

Criticisms of the Legislative Drafting Process and Suggested Reforms in Sierra Leone

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A. Thornton's Five Stages of the Drafting Process its Import and Importance

I. Thornton's Five Stages of the Drafting Process?

Thornton¹ a renowned and eminent drafter of his time distinguishes five stages in the drafting process, namely:

- Understanding the proposal
- Analysing the proposal
- Designing the law
- Composing and developing the draft, and
- Scrutiny and testing the draft

As an ardent advocate for quality legislation, Thornton divided the drafting process into five stages to provide for a better means of achieving quality legislation. Indeed if policy makers and legislative drafters meticulously and scrupulously adopt and adhere to the five stages in the drafting process as laid down by Thornton, it is very likely that the bill they draft will be of a good quality. A good and quality bill will produce quality legislation. I will develop this thinking further in this paper. The drafting process refers to the writing of the bill. It starts when the drafter receives the drafting instruction until a draft is produced. This however brings to the fore the important role the policy makers and the drafters play in the drafting process. The drafting process is part of a comprehensive legislative process.² So therefore, it should not be confused with the passage of the bill in Parliament. In

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¹ See G. C. Thornton *Legislative Drafting* 129 (1996). Also see K. Patchett, *Setting and Maintaining Law Drafting Standards, A Background Paper on Legislative Drafting*, in C. Stefanou & H. Xanthaki (Eds.), *Manual In Legislative Drafting*, at 49 (2005).

² Analysis of legislative process see J. F. Burrows, *Statute Law* 42 (2003), see also the Australian *Legislative Handbook*, the New South Wales *Drafting Manual*, see further R. J. Martineau, *Drafting Legislation and Rules in Plain English* (2003) and R. C. Bergeron, *Globalisation of Dialogue on Legislative Process*, 23 *Statute Law Review* 19 (2002). Read D. Kelly, *Essays on Legislative Drafting* 74 (1988).

short, the legislative process constitutes both the writing of the bill and its passage in Parliament into an Act or statute. Dividing the drafting process into five stages enhances easy and better analysis of the drafting process. It helps to identify problems in the drafting process and its causes, then finding and implementing a solution to those problems.³ It makes for a sound evaluation of issues involved in the drafting process. It provides for a better and proper assessment of problems, identifying better or alternative drafting skills and techniques options and also determine the audience for whom the law is made. It sharpens the focus of the drafter to a wider policy choice options and the political context in which he operates. This calls for creativity and critical thinking⁴ in addressing the problems envisaged in the drafting process. This is an analytical tool available to the drafter wherein he will use his analytical skills to look at the constituent part of the complex process and to express complex ideas in a way readily understood by the appropriate audience using his efficient communication skills.⁵ His experience will enable him further to assess and evaluate the role other key stake holders play at each stage in the drafting process. As intimated earlier, this will easily help to point out the loopholes and faults in the drafting process and provides for amendments.⁶ It is very difficult to do this if the drafting process remains a complex and complicated whole that is not divided into stages that can make analysis easier. When issues are complex and are not broken into stages it is very hard to assess and evaluate those issues.⁷ This is pursued earnestly in the interest of drafting quality bill.

In the five stages of the drafting process outlined above the policy makers and the drafters each will play their own respective parts in the development of the policy and the translation of those policies into a legislative text bearing in mind the proper articulation of those policies of government.⁸ There is a compelling need at each stage of the drafting process, for the concept to be developed, redefined and tested to see whether policy tallies with the legislative text.⁹ This is to further ensure that legislative text properly reflects the policies articulated by the policy makers. On the whole the drafting process where it is divided up into

³ For Legal problem solving see F. P. Grad, *Essay*, reprinted in R. Dickerson, *Materials on Legislative Drafting* 27 (1981), see also, R. Dickerson, *Legislative Drafting* 32-34 (1954). See also, P. Quiggin, *Training and Development of Legislative Drafters*, 2007(2) *The Loophole*, *Journal of The Commonwealth Association of Legislative Counsel* 14, at 15.

⁴ See R. Dickerson, *Statutory Interpretation: Core Meaning and Marginal Uncertainty*, 29 *Missouri Law Review* 1, at 10 (1964), see also, G. Williams, *Language and Law*, 61 *LQR* 71 (1945).

⁵ Quiggin, *supra* note 3, at 15-16.

⁶ *Id.*, at 15.

⁷ Complex issues discussed in Grad, *supra* note 3, at 27.

⁸ See A. Seidman, R. B. Seidman & N. Abeysekere, *Legislative Drafting for Democratic Change* 6 (2001). R. Dickerson, *The Fundamentals of Legal Drafting* 14 (1986). See E. A. Driedger, *The Composition of Legislation, Legislative Forms and Precedent*, xv (1976), V. C. R. A. C. Crabbe, *Legislative Drafting* 11 (1993). Dividing law and politics see also J. F. Wilson, *Challenges of Drafting in a Developing Country*, 2007(2) *The Loophole* 36, at 39.

⁹ Thornton, *supra* note 1, at 124.

five stages is a sure way of testing the policy, help refine it and this will ensure a better sense of how the proposed scheme works in practical terms.¹⁰

The dividing up of the drafting process into five stages does not make for a five stage watertight compartmentalisation of the process.¹¹ Flexibility is entertained for drafters, as and when the need arises to ensure quality draft, testing to see whether text reflect policy and verifying the text at each level of the five stages of the drafting process.¹² The movement is what is described as irregular. This could be a very daunting task and therefore very challenging for drafters and the policy makers as they visit and revisit these stages of the drafting process countless time irrespective of the order of stages until the bill is right. The choice is inescapable and inevitable for quality bill.

Nutting and Dickerson agreed with Thornton on the question of the five stages of the drafting process saying that, “Altogether there are about five separate steps in establishing the final form of a statute.”¹³ I am using draft and statute interchangeably. Statute here does not refer to an Act of Parliament as we are dealing with writing process only and not the promulgation of the bill in Parliament. They however did not name the five stages as Thornton did but it is evident that in substance they recognised those five stages in the drafting process. Nutting and Dickerson emphasised the revision and testing of the bill at each stage and turn to ensure that drafters critically assess, analyse and evaluate issues at these stages in order to get the bill right in terms of quality. I mooted earlier on that a quality bill produces quality legislation. This is important, as quality legislation is efficient and effective. It attains proportionality and subsidiarity.¹⁴ Quality legislation is fair and just. It enhances economic development, good governance and good government.¹⁵ So I will be looking at each stage of the drafting process as laid down by Thornton for a detailed excursion and in-depth analysis as a guide for the attainment of a quality bill.

II. Attaining Quality in Drafting a Bill

Legislative drafting shares certain technical characteristics attributable to its specifically legal and constitutional nature. It is a form of a written communication and therefore legislative drafting benefits from the application of all fundamental aid to effective written communication¹⁶ if the bill is to be right. Another

¹⁰ *Id.*

¹¹ *Id.*, at 129.

¹² Patchett, *supra* note 1, at 44. *See also* Thornton, *supra* note 1, at 124.

¹³ Support for five stages of drafting read C. Nutting & R. Dickerson, *Cases and Materials on Legislation* 675 (1978).

¹⁴ For quality of legislation *see* The Sutherland Report (1993). *See also* the 1993 Council Resolution on the Quality of Drafting Legislation.

¹⁵ Seidman. Seidman & Abeyeskere, *supra* note 8, at 6.

¹⁶ For effective communication *see* Dickerson, *supra* note 4, at 18-19. *See also* R. Penman, *Plain English: Wrong Solution to an Important Problem*, 19(3) *Australian Journal of Communication* 1, at 2 (1992) and Kelly, *supra* note 2, at 411. Read also E. Tanner, *Legislate to Communicate: Trends in Commonwealth Legislation*, 24 *Sydney L. R.* 592 (2002).

fundamental aid for the bill to be right is the use of the plain language in the legislative drafting process. Eagleson, a proponent of the plain language drafting says that, "Plain English is clear, straightforward expression, using many words as are necessary. It is language that avoids obscurity; inflated vocabulary and convoluted sentence structure. It is not baby talk, nor is it a simplified version of the English Language."¹⁷ Let us not be confused by the use of the terms Plain English and Plain Language. Both are used interchangeably as it is even evident from the definition put forward by Eagleson. He was using both terms to mean the same thing. I however prefer Plain Language because it is appealing to me, as it has a broader meaning compared to Plain English. Plain language refers to grammar, topography and lay out which makes its use attractive. We are using language here as a means of communication and considering its entire constituent element in achieving effective communication as easily as possible, a view enhancing clarity and understanding of a bill. Plain Language requires the accurate use of appropriate vocabulary, grammar and clear lay out of the printed page of a bill. It canvasses the proper identification of the audience to whom the language is addressed for effective communication of the law for proper absorption and understanding of the law by the appropriate audience. Plain language therefore has become an appropriate and attractive drafting tool for drafters around the globe, which when applied to legislative drafting can make a better quality bill. The type of language used by the drafter can contribute to the attainment of a quality bill. In this regard, in focussing on the freedom of drafters on the question of language used, Driedger had this to say, "... freedom to use to the fullest extent everything language permits and he must not be shackled by artificial rules and forms, and further laws should be written in modern language and not in ancient, archaic or obsolete terms or forms."¹⁸ Butts and Castle reinforced the views of Eagleson and Driedger on the question of the nature of plain language when they said that, "Legal Document should be written in modern Standard English, that is, Standard English as currently used and understood."¹⁹ Coode also rejected convoluted traditional drafting style saying that, "Nothing more is required than that instead of an accidental and incongruous style; the common popular structure of plain English be resorted to."²⁰ Although the plain language concepts exhibit a very good posture for better legislative drafting in terms of style, using modern language, simple words and shorter sentences as a means of producing quality bill, fear has been entertained that the use of plain language drafting will lead to

¹⁷ R. Eagleson, *Writing in Plain Language* 4 (1990). G. Hathaway, *An Overview of Plain English Movement for Lawyers*, 62 Michigan Bar Journal 945, 945-948 (1983). See Law Reform Commission of Victoria, *Plain English and Law Reports* 9 (1987) Appendix 1 Drafting Manual. For comprehensibility of the Plain English read E. Tanner, *The Comprehensibility Of Legal Language! Is Plain English the Solution?*, 9 Griffith L. R. 52 (2002).

¹⁸ E. Driedger, *A Manual of Instructions for Legislative Drafting and Other Writing*, Book 1-6, at 4 (1970-1979).

¹⁹ P. Butt & R. Castle, *Modern Drafting, A Guide to Using Clearer Language* 167 (2006). See also D. Mellinkoff, *The Language of the Law* 44 (1993). Natural Consumer Council, *Plain Words for Consumers* 47 (1984).

²⁰ Coode on *Legislative Expression* 321 (1952), reprinted in E. Driedger, *The Composition of Legislation; Forms and Precedents* 376 (1976).

loss of precision and therefore loss of certainty in the law. Language as a means of effective communication, it has been observed, is relatively imprecise compared to the language of mathematics in terms of accuracy of expression of ideas.²¹ This therefore creates problems in communicating effectively making it difficult for drafters to achieve quality bill in terms of precision, unambiguity and certainty. Gower has observed that,

Legal drafting must therefore be unambiguous, precise, comprehensive and largely conventional. If it is readily intelligible, so much the better; but it is by far more important that it should yield its meaning accurately than that it should yield it on the first reading, and legal draftsmen cannot afford to give attention, if any, to euphony or literally elegance. What matters most to them is that no one will succeed in persuading a court of law that their words bear a meaning they did not intend, and if possible, that no one will think it worth while to try.²²

But Thornton has viewed it differently when he said,

The purposes of legislation are most likely to be achieved by the draftsman who is ardently concerned to be intelligible. The obligation to be intelligible, to convey the intended meaning so that it is comprehensible and easily understood by affected parties, is best satisfied by writing with simplicity and precision ... A law which is drafted in precise but not simple terms may on account of its incomprehensibility, fail to achieve the result intended. The blind pursuit of precision will inevitably lead to complexity; and the complexity is a definite step along the way to obscurity.²³

While Gower was concerned about the bill being intelligible to achieve accuracy he did not emphasise the need for simplicity and understandability that which Thornton laid much emphasis on to get the bill right. The vain pursuit of precision at the expense of other factors such as simplicity will lead to complexities, a sure way to obscurity.

In pursuit of clarity and precision the drafter will contribute to the quality of the bill. How is this easily achievable? Sir Harold Kent said that,

There are two main objects that draftsmen aim at, and they are not easy to reconcile. First and foremost, to get the bill right. The test is that when it is passed the lawyer or the judge would have mastered its intricacies, the meaning is clear (in the sense of unambiguousness) and the intention carried out. Subject to this, the second is to make the bill intelligible as possible to Parliament and the general public.²⁴

Clarity in terms of both intelligibility and unambiguousness are important cardinal virtues in drafting that could be vigorously pursued to attain quality bill, but both cannot be attained at the same time. Attaining clarity in terms of intelligibility would mean sacrificing some clarity in terms of unambiguousness. This will affect the quality of the bill if a proper balance is not struck between the two extremes. There is a very subtle distinction between the two, which is difficult to detect and

²¹ Thornton, *supra* note 1, ch. 1. See also F. Bennion, *Statutory Interpretation: A Code* 3 (1997). Read F. A. R. Bennion, *Understanding Common Law Legislation, Drafting and Interpretation* 74 (2001).

²² E. Gower, *The Complete Plain Words* 7 (1986).

²³ Thornton, *supra* note 1, at 49.

²⁴ H. Kent, *Memoir of the Law Maker* 97 (1979).

sometimes ignored. To capture the perceived meaning of the subtle difference between the two concepts, perhaps the comment of Sir John Rowlatt, an eminent Parliamentary Counsel, is instructive when he said that, “The intelligibility of the bill is in inverse proportion to its chance of being right.”²⁵ In other words if you want to get the bill right some amount of intelligibility would have to be sacrificed. This thinking of Sir Rowlatt seems to support the thinking of Gower mentioned above. The bottom line is that clarity and precision are difficult to achieve simultaneously in legislative drafting, a herculean task for drafters. The US State of Maine Legislative Drafting Manual warns against overdrafting in pursuit of precision saying that,

precision in drafting is a worthy goal, but can be taken too far. It is frequently unnecessary to name every single thing you are forbidden or requiring. An overzealous attempt at precision may result in redundancy and verbosity. Drafting too precisely may create unintended loopholes.²⁶

And against vagueness it cautions that,

... underdrafting is equally dangerous. Although it is often necessary or desirable to create a general or broad legislative standard or directive, beware of language that is indefinite than that it is meaningless or begs a challenge in court as valid for vagueness. Generally, courts loathe declaring a law invalid on this ground, but careful drafting can eliminate the need for judicial scrutiny.²⁷

Whichever way a bill is drafted there will always be lawyers who wish to dispute the meaning of words used in legislation simply for being argumentative. Jonathan Swift described the situation in this manner when he said that there, “... are a society of men ... bred up from their youth in the art of proving words multiplied for the purpose, that white is black, and black is white according as they are paid.”²⁸ What then is the degree of precision that is a recognisable attribute of quality bill? How do we attain such a degree of precision in legislative drafting? Stephen J. laid down the test of the degree of precision when he said that,

It is not enough [for the drafter] to attain to a degree of precision which a person reading in good faith can understand, but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand.²⁹

This is a challenge for the drafter. The drafter should strive to attain a degree of precision that will lessen the arguments of lawyer over interpretation of the bill. Aitken also identified clarity as a quality in drafting a bill. He said that, “Another important attainable quality is clarity in the sense of being readily comprehensible to the audience to whom the document is primarily addressed.”³⁰ The drafter of

²⁵ Sir John Rowlatt’s words quoted by Kent, *supra* note 24, at 97.

²⁶ US State of Maine Legislative Drafting Manual 67 (1980).

²⁷ *Id.*, at 68.

²⁸ J. Swift, *Gulliver’s Travel: A Voyage to the Country of the Houyhnhnms* (1726), ch. 5.

²⁹ Stephen J. in re Castioni [1891] 1 QB 149 at P 167.

³⁰ J. K. Aitkens, *Piesse, The Element of Drafting* 2 (1995). For audience see M. B. Kirk (1978) reprinted in R. Dickerson, *Materials on Legislative Drafting* 20 (1981). F. Bennion, *The Readership of Legal Text*, 27 *Clarity* 78 (1993). See Clearer Commonwealth Law. Report of Inquiry into

the bill should have in mind the audience he is drafting for. Depending on the audience, the drafter should apply the requisite drafting techniques to target that audience in question appropriately for the bill to be understandable. If he fails to pay heed to these issues he cannot get the bill right.

Plain language as a tool in drafting quality bill in spite of its admirable and attractive attributes has been further criticised by other scholars. Veda Charrow criticised the Plain English school of thought that shorter words or common words will result in writing that is clear and easily understood.³¹ Professor Frank Grad fumed that Plain English is a false issue and doubted what it actually means. Though he did not defend complicated language and complicated statute but he observed that,

Many problems that need legislative solutions are complex and difficult ... we need complex language to state complex problems of law and facts ... I suggest that here too form follows function. The language of the drafter should address itself to the problem to be solved. If complex problems require complex language to their resolutions so be it. No trained drafter will use complex forms of expression unnecessarily.³²

Professor Joseph Williams in agreeing with Professor Frank Grad offers some solutions to the problem of complex writing when he said that,

There are three things to understand about complex writing: it may precisely reflect complex ideas or it may gratuitously complicate either complex issues or simple issues. Style, if used as part of the drafting process cannot only avoid the last two but also helps to reduce if not eliminate the first.³³

So a good drafting language and an elegant drafting style will make the bill simple and readable. So when the drafter is faced with the challenge of drafting a bill he makes sure that he handles the matter at hand in a very creative manner, develops a highly analytical tool, becomes highly critical and intellectual in his analysis, becomes cautious in his approach and decides for himself what is the best cause of action he should take as and when situation dictates. The problem is squarely his. Thornton said that "Unless they are clear about the nature and characteristics of the legislative texts, there is not much chance that anyone else will be."³⁴ Bennion also recognised the challenge of a drafter in their pursuit for a quality bill.³⁵ As experts, they are entrusted with the responsibility to interpret and construe the meaning of words in legislative texts and it is dangerous to encourage non-lawyers to think they can understand legal texts without expert advice.³⁶ So do drafters pursue precision and clarity at all cost to make a bill

Legislative Drafting by Commonwealth of Australia, House of Representative Standing Committee on Legal and Constitutional Affairs (1993), para. 6-12.

³¹ V. Charrow, What is 'Plain English' Anyway? 2-10 (1979) reprinted in R. Dickerson, Materials on Legislative Drafting 278 (1981). And also see Martineau, *supra* note 2, at 7.

³² Grad, *supra* note 3, at 481-489.

³³ For criticisms of plain English see J. Williams, Style xi (1990) and Martineau, *supra* note 2, at 7.

³⁴ Thornton, *supra* note 1, at 360.

³⁵ Bennion, *supra* note 21, at 344.

³⁶ Bennion, *supra* note 30, at 18. See also D. Hull, *Drafters' Devils*, 2000 The Loophole 15, at 22.

right? This is a worthy cause to pursue as recognised by the drafter but the vain search for certainty in the bill should be abandoned.³⁷ I will now discuss the aims and objective of this thesis.

III. Aims and Objectives of the Paper

The hypothesis of this paper is that Thornton's five stages in the drafting process can improve the quality of legislation in Sierra Leone. The question is whether the quality of legislation in Sierra Leone can improve if Thornton's five stages of the drafting process are adopted and followed? The aims and objectives of this paper then is to prove that policy makers and drafters can improve the quality of legislation in Sierra Leone if they adopt and follow Thornton's five stages in the drafting process. Further to this, I want to find out what pitfalls are detected and the loopholes found in the process, the problems the drafters and policymakers encounter, which directly or indirectly create an impact on the quality of the legislation they produce, find solutions for such problems and implement the solutions to ensure quality drafting of legislation. Finally, I will make suggestions and recommendations for reforms so that policy makers and drafters whose responsibility is to make law can use such a guide to enhance their performance in producing quality legislation through the application of improved and innovative drafting methods and techniques.

IV. Methodology and Structure of the Paper

I want to investigate the conduct of policy makers and drafters in the drafting process in Sierra Leone against the basis laid down by Thornton's five stages in the drafting process. To this end I have issued several questionnaires to policy makers in the key ministries of the Government of Sierra Leone and also legal drafters of the Law Officers, Department. I have chosen these groups because they are directly involved in the policy formulation and the drafters are responsible for producing the legislative text of the proposed law. I have also issued questionnaires to the Attorney General, The Solicitor General, the Clerk of Parliament and the Chairman of the Law Reform Commission. This will help me to make certain conclusions about the administrative aspect of legislative drafting in the country and to ascertain the role of these various institutions in law making. In total I have issued about twenty-five questionnaires.

Most of the question surrounds the way policy makers and drafters handle the drafting process in Sierra Leone, the issue of permission to draft, the drafting instructions, the drafting manual, the drafting instructions, the policy formulation and the skill of the drafters and the testing and verification of the legislative text. This is to name but a few of them.

I will analyse, assess and evaluate the questionnaires to prove my hypothesis. I will find out at each stage of the drafting process whether the policy makers and the drafters in Sierra Leone have followed the five stages of the drafting process

³⁷ Lord Campbell of Halloway in *Law in Plain Language* [1983] LS GAS 621.

as put forward by Thornton. From the questionnaire I will find out according to the answer they give conclude whether they indeed followed those stages. From my findings, I will make suggestions and recommendation for reforms with the view of enhancing the performance of the policy makers and the drafters to produce quality legislation. I will also resort to the use of legal literature on this subject to help me formulate principles from where I can draw valid conclusions from the analysis of the questionnaire. In this first section, I have by way of introduction discussed the five stages of the drafting process, its import and importance, the attainment of a quality bill, the aims and objectives of the thesis and the methodology. In section B, I will deal with Thornton's first stage of the drafting process, understanding the proposal and how drafters and policy makers are expected to apply it. In section C, analysing the proposal, I will explain what the second stage of the drafting process is and the implication of this stage on the policymakers and drafters. In section D I will explore the third stage of the drafting process, which is, designing the draft to show what drafters do at this stage to make quality bill. In section E, I will further discuss the fourth stage of the drafting process, that is, the composing and developing of the draft. I will see whether the drafters and policy makers have anything in common with what Thornton's has said. In section F, I will deal with the fifth stage of drafting as laid down by Thornton, that is, scrutiny and testing of the draft to see whether the method holds good with drafters and policymakers generally. And finally section G I will analyse the questionnaire by processing it, assess the findings, evaluate the findings and make conclusion where I will discuss from the foregoing analysis whether from my findings and conclusions my hypothesis holds good or not. From that conclusion I will make suggestions and recommendation for reforms of the drafting process in Sierra Leone. I will now move on to discuss each stage of the drafting process in the remaining chapters starting with the second chapter-understanding the proposal.

B. The First Stage of the Drafting Process – Understanding the Proposal

I. What Is it About?

The first stage of the drafting process is the understanding of the proposal.³⁸ It is the preliminary and preparatory stage of the drafting process, which refers to the compilation, and reception of the drafting instruction. At this stage the drafter needs to have a clear picture of the purposes of the proposed legislation and the defect and mischief, which it intends to correct.³⁹ There are a number of factors, which will help the drafter to achieve this feat for the proper understanding of

³⁸ Thornton, *supra* note 1, at 128.

³⁹ *Id.*, at 129.

the proposal. A drafter should have fine attributes and qualities.⁴⁰ He should be well trained and properly qualified. He should exercise great care and tact while drafting, employing all the innovative techniques and the analytical skills at his disposal. He should be imbued with great patience as drafting exercise is challenging, coupled with the fact that it is tedious and you have to do it over and over again. The next factor that will help the drafter to understand the proposal depends on time available to do so. Time is of the essence in drafting. I will refer to this point in due course. The next factor is to effectively and successfully communicate the drafting instructions to the drafter in a clear language and form that is readily comprehensible.⁴¹ For a draft to be of a good quality, the quality of the instructions must be set and maintained and standardised.⁴² Without clear words and effective communication of the drafting instruction we cannot expect the quality of the bill to be right. This process of drafting therefore entails the question of setting and maintaining drafting standards so that the bill will be right. The policy makers may not be knowledgeable in the field of drafting nor in policy development and formulation, but if the drafters have these expertises they should make it available to the policymakers.⁴³ It is the responsibility of the drafters to ensure that policy makers are trained in the area of writing drafting instructions and communicating it well. A Drafting Instruction Manual should be prepared for the policy makers to help them prepare drafting instruction, serving as a guide for better writing, effective communication, consistency of form and content.⁴⁴ It can also serve as a check for quality of text or more importantly it can serve as a quality control measure. Thornton emphasised that “Good instructions are a pearl beyond price and not only improve quality of the bill but also reduce drafting time.”⁴⁵ This emphasises the importance of the quality of the bill because the drafting instruction from which it came is of quality as well. The other important advantage is time in the drafting process. If the ramifications of the drafting process are skillfully settled in time then the time taken to draft a bill will be lessened. Time, as I said earlier on, is of the essence in the drafting process, which needs to be properly utilised, as there are always time targets set for the completion of the legislation for further treatment in the legislative process. The understanding of the proposal will only be complete if the drafting instruction and the consultative process of the drafters and the policy makers are fully discussed. I will now discuss the drafting instructions and later the consultative process.

⁴⁰ Clearer Commonwealth Law xviii (1993). See also Thornton, *supra* note 1, at 129 for fine attributes of the drafter.

⁴¹ Thornton, *supra* note 1, at 129.

⁴² Clearer Commonwealth Law 36 (1993).

⁴³ Thornton, *supra* note 1, at 125. See also Clearer Commonwealth Law 10 (1993).

⁴⁴ *Id.*, at 128-129. Further on stylistic consistency see Clearer Commonwealth Law xvii (1993).

⁴⁵ Thornton, *supra* note 1, at 129. For better instructions giving time for drafting see Clearer Commonwealth Law xv, 10 (1993).

II. The Drafting Instructions

Drafting instructions are a set of data the policy makers make available to the drafters to help the drafters to draft an effective legislation within the confines and parameters developed by the policy makers. It provides the historical background information for the understanding of political decision to proceed with legislation and the proposed legal means of achieving government policies. In other words, drafting instructions exhibits the background information of the proposed legislation, its purposes, the means to achieve its purpose and the impact and implications of the proposal on the existing circumstances and law.⁴⁶ If the drafter fails to grasp these basic fundamentals I cannot see how he can achieve the aim of getting the bill right. Because, if he fails to grasp these, he cannot fully understand what the proposal is all about. An experience drafter will however continue to ask questions until the policy makers delivers all the necessary ingredients that constitute a good drafting instruction

The drafting instruction delimits and determines what the drafting instruction should contain. It guides the drafter who eventually drafts the bill. Drafting instruction provides an opportunity to let other departments say how the proposed legislation will affect them. It also helps the sponsoring Ministry to see through its proposals. The drafting instruction will let the Cabinet have control over the legislative process by giving ministers the more detailed view of how the policy they approve is reflected in the legislation proposed. On the question of the quality of the legislative instructions, The Cabinet Office Lagos issued thus,

Drafting instructions should set out the requirement in plain language. They should give as fully as possible the purpose and background of the decree and should state what existing legislation affects the subject. They must not take the form of a layman's draft decree. Where a proposal is based on an existing piece of legislation, whether of Nigeria or United Kingdom or another country, this fact should be stated, and the instructions should refer the draftsman to the legislation.⁴⁷

Ann and Robert Seidman re-emphasised the importance of a quality instruction thus,

Unless the legislative drafting instructions and the theory and methodology that underpins them guides the drafters in making an adequate empirical study of their countries' relevant social realities, their bills impact in changing problematic behaviours will depend on plain luck.⁴⁸

The nature of the drafting style is unique. It should be in clear narrative form devoid of the use of technical, legalistic and archaic words and winding sentences.⁴⁹ It has to be systematic and consistent using the same language for the same concept.⁵⁰

⁴⁶ Thornton, *supra* note 1, at 130.

⁴⁷ Para. 5(5), extract from the Procedure for the Preparation of Federal Legislation under Federal Military Government issued in 1966 by Cabinet Office Lagos.

⁴⁸ Seidman, Seidman & Abeyeskere, *supra* note 8, at 39.

⁴⁹ A. Russell, *Legislative Drafting and Forms 12* (2001). *See also* Clearer Commonwealth Law 5 (1993).

⁵⁰ Thornton, *supra* note 1, at 129.

Policy makers should present drafting instruction in a logical order stating the law and then presenting amendments and repeals of existing legislation in a clear way. The drafting instruction should not be presented in a form of a draft bill.⁵¹ For consistency in the drafting process in terms of content, logical order and form it is imperative to have drafting instruction manual. I will now discuss the other element of the first stage, which is consultation with policy makers in order to get the bill right.⁵²

III. The Consultative Process

The drafter should consult with the policy makers especially the instructing officer after he has received the drafting instructions. In complex cases, says Thornton, a thorough and wide ranging discussion with instructing officers are a necessary part of the understanding of the proposal of the drafting process.⁵³ Professor Patchett describes the discussion as intensive.⁵⁴ Equally so, the skilful questioning, constructive comments and suggestions in presenting alternative solutions form a necessary part of fully appreciating the understanding of the proposal.⁵⁵ This has two possible advantages. It affords the drafter to clarify complex policy issues with the instruction officers and to check how successfully the legislative proposal in the form of drafting instructions has been communicated to the drafter. The consultation at this stage is crucial especially when the proposal is complex and the instruction faulty and problematic. It is imperative then that drafters be engaged as earlier as possible so that they can trash out difficulties in the policy that can be an impediment to proper understanding of the proposals or to ensure that policy reflect the text to be written. If policy does not reflect the text then the quality of the bill is whittled down. Engaging the drafter earlier on will save drafting time as complex policy issues are trashed in record time, which makes for lesser drafting time.

At this stage the drafter should concentrate on a comprehensive understanding of what his client has in mind.⁵⁶ This will make him fully consider and assess the proposals, its implications and consequences as a whole. It is also necessary if sponsors of proposed legislation appoints the instructing officer with sufficient authority and seniority, experience and knowledge to help the drafters in clarifying issues and answering questions put forward by drafters to get the proposal in their right perspective and hence the bill to be right.⁵⁷

⁵¹ *Id.* See also for narrative draft instruction Clearer Commonwealth Law 33 (1993).

⁵² Consultative processes see Patchett, *supra* note 1, at 58.

⁵³ Thornton, *supra* note 1, at 132.

⁵⁴ Patchett, *supra* note 1.

⁵⁵ Thornton, *supra* note 1, at 126.

⁵⁶ *Id.*, at 133.

⁵⁷ *Id.*, at 126.

IV. Factors Determining Quality at the Understanding Stage

I want to discuss the factors that determine or contribute to the quality of the bill at the understanding stage of the drafting process, which I will be using, for the analysis for quality. The policy maker or instructing officer can play an important role in determining the quality of legislation.⁵⁸ The appointment of an instructing officer with requisite skills, training and experience in the drafting process and reasonable knowledge about the subject matter with sufficient authority and of sufficient seniority to represent his ministry, deciding what details legislation will cover, will contribute to quality of the bill. This attributes of instructing officers could contribute to the quality of legislation.⁵⁹ If the instructing officer is qualified and experienced and he understands the constitutional and legal framework within which he operates he will give better instructions.⁶⁰ He can answer technical queries authoritatively to clarify issues emanating from the policy. If they are not experienced in the operational aspect of the policy they will not be able to give better instruction.⁶¹ This will adversely affect the quality of the bill. So qualification, experience, skills, authority and sufficient seniority of the instructing officers so appointed can determine the quality of the bill. The skill of the instructing officers grows both on the job and with training.⁶² Though the benefit of the good instructing officer is immense it has been suggested that variation can still exist in the quality of the drafting instruction coming from the various Ministries.⁶³

The other factor to consider is the Drafting Instruction Manual. If instructing officer use drafting manual it will guide him how to write and what to write in a way that is clear and readable to the drafter. It also provides for consistency and avoidance of variation as to content and form.⁶⁴ So when use is made of a Drafting Instruction Manual the instructing officers will meet the demand for consistency and hence the achievement of quality in a bill.

Another factor is the qualification and experience of the drafter and the role expected of him at this stage of the drafting process to get the bill right.⁶⁵ It is a "... considerable part of the drafters work in analysing instructions, asking for clarification, and pointing out gaps, anomalies and ambiguities in the legislative proposal."⁶⁶ He should be well equipped and experienced in doing so. Legislative drafting is a specialist skill that is acquired and refined through practice.⁶⁷ You only acquire and refine the skill through years of practice.⁶⁸ We call for specialisation to promote quality drafting. It is likely to produce better quality bill. Training

⁵⁸ Clearer Commonwealth Law 30 (1993).

⁵⁹ *Id.*, at 26.

⁶⁰ *Id.*, at 30.

⁶¹ *Id.*, at 31.

⁶² *Id.*, at 39.

⁶³ Sullivan (1997) at 17.

⁶⁴ Thornton, *supra* note 1, at 129.

⁶⁵ *Id.*, at 125. *See also* Clearer Commonwealth Law 26 (1993).

⁶⁶ Clearer Commonwealth Law 26 (1993).

⁶⁷ *Id.*, at xvii.

⁶⁸ *Id.*, at 50.

therefore is essential to develop the skill of the drafter.⁶⁹ So if the drafter is qualified and experienced, he can analyse and draft well. So the qualification and training of the drafter is an important factor in the determination of the quality of the bill.

The next factor is the use of the Practice-Drafting Manual within the jurisdiction. This promotes stylistic consistency within the jurisdiction, which is helpful to those who use statutes. If you do not have a Practice-Drafting Manual this will lead to variations in style in the same jurisdiction, which erodes its consistency.⁷⁰

The other factor is the form of the drafting instruction, which should not be in the form of a draft but in the narrative. Some scholars say it is good to work with the draft bill as that will save a lot of time and prevent the drafters from drafting in an archaic form. But on the contrary it has been suggested that,

time is not saved by working from a lay draft as a drafting instruction is counterproductive because irrespective of the quality of the draft from a formal point of view, the drafter can not be sure of what precisely you are trying to achieve or whether, in fact you have achieved it.⁷¹

Then the other factor I will look at is the consultation between the instructing officer and the drafter. Drafters consult to find out how successful the legislative proposal in the instruction has been communicated to them.⁷² With these one can determine the quality of the bill. This will now take me to the next section, analysing the proposal.

C. The Second Stage of the Drafting Process – Analysing the Proposal

I. What Is it About?

The second stage of the drafting process is the analysing of the legislative proposal. This borders on the analysing of three special crucial areas of how the proposal impacts on the existing law, the drafter's duty in special area of responsibility and practicability of the proposal. The drafter needs to draft a quality bill. Therefore after the proper understanding of the proposal the drafter will examine the proposal in detail. First and foremost the drafter has to determine whether the scheme or the proposal will lead to making a new law or to amend the old law. Or can the problem be handled by administrative action? The analysis involves a careful study and assessment of the legislative proposal and how it affects the existing law. The drafter has to be aware of all relevant existing laws. He should look at the new scheme or the legislative proposal and see how it will relate with the common law, statute, and case law or even subordinate legislation or administrative law

⁶⁹ *Id.*, at 74.

⁷⁰ Thornton, *supra* note 1, at 128.

⁷¹ Clearer Commonwealth Law (1993) at p 33.

⁷² Thornton, *supra* note 1, at 132.

and regulation.⁷³ In this case he will find out which provision of the existing law needs to be amended, saved or repealed to make it compatible with the new legislative proposal.⁷⁴ The drafter will avail himself with the possibility of a wider comparative study of other jurisdictions, the use of other legal materials, judicial opinion and academic opinion on the topic under discussion in the legislative proposal for a critical analysis to help shape the new scheme.⁷⁵ He will be in a position to properly elucidate the law, principle and objectives of the proposal and put it in its proper context

II. Drafters' Responsibility in Special Areas of Drafting

The analysis will enable the drafter to see in the right perspectives the nature of his responsibility in special areas of drafting and for him to take up those responsibilities very seriously. As a professional and expert drafter with the requisite experience and knowledge in the process of drafting, he should bring such expertise to bear on the analysing of the legislative proposal in an objective manner.⁷⁶ Though not involved in policy pronouncement he critically analyzes how legislative proposals border on or affect personal rights of individual, the private property rights, the power of the executive to impose taxation, retrospective legislation, international obligations and standards, territorial or constitutional competence, prerogative or executive powers and bureaucracy, and gives advice on possible legislative solutions of any inconsistencies that emanate from such analysis.⁷⁷

In the case of personal right, for example, where a proposal exclude access to the courts the House of Lords held in *Anisminic's* case that, a statutory provision to the effect that a decision cannot be called into question in any court is not effective to prevent a challenge based on a claim that the alleged decision is ultra vires and, therefore, as a matter of law, not a decision at all.⁷⁸ On this basis, any provision relating to decisions is simply irrelevant. So drafters should be careful when drafting as courts frown on legislation that oust their jurisdiction and such provisions are construed very strictly. If it is the intention of Parliament to oust the jurisdiction of the court then clear words should be used to exclude challenges in the courts notwithstanding that intention of Parliament to the contrary. In another example, there is a strong presumption against retrospectivity, that is, there is a strong presumption that statutes are not retrospective. But if the intention of Parliament is to make a law to be retrospective then that intention should be made in very clear words in the legislation. This was made clear by *Staughton LJ* in his judgment when he said,

⁷³ Thornton, *supra* note 1, at 133.

⁷⁴ Patchett, *supra* note 1, at 132.

⁷⁵ Thornton, *supra* note 1, at 133.

⁷⁶ *Id.*, at 134.

⁷⁷ *Id.* See also Clearer Commonwealth Law 54 (1993).

⁷⁸ *Anisminic Ltd v. Foreign Compensation* [1969] 1 All E R 208. The principle in this case was approved by H/L in *The Boucraa* [1947] 1 All E R 20.

... the true principle is that Parliament is presumed not to have intended to alter law applicable to past events and transactions in a manner which is unfair to those who are concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree- the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended ...⁷⁹

Justice Linde in the case of *Whipple v Houser* deals with retrospectivity as a problem of drafting saying that,

The question of the so-called 'retroactive' and 'retrospective' effect of a new law is not, or should not be, a question of adjudication. Its answer should not be sought in precedents. 'Retroactivity' is in the first instance a problem of legislative draftmanship. When it becomes a problem, the problem is a failure of drafting, probably reflecting in turn a failure to give adequate attention to the policy choices involved.⁸⁰

So the drafters' responsibility in circumstances like these is crucial to attaining a quality bill as policy choices involved that affects the rights of person should be properly discussed and analysed and pointed out to the policy makers involved. If the drafter himself fails to take into account the policy choices involved this will affect the quality of the bill. The drafter has to check whether the proposal does not conflict with the constitution or any other law. If the proposal will conflict with constitution or any other law then he has to fully discuss it with the policymakers and advice on the best way forward.⁸¹ Similarly in the case of non-compliance with international treaties the drafter should discuss it with the policymakers and point it out to them for settled legal solution.⁸² In drafting in case of extra-territoriality the onus on the drafter increases to advice on the competence of the lawmakers to do so. As mentioned earlier, when the proposal interferes with individual rights it is for the drafter to bring it out to the policymakers. There is no moral judgment as to right or wrong of the principle but drafters should tread very cautiously to highlight all problem areas, which has been dubbed potential danger zones in drafting.⁸³ On this note Thornton concluded thus, "If legislative proposals are patently unreasonable or shock the drafter's sense of justice, the drafter must advise the sponsors of the proposals of his or her opinion and draw attention to the inequity or breach of fundamental principle involved."⁸⁴ I have used these few examples to illustrate the analytical ability of the drafter in these special responsibility area mentioned above.

⁷⁹ Staughton L. J. in the case of *Secretary of State for Services v. Tunnicliffe* [1991] 1 All ER 712.

⁸⁰ *Whipple v. Houser* (1981) 291 Or. 475, 632 P.2d 782. See also R. Rose, *Time Element in Legislation*, in C. Stefanou & H. Xanthaki (Eds.), *Manual In Legislative Drafting* 109 (2005).

⁸¹ Thornton, *supra* note 1, at 137. See also Patchett, *supra* note 1, at 53.

⁸² Thornton, *supra* note 1, at 136.

⁸³ *Id.*, at 137.

⁸⁴ *Id.*, at 136.

III. Practicality of Proposal

Analysis on the legislative proposal further provides for predictability. This makes way for the practical implications of the legislative proposal and the reason for a preference for specific solution, which should be included in the drafting instruction. This analysis is conducted to supplement drafting instruction and to verify complete instruction. This is quality control check at the second stage of the drafting process.⁸⁵ The analysis may bring out many alternative routes to solution of the proposal and point out the most cost effective method to a legislative solution. This is what we call the cost benefit analysis of the proposal. Not only the cost is estimated but also the estimate of the benefit of the legislation or proposal made.⁸⁶

In the analysis of the proposal consistency of language and concepts is imperative in pursuit of ensuring uniformity of interpretation by the courts. The drafter may not have all the answers to the drafting problem that comes up in the analysis. So the drafter should be careful and cautious in his approach to this exercise and experience should play a better part in this. Care and caution is a necessary part of the analysing of proposal to bring up pertinent, valid and logical conclusions and to avoid unnecessary and unwarranted repeals of the legislation in the future. But analysis will also make provision to see how in the future the law will be changed if they are no longer necessary.⁸⁷

A good analysis is in the interest of producing a quality bill. If a drafter properly analyses the proposal, they will be able to draw fine conclusions as to the effect of the proposal on the existing law, the area of special responsibility and can be in a position to predict what the law will be in future or how well it will work. Policy issues will come up in the process of analysis. This will be trashed before drafting commences. Consultation will take place to deal with it. This is confirming that the process of consultation continues until the bill is settled.

IV. Factors Determining Quality at the Analysing Stage

At this stage I consider two important factors to determine the quality of the bill. The qualification, training and experience of the drafter in analysing the proposal are important factors to be considered. The more qualified and experience a drafter the better his analysis. The qualification of the policy maker is also important at this stage.

Drafters Consult with policymakers to verify the drafting instruction or supplement drafting instructions. This is one means of test for quality in the bill. These are the tests I am going to use to find out whether drafters in Sierra Leone follow this stage of the drafting process.

⁸⁵ *Id.*

⁸⁶ C. Stefanou, in C. Stefanou & H. Xanthaki, *Manual In Legislative Drafting* 16-21 (2005).

⁸⁷ Thornton, *supra* note 1, at 133. *See also* 74.

D. The Third Stage of the Drafting Process – Designing the Law

I. What Is it About?

Designing the law is the third stage of the drafting process.⁸⁸ It is the outline structure or plan for the law or proposal, which facilitates drafting. This is the planning stage of the law. The outline structure or plan of the law can be described as the framework of the law which shows the structure of the legislative scheme and its normative provisions organised in a rational way making the use of the law as easy as possible. This could enhance structural accessibility of the law. It involves giving prominence to the key features of the law by dividing long instrument into constituent parts maintaining a logical relationship between the parts and the whole. It also involves the orderly ranking of the normative provisions in a rational sequence. This ensures the final draft of the law to be organised and arranged in its more logical form and the actual draft to follow as a coherent scheme.⁸⁹ The drafter takes into account the most rational method by which law is divided into parts and its normative provisions ranked within those parts to effectively bring out their interrelationship. Designing a structure facilitates effective communication of the content of the law and achieves the objects of the instructions.⁹⁰ At the design stage, the drafter can look at the material as whole, weigh the relative importance of the topics and put together all those elements that are related and decide how best to present the material. In this process the drafter will consider what elements are relevant and therefore can go into the bill. At the same time he can also determine what elements are not relevant and therefore not considered for the content of the law. It is useful that drafters discuss with instructing officers issues that are relevant for their consideration. The development of the structure of the bill should be under constant review if that will enhance effective communication until it is settled. A sound structure will make way for a draft that is understandable. The outline of the framework will help drafters to visualise the shape and the broad content of the finished product. When the drafter has settled the final draft it is necessary to lay it before the instructing officers to consider it. This helps consistency and avoidance of unnecessary and unwarranted change at crucial moments.⁹¹

Designing the law aims at simplicity that achieves the object of the legislative proposal avoiding the use of unnecessary concepts. If we need complex structure they should be designed and presented in a simple user-friendly manner. In the design of an Act, there is need to comply with conventional practice as to position in the framework of statute to be given to various provisions of a formal or technical nature.⁹² Practice is not uniform as there is no settled formula by which

⁸⁸ Thornton, *supra* note 1, at 138.

⁸⁹ Patchett, *supra* note 1, at 53.

⁹⁰ *Id.* See also Thornton, *supra* note 1, at 138.

⁹¹ Thornton, *supra* note 1, at 138.

⁹² *Id.*, at 139.

you can position a particular provision in a statute. But it is imperative that we maintain consistency of practice within a jurisdiction, which facilitates the use of statute by regular users.⁹³ It has been observed that

structural conventions ... are an essential elements in the language of the law. They tell the user how to consult the legislation with the best effect. Conventions do not always conform to a nice logic and it not necessary that they should do so. What is important is that they should be stable, certain and known ...⁹⁴

A very good reason should be given why a particular tradition is followed or not. Perhaps the tradition can be found in a drafting manual, the rule of law, legality, plain language or constitutionality. Whilst you have the right to hold onto the formulae you can question it if it is not working. When there are controversial policies the drafter must recognise political realities and be prepared to make compromises to make it possible for Parliament to deal with the matter.⁹⁵ Sufficient flexibility is allowed to handle matters like these by consulting with the Minister responsible for the proposed legislation. Design assists the drafter to estimate a realistic time scale for a drafting process.⁹⁶ It facilitates delegation within the drafting team and the management of the drafting office.⁹⁷ The design acts as bill quality control. When Drafters respond to drafting instructions adequately the end result of legislation is what is expected from the policy makers. The policy concept would have been translated into the text.

Certain principles applicable to the designing of the law have to be adapted to take account of the subject matter and the legal mechanism in the particular law.⁹⁸

After the drafter has accurately seen and visualised the range of the statute as designed he can focus on the structure of the bill. As observed earlier on, order of the structure of the bill is governed by conventional practices with respect to particular jurisdictions. There is no value judgment as to right or wrong. What is crucial is that the internal arrangement should be consistent within a single jurisdiction so that readers who wish to find a particular part of the statute that they are unfamiliar with will quickly know where to look.⁹⁹ As a general traditional rule, Substantive provisions, which establish the main principle of law, should be laid down first before the administrative provisions that implements the substantive rules.¹⁰⁰ The main principle of law is debated before its administration of the practices and procedures that follows. Sequence should be logical. Procedural steps should be expressed in the order in which they occur. The general precedes the particular, the permanent before the temporary and the more important before the less important.¹⁰¹ Crabbe extensively quoted Lord Thring's five rules in

⁹³ Clearer Commonwealth Law 92 (1993).

⁹⁴ Clearer Commonwealth Law 113 (1993).

⁹⁵ Thornton, *supra* note 1, at 139.

⁹⁶ Clearer Commonwealth Law 62 (1993).

⁹⁷ D. Colagiuri, *Address on the Organisation of Drafting Offices*, 2007(2) *The Loophole* 6, at 10.

⁹⁸ Patchett, *supra* note 1, at 54.

⁹⁹ Clearer Commonwealth Law 153 (1993).

¹⁰⁰ C. Ilbert, *Legislative Methods and Forms* 245 (2005).

¹⁰¹ Thornton, *supra* note 1, at 140.

support of this principle of structuring the bill in respect of what it should contain and how it should be arranged.¹⁰² Thornton also recommended the format of the structure of the bill and its internal arrangement.¹⁰³ On the question of structuring legislation, a hierarchical approach to structuring a scheme of legislation, issues of what material should be included in the legislation, how the material should be divided between primary and subordinate components of the legislative scheme and how the materials are ordered within a piece of primary and subordinate legislation is actively considered.¹⁰⁴ This is not a hard and fast rule. Some flexibility is allowed to disrupt this sequence. Though a logical sequence is good, practical circumstances and political expediency may change it like in the case of corporations where the establishment of the corporation is provided for first before stating the principle of the law.¹⁰⁵

It is of practical importance to position the principle of the law early in the bill. The use of schedules for effective communication of the bill is imperative. Distinct and different matters should not be combined in one Act when designing the law. It follows, one Act one object, one Act one purpose. On What the nature of the structure of the bill is, Crabbe had this to say,

after reading and digesting the Drafting Instructions, after Parliamentary Counsel has mastered the subject matter of the proposed legislation, the next important step in the drafting process is the preparation of the legislative scheme. Upon that scheme hangs the quality of the bill. The legislative scheme represents Counsel's mental picture of how well the Act of Parliament would look in structure and quality, in substance and in form. Here Parliamentary Counsel deals with the logical sequence of the various matters that bear upon the bill; here the symmetrical arrangement of sections is organised. Form and substance take their proper places. The law and its administration are equally balanced. Without the legislative scheme the resultant Act will look like a patchy, sketchy work. It will give the appearance of an ill conceived, ill prepared piece of work. This is an area where the policy of the law is put in an outline for the achievement of the objectives of the proposed legislation it is in the legislative scheme that Parliamentary Counsel perceives whether the Act will be a workable piece of legislation, whether whole. The legislative scheme is in effect, the architectural plan of the building that is called an Act of Parliament.¹⁰⁶

This forms the basis of the structure of the bills. As to the reason why make an outline of the arrangement of the bill, Dickerson has this to say,

For some smaller drafting jobs an outline can be construed mentally and remembered. For the more complicated and extensive projects a written outline is invaluable. Building one forces the draftsman to think the problem through. It helps him to determine whether he has exhausted his source material. By clearing up problems of basic arrangement at the outset. It saves valuable time, since readjustments in basic arrangement are most difficult and risk greater error when put off until later. Finally, it is the tool by which a very big and complicated problem

¹⁰² Crabbe, *supra* note 8, at 148-150.

¹⁰³ Thornton, *supra* note 1, at 190-192.

¹⁰⁴ Clearer Commonwealth Law 104 (1993).

¹⁰⁵ In the case of companies or statutory bodies law first establishes them before rules of law governing them are prescribed.

¹⁰⁶ Crabbe, *supra* note 8, at 16.

can be divided into smaller, manageable ones. With a good outline to work from, a draftsman can attack each discrete component separately, his attention undistracted and unharassed, for most part, by considerations affecting the other components. This is the most important single device for solving complicated problems.¹⁰⁷

I fully agree with him on this. What then determines the quality of the bill at this stage?

II. Factors Determining Quality at the Design Stage

At this stage the policy makers consult with the drafters on the question of what should go into the bill or not. The qualification and the experience of the drafter count in order to maintain the logical order, structure and terminology of the bill. The drafter is able to bring out all the faults in the drafting process correct them or amend it. This is verification of the legal structure of the bill. The better is his qualification; the better is his analytical skills. This will make the bill qualitative. I have already treated the issue of qualification above both for the drafter and the policy maker. I will now deal with the fourth stage of drafting process in the next chapter.

E. The Fourth Stage of the Drafting Process – Composition and Development

I. What Is it About?

The fourth stage of the drafting process is the composition and development stage. At this stage the drafter will properly develop and upgrade the draft in substance and form with precision. He constantly and continuously confers with the instructing officers when composing and developing the draft. The drafter remains focused maintaining a standard of mental discipline and integrity so that his fine quality and attribute of patience, care and caution should not be eroded or derailed. The draft is properly checked as a matter of must. He cross-checks cross-references, numbering, lettering, defined terms, language, the form and substance of the draft. He will also cross check to see whether the drafting instruction has been complied with. The draft should then be subject to peer review mechanism. This is where you allow your draft to be checked and criticised by your colleagues who could offer valuable inputs that add value to your draft.¹⁰⁸ The draft should be subject to rigorous checks going over it again and again to see that the bill is right. At this stage a lot of emphasis is put on essential matters of substance rather than form when the draft is being developed. Attention is paid to the choice of words that best convey his purpose to develop sentence structure, which, improve the quality of the draft. The drafter first achieves the design and then design

¹⁰⁷ Dickerson, *supra* note 3, at 32-34.

¹⁰⁸ Thornton, *supra* note 1, at 143.

and composes the draft clause by clause accurately responding to the drafting instruction precisely and clearly. At this stage emphasis will move from substance to form as the drafter continues to develop. The drafter's duty is to translate the policy into a legislative text that is comprehensible to the readers of the text. The drafter should continue this process of polishing the draft until the draft achieves quality. The drafter will then submit the settled developed draft to the instructing officers for study and comments. If the drafters and instructing officers liaise and rigorously discuss the draft, they will be able to bring out inadequacies and ambiguities detected in the drafting instructions and the draft for corrections. Where the use of the language or the cross referencing or the numberings in the draft are not directly affected by changes may require attention to secure consistency in substance and form. Where major changes to drafting instruction affect the structure developed at the design stage the structure designed should be revisited to maintain the appropriate balance and emphasis.¹⁰⁹

Thornton's approach emphasises the need to comply with conventional practice as the position in the framework of a statute to be given to various provisions of a formal or technical nature.¹¹⁰ Practice is not uniform but consistency of practice within a jurisdiction, which facilitates the use of the statute by regular users, is highly solicited.¹¹¹

Bergeron suggests that the bill must be arranged in a logical order.¹¹² Text must be sensibly arranged to produce good logical order and sequence. This provides a map for clearer reading of the bill. A break down into chapters makes easy to locate the provisions and sections. This is best practice. The readers should be facilitated by a good and ordered logical bill.

John Bates rule says that operative provisions are essentially series of commands rather than declarations of policy or intent. So one should ensure that effective legislative provisions creates obligations or duties addressed to specific legal or natural persons.¹¹³

The way we draft depends on the drafting tradition of a particular state e.g. a common law tradition or a civil law tradition.¹¹⁴ Though the mode and style of drafting is not uniform but we call for consistency of practice within a particular jurisdiction. Prof. Keith Patchett has suggested that we should write in a clear style applying standard grammar and syntax and addressing the issues clearly. We should use plain language in current use and avoiding the use of complicated sentences.¹¹⁵ He recommended that one should follow the drafting traditions of one's jurisdiction relating to form and style of legislation that which is in consonance with what Thornton and Bergeron had put forward. Well-

¹⁰⁹ *Id.*, at 144.

¹¹⁰ *Id.*

¹¹¹ *Id.*, at 75.

¹¹² R. C. Bergeron, *Rules of Legislative Drafting to Ukrainian Drafters* (1999).

¹¹³ There exceptions to Bates Rules as other bodies can be legally competent to be sued under the Human Rights Act.

¹¹⁴ E. Driedger, *Statutory Drafting and Interpretation: Canadian Common Law*, in *Proceedings of the 9th International Symposium on Comparative Law* 71-83 (1972).

¹¹⁵ Patchett, *supra* note 1, at 55.

established conventions follow general accepted standards. He advocated for a good presentation technique laying out the draft that is easy to work with. Visual aids should be made use of in making it easier for users to find their way in the draft.

II. Factors Determining Quality at the Composition and Development Stage

At this stage of the drafting process the drafter polishes the draft.¹¹⁶ Repeated revision of the draft is to see whether it is in order in terms of content and form. His experience and qualification will help him to do so. Colleagues within the drafting division should look at the draft and criticise it to bring out any anomalies. We also allow the drafters and the policy makers to consult and see whether the text is correct according to the policy. The policy makers should study draft and offer comments. This will help to bring out loopholes in the draft and such anomalies are corrected to make the draft bill qualitative. The next chapter will now look at the scrutiny and testing of the text.

F. The Fifth Stage of the Drafting Process – Scrutiny and Testing

I. What Is it About?

The fifth stage of the drafting process is the scrutiny and testing of the text of the bill. At this stage the draft bill is tested and verified to see whether the text reflect the policy rules forming the basis of the legislative text. In other words it has to prove whether the drafter has fully complied with drafting instructions. At this stage the drafting process takes the form of much revisionary work by the policy makers and the drafters. Much consultation now takes place between the instructing officers and the drafters and others interested parties who are most likely to be affected by the legislation.¹¹⁷ The drafter will amend the draft from time to time to meet certain changes in the instructions and to supplement instructions. The draft will only be settled after so many repeated revisions. At this point the drafters and the instructing officers have revised the bill several times over and over again and they seems to be satisfied with it in substance, form, language and content.¹¹⁸ Scrutiny and testing also demands great deal of self-discipline and tenacity of purpose on the part of the drafter, which strengthens his resolve, to continue to verify and test the draft to its logical conclusion. He will critically and objectively examine the final product for a qualitative assessment of

¹¹⁶ Thornton, *supra* note 1, at 144.

¹¹⁷ Thornton, *supra* note 1, at 173.

¹¹⁸ Clearer Commonwealth Law 161 (1993) 161. *See also* R. Dickerson, *Legislative Drafting in London and Washington*, 4 CLJ 49 (1959) on team approach on the benefit of cross checking of the bill.

the draft. After all these exercises he will read the final text and give it a serious thought and consideration as a whole. He will then find out whether the draft achieves the objects of the instructions. Does the draft fit harmoniously fit into the general body of law? Are the basic principles of legality and constitutionality complied with? Does the draft coheres with a well structured whole and does material follows a logical order and sequence? Is the content and language of the draft clear and comprehensible? These are some of the questions to be answered by the drafter himself in self-examination.¹¹⁹

The drafter should test the draft by applying it to various circumstances with the instructing officers. The users of the legislation not involved with the draft should also test it. If it is possible small group of potential users of the legislation will discuss the draft and review it. This is another useful form of testing but time perhaps may not be available for it.¹²⁰

All matters of details should be checked, language and grammar, form and structures including sections, paragraphs, parts, divisions and definitions to see that conventional practices or principles are correct and consistent with particular jurisdiction under review.¹²¹

All composition needs series of drafts in order to attain a necessary quality. So other members of the drafting team should review each version of the draft so that gaps in policy or problems in the draft are identified and settled. Draft can be sent to other Ministries to obtain their reaction to the provision that affects them. Scrutiny of text should be a continuous process throughout the drafting process as a means of improving clarity and practicability.¹²²

After checking for substance and seemingly finding out to be perfectly in order you now check for legal form, clarity and comprehensibility.¹²³ This refers to wide ranging issues including legal verification. Translating policy into precise norms may introduce new features into the text. Verifications are as to constitutional requirement, forms, structure and presentation of legislation, appropriate language- simple clear words and shorter sentences. Ordering of provisions logical to facilitate its use, same terms same meanings, follows throughout the text. After that the drafter now checks for omissions, errors, content, expression of forms and for improvement of style and presentation. Legal verification imputes a check for legal and constitutional compliance. Compliance with international law and the implementation of the law as fair, just and consistent is a must. Secondary law making should also be checked to see that it falls in line with principal legislation.¹²⁴

¹¹⁹ Thornton, *supra* note 1, at 173.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Patchett, *supra* note 1, at 56.

¹²³ *Id.*

¹²⁴ *Id.*, at 57.

II. Factors Determining the Quality at the Scrutiny and Testing Stage

At this stage we also look at the repeated revision of the draft and scrutinise it to check whether the legal form is in order, it is clear and whether it is comprehensible. This is verifying the text. We also test the bill whether the text reflects the policy. Consultation with drafter and policy makers will be held to do this. Experience and qualification of the policy maker and drafter are crucial to achieve this. The draft should be scrutinised by a drafting team or other members not involved in the drafting of the text for their own inputs. Users not involved with the drafting of the bill should test the draft to see whether it is user friendly. Other Ministries affected by the legislation should also give their own input. When this is done we can be sure that the text will be of quality. On the whole the text should be verified and tested to see that drafters has got it right. We are now going to analyse the questionnaires to find out what the policy makers and drafters in Sierra Leone do to get the bill right following Thornton's five stages of drafting.

G. Analysing the Questionnaire and Conclusion

I. Processing the Questionnaire

In the previous chapters of this thesis, what I did was to bring out the role of drafters and the policy makers in the drafting process as laid down by Thornton's five stages of the drafting process as a means of achieving quality draft. At this stage I want to find out whether the drafters and the policy makers in Sierra Leone have followed Thornton's five stages of the drafting process to achieve quality bill. I will do this by processing the questionnaire, which I administered to the drafters and the policy makers in Sierra Leone wherein they answered some questions pertaining to their respective roles in the drafting process. Was it done according to Thornton's five stages in the drafting process?

I will then analyse, assess and evaluate the questionnaire to find out what is the outcome or result of the exercise. The research seeks to test the hypothesis by studying the habits of a number of drafters in the drafting process in Sierra Leone through the questionnaire, which will give me straightforward factual information about their activities and performances in the drafting process.¹²⁵ First, I will deal with policymakers and their questionnaires. I administered the same set standard questionnaire to several Ministries of which the following were answered and returned:

- The Ministry of Defence.
- The Ministry of Foreign affairs and International Cooperation.
- The Ministry of Social Welfare and Children's Affairs (Social Services Division).

¹²⁵ See E. Orna & G. Stevens, *Managing Information for Research* 24 (1995).

- The Ministry of Social Welfare and Children's affairs (Children's Affairs Division).
- Ministry of Local Government and Community Development.
- Human Rights Commission of Sierra Leone.

At this point I want to determine factors that makes a good drafting instruction. I will consider the qualification of the policy makers, his appointment as liaison officers with requisite attributes, what should the instruction contain and finally the assistance the policy makers need to write a good instruction, e.g. the use of drafting instruction manual.

On the question of whether the named Institutions or Ministries have any drafting Instruction Manual, the questionnaire reveals that out of the seven institutions under review only one has a drafting Manual instruction prepared by the Law officers Department. Six Ministries have no drafting instruction Manual or guide.

On the appointment of liaison officers the questionnaire discloses that three institutions appoint liaison officers but could not show their rank i.e. how sufficiently senior or authoritative they are in binding their Ministers. As far as training is concerned none of the policy makers except one had any training in the drafting process. One institution did not appoint a liaison officer so we cannot even talk about his rank and experience. One institution did not indicate it. Two other institutions predicated the appointment of a liaison on a hypothetical contingency.

The seven Institutions or Ministries all agreed on consultation on policy formulation with the drafters but could not decipher at what time they could consult.

What should be the content of the drafting instruction manual or guide? Since six Ministries did not have the drafting instruction Manual the question of what it should contain did not arise. It is paradoxical to note that one institution attempted to say what the drafting instructing manual contains though they have said they did not have it.

From the above analysis, it is safe to say that several Ministries did not have drafting instructing Manual; they did not appoint liaison-instructing officers with the requisite attributes. Where they were appointed they did not have the requisite training and experience and knowledge in the drafting process. Where the instructing officers are not qualified and experience they cannot write quality instructions and effectively communicate it to the drafters. If instructions are not of quality the drafts cannot be of quality because it will fail to capture the policy, which should be a legislative policy.

The absence of the drafting instruction manual can encourage variation of text and content of the draft within the same jurisdiction. This can also contribute to stylistic inconsistencies.¹²⁶

On the question of holding conferences five out of seven institutions admitted holding conferences with drafters whilst two did not. Though they hold conferences they cannot decipher at what stage do they do it and why, except for

¹²⁶ R. Sullivan, *Statutory Interpretation* 12 (1997).

two, which attempted to give good reason why they do so. It seems to me that the policymakers do not really have training in the drafting process based on the way they have even handled the questions in the questionnaire. Conferences of this nature provides the forum for drafters and policymakers to check whether text reflect the policy and this will happen at any of the stages of drafting.

As to scrutiny two institutions said they do scrutinise the bill but even those who scrutinise do not know why they scrutinise and how, which imputes to me that there is lack of knowledge in the drafting process.

When I dealt with constraints and challenges, a great deal of issues came up. It was disclosed from the questionnaire that drafting is not opened. The process is not well known. Drafters are not enough and therefore not available. There are a lot of administrative bottlenecks in the drafting process. There is lack of logistic supports and lack of training for drafters and instructing officers. Some administrative officers act as drafters or lawyers. Recruitment and retention are poor and training is not available.¹²⁷ They suggested more training for drafters and instructing officers in paralegal training, more logistical and budget support, and good condition of service for drafters and provision of a database.

The second analysis I am going to do is that pertaining to the questionnaire received from the drafters in the Law Officers Department. I also issued a separate set of standard questionnaire and two consultants gracefully responded by answering the questionnaire. Here again certain criteria are going to be considered for the determination of quality draft in the drafting process. One such criterion is attributes of the drafter, training, qualification, experience, and knowledge of the drafting process. I will consider consultation with policymakers, with users of legislations, with other colleagues for verification of text, for criticisms of the draft and also look at their constraints, challenges and recommendations. I shall also consider other factors that will help the drafters to write a good draft such as the use of Practice Drafting Manual.

On the question of receiving correct and comprehensive drafting instruction both drafters said no. As to the preparation of drafting instruction one said yes and the other said that it is in the process of preparation. But six of the institutions under review have said they do not have one prepared at all and they do not have it. They agreed that it is necessary to have the five stages of the drafting process. Both drafters have agreed yes on revising the draft, criticisms of the draft and testing of the bill. It is not evident from answer to the questionnaire how, why and what stages do they revise the bill. Both drafters are consultants and are well trained and qualified. The questionnaire reveals that there are only three drafters in the Department and on average about nine drafters are needed. The library is not well equipped for drafting purposes and there is no Practice Drafting Manual prepared for use. Both agreed on holding conferences with others drafter to test the draft for effectiveness though one said it is seldom done. They have agreed on consulting with users of legislation especially those to be affected by the legislation. On the question of constraints, challenges and recommendation it came to light that enactments, indexes of statutes are not readily available. Time

¹²⁷ Commonwealth Clearer Law 87 (1993).

also is a big constraint in drafting. A poor drafting instruction is a concern. There is lack of cooperation emanating from the instructing Ministries and Departments. It was recommended to build the capacities of the instructing Ministries.

The third analysis I am going to do is that pertaining to the questionnaire received from the Solicitor-General.

On the question of the number of drafters in the department the questionnaire discloses that only three drafters are in the Department at the moment. The three are all consultants. Further information discloses that one drafter is on study leave and there is one pupil Parliamentary Counsel. As to the number of drafters needed the questionnaire reveals that eight are needed in the Department. The questionnaire further discloses that there is no Practice Drafting Manual and the library is not well equipped for drafting purposes. On the question of constraints and challenges mention was made of poor condition of services for drafters, lack of capacity to services the Ministries and agencies in a timely manner. It was recommended that the systems be completely overhauled and the Department restructured.

II. Findings and Assessment of the Questionnaire

From the analysis of the first questionnaire, the following findings were made;

- That most Ministries under review did not have the drafting instructing manual or guide.
- That most Ministries did not appoint liaison-instructing officers with the requisite attributes- qualification, training, experience and adequate knowledge of the drafting process with sufficient seniority and authority to bind their Minister.
- No training is provided for the instructing officers.
- The seven ministries consult on policy formulation but could not decipher at which stages do they consult, how and why do they do it.
- Majority of the institution under review did not have drafting instructing manual let alone know what it contains.
- That there is a great deal of constraints and challengers for which a lot of recommendation was made.

From the above findings, I can say that since some of the Ministries did not have a drafting instructing manual it is difficult to achieve a legislative style that provides for consistency and uniformity of form and content, where the use of the same language the same word is maintained. Where they did not appoint liaison-instructing officers or where they appointed them but without the requisite attributes they cannot write a good instruction. It stands to reason that where the instruction is not of quality the draft that it begets will not be of quality. The drafters have agreed no to receiving a quality and comprehensive drafting instructing (analysis of second questionnaire) this will affect the quality of the bill adversely. So the policy makers do not follow the five stages of the drafting

process. As a result they cannot properly and effectively write and communicate a quality instruction to the drafter thus disrupting the first stage of Thornton's five stages of drafting process – understanding the proposal.

From the analysis of the second questionnaire, the following findings were made;

- The drafters do not receive a correct comprehensive drafting instructions always.
- Majority of the Ministries does not have drafting instruction manual. I find that it could be in the process of preparation.
- Drafters revise the draft. It is criticised by other colleagues and it is tested.
- Both drafters are well trained and qualified.
- That there are only three drafters in the department but nine on average is needed.
- The library is not well equipped for drafting.
- The drafters hold conferences with other drafters to test the effectiveness and validity of the drafts.
- The drafters consult with users of legislation.
- There is no Practice Drafting Manual prepared for sierra Leone.
- Constraints, challenges and recommendations were made about the drafting process as mentioned above.

From the above findings I can say that drafters though highly qualified and seems to know what to do, there are other extrinsic factors that will adversely affect their performances under the five stages of the drafting process. The absence of the Practice Drafting Manual, the receiving of poor drafting instruction can contribute to poor quality drafting. The legislative style that ascertains consistency and uniformity in form and content of the bill is endangered with non-availability of the Practice Drafting Manual. One very important point here again is the very low number of available drafters. It is quite evident that drafters are in short supply. This is normally the case in developing countries like ours. There is always the danger to engage a drafter in both policy formulation and drafting of the law. It is difficult to recruit and retain drafters. Poor condition of service is the rule. Where there is a shortage of drafters, one could raise the impossibility or difficulty of holding conferences with stakeholders and colleagues to criticise the bill. Time then becomes a crucial factor as well. Resources and budgetary support becomes critical in the drafting process. The availability of an equipped library is also important, as this will enhance the capacity of the drafters to have access to materials for study and comparisons. But this is not available. So the drafters in Sierra Leone are heavily constrained as the conditions put forward by Thornton does not exist. Therefore the drafters cannot readily meet the conditions as laid by Thornton. Though they agreed that it is good to divide the drafting process into stages as a means of problem solving device yet the drafters did not meet the

demands of the process in Sierra Leone. As a result some militating factors comes into play as is evident in the above analysis, which adversely affects the quality of the bill they draft.

From the analysis of the last questionnaire, the following findings were made:

- That there are only three drafters in the department at the moment.
- That eight drafters are needed in the department.
- That there is a shortage of drafters in the department.
- That there is no Practice Drafting Manual.
- That series of constraint and challenges were also mentioned for which recommendation was made.

From the findings I will say that there is a shortage of drafters in the department. This has far reaching consequences on the process of drafting in the country. Where drafters are not available to do the draft of the bill, it means no law will be made let alone talk of its quality. The small number of drafters always works under pressure with time constraint and working under pressure sometimes cannot produce the best result. How can a draft be done in time? How can drafters criticise the bill of others drafters if they are not available? We have said often that if there is no Drafting Manual this will impact on the quality of the bill negatively as the legislative style that provide for consistency and uniformity will be absent. This will enhance variations in the text of the draft. Uncertainty will creep into the legislation, as different interpretations will now attend concepts, which use to be uniform.

III. Evaluation and Conclusion

From the above exercises I have come to the irresistible conclusion that policy makers and drafters in Sierra Leone do not strictly follow the five stages of the drafting process as laid by Thornton as is evident from the analysis made so far. As a result they cannot produce quality bill because they have failed to adhere to the five stages of Thornton's five stages of drafting. There are loopholes in the drafting process, which has impacted on the quality of the bill adversely. There are certain techniques, which policymakers lack and therefore they cannot effectively communicate the drafting instruction. The drafters also lack modern tools of drafting such as the plain language technique of drafting, which does not allow for drafting in a modern style. The absence of the Practice Drafting instruction and the drafting Manual cause real damage to the drafting process in Sierra Leone Time and logistic support are not adequate to support the drafting process. This greatly impacts negatively on the drafting process in Sierra Leone.

IV. Recommendation for Reforms in Sierra Leone

From what we have discussed so far there is the need to reform the drafting process and systems in Sierra Leone. This is in the interest of drafting quality

bill. We have reached the conclusion that there are loopholes found in the drafting process. So if drafters are to produce quality bill we need to put in place structures and systems that can support the writing of a quality draft. We have said that if a bill is good the law that it begets will be good and if the law is good then there will be good government and good governance.

To achieve this I will make the following recommendations for reform:

- That drafters should be recruited, trained and retained. Training in academic discipline leading to professional qualification in legal drafting should be encouraged. Other forms of training such as training on the job could form part of the package. Workshops and seminars to refresh the drafters will be good. When the drafter is well trained and qualified he can offer good and quality service.
- To build the capacity of the instructors and the Ministries responsible for policy formulation. This can facilitate the writing and effective communication of instructions to the drafters.
- Two very important documents should be prepared i.e. the drafting instruction manual and the practice-drafting manual. This will provide for stylistic consistency in form and content of the bill.
- That sufficient budgetary and logistic support is provided for drafting in Sierra Leone.
- To provide good conditions of service for drafters so that they can be retained and not be tempted to leave for greener pastures.
- To demystify the drafting process and open it up to avoid bureaucracies and bottlenecks involved in drafting process.
- To adopt new forms and techniques of drafting that can lead to clarity of the law such as the plain language technique of drafting.
- To completely overhaul the drafting systems and to restructure drafting institutions, such as Law Officers' Department, Law Reform Commission, Civil Service Training School and House of Parliament, amongst others, build their capacities to handle drafting matters competently.

If these recommendations are put into practice where adequate attention is paid to the provision so itemised this can lead to the improvement of the draft bill and hence the law which enhances fairness and justice in the country. It will improve the capacity of the drafters and the policy makers and their skills at the job. It will help them to adopt good and modern techniques in drafting and therefore produce a quality bill.