

**WORKING OUT THE FUNDAMENTALS
FOR A BORDER CROSSING
POST-INSTRUMENTAL DOCTRINE
ON LEGIS-PRUDENCE (1)**

By

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«Die juristische Ausbildung ist bisher allein an der Auslegung des Gesetzes anhand des objektivierten Willens des Gesetzgebers orientiert, die politischen Implikationen sowie methodischen und technischen Probleme im Entstehungsprozess des Gesetzes werden dagegen vernachlässigt.»

Hermann Hill, Einführung in die Gesetzgebungslehre,
Heidelberg, 1982.

Summary :

Legislative doctrine and legislative studies in Europe are, up still now, rather nation-oriented. Different countries have their own distinct foci and doctrines in the field of legislative studies. This nation-dependence is partly caused by the fact that in a lot of European countries legislative studies, as a young and distinct discipline with an independent status, only recently emancipated from traditional legal studies. This contribution explores the possibilities for border crossing legislative research. Legislative

(1) Cf. U. Karpen, «Introduction ; Legislation and Legistic in European Countries», (U. Karpen, ed.), *Legislation in European Countries*, Nomos Verlagsgesellschaft, Baden-Baden, 1996, p. 11.

comparison and joint legislative research between EU countries may benefit individual EU member States, as well as legislative EU-authorities in Brussels. A lot of EU member states, as well as the Union share a lot of pressing legislative problems. Co-ordinated border crossing legislative research can contribute to the understanding and the solution of some of the problems. In order to be able to do this border crossing legislative studies – or Legis-prudence – need to be rooted in up-to-date-theories on the meaning and significance of legislation in present-day Europe.

Résumé :

En Europe, la légistique a un caractère national marqué. Chaque pays a ses propres centres d'intérêts et développe ses méthodes. Ce caractère national est dû partiellement au fait que cette discipline nouvelle en voie d'autonomisation ne s'est émancipée que très récemment des études juridiques traditionnelles. La présente contribution examine la possibilité de développer des recherches dépassant les frontières nationales. La comparaison des législations et des recherches législatives conjointes aux pays de l'UE pourraient être d'un très grand profit pour celle-ci et pour les États membres. Ils doivent en effet résoudre tous deux des problèmes législatifs pressants. Des études conjointes pourraient faciliter la compréhension de certains problèmes. Pour réaliser cette « legis-prudence », il est nécessaire de s'interroger sur la signification actuelle de la législation en Europe.

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I. INTRODUCTION : LEGISLATIVE STUDIES IN EUROPE

Legislative problems and – therefore – legislative studies in different European countries, especially those within the member states of the European Union, nowadays bear a lot of resemblance. The still increasing economical, political and legal co-operation in Europe and the ever growing interdependencies between European countries contribute to rise in similarity of legislative problems. Over regulation, vindication and implementation problems of legislation, the inaptitude of political and legislative processes to effectively tackle societal problems, the overburdening of the judiciary and poor quality and intelligibility of laws – to name a few of the most pressing legislative Gordian knots – pose problems throughout Europe. 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 a lot can mutually be learnt from legislative studies amongst European Countries by way of legislative comparison. Insights in 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, legislative vindication, implementation, and quality, more effectively sculpting legislative processes to societal needs, etc., is – judging from the Edinburgh and Amsterdam EU-conferences – rising.

Until recently legislative doctrine and legislative studies in Europe have been quite nation-oriented: different countries developed their own foci and doctrines in the field of legislative studies. In a lot of European countries the emancipation of legislative studies, as a distinct discipline with an independent status, which differs in nature from traditional legal studies, has only quite recently brought about. The tradition of sharing and exchanging legislative research results has only very recently set in. Associations like the European Association of Legislation (EAL) and – during the 1997 Congress of the Association Internationale de Méthodologie Juridique (AIMJ) which these proceedings report on – have only just recently been pioneering in the field of legislative comparison and joint legislative research.

This contribution

This contribution is dedicated to the question as to whether and how the efforts on mutually benefiting legislative research, legislative comparison and joint legislative research between European research can be taken one step further. What we really want to address is the key question: which fundamentals can constitute theoretical basics for border crossing legislative studies, which will not only benefit legislative scholars and practitioners in Europe but also assist legislators of the European Union in settling or better understanding legislative problems.

This contribution researches the key question using the Dutch situation and the Dutch legislative problems, and studies as a point of departure. Insights in this situation and into the Dutch legislative problems and developments in legislative theory are, however, to some extent exemplary for the situation in different European (EU Member) States. Though the situation in the Netherlands bares a lot of resemblance to the situation in other European countries, that what applies for the Netherlands is of course not directly applicable in other countries. The constitutional, socio-economic, political and institutional situation differs somewhat from other countries. Only more fundamental legislative comparison can filter the resemblance from the differences. However the intensified discussion on legislation in the Netherlands over – roughly – the last ten years is exemplary on a lot of shared legislative topics in Europe. Especially it is so for the six mutual fields of interest in European Legisprudence, which the Chairman

of the EAL, Mr Ulrich Karpen, states in his introduction «Legislation and Legistics in European Countries» of the study *Legislation in European Countries* (2). In order to make a comparison more readily available we will discuss the Dutch developments using the notion of these six fields of interest distinguished by Karpen.

II. THE STATUS QUO OF LEGISLATIVE RESEARCH IN THE NETHERLANDS

A. The study of problems of legislation in Europe and the Netherlands

Over the past twenty years, relatively much attention has been paid in Dutch jurisprudence and legal practice to the study of problems of legislation. Under the influence of the increasingly greater problems in practice concerning the implementation and enforcement of statutory law, the past few decades have seen the start of many discussions on the position and meaning of legislation in our system. Many of these discussions are characterised by the fact that they are centred on complaints about (the content, quality and intensity of) legislation and the demands (3) – made by law – that should be met by legislation. Until recently, problems of legislation were studied in the Netherlands mainly as *legal problems*, which could best be tackled by using methods of legal research. Other EU Member States share these experiences, which are typical for a lot of Western democracies with a continental law tradition.

Already in 1973, Peter Noll pointed out in his *Gesetzgebungslehre* that in the academic study of problems of legislation – legislative studies – a merely juridical approach is not sufficient (4). In the Netherlands too it is recognised that a strictly juridical point of view does not do full justice to the specific character of problems of legislation (5). 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 be influenced in a desirable way ; how, through legislation, law can best be shaped and expressed ; and in what way legislation can best be

(2) *Ibidem*.

(3) Cf. e.g., *Zicht op wetgeving* ('View on Legislation'), *kamerstukken II*, 1990/91, 22008, N^{os} 1-2 ; I.C. van der Vlies, *Het wetsbegrip en beginselen van behoorlijke wetgeving*, diss., University of Amsterdam, Amsterdam, 1984.

(4) Cf. P. Noll, *Gesetzgebungslehre*, Reinbek bei Hamburg, 1973.

(5) Cf. e.g., W.G. van der Velden, *De ontwikkeling van de wetgevingswetenschap*, diss., Utrecht University, Lelystad, 1988 ; Ph. Eijlander, *De wet stellen*, diss. Tilburg University, Zwolle, 1993.

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. Problems of legislation and legislative studies are inextricably linked with legal-theoretical, political, social, sociological and policy problems (6).

B. The 'aspect approach' in Dutch legislative studies

The academic study of problems of legislation has become a more independent part of legislative studies in the Netherlands over the past twenty years, and a modest, though erratic, tradition has been built. A remarkable point in this relatively recent Dutch academic research tradition is the «aspect approach»: research into legislation in the Netherlands has, up to now, particularly been focussed on the study of aspects of legislation.

Thus, relatively much (legal-)theoretical research has been carried out with the aim to determine the changing place and meaning of legislation in our system (7). Various problems in practice regarding the intensity and quality of rule making have led to analyses of and treatises on the meaning of rule making in our social, legal and legal-cultural systems (8).

Relatively much attention has also been paid to commenting on the new legislative policy started by government at the beginning of the nineties, which is aimed at improving the quality of legislation with respect to the *Rechtsstaat* (Rule of Law) and administration. This new policy, which led to a reorientation towards the use and quality of and possible alternatives for rule making, has given rise to many practice-based comments and publications in which the merits of the new policy as well as possible alternatives were discussed (9).

Particularly in policy-oriented studies and in studies in the field of management science attention has been drawn to the role of legislation as an instrument for government control. Research in

(6) See also Karpen, *op. cit.*, (note 1), p. 11.

(7) For studies in which various outlines on the issue of the role and import of legislation on our present system have been brought together see E.M.H. Hirsch Ballin, «Rechtsvorming door wetgeving: Aanzet voor een post-instrumentalistische wetvingstheorie», (eds. ?), *Rechtsstaat en beleid*, Zwolle, 1991, pp. 403 ff.

(8) From the wealth of publications cf. e.g., W.J. Witteveen et al., *Wat maakt de wet symbolisch?*, Zwolle, 1991; N.J. Huls and H.D. Stout, *Reflecties op reflexief recht*, Zwolle, 1992; Ph. Eijlander et al., *Wetgeven en de maat van de tijd*, Zwolle, 1994; F. Plate and J.A. Smit, *De wet, instrument en waarborg?*, Alphen aan den Rijn, 1996; L.A. Geelhoed and R.J. in 't Veld, *Vervlechting en verschuiving van wetgevingscomplexen aan het begin van de 21ste eeuw*, Zwolle, 1996.

(9) For some recent examples of such studies see Ph. Eijlander et al., *Overheid en zelfregulering*, Zwolle, 1993; M. Herwijer and M.G.M. van Oorschot, *Uitvoeringsgericht ontwerpen van regelgeving*, Alphen aan den Rijn, 1994; T.J. van der Ploeg, H.J. de Ru and J.W. Sap, *In plaats van de overheid*, Zwolle, 1995.

this field showed that many problems of legislation were also the result of disproportionate ambitions of that government to control. Other forms of control, such as «remote control» and control through networks that can also be meaningful in the preparation, enactment and implementation of legislation, were involved in these types of research (10).

Apart from these policy-oriented studies, over the past few years there has also been special attention for the more legal, particularly constitutional aspects of legislation. Over the past few years, juridical research into legislation particularly focussed on the demands (concerning the Rule of Law) that law at present makes on the content and realisation of legislation (11).

Finally, within Dutch research on legislation attention has been paid to the theory of legislation itself and, as part there of, to the theory of norms (12). Studies in this field – that concentrate on the phenomenon of legislation, the substantive design of norms and the possibilities of theoretical statements on legislation – are relatively scarce and strongly scholastic.

C. The state of the art in Dutch research on legislation : making the most of the results and insights

Legislative studies are often subdivided (13) into a basic theoretical part (legislation theory) and a part that concentrates on practice (the doctrine of legislation) (14). Legislation theory is aimed at analysing and explaining the phenomenon of legislation, while the doctrine of legislation is more concerned with legislation in practice. The doctrine of legislation is again subdivided into three categories : the method of legislation, the theory of the legislative process and the techniques of legislation.

The method of legislation concerns the – partly practice-based – question as to how (systems of) regulations can be designed in such a way that, as regards content, they meet the various demands made by our systems of law, society and politics as well as our legal-cultural system. The method of legislation is concerned

(10) From the wealth of publications, I will only mention I.Th.M. Snellen, *Boeiend en geboeid*, Alphen aan den Rijn, 1987 ; V.J.J.M. Bekkers, *Nieuwe vormen van sturing en informatisering*, Delft, 1993.

(11) Cf. I.C. van der Vlies, *op. cit.*, (note 3) and, following this dissertation, I.C. van der Vlies, *Handboek wetgeving*, 2nd rev. edn., Zwolle, 1991 ; F.H. Kistenkas, *Problemen van regelgeving*, Lelystad, 1994 ; F.H. van der Burg, *Regelgeving en bestuur*, Zwolle, 1995.

(12) Cf. W.G. van der Velden, *A.w.* 1988 and D.W.P. Ruiter, *Bestuursrechtelijke wetgevingsleer*, Assen/Maastricht, 1987.

(13) B. Kreams, *Grundfragen der Gesetzgebungslehre*, Berlin, 1979, p. 38 ff.

(14) For a critical follow-up to this categorisation, see D.W.P. Ruiter, *op. cit.*, (note 12), pp. 35 ff. ; Ph. Eijlander, «Proces, Methode en techniek van wetgeving : Elementen van wetgevingsonderwijs», *Bestuurswetenschappen*, July/August 1985, n° 4, p. 247, as well as W.G. van der Velden's favourable words in his *De ontwikkeling van de wetgevingswetenschap*, *op. cit.*, (note 5), pp. 63-68 and pp. 73-83.

with questions such as what type of regulation (an order, a prohibition, a system of permits, etc.) is the most suitable one to solve a particular problem ; which considerations play a part in the choice of enforcement and implementation systems ; which transitory provisions are important ; which provisions of international law are relevant ; what significance these have for the design of the regulation, etc.

The theory of the legislative process is concerned with the full «life cycle» of statutory law – that is, matters such as the process of preparation and drafting, the process of enactment, the implementation, enforcement and evaluation of regulations as well as the networks and/or agents involved therein.

The techniques of legislation are concerned, broadly, with the design of statutory law, including the techniques of structuring and formulating statutory texts.

When comparing this subdivision of legislative studies with the results of research in the field of problems of legislation over the past twenty years, it becomes clear that, although much (legal-) theoretical aspect research into legislation and problems of legislation has been carried out, these insights have not or hardly been used to develop insights in the field of the doctrine of legislation. The insights gained over the last decades have not yet been developed into integrated ideas about legislative methods and methodologies that suit our legal system, ideas about more interactive procedures of legislation or innovating, contemporary insights into techniques of legislation (15). This means that Dutch legislation research is stuck in the analytical stage of legislative studies. The results of research into legislation will rather contribute to deepening the legal-theoretic insights and to broadening juridical doctrine than to broadening doctrines for legislative studies. A broadening and deepening of a contemporary doctrine of legislation aimed at contemporary problems of legislation is, however, very important in view of the nature and extent of the current problems in legislative practice. The development of such insights into a comprehensive doctrine of legislation – which embraces a multi disciplinary and integrated view on legislative issues – may help preventing problems of legislation by producing insights, methods and techniques that are useful in Dutch, but maybe also European, practice for solving current problems of legislation.

(15) Cf. also Ph. Eijlander, *De wet stellen*, diss., Tilburg University, Zwolle, 1993, pp. 14 ff.

III. TOWARDS A POST-INSTRUMENTAL DOCTRINE OF LEGISLATION IN THE NETHERLANDS

«The doctrine of legislation starts from the question as to how social situations can be influenced by statutory norms in a desirable way», as Peter Noll put it in his authoritative *Gesetzgebungslehre* (1973) (16). Thus, in developing a doctrine of legislation – so far lacking in the Netherlands – it is important to establish, starting from the concept of law – how behaviour, relations and institutions in society can be standardised through statutory law, according to certain objectives. In this, each doctrine of legislation is dependent on the meaning and role that legislation plays within certain social, legal and legal-cultural contexts at a certain moment. In the present situation in the Netherlands, the key question is how, given the different meaning legislation now has within our social, legal and legal-cultural systems, social patterns, relations and institutions can be influenced in an interactive way by statutory law. The different role and meaning of legislation also has an impact on the key question of a contemporary doctrine of legislation.

A. The place and meaning of post-instrumental legislation : codification, modification and communication

It is not easy to determine the place and meaning of legislation within the social, legal and legal-cultural systems. Firstly, the roles that legislation plays within these different systems are intertwined. Secondly, the role that legislation plays is not a static one. The place and meaning of legislation within the different systems change according to the developments within those systems. Until recently, it has been stated that, in general, legislation has two functions within our social and legal system. On the one hand, legislation is 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. In the nineteenth century and at the beginning of the twentieth century, the safeguarding function of the law was predominant, but with the rise of the welfare state, legislation has increasingly been used as an instrument for attaining certain government objectives. The sharp increase in such so-called policy-instrumental legislation over the past decades has led to many problems in the implementation and enforcement of

(16) P. Noll, *op. cit.*, (note 4), p. 63.

statutory law. The value in se and the safeguarding function of legislation have thus come under more pressure over the past few years, so much so that – at academic and policy-making levels – ever greater efforts are made to find systems and methods to minimise policy-instrumental legislation wherever possible and, moreover, to look for ways to better gear legislation to the social agents or networks at which it is aimed (17).

The developments in the role and meaning of legislation in society have also led to a changed meaning of legislation within the legal system of the Rule of Law. In the Rule of Law as it existed at the beginning of the nineteenth century in the Netherlands, the main role of the law was to codify. The government primarily used the law to codify current legal concepts. In the social-democratic Rule of Law as it developed in the period between the two World Wars, the modifying role of the law, in which the law is the vehicle to bring about social changes by interfering with the organisation of society, became more important. The law does not follow current legal concepts, but initiates and implements a socio-economic structure of society based on – social – justice.

B. Legislation in a changing society

Law in statutes in our current legal-cultural system cannot merely be conceived anymore as the enacted law of an industrialised welfare state. In the meantime, our social and socio-economic order has changed radically. The ideologies and values that formed the basis of the model of the welfare state are no longer predominant. We are now living in a more individualised, market-oriented and internationalised society. Together with these changes in social dynamics expectations with regard to legislation have altered. For example: where some decades ago legislation predominantly perceived as a democratically legitimated arrangement for the establishment of legal rules in which members society could partake, nowadays this concept has lost a lot of its self-evidence. Under the influence of «clientism», i.e. the view on members of society as clients of government, rather than as participants in the major governmental-political processes, results in consumer-oriented expectations form legislation. The stress on legislative quality and the stress on the need for better (institutions for) legal protection against legislation in recent Dutch discussions on legislation may find an explanation in the clientism-phenomenon.

(17) Cf e.g., F Plate and J.A. Stt, *De wet, instrument en waarborg ?*, preliminary report for the «Vereniging voor wetgeving en wetgevingsbeleid» (Association for legislation and legislative policy), Alphen aan den Rijn, 1996

The fundamental changes in our society over the last twenty years also have a profound impact on the place and role of legislation. Thus, in the Netherlands, it is now increasingly understood that legislation should not be used unquestioningly by government as a neutral instrument for attaining certain policy objectives. This would do no justice to the value in se of legislation. Moreover, a purely instrumental use of legislation will lead to erosion of the instrument itself because of flaws in enforcement and implementation. Alternative forms of regulation, such as self-regulation, are often much more effective to attain certain normative objectives. Wherever legislation – inevitably – is still used to attain the government's policy objectives, more attention is being paid to interaction and the networks in which statutory law functions: Desired changes are mostly not yet brought about through a one-sided setting of norms by the government. The legitimacy and effectiveness of statutory law are strongly positively influenced when statutes are developed and effectuated through interactive chains of norms issuers and norms addressees. Such interactive, regulatory chains do not represent linear processes – they are rather cyclic processes that run from preparing and drafting via enactment to implementation and evaluation of statutes within networks of agents involved (18).

Finally, insight has also been gained into the government's possibilities of control: Experiences acquired over the past twenty years have shown that the government's power of direct control over society, even through legislation, has proved relatively little. Direct control of behaviour and situations by the government is only effective in situations in which government objectives are shared or sufficiently supported by social agents. This, in fact simple, insight has led to more attention for the involvement of social agents in the development of statutory norms (for example, by means of autopoiesis) (19) and to attention for the communicative aspect of the symbolic value and possibilities of legislation (20).

On the basis of the developments described above, the meaning and role of legislation can no longer be fully denoted by the concepts of codifying and modifying instrument and safeguard. Legislation in a postmodern society such as ours has received new dimensions of meaning. The meaning of legislation as an instrument and safeguard has its value in the current situation as well, although those meanings have, in our times, received a post-instrumental connotation. The government still needs to use

(18) Cf. R.J. in 't Veld, «Complexen van wetgeving», (eds. ?), *Vervlechting en verschuiving van wetgevingscomplexen aan het begin van de 21ste eeuw*, Zwolle, 1996, pp. 25 ff.

(19) Cf. N.J. Huls and H.D. Stout, *op. cit.*, (note 8); P. Eijlander et al., *op. cit.*, (note 8).

(20) Cf. e.g., W.J. Witteveen et al., *op. cit.*, (note 8).

legislation, but increasing attention for alternative possibilities and instruments and with explicit attention for the value in se of legislation. Also the functional meaning of legislation as a type of codification or a means of modifying legal concepts and models of justice keep their value within the current situation. Here too, however, another meaning has been added to the function of legislation : Legislation has also become an important means of (normative) communication between government and society, and among social agents, as well as an interpretation of legal concepts.

C. Changed meaning and role, changed use of legislation : the reasons for research

The fact that the meaning and role of legislation in our postmodern society have changed, has considerable consequences for drafting and implementing legislation by – an increasingly more international – government and social agents. The changes in the meanings and roles of legislation deeply affect the possibilities of substantively standardising legal relations ; they also affect processes of legislation and the techniques that can be used in designing statutory law. In addition, also non-governmental agencies are increasingly involved in rule making, even as regards subjects that were traditionally within the range of state matters.

In order to analyse these changes in the meaning and role of legislation and to make them accessible and practicable for legislation research, legislative practice and legislative education it is essential to integrate the insights into the meaning and role of legislation gained so far and to develop a contemporary, post-instrumental doctrine of legislation. Just summing up the academic insights into aspects of the changed role and meaning of legislation is not sufficient to arrive at a better founded insight into and use of legislation. Those erratic insights cannot comprehensively relate the meaning of the changes to all dimensions of the use of legislation, including the process, method and technique of legislation.

In legislative practice, a number of studies in the Netherlands (for example under the auspices of the then *Commissie voor de toetsing van wetgevingsprojecten* (Legislative Review Committee), policy documents (for example *Zicht op wetgeving* (Insight into legislation) and practice-based policy instruments (for example *Aanwijzingen voor de regelgeving, aanwijzingen voor de implementatie van Europees recht* (Guidelines for rule making, guidelines for the implementation of EU law) have tried to react to the changed role and meaning of legislation by means of changed use. An integrated academic analysis – ranging from the changed meaning of legislation to changes in the use of legislation and

changes in drafting, technique, implementation, enforcement and process of legislation – is lacking. Border crossing, joint research in this area is warranted. Fundamentals for a post-instrumental doctrine of legislation are not only important for the situation in the Netherlands.

The most important academic research on legislation in Europe has so far been carried out in German-speaking countries : Germany, Austria and Switzerland. The greater part of this research, also concerning the development of a doctrine of legislation, was however carried out in the seventies and the beginning of the eighties (21). The relevant insights gained from this research concern a period in which the meaning and function of legislation were assessed fundamentally different compared to the current situation. These truly valuable studies and doctrines deserve rejuvenation.

IV. THE COURSE OF FUTURE RESEARCH INTO LEGISLATIVE METHOD

Co-ordinated legislative research, legislative comparison and joint research in Europe is of the utmost importance if we want to prevent loss of legislative knowledge on the one hand, and want to gain both theoretical and practical insight for scholars, legislative trainees, legislative practitioners and politicians alike. The central point of attention in research like this could be what the purport of the changed insights into the role and meaning of legislation in our constitutional systems, gained over the past twenty years, mean for the question as to how, in the current situation, social patterns and institutions can be influenced through legislation.

The growing awareness that the *communicative* meaning and the value *in se* of legislation resist, increasingly strongly, a purely instrumental use of legislation, requires, in many cases, a different concept, use and a therefore different content of rule making nowadays. Legislation can no longer be considered a neutral instrument that, like any other policy instrument, can be used by a centrally controlling government to attain certain policy objectives. The value *in se* of legislation requires a more reserved use and a more interactive interpretation of rule making, in which the national and international relation networks that are influenced by legislation themselves play an increasingly important part in the enactment, implementation and enforcement of the norms expressed in legislation.

(21) Cf. e.g., J. Rödíg, E. Baden and H. Kindermann (eds.), *Vorstudien zu einer Theorie der Gesetzgebung*, Bonn, 1975 ; P. Noll, *op. cit.*, (note 4) ; H. Hill, *Einführung in die Gesetzgebungslehre*, Heidelberg, 1982, and other publications.

The aim of the joint research and legislative comparison could be to examine, for the benefit of European academia and practice, the importance of the combination of recent insights into the role and meaning of legislation for the development of an independent doctrine of legislation in which, starting from the functions of legislation, the possibilities of use, design, enactment, implementation and enforcement as well as evaluation of legislation are approached and understood.

Opportunities for and advantages of a post-instrumental doctrine of legislation

The development of a contemporary –border crossing– post-instrumental doctrine of legislation will present several opportunities. Firstly, bringing together the insights into the role and meaning of legislation will not only lead to an integration of insights into legislation for the benefit of legislative practice, it will also present possibilities of synergy and insights into the nature and characteristics of legislation. Both individual European countries as well as the legislative authorities of the European Union may benefit from experiences and new insights in how the dynamics of legislative problems work and ways in which these problems may be tackled. For legislative practitioners there is a possible additional advantage: on the one hand, the development of a doctrine of legislation may contribute to the rationalisation of legislative practice, on the other hand it may contribute to making existing practical knowledge of legislation – which is scattered over different sources in different European countries – more explicit and accessible. Furthermore the development of a post-instrumental doctrine of legislation may also contribute to the further emancipation of legislative studies. A third advantage of developing a post-instrumental doctrine of legislation is that such a doctrine would contribute to the graduate or postgraduate training of legislative draftsmen and lawyers.

V. TO CONCLUDE : AN APPEAL TO THE EU COMMISSION

This contribution tries to offer food for thought on the way in which a post-instrumental doctrine of legislation can be brought about, and ways in which it can be used in the day to day practice of designing and drafting legislation. We think it is worth while the effort to venture into a joint research project. We appeal to the European Commission to assist both substantially and financially to bring about such legislative joint research project. Especially on the level of the European Community the communicative gap between European Society and the European legislative authorities is vast

and the legislative problems resulting from it are equally big. Insights in the way in which legislation is and can be used now and in the near future within the Union and the different member states is of the utmost importance both theoretically and practical for the budding Union. We hope our appeal will be heard.

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