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Amendment and Repeal: Achieving Clarity of Drafting and other Needs at Issue

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ABSTRACT ENGLISCH

When it comes to amendment and repeal, the challenge is to employ drafting techniques which simultaneously aim to provide the legislator with a precision-based mechanism for incorporating the existing legal system; and to deliver clarity for the user reading the Statute. The article will analyse techniques in the UK and Continental Europe (Italy will be taken as case study) in order to find combinations that deliver this goal. The analysis will be carried out against a holistic background: clarity and precision (plus effectiveness) will be prioritised in the light of a hierarchy of drafter's goals.

Contents

1 Introduction

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The topic of this article is an analysis of drafting techniques for amendment and repeal in the UK and Italy. When it comes to these mechanisms, the challenge is to have drafting techniques which simultaneously aim to provide the legislator with a precision-based mechanism for incorporating the existing legal system (and a compendious tool to be used in parliamentary proceedings); and to deliver clarity for the user reading the Statute (and for Members of Parliament examining the Bill).

The main argument of this article is that, similarly in the UK, also geographically within the European continent, drafters are conscious that sometimes achieving clarity may create practical difficulties and, in particular, when it comes to a clash between precision and clarity when amending, they pursue a combination of techniques so as to take both goals into account, in the light of the principle of effectiveness. However, it seems that no holistic analysis, concerning the criteria to guide the drafter in these circumstances, has been carried out. Therefore, the aim of this article is to test how those criteria established in the British debate are followed, although without any conceptualization; and to suggest a theoretical guidance to deal in these circumstances, as happens in the UK. Moreover, it will be argued here that such a theoretical guidance should be mentioned in the domestic Drafting Guidance.

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This article will rely on a couple of successful statements concerning legislative drafting in general, arising in the British scholarly and parliamentary debate. On this basis, the article will aim to advance the scholarly discussion on this topic. A comparative research will be carried out here, so as to analyse the different solutions given to the common challenge by common law (UK) and civil law jurisdictions (Continental Europe) and to see how drafting techniques that are used in different jurisdictions can allow the drafter to achieve the aforementioned goal. When it comes to the European Continent, Italy will be taken here as the case study. The perspective will not be that of a purely theoretical approach: practical case studies will be also examined. In order to prioritize the needs at issue, it is important to start focusing on drafter's goals (and the hierarchy between them) and give some definitions.

2 Hierarchy of drafter's goals and definitions

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According to XANTHAKI, who sees legislation as a tool to achieve quality of regulation (XANTHAKI 2014: 4), the hierarchy of goals which must be pursued by drafters can be conceptualised as follows (XANTHAKI 2014: 5). The ultimate goal is efficacy, viz. "the capacity of a piece of legislation to achieve the regulatory aims that it is set to address" (XANTHAKI 2014: 6). Under this umbrella, she notes, the drafter pursues effectiveness in legislation, which requires a legislative text that can "foresee the main projected outcomes and use them

in the drafting and formulation process", "state clearly its objective and purpose", "provide for necessary and appropriate means and enforcement measures", "assess and evaluate real-life effectiveness in a consistent and timely manner"(XANTHAKI 2014: 8). In other words, effectiveness is a law-making principle which works as the "functional link" between four fundamental elements that are present in every law (objectives, content, context and results) and thus ensures that legislation has the best chance of achieving the desired result (MOUSMOUTI 2019). Effectiveness can be achieved by efficiency (the use of minimum costs for the achievement of optimum benefits of the legislative action), clarity (the quality of being clear and easily understood), precision (exactness of expression or detail) and unambiguity (certain or exact meaning). At the lower level of hierarchy, according to XANTHAKI, comes plain language (language which is subjective to each reader or user) and gender-neutral language (which promotes gender specificity in drafting).

XANTHAKI looks at legislative drafting as *phronesis*, a discipline where "theoretical principles guide the drafter to conscious decisions made in a series of subjective empirical and concrete choices" (XANTHAKI 2014: 15). In her view the importance of the pyramid of principles is that it can guide the drafter when they have to decide in a conscious and informed manner how to apply drafting rules to concrete choices. For example, she notes, when there is a clash between clarity and precision (on which cf. HERNÁNDEZ RAMOS/HEYDT 2017: 131) the criterion of choice is effectiveness, since clarity and precision are in the same grade of the pyramid: this means the drafter will need to select whichever one of these two principles serves effectiveness best, which is in a higher grade of the hierarchy (XANTHAKI 2014: 16).

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A definition of amendment and repeal must be given here. Although "what is and is not a repeal depends, for all practical legal purposes, on the substance of what is being achieved and not on form or terminology" (GREENBERG 2017: 694), if one looks at their form, the following definitions can be given with regard to the British system: amendment is defined as every addition of words/provisions or substitution of some words/provisions for other words/provisions;[1] and repeal is defined as the removal of words/provisions (GREENBERG 2017: 691-708).

As far as the Italian legal system is concerned, concepts and terminology used in the Italian Drafting Guidance are rather similar.[2] *Modifica* is the addition or substitution of words/provisions.[3] *Abrogazione* is the removal of words/provisions (with a slightly different terminology, cf. PAGANO 2004: 159-169).

1 Logically, a substitution should be treated as being in part a repeal and in part the addition of a new proposition. However, by convention, a substitution is not treated as a repeal for the purpose of being entered in the Repeal Schedule (GREENBERG 2017: 693-694).

2 PRESIDENZA DEL CONSIGLIO DEI MINISTRI, Circolare 2 maggio 2001, n. 1/1.1.26/10888/9.92, *Guida alla redazione dei testi normativi*, published in *Gazzetta Ufficiale della Repubblica italiana*, n. 105/2001.

3 Logically, a substitution is seen in part as a repeal and in part as the addition of a new proposition in Italy too, as stated by the Italian Constitutional Court (*Corte costituzionale*) (cf. Corte costituzionale, Judgment 24 January 2012, No. 13, para. 6).

3 Textual amendment and repeal *vs.* non-textual amendment and repeal

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The first controversial issue that will be examined here concerns the choice by the drafters between textual amendment/textual repeal (when the existing provision is replaced with a new one, in the same way as corrigenda or addenda in books) when compared to non-textual amendment/non-textual repeal (when the amending provision, that is inconsistent with the provision of earlier legislation, is not inserted into the previous Act, nor loses its separate identity in the statute book: in other words, the previous statutory provision and the new provision will always need to be read together).

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In the UK, the way to overcome this conundrum was to consider the pros and cons of these techniques from the perspective of the legislator and the ultimate user. From this point of view, non-textual amendments would be better understood by the legislator (who could easily follow the narrative style of these amendments) but they would give rise to practical difficulties for the users, placing burdens on them (who would have to deal with two pieces of legislation that would not be in compliance one to the other). This is the reason why in the *Renton Report* it was noted that:

> "Many statutes are already difficult enough to understand in themselves without making their sense even more abstruse by amending them in a manner which further perplexes the user. There is no doubt that the non-textual amendment of existing legislation often adds to the burdens of the user".
> (RENTON REPORT 1975: 81)

However, if one assumes that textual amendments should be preferred, they would find another problem, this time concerning both the legislator and the ultimate user: as textual amendments are largely made up of bits-and-pieces-style instructions to drafters, they would be by themselves just as incomprehensible to the users as the bill originally was to the legislator (RENTON REPORT 1975: 77-81).

Once again, a different way to look at this issue is that of the drafter's goals. This analysis has been carried out in the UK more recently. It should be said that the terminology is slightly different to that of the *Renton Report*: it is based on the distinction between express and implied amendments and, with regard to the former, between direct and indirect amendments (XANTHAKI 2014: 225-239), instead of that between textual and non-textual ones.[4] In particular, the pros of express amendments can be seen from the perspective of clarity (XANTHAKI 2014: 225), as they openly replace existing provisions with a new one. In other words, implied amendment presupposes a drafting error, as the drafter has failed to identify a consequential amendment and to express this in the Act; and they are also a breach

4 According to XANTHAKI, express amendment is undertaken by replacing the existing provision with a new or updated one; implied amendment is a consequence of inconsistencies. Express amendments can be direct or indirect: indirect amendments can be indirect referential amendments (the use of a narrative description of the amendments introduced without concrete instructions) or consist of a comprehensive repeal and re-enactments.

of the principle of separation of powers, as it requires the application of principles of judicial interpretation in order to resolve the confusion (XANTHAKI 2014: 225). However, in many cases, also precision should be taken into account, i.e. when some provisions would not be a candidate for textual amendment (e.g. transitional provisions and temporary laws) or the amendment of existing legislation could be achieved more compendiously by non-textual amendment (e.g. an amendment operating in the same way in several different contexts may be much longer if it has to spell out the changes to be made in each context) (RENTON REPORT 1975: 81-82). Moreover, sometimes the intention of the legislature can be to allow application to real cases over a period of time in order to formulate the precise fields of application of the two statutes: in these circumstances, implied amendment would be an expression of conscious vagueness and could be tolerated (XANTHAKI 2014: 225-226).

Effectiveness should guide the drafter in these circumstances: as has been noted, just as with regard to amendments:

> "the effectiveness of [this] mechanism relies to an important extent on how carefully and strategically legal systems use them, how much emphasis is placed in ensuring the health and sanity of the legal order and how much effort is invested in their quality".
> (MOUSMOUTI 2019: 143)

In other words, drafters can deviate from the textual-amendment rule but this deviation must be a conscious and rational choice in the light of effectiveness, as happens, for example, as said, when it would be much lengthier spelling out textually all the changes to be made in each context or in those cases concerning transitional, final or temporary provisions.[5]

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In Italy the *modifica* (amendment) can be textual (*novella*) or non-textual (*modifica implicita*). In Italy a preference is given in principle of textual amendment, similar to the UK. Once again, similarly to the UK, this rule is not strict, as it is clear from the words used in the Italian Drafting Guidance: non-textual amendments **should** be avoided and preference **should** be given to textual amendments.[6] Differently from the UK, though, the Italian 2001 Drafting Guidance gives neither advice on, nor holistic analysis of, the criteria to guide the drafter. If one looks at some actual pieces of legislation in the Italian legal system, however, they would find some examples of non-textual amendments and understand that the underpinning rationale concerns similar needs to those that are taken into account in the UK and were pointed out in the *Renton Report*. For example, non-textual amendments are used also in Italy when it would be much longer spelling out textually all the changes to be made in each context.[7] Non-textual amendments are also used in Italy when provisions would not be a

5 The same pros and cons can be also found when it comes to textual repeal and non-textual repeal, with some exceptions (cf. GREENBERG 2017: 703-704).

6 PRESIDENZA DEL CONSIGLIO DEI MINISTRI (2001: 29).

7 This is the case within the 1998 provision under which every fine that in the Italian legislation is expressed in *lire* (the Italian currency which was used before the euro currency) shall be converted to euros. See Decreto legislativo 24 giugno 1998, n. 213, *Disposizioni per l'introduzione dell'EURO nell'ordinamento nazionale, a norma dell'articolo 1, comma 1, della legge 17 dicembre 1997, n. 433*.

candidate for textual amendment, such as transitional, final[8] or temporary provisions.[9]

4 Short textual amendment *vs.* wholesale repeal and re-enactment

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Another controversial issue concerns the "degree of use" (GREENBERG 2017: 691) of textual amendment, that is the choice by drafters between short textual amendments or wholesale repeal and re-enactment. In order to make the choice between these two techniques, one can consider their pros and cons, once again from the perspective of the legislator and the end user: the form that emphasises the changes of the law (short textual amendment) is seen by the legislator as easiest to absorb, whereas those to whom the legislation is addressed may find that its form matters little (GREENBERG 2017: 692). However, as short textual amendments are largely made of bits-and-pieces-style instructions to drafters, they would be by themselves just as incomprehensible to the users as the bill originally was to the legislator (RENTON REPORT 1975: 77-81).

Once again, a different way to look at this issue is from that of the drafter's goals. Short textual amendment is a great precision-base mechanism, as it ensures a smooth and precise incorporation of the existing legal system. It also helps keep the historical progression of the statute, i.e. the traceability of the changes introduced by law (MOUSMOUTI 2019: 80). However, sometimes its use obscures the aim of clarity, as it usually consists in a complicated list of complex instructions referring to a text the user does not have in front of them (XANTHAKI 2014: 227-228). As mentioned above, clarity and precision lie on the same plane within the pyramid, thus they both have to be taken into account. It is then important to explore concurring techniques to achieve these goals simultaneously.

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Typically, the UK does not choose between short textual amendment or wholesale repeal and re-enactment: each case is decided on its merits (DUPRANT/XANTHAKI 2017: 122). The

8 For example, this is the case of final provisions enacted by the Italian Parliament when it amended some sections of the Italian Constitution so as to downsize the Camera dei deputati (Chamber of deputies) and the Senato della Repubblica (Senate). In that Constitutional Act, Sections 1, 2 and 3 set out textual amendments of the Constitution; whereas Section 4 sets out the date of coming into force of Sections 1 and 2 (which is different from the ordinary date of coming into force of Section 3). Section 4 was drafted as a non-textual amendment: because it was designed only to regulate the coming into force of textual amendments and thus to be temporary, it would not be appropriate to place it within the text of the Constitution. See Legge costituzionale 19 ottobre 2020, n. 1, Modifiche agli articoli 56, 57 e 59 della Costituzione in materia di riduzione del numero dei parlamentari.

9 The same pros and cons can be also found in Italy when it comes to *abrogazione* (repeal): should it be textual (*espressa*) or non-textual (*tacita* or *implicita*)? *Abrogazione* is *tacita* when a new provision is inconsistent with the provision of earlier legislation. *Abrogazione* is *implicita* when a new Act sets out entirely new regulations concerning the relevant subject. Under the Italian 2001 Drafting Guidance, a good practice would be to place a provision setting out textual repeal, so as to ensure a constant revision of legislation and a periodic control of existing legislation (cf. PRESIDENZA DEL CONSIGLIO DEI MINISTRI 2001: 48). Once again, it is clear from the words used that this rule is not strict.

repeal and re-enactment are regulated by Section 17 of the *Interpretation Act 1978* (GREENBERG 2017: 709-711). When short textual amendments are used, precision is achieved. However, in order to also take clarity into account, the legislator relies on concurring techniques which explain the policy behind the amendments, as happens with explanatory notes (XANTHAKI 2014: 228-229), or offer a copy of legislation as **intended to be** short-textually amended or as **is** short-textually amended (GREENBERG 2017: 692). Some examples will be given.

The best mechanism for offering a copy of the bill as **intended to be** short-textually amended is that of the Keeling Schedule, a Schedule to a Bill setting out how the text of provisions of another piece of legislation will appear once textually amended by the Bill (GREENBERG 2017: 277-278). This is a tool of great value for the readers of the Bill, especially the legislators themselves (MAKOWER/LAURENCE SMYTH 2019: 166-167). The best mechanism for offering a copy of legislation as **is** short-textually amended is that of consolidation (XANTHAKI 2014: 230; TEASDALE 2009: 197). However, consolidation as an autonomous mechanism carried out periodically by the Law Reform Commission within the UK has become less attractive today, thanks to the electronic sources of legislation, such as *http://www.legislation.gov.uk/*, that can provide updated versions of short-textually amended legislation (ETHERTON 2008: 20; LLOYD JONES 2013: 4). That said, the process of consolidation affords the legislature the opportunity to re-order the contents of a statute and to erase portions which are obsolete or otherwise overtaken by events.

At the end of the day, in the UK, combination techniques (short textual amendments **and** Keeling Schedule; short textual amendments **and** consolidation; consolidation "as we go"[10]) are used as mechanisms to achieve both clarity and precision. Once again, effectiveness should guide the drafter in these circumstances, when choosing the relevant combination technique.

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Most civil law jurisdictions are inclined to give preference to repeal and re-enactment but they revert to short textual amendments if the practicalities of the case so require (DUPRANT/XANTHAKI 2017: 122). In Italy this preference is clearly stated in the Italian Drafting Guidance. As it is clear from the words used there, the rule is not strict: the Guidance reads that **it is better** to re-enact the entire section as amended, with the new amended part of the section, although the amended part is simply a word or a group of words.[11] Once again, differently from the UK, though, no holistic analysis has been carried out academically concerning the criteria that should guide the drafter in these circumstances. Moreover, consolidation as a tool for carrying out a formal simplification and

10 As recently reported by Elizabeth GARDINER, First Parliamentary Counsel, the current direction of the efforts of the Office of the Parliamentary Counsel is to help parliamentarians by providing as-amended texts of existing law; and to carry out what she called "consolidation 'as we go'", viz. drafting bills to amend previous statutes rather than create new free-standing ones, and replacing entire extended passages of law rather than making lots of little changes (cf. House of Lords. Select Committee on the Constitution, *The Legislative Process: Preparing Legislation for Parliament – Evidence. Fourth Report of Session 2017–2019*, HL 27, 2017, Q96).

11 PRESIDENZA DEL CONSIGLIO DEI MINISTRI (2001: 30).

systematization of existing legislation has not been used for many years in Italy, as it should (ALBANESI 2016: 275, 2017: 264).

There is however an important tool that is used in Italy to achieve the goal of clarity in tandem with that of precision, when it comes to short textual amendments: it is that of *testo coordinato* of the *decreto-legge* (issued by the Government) amended by the Parliament (ALBANESI 2020: 195-199). Amendments to the *decreto-legge* are made separately from the main text and this gives rise to difficulties of interpretation of meaning: most of them are short textual amendments to the *decreto-legge*; some of them add to the *decreto-legge* new provisions which are strictly interlaced with the remaining provisions set out by the *decreto-legge*. This is the reason why the Ministry of Justice is tasked with drafting *testi coordinati* (published in the Italian Official Gazette), once the converting Act is enacted. They produce a sort of restatement of the *decreto-legge* as amended by the Parliament via the converting Act. As they produce a sort of restatement, they do not affect the existing law. The amended parts are italicized for the reader's ease.[12]

5 Conclusions

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At the end of the day, the solutions given in Italy to the conundrum concerning the choice between textual and non-textual amendment or between short textual amendment and wholesale repeal and re-enactment, seems to be the same as in the UK. However, as mentioned, the Italian 2001 Drafting Guidance gives neither advice on, nor holistic analysis of, the criteria to guide the drafter. A criterion should be given to the Italian drafter, anyway, and this could be, like in the UK, looking at drafter's goals and their hierarchy. Clarity must be firstly achieved (this means giving priority to textual amendment) but sometimes achieving clarity would create practical difficulties and precision should be taken into account (this means using non-textual amendments when appropriate). Moreover, achieving precision itself (via short textual amendments) should be in tandem with achieving clarity (via mechanisms, such as the Keeling Schedule and consolidation in the UK or the *testi coordinati* in Italy). However, this should be expressly set out in the Italian Drafting Guidance so as to give the drafter clearer guidelines in this field.

12 Decreto del presidente della repubblica 28 dicembre 1985, n. 1092, *Approvazione del testo unico delle disposizioni sulla promulgazione delle leggi, sulla emanazione dei decreti del Presidente della Repubblica e sulle pubblicazioni ufficiali della Repubblica italiana*.

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