

## Duncan Berry: A visionary of training in legislative drafting



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Duncan Berry has published extensively in the field of legislative drafting. His passionate approach to a simpler, yet elegant, style of legislation has been analysed extensively. But his vision on a formal training programme for legislative drafters seems to have escaped the usual level of attention awarded to his other work. This paper aims to rectify this injustice by drawing attention to the formal training programme that Duncan eloquently advocated. Duncan offers a generous insight to his approach to training and to the application of this approach in practice at the Hong Kong Department of Justice.<sup>2</sup> This article will form the basis of this analysis.

My hypothesis is that Duncan Berry's preference for formal training for drafters is supported by the nature of legislative drafting as a phronetic discipline, and by the transferability of drafting know-how. In order to prove this hypothesis I will analyse the nature of legislative drafting as phronesis: this will allow me to determine the type of intellectual activity undertaken by drafters, and the nature of tasks involved in the drafting of legislation. I will then evaluate whether know-how in drafting can be cross-fertilised or whether the national legal eccentricities render drafting a nation-focused experience. By proving that legislative drafting is a phronetic discipline with general principles and conventions that can be taught, I hope to conclude that there is scope for formal training in drafting. By proving that drafting know-how is not bound to national eccentricities, at least in its general principles, I hope to conclude that formal drafting training benefits from international and comparative experience, under strict prerequisites deriving from comparative legal methods.

Before I proceed to this analysis I must clarify that the formal drafting training, which Duncan and I advocate, does not aim to replace the traditional mentoring method of training altogether. I agree with Duncan that there is scope for mentoring. The question is whether it is now time to supplement the master and apprentice method with formal training.

### **A. What is the nature of legislative drafting?**

In order to assess which is the optimum style of training for modern legislative drafters, it is necessary to identify the nature of drafting. It is only when one understands the nature of the discipline that one can

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<sup>2</sup> See D. Berry, "Legislative drafting training in the Hong Kong Department of Justice" [2005] *The Loophole*, <http://www.opc.gov.au/calc/papers.htm#CALCpapers2005>

determine the style and elements of training that can assist drafters to deliver in their task. But determining what drafting is continues to be under debate.<sup>3</sup>

The prevailing view, mostly within the common law world, is that drafting is a pure form of art<sup>4</sup> or a quasi-craft<sup>5</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>6</sup>?

Or is drafting a science<sup>7</sup> or technique<sup>8</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 teleogenesis 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>9</sup> in the positivist sense.<sup>10</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>11</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 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

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<sup>3</sup> For an analysis on the science v art debate, see H. Xanthaki, “On transferability of legislative solutions: the functionality test” in C. Stefanou and H. Xanthaki (eds), *Drafting Legislation: A Modern Approach – in Memoriam of Sir William Dale*, (2008, Ashgate-Dartmouth, Aldershot), pp.1-18.

<sup>4</sup> See B. G. Scharffs, “Law as Craft” (2001) 45 *Vanderbilt Law Review*, 2339.

<sup>5</sup> See C. Nutting, “Legislative Drafting: A Review” (1955) 41 *American Bar Association Journal*, 76.

<sup>6</sup> See F. Ost and M. van de Kerchove, *Jalons pour une Theorie Critique du Droit*, (Brussels, Publications des Facultés universitaires Saint-Louis, 1987), 52.

<sup>7</sup> See contra Editorial Review, 22 [1903] *Can. L. Times*, 437.

<sup>8</sup> See 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>9</sup> 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.*, 1.

<sup>10</sup> See R. R. Formoy, “Special Drafting” 21 [1938] *Bell Yard: J.L. Soc’y Sch. L.*, 3; but see contra C. Langdell, “Harvard Celebration Speeches”, 3 [1887] *Law Q. Rev.*, 123-124.

<sup>11</sup> Aristotle, E.N., 5.10.1137b13-24.

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>12</sup>

But if drafting is neither pure science nor pure art, what is it? For Aristotle<sup>13</sup> all human intellectuality can be classified as<sup>14</sup> science as episteme; art as techne; or phronesis<sup>15</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>16</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>17</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>18</sup> Phronesis supports the selection of solutions made on the basis of informed yet subjective application of principles on set circumstances.<sup>19</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>20</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 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

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

<sup>13</sup> Aristotle, *Nicomachean Ethics*, bk VI, chs. 5-11 (D. Ross trans. 1980).

<sup>14</sup> M. Griffiths and G. Macleod, “Personal narratives and policy: never the twain?” [2008] 42 JPE, pp.121-143, at 126.

<sup>15</sup> Aristotle, *Nicomachean Ethics*, bk VI, chs. 5-11 (D. Ross trans. 1980).

<sup>16</sup> S-U von Kirchmann, *Die Werlosigkeit der Jurisprudenz als Wissenschaft* (1848, Verlage von Julius Springer, Berlin).

<sup>17</sup> See B. Caterino and S. F. Schram, “Introduction” in S. F. Schram and B. Caterino, 8.

<sup>18</sup> See W. Eskridge Jr., “Gadamer/Statutory interpretation” [1990] 90 ColumLRev, 635.

<sup>19</sup> See E. Engle, “Aristotle, Law and Justice: the tragic hero” [2008] 35 NKyLRev, 4.

<sup>20</sup> See C. Rideout, “Storytelling, narrative rationality, and legal persuasion” [2008] 14 Legal Writing: J. Legal Writing Inst., 75.

social perspective the regulation of a citizen's 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>21</sup> a good law is one that, with synergy, is capable of producing the regulatory results required by policy makers.<sup>22</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.

## **B. Training versus mentoring on the job**

In the realm of the pursuit for quality in legislation within phronetic legislative drafting, the choice of the most appropriate style of training becomes rather obvious. Drafting is phronetic: it is basically a series of subjective choices made by the drafter. These subjective choices are, or must be, based on two separate yet overriding and intertwining skills: know-how and experience. And thus, in order to prepare for the task ahead, drafters must be encouraged to train in a manner that cultivates these two skills, their knowledge and their experience in drafting.

Experience in drafting is what can flourish in mentoring by an experienced, open, and didactic senior. This is the one aspect or skill that drafters acquire as apprentices. This aspect of drafting acknowledges the arty elements of the drafter's task. And the nature of this type of training is professional, one could even call it vocational.

But Duncan is right. This is no longer enough. By isolating experience as a sole skill for drafters we simply ignore the second element of a drafter's task, namely knowledge and understanding. And this can only be explored through formal training offered in postgraduate mainly academic programmes which are prepared under the guidelines and the aegis of postgraduate educational institutions. After all, their staff are trained in education techniques, their programmes are assessed on consecutive cycles of independent scrutiny, and teaching is what they do. The academic aspect of drafting training is equally important, if not more so, than the vocational aspect of their training. This reflects the science elements of phronetic drafting.

It is academic training, or formal training, that allows drafters to understand the concept of quality in legislation; to become aware of what choices drafting entails; to identify the virtues or values that a drafter pursues; and the criteria and bases upon which these choices are made. And this on an abstract context. The application of this academic or theoretical context in true examples, in practice, comes with experience and through vocational training. Without this academic theoretical background the drafter simply lacks the theoretisation of experience: the link between examples and the reasons behind the solutions offered, and any lessons learnt for the future are lost, as apprenticeship involves isolated and on-the-case education. But without vocational training and practical application the theory is equally lost, as there are no concrete cases to channel lessons learnt and reasoning explained.

The dual nature of drafting, and the dual skill required, makes it impossible to consider a drafter trained without formal academic instruction in combination with practical hands-on experience. This is Duncan's

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

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

philosophy. This was Sir William Dale's philosophy, now acted upon at the Sir William Dale Centre for Legislative Studies, at the Institute of Advanced Legal Studies of the University of London.

Having proven that Duncan's approach to training is a combination of formal and mentoring education, let us now explore the elements of this training further. What aspects of training must educational institutions provide? Drafting is a sub-discipline of law that requires as a prerequisite a global understanding of law. As a result drafting can only be taught in a postgraduate environment. Of course elements of drafting and statutory interpretation must be offered to undergraduate students of law but this will inevitably be more of a taster and a skills-oriented tuition. One cannot begin to discuss effectiveness and quality in legislation without having awareness of the sources of law, their hierarchy in the legal system, the constitution or constitutional principles, and administrative structures. It is at postgraduate level that students can explore the main concepts of drafting and the general principles on which drafting choices are made. And of course this must be set within an analysis of the legislative environment: drafting is only part of the legislative process that is part of the policy process. And appreciation of law as a mere tool for regulation cannot be undertaken without an exploration of the policy context within which law is expected to function and deliver results effectively. With reference to legislative drafting as a part of legislative studies, what is required from formal training is not the provision of concrete answers to concrete drafting questions: after all, it is doubtful that such answers exist, at least uniformly and generally applicable.<sup>23</sup>

To apply here my writings on drafting manuals, what is required from training is the explanation of the role of the drafter in the drafting, legislative, and policy processes, the introduction of the main theoretical principles of drafting<sup>24</sup>, and the setting of these principles in a hierarchy. In other words what is required from drafting manuals is their use as guides [not bibles] for drafters in the making of subjective choices.<sup>25</sup> This type of training, which respects and reflects the nature of drafting as an artsy science or a liberal discipline, may assist the drafter in the development of a homogenous<sup>26</sup> drafting style in the jurisdiction.<sup>27</sup> This may prevent drafting surprises, namely circumstances, like the unilateral placement of definitions in the end, rather than the traditional beginning, of the law. But, at the same time, this type of training respects and recognizes the dynamic nature of legal rules,<sup>28</sup> the dynamic and evolving nature of drafting conventions, which, for the purposes of achieving effectiveness, require looseness, flexibility, innovation, and change.<sup>29</sup>

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<sup>23</sup> See G. Bowman, "The Art of Legislative Drafting" 7 [2005] *Eur. J.L. Reform*, 15.

<sup>24</sup> See W. D. Lewis, H. Hall, E. Freund, S. Williston, "Report of the Special Committee on Legislative Drafting" 6 [1920] *A.B.A. J.*, pp.503-504, at 504.

<sup>25</sup> See 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*, 111.

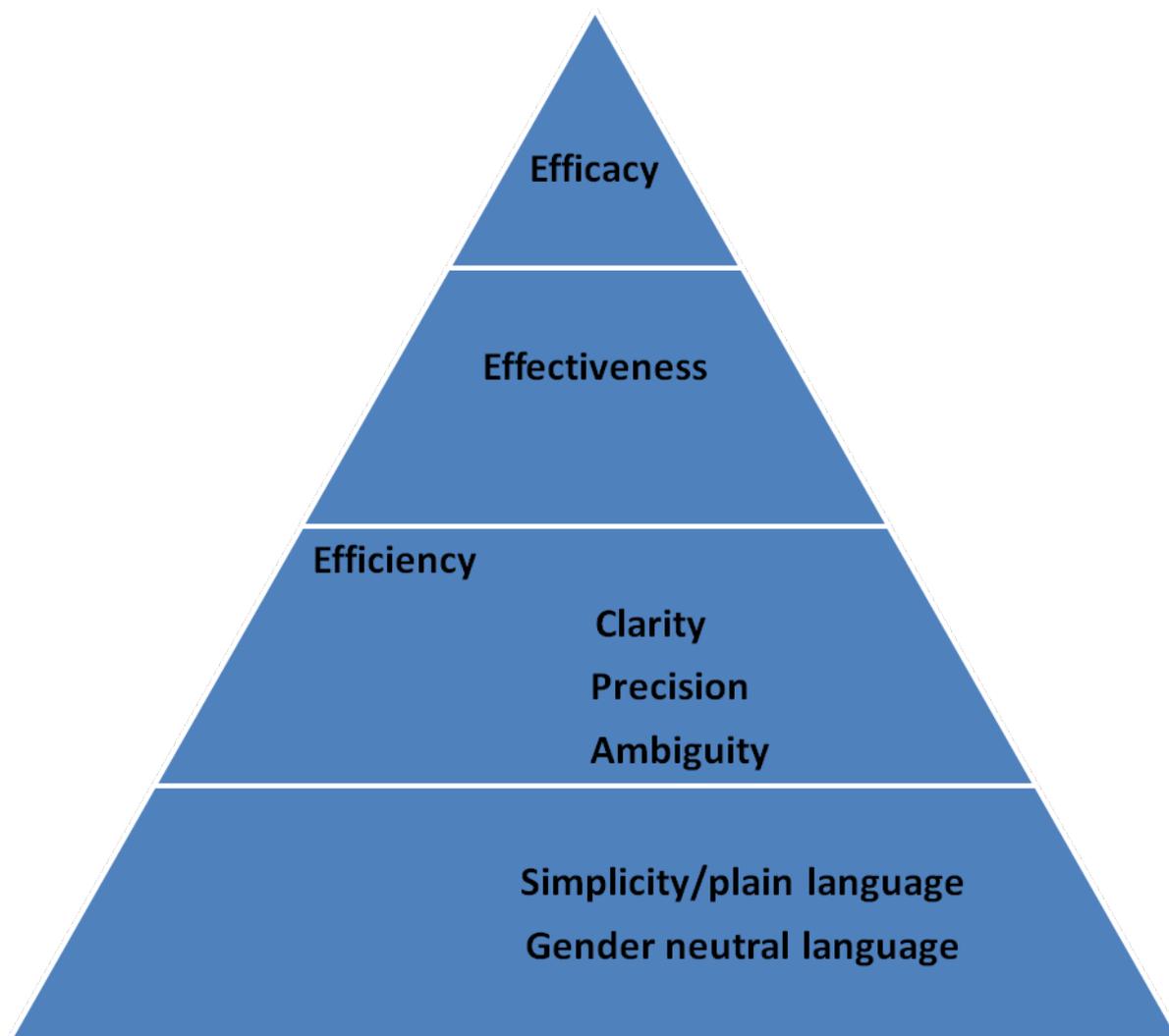
<sup>26</sup> See D. Le May, "Pour un manuel de légistique" 21 [1980] *C. de D.*, 995; also see G. Ciavarini Azzi, "Better Lawmaking: The Experience and the View of the European Commission" 4 [1998] *Colum. J. Eur. L.*, 624.

<sup>27</sup> See Interview, "Norm Larsen, "Draftstoevsky [comments]", 28 [2000-2002] *Man. L.J.*, 205; also see J. Kobba, "Criticisms of the Legislative Drafting Process and Suggested Reforms in Sierra Leone" 10 [2008] *Eur. J.L. Reform*, 231.

<sup>28</sup> See B. Deffains and M. Obidzinski, "Real Options Theory for Law Makers" 75 [2009] *Recherches économiques de Louvain*, 117.

<sup>29</sup> See W. Holdsworth, *A History of English Law*, Vol. XII, (1938, Methuen and Co. Ltd., London), 157.

Ultimately, students need to become aware of and explore the following pyramid of virtues:<sup>30</sup>



The pyramid demonstrates the place of effectiveness of legislation as a contributor to efficacy of regulation. And identifies the main drafting rules, and their hierarchical application. This is the backbone of our training philosophy at the Sir William Dale Centre: it reflects the phronetic nature of legislative drafting, and the main principles for the drafter's subjective choices. And it shows very clearly that when these principles clash, there is simply one criterion used for the selection of the most appropriate one: effectiveness. Now how effectiveness can be best served under the circumstances of the specific problem is a matter of prudence as experience. It is through ad hoc practical training that the drafter can be exposed to enough cases and solutions in order to make the link between academic training and actual practice.

Does the need for mentoring somehow negate the need for formal academic training? The answer is of course no. One can draw analogies between drafters and brain surgeons. Just as brain surgeons need to have undergraduate medical training [academic and applied] followed by specialised postgraduate formal education with vocational training in the operating theatre, drafters need undergraduate law training [academic and applied] followed by specialised postgraduate training in legislative studies combined with

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<sup>30</sup> See 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*, (2008, Ashgate-Dartmouth, Aldershot), 1.

hands on experience in a drafting office by an experienced senior. That level of specialisation and length of training time is necessary for the provision of all the skills required from drafters.

There is no arrogance in comparing drafters with neurosurgeons. Both are subspecialties of professional disciplines. And there is no notion of hierarchy between lawyers and drafters, just as there is no such notion between general medical practitioners and neurosurgeons. The analogy between drafters and neurosurgeons is based simply on the type of super-specialisation required in order to perform adequately; the only difference is that nobody questions the specialised skills of a neurosurgeon, whereas there are still those who feel that any lawyer [often even non-lawyers] can draft adequately. Just as few sane individuals would ask a foot specialist to undertake brain surgery, few sane individuals should be asking untrained professionals to draft. One should expect judges and lawyers to be bad in drafting [unless trained of course], exactly as one should expect drafters to be bad in court [unless trained and practising of course].

And so it is time, at least within the drafting community for a start, to embrace drafting as a sub-discipline of law, and drafting skills as specialised professional skills. And to finally welcome the specialised combined formal and mentoring training advocated by Duncan Berry as a necessity for drafters. But where in the world can this type of training take place?

### C. National v universal training for drafters

Is drafting so nation-focused that training must definitely relate to the national eccentricities of the jurisdiction that the student will serve? Or are there universal values in legislative drafting which can be promoted and explored in institutions outside the home jurisdiction?

Effectiveness, as synonymous to quality in legislation, and therefore the ultimate pursuit for drafters worldwide, is universal. The universality of the notion of quality in legislation is linked to the universality of legal rules. And so, if the pursuit for quality in legislation is universal, can the training required to enhance knowledge for that pursuit be equally universal?

If one follows the view that legal systems, despite their national eccentricities, can learn from each other<sup>31</sup>, then the question here is not if quality is transferrable but how.<sup>32</sup> Watson<sup>33</sup> 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.<sup>34</sup> Others qualify Watson's anarchic borrowing from anyone and anywhere with the qualifier that like must be compared with like,<sup>35</sup> namely with countries in the same

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<sup>31</sup> See P. de Cruz, *Comparative Law in a Changing World* (2007, Routledge-Cavendish, London and New York), 513-514; also see E. Öürü, "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>.

<sup>32</sup> For an in-depth analysis on borrowing and the drafting process, see Helen Xanthaki, "Legal transplants in legislation: defusing the trap" 57 [2008] *International and Comparative Law Quarterly*, 659.

<sup>33</sup> For an analysis of the term, see E. Öürü, "Critical Comparative Law: considering paradoxes for legal systems in transition" in [1999] 59 *Nederlandse Vereniging voor Rechtsvergelijking*; also see E. Öürü, "Law as Transposition" [2002] 51 *ICLQ* 206.

<sup>34</sup> See A. Watson, "Legal Transplants and Law Reform" 92 [1976] *LQR* 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.

<sup>35</sup> See H. Gutteridge, *Comparative Law* (1949, Cambridge University Press, Cambridge), 73; also see Buckland and McNair, *Roman Law and Common Law* (1936, Cambridge University Press, Cambridge).

evolutionary stage.<sup>36</sup> Others allow transferability on the basis of differences, as only differences enhance our understanding of law in a given society.<sup>37</sup>

Jhering, Zweigert and Kötz<sup>38</sup> view the question of comparability through the relative prism of functionality.<sup>39</sup> For them transferability is not a matter of nationality, but of usefulness and need.<sup>40</sup> It is precisely this notion of functionality that supports transferability on the basis of effectiveness.<sup>41</sup> 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 era of integrative legal globalisation<sup>42</sup> 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 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

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<sup>36</sup> See C. Schmidhoff, "The Science of Comparative Law" [1939] *Cambridge Law Journal*, 96.

<sup>37</sup> 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), 16.

<sup>38</sup> See Zweigert, K. und H. Kötz, *Einführung in die Rechtsvergleichung*, 3. neubearbeitete Auflage (1996, J.C.B. Mohr, Tübingen).

<sup>39</sup> See K. Zweigert and K. Sier, "Jhering's influence on the development of comparative legal method" [1971] 19 *Am.J.Comp.Law* 215.

<sup>40</sup> See K. Jhering, *Geist des römischen Rechts* (1955, Volume 1), 8-9.

<sup>41</sup> For an analysis of functionality in legislative drafting, see H. Xanthaki, "Legal transplants in legislation: defusing the trap" 57 [2008] *International and Comparative Law Quarterly*, 659.

<sup>42</sup> See L. A. Mistelis, "Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform – Some Fundamental Observations" 34 [2000] 3 *International Lawyer* 1059.

indeterminate. But, like all phronesis, drafting includes a mental-moral habit which, by mediating universals in the particular case, makes them determinate.<sup>43</sup> 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.

## D. Conclusions

Duncan Berry's approach to dual training for drafters is confirmed. Drafting is a phronetic sub-discipline of law, which deserves to be recognised as such. Drafting is not simply academic, just as drafting is not simply a technical science. Drafting encompasses both ends of the spectrum, as it is a liberal art, a phronetic discipline.

Phronetic legislative drafting, in the Aristotelian sense, requires that drafters select the most appropriate subjective choice for the solution of the problem that they face at any given time. In other words, drafting is prudence: just as a judge applies the most appropriate legal norm for the circumstances of the case, a drafter applies the most appropriate theoretical drafting principle for the circumstances of the concrete drafting issue that they are called to address.

In order to complete this task adequately, a drafter needs to possess two distinct skills:

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

To acquire the first skill, a drafter needs to have completed formal academic training in the theory of legislative drafting, both in abstract and applied. This formal training is best offered by academic institutions with experience in academic training, with independent assessment of staff and training offered, and by staff with both academic excellence in the field of legislative studies and teacher training. The use of know-how from other jurisdictions by means of international and comparative experience is useful.

To acquire the second skill, a drafter needs to have completed mentoring training on the job within the jurisdiction of choice by an experienced senior with both long service in that jurisdiction and mentoring skills.

It is rare for authors like myself to be able to affirm so effortlessly statements made by others. Duncan Berry's passionate and applied dual training for drafters has given me the chance to consider the reasoning behind my own passionate conviction that training for drafters must also take the form of formal education. I guess that this is yet one more thing for which I have to thank Duncan Berry.

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<sup>43</sup> J. Dunne, *Back to the Rough Ground* (1993, University of Notre Dame Press, Notre Dame), 311.