PROPOS CONCLUSIFS

27 Improving the quality of law by changing practices and perceptions

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The limits of legislative and jurisprudential solutions to the deteriorating quality of the law are such that we must advocate for cultural change. We must alter not only practices, by identifying best practices and rolling them out across the board, but also perceptions, representations and mindsets. If the quality of the law is to become a priority, then citizens and public authorities must all recognise its importance. In particular, the quality of the law would benefit from the development of a real legal policy.

1 - This colloquium did not seek to reflect on the classic observation that the quality of the law is deteriorating, or on proposed constitutional or legislative reforms to address that deterioration. Rather, it focused on the cultural and political changes for which legal uncertainty calls. The point of the colloquium was not, therefore, to arrive at this classic conclusion, identifying the crisis and its solutions, but to use it as a starting point to go further, finding solutions that might appear more modest but that are ultimately more easily applicable and thus more efficient. The goal was to come up with operational solutions based on practice.

2 - There is a widespread consensus about the current state of affairs. The law is suffering from three major problems, insightfully pinpointed by the French Council of State as far back as 1991: legislative inflation, instability, and deterioration in quality. Doctrine, judges, the political class and civil society have all reached the same conclusion and suggested remedies to address these issues.

3 - A number of legal solutions have been implemented, notably in the form of legislation. These include the introduction of mandatory impact assessments for bills; the development of codification; laws to simplify the law; the possibility of referring private members' bills to the Council of State for an opinion, and progressively making the law available online

4 - Solutions have also come from jurisprudence. The Constitutional Council, for instance, has enshrined the accessibility and intelligibility of the law as a constitutional objective, with automatic censure for cavalier lawmakers who fail to abide by the standards in place, while the Council of State has established legal certainty as a general principle of law.

5 - All this has contributed to a general trend towards increasing regulation and legislation on legislative drafting. Precepts from the science of legislation have been incorporated in the law, and methods derived from what might be called the "art" of law making have become legal prescriptions.

6 - Nevertheless, the efficacy of these legal solutions remains limited, disappointing even. Impact assessments are too often written *a posteriori,* to validate a piece of legislation whose necessity is not really questioned. Codification, which does not take account of some sources of law, can give the citizen a false sense of completeness and, since it does not alter the substance of the law, allows numerous drafting errors in codified laws to persist. Laws purporting to simplify the law are themselves complex. The presidents of France's legislative assemblies rarely refer bills to the Council of State for its opinion. Putting the law online does not give citizens access to all the laws applicable to them, and entails updating legislation which is itself not error-free. Although we do not always have entirely reliable indicators on the subject, the impression remains that the law is not of sufficient quality. Despite all the efforts made to address these issues, the "jurislator", to use the term coined by René Chapus, has somewhat schizophrenically continued to produce an overabundance of precarious legislative and regulatory texts that are difficult for their target audience to understand. Paradoxically enough, the Council of State's 2016 annual study on the simplification and quality of the law revealed that the situation had actually deteriorated since the 1991 and 2006 studies. The law is

still characterised by uncertainty. The law is expanding and, as it does so, it is suffocating under its own weight.

7 - The causes of legal uncertainty are not only legal and technical, but also, in part, political and social. One example is the French propensity to attempt to resolve every difficulty by simply passing a law: successive governments have answered the social demand for law with a policy of showing themselves to be taking action, considering a problem resolved once it has been legislated upon. "Virtually every report on the 8 o'clock news spawns a law," as Guy Carcassonne put it in typically pithy fashion. Political and media pressures are also contributing to an acceleration in law making: for instance, the use of the accelerated procedure often results in hastily cobbled-together laws whose quality leaves a lot to be desired and which then have to be amended. In addition, the regular changes in political leadership have created instability in laws and regulations, which are the products of the political programme of whichever party wins a majority. More generally, the beauty of the law is often sacrificed to political imperatives.

8 - All this brings us to the reason for this colloquium: though some progress has been made since the Council of State's seminal 1991 report, much work remains to be done. Should we continue to make use of the same legislative, regulatory and jurisprudential remedies ? Will salvation come from a new amendment to the Constitution or new legislation to simplify the law ?

9 - In reality, the answer that law can bring to legal uncertainty is relatively limited. *Quid leges sine moribus* ? The crux of the matter lies in practices, habits, customs, mindsets: in a word, culture. Improvements in the quality of the law are just as dependent on changing practices and mentalities as they are on reforming legislation or enshrining a new jurisprudential principle. The aim must therefore be to 'change the regulatory culture', to borrow the phrase used by the Council of State in its 2016 study.

10 - Having addressed the "why", let us turn to the "how": how exactly can we change regulatory culture? A culture is a set of behaviours and representations. Practices, customs, habits and traditions, but also knowledge, values, ideas, mentalities… in short, collective representations.

11 - We must therefore identify best practices that help improve the quality of the law, and apply them as widely as possible. However, such best practices can only be rolled out across the board in a lasting manner if backed up by a certain mindset and strong political will. It is important, then, to go beyond the legal regulation of law making: we must also politicise and "culturalise" it, integrating it to greater extent in public policy, practices, and cultural representations. We must, therefore, change (**1**) practices and, (**2**) perceptions (**3**).

1. Changing practices

12 - This colloquium attempted to identify best practices in order that they might be spread. But what are "best practices", exactly ? They are techniques, methods and behaviours considered to produce beneficial effects on the quality of the law or, more generally, on legal certainty. Best practices – whether they exist already or have yet to be created – may be enshrined in law, but those that we are interested in here are those that do not stem expressly from texts or can be applied without any prior constitutional, legislative or regulatory reform. They are available to regulatory actors and are largely dependent on their will, their initiative, and the resources placed at their disposal. They are linked to the different stages in the creation and implementation of a legislative text: design, drafting, adoption, evaluation, scrutiny, and application. Here, they will be divided into two categories based on their function: those intended to improve the accessibility and intelligibility of the law, and those which serve to limit legislative inflation and instability.

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A. – Identifying and spreading best practices designed to improve the accessibility and intelligibility of the law

13 - It is important to identify and promote widespread application of best practices designed to improve the accessibility and intelligibility of the law.

14 - **First of all, such best practices can promote more accurate knowledge of the applicable law.** Such knowledge, a prerequisite for the drafting of any new legislation or regulation, is not always fully guaranteed, due to the uncertainties caused by some regulatory practices. For this reason, a proposal has been made to identify all the provisions currently in force in our law in order to distinguish those that ought to be retained from those that should be repealed.

15 - **These best practices also make it possible to fine-tune the legislative drafting process**, the important of which in producing well-written law is well-known. For instance, they encourage the use of digital tools. One suggestion has been to make greater use of the Senate's Monalisa system, a pre-consolidation tool which provides the drafter of a law with a precise view of the final text, thus avoiding potential anomalies in numbering, etc. Another laudable example is the amendment drafting practices of the National Assembly's legislation department, which involve coordination between different bills, when they are under discussion at the same time and aim to modify the same codes.
More generally, we can hope for greater involvement of the "end users" of laws in their creation, greater consultation of the Council of State (as well as jurists from civil society) by parliamentarians, less frequent use of the accelerated procedure in

order to devote more time to drafting legislation, and stricter observance of the proper scope of laws and regulations.

16 - **Best practices can also improve the presentation of legislative texts :** one such example is the "recasting" practised in European Union law, which brings scattered provisions together into a single text, while also making substantive changes. Other examples are the introduction of explanatory notes for decrees, a best practice that could be extended to other administrative acts, and the "Lifou counter", named after the Council of State decision that resulted in a harmonised and intelligible technique for presenting legislation applicable to France's overseas collectivities.

17 - **Finally, best practices can help adapt the content of the law.** This is the case when the jurislator, true to the spirit of the Napoleonic commissioner Portalis, who guarded against "the dangerous ambition of wishing to regulate and foresee everything", does not go into excessive detail, instead leaving a margin of appreciation for the law's target audience, be they private individuals, companies, local or regional authorities, or judges. Perceptions of the respective roles of legislative texts and their target audience would benefit from greater trust, a sign that trust, central in any market economy or democracy, is also a central component of the Rule of Law.

18 - We can see, then, that there are a host of best practices that can improve the accessibility and intelligibility of the law. However, it is also important to identify and spread practices designed to limit legislative inflation and instability.

B. – Identifying and spreading best practices designed to limit legislative inflation and instability

19 - Three categories of best practices can be distinguished here.

20 - **The first category strengthens the evaluation of legislation and regulation,** helping to avoid unnecessary or harmful provisions.

21 - Some best practices could extend the scope of evaluation. The production of reports assessing the impact of certain legislative amendments or impact assessments on certain private members' bills could potentially be the first steps towards a general reform on this point. We can also develop existing tools such as LexImpact, the National Assembly service enabling parliamentarians to quickly simulate the impact of a legislative change on income tax or the budgets allocated to local authorities.

22 - Other best practices may also improve the quality of impact assessments. Today, it is possible to conduct real "option studies", weighing up the relative merits of legislating, maintaining the *status quo*, and using what Jean Carbonnier called 'non-law'. Following this evaluation, the author of a piece of legislation should be able, with complete impartiality, to abandon it if its overall effects turn out to be negative.

23 - Finally, best practices may help to carry out *ex post* or retrospective evaluations. What the National Assembly calls the "Spring Evaluations" – the new part of the parliamentary schedule devoted to checking the implementation of laws – could be a step in this direction. In order to facilitate this evaluation, we could allow the public to report difficulties arising from the quality of application of the law on citizen information websites (vie-publique.fr, service- public.fr) and on legifrance.fr.

24 - **The second category of best practices strengthens scrutiny and evaluation of legislation and other rules.**

25 - These best practices may be jurisprudential: the Constitutional Council, for instance, could reinforce its oversight of impact assessments. The Council of State, in its advisory capacity, is already contributing to their improvement, but the Constitutional Council could exercise real control in this area. Might it not also be desirable for the Council of State to flesh out the principle of legal certainty in order to better punish poorly made regulations ?

26 - Beyond that, do we need to establish an authority specifically dedicated to scrutinising the quality of the law? Without giving a definitive answer to this question, and with some doubt as to its relevance beyond the European context, the European Commission's *Regulatory Scrutiny Board (RSB),* which exercises strict control over impact analyses, certainly has its merits.

27 - **The third category of best practices are those that make legislation and other rules more effective.** This helps fight legislative inflation, as in some cases it is sufficient to better apply the existing law so that it produces all its intended effects. In such circumstances, the need for a new law would be much less keenly felt. One method in particular has proved its efficacy: the planning table established by the government's General Secretariat as soon as a new law is published. This table identifies the implementation measures the law requires and even identifies the department responsible for each of the measures within the ministry concerned. This method has helped increase the rate of application of laws from 50-60 % to 95 % in certain periods.

28 - We can see that there is no shortage of best practices intended both to improve the accessibility and intelligibility of the law and to limit legislative inflation and instability. There is no need to wait for a great legal revolution to implement these practices. Improving the quality of the law is more a question of will than of creating new rules or legislation.

29 - However, the isolated adoption of best practices will probably not be sufficient to resolve all the difficulties faced. In order for these best practices to be rolled out across the board in a lasting manner, they must be accompanied by a more general change in representations. To change practices, we must change perceptions.

2. Changing perceptions

30 - As one participant pointed out in his written submission, best practices themselves have their limits, chief among which is the lack of consensus between government, parliament and citizens about making the quality of the law a political priority. It is important to change perceptions, ideas and values by reasserting the value of high-quality law. We need to establish a shared commitment to quality law throughout society. This requires a twofold approach, with a social dimension and a political dimension.

A. – The social dimension

31 - No lasting improvement in the quality of the law can be achieved without mobilizing civil society and without bringing about a cultural change to which the various stakeholders and subjects of the law adhere. Jean Carbonnier highlighted the "passion for law" that characterises France's 5th Republic. Having envisaged various solutions to legislative inflation, the illustrious author asked the question: "Could it be that, ultimately, the most reasonable solution lies in each one of us: making more sparing use of the law ?".

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32 - This is where a best practice that promotes a change in perceptions comes in: training. Training can make a powerful contribution to building a culture of high-quality law. The teaching of legislative drafting is the most obvious component of this approach, and best practices may differ according to the target audience.

33 - Some training programmes are aimed at civil servants, such as the legislative drafting classes given at ENA, which culminate in a test designed to assess the student's ability to propose simplifications to the law, or the internal legislative drafting training the Ministry of Justice's Civil Affairs Directorate provides to new staff involved in the drafting of legislative and regulatory texts.

34 - Others concern parliamentary staff: ENA, with the support of the government's General Secretariat, organises introductory and booster training for them on legislative drafting, one of the aims of which is to raise their awareness of the stakes of improving the quality of law.

35 - Finally, there is training aimed at university students: for instance, the legislative drafting classes offered in the second year of the Master's programme in Legal Communication and Sociology of Law and Justice at Université Paris II - Panthéon-Assas, or the legislative drafting clinic at Université de Versailles-Saint-Quentin-en-Yvelines, which has the advantage of getting students to work on real-life examples. This teaching has the express purpose of developing a "culture of high-quality law". The Dutch example is also significant: in addition to some university courses, the establishment of the Academy for Legislation, a specialist institution awarding a Master's in Legislation, has led to a large proportion of ministerial drafters of legislation being trained.

36 - These examples should inspire us: why not roll out such programmes more widely in France, training a larger number of civil servants, elected representatives themselves, and students from various French universities ?

37 - Beyond that, there is nothing to stop us developing citizen education in an effort to raise the general public's awareness of the importance of high-quality law. The media would have an important role to play in such ongoing education, as they do in other fields. More anecdotally, following the introduction of *La Nuit du droit*, could we imagine a Museum of Law, along the same lines as *Citéco*, the economics museum set up a few years back in the majestic setting of Paris's Hôtel Gaillard ?

38 - In another field, it would be remiss of us not to mention the best practice that this colloquium itself intends to establish. The goal of setting up awards for quality of law is to showcase individual examples in the hope that others will follow in their wake.

39 - Many other best practices could be imagined to change perceptions of the law. Jurists, be they professors, lawyers or judges, have a role to play here: could we imagine, for instance, regularly calling upon the "legislation, public law and jurisprudence" section of the French Academy of Moral and Political Sciences to turn this academy into an *Académie française* of law? In the Netherlands, the foundation, in 1986, of a legislative drafting journal (*RegelMaat*) and the creation, in 1989, of the Dutch Legislation Association, bringing together law-drafting civil servants, members of parliament, academics, students, judges and lawyers, have contributed to the emergence of a "culture of idea sharing" on legislative drafting. Why not set up such an organisation for France or the French-speaking world, or set up a "Quality of Law Observatory" ?

40 - Nevertheless, the advent of a new legislative culture will be difficult to achieve unless politics plays its part. The social dimension must therefore be accompanied by political action.

B. – The political dimension

41 - The quality of law would benefit greatly from the development of a real legal policy. As the causes of legal uncertainty are partly political, it is at political level that action must be taken. Political or party-political imperatives too often prove an obstacle to high-quality law. Making quality of law a public policy would help overcome such obstacles.

42 - It is true that political will already exists, as shown by the circulars on quality of regulation and controlling the flow of regulatory texts, and laws designed to simplify the law. However, this work remains insufficient and too low-profile. The government should be setting out and conducting this legal policy under the scrutiny of, and under pressure from, parliament, the media and public opinion, so that the trade-offs made do not too often end up being disadvantageous. It is important for the quality of the law to be present in the public debate. If it is not, it will remain the preserve of a handful of jurists, and governments and parliamentarians will be free to prioritise different public interests as they see fit.

43 - The extremely fair recommendations made by the Council of State in 2016 provide a good starting point. The first step would be to "check the appropriateness and accuracy of the figures" by establishing a reliable and consensual reference framework. Then, it would be up to the Prime Minister to present a public policy on quality of law in his programme or general policy declaration. This policy could be rolled out by assigning specific objectives regarding quality of law to different political and administrative players, through formal obligations for ministers and department heads, ministerial simplification programmes, and annual performance projects. The government could even set out its intentions more formally by bringing forward a planning bill on the subject, which would set objectives regarding the simplification and quality of the law.

44 - There are various examples of such a political approach being successfully adopted in other countries, such as the United Kingdom, the Netherlands, Germany and Greece. The European example is particularly significant. In its work programme for the year 2015, the Juncker Commission expressed its intention to improve regulation and to lessen regulatory burdens, which subsequently enabled it to announce the withdrawal of no fewer than 73 legislative proposals and to point out that the number of "legislative" proposals had fallen from 159 in 2011 to 48 in 2015. Jean-Claude Juncker's strong political determination, displayed even before he became President of the Commission, enabled him to realise his objective of lightening the regulatory burden.

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45 - To conclude this conclusion, we could ask ourselves: to what extent can we change legislative and regulatory culture? Such change will not be quick or easy. But the point of this conference is to try to foster that change. One way of doing that is to build a network of political, legal and social stakeholders who have an interest in improving the quality of law and are prepared to work together to achieve that aim. This colloquium provides an ideal opportunity to plant the seeds of just such a network. Let us hope that the discussions that have taken place here will continue, and that all those with an interest in the issue can come together to work towards a shared ideal: law that is clearer and more accessible to its end users. ■