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THE WHYS AND WOES OF EXPERIMENTAL LEGISLATION

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DRAFT

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Abstract

Experimentation has been regarded as an essential element of the learning process and a source of valuable evidence in natural and social sciences. This perception has not been fully accepted by law, which has been sceptical not only of experiments with legislation but also of most forms of incorporation of evidence in the lawmaking process. However, the growing demand for a better interaction between the rapidly changing society and law appears to favour a broader employment of evidence-based lawmaking instruments. Experimental laws and regulations enable legislators to gather important information regarding the nature of the underlying problem, and test the effectiveness of new legal rules on a small-scale basis for a period of time determined beforehand. In this article, I argue that experimental legislation should be part of legislators' daily toolbox and I provide an overview of the different advantages of this legislative instrument. Nonetheless, there are not only 'whys' but also 'woes' in the life of the 'experimenting legislator'. A number of political and legal objections have been raised against a broader enactment of experimental legislation. In this article, I show both sides of experimental legislation and try to unravel the truth behind these objections.

Keywords

Experimental legislation, empiricism, fact-free legislation, evidence-based lawmaking, politics, better regulation, legal certainty, equal treatment.

A.INTRODUCTION

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[“*Wenn du nicht irrst, kommst du nicht zu Verstand*”]¹: is an aphorism that appears inspired by common sense. However, this type of common sense has often been overlooked by legislators. At the resemblance of the Kuhnian perception of ‘normal science’, law also appears to pretend to “*know what the world is like*”.² Legislators—like scientists—can be nevertheless conceived as ‘problem-solvers’³ that instead of pretending to know what the world is like based on theoretical knowledge, should also gather information and evidence to support their legislative choices. Consultations, impact assessments and ex ante evaluations have been steps forward in this direction; but, experimentation with laws also have an added value in this context. Experimental legislation allows legislators to submit new rules to a ‘reality check’, testing their effectiveness on a small-scale basis before their implementation is extended to the whole country. Moreover, experimental legislation is an information-production mechanism and a valuable source of evidence to justify the adoption of specific rules. In addition, experimental legislation grants the opportunity to legislators not only to try and fail but also to learn from their mistakes.

In this article, I argue that experimental legislation is an essential legislative instrument that should be more often employed since it can contribute to the rationalization of the lawmaking process, converting it into an iterative learning path. Since this type of temporary legislation is not widely known among lawyers and policymakers, I provide in section B a thorough definition of ‘experimental legislation’, distinguish it from other forms of experimentation with law, and explain the difference between this legislative instrument and scientific experiments. Section C is devoted to an overview of the functions of experimental legislation. This instrument can be particularly useful to tackle the uncertainty inherent to the lawmaking process, notably as far as the regulation of fast changing fields is concerned; gather information and improve the quality of legislation; obtain political consensus regarding controversial bills; accommodate diversity and advance decentralization. However, as the title of this article conveys, there are not only ‘whys’ but also ‘woes’ in the life of the experimental legislation. In section D different perspectives on why the use of this legislative instrument remains limited shall be discussed: firstly, experimental legislation is not often enacted due to the lawmakers’ lack of information or training regarding this instrument; secondly, even when this instrument is known, it is not chosen because the lawmaking process and politics are averse to evidence-based instruments; thirdly, when the former is possible, experimental legislation has been rejected on the grounds of ethical arguments or the potential violation of fundamental principles of law. As far as this last objection is concerned, I shall devote particular attention to the alleged conflict between experimental legislation and the principles of legal certainty and equal treatment.

The ‘whys’ and ‘woes’ of experimental legislation shall be analysed in the light of the literature, case-law and legislative practice on experimental legislation in different jurisdictions, notably Germany,

¹ J.W. Goethe, *Faust-Part II* (first published 1832, Hamburger Lesehefte Verlag, Husum, 2008) 90: ‘if thou does not err, thou does not come to understand’.

² T.S. Kuhn, *The Structure of Scientific Revolutions* (3rd edn., The University of Chicago Press, Chicago 1996).

³ G.J. Veerman, *Het meesterschap van de wetgevingsjurist* (SdU, The Hague 2011) 9-10.

France, the Netherlands, and the EU. An isolated reference to a decision of the Portuguese Constitutional Court on the constitutionality of an experimental law will be made in order to provide additional answers not yet explicitly formulated in the other mentioned jurisdictions.

B. EXPERIMENTAL LEGISLATION: DEFINITION

1. Experimental legislation: concept

Peter Noll, pleading for a new approach to lawmaking, affirmed that every (new) law is an experiment because legislators cannot entirely foresee the effects of a law⁴. While this is true, only a small fraction of legislation deserves the designation of ‘experimental laws’. Experimental legislation has been regarded as a response to the need to conceive laws based on a multidisciplinary approach and grounded in empirical methodology (*Rechtsetzungsmethodik*).⁵ Experimental lawmaking is, according to this perspective, a learning device of added value since it ‘tests’ laws ‘in the real world’ before they are definitively enacted.

Although there has been some research on experimental legislation particularly in Germany and France,⁶ a clear definition of this concept is still missing.⁷ As the word suggests, experimental legislation implies that new laws are tested; however, these experiments should not be confused with the ones performed in laboratories under highly controlled conditions.⁸ Moreover, there are multiple instruments that incorporate a form of experimentation in the lawmaking process but that are also excluded from the category ‘experimental legislation’. This section aims to provide a clear definition of the legislative instrument under analysis and distinguish it from other apparently similar instruments. I start by providing an example of a recent experimental regulation in the Netherlands. This case-study is used as a point of departure to define the concept of ‘experimental legislation’ and further elaborate on its constituent elements. I then distinguish this concept from other forms of experimentation with law, and illuminate the resemblances and differences between experimental laws and scientific experiments.

⁴ P. Noll, *Gesetzgebungslehre* (Rowolt Taschenbuch Verlag, Reinbek bei Hamburg 1973) 76.

⁵ H D Horn, *Experimentelle Gesetzgebung unter dem Grundgesetz* (Duncker & Humblot, Berlin 1989) 20-21.

⁶ For France, see Charles Morand (ed.), *Évaluation législative et lois expérimentales* (Presses Universitaires d’Aix-Marseille, Marseille 1993); B. Faure, ‘L’intégration de l’expérimentation au droit public français’ in *Mouvement du droit public, Mélanges en l’honneur de Franck Moderne* (Dalloz, Paris 2004); S. de Charentenay, ‘Les implications juridiques de la constitutionnalisation du droit à l’expérimentation’ (2003), available at < > accessed 28 August 2013. For Germany, see H.D. Horn, *Experimentelle Gesetzgebung unter dem Grundgesetz* (Duncker & Humblot 1989); V. Maß, *Experimentierklauseln für die Verwaltung und ihre verfassungsrechtlichen Grenzen* (Duncker & Humblot 2001).

⁷ W. Beck and C. Schürmeier, ‘Die kommunalrechtliche Experimentierklauseln als Reforminstrument’ (2004) *Landes- und Kommunalverwaltung* 488.

⁸ Thomas Freund, *Kommunale Standardöffnungs- und Experimentierklauseln im Lichte der Verfassung* (WVB, Berlin 2003) 16.

(a) Example

Between 2009 and 2012, the Dutch Ministry of Transport, Public Works and Water Management tested the following hypothesis: ‘dynamic speed limits are more susceptible of improving road safety, traffic flow, and the quality of air than a stringent maximum speed limit’.⁹ This could have been tested by conducting a legislative experiment under controlled conditions where subjects are asked to adapt their travelling speed to the weather or road conditions; but the legislator chose instead to enact an experimental regulation and experiment ‘in the real world’. In the mentioned period an experimental regulation imposing a dynamic speed limit of 130 km/h on selected Dutch highways was applied. Drivers were asked to adapt their maximum speed to road and weather conditions. This dynamic rule derogated on an experimental basis the maximum limit of 120 km/h established by law. The experiment proved to be successful and it was later extended to other parts of the territory. In 2012, the experimental regulation was revoked and road traffic legislation was revised to replace the former speed limit with the 130 km/h one which had been tested on a number of Dutch highways.¹⁰

Before the described experiment was conducted in the Netherlands, it had been abundantly theorized that dynamic speed limits would be beneficial for road safety and air quality. The mentioned experimental regulation does not allow the legislator to establish strong causal relations between the dynamic speed limit and these other variables because it was not possible to control all variables. Nevertheless, this experiment provided an insight and additional and valuable evidence as to the effectiveness of this regulation which could not have been obtained in another way. In this sense, experimental legislation can be an alternative to an all-or-nothing approach that can be employed to allow legislators to gather more information and test the effects of legislation in the real-world.

The above described example can be reduced to the following features: (i) a regulation, (ii) derogating from road traffic legislation (iii) for a set period of time (iii) and for a part of the territory, (iv) in order to obtain further information about its effectiveness; (v) which is accompanied or followed by an evaluation of the obtained results. This is a simplified characterization of experimental legislation: it provides a clear idea of what this legislative instrument is but requires further elaboration.

(b) The definition of ‘experimental legislation’

As the example on dynamic speed limits illustrated, the term ‘experimental legislation’ refers to statutes or, in the majority of cases, regulations enacted for a period of time determined beforehand, on

⁹The experimental regulation in question was the [*Experimenteerverkeer besluit ten behoeve van een experiment met een dynamische maximum snelheid van 130km/h op enkele wegvakken onder beheer van het Rijk*], *Staatscourant*. 2011, 2549.

¹⁰ See the report [*Evaluatie praktijkvoeren Dynamische Maximumsnelheden*], 15.07.2010, *Bijvoegsel Kamerstukken II*, 2010-2011, 32 646, nr.1, 9.

a small-scale basis, in derogation from existing law, and subject to a periodic or final evaluation. Once evaluated, an experimental law which reveals positive outcomes can be adapted in conformity with the observed results and transformed into a permanent act.¹¹ Experimental legislation is a first step towards lasting legislation: new rules are enacted on an experimental basis, their effects and side-effects are evaluated, and should these rules prove to be effective, they can be adapted and converted into permanent laws.¹² In addition, experimental legislation aims to be an informed step towards better lasting legislation since it allows legislators to test new laws on a small-scale basis, tackle the uncertainty and difficulty in making prognostics inherent to new rules, and to gather evidence to support (or reject) the legislators' legislative hypothesis.

The concept of 'experimental legislation' can be deconstructed into various elements. The first is its temporary character: an experimental law or regulation must have an [*ab initio*] limited duration. While some argue that this fixed deadline constitutes a legality requirement of any experimental law,¹³ others have argued that the experiment should terminate as soon as its underlying motives cease to exist and enough evidence has been gathered in order to perform a solid evaluation of the effects of the implementation of the experimental law.¹⁴

The second element is the derogation from current law, which implies that two requirements must be observed: firstly, there must be a statutory basis authorizing this derogation; and, secondly, it must be clear why this derogation through an experiment is necessary, meaning that the objective of the experiment must be clearly indicated.¹⁵ These legality requirements imply that both the object of the experiment as well as the evaluation criteria must be clear and defined beforehand.

The third element is the performance of an evaluation, which is an essential feature of any experimental law since the main idea behind experimental laws is to try out a new legal regime, see if it works and learn from the observed positive and negative effects. This evaluation is regarded as an opportunity to rethink the objective of the experiment and decide whether the rules which were tried out can be extended to the rest of the population and converted into general lasting rules. The evaluation of the effects of the implementation of an experimental law can be performed by the ministry or state authority in charge of the experiment, a special governmental authority or an independent agency.¹⁶

Finally, it is only possible to draw lessons as to the value of the experimental rules if it is possible to compare their effects to the ones resulting from the application of existing law. Experimental legislation is therefore only applied to a circumscribed part of the territory or to a representative group of citizens. A 'sample group' is thus chosen for the implementation of the deviating legal regime and the

¹¹G. Domenech Pascual, 'Los experimentos jurídicos' (2004) 164 *Revista de Administración Pública* 149.

¹²A. Flückiger, 'Voter, élire et signer par Internet: le droit expérimental à l'épreuve de la sécurité', in M. Müller; A. Thomas (ed.), *E-voting* (Stämpfli, Bern 2003), 109; G. Domenech Pascual, 'Los experimentos jurídicos' (2004) 164 *Revista de Administración Pública* 149.

¹³F. Crouzatier-Durand, 'Réflexions sur le concept d'expérimentation législative (à propos de la loi constitutionnelle du 28 mars 2003 relative à l'organisation décentralisée de la République)' (2003) 56 *Revue Française de Droit Constitutionnel* 687.

¹⁴B. Desjardins, 'Réflexions à partir d'une loi expérimentale: L' expression dans quelques PME d'Aquitaine' (1985) 24 *Travail et Emploi* 26.

¹⁵See A. Chanos, *Möglichkeiten und Grenzen der Befristung parlamentarischer Gesetzgebung* (Duncker & Humblot, Berlin 1999) 33-36.

¹⁶A. Kletzlen, 'Évaluation du Risque et Prévention de la Criminalité dans le Processus Législatif' (2000) Centre de Recherches Sociologiques sur le Droit et les Institutions Pénales, available at <www.cesdip.msh-paris.fr> accessed 28 August 2013.

results obtained here are compared with the ones of the ‘control group’ to which the legislative status quo is applied.

Experimental legislation is a distinctive form of legal experimentation and it can even be qualified as the most radical one since it is an experiment with the rights and duties of citizens with a direct impact on society and the economy. This is not the case with other forms of experimentation with laws which are discussed in the following section.

2. Other forms of experimentation with law

Experimental legislation coexists with a number of other instruments that have an investigational character but do not produce immediate changes in the legal order, which is the case with internal legislative experiments;¹⁷ and hybrid forms of experimentation that combine policy and legislative techniques, notably pilot projects and the Dutch *proeftuinen*; and phased implementation of legislative instruments which try to progressively adapt legislation to the new generated information without assuming an explicit experimental nature.

(a) Legislative experiments

A number of ‘legislative experiments’ have been identified in the German literature, notably [*Gesetzgebungsexperimente*], [*Modellversuch*], [*Praxistest*].¹⁸ These legislative experiments are mostly employed in a preparatory phase of the lawmaking process. [*Gesetzgebungsexperiment*], [*Modellversuch*] and [*Praxistest*] are empirical instruments used in the lawmaking process in order to try to predict the results of a law under controlled conditions. These instruments simulate the enactment of new laws by using a small group of volunteers, often randomly assigned, placed under conditions similar to the ones of a laboratory and by comparing the results to another control group. [*Gesetzgebungsexperimente*], for example, are internal experiments executed in the drafting phase of a law and aim at carrying out an [*ex ante*] control of bills.¹⁹ These legislative experiments aim to foresee the behaviour of citizens when confronted with the application of a new law and test the clarity of legal rules before they come into effect. Besides these internal experiments, legislators may also decide to carry out external legislative experiments that assume the form of field experiments. Contrary to the previous ones, these experiments produce effects on society but do not signify that specific provisions in derogation of existing law must be introduced. For instance, in 1984 a legal field experiment was carried out in Minneapolis in order to test

¹⁷See P. Fricke and W. Hugger, *Test von Gesetzentwürfen, Teil 1: Voraussetzungen einer testorientierten Rechtsetzungsmethodik* (Speyerer Forschungsberichte 11, Speyer 1979) 172.

¹⁸V. Maaß, *Experimentierklauseln für die Verwaltung und ihre verfassungsrechtlichen Grenzen* (Duncker & Humblot, Berlin, 2001), 30-31; H.D. Horn, *Experimentelle Gesetzgebung unter dem Gesetz* (Duncker & Humblot, Berlin 1989) 21-28.

¹⁹V. Maaß, *Experimentierklauseln für die Verwaltung und ihre verfassungsrechtlichen Grenzen* (Duncker & Humblot, Berlin, 2001) 30-31.

whether the immediate pre-trial sanction applied to a domestic violence abuser would result in less repeated violence. The Minneapolis Domestic Violence Experiment implied the randomized application of different sanctions to abusers.²⁰ This randomized test demonstrated that arrest was more effective to prevent repeated violence than separating the abuser for eight hours from the victim or initiating advice and mediation procedures. In the 1980s, detention was less common than it is nowadays for minor cases of domestic violence. This field experiment proved to be a valuable research tool for legal policy in this case.

Internal and external legislative experiments have been put into practice and studied by Law and Economics scholars, who regard them as a useful instrument to predict for example the deterrent effect of laws.²¹ Legislative experiments can precede and complement the use of experimental legislation. Experimental laws involve experiments with valid laws in the real world, whereas legislative experiments try to test ‘laws-to-be’ by simulating ‘real-world-conditions’.

(b)[*Proeftuinen*] and pilots

Pilot projects (or ‘pilots’) and the Dutch [*proeftuinen*] often resemble policy experiments. Both instruments are legally relevant since their results may influence lawmakers to later adapt legislation to fit the conclusions drawn from these projects. [*Proeftuinen*] are centres or institutions that conduct experiments. [*Proeftuinen*] can be placed somewhere between social experiments—because they test the effects of policy effects on human behaviour—and experimental legislation, since a legal authorization is often required. [*Proeftuinen*] are small-scale experiments, publicly funded, targeted at a specific goal, often involving the collaboration of private entities, and designed to last for a short period of time. At the end of this period, an evaluation of the results should be performed. In the Netherlands, important experiments of high social and economic significance have been carried out under the form of a [*proeftuin*]. Examples include [*proeftuinen*] designed to improve the integration of immigrants or develop social structures for improved homecare.²²

Pilots can be regarded as a first implementation of a program or policy with the objective of preparing the legal order or society in general for a structural change. However, pilot projects have often been selected as alternatives to experimental provisions in the Netherlands. It appears that the distinction between these two instruments has been rather blurry since pilot projects have been employed by the Dutch legislator to pursue typically experimental goals. In 2009, for example, the then Dutch Secretary of State of Labour Affairs stated that “the general objective of pilots was to answer questions and eliminate

²⁰ L. W. Sherman and E. G. Cohn, ‘The Impact of Research on Legal Policy: The Minneapolis Domestic Violence Experiment’ (1989) 23 *Law and Society Review* 117.

²¹ C.H. Engel, *Legal Experiments: Mission Impossible?* (Erasmus Law Lectures 28, Eleven International Publishing, The Hague, 2013).

²² For more information on these [*proeftuinen*], for [*Proeftuin Inburgering*] on the integration of immigrants, see < www.proeftuininburgering.nl> accessed 26 August 2013; and for the [*Proeftuin Wet Maatschappelijke Ondersteuning*] on homecare, see < <http://www.invoeringwmo.nl/content/de-resultaten-van-twee-jaar-proeftuin-wmo>> accessed 26 August 2013.

any uncertainties” regarding the new legislative regime under analysis and gather enough information that would justify extending it to the whole jurisdiction.²³

From an uncertainty or informational point of view, lawmakers should employ internal or external legislative experiments to obtain information as to the potential reactions of individuals when very little is known on the hypothesis under analysis, e.g. whether rule *x* introducing detention for minor domestic violence reduces the risk of repeated offences. After this information has been obtained, if legislators are still uncertain as to the effectiveness of new rules, they can enact experimental laws or regulation to compare the results obtained under the latter with the one under existing law. Pilot projects can be put in practice when legislators have gathered sufficient evidence as to the validity of the legislative hypothesis but need to prepare the legal order for the new rules and eliminate the remaining uncertainties.

3. Experimental legislation and scientific experiments

The experimental character of the legislative instrument that is the focus of this article may often evoke the stigma attached to scientific experiments which may partially justify the scepticism towards experimental laws and even legislative experiments.²⁴ Similarly to scientific experiments, experimental legislation aims to find further information so as to verify or refute a hypothesis.²⁵ In case of a scientific experiment, this is done by introducing an intervention (*e.g.* a novel medical treatment) or a manipulation of a variable and observing its effects so as to ‘explore one or more causes of a phenomenon’.²⁶ Conclusions can only be validly drawn if the intervention is applied to one group (treatment group) and the results obtained here are compared to the ones obtained in another group to which a placebo or a different treatment was given (control group). The terms ‘treatment’ and ‘control’ groups between which comparisons are being made refer to ‘Fisher’s golden standard’.²⁷ In order to guarantee the internal and external validity of the information obtained, subjects should be randomly assigned to these two groups and the experiment should be conducted under controlled conditions (often in a laboratory).²⁸ Moreover, scientific experiments involving humans are subject to strict legislation and require written consent of all participants. Are these requirements attainable in the field of legislation? Can experimental laws imply a random implementation of laws and be used to test, for example, products in the real world which have

²³ [Tijdelijke regels voor een pilot ter bevordering van de participatie van personen met een arbeidsbeperking met behulp van loondispensatie (Tijdelijke wet pilot loondispensatie), advies van Raad van State en nader rapport], Kamerstukken II, 2009-2010, 32165, nr. 4, 2.

²⁴ See also in the context of legislative experiments (not experimental laws), C. Engel, *Legal Experiments: Mission Impossible?* (Eleven International Publishing, The Hague 2013) 17-27.

²⁵ R. A. Singleton, Jr., B. C. Straits, *Approaches to Social Research* (4th ed., Oxford University Press 2005) 155.

²⁶ R. M. Lawless, J. F. Robbenolt, T. S. Ulen, *Empirical Methods in Law* (Casebook Series, Aspen Publishers/Wolter Kluwers Law & Business, New York 2009) 93.

²⁷ See R. A. Fisher, *The Design of Experiments* (8th edition, Oliver and Boyd 1966).

²⁸ R. A. Singleton, Jr., B. C. Straits, *Approaches to Social Research* (4th ed., Oxford University Press 2005) 155-178.

not been previously tested in a laboratory? The answer is a clear ‘no’: firstly, experimental legislation only tests the effectiveness of rules and not the safety of products or services; secondly, although experimental laws share a comparable logic with scientific experiments, they abide by different rules.

It is not feasible to randomly assign citizens for the sake of the implementation of experimental regulations, but an objective selection based, for example, on demographic criteria may suffice to define two groups that are representative of the general population. To wit, the experimental rules are applied to the most densely populated provinces of a country or to the ones that are sufficiently diverse to provide a good representation of the population; while existing law remains valid in the rest of the country. It is also neither achievable nor necessary to ask for individual consent for the implementation of an experimental regulation since this consent is implicit in the legislative power. Experimental laws and regulations are not extraordinary measures; instead, they are regular legislative instruments at the disposal of legislators.

Citizens should therefore not be afraid of experimental regulations or even legislative experiments because these can never be ‘too scientific’²⁹ and cannot be confused with laboratory experiments. Experimental legislation is neither a perfect translation of the scientific method to law nor does it aim to perform this role. Instead, experimental legislation is an instrument enacted to ‘search for facts’ that evidence the effectiveness or ineffectiveness of new legal provisions.

C. The whys of experimental legislation

The core function of experimental legislation is to “examine if a particular measure will effectively [and often efficiently] achieve certain goals”.³⁰ Nonetheless, this information-gathering can be both a goal pursued on its own and a means put at the service of other functions. To wit, this legislative instrument can be used to find information about laws which are controversial due to the change they introduce in society or in the legal order or considering the lack of information as to their effects. The enactment of an experimental law can be used to gather social support which would be otherwise impossible. The supporters of a new law will hope that the experimental law will deliver evidence as to the effectiveness of this law, convincing the opponents as to its enactment. The French experimental law on abortion enacted in 1975 illustrates this use of experimental legislation to gather additional information while obtaining social and political consensus.³¹ This law emerged after the controversial Bobigny case regarding the trial of a young woman who decided to terminate a pregnancy resulting from a rape. Its

²⁹ C.H. Engel, *Legal Experiments: Mission Impossible?* (Erasmus Law Lectures 28, Eleven International Publishing, The Hague 2013).

³⁰ L. Mader, ‘Evaluating the effects: a contribution to the quality of legislation’ (2001) 22 (2) *Statute Law Review* 119.

³¹ [Loi du 17 janvier 1975 relative à l’interruption volontaire de grossesse], n° 75-17 du 17 janvier 1975, *Journal Officiel* 18.01.1975, p. 739. This law became also known as the law ‘Veil’, being named after Simone Veil, one of the greatest supporters of this act. This statute was later made permanent by the [Loi n° 79/1204, 31.12.1979, *Journal Officiel*, 1.01.1980, p.31).

experimental enactment was necessary to demonstrate that the legalization of abortion would not result in an exponential growth of the number of abortions in France.

1. Experimental legislation as an information-production instrument

“Legislating is [always] an experiment with human destinies” because legislators are never fully aware of the effects and side-effects that a law can produce.³² Moreover, the complexities of legislating and regulating in a fast changing world can be partially attributed to the undeniable cognitive bias that characterizes the information-intensive lawmaking process.³³ On the one hand, legislators are daily confronted with information asymmetries regarding these new and complex societal, technological or economic problems.³⁴ On the other, they lack information as to most effective legislative instruments to tackle the former. Legislators can only try to predict what the best laws would be but, as it has been argued in the literature, legislators should ensure that these predictions are informed judgments, based on the available facts—evidence-based lawmaking—and tend less towards opinion-based lawmaking, which often depart from abstract theories and political statements.³⁵ In addition, the cognitive bias can also be tackled by adopting new legal rules for a limited period of time and on a small-scale basis so as to observe the effects of their implementation and draw lessons from them.³⁶ Experimental legislation can assist the use of other evidence-based lawmaking instruments by explicitly converting the lawmaking process into an iterative learning path where evidence resulting from experimentation is taken into account to improve the legislative activity in the next round. These aspects deserve further attention.

(a) Experimental legislation, information-production, and evidence-based lawmaking

Although information is “the lifeblood of regulatory policy” and legislation, legislators will not always dispose of this information: sometimes private actors will refuse to disclose it; other times, information concerning the effectiveness of new laws may not even exist. Legislating without sufficient information may be however risky, this is why experimenting with laws before one legislates ‘for good’³⁷ can avoid that ‘all human destinies’ are exposed to legislative failures. This idea is one of the possible interpretations of the dissenting opinion of Justice Brandeis in the 1932 case *New State Ice Co. v. Liebmann*, where he argued that “it [was] one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic

³² H. Jahrreiss, *Größe und Not der Gesetzgebung* (Schünemann, Bremen 1953) 32.

³³ W. Voermans, ‘Een lerende wetgever?’ (2000) 6 *RegelMaat* 249, 251.

³⁴ E. Bohne, ‘The Politics of Ex Ante Evaluation’ in J. M. Verschuuren, R. Van Gestel (eds.), *The Impact of Legislation: A Critical Analysis of Ex Ante Evaluation* (Martinus Nijhoff, Leiden 2009), 63, 68.

³⁵ R. A. J. Van Gestel, *Wetgeven is vooruizien*, (The Hague, Boom Juridische uitgevers 2008) 11-12, 32; R.A. J. Van Gestel, ‘Vertrouwen in een lerende wetgever’ (2011) 26 (1) *Regelmaat* 19-20.

³⁶ J. Gersen, ‘Temporary Legislation’ (2007) 74 *University of Chicago Law Review* 247.

³⁷ C. Mamontoff, ‘Réflexions sur l’expérimentation du droit’ (1998) *Revue de Droit Public* 35.

experiments without risk to the rest of the country”.³⁸ Brandeis pled here not only for a broader use of experimental legislation but also for the use of the scientific method, considering the evidence resulting from experiments. In the 1908 case *Muller v. Oregon*, serving then as an attorney, Brandeis had presented a brief to the Supreme Court elaborating on the importance of social science evidence, notably research reports, social framework evidence, the analysis of laws from other states and foreign countries.³⁹

Evidence-based decision-making, policy or lawmaking normally refers notably to the account of individual experience, anecdotal information, scientific literature, sophisticated systematic review of literature, expert opinions, and scientific survey results.⁴⁰ Experimental legislation does not produce or offer the same type of evidence as laboratory or social experiments, surveys, and policy research reports do. Instead, this legislative instrument produces information on the effects and side-effects of the new rules enacted on an experimental basis and allows the legislator to gather more evidence on the nature of the social problem it wants to handle. As mentioned above, this is often the kind of evidence legislators need in order to confirm the legislative hypothesis underlying the experimental law (e.g. that rule *x* contributes more to the reduction of unemployment than the current rule *y*). Based on the obtained results, legislators are able to decide on the success or failure of new rules; without any type of experimentation, legislators would be suggesting “mere impressions (...) with no verifiable knowledge”. Posner argues that legislators experimenting with alternatives, notably by proposing testable hypotheses should be able to produce useful information and reflect upon the effectiveness of the rules being tested.⁴¹ This is precisely what experimental legislation does. In this spirit, experimental legislation can be qualified as an evidence-based lawmaking instrument. If evidence-based practices are often qualified as those that consider scientific evidence and support decision-making on ‘what works’,⁴² then experimental legislation is undoubtedly one of them. Nevertheless, experimental legislation is simultaneously a [*sui generis*] evidence-based instrument because firstly, it does not produce and is not necessarily based on scientific evidence; and secondly, the evidence resulting from the experiment is only valid in the context of the legislative hypothesis and the effectiveness of the rules in question.

(b) Tackling uncertainty, lack of information and prognosis problems

Experimental legislation is often enacted for a determined period to tackle social, legal or economic problems or situations characterized by uncertainty, uncertainty which can refer to the duration, complexity or effects of the latter. When little is known about this type of situations, a temporary

³⁸ Justice Brandeis dissenting in *New State Ice Co v. Liebmann*, 285 U.S. 265, 52 S. Ct., 371, 76 L.Ed. 747 (1932) 311.

³⁹ G.D. Marlow, ‘From Black Robes to White Lab Coats: The Ethical Implications of a Judge’s Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process’ (1998) 72 *Saint John’s Law Review* 291.

⁴⁰ S. Zaza, J. Clymer, L. Upmeyer, S.B. Thacker, ‘Using Science-Based Guidelines to Shape Public Health Law’ (2003) 31 *Journal of Law, Medicine & Ethics* 65.

⁴¹ Richard A. Posner, ‘The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations’ (1986) 53 *University of Chicago Law Review* 366, 367.

⁴² R. K. Warren, ‘Evidence-based Practices and State Sentencing Policy: Tem Policy Initiatives to Reduce Recidivism’ (2007) 82 *Indiana Law Journal* 1307, 1309.

legislative measure can be a safe option that provides for an immediate remedy for a problem without putting the whole population at risk and which, at the same time, can be easily extinguished. Experimental legislation offers the required flexibility to deal with changing problems, situations characterized by acute uncertainty and to adapt to environmental, social and economic progress.⁴³

Experimental legislation performs an ‘information-production function’ because it allows the legislator to gather evidence from the implementation of the experimental law. This grants the legislature additional time to test and analyse the information produced before extending the new legal regime to the whole country. In Germany, experimental legislation has been depicted as an instrument of gathering information and solving the so-called [*Prognose*] problems motivated by information asymmetries and general lack of information as to the effects of laws.⁴⁴ An experiment with a new regime or with an exception to the existing legal regime opens the possibility of gathering more information and minimizing the assessable and unpredictable risks.⁴⁵ In rapidly changing sectors, such as telecommunications, the uncertainty as to the effects of regulations justify the need to adopt experimental laws that allow the legislator to deviate from existing standards and introduce new and more flexible regulatory solutions that advance innovation.⁴⁶ Rupert Stettner argues that experimenting with laws and regulations facilitates the regulation of these complex fields and ‘defines our future in a more rational and organized [way]’.⁴⁷ This rationalization of the lawmaking process based on ‘trial and error’ and ‘conjectures and refutations’ pertain to the central task of the legislature.⁴⁸ This position is supported in the jurisprudence of the German Constitutional Court that acknowledges that the legislature should be allowed to adopt a learning approach to legislation by incorporating gathered information and experience.⁴⁹

2. Experimental legislation and the regulation of fast changing fields

Reality evolves and so do (or should) laws. The evolution of society and technology dictates the pace of the legislation but makes it difficult to tune legislation with these changes. Attitudes, perceptions and judgments towards social behaviour change over time:⁵⁰ groups that used to be subjugated and segregated are now free and equal to the others; technological novelties which seemed to be at first breakthrough innovations rapidly became outdated. Therefore, laws that remain beyond the societal perception they were meant to reflect, will be necessarily regarded as obsolete. Yet, legislators cannot revise legislation at the speed of technological change not only because, as previously mentioned, they do not possess enough information to do so but also because this would be detrimental to legal certainty.

⁴³A. Flückiger, ‘Concluding Remarks. Can Better Regulation Be Achieved by Guiding Parliaments and Governments? How the Definition of the Quality of Legislation Affects Law Improvements Methods’ (2010) 4 (2) *Legisprudence*, 213, 216.

⁴⁴A. Chanos, *Möglichkeiten und Grenzen der Befristung parlamentarischer Gesetzgebung* (Duncker & Humblot, Berlin 1999).

⁴⁵T. Freund, *Kommunale Standardöffnungs- und Experimentierklauseln im Lichte der Verfassung* (WVB, Berlin 2003) 17.

⁴⁶B. Holznagel, ‘Innovationsanreize durch Regulierungsfreistellung vom Umgang mit neuen Diensten und Märkten im Medien und TK-Recht’ (2006) *MultiMedia und Recht*, 661

⁴⁷R. Stettner, ‘Verfassungsbindungen des experimentierenden Gesetzgebers’ (1989) *Neue Zeitschrift für Verwaltungsrecht* 806, 812.

⁴⁸R. Stettner, ‘Verfassungsbindungen des experimentierenden Gesetzgebers’ (1989) *Neue Zeitschrift für Verwaltungsrecht* 806.

⁴⁹Decision of the German Constitutional Court, 1 BvR 213/58, 27.01.1965, *BVerfGE* 18, 315.

⁵⁰R. E. Myers, ‘Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment’ (2008) 49 *Boston College Law Review*, 1327.

Legislators thus must find a balance between guaranteeing sufficient continuity of legislation and ensuring that legal stability does not stiffen into a rigid legal paradigm impervious to changing social norms and practices.⁵¹ This dilemma is also analysed in Pauline Westerman's article published in this issue.

Reviews and evaluations can guarantee that unnecessary or bad laws are corrected or eliminated. However, if regulation is to play a decisive role in the innovative process it has to be able to keep pace with technological developments.⁵² The enactment of permanent legislation preceded by multiple *ex ante* evaluations may simply take too much time, time which is precious for innovators who want to bring their novelties to the market as soon as possible. Experimenting with new laws and regulations may be the solution to ensure that legislation does not lag behind innovations in rapidly changing fields.

Innovating, both at the technological and social levels, implies experimenting with ever-changing opportunities from which entrepreneurs obtain more information regarding their innovations; removing unnecessary regulations concerning the diffusion of innovative products, services or projects in the market; and enacting rules that facilitate the former.

3. Experimental legislation can improve the quality of legislation

The unpredictable challenges of a fast changing reality have evidenced the need to tackle certain problems such as the overflow of regulation ('regulatory pressure') which characterizes most EU Member States.⁵³ Experimental legislation—associated with other regulatory mechanisms—offers the possibility to contribute to the improvement of the quality of legislation. In fact, this is one of the original functions of experimental legislation: in France, experimental laws were enacted in the kingdom of Louis XVI in order to “improve the effectiveness of the administration (of the country)”.⁵⁴ More recently, in the same jurisdiction, the preamble of an experimental law on the evaluation of laws and decrees reads: “one of the primary tasks of the Government is to inquire the reason for the proliferation of laws and regulations which make our law obscure, unstable and finally unfair (...) that's why [it has been] decided to experiment to include a true impact assessment in any proposal of law or decree”⁵⁵. This is just one example among the many that certainly exist wherever Member States realized the importance of

⁵¹ S. A. Lindquist, F. C. Cross, 'Stability, Predictability and the Rule of Law: Stare Decisis as Reciprocity Norm', working paper, 2012, available at <http://www.utexas.edu/law/conferences/measuring/The%20Papers/Rule%20of%20Law%20Conference.crosslindquist.pdf> accessed 30 August 2013.

⁵² W. L. Gramm, G. D. Gay, 'Leading a Regulatory Agency: Lessons from the CFTC' (1994) 17 (4) *Regulation* 65.

⁵³ J. Steinhaus, *Gesetze mit Verfallsdatum: Ein Instrument des Bürokratieabbaus?* (Books on Demand, Münster 2008).

⁵⁴ S. Charentenay, 'Les implications juridiques de la constitutionnalisation du droit de l'expérimentation' (2008), available at <http://www.droitconstitutionnel.org/congresParis/comC4/CharentenayTXT.pdf>, 2.

⁵⁵ [Preamble of the *Circulaire* of November 21, 1995 relative à l'expérimentation d'une étude d'impact accompagnant les projets de loi et décrets en Conseil d'État], NORM: PRMW9501182C.

experimental legislation to the referred matter.⁵⁶ These laws can actually contribute to the adaptation of the final version of a legal text according to solid evidence provided by the experiment. In fact, the legal aim of improving the quality of legislation and regulation can be seen as associated with a political strategy in the broader context of a social and political learning process.⁵⁷ A possible objection would be that citizens would not take any experimental laws into account due to their inherent uncertainty and temporary character, however, if a law is submitted to the test of reality, it might be recognized as more efficient and legitimate since evidence of its positive or negative impact shall be taken into consideration.⁵⁸

4. Experimental legislation as a ‘consensus-finder’ instrument

Legislation is not only the result of the consideration of distinct interests and rationalities but also of a consensus among political parties. Nonetheless, reaching an agreement in the context of socially or economically controversial bills can be easier said than done. Divided governments and significant political opposition are often reflected in legislative fragmentation, frequent legislative revisions or the imposition of future reconsiderations of laws.⁵⁹ In addition, this political consensus can be difficult to obtain when public opinion is divided. Experimental legislation has often been chosen as a mechanism to achieve social or political consensus which appeared to be absent at the Parliamentary or Senatorial levels. This occurs namely when there is a conflict of multiple interests or when information as to the potential (negative) effects of law is lacking. The adoption of experimental laws increases the probability that political opponents will support new laws due to the ‘promise’ of future evaluation or revision.⁶⁰ In the United States, experimentation often emerges in the legal order under the cover of a sunset clause⁶¹ but it has been argued in the literature that an experimentalist motivation clearly underlies these sunset clauses.⁶²

Kendra’s law is an example of a controversial act which would have gathered little consensus had it been enacted as a permanent statute. This law was passed by the State of New York following the death of a young woman brutally pushed to an oncoming train by a schizophrenic man just discharged

⁵⁶For the relationship between experimental legislation and better regulation in the EU context, see R.A.J. Van Gestel, G. v. Dijck, ‘Better Regulation through Experimental Legislation’ (2011) 17 (3) *European Public Law* 539.

⁵⁷ M. Eisner, ‘Déterminants de la politique Suisse en matière de drogue. L’exemple du programme de prescription d’ héroïne’ (1999) 23(2) *Déviante et Société* 191.

⁵⁸ K. van Aeken, ‘Pushing Evaluation Forward. Institutionalization as a Means to Foster Methodological Growth of Legislative Ex Ante Evaluation’, in J. Verschuuren, R. A. J. Van Gestel (Eds.). *The Impact of Legislation: a critical analysis of Ex Ante Evaluation* (Martinus Nijhoff Publishers, Leiden 2009) 111: this scholar refers in this case to the relevance of ex ante evaluation and the uncertainty underlying this type of scheme.

⁵⁹ F. Maltzman, C. Shipan, ‘Change, Continuity, and the Evolution of the Law’ (2008) 52 (2) *American Journal of Political Science* 252.

⁶⁰ F. Maltzman, C. Shipan, ‘Change, Continuity, and the Evolution of the Law’ (2008) 52 (2) *American Journal of Political Science* 252, 255.

⁶¹ A sunset clause is a provision that determines the termination of a law or a number of its provisions at the end of a given period, unless renewal occurs.

⁶² T. Merrill, ‘Showcase Panel IV: A Federal Sunset Law, The Federalist Society 2011 National Lawyers Conventions’ (2012) 16 *Texas Review of Law and Politics* 339.

from a psychiatric hospital.⁶³ As a result of the pressure to react to this incident, the State of New York approved a law directed at people with mental illness who, in view of their medical history, could not survive in the community without medical assistance and could be therefore submitted to involuntary outpatient treatment. It was not necessary to provide evidence that these patients constituted a real risk to society in general. The lack of compliance with this treatment plan would justify the involuntarily admission of the patient to a hospital for a seventy-two hours evaluation period. The adoption of an experimental statute was justified by the need to obtain more information on the implementation of this new system and its impact on the reduction of criminality among psychiatric patients. Since this act was highly contested, its adoption as a temporary act with an experimental character opened the possibility to reach a compromise and later to convince the opponents or sceptics of the positive effects of these new rules produced.

5. Accommodation of diversity and advancement of decentralized forms of government

We live in a 'world of standards': they ensure compatibility and interoperability of information and communications in a global world, facilitate coordination and cooperation among organizations in different continents, and increase efficiency and effectiveness.⁶⁴ Policy and legislative standardization may be economically desirable but in countries characterized by strong internal diversity this can lead to disastrous policies. In the anthropological study by James Scott, *Seeing like a State*, excessive standardization, lack of local autonomy and disrespect for diversity are pointed out as causes for the failure of so-called 'high-modernist' projects supposedly designed to ameliorate the human condition.⁶⁵ As Scott explains, citizens do not have uniform needs or interests and this is obvious when comparing different communities. A higher level of flexibility and minimum harmonization as to the instruments to be used in order to achieve national goals can produce more satisfactory results.

In Germany and France experimental laws have been implemented at the local level with the objective of enhancing the self-administration of municipalities,⁶⁶ or furthering the autonomy of French local authorities [*collectivités territoriales*].⁶⁷ In France, a constitutional right to experiment was granted

⁶³Mental Hygiene Law § 9.60 Assisted outpatient treatment. New York State Kendra's Law (due to sunset in 2015). See K. A. Worthington, 'Kendra's Law and the rights of the mentally ill: an empirical peek behind the courts' legal analysis and a suggested template for the New York State Legislature's reconsiderations for renewal in 2010' (2009) 19 *Cornell Journal of Law and Policy* 213.

⁶⁴ See N. Brunsson, B. Jacobsson, *A World of Standards* (Oxford University Press, Oxford 2003).

⁶⁵ J. C. Scott, *Seeing like a State: How certain schemes to improve the human condition have failed* (Yale University Press, New Haven 1998).

⁶⁶A. L. Göhring, *Experimentierklauseln im Kommunalrecht—Rechtsprobleme im Spannungsfeld zwischen Regelungswut und ‚laissez faire‘*, 2003 (dissertation available at <http://opus.bibliothek.uni-wuerzburg.de/frontdoor.php?source_opus=640&la=en > accessed 30 August 2013).

⁶⁷ See the text of the 2003 constitutional revision *Loi constitutionnelle n.º 2003-276 du 28 mars 2003 relative à l'organisation décentralisée de la République*, J.O. R.F. du 29.03.2003, 5568.

to them by the 2003 revision of the French Constitution.⁶⁸ Experimental legislation is conceived here as a privileged mechanism to further the decentralization process. The revision of the French Constitution establishes a ‘right to experiment’. Both the national government and the regional authorities are allowed to experiment (see articles 37 (1) and 72 (4), respectively). This constitutional revision did not introduce any substantial novelty but it limited itself to the acknowledgement of the legislative practice.

D. EXPERIMENTAL LEGISLATION: THE WOES

In the previous sections, the advantages and the different functions of experimental legislation were listed and explained. However, this legislative instrument remains underused due to a number of reasons. Firstly, experimental legislation is often dismissed with a ‘no, because I said so’ type of argument, which usually indicates that lawmakers are not aware of the functionalities of this legislative instrument. Secondly, when experimental legislation is considered by lawmakers, it might be refused by politicians or interest groups. This may occur either at the enactment level, when politicians fear that experimental laws will prove them wrong or after the evaluation, when politicians turn a blind eye to the obtained results, preventing experimental laws from being taken seriously. Thirdly, when the first and second obstacles have been overcome, experimental legislation may not survive ethical and legal objections, notably as to the potential violation of the principles of legal certainty and equal treatment. In this section, I discuss these ‘woes’ in the life of the experimenting legislator.

1. Experimental legislation: ‘no, because I said so’

It has been argued that the reduced number of policy experiments in the United States is often more connected with the lack of awareness or knowledge as to the functionalities of these instruments than with true scepticism.⁶⁹ This reasoning appears to be applicable to experimental legislation as well. In addition, policy and lawmakers frequently do not have sufficient information, resources or know-how to enact and implement them.⁷⁰ Furthermore, even when this information is available, politicians and policymakers often do not take full advantage of it.⁷¹ This can be attributed to the fact that policymakers have excessively optimistic beliefs about the effects and side-effects of policies, dismissing the importance of experiments. Not much formation or information is required to enact experimental legislation; therefore,

⁶⁸ Article 72 (4) of the French Constitution reads: “In the manner provided for by an Institutional Act, except where the essential conditions for the exercise of public freedoms or of a right guaranteed by the Constitution are affected, territorial communities or associations thereof may, where provision is made by statute or regulation, as the case may be, derogate on an experimental basis for limited purposes and duration from provisions laid down by statute or regulation governing the exercise of their powers”.

⁶⁹ A. S. Gerber and E. M. Patashnik, ‘Missing Opportunities to Solve Problems’, in A.S. Gerber, E. M. Patashnik (ed.), *Promoting the General Welfare: New Perspectives on Government Performance* (Brookings Institution Press, Washington D.C. 2006) 10.

⁷⁰ A. S. Gerber and E. M. Patashnik, ‘Missing Opportunities to Solve Problems’, in A.S. Gerber, E. M. Patashnik (ed.), *Promoting the General Welfare: New Perspectives on Government Performance* (Brookings Institution Press, Washington D.C. 2006) 10.

⁷¹ R. Hanson, ‘Decision Markets for Policy Advice’, in Alan S. Gerber, Eric M. Patashnik (ed.), *Promoting the General Welfare: New Perspectives on Government Performance* (Brookings Institution Press, Washington D.C. 2006) 151.

the argument that experimental legislation has not been considered in the lawmaking process is not properly justified by legislators. This is a weak argument that can be easily solved by enhancing the awareness of lawmakers with regard to the functionalities of experimental legislation. A more difficult question arises when this legislative instrument has been considered, but dismissed for being politically undesirable.

2. Experimental legislation: ‘possible? yes; politically desirable? no’

Trial and error are inherent to human nature, thus it is not surprising that experiments have become a widely accepted method in natural sciences for centuries, and in social sciences since a few decades. Experimentation is one of the methods used by empiricism to test new theories and gather evidence. Although the use of empirical methods in law is far from being new—its explicit use dates back for example to *Brown v. Board of Education*--⁷², its use in the form of experimental legislation by the legislator is still far from being systematic. It is however surprising that despite the growing demand for a better interaction between society and law, the need for enhanced rationalization of laws, and the development of evidence-based lawmaking, legislators still hesitate to incorporate experimentation in the lawmaking process.⁷³ The danger that the facts produced by experimentation may endanger political statements is a solid reason to dismiss experimental legislation—along with other evidence-based instruments—as an undesirable tool.

Political statements often influence both the decision to legislate and the contents of new laws.⁷⁴ Laws generally emerge as a reaction to and a solution for social or economic problems, but their shape and contents are largely determined by the multiple rationalities that play a role in the lawmaking process. In this context, political rationality and vote seeking can speak louder than sound evidence-based instruments.⁷⁵ In times of crisis, the so-called fact-free politics and populism easily spread and lead to a strong tendency to disregard evidence and the truth of empirics.⁷⁶ The legislators’ decisions are frequently influenced by other factors as well, namely constituent casework and special interests groups.⁷⁷ These elements affect the quality of the lawmaking process and can be pointed out as additional reasons to reject evidence-based instruments, avoid experimental legislation, or to turn a blind eye to the results of evaluations. Zachary Gubler claims that the scarce number of experimental regulations enacted by U.S.

⁷² J. J. Rachlinski, ‘Evidence-based Law’ (2011) 96 *Cornell Law Review* 901.

⁷³ W. Hoffman-Riem, ‘Législation expérimentale en Allemagne’ in C. A. Morand (ed.), *Évaluation législative et lois expérimentales* (Presses Universitaires d’ Aix-Marseille, Marseille 1993) 177.

⁷⁴ G. J. Veerman, *Over wetgeving* (2nd ed., Sdu, The Hague 2009), 18.

⁷⁵ M. A. H. Van der Woude, ‘Tegen Dovenmansoren? Een verkennend onderzoek naar percepties over de onderlinge communicatie tussen strafrechtswetenschap en wetgever met het oog op de kwaliteit van strafwetgeving, in H. R. Schouten (ed.), *De spanningsrelatie tussen feiten, wetenschap en wetgeving—verslag van het symposium gehouden op 20 september 2012* (Vereniging voor Wetgeving en Wetgevingsbeleid, Wolf Legal Publishers, Nijmegen 2012), 1, 2-3.

⁷⁶ See R. Kole, ‘Fact-Free Politics’ (2011) 38 (2) *Beleid en Maatschappij* 251, 255, J. Walburg, ‘Fact-free and evidence-free politics’ (2011) 9 (66) *Maandblad Geestelijke Volksgezondheid* 597, 597-600.

⁷⁷ M. Lee, ‘Political-Administrative Relations in State Government: a Legislative Perspective’ (2006) 29 *International Journal of Public Administration*, 1021, 1029.

federal agencies can be explained in the light of the disinclination of special interest groups towards experimental regulations.⁷⁸

The 'undesirable' character of experimental legislation may be detected not only during the drafting and enactment phases but also later when the results of experimental laws or regulations are made available. In principle, the results of the experiment should determine 'what happens next'. However, as previously mentioned, legislators may tend, particularly in times of crisis, to favour opinion instead of evidence-based policy and legislation. An example is the EU experiment with reduced VAT rates on labour intensive services which aimed at reducing unemployment and the black economy. At the end of the four-year period, the participating Member States provided the European Commission with information regarding the evaluation of the experiment.⁷⁹ The reports were far from enthusiastic. Based on this evidence, the Commission concluded that there was no direct causal link between reduced VAT rates and job creation.⁸⁰ Furthermore, evidence from some Member States also suggested that the lower VAT rates were not fully reflected in prices.⁸¹ The Member States involved in the experiment claimed that the measure did not have a substantial impact on employment. In conclusion, the reduced VAT rates on labour intensive services were not an effective (or efficient) measure to create more jobs and fight the black economy in this sector. Despite the mixed evidence, in 2006 the Council adopted Directive 2006/18/EC which allowed Member States either to continue applying this reduced VAT rate until 31 December 2010 or to start applying it, if they had not already participated in the experiment. In 2009, regardless of the existing evidence, the Council adopted Directive 2009/47/EC which allows on a permanent basis the optional use of reduced rates for certain labour-intensive local services.

If the results of experimental laws are not taken seriously, the value and reputation of experimental legislation shall be endangered since this instrument will be easily transformed into a puppet in the hands of politicians.

(c) Experimental legislation: 'yes, but is it legal?'

A number of legal objections could be raised against experimental legislation. In this section, I consider the potential violation of the principle of legal certainty and equal treatment.

⁷⁸ Z. J. Gubler, 'Experimental Rules' (2013) *Boston College Law Review* (2013) (forthcoming), working paper available at <www.ssrn.com> accessed 31 August 2013.

⁷⁹ See Report from the *Commission to the Council and the European Parliament—Experimental application of a reduced rate of VAT to certain labour-intensive services* [SEC (2003) 622/ COM/2003/0309 final]. For more detailed information on the Member States see *Commission staff working paper—Evaluation report on the Experimental application of a reduced rate of VAT to certain labour-intensive services* (COM (2003) 309 final/SEC/2003/0622 final).

⁸⁰ See *Commission staff working paper—Evaluation report on the Experimental application of a reduced rate of VAT to certain labour-intensive services* (COM (2003) 309 final/SEC/2003/0622 final).

⁸¹ See Report from the *Commission to the Council and the European Parliament—Experimental application of a reduced rate of VAT to certain labour-intensive services* [SEC (2003) 622/ COM/2003/0309 final].

In a world characterized by uncertainty, fear and risks, citizens turn to law as a safe harbour, where certainty, stability and continuity reign.⁸² Laws are expected to be not only knowable to the average citizen, uniformly applied and regarded as a safeguard against the arbitrariness of public administration,⁸³ but also to last. This static perception of legal certainty appears to be threatened by experimental legislation which carries two types of uncertainty: firstly, as to the continuity of the law; secondly, as to the future of experimental laws themselves. They are more uncertain since an experiment can expire at the end of the determined period, be terminated before it, renewed, or converted into a permanent law.

The Dutch Council of State has expressed on numerous occasions its apprehension as to the tension between experimental legislation and the principle of legal certainty.⁸⁴ This institution has not been the only one to point out this possible conflict. Not rarely do parliamentary discussions refer to the same constraint.⁸⁵ There is however a difference between the uncertainty allegedly caused by experimental legislation experienced by ‘the average citizen’ on the one hand and by entrepreneurs on the other. The latter are endowed with better means to making prognoses about and prepare for future changes of legislation. Even though ‘average citizens’ might find it inconvenient to be exposed to the temporal delimitation or future amendment of laws, this does not mean that an experimental law or regulation exposes them to a ‘bare uncertainty’ regarding the future legislative developments, as claimed in a recent German case before the Berlin Labour Court.⁸⁶

If private actors hesitate to invest due to the lack of trust in experimental legislation, this can have negative repercussions on the competitiveness of an economic sector and the implementation of innovation policy. Nonetheless, this effect has not been demonstrated empirically and thus remains at the theoretical level. Entrepreneurs do not expect to have absolute certainty: uncertainty is accepted as ‘part of the innovative business’.⁸⁷ Experimental laws grant sufficient certainty if they are enacted within the above described framework: for a predetermined period; with an explicit goal; and submitted to an evaluation according to evaluation criteria.

In addition, a static concept of legal certainty makes little sense in the 21st century. This may be a controversial statement that does not match, for example, the argumentation presented in the article by Pauline Westerman also published in this issue. However, it is important to underline that in the last few decades, the concept of legal certainty has evolved and one should be aware that in a fast changing society, laws are unable to keep pace with social and technological developments and foresee all the

⁸² H.A. Oldenziel, *Wetgeving en rechtszekerheid* (Kluwer, Deventer 1998), 1.

⁸³ S.Bertea, ‘Towards a new paradigm of Legal Certainty’ (2008) II *Legisprudence* 32, 32-37.

⁸⁴ Opinion of the Dutch Council of State, [Eindrapport van de Interdepartementale Werkgroep Experimenteerbepalingen ‘Het probereren waard’], 23 May 2000, *Bijvoegsel Staatscourant*, 10.10.2000, nr. 196, W03.00.0056/I, [Eindrapport van de Interdepartementale Werkgroep Experimenteerbepalingen ‘Het probereren waard’].

⁸⁵ Dutch Senate([Eerste Kamer]), *Telecommunicatiewet*, 19 October 1998, Toelichting op artikel 18.1 lid, *Kamerstukken* 25 533, nr.3, 135.

⁸⁶ LAG Berlin-Brandenburg, Berliner Gerichte für Arbeitssachen, Decision of 25.08.2011- 14 Sa 977/11, *BeckRS* 2012, 70177.

⁸⁷ R.R. Nelson and S. G. Winter, ‘In search of useful theory of innovation’ (1977) 6 *Research Policy* 36, 48.

phenomena to which they apply.⁸⁸ The legal text should be adapted to social reality, which means that legal certainty has to be interpreted dynamically. In this scenario, experimental legislation can represent a ‘blessing’ rather than a ‘curse’ for legal certainty, since experimental laws can be used to adapt the legal order to structural changes, without disrupting it. New rules are first tried, citizens can adapt to these novelties; and slowly but surely, these legislative changes can be extended to the rest of the country.⁸⁹ Patricia Popelier argues that the instruction 10a of the Dutch Instructions for Rulemaking (*aanwijzingen voor regelgeving*) appears to design experimental regulation as a transition mechanism between old and new legal rules.⁹⁰ In the German literature, experimental laws have been equally described as ‘preliminary’ legislative acts that are conceived to generate knowledge and experience and by this to reduce the uncertainty connected with the effects of new legal rules.⁹¹ The German Constitutional Court has agreed with the literature and argued, in the context of a case on the regulation of geriatric care, that “the introduction of an experimental clause was essential to create room for the temporary test of integrated and general forms of education and training [of geriatric care professionals] with novel contents and specializations related to the occupational area’.⁹² To sum up, experimental legislation can be an instrument at the service of legal certainty. Nonetheless, it is pertinent to enquire whether this instrument also observes the principle of equal treatment.

In the context of the implementation of an experimental law or regulation, not all citizens will be equal before the law: the sample group will be bound by the experimental rules, whereas for the control group the previously existing rules or standards will be valid. The Aristotelian formula ‘treat equals equally and unequals unequally’—though extensively accepted—does not translate the concrete meaning of the principle of equal treatment. It has been acknowledged that a differentiation in granting privileges can be however authorized “if [it results] from the nature of the case that there cannot be a general participation”.⁹³ This is exactly the case of experimental legislation, where a differentiation between the sample and control groups is essential to obtain valid results. Notwithstanding this possibility, the German Constitutional Court has established that this differentiation is constrained by the principle of proportionality and the prohibition of arbitrariness. Therefore, any differentiation on an experimental basis must be objectively justified; and it needs to be ensured that the differentiation in question is not excessive but proportional, and strictly connected to the goal pursued by the legislative act.⁹⁴

In 2008, the Portuguese Constitutional Court declared that the inequality resulting from the implementation of an experimental regulation could not be qualified as a violation of the principle of

⁸⁸P. Popelier, ‘Five Paradoxes on Legal Certainty and the Lawmaker’ (2008) 2 *Legisprudence*, 50, 52.

⁸⁹P. Popelier, *Rechtszekerheid als beginsel van behoorlijke wetgeving* (Intersentia, Antwerpen 1997), 429-430.

⁹⁰P. Popelier, *Rechtszekerheid als beginsel van behoorlijke wetgeving* (Intersentia, Antwerpen 1997), 429-430.

⁹¹J. Funke, *Bürokratieabbau mit Hilfe zeitlich befristeter Gesetze: zu den Erfolgsbedingungen der Sunset-Gesetzgebung* (AVM, München 2011), 48.

⁹²German Constitutional Court, 2 BvF 1/01, 24.10.2002, Paragraph 383.

⁹³T. M. Cooley, A.C. McLaughlin, *The General Principles of Constitutional Law in the United States of America* (Little, Brown and Company, Boston 1898) 248.

⁹⁴German Constitutional Court, 2 BvR 1397/09, 19.6.2012, Paragraph 54 and 55; German Constitutional Court, 2 BvL 5/00, 8.6.2004, Paragraph 58.

equal treatment.⁹⁵ In this case, the Court was required to examine the alleged unconstitutionality of a decree adopting a new model of experimental civil proceedings which was simplified in comparison to the ordinary one. The choice of the ‘sample group’ was determined on the grounds of territorial and demographic criteria. The Portuguese Constitutional Court considered that these criteria were sufficiently objective and did not give rise to discrimination. Furthermore, citizens were not ‘deprived of a right or benefit’ due to the application of the experimental regime since they did not have the right to a particular type of (civil) proceedings but rather to a due process of law which was guaranteed in that case. In addition, the Constitutional Court affirmed that the unequal treatment was inherent to any experiment and that this differentiated treatment was non-arbitrary and fully justified by the objective of the experiment: to learn or obtain more information about the effectiveness of the new procedural regime.

In conclusion, the differentiated treatment introduced by an experimental law is inherent to the central goal of this legislative instrument: to produce and gather more information as to the effectiveness of a new law. A proportional and non-arbitrary differentiation for this sake shall not violate the principle of equal treatment.

E. CONCLUSION

In this article, I define and explain the concept of ‘experimental legislation’, distinguishing it from other apparently similar instruments. Although I provide an overview of the different functions of experimental legislation in section C, I underline that this instrument performs a central function: information-production. Experimental legislation converts lawmaking into a learning process, giving legislators the opportunity to try, fail, and learn from their legislative mistakes. According to Hoffmann-Riem, this is the distinctive characteristic of this legislative instrument: the possibility to extract lessons from the experiment and use them to revise or revoke laws on the grounds of new and more effective ideas or legal instruments.⁹⁶ After having experimented with new rules, legislators will be able to make a more informed future choice between the existing rules and the ones tried on an experimental basis. Experimental legislation gathers the evidence lawmakers require to verify or refuse the hypothesis underlying a new law (*e.g.* is rule x effective in the reduction of poverty?).

Experimental legislation is often dismissed due to its inconvenience: politicians may not be willing to submit their political statements to a ‘reality check’. However, lawmaking should not be reduced to a mere translation of abstract theories and political statements in laws and regulations.⁹⁷ Laws result from the consideration of diverse political, social and economic interests which are brought together by stimulating a dialogue between the different actors involved in the legislative process.⁹⁸ As

⁹⁵Judgment of the Portuguese Constitutional Court, [*Acórdão do Tribunal Constitucional*] nr.69/2008, processo 240/2007, available at [<http://www.tribunalconstitucional.pt/tc/acordaos/>] > accessed 31 August 2013.

⁹⁶ W. Hoffmann-Riem, ‘Législation expérimentale en Allemagne’(1993) in Charles-Albert Morand (ed.) *Évaluation législative et lois expérimentales* (Presses universitaires d’Aix-Marseille, Marseille 1993), 177, 185.

⁹⁷ R. A. J. Van Gestel, ‘Evidence-based Lawmaking and the Quality of Legislation. Regulatory Impact Assessments in the European Union and the Netherlands’, in H. Schaffer and J.Iliopoulos-Strangas (eds.), *State Modernization in Europe* (SIPE, Bruylant, Brussels, 2007) 139, 140.

⁹⁸ W. Voermans, ‘Een lerende wetgever?’ (2000) 6 *RegelMaat* 249, 251.

formulated by Montesquieu, laws ‘mirror’ society⁹⁹ and not what legislators want them to reflect. Adopting Roth’s trilogy—though going beyond its meaning and context—lawmakers should ‘search for facts, promote dialogues between politicians and theorists, and whisper the results of this process in the ears of politicians’.¹⁰⁰ Experimental legislation combines this tripartite process and enables legislators to learn by testing new legislative solutions on a small-scale basis.

The legal objections raised against experimental legislation should be overcome if experimental legislation is enacted within a clear legal framework. This does not require any constitutional revision as in France; rather it needs a widespread awareness among lawmakers of the general requirements to be observed and the need to ensure that political rationality does not jeopardize the results of experimental legislation. The legal objections raised against it are not solid enough to dissuade a legislator aware of the value of this legislative instrument: instead of harming legal certainty, experimental legislation can ensure the transition between ‘old and new rules’, avoiding sudden legislative changes; instead of violating the principle of equal treatment, experimental laws introduce a temporary differentiation which is essential to decide on the effectiveness of the laws being tested.

In conclusion, experimental legislation is a learning instrument that should be more often employed. Up until now, experimental legislation has remained in the shadow of other legislative instruments and other forms of experimentation with law. In a time of rapid social and technological changes, legislators should dare to experiment with new legislative solutions and approaches. Errors will necessarily be committed, and it might indeed be unwise, in specific cases, to blindly accept all the results of experiments. Nonetheless, as quoted in the introduction of this article, it is the learning from these legislative mistakes that matters and puts us on the path of knowledge.

⁹⁹ C. Montesquieu, *The Spirit of Laws*, 1748,7; for a modern conception of the ‘mirror theory’, see Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, Oxford 2001).

¹⁰⁰ A. E. Roth, Introduction to Experimental Economics, in J. Kagel, A. Roth (ed.), *Handbook of Experimental Economics* (Princeton University Press, New Jersey 1997).