

Preface

This book includes a collection of essays addressing legislation from a legal-theoretical point of view, and gives an overview on current research in legisprudence as a new approach to lawmaking. Theoretical reflection on legislation is certainly an old concern for jurisprudence and political science: in a sense, the spirit of legisprudence may be traced back long ago in the history of legal and political thinking, with the Enlightenment being the most crucial and prolific moment. If legisprudence is claimed to be a new approach, it is because that spirit has only recently been reshaped and updated in order to recover a dedicated space to study legislation within the field of legal philosophy and legal theory. Over the last 15 years, Wintgens' attempt to refund the theory of legislation has been followed by a wealth of what might be called legisprudential research. This demonstrates that this theory is gaining as much significance as it had in past centuries. Yet it must nowadays deal with a very different context: socio-political and institutional circumstances of lawmaking are perhaps more intricate than ever. And this is precisely one of the major challenges that legisprudence faces: to construe a comprehensive theory of lawmaking which, while preserving a core of classic tenets of rational legislation, is capable of adapting them to our troubled times and setting new standards for the immediate future.

The volume stems from a workshop held in summer of 2011 in the framework of the *25th IVR World Congress of Philosophy of Law and Social Philosophy* at the Goethe University of Frankfurt am Main. Organized under the broad heading *Rethinking Legislation and Regulation in the Light of Legal Theory*, that workshop offered an excellent opportunity to gather and discuss recent advances in legisprudence. Even though a variety of themes were discussed in this workshop, contributions mostly revolved around the elusive notions of rationality and justification of legislation. In legisprudence

these concepts are intertwined: legislation may only be deemed justified if it is rational, whereas its rationality can only be determined as a result of a process of justification. Following the thread of this link, this book is divided into eight chapters, which may be organized in turn into three blocks. With the rational justification of legislation as their central theme, the pieces collected here begin by addressing the foundations and bounds of legislation and the search for principled lawmaking (Chaps. 1, 2, 3, and 4), then turn to discuss the role of legislation and lawmaking bodies in the light of democratic constitutionalism (Chaps. 5, 6, and 7) and finally explore how legislative argumentation in parliament can be reconstructed as a source of justification of laws (Chap. 8).

In the opening article, Luc Wintgens provides an extensive analysis of the problem of rationality in lawmaking. He first examines the standard view of rationality in legal science—the rationality of the legislator—to demonstrate that it remains anchored in a Cartesian model upon which reality can be known with certainty and legislators are expected to create optimal norms. Such optimality of legislation, however, would be a dangerous fiction, since social reality turns out not to be apt to be caught in fixed norms and in many cases legislators are deemed to produce suboptimal legislation. Wintgens suggests replacing this perfectionist conception of legislative rationality by a more appropriate approach. Drawing on the notion of “bounded rationality”, he tries to provide a more realistic account of legislative rationality. Bounded rationality—a notion developed in economics from the 1950s on under the impulse of H. Simon—is a key feature of decision making processes in which actors have limited time, imperfect information, and limited computation skills, among other things, and therefore can only take satisficing decisions, instead of optimal ones. Bounded rationality, it is argued, also applies to legislation: legislators act upon social reality to which they have only a limited access. Furthermore, as decision makers, they are bounded by limited rationality like economic decision makers are. This results in “satisficing” legislation, the process of which should be made as rational as possible without supposing however that it will be optimal. On this approach, rationality of the legislator is no longer an irrefutable quality, but is to be empirically assessed in terms of the quality of legislation.

The quality of legislation, in turn, makes up the central point in the second piece, where Hannele Isola-Miettinen tackles the problem of legislative rationality in terms of principled lawmaking, and presents legislative and legal principles as the key to lawmaking justification. In the global framework, she argues, national legislators often transform legal principles into positive law, say, into ordinary legislation. So they follow what could be termed as a “principled legislative strategy”. The question arises, then, of whether legislators are really able to legislate through principles in a rational way.

In order to find an answer, Isola-Miettinen analyzes two theoretical approaches to the problem of legislative justification. On the one hand, she examines Ota Weinberger's institutional legal positivism, showing that Weinberger's non-cognitivism excludes not only deductive justifications of practical conclusions based on purely cognitive arguments, but also every other cognitive way of supporting practical sentences: on this account, every practical justification requires practical arguments which express an evaluative attitude. On the other hand, Isola-Miettinen analyzes Wintgens' contribution to this problem and concentrates on how legisprudence provides the foundations for legislative justification by resorting to individual freedoms and rights. Upon the basis of the legisprudential tenet of "freedom as principium"—according to which legislation is justified in a process of weighing and balancing of the moral and political limitations of freedom—systemic principles may be developed which guide the rationality of the legislator and help to produce "good legislation".

The principled framework of legisprudence as established by Wintgens and the justification of legislation are likewise at the core of Andrej Kristan's chapter, which lays the foundations for developing evaluative standards for legislative action. In the first part of his contribution, Kristan discusses Wintgens' trade-off model of the social contract—in which legislative actions must be justified according to four legisprudential principles centered around individual freedom—and reconstructs the set of conditions that legislators should meet to honour their duty to justification. Yet besides this first basis for a rational justification of legislation (freedom), the author delves into two additional foundations: representative democracy and rule of law. Firstly, that legislators ought to rationally motivate their choices derives also from alternative conceptions of the social contract such as the "proxy model", provided that this model takes the form of representative democracy. Secondly, the author further elaborates on a normativist reconstruction of the rule of law, claiming that such a duty is an inherent requirement in any contemporary constitutional state—as the "second extension" of the rule of law, in Kristan's phrase. Within this reconstruction, four principles of practical reason in legislation are introduced, namely the principles of prospectivity and publicity, the principle of determination of possible (valid) choices, and the comprehensive motivation requirement.

In the fifth chapter, Cheoljoon Chang poses a critical issue for a comprehensive theory of legislation: how can it cope with different legal cultures in a global society. The focus of his essay is on the notions of rationality and scientificity, which are usually considered vital criteria for good legislation. The claim to rationality—he argues—constitutes an essential element of any legisprudential approach to lawmaking, yet there may be quite different understandings of such a claim. What legislative rationality is may

significantly vary depending on the socio-cultural and philosophical roots in which a theory of legislation is embedded. In the Asian, especially in the Korean context, legisprudence certainly pursues “rational legislation”, but takes this notion in a sense that goes beyond the Western approach to legislation. In Korea, the idea of rationality is strongly influenced by traditional Confucian philosophy, as Chang illustrates upon the analysis of the Act on Promotion of the Transportation Convenience of Mobility Disadvantaged Persons. This analysis leads him to conclude that scientificity offers an insufficient basis to justify the rationality of legislation in Korea, and that it must be complemented by a Confucian perspective on the social order.

Chapter 5 approaches legisprudence from a constitutionalist, institutional design perspective, looking to whether the normative heart of constitutionalism can be upheld in the current context of regulatory governance. Pablo Larrañaga’s argument in this chapter makes clear that the regulatory state, largely guided by the quest for effectiveness and efficiency, and the rule of law requirements must not be conceived as opposing, but as complementary models: constraints imposed by the rule of law make governments more effective and efficient. In other words, both institutional arrangements—rule of law principles and regulatory state—should be integrated into a joint strategy. In order to substantiate this thesis, the author elaborates on the notion of a “working constitution”—i.e. one that is designed to formulate and implement sound public policy in contemporary society—within which legitimate regulation and the actual performative capacity of rule-makers have a mutually reinforcing effect. Such a working constitution must meet two conditions: on the one hand, it should be the result of the successful coordination of interests of all relevant agents in society (legitimacy), while, on the other, it must channel social choice towards those instances that are in the best informational position to make rational collective decisions (effectiveness). So conceived, a working constitution would be a key piece of the normative infrastructure of developed societies. Therefore—Larrañaga concludes—a theory that explains and justifies this sort of institutional arrangement plays a pivotal role in contemporary legal and political theory.

Also dealing with the link between constitutionalism, institutional design and legisprudence is Jan Sieckmann’s article, which discusses legislation as implementation of constitutional law. He departs from the fact that in modern constitutional democracies legislation is limited in various ways. Its formal legitimacy depends on compliance with requirements of democratic procedures, whilst its substantive legitimacy depends on its conformity with requirements of constitutional law. These requirements do not only demarcate a playground where politicians may act as they like, but penetrate politics almost entirely, in particular if a constitutional court is applying and

enforcing them. According to Sieckmann, this implies a change in the character of politics in general and of legislation in particular, converting them to some extent in an application of constitutional law. Going beyond common theoretical disputes about this constitutionalisation of politics, he shows that such a constitutionalisation is a necessary consequence of both the structure of fundamental rights and of a substantive—i.e. not merely procedural—conception of democracy. Three major theses are defended in this regard, namely that fundamental rights include, not only directly applicable norms, but ideals or principles that figure as normative arguments in procedures of balancing; that democracy must include not only formal, but also substantive elements in the sense that democratic decisions must aim at establishing solutions that give due consideration to all interests involved; and that the substantive dimension of democracy consists, in the first place, in an attempt to implement fundamental rights-principles, for these principles point to the most important interests of the citizens that politics and legislation must protect and realize.

In the seventh chapter, Woomin Shim addresses the notions of disagreement and proceduralism in the light of legisprudence. As legisprudence relates to the rationality of lawmaking, one of its tasks would arguably be to reduce disagreements within society—in contrast, politics would rather invigorate disagreements. However, Shim contends that disagreements are inevitable when it comes to legislate, even under the aspiration of rational lawmaking, so that a mission of legisprudence must be to help people recognize disagreements in the process of legislation. This argument challenges both substance-based and procedure-centered proceduralist approaches to politics and democracy. In their attempt to neutralize disagreement, as the author explains, these theoretical strategies ultimately produce the exclusion of certain interests or values. In order to avoid this effect, Shim proposes a conception of “disagreement-respecting proceduralism” which, by abandoning the notion of pure procedure, would be able to account for the fact that the process of legislative justification may always include disagreements which cannot be removed. Shim’s leading idea, in other words, is that all possible opinions should be discussed in that process, even though disagreements among individuals come up. Legisprudence should not just envisage then, rational lawmaking, but find a way of cohabitation between conflicting axiological stances that exist in society.

The closing chapter suggests a framework to study legislative debates in parliament in the light of legisprudence, stressing the intertwinement of rational justification of statutes and deliberation about them. In his essay, Daniel Oliver-Lalana first presents argumentation as a key aspect of rational lawmaking, and defines legislative rationality as a multi-dimensional, gradual

and relative notion. Upon that basis, the bulk of the chapter is devoted to outline a basic model to reconstruct and analyze lawmaking deliberations in parliament as providing the justification of laws—an argumentation sample taken from debates held in the Spanish legislature about the bill transposing the EU data retention directive helps Oliver-Lalana to illustrate how this model could work. Finally, after touching upon some major approaches to the assessment of argumentation quality, the author discusses the implications that the study of parliamentary deliberation might carry for the tension between the judiciary and the legislative branch, particularly with regard to the judicial review of the lawmaking process.

All in all, the eight pieces collected here demonstrate that the theory of rational lawmaking—in its jurisprudential guises—embraces a number of topics that go far beyond the formal and procedural qualities of laws, and thus are often overlooked among legislation scholars. The quest for rationality and justification of legislation necessarily leads to open up the theoretical reflection on lawmaking to new problems and perspectives. In this regard, we would like to thank the contributors for having delivered stimulating papers, as well as the *Internationale Vereinigung für Rechts- und Sozialphilosophie* (IVR) and the organizers of the 25th IVR World Congress in Frankfurt for having given us the opportunity to hold a special workshop. Our gratefulness is also owed to Springer-SBM for its readiness to publish these contributions as the first volume of its new series on the theory of legislation. We are convinced that this promising research field finds in this series the best possible platform to thrive.

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