

THE ROLE OF LEGISLATIVE DRAFTERS IN DETERMINING THE CONTENT OF NORMS

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1 THE LEGISLATIVE DRAFTER SHOULD ADDRESS THE NORM'S CONTENT, AS WELL AS ITS FORM

It is generally thought that legislative drafting should be concerned only with matters of writing in the strict sense: grammar, style, vocabulary, correctness of language and textual structure.

Certainly, the legislative drafter must be concerned with these matters and ensure that enactments are flawless with regard to form. But to my mind, drafters should also attend to the content of the rule. By "content of the rule," I mean the components of what is commonly referred to as "the legislative intent" – the conduct permitted, imposed or prohibited by the rule; the institution created by the statute; the contract organised by the norm; the procedure put in place for the holding of a proceeding; and so on, together with, of course, the sanction prescribed for a breach of the rule. In other words, the legislative drafter should be responsible for not only the norm's form but also its substance.

2 GOVERNMENT BY TECHNOCRATS?

Obviously, such a proposition conflicts a priori with the notion of legislative authority in the broad sense of the term and raises the question: Is the substance of a rule not the inalienable domain of that authority's sovereignty? If the answer is yes, the formulation of a rule's substance cannot be given over to technicians, however competent they may be.

Far be it from me to urge that law making be entrusted to technocrats. Whether the issue is one of form or, a fortiori, of substance, a legislative

drafter, in my view, can never be anything but the advisor to the normative authority. The final decision, in all respects, must always rest with the legislature.

Nevertheless, I would argue that any authority that creates written rules can only benefit from the contribution of legislative drafting technique, viewed as the methodology of creating written law, in determining the content of a rule.

In other words, the drafting of written law leaves room for a science of legislative drafting that is not limited to matters of form alone but informs the content of the norm while deferring completely to the inalienable prerogatives of the legislature.

3 DETERMINING THE CONTENT OF A NORM: A TWO-FOLD TYPOLOGY OF LEGISLATIVE DRAFTING TECHNIQUES

If a legislature decided to work with legislative drafters specially trained in the drafting of written law, what might it expect of them in terms of shaping the content of a rule?

We can answer this question, first, by placing ourselves in the context of a legislative drafting science that some would characterise as utopian – a science or, more modestly, an analytical art that every drafter should strive to practise, though without despairing at the inability to reach this imaginary place, or *ou topos*.

Secondly, we can return to the firm ground of the drafting of the written law as it is concretely realisable and presents the fully achievable means of determining the content of the rule.

I

4 DETERMINING THE CONTENT OF A STATUTE IMPLIES DETERMINING THE OBJECTIVES PURSUED BY THE LEGISLATURE

The content of any statute – an instrument for realising legislative intent – is more or less narrowly a function of the objectives pursued by the legislature. These objectives may be distinguished at several levels.

5 THE GENERAL OBJECTIVE FOR WHICH THE NORM IS ADOPTED

There is, first and foremost, an objective common to all norms: an intent common to every normative authority and, to some degree although only generally, inherent in the very fact of adopting a norm.

Generally, the legislature – whatever the content of the norm it adopts – wants it to be effective and efficient, "effective" meaning that the norm produces effects, that it does not become a dead letter, and "efficient" in the sense that the norm should produce the desired effects, should not have perverse effects and should so guide conduct as to achieve the desired objective.

All of the drafter's work – in terms, of course, of not only the content of the norm, which I am discussing now, but also its drafting or the legal process of enacting the norm – should therefore be carried out with a view to advising the legislature on the drafting of a statute that is efficient.

At the risk of repetition, it seems proper to note here again that it is up to the legislature to decide what effects it wants the rule to produce, and that the legislative drafter, as such, has no say in this matter. For example, there are some instances of a legislature adopting a norm for no other reason than to give citizens the sense that it is looking out for them or effectively performing its functions. In other instances – this motive sometimes applies to the drafting of international treaties or to sensitive national issues – the authors of the norm wish to give themselves or those observing them the impression that they have reached a consensus. The

drafter must naturally bow to this political posturing. But this compliance should not prevent drafters from drawing the legislature's attention, if asked, to the probable consequences of this approach to law making. It is even their duty to do so.

If we consider only the most common cases, the legislature contemplates adopting rules in order to achieve some concrete objective. What, then, might be the drafter's role in defining the content of the rule, assuming that the legislature wants it to be efficient?

6 THE SPECIFIC OBJECTIVE OF THE PROPOSED NORM

The drafter should, above all else, obtain from the legislature a clear view of its objective. Right at the outset, the drafter may well encounter the difficulty of distinguishing the means from the ends. The lawmaker may tell him, for example, that it wants to regulate access to this or that profession. In saying this, the lawmaker is directly addressing means rather than ends. It must be forced, through relentless questioning, to focus on the objectives: "To what end? Why do you want to regulate access to this profession?" It will be necessary to reconstruct with the lawmaker the logical sequence of its objectives, from the most general and the most abstract policies to the most concrete. The content of the rule, which concerns the means of attaining these objectives, will vary accordingly. To continue with this example, access to a profession will be organised in different ways depending on whether the pursued aim is to enhance the services the profession renders to the public, improve the conditions in which it is practised or protect the position of those who practise it.

Once the legislature's objective has been defined, the drafter must demonstrate the logical connections between it and the other objectives of either the legislature or the lawmakers to which it is subordinated: Are they compatible, or, on the contrary, does the new objective conflict with others? The reasoning here is that it is impossible to determine the content of the rule until the legislature has made some trade-off between potentially conflicting purposes.

7 THE RELATIVE POWERLESSNESS OF THE LAWMAKER AND THE USEFULNESS OF ENACTING NEW LEGISLATION

Once the lawmaker's objective is clearly defined, it would seem one could begin to examine the means of achieving it, which will constitute the content of the rule.

To my mind, some thought should first be given as to whether it is actually possible to achieve the objective as defined. Every legislature should have a precise awareness of the limits of its power or, if you wish, the extent of its powerlessness. I have been told that in Communist China the legislature has made it mandatory for spouses to love one another. I do not intend to dwell right now on such impossibilities. What I do intend to do is consider the various constraints – psychological, economic, sociological and political – that might prevent the legislature from achieving, through the statute, its desired objective.

I will no doubt be told that, in some cases, it is preferable to adopt the established objective, even with the knowledge that it cannot be achieved or at least realised fully. For example, when, a few years ago, the objectives of Europe 93 were established, we knew that they could not be fully realised; nevertheless, enunciating them helped, to some degree, to relaunch the movement for European construction. However, the dangers inherent in this practice should be drawn to the attention of all legislatures; I will come back to this later.

Secondly, the question should be asked beforehand whether a new enactment is required in order to achieve the defined objective. Is the objective already pursued through some other enactment? If so, why did that enactment not have the anticipated effect? If not, is legislation needed in order to achieve it? Is there an easier, and perhaps more efficient, and less costly route to achieve this end than legislation?

8 REVIEW OF POSSIBLE MEANS OF ACHIEVING THE ESTABLISHED OBJECTIVE

If a statute seems to be the only way to achieve the desired result, the next step is to analyse the means to this end: What conduct will be imposed, prohibited or rewarded? What institution will be established?

What procedure will be set up? And so on. And above all, what sanction will be prescribed for breaches of the statute?

To this end, the legislative drafter should be guided by a close consideration of the effectiveness of previously enacted statutes and the sanctions used.

In this regard, the body of work on the effectiveness of criminal sanctions is growing. Studies are emerging on the effectiveness of statutes and their "perverse" effects. Such studies should be conducted, for example, on the effectiveness of civil sanctions.

9 LEGAL AND NON-LEGAL RULES FOR DETERMINING THE CONTENT OF THE STATUTE

These, then, are the major stages in the drafter's thinking when determining the content of the statute. But it should be kept in mind that the lawmaker cannot enact effective laws under any conditions. Depending on its position in the hierarchy of normative authorities, the lawmaker is subject, more or less imperatively, to certain limitations that may well have some impact on the content of the proposed rule. Accordingly, the drafter will have to verify compliance with those limitations in order to avoid a subsequent invalidation of the rule in question. Not all of these limitations are enshrined in legal provisions. In Belgium, only one is: the equality of citizens before the law. I would tend to characterise the others as supra-judicial: they serve as postulates for the drafting of legislation.

10 THE STATUTE MUST BE DESIGNED TO AVOID LITIGATION

The legislature wants to enact laws of optimum efficacy. Accordingly, the degree to which these laws give rise to litigation will adversely affect any positive assessment of their quality: it is postulated that between two laws of equal efficacy, the better law is the one whose application gives rise to less litigation.

Sometimes, a too contentious view of the law will prompt people to regard a rule as ineffective simply because it results in very few court decisions. To take an example from the Belgian Civil Code, four articles enshrine the principle of the strengthened irrevocability of gifts between

living persons, a principle according to which, unlike the rule that applies to acts for remuneration, the parties to a gift between living persons cannot confer on the donor the power to unilaterally revoke his gift; should they do so, the gift will be voided. The published decisions concerning these provisions can be counted on the fingers of one hand. Yet there is scarcely a legal principle that is more closely adhered to. From the standpoint of legislative drafting, therefore, this is an excellent rule because it is effective and seldom brought before the courts.

11 LEGISLATION SHOULD THUS CONTAIN NO INCONSISTENCIES OR DEFICIENCIES

To ensure that the content of a statute does not give rise to litigation, two corollaries follow from this postulate.

First, the statute that is being drafted should not conflict with any other norm of the same or a higher hierarchical level – nothing in the statute should be inconsistent with current laws.

Secondly – a corollary that is breached more often than the first – the statute should have no deficiencies. For example, when a statute provides for a standard form contract, it should leave no problem unresolved: definition of the constitutive elements of the contract, substantive and procedural requirements, requirements of proof between parties, enforceability against third parties, penalty for breach of these various requirements, determination of persons who may resort to it, liability period and so on.

A counter-example is presented by a Belgian law respecting incompetent persons of majority age. This statute provides for representation by an interim administrator, to be appointed by the judge having jurisdiction over persons who are wholly or partially, physically or mentally, incompetent to administer their assets. But it fails to consider the problems that could arise over the generous gifts that these persons, often elderly, might make. If, by today's assessment, the efficacy of this statute is satisfactory, it is a safe bet that litigation will arise on the issue of generous gifts, where it is clearly deficient. The law's efficacy will suffer as a result.

To avoid such deficiencies, the legislature may be tempted by two diametrically opposed but, to my mind, equally reprehensible solutions.

First, it may be tempted to let the judge decide in each case where the legislature has not done so. In Belgium, it is increasingly common in enactments of some importance for the legislature to rely on the courts to make any decisions it has failed to make, thereby lending greater credence to the notion that a judge can make up for the deficiencies of the law.

This point alone deserves much deeper reflection if it is to be adequately addressed. I myself believe that statutes are the least undesirable way of creating law. I do not oppose the tendency to let judges serve as private lawmakers, settling issues of child custody, the disposition and management of assets and so on. I do feel, however, that letting judges create law through legal precedents is not a good approach. First of all, this approach is not in keeping with a political system in which law, in the strict sense, is made by the nation's elected officials or under their supervision. Secondly, for law to be developed in this way there must be litigation: consequently, law is created at a significant adversarial human cost. Thirdly, the retroactivity inherent in any decision is contrary to legal security. Finally, the need for rules – particularly by those who advise the public in drafting agreements – is not satisfied until the case law has taken shape, which can sometimes take a long time. A legislature that leaves judges to complete the statute fails to legislate.

But sometimes the legislature is tempted to do the opposite: to regulate everything, right down to the smallest detail. Experience shows that it is in these cases that deficiencies most often occur. Furthermore, this approach is usually dictated by a mistrust of judges rather than by a desire to avoid deficiencies. Such mistrust cannot be justified nowadays.

The usual approach lies somewhere between these two tendencies. But it must be frankly acknowledged that there is no saying how to determine, in the abstract, just where the point of equilibrium lies. It all depends on the case, which again shows the usefulness of the legislative drafter.

12 THE STATUTE MUST GUARANTEE SECURITY TO CITIZENS

The second postulate: the content of the rule must be determined so as to ensure that citizens enjoy legal security.

In Belgium, no enactment affirms the principle of legal security. Conceivably, however, the legislature will be increasingly called on to recognise this principle as a citizens' demand that can no longer go unheeded in the expectation that, some day, the right to legal security will be a fundamental human right.

Based on this principle, guidelines can be developed for any normative authority for the drafting of legal norms. Obviously, I will consider only the guidelines that affect normative content. One of the tasks of the legislative drafter might be to enlighten the legislature about adherence to this principle.

From the standpoint of legal security, a statute is accompanied by a promise on the part of the state. The state makes this commitment to its citizens, who are the beneficiaries of legal security. This promise is likely to affect, firstly, their relations with their fellow citizens, whether purely personal relations or relations pertaining to property and estate assets. This promise is also likely to affect citizens' relations with the state itself. Indeed, since in a constitutional state the law also comes with the state's promise to apply to itself the rule that its spokesman has enunciated, the commitment is now also likely to affect citizens' relations with the institutions of the state.

What is that promise? In enacting a law, the state undertakes, first, to do everything in its power to ensure that the will of citizens who conduct themselves in a manner consistent with the stated intent of the law is respected. Secondly, the state undertakes to ensure that it conducts itself, once again, in a manner consistent with the rule.

Without claiming to cover all the requirements of legal security, I would like to mention some of them in terms of the content of the norm.

13 IMPLICATIONS OF LEGAL SECURITY IN TERMS OF TEMPORAL APPLICABILITY OF THE LAW

Legal security requires that citizens know precisely the temporal applicability of any enactment. The legislature must clearly establish when the statute comes into force and, if it repeals a previous enactment, when the latter ceases to apply.

I do not think I need to stress that the legislature should, in principle, banish any retroactive norm apt to proscribe conduct that was adopted pursuant to the previous legislation. Of course, this also rules out any interpretative statute having the same effect, whether it is genuinely interpretative or, a fortiori, only nominally interpretative. This exclusion should apply regardless of the subject matter. No one disputes that retroactive or interpretative statutes creating criminal offences or increasing the penalties for existing offences must be banished at all costs. This proscription is already one of the requirements of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. Private legal security would merit at least comparable attention.

Legal security should also rule out any enactment that results in a loss of legitimate expectations for citizens.

For example, based on legislation in force at a given time, some citizens have agreed to allow a deduction to be made from their earnings on the strength of the state's promise of a retirement pension of a specific amount to be received at a specific age. Legally, the state is not in breach of the principle stated above of the non-retroactivity of enactments if it reduces, only for those who have not yet reached retirement age, the amount of the pension or determines a different time when it is to be received. It is, however, in breach of the de facto "contract" it entered into with its citizens when it enacted the initial legislation.

On the basis of tax legislation in force at a given time, some citizens have calculated the income they would receive from bank deposits they made at that time. The state foils their calculations and thus undermines their legal security if it amends the legislation to impose higher taxes on the income to be received from the said deposits.

On the basis of civil legislation in force at a given time, some citizens have entered into contracts governing their mutual rights and obligations for a specified period of time. The state disrupts their expectations if, having changed this legislation, it decides that the new legislation applies forthwith to these contracts, even though it will in some way alter the rights and obligations of the parties.

Is it an exaggeration to speak in such cases of disloyalty on the part of the state? It is, of course, conceivable that it may be impossible to remedy an unforeseen situation with the desired urgency without undermining legal security. Here again, it is all a matter of proportion.

14 OTHER IMPLICATIONS OF LEGAL SECURITY

The question of legal security also raises some requirements of another type in connection with the content of norms. If I am somewhat reluctant to articulate these requirements, it is because they take us into an area of legislative drafting where judgments can no longer be based on objective criteria.

- For example, legal security postulates that citizens have time to adapt their conduct to the legislation. Thus, when the legislature adopts a reform of some scope, citizens must have the time necessary to acquaint themselves with it. They do not have sufficient time if the legislature adopts and implements the reform too quickly.
- For the same reason, the legislation must not be amended too frequently.
- Legal security results from the promise implicit in the statute. Thus, the state should not make such commitments rashly or it will undermine citizens' confidence in the law. Yet how many laws – I am still using the word in the broad sense – are totally or partially ineffective, either because they were adopted in a sphere in which the state is powerless; or their implementation presupposes the resort to human, physical and financial resources that the state does not have; or they do not strike a chord with citizens; or because their application meets with the inertia, ill will or even hostility of the state bodies responsible for them?
- Even more generally, legal security postulates that the normative authority not abuse its function, by which I mean that it not exercise its authority unthinkingly in making laws. I am referring here to legislative inflation, the first consequence of which is to present legal practitioners with the alternatives of knowing everything about a little or a little about everything. And since citizens cannot resort to specialists all the time, they act in ignorance of the law.

To remedy legislative inflation, there are those who advocate "deregulation" of the major spheres of social life, notably, economic relations and relations between citizens and the state. I make no secret of my misgivings about this idea, which is gaining ground. The reason – and what I am about to say is obvious but sometimes lost from view – is that when a legislature abolishes rules it had previously enacted or refrains from adopting new ones, this does not mean there is no normative principle governing the social relations in question. It means that, where there is no automatic rule in the sphere, there is a natural return to the rule of "laissez-faire" and thus to the regulation of these social relations by norms other than legal ones drafted by the normative authority. So, while being wary of passing final judgment, one can cite historical evidence to make the simple point that opinions about this system and its outcomes are divided. I concede that it has become indispensable to prune legislation, but it seems to me that this must be done with prudence and thought.

If we are unable to do this pruning, we could perhaps try to temper the rule-making zeal of the legislature. But who should be the judge of such matters, and what will be the test for excessive legislation? As I said earlier, it would be desirable for the legislature to ask itself systematically, before drafting any enactment, whether it is absolutely necessary to do so. And I clearly see the drafter assisting the legislature in its reflection, for example, by showing that the economic theory of marginal utility also applies to legislation. The more laws the legislature enacts, the less force they have in the eyes of citizens and the less able the legislature is to enforce them. An analogy might be drawn with our experience with children: the more dos and don'ts we impose in the home, the weaker our authority, because we cannot enforce them all, thereby exposing our powerlessness. At the same time, it takes more energy to enforce those rules that are essential.

15 THE STATUTE MUST REFLECT THE PRINCIPLE OF THE EQUALITY OF CITIZENS

The third rule that the legislature faces in determining the content of norms is the need to respect the equality of citizens before the law. In Belgium, this has been an established rule for legislative drafters since 1831. It has been required of Belgian legislative authorities in the strict

sense – federal, regional and community – since the Cour d'arbitrage was given jurisdiction, under a special Act of 6 January 1989, to verify their compliance with articles 10 and 11 of the Constitution, which entrench the principle of the equality of Belgians, and to annul any Act, decree or order that violates these provisions. This rule is also mandatory for the lawmakers of countries that are signatories to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, signed in Rome on 4 November 1950 (article 14), and the *International Covenant on Civil and Political Rights*, adopted in New York on 19 December 1966 (article 3), to the extent of the rights recognised by these treaties and their supplementary protocols.

The conditions that must be met in order for an enactment not to be deemed to create discrimination among Belgians have been defined by the Cour d'arbitrage, the European Court of Human Rights, the Cour de cassation and the Conseil d'État. The legislative drafter should, of course, carefully review the abundant case law of the Cour d'arbitrage concerning articles 10 and 11 of the Constitution and advise the legislature accordingly on how this case law affects the content of the norm it wishes to enact.

II

16 DETERMINING THE SUBSTANTIVE CONTENT OF STATUTES – PRACTICAL SUGGESTIONS

Having laid down the essential rules, positive and negative, for determining the content of statutes, I would like to describe two techniques for determining the substantive content of statutes.

The first is the result of a completed experiment, while the second is a mere suggestion that has not yet been implemented.

17 DETERMINING THE SUBSTANTIVE CONTENT OF STATUTES BY RELYING ON LEGAL PRACTITIONERS

It is my submission that to advance legislative drafting in a country that does not yet practise it systematically, it is preferable to apply it first in

law making that does not involve a major policy debate but is instead confined to resolving problems of a more technical nature.

With this in mind, in 1990, I asked notaries and law professors in Belgium to list the difficulties they had encountered in their practice as a result of poor legislative drafting that could give rise to conflicts between citizens. I stressed that the list be confined to technical difficulties rather than major moral or political problems. I also asked them to think about how the statutes in question might be improved to eliminate these difficulties and, accordingly, to make suggestions for reforming these flawed statutes. Their suggestions would then be submitted to legislative members in the hope that they might eventually adopt them. About forty suggestions were made. They were reviewed at a meeting attended by close to two hundred notaries. Everyone who had made a suggestion was then invited to reformulate his proposed legislation to reflect the observations made at that meeting. The results have been compiled in a work entitled *Mélanges de suggestions de lois*, in tribute to Pierre Harmel, former Prime Minister, former President of the Senate, and former Chair of Notarial Law, Faculty of Law, State University of Liège. Many of these suggestions were subsequently adopted by parliamentarians who tabled them as private member's Bills. Some were adopted by Belgium's federal legislature.

A legistic synergy was thus achieved between the legislature, legal practitioners and professors of law. It was not an overly ambitious undertaking, just a few small steps in the right direction.

18 DETERMINING THE CONTENT OF STATUTES THROUGH A LEGISTIC READING OF CASE LAW

A further suggestion I would make to advance legislative drafting as it pertains to determining content is to adopt a new approach to the reading of judicial decisions.

Let us look just at those at the Supreme Court level. At present, professors and practitioners of law study the decisions of these courts to see how a statute should be understood and applied to new cases. I suggest that, in future, this case law be given a legistic reading as well.

First, we would look at whether the decision was triggered by some statutory defect: Is the litigation due to some drafting error that led to a dispute over the statute's interpretation? Did the statute reveal flaws? Did it appear to conflict with other statutes? And so on. In other words, we would ask ourselves whether the litigation arose because the statute was not written according to the canons of legislative drafting.

If such was the case, two lessons could be drawn.

First, a substantive legislative need would be revealed: the need to reform the enactment at the root of the conflict, its flaws having been laid bare by the litigation.

Reform it how? The court that ruled in the case may have provided some possible solutions. Sometimes the drafter can draw inspiration from them; sometimes, however, he must diverge from them, in light of the criticisms levelled at the decision.

Here is an example of the legistic use of a decision of Belgium's Cour de cassation. Not long ago, the Court held that when the cause of a gift between living persons – the reason the gift was made – has disappeared, and the "disappearance" did not originate with the donor, the gift is null and void. For example, parents give their son and daughter-in-law a house. Two years later, the young couple divorce. The parents, who were in no way the cause of the divorce, can obtain restitution of the house, since the reason for their gift – to provide shelter for the young couple – has disappeared; there is no longer a couple to house. The ruling of the Cour de cassation to which I allude has generated a great many problems for the notarial profession. I will mention only the main one: Is the lapse of a gift retroactive? If so, it is not hard to imagine the consequences if the gift's recipients had rented or sold the property given to them.

A legistic reading of this judgment may lead to two concrete propositions between which the legislature must choose: either to overturn by law the (new) concept of the lapse of gifts when their cause has disappeared or to provide for the lapse of gifts by, for example, prescribing how it shall be reported to third parties, stipulating that it has no retroactive effect and so on.

A lesson with another purpose – determining the conditions in which statutes are drafted – can be drawn from a legistic reading of case law: In the long run, a typology of defects found in current legislative drafting could be prepared to identify the areas to which legislative drafters should pay careful attention. And drafters themselves could provide, in their manual of legislative drafting, a list of the pitfalls to be avoided and thereby improve the statutory corpus as a whole.

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