Legislative Techniques in Rwanda

Present and Future

Helen Xanthaki[*]

Abstract

This report is the result of the collective work of 26 Rwandan civil servants from a number of ministries, who set out to offer the Ministry of Justice a report on legislative drafting in Rwanda. The work was undertaken under the umbrella of the Diploma in Legislative Drafting offered by the Institute for Legal Professional Development (ILPD) in Nyanza under the rectorship of Prof. Nick Johnson. The authors have used their experience of practising drafting in Rwanda, but have contributed to the report in their personal capacity: their views are personal and do not reflect those of the Government of Rwanda.

My only contribution was the identification of topics, which follows the well-established structure of manuals and textbooks in drafting; the division of the report into two parts: Part 1 on the legislative process and Part 2 on drafting techniques; and the methodology of each individual entry to our report: what is current Rwandan practice, what are international standards, what is the future of Rwanda, and a short bibliography to allow the readers and users of the report to read further, if needed.

The strength of this report lies both in the methodology used and in the content offered. The breakdown of topics, their prioritization and their sequence allow the reader to acquire a holistic view on how legislation is drafted in Rwanda, but there is nothing to prevent its use in the context of surveys on legislative drafting and legislative quality in other jurisdictions. The content offers a unique insight into the legislative efforts of a jurisdiction in transition from civil to common law: both styles are assessed without prejudice, thus offering a unique fertile ground for critical assessment and practical impact analysis.

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A. Part 1: the Drafting Process

I. Stage 1 – Understanding[1]

1. Introduction

For many people, legislative drafting is about writing the text of a document that is to be made into legislation through some formal legal procedure. This view puts the emphasis on the form and style of legislation; it implies that drafting skills are concerned with using language effectively, choosing the most appropriate expressions and presenting them in a clear and unambiguous way. Far from that, legislative drafting has evolved to become the bedrock of political, economic and social transformation, which encompasses the theoretical analysis and practical application of the whole process of legislating by a drafter. An important function of the drafter as a central feature of legislative drafting is to communicate the content of legislation to those who will use it. Without question, this is by no means the complete picture.

2. Understanding Stage

Legislation deals with legal rights and duties, and with powers and liabilities – that is, with legal relationships between various classes of persons in the community and between the state and the members of the community. Drafting, then, is about settling these relationships in written law so that those affected can conduct their activities in legal security. What those relationships entail in a particular context is a matter of policy. The choice of policy is usually made by the client sponsoring the legislation and has to be confirmed or 'validated', sometimes with modifications, by the body authorized to give the instrument the force of law. Viewed from this standpoint, drafting is the act of translating a policy into formal written rules. As with any translation, it may be achieved in a variety of ways. Drafting, then, is about making choices of approach, in the light of experience of legislative solutions, to obtain the most effective and acceptable way by which the policy can be given legal effect. It calls for an understanding of what has to be provided for by law, if a new scheme is to be implemented with certainty and without legal challenge. A drafter must bear all this in mind before taking any step in the preliminary works of legislative drafting.

As legal requirements become clearer in the course of translation, the policy itself is often refined or even rethought. Drafting, then, is about the testing of the policy against the manner of its implementation: Will it work? How best can it be made to work? What are the likely legal consequences? Are these desired or should they too be modified? And so on. New legislation is not prepared in isolation. It has to be made to fit with the existing body of law (both written and unwritten), without causing conflict between the new and the old and with proper regard for the interests of those who regulated their affairs on the basis of the existing law. Drafting, then, is about producing a smooth fit and transitions. The policymaker may have given little attention to what may be needed for these

1 By AKANA BAKUNZI Jovin.

purposes and how best to bring it about. It is an integral part of the drafting process. A drafted text has no legal force until it is validated by the appropriate lawmaking authority through the recognized lawmaking process. Drafting is about producing instruments in a form that satisfies the requirements of the relevant process and facilitates their passage. Typically, this also requires the monitoring of the instrument as it passes through the process to prevent legal or formal errors from creeping in.

Legislative drafting, then, takes place at the stage when legislative policy is converted into legal rules. It is concerned with the preparation of the legislative text in the appropriate form so that it gives effect to the policy as a coherent part of the written law of the legal system. The way in which it is written determines how effectively it communicates its requirements to those affected. It has to be drafted to comply with the local house style, which in some systems is formally set out in written conventions or practice directions. But drafting is concerned with what is to be communicated, as well as with the way in which it is expressed. It therefore means that the work of a legislative drafter is responsible, demanding and complex, but must be done because it is a legal policy made visible.

3. *Current Practice of Legislative Drafting in Rwanda*

The demand for legislation may come from various sources such as:

- the government legislative programme or legislative programme of an individual Minister;
- a request by the Assembly or individual Members of Assembly;
- demands from non-governmental organizations and interest groups;
- requirements of an international treaty or of an international organization;
- court decisions;
- opinions expressed in legal doctrine, *etc.*

a) Good practice

We cannot better understand what is currently taking place in the Rwandan legislative drafting process unless we understand what the drafting process entails and how their functions came to take the form they do. First and foremost, it is by comparing the local arrangement (diagrams below) with foreign 'Styles of Drafting' that influenced the practice and by understanding whether Rwanda meets international standards.

Currently, in Rwanda, there is a Legislative Drafting Support System (LDSS) in place, which operates from the creation of legislative drafts by the Initiating Agency, through the internal review of the draft by stakeholders to review of the draft in the Ministry of Justice (MINIJUST) before the bill or final version is sent further for consideration and adoption.

The scenario is illustrated in Diagrams A, B and C, and comprises:

a. *Creation of the draft*. This is the initial step in the process. It is performed by the person in the initiating agency who is authorized to upload legislative drafts.

Diagram A

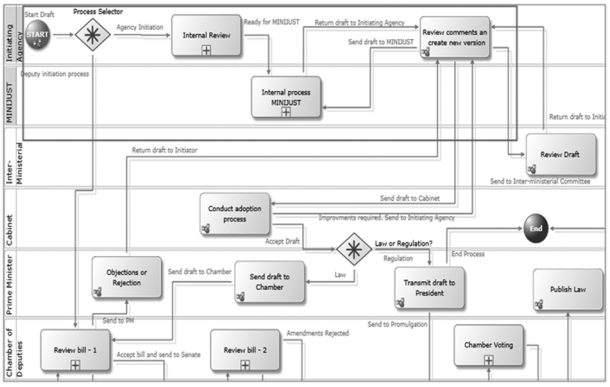
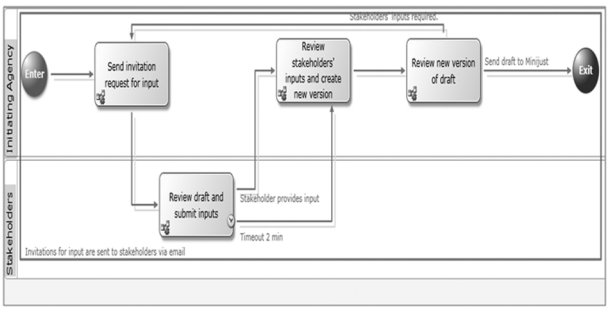


Diagram B – Internal Review Sub-Process



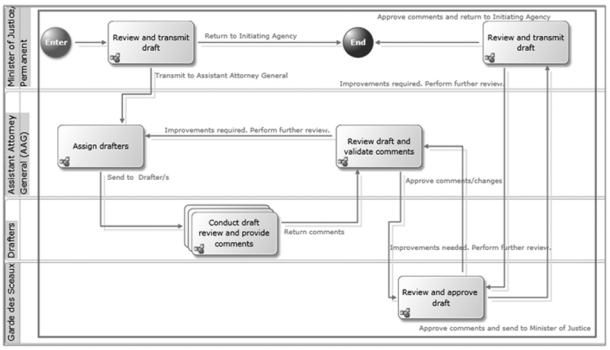
b. *Internal review*. This is performed by staff at the initiating agency and by stakeholder(s) who have been invited to provide input. Detailed steps of the process are illustrated in Diagram B.
c. *Internal process MINIJUST*. It is performed by the Minister of Justice/Permanent Secretary, Assistant Attorney General (AAG), Drafters and Garde des Sceaux. Detailed steps of the process are illustrated in Diagram C.
d. *New draft version creation*. It is performed by the initiating agency. This is the last step of the process.

b) Bad practice example

The Government of Rwanda faces a regulatory challenge. Poor regulatory practices cause public cynicism, fail to meet policy objectives, result in non-compliance, impose unnecessary bureaucratic requirements and impose unnecessary costs for both the regulated and the regulator. The question is, if there is a LDSS in place that operates (or works) from creation of legislative drafts to the end, as seen above, why then these challenges?

Like many African developing countries, Rwanda Legislation (legal Acts) remains the key policy instrument applied, where 90% of all policies developed in

Diagram C – Internal Process MINIJUST Sub-Process



the ministries have a legalistic nature. Only a few programmes and projects use tools that are not legislative. This trend is apparent not only by the frequent use of legislative and administrative directives of various kinds but also by the formalization of the legislative process and procedure. Thus, the only formal rules on policymaking, the Legislative Rules of the Government and Guidelines for Drafting and Presenting the Materials for Sessions of the Government of Rwanda ('Legislative rules'), recognize only legal tools and not other public policy tools. Similarly, the civil servants in the line ministries are not acquainted with the variety of tools available and of their use in the practice. However, the root cause of it all is the fact that the policymaking process in Rwanda has been reduced to ad hoc responses to urgent problems, leaving little room for more fundamental and long-term policy analysis, consultation, design of effective implementation strategies, monitoring and evaluation. This scenario is empirically evidenced by many badly drafted laws; one good example is the Law No. 53/2010 of 25 January 2011 establishing Rwanda Bio-medical Centre (RBC), which has caused public cynicism and resulted in non-compliance.

This law was drafted 'solely' by the Ministry of Health (MINISANTE) to merge both private and public institutions into one entity. It is evident that this Ministry had little time to develop effective cross-sectoral linkages to involve all concerned stakeholders, including the Ministry of education (MINEDUC). Some of the merged institutions were teaching institutions, which include Kigali Health Institute, Faculty of Medicine (National University Rwanda), School of Public Health, all of which had their legal personalities and were under the supervision of the Ministry of education.

Practically, RBC into which these institutions were being merged is not a teaching institution and is under the Ministry of Health. Some other merged institutions such as CAMERWA, the current MPDD (Medical Procurement and Distribution Division), King Faisal Hospital, ACM (Atelier Central de Maintenance) and RHCC (Rwanda Health Communication Centre) were legally non-profit-making organizations. Merging them into RBC created some problems linked to staff's work experiences, salary scales, *etc.*, whereas some other merged institutions had different mandates. Consequently, non-compliance of this law

was inevitable since there was no prior study on the viability of RBC in merging all those institutions.

This bad practice happened even though there were instructions to this effect. Instruction No. 01/11 of 14 November 2006 of the Minister of Justice relating to the drafting of the texts of laws was already in place. This is indicative of the problem caused by the insufficient time given to the legislative drafting process.

4. International Standards

Increasing legal convergence between governments the world over and the traffic of people over borders of jurisdictions lead to an increased interest in the problem of comparing and harmonizing legislation. Administrations need to know and understand legislation of friendly governments to be able to assist citizens and reduce negative consequences of movement.

An international report provides us with an assessment of good examples of legislative drafting worldwide and identifies options to improve existing practices in every country, in trying to promote coherent and consistent legislative drafting techniques across their legal departments.

This assessment analyses the structure of the existing system and its status and gives a series of recommendations for improvements. It presents methods to enhance the value of the legislative drafting process and reinforce its successful implementation by asking systems to:

– improve the quality of legislation
– support clear laws for citizens and businesses
– create pillars of an effective and democratic legislation process
– create legislative plans and their importance
– create sustainable drafting regulatory framework
– effectively manage a legislative office
– ensure effective consultation process standards
– ensure participation and information sharing process
– ensure transparency meanings and standards
– ensure publication and communication process
– improve the techniques for evaluation of a draft

People and companies with a need for an updated version of South African legislation, for example, will find the updated consolidated version of all South African Acts with their Rules and Regulations by using Sabinet's South African Legislation product, NetLaw.

Actually, the concept of 'good governance' not readily translatable to most of the regions worldwide has become increasingly associated with the capacity to develop and deliver public policies based on participatory principles as well as respect for the principles of effectiveness and efficiency. In other words, professional and high-quality public policymaking should be transparent and open to broad societal participation, but, at the same time, address societal problems timely and with a minimum waste of available resources.

5. *Comparative Drafting*

a) Styles of Drafting: The Common Law Style

In the common law, the aim of the drafter is precision and accuracy, that is, the drafter is required to provide a legislative text that encompasses all details on the topic so that the text could, at least in theory, stand alone in the regulation of the phenomenon that it sets out to address. In the common law, the drafter introduces a remedy in order to create a right. Drafting is viewed as a specialized trade, a technique, deserving attention and training.

b) Styles of Drafting: The Civil Law Style

In the civil law style, the aim of the drafting team is to introduce the main legal concepts that are necessary means of addressing a social phenomenon. The civil drafter rests assured that issues of detail or secondary issues will be regulated via secondary forms of law: a general provision of the civil code will require Ministerial Decisions to complete the regulation on, for example, divorce. As a result, at least seemingly, the main aim of the civil drafting team is concision (doubtful). The main aim of the civil drafting team is to strip the primary provision from all details linking it to time as a means of creating a legislative phrase that will be equally applicable in the future when circumstances might change (*e.g.* criminal procedural provisions on admissible evidence in criminal trials must be equally applicable when technology allows new types of criminal evidence such as videos, DVD, *etc.*). In other words, the aim of the civil drafting team is to introduce primary provisions that will last in time. The details included in common law provisions are added by the courts in the civil world: the courts may impart to the general provisions the flexibility and modernity that they lack. An example is Article 6 of the Civil Code of 1994, which states that "Every person is bound to exercise his civil rights in good faith." Codification permits the 'règles de droit' (fundamental legal principles, rather than specific legal rules for the particular case) to be enacted in broad terms, which may then be interpreted and extended to new situations by enlightened judicial interpretation. In the civil world, rights are introduced first and remedies follow: for example, in respect to contracts, the civil law recourses for breach of contract are the rescission of the contract or damages or both and, occasionally, specific performance.

c) Mixed Jurisdictions

Mixed jurisdictions are legal systems in which the Romano-Germanic tradition has become suffused to some degree with Anglo-American law. Examples are Scotland, Louisiana, Québec, the Republic of South Africa and, currently, the Republic of Rwanda. In these jurisdictions, there are often codes that follow the civil law tradition of interpretation, while there are also statutes that are construed in the common law manner.

6. *The Future*

Since drafting instructions serve the drafter in an excellent way, they should be given much importance in every legal department.

Critically, we have observed that drafting instructions reflect government policy; provide alternative scenarios for policy solutions; provide background research on current and proposed policy; provide initial background research on impact, risk and cost; provide the political and, to a degree, the legal framework for the legislation to be drafted and may even raise legal ethical issues. Hence, it is very important for the drafter to start work after having verified the following reference checklist:

a. Is the problem correctly defined?
b. Is government action justified?
c. Is regulation the best form of government action?
d. Is there a legal basis for regulation?
e. What is the appropriate level (or levels) of government for this action?
f. Do the benefits of regulation justify the costs?
g. Is the distribution of effects across society transparent?
h. Is the regulation clear, consistent, comprehensible and accessible to users?
i. Have all interested parties had the opportunity to present their views?
j. How will compliance be achieved?

Actually, careful consideration should be given to whether the nature of the problem is such that it calls for legislative intervention. This may not be the case if the extent of the problem is relatively limited or if the problem might solve itself in due course or through means other than legislation.

II. Stage 2 – Analysis[2]

1. Introduction

The purpose of a guide is to provide a framework to help analyse whether proposed legislation is legally sound, is likely to produce an efficient and effective result and will not have unintended consequences.

This guide does not suggest whether the policy behind proposed legislation is 'good' or 'bad'. The policy decision concerns the government and Parliament – the analysis accepts the policy decision, but scrutinizes the contents of proposed legislation to see whether the way the policy is drafted in a new or amending law is as good as it can be. The guide is structured in the following way:

It starts with a checklist of questions that deputies and staff may wish to consider when reviewing proposed legislation presented to the Chamber of Deputies.

Chapters I-III give information about the reasons for asking the questions and provide additional context for the questions.

2. Collective Wisdom

The checklist questions are intended to capture the essence of well-considered legislation. If the questions are not asked and answered in developing, drafting and considering proposed legislation, the legislation may be flawed.

2 By BAHIZI NTAKUNGIRA Johnson.

This document can be thought of as a repository of the collective wisdom and experience of parliamentarians who enact legislation and those who draft or give advice on the preparation of legislation.

The analysis stage consists of the response of the drafter to drafting instructions. It involves a brief or longer report on the basic elements of the drafter's response to the drafting instructions.

As put by Thornton, this stage involves the analysis of the existing law, the special responsibility areas and the practicality; at this stage, the drafter is concerned with analysing the instruction contained within the legislation in place, as any new law must be linked to the existing one.

The drafter must relate the document under preparation to other existing or proposed documents. The intention here is to avoid repetition or overlap. Because it appears from the statement that the introduction of any new legislation implies a modification or abrogation of the existing nature, the drafter must make an analysis of the general law that relates to the instructions for the legal drafting assignment. More so, this knowledge should include more than the substantive and procedural aspects of the particular area of law.

For instance, if the proposal is intended to operate retrospectively to confer a benefit on private persons without imposing a corresponding obligation, then no substantial objection is likely to arise.

3. To Raise a Question of Principle

From time to time legislative proposals offend fundamental principles of fairness – for example, proposals to make the law retroactive; certain powers of entry, search and seizure; interference with individual rights; expropriation without compensation and so on. Quite apart from Charter of Rights issues, legislative counsel may have a duty to raise fundamental fairness issues at a political or other level if they cannot be satisfactorily resolved with the department concerned; however, Thornton contends that legislation on the above subjects is wrong in principle and advises caution and regard for the rights of persons affected and to include, where necessary, transitional provisions and other safeguards such as right to appeal and compensation provisions.

The analysis of drafting instructions is very important, especially in Rwanda, where there is no control of anti-constitutionality of a law before the laws are passed by the Parliament and assented to by the president.

The Supreme Court has the jurisdiction of hearing petitions on the constitutionality of laws, and international treaties. Thus, the drafter who is familiar with the system can easily analyse a new and existing law instead of giving the task to a consultant who has little or no knowledge about the system and the constitution.

Furthermore, the drafting instructions are not written in the way the five stages of Thornton are written. However, Rwanda has the drafting instructions in her young stage of drafting since legislative drafting is a new legal system in the world.

What is prevalent, however, is the ministers' drafting procedures of 2005 instructing the drafters what procedure is to be followed as earlier stated, particularly in its Articles 1 and 2 of that law.

Drafters have the responsibility not only to ensure that their bills conform to the Constitution but also to communicate it and develop an obsession to draft so as to be readily understood. If only on pragmatic grounds as the law is and it should be, a drafter who writes potentially unconstitutional legislative provisions leaves the responsible implementing agencies subject to expensive litigation.

At this stage, the drafter must take pains to know what is being amended and the relevant written laws. Every new law has been considered to be an amending law, so there is a very clear need to be aware of all relevant existing laws.

This process is necessary as it helps to avoid the possibility of perpetrating an unintended repeal by implication. Since the drafter's major task at this stage is to communicate, then on the issues related to instructions he must survey the relevant law as it exists and make his decision to the content and manner in which this is to be done. Other than that if a drafter thinks that the instructions are wrong or there is something worthwhile to add, he or she should say so preferably in writing, and if their objections are not sustained, they should only proceed with a written record of their advice on file, and in extreme circumstances should consider whether or not they wish to continue to act.

Therefore, in order to achieve good quality of legislation, a proper analysis of the proposed legislation needs to be made, as well as the instructions attached. Thereby, all the potential dangers can be averted. Of course, though it appears neutral, no law affects society`s diverse social groups equally; for instance regulation that requires a police commissioner to appoint as policemen only candidates who are six feet tall or taller needlessly discriminates against women because only the rare policing job requires brawn.

4. The Future

It should not be necessary to recommend that analysis of drafting instructions include an assessment of the practicality of the scheme set out in those instructions. Nevertheless past experience confirms a widespread illusion that legislation meets the problem by sheerely being in place, as if legislation is a mystical way to action instead of amounting only to legal frame for action. The magic of words is indeed wondrous. It is not unknown for sponsors of legislation to be more interested in pushing it through than in considering the capacity of the proposed legislation to be administered effectively and equitably.

At this stage a drafter needs to study most rigorously the practical aspect of the legislation proposed and to be satisfied that the scheme will work and that the proposed machinery is practical and the legislation will be capable of enforcement. This last question is one the drafter will have to come back to when drafting a penal provision. At that stage, if it should arise that an offence is to be created that is potently incapable of proof this must be strenuously resisted.

A sound legislation is the product of good collaboration between a skilled drafter and knowledgeable officials. The departmental official must have a sense

or natural ability for reading. Finally, Rwanda should compile a legislative drafting manual. But the process can be quite long.

III. Stage 3 – Design[3]

1. Designing the Law

The design or planning stage is one of the five stages of the legislative drafting process. A good legislative drafter has to observe all five stages of the legislative drafting process, namely understanding, analysis, design, composition and scrutiny and testing, to be able to produce a good piece of legislation.

For the purpose of this chapter, only the third stage (design) will be discussed. As Crabbe has said, without a legislative scheme, the resultant Act will look like a patchy, sketchy work. This implies that legislative design is a crucial step in the preparation of a piece of legislation as its quality hinges on such a scheme.

These five legislative drafting stages in Rwanda are embedded in the Instructions of the Minister of Justice No. 01/11 of 20 May 2005 on the procedure to be followed when drafting bills and orders, although it should be noted that these stages are implicitly provided.

According to Article 4 of the aforementioned instructions, the design of the bill or a draft order is done by technicians in the field to be drafted. However, the legal advisor takes the lead in the entire drafting process so that such a piece of legislation is technically well elaborated and finalized to ensure easy comprehension of its content by everyone and is in conformity with the relevant laws.

This design or planning stage is reached after the drafter has understood the proposal and assessed its implications in relation to existing law and the instructions to be followed. The drafter's responsibility at this stage is to decide whether the new legislation is really needed or not. If the answer is affirmative, the drafter starts designing the structure to be followed before actual beginning to draft it. In such a scenario, Dr H.S. Saxena's view is that two factors must be considered.

1. For the position of the new statute in relation to various connected statutes, a short summary should be made of the basic nature and objective to be achieved as well as the means by which these objectives are to be achieved.
2. Each topic must be taken up and developed. According to him, at this stage, a marginal note describing each proposed clause should be prepared. Care should be taken to see that distinct and totally different matters are not addressed in one and the same Act. A chronological order should preferably be followed and adequate provisions should be made for the errors and omissions pointed out.

Designing a structure that will achieve the object of the instructions is the principal purpose. The objective to be achieved should be clear and policy instructions need to be clearly articulated, but the drafter`s expertise must specify the idea or rules to be expressed in the piece of legislation to be drafted. Furthermore, the drafter needs to make an outline or framework so that he can first visualize the

3 By BWANAKWERI John.

shape and broad contents of the finished product. For the Rwandan drafter, this is very important because he is often involved in the process and yet his involvement is crucial since he is well versed with the system.

What is considered at the design stage in Rwanda is not different from what it is in other jurisdictions. Thus the design stage involves the structure of the body of the draft law. This implies that any draft legislation must be subdivided into parts, volumes, titles, chapters, sections and subsections according to its dimensions or its contents. An article should embody no more than one idea. Even if this idea would have several components, the instructions stipulate that before each article there should be a heading reflecting the idea that has been developed.

The designing stage requires the drafter to identify the important legal aspects that will form the basis of the document. It also helps to ensure that there is a plan that will guide the drafter, and this will help him to focus on all the aspects of the drafting task. After making a plan for the draft, the drafter proceeds to develop his ideas at the composition and development stage.

According to Dr H.S. Saxena, every Act has a long title and it has a purpose, it indicates the general object of the Act, the preamble, the enacting formula, the date of commencement of the enactment, the territorial application of the Act and a definition to extend its ordinary meaning or limit the meaning of a word that has more than one meaning.

Stijn Debaene *et al.*, on the other hand, are of the view that rules concerning the design and structure of a bill are related to two aspects: (1) the general composition of the bill, which includes a title, an introductory part, the main part or body of the bill and the final (subscribing) part and (2) each of these parts is submitted to a further composition and layout. For instance, the title should contain the nature of the bill (statute, decree, regulation, *etc.*) and a short description of its content, again governed by specific rules. The main part or body of the bill contains an exhaustive structure (definitions, field of application, new provisions and final provisions) and an exhaustive division (part, book, title, chapter, section, article, paragraph, *etc.*).

As a comparison, the Rwandan practice does not differ from the views of Dr H.S. Saxena and Stijn Debaene *et al.* The structure is only the nature of the piece of legislation.

2. *The Future*

In a nutshell, for any piece of legislation to achieve its intended goal, the drafter has a responsibility to follow the five stages of the legislative drafting process. In Rwanda, some drafters do ignore them, and this might be the cause of the current state of poor legislation in the country. The failure to respect these stages may be attributed to the fact that these stages are impliedly embedded in the legislative instruments in force and that some drafters fail to recognize them. It is on this note that I would advise the institution concerned, namely the Ministry of Justice, to revisit these legal instruments so that these stages are expressly provided.

IV. Stage 4 – Composition and Development[4]

1. Current Situation in Rwanda

In this step, the drafter puts content into the skeleton or framework he has designed. This is a very interesting stage from different points of view. First, the drafter has to deal with the legal system, respect the Constitution, which is the supreme law, international treaties that have been ratified and other legislation, as well as the hierarchy of norms. Then the drafter has the crucial role of ensuring whether all drafting techniques required have been well executed with respect to style, clarity of language, organization and arrangement of clauses, punctuation, avoidance of redundancies, penal provisions, *etc.*

According to the ministerial instructions, each Ministry prepares a bill or a draft order relating to its sphere of activities. Technicians in the area concerned should be involved in playing a key role in this exercise. But the legal advisor should be the primary channel of this process so that the bill or draft ministerial order is technically well elaborated and finalized to ensure easy comprehension of its content by everyone and is in conformity with the relevant laws referred to in the statement of the law (Article 4 of the Minister of Justice No. 01/11 of 20 May 2005). Concretely, the legal advisor must make sure that everything is well done: the preamble, the hierarchy of norms, other legislations are not affected, the existence of penal provisions in accordance with the penal code, *etc.*

In practice, since in the past many draft laws and orders coming from ministries have been drafted by external consultants, the line ministry used to involve the legal advisor late in the process, so all his efforts focused on format. This was against the requirements of the ministerial instructions. This was the case of the law on mines, the law on management of water resources, *etc.* But now we have noticed many changes such as involving the legal advisors a bit early. The recent good case is about the law regulating the labour code of 2009, the family code law, *etc.*

The drafter of the ministry of justice assists the line ministry during this process, but his effective role ends when the draft is officially submitted. The drafter of the ministry of justice reviews the draft from the title to the end. The ministry of justice has the task of reviewing not only the content but also the format. He must verify and correct the following points:

- In the preamble, the constitutionality of the legislation proposal and whether all the constitution references are exact, the legality, the conformity with the international conventions ratified,
- In the body of the text: the possible incompatibilities with other pieces of legislation, the logical arrangement of clauses into chapters or sections, the clarity of each sentence, the hard task of checking the translation issue, *etc.* Most of the time, the draft law is redrafted because the structure is not coherent.

In this stage Article 5 of the instruction is not well covered or implemented. The ministerial instructions state that any bill or draft order of interest to the popula-

4 By RAYMOND GATERA.

tion in general or any document containing ideas to be included in the said draft should be discussed between the Ministry that initiated the draft and any other interested Ministries or other institutions before transmission to the Ministry of Justice. The Ministry of Justice is, whenever possible, represented in meetings to exchange ideas on the draft, but this does not exclude transmission of the bill once finished or ideas gathered to the Ministry of Justice to finalize the bill or draft a new bill on the basis of such ideas (Article 5 of the Minister of Justice No. 01/11 of 20 May 2005).

2. International Standards

According to Thornton, at this stage the drafter may suggest modifications on the policy in order to harmonize with the draft. This is a very good practice, but the drafter has to avoid frictions with the policymaker. Thornton also encourages the drafter to work closely with the instructing officer at this step, and each draft is likely to be accompanied by a list of queries and comments that will call for a response from the instructing officer. Reed Dickerson's advice to the draftsman, in the interest of accuracy and efficiency, is to keep each section on a separate sheet until the final draft is proposed. The advantage is that the draftsman can revise individual sections as many times as necessary without having to retype materials belonging to other sections, and the sections can be rearranged freely without retyping. Dickerson, in the same book, 60 years ago, recognized the relevance of experts for technical matters. He recommends that drafters check doubtful and technical matters with the experts for a final polishing or finishing.

In New Zealand, the composition stages consider three key areas: the objectives, the legal framework and the order provisions. The legislation should be arranged in the following logical order: substantive matters should come before procedural matters, the general should come before the particular provisions, those having universal or wide application should come before provisions that have limited application, and administrative and procedural provisions should be located after substantive provisions.

3. Comparison

The Rwandan practice does not give to drafters the possibilities of modifying the policies, as suggested by Thornton. The relationship between the drafter and the instructing officer exists, but it needs more emphasis during the process. We also note that the systematic use of an external reviewer or expert is very important for the quality of the legislation, which is not a practice in Rwanda's drafting process.

The logical arrangement in New Zealand may help us to improve the structure of our legislation.

4. The Future

Mark Segal says that legislative drafters, unfortunately, face various obstacles in meeting their requirements: they may not have full information concerning policy objectives, may not be given sufficient opportunities to obtain information, may not have up-to-date information concerning socio-economic conditions and

may not be able to meaningfully communicate with outside parties who can offer crucial guidance. In my view, the stage of composition and development must be improved. The current Rwanda legislation arrangement does not clearly show the reader the response or strategies that must address the social problem. In this stage, we have to change how to draft our objectives (purpose clause), to reconsider the arrangement of clauses depending on the type of legislation, to use a lot of plain language, to reconsider the place of delegate legislation, *etc.*

V. Stage 5 – Scrutiny and Testing

1. Legislative Scrutiny and Testing

Legislative drafting involves converting policy decisions into practical guidelines and translating policies into effective and clear legal rules. Effective legislation puts to effect the set government objectives.

The scrutiny of draft bills is widely regarded as an effective way of improving the quality of legislation. It allows experts to comment on the details of a bill so that it can be amended before it is adopted. The legislative scrutiny is sometimes done internally (in the institution that initiated a bill) or externally (outside the institution that initiates a bill). It can also be a pre-legislative scrutiny or a post-legislative scrutiny.

2. What is the Current Practice in Rwanda?

In Rwanda, the pre-legislative scrutiny and the external scrutiny are the most frequent. The internal scrutiny is almost impossible because in some ministries the Legal Advisor (drafter) is the only one who has legislative knowledge in the whole institution. Instructing authority can help only when it comes to see if the intended policy is included. The legislative scrutiny is done by the team of legal advisors in the Ministry of justice, who, after finishing, forward their conclusions to Secretaries General of the two ministries concerned and then to the Ministers concerned, who should have a common understanding about the said bill before presentation to the Cabinet.[5]

After finalizing the bill the Ministry that drafts a bill transmits it to the cabinet, pending possible additional insights based on such ideas as may be expressed during its consideration by the cabinet.[6]

After this scrutiny by MINIJUST's Legal Advisors and by the cabinet, laws are submitted to the parliament, which, after determining the laws in its plenary session, transmits them to the relevant parliamentary committee of the chamber of parliament for examination prior to their consideration and adoption in the plenary session.[7] This is the last stage of pre-legislative scrutiny. A good example of a law well scrutinized is Law No. 33/2009 of 18 November 2009 relating to arms,

5 Instructions of the Minister of Justice No. 01/11 of 20 May 2005 on the procedure to be followed when drafting bills and orders, OG No. 12 of 15 June 2005, p. 4.

6 *Ibid.*

7 Constitution of the Republic of Rwanda of 4 June 2003, as amended to date, Art. 92, p. 76.

and we can point to the Organic Law instituting the penal code as a bad example of scrutiny.

3. What Are the International Standards?

In the UK, pre-legislative scrutiny is done by the parliamentary committee in charge.[8] "There is almost universal agreement that pre-legislative scrutiny is right in principle, subject to the circumstances and nature of the legislation. It provides an opportunity for the House as a whole, for individual backbenchers and for the Opposition to contribute inputs to the form of the actual legislation, which subsequently emerges, not least because Ministers are likely to be far more receptive to suggestions for change before the Bill is actually published. It opens Parliament up to those outside affected by the legislation. At the same time, such pre-legislative scrutiny can be of real benefit to the Government. It could, and indeed should, lead to less time being needed at later stages of the legislative process; the use of the Chair's powers of selection would naturally reflect the extent and nature of previous scrutiny and debate. Above all, it should lead to better legislation and less likelihood of subsequent amending legislation."[9]

The report done in a 2000 review of the scrutiny of draft legislation, sponsored by the Constitution Unit, University of London, and the Hansard Society, concluded with some recommendations on the objectives of pre-legislative scrutiny. It should:

- clarify the purpose of the bill to Parliament;
- provide the "handbook" for the standing committee;
- provide a political judgment on the bill; and
- assess the impact of the bill on outside groups.[10]

In Hong Kong the drafter of a government Bill has to appear before the committee set up to study the Bill to explain and sometimes defend his or her drafting. What is more, the legal advisor to that committee also makes a routine appearance and is expected to comment on the drafting as well as on the legislative counsel's defence of his or her drafting.[11] In the scrutiny of legislation, they sometime divide into three heads[12]:

(a) whether the legislation reflects the declared policy objectives or intent of the bill;
(b) whether it is effective in implementing such objectives or intent; and
(c) whether it would give rise to legal issues that need to be canvassed.

8 Legislative scrutiny: Guidance on written submissions to the Joint Committee on Human Rights <www.parliament.uk>.

9 Parliamentary Scrutiny of Draft Legislation 1997-1999, p. 9 <www.ucl.ac.uk/spp/publications/unit-publications/63.pdf>.

10 G. Power, *Parliamentary Scrutiny of Draft Legislation 1997-1999*, Constitution Unit, 2000, p. 3 by R. Kelly, 'Pre-legislative Scrutiny', 2010, pp. 11-12 <www.parliament.uk/briefing-papers/SN02822.pdf>.

11 J. Ma, 'Scrutiny of Legislative Drafting by the Legislature: The Role of the Legal Advisers of the Hong Kong Legislative Council', p. 1 <www.opc.gov.au/calc/docs/Loophole_papers/Ma_Jan2010.pdf>.

12 *Id.*, p. 15.

4. Comparison

In comparison with the international practice of legislative drafting, the Rwandan practice seems to be better because the scrutiny is done in two stages or even more. It starts in the Ministry of Justice, it follows with the Cabinet and by the parliamentary committee at the end. A possible problem here is that a number of parliamentarians and members of the cabinet lack the skills in law to challenge the draft.

5. The Future

It could be better to first scrutinize the legislative draft in the Ministry or Institution where the draft is coming from because they are the ones who are closely familiar with the policy intention and the objectives to be met. Outsiders who scrutinize the law may not focus on the structure or on the substance for want of expertise in the area.

B. Part 2: Drafting Techniques

I. Clarity[13]

1. The Current Practice in Rwanda

As regards the Instructions of the Minister of Justice No. 01/11 of 14 November 2006 relating to the drafting of texts of laws in Rwanda, the preamble paragraph one says that: drafting of certain texts of law are such as to make reading difficult as well as the comprehension and the use of laws in force.

Article 2, paragraph 2 of those instructions states that there should be only a single idea in an article, and not more than one idea should be included in more than one article, even if that idea would have several components.

Article 4 of the instructions of the Minister of Justice No. 01/11 of 20 May 2005 on the procedure to be followed when drafting bills and orders states that "each Ministry prepares a bill or a draft order relating to its sphere of activities." Technicians in the area covered by a given bill should be involved in playing a key role in this exercise. But the legal advisor should be the primary channel of this process so that the bill or draft ministerial order is technically well elaborated and finalized to ensure easy comprehension of its content by everyone and is in conformity with the relevant laws to be referred to in the statement of the law.

In this regard the current practice in Rwanda is good in general, but we have come across examples of well-drafted bills and of bills that have been poorly drafted. Before we look at a few examples, let me define clarity in legislative drafting; clarity means that the drafted bill must be simple, easily understood, unambiguous, concise, and free of vagueness and verbal redundancies.

An example of a law that has clarity is Law No. 22/2002 on General Statutes for Rwanda Public Service; Article 44 states: "A government employee may benefit from leave of thirty days maximum in the case of sickness or disability justified

13 By HABYARIMANA Didier Eduine.

by a medical certificate issued by an authorized doctor." This article is well drafted.

An example of a law that has no clarity is the Organic Law instituting the penal code No. 01/2012/OL of 2 May 2012, Article 133, which states that the fact that any of the Acts provided under this chapter from Section one to Section 3 of this Organic Law was committed by a subordinate shall not relieve his/her superior of criminal liability if he/she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the offender and inform relevant authorities.

The fact that an accused person acted pursuant to an order of a Government or a superior shall not relieve him/her of criminal liability where it was obvious that the order could lead to the commission of any of the offences provided under this chapter. This article does not comply with my definition of clarity that I provided after analysing those articles that are in the Instructions of the Minister of Justice.

2. International Standards

Ann Seidman, Robert B. Seidman and Nalin Abeyesekere say that drafters bear an obligation to maintain the rule of law. As part of that obligation, they must ensure that their laws are formulated with clarity, precision and consistency, or else the law has no predictability.

V.C.R.A.C. Crabbe says that clarity in legislative drafting helps to eliminate ambiguity and vagueness.

In the United States, the National Conference of Commissioners on Uniform State Laws states that "The essentials of good bill drafting are accuracy, brevity, clarity and simplicity. Choose words that are plain and commonly understood. Use language that conveys the intended meaning to every reader. Omit unnecessary words."

In Canada, the Uniform Law Conference's drafting conventions state that "an Act should be written simply, clearly and concisely, with the required degree of precision and as much as possible in ordinary language."

The European Union guidelines state that "the wording of (an) Act should be clear, simple, concise and unambiguous; unnecessary abbreviations, 'community jargon' and excessively long sentences should be avoided."

The manual for drafting legislation for the Florida Senate states that the primary goals of every drafter are clarity, brevity, and the avoidance of vagueness and ambiguity. Bills must be drafted in language that is as clear as possible because:

(1) Legislators must know the intent and effects of measures they vote on;
(2) Each official who administers the law must understand it;
(3) Everyone who is subject to the law must know his or her duties under the law; and
(4) A judge must be able to ascertain what the law means to all parties. Therefore, the drafter should not introduce unnecessary complexities, but should use the simplest and most precise terms possible.

As for brevity, a bill should be concise because a succinct law is more easily understood than a verbose law. Although clarity and brevity are usually complementary, clarity should never be sacrificed for brevity. A clear, lengthy law is always preferable to an unclear, brief law. In general, brevity reduces the likelihood of ambiguity or contradiction. Two guidelines for drafting concisely are:

(1) Avoid redundancies, which impede comprehension; and
(2) Eliminate every word and phrase that does not serve a clear purpose.

Language in legislative writing should be simple and clear. There is no need for redundant and excessively formal language, which might sound more 'legal' but is not. Therefore, the drafter should not introduce unnecessary complexities, but should use the simplest and most precise terms possible.

For example: Employment Rights Act 1996 of the United Kingdom, Suspension on medical grounds, 64 Right to remuneration on suspension on medical grounds, Part VII Suspension from work states that:

(1) An employee who is suspended from work by his employer on medical grounds is entitled to be paid by his employer remuneration while he is so suspended for a period not exceeding twenty-six weeks.

There is no clarity in this article because the use of 'his' gives rise to the doubt as to what can happen if the employer is a woman; it is ambiguous.

(4) The Secretary of State may by order add provisions to or remove provisions from the list of provisions specified in subsection (3).

The use of 'may' here gives to the Secretary the Rights of either doing or not doing, which creates confusion as it suggests to the reader the possibility of asking himself some questions about when and how the Secretary of State may by an order add provisions or remove them.

The Max Planck Manual on legislative drafting on the level of Southern Sudan, Heidelberg 2005, p. 47, speaks about Understandability, where it states: "therefore, a successful law is one that reaches its goal of changing a certain behaviour to reach the ultimate policy goal." This should be kept in mind when drafting laws. The more specific the people who are addressed and the more understandable and clear the language of the law is, the more likely that it will have the intended effect.

3. Comparison

One has to take into account that all Laws, Bills or Acts depend on appellation in different countries in order to achieve clarity on certain essential points requiring clarity in law:

The use of the active voice rather than the passive voice, refraining from legalese as far as possible, as for example avoiding the use of Latin terms in law because of their unfamiliarity to many people such as those without a legal background. Laws are made to solve problems, not to cause them, and law has to address the public in general. The use of 'and' or 'or' should be appropriate in the context of the law because it creates confusion when it appears to be used as a conjunction but the drafter uses it to mean something else. So also, punctuation marks have to be used with care in the legal context, and surplus words should be avoided. Further, the use of 'shall' can be ambiguous and it can contribute to the

support of long sentences. Avoiding long sentences and vagueness in favour of brevity, conciseness and precision is another principle that is integral to good drafting.

A comparison of drafting practices in Rwanda with to those in other countries reveals some similarities and differences. In the developed countries mentioned above, there are many specialists in legislative drafting, and therefore laws are drafted with the necessary clarity, but in Rwanda some laws are drafted by lawyers who have not yet been involved in legal drafting.

4. The Future

In Rwanda, we have tried to improve the clarity of our laws, and this is apparent from a comparison of the laws voted on by the parliament after the genocide of the Tutsi in 1994 and the more current laws that have been passed.

It is important that every drafter in the various Ministries in Rwanda have a Diploma in Legislative Drafting; drafters need intense training in legislative drafting and to share their experience with other drafters in foreign countries to learn more drafting skills and the use of clarity in their work, since a law that is not clear is meaningless to the public in general. In cabinet meetings in Rwanda, it has been noted on several occasions that some bills and draft orders initiated by the Government are returned to their authors mainly owing to shortcomings that have been noted both in their form and content. This also shows that our drafters in Rwanda have a poor knowledge of drafting.

To sum up, training is essential for Rwandan drafters to avoid getting unclear laws that are ambiguous, vague, too long…, and showing other kinds of defects resulting from lack of knowledge in legislative drafting and style of drafting.

II. Precision[14]

1. What Is the Current Practice in Rwanda?

The instructions of the Minister of Justice No. 01/11 of 20 May 2005 on the procedures insist on the precision of any piece of legislation, in the following articles:

Article 2: "technicality in elaborating a draft law is required", so the precision of the words to use is a must";

Article 3: "as a piece of legislation serves the concerned community, affects public in general, […]. this piece of of legislation should be discussed firstly with the community for which it has to address social problem, so it must be done with precision in order to achieve adequately this goal";

Article 4 requires the legal advisor to ensure easy comprehension of the content of any piece of legislation by everyone; so, there is a must of precision;

Article 6 requires "a common understanding about the piece of legislation between the institutions concerned by this piece of legislation before being presented to the Cabinet, so a need of a precision, the accuracy of the words used";

14 By HITIMANA Sylvestre.

Article 8 requires a checking of the accuracy and the harmonization of the piece of legislation of the translation in different languages, the need for a precision of words used in translation.

The instructions of the Minister of Justice No. 01/11 of 14 November 2006 on drafting of the texts of laws insist on the precision of any piece of legislation, in the following articles:

- Article 4 requires the translation of the texts with the necessary technicality of the texts with equal value amongst the versions.
- Article 6 provides that the language version passed by Parliament is the "perfect" one: here is the aspect of precision.

Example of Well-drafted Legislation

Article 69 of the Law No. 54/2011 of 14 December 2011 relating to the Rights and the Protection of the child is a good example of precision. It states that "The Law n 27/2001 of April 28, 2001 relating to rights and protection of the child against violence and all prior legal provisions contrary to this law are hereby repealed."

Example of Badly Drafted Legislation

Article 111 of the Law No. 22/2002 of 9 July 2002 on General Statutes for Rwandan Public Service, which provides that "An employee who exercises interim duties beyond sixty days (60) has right to enjoy the financial advantages related to his/her working post" is lacking in precision about the duration of the term of interim

2. What Are the International Standards?

Martha Faulk and Irving Mebler[15] recommend that one should:

- Use short sentences for complicated thoughts: this avoids placing several ideas in one long, complex sentence in order not to induct the reader in the confusion and misunderstanding (p. 5).
- Remove surplus words in order to avoid verbosity (p. 8).
- Remove redundant legal phrases; the drafter has to discriminate between useful and useless words (p. 9).
- Use everyday language whenever possible, the drafter has to avoid the use of the Latin terms impressing the reader (pp. 10-11).

The New Zealand Drafting Manual[16] requires that one must:

- Write to communicate with your reader:As a general guide, put yourself in the readers' shoes. Ask yourself what readers need to know to help them understand.
- Words:

Use the simplest word that conveys the meaning;

Eliminate unnecessary words;

15 M. Faulk & I. Mebler, *The Elements of Writing, A Guide to Principles of Writing Clear, Concise, and Persuasive Legal Documents*, Longman, New York, NY, 1994, p. 1003.

16 Standards of Parliamentary Counsel Office in Drafting Manual, Chapter 3, 'Principles of Clear Drafting', <www.pco.parliament.govt.nz>.

Do not use archaic language;

- Always use gender-neutral language
- Define terms in a way that is truthful and helpful to the reader.
- Avoid sub-subparagraph level
- A sentence structure that requires you to use sub-subparagraphs is probably too complex.
- Avoid suspense – Get to the main point early
- Indicate the topic of the sentence at the start. Let the reader know early on what the subject matter of the sentence is.
- Keep sentences short and simple:Long sentences tax readers and keep them in suspense. To help readers, the general rule is to keep sentences short. Keep the number of ideas in the sentence to a minimum. Having more and shorter subsections is generally preferable to fewer, longer ones. However, a mere count of the number of words is not really the point. The general rule in ordinary writing is to keep sentences to 30 words or less. In legislation, with the possibility of shredding to help the reader follow what is being said, the number of words in the whole sentence is not so relevant.
- From the readers' perspective, the structure of a sentence is more important than its length. A well-structured long sentence may be easier to follow than a poorly structured short one. But it turns out that many of the techniques for good structuring also produce the most concise result.
- Avoid nominalizations – Making verbs into nouns:A nominalization is a noun derived from a verb. In formal writing, strong verbs (*e.g.* 'consider') are often replaced by a nominalization plus a weak verb (*e.g.* 'give consideration to'). The result is more wordy, less direct writing. Removing nominalizations will make your writing shorter and crisper.
- Use the simplest word that conveys meaning:"The golden rule is to pick those words that convey to the reader the meaning of the writer and to use them and only them."[17]

  Wherever possible, use simple and familiar words unless they do not accurately express the intended meaning.

  The guideline that says to use the simplest word that conveys the meaning does not mean that we may use informal or jargon words in legislation. Our vocabulary is firmly at the formal and conservative end of the continuum.
- Eliminate unnecessary words:

  An obvious way to shorten sentences is by eliminating redundant words. Some phrases that have traditionally been used in legislation can be replaced by single words or shorter phrases.
- Always use gender-neutral language:

  Drafting in gender-neutral language has been PCO practice since the mid-1980s. It is therefore essential to use gender-neutral language unless a specific gender is intended.
- Use defined terms that are truthful and convey some meaning.

17 E. Gowers, *The Complete Plain Words*, 3rd edn, HMSO, London, 1986, p. 3.

- If possible, a defined term should be –
  - intuitive (it should of itself convey some indication of its meaning);
  - accurate (the meaning that it conveys of itself should not be misleading);
  - obvious (its form and use should suggest that it is a defined term).
- If a common word is given a special meaning, you may want to alert the reader to that fact (*e.g.*, by saying "the person's income (as defined in section 2").

Sir Geoffrey Bowman[18] encompasses the philosophy of drafting in two rules:

1. decide what you want to say.
2. say it.

To expand on that a little, the basic idea is to find out what the client wants, analyse it to ensure that it stands up, and express what is needed in language that is as precise and clear as possible.

The use of plain language: language must always be easy for the reader of any piece of legislation: precise, clear and simple as the subject matter will allow. A draftsman just has to do his best in the particular circumstances facing him, and each Bill requires different techniques, as perfection is both incapable of definition and unattainable.

The general idea is to express thoughts in language that is as precise, clear and simple as the circumstances allow. Geoffrey Bowman proposes a few of the helpful drafting techniques that are familiar to drafters and tries to illustrate the general point that there are very few hard and fast rules. "Everything depends on the particular circumstances facing the drafter, who has to exercise judgment." Among the helpful techniques he proposes are explanatory material and purpose provisions according to the nature of legislation. Obviously, the drafter expresses the detailed rules and also states their purpose. But the author draws attention to the fact that purpose provisions (if included in the legislative text at all) are designed to be part of the operative legislative material, whereas explanatory provisions are not meant to be part of the operative provisions. As for the explanatory materials, they might be couched in such general terms as to be incomplete, and therefore misleading, and the explanatory overview may cause the reader to adopt the wrong assumption, thus causing trouble rather than helping.

The general view in the United Kingdom is that the best place for explanatory material is in the explanatory notes that now accompany Bills and Acts. And in 2004, the House of Lords select committee on the Constitution recommended that they not be included in Bills, but that the explanatory notes should state the purpose. It is necessary that the reader knows that all the words count and are of equal weight. For instance, a textbook might help the reader by giving a summary of difficult technical passages. That technique would not be available to the legislative drafter, who operates in an environment where all the words count and have equal weight. Nor would a modern drafter adopt the exuberant repetition and emphasis evident in this provision of an Act of Richard III.

18 Sir Geoffrey Bowman, 'The Art of Legislative Drafting' revising Sir William Dale Memorial Lecture for 2005, published in Amicus Curiae and in the *European Journal of Law Reform* in 2006.

Example:

The Interpretation Act 1999 does not continue the provision formerly contained in Section 4 of the Acts Interpretation Act 1924 that the masculine gender includes the female gender. The result of this change is that gender-specific terms are given their ordinary meaning and do not include other genders (except in enactments made or passed before the Interpretation Act 1999 came into force on 1 November 1999). For example, certain offences may be committed only against women.

3. Comparison

There are many differences between the Rwandan legal drafting practice and the International practice on precision, especially about the explanatory material of a bill, in Rwanda. Concerning the use of gender neutrality, it is still an area of weakness in Rwandan drafting practice.

4. The Future

Our Ministry of Justice has to adopt the new legislative style we are learning from experts from the well-developed countries of the Commonwealth. Rwanda should adopt the international standards of legislative drafting techniques by putting in place new instructions on legislative drafting for both precision and clarity of the texts of laws.

III. Vagueness[19]

Vagueness can be understood as uncertainty of meaning. It is the opposite of precise in matters of degree rather than a matter of choice as in ambiguity. It is distinguished from ambiguity by the fact that there is no equivocation, yet all is not clear.

There may be vagueness as to a particular thing or matter, indistinctness, an uncertainty as to meaning. There may also be an uncertainty or indistinctness as to the character of that thing or matter.

Example of vagueness:

- Extreme cruelty means the wrongful infliction of grievous bodily injury or grievous mental suffering, which destroys the ends and objects of matrimony;
- Extreme cruelty includes any unjustifiable and long-practised course of conduct that mentally destroys the legitimate ends and objects of matrimony;
- Extreme cruelty means degree of cruelty, either actually inflicted or reasonably inferred, which endangers the life or health of the aggrieved party or renders his or her life one of such extreme discomfort and wretchedness as to incapacitate her or him, physically or mentally from discharging the marital duties.

19 By HODARI Patrick.

The above definitions do not give any certainty; they can be interpreted in whichever way they are understood, because the conduct referred to in these definitions does not show that it is sufficiently grave and weighty to warrant the description of being extreme cruel.

This vagueness caused chaos until the definition was corrected to read as follows:

– The conduct must have caused injury to health or a reasonable apprehension thereof;
– must be of a grave and weighty nature;
– must be the cause of injury to health and such like tendencies; and
– The test is not that of the reasonable man but the effect on the spouse of the conduct or misconduct complained of.

In Rwanda, there are some laws that show vagueness.

The organic law instituting the penal code in Article 742: on crimes of desertion for soldiers in the face of the enemy. "Any soldier who deserts in the face of the enemy shall be liable to imprisonment of 7-10 years if he/she is an officer and of more than 5-7 years if he/she is non-officer."

It does not show the type of crime committed, whether the soldier is punished when he/she comes back, punished in absentia, punished by the ones he joined or when caught in the attempt to desert.

The Law No. 21/2012 of 14 June 2012 relating to the civil, commercial, labour and administrative procedure in Article 26.2 says, "self deprivation of the right hall not be possible in case of dropping one's rights for social status or in relation to matters of public order."

When you hear 'social status', you cannot easily know whether it is status of the disabled people, poor or rich, married or single.

According to G.C. Thornton, language is intrinsically vague and imprecise. Words have "blurred edges," various aspects of meaning and evoke emotional responses. To different people the same word may mean different things. S.K. Hiranandani quoted Montesquieu "it is essential that only such words should be used by the law-giver as are bound to produce the same notions in the minds of all men."

The stipulation of meaning by definition provides in some circumstances a valuable means of removing undesirable vagueness from a word, but definition must be recognized as a palliative with a limited success rate and possibly unpleasant side effect.

The sources of vagueness and exactness in words are numerous. Xanthaki states that three of the most important are:

• The generic character of many words;
• Their readiness to derive colour from their surrounding context;
• Their capacity to evoke emotional responses.

Hazy, uncertain or imprecise expression are used in reference to words, especially sentences and paragraphs that are not clearly expressed. A criminal statute is void for vagueness if it is so vague that it fails to give a person fair notice of what conduct is prohibited or required. A statute is also void for vagueness if a legislature's

delegation of authority to judges and/or administrators is so extensive that it would lead to arbitrary prosecutions.

However, vagueness does not always lead to a determination of invalidity. Often, judges will use tools that will help them determine the meaning of a statute. In cases where a judge uses such tools, the rule of lenity states that ambiguity in a criminal statute should be resolved in favour of the defendant.

1. Current Practice in Rwanda

In Rwanda, instructions of the Minister of Justice No. 01/11 of 20 May 2005 on the procedure to be followed when drafting bills and orders.

The article says, "each ministry prepares a bill or draft order relating to its sphere of activities. Technicians in the area concerned by the given bill should be associated to play a key role in this exercise. But the legal advisors should be the primary channel of this process or draft ministerial order in technically well elaborated and finalized to ensure easy comprehension of its content by everyone and its conformity with the relevant laws to be referred to in the statement of law."

Instructions of the minister of justice No. 01/11 of 14 November 2006 related to the drafting of the texts of laws in article one emphasizes short, clear and concise headings according to its contents;

Article 2, paragraph 2, also emphasizes having a single idea by article, and not including more than one idea in more than one article, even if this idea would have several components. This shows that Rwandan drafting instructions also prohibit vagueness in writing procedures.

2. International Standards

"Just as over drafting can affect a provision in unforeseen ways, under drafting 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 so indefinite that it is meaningless or begs a challenge in court as invalid for vagueness. Generally, courts loathe declaring a law invalid on this ground, but careful drafting can eliminate the need for judicial scrutiny."

Vagueness is the use of language in a manner such that a phrase has no clear meaning or application. Consider the following example:

Constitutional due process requires that people are able to comprehend their rights and duties under the law. A law worded in such a manner as to preclude a person of average intelligence from being able to determine his or her rights and duties may be invalidated under the void-for-vagueness doctrine that springs from this concept of due process. Moreover, separation of powers under the State Constitution does not permit the Legislature to rely on an executive agency or a court to supply essential missing details in a vague law. The Legislature may not delegate its constitutionally mandated authority to enact law to another branch of government. By supplying missing details, an executive agency or court would be enacting law.

Constitutional principles require that legislation be written with a reasonable degree of certainty, so that citizens of average intelligence are not required to guess at the meaning of the statute and its application.

Examples of terms that have resulted in vetoed bills are 'unauthorized person', 'obscene', 'loitering', 'instalment sales', 'interest', and 'loans'.

Note that whether a term is unconstitutionally vague will depend on the context in which it is used, and the usage of any of these terms is permissible provided the drafter ensures that the constitutional principles are met.

3. Comparison

When you compare Ministers' instructions on drafting, you find that instructions are mingled within a single article supporting equally clarity and precision, while international manuals on drafting lay emphasis on avoiding vagueness right from the Constitution. Example: Legislative Drafting Manual 2013, Department of Legislative Services Office of Policy Analysis, Annapolis, Maryland, October 2012, p. 30, says "Constitutional principles require that legislation be written with a reasonable degree of certainty, so that citizens of average intelligence are not required to guess at the meaning of the statute and its application." In Rwanda, on the other hand, nowhere else is the need for clarity mentioned except in ministers' instructions.

4. The Future

In my opinion, first and foremost, the name given to the instructions should change for it to be understood easily that it is a manual for drafting. For example, I myself did not know that the Instructions of the Minister of justice related to the drafting of the texts of laws are the same as drafting manual elsewhere until I studied it in class. Therefore, I wonder whether a layperson can understand it.

Proposal:

Rwandan legislative drafting manual 2005 or 2006 for any person, either a national or a foreigner, to easily identify it.

IV. Ambiguity[20]

According to G.C. Thornton, ambiguity of words is of two kinds:

- The first may be termed grammatical or syntactical ambiguity and results from combining words that are ambiguous, taken separately in such a way that the meaning of the words together are ambiguous.[21]
- The second is the kind of ambiguity that arises from the word itself and not from its use with other words. It arises when a word has more than one meaning, a circumstance that is known as polysemy.[22]

According to V.C.R.A.C. Crabbe, ambiguity happens when there is double meaning. The expression is capable of more than one meaning.[23]

20 By KAMUGISHA Patrick.
21 Legislative drafting, 4th edn by Thornton, pp. 11-13.
22 *Ibid.*
23 Legislative drafting by V.C.R.A.C. Crabbe, pp. 45-46.

Driedger also mentions difficulties in the use of words that give rise to ambiguity. Further, he gives an example of a sentence.[24]

> 'No person shall damage growing vegetation in a public park'

Could be read to mean:
(a) No person in a public park shall damage growing vegetation; or
(b) No person shall damage vegetation growing in a public park.
In (a) a person who is in a public park contravenes the provision if that person damages vegetation, whether the vegetation is growing in the public park or outside the public park. In (b) a person whether in a public park or outside of a public park contravenes the provision if that person damages vegetation that is growing in the public park.

Following the definition of ambiguity, I list a few examples of ambiguity in some Rwandan laws:

(i) Ambiguity in the Constitution:

Article 142: Term of office of the heads of Courts and judicial functions (Amendment No. 04 of 17 June 2010):

> The Law on the statute of judges and the judicial personnel shall also regulate the term of office of heads of other Courts

Analysis:

Since in Rwanda it is a Constitutional requirement that laws are disposed to end-users in three official languages, there are instances of conveying quite different messages. Therefore, the use of 'shall' in the English version is unique. However, the French and the Kinyarwanda versions convey the same message and the English one a different one. I have picked a few examples, but this appears in several laws here in Rwanda. The English version seems to be targeting the judicial personnel to be hired in the future, whereas the French and Kinyarwanda versions address it at the time of reading this article/section in the present simple tense and avoid the passive voice.

(ii) Another article is picked in the penal code that gives room for ambiguity:

Article 208: Advertisement for facilitation of prostitution:

> Any person who, by whatever means, announces that he/she facilitates prostitution shall be liable to a term of imprisonment of one (1) year to three (3) years or a fine of two hundred thousand (200,000) to three million (3,000,000) Rwandan francs.

24 Driedger in the construction of statutes, p. 4.

This article has three defects:

1. The use of 'shall' is formulated in a manner that shall bring in as well an element of the future tense and an element of an obligation to a liability of a person by whatever means facilitates prostitution.
2. Secondly, the way gender neutrality is stated.
3. Lastly, it lacks all elements of a penal provision:

The sanction is formulated in a manner such that somebody may think that the convicted person will serve an imprisonment starting from one to three years while in prison.

Another flaw is that these penal provisions miss out some elements that should constitute it as in international practice.

Elements of a penal provision:

- A prohibition
- A contravention of a prohibition
- Sanctions

The principle of constructing a penal provision is that it must first state a prohibition and then state a contravention of a prohibition, followed by a sanction. Accordingly, I have redrafted this article in such a manner that it goes directly to a sanction without creating a prohibition/contravention of the prohibition:

> Any person who, by whatever means, announces to facilitate prostitution commits an offence and is liable, on conviction, to a term of imprisonment not less than one (1) year or not exceeding three (3) years or a fine of two hundred thousand (200,000) to three million (3,000,000) Rwandan francs.

(iii) An example of a law that contains ambiguity:

LAW No. 50/2007 OF 18 September 2007 DETERMINING THE ESTABLISHMENT, ORGANIZATION AND FUNCTIONING OF COOPERATIVE ORGANIZATIONS IN RWANDA (Article 3).

> Article 3: Cooperative Values
>
> The main activities of Cooperative Organizations shall be compatible to the cooperative values as mentioned in paragraphs one and two of this article.
>
> In particular, Cooperative Organizations shall respond to the needs of their members who shall be entitled to equal participation and share in the capital establishment in conformity with cooperative principles.

Analysis:

An analysis of this article shows that the use of 'shall' can cause confusion, because it is not direct. It is subject to be understood that the main activities of the cooperative organizations said to be mentioned in the previous articles are meant to be done in the future. Alternatively, somebody might think that the 'shall' in this article creates an 'obligation' for the cooperative organizations'

actions to be compatible with the cooperative values as mentioned in paragraphs 1 and 2 of this article.

The second paragraph also creates ambiguities regarding whether cooperative organizations shall respond to the needs of their members in the future or whether it is an immediate obligation, and one that will be entitled in the future to equal participation and share in the capital establishment in conformity with cooperative principles or an immediate obligation. Therefore, the board can be reluctant because the provision is ambiguous in terms of its implementation.

- *The Future*

The way to redraft legal provisions should fulfil the internationally recognized elements that constitute legal provisions. Secondly, the use of 'shall' should be avoided, in so far as it lessens ambiguity.

V. Plain Language[25]

Plain language should be used to communicate to your audience sothat they understand the first time they read or hear it. Language that is plain to one set of readers may not be plain to others. Written material is in plain language if your audience can:

- Find what they need;
- Understand what they find; and
- Use what they find to meet their needs.

No one technique defines plain language. Rather, plain language is defined by results – it is easy to read, understand and use.

Plain language is grammatically correct language that includes complete sentence structure and accurate word usage. Plain language is not unprofessional writing or a method of 'dumping down' or 'talking down' to the reader. Writing that is clear and to the point helps improve communication and takes less time to read and understand. Clear writing tells the reader exactly what the reader needs to know without using unnecessary words or expressions. Communicating clearly is its own reward and saves time and money. It also improves reader response to messages. Using plain language avoids creating barriers that set us apart from the people with whom we are communicating.

In the other words, to draft means to communicate a message. In legal drafting, clarity portrays the fact that the message is in simple, plain and clear language.

The Instructions of the Minister of Justice No. 01/11 of 14 November 2006 Relating to the Drafting of the Texts of Laws do not stipulate the use of 'plain language' in legislative drafting except Article 4 in its Paragraph 1 of INSTRUCTIONS OF THE MINISTER OF JUSTICE No. 01/11 OF 20 MAY 2005 ON THE PROCEDURE TO BE FOLLOWED WHEN DRAFTING BILLS AND ORDERS. (OG No. 12 Of 15 June 2005).

Article 4 stipulates that each Ministry prepares a bill or a draft order relating to its sphere of activities. Technicians in the area concerned by a given bill should

25 By KANZAYIRE Alphonsine.

be play a key role in this exercise. But the legal advisor should be the primary channel of this process so that the bill or draft ministerial order is technically well elaborated and finalized to ensure easy comprehension of its content by everyone and its conformity with the relevant laws to be referred to in the statement of the law.

1. What Is Current Practice in Rwanda?

a) Good example

Article 2 of an Organic Law instituting the Penal Code stipulates that "[a]n offence is an act prohibited or an omission which manifests itself as a breach of the public order and which the law sanctions by a punishment." This article is very easy to understand.

b) Bad Example

Rwanda does not use plain language like a law on Genocide ideology in Article 3: Characteristics of the crime of genocide ideology:

> The crime of genocide ideology is characterized by any behaviour manifested by facts aimed at dehumanizing a person or a group of persons with the same characteristics in the following manner:
> 1. threatening, intimidating, degrading through defamatory speeches, documents or actions which aim at propounding wickedness or inciting hatred;

2. What Are International Standards?

The plain language movement has begun to influence the way in which legislation is drafted across the world. Many jurisdictions are now publicly committed to producing legislation in clear and concise language. In some cases the impact has been more significant than others.

A glance at recent Acts indicates that UK legislation is drafted in plainer language than was once the case. One of the most significant developments has been the establishment of the Inland Revenue's Tax Law Rewrite – a major project to rewrite almost all tax legislation in language that is plainer, and in a simpler structure, than that adopted in the legislation it replaces.

One of the functions of the New Zealand Law Commission is to advise the government on ways in which the law of New Zealand can be made as understandable and accessible as is practicable. In making recommendations it is required to have regard to the desirability of simplifying the expression and content of the law.

The various legislative drafting offices in Australia have deliberately manoeuvred away from the drafting style inherited from the UK. They consider that style to place too much emphasis on precision and not enough on simplicity and to be typified by badly constructed sentences and outdated words and phrases.

The Canadian Legislative Drafting Conventions are designed to standardize the way in which statutes in Canada are drafted. They adopt many of the princi-

ples of plain language and state that legislation should be written as much as possible in ordinary language suitable for its intended audience.

The US Plain Writing Act of 2010 defines plain language thus:

> The term 'plain writing' means writing that the intended audience can readily understand and use because that writing is clear, concise, well-organized, and follows other best practices of plain writing.

The Plain Writing Act of 2010 requires the Federal government to write all new publications, forms, and publicly distributed documents in a "clear, concise, well-organized" manner that follows the best practices of plain language writing.

> The purpose of this Act is to improve the effectiveness and accountability of Federal agencies to the public by promoting clear Government communication that the public can understand and use.

In the plain English Manual, the expression 'plain English' has been adopted by movements in the USA, the UK, Canada and Australia. In Canada they call it 'plain language' because their laws are bilingual. There are different approaches, but the aim is the same: to simplify all official writing by removing unnecessary obscurity and complexity. The Office policy is to draft in plain English, but to do more than that. It is to develop a whole art of making laws easy to understand. However, to avoid confusion, it is convenient to call this policy 'plain English' drafting.

The Office of the Scottish Parliamentary Counsel has prepared this booklet about the use of plain language in legislation. The Counsel in that office is responsible for drafting Bills for the Scottish Executive. They are committed to drafting legislation in plain language. If laws are written or contracts are drawn up that cannot be readily understood by those most affected by them, the social cost is an increasing ignorance of the law and growing disrespect for the law and those who administer it. Ignorance of and disrespect for the law damage the fabric of society. Unnecessarily complex language, redundant words and language that fails to communicate impose an enormous financial burden on all levels of society. Even minor improvements to the language of the law can bring substantial savings of time, time that can then be put to more productive use.

3. The Future

It is very important to put in place instructions on plain language. Why not adopt the good example of the US, as mentioned above. And also, it is better to have the office of parliamentary counsel in charge of legislative drafting.

VI. Gender-Neutral Drafting[26]

1. Introduction

While the use of masculine nouns and pronouns for general reference is technically correct in legal drafting, most of today's drafters avoid or minimize it when drafting. According to L.H. Edwards, one reason is that the use of masculine nouns and pronouns in legal drafting perpetuates the habit of thinking of the male as the model of a human being from which females deviate.

This statement is reinforced by Murray and De Sanctis, who assert, through some statistics that women make up at least half of the graduating classes from law schools; they constitute from 30% to 40%of the practicing bar, and represent a growing percentage of judges, so there is no excuse for writing with sexist or male-dominated language in legal contexts. In fact, all persons are not men, and for this there is no justification for using the pronouns 'he', 'him', 'his' or 'himself' in generic references to these persons and positions.

However, gender-neutral writing does not mean that you should avoid referring to gender when writing about a person. The fact is that a person has a gender, and there is nothing wrong in recognizing it. Gender-neutral drafting merely means that you try to avoid using masculine nouns and pronouns for general reference.

Using gender-neutral language is not easy, but it is a wiser strategy to use if you want to achieve gender neutrality in legal drafting. In what follows we are going to see how gender-neutral language is used in drafting through some examples worldwide, and particularly in Rwanda.

2. What is the Current Practice in Rwanda?

In Rwanda, the drafting of legal texts is regulated by Ministerial Instructions No. 01/11 of 14 November 2006 of the Minister of Justice relating to the drafting of the texts of laws. If you read these instructions carefully, you will find that they do not provide guidance about gender-neutral drafting. However, this does not mean that Rwandan drafters do not use gender-neutral language when drafting. The matter is to see whether gender-neutral language is properly used.

Gender-neutral drafting in Rwanda:

a) Gender-neutral drafting in Rwanda: a good example

> In the event of the death, resignation or permanent incapacity of the President of the Republic, the President shall be replaced in acting capacity by….

The drafter used the technique of gender-neutral drafting called the repeat of the noun. Instead of replacing the noun the President of the Republic, the drafter has repeated the noun the President.

26 By KAYIRANGA Jean Baptiste.

b) A bad example
Instead of writing:

> Any person who violates his/her obligation of secrecy shall be punishable in accordance with the provisions of the Penal Code (Article 7)

You write:

> Any person who violates the obligation of secrecy shall be punishable in accordance with the provisions of the Penal Code.

The drafter should use the technique of the omission of the pronoun and replace it by 'the'.

3. International Standards

As mentioned above, gender-neutral drafting merely means that you try to avoid using masculine nouns and pronouns for general reference. Linda H. Edwards admits that today's good drafters should avoid the use of sexist language or minimize it. She gives various strategies to achieve it, but we take two examples:

– Avoid gender-specific words

Examples: 'worker' instead of 'workman', 'chairperson' instead of 'chairman'

– Use of articles instead of pronouns

Example: A plaintiff may petition a court for relief, attaching to the [rather than 'his']complaint a copy of the receipt.The *Legislative Drafting Manual in Massachusetts* requires the drafter, whenever possible, to avoid using the terms 'he' or 'she' or 'him' or 'her', *etc.* in drafting, except in those rare instances when the topic is gender specific, *e.g.*, a bill dealing with ovarian cancer may, by necessity, include the word 'she' or 'her' and, similarly, a bill regarding prostate cancer may, by necessity, include 'he' or 'his'. Otherwise, whenever reasonable, nouns rather than pronouns should be used to refer to persons in order to avoid gender identification.

Use, for instance, an article such as 'the', 'a', 'an' or 'that' to replace the personal pronoun.

Example: An applicant must include with the (rather than 'his') application …

The Parliamentary Council Office in New Zealand produced a Legislative Drafting Manual, which sets out the principles of clear drafting. This manual requests drafters to always use gender-neutral language in legal drafting. The PCO has practised this since the mid-1980s. The manual says that it is essential to use gender-neutral language unless a specific gender is intended. For example, certain offences may be committed only against women. Some techniques for converting gender-specific language into gender-neutral language may be to omit the pronoun [A member of the Tribunal may resign his office – A member of the Tribunal may resign office]; to repeat the noun [A member of the Tribunal may resign his office – A member of the Tribunal may resign the member's office].

4. Comparison

We have mentioned above that in Rwanda, Ministerial Instructions of the Minister of Justice relating to the drafting of the texts of laws do not provide guidance on gender neutrality in drafting. On the contrary, we have seen that in Massachusetts and in New Zealand the legislative drafting manual provides clear instructions on gender neutrality in drafting and requires the drafters to use gender-neutrality techniques when drafting laws.

Another point of comparison is the use of gender-neutrality drafting through examples worldwide. We have noted that through laws from Canada, New Zealand and South Africa, drafters are used to drafting laws using gender-neutrality techniques. In Rwanda, the use of gender-neutral drafting can also be observed through some laws, but it is not a culture that is well established and properly used. Most drafters still use the technique of masculine and feminine pronouns, a practice that is waning internationally.

5. The Future

As in the case of other countries like New Zealand and Massachusetts, where legislative drafting manuals provide clear instructions on gender neutrality in drafting, Rwanda should also set up a legislative drafting manual requiring legal drafters to systematically use gender-neutrality techniques when drafting laws because the use of masculine nouns and pronouns in legal drafting that perpetuates the habit of thinking of the male as the model of a human being is not fair while we are claiming gender equality.

As observed in Canada, New Zealand, Massachusetts and South Africa, drafters are used to making bills containing gender-neutral drafting techniques; Rwandan drafters should adopt this good habit.

VII. Structure/Division in Chapters/Articles/Paragraphs[27]

I focused on provisions in certain pieces of legislation, which may be further divided to assist comprehension by means of dividing or structuring chapters/articles/paragraphs. Rwanda's current practice on how to structure the body of the text of law is guided by the Instructions of the Minister of Justice No. 01/11 of 14 November 2006 relating to the drafting of the texts of laws, most especially in Article 2, where it provides that any draft legislation must:

(1) Be subdivided, as far as possible, in Parts, Volumes, Titles, Chapters, Sections and Subsections, according to its dimension or its contents;
(2) have a single idea by article, and not include more than one idea in more than one article, even if this idea would have several components;
(3) indicate before each article a heading reflecting the idea which is developed in it.

It is from the above-mentioned article on instructions that Rwandan law's body of the text is structured in chapters, sections and articles only in that spirit provided for in the ministerial instructions.

27 By MITSINDO Tom.

In Rwanda's current practice, articles are the ones preferred in the body of the text of law. Therefore, paragraphs and subparagraphs are not in a sequence with sections and paragraphs, and in practice, an article with a single idea can be divided into paragraphs and subparagraphs according to its dimensions. This structure used in Rwandan law's body of the text can confuse foreign readers from abroad, and therefore we need international standards on the structure of the body of texts of laws in Rwanda. A good example is the penal code with 766 articles, but with no subsections in it.

The structure of a sentence, the order in which words are used, whether individually or in clusters, and the positioning (or proximity) of the parts of the sentence largely determine the meaning of the sentence.

With reference to international standards, one coherent group of ideas per section uses the narrative style to avoid excessive cross-references, and preferably no more than five subsections to avoid going down to sub-subparagraphs.

Sections (narrative paragraphs):

- One coherent group of ideas per section where sections are like paragraphs in narrative writing;
- Each sentence (subsection) in a section should relate to the main theme of the section;
- The main theme should come first, in subsection (1);
- The heading should indicate the theme or subject matter of the section.

Preferably no more than five subsections are advised to try to structure ideas into small groups. In legislation, that translates into saying, "keep the number of subsections in a section low." If there are more than about five subsections in a section, see if you can split the section.

Avoiding sub-subparagraph levels in a sentence structure that requires you to use sub- subparagraphs is probably too complex.

Example: Subsection (1) does not apply if the act or omission …

Punctuation provides a signpost to sentence structure. A great deal has been written about it, but for the purposes of this manual it is probably sufficient to repeat the four rules set out in Thornton (1996, p. 35):

- punctuate sparingly and with purpose;
- punctuate for structure and not for sound;
- use conventional punctuation.

South Australian legislation will, by convention, usually have a format that includes a standard hierarchy for the structure of the body of legislation Chapters, Parts, Divisions and Subdivisions. Chapters are reserved for use with long and complex Acts or subordinate legislation.

The practice of using sections and subsections should also be adopted in Rwanda to make the sequence perfect and clear for readers who are not familiar with the Rwandan structure of the body of the text of law.

VIII. Preliminary Provisions: What to Include[28]

The guidelines on legislative drafting in Rwanda are expressed in Instructions of the Minister of Justice No. 01/11 of 14 November 2006 relating to the Drafting of the Texts of Laws.

According to article one of these Instructions about the content of the law, any draft legislation shall comprise:

- a table of contents according to its composition;
- a short, clear and concise heading according to its contents;
- a traditional formula of promulgation;
- a preamble necessarily comprising;
    - mention of the competent legislative authorities;
    - mention of the Constitution of the Republic of Rwanda;
    - mention of the International Convention of reference where applicable;
    - mention of relevant laws of reference and reviewable laws, if applicable, while taking care to mention only the essential texts.
- The main body of the text:
    - Introductory provisions;
    - Terminology;
    - Legislative provisions;
    - Final provisions;
    - Names of all signatories at the end of the draft legislation.

According to these Instructions of the Minister of Justice, the preliminary part of the law in Rwanda is composed of:

- Table of contents according to its composition (arrangement of sections or clauses);
- A short, clear and concise heading according to its contents (title);
- A traditional formula of promulgation and (enacting formula);
- A preamble necessarily comprising the legal basis of the law and the necessity of the legislation.

This practice is followed in drafting of laws in Rwanda because all Rwandan laws include these elements.

Examples:

Organic Law No. 03/2012/OL of 13 June 2012[29] has a good preliminary part according to the Instructions mentioned above, because all elements are included therein, and immediately after them comes the substantive provisions constituting the body of the law.

Law No. 21/2012 of 14 June 2012[30] also has all the elements of the preliminary part, but the title of the law entitled 'PRELIMINARY PROVISIONS' is confusing because when identifying the parts of the legislation, it will be a problem to

28 By MUJAWAYEZU Renatha.

29 Organic Law No. 03/2012/OL of 13 June 2012 determining organization, functioning and jurisdiction of the Supreme Court, OG No. 28 of 9 July 2012.

30 Law No. 21/2012 of 14 June 2012 relating to the Civil, Commercial, Labour and Administrative procedure, OG No.29 of 16 July 2012.

find the part in which to include, for example, the title, the preamble, *etc.* The title should immediately enter into the substantive provisions of the law.

1. International Standards

The Legislative Drafting Manual. A Practitioner's Guide to Drafting Laws in Kosovo, pp. 20-23, states that Introductory provisions (Preliminary provisions) are composed of:

- The title of the law;
- The enacting clause; and
- A scope or general purpose statement.

Example: LAW NO. 2004/12 ON STANDARDIZATION, Commonwealth Distance Training Course in Legislative Drafting, p. 7.

Preliminary provisions:

- long title;
- words of enactment; and
- short title.

These are mandatory. Others are as follows:

- preamble;
- commencement provision;
- interpretation clauses;
- purpose clause;
- application clauses;
- duration clauses;
- road map clauses.

Example: The Fair Labour Standards Act of 1938, As Amended, Texas Legislative Council, Drafting Manual.

Introductory formalities:

- Heading;
- Title (also called 'Caption'); and
- Enacting clause.

Example: Texas General Appropriations Act for the 2012-2013 Biennium.

2. Comparison

As stated above, the preliminary provisions of Rwandan laws are composed of four elements, namely, a table of contents, according to its composition (arrangement of sections or clauses); short, clear and concise heading, according to its contents (title); a traditional formula of promulgation (enacting formula); and a preamble. To have these elements in the preliminary provisions is of great importance in Rwanda because the reader of the law gets an overview of the law at the beginning pertaining to its content, the name (title), the authority who has enacted it, its legal basis or its justification (the necessity of the law).

According to International practice, the following are mandatory elements to be included in the preliminary provisions of the legislation:

- the title (short or long) and

- the enacting clause.

International practice gives the drafter the possibility to add other elements in the preliminary provisions according to the nature and the length of the law. Those elements, which we do not have in Rwanda as to the preliminary part, are: commencement provision; interpretation clauses; purpose clause; application; and duration clause. But apart from duration clauses, we have these provisions along with the law. There are some provisions that are included in the Substantive provisions (Body of the law), specifically in what we call 'introductory provisions', and Final provisions.

Those provisions are the following. In sum, the Rwandan laws include the essential needed information as to Scope (application clauses), Purpose clause, Definitions (interpretation clauses) and Commencement provision, but the way of dispatching them along the law and how to draft them differ from the International practice.

3. Future

Even if the above-mentioned provisions are included in Rwandan laws, the way they are dispatched along the law is not suitable to permit the reader to get all prior necessary information about the law before reading substantive provisions of the law.

To my understanding, it is preferable to introduce the following in the preliminary provisions of the law:

- Table of content according to its composition (arrangement of sections or clauses);
- A short, clear and concise heading according to its contents (title);
- A traditional formula of promulgation (enacting formula);
- A preamble (justification or necessity of the law);
- Purpose clause (long title);
- Application clauses;
- Duration clauses;
- Commencement provision;
- Interpretation clauses.

IX. Table of Contents[31]

1. Introduction

The table of contents in legislative drafting is important when the bill is long. Given that the table of contents helps a reader to discover easily and quickly the framework and the general content of an Act, there is no advantage in providing a table of contents in a very short bill of fewer than six clauses or two or three pages; the content of the bill can just as quickly be seen by looking directly at the section headings or marginal notes as they stand in their normal position.

In other words, the table of content in any legislation is very important because it is easy for the readers to know where the needed part of law is located.

31 By MURORUNKWERE Anysie.

Part headings, section headings and all other headings may perform an additional function if they are set out in the form of a table of contents immediately before the text of an Act. In Rwandan legislative drafting, the table of contents is found after the title of the law.

2. The Current Practice in Rwanda

In Rwandan legislation, the table of contents has a compulsory place because it is provided by the "INSTRUCTIONS OF THE MINISTER OF JUSTICE N 01/11 OF 14/11/2006 RELATING TO THE DRAFTING OF THE TEXTS OF LAWS" in its Article 1, paragraph 1. Accordingly, it is an obligation to prepare a table of contents at the beginning of each law just after the title.

In general, the table of contents in Rwandan legislation is not good because it does not indicate the pages of different parts, sections or articles of the law. The reader is obliged to go page by page and see where the needed article, section, chapter or part is placed.

Example:

The Organic Law No. 01/2012/OL of 2 May 2012 instituting the Penal Code is a very long one, containing 766 articles. The table of contents of the said organic law does not mention the page where we can see, for example, Article 135.

After the publication of the Instructions of the Minister of Justice No. 01/11 of 14 November 2006 relating to the drafting of the texts of laws, all published laws in force have the table of contents.

a) Example of bad law:

Organic Law No. 08/2005 of 14 July 2005 Determining the Use and Management of Land in Rwanda. This law is bad because it has no table of contents at all and all the articles are not titled.

b) Example of good law:

Law No. 02/2011 of 10 February 2011 Determining the Responsibilities, Organization and Functioning of the National Women's Council. This law is good according to the existence of a table of contents, and all headings (chapters and articles) are titled.

3. International Standards

A glance through such a table enables a reader to discover easily and quickly the framework and the general content of an Act. As Thornton said, the table of contents facilitates the reading of the text of law, especially when the law is long. Further, Thornton said that there is no advantage in providing a table of contents in a very short bill of fewer than six clauses or two or three pages. The content of the bill can just as quickly be seen by looking directly at the section headings or marginal notes as they stand in their normal position.

Concerning Manuals on legislative drafting, I do not see anything talking about table of contents or arrangement in sections.[32] Except for Thornton's analysis of the necessity of a table of contents when the law is long, no manual talks about our topic. Hence, we have consulted the laws of different countries to see if their laws contain the table of contents.

In the legislation of Canada, there is a table of contents. Then, the reader is facilitated to consult the Canadian Acts. Examples: Access to Information Act and Contravention Act. In these Acts, the table of contents is called 'Table of provisions', which is located before the long title.

In New Zealand, the table of contents is called 'Contents', which is placed after the Short title.

Examples: Income Tax Act 2007 and Holidays Act 2003

In Kenya, the table of contents is called 'Arrangement of sections', which is placed after the short title.

Examples: Income Tax Act and The Limitation of Actions Act

In Uganda, the table of contents is also called 'Arrangement of sections', and it is placed after the short title. Examples: The Uganda Citizenship Act and The Anti-terrorism Act, 2002.

From my observation of international practice, the table of contents or arrangement of sections is mentioned in the laws after the title (here in Rwanda, we do not distinguish the long title from the short title) and after the short title in other countries. So the table of contents is important because it appears in many laws of different countries.

4. Comparison

Few foreign manuals introduce the tabe of contents as a measure of legislative quality. But the reality is that it is necessary, except in Rwanda, where there are instructions from the Minister of Justice, and Thornton advises that the table of contents be put in long texts of laws.

Country	Existing of instructions or manual about the table of contents in legislative drafting	Table of contents, part of a law
Rwanda	Instructions of Minister of justice	Ok
Canada	Nothing	Ok
New Zealand	Nothing	Ok
Kenya	Nothing	Ok
Uganda	Nothing	Ok

32 I have consulted the following:
(1) *Legislative Research and Drafting Manual*, 5th edn, Massachusetts General Court, 2010
(2) *Colorado Legislative Drafting Manual*
(3) *Manual of Legislative Drafting in Alaska*.

5. The Future

Regarding my opinion on the future, I greatly appreciate the Instructions of the Minister of Justice of Rwanda, which obliged drafters to mention the table of contents in different laws. As already mentioned, Article One of these instructions states:

> Contents of the text of law:
>
> Any draft legislation shall comprise:
>
> 1. table of contents according to its composition.

It is a wonderful thing because the table of contents helps the reader to go easily and quickly into the long laws. Thornton's idea is also very important, namely to omit the table of contents in very short bills or laws of fewer than six clauses or two or three pages. The content of the bill can just as quickly be seen from looking directly at the section headings or marginal notes as they stand in their normal position. So my own opinion is to insist on mentioning the table of contents in legislative drafting and to omit it when the law is very short.

X. Enacting Formula[33]

1. Introduction

Normally, laws are cast in a more or less uniform formal structure. According to Rwandan practice, one first deals with the preliminary or introductory provisions that contain different parts such as table of contents, long title, preamble, enacting formula, definitions clauses, interpretation clauses and application clauses, and then follow the main provisions, followed by the general, consequential and concluding provisions. The enacting formula appears, in which the legislature, in terms of its powers, declares that it enacts the law. It cites, in other words, the power under which the law is made.

However, the enacting formula is the main part of the law, and many authors acknowledge its importance.

Robert J. Martineau and Michael B. Salerne consider the enacting formula just as important as the title to the validity of a bill. Almost every state constitution requires that for a bill to become a law it must have an enacting formula.

According to V.C.R.A.C. Crabbe, every Act has an enacting formula, which gives the Act its 'jurisdictional identity and constitutional authenticity'.

Thomas R. Haggard and George W. Kuneysay that constitutions or statutes also often prescribe the exact language of the enacting formula. Under federal law, they conclude that legislation must be introduced with the following: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled."

Finally, even if enacting formula varies from one state to another, the legislation that does not contain the enacting formula is void.

33 By ZIKULIZA Felix.

2. What Is Current Practice in Rwanda?

The current practice in Rwanda is that the Instructions of the Minister of Justice No. 01/11 of 14 November 2006 on drafting of the text of laws, Article 1, Point 3, stipulate that among the main elements that any draft legislation must comprise is a traditional formula of promulgation.

a) Example of a good enacting formula

Law No. 50/2007 of 18 September 2007 determining the establishment, organization and functioning of cooperative organizations in Rwanda

The enacting formula in this law is:

> We, KAGAME Paul,
>
> President of the Republic;
>
> THE PARLIAMENT HAS ADOPTED AND WE SANCTION, PROMULGATE THE FOLLOWING LAW AND ORDER IT BE PUBLISHED IN THE OFFICIAL GAZETTE OF THE REPUBLIC OF RWANDA

b) Example of a bad enacting formula

Law No. 22/2002 of 9 July 2002 on general statutes for Rwanda Public service

The enacting formula is:

> We Paul KAGAME,
>
> President of the Republic;
>
> THE TRANSITIONAL NATIONAL ASSEMBLY HAS ADOPTED AND WE SANCTION, PROMULGATE THE LAW, DECLARED TO BE IN HARMONY WITH THE FUNDAMENTAL LAW BY THE SUPREME COURT, SECTION OF CONSTITUTIONAL COURT, IN THE RULING NO. 025/11.02/02 PASSED ON 5 JULY 2002, AND ORDER IT TO BE PUBLISHED IN THE OFFICIAL GAZETTE OF THE REPUBLIC OF RWANDA

3. International Standards

The enacting formula contains the precise words required in bills to show the authority by which the legislative power is exercised.

Enacting formulae, by convention, are placed immediately before Section 1, that is, after the long title, the commencement date and the preamble if any.

Ann Seidman, Robert B. Seidman and Nalin Abeyesekere[34] propose that the enacting formula reads, "BE IT ENACTED BY THE GENELAL ASSEMBLY OF THE STATE OF XX […]".

The State of Arkansas Legislative Drafting Manual states that the enacting formula reads, "BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS".[35]

34 A. Seidman, R.B. Seidman & N. Abeyesekere, *Legislative Drafting for Democratic Social Change, A Manuel for Drafters*, Kluwer Law International, The Hague, 2001, pp. 322-323.

35 State of Arkansas, Bureau of Legislative Drafting, *Legislative Drafting Manuel*, November, 2010, p. 16.

In the Contraventions Act S.C. 1992, c.47 the enacting formula reads, "Her Majesty, by and with the advice and consent of Canada, enacts as follows:"

Haggard and Kuney prefer "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED."[36]

4. Comparison

Considering the examples from Rwanda legislation and those from different manuals on legislative drafting, the following observations may be made about enacting formulae:

a) In all legislation, the enacting formula is mandatory and gives validity to the Act;
b) Enacting formulae are not presented the same way in all legislation. In Rwanda, for example, the name of the President of the Republic is written in bold or black "We, Paul KAGAME";
c) In Rwandan legislation, the enacting formula is in conformity with the provision of Article one of the Instruction the Minister of Justice No. 01/11 of 14 November 2006 on drafting of text laws;
d) In Rwandan legislation amending laws present enacting formulae;
e) In Rwandan legislation, the enacting formula is too long;
f) In some legislation, amending laws do not present enacting formulae, but each amendment Introduces a number.

5. The Future

From the examples given, it may be observed that enacting formulae are not based on the same model. Even when we take an example of calls that comprise the East African Community – Kenya, Uganda Burundi, Tanzania and Rwanda – enacting formulae in these countries are written differently.

In view of this difficulty, I propose that Rwandan legislation should comply with the legislation of certain countries such as Uganda, Kenya and Tanzania, not only to harmonize the legal instrument, but also to facilitate the free movement of goods and persons.

XI. Short Title and its Expression in the Text[37]

1. The Current Practice in Rwanda

a) Example of bad law

LAW NO. 22/2011 OF 28 JUNE 2011 ESTABLISHING THE NATIONAL COMMISSION FOR CHILDREN AND DETERMINING ITS MISSION, ORGANIZATION, AND FUNCTIONING. WWW.NCC.GOV.RW

36 T.R. Haggard & G.W. Kuney, *Legal Drafting*, 3rd edn, Thomson West, St. Paul, MN, 2007, p. 82.
37 By NGIRIKIRINGO Innocent.

b) Example of good law
LAW NO. 54/12/2011 RELATING TO THE RIGHTS AND THE PROTECTION OF THE CHILD WWW.NCC.GOVRW.

2. International Standards: Examples
(i)

Short Title:
This Act may be cited as the Crimes Act 1961.[38]

An Act to effect reforms in the law relating to –
(1) the effect of death in relation to causes of action;
(2) the payment of compensation under the Deaths by Accidents Compensation Act 1908;
(3) charges on insurance money payable as indemnity for liability to pay damages or compensation;
(4) the capacity, property and liabilities of married women and the liabilities of husbands;
(5) proceedings against and contributions between tortfeasors;
(6) the liability of employers to their servants for injuries caused by the negligence of fellow servants; and
(7) covenants in leases not to assign or underlet without consent of lessor.

(ii)

Short Title:
This Act may be cited as the Law Reform Act 1936.

An Act to amend the Laws relating to Crown and other Lands, including the Swamp Drainage Act 1915 [Repealed], the Public Reserves, Domains, and National Parks Act 1928 [Repealed], and the Land Subdivision in Counties Act 1946 [Repealed].

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

(iii)

Short Title
This Act may be cited as the Land Laws Amendment Act 194

Every new Act should have a short title for ease of reference. A short title should be short, accurate and unique. For example, the 'Village Library Act', 75 ILCS 40/ is a good short title. The 'Senior Citizens and Disabled Persons Property Tax

38 Act to consolidate and amend the Crimes Act 1908 and certain other enactments of the Parliament of New Zealand relating to crimes and other offences; Title: amended, on 1 January 1987, pursuant to Section 29(2) of the Constitution Act 1986 (1986 No. 114).

Relief and Pharmaceutical Assistance Act', 320 ILCS 25/ is an awful short title; no wonder most people refer to it colloquially as the Circuit Breaker Act.

3. Comparison

Naming titles are found in all Acts and subsidiary legislation. They are not common in proclamations or orders merely declaring, applying, or exempting cases from the parent Act.

Common law jurisdiction uses common forms of the short title. The title may appear in a separate section, but is often contained in the first subsection of a section that also deals with commencement. The short title is a label for the Act. Like any label, it is used both to indicate the contents and to make the container easy to find and to refer to.

Example of a short title.

This Act is The Firearms Act 1993

XII. Preamble[39]

1. Introduction

Normally a preamble is a preliminary statement that explains why legislation is needed, in contrast to the long title, which states the main legal changes the bill is to make to fill that need. In addition to this, it contains a 'recital' of the circumstances that made legislation necessary and the reason why it is considered expedient to enact the legislation now and in this form. The preamble can be used for a private or a public bill, and it can be legal or political; in a public bill the preamble deals with the constitutional importance that it of significance to the governance of the country, or in proclamations of major changes or momentous decisions, including bills of international importance, historical nature and also those that are concerned with personal or private issues.

2. Current Practice in Rwanda

In Rwanda preambles are used in the legislative process as a remnant of the civil law tradition. In Rwanda the preamble supports respect to the hierarchy of norms, which are set out as follows: Constitution, international conventions ratified by the government, organic law, ordinary law, orders, decrees and regulations.

a) An example of a bad preamble: Penal code of Rwanda

The Organic Law No. 01/2012 of 2 May 2012 instituting the penal code.

In this law, where many laws reviewed it is not right because those laws appearing in the preamble should be in the repealing provisions and those articles must also be well stated. Therefore, this is contrary to Article one, especially in the fourth sub-subsection in the fourth paragraph of instructions of Minister of

39 By NSENGIMANA Jean d'Amour.

Justice No. 01/11 of 14 November 2006 Relating to Drafting of the texts of laws, which stipulates that "mention of relevant laws of reference and reviewable laws, if applicable while taking care to mention only the essential texts." An example of one law reviewed in that law is:

– Having reviewed Law No. 03/2010 of 26 February 2010 concerning payment system, especially in Article 24;
– Having reviewed Organic Law No. 08/2005 of 14 July 2005 determining the use and management of land in Rwanda especially in Articles 83, 84 and 85; as our instructions say, all those articles must appear in repealing provisions to be repealed.

b) An example of a good preamble:

The Law No. 53/2010 of 25 January 2011 establishing Rwanda Natural Resources Authority (RNRA) and Determining its Mission, Organization and Functioning.

In its Repealing provision they stated and repealed such articles respecting the instructions of Minister of Justice No. 01/11 of 14 November 2006 Relating to Drafting of the texts of laws:

– The Law No. 25/2007 of 27 June 2007 establishing Rwanda Geology and Mines Authority (OGMR) and Determining its Responsibility, Organization and Functioning;
– The Law No. 20/2009 of 29 July 2009 establishing the National Forestry Authority (NAFA) and Determining its Responsibilities, Functioning.

3. International Standards and Comparison

a) Employment Equity Act, 1998

Preamble:

> Recognizing
>
> that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and
>
> that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws.
>
> Therefore, in order to
>
> promote the constitutional right of equality and the exercise of true democracy;
>
> eliminate unfair discrimination in employment;
>
> ensure the implementation of employment equity to redress the effects of discrimination;
>
> achieve a diverse workforce broadly representative of our people; promote economic development and efficiency in the workforce; and

> give effect to the obligations of the Republic as a member of the International Labour Organization.[40]

This is an example of a political preamble, which differs from that of our country where most of our bills show a legal preamble. An example is: The Law No. 13/2009 of 27 May 2009 Regulating Labour in Rwanda; its preamble is legal, not political.

> Disability Discrimination Act 1995
>
> An Act to make it unlawful to discriminate against disabled persons in connection with employment, the provision of goods, facilities and services or the disposal or management of premises; to make provision about the employment of disabled persons; and to establish a National Disability Council.

This is also a political preamble.[41]

Considering the other legal instruments in the East African Community (EAC) countries, a preamble does not appear in many bills, contrary to Rwanda's hybrid system (i.e. civil and common law system), where the preamble is highly recommended as our country is in the process of harmonizing its laws. I see that there is a problem to our country to make a legislative drafting without a preamble because of our mixed system. If we try to draft laws without a preamble, I think it doesn't matter.

4. The Future

Having a legal preamble is very important because it helps the reader know immediately the legal basis on which it was drafted, and the political preamble shows the objective of the policymaker during the legislative process.

The traditional function of a preamble is to explain the object of an Act or to explain the aim of any important piece of legislation. I consider the preamble to be very important since without one the bill can cause confusion to the reader over its purpose and legal basis.

XIII. Definitions[42]

1. Current Practice in Rwanda

Currently, the definitions in legislative drafting in Rwanda have no clearly defined rules for drafters to follow while defining certain terms that are used in the legislation. The reason for this is that Rwanda has no legislative drafting manual, as is the case for some other countries such as Mexico, Kosovo, etc.

As per the Kosovo Legislative Drafting Manual, definitions are intended to explain concepts in simple and concise terms. It is also important for the drafter

40 <www.acts.co.za/emp_equity/index.htm> visited on11 January 2013.

41 <www.legislation.gov.uk/ukpga/1995/50> visited on11 January 2013.

42 By NSHIMIYIMANA Eugene.

to understand how a definition will be read within the context of a law. Therefore, when creating a definition, the drafter may find it useful to insert the definition in place of the term and then determine whether the definition makes sense within a particular provision. The Manual goes on to say that definitions are generally used to explain terms that (a) are technical or scientific in nature; (b) have special meaning within the context of a particular draft law; or (c) are ambiguous.

However, in Rwanda the Instructions of the Minister of Justice No. 01/11 of 20 May 2005 on the procedure to be followed when drafting bills and orders and the Instructions of the Minister of Justice No. 01/11 of 14 November 2006 relating to the drafting of the text of laws, which serve as the legislative drafting manual for Rwandan drafters, have no details on the use of definitions. Consequently, drafters mostly face problems such as over-defining and/or under-defining.

The following is an example of a bad definition found in Rwandan Law No. 53/2011 of 14 December 2011 establishing the Rwanda Civil Aviation Authority (RCAA) and determining its mission, organization and functioning, where it defines the term 'Minister' as the minister in charge of civil aviation.

An example of a good definition is found in the Law No. 27/2001 of 27 March 2007 on Public Procurement, which defines the term 'Accounting Officer' as any official empowered to approve reports of the Tender Committee and sign the contract on behalf of the procuring entity. This official must be empowered by law to act as a Chief Budget Manager within the public entity in which he is employed.

Most of the time in Rwanda, the definition section is found in the general provisions or preliminary provisions at the beginning of the legislation. This is the case for the above-cited laws. But definitions may also be found in the body of the text, as in the case of the Organic Law No. 01/2012/OL of 2 May 2012 instituting the penal code.

2. International Standards

At this point I have analysed some laws from different jurisdictions and have found that each country has its own approach with regard to definitions of terms used in the legislation.

The laws analysed are the following:

- South African Civil Aviation Act No. 13 of 2009, which correctly defined the term 'Minister'.
- Canadian Competition Act, cc 34, RSC, 1985, which perfectly defined the term 'Minister'.
- UK Civil Aviation Act, 2012, which perfectly defined the term 'Airport'.
- New Zealand Civil Aviation Act 1990, in which the term 'Minister' is well defined.

3. Comparison

At this point the issue is to compare the above legislation from different jurisdictions and identify the one that deals best with the definition of terms in legislative drafting.

By considering what is provided for in the Legislative Drafting Manual of Kosovo, cited above, and the Legislative Drafting Manual of Mexico together with

the writing of Mark Segal in the book entitled *Legislative Drafting: Principles and Materials Prologue*, my comparison of the above listed legislation with Rwanda legislations have led me to the following observations:

- The practice of Rwandan drafters of putting the definition section at the beginning of the legislation should be encouraged because it is recommended by the above-cited Manuals and also in Mark Segal's book.
- Contrary to the practice of other legislation drafters, the above-cited Rwandan drafters customarily define terms the way they have been defined in other existing laws instead of incorporating those definitions by references.
- The Canadian and UK drafters correctly define the terms used in their legislation and these should serve as a standard of reference for Rwandan drafters.
- Compared with drafters of the above-cited legislations, Rwandan drafters typically over-define and under-define the terms in certain legislations. This is the case, for instance, for definitions given to the terms 'Day' and 'Services' in the Law on Public Procurement cited above.

4. *The Future*

- In line with Mark Segal's views, I recommend that in Rwanda, definitions should be put at the beginning of the text, after the preliminary provisions but before normative/substantive provisions;
- Definitions should be listed in alphabetical order;
- Terms should be defined whenever necessary to promote clarity, consistency and precision;
- Definitions in other legislative Acts should be incorporated by reference;
- Definitions should not include normative provisions or rules;
- Definitions should not include the terms themselves.

XIV.Application[43]

Application clauses in legislation normally imply either circular or radical departures of legislation. This is why application clauses are merely confused with the definition and the scope of the law. The difference between these three is that the application clause and the definition appear almost similar except that the latter appears radical, whereas the former is circular, and the scope is more or less a vague statement expressing the two.

On the subject of application and definition, Professor Helen Xanthaki agrees that determination of application or definition depends on:

– Definition traces or expresses a radical departure;
– Application clause portrays a circular departure;
– The aim of application is to define the scope of the legislation;
– If one is narrowing, it is a definition, whereas exclusion, extension and inclusion are applications.

There are generally three types of application clauses in legislation:

(1) Geographical application, which applies to territorial or extraterritorial situations, apply in Rwanda's Northern Province or to Rwandans living abroad;

43 By NTAMBARA Emmanuel.

(2) Time applications, which apply to the duration or lapse of a period.
(3) Class of subjects applications, which apply to a class of subjects of people, e.g. the law will apply only to married couples, registered companies, registered vehicles, etc.

1. The Current Practice in Rwanda[44]

Looking at Article 1 of the Instructions of the Minister of Justice No. 01/11 of 20 May 2005 on the procedure to be followed when drafting bills and orders as the legal basis, application clause is viewed in the general provisions and cannot be easily identified as an independent article proving for application clause. In the Rwandan experience, application normally comes in the general provisions but does not allow retroactivity whether it be geographical, durational or classifying subjects.

2. What Is Good and Bad?[45]

With regard to application clauses in Rwanda, the effective date, as provided in legislation, presents a more complicated problem than what might otherwise appear. A provision that simply states that the statute is effective when signed is an inadequate and bad clause since it does not indicate what the consequence of effectiveness is; for example, a change in procedural law could be construed:
(1) as applying only to cases that are filed after the signing date;
(2) as applying to cases that are pending and have not gone to final judgment at the time of signing; or
(3) as even applying to cases that are already on appeal or still subject to appeal.

Similarly, a change in substantive law could be construed as applying only
(1) to operative events that occur after signing;
(2) to all operative events, regardless of when they occurred, except those on which the statute of limitations has run or which have already been litigated and are barred by the doctrine of *res judicata* or collateral estoppels; or
(3) to operative events that occurred prior to signing that are, however, subject to pending litigation at the time of signing.

The courts have, however, construed the effective date of statutes in all of these ways under Rwandan legislations which actually but, would instead be good whatever the legislative intent with respect to retroactivity, that intent should be made express.

3. International Standards and their Comparison with Rwandan Experience

The common law presumption that a statute does not apply with retrospective effect has found wide recognition in South African case law for purposes of both statutory interpretation and constitutional interpretation.[46]

44 The legal basis for Instructions of the Minister of Justice No. 01/11 of 20 May 2005 on the Procedure to be followed when drafting Bills and Orders.
45 *See* T.R. Haggard & G.W. Kuney, *Legal Drafting*, West, St. Paul, MN, 2003, pp. 85-86.
46 <www.scribd.com/doc/82955190/5/F-INTERPRETATION-AND-DRAFTING> retrieved on 10 January 2012.

Article 25 Section 35 of the Constitution states that new offences and higher penalties may not be introduced retrospectively.

The New Zealand Interpretation Act 1999 is also intended to apply retrospectively. Section 4 reads as follows[47]:

> 4. Application
> (1) This Act applies to an enactment that is part of the law of New Zealand and that is passed either before or after the commencement of this Act unless –
> (a) the enactment provides otherwise; or
> (b) the context of the enactment requires a different interpretation.
> (2) The provisions of this Act apply to the interpretation of this Act.

This approach is the same as that of the past New Zealand Interpretation Acts. From their enactment they have all applied in general to the existing body of legislation as well as that to be enacted.

This is what actually happens in Rwanda; the retroactivity status appears the same both in South Africa and in Rwanda.

4. Transition

An essential step in the preparation of a bill is to determine the effect that the bill would have on existing rights, liabilities and proceedings. Draft any savings clauses and transitional provisions that are necessary to provide appropriate rules governing these matters. If existing rights are preserved, it may be desirable to require that they be asserted within a short, specified period after the effective date of the bill.[48]

Appropriate savings clauses and transitional provisions make it possible for a bill to take effect with minimum disruption of existing expectations and liabilities. Great care must be exercised in drafting these clauses.

Effect on present arrangements:

Give consideration to the effect of a bill on existing relationships, whether they are business, personal, or governmental. 'Grandfather' provisions are commonly used to resolve similar conflicts. Make a careful check of current laws.[49]

A general savings or application clause is a provision that preserves pre-existing rights that have been exercised before the regulation comes into effect. If, for example, current procedures or court actions will be disrupted when the new regulation takes effect, a savings clause may be used to exempt certain proceedings or classes of persons from the regulation.[50]

47 New Zealand Law Commission Report No. 17, para. 254.

48 *Massachusetts Senate Legislative Drafting and Legal Manual*, 3rd edn, Counsel to the Senate State House, 2003.

49 *Id.*

50 *Colorado Legislative Drafting Manual* <www.state.co.us/gov_dir/leg_dir/olls/LDM/OLLS_Drafting_Manual.pdf>.

5. The Future

The same approach should be applied in Rwanda. The application provision should provide that the Interpretation of Legislation Act applies to the interpretation of all legislation, *i.e.* existing legislation and legislation to be enacted in future.

It is proposed that the application provision should provide that the Interpretation of Legislation Act applies to the interpretation of all legislation, and if a provision of the Act is inconsistent with any specific legislation, that provision must, to the extent of the inconsistency, be disregarded in the interpretation of that legislation; or if a provision of the Act is excluded from applying to any specific legislation, that provision must, to the extent of its exclusion, be disregarded in the interpretation of that legislation.

The following application clause is proposed:

Application of this Act

(1) This Act applies to the interpretation of all legislation.

(2) If a provision of this Act –

  (a) is inconsistent with any specific legislation, that provision must, to the extent of the inconsistency, be disregarded in the interpretation of that legislation; or

  (b) is excluded from applying to any specific legislation, that provision must, to the extent of its exclusion, be disregarded in the interpretation of that legislation.

(3) When interpreting legislation –

  (a) Section 4 must be applied despite anything to the contrary in subsection (2) or any other legislation; and

  (b) all other provisions of this Act must be applied but only to the extent indicated in subsection (2).

XV. The Main Body of the Law: what to Include and what to Leave for Annex or Delegated Legislation[51]

The elements included in the main body are set, in Rwandan practice, by the Instructions No. 01/11 of 14 November 2006 of the Minister of Justice relating to the drafting of the texts of laws.

In fact, according to these instructions, the main body of the law should include the following elements:

(i). Introductory provision.

Though it is not reproduced as such in the Rwanda system, the introductory provision appears in most of the laws. The general practice opts for 'purpose of law' instead of 'introductory provision', but the two have the same content.

51 By NTIRANDEKURA Jacques.

(ii). Terminology.

The Rwandan practice shows that in most of the laws, drafters prefer to use 'definitions' instead of 'terminology'. This is a right attitude because terminology is broad and can include both definitions and interpretation.

Definitions of terms in the law are used for two purposes:

a. Avoidance of ambiguity and vagueness;
b. Avoidance, by means of abbreviation, of tedious repetition.

When set in order to avoid ambiguity, the definitions are of three broad classes: delimiting; extending; or narrowing.

A delimiting definition completely determines the limits of the significance to be attached to the term defined.

Example: Vessel means any kind of vessel used or capable of being used in navigation by water, and includes a (check missing words).

An extended definition stipulates for the defined term a meaning that in some respects goes beyond the meaning or meanings conveyed in common usage by the term. Such a definition usually adds to the conventional meaning element of assigned meaning.

Example: person includes a corporation sole and also includes a body of persons whether corporate or unincorporated.

A narrowing definition stipulates a meaning narrower in some respect than the meaning commonly conveyed by the term.

Example: Animals means cattle and horses.

(iii). Legislative provisions.

These are the substantive provisions of the law. This is the heart of the legislation. These are the provisions that are related, in the case of establishment of public institutions, for example, to the establishment, its objects, functions, its powers and duties, and such related matters.

But the common practice shows that most of the time, the best practice recommends against including every detail in the main body of the law. That is why most of time only the principles are put in the main body of the law, whereas the details and technicalities of its implementation are a subject of delegated legislation. This attitude has the benefit of saving parliamentary time that would be unnecessarily spent if a lot of details were contained in the bill. As for matters of a subsidiary or consequential nature, the common practice is to put them in annexes or schedules.

(iv). Final provisions.

Generally, the final provisions comprise savings and transitional provisions. This part includes sometimes the commencement provision, which can also be placed in the preliminary provisions.

The function of a savings provision in legislation is to preserve or save a law, a right, a privilege or an obligation that would otherwise be repealed or cease to have effect.

The function of a transitional provision is to make special provision for the application of legislation to circumstances that exist at the time when that legislation comes into force.

The necessity for savings and traditional provisions is a consequence of change in the law, whether the change is caused by new statute law or by the repeal, substitution or modification of existing statute law.

Good example: Law No. 45/2010 of 14 December 2010 establishing Rwanda Social Security Board (RSSB) and determining its mission, organization and functioning[52]:

This is a good example: it follows the standards set out in the Instructions No. 01/11 of 14 November 2006 of the Minister of Justice relating to the drafting of the texts of laws.

Bad example: Law No. 03/2012 of 15 February 2012 governing narcotics, drugs, psychotropic substances and precursors in Rwanda[53]:

This is a bad example as there are, for example, several points developed in general provisions that should rather be in the substantive provisions (legislative provisions). In fact the instruction cited above concerning the draft of texts of law mentions that the main body contains before the legislative provisions only the introductory provision and the terminology (definitions). But in this law we find many other points included in the general provisions, whereas they should be in the legislative provisions.

1. International Standards

Internationally, the main body of the law is presented differently. Burger deals with the main and ancillary provisions, which are to some extent similar to the main body structure of the law that exists in Rwandan legislation.[54] According to this book, the elements of the main body of a law are as follows:

i. Introductory provisions;
ii. Substantive provisions;
iii. Administrative provisions;
iv. General provisions;
v. Concluding provisions.

The *Practitioner's Guide to Drafting Laws in Kosovo*[55] indicates that the main body of the law has the following elements:

i. Definitions.
ii. Substantive and Regulatory Provisions

52 <www.minicom.gov.rw/IMG/pdf/Law_regulating_Kigali_International_Arbitration_Centre-2.pdf>.

53 <www.primature.gov.rw/publications/pointer/0.html?tx_mmdamfilelist_pi1%5BgetSubFolders%5D=fileadmin%2Fuser_upload%2Fdocuments%2FOfficial_Gazettes%2F2012%20Official%20Gazettes%2F&tx_mmdamfilelist_pi1%5Bgetsubfolders%5D=fileadmin%2Fuser_upload%2Fdocuments%2FOfficial_Gazettes%2F&cHash=2d92a3ffc029a634a434ebfbe6072252>.

54 <http://books.google.rw/books/about/Guide_to_Legislative_Drafting_in_South_A.html?id=b0vPg54N7ycC&redir_esc=y> *A Guide to Legislative Drafting in South Africa*, by A.J. Burger.

55 <www.drejtesia-ks.org/repository/docs/Legislative%20Drafting%20Manual.pdf>.

The *Maine Legislative Drafting Manual*[56] indicates that the following elements form the main body of the bill:
(1) Short title
(2) Purpose clauses
(3) Definitions
(4) General rules, permanent provisions and most significant provisions
(5) Subordinate provisions, temporary provisions and exceptions
(6) Penalty or enforcement provisions
(7) Housekeeping
In the YOUTH CRIMINAL JUSTICE ACT (S.C. 2002, C. 1)[57] the main elements of the main body of a law appear in this Act. Though we cannot see it expressly, its content indicates it sufficiently. The UGANDA TOURISM ACT, 2008[58] is a typical example of a piece of legislation for which the interpretative provisions and commencement, considered as part of the main body in the Rwandan system, are rather in the preliminary provision. The rest of the elements to be considered in the main body have been included, though it is not in the same practice we are used to in Rwandan legislation.

2. Comparison

From a legislative point of view, the elements to be included in the main body of a law depend largely on a common practice developed by different legal systems. In fact, most of the drafters from countries that apply the common law system prefer to include the interpretative (definitions) and commencement provisions in the preliminary part of the law, whereas the drafters in civil law tend to put the definitions and the commencement in the main body of the law.

Example:

In the Rwandan system, which applies mainly the rules from civil law, the definitions and the commencement are part of the main body of the law. This option is in line with Instructions No. 01/11/of 14 November 2006 of the Minister of Justice relating to the drafting of the texts of laws.

In Uganda Tourism Act, 2008, the interpretative provisions (definitions) and the commencement are included in the preliminary part. This form of drafting is commonly followed in countries where the common law is principally applied.

But sometimes, in the Common law system, the commencement can be put in the main body.

Although there are some formal differences in the elements to consider in the main body of the text, it is important to indicate that both systems take into consideration the fact that the main message must be completely and precisely carried out in this part of the law.

56 <www.maine.gov/legis/ros/manual/Draftman2009.pdf>.
57 <http://laws-lois.justice.gc.ca/eng/acts/Y-1.5/index.html>.
58 <www.uwti.co.ug/Acts.pdf>.

3. The Future

The content of Instructions No. 01/11/of 14 November 2006 of the Minister of Justice relating to the drafting of the texts of laws is just an indication of what should be included in the main body of the law. But the list is not exhaustive, because it is just the main point to be developed, and more elements should be included so as to carry out the message completely.

Also, definitions should be included in the preliminary part of the bill, simply because their function is to avoid ambiguity and to facilitate the reader's comprehension from the very beginning of the message to communicate throughout the whole law.

XVI.Purpose Clause[59]

1. Introduction

Quoting Reed Dickerson, Thornton notes that the most useful purpose clauses are those introducing particular sentences, which offer the advantage of focused specificity. Essentially, Thornton views the purpose clause as a clear statement of the overall purpose of a piece of legislation; hence he highlights that a purpose provision establishes a context clarifying the scope and intended effect of the law. It illuminates the principles on which the law is based, whether those principles are explicitly stated in the law or not, and it provides a guide for the interpretation of provisions where there is doubt or ambiguity.

While courts in some jurisdictions might look to the purpose clauses for interpretation, an obligation seems to be constantly shifting onto drafters to try to make purpose clauses clear enough to help the reader understand what such a piece of legislation actually intends to achieve. In other jurisdictions such as Rwanda, however, the use of purpose clauses is not very popular.

In the Instructions of the Minister of Justice relating to the drafting of texts of law in Rwanda, there is an attempt to make it clear that drafters must provide an introductory provision to each text of law. The practice, however, has tended to be the use of a long title, which again in most cases does succeed in portraying the intended aim of a piece of legislation. The following examples will help to make this clear.

Examples of purpose clauses in Rwandan law:

The Law on criminalization of discrimination and sectarianism has as its purpose clause the following;

'Crime of discrimination' means the use of any speech, written statement or action based on ethnicity, region, nationality, colour of the skin, a person's physical features, sex, language, religion or opinion aimed at depriving a person or group of persons of their rights as provided by Rwandan law and international conventions to which Rwanda is party;

'Crime of Sectarianism' means the use of any speech, written statement or action that divides people, that is likely to spark conflict among people or that

59 By NTUNGIRE Jolly.

causes an uprising which might degenerate into strife among people based on discrimination mentioned in Article 1.

Clearly, the purpose clause/long title in the above Rwandan piece of legislation falls far short of what Thornton describes as a provision of guide for the interpretation of provisions where there is doubt or ambiguity. No reader would discern the purpose of our discrimination and sectarianism law from the contents listed above. We have a detailed description of aspects of discrimination as opposed to what this piece of legislation seeks to achieve.

However, the above shortcomings in our legislation should not be looked at in isolation. It takes trained and experienced drafters to draft quality pieces of law. Rwanda is a country in transition from the civil law tradition to integrating best practices from the common law tradition and coming up with some kind of hybrid tradition of its own.

Equally, it is moving from the French language to cope with drafting in three languages, namely English, Kinyarwanda and French. In all these transitions drafters have yet to find their feet, and hence, unsurprisingly, different pieces of legislation are not of good quality. Looking beyond Rwanda, let us draw lessons from civil, common and mixed jurisdictions below.

2. *Drawing Examples from Other Jurisdictions*

The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

While the Canadian laws tend to have clear purpose clauses, the United Kingdom pieces of legislation may not necessary portray a purpose clause. Citing examples available on the website, The Family Procedure (Amendment No. 5) Rules 2012, the Criminal Justice and Immigration Act, commencement No. 3 and (Transitional Provisions) order 2008, the United Kingdom legislations seem not to give prominence to the purpose clause. Perhaps one could attribute this to the limited number of laws that one is able to access.

To amend the Higher Education Act, 1997, so as to provide afresh for the establishment of the Institute for Higher Education; to extend the functions of the Higher Institute for Higher Education; to provide for the appointment of an administrator for a national institute for Higher Education; to extend the powers and functions of an assessor; to give the Minister the power to intervene in the case of poor or non-performance or maladministration by a public higher education institution; to provide for the dissolution of the council as well as procedure for such dissolution, and to extend the powers of an administrator to temporarily take over the management, governance and administration of the council of a public Higher Institution; and to amend the national qualification framework Act, 2008, so as to change the date on which the annual report of the South African

Qualification Authority must be submitted to the Minister; and provide for matters connected therewith.

The South African example seems to be too detailed and incorporating different aspects. This could be attributed to many issues that this particular law sought to regulate and should not be used as a standard for South Africa's purpose clause drafting practices.

Having looked at different purpose clauses from different jurisdictions, let us revisit Thornton's comments on the principal purpose of legislation:

– to establish and delimit the law; and
– to communicate the law from the lawmaking authority to society and, in particular, to persons affected by it.

3. The Future

Whether the examples from the Canadian, Rwandan, South African and United Kingdom jurisdictions succeed in fulfilling Thornton's principal purposes of legislation depends on how maturely each jurisdiction has invested in its drafters. For Rwanda, we remain divided on the choice between drafting a purpose clause or a long title, both of which still pose challenges. From current practice, we are not so close to the detailed South African example of a long title/purpose clause; neither are we close to the more precise Canadian purpose clause. However, preference from the author's point of view would be to go for the long title and strive for quality in future.

XVII. Expiry: Sunset and Review Provisions[60]

1. Introduction

Duration is a part of legislation. A law continues in force until it is repealed. There are occasions, however, when it becomes necessary to provide a duration of Act of parliament. For example, "this act remains in force until the 1st November 2013." In this case, that clause is called sunset provision. Alternatively, an act can be made operational for a specific period, for example: "four years from the date of promulgation." This is a review provision. A sunset provision or review provision means expiry provision of the law.

About expiry, G.C. Thornton in Legislative Drafting, fourth edition, said that in the absence of special provision to the contrary, legislation is perpetual in duration; it continues in force until either it is repealed or it expires. If an Act, or any part of an Act, is intended to be of temporary duration, the provision for its expiry may be made by the adaptation of any of the techniques available in respect of commencement of statutes. Thus, an Act may specify a date when it will expire, or it may empower some person or authority to fix such a date or it may provide for expiry upon the occurrence of a stipulated event. Temporary statutes are small in number and almost all specify an expiry date.

About sunset, he said that increasing criticism of the growing weight of statute law and, in particular, the predilection of governments for the creation of

60 By NYIRANEZA Marcia.

statutory bodies has led in some jurisdictions to the practice of including sunset clauses in legislation. In simple form, a sunset clause is no more than an expiry provision of the kind set out above; however, the simple form is inadequate where there will, or may be, some kind of going concern operating under the Act when the sun sets on it.

The purpose of the review clause is to oblige the competent authority to review the operation of legislation after a specific period.

A review clause also has the advantage, when compared with a sunset clause, that no attempt to speculate on the likely state of affairs years ahead is necessary; in other words the clause does not presume to legislate in the early dawn for the post-sunset night.

2. The Current Practice in Rwanda

In general, in Rwanda, many laws are published with effective enforcement. The laws have life when they are not repealed. Rwanda has not many cases of laws that provide the sunset or review provision. The one example of law that I know which had an expiry period is the law about GACACA, which expired on 16 June 2012 after 10 years. That law GACACA has been promulgated in 2002.

Some regulations in certain sectors have or may have an expiry period. For example in my institution, NAEB, in the sub-sector coffee every year we have regulations about coffee season, *i.e.* "Instructions regulating coffee season 2007." It means that regulations have life in 2007 only unless the competent authority publishes other instructions for extension or promulgate new regulation. After 2007, the competent authority must establish new regulations. Briefly, the regulation may have an expiry period, sunset clause or review clause.

3. International Standards

Practice differs from country to country.

Sunset provisions have been used extensively throughout legal history. The idea of general sunset provisions was discussed extensively in the late 1970s (Steve Charnovitz, Evaluating Sunset: What Would It Mean?, in Contemporary Public Budgeting (edited by Thomas Lynch), Washington, DC: Transaction Books, 1981).

Examples of the practices of some countries are provided below:

a) United States

In American federal law parlance, legislation that is meant to renew an expired mandate is known as a reauthorization act or extension act. Re-authorizations of controversial laws or agencies may be preceded by extensive political wrangling before final votes.

That is, the constitution has been amended seventeen additional times (for a total of 27 amendments). Principles of the constitution, as amended, are applied in courts of law by judicial review.

(i) Texas

The Texas sunset provision was established in 1977. Under Texas law, all agencies except universities, courts and agencies established by the Texas constitution will be abolished on a specific date, generally 12 years after creation or renewal, unless the Texas legislature passes specific legislation to continue its functions.

(ii) Other States

Alabama has a similar review process with a more limited number of agencies and a review every four years.[8]

b) Canada

In Canada all legislation enacted under section thirty-three of the Canadian charter of rights and freedoms (the notwithstanding clause) has an implied sunset clause of five years. The Canadian anti-terrorism act contains a sunset clause that went into effect in February 2007 ("Anti-Terrorism Act. CBC. 2007-02-27. <www.cbc.ca/news/background/cdnsecurity/>. Retrieved 2008-03-22).

c) Australia

In 2005, the Australian government decided to legislate new anti-terrorism laws. These laws have a sunset clause of 10 years. In 2007, the liberal democratic party proposed a constitutional amendment to make sunset clauses compulsory in all legislation that lacks the support of a 75% parliamentary supermajority (Free Trade <Ldp.org.au.http://ldp.org.au/federal/policies/Democracy.html> Retrieved 26 June 2011).

The Legislative Instruments Act 2003 legislates the automatic expiry of most legislative instruments (delegated legislation). Starting in 2015, these legislative instruments will need to be renewed or they will expire automatically (Legislative Instruments Act 2003. ag.gov.au. <www.ag.gov.au/Administrativelaw/Pages/LegislativeInstrumentsAct2003.aspx>).

d) Germany

In the German legislation, sunset provisions are applied on several federal levels. The German constitution rules a general sunset provision of six months for emergency legislation. Some federal states, *e.g.*, Hesse and North Rhine-Westphalia, sporadically add sunset provisions to bills.

e) South Korea

A sunset provision can be found in the corporate restructuring promotion act, which is to facilitate out-of-court workout of insolvent companies. This act was effective during the period:

i. from January 2001 to December 2005 for the first time; and again
ii. from January 2007 to December 2010.

The act came into force for the third time on 19 May 2011 and will be effective till December 2013. The main content of the act has been kept intact for the purpose of constant corporate debt restructuring through market functions and pro-

motion of speedy and smooth corporate restructuring, while some minor provisions were modified from time to time.

f) New Zealand
The electoral integrity act was passed in 1999 to discourage 'waka-jumping' in a mixed member proportional parliamentary system. The amendment expired as scheduled in 2005.

g) African Countries
In Africa, many countries, including Kenya, South Africa and Tanzania, use the practice of expiry provision …

These many examples of practice about expiry provision show that the sunset and review provisions are used in legislation.

4. Comparison
The similarities:

Using of sunset and review clauses: although the practice of using the sunset or review provision in Rwanda is used in some regulations, but not frequently, I cannot say that the practice is unknown to the Rwandan legislature; if necessary it is used.

Differences:

Other countries below frequently use the sunset or review provision in many cases unlike in Rwanda which uses it rarely.

5. The Future
Laws are promulgated in a long period; there is no need to use expiry provision. But Rwandan legislation may use sunset or review provisions when the regulation *solves social problems in a short time*. In that case in the law, a review provision may be inserted if necessary. So, at the end of the period of the law, competent authority may examine whether it is necessary to extend the period or not.

XVIII. Final Provisions: what to Include[61]
The current practice in Rwanda of final provisions is given by Instructions of the Minister of Justice No. 01/11 of 14 November 2006 relating to the drafting of the texts of laws.

For these instructions, the main body of the text of law is the following:
- Introductory provision
- Terminology
- Legislation provisions and
- Final provisions

61 By NZEYIMANA Francois Xavier.

For example, the final provisions of Law No. 45/2011 of 25 November 2011 governing contracts are the following:

> CHAPTER VIII: FINAL PROVISIONS
>
> Article 162: Transitional provision
>
> The Decree of 30 July 1888 on contracts or conventional obligations shall remain effective for no contractual obligations, special contacts, civil liabilities, limitations, until the publication of specific laws governing those matters.
>
> Article 163: Drafting, consideration and adoption of this Law
>
> This Law was drafted in English, considered and adopted in Kinyarwanda.
>
> Article 164: Repealing provision
>
> Title one of the Decree of 30 July 1888 relating to contracts or conventional obligations and all prior legal provisions inconsistent with this Law are hereby repealed.
>
> Article 165: Commencement
>
> This Law shall come into force on the date of its publication in the Official Gazette of the Republic of Rwanda.

This is a bad example of final provisions because they do not mention implementing provisions setting out the government institution that is responsible for implementing the Law.

One good example of final provisions:

The commencement of LAW NO. 47/2001 OF 18 DECEMBER 2001 ON THE CRIMINALIZATION OF DISCRIMINATION AND SECTARIANISM is written as follows:

> Article 5: Commencement
>
> This law comes into force on 30 January 2002 instead of saying: "This Law shall come into force on the date of its publication in the Official Gazette of the Republic of Rwanda", as we know that the word 'shall' conveys many messages.

1. The International Standards of Final Provisions

A Practitioner's Guide to Drafting Laws in Kosovo includes the following elements in the Final provisions:

- Implementing provisions: they set out which government institutions are responsible for implementing the law.
- Transition provisions (when applicable): they are applicable when a law is replacing or repealing an existing legal structure or regulatory regime.
- Effective date: it is a simple statement that defines the date and circumstance upon which a law becomes effective.

Furthermore, in Kosovo, there are special final provisions that may be included at the end of the law for addressing the following: repeal provisions, savings provisions and restrictive provisions.

Comparison between final provisions in Rwanda and final provisions at international level[62]

Final provisions in Rwanda	Final provisions at international level
In Rwanda, final provisions include:	The international standards of final provisions are the following:
Transitional provision	Implementing provision
Drafting, consideration and adoption of a law	Transition provision
Repealing provision	Effective date
Commencement	But in some countries such as Kosovo, there are repeal provisions, savings provisions and restrictive provisions.

2. The Future

Legislative style in Rwanda came from Belgium, and now Rwanda is a member of the Commonwealth and a member of the EAC. Belgian style in legislative drafting fits with civil law, and Commonwealth style in legislative drafting fits with common law, like EAC countries. Hence, it should be better to use in Rwanda international standards of legislative drafting for harmonizing our laws with laws drafted by Commonwealth and EAC countries in which Rwanda is a member.

XIX.Transitional[63]

When legislation is amended or replaced, provisions are needed to deal with the transition from the old law to the new law. These provisions may deal with such matters as ensuring that people who are, for example, licensed under the old law continue to be licensed under the new law. Thus, a transitional provision may be defined as "a text within a law, generally at the end, that substantively or procedurally addresses changes needed to transfer authority from a prior legal act to a new legal act."[64] Transitional provisions are an essential step in the preparation of a bill that determine the effect the bill will have on existing rights, liabilities and proceedings. If existing rights are preserved, it may be desirable to require that they be asserted within a short, specified period after the effective date of the bill. Transitional provisions are generally needed when a law is to be amended or repealed. The old law has some implication for the new one.

62 Seidman *et al.*, 2001, pp. 335-336; United States Agency for International Development, *Legislative Drafting Manual: A Practitioner's Guide to Drafting Laws in Kosovo*, 2010, pp. 28-33; OECD, *The Legislative Drafting Manual of the Palestinian Authority*, 2011, p. 57; New Mexico Legislative Council Service, *Legislative Drafting Manual*, 2008, p.46.

63 By RUTAREKA Gaetan.

64 <legislationonline.org/.../action/.../73fc5e204d2e468b77be2d0718f7.pdf>.

In legal matters, the principle is that the law must govern current activities. Thus, according to Bennion,[65] if we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. The transitional provisions are then to protect those who "arrange their affairs in reliance on the law as it currently stands and should not later find that their plans have been retrospectively upset." Lex prespicit non respicit (law looks forward not backward).

Where a law contains substantive amending or repealing, it should also include transitional provisions that regulate the coming into force. Savings and transitional provisions are intended to smooth the operation of the law when an Act is repealed, whether or not it is repealed by another one.[66]

Transitional provisions are provisions whose "function is to make special provisions for the application of legislation to the circumstances which exist at the time when that legislation comes into force."[67]

Transitional provisions resolve conflicts from situations of old law and new law[68] and protect the rights that existed under previous legislation.

Transitional provisions are drafted where it is intended to facilitate a transition from one statute to another, or is intended to apply for a limited period only when it makes sense to set it out in close proximity to the subject governed by that provision.[69] It is normally drafted into a single section. In drafting transitional provisions where, for example, existing corporation is being replaced by another, the rights of actions vested in the old corporation are transferred to the new one, along with the power to take over litigation that was being carried on, by or against the old one at the time of its demise. Similarly, transitional provisions must be for the transfer of ownership of property and for the continuity of employment for staff that transfer from the old corporation to the new one, and so on. Where an Act is repealed and replaced by a new Act, it is obviously sensible to avoid the need to remake all the subordinate legislation made under the old Act.[70]

1. What Is the Current Practice in Rwanda?

For the situation of transitional provisions in the Rwandan drafting system, the instructions of drafting of legal texts do not mention any specific instruction about drafting, but we presume that these have to be drafted as well as possible.

Many Rwandan laws, especially those that amend or repeal others, contain transitional provisions. In many legal texts (laws), transitional provisions are well stated as a single article under a Chapter that often has the headings: Miscellaneous, transitional and final provisions. In this case, the chapter includes transitional, delegated, repealing and commencement articles altogether.

65 Bennion, p. 66.
66 Ian McLeod, p. 98.
67 Thornton cited by F.A. Bennion, p. 67.
68 Seidman *et al.*, 2001, p. 335.
69 Burger, p. 61.
70 Thornton, p. 383.

Examples:

Law No. 20/2005 of 20 October 2005 governing the Organization, Functioning of Higher Education.

For this law, Chapter X is Miscellaneous, transitional and final provisions. Articles 107-112 deal with the above-mentioned provisions (transitional, repealing, commencement). Article 110 reads as "[...] already higher learning public or private institutions shall adapt their laws or agreements to the provisions of this law within a period of two (2) years."

Law No. 005/2008 of 14 February 2008 on Arbitration and Conciliation in Commercial matters.

In this law, Chapter IV is headed as Transitional, miscellaneous and final provisions (Article 64-68). Article 64 deals with transitional provision and reads: "commercial cases pending before ordinary courts before publication of this, agree on taking their cases to arbitrators or conciliators." The above two examples may be cited as good examples.

Loi No. 13/2004 portant Code de procédure pénale.

This law shows a lack of consistency. It reads in Chapter X: Des dispositions speciales. The transitional provisions in this law are included in Section 2, which has the heading: transitional and final provisions. Article 275 of this Section 2 states that *pending cases remain valid*.

2. International Standards

Transitional provisions normally follow the subject matter to which they are related.[71] They can be placed at the end of the Act if they relate generally to the Act or in a schedule to the Act where they will at least affect the numbering of the sections in a later revised version of the Act.

Generally, savings and transitional provisions (clauses) are included in miscellaneous parts or chapters.[72] When a new law changes another law, it will apply to already pending on the date of its enactment. So this situation calls for a careful consideration of transition and savings clauses.

Lawmakers make clean transitional provisions from the old law to the new. According to Seidman, these are called 'savings clauses' when they:

- Save rights of persons whose position in the new law changes substantively,
- preserve positions created by prior law or appointments made to those positions
- preserve subordinate legislation promulgated under this law
- preserve existing causes of actions or litigations in process, *etc.*

3. Comparison between the Practice in Rwanda and International Standards

For the comparison of Rwandan legislative drafting in matters of transitional provisions, the spirit is the same. Even though ministerial instructions on draft-

71 Crabbe, p. 135.
72 Seidman *et al.*, 2001, p. 220.

ing of legal texts do not mention how to draft transitional provisions, these are drafted in better ways as well.

The practice and spirit are quite the same except for the lack of consistency available in Rwandan laws.

4. The Future

There should be consistency in all Rwandan laws. The place and substance of transitional provisions should be taken into consideration to avoid unfair retrospectivity. Transitional provisions should be carefully drafted to avoid harming the interests of those who were dealing with the old law. The practical advantage of having transitional provisions at the end of the law is that if they are omitted, this omission does not endanger the correctness of cross-references elsewhere in the law.[73]

XX. Repeals[74]

In the Rwandan context, the practice is that a repealing provision is placed under the main text of legislation at the end in final provisions and is stated in a traditional formula as follows: "All prior legal provisions inconsistent with this law are hereby repealed." Or the law that is repealed is mentioned and the traditional formula added:"... the law N ... of .../.../2013 regulating ... as well as other prior legal provisions contrary to this Organic Law (law, Order, instructions, ...) are hereby repealed."

This traditional formula raises some concerns and is problematic because it is vague, ambiguous and generic due to the fact that it does not state precisely which laws are repealed and leaves the reader of the law confused. The way in which the repealing provision in Rwanda is currently drafted tends to be quite vague and, consequently, leaves room for judges to act as legislators most of the time, even though it is not their mandate; only legislators legislate. Therefore drafters at the initial stage of the bill must perform their job adequately and identify all previous laws or provisions inconsistent with or contrary to the draft to be enacted and enumerate them in the repealing provision for the sake of clarity and precision.

From the Rwandan perspective, the Instructions of the Minister of Justice No. 01/11 of 14 November 2006 relating to the drafting of the texts of laws in its Article 1(4)(iv) expressly stipulate that "Any draft legislation shall comprise of [...]a preamble necessarily comprising mention of relevant laws of reference and reviewable laws, if applicable, while taking care to mention only the essential texts [...]" and (5) follows providing the composition of the main body of the text among others ... (iv) final provisions where repealing provision is placed, but there is no express mention that the repealed legal texts must be enumerated in the repealing provision.

An example for this can be traced in the same Instructions of the Minister of Justice No 01/11 of 14 November 2006 on the drafting of the texts of laws. In

73 Crabbe.

74 By RWAMAMARA Lionel.

Article 6 concerning repeals the Instructions state that "Article 6:....." Instead of being clear and precise and mentioning all the Ministerial Orders and Instructions that are being repealed, Article 6 refers vaguely to all previous and contrary provisions.

Example of a good repealing provision:

Ghana: The Labour Act, 2003 section 177 on Repeals and amendments (1). The enactments specified in schedule III are repealed.

Example of a bad repealing provision:

Rwanda: Law No. 45/2011 of 25/11/2011 governing contracts Article 164 on Repealing provision, Title One of the Decree of 30/07/1888 relating to contracts or conventional obligations and all prior legal provisions inconsistent with this law are hereby repealed.

International standards for repealing provisions suggest that:

- What is important is that you clearly identify the provision being repealed;
- Always cite the law being repealed;
- Do not describe it in general terms;
- The intention of the legislature to repeal "must be clear and manifest";
- Where an Act repeals a repealing enactment, the repeal does not revive any enactment previously repealed unless words are added reviving it.

A comparison of the Rwandan style of repealing provision in a piece of legislation with texts of law in other countries, especially those of the common law tradition, shows that Rwandan style tends to be more generic and not precise, and therefore it is an automatic repeal, while in most countries of the common law legal family, the practice is to state in the repealing provision all those laws that are being repealed.

Another difference is that in the Rwandan style the laws that are being repealed are found in the preamble, where they are preceded by the words "Reviewing the law No. ... of .../.../2013 governing ..." or "Revisit the law No. ... of .../.../2013 establishing ..." whereas in other countries you may not even find a preamble because it is not mandatory for a law to have it in some legal systems, and even in the ones that do have it you find it is very short. Perhaps for the same reason there is no other jurisdiction where the preamble mentions the laws that are being repealed. Instead they are listed in the repeal provision often as an annex or a schedule.

The similarities of the Rwandan style of repealing provision to other legislative styles in other countries is that the repealing provisions are all found in the main text of the law towards the end in the final provisions.

In conclusion, it is not good legislative drafting to simply include a saving clause stating that "all laws inconsistent with this law are hereby repealed". This does not really help the addressees because the task of figuring out whether or not the two (or more laws) conflict or whether they can be reconciled still remains with them. The automatic repeal does not make this task any easier. Therefore, state exactly which section of which law is repealed. It is the task of the drafter to check the existing legal situation and to fit any new law into that body of laws.

The draft must avoid legal uncertainty, not create it, and hence the above-mentioned legislative clause ought to be avoided because it merely tells readers to figure it out themselves.

Given the fact that Rwanda has joined the EAC and the Commonwealth also for the pursuit of harmonization and so as not to confuse the reader of the law, the style of stating all the laws that are being repealed should be adopted in the Rwandan style.

XXI.Commencement[75]

The commencement of an act is a simple statement that defines the time and circumstance upon which an act will come into force; it refers to the process by which legislation, conventions, regulations and other legal instruments come to have legal force and effect.

To come into force, an Act or a convention first needs to receive the required number of votes or ratifications. Commencement generally includes publication in an official gazette of the republic so that people know that the law or convention exists, which generally releases it into the public domain.

Normally, the Rwandan practice puts the commencement or coming into force of an Act in the chapter of final provision. This section provides that the act shall come into force on the date of its publication in the Official Gazette of the Republic of Rwanda.

A good current Rwandan example of the commencement of an act, where it is provided that the act shall enter into force on the day after its publication in the official gazette, lies with Law No. 24/2012 of 15 June 2012, Relating to the Planning of Land Use and Development in Rwanda.[76]

An example of a bad commencement of an act in Rwandan practice, where the section states that the act will come into force on the date of its publication in the Official Gazette of the Republic, on the day of its signature, and also provides that it takes effect on another previous date according to the adoption of the act by the Parliament members lies in Presidential Order No. 30/01 of 9 July 2012 on Specific Statute for Police Personnel.[77]

75 By TWAMUGABO Youssuf.

76 <www.google.rw/#hl=en&tbo=d&site=&source=hp&q=%09LAW+N%C2%B0+24%2F2012+OF+15%2F06%2F2012+RELATING+TO+THE+PLANNING+OF+LAND+USE+AND+DEVELOPMENT+IN+RWANDA.&oq=%09LAW+N%C2%B0+24%2F2012+OF+15%2F06%2F2012+RELATING+TO+THE+PLANNING+OF+LAND+USE+AND+DEVELOPMENT+IN+RWANDA.&gs_l=hp.12...17815.17815.0.19527.1.1.0.0.0.0.218.218.21.1.0.les%3B..0.0...1c.k282U5reaEU&bav=on.2,or.r_gc.rpw.&bvm=bv.1357700187,d.d2k&fp=ab99625b1c6b46e2&biw=1440&bih=754>.

77 <www.google.rw/#hl=en&tbo=d&site=&source=hp&q=%09PRESIDENTIAL+ORDER+N%C2%B030%2F01+OF+09%2F07%2F2012+ON+SPECIFIC+STATUTE+FOR+POLICE+PERSONNEL+&oq=%09PRESIDENTIAL+ORDER+N%C2%B030%2F01+OF+09%2F07%2F2012+ON+SPECIFIC+STATUTE+FOR+POLICE+PERSONNEL+&gs_l=hp.12...13901.18300.0.20485.2.2.0.0.0.0.219.426.22.2.0.les%3B..0.0...1c.1.MOXU0uc5YRw&bav=on.2,or.r_gc.r_pw.&bvm=bv.1357700187,d.d2k&fp=ab99625b1c6b46e2&biw=1440&bih=754>.

1. International Standards

International practice on the commencement of Acts depends on the legislative system of each state, and the placing of the commencement section of an act follows the same reasoning that applies to other provisions. This is not the practice in all jurisdictions; some Commonwealth countries put the commencement section very early after the section of title and purpose, but others put it in the final provisions. Countries with the civil law system used to put the commencement section in the final provisions.

The difference between the current Rwandan practice and international standards of the commencement of an act is that in the Rwandan practice the section is put at the level of final provisions, while most of the Commonwealth countries put this section in the preliminary provisions.

The Rwandan practices specify that the act shall come into force after the publication in the official gazette, according to Article 201 of the Rwandan Constitution, while the international standards at this level of commencement specify the time that the act shall come into force.

Sometimes in Rwandan practice, this section can provide that the act takes effect from the time of votes by the parliament members.

According to international standards, an act or convention may come into force a certain number of days after its publication in the Official Gazette, but its implementation may be delayed. For example, the Law on Consular Service of Diplomatic and Consular Missions in Kosovo, entered into force fifteen (15) days after its publication. In both, the dates of commencement and of implementation may be the same or different.

2. The Future

My own opinion is that until today the Rwandan legislative system has tried to follow partly common law and partly civil law; we have to follow a system that combines all the best practices of the common law with the best practices of the civil law. Personally, the common law system of specifying the effective date of an act is stronger than saying that the act shall enter into force after the publication in the official gazette without specifying the time.

XXII. Annexes[78]

Crabbe defines schedule as follows:

> A Schedule is a convenient device for dealing with matters of detail which will otherwise unnecessarily encumber the main body of an Act.[79]

Crabbe says that a schedule is used for matters of administrative detail that are not desirable to be the subject matter of an Act, to free the main body of an Act

78 By RWIGEMA Constantin.

79 V.C.R.A.C. Crabbe, *Legislative Drafting*, Cavendish, London, 1993, p. 145.

from a possible charge of untidiness.[80] He goes on to say that a schedule can conveniently be used to deal with:

- a repeal of several Acts or part of several Acts;
- a number of amendments;
- definitions;
- a treaty that is, or parts of which are, intended to have the force of law as part of the municipal law;
- an agreement where it is intended to confer statutory validity on the agreement; and
- forms.[81]

Andrew J. Burger adds that a schedule can be used to list tariffs or drugs, or group offences together.[82]

Crabbe urges that when drafting a schedule it is better to show the section (article) to which it is referring.[83] This means the section corresponding to the schedule. This is applied when in one law there is more than one schedule and this is to facilitate the reading.

B.R. Atre says that when a schedule deals with an additional text to an Act, the schedule is read together with the provision of the Act and the expression in the schedule cannot control the express provision of the statute.[84] This means that the text of the Act takes precedence all the time in the case of additional text or more explanation.

Example 1:

> Schedule 1
> Permissible use of water
> (Section 4(1) and 22(1)(a)(i) and item 2 of Schedule 3)
> (1) A person may, subject to this Act [...][85]

Example 2:

> Schedule II (Section 24)[86]

80 *Id.*
81 *Id.*
82 A.J. Burger, *A Guide to Legislative Drafting in South Africa*, JUTA, Lansdowne, South Africa, 2001, p. 63.
83 Crabbe, p. 146.
84 B.R. Atre, *Legislative Drafting (Principles and Techniques)*, 3rd edn, Universal Law Publishing, New Delhi, 2011, p. 68.
85 Burger, p. 64.
86 <www.laws-lois.justice.gc.ca/PDF/A-1.pdf> Access to information Act, RSC, 1985, c, A-1, visited on 10 January 2013.

1. What Is Current Practice in Rwanda?

According to the practice in Rwanda, a schedule is used to attach text provided for by an Act. Such texts are lists of jurisdictions,[87] professional diseases,[88] a form,[89] *etc*.

The use of a schedule to give more detail or explanation of a concept, to annexe or compile amendments, or reference is not used.

2. International Standards

In other countries, the schedule is fully exploited. Here are some examples:

In the United Kingdom it has been used to:

- specify the conditions to say that a donation is a 'small donation' in conformity with the Small Charitable Donations Act, 2012. Even if it has been defined in Section 3, the legislator set up the conditions in a schedule[90];
- put together different amendments that have been incorporated in the amended law.[91] This helps the reader to know what has been added or removed from the law.

In Canada, the schedule is used to show the reader exactly how the law is connected to the law he or she is reading. Schedule II on the Access to Information Act shows all other laws and their disposition connected to it.[92]

3. Comparison

Use of schedule in Rwanda	**Use of schedule elsewhere**
Schedule is limited to the texts that have to be annexed to the law	Use of schedule is used to:
	Show or compile amendments;
	give more explanations or conditions;
	show the laws referred to in a new law.

4. The Future

It is better to adopt international standards. In Rwandan practice, when the amending text and the amended one are consolidated, there is only a sentence, in parentheses, stating that an article has been modified by ... (the name of the law modifying it) or, for the constitution 'Amendment of ...' (mention the date of amendment). But you cannot know what has been added or removed.

87 *See* Ann. 1 and 2 of the Organic Law No. 51/2008 of 9 September 2008 determining the organization, functioning and jurisdiction of courts.

88 *See* the annexe on 'Arrêté Ministériel No. 623/06 du 14/08/1980'

89 *See* Ann. I-V of the Law No. 07/2009 of 27 April 2009 relating to Companies.

90 <www.legislation.gov.uk/ukpga/2012/23/pdfs/ukpga_20120023_en.pdf> Small Charitable Donations Act, 2012, visited on 10 January 2013.

91 <www.legislation.gov.uk/ukpga/2011/21/schedule/1> compared to <www.legislation.gov.uk/ukpga/2011/21/pdfs/ukpga_20110021_en.pdf> visited on 10 January 2013.

92 <www.laws-lois.justice.gc.ca/PDF/A-1.pdf> visited on 10 January 2013.

When consolidating the original text and amending the text, that sentence has to be replaced by 'see schedule No. …'; of course the schedule has to be attached to the consolidated text.

XXIII. The Delegation of Legislative Power

As M.S. Rahman and Kahandak M. Haq put it, "Democracy endorses the rule of law where people's sovereignty is pronounced by the parliament through legislation. The traditional belief of democratic legislation approves legislation as non-exclusive business of parliament."[93] Aberham Yohannes and Desta G. Michael say, "It is accepted at all hands that a rigid application of the doctrine of non-delegability of powers or separation of powers is neither desirable nor feasible in view of the new demand on the executive. The new role of the welfare state can be fulfilled only through greater power in the hands of government, which is the most suited to carry out the social and economic tasks. The task of enhancing the power of the government to enable it to deal with the problem of social and economic reconstruction can be effectively and efficiently accomplished through the technique of delegation of legislative power to it."[94]

To Crabbe, Parliament cannot entirely abandon its legislative powers in favour of subordinate authorities. It can lay down the legislative policy and the principles embedded in the policy and can give guidance for carrying the law into effect.[95]

Delegated legislation "(also referred to as secondary legislation or subordinate legislation or subsidiary legislation) is law made by an executive authority under powers given to them by primary legislation in order to implement and administer the requirements of that primary legislation. It is law made by a person or body other than the legislature but with the legislature's authority."[96] In addition to the power to make law itself, Parliament can delegate or pass on the power to make law to another person or body. Delegated legislation is law made by another person or body to whom Parliament has delegated or passed on the required authority. The required authority or power is usually given by Parliament in a 'parent' Act of Parliament known as an enabling Act.[97] The most significant benefit of delegated legislation is that it saves the parliament time that would be unnecessarily spent if its masses of detail were contained in bills.[98] On the part of the statute, he highlights that the statute book (law) also benefits if it is not burdened with lengthy unmanageable detail.

93 M.S. Rahman & K.M. Haq. 'Delegated Legislation and Causes of Institutionalization of Democracy in Bangladesh: A Synoptic View' (article on line), available at <www.napsipag.org/pdf/dr.m.shamsur_rahman.pdf> accessed on 11 January 2013.

94 A. Yohannes & D.G. Michael. 'Scope of Delegated Legislation', *Abyssenia Law Review Journal*, available at <http://abyssinialaw.com/study-online/item/310- scope-of-delegated-legislation> 11 January 2013.

95 V.V.R.A.C. Crabbe, *Legislative Drafting*, Cavendish, London, 1993.

96 <http://en.wikipedia.org/wiki/Delegated_legislation>.

97 Labspace – Bridge to Success B2S, Parliament and the Law – LabSpace – The Open University (part. C), available at <http://openlearn.open.ac.uk/mod/oucontent/view.php?id=398240&section=3.4.1> accessed 11 January 2013.

98 G.C. Thornton, *Legislative Drafting*, 4th edn, Tottel, West Sussex, 2005, p. 329.

Thornton highlights factors that undoubtedly justify delegated legislation on matters both legitimate and desirable, which include[99] the following: Legislative schemes, such as those involving economic controls, that demand a high degree of flexibility for successful operations; Circumstances where considerable flexibility may be needed to modify a legislative scheme to meet local or exceptional circumstances requiring special treatment; Circumstances where the technical content of laws is such that they are incomprehensible to anybody without knowledge in the field; Schemes of the kind that several tiers of legislation are necessary to make them work; and The necessity to cope with emergencies of various kinds. However much delegation of legislative power is justified on basis of the above-mentioned circumstances, this practice carries some dangers, which if not contained would do more harm than good.

Where no guidelines of legislative policy are established by principle legislation, it is within the sphere of the drafter's responsibility to make sure that extensive legislative power is not delegated for the wrong reasons including but limited to:

- Extravagant demands made by the executive; not inspired by crazed thirst for power but made simply because 'it is, after all, easier to administer a wide grant of power, and gaps in statutes can more readily be filled by delegated legislation when no real limitations are placed' on the making of such legislation;
- Incomplete preparation of work on the part of the instructing officer or department; and
- Overreaction by the drafter to the ultra vires doctrine.

On the basis of the above-mentioned reasons justifying delegated legislation, it has become a common practice, and Rwanda is no exception to this.

1. Delegation of Legislative Powers in Rwandan Context

Today in Rwanda, legislative powers are vested in the legislative power which is the parliament. The parliament can delegate legislative powers to the executive, and in exercise of these powers the executive enacts rules. The most common legislations that come under this practice include statutory rules, by-laws, ordinances and orders in councils.

The 2003 Rwandan Constitution mandates that Ministers, Ministers of state and other members of cabinet have a duty to implement laws relating to matters for which they are responsible by way of orders.[100] Likewise, District Councils are mandated to institute regulations governing the District in the political affairs and implementation of government decisions.[101]

99 *Ibid.*

100 Art. 120 of the Constitution of the Republic of Rwanda of 4 June 2003, as amended to date, OG of 4 June 2003.

101 Art. 20(3) of the Law No. 8/2006 of 24 February 2006 determining the organization and functioning of the District. special of 24 February 2006.

These pieces of legislation have the same legal force and effect as the Act of Parliament under which they were enacted and they have equal force of law such that their recipients are bound to respect them.

2. Good Practices of Delegated Legislation in Rwanda

The Law on Gender Monitoring Office gives delegating legislative powers to the executive to legislate on salaries and other fringe benefits due to Chief Gender Monitors.[102]

Law 59/2008 on Gender-based violence mandates that the Minister of local government introduce a Ministerial order to regulate the modalities of sharing of properties between people who have not been legally married where any of them wishes to legalize marriage with any of his or her spouses.[103]

Another example of best practice for delegated legislation is the Law on the use and management on land in Rwanda: here the executive (President of the Republic) by way of a presidential order determines any other land that is considered urban, namely land in suburbs of towns and municipalities and in collective settlements.[104]

3. Control Mechanisms of Delegated Legislation in Rwanda

Inasmuch as the law provides for a practice of delegation of legislative powers to the executive, some control mechanisms are laid down to contain any form of abuse of power, the most common one being judicial control by which anti-constitutional delegated legislation is also subject to control by the courts whose judges can declare a piece of delegated legislation to be *ultra vires*.[105] So the court would be saying that a piece of delegated legislation went beyond the powers granted by Parliament within the enabling Act. If the court does this, then the delegated legislation in question would be void and not effective.[106]

4. Bad practices on Delegated Legislation in Rwanda

Inasmuch as delegated legislation is a practice in Rwanda, in my opinion it does not meet international standards as the practice is characterized by the following:

- Absence of authority to scrutinize the conformity of the subsidiary law to the parent act;
- Absence of the scrutinizing committee tends to affect the quality of this type of legislation as checking for conformity is done only through a challenge exercised through judicial means.

102 Art. 20 of the Law No. 51/2007 of 20 September 2007 states: "Salaries and other fringe benefits due to Chief Gender monitors shall be determined by a Presidential Order."

103 *See* Art. 39 of the Law No. 59/2008 on gender-based violence in Rwanda.

104 Art. 5 of the Organic Law No. 8/2005 determining the use and management of land in Rwanda, OG No. 18 of 15 September 2005.

105 *Ultra vires* means 'beyond powers', so the court would be saying that a piece of delegated legislation went beyond the powers granted by Parliament within the enabling Act.

106 *See* Art. 19 of the Organic Law No. 2/2004 of 29 January 2004 establishing the organization, functioning and jurisdiction of the Supreme Court.

- Absence of a deadline as to when the subsidiary law will be enacted, so the responsible authority is left to the discretion of choosing when to do so.
- Not laying down the required procedures, non-use of procedural requirements (procedural ultra vires), so this gives room for delegated authorities to choose when and whom to consult, which affects the quality of legislation in this category.
- Non-use of disallowance mechanism gives room to the executive to choose its own procedures and timing on introduction of a delegated legislation.

5. Comparison

Unlike in Rwanda, delegated legislation is characterized by the use of the following practices in many jurisdictions. In Canada and New Zealand, the general practice of delegation of legislative power is under the authority of the Governor General, in council, and by this practice affects the whole government with responsibility for exercise of the power.

In the UK, a similar practice is acceptable, by conferring powers exercisable by Her Majesty by order in Council or to the Minister. However, what is quite different in the UK's practice from that of Rwanda is that delegated legislation with financial implications may be made only 'with the consent of the treasury' or with the approval of the 'Treasury' or by the secretary of state and the treasury acting jointly.[107]

Special measures to control delegated legislation include:

- Parliamentary control,
- Procedural ultra vires,
- Substantial ultra vires, and
- Disallowances.

Unlike in Rwanda, in some jurisdictions parliamentary scrutiny or review is exercised on bills of laws in the delegated legislation category; their work includes reviewing the delegation of legislative powers.

In Austria, New Zealand and Hong Kong, the attention of the parliament to such legislation is attained through the practice of laying before the legislature, which provides a means to disallowance of the bill.[108] In Austria and the UK, failure to comply with this requirement makes the delegated legislation void and of no effect.[109]

It is worth mentioning that although other jurisdictions have stronger mechanisms with which to contain the legitimacy and legality of delegated legislation, some of these mechanisms may do more harm than good; for instance, the requirement of laying before the legislature all bills on delegated legislations affects the existing shortage of time of the legislature, which is one important factor that justifies delegated legislations. And this is a contradiction in itself.

107 G.C. Thornton, supra note 98, p. 331.
108 G.C. Thornton, supra note 98, p. 337.
109 *Ibid.*

6. The Future

If we compare the Rwandan model to other models (the UK or Austrian model) it is self-evident that other models elsewhere are far better than the Rwandan model simply because the latter only provides for one form of challenge on primary legislation, the judicial review, and gives no room for other mechanisms like Parliamentary control, including Disallowances and Scrutiny By Committee, Procedural *ultra vires*.

For reasons indicated above, since delegated legislation has equal force of law and imposes duties and sanctions in most cases, I am of the view that the Rwandan model should also adopt mechanisms of control like those mentioned above that are prevalent in other jurisdictions. This would give delegated legislation more legitimacy and would attract high compliance to these rules as well.

The Rwandan legal system ought not to entirely abandon its legislative powers in favour of subordinate authorities. By adopting and adapting good practices from other jurisdictions such as the UK and Australian models to complement those under her legal system (say judicial control mechanism) it should lay down the legislative policy and policies embedded in it by providing an oversight mechanism by, for example, giving guidance for carrying the law into effect; embark on control of the exercise of delegated legislative powers. Of these, one can recommend the following: Procedural ultra vires, Substantial ultra vires and Disallowances.

To safeguard the legislative powers without endangering the necessity of delegated legislation, the Rwandan legal system ought to introduce checks on the abuse of delegated legislative powers. Such checks could take the following forms:

- Limits of the delegated powers should be clearly defined;
- The delegation must be to a trustworthy authority;
- Absence of authority to scrutinize the conformity of the subsidiary law to the parent act;
- Need be solved by establishing a parliamentary review mechanism;
- Too much redundancy of the delegate of delegated legislation should be solved by introduction of a legal provision under the parent act that sets a deadline;
- Non-use of procedural requirements (Procedural ultra vires) needs to be solved by the introduction of such legal requirements under the parent act; this will reduce possible threats to the rule of law;
- Non-use of the disallowance mechanism should be corrected by introduction of the practice of laying all bills before the parliamentary committee for affirmative resolution or negative resolution.

XXIV. Penal Provisions

1. Introduction

Laws are commands. A command demands obedience. Obedience to the law is secured by sanctions. Sanctions are the penalties attached to disobedience to the laws' demands. An enactment should therefore contain a penal provision to ensure its observance or compliance. Penal provision must be clearly expressed.

They are strictly construed or interpreted by the courts in favour of the individual or the accused.[110]

There are three (3) substantive elements in a penal provision:

(1) First, a statement of the prohibited act, omission or other course of conduct;
(2) Secondly, the contravention of the prohibition; and
(3) Thirdly, the sanction (that is the penalties for the contravention).

It is better to keep the three elements as separate as possible. The prohibition should be specifically stated. The legislature through the law should clearly state what the prohibited act is.

Furthermore, in most Commonwealth countries the constitution provides that a person who is accused of committing an offence is presumed innocent until proved guilty or pleads guilty.

2. What Is the Current Practice in Rwanda?

The Constitution of the Republic of Rwanda of 4 June 2003 as amended to date stipulates in its Article 20 that "Offences and related penalties shall be determined by an Organic Law."

It is in this regard that in May 2012, a new penal code was published. This Organic Law instituting the penal code reviewed *all* other laws containing penal provisions to be included in one single law.

There is no standard style in the Rwandan Penal Code concerning the drafting of penal provisions. Some provisions contain the above-mentioned three substantive elements of a penal provision, others not. Again, in some provisions the three elements are separated by sections, whereas in some other provisions they are combined in one section.

Example (good): Article 141 of the Rwandan Penal Code talks about "parricide":

> A person who kills any of his/her parents, whether or not such parents are biological or legally recognized shall commit parricide.
>
> Parricide shall be punishable by life imprisonment.

The above provision implies:

- Prohibition: No person shall kill any of his or her parents whether or not such parents are biological or legally recognized;
- A contravention of the prohibition and declaration of the offence: "The killing of the parent (parricide)" when the command is "not to kill any of the parents"; and
- The sanction: Parricide shall be punishable by life imprisonment.

Another example: Article 203 of the Rwandan Penal Code: Sexual harassment:

> An employer or any other person who sexually harasses his/her subordinate by way of orders, threats or terror for the purposes of his/her sexual pleasure

110 *R. v. Halliday* [1927] AC 260, p. 274.

> shall be liable to a term of imprisonment of six (6) months to two (2) years and a fine of one hundred thousand (100,000) to two hundred thousand (200,000) Rwandan francs.

In this provision, there is no criminalization of the behaviour. It lacks the declaration of the offence. The provision declares penalties for the behaviour that is not prohibited.

3. International Standards

For G.C. Thornton, the design stage of the drafting process should include consideration, at least in broad outline, of the conduct (if any) to which a penal sanction must be attached in order that the proposed law will be capable of achieving its purpose.[111] In developing legislative proposals, there is a need to be very clear when providing that a person is to be penalized for contravening an Act or regulation since the courts give them the benefit of the doubt when penal provisions are ambiguous.

Where the drafter addresses a crime, care should be taken to ensure that the sanctions for committing the crime are proportionate and consistent with sanctions for comparable offences.

In creating an offence, the drafter assigns it to a specified category. This serves to ensure a degree of consistency and relieves the drafter from including the details of the sanctions in the draft legislation, as they are provided in the generally applicable legislation. For example, the (UK) Criminal Justice Act 1982, Section 37, established a standard scale of five levels of fines for summary offences, which may be altered by secondary legislation. This allows the level of fines to be easily adjusted, in response to inflation, for example, without the necessity of individually amending numerous pieces of legislation.

In drafting an offence, the drafter should consider the basic drafting elements of an offence: to state the prohibited act, omission or course of conduct, that a breach of which is an offence, the sanction for such a breach; and indicating that an offence is commonly drafted in one of three styles: declaratory, conditional or directory.[112]

Examples from Ugandan Penal Code:

> CHAPTER XVIII – MURDER AND MANSLAUGHTER
>
> 187. Manslaughter.
>
> (1) Any person who by an unlawful act or omission causes the death of another person commits the felony termed manslaughter.
>
> (2) An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health,

111 G.C. Thornton, *Legislative Drafting*, 4th edn, Cavendish Press, 1996, p. 349.

112 The legislative drafting manuals for Palestinian Authority, assessment report available at <www.oecd.org/mena/governance/50402734.pdf>, consulted on 11 January 2013.

whether such omission is or is not accompanied by an intention to cause death or bodily harm.

188. Murder.

Any person who of malice aforethought causes the death of another person by an unlawful act or omission commits murder.

189. Punishment of murder.

Any person convicted of murder shall be sentenced to death.

190. Punishment of manslaughter.

Any person who commits the felony of manslaughter is liable to imprisonment for life.

Note also that good drafting style requires that the drafter specify both the class and the penalty for any crime he creates.[113]

Example: 2006 New Mexico Statutes – Section 30-2-3 – Manslaughter.

Manslaughter is the unlawful killing of a human being without malice.

A. Voluntary manslaughter consists of manslaughter committed upon a sudden quarrel or in the heat of passion.

Whoever commits voluntary manslaughter is guilty of a third degree felony resulting in the death of a human being.

B. Involuntary manslaughter consists of manslaughter committed in the commission of an unlawful act not amounting to felony, or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection.

Whoever commits involuntary manslaughter is guilty of a fourth degree felony.[114]

4. Comparison

From the examples from different countries' penal codes and essential parts that a penal code consists of as referred to in the above-mentioned textbook and legislative drafting manuals, my observation is as follows:

- A good penal provision must contain three substantive elements, namely the prohibited behaviour, declaration of the offence to the contravention of the prohibition and finally the penalties for the contravention;
- In some jurisdictions, the three elements are separated into subsections, and in some other jurisdictions they are combined in one section;
- A penal provision must be drafted in a clear manner providing that a person is to be penalized for contravening an Act or regulation since the courts give them the benefit of the doubt when a penal provision is ambiguous.

113 *Legislative Drafting Manual*, New Mexico Legislative Council Service, 2008, available at <www.nmlegis.gov/lcs/lcsdocs/draftman.pdf> consulted on 11 January 2013.

114 <http://law.justia.com/codes/new-mexico/2006/nmrc/jd_30-2-3-c517.html> consulted on 11 January 2013.

On the other hand, the current practice in Rwanda shows that most penal provisions do not contain the three substantive elements. They lack the declaration of the offence where a sanction is declared when the behaviour to which the sanction is imposed is not prohibited.

Example from Rwandan penal code:

> Article 162 Self-induced abortion
>
> Any person who carries out self-induced abortion shall be liable to a term of imprisonment of one (1) year to three (3) years and a fine of fifty thousand (50,000) to two hundred thousand (200,000) Rwandan francs.

Example from Ugandan Penal Code Act:

> 141. Attempts to procure abortion
>
> Any person who, with intent to procure the miscarriage of a woman whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means, commits a felony and is liable to imprisonment for 14 years.

From the provision from the Rwandan Penal Code, the observation is that there is an important element missing between the behaviour and the sanction to that behaviour. That element is the criminalization of the behaviour or declaration of the offence. Even the behaviour itself is not well defined and the way sanctions are written does not clearly show what the minimum and maximum penalties are.

5. The Future

As introduced, laws are commands. A command demands obedience. Obedience to the law is secured by sanctions. Sanctions are the penalties attached to disobedience to laws' demands. An enactment should therefore contain a penal provision to ensure its observance or compliance. Penal provision must be clearly expressed. They are strictly construed or interpreted by the courts in favour of the individual or the accused.

In order to achieve its purpose, I suggest that an international standard be adopted by taking into account the following when drafting a penal provision:

- The three substantive elements: prohibited behaviour, declaration of the offence and sanction;
- Separation of the three elements to make the penal provision clear and more understandable;
- Mandatory minimum sentences;
- Clear statement of the prohibited act, omission or other course of conduct; and
- Specifying both the class and the sanction for any offence (in accordance with Article 21 of the Rwandan Penal Code).

Example:

> Article 162 Self-induced abortion (Rwandan Penal Code)
>
> Any person who carries out self-induced abortion shall be liable to a term of imprisonment of one (1) year to three (3) years and a fine of fifty thousand (50,000) to two hundred thousand (200,000) Rwandan francs.

Redraft (how it should be drafted):

> Article: Abortion
>
> Any person who carries out self-induced abortion or attempt to abort by unlawfully administering or causing to take any poison or other noxious thing, or using any force of any kind, or using any other means, commits a misdemeanour termed abortion.
>
> A person guilty of abortion is liable to a term of imprisonment of not less than one (1) year and not exceeding three (3) years and a fine of not less than fifty thousand (50,000) and not exceeding two hundred thousand (200,000) Rwandan francs.

This provision implies:

- Prohibited behaviour: carrying out self-induced abortion or attempt to abort by unlawfully administering or causing to take any poison or other noxious thing, or using any force of any kind, or using any other means;
- Declaration of offence and the class of the offence: commits a misdemeanour termed abortion;
- Sanctions: imprisonment and fines;
- Mandatory minimum sentences: imprisonment of not less than one (1) year and not exceeding three (3) years and a fine of not less than fifty thousand (50,000) and not exceeding two hundred thousand (200,000) Rwandan francs;
- Separation of offence and penalty: (1) and (2).