *Ibid.*, p. 235.

117 Stefanou & Xanthaki, 2008, p. 9.

118 Salembier, 2009, p. 129.

source of instructions, drafters must aim to achieve attainment of the purpose and objectives set out in the policy.<sup>119</sup>

It seems to me that there is a lack of efficiency in Rwandan legislative process because there is no proper way on how instructions are given to the drafter; sometimes it is in the form of a letter and sometimes it is through a discussion with the Minister. One of the possible ways for the drafter to achieve efficiency in his/her drafting work is to develop a strong interest in substantive policy and even help to mold it; this way, he/she will be able accomplish efficiently what the client requires and it will enable him to learn the factual environment in which the matter arises.<sup>120</sup> In fact, efficiency enables the drafter to understand the drafting instructions, because it is recommended that legal documents should be written in modern Standard English, namely in Standard English as currently used and understood.<sup>121</sup> Generally, all necessary facts must be elicited to assist the drafter.<sup>122</sup> What should be noted is that efficiency is a desired value that must be taken into account in legislative drafting. Additionally, efficiency is a tool that the drafter can use to achieve effectiveness. It is therefore better to have fairly written drafting instructions than not having them at all. As Xanthaki rightly puts it, relatively cheap results are better than just results.<sup>123</sup> Furthermore, this analysis applies to the Rwandan context where sometimes laws are drafted in Kinyarwanda language, which does not give flexibility to the drafter to make sure that a legislative solution is efficient and those benefitting from it can fully compensate those whose welfare is diminished as a result of its application. Thus, one could support the view that efficiency in a sense of extreme economy may be adverse to effectiveness and may jeopardize results in the altar of cost maximization.<sup>124</sup> However, such challenges do not make the Rwandan drafter incapable of abiding by the drafting instructions because the expression of every law essentially consists of the description of the legal subject and the enunciation of the legal action.<sup>125</sup> Therefore, close collaboration between the instructing officers and the drafter is required in order to attain efficiency, which in turn can have a positive impact to the quality of legislation as, will be examined in the preceding section.

## *II. Instructing Officers and the Drafters*

The two main actors in legislative drafting process are the instructing officers and the drafters. When we talk of drafting instructions, we mean those instructions that tell the legislative drafter what is to be achieved by legislation and how the legislation is to achieve it.<sup>126</sup> Before preparing drafting instructions, instructing

119 Stefanou & Xanthaki, 2008, p. 7.

120 Dickerson, 1981, p. 91.

121 Stefanou & Xanthaki, 2008, p. 9.

122 R.C. Dick, *Legal Drafting in Plain Language* (3rd edn), Carswell, Scarborough, ON, 1995, p. 33.

123 Stefanou & Xanthaki, 2008, p. 9.

124 *Ibid.*

125 Driedger, 1982, p. 2.

126 D.C. Elliott, 'Preparing Drafting Instructions', 1992, p. 2, <[www.davidelliott.ca/legislativedrafting.htm](http://www.davidelliott.ca/legislativedrafting.htm)> (Accessed 10 August 2011).

officers should meet with legislative drafters to establish a relationship and find out anything drafters need to know.<sup>127</sup> When the drafter is able to respond to instructions, he/she can advise on proposals and planning for a legislative project, to draft a Bill, to draft amendments for a Bill and to advise on the implementation of an Act.<sup>128</sup> Proposed legislation often has a history that contributes to the solution proposed by the instructing department. The drafter needs this knowledge for the drafting process, but care should be taken to distinguish between the background information and the actual legislative proposal.<sup>129</sup>

The drafter's time belongs to the legislative authorities, principally the Ministers in their individual capacity and as assembled in Cabinet. The drafter must not, therefore, expend a lot of time preparing legislation which may not eventually be approved by Cabinet.<sup>130</sup>

The obvious advantage for drafters spending much time with legislative authorities is that their views will be taken into account and also ensures that the final draft will be expressed in a manner palatable to them.<sup>131</sup> In fact, this helps the drafter to produce a draft, which he/she is much more informed about. What the drafter wants to say is what will achieve the aims of the instructing department. Thus, as long as the departmental instructions are well communicated, the drafters' task is easier. But when the aims are not communicated well or are incomplete, the inadequacies are reflected in the legislation.<sup>132</sup> In Rwanda, such cases have arisen when the drafter receives a draft with incomplete instructions from the Minister and the drafter spends much time trying to work on a very long draft, which is eventually rejected by the Parliament. A case in point is the Rwandan law on Companies Act<sup>133</sup> which initially had 600 articles, which were rejected by parliamentarians claiming it was unnecessarily big. Such a problem rests squarely on the shoulders of a drafter because if the minister does not set out clearly what instructions and information it needs, it is hardly surprising that it does not get what it wants.<sup>134</sup> Therefore, the drafter should always clearly and firmly grasp the ideas behind the given instructions, and he/she should do this as a skilled person, so that he/she can commence to draft.<sup>135</sup> Admittedly, legislative proposals often involve a mix of new law, amendments to existing law, and the repeal of law,<sup>136</sup> but if the instructions are followed precisely, there is little chance

127 *Ibid.*

128 'Working with Parliamentary Counsel', 2011, p. 8, <<http://umbr4.cabinetoffice.gov.uk/media/228366/wwpc090723.pdf>> (Accessed 10 August 2011).

129 Elliott, 1992, p. 3.

130 Simamba, *supra* n. 9, p. 1139.

131 *Ibid.*

132 D.C. Elliott, 'Getting Better Instructions for Legislative Drafting', 1992, p. 3, <[www.davidelliott.ca/legislativedrafting.htm](http://www.davidelliott.ca/legislativedrafting.htm)> (Accessed 10 August 2011).

133 Law relating to companies, No. 07/2009 of 27 April 2009.

134 Elliott, 1992.

135 Dickerson, 1981, p. 134.

136 Elliott, 1992, p. 7.



of a successful negligence claim being against the drafter.<sup>137</sup> Drafters have to be prepared at all times so that when a client points out errors in a draft, instead of feeling annoyed he/she should be pleased or even relieved that error has been identified and the draft can be improved by addressing it.<sup>138</sup>

#### D. The Quality of Drafting Instructions

##### I. Importance

The most important thing about drafting instructions is to provide comprehensive information, which enables the drafter to draft the legislation in a narrative form, and it is also to avoid drafting in technical language as the instruction requires him/her to explain.<sup>139</sup> Rwanda being a developing jurisdiction requires proper drafting instructions. They are essential in that they help the drafter in preparing a sound law that can be tested in most valuable ways by asking questions of what if. In fact, these are pertinent questions, especially, if they point out flaws or improve the legislative scheme.<sup>140</sup> As Elliot echoed it, Instructions in the form of an annotated draft, supplemented by comments and meetings can be extremely helpful if the department understands that the draft bill is the drafter's responsibility, and the drafter is not bound to follow the organization or the language of a departmental draft.<sup>141</sup> Thornton's view is that, quality of drafting instructions should not be written hastily as this will waste the time of everybody concerned and delay drafting process, thus, render the work already done futile.<sup>142</sup>

Although Rwanda is a developing jurisdiction, research has proved that their procedure for making drafting instructions is almost similar to several other jurisdictions around the world, and this serves as references in search to improve the quality of legislation. For instance, in France, a project for a law springs from the government and it is formulated by the concerned ministry, and the law is drawn up and sent to the Ministry of Justice and where it is examined by drafters on matters relating to basic rights and the constitutional provisions.<sup>143</sup> Similarly, in Germany, as Dale noted, there is a loose-leaf volume of instructions to ministries on various matters such as uniformity of form, abbreviations, references, terminology, the need for clarity and the necessity to aim at perfection of language and a text intelligible to layman.<sup>144</sup>

If the quality of drafting instructions attempt to limit the types of amendments that can be made to a bill, they may require a very narrowly descriptive title and run the risk that even friendly amendments could flaw the bill by failing to include necessary title changes. Conversely, if a client wants the bill to be able

137 Sinclair, 2001, p. 31.

138 Salembier, 2009, p. 515.

139 Stefanou & Xanthaki, 2005, p. 38.

140 Elliott, 1992, p. 7.

141 *Ibid.*, p. 11.

142 Thornton, 1996, p. 130.

143 Dale, 1977, p. 111.

144 *Ibid.*

to serve as a vehicle for other-related ideas during the legislative process, a more general title would be appropriate. The general rule a drafter should follow is to avoid an extensive, wordy and overly specific title absent compelling reasons. Verbosity in a title is as bad as verbosity in the body of the bill.<sup>145</sup>

## II. Content

Drafting instructions must explain the background information of the legislative proposals, legislative models from other jurisdictions and consultations undertaken.<sup>146</sup> In fact, the content of drafting instructions must be respected in as much as possible in order to identify and resolve all legal issues. We take an example of the Alaska State Constitution, which provides that the enacting clause must be written as “Be it Enacted by the Legislature of the State of Alaska” and the instruction goes on to say that everything that follows the clause becomes law. If the clause is not in exactly the terms used in the constitution, the bill may be invalid even if all other procedures are complied with.<sup>147</sup> Another relevant example is the Supreme law of Canada, where the Charter of Rights and Freedoms must be considered throughout the drafting process, and references for constitutional opinions are often needed. And any Charter or legal issues that have not already been identified should be raised by the drafter.<sup>148</sup> So with such clear instructions, there is no reason why the legislation would fail to achieve its goal.

Rwanda, like most Canadian jurisdictions accept instructions in the form of a draft, as does the New Zealand Parliamentary Counsel Office. On the other extreme, Australia does not share the same view and they say that someone else’s draft is not an adequate substitute for “proper instructions”.<sup>149</sup> In my opinion, I agree with Australia’s view because someone’s draft is not as easy to analyse as it would have been in case the draft instructions were written and submitted separately. Also without such detailed instructions, the drafting of the legislation is will be a difficult task as the drafter uses the little time consulting to know the purpose of each issue mentioned in the draft law. Quality of drafting instructions must provide clear information as who has the function of making any administrative decisions or exercising discretions provided for.<sup>150</sup> Taking an example of the UK procedure when it comes to understanding instructions properly, the sponsoring department provides the committee with a memorandum identifying any provisions for delegated legislation, briefly stating their purpose and why the matter has been left to delegated legislation and explains why the affirmative or negative procedure is being used.<sup>151</sup>

145 Legislative Affairs Agency, *Manual of Legislative Drafting*, 2007, p. 11, <<http://w3.legis.state.ak.us/docs/pdf/DraftingManual2007.pdf>> (Accessed 11 August 2011).

146 Stefanou & Xanthaki, 2005, p. 38.

147 *Ibid.*, p. 13.

148 Elliott, 1992, p. 7.

149 *Ibid.*, p. 11.

150 Thornton, 1996, p. 131.

151 M. Zander, *The Law Making Process* (6th edn), Cambridge University Press, Cambridge, 2004, p. 113.

However, it is common for instructions to change during the drafting process. If the change in policy is significant, the drafter should seek approval from the Minister, to raise the issue.<sup>152</sup> Let us take an example of Rwanda, when bills and statutory amendments have the potential to reduce Government revenue or increase State expenditure, the drafting instructions must indicate proposals for raising the required revenue or making savings equivalent to the anticipated expenditure.<sup>153</sup> In such a case, the drafter needs the fullest information relating to the facts, particularly the terms that have been agreed. Similarly where the person giving instructions is acting under the power of attorney, then drafter should insist on seeing the power.<sup>154</sup>

Moreover, the quality of drafting instructions must include very detailed terms that have been negotiated, and the parties are more likely to have given thought to implications of the proposed law.<sup>155</sup> On the other hand, there are instances where it is necessary to send away the client on the grounds of being unable to give instructions for drafting a law, but such instances are infrequent.<sup>156</sup> As regards the imperfections in legislative drafting, the blame should not be carried on the drafter's shoulders as he/she not only acts upon instructions received from superiors but also has to confront a judiciary that has as yet, no firm policy of statutory interpretation.<sup>157</sup> Thus, the remedy for such blames that tend to take much of the drafter's time should be addressed by giving good quality of drafting instructions, which in turn save the drafter from being called upon to explain the reason for imperfections in the law.

Furthermore, it is important to note that the quality of drafting instructions facilitates the implementation of the law to flow from the law itself, and to ensure that it is effective and thoroughly researched.<sup>158</sup> Special attention should be paid when the drafter reaches the stage of drafting the form of the enabling clause as well as the form of the subsidiary legislation.<sup>159</sup> In fact, this is the essential stage where the quality of drafting instruction can be formulated through sharing information and discussion with the Minister concerned about the objectives and intended operation of the legislation.<sup>160</sup> Equally important to note is that the quality of drafting instructions is determined by the participation of the drafter when he/she is defining the meaning of the policy and translating the broad terms of policy into the law's details.<sup>161</sup> It is from this participation that the drafter can be able to fill the details that have not been provided by the instructor, hence, sometimes involving the drafter in substantive decision mak-

152 Elliott, 1992, p. 7.

153 Constitution, *supra* n. 11, Art. 91.

154 S. Robinson, *Drafting: Its Application to Conveyancing and Commercial Documents*, Butterworths, London, 1980, pp. 22-23.

155 *Ibid.*, p. 23.

156 *Ibid.*, p. 24.

157 N.J.C. van de Bergh, *Aspects of Legislative Drafting*, University of Zululand, KwaDlangezwa, 1987, p. 40.

158 A.J. Burger, *A Guide to Legislative Drafting in South Africa*, Cape Town, 2002, p. 10.

159 R.M.M. King, *Manual on Legislative Drafting*, Commonwealth Secretariat, London, 1976, p. 23.

160 *Ibid.*

161 Stefanou & Xanthaki, 2008, p. 132.

ing,<sup>162</sup> which facilitates him to get quality of drafting instructions, hence achieving his/her goal making good quality of legislation. Good drafting instructions allows for more time for better legislative drafting.<sup>163</sup> In the final remarks of this article, quality of drafting instructions should be emphasized by both drafters and instructing officers because good instructions help them to anticipate what might happen, thus, do their best to cover that too.<sup>164</sup>

## E. Analysing the Case Study and Way Forward

### I. Policy Objective

The case study concerns the law relating to the punishment of the crime of genocide ideology, which was initiated by parliamentarians at the request of the officials who are the policy makers. The policy objective was to produce a law for punishing genocide convicts. The genocide ideology law is an organic law, which is a special law as far as the Rwandan constitution is concerned.<sup>165</sup> Considering what Stefanou stated, when selecting a legislative choice or indeed, when supporting a policy choice, the drafter takes into account the financial and non-monetary costs of this choice to interest groups and to the State itself.<sup>166</sup> It is at this level when the participation of the Rwandan drafter was required to work as an architect and try to understand the draft, analyse it to be able to advise on the future consequences of the proposed legislation and submit to the Minister for action. But the fact that instructions were not properly given, it affected the law on genocide ideology because it became inapplicable immediately after its entry into force. It is, however, important to note that it is not only proper instructions that would permit the law on genocide ideology to be applicable, rather, the drafter was required to apply other tools that would facilitate him/her to produce a good quality of legislation.

As for Thornton, the procedure or machinery for the adoption of ideas as government legislative policy will, of course, vary considerably according to the nature of the institutions of government. As this ensures that the drafter is not obliged to waste his/her time working on proposals that will not be accepted as a whole. Also, this procedure offers some protection against being instructed prematurely.<sup>167</sup>

### II. Purpose

The main purpose of this law was to punish the people who committed genocide crimes during the 1994 war in Rwanda. And due to its urgency parliamentarians were not given time to discuss the key issues with policy makers, consequently, when the law came into force there arose misinterpretations of some terminolo-

162 *Ibid.*, p. 133.

163 Elliott, 1992, p. 8.

164 Asprey, 2003, p. 79.

165 Constitution, *supra* n. 11, Art. 93.

166 Stefanou & Xanthaki, 2008, p. 8.

167 G.C. Thornton, *Legislative Drafting* (2nd edn), Butterworths, London, 1979, p. 103.

gies that were not defined during the drafting of the genocide law. Article 2 of the genocide law gives the definition as follows: The genocide ideology is an aggregate of thoughts characterized by conduct, speeches, documents and other acts aiming at exterminating or inciting others to exterminate people basing on ethnic group, origin, nationality, region, colour, physical appearance, sex, language, religion or political opinion, committed in normal periods or during war.<sup>168</sup> In this definition, the words 'Aggregate of thoughts' was misinterpreted when it came to the application of the law by courts. And yet if the drafting instructions were not ignored, this problem would have arisen.

Providing comprehensive instructions and understanding the roles and responsibilities of a legislative drafter, in advance of a drafting project, mean that it is more likely the project will proceed smoothly.<sup>169</sup>

On the other hand, it is not only the proper drafting instructions that can make the legislation to be of good quality. Rather, if there was the participation of the drafter in the whole process of initiating the law on genocide ideology, it was not going to have any problems. For instance, if this law had been drafted by drafters in parliament who are familiar with issues that are frequently raised in areas such as entry into force and application of legislation,<sup>170</sup> the legislation would have been of good quality, hence achieved its goal. In my view even though drafting instructions are an essential requirement, they were not enough in this particular case study to make the legislation achieve its objective. Furthermore, on the part of government officials, I think there was a problem of limited knowledge regarding how they should give proper drafting instructions and to whom they should give them. In fact, the giving of instructions to drafters is a skill, and it requires the instructing officers to be familiar with certain key aspects of the legislative process. Because once a proposal is accepted as legislative policy and communicated to the drafter in the form of drafting instructions, his/her work begins.<sup>171</sup> However, it is of no wonder that due to the urgent nature of this legislation the normal drafting process through Thornton's five stages was put aside by drafters due to pressure from officials who were much concerned with the overwhelming number of convicts and the backlog of cases at that particular time.

What should be noted is that the instructing officer needs to be conversant with the practices and procedures within the executive arm of government and to some degree, the legislature.<sup>172</sup> As this should have helped to consult during the drafting of the law on genocide ideology, thus, be able to know the origin of the idea to draft that particular law. Because after obtaining the knowledge about drafting practices, the drafter must engage into elaborating the policy that specifies the proposed law's broad objective where various officials and ordinary citi-

168 Law relating to genocide ideology, *supra* n. 19, Art. 2.

169 Elliott, 1992, p. 7.

170 B. Simamba, *The Legislative Process: A Handbook for Public Officials*, Authorhouse, Bloomington, IN, 2009, p. xxvi.

171 Thornton, 1973, p. 103.

172 *Ibid.*

zens and all the implementing guys, together perform the detailed tasks required to achieve those objectives, thus, purport to fill the policy implementing gap.<sup>173</sup> I believe, that if the drafters had all the guidelines as stated by a number of authors, the policy for the law on genocide ideology would have been able to transform into an effective and good quality of legislation, thus, applicable.

Furthermore, in my view, the law on genocide ideology lacked the involvement of drafters in the policy process to be able to get a clear picture from the beginning. Because what is obvious is that drafters do have a role in policy initiation, in particular small and developing jurisdictions such as Rwanda requires the drafter's involvement. And the view of the drafter on the feasibility of such a policy proposal plays an important role in the final decision to proceed with a particular policy or with the timing of the introduction of a new policy.<sup>174</sup> Drafters must consider the fact that drafting instructions are clear and precise enough such that they address the issues of over emphasizing verbal facade, which implies that the problems of substance and architecture either do not exist or are simple preliminaries that may be taken for granted.<sup>175</sup>

Additionally, the involvement and input by an experienced drafter before the policy has been fully developed and accepted are likely to avoid delays during the drafting process.<sup>176</sup> As this will facilitate the drafter during the actual drafting of legislation to have the background information behind the drafting instructions, thus, be able to proceed smoothly. I think these procedures were not considered at the time of drafting the law on genocide ideology, which actually resulted into a number of issues at the time the law came into force.

### *III. Clarity and Precision*

In the definition of the law on genocide ideology, there was lack of clarity and precision for words such as 'and other acts' which caused tension between the judges and the convicts. It is evident that there was lack of proper instructions as to the words to be used in the legislation. Hence, it is obvious that we need clarity and precision in the legislative process for predictability purposes. Rwanda being a democratic government required clarity and precision to be able to understand the legislation and its applicability.<sup>177</sup> In fact, the loopholes in this law were known shortly after the entry into force of this law when convicts started questioning the limitation of such other acts, as this was the best opportunity for the convicts to deny some of the crimes they committed because the list of acts was not exhaustive, meaning that whatever was not mentioned in the law would not apply to them. This, together with other issues resulted into the review of the law on genocide ideology by drafters at the Attorney General's Office, immediately after its entry into force. I believe this was a good idea because the first thing a drafter is interested in is whether the drafting instructions contain the back-

173 Stefanou & Xanthaki, 2005, p. 289.

174 *Ibid.*

175 Nutting & Dickerson, 1978, p. 667.

176 Stefanou & Xanthaki, 2005, p. 289.

177 *Ibid.*, p. 11.

ground information to enable him to see in perspective and in context the circumstances and problems that the legislative proposal is intended to meet.<sup>178</sup> And as Xanthaki echoed it, detailed precision in drafting is particularly suitable for criminal statutes.<sup>179</sup> This assertion actually applies to the law on genocide ideology as a typical example of the mentioned statutes, where the definitions required more precision than clarity.<sup>180</sup>

On the other hand, it is obvious that the review of the law on genocide ideology increased pressures on the drafter's shoulder as it required consultations with stakeholders, discussions with officials, which all required a lot of time. I strongly agree with fellow drafters who refuse the concept that drafting of legislation should deal with polishing what others have written.<sup>181</sup> To some extent, lack of proper drafting instructions emanate from lack of enough time by some officials to first read and understand what the legislation is all about, before they venture deeply into assessing legislation from the democratic stand point. And such issues are common in developing jurisdictions where you find official are not well acquainted with the basics of the role that they are supposed to play when giving drafting instructions as well as making proposals for legislation.<sup>182</sup>

The law on genocide ideology was found to be contradicting with the Rwandan constitution because it contains a chapter on penalties, and yet there are penalties already provided in the Rwandan penal law. Article 93(3) of the constitution states, "An organic law may not contradict the Constitution. Neither may an ordinary law or decree-law contradict an organic law nor may an Order or regulations contradict law".<sup>183</sup> In my view, such a contradiction happened as a result of lack of proper written instructions in the process of making the genocide legislation. So the legislation on genocide ideology worked as an eye opener for all the parties who are concerned with putting legislation in place. Because at the time the legislation came into force, that is, when more issues relating to lack of proper drafting instructions arose, these issues were particularly related to some of the provisions in the genocide ideology law that were likely to give the genocide convicts several alternatives to appeal, deny and even defending themselves against the genocide crimes. For instance, Chapter 2 of the law on genocide ideology talks about penalties, and yet the Rwanda penal law provides penalties as well. Thus, the purpose of having properly written instructions is to help the drafter of such new legislations to turn their minds to whether the courts are likely to construe them as constitutional enactments and advise whether the legislation is likely to interfere with other laws or not.<sup>184</sup>

The preparation of drafting instructions is also an essay in communication, and, although the drafter is at the receiving end of the communication, he

178 Thornton, 1996, p. 130.

179 Stefanou & Xanthaki, 2005, p. 11.

180 *Ibid.*

181 Driedger, 1957, p. xix.

182 Simamba, 2009, p. xxvii.

183 Constitution, *supra* n. 11, Art. 93 (3).

184 Greenberg, 2008, pp. 32-33.

has a paramount interest in doing everything within his power towards promoting the complete and successful communication to himself of those instructions.<sup>185</sup>

It is no doubt that the role of a drafter is of drawing the line, but the essential prerequisite for being able to draft effective legislation is to have drafting instructions that facilitate the drafter to predict how the legislation will be applied in practice. By doing so, the drafter has to make a whole series of balancing judgments that set the parameters for what amounts to good drafting.<sup>186</sup>

Regarding the inconsistencies in the law on genocide ideology, I think parliamentarians together with their drafters did not consider the continuity concept, which would have facilitated them to arrive at different conclusions. Thus, one of the most helpful considerations when the drafter has proper drafting instructions is continuity, which involves looking backwards at the immediate past to find out if the new law fits with the old; it helps the drafter to ensure that the drafting approach does not prejudice the interpretation of provisions that have already been drafted; it leads to the principle that legislation must be drafted in the way in which the courts expect to be communicated with.<sup>187</sup> It is no wonder that there was not enough detailed research that was required before and during the drafting of genocide legislation, because a country coming out of war and destruction could not afford to have enough resources to carry out research. Otherwise being a special law, the law on genocide ideology would have necessarily involved further research to be able to re-evaluate the facts behind the individual provisions and to check the contents of the provisions against the drafting instructions and the precedents that are available at checklists.<sup>188</sup>

Furthermore, I think, the little drafting instructions to draft the law on genocide ideology were given by instructing officer who either had limited time or even little knowledge on:

1. the legislative process and how to apply their role in it;
2. approaches to drafting ability and to comment meaningfully on legislation;
3. understanding of the rules of statutory interpretation, which are taken into account in drafting legislation.<sup>189</sup>

As regards the vague words as such 'and other acts' that led to misinterpretation of the law on genocide ideology, Seidman echoed it that only as a last resort, if they have no other choice, should the drafters use vague words deliberately. These words can mean practically whatever the reader chooses to read them into.<sup>190</sup> However, the case is different as far as source of vagueness of the words used in the definition of the genocide ideology, in that, there seems to have been

185 Thornton, 1987, p. 113.

186 Sir William Dale issue, *European Journal of Law Reform*, Vol. 11, No. 2, 2009, p. 141.

187 *Ibid.*, p. 143.

188 Robinson, 1980, p. 27.

189 Simamba, 2009, p. xxiii.

190 Seidman, Seidman & Abeyesekere, 2001, p. 262.



lack of clear instructions as to the requirements of the legislation, and the drafters assumed that such words would not cause any harm to the legislation. It is also evident that due to lack of drafting instructions to draft the law on genocide ideology, drafters did not have a way of making comparisons with other jurisdictions around the world because they did not have any written copy of instructions to look at. Because they could have borrowed ideas from jurisdictions with best practices such as Sweden law, which is easily followed because of frequent cross headings as their drafting instructions, also the Germany law that is easily followed by means of their drafting instructions of putting headings to the sections, as well as for the French whose drafting instruction is to insert cross heading in the text for ease of reading.<sup>191</sup> Thus, it is important to note that not everyone with the skill in writing can write legislation. In writing legislation or, indeed, even for understanding legislation, one needs not just writing and comprehension skills but also a good knowledge of certain legal rules that have been developed by the courts on how to read and understand a statute.<sup>192</sup>

#### *IV. Consistency*

Although we focused on the instructing officer to have been the lead cause of the inconsistencies in the genocide ideology, even the drafter did not play his/her key role of putting in much effort to have a thorough understanding of the practicalities of the proposal. As long as there are proper drafting instructions, then the drafter can be able to question about issue regarding inconsistencies and the validity of the legislation in question. Rwanda is a jurisdiction with a written constitution, and the constitution is the supreme law. Therefore, with proper written instructions the drafter will be able to identify whether the genocide law is inconsistent with or, in contravention of, a provision of the constitution, hence be able to give his opinion.<sup>193</sup> This should have paved the way for the drafter to know if the instructions referred to all known implications and difficulties whether legal, social or administrative.<sup>194</sup> The purpose of the law on genocide ideology was to prevent and punish the crimes, and so the main target audiences were the convicts who are the public, the courts and the parliamentarians,<sup>195</sup> but because of lacking clear instructions everybody got involved even the uneducated groups to give their own interpretations to the vague words in order to take advantage of the loophole to release the genocide suspects and convicts, which was remedied by reviewing the legislation.

It is presumed that the legislature uses language carefully and consistently so that within a statute or their legislative instrument the same words have the same meaning and different words have different meanings.<sup>196</sup>

191 Dale, 1977, pp. 162-163.

192 Simamba, 2009, p. xxiii.

193 V.C.R.A.C. Crabbe, *Legislative Drafting*, Cavendish Publishing Limited, London, 1993, p. 17.

194 Thornton, 1987, p. 114.

195 Driedger, 1982, p. 6.

196 Greenberg, 2008, p. 129.

What should be noted however is that, such inconsistencies have not gone unnoticed for years in Rwandan legislative process. However, this argument does not justify the apparent lack of concern for the inability to equip the drafter with proper drafting instructions to enable him/her to draft good quality legislations that are easy to read and understand.<sup>197</sup> Even those who recognize the increased importance of legislation and have called for greater attention to be given to it, in the law schools they have concentrated on the study of legislation already adopted rather than the drafting of it.<sup>198</sup> When we analyse the law on genocide ideology, we find inconsistencies regarding the contents of some provisions. Articles 4-12 provide for penalties, and when it comes to Article 13 of the same law regarding false accusers, it has the reference in the penal code.<sup>199</sup> The article states that “Any person found guilty of false accusations of the crime of genocide ideology referred to in Article 4 of this Law shall be liable to the punishment provided for by the penal code”.<sup>200</sup> Although it is good to rely on the existing legislations, but it is evident that there was lack guiding instructions to make sure such inconsistencies are avoided in order for the law to be effective. This also proves that the legislation was produced by an inexperienced drafters or a lawyer who are normally constrained by the lines already drawn by the law because when such lawyers draft, they tend to rely so heavily on other laws without reflecting on the desired effects of the legislation.<sup>201</sup>

The essence of drafting instructions is for the drafter to get rid of drafting inconsistencies which tend to fail the application of the legislation, in that, it is at this point that the drafter becomes aware in the course of preparing a bill that a very minor change requires to be made to correct an obvious error by way of a note submitted to the instructing officer along with the bill.<sup>202</sup> Ideally, the drafter’s work is lessened with the assistance of instructions to guide their drafting and be able to analyse what is needed to give effect to the instructions, to devise the structure for the new provisions, which is consistent with the policy objectives of the instructing team and to produce provisions that make the legal objectives clear to users of the proposed legislation.<sup>203</sup> This process involves balancing a number of competing interests and objectives, and it is finding the right balance for the legislation in question that requires such a high quality of judgement from the drafter.<sup>204</sup>

As Greenberg puts it, legislation is often criticized for being too complicated both in form and in substance. It is clear that some of the complexity cannot be avoided and that some of it can be.<sup>205</sup> Looking at the inconsistencies within the

197 R.J. Martineau, *Drafting Legislation and Rules in Plain Language*, West Publishing Co., St. Paul, MN, 1991, p. 3.

198 *Ibid.*

199 Decree law No. 21/77 of 18 August 1977 Relating to Penal Code.

200 Law relating to genocide ideology, *supra* n. 19, Art. 13.

201 Stefanou & Xanthaki, 2008, p. 22.

202 Greenberg, 2008, p. 73.

203 Stefanou & Xanthaki, 2005, p. 23.

204 *Ibid.*

205 Greenberg, 2008, p. 81.

provisions in the law on genocide ideology it reflects the legislative complexity that Greenberg talked about earlier, and this leads me to question the following:

1. Why were related provisions not put in the same law instead of splitting them by referring only Article 13 to penal law?
2. Why were the provisions on penalties repeated in the law on genocide ideology because the penal law also provides for the same?

In my opinion, these inconsistencies emanate from both lack of proper drafting instructions and limited understanding as to where the provisions relating to damages should be placed within the legislation. More to that, the law on genocide ideology seemed to have lacked consultations on the part of those who drafted it, and consequently raised a number of issues concerning which penalties to apply to the genocide convicts as some of the penalties were in the genocide law and others in the penal law.

A discussion with the instructing officer is a necessary part of the understanding stage of the process. Not only does such a discussion give the drafter an opportunity of clarifying points he is unsure of, but also it provides a check on how successfully the proposals contained in the drafting instructions have been communicated to him.<sup>206</sup>

#### V. *Way Forward*

The most important part of drafting is the taking of clear instructions and knowing exactly what your client wants.<sup>207</sup> In this article, we are intending to know how instructions are given and of what quality, if the instructions are properly written or if they are in the form of a draft legislation that will make it difficult for the drafter to read and understand them without having to seek further explanations to what they really mean. Of course, if the drafting instructions are bad, they will result into bad legislation, which will have an impact on the people it is meant to serve. As Cutt puts it, bad instructions are bad for business because customers think twice about buying from a company whose instructions have proved useless before.<sup>208</sup> If we relate the customers to the users of the legislation such as courts and lawyers, you find that there are many complaints outside the drafting offices regarding poor quality legislation resulting from lack of proper written instructions to make that particular legislation understood.

Therefore, there is need for the drafters, particularly Rwandan drafters, to strive and make their point understood regarding the quality of drafting instructions. This is way they will be able achieve good quality of legislation. Even an experienced carpenter might readily understand the instructions “screw pendant bolts into door plates using cheese head screws”.<sup>209</sup> Nonetheless, for the quality of legislation to be good, the drafter must ensure that drafting instructions begin by indicating the main objectives that the bill is intended to achieve, so as to put

206 Thornton, 1979 p. 107.

207 Sinclair, 2001, p. 31.

208 M. Cutts, *The Plain English Guide*, Oxford University Press, Oxford, 1996, p. 132.

209 *Ibid.*, p. 133.

the drafter in the picture from the beginning; the instructions must contain all relevant background material relating to the proposals to be included in the bill, including all known legal implications and difficulties.<sup>210</sup> But as observed by Dickerson, drafting is a two-level operation: one level being the domain of words and the other being the domain of ideas.<sup>211</sup> The domain of words in my view involves properly written instructions that the drafter uses to attain his goal of translating the drafting instructions into an effective legislation. The domain of ideas relates to how the legislation will be understood by the users, because the purpose of writing is to be understood. Furthermore, it is important to imagine the reader's response and to make sure that your legislation satisfies your reader and in still the right frame of mind.<sup>212</sup>

As for the question of the Rwandan scenario as to which language the drafting instructions should be given in, I think, it should be treated as per Derlen's opinion in the case of *van der Vecht*, as he puts it that the need for a uniform interpretation of community regulations necessitates that the passage should not be applied in the isolation, but that, in case of doubt, it should be interpreted in and applied in the light of the versions existing in the other three languages.<sup>213</sup> In my opinion, the challenges within the legislative process in Rwanda, which is done in three languages, can be addressed by referring to all existing versions other than sticking to one version of Kinyarwanda, which the parliament votes in. The other way to improve the quality of Rwandan legislation is for the drafter to attend meetings where instructions are being formulated by client ministries. Although sometimes when the drafter is made part of the working group, it becomes an added burden to his/her ever increasing draft legislations, as he is required to attend all meetings especially when they are held on regular basis such as weekly.<sup>214</sup>

Choice of words is still a challenge to drafters, instructing officers and even government officials in Rwanda when they formulate drafting instructions, because sometimes they use ambiguous words as they attempt to give drafting instructions in three languages, and yet they must use words that will generate one response in the minds of the users of the legislation. As Robinson suggested, Instructing officers must develop a nose for syntactic ambiguity. In addition, they need to use all devices for resolving it.<sup>215</sup> Other ways of improving the quality of legislation in Rwanda without necessarily increasing the number of drafters is by guided participation of public officials. However, Simamba noted that many drafters and public officials in developing countries tend to take some of these

210 Stefanou & Xanthaki, 2005, pp. 42-43.

211 R. Dickerson, *Teacher's Manual for Materials on Legal Drafting*, West Publishing Co., St. Paul, MN, 1981, p. 21.

212 M. Adler, *Clarity for Lawyers: The Plain English in Legal Writing*, The Law Society, London, 1990, p. 25.

213 M. Derlen, *Multilingual Interpretation of European Union Law*, Kluwer Law International, Alphen aan den Rijn, 2009, p. 32.

214 Simamba, *supra* n. 9, p. 13.

215 Robinson, 1980, p. 46.

suggestions made here to be things they take for granted in their jurisdictions.<sup>216</sup> Thus, the only way to resolve the issue of drafting instructions in Rwanda is by training instructing officials on how to develop proper drafting instructions and better managing of legislative process that can produce quality of legislation.<sup>217</sup> I strongly believe that if these suggestions outlined above are implemented, the quality of legislation in Rwanda will improve.

## F. Conclusion

Considering various points we talked about in this piece of work, we must appreciate the fact that proper drafting instructions lead to quality of legislation. Particularly, this article was intending to prove that lack of proper drafting instructions lead to poor quality of legislation in Rwanda. This has been proved by authors such as Thornton who elaborates how drafting instructions should be the main and most important task for the drafter in order to have thorough and complete understanding of the purpose required for the legislation. And it is such understanding that is required by the Rwandan drafter to be able to get rid of poor quality legislation, hence, be able to produce good quality of legislation. This, however, can be achieved by looking at what makes the legislation ineffective and one of the reasons was observed to be emanating from giving drafting instructions in form of proposed laws, as this affects the legislation as the inexperienced authors of such attempts usually succeed in obscuring their specific objectives instead of being helpful to the drafters.<sup>218</sup> Various authors have emphasized on the fact that having good policy results into proper drafting instructions and final product is good quality legislation. As echoed by Thornton, the involvement and input by an experienced drafter before the policy has been fully developed and accepted are likely to avoid delays during the drafting process.<sup>219</sup>

In developing this piece of work, we realized that good instructions are indeed needed as an aid to the drafter especially when he/she is doing the analysis of the draft legislation, as it helps him/her to know whether the legislation is likely to interfere with the provisions of the existing laws or detract from rights or privileges enjoyed under existing written law.<sup>220</sup>

In spite of the challenges associated with legislative drafting, in particular, those of accessibility, transparency of information and the related opportunities of power and control in and through its interpretation and application, there seems to be a window of opportunity to make some changes to the way legislative provisions are drafted.<sup>221</sup> Some of the opportunities were suggested by Thornton: the guidance that must be available to those who prepare drafting instructions in

<sup>216</sup> Simamba, *supra* n. 9, p. 1126.

<sup>217</sup> *Ibid.*

<sup>218</sup> S. Pisarenko, *The Drafting of Laws*, Department of Justice of Canada and the Ministry of Justice of Ukraine, 1999, p. 54.

<sup>219</sup> Thornton, 1996, p. 126.

<sup>220</sup> *Ibid.*, p. 135.

<sup>221</sup> Berry, 2010, p. 7.

order to get the idea of what the drafter needs and the form in which it will be helpful; and the consultation between the drafter and instructing officer at an early stage after receipt and preliminary digestion of the drafting instructions.<sup>222</sup> While developing this piece of work, the analysis stage that is within the drafting process has been looked at critically to determine if it can be helpful to the Rwandan drafter to analyse the drafting instructions and be able to produce good quality legislation. Such analysis is much applicable to Rwanda where there is no control of anti-constitutionality of law before the laws are passed by the Parliament. But every problem has a remedy, because such anti-constitutional matters are regulated by the Supreme Court, which has jurisdiction of hearing petitions on the constitutionality of the organic laws, laws, decree-laws and international treaties and agreements.

Considering the challenging work of the drafter as they endeavour to draft complex legislations due to lack of proper instructions, they still attempt to refer to every conceivable contingency within their model world, and this gives their writing its second key characteristic of being all-inclusive.<sup>223</sup> However, in the whole process of drafting throughout the five stages, the drafter should be able to give full account of all the words used in the legislation as he/she is required to use the drafting instructions as his/her mirror, because this enables the drafter to produce a legislation that is simple and not in violation of any rules as required in order to produce good quality legislation. Of course, what amounts to an acceptable degree of simplicity and translucence depends on the nature of the likely reader of a piece of legislation.<sup>224</sup> It is essential for the drafter to have a working understanding of the current law relating to the subject of the bill request. With knowledge of the existing statutory scheme and, where appropriate, the relevant case law, the drafter can determine precisely what changes to the law are required to accomplish the sponsor's goals.<sup>225</sup>

Although good drafting practices can and usually do improve the quality of thought,<sup>226</sup> it is sometimes compromised by lack of proper drafting instructions. This has been the case in the Rwandan legislative process, where drafting instructions are given in the form of draft legislation, and this leads the drafter to engage into unnecessary procedures trying to scrutinize each aspect of the legislation. Moreover, the drafters in Rwanda are most often involved in examining the complexities involved in the process of the construction, interpretation and use of legislative provisions, considering the challenges and opportunities confronting the legislation to make such provisions clear, precise, unambiguous, and all-inclusive, paying particular attention to the nature.<sup>227</sup> This kind of work tends to take much of the drafter's time, and as far as drafting is concerned, those who do it have not specialized in the art, or had anything for it, but they are apt because they are good drafters able to set out legal rules clearly so that they add to their

222 Thornton, 1996, p. 129.

223 Berry, 2010, p. 3.

224 Greenberg, 2008, p. 341.

225 Biribonwoha, 2006, p. 16.

226 Dickerson, 1981, p. 21.

227 Berry, 2010, p. 6.

drafting experience in the course of their work.<sup>228</sup> As far as legislative drafting stages are concerned, the principal functions of the Scrutiny of Legislation and Regulations are to consider any bill introduced into the Parliament and to report to the Parliament as to whether the draft legislation is complete or not and give reasons. These drafting principles should be able to guide the Rwandan drafters and instructing officers as they strive to improve the quality of legislation by improving the quality of drafting instructions.

Furthermore, this article examined how quality of legislation can be achieved with the help of concepts such as efficacy, effectiveness and efficiency, which Xanthaki refers to them as functionality concept in legislative drafting.<sup>229</sup> However, we need to consider the fact that although every lawyer drafts legal instruments and thus needs to acquire competence in this discipline, it makes little difference whether he/she learns it by drafting wills, leases, contracts, statutes or constitutions and by-laws for private organizations; they are all definitive, expository documents in which the emotive element is minimal and for which the architectural, semantic and syntactic problems are generally the same.<sup>230</sup>

Despite the drafter's requirement to get properly written drafting instructions to produce quality legislation, we need to acknowledge that he cannot possibly control the efficacy of the policy decided by the Cabinet Office and pushed forward by the client department, or the efficacy of the implementation of the legislation by the executive or indeed the efficacy of its enforcement by the police. This purely proves that efficacy cannot be a goal set for the drafter alone.<sup>231</sup> The other concepts for quality of legislation which this article looked at was effectiveness which Parkinson described as reasonable legislation, and efficiency which is often perceived as a dual set of presumptions, and they include: the normative presumption, which say that the law should be efficient, and the descriptive presumption, which states that the law is in fact efficient.<sup>232</sup> But considering Rwanda as a post-war jurisdiction with its justice system still under reforms, it is not a surprise that such concepts are not respected by a drafter during the drafting process as there are other challenging factors he/she must look at in order to produce quality legislation. Some of the challenges that consume much of the Rwandan drafter's time include getting the drafting instructions in one language and yet the draft legislation must be written in three languages: Kinyarwanda, English and French. Sometimes the drafter is required to prepare the drafting instructions for a particular legislation. This, on one hand, is added advantage for the drafter because it is a learning experience, which he/she carries forward for his/her carrier, and, on the other side, it is a challenge as he/she has to deal with drafting issues prematurely. In developed jurisdictions such as the United Kingdom, drafting instructions are prepared by a legal advisor, in close consultation with the administrators and some of their tasks are: to work out what additions

228 Dale, 1977, p. 104.

229 Stefanou & Xanthaki, 2008, p. 3.

230 Nutting & Dickerson, 1978, p. 666.

231 Stefanou & Xanthaki, 2008, p. 5.

232 *Ibid.*, pp. 6-7.

to, or changes in the law needed to give effect to the policy, and to discuss with the drafter any problems or difficulties arising out of the instructions.<sup>233</sup>

In the final analysis, it is important to note that the inefficiencies that manifest themselves in Rwandan legislative process as well as on the executive side of government are often a result of failure to implement measures that do not call for a large outlay of resources. And the most glaring deficiency is the lack of proper written instructions and expectations that are formed without sufficient knowledge of what the drafting of legislation involves and the way it is processed through government system.<sup>234</sup> On the whole, to achieve quality of legislation is a difficult task to the drafter, but there are other ways that have been employed by Rwandan drafters to achieve quality of legislation. The other tools are: participating in policy meetings, extensive research, knowledge of existing laws and consultations with proficient drafters. On that note, I hope that this article may be of some use especially to Rwanda where instructing officers and drafters are still striving hard to achieve good quality of legislation.

233 Stefanou & Xanthaki, 2005, p. 42.

234 Simamba, *supra* n. 9, p. 20.