



# Legislative drafting: a new sub-discipline of law is born

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It is rare that at this day and age an academic can witness, and narrate to others, the birth of a new sub-discipline. Much more so when this does not refer to a science-oriented area of research, which may well be justified by a possible development of brand new technology. Yet, at the Sir William Dale Centre for Legislative Studies, we have observed the birth of a new sub-discipline of law: legislative drafting.

Until recently legislative drafting was viewed as a mere skill, normally and mostly, served by government lawyers. The idea was that the drafting of legislation was nothing more but know-how learnt via mentoring by brilliant lawyers whose job was to basically switch the table round from the normal lawyer's task of statutory interpretation of existing legislation to the extra-ordinary task of drafting legislation with a vision on how this would be interpreted by the others. But things have changed. Legislation became the focus of regulation, replacing the common law in the preference of regulators. There are a number of possible causes for this phenomenon: the Europeanisation of law offered common law systems the opportunity to appreciate more the feared statutory law; legal globalisation led to an emphasis on international statutory law (treaties etc.) that required national implementation via national statutory law; and finally the realisation that regulation was passed for the purposes of achieving measurable results led to the inevitable [and not always fortunate] use of statutory law as a method of regulation. Whatever the reason behind the sudden popularity of statutory law, the fact remains that it invited a detailed study of statutory law from its conceptualisation to its implementation. And so the drafting of legislation became a rather exciting task. Far from carrying the image of a stiff, stuffy, and dusty lawyer buried under an even dustier pile of paperwork, the image of the drafter, at least in the UK, seems to have changed to that of clever, knowledgeable, even fun- and people-loving lawyer, who is at the top of their game having managed to succeed in the fierce competition for entry to one of the best respected "clubs" in the civil service.

And those of us who, for whatever reason, got caught in the net of research in legislative drafting are beginning to be, long and behold, proud to explain to colleagues what our field of interest is, rather than hide behind the allegedly more acceptable terms of law reform and statutory interpretation.

And all this buzz seems to be creating a dynamic process with new doctrines, new questions, new answers in the field. Some have been there for a while, others are being introduced or are being borrowed and applied by other disciplines of law and other social sciences. So, is there a new discipline? And what is its place in the study of law? And what is its main philosophy? And what are its main elements?

## **The concept of legislative drafting and its place in the study of law**

Legislative drafting is the process of constructing a text of legislation. The classification of a form of text of binding value as legislation is outside the scope of legislative studies: it is a constitutional issue. Legislative drafting must be distinguished from legal drafting, which involves the construction of a text used in the judicial process. And it is a narrower concept to the civil law equivalent of law-making: law-making encapsulates the whole process of conceptualisation of legislation until its very implementation and thus reflects the legislative process, whereas legislative drafting reflects the drafting process only. But of course this does not mean to say that drafting is

completely foreign to the legislative process. In fact, the drafting process is part of the legislative process, which in turn is part of the policy process.<sup>1</sup>

The drafting process is divided by the great Garth Thornton into five stages:

- (1) Understanding the proposal.
- (2) Analysing the proposal.
- (3) Designing the law.
- (4) Composing and developing the draft.
- (5) Verifying the draft.<sup>2</sup>

In practice, stage 1 involves the receipt and careful reading of drafting instructions compiled by the policy and legal instructing officers of the department that requests the drafting of legislation. Drafting instructions are data provided to the legislative drafter by the policy makers as a means of assisting the drafter to draft effective legislation within the parameters detailed by the policy makers of the government. They can be brief or detailed but they must provide the drafter with the necessary background information for the comprehension of all aspects of the political decision to proceed with legislation and the choice of the proposed legal means for the achievement of government policy. They must not take the form of a lay or rough draft law.

In the UK drafting instructions for primary legislation [government Bills] are instructed by Government Departments. The detailed policy (namely the results which a proposed Bill is intended to achieve) is worked out by the Administrators, with legal advice if necessary. Administrators are administrative civil servants who are responsible for policy and administration. Legal Advisers are based in Government Departments and are familiar with the legal framework (statutory and common law) under which the Department operates. Drafting instructions are prepared by a Legal Advisor, in close consultation with the Administrators. The Legal Adviser's main tasks are to work out what additions to, or changes in, the law are needed to give effect to the policy; to provide all the information the drafter needs in order to be able to draft the Bill (namely, to provide the drafter with proper drafting instructions; to discuss with the drafter any problems or difficulties arising out of the instructions; to ensure that every draft produced by the drafter is thoroughly examined by the Legal Adviser and the Administrators to see whether it achieves the desired results and to correct errors, wrong internal references etc. Above all, to make sure that the final draft really will achieve the main results desired. Detailed instructions prepared by Legal advisers within the Department are sent to the Office of Parliamentary Counsel (OPC). This is the concept of the "Bill Team".

Private Members' Bills do not, in principle, receive drafting support from the OPC. And delegated legislation is instructed and drafted within each Government Department.

Stage 2 involves the compilation of a legislative plan, also known as a legislative research report. It involves a brief or longer report on the basic elements of the drafter's response to the drafting instructions. It does not need to be complete, but a written sketch of the report or plan will assist the drafter to reap the advantages of the design of a legislative solution. The main advantage of a legislative plan is that it ensures that the end result of the legislation is what is expected from their policy makers: often matters of policy arise when the drafter attempts to transform an idea to a legislative text. Thus, the design acts as a bill's quality control. The legislative plan includes an

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<sup>1</sup> Constantin Stefanou, 'Legislative Drafting as a form of Communication' in Luzius Mader and Marta Tavares de Almeida (eds), *Quality of Legislation Principles and Instruments* (Nomos 2011) 308; and also see C. Stefanou, 'Drafters, Drafting and the Policy Process' in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate 2008) 321.

<sup>2</sup> Helen Xanthaki, *Thornton's Legislative Drafting* (5<sup>th</sup> edn. Bloomsbury 2013), pp.145-162.

analysis of the existing law (the mischief); an analysis of the necessity of legislation, a regulatory tool that can only be used as a solution of last resort where every other regulatory choice would not be effective; analysis of potential danger areas (constitutional, legal, practical); and an analysis of the practical implications of the legislative proposal, including an analysis of matters for which secondary legislation is likely to be needed to implement the draft law.

And so the legislative plan includes the following elements of content:

- Identification of the causes of the problematic behaviours behind the social need;
- Preliminary choices:
  - delimitation of the scope of the legislative solution: identification of the specific behaviour to be addressed and differentiation from other intertwined behaviours
  - history of the social problem as a means of understanding the elements for its regulation
  - comparative experiences as a means of identifying solutions offered elsewhere;
- Potential solutions to the problem by use of foreign experiences, academic opinion and departmental analyses included in the drafting instructions;
- Conformity inducing measures<sup>3</sup> (punishments; civil damages or penalties; rewards; indirect measures);
- Description of the proposed solution;
- Analysis of the effectiveness of the proposed legislative solution;
- Analysis of the bill's probable cost and benefits;
- Identification of the monitoring and feedback systems (such as periodic evaluation of the effectiveness of the bill or sunset clause introducing limited life of the bill); and
- Justification of the bill's implementing provisions (such as the subjection of new duties to an existing agency or the creation of a new administrative, state or private agency; in the latter case a description of the new agency, appointment of members, and duties and powers of the agency must be included in the design of the legislative solution).

Stage 3 of the drafting process involves designing the law, namely structuring the legislative text in a manner that facilitates understanding, and consequently invites implementation. Bergeron<sup>4</sup> states that Bills must be arranged in a logical order. The provisions of the statute that are of a permanent nature precede those expected to have a limited life. The statute must be preceded by a table of provisions showing the headings and the section titles. The table of provisions is not part of the statute but is included to make it easier to consult. The statute is divided into parts only in those cases where the number of sections and the possibility of arranging them in categories constituting adequate conceptual units justifies this.

But the main source of doctrine when it comes to structure is Lord Thring, former First Parliamentary Counsel, who expressed his prioritisation of provisions in 5 rules:<sup>5</sup>

- Rule 1: Provisions declaring the law should be separated from, and take precedence of, provisions relating to the administration of the law:
  - "Convenience demands a clear statement of the law as distinct from its administration. One must know the law before questions of administration can arise hence the precedence of the statement of the law over its administration.
  - Thus the advice is:
    - state the law, and then
    - state the authority to administer the law, and then

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<sup>3</sup> A. Rose, "Sociological Factors in the Effectiveness of Proposed Legislative Remedies" (1959) 11 J. 470.

<sup>4</sup> R. Bergeron, *Rules of Legislative Drafting – Letters to Ukrainian Drafters* (1999, Department of Justice Canada and Ministry of Justice of Ukraine, Kiev).

<sup>5</sup> V.C.R.A.C. Crabbe, *Legislative Drafting* (Cavendish Publishing 1998), pp.148-150.

- state the manner in which the law is to be administered”.
  - An example is the setting up of the office of Coroners. It is advisable to establish the office of Coroner before stating the law of inquest. In such cases the law, as it were, emanates from the authority rather than the other way round.
- Rule 2: The simpler proposition should precede the more complex and, in an ascending scale of propositions the less should come before the greater.
  - Thus, in principle, assault should be provided for before aggravated assault.
- Rule 3: Principal provisions should be separated from subordinate provisions
  - The subordinate provisions should be placed towards the end of the Act, while the principal provisions should occupy their proper position in the narrative of the occurrence to which they refer. Principal provisions declare the material objects of the Act. Subordinate provisions are required to give effect to the principal provisions. They may deal with details, and thus complete the operation of the principal provisions.
- Rule 4: Exceptional provisions, temporary provisions and provisions relating to the repeal of Acts should be separated from the other enactments, and placed by themselves under separate headings.
- Rule 5: Procedure and matters of detail should be set apart by themselves, and should not, except under very special circumstances, find any place in the body of the Act.
  - This will explain the use of Schedules and sometimes of Regulations. In company legislation model Regulations could be set out in a Schedule. Procedural and administrative matters can also be delegated to subordinate legislation. Thus Parliament deals with the substantive law, and the procedural law is settled by departmental officials.

In practice a Bill can include some of the following types of provisions:<sup>6</sup>

- **Preliminary provisions**
  - Long title
  - Preamble
  - Enacting clause
  - Short title
  - Commencement
  - Duration/Expiry
  - Application
  - Purpose clause
  - Definitions
  - Interpretation
- **Principal provisions**
  - Substantive provisions
  - Administrative provisions
- **Miscellaneous**
  - Offences and provisions ancillary to offences such as time limit for prosecution, continuing offences, offences by corporations, and vicarious responsibility
  - Miscellaneous and supplementary provisions such as evidentiary provisions, a power to make subordinate legislation, service of notices, powers of entry and search, seizure and arrest.
- **Final Provisions**
  - Savings and transitional (these may also be placed in a schedule if they are long)
  - Repeals
  - Consequential amendments (these may be placed in an annex especially if the repeals and consequential amendments are numerous and can conveniently be presented in a tabular form)
  - Schedules

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<sup>6</sup> *Legislative Manual: Structure and Style*, New Zealand Law Commission Report No 35 (1996, Wellington).

But modern legislative drafting theory, as part of the plain language movement demanding plainer legislative texts, urges legislative drafters to bare the text from preliminary provisions and, following the lessons learnt from media studies and advertising, to start as early as possible with the regulatory message that the government is trying to convey to citizens. Legislation is a form of communication: it involves, in its most part, the expression of a prohibition of citizen activity: after all, citizens can do whatever they wish, unless it is prohibited by law. And so the pursuit of modern drafters is to share that message with their audience (the users of the legislation) in a manner that gets them to get heard loud and clear.

And so, the traditionally long list of preliminary provisions is being cut shorter and shorter. The long title, namely the description of the manner in which the law is reformed, remains at the very top of modern legislative texts. But the role of the preamble is diminished to a cosmetic one in the case of archaic or ceremonial laws, or to a transitional one in the case of the confirmation of the legal basis of the law and the observance of the constitutional stages of the legislative process in newer or weaker democracies. The enacting clause remains, as a constitutional requirement without which the text lacks legitimacy. The short title remains as a means of reference to the law in the index of the statute book. But commencement, duration, expiry, application, and interpretation provisions are now transferred to the final provisions part. Similarly, definitions are finding their way either in final provisions or, preferably, in schedules at the back of the legislative text. And what seems to be making a surprise revival is purpose clauses, which may have been persecuted to extinction in the past but now are invited back as objectives clauses including measurable and concrete criteria for the effectiveness of the legislation in regular post-legislative scrutiny cycles.

Substantive provisions introduce rights, powers, privileges, and immunities of persons to be benefited or regulated. These provisions are drafted as prescriptions, prohibitions, regulations or combinations. Statutory corporations are introduced with care: their powers can only be those awarded to them by statute and those which are necessary for the completion of the purpose of incorporation (even if they are not directly awarded to them by statute). Licensing and registration provisions cover the appointment of a licensing authority, the object of its activity, the manner of application for the licence, the sanctions for breach of the obligation to obtain a licence or fraudulent behaviours in the procedure, appeals procedures, inspection issues, subsidiary legislation and any transitional regimes.

Final provisions include savings, transitional provisions, repeals and consequential amendments, and schedules. Savings provisions preserve or “save” a law, a right or privilege that would otherwise be repealed or cease to have effect. In other words, saving provisions keep in being laws, rights or obligations that might otherwise disappear when an existing law is repealed. Transitional provisions are necessary to enable a smooth transition to be made between the existing law and the new law; they tie up the loose ends which would otherwise be left dangling. Although savings and transitional provisions are often confused, they are two different species and should carry separate headings. Savings provisions do not relate to time: they simply preserve a circle of persons or activities from the field of application of the new regime; they are long term provisions. Transitional provisions focus on regulating for the short term issues that continue to fall within the field of application of both the old and new regime but the regulation changes with the new regime. They are short term provisions that regulate the transition between the old and the new regime for the same class of subjects, or objects, or activities.

Repeals are deletions of provisions or Acts from the statute book. They must be introduced expressly to avoid confusion. Implied repeals, namely repeals that come about *de facto* but have not been expressly introduced in the legislative text are an anomaly of drafting and cannot be tolerated. At the end of the day repeals are a drafter’s not a judge’s job. Repeals can be simple, where legislation is no longer required (unusual in practice); combined with re-enactment, where a new enactment consolidates the law that is essentially unchanged; or combined with replacement, where existing legislation is being remoulded to meet new circumstances in different ways (the most usual circumstance in practice). It is still questionable whether amending Acts or subsidiary legislation deriving from the repealed Act need to



be expressly repealed. From a constitutional and statutory interpretation perspective they do not need to be repealed, as they will have merged with the principal Act on coming into force. From that point of view express repeal of such an amending Act or provision would be required only in the rare instance that it had not yet come into force at the date of proposed repeal. But from a drafting perspective where clarity and certainty in the law lies at the heart of the matter, express repeal even of delegated legislation is crucially helpful to the user, and must be upgraded to best practice.

Schedules are provisions attached to the main text of the law, hanging from a substantive provision within the text. They free the main body of an Act from a possible charge of untidiness.<sup>7</sup> The use of schedules can make a substantial contribution to effective communication by clearing away procedural and other distinct groups of provisions to schedules in order to present the main provisions of the statute prominently and in a less cluttered package. The Keeling Schedule<sup>8</sup> is a device which 'sets out the wording of the enactment, indicating by bold type the changes proposed.'<sup>9</sup> It is only used where the changes made by the Bill in the previous enactments are exclusively textual amendments or repeals. The Keeling technique not only shows, in the Schedule how the law will look once it is amended, but also makes clear, in the text of the Bill itself, how the law is being amended.<sup>10</sup>

Stage 4 sees the actual drafting of the text. The drafting of substantive provisions requires application of the rules for words and grammar that are considered to serve the intelligibility of the text. Drafters use words that are plain, clear, well understood, and unambiguous. Bad practices include the use of unnecessary words; the use of the same word or phrase in different contexts; synonyms; jargon; passive voice; plural; gender specific language; archaic terms (such as "said" as an adjective); the use of "shall" to express a duty, obligation or prohibition. Best practice includes the use of the present tense and indicative mode; the use of "may" to express a power or privilege, and "must" or present tense to express the imperative mode; and gender-neutral language. Best practice also encourages good presentation techniques. Drafters lay out the draft so that, when printed, the text is easy to work with. And so encouraged is the use of plenty of "white space" (i.e. the text is not densely packed); short sentences, and paragraphing to display component parts; a consistent system for numbering articles, paragraphs and tabulations; and visual aids, such as formulae, maps and diagrams.

Stage 5 involves the verification of the legislative text. Drafts need to be verified as a means of achieving quality. Verification takes place internally, namely within the drafting team, and externally, namely by other interested Ministries and affected agencies. Scrutiny of the legislative text should be a continuous process throughout the drafting, particularly to improve its clarity and to check its practicability. Best practice calls for each version of a draft should be subjected to scrutiny of legal form, clarity and comprehensibility; and at the end of drafting, the final version of the law must be scrutinised on a wider range of matters, including a series of legal verifications. Checks on legal form, clarity and comprehensibility includes controls that the conventional requirements as to the form, structure and presentation of legislation have been followed; the language of the legal provisions follows standard language usages and is easily comprehended and free of ambiguity; the ordering of the provisions in the law is logical and facilitates its use; terms used in the law are followed consistently throughout the law and that unnecessarily legalistic or archaic terms are not used. Legal verification checks include constitutional and legal compliance controls.

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<sup>7</sup> V.C.R.A.C. Crabbe, *Legislative Drafting* (Cavendish Publishing 1998), pp. 145-147.

<sup>8</sup> It is named after Mr. E. H. Keeling, (later Sir Edward Keeling) who, with Mr. R. P. Croom-Johnson (later Mr. Justice Croom-Johnson) made the original proposal.

<sup>9</sup> Francis Bennion, *Bennion on Statute Law* (3<sup>rd</sup> edn. Longman 1990) p 56.

<sup>10</sup> Renton Report (Cmnd 6035) para 13.22.

## A theory for legislative drafting<sup>11</sup>

But determining what drafting is continues to be under debate.<sup>12</sup> The prevailing view, mostly within the common law world, is that drafting is a pure form of art<sup>13</sup> or a quasi craft<sup>14</sup>. It is this approach to the discipline that supported the mentoring style of training for drafters. If drafting is an art or a craft, then creativity and innovation lies at the core of the task. Rules and conventions bear relative value, and the main task of the drafter is to learn the craft from those with more experience. If one believes that drafting is an art, then formal training is not relevant to drafters. In other words, if experience is the only thing that really matters, then simply time spent by a senior may offer the apprentice the only opportunity to learn on the job. But is drafting really a liberal skill possessed by enlightened legal scholars who take part in drafting committees on behalf of a variety of governmental Ministries and agencies drafting legislation?<sup>15</sup>

Or is drafting a science<sup>16</sup> or technique<sup>17</sup>? This is the prevailing approach in most of the civil law world. If drafting is a science, then there are formal rules and conventions whose inherent *nomoteleia* manages to produce predictable results, provided that the application is correct. If this approach is followed, then there is plenty of scope for formal training. Drafters may learn the rules and conventions of their science, and the correct way in which these are applied in order to produce predictable results.

But is one bound to a strict choice between art or science? If one sees drafting as a sub-discipline of law, then there must be a third option: law is not part of the arts, nor is it part of the sciences<sup>18</sup> in the positivist sense.<sup>19</sup> In sciences rules apply with universality and infallibility: gravity applies everywhere in the world [ok, on earth], and at all times. Law is different. "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".<sup>20</sup> Thus, 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

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<sup>11</sup> This section appears in H. Xanthaki, "Duncan Berry: A true visionary of training in legislative drafting" [2011] *The Loophole*, pp.18-26.

<sup>12</sup> For an analysis on the science v art debate, Helen Xanthaki, "On transferability of legislative solutions: the functionality test" in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach – in Memoriam of Sir William Dale*, (Ashgate 2008), pp.1-18.

<sup>13</sup> B. G. Scharffs, "Law as Craft" (2001) 45 *Vanderbilt Law Review*, 2339.

<sup>14</sup> C. Nutting, "Legislative Drafting: A Review" (1955) 41 *American Bar Association Journal*, 76.

<sup>15</sup> F. Ost and M. van de Kerchove, *Jalons pour une Theorie Critique du Droit* (Brussels, Publications des Facultés universitaires Saint-Louis, 1987), 52.

<sup>16</sup> contra Editorial Review, 22 [1903] *Can. L. Times*, 437.

<sup>17</sup> contra J-C Piris, "The legal orders of the European Union and of the Member States: peculiarities and influences in drafting" [2006] *EJRL*, 1.

<sup>18</sup> For an analysis of the contra argument on law as a science, M. Speziale, "Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory" 5 [1980] *Vt. L. Rev.*, 1.

<sup>19</sup> R. R. Formoy, "Special Drafting" 21 [1938] *Bell Yard: J.L. Soc'y Sch. L.*, 3; but contra C. Langdell, "Harvard Celebration Speeches", 3 [1887] *LAW Q. Rev.*, 123-124.

<sup>20</sup> Aristotle, E.N., 5.10.1137b13-24.

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 rejecting the view that drafting is a science does not necessarily confirm that drafting is an art. 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. The use of synonyms is a principle by which drafters abide, mainly to serve clarity. There may be exceptions to all rules of drafting, but this does not mean that there are no rules. And these rules carry with them a degree of relevant predictability, since the latter is one of the six elements of theory.<sup>21</sup>

But if drafting is neither pure science nor pure art, what is it? For Aristotle<sup>22</sup> all human intellectuality can be classified as<sup>23</sup> science as episteme; art as techne; or phronesis<sup>24</sup> 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.<sup>25</sup> Law and drafting seem to be classical examples of phronesis, as they are liberal disciplines with loose but prevalent rules and conventions whose correct application comes through knowledge and experience. 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”.<sup>26</sup> 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.<sup>27</sup> Phronesis supports the selection of solutions made on the basis of informed yet subjective application of principles on set circumstances.<sup>28</sup> 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”.<sup>29</sup>

So the drafter's task simply involves the choice of the appropriate rule or convention that delivers the desired results within the unique circumstances of the specific problem at any given time. In other words, the drafter needs to be aware of the multitude of often clashing rules and conventions; the drafter needs to identify the most relevant set of circumstances applicable to the problem; and the drafter needs 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. In other words, as drafting entails both elements and art and elements of science, the drafter's task entails both

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<sup>21</sup> B. Flyvbjerg, *Making Social Science Matter: Why social inquiry fails and how it can succeed again*, (Cambridge University Press 2001), 39

<sup>22</sup> Aristotle, *Nicomachean Ethics*, bk VI, chs. 5-11 (David Ross trans. Oxford University Press 1980).

<sup>23</sup> M. Griffiths and G. Macleod, “Personal narratives and policy: never the twain?” [2008] 42 JPE, pp.121-143, at 126.

<sup>24</sup> Aristotle, *Nicomachean Ethics*, bk VI, chs. 5-11 (D. Ross trans. 1980).

<sup>25</sup> S-U von Kirchmann, *Die Werlosigkeit der Jurisprudenz als Wissenschaft* (1848, Verlage von Julius Springer, Berlin).

<sup>26</sup> S. F. Schram and B. Caterino, “Introduction” in S. F. Schram and B. Caterino (eds) *Making Political Science Matter: Debating. Knowledge, Research, and Method* (New York University Press 2006) p.8.

<sup>27</sup> W. Eskridge Jr., “Gadamer/Statutory interpretation” [1990] 90 ColumLRev, 635.

<sup>28</sup> E. Engle, “Aristotle, Law and Justice: the tragic hero” [2008] 35 NKyLRev, 4.

<sup>29</sup> C. Rideout, “Storytelling, narrative rationality, and legal persuasion” [2008] 14 Legal Writing: J. Legal Writing Inst., 75.



identification of all relevant circumstances and rules; and promotion of the most appropriate rule. And so the skills required are: both an understanding of the relevant rules, and wisdom through experience in the application of the most appropriate rule. 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 and practical, both formal and via mentoring. But before we explore this further, let us clarify which are the rules of drafting, and what is the basis of the drafter's subjective choice when selecting the most appropriate one.

In other words, which is the ultimate criterion whose correct application leads the drafter to the appropriate choice between rules and drafting conventions? What is quality of legislation? My definition of quality is neither technical, nor empirical. My definition of quality in legislation is functional. If one sees legislation as a mere tool for regulation, then drafting becomes simply part of the legislative process, which in turn is part of the policy process. The object of a policy process is the promotion of a government policy, or from a social perspective the regulation of a citizens' activity. If legislation is seen as a mere tool for regulation, then a good law simply contributes its best to the achievement of the policy that it serves. As a law on its own cannot produce adequate regulatory results without synergy from the other actors of the policy process,<sup>30</sup> a good law is one that, with synergy, is able of producing the regulatory results required by policy makers.<sup>31</sup> A good law is one that is capable of leading to efficacy of regulation. A good law is an effective law. And ultimately quality in legislation is effectiveness. Effectiveness is the criterion that drafters use when selecting the most appropriate drafting rule for the problem before them. This qualitative definition of quality in legislation respects and embraces the subjectivity and flexibility of both drafting rules and conventions and, ultimately, of phronetic legislative drafting.

### **The main philosophy of legislative drafting<sup>32</sup>**

The drafter of legislation cannot be isolated from the many other actors of the process to which the drafter belongs. Leaving aside the necessity for multiplicity of disciplines to be represented in the drafting process in its narrow sense, one must view the drafter as one of the actors of the drafting process, which is a mere stage of the legislative process, which in turn constitutes a stage of the policy process.<sup>33</sup>

In other words, the government of the day seeks to implement its policy by use of the policy process. During the policy process, legislation may be selected as the optimum tool for implementation: if this is the case, the legislative process comes into play. It is within the legislative process that drafters undergo each one of Thornton's five stages of drafting and draft legislation. To retrace this journey backwards, the drafter drafts, the legislature passes laws, and thus the government executes the programme of policies with which it has been elected to govern. At the end of the day therefore legislation is a mere tool for governing, or else a mere tool of regulation of a circle of activities of citizens or subjects. If one takes this holistic picture of legislation as a tool for regulation into account, identifying the goal of the drafter as achieving "quality in legislation" is a rather short sighted and narrowly focused approach. In application of Stefanou's scheme on the three processes,

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<sup>30</sup> J. P. Chamberlain, 'Legislative drafting and law enforcement' 21 (1931) *Am.Lab.Leg.Rev.* 235-243 at 243.

<sup>31</sup> L. Mader, 'Evaluating the effect: a contribution to the quality of legislation' 22 (2001) *Statute Law Review* 119-131 at 126.

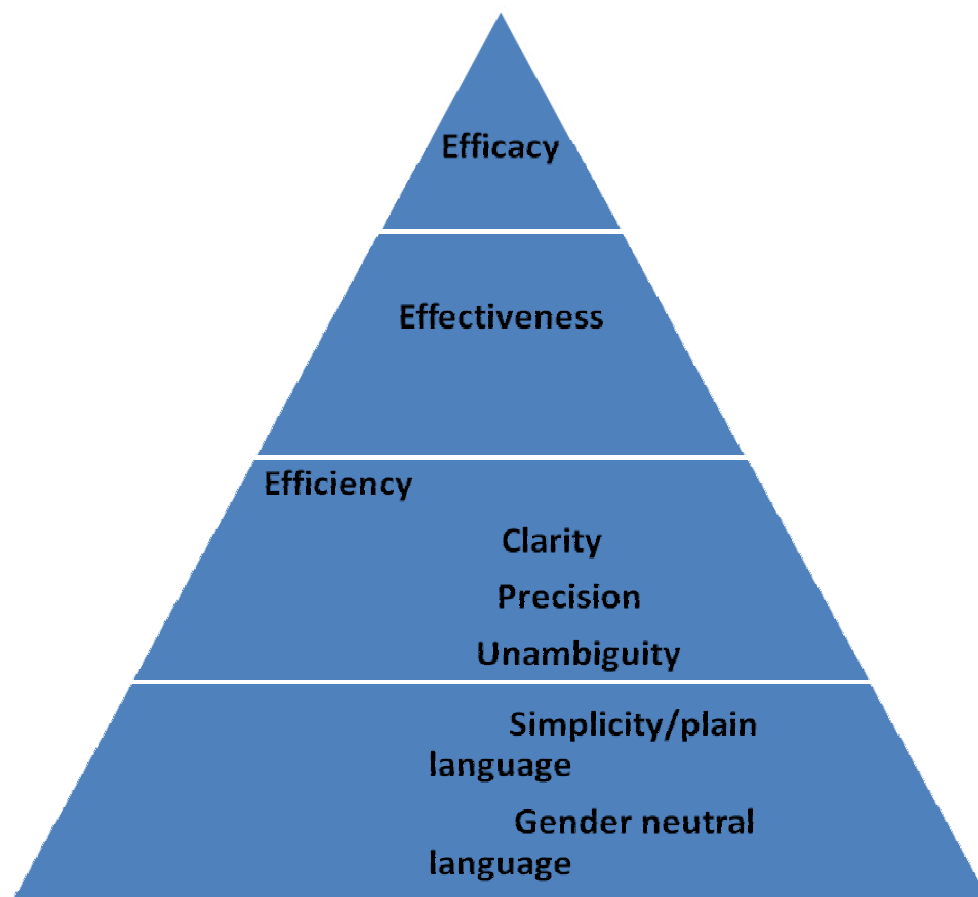
<sup>32</sup> This part appears in H. Xanthaki, "Drafting manuals and quality in legislation: positive contribution towards certainty in the law or impediment to the necessity for dynamism of rules?" [2010] 4 *Legisprudence*, pp.111-128.

<sup>33</sup> C. Stefanou, "Drafters, drafting, and the policy process" in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach – in Memoriam of Sir William Dale*, (Ashgate 2008), pp.321-332, at 323.

drafters can only aim to perform well in their little, albeit crucial, part in the application of governmental policy better expressed as regulation. Thus, the starting point of this paper is that drafters pursue quality in regulation. This statement reflects the role of the drafter in the whole of the governing process, and strengthens the view that legislation is only one, in fact the last and least<sup>34</sup>, of the choices offered to governments in their attempt to regulate. This is what the EU calls the principle of necessity<sup>35</sup> in EU regulation.<sup>36</sup>

### The main elements of the new discipline<sup>37</sup>

Drafters pursue the following pyramid of virtues.<sup>38</sup>



<sup>34</sup> S. Weatherill, "The challenge of better regulation" in Stephen Weatherill (ed.), *Better Regulation*, (Hart 2007), pp.1-19, at 19.

<sup>35</sup> French Circular of 2 Jan. 1993 on the rules for the elaboration, signature and publication of texts in the Official Journal and the coming into force of the particular procedures of the Prime Minister, art. 2.1.1.1.; German Gemeinsame Geschäftsordnung der Bundesministerien, 15 Oct. 1976 as modified, art. 40; German Manual of judicial formalities, 1991, paras. 26–28; Portuguese Deliberation of the Council of Ministers of 8 Feb. 1989 on the approval of the general principles for the elaboration of projects of normative acts, art. 1a.

<sup>36</sup> R. Haythorwaite, "Better regulation in Europe" in S. Weatherill (ed.), *op.cit.*, pp.20-26, at 23.

<sup>37</sup> This part appears in H. Xanthaki, "Quality of legislation: an achievable universal concept or a utopian pursuit?" in Marta Travares Almeida (ed.), *Quality of Legislation* (Nomos 2011), pp.75-85.

<sup>38</sup> H. Xanthaki, "On transferability of legislative solutions: the functionality test" in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach – in Memoriam of Sir William Dale* (Ashgate 2008), 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.

Phronetic 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.

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,<sup>39</sup> then a good law is simply a law that, if it enjoys support and cooperation from all actors in the legislative process,<sup>40</sup> 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.<sup>41</sup> 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

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<sup>39</sup> S. Weatherill, “The challenge of better regulation” in Stephen Weatherill (ed.), *Better Regulation*, (Hart 2007), pp.1-19, at 19.

<sup>40</sup> J. P. Chamberlain, ‘Legislative drafting and law enforcement’ 21 (1931) *Am.Lab.Leg.Rev.* 235-243 at 243.

<sup>41</sup> L. Mader, ‘Evaluating the effect: a contribution to the quality of legislation’ 22 (2001) *Statute Law Review* 119-131 at 126.

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.

## The future<sup>42</sup>

In the UK regulatory reform was at the epicentre of the manifesto of the Coalition government as evident in "The Coalition: our programme for government" document. The government undertook to cut red tape<sup>43</sup> by introducing a 'one-in, one-out' rule whereby no new regulation is brought in without other regulation being cut by a greater amount;<sup>44</sup> to end the culture of 'tick-box' regulation, and instead target inspections on high-risk organisations through co-regulation and improving professional standards; to impose 'sunset clauses' on regulations and regulators to ensure that the need for each regulation is regularly reviewed; and to give the public the opportunity to challenge the worst regulations. The latter aim is formulated in the initiative known as The Red Tape Challenge, which encourages the private sector to help identify existing regulations that they believe should be removed from, or amended on, the statute book. The Coalition government report that since 2011 their deregulation efforts have outweighed the costs of new domestic regulation by over -£850 million: the bulk of the regulatory savings delivered through private pensions' indexation in the First Statement of New Regulation has now been offset by pensions' automatic-enrolment. Excluding private pension reform, regulatory savings to business since 2011 are expected to be at least -£160 million.<sup>45</sup>

Within the context of regulatory reform in the UK each government department now has a Better Regulation Unit whose task is to cut red tape and reduce regulatory overload.<sup>46</sup> Thus, the task of controlling the developing new regulation remains within the competent department.<sup>47</sup> Oversight of these units is undertaken via the 2009 Regulatory Policy Committee<sup>48</sup>, which provides independent scrutiny of proposed regulatory measures, and the 2010 Cabinet Committee entitled Reducing Regulation Committee, which demands a robust case for each new regulation. The RPC undertakes its duty via the provision of external and independent challenge on the evidence and analysis of regulations presented in Impact Assessments supporting the development of new regulatory measures proposed by the Government.<sup>49</sup> At the same time the Better Regulation Executive within

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<sup>42</sup> This section also appears in Helen Xanthaki, "The regulatory reform agenda and modern innovations in drafting style" in L. Mader (ed.), *Regulatory Reform* (Nomos 2013), forthcoming.

<sup>43</sup> For further information on the Red Tape Challenge, see <http://www.redtapechallenge.cabinetoffice.gov.uk/home/index>.

<sup>44</sup> <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/o/11-671-one-in-one-out-methodology>.

<sup>45</sup> HM Government, "One-in, One-out: Third Statement of New Regulation", July 2012, <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/o/12-p96b-one-in-one-out-fourth-statement-new-regulation.pdf>.

<sup>46</sup> For evidence of this policy see Department for Environment Food and Rural Affairs, "Better regulation evidence plan 2011/12 (Joint Evidence Plan with Defra and Environment Agency), April 2011, <http://www.defra.gov.uk/publications/files/pb13490-ep-better-reg.pdf>.

<sup>47</sup> For an example of Better Regulation with specific application to the environment, see Department for Environment, Food and Rural Affairs, "Red Tape Challenge – Environment Theme proposals", March 2012, <http://www.defra.gov.uk/publications/files/pb13728-red-tape-environment.pdf>.

<sup>48</sup> For the 2012 Report of the Committee see <http://regulatorypolicycommittee.independent.gov.uk/wp-content/uploads/2011/09/Rating-Regulation-July-2011-FINAL-A.pdf>.

<sup>49</sup> <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/o/12-p96b-one-in-one-out-fourth-statement-new-regulation.pdf>; also see RPC, "Rating Regulation: An independent report on the analysis supporting regulatory

the Department for Business, Innovation and Skills leads regulatory reform by identifying and supporting the positive outcome of regulation, whereas the National Audit Office researches and reports on aspects of regulatory reform, such as Impact Assessment, Administrative Burdens Reduction, or the business aspect of regulation.

There is little doubt that the UK has been very active in the field of regulatory reform. This is evidenced by a recent OECD Review of the UK's Better Regulation policy implementation which pronounces the regulatory reforms in the UK as impressive.<sup>50</sup> Points of excellence identified by the OECD include the effective balance between policy breadth and the stock and the flow of regulation; the breadth and depth of ex ante impact assessment exercises before regulation; the effective risk based enforcement of regulation; and the extensive application of EU's Better Regulation initiatives in the UK<sup>51</sup>. Points in need of further reinforcement identified by OECD include the need to reinforce initiatives for citizens and public sector workers as a means of balancing the use of business as the main policy actors; the need to apply in practice even further the excellent existing transparency and consultation processes; and the need to develop a longer term strategy of regulation.

But there is one further gap which has even eluded the OECD: drafting style as a means of achieving quality of legislation has not been touched upon by the Better Regulation initiative. One could identify a number of factors which may have led to this oversight. First, in the UK drafting styles remain very strongly an exclusive concern of the highly qualified and specialised Parliamentary Counsels. This may have led to a possible reluctance of their colleagues in the other regulatory units of the Cabinet Office to touch upon a craft viciously reserved for the Parliamentary Counsels Office. Second, the current positive trend of an ideological detachment from legislating and promoting alternative means of regulation has switched the lights off legislation altogether. As a result, legislation is only mentioned as a solution of last resort, which -as such- does not seem to be worthy of further analysis. Third, even if the policy choice of the UK government and civil service was to address legislative style, this would have to be undertaken by means of a drafting manual; but this has been venomously resisted by Parliamentary Counsel in the UK whose view is that drafting is an art and thus not subject to rules and principled constraints.<sup>52</sup> Whatever the reasons may be, the fact of the matter remains that legislative style has simply escaped the UK's Better Regulation agenda.

And so any drafting innovations now present in the laws of the UK, such as gender neutral drafting<sup>53</sup>, the use of explanatory memoranda<sup>54</sup>, the placement of definitions at the end and probably in a schedule<sup>55</sup>, the increased use of Keeling schedules<sup>56</sup> to name but a few, all these cannot be

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proposals, January-June 2011", July 2011, <http://regulatorypolicycommittee.independent.gov.uk/wp-content/uploads/2011/09/Rating-Regulation-July-2011-FINAL-A.pdf>, p.7.

<sup>50</sup> <http://www.oecd.org/dataoecd/61/60/44912018.pdf>.

<sup>51</sup> For a listing of such policies and their implementation in the UK, see <http://www.bis.gov.uk/policies/bre/improving-eu-regulation/guiding-principles-eu-legislation>.

<sup>52</sup> Sir Geoffrey Bowman, "The Art of Legislative Drafting" [2006] 7 Eur. Jour. L. Ref.

<sup>53</sup> Statement of the Leader of the House of Commons on 8.3.07.

<sup>54</sup> <http://www.parliament.uk/site-information/glossary/explanatory-memorandum>.

<sup>55</sup> See Office of Parliamentary Counsel, "Drafting Guidance", 2 October 2010, <http://webarchive.nationalarchives.gov.uk/http://www.cabinetoffice.gov.uk/media/427772/drafting-guidance-101002.pdf>, p.31.

<sup>56</sup> See House of Lords Select Committee on Constitution, Fourteenth Report, 2004, <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/173/17302.htm>, chapter 4, 89.



attributed to the regulatory reform policy of the government. In application of the call for improvements in legislative style national and international drafters have introduced a long list of new drafting techniques. The increasing use of visual aids in legislation, such as the Australian depiction of the coloured Australian flag in the schedule of the relevant Act, which also includes a clickable link to the sound of the national anthem, is an application of clarity and unambiguity in the introduction of diagrams, pictures, and songs in legislation. The increasing use of explanatory materials in the introduction of legislative drafts in the Commonwealth is attributable to the need for additional clarifications of the policy and text, which are deemed too detailed to be accommodated in the modern, dry, short style of legislation. The condemnation of general implied consequential amendment clauses in Africa is giving way to exhaustive lists of express direct and consequential amendments, including those related to delegated legislation. The technique of restatement in Ireland is a direct response to the former ambiguity invited by detailed, direct amendments of legislation, which rendered the text unapproachable to the users. The replacement of mosaic laws via the New Zealand's Miscellaneous Act that breaks down into its constituting parts, which upon passing find their place in the precise Acts under amendment, constitutes a pursuit for a mechanism for clarity in the statute book. The introduction of primary and delegated legislation together as a whole regulatory package submitted before the Kenyan Parliament signifies an innovative approach to the constitutional and drafting deficiencies of modern overflowing of delegated legislation. The EU's frequent use of sunset clauses coinciding with the end of the cycle of monitoring of the legislative text is a unique technique forcing the regulators to re-consider the necessity and effectiveness of the legislation and to act in order to avoid, if necessary, the end of life of the legislative text.<sup>57</sup> The recent calls for a return of purpose or objectives clauses in legislation, provided that the latter list the factors to be taken into account when tangible and measurable effectiveness is monitored at the pre and post-legislative scrutiny exercises are a wonderful mechanism to express the link between policy choices and legislative expression, and to address regulation as a full circle beginning with policy formulation and ending with the juxtaposition of legislative objectives against the achievement of tangible policy aims. And finally, the placement of definitions at the end of the legislative text, perhaps even in a schedule, is a fantastic attempt to bare the legislative text from anything that detracts from the regulatory message and its placing at the forefront of legislative communication with the user.

### **The end: a beginning**

And so a new sub-discipline of law is born. It has a theoretical basis in phronetic legislative drafting. It has its principles and values in the hierarchy depicted in the pyramid of values. It has a goal in effectiveness of legislation. And it has recognised tools to achieve that goal.

Here we stand then. In the idyllic rise of a new research agenda, facilitated and led by the Sir William Dale Centre at IALS. There is much more to study, much more to develop, much more to write about.

And this is just the beginning.

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<sup>57</sup> In implementing the EU's sunset clauses policy the UK report that in 2011/2012 60 pieces of legislation have been introduced with sunset clauses: see <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/o/12-p96b-one-in-one-out-fourth-statement-new-regulation.pdf>.