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The Rationality and Justification of Legislation

Essays in Legisprudence

Springer

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Preface

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Chapter 1
The Rational Legislator Revisited. Bounded Rationality and Legisprudence

Luc J. Wintgens

1.1 The Familiar View and Its Discomfort

The familiar view or the view that lawyers commonly hold on the law reflects a standard belief of what law is and how it operates. I will begin by articulating some focal aspects of the familiar view in order to highlight the problem which legisprudence as a theory of rational legislation deals with. Following that, I will challenge the familiar view on the basis that it pays insufficient attention to legislative law making from a theoretical perspective, after which I will explore what "rational legislation" seems to involve and what type of questions arise when dealing with that problem.

One aspect of the familiar view is that the object of legal science or legal dogmatics is the law, both the law in the books and the law in action. Legal science describes, systematizes, and explains the law as it is. It follows that the propositions of legal science are propositions *de lege lata*, that is, existing positive law or what counts as the set of binding legal norms of a legal system. The familiar view is not concerned with what or how the law could or should be. On this view, considerations de *lege ferenda* fall out the scope of legal science.

The distinction between law *de lege lata* and *de lege ferenda* reflects another aspect of the familiar view. This points to the separation between law and morals on the one hand and between law and politics on the other. It comprises part of the familiar view in that legal science in order to be

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scientific is to be objective. Description, systematization, and explanation of the law can only be scientific if it avoids making evaluative statements or propositions *de lege ferenda*. As far as the distinction points to the separation between law and morals, legal theory is said to be positivistic while its pointing to the separation between law and politics makes it legalistic. Under the familiar view both positivism and legalism characterize the law and contribute to the delineation of both the object and the method of legal science. They contribute to the determination of both the nature and the way of scientifically investigating the law.

Yet another feature of the familiar view is that the law is a system. In this respect lawyers refer to the law as the legal system or the legal order as a systematic set of legally valid norms. Valid legal norms are part of a system, and any system consists of valid norms. The distinguishing characteristic of being legally valid is a necessary and a sufficient criterion for a norm to belong to the system. The validity of a legal norm is usually defined—at least in most civil law systems—as its being created in accordance with the hierarchically higher norms of the system.

This reveals a further facet of the familiar view: the belief that legally valid norms are unquestionably legitimate. Legal validity derives from conformity with hierarchically higher norms. These norms confer the power to issue new norms, and as long as the power holder acts in accordance with these power-conferring norms the ensuing norms are valid. Power-conferring norms confer upon—as well as limit the competence of—the power holder which makes his power a legal power. Any norm-creating act within the competence of the power holder results in a norm that is both valid and legitimate. More specifically, norms created on the basis of hierarchically higher norms are formally valid and internally legitimate, while the legal system composed of these norms is itself externally legitimate.

This points to an additional feature of the familiar view being that the legal system itself is believed to be legitimate because and in so far as it is formally legitimated. The ultimate basis of the system's legitimacy is consent expressed in terms of the consent of the governed that is confirmed on a regular basis by democratic elections. The social contract establishes the institutions of a political society that finds its foundation hence its legitimacy in the initial agreement. The establishment of the institutions of political society reflects a distributional organization of power which is commonly articulated as the separation of powers. This articulation of the distribution of powers involves a hierarchical order of the institutions of the legal system according to which the legislator creates law that the executive implements, while the judiciary has the duty to apply both the legislative and the executive norms. This is supported by the idea of the rule of law that holds that power can only be exercised on the basis of the law.

The familiar view culminates in the idea of legal science that describes, systematizes and explains the law as it is, thus making true propositions about it, and in so doing sustains—if not corroborates—the familiar view.

Current legal theory as the theory of legal science or the meta-theory of law has focused most of its attention to date on the position of the judge. Viewed from this angle, legal theory has developed various methodologies of law application. These methodologies essentially focus on judicial interpretation of the law, taking into account the judiciary's institutional subordination to the legislature. The core assumption of judicial interpretation is that the law is rational, and that its rationality is to be preserved throughout its subsequent application. This assumption underpins the actions of the judges as well as legal scholars.

Following on from this assumption underlying the familiar view the legislator is assumed to be rational. This involves a regressive assumption: from the assumption of the rationality of the product the familiar view regressively assumes the rationality of its maker. This regressive assumption of the rationality of the legislator is kept intact despite the deep-rooted conviction that legislative lawmaking has its origin in politics. Politics, in turn, is commonly described as a "power game", "Realpolitik", or even logrolling and horse trading, which ultimately leads to sofa compromises. Despite this not particularly elevated way of making the law, it is held to be rational and so is its maker.

In this contribution I will challenge some aspects of what I have described as the "familiar view". More specifically, I will explore the assumption of the rationality of the legislator underlying judicial activity and the corroborating support it receives from legal science. In doing so I will adopt a meta-theoretical point of view throwing a different light on the position of the judge from which a critical assessment can be carried out of the legislator's assumed rationality. Following on from the fruitfulness of this exploration I will then further investigate the possibility of critically theorizing the legislator's rationality using what in earlier work, I have called a "legisprudential" theory of law.

A legisprudential theory of law in contradistinction to the widespread jurisprudential approach no longer takes for granted the central position of the judge as the main legal agent. It aims instead to enlarge the spectrum of legal theory as the meta-theory of legal science by including the legislator as a legal agent thus downplaying his mainly political role in lawmaking. If my exploration and diagnosis turns out to be fruitful, it will provide us with a different way of theorizing legislative law making. As a note of comfort to adepts of the familiar view who may feel alarmed by this pronouncement, I should add that my approach amounts to a way of putting the emphasis differently as opposed to a complete revolution. It is more an invitation to look at the law in a different way than a call to radically change it.

This new way of looking at the law is triggered by an often felt discomfort with legislative law. Under the familiar view law creates order. It is the type of bureaucratic law that Weber described as the fertile soil for capitalism that emerged from one of the variants of Protestantism. The order thus created secures the economic interests that make it worthwhile to take the risk of capital investments. It does not however only protect economic interests by providing a stable environment. In creating order it also secures other interests by stabilizing legitimate social expectations. From this broader perspective law creates social stability in that it provides standards of behavior in the form of rules that serve at the same time as a standard of criticism for deviant behavior. In doing so the law aims to create certainty through guiding human behavior.

The pendant of the social order created by the law is the set of norms, in the form of rules, that are referred to as the legal order that legal science describes, further systematizes and explains. According to positivist legal theory the criterion for membership of a norm of the legal system is its validity. A general version of this criterion is "being ordered by the sovereign", and can be further constrained by more specific criteria such as "in accordance with the existing norms of the legal system". It can—and most of the time is—supplemented by a theory of the sources of law including some form of hierarchy among them.

It is here that the discomfort with legislative law comes to the fore. Legal science of the positivistic brand is concerned with the existence of valid law and who can make and apply it. The description and systematization of this product of the legal system is the object of legal science. Apart from *who* can do *what* it expresses little concern for *how* law is made. In most western legal systems an explosive growth of norms can be observed. One need only take note of the exponentially growing number of pages of the official publication bulletins of legislation to verify this observation. Something similar to road traffic is in evidence here. The more cars there are on the roads, the more collisions occur. Traffic no longer runs smoothly, but generates jams, and instead of facilitating mobility it tends to have the opposite effect. The same happens when legal systems start producing norms with an ever increasing rapidity: the risk of collisions between norms grows proportionally. As a consequence, the set of norms assembled in the legal system turns out to be no longer systematic but rather tends towards disorder. This decreasing systematicity of the legal order tends to leave in its wake a weakening of the securing ordering of social interaction which seems to result in the opposite effect to legal certainty. Other defects often complained of are that the norms contradict each other or are in conflict with the constitution, while many norms are poorly drafted. Some norms are of dubious procedural origin, lack a significant rationale, or embody a faulty means-end hypothesis.

An important side-effect of this is that while law aims at offering guidance, it also tends to generate new causes for conflicts rather than preventing them. This phenomenon is referred to as "adversarial legalism" of which divorce law is a sad example. Indeed, it seems that sometimes law creates conflicts, rather than solving them, and so it tends to deviate from guiding behavior by facilitating social interaction.

Another aspect of the discomfort with legislative law underlying the exponential growth of the legal system is that legislative law is produced at an ever quicker pace. This often results in weak preparation and poor drafting of normative texts. Grandmothers use to say that good work needs time. Legislators are likely to dismiss this advice and tend to produce vague texts that are difficult to apply or very detailed ones that quickly become redundant. On this point as well, both officials and citizens express their discomfort while still maintaining belief in the rationality of the legislator.

1.2 Rationality

The modern Western metaphysical tradition conceives Reason as a faculty with which humans are endowed. All humans—ontologically speaking—have it as a *differentia specifica*, and the correct use of this faculty results in rational, true knowledge and action. Reason, in other words, is the faculty the correct use of which results in true knowledge and moral action.

A post-metaphysical view, for its part, is critical of this direct access to reality, including human nature. To say that Reason is a faculty we *have*, amounts to ascribing to ourselves a quality. This ascription may be taken as an assumption which is close to the metaphysical approach. Under the post-metaphysical view, it amounts to a belief, which we may truly hold, yet the truth of the proposition in which we ascribe rationality to ourselves crucially depends of course on the correct use of reason. This is problematic since we may truly believe that we are rational, yet the justification for the belief crucially depends on its justification hence the use of reason. We may truly believe that we *are* rational or that we *have* the faculty of reason, but for other than rational reasons (e.g. because God created us as beings endowed with reason). Hence the rational justification of the belief, however truly we hold it, presupposes again that we have the faculty of reason or that we are rational beings.

In a similar vein, assuming that we have the faculty of reason is one thing. It is quite another to include in that assumption the idea that we therefore know how to use it. The assumption that we have it, and if we use it correctly it will lead to true knowledge and action seems to include the idea that we also have

the manual for how to use it correctly. Apart from the circular self-ascription of rationality this observation suggests the self-referentiality of the concept of rationality. Rationality thus conceived contains its own criteria which is a stipulative definition.

If we are no longer content with relying on "human nature" presupposing a direct access to reality, nor on a stipulatively defined self-referential notion of rationality—or self-evident reason including its own criteria—nor self-confidently though circularly describing ourselves as having it, we must look for different grounds for dealing with rationality in a meaningful way, seeing it as an aptitude rather than as a faculty.

When leaving aside the aspiration of a direct access reality in terms of "human nature" or conceiving rationality in terms of "faculty", we are less at risk of circularity in ascribing to ourselves a self-referential quality. Reason as a faculty which we are assumed to have (or that we ascribe to ourselves), so it seems, is not always "in act" (even, ironically, in the act of ascribing it to ourselves), which does not of course exclude the possibility of the belief that we are rational, in that we are capable of rationally justifying this belief.

One way of seeing this is that this capacity is not a capacity of isolated individuals as the Western tradition following Descartes suggests. To be a capable subject is not identical to saying that we are simply endowed with the capacity for rational knowledge and action waiting for the appropriate time, place and circumstances to be activated. Seen from this angle, we have a "concept of the self" distilled from a direct access to reality or stipulatively defined. I have argued elsewhere for the view that it is "time, place and circumstances" that activate the capacity.[1] Time, place and circumstances as the context of a subject are constitutive of this capacity. This suggests that rationality is not only agent-related but is also context dependent. It depends on a context of interaction (or participation) with others since it is only through interaction with others that the capacity develops.

Rationality is not a concept that belongs to the concept of the self, whatever this means. As a capacity for rational knowledge and action it belongs to our self-conception. If we were to suppose for a moment that "rationality" was a concept, we would be back on the track of "searching for its true meaning". That being the case, we can say that in the absence of a true meaning, agents can truly hold different conceptions of this concept. Different conceptions of rationality may conflict with each other, which leads Descartes to suggest that none of the dissenters are right. Dissent about the true meaning of rationality is not a sign of the absence of rationality though, it is only an indication of dissent/absence of agreement.

[1] Wintgens (2012: 59–90).

It is not because conflicts about the meaning of rationality arise that we are all wrong about its point. Another way of looking at it than the Cartesian solution is to conceive of rationality as an agent-related capacity for rational knowledge and action which includes the capacity for solving conflicts (theoretical in this case). In this respect we may fail to come to an agreement, but this is not a sign of irrationality. It is rather a sign that our capacities are limited without being inexistent or meaningless.

Different conceptions of rationality may appear in different contexts. Rationality in an economic context is different from rationality in a political or legal context. Referring to "rationality as capacity", this suggests that the point of economics is to solve problems of scarcity by using rational capacities (calculating, anticipating, etc.). But "rationality as capacity" is not exhausted in the tabulation of different conceptions or rationality. These different conceptions are connected to each other, something which I will not touch on here.

The disadvantage of rationality according to what I have broadly referred to as the Western tradition is that it leads to an abstraction of the real world. It is common sense to say that, even if we are rational beings, not every one of us, and not even us ourselves, always behave that way. It is intuitively correct to say that some people are more rational than others, in that they act more rationally in certain circumstances than others. And there is no shame in saying that we are essentially fallible.

To conceive of rationality as an agent-related capacity to acquire knowledge and to act in a rational way is one way of downplaying the core idea of the intellectualist tradition conceiving rationality as the divine part within us. The embedded subject being capable of coping with complexity—both theoretical and practical—to paraphrase Herbert Simon's felicitous expression. This approach may be less "strong", but it also seems less "wrong". It may to a significant extent temper our illusionary ambition in the quest for the Holy Grail of unqualified truth, disillusioning ourselves of the belief that we ultimately reach it, without however falling victim to the opposite mindset of vulgar pragmatism or even cynicism.

The view of rationality as the capacity to cope with complexity has been formulated by Simon as a critique of *homo economicus*, who can be seen as an heir of the intellectualist tradition, a twin of Descartes' *homo rationalis*. *Homo economicus* as the rational agent in neo-classical economics is supposed to always act in such a way as to maximize his wealth. *Homo economicus* settles for nothing less than the best. On Simon's view, the rationality assumption of neoclassical economics, for different reasons, is too strong. Simon's view amounts to substituting a weaker version of rationality for the comprehensive model of rational choice connected to substantive rationality

which neoclassical economics relies on. Simon calls this weaker version of rationality "bounded rationality", which I will come to shortly.

Let us first see how we can get a better hold on the rational legislator, and thus explore the context in which he shows up most frequently, that is, in the practice of judicial interpretation or construction of legislative texts. Starting from judge-centered legal theory according to which the judge is the central agent in the legal system, the best way, I would suggest, to get a hold on the problem of the rationality of legislative law and the legislator is to look at it through judicial eyes.

The argument will follow two lines. The first amounts to a clarification of some characteristics of judicial interpretation. Its main characteristic seems to be that the legislator is held to be rational, which is a variant of the principle of charity at work in judicial interpretation. My examination aims to identify a number of aspects of the assumption of the rationality of the legislator which are connected to the familiar view.

The second line of the argument, connected to the first, amounts to a reinterpretation of the principle of charity based on shedding a different light on the rationality of the legislator. Since legislators are human agents, there is no reason to suppose that they have the faculty of rationality or that they are rational. Rather, we assume that they have such faculty or that they are rational. My thesis is that the legislator is capable of rationality and acts according to "time, place and circumstances" or in a social context. Following on from this idea, I will qualify rationality as "bounded rationality". The combination of the two lines of argument will be helpful in further elaborating the contours of a legisprudential theory of law as a theory of rational law making.

Throughout the act of interpretation the author of the interpretandum is presumed to be rational in that he intends his work to be intelligible. When it comes to the interpretation of, say, a contract, an executive norm, or a statute, the interpreter assumes that the authors of the documents in question are rational agents. Upon this assumption he tries to make as much sense as possible of the text before him. He tries, that is, to find out what the text means assuming that its authors have an intelligible end or purpose which they want to achieve. In doing so, he reads paradoxical or contradictory contract clauses and legislative and executive rulings in a way that shows them to be the will of a rational agent rather than construing them as absurd, unintelligible, or contradictory.

For the purpose of this essay, I will limit the scope of inquiry to legislative acts. Their interpretation follows a recognizable path: if contradictions or inconsistencies appear within legislation both judicial and doctrinal interpretation consists of removing these using canonical principles like *lex posterior*, *lex specialis*, or *lex superior*. Interpretation using these principles

aims at safeguarding the rational connection between the norms of the system by attributing the legislation to a rationally acting legislator. The purpose of this is the preservation of the consistency or the systematic nature of the legal order.

This is only one aspect of how legal interpretation proceeds in order to keep the system rational: the interpreter assumes that the author is a rational agent and acts accordingly. The assumption of the rationality of the legislator portrays him as an agent who issues "consciously made rational rules" to use Weber's wording. According to Weber domination on the basis of valid legal norms is legitimate. Legal norms are valid based upon their being issued according to the prevailing secondary norms of the legal system. His position, in short, means that legality involves legitimacy. Consciously made rational norms legitimize domination.[2] This includes the suggestion that legitimacy depends on the rationality of norms, driven by the assumption of the rationality of their author.

The assumption of the rationality of the legislator, as we have already seen, allows the interpreter to erase a number of contradictions in or between legislative norms, as well as a number of impertinent declarations of the legislator. It also allows the reader to interpret an unconstitutional norm as if it were in conformity with the Constitution. Such an assumption can, furthermore, steer the adaptation of legislative rules to newly emerging circumstances based on the assumption that a rational legislator would have adapted his ruling had he been aware of such circumstances. These are but a few of the possibilities of the ideas that are included within the assumption of the rationality of the legislator. This assumption is brought into play as a hermeneutic tool in order to make as much sense as possible of legislative law. As a hermeneutic tool it also has a curative function in that the qualities which we ascribe to legislative norms are often lacking: some norms do contradict each other, some of them contradict the constitution, and many of them are poorly drafted. Other norms may be of dubious procedural origin, lack a significant rationale, or embody a faulty means-end hypothesis. This was referred to above as the discomfort with legislative law.

These deficiencies are patched up through interpretation by assuming that the legislator is, after all, a rational agent. What the interpreter can do, yet the only thing he can legitimately do, is making the best of the situation by assuming that the author is a rational agent. In his attempt to optimize his interpretation he anticipates the sense that the *interpretandum* has. This presupposition is an anticipation of the *perfect unity of sense* ("Vorgriff der Vollkommenheit"), as Gadamer puts it. To attempt to make sense of a text,

[2] Rheinstein (1954: 336).

typically a statutory text, presupposes that it makes sense and this presupposition includes a preconception of its perfection.[3] Optimization of interpretation relies on the hypothesis of the maximal coherence of the *interpretandum* on the assumption that its author is rational. This is what in legal interpretation the "rationality of the legislator" amounts to.

1.3 The Principle of Charity

The idea that interpretation involves an anticipated recognition of the rational character of the *interpretandum* and its author has a long history. The "anticipation of perfection" as Gadamer calls it, can be found in Christian Thomasius' work where it is suggested that it is the proper attitude of a *benigna interpretatio*. G F Meier qualifies this attitude as *aequitas hermeneutica*.[4] In more recent times, Neil Wilson[5] has coined the expression "principle of charity" to point to this fundamental premise underlying interpretation that was further elaborated by Davidson and Quine.

Quine has argued that translation should preserve logical laws. That is to say, we should translate a speaker's utterances in such a way as to avoid construing them as contradictory or absurd. We presume, in other words, that the speaker of a foreign language follows the laws of logic. The same applies to a foreign speaker's utterances in a language with which we are familiar. Quine points out that the speaker's silliness, beyond a certain point, is less likely than bad translation. The same idea applies *a fortiori* when we have the same native tongue as the speaker.

In a similar vein, Davidson's is the idea that interpretation should preserve the content of the interpretandum on the assumption that it is intelligible based upon the author's rationality. Both the preservation of the content and the laws of logic through interpretation reflect a charitable attitude towards the author of the *interpretandum*.[6]

This is an important aspect of judicial interpretation. Judicial application of norms requires understanding of their text. Understanding involves interpretation, since no text is self-interpreting. In line with Gadamer's suggestion, the anticipation of perfection provides a clarification of the "understanding of understanding". Therefore it seems that the principle of charity

[3] Gadamer (1960/1990: 299).

[4] Thomasius (1688/1993); Meier (1996), quoted in Zini (2001: 6–7).

[5] Wilson (1959: 532).

[6] Quine (1960: 59, 69); Quine (1969 : 46); Davidson (1973).

can be meaningfully implemented in judicial interpretation preceding the application of legislative law. Under the principle of charity, the judge considers the author of legislative norms to be rational in assuming that he did not wish to contradict himself, that he did intend to avoid absurd results following on from his ruling, that he was aware of the preferences of those subjected to his rules, etc.

All of this sounds very idealistic not to say counterfactual or counterintuitive. Our experience with today's legal systems is sometimes deceptive and contrary to what the familiar view promises. Legislators behave in ways that are often viewed as being anything but rational, a quality that we keep assigning to them against our better knowledge. Laws can be unconstitutional, vague, poorly drafted, ill-adapted to the end which they aim at realizing, patently inequitable, or "running behind the facts". Logical problems are, so it seems, but the easy part of the game while most legal systems seem ill-equipped to tackle the other parts.

The assumption of the rationality of the legislator in legal interpretation lies at the very basis of legal interpretation as a "prejudice" or a condition for the understanding of legislative texts. It is, one can say, a foundational premise of the legal order that is effectuated throughout judicial interpretation of legislative law. All methods of interpretation as a matter of fact rely on that foundational premise. In order to get a better hold on the discomfort with the law in connection with the familiar view, we must work our way through this foundational premise and find out what use a more finely-tuned interpretation of it can offer.

Adopting a rudimentary scheme of interpretation, three different contexts can be identified, namely, a semantic, a syntactic, and a pragmatic context. Most methods of legal interpretation can be classified according to these contexts. So, literal interpretation best fits the semantic context, while logical, systematic, and grammatical interpretation falls within the syntactic context. Teleological interpretation, finally, comes within the pragmatic context. What connects the different methods of interpretation in relation to their different contexts is their aim of making sense of normative texts. Making as much sense as possible in these different contexts in other words is what legal interpretation amounts to. Upon the underlying assumption of the rationality of the legislator, the different types of interpretation articulate different—though not separate—aspects of this assumption.

It is generally agreed, that the principle of charity operates as a constraint on interpretation. Charitable interpretation requires that we consider the object of interpretation to be the work of a rational agent. We attribute rationality to the agent and in doing so we constrain our interpretation of the *interpretandum*. One way of seeing this assumption is to put it in terms of a

presumptio juris et de jure which is irrefutable, by which I suggest a possible reinterpretation of the principle of charity as a presumption.[7]

The reinterpretation of the principle of charity which I propose places it between two extremes. One extreme states: "do not assume *a priori* that the legislator is irrational"; the other dictates: "never interpret the legislator as irrational". The former is the weakest reading of the principle of charity. While it says that the legislator's irrationality must not be *a priori* assumed, it does, however, leave room for doing so. The latter is the most stringent reading in that it suggests that Reason is simply incarnated in the legislator and is straightforwardly reflected in the norms which he issues. On this reading of the legislator he is held to be omniscient. This is the reading of the principle of charity as a *presumptio juris et de jure* articulated in the foregoing paragraphs and that underlies the familiar view.

The weakest reading, for its part, is an attractive interpretation for our purposes, though it requires some qualification. Taken as it stands, it does not inform us when (not) to consider an act of the legislator to be irrational; it only tells us not to assume this *a priori*.

The required qualification amounts to an "in-between" reading of the principle of charity in the following manner: "Do not judge the legislator to be irrational unless you have an empirically justified account of what he is doing when he violates normative standards".[8] This in-between reading of the principle of charity is attractive in that it allows one to substitute empirically justified criticism of the rationality of the legislator for an *a priori* assumption. In doing so, the rationality of legislative law is *prima facie* presumed and allows a gradual qualification in the light of empirical data. It opens up the possibility of an empirical assessment of the legislator's rationality that may be assessed on the basis of concrete experience with legislative law. On this in-between reading of the principle of charity the legislator's rationality can be turned, so it seems, from a *presumptio juris et de jure* into a *presumptio juris tantum*. The in-between reading of the principle of charity then invites us to consider the legislator as a rational agent although his performance is not always optimal without for that reason being irrational.

Before continuing our discussion, we should briefly pause to pick up on a remark made above. I stated that the aim of a legisprudential theory of law amounts to a reflection on making legislative law more rational and more rationally. This points to a distinction between what I propose to call

[7] Cf. the suggestions made in the context of social sciences in general in Thagard and Nisbett (1983).

[8] Thagard and Nisbett (1983: 251).

legislation in the passive and in the active sense. Legislation in the passive sense is a *product*. It is used in expressions like "environmental legislation" or "tax legislation". Legislation in the active sense on the contrary refers to the *process* of legislation. While problems with the rationality of legislation in the passive sense only appear when it comes to interpretation and application, problems of the rationality of legislation in the active sense appear at an earlier stage, that is, throughout the process of legislative law making. A legisprudential theory of law that no longer takes for granted the central position of the judge, but also considers the legislator as a legal agent (although he is also a political agent) focuses on the process of legislation or legislation in the active sense. From this perspective, the process of legislation seems to be the appropriate context for the exploration of the rationality of the legislator.

I hasten to add that when using the notion of "legislative process" I do not have in mind something like the descriptive approach adopted by some political scientists in their study of legislative behavior. These political scientists usually tend to concentrate on the informal processes of law making—like lobbying, compromise, and the like—rather than on more formal or rational aspects of the legislative process. Within the aspirational context of legisprudence, I rather have in mind the process of legislation as legislative *action*, that is, behavior for a reason. This comes down to asking ourselves how, that is, for what reasons, a legislator acts throughout the process of legislation.

These reasons refer to choices which the legislator makes. These choices express his "will", so it is the *process of justification* of legislative law making that I am interested in. In this respect the scope of legisprudence is broader than discovering the will of the legislator throughout judicial or doctrinal interpretation. The point of my concern, in short, is practical reason in legislation. It does not so much deal with *who* makes *which* choices than with *how* they are made; and it does not so much deal with *what* norms are made than with *how* they are made. What can we—rationally—expect from a rational legislator in this respect?

In trying to answer this question it is helpful to turn to the in-between reading of the principle of charity that I have just referred to. The principle as was stated, constrains interpretation. The product of legislation is what judges interpret, yet the process of legislation is what legislators are engaged in. To avoid considering the legislator *a priori* irrational amounts to a *prima facie* presumption that he intends to be rational in the process of legislation even if the product in question is not always optimal. In following the line of the in-between reading of the principle of charity I propose to further explore the legislator's rationality in the next section.

1.4 Bounded Rationality

We should recall the most stringent reading of the principle of charity according to which we *a priori* assume that the legislator is a rational agent. In a similar way to the familiar view in law, neoclassical economic theory assigns a standard set of characteristics to decision makers that are covered by a substantive version of rationality involving a projective element. Decision makers, so neoclassical economic theory assumes, work with well-defined problems and have a full array of alternatives to consider. Furthermore, they are assumed to have full baseline information as well as full information about the consequences of each alternative and the values and preferences of those affected by their decisions. Finally they are assumed to have adequate time, skill, and resources to make their decisions. It is upon these abstract assumptions that such decisions are optimal or rational. This strongly reminds us of some of the characteristics of the rational legislator portrayed above.

The real conditions under which decision makers act look quite different though. Most of the time, decision makers consider problems as "clear cut" or given while a more realistic view is that problems are "constructed". Problems are indeed not self-evident which means that there is risk of failing to understand them. In addition, problems are often poorly or ill-defined due, among other things, to a lack of information about alternatives, incomplete information about the baseline or the background to the problem, the consequences of supposed alternatives or the range and content of values, preferences, and interests. Choices which we call "rational" are often based on incommensurate or ill-integrated goals.

Furthermore, decision makers are supposed to act deliberately in their search for solutions without being affected by emotions. The influence of the environment on decision makers is, most of the time, left out of view, just like the uncertainty under which they make their decisions. Their search for information is often incomplete, selective, and non-optimal while the marginal cost of relevant information may become prohibitively high, since the scarce resource is not information but attention.[9] All of this, so it seems, does not come as a surprise. The surprise rather comes in the persistence of the belief in the decision makers' omniscience involving the belief in the optimality of their decisions.

The more down to earth approach to rationality just outlined may profoundly shake our self-conception as rational agents. It provides us with a

[9] Jones (1999: 302–310); Simon (1978: 13).

more realistic approach though as to how decision makers behave. Simon has coined the term "bounded rationality" for it, thus articulating the limitations of human rationality.

The main limitations to human rationality according to Simon are time, skills, and resources.[10] Decision makers act in a context of time pressure. Their computational skills and attention are limited due to their restricted brain capacity. More people and more computers for example may help to overcome this restriction, though this does not in principle tackle it. In addition, resources, mainly information and time are scarce and the marginal cost of additional information needed to reach optimal decisions may be prohibitively high. Decision makers do not have a full and comprehensive view of the values of those subjected to their decisions, and they may indeed meet with unforeseen circumstances that affect their decisions.

Under the conditions of bounded rationality, decision makers in the real world strive for rationality in that they behave intendedly rational, as Simon puts it, but only boundedly or limitedly so.[11] Therefore they settle for less than the best in that they should content themselves with *satisficing* solutions instead of optimal ones. Satisficing solutions are reasonable solutions, in that they strive to achieve a balance.

What does the rational legislator look like once we dress him up as an agent who behaves intendedly rational while not always performing in such a way?

1.4.1 A Boundedly Rational Legislator as a Legal Agent

The combination of the in-between interpretation of the principle of charity and the idea of bounded rationality results in what was stated in the foregoing section and leads us to the thesis of the legislator as a boundedly rational legal agent. This amounts to considering him to be a rational agent although his performance is not always optimal. Yet, optimal solutions are not part of the real world; at best, they exist on paper. Optimality therefore only seems to be useful as a regulative ideal for evaluating the legislator's rationality, not as a binary yardstick. Optimality from this perspective is conceived of as the outer end of a spectrum.

Following upon the adaptation of the standard of rationality to real world conditions, decision makers' dealing with its complexity in an empirically

[10] March and Simon (1993: chapter 6).

[11] Simon (1997: 88).

justifiable manner is what characterizes the rationality of their actions. It is because the agents are boundedly rational that they have to make choices. If they were really omniscient, the very idea of a choice would never come to mind. The rationality of his choices then depends on how the agent copes with the complexity of social reality. How can action, that is, legislative decision making, by a boundedly rational agent like the legislator be framed so that it can be qualified as "rational"?

Boundedly rational legislators should not simply issue their rules to the world. What classical judge oriented theories of law seem to overlook is that legislation, in order to be rational, must not only be issued according to the rules of competence and procedure of the legal system. They must also "make sense in the world". Making sense of normative texts as a matter of coherence at the level of interpretation as I have expounded above, has a counterpart at the level of legislative law making by the legislator. Once the assumption of rationality of the legislator is abandoned or at least tailored to the real world, it falls on the legislator to show *how* he makes sense of the complexity of the world.

This question triggers a variety of new questions. For the purposes of this essay, I will limit myself to the following: how does the boundedly rational legislator cope with the complexity of facts? Apart from the different facets of rationality that were briefly referred to above, this question focuses on what can broadly be characterized as the epistemic aspect of the legislator's rationality. His cognitive openness to social reality while being normatively bounded to the Constitution calls for socially sensitive decision making that is apt to counter the discomfort felt with the law.

The boundedly rational legislator was characterized as an agent empowered by the Constitution to make law, yet with limited time, skills, and resources for doing so. Upon this limitation he can at best produce "satisficing" rules, that is, the best rules possible (1) *rebus sic stantibus*, (2) all things considered (3) now. This formulation includes the suggestion of the importance of the time dimension of the process of legislation.

1.4.2 Contingency

The epistemic aspect of the legislator's rationality brings to the fore the time dimension of law. The legislator's time perspective is replete with contingency since the future is to a large extent unpredictable. The legislator knows only probabilistically the state of affairs of the social world. Contingency points in two directions viz. a synchronic and a diachronic direction. *Synchronic* contingency refers to facts at the time of the preparation and

promulgation of the legislative norm. *Diachronic* contingency for its part is slightly more complex in that it refers to facts *and* their change over time, including effects or facts resulting from legislative norms. Taking into account the effects of legislative law then points to the pragmatic dimension of the legislator's rationality.[12]

Synchronic and diachronic contingency affect the rationality of law in that a legislator's dealing with facts is part and parcel of rationally making law. Both affect legislative fact finding since the legislator has only probabilistic knowledge of facts due to the contingency of the world on the one hand and his bounded rationality on the other.

The distinction between synchronic and diachronic contingency in connection with the process of legislating allows us to distinguish the latter in the pre-legislative and the post-legislative phase. Synchronic contingency affects the legislator's dealing with complexity in the pre-legislative phase. His framing of legislative norms is preceded by a process of fact finding in view of the problem which his norms aim at regulating. The formulation of a problem therefore must rely on an adequate description of relevant facts the clustering of which results in the situation that is held to be undesirable. The regulation of the undesirable situation$_u$ purports to transform it into a more desirable situation$_d$ upon connecting legal consequences to the occurrence of situation$_u$.

This connection is not causal in that situation$_d$ will of and by itself occur as the result of the legal consequences attached to situation$_u$. In order to make this happen, a prognosis of the consequences is already in place. Prognosis of the consequences however again suffers from contingency since they are only probabilistic. Prognosis of the consequences, due to the probabilistic character of the connection between situation$_u$ and situation$_d$ requires a twofold critical appraisal of it. It first requires a comparison with alternative means to obtain situation$_d$. In addition, it requires a reasonable prospection of future circumstances, that is to say, a prospection of changing facts as well as facts as the result of the legislative norm or its effects.[13]

Due to diachronic contingency, what was considered rational or satisficing all things considered at one moment in time can become less rational or satisficing at a later moment. This can be clarified as follows. In addition to the other aspects of bounded rationality, a boundedly rational legislator acts among things under time constraint. This affects his initial fact finding as a

[12] Although diachronic contingency thus defined is more complex than synchronic contingency, it is not essentially different from it. It can be qualified as a weaker version of diachronic contingency in that the latter unlike the former includes the flow of time.

[13] Wintgens (2012: 294–302).

matter of synchronic contingency. In addition to that, even if it may have looked "optimal" at the beginning, it may turn out to have been—or become—only "satisficing" after a lapse of time. Put differently, even if a legislator more or less successfully anticipates the future, he cannot predict with certainty what will happen after he has promulgated his norm. Time in other words is not at his disposal.

In this respect one may recall the familiar view that was outlined at the beginning of this essay. It characteristically makes abstraction of—synchronic as well as diachronic—contingency in assuming the legislator's rationality. Facts are not the primary concern under the familiar view, far less time. One should recall in this respect the rationality assumption in neoliberal economics. On this assumption agents *are* rational and act in perfect markets with full transparency, no transaction costs, and no time constraints. Boundedly rational agents for their part, on Simon's approach, *behave* intendedly rational, but only *boundedly* so.

They act in social contexts that are contingent upon the flow of time. As a consequence, the intention to behave rationally and behave only boundedly so, that is, without performing in a perfectly rational way, is not the result of some "lack" due to laziness, negligence, or bad will, but is due to the inherent contingency of social reality in which decisions are made and implemented.

If then, at the moment of its promulgation, a legislative norm is held to be rational, it is not because it is bestowed with rationality from a "one shot" a-temporal perspective. The latter reflects the *product* approach according to which law is omnitemporally rational upon the incarnation of Reason in its omniscient author. The *process* approach to legislation for its part which I am advocating here suggests that legislators act in a context that is inherently contingent and complex. The rationality of legislation then depends on *how* it is made, that is, on how its author copes with the complexity of the context in making it. Put differently, the rationality of legislative norms depends on how a boundedly rational legislator makes sense of complex social reality of which contingency is an inherent aspect. Legislation as a process faces the contingency of social reality as one of the aspects of complexity which a rational legislator has to cope with in a rational manner. This way of putting it amounts to stating that on the process view of legislation that I am advocating here, a rational legislator is required to keep track of his norms over time. Without exhausting the matter, and preferring focus to detail, I confine the argument here to the effects of legislative norms as a particular type of facts from a diachronic perspective. The point of my argument is to problematize the factual dimension of legislative norm making through the lens of its effects.

1.4.3 Diachronic Contingency: Effects of Norms

We should recall that the purpose of the essay is to make plausible that the legislator is no longer covered by the assumption of his rationality. Let us also recall in this respect that on the in-between reading of the principle of charity empirically justified criticism can be substituted for the *a priori* assumption of the rationality of the legislator.

In this respect an epistemically rational legislator is not simply assumed, but is on the contrary required to be aware of social reality. His awareness of social reality and his responsiveness to the problems he detects will however be affected by his bounded rationality.[14] Boundedly rational agents strive for rationality in that they behave intendedly rationally but only boundedly or limitedly so, because they have, generally speaking, only limited time, skills, and resources. What does this mean?

Assume that the legislator has issued a satisficing norm at time t_0. Both bounded and epistemic rationality can be considered incentives to follow up the norm once it is issued. As a boundedly rational agent, the legislator is to be aware of the mere satisficing character of his norm. This awareness is reinforced by his epistemic rationality. As an epistemically rational agent he has to show how he has effectuated his awareness of social reality over time, that is to say, at t_0 as well as at t_1, t_2, …, t_n.

This focus on the effects of a norm is a way of "keeping track" of it. Effects of a norm are multifaceted and vary from desired or undesired, desirable or undesirable, positive or negative, short term or long term, symbolic or concrete, intentional or unintentional and various combinations thereof.[15] For the purposes of this essay, I propose to categorize the factual effects of a legislative norm along three lines, that is, "efficacy", "effectivity" or "effectiveness", and "efficiency".

Efficacy points to the fact that a legislative norm achieves the purpose that the legislator had in mind when issuing it, in that the state of affairs he aimed at realizing has been realized. *Effectivity*—or effectiveness—of a legislative norm for its part refers to its being followed and applied by legal agents and the judiciary respectively. There seems to be some confusion as to this notion since a norm that is effective from the perspective of the legal agents need not be actually enforced—or "applied"—by the judiciary and so would

[14] For the sake of simplicity, I consider bounded rationality at the side of the legislator as correlative of the contingency of social reality.

[15] A norm producing a desired positive effect on a short term, but a undesirable negative effect on the long term.

turn out not to be effective from that perspective. The confusion seems to stem from the idea that effectiveness only affects mandatory norms—or "primary norms of obligation" as Hart calls them.[16] There seems to be good grounds however for holding that permissive norms—"secondary norm of private power" in Hartian terminology—can qualify as effective or ineffective. This would be the case where there is a norm permitting individuals to make a will and no one makes one. *Efficiency* finally points to a cost-benefit relation between a legislative norm and its effects.

Some interrelationships can be detected between these three categories of effects. Without a claim to exhaustiveness, it is easy to see that a legislative norm can be effective without being efficacious. In that case, it is followed and/or applied but without realizing the state of affairs the legislator was aiming at achieving. Conversely, an ineffective legislative norm can hardly be said to be efficacious. If it is not followed and/or applied, it will most probably not produce the state of affairs that the legislator had in mind. A norm can also be effective and efficacious, without being a formally valid legislative norm, as is the case with customary law (or rules of positive morality).

Two formally valid legislative norms may turn out to be "incompossible", that is, when they mutually annul each other's effects. In that case they can barely be said to be efficacious. When they are applied simultaneously, there is no effect at all. If one of them is applied and/or followed at the expense of the other, the former may be said to be effective, while the other is not effective and consequentially not efficacious.

Finally, an inefficient norm may require an unreasonably high enforcement cost that jeopardises its effectivity as well as its efficacy.

In addition to the foregoing observations, it must be mentioned that none of these effects is a matter of optimality but rather a matter of degree. Optimality is a dispositive concept in that a legislative norm is or is not optimal. Put differently, optimality is not context sensitive. When we broaden the context of legislative norm making to social reality, it makes sense to say that it is "more or less" efficacious, effective, or efficient. This is, as it seems, not only a matter of common sense. It likewise fits the qualification of the legislator as a boundedly rational legal agent as well as the contingency thesis concerning social reality.

[16]Suppose a legal norm requiring that a marriage must be registered at the Registry Office, while at the same time requiring it is by an official of the Registry Office. The norm requiring registration will be maximally effective since the registration makes part of the civil servant's duty. From another perspective, it can be asked what it means to say that a criminal rule e.g. effective? That there are no wrongdoers or that all the wrongdoers are punished?

The issue of the effects of legislative norms articulates the legislator's cognitive openness to social reality as one of the core aspects of his epistemic rationality that is conditioned by his bounded rationality. Effects of legislative norms are the proper theme of social science investigations. Social scientists describe the law from an external point of view while including in their description the internal point of view of the agent, c.q. the legislator. Legislators as legal agents for their part adopt an internal point of view towards the norms of the constitution while being cognitively open to social reality as social scientists describe it.

An epistemically rational legislator must take into account the actual state of affairs in social sciences since the facts he deals with are not "brute facts". They are not yet institutional facts either, since it is the normative order instituted by legislation that confers this status on them. The legislator's dealing with social facts is therefore mediated by what social scientists have to say about them. The theoretical framework of this interaction represents what I have described elsewhere as the "reversed hermeneutical point of view".[17]

An important aspect of the interaction between legislator and social scientist is legislative evaluation. As the justification of judicial decisions allows their control, so does legislative evaluation open up the possibility of a rationality control. It is to a large extent an empirical undertaking resulting in conclusions concerning the effects of legislative norms, that is to say, their degree of effectivity, efficacy, and efficiency.[18] It is through legislative evaluation that the epistemic rationality of the legislator comes to the fore. Legislative evaluation provides the ruler with reliable knowledge as to whether or not the implementation of his norms has taken place as planned, whether the target group has behaved as predicted or ordered, whether the outcome indicators move in the "right" direction, and whether these changes can be plausibly connected to the legislative norm.[19]

Legislative evaluation offers an empirical assessment of the legislator's epistemic rationality and allows for an empirically justified criticism of it.

[17] Wintgens (1997), suggesting that Hart's moderately external point of view that includes the internal point of view of the legal agent can be reversed in such a way that the legal agent who's internal attitude is thus described can take cognizance (from his internal point of view) of these propositions. In doing so he looks as it were into a mirror.

[18] It may also bring to light that a legislative norm is experienced as illegitimate or discriminatory because the facts since the issuing of the norms may have changed in such a way that a distinction in a legislative norm is felt as unjustified. I will not further deal with this specific topic here. Suffice it to say that it can affect the Wirksamkeit of a norm, and so, as will be argued further, the validity of a norm.

[19] Bussmann (2010: 288–289).

It shows in other words *how* the legislator has dealt with the complexity of the social world in order to make sense of it.

The last stage of my argument will focus on the impact of the legislator's dealing with facts on the validity of legislative norms.

1.5 Legal Validity

Legal validity is a multifaceted concept. Generally speaking, a distinction can be made between formal, factual, and axiological validity. Theories of legal validity can be arranged according to the weight which they attach to one criterion of validity. Natural law theories stress the importance of a substantive criterion of validity, while realist theories most of the time adopt a factual criterion. Formalist theories, finally, focus on a formal criterion of validity, mainly conformity with other—higher—norms of the legal system.

It seems that while all theories of validity favour one criterion, none of them is limited to a unique criterion. Natural law theories—typically Aquinas' version—while adopting the substantive criterion of justice, include a formal criterion as well in that only "those who are in charge of the community" can make laws.[20] Realist theories for their part—typically following Holmes dictum that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law"[21]—adopt a factual or material criterion of validity, this being the actual behavior of the judiciary. Yet, the legal organization of judiciary precedes the latter's normative activity. As a consequence, despite legal realism's supposedly general rule skepticism in favor of judicial decisions, the norms organizing the judiciary are independent of the latter, and can be qualified as formal. A similar argument can be made for Scandinavian realism, which I will not focus on here.

Formal theories, finally,—typically Kelsen's *Pure Theory*—endorse a formal criterion of validity in that a norm is valid if and only if it corresponds to a higher norm. Kelsen however includes an additional factual criterion as well since a norm's validity is conditioned by its "Wirksamkeit". Since legisprudence adopts the social sources thesis relying on a positivistic concept of law, Kelsen's approach to validity seems to include a fruitful suggestion for our exploration of the rationality of legislation.

[20] Aquinas (1910: qu. 90, art. 4): "…definitio legis, quae nihil est aliud quam 'quaedam rationis ordinatio ad bonum commune, et ab eo qui curam communitatis habet promulgata'."

[21] Holmes (1896–1897: 461).

Kelsen articulates his concept of validity by distinguishing between the subjective and the objective meaning of an act. The act issuing a norm is an act of will and has the subjective meaning of a norm. The agent expresses his will that other agents behave as he wants them to behave. The act of will has the objective meaning of a norm if and only if another norm authorises the norm issuer to act in that way.[22]

He stresses the fact that no other elements stemming from psychological, sociological, ethical, or political theory[23] interfere with his concept of legal validity, thus guaranteeing the purity of law and its "ought"-existence. The validity of "lower" norms is guaranteed by their being founded upon existing higher norms, the validity of the constitution of the legal order being derived from the legal system's basic norm. As a transcendental-logical proposition the latter is a presupposed, or thought norm,[24] a credo involving the belief that the legal order is valid and that it must be obeyed and applied for that reason.

In one of its versions the basic norm reads: one ought to obey the prescriptions of the historically first constitution.[25] Since the basic norm is not a created norm, it must be considered as the constitution in the logical sense. A legal system then consists of all the norms issued on the basis of higher norms belonging to the same system, the unity of which is safeguarded by the basic norm.

If things are clear under Kelsen's explanation of the formal validity of legal norms, they may seem to be obscured by his supplementing formal validity with the additional criterion of *Wirksamkeit*. While he contends that norms are valid or exist upon their being created on the basis of a higher norm, a valid norm that is not usually applied or obeyed loses its validity.[26] In other words, formally valid norms that are not followed by legal subjects or applied by the judiciary are no longer considered valid. Although formal validity and *Wirksamkeit* are analytically distinct concepts, Kelsen points to an essential relation between them, in that "a coercive order presenting itself as the law is regarded as valid only if it is by and large effective".[27]

Wirksamkeit as a condition for the validity of single legal norms and for the legal system as a whole is a condition for the validity of the constitution

[22] Kelsen (1967: 8).

[23] Ibid., 1.

[24] Ibid., 202.

[25] Ibid., 204.

[26] Ibid., 11.

[27] Ibid., 46 and 212.

as well. A constitution that is not generally obeyed or applied loses its validity. Upon this conclusion, the basic norm reads as the reason for the validity of a legal order, that is, the reason why one ought to comply with an actually established, by and large effective, constitution, and therefore with the by and large effective norms, actually created in conformity with the constitution.[28]

What makes Kelsen's concept of validity interesting for our purpose is that formal validity is said to operate as the main criterion for a norm's existence, while effectivity operates as a condition for a norm's—continued—validity or existence. This idea of Kelsen's calls for further exploration. In the foregoing pages "effectiveness", "efficacy", and "efficiency" were identified as the factual effects of a norm. Generally speaking, they can be classified under the heading of *Wirksamkeit*.[29]

Kelsen's view suggesting that *Wirksamkeit* conditions a norm's—continued—validity or that the effects of a norm affect its validity, becomes more interesting once we compare it with the idea of the boundedly rational legislator.

As for the *Wirksamkeit* of a norm, a number of aspects come to the fore. Legislative norms can be poorly drafted. When this is the case, legal agents and the judiciary may meet with difficulties in understanding what pattern of behaviour the norm requires so that its effectiveness risks being undermined. Apart from being poorly drafted, norms can also become obsolete when they are no longer adapted to changed technical, social, political, and economic circumstances. This phenomenon is generally recognized as desuetude. It seems that Kelsen's concept of validity points to these aspects, in so far as they contribute to the *Unwirksamkeit* of a norm. In connecting a norm's *Wirksamkeit* to its existence, Kelsen only appears to commit adultery with social sciences.

His awareness of the value of a formally valid norm becoming *unwirksam* suggests that a norm's existence or validity includes a temporal dimension that covers the manifestation of its effects over time. This idea becomes more significant once we get used to the idea of the boundedly rational legislator. His limitedness in time, computational skills, etc. are unknown to Kelsen but it seems to fit his idea of a norm's validity. It draws attention to the fact that norms can become *unwirksam* because they are not preceded

[28] Kelsen (1967: 212).

[29] It must be observed that in the second French edition of the Pure Theory by Eisenmann (Kelsen 1962), the term "Wirksamkeit" is translated as "efficacité", while in the English version it is translated as "effectiveness". I make for my part a distinction between efficacy and effectiveness of a norm, as we will soon see.

by a sufficient analysis of social reality, because they are poorly drafted, insufficiently monitored, or not corrected in time. Other aspects are that legal norms interact with each other, and produce unforeseen—even unforeseeable—effects at the time of the norm's promulgation.

Kelsen's idea of validity seems to include some promises of a legisprudential concept of validity when we bear in mind that the legislator is a boundedly rational legal agent. It should be recalled once again that a boundedly rational decision maker in the real world strives towards rationality in that he behaves intendedly rationally, as Simon puts it, but only boundedly or limitedly so. No rational agent can, in any meaningful sense, claim to be omniscient. This includes the suggestion that to be rational involves the awareness of the limitations or bounded character of one's rational capacities.

Taking into account the distinction between the product and the process approaches to legislation, rational law making can be understood as "making rational law" on the one hand and "rationally making law" on the other. Making the law more rational in other words points to the larger perspective of making it more rationally. Within this larger perspective, a boundedly rational legislator who is rationally making law aims to make effective, efficient, and efficacious law. His knowledge about the future effects of his norms however, is only probabilistic in that he does not know in advance whether and to what degree his norms will be effective, efficient, and efficacious. His intention to make rational—effective, efficacious, and efficient—law may be frustrated by the—negative—effects of his norms or by unpredictable changes of circumstances in the real world.

The empirical investigation of the effects of legislative law may then allow one to describe and explain the possible discrepancies between the effects aimed for and the real or empirical effects that occur in the world. This then shows that the rationality of law is not only a matter of its optimization through interpretation. It is also a matter of rationally making it. Optimization of legislation is not identical to making it optimal. It simply means making it more satisficing or as satisficing as possible.

Kelsen's thesis on the validity of law now shows its fruitfulness for legisprudence in the following way. The thesis holds that formally valid norms, that is, norms formally validated at the moment of their promulgation, cannot be *a priori* assumed to be effective, efficacious, or efficient. Since ineffectiveness, inefficacy, or inefficiency can negatively affect a norm's validity, the process of legislation does not stop at the moment of a norm's promulgation. In order to make rational law, the law must be made rationally throughout the process of legislation. The process of legislation therefore extends to the norm's entire existence and requires keeping track of its effects. A norm, according to Kelsen, exists if and only if it is valid. It follows that the validity

of a norm is not a matter of all or nothing in that validity would be bestowed on a norm at the moment of its promulgation.

It is here that the pragmatic dimension of the legislator's epistemic rationality comes into play. Since the legislator's duty is to make valid norms his legislative activity is not limited to acting according to the norms of the legal system empowering him to do so. This is a necessary requirement for a norm to be valid at all. In addition to that however, legislating rationally requires him to take care of the *Wirksamkeit* of his norms as well. Put differently, formally valid norms require constant reconfirmation or validation, and possibly correction, in order to meet a minimal degree of *Wirksamkeit* for a norm to remain valid. Norms falling below a certain degree of *Wirksamkeit* can no longer be said to be valid. On the legislator's duty to create valid law, this duty includes upholding the validity of the laws in question in terms of their *Wirksamkeit*.

1.6 Legal Validity and Rationality Review

The foregoing considerations suggest that the evaluation of legislation, describing and explaining its effects, must be part and parcel of legislation as a rational process. The analytical part of our exploration has come to an end here. In the last section of this essay, I will briefly explore how this analytical part can be utilized in practice. Due to my own bounded rationality, this part will be short and mainly focus on a sample of decisions of the German *Bundesverfassungsgericht* (BVG) that seems to adopt the process view of legislation.

If our investigations have established that it is plausible that the legislator is tasked with keeping track of his norms upon—but not necessarily limited to—legislative evaluation, courts should not simply defer the issue to the legislator, taking him at his word. This would bring us back to the logic of the familiar view in assuming that the legislator is rational and has acted rationally. Neither can a court strike down a norm merely on its own evaluative findings *de novo* or interfere with the policy choices made by the legislator. This would put the court on the substantive review track, and risk the court being confronted with a political question and interfere with the separation of powers. Does this mean that courts have no legitimate grip on the rational making of law?

As I have argued throughout this essay, according to the process approach to legislation proper to legisprudence, it is up to the legislator to show *how* he has come to his decision. This includes, among other things, him showing *how* he has proceeded in fact finding, *how* his choices have been made and

how he has effectuated the prognosis of changing circumstances as well as the effects of his norms. Call this the pre-legislative stage. After the promulgation of his norms in what can be called the post-legislative stage, this requires that he shows *how* he deals with the effects of its norms which includes *how* he has taken into account changing circumstances after the norm's promulgation. This also means that he must show *how* legislation has been evaluated as a way of keeping track of norms, and *how* he deals with the results of such evaluation.

The way in which a court has a legitimate grip on the rational making of law amounts, then, to a rationality review which is different from a mere procedural review as well as a substantive review. The type of rationality review which courts can legitimately proceed with represents a marginal control of the rationality of the process of legislation. The marginal rationality review is critical of the court's *de novo* findings as well as of a mere deference of legislative fact finding to the legislator. Its specificity is that it consists of a meta-evaluation of the factual evidentiary evaluations provided by the legislator throughout the legislative process. A marginal control of the rationality of legislation focuses less on norms as a product than on the process of which norms are the product. This process, as I have suggested, includes the whole life of the norm, that is, the pre-legislative as well as the post-legislative stage.

It is generally agreed that rationality review of legislative action scrutinizes the rational relationship between a legitimate state purpose and the means used for its accomplishment. So this rationality test comes down to scrutinizing whether the purpose of a norm is legitimate and whether the means to achieve it are rationally connected to it. Rationality review thus conceived amounts to a test of non-arbitrariness of a norm. It is not conclusive though as regards its rationality once this is conceived as the rationality of the legislative process of which it is a product. While arbitrary norms cannot be considered rational, non-arbitrary norms are not rational for that reason alone. If the legislator is assumed to be rational, this simple version of the rationality test will suffice. Since I have been endeavoring to show that the legislator is a boundedly rational agent, a more robust version of rationality review is required.

Marginal rationality review is such a test in that it requires that the use of power must be justified in showing how it has been exercised. This model of review leaves intact the discretionary power of the legislator to make choices. Marginal rationality review does not lead to a substitution of a Court's choices for the legislator's. It severs the choices and the power to make them from *how* they are made. This comes down to justifying how the power to make choices is exercised. The fact of the matter is that legislative norms suffer from a rationality gap as long as it is not justified *how* legislative

decisions are made. The justification of how legislative choices are made is what rationally making legislative law amounts to. The assessment of the justification that fills the rationality gap is what marginal rationality review comes down to.

The following sample of cases of the German *Bundesverfassungsgericht* (BGV) shows the Court's particular sensitivity to this problem. In adopting, it seems, a process approach to legislation, the BGV interprets art. 20, 3 of the Constitution[30] in such a way that the legislator must pay attention to the cleaning up or the modernizing of obsolete norms.[31] As a matter of fact, the Court adopts the view that legislative norms are time related. Norms therefore can become unconstitutional over time[32] or "move into the direction of unconstitutionality", yet legislators must be given time to adapt a norm before declaring it unconstitutional.[33]

Since initial legislative fact finding is the prerogative of the legislator according to the BGV, the Court respects this freedom. Yet, factual presuppositions that are patently incorrect may result in the unconstitutionality of a norm.[34] The legislator's independent sphere of decision-making is according to the BVG transgressed when his factual considerations are so patently inadequate or incorrect that they cannot reasonably support the legislative norm.[35] The BVG has decided for example that, since the legislator has a duty to protect unborn life, it falls within his competence to collect and assess the relevant data affecting the issue. Reliance on mere statistical data on the number of abortions, the number of births, etc. was insufficient according to the BVG since reliance on such data precludes an adequate evaluation of the effects of the norm.[36] Initial legislative fact finding may turn out to be insufficient, however the legislator must be given time to collect relevant data regarding the effects of his norms. When empirical material contradicts the initial assessments and the legislator has failed to react adequately, the BVG has regularly held that the norm has become unconstitutional.[37]

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[30] "The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice".

[31] BVG, 49, 89 [130]; BVG, 88, 203 [310].

[32] BVG, 16, 130 [141–142].

[33] BVG, 39, 169 [187 ff], for which the Court makes a number of recommendations.

[34] BVG, 82, 126 [153].

[35] BVG, 121, 317 [349 ff]; BVG, 77, 84 [106]; BVG, 110, 141 [157 ff]; BVG, 117, 163 [183].

[36] BVG, 88, 203 [311].

[37] BVG, 33, 171 [189]; BVG, 37, 104 [118]. Cf BVG, 16, 147 [187 ff]; BVG, 18, 224 [239].

Another issue concerning facts are the prognoses made by the legislator. In this respect too, the BVG assesses the evidence produced by the legislator.[38] On a number of occasions the Court's assessment of the legislator's prognosis is based on a more intensive control of the norm's content.[39] The legislator's prognoses must be justifiable[40] which may require a correction of the norm.[41] An apparently correct prognosis by the legislator may later turn out to be entirely or partly wrong which affects its constitutionality,[42] thus requiring its adaptation according to art 20, 3 of the Constitution.[43] The Court has therefore decided that the legislator must systematically take into account and assess the available sources of knowledge in order to evaluate as accurately as possible the conceivable effects of his norms in view of correcting them when essential changes occur.[44]

So for example the BVG has proceeded to carry out an evaluation of the legislator's prognosis in saying that the effects of a tax regulation could not yet be fully assessed at the moment of the promulgation of the norm.[45] Yet changing facts may require the legislator to come up with additional support to uphold a norm.[46] A norm that was constitutional at the time of its promulgation may become unconstitutional due to changing facts.[47] When, for example, interest rates are increased only every 2 years and not more frequently due to changing facts, the BVG has not held the norm to be unconstitutional since it leads to inefficacy.[48] In a similar vein the BVG has decided that a change in the population makes an electoral circumscription unconstitutional without, however invalidating it. The legislator was instead tasked with updating the norm.[49]

In this respect, the legislator must keep abreast of changing circumstances in the social reality, and check whether his original ruling can be upheld in

[38] BVG, 17, 269 [276 ff]; BVG, 36, 1 [17]; BVG, 37, 1 [20]; BVG, 40, 196 [223].

[39] BVG, 7, 377 [415]; BVG, 11, 30 [45]; BVG, 30, 250 [263]; BVG, 39, 1 [46, 51 ff]; BVG, 45, 187 [238].

[40] BVG, 39, 210 [225 ff]; BVG, 57, 139 [160]; BVG, 65, 1 [55].

[41] BVG, 25, 1 [12 ff. 17].

[42] BVG, 88, 203 [310], cf BVG, 50, 290 [335, 352]; BGV, 56, 54 [78 ff.]; BGV, 73, 40 [94].

[43] BVG, 88, 203 [310]; BVG, 15, 337 [350].

[44] BVG, 25, 1 [13]; 49, 89 [130]; 50, 290 [335]; 95, 267 [314 ff]; 97, 271 [292].

[45] BVG, 16, [147–188].

[46] BVG, 49, 89 [130] (Kalkar decision).

[47] BVG, 88, 203 [310].

[48] BVG, 12, [248–261].

[49] BVG, 16, [130–144].

view of such changes.[50] The Court allows the legislator a period of time during which he can collect relevant data concerning the effects of his norms[51], after which the legislator must show that the proposed goal of the norm can be reached as was initially planned.[52]

1.7 Conclusion

In this essay I started from the familiar view, which includes a specific approach of the legislator's rationality. He was compared to an omniscient agent, and I have qualified this in terms of a boundedly rational legislator, referring to the principle of charity. A reinterpretation of the principle of charity opened the way to an alternative interpretation of the legislator as a rational agent. Boundedly rational agents lack time, information and computational skills, and therefore their decisions cannot be "optimal" but at best "satisficing". This occurs, so I have argued, in the field of legislation. When legislators are no longer assumed unboundedly rational, their legislative work can be taken into account from a different angle. They are presumed rational, and no longer assumed to be rational. Legislators act under conditions of contingency, they have no privileged access to reality nor to its future changes. The articulation of the bounded rationality of legislator throughout this essay opens a new avenue on the legislator's duties to fulfill throughout the process of legislation. More specifically, it was argued that they should keep track of their norms. They do so by assessing the effects of their norms in social reality, following upon their initial duty of fact finding at the moment of the promulgation of legislative norms. This thesis was illustrated by a sample of case law from the German *Bundesverfassungsgericht* that seems to adopt the main lines of the legisprudential theory that I have elaborated in earlier work.

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[51]BVG, 33, 171[189 ff]; 37, 104 [118]; 43, 291 [321]; 45, 184 [252]; 54, 173 [202]; 80, 1 [26]; 83, 1 [21 ff]; 84, 59 [76]; 267 [315].

[52]BVG, 95, 267 [315].

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Chapter 2
The Principled Legislative Strategy: Rationality of Legal Principles in the Creation of Law?

Hannele Isola-Miettinen

2.1 Introduction

The article is focusing on the "principled legislative" strategy. Legislative strategy here refers to that phenomenon that the legislator more often "writes" and "posits" legal principles[1] into the legislation, into the ordinary level statutes.[2] It is argued here that the national level legislation, because of the principled legislative strategy, is not expressed solely through "rule-based" norms but through the norm type called "legal principles". Our interest in this article is in the rationality of the "principled legislation" and "the legal principles".[3] We reflect on the rationality and the conditions of knowing about the legal principles in the creation of law.

[1] See Tuori (2007: 150–152).

[2] For example, the "Act on the Protection of Privacy in Electronic Communications" (516/2004, 1328/2007) establishes in its section 1 that "The objective of the Act is to ensure confidentiality and privacy protection in electronic communication and to promote information security in electronic communications and the balanced development of a wide range of electronic communication services." The "Act on the Protection of Privacy in Working Life" (759/2004), section 1, "The purpose of this Act is to promote the protection of privacy and other basics rights safeguarding the protection of privacy in working life."

[3] The term principle in general language means: "general truth, doctrine or proposition, on which others are based; basic moral rule or conviction; ultimate source; elementary constituent; essence; (pl) morality."

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2.1.1 Legislation – Creation of General Norms on National Level

Hans Kelsen writes: "A Law—a product of the legislative process—is essentially a general norm, or complex of such norms" (Kelsen 1945: 256–257). Kelsen in his "Theory of Law and State" (1945) has defined: "By legislative power or legislation one does not understand the entire function of creating law, but a special aspect of this function, the creation of general norms" (Kelsen 1945: 256–257). Kelsen in his theory separates the legislative and legal norms. Anyhow, by the legislation it is created general norms. The argument is that the legislation and written "statutes"[4] as a part of the legislation given by the national legislator, is traditionally stated to be the most important "source of law" in legal systems. That is the attitude taken by most legal positivists.

The term legislation—and its relation to "law"—is a concept that has been paid a lot of attention in legal theory. Among others, the concept is defined to be very close relative to the political "volition" and to the political power. For example, Kaarlo Tuori writes that legislation in its normative dimension is considered to be "not-yet- law", the raw material for the law, rather than "already-law" (Tuori 2002: 101).

In theoretical literature the term "legislation"[5] is used in nation state context, the regulation term belongs to the vocabulary of the regional or international organisations. Antoine Garapon shows that in the worldwide relations the form of law is regulation, on national territory the form of law is legislation, on universal level the form of law is declaration (Garapon 2009: 73–74). We are able to find out that there exist several forms of law. Legislation is considered to be "just" one form of law.

In Garapon's model it is stated that, on the national level, the legitimacy of law comes from its political source (Garapon 2009: 73–74). Garapon writes that on the worldwide level the legitimacy of law comes from "its necessity and efficiency". And what legitimates the declarations given on the universal level is their "values" (Garapon 2009: 73–74). The subject of universal human right law is based on the events like crimes against the

[4]The general language defines the term "statute": a "law made by a legislative authority; permanent rule made by an institution or its founder; written law; Act of Parliament." The term legislation refers in general language to "act of making laws; body of laws enacted". The term legislator in same dictionary refers to "maker of laws".

[5]In the title, with the term "legislative" we in general language refer the adjective "pertaining to legislation; having the duty of law-making; enacted by legislation". The verb "to regulate" in general language means "govern by rule; put in order; control by law; cause to function accurately; cause to conform to standard".

humanity or history. Not on divine or other origin. The perception of law is general common principles and by their definition they are abstract (Garapon 2009: 73–74). So, we conclude here that it is necessity, efficiency and values which are legitimating the law which is given on international level.

2.1.2 Influence of Regulatory Turn and Human Right Principles

The so-called "regulatory turn" in international law (Cogan 2011: 330) has increased its influence on national level law. The European Union law and global law like law of the World Trade Organisation (WTO) have had effects into the law creation on national level. The European Convention of Human Rights (ECHR) has legal influence into legal life and into the law creation of the nation states. The requests of the European Court of Human Rights in systemic problems are usually directed principally at the legislature.[6]

The regulatory turn substantially covers areas like protection of individuals and human rights norms (Cogan 2011: 359). The type of the human rights regulation usually is "legal principle". The national legislator "posits" and "transfers" the legal principles into the national legislation. The Court of the European Union and the European Court of Human Rights "regulate" more efficiently national level legislation through their case law. One phenomenon on national level legislation is that references to the relevant case law have been included into the so called *travaux préparatoires* of that legislation.

The role of international law in the protection of individuals from governmental abuse is now taken granted. Jacob Katz Cogan writes that always it was not so. The term "regulation" "entails the creation of public authoritative obligations on private parties to act or refrain from acting in certain way or the establishment or facilitation of authoritative measures to enforce such duties." The idea is to control or influence individual behaviour through the creation and application of rules (Cogan 2011: 324). Jacob Katz Cogan writes that it was the "human right turn" which preceded regulatory turn (Cogan 2011: 325). International system acts now directly on individuals, it asserts such authority in the regulatory through the articulation of rules and adoption of decisions. Not replaced state as the primary regulator but critical component is the endorsement and facilitation of state authorities through legal and institutional processes states role has changed markedly (Cogan 2011: 325–326). The so called regulatory turn is the "new paradigm" (Cogan 2011: 330).

[6]See European Court of Human Rights (2006: 14).

2.1.3 Legal Principles and "State Paradigm"?

Jacob Katz Cogan writes that the idea of that kind of international law regulation is to control or influence individual behaviour and by extension societal behaviour through the creation and application of rules. Regulatory turn has not replaced state as a primary regulator but critical component is the endorsement and facilitation of state authorities through legal and institutional processes. There is no doubt that states' role has changed markedly (Cogan 2011: 324–326). Legal principles play an important role both in the EU legislation and in the case law of the Court of Justice of European Union. The well known European law doctrine is that European Union law has "direct effects" on individuals of member states.[7]

Although the role of the state has changed, it is argued that the "state paradigm" is still dominating in our attitudes towards legislation and also its application in the individual cases. For example, Mark Van Hoecke in the article "European Legal Cultures in A Context of Globalisation" (2007) shows that there is in every legal culture a hard core of shared understandings that is very stable. Van Hoecke writes that this paradigm consist of the basic views on the concept of law, legal sources, the methodology of law, legal argumentation, the legitimation of law, and more generally some common values and world view. Such views may change over time, but only slowly. Legal rules may be changed from one day to the other, but the way these rules will be handled, interpreted and applied will still be governed by the, unchanged, legal culture.[8]

2.2 Rationality Presumption in the Creation of Law

Mark van Hoecke writes that "Law does not describe but prescribes reality, or, more precisely, interhuman behaviour" (Van Hoecke 2002: 19). Because law prescribes reality, the position of individuals and interhuman behaviour, we have reason to assume that the legislator legislates rationally. The addressees of the legislation have "the rationality presumption" towards the legislation.

But what we are as human beings able to know about legal principles? Do we as human beings have some common universal knowledge in this respect? How rationally (that is, consciously, intentionally, communicative) national legislators as human beings and as collective decision making bodies

[7] C-91/92 Faccini Dori, ECR 1994 p. I-03325, para 24.

[8] See Van Hoecke (2007: 81–99).

legislate when they are writing the worldwide and universal legal principles into the texts of the national legislation? What function that kind of principled legislation has in modern law creation?

2.2.1 Rationality and Knowing About Legal Principles as Philosophical Problem – Kant, Hegel, Hume

The term rationality refers among others to knowing, to the conditions "what" and "how" the legislator is able to know. What and how the legislator is able to know about the legal principles such as the privacy principle, the principle of justice or the human dignity principle? What is the content of legal principles which the legislator is positing into the legislation? What is the legislator communicating to its addressees through these legal principles? Do we have such a rational legislator, who is able to "know" the substantial content of the legal principles?

When we are talking about the term "rationality", we can right away see, that there exist several philosophical theories on the rationality. One of those theories, (1) the principled sense of rationality refers to the possession of a capacity generating or recognizing necessary truths, *a priori* beliefs, strictly universal normative rules, non- consequentialist moral obligations, and categorical "ought" claims. This is the Kantian conception of rationality, according to which the "reason is the faculty of *a priori* principles". The second, (2) the holistic sense of rationality means the possession of a capacity for systematically seeking coherence or to use, for example "reflective equilibrium" across a network or web of beliefs, desires, emotions, intentions, and volitions. This is the Hegelian conception of rationality. Thirdly, in (3) the instrumental sense, rationality means the possession of a capacity for generating or recognising contingent rules, *a posteriori* beliefs, contextually normative rules, consequentialist obligations, and hypothetical "ought" claims. This is the Humean concept of rationality (Hanna 2006: xvii). What kind of rationality is the legislator's "rationality"?

When connecting both natural law and positive law, it is said that modern natural law legitimates positive law in so far as it is correctly deduced from it by the regulative use of logic (Wintgens 2002: 10). In the terms of the knowledge, an interesting aspect is that what Luc J. Wintgens writes: when positive and natural law tradition are disconnected, the creation of law, in the case of natural law, is based on the "knowledge of natural law" and, in the case of democratically legitimated sovereign legislator, creation of law is based on a "decision on part of legislator" (Wintgens 2002: 10).

So, we conclude that there exists two kind of knowledge: (1) knowledge of natural law and (2) knowledge born in decisions of the legislator. Natural law is based on idealism and the way we receive our knowledge about it is the deducing. And as we know, the knowledge based on decisions of legislator we call "positive law". Wintgens shows in his discussion the relation between positive law and natural law and the tendencies about hidden relation between rules and values (Wintgens 2002: 13).

So, Wintgens writes that the way we receive knowledge from natural law is deducing. In the *deducing*, the validity of the knowledge is based on the rationality, independently of the sense of experience. The other general mean to gain the knowledge is the *inductive reasoning* which is generalising the truths from the single premises and from the sense experience. It still lefts open what kind of rationality legislative activity and legislative decision making is, in its nature.

2.2.2 Institutional Rationality in the Complex Regulatory Framework

Aulis Aarnio defines the rationality saying that there exists legal rationality which refers to paradigm of legal dogmatic (and adjudication) (Wintgens 2002: 10). The concept of institutional rationality refers to the rationality that is involved in the legal system itself. Every legal order has its own general principles, the systematic relations between the norms. The system has an internal *ratio*, Aarnio writes. The institutional rationality is a societal precondition for all legal reasoning. The social role of legal dogmatics is just to interpret the content of this rationality (the internal ratio of legal order). Aarnio writes that systemic theoretical rationality may give valuable information for legal reasoning revealing the functions of legal order. In this regard the systemic theoretical rationality is not only a precondition for legal reasoning but also a source of information (Aarnio 1997: 207–208). Van Hoecke in his study "Law as Communication" (2002) defines that "law itself essentially is based on communication: communication between legislators and citizens, between courts and litigants, between the legislator and the judiciary (…)". Van Hoecke writes that this communicational aspect is nowadays considered within the frame of the legitimation of the law: "a rational dialogue amongst lawyers as the ultimate safeguard for a "correct" interpretation and adjudication of law" (Van Hoecke 2002: 7).

The regulatory turn has made the situation of legislature more complex. The concept of institutional rationality which refers to the rationality in the single (national) legal system itself does not help us in the framework of

complex regulatory environment. Van Hoecke writes that law has been understood by most to be rational means for ordering and controlling human relations. Post-modern thinkers doubt if such rational control is possible at all. Van Hoecke writes that some in post-modern see that the lawyers are prisoners of legal language, controlled by the law, rather than controlling it (Van Hoecke 2002: 1). How to master the rationality and rational dialogue in the complex and principled regulatory framework?

2.2.3 Legal Principles – Integrated or Independent?

In the legal theory context the legal principles are various. Tuori shows several typologies of legal principles, like: (1) decision-making principles, (2) interpretation principles, (3) general principles, (4) principles of sources of law, (5) background principles of legislation or so called system principles. Tuori says that the mentioned typologies are not independent, anyhow. In legal practices the same principle (like the fairness-principle) can be used sometimes as a decision-making principle, and sometimes as an interpretation principle (Tuori 2007: 150–151).[9]

Some legal theorists think that the principles, like the moral principles, are integrated into the legislation and the law. Some legal theorists see that the principles are one independent type of the norms. Assumable Ronald Dworkin is the most popular defender of the independent legal principles. In legal theory there is no one simple agreement on the status of legal principles. For example, Aulis Aarnio puts different norm types on the "sliding scale", instead of typing them into some all-or-nothing categories (Aarnio 2006: 304). In that discussion on rules and principles the unsettled tension goes again between the dimensions called the "legal positivism" and the "natural law". Our interest is: What is it possible to know about the legal principles in this kind of principled legislation?

2.3 Weinberger's Analysis: What It Is Possible to Know?

Let us study the principle of justice. Weinberger is interestingly reflecting the conception of justice. Weinberger is establishing some theses which characterises a specific conception of justice. As first thesis, Weinberger presupposes that theories of justice are concerned to provide objective

[9] See also Armin von Bogdany (2003).

criteria as to what just is. Thus, they are providing the criteria how the concept of justice should be defined. Theories of justice preset these principles of justice either as (1) formal criteria, or (2) as substantive criteria which are intuitively evident and *a priori* or (3) as anthropological facts or (4) articles of religious faith. Weinberger expects that the utilitarian theories and Rawlsian contract theory offer objective determinants of what is just and what is unjust. But by contrast, Weinberger writes, legal positivism in its strong version says that it is only relative to some given system of positive norms that question of justice can arise at all (Weinberger 1986: 145). Second Weinberger's thesis is that precepts of justice must be understood as justifying grounds of decision and action, that is, as elements of the practical reasoning. Third Weinberger's thesis is that "My starting point is a non-cognitivist conception of practical reasoning. There is such a thing as practical thought and practical argumentation, but no such thing as practical cognition" (Weinberger 1986: 145).

With the "practical reasoning" we usually refer to the discretion with several value-laden consequences (causal, real word effects or systemic on the level of legal system) of certain legal decision. The practical reasoning type reasoning involves usually (1) clarification of possible consequences and (2) placing these consequences in a certain order of preference. Peczenick writes about the practical meaning and shows clearly the difference between the will and norm-expressive statement. Actually, this difference is difficult to prove in the case of individual level, whose will the command or norm expresses (Peczenick writes about the *independent imperative* that refers to the situation that it is not known who is commanding). It is easier to talk about norms given by Parliament or about the will of Parliament than about the will of individuals taking part to legislative activity.[10]

Fourth Weinberger's thesis is that a basis for practical reasoning can be found in structural systematisations of rational thought like in logic of norms, in formal teleology, in axiology or in preference logic. The fifth thesis is a theory of action founded on formal teleology. One can explain the anthropological function of aims, of values and of both autonomous and heteronomous norms in terms of this conception of the structure of action. The sixth thesis is that, decisions concerning actions or evaluations are reached by means of complex interplay of deliberations about utility, normative rules, and value decisions and sometimes of irrational motives (Weinberger 1986: 145). Seventh Weinberger's thesis is that problems of justice stand at the crossroads between morals, law and politics. In a certain sense, these three are complementary, writes Weinberger. They are concerned

[10]See, for example, Peczenick (2009: 42–43) and Aarnio (1987: 131–132).

with the relationships of individuals with their fellow humans and with the community. Precepts of justice determine how people should act and how their positions should be moulded. The eighth thesis is that the non-cognitivism excludes the existence of immanent principles of justice but admits the possibility of rational argument about justice. It insists that in practical reasoning we deploy convincing arguments which are neither purely formal nor cognitive in their empiricist sense. Weinberger writes that it is an anthropological fact that all humans and social groups of all kinds have convictions about justice which they regard as intuitively valid (Weinberger 1986: 146). Weinberger's ninth thesis is that the convictions about justice and judgements of what is just are always subject to analysis and are based in and developed through rational reflections. It is accordingly a matter of concern for theories of justice to expound rules and methods for substantive justification of normative positions such as:

1. the method of self-evident presuppositions,
2. the analysis of fair equilibrium in role performance,
3. the principle of reciprocity on the ground of either *de facto* or contractual partnership,
4. analyses which aim at consensus (Weinberger 1986: 146).

Lastly, and as tenth thesis Weinberger is reflecting why the reflections about justice are called dialectical analyses. Weinberger goes on saying that, although reflections are rational processes which are in principle capable being formalised, they cannot be presented in the form of a single deductive chain moving from firmly established premise to a conclusion. Weinberger says that deliberations about justice often run along several lines, and depend on comparisons of value and judgements of preference and both rational and empirical processes of proof. The aim of such deliberations is to achieve an equilibrium between moral intuitions as shaped by tradition, on the one hand, and critical analyses, on the other (Weinberger 1986: 146).

Weinberger reflects philosophical theories about justice which are trying to establish objectively what is to be deemed just. Those theories settle the principles of justice or set up single fundamental principles of such kind that other relevant principles are supposed to be derivable from it (Weinberger 1986: 147).

2.3.1 Universal Acceptance of Principles

As Weinberger shows, there are various attempts which try to prove the objective validity of the principles in order to justify the claim for the

universal acceptance. Weinberger is reflecting the principle of justice in different dimensions: (1) justice as a formal principle; (2) justice as a material a priori; (3) utilitarian criteria of justice; (4) justice as fairness; and (5) justice according to the standard of the normative order.

2.3.1.1 Justice as Formal Principle

Justice as formal principles could be understood as a formal principle, which, like every formal principle, is objectively and universally valid. Such theories attempt to reduce justice to equality (Plato, Aristotle). For example Kant's doctrine of categorical imperative and some related theories, the principle of formal justice is viewed as a criterion of justice. Also Perelman's conception people belonging to same category are to be treated alike. The postulate of the universality of "ought" statements also belongs to this category (Weinberger 1986: 147). The Aristotelian theoretical tradition distinguishes between commutative, distributive and retributive justice. It is assumed in the spirit of Aristotle that all these forms of justice are in certain way reducible to modes of equality that is to formal relations (Weinberger 1986: 147). When Weinberger analyses several disparate elements under the heading "commutative justice", the results of analysis seem like this. First, (1) about the precept of equality of value as between reciprocal performance Weinberger says that equality of performance and counter performance has to be claimed only in some specific role relations. In such cases, where equality of performance is postulated, equality of performances is not empirically given, but established only through relative evaluation of the performances. Secondly, (2) about the principle of reciprocity in interpersonal relations Weinberger shows that this relation is an aspiration of the democratic way of life. Anyhow this is not a universal principle of justice, for it only applies to those relationships which we wish to form on partnership terms. And lastly, (3) about the postulate of formal equality in the sphere of "ought" Weinberger explains that formal equality in the adjudication is presumably a generally valid demand of justice. However in order to answer to the question of what is just in concrete terms, one must decide which are the relevant criteria of equality and what are the normative consequences it is just to lay down in each generic situation (Weinberger 1986: 147).

Weinberger writes that the "distributive justice" is certainly not reducible to equality. Weinberger explains that it is not the case that an equal share for every participant in a joint venture would always be the just solution. Nor is proportional equality (for example, n-fold reward for n-fold performance) as a universally valid standard of measurement. The criteria themselves are contestable, should reward be in proportion to performance, effort or result?

Modifications in terms of any one of these factors may come into play in a given case. Deliberation leading to distributions is further complicated by the fact that different criteria have to be conjointly applied, and as a result the decision about justice in distribution depends upon the weighing of competing values (Weinberger 1986: 148). In case of the retributive justice Weinberger says, just punishment can certainly not to be determined in terms of simple equality. Weinberger writes that punishment is certainly not only—not even indeed in the first instance—to be understood as repayment of wrongdoing (Weinberger 1986: 148).

In addition to commutative, distributive or retributive justice, Weinberger reflects procedural justice. Weinberger says that procedural justice is not treated on the basis of the idea of equality. Weinberger shows that the procedural justice has no direct bearing on what is substantively just. It rests on the hypothesis that certain procedural forms lead to the materially just solutions or at least appropriate forms of procedure greatly increase the probability of just solution (Weinberger 1986: 148). Questions of the procedural justice have one further aspect which is significant from the viewpoint of the theory of justice. Modern society needs rule-governed procedural forms, whether set down in a code or in common law, in order on the one hand to (1) maximise the probability of acceptable decisions, while on the other hand (2) guaranteeing equality of those subjects to the legal proceedings. Weinberger says that the deliberate deviation from procedural rules indicates a failure of objectivity in the attitude of the decision-making authority. Procedural justice bears great weight in sustaining the framework of a democratic system (Weinberger 1986: 148).

Weinberger illuminatingly writes:

> Suppose that I am required to act according to that maxim which I can will to be valid as a general law, then I am indeed committed to realise my moral analysis under the idea of generality, but this rule of the Kantian categorical imperative does not provide me with a material criterion for deciding about justice. The categorical imperative only states a schema for the application of my own scales of value and preference in a formally universalised way. Therefore justice established on the basis of the categorical imperative depends on subjective value convictions and evaluations following subjective standards (Weinberger 1986: 148).

Weinberger says that the principle of formal equality, for all its importance, is only an instrument for securing the transparent quality of substantive criteria of justice. The establishment of categories of relevant facts and of the consequential normative provisions is left open. This has to be judged evaluatively as just or unjust (Weinberger 1986: 149). The principle of universality is related to the principle of formal equality. For Weinberger, universality of moral or legal decisions means nothing than positing structural conditions for evaluative decisions which can satisfy by seeking

out distinguishing circumstantial feature of cases, and these are always available. Thus the principles are "not a means of moral decision-making, but they merely offer a way of structuring the factors relevant to the decision" (Weinberger 1986: 149).

2.3.1.2 Justice as a Material A Priori

In this approach to justice, the existence of the substantive principles of justice is treated as a material *a priori*, as Weinberger says, discoverable by intuition and/or analysis. Weinberger writes that the existence *a priori* of the substantive principles of justice is a scientifically unacceptable hypothesis, scarcely serviceable in reasoning about justice. This is true without prejudice to the fact that we intuitively experience clear evaluations as to what is just. The fact that we experience something as intuitively certain by no means entails that this experience is objectively correct and unquestionable in the light of analysis and/or subsequent experience. The intuitions of justice can assuredly be turned to good account as facts to be reasoned about but they cannot justify *a priori* substantive principles of justice (Weinberger 1986: 149). Weinberger says that religiously inclined theorists view principles of justice as directives of God to man, and thus as also existing *a priori*. According to this conception, what is to count as just is determined through the belief-system which is accessible to human beings through revelation or through some other religious experience (Weinberger 1986: 149).

2.3.1.3 Anthropologically Given Principles

Anthropologically given principles of justice deduce the principles from the essence of humankind, that determine what must objectively count as just, on the ground that these principles themselves, as implications of anthropological constants, are anthropologically necessary "ought" principles (Weinberger 1986: 150).

2.3.1.4 Utilitarian Criteria

Weinberger analyses also the utilitarian criteria of justice, according to which moral goodness (justice) is whatever brings the greatest advantage for the greatest number of people. The utilitarian idea remains unclear between the distinction of justice aspect and the generally beneficial character of a decision and in the criteria of the good and the justifiable: whether or not to build certain canal and to put such a project into effect is a question of economic efficiency and not of justice (Weinberger 1986: 150).

2.3.1.5 Rawlsian Theory of Justice

Justice as the fairness as Rawls theory of justice has been taken its place among classical theories. To Rawls problem of the distribution in society forms the kernel of the theory of justice. The theory is arrived at by a deliberation in the so-called "original position" which is a fictitious situation refined by specific postulates. Rawls describes his doctrine as a contract theory, because in his view under the given presuppositions, everyone would have to agree to the principles of justice. The entire analysis is constructed as a thought experiment in which a reflective equilibrium is sought between well-considered intuitionistic judgements of justice and principles which would have to be accepted in the original position. The presuppositions of original position on the analysis of justice is that people are reasonable moved neither by love nor hate and only seek their best interest (Weinberger 1986: 150–152). The decision concerning the principles of justice is made under the "veil of ignorance". Deliberation in the original position is made on the assumption that the participants do not know what position in society they will actually hold; this assumption is intended to rule out subjective interests and to render the deliberations impartial. The veil of ignorance is very dense; it embraces all individual characteristics like social position, class, race, sex, preferences, character, talents, historical situation and so on. Full knowledge of laws of nature and society is stipulated. The members of society are free and equal individuals who respect the freedom of others as they do respect their own; they are motivated entirely by individual self-interest and know no envy. The conception of justice is defined with the principles of maximum possible liberty and with the principle of fair equality of opportunity. Rawls says that the first principle always takes priority (Weinberger 1986: 152).

Weinberger is critical towards Rawls's theory by remarking that the problem of justice should not be limited to societies at a given stage of economic development. Weinberger also prefers liberty over equality but sees that they are different postulates. Weinberger writes: to ask when unequal distribution is just without asking when, why and to whom should be given more and to whom less, misses the whole point of the problem of justice (Weinberger 1986: 152).

2.3.2 Justice – The Standard of a Normative Order

Weinberger writes that the traditional positivistic teaching reduces the problem of justice to a conformity of the conduct to rules as enacted, or at any rate to the formally equal decision of cases according to the rules in force.

Such conformity of conduct to a rule can be objectively tested, without any evaluation or justification of the rule in question, which is simply taken for granted as a given feature of society. The relativisation in respect to the positive system of norms brings about the objectivisation of the problem of justice, but at the price of excluding from the considerations the very being and the substance of what lies at the core of an analysis of justice. About traditional theories of justice Weinberger says: they present judgements of justice as a form of objective cognition: either out of the conviction in favour of natural law, presupposing some kind of practical cognitive faculty or some kind of religious faith according to which the normative principles have been pre-ordained for human beings or on the ground of a purportedly objective utilitarian calculus or through the relativisation to a positive system of norms (Weinberger 1986: 153).

2.3.3 Weinberger's Non-cognitivist Approach

Weinberger has a close connection to the practical philosophy, which is non-cognitivist, legal positivist and value relativist and which excludes every form of practical cognition in the sense of natural law theory. That theory among other emphasises the element of moral in our individual and communal existence, without lapsing into the metaphysical speculation (Weinberger 1986: 154). The non-cognitivism in this case means that human beings are active beings but their thoughts and perceptions are in principle subservient to praxis. For Weinberger the thinking is a processing of information, which is an instrument for gaining knowledge and the utilisation of cognition in the context of the guidance of conduct. That is, thinking is a process which plays an essential role in the structure of deliberation determining action and its control (Weinberger 1986: 154).

Without going further into this theory, one sums up the idea that Weinbergers non-cognitivism excludes not only deductive justifications of practical conclusions based on purely cognitive arguments, but also every other cognitive way of supporting practical sentences. Weinberger thinks that every practical justification requires some practical arguments which express an evaluative attitude. These premises are drawn from (1) intuition, from (2) consensus, from (3) explicit contractual agreement or from (4) other source. Weinberger says that there is no such thing as practical knowledge (Weinberger 1986: 155–156). What is interesting in Weinberger's thinking is that Weinberger sees thinking as processing information according to certain rules. For Weinberger, it is important to develop the structural theory concerning rational operations of practical thought. Although Weinberger's

thinking is in some parts of it complicated, it is interesting because it focuses on the "action" that Weinberger defines as "intentional" (as we assume that the rational legislating is, in its nature). Anyhow, in the absence of teleological concepts, one cannot explain the notion of action satisfactorily, Weinberger writes. Weinberger asks if it possible to argue for the substantive correctness of norms. The non-cognitivism rejects both the absolute values and the validity of *a priori* principles of justice and excludes every sort of the practical cognition which might purport to give a purely cognitive basis for objective values or correct normative principles (Weinberger 1986: 162).

About the complexity of justice Weinberger writes that there exists no fixed judgement about justice whose correctness is objectively guaranteed, but on the contrary always finds himself only on the search of justice. Judgements about justice are not findings of fact which could be confirmed simply by correspondence with the actions or with human attitudes or with given standards. Justice is not the fact, but a task: a task for our heads and for our hearts (Weinberger 1986: 169).

2.4 Wintgens and Legisprudence: Searching for the Rational Legislator?

2.4.1 Legality?

The principle of legality is a necessary condition for the existence of rules, but it is at the same time a sufficient condition because it regulates both the unquestionable input (legislation) as well as the output (rule application) in legal reasoning (Wintgens 2002: 15). Wintgens reflects the legislative activity through lenses of this "legalism".[11] Wintgens' purpose is to establish the theoretical approach that allows us to explain the absence of theoretical reflections on legislation and make some suggestions that may contribute to the theoretical study of legislation that allows us to articulate criteria for good legislation or as he names it to "legisprudence" (Wintgens 2002: 10). Legisprudence offers not one but several theoretical approaches to that topic.[12] Wintgens focuses not on the legislators' freedom to make choices but rather on the limitations due to rules (Wintgens 2002: 29).

[11] Wintgens (2002: 9): traditional legal theory deals with the questions of the application of law by the judges. Wintgens refers to some writers (for example Noll) favouring the approach, which see that judges and legislators, in many respect, do the same things.

[12] See Wintgens (2002: 24–29).

2.4.2 *External and Internal Perspective to the Legislative Activity?*

Wintgens takes an external and internal perspective to rationality. Rationality in this context means that legislative activity deals with the cognitive aspect of the rules to be followed by the legislator or, as Wintgens says, "more precisely, with the cognitive aspect of the internal point of view of the legislator". Wintgens says that "Rationality in legislation, then, means that the legislator does more than just is promulgating, in the form of legal rules, his own subjective preferences. Legislative activity becomes more rational, in as far as the cognitive aspect of the internal point of view of the legislator is taken seriously." Wintgens (2002: 30) asks "How can this be analysed?"[13]

One of these cognitive aspects is legal validity. It is a system-internal quality of the rule created by the legislator. Validity of legal rules can be connected to the volitional aspect of the hermeneutic point of view. It is an expression of legislators will to give legal validity to a certain proposition. External point of view refers to knowledge about reality. The legislator does not look upon the social data as raw material but such knowledge is filtered by scholarly work so that they are set up as knowledge about social reality that could be relevant for legislation. But Wintgens asks how it is theoretically possible that the extra-legal elements can be introduced in a legal system. One instrument is the constitutional review. For example, the *Bundesverfassungsgericht* has isolated certain criteria that are used to measure the quality of the legislation: a duty to establish the facts, (2) a duty to balance, (3) a duty of prognosis or prospective evaluation, (4) a duty to take future circumstances into the consideration and (5) a duty to correct legislation at a later stage, or retrospective evaluation.[14]

In the European countries there are differences in this respect of constitutional review: some countries have established constitutional courts with the capacity of constitutional review of legislation (Wintgens 2002: 14). For example, in Finland, it is the Constitutional Committee inside the Parliament, which is investigating the constitutionally relevant matters, *a priori* and *in abstracto*.

[13] See also Tuori (2002: 105–106). Tuori's distinguishes three forms of rationality in legislation: object rationality, internal rationality and normative rationality. Tuori writes that one explanation for the alleged decrease in the internal rationality of legislation in Finland may lie in the fact that law drafting takes place increasingly elsewhere in the state machinery than in the Ministry of Justice. Tuori says that there is the expertise required by the monitoring of internal rationality is concentrated.

[14] See Wintgens (2002: 30–32).

2.4.3 "Freedom as Principium"

Wintgens in his later writings says that law has its own method and "the legislative" is very difficult to see through the rational theory. Wintgens elaborates further his legisprudence approach departing from the epistemological reflections concerning the freedom of the individual. Wintgens comes again to the concept of legalism and sees that legalism mainly attempts to exclude any form of theorising on the legislation. The legislation is a matter of choice. And 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. Wintgens' solution to that problem is that Wintgens takes under the focus the knowledge and the rules that contain rights and duties (Wintgens 2005: 2–6). Wintgens sees that the freedom as *principium* means that any limitation of freedom must be justified. Wintgens defines that "Legisprudence is defined as a rational theory of legislation". It consists of an elaboration of the idea of freedom as *principium* (Wintgens 2005: 11).

The justification of legislation is marked as a process of weighing and balancing the moral and political limitations of freedom. Upon the rational character of legislation, a principled framework is then required. With the help of this framework, external limitations can be justified. And the justification is part of the process of the legitimation. Rational theory of legislation, or the legisprudence, does have its basis on the principles: the principle of alternativity, the principle of normative density, the principle of temporality, and the principle of coherence. Wintgens says that "Upon the rational character of legislation, a principled framework is required" (Wintgens 2005: 11). The principle of alternativity requires the priority of subjects' action. The idea is that 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 (Wintgens 2005: 11–12). Normative density refers to sanctions that need a special justification because they include a double restriction of freedom (Wintgens 2005: 12). The principle of temporality, the perspective of time, constrains the limitations of freedoms and the possible sanctions. The "right time" is one critical element of principle of temporality. The principle of coherence is the principle of justification of external limitations from the perspective of the legal system as a whole (Wintgens 2005: 15). Wintgens writes that politics is matter of disagreements and here Wintgens sees that principles of legisprudence are important (Wintgens 2005: 22).

In his conclusions Wintgens stresses the importance of human rights. Wintgens stresses the requirement to respect for individual freedom (Wintgens 2005: 22). What Wintgens says is "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" (Wintgens 2005: 22).

Wintgens furthers the epistemological discussion with writing about jusnaturalistic and non-jusnaturalistic models of legitimation and about freedom and about the rights. Wintgens analyses the substantive model and the model called procedural model in legislation. The result of the procedural model is born in that legitimation programme. The substantive model demands the substantial legitimation, and the substantial models basically deal with free will. Interestingly, Wintgens writes about the rights, also as political rights as participation rights and analyses theoretically the legitimacy chains. Wintgens sees that so called strong legalism goes hand in hand with the model of the legitimation that includes the irreversibility of that legitimacy chain. Strong legalism includes a "one shot" legitimation, in that the legitimation chain is activated at the "moment" of the social contract. Reversals in the legitimation chain show some mechanisms which are built into the chain that allow subject to contribute to it in active way, in elections, in referendum or by challenging the acts of sovereign (Wintgens 2007: 39–40).

2.5 Conclusions

In the global law framework the national legislator writes and "posits" legal principles into the ordinary level legislation. One calls this phenomenon the "principled legislative strategy". The main reason to this legislative mode is the implementation of human right conventions and the international regulatory turn. We are able to say that international organisations are regulating and creating law. It is the nation states who are institutionalising the international law like human right principles into the national legislation. The interesting aspect in this respect is how rationally the national legislator is legislating through these human right principles and other legal principles. What and how the legislator as human beings and as a collective body is able to know about the legal principles? Some legal theorists like Dworkin argue for the independent legal principles. The legal principles as legal norms are an unsettled problem in legal theory, anyhow.

Weinberger has studied such abstracts principles like "justice" from the epistemological point of view. Weinberger writes that there is such a thing as practical thought and practical argumentation, but no such thing as a practical cognition. Weinberger represents the non-cognitivist attitude

towards the principle of justice. Weinberger does not accept in this respect any metaphysical aspects. Weinberger does not accept the cognitivism as a knowledge, *a priori*. Weinberger sees that the phenomenon of legal principles ("justice") is a relative question, in its nature. There exists no stable or absolute material "justice". Weinberger's non-cognitivism excludes not only deductive justifications of practical conclusions based on purely cognitive arguments, but also every other cognitive way of supporting practical sentences. For Weinberger the thinking is a processing of information, which is an instrument for gaining knowledge and the utilisation of cognition in the context of the guidance of conduct. This means that thinking is a process which plays an essential role in the structure of deliberation determining action and its control. Weinberger makes the difference between the theoretical and practical sentences. Theoretical sentences are the tools for describing the facts, for statements of cognitions, suppositions, hypothesis, presuppositions and predictions. For Weinberger the most important practical sentences are the normative sentences. Weinberger shows, for example, that the formal equality is just guiding the human thinking. About complexity of justice Weinberger writes that there exists no fixed judgement about justice whose correctness is objectively guaranteed, but on the contrary one always finds himself only on the search of justice.

Wintgens in his studies concludes that there are found some legal principles which should guide the rationality of the legislator. Wintgens bases those principles on the principle called "freedom of *principium*". The most important legislative principle is the principle of coherence; other legislative principles are the principle of alternativity, the principle of normative density, the principle of temporality. Wintgens writes that upon the rational character of legislation, a principled framework is required. Wintgens stresses the role of constitution and the review of the constitutionality. Wintgens stresses the importance of human rights. Wintgens seems to think that the human right principles in the legislative context are kind of system principles (*a priori*, natural law approach). It seems that Wintgens prefers the human right principles as integrated legal principles.

One concludes here that there exist several conceptions about the gaining knowledge and promote rationality. Weinberger rejects the cognition *a priori* in case of principles. There is not found any absolute fixed judgement about justice. Weinberger sees that the phenomenon of legal principles ("justice") is a relative question, in its nature. There are found structural legal principles (Weinberger) or system principles (Wintgens) which promote and restrict the legislative choices and the rationality of legislator. For Wintgens the freedom as *principium* means that any limitation of freedom must be justified.

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Chapter 3
Three Grounds for Tests of the Justifiability of Legislative Action: Freedom, Representative Democracy, and Rule of Law

Andrej Kristan

Luc J. Wintgens has construed a trade-off model of the social contract on the basis of which every single legal rule calls for its ongoing justification. According to his account,[1] the justifiability of a legislative action, or an omission to reform existing rules (or, in certain cases, also an omission to regulate a specific domain at all), depends on how the legislative choice in question momentarily satisfies four principles of legisprudence. These principles find their normative basis in individual freedom and are termed the principle of alternativity, the principle of temporality, the principle of necessity of normative density, and the principle of coherence. This trade-off reinterpretation of the social contract thus provides one with the basis for a rational legitimation of the laws.

In what follows, I first (Sect. 3.1) give a reconstructive account of the set of conditions of the justifiability of legislative action that one finds in Wintgens' project. Along the way, I will develop his proposal slightly further.

Subsequently, I will bring to the reader's attention two other regulative ideas that may serve—alternatively or in combination with the trade-off model of the social contract—as grounds for tests of the justifiability of legislative choices.

In Sect. 3.2, we will see that even on the basis of the alternative model of the social contract which is criticised by Wintgens (that is, on its proxy

[1] The most developed are the arguments in Wintgens (2012); but see already Wintgens (2005, 2006).

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model), legislators nowadays ought to motivate their choices. In Sect. 3.3, I will develop Otto Pfersmann's reconstruction of the Rule of Law with the claim that the legislator's duty to motivate its choices is also inherent within this very requirement of a contemporary constitutional state.

In this manner we will obtain three different grounds, or points of reference, for developing a test (or various tests) of the justifiability of legislative choices in the world of global rule of law and constitutional democracy. Of course, this is only a preliminary step in search of more rigorous evaluative standards for instances of legislative action with various degrees of actionhood. But, first things first, let us turn to the Enlightenment ideas of the social contract and their twenty-first century reimagining.

3.1 The Trade-Off Model of the Social Contract

The "original position" in the thought of the figures of the Enlightenment was given to our freedom. Wintgens brashly tries to claim, however, that this freedom disappears in the classic social-contract theories as soon as it (logically) provides the basis for the social construction of the Sovereign or the State. Indeed, while freedom is their starting point, it is not their drive, or *Leitmotiv* as he himself puts it (Wintgens 2012: 138, 202 *et passim*). By entering into the contract under the command of reason, a proxy is given to the Sovereign and, on this basis, every limitation of freedom that the Sovereign imposes in the form of rules is taken to be willed or at least agreed upon (although a priori) by parties to the contract, that is, subjects. But this construction is so obviously far from reality that one might read between the lines: Freedom is a joke! The social contract theorists did not take it seriously in whatever sense it has or had. Wintgens, on the other hand, takes a different stance.[2]

I will provide no detailed presentation of his argument on this occasion. Instead, I shall direct the reader to his highly thought-provoking book (the work is well worth the time, despite the fact that, for my taste, its first part, whilst full of erudition, lacks the arts of *dispositio et eloquentia* which the author uses in the last few chapters). In this section, we will only focus on the normative output of his argument.

Although in no place presented in the following rule-centred fashion, here is an incomplete, but for my purposes sufficient, summary of what

[2] See in particular Wintgens (2012, chap. 4: Freedom in Context).

Wintgens (2012: chap. 8) coins "legisprudential validity". This corresponds to "justifiability" (a hypernym I use in this paper to broaden our perspective regarding the grounds for assessing legislative action).

For a rule to enjoy legisprudential validity—formal validity is, of course, its necessary, but insufficient condition (Wintgens 2012: 305)—a justificatory note of the reasons for it has to meet the following conditions:

(a) state the value, goal or end the (single) rule at hand is connected to;
(b) claim that social interaction, which is in the domain of the rule to be justified, is failing in view of that value, goal or end;
(c) point to what exactly makes social interaction fail;
(d) explain why, in that particular domain, limitation of freedom by means of legislative intervention in the form of a sovereignly imposed legal rule is preferable to (or less harming than) failing social interaction;
(e) show that the chosen content for the rule is necessary to protect the value, achieve the goal, or meet the end of the legislative intervention in question (whereas the alternatives that were less restrictive of individual freedom would be insufficient);
(f) eventually—if the rule is associated with a sanction—show that the chosen sanction is necessary to realise the value, goal, or end of that legislative intervention (whereas the alternatives involving no sanction or a less serious sanction would be insufficient).

An intermediate supplement is in place at this point. As you can read from condition (f), legisprudential validity requires an additional justification for rules that are associated with a sanction.

According to Wintgens (2012: 273), the "rule plus sanction" form of regulation presents a double external limitation of freedom. First, because a determination of freedom in a legal rule excludes action on individual conceptions of freedom (these being, in his terminology, one's internal limitations of freedom). But then—"if the required action is not performed freely"—a second reduction of freedom consists in the fact that a pecuniary sanction or a deprivation of liberty reduces one's means to act on conceptions of freedom in some other domains as well. Here, the author is obviously focusing on rules that impose obligations of conduct (see the above quoted fragment, which is referring to the required *action*); he does not seem to have in mind obligations of result. Comparing the two types of obligations (and of prohibitions, I should add) one will note, however, that the latter are less restricting with regards individual freedom than the former.

Under the assumption that a result may be achieved, in general, through a variety of actions (conducts), it is clear that determining a result, the

achievement of which is either obligatory or prohibited, leaves more choice to individuals than determining in that way a certain conduct. —Doesn't it?— Hence, we shall conclude that the trade-off model requires one justification for rules prescribing results or goals to achieve (condition *d* covers this requirement) and a double justification for rules prescribing determinate actions (in this case, condition *d*, which is noticed by Wintgens, is not the only one that applies; condition *e* applies as well). In any case, as he points out, an additional justification *f* is needed, if the rule is associated with a sanction.

Once these conditions have been satisfied, the legisprudential validity of a rule in question is not, however, "peremptorily" acquired (Wintgens 2012: 303). This means that it is not acquired forever. Legal rules may well lose their legisprudential validity with changing factual circumstances (Wintgens 2012: 301). These circumstances may change either independently of any legal rule, or as a result of the very rule under scrutiny. In the first hypothesis, the legislator ought to rehearse the trajectory of justification from points *a* to *f* as listed above; if not, a constitutional court adopting the legisprudential conception of legal validity might strike down the rule, that is, not as a violation of the constitution, but as a "shortcoming" (Wintgens 2012: 306).

In the second hypothesis, things are more complex. On the one hand, the change of circumstances can be the intended result of a rule under assessment. In other words: the change of circumstances can realise the purpose (value, goal, or end) of that rule. Wintgens (2012: 301) identifies this case, but makes no additional comment to it. This does not mean, however, that the legisprudential validity of the rule is preserved here. Sticking to the trade-off re-interpretation of the social contract, he too will agree (or so I would wager) that it all depends again on how the purpose of the rule was defined. Take this as example: if the goal of an ad hoc tax regulation in a time of crisis is to balance the budget of the state, its realisation makes—on the trade-off understanding—the legisprudential validity of the rule expire. The same consequence may also follow when the change of circumstances is an unintended result of legislative intervention. (I say *may*, for it follows if the change is a sufficiently negative effect of the rule under assessment to counterbalance its positive effects.)

As one can see, from the trade-off re-interpretation of the social contract there stems a duty to revise the justificatory notes of the reasons accompanying legal rules. And there is a further duty to withdraw the rules, or to change them, if accommodating notes of the reasons proves to be unsatisfactory (Wintgens 2012: 303). These duties, however, do not amount to an undesirable principle of change (this would go against stability, against legal

certainty), for there is yet another—a "duty of prospection" or prognosis (Wintgens 2012: 301–302)—which requires that the Sovereign take into consideration the foreseeable future circumstances (including positive and negative effects the rule might produce) in order to be able to argue that the slightest change in circumstances will not have immediate repercussions on the rule to be issued.

All these duties[3]—as well as legisprudential validity, which I deem to become the central concept of Wintgens' project in the future—are concretisations of the four principles of legisprudence mentioned in the introduction to this paper. In order to base these guiding principles of practical reason in legislation, Wintgens (2012) has proposed a fine (trade-off) reinterpretation of the social contract; an interpretation based on the contextualisations of freedom, rationality, and the individual.[4] I now intend to show, in the following two sections, that similar principles emerge as well from other (less novel) normative bases.

3.2 The Proxy Model in a Representative Democracy

Unlike in the trade-off model of the social contract, in the proxy model—which is its older conception—the limitations put on freedom by the Sovereign have absolute priority over one's own, that is, internal limitations of freedom (Wintgens 2012: 254).

This absolute priority of the external limitations of freedom over internal ones is a consequence of the Enlightenment idea of the social contract. With the idea of the social contract, a rational political society replaces the natural political society of larger inequalities and the unpredictable use of violence. Consent to the contract includes—according to the mentioned views—a proxy to the Sovereign, by means of which subjects "consent to abide by any of the sovereign's external limitations of freedom whatever their content may be" (Wintgens 2012: 281). This proxy to the Sovereign is, according to Enlightenment views, a general one. It therefore holds as long as the general purpose for it is assured (Wintgens 2012: 219–229 et passim). This purpose may be personal safety, in the case of Hobbes, or equality, as for Rousseau.

[3]For the exact articulation and terminology of the six duties of the legislator, see Wintgens (2012: 294–304).

[4]See Wintgens (2012, chap. 2: The Individual in Context; chap. 3: Rationality in Context; and chap. 4: Freedom in Context).

The reader will remember that Rousseau called the social contract those "true principles of public law",[5] which concern the establishment of institutions (not the content of the decisions arising from them). This is what we today call "the constitution". Now, it is an empirical question, but one may check and see for oneself that a significant number of constitutions in the world provide for what we know as "representative democracies". This is where I would like to make my first point.

In contrast with the trade-off model, the proxy model *an sich* requires no justification of individual rules (Wintgens 2012: 295); for these are justified by general proxy, as we have said. But when the proxy model of the social contract takes the form of a representative democracy, legislators ought to motivate their choices and they ought to do it in a certain way. How is this the case?

The reason for my claim is simple: In a representative democracy, the people exercise their power through representatives. These are normally elected every 4, 5, or 7 years (depending on the system). In the meantime, they are bound to take concrete, and sometimes highly technical, decisions on what is regulated and precisely how is it regulated. Consider legislation concerning GMOs, for example. In the motivating addenda to our laws, these legislative decisions ought to be connected explicitly, and as comprehensively as possible, to specific, albeit abstract values or interests. Otherwise, the legislative action cannot be reviewed by an electorate that does not have the specific knowledge for which representatives and their assistants are being paid.

Here, I would have to devote more time to show why it is precisely values and interests that the legislator needs to express but I believe that one can grasp the general idea. The background thought behind my rationale is that people, when they go to vote, need to be able to judge for themselves whether legislative choices are reflective or not of their own views, beliefs, opinions that have a highly more general and abstract character than the legislators choice in question. This is why the motivating addenda to our own laws ought to include a values-and-interests-based determination of not only the positive but also the negative effects of the choices that are being made. (Note one somewhat surprising point: this standard is higher than the one usually imposed on judicial motivations.[6])

[5] See the very last page of Jean Jacques Rousseau, *Du Contrat Social* (1762). See also Wintgens (2006: 5).

[6] Compare with Wintgens (2012: 302). See also Wintgens (2006: 18) and Wintgens (2005: 109).

As one may see, even in the proxy model of the social contract, legislators in representative democracies ought to motivate their actions. Whether what they do is justified or not is determined when people go to the election booths. Yet if legislative actions are not motivated in the way presented above, they are—on these grounds—not even justifiable, since people can't review them on the basis of specific values and interests which led them to vote for one candidate rather than for his political rival.

This having been said, we can now move to a second point I would like to make, that is, showing in what way the duty to motivate is inherent to the regulative idea of the Rule of Law.

3.3 The Rule of Law Requirements

If the argument above was simple, this one is a little more complex. I do not want to enter into the problem of "essentially contested concepts", here. Let me only stress that—as far as the concept of Rule of Law is concerned—one of the two ways to minimise or eliminate this problem can be found, in my view, in Otto Pfersmann's (2001) *Prolegomena to a Normativist Theory of the Rule of Law*.[7] Now, Pfersmann does not mention the problem of essentially contested concepts and he does not mention any "principles of legisprudence". So, what I am going to do is the following: I am going to develop what he says about the Rule of Law and I am going to give a slightly different articulation of his content.

This is how it goes.[8] We shall first distinguish the nuclear concept of the Rule of Law. (Pfersmann talks about its formal concept.) Then we shall talk about different dimensions or extensions of this nucleus. (Pfersmann himself talks about various material concepts.) The legislator's obligation to motivate his choices stems from what I call the second extension of the Rule of Law. But there are a few other principles of legisprudence that one can articulate on the basis of this model, so I will start by summarising the whole idea.

The nuclear (or the formal) concept of the Rule of Law demands the establishment of a power-conferring norm by means of which we monopolise the use of violence and translate it into the legally authorised use of force by the sovereign. Without this power-conferring norm, one cannot speak of a legal system or a state.

[7] Another way to minimize the problem is used in Laporta (2007).

[8] See already Kristan (2009).

Now, the second demand of this nuclear concept of the Rule of Law consists in the prospectivity and publicity of the norms emanating from the sovereign. If they are not prospective and public, they cannot guide our behaviour effectively. In other words, they are not law.

The first extension of the Rule of Law serves then to minimize the use of force in the immediate execution of sovereign powers. In order to delay the use of physical force as much as possible, its demand is twofold: (i) it establishes a prohibition of immediate use of force and (ii) it accompanies it with an obligation to bring any conflict before a third party.

This minimizes the execution of force. However, it still leaves the legislative and judicial authorities to decide in an arbitrary fashion.

In order to prevent arbitrariness, every exercise of power is to be substantially conditioned. This is the step we may call the second extension of the Rule of Law. It minimizes the arbitrariness and the margins of appreciation. However, at its extreme, it would eliminate the freedom of not only the authoritative powers, but of individuals as well, for these too are usually authorised to choose from among various possible actions. A liberal interpretation of the Rule of Law evades this problem by distinguishing between the private and the public sphere. We thus get two groups of addressees of legal norms: the individuals and the officials.

As far as individuals are concerned, their possibility of choice should not be limited according to this liberal interpretation—on the contrary, it is to be extended. The officials, on the other hand, should have a minimum possibility of choice.

Such a system would, first, strengthen predictability and legal certainty (which require moreover that the laws should rarely be subject to change). Second, the list of possible choices should be—under this extension of the Rule of Law—as determined as possible.

Since the legislator is empowered to make certain choices on the basis of the constitution, every particular decision of his is to be accompanied with a "notice of reason". Furthermore, because every choice made by authoritative powers is questionable (for arbitrariness), the reasons for one of the various possibilities ought to be published—so that they can actually be reviewed.

This being said, we have derived four different principles for practical reason in legislation from this articulation of the Rule of Law—that is, principles on the basis of which a legislative action is to be justified. These are the principles of prospectivity and publicity, the principle of determination of possible (valid) choices, and the comprehensive motivation requirement. Other principles follow from further "extensions" of the Rule of Law. Their examination in this place would go beyond the purpose of the article—which

is to demonstrate how the legislator's duty to motivate his choices can be derived from various normative bases: this reconstruction of the Rule of Law, the proxy model, and the trade-off model of the social contract are not the only ones.

3.4 Conclusion

The attentive reader will find that there might be some tension between principles from different "grounds". For reasons I will not insist upon here, this result is welcome. After all, we have now obtained three grounds, that is, three points of reference, which permit one to develop balanced test(s) of the justifiability of legislative actions. This is, however, only a preliminary step in a possible search for more rigorous evaluative standards for instances of legislative action with various degrees of actionhood.

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Chapter 4
Legisprudence in the Korean Context: A Practical Approach Focusing on the Confucian Effects on Rationality

Cheoljoon Chang

4.1 Introduction

'How to legislate' has not been a major concern in the Korean legal communities, since the contemporary legal system had been adopted a century ago. Instead, 'how to rule by the government' and 'how to adjudicate by the judiciary' have been the focal points, even within the legal academia. This is because the legislature had been recognized as a collaborating branch of the government for passing laws favorable to the authoritarian regimes.[1] This phenomenon attributes to the unstable history of democratization. From the beginning of the First Republic in 1948 to the current government, the main character on the stage of politics in Korea had been given to the incumbent presidents of respective regimes. The heritage of the super-powered presidentialism could not be easily eradicated, even after the dramatic democratization in 1990s. The balance of power between the executive and the legislature remains difficult to obtain, even if the current Korean Constitution, nearly perfectly democratic and legitimate, enunciates it.

[1]The Korean governmental system can be categorized into the presidential system. However, throughout the difficult period of several authoritarian regimes, such as Rhee Syngman's of 1950s and Park Chung-hee's of 1970s, and the following military governments of Chun Doo-hwan's and Rho Tae-woo's of 1980s, the Korean presidential power increased explicitly. According to Karl Loewenstein (1957), the Rhee and Park governments were called Neo-Presidentialism. Legislatures under those regimes were filled with the disarmed sycophants.

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Based on these unfavorable circumstances, the theory of legislation could hardly draw the attention of scholars or practitioners for a long time in Korea. To practitioners, deliberation during the legislative procedure was merely considered as a ceremonial element of legislation, while scholars were unable to provide proper theories. Even during the post-democratization regimes, physical quarrels among legislators were frequently reported within the plenary sessions for law making in the National Assembly. Political commentators attribute such chaotic incidences to the poor quality of political culture. However, the scarcity of legislation theory can be found as a major contributor for the current state of the Korean legislature. For these reasons, a recent shift has taken place to promote studies of the Korean legislation theories in earnest, and to legalize a more detailed legislative procedure.[2] Whereas the history of legislation theory is relatively short, aspirations for correcting the systematic flaws in the legislative procedure is delivered quite firmly in the legal academia. Concerted efforts by scholars are aimed to build up a legislation theory indigenous to Korea.[3]

Theoretically, at the core of these efforts lies a desire to seek rationality in legislation. The study of legislation pursues a rational legislation. It is natural to set rationality for the supreme goal when it comes to legislation. However, there is almost no working method to realize rationality in a systematic fashion. Korea has implemented a legislative evaluation system, but it has limited power since no law compels the National Assembly to adopt it for statute enactment process. The process for making an administrative regulation is the only one which requires legislative evaluation performed by administrative agencies. The problem is that even in this process, legislative evaluation is not given serious considerations or power to correct the contents of regulations. It is regarded as a procedural excuse to pass the bill that the executive wants-the scientificity requirement. The administration claims that the bill they want to pass was qualified with scientificity because it was tested through the legislative evaluation system. However, the current legislative evaluation system in Korea cannot provide sufficient scientificity to a bill. From the sense of normativity, scientific regulation is difficult to conclude with calculated numbers alone; it must be supplemented by other institutions, such as preliminary evaluation on normativity or constitutionality. Without the normative support, scientificity of legislative evaluation is a myth. Therefore, we can hardly say legislative evaluation in Korea rational.

[2] Lee's research reveals that the elementary legislation study began from mid-1980s, and the systematic approaches started from mid-1990s. See Lee (2006).

[3] See Han (2000).

For these reasons, I think that the focus of the Korean legislation study should not remain at the current stage of legislative evaluation; but it should reach for the fundamental meaning of rationality. Rationality in legislation should not be defined from one overarching principle of scientificity, such as equilibrium between cost and benefit. My argument is that legislation in Korea needs a more stable platform for rational deliberation which can be better understood by considering the contextual factors. In addition, this process should be systematically supported, as noted.

However, I do not mean that there is no need for legislative evaluation in the Korean legislation studies; I do not mean that legislative evaluation is not scientific. Instead, I address a contextual approach: we need a contextual concept of rationality in terms of legislative studies, and that scientificity should not be recognized as the only standard to decide rationality. The problem of the Korean legislation studies is that there is no consideration of culture in the discussion of rationality.

In this article, I will try to exemplify the possible rationality of legislation in Korea, by taking its socio-cultural context into account. This notion may seem different from the Western tradition. Korea is one of the most rapidly developed countries in Asia maintaining its Confucian heritage. The Korean concept of law is quite different from the Western concept because Korea has a unique history of democracy and the rule of law. According to the Confucian teaching, the social order is marked by age; the old deserves a priority of protection or social benefit by the young (長幼有序). Even today, it still works as an invisible social order even though its power is decreasing. The Act on Promotion of the Transportation Convenience of Mobility Disadvantaged Persons is a pertinent example of a law based on this age-oriented social order. This law essentially gives priority to the old over the young in entertaining transportation convenience. Although this Act may be regarded as an irrational legislation from the Western concept of rationality, it may be a good legislation from the Korean perspective. The following sections will prove this argument.

4.2 Rationality of Legislation Studies in Korea

After democratization, civilian governments accepted the people's requests on setting up rationally organized national governmental systems. Such systems, in which legal rules could be the subjects of judicial review by the newly founded Constitutional Court and the existing Supreme Court, was governed by the rule of law. The Legislation system was also modified with the apparatus for embracing. However, legislation in Korea is still blamed

for its lack of rationality: there are many laws that do not reflect legal realities. This situation comes from the systematic failure. There is almost no effective preliminary way of control on legislative discretion. Korea adopts legislative evaluation system, but it works in a very limited fashion.

In this situation, it is imperative that the way to hold rationality in legislation process is to secure a reasonable legislative deliberation. If communications between the legislators and the society are not sufficient, the possibility of rational choice decreases. This is the critical point where the rationality in the legislative procedure gains a practical meaning: rationality is defined by an understanding of the society. Therefore, the rationality of the Korean legislation is closely related to the character of the Korean society.

4.2.1 Rationality and Scientificity

Rationality is the concept that originated from the Western tradition of philosophy. There are Descartes, Spinoza, Kant, and Hegel. It is well known that the human reason, in their philosophy, is a defining feature for rationality. Irrefutable truth drawn by the human reason is what to pursue; so a calculated math can be strong evidence. In the arena of legislation, likewise, calculated conjecture implemented by legislators, which is recognized scientific, can be a solid ground of justification for good legislation. Rationality requires scientificity, and mathematics can be a good tool for scientificity.

Whereas calculated mathematics, in the Western tradition, can provide a scientific support, rationality in the Korean context, cannot be parallel to the Western tradition. In other words, a scientific fact cannot guarantee a rational choice. Even though Korea adopted the modern legal system from the West, the Korean people applied the Western legal system to the society in their own fashion. An institution cannot totally change a society. Therefore, if rationality in the Western tradition means scientificity, the Korean concept of rationality may inherently have a different element. I think that rationality should be understood contextually, especially in the field of legislation because we can hardly justify one sole true regulation between different societies.

Generally speaking, however, Korean laws pursue rationality because they follow the typical features of the modern Western legal system. People feel safe when they are regulated by good law, and they feel angry when ruled by bad law. The strongest standard to tell good law from bad law is rationality. In addition, they find rationality from scientific facts. No one can deny this. My argument, nevertheless, is that scientificity cannot be an overarching factor of rationality, specifically in the legislation study.

In Korean law, there are some institutions for promoting rationality; the National Assembly Act, Judicial Review, and Legislative Evaluation.

(1) *National Assembly Act*
According to Article 40 of the Constitution of the Republic of Korea, the legislative power shall be vested in the National Assembly. The National Assembly Act was enacted in order to let the National Assembly exercise their power legitimately. The Act guarantees the legislators' right to propose a bill, right to deliberate, and right to vote.[4]

(2) *Judicial Review*
The Constitutional Court of Korea has the power to judicial review.[5] Its control on statutes would impose a warning to the National Assembly for enacting rational laws. When they pass a bill, the legislators have to scrutinize it and deliberate earnestly to eliminate any content which

[4] Article 79 of National Assembly Act (Proposal or Introduction of Bills)
(1) Any National Assembly member may propose a bill with the concurrence of 10 or more National Assembly members.

Article 93 of National Assembly Act (Deliberation of Bill)
In deliberating a bill, the plenary session shall hear the report on the examination from the chairperson of the committee who examined the bill, and put the bill to a vote through and interpellation and debate.

Article 99 of National Assembly Act (Permission for Speaking)
(1) When a National Assembly member desires to take the floor, he/she shall notify the Speaker in advance and obtain his/her permission.
(3) In speaking on the proceedings, its summary shall be notified in advance to the Speaker, and the Speaker shall permit immediately those matters related directly to an item on the agenda or deemed necessary to be handled urgently, and with respect to other matters, he/she shall determine the time of permission.

Article 100 of National Assembly Act (Continuation of Speaking)
No speaking of a National Assembly member shall be stopped by another National Assembly member's speaking, and when the National Assembly member has not completed his/her speaking due to an adjournment or suspension of the session, the Speaker shall have the National Assembly member continue first his/her speaking when the proceedings are re-opened.

Article 106 of National Assembly Act (Notification of Debate)
(1) Any National Assembly member who desires to debate an item on the agenda, shall notify in advance the Speaker of his/her opposition or support thereof.

Article 109 of National Assembly Act(Quorum for Voting)
Except as otherwise prescribed in the Constitution or this Act, the proceedings shall be voted on with the attendance of a majority of all the National Assembly members on the register and by a concurrent vote of a majority of the National Assembly members present.

[5] Article 111 of Constitution of the Republic of Korea
(1) The Constitutional Court shall have jurisdiction over the following matters:
1. The Constitutionality of a law upon the request of the courts; 2. Impeachment; 3. Dissolution of a political party; 4. Competence disputes between State agencies, between State agencies and local governments, and between local governments; and 5. Constitutional complaint as prescribed by Act.

may be unconstitutional. However, the effect of the Constitutional Court's judicial review is not strong because the Constitution takes only concrete review system on the constitutionality of statute: the judicial review power can be exercised only when there is a case and controversy in the regular court. For the rational lawmaking effect, abstract review systems similar to what is permitted by the German Constitution is needed. Under this system, the legislators should be always alert on rationality of enactment because the enacted statute can be reviewed by the Constitutional Court whenever raised.

(3) *Legislative Evaluation*

Legislative evaluation is the most popular way to secure rationality of legislation.[6] Usually, it uses scientific methods to prove rationality. Because the result comes with calculated numbers, proponents of legislative evaluation understand that it is the best way to guarantee rationality. In Korea, however, there is no rule regarding legislative evaluation for the statute making process in the National Assembly. The evaluation rule only applies to the process of making an administrative order.[7] For this reason, legislative evaluation does not have an influence on the practice of legislation. Legislators are not subject to evaluation in statute making. The legislative evaluation report, made by an administrative agency, provides only a reference to the legislators. With the current institutions, there is

[6] In the Anglo-American Common Law system, legislative impact analysis has the similar function to legislative evaluation. The Korean style of legislative evaluation was named after the American legislative impact analysis.

[7] Article 7 of Framework Act on Administrative Regulations (Regulatory Impact Analysis and Independent Examination)

(1) When the head of a central administrative agency intends to establish a new regulation or reinforce existing regulations (including the extension of the effective period of regulations), he/she shall conduct a regulatory impact analysis taking account of the following matters comprehensively, and prepare a regulatory impact analysis report:

1. Necessity of establishing a new regulation or reinforcing existing regulations;
2. Feasibility of the objectives of the regulation; 3. Existence of alternative means to the regulation, or possible overlapping with existing regulations; 4. Comparative analysis on costs and benefit which is to be borne by or enjoyed by the citizens and groups subject to regulation following its implementation; 5. Whether competition-restricting factors are included; 6. Objectivity and clarity of regulation; 7. Administrative organization, human resources, and required budget following the establishment or reinforcement of regulations; 8. Whether documents required for relevant civil affairs, procedures for handling it, etc. are appropriate.

(3) The head of a central administrative agency shall determine the subject, scope, method, etc. of regulations based on the findings of the regulatory impact analysis under paragraph (1), and conduct an independent examination on the propriety thereof. In such cases, the opinions of relevant experts, etc. shall be fully reflected in the examination.

nothing to control the irrationality of legislation based on the legislative discretion, i.e. pork barrel.

Interestingly enough, however, proponents of legislative evaluation are satisfied with its scientificity. They tend to evaluate a law from the sole standard of rationality: scientificity. It makes one question their narrow understanding on rationality of legislation: the myth of scientific legislation. Once a scientific method is adopted throughout the process of legislation, they quickly assume that rationality has been acquired. This belief may lead the entire Korean academia and the legislation system into a partial understanding of legislative evaluation; but at the risk of neglecting the general theory of legisprudence.

There is a fallacious myth of scientificity behind the excessive efforts of legislative evaluation. Even though legislators analyze the possible costs and benefits of a law, based on a scientific legislative evaluation, their conjecture can be unscientific according to the adopted evaluation methods. In addition, scientificity in legislative evaluation is guaranteed only when the performers are qualified in their ability. The evaluation performers in Korea do not have enough ability in terms of finance, expertise, and human resources.[8] This is why legislative evaluation backed by scientific methods should not be overstated in Korea.

4.2.2 Confucian Tradition of Korea

As noted earlier, to understand the meaning of rationality, we have to consider the society where the legislation is made. The character of the Korean society may reveal the rationality of legislation in the Korean context. With modernization and globalization, the Korean society adopted most of the Western ways of life. Indeed, Koreans share the common Capitalist economic and social lifestyle with other continents. However, the laws governing the daily lives of people are highly influenced by the society's indigenous political history and traditional value. Traditionally, Law has not been a popular medium to solve the disputes at hand. This is because the Confucian social order-which has dominated the people's way of life for nearly a decade of century since medieval Chosun Dynasty-teaches that we should abstain from law as far as possible. Instead, the teaching presents the "rites" (禮) for the general norm governing everyday lives.[9]

[8]Currently, the institutions performing legislative evaluation are National Assembly Research Service, and Korea Legislation Research Institute.

[9]See Choi (2006).

Rite in the Confucian social order was a replaced norm that strongly governed the community. In the Chosun Dynasty, four kinds of rites operated as general rules (Choi 2006: 226): rite of maturity (冠禮), rite of marriage (婚禮), rite of funeral (喪禮), and rite of worship (祭禮). Each had detailed customary and codified rules that contained concrete normative powers. To keep the rites earnestly, a person had to be humble to others (謙讓), and to be humble, one had to cultivate oneself morally (德). The Confucian order taught that a mature person should keep oneself close to rite, but should keep distance from law, because law was the arms used by the immature. It is humiliating to depend on law before keeping rite (禮主法從) (Seung Doo Yang 1968; Hwang 2010).

Koreans, now, live in a different world. They are living at an age of high-technology. However, their innate value built on Confucianism is still alive. The ingrained value of a society cannot be eradicated, although they can be compounded by new values. According to the Confucian value of Koreans, rationality cannot always be the same to the Western one. Sometimes Koreans feel rational when they enact a law that cannot be explained with the calculated conjecture. The scarcity of scientificity may not harm the legislative rationality in Korea.

4.2.3 Rationality and Legal Consciousness in Korea

The Confucian heritage has been understood as a hurdle against the development of the rule of law in Korea. A survey on people's legal consciousness that was recently performed by Korean Legislation Research Institute suggests many interesting features regarding rationality (Yi and Lee 2008), including the influence of Korean Confucian culture on Koreans' pre-modern understanding of law (Seung Doo Yang 1968; Kun Yang 2002). Most of all, it shows that the traditional concept based on the Confucian heritage governing law has drastically changed. After 1990s, people tried to conceive law instrumentally. They now have an active approach on law-small claims suits surged. This can be explained with the heightened consciousness of individual rights.

However, many things still remain unchanged. Korean people generally do not trust the law and the legal system. They still have a low law-abiding spirit. These forms of legal consciousness are understandable because the Korean society experienced oppressive legal systems: from colonial governance by Japan, the Korean War, and authoritarian regimes. People without power have felt that law is unfair because, to their eyes, law had always sided with those in power. Such experience, combined with the Confucian heritage, negatively reinforced distrust in the law and the legal systems.

As seen, the peculiarities of the Korean law and legal system necessitate a different understanding in terms of rationality in Korea.

4.3 Act on Promotion of the Transportation Convenience of Mobility Disadvantaged Persons

The peculiarity of the Korean legal culture does not always result in negative effects on legislation. The fact that rationality in the Korean context can be a different kind, we may find a proper function of the Confucian heritage in legislation to create the different kind of rationality. In this section, I want to exemplify this argument. Korea has a unique rule of protection for the elderly: all public transportation systems have to reserve some seats for so called "the mobility disadvantaged" including the elderly. It is usual to reserve space for the other disadvantaged, such as the handicapped, and the pregnant women. However, age itself can hardly be the reason for special care in terms of mobility through the public transportation. Usually, governments support the elderly with economic benefit: Medicare, voucher, or health care.

The National Assembly enacted a statute regarding this matter: Act on Promotion of the Transportation Convenience of Mobility Disadvantaged Persons.[10] I find that the unique concept of rationality in Korea underlies this

[10] Article 1 of the Act on Promotion of the Transportation Convenience of Mobility Disadvantaged Persons (Purpose):

The Purpose of this Act is to contribute to the social participation of mobility disadvantaged persons and to the promotion of the welfare thereof by constructing people-oriented transportation systems through the expansion of convenient mobility equipment by means of transportation and passenger facilities and on roads, and through the improvement of the pedestrian environment so that the mobility disadvantaged persons may travel safely and conveniently.

Article 2 of the Act on Promotion of the Transportation Convenience of Mobility Disadvantaged Persons (Definitions):

1. The term "mobility disadvantaged persons" means persons who feel inconvenience in mobility while leading a life, such as the disabled, aged, pregnant women, persons accompanied by infants, children, etc.

Article 10 of the Act on Promotion of the Transportation Convenience of Mobility Disadvantaged Persons (Installation Standards for Convenient Mobility Equipment)

(1) The kind of convenient mobility equipment to be installed in each facility subject to installation shall be proscribed by Presidential Decree considering the scale, use, etc. of such facility.

Article 12 of Presidential Decree:

The kind of convenient mobility equipment includes direction announcement, wheelchair facility, and seats reserved for the mobility disadvantaged persons, etc.

law which governs seats reserved for the elderly. The legislation is not justified by the rationality with scientificity. Instead, it reflects the heritage of the Confucian social order for the elderly. Surprisingly, the people do not have strong antagonism toward this rule. In a legislative deliberation during the enactment, the legislators held common views on sharing seats with the elderly in a special fashion.[11]

4.4 Conclusion

In this essay, I described the ways in which legislative evaluation falls short, and delineated the need for legislative deliberations. Legislative deliberations are based upon the communications between legislators and the society, including the social norm for rationality. Rationality in legislation may be construed in various forms, when given regard to a society's inherent values and culture. Thus, although scientificity is a requisite tool for rationality in general, scientificity itself is by no means sufficient to justify the rationality of legislation. Rather, the theory of legislation comprises of qualitative factors unique to a given society which cannot be articulated by mathematics. Such is the case for rationality of legislation in Korea, a society based upon the Confucian heritage.

My argument offered that the influence of the Confucian social order in the Korean society complements and even provides an alternative understanding of the rationality of legislation in Korea, which had previously been overruled by the myth of scientificity. The Act on Promotion of the Transportation Convenience of Mobility Disadvantaged Persons is offered as a pertinent illustration of a legislation, which may be regarded irrational from the Western concept of rationality, but is rationally accepted by the Korean society based on the underlying Confucian social order. From this example, I purport the need for a contextual understanding of rationality in the study of legislation, which will enable us to look beyond the current stage of legislative evaluation to a fluid deliberation, seeking to reach the fundamental meaning of rationality.

[11]Minutes from the 4th Construction and Transportation Committee in the National Assembly 251st Session, December 27th, 2004.

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Chapter 5
The Role of Constitutionalism in Regulatory Governance

Pablo Larrañaga

> *A good government implies two things; first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained.*
>
> James Madison, *Federalist Papers*, No. 62.

For a long time, constitutionalists have been concerned with the problematic relationship between constitutionalism and regulatory governance.[1] For example, in a recent collection of essays: *Regulatory State: Constitutional Implications*,[2] Colin Scott summarizes those concerns in two kinds of critiques to regulatory governance. On the one hand, he brings up a strict or internal critique, which focuses on the constitutional problems of legislative

Previous versions of this work were discussed in diverse contexts: the Thomas Hobbes Seminar organized by ITAM and UNAM in Mexico City; the "Legisprudence" workshop at the XXV IVR World Congress in Frankfurt; the Vaquerías Seminar in Cordoba, Argentina; the Seminar of the Department of Political Theory at the University Pompeu Fabra, in Barcelona; the Seminar of the Department of Legal Philosophy of the University of Alicante and the 1st US – Latin-American Law Colloquium organized by the Law School of the University of Texas and the Department of Law of ITAM. I deeply appreciate the insights I received in every of such occasions, and naturally remain responsible of any failure remaining in the text.

[1] See, e.g., Black (2007), Majone (1997, 1999), Baldwin (1997) and Sunstein (1990).

[2] Oliver et al. (2010).

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delegation to regulatory agencies, and the obstacles to control by legal means the supposedly technical nature of such "constitutional" powers. On the other hand, he takes up a broad or external critique, which points to the legitimacy deficit of such governmental arrangements in a context of diffusion and fragmentation of sovereignty in the global regulatory arena.[3]

If Scott's picture is accurate, the problematic relationship between constitutionalism and regulatory governance has two roots. On the one hand, public law scholars—particularly, constitutionalists—consider that some of the institutional features of the regulatory state modes of government (i.e., independent and autonomous regulatory agencies located in the Executive Branch of government, with a supposedly delegate legislative-regulatory power; the use of regulatory techniques other than "command and control", e.g., information, self-regulation, state-largess, without rulemaking constraint as limit to policy discretion; the circumvent of administrative process by a managerial conception of government prerogatives, etc.), do not meet the standards (Rule of Law) intrinsic to any constitutional government.[4] On the other hand, many political theorists and government scholars sustain that the acceleration and the greater depth of globalization implies a substantial shift of public policy from a national domain to a supranational arena. In their view, globalization carries with it a substantial harmonization of governmental patterns and institutional models—e.g., trade, financial markets, industrial property, copyrights, environmental standards—that overrides the national states capacities to issue autonomous regulation, with the consequence of granting non democratic organizations (international economic organizations, e.g. IMF, OECD, WTO, etc.), transnational industries, firms and forums (e.g., NYSE, Standard & Poor's, Moody's,

[3] Scott (2010). Although "governance" is a current concept in political theory and public administration scholarship, legal scholars do not use this concept frequently—I am afraid, in contemporary constitutionalism even government is far form being a central concern. Therefore, perhaps a definition could be of some utility:

> Governance consists of the traditions and institutions by which authority in a country is exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government of effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them (The World Bank 2010: 1).

To be sure, this chapter looks particularly at the second aspect of this definition: the capacity of the government to effectively formulate and implement a sound regulatory policy.

[4] See, e.g., Strauss (2010), Freeman (1999), Richardson (1999) and Mashaw (1997).

The World Economic Forum, etc.) and NGOs (Greenpeace, Amnesty International, etc.) a substantial say on national governmental outcomes.[5]

Apart from anything else, from a more day-to-day practical perspective—which, at the end of the day, may turn out to be more relevant for the argument of this chapter—a puzzling fact reveals another facet of the problematic relationship between constitutionalism and regulatory governance: in spite of the democratic wave of the 1980s, and of the neoliberal policies of the 1990s, many developing countries that implemented those "structural" reforms still show both relatively low complaint with the constitutional government standards and a relatively weak economic and social regulatory governance.[6]

So, in spite of the canonical approach to constitutional government, it seems wise to approach the governance in contemporary society from a perspective that not only highlights the incompatibilities between constitutional

[5]In fact, as we will see, both sources of the problem are normatively intertwined. As Martin Loughlin has sustained, the central concern of public law is the government *through* the institutions of law; being constitutions a central feature of modern legal orders (Loughlin 2010, part IV). Consequently, if regulatory governance is found utterly incompatible with a constitutional framework, this would compromise no only the legal status of regulation but, more importantly, this would dissipate any possibility for its legitimacy as government technique.

Needless to say, this framing of the problem is not unproblematic. As it is well known, both "constitutionalism" and "governance" are contested categories, and their relationships with contemporary legal phenomena are, at least, controversial. See, e.g., Pollombella and Walker (2008) and Jordana and Levy-Faur (2004a, b). It is not my purpose in this chapter to participate in that theoretical conversation, but rather focus on its implications from the perspective of constitutional government.

[6]There are wide national divergences in this matter that call for alternative and, naturally, more sophisticated explanations. Nevertheless, I consider Mexico—and maybe, Argentina; a country I know definitively less—as a paradigmatic example of this phenomenon. Mexico went through a process of "structural" reforms of the 1980s and 1990s directed, on the one hand, to the reinforcement of constitutional government—consider, e.g., the impulse of constitutional justice as a relevant factor with respect to government control—and, on the other, to the deployment of a regulatory state—consider, e.g., the emergence of most of the regulatory agencies in a period of less than 5 years. Nevertheless, although Mexican economy is regularly ranked among the 15 larger economies in the world (14th, in July 2012), it is still the 98th (of 178) in the light of corruption meters of evaluation, and the 56th (of 169) on human development standards.

Statistical sources: http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results, and http://hdr.undp.org/es/estadisticas/idn

This is not the context for a detailed argument on the causal relationships among institutional environments, governance standards, and social development. Nevertheless, for an introductory approach to the Mexican case, see, e.g., Moreno-Brid and Ros (2009) and OECD (2012).

standards and regulatory governance instruments, but that also recognizes the positive, mutually reinforcing, synergy between these institutional models. This synergetic approach, I contend, is more consistent with the fact that the governance patterns in developed countries show both a higher degree of compliance with the constitutional standards and a systematic deployment of regulatory strategies.[7] Notwithstanding the dramatic failure of the financial markets regulation that caused the current capitalist crisis, there is an overwhelming consensus among economic and social historians on the mutually reinforcing dynamic between the constitutional arrangements and the governance of the economy. Both are pivotal factors to explain a sustained historic economic growth and an extended social welfare system in developed societies after World War II.[8] This evidence should meet up with the normative-constitutional approach to institutional transformation in a way that explains the interdependence between constitutionalism and governance.

The central tenet of this chapter is, thus, that there is a mutually reinforcing relationship between the constitutional standards and regulatory governance arrangements, and that the functional effects of that particular nexus have to be properly understood in order to assign to constitutionalism a proper role in the understanding of contemporary governance.

These rather bold statements have three more complex, intertwined, implications. First, a synergetic approach to constitutionalism and regulatory governance is a more accurate account of liberal democracy and market society than the canonical political-moral approach to constitutionalism.[9]

Secondly, in this approach, constitutionalism and regulatory governance are functionally linked to two different forms of governmental power, *potestas* and *potentia*, which have a reciprocal enhancing dynamic in a working constitution. This implies that the higher the performance of a government in the light of the standards of one institutional model (e.g. constitutional government), the higher its possibility of a better performance

[7] Again, institutional variation is wide, and the tendency to make an ideological reading of facts is extremely large. Nevertheless, as we will see, serious efforts to explain and understand the variation on national performance arrive to the conclusion that state power is, in fact, a *sine qua non* factor to sustained economic and social development. See, e.g., Mann (1986–2013).

[8] There is a vast literature on this topic, but one of the most vigorous examples of it is North et al. (2009).

[9] I label as "canonical" the different conceptions covered by the neo-constitutionalist wave: Robert Alexy, Luigi Ferrajoli, Gustavo Zalgrebelski, etc. But I think that maybe Dworkin's approach to the role and contents of a constitution could be a more concrete reference of what I have in mind.

with regard to the standards the other model is (e.g., regulatory governance). In this approach constitutionalism and regulatory governance are functionally interdependent elements of a working constitution.

Thirdly, in this account of constitutional government, there is a justificatory balance between the standards that we use to evaluate the performance of governmental powers in the form of *potestas* and *potentia*. Therefore, there cannot be an independent satisfaction of the standards of any such models without meeting at the same time the standards of the other. In this approach constitutionalism and regulatory governance are normatively (instrumental-pragmatic) interdependent conditions for collective power.

In this chapter I will support the previous statements by a three-level argument.[10] First, I will argue that, in contrast with the prevalent view of constitutionalism that limits its rationale to the function of controlling political power within a system of moral standards—i.e., fundamental human rights—an account of the constitutional dimension of regulatory governance requires giving its due to a frequently neglected central goal of constitutionalism: the organization of social action through the institutionalization of power, with the central purpose of generating and preserving collective power.[11] This shift in the constitutional outlook, I will contend, brings up the need of a sociological conception of constitutionalism that can reconcile, under one and the same rationale, two different basic functions of a constitution: creating and controlling governmental power. This sociological "turn"

[10]I rather talk of a "thee-level argument" instead of three arguments because, in my view, they are just elements of a unitary instrumental and "welfarist" conception of public law. As will be transparent, these levels do not clear cut usual divides like descriptive and normative discourses; function and justification, and efficacy and justice. My strategy is to formulate a persuasive argument by the coherence among the particular statements of each level, instead of formulating independent, although convergent, conclusions.

[11]This is the power to do collectively the sort of things that no one, either an individual or a private corporation, regardless its quantum of distributive power, can do by himself. I borrow the concepts collective and distributive power form Parsons (Parsons 1960: 199–225). Michael Mann sums up this notions in the following terms: "*Distributive power* is the power of an actor A over an actor B. For B to acquire more distributive power, A must lose some. But *collective power* is the joint power of actors A and B cooperating to exploit the nature or other actor, C" (Mann 1986–2013: 2). As it is well know, canonical constitutionalism deals almost exclusively with distributive power problems, being actors A and B, e.g., government and citizens; different branches of government, or different agencies of the Executive Branch. In this approach I propose to shift our attention to problems of collective power as constitutional matter, being constitutional arrangements social instruments to generate coordination for collective action between A and B, either oriented to transform nature, or to increment their (common) capabilities to control effectively actor C—i.e., a social agent (private or public) with potential ability to resist or distort collective action.

implies three things. First, the rationale for constitutionalism (as much as that of the other two institutional pillars of modernity: democracy and of capitalism) can be best depicted as a mutual advantage strategy, based on the procurement of interests of the individuals. Secondly, the notion of coordination—rather than those of contract or consensus—is the key linkage for social order, and, in consequence, the bedrock for any plausible account of the role of a constitution in governance. Thirdly, once we get rid of unnecessary deontological engagements, it is plain that the main drive of constitutionalism is the generation of the collective power necessary to procure individual welfare; all constitutional arrangements have an instrumental value with regard to this basic social goal.

The second level of the argument focuses on the specific tasks of a constitution related to the design of governmental powers. In this part I will argue that, in contrast with the current constitutional doctrine, which limits the role of constitutionalism to provide control mechanism to government despotism—division of power, checks and balance, judicial review, etc.—, a constitution that is properly designed to organize government in order to increase social collective power—i.e., a working constitution—also has to take into account the mechanisms to enable the government to control social agents (the governed), who very often have strong incentives and substantial power to resist collective-constitutional action.

The third level of the argument gets into the specific relationship between constitutionalism and regulatory governance, *in the context* of a working constitution for contemporary society—i.e., one that is properly designed to generate a regulatory regimen adequate to formulate and implement sound public policy in contemporary society.[12] Specifically, I will try to show that constitutionalism and regulatory governance are part and parcel of the regulatory regime of open access social orders, and, in this way, make evident the pivotal role that constitutionalism plays in regulatory governance.

5.1 The Strategy of Constitutionalism, Briefly Revisited

To have a constitution is the product of a social determination or, more precisely, of a series of social resolutions or decisions, such as: (a) to subordinate public power to the legal order; (b) to assign constitutional rights the role of a final standard of public argument among competing social interests and values; (c) to follow to certain procedures for making of legal rules and

[12] See Oliver et al. (2010).

for the access to public offices, etc. These are, in short, the rules of the game of constitutionalism.[13] As is well known, there are diverse and, somehow, competing rationales for the social resolutions of both "making a constitution" and "playing by a constitution", such as: moral reasons grounded in its instrumental value to protect human dignity and autonomy, and prudential reasons grounded in the instrumental value of a constitution to promote social welfare or manage social conflict. Whatever the position on this matter, what I want to underline is that those rationales are not warranted by any constitution, but reasons for constitutionalism as a mean to procure certain values or social goals.[14] That is, those are reasons for the constitutionalist strategy.

If the strategy of constitutionalism is to be considered really and truly a "strategy"—i.e., a rational ordering of means to an end—, then, this strategy is to be explained and justified from a pragmatic perspective—i.e., within a framework of the rational social action in question. First, we have to recognize the sort of impulses that motivate to undertake that sort of action—i.e., the ends or goals in question. Second, we have to show its functional mechanism by identifying which kind of social interaction it is—i.e., the means or instruments in question. And, third, we have to make explicit a sound idea "rationality" of social action—i.e., why those means fit the purported end, with a reasonable degree of efficiency.[15] In my view, the most cogent

[13]Naturally, those decisions can be described in much more detail, and their institutional consequences are far for simple and unproblematic. Actually, as it is well know, the implications of "playing by a Constitution" are both theoretically and practically significant, and have been "the" central matter for Public Law at least for the last two centuries.

[14]I am, of course, aware that there is controversy on the nature of those social goals, and that there lies the philosophical (political, social, moral, etc.) dimension of constitutionalism. This is not a conversation in which I want to participate now. What I want to highlight is a much less controversial feature of constitutionalism: its instrumental nature.

[15]Otherwise, a constitutional theory that could not formulate a convincing grounding for both the "making" the Constitution and for the social-institutional practice of "playing" by the Constitution, would be metaphysical dream.

This "strategy" is, actually, an instance of the two-step justification presented by Rawls is his seminal article "Two Concepts of Rules" (Rawls 1955), and later developed in his *A Theory of Justice* (Rawls 1971). This constructivist approach to the foundation of our institutions and, more importantly here, to the standards of justice belong to a long tradition in liberal thinking that reaches back, at least, to pre-liberals such as Hobbes. Nevertheless, letting aside its liberal *pedigree*, I think that most of its relevance in contemporary constitutionalism springs from the unequivocal artificial character of the argument, which contrasts with the implicit naturalism that pervades contemporary neo-constitutionalism.

approach to the strategy of constitutionalism is the one formulated by Hobbes, and later complemented by Hume.[16]

As is well known, according to Hobbes' account of constitutionalism,[17] self-interest is the motivation of social order; and, thus, constitutionalism can be seen as a mutual advantage strategy, in the sense that it can be considered "a causal generalization of self-interest" (Hardin 1999: 2). That is, constitutionalism is "the best way to secure our personal interest in survival and economic prosperity is to secure the general mutual interest in these things through establishing and maintaining general order" (Hardin 1999: 2). In this Hobbesian account, the "sociological law" of what work in our interest is prior to positive law (the constitution). This is so because, as Hardin underlines, the workability of a constitution through the coordination of substantial part of the population with respect to some institutional order "make[s] it in the interest of virtually all to go along with it" (Hardin 1999: 3).[18] Underlying this requisite of workability of the constitutional order, there is a welfarist (utilitarian) purpose for the maintenance of that order: "government has no value in its own right; it is merely a means to the end of human welfare" (Hardin 1999: 47). This implies that, for Hobbes (and, arguably, for any utilitarian account of legal order), "social construction of welfare obviously trumps what individuals can accomplish" (Hardin 1999: 47 ff.).

The purpose of this sketch of Hobbes's account of constitutionalism as a mutual advantage strategy is to highlight three elements of the constitutionalist strategy. These elements make evident, in my view, the congeniality of the tasks of constitutionalism and those of regulatory governance. First, since welfare is the central impulse to constitutionalism and, more particularly, of constitutional government, in contrast with a widely shared

[16]Of course, I do not claim originality in this claim. On the contrary, in the next paragraph I closely follow Russell Hardin (Hardin 1999), although for the sake of parsimony I will not elaborate on his suggestive, and complex, approach to constitutionalism, democracy and markets as mutual advantage strategies. On the role of coordination in Hume's political theory as an "improvement" of Hobbes contractualist argument, see, Hardin (2007).

Apart from that, Hardin argument is not completely original; on the contrary, it is deeply rooted in the liberal tradition within which modern constitutionalism emerged. See, e.g., Holmes (1995).

[17]For the sake of simplicity, in what follows I will assimilate the ideas of constitutionalism, order, state and government.

[18]That is, "sociologically, a mutual advantage theory is therefore *de facto* a coordination theory. The government that coordinates interests in more likely to sustain support that the government that evokes moral commitments" (Hardin 1999: 3–4).

convention in contemporary constitutional doctrine, the content of constitutions neither need to be conceived as political program nor as a moral agreement: it is, fundamentally, a device to make government possible. Constitutions are collective instruments to attain government as a collective goal.[19] Second, since coordination, rather than contract or consensus, is the key linkage for social and constitutional order, one and the same kind of reasons for collective action—i.e., self-interest—are both the causal explanation of the establishment of a constitution and of the workability of that same constitution. That is, the conditions for undertaking the strategy of constitutionalism are the same as those for the stability of a constitution.[20] Third, since constitutions are fundamentally collective action devices, the most basic purpose that any constitution must achieve is the organization of government under the technical-instrumental standard of producing, increasing, and stabilizing coordination as a source of public power. It is, thus, under the light the foregoing ideas that the strategy of constitutionalism can be

[19] Although, in my mind, it is a platitude, it may be worth recalling in the current *zeitgeist* that the question of government legitimacy is conceptually and functionally dependent of the question of government possibility. Therefore, a theory of the first that does not give a satisfactory account of the second is, at least, superfluous.

[20] See Hardin (1999: 103 ff.). On other grounds, this effectiveness principle has been formulated also in the legal theory. For example, Neil MacCormick has approached this prerequisite of constitutional effectiveness in the following terms:

> Given a constitutional order that is by-and-large efficacious, it makes sense to treat the constitution as that which ought to be respected. That is, it makes sense to act on the footing that state coercion ought to be exercised only in accordance with provisions laid down by constitutional founders, and that all other forms of coercion ought to be repressed as legally wrongful […] Two points need to be made. First, this presupposes that we know what a constitution is. This knowledge in necessarily based on […] the functions of allocating powers and establishing checks and balances among them. That is, from the appreciation of the functioning of a territorial legal order with a judiciary, executive and legislature in some kind of working interrelationship that can explain what goes into a constitution. Secondly, the existence of a constitution is not primarily a matter of the adoption, by whatever procedure, of a formal document that purports to distribute powers of government […]. It is, again, an issue of functionality, to do with the response of political actors over time to the norms formulated in the text of a constitution. These are or are not taken seriously as governing norms of conduct. To some variable degree, but at least in the great majority of relevant situations, conduct must be oriented toward these norms by actors, and understood by reference to the same norms by those acted upon. Only those that are in this sense taken seriously do really exist as working constitution, (MacCormick 2007: 45 f.).

considered as part and parcel of contemporary governance, rather than exclusively as either a straitjacket or a benchmark of legitimate public action.

Surely, many misunderstandings can be avoided by making clear the distinction between reasons *for* constitutionalism and reasons *of* a constitution. Reasons *for* constitutionalism are fully instrumental in nature, and consequently their justification or validity depends on whether the resolution to "play by a constitution" is, in fact, an adequate mean to attain certain a desired social order. In contrast, reasons *of* a constitution are authoritative in nature, and thus their justification or validity depends on whether they are compatible with the forms and content of "the" constitution. Nevertheless, for the constitution to be "rightly", "correctly" or "properly" designed, authoritative reasons *should* be functionally instrumental to the goals of constitutionalism.

I admit that this distinction between reasons *for* constitutionalism and reasons *of* a constitution is rather obvious and simplistic. Nevertheless, as I will show in the next section, it becomes more meaningful once we consider the functional nexus between these instrumental reasons in the constitutional design of governmental powers.

5.2 Constitutional Workability and Governmental Powers

In the light of the instrumental perspective sketched in the previous section, for a constitution to be part of the strategy of constitutionalism—and, thus, for the reasons *of* the constitution to "become" reasons *for* constitutionalism-, there has to be a functional relationship between the authoritative products of the constitution—i.e., the institutionalized governmental powers, and the instrumental reasons for the constitutionalist strategy. This functional relationship depends on two conditions of the "workability" of a constitution that are somehow implicit in what I have said, but that were unequivocally expressed by Madison in his famous *Federalist*:[51]

> […] if men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. *In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself* (Emphasis added).

That is, a "working" constitution must meet two standards: first, it must be effective in generating governmental power and, second, it has to be

effective in controlling such power.[21] These constitutional tasks are closely related to the technically specialized legal-administrative "forms" that frame modern public law.

5.2.1 Constitutional Forms of Governmental Power

In *Foundations of Public Law* Martin Loughlin traces back his analysis of the constitutional forms to create and control governmental power to two categorically distinct modes of relationship between players of a game—here, the strategy of constitutionalism, originally identified by Michael Oakeshott:

> One is an actual and limited relationship between real contestants, in which they seek a substantive outcome, namely to win. The other is an ideal relationship that may be invoked in a particular context, but exists independently to it; it is the mode of association understood expressly and exclusively in terms of recognition of rules. Only by focusing on the latter are we able to glimpse the idea of Rule of Law (Loughlin 2010: 326).[22]

These two modes of association are parallel to two forms of authority incorporated in the modern state, in spite of their mutual tension: *societas*—i.e., the authority generated by allegiance to an order of rules—, and *universitas*—i.e., the authority generated by allegiance to a set of common purposes.[23] Then, whereas a *societas* is the result of agreement on the authority of a set of arrangements and norms,[24] a *universitas* is a corporative association for

[21] This does not entail, of course, neither that all sources of governmental power are legal-administrative, nor that all mechanism of control of such power are constitutional. In his impressive study of the organization of social power, Michael Mann identifies four sources and organizations of power that interact in multiple overlapping and intersecting socio-spatial networks: ideological, economic, military and political (Mann 1986–2013). Although constitutional conversation has traditionally focused in the problem of controlling political power, governmental power is linked to all these sources and organizations of power, that require, I contend, a more comprehensive theory of constitutionalism. See, e.g., Larrañaga (2011).

[22] See, also, Oakeshott (1983: 119 ff.).

[23] See, Loughlin (2003: 16 ff.) and Oakeshott (1975: 185 ff.).

[24] "*Societas* is simply the product of a pact to acknowledge the authority of certain arrangements: it is a 'formal association in terms of rules, not a substantive relationship in terms of common action'" (Loughlin 2003: 16) with respect to Oakeshott (1975: 201).

the sake of common purposes.[25] While in the former, the task of governing consists, basically, in warranting the terms of the "partnership",[26] in the latter, the task of governing can be seen as a "managerial undertaking, with the ruler being related to this enterprise in some such manner as that of its custodian, guardian, director, or manager".[27]

When complemented with two different concepts of power in the public sphere, the foregoing distinctions enhance, in my view, the power of the Madison's quotation that heads this chapter. That is, the purposes of *societas* and of *universitas* have to be considered under the light of two different forms of governmental power, namely, "*potestas*, the rightful power to rule, and *potentia*, a source of power drawn from government's actual ability to control the disposition of things" (Loughlin 2010: 407). I will first consider briefly the concept of *potestas*, centered in the task of controlling the government and more congenial with canonical constitutionalism, and later, at more length, the concept of *potentia*, which is centered in the task of controlling the people and is intimately related, I argue, to the specific role of constitutionalism in contemporary regulatory governance.[28]

5.2.2 Potestas *and* Societas*: Governing as "Ruling Within the Constitution"*

One of the most puzzling problems in constitutional theory—and arguably, in legal theory—[29] is the relationship between form and substance, more precisely, the role of form in controlling power. Public lawyers have devoted

[25] "The state conceived not as a partnership but as a corporate association […] Corporate bodies of this type united 'persons associated in respect of such identified common purpose, in the pursuit if some acknowledged substantive end, or the promotion of some specified enduring interest" (Loughlin 2003: 17), and with respect to Oakeshott (1983: 203).

[26] "[T]he ruler of a state when it is understood as *societas* is the custodian of the loyalties of the association and the guardian and administration of its conditions which constitute the relationship of *socii* […] Its government (whatever its constitution) is a nomocracy whose laws are understood as conditions of conduct, not devices instrumental to the satisfaction of preferred wants", Oakeshott (1983: 218).

[27] Loughlin (2003: 17) and Oakeshott (1983: 218).

[28] Obviously, the combination of the two modes of association and the two conceptions of authority adds up to four analytical "models". Nevertheless, for the sake of parsimony I will consider only the most contrasting among them: *potestas*/*societas* and *potentia*/*universitas*. Much of what follows in this section is inspired by Loughlin (2010: ch. 6, 11 and 14).

[29] See, e.g., Summers (2010).

a good deal of time examining the functions of legal form in controlling governmental discretion. It is from this perspective that, for example, legal rights can be considered formal devices or instruments to control societal/governmental outcomes, although perhaps the most unequivocal instance of the mark of form in governmental power is the doctrine of due process.

Anything else aside, the idea of legally controlled governmental power is the bedrock of the constitutional government ideal. This ideal is contained in the very concept of constitutional *potestas* as a basic standard for the legitimate exercise of governmental power, which plays a pivotal role in the contractualist argument for allegiance in the context of a *societas.*[30] Nevertheless, the relationship between *potestas* and governmental power is not limited to the obvious function of preventing despotic or arbitrary government. *Potestas* plays a fundamental role in generating the kind of collective power that, even though it has not been the focus of canonical constitutionalism, is central to the idea of a working constitution. *Potestas* organizes public domain and, by this means, enhances state power. The foundation of this "positive constitutionalism" lies, to put it bluntly, in the functional division of institutional labor and is linked with the workings of the checks & balance mechanisms, to reach in farther into the very nature of modern state.[31]

There are, of course, several alternative approaches to the nature of the modern state. However, when considering it in the light of the design of a working constitution, it seems reasonable to adopt a "working" theory of the state. Harold Laski claimed that this theory, "must, in fact, be conceived in administrative terms" (Laski 1931: 53). That is, the state's power or will, "is the decision arrived at by a small number of men to whom is confided the legal power of making decisions" (Ibid).[32]

Taking into account this organizational shift, the element of *potestas* opens up two ways of communication between the modern state as *societas* and the idea of regulatory governance. One way runs through the process of the "juridification" of the public sphere and, the other, through the quest for

[30] As it is well known, this is particularly true in the Lockean version that influenced, over any other intellectual source, the liberal aspiration to abolish arbitrary power as an inherent moral value of the law, See, e.g., Fuller (1969: ch. 2). For a liberal, but less emphatically moralist view of the "virtue" of the Rule of Law, see, e.g. Raz (1977).

[31] Although John Stuart Mill's "positive constitutionalism" focuses in the democratic dimension of liberal institutions, I think that most of Mill's insights in this matter can be extended to the diffusion of knowledge of in constitutional governance. See Holmes (1995: 178 ff.).

[32] For a very suggesting approach to these organizational functions of law that deserves more attention by public law scholars than that received up today, see Llewellyn (1940).

the state monopolization of violence. These nexus cannot be explored here at length, but deserve a short description.

On the one hand, the institutionalization of *a* constitutional state carries with it the "juridification" of a social conversation in terms of universal legalistic dualisms: right/wrong; competence/incompetence; rights/duties, etc.[33] This process of "juridification" is particularly relevant with respect to the legitimacy of claims among individuals and, of course, between citizens and the government.[34] In a constitutional state conceived as *societas*, government is fundamentally a legal construct (an organization of legal forms or institutions), and it is through legal *potestas* that governmental action (legislation, administration, jurisdiction) must keep or guard the equilibrium between the political and civil *societies*. On the other hand, as is well known, in Weber's sociology the legitimacy of social organization through the formal rationality of state law is derived from the claim of states to the monopoly of the legitimate use of violence in society. In the sociological reading of constitutionalism sketched in the previous section, the pragmatic force of that claim to legitimacy is linked to the state power to act as an effective "last resort" in social coordination. Consequently, although the organization of state power is, as Laski notes, rather a matter of form than a question of substance, the chances of legitimacy of the outcomes of any such organization derive from factual considerations: that is, the "trustworthiness" of the state's claim to the *monopoly* of legitimate use of force. As we have seen, the source of this trust is far from being a mystery or a gratuitous concession; rather, it is a consequence of considering, first, that constitutionalism is a mutual advantage strategy and, second, that the organization of power—i.e., its organization through *potestas*—in a particular constitution *is* prompted to produce the kind of advantages that make such *trust* rational[35]: i.e., that public domain is organized in a way that enhances collective power.

[33] Social theory has been interested in this process of the "juridification" of social life for a long time. See, e.g., Habermas (1998) and Unger (1976). Nevertheless, this problem has regained actuality precisely as a consequence of the sociological analysis of the conditions of an effective regulatory state. See, e.g., Teubner (1987).

[34] Actually, the depth of the process of "juridification" of the public sphere sets the public/private divide in crisis. See, e.g., Oliver (1999).

[35] An additional quotation of Laski seems timely:

> *How that power is organised is rather a matter of form that of substance. It may, of course, be organised in such a way that it cannot, as in the Czarist Russia, attain the end which theory postulates for it*. Power, that is to say, is always a trust, and is always held upon conditions. The will of the State is subject to the scrutiny of all who come with the ambit of its decisions. Because it moulds the substance of their lives, they have the right to pass judgement upon the quality of its effort.

In brief, there are two ways in which the *potestas* of a working constitution is linked to the idea of regulatory governance; the first way runs from constitutional law to governance, and the second in the opposite direction. The "juridification" of the public sphere implies that, regardless the instruments or strategies of governance, those instruments and strategies must be susceptible of a "juristic" expression, interpretation and scrutiny. Besides, the "trust factor" required by *potestas* implies that any organization of public domain must be functional to make constitutional arrangements operative for the societal goal of generating collective power for an effective government—i.e., a government that is capable of carrying out the sort of task that we expect to be done, in order to have reasons *for* constitutionalism.

5.2.3 Potentia *and* Universitas*: Governing as "Constitutional Management"*

When we approach modern state as a *universitas,* it becomes clear that, in addition to the roles of *potestas* in the constitutional state as *societas*, there is a dimension of public power in the form of *potentia*: i.e., the government's actual ability to control the disposition of things. As already noted, a central tenet of this chapter is that the decision to "play" by the constitutionalist strategy is meant to enhance collective power through governmental organization, and, therefore, that any constitutional design of governmental powers *must* meet the demands of state *potentia* to pursue our goals as *universitas*.

The nature of *potentia* as a form of public power can be seized in the contrast between "despotic power" and "infrastructural power" that Michael Mann makes in his socio-historical analysis of the sources of power in modern state[36]:

> *Despotic power* refers to the distributive power of state elites *over* society […] *Infrastructural power* is the institutional capacity of central state, despotic or not, to penetrate its territories and logistically implement decisions. This is collective power, '*power through*' *society* coordinating social life through state infrastructures (Mann 1986–2013: 59).

> They have, indeed, the duty to pass judgement; for it is the plain lesson of historic record that the wants of men will only secure recognition to the point that they are forcibly articulate. *The State is not ourselves save where we identify ourselves with what it does. It becomes ourselves as it seeks to give expression to our wants and desires. It exerts power over us that it may establish uniformities of behaviour which make possible the enrichment of our personality. It is the body of men whose acts are directed to that end*. Broadly, that is to say, when we know the sources from which governmental acts derive we know the sources of State's will (Laski 1931: 53 f. Emphasis added).

[36] See Oliver et al. (2010).

The contrast between the state power *over* and *through* society give rise to a number of problems related to the relationship between state and society. Many of those topics are clearly relevant for an analysis of the role of constitutionalism in regulatory governance. Nevertheless, I will only deal succinctly with two interdependent aspects of the infrastructural governmental power, which I think are closely linked to the concern about the constitutional legitimacy of regulatory governance.[37]

The first aspect that I want to highlight is the nexus between *potentia* and the historical process of increasing penetration of the state in social and individual life. As Philip Gorski has shown, this process was triggered by a "disciplinary revolution" that took place at the dawn of modern state,[38] and the outcome of that revolution was the expansion and the institutionalization of "discipline" in society in general, and in bureaucratic elites in particular:

> Like the industrial revolution, the disciplinary revolution transformed the material and technological bases of production; it created new mechanisms for the production of social and political order [… This revolution] was driven by a key technology: the technology of observation –self-observation, mutual observation, hierarchical observation […] What steam did for the modern economy, discipline did for modern polity: by creating more obedient and industrious subjects with less coercion and violence, discipline dramatically increases not only the regulatory power of the state, but its extractive and coercive capacities as well (Gorski 2003: xvi).

The button-up direction of this disciplinary revolution reveals a key feature of the infrastructural power of modern state: its endogenous character. That is, in contrast with exogenous sources of state power (territory, climate, population size, etc.), infrastructural power is an endogenous power that derives from the own state *as* institution; being the routine of compliance to norms, standards, procedures, protocols, etc. the key factor for such institutionalization of government.[39] That is, whereas with regard to exogenous sources of state power, in principle, a state will be more powerful when controlling, for example, an extensive and populated territory, with regard to the endogenous *potentia*, a state will be more powerful by counting with professional,

[37] As it is well know, constitutionalist ideology is embedded in a sound liberal skepticism regarding the proper use of governmental power; particularly, with respect to the tendencies of the state to "colonize" society and of government to "capture" public interest. These are risks concomitant to any arrangement of and for authority. Nevertheless, as I will try to show in the next section, there is nothing to gain form circumventing this problem by means of ideological commitment, and a lot to improve in our institutional designs by the acknowledgement of a necessary balance between the social goal of a powerful state and the risk of misuse of that power.

[38] See Gorski (2003).

[39] Cf. above n. 18.

reliable, technically capable, etc. bureaucratic elites, and with a population prone to institutionalized behavior.[40] Briefly,

> […] discipline increases state power in so far as it creates overall levels of administrative efficiency and social order because a more orderly society is cheaper to govern and a more efficient administration in cheaper to run (Gorski 2003: 36).

A second, closely related, aspect of the increasing *potentia* of modern state is the nexus between information/knowledge and Foucault's idea of "rationality of government", manifested in the use of certain "techniques of power" or "power/knowledge" designed to "observe, monitor, shape and control the behaviour of individuals situated within a range of social and economic institutions" (Gordon 1991: 3 f.). These techniques power are the center pieces of the practical knowledge of how to govern; that is, "the immanent conditions and constraints of [governmental] practices" (Gordon 1991: 7). In Foulcault's approach to the history of governmental power, the exercise of power in contemporary states can be understood as the product of a continuum in the replacement of a "society of sovereignty" by a "disciplinary society", and this, by a "society of government". He encapsulates this process in the history of "governmentality", by which he means three associated things:

1. The ensemble formed by institutions, procedures, analyses and reflections, the calculation and tactics that allow the exercise of this very specific albeit complex form of power, which has as its target population, as its principal knowledge political economy, and as its essential means apparatuses of security.
2. The tendency which, over a long period and throughout the West, has steadily led towards the pre-eminence over all other forms (sovereignty, discipline, etc.) of this type of power which may be termed government, resulting, on the one hand, in the formation of a whole series of specific governmental apparatuses, and, on the other, in the development of a whole complex of *saviors*.
3. The process, or rather the result of the process, throughout which the state of justice of the Middle Age, transformed into the administrative state during the fifteenth and sixteenth centuries, gradually becomes "governmentalized" (Foucault 1991: 102 f.).

[40] Of course, the quality of elites is a function of social capital, and this is, again, in a mayor part a product of state *potentia*, as it is effectively implemented in public policy: education, health, infrastructure, etc. The obviousness of the virtuous circle between social development and governance does not make easy to find out the springs to start its movement.

Of course, as it could be easily recognized much of what is been said here and in the next section in close to Weber's contrast between patrimonial and bureaucratic systems. See Weber (1978: 220 ff.).

Of course, Foucault's idea of governmentality requires a series of nuances in order to make it fully applicable to the contemporary idea of regulatory governance. Nevertheless, although Foucault had clearly in mind the activity of controlling population, as we will see at more length in the next section, that idea is pertinent to understand the enhancing of the state *potentia* in promoting general welfare—i.e., the goal of *universitas* as association—, in so far as it points to the central role of technical knowledge and bureaucratic expertise as conditions (and constraints) of the performance of tasks of contemporary states.

In sum, both *potestas* and *potentia* are two fundamental components of governmental power in contemporary states. These two forms of power are related to a working constitution in different and complex ways. On the one hand, in order to attain our goals as *societas*, working constitutions are effective to the extent that they can channelize social discourse and, eventually, social conflict through constitutional institutional arrangements—i.e., through *potestas*. On the other hand, in order to attain our goals as *universitas*, working constitutions are effective in so far as they channelize social choice towards those instances that are in the best informational (rational) position to make those collective decisions. Traditionally, the idea of constitutional government has been associated only with the first sort of "controlled" governmental power, but as we will see in the next section, under the conditions and constraints of contemporary social organization, when limited to the *societas*/*potestas* couple, a constitution is not well equipped to play its role in regulatory governance.

5.3 Constitutional Government as a Regulatory Regime for Open Access Societies

The authors of *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (North et al. 2009) frame the scope of their ambitious book as follows:

> The task of the social sciences *is to explain the performance characteristics of societies through time, including the radical gap in human well-being between rich countries and poor as well as the contrasting forms of political organization, beliefs, and social structure that produce these variations in performance* […] Two social revolutions resulted in profound changes in the way societies were organized. The central task of this book is to articulate the underlying logic to the two new patterns of organization, what we call *social orders*, and to explain how societies make the transition from one to the other.
>
> In order to understand why emergent features of modern developed societies, such as economic development and democracy, are so closely linked in the second revolution, we are interested in the basic forces underlying patterns of the social order. *Social orders are characterized by the way societies craft institutions that support the existence of specific forms of human organization, the way societies*

> *limit or open access to those organizations, and through the incentives created by the pattern of organization* […]
>
> All human history has had but three social orders. The first was *foraging orders*: small social groups characteristic of hunter-gather societies. Our primary concern is with the two social orders that arose over the last ten millenia. The *limited social orders* or *natural state* emerged in the first social revolution. Personal relationships, who one is and who one knows, form the basis of social organization and constitute the arena for individual interaction, particularly personal relationships among powerful individuals. Natural states limit the ability of individuals to form organizations. In the *open access orders* that emerged in the second social revolution, personal relations still matter, but *impersonal categories of individuals, often called citizens, interact over wide areas of social behavior with no need to be cognizant of the individual identity of their partners. Identity, which in natural states is inherently personal, becomes defined as a set of impersonal characteristics in open access orders*. The ability to form organizations that the larger society supports is open to everyone who meets a set of minimal and impersonal criteria. Both social orders have public and private organizations, but natural states limit access to those organizations whereas open access do not.
>
> The transition from the natural state to an open access order is the second social revolution, the rise of modernity (North et al. 2009: 1 f. Emphasis added).

The justification of such a long quotation lies in the difficulties of the announced purpose of this section: show that, as element of the regulatory regime of open access societies, constitutionalism displays its proper role in regulatory governance. In the light of the very schematic approach to governmental powers outlined in the previous section, this quotation discloses some hints about the hypothesis of a positive relationship between constitutionalism and regulatory governance: the organizational dimension of state. And, what is more important, this socio-historical approach to the question gives a relatively general response to the question of why some countries, like Mexico, that supposedly undertook the structural reforms towards constitutional government *and* market oriented economies, still show relatively low levels of effective constitutional and regulatory governance, with the consequence of meager economic performance and lower social development than that which would be expected in the light of the available social resources (quality of the territory, size of the population, integration in global networks, etc.). The thesis I will argue for in this last section is that Mexico has failed to integrate those reforms under a working constitution, and therefore has failed to take effective social, political, and economic measures which are necessary to become an open access society.[41]

[41] Of course, I do not want to suggest that the "workability" of the constitution is the only factor—not even the main factor—to explain the resilience of those societies as natural states. My argument only goes as far as saying that a common factor among societies that exhibit high degree of constitutional governance is that they are, in fact, open access orders. This can be a *sine qua non*, but definitively not a *per quam* relation.

5.3.1 Open Access Societies

An important assumption of North et al. is that they approach the question of the social order as a matter of the social organization of complex and sophisticated forms of contracting, into the state and beyond the state. These institutional forms make possible for the members of such organizations to reach agreements on fundamental commitments, which need not be necessarily consistent, always and at every time, with the particular incentives of every participant.[42] Open access organizations, they claim, are organizations that pursue their goals through institutional arrangements, particularly through formal rules. In such context, a critical condition to open access social orders is that the formal institutions and rules can control violence "only in the presence of an organization capable of enforcing the rules impersonally" (North et al. 2009: 16).[43]

[42]This approach makes a distinction between adherent organizations and contractual organizations. Whereas, in the first case, organization does not depend on the a third party to back agreements, and cooperation among the members of the organization *must* always be compatible with the individual incentives, the second, in contrast, requires the backing of a third party to support organization, and to make possible agreements that, in some cases, are not aligned with the incentives of participants. Perhaps someone might find this approach to social order as contractual organization incompatible with my presentation, in the first section of the paper, of constitutionalism as mutual advantage strategy. Nevertheless, this supposed incompatibility fades by making the distinction between reasons *for* constitutionalism and reasons *of* the constitution. I have stressed the point that, as mutual advantage strategies, social and constitutional orders depend on the fact of serving the interest of the relevant individuals in a society; and that the existence of a working constitution—i.e., one which produces coordination under the constitution—is a condition for reasons *of* the constitution to become reasons *for* constitutionalism. I think that this is not at all incompatible with sustaining, following Hobbes, that constitutions work by authoritative means: i.e., by establishing obligations that are independent to other incentives of those regulated by the constitution. Commitments are essential features of any constitution, and their binding character depends, precisely, on the existence of the constitution in question (see, above, n. 18). This is why, mutual advantage arguments provides both an answer to the question of why constitutions are made, in first place—in my opinion, the only persuasive answer—, and a justification of why, ones established, constitutions are binding along the time: the pragmatic obligation to obey to what is in my interest—i.e., maintaining a working constitution.

[43]Although they focus on the conditions for the control of social violence, I suggest, nevertheless, that their framework is useful to give an account of the collective power required to procure any other form of social welfare besides and beyond peace. In this sense, in the light of an strategic approach to constitutionalism sketched in the first section, I consider—with Hobbes and with liberals, in general (Holmes 1995: ch. 2)—,

The larger a society is, the stronger is the demand for the organization of institutionalized violence. Social science has advanced two competing explanations of how this institutionalization takes place. On the one hand, in a Weberian fashion, the state can be considered as an individual actor, an organization of organizations that claims the legitimate monopoly of the use of violence in society. On the other hand, other social scientists (manly, economists) have modeled the state as a revenue-maximizing monarch, as a stationary bandit, or as a representative agent. These explanations allow us to give a relatively simple explanation of social order, taking for granted that it is a function of the interaction between two entities, a society and *the* state, molded by the incentives and restrictions of a single actor: the authority. Nevertheless, North et al. claim that both approaches fail because they overlook

> […] the reality that all states are organizations [and, therefore they miss] how the internal dynamics of relationships among elites within the dominant coalition affect how states interact with the larger society (North et al. 2009: 17).

Alternatively, they propose their own explanation to social order:

> Rather than abstracting from the problem of bringing together powerful individuals to manage violence through some organized effort, we begin with the problem of structuring the internal relationships among individuals who make up the organization of (potential) enforcers. The first problem in limiting violence is to answer the question: How do powerful individuals credibly commit to stop fighting? […] *The control of violence depends on the structure and maintenance of relationships among powerful individuals*" (North et al. 2009: 16 f. Emphasis added).

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that the same cluster of passions is the source for our demand of order (peace) and of welfare in general:

> The Passions that encline men to Peace, are Feare to Death; Desire of such things as are necessary to commodious living; and a Hope by their industry to obtain them. And Reason suggesteth convenient Articles of Peace, upon which men may be drawn to agreement (Hobbes [1651] 1996: 90).

Constitutionalism is, thus, one of those "Articles"—for peace, and welfare— upon which we may be drawn to agreement. Much has been said about the role of fear in Hobbes theory of human conduct, although very little has been commented by legal and political scholars about the desire of welfare and the hope for a productive life. These are "cold" and "positive"—at least, non destructive— passions, more familiar to the economic branch of liberalism, and have been considered by some as quintessentially *bourgeoises*. I claim, nevertheless, that this call to welfare is a fundamental influence of the more contemporary idea of regulatory state. See, e.g., Hirschman (1994); I have further developed this welfarist approach to constitutionalism in Larrañaga (2009: ch. 5) and Larrañaga (2011).

That is, in contrast with limited access social orders—"natural states", in their terms—,[44] which pursue their goals through the formation of a dominant coalition whose members possess special privileges, open access social orders show a positive relationship—"a virtuous linking"—between the capacity of government institutions to perform their tasks and the open character of those institutions. By integrating, then, the individual social action and the institutional context into the organization of the state, open access social orders work through a complex equilibrium or balance that reinforces their own system—in terms of this chapter, that enhances "collective power".[45] The resemblance of this equilibrium with the intertwinement between constitutionalism and regulatory governance is striking and making it crystal clear justifies, again, a long quotation:

> First, citizens in open access order share belief systems that emphasize equality, sharing, and universal inclusion. To sustain those beliefs, *all open access orders have institutions and policies that share the gains of and reduce the individual risk from market participation, including universal education, a range of social insurance programs, and widespread infrastructure and public goods* […]
>
> Second, political parties vie for control in competitive elections. *The success of party competition in policing those in power depends on open access that fosters a competitive economy the civil society*, both providing a dense set of organizations that represents a range of interests and mobilize widely dispersed constituencies in the event that and incumbent regime attempts to solidify its position through rent-creation, limiting access, or coercion.
>
> Third, *a range of institutions and incentive systems impose costs on an incumbent party that seeks to cement its position through systematic rent creation and limiting access*: imposition of systematic rent-creation yields a shrinking economy and falling tax revenue […].
>
> An important property of open access orders is the seeming independence of economic and political systems. *Economic organizations in open access orders do not need to participate in politics to maintain their rights, to enforce contracts, or to ensure their survival from expropriation; their right to exist and compete does not depend in maintaining privileges* […]
>
> An integral feature of open access order is the growth of government […] *The widespread sharing in open access […] entails large governments. Public goods spending on education and infrastructure involves expensive programs, as do the various programs that provide social insurance, including unemployment insurance, old age insurance, disability, and health insurance. Governments in open access orders are therefore larger than those in natural states, and their actions and policies are more complementary to markets* (North et al. 2009: 111 ff.).

[44] In a nutshell, the basic contrast between open access societies and natural states is that, whereas the first "regulate economic and political competition in a way that uses the entry and competition to order social relations", the second "uses political power to regulate competition and create rents; the rents order social relations, control violence and establish social cooperation" (North et al. 2009: xii).

[45] See, above, n. 9.

So, regardless specific historical and cultural variances, the open access societies that have emerged in the last two centuries share a number of commonalities:

1. A set of beliefs held among the population, and supported by the organization of the state, which includes various forms of inclusion, equality and shared growth.
2. Civil society encompasses a wide range of organizations independent of the state.
3. All open access social orders are, largely, impersonal.
4. Because of the antecedent characteristics, open access social orders cannot easily manipulate the interests of individuals and/or organizations.[46]

Probably, most Latin Americans—and, for sure, most Mexicans and, I think, a large number of Argentineans—would readily agree that those are not features of the social order they live in. Sadly, there is overwhelming evidence in the opposite direction: we live in fundamentally elitist societies, that have been unable to generate sustained growth and general access to welfare, and in which states can easily manipulate individual and group interest through invested privileges in the political system.

But, why is it so? Mexican society, for instance, has been in a long "transitional journey" to a constitutional, democratic, and market regime for more than 30 years, and still for large part of the population—the majority, in fact—live in a fundamentally despotic regime: what they experience is a social order with weak protection of rights, low levels of political representation, and despairing economic expectations. As I announced in the introduction, the general failure of those "structural reforms" is a main concern of this chapter, although I cannot give a full-fledged account of it here.[47] Nevertheless, I think that it is possible to discern some central aspects of the problem by approaching it as a failure to integrate the regulatory-constitutional regime of an open access society. That is, a society that enhances collective power in order to attain our goals to become more egalitarian, democratic, and prosperous.

5.3.2 Some Elements of the Regulatory-Constitutional Regime of Open Access Societies

There is a large literature on regulatory regimes and governance[48] and, of course, it is not my purpose to get in depth into it. On the contrary, I only want to use the idea of a "regulatory regime" as a heuristic tool to show how open

[46] See North et al. (2009: 112 ff.).

[47] See, e.g., Culebro and Larrañaga (2012).

[48] See, e.g., Braithwaite (2008) and Jordana and Levi-Faur (2004a, b).

access social orders integrate constitutionalism and regulatory governance. For this very limited expositive purpose, the idea of a regulatory regime can be reduced to two dimensions.[49] In the first dimension, a regulatory regime is considered a "control system" integrated by three basic elements: (a) ways of gathering information; (b) ways of setting standards, goals, or targets; and (c) ways of changing behavior to meet the standards or targets. The second dimension comprises the instrumental and institutional elements of a regulatory regime, covering the basic distinction between the regime "context" and the regime "content". Whereas regime context is the background (legal, economic, social, etc.) in which regulation takes place, the regime content is the policy setting and the configuration of the state and other governmental organizations involved in regulation (Hood et al. 2001: 20 ff). Of course, a detailed analysis of the elements of the regulatory regime of open access societies opens up an extremely large number of complex variables. I will, nevertheless, simplify my account by showing some instance of the deployment, in such regimens, of the kinds of governmental power enunciated in the previous section, *potestas* and *potentia*, that we associate respectively with the constitutional dimension and the governance dimension of these constitutional regimes. For the sake of parsimony, in the light of my argument in Sect. 5.2, I will only exemplify the dimension of control system, and leave for another time both the consideration of context and content.

[49] Although formulated in another context, I think that the idea of regulatory regimes as control systems developed by Hood, Rothstein and Baldwin in the book *The Government of Risk. Understanding Risk Regulation Regimes* (Hood et al. 2001) is fitted for my expositive purposes, and consequently in what follows I will be very close to their approach.

> We use the term 'regime' to denote t*he complex of institutional geography, rules, practices, and animated ideas* that are associated with the regulation of a particular risk or hazard. *Institutional geography can vary in features such as scale, from international to national to local jurisdiction; integration, from a single agency handling all features of regulation to high fragmented administration and complex overlapping systems controlling related aspects* of risk; and specialization, from risk-specific and hazard-specific expertise to general-purpose administration […] Three basic features of the regime approach deserve to be noted briefly here.
>
> First, we see risk regulation regimes as *systems*. *We view them as sets of interacting or at least related parts rather than as 'single-cell' phenomena.* So we are interested just as much in what 'street bureaucrats' and front-line people do on the ground as in the activity of standard-setters and policy-makers, and in the relationship, if any, between the two.
>
> Second, *we see regulation regimes as entities that have some degree of continuity over time*. Of course, regulatory systems seldom are, if ever, completely static. Risk regulation regimes have their sudden climacterics as well as their incremental adjustments and steady trends […]
>
> Third, *as with any system-based approach to organization, regimes are conceived as relatively bounded systems that can be specified at different levels of breath*. (Hood et al. 2001: 9 ff. Emphasis added).

5.3.2.1 Ways of Gathering Information

The regulatory constitutional regime of open access societies allows for an efficient information management, which increases *potentia* without getting rid of *potestas*. This virtuous result is a consequence of balancing the requirements of constitutionalism and of governance in this realm. *Potestas* requires, on the one hand, that government should have restricted access to the information distributed in civil society and, on the other, that society must have, in principle, unlimited access to whatever the government does. In contrast, *potentia* requires, on the one hand, that government have accurate information about what is going on in a society, and that, on the other hand, under certain conditions, a large part of society ignores, at least for some time, what is that the government is doing. The institutional mechanism of such balance includes, among others, deference, *ex post* controls, political accountability, etc. that hardly fit into a strict constitutionalist paradigm, but that nevertheless can be indirectly democratically checked. A very concrete example of this balancing is the way in which some countries—e.g., Spain and Italy and, in general, UE countries—have dealt with financial and other sensitive personal information—e.g., political and religious affiliation—in managing organized crime and antitrust policy. In principle, although the Executive branch leads this policy, creates and uses databases—in most of the cases, in coordination with transnational agencies—, the use of the information contained in those records and archives is controlled, *ex post*, by specialized administrative or legislative bodies and/or the judiciary. This networking includes, governmental access all income information as well as property registration systems, at both national and transnational levels. These policies of information management are also, in general, controlled *ex ante* by Parliaments, issuing directives to implement national policies (risk management, public security, antitrust, networks regulation, etc.) and the content of international agreements in such policy matters. Here, again, although the technical and managerial responsibilities fall in the Executive domain—in many cases, in autonomous technical agencies—, while the warranties of constitutional and democratic governance are provided by other branches of government.

In contrast, in natural states information is fragmented and, very often, its social management is patrimonial in that they benefit of privileged coalitions, including state bureaucracies. Consequently, in natural states government, there is an extensive use of codified information and a general reluctance to organize information in transparent, efficient, public records and archives. Paradoxically, this tendency is reinforced by bureaucratic specialization and decentralization. These processes create diverse degrees of opacity and different codes to access specific information, that create

complex and specialized systems. An example of this is the "over-technicality" of government language and rules in the public domain, particularly those areas related with economic competition, e.g., antitrust policy, network regulation, etc. A very concrete example of this can be found in the information provided by the Mexican government in processes of public contracting and with respect to the rulings of regulatory agencies (antitrust, telecommunication, etc.), where very often relevant information—mainly, decisional criteria—is absent or hidden among irrelevant, unspecific, and equivocal data.[50]

5.3.2.2 Ways of Setting Standards, Goals and Targets

The regulatory constitutional regimes of open access societies promote long-term commitments to public policy objectives, by the use of general standards to evaluate the effect of governmental action in specific targets of those policies. This way of setting standards, goals, and targets has obvious advantages with respect to the use of public scarce resources, but also allows for a greater participation of a wide set of organizations in the formulation and execution of those policies (NGOs, industries, academia, etc.).

[50]Mexico suffers of a particularly inefficient information management that, in my opinion, has not been significantly improved by the "transparency policy" in recent years. To be sure, there is an enormous quantity government of information available, but there is much to be done with respect to the relevance criteria of a large part of such information. Sadly, as any contractor with any government level (Federal. Local or Municipal) and any participant in market competition in Mexico has experienced, very often the official available information does not give any clue on what makes the difference at the end of the day. For example, the Federal Government policy of "publish it all" in the websites of the Secretariats and Agencies and the Supreme Court's policy of broadcasting their "deliberations" are, I am afraid, so bluntly inadequate measures for its manifested purpose that, probably, deserve to be considered mere simulations or shams. The CFC (the antitrust federal agency) has not made public the Board's criteria for ruling in different aspects of competition policy for more than 15 years, and as any patient follower of the Supreme Court debates knows, it is really very difficult to recognize clear nexus between what is "said" by the Justices in Court and the content of the Court's final "rulings". Of course, members of the dominant coalition know that information hides *the* information, and any effective measure in this respect—e.g., improving decisional processes of the CFC or the Supreme Court through reorganization, without necessarily expand their already generous budgets to despair of many—would reduce the "revenue" of privileged access to that information, enhance competition and, therefore, contribute to a more open access society. No wonder there is so much indulgence for the "argumentative" character of our Supreme Court doctrine and the "technical" content of our Agencies resolutions. See, e.g., Larrañaga (2008) for a general approach to transparency policy in Mexico, and for an evaluation of the decisional processes in regulatory agencies in Mexico, see, e.g., Centro de Estudios Espinosa-Yglesias (2009).

Making public policy "Public" in a robust way is a critical factor to make public policy both an effect and a cause of collective power, in the sense of a rational action into a incentive system that control that the assigned resources are used for the purported goals. And this is, clearly, a pivotal factor in the control of corruption.[51]

In contrast, natural states regimes are prone to formulate public policy goals in comparatively shorter temporal spans ("by the end of my mandate") and/or in general and imprecise terms ("we will do justice"). This way of formulating standards, goals, and targets not only reflects an evident lack of realism, but a deeper culture of unaccountability that cohabits comfortably with an irrational use of public resources. A consequence of this lack of an agenda of public policy is the reinforcement of an adaptive use of rule-making as a rent-seeking strategy. Dominant coalitions have a considerable leeway in deciding the allocation of social resources, not to mention the redistribution of those resources in ways that reinforce their privileges. A concrete example of this vicious circle can be found in the Mexican public education policy since the early 1970s and in the telecommunications policy since the early 1990s—with the exception of television, where the private-monopolistic public policy dates longer.[52]

5.3.2.3 Ways of Changing Behavior

Efficient information management and sound policy-making are conditions for effective regulation. Consequently, open access societies are also relatively more effective in their regulatory policies, because they use a large array of governmental tools (state largesse, communication, taxation, command

[51] See, e.g., Dahl and Lindblom (2000: ch. 2).

[52] The quality of infrastructure (transportation, utilities, telecommunications, etc.) is, probably, the most accurate standard to evaluate the "openness" of a society. It is so not only because of its very well known effect in social productivity, but mainly because it reflects the both the commitment *and* the capacity of a society to produce public goods—i.e., to open universal access to these goods. Mexico suffers of a dramatic deficit in infrastructure every domain—form gas pipes to sewers. There are three causes of this deficit, closely linked to the ways in which standards, goals and targets are settled: (1) the lack of planning for longer periods that one administration—in the Municipal level, 3 years—; (2) the strong linkage of infrastructure planning with political representation, and (3) the extremely high levels of corruption in this sector. Very little has improved by the privatization policy of the last decades. Since infrastructure projects require of considerable financial support, as a consequence of extraordinarily expensive financing, only few actors can compete in this sector—actors that, of course, can externalize their financial opportunity costs through their monopolistic rents.

and control, etc.) that rely, partially, on the state capacity to control social resources (money, knowledge, legitimacy, etc.),[53] and, partially, on the technical capacities of professionalized bureaucracies to use those resources.[54] Perhaps, the most significant example of this governmental infrastructure of the states *potentia* to effectively control social behavior is the state capacity to extract resources from society, either by taxation or by reducing the costs of governing. Contrary to the libertarian-conservative dogma, governments in open access societies control a relatively large proportion of social resources, which make possible the provision of public goods—with its intrinsic universalistic turn. This is, of course, not a consequence of a more virtuous society or more public oriented individuals, but manly the product of well-organized governments, highly effective in the everlasting fight of the state against alternative organizations over the control of scarce resources in society—actually, for the control of the social organization itself.

In contrast, natural states have a relatively lower degree of technical *potentia* due, in part, to the real lack of governmental skills of bureaucracies, and, in part, to the lack of incentives of those bureaucracies to serve the government goals, as privileged members of the rent-seeking coalition. As a consequence of this relatively low regulatory skill, relatively less wealthy societies are doomed to the extensive use of command and control regulatory techniques, which are supported by a formalist legal culture, that is, precisely, one of the weakest links in the governance chain. Contrary to a candid reading of *potestas*, natural states are seldom anomic; these are societies with a highly legalistic culture, reinforced with sophisticated formalistic legal cultures. Since large part of social order depends on the stability of the dominant coalition, effective ways of controlling the effect of conflicts among the members of the coalition are critical to such despotic social orders. In Mexico, arguably the best example of this "risk management" mechanism is the "juicio de amparo", which permits high degrees of political and administrative discretion while controlling, at the same time, the risks of "damaging" the network of privileges granted by the political and legal systems.

5.4 Conclusion

A sociological approach makes it possible to incorporate constitutionalism and governance into a common strategy, namely, the mutual advantage of enhancing collective power for the purpose of general welfare. This common

[53] See, e.g., Mann (1986–2013: ch. 11 ff.) and Migdal (1988).

[54] See, e.g., Daintith (1997).

ground gives an accurate account of contemporary forms of government, without getting rid of the normative core of constitutionalism. This normative backbone of constitutional government is expressed in the notion of a "working constitution", within which legitimate ruling (*potestas*) and the actual capacity of making things happen (*potentia*) have a mutually reinforcing relationship. In the contemporary context, constitutionalism and governance integrate a regulatory constitutional regime that embodies a system of control that makes possible the emergence of open access societies. It is in the light of the functional elements of such "control system" that the merit of structural reforms towards constitutional government *and* market economy must be evaluated.

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Chapter 6
Legislation as Implementation of Constitutional Law: A Foundation for the Demand of Legislative Rationality

Jan Sieckmann

6.1 Introduction

A crucial demand of a normative theory of legislation is that legislators should act rationally. From the perspective of practical reason, this demand of rationality seems to be undeniable. But does it also have legal or constitutional force? A general answer to this question will depend on the theory of legislation as well as on the theory of law and, in particular, constitutional law. The constitutional or legal validity of the demand of rationality is, at the very least, not obvious. Analogously to the conflict of positive law and morality, conflicts between positive law and rationality may occur, and it is far from clear that rationality will always prevail in this conflict. One might defend a prima facie-demand for rationality, which, however, may be overridden—to a certain extent—by arguments from authority, practicality, or convenience, similar as with regard to the legal validity of immoral or unjust norms. Accordingly, there will be limits for the legal validity of extremely irrational legislative or legal acts, just as one can deny the legal validity of extreme injustice. However, rationality will not hold as a constitutional or legal requirement without qualifications.

These are issues for a general theory of the relations among rationality and law. The purpose of my analysis is more limited, however. It aims at showing that the demand of rationality has constitutional force at least

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as far as the application of fundamental rights-principles is concerned, and this applies also to legislative organs of democratic constitutional states.

Legislation in the democratic constitutional state is limited by requirements of constitutional law and of democratic legitimacy. In particular, fundamental rights restrict legislative freedom. This forms part of the "constitutionalisation" of the political system, which has been criticized,[1] in particular, because it leads to a "judiciary state" (*Jurisdiktionsstaat*).[2] However, one may well doubt that this constraint on politics[3] deserves to be criticized.[4] Just to the contrary, it may well be seen as an essential element of the legitimacy of politics. Politics consists in making decisions for a certain political community or society. Since it claims these decisions, and the norms established by them, to be binding on the citizens, it needs a justification that supports this claim to bindingness. This justification must include reference to constitutional requirements, which are procedural and substantive in character. Procedural requirements concern legislative competences and processes. Substantive elements are, in first place, fundamental rights and other constitutional principles protecting interests of the people.

I will argue that legislation in a democratic constitutional state consists to great extent, and in particular as far as fundamental rights apply, in the implementation of constitutional law. In this context, implementation means, not the mere application of constitutional norms, but a creative or constructive process of establishing norms based on the balancing of constitutional principles. More specifically, I will argue the following theses:

(1) Constitutional law includes not only directly applicable norms, but also ideals or principles that figure as normative arguments in procedures of balancing.

[1] See, for example, Haltern (2007).

[2] Cfr. Böckenförde (1991).

[3] In addition, one must ask whether this effect of constitutional review really exists. As to the German Constitutional court, von Komorowski and Bechtel deny that one can descriptively confirm a tendency towards increasing interference of the Court with legislative decisions. See von Komorowski and Bechtel (2006: 296).

[4] For a defense based on an argument from political economics, see von Komorowski and Bechtel (2006: 297).

(2) The legislature is the primary addressee of the requirement to balance constitutional principles.
(3) The interpretation of fundamental rights as principles to be balanced against competing principles is a requirement of democracy itself.

The last thesis is supported by two assumptions about the nature of democracy and of fundamental rights:

(4) Democracy requires, in particular, the comprehensive consideration of all relevant interests and demands of the citizens, and their balancing in order to reach a reasonably acceptable solution.
(5) Fundamental rights point to the most important interests of human beings and, therefore, protect interests that legislation must necessarily take into account.

The connection with the demand of rationality follows from two further theses:

(6) The balancing of fundamental rights or other constitutional principles must follow the principle of proportionality.
(7) The principle of proportionality presents—in legal terminology—requirements of rationality respecting normative decisions or judgments.

6.2 The Model of Principles of the Constitution

A crucial presupposition of the thesis that legislation is and ought to be to great extent the implementation of constitutional law is that fundamental rights are conceived of as ideals or principles that ought to be realized to an extent as great as possible.[5] Thus, the first thesis states:

(1) Constitutional law includes not only directly applicable norms, but also ideals or principles that figure as normative arguments in procedures of balancing.

As a consequence, constitutional rights and principles may enter into conflict with each other, in case of which a balancing is required in which rights and other principles figure as normative arguments for particular results.[6]

[5] On this idea Alexy (2002). This should not, however, be made the definition of principles, but only serves as a characterization of the content of principles. See below.

[6] On this notion of principles as arguments to be balanced against each other and its diverse interpretations, Alexy (2002) and Sieckmann (2009a).

Since such fundamental rights-principles have a wide range of application, they penetrate the whole legal order and are relevant for almost all important legislative decisions. Thus, the legislator must apply these principles in his decisions, and legislation becomes the implementation of constitutional principles.

The character of fundamental rights as principles has been emphasized most prominently by Robert Alexy, who defines principles as optimization requirements, that is, as norms that require something to be realized to an extent as great as possible, relative to the factual and juridical possibilities. Some objections have been made against this definition.[7] In particular, it does not correspond to the thesis of the strict separation of rules and principles as logically distinct classes of norms, for requirements of optimization are second-order rules about the normative force and the type of application of the respective first-order norms, but do not have a logical structure distinct from rules. Consequently, the definition of principles as requirements of optimization does not allow one to understand how principles can figure as arguments in a procedure of balancing precisely in the situation of conflict with competing arguments.[8] Nevertheless, these norm-theoretical issues do not affect the adequacy of the idea of optimization as an explication of the manner in which rights and other norms of an ideal character guide normative decisions.[9] The point is that one has to strive for an approximate realization of a state of affairs defined by a right or other type of principle.

The interpretation of fundamental rights as principles allows one to extend the scope of these rights. For example, one can recognize

- a general right to freedom, permitting one to do what one wants,
- a right against the state to protect life, health, or property,
- social rights, for example, to state assistance, medical assistance, education, or housing,
- a right to an adequate demarcation of the scope of private rights against the rights of other citizens.

[7] See the discussion in Alexy (2009).

[8] Sieckmann (2010a, 2011).

[9] There are, however, other objections that refer to the notion of fundamental rights as exempt from state interference and not subject to a comprehensive balancing with all other relevant arguments. See, for example, Sieckmann (1995a). Therefore, it is a matter of dispute whether all contents of fundamental rights can be understood as requirements of optimization or norms resulting from balancing understood as optimization.

All these rights have been recognized, to more or less extent, by many democratic constitutional states, but also in supranational and international law. The extensive interpretation of these rights would not be possible, however, if rights had the character of definitive norms to be strictly applied and followed whenever their conditions of application are met. Only by interpreting them as principles to be balanced against competing principles, the content of these rights can be made as comprehensive as possible.

The normative tool to handle the balancing of rights-principles in constitutional law is the principle of proportionality.[10] According to this principle, any interference with fundamental rights principles must be proportionate. This requires,

firstly, that the interference pursues a legitimate objective,
secondly, that the interference is a suitable means for promoting this objective,
thirdly, that there is no alternative that is equally effective with regard to the objective but less detrimental to the fundamental right in question, and,
fourthly, that the interference is not disproportionate in the narrow sense, that is, that the intensity of the interference keeps a reasonable proportion to the importance of its objective in the circumstances of the concrete case.

The principle of proportionality applies to conflicts between rights-principles and other principles both in cases of interference with rights and in cases in which rights are not fulfilled. In both cases, rights are—at least in part—not complied with. The justification of such non-compliance requires that the applied measure pursue a legitimate objective. The objective may be the protection of rights of other agents, constitutional principles, but also a political goal.[11] If there is a legitimate objective for an action that leads to non-compliance with a right, there is at least an argument that might justify such non-compliance.

> For example, a prohibition of offensive speech has the objective to protect personal honour. This is a legitimate objective. Therefore, there is an argument that might justify the prohibition of offensive speech.

[10] See Alexy (2002), Clérico (2001) and Bernal Pulido (2006a, b).

[11] Political goals or "policies" are excluded as justification for limitations of rights by the "rights as trumps"-thesis of Dworkin (1977). However, such limitations are quite common and often accepted as legitimate. Therefore, the "rights as trumps"-thesis cannot be taken for granted, but is rather dubious.

The assessment as to whether the non-compliance with a right is proportional usually proceeds in three steps, applying, as sub-principles of the requirement of proportionality, the criteria of suitability, necessity, and proportionality in strict sense.

Suitability means that an act promotes or at least is capable of promoting the pursued objective. If a means in no way contributes to the fulfilment of its end, there is no reason to accept any negative effect on the fulfilment of rights.

Necessity means that there is no alternative to the applied means that is better with regard to the fulfilment of the affected right and equally effective with regard to the pursued objective. Again, there is no reason to apply such a means if its detrimental effects for the affected rights can be avoided without costs for the pursued objective. This—as well as the criterion of suitability—follows the idea of Pareto-optimality, although adapted to the case of conflicting principles instead of the positions of individual parties.[12]

Proportionality in strict sense means that a reasonable relation holds between the intensity of interference or affection of the right and the importance of the objectives that are meant to justify this interference or affection. This criterion requires the balancing of the conflicting rights-principle and the objectives that require interference or non-compliance with the rights-principle. The factors that are relevant for this determination are the degree of affection of the competing requirements and their relative weights.[13] Degree of affection and relative weight determine the importance of a principle in the concrete case. The requirement that is more important in the concrete case deserves priority.[14]

[12] See Schlink (1976) and Alexy (2002).

[13] See Sieckmann (1995b) and Clérico (2001).

[14] Although the usual application of the principle of proportionality includes three steps—suitability, necessity, and proportionality in strict sense—all relevant information is provided by the balancing that determines the proportionality in strict sense. For if a means is not suitable or not necessary for pursuing the objective that is meant to justify interference or non-compliance with a right, the objective is not affected if the means is not applied or an alternative is applied that complies better with the right in question. Hence it cannot justify non-compliance with the right. Consequently, one might reduce the principle of proportionality to the demand of balancing and skip the stages of suitability and necessity.

The important point is that the balancing required to determine the proportionality of an interference or non-compliance with a right is based on evaluations regarding the relative weights of the competing principles. These evaluations cannot be derived from previous determinations, for if so, no balancing would be needed but one could apply the previous determinations directly. Evaluations as to the relative importance of competing principles, however, imply that a normative determination is made, and this has the character of an act of legislation. This leads to the second thesis.

6.3 The Legislator as the Primary Addressee of Constitutional Law

As explained above, implementation of constitutional law consists in particular in the balancing of fundamental rights with other constitutional principles. This structural thesis forms the basis for a second, normative thesis:

(2) The legislature is the primary addressee of the requirement to balance constitutional principles.

As already pointed out above, the argument for this thesis is that the structure of balancing constitutional principles requires a normative determination and that this is the primary task of legislative organs. Thus, parliament or other legislative organs must be regarded the primary addressees of constitutional principles.[15] Other organs, in particular the judiciary, should apply the laws established on the basis of constitutional principles, but should not make an own decision based on the balancing of these principles directly if the legislature has correctly made such a decision or will do so in reasonable time.

The general idea of balancing is that of determining the priority amongst competing demands or requirements according to their importance in the concrete case.

> For example, if someone says about someone else that he is lying, the right to personal honour, demanding protection against insults, conflicts with the right to free speech, demanding that everyone should be allowed to say what he

[15]The fact that the legislator itself is the addressee of norms binding the legislative process has been pointed out also by Atienza (1997) and Wintgens (1997).

> thinks. Both rights cannot co-exist unrestrictedly. Hence we have a conflict of rights. Both rights apply to the case but cannot dictate the solution. They can hold only in principle, requiring a certain solution, but in need of being weighed and balanced against each other.

The basic principle of balancing states that, regarding two requirements in conflict, the one deserves priority in the respective case the fulfilment of which is more important in the circumstances of this case, or, as one might also say, the one that has the greater weight in the concrete case.[16]

The structure of balancing constitutional principles—and normative arguments in general—may be described as follows. It consists in establishing a priority among the conflicting principles that does not follow from given criteria. Thus, the determination of the importance of the conflicting requirements is itself a matter of balancing. It includes three elements, firstly, the arguments to be balanced against each other, secondly, the procedure of balancing aimed at establishing a priority among the conflicting arguments and, thirdly, the definitive norm that results from the balancing and the priority established.

In order to determine a definitive solution, a priority must be established among the competing requirements, regarding their relative weights and the facts of the case.[17]

> For example, one might assume that if the offensive assertion was false the right to personal honour deserves priority. Even if the assertion was sincere but nevertheless wrong and there are no special circumstances that legitimate the offensive speech, the right to personal honour will be given priority over that of free speech.

The important point is that the validity of this rule is established only as the result of the procedure of balancing, and is not derived from predetermined criteria.[18] The result of the balancing is a normative judgment of the agent doing the balancing. It establishes the definitive validity of a norm and, thus, creates new normative content. This, however, is the task of the legislator. Therefore, legislative organs are the primary addressees of constitutional principles and the demand of balancing them.

This thesis is based on the conception of constitutional law as a model of principles to be balancing against each other. It must be defended against critiques of this interpretation of constitutional law.

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[16] See Sieckmann (2010b).

[17] Thus, the balancing requires not only the conflicting arguments but also supplementary arguments concerning the relative weight and the degree of fulfillment or non-fulfillment of the requirements included in the conflicting arguments.

[18] See Sieckmann (2004, 2009a), on the notion of "autonomous balancing".

6.4 The Defense of the Implementation Thesis

The conception of fundamental rights as principles as well as the interpretation of legislation as implementation of constitutional principles encounter diverse objections.[19] They focus primarily[20] on two issues: the rationality and the legitimacy of balancing.[21] In addition, the nature of fundamental rights and issues of the interpretation of constitutional law are advanced as arguments against this conception. Thus, one can distinguish the following objections:

- The balancing of principles lacks rationality.
- As a consequence, judicial balancing and, in particular, the review of the constitutionality of laws based on balancing, lacks legitimacy and hence interferes with the principle of democracy.
- Balancing destroys the character of rights as "trumps"[22] or barriers against state intervention.[23]
- There is no foundation in positive law for the interpretation of fundamental rights as principles.[24]

I will primarily focus on the argument of democracy and the lack of legitimacy of judicial balancing of constitutional principles, and argue the thesis that

(3) The interpretation of fundamental rights as principles to be balanced against competing principles is a requirement of democracy itself.

[19] For a list of such objections see Alexy (2009) and Sieckmann (2009b).

[20] An even more fundamental objection is that principles as a distinct type of norms do not exist. However, opponents have neither attacked all proposed conceptions of principles, nor presented a general argument that it is impossible to define principles as a distinct class of norms. See Sieckmann (2009b). Another objection is that they are superfluous. See Jakab (2006) and Poscher (2007). Recently, Ralf Poscher has argued that balancing does not require principles beside requirements of optimization, which are rules of second order, and the objects of balancing. See Poscher (2010). However, the point of the notion of principles is that they figure as arguments for particular results of the balancing. Non-normative entities cannot have the function of arguments. Therefore, the objection of Poscher fails.

[21] See, for example, Alexy (2009), Bernal Pulido (2006a), Isola-Miettinen (2010) and Cai (2010).

[22] Cfr. Dworkin (2006).

[23] See Habermas (1994).

[24] Against this objection, Sieckmann (2007).

6.4.1 The Conception of Democracy

Among the diverse conceptions of democracy, one can distinguish formal and substantive accounts of democracy.[25] Formal accounts focus exclusively on procedure and decision-making, demanding that political decisions result from the choices of the relevant people. Substantive accounts include, in addition, a requirement that the interest of the people must be adequately represented and realized by the political process. Whilst the formal elements are beyond dispute, the crucial point is whether a conception of democracy should include substantive elements as well.

More precisely, one can state as principles of democratic systems:

(1) Everyone who is capable of taking responsibility for his own decisions must have the opportunity to take part in political processes, as far as this does not undermine the functioning of these processes.
(2) In case that a direct participation is not possible all citizens that are capable for it must have the chance to get into a position in which direct participation is possible, for example, that of a member of parliament.
(3) Democratic decisions must be orientated towards the interests of all citizens and must aim at an appropriate compromise of interests, that is, a solution that is reasonably acceptable to all citizens.

The last demand represents the transition from a formal to a substantive conception of democracy, which regards substantive correctness or acceptability as a criterion for the legitimacy of political decisions. Since such legitimacy will only be achieved by argumentation or discourse, the substantive element requires some form of deliberative democracy.[26] However, I will not discuss the diverse conceptions of deliberative democracy, but focus on the need of balancing as a tool to find reasonable acceptance of political decisions. By contrast, a purely formal conception of democracy regards voting procedures the only source of political legitimacy. Accordingly, politics aims at gaining a majority in order to then have the possibility to decide freely and unbound. Consequently, the

[25] See, for example, Böckenförde (1991: 289 ff.).

[26] On deliberative democracy, Cohen (1989), Elster (1998), Nino (1996), Gerstenberg (1997) and Fishkin (1991).

substantive adequacy of a decision is not relevant, but only the issue of majority.[27]

Formal and substantive conceptions of democracy pose different objectives for political action. A substantive conception of democracy demands the search for the highest degree possible of reasonable acceptance by the citizens. By contrast, the formal conception leads to a politics that only must seek the minimum of acceptance necessary to stay in power, but beyond this minimum can follow other objectives.

The formal conception of democracy may to large extent conform with political reality. The question remains, however, whether the legitimation of political decisions is possible on the basis on a merely formal conception of democracy or, on the contrary, democratic legitimacy requires that political decisions claim to find a solution that is reasonable acceptable to all citizens, and must strive for it. The thesis advanced here is:

(4) Democracy includes a substantive or material component, which is the reasonable acceptance of political decisions by all people involved.

Any plausible conception of political representation must acknowledge this. Representatives are not elected with the objective to invest them with political power to do whatever they want, but they receive this power in order to realize what is in the interest, and is claimed by, the citizens. Although these interests and claims may not require a certain solution, so that there is no single correct decision, this does not imply that political decisions must not be bound by these interests and claims. Therefore, striving for a solution that is reasonably acceptable to all people involved seems to be a necessary condition of legitimate power.[28] Any attempt to justify public governance must be oriented towards the individual interests of the citizens and to an optimal realisation of these interests. The degree to which they comply with this requirement[29] determines the legitimacy they gain.

[27] See also the opposition of "voluntarism" and "orientation towards correctness" in Becker (2003: 15 f.).

[28] See also the notion of "argumentative representation" in Alexy (1996, 2005, 2006). For a critical discussion of this conception see Oliver-Lalana (2009).

[29] This degree depends primarily on the quality of argumentation in the political process. As to this aspect Becker et al. (2006), Oliver-Lalana (2005, 2006, 2011), Sieckmann (2005, 2010c), Steiner et al. (2003), Bächtiger and Steenbergen (2004), Steiner and Steenbergen (2004) and Tschentscher et al. (2010).

6.4.2 The Connection Between Democracy and Fundamental Rights

Following the substantive conception of democracy, political decisions must be based on a correct balancing of the interests of the citizens. Which are these interests? In first line, these interests must be determined by the citizens themselves. However, some interests can be qualified as relevant independently from concrete choices of the citizens, at least independently from the support of a majority of the citizens. These are interests protected by fundamental rights.[30] One knows that these interests are of great importance to at least some of the citizens, and this requires that they be given due respect in the political process without regard to whether a majority of citizens shares or accepts these interests. As a consequence, we get the thesis:

(5) The substantive dimension of democracy consists, in first place, in an attempt to implement fundamental rights-principles, for these principles point to the most important interests of the citizens that politics and legislation must protect and realize.

6.5 The Demand of Rationality

The implementation thesis implies a demand for legislative rationality because the implementation of constitutional law is bound by the principle of proportionality, and this principle is nothing but a demand of rationality of normative decisions and judgment, framed in legal terminology.

The first element in the justification of this thesis is that, as already explained above, the constitutional guideline for the balancing of fundamental rights or other constitutional principles is the principle of proportionality. Legislative measures—as well as public decisions in general—that interfere or do not comply with fundamental rights but do not comply with the principle of proportionality are disproportionate and hence unconstitutional. Consequently, any legislative measure affecting fundamental rights must be based on a correct balancing of these rights,

[30] On the notion of fundamental rights see Bernal Pulido (2009).

and must comply with the principle of proportionality. Thus, the following thesis results:

(6) The balancing of fundamental rights or other constitutional principles must follow the principle of proportionality.

In addition, the principle of proportionality expresses demands of rational balancing. This leads to the following thesis:

(7) The principle of proportionality presents—in legal terminology—requirements of rationality respecting normative decisions or judgments.

The argument suggested above draws as well on the substantive conception of democracy as on the constitutional character of fundamental rights, making legislative rationality obligatory as far the application of these rights is concerned. One might ask whether the substantive conception of democracy alone is sufficient to corroborate the demand of legislative rationality. The requirement of an adequate and correct balancing of individual interests implies at least some important demands of rationality. These requirements hold thus as general requirements on legislation.

This argument indeed is correct. It suffices, however, only to establish a demand of rationality valid in principle, which might be subject to a balancing with competing arguments. These competing arguments might stem, in particular, from the political autonomy of the democratic legislature. The democratic legislature forms and represents the autonomous will of the people. Ideally, it should act rationally. Since, however, the will of the people is not necessarily rational, a tension between demands of rationality and of political autonomy might occur.

For example, the legislature might have established some regulation that, for reasons of coherence, needs certain supplements. These supplements will not, however, find the support of the majority of the members of parliaments or of the people. The resulting legislation will remain incoherent. Should one disqualify it as unconstitutional for lack of rationality?

In this case, demands of rationality and of political autonomy conflict. Implementing the demand of rationality would restrain the right of the people to decide on political issues as it sees fit. Recognizing political autonomy in the sense that the people have the right to decide as it sees fit implies a loss in rationality. How should we resolve the conflict? It seems that this is an issue for constitutional law and its interpretation, not one that has a uniquely correct solution for theoretical reasons.

Therefore, the demand of legislative rationality applies in general only in principle, subject to a balancing with competing requirements. On the other hand, as far as the application of fundamental rights is concerned, there is no room left for such a balancing. The legislature must implement these rights so as rationality requires.

6.6 Conclusion

To conclude, the demand of rationality of legislation is a consequence of the fact that legislation in a constitutional democratic state consists in the implementation of constitutional law, in particular, where fundamental rights are concerned. These rights include principles demanding the realization of fundamental individual interests to a degree as high as possible. The ideal and approximative character of these principles requires—in cases of conflict—a balancing of fundamental rights principles with competing principles. This balancing must be done, in first place, by the legislator. Thus, legislation becomes the implementation of fundamental rights principles. It is subject, in particular, to the principle of proportionality, which gives expression to fundamental requirements of rationality with respect to the solution of normative conflicts.

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Chapter 7
Disagreement and Proceduralism in the Perspective of Legisprudence

Woomin Shim

7.1 Introduction

Generally speaking, legisprudence, which is a new academic approach to legislation, relates to the rationality of law-making. It means that the mission of legisprudence is to reduce disagreements in a society, whereas that of politics is to invigorate disagreements (Wintgens 2006: 23). However, this article insists that disagreements are inevitable in law-making even when based on rationality, so legisprudence should help people recognize disagreements in the law-making process.

This argument works especially in the theories of proceduralism. Most proceduralists presume the conception of "pure procedure", and try to find a way to reduce disagreements. In this respect, the mission of proceduralism is very similar to general conceptions of legisprudence.

The pure procedure refers to the only source of the judgment of justice when there are no independent criterions other than following the just procedure (Rawls 1999: 74–75). That is, in pure procedure, the procedure itself becomes the independent standard of judgment for legislative justification or for procedural flaw of legislative process. Accordingly, pure procedure would be a useful tool to resolve the various disputes in terms of legislation if we are able to find its existence. However, these pure proceduralistic strategies inevitably produce exclusion of others in the end.

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7.2 Proceduralism

To analyze pure procedure, this article categorized the theories of proceduralism into three types: substance-based proceduralism, procedure-centered proceduralism, and disagreement-respecting proceduralism. Each category differs from each other in terms of its structure.

7.2.1 Substance-Based Proceduralism

Substance-based proceduralism deals with the substance which works for the basis of procedure judgment. Substance is more significant than procedure in this category.[1] These kinds of views are found in the theory of Ackerman's "Dualistic Constitutionalism". In this line, Ackerman divides politics into two kinds. "Constitutional politics" is one thing, and "normal politics" is another.[2] Constitutional politics means the politics under an exceptional situation such as a revolution or establishing nation. Normal politics is the politics under the constitutional systems as a result of constitutional politics. In this context, the result of constitutional politics plays a role of substantive standards for procedural judgment. Rawls also has embraced liberal stance in terms of these dualistic standpoints.

> Thus, constitutional democracy is dualist: it distinguishes constituent power from ordinary power as well as the higher law of the people from the ordinary law of legislative bodies. Parliamentary supremacy is rejected.
>
> A supreme court fits into this idea of dualist constitutional democracy as one of the institutional devices to protect the higher law. By applying public reason the court is to prevent that law from being eroded by legislation of transient majorities, or more likely, by organized and well-situated narrow interests skilled at getting their way (Rawls 1996: 233).

To construct the substance or constitution, they need the pure procedure as a conceptual element. For example, Rawls' concept of "original positions" explains about pure procedure (Rawls 1999: 11). These original positions cannot be neutral in terms of procedures as Rawls also admits himself.

[1] In these kinds of proceduralism, except for John Rawls whom will be explained below, there are Benhabib (1996: 69), Bohman (1998: 401), Dahl (1989: 175) and Barry (1979: 156–157).

[2] See Ackermann (1991: 3–35).

However, Rawls thought that, among "the facts of pluralism", original positions have the neutral goal based on common basis

> Justice as fairness is not procedurally neutral. Clearly its principles of justice are substantive and express far more than procedural values, and so do its political conceptions of society and person, which are represented in the original position. (…) It seeks common ground—or if one prefers, neutral ground—given the fact of pluralism. This common ground is the political conception itself as the focus of an overlapping consensus. But common ground, so defined, is not procedurally neutral ground (Rawls 1996: 192).

Eventually agreed on a pure procedure, we require attention to the substantive agreement. In that, the neutrality of its own procedure is impossible.[3] In conclusion, the pure procedure, in practice, is hard to exist, because substances through the pure procedure cannot be neutral.[4]

7.2.2 Procedure-Centered Proceduralism

Procedure-centered proceduralism focuses on normativity of procedure itself that is connected with legislation process.[5] Procedure is more significant than substance in this category. The pure procedure is needed to grasp neutrality or normativity of procedure. One of the leading scholars who stand in this line is Habermas. He explains that communications in legislative process which is complemented by the legal procedure is the same as combining "quasi-pure procedural justice" with imperfect procedural rationality.

> Thus the legal code gives a socially binding character to procedurally correct results; it supplies a procedural rationality of its own that compensates for the weaknesses of its complement, the procedural rationality inherent in the process of argumentation. Legal institutionalization thus has the sense of grafting a quasi-pure procedural justice, as Rawls puts it, onto discourses and their imperfect procedural rationality. In this way the logic of argumentation is not frozen but put to work for the production of reasonable decisions having the force of law (Habermas 1996: 179).

[3] In this respect, Lamore (1987: 53) suggests the concept of "a neutral justification of political neutrality".

[4] In here, James Bohman names the Rawls's proceduralism as impure proceduralism. See Bohman (1996: 7).

[5] In these kinds of proceduralism, except for Jürgen Habermas whom will be explained below, there are Cohen (1997: 72–91), Dworkin (1996: 23–24) and Tribe (2000: 1367).

To form a pure procedure, Habermas puts an "ideal discourse situation" which is based ultimately on the concept of "performative contradiction" (Habermas 1990: 79). This concept presupposes a certain common place for discourse (Jay 1992: 271). In the same line of this explanation, He also suggests the concept of "constitutional patriotism" which can be identified with the ideal discourse situation.

> [The] ethical substance of constitutional patriotism cannot detract from the legal system's neutrality vis-à-vis communities that are ethically integrated at subpolitical level. Rather, it has to sharpen sensitivity to the diversity and integrity of the different forms of life coexisting within the multicultural society. (…) The neutrality of law vis-à-vis internal ethical differentiations stems from the fact that in complex societies the citizenry as a whole can no longer be held together by substantive consensus on values but only by consensus on the procedures for the legitimate enactment of laws and the legitimate exercise of power (Habermas 1998: 225).

These indicates mean that the political discourses are based on the common political agreement or substance. This has similar point with Ely's representation-reinforcing approach to the constitutional law, which cannot be value-free in spite of Ely's emphasis on the procedure itself (Baker 1980: 1041).[6] Thus, the concept of ideal discourse situation can never be neutral.

Therefore, like the pure procedure of substance-based proceduralism, the concept of (quasi) pure procedure of procedure-centered proceduralism fails in this context, as well, because some substantial values should be excluded to activate the pure procedure. In sum, these two categories try to draw a consensus for an activated procedure by assuming the feasibility of the concept of pure procedure, but they fail at last.

7.2.3 Disagreement-Respecting Proceduralism

Disagreement-respecting proceduralism denies the concept of the tangible pure procedure.[7] Because disagreement-respecting proceduralism assumes a sustainable disagreement, both substance and procedure should be considered together, and they cannot be separated.

[6] See also Tushnet (1980: 1047).

[7] In these kinds of proceduralism, except Amy Gutmann and Dennis Thompson whom will be explained below, there are Bellamy (2007) and Waldron (1999).

This aspect has similar side to Amy Gutmann and Dennis Thompson (Gutman and Thompson 1996: 16–17), but their theories also have limitations in assuming certain substantive foundations or standards[8] just like those two kinds of theories above.[9] However, they positively accept the possibilities of ongoing disagreements after serious discussion. In other words, there can always be disagreements which cannot be removed.

> Instead of controversies to which moral reasons seem irrelevant, we find conflicts in which moral reasons so deeply divide citizens that no resolution seems possible on any fair terms of cooperation. A deliberative disagreement is one in which citizens continue to differ about basic moral principles even though they seek a resolution that is mutually justifiable. The disagreement persists within the deliberative perspective itself. It is fundamental because citizens differ not only about the right resolution but also about the reasons on which the conflict should be resolved (Gutman and Thompson 1996: 73).

This theoretical context can be found in Bellamy's theories of political constitutionalism which is against legal constitutionalism. He insists the concept of "circumstances of politics" which is originated from Waldron's theory.[10]

> [A] constitution offers a response to what Jeremy Waldron and Albert Weal, among others, have termed 'circumstances of politics'. That is to say, circumstances where we disagree about both the right and the good, yet nonetheless require a collective decision on these matters. Consequently, the constitution cannot be treated as a basic law and norm. Rather, it offers a basic framework for resolving our disagreement – albeit one that is also the subject of political debate. (…) [The] constitution is identified with the political rather than the legal system, and in particular with the ways political power is organized and divided.

The political constitutionalists such as Bellamy take the problem of ongoing disagreements seriously. They don't try to remove the disagreements but respect them. In this, this kind of proceduralism is different from those proceduralisms above, substance-based proceduralism and procedure-centered proceduralism, which are based on the pure procedure.

These differences originated from the facts that substance and procedure are not separated in disagreement-respecting proceduralism, relating to the

[8] They suggest the principles of reciprocity, publicity and accountability as regulating conditions for deliberative procedure, and the principles of basic opportunity and fair opportunity as regulating conditions for deliberative outcome or substance.

[9] See Galstone (1999: 39) and Simon (1999: 49).

[10] See Bellamy (2007: 5) and Waldron (1999: 107–108).

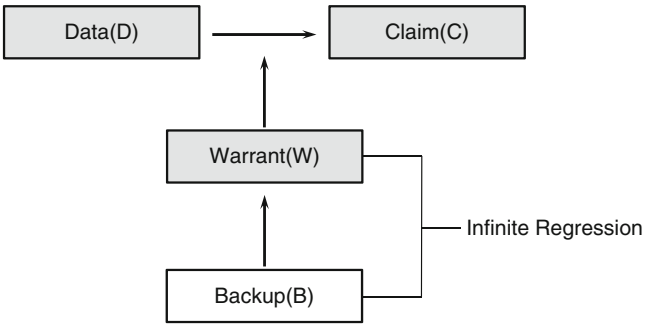

Fig. 7.1 Toulmin's argumentation model

judgment for legislative justification or for procedural flaw of legislative process. In other words, both substance and procedure should be considered together when the legislative problems are brought out.

7.3 Conclusion: The Mission of Legisprudence

The differences between two kinds of proceduralism above and disagreement-respecting proceduralism can be seen clearly in the picture of Stephen Toulmin's argumentation model (Toulmin et al. 1984).[11]

This model was designed for the purpose of overcoming the defects of syllogistic reasoning. Toulmin's argumentation model shows the process of presenting claim and reasons in the deliberative discourse. Briefly speaking, the main factors of this argumentation model are Data (D), Claim (C), Warrant (W) and Backup (B) (Fig. 7.1).

In this picture, the relation between Warrant (W) and Backup (B) is the most controversial problem in real deliberative discourse. If someone presents a certain "Claim (C)", there should be presented Warrant (W) for identifying the validity of the claim. And when there occurs doubt or Rebuttal relating to Warrant (W), there must be suggested Backup (B). In this point, some problems are brought out. There are many possibilities that the so

[11]Relating to the limitations of Toulmin's argumentation model, see Freeman (1991), Macoubrie (2003) and Walton (1996).

called "infinite regression" which means constant repetition of chains between Warrant (W) and Backup (B) can take place.[12]

The conceptions of pure procedure in Rawls and Habermas are the trials to remove these kinds of "infinite regression". However, disagreement-respecting proceduralism takes this constant repetition of such chains as usual one. Substances of each subject should be emphasized as well as the procedural aspects of argumentation.

It is not correct to give an emphasis on only substance or procedure individually according to the concept of pure procedure in legislation procedure. Therefore, we cannot give up respecting individual substantial values or disagreement, not to mention the importance of the procedure itself. Therefore, law-making based on the conception of pure procedure may not necessarily be legitimate.

In the conclusion, this article confirms that disagreement-respecting proceduralism for overcoming the limits of pure procedure fits to legisprudence rather than to the traditional dogmatic legal theories. My suggestion is that all possible opinions should be discussed in the due procedure even though there are disagreements among individuals and possible further risks of infinite regression. Legisprudence should aim not to pursue the only rational law-making or remove disagreements, but to find a way of cohabitation among value disagreements in a society. And it is also necessary to recognize that laws created through legislative process are tentative in nature. At this point, legisprudence holds the academic autonomy or distinction from other traditional legal dogmatics.

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[12] See Habermas (1984).

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Chapter 8
Rational Lawmaking and Legislative Reasoning in Parliamentary Debates

A. Daniel Oliver-Lalana

On paper, few will dispute that an ill-founded law is likely to be a bad law, or that lawmakers who do not duly justify the laws they enact are, by the same token, bad lawmakers. In decent democracies, representatives having a seat on a legislature may be expected to advance, discuss and weigh the reasons for which they pass or reject a bill. Parliamentary debates should then convey, at least, a key portion of the public justification for state lawmaking, so that the soundness of legislative decisions and arguments can be monitored. If such claims are to be taken seriously and not as pure ideological delusions, argumentation and legislation do belong together: making a law includes arguing about it. However, lawmaking deliberations in parliament are seldom conceived of as a mode of justificatory reasoning nor addressed as a component of the rationality or legitimacy of laws. Sceptical and realistic approaches to legislation remain dominant both in political theory and jurisprudence—the same goes for public opinion and average citizens—and do not leave much room for hopes of any rational discussion underlying statutes in fact. For sure, there may be plenty of instances of failed justification in real parliamentary lawmaking practices. Yet this cannot simply lead us to give up the expectation that statutes, as authoritative and enforceable decisions, must be properly debated and justified by those who are entrusted to make them. We are not better off assuming the inability of legislatures to justify their outcomes, bowing to an allegedly inescapable arbitrariness of politics or endorsing that our parliaments yield to market economy forces. What we would need, rather, is a closer examination and

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better understanding of lawmaking deliberations as source of justification of laws, thereby clearing the ground for a theory of legislative reasoning and argumentation which can be coupled with a comprehensive theory of legislation. This chapter suggests a framework to study parliamentary debates in such a *legisprudential* light. In the first sections I briefly introduce the link between legislative argumentation, rational lawmaking and normative legitimacy (Sect. 8.1), along with a multilevel conception of legislative rationality (Sect. 8.2). Leaning on that basis, the bulk of the essay is devoted to outline a basic model to reconstruct and analyze lawmaking deliberations in parliament as providing the justification of laws (Sect. 8.3–8.5). An argument sample from debates held in the Spanish legislature will serve to illustrate how this model could work. Finally, after touching upon possible approaches to the assessment of argumentation quality (Sect. 8.6), I consider some of the implications that the study of parliamentary deliberation might carry for the never-ending tension between the judiciary and the legislative branch (Sect. 8.7).

8.1 Why Bother About Lawmaking Argumentation

Rational legislation and legislative argumentation can be connected in many ways. My view on this link might be phrased in five interwoven theses emphasizing the justificatory, legitimizing *potential* of lawmaking deliberations in parliament. The first one says that, as a normative, collectively binding decision or set of decisions, every law entails a claim to justifiability[1] which cannot be fulfilled with whatever motives, but calls for good reasons and hence requires an argumentative process for these to emerge.[2] The second thesis defines the legitimacy[3] of legislation as a gradual and compound

[1] I herewith assume that every normative decision lays claim to justifiability, in the sense that decision-makers, be they individual, collective or institutional, imply to be capable of justifying (giving arguments for) their decision if justification is asked for; since statutes are sets of normative decisions, there is no apparent reason to exclude them from this assumption.

[2] Good arguments can certainly be produced through monological thinking; yet this does not suffice to establish binding norms as long as one accepts that persons are autonomous beings (Sieckmann 2012); under this presupposition, there exists an in-built discursive dimension to normative justification.

[3] Legitimacy is used here as a critical or normative concept (as an equivalent to rational acceptability within institutional contexts), not in the empirical sense of social acceptance. Stressing the distinction between legislative rationality and legitimacy, see, however, Wróblewski (1990: 114).

magnitude that does not get exhausted in the actual working of democratic systems and the legal form given to statutes, for it is also bound up with the arguments supporting them, in special—albeit not solely—with the ones publicly advanced within lawmaking institutions and procedures. Rational legislation, in one word, is impossible without arguments: a law can only be deemed rational, and thus legitimate, if it is duly justified. This constitutes a basic legisprudential tenet dating back to the Enlightenment: the "good legislator" is demanded both to create rational norms and to provide the public with reasons for them. According to the third thesis, there exists a correlation between the quality of a law and that of its underlying reasoning: broadly speaking, the better is the legislative argumentation the better will be the law *resulting* from it—i.e. to the extent that it relies on the better arguments.[4] That is precisely why statutory justification in parliament should not be detached from the theory of legislation. It seems a truism that the enactment of statutes ultimately depends on votes, not on reasons; yet, it is the quality of statutes what is now at stake, and this quality does certainly stem from reasons, not from votes. A theory of legislative argumentation must not only care about how lawmaking decisions are taken and motivated in fact, but also about how they should be justified. For sure, divergences between the quality of laws and the quality of lawmaking argumentation are thinkable: for instance, some poorly grounded legislatives choices may have positive impacts or happen to be socially beneficial, even in the short run. But it would be odd to rate them *rational* at the time of enactment if no plausible grounding was given in their support. Fourthly, the analysis of legislative justification as a social argumentative practice must incorporate the perspective of those actually involved in it, that is, the participant perspective. Through date, jurisprudential approaches to legislation have failed to give an account of lawmaking justification under that perspective. This justification is addressed in monological terms, with a focus on the grounds given by the legislator as institution, e.g. in preambles—these play a justificatory role, but use to cover only those reasons voted by the majority, thus excluding dissenting opinions—; studied on a high level of abstraction with little empirical backing; or regarded from an outsider's, external perspective, typically that of judges and legal scholars. Yet since one adopts the participant's point of view, the argumentative or discursive side of justification comes to the fore. My last thesis is that deliberation in parliament may offer a vantage point to gain insight into legislative justification, inasmuch as it conveys the

[4] This may be seen as a specification of the assumption—widely spread among legislation scholars—that the quality of both legislative procedure and process correlates with that of legislative outcomes.

(main) reasons for making a law. Parliamentary debates, be they on the floor or in dedicated committees, do not embrace the whole picture of statutory justification. This justification evolves as an intricate collective process which takes place within and outside lawmaking bodies, surrounding and preceding formal legislative proceedings. However, as the parliament remains the institutionalized centre for lawmaking,[5] legislative debates (should) make up a significant part of that process. In a sense, they present a sort of concentrate or distillate of a much larger deliberation at a social scale.[6]

All in all, these starting theses contend that the legitimacy of laws does essentially depend on arguments and that it is incumbent on parliamentarians to argue about the reasons for which they change or do not the legal order. If this holds, we have a strong incentive to develop specific models to analyze legislative debates, as well as criteria to assess their performance as source of justification—and this can be done at best within the framework of a theory of rational lawmaking.

Challenging this ideal view there stands an everlasting and widespread pessimistic perception of the way legislative decision-making operates and parliamentarians do their job. Legislation, after all, is considered as a matter of politics, and politics is usually reproached for being the realm of wicked attitudes such as opportunism, empty wordiness, profit-seeking, striving for power and the like. This negative perception fuels a number of objections against ascribing justificatory functions to debates in parliament. One might oppose, for example, that the true legislative decisions are never taken during parliamentary sittings and the real grounds for lawmaking should be better sought elsewhere; that legislators are not honest, but just dress up before the public what has already been decided in private for undisclosed motives; that representatives are committed to predefined conclusions and their votes can be easily predicted in advance, no matter how floor deliberations develop; that the ultimate reasons for taking part in the debates have rather little to do with the ones apparently supporting statutes; that the preparation of laws very much lies on the hands of experts, drafters, technocrats and governmental agencies, whereas representatives merely play a marginal role in lawmaking; or that, in many cases, parliamentarians do not even

[5] "The idea of legislation is the idea of making or changing law explicitly, through a process and in an institution publicly dedicated to this task" (Waldron 2006b: 22).

[6] This has a methodological counterpart: the complexity of lawmaking justification within and outside the parliament can hardly be grasped, whilst minuted debates can be analyzed more easily.

understand the subjects they are debating or voting on. Needless to say, the list of objections could be further continued and radicalized. Following this line of thinking, it would appear that legislative discussions in parliament are mostly pointless, poor or deceptive, and cannot constitute by any means a proper justification for statutes.

Put in short, the criticism seems to be twofold: on the one hand, no rational legislative argumentation is to be found in parliamentary debates; on the other, even if it could be found there, it does not influence their outcomes. Both points remain but in need of testing; and for that, one must first know how a rational argumentation as justifying a law should be. This is a fundamental question which cannot be answered at a stroke, for it requires a thorough account of what an adequate justification of legislation entails, which way representatives as lawmakers (should) deal with it, and how it is embedded into lawmaking deliberations, or how these can be construed as statutory justification. By contrast, the usual assumption that MPs lack both deliberative and legislative skills, or that parliaments as political institutions are doomed to fail in rational lawmaking might be impairing our judgement on their capability to produce good norms, as well as on their (potential) role within constitutional states—especially as far as concerns the tension between democracy and juristocracy.[7]

8.2 A Notion of Legislative Rationality

Taking legislative deliberation in parliament as a proxy for rational justification of laws presupposes some picture of what rational lawmaking is, and that seems all but a simple issue. There are deep theoretical disagreements about what the qualifier "rational" means in this context—not to mention in practical philosophy at large—and how we can fruitfully grasp it.[8] For present

[7] "How can a judge take seriously the job of interpreting legislation while believing that the legislature is morally bankrupt? How willingly would judges leave policy decisions to a Congress they believed to be mindless or indifferent to public interest? If we come to accept this nihilistic view of politics, judges might still going through the motions of deference to legislatures, but they will surely find it hard to muster much enthusiasm for the task" (Farber and Frickey 1991: 4). See also below, Sect. 8.7.

[8] "There is little doubt that ["rational"] is an ambiguous and frequently misapplied term. The nature of the misuse lies (…) in the fact that the concept of rationality is constantly being broadened and that we describe as rational almost all those philosophical, methodological and socio-political conceptions and attitudes we advocate" (Weinberger 1991: 213).

purposes I will just present three major, interrelated characteristics upon which a working definition of legislative rationality could be stipulated: plurality, gradualism and boundedness.

Ranging from classical views on the "rational laws", through public choice and economic models of legislation, up to current policy analysis and regulation theories, a wide number of competing approaches could be used to define a notion of legislative rationality, each of them providing its own benchmarks. What this variety probably teaches us is that "rationality" in legislation, as in other norm-giving practices, must be explicated as a complex attribute comprising several dimensions and must be assessed, accordingly, against different (formal, procedural and substantive) criteria at the same time.[9] Labels do vary depending on viewpoints and disciplines, but, in the last analysis, legislative rationality always stands for an ideal array of linguistic, systematic, instrumental and axiological features.[10] In this respect, one-sided approaches dwelling on some partial aspect only or confined to a single standard of rationality prove inevitably defective in terms of legislative justification.

Over the last years, M. Atienza (1992, 1997, 2005) has developed a multidimensional conception of legislative rationality which very well captures this complexity. In brief, he singles out five levels or types of rationality in lawmaking, namely (R1) a *linguistic* or communicative rationality, inasmuch as lawmakers must successfully transmit a given normative message to its recipients; (R2) a *legal-formal* or *systematic* rationality, as any law should fit in with the pre-existing legal order, i.e. must cohere and be logically consistent with it; (R3) a *pragmatic* or social rationality defining the degree in which statutes are complied with by their addresses, have the envisaged behavioural impact or get actually translated into facts; (R4) a *teleological* or purposive rationality referring to the ability of laws to attain their stated goals; and (R5) an *ethical-moral* rationality, since the content of legislation, like its goals and underlying values, are expected to be just or morally correct—thereby no particular moral theory is endorsed. So, in this account, each type of "rationality" correlates with certain guiding aspirations which legislation should pursue: linguistic clarity and accuracy (R1),

[9]Jurists' strong reliance on legal-formal rationality in adjudication and interpretation does not exclude further variants of rationality either. For the time being, "law cannot any more be correctly understood within a paradigm of one-dimensional rationality" (van Hoecke 2002: 10).

[10]Legislative rationality "includes among other things the idea of linguistic, logical, socio-technical, praxeological, epistemological and axiological competences of the legislator" (Ziembinski 1985: 147).

legal systematicity (R2), social realization (R3), instrumentality (R4) and normative correctness (R5). In addition to these levels, Atienza takes a sixth aspect into consideration, that of *reasonableness*: to this cross-dimensional criterion he accords the role of a meta-rationality defining the achievement of an "optimum balance" or a "reasonable adjustment" between all other rationality levels (R6). My approach to parliamentary argumentation will be essentially inspired by this conception.[11] Of course, there are other theoretical proposals available to construe a pluralistic notion of legislative rationality; dimensions and corresponding criteria, nonetheless, would remain fairly similar.[12]

That lawmaking rationality comprises several layers does not mean that it boils down to some sort of checklist against which legislative projects can be tested. Distinguishing dimensions and correlative criteria just facilitates a more differentiated analysis. While preventing reductionism, nevertheless, a pluralistic notion of legislative rationality poses an obvious difficulty, for the different yardsticks are potentially conflicting. When handling a variety of justification criteria (and sub-criteria), these can collide with each other, whereby it may be quite difficult, if not impossible, to meet all of them at once.[13] In other words, dimensions of legislative justification may be mutually

[11] One might feel uncomfortable with such a broad use of the word "rationality", so that I will hereinafter speak of layers or levels of—rational—justification instead (cf. Wróblewski 1990: 103). A couple of adaptations will be introduced below (Sect. 8.5.1) to slightly refine this basic framework.

[12] Consider e.g. La Spina's (1989: 179 ff.) seminal study on legislative decisions, where lawmaking rationality is construed as a mixture of formal, teleological, material, value and political criteria: the *formal* rationality expresses the systematic fitting of the statutes into the legal system (consistence, coherence), with the focus being on the certainty of law; the *scope* rationality is the yardstick for assessing legislative decisions as a means to an end, which includes an assessment of social effects; the *material* rationality depends on the calculation of social utility; and the *value* rationality indicates the extent to which a given, socially accepted set of substantive or ethical-moral principles are realized. Finally, La Spina identifies a *political* rationality which would preserve legislative decisional structures by reaching a reasonable combination of all previous rationality levels.

[13] Jurists face this very problem when resorting to the rational legislator model in legal interpretation: by virtue of this methodological fiction, legal provisions are interpreted as if they were created by an ideal entity endowed with an array of rational properties which jurists use as interpretive criteria. Yet, such properties may be mutually conflicting, so that the pursuit of one of them is only possible at the expense of another. The conflict can make it necessary to reject some aspect of rationality "in order to keep other ones which are more essential from a given point of view" (Ziembinski 1985: 148).

"refractory"[14]; in case of conflict, one must be given priority or be traded off against others, and this leads to ideological, value-laden choices which are hard to foresee in advance—a lexical ranking or fixed hierarchy seems unfeasible in either theory or practice. The important point is that in law-making contexts no single dimension or criterion can be entirely privileged beforehand, in the sense that it always has to be maximized at any expenses or in any occasion. And this holds for jurists and legal scholars in the first instance, as we often succumb to our "imperialist" inclinations (Tuori 2002: 107) to redefine the whole legislative enterprise in terms of dogmatic and legal-scientific criteria. This way we meet with a parallel problem: for legislative rationality does not only depend, then, on taking several justification levels into account, but also on how these get articulated. Legislation does constitute a medley of various "rationalities", but what the proportions of each one should be always remains disputable. One may try to overcome this difficulty by means of ideal optimality yardsticks such as "reasonableness" (Atienza 2005), "political rationality" (La Spina 1989) or "symphonic legislation" (Witteveen 2005). These yardsticks, however, can never be precise enough to solve the question of when a given combination of criteria of rationality can be regarded as optimal.[15] This requires an overall assessment of the piece of legislation at issue (taking all five criteria and the tradeoffs between them into account), which goes far beyond the assessment of any of the micro-decisions forming it, and which cannot be settled on an abstract level, but only—if at all—on a case-by-case basis.

This double difficulty of priority and proportions leads us to the other traits of legislative rationality I would like to pinpoint: gradualism and boundedness. The former implies that in lawmaking contexts rationality cannot be meaningfully conceived as a binary property, i.e. in terms of all or nothing, but as a matter of grade and—in Fuller's phrase—aspiration. So we mostly will have *more or less rational* statutes and statutory provisions,[16] as well as *more or less rational* justifications for them, rather than either

[14] "Dal punto de vista di una singola *r* [rationality], avremo (…) refrattartietà o "dimenticance" nella estensione dell'analisi a problem tipici di alltre r. In ciascuna delle prospettive si tenderà a "vedere" soltanto i problema che si è abituati o "pronti" a vedere, disinteresandosi degli altri. Il giurista crederà di delegare al político la scelta sui fini, e viceversa il politico crederà di delegare al giurista la stesura bene ordinata del testo della legge, e cosí via per le altre *r*. (…) In caso di conflitto, I portatori degli argomenti di ciascuna *r* tenderanno a violare i valori ispiratori delle altre" (La Spina 1989: 220–21). See further Atienza (1992: 282, 1997: 56).

[15] The point is not to redefine all partial perspectives into a general criterion, but rather to foster an understanding among them (cf. Majone 1997: 44, 106).

[16] Just for the sake of simplicity, let "provisions" or "articles" be the basic components of statutes.

rational or irrational ones.[17] As gradualism is an awkward question in practical reasoning, one might approach legislative rationality negatively, establishing some threshold below which laws could be deemed irrational, or some minimal criteria whose breach would amount to irrationality. However, even if such thresholds or criteria could be agreed on, in many cases there would be still endless disputes as to whether that minimum has been honored or not. Instead of attempting to establish any operative, easy-to-apply criteria telling us when laws can be deemed rational, it seems better to keep treating legislative rationality as a guiding or regulative idea. For, in the last analysis, there is no such thing as "right answers" in lawmaking: "it can hardly ever be said that a certain law (with a particular content, structure, etc.) was the only one possible, the correct law" (Atienza 2005: 304), not even on each justification level taken separately. In a sense, making laws in parliament is not about finishing masterpieces of legislation, but rather about improving legislative projects. Rationality is thus engendered or damaged through the amendments and modifications introduced into draft bills all along the lawmaking process—or through their rejection. And these are not epistemic moves: legislation necessarily opens up a leeway for rationally acceptable choices, and it may well be the case that two different legislative contents or arguments equally meet requirements of legislative rationality. Yet, the chief (normative) condition upon which lawmakers are given a range of options is that they justify theirs.

It is common knowledge that the cognitive, decisional and performative capacities of real lawmakers and lawmaking bodies are not unrestricted. Quite the reverse, they are invariably subject to many conditions and constraints defining the framework within which policy options are discussed and law is enacted, implemented and applied (reflection on them also belongs to legislative rationality).[18] To a great extent, such "circumstances" are inexorable for lawmakers, and hence must have a bearing on our views about their rationality: in spite of the symbolic appeal of the term, legislative *rationality* is necessarily limited and context-dependent. Borrowing from H. Simon, one may also say that it is "bounded", stressing that the inherent

[17]It is also consequential on the pluralistic conception of legislative rationality that a law often cannot be pronounced rational or irrational en bloc: it may be less rational or worse grounded in some respect while more rational or carefully justified in others—it makes a difference, though, whether it is a core policy content or some minor detail what is better (or worse) justified.

[18]There is an ancient, albeit lively tendency to consider legislators capable of shaping or controlling reality at will. Fortunately, lawmakers are not that mighty. The weight of the tangled network of normative inputs throughout society significantly affects the real impact of statutes. In the end, enacted legislation is still law on the books, not in action.

limits of human cognition and information processing, as well as other factors constraining or framing our rational decisions as individuals, e.g. insufficient skills and time, likewise affect lawmakers and lawmaking bodies. In this vein, boundedness has even been regarded as the crucial circumstance of legislation according to legisprudence.[19] This comes by no surprise once the participant's perspective is adopted. Legislation is and *must* usually be made under conditions of imperfect information, scarcity of resources and narrow budgets, work overload, uncertain prospects about societal trends and developments, convoluted decisional structures, environmental distortions, etc. Hence our expectations of rationality on the side of lawmakers must be moderate. If legislative rationality has to play a guiding role, it must be looked at with realistic eyes, accepting that legislators, as Wintgens puts it, must often "settle for less that the best and content themselves with satisfying solutions instead of optimal ones", whereby these satisfying solutions are a matter of achieving a balance in view of the circumstances. This prevents from a hasty disqualification of second-best and satisfying legislative choices, but should not be seized as a pretext: those bounds do not justify any decision whatsoever nor can be invoked to relieve lawmakers from the burden of justification.

Summing up, rationality in lawmaking is a pluralistic, gradual and limited quality. As normative concept, it fosters the attainment of a satisfactory level of fulfillment of linguistic, legal-systematic, social, instrumental and ethical-moral requirements. If linked to my second starting thesis—rational lawmaking is impossible without arguments—, this presupposes that lawmakers publicly state and exchange reasons for what they decide: it is only upon offering and discussing legislative arguments, and thus the degree of satisfaction of the various aspects of legislative rationality, that lawmakers can be deemed rational. How to apply this working notion of rational legislation as *reasoned legislation* to the practice of justification in parliamentary debates is now to be clarified.

8.3 Analyzing Legislative Argumentation: Preliminary Notes

If argumentation is roughly defined as the activity of advancing reasons for or against a claim or stance on a given question, then lawmaking deliberation in parliament can be said inherently argumentative (van Eemeren 2011:

[19] See Wintgens' piece in this volume (Sect. 1.4).

150). Inasmuch as competing claims and reasons with regard to a forthcoming piece of law are put forward, it shows a striking case of argumentation or *argumentative discussion.*[20] Yet a number of singularities make legislative argumentation a somewhat elusive object of study. We are dealing with a collective enterprise which involves many participants, including a variety of active arguers and audiences; takes place in a peculiar context—the institutional interface between law and politics—; is integrated into broader formal proceedings and governed by specific speech and debate rules (with many national variants); and extends over a considerable period of time. And all this triggers countless methodological difficulties. Although not going into them in depth, at least some demarcation may be helpful before outlining a framework for analysis.

First, I am only concerned with lawmaking deliberation *during parliamentary hearings* (as kept on *written official records*) in which MPs discuss one and the same *legislative project* (intended to become *valid law*) and hence argue in order to defend, amend, criticize or reject it. Within scope will be debates held *both on the floor and in dedicated committees*, eventually also *in both chambers* (i.e. congress and senate). It might be objected that this demarcation is too narrow, because it overlooks crucial information or key arguments included in background materials or expert reports.[21] Since debates make up just a portion, a sort of distillate of a much larger justification process, many legislative arguments circulating in the outside (say, in the public sphere) or contained in preparatory works will be definitely missing. Yet I concentrate on those questions which MPs actually consider worth raising and discussing—it is precisely the justificatory potential of debates and the respective performance of MPs what is at stake.[22]

The focus on written records pushes appealing rhetorical and political communication perspectives into the background, but this restriction is due

[20]Which is an argumentation aimed at settling a difference of opinion (van Eemeren et al. 2006: 23); in our context, the aim of "settling" differences proves problematical though, as explained later on.

[21]The bulk of lawmaking reasons often stems from preparatory works and governmental documents, but inasmuch as these are elaborated in the course of lawmaking proceedings or submitted to the parliament, it can be assumed that they will be normally reflected in legislative hearings.

[22]External materials are not fully discarded, though. Preparatory works are useful for argument reconstruction and interpretation; moreover, comparing the range of arguments actually advanced by MPs with other justificatory sources available to them may be necessary to evaluate debate thoroughness.

to practical grounds. Argumentative texts, on the one hand, prove more reliable objects for analysis than speeches (Johnson 2000: 156); and it seems advisable, on the other, not to overcomplicate the picture with details which might have little import for the rational justification of legislation. Nor will psychological or motivational aspects of argumentation be of my interest: it may well be that parliamentarians do not sincerely envisage any mutual understanding nor are committed to rational lawmaking at all—they are usually criticized on this count—, but I confine myself to the arguments they put forward in public, without attempting to unfold any spurious explications lying behind. Also, no particular orientation towards consensus, rational persuasion or to reasonably settling differences of opinion is presupposed on the participant's side. Many authors include these or like-minded immanent goals in the notion of argumentation, but in parliamentary lawmaking one can abstract from such counterfactual assumptions at the conceptual level. MPs may engage in debates in the hope of convincing their opponents or their various audiences (constituents, party fellows, the assembly as a whole, the public opinion)[23]; or may be animated by noble deliberative ideals, being ready to change their minds, to adhere to strong arguments and retract from the feeble ones, and even to vote accordingly. This cannot be excluded, but neither at all can it be a starting point. In our context, it is the twofold goal of justification and positioning what better defines argumentation: debates render a justificatory function by informing about the reasons advanced and the positions held by the citizens' representatives with regard to lawmaking choices.[24] Votes often respond to factors other than arguments, and in many cases MPs know well that their reasons have no chance to affect the bill finally passed. Also then, however, they contribute to legislative justification. This is not to say that deliberation can never result in unanimously shared, rational viewpoints, or that it cannot positively influence legislative outcomes—it often does. But we need not attach any inherent orientation towards consensus to lawmaking debates in order to make sense of them.

If built upon this preliminary demarcation, a legisprudential approach to legislative debates should at least undertake three main tasks: to reconstruct the content of argumentation, to analyze it as providing the justification of

[23] On the audiences of lawmaking deliberation, see Mucciaroni and Quirk (2006: 24–25).

[24] "When we argue, we of course aim to justify a viewpoint; but this justifying is accompanied by the aim of positioning our discourse with respect to another one" which can—actually or virtually—oppose ours "by defending a different viewpoint on the same question or by defending the same viewpoint by means of different reasons" (Micheli 2012: 123–124). This positioning differs from mere "position-taking" as discussed by Tushnet (2006: 357).

laws and to determine how good this justification was (quality assessment). The ultimate objective of this model is critical or normative: if legisprudence is applied to study the reasons given by political representatives as lawmakers, it is to produce qualitative judgments on the performance of parliaments in justifying legislation. Unfortunately, I cannot yet offer any specific criteria to evaluate quality: for, before undertaking any quality assessment, the tasks of argument reconstruction and analysis must be addressed. These will be my concern in the remainder of this chapter. A sample of arguments taken from debates held in the Spanish legislature about the 2007 Data Retention Act (hereinafter, DRA), which transposed the EU Directive 2006/24/EC into the Spanish legal order, will serve for illustration.[25]

8.4 Argument Reconstruction

With our focus being on the rational justification of laws, the first step is to get a clear picture of the content of argumentation, i.e. one has to know what arguments with regard to what issues MPs raise in legislative hearings. As debates evolve, a great deal of issues may be mentioned, but I consider only those which have a *direct bearing on the bill* upon debate. Whilst the identification of these issues entails no specific difficulty in most cases, the interpretation and reconstruction of arguments are more problematic tasks.[26] For a start, we need a definition of legislative argument.

8.4.1 Legislative Arguments

Leaning on a thin notion of argument as (a set or cluster of) reasons supporting a thesis or claim,[27] it may be said that a legislative argument has been advanced if *one position* is held by an arguer (MP_1) and at least one

[25] Ley 25/2007 de conservación de datos relativos a las comunicaciones electrónicas. Deliberation on this law included two hearings in the Congress (*Congressional Record*, VIII Session, May 30th 2007: 2a–12b and June 21st 2007: 13261a–13268b) and two in the Senate (*Senatorial Record*, VIII Session, September 27th 2007: 1a–8b and October 4th 2007: 14254a–14269b). Minutes are available at www.congreso.es. In this chapter, debates will be referred to, chronologically, as D1, D2, D3 and D4.

[26] See e.g. Johnson (2000: 36, 125 ff.); or van Eemeren et al. (2006: 45 ff.).

[27] "An argument is a claim and a reason or reasons that support it" (Blair 2012: 87); everything we need to understand its structure "is available to us in the notion that an

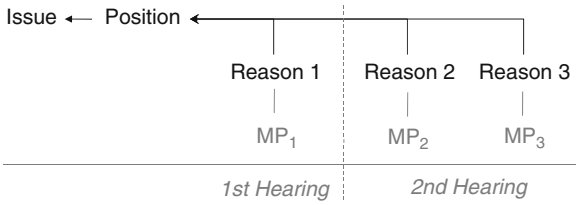

Fig. 8.1 Basic legislative argument

supporting reason for that position is put forward by the same or by another arguer (MP_1 or MP_n), regardless in which hearing, in an attempt to justify some aspect of the forthcoming piece of legislation.[28] These positions are normative, in the sense that MPs contributions, in the last analysis, always come down to claim that some item in the bill *should be* modified, added or withdrawn—or the whole bill rejected. Mere expressions of such positions are discarded, though, if no backing reason is given. Graphically, legislative arguments could be represented as showed in the above figure (Fig. 8.1).[29]

This notion results from a unitary view of legislative argumentation and tries to cope with typical features of parliamentary deliberation, like argument fragmentation (and repetition) and multi-agency. Due to debate settings, e.g. speech time restrictions, legislative arguments are often truncated and must be reconstructed on the basis of several speeches held by one or more MPs in the various sessions. All single contributions along the entire series of debates offer an ample pool of positions and reasons which can be better tackled as a whole.[30]

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argument consists of reasons put forth as rational support for the thesis" (Johnson 2000: 167). Here, one must distinguish between a subjective and objective understanding of argument. From a subjective viewpoint, an argument is "any assertion that an arguer advances as an argument", i.e. as a justification for her position, regardless of its ability to actually justify what has to be justified; while an argument in the objective sense must be recognized as such by third parties; the former is to be used for descriptive-analytical purposes and the latter for qualitative assessment (Neumann 2008: 237).

[28]This includes "meta-arguments" dealing with issues arisen from debate; see e.g. Walton (2007: 224).

[29]This depiction may indeed be refined in many respects. One can e.g. expect a higher level of complexity in legislative arguments, where positions are backed by reasons which are, in turn, claims supported by further reasons, and so on. Still, the core elements of the scheme would remain the same.

[30]"Debates are a sprawling series of individual speeches which are best studied as an organic whole" (Filler 2001: 329). Addressing legislative deliberation as an argumentative unit proves most meaningful if one considers that it is concerned with the approval of a whole statute.

In this view, arguments are not exactly ascribed to particular arguers, but are rather conceived of as a collective product. In parliamentary debates, we do not always find complete, fully developed arguments in each contribution—speeches may be very brief—; nor do single speeches always contain just one only argument. Several ones may be advanced in each speak turn as to different issues, yet without exhausting all possible backing reasons. Likewise, if argumentative disputes arise, reasons and counter-reasons for and against a position may be adduced by different MPs on different occasions. In fact, it belongs to collective, multi-agent discussions that any participant may in her speak turn complete, refine or attack arguments put forth by another. This unitary view also accounts for argument repetition. MPs of the same party usually maintain coherent arguments on all issues debated, at least if party discipline applies, and they may derive their reasons from the same preparatory materials previously elaborated in internal meetings or argue following the instructions delivered in party committees. This often makes argumentation redundant: MPs tend to repeat arguments in the same or in a slightly distinct fashion, whereas it would be misleading to treat them as different arguments.

In parliamentary debates, we find not only fragmented, but also incomplete or enthymematic arguments, so that it is often necessary to identify missing or implicit pieces in order to entirely reconstruct them; moreover, what parliamentarians really intend to say may be unclear, or doubts may appear as to whether some claim can actually be attributed to them or not. Such interpretive or hermeneutic difficulties are a critical aspect of reconstruction.[31] Argumentation theorists use to follow charitable interpretive guidelines looking for "maximally argumentative" readings (van Eemeren et al. 2006: 51–52), trying to maximize the justificatory force of arguments (Bermejo-Luque 2011: 167) or making the best possible sense of them (Johnson 2000: 127). In a similar vein, when it comes to legislative argumentation, one could follow Mucciaroni and Quirk's (2006: 48) suggestion: to attribute the most reasonable claims, preferring "only relatively specific statements" rather than "broad and ambiguous ones"; where a range of

[31] "The most general issue in dealing with incomplete arguments is how a statement can be attributed to an arguer as part of her argument if she never" made "that exact statement explicitly"; this "problem of attribution is one of interpreting a claim supposedly made, based on a quotation (…) of discourse, recording what the arguer actually said or wrote. Some would say that you can never attribute a claim to someone unless they actually made that exact claim. For after all (…), you can never really look into the other person's mind, and see what they meant, or intended to say. All attributions, other than exact quotes of claims made, as many would say, are «subjective»" (Walton and Reed 2005: 341).

interpretations is possible, they "lean toward the more modest or defensible claims that a statement might convey".[32] Hermeneutic difficulties may be further dealt with by resorting to additional elements in the process of legislative justification: besides previous contributions by other MPs, preparatory works or materials, the very bill or project upon discussion, and other sources external to debates normally supply a key interpretive aid. Using these sources when it comes to reconstruct the content of legislative debates derives from considering them as a part of a broader justification process.

Finally, this hermeneutic task poses the problem of distinguishing text passages which are argumentatively relevant, i.e. which have a bearing on justification, from those which are not (cf. Neumann 2008: 238). Parliamentary debates on a given bill often include, for instance, contributions referring to other legislative projects, to current political struggles about other themes, or to the role of parliament in society and the self-conception of parliamentarians as lawmakers. In this regard, it may be expected that hearings are utilized to make contributions with no apparent argument in them or with no relevance to the bill upon focus, or it may be the case that MP advance reasons or standpoints without making reference to any particular issue. Whether such contents are connected to legislative justification or not can be decided only upon context, which implies some decision leeway. Yet, even passages seemingly irrelevant should not be discarded: upon a closer look, they may convey meta-arguments, or can operate as discursive "framings" or as a sort of "floating" reasons which might be linked with arguments about one or more of the relevant issues.

8.4.2 Argumentative Confrontations and Undisputed Arguments

Building on this working notion of legislative argument, the task is to indicate what issues are debated and to display all arguments about them. Issues may be controversial (two or more competing positions are held, leading to argumentative confrontations) or not (only one position is defended). Both cases must be accounted for, so that we get all argumentative threads clustered around each issue.

It is in the nature of legislative debates as argumentative discussions that positions and reasons do conflict with each other. Provided that an argument has been adduced, two basic forms of confrontation are conceivable,

[32] See Mucciaroni and Quirk (2006: 214 ff.).

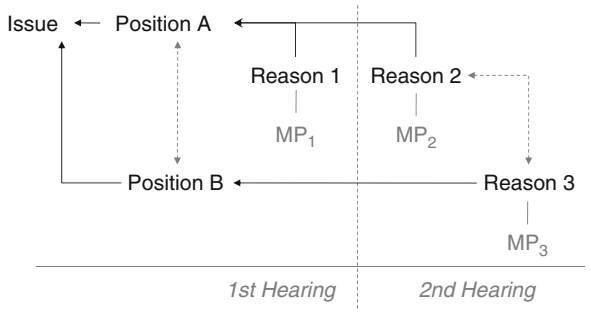

Fig. 8.2 Basic argumentative confrontation

depending on whether that argument is directly challenged or not. Most clearly, arguments can be attacked by counter-reasons, i.e. by explicitly rebutting one or more reasons already offered to support a given position. But arguments may be not replied that way, as this may consume much speech time. Instead, standpoints can just be advanced and justified which are opposed or alternative to others, yet without explicitly challenging them. No directly adversarial—say, dialectical—speech is thus required: arguers may advance positions and reasons without them being an explicit reply to previous arguments. For the sake of illustration, consider a simple scenario in which only two competing, mutually opposing positions are at play, as shown in the above figure (Fig. 8.2).

One should avoid, nonetheless, viewing debates as sequences of disputes between two parties, or between government and opposition. Legislative argumentation often goes beyond such simple scenarios, notably in multi-party and in bicameral parliamentary systems. A plural composition of the chambers may result in more than two positions as to a given issue and produce more complex argument constellations and intertwinements. In terms of legislative justification, this is beneficial inasmuch as it prevents from an unduly reduction of debate terms: whilst two-sided discussions tend to exclude relevant arguments, multilateral scenarios rather increase the informative value of debates. Consider for instance one of the core issues in data retention legislation: how long the so-called "operators" should keep e-communication data available for retrieval upon request of the authorities. In the Spanish legislature, three options were defended: (A) 12 months, which the government could extend up to 24 or reduce up to 6 months if required by circumstances; (B) 6 months; and (C) 90 days, as the scheme in the next page illustrates (counter-reasons are in italics, dotted arrows indicate an implicit contradiction) (Fig. 8.3).

In support of position A, it was first argued that it keeps within the margins set by the EU data retention directive (between 6 months and 2 years),

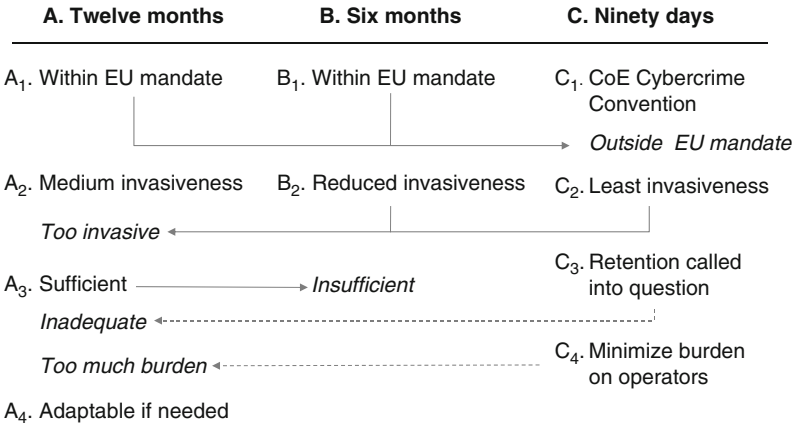

Fig. 8.3 Data retention act: multi-party confrontation over the period of retention

whereby 12 months is claimed to be an intermediate period, much shorter than the maximum allowed by the directive (A_1); also, this middle choice would be balanced or only moderately invasive (A_2), and sufficient in view of the legislative goals (A_3). All this makes a longer term unnecessary; anyway, if special circumstances require so, the government could either extend or reduce that period (A_4).[33] Secondly, a period of 6 months was proposed which would be also within the bounds of EU law (B_1), yet significantly reducing the affection of rights (B_2). Interestingly, an MP holding this position anticipates an objection by calling the effectiveness (sufficiency) of a 6-month-retention into question: she concedes that it could be too brief a period for the purpose of crime investigation, and expresses her readiness to settle for 12 months.[34]

[33] "El texto también resuelve de manera proporcionada (…) el debate relativo al tiempo durante el que las compañías (…) están obligadas a conservar los datos, puesto que (…) doce meses (…) supone un límite claramente inferior al que la propia directiva permitía" (D2, 13261b–13262a, Rubalcaba); "se ha optado por un sistema que podríamos llamar flexible al fijarse así la obligación de que la conservación cese a los doce meses, pero pudiéndose ampliar o reducir" (D3, 4a, Zubía).

[34] "Nos situábamos en la posición más garantista posible de las que la directiva permite estableciendo el plazo mínimo, por su carácter menos restrictivo de los derechos fundamentales" (D1, 3a, Uría); "nos movemos en la posibilidad de que resulte efectivo lo que se pretende con la norma o que, por velar por el valor en este caso de mayor garantía para los ciudadanos, vayamos a establecer unos plazos que luego resulten realmente ineficaces para el fin que se pretende conseguir" (D1, 2b–3a, Uría). "Existen intereses vinculados al valor seguridad que hacen pensar que la operatividad de la medida que se establece a lo mejor resulta muy escasa con solo seis meses, con lo cual (…) no nos parece mal si (…) se llega a la convicción de que debería establecerse el periodo de conservación en doce meses" (D1, 3a, Uría).

The third position was to shorten retention as much as possible, reducing it down to a period of 90 days. The reasons invoked were, on the one hand, to follow the Council of Europe Convention on Cybercrime, as recommended by the EU Parliament (C_1), and, on the other, to minimize the sacrifice of fundamental, especially privacy-related rights (C_2), as well as to reduce burdens and costs on the operators' side (C_4); moreover, data retention as such—the means predetermined by EU law in order to strengthen crime prosecution—was questioned as being ineffective (C3).[35] The proponents of this position were quite aware that it waives the mandate in the EU directive; still, they insisted on it for "philosophical" motives.[36] Anyway, in subsequent hearings, some MPs favoring 90-day retention suggested that they could agree with the 6-month minimum allowed by EU law (B_2),[37] and ended up somewhat reluctantly accepting a 12-month period as a balanced measure.[38]

[35]"[Se] propone la sustitución del plazo de doce meses por el de noventa días, dado que es el que se recoge en el Convenio sobre cibercriminalidad del Consejo de Europa" (D1, 2b, Navarro). "El objeto de nuestras enmiendas es mantener la posición mayoritaria que se tuvo en el Parlamento Europeo en el debate de dicha directiva, donde se rechazó por no ser conforme a los principios de la normativa europea de protección de datos ni cumplir con la jurisprudencia del Tribunal Europeo de Derechos Humanos relativa al derecho a la intimidad, vulnerar el principio de inocencia e imponer unas cargas desproporcionadas a las empresas de comunicaciones para implantar un sistema cuya eficacia puede resultar y resulta de hecho dudosa. Ante estas circunstancias, el Parlamento pidió a la Comisión Europea (…) una duración máxima de conservación de los datos de noventa días" (D1, 4b, Cerdà).

[36]"Somos conscientes de que la directiva (…) establece que los datos deben conservarse por un período no inferior a seis meses", [pero volvemos a reiterar] "la opinión del Parlamento Europeo (…) como parte de nuestra filosofía" (D1, 4b, Cerdà).

[37]"¿Qué está dispuesta a aceptar la ciudadanía en beneficio de la seguridad? Frente a los intereses de los Estados de poder retener los datos durante un periodo de tiempo cuanto más amplio mejor y de retener cuantos más datos, los intereses de la ciudadanía pasan por que los plazos de retención sean los más breves posible, se retengan cuantos menos datos mejor y que (…) no [se] afecte a su intimidad. (…) Esquerra Republicana ha intentado ponderar los intereses, primando (…) las garantías de protección de los derechos fundamentales. (…) Asimismo, el periodo de conservación de datos debería reducirse (…) a un plazo de seis meses fijado por la directiva como plazo mínimo" (D4, 14257a, Oliva).

[38]"Esta directiva fue objeto de (…) polémica, (…) que vuelve a reproducirse hoy aquí, entre el valor supremo de la libertad y las necesidades de seguridad frente a los delitos organizados. (…). Finalmente el resultado de esa polémica es equilibrado en el dictamen, en primer lugar porque, aunque no se ha reducido tanto como nosotros queríamos—(…) noventa días—, sí se ha reducido sustancialmente el tiempo de conservación de datos por parte de las compañías" (D2, 13266a, Llamazares).

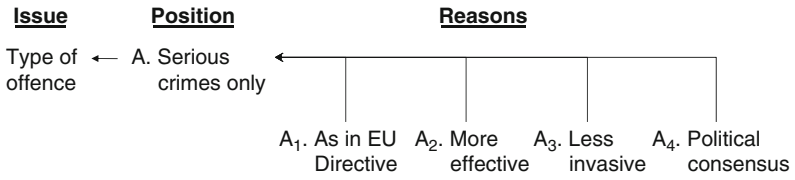

Fig. 8.4 Data retention act: type of offence which justifies data retention (undisputed)

In legislative debates, not all issues are controversial, and we often find undisputed arguments: parliamentarians may agree on one position and still offer reasons for it. They may do so e.g. in order to amend, delete or introduce some provision in the bill, thus advancing counter-arguments against a position laid down in it; or they may utilize debates to argue for an uncontroversial choice already included in the project, making its justification explicit. So we cannot presume that legislative argumentation merely conveys disputes or differential viewpoints, nor address it as always resulting from a confrontation.[39] Turning to our sample debates, we may take for instance the question of (the prosecution of) *what type of offence* justifies the retention of e-communication data (Fig. 8.4). In this case, the bill submitted to the Spanish parliament had opted for "any offence", but all arguers in debates ranged themselves against this proposal and defended a different one, "serious crimes only" (A), backing it on four grounds: besides being the same option taken by the EU directive (A_1), this limitation would imply both a higher effectiveness in crime prosecution (A_2) and a lesser invasiveness on citizen rights (A_3); since all parties agreed on this position, political consensus was also invoked to support it (A_4).

These reasons were insisted on until the last plenary session: MPs seemed to consider this point particularly relevant and dwelled on it (argument repetition). Here, although no confrontation exists, legislative debates render a key function as well, for MPs use them to explain and justify agreements reached in private contacts or in not-minuted committee meetings. It is important, therefore, to note that debates are not only confrontation arenas, say, a matter of winners and losers, but also operate "as an educational tool" (Filler 2001: 323) before the audiences, that is, they can be seen as a pool of reasons providing a justification for legislative choices. This is already the case when argumentative confrontations come up, but becomes most clear in undisputed arguments, i.e. where all participants reach a shared position for which a plurality of grounds is given.

[39] This goes in special for the pragma-dialectical approach (cf. van Eemeren et al. 2006).

8.5 Argument Analysis

To analyze debates in the light of the theory of lawmaking, we need a framework which helps organize the arguments (reasons) advanced in debates and link them to the different levels of legislative justification, so that one can see how these interrelate.[40]

8.5.1 Levels of Legislative Justification

A framework to classify legislative arguments can be derived from almost every multidimensional conception of legislative rationality, but I will take advantage of Atienza's taxonomy of "rationality" levels. This taxonomy proves useful inasmuch as legislative debates generally include arguments about the *language* of legal provisions; about problems of legal *systematicity*; about prospects of *compliance* with the law (say, about "law in action"); about what *the better (legal) means* are to accomplish legislative objectives; and about the *ethical-moral correctness* of legislation. Two slight adaptations will be introduced, however, to refine the analytical framework. On the one hand, further distinctions are added to better grasp the complexity of certain justification levels. On the other, I try to connect these levels with a constitutional layer. As a result, Atienza's taxonomy might be redesigned as indicated in the next page (Fig. 8.5).

Additional distinctions in Atienza's model are needed, in particular, for the levels of legal-formal rationality or systematicity (J2), social compliance (J3) and means-ends rationality (J4). In the legal-systematic layer, it makes sense to distinguish between an *internal* and an *external* aspect, as a law must both contain mutually consistent and coherent provisions (it must not be self-contradictory) and properly fit into the public policy at issue, the respective legal branch or the legal system as a whole (it must not bring about antinomies with existing law)[41]; moreover, since legislative proceedings are legally regulated, observance of *procedural* rules can be included in

[40] This way to look at argument analysis strays from usual approaches in argumentation theory, but could be combined with them. Cf., for instance, van Eemeren et al. (2006: 69 ff.).

[41] The role of legislative integrity or coherence poses questions that cannot be dealt with here. While some authors very much value integrity as a key part of legislative rationality (Wintgens 2006), others cast serious doubts on it (Marmor 2006). Anyway, coherence seems much less important in legislation than in adjudication; see further Atienza (2005: 304).

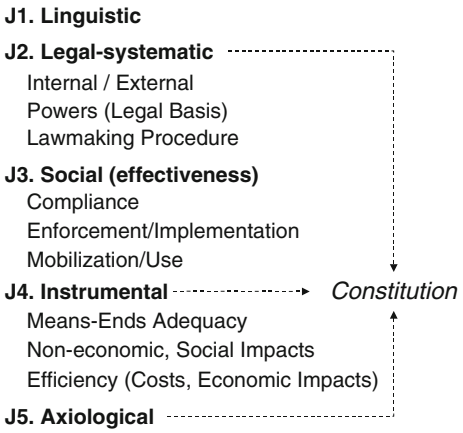

Fig. 8.5 Levels of legislative justification

this level as well. Likewise, what Atienza terms pragmatic or social rationality of legislation can be easily widened to cover aspects of effectiveness other than *compliance* with obligation and prohibition norms, such as *enforcement* or *implementation* and, in case of permissions and power-conferring rules, *mobilization or use* of legislation. Also the layer of means-end rationality must be specified. It looks obvious that statutes are instrumentally rational if they manage to attain the goals they pursue; in such a generic view of scope rationality there lies but an entire constellation of puzzling questions.[42] For now, suffice it to stress that, besides that simple notion of means-ends adequacy, this level entails a number of aspects which could be addressed

[42]Even leaving aside divergences between stated and implied or concealed goals, the difficulties posed by goal-rationality analysis are overwhelming. Just to name a few, it is often hard to exactly determine what the legislative goals are, since these are phrased and debated in abstract and vague terms or include value notions which open them to many interpretations; most objectives are not "smart" (specific, measurable, achievable, realistic and time-dependent). The very distinction between means and ends may become a blur, for there is a multiplicity of ways of arranging them depending on what questions are asked and how they are analyzed (Kaplan 1976: 63). Moreover, goals and means heavily influence each other: one cannot identify policy options "without having a clear idea of the objectives, but equally one cannot lay down detailed objectives without taking into account the specificities of various policy options" (EC 2009: 28). Also, laws rarely pursue one single objective, but many, often inconsistent ones. There is nothing irrational in that—having incompatible goals is, rather, an inherent characteristic of legislation, as this must render an integrative, political function—, but very much complicates the analysis and assessment of legislative success. Finally, even if the focus is on instrumental rationality, values are always in the background of legislative deliberation, as they are in practical reasoning at large (Walton 2007: 206, 234). Axiological reasons are needed to justify legislative goals and to decide on the better means to attain them; and ideological and value judgments pervade discussions about empirical issues,

separately. My approach incorporates only two of them: cost analysis (economic efficiency) and evaluation of non-economic impacts on society, which very much determine the success of legislation. Additional differentiations would be thinkable. For example, linguistic justification could be organized into semantics, syntax and pragmatics; or one could lean on some smart legislation, evaluation or regulation impact assessment (RIA) model to elaborate a very detailed scheme of all questions that wise and responsive lawmakers should consider before passing a law.[43] However, as our target is parliamentary deliberation carried out by regular MPs, this seems not indispensable. In the end, representatives are not experts in all fields, and cannot be expected to argue in highly differentiated terms.

On the other hand, Atienza does not leave any particular room for a constitutional dimension, nor does he clarify which role may be assigned in his model to arguments from the constitution, which can actually be supposed to recur in legislative debates. Typical for nowadays lawmaking is that legislatures must respect, develop or apply constitutional norms (especially principles), and this often implies engaging in legal, teleological and ethical-moral argumentation, hence going through different levels of justification. At least three of them converge into the constitution. First, the legal layer (J2) is affected inasmuch as the constitution is treated as positive law and MPs deploy legal-systematic arguments to interpret it; also, in federal or regional states, as well as in states belonging to supranational political structures (e.g. the European Union), there exists a key constitutional dimension to this layer with regard to legislative *powers (legal basis),* which are often defined in constitutional provisions. Secondly, instrumental rationality (J4) overlaps with constitutionality if the latter is viewed in the light of the proportionality principle or similar constitutional standards.[44] In this light,

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e.g. about the social consequences and the sociological and scientific foundations of legislation. As a result, instrumental and axiological justifications tend to overlap: "it appears that there is no such thing as instrumental rationality. That is, there is no distinctive set of deliberative standards that are involved in getting us to reason correctly from ends we have to means, and that are different from those that are involved in reasoning about which ends to have" (Raz 2005: 26).

[43] Anyway, such models use to boil down to a core set of questions: what is the problem, why a legislative intervention is needed, what are the objectives, what are the options, what are the impacts and how do those options compare (cf. EC 2009: 16, 21 ff., 2011: 13 ff.).

[44] Roughly speaking, proportionality covers three criteria. First, any measure constraining a basic right must contribute to the realization of a constitutionally supported principle, which excludes limiting the former without promoting the latter (suitability test). Second, that measure must be necessary, i.e. must not be adopted if there is any other

goal-rationality is the place to discuss proportionality in a wide sense, that is, the *adequacy* and *necessity* of the legislative measure.[45] Finally, constitutional arguments can be connected with the ethical-moral justification (J5). It is on this level where proportionality in the narrow sense is to be discussed, i.e. where the positive affection of some constitutional principle is balanced against the negative affection of another, as this calls for value judgments and trade-offs. When it comes to justify legislative goals or to decide policy alternatives, moral-ethical and constitutional reasons tend to flow together, since virtually any societal (positive morality) or critical-moral value can be anchored in the constitutions of mature democracies. So, parliamentarians may base many arguments both on an ideal of justice or on a constitutional provision, o refer indistinctly to certain values as ethical-moral or constitutional. This is also why I suggest renaming this level "axiological justification", so that it covers both ethical-moral and constitutional values.

8.5.2 Matching Arguments to Levels of Justification

In order to frame argumentation within our multidimensional model of legislative justification, two paths may be followed. The easiest one is to examine whether issues clearly falling under those dimensions are tackled: Were wording (J1), legal-systemic (J2), social effectiveness (J3), goal-attainment (J4) or value (J5) issues debated? If e.g. an obvious compliance problem was addressed, then all related arguments could be assigned to the layer of social effectiveness (J3).[46] Many issues, however, may not belong to one specific

option which brings about the same or a similar realization of the goals pursued and entails a lesser damage to the right or rights at issue. Finally, proportionality in the narrow sense requires that the negative value of the affection of a fundamental right is counterweighted by the positive value of the increase in the realization of the colliding principle. For an overview, see e.g. Alexy (2011: 11 ff.) and Sartor (2010: 194 ff.).

[45] Necessity is herewith conceived as "Pareto-necessity", which is not "the only possible understanding of the notion of necessity, but it is the one that allows fully separating the assessment of necessity from the assessment of the relative importance of the competing values at stake" (Sartor 2010: 199); the latter is a question of proportionality in the narrow sense.

[46] In debates on the Spanish DRA, for example, some issues clearly belonged to one level, so that argumentation did not go beyond it. This was the case of *compliance* arguments about the period of *vacatio legis* (J3) and of *legal* arguments about the legal rank which better suited the act (J2).

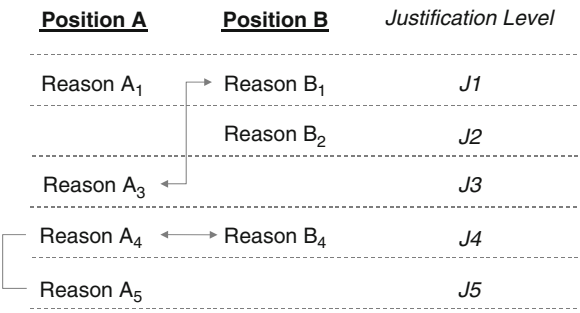

Fig. 8.6 Arguments and levels of justification

level, or it may be difficult to say to what levels they can be ascribed. Moreover, MPs do not proceed orderly by arguing on all justification dimensions one by one. Rather, they pick up issues which they consider important or controversial and spell out the reasons for their position about them, which normally involves a variety of justification levels. MPs may hold e.g. that one given provision in the bill must be amended for both legal reasons of consistency and instrumental reasons related to legislative success. So it seems better to follow another path: once we have identified issues and arguments about them, reasons (not issues) can be ascribed to levels of justification. So we will have linguistic, legal-systematic, effectiveness, instrumental and axiological reasons, as in the example above (Fig. 8.6).

On the linguistic layer (J1), the focus is typically on the clarity (obscurity), accuracy (vagueness), comprehensibility (incomprehensibility) and grammatical correctness of the wording. On the legal-systematic layer (J2), reasons have mainly to do with conflicts of norms and legal hierarchy, problems with the internal consistence of the statute, legislative powers, legal certainty and breaches in parliamentary proceedings. The layer of social effectiveness (J3) covers filters or barriers affecting compliance, expectations about enforcement and mobilization prospects. Goal rationality (J4) reasons concern the adequacy, sufficiency,[47] and necessity of the legislative measures, including their social and economic impacts. Finally, value reasons are to be accorded to the level of axiological justification (J5). There may be borderline, doubtful arguments in which reasons could be ascribed to various justification levels. The most recurrent example is probably that of arguments related to public support (arguments from democracy, from majority, from public opinion, from representativeness…). Public support might be understood either as a social fact or as a justificatory ground. In the first case, it is taken

[47] Atienza (1997) places completeness on the level of legal-systematic rationality (J2), whilst I consider it as an aspect of scope rationality, for a statute can be deemed incomplete only in relation to the scope of its goal.

as one of the empirical factors determining people's behavior and thus the effectiveness (J3) or success (J4) of the law. In the second case, social morality is resorted to as a democracy-based reason (J5). Analytical problems can also be expected in distinguishing linguistic (J1) from legal-systematic (J2) reasons; or in deciding whether breaches of legislative proceedings can be taken as violations of a legal rule (J2) or as the waiving of democracy requirements (J5).

Let us pick one example of a complex, multi-level argumentative thread from the debates on the Spanish DRA. Now the question at stake was the extent of the bill's scope of application. Two positions were held: (A) to limit retention to telephony (fixed, mobile, VoIP) and email, as laid down in the EU directive; or (B) to extend it to any provider of public access to Internet (cybercafés, public wifi providers, universities and the like), obligating them to keep a register of their users' identity and access details. Proponents of the second position wanted to avoid an alleged gap or loophole in the law, which would emerge if public access points are excluded. Their point strongly relied upon the stated goals of the DRA: to strengthen crime prevention and prosecution in the field of electronic communications. The scheme in the next page (Fig. 8.7) may help follow argumentation about this issue.

In this case, all arguments revolved around one main point: whether the limitation of the bill's scope to email, VoIP and regular telephony was sufficient or not to attain the legislative goals. The confrontation begins on level J4 with the objection that the bill's choice is an inadequate—because shortcoming—means: passing the bill would create a loophole and undermine the whole legislative policy in terms of security. If the goal is to prevent and better prosecute serious offences, and serious offences can be committed from places other than the ones envisaged (there would be clear evidences that public access points are used by criminals and terrorists), then the bill leaves a relevant room unprotected; to prevent this gap, public Internet access points should be subject to retention duties as well, which would make the bill a better, more powerful means (B_1).[48] The objection continued on the level of legal systematicity (J2), where MPs pointed at an internal incongruence in the law: it should cover either all access points or none, but, instead, it introduces an unduly differentiation between public and private ones (B_2). In the same vein, it would be also incongruent to obligate operators to register users of prepaid cards while leaving public access points untouched: in doing so, the DRA becomes a safety net riddled with holes. This internal-systematic aspect thus reinforces the loophole

[48]"Consideramos necesario identificar los cibercafés y las zonas Wi-Fi (…), porque Internet no significa impunidad, que eso es lo que quisieran seguramente los hackers. (…). Si los cibercafés o los puntos de acceso público (…) no se recogen en esta ley habrá una franca impunidad" (D3, 2b, Ramírez).

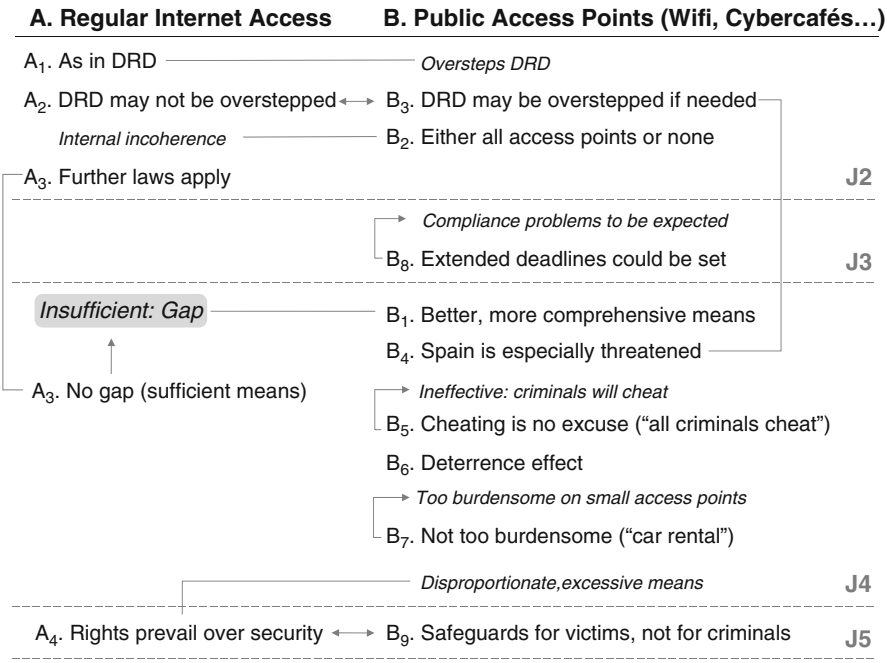

Fig. 8.7 Data retention act: confrontation over the bill's scope of application

objection: incomplete security measures result in no security, so that the bill, as designed by the government, would be a self-frustrating legal instrument—which was criticized as "absurd" and "not reasonably serious".[49]

[49] "No tiene sentido que obliguemos a las operadoras telefónicas incluso en las tarjetas prepago y, sin embargo, que dejemos impunes en el absoluto anonimato a los cibercafés, a las zonas wifi o a los locutorios de teléfono y de Internet, sin ningún control" (D1, 7a-b, Echániz); "o todos o ninguno; pero es absolutamente absurdo dotarnos de unas herramientas que, de entrada, ya son insuficientes o dejan importantes agujeros negros (…). Lamentablemente el proyecto se queda corto, porque se limita únicamente a los operadores, a determinados servicios y a determinados puntos de acceso a las redes" (D2, 13265a, Echániz); "se ha aludido a la seguridad, pero una seguridad a medias o una seguridad en partes no nos parece razonablemente serio" (D1, 7a-b, Echániz); "nadie a partir de este momento intentará para delinquir utilizar ni el teléfono móvil, ni un teléfono fijo, ni su línea ADSL. Lo que hará será irse a un cibercafé o a un hotel" (D1, 9b, Echániz). "No tiene sentido blindar los datos de las operadoras ni de las tarjetas prepago y dejar abierto, sin embargo, el agujero negro de estos centros, porque la delincuencia va a migrar muy rápidamente a esos canales. Es absurdo contemplar unos y dejar fuera otros, porque lo que se está haciendo es una labor de desplazamiento de canal (…) Si bien se ha impuesto a las operadoras de telefonía móvil la obligación de identificar las tarjetas prepago llevando un libro de registro, no existe una obligación similar para los administradores de los cibercafés o de las zonas Wi-Fi, por lo que seguramente los delincuentes que quieran seguir actuando de forma anónima dejarán de usar aquellas para utilizar estos lugares" (D4, 14258a-b, 14259a, Echániz).

Going back to level J4, it was also argued that nobody planning to commit a crime will use private phone or ADSL lines any longer, but public Internet access points (e.g. cybercafés): the law—some MPs warned—will provoke a sort of "migration effect", for criminals will just use these uncontrolled channels, which is tantamount to impunity.

Supporters of the limited scope claimed that their position better matches the EU directive (A_1), and advanced a legal counterargument on level J2: overstepping the EU mandate is not legally possible (A_2). The directive does leave some leeway, but does not permit member states to redefine its scope: this would be out of question.[50] In reply to that, however, the directive was presented by the other side as being just a harmonization tool setting minimum standards. Seen in this light, an scope extension or even stronger measures would still be possible, as long as the achievement of the legislative goal is jeopardized or the particular situation of a given member state makes it necessary (B_3). Both conditions would apply. This legislation—it was argued—responds to the terrorist attacks in London and Madrid; it seeks to preserve security, and does not preclude the adoption of measures beyond the directive's scope provided that it is required to achieve that goal.[51] On the other hand, it should not be overlooked that terrorism and cybercrime particularly touch Spain (B_4)—a number of press headlines were mentioned to illustrate it.[52] Whilst supporters of the restrained position did share concerns about security, they argued that extending the bill's scope to public access points would be excessive.[53] In their view, the gap objection missed the point. For this act is

[50] "Estamos en presencia de una trasposición que admite margen de maniobra, pero no admite hacer una ley al margen de esa directiva" (D1, 9a, Rascón).

[51] "La actual redacción no garantiza esa máxima de que no puede haber impunidad en la red. (…) La Directiva (…) como todo el mundo sabe, se impulsa a raíz del atentado terrorista (…) en Londres y viene a intentar dotar de los instrumentos legales imprescindibles para la lucha contra el terrorismo y la delincuencia organizada. (…) [C] onviene recordar que la directiva europea es un instrumento de armonización, de base y, por tanto, de mínimos, por lo que en cada Estado miembro se pueden adoptar, además, las medidas que se estimen pertinentes para la consecución efectiva y real de los fines previstos en la directiva, que dependerá de las circunstancias y riesgos de cada país" (D3, 6a-b, Ramírez).

[52] "Algunos titulares de prensa que ilustrarán (…) sobre la importancia de los argumentos que hemos defendido (…): el cabecilla de una red de pederastas montó un cibercafé para contactar con sus víctimas. Una testigo protegida: vendimos treinta tarjetas prepago al locutorio (…) para el 11-M. La Guardia Civil asegura que algunos cibercafés son foco de delitos informáticos" (D2, 13265b, Echániz).

[53] "Estamos absolutamente convencidos del fin loable que tienen sus enmiendas (…), pero entendemos que los métodos de control de estos accesos a Internet son excesivos" (D2, 13267b, Fuentes).

not the only legal instrument against cybercrime: further laws can be and are applied to prosecute crimes committed from public Internet connections (A_3).[54] What is claimed to be a loophole would already be covered in less invasive ways.[55]

Yet, this reply did not convince the proponents of a broader scope: the maxim underlying this bill—so the objection went on—is that no impunity can be tolerated, and this maxim would be violated if the scope of application is kept limited. Against this, two additional arguments were adduced by the other side. First, a compliance problem (J3) was predicted: it will be difficult for small shops and cybercafés to register who and when uses their Internet connection. Second, this obligation would be of no avail in terms of security (J4): anyway, criminals will cheat.[56] This reply was contested on both levels. As to the compliance problem, it would be not that difficult to keep record of users of public access points (B_7): car rental enterprises carry out such control with no difficulties; moreover, accessing the Internet from a public connection normally requires some identification, so that it would not entail any significant complexity to comply with the law. In sum, operative

[54]"Ha de tenerse en cuenta al menos en clave jurídica, que esta ley viene escoltada por otras tres leyes (…): la Ley General de Telecomunicaciones, la Ley de prestadores de servicios de la información (…) y (…) la Ley Orgánica 15/1999, de protección de datos de carácter personal. Lo digo porque, aunque no se mencione en esta ley—que se menciona y con mucha reiteración—la existencia de esas leyes, es obvio que están vigentes. Por tanto, aunque muchas condiciones de esas tres importantes leyes que escoltan a esta trasposición de la directiva no aparezcan, están vigentes y tienen que aplicarse. Lo digo para salir al paso de algunas de las carencias que, sobre todo, el portavoz del Grupo Popular ha manifestado. (…) Esta no es una ley panacea que resuelve todos los problemas en esta materia, sino un instrumento jurídico más" (D1, 9a, Rascón); "los objetivos que se persiguen con este excesivo control pueden perfectamente lograrse por otros medios distintos a los que esta ley contempla. Esta es una ley más que viene a apoyar la seguridad en Internet, pero no es la ley definitiva. Hay otros medios, hay fórmulas que podrían permitir la investigación de los delitos en Internet" (D2, 13268a, Fuentes).

[55]"Este es un instrumento legal más para conseguir esos datos, pero no es el único. La policía está trabajando en otras muchas cosas y estos datos les pueden servir y los pueden conseguir a través de otro circuito en donde la medida no es tan—permítaseme la expresión—invasiva (…). Se trata de un instrumento jurídico importante y novedoso porque aporta certeza y seguridad a los operadores de telecomunicación que hasta este momento no la tenían, pero no es el único" (D1, 9a-b, Rascón).

[56]"¿Usted se imagina a hoteles y a cadenas de todo tipo donde hay punto wifi con un control manual de un libro de registros para conseguir el solo dato de la identidad del usuario de 6 a 7 de la tarde, máxime teniendo en cuenta que (…) a lo mejor se encuentra con la sorpresa de que quien aparece identificado no es el personaje al que se está buscando? Esos delincuentes utilizan otras estrategias (…) y la más esencial y común de todas ellas es falsificar ese dato de identidad" (D1, 9a-b, Rascón).

and technical difficulties would be too feeble an excuse[57]; and, even if there were compliance problems, it would be possible to set extended deadlines or to introduce some flexibility (B_8).[58] For its part, the cheating argument was deemed nonsensical: if taken seriously, it would undermine any legal duty to identification[59]; in contrast, forcing users to identify themselves would have a deterrence effect and hence increase security (B_6).[60]

This defense made supporters of the bill back away from the uselessness argument. That criminals cheat—it was clarified—was not meant to be the core reason against extending the bill's scope: rather, the point was that the alleged security gaps can be filled by other means the police use to gather evidences, so that imposing additional duties on wifi providers or cybercafés would prove unnecessary.[61] Furthermore, such duties would imply too strong

[57] "[En cibercafés, zonas wifi o locutorios] es relativamente sencillo (…) que el titular sea responsable del libro de registro de quien accede y el que asigne el *password*, el código de entrada; (…) porque, en definitiva, una zona wifi o un cibercafé no es otra cosa distinta que alquilar un coche, en el que el dueño anota en un registro a quién se lo ha alquilado, de forma que si se produce una multa tiene perfectamente la información de a quién pasarle precisamente esa multa" (D1, 7a-b, Echániz); "es realmente sencillo hacer seguros esos espacios a través de la identificación del usuario y la asignación de un *password* o de una clave de acceso, y desde luego a mi grupo parlamentario no le sirven las excusas (…) sobre complejidad operativa o incapacidad técnica" (D2, 13265a, Echániz).

[58] "No nos parecen razonables las excusas que se han puesto de manifiesto como complejidad operativa o incapacidad técnica, porque no es verdad. Se puede dotar de nuevos plazos y de mayor flexibilidad para el cumplimiento de este precepto. También se ha aludido a la seguridad, pero una seguridad a medias o una seguridad en partes no nos parece razonablemente serio" (D1, 7a-b, Echániz).

[59] "En un hotel (…), para conseguir la *password* con la que conectarse necesitas identificarte y, por tanto, no es una complejidad adicional sino algo que ya existe en este momento. (…) Poner como excusa la posibilidad de utilización de un DNI o una identificación falsas es un poco ridículo porque por ese mismo argumento ningún instrumento de persecución del delito podría habilitarse (…) puesto que siempre existe la posibilidad de que uno se identifique de forma fraudulenta" (D1, 9b, Echániz).

[60] "Dotar estos espacios de medidas de seguridad (…) es ponérselo difícil a los delincuentes, es disuadirles y también impedir que haya espacios de absoluta impunidad" (D2, 13265a, Echániz).

[61] "La excusa no es esa. (…) Lo que usted busca por aquí sacrificando muchos otros intereses se consigue fácilmente por un camino que conoce bien la policía. Un punto Wifi es un punto de conexión a una red, a la que accede la policía por distintos sitios. Ese es un medio más de averiguación, no es el único. Si partimos de la base de que este es el instrumento salvador que nos va a llevar a poder descubrir todo tipo de delitos a través de Internet, estamos muy equivocados. En Internet se cometen muchos delitos (…). Pero para poder descubrir el origen y la autoría de esos crímenes están Internet y otros medios policiales que son permanentemente utilizados. Eso es lo que quería decirle. La excusa no es lo de la falsificación; (…) la policía utiliza otros muchos medios de prueba"

a restriction on the citizen's rights. Regardless of whether a compulsory identification of users is helpful or not, it would be disproportionate for a rule of law state: as one MP pointed out, "we all want more security, but not at any price".[62] In contrast, keeping the act's scope as it had been defined in the bill would minimize the affection of fundamental rights (A_4). Otherwise these would be unduly curtailed. If the scope were extended, "the relation between the goal pursued and the means proposed would result in a clearly unfavorable balance" for communications privacy; although the purpose of promoting security is well justified, the extension of the bill's scope would be excessive in comparison with the increase in security, leading to an all-surveillance, police state.[63] And, besides privacy rights, other legitimate interests would be damaged as well: broadening the scope and obligating businesses that offer public access to the Internet to keep a detailed user register would put a disproportionate burden on them.[64] This latter claim went unchallenged, but the invocation of citizen's fundamental rights was indeed contested, namely on the same axiological (constitutional) level: what an extension of the bill's scope for the sake of security tries to safeguard would be precisely our liberties. Guaranties—it was argued—should not be just for criminals, but also for victims and law-abiding citizens; and, in this case, a lesser invasiveness in fundamental rights would entail too

(D1, 9b-10a, Rascón). "Los objetivos que se persiguen con este excesivo control pueden perfectamente lograrse por otros medios distintos a los que esta ley contempla. Esta es una ley más que viene a apoyar la seguridad en Internet, pero no es la ley definitiva. Hay otros medios, hay fórmulas que podrían permitir la investigación de los delitos en Internet" (D2, 13267b, Fuentes).

[62] "Sería una desproporción para un Estado de derecho y nos situaríamos casi en un Estado policial o parapolicial que no tendría la utilidad que se busca. No tengo duda de que la queja es bienintencionada; (…) todos queremos más seguridad, pero no a cualquier precio" (D1, 9a, Rascón).

[63] "Los métodos de control de estos accesos a Internet son excesivos. La relación entre el fin perseguido y el medio que en este caso pretenden actualizar arroja (…) un balance claramente desfavorable al derecho a la intimidad en las comunicaciones y confidencialidad de los datos de los ciudadanos (…). Podemos caer en el excesivo control, en la sensación de que estamos ante un Estado policial si intentamos regular todo lo que pretenden" (D2, 13267b-13268a, Fuentes).

[64] "Sería ir demasiado lejos, sería imponer a (…) un cibercafé o sencillamente un lugar donde venden chuches y han optado por poner un punto de acceso a Internet (…) unas obligaciones que sacrifican otros intereses y que son desproporcionadas para el fin que se busca" (D1, 9b, Rascón).

heavy a sacrifice of citizens' security and hence on their liberties (B_9).[65] Charitable interpreters may find in this discussion about the gain in security versus the loss in privacy—and also in the economic freedom of enterprises—traces of a weighing of constitutional principles.

8.5.3 Relations and Adjustment Between Justification Levels

As discussed in Sect. 8.2, legislative rationality is not merely about taking several dimensions of reasoning into account; it is also about how these get articulated. Both aspects are reflected in lawmaking debates. We have seen that argumentative threads may be pretty complex and usually go through several justification levels. When disputes arise within one level, MPs may try to strengthen their standpoint, to change the focus of the discussion, or just to escape confrontation by resorting to another level. And multidimensional arguments also appear in undisputed issues: MPs may e.g. advance reasons stretching over different dimensions in an attempt to make the justification of a given choice more robust. This shows that, after reconstructing deliberation and matching reasons to the various levels of legislative justification, the problem remains of establishing their mutual relations. Debates may then be analyzed to find out, for example, whether and how reasons of social effectiveness (J3) or legal systematicity (J2) relate to those of moral correctness (J5), what interplay can be observed between linguistic accuracy or vagueness (J1) and the attainment of legislative goals (J4), and so forth. This would reveal the relative weight of each kind of reasons in the discourse of legislative justification, as well as the combination or adjustment of criteria reached at the end of debates.

[65] "La seguridad garantiza que se pueda actuar con libertad (…) y no al revés, porque, si no, estaremos dejando espacios de impunidad, es decir, libertad para los criminales que, en definitiva, limitará en el futuro nuestra libertad, la de todos, (…) las garantías podrían ser para los criminales y no para los ciudadanos y las víctimas" (D1, 6b-7a, 7b, Echániz); "esta ley puede ser positiva, pero lo puede ser en mayor medida si evitamos espacios de impunidad (…), si somos capaces de garantizar la prevención del delito y que no se eternicen las investigaciones, si somos capaces de (…) que las Fuerzas y Cuerpos de Seguridad del Estado no tengan más que obstáculos para poder defendernos, y sobre todo si somos capaces de que las garantías no sean para los criminales, contra nuestra libertad, sino para las víctimas y para todos los ciudadanos en general" (D2, 13265b-13266a, Echániz).

Between levels of justification there may be at least three basic types of relation: continuity, independency and conflict.[66] *Continuity* implies that an increase (or a decrease) in the fulfillment of one justification criterion leads to a correlative increase (decrease) of rationality in another, or, more broadly, that a reason belonging to one justification dimension makes part of a reason belonging to another. Consider the argument that a statute will encounter social opposition leading to noncompliance (J3) and hence will not achieve its ends (J4), or that the societal need of passing a power-conferring statute is challenged (J4) because the number of expected users will be insignificant (J3). In both cases legislative success and goal attainment is claimed to be conditional on the social realization of the law (compliance, mobilization). Another typical instance of continuity may be found between the linguistic and the legal-systematic layer, in the sense that a clearer and more accurate wording normally contributes to legal certainty.[67] A relation of *independence* means that the greater or lesser degree of "rationality" on one level does not affect any other, i.e. that the fulfillment of one justification criterion has no direct connection with the fulfillment of another. For example, prospects of social compliance with the law (J3) may be independent from axiological justification (J5) or from legal-systematic considerations (J2).[68] Finally, a *conflict* arises if the increase (or decrease) of rationality on one level entails a correlative decrease (increase) on another. In this regard, the tension between legal-systematic (J2) and goal-rationality or political (J4) reasons, or the tension between economic efficiency (J4) and axiological considerations (J5) are perhaps the most conspicuous ones; but, as discussed above, each dimension of legislative justification may conflict with any of the others—e.g., when trying to avoid sexism in legislative language, linguistic reasons (J1) supporting the accuracy and brevity of wordings often collide with moral or constitutional reasons of equality (J5). Although all three kinds of relations are relevant, conflicts seem to be the most important from the standpoint of rational lawmaking: the final adjustment between justification dimensions—and hence the reasonableness of the law—largely depends on how such conflicts are solved.

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[66] Cf. Atienza (1997: 58 ff.) and Ziembinski (1985: 148–49); the analysis of these relations may well be combined with that of the syntax or structure of arguments (cf. van Eemeren et al. 2006: 70 ff.).

[67] Open-ended norms and principles may contribute to consistency and legal certainty as well, and even more than rules (Braithwhaite 2002: 47 ff.).

[68] Whether or not a forthcoming law will be used or complied with may also depend on its axiological or legal-systematic properties. Compliance problems may be due to axiological shortcomings, and legal systematicity likewise has a bearing on compliance and mobilization.

All three relations can be observed in the confrontation over the DRA's scope of application (Fig. 8.7). Take for instance those involving legal-systematicity (J2). That the bill's scope is defined in line with the EU directive (A_1) and cannot be broadened any further (A_2) could form an *independent* argument for the limited-scope position. Amongst the whole set of reasons advanced in support of this standpoint, those of legal systematicity have no apparent relation with the other justification levels. Yet, if one takes on the perspective of the opposite side, this legal argument gets in *conflict* with a core policy objective on level J4: by keeping within the bounds of the EU directive—e.g. leaving cybercafés unaffected by the law—a gap would emerge which hampers the attainment of security goals, thus rendering the bill insufficient (B_1). In reply to this, however, proponents of the limited scope argue that the current legal framework already enables the prosecution of crimes committed from public Internet access points (A_3). Here, the alleged loophole is denied, and the bill deemed sufficient on level J4, upon the basis of—i.e. in *continuity* with—a systematic argument on level J2. Turning again to the other side, the legal argument (J2) that national law may overstep the margins allowed by the EU directive in order to respond to an intense security threat does continue on the level of goal-rationality (J4), where the special security needs of Spain are considered in connection with the loophole argument.

Eliciting these relations does not only give an insightful perspective on the content and structure of single argumentative threads, but also shows how MPs handle different justification criteria throughout the course of deliberation, with respect both to single issues and to the statute as a whole. As explained above, rational lawmaking models normally include some kind of "meta-level" where the articulation of the different aspects of legislative justification is to be discussed. When analyzing parliamentary deliberation, this articulation can be seen as a sort of adjustment or "balance" between reasons from various levels. Such an overall justification, in the end, depends on how the different levels are combined.

In parliamentary debates, some cases of interplay between levels of justification may appear which deserve special attention. Probably the most interesting one is *legislative balancing*. Balancing or weighing is a method of reasoning deployed to justify which one of two (or more) normative principles ought to prevail—and to what extent—over the other(s) when they come into conflict. Both fundamental rights and collective goods laid down in constitutions can be construed as normative principles, so that balancing might be used if collisions between them emerge at the lawmaking stage. This happens to be quite common in current constitutional systems, where

the scope of fundamental rights has undergone a noticeable expansion and nearly all legislative decisions may affect them. Besides, their protection or promotion is a legal requirement subject to the oversight of supreme or constitutional, or even international courts: if legislation interfering with basic rights is bound by some constitutional-interpretive standard, judges may strike down a law because of a "wrong" balancing, so that this issue becomes critical for lawmakers. Amongst such standards, the principle of proportionality is the most developed candidate to approach legislative balancing. Up to date, however, legal scholars have addressed balancing and proportionality from the point of view of external reviewers (judges, typically), whereby balancing arguments behind legislative decisions often remain opaque. Yet, legislators also engage in constitutional interpretation,[69] and, when it comes to decide on competing principles, they may well lean on balancing and proportionality schemes. This is not to say that parliamentarians do that whenever legislation interferes with fundamental rights or that they weigh constitutional principles explicitly, or as judges and legal scholars do. The kind of constitutional weighing they carry surely diverges from judicial or dogmatic methods.[70] But balancing can be often upon focus—at least in outline—in many legislative debates, be it in view of a collision between basic rights, or between them and collective goods. In either case, the principle of proportionality may come to play and, with it, a particular intertwinement of justification levels. In order to determine whether or not a legislative measure violates the principle of proportionality, arguments about goal rationality (J4) are central: the suitability of the law to attain the (constitutional) goals which are pursued is an indispensable requirement on this level of justification, and likewise crucial is the requisite of necessity, in the

[69] "The constitutional arguments made in these [Senate] debates are usually quite truncated. They contain few quotations from cases or even the Constitution, and, of course, no citations. (…) In some ways, too, the debates are telegraphic, with senators making shorthand allusions to more elaborate arguments they do not develop fully", but "nearly all the debates contain the skeletons of decent constitutional arguments, and sometimes there is even a bit of flesh on the bones" (Tushnet 2003: 460).

[70] Even though legislative balancing proves little elaborate, one cannot overlook "that also legal balancing often is done rather roughly and superficially, and that elaborated models of balancing are not necessarily applied in law cases and legal doctrine"; still, whilst courts "have contributed a lot the development of the methods of balancing", some analysis of parliamentarian debate "shows that it could hardly provide a basis for a similar development" (Sieckmann 2010: 83).

sense that between two measures equally promoting the legislative goals, the one is to be chosen which less affects constitutional rights or principles—without value tradeoffs. Under this angle, the study of the reasons about effectiveness and impacts leads to a legal-constitutional examination of the proportionality of legislative measures. And balancing often covers value tradeoffs as well, so that justification enters the axiological level (J5). If MPs tackle proportionality in the narrow sense, arguments about normative correctness must be advanced to justify the comparative assessment of the positive and negative affections of constitutional values involved in different legislative alternatives. Also, balancing may extend to further justification dimensions. In particular, legal-systematic reasons or legal-interpretive standpoints (J2) and considerations of social effectiveness (J3) may be needed to properly weigh the colliding principles. When it comes to examine proportionality in lawmaking, all relevant circumstances of the "legislative case" must be taken into account, and this may lead to consider different levels of legislative justification. In this sense, proportionality as the key constitutionality requirement when fundamental rights are at stake operates as a cross-dimensional yardstick which very much resembles what Atienza terms "reasonable adjustment" (J6) of different forms of lawmaking rationality.[71]

[71] Such a reasonable, overall adjustment is precisely what some Spanish MPs proudly claimed to have achieved: "el texto salva los equilibrios que tiene que salvar y es técnicamente correcto" (D2, 13266b, Uría); "todos los intereses en juego, prevaleciendo siempre los intereses de los ciudadanos, han sido tenidos en cuenta, (…) con todas las garantías que establece la Constitución" (D1, 8b, Rascón); "este proyecto ha resuelto satisfactoria y adecuadamente el equilibrio que debe existir entre las obligaciones que se imponen y los derechos que pueden verse afectados" (D2, Rubalcaba,13262a). These favourable conclusions seemed to result from a twofold balancing. On the one hand, MPs discussed some core provisions (type of offences to be prosecuted, retention period, and scope of application) in the light of proportionality, focusing on the affection of privacy-related rights (further basic rights and even non-constitutional principles were considered as well). On the other hand, they made an overall assessment taking further aspects of the bill into account and deeming it "balanced" in result. What MPs did here is balancing in literal sense, i.e. putting merits and problems in the wage, and broadly estimating whether the outcome was balanced or not. Arguably, they did not strike the alleged reasonable balance, at least if one compares these debates with the parallel ones in the German parliament, let alone the argumentation of the German Federal Constitutional Court, including dissenting opinions, in its March 2nd 2010 decision on this issue (1 BvR 256/08). Anyway, this is a matter of argumentation quality.

8.6 Quality Assessment

Along the previous sections, I have adhered to a pluralistic notion of legislative rationality and to a justification-oriented notion of argumentation as the practice of giving reasons, and suggested some guidelines to reconstruct lawmaking deliberation accordingly. A next task would be to determine when arguments advanced in parliament, or whole legislative debates, are actually good (better) or bad (worse) ones—when they may be said to provide a (more or less) proper legisprudential justification. If the focus shifts from reconstruction and analysis to quality, some set of critical-normative conditions must be defined which make it possible to ascribe a greater or lesser justificatory strength in terms of rational lawmaking. It is not clear, though, what those conditions might be. In this respect, a twofold issue has to be solved: what does *quality of legislative argumentation* possibly mean, and what is a proper and workable *approach to assess* or even *to measure* it? As mentioned, it is beyond the scope of this article to settle this issue, but I will at least try to explore what an account of quality might look like by going over some approaches to argumentation and deliberation quality.

Perhaps the oldest way to assess the quality of argumentation in lawmaking contexts consists in detecting fallacies, as Bentham extensively did.[72] Such a fallacy approach seemingly provides an attractive evaluation method—politicians and parliamentarians are often regarded as champions of fallacious reasoning. In principle, the search for fallacies does not presuppose endorsing any specific argumentation theory, but rather relies on general criteria of rationality, logical correctness and critical thinking. Moreover, nearly all logic textbooks and argumentation theorists since Aristotle do address this topic, so that one could benefit from a wide range of catalogues of formal and informal fallacies. But I wonder how far we can go this way. First, apart from some patent cases it could be problematical to detect when a fallacy has been made in the course of legislative deliberation. Whether an argument is to be labeled fallacious or not can depend on the argumentative context and subject-matter, and also on the appraisal framework which is applied or the theoretical orientation followed by the evaluator.[73] And not every

[72] Bentham's (1843: 5) concentrates on those fallacies employed on the occasion of "the formation of a decision procuring the adoption or rejection of some measure of *government*: including under the notion of a measure of government, a measure of legislation as well as of administration".

[73] See e.g. Atienza (2006: 108, 274–75). The very definition of fallacy proves highly controversial. An overview on this topic may be found in Bordes (2011).

argument we discard as fallacious in a given context (court proceedings, academic discussion, etc.) must necessarily be rejected in legislative debates. Second, the presence or recurrence of fallacies in legislative debates can be a quality indicator only inasmuch as they go unchallenged or remain uncorrected. Third, the impact of fallacies on the rational justification of laws may be lesser than expected. In the same thread we might find certain fallacies (say, *ad hominem* attacks) together with impeccable arguments for or against a given provision. Finally, unless we broaden the concept of fallacy to cover any flaw or deficit in argumentation, fallacy tests do not exhaust quality assessment: other faults in legislative justification may be qualitatively significant. Blundered or uninformed reasons, logical contradictions or false beliefs could result just in bad or weak arguments, not in fallacies. In spite of that, the fallacy approach to lawmaking debates paves the way to further evaluation options based either on criteria and rules for argumentative goodness, or on argumentation schemes—argumentation theorists often define fallacies as breaches of such criteria or as defective applications of argumentation schemes (van Eemeren et al. 2006: 119 ff.).

Secondly, debates may be assessed by leaning on pre-existing normative models of argumentation.[74] These establish qualitative standards defining what a good *argument* is (where arguments are seen as the product of argumentation) or rules for the argumentative *process* (rules that should govern argumentative exchanges). A good example of the former is Johnson's (2000) pragmatic theory of appraisal. He distinguishes criteria to assess the structure or "illative core" of arguments, i.e. the connection of reasons to target claims, and additional ones concerning the "dialectical obligations" which a rationally persuasive argument should meet.[75] The first set includes acceptability, truth, relevance and sufficiency[76]; the second refers to the ability of the arguer to deal with standard objections and criticism, and address how well she deals with alternate positions and anticipates consequences and implications of her argument. Among the normative models of argumentative process, the most outstanding one is probably that of "critical discussion" designed by van Eemeren and Grootendorst (1984, 2003) and the pragma-dialectical theory of argumentation. This model consists of a

[74] "Normative" as they envisage rational acceptability, not mere persuasion or factual acceptance.

[75] Johnson (2000: 180 ff., 217 ff.) also suggests normative criteria for the arguers, the process and the practice of argumentation, and further elaborates on a theory of criticism as distinct from evaluation.

[76] All conditions, in special truth, are contested. For a defense of relevance, acceptability and sufficiency as criteria which make an argument a good one, see Blair (2012: 87 ff.).

number of rules fostering the achievement of a reasonable agreement when it comes to solve differences of opinion by argumentative means. Basically, such rules grant discussants' freedom to advance and challenge any standpoint, and further subject them to a series of dialectical obligations (to defend their claims upon request; to put forward only relevant contributions; to deal with implicit premises and shared starting points in a fair manner; to adequately apply argumentation schemes; to use logically valid arguments or arguments capable of logical validation; to commit themselves to mutual understanding by being as clear and unambiguous as possible and by carefully and charitably interpreting each other; and to retract from one's own standpoint when the other discussant has successfully defend hers). Following this line, we could find like-minded approaches setting up conditions of rational discussion or argumentation. A striking instance is the model of "rational practical discourse" elaborated by Alexy (1989) on the basis of Habermasian ethics, but there also exists a large number of guides and codes of conduct for carrying out a "proper argumentation" or for being a "good arguer" which largely converge with the critical discussion model.[77] The difficulty with such general approaches is that they cannot be applied to lawmaking debates directly. We still need more specific quality criteria.

A third option is to address quality by means of argumentation schemes. Roughly, an argumentation scheme is a reasoning pattern which is used to identify and evaluate typical argumentation structures (Vega 2011: 234). Once such structures are reconstructed from debates, the evaluator would proceed by asking a number of "critical questions" conceived to check argument thoroughness. Along the years, argumentation theorists have supplied a wealth of schemes (with their corresponding sets of critical questions), many of which are likely to recur in parliamentary debates and could be thus used to evaluate lawmaking justifications—arguments from expert opinion, from consequences, etc. (cf. Walton et al. 2008; Walton and Sartor 2012). Whenever one of these typical arguments is identified, one would look at whether and how MPs deal with the critical questions related to it. Some of these schemes are indeed characteristic of legislative justification, in particular that of (value-based) teleological or practical reasoning—at least a core of teleological arguments can be expected to come up in any lawmaking debate.[78] Consider e.g. the following basic scheme for value-based practical

[77] Cf., for example, Cattani (2003: 128–29) or Bordes (2011: 124 ff., 315 ff.).

[78] In a manner, this level of justification attracts the others: as every law is a means to achieve some end, most arguments advanced by parliamentarians may be rendered into terms of teleology.

reasoning: (i) having the goal G, (ii) which is supported by the set of values V, (iii) and given that measure M is necessary to achieve G, (iv) M must be adopted. Upon this basic structure, a set of critical questions could be asked about conflicting goals, alternative measures, positive and negative impacts, costs, and so on (Walton 2007: 234).[79] In principle, this approach is limited to single arguments, but since teleological reasoning is a vital aspect of legislative justification, it may well be taken as a basis for an overall evaluation and be used at least to assess deliberation about core policy provisions.[80]

Fourthly, specific assessment models for legislative deliberation exist which could be combined with a legisprudential framework. They may be split into two major strands.[81] One is mainly concerned with the formal and pragmatic properties of lawmaking debates, while the second tries to grasp the substantive quality or soundness of legislative arguments. In the first group, the most salient device is the *Discourse Quality Index* developed at the Bern Center for Deliberative Studies (Steiner et al. 2004). The proponents of this index, which largely implements Habermasian requirements of discursive rationality, set out to measure the quality of legislative debates by coding certain features of MP's speeches.[82] Yet, this is done on a formal or

[79]This evaluative use of pragmatic schemes and critical questions comes close to conventional approaches to the quality of policy argumentation: cf. Rybacki and Rybacki (1996: 191 ff.).

[80]Some distinction between core and secondary aspects seems needed when assessing the justification of a statute. Yet, sometimes it may be problematical to objectively determine which provisions or measures are "central" and which ones are of lesser significance (say, regulation details), even from the participants' perspective—Would it depend e.g. on debate time spent on each issue or on more substantive considerations?

[81]Some models, however, cannot be easily ascribed to either strand, as they combine elements from both. Sieckmann (2005, 2010), for instance, bases his approach to evaluation on general requirements of argumentative rationality, derived from a theory of practical rational argumentation (affecting both arguments and arguers), as well as on requirements of rational balancing.

[82]The DQI comprises six indicators: "(1) level of justification (Do speakers just forward demands or do they give reasons for their position? If so, how sophisticated are the justifications), (2) content of justification (Do speakers cast their justifications in terms of common good conceptions or of narrow group/constituency interests?), (3) respect toward groups (Do speakers degrade, treat neutrally, or value groups that are to be helped?), (4) respect toward demands (Do speakers degrade, treat neutrally, value, or agree with demands from other speakers?), (5) respect toward counterarguments (Do speakers degrade, ignore, treat neutrally, value, or agree with counterarguments to their position?), and (6) constructive politics (Do speakers sit on their positions or submit alternative or mediating proposals?)" (Tschentscher et al. 2010: 26). Participation, operationalized in terms of disruptive acts, was formerly included in this index (Steiner et al. 2004: 56–57), but is not considered any further.

procedural level, so that content, structure and soundness of arguments remain out of scope—this model does not completely neglect content aspects (e.g. it separates common good arguments from particular interests), but takes them into consideration in a limited manner. The second group of models does quite the opposite: it disregards discursive, formal properties and concentrates on content. When arguing (or bargaining) about legislation, it is not only the respect for certain formal requirements or discursive rules what matters: the content of arguments can be even more important. Full compliance with patterns of discourse ethics is not enough to support rational lawmaking. An additional standpoint would be thus needed to gain insight into the justificatory performance of legislatures. An excellent example of this perspective is the model developed by Mucciaroni and Quirk (2006, 2009) to grasp what they call the "intelligence of deliberation". The touchstone for lawmaking debates would be that they engender informed or rational decisions which have the best or at least good chances to achieve intended policy goals and to have positive effects on society. Yet this raises the problem of what yardsticks can be used to evaluate the content or validity of legislative arguments, to establish their "intelligence". These authors take argumentation about policy effectiveness and social consequences as an indicator for debate quality, and assess the accuracy and plausibility of contributions about these issues by comparing them with the best empirical evidences available to parliamentarians. Still, this approach might be challenged on three basic counts.[83] One could first object that assessing the soundness of legislative arguments requires, on the researcher's side, certain knowledge about the topic under debate, which cannot always be presumed. Secondly, it is unclear whether the quality of empirical arguments on effectiveness and social impact amounts to the quality of arguments on other justification levels, or whether similar patterns of "intelligence" can be applied to them. Finally, it is often difficult to say what the best empirical evidence is, for there may be strongly value-laden, endless disputes about many empirical issues. Ultimately, whenever it comes to evaluate the soundness of arguments, the question arises of whether it can be done in an acceptably objective manner, without endorsing a given set of substantive criteria.

There are reasons to believe that all these approaches to argumentation quality do not lead to very different results in, say, clear or extreme cases. If parliamentarians largely avoid fallacious moves (conversely, if debates are full of fallacies), respect overall rationality requirements (infringe

[83]Cf. however Mucciaroni and Quirk (2006: 31–32, 2010: 52), dealing with all three objections.

them constantly), abide by (violate) rules of critical discussion; correctly (mistakenly) apply argumentation schemes, score good (terrible) marks according to the discourse quality index and base their claims on (neglect) uncontested empirical evidences and reasonable prospects, then we are likely to have a proper (feeble) lawmaking argumentation with high (low) justificatory strength. Yet, many legislative debates, perhaps the most interesting ones, are not that fine (or bad), and different models may result in different judgments. The same deliberation should be tested against them to see whether they converge or not. In the meantime, they cannot be seen as mutually exclusive, but as complementary approaches. In the last analysis, evaluations of argumentation quality should combine criteria of logical, substantive and pragmatic correctness (Atienza 2005). However, such a comprehensive evaluation framework for legislative reasoning is still lacking.

8.7 Legislative Argumentation and Judicial Review

A number of research interests may be attached to the legisprudential study of legislative argumentation. Besides revealing what and how parliamentarians argue when they argue about legislation, empirical research could provide evidences as to the chances of rational justification within parliaments; as to what factors and institutional settings constrain or facilitate it; or as to what influence parliamentary debates exert on the bills finally passed and under what circumstances they really improve lawmaking. And other points emerge if we broaden the focus. As indicated, giving reasons for or against a legislative measure is a complex phenomenon occurring within and outside legislatures: if we take parliamentary debates as a condensation of a larger argumentation process at a social scale, i.e. as a part of the public deliberation, it makes sense to analyze what are the connections between the arguments adduced in parliament and those circulating in the public sphere or what is the impact of publicity on the quality of debates. Anyway, from a legisprudential perspective, the primary significance of the study of legislative argumentation lies in the restoration of the "dignity of legislation" as an essential piece of modern legal systems, to lean on Waldron's phrase. This study may indeed carry important implications for our understanding of the capacity of parliaments to—and their performance in—rational lawmaking, as well as of their role and position within constitutional states. In this regard, particular consequences might be drawn as to the question of judicial review and the ever-lasting tension between the

judiciary and the legislative. At least two distinct, but complementary aspects deserve mention here.

On the one hand, the rise of constitutionalism has led to a so remarkable growth of judicial powers that the conflict between juristocracy and democracy has become entrenched in contemporary legal systems. The quality of lawmaking debates must play some part in this struggle, supporting either one or another side—or ameliorating the tension in between. With respect to the general, academic disputes on institutional design, the rationale for judicial review would be weakened if it could be demonstrated that a sound argumentation underlies legislation and parliamentarians succeed in providing a justification of their decisions. We legal scholars are keen on entering those disputes with theoretical equipment that is mainly designed for adjudication, and we often assume, from the very outset, that actual parliaments are incapable of producing well-founded laws.[84] Probably, this attitude gets sharpened when it comes to define the meaning of the constitution, as it is shown by the widespread reluctance of jurists to embrace popular constitutionalism. However, it seems advisable to analyze the actual interpretive performance of legislatures before deciding how the authority to constitutional interpretation should be distributed in democratic societies and what yardsticks should be used to evaluate the quality of this interpretation. One possible result of such an analysis might be, for instance, that we rethink our judge-oriented argumentation standards or further develop specific models for constitutional interpretation at the legislative stage.[85] On the contrary, if it turns out that lawmaking deliberation can neither meet

[84] "It is often thought that the great advantage of judicial decision-making on issues of individual rights is the explicit reasoning and reason-giving associated with it. Courts give reasons for their decisions, we are told, and this is a token of taking seriously what is at stake, whereas legislatures do not. In fact, this is a false contrast. Legislators give reasons for their votes just as judges do (…). The difference is that lawyers are trained to close study of the reasons that judges give; they are not trained to close study of legislative reasoning" (Waldron 2006a: 1382).

[85] "Congressional performance is adequate, and congressional capacity to engage in good constitutional analysis is demonstrated, when those who refer to constitutional questions speak in "constitutionalist" terms – connect their constitutional concerns and analyses to some broader ideas about constitutionalism, the separation of powers, and the rule of law, make reference to relevant constitutional provisions, and the like. The criterion, that is, is whether those participants who deal with constitutional questions appear to be thinking about those questions in the right way, with the Constitution and constitutionalism in mind" (Tushnet 2009: 503); cf. also Tushnet (2003, 2006).

certain requirements of argumentative quality nor come up to criteria of legislative rationality, the need for an external oversight and therefore a lesser judicial deference would be better explicated. What is more, if legislative deliberation in parliament proves systematically defective, even the very *democratic* legitimacy of judicial review would get strengthened (Sieckmann 2010: 88).[86]

On the other hand, now adopting a more concrete doctrinal perspective, the question would be whether and to what extent legislative arguments contained in parliamentary records should be subject to judicial scrutiny. Or, seen from the reverse angle, is there any legal or constitutional duty—binding on legislatures and controllable by courts—on the lawmakers' side to argue about or even to properly justify statutes within the lawmaking process, especially in parliamentary debates? If so, in which constitutional mandates may such a duty be anchored? What might be its scope and how should constitutional courts deal with it? At first glance, it may be easily defensible on both democracy and rule of law grounds that, when assessing the validity of statutes, courts should pay attention to the arguments brought forward in parliament.[87] This appears to be required if judicial review decisions, in their turn, are to be regarded as rationally justified. However, courts do not seem to care that much for actual legislative reasons.[88] As a matter of fact, it is widely assumed that, inasmuch as lawmaking outcomes fall under some constitutionally admissible interpretation, the quality and the very presence of legislative arguments poses a problem of democratic, political

[86] A parallel issue is whether judicial review is an incentive for parliaments to improve deliberation on constitutional matters. On the one hand, judicial review could foster constitutional deliberation in congress: "when there has been a real prospect of judicial scrutiny, the Court's doctrine seems to have helped motivate and shape constitutional deliberation in Congress" (Pickerill 2004: 131). Contrarily, it could sometimes promote "legislative disregard of the constitution", since legislators may think "Why bother to interpret the constitution at all, much less interpret it well, when the courts are going to end up offering the definitive interpretation anyway?" (Tushnet 2006: 357, cf. 2009: 504).

[87] Conversely, the justification of the parliaments' duty to careful deliberation may base on democracy and rule of law footing; cf. e.g. Waldron (2007:107–108), as well as Kristan's essay in this volume. For a democracy-based justification of the parliamentarian duty to constitutional interpretation, see Sieckmann (2009: 202 ff.).

[88] Cf. e.g. Fernández (1998: 95, 129 ff.), discussing the usual reluctance of the Spanish constitutional court to investigate legislative reasons and arguing that, in spite of this, it tactically invokes these reasons in order to refrain itself from examining the constitutionality of certain legislative measures.

accountability, not one of legal validity or constitutionality. In one word, neither a poor nor a lacking justification would *per se* invalidate any legislative measure. Yet, whether or not a bill has been sufficiently and even properly discussed in parliamentary debates might be constitutionally relevant as well. At least in legal systems where an explicit constitutional ban of arbitrariness exists or a general reasonableness principle applies, there seems to be a strong case for extending judicial review to lawmaking argumentation. It would be then possible to challenge the constitutionality of certain legislative choices, for instance, when parliamentarians do not give any reasons for them, as this amounts to lacking justification and hence to arbitrariness; and the scrutiny might be even stronger if courts go into the quality of deliberation and try to push for "soundness", e.g. in forcing MPs to give reasons backed by adequate empirical information. Actually, in some jurisdictions we have witnessed a like-minded, at least in part coincident trend towards the judicial examination of the grounds parliamentarians offer in support of legislation throughout the lawmaking process. As a separate form of scrutiny—which does not overlap with the substantive review of statutes as results, nor with the control of the lawmaking procedures—, courts have ruled out legislation affecting fundamental rights or basic constitutional principles because of a failed or insufficient parliamentary processing and discussion of its sociological and empirical premises.[89]

And a still more demanding variant of judicial review of legislative process and records could be developed, namely what has been termed "due deliberation" or "legislative deliberation" model.[90] This strand does not necessarily presuppose an affection of fundamental rights or basic values, nor is just confined to compelling legislatures to gather appropriate factual

[89]On the judicial review of parliamentary fact-finding and monitoring of social change in the U.S. and Germany—and the correlative evaluation and follow-up duties accorded to legislatures—, see e.g. Borgmann (2009) and Huster (2003), as well as Wintgens' article in this volume. The former author argues that the judiciary should ascertain the factual basis for legislation curtailing fundamental and minority rights, for in this context it is "better positioned to conduct fact-finding with integrity, producing a more reliable and less biased factual record", though she stresses that "there is less compelling justification for the courts to intercede" when legislation seeks to create or protect individual rights (Borgmann 2009: 35, 38).

[90]On the various approaches to due process of lawmaking, see Frickey and Smith (2001), discussing the deliberative model at length. Cf. Farber and Frickey (1991: 137): "an inquiry about legislative deliberation, standing alone, is insufficient" to invalidate statutes, while "the absence of deliberation—indeed, the positive evidence of legislative confusion—(…) should not be constitutionally irrelevant".

information, but rather entails a general duty to legislative deliberation according to which parliamentary records could be reviewed to see whether they contain sufficient support for legislative decisions. For example, in order to minimize the influence of private interests on lawmaking, Goldfeld (2004: 379, 388) suggests a doctrine which "would require a court to examine the legislative process leading to a challenged policy's enactment for evidence that a minimally satisfactory level of deliberation occurred" and "would apply to all congressional legislation, even where no particular constitutional interest is at stake"—though "targeted only at the most egregious cases of lack of deliberation"—; this doctrine, in his view, could "become a baseline standard of review to which all legislation is subject". Needless to say, both the theoretical and practical pitfalls of such an all-embracing due deliberation model are overwhelming, but this is not the point now. Interestingly enough, judicial review of the quality of legislative deliberation has entered the arena. Whether courts should control it at large, on all matters; whether they should merely control its core factual aspects when fundamental rights and key constitutional values are concerned; or whether they should not do either thing is debatable. All three options may have their advantages and drawbacks. For sure, we all wish a better deliberation in parliament, but the challenge is how the judicial review of legislative reasons can be construed in a feasible and democratically harmless manner to encourage it. Perhaps a theory of legislative argumentation could help us in the task[91]; anyway, it might provide our representatives—and other actors involved in lawmaking—with some guidance about the thorny issue of legislative justification.

8.8 Concluding Remarks

This essay's aim was to address the topic of the justification of laws—as a key legisprudential concern—upon the normative intuition that people entrusted to legislate should give reasons for their decisions. Within the democratic lawmaking process, one of the places where those reasons

[91] A theory guiding the analysis of legislative records "might tell us whether the Court is right to be suspicious of congressional motivations and fact-finding, whether the Court is asking too much of Congress when it insists that the legislative record take a certain form, and whether the legislative record can generate the information that the Courts seeks", yet "no theory of the legislative decision making exists that is capable of addressing the issues adequately" (Frickey and Smith 2001: 19).

(should) get publicly linked to specific legislative choices, thus becoming accessible to external scrutiny, are parliamentary debates, which renders them a good testing ground to study the practice of legislative justification. In order to shape this view, one must know what justification of laws can possibly consist in, a question that led us to the concept of legislative rationality. I have adhered to a pluralistic, gradual and bounded notion comprising five major levels of rational justification (linguistic, legal, social, instrumental and axiological) and leaned thereon to sketch a basic model which may serve to analyze legislative debates as conveying the justification of laws. While not addressing, far less clearing all methodological obstacles, some central features of legislative argumentation in parliament were at least highlighted. That model was presented just in outline and is very much in need of refinement. Being a preliminary attempt to unravel the intricacies of legislative argumentation, important aspects fell out of scope or could be just touched upon (especially, legislative balancing and quality assessment). Nonetheless, I hope that the foregoing discussion shows that there is a *potential* for rational justification in parliamentary lawmaking argumentation—whether it is actualized or not remains another problem. Although the approach sketched here is only one of many possible ways of tackling this argumentation, it permits to reconstruct and structure legislative deliberation and to elicit what relations the different levels of legislative justification bear to each other, and what role the correlative rational lawmaking criteria play within deliberation. With due improvements, it might hence be useful to grasp the complexity of parliamentary argumentation as a source of justification and legitimacy of legislation.

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