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Comparative Legislative Drafting

Comparing across Legal Systems

Constantin Stefanou[*]

Abstract

This article is an original, first attempt at establishing a list of comparative criteria for the comparative study of legislative drafting or aspects of legislative drafting between the two families of legal systems: common law and civil law. Because of the limited bibliography in the field of legislative drafting – let alone in comparative legislative drafting between common law and civil law systems – this article adds to existing scholarship on the field aiming to become a basis for further comparative research in legislative drafting. The list of criteria can be used on its own for different jurisdictions within the same family of legal systems, or the two lists can be used to juxtapose civil and common law experiences in legislative drafting. As this is the first time that such lists of comparative criteria in legislative drafting have been produced, it should be stressed that the lists are certainly not exhaustive. The aim of this article is to generate comparative research in legislative drafting, and so, inevitably, such comparative research might add or even subtract criteria from the lists depending on results.

Keywords: comparative legislative drafting, comparative law, drafting process.

A Introduction

It is perhaps typical of the state of affairs in the field of legislative drafting that while one expert laments how under-rated legislative drafting skills are:

> Most legal systems tend to deny the importance of statutory drafting or simply fail to realise just how central this question to modern legal systems. Even in the common law world, much judicial time and effort is devoted to the construction of legislative provisions, but this appears to be an under-rated skill.[1]

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1 G. Hogan, 'Some Suggestions from Ireland', EU Commission Legislative Drafting Seminar, 3 July 2014, p. 2. *See* <http://ec.europa.eu/dgs/legal_service/seminars/20140703_hogan_speech.pdf>.

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Another rejoices that "a new sub-discipline in law is born."[2] Although still dominated by the professional drafters, legislative drafting is now developing its own research agenda and making inroads into academia.

The purpose of this article is to set out some basic criteria for comparative research in legislative drafting in the two main families of legal systems. Comparative research in legislative drafting is rare.[3] In part, this is the result of a lack of a macro- or general theory of legislative drafting, which gives context to theoretical argumentation. An additional reason is the lack of comparative systematic scholarship in the field, each expert looking inwards into his or her jurisdiction and not branching out to examine other jurisdictions. Not that there is lack of work describing the various aspects of legislative drafting in many national jurisdictions. What we lack is work that compares similar aspects of legislative drafting in different jurisdictions.

But on which aspects of legislative drafting should one concentrate and on what basis? Drafting in different jurisdictions is, of course, based on the national policy process and legislative process. Moreover, each jurisdiction has its own 'quirks' and idiosyncrasy. To add to the confusion, civil law and common law seem to have different starting points and even a different philosophy in their approach to legislative drafting.

So, how should we compare the different aspects of legislative drafting in different jurisdictions, especially when they come from the different families of legal systems? The obvious answer here is that all comparative work hinges on its comparative criteria. Without them there can be no meaningful comparison. But where do we find comparative criteria for legislative drafting? In the absence of a substantial body of comparative work – and, therefore, established avenues for comparison – it is difficult to test existing criteria. This means that there is a need to develop sets of comparative criteria, which will guide and aid future researchers in the complicated world (or even sub-discipline) of legislative drafting. This article attempts to introduce sets of comparative criteria in both civil and common law jurisdictions and in doing so to establish a new avenue for scholarly research and debate in comparative legislative drafting.

B Common Law and Civil Law in Legislative Drafting

When looking at legislative drafting in the two main families of legal systems, it becomes obvious that from the end of the 19th century onwards, the common law and more specifically the 'English style' of drafting legislation is the dominant one. There are three reasons for the dominance of the English style of legislative drafting. The first is the colonial legacy. As is often noted, about a third of the

2 H. Xanthaki, 'Legislative Drafting: A New Sub-Discipline of Law Is Born', *IALS Student Law Review*, Vol. 1, No. 1, 2013, p. 57.

3 The publication by Lupo and Scaffardi concentrates on transplantation of legislation and the role of national Parliaments. N. Lupo & L. Scaffardi (Eds.), *Comparative Law in Legislative Drafting: The Increasing Importance of Dialogue amongst Parliaments*, The Hague, Eleven International Publishing 2014.

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world's population lives in jurisdictions which are strongly influenced by common law. The colonies had English lawyers as drafters who, of course, were mainly familiar with the English drafting style and system. The story of Sir William Dale is quite revealing in the way he approached drafting in the various jurisdictions he worked for.[4] Even after decolonization, drafters continued to come to London to train in 'The Government Legal Advisers Course', which Sir William Dale set up in 1964 initially with the Foreign and Commonwealth Office and later with the Institute of Advanced Legal Studies. Although Sir William Dale himself believed that there were elements of legislative drafting which the civil law system offered that would be useful to common law drafters, he did, in fact, teach a legislative drafting course that was based on the English style of drafting. So, hundreds, if not thousands, of drafters in the Commonwealth and beyond have been taught or exposed to the English style of legislative drafting.

The second reason for the dominance of the English style of legislative drafting is that Britain was the first country – indeed the first colonial power – to organize centrally its legislative drafting system. As is well known, faced with a 'mosaic' of legislation, in 1869 the British government took the decision to change – if not radically transform – the way of drafting legislation and created the Parliamentary Counsel's Office with Henry Thring as its first head (first Parliamentary Counsel). This decision has influenced legislative drafting in practically all common law jurisdictions which have more or less copied or adapted the British model. For example, to this day many Commonwealth jurisdictions have their drafting office attached to the Attorney General's Office. From a practical point of view, this meant that drafting offices and drafting officers who followed the English style developed similar characteristics in their approach to legislative drafting.

The third reason is linked to the academic side of legislative drafting and the dominance of British and Commonwealth experts in the development of a body of bibliography in legislative drafting. In other words, most of the published work in legislative drafting comes from common law jurisdictions. The efforts of the Australian drafters should be noted and so should the establishment of the first LLM in the field at the Institute of Advanced Legal Studies in 2004.

Drafting in civil law jurisdictions has been slightly different in that the two main exponents of civil law, Germany and France, did not develop distinctive styles of drafting. For example, in France, drafters – not necessarily with a legal background – drafted legislation in ministries on the strength of their civil service position rather than their expertise in drafting legislation. This French approach intrigued Sir William Dale, who noted,

> The assumption is that if you are a man of education, and have received the training and the high qualifications necessary to pass into the top division of

4 *See* Sir William Dale, *Time Past Time Present: An Autobiography*, London, Butterworths Law 1994.

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> the civil service, you are able to express what you have to convey in clear and exact language.[5]

Perhaps the only common characteristic in many civil law jurisdictions is that the initial draft is then vetted by another body, *e.g.*, the Conseil d'Etat in France, the Law Council in Sweden but in most other jurisdictions it is the Ministry of Justice – although in Germany it is the Bundestag and Bundesrat Committees that scrutinizes the drafts.

So, the common law style of drafting seems to be the dominant style but what does this mean in practical terms and how can it help us develop comparative criteria? It is unfortunate that a lot of allegedly comparative work in law is, in reality, not comparative. For example, quite often at the end of a piece of work, examples from other common law jurisdictions would be added, *i.e.*, South Africa or Australia, and this would be regarded as comparative work. Even though there were no specific comparative criteria to be consistently tested in different jurisdictions, work would be taken to be comparative simply on the strength of the additional descriptions of similar areas of law in other common law jurisdictions. One might look at reports from the Law Commission for England and Wales before 2006 to realize that the practice of adding other common law jurisdictions for good measure and treating such work as comparative was quite common. Although better teaching, better understanding and better use of legal comparative methodological tools has made comparative work more rigorous in legislative drafting, true comparative work is emerging slowly.

In the next part of the article, I attempt to group some characteristics that I believe are common to civil law and common law jurisdictions. The two lists are certainly neither exhaustive nor definitive. However, I believe that they are a useful first attempt at creating a set of comparative criteria. I shall start with the common law jurisdictions.

C Characteristics of Legislative Drafting in Common Law Jurisdictions

Although clearly there are variations from one jurisdiction to another, I believe that there are seven broad characteristics that define drafting in common law jurisdictions.

I Centralization

There is one central drafting unit (and in federal jurisdictions, there is one such unit in each state and the federal government). *All* draft primary legislation and *all* final versions of primary legislation that has been through Parliament are written and edited by the same drafting unit (usually the Parliamentary Counsel's Office). The team that has been assigned the drafting of a normative act stays with the draft and follows the draft till the day of the vote in Parliament. The cen-

5 Sir William Dale, *Legislative Drafting: A New Approach. A Comparative Study of Methods in France, Germany, Sweden and the United Kingdom*, London, Butterworths 1977, p. 87.

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tral drafting unit is located either at the Office of the Attorney General or by the Ministry of Justice or, as is the case in the United Kingdom, by the Cabinet. Rarely is it the office located by Parliament, although it is often the case that some drafters from the central drafting office are seconded to a small unit by Parliament. Ever since 1869, there has been centralization in the common law legislative drafting system even though, as we shall see later, in recent years there are often two centres as opposed to one.

II Exclusivity

All first drafts have the same source: the central drafting unit, whether it is called Parliamentary Counsel's Office or something else. I should point out here that in modern legislative drafting one cannot overstate the importance of the first draft. It is the main document on which all subsequent revisions are made. Although theoretically it can be completely and totally revised, in practice the first draft sets the tone of that piece of legislation and undergoes some revisions but rarely comprehensive enough to make it a completely different document. So, knowing who wrote the first draft, and what the terms were (*i.e.*, what they were asked to draft) is very important.

There is a trend in recent years, especially in small jurisdictions, for draft legislation written by others, *e.g.*, donor organizations, to be sent to the central drafting unit. In the past, drafters, especially in large jurisdictions, might have unceremoniously thrown in the bin such 'external' drafts to make a point. But in this day and age, time pressures on drafters might make them more receptive to help. A final point to make is that in some jurisdictions, *e.g.*, the United Kingdom, even international agreements or European law is transposed into national law through the Parliamentary Counsel's Office, *i.e.*, new legislation is drafted rather than taking an international agreement or a European Regulation through Parliament by attaching the translated document to a short bill. While this is time consuming, it ensures that these agreements become an organic part of the corpus of legislation in the United Kingdom. It also reaffirms the fact that *all* primary legislation is written by the same office.

III The 'Instructions'

The ministry that requires the drafting of legislation sends *drafting instructions* to the central drafting unit (*e.g.*, the Parliamentary Counsel's Office). These drafting instructions are the essential starting point for the drafter, and their purpose is to give the drafter all the necessary information to write a draft piece of legislation. The instructions are an interesting feature of drafting in common law jurisdictions because they tend to be the feature that drafters most often complain about. Each jurisdiction has its own style of drafting instructions. In some jurisdictions they tend to be short, while in some others they are quite extensive. Some jurisdictions are quite open about how the instructions are structured,[6]

6 *See*, for example, the 'Checklist for Drafting Instructions' in the UK, <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62670/working-with-parliamentary-counsel-checklist.pdf>.

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while others are quite cryptic about them. The problem with instructions is that unless they contain the right information for the drafter they are unlikely to be effective. As the Queensland Government Legislation Handbook notes, "Both the time required to draft and the quality of the drafting depends on the quality of the drafting instructions and the communication skills of the instructing officer."[7] In some jurisdictions, instructions tend to be broad and Spartan. Anecdotal stories of one paragraph instructions or the dreaded instructions via a phone call are often confirmed by drafters in small jurisdictions where such problems are usually found. In contrast, large jurisdictions tend to have better drafting instructions mainly because of the recent trend for drafters to give advice or offer training sessions to ministerial instruction officers on how to write good drafting instructions.

IV The 'Solitary' Drafter

Despite the fact that there is usually a team assigned to a draft, it is usually written by a single drafter – although the final version is usually 'combed' by the team. As Thornton himself noted, "Although drafting is inevitably a solitary occupation in many respects, it should not be wholly so."[8] Indeed this point is also made by Webster: "In caricature, drafting is the epitome of the solitary occupation. The drafter receives instructions, nods sagely, departs for a secluded office, picks up a quill pen, performs the alchemy that transforms an idea into a legislative instrument and returns with a finished statute."[9] The 'solitary' drafter is one of the lesser known characteristics of drafting in common law jurisdictions but one that is often cherished by drafters.

V Very Long Training

Most jurisdictions are not very specific about the training legislative drafters receive, although some others are very specific:

> Training of counsel
>
> 1.14 LDD places high priority on the training and professional development of its counsel. The training can take many forms – structured training by participation in legislative drafting courses and internal workshops and seminars and on the job training by drafting under the guidance of senior experienced colleagues. In addition counsel are given opportunities to connect with legislative drafters in other jurisdictions and to keep abreast of drafting trends, by

7 *See The Queensland Legislation Handbook Governing Queensland*, The State of Queensland, Department of the Premier and Cabinet 2014, p. 16.

8 *See* G.C. Thornton, 'Reflections on a Career in Legislative Drafting', New Orleans, Louisiana, 20 June 2009, p. 5, available at: <www.law.tulane.edu/uploadedFiles/Institutes_and_Centers/International_Legislative_Drafting_Institute/Garth%20Reflections%20Full%20Text.pdf>.

9 R. Webster, 'Teaching Legislative Drafting: Reflections on the Commonwealth Secretariat Short Course', *in* A.Z. Borda (Ed.), *Legislative Drafting*, New York, Routledge 2011, p. 24.

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> attachments to overseas drafting offices and attending international legislative drafting conferences.[10]

The training of drafters, in common law jurisdictions, has been an interesting issue for the best part of the 20th century. Back in the 19th century, Henry Thring himself insisted on training because it was accepted that being a lawyer does not make one automatically an expert in legislative drafting. The preferred method has been on-the-job training. The Office of Parliamentary Counsel (OPC) in London used to claim that it took around 7-10 years for a parliamentary counsel to begin to write drafts on his or her own. The training period has now been reduced to around 5 years, but it is still quite a long one. As government becomes more complex, central drafting units have come to realize that on-the-job training is erratic, incomplete and, thus, not effective. There is also no guarantee of quality as the professional drafters are not necessarily trained in teaching. So, the most recent trend is training via specialized courses. We must distinguish here between the established courses and the 'we'll teach you legislative drafting in 3-days' events that tick the training boxes for HR departments but are not offering real training.

It is interesting to note that there are only two places where training at master's level is offered (quite understandably, though, as numbers tend to be low). The problem is that training drafters is very expensive. At the Institute of Advanced Legal Studies (IALS), we have calculated that the cost of training a drafter over a period of 5 years is around £20,000 while the cost of training a trainer exceeds £30,000. For the smaller jurisdictions, such amounts can be half the budget for the department, and so understandably they might opt for cheaper alternatives.

VI Separation of Policy from Drafting (Henry Thring's Original Approach)

Henry Thring's dictum "The central drafting office considers neither policy nor substance, just form" has plagued legislative drafters in common law jurisdictions. Is it really possible to draft without looking at the policy side?

> At first glance the purists' belief that a drafter should leave policy decisions entirely to others is attractive. Certainly a drafter has not been elected or appointed to make policy. However, if drafters deferred to elected and appointed officials on every policy issue, those persons would spend an inordinate amount of time making picayune decisions and drafters would do very little drafting.[11]

10 'How Legislation Is Made in Hong Kong: A Drafter's View of the Process', Law Drafting Division, Department of Justice 2012, p. 8.

11 J. Stark, *The Art of the Statute*, Colorado, Rothman and Co. 1996, p. 17.

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I have dealt with issue in the past,[12] and so I do not intend to repeat myself here. Suffice it to say that this dictum is now regarded as a 'myth'.[13] However, although this approach is changing it is still prevalent amongst drafters in larger jurisdictions where discussions continue to concentrate on the legislative process rather than the wider policy process, in an attempt to show lack of involvement with the policy side.

VII Lack of Accompanying Documents When Submitting Draft to Parliament

The lack of accompanying documents (*travaux préparatoires*) is one of the characteristics of drafting in the common law jurisdictions. In other words, the traditional method is to send Parliament the draft bill alone. However, in the last 15 years some form of accompanying document is attached to the bill. The Explanatory Statement or Explanatory Note is attached to the draft.[14] I do not refer here to the Explanatory Memorandum, which is a different document and has been around in common law jurisdictions for over 100-years.[15] Rather I refer to the practice of the Explanatory Note, which is a short, usually a one-pager, statement about the origin and content of the bill.

Now that we have looked at the main characteristics of legislative drafting in common law jurisdictions, let us turn our attention to the other family of legal systems.

D Legislative Drafting in Civil Law Jurisdictions

Drafting in civil law jurisdictions is quite distinct from drafting in common law jurisdictions. Unlike common law jurisdictions where the English style dominate, there is not one specific style that dominates but there are broad similarities that are an interesting juxtaposition to what we just saw in the common law jurisdictions.

I Multiple Sources of Drafting

There are drafting units in various places, usually by the Parliament and by the Cabinet of Ministers but very often also in individual ministries[16] or even at the office of the President. It is even possible to have competing drafts from different

12 C. Stefanou, 'Drafters, Drafting and the Policy Process', *in* C. Stefanou & H. Xanthaki (Eds.), *Drafting Legislation: A Modern Approach*, Ashgate, Aldershot 2008, pp. 321-333.

13 A myth that had negative repercussions for developing world countries. *See* A. Seidman, R.B. Seidman & N. Abeyesekere, *Legislative Drafting for Democratic Social Change*, The Hague, Kluwer Law International 2001, pp. 30-41.

14 Explanatory Notes for Acts in the United Kingdom were only introduced in 1999.

15 According to O'Neill the first explanatory memorandum appeared in Australia in 1905. *See* P. O'Neill, 'Was There an EM? Explanatory Memoranda and Explanatory Statements in the Commonwealth Parliament', Parliament of Australia, 12 September 2006, available at: <www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/law/explanmem/wasthereanEM>.

16 In Sweden, for example, legislation is drafted at the relevant ministry before it is submitted to Parliament. *See* 'The Swedish Law-Making Process', Factsheet, Ministry of Justice, June 2007.

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sources, even within government. Classic example of the latter was the proposal of the French president for the refurbishment of the Louvre Museum – competing with the proposal of the Ministry of Culture (allegedly there was even a third draft from the Office of the Prime Minister). Each drafting unit does not necessarily produce a complete draft because all drafts tend to be vetted by either the Ministry of Justice[17] or the drafting unit by Parliament but each of the ministries affected may have drafted parts (presumably those parts that affect it) of the draft bill. The drafting polyphony of civil law jurisdictions can be a blessing and a curse for the proposed bill.

II The Drafting Committee

By-passing the old joke that a camel is a horse designed by a committee, the drafting committee is one of the better known characteristics of legislative drafting in civil law jurisdictions. Drafting committees are set up for larger, complex pieces of legislation and require months, or occasionally years, to complete their work. There are variations in the composition of the Committee depending on the jurisdiction and the importance and complexity of the proposed bill. However, the Committee usually comprises civil servants from the relevant ministries, an academic (usually a professor of law in a relevant discipline), a judge, a representative from the Parliament and a 'political' representative of the party in power. Drafting committees are notoriously slow. However, because they gather together legal and technical experts, they produce very good reports and supporting documents even if their actual draft bills tend to be complicated documents that parliaments have to untangle.

III Limited or No Instructions

In the majority of civil law jurisdictions, there are no 'instructions' in the common law sense of legislative drafting instructions. The civil law practice in some jurisdictions is for the 'policy officers' to proceed and draft the legislation or at least a version of it (although this is an oversimplification of the process as such drafts are then vetted by specialist drafters, usually by the Ministry of Justice). Some jurisdictions, though, do have their version of instructions. In Finland, for example, the Ministry of Justice has a special page for what it refers to as "instructions for legislative drafting".[18] In reality, they are consultation guidelines, the legislative process guide (the very useful FINLEX),[19] bill-drafting instructions[20] (the Finnish legislative drafting manual) and Impact Assessment guidelines. None of these documents resembles the common law instructions but taken together they

17 In Germany, for example, the federal Ministry of Justice is responsible for the scrutiny of legislation. *See* Section 46, Section 42 (4), Section 62 (2), first sentence, and Section 72 (3) of the Joint Rules of Procedure of the Federal Ministries (Gemeinsame Geschäftsordnung der Bundesministerien, GGO) which can be accessed in English and German at <www.bmi.bund.de>.

18 *See* <http://oikeusministerio.fi/en/index/basicprovisions/legislation/parempisaantely/saadosvalmisteluohjeet.html>.

19 *See* <http://lainvalmistelu.finlex.fi/>.

20 *See* <http://oikeusministerio.fi/fi/index/julkaisut/julkaisuarkisto/20063billdraftinginstructions/Files/OMJU_2006_3_Bill_Drafting_Instructions.pdf>.

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form a type of 'general instructions on drafting' that are useful, especially to drafters without a legal background. In most civil law jurisdictions, legislative drafting 'instructions' refers to legislative drafting manuals or guides or indeed their law on the drafting of legislation.

IV Unknown Origin of the First Draft

While in common law jurisdictions drafters are supposed to start with a blank page (an exaggeration, of course, as most drafters in most jurisdictions routinely revise existing legislation rather than start afresh), in civil law jurisdictions the drafting committee or the drafter at the ministry begins its work on a draft that the minister has forwarded. The origin or authorship of this first draft is often unknown. Sometimes the author is a law firm or an academic or even a donor organization. Sometimes it is translated from another jurisdiction, other times it is done by drafters who know the jurisdiction and still other times it is produced externally. The problem with drafts that have not been drafted by national drafters is that they contribute to the so-called mosaic[21] of legislation where each law looks different from the others – an issue that was at the epicentre of the 1869 reform in Britain and the creation of a central drafting unit. More than merely nor presenting an organic continuity to the domestic body of legislation, the mosaic of laws made it difficult for the courts to interpret legislation. The usual practice in civil law jurisdictions of getting translated versions of international agreements through Parliament to give them legal effect exacerbates the mosaic of legislation.

The use of drafts that originate outside government or the civil service is particularly interesting because, from the drafters' point of view, it requires skills in editing rather than drafting legislation, a skill that drafters tend to acquire on the job. Can the editing of legislation be considered 'drafting'? I think it can, even though it requires slightly different skills. In fact, modern legislative drafting courses do take this into consideration in their training methods.

V Short Training

Short training is a sore point for many drafters in civil law jurisdictions. There is generally an assumption that if you have a law degree you can draft or edit legislation. The training provided is episodic and often of dubious quality (the well-known two-day, weekend courses). A number of jurisdictions offer lectures on legislative drafting in their Civil Service Academies but such lectures tend to focus on legislative procedure rather than drafting. Admittedly, this is an issue that civil law jurisdictions are trying to address.[22] Most civil law jurisdictions have either a law on laws (*i.e.*, a law on how laws should be drafted) or a legislative

21 The word mosaic here used in the sense of pictures assembled by small and often heterogeneous pieces of materials.

22 A good example is the Netherlands, where The Legislative Review Committee (Grosheide-committee, 2000) noted that legislative drafters did not receive uniform and specific training. One year later, the Academy for Legislation (Academie voor Wetgeving) was created as a training school for legislative drafters.

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drafting manual or both. The efforts of the EU should also be noted here. As was noted by William Robinson in 2012,

> The Union institutions provide little training in legislative drafting for their staff. The Parliament and the Council have now set up a joint course for their lawyer-linguists, to foster a common drafting culture. That is a good start. But since so many other members of the institutions' staff intervene in the Union drafting process, they should all be required to follow training covering every aspect of legislation...[23]

In recent years there have been efforts by the EU institutions to train their staff, and, of course, the European Commission has its legislative drafting manual.[24]

The issue of training is quite important for drafters in civil law jurisdictions, especially those in ministries, because they are invariably non-lawyers. It is not uncommon to see civil servants who have degrees in veterinary medicine and work for the Ministry of Health draft all types of legislation for their Ministry. For them, training is essential because their job is quite different from their academic skills and qualifications.

VI Linkage of Drafting with Policy Making

In contrast with Henry Thring's original approach, in civil law jurisdictions, it is accepted that those who draft legislation will inevitably interpret the policy side. In fact, very rarely is this regarded as a problem; rather it is seen as a basic requirement for the job. It is interesting to note here that on many occasions the civil servants who were part of the drafting committee will then be assigned with the implementation of this legislation exactly because they are seen as the ones with a better understanding of it. For example, it was common at the turn of the century for the civil servants who were part of the drafting committee for money laundering legislation to be transferred to the relevant agency or authority that implemented the law. Such a move would be unthinkable in common law jurisdictions, where it is exceptionally rare for drafters to be asked to implement.

VII Reports Are Attached to the Draft Submitted to Parliament

In civil law jurisdictions, the volume of reports attached to the draft bill can be frightening. It is not unknown for the *travaux préparatoires or* accompanying documents of a substantial piece of primary legislation to run into thousands of pages. Thus, preliminary reports, experts' reports, reports from meetings with stakeholders and all types of necessary evidence of pre-legislative consultation are annexed to the draft. These documents play two very important roles: Firstly, they are there to confirm and prove that in the process of drafting this particular

23 W. Robinson, 'Drafting European Union Legislation', Directorate General for Internal Policies, European Parliament, Note PE 462.442, 2012, p. 26.

24 *See* the well-known 'Interinstitutional Style Guide' at <http://publications.europa.eu/code/en/en-000100.htm> also *see* 'Legislative Drafting a Commission Manual', for internal use only at <http://ec.europa.eu/smart-regulation/better_regulation/documents/legis_draft_comm_en.pdf>.

Table 1 Characteristics of Common Law vs. Civil Law Jurisdictions in Legislative Drafting

Common Law	Civil Law
Centralization	Multiple sources of drafting (decentralization)
Exclusivity of first draft	Unknown origin of the first draft
Instructions	Limited or no instructions
Solitary drafter	Drafting committee
Long training	Short training
Separation of drafting from policy	Linkage of drafting with policy process
Lack of accompanying documents	Many reports/documents attached

piece of legislation all legal requirements have been met. Secondly, they are there to assist with the interpretation of legislation by the courts and have legal value. Purely from an academic point of view, very often it is in the accompanying documents that the underlying reasons for legislating can be found, and experienced academic will turn their attention to such documents first.

E Have the Two Systems Remained Apart or Is There Cross-Fertilization?

While the debate about the convergence or non-convergence between common law and civil law seems to be going strong, in the field of legislative drafting there seems to be a general sense that the two families of legal systems are indeed converging.[25] Or to put it in a milder form, although the two systems retain their basic characteristics, in recent years there is some evidence of influence from each other.

The general view about legal drafting in common law and civil law jurisdictions is that common law lawyers tend to produce very long and detailed contracts, in an attempt to include all possible eventualities; in contrast, civil law lawyers tend to be more concise because they rely on legislation that is usually contained in codes (*e.g.*, civil or commercial code). It is unfortunate that this cliché was often applied to legislative drafting. As Xanthaki noted, we had the cliché of precision and accuracy for common law and simplicity and concision for civil law.[26] Clearly this is no longer the case: "At least in Europe there is a noted convergence between common law and civil law legislative drafting extending from

25 *See* H. Xanthaki, 'Editorial: Burying the Hatchet between Common Law and Civil Law Drafting Styles in Europe', *Legisprudence*, Vol. 6, 2012, p. 133.

26 H. Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation*, London, Bloomsbury Publishing 2014, p. 201. Also *see* J. Stark, 'Should the Main Goal of Statutory Drafting Be Accuracy or Clarity?', *Statute Law Review*, Vol. 14, 1994, p. 207; Dale 1977; G.C. Moss, 'International Contracts between Common Law and Civil Law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith', *Global Jurist*, Vol. 7, No. 1 (Advances), 2007, Article 3, available at: <http://folk.uio.no/giudittm/Non-state%20Law_Good%20Faith.pdf>.

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conventional approaches to actual drafting conventions."[27] So, how have the two systems 'cross-fertilized' each other?

Firstly, increasingly common law jurisdictions tend to have a second drafting unit. More commonly, it is by Parliament but it is also possible to find trained drafters in individual ministries. Having more than one unit in drafting is a feature of the civil law tradition, but the need for a second unit by Parliament is quite prevailing, especially in developing countries.[28] The existence of drafters in ministries is also quite prevalent in dual jurisdictions, *e.g.*, Cyprus, where "technical experts" – as they would be called in common law jurisdictions – are entrusted with first drafts of proposed bills, even if these proposed bills are not within their area of technical expertise.

Secondly, the first draft now often 'appears' at the Attorney General's Office and, therefore, *editing* is often the main form of drafting for the 'drafting unit'. It is difficult to ascribe a 'good' or 'bad' label to this development. Knowing the origin of the first draft is important. Drafts originating from the main drafting unit will be unlikely to have sections irrelevant to the jurisdiction, *e.g.*, the anecdotal story of the translated law in Cyprus that made reference to the Supreme Court of Ireland. They will also have taken into consideration existing realities in the jurisdiction. As one expert noted,

> For example, the political mood in a country may for the time being favour 'deregulation', such as reducing or avoiding the statutory prescription of forms. As long as that mood prevails, legislative counsel will be aware of it, and is likely to invite a client department to consider proceeding accordingly.[29]

Yet, time pressures and lack of expertise often force governments to seek outside help. This is not necessarily a bad thing nor does it automatically mean that a draft produce by outsiders will be a bad one. For small jurisdictions, external drafts are often the norm simply because they do not have enough drafters or drafters experienced enough to produce certain types of legislation.[30] For example, when e-commerce took off about 15 years ago many jurisdictions simply did not have the expertise to draft such complicate legislation, and so they 'borrowed' or asked other experienced drafters to do so for them. I do not think that external drafts under these circumstances pose a problem. What I think is becoming a serious issue is the fact that ministers often prefer their drafts to come from external sources either because they do not trust the ability of local drafters or because they fear that their plans will 'leak' to the press.

27 *See* Xanthaki 2014, p. 211.

28 Uganda was one the first countries to start a second drafting unit by the Parliament. *See* P.P. Birobonwoha, 'Efficiency of the Legislative Process in Uganda', *European Journal of Law Reform*, Vol. 7, No. 1-2, 2005, pp. 135-164.

29 D. Hull, 'The Role of Legislative Counsel: Wordsmith or Counsel?', *The Loophole*, August 2008, p. 37.

30 L. Dushimimana, 'Aspects of Legislative Drafting: Some African Realities', *The Loophole*, April 2012, p. 46.

From a practical point of view, as mentioned already, it is very rare that drafters will work on a draft for legislation that did not exist before. In the United Kingdom, for example, the last time this was done was in 1998-1999 when the then First Parliamentary Counsel Edward Caldwell drafted the Human Rights Act. Drafters revise existing legislation that they rarely start with a blank slate (*tabula rasa*).

Thirdly, it is the training in legislative drafting. At the turn of the 21st century, there were barely three established training courses for legislative drafting worldwide. Today training in legislative drafting seems to have become a lucrative business attracting the attention of law firms and private consultants. Some of it is of dubious quality, but the very fact that training is now deemed necessary, especially in civil law jurisdictions, is huge progress. Organizations such as the European Commission now have 'internal' training – although it is still only offered to functionaries rather than national officials. Longer and better training is clearly the result of the influence of common law drafters on their civil law counterparts.

Fourthly, policy-making concerns are slowly eroding Henry Thring's dictum in common law jurisdictions, and there is now a clear link between legislative drafting and the policy process in both common and civil law jurisdictions. Time and time again, professional drafters in common law jurisdictions note that policy involvement is inevitable. In the past, such views would never be expressed in public. When Sir George Engle gave a lecture at the IALS in 2001, he recalled how he would only contact ministries in writing lest he be deemed to involve himself on the policy side. In contrast, today's legislative drafters will keep in contact with the ministries exactly because they want to make sure that the policy aspirations are translated correctly into legislation. The civil law tradition here seems to have had a major influence on the common law approach about the role of drafters. In Spain, for example, the Constitutional Court noted that "the aim of legislative drafting is to detect the problems posed by the functioning of the legal system and to formulate the guidelines for their solution, contributing thereby to the certainty that the rule of law will prevail."[31] Such a view of the role of drafters and drafting would indeed be unthinkable in common law jurisdictions.

Finally, it is on the issue of legislative drafting manuals or guides. The common law tradition from England is that there is no official manual – although the OPC has internal documents that are in essence manuals. In contrast, in civil law jurisdictions the tendency has always been to have legislative drafting manuals or guides, and in many jurisdictions these manuals were turned into laws, *i.e.*, a law on the drafting of legislation. Increasingly common law jurisdictions are adopting

31 M. Martín-Casals, 'Lights and Shadows in Spanish Legislative Drafting and Planning', *federalisti.it*, No. 4, 13 December 2006, p. 5, available at: <www.federalismi.it/document/12122006105615.pdf>.

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this civil law tradition to the point that now the United Kingdom seems to be the only large common law jurisdiction without an official legislative drafting guide.[32]

F Conclusion

This article aimed at establishing, for the first time, sets of criteria for comparative legislative drafting. The two sets of criteria examined are certainly useful for comparative study across the two families of legal systems: common law and civil law. They are also useful – each list for each legal system on its own – for examining the aspects of legislative drafting it identifies.

Before discussing what has been learnt from this exercise, it is important to discuss the criteria themselves. As already mentioned, the list is neither exhaustive nor definitive. A few words here about the fact that there is not a criterion that addresses the so-called technical part of drafting (*i.e.*, no attempt was made to look at things like words, sentences, gender neutral drafting etc.). This was done intentionally because to date there is no research that identifies such aspects of drafting to be predominant (or even different) in specific families of legal systems. In other words, there is no evidence that the technical side is influenced by the legal system. If in the future research identifies that the technical side of drafting is indeed influenced by its legal system, then inevitably the lists presented in this article will have to be revised.

So, what have we learnt from the examination of the comparative criteria? Comparative research, of course, does identify similarities and differences, and the most obvious immediate conclusion is that the criteria on each list seem to be the exact opposite of the other. For example, while in common law jurisdictions there are instructions, in civil law jurisdictions there are limited or no instructions. Similarly, in common law jurisdictions legislative drafting is centralized, while in civil law jurisdictions it is decentralized. So, the lists do appear to convey the impression that all the clichés about the difference between common law and civil law are confirmed. Yet, as already noted, on closer inspection there is convergence or cross-fertilization. The reasons for the convergence are twofold. Firstly, learning has been an important element for the convergence. The digital revolution has made it very easy for legislative drafters to look into legislative drafting as it is practiced in other jurisdictions and even other legal systems, not necessarily as, so to speak, armchair researchers using the Internet search engines but as experts who now have access to documents from different jurisdictions. Secondly, necessity has dictated steps that in the past were probably deemed as unnecessary. For example, the recognized and understandable need to have a second drafting unit by Parliament led some common law jurisdictions to establish such units and in doing so departed from the centralization of legislative drafting predominant in their legal system. In many respects, this indicates that differences

32 Having said this, the official website of the OPC in London now contains a webpage with guides to different aspects of legislative drafting. For example, there is a guide to amending bills, money bills etc. *See* <https://www.gov.uk/government/collections/the-office-of-the-parliamentary-counsel-guidance>.

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between common law and civil law drafting might well be procedural/policy rather than technical – and I use the word(s) 'procedural/policy' for lack of a better word or phrase to indicate that the differences might well be epidermic.[33] As systems continue to grow together, practical considerations might result in more similarities than differences.

Finally, I end with a few brief words about comparative research in legislative drafting. In fear of repeating myself, I will once again stress the need to adhere by the basic principles of comparative research. At the epicentre of all comparative research, we have the development and testing of comparative criteria. Without them there is no true comparative work. Adding examples from jurisdictions deemed similar is exciting and informative, but it is not comparative scholarship. As more experts are now involved in legislative drafting scholarship and as drafting networks make research in legislative drafting available to drafters in practically all jurisdictions, comparative research will become more common.

33 On technical and policy matters, *see* J.M. Keyes & D. Dewhurst, 'Shifting Boundaries between Policy and Technical Matters in Legislative Drafting', *The Loophole*, January 2016, pp. 23-39.

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