

Legislation Impact Assessment between Legislative Outputs and Legislative Outcomes: A Legal Theoretical Contribution*

MAURO ZAMBONI**

The fundamental objective of this article is to explore various aspects surrounding the impact assessment of legislation, specifically the evaluation of the potential effects of a legislative act before it is enacted and becomes valid law. The central concept in this process is the object of assessment: the “impact.” Before delving into the procedures or criteria for assessing specific legislation, a preliminary question must be addressed in this contribution, a question that significantly shapes both the nature and goals of the entire assessment process: What does one assess?

Despite the critical nature of this question, a review of the current legal discourse, encompassing both legally binding documents and scholarship on impact assessment, reveals a lack of a clear answer. Generally, legal documents and scholarship tend to lump together under the broad term “impact” of new legislation its economic effects, social implications, political consequences, and its effects on the legal realm.¹ However, this generalizing approach can be misleading. It is paramount, before structuring a legislation impact assess-

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** Faculty of Law, Stockholm University, Sweden.

¹ See, e.g., HERWIG C.H. HOFMANN, GERARD C. ROWE, AND ALEXANDER H. TÜRK, *ADMINISTRATIVE LAW AND POLICY OF THE EUROPEAN UNION*, 2011, Oxford: Oxford University Press, 458–459; or Heinz Schaffer, *Evaluation and Assessment of Legal Effects Procedures: Towards a More Rational and Responsible Lawmaking Process*, 22 *STATUTE LAW REVIEW* 136–142 (2001).

ment, to clearly identify the main targets of the legislation—the specific areas it aims to affect, be it economy, society, politics, law, and so forth. Once the nature of these various impacts is identified, the discussion can then turn to the criteria and tools to be used in evaluating a particular upcoming legislative measure. For example, economic criteria, such as cost/benefit analysis, may be suitable for evaluating the potential economic effects of an act, but applying the same criteria to assess social or legal impacts could be misleading or even counterproductive.

Given this scenario, the goal of this contribution is to utilize legal theoretical analysis to clarify the impacts that a legislation impact assessment aims to evaluate. Consequently, it seeks to determine whether a distinction, and possibly a priority ranking, is necessary, at least from the perspective of legal discourse, among the criteria legislators must use when assessing potential impacts of legislation before enactment.

To achieve this objective, this contribution outlines a four-part approach to enhance legislative impact assessment. Part One stresses the importance of legal theory exploring both the formation and consequences of laws, criticizing the limited focus of risk analysis on economic, social, and cultural effects. Part Two highlights the need to differentiate between legislative outputs and outcomes in the assessment process, considering impacts within the legal system and broader societal effects. Part Three argues that due to the legalization of legislative processes, legal logic dominates, emphasizing the necessity of evaluating legal impacts for assessing legislation's effects on the community. Lastly, Part Four proposes specific steps for improvement, including separating the assessment of legislative outputs, involving external legal experts, and integrating AI for more efficient and accurate legal analysis.

Before to start, it is necessary to give some axiomatic definitions (or postulate) as to some of the key-terms that will be used in this contribution. First, in a democratic form of government, legislative law-making is the procedure, taking place within an assembly of representatives of the community (either at local or national or supranational level), where values or ideals are made into normative (i.e. binding) statement for the entire community by transforming them into legal categories and concepts inserted in a legislative measure. Secondly, the impact of an actor's work simply signifies the effect that the actor's efforts have on the environment. These effects can manifest in different ideal-typical natures. They can be intended, aligning with the original goal the actor had in mind when initiating the work, or unintended, where they deviate, either fully or partially, from the initial motive of the

action.² For the purposes of this work, it is important to note that the term “impact” encompasses both the intended and unintended consequences, unless explicitly stated otherwise.

1. Legislative Impact Assessment as the Gray Area of Legal Discourse: Risk Analysis and Legal Theory to the Rescue

It is widely acknowledged that legislation, while serving as the foundation for much of modern law, has not been the subject of profound reflection within the legal community. This general apathy of legal scholarship for the law-making, in particular in its legislative form, can be detected also in the legal theoretical discourse, where this creative phase of the law and the evaluation of the potential effects and results of a certain piece of legislation has garnered little attention.³ Such a distance between legal theory and the legislative law-making and its effects is rather peculiar and, to some extent, quite difficult to comprehend. Legal theory can be defined as that part of the legal discourse attempting to systematically explain the law. As a result, as pointed out by Mark van Hoecke, the functions attributed to legal theory are dual:

Legal theory has both a theoretical and a practical goal. On one hand it answers a theoretical need by explaining the phenomenon of law and by reducing its complexity through a globalizing, systemic approach. On the other hand, legal theory answers practical needs in that it helps to improve the methodology of legal technique and legal practice.⁴

In this respect, attention to the legislation, the processes of its making, and, in particular, its effects should be a natural part of a legal theoretical approach. First, it is true that state-made or state-based law has lost its monopolist position in the modern day’s law making: the globalization of the law has contributed to the fading of the nation state as primary regulator and thus a weakening of the nation state’s major regulatory tool, legislative law-

² See ROGER COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION*, 2nd edn, 2005, Oxford: Oxford University Press, 72–73; and Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 *AMERICAN SOCIOLOGICAL REVIEW* 894 (1936).

³ See JEREMY WALDRON, *THE DIGNITY OF LEGISLATION*, 1999, Cambridge: Cambridge University Press, 1–2.

⁴ Mark Van Hoecke, *Jurisprudence*, in C. B. GRAY (ED.), *THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA*, 1999, New York: Garland Publishing, 460.

making.⁵ However, the legislative law-making still maintain a fundamental role in a globalized legal system: it is very often through statutory provisions that the globalizing legal concepts are inserted in national communities and affect their daily lives.⁶ Therefore, if legal theory aims at describing the general traits of the law and offering answers to its eventual problems, it certainly needs to focus, though not exclusively, on the queen of the law, namely the legislation.

Second, the law does not possess a value in itself but it is always a tool, or instrumental, in order reach a certain goal. The primary goal of the law, in particular in its legislative shape, is to affect a certain community, i.e. in order to move the latter towards a certain direction.⁷ As a result, if the legal theory aims at “explaining the phenomenon of law”, it necessarily needs to have, as one of its fields of investigation, not only the creation of the law but also the investigation as to its potential and actual effects on the community.

The significance of the impact that a particular legislation has is undoubtedly acknowledged within legal discussions and scholarly research. In particular, mainstream legal theorist and philosophers (e.g. legal positivism) have debated as to the goal of the legislation before coming into action. At the same time, legal sociologists (and socio-legal studies) have investigated the concrete effects of a certain piece of legislation, i.e. the gap between the “law in action” and the “law in books.”⁸

However, there exists a “gray area” within legislative lawmaking and its repercussions—an unexplored realm where legal theory has yet to shed light: legislative impact assessment. This refers to the moment during the legislative process when an evaluation is conducted, prior to the formal ratification of an act by the competent authority, to gauge the potential effects the act may

⁵ See Gunther Teubner, *Global private regimes: Neo-spontaneous law and dual constitution of autonomous sectors in world society?*, in K.-H. LADEUR (ED.), *GLOBALIZATION AND PUBLIC GOVERNANCE*, 2004, Aldershot: Ashgate, 72.

⁶ See NEIL WALKER, *INTIMATIONS OF GLOBAL LAW*, 2015, Cambridge: Cambridge University Press, 16.

⁷ See Mauro Zamboni, *Goals and Measures of Legislation: Evaluation*, in U. KARPEN AND H. XANTHAKI (EDS.), *LEGISLATION IN EUROPE: A COMPREHENSIVE GUIDE FOR SCHOLARS AND PRACTITIONERS*, 2017, Oxford: Hart Publishing, 103–104.

⁸ See, e.g., TOM CAMPBELL, *PRESCRIPTIVE LEGAL POSITIVISM: LAW, RIGHTS AND DEMOCRACY*, 2004, London: UCL Press, 64–65; or Cristina Besio and Margrit Seckelmann, *Free floating or free riding? Recursive norm-building in the German energy transition using the example of the approval of e-scooters in German cities*, in C. F. CAMPILONGO, L. FUCCI AMATO, AND M. A. LOSCHIAVO LEME DE BARROS (EDS.), *LUHMANN AND SOCIO-LEGAL RESEARCH*, 2021, London: Routledge, 96–109.

have upon coming into force. This assessment encompasses considerations of the legal, economic, political, social, and cultural implications within a specific community. In essence, while extensive discussions have taken place regarding the general objectives and tangible outcomes of legislation, there is a noticeable theoretical gap in the “middle stage” of the legislative process—when a legislative law is being crafted and assessed before being enacted.

It is important to point out that the phase of the legislative law-making where the potential impact of the act is investigated is actually “gray” and not a “black area” for legal theory. While it has been left at the margins of the legal theoretical investigations, the potential impact of a certain legislation has been investigated by within risk analysis studies, a (relatively) new branch of legal scholarship. In the specific, risk analysis of legislation involves evaluating and assessing potential risks associated with the introduction, modification, or implementation of legal measures.⁹ This process aims to identify, analyze, and mitigate potential adverse consequences that may arise from new laws or regulatory changes. As a result, a key components of risk analysis in legislation is impact assessment, i.e. to evaluate the potential economic, social, environmental, and cultural impacts of the legislation.

While examining the evaluation of potential impacts of legislation, it is essential to recognize certain limitations within the context of legal discourse, particularly with regard to risk analysis—an approach that originated and developed outside the legal realm. Firstly, risk analysis tends to concentrate on assessing the effects that new legislation may have on various facets of community life, encompassing the economy, society, culture, and beyond.¹⁰ The comprehensiveness of this approach is understandable, given that an enacted act is intended to influence the daily life of a community by prescribing certain behavioral patterns, irrespective of individual agreement or dissent. However, it is crucial to bear in mind that this objective is primarily achieved through the enactment of a legislative act—a binding legal document designed to, first and foremost, bring about changes or, at the very least, impact the legal system. In its initial phase, the effect is concentrated on the existing regulatory framework, with subsequent ripple effects extending

⁹ See Peter Wahlgren, *Legislative Techniques*, in L. J. WINTGENS, *LEGISLATION IN CONTEXT: ESSAYS IN LEGISPRUDENCE*, 2007, London: Routledge, 91–92.

¹⁰ See, e.g., EUROPEAN COMMISSION, *BETTER REGULATION TOOLBOX -JULY 2023 EDITION*, 2023, 136–151, available at https://commission.europa.eu/document/download/9c8d2189-8abd-4f29-84e9-abc843cc68e0_en?filename=BR%20toolbox%20-%20Jul%202023%20-%20FINAL.pdf.

into the economic, social, cultural, and political realms of the community. Therefore, it is pertinent for a risk analysis to differentiate and, at least in terms of timeline, prioritize certain risks or potential impacts of the legislation over others. Specifically, the legislative impact assessment should concentrate, as a first priority, on the legal impact and its associated risks. This involves scrutinizing how the new legislation will influence the current legal system and, more broadly, the legal discourse.

Secondly, risk analysis has been introduced into the legal discourse without providing a dedicated theoretical framework outlining its structure, operation, objectives, and, equally crucial, terminology tailored specifically for the legal domain.¹¹ Like for all approaches applied to the legislative phenomenon, a clear and defined theory is essential for risk analysis and the broader study of legislative impact assessment. This theory should not only outline the goals of the approach and the rationale behind selecting specific objectives but also elucidate the key components of a scientifically sound evaluation of the potential effects of legislation. For example, a legal theory of risk analysis could clarify the concept of “potential” in the context of its effects, delving into the extent (and thus the external limits) to which the investigator’s work should aim in terms of the timeline (effects within a short, medium, or long timeframe). Furthermore, and of greater significance, the legal theory may provide rationales and criteria for making such timeline choices: should the focus be on the effects on those who elected the law-making actors (procedural democracy), or should it also consider the impacts on upcoming or future generations?

In other words, a legal theoretical approach to legislative impact assessment has the potential to legitimize the role of the risk analysis approach as a fully recognized participant in the legal discourse. This recognition holds especially true when adopting the Hartian description of legal theory, defined as “a theory of what the law is in terms of generally seeking... to give an explanatory and clarifying account of law as a complex of social and political institutions with a self-rule-governed (and in that sense ‘normative’) aspect.”¹² This integration into the legal discourse can be accomplished by

¹¹ See, e.g., Harry H. G. Post, *Legal Risks in European Environmental Law and Policy*, in E. MIŠĆENIĆ AND A. RACCAH (EDS.), *LEGAL RISKS IN EU LAW: INTERDISCIPLINARY STUDIES ON LEGAL RISK MANAGEMENT AND BETTER REGULATION IN EUROPE*, 2016, Cham: Springer, 225–226.

¹² Herbert L. A. Hart, *Postscript*, in H. L. A. HART, *THE CONCEPT OF LAW*, 2nd edn., 1994, Oxford: Clarendon Press, 239.

providing frameworks and clarifications within which risk analysis in the legal context must operate. These frameworks and clarifications, tailored to the legal discourse and its terminology, should be readily recognizable and usable by the key players in law-making, namely the legal actors.

2. The “Impact” In The Legislative Impact Assessment: Legislative outputs and Legislative outcomes

As pointed out earlier, one of the overarching objectives of legal theory, as articulated by Van Hoecke, is to elucidate “the phenomenon of law... by reducing its complexity through a globalizing, systemic approach.”¹³ When applying this task to the domain of legislative impact assessment, it becomes evident that the latter seeks to evaluate the potential effects of impending legislation on a community. However, the nature of state law in a modern democracy inherently tends to extend its effects in all directions. In Bourdieu’s terms, this involves the creation of “juridical fields” through the incorporation, under the monopoly of lawmaking and law-enforcement state agencies, of issues and solutions previously within the domain of other normative systems.¹⁴ In this regard, although the fields upon which legislation aims to have an impact are almost countless, it is essential to recognize that a legislative act serves as a specific normative tool designed primarily to influence the legal system. The act is crafted with the overarching goal of altering or, more broadly, affecting the legal system and its discourse. Through this transformation, the expectation is that the addressees will subsequently modify their behavior in the economic, social, cultural, or political spheres.

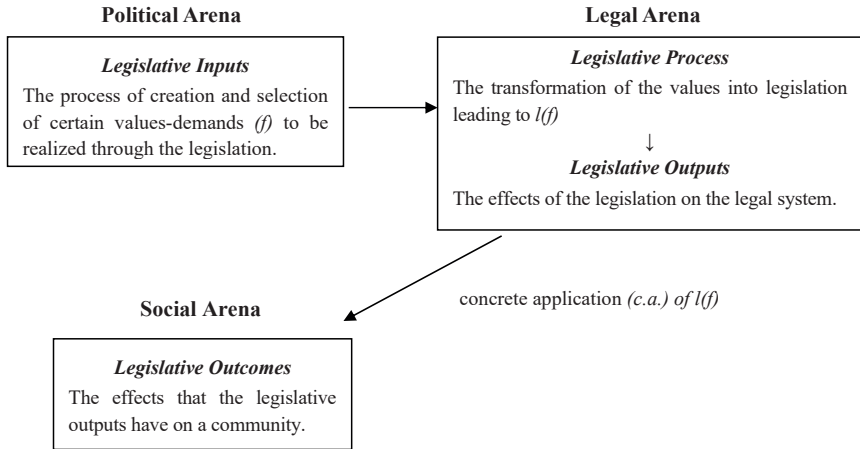
Once the functioning of legislation has been clarified, especially from the perspective of legal actors, it becomes imperative to differentiate among various types of potential impacts or effects that a new legislative act may induce. In essence, a legal theoretical approach can contribute by providing clarification regarding the spheres or discourses one should focus on when assessing the potential impacts of legislation, along with the corresponding criteria for such assessments.

¹³ Van Hoecke, *Jurisprudence*, *supra* at 460.

¹⁴ See Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 30 THE HASTINGS LAW JOURNAL 819–820 (1987).

One can, in a succinct manner, outline the legislative law-making process and the associated legislative impacts, particularly when viewed from the standpoint of legal actors, as in Figure 1.

Figure 1. The Legislative Process



When envisioning the fundamental process of implementing specific values within a community through legislation, one must commence at the foundation, namely the political arena. From the internal dimensions of a legal system, the political arena can be delineated as the optimal space where designated actors or groups decide that value f should be incorporated into the community through legislation (as illustrated in Figure 1 with *legislative inputs*).¹⁵ An illustrative instance of the elementary implementation process of values within a community, as depicted in Figure 1, is the advocacy by political parties and non-governmental organizations for gender equality in employment hiring procedures, denoted as value f .

For these values, articulated within the political arena, to be translated into actionable changes within the community via legislative acts, they must undergo a transformation, evolving into distinct legal categories and con-

¹⁵ See JEREMY WALDRON, *THE DIGNITY OF LEGISLATION*, 1999, Cambridge: Cambridge University Press, 25–28. See, e.g., Mark Van Hoecke, *Law as Communication*, 2002, Oxford: Hart Publishing, 64; or WILFRID J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM*, 1994, Oxford: Clarendon Press, 43.

cepts.¹⁶ The imperative nature of this reconstruction step becomes especially apparent in contemporary Western and Western-influenced cultures, where the ideology of legality holds sway and significantly influences the legislative process: “[T]he modern state’s specific form of legitimacy is its appeal that its commands be recognized as binding because *legal*, that is because issued in conformity with properly enacted, general rules.”¹⁷

The process of transformation is typically carried out by specialized actors dedicated to such conversions, such as the legal staff of committee members in a legislature. These individuals typically have formal education in legal matters, underpinned by a common legal rationality. This education, to varying degrees, establishes a distinct legal arena. This arena is defined as the optimal space where the initial political objective of implementing values into the community through value-based reasoning transitions into the goal of transforming these values using legal rationality.¹⁸ The ultimate aim is to integrate them into the established legal order through the legislative process.¹⁹ Even in a hypothetical scenario where political actors, such as the director of an NGO or a member of a legislature, undertake the task of transforming their values into a draft for a Bill, they would inevitably need to engage with legal language. Furthermore, they would be compelled to consider the structural intricacies of the legal system, particularly at the constitutional level, into which their proposed statute is intended to be incorporated.

Adhering to the traditional principle of the separation of powers, actors within the legal arena should function as conduits for the transformation of values originating from distinct political entities. Typically, legal actors successfully identify (or devise) a legal category or concept, denoted as l , which they consider to be the optimal translation into law ($l(f)$ in Figure 1) of the original value f expressed by the political arena. In the aforementioned example, political parties or NGOs delegate the task of transforming their

¹⁶ See Gunther Teubner, *Altera Pars Audiatur: Law in the Collision of Discourses*, in R. RAWLINGS (ED.), *LAW, SOCIETY AND ECONOMY: CENTENARY ESSAYS FOR THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE 1895–1995*, 1996, Oxford: Clarendon Press, 165.

¹⁷ GIANFRANCO POGGI, *THE DEVELOPMENT OF MODERN STATE: A SOCIOLOGICAL INTRODUCTION*, 1989, Stanford: Stanford University Press, 132 (*italics added*).

¹⁸ See IAN MCLEOD, *PRINCIPLES OF LEGISLATIVE AND REGULATORY DRAFTING*, 2009, Oxford: Hart Publishing, 1 (“In the simplest of terms, the drafter’s task is to convert policies into provisions which comply with the relevant formal conventions and are capable of being applied effectively in practice”). See also HELEN XANTHAKI, *THORNTON’S LEGISLATIVE DRAFTING*, 5th edn., 2013, West Sussex: Bloomsbury Professional, 142.

¹⁹ See KAARLO TUORI, *CRITICAL LEGAL POSITIVISM*, 2002, London: Routledge, 161.

equality value into legal proposals to their legal staff or an external legal think-tank. The latter, through a thorough examination of available legal tools, then drafts a new statute articulating in legal language the value or ideal of gender equality. The legal mechanism employed by these legal actors to realize gender equality in the job market may take the form of a legally mandatory quota system (l).

The second phase within the legal arena involves the legally consequential acceptance, typically by other legal actors (such as through a legislative vote or a decree from the competent Ministry), of the proposed legal category. Consequently, the newly introduced legal category $l(f)$ is enacted, transforming it into a legally binding mandate for other legal actors and the community. This is often achieved by incorporating $l(f)$ into one or more statutes or various administrative regulations. The representation of $l(f)$ signifies the successful transformation and incorporation of value f into the legal category l . The latter serves as the essential legal conduit, such as a new act, through which value f must traverse to be embedded in and impact on the legal system and, subsequently, to become a legally binding assertion relevant to the community.

The incorporation of f into the legal system typically results in a varying degree of impact on the system itself, as $l(f)$ will, to differing extents, alter the existing legal framework (*legislative outputs*). For instance, the legislative proposal drafted by the legal professionals of political parties and NGOs may undergo unchanged passage through the entire parliamentary process, ultimately becoming a statute that modifies both the legal obligations of employers and the legal entitlements of women seeking employment.

In the ultimate stage of this highly simplified legislative process, the legally binding category $l(f)$ is effectively put into practice, as illustrated in Figure 1 (approximated as *c.a. l(f)*), within the social arena of the national community (*legislative outcomes*).²⁰ In the given example, the tangible application of the legal category $l(f)$ within the community means that employers are compelled to adhere to male-female quotas in their recruitment procedures, resulting in the actual employment of more women than they would otherwise have done.

²⁰ See COTTERRELL, *THE SOCIOLOGY OF LAW*, *supra* at 56–58. In this work, the term “social arena” is used in a broad and residual meaning, encompassing all those communities of actors, rationalities, and processes, which somehow participate in the law-making and can be defined neither as political nor as legal (e.g., economic actors, religious organizations, or ethnic communities).

From the model depicting a straightforward (and somewhat uncomplicated) legislative law-making process, as illustrated in Figure 1, it is crucial to derive a significant conclusion pertinent to the concept of “impact” in legislative impact assessment: the distinction between legislative *outputs* and legislative *outcomes* concerning the results coming out of the processes taking place in the legislation. This separation of outputs from outcomes is actually an adaptation in the law-making process of the results reached by a long series of studies developed in political science and can be considered a consequence of the more general distinction between the normative and social functions of the law.²¹

Looking at sociological studies, the effects of an actor’s work simply refer to the impact that the actor’s efforts have on the surrounding environment. These effects can be of different ideal-typical natures. These effects can manifest in different ideal-typical natures. They can be *intended*, aligning with the actor’s initial goal when commencing the work, or *unintended*, deviating (fully or partially) from the original motive behind the action.²² In the context of legislative impact assessment, the distinction, while significant for the legislator, cannot be deemed relevant. The evaluation’s objective is to thoroughly assess all potential effects that a specific action by the legislator may have on the environment, irrespective of whether the impact was intentional or unintended.

As for the other major classification concerning the effects of actions by institutional actors, this distinction is indeed highly relevant for the purpose of legislative impact assessment. Effects can also be in the form of either *outputs* or *outcomes*.²³ Outputs are the impacts (intended or unintended) a certain action has inside the ideal-typical arena in which the action has taken place (e.g., the effect of a court decision on the legal right of the con-

²¹ See LAWRENCE FRIEDMAN, *IMPACT: HOW LAW AFFECTS BEHAVIOUR*, 2016, Cambridge: Harvard University Press, 45 and 48; FRANCIS CASTLES, *COMPARATIVE PUBLIC POLICY: PATTERNS OF POST-WAR TRANSFORMATION*, 1998, Northampton: Edward Elgar, 248–292; and Joseph Raz, *On the Functions of Law*, in A. W. B. SIMPSON (ED.), *OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES)*, 1973, Oxford: Clarendon Press, 280.

²² See COTTERRELL, *THE SOCIOLOGY OF LAW*, *supra* at 72–73; and Robert K Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 *AMERICAN SOCIOLOGICAL REVIEW* 894 (1936).

²³ See JAN-ERIK LANE AND SVANTE T. ERSSON, *THE NEW INSTITUTIONAL POLITICS: OUTCOMES AND CONSEQUENCES*, 2000, London: Routledge, 60–62. See, e.g., SELDEN BIGGS AND LELIA B. HELMS, *THE PRACTICE OF AMERICAN PUBLIC POLICYMAKING*, 2015, London: Routledge, 370–371.

victed party to appeal). Outcomes, by contrast, mark the effects (intended or unintended) such impacts have on the surrounding environment (e.g., the effect of a court decision on the economic situation of the convicted party's family).²⁴

Relocated into the context of the legislative process, outputs are the impacts of the legislative act inside the legal arena in which the process itself has taken place (e.g. changes of the legal system concerning hiring procedures). The outcomes of the legislation, in contrast, mark the effects (intended or unintended) such impacts have on the surrounding environment (e.g. changes in the concrete behaviours of the employers). For example, the distinction between legislative outputs and legislative outcomes is important in order to understand the fact that sometimes new legislation (i.e. an impact in terms of legislative output) can have more or less the same practical effects on a community as those of the previous legislation (i.e. no impact in terms of legislative outcome).²⁵

3. First Legislative Outputs, Then Legislative Outcomes

The model depicted in Figure 1 provides a straightforward illustration of a general legislative process within the national legal order of a democratic country. Its primary purpose is to highlight, within that process, a fundamental distinction between the legal and non-legal impacts of the results of a legislative process. The effects of this process on the legal system, or in other words, the incorporation of the act (*l(f)*) into the existing legal system (*legislative outputs*), should be distinguished from the impact such transformation of the legal system intends to have on the community and its life (*legislative outcomes*). This differentiation of actual effects becomes crucial for the evaluation of potential impacts and carries significant implications for establishing the foundation and structure of a legislative impact assessment process for upcoming legislation. The significance of this categorization extends beyond merely clarifying the discussion on (actual or potential) impact. It delves

²⁴ In practice, these distinct ideal-types (intended or unintended outputs, intended or unintended outcomes) often intertwine, presenting themselves in a blended fashion. While acknowledging the complexity of these real-world scenarios, in this contribution these ideal-types help unveil the fundamental nature of the effects stemming from a legislative act, allowing for a more nuanced understanding of its impact.

²⁵ See, e.g., NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM*, 2008, Oxford: Oxford University Press, 166.

deeper into the profound connection between legal outputs and the fundamental role played by legal discourse in modern democratic societies.

While it is idealistically envisioned that, in a democracy, legislation should straightforwardly represent the will of the people, as embodied by their representatives in the national assembly (depicted as legislative inputs in Figure 1) and translated into legal language, the reality is far more intricate. This complexity unveils a vast realm where legal actors, especially legislative drafters, frequently operate on their own terms—adhering to the logic of legal discourse rather than political discourse.²⁶ This tendency is the result of three forces, often overlapping and interconnected.

First, in most modern democracies, there is an observable trend towards the increasing *legalization* of legislative processes transforming values into concrete legislative measures.²⁷ The legalization of the legislative process signifies, notably, the phenomenon wherein legislative law-making and its outcomes (specifically, the acts) become progressively influenced by the logics and paradigms of the legal discourse. The transformation of values into statutory provisions, and the subsequent creation of acts, can be more comprehensively understood by primarily adopting a Hartian internal perspective. This involves considering the perspective that lawyers hold regarding the transformation of a value (*f*) into a category or concept directly pertinent to the legal order.²⁸ For instance, to comprehend an act criminalizing abortion, the legal concept of ‘human life’ held by legal advisors of a government becomes fundamental, irrespective of the prevailing sentiments in the community, the opinions of religious authorities, or the perspectives of medical experts on the issue.

The second force propelling legislative drafters and their legal logic to the forefront of the legislative stage is rooted in *the rule of law* as one of the models shaping the regulations governing the interactions between public authorities and private individuals. The rule of law provides a model that directs attention to the requirement for public authorities to adhere to the

²⁶ See ANDREW ABBOT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR*, 1988, Chicago: University of Chicago Press, 52–57; and ROGER COTTERRELL, *LAW’S COMMUNITY: LEGAL THEORY IN SOCIOLOGICAL PERSPECTIVE*, 1995, Oxford: Clarendon Press, 108–110.

²⁷ See Max Weber, *Politics as a Vocation*, in H. H. GERT AND C. WRIGHT MILLS (EDS), *FROM MAX WEBER: ESSAYS IN SOCIOLOGY*, 1991, Oxford: Oxford University Press, 95.

²⁸ See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY*, Cambridge: The MIT Press, 282.

law (and, in the case of the rule of law, certain basic rights). This emphasis consequently places legislative law-making under the guidance of the legal discourse, its logic, and its principles. The values embraced by public authorities must align with these legal foundations. Hence, both the legal frameworks (legal categories and concepts) adopted for the values and, more broadly, the perspectives on the transformation of values into legislative measures held by legal actors (especially legislative drafters and legal advisors to the parliament and government) become of paramount importance.²⁹

The third factor promoting the relocation of legislation and its ex-ante evaluation into the legal realm is the growing professionalization of legal actors dedicated to legislative law-making (e.g., legislative drafters or lawyers in think tanks). Professionalization implies that individuals or groups typically need specific training (e.g., a law degree) and a specific form of legitimation (usually of a legal nature, such as a selection based on specific legal procedures) to become institutional actors in the legislative process.³⁰ The increasing trend toward the professionalization of the legislative process and its results is evident in the prevalence of legislators in most contemporary legal systems who are assisted by staff or experts with specialized legal education. The primary responsibility of these individuals is to articulate ideas and proposals (i.e., values) endorsed by political actors in legal language, employing legal categories, concepts, and adhering to the logics and paradigms of the legal discourse.³¹ Even in conflicts with the values expressed by the political arena (legislative inputs), it is usually the final product of the work of such interpreters (legislative outputs, e.g. in the shape of a statute) that, in the end, becomes the valid law that aims at shaping the behaviour of the members of the community.

The convergence of these concurring (and often interrelated) factors -namely, the *legalization* of legislative processes, the diffusion of the *rule of*

²⁹ See Robert Summers, *A Formal Theory of the Rule of Law*, in R. SUMMERS, *ESSAYS IN LEGAL THEORY*, 2000, Dordrecht: Kluwer Academic Publishers, 167–168; and HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* at 134–135. See, e.g., FELIX UHLMANN AND STEFAN HÖFLER (EDS.), *PROFESSIONAL LEGISLATIVE DRAFTERS: STATUS, ROLES, EDUCATION*, 2016, St Gallen: Dike Verlag.

³⁰ See Bourdieu, *The Force of Law*, *supra* at 834–839. See, e.g., HELEN XANTHAKI, *DRAFTING LEGISLATION: ART AND TECHNOLOGY OF RULES FOR REGULATION*, 2014, Oxford: Hart Publishing, 354–365.

³¹ See COTTERRELL, *THE SOCIOLOGY OF LAW*, *supra* at 203–204. See also LUHMANN, *LAW AS A SOCIAL SYSTEM*, *supra* at 79–88.

law, and the *professionalization* of the legislative discourse—results in the dominance of legal discourse, its logics, and paradigms within legislative processes and their results (i.e. the statutes). Given its pivotal role in the entire legislative law-making process, the way legal discourse perceives the translation of political will (legislative inputs) into legislative measures becomes crucial. Hence, it is only natural that, to assess its potential impact, the initial crucial step is to evaluate how legislation affects the legal discourse itself—identifying the potential legislative outputs. Structuring the legislative impact assessment in this way, prioritizing the evaluation of potential (both intended and unintended) legislative outputs, aptly mirrors the dynamics of legislative law-making and its tangible effects: the reality is influenced (legislative outcomes) as long as the legal system is impacted (legislative outputs).

Despite being central to legislative law-making, legal outputs have, to some extent, taken a backseat in risk analysis, where the emphasis often shifts to potential legal outcomes—the possible impacts a new act may have on the social, economic, political, or cultural life of a community. Various factors have contributed to the marginalization of legal impacts in current studies of legislative impact assessment. One factor is that risk analysts are typically not lawyers, and even if they are, they may lack expertise in legislative studies. Consequently, looking at the law from an external perspective, the risk analyst might assume that a new piece of legislation will “naturally” bring about the desired effects or changes in the current legal system. Consequently, their assessment tends to focus on how these changes in the legal system may affect non-legal arenas (legal outcomes).

Undoubtedly, lawyers are integral to the risk analysis process; however, their reasoning and paradigms play a role in only a limited part of the assessment of the legal consequences of upcoming legislative acts. It is commonplace for lawyers to contribute to risk assessment by ensuring *legislative compliance*—ensuring that proposed legislation aligns with existing legal frameworks and does not contradict established legislations, legal principles, and, more broadly, the paradigms of legal discourse.³² Likewise, as a component of the risk analysis, it is customary that lawyers assess potential *legislative*

³² See Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 17 *PUBLIUS: THE JOURNAL OF FEDERALISM* 91–114 (1987). See, e.g., Stephen Weatherill, *The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"*, 12 *GERMAN LAW JOURNAL* 289 (2011).

ambiguities or uncertainties—areas within proposed legislation that could potentially give rise to disputes or legal challenges, both within the judicial system and in the broader legal discourse in general.³³

The predominant focus on the potential legal impacts of a legislative act, or its anticipated outputs, often then centres solely on the potential “negative” consequences of the act itself. This includes its capacity to disrupt existing legislative regimes by introducing a new contradictory act in relation to the current legal system (legal compliance) or by instilling elements of instability (legal uncertainty). In this context, the current state of risk analysis overlooks the fundamental purpose of a new act, at least from a legal perspective. The primary objective of legislation is to influence a specific reality by introducing changes in the current landscape of the legislative regulatory regimes. In other words, the primary goal of a new act is to innovate current regulations. Even legislation that provides only an “authentic interpretation” of a previous act or simply “consolidates” a particular regulatory regime (by restructuring and reorganizing previously scattered binding practices and/or acts) also aims at legal change. This is achieved by establishing a singular allowed behaviour (or set of behaviours) as legal, thereby eliminating potential disputes and rendering the legal systems and its outputs more predictable. To evaluate the potential legal outputs of an upcoming legislative measure also entails assessing its potential “positive” impact, i.e., its capacity for *legislative innovation*. The latter can be defined as the introduction of new (or new ways to interpret established) legal concepts, legal principles, and/or procedures into the binding regulatory regimes of a given community to address old or new legal challenges.³⁴

³³ See Richard A. Posner, *Statutory Interpretation -in the Classroom and in the Courtroom*, 50 UNIVERSITY OF CHICAGO LAW REVIEW 811–812 (1983). See, e.g., Aurélien Raccach, *Reframing Legal Risk in EU Law*, in E. MIŠĆENIĆ AND A. RACCAH (EDS.), *LEGAL RISKS IN EU LAW*, *supra* at 8–9.

³⁴ See Saul Levmore, *Intellectual Property and Legislative Innovation*, in F. FAGAN AND S. LEV-MORE (EDS.), *THE TIMING OF LAWMAKING*, 2017, Cheltenham: Edward Elgar 243. *But see* Antoine Masson, *Legal Innovation and Communication*, in A. MASSON AND G. ROBINSON, *MAPPING LEGAL INNOVATION -TRENDS AND PERSPECTIVES*, 2021, Cham: Springer, 90 (emphasizing that legal innovation, even within the realm of legislative drafters, often arises more from social imitation than from purely legal reasoning).

4. Some Concrete Steps to be Taken in the Legislative Impact Assessment

The analysis of legislative impact assessments underscores the significance of legal theory in elucidating the necessity of distinguishing and clarifying the potential impacts of impending legislation on the legal system from its effects outside this framework. However, as previously indicated, the role of legal theory extends beyond the clarification, questioning, and improvement of fundamental constitutive elements within the legal discourse, such as legal concepts and categories. A theoretical approach is equally essential from a more practical standpoint. Once the issues are illuminated, legal theory must offer directions or strategies through which other branches of legal knowledge—both practical and scholarly—can address problems or uncertainties. To quote Van Hoecke, “legal theory answers practical needs in that it helps to improve the methodology of legal technique and legal practice.”³⁵

In terms of “practical suggestions,” it is advisable to begin with a straightforward premise that has been explicitly emphasized in this work thus far: legislation fundamentally constitutes a legal product. In other words, its production aims to influence the existing legal discourse. From the standpoint of legal discourse, legal actors assume a pivotal role in the legislative process, since they are responsible for translating statements from the political discourse into legal discourse through the formulation of statutory measures. Based on this consideration and the legal theoretical analysis presented above, some recalibrations of the legislative impact assessment phase are necessary.

Firstly, in the process of legislative impact assessment, it is crucial to compartmentalize and prioritize its phases. The assessment should distinctly separate the evaluation of legislative outputs from that of legal outcomes. Legislation, at its core, is designed to bring about changes within the legal system, thereby influencing the broader reality. As previously explained, legislation acts as a legal tool, impacting the existing legal framework. Consequently, legislative outputs serve as a prerequisite for any societal changes intended by the new act.

Recognizing that unfavourable changes in the legal system resulting from a new act can lead to unintended consequences in other aspects of the community (e.g., economy, society, culture, etc.), it becomes evident that the assessment of potential impacts should start with a preliminary sub-phase

³⁵ Van Hoecke, *Jurisprudence*, *supra* at 460.

in the legislative impact assessment: *the evaluation of potential legal outputs*. This sub-phase is dedicated to examining the potential effects of the new act on the current legal system. This approach ensures a focused and systematic examination of the foundational elements that shape the legal landscape before considering broader societal implications.³⁶

Secondly, when delving into the realm of legislative impact assessment, the expertise of *external legal specialists* in the field(s) that the new act addresses becomes indispensable. Specifically, the legislative drafters responsible for composing the act often possess specific knowledge in the art of drafting legislation—transforming political ideas into legislative channels to materialize ideals. However, their expertise may not be equally deep in understanding how the new act, once enacted, will impact the current legal system. In essence, drafters find themselves in the challenging position of “assuming” that the act they are crafting will yield the desired effects on the legal system (legislative outputs). Consequently, it is essential to outsource the assessment of legislative outputs to legal experts external to the legislative law-making system.

In this context, “legal experts” refers to professionals with specific knowledge whose sole task is to assess the potential legal outputs of legislation.³⁷ The term “externality” signifies that those evaluating the potential impact of new legislative measures should be individuals who, even if integrated into the legislative process, maintain structural and institutional independence from the legislator (e.g., having a separate career path). This externality ensures that the assessment process is a genuine and, to the extent possible, objective evaluation of the potential legal impacts of upcoming legislation, avoiding the pitfalls of a self-evaluation by the legislative drafters or any actor in a dependency relationship with parliamentary committees. In fulfilling both criteria for selecting players in legislative impact assessment (expertise and externality), a viable option is to engage key legal stakeholders, such as judges (pertaining to the adjudicative phase), lawyers in the public sector (involved in implementing upcoming legislation), lawyers operating in the community (especially in areas affected by the legislation), and legal scholars (due to their independence).

³⁶ See Maria Mousmouti, *Making Legislative Effectiveness an Operational Concept: Unfolding the Effectiveness Test as a Conceptual Tool for Lawmaking*, 9 EUROPEAN JOURNAL OF RISK REGULATION 459–460 (2018).

³⁷ See Luzius Mader, *Evaluating the Effects: A Contribution to the Quality of Legislation*, 22 STATUTE LAW REVIEW 130 (2001).

Thirdly, when establishing the major criteria for evaluating the potential legal impacts of upcoming legislative measures, the primary objective should be considered: minimizing unintended legal consequences as much as possible. While predicting the future is inherently challenging, in the initial phase, focusing solely on the impact on the legal system (rather than society at large) should significantly reduce the potential for unintended legislative outputs. The overarching goal of this sub-phase in assessing legislative outputs is to ensure that upcoming legislation, while changing the legislative landscape (the primary purpose of enacting an act), avoids jeopardizing the systematic character inherent in a modern legal system. This systematic character relies on the central principles of legal consistency and legal certainty.³⁸ During this specific stage of legal impact assessment, one must consider the three potential ideal-typical impacts that upcoming legislation may have on the current legal system: *legislative compliance*, *legislative uncertainty*, and *legislative innovation*.

As mentioned earlier, the criterion of *legislative compliance* aims to ensure that the new legislation adheres to, or at least does not contradict, the broader constitutional frameworks and specific fundamental legal principles governing the relevant area. On the other hand, the criterion of avoiding *legislative uncertainty* compels those conducting the assessment to evaluate whether the new legislative provisions might lead to a regulatory regime where predicting how the legislative act (and/or the surrounding legislative regimes it may affect) will be interpreted, applied in specific situations, or enforced by public agencies becomes challenging. As to the third criterion, namely *legislative innovation*, the latter simply refers to the duty of the actors performing the legislative impact assessment to evaluate whether the upcoming legislative act will transform the current regulatory regime and, in general, the current legal discourse in the direction intended by the legislative inputs.³⁹

Fourthly, when considering the tools for assessing the potential legislative outputs of an upcoming act, it is logical for the evaluator to primarily utilize the traditional *modus operandi* inherent in the current legal discourse and

³⁸ See RONAN CORMACAIN, *THE FORM OF LEGISLATION AND THE RULE OF LAW*, 2022, Oxford: Hart Publishing, 279; and Stephen Laws, *Consistency versus Innovation*, *THE LOOPHOLE - JOURNAL OF THE COMMONWEALTH ASSOCIATION OF LEGISLATIVE COUNSEL* 26–31 (2009), available at <https://www.calc.ngo/sites/default/files/loophole/oct-2009.pdf>.

³⁹ See Laws, *Consistency versus Innovation*, *supra* at 31–36 (addressing the difficult equilibrium between legal consistency and legal innovation in legislation).

analysis. This approach involves situating the forthcoming regulation within the existing regulatory framework and evaluating it against the hierarchy of legal sources and legal paradigms of the contemporary legal reasoning (such as *lex superior derogate legi inferiori*, *lex specialis derogate legi generali*, and so forth). In this way, the evaluator assesses and ensures the preservation of the systematic and consistent nature of the legal discourse. However, given the substantial advancements in high-tech over the last few decades and its capacity to accumulate and systematize vast amounts of information—information that a human evaluator may struggle to master, even with access to electronic databases—this application of traditional legal discourse tools should be augmented significantly by the decisive support of AI technology.⁴⁰

The integration of artificial intelligence into the assessment process holds the potential to significantly enhance the efficiency, accuracy, and comprehensiveness of legal analysis. This integration offers a more robust and insightful evaluation of the potential legal impacts associated with upcoming acts. By linking AI systems with current legal databases, the evaluation process incorporates existing regulations, jurisprudence, practices, soft law regimes, and even legal scholarship. The use of AI as a supplementary tool in legislative impact assessment equips actors with the capability to predict, to a larger extent, both the intended and unintended effects on the existing legal system. Furthermore, it provides a more manageable approach compared to attempting to factor in all the social, economic, cultural, and political variables—a necessity when clear distinctions between legislative outputs and legislative outcomes are not readily apparent. The synergistic relationship between AI technology and traditional legal analysis methods facilitates a more comprehensive understanding of the potential legal ramifications of upcoming legislative acts.⁴¹

⁴⁰ See, e.g., MONICA PALMIRANI, FABIO VITALI, WILLY VAN PUYMBROECK, AND FERNANDO NUBLA, EUROPEAN COMMISSION LEGAL DRAFTING IN THE ERA OF ARTIFICIAL INTELLIGENCE AND DIGITISATION, 2022, Brussels: Directorate-General for Informatics Solutions for Legislation, Policy & HR 38–39, available at <https://joinup.ec.europa.eu/sites/default/files/document/2022-06/Drafting%20legislation%20in%20the%20era%20of%20AI%20and%20digitisation%20%E2%80%93%20study.pdf>.

⁴¹ See, e.g., Dag Wise Scharthum, *Sharing Information between Government Agencies: Some Legal Challenges Associated with Semantic Interoperability*, in S. VAN DER HOF AND M. GROOTHUIS (EDS.), *INNOVATING GOVERNMENT: NORMATIVE, POLICY AND TECHNOLOGICAL DIMENSIONS OF MODERN GOVERNMENT*, 2011, The Hague: T.M.C. Asser Press, 354–356 (integrating traditional legal analysis with AI systems).

It is crucial to acknowledge that legislation is a human product and, as such, is applied, interpreted, and enforced by human beings. The inherent “human factor,” with its inherent unpredictability, will always influence the actuality of legislative outputs, i.e. how potential legislative outputs evolve into actual legislative outputs. For example, the introduction of an activist judge to the Supreme Court has the potential to swiftly redirect the development of legal thinking concerning a specific legal category within a new legislative act. This shift can take the legal system in an entirely new and, from a systematic perspective, unforeseeable direction. Nevertheless, through a more profound and systematic integration of AI in the legislative impact assessment, especially when seamlessly connected to existing legal databases, the evaluator(s) gain the capability to more easily discern prevailing tendencies within the current regulation, its implementation and its adjudication. This evaluator’s enhanced capacity allows for a comprehensive assessment of how the new act will influence these legal trends, aligning with or deviating from the legislator’s intentions. In other words, the advanced analytical capabilities provided by AI contribute significantly to the evaluator’s ability to navigate complex legal landscapes, facilitating a more nuanced understanding of the potential impacts of the new act on existing legal tendencies.⁴²

5. Conclusion

The primary goal of this contribution has been to apply a legal theoretical approach to the procedures of legislative impact assessment, which are incorporated by many legislatures globally into the legislative law-making process: to evaluate the potential impact of an upcoming act on a community. Through this approach, it becomes evident that new legislation has a dual-stage impact on a community, regardless of whether these changes are intended or unintended. The new legislation is initially designed to alter the existing regulatory framework (legislative outputs). Only after this initial stage does it subsequently guide the modified regulatory framework to influence the addressees towards patterns of behavior (legislative outcomes), in the hope that such behaviors are aligned with the legislator’s intentions

⁴² See ABDI AIDID and BENJAMIN ALARIE, *THE LEGAL SINGULARITY: HOW ARTIFICIAL INTELLIGENCE CAN MAKE LAW RADICALLY BETTER*, 2023, Toronto: University of Toronto Press, ch. 8. See also GEORGIOS I. ZEKOS, *ADVANCED ARTIFICIAL INTELLIGENCE AND ROBOTICS*, 2022, Cham: Springer Nature, 329 (for a similar synergy between traditional arbitration practices and AI technologies).

(legislative inputs). This two-stage effect underscores the intricate nature of legislative impact, emphasizing the importance of evaluating the changes to the legal system and the subsequent behavioral patterns within the community as two interdependent but different potential effects of the legislation.

In conclusion, a legal theoretical approach not only provides a clear delineation of the various stages of legislative impact assessment, notably distinguishing the legal stage (assessment of legislative outputs) from the subsequent stages (assessment of legislative outcomes). This theoretical clarity establishes the “purely legal” moment as a necessary and autonomous condition for the entire evaluation process, incorporating key players (external legal experts), specific criteria (legislative compliance, uncertainty, and innovation), and tools (fundamental paradigms of the legal reasoning supported by AI). By first comprehensively assessing whether and to what extent upcoming legislation may have the intended effects on the current legal system (potential legal outputs), this “purely legal” stage lays the foundation for the subsequent evaluation. Only after this foundational assessment can the broader impacts on the desired legal outcomes—whether in terms of economic efficiency, social justice, or other objectives—be thoroughly analyzed. This sequential and systematic approach ensures a thorough and methodical legislative impact assessment, contributing to a more informed understanding of the potential implications of new legislation, both within and outside the legal world.