

Chapter 1

Legislation as a Tool for Regulation

REGULATORY AND LEGISLATIVE QUALITY

1.1

As in every good legislative draft, I start with the objectives clause.

The main objective of this book is to promote good legislation by offering drafting techniques conducive to legislative quality.

But what is good legislation? What amounts to legislative quality? If this is not defined, then our objective is vague. And the route to reach that vague objective can only be haphazard.

1.2

In order to define good law, it is important to identify the aim and function of legislation within the overarching environment of regulation.

Governments are elected to govern.

Governing means regulating.

Regulating involves setting regulatory aims, introducing regulatory routes towards these aims, and setting regulatory targets. For example, reducing road accidents caused by drink driving by increasing the penalty for the offence by 20% over a period of five years.

Regulatory success is the achievement of the desired regulatory results. In the example, this would be the reduction of road accidents caused by drink driving by 20% over a period of five years. This is regulatory efficacy.

The pursuit of regulatory efficacy is undertaken by diverse regulatory means. In the example, these would include public awareness campaigns, incentives such as a reward for those drinking less than the legal limit (a reduction on their bill or their car insurance), training drinkers in recognising their own limits, self-regulation for drinkers or bartenders, or raising the price of alcohol even higher. Regulatory means often include legislation.

Legislation is one of the tools for regulation.

Good legislation is legislation that is conducive to regulatory efficacy. Good law is one that can produce the desired regulatory results. This is legislative effectiveness. Legislative quality is legislative effectiveness

1.3

But legislation is the least conducive tool for regulatory efficacy.

Why is that?

- a Legislation is not easy to trace. A public awareness campaign can be on the driver's radar in bus stops, on billboards, in petrol stations, outside pubs, on the pub bill, on the television, on the internet. Legislation is in the statute book, and on the internet.
- b Legislation is still a user unfriendly text: users tend to avoid reading it, if they can; and when they do read it, they are persuaded that there must be a hidden message. So legislation is not yet trusted by lay users.
- c Legislation suffers from the flaws of written communication. No text, no matter how excellent it is, can convey the regulatory message as loudly and emotively as an image. Compare the image of a bloodied soft toy on the asphalt with any provision prohibiting drink driving. Legislation cannot win.

For all these reasons, legislation is the least effective means of regulation.

1.4

And it is a solution of last resort.

Because every time we legislate, we chew away a little bit of our citizens' freedom.

Regulation, also via legislation, is mostly a benevolent exercise. But, inevitably, it carries with it restriction. Restriction of citizens' activity. Which was free and unregulated before.

And so legislation is not a step that should be undertaken lightly. In fact, the starting point in any drafter's response to drafting requests must be negative. Surely, regulatory efficacy can be achieved by non-legislative means?! It is only when the drafter persuades themselves that actually in these exceptional circumstances regulatory efficacy does require legislation that drafting can begin.

1.5

By refusing to draft legislation unless absolutely necessary, the drafter serves regulatory efficacy as it encourages the use of more conducive means of regulation.

Also, they play a critical role in preventing one of the plagues of legislation, legislative inflation. In turn this simplifies the statute book, renders it more user friendly, and enhances trust in legislation.

And by limiting the frequency of legislative intervention, the drafter enhances the weight of the few remaining legislative interventions. The user's attention is drawn both to the topic of the legislation and also to the necessity of acting on it. After all, this is important enough for the government to use legislation!

QUALITY OF LEGISLATION

1.6

Legislative quality is legislative effectiveness.

Legislative effectiveness means legislation that, with the synergy of the other actors in the regulatory process, can lead to the desired regulatory results.

The synergy of the other actors in the regulatory process is required, since regulation is the legislative environment.

There can be no legislative effectiveness without a sound regulatory policy and a sound selection of regulatory means. No matter how excellent the legislative expression, it cannot cover or salvage regulatory errors. For example, a perfect legislation cannot reduce the number of accidents caused by drink driving if it expresses the regulatory choice to reduce the cost of alcohol.

There can be no legislative effectiveness without a sound enforcement mechanism. No matter how excellent the legislative expression, it cannot cover or salvage a lack of enforcement capacity. For example, the perfect legislation cannot reduce the number of accidents caused by drink driving if traffic police lack breathalysing kits. Of course, the drafter can ensure that enforcement mechanisms are in the legislation, that they are feasible and adequate. The drafter can influence enforcement. But does not have full control of it.

There can be no legislative effectiveness without sound interpretation. But this is an area that the drafter can influence, by precipitating interpretation problems and drafting to prevent them.

1.7

Effectiveness can be accused of being exclusively functional.

And it is. It is a functional criterion of legislative quality.

But at the same time it is all encompassing. It requires adherence to the rule of law, constitutionality, legality, and compliance with regional and international law. Legislation with these flaws cannot be effective: at least within the context of jurisdictions respecting the rule of law, flawed legislation will be repealed or put to the side by constitutional judges. And it will not produce the desired regulatory results. So, legislation that clashes with the rule of law, the constitution, existing legislation, or international and regional obligations is ineffective.

Similarly, legislation that clashes with the jurisdiction's sense of morality is ineffective. It will not be applied by the users, and it will not produce the desired regulatory results.

It is therefore fair to state that legislation with legal or moral flaws is de facto ineffective.

1.8

This is the pyramid of drafting values and their hierarchy:¹

#ArtworkB

Artwork1.8

#ArtworkE

Regulation pursues regulatory efficacy. This is a factual value that answers the question, has the regulatory effort produced the desired regulatory results?

Regulatory efficacy can be nurtured by legislative effectiveness. Drafters can only aspire to producing a legislative text that can lead to the production of the desired regulatory results.

In the current era of economic challenges, drafters aspire to expressing regulatory solutions that are capable of producing maximum results for minimum cost. Cost can be economic, social, environmental, or other. This is cost efficiency.

To achieve effectiveness, drafters use clarity, precision, and unambiguity of legislative communication. Legislative communication is clear if the recipient receives the concept exactly as intended by the sender. Legislative communication is precise if the boundaries of the semantic fields of the communication are exactly as intended by the sender (otherwise the communication is vague, too limited, or extended). Legislative communication is unambiguous if the terms used convey a single meaning.

Clarity, precision, and unambiguity enhance legislative effectiveness by ensuring that the users of the legislation receive the regulatory message exactly as intended by the regulators. This allows them to understand what the legislation tells them. And those who are inclined to do so, apply the legislation. This achieves the switch to the behaviour sought by the legislative text. And in turn this contributes to the achievement of the desired regulatory results. Caveats: the regulation is sound, the choice of regulatory solutions is sound, the legislation is applied, enforced and interpreted correctly. The drafter has limited control over these caveats. But they are trained to identify and precipitate problems with them all.

Clarity is enhanced by the use of easified language and gender inclusive (or gender neutral) language. Easified language pitches the legislative text at the level of topical and legal sophistication that is appropriate for each legislative audience.

And gender neutrality (in jurisdictions recognising two genders only) or gender inclusivity (for jurisdictions recognising any or no genders) enhances clarity by ensuring that users identify themselves as subjects of the legislative enactment.

In reverse order, legislation that identifies who must apply it correctly and conveys the regulatory message to each legislative audience in a manner that they understand nurtures clarity. Clarity, precision, and unambiguity nurture effectiveness as they convey the regulatory messages in the manner intended by the regulators. Legislative effectiveness nurtures the achievement of the desired regulatory results, namely regulatory efficacy.

PURSUING EFFECTIVENESS

1.10

Setting legislative effectiveness at the forefront of legislative drafting provides a practical aid to drafting dilemmas. Drafters choose whichever solution can lead to the production of the desired regulatory results.

At the time of enactment.

In the jurisdiction of enactment.

¹ Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (2014, Hart Publishing, Oxford).

1.11

Mousmouti operationalises legislative effectiveness by introducing the main four questions that assess legislative quality:

- a Does legislation have a clear purpose?
- b Is the substantive content of legislation realistic, aligned to purpose and conducive to results?
- c Is there adequate information to measure the results of legislation?
- d How do the new provisions interact with the legal order?²

1.12

The first editions of *Thornton's* did not have the benefit of the prevalence of effectiveness as a measure of legislative quality. But they did apply effectiveness at its core. Perhaps it was Garth Thornton, who whispered the concept in modern legislative academics. He certainly was amongst those who planted the seed of effectiveness as a guide in legislative practice.

² Maria Mousmouti, *Designing Effective Legislation* (2019, Elgar, London).