EDITORIAL

Editorial

Special Issue Experimental Legislation in Times of Crisis, Sofia Ranchordás & Bart van Klink (eds.)

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Experiments are nowadays crucial methods in medical research and the policy learning process and also a source of valuable evidence in natural and social sciences. Traditionally, this perception was not fully shared by lawyers who were sceptical not only of experiments with legislation but also of most forms of incorporation of experimental evidence in the lawmaking process. However, the growing demand for flexibility and for a better interaction between the rapid changing society and law, as well as the need to close the gap between regulation and technology, appear to favour a broader employment of experimental legislation and experimental approaches to law.

Experimental legislation has existed for centuries and can be dated back to French legislation enacted in the 17th century (Ranchordás, 2014). Legal experiments were also used in the 19th century in the former British Empire to help govern certain provinces (e.g., in India) (Kouroutakis, 2016; Ranchordás, 2014). Yet, experimental legislation remained unknown and underused for centuries. This changed fairly recently: in the last twenty years, the interest in the broader use of experimental legislation, experimental regulations, pilots and policy experiments has increased. Nowadays, a large number of European countries know some form of experimental legal regime, even though the definition and legal framework for its application differ greatly. Multiple uncertainties remain regarding the constitutional and legal limits of experimental legal regimes. While policymakers and legislators in The Netherlands and France turned in the 1970s to experimental legislation to enact controversial laws, temporary legislation and particularly experimental laws and regulations remained overlooked and undertheorized elsewhere and in the literature.

While there is no widely accepted definition of experimental legislation, an experimental law can be defined as follows: An experimental law is *a legislative or regulatory instrument of a temporary nature with limited geographic and/or subject application which is designed to test a new policy or legal solution and includes the*

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prospect of an evaluation at the end of the experimental period.[1] In practice, this is translated in the adoption of experimental clauses or regulations which allow for the temporary adoption of legal measures that are only applied in a certain territory of part of the population. These experimental measures are often based on a statute which will allow for temporary and experimental derogations by secondary legislation. Existing scholarship has identified two central categories of experimental laws: first, experimentation by derogation, which means that certain rules will not be applied to a certain group of citizens or geographical region for a predetermined period of time. The primary legislator introduces an experimental clause to enable derogation from statutory rules by secondary legislation. A part of the country (e.g., ten municipalities) abides by a new experimental legal regime, while the rest complies with another one (e.g., the previously existing one). A second type of experimental laws is conducted by devolution, which means that a higher (federal or supra) national government empowers multiple lower levels of government (state, national or local) to establish, in parallel, new regulations in their own jurisdictions on a particular policy area or objective (e.g., experimental powers) – also known as 'experimentalist governance'. Devolution creates a wide range of opportunities to make new laws, adapt national policies to local circumstances and budgets and initiate policy experiments. This transfer of powers can allow the different local governments to enact different experiments. Contrary to experimentation by derogation, not all the units in the sample group will apply the same legal conditions to their citizens. Each local unit may experiment with its own solution as long as this fits the federal or supranational experimental framework. 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 over a predetermined period of time. Experimental laws and regulations are required to comply with regular constitutional and legal frameworks, including *inter alia* the principles of legality, equal treatment, legal certainty and proportionality.

In the last decade, a number of legal scholars throughout the world have started analysing different aspects of the relationship between time and law, including the duration of constitutions (e.g., Elkins, Ginsburg & Melton, 2009) and legislation (e.g., Fagan, 2013; Gersen, 2007; Ranchordás, 2014), the path-dependent character of common law (e.g., Hathaway, 2001; Ginsburg, Masur & McAdams, 2014), the political interests inherent to temporary legislation (e.g., Kysar, 2006), temporal boundaries of law (e.g., Corrias & Francot, 2018) and the use of experimental legislation as an instrument to improve the quality of legislation (e.g., Bar-Siman-Tov, 2018) or regulate disruptive innovation (e.g., Cortez, 2014; Martinek, 2018). In the last years, the number of experimental laws and policies appears to have also drawn the attention of regulators in specific fields such as financial regulation (FinTech). However, the methodology used to design and implement experimental laws, regulations and policies has remained understudied.

While scientific experiments serve specific purposes, abide by numerous principles and are subject to multiple limitations to ensure that their results can be

1 See, for example, Heldeweg (2015).

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generalised, experiments in law and policy are often implemented with loose evaluation frameworks. The deficient design of experimental clauses, policies and regulations and the lack of systematic evaluation give rise to questions on the real value of experimenting in the legislative and regulatory fields. This special issue of *Law and Method* seeks to address both legal and methodological problems that are raised when designing experiments in law. It aims to compile information from different jurisdictions on the design and implementation of experimental laws, regulations and policies, thus shedding light on a number of unanswered questions such as:

– In what fields are experimental regulations and policies more often implemented?
– How are experimental laws and regulations designed?
– How are regulatory sandboxes being designed? How can we improve their methods?
– How are experimental laws and regulations evaluated? Are they evaluated by independent commissions? And how are their results considered?
– How are risk-based approaches taken into account in the design of experimental laws and policies?

This special issue consists of four articles. To begin with, **Gabriel Doménech-Pascual** addresses in his contribution not so much real-life experiments but thought experiments in law.[2] Thought experiments have been widely used in virtually all sciences and humanities. Law is no exception. We can find countless instances of such experiments in both the legal practice and the legal theory. However, this method has hardly been studied in the domain of law as opposed to other fields of knowledge. The author analyses the role that thought experiments may play in law, in particular *empirical* thought experiments. He defines empirical thought experiments as 'the kind of scientific experience that takes place in an imaginary scenario, where some change is provoked and its outcome [is] observed and interpreted with a cognitive aim'. In other words, an imaginary legal change is made and its social effects are observed. Doménech-Pascual demonstrates why experimental thought experiments may be useful for the practice and theory of law, what the main principles are for conducting them and how the law deals with them.

Subsequently, **Lonneke Poort and Willem-Jan Kortleven** discuss a concrete example of experimental legislation in real life: the EU Regulation 2020/1043 on Covid-19 against the backdrop of the current deadlock in EU regulation of genetically modified organisms (GMOs).[3] The Covid-19 Regulation aims at speeding up the development of GMO-based Covid-19 treatments or vaccines by temporarily suspending requirements that otherwise would have made for time-consuming and burdensome authorization processes. Although the Regulation lacks an explicit experimental purpose, experiences with its functioning may be utilised in evaluation processes serving attempts to change the GMO legal framework. As

2 https://www.lawandmethod.nl/tijdschrift/lawandmethod/2021/05/lawandmethod-D-21-00004.
3 https://www.lawandmethod.nl/tijdschrift/lawandmethod/2021/09/lawandmethod-D-21-00008.

such, it may fulfil a latent experimental function. The authors reflect on the types of knowledge that are relevant when evaluating experimental legislation and developing regulation more generally and argue that the inclusion of social knowledge is pertinent in dealing with complex issues such as GMO regulation. Experimental law literature focuses on gathering evidence-based knowledge about the functioning of legislation but virtually neglects knowledge about different experiences and value appreciations of various societal actors and social-contextual mechanisms. Poort and Kortleven propose that such social knowledge be included in the design of experimental legislation and that evaluation be approached bottom-up instead of top-down.

In the next article, **Erik Longo** also addresses the usefulness of experimental legislation in addressing the problems raised by the pandemic as well as its aftermath.[4] The Covid-19 crisis impelled us to reconsider the basic principles of constitutional law such as the separation of powers, the rule of law and how we protect human rights in the context of a state of emergency. The two most pressing legal issues that have attracted the attention of legal scholars so far are, on the one hand, the different regulatory policies implemented by governments and, on the other, the balance among the branches of government in deciding matters of the emergency. The pandemic has determined a further and violent acceleration of the legislature's temporal dimension and the acknowledgement that, to make legislation quicker, parliament must permanently displace its legislative power in favour of the government. Measures adopted to tackle the outbreak and recover from the interruption of economic and industrial businesses powerfully confirm that today our societies are more dependent on the executives than on parliaments and, from a temporal perspective, that the language of the law is substantially the present instead of the future. Against this background, Longo discusses how the prevalence of governments' legislative power leads to the use of temporary and experimental legislation in a time, like the pandemic, when the issue of 'surviving' becomes dominant.

Finally, **Sofia Ranchordás** discusses in her article the key methodological shortcomings of experimental regulations and regulatory sandboxes.[5] As she argues, the poor design and implementation of these experimental legal regimes have both methodological and legal implications. The deficient design of experimental regulations and regulatory sandboxes can have three adverse effects: First, the internal validity of experimental legal regimes is limited because it is unclear whether the verified results are the direct result of the experimental intervention or other circumstances. The limited external validity of experimental legal regimes impedes the generalizability of the experiment. Second, experimental legal regimes that are not scientifically sound make a limited contribution to the advancement of evidence-based lawmaking and the rationalization of regulation. Third, methodological deficiencies may result in the violation of legal principles, which require that experimental regulations follow objective, transparent and

4 https://www.lawandmethod.nl/tijdschrift/lawandmethod/2021/09/lawandmethod-D-21-00007.
5 https://www.lawandmethod.nl/tijdschrift/lawandmethod/2021/12/lawandmethod-D-21-00012.

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predictable standards. Using an interdisciplinary framework, Ranchordás aims to improve the design of experimental regulations and regulatory sandboxes. She draws on social science literature on the methods of field experiments to offer novel methodological insights for a more transparent and objective design of experimental regulations and regulatory sandboxes.

This special issue intends to contribute to the ongoing academic discussion on the use and usefulness of experimental legislation. Through interdisciplinary scholarship and empirical evidence, we can learn how experimental legislation may help to deal with crises and how its efficacy can be improved.

References

Bar-Siman-Tov, I. (2018). Temporary legislation, better regulation, and experimentalist governance: An empirical study. *Regulation & Governance, 12*(2), 192-219. doi:10.1111/rego.12148.

Corrias, L. & Francot, L. (Eds.) (2018). *Temporal boundaries of law and politics: Time out of joint*. Oxfordshire: Routledge.

Cortez, N. (2014). Regulating disruptive innovation. *Berkeley Technology Law Journal, 29*, 175-228.

Elkins, Z., Ginsburg, T. & Melton, J. (2009). *The endurance of national constitutions*. New York: Cambridge University Press.

Fagan, F. (2013). *Law and the limits of government: Temporary versus permanent legislation*. Cheltenham: Edward Elgar.

Gersen, J. E. (2007). Temporary legislation. *University of Chicago Law Review, 74*(1), 247-298.

Ginsburg, T., Masur, J. S. & McAdams, R. (2014). Libertarian paternalism, path dependence, and temporary Law. *University of Chicago Law Review*, *81*(1), 291-359.

Hathaway, O. (2001). Path dependence in the law: The course and pattern of legal change in a common law system. *Iowa Law Review, 86*(2), 101-165.

Heldeweg, M. (2015). Experimental legislation concerning technological & governance innovation – an analytical approach. *The Theory and Practice of Legislation, 3*(2), 169-193. doi:10.1080/20508840.2015.1083242.

Kouroutakis, A. (2016). *The constitutional value of sunset clauses*. London: Routledge.

Kysar, R. M. (2006). Sun also rises: The political economy of sunset provisions in the Tax Code. *Georgia Law Review, 40*(2), 335-406.

Martinek, M. (2018). *Experimental legislation in China between efficiency and legality: The delegated legislative power of the Shenzhen Special Economic Zone*. Heidelberg: Springer.

Ranchordás, S. (2014). *Constitutional sunsets and experimental legislation: A comparative perspective*. Cheltenham: Edward Elgar.