

LEGISLATIVE DRAFTING TECHNIQUE AS A FACTOR OF GUARANTEEING THE RULE OF LAW

Vozniak Ihor

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Annotation. The article defines the legislative drafting technique and characterises its role in ensuring the rule of law. Formal and material aspects of the rule of law are examined. Criteria for determining whether a law can ensure legal certainty as an element of the rule of law are formulated based on the decisions of the Constitutional Court of Ukraine. The practice of other Ukrainian courts is used to provide examples of low-quality legislation. The case law of the European Court of Justice and the European Court of Human Rights is analysed to illustrate the importance of clear and unambiguous legislation in safeguarding people's rights. The criteria of good legislation formulated by the Office for Democratic Institutions and Human Rights are listed. The conclusion about the possibility for further development of the theory of good legislation is drawn.

Key words: legislative drafting technique, formal legistics, rule of law, lawmaking, quality of legislation.

1. Introduction.

Legislative drafting technique is one of the most important factors shaping a legal system. It is undeniable that failure to comply with the rules of legislative drafting technique (also formal legistics) leads to the adoption of legislative acts of low quality and efficiency [5, p. 158]. Low-quality legislation cannot ensure the functioning of the rule of law in a society, so lawmakers should constantly improve their legislative drafting technique to produce effective laws. Significantly more attention has been paid to the legislative drafting technique in Ukraine, and some substantial steps have been made to improve it, including passing the Law of Ukraine "On Lawmaking Activity." Still, not enough theoretical work has been done to substantiate the evolution of formal legistics in Ukraine.

2. Analysis of scientific publications.

Many Ukrainian legal scholars have dealt with various aspects of legal technique in general and legislative drafting technique in particular. Among them are I. Bylia, T. Didych, T. Dudash, Zh. Dzeiko, A. Krasnytska, V. Kosovych, V. Lebedenko, L. Luts, I. Onyshchuk, L. Pryhara, V. Ryndiuk, I. Shutak, V. Tatsii. But the legal studies still lack a comprehensive theory of the quality of law and its dependence on legislative drafting technique.

A. Kuchuk and Ye. Zamkovyi postulate that the processes of creating, changing, interpreting, and realising of legal acts define the efficiency of law in society [9, p. 91]. The scholars go on with their argument and show how incompliance with the rules of legislative drafting in the Criminal Code of Ukraine leads to its faulty interpretations and, as a consequence, violates human rights, in this case, to a fair trial. N. Kleshchenko summarises that the effectiveness of legal regulation of social relations, as well as the implementation of legal norms and ensuring the protection of the rights and freedoms of broad segments of the population, depends on the clarity and accessibility of legislation [7, p. 128]. We do agree with their opinion and therefore would like to deepen this argumentation, partially by borrowing European approaches.

3. The aim of the article.

The article seeks to demonstrate how appropriate legislative drafting technique and its application help to safeguard human rights in a democratic society by assisting in ensuring the rule of law. The research findings rest upon the European and Ukrainian legal literature, case-law of the Court of Justice of the European Union, the European Court of Human Rights, Ukrainian courts, as well as recommendations of the Office for Democratic Institutions and Human Rights.

4. Review and discussion.

Ukraine has for some time already been in a transitional phase from being a post-Soviet country with arbitrariness in the legal domain to becoming a country devoted to the principles of the rule of law and European governing practices. Nevertheless, there is still much work to do, including improvements to the legislative process and legislation. According to Associate Professor of Constitutional Law at the University of Genoa Enrico Albanesi, the quality of Ukrainian legislation poses some issues, if one reads the opinions of the Venice Commission [1, p. 48], so Ukraine should improve the way its institutions draft and scrutinise bills as well as should adopt best practices from Europe to enhance the quality of its primary legislation and, thus, to give effect to the principle of the rule of law [1, p. 47]. For these reasons, close attention is currently being paid to the problems of the legislative drafting technique in Ukraine, which substantiates the need for research in this field.

Legislative drafting is the process of constructing a text of legislation [18, p. 57], and it constitutes the set of methods, techniques, and procedures for the material or formal expression of ideas that need legislative reflection in appropriate forms [4, p. 37]. However, the significance of legislative drafting technique should not be considered only in a narrow sense as a technical and legal means of ensuring the quality of legislation. It should also be viewed in a broader theoretical and philosophical sense as a means of implementing the principle of legal certainty, which inevitably helps to safeguard human rights.

The concept of the rule of law is complex and encompasses various elements and aspects. According to Ukrainian scholar S. Pohrebniak, the principle of the rule of law comprises two aspects: formal and material (organic) [12, p. 44]. From a formal point of view, the rule of law demands that, in a society, there should be legal norms that are observed by all subjects, including the state [12, p. 44], and from a material point of view, it demands that there should be fairly clear standards determining the essence of positive law [12, p. 47]. The fulfilment of the requirements arising from the formal aspect of the rule of law is ensured by several legal instruments and institutions: adhering to the rules of the legislative drafting technique, maintaining the internal logic of the legal system and connections between norms despite constant legislative changes, observing the obligation to publish regulatory acts and the general prohibition of their retroactive effect, applying the principles of legal certainty, “economy of law,” and good faith, maintaining effective judicial system [12, pp. 46–47]. Among the various criteria the Venice Commission proposes to use to assess adherence to the rule of law, we can find the accessibility of legislation and court decisions, foreseeability of laws (including whether they are intelligible), stability and consistency of the law [17, pp. 25 – 26]. Proper legislative drafting technique and its application are one of the main factors contributing to ensuring that these criteria of the rule of law are realized.

Criteria for whether a law is able to ensure legal certainty (and, consequently, human rights) or not were defined in judicial practice both in Ukraine and the European Union. Article 8 of the Constitution of Ukraine establishes that the principle of the rule of law is recognized and effective in Ukraine [8]. The Constitutional Court of Ukraine has repeatedly stipulated in its decisions that one of the elements of the rule of law is the principle of legal certainty. The Constitutional Court of Ukraine noted, in particular, in its decision No. 2-p/2017 of 20 December 2017, that the principle of legal certainty requires clarity, comprehensibility, and unambiguousness of legal norms, in particular, their predictability (foreseeability) and stability [14]. The Constitutional Court of Ukraine also assumed in its decision No. 3-p/2019 of 6 June 2019 that the principle of legal certainty as a component of the constitutional principle of the rule of law is a set of requirements for the organization and functioning of the legal system, law-making processes, and law enforcement so that it is possible to

ensure the stability of the legal status of the individual [15]. Thus, the Constitutional Court of Ukraine established in its practice the criteria that legal norms must meet to ensure the operation of the rule of law.

We should also note that not only does the Constitutional Court of Ukraine argue that disobeying the rules of legislative drafting technique leads to violations of the rule of law, but also that courts of other jurisdictions do this. The Supreme Court mostly indirectly refers to the violations of legal technique (*юридична техніка*), which is a broader concept and includes legislative drafting technique, and mentions “vague wording,” “uncertainty,” “declarative wording of provisions,” etc., while motivating its decisions and denouncing a legal norm as “defective.” The same do courts of lower instances. For example, the Kyiv District Administrative Court noted in its decision of 11 March 2024 in case No. 320/40276/23 on the recognition of the tax notice-decision as unlawful and the cancellation thereof that the legislator, due to the violation of the rules of legislative drafting technique, placed the participants of tax legal relations in a situation of legal uncertainty [16]. However, the court did not specify which “rules of legislative drafting technique” it referred to, but, most likely, simply appealed to generally established legislative practice. But the Supreme Court starts to take into consideration the demands of the new Law of Ukraine “On Lawmaking Activity” (referred to as “the Law”), and the number of such decisions is increasing. For instance, the Supreme Court, as the panel of judges of the Second Judicial Chamber of the Criminal Court of Cassation, reinforced its decision of 10 December 2024 in case No. 202/13808/23 by referring to section 2 part three article 66 of the Law regarding the differences between legal acts of equal legal force [13]. So, we can claim that there is an ever-growing acknowledgment of the legislative drafting technique’s importance among Ukrainian legal professionals.

Similar approaches can be found in the practice of European courts. The Court of Justice of the European Union maintained that Community legislation must be certain and its application foreseeable by individuals, and the principle of legal certainty requires that every measure of the institutions having legal effects must be clear and precise and must be brought to the notice of the person concerned in such a way that he can ascertain exactly the time at which the measure comes into being and starts to have legal effects (paragraph 124 of the decision in case T-115/94 “Opel Austria GmbH v Council of the European Union” of 22 January 1997) [3, p. 40]. The principle of legal certainty, from which the principle of the protection of legitimate expectations derives, requires that, on the one hand, rules of law must be clear and precise and, on the other hand, that their application must be foreseeable by those subject to them (paragraph 46 of the judgment in Case C-201/08 “Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt” of 10 September 2009) [2]. The Court of Justice of the EU has expressed similar considerations and conclusions in a number of its decisions.

The Constitutional Court of Ukraine also uses the concept of “high-quality [legal] norms,” but it has yet to provide a definition of this concept and establish standards for the quality of legislation, though they will definitively include all the criteria the Court set out in its previous decisions, including the ones mentioned before. Ukrainian legal scholars distinguish between two aspects of the quality of legislation: social, which is related to its content, and legal, which is related to the form [11, p. 20]. If we rely on these two aspects of the quality of the law, the accessibility and clarity of the formulation of the law can be associated with the legal aspect of quality, while predictability with the social one. The legal quality of legislation is ensured, in particular, by the legislative drafting technique, and therefore, its development will certainly lead to an improvement in the quality of legislation. It is also worth noting that some Ukrainian scholars have made attempts to devise a full-fledged theory of the concept of high-quality legislation, but it is not yet possible to pronounce that it is formed, so another field of research should be the problem of defining this concept and composing a certain system of requirements for checking the quality of legislation based on legal doctrines and judicial practice.

Since the case law of the European Court of Human Rights is obligatory for Ukrainian courts and lawmaking, we should also consider the respective conclusions of this judicial institution. As per the ECHR in its decision in the case Hashman and Harrup v. the United Kingdom, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct [6]. At the same time, whilst certainty in the law is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances [6]. The level of precision required of domestic legislation—which cannot in any case provide for every eventuality—depends to a considerable degree on the content of the instrument in question, the

field it is designed to cover and the number and status of those to whom it is addressed [6]. In this case, the ECHR set the criteria for a good law but also defined the limits because these criteria can never be totally objective and can sometimes—under strict circumstances—be violated if the guarding of human rights is otherwise impossible.

As a starting point for devising the concept of “high-quality legal norms,” Ukrainian lawmakers and scholars could also use the definition of good quality laws provided by the Office for Democratic Institutions and Human Rights (ODIHR) which defines it as follows: laws are of good quality when they are clear, intelligible, foreseeable, consistent, stable, predictable, accessible, compliant with rule of law and human rights standards, gender- and diversity-sensitive, and non-discriminatory, in both content and practice, while being proportionate and effective [10, p. 3]. This definition is found in the publication “Guiding Principles of Democratic Lawmaking and Better Laws,” where core principles for democratic lawmaking and achieving good quality laws are set out [10]. The key principles determine how laws are made (the process of making laws), which standards the substance of a law should adhere to (the content of the law), and what form a law should take (the form of legislation) as well as give detailed, concrete and practical recommendations on how they can be observed at each phase of the legislative cycle [10, p. 6]. Though the experts of ODIHR maintain that the rule of law is one of the factors that influence lawmaking (principle 2, which is found in the first — “Prerequisites for democratic lawmaking and better laws” — of three parts of the above-mentioned publication, is adherence to the rule of law), the opposite can also hold true: due legislative process reinforced by due legislative drafting technique leads to strengthening democracy and rule of law.

As to the form of laws, ODIHR has formulated three principles: 1) clarity and intelligibility, 2) foreseeability, and 3) publication and accessibility [10, pp. 16–17]. Clarity and intelligibility mean that laws must be drafted in a clear, precise, and unambiguous manner [10, p. 16]. They must be easy to understand, even when they involve complex topics, and avoid, to the extent possible, excessive or unnecessary details [10, p. 16]. Consistent drafting and structure, harmonious use of terminology, justified use of definitions, and relevant cross-references to other legal acts are all required for a law to be unambiguous. For this purpose, drafters should follow clear and unified drafting instructions, and sufficient funds should be invested in training and capacity-building for legal drafters to ensure high-quality, written legislation [10, p. 16]. Well-drafted and clear legislation helps to avoid legal loopholes as well as vague, contradictory, or ambiguous wording, which can undermine legal certainty and trust in legislation [10, p. 16]. It is also worth mentioning that in comparison to many legal scholars and courts, ODIHR experts demand not only publication of laws in a manner that they are easily accessible for the entire population, but also publication of draft laws, which ensures transparency of the legislative process [10, p. 17]. So, the legislator should take into account a number of requirements to ensure that the resulting legislation can help maintain the rule of law in the respective legal system.

5. Conclusions.

Based on this research, it can be concluded that high-quality legislation helps ensure the implementation of the rule of law, first of all, the realization of the principle of legal certainty. This is done with a properly developed legislative drafting technique, since it is connected with the legal aspect of legislation's quality (the other one being the social aspect). This is evidenced by the practice of various Ukrainian courts, the Court of Justice of the EU, the ECHR, as well as by the recommendations of the Venice Commission and the ODIHR. They all to some extent maintain that the quality legislation should be clear, precise, unambiguous, intelligible, foreseeable, consistent, stable, predictable (as to both their way of execution and the time at which the measure comes into being and has legal effects) and accessible for those subject to them, compliant with the rule of law and human rights standards, gender- and diversity-sensitive, non-discriminatory in both content and practice, proportionate, and effective. Therefore, proper legislative drafting technique should *inter alia* provide for consistent drafting and structure, harmonious use of terminology, justified use of definitions, and relevant cross-references to other legal acts. Their findings should be used as a basis for the theory of quality of legislation that is currently being formed in legal science and practice of the Ukrainian courts of higher instances.

Further research into the role of formal legistics as a means of ensuring the rule of law and its development is highly promising, especially for Ukrainian lawmakers, since it may allow for the improvement of

Ukrainian legislation that is sometimes criticised as being defective, and for better ensuring the rule of law in Ukraine. The national formal legistics may be improved by introducing the aforementioned practice- and theory-based approaches to the Law of Ukraine “On Lawmaking Activity.”

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Ihor Vozniak,

*PhD student at the Department of Theory and Philosophy of Law,
Ivan Franko National University of Lviv,
Lviv, Ukraine*

*E-mail: ihor.vozniak@lnu.edu.ua
ORCID: 0009-0009-5409-8932*