

LEGISTICS AND THE QUALITY OF LEGISLATION IN FRANCE

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France belongs to the group of “continental law” countries, which place a high value on legal security to be provided to society by legislation. But in France, the law making system developed over the centuries has been evolving in recent years to accommodate updated standards of quality addressing a wider range of societal demands, chiefly making the body of law easier to access, to understand and to apply, and supporting higher economic performance. Some of the new traits have been inspired by foreign examples, others still reflect national priorities, but all may be considered in the search for best practice solutions. This article, drafted by a practitioner, attempts to identify what is specific about the French approach, and to appraise the model and its results against international best practice as expressed by the “Better Regulation” principles promoted by OECD. It concludes that much progress has been made but further improvements are necessary if the system is to guarantee economic accountability on a par with legal security, and remain an “attractive” model. A full version of this article was published in the first issue of the International Association of Legislative Drafting (June 2012).²

THE FRENCH DEFINITION OF LEGISLATIVE QUALITY

The most widely held viewpoint in France is that a country of longstanding tradition in all matters administrative, with a recognised experience in legal production can be proud of its well managed body of law. The national authorities themselves devote significant attention to the issue of “attractiveness of French law”³ viewed as an alternative to the “Anglo-Saxon” model. In this context, legal drafting has always been a prime concern in France, central to normative production. The government regularly updates guidance to policy-makers, the most recent such document being the [circular of 7 July 2011](#)⁴ “on the quality of the law”. This document highlights the need for improved steering of the normative production in our days of regulatory impact assessment (RIA), and confirms the value of proportionality and legal consistency.

Understanding the official policy is facilitated by the wealth of policy statements issued over the last 10 years, from the Mandelkern report of 2002,⁵ the two circulars of 26 August 2003 under entitled “combating normative inflation and improving regulatory quality.” In 2006, a Council of State landmark report makes the case for further consolidating the principle of legal security, without losing sight of the immediate objective of curbing the over-production of norms. This report makes detailed proposals that implicitly refer to some of the principles and tools of Better Regulation:

- use of alternatives such as self-regulation;
- regulatory impact analysis (page 303);

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² www.legislativedraftingjournal.com

³ See the work of the Foundation for continental law: http://www.fondation-droitcontinental.org/jcms/c_5105/accueil

⁴ http://circulaire.legifrance.gouv.fr/pdf/2011/07/cir_33427.pdf

⁵ <http://www.ladocumentationfrancaise.fr/rapports-publics/024000213/index.shtml>

- clearer separation between policy making and legislative drafting (page 302).

Other recommendations seem more specific to the French constitutional framework, but demonstrate that quality of legislation requires both the right legal skills at the drafter's level, and sound institutional arrangements:

- stricter respect of respective spheres of competence of parliament and government, one of the key principles of the current constitution;
- sounder use of the amending process to avoid the proliferation of norms;
- "new working methods for Parliament" including a stronger commitment to evaluation (page 322);
- better implementation of texts (p. 328) and information of the public.

All in all, the 2006 report provided the conceptual background for the 2008-2010 constitutional reform which make regulatory impact assessment (RIA) obligatory for all bills, which has been the single recent most effective step towards increased legislative quality in France.

Beyond policy announcements, how is quality pursued by the regulators in government offices and parliament? We will now focus on legislative drafting, and examine how the resources made available to desk officers engaged in drafting legislation (termed "legistics") and the controls during the regulatory management cycle effectively deliver on the quality front.

LEGISTICS: THE CORNERSTONE OF DRAFTING QUALITY IN FRANCE

A well supported concept

As mentioned above, the quality of legislative drafting is a highly valued skill in France. A "*guide de légistique*,"⁶ a voluminous manual (500 pages) available on the web unfortunately without an English translation, provides a wealth of advice, ranging from the collection of legal data to drafting rules and style, but does not include policy making nor RIA.

Content of *guide de légistique*

This key document, written for officials drafting regulation, contains both theoretical insights and practical tips on how to write good (legally secure) texts. This is the structure of the guide:

- Conception of draft legislation: describes the various types of norms and their hierarchy from constitution to standing instruction ("*circulaire*"). It purports to encourage regulators to question the "usefulness and efficiency of the projected new norm"
- Stages in the preparation of the new text, "described on the basis of current rules published by the Prime minister";
- Drafting of regulation: includes rules and examples of good practice, as well as solutions to common issues met when dealing with new legislation, presented as a series of practical fiches.

How effective is the legistics guide? The box above, summarizing the contents, shows an emphasis on process rather than on product. Formal prescriptions are abundant, when little is said on how to collect evidence about the "usefulness and efficiency of the new norm." Though supported in recent policy guidance following the constitutional reform, the impact assessment procedure has not been integrated into Legistics, and the instructions are published on a restricted intranet instead of directly available to the general public.

Training in legislative drafting for officials

Most public law studies in France include some training for policy making skills, as part of the preparation for the practical use of public law. The best course is provided by the Institute of Political Studies in Paris, whose students will often be sitting the entrance examination to the

⁶ http://www.legifrance.gouv.fr/html/Guide_legistique/accueil_guide_leg.htm

senior civil service, *inter alia* the national school of administration (ENA). However, legislative drafting is provided mainly in the induction courses, such as those provided to graduates admitted to ENA, where it is one of the most important items on the curriculum. The skills are developed on the basis of real life dossiers, presented by practitioners from the ministries to help transmit the professional know-how. The training places great store on legal expertise, and less on social sciences, but also includes change management; young officials handle real cases where reforms are often summarized by the necessary new legislation they entail; around 100 officials a year receive this training.

Tips to draft good legislation, according to the French tradition

(Detailed advice from the *guide de légistique*)

- pay scrupulous attention to the presentation of the new text: how to write the introductory report; how to situate the new rules in the legal corpus; the rules for organising the subject matter and the use of annexes;
- carefully quality control the language: vocabulary, syntax, use of acronyms, etc;
- provide a logical and clear technical layout, especially for texts modifying existing regulation;
- do not forget specific legal regimes (such as overseas territories);
- respect specific procedures which differ according to the type of text and specific rules (implementation of international conventions or EU Law, individual measures), or call for different consultation processes (compulsory or not), approval procedures and formal presentation rules.

WHO SHOULD DO THE LEGISLATIVE DRAFTING?

International comparisons show that there are two options when it comes to transforming policy into law:

- the seamless drafting of the rule by the substantive expert in the ministry, subject to later quality checks and legal supervision: this is an approach adopted by France and other countries;
- the handling of all drafting issues by a specialised body of lawyers, as practiced in the United Kingdom and other countries.

The question is how effective is that approach? Though sometimes criticised, the near parallel management of policy making and legislative drafting has a number of positive consequences on the quality of the ensuing product:

- associating the two functions ensures that all the evidence available to the policy maker (including evaluation of existing policy) is naturally fed into the preparation of the projected new rules .
- the early drafting of the new rule focuses the reform efforts on the insertion of the policy content into the existing legal framework. The danger is of course to restrict the scope of the changes by giving too much weight to existing structures or concepts;
- the existence of an early draft of the new legislation is also an asset during the consultation process with other administrations and with stakeholders, as the nature and extent of the changes can be more immediately apparent.

On the downside, once the initial draft of a new bill has been completed, it could be more difficult to consider alternative options, hence the need recognised in international best practice of avoiding premature drafting.

On balance, the advanced legal culture of policy makers, their recognised expertise in guaranteeing legal consistency and clarity may contribute to delay the urgency of migrating

towards a broader set of quality standards for regulation, including simplicity and economic relevance. France is not the only country to have experienced difficulties to introduce the regulatory impact assessment (RIA) into the legislative drafting process,⁷ which is one of the most common ways of starting a better regulation policy. The system however does also include several quality checks at various stages of the rule-production process, which will be the topic of the next sections.

QUALITY CONTROL DURING THE DRAFTING PROCESS

Quality of the final draft relies of course on the expertise of the front-line, in this case the legal drafter. But it makes sense to introduce checks and counter checks at each stage of the process, which involves a number of institutional actors (see table 1).

Table 1: summary of quality controls during the preparation of new legislation in France

Phase of preparation	Tools and quality checks
Production of the first legal draft	<ul style="list-style-type: none"> ▪ Making sure that the policy desk has all the information about implementation of the current legislation ▪ Maintenance of a comprehensive consolidation of legislation for the policy area; centralisation of all guidance, and reports about implementation ▪ IT supported workflow for processing draft legislation (SOLON application), with corresponding unification of formatting and drafting style ▪ RIA requirement for new primary legislation
Controls during the consultation process	<ul style="list-style-type: none"> ▪ Formal rules for “prior consultation” of stakeholders ▪ Legal requirement for consultation, failing which the new law may lack legal basis
Finalisation of the bill	<ul style="list-style-type: none"> ▪ Consistency check with other policies, and coordination where needed, by the centre of government (Prime Minister’s office) ▪ Consultation of the Council of State for draft bills and important secondary legislation ▪ Specific controls such as regulatory burdens on local government ▪ Enactment in Council of ministers
Controls after enactment	<ul style="list-style-type: none"> ▪ Careful monitoring of effective delivery of implementing rules by centre of government, reports to Parliament on individual laws ▪ Consolidation and codification, for easier access to legislation by stakeholders ▪ Evaluation of policies and legislation by various senior audit bodies.

Viewed from the international best practice point of view, the French approach has many strengths, being built on a solid legal tradition. It displays, however, tendencies that can be found in many countries still building their law-making capacities, but which must be combated for the end-product to be considered state-of-the-art:

⁷ See the loi organique dated 15 April 2009 (<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020521873&fastPos=2&fastReqId=187094993&categorieLien=cid&oldAction=rechTexte> and circulaire of the same day <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020522151> which emphasize legal consistency and consistency, including with the European level of legislation.

- an emphasis on process rather than on impact
- a pre-eminence of the principle of legal security over that of economic accountability;
- more resources put into design than into implementation and evaluation;
- over –reliance on regulation to deliver policy outcomes, with insufficient use of other delivery means..

As recommended by OECD 2010 report, the system needs to embrace more whole-heartedly the principles of Better Regulation. Most urgent are a true subscription to the spirit of RIA as a pre-condition for the decision to regulate, and a sincere commitment to open consultation.

Subject to these changes being adopted, the French model, which has been exported to many countries in Africa and South America via cooperation agreements, could remain attractive. A number of reforms signalled in this article have already been undertaken and show that the model is indeed capable and willing to evolve and likely to remain a reference in coming years for excellence in legislative drafting.

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