

## The Justification of Legislation. An Introduction to Legisprudence

The process of the institutionalisation of law that started at the end of the 18<sup>th</sup> century was followed by a general wave of codification throughout Europe. The French codification of 1804 was exemplary for all the others. The “law in books” was complete, certain, clear, and undisputable. From then on, the law in books had priority over the “law in action”. Law in books was a critique of law in action that preceded the French Revolution. Judicial activism was proscribed, and judges were called to apply the rules issued by the legislator.

This ideal of the French Revolution is still framing our pattern of legal thinking. It is dominant throughout the 19<sup>th</sup> century with the *école de l'exégèse* in France, *Begriffjurisprudenz* in Germany, and analytical jurisprudence in Anglo-American legal systems. Legal formalism or the deductive application of rules is the only form of judicial reasoning that is allowed. The science of law, as a consequence, was confined to a theoretical support and elaboration of this judge-centred approach to law.

This view on law and legal science persisted throughout the last century. It started being criticized in the late 1960s, a critique that paved the path for a more active role of the judge. New theories of interpretation were proposed so as to supplement the law in books with theoretically justified methodologies to determine its meaning.

The findings of legal theory are still, to a large extent, premised on the central role of the judge in the legal system. Although this evolution may be applauded for having contributed to a more dynamic attitude towards the law, the role of the legislator remains largely underexposed. Legal theory takes the law as “just there”, and limits its theoretical undertakings to law as it is. Law, so it is said, is the result of political decision-making. Once it comes into being however, it is separated from politics. Politics, that is, is thought of as impure, at least when compared to the methods of legal reasoning and decision-making.

This brings us to the theme of this book. Some of the questions I propose to explore are: Where does the law come from? What are the premises of a theory that considers law separated from politics? What does it mean for a legislator to be bound to the rules of a constitution throughout the process of legislation? Does the constitution consist of rules to be followed by the legislator or is its role merely confined to be a political programme?

These and other questions frame the main problem this book proposes to deal with. They are triggered by the fact of the exponential growth of today's legal systems. Complaints about both the increasing volume of legislation and its decreasing quality in most European countries have raised the question as to whether collaboration between legislators and legal theory can help to articulate and to solve that problem.

As a matter of fact, although the complaints are made with an ever-stronger voice, solutions are by no means obvious. Legislation as a matter of politics is not rational. Politics is a power game, resulting in compromises that are framed into a legislative or statutory structure. This power game seems to have its own logic, the results of which most of the time outweigh any other form of logic.

Legal theory for its part is considered, from the perspective of politics at least, to be a “theoretical” approach to legal problems. It contributes to the description and systematisation of existing valid law. It shows up, like Minerva’s owl, after the sunset of legislative activity. From that perspective, there is not much hope that legal theory can usefully intervene in the process of legislation or regulation, *i.e.* before or during the creation of rules. Legal theory then is confined to “legal science” or “legal dogmatics”.

I propose to consider the problem of legislation from another angle. The premises of the problem are that, although legislation and regulation is the result of a *political* process, they can be the object of a *theoretical* study. Using an approach analogous to *e.g.* Hans Kelsen in legal theory <sup>1</sup>, the main idea is not to primarily focus on the content of rules and concepts, but rather on the *structure* and *function* of legal systems.

In the approach of this book, the focal point is on problems that are common to most legal systems and not on the characteristics, *viz.* the content of concepts that are specific for one or more legal systems. The creation of law, so is my claim, has become a problem.

Kelsen’s approach leaves legislation and regulation – apart from their formal validity aspects – outside the scope of study. The creation of rules relies on value judgments that are according to him not fit for theoretical study. In short, the creation of legal rules is a matter of politics and politics is not fit for scientific study.

This position is an understandable one, though it is only partially acceptable. Rule creation is a matter of choice. The legitimation of this choice is found in the democratic character of the regulating process and not in some science of values. In other words, would one try to mould legislation into the frame of a science, we would face something like “scientific politics”, as Marxism propagated, and which is, for several reasons, unacceptable.

A different standpoint is to study legislative problems from the angle of legal theory. This approach I propose to call *legisprudence*. The object of study of legisprudence is the rational creation of legislation and regulation. As to its method, it makes use of the theoretical insights and tools of current legal theory. Whereas the latter has been dealing most of the time dealing with problems of the *application* of law by the *judge*,

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<sup>1</sup> L Duguit, H Kelsen and F Weyer, “Préface”, (1926-27) *Revue internationale de théorie du droit*, 1-4.

legisprudence explores the possibilities of the enlargement of the field of study as to include the *creation* of law by the *legislator*.

Within this new approach, a variety of new question and problems – e.g. the validity of norms, their meaning, the structure of the legal system, etc. – are raised. They are traditionally dealt with from the perspective of the judge or are taken for granted by classical legal theory. However, when shifting our attention from the judge to the legislator, the same questions arise: In what sense does the legislator have to take the systematicity of the legal order into account? What counts as a valid norm? What meanings can be created and how? to mention but a few.

Traditional legal science or legal dogmatics covers many of these questions with the cloak of sovereignty. Legislators are sovereign, they decide what will count as a valid norm, and its meaning. Whether and how a rule and its meaning fit with the legal system, is then a matter of interpretation – and this is the task of the judge and the legal scientist.

On this view, the process of legislation seems to be inappropriate for theoretical inquiry. After long decades of legalism in legal reasoning, it can be said that the dominant views in legal theory resulting from that, have precisely barred the way for inquiring into the position of the legislator. Everything happens behind the veil of sovereignty as far as legislation properly so called is concerned, and behind the veil of legality when it comes to the execution of legislative acts. These veils conceal a great part of ignorance related to the possibilities of an alternative theoretical reflection on rule making. Sovereignty itself, so one can say, creates silence about this alternative, so that it becomes “sovereignty in silence”<sup>2</sup>.

Sovereignty of the ruler prevents his rules from being questioned in any other than binary terms. Validity is a good example of that. The only question that is worthwhile putting is: Is this propositional content a valid rule *yes* or *no*? As a consequence, questions on its efficacy, effectivity, efficiency, or acceptability are not in order.

The claim of legisprudence is that these questions, like others, are important ones, and that they can be analysed with the help of legal theory.

The book is divided into three parts.

In the first part, I propose to explore the three basic tenets of the Modern philosophical project as Descartes inaugurated it. These three tenets are: rationality, the individuality of the subject, and freedom. A brief sketch of what is meant by them is offered in the first chapter.

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<sup>2</sup> H M Hurd, “Sovereignty in Silence”, (1990) *Yale Law Journal*, 945-1028.

Rationality as it is dealt with in the Modern philosophical project means that what is rational is self-evident. Self-evidence is certainty and certainty is the mark of truth. The question for whom something is certain is however left out of view. The subject, that is, has himself immediate access to reason and truth upon the use of his rational capacities. The latter are presumed to be identical in and for all. The subject's reflection on himself leads to the true insight that he is a *res cogitans*.

The subject thinks of himself as an "I", that is, as an individual. Others are not thought of as others, but rather as representations or ideas. The subject as an individual is a product of thought, that is, upon the Modern approach of rationality, a theoretical idea.

As a result of rationality as self-evidence and the subject as an individual, practical reason is confined to free will. Freedom as the third basic tenet of the Modern philosophical project is limited to following the commands of God and the rules of the country. These commands and rules are found "out there", without questioning either their origin or their purpose.

The main critique of the Modern philosophical project as it is briefly set out in the first chapter is that it is based on the so-called "scholastic fallacy". This fallacy involves that rationality is presupposed identical in everyone's head. On the supposition that all subjects are ontologically rational as Descartes suggests, their use of their rational capacities would result in an identical outcome that is truth. The universality of reason is, however, a hidden premise of the Modern philosophical project. It unfolds from a "view from nowhere". This view of rationality is challenged as an unreflected one, and the methodological device of this book is to avoid this type of fallacies.

Chapter 2 focuses on the idea of science as it comes up with the Modern philosophical project. The infinite universe is substituted for the Aristotelian closed world. Mathematics becomes the appropriate method of the *scientia nova* that Descartes and Galilei initiate. As Descartes' method aims at being a *mathesis universalis* it is believed to include the aptitude to deal with any problem, theoretical as well as practical.

The subsequent epistemologization of philosophy tacitly presupposes that mathematics belongs to the very nature of reality. From there, it follows that philosophy is thought of as a theory of reality. On an alternative view, mainly advocated by, e.g., Heidegger, it is claimed that mathematics as a method of science is a matter of choice. If the method is a matter of choice, the *scientia nova* can be articulated as a liberation from the shackles of ecclesiastical authority, and hence as a matter of freedom. Another consequence is that the *scientia nova* can articulate true propositions about reality, without having direct access to it. The distinction between a theory of reality and a theory about reality is illustrated with the help of the conflict between Galilei and the Church.

Chapter 3 concentrates on the subject and rationality. Both the subject and rationality are put in context, that is, a context of participation. With this approach, I propose to challenge the self-evidentiary character of rationality as well as the idea of the isolated and ontologically anchored Cartesian subject. Relying on George Herbert Mead's theory of the subject, I argue that the subject is first and foremost an "intersubject".

The subject, it is argued, is a social subject whose self emerges through interaction with others. The substitution of a subject of meaning for a subject of truth concretises the critique of the Cartesian subject in the first chapter. Both the subject and meaning, so it is argued, emerge from interaction in a context of participation. The subject's self includes a social as well as an individual pole. These two poles and the interaction between them have been neglected throughout the Modern philosophical project. By articulating them, an attempt is made to take the subject *qua* subject seriously.

A similar contextualisation is operated with rationality. Rationality, even in its rationalistic appearance, is not self-revealing. The idealisation of rationality in the Modern philosophical project, that is, its decontextualisation, obscures the fact that it is historically situated. This situatedness refers to its emergence and operation in a specific context. This recontextualisation shows it as one conception of rationality among others. The Modern philosophical project held its conception of rationality to be a reflection of reality, upon its belief in the direct access to the latter.

The distinction between conceptions on the one hand and a concept on the other is the methodological device that serves to further articulate the concept of freedom. This is the theme of chapter 4. Freedom is related to the emergence of science in the 17<sup>th</sup> century. While the subject and rationality were connected to a context of participation in the foregoing chapters, attention will be drawn to the characteristics of the concept of freedom in this chapter.

The basic premise of the theory of freedom proposed in this chapter comes to saying that in the absence of any external limitation, subjects are free to act as they please. If they want to act, however, freedom unlimited as it is called must be determined. This means that from the infinite range of possibilities, a choice has to be made. Without a choice, everything remains possible though no action can occur. To make a choice implies that the concept of freedom is concretised. This concretisation is called a conception. Action is possible, so it is argued further, on two types of conceptions. One is a conception *of* freedom, the other a conception *about* freedom. A conception of freedom is a conception of the subject himself; a conception about freedom on the contrary is a conception of someone else.

On the basic premise of the theory of freedom advocated throughout the book, freedom is unlimited. This includes a priority of the subject acting on conceptions of freedom. Therefore, his acting on conceptions about freedom must be justified. This requirement of justification is connected to the idea of freedom as *principium*. A

*principium* has a twofold meaning. The first is a starting point; the second is that a principle is also a *leitmotiv*.

Freedom unlimited is the starting point of political philosophy as it is found in Hobbes and Rousseau. They will be our main discussion partners throughout the book. Their theory of the social contract as the basis of the construction of political space is premised by the idea of freedom unlimited. They do neglect though the second aspect of freedom as *principium*, that is, freedom as the *leitmotiv* of the organisation of political space. This aspect is briefly elaborated in chapter 4 where Hobbes' theory is diagnosed as a theory *about* freedom, while it purports to be a theory *of* freedom.

Freedom as *principium* and the priority of the subject acting on conceptions of freedom that it involves is identified as the basic principle of jurisprudence. It holds, summarizing, that law can only be legitimate if it is legitimated to operate as an alternative for failing social interaction. The idea of freedom as *principium* will be elaborated in chapter 8 where I proceed to the identification of the principles of jurisprudence.

The second part of the book is dedicated to the problem of legalism and legitimation.

Chapter 5 explores the reason for the absence of a theory of legislation until now. The main reason is that law, from the very beginning of the Modern philosophical project, is unfolded as a reflection of reality. The obscuration of the embedment of law in the realm of politics is explained as a strategy of practical reason. This strategy is at the basis of what is identified as strong legalism. Strong legalism is the dominant pattern of thought in legal thinking. It holds that normativity is a matter of rule following, irrespective of where the rules come from. It easily fits the idea of the provisional morality Descartes has sketched, but that never came to a real end.

The main characteristics of strong legalism are pointed from a reading of Hobbes and Rousseau. The characteristics identified are: representationalism, universality or the neglect of the time dimension, concealed instrumentalism, and etatism. These characteristics of the legalistic thought pattern are supported and corroborated by a type of legal science that finds its roots in the Modern philosophical project.

Over against this form of legalism that is labelled "strong legalism" chapter 6 explores the contours of a different brand of legalism that I propose to mark as "weak legalism".

Weak legalism or "legalism with a human face" comprises a critique of strong legalism in that the latter neglects the position of the subject *qua* subject. As it will be discussed in the first part of the book, the Modern philosophical project makes the subject the preponderant actor in reality. He is, however, an *actor* in a play written in advance by others and not an *auctor* or an agent.

To take the subject *qua* subject seriously, as weak legalism purports, entails placing him in a context with others. This part of chapter 6 joins the insights articulated in the first part of the book, more specifically in chapter 2. Others, and not just “otherness” as a representation of the subject, belong to the subject’s context. If it is in this context that the self and meaning emerge, this process is not necessarily conflict-free. Hobbes and Rousseau conclude from this fact that social interaction leads to war. It provides them with an argument to substitute interaction based on legal rules from social interaction based on conceptions of freedom. The former are issued by the sovereign and can be qualified as conceptions about freedom.

Hobbes and Rousseau hold that this substitution is *ipso facto* legitimate. On the theory of freedom that was sketched out in chapter 4, this substitution however needs to be legitimated.

Chapter 7 deals with the issue of legitimation. I distinguish to begin with between jusnaturalistic and non-jusnaturalistic theories of legitimation. On the former, law is legitimated if it corresponds to at least one transcendent true norm. On the latter, no transcendent content is available. This is proper to a democratic theory of legitimation upon which the *demos* determines the ends of action as well as the means to realise them.

Apart from this difference between jusnaturalistic and non-jusnaturalistic theories, the dynamics of the legitimation process they embrace is the same. This dynamic refers to the direction of the legitimation chain. In jusnaturalistic theories, the dynamics of the legitimation chain runs *from* a transcendent norm *to* a rule of the sovereign. In non-jusnaturalistic theories exemplified by Hobbes and Rousseau the dynamics of the chain runs *from* an initial consent to the social contract *to* the set of rules issued by the sovereign.

The dynamic of the chain in both type of theories, so it is argued, is irreversible. The operationalisation of political space ensuing from the social contract is what legislation is about according to the Modern philosophical project. Taken as it stands, the initial consent of the subjects to the social contract or their proxy to the sovereign is an action on a conception of freedom. They do give, though, a proxy to the sovereign to issue subsequent limitations of their freedom that are yet unknown when subscribing the contract<sup>3</sup>. From the “moment” of the contract, the sovereign is legitimated in substituting conceptions about freedom for conceptions of freedom. The initial proxy contained in the contract covers any of his limitations of freedom. As both Hobbes and Rousseau argue, the rules of the sovereign are always morally correct. As a consequence, they cannot be criticized for whatever reason. Would this

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<sup>3</sup> These reflections may suggest that the social contract is some real event that takes place at some time and some place. This is however only a form of speech in order to keep the argument clear and easier to follow.

be possible then the chain of legitimation initiated by the social contract would be reversed.

On strong legalism, however the chain is unidirectional. The sovereign transforms any propositional content into a true norm, which allows for the qualification of sovereignty as a black box.

Chapter 7 ends with the articulation of some possibilities of reversing the chain of legitimation in what is called the proxy model. On this idea of a reversal of the legitimation chain, a more general approach is initiated. This approach leads to the claim that a legislator's limitations of freedom are to be justified. They are deemed legitimate and legitimated on a general proxy. The latter however affects the reflexive character of freedom of the subject. On the idea of a general proxy, any of his conceptions of freedom can *a priori* be replaced by conceptions about freedom. The general approach to the idea of a reversal of the legitimation chain comes to say that this substitution must be justified. Sovereigns, that is, should give reasons for their rules.

This is basically what legisprudence as a theory of rational legislation comes to. Its more concrete articulation is the topic of the third part of the book.

Chapter 8 starts with the exploration of an alternative for the proxy model of legitimation that was investigated in the previous chapters. The alternative is labelled the trade-off model. On this model, the subjects trade off conceptions of freedom for conceptions about freedom. This comes to saying that the substitution of conceptions about freedom for conceptions of freedom must be justified. No rule can be held legitimate if this justification or legitimation is lacking.

The trade off model is based on freedom as *principium* in its twofold meaning. Freedom unlimited as was argued in chapter 4 is both the starting point and the *leitmotiv* of the organisation of political space. It follows from there that subjects are primarily to act on conceptions of freedom. A substitution of a conception about freedom for conceptions of freedom can only be legitimate if it is legitimated or justified as an alternative for failing social interaction. This is the first principle of legisprudence that is called the "principle of alternativity". The second principle is the principle of necessity of the normative density. Rules should not automatically contain sanctions. If sanctions are included, this requires a specific justification. Rules with a sanction embrace a double reduction of freedom. First, the pattern of behaviour is imposed and second its realisation is enforced. Before realising a rule with the help of force alternative means of achievement of its goals are to be outweighed.

The third principle of legisprudence is the principle of temporality. The limitation of freedom on a conception about freedom must be justified as "on time". Any justification is embedded in a context. This means that if it is successful it will only be

temporarily so. The principle of temporality then requires a justification over time, and not only on the moment that a rule is issued.

The principle of coherence is the fourth principle of legisprudence. It requires that rules, both judicial and legislative make sense as a whole. The principle of coherence thus identified is elaborated in a theory that I propose to call the “level theory of coherence”, and that makes part of legisprudence.

At the end of the chapter, the principles of legisprudence are focused on from the position of the legislator before they are further explored in chapter 9. This chapter concretises the operationalisation of the principles of legisprudence. The principles of legisprudence, so it is argued, are to be read within the context of one another. Upon weighing and balancing their relative weight in the process of legislation, the ruling of the sovereign can be said to be legisprudentially optimal.

Legisprudential optimality on its turn is further concretised in chapter 10. The sovereign has to discharge of his duties throughout the legislative process while taking the circumstances of legislation into account. These circumstances are the fact that subjects interact with each other on the basis of conceptions of freedom. These circumstances result from the theory of freedom that was set out in chapter 4 and further elaborated in the subsequent chapters.

The duties of the sovereign throughout the process of legislation amount to a duty of fact finding, problem formulation, weighing and balancing of alternatives, prognosis, retrospection, taking future circumstances into account and finally a duty to correction.

Finally, a brief sketch is offered of the concept of validity according to legisprudence. Apart from the necessity of formal validity, both efficacy and axiological validity are briefly commented upon. From the diagnosis of some theories of validity that mainly focus on only one of the aspects of validity, the concept of validity according to legisprudence is called “network validity”.

Thomas Roberts helped me with the linguistic corrections of the text.

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