

Quality of legislation: an achievable universal concept or a utopian pursuit?

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Choosing sides in the dilemma of realism versus utopia of the concept of quality in legislation is not a simple matter. The practice of drafting legislation extends to a wealth of experience spreading over thousands of years in time, hundreds of countries in geographical space, and hundreds of legal systems of all known families of laws. Yet this richness of tradition, this repeated Tantalian trial and error over many years and through all known ideologies, philosophies, cultures, and laws has, in practice, failed to yield wisdom on quality of legislation. What is it that makes a law "good"? What elements can be duplicated in order to recreate, again and again, on request, laws that prescribe by an accepted threshold of quality?

When trying to identify the elements of good laws, one may resort to the many widely accepted rules and conventions of drafting. These are included in lists, albeit non exhaustive, of models available to drafters in the form of manuals. It would be feasible for a group of experts to collect as many rules and conventions as possible, dig out those that are common across borders, and declare them as models for quality in legislation. But, although one can indeed identify a great number of manuals in legislative drafting, and identify commonly shared rules and conventions, these rules cannot be baptised elements of quality. Judged against the results that they have yielded in their rich past, these manuals can only be viewed as compilations of good practice that may, when everything else is right, lead to the production of good law. In other words, most manuals repeat the same basic principles, they offer similar examples of bad practices and best practices, but at the end of the day legislation produced on their basis continues to fail to always reach high standards even when all these conventions are adhered to.

But, if non application of the common wisdom of drafters and law makers is not to blame for bad laws, at least not exclusively, then what is the problem? Could it be that the nature of these rules is such, that their unfailing application does not guarantee quality in legislation? In other words, could it be that drafting rules and conventions differ from natural laws? That they are not appropriate for blind application, without exception? And that therefore the list of rules and conventions that we hold sacred in our drafting manuals are inappropriate as elements of quality in legislation?

The hypothesis of this paper is that a functional definition of quality of legislation renders it a realistic, and indeed universally applicable, concept within phronetic¹ legislative drafting. In other words, within the realm of legislative drafting as phronesis, rules and conventions only serve as a selection of tools which can be chosen by the subjective learned drafter in order to produce good laws. Since the rules and conventions of phronetic legislative drafting cannot possibly be applied with the rigidity and teleogenesis or inexorableness of rules of epistemic disciplines, promoting them to elements sine qua non of the concept of quality in legislation is an unfortunate logical faux pas. Elements of a concept cannot possibly carry such a degree of flexibility and subjectivity that their semantic field lacks stability of meaning. And even faithful duplication of the application of such rules can never lead to certainty in the quality of the resulting law. In phronetic legislative drafting repetition of application of the same rule can produce, by definition, variable results.² First, the subjectivity of the recreation of the application by the drafter entails variable success in the identification of the precise same set of circumstances as the original environment. And this weakness can be viewed either as possible or, perhaps rightly so, as inherent in the task of drafting legislation: can the legal and legislative environment ever be the same? Second, the alleged repetition of the application of the same rule entails variable success in the subjective judgement of the appropriateness of the rule per se, but also of its promotion as the best, amongst other more or less suitable, tool. In phronetic legislative drafting the process of drafting via the repeated application of the same rule or convention carries no guarantees of duplication of results. Since the legislative environment is by definition fluid, dynamic, and complex, the lab within which the legislative experiment takes place cannot remain identically the same. Moreover, since the correlation of rules and conventions at any given time is unstable, even within the same moment in time and at the same space, the mathematical formula promoted by the subjective researcher cannot remain identical to the original one. But if the lab environment changes, and the formula is variable, how can one possibly expect predictable results?

The placement of rules and drafting conventions within a realm of phronetic legislative science reveals their subjectivity and an unfortunate dependence on a myriad of variable external factors. In fact, placing them within a phronetic approach to legislative drafting deprives rules and conventions from credibility as elements of quality. Rules and conventions simply fail to serve as lists of practices that will predictably result to good laws. And thus, these rules and conventions cannot be considered as *conditio sine qua non* of what is a good law.

The nature of legislative drafting

But is drafting really phronetic? Is this classification of legislative drafting as phronetic a plausible alternative to the art versus science pseudo-dilemma?

¹ In the sense of Flyvbjerg's phronetic social sciences paradigm. See B. Flyvbjerg, *Making Social Science Matter: Why Social Inquiry Fails and How it can Succeed Again* (2001, Cambridge University Press, Cambridge).

² Aristotle, *Statesman*, 294b-295b.

For Aristotle³ all human intellectuality can be classified as⁴ science as episteme; art as techne; or phronesis⁵ as the praxis of subjective decision making on factual circumstances or the practical wisdom of the subjective classification of factual circumstances to principals and wisdom as episteme.⁶

Science carries with it universality,⁷ teleogenesis, and predictability: if a heavy object is to be dropped from the top floor of a tall building, it will definitely head down. If drafting were to be viewed as a science in its positivist sense, then the correct application of a widely agreeable list of drafting rules and wisdoms would definitely lead to repeated quality in the end result. But drafting is not a science,⁸ and its rules are simply not rigid. In fact, rules of law may well be universal but they do not apply with infallibility. “All law is universal but about some things it is not possible to make a universal statement which will be correct... the error is not in the law nor in the legislator but in the nature of the thing”.⁹ Using the term “shall” may be an abomination for those of us who avoid ambiguity, but it would be rather misguided to reject the use of the term rigidly: it may well be that “shall”, ambiguous as it is, would be understood better, and therefore be more effective, in amendments of archaic laws where the term is used repeatedly to signify “must”; here, using the term “must” in conjunction with the existing “shall” would create the legitimate impression to the user that the meaning of “shall” and “must” is somewhat different.

But accepting that drafting cannot be regulated by rigid inexorable rules cannot be taken to the extreme of seeing drafting as an art. Art is know-how associated with practicing an art.¹⁰ Art tends to lack any sense of rules. In the pursuit of aesthetic pleasure, art uses whatever tools are available. Art is anarchic. But drafting is not. Of course its rules are not rigid, but they are present. General principles form a theoretical background against which legislative drafting develops¹¹: theories or principles in drafting carry a degree of relative predictability since the latter is one of the six elements of theory.¹²

So, the debate between drafting as art¹³ or a quasi craft¹⁴ and drafting as science¹⁵ or technique¹⁶ seems to be false. It ignores relativity as the essence of legal science. Law, and consequently drafting as its discipline, is not part of the arts, nor is it part of the sciences¹⁷ in

³ Aristotle, *Nicomachean Ethics*, bk VI, chs. 5-11 (D. Ross trans. 1980).

⁴ M. Griffiths and G. Macleod, “Personal narratives and policy: never the twain?” [2008] 42 JPE, pp.121-143, at 126.

⁵ Aristotle, *Nicomachean Ethics*, bk VI, chs. 5-11 (D. Ross trans. 1980).

⁶ S-U von Kirchmann, *Die Werlosigkeit der Jurisprudenz als Wissenschaft* (1848, Verlage von Julius Springer, Berlin).

⁷ See B. Caterino and S. F. Schram, “Introduction” in S. F. Schram and B. Caterino, *Making Political Science Matter: Debating Knowledge, Research, and Method* (2006, New York University Press, New York), pp.1-13, at 8.

⁸ See contra B. G. Scharffs, “Law as craft” 54 Vand L Rev [2001] pp. 2243-2348.

⁹ Aristotle, E.N., 5.10.1137b13-24.

¹⁰ See B. Caterino and S. F. Schram, op.cit., p.8.

¹¹ I. Zajtey, “Immutability of rules and principles of legal development: The permanence of Roman Law concepts” in V. Gessner, A. Hoeland, C. Varga (eds.), *European Legal Cultures* (1996, Dartmouth, Aldershot-Brookfield USA-Singapore-Sydney), pp.67-68, at 67.

¹² See B. Flyvbjerg, *Making Social Science Matter: Why social inquiry fails and how it can succeed again*, (2001, Cambridge University Press, Cambridge), p.39

¹³ G. Bowman, “The Art of Legislative Drafting” [2005] EJLR, pp.3-17, at 3.

¹⁴ B. G. Scharffs, “Law as Craft” [2001] 45 VandLRev, pp.2245-2348, at 2339.

¹⁵ See contra Editorial Review, 22 [1903] Can. L. Times, pp.428-440, at 437.

¹⁶ See contra J-C Piris, “The legal orders of the European Union and of the Member States: peculiarities and influences in drafting” [2006] EJRL, pp.1-14, at 1.

¹⁷ For an analysis of the contra argument on law as a science, see M. Speziale, “Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory” 5 [1980] Vt. L. Rev., pp.1-38.

the positivist sense.¹⁸ Law and consequently drafting is neither episteme nor techne. It is phronesis, an art science, with principles and rules that may well apply, but only in principle. It goes beyond analytical scientific knowledge (episteme) and know-how (techne), and it involves judgements and decisions made “in the manner of a virtuoso social actor”.¹⁹ Virtuosos do not apply rules: they act on the basis of a holistic understanding of nets of rules that require proficiency.²⁰ This is undertaken within the realm of Wintegen’s legisprudence as a theory of law.²¹ In other words, law, and consequently drafting, is a liberal discipline where theoretical principles guide the drafter to conscious decisions made in a series of subjective empirical and concrete choices. Drafting as phronesis is “akin to practical wisdom that comes from an intimate familiarity with contingencies and uncertainties of various forms of social practice embedded in complex social settings”.²² In other words, the art of drafting lies with the subjective use and application of its science, with the conscious subjective Aristotelian application and implementation of its universal theoretical principles to the concrete circumstances of the problem.²³

Law as phronesis encourages continued uniform application, and thus supports certainty and the rule of law in the civil law tradition. Law as phronesis supports prudence or appropriateness, and hence *stare decisis*, in the common law tradition. Phronesis can serve as a concrete guide to anyone wishing to ameliorate justice by urging the subject to answer the following questions: where are we heading to? Who wins and who loses, and by virtue of what mechanisms? What are desirable consequences? What can be done on this topic?²⁴ Phronesis supports probabilistic reasoning, as opposed to deductive reasoning, which can be defined as the selection of solutions made on the basis of informed yet subjective application of principles on set circumstances.²⁵ Phronesis is “practical wisdom that responds to nuance and a sense of the concrete, outstripping abstract or general theories of what is right. In this way, practical wisdom relies on a kind of immediate insight, rather than more formal inferential processes”.²⁶

Being aware of these principles, the drafter has to decide in a conscious and informed manner, how to apply them to the concrete future choices²⁷ that form part of their trade. And this can only be done if the drafter is aware of the theoretical principles that need to be applied, and of their hierarchy in the pyramid of principles.²⁸

Drafters pursue the following pyramid of virtues:²⁹

¹⁸ See R. R. Formoy, “Special Drafting” 21 [1938] *Bell Yard: J.L. Soc’y Sch. L.*, pp.3-4, at 3; but see contra C. Langdell, “Harvard Celebration Speeches”, 3 [1887] *LAW Q. Rev.* 118-128, at 123-124.

¹⁹ See B. Flyvberg, “E peresroikan straw man answers back” in B. Caterino and S. F. Schram, op.cit., pp. 56-85, at 68.

²⁰ See L. P. Thiele, “Making intuition matter”, in B. Caterino and S. F. Schram, op.cit., pp. 188-206, at 188.

²¹ See L. J. Wintgens “Legisprudence as a New Theory of Legislation” 19 [2006] *Ratio Juris*, pp. 1–25.

²² See B. Caterino and S. F. Schram, “Introduction” in S. F. Schram and B. Caterino, op.cit., p. 8.

²³ W. Eskridge Jr., “Gadamer/Statutory interpretation” [1990] 90 *ColumLRev*, pp.609-681 , at 635.

²⁴ M. Deschamps, “L’acces a la justice, l’affaire de chacun” [2009] 50 *Cahiers de Droit*, pp.248-258, at 253

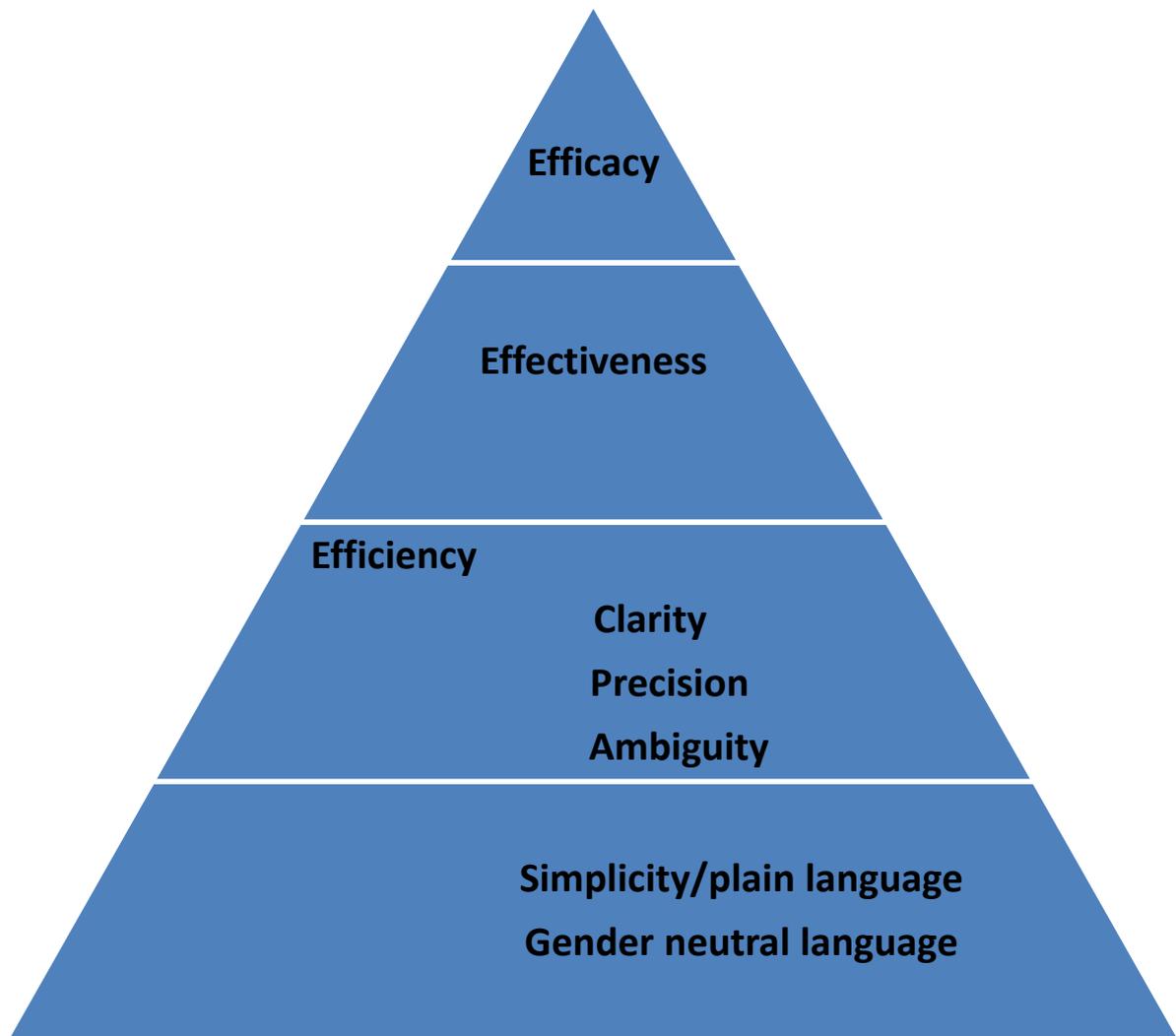
²⁵ E. Engle, “Aristotle, Law and Justice: the tragic hero” [2008] 35 *NKyLRev*, pp.-17, at 4.

²⁶ C. Rideout, “Storytelling, narrative rationality, and legal persuasion” [2008] 14 *Legal Writing: J. Legal Writing Inst.*, pp.53-86, at 75.

²⁷ See Curtis, “A Better Theory of Legal Interpretation” 3 [1950] *VAND. L. Rev.*, pp.407, at 423-24.

²⁸ See Helen Xanthaki, “Drafting manuals and quality in legislation: positive contribution towards certainty in the law or impediment to the necessity for dynamism of rules?” [2010] 4 *Legisprudence*, pp.111-128.

²⁹ See H. Xanthaki, “On transferability of legislative solutions: the functionality test” in Constantin Ste-fanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach – in Memoriam of Sir William Dale*, (2008, Ashgate-Dartmouth, Aldershot), pp.1-18.



Take for example, the notorious question of limits in the extreme use of plain language: do we need to substitute the term “mens rea” in modern English in rules of criminal procedure or criminal evidence? If one refers to the hierarchy of principles in drafting, then plain language is clearly a tool for clarity: thus, since the term “mens rea” is clear to lawyers and judges as the main users of rules of criminal evidence or criminal procedure, plain language bows down to clarity, and there is no need for a substitution of the term with its plain language equivalent. Moreover, the introduction of a new term may distort clarity and hence effectiveness of the new legislation. Another example of another notorious question: what happens in the event of a clash between clarity and precision? Simply, in application of the pyramid, the criterion of choice is effectiveness: since clarity and precision are in the same grade of the pyramid, the drafter will need to select whichever one of these two principles serves effectiveness best.

Phonetic legislative drafting does not ignore the elements of art and science identified within the discipline. It merely focuses on the subjectivity of prioritisation in the selection of the most

appropriate virtue to be applied by the drafter in cases of clash between equal virtues. But subjectivity is not anarchic: it is qualified by means of recognising effectiveness as the sole overriding criterion for that choice.

What is quality in legislation?

If the current lists of drafting rules and conventions cannot adequately serve as elements of quality in legislation, how can one define the concept of quality? It has now become obvious that this is not a matter of agreeing or disagreeing in the components of an empirical or technical definition. If the fault lies with the subjective and inexorable nature of drafting rules, then we need to review our approach to quality by seeking its definition on a non technical, non empirical nature.

In a search for a qualitative definition of quality in legislation, one can resort to functionality. If legislation is a mere tool for regulation, and indeed a tool only to be used if everything else will fail,³⁰ then a good law is simply a law that, if it enjoys support and cooperation from all actors in the legislative process,³¹ is able of producing the regulatory results required by policy makers. In other words, a good law is simply a law that is capable of achieving the regulatory reform that it was released to effectuate or support.³² A good law is one that is capable of leading to efficacy of regulation. There is nothing technical at this level of qualitative functionality: what counts is the ability of the law to achieve the reforms requested by the policy officers. And, in view of the myriad of parameters that are unique in each dossier, there are no precise elements of quality at this level. If anything, this qualitative definition of quality in legislation as synonymous to effectiveness respects and embraces the subjectivity and flexibility of both drafting rules and conventions and, ultimately, of phronetic legislative drafting.

But does the qualitative functional approach to the definition of quality in legislation signify that everything goes? The answer is of course negative: legislative drafting is phronetic, it is not art. In phronetic legislative drafting one must be able to identify basic principles which, as a rule, can render a law good. Cost efficiency, clarity, precision, and unambiguity are such principles: when applied, at least in the majority of cases, they lead to good laws. But, at the end of the day, each dossier carries subjective choices for the drafter, choices made on the basis of the ultimate functional test: effectiveness. What makes a law a good law therefore is the ability of the drafter to use the criterion of effectiveness consciously and correctly. What is correct application of the effectiveness criterion is a matter of debate and deliberation within the drafting team: after all, even drafters are human. Perhaps this is the beauty of a drafter's trade: there are no safety nets, no walls to hide one's nudity before the cruel sword of the end result.

³⁰ See S. Weatherhill, "The challenge of better regulation" in S. Weatherhill (ed.), *Better Regulation*, (2007, Hart, Oxford and Portland, Oregon), pp.1-19, at 19.

³¹ See J. P. Chamberlain, 'Legislative drafting and law enforcement' 21 (1931) *Am.Lab.Leg.Rev.* 235-243 at 243.

³² See L. Mader, 'Evaluating the effect: a contribution to the quality of legislation' 22 (2001) *Statute Law Review* 119-131 at 126.

Is quality universal?

But, if one defines quality as effectiveness, does one subject quality as a concept to a fate of isolated subjectivity, relativity, and ultimately national eccentricity? Does a functional approach to quality tie it down to a national context [a national legal system, a national legislative environment, and a national regulatory agenda]? Does it deprive quality from transferability? And, ultimately, from universality?

The universality of quality in legislation is linked to the universality of legal rules. If one follows the view that legal systems, despite their national eccentricities, can learn from each other³³, then the question here is not if quality is transferrable but how. Watson³⁴ claims that legal rules are equally at home in many places, irrespective of their historical origins and connection to any particular people, any particular period of time or any particular place.³⁵ Others qualify Watson's anarchic borrowing from anyone and anywhere with the qualifier that like must be compared with like,³⁶ namely with countries in the same evolutionary stage.³⁷ Others allow transferability on the basis of differences, as only differences enhance our understanding of law in a given society.³⁸

Jhering, Zweigert and Kötz³⁹ view the question of comparability through the relative prism of functionality.⁴⁰ For them transferability is not a matter of nationality, but of usefulness and need.⁴¹ It is precisely this notion of functionality that supports transferability on the basis of effectiveness.⁴² The objective of a good law is to effectuate adequate reform along the lines requested by the government of the day. If the reform requested applies to more than one jurisdiction, then the notion of effectiveness breaks the geographical boundaries of a single jurisdiction. And transferability is not only possible, but also desirable. In the current

³³ See P. de Cruz, *Comparative Law in a Changing World* (2007, Routledge-Cavendish, London and New York), pp.513-514; also see E. Öcürü, "Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition" [2000] 4 *Electronic Journal of Comparative Law*, <http://www.ejcl.org/ejcl/41/art41-1.html>

³⁴ For an analysis of the term see E. Öcürü, "Critical Comparative Law: considering paradoxes for legal systems in transition" in [1999] 59 *Nederlandse Vereniging voor Rechtsvergelijking*; also see E. Öcürü, "Law as Transposition" [2002] 51 *ICLQ* 205-223, p.206.

³⁵ See A. Watson, "Legal Transplants and Law Reform" 92 [1976] *LQR* 79, at 80; also see A. Watson, *Legal Transplants: An Approach to Comparative Law* (1974, Scottish Academic Press, Edinburgh); Alan Watson, "Legal transplants and European private law", *Ius Commune Lectures on European Private Law*, no 2.

³⁶ See H. Gutteridge, *Comparative Law* (1949, Cambridge University Press, Cambridge), p.73; also see Buckland and McNair, *Roman Law and Common Law* (1936, Cambridge University Press, Cambridge).

³⁷ C. Schmidhoff, "The Science of Comparative Law" [1939] *Cambridge Law Journal* p.94, at 96.

³⁸ See F. Teubner, "Legal Irritants: Good faith in British law or how unifying law wends up in new divergences" [1998] 61 *MLR* 11; also see JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (1996, Clarendon Press, Oxford), p.16.

³⁹ See Zweigert, K. und H. Kötz, *Einführung in die Rechtsvergleichung*, 3. neubearbeitete Auflage (1996, J.C.B. Mohr, Tübingen).

⁴⁰ See K. Zweigert and K. Sier, "Jhering's influence on the development of comparative legal method" [1971] 19 *Am.J.Comp.Law* 215-231.

⁴¹ See K. Jhering, *Geist des römischen Rechts* (1955, Volume 1), pp.8-9.

⁴² For an analysis of functionality in legislative drafting, see Helen Xanthaki, "Legal transplants in legislation: defusing the trap" 57 [2008] *International and Comparative Law Quarterly*, pp.659-673.

era of integrative legal globalisation⁴³ transnational problems require urgent transnational solutions. Nowadays integrative transnational approaches seem to be no longer a luxury but a realistic response. Trade in human organs, organised crime, terrorism, paedophilia cross national borders and therefore require a-national solutions. Borrowing laws already applied elsewhere simply offers the drafting team the opportunity to propose and apply policy and legislative responses with unprecedented insight to the possible results to be produced.

The pyramid of virtues pursued by the drafter promotes effectiveness as the common highest pursuit for drafters, while allowing them to select the most appropriate tools within the constitutional, political, legal, and cultural constraints of the specific society at the specific time. Thus, the qualitative functional definition of quality reflects the integrative nature of our era of globalisation, while emphasising the need for naturalisation of legislative concepts. As a result, it promotes true universality rather than superficial standardisation. Diversity in drafting does not signify drafting nationalism. It is simply a reflection of the inherent subjective prioritisation of drafting virtues within the same hierarchical step to the ladder, based solely on national eccentricities, rather than an alleged rigid and rigid civil versus common law divide. But if common versus civil law barriers are demolished, what is it that explains diversity of drafting styles and choices?

If one views drafting as a series of subjective choices, what explains diversity of law as the product can only be diversity in the factors that influence these choices. The nature of the legal system is one, but only one of those influencing factors. But what shines through diversity is universality,

- In the concept of quality of legislation;
- In the virtues that contribute to quality; and
- In their hierarchical classification.

After all, in the sphere of Aristotelian phronesis virtues are moral universals that are indeterminate. Thus phronetic drafting involves the virtue of effectiveness as a moral universal. Effectiveness as a virtue is indeterminate. But, like all phronesis, drafting includes a mental-moral habit which, by mediating universals in the particular case, makes them determinate.⁴⁴ Thus, effectiveness as quality in legislation is universal and as such indeterminate. In order to attribute to it specific elements one needs to place it within the context of legal system, culture, legislative environment, and policy.

Conclusions

The aim of all drafters and law makers, irrespective of their legal tradition of origin, is ultimately the production of legislative texts that are capable of producing the desired regulatory results, as these are dictated by the policy makers of the government. The universality of this approach can be applied to produce a functional definition of quality of legislation: quality of laws signifies ability to produce the regulatory reforms required by the policy makers. Quality is effectiveness. Effectiveness may lead to efficacy if all actors in the policy and legislative processes cooperate harmoniously, and thus the regulatory reform actually does take place. But a drafter alone cannot achieve, nor indeed aspire to, efficacy.

⁴³ See L. A. Mistelis, "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations" 34 [2000] 3 *International Lawyer* 1059.

⁴⁴ J. Dunne, *Back to the Rough Ground* (1993, University of Notre Dame Press, Notre Dame), p.311.

Quality as effectiveness is a qualitative concept. There are no concrete parameters and rules that will always lead to effectiveness with persistence and infallibility. This is because the legal, political, social, and financial parameters which form the legislative environment are so varied, that duplication or reproduction of the exact same environment is simply impossible. But legislative drafting is not anarchic. Drafting is not an art. It is not a science either. And so rules of drafting are to be perceived as virtues to which a drafter can aspire, and which can result to effectiveness, if and when the drafter's subjective choice to apply them in the current legislative circumstances is indeed appropriate.

Drafting is phronesis. Drafting entails the application of drafting rules and conventions where appropriate. Appropriateness is proven via tests of application of the law against results produced: this is where post legislative scrutiny comes into play.

Is quality of legislation an achievable concept? Effectiveness is achievable. Where the drafter's subjective choices take place appropriately and within an appropriate legislative environment, the law can produce the required results and reforms. Is quality a universal pursuit? Well, if one uses the qualitative and functional definition of quality, yes, quality is universal. Drafters seek to produce reforms: legislation is a tool for regulation. This approach prevails both in the civil and the common law worlds. And clarity, precision, and unambiguity are virtues to which drafters aspire universally. Of course, the prioritisation of clashing or intertwined virtues when drafting legislation differs on the basis of national intricacies and eccentricities, one of which is the family of law within which the drafter drafts. But, this type of prioritisation is simply one more variable within which the drafter makes choices, within which the drafter applies their phronesis.

Drafting is phronetic. Effectiveness is the ultimate pursuit, and the ultimate criterion of quality. Quality is effectiveness. And quality is a universal concept. And it is by no means utopian.