Recent trends in legislation and legisprudence in Europe: how can scholarship help to improve regulatory quality?

by Ulrich Karpen

INTRODUCTION

Laws of comprehensible quantity and good quality, precise and transparent statutes are essential elements of rule of law. Legislation in all European countries and the European Union, however, fails to reach these goals. The number of laws, as enacted, and the quantity of the body of law is constantly increasing. Undoubtedly, excessive legislation is a criterion of quality deficits, for laws which one cannot know or understand cannot be effectively implemented. But quality standards fail to be met in many more respects, namely in a formal sense. The law should be as simple as possible and formulated in a plain language, unless the addressees are specialists (eg in technology). The law also should obey a coherent structure; style, wording, the use of references, general clauses etc must be properly used. The reality is that legislation often neglects to follow these rules. This is a standing complaint in all European countries; legislation is neither transparent nor understandable and close to the citizens. Instead, it is often superfluous and irritating.

Legisprudence is scholarship in legislation, and in the form of research, publication of results and teaching in legislation is called upon to improve this deplorable situation. Since the law is the primary and central instrument of government in the democratic and rule-of-law state, legisprudence contributes to "better legislation" as an essential element of better regulation and "better government".

The following remarks start from some apparent trends in legislation today in a comparative, rather than national, perspective. They will then proceed to look at chances and limits of scholarship in legislation.

SOME TRENDS IN LEGISLATION AND LEGISPRUDENCE

This article sheds light on three trends in legislation, which can be observed in all states of the constitutional type: (1) the quantity of legislative output, (2) the belief in the rationalisation of legislation and its progress, and finally (3) the monitoring of legislation by regulatory impact assessment (RIA), namely by judicial review.

Legislation

Much has been written on the quality of modern legislation. The reasons for this may be the increase of public tasks in the modern welfare and intervention state, technology and the constitutional understanding, and that abridgement of individual rights requires a Parliamentary Act. Supranational activism and globalisation add a huge bulk of written law.

Rationalisation

Any law is of course a political decision of Parliament. In a constitutional state it must be based however on legal and "managerial" rationality. The most important criterion of quality of law is conformity with the body of law of the country. The statute has to observe the organic constitution and international law as well as the dogmatic constitution (structural principles like rule of law or the federal state and the civil rights section of the constitution) and to realise as much as possible the value-system of the supreme law of the country.

"Managerial rationality" covers the 3 Es: efficacy, effectiveness and efficiency. A law has a high level of efficacy (and therefore qualifies on this count) if – when implemented – it comes closest to the legislator's intent. Second, a law is effective if it is implemented, executed, accepted and obeyed by as many addressees as possible. Third, efficiency –is economic rationality, a positive cost-result (input/output) relation. All

three principles are facets of proportionality, which is a core element of rule of law. To be effective law requires stability, limited quantity and transparency. The call for performance rationality and managerial quality may have several reasons. It is a general economisation of thinking which affects social life and governance. Partly, this is induced by doubts on the capacity of traditional instruments to manage new problems ("governability"), namely under the pressure of international competition. Furthermore, it might be the acceleration of changes in the modern world which makes it more difficult for laws to produce long-lasting regulations which guarantee equality.

Monitoring and juridification of legislation

Control is an important instrument to increase the rationality of legislation. Regulatory impact assessment (RIA) should be used for improving legality and economic rationality in evidence-based empirical review *ex ante* and *ex post*. Parliament and government as initiators and decision-making institutions are the first censors which monitor the quality of legislation, before enacting it. Also, it is Parliament's responsibility to amend failed laws. In the process of RIA, Parliament is supported by hearings, inquiries and the scientific service of the house. In some countries, Parliament and government enjoy the support of special independent norm-control bodies. Finally, the courts are the "watchdogs" of good legislation: be it that ordinary courts measure laws against the constitution (*Marbury v Madison* 5 U.S. 137 (1803)), including the proportionality as rationality principle, or constitutional courts which are exclusively entitled to declare laws void if they contradict the constitution.

HOW CAN SCHOLARSHIP HELP TO IMPROVE REGULATORY QUALITY?

As we have seen, three trends of legislation can currently be identified: legalisation of governance, rationalisation of drafting and monitoring, and juridification of implementation. In all three fields major problems occur in the course of accelerated, inter-connected and differentiated work. Scholarship is called upon to assist in adapting legislation to new conditions and to develop instruments to improve the quality and effective implementation of legislation. We may understand "scholarship" as research, publication and teaching.

Research

Legisprudence is the study of theory and practice of legislation. it looks into the whole regulation cycle, from impulse to amendment. It does so by:

- analysing norms;
- research and practice of organisations;
- describing methods for policies and adequate goal-setting for pieces of law ;
- choice of effective and efficient means of regulation;
- assisting regulation in a precise, clear, understandable form and language.

Legisprudence as scholarship looks at all facets of legislation. It is an interdisciplinary theoretical and practical science. Finally, legisprudence deals with handicraft or even arts and – at its best – requires intuition, talent and gift:

> *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among them are life, liberty and the pursuit of happiness*.

GK Chesterton held this text of the United States Declaration of Independence (4 July 1776) to be a piece of great literature (Gilbert Keith Chesterton, *What I saw in America* (New York, Dodd, Mead & Company, 1922/7). Comparative law is an essential element of legisprudence, in particular in search of methods for better regulation. Comparative law as well as supra and international legislation developed quality standards for procedure, goals and contents, as well as textual forms of legislation. Some of these standards may be traced from substantive and material as well as procedural principles of due process (L Tribe, American Constitutional Law (2nd ed, New York, Foundation Press, 1988), 1988, 679, 793, 947, 1333, 1672).

Scholarship can show – namely in international and comparative perspective – how continental code law and anglo-American case law differ in coping with the afore-mentioned problem of exuberant legislation. Scholarship should demonstrate, how European Union law a code law influenced case law systems. Legislative scholarship should carefully differentiate where a Parliamentary law is required – by constitution or purely for political reasons – and where lower levels of regulation would suffice; such as delegated law, administrative regulation and arrangements, statutes of autonomous bodies, and contracts. Legisprudence can show that – according to general principles of law and state (namely rule of law) – a law as passed by Parliament may be indispensable only when implementing the law may restrict human rights. Furthermore, e-legislation (moreover e-government) requires permanent study.

Publication

The results of studies in legislation are published in many ways – specialised papers, textbooks, and handbooks, guidelines for practical use. Since the addressees of the latter are drafters

in ministries, Parliamentary staff, and lobby organisations, guidelines should be as practical as possible. Legislation today is predominantly a national matter. However, supranational matters, like EU-law, and global ones, eg in the international economy (WTO) and environmental law, increasingly have to be implemented. Transition from harmonisation of law in content and steps to unification seem to be inevitable. Law-drafting guidelines for (good) legislation and manuals are still oriented to national legislation, although there is a great deal of common ground between them in what constitutes "good legislation". It is, however, necessary and possible to develop principles and standards of the democratic rule-of-law state which determine procedures and contents of legislation and laws. Moreover, it is remarkable that – notwithstanding different styles of legislation – legal solutions to problems are pretty much the same, or at least similar.

Guidelines and manuals for better legislation should be based on these principles and standards. They cannot be "cookbooks" for better regulation, but they collect the results of "good practice" in many countries, a sample of "trials and errors". In the meantime, we have a good handful of excellent treatises and guidelines in this perspective (for the former see Georg Müller/Felix Uhlmann, *Elemente einer Rechtssetzungslehre* (3rd ed, Zürich, Schulthess, 2013); Helen Xanthaki, *Drafting Legislation, Art and Technology of Rules for Regulation* (Oxford, Hart, 2014); *Ines Härtel, Handbuch Europäische Rechtsetzung* (Berlin, Springer, 2006); Ulrich Karpen, *Gesetzgebungslehre-neu evaluiert-Legistics-freshly evaluated* (2nd ed, Baden-Baden, Nomos,2008); and for the latter see *Gesetzgebungsleitfaden* (3rd ed, Bern, Bundesamt für Justiz, 2007); Bundesministerium der Justiz, *Handbuch der Rechtsförmlichkeit* (3rd ed, Cologne, Bundesanzeiger-Verlag, 2008); Catherine Bergeal, *Rediger un Texte Normatif* (6th ed, Paris, Berger-Levrault, 2008).

Manuals can help to reduce the quantity of law, by dealing with the arts to write codes instead of detailed and fragmented statutes, and to propose comprehensive amendments instead of piecemeal-engineering. The main purpose is, however, to improve the quality in structure, wording, technical instruments, like references. Guidelines should strive at gaining at a uniform wording of law, as far as a good form of legislation is concerned.

The learning legislator

Many countries which suffer from the quantity and quality deficiencies of legislation, as referred to previously, introduce projects to improve the organisation and procedure of law drafting and create opportunities for preparing technically and conceptually sound drafts through expert input and appropriate consultative tools and methods. In particular, they sensitise the legislator in ministries and Parliament, as well as other actors who are directly or indirectly involved in the law-making process at various stages and in various forms of legislative process. They also offer learning opportunities to staff in the legislative machinery. Teaching legislation at all stages and facets of the process is an important contribution of scholarship to better law-making.

Of course national legal systems are different. General principles and techniques for drafting, precise, concise and clear legislation can, however, be taught and learned – and adapted to national legislative procedures. The question for designing courses and writing curricula are who are the participants, what is taught, and which are the proper methods to teach.

The implementation strategy of a proposed programme for teaching legislation combines the technical and substantive aspects of drafting as well as elements of the legislative process in a series of interrelated seminars and workshops directed at three different target groups:

- key legislative actors (heads of executive departments, those who initiate, and those appointed to act on their behalf);
- support staff in Parliament and the executive branch;
- a core group of stakeholders, who take interest and influence government policy (political parties, unions, NGOs, lawyers, chambers of commerce etc).

Key government and non-governmental actors generally (for shortage of time reasons) will not be involved in a course dealing with language and technical aspects of drafting. But they need to understand elements of better government such as RIA, financing and controlling. Support staff in all institutions (ie the people who finally pull the cart) need to command the whole range of steps and contents of a law – from impulse to amendment, and from structure, policy-setting, and techniques to implementation.

The curriculum should be tailored so as to be completed after one year with a "Master of Legislation" (or "Master of Legisprudence") qualification, and with possibly a doctoral programme to follow. The required basis for study should be a first degree in subjects such as law, social science or political science. The content of the curriculum should be very basic, including topics such "relationship between law and policy", "sources of law", "constitutional provisions for the legislative process" and then "composition, style and language", "legal instruments of implementation"; "RIA", "sunset provisions", "amendments", "budget laws", and "delegated law and other substitute regulations".

Training must rely heavily on practical exercises. For example, as a starting exercise, each participant may be asked to observe one concrete action or prohibition to improve the

quality of his or her environment and to draft some simple provisions to make that happen. Individual drafts would be discussed in groups to connect policy demands and law, to explore different options for implementing the same policy, and to examine the implication of each option. This type of training and learning "on the job" is time-consuming but necessary if participants want to internalise relatively complex concepts of policy-making and how to put the plan into action.

Such courses, with comparable curricula, should be offered in national states and of course on the EU level.

AND FINALLY…

As for the future of legislation and legisprudence, some trends will be lasting and even become more intense:

- The quantity of laws is likely to become reinforced.
- The progress of harmonisation and unification of legal procedures, content and form will proceed.
- Legislation is a matter for Parliament. It is, and should be, the centre of power in a democratic state.
- Nevertheless, coordinated, agreed national drafts as well as supranational legislation will lower the barriers in between national states. States are already – and will become even more so – "open states" with converging legislation.
- Juridification of legislation will proceed. The judge is part of the legislative cycle. The courts measure procedures, targets, instruments and forms of legislation against the constitution and may be entitled to declare them void.

Finally, scholarship and legisprudence should be aware of its limitations. Legislation should be as good, precise, effective, efficient and as rational as possible, but it will never be mathematics. As John Dickinson said on 13 August 1787 in the Constitutional Assembly of the United States of America in Philadelphia: "The life of the Law has not been logic. It has been experience" ("Century of Lawmaking for a New Nation: US Congressional Documents and Debates, 1774-1875", *Farrand's Records*, vol 2 (New Haven, Yale University Press, 1911) 278.

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