

The Drafter's Role in the Drafting Process

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Abstract

Every government needs legislation to cover all issues transposing obligations in the manner required by the initiator and with respect to constitutional obligations and rules that provide for the conduct of society.

Every legislative drafter should strive to achieve a law that is people oriented. The idea is to serve by extending legislative benefits to them in the best possible manner. Drafting is not a simple transcription or translation of administrative or executive guidelines, but is the command of legislative intent. It is a mixture of vision, mission and design, which brings out a workable proposition considering the background of a problem and foreseeing the ramifications of the legislative action. Drafting always supposes precision, brevity and clarity. Drafting should be compared to a focus of technical knowledge of a special kind that put together minds to produce a unity of thought enunciated as a command.

In order to produce quality legislation, drafters need undergraduate law training, followed by specialised postgraduate training in legislative studies, combined with hands on experience in a drafting office with an experienced senior drafter.

Keywords: drafter, drafting process, techniques, scrutiny.

A. Introduction

The skills required to create coherent and effective laws are very rare,¹ and thus the numbers of lawyers trained in legislative drafting is limited, yet each jurisdiction needs drafting capacity, since governments need legislation to cover all issues transposing obligations in the manner required by the initiator and with respect to constitutional obligations,² and rules that provide for the conduct of society.³ Not only new laws are needed, but existing laws also require revision. Some African countries are undertaking law revision, for example, in Rwanda, a

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1 S.C. Markman, 'Legislative Drafting: Art, Science or Discipline?', *The Loophole-CALC*, No. 4, November 2011, p. 11.

2 P. Peralta, 'Emerging From the Shadow – Legislative Drafting in Gibraltar', *The Loophole-CALC*, No. 4, November 2011, p. 36.

3 R. Rose, 'The Language of the Law: How Do We Need to Use Language in Drafting Legislation?', *The Loophole-CALC*, No. 3, August 2011, p. 2.

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Law Review Commission is currently being set up. These matters need lawyers skilled in drafting.⁴

Politicians have a responsibility to understand clearly the goals of legislation and the tools available to reach them. The drafter must know what the policy is and what politicians want him or her to do, and drafting should be preceded by research into the political, social, economic, financial, legal, cultural and psychological situation in the field of regulation.⁵ The legislative process is part of the policy process located between the formulation and implementation stages;⁶ drafter's role mainly falls in the formulation stage, and the drafter is not active in the remaining stages.⁷

Executive authorities want to ensure that the message is reflected throughout the country and thus drafters are expected to achieve much within a short time, while the public wants free and rapid access to the law.⁸ It is the drafter's responsibility to produce reasoned solutions.

I. Hypothesis and Methodology

The hypothesis of this study is that drafters should adopt Thornton's five stages of the drafting process in order to improve the quality of legislation. The aim and objective is to prove that applying the classification of these stages and identifying the skills required by drafters can improve the production of quality of legislation. Certain questions surround the way drafters handle the drafting process, the issue of permission to draft, drafting instructions, drafting manual, the drafter's skills, the quality of legislation, and applying Thornton's five stages of drafting process. These are the major questions discussed in this article. The methodology followed is using of the following Thornton's five stages of the drafting process: understanding the proposal, analysing the proposal, designing the law, composing and developing the draft and the scrutiny of the draft. The fundamental purpose of this dissertation is to apply the classification of Thornton's five stages of the drafting process in order to identify the role of drafters and identification of skills required by drafters to improve quality in legislation. The governing policy and drafting instructions should be provided and be clear enough. Legislative drafters should be well trained in order to correctly translate the policy in exact, legal and well-constructed sentences. Drafters should use drafting techniques to avoid complicated as well as long sentences, and should organize the law in a logical manner. The preferred approach is to focus mainly on the legislative drafting process and the drafter's role in the production of quality legislation. The discussion is supported with arguments put forward by different legal experts and legal professionals. The inspiration for this article was derived

4 L. Dushimimana, 'Aspects of Legislative Drafting: Some African Realities', *The Loophole-CALC*, No. 2, April 2012, p. 45.

5 U. Karpen, 'Instructions for Drafting', *European Journal of Law Reform*, Vol. 10, 2008, p. 163.

6 C. Stefanou, 'Drafters, Drafting and the Policy Process', in C. Stefanou & H. Xanthaki (Eds.), *Drafting Legislation: A Modern Approach*, Ashgate, Aldershot, 2008, p. 322.

7 A. Sheppard, *Survey of Legislative Services in Canada*, Ottawa, 1998, p. 36.

8 D.L. Revell, 'Enhancing the Legislative Process: The Value of the Legislative Drafter', *Statute Law Review*, Vol. 32, No. 2, 2011, p. 151.

from the drafting process and application of Thornton's five stages of drafting process. Further to this, I will identify any gaps in the process and the problems drafters encounter, which directly or indirectly affect the quality of the legislation they produce. The illustration using examples of a study by Joseph Kobba on the Jurisdiction of Sierra Leone⁹ and examples of Rwandan Jurisdiction based on interviews with drafters from five key Rwandan legislative institutions, namely, the Ministry of Justice, the Rwandan Senate, the Rwandan Parliament, the President's office and the Prime Minister's office. Six of these drafters are doing master's degrees in Legislative Drafting at IALS, University of London, and two are taking a different course at University of Liverpool.

II. Structure

This work is divided into seven sections. Section A is the introduction and is comprised of the hypothesis, methodology, structure and information about Thornton's five steps, as well as quality in legislation. Section B deals with the first stage of the drafting process, understanding the proposal and how drafters are expected to apply it. Section C analyses the proposal, and explains the second stage of drafting and its implications for the drafter. Section D explores the third stage of the drafting process, which is designing the draft, to show what drafters do at this stage of the drafting to make quality bills. Section E discusses the fourth stage of the drafting process that is composing and developing the draft. Section F deals with the fifth stage, that is, testing and scrutiny of the draft. Finally, Section G draws conclusions that may be used by drafters whose responsibility is to draft laws, as a guide to enhance their performance in producing quality legislation through the application of improvements and innovative drafting methods and techniques.

III. Thornton's Five Steps and Quality in Legislation

Before discussing Thornton's five stages it is important to ask who Thornton is, and what are Thornton's five stages and the reason for having them? Thornton was renowned and eminent drafter. He classified drafting process into five stages, namely, understanding the proposal, analysing the proposal, designing the law, composing and developing the draft. Thornton divided the drafting process into five stages. If drafters adopt and adhere to the five stages of the drafting process as laid down by Thornton, it is considered very likely that the bill they draft will be of good quality, which intention will produce quality legislation that uses all fundamental principles to be right and effective.¹⁰ Quality legislation is that which is capable of producing regulatory results required by policy makers, a law which is capable of leading to efficacy and effectiveness.¹¹ This is the definition of quality legislation adopted for the purpose of this work. Dividing the drafting

9 J.G. Kobba, 'Criticism of the Legislative Drafting Process and Suggested Reform in Sierra Leone', *European Journal of Law Reform*, Vol. 10, 2008, p. 219.

10 *Ibid.*

11 H. Xanthaki, 'Duncan Berry: A Visionary of Training in Legislative Drafting', *The Loophole-CALC*, Special issue, 9 February 2011, p. 18.

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into five stages enhances analysis of the drafting process. It helps to identify problems in the drafting process and their causes, and then to find and implement solutions to those problems. It makes for a sound evaluation of issues involved in the drafting process, it provides for proper assessment of problems, identifying better or alternative drafting skills and techniques, and also determines the audience for whom the law is made.¹² After the introduction, the hypothesis, the methodology, the structure, the Thornton's five steps and quality in legislation, I will now move on to discuss the first stage of the drafting process, which is the understanding of the proposal.

B. Understanding the Proposal

Understanding the proposal is the first preparatory stage of the drafting process.¹³ It involves the drafter referring to the drafting instructions. He must have a clear picture of the purposes of the proposed legislation, and the defect it intends to correct. In order to achieve the objective of proper understanding of the proposal, the following factors can help the drafter: a drafter should have fine attributes and qualities. He should be well trained and properly qualified. He should take great care while drafting, as well as great patience. A drafter should employ all the innovative techniques and analytical skills at his disposal. Another very important factor for the drafter is time. He must also be able to communicate effectively and successfully in a clear form using language that is readily comprehensible to understand the proposal correctly. This process of understanding the proposal therefore involves the question of setting, maintaining and developing drafting standards so that a quality bill is produced. Policy makers may not be knowledgeable in the field of drafting, but if drafters have the necessary expertise, they should make it available to them.¹⁴

I. Training of Drafters

Drafters need training, which can give a solid professional foundation that allows new drafters to be used in drafting and to enable them to develop into mature professionals.¹⁵ In general, there is a lack of training of drafters, and the little that is being provided is not adequate.¹⁶ The drafter needs to be aware of the multitude of often clashing rules and conventions. He needs to identify the most relevant set of circumstances applicable to the problem and to have the theoretical knowledge and practical experience to promote the rule or convention that best delivers under the mostly unique circumstances of the problem.¹⁷

In order to assess the best type of training for modern drafters, it is necessary to identify the nature of drafting as it determines the style and elements of train-

12 Kobba, 2008.

13 G.C. Thornton, *Legislative Drafting*, 4th edn, Butterworths, London, 1996, p. 128.

14 Kobba, 2008, at 227.

15 Markman, 2011.

16 R. Dickerson, *The Fundamentals of Legal Drafting*, West Publishing, St. Paul, MN, 1981, p. 4.

17 Xanthaki, 2011.

ing that can assist drafters to deliver their work.¹⁸ Drafters must be trained in a manner that cultivates the two skills of know-how and experience, both of which are important in drafting. Sandra Markman developed two myths about the training of legislative drafters. The first is that:

drafting skills cannot really be taught in any formal way, and especially not in an academic setting. Drafting skills can be learned only by service in a long apprenticeship to experienced practitioners than to modern professionals engaged in professional training.

The second is that: “the drafting skill-set is purely a part of the skill-set that all lawyers are supposed to have.” However, Crabbe VCRAC argues that “legislative drafting is a discipline. It requires continuous training and experience. It demands hours and hours of concentrated intellectual labour”; While Helen Xanthaki and Duncan Berry stated that “formal drafting training and the traditional mentoring method of training altogether are complementary each other.”

What all these views show is that drafters badly need training that can help them to perform their task correctly. However, drafters also need to possess the following skills:

- Awareness and understanding of theoretical drafting principles, their purpose, their application, and expected results from their use; and
- Experience in the application of drafting principles in concrete cases within the jurisdiction that they currently serve, and beyond.

Acquiring the first skill gives completion of the formal academic training offered by academic institutions with independent training, while the second is acquired by the completion of training on the job under an experienced senior drafter with long service and supervision mentoring skills.¹⁹ This training improves the drafter's performance, enabling him to provide legislatively exactly what the clients want and to do it as smoothly as possible. Drafters need legal knowledge and a power of drafting of the highest order, and they must have the accuracy and consistency of an engineer of the law.²⁰ Drafting skills can be studied and learned very successfully, but it is certainly true that no professional is ever fully functional without a period of hands-on experience in the field. Training programmes can provide a solid professional foundation that allows new drafters to gain on-the-job training to be put to use in honing skills and developing mature professional judgment.²¹

Training is therefore essential to develop drafter's skill. If the drafter is qualified and experienced, he can analyse and draft well. Thus, an important factor in the determination of the quality of the bill is the qualification and training of the

18 *Ibid.*

19 *Ibid.*, p. 26.

20 R. Dickerson, *Materials on Legal Drafting*, West Publishing, St. Paul, MN, 1981, p. 14.

21 Markman, 2011.

drafter.²² Formal training under the guidelines of postgraduate educational institutions enhances the drafter's knowledge and understanding.²³ With reference to legislative drafting as part of the legislative and policy process, appreciation of the law as a mere tool for regulation cannot be achieved without an exploration of the policy context within which law is expected to function and deliver results effectively.²⁴ Training respects and recognizes the dynamic nature of legal rules, the dynamic and evolving nature of drafting conventions, which, for the purposes of achieving effectiveness, require looseness, flexibility, innovation, and change.²⁵ It is through ad hoc practical training that the drafter can be exposed to enough cases and solutions in order to make the link between academic training and actual practice.

Among the skills required are an understanding of the relevant rules and wisdom gained through experience in the application of the most appropriate rules. These are the main skills that training in drafting must deliver and they form the core of the reasoning behind the argument that training in drafting must be both academic formal and practical, via mentoring.²⁶ Academic training allows drafters to understand the concept of quality in legislation, to become aware of drafting choices and to identify the values that a drafter pursues upon which these choices are made. The application of this academic training in practice comes with experience and through vocational training. However, without this theoretical academic background, the drafter would lack the link between examples and the reasons behind the solutions offered, and any lessons learnt for the future would be lost, as apprenticeship involves isolated and on-the-case education. However, an absence of vocational training and practical application of the theory would have the same result, as there would be no concrete cases to apply the lessons learnt and the reasoning explained.²⁷ Proposals can only be fully understood if drafters are well trained.

II. *Drafting Instructions*

Drafting instructions are a set of data that policy makers make available to the drafter to help him draft effective legislation within the confines and parameters they have developed.²⁸ The drafting instructions provide historical background information to understand the political decision to proceed with legislation and the proposed legal means of achieving government policies. In addition, they provide information about the proposed legislations, purposes, means of achieving its purposes and the impact and implications of the proposal on existing circumstances and law.²⁹ Crabbe provides 12 elements that can help in drafting instructions as follows:

22 Kobba, 2008.

23 Xanthaki, 2011, at 21.

24 *Ibid.*

25 *Ibid.*

26 *Ibid.* (n 20).

27 *Ibid.*

28 Kobba, 2008, at 229.

29 Thornton, 1996, at 130.

1. Approval in principles for the drafting of the legislation;
2. State clearly the principal objectives the legislation is intended to achieve;
3. State clearly the anticipated implications of the legislation;
4. Contain all relevant information touching upon the legislation;
5. Contain appropriate references to decided cases which have a bearing upon the legislation;
6. State clearly any unresolved issues which have a bearing upon the matters that are to be included in the legislation, accompanied y any opinion, legal or otherwise, and the views of the sponsoring Ministry on those opinions;
7. Containing suggestions as to the penalties to be imposed for infringement of the legislation;
8. Indicate whether an existing legislation might need amendment or whether consideration should be given to that existing legislation;
9. Contain suggestion regarding commencement and the reasons for suggesting different dates for different provisions;
10. State clearly whether departments which may be affected by the legislation have been consulted and the views of those departments;
11. Be accompanied by the reports of commissions of Inquiry or committees, the recommendations of which form the basis for the legislation or have a bearing on the legislation;
12. Contain suggestions for transitional or temporary provisions or for saving provisions.³⁰

The main purpose of instructions is to give the drafter everything he needs to produce a draft,³¹ to show what is wanted, but also to tell the drafter the reasons behind the various proposals in sufficient quality to allow the drafter to produce a quality draft bill.³² Policy makers have a responsibility to ensure that they are trained in the area of drafting instructions and communicating them well. A Drafting Instructions Manual should be prepared for the policy makers to help them prepare drafting instructions, serving as a guide for better writing, effective communication and consistency of form and content. It can also serve as a tool for checking texts or, more importantly as a quality control measure.³³ Thornton emphasizes that "good instructions are a pearl beyond price and not only improve the quality of the bill but also reduce drafting time." This emphasizes the importance of the quality of bills, which can only be achieved if the drafting instructions from which they came are of high quality as well.³⁴

Another important aspect of the drafting process is time. If the drafting instructions are well settled, then the time for drafting a bill will be short. Time needs to be properly used, as there are always time targets set for the completion

30 V.C.R.A.C. Crabbe, *Legislative Drafting*, Cavendish, London, 1993, p. 15.

31 Parliamentary Counsel, *Working With Parliamentary Counsel*, January 2011, p. 29.

32 Cabinet Office, *Guide to Making Legislation*, June 2012, p. 48.

33 Kobba, 2008.

34 *Ibid.*

of legislation for further treatment in the legislative process.³⁵ Instructions should be written in narrative form in clear, straightforward language that is as free from jargon and technical language as the substance allows. They should be complete and comprehensive. Details may be presented in tabular form if that seems to aid communication.³⁶ Thornton states that good instructions will illuminate:

- The nature of the problem by providing background information;
- The purpose of the proposed legislation;
- The means by which those purposes are to be achieved;
- And the impact of the proposals on existing circumstances and law.

Joseph Kobba, points out that if the drafter does not understand these fundamental principles, it is not easy to get the bill right, as he cannot then fully understand what the proposal is all about. An experienced drafter will continue to ask questions until the policy makers deliver all the necessary ingredients for good drafting instructions. The drafting instructions delimit and determine what they should contain. They guide the drafter who eventually drafts the bill. Drafting instructions provide an opportunity to let other departments say how the proposed legislation will affect them. It also helps the sponsoring ministry to see its proposals through. The drafting instructions will let the cabinet have control over the legislative process by giving ministers a more detailed view of how the policy they have approved is reflected in the legislation proposed.³⁷

Drafting instructions should be presented in a logical order stating the law and then presenting amendments and repeals of existing legislation in a clear way. Good drafting instructions mean clear policy papers, setting out clear objectives, which are formulated on the basis of a consultative process involving all stakeholders.³⁸ The appointment of an instructing officer with sufficient seniority, skills, authority, experience and reasonable knowledge about the subject matter contributes to the quality of the bill. If this authority is qualified, experienced and understands the constitutional and legal framework within which he operates he will give better instructions. He can answer technical queries authoritatively to clarify issues emanating from the policy. On the other hand, if, this officer is not experienced in the operational aspects of the policy he will not be able to give good instructions. This will seriously affect the quality of the bill. Thus, the instructing officer appointed can determine the quality of the bill.³⁹

Another factor to consider regarding drafting instructions is the Drafting Instructions Manual. If the officer uses this, it will guide him how to write drafting instructions in a way that is clear and readable. When use is made of a Drafting Instructions Manual, the instructing officer will also meet the demand for

35 *Ibid.*

36 Thornton, 1996, at 129.

37 Kobba, 2008, at 229.

38 T. Perera, 'The Wavering Line Between Policy Development and Legislative Drafting', *The Loop-hole-CALC*, No. 3, August 2011, p. 65.

39 Kobba, 2008, at 229.

consistency and hence the achievement of quality in a bill.⁴⁰ Understanding of the proposal will be successfully completed if the drafting instructions are well established.

III. Consultations

The drafter should consult with the policy makers, especially regarding the instructions. In complex cases, Thornton maintains that a thorough and wide-ranging discussion with instructing officers is a necessary part of understanding the proposal of the drafting process.⁴¹ Communication between policy makers and the drafter leads to good understanding of the proposal.⁴² Constructive comments and suggestions for alternative solutions form a necessary part of fully appreciating and understanding the proposal. This has two possible advantages. It affords the drafter the opportunity to clarify complex policy issues with the instructions officers and to check how successfully the legislative proposal, in the form of drafting instructions, has been communicated to him. Consultation at this stage is crucial especially when the proposal is complex, and the drafter should be engaged as early as possible. If the policy is not reflected in the text then the quality of the bill will be diminished. Therefore, engaging the drafter as earlier as possible saves unnecessary drafting.⁴³ At this stage, the drafter should concentrate on a comprehensive understanding of what his client has in mind. This will make him fully consider and assess the proposals, including their implications and consequences as a whole. It is also necessary for sponsors of the proposed legislation to appoint an instructing officer with sufficient knowledge to help the drafters by clarifying issues and answering their questions in order to see the proposal from proper perspective and thus to ensure the bill will be right.⁴⁴ Understanding of the proposal will only be complete if the consultative process between the drafters and policy makers is comprehensive. The next section will deal with the second stage of drafting process which is the analysing the proposal.

C. Analysing the Proposal

The third section is the analysing the proposal.⁴⁵ After achieving proper understanding the drafter has to examine the proposal in detail to determine whether the proposal will lead to making a new law or amending an old law. The drafter has to see if the problem can be handled by administrative action or not. This step involves a careful study and assessment of the legislative proposal and how it affects the existing law. The drafter has to be aware of existing laws. As he needs to examine the proposal and see how it relates to them, as well as to statutes case

40 *Ibid.*

41 Thornton, 1996, at 132.

42 M. Ng, 'Legislative Drafting: A Lawmaker's Perspective', *The Loophole-CALC*, No. 3, December 2010, p. 78.

43 Thornton, 1996, at 126.

44 Kobba, 2008, at 230.

45 *Ibid.* (n 43), at 133.

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law, subordinate legislation or administrative law and regulations.⁴⁶ By doing this he will discover which provisions of existing law need to be amended, saved or repealed to make it compatible with the new legislative proposal.⁴⁷ This analysis will enable the drafter to see the nature of his role and responsibility in special areas of drafting from the right perspective and to take on his responsibilities seriously.

I. The Drafter's Role and Responsibility

The process of drafting begins when the Cabinet makes a decision in respect of a particular, accompanied by a Cabinet memorandum, which is called the policy document and any other documents relevant to that particular subject. These documents are the starting point of the drafting process, which has to be carried out in terms of the provisions of the country's constitution and any other administrative rules or regulations which may be issued in that regard by the cabinet.⁴⁸

A drafter with experience and knowledge should bear in mind that the law is supposed to be read and understood by the ordinary man.⁴⁹ He should bring his expertise to bear on analysing the legislative proposal in an objective manner.⁵⁰ His role is therefore to translate policy decisions into effective law that is fit for purpose⁵¹ and take the client's policies and transform them into text that will promote those policies as effectively as possible.⁵² However, the drafter's role depends on the appointment, size and nature of the jurisdiction. In small jurisdictions, drafters are often responsible only for the introduction of some types of routine legislation. Drafters in most jurisdictions revise existing legislation. Opportunities to draft brand new legislation are relatively rare. In large established jurisdictions, it is quite rare for drafters to be asked to produce brand new legislation.⁵³ Normally, the first duty of a drafter is to prepare draft written rules before they are passed into law. Thus, the profession is a discipline of law that requires complete devotion, focused attention and consistent hard work.⁵⁴

The drafter has to remember the reason for legislation and to consider the state of the society. This means that the drafter has to deal with the problems of the past and present but must also think of the future by laying down rules of conduct for the guidance of society. If there are open spaces between policy and legislation, the drafter must fill them. If the drafter found that a proposed bill

46 *Ibid.*

47 *Ibid.*

48 Perera, 2011.

49 D. Greenberg (Ed.), *Craies on Legislation*, 9th edn, Sweet & Maxwell, London, 2008, p. 339.

50 Kobba, 2008, at 232-233.

51 S. Markman, 'It's Just Your Imagination – Some Thoughts on the Role of Parliamentary Counsel in Ensuring Practicability of Legislative Instruments', *The Loophole-CALC*, Special Issue, 9 February 2011, p. 109.

52 P. Salembier, 'Testing Client Policy: The Emperor's Clothes', *The Loophole-CALC*, No. 3, August 2011, p. 44.

53 Stefanou, 2008, at 323.

54 R.C. Nzerem, 'The Role of the Legislative Drafter in Promoting Social Transformation', in C. Stefanou & H. Xanthaki (Eds.), *Drafting Legislation: A Modern Approach*, Ashgate, Aldershot, 2008, p. 132.

would result in a particular problem it is his responsibility to raise them out.⁵⁵ The Drafter's experience will enable him to assess and evaluate the role of other key stakeholders at each stage of the drafting process. This will easily help to point out some problems and faults in the drafting process and provide for amendments. It is not easy to point out those problems when the drafting process remains a complex and complicated whole that is not divided into stages to facilitate analysis. When the process is not broken into stages, it is very hard to assess and evaluate emerging complications.⁵⁶

Being directly involved in policy pronouncement, the drafter critically analyses how proposals affect individuals' personal rights, private property rights, the power of the executive to impose taxation, retrospective legislation, international obligations and standards, territorial or constitutional competence, prerogative or executive powers and bureaucracy. He also gives advice on possible legislative solutions to any inconsistencies that emanate from such analysis.⁵⁷ If the drafter does not take into account of the policy, the quality of the bill will be affected. If the proposal conflicts with the constitution, international treaties, or any other law then he has to discuss it fully with the policy makers and advise on the best way forward to find a legal solution.⁵⁸

On receipt of the proposal, the drafter must examine and analyse it to see whether implementation is possible and how the proposed legislation will fit into existing legislation. He must look alternative and whether an amendment would be more appropriated than a new piece of legislation. In addition, he will consider any legal difficulties inherent in the proposal and the implications of the proposal for the penal rights and vested.⁵⁹ The drafter who designs and drafts the proposed law's detailed provisions⁶⁰ is entitled to rely on any normal implication that attaches to the features of the legislative message that he has made express.⁶¹ He has an obligation to maintain the rule of law as much as possible, by clarifying what the law demands, grants and what sorts of behaviour they can expect from officials.⁶²

As discussed above the drafter's role involves transforming policy into laws that are understandable and implementable.⁶³ When there is a good working relationship between instructor and drafter, the line between advising on policy and legal issues can become extended. A legislative drafter may express opinions on

55 *Ibid.*

56 Kobba, 2008.

57 *Ibid.*

58 *Ibid.*

59 United Nations Institute for Training and Research (UNITAR), *The Role of Parliamentary Counsel in Legislative Drafting*, Geneva, 2000, p. 15.

60 A. Seidman & R.B. Seidman, 'Between Policy and Implementation: Legislative Drafting for Development', in C. Stefanou & H. Xanthaki (Eds.), *Drafting Legislation: A Modern Approach*, Ashgate, Aldershot, 2008, p. 294.

61 R. Dickerson, 'The Diseases of Legislative Language', *Harvard Journal on Legislation*, Vol. 1, No. 5, 1964, p. 15.

62 E. Majambere, 'Clarity, Precision and Unambiguity: Aspects for Effective Legislative Drafting', *Commonwealth Law Bulletin*, Vol. 37, No. 3, 2011, p. 418.

63 Perera, 2011.

policy issues and those who develop policy may have views about how to achieve the desired legal outcome.⁶⁴ This shows that even if traditionally, the drafter's role is the translation of policy into law; this can be extended to the advising on the policy process. This flexibility can have the advantage of correcting the policy. If the drafters and instructors have a close working relationship this can help them achieve the intended goal, which is a law that fits well with basic legal principles and the rest of the relevant law, as well as achieving the policy objectives articulated and approved by the cabinet. When there is flexibility, it seems that the legislative drafter helps to decide what the law ought to be. There can be adjustments to the policy along the way and it may be that the instructors will return to cabinet to obtain agreement to additional or modified policies. Drafters approach bills with a fresh and independent eye. They should not take things for granted and should be prepared to question ideas with the sponsoring ministry, as their capacity to contribute fresh and constructive ideas is important.⁶⁵

II. *Practicability Analysis*

Analysis of the legislative proposal provides for predictability. This makes way for the practical implications of the legislative proposal and the reason for a preference for a specific solution, which should be included in the drafting instructions. This analysis is conducted to supplement drafting instructions and to verify complete instructions. This quality control check is at the second stage of the drafting process. The analysis may reveal many alternative routes for solving the proposal and point out the most effective method to achieve a legislative solution. In the drafting process, this is what they call a benefit of the legislation or proposal made.⁶⁶

The drafter may use the following checklist to see whether the measure is necessary and likely to be effective and whether it is comprehensible: Is action necessary? What are the alternatives? Is it required at national level? Is a new law needed? Is immediate action required? Does the scope of the provision need to be as wide as intended? Can the length of the period for which it is to remain in force be limited?⁶⁷ These questions may help the drafter to check the practicability of the proposal. The drafter must know that clients want bills and regulations because they need them. Clients believe drafters and want problems and crises resolved.⁶⁸ The drafter must also know that the audience want to be able to understand a law when they read it. They expect laws to be fair, sensible and want them to do what they are supposed to do. However, people will criticize the drafting no matter how well drafted a document may be.⁶⁹

64 E. Grant, 'The Wavering Line Between Policy Development and Legislative Drafting', *The Loophole-CALC*, No. 3, August 2011, p. 58.

65 L.A. Levert, 'Work Methods and Processes in a Drafting Environment', *The Loophole-CALC*, Special Issue, 9 February 2011, p. 29.

66 Kobba, 2008, at 235.

67 Karpen, 2008, at 171.

68 Revell, 2011, at 152.

69 *Ibid.*

In order to avoid unwarranted repeals of legislation in the future, when the drafter finds that he has no answer to the problems found in the analysis, he should be careful in the proposal to make pertinent, valid and logical conclusions, so that the analysis makes provision for how the law can be changed in the future if necessary.⁷⁰ For this purpose in assessing quality of the proposal, legal, economic, financial, technical, scientific, linguistic, ecological and other forms of expertise need to be applied, given the type of social relations to be regulated.⁷¹ If a drafter properly analyses the proposal, he will be able to draw conclusions as to the effect of the proposal on the existing law, to predict what the law will be in the future and how it will work and the more the drafter is experienced the better analysis will be.⁷² Section D will deal with the third stage of drafting process, which is the designing of the law.

D. Designing the Law

Designing the law is the third stage of the drafting process. It involves producing a hierarchical structure for the proposal an outline structure or plan for the law, which facilitates the drafter in the drafting process. This is the planning stage of the law,⁷³ and it is based on and guided by the nature of the legal system of the country. The structure of the law can be described as its framework as it provides the structure of the legislative scheme and its normative provisions organized in a rational way, making the use of the law as easy as possible, to enable the document to be read and used quickly and effectively.⁷⁴ It involves giving prominence to the key features of the law, by giving instrument into constituent parts, maintaining a logical relationship between the parts and the whole. It also involves the orderly ranking of the normative provisions in a rational sequence. This ensures the final draft law to be organized and arranged in its most logical form and that the actual draft follow as a coherent scheme.⁷⁵ The drafter takes into account the most rational method by which the law is divided into parts and its normative provisions are ranked within those parts to effectively bring out their interrelationship. Designing a structure facilitates communication of the content of the law and achieves objects of the drafting instructions.⁷⁶ Without a structure, a draft looks like a bad piece of work. As it will have the appearance of being incomplete. It is within the legislative design that the drafter will see if the Act is a workable piece of law.⁷⁷ It is for this reason that drafters must take care that the form of their laws leads to quality.⁷⁸

70 Kobba, 2008, at 235.

71 Karpen, 2008.

72 Kobba, 2008, at 235.

73 Thornton, 1996, at 138.

74 P. Butt & R. Castle, *Modern Legal Drafting: A Guide to Using Clearer Language*, 2nd edn, Cambridge University Press, Cambridge, 2006, p. 170.

75 Kobba, 2008, at 235-238.

76 *Ibid.*

77 Crabbe, 1993, at 16.

78 Majambere, 2011.

At this stage of designing the law, the drafter has to look at the material as a whole to weigh the relative importance of the topic and put together all related elements and decide how best to present the material. In this process, the drafter will consider what elements are relevant and can therefore go into the bill. At the same time, he can determine what elements are not relevant and therefore not considered for the content of the law. The development of the bill structure must be under constant review to enhance effective communication until it is settled. A sound structure will make a way for a draft that is understandable. The outline of the framework enables drafters to visualize the shape and the broad content of the finished product. When the drafter has settled the final draft, it is necessary to lay it before the instructing officer to consider it. This helps to achieve consistency and avoids unnecessary and unwarranted change at crucial moments.⁷⁹

Designing the law aims at simplicity to achieve the object of the legislative proposal avoiding the use of unnecessary concepts. The Structure should be designed and presented in a simple manner. In designing an Act, there is a need to comply with conventional practice so that formal or technical natures are included in statutes. Thus practice is not uniform as there is no settled formula by which you can position a particular provision in a statute, but it is nevertheless important that we maintain consistency of practice within a jurisdiction that facilitates the use of statutes.⁸⁰ The main principles of law are debated before administration of the practices and procedures that follow. The sequence should be logical and procedural steps should be expressed in the order in which they occur. The general precedes the particular the permanent comes before the temporary and the more important before the less important.⁸¹

Based on structure of a bills proposed by Professor Ann Seidman and other authors, Nick Horn proposed eight categories for shaping a policy into a good law as follows:

1. Framing provisions (title, commencement, definitions);
2. Primary rules (prescribe the primary role occupants' behaviour);
3. Implementation rules (implementing agency);
4. Compliance rules (inspection, monitoring and reporting rules);
5. Enforcement rules (sanctions, penalties or other measures);
6. Dispute settlement rules (administrative, judicial review, or conciliation);
7. Finance rules (resources to implement bills);
8. Miscellaneous provisions (powers, validity).⁸²

79 Kobba, 2008, at 235-238.

80 *Ibid.*

81 Kobba, 2008, at 235-238.

82 N. Horn, 'Shaping Policy Into Law: A Strategy for Developing Common Standards', *The Loophole-CALC*, Special issue, 9 February 2011, p. 40.

Dickerson states that:

the structure of a proposal is the tool by which a very big and complicated problem can be divided into smaller manageable ones. Without a good outline to work from a drafter can attack each discrete component separately. This is one of the most important devices for solving complicated problems.⁸³

Futhermore, Crabbe state that:

the important step in the drafting process is the preparation of the legislative scheme. Upon that scheme hangs the quality of the bill. The legislative scheme represents Counsel's mental picture of how well the Act of Parliament would look in structure and quality, in substance and in form. Without the legislative scheme the resultant Act will look like a patchy, sketchy work. It will give the appearance of an ill conceived, ill prepared piece of work. The legislative scheme is in effect, the architectural plan of the building that is called an Act of Parliament.⁸⁴

By the same logic, Crabbe quotes Lord Thring's five rules extensively in support of this principle of structuring the bill in respect of what it should contain and how it should be arranged. Thornton also highlights the structure of the bill and its internal arrangement.

On the question of structuring legislation, a hierarchal approach is actually considered, as issues concerning material included in the legislation, how the material should be divided between primary and subordinate components of the legislative scheme and how the materials are ordered within a piece of primary and subordinate legislation. Some flexibility is allowed to disrupt this sequence, though a logical sequence is good, practical circumstances and practical expedience may change it, as in the case of corporations where the establishment of the corporation is provided for first before stating the principle of the law.⁸⁵

The structure helps the drafter to estimate a realistic time – scale for the drafting process. It facilitates the drafting team and the management office. The design acts as quality control for the bill. Certain principles applicable to the design of the law have to be adapted to take account of the subject matter and the legal mechanism in the particular law.⁸⁶ After the drafter has accurately seen and visualized the range of the statute as designed he can focus on the structure of the bill. The order of the structure can be governed by conventional practices with respect to particular jurisdictions. There is no value judgement as to right or wrong. As a general traditional rule, substantive provisions, which establish the main principle of law, should be laid down first before the administrative provi-

83 Dickerson, 1964, at 32-34.

84 Crabbe, 1993, at 16.

85 Kobba, 2008, at 235-238.

86 *Ibid.*

sions that implement the substantive rules.⁸⁷ It is of practical importance to position the principle of the law early in the bill. The use of schedules for effective communication of the bill is essential. Distinct and different matters should not be combined in one draft bill when designing the law. It follows, that one Act, one object; one Act one purpose.

Drafters should consider ways of making sure that the structure of a provision remains clear, particularly if adding length to a section. For example, drafters could consider inserting subsection headings to group subsections on related topics and to provide structure to a section that is being amended.⁸⁸ The structure of the draft tries to deal with the policy as simply as possible by including parts in descending order of importance for readers.⁸⁹ If the framework is well designed, it should be easy to put all ideas into it. Through the process the drafter has to look at how best to fit different parts into the pre-determined framework and to ensure that various clarifications and examples are expressed in a coherent way.⁹⁰ The next section will deal with the fourth stage of drafting process, which is the composition and development of the draft.

E. Composing and Developing the Draft

The fourth stage of the drafting process is the composition and development stage.⁹¹ This section consists of three subsections focusing on composition, drafting techniques and challenges faced by drafters.

I. Composition

At this stage, the drafter properly develops and upgrades the draft in substance and form with precision. He must constantly and continuously confer with the instructing officers when composing⁹² sentences, which are required to be clear, precise and unambiguous.⁹³ The Composition of a draft should follow an elaborate and logical structure, with a clear purpose, a correct function, a connection between conditions or consequences and the relevant behavioural directive, good knowledge and fit of the statute into its systems.⁹⁴

There is a difference in how drafting offices operate in large and small jurisdictions. Large jurisdictions usually have dedicated units or individuals who specialize in drafting. In small jurisdictions, the drafter's position depends on the

87 *Ibid.*

88 Parliamentary Counsel, *Reducing Complexity in Legislation*, May 2011, p. 16 <www.opc.gov.au/>, accessed on 14 June 2012.

89 *Ibid.*

90 D. Lovric, 'Principles-Based Drafting: Experiences From Tax Drafting', *The Loophole-CALC*, No. 3, December 2010, p. 16.

91 Thornton, 1996, at 143.

92 *Ibid.*

93 V.K. Bhatia, 'Drafting Legislative Provisions: Challenges and Opportunities', *The Loophole-CALC*, No. 3, August 2011, p. 5.

94 J. Stark, 'Tools for Statutory Drafters', *The Loophole-CALC*, No. 2, April 2012, p. 51.

jurisdiction and, of course, the volume of work.⁹⁵ Trained drafters draft laws. Nevertheless, it is humanly difficult, even impossible, to give anything like an exhaustive account of legislation that should be drafted⁹⁶ as it is difficult to draft legislation to cover every situation that might arise in the country.⁹⁷ As Driedger states, "the perfect bill has never been written, and never will be."⁹⁸ For this reason, each state develops its own standards for parts, parts, sections, subsections, subdivisions and items.⁹⁹ Production of quality legislation requires the application of at least three distinct knowledge sets:

- Legal (constitutional, statutory, substantive, international),
- Governmental and political (formal legislative process, cabinet process, government policy),
- Technical (drafting conventions, research methods and tools).¹⁰⁰

One of the requisite talents of the drafter is the ability to focus. He needs the ability to rivet his attention on a draft's main purpose, to relate that purpose to secondary material and to avoid unnecessary words. Without clear and effective words meeting drafting standards, we cannot expect the bill to be right.¹⁰¹ A drafter needs to determine whether conditions or consequences apply. If they do apply, they need to be connected to the behavioural directive logically and either syntactically or structurally. He must focus on maintaining a standard of discipline and integrity, so that attention is not be eroded, and conduct rigorous checks in going over the content and style to ensure that the bill is right.¹⁰²

A lot of emphasis is put on essential matters of substance for example, attention should be paid to the choice of words that best convey the drafter's purpose in develop sentence structures, that improve the quality of the draft. The composition of clauses must accurately reflect to the drafting instructions, both in precision and in clarity. As the drafter continues to develop, emphasize oriented on both substance and form.¹⁰³ Drafters should continue this process of polishing the draft until it is of sufficient quality. At the design stage if the structure is affected by the use of the language, cross-referencing or numbering, the structure designed should be revisited to maintain the appropriate balance and emphasis.¹⁰⁴ It is not good for drafters to draft under the constant pressure of tight deadlines. In addition, other criteria should be taken into consideration in assigning drafting files. For instance, managers should make sure their drafters get to work with a wide range of colleagues and can learn from each other.¹⁰⁵

95 Stefanou, 2008.

96 Greenberg, 2008, at 335.

97 The Rt. Hon. Lady Justice Mary Arden, DBE, 'The Impact of Judicial Interpretation on Legislative Drafting', *The Loophole-CALC*, No. 1, August 2008, 5.

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

99 Karpen, 2008, at 176.

100 Markman, 2011, at 9.

101 Stark, 2012.

102 *Ibid.*

103 Kobba, 2008, at 239-240.

104 Kobba, 2008, at 239-240.

105 Levert, 2011.

By ensuring constitutionality goals, a drafter plays a role in the protection of human rights, which is not a central but a peripheral role.¹⁰⁶ Thornton's approach emphasizes the need to comply with conventional practice in positioning in the framework of a statute to various provisions of a formal or technical nature. Practice is not uniform but consistency of practice within a jurisdiction is highly valued.¹⁰⁷ Bergeron suggests that the bill must be arranged in a logical order. This means that, the text must be sensibly arranged to produce a good logical order and sequence. This provides a map for clearer reading of the bill. A break down into parts makes it easy for reader to locate the provisions and sections.¹⁰⁸

At this stage of designing the law, the drafter polishes the draft and repeatedly revises it to see whether it is in order in terms of content and form. His experience and qualification will help him to do this. Drafters and policy makers are also allowed to consult and see whether the text is correct according to the policy¹⁰⁹ so that the drafter moves in a logical progression from drafting to developing and revising the draft.¹¹⁰ However, the drafting process needs to be seen in the wider context if it is to be understood fully and eventually pass through the legislative machinery to reach the statute book as law.¹¹¹ Indeed, ensuring the quality of the draft at this stage involves seeing whether the text reflects policy, verifying the text at each level of the five stages of the drafting process, checking and rechecking the draft until the bill is right.¹¹² Furthermore, if the drafter and instructing officer liaise and rigorously discuss the draft, they will be able to bring out inadequacies and ambiguities detected in the drafting instructions and the draft for corrections. The qualification and the experience of the drafter help him to maintain the logical order, structure and terminology of the bill. This is verification of the legal structure of the draft. The better his qualifications, the better his analytical skills and this will make the bill qualitative.¹¹³ The drafter will then submit what he has developed to the instructing officers for study and comments.

II. Drafting Techniques

Another fundamental element of a bill to be right is the use of drafting techniques. A drafter applies the most appropriate theoretical drafting principle and drafting technique, which consists mostly of finding the right words, and putting them in the right order¹¹⁴ for the circumstances of the concrete drafting issue he is called to address.¹¹⁵ The drafter must apply reason informed by experience to translate policy into laws that modify behaviours and bring about transformation

106 D. Lovric, 'Human Rights: The Role of Legislative Counsel', *The Loophole-CALC*, No. 3, August 2011, p. 73.

107 Kobba, 2008, at 239-240.

108 *Ibid.*

109 *Ibid.*

110 Thornton, 1996.

111 *Ibid.*

112 Kobba, 2008, at 238-239.

113 *Ibid.*

114 Horn, 2011.

115 Xanthaki, 2011.

in society. Drafting performs its own complement of functions, so the set of tools or tactics that can be used to do it well differ from the complements that work for other kinds of writing. Tools are more likely to be useful if they accord with the context and if they result from a careful functional analysis.¹¹⁶ Plain language principles, gender-neutral language, section headings or any other technique can be used, but each case and its particular needs warrant special attention and application.

The drafter should attain a degree of precision that will help lawyers interpret the bill, adopting the new requirement to draft in a gender-neutral style as the standard way of dealing with the problem of repletion.¹¹⁷ Aitken identifies clarity as a quality in drafting a bill. He states that, "another important attainable quality is clarity in the sense of being readily comprehensible to the audience to whom the document is primarily addressed." The drafter of the bill should have in mind the audience he is drafting for. Depending on the audience, the drafter should apply the requisite drafting techniques to target that audience in question appropriately for the bill to be understandable. If he does not pay attention to these issues, he cannot get the bill right.¹¹⁸ Professor Keith Patchett has suggested that drafters should write in a clear style applying standards of grammar and syntax and addressing the issues clearly. He recommends that drafters should follow the drafting traditions of their jurisdiction relating to form and style of legislation. He advocates for a good presentation laying out a draft that is easy to work with. Visual aids should be made use of to make it easier for users to find their way around the draft. They should use plain language in current use and avoid using complicated sentences.¹¹⁹ Eagleson, a proponent of plain language drafting argue that, "plain language is clear, straightforward expression, using many words as are necessary. It is not baby talk, nor is it a simplified version of the English language."¹²⁰

The plain language concepts promote better legislative drafting in terms of style, using modern language, simple words and shorter sentences as a means of producing quality bills.¹²¹ Despite its admirable and attractive attributes, plain language as a tool for producing quality bills has been criticized by other scholars like, Veda Charrow, Professor Frank Grad, Francis Bennion and others. Professor Frank Grad maintains that

many problems that need legislative solutions are complex and difficult; we need complex language to state problems of the law and facts. The language of the drafter addresses itself to the problem to be solved. If complex prob-

116 Stark, 2012.

117 D. Greenberg, 'The Techniques of Gender-Neutral Drafting', in C. Stefanou & H. Xanthaki (Eds.), *Drafting Legislation: A Modern Approach*, Ashgate, Aldershot, 2008, p. 63.

118 Kobba, 2008.

119 Kobba, 2008, at 221-225.

120 *Ibid.*

121 *Ibid.*

lems require complex language for their resolution so be it. No trained drafter will use complicated forms of expression unnecessarily.¹²²

Section headings can be applied to cross-headings and subsection headings. The positioning of the heading in the margin or in the body of the text significantly affects the comprehensibility or ease of use of the text. The numbering and descriptive labelling of sections was proposed over 150 years ago by Jeremy Bentham and Arthur Symonds. Symonds explicitly encouraged the use of descriptive headings in the form of marginal notes.¹²³ Thring recommends that section headings, when read together in order of the arrangement of sections, should have such a consecutive meaning as to give a tolerably accurate idea of the contents of the law.¹²⁴ There is an assumption in the literature on this topic that the use of section headings can assist primary users to understand the law.¹²⁵ However, Nick Horn points out that there is no evidence as to whether, in practice for any particular law, these techniques significantly help individuals who use the law to generate the meanings intended for the law.¹²⁶

A drafter who produces a draft of law, with no regard for how the reader is satisfied, makes the mistake of making the law without communicating it in an effective manner.¹²⁷ If drafters are to produce quality bills, they need structures and systems that can support the writing of them. If a bill is good, the law will be good. To achieve this Joseph Kobba proposes that:

- A drafter should be recruited, trained and retrained. Training in academic disciplines leading to a professional qualification in legal drafting should be encouraged;
- Other forms of training such as training on the job could form part of the package;
- Workshops and seminars to refresh the drafters will be good;
- Two very important documents should be prepared i.e. the drafting manual and the practice –drafting manual. This will provide for stylistic consistency in form and content of the bill;
- To provide good conditions of service for drafters so that they can be retained and not tempted to leave for greener pastures;
- To demystify the drafting process and open it up to avoid bureaucracies and bottlenecks involved in drafting process;
- To adopt new forms and techniques of drafting that can lead to clarity of the law such as the plain language technique of drafting;

122 Kobba, 2008, at 221-225.

123 N. Horn, 'Legislative Section Headings: Drafting Techniques, Plain Language, and Redundancy', *The Loophole-CALC*, No. 2, April 2012, p. 9.

124 *Ibid.*

125 *Ibid.*

126 *Ibid.* (n 7).

127 D. Greenberg, 'The Three Myths of Plain English Drafting', *The Loophole-CALC*, Special issue, 9 February 2011, p. 103.

- To completely overhaul the drafting systems and to restructure drafting instructions and build the capacity of handling drafting matters completely.¹²⁸

Kobba confirms that whenever these points are put into practice and where adequate attention is paid to the provision, this can lead to improvement in the drafting of bills, and hence the law which enhances fairness and justice in the country. It also improves the capacity of drafters and their skills at the job. It helps them to adopt a good, modern technique in drafting and therefore produce quality bills. Similarly, examples can be used to clarify a particularly complex provision.¹²⁹ If what is wanted are statutes that are clear, simple and precise, then put all concerned in the drafting process.¹³⁰ However, according to the experience of Lionel A. Levert, it is better to adopt for generalist rather than ultra-specialized approach of drafters. Although a certain level of ultra-specialization may be good in some areas of law, like criminal law.¹³¹

III. Challenges Facing Drafters

Legislative drafters have the most crucial role in the whole exercise of drafting of legislation and its making, particularly in terms of making it an efficient legal document. It is said that, "if the law is good, praise the person who brought it and if it is bad, condemn the legislative drafter."¹³² Depending on the jurisdiction the drafter might have detailed or broad instructions. This means that sometimes it is the drafter's responsibility to design appropriate laws. In some jurisdictions drafting instructions are vague, poor, inadequate, unclear or even not formulated at all, thereby inhibiting the drafting of quality regulations.¹³³ The United Nations Institute for Training and Research enumerated challenges facing drafters as follows:

- As experts, drafters are entrusted with the responsibility to interpret and construe the meaning of words in legislative texts;
- Drafters pursue precision and clarity at all cost to make a bill right;
- The training given to drafters, their vast knowledge of a piece of legislation, all these matters place them in a pedestal from which they have to be consulted on policy issues and from which they need to advise and warn;
- Their vital function of concept and the birth of an Act in a language free from ambiguity, transforming government policies into legal effects;

128 Kobba, 2008, at 249.

129 Parliamentary Counsel, 2011, at 23.

130 R. Cormacain, 'A Plain Language Case Study: Business Tenancies (Northern Ireland) Order 1996', *The Loophole-CALC*, No. 2, April 2012, p. 42.

131 Levert, 2011.

132 S. Rani, 'The Role and Efficacy of Legislation', *The Loophole-CALC*, No. 4, November 2011, p. 78.

133 Stefanou, 2008, at 324.

- Government expects that drafters will ensure that a bill as well should not be in any conflict with all existing legislation.¹³⁴

The main cause of imprecision in drafting is not that the drafter cannot find or does not wish to take the trouble to find a precise way of expressing the concept in his mind, but rather that the concept in his mind is not sufficiently precise to allow clear expression. The principal task in drafting is to refine and analyse the policy to achieve a state of clarity in which the words for its expression suggest themselves naturally.¹³⁵ Thus, it is not easy to give an exhaustive account of how legislation should be drafted, not least because of the impossibility of predicting all the difficulties and questions that drafters may face in the course of their work.¹³⁶

Drafters should accept criticism whether made in good or bad faith, because it is an asset for them. They should also attempt to improve the quality of bills. How good will the quality of resultant Act is in practice? Criticism will help the drafter to recognize where there is ambiguity, where wording has deviated from substance and where clarity has been sacrificed to simplicity.¹³⁷ The next section will now look at the fifth and last stage of the drafting process, which is the scrutiny, and testing of the draft.

F. Scrutiny and Testing of the Draft

The fifth and last stage of the drafting process is scrutiny and testing of the bill.¹³⁸ The draft is tested and verified to see whether the text reflects the policy rules forming the basis of the legislative text. In other words, it has to prove whether the drafter has fully complied with the drafting instructions. At this stage, the drafting process takes the form of much revisionary work by the policy makers and drafters. Much consultation now takes place between the instructing officers and the drafters and other interested parties who are most likely to be affected by the legislation.¹³⁹ The draft is properly, seriously and systematically checked by the drafter who cross-checks cross-references, numbering, lettering, defined terms, language, the form and substance of the draft. He also cross-checks to see whether the drafting instructions have been complied with.¹⁴⁰ A drafter who has finished a draft has to check if the assumption is valid and consider the possibility that the draft may need some other modifications. Thus, there is a need for scrutiny and testing in order to increase accuracy.¹⁴¹

134 UNITAR, 2000, at 13.

135 Greenberg, 2008, at 336.

136 Majambere, 2011, at 421.

137 Crabbe, 1993, at 17.

138 Thornton, 1996, at 173.

139 Kobba, 2008, at 241-242.

140 *Ibid.*

141 Stark, 2012.

Policy makers should study the draft and offer comments. This will help to raise problems in the draft so that anomalies can be corrected to improve the quality of the draft bill.¹⁴² The drafter amends draft from time to time to meet certain changes in instructions and it is only settled after repeated revisions when he is satisfied with it in substance, form, language and content. Scrutiny and testing also demand self-discipline and tenacity on the part of the drafter, which strengthens his resolve, to continue to verify and test the draft to its logical conclusion. The drafter should critically and objectively examine the final product for a qualitative assessment. This is where colleagues within the drafting division are allowed to look at the draft and check, criticize and offer valuable inputs that add value to the draft in order to bring out any anomalies, so that gaps in policy or problems in the draft are identified and settled.¹⁴³

The drafter should test the draft by applying it to various circumstances with the instructing officers. The users of the legislation not involved with the draft should also test it. If possible, a small group of potential users of the legislation can discuss the draft and review it. All matters of detail should be checked, including language and grammar, form and structures sections, paragraphs, parts, divisions and definitions to see that conventional practices and principles are correct and consistent with particular jurisdiction under review.¹⁴⁴ Sometimes it is necessary to determine who knows what. Some colleagues will be good at a particular drafting problem, such as constructing appropriations. Others will have a good understanding of a branch of the law, such as a particular constitutional provision. A drafter should not hesitate to draw on colleagues' expertise.¹⁴⁵ After checking for substance to see whether it is perfectly in order the drafter checks for legal form, clarity and comprehensibility. This refers to wide-ranging issues including legal verification. Translating policy into precise norms may introduce new features into the text. Thus, there is a need of verifications of constitutional requirements, and presentation of legislation, using simple, clear words and short sentences. Ordering of provisions logically to facilitate their use and employing the same terms with the same meanings should be consistent throughout the text. After this, the drafter checks for omissions and errors in content, expression of forms and the implementation of the law as fair, just and consistent.¹⁴⁶

In order to achieve the necessary quality, the draft can be sent to the Ministries to obtain their reaction to the provisions that affect them. Scrutiny of the text should be continuous throughout the drafting process as a means of improving clarity.¹⁴⁷ Consultation is held between the drafter and policy makers in order to verify the text. The bill is also tested to see whether the law reflects the policy, the experience and qualification of the policy maker and the drafter are crucial to achieve this. The draft should be scrutinized by the drafting team and other members not involved in the drafting of the text for their own input. Users not

142 Kobba, 2008, at 241-242.

143 *Ibid.*

144 *Ibid.*

145 Stark, 2012.

146 Kobba, 2008, at 241.

147 Kobba, 2008, at 241-242.

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involved in the drafting of the bill should test it to see that it is user friendly. Other Ministries affected by the legislation should also give their input. When this is done, we can be sure that the text will be of quality. Overall, the text should be verified and tested to see that the drafter has got it right.

Discussions within and outside drafting offices can also be very helpful. Sound legislation is further enhanced by help from experts in drafting software, legislative editing, linguistics, law, hard-copy printing and electronic publication. Drafts and other forms of pre-legislative scrutiny can help, for example, scrutiny by executive or parliamentary scrutiny committees and law reform bodies. Clients must, of course, waive relevant legal advice privilege.¹⁴⁸ In some cases, decisions are beyond the control of instructors and drafters (such as decisions of cabinet or ministers). A careful balancing of factors, and good judgment, may help to ensure that the least complex approach is taken when deciding whether that approach is the most appropriate.¹⁴⁹

After the draft has been considered by the main instructing official or officials and as the drafter moves towards an agreed draft, all parties in the government who will be affected in one way or another by the legislation must sit together and comment on the draft. A draft is more likely to achieve quality if all parties have reacted to the draft.¹⁵⁰ Before the draft is given to the client, the drafter must find out whether it achieves the objectives of the instructions. Does the draft harmoniously fit into the general body of the law? Are the basic principles of legality and constitutionality complied with? Is the draft cohesive and well structured, and does the material follow a logical order and sequence? Is the content and language of the draft clear and comprehensible? These are some of the questions to be answered by the drafter himself in self-examination.¹⁵¹ After the conclusion of this long process and after responding to all these questions, the drafter reads the final text and gives it serious thought and consideration as a whole.

G. Conclusion

Reed Dickerson and Charles B. Nutting agree with the five stages of Thornton of drafting process, although they did not name the five stages in the same way as Thornton did. Instead, their structure presents nine general steps, which are divided into two parts,¹⁵² substance and style. They emphasize revision and testing of the law at each stage and turn to ensure that drafters regularly critically assess,

148 R. Carter, "High-Quality" Legislation – (How) Can Legislative Counsel Facilitate It?, *The Loophole-CALC*, No. 4, November 2011, p. 55.

149 Parliamentary Counsel, 2011, at 25.

150 B.H. Simamba, 'Managing Increasing Government Expectations With Respect to Legislation While Maintaining Quality: An Assessment of Developing Jurisdictions', *The Loophole-CALC*, No. 1, January 2009, p. 7.

151 Kobba, 2008, at 241-242.

152 C.B. Nutting & R. Dickerson, *Legislation Cases and Materials*, West Publication, St. Paul, MN, 1977, p. 679.

analyse and evaluate issues, in order to get the law right in terms of quality.¹⁵³ The substance side is divided into the following three steps:

1. What the client wants,
2. Exploring legal situation, and
3. The plan of organization.

On the other hand, the stylistic or composition side is divided into the following five steps:

1. Preparation of the draft,
2. Revision of the draft,
3. Cross-checking,
4. Cross-checking with others, and
5. Polishing the results.¹⁵⁴

The problem with these nine general steps is that there is a confusion regarding the first stage of the composition steps, which is called objectives. This objective is considered by Charles B. Nutting and Reed Dickerson as a stage. Sometimes it is considered as step, at another time it is considered as a simple objective.¹⁵⁵ The Thornton's stages are clearer than the nine general steps of Nutting and Dickerson, but the nine stages are more detailed than Thornton's stages. Joseph Kobba shows that, the way of drafting depends on the drafting tradition of a particular state, for instance a common law tradition or a civil law tradition. However, there are also some other examples, like Rwanda or Canada, which draft using mixed system. Though the mode and style of drafting are not uniform but it is advisable to have consistency of practice within a particular jurisdiction. On the whole, when the drafting process is divided up into five stages, this is a sure way of testing the policy, helping to refine it to ensure a better sense of how the proposed scheme works in practical terms.

Whether in centralized or decentralized drafting systems, large or small jurisdictions (examples of Sierra Leone with the study of Joseph Kobba and Rwandan case from interview conducted for this work); Thornton's five stages of drafting are very important and helpful in the drafting process, in a way that they provide at the same time the theoretical and practical method of drafting legislation. Joseph Kobba's study shows that in Sierra Leone, quality bill cannot be produce because they have failed to adhere to the Thornton's five stages of drafting. Thus, applying the Thornton five stages of the drafting process can help to produce quality legislation in Sierra Leone. In interview with Rwandan drafters from five different key legislative institutions shows that the Rwandan Jurisdiction is

153 Kobba, 2008.

154 Nutting, 1977, at 676; R. Dickerson, *The Fundamentals of Legal Drafting*, Little Brown and Company, Boston, MA, 1965, p. 37; S. Robinson, *Drafting: Its Application to Conveyancing and Commercial Documents*, Butterworths, London, 1980, p. 23.

155 Nutting & Dickerson in their book '*Legislation Cases and Materials*' on p. 675, showed that the second steps of composition or style is composed with five separate steps, but in the book of Dickerson, *The Fundamentals of Legal Drafting* on pp. 42-44, they included objectives as a step for that reason steps became six. This brings confusion in those steps because sometimes they are five sometimes they are six. There is problem of understanding whether they are six or five, in the same logic; this brings another confusion of general steps whether they are nine or eight.

hybrid (civil law and common law) with a decentralized drafting process. Thornton five stages are not recognized and used as enumerates by Thornton. Analysis of Rwandan drafting process reveals that the five Thornton stages are not applied systematically. Instead the Rwandan processes a scattered procedure with some stapes comparable or resembles to Thornton's stages. It was found from the interviews that consultants, legal officers or legal drafters first to endeavour to understand the proposal, then analyse, design, compose, develop, scrutinize and finally test the draft. In Rwanda, most government and private members bills are drafted by consultants, helped by legal officers or legal drafters (where they exist)¹⁵⁶ from the institution that is sponsoring that law. Consultants need not have any training in legislative drafting because they are experts in drafting. However today there are many reforms so that drafting be done by the Drafters. This is why adopting Thornton's five stages can help to produce quality in legislation.

The decentralized Rwandan institutions involved in the drafting process are working hard to produce quality legislation, but the guiding ministerial instructions relating to the drafting¹⁵⁷ are not enough to help drafters to produce quality legislation. If they used Thornton's five stages, to strengthen them, it would be very easy to achieve quality in legislation because the Thornton's structure is presented in a sequential and logical manner. The drafter understands, analyses, designs, composes, develops, scrutinizes and finally he tests the draft. However, some stages are very similar which may make it difficult for someone to differentiate between them. For example, the first two stages are very similar, since at the same time as analysing a proposal, the drafter understands it, and vice versa. Likewise, the third and fourth stages are very similar and simultaneous, because at the same time as designing the draft he composes and vice versa.

The drafter's role is to be creative and positive, make constructive comments and contribute to the achievement of the policy objectives, by providing a professional service.¹⁵⁸ He must have skills and knowledge not generally possessed by policy makers, be an architect of social structures, an expert in the designing of frameworks of collaboration for all kinds of purposes, a specialist in the high art of speaking to the future, knowing when and how to try and bind it and when not to try at all.¹⁵⁹ A quality draft bill produces quality legislation. This is important, as quality legislation is efficient and effective. It attains proportionality and subsidiary, it is fair and just, it enhances economic development in all sectors of the country.¹⁶⁰

156 The term Legal Drafter in Rwandan legislative process is new, it was adopted in order to harmonize the legislative process with East African Community (EAC), since Rwanda interred in the community and undertook some reforms in different sector including legislative sector. Currently in Rwanda there are different trainings of legal drafters and legislative institutions in general.

157 Instructions of the Minister of Justice No. 01/11 of 14 November 2006 relating to the drafting of the texts of laws.

158 Thornton, 1996, at 126.

159 *Ibid.*

160 Kobba, 2008.

In order to produce quality law, it is advisable to adopt Thornton's five stages of the drafting process, because they present a practical and logical structure that guides a drafter while drafting. Drafters have to adopt modern tools, such as the plain language technique of drafting. Drafters need time and logical supports in the all drafting process. He needs a very high level of technical skills to enable him to:

- find clear, simple and precise language suitable for the intended audiences;
- conform to the appropriate style for the particular instrument type;
- establish the necessary harmony, both formal and substantive, between the new provisions and others, both within and outside the instrument being drafted;
- ensure the equivalency of various language versions.¹⁶¹

It is necessary for legislative drafting to be taught in law schools, because there is a lack of awareness among law graduates of legislative drafting as a viable career option.¹⁶² There is a growing awareness of their role and importance for instance, in Rwanda, where the Law Review Commission (recently elaborated) intends to revise many laws. A drafter's first responsibility is to produce a legally effective law that achieves the policy goals of the instructors. Drafters are also responsible for ensuring that the law is clear and concise. One way this can be achieved is by adopting a coherent drafting approach. As the Plain English Manual says, this is the style used when you deliberately state the law in general principles and leave the details to be filled by delegated legislation or in some other way.

Drafters can avoid additional complexity by ensuring that they have a strong understanding of concepts that they are working with, either in drafting a new principal law or in amending an existing one. It is also important for drafters and instructors to keep an open mind when reading their draft to ensure that the concept is well defined. Having others, who have not been so closely involved in the project, read a draft can also bring fresh views to ensure that concepts are defined properly.¹⁶³ Drafters must identify the real purpose of a provision and the role of a particular concept or provision before accepting that it will be included in the draft. It is also important for a drafter to consider a proposed provision in the context of the relevant section.¹⁶⁴ Once a policy decision has been made to include a specific rule for a particular case, or to include an exception to a main rule, the decision for the drafter becomes one of determining how to draft the provision in the simplest way.

The drafter needs to consider whether the specific rule or exception needs its own section or division, and where best to place the specific rule or exception, in a way that does least damage to the main rules. The Act might need some additional structure to be imposed in order to deal with the new rules. For example, it might be best to divide a part, that previously had no divisions, into divisions, so

161 Markman, 2011, at 7.

162 E. Appiah, 'Training and Development of Legislative Counsel in Commonwealth Africa – The Way Forward', *The Loophole-CALC*, No. 4, November 2011, p. 86.

163 Parliamentary Counsel, 2011.

164 *Ibid.*

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that one division can deal with the main rules and another deal with the specific rules or exceptions.¹⁶⁵

In order to meet the needs of clients, the legislative drafter must focus on the ultimate user of a text, which is usually judges, but sometimes the public or others. For this reason, he needs to be alert to the dangers of negligence or oversight.¹⁶⁶ He is required to write with clarity, precision and consistency so that the will of the executive, as translated by the legislature, promotes democracy and enhances the well-being of society, ensuring that legislation is drafted in such a way that government conducts government business without ambiguity and abuse of power. The legislative drafter must be well trained to draft legislation in a precise and consistent manner. This requires the ingenious use of language in the context of the law, particularly in the construction of legislative sentences that succinctly convey the meaning of the law in such a way that those for whom it is intended will understand it and that duty bound to implement it will not misinterpret it. Drafters must have the ability to use of the language of legislative instruments because drafting is a highly technical discipline. Experience in legal practice is desirable, a systematic mind and orderliness in the formation of thoughts, the ability to pay meticulous attention to detail and to work with accuracy under pressure. Necessary qualities include the ability to work with colleagues and others skilled in different disciplines. Senior legislative drafters are generally submerged in their own work and therefore do not have sufficient time to teach on the job.¹⁶⁷ Common sense, social and economic awareness are essential. To these must be added a sense of humour. A drafter must also cultivate an altitude of rigid self-criticism. He must remember at all times that what seems perfectly clear to him may not be equally clear to the person who reads a piece of law. The measure of his ability is his success in giving little room for doubt and ambiguity.¹⁶⁸

In order to produce quality legislation, drafters need undergraduate law training, followed by specialized postgraduate training in legislative studies, combined with hands on experience in a drafting office with an experienced senior drafter. That level of specialization and length of training time is necessary for drafters to acquire all the skills needed.¹⁶⁹ During the drafting process, access to fine library is highly desirable. It is a great advantage to have different books available that can help in drafting. Every drafting office needs a practice or style manual and a mechanism to keep it under review. The production of a manual requires a careful and critical review of existing practices and this exercise is itself likely to result in improvements. The existence of a practice or style manual promotes stylistic consistency within a jurisdiction, which is helpful. An established procedure for shar-

165 *Ibid.*

166 D. Bellis, 'The Role and Efficacy of Legislative Drafting in the United States: An Update on the American Drafting Process', *The Loophole-CALC*, No. 4, November 2011, p. 14.

167 Appiah, 2011, at 81.

168 Crabbe, 1993, at 16-17.

169 Xanthaki, 2011.

ing experience and knowledge can contribute significantly to both the effectiveness and satisfaction of the drafting institutions.¹⁷⁰

Every legislative drafter should strive to achieve a law that is people oriented. The idea is to serve by extending legislative benefits to them in the best possible manner. Drafting is not a simple transcription or translation of administrative or executive guidelines, but is the command of legislative intent. It is a mixture of vision, mission and design, which brings out a workable proposition considering the background of a problem and foreseeing the ramifications of the legislative action. Drafting always supposes precision, brevity and clarity.¹⁷¹ Drafting should be compared to a focus of technical knowledge of a special kind that put together minds to produce a unity of thought enunciated as a command. It can constantly draw its audience to the ideals behind the policy decisions that motivate legislation.¹⁷² In the same way, drafting offices should adopt sound teamwork approaches and make sure they can maximize some of the positive impacts of these approaches on other key aspects in the drafting environment.¹⁷³ In each system and size of the Jurisdiction, in order to achieve high drafting standards there is a need for common understanding of the overall forms and shape of the translation of policy into law.

170 Thornton, 1996.

171 Rani, 2011.

172 UNITAR, 2000, at 25.

173 Levert, 2011.