

Chapter 2

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

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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 principles¹ 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.

¹See Tuori (2007: 150–152).

²For 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.”

³The 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

⁴The 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”.

⁵In 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).

⁶See 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

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

⁸See 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 leaves 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

⁹See 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

¹⁰See, 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 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).

¹¹Wintgens (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.

¹²See 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*.

¹³See 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.

¹⁴See 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 jurisprudence 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 jurisprudence, 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 jurisprudence 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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