§ ZfR
Zentrum für Rechtsetzungslehre (ZfR)
Felix Uhlmann (Hrsg.)

Band 6

Felix Uhlmann / Stefan Höfler (Eds./Hrsg.)

Professional Legislative Drafters

Status, Roles, Education

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Bibliografische Information der Deutschen Nationalbibliothek
Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über http://dnb.dnb.de abrufbar.

ISBN 978-3-03751-829-8

www.dike.ch

Preface

Several countries and legal systems have comprehensive educational programmes for professional legislative drafters. In Switzerland, there is no such education: training in legislative drafting is confined to introductory courses on legislation offered by some universities and to in-house vocational training organised by certain public administrations. The Swiss Society of Legislation (SSL) and the Centre for Legislative Studies of the University of Zurich (CfL), who both contribute with their own courses to the training of professionals involved in legislative drafting, have therefore decided to have a closer look at the systems that other countries have in place: How does one become a legislative drafter in these countries? Who organises their education? Where do professional legislative drafters typically work and what are their usual duties and responsibilities? What are the advantages and disadvantages of a specialised education for professional legislative drafters?

The present volume provides answers to these questions. It compares the Swiss systems with professional legislative drafting in the United Kingdom, the Netherlands, Poland, the United States, Canada and Australia. The individual contributions were first presented on 5th November 2015 in Bern, at a symposium jointly organised by SSL and CfL; the present volume contains the proceedings of this symposium. It aims to encourage the debate on the potential need for professional legislative drafters and the benefits such a change of system might bring – a debate that SSL and CfL intend to continue in the future.

Zurich, in April 2016 — The editors

Vorwort

In verschiedenen Rechtssystemen und Staaten gibt es eine eigenständige (juristische) Ausbildung zum spezialisierten «Gesetzesschreiber» resp. zur «Gesetzesschreiberin». In der Schweiz ergänzen sich universitäre Grundausbildungen in Rechtsetzungslehre und praktische Aus- und Weiterbildungsveranstaltungen der öffentlichen Verwaltungen. Eigenständige und integrierte Ausbildungslehrgänge mit eigenen Abschlüssen gibt es indessen nicht. Die Schweizerische Gesellschaft für Gesetzgebung (SGG) und das Zentrum für Rechtsetzungslehre der Universität Zürich (ZfR), die sich mit eigenen Angeboten in der legistischen Aus- und Weiterbildung engagieren, haben sich vorgenommen, die ausländischen Lösungsansätze genauer anzusehen: Wie sind diese spezifischen Ausbildungen zu «Professional Legislative Drafters» gestaltet? Wer führt diese Ausbildungen durch? Wo und wie werden derart geschulte Spezialistinnen und Spezialisten in den öffentlichen und parlamentarischen Verwaltungen eingesetzt? Welchen Nutzen verspricht man sich von solchen Spezialisierungen?

Die vorliegenden Berichte aus der Schweiz, Grossbritannien, den Niederlanden, Polen, den Vereinigten Staaten, Kanada und Australien wurden am 5. November 2015 anlässlich einer gemeinsamen Tagung von SGG und ZfR in Bern präsentiert. Mit ihnen soll die Diskussion über Bedarf und Nutzen in der Schweiz lanciert werden – eine Diskussion, die SGG und ZfR aktiv fortführen wollen.

Zürich, im April 2016 Die Herausgeber

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Legistische Aus- und Weiterbildung in der Schweiz: Angebote, Akteure, Perspektiven

Martin Wyss

Inhaltsübersicht

I. Einführung

Während sich die Rechtsetzungslehre als eigenständige rechtswissenschaftliche Disziplin in den letzten drei Jahrzehnten zu etablieren vermocht hatte, sind die Bedürfnisse der legistischen Praxis heute nur in Umrissen bekannt. Es zeigt sich, dass das in den universitären Curricula vermittelte spezifische Wissen und Können nicht ohne weiteres auf den Arbeitsalltag der mit der Rechtsetzung beschäftigten Personen und Instanzen übertragen und sich operationalisieren lässt. Aktuell stehen neben den einzelnen, formal und inhaltlich heterogenen universitären Angeboten eine Vielzahl von privaten und öffentlichen Weiterbildungs- und Vertiefungsmöglichkeiten zur Verfügung. Die Schweizerische Gesellschaft für Gesetzgebung (SGG) hat es seit ihrer Gründung im Jahre 1982 als eine ihrer Aufgaben angesehen, akademische und praktische Aus- und Weiterbildungsbedürfnisse zu identifizieren und dafür eigene Angebote anzubieten. Die SGG sieht sich daher auch dazu berufen, eine Gesamtsicht der Angebotslage zu ermöglichen und Reformbereiche zu ermitteln. Dazu ist es nützlich, sich ein Bild über die Wege zu machen, die ausländische staatliche Einrichtungen und private Organisationen gegangen sind. Der vorliegende Tagungsband will eine Bestandsaufnahme der Schweiz in Umrissen vermitteln und ausgewählte Beispiele aus dem Ausland vorstellen.

Es soll hier von einem weiten Begriff der Rechtsetzungslehre ausgegangen werden. Dieser umfasst (a) die staatsrechtlichen Grundlagen, (b) die für die Rechtsetzung aller Normstufen spezifischen Teilfragen wie jene nach der Tragweite des Legalitätsprinzips oder des Bestimmtheitserfordernisses, (c) die rechts- und staatspolitische Suche nach Qualitätskriterien der Rechtsetzung und ihrer praktischen Verwirklichung, (d) die verfahrensrechtlichen Aspekte der Rechtsetzung als rechtlich verfasstem politischem Prozess sowie (e) die Gesetzgebungstechnik als Summe der für jedes Gemeinwesen spezifischen sprachlichen, strukturellen und formalen Aspekte bei der Ausgestaltung von Erlassen und einzelnen Rechtssätzen.

II. Aus- und Weiterbildungsangebote in der Schweiz

1. Universitäre Angebote

An verschiedenen Universitäten in der Schweiz wird das Fach Rechtsetzungslehre regelmässig angeboten. Die Angebote unterscheiden sich allerdings bezüglich den Unterrichtsformen – Vorlesungen, Seminare, Übungen –, der Ausstattung mit ECTS-Punkten, der Positionierung im Curriculum und den Prüfungsmodalitäten.

An der Universität Zürich gelang es dem Doyen der Rechtsetzungslehre in der Schweiz, Georg Müller, das Fach im Curriculum fest zu verankern. Es wird heute für Studierende ab dem vierten Semester mit einer einsemestrigen Vorlesung zu zwei Wochenstunden in zwei Gruppen angeboten; hinzu kommen Seminare.

An der Universität Bern wird das Fach im Rahmen des Masterstudiums während einem Semester mit vier Wochenstunden gelesen. Die Universität Fribourg bietet das Fach ebenfalls als (Wahlfach-)Masterkurs mit drei Wochenstunden in Deutsch und Französisch an und ergänzt das Angebot mit Blockseminaren. Die Universitäten St. Gallen und Luzern bieten in grösseren zeitlichen Abständen Vorlesungen und Seminare an.

In der französischen Schweiz präsentiert sich die Lage ähnlich heterogen: In Lausanne wird das Fach am IDHEAP angeboten, Neuenburg wiederum offeriert einen Pflichtkurs in «Terminologie juridique allemande», der als Teil der Rechtsetzungslehre verstanden werden kann, und ein Seminar in Strasbourg für Master-Studierende als Blockseminar. In Genf, in dem das Centre d›étude, de technique et d›évaluation législatives (CETEL) angesiedelt ist, wir das Fach «Légistique suisse et européenne» mit zwei Wochenstunden als Pflichtfach gelesen.

Die Angebote sind stark geprägt von den Dozierenden, die sich in der Regel auch wissenschaftlich für das Thema engagieren. Inhaltlich orientieren sich die Veranstaltungen an den spezifischen Unterrichtsmaterialien und subsidiär am

Werk von Georg Müller und Felix Uhlmann,[1] sowie – aus der Verwaltungspraxis – am Gesetzgebungsleitfaden, den das Bundesamt für Justiz herausgibt.[2] Grundsätzlich existiert an allen erwähnten Universitäten die Möglichkeit, Masterarbeiten und Dissertationen zu verfassen.

2. Angebote der öffentlichen Verwaltungen

Auf die spezifischen Bedürfnisse der Praxis der jeweiligen politischen Institutionen und Verwaltungseinheiten ausgerichtet sind Weiterbildungs- und Vertiefungsangebote, die einzelne kantonale Verwaltungen und das Bundesamt für Justiz für die Bundesverwaltung anbieten. So führen die Kantone Aargau und Graubünden – teils mit fachlicher und didaktischer Unterstützung des Zentrums für Rechtsetzungslehre der Universität Zürich (ZfR) – Kurse und Seminare für das eigene, mit Rechtsetzungsgeschäften jeder Stufe befasste Fachpersonal durch. Dass sich das verwaltungsinterne Ausbildungs- und Vertiefungsangebot vergleichsweise bescheiden ausnimmt, liegt daran, dass nur wenige Kantone über spezialisierte Gesetzgebungsdienste verfügen, die in der Regel mit wenig Personal ausgestattet sind.

Für die Bundesverwaltung bietet das Bundesamt für Justiz einen – kostenpflichtigen – Kurs in zwei Teilen an. Mitarbeitende aus Bundes- und Parlamentsverwaltung führen theoretisch in die einzelnen Themenblöcke ein, die nachfolgend mit Beispielen aus dem Gesetzgebungsalltag beübt werden. Didaktisch werden die verwaltungsinternen Arbeitsmaterialien – Gesetzgebungsleitfaden des Bundesamtes für Justiz und die Gesetzestechnischen Richtlinien der Bundeskanzlei[3] – eingesetzt. Diese Kurse geniessen einen guten Ruf und sind regelmässig rasch ausgebucht.

Der kontinuierlichen fachlichen Weiterbildung dient auch das vom Bundesamt für Justiz betreute «Forum für Rechtsetzung». In jährlich vier halbtägigen Veranstaltungen werden aktuelle Themen und Fragenstellungen aus der Gesetzgebungspraxis vorgestellt und mit dem interessierten juristischen Fachpersonal diskutiert. Ein Forum ist jeweils den spezifischen Themen gewidmet, mit denen

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[1] Müller Georg/Uhlmann Felix, Elemente einer Rechtssetzungslehre, 3. Aufl. Zürich 2013.

[2] Bundesamt für Justiz (Hrsg.), Gesetzgebungsleitfaden: Leitfaden für die Ausarbeitung von Erlassen des Bundes, 3. Aufl. Bern 2007.

[3] Bundeskanzlei (Hrsg.), Gesetzestechnische Richtlinien (GTR), 2. Aufl. Bern 2013.

die kantonale Gesetzgebung konfrontiert ist. Gesetzgebungsthemen, die sich aus Staatsverträgen und Beschlüssen internationaler Organisationen ergeben und die von den inhaltlichen und formalen Eigenheiten des Völkervertragsrechts geprägt sind, werden punktuell zusammen mit der Direktion für Völkerrecht aufgearbeitet und im Forum vorgestellt.

3. Die Rolle der SGG

Die SGG hatte vor einigen Jahren ihre bisherigen Ausbildungsangebote kritisch zu hinterfragen begonnen. Zu diesem Zweck wurde ein vereinsinterner Bildungsrat geschaffen, welcher u. a. die Aufgabe hat, für die Weiterbildungsbildungsangebote Leistungsvereinbarungen mit den (universitären) Anbietern abzuschliessen. Heute ist dieser Konsolidierungsprozess erfolgreich abgeschlossen, weshalb der Bildungsrat als eigenständiges Organ aufgelöst werden konnte.

Unter der Ägide der SGG werden vergleichsweise kostengünstige mehrtägige Kurse in Deutsch und Französisch angeboten, an denen Fachpersonal aus kommunalen, kantonalen und aus der Bundesverwaltung teilnehmen.

Die deutschsprachigen Seminare werden von den Universitäten Fribourg und Zürich in Murten angeboten: Ein erstes Seminar ist der Gesetzgebungsmethode gewidmet und konzentriert sich mit Einführungsreferaten und Gruppenübungen auf die konzeptuellen Vorarbeiten der Gesetzgebung. Ein zweites Seminar ist auf die Gesetzgebungstechnik ausgerichtet und fokussiert auf die Arbeit an konkreten Textbeispielen.

In französischer Sprache bietet die Universität Genf in Jogny bei Vevey ein mehrtägiges Seminar an, das im Anspruch und Aufbau mit den Seminaren in Murten vergleichbar ist, die didaktischen und inhaltlichen Gewichtungen aber etwas anders setzt. Beide Seminare geniessen grosse Beliebtheit und werden als akademische Spezialausbildungen wahrgenommen, ohne dass diese indessen mit einem bestimmten Status oder Titel versehen wären.

Die SGG hatte es sich auch vorgenommen, zu einzelnen besonders neuralgischen Themen der Gesetzgebungsarbeit kürzere Vertiefungsseminare anzubieten. Über sporadische Aktivitäten ist man bisher allerdings noch nicht hinaus gekommen.

III. Wie weiter?

Während sich das Fach Rechtsetzungslehre als Teil des rechtswissenschaftlichen Fächerkanons auf universitärer Stufe weitgehend etablieren konnte, sind die fachlichen Bedürfnisse der (Verwaltungs-)Praxis nur oberflächlich bekannt. So beliebt das politische Schimpfen über den Niedergang der Gesetzgebungsqualität ist, so orientierungslos ist die Suche nach den Heilmitteln, wie diesem – vermeintlichen oder tatsächlichen Malaise beizukommen wäre. Vom vielfach, aber nicht durchwegs universitär-juristisch ausgebildeten Verwaltungspersonal wird erwartet, dass es mit den internen Abläufen und den Verfahrensschritten vertraut ist, die ein Rechtsetzungsverfahren durchlaufen muss. Diese Kenntnisse und Fertigkeiten werden durch die universitären und ausseruniversitären Aus- und Weiterbildungsangebote in der Regel in guter Qualität vermittelt. Der Teufel steckt aber auch hier im (praktischen) Detail: Wer beispielsweise die rechtlichen und administrativen Rahmenbedingungen für ein Vernehmlassungsverfahren zu einem Bundesgesetz kennt, ist damit nicht ohne weiteres befähigt, die heterogenen Stellungnahmen in einem ausgewogenen Bericht zu präsentieren und einer politischen Gewichtung zuzuführen. Wer Inhalt, Bedeutung und Tragweite des Legalitätsprinzips kennt, wird zwar um die Art und Weise Bescheid wissen, wie man eine gesetzliche Grundlage für gesetzesvertretendes Verordnungsrecht «konstruiert» – wie indessen die Verordnungsregelung konkret zu strukturieren, im bestehenden Normengefüge einzupassen und (mehrsprachig) zu redigieren wäre, wird ihn erst die Berufspraxis (und allfällige Mängel, die das Bundesgericht in Verfahren der konkreten oder abstrakten Normenkontrolle feststellt) lehren.

Hört man sich im Kreise derjenigen um, die für die verschiedenen Unterrichtsangebote verantwortlich zeichnen, dann zeigt sich an verschiedenen Stellen Optimierungsbedarf: So werden etwa eine bessere Verankerung der Rechtsetzungslehre im universitären Studium gewünscht oder spezielle Unterrichtsangebote, um allgemein die juristische Sprachkompetenz zu erhöhen. Die Rechtsetzungslehre lebt von der Arbeit an konkreten Erlass- und Normtexten. Wer sich mit Rechtsetzungslehre beschäftigt, will befähigt werden, Rechtsnormen und Erlasse konzipieren, strukturieren und redigieren zu können, die sich durch eine hohe rechtliche, sprachliche und politische Qualität auszeichnen. Da sich das Fach an der Schnittstelle verschiedener rechtswissenschaftlicher Disziplinen und praktischer Fertigkeiten ansiedelt, müssen für den Grundlagenunterricht und für die weiterführenden Bildungsangebote die geeigneten Vermitt-

lungs- und Übungsmethoden gefunden werden, die sich vom übrigen rechtswissenschaftlichen Unterricht in mehrfacher Hinsicht unterscheiden:

– Für die Fragestellungen der Rechtsetzungslehre gibt es häufig keine einzig richtige Lösung, sondern in aller Regel mehrere rechtlich gleichermassen valable, meistens aber unterschiedlich praktikable oder politisch realisierbare Alternativen. Damit unterscheidet sich das Fach vom Leitmotiv anderer juristischer Disziplinen, die ihre Fragen in der Regel aus der Optik eines urteilenden Gerichts einem gewissermassen binären Antwortschema zuführen (auf Beschwerden eintreten/nicht eintreten; Klagen gutheissen/abweisen).
– Während im juristischen Unterricht der ex-post-Blick auf einen Sachverhalt üblich ist und nach der rechtlichen Qualifikation der Lebensvorgänge gefragt wird, ist der Rechtsetzungslehre der ex-ante-Blick eigen. Gefragt wird danach, wie die rechtliche Grundlage für bestimmte Massnahmen aussehen muss, damit sie vor einer verfassungsrechtlichen Nachprüfung im späteren Anwendungsfall Bestand haben kann.
– Rechtsetzungsfragen werden von der Politik erheblich geformt und konturiert. Die rechtliche bzw. rechtswissenschaftliche Befassung mit der Rechtsetzung ist und bleibt aber dennoch eine juristische Arbeit – trotz Politik (und nicht umgekehrt). So nötig eine solide Kenntnis der politischen Prozesse und ihrer Akteure ist, so wenig darf die Arbeit an Erlassen und Rechtsnormen auf (partei-)politische Strategieüberlegungen reduziert werden.
– Rechtsetzungsfragen sind primär, aber nicht ausschliesslich juristische Fragen. Gute Antworten auf diese Fragen können nur unter gebührender Berücksichtigung anderer Fachbereiche und mit einem geschärften Verständnis für die Eigenheiten des Sachgebiets gefunden werden. Wer sich mit Rechtsetzungslehre und Rechtsetzungsarbeit beschäftigt, muss mehr als nur eine oberflächliche Ahnung vom Sachgebiet haben, das mit Rechtsnormen erfasst, geordnet und gesteuert werden soll. Er braucht «Zulieferer», die ihn vertraut machen mit den Eigenheiten des Sachgebiets und den vielfach gegenläufigen Regelungserwartungen, die Fach- und Zivilgesellschaft an die Rechtsetzung richten.

Es ist an der Zeit, dass sich die verschiedenen Unterrichtsverantwortlichen an den Universitäten und in den öffentlichen Verwaltungen vertieft mit der Frage auseinandersetzen, wie die Aus- und Weiterbildungen gestaltet und weiterentwickelt werden können, damit wissenschaftliche Durchdringung des Stoffes

und praktische Umsetzung der Erkenntnisse in den Alltag von Politik und Verwaltung optimal gelingen. Die SGG nimmt für sich in Anspruch, in dieser Debatte eine Führungsrolle zu übernehmen: Sie vereinigt in ihrem Kreis nahezu alle Akteure auf dem Gebiet und verfügt über gute Kontakte zu den Universitäten und Verwaltungen. Sie wird sich daher in den nächsten Jahren aktiv diesen Fragen annehmen und Vorschläge für die universitäre und ausseruniversitäre Aus- und Weiterbildung formulieren. Die vorliegende Veranstaltung stellt gewissermassen den Startschuss für diese Politik dar.

Legislative Drafting: The UK Experience

Helen Xanthaki

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It would be a great mistake to start this paper without a disclaimer. There is really is no single drafting experience in the UK.

With devolution one observes a healthy array of drafting styles in Westminster/English, Scottish, Welsh, and Northern Irish legislation. Each jurisdiction develops its own drafting style influenced by the nature and ethos of substantive law in the jurisdiction, by parallel legislating in two languages, or by the specific jurisdictional arrangements in the devolution package of each jurisdiction. But of course the lack of a single drafting style in the UK goes even deeper than this: even within the Westminster produced body of legislation one observes an equally rich array of individual drafting styles. These have been allowed to develop as traditionally the UK does not impose a drafting manual on its drafters. But of course freedom and drafting flexibility has not been allowed to lead to drafting anarchy: healthy diversity is developed amongst a small group of professional career drafters who man the Office of Parliamentary Counsel and who learn on the job by means of careful mentoring. In fact, in recent years there has been a move towards increased cross-fertilisation of styles and some homogeneity resulting from the recording and compilation of conclusions of staff seminars within a Guide. But let's take things from the start.

I. The Drafting Process

Grant Thornton, one of the leading experts and innovators in the discipline of legislative drafting, systematises the legislative drafting process[1] into five stages:

(1) Understanding the proposal.

(2) Analysing the proposal.

(3) Designing the law.

(4) Composing and developing the draft.

(5) Verifying the draft.[2]

In stage 1 the drafter begins with the reading and understanding of the request for the drafting of legislation sent to them by the instructing officers. Drafting instructions are requests from the policy and legal officers to the drafting officers to proceed with the drafting of legislation within the parameters set.[3] The term is jargon for "request".[4] Within the realm of effectiveness, the drafter requires a precise understanding of the field under intervention, its function and logic, and an explicit diagnosis of the problem with evidence not only of the aim pursued but also its objectives[5]: the ultimate goal is the elaboration of an effective strategy of legislation withstanding pre- and post-legislative scrutiny.[6] Normally drafting instructions are collections of data provided to the legislative drafter by the policy makers and legal officers as a means of assisting the drafter to draft effective legislation within the parameters detailed by the policy

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1 For the distinction between the legislative and the drafting process, see C. Stefanou, "Drafters, Drafting and the Policy Process" in C. Stefanou & H. Xanthaki (eds.), *Drafting Legislation: A Modern Approach* (Aldershot, Ashgate Publishing, 2008) 323.

2 See H. Xanthaki, *Thornton's Legislative Drafting*, 5th edition (West Sussex, Bloomsbury Professional, 2013) 145.

3 Lord Goldsmith described the role of a drafter as translating policy into legal text: Lord Goldsmith QC, "Parliament for Lawyers: An Overview of the Legislative Process" (2002) 4 *Eur JLReform*, 511, 513.

4 See B. Simamba, *How to make effective legislative proposals* (Indiana, AuthorHouse, 2012) 8.

5 See Office of Parliamentary Counsel UK, "Working with Parliamentary Counsel", 6 December 2011, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62668/WWPC_6_Dec_2011.pdf, para 132.

6 See A. Flückiger and J.-D. Delley, "L'élaboration rationnelle du droit privé: de la codification à la légistique" in C. Chappuis et al. (eds), *Le législateur et le droit privé, Mélanges en l'honneur de Gilles Petitpierre* (Geneva and Zurich), Bale, 2006) 125–126.

makers of the government.[7] And so by definition drafting instructions normally include the request, the background materials leading to the policy and legal choices already made by the instructing officers, and any background information necessary for the comprehension of all aspects of the political decision to proceed with legislation and the choice of the proposed legal means for the achievement of government policy. Good instructions will illuminate the nature of the problem by providing background information, the purposes of the proposed legislation, the means by which those purposes are to be achieved, and the impact of the proposals on existing circumstances and law.

In stage 2 the drafter proceeds with an analysis of the drafting request, which takes the form of a legislative plan. The analysis touches upon existing law, special responsibility areas, and practicality.

In stage 3 the drafter begins to identify the structure of the legislation. After gaining an understanding of the proposals and assessing their implications in relation to existing law, the drafter reaches the design or planning stage. The first step is to consider whether further legislation is in fact necessary or whether the desired ends might not be capable of achievement wholly or in part either by administrative means or under existing legislation. If a new statute is necessary, its structure is designed before textual drafting begins. The principal purpose is to design a structure that facilitates communication of the content at the same time as it achieves the objects of the instructions. The design is an opportunity to look at the material as a whole, to weigh up the relative importance of topics, to bring together in the mind those elements that are related, and to consider how the material can best be presented. The preliminary design of a statute takes into account four important factors. First and foremost, the design aims at the greatest level of simplicity that is compatible with the achievement of the objects of the proposed legislation. Secondly, the design adheres to conventional practices on the position of formal technical provisions such as the short title, commencement, application, definitions, interpretation, repeal and savings provision. Thirdly, the drafter takes into account political realities and be prepared to compromise over the arrangement of the material. Fourthly, a new separate statute should be contemplated only if a new part of an existing statute is ineffective.

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[7] The government "needs legislation to give legal effect to its policies, to clothe them with the force of law": see D.R. Miers and A.C. Page, *Legislation* (2nd edn, London, Sweet and Maxwell, 1990) 11.

In stage 4, and only then, the drafter puts pen to paper and drafts the requested legislation.

Stage 5 concerns the internal and external verification of the first version of the draft legislation delivered within and outside the drafting team[8].

II. Drafters and Drafting

Each devolved government has made its own separate drafting arrangements. But the model remains the same and is borrowed from Westminster. This involves two separate sets of arrangements for primary and delegated legislation. Simply, all primary UK legislation is drafted by the professional drafters at the Office of Parliamentary Counsel (OPC) upon instruction from Government Departments (Ministries). Private Members' Bills lack drafting support. Amendments to primary legislation are drafted by the Government in the same manner as new Bills. Delegated legislation is instructed and drafted within each Department/Ministry.

Let us explore these arrangements further. The OPC is a separate government unit, not attached to Parliament as its name seems to indicate, but attached to the Cabinet. The First Parliamentary Counsel who heads the Office is directly answerable to the Prime Minister. The Office is a government office serving the government of the day with its experienced professional career civil servants whose only task is to draft legislation. In the history of the Office drafters have been attached to a number of projects, such as the Tax Law Rewrite Project aiming to simplify taxation legislation, or the Law Commission. But drafters do not specialise in specific areas of law, with the exception of those who draft financial Bills. This reflects the ethos of UK drafting, which requires that drafters are drafting technicians without an awareness of substantive law in the field: this is supplied by the instructing legal officers.

Professional drafters are normally qualified solicitors or barristers, with some years' experience in practice, who pass not just the civil service tests but also competitive tests for the Office. They are recognised as highly expert drafters, with unquestionable independence, and unsurpassable skill in their narrow area of drafting expertise. They serve no policy aims and have no political allegiance.

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[8] See J. Stark, *The Art of the Statute* (Littleton, F Rothman, 1996) 52–53.

They are not involved in policy formulation. Their sole task is to express into law the policy pursued by their instructing officers.

It is precisely the professionalism of drafters in the UK, coupled with the obvious focus of the government on regulatory and legislative quality, that drives great innovations in drafting in the UK.

III. Recent Trends and Innovations

1. Good Law in the UK

The first innovation in the area of drafting in the UK is the widely accepted agreement on what constitutes good legislation. From a legislative studies perspective good legislation is legislation that manages to achieve the desired regulatory results.[9] Since governments use legislation as a tool of successful governing[10], namely as a tool for putting into effect policies that produce the desired regulatory results[11], the qualitative measure of successful legislation coincides with the prevalent measure of policy success, which is the extent of production of the desired results.[12] Provided that the government's choice is indeed to put a policy to effect rather than only on paper.[13] Within this context, regulation is the process of putting government policies into effect to the degree and extent intended by government.[14] Legislation, as one of the many regulatory tools available to government[15], is the means by which the produc-

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[9] See H. Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (2014, Hart Publishers, Oxford), chapter 1.

[10] See OECD, "Recommendation of the Council on Improving the Quality of Government Regulation", 9 March 1995, C(95)21/Final.

[11] The executive branch of government is no longer expected to confine itself to the mere making of proposals: it has to see them through. See J. Craig Peacock, *Notes on Legislative Drafting* (Washington, REC Foundation, 1961) 3.

[12] See N. Staem, "Governance, Democracy and Evaluation" (2006) 12(7) *Evaluation* 7, 7.

[13] And the choice is the government's not the drafter's: see P. Delnoy, *Le rôle des légistes dans la détermination du contenu des norms*, 2013 Report for the International Cooperation Group, Department of Justice, Canada, http://www.justice.gc.ca/fra/apd-abt/gci-icg/publications.html, 3.

[14] See National Audit Office, Department for Business, Innovations and Skills, "Delivering regulatory reform", 10 February 2011, para 1.

[15] Tools for regulation vary from flexible forms of traditional regulation (such as performance-based and incentive approaches), to co-regulation and self-regulation schemes,

tion of the desired regulatory results is pursued. And in application of Stefanou's scheme on the policy, legislative, and drafting processes[16], legislative quality is a partial but crucial contribution to regulatory quality.[17] This promotes the current synergetic approach to legislation eloquently expressed by Richard Heaton, former First Parliamentary Counsel and Permanent Secretary of the Cabinet Office:

> "I believe that we need to establish a sense of shared accountability, within and beyond government, for the quality of what (perhaps misleadingly) we call our statute book, and to promote a shared professional pride in it. In doing so, I hope we can create confidence among users that legislation is for them."[18]

This approach feeds into this diagram of elements of regulatory and legislative quality:[19]

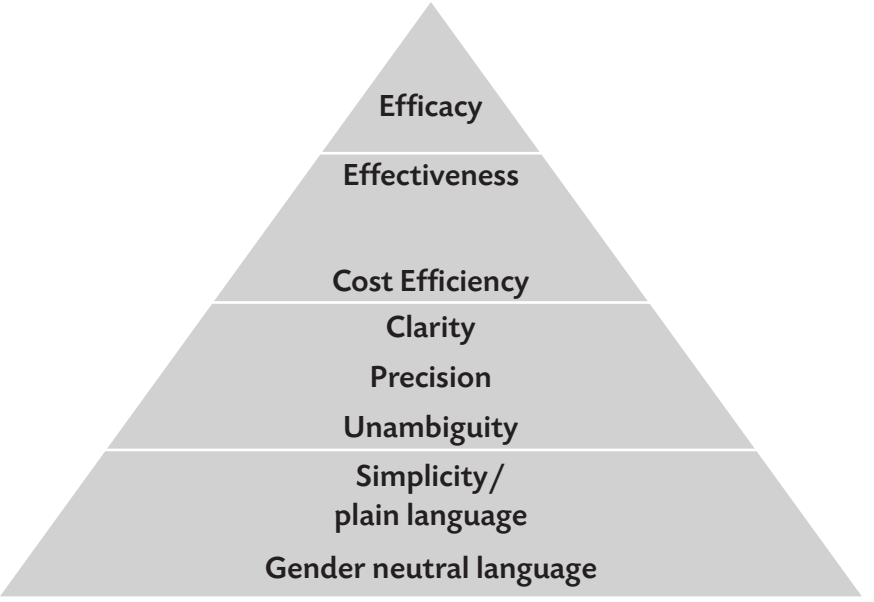
incentive and market based instruments (such as tax breaks and tradable permits) and information approaches. See Better Regulation Task Force (BRTF), "Routes to Better Regulation: A Guide to Alternatives to Classic Regulation", December 2005; also see J. Miller, "The FTC and Voluntary Standards: Maximizing the Net Benefits of Self-Regulation" (1985) 4 *Cato Journal* 897; and OECD Report, "Alternatives to traditional regulation", para 0.3; and also OECD, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (Paris, OECD, 2002).

16 See C. Stefanou, "Legislative Drafting as a form of Communication" in L. Mader and M. Travares-Almeida (eds), *Quality of Legislation Principles and Instruments* (Baden-Baden, Nomos, 2011) 308; and also see C. Stefanou, "Drafters, Drafting and the Policy Process" in C. Stefanou and H. Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Aldershot, Ashgate, 2008) 321.

17 In fact, there is an emergence of a public interest in good quality of rules: see M. De Benedetto, M. Martelli and N. Rangone, *La Qualità delle Regole* (Bologna, SE il Mulino, 2011), 23.

18 See R. Heaton, "Foreword" in Cabinet Office, Office of Parliamentary Counsel, *When Laws Become Too Complex*, 16 April 2013.

19 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*, above, n.12, 1.



Efficacy as synonymous to regulatory quality is the extent to which regulators achieve their goal.[20] Regulatory efficacy is achieved via legislative effectiveness.[21] OPC repeat their aspiration to effectiveness as a contribution to or in balance with accuracy but do not define the term.[22] Effectiveness is the ultimate measure of quality in legislation.[23] If one subjects effectiveness of legislation to the wider semantic field of efficacy of regulation as its element, effectiveness manages to hold true even with reference to diverse legislative phenomena, such as symbol legislation, or even the role of law as a ritual. If the purpose of legislation is to serve as a symbol, then effectiveness becomes the measure of achieved inspiration of the users of the symbol legislation. If the legislation is to be used as a ritual, effectiveness takes the robe of persuasion of the users who bow down to its appropriate rituality. Effectiveness requires a legislative text that can (i) foresee the main projected outcomes and use them in the drafting and formulation process; (ii) state clearly its objectives and purpose; (iii) provide for

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[20] See *ibid*, 126.

[21] See C. Timmermans, "How Can One Improve the Quality of Community Legislation?" (1997) 34, *Common Market Law Review* 1229, 1236–7.

[22] See Office of Parliamentary Counsel, "Working with OPC", 6 December 2011; and OPC, "Drafting Guidance", 16 December 2011.

[23] See H. Xanthaki, "On Transferability of Legal Solutions" in C. Stefanou and H. Xanthaki (eds.) *Drafting Legislation, A Modern Approach*, above, n 19, 6.

necessary and appropriate means and enforcement measures; (iv) assess and evaluate real-life effectiveness in a consistent and timely manner.[24]

Leaving cost efficiency out of the equation, since it is an economico-political rather than purely legal choice[25], effectiveness is promoted by clarity, precision, and unambiguity. In turn, clarity, precision, and unambiguity are promoted by plain language and gender neutral language.

2. Plain Language in the UK

Plain language has long been promoted in the UK as the main tool for achieving clarity and in turn effectiveness of legislation. But its meaning has been transformed, thus qualifying as a second innovation for the UK. Plain language is defined by Peter Butt as clear and effective for its audience.[26] In its traditional definition plain language is a general and inevitably vague pursuit for techniques that can produce a text that may be understood by the users in the first reading. This in turn enhances clarity of the text, an attribute that makes it possible for users to adhere with the legislation, if they so wish. And it consequently promotes implementation, which is necessary for effectiveness. This is the crucial link between plain language and good legislation. But, if plain language is all about facilitating implementation, does it really matter if successful communication of the legislative message takes place in the first reading?

Moreover, plain language is... not only about language. Words, syntax, punctuation are very important elements. But so are the structure of the legislative text, its layout on paper and screen, and the architecture of the whole statute book as a means of facilitating awareness of the interconnections between texts. And so plain language begins to kick in during the analysis of the policy and the initial translation into legislation, with the selection and prioritization of the information that readers need to receive. It continues with choices related to structure during the selection and design of the legislative solution, with simplification of the policy, simplification of the legal concepts involved in putting the policy to effect, and initial plain language choices of legislative ex-

[24] This is Mousmouti's effectiveness test: M. Mousmouti, above, n 5, 202.

[25] See R. Posner, "Cost Benefit Analysis: definition, justification, and comments on conference papers" (2000) 29 *The Journal of Legal Studies* 1153.

[26] See P. Butt and R. Castle, *Modern Legal Drafting* (2006, Cambridge University Press, New York).

pression (for example, a decision for direct textual amendments combined by a Keeling schedule, or a repeal and re-enactment when possible). Plain language enters very much into the agenda during composition of the legislative text. And remains in the cards during the text verification, where additional confirmation of appropriate layout and visually appeal come into play. And so plain language extends from policy to law to drafting.

Recent innovation in the UK has advanced the plain language movement even further by putting an end to past criticisms of vagueness through empirically supported concrete parameters of its conceptual relativity. Plain language is a tool promoting uninhibited communication between the text and its users or, to personify the communication, between the drafter and the user. The drafter is, at least in the UK, a trained lawyer with drafting training and experience. The user of the legislative text can be anyone from a senior judge to an illiterate citizen of below average capacity: the inequality in the understanding of both common terms (whichever they may be) and legal terms renders communication via a single text a hopeless task. What can facilitate communication is the identification of the possible precise users of the specific legislative text: identifying who the users of the text will be allows the text to "speak" to them in a language that tends to be understood by them. Until now identifying the users was a hypothetical and rather academic exercise. Recent empirical data offered by a revolutionary survey of The National Archives in cooperation with the OPC have provided much needed answers.[27]

Starting with the Tax Law Rewrite project, the UK government went to great length in order to identify the users of tax legislation, as a means of drafting as a "joint" venture.[28] But, as was the case with the plain language movement, the question remained on which is the audience of legislation. Speaking to the users is a noble pursuit but presupposes and understanding of who uses legislation and what level of legal awareness these users have. At the end of the day, identifying the people whose choice to act or not makes government policy a success or a failure[29] is crucial in establishing effective communication with them. This is absolutely necessary for three reasons.

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[27] See https://www.gov.uk/good-law.

[28] See D. Salter, "Towards a Parliamentary Procedure for the Tax Law Rewrite" (1998) 19 *Statute Law Review*. 65, 68; also see Inland Revenue, "The Tax Law Rewrite: The Way Forward", http://www.dinlandrevenue.gov.ukrewnitdwayforward/tlrc9.htm.

[29] See D. Berry, "Audience Analysis in the Legislative Drafting Process" (2000) *Loophole*, www.opc.gov.au/calc/docs/calc-june/audience.htm.

First, compliance with the legislative command cannot occur without user awareness of what is being imposed; ineffectiveness of the legislative text is inevitable; and so is the failure of the underlying regulatory reform. This is confirmed by user testing experiments, such as the one undertaken by the Knight and Kimble team in the late 1990s[30] or the Canadian studies by Schmolka, or the recent UK's Good Law initiative. Second, the government and legislature that knowingly pass an intelligible piece of legislation entrap the citizens by asking them to perform an impossible task (they do not understand it so how can they possibly do it?), and on top of that they impose penalties for non-compliance of that impossible task. Third, the government that proposes a knowingly intelligible piece of legislation creates to voters the fraudulent impression that it has acknowledged the problem behind the legislative text, and that it has done something about it by legislating: the truth of course is that the government proposes an ineffective piece of legislation that cannot lead to regulatory efficacy.

And so, knowing the legislative audience is a matter very relevant to democracy, the rule of law, citizens' rights, and of course regulatory and legislative quality. But is there one audience of legislation? Can a drafter rely on the common notion of the "lay person", the "average man on the street"[31], the "user"? The theoretical debate over this point has now been answered by the Good Law Initiative survey: at least three categories of people constitute the audience of legislation, and these are lay persons reading the legislation to make it work for them[32], sophisticated non-lawyers using the law in the process of their professional activities, and lawyers and judges. In more detail, in the UK there are three categories of users of legislation:

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[30] See P. Knight, *Clearly Better Drafting: A Report to Plain English Campaign on Testing Two Versions of the South Africa Human Rights Commission Act, 1995* (Stockport, U.K.: Plain English Campaign, 1996) 39.

[31] See D. Murphy, "Plain English-Principles and Practice", Conference on Legislative Drafting, Canberra, Australia, 15 July 1992.

[32] See J. J. E. Gracia, A *Theory of Textuality: The Logic and Epistemology* (Albany, State University of New York Press, 1995), 159–163, and 164–165; also see G.L. Pi and V. Schmolka, "A Report on Results of Usability Testing Research on Plain Language Draft Sections of the Employment Insurance Act: A Report to Department of Justice Canada and Human Resources Development Canada" (unpublished, August 2000); and V. Schmolka, "Consumer Fireworks Regulations: Usability Testing", TR1995-2e (Department of Justice Canada, unpublished, 1995).

a. non-lawyers who need to use legislation for work, such as law enforcers, human resources professionals, or local council officials; the "Mark Green" of the survey represents about 60% of users of legislation;

b. lay persons who seek answers to questions related to their personal or familial situation; "Heather Cole" represents about 20% of users of legislation; and

c. lawyers, judges, and senior law librarians; the "Jane Booker" persona represents about 20 % of users of legislation.[33]

The significance of the survey for plain language and good legislation cannot be understated. The survey provides, for the first time in UK legislative practice, empirical evidence from a huge sample of the 2,000,000 visitors of *www.legislation.gov.uk* per month. The survey, whose data relate to users of electronic versions of the free government database of legislation only, destroys the myth that legislation is for legal professionals alone. In fact, legal professionals are very much in the minority of users, although their precise percentage may well be affected by their tendency to use subscription databases rather than the government database, which is not annotated and often not updated. Whatever the exact percentages of each category are, there is significant empirical evidence that in the UK legislation speaks to three distinct groups of users, whose legal awareness varies from none, to some, to much. But is the legal awareness of the users the only parameter for plain language as a means of effective legislative communication?

Pitching the legislative text to the "right" level requires an additional consideration. Having realised what the rough profiles of the audience are, the next parameter for plain communication is the topic of the legislative text. Legislative texts are not all aimed at the same readers. Their primary audience varies. For example, the main users of rules of evidence are probably judges and lawyers.[34] So the language and terminology used can be sophisticated: paraphrasing the terms "intent" or "mens rea" with a plain language equivalent such as "meaning to" would lead the primarily legal audience to the legitimate assump-

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[33] See A. Bertlin, "What works best for the reader? A study on drafting and presenting legislation" [2014] *The Loophole*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/326937/Loophole_-_2014-2__2014-05-09_-What_works_best_for_the_reader.pdf, pp.27–28.

[34] See B. A. Garner, "Guidelines for drafting and editing court rules" [1997] *Federal Rules Decisions* 169, 187.

tion that the legislation means something other than "intent" and would not easily carry the interpretative case-law of "intent" on to "meaning to". And so rules of evidence can be drafted in specialist language, albeit with a caveat: a primarily legally sophisticated audience cannot serve as a "carte blanche" for legalese, since non-lawyers may need to, and in any case must, have access to the legislation too. As audiences become more specialized and more educated in technical areas, they expect texts that are targeted to their particular needs.[35] Moreover, since accessibility of legislation is directly linked to Bingham's rule of law[36], passing inaccessible legislation under the feeble excuse that its primary audience possesses legal sophistication is not easily acceptable. And so there is an argument for either the continued use of legal terminology or for the provision of a definition of the new plain language equivalent referring to the legal term used until now.

But how "plain" must legislation be? Even within the "Heather Cole" persona there is plenty of diversity. There is a given commonality in the lack of legal training, but the sophistication, general and legal, of Heather Coles can range from a fiercely intelligent and generally sophisticated user to a rather naïve, perhaps illiterate, and even intellectually challenged individual. Which of those Heather Coles is the legislation speaking to? It certainly is not the one commonly described as "the average man on the street". To start with, there are also women on our streets, and they are users of legislation too. And then, why are the "above or below averages" amongst us excluded from legislative communication?[37] Since effectiveness is the goal of legislative texts, should legislation not speak to each and every user who falls within the subjects of the policy solution expressed by this specific legislative text? This includes the above average, the average, and the below average people.

This is a rather revolutionary innovation. Identifying the users of legislation has led to not one but two earthquakes in legislative studies: yes, the law does not speak to lawyers alone; but the law does not speak to the traditional plain language "average man". The significance of this UK innovation cannot be side-

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[35] See K. A. Schriver, "Plain Language through Protocol-Aided Revision" in E. R. Steinberg (ed.), *Plain Language: Principles and Practice* (Detroit, Wayne State University Press, 1991), 148, 152.

[36] See Lord Simon of Glaisdale, "The Renton Report-Ten Years On" (1985) *Statute Law Review* 133.

[37] See J. Kimble, "Answering the Critics of Plain Language" (1994–1995) 5 *The Scribes Journal of Legal Writing* 51, 59.

lined. Identifying the users has provided irrefutable empirical evidence on who uses legislation, and for what purpose. If applied in practice, this new knowledge will change the way in which legislation is drafted here and abroad. First, legislative language can no longer be gauged at legal and regulatory professionals. Although great advances have already taken place, legislation now tends to be pitched to "Mark Green": further simplification to the benefit of "Heather Cole" needs to take place with immediate effect. The OPC are working on this: for example, the term "long title" has disappeared from UK Acts, and replaced by "introductory text". Similarly, there is talk of switching from "commencement" to "start date", as user testing has shown that commencement is puzzling to non-lawyers. The Guidance to drafting legislation reflects the UK government's commitment to legislating in a user friendly manner.[38]

3. New Possibilities

Having established the concept of effectiveness as synonymous to good legislation, and the new holistic mandate of plain language in legislation, and armed with the new empirical data offered by TNA and OPC, let us discuss further possibilities. I have identified three blue-sky mechanisms for better law. They respond to widely accepted *faiblesses* in UK legislation stemming from the newly identified need for legislation to speak to three diverse user groups with a single text: the layered structure promotes a three-tier structure for legislative texts, each addressed to each of the three user groups; the typography-inspired presentation and layout responds to the need to bring to light the main regulatory messages in legislation; and the interactive electronic statute book highlights the interconnectivity between legislative texts within the statute book as a whole.

a) The Layered Approach to Structure

Currently legislative texts are structured in application of Lord Thring's Five Rules of Drafting[39] that offer precedence to provisions declaring the law versus

[38] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/293866/guidancebook-20_March.pdf.

[39] See Lord Thring, *Practical Legislation, The Composition and Language of Acts of Parliament and Business Documents* (London, 1902), 38; also see V.C.R.A.C. Crabbe, *Legislative Drafting* (Oxford, Cavendish Publishing, 1998), 148–150.

provisions relating to the administration of the law, to simpler versus the more complex proposition, and to principal versus subordinate provisions. Exceptional, temporary, and provisions relating to the repeal of Acts, and procedure and matters of detail should be set apart.

The application of Thring's rules has led to a traditional legislative structure of preliminary provisions (long title, preamble, enacting clause, short title, commencement, duration/expiry, application, purpose clause, definitions, interpretation); principal provisions (substantive, administrative), miscellaneous (offences and provisions ancillary to offences, miscellaneous and supplementary), and final (savings and transitional, repeals, consequential amendments, schedules). Current plain language interventions have led to a bare top text that leads the user straight to the main regulatory message: preliminary (introductory text/long title, enacting clause, start/expiry date with a hanging clause for a Schedule, hanging clause for definitions, application); substantive and administrative (principal, subordinate); and final provisions (savings, duration/expiry where not in preliminary of Schedule, transitional, repeals, consequential amendments, purpose clause with tangible criteria for effectiveness that are applied in pre- and post-legislative scrutiny, short title, Schedules, definitions, other).

But there is much scope for blue-sky innovation by use of the layered approach[40]. The rationale behind the modern approach lies with the logical sequence of provisions within the text, which reflects logic, and philosophical and linguistic approaches to language and thought. This basis has now been overcome by the crucial evidence on the three user groups for legislation. Heather Cole, Mark Greene, and Jane Booker are diverse users that require diverse pitches of the legislative text. Speaking to all three of them at the same time is a rather complex, for some impossible, task. Introducing three versions of the same legislative text is a possibility, but it is a recipe for disaster on such a diverse range of grounds, moral, ethical, constitutional, practical: rule of law, issues of interpretation between versions, identifying which version corresponds to each user, using that version as opposed to the one selected by the user, who subjects each user to their corresponding persona, ethical and moral consequences of the application of a diverse version for each user. And the parallel existence of

[40] The term, and to a certain extent, the concept is attributed to John Witing, Tax Director at the Tax Simplification Office. I am very grateful to John for his inspiration and the generosity with which he has shared it with me.

three different texts could be counter-productive: users currently choose to use the complex but official legislative text over any of the many interpretation aids offered by government. If the plethora of attractive user-friendly manuals and policy documents are shunned in favour of legislative texts, what makes it probable that users will go to the simple Heather Cole text as opposed to the legal Jane Booker one that reflects users' perception of legislation? And so, remaining with a single text is really the only option. But this is exactly what has imprisoned legislative drafters in the struggle for simplicity within legislative texts.

It is now possible to see that each user group has its individual requirements for legislative information that are distinct from those of the other user groups. Identifying the needs for legislative information for each user group at the level of provisions, rather than texts, would allow drafters to imitate oral communication, and pitch the legislative text to specific abilities and requirements. Drafters of legislative texts can now begin to think what regulatory or legal message is relevant to each group, and structure the text accordingly.

The layered approach promotes the division of legislation into three parts, corresponding to each of the three profiles of legislative users. Part 1 can speak to lay persons: the content is limited to the main regulatory messages, thus conveying the essence of law reform attempted by the legislation, focusing gravely on the information that lay persons need in order to become aware of a new regulation, to comply with new obligations, or to enjoy new rights. Part 2 can speak to non-legally trained professionals who use the legislation in the course of their employment. Here one can see scope for further detail in the regulatory messages introduced, and for language that is balanced (technical, yet approachable to the professionals in question). Part 3 of the legislation can then deal with issues of legislative interpretation, issues of procedure, and issues of application, in a language that is complex but not quite legalese, as there is nothing to prevent all groups from reading all parts.

The layered approach is revolutionary, as it shifts the criterion for legislative structure from the content and nature of provisions to the profile of the users. It switches on a user-centred structure, thus promoting both a link between policy and its effecting legislative text but also enhancing and personalising the channel of communication between drafters and users. And it applies and reflects the modern doctrine of contextualism in language and philosophy. But it cannot be viewed as a complete departure from tradition, as it continues to apply Lord Thring's five rules. By requiring that Part 1 includes the primary

regulatory message, it promotes Lord Thring's rules that give precedence to the simpler proposition. And by structuring legislation into three parts, the layered approach complies with the other Thring rules requiring that provisions declaring the law (in Part 1 or 2) should be separated from provisions administrating the law (in Part 2 or 3 accordingly); that principal provisions should be separated from subordinate provisions (in Parts 1 and 2); that exceptional, temporary, and provisions relating to the repeal of Acts should be separated from the other enactments and placed by themselves under separate headings (in Part 3); and that procedure and matters of detail should be set apart by themselves (either in Part 3 of the layered approach, or in a Schedule).

The layered approach seems to be one of the promising initiatives in the field of legislation. But there are three points that need to be clarified. First, the layered approach may, but will not necessarily, lead to a partial, fragmented, or incomplete legislative communication to Heather Cole. There is no doubt that an erroneous application of the approach could result to that. But the placement of the main messages in Part 1 per se must be seen as an added bonus to lay users compared with the current state of affairs: in the layered approach the now frequently elusive main regulatory message will be easily identified, will be brought forward in a pronounced place at the beginning of the legislative text, and will be expressed in a language that is accessible to lay users. Compared to the current state of affairs, where the main message is communicated somewhere within the legislative text and is expressed in the layered approach's Part 2 or 3 language, this is certainly an improvement. And of course, there is nothing preventing Heather Cole from reading the rest of the text: in fact, an inviting Part 1 can only encourage Heather Cole to keep reading, whilst offering her a clear context within which her understanding of complex and detailed messages can only be enhanced.

Second, although Part 1 carrying the main regulatory message is distinctly different from Parts 2 and 3, it may be unclear what really distinguishes between Part 2 data and Part 3 data: both Mark Green and Jane Booker are able to handle complexity and technicality of legislative data. However, they do not both require the same data, as demonstrated by their motives when using *www.legislation.gov.uk*: Mark Green is interested in answers that allow him to perform his professional but non-legal duties, whereas Jane Booker seeks legal information. As a result, what Mark Green needs is a clear understanding of substantive and procedural requirements imposed by the legislation, whereas Jane Booker seeks deeper statutory interpretation often coupled with a holistic view of the

statute book. As a result, Part 2 of the layered approach involves answers to questions such as who must do what by when, and what happens if they don't. Part 3 will delve deeper into intricate distinctions and possible exceptions that relate to statutory interpretation and interconnections between legislative texts within the statute book. There are two caveats here. One, Mark Green must still read the text as a whole. And Part 3 cannot be viewed as a mere shell of definitions, repeals, and consequential amendments: this would deprive the readers from at least part of the benefits of the layered approach.

Third, it would be inappropriate to consider that the simplification serviced by the layered approach would result in an abolition of the need for explanatory materials for legislation. In fact, as the layered approach results in an inherent fragmentation of data, it renders the use of explanatory materials and notes reinstating the fluidity of information and the cross-fertilisation between parts an ever so crucial requirement. The new style of explanatory notes[41] introduced by Good Law and showcased in the Armed Forces (Service Complaints and Financial Assistance) Bill [HL] Explanatory Notes[42] enhance the layered approach by introducing a clear table of contents that is thematic rather than provision based, with information on the policy and legal context of the Act, and with simple narratives on the main regulatory messages for all three user groups.[43]

Ultimately, the proof of the layered approach is in its application. User testing can prove whether it works, for which user group, and how it can be amended or fine-tuned to serve users better.

b) Legislative Image: Presentation, Layout, Pictures

Looking now at the image of the legislative text, namely at the picture that the user receives when looking at the text, it is necessary to distinguish between paper and electronic. It is noteworthy that in New Zealand legislation is only published electronically: paper publication ceased last year. In the UK I am not

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[41] See Office of Parliamentary Counsel, "Explanatory Notes Pilot: Response to Consultation", April 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/427779/explanatory_notes_response_to_consultation_on_pilot.pdf.

[42] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/377467/new-format-explanatory-notes.pdf.

[43] See http://www.publications.parliament.uk/pa/bills/lbill/2014-2015/0003/en/15003en.htm.

aware of government intent to abolish paper publication or even the tradition of vellum.

Plain language has always advocated the need to rethink the layout of legislative texts.[44] The single font, the lack of adequate contrast between paper and text, the unique format are elements of the current legislative image that prevent the user from identifying the important aspects of the regulatory message, thus reducing readability of legislative texts. Legislative texts attempt to convey a "legislative story" to the user, thus allowing them to identify and then understand the underlying policy, the legislative choices made, and the rationale behind the text. This offers them the ability to read and interpret the text in context, thus making accessibility easier and more secure.

The importance of layout has been the main motivation behind the change of legislative layout in the UK in 2001. The current layout shows a little more white space and a slight change of font coupled with shorter sections and sentences; structure in parts and sections, headings, and the new table of contents (previously known as the table of arrangements) are all tools that promote clearer layout for the purposes of enhancing readability. Specific demonstrations of the modern layout are observed in a number of Acts: the "step by step" approach to setting out a series of complex rules in section 91 of the Income Tax Act 2007; the tables in section 181 of the Finance Act 2013; the headings for subsections in section 2 of the National Insurance Contributions Act 2014.[45]

However, there is plenty of scope for further progress. Within the remit of Good Law, the use of typography tools has been discussed and tested amongst experts. Rob Waller of the Simplification Centre presented before and after images of legislative text with text presented in different fonts, in frames, in colour. The Waller layout involves reduced punctuation and simplified numbering, bold terms and horizontal rules to show the structure, a solution to the problem

[44] See Office of Scottish Parliamentary Counsel, "Plain language and legislation", February 2006, http://www.gov.scot/resource/doc/93488/0022476.pdf.

[45] See H. Rogers, "Good Law: how can the design of Bills and Acts help?" in Design Commission, *Designing Democracy: how designers are changing democracy – spaces and processes*, An Inquiry of the Design Commission, March 2015, http://www.policyconnect.org.uk/apdig/sites/site_apdig/files/report/497/fieldreportdownload/designingdemocracyinquiry.pdf, 56.

of "and" and "or" relationships, and framed text showing amendments to other Acts.[46]

Layout is now at the forefront of practitioners' agenda. And quite rightly so. It has been overlooked and there is great scope for change. However, layout alone cannot respond to a complex text, to a complex regulatory message, or indeed to a complex policy. It will contribute to simplification but with the aid of additional visual tools.

One of those tools that have been ignored by even the most visionary of legislative academics and practitioners is the use of image in legislation. Images have been used in legislation that introduces national flags, traffic signs, or planning regulations. But the relationship between picture and legislation has not been explored fully. The visual arts could play a significant role here: there is nothing more direct, relevant to a wide range of users, and time resistant than Cain swinging his club above the prostrate Abel in Titian's painting in Santa Maria della Salute in Venice. The visual representations of themes relating to wrongdoing are so emotionally charged and the characters shown in such magnification that, combined with beauty and other aesthetic values, picture has had tremendous impact on the viewer.

Perhaps the inclusion of images in legislation can enhance the quality of communication. An example could be drawn from criminal provisions. The picture accompanying the legislation in the form of a Schedule may show:

– what behaviour is to be condemned (show the action; and specify if the person knows that this is bad, suspects that this is bad, or is ignorant of the badness of the behaviour); and
– that this is an offence (for example show a stop sign or show societal disapproval); and
– that it carries a sanction (for example show the penalty and its adverse effect).

The use of typographical and visual aids in legislation can enhance readability[47] immensely. They can address textual limitations and can take the user further

[46] See R. Waller, "Layout for Legislation", Technical Paper 15, www.simplificationcentre.org.uk/resources/ technical-papers/.

[47] See G. Jones, P. Rice, J. Sherwood, J. Whiting "Developing a Tax Complexity Index for the UK", https://www.gov.uk/government/uploads/system/uploads/attachment_

by banishing the barriers or written textual communication. User testing is the only way to assess if and how useful they are. But academic research, indeed inter-disciplinary academic research, is the only forum for analysis at a theoretical level first, and then in application to actual legislation.

c) The Statute Book as a Whole

Reforming the structure and layout of individual legislative texts may bear little fruit without changes in the statute book as a whole. Addressing the issue of legislative volume that enhances complexity[48] has been at the forefront of the agendas of the last two governments as the epicentre of regulatory quality. The volume of legislation came under review in 2003. The Better Regulation Task Force's "Principles of Good Regulation"[49] linked better regulation with less legislation, and offered a number of regulatory alternatives: do nothing; advertising campaigns and education; using the market; financial incentives; self-regulation and voluntary codes of practice; and prescriptive regulation. In "The Coalition: our programme for government"[50] the previous government undertook (i) to cut red tape[51] by introducing a "one-in, one-out" rule whereby no new regulation is brought in without other regulation being cut by a greater amount[52]; (ii) to impose sunset clauses on regulations; and (iii) to give the public the opportunity to challenge the worst regulations. Such was the importance attributed to legislative volume that the Prime Minister in his letter of 6 April 2011 to all Cabinet Ministers declared:

> "I want us to be the first Government in modern history to leave office having reduced the overall burden of regulation, rather than increasing it."

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data/file/285944/OTS_Developing_a_Tax_Complexity_Index_for_the_UK.pdf.

48 See Office of Parliamentary Counsel "When Laws Become Too Complex: A review into the causes of complex legislation, March 2013, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/187015/GoodLaw_report_8April_AP.pdf, 6–7.

49 See http://webarchive.nationalarchives.gov.uk/20100407162704/http:/archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principlesleaflet.pdf.

50 See "The Coalition: our programme for government", https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf.

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

52 See http://www.bis.gov.uk/assets/biscore/better-regulation/docs/o/11-671-one-in-one-out-methodology.

In order to achieve this aim, the UK government went one step further and introduced a one-in, two-out approach. It undertook to use regulation for the achievement of its policy objectives only where non-regulatory approaches cannot lead to satisfactory outcomes; cost benefits analysis demonstrates a clear margin of superiority of regulation to alternative, self-regulatory, or non-regulatory approaches; or the regulation and the enforcement framework can be implemented in a fashion which is demonstrably proportionate, accountable, consistent, transparent and targeted.[53] The number of Acts passed in 2012 was only 20 with a total number of pages of 1,886[54]: this was a new low after the peak of the late 1990s and early 2000s. But, whilst the number of Acts has decreased since the 1980s, the mean average number of pages per Act has increased significantly, from 37 and 47 pages during the 1980s and 1990s respectively, to 85 in the past decade; if one compares these numbers with the 1950s when the average was 16, a trend of fewer but longer Acts becomes evident.[55] One could contribute this increase to plain language drafting and to the increasing amounts of white space and bigger margins leading to 20% fewer words on a page.[56] However, there is a crucial contributing factor: over the last 30–40 years the number of Statutory Instruments has steadily increased.[57] And so the volume of legislation, including primary and delegated, seems to be fighting its ground in practice.[58]

Nonetheless, the UK has been very active in the field of regulatory reform. This is evidenced by a recent OECD Review, which pronounces the regulatory reforms in the UK as impressive.[59] Points of excellence include the effective bal-

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[53] See Department for Business, Innovation and Skills, "Better Regulation Framework Manual", July 2013, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/211981/bis-13-1038-better-regulation-framework-manual-guidance-for-officials.pdf, 4.

[54] See HoL Library Note 2013/008, Volume of Legislation, 4.

[55] See HoL Library Note, Volume of Legislation, LLN 2011/028, September 2011.

[56] See R. Heaton, House of Commons Political and Constitutional Reform Committee "Ensuring standards in the quality of legislation" First Report of Session 2013–14, HC 85 Incorporating HC 74-i to vii, Session 2012-13, 20 May 2013, Question 64.

[57] See R. Cracknell and R. Clements "Acts and Statutory Instruments: the volume of UK legislation 1950 to 2012" HoC Standard Note SN/SG/2911, 15 November 2012, 2.

[58] And not just in the UK: see R. Pagano *Introduzione alla legistica – L'arte di preparare le leggi* (Milano, Giuffre, 1999) 6.

[59] See http://www.oecd.org/dataoecd/61/60/44912018.pdf.

ance between policy breadth and the stock and the flow of regulation, and the extensive application of EU's Better Regulation initiatives in the UK[60].

But, of course, innovations to the statute book do not end with legislative volume. Blue-sky proposals, which in this case may be put to effect much quicker than one might expect, include the current work of The National Archives. John Sheridan leads current thinking both at the theoretical level of viewing the statute book as a collection of big data, and at the application level of presenting a prototype of a radically reformed screen presenting legislation at *www.legislation.gov.uk*. Our Big Data in Law project[61] revolutionized the way in which the statute book is viewed and led to big data applications and capabilities to UK legislation as a coherent, interrelated, and up-to-date whole. The project created a search mechanism for researchers, allowing them to instigate research on legislation as a body: from the census that allows counting for example the number of "shall" in UK legislation throughout the years to the introduction of methodology tools that provide empirical data on aspects of the statute book or the whole of the statute book.[62] This entirely new and free resource for the research community offers pre-packaged analyses of the data, new open data from closed data, and creates the capability of identifying pattern language for legislation, which would encapsulate commonly occurring legislative solutions to commonly occurring problems, thus facilitating legislative communication. The project, which has just concluded, enhances user (in this case researchers) understanding of the interrelations and interconnections between legislative texts, within fields of law, and across fields of law.

The project feeds into the great efforts led by The National Archives to review the way in which legislation is "served" to users by offering unprecedented capabilities of identifying relevant legislative texts, such as delegated legislation, cross referenced texts, definitions of terms used in a legislative text, and, in the long term, even case-law clarifying or applying the text to cases. There are already two prototypes of the new screen for legislation. Both have been tested in user testing undertaken by BunnyFoot and including iris trackers as a means of assessing how long a user's eye spends in each part of the text, where the eye

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

[61] The project team was led by John Sheridan, TNA, as Principal Investigator; D. Howarth, University of Cambridge, and I were Co-Investigators; the Advisory Board was chaired by Sir Stephen Laws, KCB, QC, LLD former First Parliamentary Counsel.

[62] See http://tna.bunnyfoot.com/LDRI/#p=home.

is searching for further information and where on the screen, and where the user fails to understand the text or the cross reference completely. This work is of profound importance. What is missing for the purposes of legislative readability is context, and this is what the new screen can provide. This, along with the new format of explanatory notes, can finally offer the user an accurate picture of the labyrinth of legislative data in all their complexity and cross-wiring. Would this facilitate the user? Of course it will: it will depict an accurate image of legislative regulation on the topic searched, thus demonstrating if clear answers can be found or if it is time for the user to accept that statutory interpretation by a trained legal professional is what is really needed in that case.

IV. Conclusions

So, in the UK, legislative studies and legislative practice is rapidly progressing to its age of maturity via a great number of innovations. But the review of recent governments' regulatory policy shows that the many drafting innovations now present in the laws of the UK, such as gender neutral drafting[63], the use of explanatory memoranda[64], the placement of definitions at the end and probably in a schedule[65], the increased use of Keeling schedules[66], to name but a few, cannot be attributed to the regulatory reform policy of the government.[67] In fact, legislative innovation is happening all over the world.

Until recently legislative drafting was viewed as a mere skill, normally and mostly, served by government lawyers. But things have changed. Legislation became the focus of regulation replacing the common law. There are a number of possible causes for this phenomenon: the Europeanisation of law offered common law systems the opportunity to appreciate more the feared statutory law; legal globalisation led to an emphasis on international statutory law (treaties etc.)

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63 Statement of the Leader of the House of Commons on 8.3.07.

64 http://www.parliament.uk/site-information/glossary/explanatory-memorandum.

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

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

67 See H. Xanthaki, "The regulatory reform agenda and modern innovations in drafting style" in L. Mader (ed.), *Regulatory Reform* (2013, Nomos, Baden-Baden).

that required national implementation via national statutory law; and finally the realisation that regulation was passed for the purposes of achieving measurable results led to the inevitable (and not always fortunate) use of statutory law as a method of regulation. Whatever the reason, it invited a detailed study of statutory law from its conceptualisation to its implementation. And it paved the way for a new theory for legislative drafting[68].

This qualitative definition of quality in legislation respects and embraces the subjectivity and flexibility of phronetic legislative drafting.[69] Phronetic legislative drafting focuses on the subjectivity of prioritisation in the selection of the most appropriate virtue to be applied by the drafter in cases of clash between equal virtues. But subjectivity is not anarchic: it is qualified by means of recognising effectiveness as the sole overriding criterion for that choice. In phronetic legislative drafting one must be able to identify basic principles which, as a rule, can render a law good. The pyramid in the beginning of this paper presents such principles: when applied, at least in the majority of cases, they lead to good law. Yet the ultimate criterion of good law is its effectiveness, at least under the prism of phronetic legislative theory, a theory that has innovated legislative study and legislative practice in the UK and beyond.

Does all this mean that legislation in the UK is perfect? I would find it impossible to find a supporter of such a view. There is plenty of work that needs to be done in order to push the UK as a model of excellence. But one cannot doubt that it is a model of innovation, a model of reflection, and a model of trial, error, and incredible tangible successes. I myself am an enthusiastic fan of the structure and of the developing product.

[68] See H. Xanthaki, "Duncan Berry: A true visionary of training in legislative drafting" [2011] *The Loophole,* pp.18-26.

[69] See H. Xanthaki, "Quality of legislation: an achievable universal concept or a utopian pursuit?" in Marta Travares Almeida (ed.), *Quality of Legislation* (2011, Nomos, Baden-Baden), pp.75-85.

Education, Knowledge-Exchange and the Role of Professional Legislative Lawyers in the Netherlands

Wim J. M. Voermans / Sjoerd E. Zijlstra

Content

I. Role of Legislative Lawyers

In the Netherlands, bills are drafted by civil servants within the ministerial departments. In most cases, these legislative lawyers form a separate unit within the department, typically called Legislative and Legal Affairs Unit or just Legal Affairs Unit. Thus, legislative lawyers work in different fields of public policy, where they are required to "translate" policy into legislation. In this sense, one might speak of a separate workforce of drafters, although this is not a workforce for the whole government, but a workforce within each ministerial department. This results in what has been called "legislative families": the legislative lawyers of each ministerial department have their own style of legislation. This causes problems in the way of coordination, efficiency and even legal certainty. For this reason, for more than 50 years, *General Instructions for Legislative Drafting (Aanwijzingen voor de regelgeving)* have existed.

Civil servants whose job is to draft legislation are called "legislative lawyers" *(wetgevingsjuristen* in Dutch; *Gesetzgebungsjuristen* in German). They have their own professional association (the Dutch *Association for Legislation and Legislative Policy*), their own biennial "Day of Legislation" and their own scientific journal *(RegelMaat*, its name being a pun which is impossible to translate).

The legislative experts operate as individual (policy-making) civil servants (furthermore referred to as "policy-making officials") and as legislative lawyers. Although the civil service sometimes establishes project teams[1] or task forces[2] for the purpose of cooperating on the preparation of more extensive legislative projects, as a rule, departments work by themselves. When it comes to drafting, it is common procedure that an individual policy department within a ministry prepares a first policy outline and then requests the assistance of a legislative department to actually draft a legislative proposal or, if a draft proposal already exists, to comment on that draft or review it.

II. Education and Skills

In general, legislative lawyers hold a law degree, with a specialization in constitutional and administrative law, sometimes civil law, criminal law or international law.

Most Dutch law faculties teach a course on Legislation and Legislative Drafting as part of their Master's programme in Dutch Law. The most elaborate course (12 ECT points) is taught at the VU University Amsterdam. Nevertheless, in the Dutch experience, students who participate in these courses seldom become legislative lawyers, and conversely, most legislative lawyers have not participated in such a course. It is mostly a matter of a late-in-the-day decision on the part of the student to aim for a job as a legislative lawyer.

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1 Ideally, such project groups are composed of policy-making officials or technical experts, civil servants engaged in drafting legislation and persons who are well-informed about implementation and the implementation field. On this subject, see also Philip Eijlander and Wim Voermans, *Wetgevingsleer* [Legislative Drafting], The Hague 2000, pp. 313–314.

2 In the policy document called *Voortvarend wetgeven* [Effective Legislation], the term "task force" is used for interdepartmental teams of experienced civil servants engaged in legislation who work on complex and priority legislation projects *Kamerstukken* [Dutch Parliamentary Papers] II, 1993/94, 23 462, no. l, p. 10.

Because of that practice (and after an incident which showed a lack of knowledge of EU law on the part of legislative lawyers), the Dutch Academy for Legislation was founded in 2001.[3] The Academy[4] offers a two-year dual Master programme for legislative lawyers. Every year the Academy recruits young professionals through a strict selection process, who follow this programme to become a legislative lawyer. The course combines lectures at the Academy with practice at a ministry, the Council of State or the lower house of parliament (Tweede Kamer). At the present time, the ministries only recruit legislative lawyers form the ranks of Academy graduates. The Academy also organizes courses for experienced legislative lawyers (see below).

The knowledge required for becoming a legislative lawyer comprises:

a) constitutional and administrative law as well as EU law;

b) best practices in legislative drafting technique;

c) best practices in effective and efficient drafting (alternatives for government intervention in society, enforceability).

The required skills are:

a) drafting of legal texts in general, and legislation in particular;

b) negotiation;

c) political sensibility.

There is no obligation for ongoing education for legislative lawyers, although in our opinion there should be (see below). Legislative lawyers may choose according to their needs and interests.

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[3] See Wim Voermans, "A learning Legislator? Dutch attempts to prevent brain drains in the legislative process', in: Luzius Mader and Chris Moll (eds.), *The Learning Legislator: Proceedings of the 7th Congress of the European Association of Legislation (EAL)31st May, 1st June 2006, The Hague, The Netherlands*, Baden-Baden: Nomos 2009, pp. 179 ff.; Academy for Legislation, The Hague 2008, p. 179–196; Menno Bouwes, "De vorming van de wetgevingsjurist", in: Edward L. Rubin, Felix Uhlmann and Menno Bouwes, *De opleiding van wetgevingsjuristen en wetgevingsonderzoekers in vergelijkend perspectief*, Nijmegen: Wolf 2009.

[4] http://academievoorwetgeving.nl/landingpage/english.

Several institutions organize courses on subjects that are relevant for legislative lawyers:

a) the Academy for Legislation;

b) universities (law schools);

c) units within ministerial departments;

d) private corporations such as Euroforum, Wolters Kluwer and Elsevier.

In most cases, the courses are taught by university professors, because they are considered to have the best knowledge on developments in law and even legislative technique. Some courses (especially courses concerning practical subjects like drafting technique) are also taught by (senior) legislative lawyers.

III. Work

From the legislative lawyers' perspective, the assignment to draft a legal text typically comes from their direct superior within the department. Of course, a ministerial decision is needed before the process of drafting commences.

There is no specific instructor, apart from the hierarchical superior, his or her superior etc., who may at any stage in the drafting process intervene with instructions. The technical aspects of drafting are usually left to the legislative lawyer.

In the Netherlands, specific Acts and Ordinances (as well as legal questions arising from these Acts and Ordinances) are assigned to one or more specific legislative lawyers. In this fashion, the legislative lawyers are and remain "owners" of their draft: they will work on it until it is finished.

Coordination between legislative lawyers and their principles and colleagues takes place in one or more of the following ways:

a) incrementally (via email, telephone or face to face);

b) in fixed structures like weekly meetings;

c) in an ad-hoc intra- or interdepartmental committee of legislative lawyers;

d) in standing intra- or interdepartmental committees of legislative lawyers.

The salary of a legislative lawyer is usually the same as for other civil servants within the ministerial department, although in some departments, exceptionally skilled and experienced legislative lawyers are paid higher salaries.

IV. Assessment

Although policy-making officials and legislative lawyers generally know where to find each other, and although they cooperate closely and well, legislative lawyers complain that they are often engaged at too late a stage. At that stage, the crucial choices have already been made and the specific legislative input and expertise often comes too late in the day. The fact of life that the legislative angle or legal input – which sometimes slows down a legislative process – is generally not very popular within the ministerial working processes, makes matters for timely legal and legislative input even worse. As a result of mounting pressure to achieve policies within short periods of time, a focus on legal or specific legislation issues is usually perceived as an inconvenient barrier in policy processes. This lack of popularity has effects on several fronts. For example, the number of legal experts has declined at the Dutch ministries.[5] Also the number of lawyers in executive positions at the ministries has dropped. This might explain why the legislative function is not strongly embedded in most ministerial organisations, especially if we compare it to the way policy responsible directorates are engrained. And, last but not least, the career perspectives of legislative staff within the ministries are less favourable than those of their colleagues in the policy directorates: the position of legislative lawyer does not hold promising career opportunities. In most cases it is a "final" post or position. It is difficult to become a manager or a director on the mere basis of drafting experience.

The relatively weak embedment of the legal and legislative function in an environment that is becoming increasingly complex in the legal and legislative field in particular – mainly because of the increasingly important role of international and, especially, Community law – poses a threat to the quality of legislation in two ways. Where preparation of legislation requires increased expertise and

[5] This was the conclusion drawn in a research report by a Tilburg-based Institute for Social Research; see IVA, *Meesterwerk* [Masterly Work], Tilburg 1999, ch. 3.

attention because of the increased complexity and the role of international law, such attention is in fact flagging.

These developments make so-called knowledge management within the legislative process extremely vulnerable, all the more so because it is often just one or a few policy-making officers or legislative lawyers that possess the detailed knowledge of and about important legislative files. This individual knowledge of legislative projects is recorded or used rarely as such and is enshrined in the individual civil servants' experience. When they leave office, the knowledge and experience they gained may be lost at once. Legislative departments and ministries are facing this problem more and more as a result of the increasing labour market mobility. Experience gained by individual civil servants may occasionally be passed on if a senior legislation officer is entrusted with the task of training a new colleague (patronage), but this is not a systematic practice in the Netherlands anymore.

In this respect the Dutch Legislative Review Committee in 2000 observed serious defects with respect to the learning capacity[6] of the ministerial legislative processes. The Committee even observed a certain degree of passiveness in the field of training and the permanent education of legislation professionals. To a great extent, it is left to legislation lawyers themselves to determine what further training courses they will attend. Even though training courses are on offer, these are not very well attended.[7] The ministries themselves actively offer training courses only occasionally.[8] More generally, the Review Committee was of the opinion that the ministries were, at the time, not very active in pursuing a policy aimed at guaranteeing the legislative lawyers' professionalism. Nevertheless, these professionals bear responsibility for the preparation of legislation to a considerable degree. This was all the more evident, *inter alia*, from the absence of a broader policy vision on recruiting and selecting legislative lawyers

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[6] This refers to a number of aspects of the building and maintenance of collective memory (method and substantive aspects) and expertise (knowledge management and staff policy); see Legislative Review Committee (Grosheide Committee), *Regels en risico's* [Rules and Risks], The Hague, January 2000.

[7] Legislative Review Committee *op. cit.*, p. 34.

[8] Examples include the in-company training courses on legislative drafting and legislative method and the legislation seminars that are organised, for example, by means of the external education bureaus within the Ministry of Transport, Public Works and Water Management (now: Infrastructure and Environment) and the Ministry of Social Affairs and Employment.

and other lawyers. For this reason too, it sometimes turns out that it is difficult to fill vacancies for senior legislation lawyers.

Not only the personnel but also the internal routines were lacking in the eyes of the Committee. In 2000, there were hardly any protocols on the actions to be taken in various legislative processes and there was no systematic reflection on formulas or "best practice" scenarios for such processes on the basis of experiences gained or knowledge gathered from process evaluations.

In the Review Committee's words:

> "[...] there is no institutionalised instrument to improve processes, if necessary. This is because individuals may learn from their actions, but in an organisation actions are improved only if a procedure for improvement has been laid down and is communicated. Further, the possibilities offered by information and communication technology in the field of knowledge collection and exchange are used only to minimum degree. This is true of knowledge collection and exchange within ministries, and definitely between the ministries."[9]

The alarm raised here did not go unnoticed. It was the Review Committee's report that spurred the establishment of the Academy for Legislation in 2001 as a vocational training school for legislative lawyers, with responsibilities in the field of recruitment. And most ministerial departments have elaborated and enacted protocols on legislative routines ever since 2001.

V. Knowledge Exchange – Programmes and Institutions

An important change has taken place in the way the legislative function is organized in ministerial departments. Some ministries used to have a strongly decentralized structure of the legislative function (for example, the Ministry of the Interior and Kingdom Relations); in this way, legislative lawyers and policy makers worked more closely together, leading to better legislation. In recent years, all ministerial departments have opted for a more or less strict separation between policy making and drafting.

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[9] Legislative Review Committee, *op. cit.*, p. 36.

In the field of education the establishment, in 2001, of the Academy of Legislation (see above, Section II) is a notable change.

1. The Academy for Legislation

The Dutch Academy for Legislation (AL) is a vocational training school for legislative drafters, with responsibilities in the field of recruitment. Once a year 6–20 graduated lawyers can apply to the Academy to enter the bi-annual training programme. On admissions a candidate is assigned to one of the ministerial departments and linked up with a supervisor. Two days a week the recruits are trained in the Academy, the rest of the training is "on the job." The programme consists of separate courses such as Constitutional Law, European Law, Enforcement, Drafting Technique and Negotiation, each followed by an exam. After two years each student makes a draft Bill or Regulation which is reviewed by a panel of experts. Upon graduation the students receive a position in a department.

The Academy offers post-initial training too. There is a host of courses on offer, supervised by one of four academic directors. The Academy has its own housing (a 17th Century building on the Lange Voorhout) in the Hague and uses state-of-the-art teaching methods, techniques and materials. It is funded by the Dutch government. The Dutch Academy for Legislation was evaluated in 2007 and duly accredited afterward. It proved a success. In 2008 the European Academy for Law and Legislation followed suit.

2. Programmes of the Academy for Legislation

The AL aims to provide courses that will increase the knowledge and skills of the participants, both in a theoretical and a practical sense. That is why the courses do not stop at legislation proper but also comprise tuition in public administration, constitutional law, European and international law, administrative law and political sciences. There are different programmes, but the most important are (1) a Master's programme for legislative lawyers trainees, (2) a course for professionals and draftsmen already employed in the civil service, and (3) courses in legal counselling for professionals.

The students for the two-year master "trainee" programme are carefully selected. These trainees enrol in the on-the-job training programme. As indicated above, they work three days a week as draftsmen or lawyers within one of the ministerial departments, the Dutch Council of State, or one of the houses of Parliament as the case may be. The programme places much value in the interplay between theory and practice.

The selection procedure for the positions starts in February of each year. In 2015, the fifteenth cycle was underway. From the applications received (mostly in the hundreds), a specialized bureau selects the candidates who then will enter a two stage contest (with tests in knowledge, writing and a psychological review). After the initial rounds the remaining candidates are interviewed by senior officials and the Dean of the Academy. By June, the final selection is made. In the two year programme, aside from the courses, all kinds of skills are trained, among them communicative, writing and negotiation skills as well as skills in presentation. The programme is also rich in field trips to Brussels and Strasbourg (EU institutions, Council of Europe, European courts, etc.) and other national and international institutions. The students take exams in all the classes and are graded. At the end of the two-year programme, they do a "live" project. They look into an actual policy problem and see whether action is needed and a draft needs to be made. They present their analysis and plan in an hour-long session to a specialist panel. If the trainees finish the programme successfully, they get a diploma and there is a graduation session in Parliament.

The trainee programme, as well as the other programmes, have proved to be a success. The departments and other institutions are satisfied and report that it is worthwhile the effort and investment. Before 2002, they had to invest quite substantial funds in permanent education of their staff. The academy pays off in this respect: on the whole, it is cheaper than all of these individual courses from the past. The trainee programme (and other programmes) are run very professionally. The teachers and academic staff are specialist in the field, most of them leading academics as well. The four programme directors are all leading university professors. The programme itself was reviewed by the Dutch and Flemish Academic Accreditation Authority in 2005 and 2010 and accredited as a sound academic body. In 2006, the Academy even won the national prize for best trainee institution.

3. Departmental Efforts: Knowledge Centre, Protocols

Besides training and recruitment efforts, most ministerial departments have elaborated and enacted protocols on legislative routines ever since 2001. A lot of them are around. There is a tendency to make them electronically available. The Knowledge Centre on Legislation – another outcome of the recommendations of the Grosheide Committee – runs a website offering access to all of these protocols. There is the problem of proliferation of these manuals and protocols. The forest tends to become invisible for the trees. An integration and accessibility project is currently underway to solve these problems.

4. Academic Input

Academic curricula in Tilburg, Amsterdam and Leiden also provide courses in Legislative Studies and Drafting in their regular curricula and post-academic courses as well. Sometimes they offer their post graduate courses via the Academy.

5. Drafting Directives as a Living Body of Drafting Knowledge

Pursuant to the Dutch Legislative quality policy of the 1990s, a voluminous set of general instructions for drafting was enacted: the aforementioned *General Instructions for Legislative Drafting*. The Dutch have had drafting instructions – a sort of a manual on best legislative practice – ever since the 1950s, but 1992 brought a major revision and elaboration. At present – after six major revisions since 1992 – there are 347 instructions. The Dutch General Instructions, for the major part, deal with drafting-technique issues (65 % of the content) but also contain provisions on proper procedure and formats, and tackle methodical issues (proper preparation of a bill, regard for proportionality and alternative solutions, self-regulation, ex ante evaluation, compliance issues, implementation, sanctioning, etc.) and policy-related legislative issues as well. The directives are accompanied by a lot of secondary information (examples, explanations, illustrations, model clauses, etc.). All government officials and public servants are obliged to observe the General Instructions when drafting bills. Derogation from the Instructions is allowed only if application of the Instructions would lead to unacceptable results (Instruction no. 5). The manual is not binding on the Council of State, parliament or decentralized bodies, but these authorities

use the General Instructions anyways because they are an authoritative Code of Good Practice. The General Instructions are updated regularly with new insights and best practices by an expert committee. This makes them a living body of drafting knowledge.

6. Information Technology

Information technology is used throughout the legislative process in the Netherlands, especially by the government. In the 1990s experiments into computer based legislative drafting were conducted, resulting in the Dutch *Leda* system, a system which offers support for drafting by offering easy and context-sensitive access to the Dutch Drafting directives.

In the Netherlands, almost all legislation is made available electronically at the moment. This begs the question whether the drafting process itself – still largely paper-based – should not be streamlined and digitalized as well. Especially the way amendments are drafted is antiquated and prohibitive to laymen understanding and access. At present, the *Legis* project is underway, which will result in a new digitalized architecture for the whole of the Dutch legislative drafting and enacting process.

7. Learning from Experience: Monitoring and Evaluation

There has been a growing need, particularly in the past 15 years, to know more about the experiences administrative authorities, supervisors and enforcement authorities have gained with respect to effects of legislation. In order to take advantage of the experiences of administrators and law enforcement bodies on the occasion of preparation of (modifications to existing) legislation, systematic consultation of administrative authorities and enforcement bodies is becoming increasingly popular. In some Dutch ministries, this is the result of a dedicated "chain approach" ; other ministries, such as the tax section of the Ministry of Finances, have a detailed system for consulting administrative authorities and harvesting feedback of experiences gained by such authorities. A special form of informed preparation of legislation concerns impact assessment, which is traditionally well-engrained in Dutch Legislative processes. Different impact assessment tests exist to make a preliminary analysis and thus predict the administrative, environmental, business, financial, enforcement, compliance, etc.

effects of proposed legislation. These tests come in different forms and shapes. They may be carried out as a regular paper-based impact assessment but also on the basis of a simulation or field experiment. Obviously, the quality of legislation benefits from such knowledge in a number of ways.

In the Netherlands, important Acts of Parliament are being evaluated after some time more and more frequently, even though such evaluation is still not a fixed practice. The focus of evaluation is usually on the effectiveness of policies rather than on the effectiveness of the Act of Parliament or regulation examined. Naturally, the experiences revealed by the evaluation are also highly relevant to measuring the effectiveness of the solutions that are enshrined in legislation. Here too, however, the problem is that evaluation experiences gained from systematic statutory evaluation are usually used only once and only within the legislative project that is being evaluated. The results of most legislative evaluations are used to adjust some aspects of statutory regulations. Usually no lessons are drawn for the future or for other projects. A few years ago a "Clearing House" was established within the Knowledge Centre for Legislation to improve the situation. The Clearing House tries to reuse insights from evaluations for other projects.

Status and Professional Roles of a Legislative Drafter in Poland

Wiesław Staśkiewicz

Content

I. Historical Background

1. The Profession of the Legislative Drafter

The profession of the legislative drafter in Poland was historically always connected with the status of an official. This is how it was in the 20th century and this is how it is now. After Poland regained its independence in 1918, an urgent need appeared to unify Polish law – and actually construct a new legal system from the legislations binding within the annexed territories: Prussian, Austrian and Russian, as well as Polish law in force before the loss of independence and French law (Napoleonic Code in force in the 19th century in the Duchy of Warsaw). This was an unprecedented situation in Europe.

This state of affairs somewhat forced the development of the profession of legislative drafters. The needs to write new bills and other legal acts were significant. Draft legal acts were prepared mainly by officials/clerks employed in the Ministry of Justice and the Ministry of Interior. Any work technically concerning codes, however, remained within the competences of the Unification Commission, the members of which were the most eminent Polish professors of law. The experience of the interwar period shaped the legislative drafter's ethos and legislative techniques in Poland.

2. Principles of Legislative Technique

The profession of a legislative drafter in Poland is associated with the ability to construct legal regulations and create draft normative acts. Any person holding this social role is required first and foremost to know the construction of normative acts and the legislative technique. This knowledge is contained in a special guide discussing principles and methods of law-making, entitled *Principles of Legislative Technique (PLT),* the history of which dates back to 1929. This was the year in which the PLT were published for the first time in a circular of the Ministry of Interior as the *Collection of principles and forms of legislative technique;* it constituted a concise act, composed of two parts: the first part (comprising eleven short chapters) was devoted to the development of Acts and Regulations with the force of Acts, and the second part to the development of Regulations and other Acts "not of statutory nature". It also contained a list of abbreviations and acronyms (as an appendix).

The PLT was published for the second time in 1939, in the form of a book, this time as the *Principles of Legislative Technique – guide to legislative drafter's work*. The instructions for legislative drafters, composed of fifty two pages, were contained in seventy paragraphs grouped into two parts. The first part (Legislative Acts) contains five sections (Section I. General principles; Section II. Subject layout of a legislative act; Section III. Formal layout of a legislative act; Section IV Amendment of legislative acts; Section V. Abbreviations and other simplifications). Part two concerns implementing regulations. The text also contains four appendices: list of incorrect expressions, model of a legislative act, graphic layout of an article divided into paragraphs, subparagraphs, letters, and model of an amendment.

This document, after changes in 1960s and 1990s, became the basis for the *Principles of Legislative Technique* which are in force now. The contemporary PLT constitute a guide introducing methods and aspects of legislation: types and layout of regulations, types of normative acts and legislative techniques. The collection has seven sections containing 163 paragraphs: Section I – Bill, Section II – Change (amendment) of an Act, Section III – Consolidated text, Section IV – Correction of an error, Section V – Draft implementing acts (regulations), Section VI – Draft normative acts of internal nature (resolutions and orders), Section VII – Draft acts of local law, Section VIII – Typical methods of legislative technique.

This act, although formally of a low legal rank (appendix to a Regulation of the Council of Ministers), it is officially binding for legislative drafters of the Executive. In reality, however, it constitutes the "legislative drafters' constitution" and all participants of the legislative process conscientiously observe its guidelines and instructions. Moreover, although discussions continue today in Poland on the need to change the Constitution or individual Acts, no one is proposing fundamental changes to the PLT. There is a consensus as to the functionality and aptness of the regulation. Despite the fact that the PLT is only a government document, its provisions are used not only by government legislative drafters in their work, but also by parliamentary legislative drafters, experts and judges, and lobbyists. In reality, none of the draft legal acts created in Poland may be contrary to the PLT. The argument of infringement of the PLT rules is always taken into consideration during the legislative process and may constitute a reason for the Constitutional Court to repeal a legal regulation. Thus, the PLT, the genesis of which reaches back to the Second Republic of Poland (1918–

1939/44), have become standards customarily observed not only by lawyers who are not legislative drafters, but also by politicians.

II. Legislative Drafters of Contemporary Times

1. Roles

We have two separate civil servant corporations, and depending on which of them legislative drafters belong to, their role and status differ. Government drafters are subject to the statutory regulation of 2008 on civil service. Parliamentary drafters are subject to the statutory regulation, dating back to 1982, on state officials. We should add that legislative drafters are also employed in the President's Chancellery although this group is the smallest. Overall, we thus have two groups of professional legislative drafters in the state bodies: (a) legislative drafters – state officials, and (b) legislative drafters – members of the civil service corps.

Depending on which of the groups the legislative drafter belongs to, they perform at least one of the following tasks:

- development of assumptions for bills or implementing acts
- development of a bill or implementing acts
- drawing up opinions on draft normative acts
- participation in agreeing the contents of a normative act
- editing a normative act
- watching over updates of normative acts
- drawing up consolidated texts of normative acts.

The picture of legislative work presented above is incomplete, because both groups of legislators are supported by legislation experts. Their task is to evaluate bills considered by the Parliament in terms of their compliance with the Constitution, EU law, international conventions, PLT and the Polish legal system. Their number is much larger in the parliamentary administration than in the government one. They hold the function of "controllers of law created" by issuing opinions on bills.

2. Status

Currently, the title of a "legislative drafter" is used officially by employees of: (a) legislative services of ministries and government agencies, (b) the Government Legislation Centre, (c) parliamentary administration – legislative offices of the Sejm and the Senate, and (d) President's administration. However, although the government legislative drafter's role is mainly to draw up bills and draft regulations, the role of the parliamentary legislative drafters is to "pilot" those drafts through the legislative process in the Parliament. Parliamentary legislative drafters guard the compliance of amendments submitted by deputies and senators to all bills with the Constitution and the PLT.

Until 2003, the Polish legislator did not use the term "legislative drafter". The term "legislative drafter" was introduced in 2003 in the Act on Civil Service to describe some employees employed in the Government Legislation Centre. The government's implementing acts currently use the following terms: "junior legislative drafter", "legislative, drafter", "senior legislative drafter", "chief legislative drafter", and "specialist for legislation". The parliamentary administration, on the other hand, uses the term "legal service" (this term is included in the Sejm Regulations). Members of this service may be a "legislative drafter" (an official employed in the Legislative Office) or a legislation expert (an official employed in the Sejm Analyses Office). Of course, the title is accompanied with appropriate ranks, such as "senior", "chief", etc. The President's Chancellery employs "chief specialists for legislation" (a university degree in law and at least seven years of professional experience as well as completed legislative traineeship are requirements for this position).

Thus, we can give the following answer to the question about the legislative drafter's status: *A legislative drafter is an employee of the state apparatus, employed in the government, parliamentary or presidential administration, who is authorised to draw up draft normative acts, evaluate or edit them.*

3. Work Range

The range of tasks of Polish legislators in our times is determined first and foremost by changes taking place in the economy, as well as changes which took place after Poland's accession to the European Union. Other factors also play a

significant role. The specific features of Polish democracy are five phenomena determining both the extent of the legislative drafters' work and its results:

1. The Polish Sejm has not been subject to parliament rationalisation as yet. Polish government may not issue decrees because the Polish Constitution does not provide for delegated legislation. The government also has no powers to set the agenda for the Sejm's work (it has no influence on legislative agenda setting), and government bills are identical in rank to bills submitted by other entities authorised to submit them to the Parliament. Government drafts also have no preference in the parliamentary work.
2. A considerable percentage of bills considered by the Sejm originates from other entities (15 deputies, Senate, President, citizens) rather than from the government. In the last twenty years, the percentage of those bills decreased from 82% in the first term of office of the Sejm to 44% in the last term of office, but this is still a worrying phenomenon. This means that the government has no control over the legislative process and it determines the scope of tasks of the parliamentary legislative drafters.
3. It has become a bad tradition in Poland that government bills are "amended" on a large scale during parliamentary work. Often in the course of work in committees, particularly parliamentary subcommittees, the government bill is subject to far-reaching transformations. Legislative drafters have practically no influence on this state of affairs. This fact, however, determines their everyday work.
4. The Polish Sejm adopts a very large percentage of amendments. In the current term of office, the number of amendments in bills considered is nearing 90%. As is known, amendments are subject to separate laws. A thesis that Acts in force in Poland are amended permanently is justified. It significantly hinders the legislative drafters' work.
5. No legislative planning is known in Poland. Many bills are *ad-hoc legislation*. In this state of affairs it is difficult to plan earlier the work of experts and legislative drafters, and conduct any study work.

The phenomena described above, besides the negative impact on the drafters' work, strongly diversify the work of government and parliamentary legislative drafters.

4. Specialisation

As we know, legislative drafters in Poland work in different state bodies and at different stages of the legislative process – both in the government, parliamentary and post-legislative phase (implementation of judgments of the Constitutional Court, ordering the change of contents of the law in force). Even this fact enables us to talk about their specialisation. After all, a representative of the legislative services of the Ministry of Health after years of work becomes a specialist in health. Practice plays a significant role in the education of a legislative drafter. Thus, the first criterion of professional specialisation of a drafter is their place of work. Legislative drafters specialised in different fields of public policy are first and foremost drafters working in ministries and government agencies.

In political practice, however, the situation is much more complex. And so, in the Second Republic of Poland (before World War II) and during the period of the Polish People's Republic, the group of legislative drafters was formed from officials employed in the Ministry of Justice and the Ministry of Interior. These were leading ministries in the preparation of government bills.

This situation changed after 1990. From the beginning of the 1990s, legislative drafters of the Ministry of Justice work only on the amendment of codes in force (the Penal Code and the Civil Code, as well as the Codes of Penal Procedure and Civil Procedure), they support the work of codification committees working on the draft new Civil Code and Code of Civil Procedure since 2002, and they prepare bills concerning matters of justice. Legislative drafters from other ministries are responsible for drafts of other codes on which work is conducted (Labour Law Code, Maritime Law Code and Building Law Code).

Generally speaking, in the 1990s a revolution described as the "ministerial legislation" took place in Poland. Each of the ministries created their own legislative units, employing from several to a dozen or so legislative drafters. During the transformation period, ministries secured "legislative autonomy" for themselves. This peculiar phenomenon led to far-reaching pluralisation in the creation of bills and draft implementation acts. Officially, the reason behind this state of affairs were the needs resulting from the harmonisation of Polish law with the European Union law in the years 1994–2004. However, particular and sectoral interests, and the weakness of the decision-making centre of the government also played a significant role in this. An advantage of this situation

became the specialisation of legislative drafters. The flaw of ministerial drafters was their susceptibility to influence by groups which did not always represent public interests.

The establishment of the Government Legislation Centre on 1 January 2000 was an attempt at changing the model of preparation of bills by the government. The idea to be implemented by the Centre was to focus legislative work on government bills in a single government centre. The implementation of this idea, however, encountered considerable difficulties. It was only after ten years that the monopoly of the ministerial legislation was broken. This does not mean that ministries stopped creating bills today. In practice still around a third of all bills are drafted in the ministries, and not in the GLC.

5. Division of Labour

After 15 years of functioning of the Centre and after the new Rules of Procedure of the Council of Ministers came into effect on 1 January 2014, in most cases government bills are prepared in accordance with the following division of labour: specialised legislative drafters employed in individual ministries and agencies are responsible for preparing assumptions for bills (preliminary draft of the regulation). The GLC legislative drafters, in turn, are responsible for "writing" the bill and giving it its final shape, as a result of arrangements in the course of the government's work.

At the moment, the GLC is implementing its tasks through 163 full-time equivalents (FTEs). The Sejm and Senat administration, and more accurately the Legislative Office and the Sejm Analyses Office, have an almost identical number of FTEs for legal services.

And a final comment: employment of legislative drafters in law firms has become a novelty in the recent years. This is a new group of drafters. This "private army" of legislative drafters will prepare bills on commission both from ministries and government agencies (although this is a diminishing trend), and from interest groups and lobbyists. They also prepare support for lobbyists – i.e. amendments to bills which are in the legislative process in the Parliament.

III. Education of Legislative Staff

1. Regulations

As I have mentioned before, part of the legislative drafters are officials who have previously graduated from law studies and have become drafters thanks to their practice in the state administration. This is an older group. In individual cases, among persons in the profession of the legislative drafter, you can also meet people who have a university degree in a subject other than law. Thus, the condition of having completed law studies does not have to be met formally. In the case of the profession of a legislative drafter, the condition for having completed law studies has been stipulated directly neither in Acts nor in the statute of the Polish Legislative Association. So far, no cohesive legal regulation which would determine the legislative drafter's status could be created in Poland. Regulations currently in force are dispersed and fragmentary.

The attempt at regulating the status of a legislative drafter was undertaken 10 years ago by the Polish Legislative Association in a bill. The initiative, unfortunately, was unsuccessful. The legislative drafter's profession as a public trust profession could not be regulated. As Radosław Iłowiecki writes, when analysing the bill devoted to the legislative drafter's profession:[1]

> "I distinguished seven fundamental postulates in this project, and these concern:
>
> 1) introduction of a regulation establishing the legislative drafter's profession;
> 2) identifying entities which would have to obligatorily employ legislative drafters or for which it would be optional;
> 3) performing the legislative drafter's profession;
> 4) boundaries of legislative drafter's independence;
> 5) education and examination;
> 6) role of the Legislative Council;
> 7) legal protection for the title 'legislative drafter'."

[1] Radosław Iłowiecki, Status of a legislative drafter in public authorities. Legislative drafter's profession, Przegląd Sejmowy 2010/6, p. 36.

The failures in this respect were the consequence, among other things, of the Polish legislator implementing the idea of deregulation of legal professions in 2006. Access to all legal corporations was made much simpler, and thus the profession of a legislative drafter became more of a contractual than a legal affair (with the exception of people employed in state offices); a profession regulated more according to custom than law; a profession better paid in private law firms than in state offices; more of an open than closed profession.

Let us complete the state of affairs described by adding that the Polish legal circles also have a negative attitude to a bill on legislation in which the legislative drafter's profession could be possibly regulated. In two discussions which took place in the legal circles at the end of the last century, supporters of the idea that there is no need to introduce such a regulation were in the majority. Also currently the bill on legislation is treated as redundant in the circles of constitutionalists.

2. Studies and Traineeship

Today, it is expected that the younger generations of legislative drafters have completed a specialisation in legislation. Interestingly, no significant importance is attached in Poland to the obligation to complete a legislative traineeship: this practice-oriented approach is still foreign to how the profession of legislative drafters is thought about. However, it is still possible to join the profession based on a two-step method: (1) first, one seeks employment as a lawyer in a state office, and then (2) after years of practice, one may be appointed to the position of a legislative drafter (although this is not possible in the case of the civil service).

Generally speaking, one can currently become a legislative drafter in Poland by completing law studies and additionally either postgraduate legislative studies at a university or a government legislative traineeship.

a) Postgraduate Studies (Warsaw University)

The oldest form of education is the Legislative Issues Postgraduate Study (LIPS) established in the 1970s at the Faculty of Law and Administration of Warsaw University. The eighteen-month education cycle is composed of three semesters. The students of the programme may be both graduates from faculties of

law (which is almost a rule) and graduates from other faculties. Lecturers are members of the academic staff of the Faculty of Law and Administration and outstanding practitioners. Study fees amount to around EUR 2000. The fees are usually covered by the employer. The classes are held at selected dates on Friday afternoons and on Saturdays. The curriculum of the programme consists of 240 hours of class and encompasses the following subjects:

- selected problems of legal text editing (lecture + practical classes)
- the Act in the system of sources of law
- Polish language culture
- selected problems of the theory and philosophy of law
- fundamental system principles of the Constitution of the Republic of Poland
- legislation in the light of the judicature of the Constitutional Court
- legislation in the light of the judicature of the Supreme Court
- legislation in the light of the judicature of the Supreme Administrative Court
- selected problems of the organisation of the legislative process in Poland
- selected problems of the organisation of the legislative process in the European Union
- introduction to jurisprudence (for non-lawyers).

The condition for completion of the programme is attending all lectures and obtaining a pass from them, writing a diploma thesis (in the course of a one-year seminar) and defending it. The diploma thesis and its defence are graded.

In the course of forty years of its operation, over 2000 students graduated from the LIPS. In recent years, however, the number of students has decreased. Whereas in the past, an average of 120–150 students participated in classes, in recent years, their number dropped to 80. This fact is related to the establishment of the government legislative application in the 1990s.

b) Government Traineeship

The government legislative application was established in 1994. Originally, it was addressed exclusively to civil servants and was a kind of "internal training". Unlike in the "standard" legal traineeship (for a judge or legal advisor), *the selection for the legislative traineeship was not, and still is not, an open one.* This is be-

cause one can be referred to the legislative traineeship only if one is a member of the civil service corps with a degree in law or a state official with a degree in law.

As time went by, however, access to this traineeship was extended to other persons. And thus, for the first time in 2001, a regulation by the Prime Minister concerning this matter allowed for persons "who are not members of the civil service corps" to participate in the traineeship. Among other things, the regulation opened access to the traineeship to parliamentary and presidential administration officials. Since 2008, professional soldiers and officials from state services may participate in the traineeship. Another – very important – extension of the group of participants in the traineeship took place several months ago: as of 1 May 2015, local government employees may take part in the legislative traineeship.

Access, participation, completion of the traineeship and its costs are regulated in detail in legal regulations. As Article 110 of the Act of 21 November 2008 on the civil service (consolidated text, Journal of Laws 2015.211) stipulates:

> 1. The director general of the office may second a member of the civil service corps who has a degree in law to the legislative traineeship. The mutual rights and obligations of the office and the member of the civil service corps connected with the secondment to the legislative traineeship are set out in the agreement concluded by the office's director general and the member of the civil service corps.
>
> 2. The legislative traineeship ends with an examination.
>
> 3. The Prime Minister determines, by means of a regulation, the rules for and mode in which the traineeship is organised and attended, rights which constitute the basis for preparation of the legal traineeship programme, conditions and mode of admitting candidates to the traineeship, including persons who are not members of the civil service corps, amount of the fees for participation in the traineeship and manner in which they are paid, obligations of trainees and their patrons, detailed rules, conditions and stages of admitting candidates to the examination which concludes the traineeship and conducting it, composition of the examination board, as well as the sample form of the certificate which proves the examination has been passed.

All detailed issues – organisational, curricular and financial – are determined in the regulation mentioned above. (The text of the regulation is enclosed in the appendix.)

Since 2008, the legislative traineeship has been organised and conducted by the Government Legislation Centre (earlier, the Chancellery of the Prime Minister). The legislative traineeship encompasses lectures and seminars held on allocated

dates for a period of 10 months, and practical classes which are held for a period of 12 months.

The purpose of lectures and seminars conducted under the traineeship is to acquaint the trainees with the problems of sources of law which is in force within the territory of the Republic of Poland, the methodology of legislative work, legislative procedure, and issues connected with legislative language and legal language in general. Practical classes in which trainees participate consist in drawing up draft legal acts, draft assumptions for bills, and legal and legislative positions for draft legal acts or draft assumptions for bills. The legislative traineeship is provided against a fee. The amount of the fee for the (entire) traineeship is quite high: it is equivalent to as much as *fourteen minimum salaries*. At the moment, the fee amounts to PLN 24,592.49, i.e. around EUR 6,000. These costs, however, are covered not from the trainee's pocket (as in the case of the most popular legal traineeships), but from the funds of the entity which referred the given person to the traineeship. Every year the number of participants is determined in the regulation mentioned above. On average, 35 persons per year are trained under the legislative traineeship. So far, 560 persons completed the traineeship.

The legislative traineeship ends with a *two-stage examination*, composed of a written and an oral part. After passing the examination, the trainee (and the entity that sent them to the traineeship) receives a certificate confirming the completion of the legislative traineeship. Although this document does not give the trainee a particular legal status (e.g. does not guarantee that they will be able to fill a specific position), in the majority of cases it constitutes a pass for professional promotion within the structures of the office in which the given person is employed.

c) Postgraduate Studies (Łazarski University)

The growing demand for legislative drafters in law firms, executing lobbyists' orders, was probably the reason for the establishment of the "Legislation in Practice" study programme at the Faculty of Law of the private Łazarski University (as part of the "Law Academy"). The first study cycle commenced on 1 October 2015.

As the university authorities write: "Studies are addressed to persons working or starting work in the government and local government administration, as

well as in legal units of large private entities, where it is necessary to know the principles of creation and adoption of legal acts". The following elements are to constitute chief assets of the studies:

– complex knowledge of the legislative process
– workshops focused on acquiring the skills to create legal regulations
– lecturers are practitioners who work on the creation of legal acts on a daily basis
– completion of postgraduate studies in legislation deemed to be equivalent to the completion of the legislative traineeship, in accordance with the Regulation of the Prime Minister of 9 December 2009 on determination of official positions, required professional qualifications, official ranks of civil servants, multipliers to determine pay, and detailed principles of determining and paying other benefits to which members of the civil service corps are entitled
– the only postgraduate studies in Poland focused on practice and not theory.

The studies include 185 hours of class and cost PLN 5,000 (around EUR 1,200). The fee is lower than in the case of other forms of education and thus makes it possible for private individuals to invest in their future. An evaluation of this form of education is still to be provided.

3. Evaluation

When trying to evaluate the forms of education described above, one should take account of the following facts:

1. The rank of the government traineeship is clearly growing, however access to it is restricted to state officials.
2. Because legislation has become the object of interest of law firms, private universities are trying to take over the initiative in the education of legislators.
3. Despite many changes in the legislative technique due to the introduction of EU law into Polish legislation and the growing role of judicature, there are no permanent forms of education in Poland for "senior legislative drafters". The only exceptions are the two-day legislative workshops organised by the GLC for 4 years under the European Union programme with the title "Pro-

motion and implementation of the programme for improvement and unification of legislative techniques in offices providing service to public authorities". These workshops, however, are more about the exchange of experience among state administration managerial personnel and less about the education of professional legislative drafters.

4. So far, around 80 legislative drafters have been educated each year in Poland: 30–40 complete the government legislative traineeship and 40–45 the postgraduate legislative studies at a university (the graduates complete the studies in a two-year cycle).
5. The Polish Legislative Association does not organise training courses for prospective legislative drafters. Important problems in the legislative drafters' work are discussed during meetings of the Association members (3 meetings a year on average).

IV. Legislative Drafters in the Process of the Creation of Bills

1. Government Drafters

The most difficult task is to discuss the work of a Polish legislative drafter at individual stages of the legislative process. The scope of duties and activities are determined in the following regulations: Rules of Procedure of the Council of Ministers, Regulations of the Sejm and the Senate. The most precise determination of the scope of the legislative drafter's duties is contained in the new Rules of Procedure of the Council of Ministers of 29 October 2013.

This government document, composed of 174 paragraphs, for the first time tries to accurately describe both individual stages of the process of "writing" government bills and draft regulations, and precisely determine the rights and duties of legislative drafters in this process. There are five entities involved in the process: the Council of Ministers, individual Ministers, the standing committee of the Council of Ministers, the Government Legislation Centre, and the legal commission appointed by them. The role of the standing committee of the Council of Ministers and the role of the Council of Ministers itself is easy to describe: they consider and possibly accept bills and draft regulations. The role

of the other entities is more complex. Before describing it, four important problems should be pointed out:

1. For the first time the following documents were introduced into the legislative process in Poland: the *"assumptions for a bill"* and the *"regulatory test"*; in consequence, legislative drafters encountered new tasks in their work.

2. The institution of the Regulatory Impact Assessment (RIA) and procedures for its development have been described precisely for the first time; the RIA institution has an over ten-year history in Poland, and its adaptation has encountered and is encountering numerous problems. The current regulations are restrictive towards bills – their justification should contain a RIA drawn up in accordance with a schematic diagram, which is precisely described and expanded in the regulations.

3. The bills drawn up by legislative drafters have been divided into

   a) bills developed on the basis of assumptions for the bill, and

   b) bills developed without the prior adoption of those assumptions by the Council of Ministers.

   The fact that this division is maintained means, in reality, the absence of full influence of the Government Legislation Centre (GLC) on the creation of bills. This state of affairs may be assessed as: (a) the effect of the lack of "professional legislative drafters" in the GLC (and as a result of this fact the GLC being incapable of preparing bills independently), (b) a result of the fact that regardless of the capacities of the GLC, the monopoly of the ministries for "writing" bills could not be successfully broken in the end.

   It seems, however, that the main reason behind this state of affairs is the lack of legislative planning and the permanent lack of time in the law-making model practiced; the high number of amendments, which by their very nature are prepared by ministerial experts and legislative drafters, is also of relevance.

4. For the first time since 2000, most tasks and competences connected with the work on government bills and draft regulations have been transferred to the Government Legislation Centre. The Centre is formally responsible for the preparation of government bills.

   The "assumptions for bills" are a new institution. Based on the resolution, the owners of assumptions for bills are ministers, and it is the legislative

drafters in their ministries that are responsible for preparing assumptions for the bill and equipping them with the regulatory test, i.e. the "small RIA". This document, after it has been approved by the Council of Ministers, is a condition for the future preparation of the bill by legislative drafters from the Government Legislation Centre. Thus, in this – main – option, it is not the ministries that prepare bills but the GLC. Formally, the role of ministries and ministers has been reduced to the content-based initiation of work on the bill – justification of the application and the "professional contribution".

The institution of "assumptions for the bill" has been described in the Rules of Procedure as follows:

§ 103. 1. The draft assumptions for the bill encompasses concise presentation of the purpose of the planned Act, essence of the solutions proposed, and the scope of the anticipated regulation and basic issues which need to be regulated, including the abolition of existing or appointing new authorities or institutions.

2. The draft assumptions for the bill also contain:

1) a statement of the applying authority confirming the compliance of regulations designed with the European Union law;
2) assessment of the applying authority whether the bill will be subject to notification in accordance with regulations concerning the functioning of the national system of notification of standards and legal acts.

§ 104. 1. The regulatory test constitutes a separate part of the draft assumptions for the bill [...].

The further process – after omitting complicated arrangement procedures and consultations within the government and with external entities interested in the Act – is described as follows:

§ 112. 1. The bill on the basis of the assumptions for the bill adopted by the Council of Ministers is drawn up, subject to § 125, by the Government Legislation Centre in cooperation with the applying authority, which in particular provides the Government Legislation Centre with detailed proposals of solutions necessary to draw up the bill, and presents information and explanations concerning the bill. [...]

§ 113. The drafting of the bill in legal, legislative and editorial terms is confirmed by the signature of the manager of the organisational unit of the Government Legislation Centre competent to draw up the bill.

§ 114. Together with the bill, the Government Legislation Centre drafts part of the justification for the bill, including the demonstration of the difference between the existing and the planned legal status (anticipated legal consequences of the Act coming into effect).

§ 115. 1. After the bill has been drawn up, the Government Legislation Centre submits it to the applying authority.

2. The applying authority may submit comments to the bill to the Government Legislation Centre.

3. The Government Legislation Centre draws up and submits to the applying authority the new text of the bill, taking into account the comments submitted, however issues of legislative nature are resolved by the Government Legislation Centre.

A different situation is also possible, where the Council of Ministers considers a bill for which no assumptions for the bill have been drawn up earlier. As § 127 states: the same provisions that apply to projects drawn up on the basis of assumptions for the bill also apply to bills drawn up without the prior adoption of assumptions by the Council of Ministers.

In any event, each of the bills, before it is considered by the Council of Ministers, should be considered by a new government institution – the legal committee. Its organisation, competences and obligations are described as follows:

§ 73. 1. The President of the Government Legislation Centre determines the composition of the legal committee, indicating ministries and central offices whose representatives are obliged to participate in the meeting of the legal committee.

2. In justified cases, the President of the Government Legislation Centre may invite representatives of other governments or institutions than those indicated in paragraph 1 to participate in the meeting of the legal committee.

3. The authorisation to participate in the meeting of the legal committee is tantamount to the authorisation to agree all legal, legislative and editorial issues which may appear in the course of consideration of the bill.

§ 74. The legal committee shall be chaired by an employee of the Government Legislation Centre appointed by the President of the Government Legislation Centre.

§ 75. 1. The legal committee evaluates the bill and the draft regulation in legal, legislative and editorial terms, in particular the compliance of provisions of the bill with the existing legal system and principles of legislative technique, as well as takes account of the opinion of the Legislative Council and the linguistic correctness.

2. Legal issues which arose during the consideration of the bill are resolved by the legal committee through agreement. If the resolution is not agreed, the chairperson may:

1) independently resolve the legal issue;
2) subject the legal issue to a vote and resolve it allowing for the opinion of the majority of legal committee members.

3. Legal issues concerning the compliance of the bill with the European Union law are resolved by a representative of the office providing service to the minister competent for the membership of the Republic of Poland in the European Union, at the request of the chairperson.

4. The legislative issues which appear in the course of consideration of the bill are resolved by the chairperson of the legal committee.

§ 76. As a result of the work conducted, the legal committee determines the wording of the bill and the draft regulation in legal, legislative and editorial terms.

§ 77. Minutes are drawn up from the meeting of the legal committee, encompassing its findings, which in particular may be drawn up in the form of a text of the bill with corrections.

§ 78. 1. In justified cases, the President of the Government Legislation Centre may release the bill or the draft regulation from the obligation to be considered by the legal committee, however subject to the introduction of specific corrections.

2. Before the meeting of the legal committee is appointed or the bill is released from the obligation to be considered by the legal committee, the President of the Government Legislation Centre may present a position containing comments for the bill to the applying authority.

After the bill has been adopted by the Council of Ministers, the President of the Government Legislation Centre, at the request of the applying authority, appoints a representative of the Government Legislation Centre to participate in the parliamentary work on the bill. Unfortunately, this is not a rule, and so far the "one pen" principle – i.e. assigning a specific legislative drafter to a specific bill, whereby the legislative drafter would represent the government in the future during the work on amendments to that Act – could not be implemented. Thus, we are entering the next phase of the legislative process: the parliamentary phase.

2. Parliamentary Drafters

The evaluation of the legislative drafters' work in the Parliament is more complex. This is mainly the consequence of the fact that legislative drafters cooperate with collegial bodies with little experience in creating law. Other factors also play a role here:

1. Still over half of the bills considered in the Sejm originates from entities other than the government. By their very nature, these are bills which were not prepared as well as the government bills. Moreover, they do not have to be (and usually are not) equipped with Regulatory Impact Assessments. This situation makes the evaluation of these bills difficult. Moreover, the government coalition may have submitted reservations to the bills, and the legislative parliamentary services may have made corrections to them.
2. During parliamentary work, government bills are subject to numerous changes, amendments and often differ significantly from the version that the government has sent to the Sejm. This situation requires the parliamentary legislative services to be continuously ready and permanently present during all of the work conducted by committees, debates and arrangements.

3. Most of the amendments to bills are submitted not in the course of work conducted by Sejm committees but during the low-transparency work conducted by subcommittees. If you consider that the Sejm has 28 standing committees, 3 extraordinary committees, and many ad-hoc subcommittees considering bills, the scale of the problem is revealed. The Legislative Office of the Sejm, in order to service all those members, employs 63 legislative drafters.
4. There are no legislative plans, so the parliamentary legislative process is a spontaneous one. It is susceptible to influence by politicians, interest groups and lobbyists. This makes the problem of the independence and neutrality of legislative drafters part of the daily agenda.

The Regulations of the Sejm determine the participation of experts and legislative drafters in the Sejm legislative process in a very imprecise way. Article 70 of the Regulations of the Sejm only contains the following statements:

> 1. The proceedings relating to bills and draft resolutions shall be attended by a representative of the legal services of the Chancellery of the Sejm, who may make conclusions and remarks within the field of law and legislation, including matters of the conformity of bills to the legislation of the European Union.
>
> 2. The Marshal of the Sejm may request the committee to express its attitude to the conclusions and remarks made by the legal services of the Chancellery of the Sejm, concerning major legislative problems and those concerning conformity to the legislation of the European Union, which have not been taken into consideration.

V. Attempt at an Evaluation

1. Context

In the past 25 years, after the first free elections to the Sejm, Polish legislation has undergone far-reaching transformations. The changes were evolutionary and even today, there are still 84 Acts in the Polish legal system which were adopted during the period of the socialist state. The transformation of the law has been achieved thanks to the great effort of legislative drafters. Because most of the legislative activities were spontaneous, with the government holding limited control over them, the quality of Acts adopted is subject to numerous concerns and stern criticism. In this state of affairs, however, one should be very cautious when criticising the work of Polish legislative drafters. They have

no impact on the final shape of Acts adopted. They are more executors of orders than creators of Acts.

2. Problems

Theoretical and technical aspects of the problems of creation of law in Poland have been discussed in detail in the report of December 2005 by the Chairwoman of the then Legislative Council, Professor Sławomira Wronkowska-Jaśkiewicz[2]. Wronkowska pointed out the most acute defects of the Polish legislation: (a) excess of legal regulations, (b) instability of law, (c) inconsistency of regulations, (d) lack of transparency of the legal system, (e) low technical level of legislation. The organisation of legislative work on bills both on the governmental and parliamentary side was criticised.

On the government side this referred to: (a) the ministerial model of creation of law, excluding the coordination of legislative measures, (b) the initiation of legislative work being too easy, leading to further amendments of starting drafts which have not been developed very professionally, (c) the Government Legislation Centre (around 100 FTEs) not being equipped with competences allowing the participation in decisions on the course of the government legislative process, (d) formal treatment of consultations in the law creation process, (e) RIA (Regulatory Impact Assessment) institutions – the RIA has been implemented in response to obligations towards OECD and it is still a decorative element (as the authors of the report write: "it remains an exceptionally weak side of the Polish legislative process") –, (f) failure to use the judicature of the Constitutional Court, the Supreme Administrative Court and the Supreme Court for the legislative work, and (g) failure to appreciate the work of the Legislative Council and its achievements.

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[2] Sławomira Wronkowska, Tworzenie prawa w Polsce – ocena i proponowane kierunki zmian. Raport Rady Legislacyjnej przy Prezesie Rady Ministrów [Creation of law in Poland – evaluation and proposed directions of changes. Report of the Legislative Council of the Prime Minister], Przegląd Legislacyjny [Legislative Review] 1 (53) 2006, p. 7 et seq. Compare also other reports concerning this matter: Janusz Kochanowski, Deregulacja jako pierwszy etap reformy systemu tworzenia prawa [Deregulation as the first stage of the reform of the law creation system], Ius et Lex 1 2005, p. 213 et seq.; Sławomira Wronkowska, Polski proces prawotwórczy – między autonomią a polityką [Polish legislative process – between autonomy and politics], Ius et Lex 1 2005.

On the parliamentary side, the following things were pointed out: (a) the activity of legislative government services being too low in the phase of parliamentary work on the bills, as a result of which these bills "too often initiate their thorough redrafting in Sejm committees, or the creation of competitive (regulating the same area) bills submitted by deputies, and then 'compiling' one bill from them", (b) the Marshal of the Sejm using his or her competences concerning the preliminary checks of bills to a limited extent, (c) the lack of planning of the legislative work in the Sejm, (d) there being no requirements obliging authors of bills to systematically conduct the assessment of the effectiveness of law, and (e) no clear rules for cooperation between the government and the governing coalition in the adoption of Acts.

In consequence – as Professor Wronkowska noted – "[n]one of the phases of the legislative process (government and parliamentary) have been shaped in such a way so as to support the creation of a cohesive legal system; on the contrary, each of them has solutions which create preferences for particular solutions." In practice this means that ministries initiating Acts see individual acts and not a harmoniously functioning system of norms. The perspective of the Parliament is similar – it perceives further dozens of Acts, and not an axiologically and praxeologically cohesive system of law. In each of those phases there are disruptions in the transfer of information: the government is not prepared to conduct a selection of ministerial initiatives, and the Sejm in practice does not hold the role of an institution which critically analyses the drafts submitted, but takes over the role of an institution preparing and editing drafts.

3. Postulates

The proposal of changes submitted by the Legislative Council has over a dozen extended postulates, among which we should mention:

1. It is necessary to restrict the number of legal acts issued and their amendments.
2. Codes and Acts of particular significance should be adopted in special codification committees.
3. Bills should allow each time for Polish international undertakings and the community law.

4. The organisation of the legislative process in the government requires departure from the ministry-based system and focusing on the coordination of legislative measures. Experience of other states should be drawn from, particularly with regard to the institution of the "Council of State" or the "Legislative Commission".
5. A new unit coordinating the issues of participation in the creation of community law and its implementation in Polish law should be established.
6. The institution of green and white papers should be established, making it possible for interested entities to participate in the legislative process. The procedure of legislation in Poland should be compatible with the legislative procedure in the EU and its Member States.
7. An organisational unit should be created conducting post-legislation surveys (assessing the effectiveness of drafts implemented).
8. Planning activity should be taken seriously in the legislative process.
9. Legislative drafters should participate in the legislative work from the beginning. The "one-pen principle" should be adopted in the work on the bill: from the moment of the bill being created and throughout the entire legislative process, the same legislative drafter should deal with it.
10. The work conducted by legislative services in the ministries should be periodically evaluated.
11. Ministries should be obliged to monitor the functioning of legal acts and notify the need for their consolidation.
12. It should be made impossible to draft one bill being in the Sejm on the basis of several bills submitted by different entities.
13. It should be made impossible in parliamentary procedure to debate a government bill in many committees and subcommittees.
14. A broad range of subject matters should be defined for which the first reading of Acts must take place at a plenary session.
15. Institutionalised guidelines formulated by the chamber and addressed to the committees working on the bill should be introduced.
16. Government projects should be given priority in the adoption of the parliamentary work calendar.

4. Summary

The summary of our deliberations is rather simple: it is enough to compare evaluations and postulates of the Legislative Council from 10 years ago with the situation described by us earlier. The implementation of the postulates by the government and moderate changes on the parliamentary side are clearly visible. The problem is not in the lack of diagnosis concerning reasons for the low quality of law created and the role of legislative drafters in it. Such diagnosis is complete. The problem is rather the lack of will to make changes on the part of governments. In this situation the fates of legislative drafters have not changed significantly. The situation of drafters was described aptly by Sławomira Wronkowska: "[...] we let ourselves be pushed down to the role of a professional who only and exclusively notes down someone else's idea. However, the role of a legislative drafter may not be limited to the drafting of regulations. It is the drafter and only the drafter who should be the guardian of the logic of the system of law and oppose legal acts which could shake it."[3]

[3] Wronkowska (n 2).

Appendix: Regulation on the Legislative Traineeship

Item 587

REGULATION

OF THE PRIME MINISTER

of 28 April 2015

on the legislative traineeship

Pursuant to Article 110 clause 3 of the Act of 21 November 2008 on the Civil Service (Journal of Laws 2014, item 1111 and 1199 and of 2015, item 211) it is ordered, as follows:

§ 1. The legislative traineeship, hereinafter referred to as the "traineeship", is conducted by the Government Legislation Centre.

§ 2. The President of the Government Legislation Centre exercises supervision over the traineeship programme.

§3. 1. The traineeship begins in September each year and lasts 10 months.

2. The traineeship covers:

1) lectures and practical classes;
2) classes with patrons;
3) examination which ends the traineeship, hereinafter referred to as the "examination".

3. The classes referred to in clause 2.12 take place at pre-determined dates during the traineeship.

§4. 1. The lectures are devoted to:

1) sources of law in the Republic of Poland;
2) methodology of the legislative work;
3) standards of creating law in a state ruled by law;
4) legislative procedure;
5) selected legislative problems of the basic law disciplines;
6) European Union law and harmonisation of the Polish law with European Union law;
7) selected problems related to the international law, including the influence of the international law obligations of the Republic of Poland in the area of human rights on the legislative process;
8) judicial decisions of the Constitutional Tribunal and courts;
9) language of the law and legal language;
10) ethics of the legislator's profession;
11) use of IT tools.

2. Practical classes and classes with patrons are in particular devoted to the preparation of:

1) draft legal acts;
2) draft principles for bills;

3) law and legislation positions for draft legal acts or draft principles for bills.

§5. 1. The head of the traineeship is appointed and recalled by the President of the Government Legislation Centre.

2. The President of the Government Legislation Centre, in consultation with the head of the traineeship, may appoint the deputy head of the traineeship from among the employees of the Government Legislation Centre.

§ 6. 1. The head of the traineeship prepares the draft programme of the traineeship, and ensures the right subject-matter level of the classes conducted.

2. The duties of the head of the traineeship include, in particular:

1) preparation of proposals of the detailed timetable of the classes referred to in §3 clause 2.1;
2) preparation of the list of persons who conduct lectures and classes and the list of patrons;
3) designating patrons to trainees;
4) setting out the deadline for submission of written information on fulfilment by the patrons of the obligation referred to in § 10 clause 4;
5) allowing trainees to take the examination.

3. The draft traineeship programme, proposals of the detailed timetable of classes referred to in § 3 clause 2.1, list of persons who conduct lectures and classes as well as the list of patrons are approved by the President of the Government Legislation Centre.

4. The organisational and financial handling of the recruitment for the traineeship and the traineeship is provided by the Government Legislation Centre.

§7. 1. The recruitment for the traineeship is conducted in the form of an interview.

2. The President of the Government Legislation Centre:

1) each time determines the limit of candidates to be admitted to the traineeship, taking into account the needs of offices as well as organisational and financial conditions of the traineeship;
2) not later than 3 months before the beginning of the traineeship informs the public about the recruitment for the traineeship.

3. The information on the recruitment for the traineeship includes:

1) limit of candidates to be admitted to the traineeship;
2) conditions and mode of seconding to the traineeship;
3) deadline for submitting applications for the traineeship;
4) date of the interview.

4. The information on recruitment for the traineeship must be published in the Public Information Bulletin on the relevant website of the Government Legislation Centre.

§ 8. Persons who may be allowed to take part in the interview include the members of the civil service corps who have a degree in law referred to in Article 110 clause 1 of the Act of 21 November 2008 on the Civil Service, civil servants referred to in Article 7^1 clause 1 of the Act of 16 September 1982 on employees of state offices (Journal of Laws 2013, item 269 and of 2014, item 1199), professional soldiers, officers of services and local government employees.

§ 9. 1. The interview referred to in § 7 clause 1 is conducted by a board which consists of: the President of the Government Legislation Centre or his representative, the head of the traineeship, deputy head of the traineeship, provided he has been appointed, the Head of the Civil Service or his representative and two representatives of the Government Legislation Centre.

2. The board prepares the list of the persons qualified to take part in the traineeship, taking into account – apart from the requirements set out in the regulations enumerated in § 8:

1) number of years worked by a candidate, including the period of work connected with legislation;
2) needs of the entities which second candidates to the traineeship.

3. The list of persons qualified for the traineeship, which includes their names and surnames as well as the names of the entities which have seconded them to the traineeship, must be published in the Public Information Bulletin on the relevant website of the Government Legislation Centre.

§ 10. 1. The head of the traineeship assigns to each trainee a patron from among persons with a degree in law and at least 5 years worked in a job connected with legislation, and who currently perform work connected with legislation.

2. The patron may take care of maximum two trainees.

3. The patron's duties include, in particular:

1) determining dates of the classes referred to in §3 clause 2.2;
2) conducting the classes referred to in §3 clause 2.2;
3) providing the trainee with ongoing help in explaining doubts which concern legislative problems;
4) controlling the trainee's educational progress;
5) preparing the opinion referred to in § 14.

4. The patron is obliged to conduct at least 30 hours of the classes referred to in § 3 clause 2.2, preferably at least 3 meetings with the trainee per month. If he takes care of two trainees, the patron conducts the classes with each of them separately.

§ 11. The head of the application designates:

1) one day a week when the lectures and practical classes take place;
2) days when the lectures and practical classes take place in the form of away classes – maximum 10 days during the traineeship.

§ 12. The trainee's duties include:

1) participation in the classes referred to in §3 clause 2.1 and 2.2;
2) taking the examination at the date indicated.

§13. 1. The examination is taken before the examination board.

2. The examination board consists of:

1) chairman of the examination board – President of the Government Legislation Centre or a person indicated by him, referred to in section 2 (a) or (b);
2) members appointed by the President of the Government Legislation Centre:
   a) head of the traineeship,

b) deputy head of the traineeship, if he has been appointed,

c) Chairman of the legislative Board at the Prime Minister or his representative who is a member of the Legislative Council,

d) Head of the Civil Service or his representative,

e) representative of the President of the Government Legislation Centre.

3. The President of the Government Legislation Centre may appoint to the examination board maximum three experts in the issues listed in §4 clause 1.

4. A person designated as a patron in a given edition of the traineeship may not be appointed member of the examination board.

§ 14. Prior to allowing a candidate to take the examination, the patron prepares the opinion about the trainee, which includes information on the trainee's progress and his usefulness for legislative work, and hands it over to the head of the traineeship 14 days before the examination.

§ 15. 1. A trainee who has missed more than 10 days of the classes referred to in § 3 clause 2.1, irrespective of the reason for the absence, may not be allowed to take the examination. Such a trainee is deleted from the list of trainees.

2. In the case of justified absence, a trainee deleted from the list of trainees may be readmitted to the subsequent edition of the traineeship without the need to take part in the interview referred to in § 7 clause 1, provided that he is seconded to the traineeship again and pays the fee for the participation in the traineeship.

§ 16. 1. The date and place of the examination are determined by the chairman of the examination board and are communicated to the members of the examination board, patrons and trainees at least 30 days in advance.

2. The head of the traineeship informs the trainees about being allowed to take the examination at least 7 days before the examination.

§ 17. The examination consists of the written and oral part, and each of them takes place on a separate day.

§ 18. 1. The written part of the examination consists in:

1) preparation of a draft legal act or preparation of draft principles for a bill;

2) preparation of a legal and legislative position on a legal act or preparation of a legal and legislative position on draft principles for a bill.

2. During the written part of the examination, trainees may use texts of legal acts, collections of judicial decisions or electronic bases of legal knowledge made available by the person in charge of the traineeship.

3. The written part of the examination takes place under supervision of the head of the traineeship and the person designated by the chairman of the examination board from among the remaining members of the board.

§ 19. 1. The oral part of the examination is devoted to checking the trainee's knowledge of the issues set out in § 4 clause 1.

2. The oral part of the examination takes place before the examination board. The trainee's patron may be present during the oral part of the examination.

§ 20. 1. The examination board assesses the examination results, and adopts a resolution with the majority of votes. In the case of equal number of votes, the vote cast by the chairman of the examination board is decisive.

2. The general grade for the examination is determined by the total grade for the written and oral part, according to the following scale: excellent (6), very good (5), good (4), satisfactory (3), acceptable (2), fail (1).

3. A report on the course of the examination is prepared, and it covers, in particular, the examination grade; the report is signed by the chairman and all members of the examination board.

§ 21. 1. If the trainee fails the examination, he may retake it only once, not earlier than 3 months after the examination date, on the day determined by the chairman of the examination board. The provisions of § 17-20 are used accordingly.

2. In the period between the examination referred to in clause 1 and the date on which the trainee is to retake it, he may, on his initiative, take part in the classes with his patron.

§ 22. In the case of justified inability to take the examination or any of its parts, the trainee may take the examination on the day determined by the chairman of the examination board. The provisions of § 17-20 are used accordingly.

§ 23. 1. Pursuant to the report referred to in § 20 clause 3, the President of the Government Legislation Centre issues the certificate which confirms passing the examination and completion of the traineeship. The sample form of the certificate has been presented in the appendix hereto.

2. The President of the Government Legislation Centre sends a copy of the certificate referred to in clause 1 also to the entity which seconded the trainee to the traineeship.

§ 24. 1. The fee for the participation in the traineeship is equivalent to 6.5 times the amount of the average remuneration in the national economy in 2014, determined pursuant to Article 20.1 (l) of the act of 17 December 1998 on old-age and disability pensions from the Social Insurance Fund (Journal of Laws of 2013 item 1440, as amended) [4]), hereinafter referred to as the "average remuneration".

2. The entity which seconds the employee to the traineeship pays the fee for the participation in the traineeship to the account indicated by the Government Legislation Centre. The fee is paid it two instalments. The deadlines and manner of payment are set out in the agreement concluded between the Government Legislation Centre and the entity which seconds the employee to the traineeship.

§ 25. 1. As part of the funds earmarked for financing of the traineeship, the President of the Government Legislation Centre:

1) determines the amount of monthly remuneration for:
   a) head of the traineeship in the amount of up to 140 % of the average remuneration,
   b) deputy head of the traineeship, if he has been appointed, in the amount of up to 115 % of the average remuneration,

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[4] The changes to the consolidated text of the Act in question were published in the Journal of Laws of 2013, items. 1717 and 1734, of 2014, items 496, 567, 683, 684 and 1682 and of 2015, item 552.

c) patrons, in the amount of up to 70% of the average remuneration – for each trainee;

2) determines the amount of remuneration for:

a) members of the board which prepares the list of the persons qualified to take part in the traineeship in the amount up to 45% of the average remuneration,

c) patrons, in the amount of up to 90% of the average remuneration – for each trainee;

3) enters into agreements with the persons who conduct the lectures and practical classes;

4) approves costs of transport and accommodation of the persons who conduct the lectures and practical classes in accordance with the rules set out in the regulations issued pursuant to Article 77 § 2 of the Act of 26 June 1974 – Labour Code (Journal of Laws of 2014, item 1502 and 1662);

5) purchases technical means and teaching aids necessary to conduct the traineeship in accordance with the rules set out in public procurement regulations.

2. The head of the traineeship, deputy head of the traineeship, if he has been appointed, and the persons who conduct the lectures and practical classes are entitled to reimbursement of the costs of transport and accommodation in accordance with the rules set out in the regulations issued pursuant to Article 77 § 2 of the Act of 26 June 1974 – Labour Code.

3. The means of transport which is appropriate to complete the trip referred to in clause 2 has been determined by the agreement concluded with the President of the Government Legislation Centre.

4. As part of the funds earmarked for financing of the traineeship, the President of the Government Legislation Centre may enter into agreements, award special allowances and bonuses to persons who carry out actions connected with the traineeship organisational and financial support.

§ 26. 1. The 2014/2015 traineeship edition, allowing the trainees to take the examination which ends the traineeship, conducting it and retaking the examination take place under the existing rules.

2. Certificates which confirm completion of the 2014/2015 traineeship edition are issued under the existing rules.

3. In the 2014/2015 traineeship edition, the remuneration referred to in § 25 clause 1.1 (c) and 1.2 (b) is paid out under the existing rules.

§ 27. The regulation of the Prime Minister of 1 September 2010 on the legislative traineeship (Journal of Laws No. 161, item 1079) shall become null and void.

§ 28. The regulation shall enter into force on 1 May 2015.

Prime Minister E. Kopacz

Appendix to the regulation of the
Prime Minister of 28 April 2015
(item 587)

SAMPLE FORM

CERTIFICATE

GOVERNMENT LEGISLATION CENTRE

CERTIFICATE
WHICH CONFIRMS PASSING THE EXAMINATION AND COMPLETION OF THE
LEGISLATIVE TRAINEESHIP

Mr/Ms .....

born on ..... in .....

attended in the years .....

the legislative traineeship and completed it on .....

with the grade .....

..... (stamp and signature of the chairman of the examination board)

..... (stamp and signature of the head of the legislative traineeship)

.....
President of
the Government Legislation Centre

Warsaw, on ..... 20 .....

Legislative Drafting: Teaching and Training Strategies in the U.S.

David A. Marcello

Content

Legislative drafting – once largely neglected by U.S. law schools – has become more prevalent in law school course offerings and has even recently begun to invade that most sacred terrain of legal education, the first-year curriculum.[1] An entirely separate item of pedagogical business – training lawyers who practice as legislative drafters – remains largely in the hands of legislative bodies and their trade organizations; even if such work were taken up by law schools, it's unclear whether current course offerings would be of much value to the practicing scribes who produce legislative and regulatory instruments.

This article examines how legislative drafting is taught to law students; how legislative drafters are trained for the work they do in legislative bodies; and how each might inform and enrich the other.

[1] See the August 2015 edition of the Journal of Legal Education, with articles devoted to "Legislation/Regulation and the Core Curriculum." 65 J. Legal Educ. 3-163 (2015).

I. A Brief History of U.S. Legal Education

Let's start with a 60-second tour of U.S. legal education.

Once upon a time if you wanted to be a lawyer, you apprenticed yourself to a seasoned practitioner, and when that system worked well, it produced an Abraham Lincoln.

Then came law schools. The model of modern legal education arrived in 1873 when Harvard Law School Dean Christopher Columbus Langdell launched the "case method" of legal study.[2] Its hold on American legal education has been enduring. Still today, we teach doctrinal law by having students read and analyze the published opinions of appellate judges. When we talk about teaching students to "think like a lawyer," we are talking about case method and the Socratic dialogue.[3]

Next came the advent of examinations and licensing for admission to the bar during the first half of the 20th century. Some historians of legal education have described these "gateways" as exclusionary mechanisms devised by the White Anglo-Saxon Protestant establishment to limit access to the practice of law by "undesirables."[4]

Starting in the late 1960s and continuing for several decades thereafter, American law schools breathed new life into legal education with a "practice" and "apprenticeship" clinical training model. The Ford Foundation gave $11 million to fund the Council for Legal Education on Professional Responsibility, and CLEPR in turn dispensed "seed money" grants that induced law schools to start clinical legal education programs.[5] By the end of the 20th century, clinical legal education was widely accepted among U.S. law schools as an important complement to the case method in training lawyers.

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2 Bruce Kimball, *The Inception of Modern Professional Education: C.C. Langdell, 1826-1906* (Univ. of No. Carolina Press 2015). See also William P. LaPiana, *Logic and Experience: The Origins of Modern American Legal Education* (1994).

3 David A. Marcello, "The Law School in Fiction and Fact: Alternatives in Legal Education," 35 Loyola L. Rev. 565 (1989) (Essay Review of "The Socratic Method").

4 Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (Oxford University Press: New York, 1976).

5 Philip G. Schrag and Michael Meltsner, *Reflections on Clinical Legal Education* (Northeastern University Press: Boston, MA 1998).

Over the past three decades, a series of reports emanating from the legal academy[6] and from the American Bar Association[7] have called upon law schools to produce "practice ready" graduates who receive more and more skills training in their legal education.[8] This development is good news for those of us who believe legal education should go beyond teaching students how to "think like a lawyer" and should devote some time and attention as well to teaching them how to practice like one.

But what should the content of that practical training look like? And particularly, what should it look like in the realm of legislative practice?

II. On Teaching Legislation: Doctrinal or Methodological?

Not all legislation courses are created equal.

If you look beyond the title, you'll find that many courses labeled "Legislation" offer content about "social justice" law. They analyze cases and statutes governing freedom from discrimination in housing and public accommodations or an applicant's entitlement to welfare benefits.

A second large group of legislation courses analyze how courts make sense of imperfectly drafted legislative instruments through their use of "statutory construction" or "statutory interpretation." When the legislative drafter's work product – or perhaps more accurately in most cases, the product of legislative political compromises – hits the law books in less-than-perfect form, litigants

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6 William M. Sullivan, et al., Carnegie Foundation for the Advancement of Teaching, *Educating Lawyers: Preparation for the Profession of Law* (2007) (the *Carnegie Report*) at 8, urging that "Legal education should seek to unite the two sides of legal knowledge: formal knowledge and experience of practice"; and Roy Stuckey, *et al.*, *Best Practices for Legal Education* (2007), highlighting at 1 the need to "effectively prepare students for practice."

7 *Legal Education and Professional Development – an Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, ABA Sect. of Legal Educ. & Admissions to the Bar (July 1992) (the McCrate Report).

8 See, *e.g.*, ABA Standard 302(b) and Interpretation 302-5, requiring that law schools "offer substantial opportunities for … live-client or other real-life practice experiences," which "may be accomplished through clinics or field placements," in *2013–2014 ABA Standards and Rules of Procedure for Approval of Law Schools* 21-22 (2013).

look to the courts to give meaning where the chosen words leave uncharted legal terrain.

These two types of legislation courses usually spend little or no time talking about how legislation is enacted. Rather, they focus students' attention on what happens after a bill becomes law. Courses on social justice legislation may consider whether the law worked well or poorly in addressing problems of poverty or discrimination. Courses on statutory interpretation inevitably review legislative instruments with drafting problems that needed judicial interpretation to supply essential, missing meaning. Both types of courses rely heavily on traditional case method in teaching legislation. They study the work of litigators and judges rather than that of drafters and legislators.

Years ago, when I began teaching legislation[9] courses at Tulane and Loyola law schools in New Orleans, I decided my students would learn about the enactment process – the "nuts and bolts" of how a bill becomes law. For the first couple of years teaching Legislative and Administrative Advocacy, I included a class on statutory interpretation. I put it in the syllabus for "political" reasons – not reasons related to the politics of the legislative process but rather because of internal law school politics. I knew my faculty colleagues might take some comfort from seeing familiar subject matter covered in the course, and I thought it might ease some of their concerns about the alarming prospect of teaching legislation to law students.

"Alarming," because at both Tulane and Loyola, I heard the same response: "Why should we be teaching students about lobbying?" Many faculty members quickly conflated the study of legislation with what they viewed as the sordid practice of lobbying. Today, I hope we have established a better understanding among traditional faculty that the legislative practice we teach in the classroom is a familiar and conventional form of transactional lawyering – not lobbying.

My Legislative and Administrative Advocacy students learn early in the semester the difference between lobbyists and legislative counsel. *Lobbyists* are superb practitioners of the art of interest analysis; they tell you whose interests will be impacted by passage or defeat of proposed legislation. In contrast, *legislative counsel* assists clients in navigating the legal and constitutional constraints that govern the enactment process, rendering legal advice about when legislation

[9] David Marcello, "Teaching Plain Language Drafting in a Legislative and Administrative Advocacy Clinic," 70 Clarity 46 (December 2013).

must be introduced, whether notice must be published in advance, what effect proposed amendments may have on the bill, and many other technical aspects comfortably based in *law*, not politics.

Drafting: We launch the Leg/Ad course with classes on drafting. Plain language drafting is our message, and Richard Wydick's *Plain English for Lawyers*[10] is the medium for teaching plain language techniques.

Enactment Procedures: We teach students about legislative enactment procedures and the promulgation of agency regulations. They read cases that discuss constitutional constraints and statutory requirements governing each process, but we use the cases primarily to enhance students' understanding of the process. These methodological studies are a departure from the focus on doctrinal law in most traditional law school courses.

Experiential Learning: Concurrently with their classroom studies, Leg/Ad students draft instruments for clients who are traditionally underrepresented in the legislative and administrative processes of government.

Our Leg/Ad course expands students' understanding of the U.S. legal system in one important respect. Law students in the U.S. could reasonably graduate from law school believing that most of the meaningful law in our system is made by appellate judges, because that's what we make them read relentlessly throughout their legal education – appellate judicial opinions.

But in fact, a vast body of law is made by legislative enactment of statutes, and an even vaster body of administrative law is promulgated as agency rules or regulations ("subordinate legislation" in the language of parliamentary systems): "In 2013 alone, federal agencies filled nearly 80,000 pages of the Federal Register with adopted rules, proposed rules, and notices. By contrast, the 113th Congress enacted (over nineteen months) just one hundred forty-four public laws for a total of 1,750 pages in the Statutes at Large."[11] Now, remarkably, at the dawn of the third millennium and well after the rise of the administrative state, many law students still "express surprise at the fact that as a

[10] Richard C. Wydick, *Plain English for Lawyers* (Carolina Academic Press: 5th ed., 2005).

[11] Dakota S. Rudesill, Christopher J. Walker, and Daniel P. Tokaji, "A Program in Legislation," 65 J. Legal Educ. 70, 72 (2015).

quantitative matter, agencies generate more law than legislatures and courts taken together."[12]

Leg/Ad students read expressions of legislative will in their "raw" state, unmediated by judicial opinions or law review commentaries. For many of our students, Leg/Ad may be their first law school experience in reading directly the language of statutes and regulations – because in order to draft changes to statutory or administrative law, it's first necessary to read and understand these texts.

Both in the classroom and in their clinical work, students learn the skills needed to draft good instruments and to shepherd them through legislative enactment or administrative promulgation. We are aided in this enterprise by the comparative law perspective that informs legal studies in Louisiana.

III. Legislative Drafting: Common Law and Civil Code Perspectives

Louisiana is a civil code "island" in a "sea" of common-law jurisdictions. Our Spanish and French Civil Code heritage distinguishes the state's legal system from 49 other states and the federal government, all of them common-law systems.

The differences between these two methodologies are well known. The common law derives meaning from multiple judicial decisions resolving specific disputes; it is inherently retrospective, looking back and applying an analytical mind to deconstruct cases and extract general principles of law from myriad judicial opinions rendered over time. Langdell's case method and the Socratic dialogue are indispensable tools for unlocking meaning within a common-law legal system.

By contrast, civilian methodology first formulates rules of law that anticipate future conflicts; it's a forward-looking, creative, synthesizing process quite the opposite from an analytical, deconstructing frame of mind. Civil code drafters, like legislative drafters everywhere, focus not on resolving specific disputes

[12] Thomas O. Sargentich, "Teaching and Learning Administrative Law," 38 Brandeis L.J. 393, 403 (2000).

between warring parties but rather on the big picture, devising general principles of law that govern when competing interests clash.

Here's what one longtime teacher of law and legislative drafting says about the different mental states between drafting and case analysis: "[Drafting] statutes requires different mental operations from traditional common-law legal reasoning ... . In working on the development of statutes, the lawyer is *looking forward creatively instead of looking back critically*. This is a dramatic shift in orientation."[13] The differences between drafting and the case method, between crafting new laws or contesting existing law in a courtroom, are analogous to civil code and common law modes of thinking. At Tulane Law School, we necessarily teach both methodologies, offering common law courses for the large majority of our out-of-state students and civil code classes for students who plan to practice in Louisiana.

Is it helpful to teach legislative drafting by having students look at judicial opinions interpreting imperfectly-drafted legislation and encouraging them to reason back from the mistakes of others? It's a mindset that I'll characterize as the "common law" approach to drafting. I believe it does not work as an aid to legislative drafting, and that brings us to consideration of statutory interpretation.

IV. What Role for Statutory Interpretation in Teaching Legislative Drafting?

Here are the first two sentences of a typical catalog description for a law school course on "Legislation": "Most law today is found in statutes and it is therefore important to understand how courts deal with statutory law. *The major emphasis in this course is statutory interpretation*."[14] This course description is from Indiana Law School, where Professor Reed Dickerson taught and wrote his texts on legislative drafting.[15] Dickerson was the foremost teacher of legislative drafting in the United States during the latter half of the 20th century, and he put the

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[13] Williams, (emphasis added).

[14] See Indiana University Bloomington Maurer School of Law course listing for "Legislation" at http://apps.law.indiana.edu/degrees/courses/lookup.asp?course=13 (emphasis added) (last visited on November 2, 2015).

[15] See, e.g., Reed Dickerson, *Fundamentals of Legal Drafting* (Little Brown & Co. 1986).

emphasis on skills needed to draft good legislative instruments. Now, three decades after Dickerson died, his emphasis on legislative drafting skills has been displaced by a fascination in legal academia with how courts interpret the work product of legislative bodies.

How are we to account for the extraordinary popularity of statutory interpretation as a subject of study[16] among members of the legal academy? One explanation may be that familiarity breeds *comfort*, not contempt. Where do all these law professors come from? *Law schools*, where every one of them was once a law student. And what were they all taught there? *Case analysis* that started in year one and usually continued all the way through year three. If they practice law (many law faculty never do), they are more likely to appear in court arguing cases before judges who write opinions of the type that are assigned reading for law students, rather than testifying in committees and appealing for the votes of legislators who may not even be ... lawyers.

Few law professors have ever worked in a legislative context.[17] They know little or nothing about the legislative process.[18] Their poor grasp of the subject matter may account for why legislation courses have sometimes been poorly received in student evaluations.[19] Law professors may prefer to teach statutory interpretation because most law professors know something about case analysis and judicial process. It's easier than learning how the legislative enactment process actually works.

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[16] See, e.g., John F. Manning and Matthew Stephenson, "Legislation & Regulation and Reform of the First Year," 65 J. Legal Educ. 45 (2015), citing a small sample of a vast literature at 53, note 24 in support of their observation that "Legal scholars, political scientists, economists, and linguists have debated an ever-growing array of statutory interpretation questions. The literature is too large even to give a brief summary of all the issues debated today."

[17] Dakota S. Rudesill, "Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress," 87 Wash. U. L. Rev. 699, 702 (2010), notes that only 5 % of law professors at elite schools ever worked for a legislative institution.

[18] Victoria Nourse, "A Decision Theory of Statutory Interpretation: Legislative History by the Rules," 122 Yale L.J. 70, 72 (2012), concludes that law professors and the typical law school curriculum are woefully under-informed about the legislative enactment process.

[19] James J. Brudney, "Legislation and Regulation in the Core Curriculum: A Virtue or a Necessity?", 65 J. Legal. Educ. 3, 19–20 (2015).

Law professors emphasize the importance of doctrinal legal studies in teaching students how to "think like a lawyer" – and they are correct in doing so. But some professors embrace the case method with such enthusiasm and exclusivity that they disparage teaching "how a bill becomes law" as unrewarding "high school civics" studies. They see no pedagogical value in studying how the wheels of government turn in legislatures, grinding out an unlovely "sausage" that needs judicial "casing" to acquire true form and substance in the legal world. Some would go further and characterize the legislative process as sordid, unseemly, riddled with lobbyists and lay people, corrupt to the core – not at all like the judicial process that is comfortably populated by lawyers, on the bench and at counsel's table.

Let's now move away from legislative studies in legal education and examine instead how "real world" legislative drafters learn their craft.

V. Training of U.S. Legislative Drafters

In the United States, public employers comprise the largest corps of legislative drafters. These governmental legislative drafters deliver their services in two very different contexts – among the 50 state legislatures and in the federal Congressional process. Their training also differs as to content and context, depending upon where they practice.

According to the National Conference of State Legislatures (NCSL), most state legislative drafters are trained through in-house classes and on-the-job training (OJT), supplemented by mentoring and apprenticeship programs in which newly-hired legislative drafting staff work with an experienced staff member. NCSL offers training of a few days or a week's duration through its Legal Services Staff Section and in sessions held at NCSL's annual conference.

The United States Congress uses a similar combination of in-house classes, OJT, mentoring and apprenticeship to train its new legislative staff. They occasionally rely on training sessions run by the Congressional Research Service, though these tend to be rendered from a generalist's perspective and are intended for staff serving in a Member's office or with a committee.

The Office of Legislative Counsel (OLC) conducts training sessions for professional, full-time legislative drafters, addressing the legislative enactment pro-

cess and the conventions of formatting that yield a consistent look in enacted statutes. OLC classes touch upon statutory interpretation, but do not treat it in depth. Drafters are encouraged to strive for gender-neutral language when original texts are produced by the office and to clean up gender-specific pronouns when earlier statutes are revised.

Like members of the legislative body that they serve, Congressional drafting personnel are governed by a strict system of seniority. Legend has it that when two new recruits showed up for their first day at work, he politely held the door open, and she crossed the threshold first, forever thereafter enjoying more senior status in the office.

The House and Senate legislative drafting offices provide no credit for time served elsewhere, even if that service involved working in a Member of Congress' office. The federal drafting offices prefer to get raw recruits and train them in the legislative drafting practices of Congress rather than having to "untrain" personnel who learned their craft elsewhere – and in the view of Congressional drafters, may have learned it badly.

How are legislative drafters in governmental service compensated? It depends. In my own state of Louisiana, legislative drafters might serve on a part-time, full-time, or contract basis; they may be "newbies" or "elders"; and they will be compensated accordingly, with salaries ranging from $35,000 to more than $100,000. Their salaries are comparable to compensation standards nationally, and within Louisiana they are somewhat ahead of salaries paid to other governmental lawyers because legislative drafters are "unclassified." Governmental employees hired within the classified service are protected by Civil Service and paid in accordance with approved salary schedules applicable to all similarly situated personnel.[20] The Louisiana Constitution exempts lawyers employed in a legislative drafting office from the classified service.[21]

Legislative drafting in Louisiana is not the exclusive province of lawyers. Non-lawyer drafters have served for many years in the Louisiana House of Representatives drafting office. They generally receive slightly less compensation

[20] La. Const. Art. X, Sec. 1 establishes state and city civil service systems and provides in 2(A) that "Persons not included in the unclassified service are in the classified service."

[21] La. Const. Art. X, Sec. 2(B)(10) places in the unclassified service "employees, deputies, and officers of the legislature ... ."

than lawyer drafters, but those with advanced degrees (CPA, doctorate, or masters) are paid at the same level as attorneys.

Non-Governmental Legislative Drafters

Other than in governmental offices, where else do we find legislative drafters? In the United States, we find them almost everywhere.

The Public Law Center,[22] for example, is not only a law school clinical legal education program; it's also a nongovernmental organization (NGO) that provides legislative and administrative advocacy in support of traditionally underrepresented clients. The National Consumer Law Center (NCLC)[23] plays a similar NGO advocacy role on a grander national stage. Locally and nationally, NGOs draft legislation and administrative regulations on behalf of their public interest clients and then champion these instruments before legislative and administrative bodies in government.

Legislative advocacy remains a bit of a mystery among most recent law graduates and even among long-time practicing lawyers; administrative advocacy is even further off the radar screen for most lawyers in private practice. But locate the lawyers who represent industries that are regulated by government, and you will find a sophisticated and well-informed corps of legislative and administrative advocates. These lawyers frequently function as legislative or regulatory drafters, and they may ply their trade either as corporate in-house counsel or as high-priced members of private law firms.

State and national "model law" initiatives also harbor skilled legislative drafters. The National Conference of Commissioners on Uniform State Laws (NCCUSL),[24] for example, drafts model laws that are subsequently adapted and adopted by state legislatures. In my own state, the Louisiana Law Institute[25] undertakes major drafting projects that periodically revise portions of the Civil Code. These and other model law enterprises engage volunteers and hire employees who practice a high quality of legislative drafting.

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[22] See http://www.law.tulane.edu/tlscenters/PublicLawCenter/index.aspx (last visited on November 12, 2015).

[23] See http://www.nclc.org/ (last visited November 12, 2015).

[24] See http://www.uniformlaws.org/ (last visited November 12, 2015).

[25] See http://www.lsli.org/ (last visited on November 12, 2015).

Additional Training Resources

New developments and informational resources enrich the training landscape for legislative drafters. In Utah, for example, electronic training modules loaded onto the intranet are used to train newly-hired drafters.[26]

During the 1990s, a Clinton-Gore initiative expanded the use of plain language drafting by U.S. government personnel. John Strylowski, who regularly speaks at our annual International Legislative Drafting Institute in New Orleans, conducted numerous plain language training events for federal administrative personnel throughout the 90s and on through 2014, when he retired from the Interior Department. He taught thousands of the proverbial "bureaucrats" how to draft regulations in plain language and avoid "bureaucratese." His drafting wisdom includes the use of personal pronouns and Q&A format in drafting regulations,[27] and it always has a provocative effect on our international drafters. Many can see that it works, but they are not always prepared to incorporate it into their own drafting practices.

Plain language movements and publications inform legislative drafting practice across the globe. John Strylowski, Annette Cheek, and other U.S. government employees founded the Plain Language Action and Information Network (PLAIN),[28] which maintains a website with helpful resources and hosts an annual conference to advance plain language drafting. A combined plain language movement and publication operating under the banner of "Clarity" distributes a periodic newsletter.[29] The Plain Language Association International,[30] Plain English Campaign,[31] and Plain English Foundation[32] all offer supportive services, conferences, and informational resources on their websites.

Various written materials serve both as informational resources and as training vehicles for legislative drafters. The *Legislative Drafter's Desk Book*[33] is a useful

[26] For more information, contact the Utah Office of Legislative Counsel.
[27] See the Plain English Handbook at www.sec.gov/pdf/handbook.pdf.
[28] See www.plainlanguage.gov.
[29] See http://www.clarity-international.net/.
[30] See http://plainlanguagenetwork.org/.
[31] See www.plainenglish.co.uk.
[32] See www.plainenglishfoundation.com.
[33] Tobias Dorsey, *Legislative Drafter's Deskbook: A Practical Guide* (Alexandria, Va.: The-Capitol.Net, 2006).

reference in daily drafting practice. Many jurisdictions have a drafting manual[34] that serves multiple functions – as a repository of drafting wisdom within the office, as a training resource for newly-hired drafters, as a tool to standardize drafting practices among diverse drafting offices, and as a "professionalism" credential for legislative drafters, who can handle queries about new drafting techniques by telling skeptical traditionalists, "That's how the manual says we're supposed to do it."

VI. Legislative Drafting: A Multi-Party Process Impacted by Multiple Agendas

On Capitol Hill, legislative drafting is a fractured enterprise. Professional legislative drafters who work for the Office of Legislative Counsel focus on crafting and improving legislative texts, but they do not exercise exclusive control over those texts. Legislative language produced by staff working in Members' offices is frequently focused on policy and political considerations, which does not necessarily render the most pristine of texts. When committee staff members get their own "bite at the apple," additional subject matter experts weigh in on policy. Time-compressed markup sessions may run into the night or unto morning, and harried committee staffers can significantly change existing text in ways that affect matters of policy, language, politics, appropriations, post-enactment administrative implementation, and most anything else in the developing legislation. These many significant players in the legislative drafting process populate a messy landscape of drafters; all of them may impact the evolution of policy in diverse ways. What does this fractured operational reality do to the concept of "legislative intent"?

Lawyers who work for federal or state agencies, boards, and commissions are frequently called upon to draft proposed legislation. Some state agencies are headed by elected officials (e.g., an Attorney General running the Department of Justice within state government or an elected member of the Public Service Commission), and not surprisingly, their legislative goals may be heavily influenced by perceptions of political advantage.

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[34] See the helpful list with links to various state drafting manuals on the website of the National Conference of State Legislatures: http://www.ncsl.org/legislators-staff/legislative-staff/legal-services/bill-drafting-manuals.aspx.

Legislative drafters working in many different contexts may occasionally be called upon to draft language that is driven by political goals. What these diverse drafters produce may not always be a textbook example of good drafting practice. Confusion and ambiguity would be vices in a world run entirely by legislative drafters, but in a legislative process run by elected officials, confusion and ambiguity – and their more respectable cousins, vagueness and generality – are sometimes merely the handmaidens of political compromise.

Put aside for a moment this troubling multiplicity in legislative drafting and ask a question divorced from pragmatic considerations: What would be an "ideal" curriculum for training legislative drafters?

VII. The Content of Training for Legislative Drafters

At its core, legislative drafting is about *drafting*, so instruction at the level of text is valuable and inevitable. Both in the law school classroom and "on the road" in our international training events, we teach plain language drafting. It should be an essential component of the training curriculum for actual legislative drafters.

Equally clear is that legislative drafters must know and understand the legislative enactment process. Drafting is a political enterprise that takes place in a political context,[35] so drafters should understand both the politics and the process by which bills are enacted into law.

Ethics constitutes another important subject for study by legislative drafting personnel. We can speak of ethics in multiple contexts. Lawyer-drafters are governed by professional legal ethics. But non-lawyer drafters are also governed by ethical constraints (such as confidentiality) that may be driven by either pragmatic considerations or by rules adopted in their drafting offices. Finally, governmental ethics codes impose important restrictions and expectations on all public employees, legislative drafters included. Training in ethics should be

[35] David A. Marcello, "The Ethics and Politics of Legislative Drafting," 70 Tulane L. Rev. 2437, 2446 (1996): "The legislative process and its essential derivative, the drafting process, are inherently political in nature. The choices made within such a context are inescapably political, advocacy choices."

included in the legislative drafting curriculum because it serves both individual drafters and the over-arching legislative process extremely well.

What I would not teach in a curriculum designed to prepare legislative drafters: statutory interpretation.

I would not teach statutory interpretation for two reasons: first, it does not help drafters produce better texts; second, the entire field is built on discerning the meaning of legislative enactments by employing interpretive canons that are extracted from judges' opinions and largely uninformed by any understanding of the legislative process.

I've just put forward a polemic. Let me offer an explanation and justification for these views.

Begin with the proposition that teaching drafters about statutory interpretation does little or nothing to improve the quality of their legislative drafting texts. I understand the concept supporting the opposite point of view – that if drafters understood how judges will interpret their texts, they would be better informed and therefore better able to avoid mistakes that enable judges to undermine their intended meaning. But a drafter's mental process simply does not work that way. In the act of drafting, we look forward in a creative synthesizing mindset that is the reverse of "case method" mental operations, which are retrospective, analytical, deconstructing, and fact specific.

Statutory interpretation might have something positive to offer in the form of a "checklist" employed after the text is drafted: *Ejusdem generis*? Check! *Expressio unius*? Check! *In pari materia*? Check! But in the midst of producing a draft, it is difficult bordering on impossible to train drafters' minds so that they can apply statutory interpretation as an aid to advance the legislative drafting process.

What about my second proposition – that statutory interpretation is built on a flawed foundation of using judicially-derived rules to interpret legislative texts? This particular deconstruction process must start with a reference to Karl Lewellyn's legendary 1950 article in the Vanderbilt Law Review, asserting that for every interpretive canon compelling one outcome, an equal and countervailing canon exists pushing the outcome in the other direction.[36] These internally contradictory "canons" of construction attain legal consequence only in-

[36] Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed," 3 Vand. L. Rev. 395, 399 (1950), noting

sofar as judges deem them appropriate for use in supporting outcomes that the judges deem desirable, which is not a very rigorous standard for judicial decision making.

We must also recognize that the interpretive canons are creatures not of the legislature but of the judiciary. They were created by judges to bring meaning to legislative pronouncements – but the canons have little to do with how legislatures actually work. Does it matter that they are more often than not fictions entirely divorced from the realities of the legislative process? It matters if you subscribe to the view that judges should be "faithful agents" carrying out the intent of legislatures, and most judges do describe their role in precisely such terms.

My critique is even more fundamental. There's a better way to do statutory interpretation, and I happily cite in support a different rules-based approach to statutory construction advanced by Professor Victoria Nourse in the Yale Law Journal.[37]

VIII. Statutory Interpretation "By the Rules"

Nourse properly critiques current theories of statutory interpretation because they fail to appreciate "how legislation is actually created and how elected officials" operate.[38] The concept of "legislative intent" is not a fair description of reality. Legislatures are multimember bodies that make multiple decisions about public policy when they enact a new law. Decisions are made by continually shifting coalitions of members, not by a unitary legislative "mind."[39] Congress is a "they," not an "it."[40] The canons of statutory interpretation, deployed in a quest for Congressional intent, are built on "an obvious error of composition: reducing a multipurpose institution to a single person... . [T]he very essence of Congress is its plurality, its multiplicity, its 535-ness. In this sense, the

that in "the field of statutory construction ... there are 'correct,' unchallengeable rules of 'how to read' which lead in happily variant directions."

37 Victoria Nourse, "A Decision Theory of Statutory Interpretation: Legislative History by the Rules," 122 Yale L.J. 70 (2012) (hereinafter, "Nourse").

38 Nourse 72.

39 Nourse 76.

40 Nourse 80, attributing the concept to Kenneth Shepsle.

'Congress-is-a-person' analogy is misleading: Congress has no brain, no desire, no hopes or dreams."[41]

These harshly unconventional but accurate observations do not banish statutory interpretation as a useful tool for judges seeking to make sense of ambiguous or poorly-drafted statutes. But Nourse's analytical framework does emphatically, irrevocably, and literally change the rules of the game.

The rules governing enactment, both written and collegial or customary, guide how decisions are made in the legislative process. When judges seek to interpret statutes enacted through that process, it behooves judges to understand the rules that produced the statute: "If courts must respect Congress's decisions, then judges ... must begin the process of understanding Congress's methods."[42]

Congress' texts are produced by rules that create stability and facilitate decision-making; these rules are in effect means for aggregating individual preferences. If we strike the term "intent" in favor of "decision," it makes fine sense to say that a particular text was the result of a Congressional decision. We need not describe the decision in terms of "intent" to understand that the choice has been made.[43] Judges who labor to discern collective "intent" in the products of a legislative process suffer under a serious handicap; their interpretive strategies "remain untethered from one important congressional reality: the rules."[44]

Just as corporations are bound by the statements of their agents, "Congress may be bound by the statements of its agents ... . [H]owever fictional, the concept of group agency exists in the law. And if such a rule is good enough for corporations and other legal entities, query why it should not be good enough for Congress."[45] Nourse makes her claim for "one simple, but powerful, canon of construction," and she enjoins courts to observe it: just as Congress is presumed to know and follow the "surrounding body of law," there should be an even stronger presumption that Congress knows and follows its own rules.[46] Courts should honor the legislative rules that govern decisions made in the enactment process.

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41 Nourse 81.
42 Nourse 76–78.
43 Nourse 83.
44 Nourse 84.
45 Nourse 82.
46 Nourse 92.

IX. Where Do We Go From Here?

Technology has changed many aspects of the world around us in huge and unexpected ways. It will most assuredly continue to be a factor in legislative drafting. Technology currently enables drafters to share and coordinate texts among themselves, even when drafters do not share the same office – or continent. Legislative drafters have explored the possibilities and limitations of online templates.[47] Law professors have recently been treated to colorful IBM ads that ask, "Will Watson replace law schools?"

Technology enables distance learning, and techniques are steadily improving. Our office tried it as we embarked on both in-country and distant training of legislative drafters in Vietnam. We are far from having plumbed the depths and mastered the challenges of distance learning, but we are trying.

At TPLC, we do still believe in the value of convening legislative drafters to share a training experience that yields benefits not only within the classroom but also in the participants' informal communications outside of class presentations. Our International Legislative Drafting Institute (ILDI)[48] has now undergone 21 annual iterations since 1995. We tell registrants that there are at least two things we cannot "take on the road" and replicate when we're invited to bring the training to their countries: (1) We cannot bring with us the diverse corps of instructors (usually in excess of 20) who enrich ILDI training in New Orleans; and (2) We cannot provide the diversity of contact with legislative drafting personnel from multiple jurisdictions represented each year among the Institute's new graduates.

We could bring the training to diverse drafters out and around the globe with meaningful representation of multiple instructors by organizing regional conferences that draw registrants from countries reasonably proximate to the training locations. We will continue to explore this tension between enriching the participants' cross-cultural educational experiences while also attempting to reduce the heavy carbon footprint left by travel to and from distant locations.

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[47] Prof. Wim Voermans at Leiden University in the Netherlands has experience in this subject area.

[48] See the Institute website: http://www.law.tulane.edu/ildi/.

X. Increased Emphasis on State Legislative Process Should Inform Legal Education in the Classroom.

In designing legislation courses for their students, law professors would do well to consider the two contexts – state and federal – in which "real world" legislative drafters practice. All too often and without much deliberation, law school instruction in the legislative enactment process focuses on Congressional procedures, which may be unwise for several reasons.

First, many aspects of the federal enactment process are unique to Congress – an accretion of complexities left behind by over two centuries' worth of rules that arose in response to specific political and historical quirks in the U.S. House and Senate. Because of those complexities and because Congress is very well-resourced as compared with most other legislative bodies around the globe, federal legislative process does not always "travel" well. By contrast, most features of the state legislative process are reliably replicated among the 50 states. An additional difference is that the U.S. Constitution enumerates federal legislative powers, while most state constitutions repose plenary power in their legislatures – an important distinction that students should understand. If power to legislate on a particular subject is not listed among those subjects specifically enumerated in the U.S. Constitution, then Congress does not possess lawmaking power on the omitted subject matter. State legislatures, on the other hand, usually exercise any and all legislative powers, except those expressly denied to them by the state's constitution.

Second, complexities in the Congressional process needlessly burden students' understanding of enactment procedures that could be much more coherently presented in the context of state legislative process – with the added benefit that if students ever use this learning in practice, they'll have 50 forums in which to apply it, not just one.

Studying state rather than federal law-making procedures affords significant pedagogical benefits in the realm of administrative rulemaking as well:

– The Model State Administrative Procedure Act (MSAPA) is simpler and more easily understood than the federal Administrative Procedures Act (APA). The federal APA's distinction between "formal" and "informal" rulemaking, for example, is neither an essential feature of rulemaking nor an

improvement on the more straightforward procedures employed by most state APA's.

– Many law students will encounter the federal promulgation process in general administrative law courses, which encompass both adjudication and rulemaking. They would be far less likely to study state procedures in the normal course of their legal education. By adopting state agency rulemaking as the central spine of a clinical course, instructors can impart added value to students' law school experience.
– "Delegation" doctrine has effectively been written out of federal law while it retains vitality among most states. Studying delegation at the state level can teach students useful lessons about:
  - the separation of powers;
  - the adequacy of standards and criteria by which legislative bodies empower policy making by executive branch officials;
  - the opportunities and hazards of legislative oversight as a vehicle for public participation and democratic decision making;
  - relationships between elected law-givers and the less accountable agency personnel who implement legislative policy.

  Remember that in most parliamentary jurisdictions around the world, the instruments produced by executive branch agencies (or ministries) are described – and more accurately described – as "subordinate legislation."

Delegation doctrine, *ultra vires* action, "plenary" versus "enumerated" legislative powers – all have value that is well studied in the context of state legislative and administrative processes of government.

Third, we cannot assert any longer that Congress enjoys unquestioned political primacy as the singular forum worthy of study above all others. The Reagan Revolution of the1980s and enduring conservative initiatives since then have diminished the role of the federal government and devolved power unto the states. Many of the most important political battles of the day are currently fought in state legislatures, where informed advocates and their clients can play a powerful role, exerting an impact on outcomes that far exceeds their ability to intervene and influence a more cumbersome Congressional process.

Congressional process will never lack value as an object of study, but it's time for an antidote to the relentlessly federal-centric study of legislative process

that plays out too frequently and unthinkingly in law school curricula scattered among the 50 states. For all the foregoing reasons plus the availability of nearby experiential learning opportunities, law professors need to consider focusing on state rather than federal process in their classroom instruction of U.S. law students.

XI. Conclusion

It's a good time to be a legislative drafter. Our Institute came online in the 1990s because that's when countries all around the world began grappling with the implications of a global economy and the move toward increasing democratization. Those developments required many jurisdictions to create a whole new regime of domestic laws, and the legislative drafters who were called upon to produce these proposed new laws recognized a skills deficit and their need for training.

We've come a long way since then, but the need for skilled legislative drafters is not less acute today. New industries have arisen that were not yet invented when we planned and launched the Institute. Globalization is ever more the order of the day. Regional economic alliances have become a matter of survival. Cross-border conflicts and immigration are increasingly impacting people's lives and the economies of nations.

Drafters cannot solve these problems, but we will surely be called upon to address them with our particular skill set. High-quality training in legislative drafting may not be the key to world peace, but it's a start.

L'exercice de la profession de rédacteur législatif au Québec

Richard Tremblay[1]

Content

I. Introduction

Les rédacteurs législatifs exercent une fonction centrale au sein de l'État, dans des conditions qui, souvent, ressemblent au parcours du combattant. Ces conditions n'ont guère encore été étudiées, et le colloque d'aujourd'hui nous donne l'occasion d'aborder ce sujet négligé. Nous tenterons donc, au mieux de nos connaissances, de répondre aux questions que nous ont proposées les organisateurs du colloque au regard de l'expérience québécoise.

II. Aperçu du cadre professionnel

(Questions 1 et 6 à 10: Is there a workforce in your country, mainly creating bills and rules or regulations as a profession, typically paid by government (executive or legislative branch, working in very different fields of public policy, hence "translating" public policy into legal texts? Who/what (governmental) entity assigns a draft legal text? How do

[1] Je remercie Jacques Lagacé, mon collègue et ami, qui m'a fait de judicieux commentaires sur mon texte.

drafters coordinate their work among themselves or with their principals? Who/what (governmental) entity instructs the drafters? Do professional drafters „follow" their draft, i.e. will they work on the text again if needed? What is the salary of a professional drafter – compared to the salary of other civil servants?)

Commençons par une brève présentation du cadre professionnel des légistes. Au Québec, les rédacteurs législatifs doivent obligatoirement être avocats ou notaires, et donc être membres du Barreau du Québec ou de la Chambre des notaires du Québec. Parmi les juristes de la fonction publique, environ quatre-vingts ont comme principale fonction de rédiger les lois et les règlements. Rémunérés par le gouvernement, ils sont déconcentrés dans les différents ministères et organismes du gouvernement. Cependant, ceux qui travaillent dans les ministères, contrairement à ceux qui travaillent dans les organismes, relèvent administrativement du ministère de la Justice.

Les orientations politiques qui sous-tendent un projet de loi ou un projet de règlement sont d'abord définies par le ministre qui le parraine, c'est-à-dire, concrètement, par les experts qui, au sein du ministère ou de l'organisme intéressé, s'occupent du domaine dont le projet traite. Quant à la rédaction du projet, elle est confiée par le ministre-parrain à la direction des affaires juridiques de son ministère ou à celle de l'organisme gouvernemental compétent; il revient ensuite au directeur de ce service d'attribuer le dossier à un ou plusieurs légistes.

Le mandat du légiste est de mettre les orientations en « forme juridique », en fonction des instructions que lui donne le chargé de projet. Ces instructions, qui peuvent prendre différentes formes, devraient, idéalement, bien faire ressortir le problème social que le projet cherche à résoudre, les solutions normatives qu'elles préconisent, tout en détaillant le contenu du projet. Mais on est souvent très loin de l'idéal, et le rédacteur, bien que ce ne soit pas en principe son rôle de définir les orientations politiques, peut être fortement sollicité à ce niveau, surtout si les aspects juridiques du projet sont particulièrement délicats ou complexes. Cela ne va pas sans alourdir considérablement sa tâche. La tâche du rédacteur est pourtant déjà assez lourde. En effet, sa responsabilité ne se limite pas à la rédaction du projet de loi, mais s'étend à celle des textes qui seront pris pour l'application de la future loi. Il est aussi appelé à travailler en équipe, particulièrement lorsque le texte revêt un caractère technique, ce qui entraîne de nombreuses réunions, consultations et activités de coordination.

Le rédacteur doit également suivre son texte tout au long du processus législatif. Il est donc responsable, non seulement de sa version initiale, mais aussi de ses versions successives, jusqu'aux amendements en commission parlementaire. La responsabilité de l'approbation finale du projet de loi au niveau administratif, avant qu'il ne soit soumis à l'Assemblée nationale, revient au Comité de législation, un comité ministériel chargé de s'assurer de la cohérence juridique du projet de loi et de sa conformité à la décision antérieure du Conseil des ministres.

Mentionnons enfin que les légistes sont rémunérés en tant que juristes de l'État. Ils reçoivent donc une rémunération annuelle variant entre 54 000 $ à 125 000 $ canadiens[2]. Cela se compare avantageusement à l'échelle de traitement des autres professionnels du gouvernement, qui varie entre 40 000 $ et 76 000 $. Seuls les médecins, qui forment un groupe à part – on parle ici seulement, soulignons-le, des médecins qui sont des salariés de l'État – gagnent plus que les juristes. La rémunération des juristes québécois demeure néanmoins inférieure à la moyenne canadienne.

III. La formation des légistes

(Questions 2, 3 et 5: What is the educational background of professional drafters? How do you become a professional drafter? Is it an education at a university/in the government/on the job? What are the main contents of such an education? Is there an ongoing education once you have become a professional drafter?)

Traditionnellement, il n'existe pas au Québec de filière menant à la profession de légiste. On devient légiste par intérêt ou par les hasards de la carrière, et on apprend sur le tas par la suite. Mentionnons tout de même l'existence, à l'Université Laval, du cours *Méthode du droit et législation,* cours optionnel de premier cycle donné depuis une cinquantaine d'années, qui consacre une vingtaine d'heures à la rédaction des lois. Les étudiants y sont appelés à rédiger un court projet de loi, ce qui les sensibilise aux exigences du métier de légiste. Il reste que

[2] Le juriste qui assume des responsabilités spéciales peut en outre se voir octroyer une rémunération supplémentaire pouvant varier entre un minimum de 3 % et un maximum de 10 % du traitement qu'il recevrait normalement. S'ajoute à cela la possibilité de voir sa semaine de travail passer de 35 heures à 37,5 heures ou 40 heures, sa rémunération étant majorée en conséquence.

ce cours n'est suivi que par une faible minorité d'étudiants, et sa durée limitée ne permet pas d'approfondir la matière.

Dans le but de combler cette lacune, et consciente que la rédaction législative occupe une place importante dans le domaine du droit, l'Université Laval, en collaboration avec la Chaire de rédaction juridique Louis-Philippe Pigeon, a récemment pris une initiative majeure en créant le microprogramme de maîtrise en légistique. Ce programme, loin d'être une création spontanée, avait préalablement été développé au sein du ministère de la Justice du Québec dans le cadre d'un projet gouvernemental d'amélioration de la qualité des textes législatifs. Les réflexions et les recherches effectuées dans ce cadre ont abouti, en 2003, à la création d'un programme de formation à l'intérieur du ministère de la Justice et s'adressant aux rédacteurs législatifs du Québec, formation qui répondait au besoin que ceux-ci avaient maintes fois exprimé d'avoir accès à des séances de perfectionnement qui aborderaient leurs problèmes spécifiques. C'est en 2010 que cette formation a été prise en charge par la faculté de droit de l'Université Laval, qui allait en faire un microprogramme comportant 12 crédits (c'est-à-dire 180 heures de cours). Les cours allaient être donnés au rythme de trois heures par semaine, sur deux ans. Le transfert de l'ancien programme gouvernemental vers l'université allait assurer sa pérennité et son développement, et ceux qui le suivraient verraient leurs efforts couronnés par un diplôme universitaire en bonne et due forme.

Le microprogramme en est maintenant à sa troisième cohorte. Il traite essentiellement de légistique « formelle », cette branche de la légistique qui concerne la traduction des orientations législatives dans un texte normatif (par opposition à la légistique « matérielle », qui traite du processus même de détermination des orientations). Les deux principaux enseignants, un juriste et un jurilinguiste, sont des professionnels de la rédaction législative qui s'attachent particulièrement à déterminer quels sont les principes fondamentaux dont l'application permettrait d'arriver à la meilleure qualité formelle possible des textes normatifs. Se joignent à eux quelques professeurs d'université ou rédacteurs législatifs ayant acquis une expertise particulière dans l'un ou l'autre des domaines qui touchent à la légistique.

Le microprogramme fait une place très importante à la théorie du droit et aux principes de bonne communication linguistique. Ses initiateurs ont ressenti, dès le début, le besoin de contrer certains défauts particulièrement nuisibles à la qualité des textes législatifs, notamment une pensée juridique excessivement

formaliste, elle-même liée à un excès de positivisme juridique. Il fallait, pour cela, bien situer la loi à l'intérieur du système complexe que forme le droit, en mettant en lumière certaines questions fondamentales de la théorie du droit, notamment celle des principes généraux du droit. Le programme adopte donc sur la rédaction une perspective critique. Il s'agit non pas purement et simplement d'enseigner les usages législatifs tels qu'ils existent, mais de les analyser et de les remettre en question, le cas échéant.

Plus précisément, voici le contenu du microprogramme avec, en regard de chacun des thèmes, le nombre d'heures qui y est consacré :

– Théorie du droit et interprétation des lois (21 heures)
– Principes de rédaction et aspects du fonctionnement du langage (21 heures)
– Phraséologie de base des textes normatifs (6 heures)
– Les fautes de nos lois : tournures fautives, grammaire et ponctuation (9 heures)
– Le degré de précision de la rédaction (3 heures)
– Les éléments introductifs des textes normatifs et les définitions (9 heures)
– Types de dispositions courantes dans les lois : habilitations réglementaires, dispositions pénales, dispositions transitoires et dispositions d'entrée en vigueur (33 heures)
– L'interaction entre les lois particulières et certaines lois générales : le *Code civil* et la *Loi sur la justice administrative* (9 heures)
– Aspects particuliers du droit administratif : typologie des actes administratifs unilatéraux, l'élaboration des règlements, les critères de légalité des règlements, les autorisations administratives (12 heures)
– Nouveaux modes de réglementation : réglementation par objectifs et normes de substitution (3 heures)
– Pratique de rédaction législative (21 heures)

Dans les cours se rapportant, non pas à des questions générales de rédaction normative, mais à un domaine particulier du droit, on prend d'abord soin de revoir les principes de base gouvernant ce domaine, pour en aborder ensuite les aspects rédactionnels. Ainsi, en matière pénale, on traite des principes généraux du droit pénal (principe de légalité des peines et des délits, catégories d'infraction et imputabilité pénale) avant d'aborder l'incidence de ces principes sur la

rédaction, comme telle, des dispositions pénales. En droit transitoire, on voit d'abord les différents « temps » de la loi (édiction, entrée en vigueur, abrogation), les conflits de lois dans le temps et les modèles théoriques du droit transitoire, pour s'attaquer ensuite à la rédaction des dispositions transitoires. Sont alors passés en revue l'interaction de ces dispositions avec les dispositions d'entrée en vigueur, les règles de conflit de lois, les règles substantielles et, finalement, certains problèmes stylistiques.

Quant à l'ordre des cours, on procède, autant que possible, de l'essentiel à l'accessoire. Ainsi, au moment de traiter des dispositions transitoires, on aura préalablement enseigné la théorie générale du droit. On y aura vu, entre autres, qu'en tant que principe général du droit, le principe de la non-rétroactivité des lois n'a pas à être exprimé formellement, mais que le législateur peut, dans des conditions qu'on aura précisées, y déroger. Il ne reste plus alors qu'à aborder le droit transitoire dans ce qu'il a de spécifique.

Les cours comportent, en première partie, un exposé magistral portant sur la matière contenue dans un manuel dont les étudiants auront lu au préalable les textes pertinents. Cependant, ils font une large place, dans une seconde partie, à des exercices pratiques où les étudiants sont appelés à interagir, d'abord en petits groupes, et ensuite dans le cadre d'une discussion générale où intervient le chargé de cours et où sont examinées les réponses de chaque groupe. Rappelons que, pour réaliser ces exercices, il s'agit moins de se conformer aux pratiques, conventions et usages rédactionnels québécois que de s'interroger sur eux et de les corriger au besoin.

On a également prévu, dans le programme, des cours purement pratiques consistant à réécrire un texte normatif. Les étudiants font une première réécriture, sur laquelle l'enseignant fait des commentaires écrits, puis une nouvelle version qui tient compte de ces commentaires est ensuite produite. Notons qu'à la différence des autres cours, les cours de pratique de rédaction font l'objet d'une évaluation formative, dont l'objectif est moins de juger la performance rédactionnelle de l'étudiant que d'aider à son apprentissage en lui signalant les difficultés particulières de son texte et en lui indiquant des pistes d'amélioration.

Le microprogramme de légistique peut être qualifié de maîtrise « professionnelle » (par opposition à une maîtrise dite « de recherche ») dont la clientèle, à quelques exceptions près, est formée de légistes au service de l'État. Le nombre d'inscriptions par cohorte se situe entre 20 et 30 personnes. Ceux qui ont suivi

le microprogramme avec succès peuvent éventuellement l'inclure dans un programme de deuxième cycle en droit, de façon à former un programme complet de maîtrise.

Actuellement, les cours supposent la présence des étudiants en classe, mais la faculté de droit étudie la possibilité de transformer tout ou partie du microprogramme en un enseignement à distance, pour en faciliter l'accès, éventuellement, aux étudiants étrangers.

Mais une formation en légistique suffit-elle à faire de quelqu'un un bon légiste? Comme on peut s'en douter, il faut également avoir des prédispositions.

IV. Les qualités requises pour devenir légiste

(Question 4: What skills are required to become a professional drafter?)

Les qualités attendues du rédacteur législatif sont nombreuses. À la base, il doit être rigoureux, avoir un bon esprit de synthèse et, évidemment, posséder des aptitudes particulières dans le domaine de la communication écrite. En tant que spécialiste des lois, il doit également avoir une solide connaissance de la législation et du système juridique dans lequel celle-ci s'inscrit.

Le caractère versatile du monde politique exige du légiste qu'il soit souple et qu'il sache s'adapter à des changements de cap soudains. Il doit en outre être créatif, imaginatif et ouvert aux solutions retenues dans d'autres États, tout en faisant preuve de discernement à cet égard, car les emprunts aux droits étrangers doivent pouvoir s'intégrer harmonieusement au droit québécois.

Il doit aimer travailler en solitaire et aborder son travail avec philosophie, sachant qu'il ne décide pas de la teneur du texte et qu'il n'aura pas la propriété du produit fini. Malgré cela, il doit se sentir pleinement responsable du texte qu'il a rédigé et être en mesure de réponde de son contenu aux différentes étapes du processus législatif. Il doit en outre jouir d'une bonne résistance physique et psychologique, car, à l'intérieur de délais parfois irréalistes, il est appelé à fournir un effort intense et soutenu. L'obligation de faire de nombreuses heures supplémentaires ne doit pas le rebuter.

En tant que conseiller du ministre qui parraine le projet de loi, il doit, sur invitation de ce dernier, prendre la parole en commission parlementaire. La nature

souvent enflammée et imprévisible des débats qui s'y déroulent exige de la vivacité d'esprit et de la concentration de la part du légiste. Si d'aventure il fait face à une obstruction parlementaire prenant la forme de discours interminables, il doit demeurer patient et ne pas perdre le fil, même si les propos sont peu pertinents, car il s'y cache parfois des questions auxquelles il devra à un moment ou à un autre fournir une réponse valable. Plus généralement, il est appelé à interagir avec plusieurs intervenants du processus législatif, qu'il doit pouvoir convaincre du bien-fondé de ses choix, sans pour autant les heurter. Au besoin, il doit pouvoir vulgariser une question complexe. Un bon sens de la diplomatie et de la communication se révèlent, par conséquent, des atouts certains.

Toutes ces qualités, le légiste doit les posséder à un haut niveau. Autrement dit, il doit être parfait... Comme cela est humainement impossible, disons, de façon plus réaliste, qu'on devrait attendre de lui qu'il ait un certain don pour l'écriture, qu'il sache relativement bien s'exprimer verbalement et qu'il ait de bonnes connaissances en droit.

V. Évaluation des conditions dans lesquelles évoluent les légistes et évaluation législative

(Questions 11 à 14: How do you assess strengths and weaknesses of the work products and the system of professional legislative drafters? Have there been recent changes in your country regarding professional legislative drafters? Are there projects that are particularly suitable/not suitable for professional drafters?)

Nous avons vu qu'au Québec la rédaction des projets de loi se fait au sein des directions d'affaires juridiques des différents ministères et organismes. Pendant une trentaine d'années, jusqu'en 2010, une direction centrale du ministère de la Justice, la Direction des affaires législatives, avait pour tâche de réviser les projets de loi sur le plan juridique et formel. Cette révision n'aboutissait pas toujours au résultat souhaité, dans la mesure où le temps alloué était généralement restreint et que les instructions fournies au réviseur ne lui permettaient pas toujours de se faire une idée exacte des objectifs poursuivis. De plus, l'existence même de la Direction des affaires législatives posait un problème de gestion, car son mandat chevauchait celui du Secrétariat du Comité de législation, qui est l'ultime organe de révision des projets de loi au sein du gouverne-

ment. Une des deux unités devait disparaître : l'intervention du Comité de législation étant jugée centrale sur le plan politique, c'est la Direction des affaires législatives qui fut abolie[3].

Conscientes que l'équipe réduite du Secrétariat ne suffirait pas à la tâche, les autorités du ministère de la Justice avaient envisagé un mécanisme de révision « allégé » au sein de chaque ministère, consistant en un examen du projet par un légiste chevronné de la Direction même qui l'a élaboré. Cette forme de révision avait un double mérite. Premièrement, elle évitait que le légiste ne soit totalement laissé à lui-même dans un domaine aussi complexe que la rédaction législative. Deuxièmement, le rapprochement du réviseur et du révisé faisait que la révision était conçue non pas comme un processus a posteriori, mais comme une collaboration continue avec le réviseur commençant dès le début du travail de rédaction, cela dans le but de bien réussir du premier coup[4]. Malheureusement, l'implantation de cette forme de révision est demeurée très sporadique, notamment en raison de contraintes budgétaires qui ont conduit les ministères à aller au plus pressé.

On peut se demander quelle est la meilleure organisation administrative en matière de rédaction des textes normatifs : la décentralisation ou la centralisation des services législatifs. La décentralisation présente des avantages certains, offrant aux légistes une connaissance directe du domaine à régir et la possibilité d'approfondir les textes législatifs et réglementaires pertinents. Elle pose cependant deux difficultés. Premièrement, un même service peut, à certains moments, être surchargé de projets normatifs pendant qu'un autre, éventuellement mieux pourvu en légistes, a peu de projets en cours. Deuxièmement, la multiplication des organes appelés à rédiger les lois risque de compromettre l'unité du corpus législatif, puisqu'elle rend difficiles l'adoption de pratiques rédactionnelles cohérentes et le développement d'une expertise dans le domaine spécialisé de la légistique. Il est, par exemple, pratiquement impossible

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[3] Une solution alternative aurait été, d'une part, de confier comme unique tâche au Secrétariat du Comité de législation le soin de vérifier la conformité du projet de loi avec la décision antérieure du Conseil des ministres et de décider des orientations complémentaires et, d'autre part, de laisser à la Direction des affaires législatives le soin de vérifier les autres aspects du projet.

[4] Bien faire du premier coup est une des conditions centrales de la qualité totale, ainsi que l'a fait ressortir Alain-François Bisson (« Rédaction législative et qualité totale », dans *Actes de la XIe Conférence des juristes de l'État,* Cowansville, Éditions Yvon Blais, 1992, p. 25).

d'élaborer dans ce cadre un guide de rédaction législative d'application générale. Le regroupement des légistes en une équipe unique permet, à l'inverse, une meilleure cohésion des effectifs, tout en fournissant un cadre propice à l'établissement d'orientations légistiques[5].

La centralisation des services législatifs comporte elle aussi des écueils: elle peut mener au développement d'un esprit de caste propice à l'adoption de pratiques rédactionnelles artificielles, voire ésotériques. Sans compter le risque que représente la surspécialisation d'un corps de juristes dans les aspects formels des textes, qui peut se traduire par une mise à distance néfaste de ceux-ci par rapport à la matière traitée.

Devant les difficultés respectives de la centralisation et de la décentralisation des services législatifs, le ministère de la Justice du Québec a opté pour une solution mitoyenne : chaque légiste œuvre au sein d'un ministère particulier, tout en dépendant administrativement du ministère de la Justice. Ainsi, les rédacteurs bénéficient d'une proximité immédiate avec le domaine à régir, et le ministère demeure en mesure de coordonner leur action. Par ailleurs, dans le but d'éviter que les légistes ne se sentent trop isolés, le ministère de la Justice a créé, il y a une quinzaine d'années, une table d'échange où les légistes des différents ministères peuvent partager leur expérience et discuter de leurs difficultés respectives. Ceux-ci ont également la possibilité de progresser sur le plan proprement légistique, car ils sont systématiquement invités à suivre le microprogramme de maîtrise en légistique de l'Université Laval, ce qui favorise par ailleurs une unité dans la conception et le style des textes.

En amont de ces questions, on aurait pu se demander si la rédaction d'une loi ou d'un règlement devrait être réservée aux seuls juristes. Un fonctionnaire bien au fait du domaine auquel le texte se rapporte pourrait-il aussi bien s'acquitter de cette tâche, étant entendu que l'intervention d'un juriste serait nécessaire dès lors que le texte met en cause des principes de droit importants? Mais la réponse probable est que le rédacteur de textes de loi devrait, idéalement, être un juriste, car la rédaction législative a ses exigences propres, pour lesquelles les

[5] Certains légistes sont portés à voir, dans les orientations légistiques, une sacralisation des techniques qu'elles préconisent, jusqu'à en faire une application mécanique, au détriment d'une adaptation à chaque contexte. Or, semblables orientations ne sont jamais que de simples guides, ne devant en aucun cas faire obstacle à l'évolution de la méthode législative ou à enrichissement de l'expression.

connaissances et compétences que procure une formation en droit sont un atout majeur.

Peu importe le modèle organisationnel retenu, les conditions dans lesquelles les légistes travaillent demeurent par nature exigeantes, notamment en raison de l'activisme incontrôlé de certains acteurs politiques et du sempiternel sentiment d'urgence qui règne au sein des officines gouvernementales. Peu conscients du fait que la loi est un ouvrage intellectuel complexe, dont l'élaboration exige temps et efforts, certains ministres ont avant tout pour but de faire cesser les pressions populaires et médiatiques qui s'exercent sur eux, quand ce n'est pas tout simplement d'accroître leur visibilité publique. Heureusement, des mécanismes contribuent à calmer le jeu. Ainsi, un décret du gouvernement du Québec[6] encadre l'établissement de la programmation législative en obligeant les ministres à transmettre au Conseil exécutif, vers la fin de chaque session parlementaire (au plus tard le 15 décembre pour la session du printemps, et au plus tard le 15 juin pour celle de l'automne), la liste des projets de loi qu'ils entendent proposer à la session suivante. Le décret exige en outre que tout projet qu'un ministre compte déposer et faire adopter à la session du printemps soit transmis au Conseil exécutif, pour examen, au plus tard le 21 janvier. Pour la session d'automne, la date limite de transmission est le 1er septembre. Ne sont toutefois pas soumis à ces délais les projets de loi présentant un caractère d'urgence[7] ou désignés exceptionnellement comme prioritaires par le premier ministre. De son côté, le *Règlement de l'Assemblée nationale* fait en sorte que la phase parlementaire dure au moins un mois, en empêchant qu'un projet de loi déposé après le 15 mai puisse être adopté à la session du printemps, et qu'un projet déposé après le 15 novembre puisse être adopté à la session d'automne.

Ces délais contribuent à discipliner les ministres en ce qui concerne l'examen du projet de loi par le Conseil exécutif et par l'Assemblée nationale, mais laissent incontrôlée la phase initiale de rédaction du projet. À cette étape, les pressions temporelles peuvent s'exercer à peu près librement sur le légiste, situation d'autant plus critiquable que ce dernier reçoit souvent des instructions insuffisamment précises concernant les orientations du projet. Il est alors confronté à

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6 Décret n° 390-2014 du 24 avril 2014 concernant le Comité de législation, *Gazette officielle du Québec*, partie II, p. 1887.

7 Le projet jugé urgent doit néanmoins être transmis au Conseil exécutif environ deux mois avant la fin de la session parlementaire, à savoir au plus tard le 24 avril pour la session du printemps et au plus tard le 25 octobre pour celle de l'automne.

l'impossible tâche de transformer des instructions imprécises en un texte normatif clair et précis. Dans ce climat d'incertitude, il n'est pas rare que les autorités ne précisent leurs orientations qu'à la faveur de la rédaction d'ébauches successives du projet de loi. C'est alors le projet de texte normatif qui engendre les orientations politiques plutôt que le contraire. Ce fonctionnement « à l'envers » n'est pas étranger au décret gouvernemental qui exige que tout mémoire au Conseil des ministres qui recommande l'édiction d'une loi soit accompagné du texte même du projet de loi[8]. Cette obligation de soumettre en même temps au Conseil, pour approbation, à la fois le mémoire et le texte normatif qui y donne suite, n'est pas plus justifiable qu'une disposition réglementaire municipale qui exigerait des demandeurs de permis de construction qu'ils soumettent à l'administration, avec les plans, le bâtiment déjà construit pour permettre aux fonctionnaires de se faire une meilleure idée du projet. Le fait de rédiger le projet de texte normatif avant même que les orientations politiques aient été entérinées entraîne, lorsque celles-ci sont rejetées ou modifiées substantiellement, un important gaspillage de ressources humaines et financières.

Ces désordres du processus législatif se révèlent financièrement coûteux et risquent de compromettre la cohésion, l'harmonie et la pérennité de la loi.

Pareille situation devrait nous conduire à évaluer la qualité des textes normatifs, opération qui s'envisage plus aisément sur le plan de leur efficacité pratique que sur le plan de leur qualité formelle. En effet, s'il est toujours possible de mesurer l'efficacité d'une politique publique par l'examen de ses effets concrets sur le terrain, l'évaluation de sa qualité sur le plan formel est une entreprise autrement plus délicate, car on ne dispose d'aucun instrument précis permettant d'évaluer les qualités de composition des œuvres conceptuelles. On doit s'en remettre à des critères variables, qui dépendront non seulement de la culture et de l'expérience de celui qui pose un tel diagnostic, mais aussi de sa sensibilité, voire de ses préjugés[9]. Force est de demeurer prudent à cet égard. Nous nous risquerons néanmoins à formuler quelques observations concernant la forme de nos lois, en nous appuyant au passage sur des avis qui n'ont guère été contestés jusqu'à ce jour.

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[8] Annexe A de la codification administrative du *Décret n° 111-2005 du 18 février 2005 concernant l'organisation et le fonctionnement du Conseil exécutif*, incluant ses modifications postérieures. Voir le site internet suivant : https://www.mce.gouv.qc.ca/publications/decret_mce.pdf.

[9] A.-F. BISSON, *loc. cit.*, note 4, p. 20.

Ces dernières décennies, la norme législative ou réglementaire fait, un peu partout dans le monde, l'objet de critiques sévères, à l'égard tant de son contenu que de sa forme. Sur le plan du contenu, une critique constante concerne la prolifération normative résultant de ce que les autorités politiques, trop conscientes de la facilité avec laquelle on peut édicter une loi, optent spontanément pour cette solution, lors même qu'un mode différent d'intervention étatique devrait être privilégié. Sensible à ce problème, le gouvernement québécois s'est récemment doté d'une politique d'allégement réglementaire visant à minimiser le fardeau que représente pour les entreprises l'accumulation des normes[10]. Cette politique exige de l'autorité administrative qui propose l'édiction d'un texte normatif qu'elle démontre qu'elle a préalablement envisagé d'autres moyens d'intervention, tels que l'information, l'éducation ou le recours à des instruments économiques. Lorsque, à l'analyse, l'intervention normative se révèle nécessaire, le législateur ou l'autorité réglementaire, selon le cas, doit opter pour une approche normative de nature à minimiser les coûts pour les entreprises et à leur laisser une marge de manœuvre optimale pour innover dans leur domaine d'activité. Aussi la règlementation par objectifs, axée sur les résultats, est-elle favorisée par rapport à la règlementation traditionnelle axée sur les moyens.

Dans son ouvrage sur la légistique comparée, qui date de plus de vingt-cinq ans, mais demeure d'actualité, Alain Viandier fait état d'un mépris sans précédent pour la « plastique du droit »[11]. Au soutien de cette affirmation, il énumère certains défauts courants de la composition des lois : style bureaucratique déplacé, textes de faible cohérence et excès de détails faisant perdre de vue les idées essentielles. On y voit fréquemment des définitions artificielles, inopportunes ou porteuses de règles de fond. Les articles sont découpés sans unité de pensée, les constructions sont compliquées, voire opaques, etc. Sur cette pente glissante, la loi perd graduellement son caractère général et abstrait pour verser dans le pointillisme. Résultat : les lois sont de moins en moins lisibles et sont en rupture avec les canons de simplicité, de clarté et de précision[12]. Le Québec partage à cet égard, avec les autres nations, un fond commun de problèmes.

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[10] Gouvernement du Québec, *Politique gouvernementale sur l'allégement réglementaire et administratif*, 2014.

[11] Voir Alain VIANDIER, *Recherche de légistique comparée*, éditions Springer-Verlag, Berlin, 1988, (cet ouvrage a été élaboré dans le cadre d'un programme de recherche de la Fondation européenne de la Science en matière de droit comparé), p. 132.

[12] *Ibid*., p. 133.

À ces problèmes généraux s'ajoutent certaines difficultés liées à l'histoire du Québec. Comme on le sait, le droit québécois est mixte : d'un côté, le droit privé, d'inspiration romano-germanique, prend sa source dans le droit civil français et, de l'autre, le droit public qui nous vient d'Angleterre.

Au Québec, tous s'entendent pour dire que le Code civil est une œuvre de bonne qualité, qui fait bien ressortir les idées essentielles en laissant à l'abstraction la part qui lui revient : en un mot, le Code civil est vu comme un modèle de rédaction législative. Le style romano-germanique du Code s'est, jusqu'à un certain point, étendu à l'ensemble des lois québécoises. Mais, comme celles-ci concernent, dans leur grande majorité, le droit public – qui, comme nous venons de le voir, est un héritage britannique – nous avons emprunté, en même temps que le fond du droit, incontestablement riche, certains traits du style moins heureux des lois anglaises. Il convient ici de mettre les choses en perspective. Traditionnellement, le législateur anglais n'avait d'autres visées que de corriger les excès de la common law ou d'y ajouter des dispositions jugées nécessaires. À aucun moment il n'a cherché à codifier le droit commun, ni n'a prétendu faire de la loi un modèle de raison. La loi, dans ce contexte, pouvait se réduire à un patchwork. On y observe également un style précautionneux, voire tatillon, résultant de la lutte que le Parlement a dû livrer aux tribunaux, trop enclins à ignorer ses volontés.

C'est sur ce fond agité que s'est développée la législation québécoise. Certes, notre méthode législative s'est graduellement distinguée de la méthode anglo-saxonne, mais elle a encore avec elle certains points communs, notamment une tendance à l'excès de formalisme. En droit pénal, à titre d'illustration, les lois québécoises, calquant les lois anglaises, qualifient systématiquement d'infractions les comportements punis d'une amende ou d'un emprisonnement. Au lieu de présumer que tout manquement à la loi sanctionné pénalement constitue une infraction, on présume, au contraire, que si les mots « commet une infraction » ne sont pas présents, l'infraction ne sera pas valablement définie dans la loi. Il aura fallu une décision de la Cour suprême pour inverser cette prémisse[13]. Mais le formalisme à la vie dure : les autorités exécutives chargées de réviser les lois au Québec continuent d'exiger l'insertion de la sacro-sainte formule « commet une infraction ».

[13] *Strasser c. Roberge*, [1979] 2 R.C.S. 953.

En ce qui a trait à l'organisation de la règle pénale, nous avons subi l'influence de Georges Coode, un juriste anglais du XIXe siècle, qui affirmait que toute disposition législative devait nécessairement faire mention de deux éléments essentiels, à savoir le sujet de droit *(legal subject)* et l'action légale *(legal action)*[14], d'où il a déduit, à tort, que tout énoncé législatif doit invariablement se rapporter à une personne et non à une chose[15]. Certes, Coode cherchait à garantir par là une sécurité juridique optimale, mais son enseignement a conduit les rédacteurs à déformer la norme, en présentant comme des obligations de comportement des obligations de résultat. Ainsi en va-t-il de l'article 30 du *Code de la sécurité routière*, qui est ainsi rédigé : *« Le propriétaire* d'un véhicule routier doit fixer solidement la plaque d'immatriculation qui lui a été délivrée à l'arrière du véhicule [...] ». Techniquement, le propriétaire du véhicule est coupable si quelqu'un d'autre que lui a fixé la plaque, ce que ne voulait certainement pas le législateur. En fait, ce dernier voulait simplement que tout véhicule soit muni d'une plaque, obligation de résultat que la norme aurait dû énoncer comme telle. Une fois fixée cette norme, il ne reste plus qu'à établir le régime de la responsabilité pénale, c'est-à-dire à préciser qui, du propriétaire du véhicule ou de son conducteur, sera puni. Tous les éléments de la règle pénale se trouvent alors réunis, mais sont présentés dans des dispositions distinctes, ce qui est tout à fait conforme au principe de légalité des peines et des délits.

L'influence de la common law traditionnelle prend parfois des formes subtiles. Par exemple, au Québec, pour valider un acte administratif irrégulier, on a tendance à bloquer le contrôle juridictionnel plutôt que de valider l'acte lui-même. On dira, le plus souvent, que l'acte en question ne peut être attaqué en justice ou qu'aucun juge ne peut l'invalider, approche qui a le défaut de bloquer la procédure en annulation tout en laissant subsister l'invalidité de l'acte, ce qui est illogique. Une telle tournure rappelle l'importance indue qui était traditionnellement accordée, en droit anglais, à la procédure par rapport au fond du droit : *Remedies precede rights*. Or, la procédure judiciaire devrait, dans tous les cas, demeurer accessoire par rapport au droit lui-même. On devrait donc énon-

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[14] George COODE, *Coode on Legislative Expression or The Language of the Written Law*, reproduit dans Elmer DRIEDGER, The composition of legislation, 2e éd., Ottawa, ministère de la Justice du Canada, 1976, p. 322 et s.

[15] *Ibid*., p. 327. L'analyse de Coode est trop rigide. Moult dispositions, en effet, visent formellement une chose et non une personne. Ainsi, l'énoncé selon lequel « l'avis est envoyé dans les dix jours » ne se réfère à aucune action et revêt une forme impersonnelle, mais il est pourtant correctement rédigé.

cer simplement que l'acte en question est « validé »[16]. C'est d'ailleurs la technique qui est privilégiée dans les pays de la famille romano-germanique.

Mentionnons également l'adoption du procédé consistant à regrouper en début de loi toutes les définitions et, en fin de loi, toutes les habilitations réglementaires, le résultat étant que ces informations n'apparaissent pas là où elles seraient vraiment utiles. Pareillement, on ne livre pas toujours dès le début les informations essentielles à la compréhension du texte. Ces problèmes de structuration et d'organisation de la matière nuisent considérablement à l'intelligibilité de la loi.

Ces défauts de nos lois, et bien d'autres, ont été examinés dans un ouvrage que nous avons consacré à la légistique formelle[17]. Si notre message semble de mieux en mieux entendu et compris, le renouvellement des pratiques législatives demeure lent. Dans la mesure où aucun administrateur ne s'est vu confier la responsabilité de faire évoluer les techniques défectueuses, le champ demeure inoccupé, si ce n'est qu'un certain leadership est exercé par le Secrétariat du Comité de législation, leadership qui va principalement dans le sens d'une uniformisation peu nuancée des procédés et de la perpétuation des usages traditionnels[18]. L'évolution souhaitable de la méthode législative s'y voit malheureusement sacrifiée en large part.

VI. Conclusion

En conclusion, le cadre dans lequel les lois s'élaborent n'est que rarement remis en question ni de l'intérieur ni de l'extérieur de l'État. On refait les choses à peu près toujours de la même façon, par la force de la tradition et de l'habitude. Or, par un phénomène d'entropie, les choses dont on ne s'occupe pas finissent par se dégrader. Pour qu'une telle dégradation soit évitée, les processus de produc-

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[16] D'autres techniques de confirmation législative sont également possibles. Voir : « Les dispositions relatives à l'application des lois dans le temps », dans R. TREMBLAY (dir.), *Éléments de légistique. Comment rédiger les lois et les règlements*, Cowansville, Éditions Yvon Blais, 2010, p. 781 et s.

[17] *Éléments de légistique. Comment rédiger les lois et les règlements*, précité, note 16.

[18] Le rôle politique du Comité de législation peut expliquer la tendance de son secrétariat à écarter le plus possible les procédés inusités, qui pourraient éventuellement mettre dans l'embarras le parrain du projet de loi lors des discussions en commission parlementaire.

tion, de même que les produits qui en résultent, devraient être évalués régulièrement. Ils devraient même, si on se réfère au concept marchand de « qualité totale », faire l'objet d'une amélioration continue[19]. Appliquée au domaine législatif, cette idée suppose, en tout premier lieu, une évaluation aussi objective que possible des forces et des faiblesses de notre législation. Malheureusement, devant une clientèle captive et en l'absence d'un marché ouvert à la concurrence, les principaux intéressés du processus législatif négligent de poser un tel diagnostic. En particulier, cette initiative ne risque pas de venir des acteurs politiques, qui semblent surtout préoccupés d'obtenir des textes susceptibles de cheminer sans encombre à travers les dédales législatifs. Ils ne sont donc pas disposés à faire face aux difficultés qu'engendre la rupture avec les traditions rédactionnelles. C'est pourquoi la responsabilité d'évaluer la qualité formelle de nos lois revient peut-être, en partie, aux universités, qui sont bien placées pour développer une grille d'analyse des problèmes existants. Au Québec, par exemple, cette évaluation pourrait être faite par la Chaire de rédaction juridique Louis-Philippe Pigeon. Il demeure que le devoir d'évaluer la qualité des lois et de trouver des pistes d'amélioration revient principalement, au bout du compte, aux administrateurs de l'État, car c'est sous leur responsabilité que se font les lois, et rien ne peut évoluer sans que la volonté de changement vienne d'eux.

[19] A.-F. BISSON, *loc. cit.*, note 4, p. 23.

Legislative Drafting in Australia

Peter Quiggin / Louise Finucane

Inhaltsübersicht

I. Introduction

This paper is intended to give an overview of legislative drafting in Australia.

Australia is a federation with a national government, 6 state governments and 2 territory governments.

Each government has its own drafting office. The drafting office is part of the executive arm of government (rather than part of the parliamentary arm of government).

The approach to legislation and the structure and operation of drafting offices have largely been derived from the approach taken in the United Kingdom.

While there has been continuous improvement in all drafting offices, the basic approaches and structures have remained unchanged for many years.

II. The Basic Process of Legislation

Most of the parliaments in Australia are bi-cameral. A small number are unicameral.

Generally, the government will have a majority in the lower house of parliament. However, it is very common for the government not to have a majority in both houses.

Due to the fairly strict party discipline that operates in Australia it is unusual for a government to lose a vote in a house in which they have a majority.

One effect of this is that it is quite unusual for legislation to be passed if it is not supported by the government. As a result, nearly all legislation that is passed is drafted by the government's drafting office.

III. Structure of Drafting Offices

There are some variations in the structure of drafting offices in the various Australian jurisdictions but they share a number of common features:

- the drafting offices are all organisationally distinct entities or units (although some are parts of larger entities, such as departments);
- the drafting offices are all headed by a person with extensive experience in legislative drafting;
- the drafting offices are responsible for the drafting of all primary legislation for the government;
- the drafting work is all done by lawyers who are specialist legislative drafters;
- the drafters are not generally involved in work other than legislative drafting;
- the drafters generally work for most of their careers in legislative drafting;
- the drafters work on the basis of instructions given by policy officers from the government agency that is responsible for the policy.

Nearly all Australian drafting offices draft some, but not all, subordinate legislation for the government. There are variations in the proportion of subordinate legislation drafted between the drafting offices. The remaining subordinate legislation is generally drafted in the government agency that is responsible for the policy.

Most drafting jobs are handled by a small team of one or 2 drafters. The exact arrangement of work varies between the offices but it is normal for at least 2 drafters to consider each piece of drafting work and it would be unusual for more than 3 drafters to consider a piece.

Generally drafters are expected to be able to work on legislation in a wide range of subject matter areas. In some drafting offices there is some level of specialisation by subject matter (for example, taxation). This tends to be in areas where there is a substantial and consistent workload or where particular specialisation is important.

IV. The Australian Office of Parliamentary Counsel

1. Overview

The drafting office that the authors work for is the Australian Office of Parliamentary Counsel (AOPC). It works for the national government. The following is information about how AOPC operates.

AOPC is a separate statutory office that was established under the *Parliamentary Counsel Act 1970*. Its functions are set out in section 3 of that Act. They are (basically):

- the drafting of Bills (which, when passed, become Acts) for introduction into either house of the parliament;
- the drafting of legislative instruments that are to be made by the Governor-General in Council; and
- the drafting of some other legislative instruments on a billable basis; and
- the publication of Commonwealth legislation through the Federal Register of Legislation (which is at www.legislation.gov.au).

As part of the publication process, AOPC is responsible for compiling amendments of the law into the principal legislation so that the public have access to up-to-date versions of the law as is force. Prior versions are also made available.

Our office only drafts legislation for the national government. As mentioned above, there is an equivalent office in each State and Territory to draft their legislation.

Before each parliamentary sittings, the national government formulates the program of Bills that it requires to be drafted for the sittings. Since it may not be possible for all Bills on the program to be drafted, a drafting priority is given to each Bill. A similar process is undertaken for instruments to be made by the Governor-General.

On the basis of the programs, government agencies instruct drafters in AOPC on the policy to be implemented by the proposed Bills and instruments.

In consultation with instructing officers, the drafters consider the constitutional and legal background against which the legislation is to be framed, analyse the policy and determine the structure of the legislation. Then they draft the legislation in terms intended to give effect, as precisely as possible, to the policy in as clear and user-friendly a manner as possible.

If the government decides to amend Bills during their passage through the parliament, drafters in AOPC prepare the necessary amendments and provide copies to the parliament.

As mentioned above, AOPC is part of the executive, not the legislature, and is in the Attorney-General's Portfolio. We almost exclusively draft for the government, although we do draft a small number of amendments that are moved by the opposition, minor parties or independents.

AOPC has about 100 staff, of whom about 40 are drafters.

2. The Role of Drafters

Agencies approach AOPC because they have policy concerns which, they believe, can only be addressed by legislative action. Because the drafting of much legislation is tied to AOPC, agencies must come to AOPC to get it drafted.

It sometimes happens that the instructors' legislative wishes are straightforward and the means by which they are to be achieved is obvious: all that is required is the writing work. However most policy objectives are complex and, at their conception, are at a high level of generality. The role of drafters is to assist the instructors to unravel the key implications of the policy objectives, and this invariably involves close and prolonged analysis.

Having identified the key issues, the drafters are then in a position to assist the instructors to arrive at a satisfactory solution to their legislative concerns in a way that meets their intentions and AOPC's service standards.

The relationship between drafters and instructors is an ambiguous one. Instructors are basically in the role of clients: they ask for and receive drafting services, and it is their statement of government policy that AOPC drafters must turn into law. However, while the instructors' statement of policy is the starting point of the drafting process, drafters have a major role in determining the outcome, especially in refining instructions and on matters of law, parliamentary procedure and deadlines. AOPC also has a responsibility to the government as a whole and, where instructions from a particular agency appear to be at odds with broader government policy, drafters need to ensure that the conflict is brought to notice and resolved.

Instructing agencies are usually represented by small teams led by an Executive Level or Senior Executive Service officer. Ministers or their offices are often involved (although not generally directly with AOPC), especially at the early or late stages of Bill preparation or where amendments are required at a result of parliamentary consideration.

The basic operating units of AOPC are 2 or 3 person drafting teams comprising a senior drafter and one or 2 assistant drafters. These teams have complete operational autonomy, apart from general office management oversight that is exercised by me as the First parliamentary Counsel. Their work is intellectually demanding, requires high skill levels, is essentially technical, is provided against tight deadlines and requires attention to detail as well as a clear perception of the bigger picture. The need to meet deadlines and to deal with sometimes difficult instructors in very senior positions in government can lead to stress. Responsibility for the final product lies with the senior drafter. The duties of assistant drafters vary according to experience but usually encompass research, drafting of some Bill or instrument provisions, administrative arrangements and some negotiations with instructors.

One of the major responsibilities of senior drafters is the training of assistant drafters. This training must be such that drafters who are at the threshold of promotion into the Senior Executive Service will have had enough independent legislative drafting experience to cope successfully with the autonomy of the senior drafter's role.

The need for intra-office coordination within AOPC is currently relatively limited, in part because AOPC is small but mainly because, in an operational sense, drafting teams are largely autonomous. Overall management of AOPC services (work priorities, project allocation, performance monitoring, quality control) lies with me as the First parliamentary Counsel.

Drafters are almost entirely engaged in drafting. They have little role in the management of budget, physical assets, travel etc. that are handled by specialist Corporate Services staff in AOPC.

3. Legislative Problem Solving

A major part of the role of legislative drafters is problem solving. The extent to which a drafter has to do this on a particular job will depend on a number of factors including:

- the level of experience and skill of the instructing team;
- the level of understanding that the instructing team has of legislation and the process of preparing legislation;
- the time that has been available to prepare the drafting instructions;
- the complexity of the policy;
- the complexity of the existing legislation.

Problem-solving ability is the ability to find and apply the means by which a desired outcome may be attained. Although it may seem surprising, in a number of drafting jobs the instructing agency will have done little work on either of these, or the work they have done will have major flaws.

Most policy objectives are complex and at their conception are at a high level of generality. This can disguise whether legislation is the only, or the most desirable, policy implementation option; but it also can disguise the logical, legal, policy and implementation implications of the detailed articulation of the pol-

icy. The role of the drafter is to assist the instructor to unravel these implications and this invariably involves close and prolonged analysis.

The kinds of issues that such analysis can reveal are as follows:

– *legal issues* e.g. Is already existing legislation sufficient? Is the policy issue best dealt with via legislation? Does the policy have unintended legal consequences?

– *logical issues* e.g. Is there internal inconsistency, confusion of means and ends, circularity of concepts?

– *policy and implementation issues* e.g. Does detailed legislative analysis throw up unforeseen policy and implementation options and problems? How do the individual provisions of the proposed Bill interact with each other? Does the proposal conflict with broader government policy (e.g. retrospectivity of legislation), or federalism?

It is the role of the drafter, having identified the key issues, to assist the instructor to arrive at a satisfactory solution to his or her legislative concerns in a way which:

– addresses both the broad thrust and the detail of the instructor's intentions;

– draws on necessary and sufficient powers and is consistent with constitutional and general law;

– does not have undesired legal consequences;

– is both legally and practically effective;

– does not conflict with broad government policy, is cognisant of political realities, and reflects AOPC's responsibility to the government as a whole;

– is internally coherent, comprehensive, includes nothing that is irrelevant and is right in matters of detail;

– is readily understandable by potential audience(s) and those who administer the law;

– conforms with parliamentary requirements and meets the instructor's and/or parliamentary deadlines.

4. Assisting our Clients to Avoid Potholes

One of the important roles of the drafter is to assist our clients to avoid problems with their legislation. There are many of these. High on the list is constitutional issues. It is surprising how often constitutional issues arise in drafting Bills and instruments.

It is a critical role of drafters in AOPC to identify constitutional issues. However, it is not AOPC's role to provide formal legal advice, including advice on constitutional law issues. This is the role of the Australian Government Solicitor and the Solicitor-General.

AOPC's role is to identify the issues and ensure that advice is sought. AOPC will also often be actively involved in developing a legislative solution to legal and constitutional issues, however, it is ultimately for Australian Government Solicitor and the Solicitor-General to provide advice about the probable validity of legislation.

There is no separate process to check the constitutionality of Bills before they are introduced into Parliament.

In addition to the constitutional issues that may come up, we need to be mindful of matters that may be raised by parliamentary scrutiny committees. These committees examine legislation and assess it against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety.

We also try to avoid uncertainty. That is, if we are aware that there is an uncertainty in the law we will usually try to draft in a way that overcomes this.

Where there is a need for subordinate legislation, provision is made for this in the primary legislation. The primary legislation will generally set out the scope of subordinate instruments that can be made. A substantial proportion of (and generally the most important) subordinate instruments are drafted by AOPC.

5. Provision of Training to Instructors

AOPC provides a one-day course called the Legislation Process Course to assist instructing officers from government agencies in their work. The course is presented by a team of experienced drafters of AOPC.

The course currently covers the following topics:

– basic features of legislation;
– priorities and policy authority;
– roles of instructors and drafters;
– parliamentary scrutiny of legislation;
– additional information relating to different kinds of legislation.

The course is constantly reviewed and refined to ensure that it remains highly relevant and up-to-date. A total of 237 courses have been given since they first began in 1994. Currently, there are 30 participants per course.

In addition, AOPC has recently developed an Advanced Legislation Process Course. It is envisaged that more courses, possibly in the form of master classes on specific topics, will be developed.

AOPC considers that running these courses is an important way that AOPC can contribute to the improvement in the standard of instructing.

V. Advantages of a Single Drafting Office

We believe that there are a range of benefits that result from having a single office drafting the legislation of a jurisdiction.

The main advantages are:

– the ability to recruit, train and retain drafters and ensure that they become highly skilled in the specialist work of legislative drafting; and
– ensuring that the government's drafting resources can be moved quickly to work on the highest priority work for the government; and
– the ability to obtain much greater standardisation and consistency across the statute book and in government policy and processes; and
– the ability to establish specialist information technology systems to support the drafting work; and
– the ability to ensure that whole-of-government perspectives are taken into account when drafting the legislation.

1. Recruitment, Training, Retention and Remuneration of Drafters

As there is no external supply of trained drafters available in Australia, Australian drafting offices cannot generally recruit trained drafters (although there is some movement of trained drafters between the drafting offices).

The training of drafters in Australia is predominately done in-house in drafting offices relying substantially on on-the-job training.

All Australian drafters are legally trained (i.e. have a Bachelor of Laws or equivalent degree) and admitted as lawyers (i.e. admitted to court as a barrister or solicitor).

While there are some variations between the recruitment approaches of the drafting offices in the various jurisdictions, most would seek to hire lawyers with very good academic records and with a few years' experience in the workforce.

In 2005 Peter Quiggin presented a paper on the recruitment and training of drafters. This provides a description of the approach to drafting that is still current. The paper, *Training and development of legislative drafters*, was published in The Loophole in July 2007 and is available on the website of the Commonwealth Association of Legislative Counsel.

Australian drafters are generally public servants or statutory office holders. Their remuneration is therefore commensurate with other public servants. However, as a general rule, drafting offices have substantially more senior positions than other government agencies. For example, in the AOPC about half of the drafters are senior drafters and are in the Senior Executive Service. In contrast, only about 2 % of all public servants are in the Senior Executive Service.

Due to the substantial proportion of senior positions, Australian drafting offices are able to offer a career path for people who are well suited to drafting. And, unlike other areas of the public service where there is high level of movement between jobs, drafters tend to stay at drafting. This means that drafting offices have a high drafter retention rate. It also means that drafters develop a large body of corporate knowledge, which from a whole-of-government perspective can be extremely useful.

2. Organisation of Drafting Resources

Having a centralised drafting office means that the government's drafting resources can be very quickly moved to the policy areas that are of particular importance to the government from time-to-time.

This means that a smaller number of skilled drafters is required than would be the case if each policy agency had sufficient drafters to deal with the peaks in workload in the particular agency.

The method of allocating drafting work varies somewhat between drafting offices, although it is usually overseen by the head of the drafting office.

3. Standardisation and Consistency

a) The Statute Book

Having a centralised drafting office contributes greatly to standardisation and consistency across the statute book. In AOPC, the Drafting Directions are a good example of this. They are issued by First Parliamentary Counsel after consultation inside and (sometimes) outside the office and are publically available on the AOPC website. They mostly contain requirements that drafters need to comply with when drafting legislation. However, they also contain useful information for drafters (and others) when drafting various types of laws.[1]

There are advantages in having documented rules like the Drafting Directions.

- They promote consistency of the statute book, which may aid its useability and legal effectiveness.
- They save time and energy—individuals drafters do not need to spend the time and effort researching, discussing and developing their own bespoke provisions for common drafting issues. This is particularly useful for uncontentious areas, such as amendment forms.
- They assist in educating drafters about various matters relevant to drafting and, as they are publically available, educate others outside of the office (such as instructors).

[1] For example, DD 3.2 contains useful information about drafting tax laws.

– Because drafters (and in some cases others) are able to comment on each Drafting Direction before it is issued, the Drafting Directions benefit from the collective knowledge of the whole office (and sometimes others). This maximises the chance of the Drafting Directions containing better solutions to common problems.
– Some of the Drafting Directions reflect outcomes agreed with the parliament (including parliamentary committees and staff) or other Commonwealth agencies, so they record, and help ensure compliance with, those agreed outcomes.

The Drafting Directions are constantly evolving: they are revised, some are revoked and new ones are added. This helps to ensure that they remain effective, relevant and responsive.

Of course, if a rule specified in a Drafting Direction is not appropriate in the circumstances of a particular case, First Parliamentary Counsel may authorise departure from the direction. Indeed, if this happened frequently, this may lead to the direction being revised.

The Drafting Directions are available on our website at www.opc.gov.au.

b) Government Policy and Processes

Having a centralised drafting office also contributes to standardisation and consistency in government policy and processes.

A good example of AOPC's role in standardisation and consistency in government policy is the referral process (which is set out in Drafting Direction 4.2). Whenever a Bill implements policy that is within the portfolio responsibility of another government agency, the drafters refer the Bill to that agency for consultation. This checks whether the policy contained in the Bill is consistent with the policy of the government as a whole. If the agency considers that the Bill is inconsistent with government policy, then the drafters will facilitate a resolution of the issue between that agency and the instructing agency.

A good example of AOPC's role in standardisation and consistency in government processes is AOPC's involvement in the Legislation Approval Process (LAP), a process that takes place before any Bill can be introduced into the parliament. The process checks that, from a whole-of-government perspective, the Bill is fit to be introduced—for example, that it has appropriate policy au-

thority (whether from Cabinet, the Prime Minister or a Minister); that the Minister sponsoring the Bill has approved it; that any necessary approvals from other Ministers have been obtained; and that any other issues (such as constitutional validity or conflict between government agencies over policy) have been resolved. The drafters of the Bill must prepare a LAP memo, which sets out whether the necessary approvals etc. have been obtained. In doing so, the drafters may need to liaise with the Department of Prime Minister and Cabinet (the agency responsible for the legislative program) and other government agencies to progress the Bill for introduction.

4. Specialist Information Technology Systems

Having a single office and substantial standardisation offers the potential to have a specialist information technology system that increases the productivity of drafters.

One of the most important mechanisms we have used in AOPC to improve our effectiveness and efficiency has been in leveraging the IT system. We have our own in-house IT system that has been built specifically for the drafters (although it also fully caters for other areas of the office, such as publications and finance). We also have our own in-house IT team. The IT officers are extremely responsive to our needs and are instrumental to the success of the IT system.

Being able to fully control and tailor the IT system to our specific needs has been a substantial asset for our office.

A good example of this is a database that we call "Penguin". It has been specifically designed by the IT team to collect information (e.g. about the legislative program) from different sources automatically and allow access to that information by our staff. It is also able to generate different types of reports about that information.

The benefit of having a database such as Penguin is that it records very useful information about a legislative project in one place and allows staff to access that information very easily and when needed.

We have also developed in-house databases of legislation that have similar content to the public databases but also include drafts. This enables drafters to

search across the full statute book including draft amendments to Acts and instruments.

VI. Surveys of Clients

The AOPC surveys its clients at the end of each drafting project. The survey covers a range of matters including the relationship between the drafter and the instructor, the extent to which the instructor's policy has been implemented and how easy the legislation is to read.

There is also a question about overall satisfaction for which a ranking from 1 (poor) to 5 (outstanding) is given. For a number of years, the average response to this question has been above 4.9 out of 5.

This is a reflection of the high regard in which the work of drafters is held and the high level of satisfaction in the work that is produced.

VII. The Future of Drafting in Australia

The current system of legislative drafting in Australia is well entrenched and has consistently been able to deliver the outcomes that are sought by governments across the country.

While there will always be change and continuous improvement, it seems unlikely that there will be any move away from the use of professional drafters working in centralised drafting offices in the foreseeable future. Indeed, there is pressure from various sources (e.g. parliamentary scrutiny committees) to increase the scope of legislative instruments that can only be drafted by professional drafters. This may signal a move toward greater use of professional drafters, as well as indicate an increasing awareness of the value that professional drafting services can provide.

Professional Legislative Drafters – New Ideas for Switzerland?

Felix Uhlmann / Stefan Höfler

Content

I. Introduction

Legislative drafting – i.e. the composition of legislative texts such as Acts of Parliament (primary legislation) and executive ordinances (secondary legislation) – is both a task and a process that bears great consequences for the functioning of any legal system, independent of whether that system is rooted in the civil law or common law tradition. In the ideal case, legislative drafting results in high-quality legislation that not only meets criteria of substance (fairness, necessity, effectiveness, efficiency, etc.) but also complies with standards of form (precision, clarity, conciseness, etc.); it will thus allow for a smooth operation of justice. However, if the process of legislative drafting delivers a product that lacks such properties, it may diminish legal certainty and thus lead to an increased number of lawsuits and costly administrative procedures.[1]

[1] See, e.g., Müller Jörg Paul, Gute Gesetzgebung in der Demokratie – Chancen und Klippen, in: Griffel Alain (ed.), Vom Wert einer guten Gesetzgebung, Bern 2008, pp. 75 ff., p. 81; Schröder Ole/Würdemann Christian, Rechtstexte verständlich formulieren: Implementierung einer Sprachanalyse im Gesetzgebungsverfahren, in: Eichhoff-Cyrus Karin M./Antos Gerd, Verständlichkeit als Bürgerrecht? Die Rechts- und Verwaltungssprache in der öffentlichen Diskussion, Mannheim 2008, pp. 324 ff., pp. 326 f.

It therefore seemed appropriate to have a closer look at the people who are tasked with the drafting of legislative texts: Who are they? How are they trained? What is their role in legislation? And what impact do they have on the outcome of the process? Specifically, we wanted to compare the system that is in place in Switzerland with models of legislative drafting that are radically different, viz. the models employed in Australia, Canada, the Netherlands, Poland, the United Kingdom and the United States.[2] What these latter models have in common is that they all include, in one form or another, the concept of professional legislative drafters. Comparing them to the Swiss system, which does not know such a concept, might well yield novel insights into how legislative drafting in Switzerland can be improved – and it might provide new ideas about how this important task can be organised in the first place.

In what follows, we present our findings. We will first summarise the models of legislative drafting that are in place in the aforementioned countries: we will discuss the roles that professional drafters have come to play in these models and the influence they exert on the final product, and we will look at the ways in which the education of these persons has been organised. We will then compare these models with how legislative drafting, and the training of persons involved in it, has been done in Switzerland. Finally, we will reflect on the impact that the experiences made in other countries could or should have on the Swiss system: What can be learnt from the models described? Is it advisable to make adjustments? Should there even be a change of system? Or are there reasons for Switzerland to abstain from employing professional legislative drafters?

II. Models of Legislative Drafting

Whether a legal system employs professional legislative drafters may well be one of the most defining characteristics of how it organises the process of legislative drafting.[3] The difference is one between professionalised drafting and so-called "lay drafting", i.e. it pertains to the question whether legislative texts are composed (a) by specialists who have obtained specific academic or voca-

[2] See the respective contributions in this volume.

[3] See Höfler Stefan/Nussbaumer Markus/Xanthaki Helen, Legislative Drafting, in: Karpen Ulrich/Xanthaki Helen, Legislation in Europe – A Comprehensive Guide for Scholars and Practitioners, Oxford 2017, pp. 153 ff.

tional training in legislative drafting and whose main occupation is just that, drafting legislative texts, or (b) by generalists (civil servants, lawyers, academics) with no or only very little education and practical experience in legislative drafting for whom drafting is just one, potentially rare task among others.

1. Professionalised Drafting

The countries we have chosen as references (Australia, Canada, Netherlands, Poland, United Kingdom and United States) have all implemented, in one way or another, systems in which legislative drafting has been professionalised. In such systems, policy makers commission professional legislative drafters with composing a legislative text: they provide the drafters with instructions detailing the policy they want to enshrine in the law, but they do not engage in drawing up a specific text themselves. This latter task they leave to the professional drafters. However, the role of the drafter is not a merely technical one, translating policy into law: he or she is also "the guardian of the logic of the system of law."[4] Similar to how lawyers advise their clients, drafters usually advise policy makers with regard to how the intended policy can best be transferred into an actual piece of legislation within a given system of law. Conversely, they depend on the policy makers reviewing their drafts to make sure that the instructions have been understood properly. It has thus proven vital to this model of legislative drafting that high-quality instructions are provided and that drafters, instructive officers and policy makers stay in close contact and regularly interact throughout the process.[5]

Professional legislative drafters typically work for some centralised governmental drafting service. Such a drafting service may be attached to a parliament (e.g. the Offices of Legislative Counsel in the United States[6]) or to the cabinet (e.g. the Office of Parliamentary Counsel in the United Kingdom[7] and the Government Legislation Centre in Poland[8]). As members of such services, professional

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4 Staśkiewicz Wiesław, Status and Professional Roles of a Legislative Drafter in Poland, in this volume, p. 74.

5 See, e.g., Xanthaki Helen, Thornton's Legislative Drafting, 5th ed., London 2013, pp. 142–144.

6 See, e.g., Marcello David, Legislative Drafting: Teaching and Training Strategies in the U.S., in this volume, p. 91.

7 See Xanthaki Helen, Legislative Drafting: The UK Experience, in this volume, p. 18.

8 See Staśkiewicz, *supra* note 4, p. 58.

legislative drafters are usually tasked with composing primary legislation. However, while the notion of professional legislative drafters has typically been associated with a certain centralisation of the drafting process (particularly with regard to primary legislation), professional legislative drafters have also been known to work for other players involved in the process of drafting legislation, e.g. for individual ministries and other de-centralised units of government (especially where the development of secondary legislation is concerned), for non-governmental organisations and even for private companies (where they engage in political lobbying).[9] Naturally, the role that the individual drafters play, and the influence they can exert on the final product, differs whether they are involved in the preparation of bills or ordinances for the executive branch or in the finalising of acts at the parliamentary stage. In the latter case, political considerations may interfere with the drafters' work more often, and the drafting process as a whole may be less streamlined and more spontaneous than in the former.[10]

On the whole, the employment of professional drafters has been deemed to have a positive impact on the quality of legislation.[11] It seems that the involvement of professional legislative drafters does not only bring to the table expert knowledge in the techniques of legislative writing but also a neutral perspective on policy, which benefits both the text and its content.[12] One concept that seems to prove particularly beneficial is the so-called "one-pen principle"[13], i.e. the idea that one and the same drafter is responsible for a bill throughout all stages of law-making, following his or her project from its onset within the administration all the way through to its finalisation in the parliamentary phase. Some countries (e.g. Canada[14]) also safeguard such shepherding procedurally. Due to their neutral outlook on policy, there is no indication that drafters have

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9 See, e.g., Marcello, *supra* note 6, p. 93.

10 See, e.g., Staśkiewicz, *supra* note 4, pp. 69 f.

11 See the contributions in this volume. Shobe Jarrod, Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting, Columbia Law Review 2014 14/4, pp. 807 ff. even argues that the increased involvement of professional drafters in the legislative process of the United States Congress has lead to a decrease in unintentional ambiguity in statutory law.

12 See also Höfler et al., *supra* note 3, sect. 3.2.

13 Staśkiewicz, *supra* note 4, p. 73.

14 See Tremblay Richard E., L'exercice de la profession de rédacteur législatif au Québec, in this volume, p. 113.

problems switching from their role of working for the executive branch to working for parliament.

The traditional pathway to becoming a legislative drafter seems to be one where an experienced and exceptionally qualified civil servant is hired by a unit of government specialised in legislative drafting. These civil servants typically (but not necessarily) have a general background in law. Training in legislative drafting usually happens on the job. Due to the experience and qualifications of the persons hired, and their job-related neutral outlook on policy, professional legislative drafters seem to enjoy comparatively high prestige – although some countries (e.g. the Netherlands[15]) report that their standing has been on the decline in the last couple of years.

In addition, recent years have seen a development towards more specific education, with several academic institutions and professional organisations offering training programmes specifically geared to persons pursuing a career in legislative drafting; in some cases, such programmes are complemented with government-sponsored traineeships. Recruitment still mainly targets professionals with a degree in law, but programmes seem to slowly open up to candidates with backgrounds in related fields too, thus reflecting the inherently interdisciplinary nature of the task.

2. Lay Drafting in Switzerland

While in systems with professional legislative drafters, drafting specialists compose the text and policy makers review it for accuracy of content, the roles are inverted in systems that practice lay drafting: in these latter systems, the texts are composed by generalists, usually policy makers and/or civil servants familiar with the subject matter at hand, while drafting specialists are only involved at a later stage, if at all, when they are asked to review the drafts for appropriateness with regard to legal, formal and linguistic criteria. This is the model of legislative drafting implemented in Switzerland – and in many other civil law jurisdictions in Europe, including the European Union.

While lay drafting is prevalent in Switzerland, the federal government and some of the cantons have provided for a professionalised reviewing of the drafts: they

[15] See Voermans Wim J.M./Zijstra Sjoerd E., Education, Knowledge-Exchange and the Role of Professional Legislative Drafters in the Netherlands, in this volume, pp. 43 ff.

have installed specialised legislative units that check the drafts for their legal, formal and linguistic quality.[16] At the federal level, three units of government are involved in this process: for the legal aspects the Federal Office of Justice, for the formal aspects the Federal Chancellery[17] and for the linguistic aspects the Drafting Committee of the Federal Administration, an interdisciplinary committee composed of both lawyers and linguists.[18] Agencies within the administration are required to have their drafts reviewed by these three units – even though technically, they are not obliged to follow their advice: text ownership remains with the agency that composed the draft. Parliament, on the other hand, is under no obligation to consult with said institutions. As a consequence, there are fewer quality checks during the parliamentary process of legislation than there are during its administration-internal counterpart: the only compulsory check installed is that of a special parliamentary committee, the Drafting Committee of the Federal Assembly,[19] assessing the formal quality of the text before it is submitted to a final vote in the Chambers; but as this assessment happens very late in the process, the committee's activities are more or less confined to initiating minor editorial corrections.[20] Parliament typically relies on governmental drafts when passing legislation. Still, the Federal Assembly and some cantonal parliaments have become more active in recent years, hence accentuating the issue of quality checks within Parliament.

There is no specific educational programme for legislative drafters in Switzerland. Rather, both the civil servants involved in composing draft legislation and

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[16] See, e.g., for the canton of Zurich, Schuhmacher Christian, Der Gesetzgebungsdienst des Kantons Zürich, LeGes 2003 14/2, pp. 127 ff.

[17] See Sägesser Thomas, Gesetzgebung und begleitende Rechtsetzung: Zuständigkeitsabgrenzung zwischen Bundeskanzlei und Bundesamt für Justiz: Beschluss des Bundesrates vom 13. Februar 2008, AJP 2008/7, pp. 901 ff.

[18] See Nussbaumer Markus, Der Verständlichkeit eine Anwältin! Die Redaktionskommission der schweizerischen Bundesverwaltung und ihre Arbeit an der Gesetzessprache, in: Eichhoff-Cyrus Karin M./Antos Gerd (eds.): Verständlichkeit als Bürgerrecht? Die Rechts- und Verwaltungssprache in der öffentlichen Diskussion, Mannheim 2008, pp. 301 ff.

[19] See Steiner Sigrid, Redaktionskommission (Art. 56–59), in: Graf Martin/Theler, Cornelia/von Wyss, Moritz (eds.), Parlamentsrecht und Parlementspraxis der Schweizerischen Bundesversammlung: Kommentar zum Parlamentsgesetz (ParlG), Basel 2014, pp. 465–489; for equivalent institutions in cantonal parliaments see Schuhmacher Christian/Caussignac Gérard, Sicherstellung der legistischen Qualität von Gesetzen in den kantonalen Parlamenten, LeGes 2006 17/2, pp. 45 ff.

[20] See, e.g., Müller Georg/Uhlmann Felix, Elemente einer Rechtssetzungslehre, 3rd ed., Zürich 2013, n. 73 ff.

the lawyers and linguists tasked with checking the drafts for compliance with legal, formal and linguistic requirements obtain their training on the job. In addition, there are one- or two-day seminars organised by the Swiss Society of Legislation, certain academic institutions (e.g. the Centre for Legislative Studies at the University of Zurich) and some public administrations. Some universities also offer introductory courses in legislative drafting as part of their Master's programme in law, but these courses are not immediately linked to a career in composing or reviewing legislative texts.[21]

III. New Ideas for Switzerland?

Complaints about the allegedly poor quality of legislation have probably been around for as long as there have been laws; they re-surface in more or less regular intervals. In Switzerland, the discussion has recently been rekindled with the publication of an article in one of the country's major newspapers. The article argued that the quality of legislation is "plummeting."[22] Independent of whether one agrees with the article's findings and disregarding the fact that what constitutes "good" or "poor" quality in legislation can be quite elusive, it seems worthwhile to think about potential avenues for safeguarding or improving the quality of legislation. While one measure may be found in increased research into the methods and techniques of drafting,[23] reviewing the procedures implemented to bring about legislative texts may be equally important.[24] In what follows, we thus want to ask if the experiences that our countries of reference have gained with the employment of professional legislative drafters could, or even should, lead to a rethinking of how legislative drafting is organised and how drafters are educated in Switzerland.

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[21] See Wyss Martin, Legistische Aus- und Weiterbildung in der Schweiz: Angebote, Akteure, Perspektiven, in this volume; Uhlmann Felix, Developments in the Education of Legislation and Regulation: Germany and Switzerland, in: Vereniging voor Wetgeving en wetgevingsbeleid (ed.), De Opleiding van Wetgevingsjuristen en Wetgevingsonderzoekers In Vergelijkend Perspectief, Nijmegen 2011, 43 ff.

[22] Neue Zürcher Zeitung, Qualität der Gesetzgebung im Sinkflug, 8 February 2013; for the public debate iniated by the article, see Griffel Alain (ed.), Vom Wert einer guten Gesetzgebung, Bern 2014.

[23] See, e.g., Xanthaki, *supra* note 7, pp. 19 ff.

[24] See Höfler et al., *supra* note 3.

1. Institutions and Procedures

The obvious difference between the Swiss system and the other models discussed above is that in the latter, legislative texts are composed by drafting specialists *ab ovo*. Switching to such a system may come with a number of benefits. For one, the impact of expert knowledge would likely be improved. In some Swiss jurisdictions, drafting specialists still come into play comparatively early in the process, when they review and revise the first drafts drawn up by the individual agencies, but the fact remains that the basic directions have been set at that point and time constraints often prevent a complete overhaul of a text even if it were necessary. It is for this reason that common law countries sometimes discourage the concept of lay drafting:[25] bringing in drafting specialists only after a first draft has been composed is considered a waste of resources as these specialists may end up merely editing the text, thus but consolidating a suboptimal result, or destroying the text and starting afresh.

The experience of countries who employ professional legislative drafters has also shown that by doing so, a clearer, more conscious division can be achieved between the drafting of a legislative text, on the one hand, and the preceding steps of policy formulation and conceptualisation, on the other hand. Swiss civil servants typically do policy analysis and legislative drafting by the same token and thus often blur the line between the two tasks. While scholars and guidelines postulate a conceptual analysis before the onset of drafting,[26] time pressure and a lack of education often lead to a neglect of conceptual thinking – a circumstance that has frequently been described as one of the main causes for low-quality texts.

However, a change of system would necessitate a certain centralisation of the drafting process. If one were to keep the de-centralised organisation of legislative drafting currently in place, an unrealistically high number of professional legislative drafters would have to be hired to staff all departments within the administration. One argument occasionally invoked against centralising the task of legislative drafting is, however, that it may further remove the authors of the

[25] See, e.g., Dale William, Canadian Draftmanship, and the French Connection, Commonwealth Law Bulletin 1984/10, pp. 1865 ff., p. 1866.

[26] See, e.g., Müller Georg/Uhlmann Felix, *supra* note 20, n 82 ff.; Federal Office of Justice (ed.), Gesetzgebungsleitfaden: Leitfaden für die Ausarbeitung von Erlassen des Bundes, 3rd ed., Bern 2007, n 641 ff.

legislative texts from their addressees.[27] It has always been considered an asset of the Swiss system that those who draft legislation are relatively close to those who have to apply it and those who are most immediately affected by it. Even so, federal legislation has sometimes been criticised by the cantons for lack of knowledge on implementation, and indeed their practical experience should be reflected early in the process.[28] If drafting was centralised, such direct channels of communication may be lost. A centralisation of legislative drafting may even lead to somewhat of an ivory-tower mentality, as a recent study has noted: "as most drafters join [the drafting service] early in their career and remain involved in its work for their whole working experience, they develop a specific style that some commentators consider removed from the day-to-day application and use of statutes in legal practice."[29]

By and large, countries employing professional legislative drafters seem to have recognised these pitfalls and taken appropriate action. Measures have included, on the one hand, the development of strategies to institutionalise and cultivate communications between drafters and policy makers, e.g. by strengthening the role of instructive officers. On the other hand, there have been strong moves to promote the use of plain language in legislative drafting and to put the addressees of the texts to the forefront of drafters' minds, a development that can be witnessed in the Anglosphere in particular.[30]

We find it highly plausible that under such conditions the employment of professional legislative drafters will provide good results. While Switzerland may not be ready for a complete system overhaul, the ground may be prepared for taking some further fruitful steps in the direction of the models described. Such an effect could be achieved, for instance, by strengthening the position of existing legislative units: they could be involved even earlier in the drafting process and their role could be transformed from that of mere watchdogs to that of advisers who lend active support to departments confronted with the task of

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[27] See, e.g., Federal Council, Bericht vom 15. März 2010 über die Stärkung der präventiven Rechtskontrolle (BBl 2009 2187) p. 2243.

[28] Müller Georg/Uhlmann Felix, *supra* note 20, n 384.

[29] European Commission, Directorate-General for Translation (ed.), Document Quality Control in Public Administrations and International Organisations, Luxembourg 2013, p. 43. The same phenomenon can also be observed in institutions reviewing legislative drafts, as pointed out, e.g., in Höfler Stefan, Die verwaltungsinterne Verständlichkeitskontrolle im Rechtsetzungsverfahren des Bundes, Diploma thesis, Bern 2015, p. 27.

[30] See, e.g., Marcello, *supra* note 6, pp. 86 ff.; Xanthaki, *supra* note 7, pp. 22 ff.

drawing up a legislative text. It seems that this possibility already exists under current law but that it is rarely used.[31]

Parliamentary procedures may be another field of action: legislative advice to parliaments should be extended and further institutionalised. Swiss parliaments typically resort to civil servants for advice on major legislative projects; they do so on a more or less voluntary basis. This system works well if there is an atmosphere of mutual trust between parliament and administration, but the fact that the latter is typically subordinated to the executive branch may create sentiments of competition rather than co-operation. As a result, proper advice may be sought less often than it would be deemed necessary. The idea of parliaments establishing their own drafting services has generally been discouraged though, as it would go against the notion of a unitary administration stipulated in Swiss constitutional theory.[32] Meanwhile, a somewhat detached, centralised legislative advisory unit may be able to serve both parliament and the executive without running into conflicts of interest and thus overcome some the aforementioned problems.

2. Education and Research

A second point to be learnt from the experience with the described models of legislative drafting is that the employment of professionalised legislative drafters also creates the need for specialised training in that field. Countries who have implemented such a model have seen a recent shift from drafters with a generalist education in law and on-the-job training to specialists who have undergone further, more specific education.

Like elsewhere, Swiss legal education is still almost exclusively concerned with the analysis and interpretation of statutes and their application to specific cases; there is almost no training in planning legislation and composing the corresponding texts. However, experience shows that the skills required for the former are very different from those required for the latter.[33] Thus, if one assumes that there is a potential need for professional legislative drafters in specialised units of government, one cannot but call for further in-depth training in this

[31] Schuhmacher, *supra* note 16, p. 130.

[32] See von Wyss Moritz, Gesetzesformulierung oder Gesetzesabsegnung durch das Parlament, LeGes 2002/3, pp. 59 ff.

[33] See Marcello, *supra* note 6, pp. 89 ff.

very particular area of legal practice. Such training may well be realised in the form of an advanced degree in legislative drafting, thus conferring a title to its graduates that bears testimony to their specialist qualifications.

The emphasis that our countries of reference put on the issue of plain language also shows that training in legislative drafting always is an interdisciplinary undertaking that encompasses both legal and linguistic aspects. Switzerland has not only a tradition of plain-language drafting but also of recognising the interdisciplinary nature of the task: at the federal level, drafts are reviewed by lawyers and linguists together. Professional legislative drafters would have to unify, in one person, the skills that these two groups of specialists bring to the table: they would have to be versed both in the legal and the linguistic aspects of legislative drafting. This necessity should also be reflected in their education. However, to provide such education, more research into the peculiarities of legislative language and their connections to the issue of comprehensibility is required – an area that, curiously, still remains somewhat understudied.[34]

IV. Conclusions

The deliberations presented in this article, and indeed the present volume as a whole, have shown, first and foremost, that it is worthwhile to look beyond one's own country, one's own linguistic community, and one's own legal system. Australia, Canada, the Netherlands, Poland, the United Kingdom and the United States represent six countries with strong democratic institutions but otherwise rather different constitutional and legal traditions. Yet, they share a common denominator: they all employ, in one way or another, professional legislative drafters. The particulars of their models may well work in their own context but not in Switzerland. Nonetheless, we strongly believe that many of the problems these countries have attempted to address are the same that we also face in Switzerland. The solutions they have found should inspire us to think outside the box and contemplate new, seemingly "foreign" ideas.

The strengths associated with the concept of professional legislative drafters are evident: (a) a more effective integration of expert knowledge of the legal, formal and linguistic aspects of good legislative drafting in the process of legis-

[34] See, e.g., Höfler, *supra* note 29, p. 39.

lation, (b) a clearer separation of conceptual work and text composition, (c) a more neutral stance towards the policy to be enshrined in the law during the drafting process. The requirements are also clear: (a) good communications between drafters and policy makers, and (b) high-standard theoretical and practical training in all aspects of legislative drafting, including plain-language writing.

At the very least, these findings warrant an in-depth debate on whether Switzerland would benefit from a further professionalisation of legislative drafting – Switzerland already has some civil servants that qualify as "professional legislative drafters" even though they may not have the title – and whether some additional streamlining in the selection and education process is advisable. On a personal note, we believe that such an approach is worth trying – of course in the evolutionary way typical for Switzerland, i.e. by small incremental steps.

Several countries and legal systems have comprehensive educational programmes for professional legislative drafters. The present volume compares the Swiss system, which does not know professional legislative drafters, with the systems implemented in the United Kingdom, the Netherlands, Poland, the United States, Canada and Australia, where such a profession, in one form or another, exists. It aims to encourage the debate on the potential need for professional legislative drafters in Switzerland and the benefits such a change of system might bring.

In verschiedenen Rechtssystemen und Staaten gibt es eine eigenständige Ausbildung zum spezialisierten «Gesetzesschreiber» resp. zur «Gesetzesschreiberin». Der vorliegende Band vergleicht das Schweizer System, das keine professionellen Gesetzesschreiber kennt, mit jenen in Grossbritannien, den Niederlanden, Polen, den Vereinigten Staaten, Kanada und Australien, die alle in der einen oder anderen Form einen solchen Berufsstand kennen. Damit soll die Diskussion über Bedarf und Nutzen von «Professional Legislative Drafters» auch in der Schweiz lanciert werden.

ISBN 978-3-03751-829-8