



LEGISPRUDENCE: THE ROLE AND RATIONALITY OF
LEGISLATORS —*VIS-À-VIS* JUDGES— TOWARDS
THE REALIZATION OF JUSTICE*

Imer B. FLORES**

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I. INTRODUCTION

Putting justice in its place as the legal value *per antonomasia* and the political/social and ethical/moral virtue *par excellence* implies readdressing —and redressing— some (mis)conceptions about it and requires reassessing —and restoring— some (mis)interpretations on its relation to legal officials and op-

* Revised version of the paper “Legisprudence: The Rationality of Legislators —and Judges— in the Light of Justice” prepared for the International Law Congress 2008 *Justice: Basic Problems and Recent Developments at the Beginning of XXI Century*, in Ankara, Turkey, January 8-11, 2008 and presented as “On the Rationality of Legislation and Adjudication” in a Seminar at McMaster University, Hamilton, Ontario (Canada), March 26, 2009.

** Professor-Researcher, Institute for Legal Research, UNAM (E-mail: imer@servidor.unam.mx). LL.B. Law School UNAM; LL.M. Harvard Law School; SJD Law School UNAM. The author is grateful to an anonymous referee for helpful and insightful comments; to Gülriz Uygur and Wil Waluchow for their generous invitations to prepare and present the paper; to the public at McMaster University for an extremely useful discussion on its merits or demerits; and to Martha Linares for revising a previous version.

erators, as well as lawyers and citizens, but especially to legislators and judges. In that sense, in this article I intend to: 1) contrast several ideas related to the realization of justice, in general;¹ 2) contest the idea that due to their respective roles, legislators and judges necessarily compete against each other and therefore are in conflict, in particular;² and 3) consider some of the new developments in make-law in the pursuit of rationality in legislation and its relationship with adjudication.³ Accordingly, this paper is divided into three main parts:

In the first part, I will contrast two basic conceptions of “justice”. In one sense, “justice” is considered totally subjective and as such it is neglected as a (valid) scientific claim. In another, “justice” is deemed not completely subjective and as such it is accepted but seems to be reduced to being literally and uncritically applied by judges to whatever was enacted as law by legislators or law-abiding conduct. In contrast, I claim that “justice,” if correctly understood, must first be objective —or at least without anything precluding its existence as such; and, second, cannot be reduced to being applied literally and uncritically by either judges or as mere law-abiding conduct. There is yet another idea I would like to challenge, but due to limited space here I will only mention it in passing: “justice” is valued as necessarily in conflict with other (legal) values such as (legal) certainty and security, but, if correctly understood, “justice” comprises the realization of all (legal) values, including (legal) certainty and security.

In the second part, I will contest the idea that legislators and judges are inevitably in competition and conflict. The implication not only comprises the conflictive views on justice held by legislators and judges, but also the assumption according to which the conflict must be solved in favor of the legislative view. On the contrary, I contend that legislators and judges are

¹ See Imer B. Flores, *Assessing Democracy and Rule of Law: Access to Justice*, in PROCEEDINGS OF THE 21ST IVR WORLD CONGRESS, LUND (SWEDEN), 12-17 AUGUST, 2003, PART I: JUSTICE 146-154 (Aleksander Peczenik ed., Franz Steiner Verlag, 2004).

² See Imer B. Flores, *The Living Tree: Fixity and Flexibility. A General Theory of (Judicial Review in a) Constitutional Democracy?*, 2 PROBLEMA. ANUARIO DE FILOSOFÍA Y TEORÍA DEL DERECHO 285 (2008).

³ See Imer B. Flores, *The Quest for Legisprudence: Constitutionalism v. Legalism*, in THE THEORY AND PRACTICE OF LEGISLATION: ESSAYS ON LEGISPRUDENCE 26-52 (Luc J. Wintgens ed., Ashgate, 2005); and, *Legisprudence: The Forms and Limits of Legislation*, 1 PROBLEMA. ANUARIO DE FILOSOFÍA Y TEORÍA DEL DERECHO 247 (2007) (There are two previous versions: *Legisprudence: The Forms and Limits of Legislation*, in PROCEEDINGS OF THE 22ND IVR WORLD CONGRESS GRANADA 2005, VOLUME I: LEGAL THEORY/TEORÍA DEL DERECHO. LEGAL POSITIVISM AND CONCEPTUAL ANALYSIS/POSITIVISMO JURÍDICO Y ANÁLISIS CONCEPTUAL 194-202 (José Juan Moreso ed., Franz Steiner Verlag, 2007); and *Lon L. Fuller’s Implicit Laws of Lawmaking: The Forms and Limits of Legislation*, 5 DE LEGIBUS. REVIEW OF THE HARVARD LAW SCHOOL ASSOCIATION OF MEXICO 83 (2006).

not in competition and conflict and hence, collaboration and cooperation provide a better understanding of the role and rationality of both legislators and judges towards the realization of justice in its best (moral) light, which can be either the legislative perspective or the judiciary point of view.⁴

In the third and last part, I will consider some of the new developments in make-law, the two most important ones being: the appearance —or re-appearance— of legisprudence, (*i.e.* a term coined more than half century ago to describe —and even to prescribe— a (new) theoretical approach or theory of legislation, which implies not only leveling the legal playing field, but also reincorporating legislation into the center of legal studies next to adjudication);⁵ and, as a consequence, the emergence —or reemergence— of the rationality of legislation —and its relationship with adjudication— to the forefront of legal discussion.⁶

⁴ See WILFRID J. WALUCHOW, *A COMMON LAW THEORY OF JUDICIAL REVIEW. THE LIVING TREE* (Cambridge University Press, 2007); Wilfrid J. Waluchow, *A Common Law Theory of Judicial Review*, 1 PROBLEMA. ANUARIO DE FILOSOFÍA Y TEORÍA DEL DERECHO 117 (2007); and, *Constitutions as Living Trees: An Idiot Defends*, 43 CANADIAN JOURNAL OF LAW AND JURISPRUDENCE 207 (2005); and, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE LAW JOURNAL 1346 (2006).

⁵ See Julius Cohen, *Towards Realism in Legisprudence*, 59 THE YALE LAW JOURNAL 886 (1950); and *Legisprudence: Problems and Agenda*, 11 HOFSTRA LAW REVIEW 1163 (1983); and Luc J. Wintgens, *Rationality in Legislation. Legal Theory as Legisprudence: An Introduction and Legislation as an Object of Study of Legal Theory: Legisprudence*, in LEGISPRUDENCE: A NEW THEORETICAL APPROACH TO LEGISLATION 1-7 and 9-39 (Luc J. Wintgens ed., Hart Publishing, 2002); and, *Introduction and Legisprudence as a New Theory of Legislation*, in THE THEORY AND PRACTICE OF LEGISLATION..., *supra* note 3 at 3-25.

⁶ See LON L. FULLER, *THE MORALITY OF LAW* 39 (2nd ed., Yale University Press, 1969); Lon L. Fuller, *Implicit Elements in Made Law*, in THE ANATOMY OF LAW 91-110 (Frederick A. Praeger, 1968); Norberto Bobbio, *Le bon législateur (The Good Legislator)*, in *Le raisonnement juridique/Legal Reasoning/Die juristische Argumentation* 243-249 (Hubert Hubien ed., Établissements Émile Bruylant, 1971); and, Manuel Atienza, *Sociología jurídica y ciencia de la legislación (Legal Sociology and The Science of Legislation)*, in EL DERECHO Y SUS REALIDADES. INVESTIGACIÓN Y ENSEÑANZA DE LA SOCIOLOGÍA JURÍDICA 41-70 (R. Bergalli ed., PPU, 1989); *Contribución a la teoría de la legislación (Contribution to the Theory of Legislation)*, 6 DOXA 385 (1989); *Para una teoría de la argumentación jurídica (For a Theory of Legal Argumentation)*, 8 DOXA 39 (1990); *Razón práctica y legislación (Practical Reason and Legislation)*, 3 REVISTA MEXICANA DE ESTUDIOS PARLAMENTARIOS 9 (1991); MANUEL ATIENZA, *CONTRIBUCIÓN A LA TEORÍA DE LA LEGISLACIÓN (Contribution to the Theory of Legislation)* (Tecnos, 1997); *LAS RAZONES DEL DERECHO. TEORÍAS DE LA ARGUMENTACIÓN JURÍDICA (The Reasons of Law. Theories of Legal Argumentation)* (Centro de Estudios Constitucionales, 1997); and Manuel Atienza, *Reasoning and Legislation* in THE THEORY AND PRACTICE OF LEGISLATION..., *supra* note 3 at 297-317. *Vid.* also EDUARDO GARCÍA MÁYNEZ, *LOS PRINCIPIOS DE LA ONTOLOGÍA FORMAL DEL DERECHO Y SU EXPRESIÓN SIMBÓLICA (THE PRINCIPLES OF THE FORMAL ONTOLOGY OF LAW AND ITS SYMBOLIC EXPRESSION)* (Imprenta Universitaria, 1953); and IMER B. FLORES, EDUARDO GARCÍA MÁYNEZ (1908-1993) 50-59 (UNAM-IJ, 2007).

II. THE REALIZATION OF JUSTICE

Let me start by recalling that it is commonplace to affirm not only that *justice* is the major legal *value* and the superior political/social and ethical/moral *virtue*, but also that justice is an *end* in itself and *law* is the *means* to that end. It is worth mentioning that the primacy of justice as the legal value *per antonomasia* or the political/social and ethical/moral virtue *par excellence* is not unchallenged. Marcus Tullius Cicero's long-established claim is forthright: *Ollis salus populi, suprema lex est* ("Let the good of the public be the supreme law" or "The welfare of the people shall be the supreme law").⁷ But Gustav Radbruch's reply is also straightforward: *iustitia fundamentum, regnorum* ("justice is justified and reigning")⁸ —or alternatively as Cicero himself claimed *Iustitia enim una virtus omnium est domina et regina virtutum* ("Justice as a virtue is the ruling and queen of all virtues.")⁹ Following John Rawls, we can affirm that justice is justified in a way that does not depend on any particular vision of the good and reigning, an end in itself above all other ends and regulative to such ends.¹⁰

It is also worth noting that the *Digest* of Justinian compiled, among others, Ulpian's definitions of both *ius* (law) as *ars boni et aequi* (art of good and fair)¹¹ and *iustitia* (justice) as *constans et perpetua voluntas, ius suum cuique tribuendi* (set and constant purpose of giving everyone what is due.)¹² The latter im-

⁷ MARCUS TULLIUS CICERO, DE LEGIBUS, III, 3, § 8.

⁸ Radbruch has pointed out the tensions not only between the first and second adages but also with its twins: *fiat iustitia pereat mundus* (i.e. "Let justice prevail even if the world perishes") (quoted by Immanuel Kant, *Appendix I. On the Disagreement between Morals and Politics in Relation to Perpetual Peace, The Perpetual Peace*, in POLITICAL WRITINGS 123 (trans. H. B. Nisbet) (Hans Reiss ed., Cambridge University Press, 1970): "*fiat iustitia, pereat mundus* (i.e. let justice reign, even if all the rogues in the world perish)"; and *summum ius, summa iniuria* (i.e. "More law, less justice" or "The strict application of law leads to an injustice") (quoted by MARCUS TULLIUS CICERO, DE OFFICIIS I, 10, § 33). *Vid.* Gustav Radbruch, *El fin del derecho, (The End of Law)* in LOUIS LE FUR ET AL., LOS FINES DEL DERECHO. BIEN COMÚN, JUSTICIA Y SEGURIDAD 55-70 (UNAM, 1981). *Vid.* also Imer B. Flores, *La definición del derecho (The Definition of Law)*, 209-210 REVISTA DE LA FACULTAD DE DERECHO DE MÉXICO 81-83 (1996).

⁹ MARCUS TULLIUS CICERO, DE OFFICIIS, III, 6, § 28. *Vid.* JOHN RAWLS, A THEORY OF JUSTICE § 1, 3-4 (Harvard University Press, 1971); and MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (Cambridge University Press, 1982). See also Imer B. Flores, *El liberalismo igualitario de John Rawls (The Egalitarian Liberalism of John Rawls)*, 1 CUESTIONES CONSTITUCIONALES. REVISTA MEXICANA DE DERECHO CONSTITUCIONAL, 85 (1999).

¹⁰ See JOHN RAWLS, A THEORY OF JUSTICE, *supra* note 9 at § 1, 3-6. *Vid.* also TOM CAMPBELL, JUSTICE (Humanities Press International, 1988); and, Brian Bix, *Justice*, in JURISPRUDENCE: THEORY AND CONTEXT 103-117 (3rd ed., Sweet & Maxwell, 2003).

¹¹ See IUSTINIAN, DIGEST, 1.1.1.

¹² *Id.*, 1.1.10.

plies a two-part formula: 1) “set and constant purpose” and 2) “give everyone what is due.” Traditionally, authors have focused almost exclusively on the second, and almost entirely ignored the first, the one compatible with the realization of (legal) certainty and security. In other words, once a criteria for giving everyone what is due has been set, its application must be constant.¹³

However, what is “due” to each is still an open-ended question because it is simply too vague. What does “due” actually—or eventually—mean?¹⁴ For example, Rawls considers justice as a set of principles that “provide a way of assigning *rights* and *duties* in the basic institutions of society and they define the appropriate distribution of the *benefits* and *burdens* of social cooperation.”¹⁵ But which of those rights and duties, benefits and burdens are to be assigned or distributed? Furthermore, for someone else, “due” might mean something else in keeping with differing moral and political outlooks. For instance, David Miller identifies three independent “interpretations of justice which may be summarized in three principles: to each according to his rights; to each according to his deserts; to each according to his needs.” Similarly, Michael Walzer pinpoints three distributive principles: “free exchange,” “desert,” and “need” and, consequently, points out the existence of the different “spheres of justice.”¹⁶

While everyone agrees that justice is by definition giving people what is “due,” there appears to be little agreement concerning what it is “due” for them. In sum, there is apparently one concept of justice but as many conceptions of it as there are authors. Some emphasize one principle over another,¹⁷ *e.g.* liberty over equality and vice versa;¹⁸ and others, even one ver-

¹³ See Imer B. Flores, *La definición del derecho*, *supra* note 8 at 81-83.

¹⁴ See Hans Kelsen, *What is Justice?* in *WHAT IS JUSTICE? JUSTICE, LAW AND POLITICS IN THE MIRROR OF SCIENCE* 1-24 (University of California Press, 1971).

¹⁵ JOHN RAWLS, *A THEORY OF JUSTICE*, *supra* note 9, at § 1, p. 4 (The emphasis is mine).

¹⁶ See DAVID MILLER, *SOCIAL JUSTICE* 27 (Clarendon Press, 1976); and, *PRINCIPLES OF SOCIAL JUSTICE* (Harvard University Press, 1999); and, MICHAEL WALZER, *SPHERES OF JUSTICE. A DEFENSE OF PLURALISM AND EQUALITY* 21-26 (Basic Books, 1983). *Vid.* also DAVID MILLER & MICHAEL WALZER (eds.), *PLURALISM, JUSTICE AND EQUALITY* (Oxford University Press, 1995).

¹⁷ For some of the debates on liberty or equality, distribution/state intervention or property rights, justice or efficiency: *vid.* JOHN RAWLS, *A THEORY OF JUSTICE*, *supra* note 9; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (2nd ed. Harvard University Press, 1978); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (Basic Books, 1974); and, Amartya Sen, *Rawls versus Bentham: An Axiomatic Examination of the Pure Distribution Problem*, 4 *THEORY AND DECISION* 301 (1974).

¹⁸ See RONALD DWORKIN, *A MATTER OF PRINCIPLE* 188 (Harvard University Press, 1985): “Unfortunately, liberty and equality often conflict: sometimes the only effective means to promote equality require some limitation of liberty, and sometimes the consequences of promoting liberty are detrimental to equality.”

sion of a principle over an alternative or alternatives, *v.gr.* instead of enforcing equality of *welfare*, authors are implementing equality of *capabilities* (Amartya Sen), *opportunities* (G. A. Cohen and John E. Roemer), and *resources* (Ronald Dworkin).¹⁹

Notwithstanding its open-ended formulation, the second part of the definition of justice is not a weakness, but strength in itself. Justice is not a meaningless empty or rigid concept but a meaningful rich and flexible one, requiring that conditions for its application be adaptable and revisable from place-to-place and time-to-time in case-by-case scenarios. What is more, it is the first part that provides a fixed point. Once a criteria of justice is “set” (established by a legitimate authority such as a legislator or a judge —and even by other legal officials), it must be “constant” (applied to like cases in a similar fashion and to dislike cases in a different one).

Let me bring to mind that Aristotle devoted the “Book V” of the *Nicomachean Ethics* to the analysis of “Justice” and “Injustice.”²⁰

“Now we observe that everybody means by Justice that moral disposition which renders men apt to do just things, and which causes them to act justly and to wish what is just; and similarly by Injustice that disposition which makes men act unjustly and wish what is unjust.”

However, he realized that the terms were “used in several senses, but as their equivocal uses are closely connected, the equivocation is not detected” and proceeded to uncover the equivocation by distinguishing between two different senses of “just” and “unjust.”²¹

Let us then ascertain in how many senses a man is said to be “unjust.” Now the term “unjust” is held to apply both to the man who breaks the law and the man who takes more than his due, the unfair man. Hence it is clear that the law-abiding man and the fair man will both be just. “The just” therefore means that which is lawful and that which is equal or fair, and “the unjust” means that which is illegal and that which is unequal or unfair.

Accordingly, in the first sense “just” means that which is legal or lawful and “unjust” that which is illegal or unlawful. In the second, “just” means that which is equal or fair and “unjust” that which is unequal or unfair.

¹⁹ See AMARTYA SEN, *INEQUALITY REEXAMINED* (Harvard University Press, 1992); G. A. COHEN *On the Currency on Egalitarian Justice*, 99 *ETHICS* (1989); and G. A. COHEN, *IF YOU'RE AND EGALITARIAN, HOW COME YOU'RE SO RICH?* (Harvard University Press, 2000); JOHN E. ROEMER, *EQUALITY OF OPPORTUNITY* (Harvard University Press, 1998); and Ronald Dworkin, *What is Equality? Parts 1 and 2*, in *SOVEREIGN VIRTUE. THE THEORY AND PRACTICE OF EQUALITY* 11-64 and 65-119 (Harvard University Press, 2000).

²⁰ Aristotle, *Nicomachean Ethics*, Book V, 1129^a, in *THE GREAT LEGAL PHILOSOPHERS. SELECTED READINGS IN JURISPRUDENCE* 16 (Clarence Morris ed., University of Pennsylvania Press, 1959).

²¹ *Id.*

With this in mind, we can proceed to contrast the two ideas already outlined:

(1) “Justice” —in the Aristotelian use of just that refers to equal and fair by implying a value judgment— is considered entirely subjective and is discounted as a (valid) scientific claim by legal positivists like Hans Kelsen.

The Austrian jurist not only censured the open-ended formulation of justice for providing justification to any social order —capitalist or socialist, democratic or aristocratic— but also condemned it for requiring a valuation (a value judgment) and, as such, for being relative and subjective.²² He severely criticized both points, which imply moral judgments, for being inconsistent with a scientific description of law, as the one his “pure theory of law” aimed to provide.²³

By definition, legal positivists maintain that there is no necessary conceptual relation between law and morality —or for that purpose between law and justice— (the so-called *separation thesis*) and for the most part retain a form of value-skepticism, *i.e.* the impossibility of considering values as objective —and determinate. This sort of skepticism is analogous to the rule-skepticism of the legal realists, *i.e.* the impossibility of considering legal rules as objective —and determinate.

Moreover, if H. L. A. Hart²⁴ was right in responding analytically that, despite the existence of subjective elements in its creation and application, rules are to a certain degree objective to govern or guide human conduct. I do not see why we cannot continue along this line to state that, despite the presence of subjective elements in its recollection and recreation values —including principles such as justice— are objective. By failing to apply this distinction in the second case, analytical legal philosophers are compromising the first one as well. Why can they affirm that it is possible in one case and not in the other? In contrast, I would like to advise my analytical friends to be more —and not less— analytical by introducing a distinction between “justice for me/you” and “justice in itself:” the former being a *subjective* appraisal whilst the latter, an *objective* value.²⁵

Consider the following example. Imagine that via an executive decree, the government exercises its eminent domain by taking private property from legitimate owners for public use and paying them a compensation that

²² See Hans Kelsen, *What is Justice?*, *supra* note 14 at 1-24.

²³ See HANS KELSEN, *THE PURE THEORY OF LAW* 1 (trans. Max Knight) (University of California Press, 1967). See also Brian Bix, *Hans Kelsen's Pure Theory of Law*, in *JURISPRUDENCE...*, *supra* note 10 at 56.

²⁴ See H. L. A. HART, *THE CONCEPT OF LAW* 124-154 (2nd ed., Oxford University Press, 1994).

²⁵ See EDUARDO GARCÍA MÁYNEZ, *EL PROBLEMA FILOSÓFICO-JURÍDICO DE LA VALIDEZ DEL DERECHO* [THE LEGAL-PHILOSOPHICAL PROBLEM OF LEGAL VALIDITY] 37 (Imprenta Mundial, 1935). See also IMER B. FLORES, EDUARDO GARCÍA MÁYNEZ..., *supra* note 6 at 30-41.

apparently satisfy the criteria set by the legislature—or the framers for that purpose.²⁶ One owner may be right in believing it an *injustice for him or her* to have to give up a piece of land, especially when the government could be taking property from another neighbor, but those are *subjective* appreciations. However, the very same owner is certainly right in considering it an *injustice in itself* if the government fails to justify the takings for public use or fails to pay compensation, specifically if it is willing to pay the neighbor, but those are *objective* evaluations.

It is clear that in the search for a (valid) scientific claim, the *objective* sense of justice (“in itself”) ought to prevail over the *subjective* one (“for me/you”). To that extent, justice—if correctly understood—is and must be an objective value or virtue. Additionally, nothing precludes the legislature—or the judiciary—from developing the criteria that justice must meet in order to be and remain objective as in the previous example by requiring both public use and compensation. To clarify, this is not to say that law is just, but that law must tend toward the realization of justice objectively and not subjectively by both legislators and judges, as well as by other legal officials.

(2) “Justice”—in the Aristotelian use of just that refers to legal or lawful—is regarded not wholly subjective or accepted *prima facie* as objective, but it seems to be reduced to literal and uncritical application by judges of whatever passes as law by legislators or mere law-abiding conduct by other legal officials and citizens, deferring completely to the legislative branch or taking what has been enacted literally.

In Aristotle’s words:²⁷

Again, we saw that the law-breaker is unjust and the law-abiding man just. It is therefore clear that all lawful things are just in one sense of the word, for what is lawful is decided by legislature and the several decisions of the legislature we call rules of justice. Now all the various pronouncements of the law aim either at the common interest of all, or at the interest of a ruling class determined either by the excellence or in some similar way; so that in one of its senses the term “just” is applied to anything that produces and preserves the happiness, or the component parts of the happiness, of the political community.

There is clearly a problem. This notion of justice is based not only on the assumption that legislators are rational and that whatever the legislature decides is legal or lawful and in the common interest of all, but also on the presumption that the legislature is truly representative of the people and

²⁶ The article 27 of the Mexican Constitution establishes two requirements for takings: (1) taken for “public use,” and (2) through “compensation;” whereas the Amendment V of the United States requires it be: (1) taken for “public use”; and (2) through “just compensation.”

²⁷ Aristotle, *Nicomachean Ethics*, Book V, 1129^b, *supra* note 20 at 16-17.

a legitimate form of self-government in a democracy or republic.²⁸ Instead of taking this for granted, I would like to suggest that legislators and judges—as well as other legal officials—must meet certain criteria in order for them and their decisions to be—and remain—truthfully objective.²⁹

Consider the takings example again. Imagine that the government, via an executive decree, justifies the takings for public good, but is willing to pay a ridiculous amount as compensation. Is the executive meeting the criteria set by the legislative branch—or the framers? Would the takings be legal or lawful? Would it be in the common interest of all? Could the executive argue that the law only requires paying “compensation” and that he or she is doing so? Furthermore, do judges need to apply it literally and uncritically or is mere law-abiding conduct sufficient? In that sense, do law and justice entail a literal and uncritical approach?

In a nutshell, “justice”—if correctly understood—cannot be reduced either to a literal and uncritical application by judges or mere law-abiding conduct by legal officials and citizens. A critical—and hence an evaluative—but still objective approach to law and justice is indispensable: “something like” Rawls’ “reflective equilibrium” or even Hart’s “critical reflective attitude.”³⁰ In that sense, either the legislator—and for that purpose the framer—or the judge can explicitly make objective conditions implicit in the term “compensation” requiring it to be “fair” or “just” to truly be so. The framers of the United States Constitution did succeed in explicitly requiring a “just compensation” in the Fifth Amendment, while the framers of the Mexican Constitution failed by merely requiring “compensation.” However, in interpreting such a norm and its purpose, judges must, not literally, but critically, say that the compensation must be objectively and not

²⁸ We are already disregarding the possibility of law being only on the interest of the ruling class since it is incompatible with the idea of self-government (in a democracy or republic). See Jeremy Waldron, *Dirty Little Secret*, 98 COLUMBIA LAW REVIEW 522 (1998): “[T]o start the construction of a jurisprudence appropriate to the aspiration of a free people to govern themselves under laws that they themselves have made.” See also Jean-Jacques Rousseau, *On the Social Contract* in THE BASIC POLITICAL WRITINGS (trans. Donald A. Cress) (Hackett, 1987); and Immanuel Kant, *The Metaphysics of Morals* in POLITICAL WRITINGS, *supra* note 8 at 131-175.

²⁹ See EDUARDO GARCÍA MÁYNEZ, LOS PRINCIPIOS DE LA ONTOLOGÍA FORMAL..., *supra* note 6 at 5-6. *Vid.* also IMER B. FLORES, EDUARDO GARCÍA MÁYNEZ..., *supra* note 6 at 50-59.

³⁰ See JOHN RAWLS, A THEORY OF JUSTICE, *supra* note 9 at 20-21 and 48-51; and, H. L. A. HART, THE CONCEPT OF LAW 57, *supra* note 24. Elsewhere I have criticized Hart’s “critical reflective attitude” as uncritically developed by him and his disciples, but have endorsed the necessity of adopting the internal point of view and the need for a critical reflective attitude—or at least “something like” it. See Imer B. Flores, *In the Dark Side of the Conventionality Thesis?*, in STUDIES IN SOCIAL, POLITICAL AND LEGAL PHILOSOPHY. PHILOSOPHY OF LAW AND OF POLITICS 155-156 (Enrique Villanueva ed., Rodopi, 2002).

subjectively “fair” or “just” to truly be so. The judge is not legislating out of the blue —or inventing— these conditions, but interpreting the principles embedded in the term “compensation,” which implies the objective criteria to be fair or just.

It is now clear that “justice” —as a result of (1) and (2)— has been looked upon as an openly subjective matter of law creation or make-law, a justified political decision by legislatures; and, paradoxically, as a literal and uncritically objective matter of law application or find-law, seen as a legitimate technical decision as long as the courts defer to whatever was decided by the legislature and whenever they depart from it —or even exercise discretion— it becomes a presumably subjective matter of law creation or make-law, under the form of “judicial legislation” or “judicial usurpation.”³¹ On the contrary, “justice” should be regarded as a critical and objective matter of law creation or make-law and law application or find-law, by legislators and judges, as well as other legal officials, who meet and must meet the same criteria of legal rationality.³²

III. THE ROLE OF LEGISLATORS *VIS-À-VIS* JUDGES

As mentioned above, I contest not only the idea that legislators and judges are necessarily in competition and therefore in conflict, but also the implication that in the event of holding conflicting views on justice in a matter, it is assumed that the disagreement must be solved unwaveringly in favor of the legislative view.

This idea derives from a notion advocated by legal formalists and positivists, who hold that presumably any political decision by the legislative branch is justified solely due to its elective-representative character; whereas a technical decision of the judiciary is legitimated as long as the court defers to whatever was previously decided by the legislature, because of their non-elective and non-representative nature. But, whenever the court has to depart from the legislature or exercise its discretion, it appears to be illegitimately assuming a legislative role. Apparently, in case of conflict between the legislature and the court, the former ought to prevail over

³¹ See H. L. A. Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 128 (Clarendon Press, 1983); and, Lon L. Fuller, *The Case of the Speluncean Explorers*, 112 *HARVARD LAW REVIEW* 1858 (1999). *Vid.* also H. L. A. HART, *THE CONCEPT OF LAW*, *supra* note 24 at 204: “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.”

³² See *infra* IV. The Rationality of Legislation —and Adjudication.

the latter, due merely to its elective-representative nature following James Madison's maxim: "In republican government, the legislative authority necessarily predominates."³³

However, the mere existence of elections or the fact of being elected is neither a necessary nor a sufficient condition for being representative—or even democratic. To recall Jean-Jacques Rousseau's criticism:³⁴

Sovereignty cannot be represented for the same reason that it cannot be alienated. It consists essentially in the general will, and the will does not allow of being represented. It is either itself or something else; there is nothing in between. The deputies of the people, therefore, neither are nor can be its representatives; they are merely its agents. They cannot conclude anything definitively. Any law that the populace has not ratified in person is null; it is not a law at all. The English people believes [*sic*] itself to be free. It is greatly mistaken; it is free only during the election of the members of parliament. Once they are elected, the populace is enslaved; it is nothing.

If judges were elected—and some actually are—the assumption in favor of the legislator would fade. Despite the fact of not being elected directly by the people, judges can still be considered as a "representative" agent designated indirectly by them through a "representative" agent—such as the executive or the legislative—and even protective of minorities against the will of the majorities.³⁵

Whereas legislators are—or can be—held accountable for their political decisions, judges are *prima facie* politically unaccountable for their technical decisions. If judges were held accountable—and some actually are—the presumption in favor of the legislator would also fade. Hence, there is no conclusive reason for supposing that the legislative view ought to prevail in case of conflict over judges, due to the "false necessity" of their elective-representative and politically accountable position.³⁶ Moreover, the very idea of being in competition and in conflict is false or falsifiable, and must be replaced by the notion of collaboration and cooperation; as Fuller

³³ James Madison, *No. 51*, in ALEXANDER HAMILTON *ET AL.*, *THE FEDERALIST PAPERS* 322 (Mentor, 1961).

³⁴ Jean-Jacques Rousseau, *On the Social Contract*, Book III, Chapter XV, *supra* note 28 at 198.

³⁵ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 17; and, Ronald Dworkin *Introduction: The Moral Reading and the Majoritarian Premise*, in *FREEDOM'S LAW. THE MORAL READING OF THE AMERICAN CONSTITUTION* 1-38 (Harvard University Press, 1996); and, JOHN HART ELY, *DEMOCRACY AND DISTRUST. A THEORY OF JUDICIAL REVIEW* (Harvard University Press, 1980).

³⁶ See ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (Cambridge University Press, 1987).

suggested: “The correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective.”³⁷

According to Duncan Kennedy, the notion of competition and conflict derives from the “great dichotomies” between legal and political theory. Examples of these are the distinctions adjudication and legislation, law-application and law-creation, find-law and make-law, judges and legislators, courts and legislatures, and so on, all of which reinforce the apparent separation between law and politics.³⁸

Correspondingly, it is held that adjudication as law-application or find-law by judges in courts belongs to the legal domain and legislation as law-creation or make-law by legislators in legislatures corresponds to the political realm. Interestingly, in adjudication the political and ideological element is overlooked and underestimated, while in legislation the political and ideological one is taken for granted and overestimated. Likewise, adjudication appears to be totally objective and the political element absolutely minimized, whilst legislation seems to be wholly subjective and the political element completely maximized.

Furthermore, it is alleged that “adjudication is what courts do and legislation is what legislatures do... But it is perfectly possible for a legislature to adjudicate and for a court to legislate.”³⁹ As Fuller highlighted: “[T]he distinction between legislative and judicial functions, today taken for granted, is a comparatively modern development.”⁴⁰ In fact, as he states: “The English Parliament in its origin was primarily an adjudicative or ‘law-finding’ body, and it only gradually began openly to assert legislative powers.”⁴¹ And, he actually brings this to light:⁴²

This is a point on which legal scholarship has diverged sharply. The old view, still not entirely abandoned, maintained that the courts do not make law at all, but merely discover or discern it. The opposing view is that the courts just as truly make law as do legislatures; the only difference is that the legislature lays down in advance a general rule, whereas the courts develop general rules gradually in the course of a case-by-case decision of controversies as they are presented for decision.

It is also said that “what legislatures do when they legislate is [create or] make law, and what courts do when they adjudicate is apply [or find] law.”⁴³ The law-making process insists on value judgments, which appear

³⁷ Lon L. Fuller, *The Case of the Speluncean Explorers*, *supra* note 31 at 1859.

³⁸ See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE)* 23-38 (Harvard University Press, 1996).

³⁹ *Id.* at 26.

⁴⁰ LON L. FULLER, *THE ANATOMY OF LAW*, *supra* note 6 at 32.

⁴¹ *Id.* at 89-90.

⁴² *Id.* at 135.

⁴³ DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION...*, *supra* note 38 at 26.

to be subjective and political. Then, arguably, legislators, as elected and accountable officials, should do it and judges should abstain from legislating simply because they are *prima facie* not elected and unaccountable. The law-finding process involves questions that are apparently independent to value judgments, questions of meaning and of fact, which are objective and legal—or non-political. Thus, legal professionals as non-elected and unaccountable officials should do it and legislators should refrain from adjudicating because they are not necessarily legal professionals. As Kennedy points out:⁴⁴

When identified with the contrast between law making and law application, the legislation/adjudication dichotomy seems to admit of no middle term. But as soon as we shift to this broader notion of legal interpretation, it follows that adjudication involves both making and applying. But it does not follow, and is controverted, that judicial law making must be or is in fact “judicial legislation” and therefore abhorrent...

According to him, there are at least four different strategies for dealing with the problem:

- 1) Deny or at least ignore the possibility of a middle term, what is not law-application is law-creation, in the form of “judicial legislation;”⁴⁵
- 2) Collapse the distinction between law-creating and law-applying;
 - a) By demonstrating that any legal process entails both creation and application;⁴⁶ and/or
 - b) By illustrating that application cannot be insulated from the ideological, political or subjective element;⁴⁷

⁴⁴ *Id.* at 28.

⁴⁵ See H. L. A. HART, *THE CONCEPT OF LAW*, *cit.* note 24 at 200: “Judicial decision, especially on matters of high constitutional import, often involves a choice between moral values, and not merely the application of some single outstanding moral principle; for it is folly to believe that where the meaning of the law is in doubt, morality always has a clear answer to offer. At this point judges may again make a choice which is neither arbitrary nor mechanical; and here often display characteristic judicial virtues, the special appropriateness of which to legal decision explains why some feel reluctant to call such judicial activity ‘legislative’.”

⁴⁶ See HANS Kelsen, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY* § 32, 77 (trans. Bonnie Litschewski Paulson & Stanley L. Paulson) (Oxford University Press, 1992): “There is, in short, interpretation of all norms in so far as they are to be applied—that is, in so far as the process of creating and applying the law moves from one level of the legal system to the next.”

⁴⁷ See ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 88-89 (The Free Press, 1975): “It is no help to have a doctrine for the justification of rulemaking unless we have one for the application of rules. Freedom requires general, impersonal, or neutral

- 3) Curtail the distinction to the extent that the court interstitially applies law, as a general rule, and creates law, as an exception;⁴⁸ and
- 4) Propose a genuine middle term between law-application and law-creation: the method of “coherence” or “fit,” which concedes the ideological and political character of adjudication —and legislation— without giving up the demand for objectivity and maintaining that there is some sort of distinction between judging and legislating.⁴⁹

In my opinion, it is imperative: first of all, to neglect points 1) and 3) completely, because they reject the plausibility of a middle term between law-creation and law-application (what is not law-application must be law-creation and vice versa) to the extent that the judiciary and judges instead of their own activity of law-finding (*ius iudicare*) should be law-making (*ius dare*) which not only does not apply to them, but also encroaches on the legislature and the legislative branch. Furthermore, in justifying this intrusion as a form of “judicial legislation” with a supposedly exceptional nature does not annul its invasive nature as “interstitial judicial legislation,” which accounts for an invasion of the legislator’s role and even worse an *ex post facto* legislation, regardless of how rarely this may occur.⁵⁰

laws. The definition of neutrality and its reconciliation with the demands of concreteness are the central themes of the theory of legislation. Once we manage to formulate an adequate doctrine of lawmaking, we still have to be able to determine what it means to apply the laws to particular cases... Unless we can justify one interpretation of rules over another, the claim of legislative generality will quite rightly be rejected as a sham. The theory of adjudication is therefore a continuation of the theory of legislation.” *Vid.* also ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY. TOWARD A CRITICISM OF SOCIAL THEORY* (The Free Press, 1976).

⁴⁸ See Oliver Wendell Holmes Jr., *Dissenting Opinion*, in *SOUTHERN PACIFIC V. JENSEN*, 244 U.S. 205, 221-222 (1917): “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’.” *Vid.* also *The Path of Law*, 110 *HARVARD LAW REVIEW* 991-1009 (1997).

⁴⁹ See Lon L. Fuller, *Positivism and Fidelity to Law —A Reply to Professor Hart*, 71 *HARVARD LAW REVIEW* 667 (1958): “This fabric [*i.e.* the interpretative process] is something we seek to discern, so that we may know truly what it is, but it is also something that we inevitably help to create as we strive (in accordance with our obligation of fidelity to law) to make a statute a coherent, workable whole.” *Vid.* also *The Forms and Limits of Adjudication*, 92 *HARVARD LAW REVIEW*, 357-409 (1978); and RONALD DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 18 at 146: “I shall argue that legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally. Law so conceived is deeply and thoroughly political. Lawyers and judges cannot avoid politics in the broad sense of political theory. But law is not a matter of personal or partisan politics, and a critique of law that does not understand this difference will provide poor understanding and even poorer guidance.” See also RONALD DWORKIN, *LAW’S EMPIRE* 176-224 (Harvard University Press, 1987).

⁵⁰ See Imer B. Flores, *Legisprudence...*, *supra* note 3 at 257-258.

Second, I propose accepting 2a) totally and 2b) partially, *i.e.* the possibility of a creative-applicative and political-ideological characterization of the process of legislation and adjudication by breaking down the distinction between law-creation and law-application to the point of demonstrating that any legal process entails both creation and application, as well as illustrating that both are political-ideological, but not necessarily subjective, as argued above.⁵¹

And, third, to admit 4) entirely, which concedes that despite being political-ideological, both legislation and adjudication do not have to renounce the demand for objectivity —and for the purpose of this paper “justice”— and that in spite of being creative-applicative, there is still some distinction between judging and legislating. The latter is a piece of legislation that creates a general and abstract norm (*invention*), whilst the former is a judicial decision that creates not only a particular and concrete norm —*i.e.* an individual norm— for the case at hand, but also criteria or precedent for future cases (*interpretation*).⁵²

Since the implications are still implicit, I try to explain what follows from the fact that both legislation and adjudication are creative-applicative and political-ideological, while still being objective. Not only does it imply different legal processes with distinct degrees of freedom and constraint within a Kelsenian “frame”⁵³ for legislators and judges to the extent that the former can invent (new) laws and the latter must interpret the (existing) law,⁵⁴ but it also entails different legal products: a general and abstract norm created by legislators and a particular and concrete norm —and even a criteria or precedent for judging future cases— created by judges.⁵⁵ It requires a

⁵¹ See *supra* II. The Realization of Justice.

⁵² See Imer B. Flores, *Legisprudence...*, *supra* note 3 at 259-260.

⁵³ See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 JOURNAL OF LEGAL EDUCATION, 518-562 (1986). *Vid.* also HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, *supra* note 46 at 80-81.

⁵⁴ See LON L. FULLER, THE MORALITY OF LAW, *supra* note 6 at 84: “If a court applies the statute to a weapon its draftsman had not thought of, then it would be ‘legislating’, not ‘interpreting’, as even more obviously it would be if it were to apply the statute to a weapon not yet invented when the statute was passed.” *Vid.* also RONALD DWORKIN, LAW’S EMPIRE, *supra* note 49 at 366: “We cannot just dismiss that claim as obviously disingenuous, as masking what is really *invention* rather than *interpretation*.” RONALD DWORKIN, JUSTICE IN ROBES 15 (Harvard University Press, 2006): “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*.”

⁵⁵ See Imer B. Flores, *Apuntes para una teoría —y práctica— del derecho judicial: algunas reflexiones críticas sobre técnica jurídica (Notes on a Theory —and Practice— of Find-Law: Some Critical Reflections on Legal Technique)*, 7 REFORMA JUDICIAL. REVISTA MEXICANA DE JUSTICIA 3-25 (2006). *Vid.* also HANS KELSEN, INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY, *supra* note 46 at 70, and Hans Kelsen, *The Law as a Specific Social Technique* in WHAT IS JUSTICE?..., *supra* note 14 at 244-246.

critical assessment of its objective character, and hence in the following part we need to focus on the criteria that both adjudication and legislation must meet in order to be objective.

IV. THE RATIONALITY OF LEGISLATION —AND ADJUDICATION

In this part, I will deal with two of the most important new developments in make-law: 1) the appearance —or reappearance— of the theory of legislation at the core of legal studies and, 2) the emergence —or reemergence— as a consequence of the rationality of legislation to the forefront of legal discussion.

1. *The Theory of Legislation*

In order to guarantee that legislation is objective, it must be subject to critical and scientific inquiry, and as such, an adequate theoretical approach to or theory of legislation (*i.e.* “Legisprudence”) is needed. This (new) theoretical approach or theory implies the study of not only legislators and legislatures, but also of law-making, including its objective forms and limits.⁵⁶ For that purpose, the focus on the rationality of legislation is simply *sine qua non*.⁵⁷

Consequently, it must focus on: 1) lawmaking —legislation itself and statutes— covering everything from a draft to the final product and the entire process from a statute’s conception and gestation —through its drafting and implementation— to its death —either by fleeting derogation or lingering desuetude;⁵⁸ and 2) legislators and legislatures, beginning with the regulation of elections through which representatives are voted into Congress or Parliament, continuing with the organization of the legislature at large and/or committees and even subcommittees, and finishing with the supervision of what they —and others— may and may not do “lawfully” in the lawmaking process.⁵⁹

2. *The Rationality of Legislation*

Paradoxically, the least dangerous branch of government is the more —and arguably better— examined, while the most dangerous one is the

⁵⁶ See Imer B. Flores, *Legisprudence...*, *supra* note 3 at 247-266. *Vid.* also Imer B. Flores, *The Quest for Legisprudence...*, *supra* note 3 at 29-34.

⁵⁷ See Imer B. Flores, *Legisprudence...*, *supra* note 3 264-266. *Vid.* also Imer B. Flores, *The Quest for Legisprudence...*, *supra* note 3 at 35-38.

⁵⁸ See Imer B. Flores, *The Quest for Legisprudence...*, *supra* note 3 at 31-34.

⁵⁹ *Id.* at 30-31.

less —and presumably worse— studied, at least from a legal perspective.⁶⁰ However, there are few exceptions. Of these, we will discuss the cases of Norberto Bobbio and Lon L. Fuller in detail, and mention that of Manuel Atienza, in order to integrate the proposals into a single one.

In the proceedings of the IVR World Congress on “Legal Reasoning” celebrated in Brussels, in 1971, Bobbio published an article on the image of the *bon législateur*. In that paper, he distinguishes the essential and non-essential attributes of a (good) legislator.⁶¹ He stipulates that “*essential attributes*” are those necessary prohibitions that the legislator cannot violate, without any exceptions (as imperatives); and “*non-essential attributes*” are those contingent that may, under certain conditions, institute prohibitions for the legislator but with certain exceptions (as directives). Therefore, he establishes that the essential attributes include the following: 1) *justice*: equal treatment to like cases and different treatment to unlike ones; 2) *coherence*: no (logical) contradictions; 3) *rationality*: in the formal-logical or intrinsic sense of *Zweckrationalität* —according to Max Weber; and 4) *non-redundancy*: no repetition or unwarranted reiteration. Meanwhile, the non-essential attributes are: 1) *rigorous*: scrupulous in the process of law-making; 2) *systematic*: methodical in the order of their exposition; and 3) *exhaustive*: completeness in determining specific cases. In consequence, he assumes a necessary just, coherent, rational, and non-redundant legislator while presuming a contingent rigorous, systematic and exhaustive legislator.

On the other hand, Fuller advocates the existence of the “implicit laws of law-making” or “internal morality of law,” that is certain limitations to what a legislator can objectively do.⁶² The eight principles comprise: 1) *generality*: laws must be general not only by creating general and abstract cases, but also by promoting the common good or interest; 2) *publicity*: laws must be promulgated in order to be known by its subjects; 3) *non-retroactivity*: laws must not be applied *ex post facto* (*i.e.* to facts that occur before entering into force —and only under special circumstances applied retroactively); 4) *clarity*: laws must clear and precise in order to be followed; 5) *non-contradictory*: laws must be coherent and without (logical) contradictions or inconsistencies; 6) *possibility*: laws must not command something impossible and therefore must not be given a (merely) symbolic effect; 7) *constancy*: laws must be general not only in their creation, but also in their application, and hence laws should not be changed too frequently or enforced intermittently; and

⁶⁰ Bear in mind that “[T]he judiciary... will always be the least dangerous to the political rights of the Constitution.” Alexander Hamilton, *No. 78*, in ALEXANDER HAMILTON *ET AL.*, *THE FEDERALIST PAPERS*, *supra* note 33 at 465. *Cfr.* ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (Yale University Press, 1962); and A. Michael Froomkin, *Climbing the Most Dangerous Branch of Government: Legisprudence and the New Legal Process*, 66 *TEXAS LAW REVIEW* 1071-1098 (1988).

⁶¹ See Norberto Bobbio, *Le bon législateur*, *supra* note 6 at 243-249.

⁶² See LON L. FULLER, *THE MORALITY OF LAW*, *supra* note 6 at 33-94.

8) *congruency*: laws must be applied according to the purpose for which they were created, preventing any discrepancy between the law as declared and as it is actually enforced.

Finally, in following Atienza, we can summarize that legal rationality—which is the same in adjudication as in legislation—⁶³ comprises five different types that are and must be integrated into one:

- 1) *Linguistic rationality*: laws must be clear and precise to avoid the problems of ambiguity and vagueness (*R1*).
- 2) *Legal-formal* —or *systematic*— *rationality*: laws must be not only valid—and as such general, abstract, impersonal and permanent—but also coherent, non-redundant, non-contradictory, prospective or non-retroactive, and publicized to avoid problems of antinomies, redundancies and gaps, while promoting the completeness of law as a system (*R2*).
- 3) *Teleological rationality*: laws must be efficacious in serving as a means to a end and consequently, they cannot establish something impossible or merely symbolic (*R3*).
- 4) *Pragmatic rationality*: laws must not only be efficacious, but also socially effective and economically efficient in the case of conflict (*R4*); and
- 5) *Ethical rationality*: laws must be just or fair and as a result can neither admit an injustice or the violation of basic principles and rights (*R5*).⁶⁴

⁶³ See Manuel Atienza, *Para una teoría de la argumentación jurídica*, *supra* note 6 at 39-40.

⁶⁴ It is worth pointing out that we agree with Atienza that the (good) legislator must begin by using clear and precise language to avoid problems related to ambiguities and vagueness (*linguistic* —or *communicative*— *rationality*) and must carry on by inquiring about the coherency and completeness of the legal system to avoid contradictions and gaps (*legal formal* —or *systematic*— *rationality*). However, we are at variance with him in the order of the pragmatic and teleological rationalities, and hence, have inverted their places. Our explanation is simple: the legislator must continue by drafting at least one end (*teleological rationality*) into law, but it may be the case of establishing more than two ends —or sets of interests, purposes or values— (*pragmatic rationality*) and not the other way around. Finally, the legislator must guarantee an overall justified principle embedded into the law or at least not violated by it (*ethical rationality*).

By the same token, the (good) judge must begin by asking about the clarity and precision of the language used (*linguistic* —or *communicative*— *rationality*); and, only when the language is neither clear nor precise, must carry on by inquiring about the coherency and completeness of the legal system (*legal formal* —or *systematic*— *rationality*). Analogously, only when the language and legal system appear to be incoherent or incomplete, the judge must go on to request an end (*teleological rationality*), as in the case when there are more than two ends —or sets of interests, purposes or values— equally available, by appealing to the better one (*pragmatic rationality*). Finally, only when their consequences and effects are illegitimate, the judge must strive to secure an overall legitimate principle (*ethical rationality*). *Cfr.* Manuel Atienza, *Sociología jurídica y ciencia de la legislación*, *supra* note 6 at 50-51; *Contribución a la teoría de la legislación*, *supra* note 6 at 385-393; and CONTRIBUCIÓN A LA TEORÍA DE LA LEGISLACIÓN, *supra* note 6 at 27-40.

In that sense, a (good) legislator —and a (good) judge— not only knows and must know the intricacies of our language (*R1*); the details of our existing legal system, its past, present and future (*R2*); the minutiae of our scheme of ends, interests, purposes and values (*R3*); the ins and outs of their possible consequences and effects (*R4*); and, the niceties of every single principle of justice (*R5*); but also integrate these five different types of legal rationality.

V. CONCLUSION

To conclude, let me quote —or more precisely paraphrase— Wilfrid J. Waluchow:⁶⁵

Seen in this light, judges and legislators need not be seen to be in *competition* with each other over who has more courage or the better moral vision. On the contrary, they can each be seen to contribute, in their own unique ways, from their own unique perspectives, and within their unique contexts of decision, to the achievement of a morally sensitive and enlightened rule of law... [and “justice”...] judicial review sets the stage for a “dialogue” between the courts and the legislature... not as an imposition that thwarts the democratic will but as one stage in the democratic process.

Finally, instead of a literal and an uncritical approach to justice embodied in the Latin adagio *Fiat iustitia, et pereat mundus* (*i.e.* “Let justice be done, though the world perish”), we need a critical attitude.⁶⁶ As a result there is no necessary conflict between the legislators and judges, since both meet —and must meet— the same objective criteria towards the realization of justice in its best (moral) light, as Dworkin anticipated:⁶⁷

⁶⁵ WILFRID J. WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW..., *supra* note 4 at 269-270.

⁶⁶ Although this adage and its twin *Fiat iusticia, ruat caelum* (“Let justice be done, even if heavens falls”) have analogous meanings along the lines of “justice must be done at any price or regardless of consequences.” Nowadays, the former —popularized by the Emperor Ferdinand I— is used to criticize a legal opinion or practice that wants to preserve maxims in law at any price despite absurd or contradictory consequences, whereas the latter —recognized by William Murray, Lord Mansfield— is used to eulogize the realization of justice despite appearing to be outweighed by a pragmatic or utilitarian consideration. *Vid.* Lord Mansfield’s judgment in *R v Wilkes* (1770) 4 Burr 2527 at 2561-2562 [98 ER 327 at 346-347]: “The constitution does not allow reasons of state to influence our judgments: God forbid it should! We must not regard political consequences; however formidable soever they might be: if rebellion was the certain consequence, we are bound to say ‘*fiat iustitia, ruat caelum*’ (Let justice be done even if the heaven falls).”

⁶⁷ RONALD DWORKIN, LAW’S EMPIRE, *supra* note 49 at 406.

We hope that our legislature will recognize what justice requires so that no practical conflict remains between justice and legislative supremacy; we hope that departments of law will be rearranged, in professional and public understanding, to map true distinctions of principle, so that local priority presents no impediment to a judge seeking a natural flow of principle throughout the law.