The Legitimacy Sphere: Between Law, Culture, Politics and Enforceability

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1 Introduction

In law as in society relativism is apparent. Capital punishment is considered to be important in several jurisdictions but is unthinkable in others. The law varies geographically and what are considered to be legitimate solutions fluctuate with time. The same is true for human and civil rights, and although the black letter provisions may be similar their practical implications vary considerably.

Relativism is a serious challenge for anyone seeking to study the law from an objective point of view. The core question is whether it is possible to characterize legislation as good or bad from a jurisprudential perspective. Or, to put it in other words, what is it that creates legitimacy? The issue consists of a number of sub problems. Are there principles that cannot be violated, is it possible to identify any lowest acceptable standards, and is it appropriate for the legal sector to have distinct opinions concerning the development of the legal system, apart from pure technicalities?

The literature on these matters is abundant. The opinions vary and in legal theory legitimacy is usually analysed from the philosophical point of view.[1] This contribution, however, starts out from an inventory of practical requirements. The hypothesis is that it is possible to decompose the concept of legitimacy into various aspects of rationality which can be analysed separately. The ambition is thus to provide a holistic perspective, and to shift the focus of the discussion somewhat as compared to many traditional approaches.[2]

In short it is suggested that five aspects of rationality can be identified, each representing a necessary component of legitimacy. The first one being a reflection of the obvious fact that legislation is a democratic instrument that must be able to function as an operative tool or, to put it plain and simple, that laws must exhibit *political rationality*. At the same time it is evident that the legal system must be acceptable from the point of view of the legal sector, i.e. that there is a demand for *legal rationality*. Equally relevant is that legislation should be *culturally rational* in the sense that it must be understandable in its social context – a law that is not accepted by those affected by its effects is not a legitimate law. Likewise, a legal system must be enforceable, meaning that the rules should be efficient and possible to uphold. Legislation must therefore reflect *operational rationality*. The fifth aspect is a consequence of the fact that a legal system should be consistent in the sense that it should be free from contradictions, voids and logical errors, the latter a requirement that can be understood as a need for *internal rationality*.

Another initial assumption in this article is that the various aspects of rationality often contradict each other, and the remaining part of this paper is devoted to an analysis of their different characteristics and relationships.

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1 For introductions and further references, *see* e.g. Harris, J .W. *Legal Philosophies*, 2 ed, Butterworths, London 1997, Penner, J.E. *McCoubrey & Whites Textbook on Jurisprudence*, 4 ed. Oxford University Press, Oxford, 2008 and Wacks, R., *Understanding Jurisprudence: An Introduction to Legal Theory*, Oxford University Press, Oxford, 2 ed. 2009.

2 The perspective that is presented here was first outlined in Wahlgren, P, *Lagstiftning: Problem, teknik, möjligheter*, Stockhom, Norstedts, 2008.

2 Background

In all sectors of society we see the emergence of new forms of technically dependent legislation. A phenomenon which may be labelled embedded laws,[3] i.e. regulations that are actually built in into the physical environment.[4] A variety of solutions can be observed. An illustration is road tolls with the purpose to cut congestion and minimize traffic jams, which are based on pay-as-you-drive charges. Such regulation are often entirely dependent on ICT solutions, e.g., various types of satellite tracking devices, digital image recognition and/or microwave signals automatically identifying tags attached to the vehicles. The data is then electronically processed and fees are decided, sent out and paid via IT-systems without human intervention. Another example is modern tax regulations concerning verification of transactions which presuppose technical solutions.[5] Also rule-based activities depending on ICT support systems within public authorities continuously increase, for the management of procurement processes, taxation, administration of elections, etc.

This development has actually gone so far so that in many situations it would be impossible to return to a "pure", non-technical legislative strategy. Frequently, technical representations as extension of the provisions are taken for granted, and may also be essential for the effectiveness of the legislation.[6] Already today we are completely dependent on technical means in order to vindicate the regulations aiming to combat computer intrusions and the situation is doubtlessly the same when it comes to upholding security for electronic communication, electronic payment systems, etc.

Although technical implementations of this kind cannot be looked upon as alternatives to traditional legislation it is quite clear that they provide important complements to the regulations. In many cases the technical implementations are the only perceptible parts those affected by the legislation come into contact with. From this also follows that solutions of this kind may change the opinion on what is considered to be legitimate solutions as they clearly operate in different ways as compared to conventional black letter law.

Noticeable is also that the possibilities to integrate rule-based solutions into technical systems are constantly increasing. Potentially more advanced technical solutions may include elaborate forms of e-government for virtually all kinds of

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3 *See* Wahlgren, P., *IT and Legislative Development*, Scandinavian Studies in Law, Vol 47, 2004 p. 601-618.

4 *Cf* . for predictions and early illustrations, Beutel, F.K., *Some Potentialities of Experimental Jurisprudence as a New Branch of Social Science*, University of Nebraska Press, Lincoln 1957, Seipel, P., *Computing Law*, Liber förlag, Stockholm 1977, Lessig, L., *Code, version 2*. Basic Books New York 2006. Susskind, R., *The Future of Law, Facing the Challenges of Information Technology*, Clarendon Press, Oxford 1996, and Susskind, R., *The End of Lawyers?* Oxford University Press, Oxford 2008.

5 In Sweden a new Act 2010 stipulates that all enterprises handing cash must have an on-line connection between their cash-registers and the tax authorities for control purposes (Lag (2007:592) om kassaregister m.m.

6 *See* Wahlgren, supra footnote 2 p. 215-222.

administrative services, automatically supervised, dynamic road traffic regulations and, eventually, legal decision-making within the courts, perhaps based on computerised sentencing guidelines and pre-programmed procedural codes.

The utilisation of ICT for the implementation of legislation can be highly efficient and it is quite obvious that legislation combined with embedded ICT components actually can eliminate many of the present problems with poor legislative impact. It is also likely that the interest concerning further developments in this direction is going to increase as the understanding of the potentialities becomes more widespread.

At the same time it must be conceded that the use of embedded regulations raises a lot of questions as a continuous development of more sophisticated legislation provides new challenges for the legal domain. Several of the risks related to the development of a more technocratic society are of a very serious nature which is why these aspects should be given considerable attention. One such issue concerns transparency. Intricate technical solutions are often difficult to understand and they may thus appear fear-provoking or alienating.

A fundamental objection is also that a development of more technocratic societies puts democratic ideals in peril. This simply because technical standards can be established without the involvement of authorities, and as actors with sufficient resources easily can alter the balance laid down in embedded legislation, by means of altering technical platforms or introducing mechanisms obstructing the systems.

Closely related to such a *technocracy scenario* is the development of an Orwellian Big Brother society in which technology becomes ubiquitous and where surveillance and privacy control seriously delimits the freedom of individuals. At a somewhat more concrete level, problems of adequate transformation of legal provisions into computer code, difficulties in upholding essential legal principles, e.g., concerning freedom of information, as well as unpredicted secondary effects originating from system complexity must be acknowledged.[7]

7 The study of Legal Automation (Rechtsautomation) has generated a comprehensive literature in the Scandinavian countries. *See e.g.*, Magnusson Sjöberg, C., *Rättsautomation. Särskilt om statsförvaltningens automatisering*, Norstedts Juridik AB, Stockholm 1992, Schartum, D. Wiese., *Rettssikkerhet og systemutvikling i offentlig forvaltning*, Universitets-forlaget, Oslo 1993 and , for a somewhat different perspective, Lessig, supra footnote 4.

3 Aspects of Rationality

3.1 Political Rationality

Legislation is sometimes the only available means in order to handle problems on a societal level – politicians seeking to implement reforms use legislation as a tool. In this respect laws are political instruments employed in order to achieve certain objectives. In this respect legislation is a crucial component in all political systems and for many reasons this role of operative steering may be looked upon as the core function of the legislation.[8]

> "It is correct that we produce a lot of legislation, and that the laws have a short lifespan and are renewed at a fast pace. We are advancing the positions in line with our own values.
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> It is not easy to be updated on what [the laws] stipulate at any given moment. But we have no alternative… The laws should not be looked upon with humble respect. They are working tools for reaching political goals."[9]

The instrumental functions of the laws are reflected in opinions on how the legislative technique ought to be developed. As a consequence all discussions about legitimate legislation, as well as opinions about how different acts should be designed, have political dimensions. From the politicians horizon it may be appropriate to argue that research on legislative techniques first and foremost should focus on the development of methods supporting political efficiency. The legislative mechanisms should be uncomplicated to employ in order to achieve different objectives as swiftly as possible and the laws should be uncomplicated to replace and update.[10] Instrumental objectives of this kind are frequently also mirrored in political desires to implement provisions of a very detailed nature.

To study political rationality is a complex task. As the intention with different laws varies, different attributes and effects become relevant to investigate. Pedagogical aspects, timing, issues of language, transparency, media strategies concerning implementation, and many other aspects come into focus.

For several reasons political rationality raise demands concerning the legislative process as it may be defined in the Constitution. To take into consideration is also that poorly prepared legislative propositions may be heavily

8 *See e.g.* OECD, *Guiding Principles for Regulatory Quality and Performance* 2005, p. 3 "Good regulation should … serve clearly identified policy goals, and be effective in achieving those goals."

9 Protokoll fört vid Svenska Pappersindustriarbetareförbundets 14:e ordinarie kongress, *Tal av statsrådet Carl Lidbom*, Stockholm 1974 p. 190–191.

10 *See* concerning the debate in Sweden in the latter part of the 20th century, Lidbom, C., *Reformist*, Tidens förlag, Stockholm 1982 p. 164–182, Sundberg, J. W.F. *Rättskällorna på 1970-talet*, i Svensk rätt i omvandling: Studier tillägnade Hilding Eek, Seve Ljungman, Folke Schmidt, Stockholm: Norstedt, 1976 p. 495–518 and Ahlin, P. & Bergstrand, M., *Den godhjärtade buffeln: En bok om Carl Lidbom*, Juristförlaget, Stockholm 1997 p. 65–89.

criticised and thus counterproductive from the political point of view.[11] Implementation processes should therefore be designed in a conscious manner and a number of factors should be observed. A checklist published by the OECD among other things points out that market and competition issues should be respected; that political leaders and leading public officers should articulate their support for the reform; that the mechanisms that are intended to secure the effective implementation of the reform are evaluated beforehand; that the reform has been enacted and coordinated between all levels of authorities involved; that the reform is understandable, consistent and transparent for those affected; that mechanisms for effectuation are timely established; that the reforms are coordinated between the different ministries.[12]

Political rationality: Laws should be	Constitutionally enacted
	Informative, declarative, policy supporting
	Readily available tools
	Instrumental
	Changeable
	Flexible
	Pedagogical
	Detailed

Table 1: Aspects of political rationality.

3.2 Legal Rationality

To perceive laws as short lived political tools is not an uncontroversial attitude. In several ways such a position may clash with the established jurisprudential position, assuming that the rule of law, the principle of predictability and other legal fundaments should have the power to restrict political ambitions by means of ruling out certain types of laws.

Anyone admitting that the legal system should have a special position may also embrace the standpoint that the legislative process should not be too hurried, as important functions of the legal system is to provide stability and to make the future less volatile. Arguments in line with such a viewpoint make it natural to suggest that the legislative process must include a number of extensive formal components.[13]

From the point of view of the legal decision maker it must be taken into consideration that the laws often function as decision support and that this raises

11 In Sweden as well as in some 15 other countries new political parties have been registered since 2006, basically as reactions to new legislation concerning control of file sharing and other forms of on-line surveillance. On of them, the Swedish Pirate Party in 2009 won a seat in the EU-parliament.

12 OECD footnote 8 supra p. 6–13 and passim.

13 Beyer, C. *Rättssäkerhet – en formsak*. Juridisk tidskrift 1990-91 p. 393 ” All demands and principles [concerning the rule of law] can be understood as focusing on issues of formality…”

demands for clarity and access to provisions that are as precise as possible. On the other hand, the need to balance interests and support conflict resolution over time frequently requires that legislation cannot be too specific. Very detailed rules are likely to have a short life span and require revision as the preconditions change, thus hampering predictability.

The legal perspective is also manifest in demands concerning the design of the legislative preparatory process and organisational arrangements, facilitating the evaluation of the final products. Illustration of the former may be requirements focusing on the need to incorporate specific procedures concerning the hearing of interest groups and adherence to strictly formalized and sometimes time consuming mechanisms ensuring that the principles of the Constitution are upheld. In Sweden the latter task is assigned to a Legislative Council, reviewing proposed legislative acts, and in many other countries Constitutional Courts fulfil this function.

From a theoretical point of view arguments concerning legal rationality are sometimes based on the idea that the laws to some extent should reflect values that cannot, or, at least, should not be politicised. Theories of this kind are sometimes labelled *natural law* and according to these theories the laws must be developed within a certain framework.

> "But in human affairs a thing is said to be just when it accords aright with the rule of reason: and … the first rule of reason is the natural law. Thus all humanly enacted laws are in accord with reason to the extent that they derive from the natural law. And if a human law is at variance in any particular with the natural law, it is no longer legal, but rather a corruption of law.
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> Man is bound to obey secular Rulers to the extent that the order of justice requires. For this reason if such rulers have no just title to power, or have ursuped it, or if they command things to be done which are unjust, their subjects are not obliged to obey them…"[14]

Although the standards that may be elicited from the concept of natural law are rather vague it is possible to distinguish a variety of demands, e.g. concerning the avoidance of retroactive legislation, incorporation of principles relating to human rights and the necessity to acknowledge democratically ratified limitations of powers.[15]

To precisely define the fundaments or requirements that may be unanimously acknowledged as core elements of a legal order is nevertheless difficult. Various jurisdictions exhibit significant differences concerning these matters. The relativism is apparent. Noticeable is also that elements that usually are vindicated as basic human rights frequently are put aside, even by countries which may have ratified international agreements on the matter. The

14 D' Entreves (ed.) Aquinas, St T, *Selected Political Writings* (1959) pp 121, 179. As cited by Harris, supra footnote 1.

15 The literature is voluminous. *See*, for overviews and further references, e.g. Murphy, M., *Natural Law in Jurisprudence and Politics*, Cambridge University Press, Cambridge 2006 (Cambridge Studies in Philosophy and Law) and Wacks, supra note 1.

explanations for doing so are then often referred to as necessities brought about by external circumstances, self defence, threats, economic reasons etc. The gap between theory and practice is often huge.

The assumption that there exist certain standards that must be incorporated in any legal system may also be the basis for arguments concerning what is an appropriate legislative technique. Whether natural law is an adequate label for such theories may still be discussed, but regardless of that it is beyond doubt that all legal systems, as well as legislative processes must meet some demands for quality and uphold a number of functions recognised as legal principles in order to be acknowledged as a legitimate legal order.

Legal rationality: Laws should	Exhibit and support stability
	Support decision making
	Support conflict resolution
	Balance conflicting interests
	Vindicate fundamental, jurisprudential principles, human and civil rights, rule of law/Rechtsicherheit (equal justice, objectivity, etc.)
	Be in line with the constitution
	Be predictable (not retroactive)
	Be general
	Be promulgated

Table 2: Aspects of legal rationality.

3.3 Cultural Rationality

Cultural rationality is important in order to understand the always apparent issue of relativism. In order to be rational from the cultural point of view legislation must relate to certain contextual frameworks. A law that raises doubts in the environment in which it is intended to be employed is more likely to be obstructed than a culturally well-founded one. In this respect it is clear that there exist a continuum, from laws that are easily tolerable to ones that are resented by large groups of the society.

At a somewhat more detailed level the demand for cultural rationality specify that the laws must be acceptable from moral, religious and ethical points if view. Legislation must also be understandable to the subjects affected and should not clash with traditional customs. In other words the lawmaker should seek to design laws that are understandable, in accordance with the public sense of fairness, and, at least to some extent, exhibit details that are recognisable by the addresses. From this also follows that dramatic changes in the legal system may be more cumbersome to obtain acceptance for as compared to changes through small succeeding steps.

Cultural rationality may reflect not only the substantial content of the laws but also the enactment process as such. In most countries a democratic process is presupposed but the standards that are indicated by this are not easy to define.

Democracy can be characterized in many ways, and in several jurisdictions democratic attributes are mere façades.

In this respect OECD has issued a checklist for legislative reforms stating that "[t]ranparency in rule making also reinforces legitimacy and fairness of regulatory processes" It is furthermore suggested that regulations should be developed in an open … fashion, with appropriate and well-published procedures for effective and timely inputs from interested national and foreign parties, such as affected business, trade unions, wider interest groups such as consumer or environmental organisations, or other levels of government.[16] It is furthermore argued that it is important to consult with "all significantly affected and potentially interested parties …where appropriate at the earliest possible stage while developing or reviewing regulations, ensuring that the consultation itself is timely and transparent, and that its scope is clearly understood."[17]

In addition to preconditions concerning transparency contextual demands often make it advisable to design laws so that they are in line with the development of social, religious and historical presuppositions. Several such matters may be commonly recognized but they may also be less well defined and only possible to understand through the acceptance of various culturally biased interpretations of e.g. human rights, protection of minorities, freedom of religion, freedom of information, the right to free speech, openness, equality, etc.

In many cases the complexity of these matters are illustrated by incidents of violence and other forms of clashes. The publication of Mohammed Cartoons in Danish newspapers, accompanying demonstrations about the limits of free speech, the ongoing discussion about the use of capital punishment, and different opinions concerning the proper balancing of surveillance mechanisms for security reasons and privacy are just some examples.

Globalisation and a more intense international cooperation have recently highlighted discussions concerning the legitimacy of solutions in many different fields of the law. The recent decades have thus to some extent defined the limitations of national legislation. Still, when it comes to cultural rationality the nature of what is considered to be acceptable often changes rapidly. There has also been a vivid debate about whether the legislatures power has shifted, e.g. towards the European Parliament, and it has been questioned whether the development brings about power structures which successively are becoming more difficult to influence. Discussions which negatively have affected the possibilities to get acceptance for national legislation initiated by the EU.

To aspects of cultural rationality it is also relevant to relate the issue of how legislation is communicated and described in the society in which is it implemented. The fact that laws are published and promulgated is not enough. The content must also be made public in an understandable and easily accessible way. Apart from the ever present demand for clarity this means that it is important to communicate information about the purpose of the legislation.

16 OECD, *APEC–OECD Integrated Checklist on Regulatory Reform* p. 17. "www.oecd.org/dataoecd/41/9/34989455.pdf".

17 OECD, *Guiding Principles for Regulatory Quality and Performance 2005*, "www.oecd.org/dataoecd/19/51/ 37318586.pdf".

In a somewhat different terminology this may be described as a demand for intersubjectivity.[18] From the market perspective it has also been suggested that the lawmaker should take into consideration that legislation should be "clear, simple and practical for the users … minimise costs and market distortions … [be] compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international level".[19]

Cultural rationality: Laws should be	Contextually (ethically, morally, religiously) acceptable
	In accordance with the common sense of justice
	In line with the development of society
	Understandable (accompanied by explanatory information concerning purpose and context)
	Specific
	Traditional

Table 3: Aspects of cultural rationality.

3.4 Functional Rationality

If the law should fulfil its objectives it must be possible to employ the substantial rules in an efficient way. This may be described as a demand for functional rationality, i.e. legitimate laws must also be operational – they should be upheld in practice and be possible to enforce, preferably at a low cost and with little time delay. This in turn presupposes access to resources and well developed methodological rules. In this respect it is rarely sufficient to rely only on the implementation of new provisions; also the allocation of resources, education and the development of instructions or ordinances for the practical management of the enactments are likely to be crucial.

Another general demand is that the laws must be possible to adjust to different presuppositions prevailing in various areas of society.[20] Also in this case the demands vary considerably. Activities may be more or less tolerant to inefficiency and at the same time the control, supervision and organisation needed in order to administrate a specific law differ, depending on the presuppositions in various regulatory domains and with respect to the more precise objectives that may underlie the rules.[21] An additional factor to observe is that any new law ideally should be implemented without side effects.

To take into consideration is furthermore that there may exist different opinions concerning the type of legislative design that is likely to be rational

18 *See* e.g. "en.wikipedia.org/wiki/Intersubjectivity". "Shared meanings constructed by people in their interactions with each other and used as an everyday resource to interpret the meaning of elements of social and cultural life".

19 See e.g.. OECD, footnote 8 supra p. 3.

20 *See* e.g. OECD, footnote 8 supra p. 3 concerning "a sound legal and empirical basis".

21 *See Tillsyn. Förslag om en tydligare och effektivare tillsyn* SOU 2004:100.

from the operational point of view. From the fact that it is possible to find consensus about the objective does not necessary follow that there is a common understanding of the means.

Also in this respect the issue of intersubjectivity is relevant. If a law should have the desired impact the effectuating authorities, the public and the courts must be in the position to rightly understand its underlying purpose. In this respect it must be noted that certain laws primarily have informative, knowledge enhancing, or policymaking objectives, i.e. the intention is not necessarily to immediately change any substantial matter, but to affect peoples behaviour in a long term perspective.

Examples of the latter would be regulations defining recommendations concerning the implementation of self regulation mechanisms, e.g. quality assurance systems, or articulating ideals for transparency and freedom of information in various sectors of society, e.g. those dealing with food production and financial products, etc. In the short term perspective the practical efforts that need to be initiated may in such cases be limited but operational rationality is still always a factor to take into consideration. A law whose primary objective is to inform or to describe long term goals is only legitimate if the content is dispersed in an understandable manner. In this respect it is often fruitful to perceive the implementation of new laws as a communicative process. This in turn indicates that it often is relevant to develop information about new legislation and also to recognize this task as a natural part of the legislative process.

The need for operative rationality furthermore indicates that it is relevant to develop knowledge about to what extent enacted laws fulfil the desired objectives, i.e to examine the effects of implemented legislation. This simply because it is important to understand and develop knowledge about in which situations different forms of regulations are likely to be more or less efficient. From this follows that it is important to establish routines for continuous data collection about the impact of the laws, and preferably this should be done on a routine basis already when a new piece of legislation is implemented. At present however, the latter is not a very well developed facet of legislative techniques.

Functional rationality: Laws should be	Adequately designed with respect to purpose
	Without side effects
	Efficiently appliable (fast/cheap)
	Be possible to complement with explanatory information to the administration concerning purpose and context
	Complemented with excecutive resources

Table 4: Aspects of functional rationality.

3.5 Internal Rationality

The fact that a law is considered to be politically, legally, culturally, and functionally rational is not enough. Not all such laws are legitimate. A purposeful law must also exhibit internal rationality.[22] Important in this respect is that the law as such, in its logical structure and textual representation, meets certain demands concerning coherence, which in turn may be defined both in a positive manner (rational laws must have a certain form and carry certain attributes) and in a negative manner (there exist a number of shortcomings that must be avoided).

In its details this aspect of legitimacy stipulates that the laws are designed so that the rule syntax is transparent and as clear as possible. Both the antecedents and the consequents should be simple to identify and in cases where several rules are interdependent of each other the connections between them should be systematic. That is simply to say that if the rules are presuppositions for each other, i.e. if a consequent in a rule also is the antecedent in an other rule, as far as possible such a relationship should be represented in a sequential order. Likewise, if the rules contain exceptions from previously defined consequences, such components should be presented as consistently as possible, so that the need for repetitions and references can be minimized. Sometimes it is also appropriate to divide the rules into general and specific pars of the legislation.

Internal rationality also entails far reaching demands for integration with adjoining laws and regulations. New laws must be systematically incorporated in the legislation as a whole.[23] The relations to other laws at the same level, to the Constitution, as well as to lower level authorities' regulations and ordinances, should be defined so that rule collisions, rule competition and gaps are avoided. In practice, this is first and foremost an issue of designing the texts so that necessary references between different laws can be minimized. In many situations this can be accomplished by means of structuring interrelated laws and provisions in a similar manner.

In addition to this any new legislation should acknowledge demands relating to the formulation of methodological rules, competence rules and qualifications provisions, which should be designed so that they can be understood and operated as efficiently as possible. Furthermore, in the context of ICT dependent or imbedded provisions, it is of utmost importance that the solutions stand out as isomorphic vis-à-vis their textual representation.

Important is also that there are well defined promulgation provisions, and that the laws also demonstrate consistency over time. In this respect it is desirable that newer laws relate to established legal concepts, preferably in an unbiased

22 Often referred to as Internal Coherence. *See* e.g. Wintgens, L., J. *Making Sense of Coherence: The Level Theory of Coherence*, In Moens, M-F. & Spyns, P. (eds) Jurix 2005, The Eighteen Annual Conference, IOS Press, Amsterdam,… 2005. *Cf.* Hellner J., *Lagstiftning inom förmögenhetsrätten, praktik, teori, teknik.* Juristförlaget, Stockholm 1990 p. 199–216 about "microstructures".

23 OECD, footnote 8 supra p. 3 "be consistent with other regulations and policies".

manner.[24] Alternatively, when conceptual redefinitions become necessary, it is essential to avoid contradictions and vagueness. The latter is an important presupposition for the possibility to uphold a good systematic structure as many legal concepts first and foremost fulfil classifying and categorizing functions. In practice this is also often a question of eliminating unnecessary intermediate concepts and presenting the components in a sequentially, hierarchically or procedurally adequate way, taking into consideration the nature and preconditions of the subject matters that are to be regulated.

The demands concerning logical and syntactic structure have direct counterparts in the quite detailed requirements that hold for semantic and linguistic design. In this respect the selection of words, use of phrases, sentence constructing, grammar, and the surface structure of the written language should be handled in a consequent and conscious manner. Uniform and thoughtful use of subheadings, references, checklists, tables and other textual components are also elements that should be given thoughtful consideration. This aspect is without doubt one of the most discussed issues in the theory of legislative techniques and the accumulated number of advice, guidelines and instructions concerning this is considerable.[25]

Internal rationality: Laws should be complemented by/exhibit	Secondary (methodological) rules
	Semantical coherence and consistency
	Conceptual coherence and logic
	Rule syntactic coherence and logic
	Rule systematic coherence and logic
	Gramatical and linguistic consistency
	Consistent referencing
	Meta information concerning issuer, validity in time and space, promulgation provisions

Table 5: Aspects of internal rationality.

24 *See* for a discussion on this matter with examples from criminal law, Wennberg, S., *Lagstiftningsteknikens betydelse i straffrätten – några synpunkter*. In Magnusson Sjöberg, C. & Wahlgren, P., (eds) Festskrift till Peter Seipel, Norstedts Juridik AB, Stockholm 2006.

25 *See* e.g. Butt, P. & Castle, R., *Modern Legal Drafting: A Guide to Using Clearer Language*, Cambridge University Press, Cambridge, … 2001 and, concerning the Swedish legislative process, Statsrådsberedningen, *Språket i lagar och andra författningar*,1967, Statsrådsberedningen, *Svarta Listan 1993: Ord och uttryck som kan ersättas i författningsspråk*, Stockhom 1993, Statsrådsberedningen, *Några riktlinjer för författningsspråket*, PM 1994:4, Statsrådsberedningen, *Gröna boken, Riktlinjer för författningsskrivning*, Stockholm 1998 (Ds 1998:66) "www.regeringen.se/sb/d/253/a/22948". See also Justitiedepartementet "www.regeringen.se/sb/d/2518".

4 Legitimacy

The aforementioned aspects of political, legal, cultural, functional and internal rationality raise demands which may be of a conflicting nature. Frequently the ambitions to create rational legislation clash, with each other and with public expectations. The politician who wants to act vigorously is often interested in ad hoc solutions attacking acute problems as promptly as possible. Legal scholars, on the other hand, are likely to advocate for broader solutions and formalised implementation processes in order to avoid unwanted effects. The public opinion, in turn, often adopts a critical attitude towards new proposals and suggested solutions may be impractical to put in force due to a lack of resources or logistical reasons, etc.

To complicate matters further any law may have both explicit and implicit functions. Some tasks are obvious while others may be controversial. Noticeable is also that laws sometimes have a symbolic value and that different aspects may be intertwined. Minor changes may have far reaching implications at more than one level. Several relevant perspectives exist and the attitudes towards legal solutions often vary a lot. A piece of legislation that is accepted in one context, and from a legal perspective fulfils apparent demands for rationality may not be acceptable in the context of others.

Differences of the latter kind are not novel. History provides a large number of theories postulating that legislation should primarily be understood as an instrument of oppression, enduring illegitimate structures of power. Such arguments are united by the viewpoint that the laws are not and cannot be neutral. Conflicting perspectives of this kind are also reflected within jurisprudence. More or less incompatible theories can be found among the many movements referred to as Critical Legal Studies,[26] Marxist law[27] or feminist jurisprudence.[28]

The discussion thus far clearly illustrates that the issues traditionally addressed by the legal sector are not the only possible ones. Legitimacy is not only a question about upholding the rule of law, vindicating of the principle of objectivity, or protection of human and civil rights. Legitimacy is a phenomena created by the balancing of a number of claims of different origin.

The above presented specification of various aspects of rationality nevertheless makes it possible to describe the concept of legitimacy in a somewhat more holistic manner. In such a perspective it may be suggested that a law always operates in a field of tension, meaning that any measures that are taken in order to secure a specific function must be designed in such a way that they do not violate competing demands. The relationship between the various claims may thus be understood as creating a *sphere of legitimacy* in which laws should be positioned in order not to violate the sometimes contradicting aspects of rationality.

26 *See e.g.* Wacks supra footnote 1, p. 332–353.

27 *See e.g.* McCoubrey, supra footnote 1 p. 120–143.

28 *See e.g.* Wacks, supra footnote 1 p. 309–331.

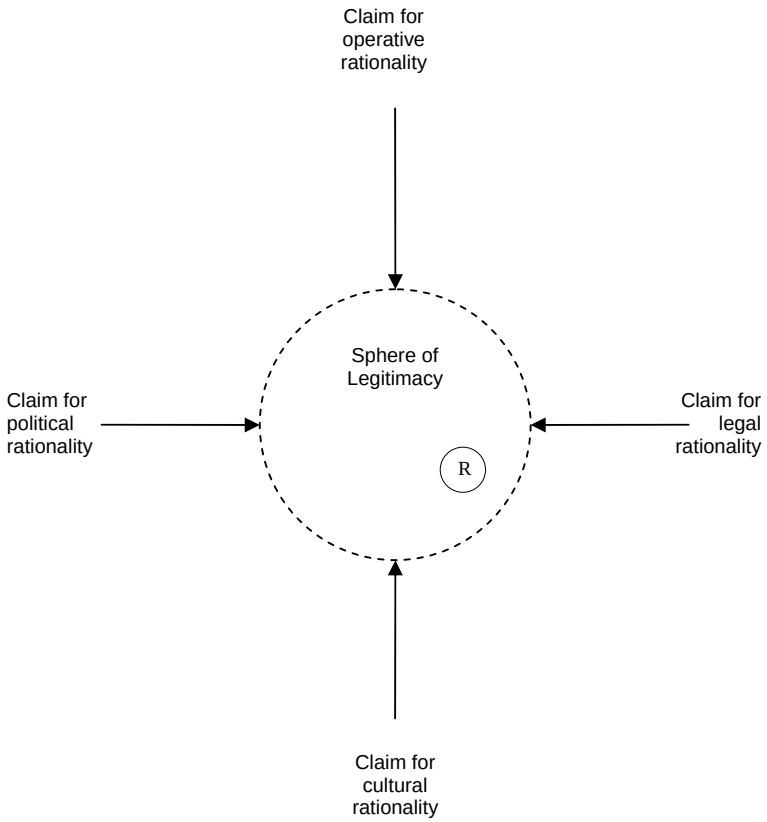

Figure 1: In order to be accepted as legitimate a legal rule (closed circle) must be adjusted to political, legal, cultural and functional claims. This can be understood as the existence of a limited sphere of legitimacy (dotted circle). A legitimate rule should, in addition to being positioned within the legitimate sphere, exhibit internal rationality (R).

Admittedly, the borderlines between law, policy, culture and functionality are difficult to define. The different aspects of rationality have a strong influence over each other and it is sometimes complicated to determine how they are interrelated. To a large extent they are also components interdependent of each other. Many core functions of the legislation, e.g. relating to protection and security, are crucial both from a political and legal perspective. It is also obvious that both the legal and political perspective presupposes access to operative mechanisms in order to have any practical impact.

Likewise, any reformist argument of political or cultural origin may generate demands for legal reforms in order to have any practical effect. At the same time jurisprudential theories may be articulated in order to enhance the public opinions understanding of legal culture.[29]

29 For obvious reasons it is easier to get acceptance for political initiatives which can be affiliated to cultural, moral or religious values and in a historical perspective is no surprise that legislation frequently has been complemented with religious references.

In this respect the sphere of legitimacy is a model underlining the necessity to take all types of rationality into consideration when a new piece of legislation is prepared. The model also emphasizes the necessity to balance the various claims, as the violation of any aspect of rationality may give rise to criticism and indicate that the proposal ought to be redesigned.

The concept of a sphere of legitimacy is apparently also relevant when new forms of legislation presupposing embedded ICT components are being contemplated. Such solutions, e.g. technical surveillance of the internet in order to minimize file sharing, or the analysis of telecommunication data in order to fight terrorism may be very efficient but should not be implemented without taking legal and cultural claims into consideration. A completely secure society is a society in which the surveillance of the inhabitants is obnoxious, but also a society in which the unease the control system creates may be as concrete as the fear of the original threats. Hence, functional rationality cannot substitute social rationality, nor should democratic ideals be eroded by technocracy. Legislation should always seek to be legitimate, disregarding the form and intended function, and this presupposes the acknowledging and balancing of several types of rationality.