Abstract
In an age of soft law and globalization, it has become increasingly difficult for the law to “lay down the law”. To ensure in this new context that its impact is as fair as optimal, legistic must go beyond mere clear legislative drafting: it has to propose a method for integrating the strength of soft law in the democratic law-making process. This treatise presents the foundations of the sciences of legislation (legistic or legisprudence), historically constituted to make laws more rational and effective, clearer and shorter. It explains how to: create an integrated impact assessment that factors in all the components of sustainable development, among the multiplicity of public and private policy instruments (ex ante material legistic); formulate and communicate clear and coherent texts (formal legistic); retrospectively evaluate laws and public policies through methods which should become more participative (ex post material legistic). This treatise is based on Swiss and European Union law, with a look on comparative law. It includes developments in regulation and regulatory governance, behavioral economics, […]

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This treatise is based on Swiss and European Union law, with a look on comparative law.

It includes developments in regulation and regulatory governance, behavioral economics, affective sciences and artificial intelligence.

This work is intended not only for lawyers, but also for social scientist, members of political and administrative authorities, and anyone interested in public policy evaluation.
Author

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Foreword¹

Law no longer lays down the law – The strength of law has probably always been overestimated as an instrument for governing mankind. “What law guards against,” writes Laurent DE SUTTER, “is not so much the non-observance of the principle it sets out; rather, it is a reminder of the law’s inability to guarantee its observance—its inability to fulfill its function. Law is powerlessness: it stands as living witness to the fact that transgression, rather than penalty, is the essence of law. Law lives by virtue of transgression, and must therefore anticipate it.”² In this era of soft law, governance, regulation and globalization, this observation is renewed with a disproportionate scope. Benoît FRYDMAN is among the many authors who remind us of this, as “globalization affects the effectiveness of laws established by States to the extent that it gives stakeholders ever broader and increasingly accessible possibilities for eluding the rules of national law and for opportunistically choosing, among the regulations of various legal orders or through their combination, the most favorable legal regime.”³ In our democratic constitutional States, legislators feel fundamentally powerless up against the problems they are supposed to solve. This admission is a heavy one. Law is but a text. Law “reveals itself a great deal less in its concept or formula than in its implementation and the effects it produces.”⁴ As a symbolic tool of democracy, its powerlessness is also the

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² Laurent DE SUTTER, Après la loi, Paris, 2018, p. 143 s. [translation]. In this regard, see more particularly below [=Alexandre FLUCKIGER, (Re)faire la loi : traité de légistique à l'ère du droit souple, Berne (éd. Stämpfli) 2019], c. 3.6.3.3, 5.2.1 and 6.1.2.
⁴ FRYDMAN (2018), p. 10 [translation].
powerlessness of citizens to fully participate in public affairs.

*Laying down the law* – Does that mean we must lay down our arms? This collective sense of powerlessness is the perfect starter culture for populism. Because law has always been a product of emotions and numerous contortions, whereas it ought to be born of reason, it is extremely vulnerable to demagogical assaults.\(^5\) Believing or pretending to believe in the myth of powerful, rational law involves a degree of danger.\(^6\) In this context, can our democracies lay down the law, that is, help law recover its efficacy?

This pinpoints the challenge that legisic must overcome: how can law be conceived, evaluated and drafted to achieve an impact as fair as it is optimal? Under such conditions, it is no longer a matter of just drafting clear texts, but of moving beyond words. We propose, then, that *conventional legisic be revisited*, in a context increasingly under the sway of soft law that challenge the legislator: a form of legisic that must be central to the rule of law and to democracy in a multi-level governance in this era of global law.\(^7\) Legislators will accordingly develop, in the public policies they introduce, impact strategies that are bound to be less direct and inevitably more flexible and less spectacular in an attempt to gain a democratic foothold. The strength of the law will reside in *strategic reappropriation of all instruments for action* at its disposal, be they legal or not, public or private, unilateral or cooperative, normative or material, strong or weak, hard or soft: \(^8\) Legislation becomes the orchestra conductor of regulation.\(^9\) This legisic will exceed the simple letter, will focus on the substance of the standard in order to ensure that *its impact is as fair as it is effective*.\(^10\)

However, this kind of legisic can only be very *modest*—since the strength of law resides in strategic use of its weakness—and very patient, having recognized that the (apparent) fragility of its immediate impacts will be revealed only at a later time when, through gradual maturation, a certain number of diffuse, soft, experimental and plural standards become progressively mandatory rules (*creation of law through crystallization*).\(^11\) This type of legislative drafting also demands that *the concept of efficacy be rethought*,

\(^5\) See below c. 1.3.3.1.
\(^6\) See below c. 1.2.2.
\(^7\) See below c. 1.3.3.1c.
\(^8\) See below c. 3.
\(^9\) On this evolution of legislation toward regulation, see below c. 1.3.3.1a.
\(^10\) See below c. 1.3.3.2c.
\(^11\) See below c. 3.3.4.2 and 6.2.4.3c.III.
turning away from the usual idea of misconduct vis-à-vis the targeted goals toward a capacity to make strategic use of the unexpected.  

François OST sketched an outline of the issue by asking “how, in a context of continual reassessment, can legal security be restored, while ensuring the efficacy of laws, their hold on reality?” From a positive perspective, there is reason to laud the lucidity of the legislator who has grasped that the premise of rationality, or even infallibility, that only yesterday was associated with law, has today disappeared, such that the legislator must now supply the evidence of the necessity, relevance and practicability of every draft text. This concern extends beyond conventional legistic, which concerned that formal quality of the texts; here, it involves substantial control over the very content of the legislation. All this leads the legislator to a new modesty: given the growing uncertainty surrounding every intervention, the legislator is now limited to adopting rules that are both informed and provisional, and the validity of which, on the whole, is both precarious and conditional.

Thus, law-making also means making perpetual improvements to the law in order to evaluate and revise it in successive, continual learning cycles, like Plato’s legislator, an artist “unable to cease perfecting his work, to the point where the painting can neither be made more beautiful nor more expressive.”

Making the law – To make such a law, legislative drafting focuses on the method by opening an interdisciplinary crossroads. In a process inspired by public policy analysis, the law will, successively and ceaselessly, cycle through the stages of rough sketch, outline, draft, completed work, usage, and amendment (see Figure 1-1). In the rough sketch phase, its shape will emerge as part of prospective material legistic (impact assessment or ex-ante evaluation [see Figure 2-2]); through usage and amendment, it will be laid on the easel of retrospective material legistic (ex-post evaluation [see Figure 6-1]); in between, it will be fleshed out by the ever finer brushes of formal legistic (see Figure 5-1).

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12 See below c. 6.2.2.1.
16 OST (2016), p. 536. [translation].
17 OST (2016), p. 536. [translation].
18 To paraphrase BOILEAU: see below c. 1.3.2.1 i.f. (ref. cit.).
19 See below c. 1.3.2.1 (ref. cit.).
While this may not make law a rational construct, it will become more modestly reasoned, as it will henceforward factor in the limited rationality of our behaviours, the cognitive biases that affect us, the place of emotions, and the limitations of the logical model in law\textsuperscript{20} (Chapter 1 – \textit{Reasoned Law}). The objectives that law sets will then have a relevant impact on the social reality and have the potential to better solve the societal problem without disproportionate undesirable effects (Chapter 2 – \textit{Relevant Law}). To do so, law will have to strategically appropriate normative pluralism for the purpose of serving its objectives while attempting to lay for it a democratic foundation. We will examine a certain number of techniques at the legislator’s disposal, which are intended to boost both the effectiveness\textsuperscript{21} and legitimacy\textsuperscript{22} of instruments for action (Chapter 3 – \textit{Strategic Law}). Evaluation of the legislative impact will extend beyond economic criteria to encompass all components of sustainable development, including the social and ecological impacts. The assessment of efficacy, effectiveness and efficiency (see Figure 4-5\textsuperscript{23}) will solely be an aid to the legislator in clarifying its choices as transparently as possible, without deciding in its stead, as well as preventing economic and rational excesses (Chapter 4 – \textit{Effective Law}). Aiming for a text with a certain elegance, formal legistic will attempt to make the law clear, with all ambiguity concealed behind this objective, to ensure the law has as faithful an impact as possible on its target audience (Chapter 5 – \textit{Clear Law}). Finally, in terms of how the legislative text affects reality, legistic not only anticipates implementation, it supports it. In comparing the law that the legislator intended to make with that actually enacted, the ex-post evaluation suggests re-examining the law such that lessons can be learned from experience (Chapter 6 – \textit{Reflexive Law}).

Methodologically, we have used flashbacks regularly throughout this work, returning whenever we could to the origins of the “science of legislation” so popular in the 18\textsuperscript{th} century, by rereading authors — some, long-forgotten — thanks to digitized collections. We then laid

\textsuperscript{20} On this evolution of rationality, see below c. 1.3.2.2b.
\textsuperscript{21} See below c. 3.3.5.2a (for non-binding instruments) and c. 3.5.2.5b (for coordination instruments).
\textsuperscript{22} See below c. 3.3.6 (for non-binding instruments), c. 3.4.5 (for cooperative instruments) and c. 3.5.4.4 (for governance acts).
\textsuperscript{23} See below c. 4.3.3.5- intervention logic diagram - impact model.
anchor in Swiss law, not just because it is the law we teach, but also because legistic became established in Switzerland very early on, first in doctrine, then in soft law. At the same time, we decided to analyze European Union law for two reasons: in the era of globalization, it would be pointless to discuss the best ways in which law can achieve more impact if we remain confined to national boundaries, opening the vast field of multi-level legistic that remains to be built; the European Union has now institutionalized the legistic process in a highly formalized manner as part of a better law-making agreement. Forays into French, German and U.S. law, in particular, complete the tableau.

Making this book — The legislative drafting process is intrinsically interdisciplinary and cannot be reduced to a kind of monoculture. Yet venturing outside one’s traditional field of competency entails a risk: that of superficiality or, worse, that of ignorance, error and shortcoming. May the specialists in political science, philosophy, history, psychology, sociology, economics, management, governance, evaluation, communication sciences or linguistics forgive in advance the furtive and arbitrary incursions of this jurist, driven simply to include these various perspectives in order to understand what law has become in this age of governance and global law.

At the outset, this book was conceived of as an aid to legislative drafters in designing a legislative bill, as they are often disconcerted when first asked to draw up a normative text and sit facing a blank page. Mastery of formal legistic tools alone is wholly inadequate when it comes to drafting a law that is expected to have an impact. Making legislative drafting (formal legistic) part of the broader strategic design (material legistic) leads to a better understanding of substance, potentiality and limits from the perspective of implementation and diversity in normative instruments.

Fundamentally, this book’s primary audience is the legislator, that is, the politicians who enact laws. Practically speaking, teaching this branch for the past two decades as part of the ongoing professional development has shown — at most — a polite indifference on their part. Yet dissecting the toolbox of contemporary governance would help politicians in their work of designing more coherent regulatory scenarios.

From a lawyer’s point of view, this book is a complement to works on administrative, constitutional and parliamentary law as well as on legal theory. It is written as much for academics (legal methodology, theory of sources) as for those who must design, propose and implement legislative reforms and who are open to the genesis of law as well as to its application.
Evaluation specialists will find in it an opportunity to learn how their practice fits into a legal framework and the resulting implications. Finally, because this book owes its creation to a jurist who, as he gradually discovered a vast archipelago of alternative normative instruments, found entertainment in classifying them, like an entomologist, in his normative thinking scheme, it may be of interest to anyone who observes and analyses new ways of governance and regulation.