

## Tilburg University

### Outlooks for Legislation

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*Published in:*  
RegelMaat

*Publication date:*  
1999

[Link to publication in Tilburg University Research Portal](#)

*Citation for published version (APA):*  
Eijlander, P., & Voermans, W. J. M. (1999). Outlooks for Legislation: Introduction. *RegelMaat*, (1999/3), 120-125.

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## Outlooks for legislation: Introduction

### 1. (New) insights into the nature and position of legislation in the Netherlands

According to the legislative scholar G.C. Thornton, the drafting of law, and legislation for that matter, is first and foremost an essay in communication.<sup>1</sup> Although Thornton was referring first of all to forms of immediate communication in legislation by way of language and legislative techniques, we tend to agree with him in more than one respect. Legislation can communicate on different levels. First of all, legislation expresses messages in the form of legal norms that can or do guide the behaviour of the subjects of these norms. In another respect, legislation may express values which fulfill – for instance as a common term of reference – an important role in societal relations and political debates. On the other hand, legislation may be used to reconcile differing points of view, it can be used by government as an instrument to achieve policy goals or communicate policy objectives, etc.

The idea of legislation as a communicative arrangement is not new,<sup>2</sup> but, at least in the Netherlands, it met with renewed interest during the last decades when fundamental legislative problems threatened to affect the effectiveness of legislation severely. Increasing

problems concerning the implementation and enforcement of statutory law, problems of overregulation, the inability of political and legislative processes to effectively tackle societal problems, the overburdening of the judiciary and the poor quality and intelligibility of laws triggered many practical and theoretical discussions on the position and meaning of legislation in the Dutch system. In the field of day-to-day legislative practice, most of these discussions focused on the insufficient interaction and understanding on behalf of the legislature of the nature and dynamics of social processes, the poor quality of legislation in different respects, overregulation and the legal, societal, political and administrative standards<sup>3</sup> that should be met by legislation. It was commonly felt that the possibilities of legislation as an instrument of societal change had been overrated in the recent past, with detrimental effects on the effectiveness of legislation. Therefore, new legislative policies were adopted in the Netherlands with a more realistic and modest concept of the potential of legislation to govern society and the identification and implementation of quality standards to improve the effectiveness and quality of legislation.<sup>4</sup>

The Dutch theoretical discussion on the – changed – meaning and position of legis-

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1. G.C. Thornton, *Legislative Drafting*, 3rd edition, London 1987, p. 1.
2. It is in fact antique. Plato already had a keen eye for the communicative aspect of legislation as is demonstrated in the scene in his book 'The laws' where Socrates relates his discussion with the laws of Athens, when he is considering the suggestion of a flight from prison to avoid conviction. See Plato, *The Laws* (translated by Trevor J. Saunders), Harmondsworth, Penguin Classics, 1970.
3. See, e.g., *Zicht op wetgeving (Legislation in Perspective)*, The Hague 1991, also published in the Dutch Parliamentary Papers, *Kamerstukken II 1990/91*, 22 008, nr. 1-2.
4. Cf. J.H. van Kreveld, 'The Main Elements of a General Policy on Legislative Policy: Dutch Experiences', in: A.E. Kellerman, et al. (eds.), *Improving the Quality of Legislation in Europe*, The Hague/London, 1998, p. 85-100.



lation lags somewhat behind on the discussions and activism in legislative practice.<sup>5</sup> Until recently, a lot of legislative problems were studied mainly as *legal problems*, which could best be tackled by using methods of legal research. A strictly juridical point of view, however, does not do full justice to the specific character of problems of legislation.<sup>6</sup> Problems of legislation – also those in legal practice – do not primarily concern purely juridical questions, but rather questions as to how, through legislation, certain social patterns, relations and institutions can or will be influenced; how, through legislation, law can best be shaped and expressed; and in what way legislation can best be implemented and enforced so as to ensure that laws are observed. To answer these questions, it is insufficient to draw on law or jurisprudence only; other disciplines will have to be consulted as well.<sup>7</sup> Problems of legislation and legislative studies are inextricably linked with legal-theoretical, political, social, sociological and policy problems.<sup>8</sup>

## 2. Object of this RegelMaat special

This special issue of RegelMaat, a Dutch journal dedicated to legislative study and legislative issues, deals with some of the most recent insights into the nature of legislation which have emerged, more or less in an interaction between Dutch legislative politics, in Dutch legislative studies. One of these most recent insights that resulted from legislative research with an integrated approach (i.e. not merely or predominantly juridical) is that legislation is a communicative arrangement on different levels and in different respects. It is not so much the insight that legislation is a communicative arrangement that is new, but rather the understanding of the nature and the dynamics of the communicative processes that are linked to or

caused by legislation. In this issue, we will explore some of these communicative dimensions in order and inform both legislative practitioners and legislative scholars. The deeper understanding of the communicative implications of legislation is equally important for practical and for theoretical purposes. More insight into the nature, meaning and effects of legislation will help the legislature in creating laws that better fit and address the problems they try to address. The better understanding of the position and meaning of legislation itself and the result in the form of possible 'theoretical timber' are the rewards for legislative theoreticians.

In order to have a somewhat representative spread of approaches, the guest editors of this issue invited different legislative scholars to assess the impact of recent legislative developments in the Netherlands on theoretical insights into the meaning and position of legislation. In addition, we asked them to try to assess the implications of their findings for the day-to-day practice of legislation. The authors have succeeded wonderfully in tackling this complex assignment. The result is an issue which is both rich in theoretical analysis and practical guidelines for legislators.

### 2.1. Witteveen and Van Klink: a communicative style of legislation

Willem Witteveen and Bart van Klink, both researchers at the Centre for Legislative Studies at Tilburg University – the coproducer of this special issue – introduce the concept of communicative legislation in their contribution: 'Why is Soft Law Really Law?' A Communicative Approach to Legislation. What does a communicative approach consist of? Traditionally, legislation has two basic functions within Western democracies. On the one hand, legislation is

5. Cf. W. Voermans & Ph. Eijlander, 'Working out the Fundamentals for a Border Crossing Post-Instrumental Doctrine on Legis-Prudence', in: C.A. Morand (ed.), *Légistique formelle et matérielle (Formal and Material Legistics)*, Presses Universitaires d'Aix-Marseilles, Aix-en-Provence 1999, p. 47-60.

6. Cf., e.g. Ph. Eijlander, *De wet stellen*, PhD (diss. Tilburg University), Zwolle, 1993.

7. It was Peter Noll who, already in 1973, pointed out that in the academic study of problems of legislation – legislative studies – a merely juridical approach is insufficient. Cf. Peter Noll, *Gesetzgebungslehre*, Reinbek bei Hamburg, 1973. See also Ph. Eijlander & W. Voermans, *Wetgevingsleer (Legislative doctrine)*, Deventer: Kluwer 1999.

8. Cf., e.g. Ulrich Karpen, 'Introduction; Legislation and Legistics in European Countries', in: Ulrich Karpen (ed.), *Legislation in European Countries*, Nomos Verlagsgesellschaft, Baden-Baden 1997, p. 11.



an instrument – usually controlled by government – for influencing social behaviour or social relations, patterns and institutions in such a way that they conform to a certain (policy) direction. On the other hand, legislation has a ‘safeguarding function’ for that government or a powerful social agent comparable to government: through legislation, claims and rights can be legitimised and ensured. This pattern of meaning, however, has proven not to be comprehensive. Present-day legislation is more than a warrant for citizens to safeguard them from governmental interference or a mere instrument for government to attain policy goals. Legislation also represents a value *in se* as a means of normative communication and interaction between the legislature and legislative subjects. We have expectations of legislation and act upon these expectations. If legislation does not have a minimal normative basis in the community it is meant for, it will prove very difficult, if not impossible, to uphold it. On the other hand, if the legislature is successful in communicating the message that a certain norm or piece of legislation is vital, subjects will readily abide by it, even if there is no real punitive sanction for offenders within the law itself. Legislation can be a very powerful symbol.

In their contribution, Witteveen and Klink illustrate this communicative function of legislation by discussing an example of the effectiveness of forms of soft law. Soft law is law that is characterized by the fact that it does not give very clear or direct guidelines/rules or confer competence, or does not have well defined sanctions. Still, soft law can be as effective as ordinary ‘hard’ legislation or even more so. Klink and Witteveen try to get to the bottom of this phenomenon and try to draw lessons from this communicative effect of legislation. Is it possible to develop a communicative style of legislation? Under which, if any, conditions may this communicative style be rightfully as well as effectively used in legislation? What tech-

niques can be used to improve the communicative aspects of legislation and what are the conditions that govern the success of communicative legislation? These and more questions relating to the communicative style of legislation are dealt with. Both for the analysis and for the outcome, Witteveen and Van Klink use illustrations derived from Dutch anti-discrimination law, which, in some respects, is largely ‘soft law’ and strongly communicative in character.

## 2.2. Dorbeck-Jung: realistic jurisprudence

Bärbel Dorbeck-Jung – researcher at Twente University – chooses a different approach. She tries to understand the basics of the legislative policies in the Netherlands during the last decade, and especially the ‘good quality’ standards that were adopted as a result of these legislative policies of the early 1990s.<sup>9</sup> Many (of the) practical quality standards in the Netherlands are specified in the Directives for Regulations.<sup>10</sup> On the basis of these Directives, and in line with departmental practice, ten main requirements can be distinguished. They are: necessity and proportionality (1), consistency with superior law (2), respecting the primacy of Parliament (3), stability and predictability (4), compliance, applicability and enforceability (5), effectiveness (6), consistency and coherence within the whole body of legislation (7), simplicity, clarity and transparency (8), based on careful consideration of all relevant facts, interests and alternatives (9), easily accessible to the public (10).

In her contribution, Dorbeck-Jung discusses the function and role of these practical quality standards within the legislative process, as well as their basis. These insights are then compared with already existing theoretical concepts related to the quality of legislation, especially Nonet and Selznick’s concept of responsive regulation.<sup>11</sup> The core idea underlying this responsive approach to law, according to Dorbeck-Jung, is that of *purposiveness*. This means that law concen-

9. Most of these quality standards were formulated in the policy memorandum of the Dutch Minister of Justice, *Legislation in Perspective*, The Hague 1991. See also note 3.

10. *Directives for Regulations (Aanwijzingen voor de regelgeving)*, regulations for legislative drafting issued by the Prime Minister, November 26, 1992, *Dutch Government Gazette* 1992, 230 (in effect on January 1, 1993).

11. P. Nonet & P. Selznick, *Law and Society in Transition. Towards Responsive Law*, New York 1987, p. 73.



trates primarily on social needs and resources; i.e. the purpose of law is to deal effectively with social problems in order to realize substantive justice. In line with its problem-solving aspirations, responsive law does not primarily focus on legislation or legal rule-making. Since regulation concerns various modes of government control (such as information and the allocation of resources) as well as self-regulation, legislation is only one way among many to implement public policies. If social problems can be solved more effectively by means of private control, self-regulation is given priority. Assuming that negotiation, dialogue and compromise can contribute more effectively to problem-solving than hierarchical legislation, Nonet and Selznick advocate a prudential strategy of regulation.

This same strategy of alternative solutions and regulation as a last resort and 'additional' means of solving problem also underlies some of the Dutch Directives for regulation (especially the **directives** in section 2.1). Dorbeck-Jung tries to determine the impact and meaning of this confrontation between theory and practice. She concludes that the confrontation offers basic ideas of *Realistic Legisprudence*, which, according to Dorbeck-Jung, is an applied theory of legislation that aims to provide rationally based recommendations on the quality of legislation. As such, *Realistic Legisprudence* seeks to motivate, facilitate and guide the (*ex ante* and *ex post*) evaluation of legislation. To put the ideas of Realistic legisprudence to the test, Dorbeck-Jung compares the quality standards derived from the Realistic legisprudence model with the practical quality standards the Dutch Directives for Regulations. The comparison shows that the recommendations offered by *Realistic Legisprudence* cover more aspects than just those of structure and effects of legislation as the Directives do; they also refer to the quality of the regulation process. When emphasizing the importance of standards of control and correction, the responsive quality standards draw attention to the need of a refined system of checks and balances that is a major subject in the current debate on Dutch legislative policies.

### 2.3. De Jong: understanding the logic of the legislature

A distinctly different perspective on communicative interaction between the legislature and norm subjects is adopted by Huib de Jong, a legislative scholar at Twente University. He argues that more empirical research on the logic of the legislature is needed, especially since there is an ongoing legitimacy crisis threatening the effectiveness of law and legislation. In liberal democracies, the claim for legitimacy is based on a fundamental structure that enables open discussion, aimed at consensus on the best response to a particular type of social challenge and the effective execution of the response that is eventually decided on. Although an exact measure for the success or failure of this claim is lacking, there are many signs that in certain parts of society its effectiveness has decreased. The problem of legitimacy is, as De Jong argues, also a problem of responsibility, the essential mechanism that links the ideational and the operational levels of liberal democratic constitutions.

Empirical research on the logic of the legislature's claim for legitimacy requires a specific research strategy. To this end, De Jong applies the theory of argumentation. In particular, he looks at that part of the theory that deals with 'informal' or applied logic. This is the part that is most relevant to the processes of communication that constitute the 'hard core' of the legitimacy problem. In addition, this approach is more suitable for the analysis of legislative processes.

In order to link empirical research on the logic of the legislature to its claim for legitimacy, insight into the nature of the claim is required so De Jong subsequently adopts a research strategy that enables him to describe and explain actions and to evaluate them. De Jong defines legitimacy in terms of the moral justification of governance. In order to describe and explain the standards and procedures of the legislature, he uses the theory of argumentation, which allows him to concentrate on the analysis of language and its role in the exchange of ideas in certain practices. The whole purpose of the theory of argumentation is to provide insight into the characteristics of linguistic actions and the



criteria for their soundness.<sup>12</sup> The latter part of this theory focuses on the possibility of discussion as a requirement for collective decision-making in a liberal democratic political society.

The result of De Jong's analysis and quest is that moral quality, plurality of the social environment, and the dynamics and the institutional setting of reasoning are essential elements of a theoretical framework. He embraces the position of Toulmin, who sees the argument as an organism that changes over time, depending on the exchange of moves in the discussion and the circumstances of the debate.<sup>13</sup> De Jong adds this concept of learning to the preceding essential elements of argumentation, as well as the general and more detailed version of the structure of arguments. He also adds the element of dialogue which is lacking in Toulmin's model.

At the end of his contribution, De Jong argues that empirical research on the logic of the legislature is indeed required, and that he has designed a suitable research strategy for this type of research. The understanding of the crucial role of responsibility in liberal democracies lead him to a rejection of symbolic logic and the acceptance of 'informal' logic, which focuses on the habits of reasoning and justification. With research based on De Jong's methodology, it is possible to obtain more analytical insight into the extent to which a legislative process is really characterized by openness of the debate and aimed at a consensus that results in a moral acceptance of a collective decision. It is important to make haste with this kind of research, according to De Jong, because its results may contribute to a higher quality of the claim to legitimacy by the legislature. On the other hand, the complexity of the theme calls for a careful gathering and analysis of data. It is therefore important to make haste, but also essential to tread carefully.

### 3. Outlooks for legislation

This special issue of *RegelMaat* by no means

gives a comprehensive or even representative account of recent developments in Dutch legislative practice or theory. It merely hints at some of the most interesting legislative developments, legislative research and possible practical implications in the Netherlands. Notwithstanding these substantial limitations, *RegelMaat* – a journal which tries to inform legislative practitioners and theoreticians alike – considered it of great importance to unveil some of the Dutch insights and legislative developments for a national and international forum.

Current legislative problems and – therefore – legislative studies in different western democracies are very similar, especially those within the member states of the European Union. The still increasing economical, political and legal co-operation in Europe and the ever growing interdependencies between European countries generate similarity of legislative problems. Overregulation, enforcement and implementation problems of legislation, the inability of political and legislative processes to effectively tackle societal problems, the overburdening of the judiciary and the poor quality and intelligibility of laws – to name a few of the most pressing legislative Gordian knots – pose problems throughout the European Union. The fact that most European countries are organized as democratic constitutional (*Rechtsstaat*) welfare states, and share a lot of roots in their historical development means, however, that much can be learnt on all sides from legislative studies amongst European Countries by way of *legislative* comparison. Insights into the nature and cause of shared legislative problems may even be helpful in solving problems and dilemmas which face the legislators of the European Union. The interest of the Union in traditional legislative issues like deregulation, enforcement, implementation, and quality, more effectively tailoring legislative processes to societal needs, etc., is rising, judging by the Edinburgh and Amsterdam EU conferences.

Until recently, legislative doctrine and

12. Cf. Frans H. van Eemeren & Rob Grootendorst, 'Ontwikkelingen in de argumentatietheorie', in: Frans van Eemeren & Rob Grootendorst (red.), *Studies over argumentatie*, Amsterdam/Meppel 1997, p. 11

13. Stephen Toulmin, *The Uses of Argument*, Cambridge 1991.

legislative studies in Europe have been quite nation-oriented: different countries developed their own foci and doctrines in the field of legislative studies. In many European countries, the emancipation of legislative studies, as a distinct discipline with an independent status, which differs in nature from traditional legal studies, has come about only quite recently. The tradition of sharing and exchanging legislative research results has set in also relatively recently. Associations like the European Association of Legislation

(EAL) and the Association Internationale de Méthodologie Juridique (AIMJ) have only just recently been pioneering in the field of legislative comparison and joint legislative research.

Together with the coproducer of this issue – the Tilburg Centre for Legislative Studies – we express the hope that this *RegelMaat* issue may contribute to both the international exchange of legislative knowledge & skills and to international initiatives for joint legislative research.