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"LEGISLATION IN EUROPE: A COUNTRY-BY-COUNTRY GUIDE" ULRICH KARPEN, HELEN XANTHAKI (Edited by), HART PUBLISHING, UK, 2020

BOOK REVIEW[1]

Livia LORENZONI[2]

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1. CONTEXT

Over the last decade, the quality of legislation has gained an increasing relevance in the academic and institutional debate, both at national, European, and international level. The

[1] The book review is not submitted to peer-review

[2] Assistant Professor of Administrative Law, Roma Tre University, Italy

book “Legislation in Europe: A Country-by-Country Guide”[3] contains a series of important essays on the quality of legislation. Its first version, published in 2017, entitled “Legislation in Europe: a comprehensive guide for scholars and practitioners” – aimed at providing a guidebook for national and European drafters – policy makers and legislators focused on the main aspects emerged in the studies on legislation. This new version has widened and completed the work, providing an analysis of the legislative features of several European countries.

The book addresses the general principles and best practices in law making within each single State and in the European Union itself. It refers to the concept of “legisprudence”, as a field of legal studies dedicated to researching and teaching about both the theory and the practice of legislation.

The different legal systems are analysed with particular attention to the regulatory environment and primary legislation. Each chapter examines the processes of formation of laws, the methods of approval and the rules on assent, as well as the methodology and techniques of drafting. It deals, among other things, with the principles of subsidiarity, legitimacy, proportionality, effectiveness, and efficiency. Finally, the essays address the issues of regulatory impact analysis, monitoring and, more generally, the culture of "good legislation".

The authors of this volume – academics, and professionals with specific expertise in this field – delve into the issue of the quality of legislation in their respective countries. Their analysis provides a unique and important basis for comparison, aimed at advising national institutions in the development of guidelines for legislators and regulators.

[3] U. Karpen, H. Xanthaki, *Legislation in Europe: A Country-by-Country Guide*, Hart Publishing, UK, 2020, https://www.bloomsburyprofessional.com/uk/legislation-in-europe-9781509924707/.

2. THE INTRODUCTION OF THE BOOK

The introductory chapter presents, in terms of comparison, the wide theme of legislation in European countries. It highlights that, despite the profound differences in the political structure, the functioning of the law, the organisation, and the process of legislation of each of the countries covered in the book, "they all at least aspire to democracy, the rule of law, the separation of powers and the independence of the judiciary"[4]. Their constitutions, written or not, regulate the main structures of governance of the State, including the form of government, the separation of powers and institutions thereof with their respective competence and layers of governance, territorial subunits, and municipal governance. Finally, all EU Member States have an executive at the central level that is split into the government and the head of State and a parliamentary democratic type of government.

The introduction contains a very helpful overview on the main instruments of enhancing better legislation adopted in the countries considered. It also addresses the common core of national legal frameworks in terms of value, principles, and directives (drawing on Ronald Dworkin leading theory[5]). The main pillars of the constitutional State in Europe are listed: fundamental rights; democracy; and the rule of law. Also, some common aspects of legislation in multi-layered systems are analysed. The focus on the similarities and differences among the States considered appears to be pivotal for achieving a profitable legal comparison.

[4] U. Karpen and H. Xanthaki, Introduction: Law, Legislation and Legisprudence, in U. Karpen, H. Xanthaki, *Legislation in Europe: A Country-by-Country Guide,* Hart Publishing, Bloomsbury, UK, p. 3.

[5] R. Dworkin, Taking Rights Seriously, Harvard University Press, 1977.

The introductory chapter also provides some definitions, useful to limit the scope of the following papers. It clearly explains what is meant by the concept of "law" (as general abstract norm as opposed to decisions in particular cases) and "legislative process" (focusing on the organs and the procedures involved in the enactment of laws) in the countries analysed and what are the relevant definitions for the purpose of the research.

It then states the values and goals of laws, such as good legislation, and evaluation, referring to them as "substantial legisprudence", while the structure, language and techniques of law-drafting is named "formal legisprudence"[6]. Finally, it observes how the topic is understudied in most countries and suggests ways to spread, teach and learn professional legislation.

The introduction is followed by chapters on 30 individual States, in alphabetical order. The analysis also includes States that are not part of the European Union, but which fall within the territorial scope of Europe (such as Switzerland).

The chapters on individual countries are all structured according to a common outline that analyses the following points:

- the national constitutional environment and its connection with European Union law;
- the nature and types of legislation;
- the legislative process;
- the drafting process;
- jurisprudence conventions;
- the training of drafters.

3. INSIGHTS FROM SOME RELEVANT CHAPTERS

The Italian chapter provides interesting insights on the main factors that influence the quality of the national legislative framework. After an introduction on the main Italian literature on

[6] For a recent and comprehensive study on legislative drafting and effectiveness, see M. Mousmouti, Designing Effective Legislation, Edward Elgar Publishers, 2019.

legislation, the author states that "Italian practice in terms of legislation has not had a strong and structured tradition, and the public debate on this topic has not made good progress since then"[7]. She points out the serious gap between theory and practice in the Italian experience. The chapter goes on providing a wide definition of legislation, based on the Italian Constitutional framework and the hierarchy of norms deriving from it. It also refers to the multi-level character of Italian legislation, where EU laws are often binding and cover wide areas of law and regions are entrusted with legislative power on important matters. It also considers the governmental non-primary regulation and the sector-specific regulation adopted by independent administrative agencies and their relevant aspects for studies on legislation.

The following paragraph describes the main aspects of the Italian legislative procedures. It highlights a huge problem of legislative inflation and its harmful consequences on legal certainty, creative compliance, and lack of effective enforcement. Then, it analyses the objectives of legislation from a public policy perspective. The author shows how, in theory, RIA, clear objectives, and evaluation of outcomes should be the core of the legislative process, while, in practice, these instruments have rarely been effectively employed. The analysis distinguishes the formal and the substantial quality of legislation. The formal quality has gained importance in the institutional debate over the last decades. The substantive quality is analysed in three stages. The first period (1999-2005) is characterised by the rise of the better regulation discourse. The second period (2005-2017) has faced attempts of improvement, such as the Simplification Law and the Decree on RIA implementation. The third period (2017-present) is aimed at strengthening the institutional capacity of Better Regulation tools and has been featured by a strong role played by the advisory role of the Consiglio di Stato. A similar role is played in France by the Conseil d'Etat that, together with the Secrétariat general du Gouvernement (SGG), is responsible for ensuring the quality of

[7] M. De Benedetto, Legislation in Italy, in U. Karpen, H. Xanthaki, *Legislation in Europe: A Country-by-Country Guide*, cit., p. 268.

legislative drafting[8]. Finally, the Italian chapter refers to the training on legislation, pointing out the lack of a strong tradition of legislative studies, drafting and Better Regulation in Italian Universities, while some post-graduate courses are available, and it mentions cases of prominent institutional, not exclusively academic training.

The conclusion on the Italian legislative system emphasises its main criticisms, such as, degeneration of the parliamentary system; pressures of groups of interests; public intervention on the economy; symbolic and unstable politics; lack of clarity of the normative texts; the wide use of urgent governmental decrees, that contribute to hinder the confidence in legislation. It recalls the need for a stronger and more stable inter-institutional relationship and a greater awareness of the importance of the issue.

An interesting analysis emerge from the chapters on federal States, such as Germany and Switzerland. The chapter on Germany starts with a general overview of its constitutional framework, with a particular focus on fundamental rights, the rule of law, and the importance of the division of the federation into Länder and their participation in the national legislative process. The author (who is also one of the editors of the book) highlights that the "value-oriented, supra-positive notion of the Basic Law is certainly a product of recent German history"[9]. The hierarchy of laws in Germany and the main aspects of the law-making process are then illustrated. One of the main peculiarities of German parliamentary system is represented by the Bundesrat, that is not a Second Chamber (as, for example, in Italy) and represents the Länder governments.

The author deals with the aspects of substantial quality of legislation referring to the "methodology" of policy-making. This means setting clear goals and principles that the legislator must follow. As for the formal quality of legislation, it refers to structure, language,

[8] K. Gilberg, Legislation in France, in U. Karpen, H. Xanthaki, *Legislation in Europe: A Country-by-Country Guide*, cit., pp. 280 ss.

[9] U. Karpen, Legislation in Germany, in U. Karpen, H. Xanthaki, *Legislation in Europe: A Country-by-Country Guide*, cit., p. 200.

and amendments of legislation. It is interesting to notice how the German legal system includes some express guidance, as, for example, the Handbook for the Preparation of Statutory Laws/Instruments, and the Manual for Drafting Legislation. All bills are structured in a very clear and straightforward way. For example, they start with a front page that indicates, possibly in one word, the problem, the solution provided in the bill, alternative solutions and the reason of the choice, the expected expenditure, the compliance costs and its argument. Systematic order, clear and simple language are also considered of great relevance.
A further interesting example is that of Switzerland: a federal state characterised by a hierarchically organization: federal, cantonal, and communal law. Each of which law is in turn layered into a constitution, primary legislation, and secondary legislation. A key role is reserved for people in the Swiss legal system; indeed, the citizen can participate in legislation with consultation, referendum, and popular initiative. The Swiss Parliament consists of two chambers: a house of representatives (which are elected directly by the people according to a system of proportional representation), that is the National Council, and a senate, the Council of States (that is composed of 46 representatives of the cantons). The Swiss law-making process consists of up to five phases: initiation (introduced by way of legislation or by means of a popular initiative); drafting by the administration (the drafting phase falls into three stages: the preparation of a preliminary draft, the consultation of the public and the preparation of a final draft); parliamentary deliberation (that require the agreement of both chambers); referendum, commencement and publication; and evaluation (article 170 of the Swiss Federal Constitution).
Regarding drafting techniques two elements need to be taken into consideration: the multi-lingualism of the legal system (article 4 and 70, para 1 of Federal Constitution: Switzerland has four national languages; Germany, French, Italian and Romansh) and Switzerland's tradition of plain-language drafting. Even though the Swiss system includes a very little training in the theory of practice of legislation, Switzerland shows a good level of quality of its legislation.
One of the countries that has recently shown a good development of substantial and procedural legisprudence in practice is France, where the term "légistique" is widely used. Only since the 1980s legislation has been subject to requirements of rationality and efficiency. The primary source of French legislation is the statute law, which is an act of

Parliament (Article 6 of Declaration of Human and Citizens), that is also the primary focus of legisprudence in France. Historically, academics consider that the 1958 French Constitution set up a "parliamentary system with a twist", given the prominent role of the government in the law-making process. The French legal system can be described as a highly codified system; indeed, the tradition of codification starts with the Royal Ordonnance of Montil-lés-Tours of 1453 and the Napoleonic codification (1804-10) and continued with the codification of 1948-1987 and 1989. The "constitutionalisation of French Law", the influence of international and EU law, as well as the expansion of intra-legislative norms, and the development of soft law are all factors that played an important role. Despite those phenomena, statute law remains at the very heart of the French legal system.

As mentioned above, two institutional advisors are responsible for the ensuring the quality of legislative drafting in the law-making process: the Secrétariat general du Gouvernement (SGG) and the Conseil d'Etat. Non-governmental actors also play a role in the law-making process. The Guide de Légistique identifies three types of participation: preparatory consultations, concentrations, and open consultation on the internet. The French substantial legisprudence focuses on techniques to improving the preparatory phase of legislation but consider also an ex-post evaluation.

In the French legislative system, there has been a constitutionalization of the drafting rules and French legisprudence also draws legislative drafters' attention to "risky techniques" which should be used with great caution. Some drafting rules also have acquired binding force, like the "principle of clarity", in the 1998 by the Conseil constitutional. Despite all the French system is still considered problematic for the quality of legislation, so preventing over-regulation and providing guidance, training and assistance to legislative drafters could be the key steps to improve the situation.

The above-mentioned examples show how the book provides a great variety of approaches that may be employed to tackle the issue of legislative quality. This constitutes the main usefulness of the book, where legislators, policy-makers, scholars and practitioners may find a great number of tools to improve national legislation.

4. CONCLUSION

The book concludes with an analysis of trends and best practices in Europe.

The study shows that the problems associated with the production of legislation are recurrent in the various countries examined. In particular, the following criticisms are noted: excessive legislative production, poor quality regulatory production, and inaccessibility of legislation. These issues persist, despite the widespread promotion and application of regulatory impact analysis in most countries.

The highly innovative profile of the volume consists in the change of perspective with respect to the study of legislation. The attention, traditionally focused on the scrutiny of the formation phase, on the general regulatory context, or on the subsequent review of the legitimacy of laws, begins to be shifted to the legislation itself, that is conceived as a product.

The aim of the volume is to identify recurrent elements of legislative failures in order to seek common solutions in the European context. The European Union, in fact, has long been committed to the goal of improving the production of legislation, as demonstrated, for example, by the agenda on the quality of regulation. The authors wish that just as much attention will be paid to the quality of legislation, to make it more accessible and comprehensible to those to whom it is addressed.

Restructuring the channel of communication between citizens and national legislators is even more necessary in the current context, in which anyone can access regulatory texts directly on the Web, without the help of professionals. Improving communication between individuals and legislative bodies, through a good law making, would facilitate citizens' understanding of the goals and objectives behind legislative interventions and their acceptance.

The above-mentioned improvement would also enable citizens to have a clear view on the actions they need to take to comply with current legislation. This would produce positive effects in terms of compliance, avoiding recourse to sanctions or other coercive instruments, encouraging greater participation and collaboration in the pursuit of the long-term objectives of legislation. Finally, good legislative production - clear, understandable, accessible by the public - would help increase public trust in institutions. The current tendency towards populism, experienced by several States, could be hindered by an overall change in the communicative relationship between parliamentary institutions and the recipients of the norms, which would promote the establishment of a fiduciary relationship, fundamental for the functioning of democratic systems.

The book concludes with a hope that the impact of the debate, begun with the first edition, may extend not only to the institutions of European countries, but also beyond the continental borders.

This volume contains a very rich and deep comparative analysis of the most important European legal system, based on a quite unique idea: the substantial as well as formal improvement of legislation. It will certainly constitute a fundamental tool both for legal scholars and for -public institutions.