Quality of Legislation: lessons from the Luxembourg and Strasbourg case-law
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Modern trends in achieving legislative quality

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Quality of Legislation

- Although achieving quality in legislation is at the core of the EU and national legislators’ pursuit, there seems to be little agreement over the semantic elements of the concept.
- Attempts to define legislative quality by means of a list of drafting conventions have failed.
- But, is there really such a list?
- Is legislative drafting a science with natural laws that without fail will lead to good legislation?
  - In drafting there are no natural laws that are to be followed without exception.
  - And so drafting is not a science [je vous demande pardon, Jean-Claude!]
- But, does this mean that legislative drafting is an art?
  - But there is no gravitas on the aesthetics of the end result.
  - And there are indeed principles that *normally* do lead to an expected effect.
  - And so drafting is not an art either [sorry, Sir Geoffrey!]

...
Aristotle offers a third possibility

All human intellectuality can only be one of these three:

- science as episteme (ἐπιστημή);
- art as techne (ΤΕΧΝΗ); or
- Phronesis (φρονησίς) as the praxis of subjective decision making on factual circumstances; or the practical wisdom of the subjective classification of factual circumstances under principles

[Aristotle, Nichomachean Ethics, bk VI, chs. 5-11 (D. Ross trans. 1980)]
Phronetic legislative drafting

- And so phronetic legislative drafting is a series of subjective decisions on drafting dilemmas; or the practice of the subjective projection of factual circumstances onto one of the competing/clashing relevant drafting principles.

- Phronetic legislative drafting views legislative quality as the selection of the most appropriate principle to be applied by the drafter in cases of clash between equal virtues.

- But which are these drafting virtues and what aim do they serve?
What goal, what virtues?

If one sees legislation as a mere tool for regulation, then the drafter’s goals become clearer, albeit result driven and related

- Governments are elected to govern on the basis of their electoral mandate
- Governing involves the regulation of fields of activity
- Such regulation may be achieved via, amongst others, legislation
- So, legislative drafting is undertaken as a means of achieving regulation

- Thus, legislation of good quality is legislation that produces the types, extent, and level of regulation required by the government
- And drafting virtues are concepts that support and promote legislative quality in that sense
HIERARCHICAL PYRAMID
ELEMENTS OF LEGISLATIVE QUALITY

Efficacy

Effectiveness
Cost Efficiency

Clarity
Precision
Unambiguity

Simplicity/plain language
Gender neutral language
Now apply this to EU legislation!

- The EU’s long engagement with legislative quality is characterized by a struggle to accommodate a multitude of national legal systems, legal and spoken languages, and legislative styles; and to host them all under a harmonised umbrella of ever changing aspirations of integration.

- EU institutions agree that good law means effective law but, typically, they have not defined effectiveness.

- Numerous initiatives have been introduced: from the Sutherland criteria to Inter-institutional Agreements, to Better Regulation, and now Smart Regulation and its Smart agenda.

- Smart Regulation is currently hailed as a state of the art tool for better EU legislative quality.

- Unfortunately, it is an ineffective tool for the purposes of the text itself.
  - ‘Simplification’ cannot be achieved solely via ‘the reduction of administrative burdens’.
  - ‘Evaluation of law effectiveness and efficiency ex ante’ cannot be achieved simply via ‘fitness checks and general policy evaluations’.
  - ‘The improvement of implementation records’ cannot be achieved via post legislative scrutiny, SOLVIT, and assistance with application.
  - The ‘choice of the “best possible solution”’ cannot be achieved solely via Impact Assessments, clear and simple laws and codification.
What is needed for better EU legislation?

- What is needed really is a principled approach to legislative quality that looks at the product itself as much as its environment.

- This requires a clear setting of policy goals against which efficacy of regulation is set.

- It requires an effective draft text that is drafted by professional drafters without vested policy agendas.

- It requires pre and post legislative scrutiny undertaken by a learned and able EP.

- And it requires action on ineffective EU laws [fine-tuning or repealing]
Is this realistic?

- One wonders whether these requirements are utopian, under the current realities of an enlarged EU: I share these doubts.
- But, if this is the case, is there not a mismatch between the legislative capacity of the EU institutions and the type of legislative instruments produced?
- If achieving effective legislative texts at the EU level is a problem, why not accept the fact and...
  - Embrace the EU’s role as a goal regulator and legislate solely via Directives.
  - And entrust national drafters to achieve effectiveness of the EU/MS regulatory package by means of national transposing regulatory [not necessarily legislative] measures.
What is effective transposition?

Currently transposition remains chained to the choices of the EU legislator:
- The tests of necessity, proportionality, adequacy, synergy, adaptability, and subsidiarity have been passed
- The choice of legislation made
- The type of legislative instrument decided

Effectiveness as legislative quality demolishes this view: all choices need to be reconsidered under the prism of the national regulatory environment

And so effectiveness demands that EU laws are used as legislative instructions, not model laws

Which promotes transposition via elaboration

But this requires a shift of balance towards national drafters: maybe this is what is Utopian after all…
An example of effectiveness applied: Lessons to be learnt

- This VR Directive fails to identify:
  - What regulatory goal is being pursued; and
  - What is the prioritisation of competing regulatory goals
    - What prevails in a clash between the requirement to offer full protection to victims and the danger of disturbing the rights of the accused/convicted?

Lesson 1

- Identify the true and specific regulatory goals of the proposed legal instrument
- And reflect those in the legislative text in a precise and clear manner that applies to the specific policy sought by this instrument, not the EU in general.
Lessons to be learnt

The VR Directive cross references heavily between its parts, thus making the transposition of the right to seek assistance rather confusing:

- when can assistance be sought
- by which national agency, and
- in what format this will be?

Lesson 2

Structure the legislative text by means of transposition themes, thus facilitating uniformity in national implementation.
Lessons to be learnt

This VR Directive fails to protect victims as the term of the field of application already has a variety of meanings with national legal orders.

Lesson 3

Select terms, at least for the main concepts, that carry the same definition in all nationals laws, or…

Simply select a generic term and harmonise the concept.
Lessons to be learnt

The language of the VR Directive is convoluted, syntax is complex, and words vague [victims???

Lesson 4

Simple and logical structure, short sentences, plain language promote clarity, precision, and unambiguity...

Simply follow the Inter-institutional Agreements and the Joint Practical Guide.
Lessons to be learnt

- The VR Directive is escorted by an extended Guidance for Transposition.

- But the Guidance introduces additional transposition requirements by reference to Council of Europe instruments.

Lesson 5

- Legislate by means of the EU text, not via the Guidance for Transposition.

- If needed, cross refer in the preamble (i.e. between the title and the enacting terms) or in the text; or repeat the Council of Europe instruments verbatim.
Lessons to be learnt

- It is unclear how the VR Directive falls into place within EU criminal policy
  - This deprives the user from a strategic and holistic analysis of the policy behind the Directive [Smart Regulation]
  - And it fails to reveal the strategic goals that place the legislative text in context.
  - In turn this confuses transposition authorities in their legislative choices.

Lesson 6

- EU criminal law texts must state the policy super goal placing the text in context
Lessons to be learnt: 7

- The VR Directive is a good guide for national drafters but cannot serve as a stand alone text.
- The choice of a Directive supports effectiveness of regulation, and must be raised as a good legislative point.

Lesson 7

EU legislative texts are inevitably the product of compromise: very few, if any, legislative texts can function readily as effective national law without national intervention. Encourage effective transposition via naturalisation of the EU text.
Lessons to be learnt

Lesson 8

- Drafting effective EU laws required a bold reassessment of the procedures of drafting at the EU level.

- There is a clear urgency for reform in:
  - The use of lay drafts offered by the Commission
  - The membership of working groups with substantive rather than drafting specialists
  - The lack of professional drafters trained in drafting legislation, as opposed to lawyer linguists, in the Commission and Council etc.
So what? What now?

- We need to empirically explore what the audience of EU legislation really is, in each jurisdiction
  - Lay people: do they ever read EU law? If so,
    - We need to share the goal and super goal: create a vision to which EU citizens have ownership and avoid misunderstanding of the reasoning behind EU regulation
    - We need to persuade them that EU action is more effective than national action: subsidiarity for non specialists
    - We need to present a clear regulatory message
    - And we need to gauge language to the non specialist level
  - Members of the regulating professions
    - Tell them clearly how the law changes (long title)
    - What they need to do and by when
    - Language can be semi-expert
  - Member States’ civil services
    - Keep current language
    - Change the approach to invite elaboration: where and how
    - Educate on drafting for transposition