Part II

What Makes a Good Rule?

4

Criteria for Laws

> [I]t is perfectly fair to ask regulators to justify both their purposes and the instruments (the rules or the designs) that they have adopted.[1]

The previous chapter looked at the characteristics of strong legalism, before considering how they are exhibited and amplified by code. This and the next chapter take a similar approach in structure, looking first at literature in the legal sphere before shifting the analysis to the computational domain. First I discuss various notions of legitimacy in the literature, before looking more closely at two sets of normative criteria for the creation of legal norms, namely Fuller's *internal morality of law*, and Wintgens's *legisprudence*. The next chapter then shifts focus to a critical review of the existing literature on normative criteria for code-making, including the application of Fuller's principles to code. From this discussion we gain a sense of the kinds of concern around computational legitimacy that exist in the literature, and what considerations are missing or less fully analysed: the most obvious limitation in the current literature concerns the production of private code, and the unintended creation of technological normativity. These gaps are then considered in the development of the digisprudence framework in the next and final part of the book.

4.1 Normative Criteria for Law-Making: The Aspirations of Legality

The strong legalism we saw in Chapter 3 might be described as the extreme end of a spectrum, at the opposite of which lies the open-ended particularism of certain strands of Critical Legal Studies scholarship.[2] Legality, on the

[1] R Brownsword, 'In the year 2061: From law to technological management' (2015) 7 *Law, Innovation and Technology* 1, 29.

[2] Z Bańkowski and N MacCormick, 'Legality without legalism' in W Krawietz et al. (eds), *The Reasonable as Rational? On Legal Argumentation and Justification; Festschrift for Aulis Aarnio* (Duncker & Humblot 2000) 191; Z Bańkowski, 'Don't think about it: Legalism and legality' in MM Karlsson, Ó Páll Jónsson and EM Brynjarsdóttir (eds), *Rechtstheorie: Zeitschrift*

other hand, is viewed by some as a more aspirational concept, somewhere in-between, which is of fundamental importance to constitutional democracy: according to Bańkowski, it is a crucial element in what makes a free and democratic society – it is 'something worth living for; something worth dying for'.[3]

Although legality is a contested notion, some common themes run through the literature. Bańkowski speaks of the operation of individual will ameliorating the blanket heteronomy of legalism, with legality representing the appropriate interplay, or placing of the threshold, between the moralities of duty and aspiration. Some rules can be followed 'mindlessly', like automata, while others ought to be considered more deeply before acting, sometimes with the help of the appropriate agency-institutions.[4] Brownsword views legality as a 'legal approach' embedding 'participation, transparency, due process, and the like'.[5] He also speaks of 'processual public law values of transparency, accountability, inclusive participation, reason-giving and the like together with the controls exerted by background fundamental values (such as compatibility with respect for human rights and human dignity)'.[6] Waldron makes a similar point: we aspire to a law which 'conceives of the people who live under it as bearers of reason and intelligence', even if the price of this is a 'diminution in law's certainty'.[7]

For Hildebrandt, legality is the combination of purpose binding with the imposition of checks and balances, 'tying the state to its own legal rules, but also [instantiating] a system of checks and balances that safeguards against the Sirens of tyranny or those of market fundamentalism'.[8] Fundamental rights play a role too, preventing the rule of law lapsing into a legalistic rule 'by' law.[9] She invokes the Greek legend of Odysseus as an illustration of the purpose

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für Logik, Methodenlehre, Kybernetik und Soziologie des Rechts (Duncker & Humblot 1993) 51. See also N MacCormick, 'Reconstruction after deconstruction: A response to CLS' (1990) 10 *Oxford Journal of Legal Studies* 539.

[3] Bańkowski (n 2) 45.

[4] Ibid. 56–7. See also Z Bańkowski and B Schafer, 'Double-click justice: Legalism in the computer age' (2007) 1 *Legisprudence* 31, 36–7.

[5] R Brownsword, 'Lost in translation: Legality, regulatory margins, and technological management' (2011) 26 *Berkeley Technology Law Journal* 1321, 1363.

[6] Brownsword, 'In the year 2061' (n 1) 48.

[7] J Waldron, 'The rule of law and the importance of procedure' (2011) 50 *Nomos* 3, 18 *et seq.*, and also his 'How law protects dignity' (2012) 71 *The Cambridge Law Journal* 200.

[8] M Hildebrandt, *Smart Technologies and the End(s) of Law: Novel Entanglements of Law and Technology* (Edward Elgar Publishing 2015) 157–8.

[9] Ibid. 157.

binding principle – like its protagonist, in a constitutional democracy the government is bound by its own predefined rules, despite its notional power to redraw those rules and the evident temptation to do so.[10] Ultimately, this results in a 'modern law' that consists in 'self-rule, disobedience and contestability': (1) laws are constituted by a democratic legislator and are made visible and intelligible to those they seek to govern, (2) the governed have the ability to violate those laws, and so the decision to comply is an exercise of autonomy, and (3) the substance and interpretation of the legal norms, and the consequences of their violation, can be contested in a court of law.[11]

These various conceptions of legality have a certain liminal quality; they point towards a kind of open space for rational contemplation and the exercise of autonomy, lying somewhere between the two poles of heteronomy and anarchism.[12] Acting appropriately involves more than simply falling in line with legalism's rote morality of duty, but also something more structured than a chaotically subjective choice based on the particulars of each and every circumstance. Somewhere between these extremes lies a balance of autonomy and duty, provided by legal and social frameworks whose guiding force and institutions create spaces that allow for that consideration to take place. The 'intimate justice' of particularity cannot be real justice because of its lack of even-handedness, while simultaneously an 'aloof' and 'objective' justice will at times be harsh and unforgiving.[13] The ideal of legality aims to tread a difficult line between these poles, providing a measure of institutional guidance and rule-bound certainty whilst also maintaining freedom of choice and reflection. In that respect, then, it encompasses aspects of legalism; the latter is a necessary element of legality, providing a level of predictability that is necessary to avoid the need to enquire into the particularities of every circumstance.

For Bańkowski and MacCormick, the strong legalism described in the previous chapter is a 'negative ideology'. Their conception of legality, which as we saw maps onto Wintgens's idea of 'weak legalism' (discussed below), does make use of the legalistic outlook insofar as positive law and legal certainty

[10] Lessig also invokes the Odyssey to highlight the difference between what he calls a 'codifying constitution' (the codification of existing norms to maintain stability – Odysseus being tied to the mast) and a 'transformative constitution', in which new significant societal changes are sought to be implemented (as in the French Revolution). See L Lessig, *Code: Version 2.0* (Basic Books 2006) 313–14.

[11] Hildebrandt, *Smart Technologies* (n 8) 10.

[12] Recall the discussion at various points in Part I of the spectrum of technological normativity.

[13] LL Fuller, *The Morality of Law* (Yale University Press 1977) 72.

are necessary for the ordering of 'durable social organizations',[14] but it rejects heteronomy untempered by rational and critical reflection:

> It remains true, however, that rules without underlying principles of a kind that could be assented to by a rational autonomous being are rules that can be implements of tyranny. It is also true that every application of a rule is also an interpretation of it. Approaches to interpretation that ignore or undervalue the need for attention to principles, and to the consequences of decision [sic] judged against implicit values and principles of law, are undesirable on the same ground if to a lesser degree. Legalism as vice is indeed the vice of this narrow governance of rules, unleavened by the principled approach of interpretation.[15]

This view of legality thus encompasses legalism as far as is necessary to create a predictable and reliable institutional order, but leaves a space in which the individual can deliberate about what her course of action ought to be. Unlike the strong legalism set out in the previous chapter, legality on this view does not confuse the rules and heuristics with the entirety of the law – it allows a dignified space for reflexive exercise of reason, intelligence, and freedom,[16] in contrast to the 'one shot' at autonomy allowed in the proxy model of strong legalism.[17] Radbruch captures this qualified role of legal certainty in his antinomian theory of law. For him, the legal certainty provided by posited rules is indeed fundamentally important, but as a goal it sits in continual and productive tension with the aims of justice and purposiveness – a balance that is constantly reinvigorated as particular cases entail new interpretations and reasoning taking the three elements into account. The ever-present tension between legal certainty, justice, and purposiveness is what holds the law aloft.[18]

Bańkowski draws on Fuller to argue that whereas the legalistic attitude cares only to meet the threshold of the morality of duty and no more, legality expands this to include the idea of a morality of aspiration. Here the question is not simply of what is 'owed'; instead, less strictly limned values

[14] Bańkowski and MacCormick (n 2) 194.

[15] Ibid.

[16] Waldron, 'The rule of law and the importance of procedure' (n 7) 19–20.

[17] L Wintgens, *Legisprudence: Practical Reason in Legislation* (Routledge 2012) 206.

[18] G Radbruch, 'Legal philosophy' in K Wilk (ed.), *The Legal Philosophies of Lask, Radbruch, and Dabin* (Harvard University Press 1950) 111–12. For a valuable discussion of Radbruch's contribution to legal philosophy, which seems to have had less of an impact in Anglo-American jurisprudence than it deserves, see H Leawoods, 'Gustav Radbruch: An extraordinary legal philosopher' 2 *Journal of Law and Policy* 28. This qualified perspective is also central to MacCormick's notion of 'post-positivism' – see his *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007) 278.

come into play, such as authenticity.[19] It is, he argues, not sufficient simply to meet the minimum standard represented by a bald interpretation of the rule; instead, these exist on an 'aspirational scale'[20] and there are times when it is appropriate to expect more of an actor (or indeed perhaps 'less', in the consequentialist sense where disobeying a rule can be morally desirable if it means a better outcome, *pace* the legalistic categorical imperative). The morality of duty is one point on the aspirational scale and represents (*ceteris paribus*) the minimum action that is required. But the scale goes further; it is possible to do more. Aspiration goes beyond the morality of duty's 'rules of grammar', aiming instead for what Smith called 'what is sublime and elegant in composition'.[21] As we shall see, the question of where the threshold between duty and aspiration should lie also arises in the context of code: to what extent should the concrete behaviour of the technical design be legalistic (fixed configuration; the heteronomous end-user), and to what extent should it build in the aspirations of legality (flexible configuration; the autonomous end-user)?

(a) Input and Output Legitimacy in Law

We can see from the above views of legality that it is to some extent an amorphous ideal. Conceptions focus sometimes on the ex ante criteria that dictate the process of norm creation and the formal qualities of the resulting rules, sometimes on ex post criteria that provide for due process and non-arbitrariness in administration (this latter perspective is what I understand by the rule of law[22]), and sometimes both.[23] Waldron makes a similar distinction between what law is (the 'concept of law', or what constitutes the legal), and how it is administered and applied (the 'rule of law').[24] Legality on this account speaks to the formal qualities of the rules, while the rule of law speaks

[19] Bańkowski and Schafer (n 4) 33; Bańkowski and MacCormick (n 2) 183; Bańkowski (n 2) 45.

[20] Bańkowski (n 2) 51.

[21] Fuller, *The Morality of Law* (n 13) 6, quoting A Smith, *The Theory of Moral Sentiments* (2nd edn, Millar 1761) 257. One can find hints of this notion in contemporary discussions around the boundary between compliance with 'bare law' and the ethical requirement to do more; see for example L Floridi, 'Soft ethics, the governance of the digital and the General Data Protection Regulation' (2018) 376 *Philosophical Transactions of the Royal Society A* 20180081. For a recent discussion of this crucial distinction in relation to code, see M Hildebrandt, *Law for Computer Scientists and Other Folk* (Oxford University Press 2020) chapter 11.

[22] Cf. J Raz, 'The rule of law and its virtue' in *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979).

[23] This is true both of Raz's principles (ibid. 218) and Fuller's, the latter of which I discuss in detail below.

[24] J Waldron, 'The concept and the rule of law' (2008) 43 *Georgia Law Review* 1.

to how those rules are applied in practice. Neither of these ideas concerns the substantive content of the rules directly – the question is one of process, both before promulgation (that is, in the design of the norm), and after (in its application).[25]

Scharpf and Waldron each contrast the concepts of input (process) and output (result) legitimacy within the contexts of legislation and judicial review. Input legitimacy concerns the process being followed, which in the traditional sphere requires participation or representation of some form.[26] Scharpf calls this 'government by the people';[27] Waldron gives the obvious examples of political equality and enfranchisement.[28] Output legitimacy, on the other hand, is about the 'proof being in the pudding' – legitimacy is established through an assessment of the results of a rule's operation. Scharpf calls this 'government for the people', where a result is deemed legitimate because it solves the problem it was aimed at.[29]

Disagreement about the desirability of a norm's substantive content (its output) can exist alongside an agreement that the norm was arrived at and formulated in a proper way (its input legitimacy). This is how the norm, despite its divisiveness, attains (political) legitimacy.[30] As we will see, the distinction between input and output reasons chimes with the Fullerian ideas of the inner and external morality of law, the former being constituted by his principles of legality, discussed below. Whereas input criteria speak to the procedural aspects of the creation of a given rule or judicial decision, output criteria speak to its efficacy or desirability in the world. Goldoni describes the distinction in the following terms:

> Input reasons are those reasons that apply to the procedural aspects of decisions, that is, to how a decision is reached. As a measure for legitimacy, input reasons take into account the fairness of the adopted procedure. Output reasons concern the content of decisions and they represent a moral yardstick for judging the legitimacy of technologies. What counts

[25] Waldron appears to consider 'procedure' to relate only to ex post due process, arguing that Fuller's use of the word is misplaced and that the latter is in fact referring to formal validity. See Waldron, 'The rule of law and the importance of procedure' (n 7) 8.

[26] F Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999) 7; J Waldron, 'The core of the case against judicial review' (2006) 115 *Yale Law Journal* 1346, 1372.

[27] Scharpf (n 26) 6.

[28] Waldron, 'The core of the case against judicial review' (n 26) 1373.

[29] Scharpf (n 26) 11. Recall the goal of purposiveness – what the rule-giver aims to achieve by promulgating a particular norm – in Radbruch's tripartite antinomy. See Radbruch (n 18).

[30] Waldron, 'The core of the case against judicial review' (n 26) 1387.

> as legitimate, according to the output-based perspective, is the end result of a decision and its normative content, not how the decision was reached.[31]

Very crudely, then, a focus on input criteria is deontological, while a focus on output criteria is consequentialist. As with Fuller, the two perspectives interact – the quality of the rule in action (that is, its consequences or output) is shaped by the conditions that channel how it was made; those conditions can tend towards normatively undesirable as well as desirable substantive rules[32] (although, in his debate with Hart, Fuller argued that the principles of legality do tend towards less substantive iniquity[33]). Thus the inner, input, morality constrains the substantive content of its outer, or output, morality; form circumscribes substance.[34] Wintgens's theory of legisprudence makes a similar claim: whether a given proposed legislative rule is legitimate or not is contingent on it being justified according to the principles of legisprudence, whose formal qualities dictate, apart from any substantive political content, the base level required in order for legitimacy to obtain.

We can identify from this analysis a roughly four-part classification of the various types of criteria, according to their target and temporal position. In terms of input (ex ante) criteria, these can be split into (1) procedural criteria that govern the process of deliberation that leads to a given norm being created,[35] and (2) criteria that constrain what formal qualities the norm should have, assessed separately from its substantive content.[36] In terms of output (ex post) criteria, we have (3) mechanisms of due process, transparency, and accountability to enable the detection and remedy of wrongs in operation,[37] and (4) assessments of the moral or political content of the norm itself.[38]

As we shall see, most theorists' frameworks include criteria from more than one of these categories. Of course, computational legalism requires greater focus on the first two of these classifications, although in the private sector, at least, ex ante procedural criteria are less likely to be readily applicable than ex ante formal criteria, given the lack of incentives and resources to

[31] M Goldoni, 'The politics of code as law: Toward input reasons' in J Reichel and AS Lind (eds), *Freedom of Expression, the Internet and Democracy* (Brill 2015) 127.

[32] Cf. Waldron, 'The core of the case against judicial review' (n 26) 1374.

[33] LL Fuller, 'Positivism and fidelity to law: A reply to Professor Hart' (1958) 71 *Harvard Law Review* 630, 636.

[34] Ibid.

[35] Broadly, this view requires democratic participation, and encompasses the analyses of Brownsword, Hildebrandt, and Goldoni.

[36] This would encompass Fuller's and Wintgens's analyses, as well as my own.

[37] This is the ex post conception of procedure that Waldron refers to and includes Hildebrandt's requirement of contestability. I too include the latter in the digisprudential framework.

[38] This would encompass Brownsword's and Koops's analyses.

facilitate participation. The digisprudential theory I am developing is primarily concerned with the second classification (formal ex ante, or input, criteria), part of which is intended to facilitate the ex post criterion of contestability (the third classification). In this way, the former operate simultaneously to constrain iniquity and to facilitate the latter. I return to the question of criteria for code in the next chapter, but for now I set out more fully Fuller's and Wintgens's normative frameworks for the design of legal norms.

(b) Fuller's Internal Morality of Law

Perhaps the most prominent and influential discussion of formal normative standards for law-making can be found in Fuller's *The Morality of Law*.[39] Explicitly aspirational, Fuller's eight 'principles of legality' are intended to appeal to 'a sense of trusteeship and to the pride of the craftsman'.[40] They are about trying to achieve excellence (not to say perfection) in the business of law-making and application – a primary consideration arising from his principles is how best to design a law, as distinct from what its political content is or ought to be. Indeed, Fuller uses the language of design on various occasions, referring to law-making as a 'craft',[41] and to the eight principles as 'those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those living in it'.[42] As can be appreciated from the principles, listed below, they are not just about making good law from the perspective of the conscientious law-maker, but can also be viewed as constraining the unconscientious law-maker to prevent the possibility of (excessive) iniquity.[43]

Fuller's eight principles are as follows:

1. **The generality of law.** In order for conduct to be regulated, rules must be laid down that display 'reasoned generality' rather than the 'patternless exercise of political power'.[44] Arbitrariness is to be avoided. (Recall the discussion of legality above, and the threshold between duty and aspiration.)
2. **Promulgation.** The rules must be made available to those who will be governed by them, who are thus empowered to interpret and criticise them, and observe how they are applied and enforced.[45]

[39] Fuller, *The Morality of Law* (n 13).
[40] Ibid. 43.
[41] Ibid. 43, 156.
[42] Ibid. 96.
[43] Fuller, 'Positivism and fidelity to law' (n 33) 636.
[44] Fuller, *The Morality of Law* (n 13) 46–9.
[45] Ibid. 49–51.

3. **Retroactive laws.** This principle overlaps with the others: if laws are promulgated which render conduct unlawful that was not prohibited at the time it took place, the possibility of citizens knowing and obeying the law becomes fatally undermined. This principle is not absolute, however: Fuller notes that while retrospective law-making is *prima facie* 'a monstrosity', in some cases a holistic view of the principles will require it in order to cure some other 'shipwreck' in the enterprise of legality.[46] This hints at the non-absolute, deliberative nature of legality.
4. **Clarity of laws.** Fuller views this as one of the most essential of the principles. Whereas legalism deems that what looks like law is law (that is, formal validity begets law, regardless of its substantive merits), this principle requires the legislator to do more. As Fuller puts it, 'it is obvious that obscure and incoherent legislation can make legality unattainable by anyone, or at least unattainable without an unauthorized revision which itself impairs legality'.[47] If a rule is so unclear that its interpretation distorts either its original expression or the intention behind it, then recursively we hit the buffers of legality again, whereby the law as practised is not the law as promulgated.[48]
5. **Contradictions in the laws.** Fuller suggests that dealing with contradictions in legal norms is not simply a case of logic, that is to say it is not enough to observe that norm *A* cannot be the same as not-*A*; clearly, such a statement does not on its own assist in resolving the contradiction. Determining whether two laws are contradictory requires something more: an appeal to extra-legal factors is necessary to determine the state of the world, what he calls the 'whole institutional setting of the problem – legal, moral, political, economic, and sociological'.[49]
6. **Laws requiring the impossible.** Fuller's treatment of this principle is complex and includes a discussion of criminal and delictual liability, unjust enrichment, and tax law that is not of relevance here. The essential concept is simple, however: a law should not compel the impossible, for example that 'one should become ten feet tall'.[50] The promulgation of laws which are impossible to follow risks 'doing serious injustice or . . .

[46] Ibid. 51–62.
[47] Ibid. 63.
[48] Ibid. 63–5.
[49] Ibid. 65–70, quote at 70. This idea of 'peering in' to the legal system from some outside vantage point, to garner from that external perspective information necessary to the interpretation of the rule, is echoed strongly in Wintgens's principle of coherence, discussed below.
[50] Ibid. 70 n 29.

diluting respect for law'.[51] Although in other contexts, such as the classroom, the exhortation to impossible ends can be an incentive to aspire to better results, in the legal context the stakes are different, and higher.[52]

7. **Constancy of the law through time.** This requirement is interesting from the perspective of the dignified pace of law. Fuller observes that both retrospective laws and constantly changing laws are apt to create injustice. If one of the aims of law is to normalise expectations, this can only be achieved if norms have a chance to settle in to the society in which they are promulgated.[53]
8. **Congruence between declared rule and official action.** Fuller describes this as the most complex principle, such congruence being potentially undermined in various ways, including 'mistaken interpretation, inaccessibility of the law, lack of insight into what is required to maintain the integrity of a legal system, bribery, prejudice, indifference, stupidity, and the drive toward personal power'.[54] This is in a sense a catch-all requirement, under which practices and institutions such as procedural due process, contest, and judicial review operate to identify and address such problems. It relates also to the constancy and retroactivity principles; the settling of arrangements over time may be necessary for latent incongruence to emerge as circumstances evolve.

The 'inner morality' that the principles engender is distinct from the 'external' morality of law, which represents the substantive content of legal norms. On this account a legal norm can be simultaneously 'internally moral' and 'externally immoral' – the assessment of external morality will differ according to each individual's moral and political outlook whereas, Fuller argues, the internal morality of law requires certain standards which are universal in a democratic polity. Internal morality should not be optional, whatever one's political persuasion.

Fuller's principles are a mix of input (ex ante formal) and output (ex post procedural) criteria. Principles three to six govern the form of a proposed rule, constraining ex ante what its substance can possibly be: the rule cannot be retroactive (with exceptions); it must be reasonably clear in order to enable interpretation by regulatees; it cannot contradict extant rules without amending or repealing them; and it cannot require the impossible. Principles two and eight are examples of ex post procedural criteria: the former requires

[51] Ibid. 71.
[52] Ibid. 70–9.
[53] Ibid. 79–81.
[54] Ibid. 81.

that the rules once made are publicised, while the latter binds the implementing authority to operate according to a reasonable interpretation of the substantive content of the rule (subject to the overarching contestability requirement).

As will become apparent, there are significant parallels between Fuller's inner morality and Wintgens's legisprudence, although the latter's formal prescriptions constrain even more tightly the substantive content a norm can have. The same concern, adverted to above, applies however, whereby any and all norms ought to demonstrate those formal characteristics in order to be deemed legitimate, regardless of the political content (external morality) each seeks to instrumentalise.

(c) Wintgens's Legisprudence

Legisprudence combines criteria for ex ante formal validity with additional criteria that constrain the possible substance of a rule, rejecting a strong-legalistic perspective in order actively to peer behind the 'veil of sovereignty'[55] to find additional legitimation of the proposed norm. Given the sovereignty of the legislator, Wintgens says that there is no notional limit to the theoretical foundation of a rule: the rationale could for example be economic, sociological, technical, or, presumably, ideological. The important point, however, is that there must always be justification from some theoretical basis other than just bare sovereign whim. Unlike strong legalism, which as we have seen is content not to lift the veil of sovereignty to reveal the reasoning that motivated a particular exercise of power, the legisprudence framework requires both formal qualities in the norms that are promulgated, and enquiries as to the other, extra-legal, theoretical bases that provide the necessary additional justification.

This provides some useful, and I think necessary, theoretical grounding for a critique of computational legalism and for the guidance of the production of technological normativity. The remainder of this section sets out the main parts of the theory of legisprudence, before moving on to discuss each of its principles.

What is Legisprudence?

Legisprudence aims to shift jurisprudence away from a focus on the ex post reasoning of the judiciary and legal professionals towards a greater consideration of the ex ante reasoning of legislators. The intention is to provide an

[55] Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 2. Recall the discussion in 'The Veiling of Code's Production' in Section 3.2.

explicitly legal-theoretical (as opposed to ethical or political) framework for the creation of legal rules, instead of ignoring the latter as an aspect of the 'dirty business' of politics. Shklar's fences of legalism – those boundaries that surround law, separating it from other human endeavours – are thus broken down. Wintgens summarises legisprudence like this:

> A different position is to study legislative problems from the angle of legal theory. This approach I propose to call *legisprudence*. Legisprudence has as its object legislation and regulation, making use of the theoretical tools and insights of legal theory. The latter predominantly deals with the question of the *application* of law by the *judge*. Legisprudence enlarges the field of study to include the *creation* of law by the *legislator*.[56]

Legisprudence is a practical approach through which those who legislate can avoid succumbing to a strongly legalistic ideology. It aims to foster 'weak' legalism, under which fidelity to rules is accepted as necessary but only on the condition that the form of those rules meets certain criteria and the rules are subject to ongoing justification. As Wintgens puts it,

> [l]egisprudence can therefore be taken to be a meta-theory of morality, in that it allows for the formulation of principles that justify external limitations [of freedom, that is legal norms]. It is the latter that make morality possible, without enforcing any substantive moral principle whatsoever.[57]

The framework thus constrains the substance of the rules to which it is applied regardless of the subject area they are concerned with. If we consider that the principles of legality in a constitutional democracy are broadly about fairness and accountability, legisprudence can be viewed both as a tool to achieve legality at the outset of the legislative process, and as an ongoing means of upholding it as time passes and circumstances change.[58] It views the law-making process in a holistic fashion that seeks to achieve not just formal validity but also a broader rationality in the enterprise of making new norms.[59]

The Requirement of Justification

Wintgens contrasts strong legalism, described in Chapter 3, with its weaker alternative, under which the legalistic perspective is tempered by a central

[56] L Wintgens, *Legisprudence: A New Theoretical Approach to Legislation* (Hart 2002) 2 (emphasis supplied; references omitted).

[57] Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 297.

[58] L Wintgens, 'The rational legislator revisited. Bounded rationality and legisprudence' in *The Rationality and Justification of Legislation* (Springer 2013).

[59] Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 234–5.

test requiring the limitation by law of individual freedom to be justified.[60] Whereas strong legalism is satisfied by the presence of an authorised sovereign and does not enquire (indeed, prohibits enquiry) as to how or why a particular rule was made, weak legalism permits the lifting of the 'veil of sovereignty', to enquire as to the reasons behind its exercise.[61] The justification for a new rule cannot simply be the 'bare sovereign power' of the legislator, and neither can any natural law or social contract she might purport to instrumentalise.

Whereas under strong legalism the hierarchy of powers means the subordinate may not (in most cases) question the superior, under weak legalism the requirement of justification enables precisely this – the hierarchy of power can, for this purpose, be reversed. This is the work of legisprudence, which provides a framework for this temporary reversal, to legitimate the work of the legislator which the strongly legalistic perspective requires to be ignored. In this way the appropriate level of justification for a particular limitation on freedom (legislative norm) can be ascertained, both in advance of its promulgation (ex ante), and as an ongoing test of its efficacy in the world (ex post).

Freedom and the Trade-Off Model

For Wintgens, there is a *principium*, or foundational principle, of individual freedom. This has two elements. The first is descriptive, akin to the 'state of nature' in political philosophy: '[i]n the absence of any norm, anyone is free. In the beginning that is, there is freedom. From this perspective, freedom is at the origin of our philosophical inquiry.'[62] The second is normative, in that individual freedom should be a *leitmotif*, or guide, for both politics and law.[63] By definition, legislative rules constrain that foundational freedom for some individual or group in some place at some time. According to legisprudence, the fact that a proposed norm constrains foundational freedom means it should be rejected *a priori*, unless and until its imposition is sufficiently justified. Requiring citizens to acquiescence to rules simply because they are 'there', as strong legalism does, is not a legitimate exercise of power

[60] Ibid. 220; L Wintgens, 'Legisprudence as a new theory of legislation' (2006) 19 *Ratio Juris* 1.

[61] Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 2.

[62] Ibid. 124, 207 and see generally ibid. chapter 4.

[63] Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 207. This notion of a 'rational' law is not the preserve of a liberal conception of law. Shoikhedbrod argues that Marx's critique of liberal legality, for example, was founded not on a distaste for liberal rights *per se*, as is often assumed, but on the basis that positive law and the exercise of those rights is often at odds with maximising human freedom – with rational law. See I Shoikhedbrod, *Revisiting Marx's Critique of Liberalism: Rethinking Justice, Legality and Rights* (Springer 2019).

according to this conception of freedom as *principium* – it is merely the arbitrary exercise of sovereignty, regardless of any teleological value it might have.[64] Individuals' subjective conceptions of what freedom is (and is not) should not be interfered with lightly by the political project of the legislator.[65] Under legisprudential theory, with the primacy it places on individual freedom, the individual's idea of substantive freedom therefore takes precedence over the state's external view of it.[66]

As Chapter 3 discussed,[67] under strong legalism the sovereign is given a 'general proxy' to promulgate rules, and the resulting legislative acts are thus *de facto* legitimated – the veil is not lifted to consider whether or not they are justified; they are *a priori* deemed to be so. Under this model, the individual circumscribes her absolute freedom from the beginning through the 'outsourcing' of its limitation to the sovereign, thereafter accepting whatever limits the latter promulgates under that arrangement. The proxy model provides the sovereign with generalised justification for imposing limitations on the freedom of the individual.

By contrast, Wintgens's alternative 'trade-off' model requires that such limitations be justified in each case, in order that the *principium* of maximising individual freedom (or, expressed another way, the minimising of external limitations on individuals' conceptions of freedom) be honoured each time a new rule is considered.[68] Under weak legalism, then, there is no proxy that 'takes control' of the individual's conception 'of' freedom and is able unilaterally to limit it. There is instead a trade-off, in which the sovereign's desire to impose regulation based on its conceptions 'about' freedom must be balanced with the individual's subjective conceptions of freedom:

> Legislative ruling on the trade-off theory is not a priori legitimate as it was in the proxy theory. Legitimation, according to the trade-off model, consists of a justification as to why acting on a conception about freedom is preferable to acting on a conception of freedom. The legitimation of law under the trade-off theory, in short, consists in a justification of each external limitation of freedom that is a priori presumed to be legitimate or justified under the proxy model.[69]

[64] Wintgens, 'Legisprudence as a new theory of legislation' (n 60) 10.
[65] Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 126, 254.
[66] Ibid. 254–7.
[67] See 'Legalism According to Legisprudence' in Section 3.1.
[68] Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 229.
[69] Ibid. 220.

The primacy of moral (individual) conceptions of freedom mean political (sovereign) conceptions about freedom must be justified, and if the standards of the latter are not met, the balance cannot be tipped legitimately in favour of the limitation on freedom (that is, the creation of the rule). Wintgens summarises the test as follows:

> It is on the basis of freedom as *principium* that a norm giver is to justify why freedom is limited, that is, because (1) social interaction is failing, and (2) weaker alternatives are insufficient. In addition, freedom as principle requires that (3) the norm giver justify why he is issuing an external limitation at a certain time, in addition to an upholding of the limitation of freedom over time, and (4) a justification of its relation to the legal system as a whole.[70]

Those requirements map onto the four principles of legisprudence, which in turn become duties the legislator must consider in the course of making a new norm.

The Principle of Coherence (PC)[71]

Wintgens views the legal system as a complex system of dynamic and intertwined rules, which has grown exponentially (rules beget rules, in order to facilitate the 'operative closure' of legalism[72]). Within this he identifies four levels of coherence, LoC_0–LoC_3, which apply to ex ante legislative as well as ex post judicial reasoning. The PC is cumulatively normative: its levels are stepped through, and in order to be properly justified on the basis of the PC, a legislative act should attain coherence at each level. Wintgens argues that '[c]oherent legislation as the upshot of freedom as *principium* takes citizens morally seriously in legislative and not only in judicial decision making.'[73]

LoC_0 ('internal or synchronic coherence'). The basic vocabulary and grammar of a discourse, this level of coherence is about the building blocks of intelligibility, without which the substance of the concepts that make up the system cannot be communicated.[74] This level is concerned with the basic elements of language (grammar, semantics, the logic of individual norms), and their compatibility with one another. In an earlier paper Wintgens labels

[70] Ibid. 283–4 (emphasis supplied).

[71] Wintgens, 'Legisprudence as a new theory of legislation' (n 60) 15–22; Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 235–57.

[72] N Luhmann, 'Self-organization and autopoiesis' in B Clarke et al. (eds), *Emergence and Embodiment: New Essays on Second-Order Systems Theory* (Duke University Press 2009).

[73] Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 256 (emphasis supplied).

[74] Ibid. 242; Wintgens, 'Legisprudence as a new theory of legislation' (n 60) 16.

this first level of coherence 'simultaneous consistency', which has the slightly different meaning that no inconsistencies or contradictions be permitted within a particular decision or instrument.[75] These two elements – the alignment of individuals' understanding of the intension of a concept and the absence of logical contradiction between those understandings – can be read together to make up LoC_0. As Fuller notes, difficulties in avoiding contradictions can arise both within and between legislative instruments, and it is in part the 'legislative carelessness about the jibe of statutes with one another' that is ultimately 'very hurtful to legality'.[76] The aim of the coherence principle is to mitigate this kind of carelessness.

This level relates to Hildebrandt's discussion of the printing press as essential to the affordance of modern legality. Without an agreed vocabulary of relatively stable meanings, facilitated by the communicative affordances of writing and later the printing press, this level of coherence will always be contingent on the accuracy and consistency of verbal communications between practitioners and between generations.[77] The idea of epistemic continuity is closely related to the Level of Coherence 1, which begins to look at the relations between the elements of the discourse rather than their individual intelligibility.

LoC_1 ('diachronic or rule coherence'). This level considers consistency over time – similar cases should attract similar judgments. This is in large part the consistency required by the rule of law: everyone is equal before the law, and the external limitations on freedom should be uniform across every individual who is addressed by them (*ceteris paribus*). From the perspective of the legislator, who as the sovereign is not bound by *stare decisis*, this translates into the principle that the rules should not be changed too frequently, but when they are, good reasons should be given for doing so.[78] If an element of doing justice is the modulation of expectations over time, it follows that injustice arises from the excessive promulgation of new rules that arbitrarily override what has gone before.[79]

LoC_2 ('compossibility or system coherence'). Despite LoC_1, circumstances of course can and do change over time, and therefore so can and

[75] L Wintgens, 'Legislation as an object of study of legal theory: Legisprudence' in *Legisprudence: A New Theoretical Approach to Legislation* (Hart 2002) 36–7, citing Fuller, *The Morality of Law* (n 13) 65–70.

[76] Fuller, *The Morality of Law* (n 13) 69.

[77] Hildebrandt, *Smart Technologies* (n 8) 47 *et seq*. ('3.3.1 Affordances of Information and Communication Infrastructures (ICIs)'). See also J Goody, *The Logic of Writing and the Organization of Society* (Cambridge University Press 1986) chapter 4.

[78] Wintgens, 'Legislation as an object of study of legal theory' (n 75) 38.

[79] Fuller terms this 'legislative inconstancy'. See Fuller, *The Morality of Law* (n 13) 79–80.

should legal norms change, provided this is otherwise legitimated by the justification principle. The arguments that warrant this departure from precedent are provided by LoC_2; they take into account not just the individual facts of a particular case, but the legal system as a whole. Through 'systematic interpretation', which views the legal system holistically, it may be that another part of it invites, permits, or justifies a different interpretation and thus a different judgment from that which came before.

A paradigm example given by Wintgens is the question of whether to view a lease through the lens of contract or of property law.[80] Either choice is *prima facie* legitimate, but the legal implications differ significantly. Stopping at LoC_1 would require continuity with past similar decisions, so no change in approach would be mandated. In this situation, however, a departure could be justified under LoC_2: the judge views the legal system as a systematic whole and observes that there are parts of it other than those elements used in preceding cases that can legitimately influence her ruling. Wintgens illustrates this with a case from Belgium where it was ruled that a husband is eligible for a 'spousal premium', despite there being no precedent in Belgian law of a male being the recipient.[81] The justification for departure on LoC_2 (in direct contradiction of LoC_1) was demonstrated by other instruments expressing a general principle of spousal equality, including domestic legislation such as Belgium's Matrimonial Act 1976, and international human rights treaties. In this instance, the judge took a holistic view of the system, rather than just the precedents immediately relevant to the instant case, and found external, but justifying, reasons to rule differently. Indeed, when viewing the system as a whole, coherence is improved by such a ruling because it brings judicial precedent with respect to the spousal premium into line with the principles expressed in those various legislative instruments. A departure from LoC_1, justified by LoC_2, resulted in a more coherent legal system; judicial interpretation was realigned to fit legislative principle.

Whereas the judge assumes the possibility of viewing the legal system as a coherent whole, it is the legislature's duty to facilitate that systematic 'wholeness', *contra* the latitude of its sovereignty. Of course, this is a difficult task, replete with possibilities for carelessness and oversight.[82] The point is that the legislator 'has to justify his external limitations so that they allow the judge to make $coherence_2$ arguments'.[83] The unbridled sovereignty of the legislator means that he or she is not constrained in the way that the judge

[80] Wintgens, 'Legisprudence as a new theory of legislation' (n 60) 19.
[81] Ibid. n 6.
[82] Fuller, *The Morality of Law* (n 13) 65–70.
[83] Wintgens, 'Legisprudence as a new theory of legislation' (n 60) 20.

is by the assumption that the legal system is coherent. The onus on her is all the greater, then, to justify her legislative 'activism', in order that its effects cohere with the rest of the system, including ex post adjudication.[84] One can see how this contrasts with strong legalism, according to which the legislator's promulgated rules are law, to be grappled with by the adjudicator regardless of how incoherent they may turn out to be. Whereas LoC_0 was concerned with mere logical coherence, LoC_2 is about 'compossibility', the requirement that norms do not contradict one another's substantive effect.[85]

LoC_3 ('environmental coherence'). According to this level of coherence, attaining a holistic view of the system is not possible from a standpoint within that system – an external perspective is required to make sense of it.[86] Wintgens suggests that to get such a perspective is possible only by 'leaning over the edges of what is considered the whole'.[87] Whereas LoC_1 and LoC_2 are concerned with the internal rationality of the legal system, LoC_3 places that coherence within a wider, non-legal, context. This is where Shklar's fences of legalism are broken down; not only do we observe that law does not operate in a vacuum, but we require that sensitivity to this fact be embodied in it through its justification according to the broader societal context within which it operates.[88]

This required sensitivity is what Wintgens calls 'theory dependence'; at LoC_3 the legitimacy of the legislator's proposed rule is dependent on some extra-legal theory that can justify it – it is not enough to look for justification from within the legal system. Unlike strong legalism, where the perspective of the sovereign legislator is held to be a direct conduit to reality and so her pronouncements are isomorphic with that reality, under LoC_3 there is a requirement for an external mediating theory that justifies, according to the

[84] Ibid.

[85] Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 252.

[86] Wintgens, 'Legisprudence as a new theory of legislation' (n 60) 21.

[87] Ibid. This brings to mind the notion of the 'hermeneutic circle', where the whole cannot be understood separately from its parts, nor they separately from the whole. See N MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press 2005) 48; and generally LD Introna, 'Hermeneutics and meaning-making in information systems' in RD Galliers and WL Currie (eds), *The Oxford Handbook of Management Information Systems: Critical Perspectives and New Directions* (Oxford University Press 2011) 241 *et seq*.

[88] On the importance of viewing law as an integral part of a broader social good, see Z Bańkowski, 'Bringing the outside in: The ethical life of legal institutions' in T Gizbert-Studnicki and J Stelmach (eds), *Law and Legal Cultures in the 21st Century* (Wolters Kluwer 2007).

requirements of its own 'regime of veridiction',[89] the legislative rule that is to be made. From the perspective of that external theoretical framework, the law will take on a shape that is different from that of the sovereign who operates in a strong legalistic bubble, or indeed even that of the enlightened legal practitioner whose perspective is nonetheless circumscribed by her professional background. Fuller makes a related argument about identifying contradictions between rules as part of his fifth principle, noting that it is not 'merely or even chiefly technological' incompatibilities that must be taken into account but the 'whole institutional setting of the problem – legal, moral, political, economic, and sociological'.[90] Wintgens gives the law and economics school as one example of this – the study of law from the external viewpoint of some other field.[91]

On LoC_3, then, the legal system must be viewed holistically and in context. It is not simply a question of applying the rules according to the internal logics of LoC_1 or LoC_2 – something more is required (again we detect the distinction between the moralities of duty and aspiration in the search for legality, compared with legalism[92]). There is a connection here with MacCormick's 'post-positivist' theory of rules, whereby the legislator has both an internal view of the legal system and an external view of its coherence vis-à-vis the social context. Quoting him, Wintgens says:

> Since law or a legal system refers to a 'form of life', as MacCormick and Aarnio rightly puts [sic] it, coherence, then, is not a matter of logic alone, but a matter of 'making sense as a whole'. This 'making sense as a whole' refers to 'the whole corpus of the normative system', and thus brings MacCormick to state: 'To put it crudely, legal decisions must make sense *in the world* and they must also make sense in *the context of a legal system*.'[93]

From the perspective of rule-making, the proposed norm can be observed then from both the legal (internal) perspective and its broader social (external) perspective. Viewing it only from the 'inside' begets legalism, while the

[89] This is Hildebrandt's terminology, borrowed from Latour. She makes a related argument that '[t]he ends of law – though deeply entwined with their internal validation – are thus co-determined by the needs of the society it serves and co-constitutes.' The first part of this quote maps onto LOCs 1 and 2; the latter part onto LOC_3. See Hildebrandt, *Smart Technologies* (n 8) 144–5 citing B Latour, 'Biography of an inquiry: On a book about modes of existence' (2013) 43 *Social Studies of Science* 287.

[90] Fuller, *The Morality of Law* (n 13) 70.

[91] Wintgens, 'Legislation as an object of study of legal theory' (n 75) 22 and n 47.

[92] See ibid. 26 *et seq*. and Fuller, *The Morality of Law* (n 13) 5 *et seq*.

[93] Wintgens, 'Legislation as an object of study of legal theory' (n 75) 35, citing N MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press 1994) 103 (emphasis supplied).

addition of extra-legal justification consolidates its legitimacy – its ability to make sense 'in the world' that it is intended to serve. The norm must be justified, therefore, according to both the internal logic of the legal system (LoC_1 and LoC_2; the 'cognitive internal' aspect in MacCormick's language[94]), and the external reality of society (LoC_3), it being reflected in whatever external theoretical framework provides the extra justification that is required under legisprudence.[95] Rationality in the project of legislating arises from the legislator taking such a hermeneutic perspective: the rational quality of a rule consists not just in (legal) formal validity, that is the internal perspective, but also in the validity that flows from an investigation into the 'external social data' that have been produced and rendered as knowledge by other scholarly fields.[96] Legal reality is thus made to relate to social reality.[97]

The Principle of Alternativity (PA)[98]

The PA requires that the creation of a legislative rule must be preferable to the absence of that rule. Creating a rule that prohibits certain conduct removes or circumscribes the possibility of agonistic conflict,[99] which thereby contracts to that extent 'social space' while simultaneously expanding 'political space' to fill the gap that is created. Social space involves practices whose dimensions are discernible partly by the observation and resolution of conflict according to the practice's internal rules, and if that possibility is removed, which an external rule threatens to do, the practice itself might also cease to exist. By imposing an external legal rule, the ability of individuals to choose is removed, thus potentially reducing their scope to exercise moral autonomy. The imposition of a rule can only be justified, then, to correct a dysfunction that the practice cannot resolve according to its own internal processes.[100] This relates to contestability as an inherent part of legitimacy, and legislators should be loath to promulgate rules without first considering whether an alternative scheme might have the desired effect.

The PA is concerned not with the substantive content of the proposed rule, but with whether it is justified to have a rule at all – because freedom is notionally infinite prior to the imposition of a rule, the proposed

[94] MacCormick, *Legal Reasoning and Legal Theory* (n 93) 290 *et seq*.
[95] Wintgens, 'Legislation as an object of study of legal theory' (n 75) 17 *et seq*.
[96] Ibid. 31.
[97] Ibid. 38.
[98] Wintgens, 'Legisprudence as a new theory of legislation' (n 60) 10–11.
[99] Ibid. 11. See also M Hildebrandt, 'Algorithmic regulation and the rule of law' (2018) 376 *Philosophical Transactions of the Royal Society A* 20170355.
[100] Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 257.

limitation must be *a priori* justified, regardless of its actual content.[101] The PA is therefore a threshold requirement, which once passed is connected particularly intimately with the principle of normative density with respect to the behavioural impact of the design mechanism that is chosen (this principle is discussed below). This idea of a threshold is related to the discussion in Chapter 2 of the spectrum of technological normativity.[102]

The Principle of Temporality (PT)[103]

The PT signals a significant departure from the 'single moment' focus of strong legalism. Whereas legalism wants to 'switch time off',[104] the PT requires a recognition that legislative rules exist in a historical context. Unlike physical laws, which are constant, the contexts within which legislation must operate are evolving, and so the process of enacting a legislative provision must take account of, and be responsive to, such contingency.

Over time the justification for a legislative norm may change. Whereas strong legalism takes no account of this (the law is the law until the legislator changes it; the morality of duty requires obedience to the rule as-is, regardless of any consideration that might merit a different response), the weak legalism of legisprudence requires that the passage of time be taken into account. In terms of equality, distinctions that obtained at the time of the rule's creation may no longer hold, leading to unjust discrimination.[105] More broadly, justificatory reasons that held true at time of promulgation may no longer apply. The legislator's focus is the future, but she cannot foresee all the possible circumstances that might undermine the justification of the norm she proposes in the present.[106] Justifying the promulgated rule is thus an ongoing process: circumstances must be continually assessed to ensure that the legislative norm continues to be an appropriate purposive response to what was originally targeted for change.[107] Failure to do so is to fall back into legalism, where the rule is viewed as 'just there', to be followed without further consideration of its legitimacy. Legitimacy under legisprudence is therefore an ongoing process that requires continual renewal in response to the requirements of each of the principles.[108] The PT requires consideration of the prospective effects

[101] Ibid. 297.
[102] See 'A Spectrum of Technological Normativity' in Section 2.2.
[103] Wintgens, 'Legisprudence as a new theory of legislation' (n 60) 13–15.
[104] Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 268.
[105] Ibid. 269.
[106] Wintgens, 'The rational legislator revisited' (n 58); Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 268–9, 281.
[107] Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 269–70.
[108] Ibid. 270–1, 300–3.

of the rule, but because some effects are likely to be unintended, ongoing assessment and (if necessary) subsequent rectification and rejustification are also required.[109]

The Principle of Normative Density (PN)[110]

The PN is related to, but more nuanced than, the notion of proportionality. The extent of the limitation on freedom that a legislative norm imposes must be in proportion to its justification. In other words, the stronger the regulative force of the rule (the more 'dense' or 'intense', in Wintgens's terminology[111]), the greater the level of justification that is required to legitimate it. Normative density exists on a spectrum: criminal sanctions represent the highest density, while other options include 'regulatory techniques such as information, incentives such as tax relief, self-regulation based on codes of conduct or agreements, labelling and the like'.[112] The PN expects there to be a proportionate connection between a policy aim and the means by which it is achieved; the impact on freedom should be as close to the minimum required to achieve the policy aim as is possible, in order not to over-regulate.[113] The use of a technique with a particular normative impact must therefore be justified against any techniques that would have a lesser impact on freedom.[114] Again, one can appreciate the connection to the spectrum of normativity discussed in Chapter 2, from wired-in configuration to greater openness of behavioural possibilities.[115]

4.2 Conclusion

We can see that the legisprudential principles are about legitimising an incursion on freedom, and without sufficient justification that incursion is *a priori* illegitimate. Although the principles have equal weight, like Fuller's principles of legality they do not apply equally in every case. The justification under each principle can therefore operate more or less strongly depending on the circumstances.[116] They are aspirational and might never be fully embodied in a proposed norm, but the idea is to reach for the best possible laws, rather

[109] Ibid. 301–4.

[110] Wintgens, 'Legisprudence as a new theory of legislation' (n 60) 11–13.

[111] Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 271.

[112] Ibid. 299–300; Wintgens, 'Legisprudence as a new theory of legislation' (n 60) 12–13.

[113] Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 276, 279.

[114] Wintgens, 'Legisprudence as a new theory of legislation' (n 60) 13.

[115] See 'A Spectrum of Technological Normativity' in Section 2.2. This topic is returned to in Chapter 6.

[116] Wintgens, *Legisprudence: Practical Reason in Legislation* (n 17) 280. I consider this further in the code context in Chapter 6.

than to achieve a perfection that is unattainable due to the contingencies of time and the limits inherent in trying to anticipate the future.[117]

Returning to the discussion of input and output legitimacy above, we can appreciate how the principles of legisprudence expand upon the categories previously mentioned. The principle of coherence is an ex ante formal standard for assessing the intelligibility of the proposed norm vis-à-vis both existing legal norms and one or more potentially legitimating extra-legal theories. The principle of alternativity is both ex ante procedural (it speaks to the decision of whether or not to institute the proposed norm at all) and ex ante formal (it asks whether a rule is the correct format for achieving the desired outcome). The principle of temporality is both ex ante and ex post procedural, in that it requires justification at the time of promulgation that that was the correct thing to do, and ongoing (ex post) legitimation that it continues to be legitimate.

Fuller's principles are to an extent more hands-off than Wintgens's; the latter constrain more forcefully what the substantive content of a rule can possibly be. We can identify overlaps between them, however. Fuller's first principle requiring the use of rules connects with the legisprudential principle of alternativity – whether or not to use a rule in the first place. The second principle (promulgation) also connects with the principle of alternativity – can the mechanism chosen, if not a rule, be promulgated such that regulatees are able to understand how they are being regulated? It also connects with the principle of normativity, where the extent of normative force may be such, and in so many forms, that promulgation in the usual sense becomes impossible. The third, fifth, and seventh principles of legality (against retroactivity, against contradiction, and in favour of constancy, respectively) speak to the levels within the principle of coherence.

In this chapter I have considered two influential normative frameworks aimed at facilitating the creation of legitimate legal rules. For Fuller, achieving this is about respecting the 'internal morality' of law, which in turn minimises the potential for iniquity in the substance of the norms that can subsequently be promulgated from within that framework. For Wintgens, legitimate rules respect as far as possible individual autonomy, requiring justification of incursions on freedom only when they are in accordance with the legisprudential principles. As with Fuller's theory, these limit what the content of the resulting rules can possibly be. These theories identify the expectations we ought to have of legislators when they are trying to make good laws, regardless of the political content of those laws.

[117] Ibid. 282, 305–7.

In Part III of the book I will adapt these criteria to the design environment, on the basis that if they are the kinds of formal features we ought to expect from a normative order that constitutes and regulates our behaviour, then we might reasonably expect them (or their analogues) to be present in all such orders. Before I move on to that synthesis, the next chapter explores and assesses the existing literature on normative criteria for code, identifying gaps – especially regarding ex ante analysis and the practicalities of code's production – that digisprudence aims to begin filling.