PROBLEMA

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LEGISPRUDENCE: THE FORMS AND LIMITS OF LEGISLATION

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Resumen:

En este artículo el autor argumenta que la ausencia de una explicación adecuada de la legislación al interior de la teoría del derecho, junto con la falta de legisladores y de las legislaturas en el discurso filosófico-jurídico, crea —y fortalece— la presunción de que la adjudicación, los jueces y los tribunales son centrales al entendimiento del derecho. Por tanto, pretende no sólo equilibrar la relación entre legislación y adjudicación, al requerir que ambos cumplan los mismos estándares de coherencia y consistencia, predicción y aceptabilidad, racionalidad y objetividad, sino también explorar las formas y los límites de la legislación, al cuestionar desde el punto de vista del constitucionalismo la idea de que la legislación como una actividad soberana está completamente libre de límites.

Abstract:

In this article the author claims that the absence of a an adequate explanation of legislation within legal theory, jointly with the lack of legislators and of legislatures in jurisprudential discourse, creates —and reinforces— the presumption that adjudication, judges, and courts are central to the understanding of law. Hence, he intends not only to rebalance the relationship between legislation and adjudication, by requiring that both meet the same standards of coherence and consistency, predictability and acceptability, rationality and objectivity, but also to explore the forms and limits of legislation, by challenging from the point of view of constitutionalism the idea that legislation as a sovereign activity is completely limit-free.

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> Common sense tells us that there must be a distinction between *a law* and *a good law*, and at first glance positivism seems amply justified in resting its whole case on the self-evident quality of this distinction. But we must remember that those distinctions which seem too obvious to require analysis are often precisely those which will not stand analysis. Common sense tells me that there is a clear distinction between a thing"s being a steam engine and its being a good steam engine. Yet if I have a dubious assemblage of wheels, gears, and pistons before me and I ask, "Is this a steam engine?" it is clear that this inquiry overlaps mightily with the question: "Is this a good steam engine?" In the field of purposive human activity, which includes both steam engines and the law, value and being are not two different things, but two aspects of an integral reality.
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> Lon. L. FULLER,
> *The Law in Quest of Itself*, 1940.

SUMMARY: I. *Introduction: An Imbalance between Adjudication and Legislation?* II. *Legisprudence: The Theory and Practice of Legislation.* III. *The Forms and Limits of Legislation.* IV. *Conclusion: The Quest for a Bon Législateur.*

I. INTRODUCTION: AN IMBALANCE BETWEEN ADJUDICATION AND LEGISLATION?

Leveling the legal playing field does not imply changing the traditional judge-oriented approach to law with a legislator-oriented attitude, but complementing them, instead. In fact, the absence of an adequate theory of legislation within legal theory, jointly with the lack of legislators and of legis-

latures in jurisprudential discourse creates the presumption —and even the obsession— that adjudication, judges, and courts are what law is all about. In addition, legislation is considered rather a matter of political theory and, as such**,** an object of study not for legal scholars but for political scientists, as a pre-law material.

In that sense, jurisprudence tends to focus exclusively on the judicative side of the law whereas the legislative trait has not been properly taken care of by it. With such an imbalance there is indeed a call to redress two things: the one-sidedness in favor of a theory of adjudication, re-characterized as "judicativeprudence", and the unevenness regarding the treatment of a theory of legislation, re-considered as "legislativeprudence".

For that purpose we must first recall that we had characterized the latter —the theory (and practice) of legislation— as "legisprudence", which included among its features the study of lawmaking and of laws, as well as the survey of legislators and legislatures, *i.e.* what the legislative agents or legislators do and cannot do in the legislative forum or legislature.

Now, in this paper our main aim is to explore *a la* Lon L. Fuller the forms and limits of legislation. Therefore, we intend not only to rebalance its relationship to adjudication, by meeting the same standards of coherence and consistency, predictability and acceptability, rationality and objectivity, but also to challenge from the point of view of constitutionalism the idea that legislation as a sovereign activity is completely limit-free.

In doing so we must explicitly say that both the so-called implicit laws of lawmaking —generality, publicity, irretroactivity or prospectivity, clarity, non-contradictory, possibility, constancy, and congruity— and the prohibitions to which a legislature is subjected, such as abridging freedom of speech, included in the First Amendment of the United States Constitution; and mature principles similar to those of lawfinding, and other limits to what a legislature can and

cannot do or decide. For example, "*audi alteram partem*", *i.e.* "let no one be a judge in its own cause" and enforcing the corresponding analogous "let no one be a legislator in its own cause", as embodied in the XXVII Amendment of the United States Constitution: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."

II. Legisprudence: the Theory and Practice of Legislation

To cut a really long story short, let me start by saying that "legisprudence" is characterized as "the theory —and practice— of legislation". However, as the term "legislation" is not free from a process-result ambiguity, we must clarify that legisprudence comprises the study, on the one hand, of the "legislative process or lawmaking", and, on the other hand, of the "legislative result or laws". As legisprudence implies the "theory —and practice— of lawmaking and of laws", it also contains the survey of "legislators and legislatures".[1]

It is also worth clarifying that by "law-making" and by "laws" I mean, on one side, any legislative process, and, on the other, any legislative result. Although, I will refer mostly to the narrower sense of "legislation" as enacted by legislators in legislatures, regardless of their actual name such as decree, edict, law, ordinance, regulation, statute, and so on. I am not ruling out the possibility of using "legislation" in a broader sense to refer to any legislative process or legislative result. This sense could include the action of parents

[1] See, Flores, Imer B., "The Quest for Legisprudence: Constitutionalism *v.* Legalism", in Wintgens, Luc J. (ed.), *The Theory and Practice of Legislation. Essays in Legisprudence*, Aldershot, Hampshire, Ashgate, 2005, p. 26. It is worth to mention that the term "legisprudence" was coined more than half a century ago and is gaining an increasing status as "a new theoretical approach to legislation". *Cfr.* Cohen, Julius, "Towards Realism in Legisprudence", *The Yale Law Journal*, vol. 59, 1950, pp. 886-897; and Wintgens, Luc J. (ed.), *Legisprudence: A New Theoretical Approach to Legislation*, Oxford, Hart Publishing, 2002.

that assume the role of legislators to set some fundamental principles and/or ground rules for their children all the way to the drafting of a Constitution and its amendments or reforms, the celebration by the executive and ratification of (international) treaties by the Senate, executive agreements by Congress, executive regulations and judicial agreements, as long as their intended outcome is to serve as a general, abstract, impersonal and permanent direction or guideline of conduct.

Moreover, legislation, legislators and legislatures have in spite of everything a "bad name" in legal and political philosophy as Jeremy Waldron points out,[2] and are still considered the "poor cousins" of legal education as A. Michael Froomkin puts it.[3] In fact, the absence of an adequate theory of legislation, jointly with the nonappearance of legislators and the nonattendance of legislatures, creates the presumption that adjudication, judges and courts are what law is all about.[4]

Paradoxically, the least dangerous branch of government is the more —and arguably better— examined, meanwhile the most dangerous one is the less —and presumably worse— studied, at least from the legal perspective.[5] One of the very few and great exceptions is due to late professor Norberto Bobbio, who in the proceedings of the IVR World

[2] Waldron, Jeremy, *The Dignity of Legislation*, Cambridge, Cambridge University Press, 1999, p. 1.

[3] Froomkin, A. Michael, "Climbing the Most Dangerous Branch of Government: Legisprudence and the New Legal Process", *Texas Law Review*, num. 66, 1988, p. 1071.

[4] *Cfr.* Hart, H. L. A., *The Concept of Law*, Oxford, Oxford University Press, 1961, p. 1 (there is Spanish versión: *El concepto de derecho*, trans. Genaro R. Carrió, Buenos Aires, Abeledo-Perrot, 1963, p. 1) (there is a 2nd. edition with a "Postscript", 1994, p. 1; and there is Spanish version: *Post scriptum a El concepto de derecho*, trans. Rolando Tamayo y Salmorán, México, Instituto de Investigaciones Jurídicas, 2000.)

[5] Bear in mind Alexander Hamilton's dictum: "[T]he judiciary… will always be the least dangerous to the political rights of the Constitution"; and James Madison's maxim: "In republican government, the legislative authority necessarily predominates". See Hamilton, Madison and Jay, *The Federalist Papers*, New York, Mentor, 1961, pp. 465 and 322 (originally published in 1787 and 1788.)

Congress on "Legal Reasoning" celebrated in Brussels, in 1971, published an article on the image of the *bon législateur*. In that paper, he distinguished not only between essential and non-essential attributes of a (good) legislator, but also between two ideals in opposition.[6]

On the one hand, he stipulated that "*essential attributes*" are those necessary prohibitions that the legislator cannot violate, without exceptions (as imperatives); and, "*non-essential attributes*" are those contingent —not necessary— that may under certain conditions institute prohibitions to the legislator with exceptions (as directives). Therefore, he established that the former —essential attributes— included the following: 1) *justice*: equal treatment to that alike and different treatment to those unlike; 2) *coherence*: no (logical) contradictions; 3) *rationality*: in the formal-logical or intrinsic sense of *zweckrationalität —a la* Max Weber; and 4) *non-redundancy*: no repetition or unnecessary reiteration. Whereas, the latter —non-essential attributes— comprise the subsequent: 1) *rigorous:* scrupulous in the process of law-making; 2) *systematic*: methodical in the order of exposition; and 3) *exhaustive*: completeness in the determination of specific cases. In consequence, he assumes a necessary just, coherent, rational, and non-redundant legislator, and presumes a contingent rigorous, systematic and exhaustive legislator.

On the other hand, he stated as a general rule the ideal of the *bon législateur* and the *juge loyal*; and, as the exception the ideal of the *bon législateur* complemented by the *bon juge*, in the sense of the well-known *bon juge* Magnaud:

> Dans ce cas, un contraste existe entre l'idéal du *bon législateur* et celui du *juge loyal* (idéal non moins constant et non moins persistant) dont la tâche est d'appliquer le droit établi et non de créer un droit nouveau. Dans cette opposition, le second idéal l'emporte en général sur le premier. On

[6] Bobbio, Norberto, "Le bon législateur", in Hubien, Hubert (ed.), *Le raisonnment juridique/Legal Reasoning/Die jurisdiche argumentation*, Bruxelles, Établissements Émile Bruylant, 1971, pp. 243-249.

> peut exprimer cette priorité en ces termes: en certains cas extrêmes, mieux vaut admettre que soit affaiblie l'image du *bon* législateur plutôt que d'accepter le principe du *bon juge*, au sens du bon juge Magnaud, c'est-à-dire du juge qui prend la place du législateur.

Although I am very sympathetic to his work, in general, and to this piece, in particular, for being the first and —for a long time— almost the one and only, to address these issues regarding the (good) legislation, legislator and legislature, I will start by criticizing his account. Besides some other minor points, my major criticism is that this account fails by considering the ideals of *juge loyal* and *bon juge* as incompatible ones, when a characteristic of a good judge seems to be being a loyal judge.

Clearly the problem is: loyal to what?[7] The targeted conception embedded in "legalism" considers that the judge is —and must be— loyal to the (good) legislator, who created the general, abstract, impersonal and permanent laws to be applied impartially, and that as an exception becomes a *bon juge* when he/she takes the place of the *bon législateur* in order to legislate interstitially. All this loyalty —and deference— from the judge to the legislator assumes that the latter is just, coherent, rational-reasonable, and non-redundant. It even presumes that it is also rigorous, systematic and exhaustive in its formulations, and specially presupposes that law-making is a sovereign activity completely free or limitless, with the Latin adage *Quod principi placuit*

[7] See Flores, Imer B., "The Quest for Legisprudence…", *cit.*, note 1, pp. 38-47. See also Imer B. Flores, "Assessing Democracy and Rule of Law: Access to Justice", en Peczenik, Aleksander (ed.), *Proceedings of the 21st. IVR World Congress, Lund (Sweden), 12-17 August, 2003, Part I: Justice*, Stuttgart, Franz Steiner Verlag, 2004, pp. 149-152. See also the Hart-Fuller debate: H. L. A. Hart, "Positivism and the Separation of Law and Morals", *Harvard Law Review*, vol. 71, num. 4, february, 1958, pp. 593-629; and Fuller, Lon. L., "Positivism and Fidelity to Law-A Reply to Professor Hart", *Harvard Law Review*, vol. 71, num. 4, february, 1958, pp. 630-672.

vigorem legis habet ("Whatever pleases the prince has the force of law") as the family motto.[8]

On the contrary, the alterative conception embodied in "constitutionalism" considers that the judge is —and must be— loyal to the (good) legislator, as long as the legislator does not violate the prohibitions related not only to Bobbio's "essential and non-essential attributes of the *bon législateur*" but also to Fuller"s "implicit laws of lawmaking", those identified as the internal morality of law: "generality", "publicity", "irretroactivity" or "prospectivity", "clarity", "non-contradictoriness", "possibility", "constancy" and "congruity",[9] which we are going to re-characterize as "the legal rationality of (good) legislation" and re-develop as "the forms and limits of (good) legislation", including according to "constitutionalism" the respect for human rights and separation of powers (article 16 of the French Declaration of the Rights of Men and Citizen): "*Tout societé dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution*".

My hunch is that the absence of an adequate theory of legislation within legal theory, jointly with the lack of analysis and discussion about legislators and legislatures in jurisprudence creates the presumption that adjudication, judges, and courts are what law is all about. In that sense it is necessary to level the legal playing field. Let me insist that it does not imply changing the traditional judge-oriented approach to law with a legislator-oriented attitude, but complementing them, instead.

[8] See Waldron, Jeremy, "Large Legislatures", in Villanueva, Enrique (ed.), *Legal and Political Philosophy*, Amsterdam-New York, Rodopi, 2002, p. 10.

[9] See Fuller, Lon L., *The Morality of Law*, New Haven, Yale University Press, 1969, p. 39 (revised edition of the originally published in 1964, from which there is Spanish translation: "La moral del derecho", trans. Francisco Navarro, México, Trillas, 1967). See also "Implicit Elements in Made Law", *The Anatomy of Law*, New York, Frederick A. Praeger, 1968, pp. 91-110 (an extract was republished as "The Implicit Laws of Lawmaking", in Winston, Kenneth I. (ed.), *The Principles of Social Order. Selected Essays of Lon L. Fuller*, Durham, North Carolina, Duke University Press, 1981, pp. 158-168).

In order to advance the argument for legisprudence, my target has been "legalism" and my alternative scheme "constitutionalism". In sum, I am against the former because it adopts a rigid separation of powers and fails to protect human rights by taking for granted that the legislator is not only rational but also represents "the" sovereign itself completely free of any limitation. On the contrary, in the following part, I intend to explicit the forms and limits of (good) legislation.

III. The Forms and Limits of Legislation

As I had already mentioned, the term "legislation" as it is used here is not restricted to legislators and legislatures functioning as part of an established government, but applied to anyone that makes general, abstract, impersonal and permanent rules. Accordingly, it includes not only legislative assemblies but also agents or bodies assuming legislative powers: to draft a Constitution; to amend or to reform it; to add or modify, on one side, and, to abrogate or derogate, on the other, a piece of legislation; to outline an international, regional or bilateral treaty or even an executive agreement; to prepare an executive regulation, and so on.

It is clear that according to the ideal of the rule of law, we must be governed by laws —*nómos basileus* for the Greeks and *lex rex* for the Romans— that are formulated in general terms, as Cicero said *leges legum*,[10] to be applied generally to all the cases covered by them. Hence, the legislative product or result must be general, abstract, impersonal and permanent. However, questions of the permissible forms and the proper limits of legislation remain unclear. On that account the problem that we expect to address in this part is captured by the two terms of its title: the *forms* and *limits* of legislation.[11]

[10] Marcus Tullius Cicero, *De Legibus*, II, 7, 18.

[11] It is fair to say that this part borrows the strategy and the title *mutatis mutandi* from Fuller, Lon L., "The Forms and Limits of Adjudication", in Winston, Ken-

1. *Forms*

By the *forms* of legislation I mean the ways in which it may be organized and realized. Therefore, in this section, I will attempt to answer two questions: What are the permissible variations in the forms of legislation? When has its nature been so altered that we are compelled to speak of an abuse or a perversion of the legislative process?

On the one hand, I consider as *permitted* or *proper forms* of legislation those legislative products or results that are truly general, abstract, impersonal and permanent, independently of the agent or body assuming legislative powers, because they are both acting according to the principles of legal rationality and they are authorized to do it.[12] For those reasons the acceptable variations of legislation, besides the clear case of *a legislative assembly enacting legislation*, *i.e.* a general, abstract, impersonal and permanent law, regardless its name, include:

A) *A constitutional assembly drafting a Constitution*, which intends to govern or guide human conduct according to shared principles and purposes of the relevant moral and political community, *i.e.* the people governed, regardless of further requirements, as long as it guarantees the human rights and determines the separation of powers, and does not legislate something impossible.

B) *A legislative assembly amending or reforming a Constitution*, as long as it continues to be general, abstract, impersonal and permanent, and respects the human rights and the separation of powers, regardless of further requirements such as: a two thirds majority and/or ratification by the majority of state legislatures or by the people themselves through a constitutional referendum.

neth I. (ed.), *The Principles of Social Order...*, *cit.*, note 9, pp. 87-124 (published originally in *Harvard Law Review*, vol. 92, núm. 2, 1978, pp. 357-409.

[12] Flores, Imer B., "The Quest for Legisprudence...", *cit.*, note 1, pp. 37 and 38.

C) *A legislative assembly adding or modifying*, on one side, and, *abrogating or derogating*, on the other, *a piece of legislation*, as long as the reform is general, abstract, impersonal and permanent, regardless of further requirements, and is entitled to do it or there is no express prohibition, such as abridging freedom of speech as the First Amendment of the United States Constitution bans.

D) *A head of a State*, usually the executive, *outlining* —in a convention with other heads of States or executives— *an international, regional or bilateral treaty or an executive agreement*, which intends to govern or guide human conduct according to shared principles and purposes of the relevant moral and political community, *i.e.* the signing parties, regardless of whether there are or not further requirements such as: a simple majority or two thirds majority of the Senate, a simple majority on both Chambers of Congress, and/or ratification by the majority of state legislatures or by the people themselves through a referendum, as long as it is entitled to do it and there is no express prohibition, such as article 15 of the Mexican Constitution which bars extradition treaties of political prisoners or slaves, and treaties against the rights and guarantees established by it; and,

E) *An executive —or any other branch of government— preparing a regulation, a general accord or memorandum to provide its own administration or bureaucracy with some guidelines to enforce a piece of legislation*, as long as the regulation remains truly general, abstract, impersonal and permanent, and respects the hierarchy of laws as it is subordinated to a piece of legislation.

On the other hand, I consider as *perverted* or *improper forms* of legislation those legislative products or results that are not truly general, abstract, impersonal and permanent, independently of the agent or body assuming legislative

powers, because they either fail to respect the principles of legal rationality or were not authorized to do it.

The troublesome case here is that of the so-called "judicial legislation", *i.e.* the recognition that under exceptional circumstances a judge does legislate —or at least does it— interstitially as Oliver Wendell Holmes realized:[13] "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from "molar to molecular motions".

Or as Herbert Louis Adoplhus Hart recognized, due to the "open texture", judges inevitably have to exercise their discretion assuming the role of the legislator and in doing so they create law interstitially, *i.e.* legislating from time to time:[14] "Laws require interpretation if they are to be applied to concrete cases, and once the myths which obscure the nature of the judicial processes are dispelled by realistic study, it is patent… that the open texture of law leaves a vast field for a creative activity which some call legislative".

On this regard, I will like to state the following:

1) Judges are not authorized to legislate, *i.e.* to make law —*ius dare*— but to apply the general rule to particular cases.[15]
2) Judges have —as a primary and proper function— to adjudicate, *i.e.* to find law applicable in order to

[13] Southern Pacific *v.* Jensen, 244 U.S. 205, 221 (1917) (Holmes, dissenting). *Cfr.* Hart, H. L. A., "American Jurisprudence through English Eyes: The Nightmare and the Noble Dream", *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon Press, 1983, p. 128 (there is Spanish version: "Una mirada inglesa a la teoría del derecho norteamericana: la pesadilla y el noble sueño", trans. José Juan Moreso y Pablo Eugenio Navarro, in Casanovas, Pompeu y Moreso, Jose Juan (eds.), *El ámbito de lo jurídico. Lecturas de pensamiento jurídico contemporáneo*, Barcelona, Crítica, 1994, pp. 327-350) (published originally: *Georgia Law Review*, vol. 11, num. 5, 1977).

[14] Hart, H. L. A., *The Concept of Law*, *cit.*, note 4, p. 200. pp. 252, 205.

[15] See Bacon, Francis, "Of Judicature", *Essays*, London, Everyman, 1994, p. 141: "Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law" (there is Spanish version: "Sobre los deberes de los jueces", *Ensayos sobre moral y política*, trans. Arcadio Roda Rivas, México, UNAM, 1974, p. 226. See Flores, Imer B., "The Quest for Legisprudence…", *cit.*, note 1, pp. 43-45.

settle disputes about rights and duties —*ius iudicare*;[16] and,

3) Judges have inevitably to assume other secondary functions, both proper and improper, in the process of achieving their primary and proper function of adjudicating rights and duties:[17]

   a) Judges have to interpret the law, *i.e.* to ascribe a meaning to the rule or principle to be applied —*ius dicere*;
   b) Judges, while interpreting, have sometimes to fill in gaps and to solve contradictions, including conflicts of rules and collisions of principles, *i.e.* to correct legislative errors and oversights, by drawing analogies intended to derive or to infer from the explicit part the implicit one or even deciding which interpretation fits best;[18] and
   c) Judges have to argue, *i.e.* to provide reasons to justify their interpretation not only as the one that fits best but also as the required one according to law and not to their own preferences.[19]

I do not challenge the fact that judges always create an individual norm to the case at hand, *e.g.* "The ruling in this

[16] See Fuller, Lon L., "The Forms and Limits of Adjudication", *cit.*, note 11, p. 96: "The proper province of adjudication is to make an authoritative determination of questions raised by claims of right and accusations of fault or guilt" (p. 368).

[17] See Flores, Imer B., "Apuntes para una teoría —y práctica— del derecho judicial: algunas reflexiones críticas sobre técnica jurídica", *Reforma judicial. Revista Mexicana de Justicia*, México, núm. 7, enero-junio de 2006, pp. 3-25.

[18] See Fuller, Lon L., "The Case of the Speluncean Explorers", *Harvard Law Review*, vol. 112, num. 8, 1999, p. 1859: "The correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective" (published originally in 1949; and there is Spanish version: *El caso de los exploradores de cavernas*, Genaro R. Carrío, Buenos Aires, Abeledo-Perrot, 1961, p. 32. Republished in: Peter Suber, *The Case of the Speluncean Explorers. Nine New Opinions*, London, Routledge, 1998, p. 14).

[19] Dworkin, Ronald, *Justice in Robes*, Cambridge, Massachusetts, Harvard University Press, 2006, p. 15: "Any lawyer has built up, through education, training, and experience, his own sense of when an interpretation fits well enough to count as an interpretation rather than as an invention".

case is that *x* is condemned to pay to *y*, because liable of *z*". Nor that in doing so the judge sometimes creates a precedent, *i.e.* a criteria or model of interpretation for future cases, e.g. "Those in the same situation as *x* must be condemned to pay to those similar to *y*, because they will also be liable of something like *z*".

Let me clarify that I do contend, what Fuller labeled as a "judicial usurpation",[20] *i.e.* the idea that judges are allowed in exceptional cases to legislate interstitially as if they were the legislators, *i.e.* create general, abstract, impersonal and permanent rules, not the idea that they do somehow create law, whether it is an individual norm or a precedent makes no difference at all. I even criticize the idea that a judge can create law out of the blue. The latter is something that not even a legislator can do or does, because doing that will represent failing to respect the explicit and implicit limits of its functions, as well as the principles of legal rationality, specially according to "constitutionalism" where they cannot restrict or violate human rights and separation of powers. On the contrary, judges derive or infer from general rules, as well as from general principles of fairness and equity, an impartial decision to the case before them.

2. *Limits*

By the *limits* of legislation I refer to the (explicit and implicit) restrictions on the fashion of its organization or realization. Thus, in this section, I will attempt to answer to two questions: What kinds of social tasks can properly be assigned to legislatures and other legislative bodies? What tacit assumptions underlie the conviction that certain problems are inherently unsuited for legislative disposition and should be left to the courts and tribunals?

On the one side, it is clear that the social tasks properly assigned to legislatures and other legislative agents or bod-

[20] See Fuller, Lon L., "The Case of the Speluncean Explorers", *cit.*, note 18, pp. 858 (p. 31) (p. 14).

ies, especially due to their representative nature, imply taking *political decisions* —ideological but not necessarily subjective— or at least dependent to certain degree of political considerations, such as whether the electorate agrees or disagrees with the final product or result, including law-making.

In that sense, political decisions are taken in relation not only to the questions on how to govern or to guide human conduct in accordance to shared principles and purposes of the relevant moral and political community out of general rules, but also to the quizzes on how to control another branch of government through a budgetary constrain or even to persecute a public official via an impeachment trial.[21]

On the other side, there are functions unsuited to legislative disposition such as taking *technical decisions*, which are not necessarily apolitical, but at least they are independent from political considerations, such as whether the electorate agrees or disagrees with the product or result, including law-finding. In fact, decisions which imply that judges apply and derive or infer form general rules, as well as from general principles of fairness and equity, an impartial decision to the case before them must be technical, not political. In addition, problems related to what Hart characterized as the "open texture of language", such as ambiguity and vagueness, as well as gaps and contradictions, including conflicts of rules and collisions of principles, are best solved technically rather than politically.[22]

In that sense, decisions aimed at individuals —but not to a class or kind of them— and precedents are a clear limit to legislation. This is true because *per definitio* the first ones are not and cannot be general, and, the second ones, although they are stated in more or less broad terms and are

[21] The fact that these decisions are mainly *political* does not rule out that they are also to some extent *technical* nor that they must meet the same principles of legal rationality. See Flores, Imer B., "The Quest for Legisprudence...", *cit.*, note 1, pp. 37 and 38.

[22] *Cfr.* Hart, H. L. A., *The Concept of Law*, *cit.*, note 4, pp. 121-136, 155-169.

given some sort of general effects, they are not a piece of legislation compulsory to everyone, both public officials and those governed, but a criteria or model of interpretation for future cases with particular and concrete features mandatory more or less to the public officials but not necessarily to all, including those governed. Furthermore if the legislature dislikes —or does not agree with— the criteria or model of interpretation (for future cases) set forth by the courts, they can legislate and even propose a constitutional amendment or reform.

Certainly, there are pieces of legislation, from codes to treaties, which are filled with purposeful ambiguities and vague provisions, such as those requiring "good faith" and "fair practice" without further specification of the kind of behavior expected or intended. As Fuller —referring to international treaties but applicable to other pieces of legislation as well— mentioned: "some issues are simply too touchy to be resolved by agreement".[23] However, let me say that from this, it does not follow that there is no agreement at all, but that there is no further over comprehensive agreement beyond certain point.[24] What's more, in some countries, like in the Mexican case, the legislatures are entitled to provide interpretations to their pieces of legislation (article 72 f of the Constitution).

As laws must be general both in their creation and application, according to the alternative constitutionalist account that protects not only the separation of powers but also human rights, we argue that there are principles anal-

[23] Fuller, Lon L., "The Forms and Limits of Adjudication", *cit.*, note 11, p. 100. p. 373.

[24] Let me suggest that sometimes the ambiguous or vague provisions are not only necessary but they are indeed the sole means plausible to reach an agreement. Imagine that several countries —including at least one Western and a Muslim one— are going to sign a human rights declaration including the "prohibition of cruel and unusual punishments". Instead of getting into details on what counts (and not) as a "cruel and unusual punishment", a theme where they might disagree, and hence where they might not reach a (comprehensive) agreement; they decide to abide by a broader picture of "cruel and unusual punishment", a topic in which they agree, and so in which they reach an agreement.

ogous enforceable both to the judge and to the legislator. For instance, the *principle of impartiality*, on the part of the judge, *i.e.* "No one can be judge in his/her own cause", is and must be complemented by a twin *principle*, on the part of the legislator, *i.e.* "No one can be legislator in his/her own cause".

I must clarify that a legislator —due to its clear representative nature— is legitimated to take political decisions, including law-making, on behalf of everyone (impersonal) and for the common benefit (general), but not in his/her own name (personal) nor for his/her own gain (particular). Especially, in democracies, legislators cannot take that sort of decisions nor legislate on behalf of or for the benefit of one sole person —or group— since that will also fail to respect the principles not only of generality and impersonality but also of impartiality and isonomy.

Hence, the principle must be restated in the following terms "No one can be legislator in his/her own cause, nor legislate on behalf of or for the benefit of one particular person —or group".

In those cases, in which this principle appears to be compromised, because it may be said that legislators are legislating for their own cause and on behalf of or for the benefit of one particular person —or group— the best thing to do is to delay its effect until after one election to their position —or to the benefited one— has passed. To illustrate the latter point, I must appeal to some cases:

1) The XXVII Amendment of the United States Constitution: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representative shall be intervened".
2) The failed initiative to reform the mexican Constitution, which considered the consecutive or immediate reelection of legislators in both chambers of Congress, but that similarly contemplated that it shall take ef-

fect until after one concurring election to those positions has passed.

3) The decision of the Colombian Court of Constitutionality, regarding whether it was permissible or not to reform the Colombian constitution to allow the consecutive or immediate reelection of the President, but without taking effect until after one election to that position has passed.[25]

In addition, legislation is limited by the principles of (good) legal rationality: 1) clarity and precision, imply avoiding ambiguities and vagueness (*linguistic rationality*); 2) generality, publicity, irretroactivity or prospectivity —or at least not abusive of the *ex post facto* principle—, coherent —non-contradictory or non-redundant—, and constancy (*systemic rationality*); 3) possibility —no symbolic law or effect— (*pragmatic rationality*); 4) congruity —sociological effective and economically efficient— (*teleological rationality*); and 5) impartiality and isonomy to achieve fairness and justice (*ethical rationality*).

IV. Conclusion: The Quest for a *Bon Législateur*

By now, legal philosophers have said very much about judges but too little on legislators. To my recollection the two competing images of judges —the *juge loyal* and the *bon juge*— have become at least three: Hart's Herbert, Dworkin's Hercules and Kennedy's Heraclites.[26]

[25] In this case, the majority of the Court ruled that it was permissible to do it, but the minority argued that the reform was unconstitutional and hence invalid, because it failed —among other things— to be truly general and impersonal, by being particular and personal, benefiting only the actual (incumbent) president and not a hypothetical one. See, Flores, Imer B., "Sobre las formas y los límites de la legislación: A propósito de la constitucionalidad de una reforma constitucional", en Valadés, Diego and Carbonell, Miguel (eds.), *El Estado constitucional contemporáneo. Culturas y sistemas jurídicos comparados*, México, Instituto de Investigaciones Jurídicas, 2006, t. I, pp. 271-292.

[26] See, Flores, Imer B., "¿Ensueño, pesadilla o realidad? Objetividad e (in)determinación en la interpretación del derecho", in Cáceres, Enrique *et al.* (eds.), *Pro-*

However, the *bon législateur* has remained as the sole image of a legislator and does not even have a name. The problem is that we had deemed the legislators as rational agents or bodies without actually testing them, either by asking which are the forms and limits of (good) legislation. Unless we really complement the traditional judge-oriented approach to law with a legislator-oriented attitude, critical of the legislation or legislators we seem to be doomed to failure.

The straight forward question to be solved is: Which are the (necessary) conditions of adequacy for the tests of legal rationality as applied to legislation, legislators and legislatures? My intuition is that at the end we must propose *a la* Dworkin some sort of ideal legislator, one that does know: all the intricacies of our language (*linguistic rationality*); the complete existing legal system and its future possibilities (*systemic rationality*); the entire scheme of possible consequences and effects (*pragmatic rationality*); the whole set of interests, purposes and values (*teleological rationality*); and, every single principle of fairness and justice worth to be drafted into law (*ethical rationality*).[27]

Finally, I guess we must name this ideal jurist on behalf of a great law-maker or legislator, such as codifiers Hammurabi, Justinian, Napoleon, or simply Hercules. Please, do not get me wrong, I am aware that if I decide to go for the latter I will be attributing the same name twice. But, after all, Hercules had to complete twelve labors, and Dworkin has probably only ascribed five labors so far —adjudication,

blemas contemporáneos de la filosofía del derecho, México, Instituto de Investigaciones Jurídicas, 2005, pp. 183 and 184.

[27] Dworkin, Ronald, *Taking Rights Seriously*, Cambridge, Massachusetts, Harvard University Press, 1978, pp. 105-106: "[A] lawyer of superhuman skill, learning, patience and acumen, whom I shall call Hercules… a judge in some representative American jurisdiction… [who] accepts the main uncontroversial constitutive and regulative rules of the law in his jurisdiction…that is, that statutes have the general power to create and extinguish legal rights, and that judges have the general duty to follow earlier decisions of their court or higher courts whose rationale… extends to the case at bar" (second edition with a reply to critics from the originally published in 1977).

interpretation, filling gaps, solving contradictions, including conflicts of rules and collisions of principles, and argumentation— to an ideal jurist, to whom we will be attributing legislation now.

In sum, the forms and limits of legislation enable us to prepare the discussion on the (necessary) conditions of adequacy for the tests of legal rationality as applied to legislators and legislatures, which require among other things applying analogous principles to those followed by the judges. Accordingly, we must enforce principles such as "No one can be legislator in his/her own cause, nor legislate on behalf of or for the benefit of one particular person —or group", as well as recognize that legislation is not completely free or limitless.