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Virgilio Zapatero Gómez

The Art of Legislating

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Preface

Any contemporary state presents itself as committed to the "rule of law". The notion of rule of law is perhaps the most powerful and repeated political ideal within the current global discourse on legal and political institutions—this notion constitutes, in fact, the yardstick against which the legitimacy of a state is commonly evaluated and asserted (Tamanaha 2004, 2012). Of course, the meaning of the term "rule of law", like that of all open-textured terms, has a wide grey or twilight zone where old oligarchies and modern autocracies might eventually find a place. Yet, despite being a contested concept, the rule of law nevertheless retains a clear core of meaning that is generally recognised.

In the search of this minimal content of the notion of the rule of law, Friedrich Hayek's approach is a good starting point. In his view, the Rule of Law, once "stripped of all technicalities, (. . .) means that government is bound in all its actions by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge" (Hayek 1976, pp. 103–104 [80]). Though not sharing all of Hayek's conclusions, Joseph Raz also endorses this formal starting point (Raz 1979) and stresses that the rule of law is a crucial virtue of the state which should not be confused, as often happens, with other important principles, such as democracy, justice, social equality, or human rights. Surely these other values and ideals refer also to virtues of the political system, but it is advisable to keep them conceptually separated from the ideal of the rule of law.

The rule of law means, in a manner, what it literally expresses: the government of laws. In legal and political theory, it implies that the state governs through laws and is subjected to them—or, put otherwise, that every state intervention must be backed by laws and live up to the principle of legality. Obviously, laws may be changed, but any change must always respect previously established legal procedures. As a result, all state authorities must make their decisions within the boundaries set by a given normative framework, not upon the basis of their subjective preferences, their ideology, or their sense of what is just or unjust. Apparently, the rule of law does

nothing more than this: to delimit the playground, to set the rules of the game, and to make these rules respected.

Underpinning this formal conception of the rule of law lie such important ideas as legal certainty and security, and the predictability of government powers. The ultimate objective served by the rule of law may well vary depending on the ideological perspective of its advocates (see e.g. Waldron 2008, pp. 6 ff). For authors like Raz or, in this respect, also Hayek, the rule of law makes citizens' freedom and self-determination possible, enabling them to pursue their own life plans. For others, the objective of the rule of law is tightly associated with equality, in both its horizontal (between fellow citizens) and its vertical dimensions (between citizens and government) (Gowder 2014a, b). And yet other authors lay emphasis on the link between development and the rule of law, claiming that the rule of law is a reliable trigger of societal development and stability (Carugati 2014). For all of them, anyway, the rule of law is a key virtue of any legal system.

Even a seemingly formal and aseptic slogan like "the government of laws, not of men" gives rise to a number of principles which must be respected in the making of laws—regardless of their particular contents. These principles include requirements that, on the one hand, affect the very concept of law: no law exists unless it is based on rules (Hart 1968, pp. 99–125). And they also affect, on the other hand, the form of laws themselves: the rule of law vanishes, or is significantly weakened, whenever norms are drafted in such a way that they cannot be known in advance, for this lack of certainty hampers citizens' self-determination and makes it impossible for them to carry out their own life plans. Finally, the rule of law can be said to fail if legal norms are applied without due observance of legally established procedures and warranties. Thus, a basic conception of the rule of law must positively respond to these three questions: Is government limited by laws? Do state powers honour the tenets of formal legality when they act? Are laws impartially applied?

This book is mainly concerned with formal legality and with the question of how to achieve good laws—a topic which was famously addressed by the eighteenth century enlightened thinkers (Zapatero 2000), and on which a number of prominent legal scholars of our times have also elaborated: think, e.g. of authors like Fuller (1969), Raz (1979), or Waldron (1999). Historically, the baseline canon of "good legislation" demanded generality, publicity and accessibility, and comprehensibility of laws; prospectivity or non-retroactive norms; consistency or non-contradiction; the actual possibility of complying with legal obligations and prohibitions; stability; or congruency between enacted laws and their application. All these are valuable ideals that should not be abandoned in today's legal systems, particularly in view of the silent revolution which is transforming our legality-based "states of law" into jurisdictional states. Such ideals remain entirely alive and are still worth pursuing for those who believe—as I do—in representative democracy and thus in the dignity of legislation.

The idea of writing this book originally emerged during my parliamentary and governmental experience. From 1982 until 1993, I was the person in charge of legislative co-ordination for the Government of Spain. Those were years of very intensive legislative production. The 527 laws we elaborated during this period (along with thousands of decrees) profoundly modified all sectors of the legal

order inherited from Franco's dictatorship and laid the foundations of a new social and democratic system. To an academic like me, this was really exciting and enriching—a unique experience—and I thought that, upon my return to the university, I should reflect on this experience and elaborate on it, in an attempt to contribute to improving not only scholarly awareness of how laws are made but also, and above all, their quality. I am deeply convinced that legal education and training of jurists should not only be limited to the teaching of how laws are interpreted or applied by courts, but also extend to how it is possible to make good laws. This was the ultimate goal I pursued some years ago when writing this book. The fact that the Spanish edition (Zapatero 2009) is sold out and the suggestion of my colleague Daniel Oliver-Lalana of translating it for the Springer's *Legisprudence Library* have given me the impulse to publish this English version, in the hope that it may be of interest to an international audience.

Madrid, Spain Virgilio Zapatero Gómez
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He has extensively published on legisprudence, as well as on legal theory and philosophy, in leading Spanish-speaking academic journals. His books include, among others, the following: *El arte de legislar* (Pamplona: Thomson-Aranzadi, 2009); *El derecho como proceso normativo: lecciones de teoría del derecho* [Law as a normative process: lessons in legal theory] (Madrid: UAH, 2010, 2nd edition); *Nomografía o el arte de redactar leyes de Bentham* (Madrid: CEPC, 2004); *Fernando de los Ríos: biografía intelectual* (Valencia: Pre-Textos, 1999, 2nd edition); or *Socialismo y ética* [Socialism and Ethics] (Madrid: Debate, 1980).

Professor Zapatero has prepared reports on "Human Rights in Central America" (1997) and "Human Rights in Colombia" (1998) on behalf of the European Commission, and also drafted a Deontological Code for the International Federation of the Red Cross and Red Crescent Societies (IFRC) (2000).

He holds Doctor Honoris Causa degrees by several universities including the Universidad Ricardo Palma (Lima, Peru), the Universidad Nacional Autónoma de León (Nicaragua), or the Universidad Autónoma de Santo Domingo (Dominican Republic).

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the *Gran Cruz de la Orden de Bernardo O'Higgins* (Chile); the *Distinción de la Federación Iberoamericana de Ombudsman* (FIO); the *Master de Oro del Forum de Alta Dirección;* the *Gran Cruz del Mérito Naval;* and the *Medalla de la Orden de Sikatuna* (Philippines).

Chapter 1
Introduction: The Study of Legislation

The history of law is marked by alternate periods of overflow and channeling (Morand 1987, p. 502). If the answer to the spread of customs and to the unpredictability and inaccessibility of judicial decision-making was the discovery, with the French Revolution, of written laws as the only source of justice—and of codification as the ideal instrument of knowledge—, what could be the answer our modern society finds to the problem of managing a body of norms that will most likely continue to grow in volume and cause more ink to flow over its quality, efficacy, effectiveness and efficiency? Deregulation programs have attempted to redress an alleged overflow of legislation, pointing only to its over-cost and inefficiency. But we live nowadays in communities that are organised by laws, inside a regulatory State that articulates its policies through legal norms (Eskridge and Peller 1991, p. 707 ff; Farber and Frickey 1991, p. 875 ff), and to which we still attribute the task of steering society. And as long as this is the case, the pertinent question is not whether or not there are too many norms, but rather if they all satisfy the minimal demandable parameters of quality so they can fulfil the functions we have assigned to them, which are the functions of a social, democratic, and rule of law-based state.

The increase in the volume of regulation, the poor quality of legal texts, the doubts about the effectiveness of norms and the perceptions about their inefficiency and low efficacy have contributed to the germination of the most daring interpretations, or even to the sheer abandonment of law. Deregulation has been presented as the solution to the straying of regulation. But this is not an innocent response, because deregulation is nothing else than a re-regulation that has often served to mask a political agenda aimed at the restriction of democracy, the dismantling of the welfare state (see Tolchin and Tolchin 1983), and the substitution of the visible—and therefore politically accountable—hand of the government by the invisible hand of the market.

The regulations that were eliminated are precisely the ones that protected us from the greed of irresponsible corporations that force the very economic system to the edge of the cliff, or those that guarantee breathable air, drinkable water, edible food, safety and higiene in working places, protection against nuclear disaster, assurance

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in old age, and a long etcetera of rights promised by the welfare state—after the severe, worldwide financial crisis exploded in 2008, few can now ignore what deregulation entails. But even if deregulation is not the answer, some of the problems that prompted it are real and demand deeper reflexion to find a possible solution within the framework of the social and democratic *Rechtsstaat*. The aim of this effort cannot be a deluge of new regulations but rather to equip ourselves with the ones that are necessary, and whose effectiveness, efficacy and efficiency can be guaranteed. In this sense, it could be very healthy to turn our eyes back to the process of legislating, so we can discover where and why rationality goes astray.

The preoccupation for the quality of laws has existed for many centuries, as demonstrated by the works of Plato *(The Laws)*, Aristotle *(Politics)*, Cicero *(On Laws)*, Pletho *(The Book of Laws)*, or Aquinas *(Summa Theologica)*, among many others. However, these works were written for another kind of cultural universe, for a context very different to our own. What is missing in them are certain elements essential to modernity, without which it was not probable that a technique or art of legislating would have ever developed. The legislating state had not yet made its appearance, the crisis of certainty had not yet fallen over our societies as it did towards the end of the seventeenth century (cf. Tomás y Valiente 1993), and rationalism had not yet extended into politics—all these conditions only did fully mature well into the eighteenth century. Rationalism applied to politics, the demand for more certainty and security in the face of the legal particularism of the *Ancien Régime*, and the state's ambition to monopolise normative power were the factors that fuelled the development of a will to rationalise and systematise the legal order. Such a will manifested itself in two complementary directions: codification, which would make it possible to know the existing law, and the art of legislating, which promised better laws. Both of them reached their peak during the age of Enlightenment (see Zapatero 2000). The names of Muratori (1753), Montesquieu (1964), Beccaria (1821), Condorcet (1980, 1821), Abbot Mably (1797), Schmid D'Avenstein (1776), Filangieri (1787), Rousseau (1973), Diderot (1989), Comte (1837) in France, or Bentham (1843, 1981, 2000) in the Anglo-Saxon context, are some examples of those enlightened minds that occupied themselves with the art of legislating, an art that was meant to liberate humanity from the despotism of monarchs (Rousseau) and the no less fearsome despotism of judges (Montesquieu). Certainty, legal security, liberty in short, did not only require an effort in codification and limitation of the executive and judicial powers; it also demanded taking good care of the writing of norms. This was ultimately the fundamental obsession of the enlightened. The legislator had to be taught to weigh words as if they were diamonds, for our liberties depend on them. Had it not been for this conviction, for the hope in this art of legislation, much of the legisprudential production of the Enlightenment would never have existed.

Of course, pointing out the deficiencies of some of these ideas today, two hundred years later, is not very difficult. But the really interesting question here is to know if the problem faced by the enlightened—to guarantee security and liberty by means of properly written laws—is relatively solved or not. Unfortunately, it would seem rather that the multiplication of sources in our modern legal orders resembles the

particularism of the *Ancien Régime*, that normative motorisation has created oceans of norms, that the famous principles theorised by Dworkin (1978) revive in our systems the old and unreliable *interpretatio* and that the "rule of the constitution" is opposed to the rule of law.[1]

Drowned by the most dogmatic methodological and axiological positivism, the enlightened vocation for artful legislating was substituted by the vocation for interpretation. The jurist, from then on a scientist of the law (Díaz 1974, p. 65 ff), is interested predominantly in positive legal norms, in so far as they are valid, formally in force, and as long as they continue to be so. Hence, legal dogmatism has made the norm as it has been promulgated the inalienable and exclusive center of attention. Curiously enough, although positivism has put laws in a place of honor within the legal realm, modern positivists have been far less interested in legislation than in the functioning of courts and the performance of judges. They sustain the traditional thesis that defines law by its institutional sources, but the institutions they are more interested in are courts, rather than parliaments (Waldron 1999). Eventually, the legislator was overthrown and the judge was enthroned instead. The reasons for this short-sightedness can be found in various factors such as the voluntarist conception of law, the ideal of the purity of the science of law or the myth of the rational legislator, all-knowing, all-powerful, whose produce may not even be discussed or improved.[2] But, as Waldron (1999) points out, at the root of this disregard for legal reflection is also a mistrust of parliaments, those assemblies riddled with inexperienced people who, unlike judges, are politically active. And so, this incoherence, this reductionism has led to a certain disdain for the study of the normative process; that is, the study of the moment of the birth of the norm. That is how the traditional approach of legal thought has not only circumvented—as Peces-Barba (1988, p. 29 ff) explains—the problem of the relationship of power and law but, a fortiori and consequently, has dispensed with the study of the capital process of the conversion of politics into law.

It has been necessary to wait for the old problems that gave rise to the art of legislating in the eighteenth century to reappear in some way, so that even if timidly, the preoccupation for the study of the process of drafting norms can be rekindled. It was possibly in the United States where, during the New Deal, the concern for legislation recovered more strongly.[3] The revolt against common law formalism began to conceive law as a tool at the legislator's disposal to achieve certain social objectives, and to rely on social engineering as a conscious effort to change society and its institutions through the legal order. The work of figures such as Justice Holmes (1897), Pound (1911, 1942), or Gray (1909) already agreed on the need to adopt this new approach regarding common law. This new path was complemented by the writings of Louis Brandeis, Frankfurter (1927) or Landis (1938), who developed a positive vision of government based on the principle of institutional

[1] See Díaz's (1999, p. 101 ff) critique of this unwarranted and biased contradistinction.

[2] On this point, see García Amado (2000, p. 304 ff), as well as Marcilla (2005, p. 251 ff).

[3] For an overview of this new approach in the U.S., see Eskridge and Frickey (1994).

competence (the government was better equipped, better informed and better prepared than the judges to make general decisions), and leaned on this principle to justify the necessary deference of judges to government and parliament. But it was the work of Hart and Sacks (1958) that, from the 1950s to the present, has had a decisive influence on the teaching of law and the judicial interpretation of law in the United States. From then until the 1990s, most law students had *The Legal Process* as textbook. Its study has fostered the interaction between law and political science, has conditioned legal interpretation theories in the post-war period, and has significantly stimulated research on the lawmaking process. In spite of its more modern critics, the work of Hart and Sacks has established itself with an unusually robust vitality.

As to Europe, it has been in the second half of the twentieth century, and especially in the 1970s, when the studies on legislation have regained status, largely because of the application of the methodology of political science to law.[4] Peter Noll's influential book *Gesetzgebungsehre* (1973) is usually regarded as the beginning of a change of course to which a series of important works have contributed decisively.[5] It is to be expected that also in Spain (López-Calera 1988, p. 79), once the initial phase of transition and consolidation of democracy has been completed (a phase in which what was really at stake was the fundamental aspects of an advanced social and legal order), the preoccupation for the theory of legislation that is timidly emerging will vigorously develop.[6] Some studies specifically dedicated to the matter, as those of Galiana (2008, 2003, 2001, 2000) and Marcilla (2005), already point in that very desirable direction.

As I have explained elsewhere (Zapatero 1994), the scope of this kind of studies depends on whether their conception of the norm-making process is "minimalist" or "maximalist". This will determine if the studies concentrate on logical and linguistic problems only, if they include the political and institutional dimensions of the process of legislating, or if they go even further, encompassing the ethical dimension. In the work of Marcilla (2005, p. 275 ff) we can find a detailed discussion of the advantages and inconveniences of each of these possibilities—and of the reasons why she is inclined towards a maximalist conception. As far as the present book is concerned, its purpose is none other than to contribute to improving laws *("la ley")* as the most respectable source and the most worthy instrument of government. With this in mind we think of a theory of legislation that is far more humble than the Enlightenment's science of legislation, which wanted to tell the legislator what to do. Without giving up the discussion on the justice and morality of norms, the main

[4]On the rebirth of legislative jurisprudence in the U.S. and Europe, see Bar-Siman-Tov (2019); cf. also Oliver-Lalana and Wintgens (2019).

[5]To name but a few, see e.g. Giuliani and Picardi (1987), Amselek et al. (1988), Pagano (1988), La Spina (1989), or, more recently, Wintgens (2012), Albanesi (2013), Müller and Uhlmann (2013), and Karpen and Xanthaki (2017).

[6]See, among others, Atienza (1997), GRETEL (1986, 1989), Montoro (1989), Sainz and Ochoa (1989), Corona et al. (1994), Díez-Ripollés (2013[2003]), Menéndez and Pau Pedrón (2004), Zapatero (1994, 1998, 2000), Pérez Luño (1993), Laporta (1999, 2004), García Amado (2000), Fuertes (2008).

object of this work is to study how we can achieve legislation that lives up to what Lon Fuller (1969) called the internal morality of law; how we can make laws more efficacious, more effective and more efficient; how to articulate the process of norm production so that norms are the expression of the will of citizens; or how to better build the relationship between legislators and judges to make the rule of law a reality. And it is from this perspective that a theory of legislation can contribute to our legal systems by providing them with a little more linguistic, logical-formal, pragmatic, teleological and perhaps also ethical rationality (Atienza 1997).

It makes sense to ask ourselves how useful it might be to bring together, under the same label, fields of research and perspectives as different as those required for this type of study (Mader 1988; Posner 1983). Wróblewski (1979) points out that, in general terms, the effects of a science of legislation can be felt in three different directions: in the education of those who formally and informally influence legislative decisions, in the preparation and analysis of normative texts and through the participation of experts in the shaping of public opinion around legislative decisions. But I would also mention the contribution of the science of legislation to improving the training of lawyers. The manifesto *Pour une nouvelle génération de légistes*[7] that was published in 1979 in Belgium requesting the creation of a Belgian Institute of Legistics is based on this observation: the present legal training is essentially reduced to the application of law, that is to say, to the appreciation of past or future social behaviour in their relation with already existing rules; but there is something wrong when the reverse side of law, which refers to the invention of rules capable of guiding social behaviour in the direction desired by political power, remains hidden in legal training. Neglecting this perspective results in a mutilation of the capabilities of lawyers who, in many cases, not only interpret rules but also produce them. Producing rules is, curiously enough, what they have not been taught to do. That is why legal training should no longer be limited to the instruction of good judges and good lawyers but also teach the art of making good laws (Fleiner-Gerster 1982, p. 18).

Alchourrón and Bulygin (1993, p. 410) think that there are no specialists or technicians in legislative science for the simple reason that there are no academic centres to prepare them, and there are no such centres because there is no body of doctrine, i.e. there is no theory that systematically and methodically studies the problems posed by legislation and how to solve them. Maybe it is not impossible to change this, and maybe it's already changing. For a scientific approach to have a real influence, Wróblewski insists, two conditions must be met: first, science must have useful information contribute to the legislative process and, second, its influence at the decisive stages of the process must be guaranteed by appropriate bodies. The first condition depends on the results of scientific research in the areas of interest to normative production, while the second depends on the establishment of suitable institutional mechanisms and the functioning of the constitutional framework.

[7] See the Belgian *Journal des Tribunaux* of 17 November 1979.

The first condition can be considered largely fulfilled: that is, that science has something to say to the legislator, something to contribute to the regulatory process. Indeed, research on the language applied to law can provide criteria on the best use of normative language. The study of the structure of rules has already provided the legislator with models that standardise the presentation of legislative texts. The reflection on the development of public policies allows a better understanding of social demands and their subsequent conversion into political decisions. Comparative law studies enable a serious debate on what the best method for drafting regulations is. Sociology of law can contribute to the analysis of the efficacy of rules. Evaluation agencies offer increasingly refined analyses of the effectiveness of rules. The application of economic theory to the world of law provides a better understanding of the cost-benefit ratio of each legislative decision. Constitutional and parliamentary law, together with better knowledge of how collective decisions are made, can improve the normative process. And so we could list all the useful information that scientific disciplines make available to those in charge and that a theory of legislation could synthesise to help the legislator make better laws, endowed with the "internal morality" (Fuller 1969, p. 339 ff) that requires them to be necessary, clear in their formulation, efficacious, effective, efficient and therefore somewhat closer to the ideal of justice.

The problem, then, is not whether science has something important to offer, but whether the legislator is willing to accept it. Political rationality has its own laws, its own particular logic. To what extent is a legislator willing to "be advised" and are the necessary administrative and political structures in place to facilitate this cooperation? Something may be starting to change in our political systems, allowing us to keep hoping for a closer collaboration of the various specialists involved in the legislative process.

Indeed, governments are increasingly concerned about the process of producing regulation and its results. The increase in the quantity of norms in recent decades has led developed countries to believe that centralised management and monitoring of legislative activities are needed. As the OECD (1989) observes, the creation of these new organisms occurred in the 1970s although most of them were not operational until the 1980s. Three-quarters of OECD governments have set up high-level bodies to assist in the planning, direction, coordination and review of the normative system. Such bodies are dedicated to promoting better regulation in the future and to reforming regulatory procedures with a view to improving their efficiency and effectiveness. They all share the common goal of generating greater concern about the implications of normative decisions. National regulatory policies are being developed with the emergence of these organisms dedicated to the management of regulatory processes. But it is also true that in most countries these policies have been part of a broader plan, a set of structural adjustments aimed at contracting state and law. Now is the time to reconsider: the already serious consequences of the deregulation strategy mark an excellent opportunity to redirect the "willingness" of governments to improve their regulatory process. It is well worth the try if we consider that what is at stake here is our model of social order and coexistence that is the social and democratic state of law.

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Chapter 2
The Dignity of Laws

2.1 The Doubts of Our Time

The twentieth century, which some have defined as a firing squad in permanent operation, has also been the century of the revolution of legal and constitutional rights. Generations of rights—civil, political, economic, social and cultural—have followed one another inexorably (Peces-Barba 1999, p. 154 ff, 207 ff; 1998), relying on an economic model that has generated the surpluses needed to develop the idea of citizenship. This is what happened in Europe after the Second World War, in the United States of America with President Roosevelt's New Deal (Sunstein 1990), or in Spain as a result of the legislative development of the Constitution of 1978. The success of the model has been remarkable in terms of the percentage of public expenditure allocated to social programs, in the degree of income distribution, or in the policy of compensation for the new forms of poverty of our time; in short, a system of liberties has been built that also manages to generate increasing levels of equality. But for some time now, this formula of "social peace with democracy" has become the object of doubts, if not of radical criticism and political conflicts. The idea has spread that this model of social state—the most extensive and legitimate instrument for the political resolution of social problems—has turned out to be problematic, and the undisputed confidence in its promises has become blurred.

A certain kind of leftist political thought has not been alien to the radical criticism of the social state. But it was after the first economic recession in the 1970s that a whole set of ideas emerged with force which called for a "recycling" of the welfare state—a climate of opinion encouraged from the right-wing sectors of society. It has gone too far, they said, the state is oversized. And certainly, whoever compares our present states with those of past centuries will clearly perceive the extent to which the functions of the state have increased. From a state that was simply expected to administer justice, to maintain internal order and to guarantee the integrity of exterior borders, we have moved on to a welfare state that constantly multiplies its functions and commitments. And with this overload the model does not work, it is said,

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because it disincentives both investment and work (Offe 1982, p. 68 ff). Trust in the state as an instrument of social direction and change has been replaced by mistrust of the state, and there is growing suspicion, in the best of cases, over the innocuousness of its laws and regulations: if you distrust the government as much as I do, they are telling us, you might not find it absurd to ask yourself this question: What are governments and their regulations for? And so we soon moved on from suspicion to stigmatisation. Are profits down? It's the regulation's fault. Are prices up? It's the regulation's fault. Is there a problem with the competitiveness of our industry? It's the regulation's fault. Are we lacking a research, development and innovation policy? It's the regulation's fault.

This has been and still is the intellectual atmosphere that we breathe at the beginning of the twenty-first century, in which a growing scepticism toward norms has developed (Mignone 1997). It is said that there are too many rules; that the rules are obscure and imprecise; that they rarely achieve the objectives they pursue or, in any case, achieve them at excessively high costs; and that they are increasingly burdened with a major democratic deficit that erodes their legitimacy. And this is how the close examination of the quantity, quality, effectiveness, efficiency,[1] and legitimacy of norms seems today to invite to a certain normative abstinence of the state, and to look outside the law—i.e. in the market—for the social control benefits it traditionally offered.

Besides disclosing the ideological background that underpins the political slogan of deregulation, those who defend the model of the social state should embark on a careful investigation of the profound changes that are taking place, and that affect the role and meaning of law—at least as it has been traditionally understood in our democratic systems. And in this task, a return to the studies of legislation can not only help to better understand such changes and their implications but also to facilitate the governance of our societies within the structures and principles of the rule of law. Let us point out some of these transformations that make it advisable to consider the process of normative production much more seriously.

2.2 Legitimacy Problems

Modernity saw in the state and in law the material and formal source of laws. Later, the State of Law or *Rechtsstaat*—with its classic principles: national sovereignty, division of powers, rule of law, and a catalogue of fundamental rights—allowed the

[1] In fact, the concern for the problems of effectiveness and efficiency of norms is shared by political figures adhering to different ideologies. And so, both conservative and progressive governments have instituted legislative and regulatory evaluation bodies—especially since the 1980s (see OECD 1989). As a proof of the growing interest for the improvement of regulation, important initiatives have been taken in numerous countries, most notably under the auspices of the OECD and with the involvement of the EU: see e.g. OECD (1999, 2010a, b, 2018a, b, 2019; cf. also Chap. 11 in this volume).