HUMBOLDT FORUM RECHT
- Die juristische Internet-Zeitschrift an der Humboldt-Universität zu Berlin -

HFR 4/2015 ISSN 1862-7617 Aufsatz

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Parliamentarism, Legislation and Legisprudence in the Constitutional State

Legisprudence as an academic discipline has only recently gained recognition among the scientific community. This paper evaluates the importance of legisprudence in the constitutional state and outlines the different perspectives of legisprudence on legislation. Notably, the author considers current and future legisprudential challenges concerning supranational legislation, such as EU Law, and emphasizes on a comparative perspective in legisprudence.

1. What this paper intends

1 The modern state faces an inflation of laws and other regulations. Many of them are imperfectly, even badly drafted. 'Legistics' or 'legisprudence' as research, teaching and learning of law-production tries to reduce quantity and improve quality of norms. It deals with analysis of norms, organisation and procedure of norm-setting, namely in parliament, the content of law, legislative techniques and proper monitoring as well as the effective implementation of regulations. The paper wants to contribute to 'better regulation' as an essential element of 'good governance'. It presents a survey of problems and possible solutions, mainly – although not exclusively – from the point of view of the constitutional state of the Western tradition, shaped by Human Rights, democracy and rule of law.

2 Legislation today is still predominantly a national matter. However, supranational regulations, e.g. EU Law, and global ones, like in international economic and environmental law, are implemented. To render this multi-level system of regulations more transparent, comparative law efforts are required. Steps towards unified legislation have been taken.

3 The principles of good legislation, which are presented here, are the results of 'good practice'. The comparative perspective might widen our horizon. One of the well-known aphorisms of the psychiatrist Scott Peck suggests, 'that we should share our similarities and celebrate our differences'.[1] If we understand why and how others – in applying common standards – legislate differently than how we do, we are encouraged to compare and learn and to improve our methods, or to retain our own legislative style.[2]

2. Legislation and Legisprudence

2.1. Laws and Other Regulations

4 Laws are general, abstract norms as opposed to decisions in a particular case. The law is the primary and central instrument of government in a democratic rule-of-law state. The law regulates organization and procedure of state institutions, protects individual freedoms and serves as the single and most important instrument to distribute and allot social expenditures. The subject of legisprudence, however, refers to law-making in a broader sense, i.e. regulation. 'Good regulation' is the key issue of 'better

[1] See W Voermans, 'Styles of Legislation and Their Effects' (2010) *32 Statute Law Review* 38.
[2] See U Karpen, 'Comparative Law: Perspectives of Legislation' (2012) *6 Legisprudence* 149 - 189.

government' which the modern state is in need of.

S. 43

5 2.2. Legisprudence

Legisprudence (legistics, legistique) looks into the whole regulation cycle, from impulse to amendment. It does so as analysis of norms, as research and practice on organisation and procedure, further on by describing methods for policy- and adequate goal-setting, as well as choice of effective and efficient means of regulation and with the intent to regulate on matters in a precise, clear, understandable form and by applying technical instruments for better regulation, like references, settlements or codifications, in order to keep the body of law small and transparent. Legisprudence deals with the key questions: Who legislates? Why do we legislate? How does one legislate? Legisprudence is an interdisciplinary theoretical and practical science. Juridical sciences, economics, social and political sciences, philologies, information theory and cybernetics cooperate to better understand and improve legislation, to facilitate the implementation of constitutional values and laws, and 'social engineering'. Legisprudence – first – is a theoretical science. It is descriptive, applying the hermeneutical methods of humanities. It writes and interprets legal texts and uses empirical methods of social sciences. Secondly, legisprudence is a practical science as well. It is prescriptive and normative. As a practical science it does not primarily accumulate knowledge, but wants to direct actions and support good legislation. Thinking about legislation strives at political rationality. Politics need to gain (and keep) democratic legitimation in order to realise policies by legislation. Finally, legisprudence deals with handicraft or even arts, and – at its best – requires intuition, talent and gift. 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among them are life, liberty and the pursuit of happiness.' These well-known words of the American Declaration of Independence are an outstanding piece of legislation, and G.K. Chesterton did not hesitate to evaluate it as 'great literature'.[3]

6 2.3. Good governance, Better Regulation, Better Legislation

The practical side of legislation, namely the policy elements of planning and decision-making in the legislative process, have been neglected for a long time. It is obvious that legitimation of law does not come from rationality of its matter, but from democratic sources. Parliament and government as legislators need majority support of the people. At its best, rationality and majority coincide as a solid basis for implementing the law. If this is not the case, majority vote in politics takes precedence. This is one of the main reasons why legisprudence in recent times is more interested in the broader approaches of 'good government' and 'better regulation' – better policy. In the focus of 'better legislation' it cooperates in reducing quantity and improving quality of legislation.

S. 44

7 The term 'better regulation' is more oriented towards political management. The evaluation of political bodies, like states, measures the steering capacity of governments and institutions of society on their way to democracy and social market economy. Legislation is just one instrument of regulation among others, like (financial) support, subsidies, contracts and various forms of coordination and cooperation.[4] As 'better law-making', legisprudence strives at reducing the number of statutes and improving transparency of legal systems as well as increasing their efficacy, effectiveness and efficiency.

8 Much has been written on the quantity of modern legislation. For example, take the

[3] Ibid, *What I saw in America* (New York, Dodd, Mead and Company, 1922) 7.
[4] See 5.2 below.

enormous body of European law, the so-called 'acquis communautaire'. It covers 30.000 legal acts (from primary treaties and secondary regulations to guidelines) as well as 10.0000 judgements of the European Court of Justice and 4.000 international agreements. All in all, there are more than 120.000 pages of law which are binding the member states and their citizens. Reason for this deluge of laws may be the increase of public tasks in welfare and intervention states, technology, juridification of many areas of life. Undoubtedly, excessive legislation is a criterion of quality - deficits, for laws which one cannot know or does not understand, cannot be effectively implemented.

9 **2.4. Comparative Legisprudence as a Tool of 'Better Legislation'**

Comparative law is an essential element of theory and practice of legislation, in particular in search of methods for better regulation. This is particularly true for comparative constitutional law. Constitutional law covers principles of the democratic rule-of-law state which determine procedure and contents of legislation and laws. These standards are separation of powers, and (partly) federal decentralization on the one hand, human rights, social and ecological state requirements on the other. Styles of legislation, methods of interpretation and implementation may differ significantly: civil and case law, codes or precedents, deductive or inductive methods of understanding the body of law. The main elements of national constitutions – as well as the treaties of the EU – are, however, comparable, if not identical. The growing integration into European law supports this convergence as well as the requirements of the subject matter. The latter is particularly true for tax-, social security-, building-, environmental- and food legislation. On national, supranational and international levels one would find well-known 'clubs of experts' on any given subject, who, of course, intensively influence legislation.

S. 45

10 Transition from harmonization of law in contents and style to unification is inevitable and desirable. Constitutional provisions allow for streaming in of supra- and international law into national law, even transfer parts of legislative sovereignty onto transnational levels. One important goal of that emergence of 'open states' is to foster peaceful cooperation. The EU itself is a 'communauté de droit', with legal principles, statutory law, rules, standards, best practices – all in all 'general principles common to the law of the member states'.[5] And more than that: international standards, rules, best practices emerge. Issues of health protection, trafficking in human beings and drugs, new techniques (information and computer technology, biotechnology) require political and legal cooperation. It is difficult to manage this new situation with case law. So the body of statutory legislation is increasingly in disfavour of judge-made law. In contract law, social security law and labour law universal rules are being developed.

11 **3. Process of Legislation**

3.1. Competences, Organisation and Procedure of Legislation

The first question must be: who is the legislator, be it in a multi-layer system or in the frame of a national state constitution. Three principles of organisation and procedure have to be taken into account. First, there is the vertical separation of powers. In some states legislative competences are left to the centre and subnational units, like the states in the USA and the Länder in Germany on the one hand, the cantons in Switzerland, the regions in Spain or other autonomous bodies. Similarly, on the vertical axis there are three layers of legislation: national, supranational and international. Second, on each level there is a horizontal separation of powers. On the national level, all three branches of government are actors in legislation: legislative, executive and even the constitutional judiciary. On the supranational (European) or international level, separation of powers is not fully developed yet. In the EU, democratic progress has been accomplished by more participation of the European Parliament in legislation.

[5] Art 340(3) TFEU.

The 'legislators' are the European Council, the European Commission and the European Parliament; the executive are the European Commission and the judiciary (e.g. the European Court of Justice). The same – not fully developed horizontal separation of powers – is even more true on the international level[6] and its procedure as being the central function of government is characterised by cooperation of all its branches and units. Cooperation, however, is obviously needed in the horizontal direction, like 'cooperative federalism'. It is, therefore, legitimate to speak of a network of decision-making processes in legislation.

S. 46

12 3.2. Legislation in Multi-level Systems

Public tasks are accomplished primarily on a national level. According to national constitutions, competences are split and partly attributed to central as well as deconcentrated or decentralized lower levels. In unitarian, although deconcentrated, states – like the Netherlands, Sweden and Hungary – all legislation derives from the highest level, in contrast to administration. Federal systems are pluriform. Austrian federalism is weak, German federalism much stronger. In Switzerland, the subsidiarity principle is taken very seriously, in the USA the state exists in very different and vivid subnational constitutional spaces. Hence the distribution of legislative competences varies pretty much.

13 There are adversary trends in distribution of legislative competences: unitarisation and decentralisation. In all vertically structured systems socio-cultural unity in a shrinking world is a predominant factor. On the other hand, democratic participation could easier be managed in regional units, which citizens can oversee, participation of people is an engine for more decentralisation, which could be observed in the Scottish and Catalonian referenda.

14 The European Union as the legislator above the member states' ones is sort of a 'state in being', whether a supranational federation or how one prefers to call it. EU legislation more and more acquires the status of constitutional law, mainly by way of the decisions of the two European courts. European Parliament and Council are entitled to authorise the Commission to legislate, but only under strict preconditions of delegation. We are witnessing the emergence of a European constitutional and administrative space already. In addition, an ever-increasing internationalisation of legislation takes place, by virtue of coordination, consultation and cooperation. These are gateways for opening national and supranational law to international legal orders, like the UN, ILO, WTO etc. These organisations, in general, do not produce binding law, as statutes, but rather 'soft law'.

15 3.3. Organisation of Legislation and Separation of Powers

Legislation is primarily a responsibility of parliament. The initiative for law-making rests in most countries with the government. Parliament adopts statutory laws (and international treaties) and approves the budget. The principle of statutory reservation (réserve de loi) requires parliamentary legislation for any administrative encroachment on human rights. Sub-legal regulation in most countries requires authorisation by statutory law. From the floor of the house initiatives may originate. Every parliament has structures for division of work (like committees, caucuses, parliamentary services etc). Parliament in many countries consists of one chamber, in others there is a second one.

[6] C Möllers, *Gewaltengliederung, Legitimation und Dogmatik im nationalen und internationalen Vergleich* (Tübingen, Mohr, 2005) 253.

S. 47 - HFR 4/2015 S. 6 -

16 Some countries (like Denmark, Sweden and Iceland) abolished the bicameral systems for reasons of transparent democratic legislation and better functional efficiency. Second chambers are often federal/regional representations; otherwise they represent professional, social or economic groups of society or are elements of a corporate state (as is the Irish Senate). In countries with direct-democratic elements, the people participate in adopting constitutional and statutory laws and to some extent may even initiate legislation: Switzerland has the strongest form of referenda. Direct democracy is an addition to parliamentary action. However, without a parliamentary basis and support a referendum-democracy cannot function. To initiate a facultative referendum, in addition to obligatory ones, is very often a 'threat' used in political debates. Anyway, referenda are increasingly appreciated as an innovative procedure for fostering participation of the citizens in the decision-making process.

17 Government, one of its responsibilities being to set guidelines for policy, initiates most drafts. It requires laws (and the budget) for running the country. Some constitutions have a catalogue of government functions, others do not, but undoubtedly planning and coordination of state functions includes directing legislation. Laws are mostly drafted in ministries and approved by cabinet. In the UK, the Office of Parliamentary Counsel in the Prime Minister's office realises the government's programme in drafts.7 Courts and other state organs may have a 'negative legislative competence' in the sense that they are entitled to declare a law void or to refuse the application of a given law in a single case. This is a 'juridification of legislation' (juridification progressive des règles de methode législative).[8] Juridicial review of laws is a tool for protecting the constitution, a curb-stone of precedence of the constitution as a basic law.

18 **3.4. Legislation in the Regulatory Cycle**

Laws are drafted, adopted, implemented and – if needed – amended in a multi-step procedure, in which all constitutional organs, as mentioned above, participate.[9] The main steps are: impulse, analysis of the social problem, policy-setting, definition of targets and instruments of regulation, drafting, initiating, deliberation and adoption of the draft in parliament, implementation, monitoring of implementation, amendment – if necessary – in a new procedure.

S. 48 - HFR 4/2015 S. 7 -

19 The regulatory cycle includes, in short, four phases: drafting and initiating, deliberation and adoption, implementation and enforcement control, and amendment. The basic structures of the legislative process are part of the constitution. Details are regulated on in rules of procedure of parliament and government. Governments and (constitutional) courts have established directives for good legislation: to check the facts in detail, to make a sound prognosis, to balance the interests at stake, to carefully monitor the impact of regulation, to induce amendments (if required). This catalogue is applicable in every modern legislation, including European legislation.

20 In the EU, the Commission has the monopoly for initiatives in Council and Parliament. Deliberations and adoption of the drafts are the responsibility of Parliament. In general, in between first, second and third reading in the plenary, work in detail takes place in the committees. There may be hearings. According to the constitution of the country the draft may be transferred to the second chamber (if there is any). In some states, if the decisions of both chambers diverge, a Joint Committee is set up to reach a compromise. A referendum may be mandatory or optional. Then the draft is signed, in general by the head of state, promulgated and published. Effective implementation is

[7] J Bates, 'United Kingdom' in U Karpen (ed), *Legislation in European Countries* (Baden-Baden, Nomos, 1996) 542.
[8] CA Morand (ed), *Légistique Formelle et Materielle, Formal and Material Legistics* (Aix-en-Provence, Presses Universitaires d'Aix-Marseilles, 1999), 39.
[9] See 3.2 above.

the predominant quality criterion of every law. Transformation and implementation of EU law is, in general, an institutional and procedural matter of the member states, which distribute competences to levels, organs and institutions, according to their own constitutions. As a 'watchdog of the treaties', the Commission is responsible for ensuring the union-wide effective implementation of European regulations. It is primarily the Parliament itself which monitors the effective implementation of laws. It keeps its 'legal production under control', by obliging governments to regularly report on the effects of the law, by 'sunset legislation' or by regular consolidation of law. In some countries – like the Netherlands, Germany and others – an independent body undertakes an evaluation, a Regulatory Impact Assessment (RIA),[10] which analyses, e.g., bureaucratic burdens, environmental costs etc. Finally, there is the supervision of laws by just applying them: by courts, administrative bodies, lawyers, as well as by law schools who deal with them in theory and practice. The same is true for offices of ombudsmen.

21 In view of the rule of law and legislation as well as obvious deficiencies of representative government there are two main challenges for the legislative process: transparency and participation. Modern information and communication techniques facilitate the distribution of facts and knowledge; they are, however, only partly exhausted. Procedures of preparing and adopting laws are often extremely accelerated. Language and form of the final product may be poor and indigestible, in other words: intransparent. Examples are national security acts after 9/11 or financial packages 'to save the Euro' (ESM) or 'new energy' legislation after Fukushima. Better participation should help to avoid that sort of legislation and bring in expertise and opinions of legal academics, legal practitioners and 'intermediate agents', like interest groups (e.g. autonomous bodies of local self-government, the media and other stakeholders).[11]

S. 49 - HFR 4/2015 S. 8 -

22 **4. Policy-Making, Targets and Instruments of Legislation, Evaluation**

4.1. Policy-Making

The next focus is on 'why' legislating. This part deals with the purposes of a legal project, the programme (policy), the intent (objectives, legislative targets, goals) of a law and the instruments to realise it. The first step in preparing regulation must be a political directive of government (policy). The red rope of the project should be determined. The drafter requires the main lines to be drawn in order to understand what is the intended legal situation. It is vital that the legal project fits into the governmental programme. A political directive reacts to a problem – impulse, a thorough analysis of a deficit, wherever it originates. To put it simply: 'What is the matter? Why is governmental action needed? Where is the problem?'[12] Diagnosis and corresponding policy-setting should follow a 'policy checklist': What is the proper reaction to the problem? Is the best solution to enact a law? Who are the stakeholders? Which sociological, economic or cultural factors have to be taken into account? In particular, a feeling for the 'managables' is required. To bring it to the point: 'Policy-making is not a topic (only) for lawyers.'[13]

23 ### 4.2. Targets of Legislation

Within the established policy frame, the possibilities of regulation have to be considered. This means, in fact (if a law is indispensable), setting the targets for drafting. It is necessary to choose an option for tackling the problem: cause- or system-oriented, punctual or comprehensive, preventive or repressive? The 'goal' of

[10] See 4.4 below.
[11] C Bergeal, *Rédiger un Texte Normatif*, 6th edn (Paris, Berger-Levrault, 2008) 206; the Dutch *Woestinwet ('Law of the Desert')* of 1995.
[12] Gesetzgebungsleitfaden, *Leitfaden für die Ausarbeitung von Erlassen des Bundes*, 3rd ed (Bern, Bundesamt für Justiz, 2007) 113.
[13] K von Beyme, *Der Gesetzgeber* (Opladen, Westdeutscher Verlag, 1997) 73 ff.

the law is often mentioned in the preamble, mostly in the arguments or even in the form of a directive norm in the text itself.

24 **4.3. Instruments of Legislation**

The legislator often prefers causal steering of economy, society, actions of administrative agencies. In view of some scepticism versus 'planning and steering', government may choose directives. In this case, the law is binding, as to the results to be achieved, but leaves room as to the choice of measures, forms and methods to the authorities implementing the law.[14] Other instruments of legislation may be of a benefiting, stimulating or prohibiting or even punishing nature ('carrots and sticks').

S. 50

25 **4.4. Evaluation**

Legisprudence is interested in policy-making, the decision-making process for intent and instruments in a procedural sense, but as well in developing value criteria for effective and efficient legislation; all in all: 'good legislation'. This requires some considerations on standards and an evaluation of quality.[15] The constitution of a rule-of-law democracy includes material and procedural principles for legislation.[16] The contents of laws must be oriented to public welfare. It should apply constitutional values like social, ecological and cultural state targets. Subsidiarity and proportionality are to be obeyed on all steps of approaching legal goals, formulating contents or choosing instruments for implementation. Goals and instruments are evaluated against three criteria: conformity with the constitution and law, effectiveness and trust.[17]

26 Every piece of law, first, has to obey the organic constitution and international law as well as the dogmatic constitution (structural principles and human rights). Second: Important criteria of a qualified law are efficacy, effectiveness, efficiency (the 'three E's'). A law has a high level of efficacy if it – when implemented – comes closer to the legislator's intent. The seat-belt-fastening duty, e.g., was intended to reduce accidents with lethal or severe injuries. As far as one knows, the belt has had that effect. A law, moreover, is effective if it is implemented, executed and obeyed by as many addressees as possible. The seat-belt-provision is plausible and complied with by most drivers. There remain, of course, sociological and psychological questions why this is more or less true in different countries.

27 Efficiency, thirdly, is economic rationality, a positive cost-result (input-output) relation. The regulation is efficient if the result – i.e. reducing the number of severe traffic accidents –, is accomplished cheaper than with other measures, like better road-building or increased railway-transport of cars. This seems to be the case. This does not exclude, however, alternative (legal) action, so that more input – like road-building and/or speed limits and railroad transport – leads to a more effective – i.e. more significant – reduction of severe accidents. Effective regulation, thirdly, is built on trust. Trust is an important resource of stability which combats frequent legislation to amend, adjust and repair law as enacted. Trust contrasts a 'motorised legislator'. Undoubtedly, the reduction of 'legalisation' in all European states is a mandate of the time. Combating the deluge of laws is an aim of debureaucratisation.[18] Instruments of New Public Management, devolution, decentralisation, co-regulation – all sorts of participation – contribute to that end.

[14] e.g. Art 288(3) TFEU.
[15] P Popelier, *De Wet: Juridisch bekeken* (Brugge, Die Keure, 2004) 23 ff.
[16] European Commission, *Better Regulation: Simply Explained* (Brussels, Office of Official Publications, 2006).
[17] See 3.1 above.
[18] OECD, *Cutting Red Tape. Why is Administrative Simplification so Complicated? Looking Beyond 2010* (Paris, OECD Publ., 2010) 15.

28 To improve quality, namely rationality of legislation, new methods of RIA have been introduced. They assess the intended and not intended impacts of the law. RIA of a draft law generally is done prior to adoption (prospective, ex ante), also concurrent in the process of parliamentary deliberations in committees and the plenary, and after implementation (retrospective, ex post).

S. 51

29 ## 5. Techniques

5.1. Law Drafting

Legisprudence finally deals with issues of 'how' to draft norms. In a formal sense, the law should be as simple as possible and formulated in a clear, plain language and coherent structure. These are the questions of formal quality: style, structure, language, the use of references, general clauses, etc. Drafting technique, however, does not only have a formal character. It refers to the content of the draft, shapes it and is influenced by it. Form and content are in a dialectic tension. Method, procedure and technique of norm drafting are linked. Choice of language depends on addressees, procedure on form and content. An optional connection of these elements strengthens effectiveness of the norm and renders a law 'good'. As the late Lord Renton wrote: 'I am not being entirely frivolous when I remind you that Moses was an excellent draftsman. When he said, "Thou shall not steal", everybody knew what he meant. But we have the Theft Act 1978 with 36 sections, which have given rise to many problems of interpretation, which have had (…) considered many times by the Court of Appeal.'[19]

30 ### 5.2. Structure, Language, References

Good disposition and structure of a draft and transparent systematics are the red rope for comprehension. Systematics foster the unity of the legal order. Old laws, by virtue of many amendments, may sufficiently regulate on the matter, but readability may be degenerated into an non-transparent and incomprehensible piece of patchwork. All countries want to strengthen legislation by consolidation and codification of laws. However, urgent daily political problems are not favouring good legislation. It is hectic, superfluous and too detailed.

31 The language of norms is an inexhaustible topic. As Nicolas Boileau-Despréaux wrote in his 'Art of poetry' in 1674: 'Whatever is well conceived is clearly said. And the words to say it flow with ease.'[20] The language must be oriented towards function and addressees of the law. Traffic, criminal and contract law must be understandable to everybody.

32 All draftsmen use drafting techniques. Among them are legal definitions, references and repetitions. Definitions are ambivalent. They could be lighthouses in the ocean of norms, but provide extreme details as well. As far as transparent publication of laws is concerned, sometimes 'the diligence of an archive keeper' is required to trace them, and there are pieces of law which can only be found 'with subtle expert knowledge, extraordinary methodological expertise and some pleasure to solve brainteasers', as an Austrian Court said.[21]

S. 52

33 ### 5.3. Special Categories of Laws

Due to the torrent of laws and their hectic sequence, amendments are of particular

[19] Lord Renton, *The Evolution of Modern State Law and Its Future, Inaugural Statute Law Society Lecture* (London, University College, 1995) 8.
[20] Nicolas Boileau-Despréaux, *The Art of Poetry* (1674) Canto I, I 153, German ed (Stuttgart, Reclam, 1967).
[21] Austrian Court Decision, E Wiederin, in von Bogdandy et al (eds), *Handbuch Ius Publicum Europaeum Vol 1* (Heidelberg, CF Müller, 2007) 432, no. 174.

interest. In view of non-transparency of huge numbers of laws, special legislation is used in most countries to abolish (outdated) laws or republish them in a purified form or to consolidate large areas of law. These techniques keep the body of law up to date, smooth and transparent. They have been facilitated by applying Information and Computer Technology.

34 5.4. Guidelines and Manuals for Law-Making

To coordinate legislation and to assist drafters, most governments have implemented legislative guidelines.[22] Many of them start – of course – from the same principles and include similar examples of good or bad legislation. These guidelines are conventions, rules of best practice, which could be addressed as 'loi des lois'.

35 Unanimity in principles of drafting – whether practiced throughout or not – is developed so far that it might well be possible to mandate a group of experts to collect them under the umbrella of a model of better legislation. But even if applied, the legislator will not always succeed in drafting first class bills. There remain differences between practice and rules, even when the latter are taken from practices.

36 6. Some Trends of Legislation and Legisprudence

From a comparative law perspective, four trends of legislation in modern states may be noted. First legislation and its problems as analysed and described by legisprudence are similar but not the same in constitutional states. Astonishment over differences is the engine of comparative law. Progress of harmonization and unification of legal procedures, content and form of laws will proceed. Europeanisation and globalisation of legislation do provide a common basis by opening constitutions to the world. European and national constitutional states could be understood as a 'complimentary constitution' of a 'constitutional compound', not yet a confederation or even a federation. European countries and others constitute a constitutional family, in which constitutions enrich each other.

37 Legislation – second – is a matter of parliament. It is the centre of power in a democratic state. However, its role may change. Parliament is under permanent political pressure to guarantee stability and flexibility of laws at the same time. Effectiveness of norms is the primordial goal. Quantity of law production versus deregulation, lacking quality, insufficient transparency, increasing participation, RIA, governmentalization on the one hand – and regional and federal as well as autonomous legislative competences (devolution) on the other.

38 Juridification – thirdly – of legislation will proceed. The judge is part of the legislative cycle. He finally measures procedures, targets, instruments and forms of legislation against the constitution. National courts, the European Court of Justice and the European Court of Human Rights gain increasing directive influence on national as well as European legislation: 'Gulliver enchaîné'.[23]

39 Finally, legisprudence should be aware of its limitations. Legislation should be as good, precise, effective, efficient and as rational as possible, but it will never be mathematics. As John Dickinson said on 13 August 1787 in the Constitutional Assembly of the United States of America in Philadelphia: 'The life of the Law has not been logic: it has been experience."[24]

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[22] e.g. JP Duprat, 'The Recent Evolution in French Legislative Practice: A Managerial Conception of Statutes' (2009) *50 Legislação: Cadernos de Ciência de Legislação* 261; W Robinson, 'Drafting of EU Acts: A View From the European Commission' in C Stefanou and H Xanthaki (eds), *Drafting Legislation, A Modern Approach* (Bodmin, Cornwall, Ashgate, 2008) 177.

[23] Morand (n 8) 43.

[24] Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 - 1875, Farrand's Records, Vol 2 (1991), 278.

Zitierempfehlung: Ulrich Karpen, HFR 2015, S. 42 ff.