Can Better Regulation Be Achieved By Guiding Parliaments and Governments? How the Definition of the Quality of Legislation Affects Law Improvement Methods (Concluding Remarks)

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CONCLUDING REMARKS
CAN BETTER REGULATION BE ACHIEVED BY GUIDING PARLIAMENTS AND GOVERNMENTS? HOW THE DEFINITION OF THE QUALITY OF LEGISLATION AFFECTS LAW IMPROVEMENT METHODS

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Abstract

There is no single answer to the question whether regulation can be improved if parliaments or governments are given guidance. The problem lies in the polysemous concept of legislative quality that can be legal (subsidiarity, proportionality, legal security, transparency, ...), factual (effectiveness, simplicity of State action, ...) or drafting-related (clarity, consistency, concision, ...). Legistics methods are required to achieve better law-making. These can be codified in both formal and material legistics guides, so that Parliaments and Governments will not only be able to improve legislative drafting, but also the law’s ability to affect social reality.

Keywords

legistics, better regulation, legislation, law, evaluation, legislative drafting

Can regulation be improved if parliaments or governments are given guidance? This was the question I asked at a colloquium not only with respect to Switzerland at the federal and cantonal levels, but also with respect to the European Union, Germany and France. It is also one of the questions addressed in this thematic issue of Legisprudence.

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1 A Flückiger and C Guy-Ecubert (eds), Guider les Parlements et les Gouvernements pour mieux légiférer: le rôle des guides de légistique (Geneva, Schulthess, 2008).
2 In addition to his contribution to this volume, see also W Robinson, “Le Rôle des Guides de Légistique dans l’Union Européenne”, ibid, 95.
4 E Millard, “Les limites des guides de légistique: l’exemple du droit français”, ibid, 117. Each of the earlier criticisms is based on a specific definition of quality as a concept. This means that to improve
As one might expect, there is no single answer to this question. In any case it stems from a premise that ought to be debated beforehand, being: that quality of law today is poor and requires improvement. Some claim that we need to remedy a law that is sick, pathological, in crisis and disarray and that requires radical review, having become so unintelligible and complex that it threatens the rule of law. Apparently, legislation is proliferating at epidemic scale, the product of a machine churning out reams in the sources of law and avalanches of regulation. Their proposed solution is to trim, reduce, reorganize and occasionally give law a “clean sweep”. In reading this, one might wonder whether laws have become the new Augean stables.6

Yet criticism of the supposedly poor quality of legislation is nothing new. It is a recurrent topic rooted in the past. Over the years, author upon author has critiqued laws as too complicated, too incomprehensible, too long and too numerous.6

The problem lies in the vague and polysemous concept of legislative quality. Thus, the central concept of the clarity of law is, paradoxically, anything but clear, since it can just as legitimately be understood as a requirement of comprehensibility, simplicity and concision as the necessity for a corpus of very precise, detailed regulations—the contrary of simplicity—that allows any audience to understand clearly how the law applies in every possible situation.7

Schematically, we find three types of criteria—legal, factual and drafting-related—which offer a series of potential definitions.

Community law offers a representative panorama in this regard.8 The legal criteria of good legislation arise from democratic legitimacy,9 subsidiarity and proportionality,10 legal security11 and the transparency of the legislative process.12 The factual criteria (ie, those that allow us to determine whether law can affect

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5 A Flückiger, “Qu’est-ce que ‘mieux légiférer’? Enjeux et instrumentalisation de la notion de qualité législative”, in Flückiger and Guy-Ecobert (eds), Guider les parlements, supra, n 1, 11.
8 The Inter-institutional Agreement of 16 December 2003 on Better Law-Making (2003/C 321/01) [Agreement on Better Law-Making] and, regarding drafting more specifically, see the Interinstitutinal Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (1999/C 73/01) [Agreement on the Quality of Drafting].
12 C 2, 10 and 11 of the Agreement on Better Law-Making.
facts) are effectiveness, measured by evaluation, and the simplicity of State action. The drafting-related criteria are clarity, simplicity and consistency, as well as concision, precision and a reduced volume of legislation.

The choice of methods to improve regulation arises from the definitions selected to describe “good” law. These are, necessarily, wide ranging.

We will begin by distinguishing logistic methods from conventional legal methods, which aim to ensure that constitutional principles are applied to the law per se by developing control of the legislation’s constitutionality or techniques for incorporating and controlling compliance with international law in particular. Improving legislative drafting and legislative technique (formal logistics) may involve defining quality standards, instituting legislative drafting committees, and limiting and overseeing parliamentary amendments. It may also favour techniques like electronic dissemination of legislative texts, the codification, recasting and consolidation of law or periodic reviews of law and be embodied in legislation drafting guides (formal logistics manuals).

Finally, improving law’s ability to affect social reality (material logistics) involves developing legislative evaluation, introducing regulatory bodies, using less bureaucratic, pluridisciplinary expertise in the legislative design process, planning and coordinating legislative activity, using checklists and writers’ guides to material logistics and analytical tools (review of the problem, definition of objectives, choice and evaluation of instruments), and using new types of legislation that are more permeable to environmental, social and economic progress and changes (experimental legislation, Damocles’ laws, sunset laws). These processes can be codified in material logistics guides. A range of political and social issues dictate the methods chosen to improve regulation. Legistics, as a methodical process for improving normative production, is more than just an axiologically or politically neutral technology: it is constantly at risk of being instrumentalized. This danger is not a new one. In the Age of Enlightenment, the call for accessible legislative language or the drafting of a simplified corpus of statutes—one version for jurists, another for lay persons—was intended to educate the masses, improve public acceptance of rules, reduce legal disputes, limit the authority of jurists or protect the sovereign from competing sources of law. Some legislative technique requirements have also been used to justify reducing the right to political participation by restricting the right of parliaments to participate in complex projects on the grounds of consistency and rationality. In the past, the institutionalization of permanent legislative committees has been defended as a means of strengthening parliament’s legislative sovereignty against court control, for example.

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26 Germany, basing itself on the Dutch model, created a “national regulatory council” (“Normenkontrollrat”) to reduce their bureaucratic cost (Gesetz zur Einrichtung eines Nationalen Normenkontrollrates of August 14, 2006).
27 See P Richli, Interdisziplinäre Daumenregeln für eine faire Rechtsetzung: ein Beitrag zur Rechtsetzungslehre im liberalen sozial und ökologisch orientierten Rechtsstaat (Basel, Schultess, 2000).
29 G Müller, Elemente einer Rechtsetzungslehre (Zürich, Schultess, 2nd edn, 2006), 1044 ff.
30 See references infra, n 43.
35 B Mertens, Gesetzgebungskunst im Zeitalter der Kodifikationen, supra, n 6, 506.
36 Ibid.
37 Ibid.
Switzerland's early bias in favour of simple, understandable legislation for the people is attributable to both the specificities of direct democracy institutions and the role of lay persons in case law. This straightforward style has just been cited by the federal government itself to symbolically assert Switzerland's sovereignty with respect to the European Union by (self-)critiquing its own growing tendency to incorporate EU law directly into the Swiss legal system rather than creating equivalent regulations based on Swiss canons. The federal government claims that doing so threatens the Swiss legislative culture since EU law is often hard to understand, inaccessible, and characterized by lengthy and complicated regulatory prose.

Jurists' role in the legislative process also comes into play, depending on which methods are being advocated to improve regulations. Promoting normative precision over the use of general clauses or the use of simple, concise regulations distributes authority among the legislative, executive and judiciary arms. Legislation drafted in complex legal jargon fans the flames of mistrust with respect to government by judges and, more generally, raises a fear of jurists' ascendancy over political regulation. The institutionalization of legislative evaluation has led jurists to relinquish their traditional expertise in legislative matters to representatives of other fields (political science, economics, sociology, etc.). Such was the program defended by Peter Noll, who promoted methodic, pluridisciplinary material legistics based on a planning rationality.

Competition among authorities is also a factor, whether in formal legistics when loose wording is favored to increase government's decision-making margin or in material legistics when parliament demands a command of legislative evaluation to strengthen its control over government.

Quality criteria may also be defined so as to achieve one essentially political goal over another. Such is the case with the OECD Guiding Principles for Regulatory Quality and Performance adopted by the OECD Council on April 28, 2005, which clearly define regulatory quality standards from the perspective of

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38 The drafter of the Swiss Civil Code believed it must be a "people's law" written not for judges, but for everyman (E Huber, Code civil Suisse: exposé des motifs de l'avant-projet du Département fédéral de justice et police (Berne, Département fédéral de justice et police, 1901), 10 ff.
39 B Mertens, Gesetzgebungskunst im Zeitalter der Kodifikationen, supra, n 6, 507.
41 Ibid.
42 Ibid, 5797.
economic effectiveness in order to foster true competitive conditions. This is an obvious example of the concept of legislative quality being instrumentalized in pursuit of a justifiable political goal to the detriment of other equally legitimate goals. Taking this reasoning farther, there is nothing to prevent us from also—or especially—defining quality legislation through its social or ecological qualities, for example. This type of definition leads to a gaping polysemous breach in the concept of legislative quality.

The requirement to curb legislative inflation, reduce normative density, and abrogate, shorten and “clean up” legislation is also unequivocally a requirement of liberalism: the ideal of few laws, as unattainable as any ideal, should allow individuals, businesses and even government to recover a freedom that regulation has eroded over time. According to this doctrine, developing the principle of legality, though originally intended to emancipate citizens from state guardianship and protect their freedoms, leads to perverse effects that outnumber benefits. By focusing on legislative proliferation, we quickly forget that simplifying law will inevitably make it more complex for administrative and judiciary authorities to concretely apply, thereby amplifying the problem. The full extent of law is not contained by the wording of law, although positivism may have convinced us so for a time. The complexity of law reflects our world, and any attempt to simplify law seems laughable, if not naive, where that simplification is also supposed to reshape the world. “Simple” legislation that consists of mandatory, general and abstract commands no longer allows us to decide how our contemporary societies evolve, if it ever did, since these societies are less sensitive to hierarchical, authoritarian and unitarian methods. Nor is it certain that reducing regulatory density will enable the legislator to truly help citizens recover their overall understanding of modern law, in the wider sense, though it may indeed provide an overview of legislative documents.

With the 20th-century boom in public policy, we can conclude that the right law is not necessarily the well drafted law, but that which produces beneficial effects for society and the environment. Provided guides or manuals are not limited solely to formal logistics, they are certainly welcome tools, though tools whose limitations we would do well to keep in mind.

44 See, in particular, principles 4, 5 and 6: “Eliminate unnecessary regulatory barriers to trade and investment through continued liberalisation and enhance the consideration and better integration of market openness throughout the regulatory process, thus strengthening economic efficiency and competitiveness.” (Principle 6).
46 C Courvoisier, “L’idéal de la loi rare” in Collectif, Pensée politique et loi (Aix-en-Provence, Presses universitaires d’Aix-Marseille, 2009), quoted in Mathieu, La loi, supra, n 31, 73.
47 Regarding the limitations of logistic guides, especially formal guides, see E Millard, “Les limites des guides de légistique: l’exemple du droit français”, supra, n 4.