BOOK REVIEW

Helen Xanthaki, **Drafting Legislation – Art and Technology of Rules for Regulation, Oxford and Portland (Hart) 2014, 374 p.**

Legislation and legisprudence, until recent times, have been looked at as national matters. However, since European integration and worldwide growing together of economy and legal systems – as part of "globalization" – comparative law, harmonization and convergence of regulations, even approximation or unification of legal provisions, is standard in legal research and practice. The national state becomes more and more "open", porous to regional and international statutes and treaties: equal principles and standards even lead to convergence of common and civil law.

This is true for techniques and craftsmanship in drafting legislation. A strong incentive for this development is European unity in plurality. Legislation and legisprudence are sub-disciplines of law, but of course with a heavy impact of interdisciplinary knowledge. Legislation is science and art, so it could be taught and learnt, as art improves by experience and mentoring. Helen Xanthaki's new book on "Drafting Legislation" is a big leap forward to look at legislation from a supranational, regional (EU) and international perspective. The author is Professor of Law and Legislative Drafting and Director of Research Studies at the Institute of Advanced Legal Studies of the University of London and the Academic Director of the Sir William Dale Centre for Legislative Studies in London. She is the chairperson of the International Association of Legislation (IAL) in The Hague.

The author understands legislation in a broader as well as in a relatively narrower sense. The first covers more or less the whole policy-circle: policy design, drafting, implementation, evaluation, revision and amendment. The latter – legislation in a relatively narrower sense – is "drafting legislation" as part of the parliamentary process, which is part of the policy process. The book is structured in 20 chapters, from general remarks on regulation, the legislative process to teaching how to draft statutes. If the reader wants, he can break down the chapters into four segments. First, a "general part": What is a law and how do we make laws? (1-6). The author describes legislation as a process in the field of forms of regulation. From the beginning, the book exclusively focuses on "effectiveness", which to reach is the principal goal of all governmental actions and, of course, legislation. The second part of the book may be looked at as a "special part", primarily looking inside a law (what sort of provisions would you find? [7-9]) and then looking into the statute book (what sort of laws are of special parliamentary drafting interest? Penal law, taxation law, extraterritorial legislation? [12-16]). Third, you will find a bloc of two important chapters: How do we interpret our laws? (17, 18), and – finally – what else? There are two appendices: legislation post-Lisbon and training drafters (19, 20).

The first chapter starts with general remarks on *theory and practice of drafting legislation* and *effectiveness in drafting*. Legislation remains just a choice offered to governments as a regulatory tool. And this is really what gives legitimacy to the

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law: its adoption by the formally authorized legislature (p. 3). Legislation is one of the many choices offered to governments in their pursuit of putting their policies to effect. The quality of hierarchy of goals for policy, and hence legislation, is measured by the three "Es": Efficacy, Effectiveness, Efficiency. There is much confusion in literature about these key terms: the reader, therefore, will appreciate the clear terminology supported by graphs. Since in all countries and in the EU one hears complaints that we face a torrent of indigestible laws, it is to be welcomed that the author deals extensively with the linguistic quality of laws. Clarity, precision, unambiguity, predictability, simplicity, plain language and gender-neutral language: these criteria are essential facets of effectiveness. If a person cannot understand the law, the person cannot follow it. In the first (and general) part, the author also addresses the topic, how one should understand "drafting legislation": as a science? or as an art? It is a part of both; it requires practical wisdom and professional experience. All European countries (Chapter 2) and the EU-legislator apply as practical tools "Rules of legislation", "Drafting Instructions", "Manuals for Good Drafting". The author follows G. C. Thornton (Legislative Drafting, 5th edition, edited. by Helen Xanthaki, London 2013) throughout her book, in understanding analysis, design, composition and scrutiny as steps of drafting laws in the narrow sense. It is important to understand that drafting requires a political drafting plan (Chapter 3). The drafters need to know what the problems are and how policy wants to cope with them. Legislation must be viewed as a solution of last resort (p. 6). In the words of Montesquieu: "If it is not necessary to write a law, it is necessary not to write a law."

In Chapter 4, the author presents – quite new for legisprudence – the multi-layered approach to legislative texts. It takes care of the different levels of understanding and perception of addressees. The text must speak to ordinary citizens, to professionals in fields outside the law, and to lawyers and judges. The traffic regulation provisions are targeting another audience than a nuclear power statute. An iterative approach is a novel idea.

In Chapters 5 and 6 the author deals with quality of language, following – and a little bit adapting – Edmund Burke's saying "Unclear laws are the worst form of tyranny" (p. 86).

Chapters 7-9 explain the main types of provisions within a statute: preliminary, principal and final provisions. These chapters cover the transposition of EU and International Law into UK-Law, which cannot be appreciated here in detail and, in fact, deserves a special chapter.

Chapter 11 describes "Time in Regulation: Prospective, Retrospective, Retroactive" and the rule-of-law problems going along with it, whereas Chapter 12 addresses "amending provisions," schedules and annexes.

Chapters 13 and 16 deal with "Penal and Taxation Legislation." Both types of legislation are challenging for the drafters. The first category presents a chasm between inevitable complexities of penal legal norms against the very possible inexperience of the user. Students might recall "nit picking" in penal law lectures. Taxation law is complicated, complex and extends over a multitude of layers of legislation; besides, it is notoriously fluid.

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Chapter 14 deals with delegated legislation, which causes primarily constitutional problems, since the enabling clause in primary legislation according to the separation of powers-principle must specify content, purpose and scope of the authority conferred. The statutory law could not be a skeleton legislation (p. 258).

Chapter 17 addresses the problem of extra-territorial legislation, which is merely an exception to the principle that the boundaries of a state coincide with its jurisdictional boundaries. The universal jurisdiction in criminal law is such an exception.

Chapter 19 – as an appendix to the preceding chapters – raises the matter of "Quality of Legislation Post-Lisbon and the Role of Parliaments." It sheds light on the English activities in the EU for a better quality of legislation and EU activities on better regulation. These are recent developments to "cut red tape" and reduce the burden of EU "legislative activism" (Good Governance, Smart Legislation, Refit-Programme a.s.o.). The EU increasingly shifts the focus from legislative quality to better regulation.

Finally, the practical Chapter 20 approaches the issue of "Legislative Education and Training." The author is of the more or less undisputed opinion that the dual nature of drafting and the dual skills required – science and craft – make it impossible to consider a drafter trained without formal academic instructions in combination with lengthy practical hands-on experience.

Probably not every reader – namely outside the UK – would expect two chapters on the interpretation of law in a drafting handbook: "Comparative Legislative Drafting" (10) and "Statutory Interpretation and Legislative Drafting" (18). Interpretation would probably be looked at as being a task of administrative and judiciary officials and lawyers. But it is true that interpretation is tangentially an important guideline for the drafter, because he writes for those who have to understand, interpret in cases of doubt, implement and enforce law. Nevertheless, many scholars consider "interpretation" a special field of methodology, as different from drafting. But this may be for the scholars' wisdom to decide. What is very interesting for Chapter 10 is the comparison of common and civil law interpretation. Narrowing the gap might be the fate of English and Continental law under EU regime. Both legal families in interpretation follow the word- and grammar-approach, historical arguments and the purposive method. It may be true that case law and stare decisis keep their dominant position in common law practice. Nevertheless, the purposive method is gaining ground in both legal families.

> At the end of the day, the role of precedent in common law is inherently limited since there are no limits upon the power of the parliament to make law, since judges must give effect to the Parliament's intent, and the only rule for the construction of Acts of parliament is that they should be construed according to the intent of the Parliament, which passed the Act. (p. 207)

On the other hand, in civil law countries the courts in practice are bound by decisions of the Higher and Highest Courts. In some countries, even parliament is bound by judgments of Constitutional Courts. Both common law and civil law cul-

tures are partially bound to ECJ- and ECHR-judgments. On the other hand (Chapter 18) both legal families – particularly to be observed with the ECJ and the German Constitutional Court – there is judicial activism: Statutory interpretation allowing judges to "legislate" through case law, and where possible – e.g. in Germany – to declare laws as unconstitutional, void, obsolete. Some scholars label the latter as "negative legislation." In effect, these are approaches to "drafting legislation" by judges on both sides. And UK and Continental judges simply enjoy and suffer under the obligation to marry national laws and EU legislation and the ECHR (p. 327).

The book is an excellent introduction to drafting legislation from a modern perspective, useful for English and non-English readers. This is particularly true for the general chapters, as indicated (1-6, 10, 18, 19 and 20). Some other chapters work mostly with English materials, but can easily be transposed to other legal orders. This includes European drafting of legislation. This is a review from a civil law perspective. It does not make much of a difference, but sheds light on some divergent aspects of legislation. The book is written on a very broad basis of materials. It covers some 120 pieces of legislation – Europe, UK, Australia, Canada, New Zealand, USA – and 150 cases, which are listed in tables. A table of abbreviations, unfortunately, is missing. The text covers many illustrative examples from statutes and cases. Sometimes texts, including authors, are cited in full wording. So the reader does not need to trace them "under the line". Citations are from English, French, German and other languages. The language is easy to read; some rhetorical questions add to the pleasure of reading.

The author is indebted to two great authors: her teacher, Sir William Dale (Legislative Drafting: A New Approach, London 1977) and G. C. Thornton, as mentioned above. One may say that some of the author's ideas are developed from Dale's writings: a general comparative perspective on drafting. Many details are inspired by Thornton's "Legislative Drafting," which is a sort of bible for English drafters. The author took the keywords of the title of her book *Drafting Legislation* from both Dale's and Thornton's works. Actually, she took the full title of Dale's book in a collection of authors and topics in memory of Sir William Dale (edited in 2008, Aldershot/Ashgate, by Constantin Stefanou and her). Some chapters of the book, as reviewed here, have been pre-published elsewhere (e.g. Chapters 10, 19 and 20).

All in all, it is a new and up-to-date reader on the principles and standards of legislation. It is reaching out from a deeply rooted English basis. If one wants to use it as a basis of a national reader for other countries, one simply has to add chapters on the organization, procedure, participation and management of drafting legislation in that country. That's all, and that's the great value of this book.

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