

## OUVERTURE DU COLLOQUE

# 4 Round Table Discussions in Summary



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The following text provides a faithful summary of the comments made during the round table discussions of 26 November 2020.

1 - In 2016, the French Council of State concluded its annual study by stating that legislative procedures – however good they may be – will never be effective unless all stakeholders concerned by the country's regulations bring about a far-reaching cultural change in this domain. It is with this viewpoint clearly in mind that the National Council for the Evaluation of Regulations (*Conseil national d'évaluation des normes*) and LexisNexis, under the guidance of researcher Pierre de Montalivet, decided to organise a colloquium dedicated to changing the regulatory culture through the spreading of best practices. This supplement to *La Semaine juridique* summarises the main comments stemming from the event.

**Alain Lambert** (*Étude 1*) opened the colloquium by highlighting the need for a veritable sea change. The French people need to once again have respect for their laws, thus returning these laws to their rightful place in the French psyche. To achieve this aim, all stakeholders within the regulatory process must play their part: while it may be easy to legislate with virtue, it is much more difficult to truly bring about a change in regulatory practices.

**Bernard Cazeneuve** (*Étude 2*) confirmed this observation: drawing conclusions from his time in government, he affirmed that, in reality, an extraordinarily high level of political will is needed in order to improve the quality of the law. Given that the authority of the state is in part built on its ability to respond to social needs through the creation of regulations, imposing a qualitative dimension upon this creation process is not in the French legal tradition. It is with the aim of changing this regulatory culture that the colloquium sought to highlight best practices that should be more widely spread, by identifying four themes that were each the inspiration behind a round table debate.

## 1. Round Table 1: Training and Information

2 - The first round table began with a presentation by its chair **Karine Gilberg** (*Étude 9*), who spoke about the link between the drafters of laws and the authorities that implement those laws. The implementing authorities cannot effectively understand the regulatory objectives without receiving initial training and information.

In light of this, training for civil servants studying at France's National School of Administration (ENA) was the object of particular attention. The school's director, **Patrick Gérard** (*Étude 6*), stated that, given its constitutional status, the civil service is at the heart of the regulatory process. This process is under a high level of pressure to respond to societal issues through the creation of rules of law. In view of this, the teaching of legislation focuses mainly on the need – or otherwise – to resort to legal rules. **Cédric Groulier** (*Étude 7*) believes that more widespread teaching of legislative drafting in universities could be pertinent in order to increase public awareness of the importance of rationalised regulation. **Willem Konijnenbelt** (*Étude 8*) supported this idea, pointing to the highly successful example of the Academy of Legislation set up in the Netherlands.

## 2. Round Table 2: Evaluation

3 - **Olivier Pluen** (*Étude 11*), who chaired the second round table, opened by highlighting France's shortcomings in terms of evaluation. He believes that these deficiencies are due to a tendency to create "lace-like legislation", that is to say, too great a focus on form over substance when creating and preserving laws, instead of concentrating on their clear objectives.

The French MP **Jean-Noël Barrot** (*Étude 12*) presented some recent examples of progress made by parliament when it comes to evaluation, notably the creation of the "LexImpact" software program, which produces simulations of the impact of a tax reform, or the implementation of the "Spring Evaluations" (*Printemps de l'évaluation*) which establishes an annual, *ex post facto* appraisal of measures adopted. Setting a more pessimistic tone, **Hervé Novelli** (*Étude 13*) believes that the current evaluation methods do not allow for a true understanding of the effects of regulations: only the creation of a truly independent parliamentary evaluation body, whose sole mission is to carry out all regulatory analysis, would be able to achieve this. **Hervé Moysan** (*Étude 14*) added that parliament also needs to address the evaluation of the applicable legislative scope. It could, to this end,

carry out a general census of the provisions currently in force within our body of French law in order to determine which ones deserve to be preserved and which ones should be formally repealed. Parliament would then introduce a general mechanism for abrogation similar to that which was already used for circulars and provisions in relation to advisory committees back in the 2000<sup>s</sup>.

### 3. Round Table 3: Development and Implementation

4 - **Anne Levade** (*Étude 19*), who chaired this round table, stated that the development of laws is traditionally the theme most commonly associated with the science of legislative drafting. She then went on to say, however, that imposing detailed rules concerning the production of regulations did not necessarily guarantee their sound application.

**Catherine Bergeal** (*Étude 16*) observed that despite improvements in the effectiveness of judicial review – notably thanks to the priority preliminary ruling on constitutionality and the injunction powers of administrative judges – progress in terms of the “building blocks” of the quality of the law – namely intelligibility, stability and operability – remained highly insufficient. Real progress could not be made in the matter unless parliament, the government and citizens all agreed to make the quality of the law a top priority.

**Charles Touboul** (*Étude 17*) acknowledged that this situation had worsened with the Covid-19 crisis.

Although the main principles of legislative drafting had, on the whole, remained intact, the urgency of the situation had been a source of legal uncertainty. **David Sarthou** (*Étude 18*) added that it remained difficult to predict the effects of laws, as laws only produce effects as of the adoption of their implementing decree. Although a shift in administrative culture can be seen, a doubling – or even tripling – in the volume of laws during parliamentary debates makes implementation efforts extremely difficult.

### 4. Round Table 4: Oversight

5 - The final round table opened with its chair, **Nicolas Molfessis** (*Étude 24*), wondering which institution is best placed to monitor the quality of regulations.

**Guillaume Drago** (*Étude 21*) informed us that an upstream review of this nature is already carried out by the Council of State and the general secretariats of the different ministries. It would therefore be dangerous to entrust an extra-parliamentary institution with such oversight given that the law remains an expression of the general will of the people. Allowing another body to review the quality of the law would therefore amount to undermining the principle of democracy. In contrast, the German constitutional court – the *Bundesverfassungsgericht* – carries out such a review, while still respecting the limits of its constitutional framework. **Matthias Rossi** (*Étude 23*) explained that the *Bundesverfassungsgericht* monitors regulation quality by monitoring proportionality as well as through the constitutional principle of clear determination of rules. On this point, **Stéphane de La Rosa** (*Étude 22*) stated his belief that judicial review can be complemented by an alternative review. He cited the example of the European Union, more specifically that of its Regulatory Scrutiny Board, charged with carrying out this qualitative analysis. Given that the Court of Justice does not carry

out satisfactory oversight of the European texts in this area, it is this independent body, under the aegis of the European Commission, that fills the gap by checking the quality of all impact studies.

### 5. Conclusion and Awarding of Prizes

6 - **Pierre de Montalivet** (*Étude 26*), scientific director of the colloquium, concluded the event by underscoring that textual and jurisprudential initiatives taken in response to the decline in the quality

of the law are of limited effectiveness. The answer is therefore to change the regulatory culture, which means bringing about a change in practices but also in representations. The quality of the law needs to become an ethical issue that is addressed by both citizens and by public authorities in order to become a societal priority and a matter of public policy.

Finally, in order to ensure that the event would have a ripple effect in terms of communication, a panel of nine judges, presided over by **Pierre Albertini** (*Étude 30*), was constituted to award prizes in recognition of best practices already adopted to reinvigorate our existing regulatory framework. In keeping with the spirit of the colloquium, which was centred on tangible solutions for improving the quality of the law, the winning practices were those from which inspiration should be drawn in order to finally achieve a true regulatory paradigm shift. ■

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