Legislative Policy and Effectiveness: A (Small) Contribution from Legal Theory

Mauro ZAMBONI*

Abstract

The purpose of this paper is to use legal theory to clarify the nature and the components of effectiveness in legislation, in particular when it comes to choosing legislative policy, ie the legislative model used to tackle a certain issue via legislation. Part II is devoted to revealing the true meaning of the idea of effectiveness, ie as a functional link helping legislative drafters to move among three elements (ideals, situation, results) rather than as an absolute value that drafters should pursue in their work. Part III continues by investigating the problems that such confusion has produced within legislative discourse and practice, in particular by focusing upon two types of effectiveness as external and internal to the legislative process. Finally, Part IV proposes how this idea of effectiveness as a functional element of legislative work (and the consequent distinction between an external and an internal version) can (and should) affect the work of legislative drafters. This idea becomes particularly relevant in relation to the optimal location of the non-legal experts in the legislative process as a means of increasing the effectiveness of legislative policy.

I. Introduction

Writing to an audience of legislative studies scholars and practitioners about effectiveness in legislation is like talking about "playing effective football" to football fans: everyone agrees that this is what the game is all about, that it is something that is inherently good and that it needs no further justification. However, as soon as one departs from these general statements and attempts to concretise the concept, it is easy to see that – just like football fans – legal scholars and practitioners end up in pretty divergent positions as to what the expression "effectiveness" really means, ie what the notion of effectiveness implies in the reality of the legislative process and its results.[1]

* Professor in Legal Theory, Faculty of Law, Stockholm University, Sweden.

[1] See H Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Hart Publishing 2014) 6–7; and M Mousmouti, "Operationalising Quality of Legislation through the Effectiveness Test" (2013) 6 *Legisprudence* 191, 197–200 (where the problem as to the unclear meaning of the criterion of effectiveness is traced back to the vast array of ideas as to what "quality of legislation" means). See, eg P Birnie and A Boyle, *International Law & the Environment* (2nd edn, Oxford University Press 2002) 9–10. See also H Xanthaki, "Quality of Legislation: an Achievable Universal Concept or a Utopian Pursuit?" in L Mader and M Travares Almeida (eds), *Quality of Legislation: Principles and Instruments* (Nomos 2011) 75–85 (as to the need of having an effective legislation as a unifying desire shared by all legislative scholars and practitioners).

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Italian football equates "playing effective football" with winning (usually through a well-played defensive game), but for English fans the expression naturally means to play an offensive match (regardless of the result). Similarly, when observing legislative studies literature and the opinions of its practitioners, one can easily notice how some scholars (and practitioners), after having left the safe harbour of defining effectiveness as the capacity of legislative measures to produced "actual results", consider a piece of legislation effective as soon as it is capable of redirecting the legislative panorama in the desired direction.[2] For others, focus should be put on obtaining the desired changes in society.[3] Yet others consider a legislative measure to be effective as long as it achieves its political goals, ie the specific ambitions of the political actors (eg by increasing support from the electorate), regardless of whether the new law has any effect on social realities or the legal system.[4]

The purpose of this brief article is certainly not to resolve all the important and indeed complex issues related to the idea of effectiveness in legislative policy. The goal is a much humbler one: to use legal theory to clarify the nature and the components of effectiveness in legislation, in particular when it comes to choosing legislative policy, ie the legislative model used to tackle a certain issue via legislation. The focus on this aspect of the legislative process is strengthened by the observation that in the choice of legislative policy, more than in other phases of lawmaking, the difficult position of the legal actors (especially the legislative drafters) as intermediary and preserver of balance among different worlds (politics, law, and society) comes to the surface.[5] As pointed out by Stephen Laws, "[t]he process of converting policy from its political context into legal propositions having the desired policy-driven effect on day-to-day activities in the real world is an essential part of making legislation effective".[6] For this reason, the main perspective adopted in this task of clarifying the matter of effectiveness in legislative policy is that of legislative drafters. This view has been selected not only because drafters are the key (and often concealed) actors in the legislative process, but also because they epitomise the overall dilemma shared by legal actors in modern society when it comes to lawmaking. As with most other legal actors involved in producing regulation, legislative drafters tend to be challenged in their daily work by the constant conflict of different goals, different discourses, and different forms of logic. These professionals take on not

[2] See eg HK Jacobson, "Conceptual, methodological and substantive issues entwined in studying compliance" (1998) 19 Michigan Journal of International Law 569, 573, where the author, when dealing with effective legislation, is more attentive to its impact on the legal system.

[3] See eg J Iredell, *Social Order and the Limits of the Law: a Theoretical Essay* (Princeton University Press 1981) 180; or L Mader, "Evaluating the Effects: A Contribution to the Quality of Legislation" (2001) 22 Statute Law Review 119, 126 (focusing on the legislation and its social consequences).

[4] See eg MD McCubbins, RG Noll and BR Weingast, "Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation" (1994) 57 Law and Contemporary Problems 3, 14, 26. See also A Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (Oxford University Press 2007) 219.

[5] See A Willcox Seidman, RB Seidman, and N Abeyesekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International 2001) 21; and F Reed Dickerson, *The Fundamentals of Legal Drafting* (Little Brown for the American Bar Association 1965) 8. See also T Perera, "The Wavering Line between Policy Development and Legislative Drafting" (2011) 3 The Loophole – Journal of the Commonwealth Association of Legislative Counsel 65; and, in general for the central role of legal actors in the political discourse, M Weber, "Politics as a Vocation" in HH Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Oxford University Press 1991) 95.

[6] S Laws, "Legislation and Politics" in D Feldman, *Law in Politics, Politics in Law* (Hart Publishing 2013) 90.

just the specific task of translating political will into legislation, but the more challenging job of transforming ideals (*political discourse*) into rules (*legal discourse*) in order to change the reality (*social, economic and cultural discourses*).[7]

To achieve this goal – clarifying the meaning of effectiveness in legislative policy from the legislative drafters' perspective – a legal theoretical approach is taken. By legal theoretical, I mean whether an approach to the law and (as in particular in this case) its making generally seeks "to give an explanatory and clarifying account of law as a complex of social and political institutions" with a rule-governed (and in that sense "normative") aspect.[8] Having this perspective in mind, Part II is devoted to revealing the true meaning of the idea of effectiveness, ie as a functional link helping legislative drafters to move among three elements (ideals, situation, results) rather than as an absolute value that drafters should pursue in their work. Part III continues by investigating the problems that such confusion has produced within legislative discourse and practice, in particular by focusing upon two types of effectiveness as external and internal to the legislative process. Finally, Part IV proposes how this idea of effectiveness as a functional element of legislative work (and the consequent distinction between an external and an internal version) can (and should) affect the work of legislative drafters, particularly in relation to the optimal location of the non-legal experts in the legislative process as a means of increasing the effectiveness of legislative policy.

II. Effectiveness of legislative policy: from "value" to functional link among milestones

As briefly pointed out above, the different positions held with regard to the meaning of effectiveness in legislation occupy a highly varied landscape, concealed under a thin crust of unanimity. This fragmentation in defining "effectiveness is in practice" is produced by two concurring and interconnected factors: the widespread notion of effectiveness as a value "per se" to be fulfilled by legislators; and the different views as to where this value should be located (either outside or inside the legislative process).[9]

[7] See Seidman, Seidman, and Abeyesekere, supra note 5, 25–28. As to the centrality of legal actors in law-making in general and in the policy moment in particular, see eg R Cotterrell, *The Sociology of Law: an Introduction* (2nd edn, Butterworths 1992) 203–204; N Luhmann, *Law as a Social System* (Oxford University Press 2004) 79–88; L Friedman, *The Limits of Law: a Critique and a Proposal* (Center for Studies on Changing Norms and Mobility 1986) 27–28; N MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press 1997) 235–237; and R Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press 1995) 240–248. See also P Delnoy, "*The role of legislative drafters in determining the content of norms*" (Government of Canada: Department of Justice 1995) < www.justice.gc.ca/eng/rp-pr/csj-sjc/ilp-pji/norm/index.html > accessed 10 May 2018; and the distinction between "efficacy" and "effectiveness" as sketched by H Xanthaki, "On Transferability of Legislative Solutions: The Functionality Test" in C Stefanou and H Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Routledge 2016) 4–5. For Xanthaki, while efficacy is a general quality of legislation (as to the capacity to produce the intended results), effectiveness is a quality specific to the contribution of the legislative drafters to the law-making process.

[8] HLA Hart, "Postscript" in HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 239. See also N MacCormick, *HLA Hart* (Stanford University Press 1981) 37–40; and K Tuori, *Critical Legal Positivism* (Ashgate Publishing 2002) 320.

[9] As to other potential causes of such discrepancy as to the meaning of "effectiveness of legislation", see Mousmouti, supra, note 1, 192–193.

Let us begin by examining the first factor promoting such shattered scenery. The confusion here can be traced to a fundamental misunderstanding as to the nature of effectiveness within legislative processes and discourses. For historical and institutional reasons (which due to their complexity and the space limitations of this article cannot be addressed here), effectiveness has become a value in itself of legislation. Like the concepts of democracy or basic rights, effectiveness in legislation has become a "reason for preferring certain ways of acting and states of affairs to others… not necessarily backed by further or ulterior reasons".[10] In other words, effectiveness is often used as the trump card in deciding whether to choose one or another legislative policy, without necessarily seeking further reasons why this policy should aim to be "effective" and not, for instance, "democratic".[11] However, effectiveness is not an absolute value in itself (ie to be fulfilled no matter what) and it should be treated instead as a relative criterion (ie as a path that *can* be chosen in order to fulfil other values).[12] For instance, effectiveness must always be considered as a preferred (but not absolute) way to better fulfil the value (or idea) of democracy, since it helps the representatives of the people to reach the concrete results for which they were elected by a certain community.

Instead, both political and legal actors tend nowadays to use effectiveness as a paramount value per se of the legislation. This use assumes effectiveness as an ideal which every legislative measure must fulfil, regardless of whether its results collide with other equally valid (and for this matter "real") values and according to which the "goodness" – or lack thereof – in a piece of legislation is measured (often at the expense of other "real" values, such as democracy, social justice, or basic rights).[13] This use of the idea of effectiveness as an ultimate value for legislative lawmaking is particularly strange when one looks at the basic definition of this concept, upon which most of the literature and practitioners agree. In terms of the meaning of effectiveness in legislation, opinions may diverge considerably as to its extent, its fundamental components and its role in the legislative process and ensuing results. However, there is a core idea on which

[10] MacCormick, *HLA Hart*, supra, note 8, 48. See also, for a similar definition but under the label of "ideology," Cotterrell, supra note 7, 13. See, eg, Xanthaki, supra, note 7, 16–17.

[11] See eg CWA Timmermans, "How to improve the Quality of Community Legislation: the Viewpoint of the European Commission" in AE Kellermann, GC Azzi, SH Jacobs and R Deigthon-Smith (eds), *Improving the Quality of Legislation in Europe* (Kluwer Law International 1997) 45–46; or U Karpen, "Comparative Law: Perspectives of Legislation" (2012) 6 Legisprudence 149, 173–185 (as to effectiveness as to the primary value to measure the "good quality legislation"). See also W Dale, *Legislative Drafting: A New Approach* (Butterworths 1977) 340, where the author points out effectiveness as the goal of legislation (leaving its "functionality" to values such as human rights and rule of law somehow at the horizon).

[12] See W Voermans, "Concern about the quality of EU legislation: what kind of problem, by what kind of standards?" (2009) 2 Erasmus Law Review 59, 66–68 (where effectiveness is a functional tool in order to realise the rule of law); Dale, *Legislative Drafting*, supra, note 11, 340; and U Karpen, "Efficacy, Effectiveness, Efficiency: From Judicial to Managerial Rationality" in K Meßerschmidt and DA Oliver-Lalana (eds), *Rational Lawmaking under Review: Legisprudence According to the German Federal Constitutional Court* (Springer 2016) 304–308 (where effectiveness in legislation is not considered a value per se but one of the criteria functional in order to measure the legitimacy of law as a whole).

[13] See eg H Xanthaki, "Duncan Berry: A Visionary of Training Legislative Drafting" (2011) 1 The Loophole – Journal of the Commonwealth Association of Legislative Counsel 18; or M Mousmouti, "Effectiveness as an Aid to Legislative Drafting" (2014) 2 The Loophole – Journal of the Commonwealth Association of Legislative Counsel 15. See also A Flückiger, "Effectiveness: a new Constitutional Principle" (2009) 50 *Legislação: cadernos de ciência de legislação* 183, 187; and OW Lembcke, "Symbolic Legislation and Authority" in B Van Klink, B Van Beers and L Poort (eds), *Symbolic Legislation Theory and Developments in Biolaw* (Springer 2016) 87–104 (where the effectiveness/ineffectiveness quality of the legislation is used by political actors as a specific goal of the legislative process).

many legislative scholars and practitioners agree: effectiveness in legislative policy is the *measure* of the capacity of chosen legislative patterns in obtaining results that are as close as possible to realising the ideal expressed by the political actors, considering the context of operation.[14]

From this simplified definition, it is possible to note immediately how effectiveness, despite its usage in modern legislative discourse, cannot be considered an ideal, or a value, that stands on its own. In contrast with values such as gender equality or democracy or basic rights, effectiveness is not a goal (or ideal model of reality) that legislation ought to pursue. Effectiveness is instead the path that legislation has to follow to fulfil the values that the community or the political representatives consider to be the foundations upon which society is (or should be) built. While the fulfilment of values such as gender quality is the goal of modern Western societies, ie values that can stand on their own as a goal without further justification (because they are considered "good" in themselves), effectiveness deals with the "measurement" of something: it is a relational ideal that acquires meaning (and it can be evaluated as being fulfilled or not) only within a certain context and in relation to external elements.[15]

In other words, effectiveness is not a value in and of itself; it comes to life within and is functional with respect to a certain structure. This statement immediately begs the question "effective in relation to what?". Effectiveness comes into existence not as the destination of the lawmaking journey but as a road between different standpoints, linking in particular two milestones of the legislative process. These two different components – the two benchmarks within (and only within) which the idea of effectiveness acquires concrete significance as a guiding light for legislative drafters in the legislative processes – are the following: the *original idea* to be legislated upon (what one wants to achieve with the legislative process); and the *results* of legislation (what the legislative process has actually achieved). To these one should also add the conditions of the path connecting ideas and results, ie the *actual situation* in which to legislate (the environment in which the legislative process operates).[16]

Thus, the first of these two milestones of effectiveness of a legislative policy is the *original idea* to be legislated upon. This benchmark is the starting point of the legislative process and consists of the ideal that one wants to implement in society; it can be embedded for instance in the preparatory works, the parliamentary discussion, or the preambles of the statutes. It is the political message of each legislation, namely the ideal painting of a certain society (or part thereof) that the political actors (usually sitting in the representative assemblies) want to bring about (ie the realisation of their

[14] See Mader, supra, note 3, 119; and Mousmouti, supra, note 1, 200 (as to effectiveness as the measure of the causal relation between legislation and its effects). See also F Reed Dickerson, *Materials on Legal Drafting* (West Publishing Co 1981) 191. But see eg N Moons and B Hubeau, "Conceptual and Practical Concerns for the Effectiveness of the Right to Housing" (2016) 6 Oñati Socio-legal Series 656, 661–662, < opo.iisj.net/index.php/osls/article/viewFile/461/904 > accessed 10 May 2018 (as to the difficulty in tracing "the" purpose of a certain legislation).

[15] See Xanthaki, *Drafting Legislation*, supra, note 1, 7–8 (as to effectiveness as the measure of quality of legislation). As to this fundamental relational nature of the idea of effectiveness, see also Xanthaki, supra, note 7, 6 (where effectiveness "reflect[s] the relationship between the effects produced by legislation and the purpose of the statute passed").

[16] See GE Axtelle, "*Effectiveness as a Value Concept*" (1956) 29 The Journal of Educational Sociology 240, 241 (where effectiveness is described as "the maximization [*results*] of ends [*original idea*] with available resources [*actual situation*]").

ideal).[17] For example, the original ideal to be implemented in a community could be the promotion of small enterprises as primary actors in a well-functioning and advanced capitalistic economic system.

The second milestone for evaluating the effectiveness of a legislative policy is the *result* of legislation. These results are the changes that legislative measures have produced in the targeted reality, regardless of whether they correspond to the ideals: they are both the intended and the unintended consequences produced by new legislation in a certain community.[18] For example, the results of a new legislative provision obligating banks to devote a percentage of their financial investments to small enterprises can be that more small businesses can access the financial market. The opposite effect can be that the banking system, after a risk evaluation, decides to limit lending to the economic system in general (even for the larger industries), thus lowering the total amount of their financial investments on which the percentage devoted to the small enterprises is calculated.

Finally, the third fundamental element in which legislative effectiveness operates is the *actual situation* (or environment) in which the legislation is operating. This environmental component is the social, economic, cultural, legal and political reality in which the original ideal is going to operate and which the political actors aim at implement by legislating (and by which the legislative process in turn is influenced). In other words, the legislation affects the external environment, but, at the same time, the external environment aims to affect the legislation.[19] For instance, economic systems typical of traditional capitalist societies encourage economies of scale (for instance due to the necessity of high initial investments); therefore, because of the high costs of entry in economic production, these economic systems favour large corporations and mass production.

These three components (ideal, situation, and results) designate the field in which effectiveness operates, since legislative measures are set up to the function within all three: by means of statutory provisions, political actors affect reality, with the goal of changing the current environment so that it mirrors their ideal picture of society.[20] For instance, political actors, in order to promote a stronger role for small businesses in the

[17] See Laws, supra, note 6, 89–90 ("[T]he ultimate objective for a proposal of legislation is always more or less political", 89); and H Drechsler, W Hilligen and F Neumann (eds), *Gesellschaft und Staat: Lexikon der Politik* (9th edn, Verlag Franz Vahlen 1995) 632. See also M Zamboni, *The Policy of Law: A Legal Theoretical Framework* (Hart Publishing 2007) 135–137. But seeA Allott, "The Effectiveness of Laws" (1981) 15 Valparaiso University Law Review 229, 233 (as to the difference, in the addressees' eyes, between the purpose of the originator of the norm and the purpose of the current emitter).

[18] See Laws, supra, note 6, 88 ("Legislation is all about changing things"). See also IB Flores, "The Quest for Legisprudence: Constitutionalism v. Legalism" in LJ Wintgens (ed.), *The Theory and Practice of Legislation: Essays in Legisprudence* (Ashgate 2005) 29 (where the author points out the ambiguity of the term legislation, swinging between the process of formation of regulations and these very regulations).

[19] See N Luhmann, "The Coding of the Legal System" (1992) 1991–1992 European Yearbook in the Sociology of Law 145, 145–146; and Xanthaki, *Drafting Legislation*, supra, note 1, 351–352 ("Effectiveness must be at the forefront of pre-legislative scrutiny, and this involves evidence-based, empirical research", 352). See also R Cranston, "Reform through Legislation: The Dimension of Legislative Technique" (1978–1979) 73 North Western University Law Review 873, 875; and Zamboni, supra, note 17, 143–148.

[20] See Mousmouti, supra, note 13, 17, where the author identifies four components of the criterion of effectiveness, namely purpose, substantive content, the legal context (or "overarching structure") and the "real-life results". But see G Müller and F Uhlmann, *Elemente einer Rechtssetzungslehre* (3rd edn, Schulthess 2013) 51–52 (where effectiveness is the measurement of the degree of the legislation's fulfilment of its intended goals without suffering from unwanted side-effects). It is worth noticing how Müller and Uhlmann's definition of effectiveness tends to be more of normative character than descriptive, considering that in reality legislation almost always tends to have (to a larger or narrower extent) unwanted results.

current unfavourable economic system, use statutes to promote decreased taxation of profits for enterprises employing fewer than 20 people. When looking at the effectiveness in legislative policy, the focus here is not on whether it has been achieved "in itself"; it is not a goal of the legislative process (as it can be in the implementation of human rights or democracy). Effectiveness in legislation is instead a criterion to measure of the capacity of the chosen legislative patterns to operate in all three elements (ideal, environment, and results) to obtain the results that are as close as possible to the original ideals, considering the context of operation.

III. Internal versus external effectiveness of legislative policy

The second factor encouraging fragmentation into different (and often conflicting) ideas as to what legislative effectiveness is "in practice" is connected to the first cause. Because it is not an absolute (and fixed) value, but rather a criterion, effectiveness in legislation depends very much upon the positioning of the three elements – in other words, effectiveness in legislation, being a relational criterion, tends to be used and molded around the specific world-view of its users.[21] Political actors (eg political parties sitting in the national assemblies) tend to consider effectiveness in relation to the reaching of results through legislative provisions (or sometimes only of purely political results, such as sending a message to potential voters).[22] Instead, for the legal actors, the creation of an effective statute tends to identify the making of provisions that are capable of having an impact on the legal system, and therefore are capable of creating concrete change in the current regulatory panorama.[23]

As it directly appears from these different perspectives on effectiveness, the root of potential and actual disagreements about the nature of effective legislation often centres on the idea of *results*. Particularly for the legislative drafters (who have the major task of creating effective legislation), the intended "results" of the legislative provisions are of

[21] In this respect, this article shares a basic assumption of the Positive Political Theory when it comes to the law-making and the law in general, namely the idea that all relevant actors within the legislative discourse (eg political parties, when it comes to its making, or judges, when it concerns its interpretation) tend rationally to mold the legislative product as close as possible to their own preferred outcome (which can space from being reelected to accomplish a good public policy). See DA Farber and PP Frickey, "Foreword: Positive Political Theory in the Nineties" (1992) 80 Georgetown Law Journal 457, 463–471; and DA Farber and P Frickey, *Law and Public Choice: A Critical Introduction* (University of Chicago Press 1991) 21. See also O Young and MA Levy, "The effectiveness of international environmental regimes" in O Young (ed.), *The Effectiveness of International Environmental Regimes: Causal Connections and Behaviour Mechanisms* (The MIT Press 1999) 3–5 (coupling effectiveness to the kind of rationality shared by the evaluating actors and therefore distinguishing between, for instance, a political approach, a legal approach, and an economic approach).

[22] See eg H Bähr, *The Politics of Means and Ends: Policy Instruments in the European Union* (Ashgate 2010) 115. See also A Seidman and RB Seidman, "Between policy and implementation: legislative drafting for development" in Stefanou and Xanthaki, supra, note 7, 295.

[23] See N MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007) 179. See eg CJ Petersen, "Racial Equality and the Law: Creating an Effective Statute and Enforcement Model for Hong Kong" (2004) 34 Hong Kong Law Journal 459. See also M Weber, *Economy and Society* (Guenther Roth and Claus Wittich eds, University of California Press 1978) 657; Tuori, supra, note 8, 36–39; Xanthaki, supra, note 7, 6 (where the author hints at such a distinction by defining efficacy as to the capacity of the legislation to realise its policy content, or as here defined the political actors' goal, while effectiveness "relates to the effect of the statute", ie the legal actors' goals); and N MacCormick, "On Legal Decisions and their Consequences: from Dewey to Dworkin" (1983) 58 New York University Law Review 239, 247 (where, though confined to the decision-making process, the author sketches a distinction between "consequences" and "juridical consequences" of a legal action).

great significance.[24] For instance, when it comes to legislation regulating the financial sector, everybody would agree that the law has to offer results, ie it has to be effective. However, "results" can be interpreted here in at least three different ways. For politicians, for instance, "results" means that they have shown the population that they act to control the instability of the financial market (eg in terms of symbolic politics), but for the actors operating in the financial market, legislation is effective when it has an impact on their daily work.[25] Legal actors will evaluate the effectiveness of the legislation on the financial markets in terms of impact (or lack thereof) upon the current regulation, ie in terms of actually changing the current regulation (regardless of, or merely in hopes of, an impact upon the financial market).[26]

In other words, because it serves as a functional link rather than an absolute value, effectiveness in legislation makes the work of legislators (and especially legislative drafters) extremely difficult. The constitutive elements (starting ideal, environment, concrete results) for which these actors must build a road (ie legislation) tend to be moving targets, based on the perspective from which these elements are considered (or, in more sophisticated terms, based on the perspective of the different interpretative communities). In particular, when talking about effectiveness of legislative policy from a legislative drafters' perspective, one should clearly point out that when looking at the milestone of "results", there are two basic (and ideal-typical) types of effectiveness: an *internal* and an *external* effectiveness of legislative policy. Internal effectiveness of legislative policy measures *legal policy outputs*, ie the impact the new legislation has on the actual legal system or how much the law has changed. External effectiveness focuses instead upon the *legal policy outcomes* of the legislative process, ie the changes the altered legal system has brought to bear upon the social, economic, and political realities.[27]

This separation of outputs from outcomes is actually an adaptation in the lawmaking process of the results attained through a long series of studies developed in political science.[28] Relocated into the context of the legislative process of legal policy, outputs are thus the impacts of the legislative processes inside the legal arena in which the process

[24] See Xanthaki, *Drafting Legislation*, supra, note 1, 7 ("For the purposes of drafting… effectiveness is the ultimate measure of quality in legislation. It simply reflects the extent to which the legislation manages to introduce adequate mechanisms capable of producing the desired regulatory results"). See eg O Birungi Kamugundu, "Prioritising legislation in the policy process" in H Xanthaki (ed.), *Enhancing Legislative Drafting in the Commonwealth: A Wealth of Innovation* (Routledge 2015) 90–92.

[25] See eg D Lombardi and M Moschella, "The symbolic politics of delegation: macroprudential policy and independent regulatory authorities" (2017) 22 New Political Economy 92, 97–101 and GA Walker, *International Banking Regulation: Law, Policy and Practice* (Kluwer Law International 2001) 489–502 (as to the meaning of the term "results" when it comes to legislative reforms' results for the political and financial actors respectively).

[26] See eg The World Bank and International Monetary Fund, *Financial Sector Assessment: A Handbook* (World Bank Publications 2005) ch 9 (as to the legal actors' perspective as to having an effective regulatory legislation of the financial markets).

[27] See Laws, supra, note 6, 90 ("an effect [of legislation] in the real world is not the inevitable result of the conversion of policy into law"). See also Voermans, supra, note 12, 66–67 as to the distinction between legislative quality (dealing with the legislation's outputs) and regulatory quality (more focused upon the outcomes of a legislation). As to the identification of the criterion of effectiveness with reaching (or not) certain legal policy outcomes, see eg L Mader, "Evaluation of Legislation: A Contribution to the Quality of Legislation", in *Evaluation of Legislation: Proceedings of the Council of Europe's Legal Co-operation and Assistance Activities (2000–2001)* (Council of Europe Publishing 2001) 24.

[28] See FG Castles, *Comparative Public Policy. Patterns of Post-war Transformation* (Edward Elgar 1998) 248–292. See also Zamboni, supra, note 17, 139–142. See eg JA Thompson, "Outputs and Outcomes of State Workmen's Compensation Laws" (1981) 43 Journal of Politics 1129, 1132.

itself has taken place (eg changes in the legal system concerning regulation of banking loans). The outcomes of the legislative process, on the contrary, mark the effects (intended or unintended) such impacts have on the surrounding environment (eg changes in the concrete behaviours of banks).[29] For example, the distinction between legal policy outputs and legal policy outcomes is important in understanding that sometimes, a new piece of legislation (legal policy outputs) can be internally but not externally effective, ie it has more or less the same practical effects on a community (same legal policy outcome) as those of the previous legislation.[30] In legal theoretical terms, the distinction between legal policy outputs and legal policy outcomes can be important in pointing out the difference between a *valid* new law (new outputs) and an *in-force* new law (new outcomes).[31] For example, a legislature promulgates a statutory provision of penal law criminalising abortion practices, proactively and retroactively. Before the decision is applied by any court or enforcement agency to a concrete case, the legislature then decides to change its construction because of strong criticism from the legal community. During this short period, the legal category of criminalising abortion has been valid, ie the law has been internally effective in the sense that it produced certain legal outputs. The criminalisation has provisionally changed the structure of criminal law (eg by disregarding the legal principle of *nullum crimen sine lege*). On the other hand, the new legal category of punishing abortion practitioners and patients retroactively has never been in force, and therefore it has been externally ineffective, since it has not and never will produce any concrete results (outcomes) as to the behaviours of the members of the national community.[32]

IV. A PRACTICAL CONSEQUENCE: LET'S FREE THE DRAFTERS… BY LIMITING THE NON-LEGAL EXPERTS

This distinction between external effectiveness of legislative policy (ie the measure of outcomes) and internal effectiveness (ie the measure of legal outputs) is not a mere

[29] This different kind of effect can be considered a consequence of the more general distinction between normative and social function of the law. See J Raz, "On the Functions of Law" in BAW Simpson (ed.), *Oxford Essays in Jurisprudence (Second Series)* (Clarendon Press 1980) 280. See also S Laws, "Giving Effect to Policy in Legislation: How to Avoid Missing the Point" (2011) 32 Statute Law Review 1, 3–4 (as to the different types of legislative outcomes); P Delnoy, *The Role of Legislative Drafters in Determining the Content of Norms* (The Internal Cooperation Group – Department of Justice of Canada 2005) 3, where effectiveness is the quality of the norms to produce an (intended or unintended) effect (outcome), while efficient are the norms that produce the desired effect (or intended outcome); and Mousmouti, supra, note 13, 17, distinguishing between *prospective dimension* of effectiveness (ie intended outcomes) and *real-life dimension* of an effective legislation (actual outcomes).

[30] See Xanthaki, *Drafting Legislation*, supra note 1, 6 ("A wonderful draft may be capable of producing the desired regulatory effects [outputs], but bad implementation and bad judicial application may interfere with its actual results [outcomes]"). See eg R Banakar, *Merging Law and Sociology: Beyond the Dichotomies in Socio-Legal Research* (Galda + Wilch Verlag 2003) 277–285 (as to the former Swedish legislation against gender discrimination, which had produced an high number of changes in the regulatory regime, ie legal policy outputs, but, due to several circumstances, a low impact upon the economic and social spheres, ie few legal policy outcomes).

[31] See E Bulygin, "Valid Law and Law in Force" in E Bulygin, *Essays in Legal Philosophy* (Oxford University Press 2015) 284–292; and E Pattaro, *A Treatise of Legal Philosophy and General Jurisprudence: Volume 1: The Law and The Right* (Springer 2005) 156–157. See eg K Olivecrona, *Law as Fact* (2nd edn, Stevens & Sons 1971) 222–223; and A Ross, *On Law and Justice* (Stevens & Sons 1958) 81. But see HLA Hart, "Self-referring Laws" in HLA Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983) 175–178.

[32] See W Lang, "A Concept of the Validity of Law" (1996–1997) XXIX-XXX Archivum Iuridicum Cracoviense 87, 88.

terminological distinction. As often happens with theoretical classification, it brings with it an implicit normative message to legislative drafters, ie it is a carrier of concrete implications as to drafters' very role in the legislative process, in particular in relation to the non-legal "experts". Legislative drafters are purely legal actors, ie they are usually educated in the artisanship (or in the technique) of creating new statutory provisions according to the traditional principles superseding the legal discourse.[33] In other words, they are educated, hired and, in the end, legitimised to produce legislation according for instance to principles such as coherence or consequentiality, ie "canons or standards of legal reasoning which establish what are satisfactory [from the lawyers' perspective] justifications" of lawmaking processes.[34]

For this reason, legislative drafters engaged in writing the law often lack the knowledge needed to evaluate the external effectiveness of the law, ie its impact upon the environment surrounding the law (and whether the law offers the desired results).[35] At the same time, these drafters possess the competence and legitimacy to be the quasi-monopolistic interpreters of the internal effectiveness of legislative policy, ie to measure and evaluate how a new statute may affect the legal system.[36] For instance, legislative drafters have the competence and legitimacy to measure whether their legislation obliging banks to invest a percentage of their loans to small enterprises will effectively operate in a legal environment otherwise dominated by the legal principle of freedom of contract. However, legal actors – as legislative drafters – lack both the knowledge and expertise to measure the impact of such legislation on the financial and economic strategies the banks will adopt to counteract the enacted law (as this is more the preserve of economists and financial experts).

In this respect, non-legal experts brought in the legislative process play a pivotal role in ensuring that internal effectiveness, ie a concrete change of the law, becomes external

[33] See BG Scharffs, "Law as Craft" (2001) 45 Vanderbilt Law Review 2245, 2339; J-C Piris, "The Legal Orders of the European Union and of the Member States: Peculiarities and Influences in Drafting" (2004) 1–2 European Journal of Law Reform 1, 1; and G Bowman, "The Art of Legislative Drafting" (2005) 7 European Journal of Law Reform 1, 3. See also A Symonds, *The Mechanics of Law-Making* (Edward Churton 1835) iv. But see Xanthaki, *Drafting Legislation*, supra, note 1, 10–16 (where the author points out how, in the modern age of technological progress, drafting can be considered neither a science nor an art).

[34] MacCormick, *HLA Hart*, supra, note 8, 126. See also Xanthaki, *Drafting Legislation*, supra, note 1, 15 (where the author points out how legislative drafting "is a liberal discipline where theoretical principles guide the drafter to conscious decisions made in a series of subjective empirical and concrete choices… [which are] context dependent… [and] will always depend on normative judgements").

[35] See eg SC Markman, "Training of Legislative Counsel: learning to draft without Nellie" in A Zammit Borda (ed.), *Legislative Drafting* (Routledge 2011) 17–19 (where among the knowledge required by the legislative drafters are only accounted legal knowledge and knowledge as to the political system, but no requirement is needed as to the socio-economic environment upon which the legislation is going to operate); or N Haji Ismail, "Legislative drafters: lawyers or not?" in Xanthaki (ed.), *Enhancing Legislative Drafting in the Commonwealth*, supra, note 24, 71–72 and Xanthaki, *Drafting Legislation*, supra, note 1, 359–360 (both authors limiting the duty of the legislative drafters to a, though extended, legal knowledge).

[36] See Laws, supra, note 6, 94 ("the legislative process does always involve an element of diluting the political content of the inputs to produce a legal output"). See also A Seidman and RB Seidman, "ILTAM: Drafting Evidence Based Legislation for Democratic Social Change" (2009) 89 Boston University Law Review 435, 444–448 (as to the central role played by the legislative drafters not only as "scrivener" but also as a "designer" of the legislation); and E Gowers, *Plain Words: Their ABC* (Alfred A Knopf 1954) 18. It is worth noticing that in this work within 'legislative drafters' are included both the proper drafters and the substantive law experts, who are usually involved in the drafting process, as pointed out by Xanthaki, *Drafting Legislation*, supra, note 1, 24. Compare S Höfler, M Nussbaumer and H Xanthaki, "Legislative Drafting" in U Karpen and H Xanthaki (eds), *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (Hart Publishing 2017) 153–156.

effectiveness, ie a concrete change of reality, in the direction expected by the political actors who formulated the original idea.[37] However, an important question follows from this: when should such experts enter into the lawmaking process, to guarantee that the process is not only based on a correct evaluation of the actual situation, but also that its product (ie the statutory provisions) may be externally effective (ie have a concrete impact on such a situation)?

My impression in this regard is that the role non-legal experts have come to play in recent decades in the legislative process has increased confusion as to the question of creating "effective legislation". Non-legal experts are usually called upon, explicitly or implicitly, throughout the entire lawmaking process – from when political actors establish the original idea to be legislated, to assessing the actual situation in which the legislation is going to operate, and concluding with the evaluation of the results.[38] This tendency may be positive, by increasing the amount of knowledge acquired during the legislative process as to vital milestones of the effectiveness of legislation. Yet it comes at a price: for example, as parliamentary transcripts and preliminary works can demonstrate, when non-legal experts are involved in the drafting of legislative provisions, their involvement in the process increases the chances that the legislative provisions will be less effective. As correctly stated by Neil MacCormick,

> "Legal experts (drafters) employed by the legislature or the executive may be employed to ensure that the actual words enacted will be likely to bring about the consequences their authors intend. Having such experts is necessary, because the legislature's output is input from the point of view of lawyers and courts…. Only somebody who understands well the practice of statutory interpretation is in a position to ensure that statutes are written in such a way that the interpretation applied by the law-applier is likely to match reasonably closely what was intended by the promoter of the legislative proposal".[39]

As noted previously, in order to create a certain outcome (ie effects on society), legislation must first produce an output (ie effects on the law). However, by involving non-legal experts in legislative drafting the, ie actors who are not usually familiar with the basic structures and working methods of the legal system, new legislative provisions are frequently structured so that they perform poorly in terms of internal (and consequently external) effectiveness. By being constantly forced to confront (and sometimes accept the inclusion of) non-legal arguments and discourses while

[37] See K Eder, "Öffentlichkeit und Demokratie" in M Jachtenfuchs and B Kohler-Koch (eds), *Europäische Integration* (Springer 2004) 105–106. See eg LG Trubek, M Nance and TK Hervey, "The Construction of Healthier Europe: Lessons from the Fight against Cancer" (2008) 26 Wisconsin International Law Journal 804, 814; or JJ Kilborn, *Expert Recommendations and the Evolution of European Best Practices for the Treatment of Overindebtedness, 1984–2010* (2010) < ssrn.com/abstract = 1663108 > accessed 10 May 2018.

[38] See eg N Zeegers, "Distinguishing True from other Hybrids. A Case Study of the Merits and Pitfalls of Devolved Regulation in the UK" (2009) 3 Legisprudence 299; or AE Black, *From Inspiration to Legislation: How an Idea Becomes a Bill* (Pearson Prentice Hall 2006) 123. But see B Bimber, *The Politics of Expertise in Congress: The Rise and Fall of the Office of Technology Assessment* (State University of New York Press 1996) 60–68, as to potential different goals between non-legal experts somehow internal to the legislative process (eg as part of another Ministry) and those non-legal experts which are institutionally external to the law-making (eg representing certain interests groups).

[39] MacCormick, *Institutions of Law*, supra, note 23, 179. See also AP Blaustein and CO Porte, *The American Lawyer: A Summary of the Survey of the Legal Profession* (The University of Chicago Press 1954) 99–100; and J Hage, "Legislation and Expertise on Goals" (2009) 3 Legisprudence 351, 352. See eg V Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart Publishing 2015) 281 (where, in terms of tobacco control, the experts' concerns as to public health had no impact upon legislation due to their conflicting with intellectual property rights viewed as fundamental rights).

writing the law, legal drafters must not only start playing a role for which they are ill equipped (eg as amateur sociologists or economists in order to create an external effective law). They also must introduce concepts and ideas in the legal texts that are ill-suited for truly affecting society – because of the legal actors' incomprehension of the articulated social, economic, and/or cultural reality in which their legislative product is going to operate.[40] Using the previous example, an excessively deep involvement of financial experts in legislative drafting of hypothetical legislation regulating the banking sector designed to encourage small enterprises may produce a text which, by imposing a certain quota of financial investment to be earmarked for this type of company, will certainly fulfil some paradigm of financial thinking. However, there is considerable risk that such a text will never become reality (ie not even produce a change in the law), due to the violation of basic principles of the legal system (eg freedom of contract).

Based on these considerations, the suitable approach for creating a legislative text that can offer more internal effectiveness (ie capacity to really change the law) and external effectiveness (ie capacity to really change society) would be to clearly limit the role of the non-legal experts – by law but also in parliamentary practice. The use of non-legal experts should be limited at the beginning and end of the legislative process, ie to the phases of the formulation of proposals to be realised by the legislation and the evaluation of the law's impact upon society.[41] In both these phases, non-legal experts' competence as to the "external" effect of the legislation can be decisive (eg through their knowledge of the role of banks in the financial markets' failure to help small businesses). When it comes to the very drafting process, on the other hand, it is possible that the presence of non-legal experts, with their use of non-legal paradigms and principles, could endanger the role of the legislative drafter as professional transformers of political, social, and economic ideals into legally effective categories (ie with a concrete impact on the legal system).[42] For example, experts in economics and finance will be better suited to determining whether small businesses are actually

[40] This problem of legislative drafters operating outside their field of expertise becomes particularly striking in many cases of law-reform projects in developing and transitional countries. See, eg, JM Otto, *Conflicts between citizen and state in Indonesia: the development of administrative jurisdiction. Working Paper no 1*, (Van Vollenhoven Institute for Law, Governance and Development in Non-Western Countries 1992). See also Hage, supra, note 39, 352 (where the author points out how legislative goals, ie one of the pillar of effectiveness, do not belong to the Is-world, but to the Ought-world: "[t]he quality of legislation depends in part on the goals pursued by means of the legislation. There can be no expertise on goals because they are not an object of knowledge, but rather of adoption"). But see Seidman and Seidman, supra, note 36, 457–461.

[41] See Müller and Uhlman, supra, note 20, 299–300. See also H Schulze-Fielitz, "Paths Towards Better Legislation, Detours and Dead-Ends" in Meßerschmidt and Oliver-Lalana, supra, note 12, 46–47; and H Xanthaki, *Thornton's Legislative Drafting* (5th edn, Bloomsbury Professional 2013) 145, as to the five stages of the legislative process (dealing specifically with the creation of new statutory provisions) which should be the monopoly of the drafters.

[42] See LM Friedman, "Law and Its Language" (1964) 33 George Washington Law Review 563, 566–567 ("The uniqueness and the toughness of legal language enhance the claim of lawyers to be members of a 'profession'", at 567); and V Crabbe, *Legislative Drafting. Vol 1* (Routledge-Cavendish 1993) 22–23. See also J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (The MIT Press 1998) 255 (as to the necessary transformative role of the law-making); and G Teubner, "How the Law Thinks: toward a Constructivist Epistemology of Law" (1989) 23 Law and Society Review 727, 745. See eg D Cook's striking statement that "the reality is we are not writing for The Sun; we are drafting legislation. Legislation is there to change the law and any extraneous material that does not change the law is likely to cause confusion in the courts and litigation and unnecessary expense", as reported in House of Commons, Political and Constitutional Reform Committee, *Ensuring standards in the quality of legislation – First Report of Session 2013–14* (2013) under ev. 13, <publications.parliament.uk/pa/cm201314/cmselect/cmpolcon/85/85.pdf> accessed 10 May 2018.

disadvantaged in modern capitalist economy, while they may play a vital role in its advanced form. However, once this signal is sent (through the political actors sitting in the national assemblies) to the legislative drafters, the matter of choosing (or constructing) the best legal channel (ie legislative policy) to help such companies should be left to the drafters, considering the actual legal environment. For instance, legislative drafters, instead of opting for a solution of setting a percentage of bank loans as compulsory funding destined for small business (a path which will most likely be legally ineffective), may opt for a legally effective (and therefore potentially externally effective) solution such as lowering taxation for banking profits from loans to this type of enterprise.

This limitation (by law and/or parliamentary praxis) of the role of non-legal experts, as a way to increase the chances of legislative policy effectiveness, requires a simultaneous increase in role of the political actors sitting in the national assemblies. When it comes to law, a tendency observed in recent decades is a (voluntary or involuntary) withdrawal of political actors from many phases of the legal discourse, in particular the legislative.[43] For different reasons (eg unwillingness to expose themselves by taking a stance on highly controversial topics, or sheer incomprehension of the legal and "experts'" world), a major trend is that political representatives address a political ideal (eg "we need a new law to help small business") in a *laissez faire* fashion. They let the legislative process proceed on its own, with an often unregulated (and difficult) cooperation between drafters and non-legal experts, in the hope that the legislative provisions produced will somehow provide the expected results.[44]

However, due to the discrepancy between internal and external effectiveness (and the different principles and discourse governing them – legal and non-legal respectively) and the consequent separation of roles between legislative drafters and non-legal experts, political actors should be forced to reposition themselves at the centre of the legislative process. They should reclaim the central role of being responsible for coordinating and weighing non-legal experts' evaluations against the product of legal reasoning, namely the legislative draft.[45] For example, at the end of the legislative process, political actors

[43] See Cotterrell, *Law's Community*, supra, note 7, 12 and 299. See also R Summers, "Law as a Type of 'Machine' Technology" in R Summers, *Essays in Legal Theory* (Kluwer Academic Publishers 2000) 49; J Raz, "The Inner Logic of the Law" in J Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) 236–237; N Luhmann, *A Sociological Theory of Law* (Routledge & Kegan Paul 1985) 159–160; and B Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001) 71–76.

[44] In legislative drafting, this phenomenon is particularly evident in the so-called "principles based legislation" (or goal-legislation), where "law-making is increasingly outsourced to non-legal experts and its concepts are often derived from non-legal discourse". See PC Westerman, "Breaking the Circle: Goal-Legislation and the Need for Empirical Research" (2013) 1 *The Theory and Practice of Legislation* 395, 395. See also J Black, "Forms and Paradoxes of Principles Based Regulation" (2008) LSE Legal Studies Working Paper No 13/2008, 13–17, <dx.doi.org/10.2139/ssrn.1267722> accessed 10 May 2018 (in this respect, the phenomenon identified in this work could be classified as Black's "formal principled based regulation"). See eg P Pohlmann, "Principles-based Insurance Regulation: Lessons to be Learned from a Comparison of the EU and German Law of Risk Management" in J Burling and K Lazarus (eds), *Research Handbook on International Insurance Law and Regulation* (Edward Elgar 2011) 336–340.

[45] See Laws, supra, note 6, 100. See eg T Tröger, "How Special Are They? Targeting Systemic Risk by Regulating Shadow Banks" in B Lomfeld, A Somma and P Zumbansen (eds), *Reshaping Markets. Economic Governance and Liberal Utopia* (Cambridge University Press 2016) 185–207. See also *USAID Handbook on Legislative Strengthening* (Center for Democracy and Governance – US Agency for International Development 2010) 7, <pdf.usaid.gov/pdf_docs/Pdact310.pdf> accessed 10 May 2018 ("Most legislatures have ample lawmaking authority in theory… For this to be done effectively, legislators and their constituents need to track proposals at various stages of the legislative process, and to be given an opportunity to influence them before final adoption").

(by using categories typical of the political discourse, such as "economic justice") should weigh the product of the legislative drafters (namely the draft decreasing the level of taxation for certain profits earned by banks) and the evaluations by non-legal actors as to the external efficacy (or lack thereof) of such (internally effective) legal measures intended to push banks towards a more favourable attitude when it comes to financing small enterprises.

In short, increasing the internal effectiveness of the legislative process (and consequently the changes resulting in increased external effectiveness), requires not only the limitation of the role of non-legal actors (and in particular experts) to the start and end of the legislative process (ie at the formulation of the objectives and the evaluation of whether such objectives can be reached with the new legislation). It is also essential to ensure that politics is not simply limited to starting legislative processes; politics must also take back responsibility to be a "true" law-maker. Among the duties of the political actors sitting in the legislative bodies, certainly one is the task of evaluating and weighing the considerations of internal effectiveness (ie whether the new statute will change the legal landscape) and external effectiveness (ie whether such legal change will actually have an effect, in the desired direction, in the "real" world). This task of increasing the global effectiveness of legislative processes (ie internal and external) should not be so far from the daily work of political actors. After all, the essence of the art of democratic politics is to reach compromise among different worldviews with respect to the same problem, and try to find the most feasible solution.[46]

V. Conclusion

To sum up, in Part I it has been shown how effectiveness, when it comes to legislation, is not a "value" per se, to be pursued no matter what. It is rather a functional link, ie a quality of legislation coming to life when used within a certain framework and assisting legislative drafters in their journey among three elements (ideals, situation, results). Based on this characterisation of effectiveness as relational element in the legislative process, Part II has pointed out how in the legislative discourse there is often confusion between two types of effectiveness: an effectiveness external to the legislative process (focusing on the impact of the regulatory measures on the socio-economic reality), and an effectiveness internal to the legal system (where attention is instead paid to the actual changes of the regulatory regimes produced by the legislation). Finally, Part III proposes how this idea of effectiveness as a functional element of legislative work, and the consequent distinction between an external and an internal version, can (and should) affect the work of legislative drafters. Particularly, it can influence as to the optimal location of the non-legal experts in the legislative process as a means of increasing the effectiveness of legislative policy.

To conclude where this paper started, ie with the football-related metaphor, everybody agrees that a team is playing an "effective" game when it delivers some results. However, once past this general statement, observers can note how opinions may diverge as to the

[46] See Laws, supra, note 29, 9–16. See also Habermas, supra, note 42, 452 and 487; and J Waldron, *The Dignity of Legislation* (Cambridge University Press 1999) 156.

meaning of "results": for the English football is an enjoyable game, but for an Italian football is simply winning the game, no matter how. Similarly, the definition of effectiveness in legislation is not so terribly problematic; however, when it comes to the application of this definition to reality, a considerable body of literature shows that the determination of whether legislation is effective is highly dependent on one's definition of "results".

Due to the specific nature of legislation, ie its function as a normative tool (with specific principles) placed in the hands of politicians (also with their own specific principles) to change reality (also with its own specific principles), this complexity makes the work of legislators (and legislative drafters in particular) extremely difficult (if not somewhat schizophrenic). Drafters must build a functioning road connecting ideals and reality, according to "engineering" paradigms (ie legal discourse), while also fulfilling the wishes and paradigms of an "artistic" character (ie political ideals), and with a nod to "environmental issues" (ie social reality). In this respect, legal theory may be able to contribute, not by resolving this schizophrenic situation, but at least making it a little easier for the legal actors by clarifying the boundaries between different types of effectiveness (internal/legal versus external/non-legal) and by assigning each group of actors a clearer (and therefore more focused) role.