입법평가연구 제10-1호 2016년 10월 pp. 57~74

Strategy for Legislators*

Peter Wahlgren**

Contents

* This is an updated and expanded version of an article originaly published in Swedish in Liber *Amicorum Jan Rosén*, Eddy, 2016.

** Prof., Faculty of Law, University of stockholm

1. Background

Designing legislation for new technology or new phenomena requires making a number of choices. Some issues are recurring and well described in the jurisprudential literature, but the accelerating societal development constantly generates new requirements and alters the expectations on how regulations should be designed.

Internationalisation, technical & scientific development and a more intense media scrutiny of the legal sector are propelling the development. Previously unnoticed problem areas calling for regulation are identified as a consequence of new prioritations, unexpected events or changing preconditions. From the perspective of the legislature there is then a need to transform and/or complement established legislation in a profound way. In such situations established legal methods provide little help and practical guidelines are to a large extent lacking. It is therefore relevant to consider whether it is possible to develop overall strategies for the production of more efficient legislative structures.

Against this background this text summarizes some reflections from an assignement as a legal expert in a European collaborative project concerning the development of systems for disaster management.[1] International disaster management systems represent a relatively new phenomenon. They comprise a number of components of various origins, integrated into a system of systems. The systems have far reaching legal implications but collective legislation is lacking, and a considerable part of the work came to focus on analysis of how such legislation ought to be designed. A natural progression of this project was to reflect over the kind of choices and opportunities that are available to legislators in similar situations.

---

1) BRIDGE (Bridging resources and agencies in large-scale emergency management ("www.bridgeproject.eu/en") was financed by the EU's Seventh Framework Programme for Research and Technological Development (FP7-SEC-2010-1) SEC-2010.4-2-1: Interoperability of data, systems, tools and equipment. Grant agreement no. 261817. The work was undertaken 2011−2015, with a budget exceding € 18,000 000.

2. General or Detailed Rules?

A long-standing central theme in the legal discourse has been the question of whether laws should be general or detailed. This question has been dealt with extensively in both continental and Anglo-American doctrine, and is related to the question of whether legislation should rely on general or more detailed concepts.

It is easy to understand why this question has garnered so much attention. General and detailed laws have different characteristics, and depending on how the purpose of the legislation is interpreted different aspects become important. An argument in favour of more general laws is that in the application phase they leave room for handling differences between individual cases and changing situations – which can be advantageous when development is rapid or the object of legislation is technically complex. The reason for creating more general legislation can however also be more prosaic: general rules can be the only alternative when political unity cannot be reached in how a specific matter should be handled.

Arguments in favour of more operational legislation, on the other hand, can point to the reduced control offered by more general laws. Lessened control can in turn result in undesirable variations in the application phase, and eventually lead to difficulties identify the predominant legal opinion in a matter. To understand how the legislation works or is intended to work, one must study the relevant case law and/or preparatory works, and piece together different legal fragments to create a whole, which can be a time-consuming and complex task. Another argument against general legislation is that the distribution of power between the legislature and the court system becomes unclear, as general laws have to be interpreted and supplemented during the decision-making.

In contrast, detailed legislation is likely to increase the precision of regulations. The application of the rules also becomes easier as there is less need for interpretation. This means that the predictability of outcomes increases, and that

detailed legislation more accurately lives up to the ideal of jurisprudence in terms of equality before the law etc. Detailed rules thus also promote a clearer distribution of work tasks between the legislator and the applier.

Nevertheless, detailed legislation may also be critisised, not least for practical reasons. Detailed regulations tend to be extensive and complex, making it difficult to identify and make use of individual sections. These rules must also be revised more often in connection with changing conditions – as gaps and grey areas emerge specialised rules risk becoming outdated. In addition, more detailed regulations can lead to unreasonable results in individual cases. This in turn entails a risk that ways to circumvent the rules will be developed.

Given the very different characteristics of these two forms of expression, the sometimes intense debate over the degree of detail legislation should reflect may seem surprising. If one examine how different rules function in practice, it is clear that general and detailed rules have different advantages and disadvantages. General laws are less effective in areas requiring detailed control whereas detailed legislation is less suitable for an area that is experiencing rapid development – and so on.

Noticeable is also that problems that must be addressed by legislation are seldom easy to categorize in this regard. There is often reason to express overall or long-term goals in general terms, while it at the same time may be necessary to provide detailed regulations, for example about who should be affected by a certain regulation. A reasonable strategy is therefore to combine general and detailed rules in order to create a whole that meets the substantial and varying requirements at hand.

The latter is also commonly reflected in modern legislation. Laws often begin with introductory paragraphs or preambles expressing general principles; these principles are then defined more precisely in the detailed rules, and often the right to create even more detailed provisions on the matter is delegated to regional bodies or public authorities with the power to issue ordinances. Thus laws frequently acquire even more detail and in some cases the legislation is complemented with instructions,

directions, formalized working routines or predefined procedures that establish considerable control over work processes and operations.

In the end, pitting general and detailed regulations against each other is not especially fruitful and the question of whether legislators should give preference to one or the other is of relatively little interest. The important thing is how rules with varying degrees of detail are combined. How this ought to be done in turn depends on the context and it is also necessary to consider other aspects in order to create a law appropriate for its purpose.

3. Soft or Hard Rules?

If one studies legislation from a functional perspective it becomes clear that laws and regulations generated by official power are not isolated components. What we traditionally consider as rules of law and their ancillary information is usually enhanced with other types of regulation. Many other forms of rules are well known and founded on longstanding traditions. The term *soft law* was used initially to designate intergovernmental agreements that lacked the operative mechanisms needed to impose sanctions, but in recent times the term has acquired a broader meaning and is now often used to signify instruments such as agreements, standards, industry norms and so on. Soft law may also denote mechanisms developed through cooperation between private and public entities. In such cases, traditional legislation can provide the framework for a certain activity, while the individual actors involved are allowed to formulate the details. Examples include quality assurance systems. Companies that choose to adopt such a system agree to follow certain procedures, undergo training or seek certification, which in turn can provide them with certain advantages in the form of simplified reporting, less extensive review by authorities and so on.

A wide range of soft rules is available. Their common feature is that their

enactments require the participation of those affected by the rules. They are also often the result of private initiatives and therefore the effect depends largely on the good will of the parties. These aspects, usually combined with milder sanctions and more limited mechanisms for enforcement, explains why such rules are perceived as soft compared to conventional legislation. Soft law is not a new phenomenon, but in recent years it has received increasing attention as the interest in de-, self- and co-regulation has grown. Paving the way for soft laws is seen as a way to mitigate effects of perceived overregulation, cumbersome bureaucracy and the proliferation of difficult-to-grasp regulations. The development of soft law reforms is also encouraged by the EU in its work to create better regulation, and the Union has determined that traditional legislation should be created only when all other means of resolving the problem have proven ineffective.

Soft law does offer many advantages. Soft laws are often formulated in cooperation with the parties affected by the laws, and they are associated with a certain degree of voluntariness. These characteristics lend soft laws greater legitimacy and they can usually be presumed to garner greater respect and adherence than mandatory, authoritative rules. Less bother, and faster, cheaper processes are also important incentives for the establishment of private dispute resolution mechanisms in the form of arbitration awards and the like. In addition, the content and results of the dealings between the parties do not need to become a matter of official record in the same way as they do in court-based dispute resolution – which commercial actors can find attractive.

The drawback of self-regulation is that weaker parties risk being treated less fairly. Actors who have substantial resources at their disposal can set de facto standards that are difficult for individuals to contravene. This means that some form of general control or protective rules could be necessary, for example to preserve the interests of consumers or employees. For similar reason, self-regulation is not feasible in a number of areas.

The lack of enforcement mechanisms can also make it more difficult to implement sanctions, and insufficiently developed control processes can invite poor adherence to soft laws. A system of private dispute resolution can thus appear to be legally uncertain. The lack of a precedent function can mean that the same legal question is reviewed again and again, and if decisions are not made public, the legal situation can be difficult to ascertain. In addition, a well-developed self-regulation system can come into conflict with political rationality, e.g. when a certain activity is to be adjusted to international commitments.

While some rules can be described as soft, it can also be asserted that others are hard. Developments in recent decades have made it possible to integrate rules in technical systems. Laws and other regulations can be represented in computer programs that offer very detailed control of activities. Such rules are hard in the sense that one cannot avoid obeying them. They can also be introduced without any participation on the part of the parties affected by them.

Hard rules can be found in many areas. Some of the first were digital systems for financial transactions, in which tax rules were integrated. Significant parts of the tax system are now computer-based and it is unthinkable to return to manual administration. Copyright law is another example. Protection in the form of technical solutions has been introduced to prevent unauthorized use of copyrighted materials. Other illustrative examples include rules to protect IT systems from attack. Provisions in Penal Codes on data intrusion are of little significance. In practice, some form of physical protection is needed, such as antivirus programs and firewalls; i.e. embedded, programmed rules that determine which data a system is allowed to receive and use. Share trading, pension administration and parts of the social security system are other areas where autonomously operating hard-wired legal rules are predominant.

The ever-increasing focus on security, demands for efficiency in administration, research on autonomous vehicles, development of support systems and prophecies

of artificial intelligence based on predictive analysis show that embedded rules constitute a general trend. This shoud not come as a surprise. In a very short time, information technology has radically changed the landscape for almost every sector of society and it seems unlikely that any areas can be immune to these developments. The judicial system has already been affected: traditional legislation has been augmented and replaced by hard law.

Hard, embedded rules also have advantages. Manual management of tasks is minimized and there are numerous opportunities to improve efficiency and reduce costs. This applies in both the short and the long term. Much work in the legal sector is about handling huge numbers of more or less identical cases with well-defined conditions. This and the successive development of technology mean that increasing numbers of processes can be automated, including legal decision-making. Hard rules also satisfy many juridical ideals. Legal certainty can be improved because it is possible to increase predictability and consistency, speed up administrative routines and minimize the risk for oversight.

However, far-reaching automation based on pre-programmed rules is also associated with risks. Problems can arise if technology systems are too complex or poorly documented. Updates and adjustments can be difficult to carry out. Another problem is that the technical solution can be difficult to influence because modifications require technical competence. Solutions can be perceived as inflexible. IT systems for e-commerce and debit/credit card payment systems are examples of de facto standards that establish 'technical jurisdictions' without the involvement of the inhabitants. They can also be more or less impossible for national legislators to influence – democracy successevly becomes replaced by technocracy.

Construction of automated systems in this context also poses problems. Converting juridical rules into technical instructions is a multi-step process that can be difficult to follow. This means that continued development of more sophisticated hard-law systems can create problems for transparency as the rule framework becomes too

difficult to understand.

Furthermore, technical solutions can be manipulated. Actors with sufficient resources can introduce mechanisms that efficiently change or hinder the intended effect. The field of intellectual property law offers illustrations of how technology can be used to promote legal intentions – or circumvent them. For example, media producers use technical solutions to develop or defend their copyright interests, and consumers use other solutions to illegally copy or download digital content.

Another severe complication is that advanced technology for inspection, enforcement and control creates risks in the form of unauthorized surveillance and misuse of information. Autonomous systems must be designed so that security and privacy can be preserved. Yet another risk is the vulnerability of technical systems to disruption or downtime. Technical problems can emerge spontaneously or as a result of manipulation or sabotage.

The excistance of different advantages and drawbacks lead up to the conclusion that neither soft and hard law should be contrasted with oneanother. Several aspects must be examined and taken into account before one makes a decision to use one or the other. Nevertheless, both hard rules and soft rules are concrete, useful additions and alternatives to traditional legislation.

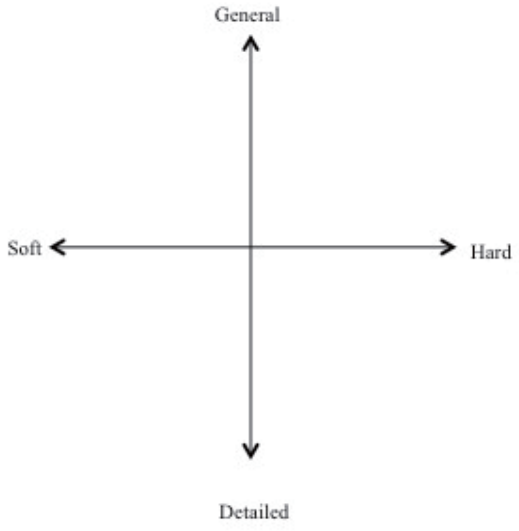

Figure 1: An obvious starting point is that rules can be formulated to be more or less general or detailed, Another aspect that so far has received less attention is that the implementations of laws can be varied, and related to one another on a scale that can be described as moving from soft to hard.

4. Proactive, Operative or Reactive Rules?

Apart from being described as general/detailed and hard/soft rules can be classified based on their relation in time to the event or action to be regulated. Are the rules intended to ensure that actors can avoid, prevent or plan something that has not yet happened, or should the rules serve as decision support, e.g. as instructions or checklists for how an activity should be carried out on a particular occasion? Alternatively, are the rules meant to create the possibility for redress, punishment or to restore original conditions after a particular event has occurred? From this perspective, rules can be designated as *proactive*, *operative* or *reactive*.

Proactive rules vary a lot and a large part of legislation is designed to be preventative. There are numerous examples: regulations for utility and food supply, traffic insurance, occupational safety, surveillance, inspections, standardization and certification. Many of these rules – such as the regulations on how risk analyses and inspections should be carried out – are extremely detailed, but many fields of law are entirely hallmarked by its chief purpose of promoting continuity in society, for example administrative law, tax law and regulations for the educational sector.

Operative rules are intended to serve as decision support and must be readily available when a specific situation arises or when certain actions or work processes are to be performed. These rules can be designed as checklists or instructions and they are often expressed as formal rules. They can stipulate who has decision-making authority; how certain information must be collected and communicated; which measures must be taken; and which time frames must be observed. Instructions can

be directed towards public authorities and/or individual actors. It is common to set out these rules in a special section of a law but this is not always the case. Rule systems describing how something should happen can also be very extensive – for example, considerable parts of the rules in procedural laws are operative in nature.

Many legal rules are reactive. Their primary function is to stipulate the consequences that must or can occur after a particular event has taken place. Reactive rules also vary considerably. They can specify how liability and costs are to be distributed after accidents or unforeseen events or they can stipulate disciplinary action, penalties or damages if a person is found guilty of recklessness, criminal offences or negligence. This category also includes rules for determining the course of events after something has happened. The reactive perspective is very prominent in the legal domain. Much of the courts' work involves analysis of previous events and it is well known that legal work often begins by investigating what has already taken place.

In most situations, an adequate result is obtained when proactive, operation and reactive rules interact. This is the case in safety work, for example. Rules for training, risk analysis and construction are designed to prevent undesirable events. Operative rules specify the distribution of labour and responsibility, provide instructions, and contribute to limiting injuries or damage if and when undesirable events take place. Reactive rules describe how penalties and liability can be imposed when mistakes, negligence or crimes are the cause of a certain event. This division of rules into effects prior to, during and after an event thus create a basis for systematic legislative strategies, and the same strategy can be applied in a number of areas.

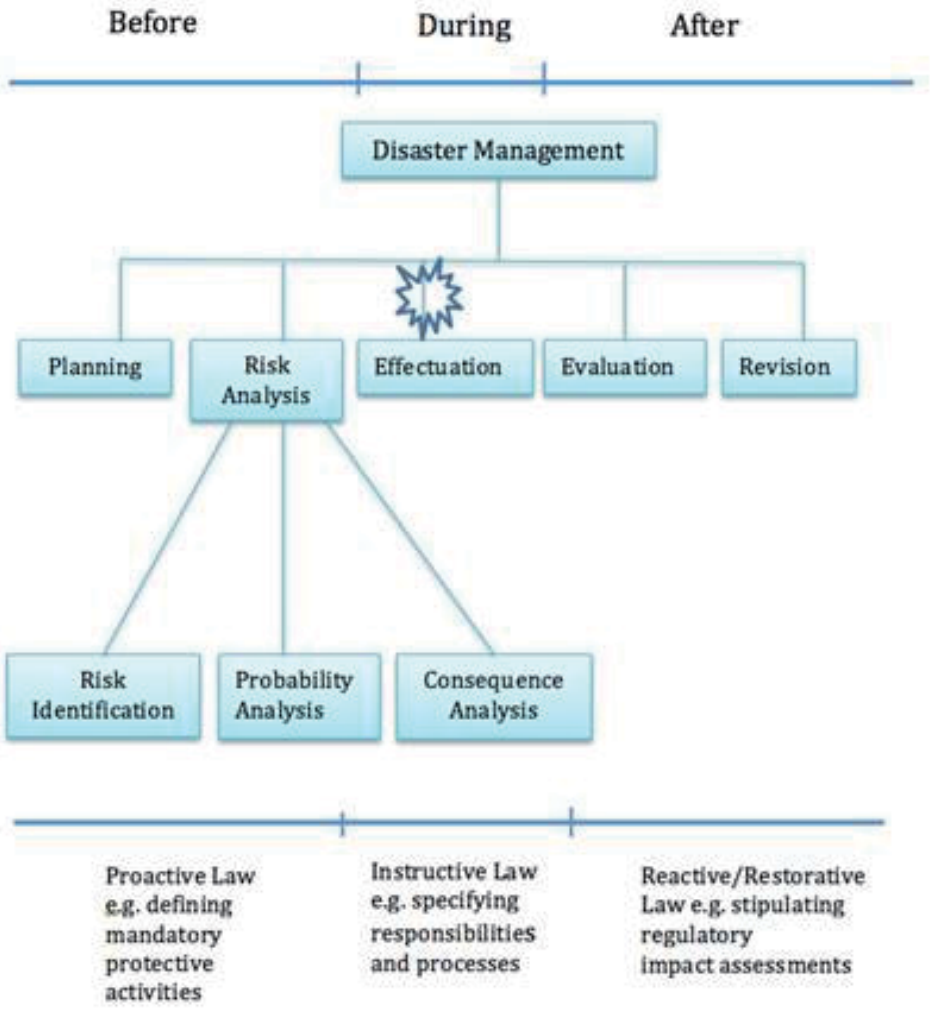

Figure 2: The primary function of rules can be proactive, operative or reactive; that is, they are designed to regulate activities before, during or after the event or activity that prompted creation of the law.

5. What should be Regulated?

Functional classifications of the kind described above can be developed and rule forms can be combined. Classifications can be based on the function of the rules:

the purpose can be e.g. to influence organizations, individuals, processes or material conditions. If such classifications are combined with a proactive – operative – reactive categorization it is possible to create matrices. Such matrices serve as checklists and help create a systematic review of possibilities and requirements. Each cell in the matrix is a defined unit, so it is relatively easy to focus the work. It is also easy to obtain an overview of the measures available and it becomes easier to identify suitable procedures for a particular issue. The alternative – working without the matrix or with an unarticulated or implicit structure – is significantly more demanding, and there are increased risks some combinations can be overlooked.

Purpose of the regulation (e.g. improve security in IT systems)				
	Detailed through rules that influence			
	Organisations	Individuals	Processes	Materials
Stipulating before an incident	Planning, Resource allocation, Cooperation, Trend analysis	Training, Competence requirements, Standby availability	Risk analysis, Exercises, Documentation, Monitoring,	Storage, Updating, Inspection/ Control, Maintenance
Stipulating during an incident	Leadership, Division of work, Information management, Data security	Managemet,Respon sibilities, Protection	Communication, Transports, Back-up	Functions, Accessibility, Requisitioning
Stipulating after an incident	Revision, Reporting, Evaluation	Continuing education, Inspection, testing	Documentation, Follow-up, Updates	Service, Complementing, Upgrading

Figure 3: Different rule categories can be combined to obtain an overview of the requirements and regulatory alternatives for a particular problem or matter. Analytical tools such as these are general, and the matrices can be tailored to suit the matter at hand. Categories can be added, replaced or described more precisely. When the task is to create a more detailed rule system, for example, 'individuals' can be divided into 'end users', 'operations manager' 'personal data controller 'customer/client' and so on.

6. Is there a Strategy?

So far this line of reasoning outlined in this text has illustrated the obvious: there are different kinds of rules and rule forms, and these have different advantages and drawbacks. Thus, a functional classification can simplify the work of identifying and combining rules and expressions of rules in a suitable way. The work can be carried out in a consistent manner – and this alone indicates that in principle, there are no barriers to developing relatively detailed regulatory strategies.

Still, insight about the different characteristics and expressive nature of rules is not enough for developing a general strategy for producing high quality legislation. In order to build knowledge of this, it is necessary to consider additional aspects. Most of all, it is crucial to take into account the conditions of the legal field in question. The problems to be dealt with differ and regulations must be adapted to the needs identified in each and every case. Using the various strengths and weaknesses of rule forms as a starting point thus requires investigation of a number of conditions that can be significant for rule formulation. Consider the following examples:

- The rate of change in the domain that should be regulated affects the level of detail that rules should be given.
- It is not economically defensible to develop hard rules if the problems that are to be dealt with does not occur with a certain frequency.
- The possibility to introduce hard rules is determined by the physical environment – embedded hard rules assume that the issues can be concretized in a suitable way.
- The need to combine proactive, operative and reactive rules depends on whether the subject of regulation reflect extensive processes or individual events.
- The existence of established technical standards in a certain domain can severely

limit the way that the legislation can be designed.

- Rules directed towards a small number of experts and rules affecting large groups of the population must be formulated in different ways.

In summary this means that there is still much work to be done before it is possible to present a general strategy for legislation. The task is nevertheless an interesting one – many opportunities and possibilities are on the road ahead; the field of legislative techniques and strategy is undeveloped as a research discipline, and most of the work is still to be done. The work is therefore both engaging and legitimate. Information and communications technology is revolutionizing virtually every way of working, and it is improbable that legislation will be a bystander. Every day, more stringent requirements and new situations demand ever more competent efforts in the process of deveolping updated legislation.

Abstract

Designing legislation for new technology or new phenomena requires making a number of choices. Some issues are recurring and well described in the jurisprudential literature, but the accelerating societal development constantly generates new requirements and alters the expectations on how regulations should be designed.

Internationalisation, technical & scientific development and a more intense media scrutiny of the legal sector are propelling the development. Previously unnoticed problem areas calling for regulation are identified as a consequence of new prioritations, unexpected events or changing preconditions. From the perspective of the legislature there is then a need to transform and/or complement established legislation in a profound way. In such situations established legal methods provide little help and practical guidelines are to a large extent lacking. It is therefore relevant to consider whether it is possible to develop overall strategies for the production of more efficient legislative structures.

Against this background this text summarizes some reflections from an assignment as a legal expert in a European collaborative project concerning the development of systems for disaster management. International disaster management systems represent a relatively new phenomenon. They comprise a number of components of various origins, integrated into a system of systems. The systems have far reaching legal implications but collective legislation is lacking, and a considerable part of the work came to focus on analysis of how such legislation ought to be designed. A natural progression of this project was to reflect over the kind of choices and opportunities that are available to legislators in similar situations.

Key Words

Designing Legislation, Efficient Legislative Structure, Legislator, Legislative Strategy, Practical Guideline

국문초록

입법자를 위한 전략

Peter Wahlgren
(스톡홀름 대학교 교수)

새로운 기술 또는 새로운 현상에 대한 입법을 기획하기 위해서는 많은 선택이 필요하다. 일부 주제들은 법학문헌들에서 반복적으로 제기되고 잘 설명되기도 하지만, 가속화된 사회 발전은 끊임없이 새로운 요구를 생성하며 과연 규제를 어떻게 설계할 것인지에 대한 기대를 변경한다.

법 분야에 있어서의 국제화, 기술과 과학의 발전, 그리고 더욱 강도 높은 언론의 감시가 발전을 추동시키고 있다. 새로운 우선순위화, 예상치 못한 사건 또는 전제 조건의 변화들로 말미암아 종래 인지되지 않았던 문제의 영역들에 대하 규제 필요성이 야기되고 있다. 그 경우 입법자의 관점에서는 전면적인 방식으로 확립된 제정법을 개정하거나 보완해야 할 필요가 발생한다. 이 같은 상황에서 정립된 법 방법론은 거의 도움이 되지 않으며 실질적인 지침을 제시하지 못한다. 그러므로 보다 효율적인 입법 체계를 만들 수 있는 총제적인 전략을 개발할 수 있는지 여부가 고려되어야만 한다.

이러한 배경에 맞서 본 논문은 재난 관리 시스템의 개발과 관련된 유럽 협력 프로젝트의 법률 전문가로서의 임무로부터 도출된 몇 가지 생각을 요약하고 있다. 국제 재난 관리 시스템은 상대적으로 새로운 현상을 대표한다. 이들 시스템들은 다양한 출처의 구성 요소들이 시스템 속의 시스템의 형태로 통합되어 구성된다. 이 시스템은 막대한 법적 함의를 가짐에도 불구하고 총체적인 입법이 미비된 상태이며, 작업의 상당한 부분은 그러한 입법이 어떻게 설계되어야 하는지 여부를 분석하는데 초점을 둔다. 이 프로젝트를 통해 자연스럽게 이와 유사한 상황에서 입법자들에게 허용되는 이같은 선택과 기회들을 생각해보고자 한다.

주제어

입법 설계, 효율적인 입법체계, 입법자, 입법 전략, 실용적 가이드라인