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CONTRIBUTION

from

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to the General Debate on

“Overburdening the statute book in response to current events?”

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## **Event-related legislation: necessary or harmful?**

The role of the law is to organise life in society. Generally speaking, parliament makes a law in response to a clearly defined social need.

The aim of legislative activity is thus to remedy a situation widely regarded as unsatisfactory, by finding a solution that is better, fairer and more suited to needs, normally by applying appropriate legal instruments (laws, programmes, public policy, etc.).

Before enacting legislation, it is important to assess whether a situation is so unsatisfactory as to make state intervention necessary. First, we must gather and study the relevant information, and then assess the situation, ideally with the help of the actors concerned. In sum, this phase must provide answers to the following questions:

- What is the nature of the problem and how serious is it?
- How big is the problem and who is affected?
- What are the causes of the problem?
- Does the problem affect other areas and if so, how?
- Is it a long-term problem?
- What ultimate goal do we want to achieve?
- What would be the consequences of doing nothing ('option zero')?

Having done all this, we should consider what courses of action are possible. Broadly speaking, two questions need to be asked:

- Does the state have to intervene or are there other ways to solve the problem concerned? There are many situations in society that are less than satisfactory and which would be worth improving but which do not require any intervention by the state.
- If we accept that the state has to intervene, we should ask the second question: does the state have to enact legislation? Legislating is the state's main method of influencing a situation, but there are other ways of dealing with social issues (incentives, self-regulation, information campaigns, etc.). The latter approach, though less formal, may prove more effective.

Once we have decided to legislate, we must choose the best way to achieve the intended objective, while respecting the following principles:

- The principle of appropriateness: the measure chosen must be suitable to achieve the intended objective with sufficient certainty. This presupposes making the correct choice of state intervention level (in particular in federal states) and of normative intervention level (constitution, act, decree, ordinance, regulations, etc.).
- The principle of proportionality: the measure proposed must be justified by the importance of the objective and pose the lowest possible threat to civil liberties.
- The principle of fairness and equality: the measure must treat identical cases in an identical way and different cases in a different way.
- Ease of implementation: it must be possible to implement the measure; if required, resources have to be made available.
- Respect for consistency in the legal order: the measure must fit into the existing legal framework and not contradict other legal texts.

It follows from the foregoing criteria that any decision to introduce new legislation involves a rigorous process that takes time and requires a precise understanding of the situation to be resolved.

This approach, however, is called into question not only when exceptional circumstances occur, but also following a variety of events that shake public opinion. In such situations, it is not uncommon for the authorities to seek to take advantage of the circumstances by legislating immediately, if only to demonstrate that they are doing something. This is what I call 'event-related legislation'. Some authors talk of 'instant legislation' or 'knee-jerk legislation'.

#### Definition

'Event-related legislation' means the result of a legislative process, often less than systematic, which has been triggered by a specific event that has influenced public opinion and which has been the subject of widespread media attention.

In these circumstances, the impetus overrides the need to define and analyse the problem. It is assumed that there is a need to legislate and urgency dictates the tempo of the debate, which at the same time reduces the time for analysis and reflection. In other words, it is no longer the law that dictates the event but the event that dictates the law.

Two factors with their own dynamics heavily influence the process: time and emotion.

Time has always been an essential factor in politics. It relies on a harmonious balance between the long term and the immediate: a long-term outlook is needed, for example, in order to carry out major infrastructure works or to implement large-scale projects; immediacy is the essence of action, for example, in reaction to a natural disaster.<sup>1</sup> New technologies and the real or supposed needs of society upset the time scales and rhythm of the parliament, which has to work in real time all the time. We may regret it, but it is a fact: the tempo of politics has increasingly become instantaneous, rapid, and ubiquitous. Urgency, as we see more and more often, has pervaded the work of parliament, at the same time reducing the time available for analysis and reflection. Like 'fast food', we now have 'fast law'.

Emotion is another factor that increasingly determines the relationship between governors and the governed. The reason for this is the spread of tools of communication and developments in the media world. Television, internet and social media have brought politics closer to the public. While positive in itself, this development has led to a tendency to favour appearances rather than content, to prefer form to substance. The complexity of the circumstances is then reduced to its most basic form and it is not uncommon for pictures and evocative headlines to obscure the real problems. The shock of images on the news or the buzz on the internet sometimes serve to exaggerate problems that may not even exist.

#### Law on dangerous dogs

In 2005, the death of a six-year-old boy, savaged by three pit bull terriers, caused a massive outcry in Switzerland. This tragic event gave rise to a major debate among politicians and the public on the subject of dangerous dogs. Six days after the incident, a

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<sup>1</sup> EDMUND HUSSERL (1859-1938) insists on a direct correlation between the three forms of time and three branches of the democratic state. In his view, the past is a matter for the judiciary, with its ability to judge what has already taken place; the present is matter for the executive, because it manages ongoing business and deals with emergencies; while the future is a matter for the legislature (see: *Leçons pour une phénoménologie de la conscience intime du temps*, Paris, 1991).

member of the National Council submitted a parliamentary initiative demanding a ban on certain breeds of dog. At the same time, 180,000 people signed a petition launched by the tabloid press calling for an immediate ban on pit bull terriers in Switzerland. Parliament concluded that a ban on dangerous dogs could not be achieved by a law, but required a revision of the Constitution, because the Confederation had no power to enact legislation to protect people from animals. Parliament spent five years drafting a law only to realise that the cantons had already solved the problem. The proposed law was therefore rejected in an atmosphere of indifference that contrasted with the emotion initially felt.

The emphasis on urgency and emotion creates a permanent conflict that directly affects, indeed compromises the running of parliament, which is more used to working on a long-term, more reasoned basis.

It would however be wrong to ignore this phenomenon: the public expects their members of parliament to pay attention and react to their urgent needs and their emotions. Speed of intervention becomes a barometer for the importance given to issues that cause public concern. Often it is more effective – in electoral terms – to say that one is going to make a law to correct a problem than to determine the causes of the problem. The law then becomes a response without being a solution.

Certain areas are especially susceptible to this form of legislation:

- Security and combating violent crime (anti-terrorist legislation, day release for dangerous offenders, increased sentences for certain categories of offence, dealing with road rage offences, regulating the risks of certain sporting activities, dealing with football hooliganism, protecting victims of crime, etc.).
- Economic and financial matters (measures in response to the financial crisis, reform of international taxation, limiting the remuneration of executives of multinational companies, combating social benefits fraud, etc.).
- Issues relating to accountability in public life (combating corruption, prohibiting dual mandates, eliminating conflicts of interest, restricting employment opportunities in the private sector for former public officials and ministers, etc.).

Clearly there may be some cases where event-related legislation may prove necessary, if only to send a signal in a given situation which is seen as scandalous; this applies in particular to legislation on rehabilitation (e.g. the rehabilitation of Swiss combatants in the Spanish Civil War who were convicted in Switzerland, recognition of the child victims of administrative detention, locating the unclaimed assets of the victims of the Nazi regime, etc.).

Such situations should however remain an exception. Most of the time, event-related legislation does not respond to a real problem, is ill conceived and cannot always be implemented. Generally, it creates special derogatory regimes that do not fit easily into the existing body of law and which undermine existing legislation. It is worth remembering the words of PORTALIS in his preliminary address on the draft of the French Civil Code: “There must be no unnecessary laws. They would weaken the necessary laws; they would compromise the certitude and majesty of legislation”.

#### Legislation on hazardous activities

In June 2000, a member of the National Council submitted a parliamentary initiative to regulate the outdoor adventure activity business (canyoning, rafting and bungee jumping) and the mountain guide profession. The initiative closely followed a canyoning accident

that had resulted in 21 deaths. Despite opposition from the government and the majority of cantons, Parliament adopted a law in 2010. Since coming into force on 1 January 2014, the Federal Act on High-Risk Activities has not had the anticipated effect. By finding specific solutions for the various associations active in this sector, it has been possible to introduce equivalent safety regulations that are arguably superior to those required by the new law. Recently, the government proposed to Parliament to repeal the law.

Several safeguards exist that restrict the volume of event-related legislation and prevent its excesses:

1. Bicameral parliaments: where a second chamber reviews draft legislation, flaws in legislation approved in haste by the first chamber can be rectified.<sup>2</sup>
2. The possibility of a referendum, which allows citizens to vote on the new legislation.
3. The review of the constitutionality of legislation by an independent authority (e.g. a constitutional court).
4. A system of decentralised state structures with several centres of power and expertise (a federal system).
5. The use of legislation that is subject to a time limit ('sunset legislation') or of less formal instruments than legislation (e.g. resolutions).

In any event, Parliament should demand the right to 'give time more time'. We should also remember that democracy is the instrument of a social group endowed with reason and not of an assortment of individuals buffeted by waves of emotion. "Urgent action, haphazard by its nature, has no time to take account of the fundamental values of general interests, sources of coherence and social cohesion."<sup>3</sup>

Experience shows that legislative action needs perspective, time for reflection and discussion: it is based on operational and procedural rules that should allow long-term interests to have priority over daily business. This requires patience, calmness and discipline, allowing us time to relax, soothe the emotions and apply reason.

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<sup>2</sup> This is the argument advanced by JAMES MADISON (1761-1836) at the Philadelphia Convention, according to which a Senate is required "to protect the people against their rulers (and) to protect the people against the transient impressions into which they themselves might be led."

<sup>3</sup> JEAN-MARIE COTTERET, *Parlement 2.0*, Fauves Editions, Paris, 2015, p. 41.