
IS LEGISLATION AN UNPRINCIPLED, INCOHERENT, UNDIGNIFIED MESS?

EDITORS' NOTE ON "LEGISPRUDENCE"

The second panel, "Is Legislation an Unprincipled, Incoherent, Undignified Mess?," considered the following issues:

Just as Congress is viewed as "the broken branch," legislation itself is commonly disparaged as an unprincipled, incoherent, and undignified mess (to recall Jeremy Waldron's book, *The Dignity of Legislation*). Are there other plausible pictures of legislation that portray it as more defensible? A new journal, *Legisprudence*, "aims at contributing to the improvement of legislation by studying the processes of legislation from the perspective of legal theory." What are the aspirations and prospects of "legisprudence"? What has it contributed, and might it contribute, to the improvement of legislation?

Thus, we invited consideration of the aspirations and prospects of "legisprudence." Professor Luc J. Wintgens is the founder of the *Legisprudence* project and the general editor (with Jaap Hage) of the *Legisprudence* journal. Because American legal and political science audiences may not be familiar with "legisprudence," we reprint here these professors' description of the project and journal from the website Center for Legislation, Regulation and Legisprudence, http://www.cwrl.be/eng/legisprud_journal.htm:

Legisprudence has a short history, but a long tradition. Many philosophers, from Plato and Aristotle on, have said their word on legislation. From Tacitus to Montesquieu, complaints about legislative quality were heard. However, the legal and political philosophy that guides current legal thinking never came to a systematic, theoretical study of legislation. The findings of legal theory are still, to a large extent, premised on the central role of the judge in the legal system. Although this approach may be applauded for having contributed to a more dynamic attitude towards the law, the role of the legislator remains largely underexposed.

Traditional legal theory takes the law as a given, and limits its theoretical undertakings to law as it is. Law, so it is said, is the result of political decision-making. Legislation as a matter of politics is not rational. Politics is believed to be a power game, resulting in compromises that are framed into a legislative or statutory structure. This power game seems to have its own "logic," the results of which most of the time outweigh any other form of logic.

Legal theory for its part is considered, from the perspective of politics at least, to be a “theoretical” approach to legal problems. It contributes to the description and systematization of existing valid law. It shows up, like Minerva’s owl, after the sunset of legislative activity. From that perspective, there is not much hope that legal theory can usefully intervene in the process of legislation or regulation, that is, before or during the creation of rules.

Criticism of this view is triggered by the exponential growth of today’s legal systems. Complaints about both the increasing volume of legislation and its decreasing quality in most European countries, have raised the question as to whether collaboration between legislators and legal theory can help to articulate and to solve that problem.

Therefore, this journal considers legislation from a different angle. The premises of the new approach are that, although legislation and regulation are the results of a *political* process, they can be the object of a *theoretical* study. Legisprudence focuses on the creation of law, a subject that has been largely underexposed until now. Its object of study is the rational creation of legislation and regulation. As to its method, it makes use of the theoretical insights and tools of current legal theory. Whereas the latter has been dealing most of the time . . . with problems of the *application* of law by the *judge*, legisprudence explores the possibilities of the enlargement of the field of study as to include the *creation* of law by the *legislator*.

Existing journals for legislation (e.g., *Zeitschrift für Gesetzgebung* (Germany), *Statute Law Review* (UK), *Leges* (Switzerland), *Regelmaat* (the Netherlands), *Legislação* (Portugal), *Iter Iuris* (Italy), *Tijdschrift voor Wetgeving* (Belgium), and *Harvard Journal on Legislation* (USA)) publish contributions that are mainly related to national law, or to technical aspects of legislation. Theoretical study of legislation is not their primary object. This justifies the creation of a new journal, with a new approach to both legislation and legal theory. Legisprudence aims at contributing to the improvement of legislation by studying the processes of legislation from the perspective of legal theory.

The content of the journal covers legislation in a broad sense. This comprises legislation in both the formal and the material sense (from national and European parliaments, regulation, international law), and alternatives to legislation (covenants, sunset legislation, etc.). It also takes in regulation such as pseudo-legislation, codes of behaviour and deontological codes, etc.

The journal is theoretical and reflective. Contributions to the journal preferably make use of an interdisciplinary method in legal theory. Comparative and system transcending approaches are encouraged. Sociological, historical, or economic studies are taken into account to the

extent that they are relevant from the perspective of interdisciplinary legal theory. Dogmatic descriptions of positive law, however, are not taken into consideration.

Articles preferably focus on systematic (as opposed to historical) issues, including (but not limited to): the utility and the necessity of codification, informatics in legislation, the use of scientific research in the creation of legislation, vague norms, the relation between law and language, creation and interpretation of law, fictions in legislation, the relation between the legislator and the judge, judicial review and problems of democracy, conflicts of norms from the point of view of the legislator, the exponential growth of legislation, evaluation of legislation, effectivity, efficacy and efficiency of legislative rules, multi-lingual legislation, access to legislation, constitutionalism, legalism, principles of legislation, rights and legislation, legislative technique, the concept of the state, separation of powers, the primacy of politics, regulation management, legitimation of law.

A new journal is a signal of the institutionalisation of a scientific field or theoretical domain. It identifies a scientific community characterised by an object of study. Legisprudence may be new in the sense that it has a short history. However, it has a long tradition that this journal want[s] to make explicit and uphold: the search for ever better legislation in a democratic society.

We also include a link to Professor Wintgens's article, *Legitimacy and Legitimation from the Legisprudential Perspective*, in *Legislation in Context: Essays in Legisprudence* (Luc J. Wintgens & Philippe Thion eds., 2007): <http://books.google.com/books> (search "Legislation in Context"; then follow "Legislation in context: essays in legisprudence" hyperlink).

For the symposium, we invited Professor Vlad Perju of Boston College Law School to write a comment on Professor Wintgens's article and on the Legisprudence project more generally. Professor Perju's comment follows.