Legisprudence as a New Theory of Legislation

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Luc J Wintgens
Professor at the European Academy for Legal Theory (Brussels)
Director of the Centre for Legislation, Regulation and Legisprudence (Brussels)

Preliminary

In this paper I will argue that the separation of law and politics that has been predominant in legal thinking until recently. Because of this separation, the creation of law via legislation has not been deemed a proper theme of attention for legal theory. [i] Legislation belongs to the realm of politics focused on by political scientists of different sorts.

Law for its part is recognized to root in politics, though it lives its own life in being cut off from this root. Law has its own method of study, called legal dogmatics or, more broadly, legal theory of different sorts. The way law is created throughout the process of legislation does not appear on the screen of the legal theorist. The question why this is so, and a critique of this position is the topic of this paper.

The central thesis is that law is separated from politics for a political reason. [ii] The separation is operated on epistemological grounds, which contribute to the concealment of the political choices made. As a result, the domain of values, both moral and political, is structured on a "neutral" basis that prevents the elaboration of a rational theory of legislation. [iii]

I.. The Social Contract and the Three Axes of Modern Philosophy

The elaboration of legisprudence as a rational theory of legislation starts with a reflection on the organisation of political space since Modernity. The basic model of this organisation is the social contract. This contract is an act of will of the subjects. Upon its conclusion, a sovereign is called into being. From the moment of his emergence, the sovereign has the power to decide about matters of practical reason. He decides about what and how of human action.

The articulation of the sovereign is premised by a reflection on freedom. This reflection articulates the three main axes of the Modern philosophical project, that is, the epistemologization of philosophy, the political axe resulting in the construction of the state and the moral axe, mainly concentrating on the freedom of the individual.

The basic premise that both Hobbes and Rousseau adopt is freedom unlimited.

For Hobbes, everyone can act in freedom on the *ius naturale.* It includes a right of all to all. The laws of nature impose some duties that, however, are unworkable in the state of nature. This is because of his nominalistic epistemology. According to this epistemology, concepts have no ontological value. They depend on definition by the subjects. Because everybody is more likely to define these concepts following his own biases, the laws of nature are unworkable. In short, they do exist though they are semantically empty. Only a sovereign can define their content in a binding way. Unless this is the case, there is a war of all against all.

A similar though slightly different thesis is found in Rousseau. According to him, man is born free and everywhere he is in chains. Rousseau's is mainly an economic theory. For Rousseau like for Hobbes the conclusion of a contract is a necessary condition for warding of the dangers of this war.

From there, it follows that freedom is mainly considered a political theme. Freedom comes to its realisation in political space as a result of the will of individual subjects.

The latter's freedom as a moral issue is only a secondary matter. Individual freedom and the possibility of subjects to interact on their own insights in social space are surpassed by the political variant of freedom or freedom according to the law. The organisation of political space is superimposed on some form of self-regulating social space in which neither Hobbes nor Rousseau believes. As long as the sovereign does not regulate an issue, subjects can act as they please. The sovereign though can intervene whenever he deems it fit, in view of the finality of his position.

Apart from the political and moral components of freedom the theory of the social contract, as it seems, is mainly coloured by the third axe, that is, the epistemological perspective.

In comparison with Descartes, both Hobbes and Rousseau face freedom as a problem. While Descartes is of the opinion that morality would unfold as a rational system, Hobbes and Rousseau consider this not possible. They are in a way more realistic than their forerunner. They do espouse however his basic insight that comes to an epistemologization of philosophy in general and of practical philosophy in particular.

Philosophical truth for Descartes comes to securing the latter's certainty. Ideas having the same clarity and distinctiveness as the *cogito* can be logically concatenated to the latter, and so to each other. Upon this, reality can be

unfolded in a rational way. At the reverse, what is not capable of logical or empirical proof is therefore not rational.

Fruitful as this may have turned out for scientific thinking it strongly reduces though the action radius of practical reason. Values, or goals and ends of action are not capable of logical or empirical proof; hence, they are not rational. These effects have been felt for some three centuries, and persist throughout the programme of logical positivism.

The model of the social contract as Hobbes and Rousseau conceive it purports to solve the problem of political integration as it follows from individualism. They do so by applying and enlarging the Cartesian method of transforming thinking into knowing. They deliver, that is, a specific exercise of epistemologized philosophy.

To begin with, the social contract is a true idea. In making use of his rational capacities, the subject cannot but conclude that entering into the contract is preferable to staying in the state of nature. In Razian language, the reason for entering the contract is an exclusionary reason. While Hobbes can be read to hold some utilitarian version of rationality, Rousseau's most obviously is of a more purified brand. It is reason itself that unfolds and induces to the adherence to the true principles of public law as he calls the social contract.

Both variants of the contract result however in the same: the sovereign's rules are morally true. They are so in the hobessian variant because the rules of the sovereign are implementations of the laws of nature. The latter being commands of God, they are the only true morality. They are also true in Rousseau's version because no law, because it is a law, can be unjust.

The logic of both the variants of the social contract is nearly inescapable. From the truth of the premise, that is, the social contract one can logically conclude to the truth of propositions based on it, that is, laws.

II. Legalism

From the above diagnosis, we can proceed to an articulation of the main characteristics of the pattern of legal thinking that has been dominant from the 17th throughout the middle of the last century. It is commonly labelled as "legalism". Legalism, so we can read from Judith Shklar, takes normative behaviour to be a matter of rule following. Zenon Bankowski has added to this that it does not matter where these rules come from. Law, that is, is "just there".

This addition brings also to light a characteristic of legalism shared by positivism and jusnaturalism share. Both hold that law represents reality. This is obvious for jusnaturalism. The content of law is dictated by a substantial

transcendent norm that is reproduced through the law of the sovereign. Representationalism is less obvious in positivism. Law as a command of a sovereign is a decision of the latter. It is however true as both Hobbes and Rousseau claim because it is based on the social contract. The latter is true, and consequently the rules based on it must also be true. It is a consequence of their epistemologized version of philosophy.

Representationalism as the basic metaphysical premise of their theories is supplemented with four other aspects that identity legalism. First, if the construction of laws results in true normative propositions, the latter must be timeless. If they were not, they could hardly be held true since truth is eternal.

Secondly, since laws are true there can be no discussion about their content. This entails that the disputable nature of values, goals and ends is concealed. Any rule is true which means that the value, goal or end is morally correct. On this view, laws are considered instruments for their realisation without any need to be chosen. This characteristic of legalism can be called its concealed instrumentalism.

Thirdly, upon the conclusion of the social contract any normative proposition of the sovereign *ipso facto* outweighs any other proposition that would pretend to have normative value. Personal moral insights of the subjects as to what is right or wrong is conclusively waved from the normative screen. It is the law of the state that prescribes what is right and wrong. This aspect of legalism can be qualified as etatism.

Fourthly and finally, the study of law is confined to the study of true propositions. As to its method, the study of law is held identical to that of the science of nature. Scientific method as a description and explanation of an object found "out there" equally applies to law as to nature. The study of law then is aptly labelled as the "science of law". Propositions resulting from the science of law can operate as a supplementary source of law. This conclusion is a logical result of the truth of the premises – the law – and the uniqueness of the method of science. Hence, the legal system is a closed set of logically connected propositions.

Legalism then consists of a conjugation of these five characteristics – representationalism, timelessness, concealed instrumentalism, etatism and the scientific method of study of law. I propose to call this form of legalism "strong legalism" and will qualify it later.

III. Strong Legalism and the Proxy Model of the Social Contract

The foregoing brief articulation of legalism sheds some light on the theory of legislation. Legalism mainly attempts to exclude any form of theorizing on legislation. Legislation is a matter of politics. Politics is a matter of choice.

Choices are disputable, so that a theory that would take them to be the object of knowledge is condemned to failure from the very beginning. Legalism then solves this problem by epistemologizing it and transforming practical reason into a branch of theoretical reason. What ought to be done is confined to the knowledge of the rules that contain rights and duties. Following rules is a matter of knowledge; their enforcement is a matter of application.

As a consequence, the central position of the judge as the main actor within the legal system and the subsequent reduction of jurisprudence to the theory of the application of rules goes without saying. The legislator operates behind the scene of the legal system. His role is confined to political decision-making. The true principles of public law as Rousseau had labelled the social contract concern the establishment of the institutions, and not the content of the decisions that result from that.

This is a consequence of sovereignty. The legislator is a sovereign actor within political space. He cannot be bound to rules, at least not in the sense a judge is. If he were, he would not be a sovereign. On this view, the constitution is a political programme that steers legislation. It is not a set of binding rules for the legislator. As a consequence, the legislator is not considered a legal actor. He is only a political actor. Legislation then is a matter of politics. In severing law from its political origin, law making is not a matter of legal theory.

In the pages to come, I will challenge this view. The argument of this paper aims at articulating the position of the legislator as a legal actor. I will do so in three steps. In the rest of this paragraph, I will briefly explore the meaning of freedom. The next paragraph is dedicated to the articulation of the contours of an alternative version of the social contract. In the last paragraph, four principles of legisprudence will be identified, that allow for a rational elaboration of legislation.

This tentative sketch has not the ambition of being complete. It only contains a rudimentary outline of legisprudence as a theory of legislation, that is elaborated at more length in a forthcoming publication. [iv]

I propose to start with the concept of freedom. In the absence of any external limitation, any subject is free to act as he pleases. [v] Both Hobbes and Rousseau take this as a starting point. As a matter of logic, the subject faces an infinite variety of possibilities to concretise the concept freedom. The concept of freedom allows any action. Paradoxically, freedom has to be limited for action to be possible at all. If no choice is made from the infinite variety of possibilities, no action ever takes place.

This comes to say that action in order to be possible is preceded by a limitation of freedom. Freedom-unlimited is only a concept; it must be

supplemented by a concretisation that I propose to call a "conception". Conceptions, that is, are a necessary condition for action.

In the absence of any external limitation of freedom, subjects are to act on their own conceptions. They have to choose for limitations of freedom that I propose to call "conceptions *of* freedom". Conceptions of freedom are concretisations thereof and these concretisations are determinations of the infinite variety of possibilities. Conceptions of freedom are limitations of freedom by the subject. When the subject acts on a concretisation of freedom that is not his own, he acts on a conception *about* freedom. A conception about freedom can also be called an external limitation of freedom, since the limitation that is necessary for action is *external* to the subject. At the opposite, a conception of freedom can be considered an *internal* limitation of freedom.

What both Hobbes and Rousseau are eager to show is that social interaction cannot take place on the basis of conceptions of freedom. This is most obviously the case with Hobbes. According to him, subjects do not dispose of the true meaning of the laws of nature. This is because of their semantic emptiness. Once we would achieve the true meaning of the laws of nature social interaction disposes of rules.

Unlike Hobbes, Rousseau holds that there exists a society before a state comes into being. His theory embraces the possibility of social interaction based on meaning. Subjects, that is, interact in context of participation. It is within this context of participation that they recognize each other as members of a social bound. The existence of a war of all against all is a sign that there is a society. War, that is, is a form of social interaction.

Meaning, however, is different from truth. Truth is unique while meanings are multiple. Social interaction based on meanings, that is, social interaction from the perspective of a context of participation, is deemed to failure. This is so because of man's wicked nature as can be read from Hobbes. It is due to relations of dependence resulting from the economic settings within social space according to Rousseau.

This can be reframed in the above terminology. Subjects acting on conceptions of freedom do not dispose of its "true" meaning. Conceptions of freedom are of an infinite variety; the "true" meaning of freedom for its part must be unique.

The three axes that were pointed to above appear in the contractual setting in the following way. Conceptions of freedom as the basis of action of the subject are of a practical necessity. Without conceptions of freedom there can be no action. This practical necessity includes at the same time a priority of the subject. If there are no external limitations of freedom, that is, conceptions about freedom, the subjects can act as they please. However, as Hobbes and

Rousseau argue, the practical necessity of concretisations of freedom is reframed as a political priority. Concretisations of freedom by the sovereign, that is, conceptions about freedom, predominate over conceptions of freedom. They do so for an epistemological reason.

This reason is epistemological in that it has an exclusionary character. Hobbes and Rousseau presume that all subjects are endowed with an identical rational capacity. Upon using their rational capacity, they will all come to the conclusion that entering into the contract is preferable to remaining in the state of nature. On this presumption, truth, that is, is rationally preferred to mere meaning.

The political organisation of freedom then, for an epistemological reason, outweighs the moral priority of the subject to act on conceptions of freedom. From the "moment" of the contract on, subjects primarily act on conceptions about freedom. Their consent to the contract includes a proxy to the sovereign. On this proxy, they consent to abide by any of the sovereign's external limitations of freedom whatever their content may be.

The mechanism of the proxy model operates itself however as a conception of freedom. It is the subjects who act on a conception of freedom when they enter into it. The conceptions about freedom that result from there are ascribed to them as if it were conceptions of freedom. That is what the general proxy comes to.

It relies however on a misconception of freedom. Freedom means the possibility to act on conceptions of freedom in the absence of any external limitations, that is, conceptions about freedom. Speaking more generally, freedom is the starting point of the organisation of political space. This is the meaning of freedom as principle or *principium*. A *principium*, however, also means guiding principle as "leitmotiv". From this perspective, freedom is not only the starting point of the organisation of political space.

It has however also a moral dimension that is outweighed by the political dimension. As was argued above, this happens for an epistemological reason. The consequence of this is the following. If the political organisation of freedom outweighs its moral dimension, action on conceptions about freedom always automatically outweighs conceptions of freedom. The latter however affects the reflexive character of the concept of freedom. The reflexive character of freedom is what makes it a moral concept. As a moral concept, it articulates moral autonomy. Moral autonomy requires freedom to be exercised in freedom. This is the same as saying that acting on conceptions of freedom has priority over acting on conceptions about freedom.

This is what is denied in the theory of the social contract. The proxy outweighs freedom in the moral sense in that conceptions about freedom always have priority over conceptions of freedom.

IV. Weak Legalism and the Trade Off Model of the Social Contract

Over against the proxy model of the social contract, I propose to sketch the characteristics of a different model. If any external limitation of freedom is by its very existence *ipso facto* legitimate, this results in what we testify nowadays as the exponential growth of legal systems. Any external limitation of freedom that is formally legitimated as a saying of the sovereign is a valid rule.

Because the proxy is a general one, the legal system as a whole is supposed to have a general purpose. The proxy is given for a reason – safety of one's life in Hobbes, or [XX] in Rousseau – and this reason is the purpose of the legal system as a whole. It *a priori* justifies any of the future external limitations the content of which is yet unknown at the "moment" of the contract. Therefore, both the proxy and the purpose of the legal system are general. On this characterisation, any of the external limitations is covered by the proxy and serves the purpose of the legal system. Their number is not limited on any criterion.

The quantitative aspect of the legal order is a well-known problem nowadays. However important it is, it will not be dealt within the limits of this contribution. It will be limited to the qualitative transformation of freedom on the basis of the social contract.

The latter is a rational reconstruction of the Aristotelian paradise lost, that is, natural political society. Methodological individualism is hard to conjugate within a body politic without some rational conceptual glue that integrates the individual parts into some whole. Rational political society is substituted for natural political society with the help of the social contract.

As a hypothetical reconstruction, however it jeopardizes the moral dimension of freedom. If any external limitation or conception about freedom can be legitimately substituted for any internal limitation or conception of freedom, it follows that a concretisation of freedom in the moral sense can always be replaced by a concretisation of freedom in the political sense.

The reason for concluding the social contract coincides with the finality of the state or the general purpose of the legal system. From this perspective, it can be asked whether freedom in the moral sense can be the general purpose of the legal system ?

If freedom in the moral sense is considered the general purpose or the *leitmotiv* of the legal system, we get a thinner version of the social contract. In this version, *it is law that is to make morality possible.* This includes a different characterisation of the relation between law and morality, to which I just point without going deeper into it. Suffice it to say that on this characterisation of the relation between law and morality, morality has a priority over law.

It is not to be concluded from the above that this priority is absolute. It is a relative priority in that conceptions about freedom can outweigh conceptions of freedom. The challenge of the absolute priority of conceptions about freedom refers to an alternative model of the social contract, that I propose to call the *trade off model.*

On the trade off model, subjects do not give a general proxy to the sovereign. On the contrary, the model comprises that freedom is traded off with each and every external limitation. Put differently, the proxy model contains a general and *a priori* trade off of freedom. The trade off model on the contrary qualifies the proxy character of the social contract, in that the subjects do not trade of their capacity to act on conceptions of freedom; they only trade off a conception of freedom.

At the difference with Hobbes this trade off model is not based on a general assessment of human nature that makes action on conceptions of freedom unworkable. It is different from Rousseau's in that it does not take in a general appraisal of human society that affects social interaction and culminates in war.

The trade off model fits up the three axes of the Modern philosophical project and puts them in a new setting.

The epistemological axe is reframed in that the meaning of a concept is not identical to truth. Concepts, that is, can have different meanings dependent on the context of participation. The denial of the distinction between truth and meaning comes to a denial of the idea of a context of participation all together. Truth exists independently of any context though meaning does not. The equalisation of truth and meaning, or the idea of "true meaning" results in adopting some "view from nowhere" that underlies representationalism proper to the Modern philosophical project.

The political axe of the project aims at institutionalising truth thus discovered or discoverable in principle. The result of this for the moral axe is quite clear: subjects are not supposed capable of acting on their own moral insights or conceptions of freedom, due to their nature (Hobbes) or due to their life in society (Rousseau).

The epistemological distinction between "concept" and "conceptions" for its part has the potential to strike the balance between the political and the moral axe. Concretisations of freedom by way of conceptions about freedom then do not automatically outweigh conceptions of freedom. If they did, there simply is no balance to strike.

There is however a balance to search on the trade off model. This is precisely what trading off comes to. Any rule of the sovereign is an external limitation of freedom. On freedom as *principium*, the political and moral concretisations of the concept of freedom – that is, conceptions about and conceptions of freedom - have to be weighed and balanced.[vi]

On freedom as *principium*, conceptions of freedom have a *prima facie* priority. They can be outweighed by conceptions about freedom on the condition that the latter are justified as preferable to conceptions of freedom. This justification aims at striking the balance between the political and the moral axe.

The requirement of justification for its part expresses the priority of the moral over the political concretisations of freedom. In addition to that, the possibility that a moral concretisation be outweighed by a political concretisation of freedom shows that the priority is only a relative one.

V. The Principles of Legisprudence

On freedom as *principium*, any external limitation of freedom must be justified. This comes to a justification of the substitution of a conception about freedom for a conception of freedom. The duty of justification is what legisprudence is about. Legisprudence is defined as a rational theory of legislation. It consists of an elaboration of the idea of freedom as *principium*.

The justification of legislation is marked as a process of weighing and balancing the moral and the political limitations of freedom. Upon the rational character of legislation, a principled framework is required. With the help of this framework, external limitations can be justified. Justification is part of the process of legitimation. It does not lead to an external limitation to be ultimately justified. [vii] External limitations are never legitimate as such. They are submitted to an ongoing legitimation, as will be clarified in the following pages.

The framework is made up of four principles that I will briefly expose and comment upon hereafter. The four principles are: the principle of alternativity, the principle of normative density, the principle of celerity, and the principle of coherence.

1. The Principle of Alternativity (PA)

The PA requires that an external limitation of freedom be justified as an alternative for failing social interaction. The PA is the most obviously related to freedom as *principium* in that it expresses the priority of the subjects' action, that is, action on a conception of freedom. This priority, again, is not absolute. It is relative in that social interaction can turn out to fail. This failure however should not be presumed as Hobbes and Rousseau do.

What must be justified is that an external limitation of the sovereign is preferable to the absence of an external limitation. The relation between the sovereign and the subjects is of an a-symmetric nature. [viii] This involves the existence of a gap between the sovereign's claim to legitimacy and the subjects' belief in it. If the relation were symmetrical, any of the sovereign's claims to legitimacy would be *ipso facto* filled with the subjects' belief in it. This puts the argument back on the track of the proxy model of the social contract with strong legalism in its wake.

The PA as a principle of justification is based on the subject's capacity to act on conceptions of freedom. This involves that social practices are presumed to be self-regulating. Subjects involved in interaction create meaning. Meaning that emerges from social interaction refers to rules that are embedded in a social practice. At the same time, these rules are constitutive of these practices.

Scientific research, musical performance, carpentry, education, and religion are all types of practices. Any of these practices has its own rules upon which these practices are meaningful forms of interaction. Mark Hunyadi has convincingly argued that the existence of these rules comes to the surface in the case of a conflict. [ix] Conflicts, that is, reveal the existence of rules together with the practices in which they emerge. Conflicts, rules, and meaning are necessary conditions for a practice to exist. Social space can be considered an intertwinement of an innumerable variety of practices, involving conflicts within as well as between them.

Would any conflict be *a priori* prevented, we face a situation that is similar to Hobbes' epistemologized version of politics. The sovereign's definitions of meaning may be apt to prevent or to solve conflicts. At the same time, however, it jeopardizes the existence of social practices all together. As a consequence, social and political space, or society and state would be identical.

The result of this is that the subject as an autonomous moral agent is brushed aside. What is left over to him are accidental domains where he can act on conceptions of freedom as long as they are not regulated by the sovereign. The latter can intervene in any of them whenever he deems fit.

On the PA, the opposite is the case. The sovereign can only intervene on the condition that it is argued that his external limitation is preferable to an internal limitation of freedom as a reason for action, due to a failure of social interaction.

2. The Principle of Normative Density

The principle of normative density (PN) submits an external limitation to justification as far as the density of the normative impact is concerned. Put briefly, sanctions need a special justification because they include a double restriction of freedom. First, external limitations are conceptions about freedom. They exclude action on a conception of freedom. This is a first constraint. Secondly, if they are accompanied by a sanction, the purpose, goal, or end of the rule can only be realised in the way that is prescribed. It the pattern of behaviour is not realised that way a sanction is imputed. This prevents the subject again from acting on conceptions of freedom. [x]

External limitations are not by themselves exclusionary reasons for action. If they were, we are again on the track of the proxy model. On the trade off model, however, the legal system has only a modest general purpose that is making morality possible.

If the trade off is justified on the PA, it does not automatically follow that a sanction is the most preferable manner to get the purpose, goal or end of the external limitation realised.

Hart has convincingly criticized both the austinian and kelsenian concept of a legal rule. According to him, any legal system contains rules that confer powers. Rules can confer powers to officials. Such rules allocate a power on an official to create or change a rule and to apply it. At the same time, these rules make the recognition of rules possible, both for officials and citizens. Generally speaking, power-conferring rules do not prescribe sanctions.

Yet, rules can also confer power on private persons. In virtue of such rules, private persons can create wills, get married or make contracts. Again these rules are not orders, far less are they backed by threats or is there an "essential connection" with a sanction. No one has an obligation, *e.g.*, to get married. If a person wants to get married, he has to realise the pattern of behaviour of what counts as a valid marriage. If he does not, there simply is not marriage, though maybe another form of relationship.

While Hart achieves to disconnect the validity of an external limitation and a sanction the PN requires one more step. If there is no essential or necessary connection between a rule and a sanction, the relation is a contingent one. On this characterisation, the relation between a rule and a sanction must be justified.

The justification of a sanction includes an argument why the supplementary limitation freedom is necessary. A sanction in pecuniary terms or as a physical constraint of freedom is only one option among a wide variety of possibilities to realise some pattern of behaviour. The extension of these possibilities has a variable degree of normative density, with sanction as the maximum. It includes regulative techniques like information, incentives like tax reductions, self-regulation based on codes of conduct or covenants, labelling and the like

The point is that punishing behaviour must be justified because freedom as *principium* requires that action on a conception of freedom has priority over action on a conception about freedom. On the PA, the latter must outweigh the former. As a result, the type of conception to be realised is a conception about freedom. The substitution of a conception about freedom for a conception of freedom does not, however, automatically justify that the latter be enforced with a sanction. What must be realised is an end, purpose or goal.

The PN then requires that the means of realisation of the rule's end, purpose, or goal result from a process of weighing and balancing of the alternatives. An alternative for a rule punishing possession and use of drugs could be an information campaign in schools. Such a campaign informs about the negative consequences of drug use. It can go along with by a covenant between the government and a school aiming at keeping the establishment drug free. In addition to that, a label can be conferred to a school that adopts this line of conduct. This label can be complemented with an additional subvention. An award may be conferred to a school that has respected the covenant for a certain period and so forth.

For the realisation of an end, goal or purpose a variety of possibilities turn out to be available. Sanctions are only one among others. If the essential connection between a rule and a sanction is broken a connection between the end, goal, or purpose and the means to realise it must be established. The establishment of this connection is what the PN is about.

It is needless to add that the different means have a different normative density. Their impact on freedom is dissimilar. It goes without saying that the instrument with the lowest normative density compared to sanctions is to be preferred. Put differently, if a sanction is used, its justification involves an outweighing of the alternatives with a weaker normative impact.

3. The Principle of Celerity or Temporality

The principle of celerity (PC) brings in the time dimension into the legal system. On strong legalism, the legal system is a timeless set of rules. They represent reality and absorb the realm of meaning. On the legisprudential

view of the matter, rules or external limitations are a matter of human creation. Rule creation is like any human activity related to historical conditions. Human activity, that is, is replete with temporality.

Theories that claim to have direct access to reality, like Hobbes' or Rousseau's, deny the temporal character of this access. Knowledge provided by this type of theories is ontologically true. At the opposite of these theories *of* reality, theories *about* reality consider this access to be mediated. Access to reality, that is, is mediated by a theory. I propose to call the latter type of theory an analytical theory or "paradigm". Analytical theories rely for their part on yet another analytical theory, and so forth. Theories of reality deny the mediation by an analytical theory. Unlike theories about reality, they claim truth unqualified. Theories about reality for their part only claim objective knowledge or knowledge unqualified. Knowledge unqualified refers to a theoretical framework on which it is dependent.

Theory dependence of a theory can be apprehended as the epistemological translation of human imperfection due to the temporality of the human condition. Consciousness of the historical nature of knowledge should not turn over into scepticism. It only induces a form of relativism as to the ontological truth of knowledge.

This view on temporality corroborates the distinction between truth and meaning. Meaning is connected to a context of participation. Logically speaking, truth in the philosophical sense cannot. Something is true or is not. A proposition can be true given a certain context. This is, however, different from the claim that a proposition is ontologically true.

Moral and political action does not qualify for ontological truth. This is the basic error of the social contract theories. They claim to have direct access to reality and so they set up the unique normative framework for the organisation of political space.

What goes for explanation in the field of knowledge similarly applies to justification in the domain of action. [xi] On this claim, truth comes to justified belief. For reasons of brevity, I will not enter into the justification of this. Suffice it to say that justification is a form of action. If truth can be reached, it is mediated by a theory. The analytical theory that mediates access to reality at the same time bars direct access to it. Truth is qualified as "true knowledge" that is itself premised by what I propose to call "temporal cognitivism".

The variety of possible concretisations of the concept of freedom rules out the very option of any "true meaning" of freedom. The choice for a conception about freedom is submitted to justification. On the PA, this justification focuses on the external justification as an alternative for failing social

interaction. On the PN, this normative density of the external justification must be justified. The PC on its turn stresses the general historical character of any justification.

The PC constrains normative proposition submitted to justification on the PA and the PN from the perspective of time. An external limitation can be justified on both these principles on a certain moment of time.

Two important aspects of the PC are to be noted in this respect. First, the external limitation, apart from its content that is constrained on the PA and the PN must be shown to come on the "right time". Concrete circumstances *hic et nunc* may justify the issuing of an external limitation.

At the opposite of concrete circumstances, we find a-historical social reality. This is social reality as it is conceived through the looking glass of strong legalism. Strong legalism aims at turning off the button of time. Weak legalism or the form of legalism underlying legisprudence on the contrary takes the temporal dimension of human action seriously. The rationality of legislation as the main concern of legisprudence compels the legislator to take concrete circumstances into consideration. These circumstances are replete with temporality.

As a consequence of that, what once was at the right moment may after a lapse of time be misplaced. This is the second aspect of the PC. It shows that what once was justified may turn out to have become unjustified. The justification of external limitations then is an ongoing process of justification. This process of justification should include the consciousness that external limitations must be kept in track with changing circumstances. Obsolete legislation or external limitations that are eroded by desuetude are no longer legitimated. They are to be withdrawn, changed or qualified in view of the PA and the PN.

4. The Principle of Coherence : the Level Theory of Coherence

The principle of coherence (PCO) is a principle of justification of external limitations from the perspective of the legal system as a whole. A legal system is not a static chain of external limitations; it is on the contrary a complex and dynamic set of intertwined propositions concerning what ought to be done and how it ought to be done.

On a somewhat strong claim, it could be said that any change in the system affects it as a whole. Complex as it may be by its very nature, it turns out to become increasingly complicated. The complication of a legal system is mainly due to its exponential growth. Consequential upon this, the systematic character of the legal system risks to be jeopardized.

From there, the idea of coherence of a legal system can be articulated. Coherence is often interconnected with consistency. Consistency means the absence of contradictions within the set of propositions that is called a theory. One contradiction makes the system inconsistent. On the idea that consistency is considered a condition for coherence, a contradiction would make the system also incoherent.

Apart from this relation between coherence and consistency, some would say that consistency is a matter of all or nothing. Coherence on its turn is a matter of degree. On this view, consistency is a logical requirement while coherence refers to "making sense as a whole".

The relation between coherence and consistency can be defined in yet a different way. If coherence means "to make sense as a whole" consistency can be taken to be a specific and strong way of making sense. It then only looks as if consistency is a matter of all or nothing, while coherence is a matter of degree.

From the perspective we are dealing with here, coherence concerns discourse or a set of propositions. These propositions can hang together in different ways. Consistency is one of them. If they cohere in a consistent way, we have a logical or consistent whole, that is, a set of contradiction free propositions. The set of propositions can be said to make sense as a whole. On consistency as a conception of coherence, there exist other ways of making sense.

These appear when the "whole" is enlarged as to include the context of participation. Law is not a set of propositions "turning on its own". It is to get in touch with social interaction, that it regulates. When the whole is enlarged that way, the distinction between consistency and coherence becomes all the more clear.

With this in mind, we can proceed to the articulation of the PCO. The PCO can be distinguished as a distinct theory that I propose to call the level theory of coherence. Generally speaking, four levels of coherence can be distinguished.

a. Coherence$_0$

The first level is not specific for the theory. It is a level of coherence below which nothing makes sense. It is called the level of coherence$_0$. This level concerns the elementary level of speech (say, a sentence, a judicial or legislative decision). If there appears a contradiction at this elementary level of speech, the subsequent elements of the discourse will be affected by that. Coherence$_0$ is necessary condition for any discourse to make sense. It requires the absence of contradictions at the elementary level of speech. It has been aptly labelled "simultaneous consistency". [xii]

Yet, the requirement of coherence$_0$ is not universal in that it is an identical requirement for each and every type of discourse. It depends on what counts as an elementary level of speech. The latter on its turn depends on the context. In poetic discourse is will be less constraining than in a logical discourse respect. Every type of discourse has, so to say, an elementary level of speech. Although this level may be different depending on the type of discourse, the requirement of coherence$_0$ itself is a universal one. In this way it is unaffected by time.

b. The Level of Coherence$_1$

The requirement of coherence changes when the time dimension is added. When the time dimension is taken into consideration, the level of coherence$_0$ is not affected. When two judicial rulings on a similar case are compared, both should meet the requirement of coherence$_0$. Further, we want the decisions to be similar because the cases are similar. If a judge condemns a thief to a fine of € 100, formal justice compels to pronounce the same fine in a subsequent and similar case. Our sense of justice may be shocked if this were not the case.

Formal justice looks most similar to consistency. There are mainly two reasons for this. The first reason is the rule character of law. The rule character of law is founded in the process of epistemologization of philosophy. This process gave rise to the development of natural science. For natural science, reality is expressed in rules. The grammar of reality is expressed in mathematical rules. Scientific truths are mathematical equations. At least on some interpretation of modern science, reality is, ontologically speaking, mathematical. The mimicking of natural science by the sciences of man results in the rule character of the latter.

The second reason is related to the first. Legal rules like scientific rules are to be applied equally to equal cases. If they were not, their rule character would be affected. Unlike logical rules, however, the rule character of external limitations expresses a value judgement. The value that is expressed by the rule character of law is equality. On freedom as *principium* freedom must be equal for all. Consequential upon that the necessity of equal treatment of equal cases results from a normative demand. This demand dictates and corroborates the rule character of law. It is because we care for equality that law as rules is preferred to, *e.g.*, law as a command.

The assimilation of law to natural science according to strong legalism then must lead to identical requirements as to consistency. The main reason why this is not the case is that the time dimension is left out of view. This means that no distinction is made between coherence0 and coherence1. Coherence$_0$, as one remembers, requires the absence of contradictions at the elementary unit of speech of a discourse. The absence of the distinction between

coherence$_0$ and coherence$_1$ for its part denies that elementary units of speech can be identified. It takes consistency to be a matter of all or nothing. As a consequence, it is the whole that must be consistent in order to make sense at all.

Once the time dimension is brought in, it affects the process of application of rules. It can be said that it is the time dimension that makes law different from natural science. If the application of rules is mainly a logical operation the introduction of the time dimension involves that the temporal aspects of this operation are to be taken into account. These temporal aspects make that a justification of decisions is substituted for a mere application of rules. Justification includes that the identity of cases is tempered to their similarity. The conclusion that two cases are similar involves a value judgment that requires a justification. This conclusion is not compelling; it is at best convincing.

Since justification is submitted to temporal conditions, it could hardly be expected that the set of external limitations that result from there is logically consistent. On the contrary, it varies over time.

As far as judicial decision-making is concerned this means that he can depart from earlier decisions. Formal justice as a rule of decision-making is not absolute, since decision-making is submitted to time. Departure from a rule or a precedent is possible on the condition that it is justified, while following precedent needs no justification.

Things are similar though slightly different from the perspective of the legislator. As a matter of fact the latter's freedom is much larger than the judge's. Judges are bound by the rules of the legal system. Since legislators create and can change these rules they are, logically speaking, not bound by any of them. The aspects of change and creation of external limitations call for two different sets of observations. The first relates to coherence$_1$, while the second deals with another level of coherence that will be treated in the next subparagraph.

A judge must not justify the fact that he follows the rule or the precedent. The only thing he has to justify is departure from them. The legislator for his part can be called to justify both the *status quo* and a departure from an existing situation on the PA, the PN and the PC. Paradoxically, the legislator's duty of justification in view of the PCO is in a sense stronger than the judge's.

This specific character of the legislator's duty is connected to the fact that external limitations of freedom are submitted to justification on the PA and the PN. As long as the situation S does not change, a change of the external limitation would entail a formal injustice. If all A's are to be treated as B's on

an existent external limitation R, any change of R results in a different treatment of A from that moment on. Therefore, a justification is required. [xiii]

If no distinction were made between coherence$_0$ and coherence$_1$, no changes would be possible. Any change, that is, would be barred by the requirement of formal justice. The judge has not to justify adherence to the precedent though he has to justify departure from it. The legislator for his part has to justify both the status quo and the change of external limitations. This is, briefly, what the level of coherence$_1$ from the legisprudential perspective requires.

When we focus on the change of external limitations from the perspective of the judge, a further distinction has to be made that opens the way for a different level of coherence.

c. The Level of Coherence$_2$

A judge who departs from precedent violates the requirements of formal justice. This violation can be outweighed by justification. The view exposed through now needs some qualification. It is premised by the idea that rules are "just there" and that they jump out from the rulebook right on the judge's desk. Reality is however more complex. Judges are to choose the rule they apply to a case. A textbook example is whether a lease is ruled by a contract regime or by a property regime. The specific set of rules has to be chosen. This choice is not compelling. The consequences of both regimes embrace serious differences as to the rights and duties of the landlord and tenant. On coherence1, the line of decision along one of these regimes has to be followed. Departing from it is possible if it is justified. For this justification, a supplementary level of coherence is needed.

This level of coherence, that is, the level of coherence$_2$, provides arguments for departing from the requirements of coherence1. [xiv]

It follows from the above that departure from a line of precedent is permitted if it is justified. Arguments that justify such a departure are of a different level than coherence$_1$. They belong to the level of coherence$_2$. Systematic interpretation is an exemplary case of argumentation on the level of coherence2 from the perspective of the judge. On this level, the whole of the legal system is taken into account. Yet, similar observations can be made for other methods of interpretation.

Apart from the requirements of coherence$_1$, legislative activity is also submitted to the constraints of the level of coherence$_2$. As is the case with the judge, coherence$_2$ arguments from the perspective of the legislator require him to take the system as a whole into consideration. On arguments of coherence$_2$, the judge can rely on the systematic character of the legal system.

The corresponding perspective of the legislator comes to the requirement to constitute the legal system as a whole. [xv]

When the judge argues on the level of coherence$_2$ – *e.g.*, in systematic interpretation - he assumes the unity of the legal system, in that he takes it as a whole. Coherence$_2$ argumentation from the perspective of the legislator requires the latter to constitute this unity.

Unlike in strong legalism, the rationality of the legislator is not irrefutably presumed. If it were, the proxy model would again be substituted for the trade off model. The legislator, that is, has to justify his external limitations so that they allow the judge to make coherence$_2$ arguments at all.

Once the central position of the judge is qualified, the legislator's place becomes more apparent. Legislative activism includes an active justification of external limitations. Unlike the judge, the legislator cannot assume the systematic character of the legal system.

The more external limitations are shown, apart from their coherence$_0$ and coherence$_1$ aspects, to fit the system as a whole when seen from inside the system, that is, the better they satisfy coherence$_2$ justification. The assumption of rationality of the legislator, typically, belongs to the premises of strong legalism since, on the latter, external limitation are considered representations of reality. On strong legalism, the creation of rules or external limitations is considered a reproduction of reality; on weak legalism, the construction of rules is just a construction of rules, and not a reconstruction of reality.

On this reinterpretation of the premise of rationality of the legislator, he is not presumed to be rational. His rationality is to follow from his acts. If the latter presumption is part of the premises of strong legalism, on weak legalism, however, the rationality of the legislator is a matter of justification, not of presumption.

d. The Level of Coherence$_3$

On strong legalism, judges apply rules that legislators create. Rule application is a theoretical matter like it is in mathematics. Rule creation for its part is considered a political matter that does not appear on the screen of legal theory.

On weak legalism, however, both judge and legislator create rules and follow rules. The judge follows rules in the application of rules. At the same time, he creates individual rules. The legislator for his part follows rules while creating general rules or external limitations. The differences between these positions may be considerable; they are not opposite, however.

As far as the judge's position is concerned, rules are not self-interpreting. The process of the determination of meaning as well as the choice of the rule needs a theory in order to be rational. Rationality in decision-making however is not limited to fitting in new decisions into a set of existing rules. This is only one way of putting the matter that can be labelled "internal rationality". So, the whole of the existing rules can be said to be rational or coherent or to make sense from this perspective.

However, on the articulation of coherence as "making sense *as a whole*" one needs another perspective. You cannot see something as a whole unless an external perspective is included. While the legal system as a set of external limitations can be internally rational or coherent, its making sense as a whole requires a perspective that allows to see it as a whole. This is only possible by leaning over the edges of what is considered the whole. In addition to that, saying that the whole becomes *more* coherent by transforming some of its elements, the comparative term necessitates that the whole *qua* whole is taken into consideration. This again requires an external perspective that I propose to call "external rationality". While the levels of coherence$_1$ and coherence$_2$ refer to internal rationality, their operationalisation is conditioned by external rationality. This relation can be articulated in the following way.

The basic premise of the argument is that things do not have meaning of their own. Meaning is conveyed upon something. On this objection against the plain meaning doctrine, it follows that the meaning of a rule is subsequent to interpretation, since rules do not speak of themselves. From this perspective, the rule following judge and the rule following legislator are in a similar position.

The meaning of rules does not stem from the rules itself. Meaning cannot be grasped by merely gazing at them. [xvi] Interpretation, and meaning resulting from that, is a theoretical construction that depends itself on a theory. The plain meaning doctrine as an ally of strong legalism denies this theory dependence. Strong legalism, as one remembers, goes back on a direct access to reality; weak legalism for its part relies only on an indirect access to it. This indirect access means that a theory is about reality and that its access to it is mediated by a theoretical framework. This theoretical framework is the analytical theory of a legal system referred to below.

In order for the legal system to make sense as a whole, the legal officials operating its buttons are to keep an eye on what makes it a whole; and that is a theoretical framework on which the legal system depends. [xvii] This theory dependence of the legal system is what the level of coherence$_3$ is about.

The level of coherence$_3$ is best articulated via the distinction between the internal and the external point of view that can be adopted toward a rule.

While the external point of view expresses the behavioural regularities that can be connected to rule following behaviour, the internal point of view expresses the rule's normative character. MacCormick's qualification of this original insight of H L A Hart comes to saying that the legal scholar, while adopting an external perspective, at the same time includes in his description the internal point of view. On that view, legal scholarship gives full weight to rules as reasons for action.

MacCormick's qualification of Hart's moderately external point of view, that he aptly labels the "hermeneutical point of view" refers to a specific dynamics. It is a perspective that starts *from* the external point of view *towards* the internal point of view. The connection between the scholar's own method – economics, morals, history, sociology, comparative law, etc. – and the object "law" is likely to result in a different understanding of the object all together.

Yet, on my view of the matter, the dynamics of the MacCormickian hermeneutical perspective can be reversed. Roughly speaking, a scholar revealing an alternative reading of a set of legal rules according to his own method adopts an "as if" position. His scholarly conclusions, so it can be said, do not have the same authority as a judicial decision. Yet, in as far as his reading includes the internal point of view of the judge, his conclusions may come very close to the way the judge reads the statute. The latter, in taking cognisance of the scholar's work, sees a virtual image of himself.

This image is a virtual one as long as the judge did not adopt this position. The law and economics research illustrates this point. From an external point of view the law and economics scholar may reveal a new reading of the torts rule.

A textbook example is Calabresi's and Melahmed's approach that eloquently reveals a different view of the cathedral of torts. Apart from the meanings of the tort rule considered from within the legal system, an economic analysis informs about an alternative meaning from an external perspective. When this external perspective is a moderately external one, or as MacCormick calls it a "hermeneutical" perspective, the mirror effect is obtained. A judge withholding the new meaning reverses the dynamics of the hermeneutical point of view. That is to say that *from* an internal point of view which expresses the rule being a norm for him, he goes *towards* the external point of view.

It may look as if the third level of coherence is some supplementary level that is relevant only when the rules to be applied need some interpretation. Put differently, only if rules are unclear, they are to be interpreted. In order to determine their meaning, the judge is then to lean over the edge of the system as a set of rules. There he finds supplementary tools to interpret these rules.

This view is however wrong. The clarity of a rule does not precede interpretation, so that only unclear rules must be interpreted. If rules were held clear by themselves, meaning would exist on itself or "out there", which is clear nonsense. On the contrary, the clarity of a rule is the result of an interpretation that may be concealed.

A theory of interpretation with the help of which rules are interpreted is not itself law. It does not belong to the legal system that consists of a set of rules; it is though necessary for a legal system to dispose of such a theory.

Summarizing, rule following behaviour includes a cognitive and a volitional aspect. The volitional aspect of the internal point of view, however, is not a pure act of will. It is, so to say, replete with theory that is not contained within the rule if you wish. It is contained in the analytical theory of the legal system saying why rules are preferable to commands, and so why freedom and equality are preferable to arbitrariness, and why therefore it is preferable that the powers in political space are separated, and so on. From that perspective, the analytical theory of the legal system orients the choice of acceptable theories of interpretation, that is, theories to determine the meaning of rules of the legal system result in the legal system making sense as a whole. In short, the analytical theory of the legal system is what makes the legal system a legal order.

On the thesis that the legislator, like the judge, is a rule follower, a similar account can be given of his activity. Like the rules of the legal system are not self-interpreting, the rules of the constitution rarely contain a positive indication as to the substance of legal rules issued by the legislator. His rule following behaviour is then confined to not violating the rules he is supposed to follow. Following rules however includes more than the minimalist duty not to violate them. [xviii]

If following rules by the legislator involves as a minimum or negatively that they are not violated, it includes positively, however, or as a matter of aspiration that the rights and duties it includes can be effectively exercised, that they are sufficiently protected and enforced respectively, and so on. The legislator's aspiration is more than a matter that deserves prize when effectuated. It resembles rather a duty to aspire to the best possible rules than a simple political aspiration to do so. It is on this condition that the legal system starts making sense as a whole from the legisprudential point of view.

It would be tempting to say right on this point that the "best possible rules" are a matter of politics, and that politics is a matter of disagreement. Here come in though the principles of legisprudence, the PCO on top. The circumstances of politics make that there exists disagreement among people, while at the same time there is a need to act in concert, at least in some

domains. [xix] Politics does not aim at disagreement to evaporate; it must make disagreement workable.

Some would say that this is achieved by respecting human rights. This is correct, and so it is also correct to say that human rights are part of the analytical theory of the legal system. The respect for human rights is achieved by not violating them. Individual freedom is protected by human rights as the requirement of respect for individual freedom.

This is, however, only one way of making sense of freedom. It is a negative stipulation that stems from the analytical theory of the legal system making it a legal order. The reflexive character of freedom however requires more than a negative protection of some essential features of freedom. From this perspective, legal rules or external limitations of freedom are submitted to justification on the principle of alternativity, the principle of celerity, and the principle of normative density. This justification comes to a positive implementation of the moral autonomy of the subject. The supplementary justification on the principle of coherence underpins the connection between the concept of freedom as part of the analytical theory of the legal system and the system's rules.

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[i] See on this J Waldron, *The Dignity of Legislation*, Cambridge, Cambridge University Press, 1999, 2 ff.

[ii] Cf the thesis advanced by Lon Fuller in L L Fuller, *The Law in Quest of Itself*, Chicago, Foundation Press, 1978, 28, 75.

[iii] In this respect, I disagree with Jeremy Waldron, who claims that: "We paint legislation up in these lurid shades [deal-making, horse-trading, log-rolling, etc.] in order to lend credibility to the idea of judicial review (…)." (J Waldron, *The Dignity of Legislation*, 2). Although this thesis may be correct for the American legal system where judicial review exists, albeit largely criticized, it is incorrect for civil law systems where no judicial review existed through recently (e.g. in Belgium) or does not exist at all (e.g. in the Netherlands). From this perspective, the reasons for the lack of interest in or the absence of a theory of legislation must be sought elsewhere.

[iv] L J Wintgens, *The Justification of Legislation. Legisprudence as a New Theory of Legislation*, pro manuscr., 410 p.

[v] Cf H L A, Hart, "Are There Any Natural Rights ?" in D Lyons (ed.), *Rights* (Belmont, Wadworth Publ. Comp., 1979), 14-25 (14).

[vi] This means to be weighed and balanced against each other, as conceptions of or conceptions about. It does not only mean a weighing and balancing of two or more conceptions about freedom.

[vii] I should thank Manuel Atienza for his comment on this point.

[viii] P Ricoeur, "Science et idéologie" in *Du texte à l'action*, Paris, Esprit Seuil, 1986, 310.

[ix] M Hunyadi, *La vertu du conflit. Pour une morale de la médiation*, Paris, Cerf, 1995.

[x] When a person is in jail, his capacity to act on conceptions of freedom is by definition limited. If he has to pay fine, he cannot spent the money according to his own wish.

[xi] This does not suggest that explanation would not be of a justificatory type.

[xii] L A Kornhauser and L G Sager, "Unpacking the Court", 96 *Yale Law Journal* (1986), (page #); P Winch, *The Idea of Social Science and its Relation to Philosophy*, London, Routledge, 1990 (2nd ed), 61.

[xiii] If a tax measure is justified on the PA and the PN in order to increase economic activity, it may well be that the effects of R are insufficient to realise the goal. Therefore, R is to be

changed. This change is submitted to justification. If S does change over time, this may be a reason for changing R. It may, on the contrary, also be a reason for not doing so. In the first hypothesis, a justification is required on the PN and the PA. In the second, a reason must be given for not changing R. It may indeed turn out that the tax measure did realise its goal. If economic production has reached the level, the measure purported to realise the tax measure becomes unjustified.

[xiv] The potential of the level of coherence$_2$ can be illustrated with an example from judicial decision-making. According to a rule from 1963, a spouse staying home and taking care of her children qualified for the sc. "premium for the spouse at the fireside". In XX a husband claimed the premium. Over against the plain meaning of the text of the law, the judge decided for plaintiff. His argument involved a reference to other rules of the system that proclaimed the principled equality of husband and wife. The matrimonial act of 1976, the European convention on human rights XXX, the Universal Declaration.., as well as legal doctrine supported this view. The decision was inconsistent with the preceding line of jurisdiction. Despite the violation of the requirements of coherence1, this decision was held to make more sense as a whole. Hence, it was more coherent than earlier decisions. The decision relied on a systematic interpretation of the XX rule. A systematic interpretation comes to reading a rule in the light of other rules of the system.

[xv] An example will illustrate this position. On rule R_1 unemployed persons receive an unemployment benefit U according to fixed criteria of distribution. Some time later, the sovereign issues R_2. On rule R_2, companies who employ a person qualifying for the unemployment benefit under R_1 on their turn qualify for a premium encouraging the employment of the economically inactive. Both premiums are paid by the state. A person P_2 who, in doing so, qualifies for the premium on R_2 offers a person P1 qualifying under R_1 for the unemployment benefit a job. Both P_1 and P_2 can be thought to have an interest, in that P_1 gets a job and a salary S and P_2 gets the premium. However, if P_1's S only slightly exceeds his U, he may be entitled to think that he is paid only very little for his work. He may think that what he "really" earns by working comes to [S – U]. The smaller the result of [S – U], the more he will be encouraged to think that way. This problem is known as the unemployment trap. The simultaneous effects of R_1 and R_2 not contradict. They simply annul each other's effect to a large extent. If both R_1 and R_2 are valid rules and, *ex hypothesi*, satisfy coherence$_0$ requirements and are justified on coherence$_1$, they do not necessarily satisfy however the requirements of coherence$_2$. Their combination impairs the systematic character of the legal system. Their simultaneous existence causes a lot of hay, including administrative bother, eventually procedures in court, and the like, for an effect that is close to zero. R_1 and R_2, so it can be said, are not efficacious. R_2 then needs a supplementary justification on the PCO in order to show that it fits with the system as a whole. Coherence$_2$ from the perspective of the legislator, that is, requires him to take the systematic character of the system as a whole into consideration. Even while avoiding violations of coherence$_0$ and coherence$_1$, he can violate coherence$_2$ in adding rules that are inefficacious, or impair the systematic character of the whole, or annul other rules' effects.

[xvi] C Perelman, "Avoir un sens et donner un sens" in *Le champ de l'argumentation*, Brussels, Presses univ. Bruxelles, 1970, 64-78.

[xvii] Together with this I should like to argue that the legal system is itself a theory. Unfortunately, this proposition is to keep its dogmatic formulation as space is lacking here.

[xviii] See on this Z Bankowski, "Don't Think About It : Legalism and Legality" in M Karlsson (ed.), *Rechtstheorie*, Beihefte, 15, 1993, 45-57.

[xix] J Waldron, *Law and Disagreement*, Oxford, Oxford University Press, 1999, 102 ff.; Id., *The Dignity of Legislation*, 156 ff.