Legislating with Dignity

Form As Legislation's Inner Morality

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Abstract

This thesis studies the conceptual form of legislation to create a guide for improving lawmaking as a craft. It learns from abstract ideas to establish a theoretical framework, providing tangible advice to lawmakers on how to be more faithful to their craft and satisfy their polity's legislative intentions.

The thesis's Part I is dedicated to developing a thicker meaning of form to show that the contextual backdrop of the communal act of lawmaking creates a normative loading that conditions legislating. Inspired by the work of Lon Fuller, it transfers his insights on the 'morality that makes law possible" onto the social enterprise of making law. It uncovers the practical implications of the normative loading of form and explains the directions they give partakers in legislating and law.

Part II creates a description of how legislators should act towards the craft of legislating by maintaining "the dignity of legislating." This novel concept is built off the work of Jeremy Waldron and describes what aspects of form lawmakers must be alert of in order to serve their craft in a more informed way. This part carefully defines the concept by disambiguating, laying the groundwork, and unpacking its constituent parts.

Part III gathers the insights of the previous Parts and puts them to the test. The test case it utilizes is legislative conditionality, where legislatures must act at the behest of external actors to satisfy conditions to state agreements. The thesis unpacks the explosive and catastrophic potentiality of conditionality to highlight specific instances where legislatures failed at the craft of legislating. A particular point of guidance is identified and analyzed through each of these failures, creating a non-finite list of points of attention. In all, the thesis intends to make legislating better as a craft by making it truer to form.

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Acknowledgments

Organizing my thoughts into a thesis was always going to be an arduous undertaking. Everything was potentially interesting. Sticking to the basics was always an issue, and so was suppressing my thirst for flair and haymakers. But through backtracks and summersaults (and a global pandemic), I arrived at this thesis. I was lucky enough to have people to lean on, to whom I am forever grateful. In no particular order, I'd like to express my gratitude and acknowledgments to:

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P.S. There are two lyrics I have scribbled on nearly all my academic notebooks: "If it was up to me, I would've figured you out" and "Hell o' Glory." I think after being recorded in this Ph.D., they can be retired.

Note on Translations

Many of the primary sources used in the document are originally in Greek. Wherever a translator has not been noted, the translations are my own.

Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Printed Name: Neofytos Sakellaridis Mangouras

Date: 26/09/2023

signed again on 11/04/2024

Signature: _____

1 Introduction

1.1 Legislation, Craftmanship, and Legal Theory

The creation of law by means of legislation[1] is a ubiquitous phenomenon. It takes place every day around the world. The significant volume of legislative processes matches the sheer variety in the methods employed to legislate. Despite the vast array of combinations, a commonality can be identified. All these legislative practices share a primary objective: to transfer political priorities and mandates into legal products, particularly statute law. Legislating is, in this sense, the craft of making statute law. The thesis that follows is about legislating and specifically how to make legislating better as a craft though interrogating legal-theoretical concepts and carrying out the enterprise of making law through legislation in a better way.

The emphasis on the craft of law will follow the analysis. But before that, it is essential to mention that legislation, on a rudimentary level, is about creating something. Legislation is the same as any other craft in this sense. Legislation as a process has a telos to make law and is carried out as a deliberate choice. Irrespective of what it regulates or organizes, legislation can be carried out well or poorly, as a craft. But unlike many crafts, the impact of legislation is not cosmetic or ornamental. A failure in the craft of legislating can be catastrophic for a state and its people. Thus, unlike everyday tasks such as household activities or even authoring a thesis, legislation is much more profound because of its role in modern society. Its weight and salience cannot be understated as an institution in modern constitutional structures.

To picture the salience of legislating in today's representative democracies, we can see their accomplishments. Examples of these accomplishments are the entrenchment of civil and social rights, the rule of law, and social welfare rules that equate to a high quality of life. None of these things could have been made possible without having deliberately carried out the act to legislate them.

[1] Legislation is a tricky terminology, it means both the product and the procedure of making law formally. For the purposes of this thesis, legislation that is aimed as is for the most part the procedure of making law, rather than the product.

Further, any significant shift in regulation passes at least in part through legislative mechanisms. Therefore, it is intuitive that legislation is important and necessary, especially for states that purport to subscribe to the rule of law.

Apart from social and political importance, legislation differs from many other purposive crafts in complexity. It gets entwined both on a theoretical and a practical level with other foundational ideas and institutions. Crafting law crosses paths with things like democracy, representation, and procedure, but also theoretical questions like those seeking the nature of law never fall too far away from legislation. So when looking as to how to improve legislation, it requires very careful tightrope-ropewalking as not to get entangled.

The initial image that surfaces is that legislating[2] is a craft and, as such, it can be carried out well or poorly. Further, it is vital to modern states, and it is intertwined with socially-important ideas. The following research takes this image to heart and addresses legislating as a purposive craft of great political importance for society and as a cornerstone for polities subscribed to the rule of law. The project attempts to reach conclusions about how to legislate well by analyzing the question of legislative form in great depth and creating a way to give practical direction to legislating. The thesis's intended outcome is to give insights that help lawmakers avoid falling short while exercising the craft of legislation. It aims to show how legislating is done well when the call of polity to legislate is answered in the best way possible. This thesis will look at form heuristically. The thesis will engage with the idea of form heuristically, as the form of legislation is what distinguishes legislation from other means of making legal rules. Heuristically in this context means wading through the cavernous idea of form to pull any help legislation be better as craft.

From this programmatic statement, there is a lot to unpack. The remainder of this introduction will bolster this statement by articulating the motivation for this research, giving a view of methodological commitments and basic assumptions, articulating the research questions, and finally, giving a basic outline of the arguments that will follow.

[2] Using the verbal noun "legislating" instead of "legislation" to stress the dynamic process of legislation instead of the product.

1.2 Falling Short and Wondering Why

To explain the motivation and the warrant for this research, let us consider situate ourselves in Athens, Greece roughly 15 years ago. Those were the years of the fiscal crisis. Starting in 2008, the crisis caused an economic recession around the world. The ramifications of the crisis snowballed and took some time to reach Greece. But when they did, the fiscal situation in Greece was dire: a ballooning debt and the possible collapse of the national economy. When coupled with another seismic event- the Lisbon Treaty[3] coming into force in 2009- the situation created much impetus for wide-ranging and numerous legislative reforms[4], often drastically overturning entrenched policies and regulatory systems. What was learned about specific fields of law one day was replaced the next with sweeping reforms that needed to be relearned, only to have those replaced again shortly thereafter.

While the changing, augmenting, and reforming laws and regulations is always commonplace, there was something different about many of the laws during this time. Many of the laws passed were mandated as conditions for loans from actors outside the state context and markets. This, in a Greek context, was unprecedented. Furthermore, these laws were not formed in a way that is normally expected of Greek laws, lacking the characteristic extended maceration through discussion in parliamentary committees and the fact that the policies they looked to enshrine did not come from a minister. Instead, the measures had been suggested and overseen by the Troika.[5] It seemed that the only thing parliament was meant to do was to rubberstamp these measures, promulgate them, and nominate them as law. A process such as this appeared to be a departure from the normal way legislation was produced. The novelties in the creation process seemed to be at odds with the surrounding legislative culture.[6]

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[3] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community (2007/C 306/01)

[4] Covered in depth in Chapter 7

[5] Troika refers to the triumvirate that liaised and set conditions with debt-stricken states during the Eurocrisis. It was comprised of the European Union, the International Monetary Fund, and the European Central Bank

[6] Legislative culture meaning the entirety of written and unwritten norms in the production of legislation.

A peculiarity, therefore, arises when comparing one of the troika laws and a law that was done in the perceived traditional manner. On one hand, the two legislative products are indiscernible. The same parliament voted on them, signed into law by the same head of state, and published in the same official gazette. Yet, they contrasted and did not seem the same. I hypothesized that if there is a difference to be found, then it will be found in the way which these pieces of legislation were formed . It remained to look into the formation to find what exactly accounted for the difference.

To follow the directives of a given craft well is intrinsically valuable to its exercise. The same goes for legislating according to form. Legislating according to good form acts as a fulfilment of the craft by which the polity intends to make legislation. To legislate as intended is to deliver on the trust of the governed people and to fulfil what the polity expects of the role of legislators. What was left then was to explain why the laws produced then did not do that. They both had a form that looked and had the place of legislation, but one of the two did not seem true. The question from this observation was: what does it really mean for legislation to be true to form and how can legislative practice align closer to form?

In legal theory literature, there are not any apparent roads to engage with this conundrum. Starting from the point that "attention has been given mostly to the life of law […] and its death […], but not so much to the birth of law – that is, law-making processes."[7] Yet, there are exceptions to the rule. Namely, there are prominent scholarly intervention that pay attention to how legislation is made and how purpose informs its existence on route to answering the question of "What is law?".. A second type of intervention is a more recent exception that examines how the methods of production of legislation influence either the nature of law or democracy within a particular polity. Understood broadly, the

[7] Zamboni, M. (2019). "A Middle-range Theory of Legislation in a Globalizing World " Stockholm University Research Paper No. 70,(Available at SSRN: https://ssrn.com/abstract=3373134 or http://dx.doi.org/10.2139/ssrn.3373134).

first set of ideas is epitomized by Lon Fuller[8] and the second by Jeremy Waldron.[9]

This project draws from both scholars but offers its own view of legislating. Neither can provide a direct answer to the curiosity at hand which is how the form of making legislation can be improved practically. Their work, however, offers many tools to engage with the issue. As they shed light on the production of legislation and they give us tools to understand the fit and aspects of legislating in the context of polity. That is why they provide the bulk of the theoretical backing for the following thesis.

The work, however, should not be considered an reimagination of either. Instead, this work's scope is providing theoretical insight on key concepts which then can give direction to improve the craft of legislating. Both Fuller and Waldron provide ample amounts of material to do this. The project will attempt to take their work and repurpose it to ultimately answer the questions explicated below. The following section, therefore, sketches the intent and how the thesis will reach its aim.

1.3 Perspective, Theoretical Locus, and Outline

From the example of the Greek debt crisis mentioned above, an interesting scenario arose. To reiterate, we can observe pieces of legislation that had passed and become law. The comparison is between a law that had been created as it had been from the establishment of the current state and one whose content was dictated as a condition to a loan necessary for state survival. Both share the same formal classification as formal law, yet the fact that the legislating was carried out in a vastly different fashion colors our understanding of them differently. But does classifying them as promulgated laws suffice to make us forget they were made under different conditions? The hypothesis that is forwarded by this thesis is no, the surface recognition of form is not enough to

[8] Lon Luvois Fuller (June 15, 1902 – April 8, 1978) was American legal academic whose positions on the nature of law became canon in the west. His work on form makes up the basis for Part I of this work.
[9] Jeremy Waldron (1953 -) is a New Zealander academic whose work on the position of legislation in our modern democracy created much of the base for part II of this work.

fulfill what is expected from the form of legislating and how legislating is to be carried out.

With such a hypothesis, understanding what constitutes form becomes paramount. The underlying intuition that will be argued for is that the form of legislation is constituted somewhere between formal procedural provisions of constitutional law and normative expectations of the polity. The suspicion outlined with the two laws above is that the outer layer of form does not exhaust the entirety of form. What lies under the hood is important for this inquiry, and that is where the focus will lie. Thus, the thesis will try to unpack the form of legislating to see what it is and how it figures in materializing the normative expectations of a polity for legislating. In this light, form becomes the means of "the transformation of politics into statutory provisions."[10] The intent is to create a theory within what Mauro Zamboni calls: "middle-range theory,"[11] which focuses on the conditions and normative features of the transformation of politics into law. In accepting this position in the middle, what is left out are the politics of what goes into making law with legislation nor the observation and examination of policy outcomes after legislative action.

In this way, the analysis mirrors the idea of "throughput"[12] as seen in the study of legitimacy and other theoretical positions in political science. Throughput theories came from the drive to cover the gap between two traditional focuses of political studies. The first group of theories focuses on the participation of citizens in policy formation (input legitimacy).[13] In contrast, the second group focuses on what is delivered by policy(output legitimacy).[14] These focuses left a large area of the political process in the dark, creating a "blackbox."[15] Several

[10] Zamboni, M. (2019). "A Middle-range Theory of Legislation in a Globalizing World " Stockholm University Research Paper No. 70,(Available at SSRN: https://ssrn.com/abstract=3373134 or http://dx.doi.org/10.2139/ssrn.3373134).

[11] A term popularized first by sociologist Robert Merton

[12] This term is most associated with both Yannis Papadopoulos and Vivien Schmidt both of whom looked at the politics of the European Union see accordingly Papadopoulos, Y. (2003). "Cooperative forms of governance: Problems of democratic accountability in complex environments." European Journal of Political Research **42**(4): 473-501. Schmidt, V. A. (2020). Conceptualizing Legitimacy: Input, Output, and Throughput. Europe's Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone. V. A. Schmidt, Oxford University Press**:** 0.

[13] Schmidt, Ibid

[14] Schmidt, Ibid 728

[15] Schmidt, V. A. (2013). "Democracy and Legitimacy in the European Union Revisited: Input, Output and 'Throughput'." Political Studies **61**(1): 2-22.

scholars wanted to shine light into this 'blackbox,' especially for the production of rules in the EU, to show how "it processes the input demands "by the people" to produce the policy outputs "for the people."[16] This goal of 'throughput' theory is to shine light on a specific idea during the actual creation processess of politics. The inspiration for this theory is to mirror the will of throughput to shine light into the blackbox of legislating. The thesis wants to theorize the form of legislating as a normative force within the creation of legislationg.

To reiterate, the thesis is intended to contribute to a middle-range theory of legislation and shine a light on an oft-neglected area of legal theory. The vehicle to deliver this legal theoretical inquiry is the concept of form of legislation and legislating. Form will act as the common thread between the three parts of the thesis. However, as the intended impact of the thesis is to give guidance to lawmakers, it cannot stay on the abstract theoretical level. As it will be repeated periodically in the thesis, the aim is to articulate theory in a way that is useful for practice to better itself. The vehicle to go from the idea of abstract form to practical advice is forwarded by an intermediary concept, the dignity of legislating.

This path to guidance is articulated into three parts. Each part of the corresponds to the transition from abstract concepts to practice. Part I will deal with the conception of form in law and legislation as abstract ideas, the second will develop a more specialized theoretical tool (the dignity of legislating) that bridges the form of legislation to practice, and Part III of the thesis will apply give practical applications to the idea of dignity of legislating through the use of a case study.

Part I

The first chapter of Part I follows the work of Lon Fuller into the exploration of form as a concept. It lays down the groundwork for investigating form by extracting necessary parts from the work of Fuller. It focuses on introducing

[16] Schmidt, op.cit. 12

form as a conceptual topic, the possible audience, and how a "thick" conception[17] is the most apt articulation for understanding the craft of legislating.

The first chapter aims to emphasize the most essential points from the work of Lon Fuller that can be used to create an idea of form fixed on creating guidance. The key ideas stressed in this chapter are Fuller's framing of law as an enterprise, his ideas about 'low-floor'[18] morality, and how he grounds the distinctiveness of law against other types of ordering by the meeting of normative aspects of its form. However, Fuller was a sui generis thinker and even gave himself a niche as a 'procedural natural law' theorist. This unorthodox position in jurisprudence and his perspective as lawyer-qua-theorist all evidence the need to describe how he approached law and how to engage with his work. This chapter engages with the work of Fuller heuristically to excavate the most important aspects of his work.

The next Chapter, "The Tumultuous Journey to Form," pinpoints, analyzes and adapts the particular ideas of Fuller's work for the purposes of this thesis. It takes us from the total of Fuller's work to a relevant understanding of form for legislating. The motivation for this is double: first, it makes the shift of focus from law at large to the much narrower domain of crafting law through legislating possible. Secondly, it prioritizes the important normative ideas found in his theory. Emphasis is given to three normative concepts derived from the work of Fuller. These three are Reciprocity, Ethos, and Agency.[19] Each of these is explicated, and the chapter emphasizes how these exemplify 'normative pushes.'

Chapter 4, "Fuller Form Finalized," acts as a synthesis and an organizational tally of the previous chapters. It catalogues and creates a coherent whole from the previously explicated componentry. It reconstructs Fuller's theory with the

[17] "thick" and "thicker" will be mentioned throughout this thesis in reference to the understanding of form. It is meant as having a spherical view of a concept that is not satisfied with looking at its surface. In the sense of form, it means looking beyond the container of the thing and what human activity goes into making said thing. To illustrate this using the analogy of a Scottish sport, when examining a golf swing, to see if it is good or bad has nothing to do with where the ball lands.

[18] This term will be explained below in Section 2.2.4.

[19] The idea of agency is largely based on the analytic work of Kristen Rundle on Lon Fuller see below at section 3.5

benefit of added interpretations of other thinkers, while arguing why Fuller and his ideas suit the task. It offers an account of form that creates a solid foundation for the abstract concept of form, which the next Parts will build on.

Part II

The conceptualization of form from Part I cannot however be translated directly into guidance. Part II, therefore, looks to address this need by expounding an intermediary conceptual vehicle to connect the theory of form to the normative improvement of practice. The concept chosen for this role is the dignity of legislating. Dignity, as a normative concept, can give direction to human action and also provide a standard of quality to that action. Further, it has a long history of intertwinement with law and has a corresponding body of literature to draw from which allows tethering to the enterprise of legislation. The choice of dignity is not extraordinary. Chapter 5, "The Dignity of Legislation, Reduxed," takes stock of the interaction of law, dignity, and legislation as it appears in literature. The chapter disentangles the different streams of work on the topic. It opens a discussion on the suitability of existing literature to become the basis for the version of dignity that can help deliver a thick conception of the form of legislation. Jeremy Waldron's conception of the Dignity of Legislation[20] is given a particular focus, as it ushered in a discourse on the position of legislation within modern states and brought to light the under-theorisation of legislation. The writing takes on board many of his insights but also shows how this conception is not directly transferrable to the practical improvement the craft of legislation. Therefore, a new concept of dignity, one that can lead to improving the "how" of legislation, is needed for delivering this purpose.

Chapter 6, "From the Dignity of Legislation to that of Legislating," takes on the challenge of creating a new articulation of Dignity suited to improving legislative practice. The first change is to shift away from the direction of many legal scholars aimed at aligning the content of law with conceptions of human dignity. In its place, the chapter offers a narrower, specialised idea of dignity that refers solely to how to effectively treat the legislative process with due dignity and reflects the deliberate and communal nature of legislation as a craft.

[20] See section 5.3

It, therefore, takes the idea of 'dignity of legislation' and transitions it to the verbal noun 'legislating' to reflect this shift. In following the need for a new definition, chapter 6 invokes trial and error methodology to create a definition. This is done through a step-by-step approach to identify the genus and the *differentiae specificae* that are capable, adequate, and specific enough to deliver the idea of the dignity of legislating. After these parts are considered and identified, a new understanding of the dignity of legislating is proposed. This idea is made identify what are the After which, it closes by unpacking the constituent part of the definition with special consideration given to the elements of form (protocolar, evaluative, and normative). With this explication complete, the following section wants to bring theory to practice, making "practice more intelligent."[21]

Part III

As the thesis looks to complete the journey from the abstract to the concrete, Part III provides the last step to take the concept developed in the previous parts and make it into tangible guidance for legislating. It employs a hybrid methodology inspired by Lon Fuller's allegory of King Rex. It showcases how falling short can bring to the fore the aspects of legislating were not given due attention. It is hybrid because, instead of using fictional scenarios, Part III develops a test case for the dignity of legislating utilizing the case of legislating under conditionality.

Chapter 7, "Conditionality as a Laboratory," describes the approach in detail. It argues why conditionality offers perhaps the best test case for showing the limits of form and how the dignity of legislation can be abused. It does so by describing what conditionality is and under which conditions Conditionality can become dangerous for the dignity of legislating. The dangers that are present under certain kinds of conditionality have negative implications for the rule of law and the expectations of self-governance of the polity it concerns. Crafting law properly is inherently dignified, and this is epitomized by legislating according to form. As portrayed in Chapter 7, Conditionality creates a challenge to

[21] During the thesis there are many references to this motif, for explication see Section 6.1

legislating by having the potential for danger for the according to form by interjecting its own.

Chapter 8, "Instances of Limits," intends to show instances where legislative form was abused under the dictates of conditionality, creating cases that run afoul with the dignity of legislating. Six instances are identified, explained, and examined to create a list of specific concerns. These are the double cognizance of form, time, fidelity to the enterprise, independence/non-duress, non-impossibility, and self-scrutiny. These instances stand as lessons and indicate points of attention for those who legislate. Stemming from these, an article of guidance is suggested to either avoid or rectify the shortcomings and bolster respect for the dignity of legislating. The gathered list is not meant to be finite. Instead, it aims to create a beginning and a cataloguing of what things need attention to legislate in a way that introduces the kind of craftsmanship that delivers dignified law.

PART I

2 Following Fuller into form

This Chapter aims to draw conclusions on the nature of the form of law to then transfer to legislation. Its point of entry chiefly is the work of Lon Fuller[1] on law, morality, and the material conditions that allow law to come about. To begin, the idea of form strikes us almost as an unavoidable feature of law; form is what evidences legal substance and allows us to differentiate it from other types of ordering. Most thinkers and societies can easily accept that the recognition of 'form' as a concept in Law is omnipresent in day-to-day legal life. Form, therefore, is easily understood as a critical factor in the use and identification of law. Yet, the reason for my inquiry, as said in the introduction, is to dive deep into the inner workings of form and show that there is more to the embodiment of form than just ticking boxes. This is a poignant position in the most public of legal forms, legislation. As such, and to begin this quest, we have the idea of form, its role in law, and what we are looking for is a deeper notion of it in legislating.

2.1.1 Formal Starting Points

For law-users, whether they are practitioners, legislators, or citizens, the default understanding of the form of legislation has to do with its appearance and how it is made. Form is generally considered complete once the legally recognized steps are likewise completed. This approach can be called purely procedural,[2] as it relies solely on a 'ticking-the-boxes' ideal of constituting legislation. This is seemingly the default for most law users; as soon as the boxes are ticked, it can be considered law. This chapter will not deal with the completion of this understanding of form. Instead, it will lay the groundwork for conceptual coverage capable of grasping the normative elements that exist during the making of legislation, like general legislative purpose, goals of the specific rule, and fundamental constitutional objectives. The understanding of

[1] Fuller's work is broad but his most famous book and core material of this chapter is Fuller, L. L. (1977). The Morality of Law. New Haven, Yale University Press. henceforth referred to as *Morality*.

[2] This term is borrowed and repurposed slightly from theories of democratic legitimacy, indicatively se Peter, F. (2008). "Pure Epistemic Proceduralism." Episteme **5**(1): 33-55. And Peter, F. (2017). Political Legitimacy. The Stanford Encyclopedia of Philosophy. E. N. Zalta, Metaphysics Research Lab, Stanford University. Later (in section 6.5.1.1) it will be referred to and analyzed as 'protocolar'

Form, this chapter is hinged on what it means to make law with good form, not just complete it.

On a theoretical note, the concept of 'form' offers the benefit of including many aspects that reflect the specificity of the context of the legislating at hand. This is due to the ability of the term 'form' to house all those general sentiments, restraints, and overarching teleologies that are imposed by the legislative environments an make each environment unique. Therefore, the intervention sought after is to give more attention to 'form' and release the potential of its thicker notion. That way, the normative and purposeful parts of legislation, which are missing from the procedural picture, can be seen better.

2.1.2 The Form Spectrum and the Questions to Be Answered

The sources for this chapter are drawn from legal theory, more specifically, jurisprudential work with a focus on law as a purposeful enterprise. For this reason, the work of Lon Fuller[3] is exceptionally interesting. Specifically, his ideas on the thicker notion of form[4] and his framing of Law as an enterprise are important for this inquiry. Framing law and legislating as an enterprise instead of as a thing or object allows greater leeway to examine normative ideas that will be identified as . With such ideas, Fuller gives us tools to analyze law as a purpose-driven process more than any other 20th-century mainstream jurisprude. Indicatively, Fuller was critical of those who ignored the role of the assumption of the purposive activity of making law. Citing Evgeny Pashukanis's insights, Fuller posited that if you miss the idea of purpose, you miss a substantial portion of the picture as well:

> *"{I]f a neat chain of command were the most significant quality of law, then we should regard the military as the archetypal expression of juristic order. Yet any such view would violate the most elementary common sense. The source of this tension between theory and everyday wisdom lies, quite obviously, in a concentration by theory on formal structure to the neglect of the purposive activity this structure is assumed to organize."*[5]

[3] Summers, R. S. (1984). Lon L. Fuller. London, Edward Arnold.
[4] For the meaning of thick see supra note 17 on p. 11
[5] Ibid p, 113

Fuller wanted to offer an account that captured a thicker understanding of Law; one that accounted for purpose. This allows his theory to capture what law is alongside how law works. Thus, he theorized Law as a social enterprise capable of having a purposive orientation. In this view, Law entails the gathering many people around a communal activity with an aspirational goal at the end. The parallelism between an 'enterprise-framed' view of Law and the communal activity of legislating motivates the present inquiry, as well. Moreover, the case will be made that purpose enables and becomes respondent in form. And, as Fuller theorized that form has inescapable elements within the enterprise of law, the concept of purpose also rises to the surface. Thus, the motivation is that if we were to look at the interaction between Law and its form, we could find some insight into the normative bearing of form on the process and product of legislating.

In the greater field of jurisprudence, Fuller isn't the only one that deals with the abstract idea of form. There is a wide array of accounts of the nature of the form of law, nearly covering the entire spectrum of possibility. For a brief schematic representation, the ideas about the role of form can be placed on a spectrum from the minimal to the maximal.[6] On the minimal end, some theories do not assign any role to form. Ideas in this category include Scandinavian legal realist Axel Hägerström, who doubted any constitutive action of form.[7] That is because Law does not have any metaphysical substance in the first place, and thus, form cannot 'make' Law as there is nothing to be made. On the other extreme, there are those who believe that form is constitutive of law. In this case, law carries meaning and becomes recognizable if and only if only if Form is realized.[8]

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[6] Patricia Mindus has written on the placing of legislation on the whole (not just its form) for the field of legal theory on her piece about Hagerström's place on the transcending spectrum of politics into law see Mindus, P. (2013). "Axel Hägerström on Law-Making." The Theory and Practice of Legislation **1**(1): 7-32.

[7] ibid

[8] This can be blatant as when found in a positivistic validation, law is only law when it is fulfils a pedigree or a broader deliberative or communicative proceduralist milieu such as "But if a procedural approach that is not arbitrary could be devised, then justice could be achieved without interpretation and without reliance on contested conceptions of the good. This precisely is what Jürgen Habermas seeks to achieve through the proceduralist paradigm of law that he derives from his discourse-theoretical approach to ethics, law, and politics." Rosenfeld, M. (1998). Just interpretations : law between ethics and politics. Berkeley, University of California Press.

Where is Fuller parked between these extremes? I believe Fuller's ideas on form are so different that it is on a completely different scale. This is because law is an enterprise and, therefore, is an activity. This position walks a tightrope in jurisprudential theory because it holds on to law as the object of study- as opposed to the sociology of law- but also underlines its communal nature. This will be expounded in detail below. To reiterate its appeal, it has three valuable items: its framing, its ability to account for normative ideas, and its inclusion of purpose into the scheme. These combine and showcase a motif evident throughout his work: that the conceptualization of law is (and out to be) about 'doing' law and not a post-mortem examination of it as a static object. And, since legislating is the quintessential and most deliberate means of 'doing' law, Fuller's theory, at least at face value, becomes interesting.[9]

To rephrase the questions this chapter aims to answer given this focus: What features does purpose-centric jurisprudence of Lon Fuller give to the concept of form? If so, what conceptual insights does it offer to normativity? Could a more holistic conception of form grant a greater sense of correct practice to lawmakers and jurists alike?

With the questions of this chapter in place, a word of caution: this work should not be seen as a panegyric restatement or a wholesale endorsement of Fuller's work. The aim is to engage with Fuller's work purposively, to take out the valuable ideas and concepts for a thicker notion of legislating, and use the findings to improve legislative practice. "Thicker" equates to considering context and normative loading as to offer insight into what can serve the purpose of legislating. The approach this thesis forwards is that normative ideas like purpose and assumption of an enterprise are necessary to understand the entire picture of form. The approach reads Fuller in having similar ideas about law at large. This is much different to others' views of Fuller, for instance it contradicts what Konatsu Nishigai has written. For her, the Fuller has a formalism, as

[9] Getting guidance about what to do in reference to a task at hand is something that bides well with doing things. It is in this light, that law as something to be done should be appealing too. Also suggest why David Luban- a scholar who writes about ethic and standards in organization- called Fuller 'the greatest philosopher since Plato to write about the ethics of lawyers.' (Albeit in a highly qualified way (American, etc.)) Luban, D. (1999). Rediscovering Fuller's Legal Ethics. Rediscovering Fuller: Essays On Implicit Law and Institutional Design. W. J. Witteveen and W. v. d. Burg. Amsterdam, Amsterdam University Press.

expressed by his 8 canons. The formulism represents a legalistic view of the rule of law and is incomplete as it only offers partial coverage.[10] Fuller is legalistic in this view because it is read like a checklist of features the law should have to be good at being law. The concern of partial coverage is because Fuller's idea of form only covers "command type" lawmaking acts,[11] which do not cover all the ways rules are made but also leaves out large parts of the loaded environment of legislating. Readings like Nishigai's seem excommunicated with the embedded nature of lawmaking systems within polities, which are rife with teleology and normativity. Therefore, in calling Fuller legalistic, such analyses miss the thicker notion of form, which understands the unique nature of form that is embedded in a polity's normative environment. As per the latter concern, command-type rules (what are legislated rules) offer the bulk and the most essential rules. For this reason, this inquiry into Fuller can set that concern aside as it deals only with 'made' laws.[12]

In all, pursuing Fuller is not motivated by an aim to contribute to the question of "what is law?" as Fuller is most known for. Instead, my project work wants to follow Fuller's project of 'Eunomics'[13] in its will to study how law and good order can be best formulated. Essentially, what follows is a precursor to restructuring basic jurisprudential theory towards guidance for better legislating. As such, it would not be too much to say that many of the formulations provided would never be in his vocabulary. Therefore, this inquiry wants to capitalize on his intuitions, motivations, and concepts for its own aims, not to justify, substantiate, or modernize his theory. It should be seen as a purposive reading methodologically.[14]

The remainder of Part I is dedicated to unpacking all of useful ideas from Fuller, his methodological points, and there grafting on the topic of the thesis.

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[10] Nishigai, K. (2022). "Two Types of Formalism of the Rule of Law." Oxford Journal of Legal Studies **42**(2): 495-520.
[11] Ibid 497-500
[12] Infra at 7.5.2
[13] this Eunomics project wanted to do away with the juridical centric turn of legal philosophy theory and instead illuminate a different part as well: " the science, theory or study of good order and workable arrangements" Fuller, L. L. (1953). "American Legal Philosophy at Mid-Century." Journal of legal education **6**: 457.
[14] As covered in chapter 1

2.2 Preliminary Points.

Lon Fuller differed significantly in his approach to understanding law from the canon contemporary of his time. Therefore, the following section lays down the groundwork for sketching the perspective of his ideas, the framing of his theory to showcase the strengths of his approach, and it will invite us to avoid common pitfalls when reading his work. Hopefully, this will give us insight on a meta-level so we can progress on to the actual ideas of form. In this discussion, the key features are framing, distinct ideas of morality, and purpose.

2.2.1 Background Inclinations

This section is dedicated to sketching some of Fuller's theoretical inclinations highlighting the delicate nuances of his theory. The point of entry is his self-identification theoretically. Fuller considered himself a natural law theorist, meaning that he believed that positing was not always enough to ground the validity of Law. He bolstered his position with ample qualification which differentiated himself from the common ideas of Natural law. He called himself a 'procedural' natural law theorist.[15] The system he introduced created two 'kinds' of natural law, substantive and procedural (or institutional.)[16] At first glance, what is important to understand is that procedural natural law theorists recognize that legal systems have inherent componentry and conditions (some of procedural provenance) that contain moral elements. Law "must be constructed and administered if it [law] is to be efficacious and at the same time remain what it purports to be."[17] This position gives great weight to the way law is made and implemented. Such a position suggests that form transcends the boundary of just a check of authentication against a master rule, whether that is a moral or positivistic rule. This position displays a view of law broader and more embedded than a mere conceptual analysis offered by other theories.

In section 2.2.3, the important differences between substantive/procedural natural law will be expounded in greater detail, but for now it can be said that procedural natural law sketches a certain mentality: one set on action rather

[15]The entire scheme of procedural and substantive can be found in *Morality* p.96-97
[16] As he uses the terms interchangeably e.g., *Morality* p. 184
[17] *Morality 97*

than recognizing. Fuller's lawyerly provenance may explain this perspective, which did not kick off from an analytic philosopher's or a devout social critic's perspective, but instead, the practitioner's and the jurist's.[18] A practitioner's practical attitude towards the puzzle of law can be seen as a motif throughout his work of trying to unravel a mystery. The lawyerly demeanor however does not preclude theoretical inclinations. Philosophy, especially American Pragmatism, featured at various points throughout his work, especially with references to William James and John Dewey.[19] Indeed, the architecture of his approach and the conclusions he produced, we can see pragmatism's influence in the way he regards his conclusions.[20] American pragmatism is characterized by a willingness to push society towards improvement by making sense of societal aspects. A viewpoint like this does not seem foreign to Fuller's work. For Fuller, law can be done for a social good; it takes the shape of a flowing process. This rings as a pragmatist note. I believe it is not too farfetched to say he tried to recapture the "juristic imagination," preempting much of the narrowing that followed.[21]

American pragmatism gels well with a focus on practice and day-to-day legislative activity. The centrality of practice can also be reflected in the Fullerian position that law is neither a command nor a norm. Instead, law is a communal enterprise founded on the reciprocal relationship at the center of law.[22] Connecting his theory to a relationship imports a dynamism and an action-orientation given that relationships are not static objects, but an interchange embedded in practice. If we read into this dynamism, both the solid and the in-flux features allow for a pragmatist understanding of a communal process. This is supplemented by the ease with which Fuller's aspirational[23] view of law leans on what is practicable and not with abstract ideas. Law is law only if it is accomplishable. If this is compared with ideas like John Dewey's

[18] Rundle, K. (2012). Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller. Portland, Oxford, Hart Publishing. hereforth referred to as *Forms* for its many references in this chapter.
[19] *Forms*, p 46
[20] *Forms*, p 61
[21] This idea/phraseology is borrowed from Hutchinson, A. C. (2023). Hart, Fuller, and Everything After : The Politics of Legal Theory. Oxford, Hart Publishing. 16
[22] What is Reciprocity will be considered in detail later in this chapter. Fuller's
[23] This leans on Fuller's dichotomic morality which will be described below at section 2.2.5.1

'everything is an event' thesis or James's pragmatic method, a case can be made for a parallel between them.

A third point of similarity between pragmatism that can be identified is the avoidance of unnecessary distinctions or dualisms.[24] This appears in Fuller when he accounts for a gap in the picture of law. As Fuller wrote: "in any interpretation of events which treats what is observed as purposive, facts and value merge. In such a case, the view that value is something foreign to a purely factual account -something projected by the observer on the thing observed simply will not stand scrutiny."[25]

Further, his quest for jurisprudential theory disallows a sterile and disconnected view of law. His is a view of law in practice. This does not mean, however, that he gave no head to anything other than the tangible and practical. Many of his texts are in the shape of problem scenarios. We can see this in his choice of fable in texts like the stories of Rex II, the Speluncean Explorers, and The Grudge Informers. By using fable to illustrate his points, elements of human behavior and purpose become the central elements of his narrative in a way that combines factual occurrences and contemplation of values. Analytic thinkers of his time were more inclined to bear examples and not embedded fables.[26] But the use of fable, as it is not empirical data or a forensic assessment of court practice, also highlights the distance between Fuller and those who studied law in an embedded form. American legal realism is such a tool, where "law in books" and "law in practice" were considered separate. But Fuller was not just a data-first theorist. He included purposiveness in his idea. Therefore, even though he had similar sympathies with pragmatism, like American legal realist Oliver Wendell-Holmes,[27] he did so while maintaining a different stream.

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[24] See McDermid, D. "Pragmatism". Internet Encyclopedia of Philosophy (IEP). Martin, USA, University of Tennessee Martin.

[25] Fuller, L. L. (1958). "Human Purpose and Natural Law." Natural Law Forum **3**(1): 68., 70 quoted by Winston, K. I. (1988). "Is/Ought Redux: The Pragmatist Context of Lon Fuller's Conception of Law." Oxford Journal of Legal Studies **8**(3): 329-349.

[26] See below the story of the gunman. There are, thought, notable exceptions to this, such as: Ross, A. (1957). "Tû-Tû." Harvard Law Review **70**(5): 812-825.

[27] Oliver Wendell Holmes was a member of what was known as the 'Metaphysical Club' and spent considerable time with William James, see Menand, L. (2001). The Metaphysical Club. London, Flamingo.

In total, Fuller's theoretical inclinations occupied a space with a view on how things worked for law to be practicable, a space where he looked at how things are done on the ground as a practitioner and a citizen rather than an external observer. An example of this, referred to later, is the dichotomy of morals into morals of aspiration and duty.[28] This dichotomy shows Fuller's pragmatic mindset because part of the classification is hinged on how people act in reference to the different 'oughts,' rather than focusing solely on the nature of the 'oughts' themselves. In my opinion, this allows a greater ease of identifying the generation and maintenance of a type of ordering within the context of a polity.

2.2.2 Framing

After theoretical inclinations, the next point of interest is Fuller's framing and why framing is essential to understanding a theory of law. Key to exhibiting the importance of framing is our main idea form. From a Fullerian frame, the form of Law is what makes it distinct from other types of ordering in a way. Form is married to practice because it needs to harbor 'practicable' results that guarantee that form – Law is thought to be 'able to become part of practice.'

Fuller's viewpoint is what Frederick Schauer calls an "internal perspective on law."[29] Schauer argues that Fuller saw himself from within the system and that Fuller's theory was meant not to have a clinical discussion about law; still, instead, it was intended for a 'user' audience that "at the time of reading be inescapably situated within the law and its processes."[30] Fuller, it seems, had the will to pinpoint what lifted the law to its 'lawful' position from within its practice and what types of things conditioned the existence of law. External points of reference could not account for the differences Law exhibits. His famous inner morality of law, or the 'morality that makes law possible,'[31] is the epitome of his quest. He produced his well-known list of eight procedural points

[28] *Morality* p. 97
[29] Not to be confused with HLA Hart's idea with the same name see Schauer, F. (1994). "Fuller's Internal Point of View." Law and philosophy **13**(3): 285-312.
[30] Ibid, 286
[31] *Morality* Chapter II

or canons,[32] the absence of which results in something that is not "properly called a legal system at all."[33] These points were not a checklist for quality control, but instead, they are features that allow the ordering to reach the level of law in the first place. In this way, Fuller is explaining how to make law tangible through form and practicability.

For Fuller, all human societies exhibit ordering, which can exist many forms and shapes.[34] Of these, Fullerian legal theory aimed to give an account of law in a way that expressly distinguished law from the other systems of ordering. The plastering on a façade would not suffice. Fuller argued that "[a] legal system cannot lift itself into being legal by fiat."[35] This means that the distinctiveness of Law cannot just be a given or an attribute or denomination that is bestowed upon it. It must be earned and be able to materialize in practice. The difference between law and other forms of ordering is tangible and other conditions apart from denomination need to be met. In this vein, for Fuller, it can be observed that mere labelling of law (like positivists contend) as a determinate is inadequate. Instead, there must be a series of qualifications in practice that do the work of distinction. The essence of law is embodied by practice, and practice is constrained by form.

Out of context, this might seem positivistic, that the law is verified but only by recognizing its external form. Many readers of Fuller place a full stop here. Yet, this reading of Fuller sees an attribution of the status of law as an act of recognizing pedigree[36] or as evidence of factual being for law. However, in doing so, it misses the direction and nuance of Fuller's work, as will be argued further below.[37]

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[32] Ad hoc adjudication, non-publicity, abuse of retroactive law, non-coherence, contradictory rules, not to make laws impossible to follow, non- stability, lack of congruence between law and official action, *Morality* p. 39

[33] Ibid.

[34] For an instance of ordering other than law, in the 'Reply to Critics' annex of the second edition of *Morality,* Fuller speaks of managerialism as an alternate form of ordering. P.

[35] From an unpublished document in the Harvard archives found in Rundle, K. (2012). Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller. Portland, Oxford, Hart Publishing. p. 14

[36] A view of positivism forwarded by Ronald Dworkin and succinctly defined as searching for "the necessary and sufficient conditions for legal validity having to do with how or by whom law is promulgated" Himma, K. E. (1999). "Judicial Discretion and the Concept of Law." Oxford journal of legal studies **19**(1): 71-82.

[37] Infra section 2.2.5.

Moreover, trying to frame the inquiry into law as practice is seen in Fuller's use of allegory to show where ordering can fail to become law proper. For instance, through the trials and tribulations of Rex II,[38] we can observe someone trying to fulfill a goal. When Rex trialed and errored he failed at doing law, he did not fail through misapplication or interpreting the law/legislation. Instead, the absence of such formal features of law precluded it from reaching its distinctiveness as a type of ordering. While the details of Rex's story are not important now. What must be underlined is that the failures of Rex were practical failures to make the purpose possible. The Fullerian approach therefore has a distinct practical dimension which needs to be kept in mind.

2.2.3 Fuller's Naturality

The next point is the significance of Fuller's self-identification as a procedural natural law theorist. This needs to be laid out to gain a handle on the idea of form. The meaning and perspective he sought to show made him differ from the other major schools of thought, especially positivism and 'traditional' natural law theory. The will to differ suggests that he saw things differently and that these theories did not satisfy his perceptions of law. It becomes, therefore, helpful to set out Fuller's footing in the jurisprudential world. Key to this is Fuller's relationship with the school of natural law and the distance he kept from his positivist critics, especially HLA Hart, which adds to a richer understanding of his position. After 'doing' became the focal point of the section above, we can assess his 'naturality' to see where Fuller lands.

2.2.3.1 Staking Flags

To begin, as Fuller readily stated, that he planted his flag in a suburb of natural law but not centrally in the heart of its city. He accepted the label but only with explicit qualifications, thus. Unlike other natural law theorists, Fuller did not consider that law must fulfill a particular character or that a specific moral character of law is preferable to another. Law has nothing to do with "brooding omnipresence in the skies."[39] Instead, he offered a theory that asked us to look closer at the inner workings of law. Natural, in his view, would have to mean

[38] We will delve into the approach of this story below in section 7.3
[39] *Morality* p. 96

what comes native to it and not from the heavens without the need for human intervention.

Before we look at the differences between Fuller and his natural law neighbors, it is worth mentioning their common ground. The first and perhaps most obvious point is the position of non-separation of law and morals. Secondly, they share that law has a series of inescapable features in "Law", which do not necessarily are not what make law, but condition it. They are in place for law to be able to be constituted or maintained.

Fuller and Substantive natural law converge that these inescapable features inhere in law and the human attribution of the title 'law' cannot therapy their absence, whereas positivists do not agree. What things or features are identified as inherent parts is ultimately where the divergence lies. In substantive natural law, an example is in Aquinas, when the law becomes the embodiment of reason or when a rule of manufactured law contravenes some eternal law. It would be stripped of the name 'law' by virtue of the clash.[40] Both sides of natural law hold that certain aspects come antecedently to the creation of any law. One is that law is oriented towards something, regardless of human intervention. This can be seen, for instance, when Finnis connects law with human flourishing,[41] or when St Augustine shows how eternal law leads to the City of God[42] you there without the necessity of humans to want it to.

The nature of the second point of similarity, the aspect of law having 'things-you-just-can't-get-around,' was different for Fuller and the best contender for a reason to differ from his neighbors. His came from a view that centered the conception of law as an enterprise of ordering as a practice, so whatever 'things-you-just-can't-get-around' might be, they would be practical and have to do with form and not the content of law. Any character of necessity or antecedence is thus grounded in the nature of the process instead of the nature of the outcome. This is contrasted with other natural law thinkers who placed their 'things-you-just-can't-get-around on the quality and goodness of the legal arrangement.

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[40] For brief summary of Aquinas see Harris, J. W. (1997). Legal Philosophies. Oxford, Oxford University Press. p, 8. 9, 14

[41] Ibid, p. 14-17

[42] Gronewoller, B. (2019). Augustine of Hippo. Great Christian Jurists and Legal Collections in the First Millennium. P. L. Reynolds. Cambridge, Cambridge University Press**:** 266-282.

Theirs is of substance; his is of practice (which I believe is a more apt word than Procedure).

This idea of "things-you-just-can't-get-around" or antecedent/necessary is a common motif of Fuller's work, requiring caution. Namely, Fuller calls these points moral, which is a departure from the common understanding of the work . In an unpublished note from his archives, Fuller, speaking on the reciprocal relationship of lawgiver and law follower, said: "'moral' means merely that it is antecedent to law."[43] Moral, in the essence of this view, pertains to the conditions that must be in place for law to exist that are both prior and necessary to law. If they are not in place law cannot "be." It does not mean attributing a moral quality of good or bad to the law. 'Moral,' therefore, is best understood as antecedence and represents the quality of law as a social process with inescapable features. These features are not in the posited content of the law but must be in place for it to materialize as a process. These material features are what separate law from other forms of ordering. This view of moral gives way to something that can be called "a low floor morality."

A second consequence of this 'moral' is that ordering itself is inescapable. All societies feature ordering, or they cannot exist as societies. Thus, ordering is antecedent to societies, too. This understanding of Fuller forwards the linear connection of whatever is inescapable about law is moral, and what is moral comes to precondition law. To be moral in this sense is a relatively low bar but clarifies what Fuller meant by 'natural.'

2.2.4 Natural Differences in Framing

It is becoming evident that Fuller's procedural natural law works differently from the substantive variety of natural law. It looks at how the law tends to function and aims at identifying the procedural features that make possible to fulfill both its purpose and the law's claim to distinctiveness against other forms of ordering. Procedural natural law asks what antecedent features of law maintain the character of the process and the character of the roles of the partakers. The process must be true to purpose; the partakers need to respond

[43] Untitled and undated document, paginated in hand as p 25, The Papers of Lon L Fuller, Harvard Law School Library, Box 12, Folder 4 found in *Forms* p. 14

to their role and yield to the enterprise's practical necessities. Therefore, both types understand natural in their own ways. For substantive natural law, this amalgamates into agreeing with a value, for instance, in the eyes of God, morality, or human flourishing. For procedural natural law, the 'natural' attachment is found in the 'necessary-ness' that allows an instance of ordering to become law. The practical couples with the natural/moral to highlight what is needed for any form of law. The form of each kind of natural law reflects this differentiation, where the form of substantive natural law dissolves when it contravenes higher norms, and procedural natural law's form is complete only when it can fulfill its role and purpose.

This last position needs more detail; procedural natural law is not satisfied just by the possibility of completion. If Fuller's framing is accepted, the teleology ingrained in procedure influences the examination of 'what is law.' Procedures are concocted with an end in mind, and with this necessary intertwinement of purpose and procedure, there is an effect on the view of normativity of the procedure. Fuller explained this by making an analogy to purposive crafts. If someone has the will to construct something that will serve a purpose, it is inherent that there are material necessities that need to be considered to allow the creation to ever come about. Therefore, a procedure that can enable the final product to accomplish its initial purpose must be developed. Fuller gave the following famous example: if one wants to build a house, the construction must follow: "those laws that are respected by a carpenter who wants to have the house he builds to remain standing and serve the purposes of those who live in it."[44]

What Fuller argues is that undertaking a purposive exercise means that you also necessarily try to assume to complete its purpose. The second assumption creates a value-laden position in which you commit to reach the desired end. For the context of making and maintaining law, this amounts to installing order in such a way that can deliver law. Kristen Rundle points to a quote from Fuller to capture this point:

[44] *Morality* p. 96

> *"a system of rules for governing human conduct must be constructed and administered if it is to be efficacious at the same time remain what it purports to be."45*

From this quote, the difference in framing to substantive natural law can be seen. The aim of law becomes double: it must serve both the ideals of a minimal efficacy and "what it purports to be." Efficacy, in this context, is a base understanding; it does not mean that the policy goals of the lawmaker will be reached. It is efficacy in that law must be able to fulfill its purpose to order human behavior in a way that is distinctive to law. Law must make its basic aim (to be capable of ordering human behavior) deliverable. Chapter 4 gives several examples, but let us consider the PRC's State Religious Affairs Bureau Order No. 5 for the time.[46] It forbids the unapproved reincarnation of Living Buddhas. This comprises a 'natural' Fullerian failure to be law because it is inefficacious, because it will never being able to order human behavior. Secondly, it cannot fulfill what it purported to do, namely, be a legal arrangement.

To clarify their distinction between the 'purporting' and the 'efficacy' here: First, 'purporting to be' means a commitment to something in a specific way that matches the intended result. Efficacy, on the other hand, is measured consequentially in reference to an outcome. Secondly, purporting to do something creates an aspiration rather than a result. It makes a promise that the process can and will follow through. So, there are promissory and factual components to it. Although promises are theoretically thorny, a certain amount of expectation arises regarding the ability and the delivery of what is promised. Efficacy, on the other hand, is more clinical and makes no promises. It has more to do with the factual nature of a process of law to be able to come to an end. As we will see later, Fuller's whole enterprise of law is based on a reciprocal

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45 Ibid p. 97, *Forms* p. 93

46 Detailed below in section 8.5, "Central Government of the People's Republic of China, "藏传佛教活佛转世管理办法 [Tibetan Buddhism's Living Buddha Reincarnation Management Measures]," 国家宗教事务局令 [Order of the State Bureau of Religious Affairs], http://www.gov.cn/gongbao/content/2008/content_923053.htm

relationship based on the de facto assumption of roles between lawgiver and law-follower.[47]

Other schools of thought can easily subsume each of these two features. Substantive natural law can easily claim to be the purporting element, and schools of positivism could claim efficacy.[48] But it is only when they combine into the package of antecedent features native to law that Fuller gets the theoretical purchase to get away from both positive law positions and substantive natural positions. He breaks from the positivist school of legal thinking because law has features outside the action of positing and from substantive natural positions. There are no given maxims of value to gauge the validity of law against, despite having certain inherent features. In this light, we can now learn from the readings of his work by his positivist contemporaries.

2.2.5 Reading Fuller, But Also How Not To

2.2.5.1 Why Framing Is Important

With all these differentiations in ' naturalness', it becomes evident that if one approaches Fuller without having this frame of reference, they will miss the nuances to engage his ideas. This is not just a case of idiosyncratic language but a shift of the entire framing of the jurisprudential inquest. Willem Witteveen captured this new framing succinctly: "In his writings, Fuller continually addresses the problem of the creation and the maintenance of order in the social world employing law. For him, there was no theoretical quest for legal systems that would be doctrinally right;[…](instead) An interest in the conditions under which groups, organizations, and whole societies flourish is essential for lawyers to perform a socially useful function."[49] With a framing such as what Witteveen captured, it becomes evident that the tools of the trade necessary to approach must be capable of carrying value conceptions, especially morality. As such,

[47] Fuller uses the term legal subject, I believe the law follower is more adept at capturing the mirroring of this basic relationship for a legal order, both linguistically in the sense that it makes a more rounded pair, but also gives a better indication of the roles that each side plays.
[48] Although there are positivistic accounts like that of Brian Tamanaha which seem to contend that efficacy is not all that important see Tamanaha, B. Z. (2008). "Understanding Legal Pluralism: Past to Present, Local to Global." Sydney Law Review **30**(3): 375-411.
[49] Witteveen, W. (1999). Rediscovering Fuller: an introduction. Rediscovering Fuller: Essays On Implicit Law and Institutional Design. W. J. Witteveen and W. v. d. Burg. Amsterdam, Amsterdam University Press.

searching for what normativity means and its role in this context is essential. The intended outcome is to find the normative footing, including morality and its intertwinement with 'process' and how all of that is encapsulated in form.

This is not the entire story of what morality means for Fuller. Specifically, when Fuller speaks of morality, he does not just speak of antecedence, as noted above. He tunes it to the needs of his framing and explains it into two types:[50] the morality of aspiration and the morality of duty. These two types are differentiated by scope and reaction. This is clear cut at first but as Wibren van der Burgs says "Although the basic idea of the distinction may be simple, we encounter a swamp of ambiguities when we try to elaborate it."[51]

The two kinds of morality differ in many ways, but the most characteristic difference is their scope. First, the morality of aspiration. It is a morality that looks prospectively with a view towards excellence, it is a normative drive towards fulfilling ultimate potential. This kind of morality creates a scope to carry something through to its inbuilt end and features a hope of achievement. Fuller referred to the way Ancient Greeks understood morality to explain this type of morality, because it is "most plainly exemplified"[52] there. The morality in this case was not oriented to the stand-alone nature of the acts at hand, but the orientation to act in a fitting and appropriate way for the given moral purpose. An example that could be added here is the definition of justice from Plato's Republic:[53] τὸ ἑαυτοῦ πράττειν (to be just, one must do in society what is given by their natural endowment). In this example, society is taken as our only shot towards the 'good life'-whatever that might be- and, to reach that goal, everyone must do their part according to their abilities. So, we have a goal, and then the means to the goal give partakers an 'ought' to follow, which normatively loads their actions by orienting them. The morality of aspiration does not have the scope to make judgments retrospectively by evaluating performance. If there

[50] *Morality* p. 3-20
[51] van der Burg, W. (1999). The Morality of Aspiration: A Neglected Dimension of Law and Morality. Rediscovering Fuller: essays on implicit law and institutional design. W. Witteveen and W. van der Burg. Amsterdam, Amsterdam University Press.
[52] *Morality* p. 5
[53] Book 4 paragraph 433, line a Plato (1963). The Republic. Cambridge, Mass, Harvard University Press. translated by Paul Shorey whose exact translation is "each one man must perform one social service in the state for which his nature is best adapted."

is a failure to achieve potential, there is no corresponding sanction as that is not in its gambit. Aspirations give direction, not performance levels.

The scope of the morality of duty, contrariwise, looks inquisitorially to see whether the moral quality of action is good or bad. That makes the morality of duty a performance benchmark. The understanding of Fuller couples the morality of duty to the minimum maintenance of a moral system. It examines the quality of an act which either enables or prevents morality and, thus, it has the scope of bestowing a judgment of 'good' or forbidding 'bad'. When a human fails, this means doing a wrong. It is a morality that sets the "basic requirements of human living" that society needs to operate, and the opposite of this morality is not tolerated.[54] This morality draws red lines which are not to be crossed. Fuller gives for this the example of 'deep play' gambling to explain this idea.[55] Deep Play gambling is when the significant cost of losing outweighs the benefit of winning. To gauge whether deep-play gambling is morally permissible from the scope of the morality of duty, is a matter of examining it on the basis if it is harmful to the point that it challenges the workings of society universally, and act either allowing it or not allowing it. The moral of duty in this situation would plainly forbid it given the grave consequences it could entail for the good functioning of society. It does not look to see condemn on the basis of seeking potential, but as measure of defense.

Reflexively, the cleavage of the two moralities corresponds to a differentiation of reaction as well. The morality of duty carries a condemnation, whereas the morality of aspiration does not. In the case of a morality of aspiration, no one would sanction you for not maximizing potential, whereas failing a morality of duty would garner condemnation. Still, the two moralities do not exist in mutual exclusivity. They live in a complementary nature: where the morality of duty sets the basic ability by setting the rules for something to happen, the morality of aspiration sets the orientation and gives the motivation to reach its final,

[54] *Morality p.6* Functionally, Fuller argues that the morality of duty is necessary because it gives the basic moral content for a society to be maintained. It is a mechanism that "does not condemn men for failing to embrace opportunities for the fullest realization of their powers. Instead, it condemns them for failing to respect the basic requirements of social living." The "fullest" and the organizing of potential is material for the morality of aspiration.
[55] A term he borrowed from Jeremy Bentham, *Morality* p.6

intended form. The duty of aspiration is not hinged on its performance, yet it give direction for performance.

Peter Nicholson captured this point well: "The two moralities differ in various, interconnected ways. The morality of duty imposes duties concerning what is necessary for social life (e.g., do not steal), which are backed by legal, cultural, and social sanctions and can and must be performed completely and vary widely. The morality of aspiration presents challenging ideals (e.g., be wholesome or generous), which are reinforced by the rewards of honor and self-satisfaction and are not expected to be carried out to the full or by everyone. The ideals of the morality of aspiration are precisely that: aspirations. They are only achieved to a certain degree. Moreover, these ideals may conflict, so one can only be fulfilled at the expense of another or others, and then we must resort to something akin to the kind of calculation governed by the marginal utility principle by which we make the best use of limited economic resources. But failure to achieve aspirations will not collapse society, as would failure to perform duties."[56]

The more interesting of the two for this thesis is that of the morality of aspiration, because it is forwards minded and more adept for setting a northern light for better legislating which aspires to create. The morality of duty might be interesting to what the legislator puts into the content of the legislation, but, insofar we are talking for the enterprise of legislating itself – as a craft, the aspiration, the ideals, and the means to reach its potential are more important. The morality of aspiration is about aiming to do well, and this thesis's goal is on how to legislate better.

Returning to the distinction between the two moralities, it must be said that the dichotomy was a largely context setting exercise and not the central focus of *Morality*. The focus was to make sense of Law. The single chapter that Fuller dedicates to the moralities could use expansion, and the limited length constrains the clarity needed in the ontological and functional deviation of the two moralities. Fuller himself admitted that this exposition of morality is

[56] Nicholson, P. P. (1974). "The Internal Morality of Law: Fuller and His Critics." Ethics **84**(4): 307-326.

imperfect, relatively brief, and features several gaps.[57] Despite this, this double view of morality, and, more importantly for this writing, the scope of each show how morality can be used functionally, and how can figure when giving normative direction. Practice and deliverability come to the forefront at the cost of covering an interminable dispute whose outcome will not affect the necessity of finishing the task.[58] As such, Fuller understood morality in a way that is compatible to the pursuit of practice, through the morality of aspiration, but also functional through moralities of duty that enable the basic workings of a system. To see how this can be operationalized for the improvement of legislation, the first place to look for this answer is how Fuller put gave operational direction to the inner morality's eight Canons.[59]

2.2.5.2 Rex Marks The Spot

Through his story of Rex II,[60] Fuller gave the allegory of a ruler of an unnamed land who consistently failed at making law in a way that fulfilled its potential. Apart from giving a relatable explanatory vehicle for Fuller's ideas about the morality that makes law possible, the story of Rex II reveals many features of his approach and framing. When Rex II legislated, his method concentrated on creating law in such a way that he could order the human behavior of his subjects. Each time Rex attempted or pondered a new maneuver to order the subjects of his law, there would be a failure and a ponderance as to why it failed. Each failure corresponds to each of Fuller's eight canons.

Through trial and error, Rex found a series of features that, if not treated, would hinder law from rendering its intended purpose. Through the commitment of

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[57] "agreeing with Hart that his analysis of the moralities of duty and aspiration was 'full of open ends', but had he tried to trace out all the relationships implied by it, he 'would never have got past the first lecture'. From *Forms p 86*

[58] Framed like this it is reminiscent of William James: I tell this trivial anecdote because it is a peculiarly simple example of what I wish now to speak of as the pragmatic method. The pragmatic method is primarily a method of settling metaphysical disputes that otherwise might be interminable. Is the world one or many? – fated or free? – material or spiritual? – here are notions either of which may or may not hold good of the world; and disputes over such notions are unending. The pragmatic method in such cases is to try to interpret each notion by tracing its respective practical consequences" Lecture II in James, W. (1907). Pragmatism: A New Name for Some Old Ways of Thinking. Auckland, New Zealand, Floating Press.

[59] *Morality* p. 39 I follow Luban, supra at note 15 in using the word "canons". I think it is more appropriate than the usual 'desiderata' because 'canons' offers better coverage to the process of lawmaking.

[60] *Morality* pp. 33 - 40

Rex to find the solution, the allegory exhibits the practical mindset of Fuller, but also the morality that aspires to have a system of law meant to do a job in a specific way. Rex aspires to make law that fulfils its potential and encounters practical difficulties that bar it from doing that. Specifically, Rex's aspiration is wanting to complete the task. The narrative of Rex is an example of the aspiration of trying to find what 'works' and what does not when undertaking a purposive craft. As Phillip Selznick put it: "Thus for Fuller, the "internal" morality of law consists of standards that emerge as we learn the crafts of judging and legislating."[61] In this way, Fuller exposes a vital facility of practice through Rex. Rex is looking to see how law can come about and how it can order and govern human behavior. It is a much different framing than his contemporary many of whom act as if they are poking Law's carcass with a stick and one that is much more aligned with law that is in the making.

But does view of Rex's practice-mindedness really have to do with morality or is it something else? This is a point that HLA Hart and other positivists readily pounced on distinctly. This pouncing is something that is attributable to the difference in framing between Fuller and them. For many positivists, even law that aligns with inner morality still runs the risk of being iniquitous hence Fuller is not really talking about morality. The contention then becomes that morality is being confused with purpose and efficiency.[62] Specifically, HLA Hart, in his review, spoke of Fuller as another confused theorist who obscures the distinctions between morality, teleology, and suitability for purpose. Hart criticized Fuller for his rendition of morality as nothing more than a servicing of efficacy and is, for that reason, not moral at all. Hart famously said that there is nothing distinguishable from the inner morality of law with any other purposive process, like poisoning:

> *"Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. ("Avoid poisons however lethal if they cause the victim to vomit," or "Avoid poisons however lethal if their shape, color, or size is likely to attract notice.") But to call these*

[61] Selznick, P. (1999). Preface. Rediscovering Fuller: Essays on Implicit Law and Institutional Design. W. J. W. a. W. v. d. Berg. Amsterdam, Amsterdam Univesity Press.
[62] The evangelion of the positivist attack on Fuller is found in Hart, H. L. A. (1964). "Book review: The Morality of the Law " Harvard Law Review **78**(6): 1281-1295.

principles of the poisoner's art "the morality of poisoning" would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned."[63]

Hart's criticism of Fuller is hinged on the position that Fuller held a view of Law that was a purposive instrument and was uneasy to concede anything to Fuller. Hart reiterates that Fuller conflates purpose and morality multiple times, finishing his review by saying, "The author has all his life been in love with the notion of purpose, and this passion, like any other, can both inspire and blind a man."[64] For many of its readers, Hart's criticism seemed to be a fatal blow to the theory of inner morality. However, Hart's complaint is essentially missing the entire frame of reference because it sees law as a material artifact instead of a process. Morality for Fuller is not a feature of the law itself but rather part of the process, material environment, and procedure of law, and that escapes Hart.

Yet, Fuller's view is not crystalline[65] on what kind of morality the inner morality of law is. Saying it is "largely a morality of aspiration."[66] Despite this messiness becoming an easy target for Hart's criticism, Hart's position remains all too dismissive without delving enough into Fuller's viewpoint. Hart theorizes the juxtaposition of morality versus efficacy without heeding Fuller's multiplicity of moralities or the suggestion that law must also be grounded in aspiration as much as in real world facts.[67] Hart only engages with morality as a mode of making moral judgments of value and not of aspiration. He sees Fuller's theory as a quality control mechanism, whereas Fuller intends to sketch what character is needed for law ever to be able to fulfill its intended purpose. It shows

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[63] Op.cit. 56 ibid.
[64] Ibid, 1296
[65] Even sympathetic readers say as much: "Those familiar with Fuller's writings will surely agree that he did not necessarily succeed in articulating this jurisprudential vision in a way that might have seen his message better understood and better placed to endure" *Forms 24.* Also, Nigel Simmonds find his truths "malformed" Simmonds, N. E. (2014). "Freedom, Responsible Agency and Law Review Symposium: Kristen Rundle, Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller (Hart Publishing, 2012)." Jurisprudence **5**(1): 75-84.
[66] *Morality p 43: "*all of this adds up to the conclusion that the inner morality of law is condemned to largely a morality of aspiration and not of duty"
[67] Forms p 33

a cavernous cleavage between the two and shows the difficulty of reaching conclusions on their discourse.

The fundamental difference in framing between the two is reflected in each thinker's different enterprises and philosophical backgrounds. Hart prioritizes analytical clarity regarding the nature and content of law. Fuller wants to show that law is distinguishable from other forms of ordering and how law is conditioned by its making and maintenance. This point indicates a fundamental disagreement that they perceive the issue vastly differently, so much so that it can be argued that they are having a different conversation.

Kristen Rundle made a similar argument by saying there was a fundamental disagreement between Fuller and Hart, which was never understood by Hart or pointed out by either.[68] Rundle tried to exhibit this point and show it is moot since Fuller and Hart do not see the same relationship between morality and servicing its purpose. To quote Rundle, Fuller "sees the moral dimensions of law as not standing in a relationship of polarity but rather in one of irreducible connection, with the connection arising from the way the structural features of law interact with animating moral commitments to constitute its[law's] distinctive form."[69] Rundle's point here is that, essentially, even though Hart and others think that their criticism of the inner morality is 'not merely a verbal criticism,' they seem to understand morality in a distinct way as compared to Fuller and preoccupied with showing how legality is in no way moral.

To make signal crossing between Hart and Fuller evident, let us contrast the meanings of morality at play. First, Fuller's morality: morality comes from law's definition as a purposive exercise and process accounts both for specific material constraints and aspirational direction. With this understanding, the moral 'oughts' that are born are tethered to the creation and maintenance of a system of law. Morality normatively loads practice and asks it to be "proper and fitting."[70] This view of morality is prospective. The morality of duty is set on giving the material ability for law to come about.

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[68] *Forms* p. 11-19
[69] *Forms* p. 47
[70] *Morality* p. 5

On the contrary, Hart's understanding of morality is completely different. Hart's position aligns with how many other positivists address it. Morality becomes a binary understanding of good or bad and if morals are engaged or not in law. And given that the separation of law and morals respondent in their theory, the answer is always that law and morals do not mix, and that morality is a separate system of norms. Positivists examine law's morality as it stands without considering the implications in setting aspirations or ensuring material ability for law to unfurl itself. This leaves out any thought of what law was meant to do or how it could function as to its potential. Although there is an attributive mechanism also with the morality of duty, that relates to the idea of ability and making sure the ability for Law's purpose to come about is in place. It does not have a nominating function as with more examinational and attributional purpose in Hart's understanding.

The positivist conception is akin to activating a binary register that gauges morality, like an on/off switch. Morality is engaged with the two sides of value judgment, which are mutually exclusive, like good or evil. Thus, Hart's specific moral register cannot fit in a morality of aspiration as Fuller means it. Fuller means aspiration as an intention and a commitment to follow that intention through, something that cannot be articulated or is irrelevant in a positivist vocabulary. The view that comes together signals a reluctance from Hart to engage with Fuller using the latter's framing. While it is mere speculation, this can be due to Hart's will concede no ground for a separation thesis between law and morals. Switching the perspective and meaning of morality to encompass the idea of normative pressures would necessitate a theoretical pivot that Hart might not have wanted to make.

Based on the discrepancy in understanding between the two, we can see evidence of Hart's reception of the concept of morality being binary; for him, morality is or not and can be part of the law or not. This indicates the failure of many misreads of Fuller where positivists to address him as a process-minded jurisprude. There is not much room for gradation. In accepting this point of view, Hart does not allow himself to take on Fuller on his own terms. With positivists like Hart, this view makes no effort to understand Fuller on his own terms, as the morality of aspiration does not look at the role of morality in diagnosing

what is law, but the perspective morality associated with the construction and maintenance of law. That is why Hart cannot see beyond the idea of efficacy when judging the merit of the inner morality of law. Because morality is interwoven with the fabric of law itself, it creates a normativity of give and take that Hart lacks the framework to articulate. Colleen Murphy said, for positivists, "you can use a knife to chop vegetables or commit murder, and there is nothing about the nature of knives that constrains murder as an object, so too with law."[71] Hart, therefore, thinks Fuller adopts this knife mentality, too. Instrumentality remains a surface level for positivists, one that takes for granted that moral intuitions or sentiments at play are separate and seen as the product. In a Fullerian world, however, the instrumentality is just making a process reach its envisioned goal, and the push to this goal is imbued with morality.

Modern positivists still follow suit, with some conducting red herring expeditions. Matthew Kramer's analysis[72] of Fuller gives a fitting example of how missing Fuller's framing can result in missing the bigger picture. If one looks at law as if it were a finite product, rather than focusing on the 'oughts' that impact its generation and maintenance, one will ultimately miss the usefulness of Fuller's work. Kramer exhibits this by crafting a scheme of possible outcome scenarios of Fuller's theory to prove that Fuller's 'morality' could also allow for unjust results. Kramer schematizes this in a grid with law on one axis and procedural deviations on the other. On the law axis, there is a graduation from good to bad law, and on the procedural deviation side, from non-deviation to malign deviation. While scholarly and thorough, his work missed the critical moment of Fuller's theory, which is along the process of law and not at its end. In this way, it loses the main aspects of Fuller, aspiration, and practice, as they cannot register. This is because, irrespective of all the scenarios that might be constructed from combining what is on the two axes, they all measure morality

[71] Corver, F. (2020). Lon Fuller & The Morality of Law (with Colleen Murphy). 'Dare to know!' Philosophy Podcast. podcast available at https://daretoknowpodcast.libsyn.com/lon-fuller-the-morality-of-law-with-colleen-murphy-philosophy-of-law-3

[72] See Kramer, M. (1998). "Scrupulousness without Scruples: A Critique of Lon Fuller and His Defenders." Oxford journal of legal studies **18**(2): 235-263. especially his modelled scenarios for law making p 241-243

in such a way that the process of lawmaking is not considerable.[73] Kramer looks at law as a static object, whereas Fuller builds his theory of law as a dynamic process. The dynamic process is what Fuller considers a loaded moral enterprise. Analyses such as these leave the subject out of the frame and, ultimately, attempt to discredit an otherwise valuable theory. Yet, Kramer's article is constructive in two ways: Fuller's framing is important, and there is a need to articulate the morality of Fuller in a more tangible sense. What is really meant is that intrinsic morality is anchored in the process of law. If we are to unpack the idea of the morality of law within this framing, it will become more tangible. In many ways, the process of law is formal, so if we connect morality to form, we can get a better result.

This also falls afoul with other authors sympathetic to Fuller. For instance, Kramer's "high noon"[74] standoff opponent Nigel Simmonds, in a review of Forms Liberate, seemed unable to get past the 'law-as-a-thing' view that is so central to positivistic thought. Simmonds devotes most of his review to how you cannot take substantive ideas entirely out of the equation and that compliance with Fuller's eight canons does not rule out 'iniquitous' results. Among other things, Simmonds fires against Rundle's will to ascribe value to the explication of agency (dealt with later). Whether or not this is true or not is not what is essential here. Instead, determining wickedness is hinged on a view necessarily subscribed to an outcome-based appreciation of law. This is only possible if you assess the law as a thing and not a process. This follows notionally because goal orientation is not concerned with the goal outcome apart from the ability to reach that point. In considering law as an enterprise, law can fail to materialize, as Rex II found out the hard way. In all, therefore, not only positivists fall into this framing trap, but also their opponents.

Aside from questions of framing, another question needs to be addressed in reference to Lon Fuller. And that is how to handle the questions of: "What is law?" and "What law ought to be?" should these be dealt with together or

[73] On a more critical note, it seems that what was sought after was a "gotcha" against Fuller-sympathizers. Vendettas aside, his criticism seems to have missed the mark.
[74] See their debate in the American Journal of Jurisprudence: Kramer, M. H. (2011). "For the Record: A Final Reply to N.E. Simmonds." American Journal of Jurisprudence **56**: 115-134. And Simmonds, N. E. Ibid."Kramer's High Noon." 135-150.

separately? This was something that haunted Fuller as well. This will be covered in the next section. But, in closing, in this section, I wanted to show that reading Lon Fuller's is most useful when read from a specific lens. One of natural law, but also not what typically is associated with natural law. One that sees law as a purpose enterprise and a social process, not as an artifact. His opponents, mostly positivists, missed this completely and could not step aside their own approach to engage with Fuller's ideas. Hart, in particular, never set out the fatal blow that many think he did. To fully assess Fuller's contribution to understanding the process of making law, engaging with his works using his framing is necessary, as it shifts the focus completely and makes the outcome incidental to the nature of the process.

2.2.6 Fuller's perspective set

In all and to recap this chapter, the aim was to pinpoint the very particular vantage point of Lon Fuller. This I argued is necessary as to understand and then tackle the thicker idea of form. For this purpose, the chapter relayed an interpretation of his perspective, his theoretical inclinations, and his framing. His stance of procedural natural law and had to be pinned down alongside his specific understanding of morality that was different and specific to him.

The most important elements in this regard indeed were his framing of law as something that is more than an artifact and his view on morality. Both his framing and views on morality complement each other and empower his viewpoint to address important social enterprises such as that of making law through legislation. Specifically, the notion of having both moralities offers coverage to the intrinsic nature of aspiration and how that it couples with the inherent purpose inbuilt into any task. This is inclusion of aspiration captures the nature of legislating as communal enterprise to reach its potential. Likewise, the notion of the morality of duty gives space to consider the minimal material condition that lay the ground rules for legislation.

These moralities however are best understood as having a low floor, meaning that their moral asks are not especially high, have a universal character, or have a supernatural provenance. They are about giving light to the normative constraints that arise when creating and maintaining a system of law.

Specifically for the morality of aspiration, the moral loading is expressed by the orientation towards the fulfillment of purpose and potential. For the morality of duty, it suffices to not preclude the task at hand from happening. When coupled with the framing of law being embedded and being a social practice, we can start to capture a thicker meaning of form that also takes into account normative loaded aspects. As this thesis is meant to articulate how to making legislating better, using Fuller's framing and ideas about low floor morality is attractive because it is able to capture the normative weights that are found in a practice such as legislating, but its prospective and aspirational character.

3 The Tumultuous Journey To Form

3.1 Implications Of 'Doing'

The previous chapter tried to capture the nuance necessary to weigh Fuller's ideas through his unique approach, with a special focus on the ideas of form and morality. It exhibited how Fuller had to distinguish himself both from 'substantive' natural law theory and positivists. The writing also argued how difficult Fullerian jurisprudence cannot be engaged with from a positivist view without significant shifts in perspective regarding the role of morality. It concluded that Fuller could be best understood under his own framing with all of its intricacies and specific terminological understandings because only then can his theory be made most useful. Included in this framing were his ideas of enterprise, that normativity cannot be broken away from law, and that there is an essential inbuilt teleology to ordering through the device of law. If linked together in such a way, Fuller's view seems especially fitted to addressing legislating.

Alongside explaining Fuller's framing, key features of his theory were emphasized in view of capturing the nuances of his theory. This chapter is now tasked with using a nuanced approach to underline specific topics to reach the thicker idea form by relaying specific ways through normative loading. Therefore, I will try to show Fuller's understanding of form by relaying why it includes moral items through the giving 'oughts' and knotting together the crucial rudiments touched on before morality, form, and purpose.

The contextual conclusions that were made can offer interesting inroads for the project overall. To reiterate: First, if law is indeed moral in the specific Fullerian way, it is framed in a way that is different to both substantive natural law and positivism. Morality, by ways of normative loading, becomes available at every point along its creation, production, and use/ deployment into society. With morality being bimodal in Fuller, it is split between aspiration and duty, and when we speak about the law as an enterprise, the focus falls mostly on the

former. As the making and maintenance of law exhibit mostly the type of aspiration[1] because of perspectivity, Fuller seems to be defending a morality that eludes both substantive natural lawyers and positivists. What constitutes moralities of aspiration is the bona fide attempt to reach an excellence, not achievement of the excellence per se; therefore, in law, that would be to treat law in a way that suits its purpose, not if it reaches it. Remodelling Fuller's carpenter metaphor: a carpenter can carry out the laws of carpentry well in synergy with the entire crew to create a flawless timber frame for a two-bedroom house, and the product fulfils its two-bedroom purpose. That will not necessarily make it 'excellent' for a family of eight.

Apart from the particular views of Fuller, his story of Rex shows a framing that both considers law as embedded in the societal arena and that covers perspective action. This is particularly pertinent to the morality of aspiration and that not tending to it will likely shunt the potential of legislative endeavours. The eight canons Fuller produced as "the morality that makes law possible'[2] exemplify the framing. In doing so, they diverge from archetypical natural law, such as Aquinas or Augustine. The framing is not necessarily connected to a maxim of a higher providence, like *lex iniusta non lex est*.[3] Instead, Fuller's framing se seen in the canons shows what is needed to make, shape, and apply law; without them, there is a fault in form, not value. The inner morality entreats law as an enterprise and a practice, and the morality it describes will be a practical morality. Yet, neither of these points suffice to reach an understanding of Fuller's idea of form, nor do they articulate the moral elements and pressures of the endeavor of law.

Arguing that morality is part of law was Fuller's aim, so it might be argued that is something more to be desired as per the clarity of the meaning of morality in the social practice of law. Some of the literature considers the l as the weak point of his theory.[4] This Chapter will attempt to fill in this gap by showing several

[1] The reservation of the word 'mostly', is do avoid particularistic rebuttal that in some small sense there will be a situation where law creates a moral obligation that one can fail at.
[2] Chapter 2 *Morality*
[3] For history of the term se introduction of Santos Campos, A. (2014). "Aquinas's lex iniusta non est lex: a Test of Legal Validity." Archiv für Rechts- und Sozialphilosophie **100**(3): 366-378.
[4] The aim of Rundle's *Forms Liberate* was to show some of the important yet implicit moral points found in Fuller. See also Rundle, K. (2014). "Reply: Review Symposium: Kristen Rundle,

ways morality becomes part of form, in a way attuned to the framing of law as an enterprise. My thesis is that form of legislation and legislating is necessarily thick. It is the idea that can house procedural completeness and the normative pushes that are present while legislating. These pushes dictate aspirations and excellence along the way of creation and maintenance of law. The approach that is employed differs from many readings of Fuller's morality, but it does move to tease out the law's 'implicit' morality.[5] In what follows, the writing will identify and describe some of the 'oughts' of law to show how normative features become part of form.

3.2 'Oughts' To Make Morality

1.1.1 Formal Gaps

In Fuller's work, the idea of Form lies in the background and accordingly garners less attention. Form is almost always dealt with indirectly, for instance, with the formal failings of Rex II, which leaves much room for better conceptualization. Kristin Rundle has tried to bolster the idea of form by arguing that the form of law necessarily is connected to human agency, adding therefore a normative aspect to it. She sought to bolster Fuller's work with the tools needed to articulate this idea. In doing so, her work underlines the importance of form in Fullerian jurisprudence schemes. The need for clarifying the idea of form is necessary because the distinctiveness of the legal form plays a central role and the lynchpin that ties together law and its internal morality. With the addition of the expanded role of form, Fullerian jurisprudence can get closer to practice and create a better base for legislating "on the character, existence, and normativity of law."[6] One that recognizes humans not as pawns in the legal game but "instead a bearer of dignity, with a life to live of her own."

To elaborate further, in her monograph *Forms*, Rundle aims to persuade her reader that Fuller was correct in his intuition that there is more to law than the recognition of a rule as law; there must be a meaningful account of the

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Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller " Jurisprudence **5**(1): 133-160. Especially 138

[5] Fuller, L. L. (1958). "Positivism and Fidelity to Law: A Reply to Professor Hart." Harvard Law Review **71**(4): 630-672. p 645

[6] *Forms p.2*

relationship between lawgiver and law-follower as it is reflected in the form that distinguishes it from other means of ordering. The important inroads made by the import of normative loading is that law is uses them to be distinguished from other forms of ordering.

On the whole, Fuller creates a vein of thinking that prioritizes the actors and their directions and thoughts to answer the question of "what is law" through the inclusion of normative items. This theoretical move frames law as an ongoing enterprise, that shifts along with the normative features but also leaves room for more descriptive elements. To frame law as an ongoing enterprise also adds to the wider, thicker view of form. Something that cannot be accounted for in the same way by substantive natural law and positivist schools that examine law and its form solely as a product.

But morality needs to be articulated further in a tangible way for it to become useful in practice. For this thesis's purposes, the morality of aspiration takes precedent when law is being made as it primarily prospective rather than retrospective. This capture of prospectivity by the morality of aspiration can show law's morality on a functional-pragmatic level. Accordingly, this is the sense of morality that makes Fuller's framing unique and adequate to tackle legislating.

That aside, we can move onto braking down some of the features of morality that can explain how normative loading can occur in the law, and by extension legislating. This section aims to cover some of the 'oughts' that are formed the creation and maintenance of law as a social enterprise.

To start it can be said that Fuller finds morality through the inclusion of normativity in the relationship from which law begins, the relationship between lawgiver and law follower. Rundle connects this point with a morality stems from the maintenance of a specific 'ethos.' This ethos which can be found at the beginning of law:

> "*Law is an intrinsically moral phenomenon, and which he [Fuller] defended along two interconnected lines, one relating to the moral demands of lawgiving, and the other to its moral value from the point of*

view of the legal subject. As Fuller explained it, when we take seriously the idea that law finds expression through a distinctive form, we come to see that to create and maintain that form requires the adoption of a distinctive ethos, a special understanding of the demands of his role, on the part of a lawgiver. Law is thus intrinsically moral because it is constitutively dependent on the observance of this ethos. But second, and itself a key part of the demands of this ethos, law is also intrinsically moral for how its form— that of governance of general rules— presupposes the legal subject's status as a responsible agent." [7]

From this quote, we can tally many essential things, and these, in turn, can lead to the examples of normative inclusion in the form of law. Namely, there is a relationship with the main feature of reciprocity that stands at the epicenter of law. It accommodates different moral lines that are attributable to each partaker of the relationship. Second, there is an ethos that law aspires to maintain law as a constitutive of what it means to generate legal obligation. Finally, Rundle's intervention is that there is a systemic necessity to treat humans as being able to act; that law must respect the ability of humans to act. But returning to these points overall, they work synergistically to ground morality throughout the stages of development and application. They sprout from the basic relationship of law, which is dominated by reciprocity. For Fuller, reciprocity is so poignant that he characterizes it as "a fundamental basis of social order."[8] The webbing of these needs to be explicated to feel the full possible weight of form.

As such, the analysis will try to explicate these three ideas individually. It will use the framing of Fuller's bifurcated morality and law as a process and enterprise. The hope is to establish a coherent articulation of what expresses morality in Fuller and what connects it to the conceptual form of legality. With a cohesive narrative, form can unfurl its potential. This all starts from the most fundamental element of these, which is undoubtedly for Fuller, the character

[7] *Forms, p 3*
[8] From *Forms, p 43:* Letter from Lon Fuller to Professor John Rawls, Department of Philosophy, Massachusetts Institute of Technology, 20 September 1961, The Papers of Lon L Fuller, Harvard Law School Library, Box 7, Folder 4 (correspondence).

and features of the two-poled relationship of lawgiver and lawfollower. Fuller's understanding of this relationship pivots on the concept of reciprocity.

3.3 Reciprocity

3.3.1.1 Reciprocity, Fuller's Cornerstone

Reciprocity describes the nature of the relationship between the partakers in the adoption and maintenance of a system of law. The lawgiver and lawfollowers are the partakers and a foundational relationship is created that supports forming role-based bonds. These bonds have a double role: one of recognition of each role, and two in the information as to where each partaker should direct their actions in reference to the system of law. The necessity of reciprocity and these double bonds resembles a path dependency of sorts. The path is constrained by the adopted need to reach the goal.[9] This can be seen when Fuller takes the step to consider that society will always feature some form of ordering. If the mode of ordering installed in the society is law, then a relationship between lawgiver and lawfollower will necessarily be present.[10] The assumption of these roles with these corresponding roles is necessary to give Law its distinctiveness and juxtapose it against other forms of ordering. Reciprocity becomes an antecedence, *a sine qua non* of law as a form of ordering. This position is not solely classificatory but one of pragmatic necessity. As Kristen Rundle points out, quoting Fuller, "[b]ut if this bond of reciprocity is finally and completely ruptured, then 'nothing is left on which to ground the citizen's duty' to observe the lawgiver's rules."[11] So, law would not be able to function without reciprocity as that gives the partakers the directions to observe and to give rules. Essentially, the existence of the relationship works as the distinctive feature of law but also as a practical constraint, so much so that it becomes immovable.

3.3.1.2 Reciprocal Bases

Reciprocity is not just any irreducible relational connection between the partakers in law; it corresponds to specified roles for each group to function. The

[9] To score a basket, one is constrained to throwing the ball in the basket.
[10] *Morality* p. 19, 39, 41
[11] *Forms* p. 90

constructed relationship is not a transaction but a framework that binds each side to a role in the making, maintaining, and changing law. Corresponding to their role, each side is given several normative pushes- which will be analyzed below- and results in the possibility of law. Reciprocity becomes a pole of commitment and enters as the binding force that upholds this relationship for the purpose of ordering. Reciprocity works as a cantilever that props each side up and allows a system of ordering to be put in place. It does so by normatively loading both side with the 'oughts' of direction.

Reciprocity also works to orient each partaker towards what they must do about the law. On the lawgiver side of the relationship, there is the role of attributing specific content to law and guaranteeing that what is promoted is the law and nothing else outside it can be law. This means the monopoly of the definition of law belongs to this side, and law is the only form of ordering in the given society. The lawgiver's role is to provide law, and this act enables the lawfollower to make sense of and follow the law. On the lawfollower side, we have the role of accepting and following the rules set forth by the lawgiver. The lawgiver also stabilizes the other part of the enterprise. The role performs this by recognizing that these laws- those of the lawgiver- are the only form of ordering to follow. These two roles and their corresponding commitments complement each other and give the base of ability that allows law to reach its purpose. Each side, in its own way, becomes a procedural propagator.

These are the roles of reciprocity, but how is the relationship of reciprocity not just another point of better lawmaking practice sequentially before Fuller's canons? How is the servicing of reciprocity not just an insurance policy for efficacy instead of morality? Kristen Rundle's answer throughout *Forms Liberate* is a) that Fuller and the positivists are talking beyond each other because efficacy and morality aren't mutually exclusive,[12] b) the ultimate morality of the enterprise of law lies in the respect for the human capacity of

[12] Rundle captures this eloquently: "what at Hart's hand had become the central question: namely, whether the alleged moral dimensions of the principles of the rule of law were in fact merely morally neutral principles in aid of efficacy." Rundle, K. (2014). "Reply: Review Symposium: Kristen Rundle, Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller " Jurisprudence **5**(1): 133-160. p. 138

agency,[13] and c) ultimately what keeps law distinct from other points of ordering are the normative features it houses, like reciprocity.

The defense against thinking reciprocity is just an insurance policy can be bolstered by the argument that is that if law is framed as an enterprise, this concern for efficacy is on a separate scale. In the adoption of framing the law as an enterprise, law is seen prospectively, centered around aspiration. It is not affected in kind by the outcome. Efficacy is in the business of retrospective gauging of results. Thus, a fundamental difference in measurement scale leads this question to a dead end.

3.3.1.3 Reciprocity's Double Morality

Using the framing of Fuller that is promoted, I argue that reciprocity expresses morality in two ways: Firstly, there is a moral commitment that is accepted by both sides of the reciprocal relationship, which stems not from their agreement but from the decision of ordering of human conduct with the vehicle of law; you undertake a moral commitment to follow the necessities that law prescribes to function. Secondly, if one undertakes any enterprise, a normative direction is imposed to make the enterprise deliverable. The undertaking of this purposive task of installing and maintain law carries with a host of normative pushes. These, in turn, provide 'oughts' to the partakers in law. Normative pushes are pressures that come with the assumption of a purpose act. Although these are infinite in type in all contexts of purposive activity, the two mentioned before are generated by reciprocity. They have directional quality whereby they orient the process in a specific direction.

To set the normative pushes generated by reciprocity, we begin from the moral commitment, which holds that if law is to be installed and maintained, one role must set the body of rules, and the other must follow it. If this is not the case, then the law cannot really exist because it cannot do what it is meant to do, to order human behavior. From this reading of reciprocity, we see it embedded in practical reasoning: If a society wills to be ordered by means of law, then there

[13] See below section 3.5.2

are prerequisites that are antecedent to completing this otherwise they will never reach that goal.

In this framing, what distinguishes one kind of ordering from another creates unavoidable prerequisites. The prerequisites are viewed as material necessities built into the task and provide normativity in the form of directives towards alignment by sheerly being unavoidable. This framing foreshadows a normativity in that it highlights to both types of partakers in the legal enterprise what needs to be done to deliver the purpose. Going back to the first normative expression of reciprocity, it can be considered moral insofar it provides a normative motivation/aspiration or an 'ought' to the lawfollower to recognize the followability of a rule, and the lawgiver an 'ought' to give rules to be followed. Without the inter- complementing pieces, the enterprise of law will fail because it will be unable to bring order at all.

In the second instance, the morality of making things fit for purpose is broader and a-specific to law. This morality finds its roots in the aforementioned passage about laws of carpentry in which Fuller argues that "those laws who are respected by a carpenter who wants to have the house he builds to remain standing and serve the purposes of those who live in it."[14] The morality is that the undertaker of any enterprise is dealt an ought, a moral ought, to carry it out in a way that allows the initiative to reach its end. This is housed in the conscious undertaking of any deed, including setting orders as law. I believe these two commitments are enough to ground morality in the reciprocal relationship between lawgiver and lawfollower. This morality is not based on a value judgment of some specific metric or quality but is built by giving normative direction to act in the direction of law.

3.3.1.4 Reciprocity's Moral Floor

If we consider these points moral, there is an obvious objection. Is providing a normative push giving direction enough to call something moral? The base for such a doubt begins from understanding morality as an on/off value assessment instead of looking at it as aspirational.[15] As was pointed out, such a view does

[14] *Morality* 96
[15] See Section 2.2.3

not consider the normative-moral considerations that weigh in when undertaking an enterprise, let alone one that is important to society, such as law. Normative pushes, such as those created from the reciprocal relationship, affect moral judgment, even if they do not create a basis to evaluate them as good/evil, as the on/off moral judgment wants.

The idea of the normative pushes, those normative directions generated by the purpose of the production and maintenance of a system of law, extend beyond just the practical necessities for the installation of law. A further important implication of normative pushes is that they weigh in on indicating what the partaker in law *should* do. The directive that is created is aspirational and guiding towards a the fulfilment of the purpose at hand, namely the enterprise of law. Whether the outcome factors well or poorly in the future does not make this or any other normative pressure any less moral. In this framing therefore, the relationship of reciprocity creates a low floor morality for law by setting 'ought' and giving specific directives for practical reasoning.

To reiterate the main takeaway of this section, when approaching the Fullerian reciprocity with a mindset hinged on practice, it can be considered as something that sets a low floor morality. This morality stems from the commitment it has at its core to fulfil its purpose and it provides the normative for fulfilling those connections. The aspiration it harbors provides the 'oughts'[16] and normative drive to the partakers in the general grounding and maintenance of law as the system of ordering within a polity. However, a push at the beginning of an enterprise does not guarantee that procedural necessities are met or that the normative nature continues to be crucial to the enterprise. It seems that the next question is what normative feature is available to bind the participants continually?

An answer can be found in an idea of ethos, the idea of a continual connect to certain normative direction. In the context of Fuller's understanding of law, ethos is defined as a catalytic normative attitude in the propagation and continuance of the enterprise of law. 'Catalytic,' in this instance, means that ethos pushes the enterprise along by pushing the partakers closer to the ongoing

[16] In the sense of the implicit and explicit propositions that direct behavior

workings of the enterprise of law. The purpose of such an idea is to account for what normative binding exists amongst the partakers throughout the ongoing workings of the enterprise of law.

The Section 3.4 will sketch a meaning of ethos in greater detail to show its normative role in this context. The idea of ethos is one of attitude that is needed to maintain law. To clarify Ethos as a concept, it will be contrasted against 'ethos' as seen in Aristotle and John Finnis's ideas on the common good. Through this contrast, a common structure between the accounts should surface. In total, when a communal goal which is obtainable through a non-exhaustive enterprise, there is a normative push to keep the partakers close to the enterprise. The specific nature of this push inheres in the form of the given enterprise. Without this push and the fidelity to the process it inspires, the law will not be able to materialize.

3.3.2 Is/Ought and The Forbearing Of Ethos

The examinable materials to understand the meaning of Ethos and its practical implications are the bonds it creates between the process of law and its partakers. This has implications on the form of law since both are expressions of it. Key to this is understanding how 'oughts' can be utilized in this scheme. It is important to then backtrack slightly to meta-analytically understand the role of is/ought propositions in a framing like this. 'Oughts' have been mentioned continually, so it is important to note how the relationship between those and the 'is' was being handled. Hence, to make sense of attitudes, directions, etc., it is vital to see the angle they approach and why.

Kenneth Winston's reading of Fuller shades that Fuller was not intent on making the is/ought distinction a rather big deal. For Winston, it is due to a deliberate choice of philosophical stance and theoretical inclination.[17] Specifically, it is suggested that American Pragmatism[18] had the greatest influence on Fuller alongside the work of specific jurisprudential thinkers such

[17] see Winston, K. I. (1988). "Is/Ought Redux: The Pragmatist Context of Lon Fuller's Conception of Law." Oxford Journal of Legal Studies **8**(3): 329-349.
[18] As mentioned above in Section 2.2.1

as Roscoe Pound, François Gény, and Morris Cohen.[19] Winston bolsters this by saying if we place Fuller's theory against this backdrop, it stands that the weight of focus would be foremost on the practical consideration of law rather than on theoretical clarity.

If one looks at each of these thinker's relevant ideas they share parallel framings, especially like Pound's duality of law in the books and law in action,[20] Gény's theory of law being science and technique,[21] and, finally, Cohen's schema (to which we will turn shortly). In their individual ways, each exhibits an inclination towards understanding law as a human practice, one that is not monolithic favoring "is" or "oughts." This can also be said of Fuller's devout focus on practice and practical constraints rather than theoretical distinctions. Willem Witteveen gives a good explanation of Fuller's questioning of the distinction: "These professional roles and the morality attached to them are, for Fuller, what matter most. The task of legal philosophy is not to provide pure statements about "valid" law, nor engage in metaphysical speculation, but "to give a profitable and satisfying direction to the application of human energies in the law."[22]

There is another account based on Fuller's less-read collection of lectures, *Law in the Quest of Itself*.[23] In this book, Fuller aimed to problematize by questioning certain assumptions ordinarily made in jurisprudence. He asked the necessity and the practicality of jurisprudence's persistence in considering is and oughts- descriptive and normative propositions- separately. "How can we legitimately refer to the problem as one of two alternative ways of applying ourselves to legal study?"[24]

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[20] Ibid note 19
[20] Pound, R. (1910). "Law in Books and Law in Action." American Law Review **44**: 12.
[21] For overview see O'Toole, T. J. (1958). "The Jurisprundence of François Gény." Villanova Law Review **3**: 445.
[22] Witteveen, W. (1999). Rediscovering Fuller: an introduction. Rediscovering Fuller: Essays On Implicit Law and Institutional Design. W. J. Witteveen and W. v. d. Burg. Amsterdam, Amsterdam University Press. 26 quoting Fuller, L. L. (2012 reprint). The Law in the Quest of Itself. Boston, Beacon Press. p 2
[23] Fuller, L. L. (2012 reprint). The Law in the Quest of Itself. Boston, Beacon Press.
[24] Ibid p. 7

Fuller contended that this is not that useful when doing law. The main perpetrators were the positivists. The barb of the argument was that it is impossible to disambiguate the descriptive and normative elements of the law in practice. Purpose breathes normativity,[25] and an account of law that is disjuncted from normativity is incomplete. It does not account for the strains and necessities encountered by practitioners of the law. Fuller accordingly saw the futility of this positivistic approach due to seeing only part of the entire picture.[26] The opposite also holds, that if society is to only deal in oughts, then a lot of the non-normative work the law does, such as description or organization, would not be explained. So, what is left if choosing one or the other is unavailable? Fuller saw that if we demote law to only "is" propositions, as the positivists do, we will be unable to satisfactorily understand law's inherent and normatively driven purpose and teleology.

This view is not without criticism though. Kenneth Winston recounts that Morris R. Cohen gave a scathing review to Fuller for creating a murky division of is and ought prepositions.[27] Cohen criticized Fuller for obscurantism and not clarifying what is what. [28] This is paradoxical since it seems that Cohen's theory influenced Fuller greatly, and the tendency to push aside the is/ought cleavage might stem from Cohen's work. In *Reason and Nature*,[29] Cohen proposed that the teleology associated with law and other social 'affairs' created a mutual dependence between is and oughts. Their de facto intertwining in practice made it more sensical to consider them both simultaneously rather than separately. Winston's reading is that Fuller took this emphatically onboard: "Fuller allows that the activity of legislating does not threaten the is/ought distinction. I think his intent here is to point up the practical meaning of the debate between positivism and natural law: namely, that legislators may be either positivists or natural lawyers without radically altering the proper conception of their role."[30] This can be frictionlessly read into Fuller. Moreover, the reciprocal relationship

[25] Especially when we consider the normative pushes mentioned throughout this chapter.
[26] Ibid
[27] Winston op.cit. 18
[28] Ibid
[29] Cohen, M. R. (1953). Reason and Nature: an Essay on the Meaning of Scientific Method. Glencoe, Ill;London;, Free Press. via Winston
[30] Winston, K. I. (1988). "Is/Ought Redux: The Pragmatist Context of Lon Fuller's Conception of Law." Oxford Journal of Legal Studies **8**(3): 329-349. 330

provides an excellent example of how analyses would be awkward and cut out of context if 'oughts' and other normative thoughts are not included in the picture. The reason for this though is that the reciprocal relationship produces a normative directive which also gets incorporated into the form of law. In this framing, an 'ought' of direction is paired with a "is" of observation. Leaving out either creates a lacuna, in this sense.

What is more, the normative push of the ongoing communal enterprise can house a multiplicity of understandings when it comes to law. In the framing of Fuller, the scope of potential and of completion is what generates the normative force. The nature of the relationship between the partakers and law is that of a communal undertaking and that allows the underlying convictions of each individual (ideological, etc) to co-exist insofar their ideas do preclude communal enterprise. Going any deeper into what kind of core material content can be compatible with law would make jurisprudes happy, but that would not yield extra conceptual tools for any of the partakers in the enterprise, especially while trying to make legislation. Along these lines, Fuller wrote:

> *"What law must foreseeably do to achieve its aims is something quite different from law itself."*[31]

The reading of Fuller being forwarded hinges on this understanding of the is/ought cleavage. It is a 'practical' reading and is the most fitting for the utmost goal of this thesis, which is guidance for legislating. Much like Roscoe Pound's famous law in the books and law in action dichotomy,[32] any abstract approach potentially could be many steps away from the everyday and hands-on approach of those handling lawmaking. Thus, it is likely that the partakers in law do not have the intent, the time, or the will needed for the intense metaphysical construction necessary to get hold of a, e.g., Kantian-inspired reading of Fuller that centers on universal rules.[33] Lawmakers typically know the goals they want to achieve without further recourse to why they have them. Therefore, as this writing looks to make something tangibly valuable for those immersed in the

[31] *Morality* p. 108
[32] See Pound, R. (1910). "Law in Books and Law in Action." American Law Review **44**: 12.
[33] As universal rules were expounded in Kant's Groundwork of the Metaphysics of Morals 1785

process of lawmaking, identifying the normative pushes in joint is/ought terms is preferred.

3.4 Ethos Of Lawmaking

3.4.1 Ethos, A Heavyweight

Reciprocity, as examined above, gives a sense of direction and attributes roles when installing law as a system of ordering. However, as law is an ongoing process, its workings are continuous, and focusing merely on the beginning cannot offer complete coverage to its ongoing nature. Law is an enterprise and never stops developing. The 'oughts' from reciprocity only provide direction yet do not suffice for a continuous normative push to keep the partakers aligned with the enterprise as it progresses. There must be something more that keeps the partakers of law in parallel to the enterprise. The need for alignment is provided for by an idea of ethos, which can be a conceptual vehicle that allows continuity in a thicker notion of form.

To understand ethos better, let's see what it means before applying it to law and lawmaking. Ethos is an attitude by which one typically conducts themselves. This attitude is often placed within a specific context like a workplace, within the undertaking of a task, or having a role within a communal activity. Embedding ethos into a context gives it the attributes and the teleological orientation needed to provide alignment. Ethos creates bonds tailored to each context, and the character of these bonds is provided by what is necessary to complete what the context asks for—for instance, the ethos of teaching harbors attributes such as commitment to listening and goodwill towards students. Contrariwise, the ethos of computer programming has a different set of commitments altogether, like quality lines of code. Ethos unfurls itself into several normative bonds that correspond to each context and, through these, gives the partaker a series of 'oughts' to act in one way or another, always about the context at hand. Their practice is informed by the goal of what they are striving to produce, and ethos is the bond that keeps the practice in line.

In the space of the legal enterprise, ethos stands as an attitude exhibited towards law. From the framing of law-as-enterprise, ethos is seen when the

partakers create and maintain law in line with its general purpose, which is reiterated as the ordering society in the law's distinct manner.

When overlayed onto Fuller's theory, the work of ethos is the normative connection that connects the partakers to inner morality. Ethos creates the connection to push the partakers toward their inner morality, allowing law to fulfill its role and its ultimate potential. The grounding and the initial direction, as said before, are provided by reciprocity, and then the enterprise is kept moving forward by the ethos of the partakers. Though he does not name it as ethos, Fuller hints that within this system, there must be a general normative stance to it, as Fuller puts it:

> *"It is then a small step from acknowledging this distinctive mode of participation to the moral conclusion that forms of ordering that are designed around structures and dynamics of reciprocity in this way manifest a 'certain regard for human dignity' through how they necessarily treat their participants as ends in themselves."*[34]

There is much to unpack from this quote. First, we need to slightly sidestep the partakers considering themselves "ends in themselves." This is reminiscent of a Kantian position[35] and can lead to finding a more fundamental philosophical thought of Fuller. Next we can focus on the more relevant thought that the structures and dynamics of reciprocity give the 'certain regard of human dignity.'[36] Even though Fuller does not name ethos as such, but this idea divulges that a general attitude of commitment is observable amongst the partakers. The function of law requires action in such a way that necessitates a certain attitude of respect and dignity to work. But that is not respondent as an intrinsic part of the human condition. Instead, it is provided by the legal enterprise's participation and 'communality,' the character of law as something a society does together. Therefore, ethos is found as a consequence of the

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[34] Fuller, L. L. (1978). "The Forms and Limits of Adjudication." Harvard law review **92**(2): 353-409. 362 via *Forms* 41

[35]Johnson, R. and A. Cureton (2021). Kant's Moral Philosophy. Plato, Stanford Encyclopedia of Philosophy. E. N. Zalta. Stanford Encyclopaedia of Philosophy

[36] Jeremy Waldron has written much about the dignity of legislation, which will be covered in the next chapter.

communal assumption of the enterprise of law and not sourced from the default nature of the individual.

Ethos is then the attitude that encapsulates the practical alignment needed to generate and maintain Law. Ethos can be applied to both sides of the lawmaking enterprise. The reciprocal relationship leads to a specific kind of attitude that is in tune with the mutual relationship's goal: to make a system of social ordering. But it is not enough, and the need for something spills over into Ethos. Even though, in practice, most of the procedural necessities fall on the side of the lawgiver rather than the lawfollower; it still affects both sides of the relationship.

In what follows, there will be other conceptions of ethos forwarded to then compare. These all arise within the space of law and social ordering. By laying them out, contrasting, and comparing them to the ideas above, the writing intends to clarify what ethos can give to communal enterprises of ordering, with a special focus on lawmaking. The idea is that if law is a communal enterprise there is a normative loading created by the assumption of the task, and respondent in the fulfilment of the potential of law. The part of this loading that is relevant to continuous alignment is that of ethos.

3.4.2 Comparative Ethos No.1: Aristotle

Taking a point from Rundle again, theorizing a concept like the Ethos of law came long before Fuller. It can be traced back to Aristotle. It is said that Fuller himself was an avid reader of Aristotelian philosophy.[37] When reading his work, one can identify a corresponding mentality, seen when Fuller portrays law as something to be excelled at and that there must also be an act of repetition for a law to be law. That seems very Aristotelian, and one can argue that the lineage of teleology came from Aristotelian thought and its ultimate excellence of flourishing at life, which he identified as Eudaimonia.

For the topic of this kind of ethos in particular, Aristotle had his own version: "a general willingness to submit to law's governance, deference to its limits and requirements, but also an active engagement of citizens and officials holding

[37] *Forms* pp. 42,43,47

citizens and officials to their responsibilities under the law."[38] The Aristotelian understanding of law's ethos has much in common with the above attitude, especially in framing law aimed at an utmost goal an a fulfilment of potential. Aristotle's utmost goal is *eudaimonia*. In following, his idea of ethos is to have everyone commit to the social goal of *eudemonia* through the institution of law. Fuller's idea of ethos moves in parallel, but it is an attitude that shoots at a much more modest goal: *maintaining* the enterprise of law instead of *eudaimonia*.

The Ethe described by Aristotle and Fuller identify law as a social process with a particular *telos*, which is some sort of common good. These common goods are of variable intensity, comparing eudaimonia with installing a system of ordering distinctive to law. The parallel is slight but indicates that the underlying structure is similar. There is a normative attitude that helps society keep in check with law to reach an utmost goal of fulfilment, whatever that might be. Fuller's goals appreciate ordering and maintenance of law as a goal and an extension of the commitment to excellence found therein. Aristotle has a more ambitious goal that targets eudaimonia, the peak of human well-being and endeavor. In both conceptions, law is an enterprise like any other purposive act with an end game of excellence.

Another common point between the two ethe on law is that they hold lawgiver and lawfollower to the same standard of attitude without having the same requirements. The intensity remains the same for each role, but the context is distinctive. In other words, both ethe fit differently to each side of the partakers' divide. The context and content of each ethos are tailored to each bimodal side, but each side also must consider that the other side must act. There is a necessary level of interaction and commitment from those involved to activate it. Rules are made as an enterprise to dictate human behavior; therefore, humans must act for them to come about and be meaningful. What normatively colors the ethos is this connection with a particular process, but also, considering the given role, that the partakers' range of motion is normatively confined.

[38] Postema, G. J. (2010). "Law's Ethos: Reflections on a Public Practice of Illegality." Boston University Law Review **90**(4): 1847. 1853

Fuller does not address the following phrase explicitly to the idea of an ethos. Yet, this passage from his *Anatomy of the Law* seems fitting: "Those who participate in the enterprise of law must acquire a sense of institutional role and give thought to how that role may most effectively be discharged without transcending its essential restraints. These are matters of perception and understanding and need not simply reflect personal preference or inherited tradition."[39]

The ethe of Fuller and Aristotle are not entirely synonymous, however. Their most poignant difference is in their initial grounding on how the ethos is formed amongst the partakers. Aristotle's ethos is achieved by repeating it indeterminately and, therefore, is produced by habituation and habit-forming within the *polis*. Fuller's idea, conversely, is a matter of procedural necessity but with a modest threshold. This threshold is important because, even though both see the necessity of an attitude to forward a teleological process of law, Aristotle's version has more of an intent on an ambitious outcome, whereas Fuller's sets minimum to service function. To wit, the level of commitment shoots merely at the functional necessities that will allow it to reach its end of ordering society. One can understand how Fuller is inching closer to the idea of form. The ethos for the partakers connects to an ongoing process; for this to have any continuity, it would need to have stable attributes. In turn, 'stable attributes' sketch a place for form and a method by which ethos can succeed. Of course, this form will not just be a ticking-the-boxes procedural affair but one that would invoke normative elements to bind the partakers.

We can see a bridge start to form. This bridge connects the 'oughts' of Fullerian morality to procedure through the attachment of ethos and, in turn, to the values of reciprocity. With this move, morality in the sense of normative binding becomes ever closer to the process of making law. Although, it must again be underlined that morality is meant in the limited Fullerian sense. Ethos, an attitude that reflects this normative environment, binds the partakers to the process in a moral-normative way; ethos is the necessary attitude to complete the scope. This attitude is concentrated on doing law and reflects in yet one more

[39] Fuller, L. L. (1968). Anatomy of the Law. Westport, Conn. , Praeger. 116

way Fuller's pragmatic "doing" understanding of law.[40] This is because the partakers need an 'ought' to identify and follow through with the practical requirements of the process. Without the wayfinding offered by ethos, the partakers could not move the process forward.

The pragmatism of Fuller often becomes hazy at the edges of its terms, yet with ethos connecting the other components, we start seeing the sketch of form on the horizon. Ethos, in total, is a morally sensitive attitude that binds and holds together the partakers with the process of law and provides the 'oughts' that allow the deliverance of law by maintaining alignment to the enterprise. It is characterized by respect for the partakers of the reciprocal relationship at the heart of law and calls for their dignity to be cherished. This ethos is also not detachable from the process of law if law is considered a purposive enterprise in the Fullerian sense, giving us one more idea of what is included in a thicker articulation of form. Ethos showcases form by displaying what attributes it must have for the purpose of alignment. In the form of law a distincive type of ordering needs an idea of ethos, otherwise law would not be able to come about or continue.

To broaden the idea of ethos in the context of teleology and things related to communal undertakings of ordering, the next section will look at the work of another relevant theorist: John Finnis.

3.4.3 Comparative Ethos No.2: Finnis, Participation, and Process

There is a parallel conceptual mechanism when shooting for a goal of excellence through a communal process. To deepen the notion of ethos as it arises in teleological understandings of law, we can see how it associates with another 'common good' of a different Aristotelian natural law jurist, John Finnis.[41] In

[40] That is to take pragmatism to be the philosophical understanding that, when is search of the understanding of concepts we must "Consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object." Peirce, C. S. (1878). How To Make Our Ideas Clear. Popular Science Monthly., or in simpler terms, we consider the effects a concept might have while explicating it.

[41] Gavin Faulkner in conversation noted that Finnis would reject this qualification, and Finnis would consider himself more Thomist than Aristotelian. I suppose I went for the intellectual great grandfather rather than Aquinas or his re-stater Germain Grisez.

what follows, I will examine Finnis's conception of the common good to ascertain whether there is a parallel structure that can be identified between thinkers that reach for common purpose. The test here is to see how a communal goal that is only reachable through communal action is conceptualized in Finnis to give theoretical purchase for identifying parallels between all three thinkers.

To initiate the comparison, let us lay out how Finnis deploys his theory here. His goals are not eudaimonia or ordering but what he considers the 'usual' meanings of 'common good'[42] and mirror Aristotle's and Fuller's communal goals in that they are participatory and embedded in a social context. To lay out this scheme, Finnis implements a triptych of what he calls Senses[43] of common goods,[44] which stand as a type of normative attitude. These normative attitudes serve a greater goal, much like Aristotle and Fuller.

To isolate the area of Finnis's theory that is interesting here, the writing will describe his three senses of common good, comparing them to Fuller and Aristotle to show that there is a formal need for ethos here, too. Also, through this comparison, the analysis will try to exhibit how purpose breeds normativity through the formal needs of a participatory social process. Finnis's Senses of Common Good that I have identified are three: The first has to do with undertaking communal objectives, the second with the more ecumenical of his values of human flourishing, and the third has to do with giving an environment that the partakers of political community to reach 'reasonable' objectives which are only reachable through human interaction.

As the analysis will tackle these individually, what will hopefully become evident is that there is an escalation from the discreetly reserved and minute Sense to the all-encompassing and most significant Sense. Alongside this escalation, features and uses they have in common will hopefully arise. Finnis couples these escalations of common good with didactic examples of how they

[42] Finnis, J. (2011). Natural Law and Natural Rights. Oxford, Oxford University Press. Common good here is meant in a given social manner at home with natural law theorists like Finnis, not the aggregate idea of happiness or felicific calculus like utilitarians.
[43] Senses capitalized refers to the specific iteration within Finnis's theory.
[44] Finnis uses the phrase 'sense of common good' on page 154 of the above, I capitalize it to make category terms that reflect the distinctions that Finnis describes. Senses here are meant as variations or types of common good.

can work in practice. What is important to see from these is that there is a common structure and functional orientation towards goal achievement and how that ultimately necessitates an attitude towards achieving the goal.

3.4.3.1 Sense A:

Finnis describes sense A common good as being segmented into three sub-senses. He explains it in what seems to be an order of complexity of the aims of the partakers:[45]

- In the first sub-sense, the created environment allows everyone to enjoy what is on offer. There is a singular requirement: a specific joint objective is only practicable communally. The example Finnis gives for this is that students collaborate to be able to learn from a tutor who only teaches in pairs.[46] Common good materializes with a specific limited executable goal in its vicinity and, thereby, is the simplest conception.
- The second understanding of common good is that "which requires not only a substratum of material conditions but also a certain quality (rule-conformity, sportsmanship, etc.) in the co-ordination itself."[47] It is understood in multilateral relationships when a broad goal can be broken into smaller goals. This broad goal is not concentrated on one specific but a multivalency of aims. This 'common good' plays out in the scenes of communal activity, which needs the interaction of the participants as he relays the example of a game. The common good is satisfied when there is "'good play of the game'" and not based on outcome.[48] This is reminiscent of a morality of aspiration that is found in Fuller.[49]
- The third conception of common good is found in the environment not of a specific or finite set of objectives but, instead, involves the all-encompassing association that makes up a political community. The common good, in this instance, is what allows the participants of the

[45] Although he makes note that he considers these equivocally discrete from utilitarian conceptions, Finnis, J. (2011). Natural Law and Natural Rights. Oxford, Oxford University Press. 154
[46] Ibid 139
[47] Ibid 155
[48] Ibid 141
[49] See above at section 2.2.3.

political community to develop themselves. Finnis states that the common good is found in "the factor or set of factors […] which, as considerations in someone's practical reasoning, would make sense of or give reason for that individual's collaboration with others and would likewise, from their point of view, give reason for their collaboration with each other and with that individual."[50] Finnis likens this to navigating a ship where all on board wish to reach the intended port of destination. Here, all aboard are joined together from their initial choice to embark on the ship and not based on what they are meant to do on the boat. Here, the common goal is "definite and attainable" yet not immediately available. With this sub-sense, we can easily see the parallels between Finnis and Aristotle. Goals that are only achievable through a communal effort (with at least two participants) added to that the ultimate achievement does not determine its nature.

3.4.3.2 Sense B:

After the first trichotomized Sense A, Finnis continues onto what I call Sense B of the common good. Finnis describes Sense B as being based on his values of human flourishing.[51] The mechanics are similar to the previous version by the common goal attainable via communal means. The difference lies in the nature of the teleological goal. On first reading, Sense A seems to have the 'good' stemming from the initial assumption of the activity from a multiplicity of people. Sense B differs because the common good it aims for is inherent in human existence, so much so that sense B's common good is self-evident.

According to Finnis, in the space of political life, human activity is intrinsically geared toward completing this common good. At least at face value, they are more important since they are unavoidable and more communal. This, I believe, is not the most interesting differentiation of Finnis's first two senses. Instead, the focus should shift to the mechanism by which the values of human flourishing create a cast of goals that are not exhaustible. Sense A is context-specific and fulfilled when and if the task is completed, whereas Sense B never

[50] Finnis, J. (2011). Natural Law and Natural Rights. Oxford, Oxford University Press., 154
[51] For a very short summary: Harris, J. W. (1997). Legal Philosophies. Oxford, Oxford University Press. 15

gets exhausted. Apart from this, Sense B applies to all and not just to the activity participants. What Sense B gains over Sense A is that it does not necessitate a given goal or finality of the task to come about. It offers common enterprise. When the game is over, so is Sense A. Contrarily, the values of human flourishing- "life, knowledge, play, aesthetic experience, friendship religion and freedom in practical reasonableness"[52]- reach the sense of a level of 'common-ness' not in and of themselves but instead they can be enjoyed in limitless amount and ways through community-harbored activity. These all necessitate cooperation and participation; that interaction gives their common good. Finnis relays Sense B as an element of a communal practice to arrive at the value, not how the value resonates with each user. We can already see a commonality between A and B, that everyone is shooting to complete something considered excellent, and they are readily available to conform to working with other partakers to enjoy it.

3.4.3.3 Sense C

The third and final sense, Sense C, continues Finnis's path toward further abstraction and scalability. Finnis offers this sense as "a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate (positively and/or negatively) in a community."[53] This seems to be his scheme's most generalized, grand, and prominent conceptualization. It is also what he adopts as the default meaning for the entirety of this work. It is an all-encompassing sense in which vital features are cooperation in a political community, and what is intended is to reach a reasonable final point. Finnis caveats this sense of common good on 1) that the political community ebbs and flows in its composition, which is neither stable nor definite, and 2) that the values or objectives do not have to be given or even omnipresent. The only thing that must be given is the base conditions- the structure- that allows partakers to reach any 'reasonable' ends. It takes away much of the formal elements found in senses A and B but still imposes a limit of reasonableness. The containment is there, and so is a general goal of

[52] Finnis, J. (2011). Natural Law and Natural Rights. Oxford, Oxford University Press., 155
[53] Ibid 156

some state of excellence. Humans work together to attain the goal of excellence.[54] So, this sense of common good offers both a teleology and a communal activity to reach it. This offer begins to highlight the commonality with both Fuller and Aristotle, who employ parallel structures in their ideas.

Beyond the differences that are evident between the three senses of common good, what is essential for the comparison with the previously mentioned ideas of Fuller and Aristotle is what they have in common. In Finnis's scheme, partakers engage in communal activity to reach good ends. The other two thinkers join in this necessity for common action; their goals also mandate participation. Additionally, Finnis portrays a type of objective goal in all the senses of common good. This goal ranges from something as narrow as a joint goal, which is realizable only once in the first sense, to a framework in which an infinite number of reasonable goals are empowered and the ability to reach them in the last instance. But the striking similarity between Aristotle and Fuller's theories and Finnis is that the actual achievement of the goal is not crucial to the nature nor to the character of the common good; the orientation to the excellence that each thinker points out is, though. While the aim is necessitated, the accomplishment is not. What is meant by this is that the partakers, in all the senses, are merely offered a clear track to the final goal, which is capable of delivering but will not necessarily or inescapably deliver the good that is aimed at or even be able to. Like the previous senses of common good, the main element is the participatory one. Humans engage solely as participators, not as cognitive agents or appraisers of value; the achievement or not of the goal does not affect the "common good" of the endeavor. Simple participation, as in just becoming an active member of the process to achieve the social goal, becomes the exhauster and ultimate limit of a single human's role in the grand scheme of social

[54] Gavin Faulkner, in conversation, pointed out that the meaning of excellence might need to be watered down here to fit Finnis. the reason being that the political community is not a petri dish for virtue- culture in Finnis, unlike Aristotle, or unlike Fuller, a petri dish for good ordering. This is because political community and the common goods abundant therein are not excellences but means to reach ultimate human flourishing "in ways consistent with the other aspects of the common good of the political community, uniquely complex and far-reaching in its rationale and peculiarly demanding in its requirements of co-operation" Finnis, J. (2001). Is Natural Law Theory Compatible with Limited Government? Natural law, liberalism, and morality: contemporary essays. R. P. George. Oxford, Clarendon. However, I digress in that you still must achieve common good, so- even in a smaller sense- you must achieve the excellence of common good to get anywhere in Finnis's scheme.

interaction. Participation takes centerstage as a type of action when whichever goal can only manifest through action in a social context; in this sense, the participation becomes form. Form becomes the necessary means of achievement, and an ethos arises at the behest of participation.

3.4.4 The Participatory Conclusion

The ethe mentioned have differences but are similar in their understanding of participation in a common end. First, Fuller's ethos aims to realize the continuation of the communal enterprise of law. It is the attitude necessary to push the law forward through participation on both sides of law's reciprocity. Aristotle's ethos is only realized in a communal participatory environment of a *polis*; his version of ethos helps it along. Finnis sees flourishing through participatory social practices that develop differently depending on the sense of common good in play. Ethos then becomes what ties humans to participation in communal activity. From these three distinct ideas, we can discern that their structure is similar. We have a social goal, a commitment to common action to reach it, and a participatory mechanism to deliver it. For these mechanisms to reach their intended social goals, they need participation and an ethos to keep them together. Because participation and ethos are formative of these teleological social processes, they should be included and considered part of the form of the given social enterprise.

It must be mentioned that despite their similarities, the insights from these theories cannot be directly transferred onto legislation. Finnis's theory becomes especially difficult. Namely, it does not account for or even give a notion that could bind people to the enterprise (in our case, lawmaking) but instead relies on a concept of human nature to explain the binding. Conversely, this is something theorized by Fuller and Aristotle. Granted, Finnis's Senses A and B of common good offer bindingness for the participants. However, it is short-lived as it can be exhausted in one application and does not offer coverage for an ongoing process. Sense C, which Finnis holds as the most prominent, relies on values rather than functional constraints or practical efficiencies to achieve the goal. Perhaps the participants in the social enterprise could use values as an intention-setting exercise. Intentions, after all, play a central role in Finnis's

moral philosophy.[55] The choice of intention is a vital pole for gauging the nature of an act for him.[56] Fuller and Aristotle, however, take a different route. They focus and invest in the outcome, not necessarily achieving it, but at least some forethought of being able to achieve it. They do so with different means (habituation and functional restrictions, respectively), but they at least do something about achieving the goal.

The ambition of this comparison was to show that when a thinker wants to theorize the realization of a social goal, they often resort to a mechanism that promotes a sort of elevated instrumentality for social goals, and interwoven with this instrumentality is a certain attitude that has been called ethos. Generally, instrumentality is understood as using something as a means to an end; however, it is more complex in our case. The instrumentality becomes elevated when values are imbued into the process and the participation. Though what each thinker is chasing is ultimately different, they know that a normative orientation of some sort is needed when speaking about communal goals. Whether the good is reached or not is not the focal point. The mechanism that allows it to be pursued is what needs to be in place.

3.4.5 Ethos, The Common

Speaking in the context of ethos, it must be abundantly clear that *a* common good is not necessarily *the* common good. The determinate article makes a world of difference. That is because the role of ethos is not meant to solidify a general moral commandment or orientation that is otherwise abundant or inherent to the human condition. It is meant to articulate one aspect of the normative environment surrounding communal social undertakings. This can be juxtaposed against recent scholarship, which has caused much commotion regarding common good constitutionalism, especially that of Adrian Vermeule.[57] This recent school of thought normatively argues that the institutions of a state

[55] Finnis, J. (2011). Collected essays: Intention and identity. Oxford, Oxford University Press. chapter 9 and 10
[56] Ibid p 153
[57] See Vermeule, A. (2022). Common Good Constitutionalism. Medford, Polity Press. And Vermeule, A. (2020). Beyond Originalism. The Atlantic. New York, the Atlantic Monthly Group**:** https://www.theatlantic.com/ideas/archive/2020/2003/common-good-constitutionalism/609037/. but also Casey, C. (2020). "'Common Good Constitutionalism' and the New Debate Over Constitutional Interpretation in the United States." Public law(4): 765-787.

should aim at a common good, especially in the case of the interpretation of constitutional rules by courts. It must be made clear that our cases regard a common good, not the common good, as Vermeule-adjacent scholars understand. The argument being made regards the approach mechanism when law is engaged as the communal activity, not the substantive goal of the legislation itself. Ethos becomes the mode of binding to the process, not to the end. Ethos is a normative attitude of alignment towards the enterprise of law, and- just like reciprocity- is not hinged on the quality of the outcome.

To connect the relevance of ethos and the comparison with Aristotle and Finnis to the main topic of this writing, we must consider that if legislation is seen as an enterprise, then the achievement of lawmaking must be understood as a communal goal *ipso facto*. In all three cases, the structure has a specified social goal; these have a central component of participation in a social enterprise to reach said goal. The participation is necessary for this enterprise. But, participation needs to have a certain quality that is conditioned by the goal at hand. Even though participation is all that the partakers can do, aspects of its quality must allow the social goal to materialize. The achievement of legislating cannot be had, if participation is not informed by some unmoving and inescapable functional restrictions. Therefore, if we consider it a meaningful social enterprise that is aimed at achieving a specific action (i.e. legislating properly), then it follows that there is an element of form when people participate.

It is through the necessary participation and the corresponding ethos of alignment that form subsumes the actions humans on both sides of the Fullerian image of the reciprocal relationship of law. The ethos then becomes the motivating force not only to keep the enterprise going but also to maintain the impetus to participate. At the same moment, it becomes tied to the demand and the idea of reciprocity.

The parallel structure we found in Fuller, Aristotle, and Finnis provides a framework for understanding the process of legislation as an enterprise, and what else is included in a thicker articulation of the idea of form. A structure like this also highlights the importance of ethos, a motivating attitude, to bring

the whole social enterprise of law forward. This lengthy comparison showed that ethos features prominently in theoretical schemes that explain social interaction towards a communal good. If we frame legislation as a social enterprise towards a common good, then the gains from the above will resonate. But before we proceed, there are other distillates of Fuller's conception of law that provide pylons for an examination of form and legislation. The next element that will be tackled is provided from Kristen Rundle's view of Fuller.[58] This view is a particular The idea of agency, or what the allotment of space of action to members of society means for the social enterprise of law.

3.5 Agency

3.5.1 The Uphill

The switchbacks of the Passo dello Stelvio[59] lead to the highest alpine pass in Italy. This serpentine road is unique in the way the entirety of its length is visible from every point: from the beginning in the valley all the way up to 2757 meters altitude at the peak. As such, a cyclist can see the top of the pass at any given moment when climbing. The curiosity that arises is that the distance to the top never seems any closer considering the low speed induced by the incline. The peak remains just as visible as it was two turns before, even though some distance was covered. Plenty of effort is being expended, but it seems a never-ending effort. The direction given at the base and the willpower to get to the top offer little information on how to take each turn to make it easier or the pace the cyclist needs to reach the top. This image serves as a metaphor for the path to form in Lon Fuller's theory. It has many twists and turns, seemingly taking forever to reach the top. The cyclist could see the path from the beginning; the top remains visible from any point along the way, but what pushed them to begin, or the fidelity to the roads, does not account for the fact that they have free reign to get up the mountain. The form of law, just like the Stelvio has both confinements and allotment for free expression of activity.

[58] Referred to already before from *Forms*

[59] It is one of the most famed peaks in cycling and driving. The top of the pass is at 46°31′43″N 10°27′10″E and lies on the Franco-Italian border.

To explain the mystery concept of form that is beginning to be sketched, what we have covered so far: we have analyzed and compared the pieces of Fuller's theory, but what is left is to highlight their connections. For every part of it, we see a hairpin bend up the Stelvio: Fuller's framing of law as a enterprise going along is the asphalt; at the apexes, one finds reciprocity, ethos, and, further ahead, the last concern, the idea of agency. The journey becomes possible only by going through each waypoint and gives us the broader understanding necessary to see how morality manifests as 'oughts' and becomes part of the form that distinguishes law.

The Fullerian route began from the observation that society needs to be ordered and the type of 'ordering,' and law must have specific features to be distinct as one of the types. For Fuller, law is distinct because it is a moral enterprise that has a purpose. The genus of the definition is enterprise because law is an ongoing and non-finite communal effort, one that has actors and acts and needs to be pushed forth. Apart from this genus, the purpose of law is also a critical component because, in the Fullerian framework, the installation of a certain type of ordering dictates the necessary inclusion of formal features: his eight canons that make law possible[60] but also the other functional necessities that we covered, and that everyone, both the law givers and the law followers must do their part.

The starting point for Fuller is as stated before, a low floor morality which stems from the fundamental reciprocal relationship. It has a low floor in that Fullerian morality is given by the ought-generation. Each side of the relationship at the center undertakes specific roles, and morality becomes linked with, and respondent to, the reciprocity found in each side of the relationship. Each side undertakes a series of obligations to make law meaningful and allow law to reach its potential. Although this scheme gives a solid basis for law and direction, more is needed to complement the form of law and send the enterprise along its way. The relationship does not give the necessary attitude to push the enterprise through to its destination. With these steps, we have yet to go to the formal top of the mountain, but the valley below seems further away. However,

[60] *Morality* Chapter 2

the last push to the top will need focus not on the reciprocal relationship, nor the lawmaker's attitude, but the ability of those involved to alter the law through their actions. The ability of the lawfollower as well as the lawmaker to alter the impact of law in a normative sense. This is encapsulated in Kristen Rundle's intervention regarding agency.

3.5.2 The Addition of Agency

3.5.2.1 Agency As A Prerequisite To Law

In *Forms Liberate*, where Rundle restates Fuller's theory in the jurisprudential discourse of the 21st century. Fuller, as deep of a thinker as he may be, could never have been prophetic enough to envision how capitalism, identity politics, technology, and globalization changed everything. Rundle readily uptakes such a challenge and tempts us to reread the theory of Lon Fuller while resetting and adding to his theory. Rundle contends there is no need to graft fuller onto the debate of separating law and morals. Instead, Rundle invites us to adopt a mindset that reads Fuller's theory of law in such a way that shows how his theory captures the distinctiveness of law by empowering the human capacity for agency and, perhaps, human liberty. In this context, agency is understood as the ability of humans to choose what actions they can take about the law.. In Rundle's words, "treat the legal subject [lawfollower] with respect as a responsible agent." Through this mechanism, law can "respect or nurture the subject as an end in herself."[61] The (moral) value of the Fullerian system rests in this regard. Law needs the concept of agency as a vital distinguishing factor against other types of ordering.

The useful extraction from Rundle's intervention is an aspect that is encapsulated in 'agency.' This aspect is that law features an inbuilt recognition of the human ability to shape the enterprise of law. The range of motion that is attached to this ability is to be found on both sides of the reciprocal relationship; the dominant position of lawmaker but also from the position of the recipient of the ordering, the lawfollower. In recognizing the ability to choose their own course of action, Rundle finds a deep respect for the human participant and,

[61] Speaking about what the opposite- law as a managerialism- *does not* do. *Forms* p. 49

more specifically, the respect to decide to do in reference to law. This respect is unique to law as a type of ordering and is necessary as a distinguishing feature of law. Agency, thus, becomes a part of form.

In her view, agency is "conceptually tied" to the existence and normative force of law[62] but also that form (that includes aspects of agency) becomes morally salient.[63] Agency becomes the specific difference that distinguishes law from other forms of ordering. This has two beneficial effects: it underlines that the partakers of law and their actions are equally important with non-living characteristics of the law and that there is more that can be understood about law than what positivism and (substantive) natural law have to offer, as pointed out by Bertea.[64]

We can take this point of conceptual intertwinement and emphasize the practical aspect of agency. Namely that it can be considered a practically antecedent feature. In other words, that law needs agency to fulfill its goal of ordering in a specific way, and there fore a normative push to act is created that exists during the enterprise of law. In this specific context, the practical necessity indicated is that if one uses law as the means of social ordering, then both sides of the reciprocal relationship must be allowed space to choose their action in reference to the law. If this doesn't happen then law collapses into something else. In practice, this situation is realized when, first, humans act, and their actions make and maintain law. Secondly, they must make choices within the scope of law. If a society wants to order itself using law, it must allow partakers in law to have room to choose their actions and address them as rational actors. Agency, therefore, becomes necessary because law needs to allow for itself to be followed. It clarifies how a commonality can house a specific range of motion in the participatory enterprises of law.

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[62] Or at least according to Stefano Bertea's view of her work, Ibid. 102 note no 16. Practicality, however, in this context, I take to mean to be what is important in now of practical reasoning. And how law's purpose is to shape human conduct at this moment.
[63] *Forms* p.7
[64] See note p. 80

3.5.2.2 Agency as Form

In a move to clarify the connection between agency and form, Kristen Rundle argues that the environment built around the respect for agency grounds the distinctiveness of law against other forms of ordering.[65] Law has the advantage over other types of ordering in that it recognizes the ability of each of the parties to have a specified -at least limited- range of movement against a determined act. This imports normativity into law because of the intertwine of ideas of respect and space. But as the thesis's journey to form until now has been built upon a pragmatic mindset and the practical implications that might have, where might this respect be housed? An answer that can be taken from Rundle is "that this distinctiveness is constituted and maintained only if certain demands of formal integrity are met."[66]

In line with this, the idea that is formed is that law as a purposive enterprise that includes agency in its purpose, expanding on Fuller. This becomes evident when Fuller regards the entreatment of agency as a functional requirement of law. Scilicet, that for law to work as it is envisioned to, an individual has to be given space to act, given the space of agency, or as Rundle puts it, "how, if it [law] is to function, it must maintain and communicate respect for that status of agency."[67] Without this requirement, the ability to follow law, and thus a basis for its distinctiveness from other forms of ordering, would be precluded. Therefore, both reciprocity and ethos are not enough to give a full picture of the normative environ. Rundle's contribution connects Fuller to the idea of agency and simultaneously reflects Fuller's pragmatic mindset and the overarching narrative of purpose found in his theory of law.

Complementing Fuller's theory, Rundle's concept of agency helps understanding form, because it captures the idea of low-floor morality in the enterprise of law and illuminates another aspect of thick ideas of form. It covers a view of normative directives exist in communal efforts to complete goals. Within this scheme, the partakers need to recognize the full array of the other roles and the range of possible motion within the enterprise. Rundle's contribution, therefore,

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[65] *Forms*, p. 40-42, 124-135
[66] *Forms*. p. 40
[67] *Forms*, p. 3

clarifies who is involved, that they have a range of motion, and that each range needs acknowledgment and it argues that there are normative reasons to do all these things. With the addition of a conception of agency, we now have a complete set that sees form in a specific way. Agency complements and completes the understanding of law as an enterprise, as Fuller would want, and grounds its distinctiveness with the normative ideas involved.

It starts with the relationship at the heart of law built based on the reciprocity between two types of partakers; this relationship births idiosyncratic morality from accepting the enterprise to govern human behavior. The relationship gives purpose and direction to the enterprise. However, more than a push in the right direction is needed to ensure the enterprise stays on track. That is where ethos comes in, the attitude of binding-ness that keeps the partaker in line with the process, but it does not come alone. Inherent in it is an acceptance of both sides of the enterprise that the other must act but also expect what comes of it by knowing the range of motion that counterpart has. An environment of normatively charged intertwinement creates an extra practical necessity that makes everything work for each role. They create and maintain 'oughts' with the ethos of law-making and the respect of agency that keeps the process afloat. These features, in concert, push the enterprise of ordering of society by law forward and what makes law different from other forms of ordering. Further, by highlighting the necessity for room for action, what the idea of agency brings to the fore is that law's distinctiveness is not only respondent in certain features, but the completion very form is dependent on the recognition of human decision-making, making a negative requirement for form. It is negative because it has a component of abstention from intervention into the space covered by agency. By coöpting a logic of procedural and practical necessity, there is an antecedent need to be respected for the process to reach its end. In that sense, agency is a requirement of form which is antecedent to the making and maintenance of law.

To explicate the normative load of agency a bit further, it can be found in this allowance in that it calls for respect for human autonomy that is not allotted by any other form of ordering. As Fuller noted, law is not just "a repetitive pattern

discernible in the behavior of state officials."[68] It is also found in the recognition of range of action of partakers. This is the case also for the opposite side of the reciprocal relationship in the acknowledgment of the possibility to act as in law enforcement by officials. The idea of agency gives a theoretical backdrop to make this possible; it provides room for the ability to follow the law, just like the rest of the considerations.

Agency, therefore, becomes another piece of the puzzle between the enterprise of lawmaking and form. What Rundle ostensibly meant by titling her book *Forms Liberate* was that the form of law grants the individual the agency that makes law unique. This agency enables the liberty to engage in practical reason through which reciprocity is realized, and a particular ethos can prevail. It is in law's distinctiveness that liberty is afforded through the respect of the individual's agency.

Altogether, agency is added to ethos and reciprocity are respondent in the form law and allow law's differentiation as a privileged kind of ordering. These ideas are form in a sense, but not formalities. They are formative but not formulaic. Together, they work to make the law reach its teleological purpose and distinguish it from other kinds of ordering.

3.5.2.3 Agency As Anti-Managerialism

In the discussion about the form of law, it is crucial to understand how agency complements the Fullerian idea that managerialism is a non-law type of ordering. This is relevant to our discussion because the aspect of choice is so vital to law and the normative loading of its form. The distinction between law and managerialism rests upon mutual respect for two things: being able to choose how to act in relation to the law and respecting others' choices within the allowed range.[69] While managerialism and law are both systems of ordering, only law respects the space for the rule-follower to willingly decide to follow it.

[68] Fuller, L. L. (1958). "Positivism and Fidelity to Law: A Reply to Professor Hart." Harvard Law Review **71**(4): 630-672. p. 632
[69] Morality p. 206-210

Managerialism, conversely, does not have any such necessity; humans merely follow managerial will.[70]

The recognition of agency is one distinction, but another, perhaps more significant chasm lies in the underlying motivation of each system of ordering. In a system of managerialism, the human component is just another condition of the regulation machine. Managerialists seek a specific outcome, and human action is the means of propagation toward that end. Humans are a means to an end, and any attention paid to humans is solely to better provide the intended regulatory outcome of the rule-giver. On the contrary, law is built on a respect for humans in and of themselves as the subjects of the system of ordering.

The definitive focus for humans at the center of law's workings is to allow them agency to decide. This focus is non-negotiable for law. Therefore, the 'practical' dimension of agency for law becomes the recognized range of action that may vary. Still, if there is no space allotted for the partaker, then law collapses into another form of ordering. In this way, the normative dimension of agency constructs at least part of the thicker meaning of the form of law.

To explain how agency functions in a way that is specific to law, it creates respect on both sides of the reciprocal relationship. This is juxtaposed to Managerialism, which capitalizes on what Bertea calls "a vertical structure of subordination,"[71] meaning that it is based around creating and maintaining a system in which lawgiver and lawfollower are in a relationship of hierarchy. The form of managerialism needs instrumentalized law-followers to fulfill its scope. That way, its normative pushes are made of subordination and instrumentalization. This form is also normative, but its lack of the specific normative features of law makes it a different system of ordering. Law must be built on a reciprocal relationship built around the distribution of roles amongst

[70] one can make the argument that agency may be respected in managerialism but only insofar it expedites the will of the ruling managers. But this falls short of necessity and is at best ephemeral.

[71] Bertea, S. (2014). "Legal Form and Agency: Variations on Two Central Themes in Fuller's Legal Theory Review Symposium: Kristen Rundle, Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller " Jurisprudence **5**(1): 96-108. p. 101

'equal agents.'[72] Therefore, instrumentalization breaks equality, dissolves the system, and does not fulfill the form of law.

Agency, thus, functionally needs to be respected to maintain the form of law. The partakers must be understood both on equal footing for the enterprise to be practicable. The equal importance between the lawfollower's role and the role of the lawmaker can be found in the dual necessity of their action. To make law fulfillable, both sides must complete the tasks necessitated by the enterprise of law but to do so without the use of subordination. Therefore, this sense of respect affirms that both sides of the enterprise have a range of motion despite any possible power differential between the two. We can ground this in the necessity of bimodal action of the two: without each other, the enterprise of law cannot move forward.

One can read the anti-managerialism as a Kantian position: humans (and their agency) have inherent worth (würde), and they are ends and not a means to serve the intended regulatory outcome of the lawgiver. Respecting agency, therefore, becomes paramount to maintaining law. If agency is not respected law cannot order society, but dissolves into other forms of ordering. Likewise, managerialism cannot be law because agency is ingrained in the form of law.

The essence of law is hinged on the ability, as Fuller reminds us:

"To embark on the enterprise of subjecting human conduct to rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults. Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent. […] to order him to do an act that is impossible is to convey to him your indifference to his powers of self-determination." [73]

[72] Ibid
[73] *Morality*, p. 162

3.6 What It Was All Along

But where does this leave the nature of form and its connection to legislation? Or, after this journey, we are left with a linear connection between form and morality? Let us take stock.

Each of these three concepts encapsulate specific 'oughts' which inhere in the enterprise of law. These 'oughts' create webs of normative pushes that direct, keep in line, and propel the enterprise of law forward. The 'oughts' are documented in a pragmatic and functional sense and, in doing so, characterize the enterprise with Fuller's low floor morality but also become elements of the form of law. They are generated by their practical need to be fulfilled in order to reach the tangible goal of law and to preserve its distinctiveness. They are part of form because they are part of the necessary elements for the law to come about and be different. These features are so intertwined and vital to the enterprise of law that if you take them out of the process, the ordering will never reach the distinctiveness that law holds against other forms of ordering. The three outlined aspects are formative as they are a practical necessity to law. But do the necessities that follow the formation of law collectively amount to the form of law itself? If we answer this question, we will unlock the key to the whole endeavor of this writing, and that unequivocally is yes.

Fuller's theory of the inner morality of law becomes most useful at this point. It is parallel as it is a collection of practical and necessary features that law must hold. With these eight features,[74] law can reach and maintain itself as a distinct system of ordering. These features reflect the ongoing commitment from both classes of partakers in law. In this sense, the canons serve the same role as the normative-natured reciprocity, ethos, and agency.

Both the principles of inner morality and the trifecta of this chapter are equally functionally necessary for the entirety of the legal enterprise. In this sense, the principles of inner morality and the normative trio are necessary and longitudinal. Longitudinal simply means that they forward a need that they must be engaged over the duration of the law, whether that be an individual law

[74] The features themselves will not be discussed; the analysis addresses them as a collection.

or law as a system. To understand what it means to be longitudinally necessary, the observation of law must depart from a cross-sectional, diagnostic approach.

This theory, originated by Fuller and added to by Rundle, does not rely on the observable features that are distinguishable from the end product. To disambiguate law from non-law, the whole enterprise of law needs to be examined. This understanding can be juxtaposed against this approach, which looks ex-post factum at the criteria to be law. Only seeing the law longitudinally will allow the capture of the necessity of normative features at all points of its production and maintenance. We have a canyon which, on one side, has a longitudinal view, and on the other, a static cross-sectional approach to the formal requirements of law is seen in theories like HLA Hart[75] or John Austin.[76] Pushing aside the different criteria chosen by the positivists, what they indeed look at is to diagnose law in a staccato way, in which law is cross-sectionally examined as a thing. This positivistic approach works much like Jeremy Waldron has described as "Law-detectors,"[77] whereby the "marks" of what is law and what is not is based on a formal identification process. The best that cross-sectional observation can possibly do is infer that law was made but cannot account for the behaviors that keep the law going.

In total, the approach to identifying the features of the law is much different than Fuller's idea, where the constitution of law is gauged multivalently on statuses, behaviors, and attitudes found outside the text and imposition of law. To illustrate this point, let us examine one of the elements of Fuller's inner morality: non-congruence between law and official action. The observation of official action cannot be taken cross-sectionally but needs a critical mass of duration to be fully appreciated. The fact that a traffic marshal cuts a fine at one instance but for the same offense and omits later to do the same does not give us a conclusive picture of official action. There needs to be a longer and wider viewpoint that can allow us to determine what is law, especially if we are to exercise Fuller's inner morality. Therefore, the Fuller/Positivist juxtaposition shows two things: there is more to the form of law than just law as a final

[75] See Hart, H. L. A. (2012). The Concept of Law. Oxford, Oxford University Press.
[76] See Austin, J. (1832). The Province of Jurisprudence Determined. London, J. Murray.
[77] Waldron, J. (1999). The Dignity of Legislation. Cambridge, Cambridge University Press. 14

product. And two, that the needs of form cannot be appreciated in a static, forensic way, like how the positivists approach it. Instead, it needs a longer appreciation period to determine if what makes up the form is in place. One must look at the form for a longer time period.

Form in Fuller is, therefore, conceived in a particular way compared to the conventional understanding. This holds both in terms of duration and material. To reiterate, what I argue is that the formative features are considered in the space of viewing law as an enterprise. For this reason, the form of the enterprise of law must be considered in a way that is broader than what is normally covered by the term. In identifying law as an enterprise, the Fullerian understanding of the form of law must be representative of a process; the features must be seen, as said above, less forensically and more longitudinally as is fitting to an ongoing process. Form is not just assessed solely from the final product, nor is it tasked with being a checklist or a proof of being. Espousing the opposite, to wit that the inner morality of law is just another checklist, indeed makes it easier to attack Fuller on his eight principles of the inner morality of law, yet ultimately does not engage the inner morality on its own terms. Therefore, it becomes a rather hollow criticism since the ideas and morality have roots that are spread much further than what his detractors care to acknowledge.

Instead of treating the inner morality of law as a checklist, what I argue follows cues from Rundle in extending Fuller's understanding. To take the inner morality of law and extend it to give a better, more practice-minded understanding of form in Fuller. We need to look further and not try to decipher form from the end product of law but also look at the features that helped it along its way. This includes a multitude of normative pushes that are present throughout the genesis and the maintenance of law. This is where the features of reciprocity, ethos, and agency factor into the equation. These features become formal because they are necessary for the enterprise of law to reach its desired function. As described above, Reciprocity gives the moral foundation and breeds the normative 'ought' that allows the enterprise to have a teleology and a direction. It also offers normative justification to take the enterprise on as well. Ethos, as said above, is an attitude and is exemplified in doing law in a manner suitable for purpose. It allows reiteration of purpose, which in itself also gives

reason to keep the enterprise of law moving onward to its ultimate goal of the actual ordering of human activity. This also becomes a necessary element of form because the people partaking in the enterprise of law know what they are doing and why they are doing it; it binds the partakers to the process, pushing the enterprise along. No one makes law accidentally. Finally, we come to agency, which is Rundle's largest contribution to contextualizing Fuller's theory. Agency and respect for it are both necessary features of form because if there is no allotment of range of motion for the enterprise of law, no "enterprise" is left. To wit, if the partakers in law are not allowed to decide the path of actions, it is not law but some type of compulsory ordering. As with any enterprise, it takes a multiplicity of actors to bring the system forward. All actors need to have at least some range of autonomous choices. Otherwise, they would become mere instruments. With these workings in mind, the respect for reciprocity, ethos, and agency as form plays a distinct part in having law reach its destination. In this sense, it is the form of law itself.

From the previous paragraph, we can draw that form is also found when law is considered a process or an enterprise. Form cannot be narrowed down to the dissection of its parts and cannot be captured solely from a single moment. That means form can also be found in *law in its making*. Fuller, who theorized law as a social enterprise, exemplifies this. Apart from the form offered by his inner morality of law, the trifecta of reciprocity, ethos, and agency bolster the idea of legal form, as was argued throughout this section.

The concepts that were laid out are practical results of having a certain idea of law. The practical implications become evident if we investigate certain elements in each corresponding definition's genera.[78] There are relationships, attitudes, and space for action found respectively within these genera. All of these constitute kinds of moving forces in that they characterize human behavior and social practice and inform the action in one or another. They are things that express direction and push towards a goal. In a pragmatic sense, they are felt in doing, not imposed by the product of what is done. We see the respective genera encapsulate a series of oughts, deontologies, and goals with

[78] 'Genera' used here is meant as the plural of genus, as in the class of things that the defined word belongs to

some sort of normative push closed within them. Not only do they all circle normatively loaded concepts, but they venture into morality given that a purpose-driven 'ought' suggests what a partaker should do or where the partaker should aim their activities. It is in the placing of the 'oughts,' 'shoulds,' and 'musts' that a distinctive moral element can be found.

The ongoing nature of the enterprise, as represented by the necessary relationships and the framework that allows law to develop, indicates when and how the tasks necessary for it to reach its distinctiveness[79] should be done. In this very indication is where morality is found. This is a morality found in the character of doing, respondent in the character of enterprise of law. It is not a static morality that could be indicated at the end of the process, nor does it distinguish good from bad based on eternal truths to set maxims in stone. It is a morality that is geared to deliver the intended outcome but need not be satisfied by it. The morality cannot be proven or evidenced when looking at the law outside of its framing, as an enterprise and a social process in the way a positivist might want it. Fullerians must instead look at the overarching practice instead of the end product to situate morality. Therefore, a forensic examination of the product of the enterprise cannot divulge information about the process by which it was made. This excludes many portions of mainstream jurisprudence, such as Hartian positivism, from having the conceptual tools needed to climb this slope.

To pinpoint morality in the enterprise of law, we must look at the practical implications of the normative charge of functional necessities that were pointed out above, taking inspiration from Fuller and Rundle. Both encompass 'morals' in a broader sense than judgments of good and bad; 'moral' this conceptualization is expanded, incorporating the oughts of purpose, motivations, attitudes, and relationships involved in functional necessities of the enterprise of law. When Fuller framed the inner morality of law as the "morality that makes law possible,"[80] he wanted to sketch a picture that accounts for law as a way of ordering that carries purpose. Law is normatively charged, and if ignored, it collapses into a different type of ordering. If we are to

[79] Law's distinctiveness against other forms of ordering
[80] *Morality,* Chapter II

understand the low-floor morality in this context as part of form, it will be found in the oughts inherent in the creation of law as a purposive enterprise. This scheme does not ignore that law takes human acts to be put together. It considers that there is purpose to each act along the way and ignores the normative load it instills. It is what gives law its distinctiveness and its practical dimension.

This expanded hands-on approach taken from Fuller on how to best understand law is the most appealing and vital to the general project of this thesis. From its beginning, Part I was meant to extract ideas on form from the work of Lon Fuller. It meant to engage purposively to make a baseplate that could be utilized to gain guidance and insight for the process of legislation. The analysis began by introducing what part of Fullerian thinking would be covered, where Fuller moved in the theoretical map and the necessary preliminary points. I believe it is necessary because the difference in definitional genus makes a chasm between him and the cast of mainstream jurisprudence. Answering how Fuller saw himself and how this came across to his main critics helps bring this along. When the framing of law is that of a social enterprise, his contemporaries could not address the law in the same way as he did. The next chapter will take the views generated here and expand them.

4 Fuller Form Finalized

4.1 Recapitulation: Being Pragmatic and Practical About Fuller

In what follows, I would like to take an inventory of the many theoretical fronts that have previously been opened so far in Part I and explain how it all works together.

To start, Fuller did things differently, meaning. This 'differently' creates a need to clarify his approach for it to be best applied to the context of bettering legislation. For this reason, the first sections sought to introduce and situate Fuller in the context of his philosophical inclinations and the jurisprudential landscape of the literature. Fuller stood as a maverick towards his contemporaries, which warrants particular care. The work must be engaged with on its own terms. This discussion tried to pinpoint which crucial elements of framing are necessary. In the defended view, Fuller is best read as a lawyer trying to make sense of the construction, the origin, and the continuity of law. In this endeavor, Rundle's extensive reading of his correspondence and his intellectual history showed he was not only well-versed in philosophy but showed direct interest in it.

The text suggested that American Pragmatism was poignant for Fuller and influenced this thinking. The evidence for this is in his approach to law, which he understood to be an enterprise. Looking at law as an enterprise entails a focus on "doing"[1] law rather than observing law. As Tripkovic and Patterson put it, pragmatism is hinged on "a conception of truth as a construct that serves human purposes and the understanding of inquiry as an activity embedded in human practices."[2] Even though they do not cite Fuller in their assessment of legal pragmatism, the ideas of purpose and inquiry resonate in the picture painted here. It is true that, much like how John Dewey was suspicious of unnecessary theoretical dichotomies, Fuller readily distanced himself from any known school of thought. And yet, I want to argue that Fuller is best read as a

[1] Perhaps Dewey-ing law so to speak
[2] Tripkovic, B. and D. Patterson (2017). Legal Pragmatism. Encyclopedia of the Philosophy of Law and Social Philosophy. M. Sellers and S. Kirste. Dordrecht, Springer Netherlands**:** 1-8.

pragmatist. Engaging with him in such a way makes better use of his ideas of the immediate day-to-day requirements of law, and it seems more fitting to the process of legislation.

On another note of pragmatism, much like how John Dewey believed there was a need for active participation in the public sphere to complete the shared goal of democracy,[3] Fuller, while never the radical democrat that Dewey was, viewed the law as a continuous social effort propagated by both sides of the reciprocal relationship, i.e., in need of human participation from all the partakers to fulfill its role as ordering. With such framing, Law becomes less of a static object, more interactive, and more *practice-driven.* This is different than approaching law as a social fact, as an object, or interpretive technique. It must be situated with all the necessary actors in its natural social context. For Fuller, in other words, law is a practice. The actions it entails are constrained by the form-specific features typified inter alia by Fuller's inner morality. The focus shifts to practice more than observation, suggesting Fuller had a pragmatist leaning. All in all, I argue that his starting point, technique, and use of language were much different from his contemporaries. Therefore, we should approach his ideas in a fitting way and in a way that differs from how his jurisprudential interlocutors approached him.

4.1.1 Channel Island

The chapter also veered into specific aspects of Fuller's theoretical battles to stress which mistakes must be avoided when reading his work. Fuller was as staunchly not positivist as he was not a substantive natural lawyer. Imagining him like a Channel Island away from the mainland of natural law (UK) and positivism (France) helps illustrate his position. The Channel Islands are not a continuous land mass with the UK, but when push comes to shove, they remain a loose union, always wanting to differ from France.[4] It is not only that Fuller

[3] For a brief overview of Dewey's idea of participation in democracy and the public sphere see: Calhoun, C. (2017). Facets of the Public Sphere Dewey, Arendt, Habermas. Institutional Change in the Public Sphere. F. Engelstad, H. Larsen, J. Rogstad et al., De Gruyter**:** 23-45.

[4] For instance, when it comes to fishing rights, the UK sought to protect Guernsey yet Guernsey does not follow all the UK laws. Rankin, J., J. Henley and A. Allegretti (2021). British and French Talks to Settle Fishing Row End in Stalemate The Guardian. London, Guardian News & Media. accessed on 8 November 2021

differed, but he also wanted to differ.[5] This is because to be natural for Fuller is not to make laws subject to a maxim that distinguishes good from evil laws. Instead, he offered a view that there is something intrinsically moral in the law itself. The 'moralness' of the law is provided by the purpose of law and the necessity to reach excellence in its intrinsic goal to order society in a specific way. Morality is just a component of the process toward this end.

The implication of this is that law is to have certain, inherent, inescapable components or features that cannot be ignored. These were in place since law is a deliberate social process that has an aim of ordering society in a specific way. This framing of law as a process turns law forward toward the future, and for this reason, Fuller's theory cannot be engaged with by the other schools. As law is "a system of rules for governing human conduct must be constructed and administered if it is to be efficacious at the same time remain what it purports to be,"[6] it cannot be dealt with as a dormant thing but a moving enterprise.[7]

4.1.2 The Static and The Moving

Law is in motion in a sense by its nature as an enterprise. That does not mean, however, that it is relative and wildly variable. There are characteristics that are stable. The terms that were used to encase this necessity and antecedence. I wanted to capture that a mix of unavoidable, inherent features gives law its distinctiveness. These terms also create practical demands that push the partakers in law to act according to the process when they are engaged in the enterprise of law.

We should pause here and consider the implications of these ideas of necessity and antecedence. If something is antecedent to law, it is a necessary forebearer that must be in place for law to be able to complete what it is supposed to do. In

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[5] Just like the way the Bailiwicks of Guernsey and Jersey remained connected to the crown but also never entered the EU, even before Brexit.

[6] Ibid 97, *Forms* 93

[7] Although it must be quickly noted that this is not meant in the same way that Karl Llewellyn meant when he said we must understand law as "in flux" nor what Eugen Ehrlich meant by living law, both of which center on, albeit different, concepts on the shifting content of law. See respectively Llewellyn, K. N. (1931). "Some Realism about Realism: Responding to Dean Pound." Harvard Law Review **44**(8): 1222-1264. P 1236, and Ehrlich, E. (1936). Fundamental Principles of the Sociology of Law. Cambridge, Mass, Harvard University Press. What I contend is that it is action based ergo in motion.

law, as with all purposive crafts, there is a layer of ability that must be in place for it to unfurl its ability to order human conduct. The question then becomes how do the mechanics of this affect the partakers in law? The answer lies in the morality of aspiration, in that the initial normative push suffices. As said above, the morality of aspiration is not necessarily connected with an outcome. So those that partake do not necessarily have the outcome at hand, nor is it hinged on possible achievement. The partakers must act in a way that aspires towards the goal of ordering by law, but reaching it is not important to the enterprise's existence. Law grows in an environment of antecedent features that characterize it and give a normative charge for its partakers.

My reading of Fuller is hinged upon the idea that these antecedent practical features install normativity in the law by giving the partakers of law the "should" and the "ought" they will face to establish and continue the enterprise. To wit, if law is understood as an intentional enterprise and the partakers are invested in it, then the practical constraints like Fuller's canons[8] will feature in their actions normatively.

Building from this thought, law for Fuller, as I argued, cannot be gauged on a dyadic and completely separate understandings of morality and law. Dyadic in this context means that morality would work in an on-off way. I argued that this is the approach both natural law theorists and positivists espoused. The dyadic method becomes a quality control mechanism for gauging morality; morality becomes a binary yes/no.

On the contrary, Fuller first sees the need to determine which morality is in play. Law houses a morality of aspiration; therefore, it has morality that cannot be gauged in this way. It is an intrinsic component, a thread of the fabric that makes law. There is something analogous to this that we can take from a thought of Harry Frankfurt on love, "When we accede to the irresistible requirements of logic or of love, the feeling with which we do so is not one of

[8] For reiterations sake: Generality, Publicity, prospectivity, clarity, non-contradictory, stability, and congruence between rules and official action.

dispirited confinement or passivity"[9] and "The origins of normativity …lie in the contingent necessities of love."[10] Law, like love, has a number of normative and moral commitments surrounding it that are just there; they come with the territory. They are part of the form of law. This inescapability of features that set law apart and how this creates 'oughts' necessarily is what I take morality to mean for Fuller: i.e. the total normative load a partaker does when doing law. These normative commitments are felt irrespective of whether an individual chooses to follow them. Further these normative commitments are generated by the purposive nature of the enterprise of law. If, when describing law, a jurist wants to use a page of Fuller's inner morality playbook, they will not be able to do so without agreeing with his view on morality. I think that is why Fuller is the morality that makes law possible; without the felt normativity, it cannot be law, but it is something else like the managerialism seen in many legal arrangements today or the brute force of soldiers ordering civilians from a tank marked with the letter Z. The morality, including Fuller's celebrated inner morality, comprises the quintessential components that set a normativity that allows law to be and function in the first place. For this reason alone, Fuller's morality is, and should be, set apart. He argued as much in his work, and, in this way can we best make use of the scope and meaning of his theory?

4.1.3 Commentary on Normative Pushes

Taking Fuller's stance and theory into account, the chapter's resolve was to make a useful, explanatory, and operational narrative to understand a thicker version of form. This can be considered a reconstruction or a repurposing of Fuller's work with a view specifically centered on unearthing what form can hold.

Form was argued to also encompass normative features beyond the exterior-observable understanding of form. In particular to law, the next move was to describe three examples of the normative bearings of law. These were called normative pushes: reciprocity, ethos, and agency. In the following section, I'll

[9] Frankfurt, H. (2000). Some Mysteries of Love. The Lindley Lecture, University of Kansas, University of Kansas.15 I owe this quote to Scott Veitch in his work Veitch, S. (2021). Obligations: new trajectories in law. Abingdon, Oxon, Routledge, Taylor & Francis Group. 15
[10] Ibid at 7

make some general comments that hopefully will justify the long exposition of normative pushes above. It should be noted that these are not to be thought of as a *numerus clausus* list but that they are part of the lawmaking ecosystem and are expressions of normativity inbuilt into law. There very well be other types of normative pushes that might be universally applicable or only to a certain type of legal enterprise.

To begin, the framing of law as an enterprise and what that entails expands the meaning of law to additionally include those who partake in it as part of the moving componentry. It is their actions and the pressures that they feel are essential for law to keep moving. To accept such a context means that one must include elements that weigh in on the decision-making of the partakers, such as normative pushes. I approached normative pushes not as cognitive decision-making elements but instead as procedural realities. The inspiration for this came from Fuller, who may not have explicitly said as much, but it offers a viable reading. Doing law becomes more central than diagnosing law. Evidence for this might be seen when he wrote, 'called my book, instead of The Morality of Law, The Morality of Lawing, much of the misunderstanding might have been avoided.'[11] What is discernible here is that if law is framed as an enterprise, then inquiry into features of the actions seems not only a good idea but obligatory.

This understanding of law includes more features revolving around 'doing' and, in this way, becomes something that perhaps evades many positivists. Yet, any sidestepping from this matter is forgivable as it is hazy by necessity. It is always difficult to describe in detail what goes on in the background of human activity. This difficulty was represented in this chapter by the allegory of the serpentine path to the famous high pass the Stelvio. It was meant to illustrate that the path

[11] *Forms, 115:"*In a letter to the British philosopher and sociologist Dorothy Emmet whose work on the ethics of roles he admired greatly, Fuller further reports that one of his students had suggested 'that if I could have called my book, instead of The Morality of Law , The Morality of Lawing, much of the misunderstanding might have been avoided', because while the word law 'calls to mind books lying inertly on shelves', 'lawing' calls to mind 'people in interaction with one another, and that picture in turn would suggest reciprocal responsibilities if the interaction is to proceed properly'"

to understanding these things is difficult, especially when we continually look at the perspective outcome.

Moving onto the normative pushes themselves, each has a functional role in the enterprise of law. However, it is the *linkages* between them that become exceptionally important. In this light, reciprocity can be understood as giving direction and grounding, but also the distinct roles of the partakers. It creates a useful understanding of the task at hand for all those involved. It stands as the first step and cornerstone of the enterprise, yet it lacks a basis for continual fidelity to the law. This is what ethos is for. But that does not limit reciprocity's functionality or its usefulness.

For Ethos, its conceptualization is an account of the necessary attitude that keeps partakers in line with the process of law. It has a shepherding function to push towards that directs action and keeps the aspiration deliverable. To show the function of ethos, I included a comparison with Aristotle and Finnis. This comparison illustrated that when excellence-directed social enterprises are undertaken, they need normative concepts to help them along. A normative attitude of some sort was used by all three thinkers, creating a parallel despite their differences. Ethos can, consequently, be utilized as a viable understanding to guide when excellence is sought after as a social goal.

The next normative push, agency, presents a greater difficulty. It is defined as the feature of law that allows participants to choose their actions in reference to the law. One of the main arguments that flows throughout *Forms* is that law is distinct from other forms of ordering based on its respect for agency. Without this specific respect law collapses into managerialism. So, how does this develop into a normative push? This happens reflexively in two ways, corresponding to each side of the reciprocal relationship. Lawgivers are pushed to give the participants recognition of the space to act in order to make ordering by law possible. Lawfollowers, on the other hand, are pushed to choose which action to take as they are empowered to choose in reference to the law and not reliant on

managerial dictées. The wiggle room allowed by agency can give ample room in the analysis of lawmaking[12] to be able to govern the path towards law.

Now, this picture seems to focus on a functional element, and the pursuit of function might seem to be realism or the quest for efficacy. Digressing to this, however, It has been heftily reiterated that efficacy is a hindsight-ed gauge. Law has inbuilt elements that are prospective, that have latent hope, and a will to achieve. I believe documenting these normative elements and getting rid of the unnecessary separation thesis gives a much thicker and overall better understanding of law. This could then feed into legislation. When making law, however, one must be aspirational because the intention is to bring about a change in the legal world. So, when a society is undertaking an enterprise of law, understanding the process has importance in its own right. Therefore, normative pushes are valuable in mapping out what is important throughout legislating.

4.2 Why Fullerian Form Can Work

4.2.1 The Transferrables

Continuing the theme of purposive reading, I believe the best way of framing normative pushes is as an expression and part of the form of law. And as law is a broader social enterprise that also encompasses legislating law, what holds for the entirety also holds for the subset. For this to be meaningful and follow logically, there must be a connection between two sets of ideas: Form to normativity and law-as-enterprise to legislating. Considering the framing that has been proposed, a fitting construction is that law takes shape as an enterprise, and this then brings with a multitude of features: 1) that being an enterprise conveys an explicit purpose, 2) purpose brings along a commitment to reach the *telos* of the enterprise carried by the partakers,[13] 3) morality stems from this as a low-floor morality, which gives the partakers normative direction though the allocation of 'oughts' that correspond to each role and 4) purpose also

[12] Infra parts II and III

[13] On a side note, this could be extrapolated into a general constitutive force like what was described as "fundamental political objectives" in Goldoni, M. and M. Wilkinson (2018). "The Material Constitution." Modern law review **81**(4): 567-597.

brings about a necessity of form, in that, in order to complete its purpose, the enterprise purpose must have specific formative features that allow all this to happen. If we put all these elements together, we get this scheme in which enterprise brings purpose, purpose brings morality, and it is all encapsulated by form. Law falls squarely within this scheme. It is a social enterprise hinged on the purpose of ordering human activity; the partakers act towards completing the purpose of ordering, and they submit to the morality- in the shape of 'oughts' that dictate certain actions on the part of the partakers- and all of this is encapsulated in the form of law. As legislating is a more specific subset of law and is by quintessence a deliberate process of making law, the form of legislation also creates similar conditions for legislating.

In *Forms*, it was argued that the form of law that "constrains what we can do with legal means,'[14] This position can be extended to a functional explanation of the form of law. It can also be read as a 'how.' Form also constrains how we can do things with legal means. Form functionally constrains what partakers can do with legal the mode of law, and in this way it installs a limit on the enterprise. The means of containment are the thick normative components which bare on the partakers, irrespective if they might ignore it. If they do however, what there is a mis-alignment with what they want (law) and what is done (not law).

In this light, the features of Fuller's inner morality can be thought of as prerequisites to reach the end of the enterprise successfully and a means to reach law's potential as enclosed by the form of law. Law cannot be if many practical constraints avert it from coming into being or if it does not reach what form intends it collapses into something else. For Fuller, to bow to these constraints is inescapable at some level because their absence precludes the purpose and the completion of law as an enterprise. As in a practical example of baseball, you cannot hit a ball with a bat to run the bases if the bat, the ball, or the bases are missing.

With such an understanding of form that incorporates normative notions of direction, it remains to harness this position into guidance for the process and

[14]I borrow this formulation from Rosler, A. (2014). "The Law Is the Law, Not Management Review Symposium: Kristen Rundle, Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller (Hart Publishing, 2012)." Jurisprudence **5**(1): 119-132. 120

product of legislation. The transition needed to get to legislating from law therefore is two parts: one being a shift from a bigger to a smaller scale of legislating and the second being that being true to form can be construed as improvement ipso facto. The first holds because legislating is part of law. The latter point holds that that form offers a road map to reach the potential of the enterprise. Form gives the standards of "where" and "how to" for the enterprise. And, since form provides directives, if the asks of form are met, then we can have a clear indication of quality. Improvement in the execution of task of the enterprise, whether that is law or legislating, will then come from identifying what needs to be given attention from the body given from the thick idea of form.

Yet, phrases like 'getting to work,' 'deliverability,' and 'doing' beckon thoughts of efficacy. It is too easy to repeat the positivist position that morality and form are just convoluted window-dressing for efficacy. This, again, is out of place for two reasons. The first reason is the reminder that efficacy is gauged on outcome. To this end, efficacy cannot be an arbiter of aspiration. The complexity of law, as well as its aspirational dimension, defy such reductive readings. Two, efficacy and morality (in the sense of the low floor kind) are not mutually exclusive, as Rundle points outincidentally while saying the scope of efficaciousness does not necessarily impede on the respect for agency.[15]

This point aside, the question remains: how can one mobilize the form of law in a way that is adept to lawmaking. I think it is most useful to think of form as the containment of a multitude of things. With what has been said so far, the thick sense of form can easily lead into envisioning form as a nesting doll, an ecosystem,[16] or the wall of a plant cell separating the out from in. These images all see form as the material boundary that contains the enterprise of law and make it differ from other types of ordering. But before this boundary is revealed, it is important to remember that law is aspirational, and it has normative components that, in effect, become moral guidelines. Subsequently, the

[15] "a relationship in which the lawgiver can pursue his ends efficaciously at the same time as the subject is respected as an agent." *Forms, p.10*

[16] Although concerning a specific section of law, Scott Veitch takes cues from ecology as a model to map law because of the equilibriums of pushes and pulls. See chapter 4 in Veitch, S. (2021). Obligations: new trajectories in law. Abingdon, Oxon, Routledge, Taylor & Francis Group.

boundary that form sets apart the enterprise that can order society by law and what cannot.

Further, law has a teleological character that surfaces as an aspiration to order in a specific way that can maintain its distinct character. With such an explicit aspiration in place, it is inherent that certain action must be taken if this aspiration is to be taken seriously. This is how the low-floor morality mentioned previously is created. Form then encapsulates this chain of events and creates a frame of reference for the humans who take part in the enterprise of law. As Fuller said: "The morality of aspiration is, after all, morality of human aspiration. It cannot refuse the human quality to a human being without repudiating itself."[17]

This might not be the highest of standards for law. Yet, suppose one connects normativity to the process foremostly. In that case, it makes sense not to invest that much into a view that considers the process as well instead of exclusively focusing on the outcome. In total, this and what it can amount to can be extracted from the following quotation from Fuller:

> *"Law, as something deserving of loyalty, must represent a human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the behavior of state officials. The respect we owe to human laws must be something different from the respect we accord to the laws of gravitation. If laws, even bad laws, have a claim to our respect, then law must represent some general direction of human effort that we can understand and describe and that we can approve in principle even at the moment when it seems to us to miss its mark."*[18]

Naming something law is not enough to bestow it legal status according to the above, and law demands human action of a certain character. Fuller speaks of the law as 'something deserving of loyalty' and, throughout his work, he readily uses the words 'fidelity' and 'respect.' This signals that having a certain stance towards the process is also integral to its form; Partakers need to respect the

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[17] *Morality* 183 italics in original

[18] Fuller, L. L. (1958). "Positivism and Fidelity to Law: A Reply to Professor Hart." Harvard Law Review **71**(4): 630-672.

process to secure its results. I want to take this a step further: the deliberate process of legislation is also duly worthy of respect and dignity.

In *Forms*, Rundle forwards an idea that this goes both ways. Law makes sense only when the lawfollower is treated with respect because that, too, is part of what makes law distinct. It is not enough to just follow the law; the system must treat the individual as an agent who is "more than someone simply capable of responding to a lawgiver's direction, even if that direction is entirely favorable to her. She is instead a bearer of dignity, with a life to live of her own."[19] So we have a triple demand of dignity from the idea of form for law. First, that is showing dignity towards the law from the part of the partakers. Next, the dignity that has to be shown towards the agency of the partakers. And, finally, and a dignity towards the process of making law. All these in here in the form of law. Perhaps then, a similar construction can be made in line with these demands to create a more specified list for legislating in particular.

4.2.2 Moving Frames

This section is meant to begin the transfer from Lon Fuller's views and framing to a new hope for understanding in the process of legislating. It was grounded in the practice of doing rather than diagnosing or bestowing a name onto something. From it, the analysis built an understanding of form that incorporates normative ideas which stem from its nature as an enterprise. Adopting this framing and understanding can be more helpful to understanding what form means for legislating than a Hartian view that is "not interested than anything else than a bare-bones philosophy of law, which he for him was "a largely descriptive analysis of the conceptual structure of law"[20] or a substantive natural law position.

What is useful for my project after the escapades into form, enterprise, and normative pushes? How can it be made operational? On a surface level, Fuller's theory focuses on the nature of law. Still, as legislation is but a deliberate act of lawmaking, as an *ad maiore ad minus* argument, it follows that if it works for

[19] Forms, p 10
[20] Dyzenhaus, D. (2008). "The Grudge Informer Case Revisited." New York University law review (1950) **83**(4): 1000.1

law, it will also work for legislation. Therefore, what form demands of legislating can be found.

Of course, this transfer of insight from the major (law) to the minor (legislating) is not automatic and needs more to substantiate it. Several conceptual difficulties first need attention. For one, legislation is not yet law, or rather, as law is still in the making, so it will be difficult to please positivists and natural law jurists. This is because, at least for positivism, it has not fulfilled a pedigree, nor has it been tested for "recognition" as a Hartian would like or for a command as an Austinian would prefer. For natural law, law-in-the-making has not been given any substance yet to be gauged against natural principles. It has not yet been tested by natural principles. These points are mentioned as indicative examples of the difficulties of transferring Fuller's theory from law to legislation.

Yet, it is not to say that exposition regarding the form of law will not be useful for legislating. There are three points that indicate and support the claim for the meaningful transfer: the formality of lawmaking, the requirement of human action, and its continuity.

The first point is quite straightforward. As both Fuller and Rundle emphasize the work that form does for law as a process, it seems fitting that an explicitly formal procedure such as that of legislating could find parallels. Legislating in modernity features a very well-described process with many descript and official points for it to reach its end. Each formal step in the procedure is closely tracked by the normative push to complete it. At this point, parallel things to reciprocity, ethos, and agency start making sense and could become useful for the practice of legislating. Those involved with lawmaking will exhibit some kind of attitude in reference to the normative pressure to fulfill the formal character of the procedure of legislating. For this reason, a depiction of these normative pressures, which are bound to form, could also find a home with legislation.

Second, lawmaking is not an automatic or a self-actuating robot. The human element is paramount and characteristic. The above discussion of agency is pivotal here. Law directs law-followers as rational agents capable of decision-making. Law without this consideration collapses into a different modality of

ordering. Without bolstering this human element, law quickly collapses into some other form of ordering. Legislation is a process to make law, not managerial orders.

Third, the form of law encases and maintains law throughout its existence. It creates, rescinds, updates, and rehashes laws to suit society. The ongoing and ever-regenerating process of legislation needs conceptual tools to get closer to its inbuilt aspirations. Legislation is a moment in the ongoing life of law, held together by constitutional principles that ensure continuity and what was mentioned earlier as its 'longitudinal' dimension. It is also reined in by the key requirement to maintain the rule of law and the stability of expectations.

The normative landscape of law seemingly could be transferred to legislation. The next question is how to operationalize this. Above, I wrote, "the deliberate process of making law itself is also duly worthy of respect and dignity." Taking inspiration from the work of Fuller, as read above, there could be something to say about dignity as a practical necessity of the enterprise of legislation. Dignity is a vehicle of directing behaviour towards something and creates expectation of a certain character of action. But it also a broad idea[21] both as per where it is grounded, where it is aimed, what is its nature, and what standards it beckons. Areas of legal scholarship have been prolific in theorizing dignity, especially human rights.[22] There it is seen, inter alia, as legitimation of human rights or what they protect. In some senses, dignity is also protected via specific legislative arrangements, like libel, defamation, or naming laws. These all have a substantive or quasi-substantive legal view of dignity, in that they have to do either with the content of law. Below however, I will explore the possibility that alongside these views, one can imagine dignity as a procedural necessity of legislating. This view will call for a dignity of a specific quality that is a aspirational directive of action when legislating. The next chapter will address this. There, I will defend the idea that treating legislation with dignity is not only a functional necessity but also that it both precludes law's purpose when it

[21] As will be argued in the following chapter.
[22] See infra at Section 5.2

is not followed and that legislation that fails at aspiration collapses into something else.

PART II

5 The Dignity of Legislation, Reduxed

5.1 Introduction

The grand question of my project is to answer: "What does it mean for legislation to be true to form?" The view for the answer is also one that can translate a political mission into praxis. The first order of business in this direction was to explore form and see what it can encompasses and what this means to the partakers in terms of directive. What was found was a thicker meaning of form, one laced with normative direction. To distill guidance for the social of legislating from form would need a mechanism that can reflect such a forward directive-minded idea. As it needs to be perspective and prospect—minded identifying an specific feature or retrospectively engaging with the output of the enterprise wil not suffice.

Prospectivity aside, the previous chapters were an effort to lay the groundwork for a thicker, more practically minded conceptualization form within the space of lawmaking. "Thicker" in this context means that there is more to form than surface-level completion of procedure.. The conclusions that arose were that the meaning of form is broader than what the surface discloses, there are normative and practical elements that also follow form. Lon Fuller made inroads by opening such a discussion on the form of law as explicated above, which this analysis now inherits and will seek to situate more carefully in a legislative/lawmaking context and create a directive concept of dignity that can guide law legislating to fulfil its potential. This part of the thesis is meant to transition from these ideas on the thicker meaning of form to a theory that can capably stand as guidance for better legislating. The measure of 'better' is according to form, but it needs an articulation of "good enough." The discussion to get to this point will come from the conceptualization of the dignity that follows.

The key sought after, therefore, is constructing an idea for a special dignity for legislation and legislating. This dignity is meant as treating the enterprise of law with a level of due diligence. This dignity is informed by form as the

completion of the form is the goal. As such, ideas that come from form will provide the content from which the dignity draws its measure.

Additionally, for this to work, , the base assumption is that dignity that is being sought after is comes from the will of the political community to make rules in a specific way. The arguments that follow have the understanding that the dignity at hand is deeply connected to form and, consequently, form needs to be treated up to the measure of dignity. This side steps metaphysical questions of grounding, but that is necessary as the scope of the thesis lies in the realm of tangible-practical improvement.

This chapter thusly factors in the meaning of form, the meaning of dignity, and their coalescence in the context of the social enterprise of legislating. This effort will try to capture the main motif that carries on from Fuller, that form does the heavy lifting, and that form is much deeper than just the surface verification of completion of the acts of legislating. There are elements of form that are normative, protocolar, and evaluative which must be noted.

To get to this concept of dignity, the questions that are to be dealt with is what is what gives its content? where are these concepts grounded? What does this all have to do with the political community? What role do the choices in representation and type of system of governance have in this scheme?

Therefore, the way the chapter is structured will start from the question of dignity, and then questions of form. This dignity is the main idea of this chapter and what will take up the bulk of the analysis. Its underlying idea is that legislation demands a functionally dignified level of action and expands on the relevant work of Jeremy Waldron.[1] His work offers the foundation for the arguments that will follow, however it will also be taken in a new direction. It is my firm belief His conception needs to be recalibrated, extended beyond its original setting, and applied to legislatures to offer full utility to the enterprise of legislation. This chapter will expound his ideas, show what they are good for and how they can be built upon. Before that however, because dignity is such a

[1] Waldron, J. (1995). "The Dignity of Legislation." Maryland Law Review **54**(2): 633. and Waldron, J. (1999). The Dignity of Legislation. Cambridge, Cambridge University Press. the latter is hereforth abbreviated to DoL.

vast subject some delineation and discussion are needed to show the area of the legal- theoretical study of dignity which is most pertinent. After situating itself in the relevant discourse, the writing will conduct a step-by-step procession towards a definition of dignity of legislation in new terms. The view is to create a purposive definition. “Purposive” here means that the definition that is being constructed to be used for a specific purpose, i.e., to improve lawmaking practice. What follows then is the analysis of how dignity and form interplay and how form is substantiated, and what elements it has.

5.2 Overview Of The Legal Literature On Dignity: New, Old, And Different

‘Dignity of Legislation’ is not a new quest; it is an idea that has been macerated for decades. As mentioned, Jeremy Waldron has authored large amount not only on the dignity of legislation but on the concept of dignity outside of legal domains as well. His influence and contributions to the topic are not to be underestimated, to specify what they cover in the legal domain:[2] nearly the whole gamut of the law-dignity interplay. Waldron also has authored work[3] on the topic of the nature of human dignity without much interaction with law. The ‘dignity of legislation,’ however, was promoted with a paper and book with that name both published in the 1990s.[4] From these works, the important inroads he made were on two fronts: on connecting the procedural workings of legislation

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[2] Indicatively, from most recent going backwards in time Waldron, J. (2012). "How Law Protects Dignity." Cambridge law journal **71**(1): 200-222. also available as a video: Waldron, J. (2011). 'The Rule of Law and Human Dignity': The 2011 Sir David Williams Lecture - Professor Jeremy Waldron. Sir David Williams Lecture. Cambridge., Waldron, J. (2011). "Dignity, rights, and responsibilities." Arizona State law journal **43**(4): 1107. The Waldron, J. (2008). "The Dignity of Groups." Acta juridica (Cape Town) **2008**(1): 66-90. Waldron, J. (2007). "Dignity and Rank." Archives européennes de sociologie. European journal of sociology. **48**(2): 201-237.Jeremy Waldron, *The Dignity of Legislation* (Seeley lectures, Cambridge University Press 1999) Waldron, J. (1995). "The Dignity of Legislation." Maryland Law Review **54**(2): 633. Additionaly, a book review: Waldron, J. (2013). "The Paradoxes of Dignity - About Michael Rosen, Dignity: its History and Meaning (Harvard University Press, 2012)." Archives européennes de sociologie. European journal of sociology. **54**(3): 554-561.

[3] Waldron, J., M. Dan-Cohen, W.-c. Dimock, D. Herzog and M. Rosen (2012). Dignity, rank, and rights. New York ; Oxford, Oxford University Press.

[4] In the article, when Waldron asks “What would it be like to develop, for the philosophy of law, a rosy picture of legislatures that matched in its normativity and, perhaps, in its naivete the picture of courts-"the forum of principle"-that we present in the more elevated moments of our constitutional jurisprudence?” p 640 note 29 he introduces the problematization that making law in legislatures is not on the same level of recognition or attention that using rules is. This idea is endorsable and at fundamental odds at the societal tendency to look first to legislatures when legislative change is wanted.

to something bigger than boring protocol, and on mapping out how legislation is often neglected or demeaned by political, legal, and constitutional theory.

Considering it in its entirety, Waldron's work is the most relevant for the project at hand, specifically the meaning of dignity in the context of legislation and legislating. Specifically, Waldron's point on how legislation *is* dignified and how there are authors- who also influence partakers in the legal enterprise- who show undue *indignity* towards legislation. The indignity comes to undermine not only the process of lawmaking, but the polity's fundamental constitutional choices. These points are especially important for the normative argument on why practice should upkeep dignity for legislation. Before progressing into a specific overview of Waldron, it is worth giving a whistlestop tour of the vast literature on the intersection of law and dignity. This is valuable to situate the discourse in its intended environment.

5.2.1 Dignity In Legal-Theoretical Scholarship

Scholarship on the meaning and manifestations of dignity covers vast array of meanings in law, policy, economics, ethics, and even the hard sciences. So much so, that that some call dignity's thematic breadth its conceptual weakness.5 This is one of the main criticisms a concept of dignity: it becomes so broad and encompassing that the term descends into meaninglessness.[6]

Contrarily to this claim of meaninglessness, what some might call murkiness, I contend that the term dignity has reflexivity and allows adequate thematic

[5] There is even a line of argumentation followed by the psychologist Steven Pinker, that the broadness of the concept dignity is its demise. Citing Ruth Macklin, Pinker contends that the concept of dignity is worthless as devoid of meaning. He authored a piece called the Stupidity of Dignity where he wrote: "Almost every essayist concedes that the concept remains slippery and ambiguous. In fact, it spawns outright contradictions at every turn. We read that slavery and degradation are morally wrong because they take someone's dignity away. But we also read that nothing you can do to a person, including enslaving or degrading him, can take his dignity away. We read that dignity reflects excellence, striving, and conscience, so that only some people achieve it by dint of effort and character. We also read that everyone, no matter how lazy, evil, or mentally impaired, has dignity in full measure. Several essayists play the genocide card and claim that the horrors of the twentieth century are what you get when you fail to hold dignity sacrosanct. But one hardly needs the notion of "dignity" to say why it's wrong to gas six million Jews or to send Russian dissidents to the gulag." However, it is fairly certain that Pinker would not want to live in a world without dignity and there is slight worry that Macklin had something else in mind. See: Pinker, S. (2008). "The Stupidity of Dignity." the New Republic, from https://newrepublic.com/article/64674/the-stupidity-dignity. 14, September 2021

[6] Ibid

tolerance for better exegesis of complex social practices. The first reason for this is that it invites reflection about its meaning instead of making a strict yardstick against which to measure; the question is "what does dignity mean in this situation" not whether we have x amount of dignity. The second reason that its relative indeterminacy is a benefit in that it offers contextual adaptation.[7] Adaptation here does not mean that that dignity does not have limits but instead that dignity offers guidance and gives space for agency in multiple contexts. There is not set understanding from which it must be met outside its given setting. Dignity does not rely on the prescription of specific action to be met; instead, it invites those involved to act accordingly to the situation which they are presented.[8] This is a departure from most legal literature. Legal scholars mostly gauge dignity as it arises as a matter of rule content and adjudication, not what it is nor how to do legal/social enterprises with dignity.

To explain this further, dignity is mostly examined instrumentally[9] or as a proxy. The attention that is paid to the intersection dignity and law/legislation is characterized by intermittent dormancy over the last two decades with the main ideas and popularity coming usually in waves. It stands either as a legislative outcome, e.g., the respect of human rights, or as an interpretive puzzle, like when trying to make sense of the dignity clause of the German Grundgesetz,[10] or human rights in the principles of the UN's Universal Declaration of Human Rights.[11] Then there are certain application of human dignity where human dignity is the thing regulated by law, as we see in work

[7] This not meant in the way the philosopher of language James Ross means it: "Adaptation of word meaning to context is characteristic and not episodic in discourse, and it is a distinctive feature of natural languages in contrast to artificial and purely formal ones." Or if specific words mean different things in different discursive settings. Instead it is meant that the flexibility of the meaning of dignity allows for better contextual fit for it while still maintaining some structure. See Ross, J. (2009). "Contextual Adaptation." American Philosophical Quarterly **46**(1): 19-30.

[8] This is another point of departure from the original popularization of the term from Waldron, in that Waldron argues *why* Legislation is dignified in Waldron 1999a, where here the argument is *how* to get there. This idea will be expanded below in section 0.

[9] Instrumentally here is meant broadly; that dignity becomes a goal for legal arrangements to protect or a means to protect other values.

[10] E.g. Enders, C. (2018). Human Dignity in Germany. Handbook of Human Dignity in Europe. P. Becchi and K. Mathis. Cham, Springer International Publishing**:** 1-39.

[11] Carozza, P. G. (2013). Human Dignity. The Oxford Handbook of International Human Rights Law. D. Shelton, Oxford University Press**:** 0.

about euthanasia,[12] bioethics,[13] clinical trials of medical treatments,[14] and even pharmaceutical patents via the right to life.[15] Alongside these, there are substantial caselaw that pivots on human dignity to examine the legality of state acts with principles of human dignity as the matter of adjudication.[16] While this work is vast and undoubtedly important, it lays outside the aim of this chapter, which is does not treat it instrumentally but looks to subsume a specialized version of dignity into legislation. In terms of navigation of the field of study, what follows ahead departs from these human-centric ideas of dignity and is situated in legal theory, constitutional law, and legisprudence.[17]

However, it is mistaken to think that legal scholars have only dealt with dignity en route to other things or as the substantive object of law. They see dignity as a 'regulandum.' Recently work has arisen with a pronounced legal theoretical angle with dignity itself being a constitutive feature of law main topic. The work of Jacob Weinrib[18] and Michał Rupniewski[19] have shown great promise reading dignity into specific parts of the constitutional and social world. In this sense, they have much in common and have taken the torch from Waldron to keep this jurisprudential occupation with dignity at the forefront.

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[12] Biggs, H. (2001). Euthanasia, Death with Dignity, and the Law. Oxford [England];Portland, Or;, Hart Publ.

[13] Feuillet-Liger, B. and K. Orfali (2018). The Reality of Human Dignity in Law and Bioethics: Comparative Perspectives. Cham, Springer International Publishing.

[14] Lamkin, M. and C. Elliott (2018). "Avoiding Exploitation in Phase I Clinical Trials: More than (Un)Just Compensation." The Journal of law, medicine & ethics **46**(1): 52-63.

[15] Daniel Pinheiro Aston

[16] Indicatively, the dwarf tossing case: Manuel Wackenheim v. France, Communication No 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (2002), and Omega Spielhallen und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn (2004) C-36/02

[17] This is term is frowned on slightly because of its history in academic politics, but Luc Witgens who is often most associated with it defines it as: "name for the branch of legal theory that deals with legislation from a theoretical and a practical perspective" quoted in Ferraro, F. and S. Zorzetto (2022). Introduction. Exploring the Province of Legislation: Theoretical and Practical Perspectives in Legisprudence. F. Ferraro and S. Zorzetto. Cham, Springer International Publishing**:** 1-6.

[18] Weinrib, J. (2016). Dimensions of dignity: the theory and practice of modern constitutional law. Cambridge, Cambridge University Press. Weinrib wants to create a "general theory of public law that not only captures the distinctiveness of modern constitutional practice, but also delineates the obligation of all states to bring themselves within its parameters. The animating idea of this theory is human dignity, conceived in terms of the right of each person to equal freedom. By systematically unpacking the normative, institutional, and doctrinal ramifications of this simple idea for the public law relationship between rulers and ruled, a theory illuminating constitutional practice materializes" p. 3

[19] Rupniewski, M. (2023). Human dignity and the law: a personalist theory. Abingdon, Oxon;New York, NY;, Routledge.

To summarize their work in short:

Weinrib takes a Kantian line to build a view of public law anchored in the dignity of those who are subjected to the public authority. The main idea is that dignity is an important determinate in the application of political power withing the endeavor of constitutionalism. For Weinrib, political power is organized in a way that is "adequate to the dignity of all"[20] for it to be democratic. What is particularly interesting about his work is that he sets a constitutive role for dignity in the democratic space. "The exercise of public authority must be made accountable to the inherent dignity of all who are subject to it"21 he argues. Dignity sets the need for accountability and therefore cements the need for judicial review of state action.

Michal Rupniewski takes on a similar project but does not center it around a defense of judicial review. He uses a personalist account,[22] in the sense of focusing on one's individual person to create an account of dignity that is inbuilt into law. His project is important because it attempts to draw a common ground between the two sides of schism he identifies within public law: on one hand, the regulation of public authority and on the other the dictées of a conception of good or common dignity through the mediation of judicial review.[23] So the active role of dignity is a central axis of the development of his legal- theoretical ideas, rather than an instrument or a policy goal.

Rupniewski's focus on dignity, which is centered on making sense of dignity's foundational role, holds for all areas of law. He starts with some philosophical foundations through which he develops his theory of dignity in law, the SPT (status of personhood theory). This theory stresses the necessity to recognize dignity of people as a principled basis in law. He calls this moment of recognition the Principle of the Status of Personhood.[24] The functional connection this

[20] Note 20 supra, 216
[21] Allan, T. R. S. (2018). "Jacob Weinrib, Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law, Book Review." University of Toronto Law Journal **68**(2): 312-318.
[22] Personalist here is based on the idea that "Persons do not exist as replaceable specimens or as mere instances of some ideal or type but exist rather for their own sakes" John F Crosby quoted in Rupniewski, supra nt. 20. P 70. This a more specific account of the worldview that based on the uniqueness and inviolability of person.
[23] "Justice denies the adequacy of what authority establishes. Authority denies the actuality of what justice demands" Ibid, p 12.
[24] See note 20.

conceptualization of law and dignity is facilitated by the SPT. The SPT informs the interpretation of law by stipulating that individual personhood must respected. Drawing from philosophical works of Karol Wojtyła[25] and Tadeus Styczén,[26] Rupniewski argues that the relationship between dignity is not a chance alignment between a conception of good and the law but instead indicates an inbuilt connection between "legal activity" and "natural personhood." He then builds this into a theory of the rule of law, which respects the dignity of individual personhood. While not directly relevant to a discourse centered on the creation of legislation, there are some reflective ideas to be had, especially the idea that dignity is not solely an ideological commitment but can, under conditions, be a functional lynchpin to a broader social enterprise (In Rupniewski's case ordering via law). Just like Weinrib, his theses take a rich constitutive understanding of dignity into jurisprudential and legal theory, instead of ad hoc application of legal problems surrounding the administering of human dignity. Both Weinrib and Rupniewski do not treat dignity as a legal material, like a contract, a trust, or a right, but a building block in their respective analyses of jurisprudential ideas.

The work of both is much closer to the ideas of dignity in this project. While the thematic overlap is limited to this thesis, their work parallel the idea that dignity can be part of normative componentry in a legal/political landscape. They find dignity in the legal plane as a constituent or at least a requirement. They join Waldron in departing from legal analyses which work to interpret dignity in as a legal object, a *regulandum*, or an *interpretandum* of what is found in existing legal arrangements. The dignity expounded in this chapter might differ, but is built around the same intuition that there is intrinsic dignity in the composition of legal enterprises.

The deviation of this project is to create a specific conception of the dignity that is not bound to humanity, or our social connections, but to the political community and its undertakings. It will not focus on either the interpretation, the legal grounding, or the nature/manifestations of human dignity in the legal realm. Instead, it wants to make a defense of legislation by arguing for a

[25] Wojtyła's name was changed to John Paul II when he was elected Pope in 1978.
[26] Styzén was a Catholic priest and philosopher active in Poland during the 20th century.

functional necessity to treat legislating with dignity. Only then can legislation be true to form.

5.3 Waldron's Conception Of The Dignity Of Legislation

5.3.1 Background

It is interesting to share a succinct history of Jeremy Waldron's notable intertwinement with the dignity of legislation. It begins with a paper in 1994 which then continued in his 1999 book that share the name 'Dignity of Legislation'.[27] The paper is tasked with finding the grounds that dignify legislation as a process. A quote from Locke used by Waldron shows from when the inspiration for this came: "the institution which resolves our ultimate differences in moral principle, ought to be the same, and that the institution which combines these functions thereby embodies our civic unity and our sense of mutual sympathy. "This [the Legislature] is the Soul that gives Form, Life, and Unity to the Commonwealth."[28]

To start with the paper, Waldron wants to clarify the position of respect of legislation and bolster it. He wants to defend legislation from the systematic disregard of modern legal (and political) philosophy. This quest begins by acknowledging that there is a paradox, that on one hand legislatures are central to our understanding of states and legal systems; yet, on the other hand, they are regarded as of lesser importance, either as a pariah or a parvenu. Waldron decries this. The assemblies that make up most of our legislatures have a 'respectable pedigree"[29] because they are vital for democracy and the dynamics of representation they provide. If legislatures work correctly, they can be a miniature of the communities they represent. Despite this many thinkers, like Condorcet, Rousseau, or Bagehot, condense into a "very unattractive image of

[27] Op.cit. 1
[28] Waldron takes this quote from Locke's Second Treatise (11:212) *DoL* p. 65
[29] Ibid

legislation that prevails in modern jurisprudence, particularly American jurisprudence."[30]

Waldron obviously disagrees with having legislation as a less important or demeaned source of ordering, especially in democratic polities. In short, his argument is that the size of the assembly, usually in the hundreds, is indicative of their value for society as only a large assembly can give the wide range of opinion necessary for legal quality.[31] Waldron's intuition here is that the volume and the legislature's will to act as a representatives cannot simply be ignored. The same holds for the nearly ubiquitous constitutional choice of having such assemblies:[32] "Somewhere in our tacit theory of the authority of legislation is a sense that discussion and validation by a large assembly of representatives is indispensable to the recognition of a general measure of principle or policy as law."[33] The main intuition extracted from this work is that assemblies are respectable because of their *bona fide* democratic deliberation.

His paper is the base from which he built up later in the book. In the book, he unpacks the issues, names his opponents, and builds up for rule by assembly via the philosophical heavyweights of Kant,[34] Aristotle,[35] and Locke/Rawls.[36] The next section will detail some key points from the book but also from the entirety of Waldron's work on the subject. These points provide groundwork and some key points to contrast against for the restatement of the dignity of legislation that will follow. But to encompass both those roles they must first be explicated.

5.3.2 Waldron's Strategy To Dignity

To reiterate, Waldron 's aim i to "recover and highlight ways of thinking of legislation that present it as a dignified mode of governance and as a respectable

[30] Waldron gives gives the example of the following paper for American jurisprudence: William H. Riker & Barry R. Weingast, Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures,74 VA. L. Ray. 373 (1988)
[31] This position is derived as a general sentiment from the entirety of the work.
[32] Ibid 638-642
[33] Ibid 641
[34] *DoL* Chapter 3
[35] *DoL* Chapter 4
[36] *DoL* Chapter 5

source of law."[37] The status quo of disinterest is not satisfactory, especially given the centrality of legislation in modern representative democracies. Fighting against this stance gives Waldron the reason to change theoreticians' negative mindset on the matter. To do so, he builds the groundwork for this claim deploying the following steps:

1. Giving a detailed description of the landscape against legislation and asking from where and from whom does the disparagement come from? what is it its backing?
2. Enlisting mainstream philosophers that are not typically associated with legislation to show how their specific ideas can underpin dignity for legislation.
3. Then finally, putting this all together and arguing why legislation is dignified *because* of its normative position within a democracy *and* the characteristics that inhere in its procedural form. Legislation is dignified because its workings are. The dignification of legislation comes as a consequence of what Waldron calls "*The physics of consent."*[38]

These steps are tactically deployed to show how tried positions of philosophy come to debunk the negative sentiments and indignity surrounding legislation. Waldron then uses these as totality to indicate why legislation is dignified through a composite depiction of all the positive things brought about procedurally.

5.3.2.1 The Opponents

5.3.2.1.1 The Positivists

In the first step, Waldron recognizes a general dissociative tendency of jurisprudential thinkers belonging to different traditions to decouple law from legislation. He proceeds by reading this into a history of common-law jurists who think legislation is an inferior source: "Statutes" we are told "have no roots"[39] as

[37] 2, Waldron returns to this theme in other works as well "*legislatures* - is the topic to which philosophers of law have devoted least attention." Waldron, J. (1999). Law and Disagreement. Oxford, Clarendon Press. 21
[38] See section 5.3.2.3
[39] Waldron, J. (1999). Law and Disagreement. Oxford, Clarendon Press. p 9

they have not "worked [themselves] pure."[40] These common-law thinkers believe that common law is of better quality since it has been molded after long term generational practices. This is opposite to statutes which have "all power, and no heritage."[41]

Grafting this on the dominant understanding of law across academic disciplines, positivism, it would not be espoused. One would normally think that this position would not be accepted by the stalwarts of positivism, given the crisp source thesis available through legislation. Classical positivists like Hobbes and Austin should relish the clarity of sovereign dictates,[42] and the clarity of provenance that it would afford. What better than a clear rule of law that was explicitly posited as law by an empowered legislator. However, as Waldron notes,[43] modern positivists instead of being drawn to legislation, feel and exhibit a general unease. They shield legislation from attention, disguise it if legislative questions arise during adjudication, and ignore it ever happened altogether. Jurisprudence under the positivist pressure remains fixed on courts, the common law, and judicial reasoning. Mainstream jurisprudes, according to this narrative, hold the rule of recognition sacred, yet reserve it, in terms of focus and function, solely for the courts. Raz, sets an example of this position, "there is no reason why courts need to orient themselves to legislation at all."[44]

In essence, positivists treat law and legislation separately, and legislation is a child of a lesser god. Legislation becomes just pure records, without the attribution of any why it was made, by whom, or for what reason. For positivists "what matters is simply the intentionality of yay or nay in relation to a specific motion, not any hope, aspirations, or understandings that may have accompanied the vote."[45] This strikes a foul note with Waldron, and it is quite counterintuitive to think that the production of law through legislation carries no weight. This becomes especially evident it we fast-forward to today, where

[40] Ibid. p. 10
[41] Ibid p. 12
[42] *DoL, chapter 1*
[43] *ibid*
[44] *DoL* p. 15
[45] *DoL* p. 28

every breath of a legislature is recorded and live-streamed, intentionality is intensely abundant, and it is backed by volumes of reports.[46]

But why do positivists do this? Waldron gives some possible explanations for this. The first option is the intellectual connections of Hart and others to the polemics of political rationalism. Especially focusing on Oakeshott and Hayek who were "at the level of political theory, […] particularly dismayed by the emphasis on legislation and legislatures."[47] As they usurp the spontaneous and organic ordering of society. But he quickly doubles down, because there is inherent constructivism in positivist thought that is incompatible with anti-rationalists.[48]

Another explanation Waldron offers is the anonymity that law affords positivists. Anonymity here regards that the lawmaker is depersonalized. The law is the law, and the lawmaker is a faceless voice of the polity. Having to think of law without those pesky humans who contributed to its creation makes it easier to purify it from morality or politics. This maintenance of the ignorance of provenance soothes positivist theory by making law anonymous. It does away with the "deliberate intellectualization of politics"[49] because it leaves anything apart from the artifact bequeathed by legislation outside the scope of legal theory. Anything to do with legislation then becomes "pre-legal reasoning."[50]

Against this unsavory picture painted by many jurisprudes, Waldron builds his idea of dignity of legislation. The normative reason for arguing against the disparagement of legislation seems very agreeable and intuitive; the seriousness of what goes on in legislatures is not something to be brushed over and lost in

[46] For instance, see section 8.2
[47] Dol p. 23
[48] Anti-rationalism takes many forms, but specifically for Hayek: " [he] thinks this conception of 'rationality' is wrong both normatively and empirically. But his denial of a goal-oriented model of rationality does not imply that he himself, as a political theorist, does not act according to this model. His own recommendation to political actors (to follow an 'anti-rational', rule-governed way of choosing measures) may well be interpreted as a case of rationality in accordance with the idea of 'economic man' in its own right; […] Hayek also makes use of another notion of 'rationality'. He argues against an epistemological rationalism associated with Descartes. This kind of rationalism concerns the epistemic foundation of knowledge, not the choice of action from subjective values and beliefs. Yet there is no self-evident logical connection between these two different notions of 'rationality.'" Lundström, M. (1992). "Is Anti-Rationalism Rational? The Case of F. A. Hayek*." Scandinavian Political Studies **15**(3): 235-248.
[49] *DoL*17
[50] This phrase is attributed to Joseph Raz, *DoL* p. 25

anonymity, after all. Waldron's point d'appui against the contra-legislation view also starts from a reason point that his opponents forget how central legislation is to society. Their position represents a skewed understanding of reality, as all that effort and scrutiny surrounding legislation is lost, with no reason beyond positivists' ease of keeping a clear theory. In this way, Waldron's conclusion that "quest for institutional neutrality in legal theory is largely misguided"[51] is justified. What can be taken from this reading of Waldron, is that demoting, bemoaning, or ignoring the acts of lawmaking strip necessary attention from legislation. Without this attention, it will be much harder to make lawmaking better, and positivists and common-law theorists, considered above, are not helping.

5.3.2.1.2 The 'Somewhat-cynicals'

Apart from the positivists' stance, there is theoretical grouping that undermine legislation according to Waldron. These however are not clearly jurisprudential nor clearly within political theory. This grouping's ideas have to do with the nature of the workings of modern legislatures, namely their size, the way they decide, and their legitimacy. And will be taken on one by one below. Generally, though, their commonality is that they cast a negative light on legislation by doubting that a legislature's modus operandi and characteristics are worthy of dignity. They often do not think there is another better system, but legislation as we know it today is at best a concession which society acquiesces to. From Waldron's depiction of these kinds of ideas, those that stand out are: That majority voting is always going to be a failure,[52] any voting is arbitrary,[53] that the size of legislatures makes legislation lethargic,[54] and that majority is a sign of self-interest.[55]

To explain how each instant of critical attitude is portrayed and answered to by Waldron:

[51] Law and disagreement 76
[52] *DoL* p. 151
[53] Ibid p. 127
[54] Ibid p. 31-34
[55] Ibid pp. 47, 78, 159

The first criticism is that majority voting, the mode of decision making employed by legislatures, signals a failure of deliberation. Since in ideal terms, deliberation must end in consensus is not reached that is by default a failure as that consensus is the utmost goal of deliberation. This view crystalized in the following quote from Friedrich Hayek: "deliberation aims to arrive at a rationally motivated consensus- to find reasons that are persuasive to all who are committed to action on the results of a free and reasoned assessment of alternatives by equals."[56] In other words, if something is hands-down the right thing to do in a situation, then it will be chosen as best. And those who disagree are also wrong. In the eyes of those who adopt this position, majority-voted legislation will always be a sub-standard means.

Waldron answer to this is that it is naïve in the conditions of politics; disagreement is not a fault but as much as an intrinsic strength of democracy as consensus. The fact that legislation can function despite disagreement and without total subjugation of the minority is a not only respectable but a triumph. Waldron likens disagreement to John Rawls's *circumstances of justice,* those factual aspects of the human condition, such as moderate scarcity of resources and the limited altruism of individuals, which make justice as a virtue and a practice both possible and necessary. "We may say, along similar lines, that disagreement among citizens as to what they should do, as a political body, is one of the circumstances of politics."[57] And continues, "disagreement wouldn't matter if people didn't prefer a common decision; and the need for a common decision would not give rise to politics as we know it if there wasn't at least the potential for disagreement about what the common decision should be."[58] So the necessity of decision, and the fact that no one gets trampled in the process makes it legitimized. In essence, this is bolstered by the Kantian backing to the dignified nature of the workings of legislation that he expounds earlier in the book.[59]

The second and third criticisms begin from a similar position. They essentially argue that legislatures with majority voting procedures are arbitrary, and this

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[56] Ibid p. 151
[57] Ibid p. 154
[58] Ibid
[59] *DoL* p. Chapter 3

happens in a general and a specific way. The specific version of this criticism regards the size of the legislature is taken from thinkers like Blackstone, Rousseau, Mill, and Bagehot.[60] For them, legislatures are big and therefore inefficient at producing governance. How can an assembly of hundreds, perhaps thousands[61] work so well as to produce legislation when there as many opinions as members; without dissolving into a cacophony. Rousseau's version of this point is "How can a blind multitude, which often does not know what it wills…carry out for itself so great and difficult an enterprise as a system of legislation."[62] The detractors of legislation become quite cynical at this point. The indignity that comes from this comes from this cynicality. If one were to agree with them, they would be forced to look at legislation with indignity because what would be the point of endowing care and attention to a process that is arbitrary anyway?

Practical impasse may indeed come to legislation and lawmaking. It is not difficult to think of all the filibusters in the US Senate for instance.[63] Presumably, that is why plenary sessions are not the default, and there are many committee stages in many legislatures. Yet are any practical difficulties so damaging that it warrants indignity? In my view no, it is well known that legislatures are often raucous and seemingly dead ended, but that does not mean that the inherent fervor of disagreement is necessarily a fault of the procedure worthy of treating it with indignity.

Waldron also disagrees with this cynical position. He picks up the defense by not only arguing that this position has questionable merit, but that the multitudinous nature of legislation is dignified in and of itself. The firepower needed for this is taken from Aristotle, to whom a whole chapter is dedicated.[64] The basic argument taken from Aristotle to ground dignity is that a multitude

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[60] *DoL* p. 32

[61] The Houses of the UK Parliament are 650 for the commons and roughly 800 eligible members of the House of Lords, nearing 1500.

[62] 33, there is also a famous quote along these lines that is attributed often to Charles Kettering, a celebrity inventor and engineer of the 20th century: "If you want to kill any idea in the world, get a committee working on it."

[63] An example would be the notorious 24 hour and 18 minute filibuster of Sen. Strom Thurmond against the Civil Rights Act States, C. o. t. U. (1957). Congressional Record. S. o. t. U. States. Washington DC, Congress of the United States. **102:** 15561-17012.1957

[64] *DoL* Chapter 5

of people offers a better end- result than any smaller grouping of people. Waldron refers us to one of Aristotle's analogies to explain this:[65]

> *"{M]atters of detail about which men deliberate cannot be included in legislation. Nor does anyone deny that the decision of such matters must be left to man, but it is argued that there should be many judges, and not one only. An individual ruler, if he has been well educated by law, gives good decisions; but he has only one pair of eyes and ears, one pair of feet and hands, and it would be a paradox if he had better vision in judgement and action than many men with many pairs. Monarchical rulers, as we see even in our own times, appoint large numbers of men to be their eyes and ears, hands, and feet"*[66]

The strength of multitude therefore is found in the aggregation of talent within a large composite body. The thought goes, if there are more people, then more ability is put in the same room, and more good things are probable to happen. Even though at times this composition would slow the legislature down, large assemblies will have greater chance to produce quality decisions. Multitude is therefore a thing that can ground dignity for Waldron because it offers the best chance at a good outcome.

After the "too big to function"-function argument comes a salient criticism regarding the arbitrariness of majority decision. This is the general argument spoken about previously This argument comes from the comparison of the tallying of votes and the quality of a reasoned decision. There is no direct guarantee that the choice with the most votes is that which is the best. This simple yet striking remark, challenges the dignity of legislation as that legislation demands respect but that is hardly grounded in an arbitrary practice.

Waldron's answer this position of reducing legislation to just "head-counting" is overly reductive and does not contemplate all the safeguards and procedures that are set in place. Legislation has a host of thicker quality control mechanisms than just counting heads. This is evidenced by the fact that the vast majority seismic improvements of citizen's lives have been forwarded through legislating. This success story is not just arbitrary numbers.

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[65] *DoL* p. 102

[66] Aristotle, Politics, 1281b2–6, Note: I use a mix of translations found in Waldron and Sophie Smith's from Smith, S. (2018). "Democracy and the Body Politic from Aristotle to Hobbes." Political Theory **46**(2): 167-196.

A second answer for this is based on the respect for individuals that only majority decision making can provide. Majority voting keeps equality between all the alternatives and does not oust the losers. For Waldron, "[majority] respects individuals in two ways. First it respects and takes seriously the reality of their differences of opinion about justice and the common good. Majority-decision does not require anyone's view to be played down or hushed up because of the fancied importance of consensus."[67] And secondly, "by treating them [the individuals] as equals in the authorization of political action"[68]

There is, however, a second aspect of this attack on majoritarianism. There are those who doubt the motivation of those voting. That the "yeas" and "nays" are essentially self-driven, so it is the voter's best interest which are guiding the choice; and not the communal good. As Waldron formulates it, those "issues that legislation addresses are issues where important individual interests are being balanced, and if great care is not taken, there is a danger that some will be oppressed or unjustly treated. Yet voting - counting heads - seems the very opposite of the sort of care that justice requires, and that majority is a sign of self-interest."[69] This type of argument Waldron also finds in the lineage of Rousseau and others.[70]

Waldron however does not give a direct answer and slightly side steps this concern, by implying that this is also part of the circumstances of politics. When self-interested votes are cast, as is inevitable, it is just a misfire in the aspiration towards a better legislation. If deliberation happens to an acceptable degree, under conditions of good faith and having orientation to the best communal outcome, this danger will be at least mitigated. Therefore, if we are to stay on and ideal theoretical level[71] then even under conditions of self-interest, the dignity, and the character of achievement that both engulf legislation remain intact.

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[67] *DoL* p. 158
[68] *Ibid* p. 160
[69] Ibid p. 127
[70] Ibid p. 153
[71] Explained below in Section 5.3.3.1

5.3.2.2 The physics of consent

The last point I want to touch on from Waldron's theorizing of the dignity of legislation is his "the physics of consent."[72] Waldron through this argument makes an analogy to physics to 'mechanically' produce the necessary connection between the lawmaking enterprise and its innate human character. At is core, the physics are an explanation of how the forming of legislation works through an analogy to how physical forces work in nature.

In Newtonian physics, multiple bodies are either in motion or static and their interactions can be described in terms of mechanical energy. For instance, the inertia of body A keeps it in motion until it collides with object B. The collision's angles, forces, and energies create a new physical reality through mechanical interactions. If we want an object to travel towards specific direction, then the forces and the angles must line up for this. This is the spine of the analogy that is transferred to legislation. In the place of mechanical energy, Waldron places consent, which gives the force to legislative context: "Consent does not carry physical force; it carries rather moral force with regard to the purposes for which consent is required."[73]

The consent in question is the individual's consent to be legislate in a democratic way. It belongs to the partakers in who are equal in footing,[74] have the competence to express their opinions, deliberate, and ultimately show favor or not for a decision in question. The matter to which they are consenting is the decision to give transfer their political authority and subject themselves to the collective body. This outlines an alignment to individualism which at first seems counterintuitive since lawmaking in assembly is a collective. It raises the question how could a diverse group get together and chose one outcome and support it if consent is necessary?

This point is what the physics are trying to explain, how from all the various opinions within the legislature, one becomes that of the legislature without having to resort to any kind of domination of the minorities in the group. This

[72] *DoL* Chapter 6
[73] *DoL* p. 136
[74] "Free, equal, and independent" as Locke's description is quoted, Ibid

point is critical because if successful it shows how legislation retains dignity. Lawmaking in assembly is more dignified than other decision-making schemes, because the winning idea does not have to resort to domination to be chosen.

The connection between the physics of mechanical energy and those of consent that arises is through what Waldron calls a "logic of aggregation." With the example that "with three forces pushing north and two pushing south, the body will move north when the individual forces are equal."[75] Thus, insofar the members of the assembly are equal in stature, only their aggregation is the determinate for direction.

To make the logic of this analogy and the physics of consent work, Waldron caveats with 3 points:

- First, that no matter what the decision of the legislature is that it will continue as a whole after the decision is taken.[76] If the legislature where to disband thereafter then all of this would come to naught.
- Second, That the legislature moves as one in mutually exclusivity amongst the possible decisions;[77] this is to say that only one decision can be taken and the other possibilities that fail to aggregate fail to materialize; the legislature moves as a complete whole after taking a decision.
- Third that consent itself has a legitimating function which is inherent in the personhood of each individual partaker, and not connected to their 'political effectiveness';[78] the normative force of their individual consent is independent of merit and talent in the political forum.

What can be seen further from these points is that the physics in question are essential normative aspects that have to do with individual personhood[79] which then moves (gets transferred) onto a collective body. This is indicative not only of the routes of this idea in classical liberalism but also of the kind of democracy that Waldron has in mind. Enlighted, responsible, and individual actors

[75] Ibid p. 144,
[76] Ibid p. 139
[77] Ibid p. 141
[78] *DoL* p. 144, I take this to mean that the statesmanship or talent in politics of each individual.
[79] Taking this interpretation from the entirety of the '*Physics of Content'* chapter of DoL

cultivate a respectable and respectful environment for discussion, deliberation, and disagreement. Through multitudes and the physics of consent, this body then puts its will into a final decision form. It is content independent but not devoid of human values sourced from personhood.

In total, Waldron's physics of consent are an explanatory vehicle to show the connection between majority decision making and maintenance of individual personhood without use of domination/subjugation. This is done to underline the human connection to legislation and provide a solid foundation for having majority decision making ss a "dignified mode of governance and a respectable source of law."[80]

5.3.2.3 Bottom line of Waldron's Dignity

Through these points and counter points, a satisfactory image of what the dignity of legislation means for Waldron becomes evident. His view was to present legislation in a better light and as something worth of respect because, frankly, legislation is worth it. The dignity he built needs to match up with: "Our respect for legislation is in part the tribute we should pay to the achievement of concerted, cooperative, coordinated or collective action in the circumstances of modern life"[81] and this was built up through the points of argumentation analyzed above.

To surmise, Waldron builds his defense of legislation against the influential position that legislation is not worthy of dignity through counterpoints to the common criticisms. Briefly, for Waldron, rule by majority is the grounding of the dignity of legislation because: 1) it is the only decision-making system that gives equal weight to all of those who partake in it thereby equally respecting the individual identity of those who comprise it 2) Because social enterprises have more chances to make correct decisions through the aggregation of talent and abilities 3) that only through majority decision in the space of an assembly can minority opinions be respected.[82] The dignity of legislation therefore is grounded

[80] D*ol* p. 2
[81] DoL p. 156
[82] Waldron ties this idea into his theory of disagreement within legislatures, which states that majority decision making is the only means that give so much wait to individual opinions; that

in the way it works through the dignified mechanics of multitude and the physics of consent. It is dignified as a social activity, with the content of its production becoming important at a later stage. His defense is about why legislation but not how to make legislation with dignity.

His defense is grounded in a (classical) liberal mindset that tries to reconcile liberty without undue use of domination. Under ideal deliberative conditions, legislation is dignified because of the process by which it works- majority decision making- is respectful of individuals in a way that can only be done through majoritarianism. However, the majoritarianism that Waldron forwards is not a fight to the death of the various opinions until one prevails. Instead an opinion wins when it amassed a 'physics' of consent. Since there is no reference to the content of the decision, Waldron's theory is procedural and formal more than substantive. It does however have building blocks, those ideas upon which it is built, that are capable of orientating behavior making it also a normative theory.

In the next sections, I will argue that this dignity is worthy but needs more steps to orient itself towards practice. The dignity of legislation needs to do more than just silencing its critics, despite the worthiness of this endeavor. It is meant to an aspiration guidance for those partaking in legislation. To this end, in the following section the most useful points for this purpose will be chosen and scrutinized, and then it will be argued why dignity is need for a restatement.

5.3.3 New Direction

5.3.3.1 Comments on Waldron

Waldron's main points are foremostly important to give legislation a better position in jurisprudential theory. Those points are that the way by which legislation is made is dignified and that detractors must be pushed back against. This scope is a noble mission, but his incidental points were also important. For

at the beginning of choosing policy to be made into law, that each member of the assembly has equal footing. See *DoL* p. 148

instance, there is a lacuna for an ideal theory of legislation in jurisprudence.[83] There is much written for the role of law in society, its connection or not to systems of norms, its role, or its normativity. But, as far as legislating is concerned, jurisprudence dedicates few resources. There is not much attention for questions such as "What does it mean for legislation to made suitable for purpose?" or "What does it mean philosophically, socially, politically, legally, for legislation to work ideally?"

While not answered directly in Waldron, there is groundwork for such inquiries. Through the dignity of legislation, we have a meta-theoretical justification to investigate questions such as these. But they can go further too. They can be expanded into solutions for specific problems that surface in parliamentary workings and how law is produced.

I find these intuitions inspiring but also in need of a step further: The first path that need exploring is to investigate the teleological constraints of legislating, not just the following of nominated procedures of assembly, majority voting, and inter-institutional dialogue. The voice heard in democratic legislation is that of a *demos*. The *demos's* voice invariably will load the legislative procedure with constraints and condition the form of legislation. Waldron however arrives to take this next step in his theory. He chose to remain on the fact that legislating by assembly is omnipresent, the position that majority voting makes sense, and that diversity of opinion makes sense. When these three are put together we can see a dignity of legislation. This is a theory of *why legislation is dignified* not *how to legislate in a dignified way*. But Waldron offers an important stepping stone in his bottom line that legislation is a respectable source of law. In other words, an endearing feature of Waldron's theory is the normative aspect, which is that we should pay attention to legislation and make an ideal theory for it, *because* it is dignified. But this point needs strengthening as I believe it does not go far enough. The normative theory should not just be raising awareness of rampant theoretical disregard and doing away with cynics, but also fortify the legislating from abuse.

[83] Using the Rawlsian meaning of ideal theory. Which in this context means a theory of what optimal legislation looks like for an overview of the debate of this term see Thompson, C. (2020). Ideal and Nonideal Theory in Political Philosophy, Oxford University Press.

This is because making rules is vital in modern states, whose paradigm governance principally is representative democracy. Consequently, it is the cognizance of the mission of legislation itself and the fidelity to the *demos* that is the thing that needs to be stood up for, not (just) diverse voices through representation and the beauty of majority voting. Diversity of ideas and their equal footing in legislature are indeed good, but neither is the main feature of communal rulemaking, nor necessarily always good (for instance, idea- diversity in matters of reproductive bodily autonomy or fundamentalist positions in matters of faith). There needs to be a procedural underpinning that enables and empowers the legislature to legislate well. If legislating is investigated more closely, the communal character it has will show that the importance of these features is not so much a base of dignity, but an enabler of outcome.

Legislating is a communal undertaking for a communal goal and basing its dignity on the respect of equal footing of individuals detracts from its intrinsic teleological character. No one legislates accidentally or not having distinct purpose to legislate. If the view of this fact is not incorporated into the defense of legislation, there is a large part missing. Without this, what is left is a defense too atomized to make it useful for legislating in a way that is true to form.

Thus, a restatement of the dignity of legislation must consider the scope of legislating as a consciously chosen task and become more forceful in its reach. That is why I suggest shifting the framing towards a dignity of legislating. The primary result of this shift is to turn intently to the actual process of making rules, to the technique of lawmaking in good faith. This will make clearer what is dignified and take heed that lawmaking and how it is carried out is important. Legislating as a purposive craft therefore takes centerstage.

Shifting the focus in a more pronounced way towards legislating also allows more focused thematic coverage. That way, the accompanying normative theory can better consider the context, the teleology, and the reasons for legislation. The study will engage legislating like the Fullerian carpenter engaged in a purposive craft. But before the details and intricacies can be detailed, that there are more points of contention to be outlined in the following section.

5.3.3.2 Barking up the wrong Hyperion[84]

A point of improvement on Waldron's work can be his choice of opponents, the positivists and the somewhat-cynicals. These opponents demean legislation and, while they should be challenged, there are more prominent opponents to the dignity at hand. More prominent are those who usurp, constrain, and weaponize legislation and mistreat the form of legislation.

To understand who can be considered a usurper, we can build on the base built by Waldron. His theory does well to showcase roots that allow dignity and to depict legislation in a way that reflects its central position in our legal cultures and our states. The choice to do so in the realm of jurisprudence is a very agreeable methodological claim. This choice enables the consideration of the significant role legislation has in the creation of law.

However, it follows from my main contention with Waldron's framing that focusing solely on theoretical confines loses the view of the real problems that plague legislation as craft. And since this thesis aim is to improve practice, theoreticians cannot be the main violators of legislation's dignity as they are not partaking in legislating for the most part. The role of is left to those who try to make a farce of legislation;[85] those who undermine the dignity of legislating in practice are the greatest threat. Thus, a theory of dignity should principally create normative reason to resist those violators, and secondarily to charge against jurisprudential thinkers.

But who are these violators of the dignity of legislating? It is they who either do not pay due heed to the significance of the procedure of lawmaking, the normative inclusions in the form of legislation, or those who want to usurp it altogether. The next part of the thesis will give example of who these people are and how they work. In short for now, it is all those actors who use weaponize legislation to forward their aims disregarding crucial elements of form. They could be foreign states, supranational organizations, special interest groups, lobbyists, and others. It is those who do not care about the normative loading

[84] Hyperion, a coastal redwood in California, is the world's tallest known living tree.
[85] This will be laid out in greater detail in the next part of the thesis. For now, 'farce' can be a placeholder for those who complete the procedure but, in reality, are making a mockery of legislation.

included in making law through legislation as set out by the polity. The usurpers who fall within this category can be exemplified by the non-state actors of the problem scenario in Part III, but for now we can hold that it is not theoreticians who should bear the brunt of the critique of being indignant towards legislation.

The shift away from the opponents Waldron nominates has an additional implication. Namely, choosing legal or political thinkers as the main enemy of legislation adds layers of remoteness between the theory and possible normatively driven change for improving legislating. If the position "legislation is good, we should give it more attention" makes up the whole of defense then to get to any impact, it requires the intervention of many actors. As Waldron's opponents are the theorists who happy to ignore legislation and those who fire against it willingly, there is a gap that is created leaving out a large category, those who instrumentally work around or through legislation. Non-state actors, supranational organizations, other states, overly powerful special interest groups, these are the most dangerous for legislation. Not Hart and Raz nor Bagehot, Hayek and Oakeshott.[86] That is not to say that theoretical musings are not enough to reflect true indignancy,[87] instead that it is the practical consequences of ill-treatment that should take the majority of the attention.

In this sense, Waldron seemingly does not go far enough. His work, however, is still a major contribution. Especially, his "the indignity of legislation"[88] remains the most relevant to my project. The most important argument that Waldron puts forward is that legislation is intrinsic to the workings of states and their legal system. A normative implication of this argument is the importance of firing against those who ignore or demote legislation, the process of legislating and legislatures. Keeping the vital character and esteem of legislation as a respectable source of law does much heavy lifting for those involved in the enterprise of legislation. Though the distance between influencing theoreticians

[86] Mentioned as significant propagators of the indignity of legislation in chapters 2 and 6 of *DoL*
[87] There are many examples of influence, though. Augusto Pinochet and Margaret Thatcher are both notable heads of state influenced by Friedrich Hayek. For a short overview see Selwyn, B. "Friedrich Hayek: in defence of dictatorship." openDemocracy https://www.opendemocracy.net/en/friedrich-hayek-dictatorship/.
[88] Using the term from the title of Chapter 2 *DoL*

and giving input to lawmakers might be great, Waldron's views are in the right direction.

5.3.3.3 Other Points to Take Onboard

Waldron says something in passing regarding Locke's understanding of legislation which warrants extra attention. Based on the liberal thought that society is the coming together of individuals by consent, legislation as product and a process can be considered 'ours;"[89] the polity becomes owner of its distinct way of legislating. If we then connect this thought with Waldron's framing that legislation is an achievement, we are offered a handle on the normative importance that dignity of legislating can hold. An idea of dignity that is rooted in the communal character and ownership of legislation, a dignity that is rooted as a joint and several venture, in which all participants have a claim, for it is "theirs". A position that includes communal stakeholding in legislation can also give due rise to claims for the dignity of legislation. Dignity is needed to protect the "*ours*" of legislation. The communal decision to make legislation in a specific way.

This is probably a departure from both Waldron's and Locke's understandings of both lawmaking and dignity, because it is not rooted in the individual-ness nor does it need a clear juxtaposition of person and state to work. That still leaves plenty of salvageable material and ideas. Ideas of personhood, majoritarianism, and respect of the non-chosen positions are all virtuous defenses, albeit on a complementary level. We can exhume that it is better and more reflective of our communality as humans to legislate with more rather than fewer people, and for this reason we should pay more attention to legislation. There is dignity to be found in the wealth of knowledge and the quality of many voices through discourse, and all this is aggregated in legislation. This point is normative and trying to inspire attention to legislation, and it is persuasive in doing so. Yet it can only remain exactly that: a way of drawing attention to legislation, not theorize how to guard it against material

[89] *DoL* p. 76

abuse by passing things obviously against the what the form of lawmaking entails.

The position that Waldron formulates boils down to: 'legislation is dignified because assemblies and majority rule are good.' Whether that is on a Kantian, Lockean, or Aristotelian basis, it is a useful reminder that legislation should have attention. However, Waldron's idea is especially useful this position turns attention to the procedural. It gives an entry to examine the way we legislate on its own terms not to have to look to the content to grant virtue or vice to legislation. Evaluating the process separately than the outcome gives space for legislation to be something more than instrumentally beneficial. Legislation can become a social institution that we can respect in its own right.

Therefore, room for the intervention into dignity can be seen. A need to set the dignity of legislating that can stand up for the community's decision to legislate in a certain way. This steps far beyond Waldron's position which is not an overarching defense of legislation but a defense of assemblies instead of oligarchic/monarchic legislative mechanisms. It is more useful to decouple dignity from the way of making decisions and find it in the communal assumption of the enterprise of lawmaking. Dignity is about being true to the enterprise and what it asks.

My project therefore becomes about figuring out what this line of thought entails; What is needed to deliver dignity? What are the material necessities that will allow legislation to fulfill its potential and its role in each political community? Dignity is about being *able to* deliver the mission instilled in legislation by the political community. Therefore, instead of Waldron's focus of the dignity of legislation being found in democratic governance and breaking bread with opponents in political decision-making, the dignity whose exegesis follows is centered on the aims of political community and the alignment of the aim with the means. Thus, the dignity that is being sought is one of legislating.

6 From the Dignity of Legislation to that of Legislating

6.1 The Need for Rethatching

The previous sections exhibited how dignity is dealt with in legal scholarship, broadly, and a Waldronian idea of the dignity of legislation. Regarding information gathering, we found that the manifestations of dignity and law are in many areas. The intertwinement of legislation with human dignity is more about a product than a process, and the existing literature on the dignity of legislation is limited. In terms of strategy and methodology, jurisprudential framing was argued to be adequate to look for a dignity capable of providing direction for legislating. Also, Waldronian dignity was analyzed and found to be an adequate point d'appui for further inquiry. And, finally, it was concluded, however, that a shift from Waldron's dignity of legislation to the dignity of legislating is more beneficial.

Taking all these points into account, this part of the thesis reimagines the dignity of legislating (neé legislation) but wants to articulate it in a way that is oriented towards the partakers of the legislative enterprise, to be a guide for better legislative craftsmanship on a normative basis. It seeks to offer a more practice-friendly outlook that a) offers coverage to material challenges to the dignity of legislating and b) a toolbox to benchmark dignity that is useful to the partakers in the enterprise of legislation. The method employed will remain jurisprudential in nature because it is still seen as question of theoretical basis within the realm of law. In all, this part of the writing's scope is getting a coherent scheme of the dignity of legislating so that it can inform practice. It wants to employ theoretical tools in a fashion that John Dewey suggested: "not

to make theory practical but practice more intelligent."[1] Something, possibly, that Karl Marx would also agree with as per his 11th thesis on Feuerbach.[2]

Since form is what separates legislation as a kind, it is important to pinpoint what parts of form are important to underline in the search for practical guidance. In what follows, the thesis will build a new definition of what a practically minded incarnation of the dignity of legislating is and intends to do. The section will start with pointing out the mission at hand. Next, it will build definitions[3] of dignity until a satisfactory solution is achieved. In the spirit of definition building, the analysis will be constructed in three parts: the first is the term to be defined, the second is the *genus* of the definition, and the third is the *differentiae specificae*, according to conventional definition-making. Each one of these parts will be analyzed, and with careful consideration, the definition will be complete. The intended goal of this exercise is to produce something worthy of the scope, able to provide sufficient thematic coverage, and useful in practical guidance for the process of legislation. The dignity that will be developed will not be aimed at substantiating because legislating is a dignified task but how to practically carry out legislating in line with the dignity it demands.

6.2 Attempts At 'Dignity'

To begin putting together the definition, let us first consider that the dignity of legislating in this chapter and that which is found in Waldron's work are slightly counter-intuitive. Both conceptions of dignity, discussed above as rank and dignity towards legislation, disconnect from a directly human attribute yet still

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[1] This is paraphrased from a quote often attributed to John Dewey and is found in inter alia Sullivan, M. (2007). Legal pragmatism: community, rights, and democracy. Bloomington, Indiana University Press. p 96, and Stuhr, J. J. (2003). Pragmatism, postmodernism, and the future of philosophy. New York, Routledge. p 49. It rings familiar and native to think that if one knows more about a social practice, the decisions they make will be more informed and, using Dewey's word, intelligent.

[2] If we are to extend Karl Marx's 11th thesis on Feuerbach: "Philosophers have hitherto only interpreted the world in various ways; the point is to change it" Although indirect by nature, giving a resource that could educate the partakers in legislation could hit home and change the world; possibly.

[3] The seeming most apt form of the definition is that of genus plus specific difference, an idea that can be traced back to Aristotle, For overview see Lennox, J. G. (1980). "Aristotle on Genera, Species, and "The More and the Less"." Journal of the history of biology **13**(2): 321-346.

intertwine it with some type of human association. They act as the dignity of a human creation and direct human behaviour towards it.

The stance and purpose of dignity as argued by Waldron and suggest hear have a different nuance to most theories. If we take Michael Rosen categorization of the representations of dignity in the socio-philosophical realm, we can see a contrast. In general, Rosen herds together these different meanings into four "strands of the conceptual makeup."[4] Specifically, "The first was dignity as a rank or status—and human dignity as the status or rank proper to human beings just as human beings. The second was that of intrinsic value: something that, according to Kant, only human beings (strictly speaking, the moral law within them) have. The third was dignity as measured and self-possessed behavior. Fourthly, there was the idea that people should be treated with dignity—that is, respectfully."[5]

These categorizations of dignity often find motivational correlates in the law and legal theory. Such correlations of law towards dignity were especially prevalent during the time Rupniewski calls the "dignitarian movement" in law.[6] This movement came after the atrocities of WWII, where there was a determined effort to avoid the mistakes that led to the biggest war in history. Including human dignity into legal orders was employed as the tactic. This movement's most prominent poignant legalizations were the enshrinement of human dignity in international treaties such as the UNHRD and the entrenchment in constitutional documents or other legal arrangements.[7] Yet the intertwinement of law and dignity in such correlates is about human dignity exclusively, making it less helpful for defining a legal concept of a dignity of legislating.

What is more, the fields of legal studies mentioned in section 5.1 tend to fall neatly into Rosen's classifications understandings to solidify their positions.

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[4] Rosen, M. (2012). Dignity: its history and meaning. Cambridge, Mass, Harvard University Press. P.138

[5] Ibid, he also makes note of a specific subvariant what he calls "expanding circle narrative" in which dignity as status/rank is expanded to subsume all humans in the given community. This subvariant is endorsed by Waldron and has its lineage in Gregory Vlastos see Vlastos, G. (1984). Justice and Equality. Theories of rights. J. Waldron. Oxford, Oxford University Press**:** 41-76.

[6] Especially after the second world war as the world reckoned with its aftermath, it became a priority to enshrine and protect human dignity in entrenched legal arrangements see Rupniewski, M. (2023). Human dignity and the law: a personalist theory. Abingdon, Oxon;New York, NY;, Routledge. 52-60

Although there are notable exceptions, these fields of law operate in one of two ways: either they try to use law to protect some conception of dignity or to tease out the meaning of 'dignity' in a legal arrangement on an argumentative or interpretive level. These mechanisms, however, do not seem particularly well suited to our definitional task, which is a dignity that does not directly deal with individuals, nor can it fall under either of Rosen's four ideas. It would be hard to accept the dignity of legislating if we put them in these terms, as there is no consensus on what human dignity *is*.[7] Thus, all these legal ideas can be left alone due to the inherent remoteness of the dignity at hand with the general concept of human dignity. The ideas found in human dignity will not be contested or supplanted by the definition being crafted. The only thing they can offer here is a basis of contrast.

Like this, the focus of the definition can remain on legislating. There will be no definitional claims against those of human dignity, but the entire focus is on describing the dignity of a specific legal thing. In this sense, the process will have the view of a particular purpose, much like the approach of the chapter dedicated to Fuller above.[8] And that is to construct a notion of dignity that can stand as a quality assessment for legislation. It is not centered on the attitudes and dispositions of the partakers, nor does it come to describe human values. It refers to the respect necessary for the enterprise of legislation as envisioned. Dignity is not borrowed from humans, nor is it something that is stumbled upon when legislating. The dignity that is being sought after *belongs* to lawmaking.

6.3 A First Shot

To make a first a first attempt, let us first put together some of the ideas that have been put forth. That the level of dignity needed can be formulated from the content of form, as form, in turn, reflects that legislating is a deliberate and

[7] The editors make this point in the preamble of Duwell, M., J. Braarvig, R. Brownsword and D. Mieth (2014). The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives. Cambridge, Cambridge University Press. They make another claim, which is quite interesting as well, that there is an inherent tension between dignity and its enforcement and recognition. They contend that even though dignity is individual, it is recognized collectively. This rests on the idea that everyone agrees dignity breeds in individuality, but this too could be contested instead of being taken for granted.

[8] See Chapters 2 and 3

purposive enterprise. Putting this together coarsely into a could be formulated as follows:

> *The dignity of legislating is the situation where legislation is treated as is necessitated by its form and allows it to complete its purpose.*

6.3.1 The Descriptors Of Genus

This definition has the genus of 'situation' and the specific differences that could be written in shorthand as lawmaking, necessity, form, and purpose. While this definition grasps basic ideas, there are a series of issues already that need clarifying. The first concern is the genus of the definition. Already, the definition is slightly idiosyncratic. Both the Oxford[9] and the Collins[10] dictionaries do not use 'situation' as the base genus for any of their combined 15 definitions.[11] The above definition frames dignity as a stand-alone thing rather than being connected to a human capacity in which it is rooted. It is framed as something that needs protection, and 'situation' indicates a static idea. [12] This is not entirely representative of the human actions necessary to substantiate it; there needs to be a genus that allows for dynamic character and underlines the purpose-oriented activity.

As discussed above, Rosen pointed out that there are normally some human qualities or capacities to which dignity is connected. The genera he collected revolve around humans. It is a human attribute to access, accept, or reject dignity. This holds for rank/ status, intrinsic value (what Kant called Würde), measured and self-possessed behavior, and the claim that people should be treated with dignity. With these, the receiver and the actor are humans. However, the base understanding of legislating is not strictly human or personhood-based. Hence, the genus needs not to reflect human qualities, but that of a communal enterprise.

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[9] DOED (2011). The Oxford Dictionary of English. Oxford, Oxford University Press.
[10] Collins (2018). Collins English Dictionary. Glasgow, Collins.
[11] For the record Oxford has: "state or quality" and "manner or style" and Collins has bearing, state, rank, sense, importance, person, quality, repute, worth, loftiness, pride.
[12] It could be said that situation and static are even etymological decedents of the same root.

The character of enterprises is not conditioned on the character of those perpetuating them but on their characteristics. The human component is supplementary; bringing it forward would not serve our focus. Although this might be done via a legal fiction or a recourse to those whose actions make the enterprise happen, the 'humanoid' genera are not fitting for the dignity of legislation.

Jeremy Waldron, in his writings on human dignity,[13] chose "rank" as a genus and thusly falls into Rosen's first category of understandings.[14] He argues that it is the most appropriate genus when referring to aspects of social life and order.[15] But in the *Dignity of Legislation,*[16] this is not there to be found. Waldron's work on human dignity came later than the *Dignity of Legislation,* [17], and the latter's contention was a statement of programmatic intent against indignity rather than an attempt to define it. We spoke about these works in detail above. Still, the important takeaway is that, in the latter work, it seems that Waldron never drew an explicit connection between human dignity and the dignity of legislation. Therefore, the genus of rank is not necessarily common to both. This seems deliberate, as if he is speaking on completely distinct meanings of dignity, which remain legal in some sense. When speaking about the dignity of legislation, it seems Waldron is not arguing for status but instead is arguing that people should show dignity *towards* legislation.[18] A juxtaposition then becomes evident from Waldron's point of view that human dignity and the dignity of legislation are so intrinsically different that "status" cannot be used by both. Further, using the same qualifier for humans and the parts of the enterprise is rather conflating, so this is another counterindication.

The genus of 'situation' which was chosen above could fix this. However, both it and 'rank' have shortcomings in common: they are static, diagnostic, and cross-

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[13] Supra section 5.2
[14] See above at […]
[15] Waldron, J., M. Dan-Cohen, W.-c. Dimock, D. Herzog and M. Rosen (2012). Dignity, rank, and rights. New York ; Oxford, Oxford University Press.
[16] Section 5 note 1
[17] We should also note that *Dignity of Legislation* preceded *Dignity rank and right* by c. a decade.
[18] This is the main point of the eponymous book; see note 7. Notably, he says: "The Dignity of Legislation" and my aim is to evoke, recover, and highlight ways of thinking about legislation in legal and political philosophy that present it as an important and dignified mode of governance" p.5

sectional. This creates a mismatch between the static-ness of these genera and the character of legislation as dynamic and in flux.[19] The dynamic nature of legislation as an enterprise and its dignity should also have a genus reflecting an ongoing longitudinal[20] character. Thus, neither is genuinely preferable.

Although close, Waldron's claim showing dignity towards legislation is also not preferable because it does not seem able to capture the intrinsic dignity provided by the nature of legislation. Moreover, focusing on treating lawmaking with dignity shifts the focal point away from the procedure of dignity and towards the behavior and reception of dignity from individuals. This is a further distraction from the point that lawmaking is dignified.

Therefore, to tally the concerns, the genus of the definition should reflect that dignity is a concept attributed to humans or human actions, that the genus is dynamic, and that it serves the purposes of this chapter. But apart from the above static-ness, it also must avoid wandering off in ontological discourse of who has dignity, who acts with it, or what dignified way people should carry themselves since we are asking what the enterprise of lawmaking asks.

6.3.2 *Differentiae Specifcae*

The next step is to scrutinize the first definition's *differentiae specifcae,* those definitional aspects that set this dignity away from the others of its class. The original version of the definition offers the principal elements of purpose and practice. Yet there is a difficult balance between bottling all the features it needs and avoiding vagueness. To cohere with what the previous chapters have produced, the differentia must reflect form, function, purpose, and normativity. While form and purpose are explicitly engaged, there is a need for interpretive

[19] This term is meant in the way Karl Llewellyn meant it, that the content of the legal system is always in motion. Although here it differs because Llewellyn, as is typical for an American realist like himself, concentrated on the judicial creation of law- this is more at home in mixed/common law systems- whereas here this discussion is on the legislative creation of law. Yet the sentiment is the same. See: Llewellyn, K. N. (1931). "Some Realism about Realism: Responding to Dean Pound." Harvard Law Review **44**(8): 1222-1264.

[20] Longitudinal is meant here in as the opposite of cross-sectional, borrowing the terminology from data-collecting sciences. Cross-sectional means the inquiry focuses on a single point in time whereas longitudinal means the inquiry considers a longer non-momentary period of time see chapter 3 in Clark, T., L. Foster, L. Sloan and A. Bryman (2021). Bryman's Social Research Methods. Oxford, Oxford University Press.

gymnastics to pull out the other features that have been referred to so far. So, at this point, that means returning to the drawing board.

The first step in this direction is to return to the reason for making this definition in the first place. Namely, that the dignity of legislating much become a bridge between abstract ideas of form and practice. The specific differences enclosed must reflect the will to make the meaning of form tangible and operational.

Further, the employed viewpoint is best to have jurisprudential provenance. Such a viewpoint does not do away with the underlying theory and allows the definition to reflect that the way law is made is intrinsically important to the nature and character of law. The task at hand, therefore, becomes to create a conceptual tool to engage with and inform legal practice, which then is further focused on making the enterprise of legislation more 'intelligent' in the Deweyan meaning of the word.[21] Conceptual quests on dignity vary from why law should protect dignity, or that law is dignified that human dignity is the base value of political power, or that constitutionalism is charged with upkeeping and safeguarding.[22] Undoubtedly, they have a lot to say for humankind and our legal civilizations, but that is not the turn this analysis wants to take. The dignity of legislating sought after here is a much narrower concept with a more modest goal that ponders the implications of the initial decision to legislate in a certain way on the process of making legislation.

I want to argue for a dignity of legislating the achievement of which enables better lawmaking, capable of reaching its potential as a craft. The will is to create a singular but adaptable guide to assure the quality of legislating; that will be called the dignity of legislating. The choice is to create something capable of exhibiting what needs to be done, something that can help realize the aspirational element of legislation, to give, in other words, a target of excellence, a mark of lawmaking well done. This dignity is about legislating with craftsmanship.

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[21] Better to fulfill social aims

[22] For overview, see Waldron, J. (2011). "Dignity, rights, and responsibilities." Arizona State law journal **43**(4): 1107.

6.4 Second Shot

After taking all these concerns about the genus into account, a second attempt at the definition is the following:

> *The dignity of legislating is the measure of practice when the normative, evaluative, and protocolar features of form are adhered to in such a way that allows lawmaking to fulfill its contextually determined purpose.*

The improvements from the first iteration begin with the genus. The genus now is 'practice,' which is dynamic, inexhaustible, and longitudinal. In the first instance, this genus's temporal character expresses duration and an ethological-view.[23] The definition intends to capture how law making can line up with the form that is intended. In this view practice becomes a distinct focus. "Practice," here, represents a motion and a communal effort and, therefore, cannot be confined to a single glimpse or a snapshot in time. It needs temporal depther so that it can give a good idea of how dignity could repeatedly be achieved. The genus in the second iteration becomes inexhaustible as it allows infinite repetition without losing its stable elements. There must be, after all, something constant that can be repeated but not so narrow of a conception that it could be pinned down to repeating a ticking-the-boxes approach. Additionally, 'practice'[24] is longitudinal and to observe any practice, one needs time and longitudinal observation. Finally, practice implies that humans are practicing it. Even though it was argued that the legislation is not human per se, allowing for the inference that they are involved is an added benefit. This is important because legislation is framed as an enterprise perpetuated by purposive actions, not just something that randomly materializes. Practice implies an important group of people acting in a constant and at least somewhat stable way.

The specific differences also have been improved. One of the main shortcomings of the previous iteration was that it was perhaps not tangible enough.

[23] Ethology, taken textually, is the combination of ἦθος (= ethos in the sense of character) and -λόγια (study of) and is a field that examines animal behavior and natural conditions, like Dame Jane Goodall's study of chimpanzees. The important takeaway from this approach is that it necessitates 1) long-term observation and 2) observation under natural conditions to make sense of repeating communal activities.

[24] Practice here means the human acts of the parliament employed to make law.

Considering that the aim of this project is to provide tangible guidance to lawmakers, the idea of form needs to be organized and given a lens through which it can become operationalized. The greater specificity necessitated by such a task beckons breaking up the idea of form in smaller more wieldy pieces. Thick ideas of form incorporate large swaths of information so corralling it into subcategories helps. The suggestion that will be expounded on in Section 6.5 is that form should be broken up into three aspects: evaluative, protocolar, and normative form. These all focus on a single part of the picture of form which offers greater facility to pin the ideas of form down, thereby making following form into better practice easier.

Another important edit to the definition takes inspiration from Fuller's list of features for law.[25] In doing so, it latently connects the idea of dignity to aspiration. This happens through the inclusion of a prospective orientation towards the goal of legislating that aligns with fulfilling potential. Dignity is defined as not tethered to its achievement; what is important is that the stance is gauged on the foreboding of the aspiration to complete legislating well. The inclusion of 'purpose' in the definition indicates the teleology and the orientation that intrinsic in legislation. The purpose of legislation writ large is to make law in a way that is specific to the polity and maintains the distinctiveness of the enterprise.

However, there is still a danger to of collapse into a debate about efficacy. To this it is important to answer that the dignity of legislating this chapter shoots for is aspirational. Its about legislating well, and in doing so treating the legislating with dignity.

Another criticism that can be lodged against this definition is that it is not specific enough to lawmaking, whereby any social institution with a purposive character can be substituted for lawmaking. This criticism may indeed have firepower because if everything in a definition is amendable, how does it help define anything? This definition is meant to applicable in most situations of legislating through a given process. It must be both guiding and flexible enough to be applied in multiple contexts. The acts that equate to dignity might change

[25] Sections 2.1.7 and 2.1.8

from context to context but doing right towards legislating in a continual and non-exhaustive manner. It cannot be pinned down in one moment, so there must be wiggle room in the shape of contextual adaptability and reflexivity.

Apart from this, the form descriptors in bolster the adaptability while maintaining the prominence and lawmaking-specific nature of form. Their openness can also assure moldability and preciseness for each contextual setting. It is, therefore, essential to articulate what each of these means. What follows will attempt this and will also be tasked with identifying the questions the partakers in the enterprise legislation must ask to determine what form means in their respective contexts. However, the analysis will clarify what it means by form and what it takes on board from Fuller.

6.5 Three Elements of Form

This section is meant to making the aforementioned classifications or groupings that will help form become more tangible. The three groupings being forwarded are protocolar, evaluative, and normative from. In terms of deployment, these groupings are not to be thought of as a closed typology but as modes of form or type of content that can be drawn from form. Thus, organizing the inquiry around these characterizations can make evident what the form of legislating is asking for.

The view being supported is that the dignity of legislating is a question of entreating the necessary form to a competent degree. Therefore, its focal point is the enterprise itself. This Dignity's primary concern is not esteem or the inherent worth of the people partaking or those whom the partakers represent. The craft of lawmaking and what informs its potential creates the focal point. is This section will continue the progression towards the articulation of the dignity of legislating by qualifying what form means in this context and explicating the protocolar, evaluative, and normative elements of form.

These descriptors want to capture the thicker notion of form borrowed from both Lon Fuller and Jeremy Waldron. They have laid markers for thick-type conceptualizations, albeit for different topics. As will be briefly outlined later, Fuller pursued a broader meaning of form to see what is needed for law to be

and act law.[26] Waldron did much the same in his work when he sought what the rule of law required.[27] The dignity of legislating will take this approach in an entirely new direction; it will look to articulate, or at least give the tools to articulate, what form is necessary to fulfill legislation's purpose. The intention is to enable dignity, to show what means one can take from form, not to dictate specific behavior.

Moreover, it is important to reiterate that the view of form is transferred from the framing in Fuller's theory of law,[28] whereby law and its making are both is seen as a social enterprise. The implication of this framing is that it addresses legislation as being a never-ending process, forever in motion. This renders the view capable of capturing the dynamic nature of lawmaking. In the following, any character of form that will be unpacked is in view of inexhaustibility and continuous longitudinal movement rather than a description in a single moment in time.

Apart from this, the view for this definition is procedural but in a very specific, slightly idiosyncratic manner. Procedure, after all, is the process by which form is fulfilled or something becomes complete.[29] But the form being investigated includes things that are wider than just ticking the boxes of the rules of legislative procedure. It is a meaning of the procedure and form that hinges not on superficial completion of prescribed steps but adds necessity brought by being able to fulfill aims. In this way, it is not purely procedural[30] to borrow the term from political theory. Procedure can also carry things beyond formal completeness; it can involve the teleological achievement of legislation to fulfill its purpose. For this to happen reliably, it must depend on a clear scope for

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[26] Chapter 2

[27] Concept and the rule of law Waldron Waldron, J. (2008). "The concept and the rule of law." Georgia law review (Athens, Ga. : 1966) **43**(1): 1.

[28] Chapter 2

[29] "the formal manner in which legal proceedings are conducted" is the definition in Law, J. and E. A. Martin (2009). Procedure. A Dictionary of Law, Oxford University Press.

[30] I borrow this formulation from Fabienne Peter, meaning that if the steps of the procedure are met then they are legitimate. She expounds this in the context of democratic legitimacy, but here is merely transferred to the constituting of legislation, for more on this approach: Peter, F. (2008). "Pure Epistemic Proceduralism." Episteme **5**(1): 33-55. Pierre Rosevale on the other hand calls this just 'procedural' in the same context Rosanvallon, P. (2011). Democratic Legitimacy : Impartiality, Reflexivity, Proximity. Princeton, Princeton University Press.

procedure, which will be provided by the ideas of protocolar, evaluative, and normative forms, illustrated below.

6.5.1 Breaking Down Form

6.5.1.1 The Protocolar

Protocolar form is the character of form that is most familiar to lawyers and jurists. As its name implies, it is the face of form that has to do with identifying the steps of the protocol that are necessary for legislation to come into being. When all the steps a legislature is tasked with have been taken, legislation is considered promulgated and fully incorporated into the legal order.

Protocolar form typically includes all those measures that create legislation: the introduction of a bill, its discussion, committee work, committee voting, plenary discussion, voting, transcription, and final adoption/ publication. These can be seen with various mechanisms across all states governed by representative democracy.[31]

The legal framework for protocolar form is found in the materials of constitutional law. These may include constitutions (the documents), standing orders of parliament, house rules, and other kinds of special internal legislation.[32] Custom also has its place in identifying protocolar form as is found in states like the UK, where much of constitutional law is unwritten.[33] Protocolar form does not cover the minutia of the steps themselves, like the need for an absolute or relative majority. But it is better understood as that part of form where all the procedural steps to reach formal validity have been completed. The word protocolar embodies the formal completeness of the acts of lawmaking and is preferred as a terminology to "formal" or "procedural." This is

[31] This is described in detail in many constitutional law handbooks of the corresponding states
[32] Many states rely on codification for these things: e.g. the Standing Orders of the Hellenic Parliament (Κανονισμός της Βουλής των Ελλήνων) available at https://www.hellenicparliament.gr/en/Vouli-ton-Ellinon/Kanonismos-tis-Voulis/ or the UK standing orders https://www.parliament.uk/business/publications/commons/standing-orders-public11/
[33] Parliamentary conventions are cherished UK customs, e.g., that the King/Queen is not allowed in the House of Commons or that the prime minister must seek approval for military action Strong, J. (2021). "Did Theresa May Kill the War Powers Convention? Comparing Parliamentary Debates on UK Intervention in Syria in 2013 and 2018." Parliamentary Affairs **75**(2): 400-419.

because the former is pleonastic, and the latter seems too ambiguous, especially after considering the discussion on "Pure Procedural" mentioned above.[34] What is wanted with this term is the form, which was called the ticking-the-boxes approach.

The idea behind protocolar form is more at home in civil law systems, where the native vocabulary describes it within principles such as the German Formgültigkeit, French formelle, and Greek τυπικότητα (tipikótita). The role of these principles is essentially to dictate when something is constituted legally. Once the conditions of its existence are fulfilled, that face of form is complete. But by no means is that the entirety of form; it is only one facet.

Anglophone legal scholarship does not offer much by way of theoretical attention or controversy to the subject of protocolar form in lawmaking. A notable exception is the interpretation of legislative rules.[35] But this essentially is an application of legal/judicial reasoning regarding a rule governing legislative matters. However, a more relevant discussion is found in the intersection of law and collective politics. This can be seen in defenses of certain types of decision-making schemes within legislatures, which are, of course, governed by rules. Examples of such discussion are what we say above about majority voting and deliberation expounded by Waldron[36] or theories that procedure can capture ideal discussion during legislating, thereby bringing favorable results,[37] each of which emphasizes this feature of form. These proceduralist theories focus heavily on how the legislature makes decisions as a committed representative body. They hold that if a principle (whether it is a virtue of multitude like in Waldron,[38] epistemic promise in Estlund,[39] or anything else) is ingrained in the procedure, then any outcome is representative of their chosen principle insofar

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[34] See section 2.1.1

[35] For instance, like comments on R (Wheeler) v. Office of the Prime Minister [2008] EWHC 1409 see Young, A. L., C. Turpin and A. Tomkins (2021). Turpin and Tomkins' British government and the constitution: text and materials. Cambridge, Cambridge University Press. 174

[36] More prominently in *Law and Disagreement*

[37] This can also be extrapolated from the many different procedural conceptions of political legitimacy. Here the reference is to epistemic proceduralism of Estlund, D. (2009). Epistemic Proceduralism and Democratic Authority. Does Truth Matter? Democracy and Public Space. R. Geenens and R. Tinnevelt. Dordrecht, Springer Netherlands**:** 15-27.

[38] *DoL* Chapter 5

[39] See Estlund, D. (2009). Epistemic Proceduralism and Democratic Authority. Does Truth Matter? Democracy and Public Space. R. Geenens and R. Tinnevelt. Dordrecht, Springer Netherlands**:** 15-27.

as the procedure was followed in earnest. Protocolar form is essentially the main determinant of these theories' scope. However, this does not offer much guidance in articulating the dignity of legislating. Filling in the steps does not tell the legislator if it is in the right direction as per the polity's wishes. While procedure is important, the aim here is not to defend democracy during legislation but to find a way to live up to the commitment to make legislation the way the polity intends. So, while determinate of form, protocolar form cannot offer everything.

Building up a dignity of legislation seems to necessitate reference to this face of form, yet, as it has been repeated many times[40] until now, it is not enough. If we look solely at protocolar form, we cannot reflect if legislating is oriented in the right direction. Therefore, the entire picture cannot be seen with reference to the *modi operandi,* even though they are an important part of legislation. One cannot always holistically understand an enterprise from a partial view.

While protocolar form might be blatantly obvious in the context of most western states, it is neither too simple to exclude it from the form of legislation nor does it constitute the entirety of form, but only a base. The next face of form complements it by challenging us to interrogate the direction that form must take. What steps need to be done is given by protocolar form, but how well partakers perform them is a matter of evaluative form.

6.5.1.2 The Evaluative

Evaluative form describes a part of form that pertains to the evaluation of contextual correctness to be identified. When something is 'evaluative,' it typically means that we are looking to substantiate how much or how well something performs based on a chosen metric. Evaluative form, therefore, is that part of form that clarifies its contextual correctness where it identifies both the metric and the performance of the legislating at hand. It takes knowing the demands of context and weighing them against intended or current practice. The choice of the metrics will be detailed later, but staying at the bare bones level, the necessities to constitute evaluative form are a metric and acts to evaluate.

[40] In this chapter alone, "' ticking-the-boxes' is not enough" has been repeated six times.

The object of this element of form is not just identifying and evaluating the steps of the relevant legislative protocol as per what they are and if they were followed. It is hinged on determining the latent substantive concerns that come along with any social enterprise. These concerns are nominated by evaluating the context of legislating in a specific polity. Evaluative form is a mechanism of correctness.

It can be summed in the thought: "If something is created to fulfill a specific role, the purpose of completing this job provides the conditions for its form to be met." Hence, to evaluate means to approach the form of legislating considering all those features that arise from the context. This broadens form to include contextual correctness, not just procedural correctness. Therefore, the context must be evaluated to locate all features, whether inside or outside the law-making process. The inside faces are things like the *interna corporis,*[41] and the outside faces are whatever is not within the enterprise but belongs to the context, like higher-order norms like constitutions and treaties, but also fundamental political objectives and commitments to the rule of law or democracy.

To give an idea of what this looks like, examples of evaluative form are found in other approaches to social enterprises: that of Fuller in relation to installing a system of law and that of Waldron in that of democracy. Some things are expected but not given within the surface-level protocolar form.

First, let us consider this quote from Fuller:

> *"A legal system cannot lift itself into being legal by fiat. Its security and efficacy must rest on opinions formed outside of it which create an attitude of deference towards its human author (say, a royal law-giver), or a constitutional procedure prescribing the rules for enacting valid law."*[42]

[41] Supra at Section 6.1.1.2
[42] See Section 2.1.4

This position is about legal systems[43] and shows that there is more to its form beyond the steps that make it. Fuller uses the term 'deference' to show the need to step outside strict procedure and that there is more to the steps that are inherent to the enterprise of legal systems. Deference means shifting from the text at hand to empower someone's discretion, to defer to someone or something else. Consequently, there is already a step outside the strict confines of the protocolar side of law. Since Fuller intends to exhibit a distinctiveness appropriate to law,[44], one must consider the rich context in which the examined enterprise is set. Evaluation is necessary first to identify those features and whether the steps taken follow them. Only then can we get closer to a total picture of form.

In addition to Fuller's inclusion of 'deference' in his argument, his ideas about law encompass "Certain procedural purposes must be honored for a system to qualify as a system of law rather than a mere regime of arbitrary and patternless exercise of state power."[45] This idea further underlines the connection between the conditions that allow a specific social enterprise to arise as wanted and its context. The idea indicates what kind of things can be included in evaluative form. To state this within the terms of evaluative form more clearly, 'deference' and purpose are two metrics which protocolar form is then measured against.[46]

If the metrics of contextual correctness are to be meaningful, then there must be some way to adhere to them. This is where evaluative form steps in. In other words, whatever metric surfaces from examining the context at hand, the essence of the evaluation is to see whether the way form is employed can deliver it. In this example from Fuller, If legal systems are made to deliver the intended purpose (which is a distinct system of ordering, i.e., law), they must have the potential and the ability to function in a way that is suited to deliver their purpose. To get to this complex idea of form, evaluation is needed.

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[43] "System" is best understood as a broader umbrella term to capture everything legal in a single context.
[44] In light of the discussion in Chapters 2 and 3
[45] Summers, R. S. (1984). Lon L. Fuller. London, Edward Arnold. P 28
[46] Fuller engaged in this very step with the allegory of Rex II, supra at[….]

A similar evaluative approach can be found in Waldron's ideas as well. Specifically, let's consider the following quote:

"During the Cold War, we did not take seriously the titles that certain societies gave themselves, such as "German Democratic Republic" (GDR). We knew that the GDR was not a democracy, and we were not fooled by its title. Just because something called itself a democracy did not mean that it was a democracy. We do not pander to the authoritarians. For us to recognize a system as a democracy means that the system must satisfy certain substantive criteria."[47]

To put this into context, Waldron here is making an argument about the rule of law and the figurative example of what he considers a feigned democracy. Arguments of fact aside, we can see that the structure of his argument runs parallel to fuller. Namely, Waldron argues that superficial denomination is not as important as actually being what the name 'democracy' implies. In his view, to properly bestow the title "democracy," the governance of the state must *act* like one, and that needs to be evaluated. In Waldron's account, his evaluation of the form of democracy is that authoritarian rule is not truly compatible with being a democracy. Although this creeps towards an argument of efficacy, it is best read otherwise in that it at least presupposes that the question of ability lurks beneath the surface of formal completeness.

For this, 'democracy' was formally complete, but its workings did not deliver its title. Substantive considerations of alignment between the label and content of a social enterprise need to be made for form to be completed. And this happens through a series of determinations of substantive qualities. In this example, the assessment that must be made is: "is the GDR actually a democracy?"

The point stemming from both examples is that the abundant substantive considerations are accessible through evaluation. Completeness of the protocolar is needed. The point taken from Waldron's example parallels Fuller's point about legal systems. It has a slightly different nuance, in that it is not just that we must look outside formal denomination, but also to go into depth on how much of a quality something has. In this case, this would be to gauge how

[47]Waldron, J. (2008). "The concept and the rule of law." Georgia law review (Athens, Ga. : 1966) **43**(1): 1.

democratic is the 'democracy' we are looking at. Evaluative form houses this idea of looking into the context.

Both authors converge that bestowing a name on something is not enough and that evaluation of things outside protocolar form is needed to substantiate what social enterprises genuinely are. For Waldron and Fuller, the form they conceptualize must function in a way that preserves its distinctiveness and essence. This happens by identifying what criteria to evaluate form on whether the practice of protocolar form can promise the delivery of that metric. Fuller and Waldron use slightly different bases for this. Fuller bases it on pragmatic functional terms, whereas Waldron matches name with output. The ontological and methodological underpinnings are interesting because both relay the view that social institutions must be able to function in a way that can satisfy their teleology as set by function or by name. This is only accessible through evaluative mechanisms.

Therefore, when speaking about evaluative form, there is a double implication: First, there are features of the form of legislation that are capable of gradation, and to identify them needs some means of evaluation. Second, when social institutions are the object of conceptualization, their scopes, purposes, and teleologies also enter the frame through reference to their context. To apply this to the form of legislation, the evaluative face of the form of legislation comes from the evaluation of its scope, its aims, and its teleology. When legislation is meant to happen in a certain way and is meant to produce a certain product. In this vein, legislation must be produced in a way that allows it to function as it is meant to be. Lawmaking must function in a manner that preserves the ideals in the process. Thus, evaluative form is that part of form that helps us pinpoint what the context asks to be delivered and whether practice provides it.

6.5.1.3 The Normative

So far, the scheme has identified protocolar form, which indicates what can count as legislation by identifying the formal acts leading to it. It then described evaluative form, which assesses context and protocol and asks whether correctness is in place. Yet this scheme leaves out the propagator of the legislative process: the partakers. As an enterprise, legislation is propagated

solely by human activity. Yet, these two elements of form do not directly account for the interactions between the enterprise and the partakers. Protocolar form deals with rules, and evaluative form deals with context and correctness. Yet, nothing is there to account for the direction of human activity.

Earlier in the analysis of the enterprise of law,[48] we had seen a lacuna created by the lack of a concept that could bridge the gap between the normative connection of human activity and the enterprise of law. This gap was covered by the theorization of ethos and agency as means to give normative direction to lawmaking. Ethos helped by conceptually explaining the alignment of people with the enterprise, whereas agency helped explain how it is vital that humans still have a choice on how to act.

We can transfer these insights on the human component to the concept of form. The offered solution is what we will name the normative element of form. Normative form is meant to articulate what is dictated to the partakers to legislate well. It is the part of form that denotes the directional quality of the form of legislation. It is called 'normative' because it indicates imperatives and designates courses of action. But what does normative form even look like? Bluntly, it essentially is a renewed and different application of what in Chapter 3 was called normative pushes.

To explain this further, normative pushes were identified earlier in the context of grounding the Fullerian understanding enterprise of law.[49] These pushes can hold many shapes and content, but ultimately, they act as normative guidelines necessary to perpetuate social enterprises. In the context of Fuller, three normative pushes were named, each of which had a corresponding goal.[50] In short, these normative pushes acted like the lynchpin for Fuller's scheme of law in that they tied together scope and action through guidance. In that case, creating a system of law is the given purpose. That purpose endows the enterprise with a thick normative environment, within which the partakers can

[48] See Section 3.3
[49] Chapter 3
[50] For reiterations sake: reciprocity produced a normative direction for the enterprise of the founding and maintenance of a legal system, ethos produced fidelity to the process and maintenance of the legal system, and agency produced the type of normative environment which empowers and limits the partakers' possibility of action.

orient their efforts to maintain and continue a system of law. The normative pushes enabled the partakers because they offer the necessary attitudes to complete the purpose of the task at hand, viz., in Fuller, the installation of a system of ordering of law. Therefore, the system gives the partakers normative direction regarding its form.

Normative form is that part of form that gives partakers the 'ought,' the imperative of telling you how to act to fulfill it. It is the translation of the protocolar and evaluative form into direction for action. It is called normative because it is the element of form that gives direction for action. The way it manifests is through normative pushes. Normative pushes become another facet of legislation because they offer guidance toward proper completion when they materialize.

Normative pushes are an analogy to physicality but should not be confused with the 'physics of consent' analyzed above.[51] Waldron talks about 'pushing' and 'pushes,'[52], but these ideas are pronouncedly different: They start from individual consent and how that gets transposed into a communal decision. It is a mechanism of aggregation of consent but, as a basis, has individual thought. It is a ground-up construction starting from individual preference building into the collectivity. Here, these normative pushes start from the collective will of the political community and move downwards into the partakers. And the content of these pushes is encased in the form of the legislative enterprise.

Normative form is vital for getting the true weight of form and, thereby, the dignity of legislation because it offers guidance. Guidance for the partakers to assemble the dispositional stances that are necessary for delivering legislation as the context dictates.

6.6 What These Elements Mean

In total, these elements of form create a basis for the refocused dignity of legislating. They are called elements because they are mere parts of the complex

[51] Section 5.3.2.3

[52] "Each of the various opinions will tend to push the collectivity in one direction rather than another - but the "pushing" is now understood as the logical tendency of a proposition about consent rather than the physical force of the human who holds it." *DoL* p 137

ensemble that makes up form. Protocolar form describes the steps that need to be taken to ensure legal correctness, evaluative form certifies those steps are contextually correct, and normative form is the part of form that guides the partakers on how to act in reference to the enterprise.

As parts of the specific differences of the definition, these amalgamations of form have the first word in showing how to treat legislation with dignity. Yet there is more to qualify to complete this definition: the articulation of "*determined purpose*" found in this chapter's definition of the dignity of legislating.

To state the obvious, to have any determined purpose, there is a need both for someone or something that determines the purpose and the purpose itself. In the case of legislation, the best answer, as I will argue, is that the determination of the purpose of legislating is set by the polity's will to legislate in a specified way. This happens, for instance, when a polity creates an assembly to create laws. It inheres that the procedure must serve 'legislation by assembly.' To understand this purpose in detail, one must interrogate the context of the polity in question. But how can this be done?

6.7 The Question Of Content

The three elements explained above are meant to give a base to understand the practical application of form better. Yet, one must wonder where these parts receive their substantive content; the structure might come through, but how can this insight be bolstered with tangible content? Content, in this sense, is the directive that comes from form. This content varies between polities, as they do not ask the same from the legislative process. Therefore, the content of form depends on the constitutional environment of each polity, its protocolar foundation, its context, and the normative directions form provides. This section identifies heuristic tools to find where content lies. This might seem counterintuitive since the intended point is concretely identifying several elements of form. But that was just a skeleton; now, we can receive tangible content to build on the skeletons. This should be seen as something other than a treasure map to find the singular chest of gold coins of form. It is an indication of where to start to look.

What is more, the dignity of legislating has to do with the manner of making law, not its content. Its content is a whole different topic. The dignity of legislating is specific to how legislatures treat the acts that make legislation. The legislature's laws can be heinous or virtuous, but the appraisal of substantive merit is ultimately a different exploration. This part is meant to bridge the gap from theory to guidance.

Returning to the form of lawmaking, since it constitutes the building blocks upon which the political apparatus of the state is built, a good first place to start is theories of constitutionalism.[53] Theories of constitutionalism offer answers to what makes up the state, and starting from such theories, we get a compass to search with. These theories can give us the questions that need to be asked to get to the tangible content of form.

One theory stands out as an excellent option to take this on: Goldoni and Wilkinson's theory of material constitution.[54] The wayfinding tool offered by this theory is the identification of four ordering forces that make up the shifting relationship between the formal constitution and the whole of constitutional ordering in situ. These four ordering forces are political unity, constructed institutions, the existing social relations of a certain type within the polity, and fundamental political objectives.[55] By identifying these four ordering forces within a polity, we are offered an initial direction to start the search for content to form.

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[53] Constitutionalism I take to mean the act of organizing political power into legal institutions or "They mean not only that there are norms creating legislative, executive and judicial powers, but that these norms impose significant limits on those powers" Waluchow, W. and D. Kyritsis (2022). Constitutionalism. The Stanford Encyclopedia of Philosophy. E. N. Zalta, Metaphysics Research Lab, Stanford University.

[54] Goldoni, M. and M. Wilkinson (2018). "The Material Constitution." Modern law review **81**(4): 567-597. Goldoni and Wilkinson's theory portrays the four ordering forces (mentioned in the following sentence) as a dynamic tethering of a constitutional order, where, through opposing tension, these forces keep the constitutional order suspended above the ground. None of these four is overpowering because the dominance of one ordering force would mean a collapse of the constitutional order. There are different views of the material constitution, like Joel Colón Rios's more historical version. Like Goldoni and Wilkinson, he grounds the concept in Heller, Moriarti juxtaposed against Schmitt and Kelsen. However, Colón Rios stays in the historical version without applying it to modern constitutional conundrums. Instead, he examines the various meanings of material constitution to see if they provide justification to truncate the ability of constitutional amendment.

[55] Goldoni and Wilkinson, Ibid

Further, if we couple the framing of the 4 ordering forces with the above ideas of form, the search for the content of form becomes increasingly tangible. The mechanics is that we take a constitutional theory that can be used to interrogate the context, giving us what is included by form. If we take the approach of material constitution, we can create questions to identify the scope and the purpose of how to legislate in a specific context:

- What is the nature and who is in the political unity that makes up this state?
- What institutions preexist our inquiry and condition political power in this state in reference to legislation?
- What is the nature of the social relations in this state through that condition the creation and application of legislation?
- And, most importantly, what are the fundamental political objectives put forth by the polity that are to be fulfilled through legislation?

The material constitution is not the sole applicable theory to this idea of content-finding. Any theory that can break down the sources of embedded constitutional norms that affect lawmaking is good enough to fulfill this role. The well-known ideas of constitutionalism, like the legal or political varieties or even constitutional pluralism, could be successful at this task. Material constitution theory, however, seems particularly capable of interacting with the extra-legal sources of content that may be involved with content finding. Protocolar form is codified and is easy to find for that reason. The other two elements of form need such an exploration to find their content, and these theories can show the way in.

Therefore, engaging a nominated constitutional theory can give us the inroads to investigate the content of form; content is needed to gain tangible outcomes. The question remains, however, on what sort of content will be found. This is also a puzzling question, but one that is informed by the same answer as where to find the content of form. It is located in the constitutional context of the polity at hand. When the specific polity decides to legislate in a particular way, this carries over into the process of legislating. The decision engenders inescapable

features that make the goal of the polity's legislative will deliverable. This follows for both features that inhere in the enterprise's character and explicitly chosen features. These features are bundled up in form. Whether implicit/inherent or explicit/chosen, these features demand a lawmaking procedure capable of reaching that aspiration. This categorization is not meant to juxtapose but to show that polities can also decide the content of form.[56]

To show what this means in practice, an example of a feature that is implicit/inherent would be one that follows more general choices surrounding lawmaking. If a polity wants to be a democracy, it follows that a democratically legitimate multitude must approve its rules. Not being able to deliver such a vital goal is a formal problem. If such a multitude does not approve laws, they are *a priori* barred from reaching democracy as intended by the polity. This is the logic of the low-floor morality developed in Chapter 2. This logic is also present in the abovementioned examples of denomination mismatches that Fuller and Waldron. Viz, this is a logic by which undertaking a specific task – be it lawmaking democratically, building a wood frame for a house, or constituting a democracy- loads the respective process with a host of features that make it possible to reach the aspiration goal of the enterprise.

The second grouping of necessary features is more intricately connected to explicit choices. It follows that in a polity that seeks to employ a specific character on an already narrowed fundamental aim, the necessary features get further specified. For instance, this is the case when a polity seeks to employ a specific kind of representation. It would then follow that its lawmaking process will have to employ that particular method to reach the goal that follows that choice. To make this more tangible, let us think of a polity that espouses federalism and wants to create a voting procedure that allows equal representation of its citizens and on behalf of its territorial subunits of governance. If this were a fundamental basis for that polity, then the state apparatus would need to feature a system of representation that would reflect this explicit choice. This can be seen in lawmaking systems like the bicameral

[56] Both explicitly and by virtue of general constitutional choices

legislatures of the United States[57] or Germany.[58] In both states, the lawmaking process is designed to formally mandate one of the assemblies to represent the interests of territorial subunits, as they have a direct voice in the legislature.[59] This is juxtaposed against the popular interests represented by the other house in the legislature.[60]

An alignment is evident through these choices in each constitutional architecture. Specifically, we see content being given the form of lawmaking in which procedure and fundamental state teleologies align. What is essential, therefore, from this content-finding exercise is that fundamental objectives of the polity[61] need to provide content to the form of lawmaking and become embossed into the procedure.

Generally, representation is not by nature necessary content of form but becomes necessary insofar as it is mandated in context, just like anything else. As seen in the example of the bicameral legislatures of the US and Germany, the simultaneous yet separate representation of the territorial subunits and the folk population became imperative to both countries and, therefore, informed fundamental constitutional facets. This provided content to form, which then was morphed accordingly. This is not a prerogative of this or any representation type. Identifying specific representation models, like the delegate[62] or trustee[63] models of representation, could also receive similar treatment. The abstract architecture is that the form of legislating must be capable of delivering these constitutional aims.

In all, the content of form is necessary to operationalize these abstract ideas of form. To find the details of the who, where, and what provides the content of form, some kind of examination of the context needs to be carried out, as the

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[57] With the Senate and the House of Representatives in Congress
[58] With the Bundestag and the Bundesrat
[59] In the case of the US with each state having equal number of senators, and Germany having a mandated envoy from each Länder to represent that Länder's interest in the Bundesrat.
[60] The House of Representative and the Bundestag whose seats are allocated according to population.
[61] Borrowing the language of Goldoni and Wilkinson op.cit. 56
[62] The Delegate model is the model where the elected representative votes in line with the specific wishes of their constituency, for more, see McCrone, D. and J. Kuklinski (1979). "The Delegate Theory of Representation." American Journal of Political Science **23**(2): 278-300.
[63] Conversely, the Trustee model is where the voters but trust in the good judgment of the representative; famously expounded By Edmund Burke.

content will vary from polity to polity. What remains the same is the need for lawmaking to be able to deliver these aims, whatever they might be. To engage in just such a search, a constitutional theory can help inform the inquiry into populating the content of form.

6.8 Making The Craft Of Legislating Better Through Dignity

To close this chapter, I will recap what was said and argue that legislating with dignity leads to better quality legislation.

To begin, the last sections tried to transfer the dignity of legislating from abstract ideas closer to practice. Dignity is meant as a standard of practice and a measure that the practice of legislating needs to upkeep. Form becomes the determinant of the action because the partakers can make sense of what they need to do by examining form. To make sense of form, various elements were described in depth, and a means to situate form into a given context was suggested through inquisitive questions. All of this needed special qualification, and after that, it became evident that the theory developed is a departure from the physicalist-Waldronian conception of dignity that was detailed before it.

The main update is to use the form of legislation as a base for identifying the dignity of legislation instead of engaging the virtuousness of majority rule as Waldron does. By doing this, the writing shifted the focus from the partaker[64] to the process itself. The dignity of legislation, after this shift, becomes an aspirational goal to fulfill. This dignity becomes itself a purpose and a function-oriented standard to be met. Waldron's conception was a bit different, as his view was to verify that legislation can be dignified. In contrast, this restatement is more about how to give legislation its due dignity. The underlying thought for the normative energy to do legislation is that in undertaking a social enterprise, there is a commitment to the political community to do it in a way capable of fulfilling its promise.

[64] Waldron's focus on the partaker is evident in the role of majoritarianism in his scheme as the justificatory footing for dignity.

On a cautionary note, Form might seem like a relativistic account and stipulation of measure. Form, however, is not radically indeterminate. Yes, indeed, form can feature variations, but its provenance and nature are articulated and made concrete in the same place in every context: the practice of polity. Observing the three elements of form makes it possible to envision what is wanted and what is intended from the polity. Indeed, this might lead to infinite variations of the form of lawmaking, but that does not make it indeterminate if all the parameters and elements of the form of legislation are taken into account.

With all of these in mind, dignity is, as a concept, more procedural, narrow, and purposeful. It is procedural because it deals with the ability of the process of lawmaking to be completed in a fashion that lines up with the aims of the polity that created it. It is narrow because it is not reliant on the quality of the content; as such, it is different from human dignity.[65] It is purposeful because it is designed to put the dignity of legislation into a toolbox and fulfill a specific role. It relies on the idea of thicker formality, as said above, which has substantive, normative, and protocolar features. Dignity is constructed and embossed with meaning by the initial commitment to an enterprise and the conscious orientation towards it. It tries to be a more precise way of saying *legislating with dignity is legislating how you are supposed to*, and how to do that is found by interrogating form.

Therefore, the discussion that followed has described what dignity is and what it is supposed to do. What is left is to identify where to look to find all those things that condition form and, in turn, dignity. We described briefly how to find purpose and the content of form, but now we must put that into practice.

To preface, the claim is that legislation and legislative practice reach an adequate level of dignity only when the conditions of form can be met. This idea regards a certain coherency, a lining-up of purpose and process. In this sense, it is aspirational, as it aims to ensure the ability to deliver, not the delivery of the intended outcome itself. Delivery of the aim cannot be assessed by the same means as ability as it needs to enlist a different retrospective mechanism to be

[65] See above Section 5.2.1

ascertained. The dignity associated with Form, contrariwise, is attained through prospective crafting. Lawmaking must avoid precluding the polity's initial goals for it.

Keeping with this view, what is left to do is to imagine the materials that shape form and, through that, a dignity of legislating.

Before that, however, I would like to place a thematic buffer to insulate the line of reasoning for the dignity of legislation from veering off track. First, the legislation that is important to this inquiry is what is made by representative assemblies in Western liberal democracies. Next, what follows should not be read as a principled defense of a specific sense of constitutionalist thought,[66] whether it is against classical liberalism, anarchic, republican, pluralist, or otherwise. The intent here is to make a claim about the nature of lawmaking, not to argue for the need for deliberation,[67] the embracing of disagreement in rulemaking,[68] or its favorability as a means of social governance. It is also not meant to give a definitive answer as to what kind of representation inheres by representative systems of lawmaking, whether it was Hobbes, Rousseau, or Burke who had a better deontic idea for the nature of representation. The writing's aim is slightly humbler. It is to highlight that when a kind of framework for legislation is chosen and deployed, there are a series of prerequisites-- features that allow and condition its success-- that follow it.

Therefore, the elected context in our case is representative liberal democracies found in the global north. And the context does not question the motivation of the method of lawmaking that is employed. This is not to say that legislation should be seen as infallible. This work is partly a critique, and we should be downright hostile to many legislative practices. It is not controversial to say that legislation is central to such states. Still, it might be controversial to say that

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[66] Constitutionalism as the principle that the application of political power by a state should adhere to a body of rules. It is taken as given that part of this political power is making rules.
[67] Cass Sunstein puts deliberation at the epicenter of modern republicanism as one of its key tenets, see Sunstein, C. R. (1988). "Beyond the Republican Revival." The Yale law journal **97**(8): 1539-1590. And, "To the republicans, the role of politics was above all deliberative. Dialogue and discussion among the citizenry were critical features in the democratic process." Sunstein, C. R. (1985). "Interest Groups in American Public Law." Stanford law review **38**(1): 29-87. 31
[68] Waldron has vehemently defended that the task of law is to create a framework in which society can remain well legislated in the face of the ubiquity of disagreement, see: Waldron, J. (1999). Law and Disagreement. Oxford, Clarendon Press. Part 1

doing so comes with a set of constituent acts and corresponding responsibilities to act that are imposed by form. The Dignity of Legislating is not meant as a substantive checklist or a list of features as Waldron and Fuller formulated.[69] Instead, it is a standard to aspire towards, which can be reached through interrogating the process of legislating in its own context and looking at it from an internal standpoint.

As a precursor to the next chapter, what follows is a working list of what the dignity that makes legislation possible can look like. It aims to draw from form and become adaptable to context for the reasons argued for in this chapter. The list is an assemblage of ideas of what formal commitments can ensure 'making possible.' It is a list of concerns aimed at the partakers to treat legislation with dignity. To feel the full extent and power of these points, they need unpacking. The next chapter is tasked with using limit cases taken from practice. The limit cases will show that failing to respect the things on this list means failing to respect the dignity of legislation.

[69] Waldron op.cit. 49 and Fuller in Chapter 2 of *Morality*

PART III

7 Conditionality a Laboratory

7.1 Introduction

As the first chapter of Part III, the aim is to bridge the idea of the dignity of legislation towards the level of practice. This section is split between setting the groundwork for examining the limit case and examining the dignity of legislating in situ.

The outlook of this part is to exhibit how to find the limits beyond which lawmaking can be misaligned with its form. The core claim is that the dignity of legislation is needed to do law correctly in terms of craftsmanship. This can be seen through examples of legislative practice in times of conditionality, as described below. Thus, it is the correctness that is being sought after.

This part of the thesis aims to highlight specific points of attention for the legislative process.[1] The points of normative attention, if fulfilled, give lawmakers indications of how to treat legislation with due dignity. The main concern is the correctness of the legislating that takes place and how that, in certain conditions, is not duly taken care of. The approach used mirrors Lon Fuller's allegory of Rex. But instead of deliberate fiction, the chapter will draw from legal developments of the 21st century to draw points and guidance about the limits of form and the dignity of Legislating.

The argument, further, is to show that the abstract idea of form can have real implications and can explain otherwise intuitive receptions to lawmaking. In the same way that Lon Fuller demonstrated how humans can err when constructing 'made'[2] law, the scope is to exhibit legislating's shortcomings. The analysis will build these accounts from the circumstances surrounding the legislative and legal practice in fiscal debt programs. First, The aim is to show that assimilating practice into theoretical inquiry is worthwhile. Next, it is to introduce conditionality and why it can be a limit test of our dignity. And finally,

[1] See Chapter 1

[2] Fuller made the distinction between "Made" and "Implicit" law which are distinguished on account that made law is purpose-built whereas implicit law is built of time and repetitive practice. Fuller, L. L. (1968). Anatomy of the Law. Westport, Conn. , Praeger. 57

it wants to show where room for practical consideration of improvement can be situated.

The dignity of legislating will be illuminated by means of examining pitfalls. An examination like this accordingly needs methodological attention. The pitfall-centered approach of this part will be constructed in a way that shifts from the allegorical, as seen in Lon Fuller's story of Rex II, to the ethological. I use the term "ethological" to cover the observation of the formal parts of lawmaking processes and see how they developed. Based on these observations, the will is to gauge the quality of lawmaking from a formal perspective. Until now, the analysis has been meant to be legal-theoretical or even legisprudential.[3] It has been careful to focus on the form of legislation and its normative implications while not veering the discourse into a political direction. This is not because there are no political implications in the realm of lawmaking but the theory that is being wrestled with wants to be situated within the 'middle-range'. A 'middle-range' theory of legislation, as defined by Mauro Zamboni, is a theory that is "a structure capable of channeling the messages coming from the political world into viable and concrete legislative products."[4] What is aimed at, therefore, is a theoretically informed understanding of legislative practice focusing on *delivering* the political element of legislative products.

Until this point in the project, the 'viable,' the 'concrete,' and the 'adequate' have been found in the normative dictates of form. The following chapter tries to show where the limits of form are and, thereby, find better ways to serve the dignity of legislating. I will argue that perhaps a *new* Rex is needed. Then, that conditionality is an ideal candidate case to show how lawmaking may be pushed to its formal limits, and that conditionality produced examples that highlight specific pitfalls to avoid if legislation is made as intended by its form.

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[3] Ferraro, F. and S. Zorzetto (2022). Introduction. Exploring the Province of Legislation: Theoretical and Practical Perspectives in Legisprudence. F. Ferraro and S. Zorzetto. Cham, Springer International Publishing**:** 1-6.

[4]Zamboni, M. (2019). "A Middle-range Theory of Legislation in a Globalizing World " Stockholm University Research Paper No. 70,(Available at SSRN: https://ssrn.com/abstract=3373134 or http://dx.doi.org/10.2139/ssrn.3373134). p 3

7.2 From Allegory To Pitfalls

Pitfall orientation can help bring out the dignity of legislating, and we can see that generally in many allegories and fables. Allegory was utilized in Fuller's nature-of-law arguments[5] to the same effect. The fictional story of Rex II provided a clean slate and gave room for a story of experimentation in lawmaking. The substantive aim of using Rex was to show that if there is a given purpose to law as a thing, then there are internally rooted limits that cannot be avoided.[6] It was through Rex's misses that Fuller was given the chance to sketch what things are needed for law to be true to purpose.[7] As such, Rex tried new approaches to lawmaking and failed. Much to Rex's disappointment, each failure revealed a new kind of problem. For each problem, there was an identification of a necessary formal feature that enabled law to act as 'law.' Each failure added to the list of features law should have, ultimately resulting in Fuller's list of canons.

Fuller's allegory, however appealing, has its limitations. Two that spring to mind are the direct consequences of concentrating legislative competence on a single person, like Rex II. The first consequence is that there is no externalization of what constituent concerns arise during legislation. All of the formation of legislation takes place in the *forum internum,*[8] the space where any individual thinks. This makes it impossible to observe the constituent acts of legislation. The difficulty brought by concentration makes the transfer of any insight to collective lawmaking a nearly impossible task.

The second limitation is how a monarch cannot give coverage to legislating in today's complexity. The simplicity of having a singular Rex II served Fuller's focus on the formal features of law. Yet the phase of legislating was sped through. Law was conditioned, formed, and communicated in a short chain of events culminating in the utterances of Rex's will. The monarchic story did not

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[5] Chapter 2 *Morality*

[6] Although David Laban challenges that Fuller's canons are solely procedural and regarding the vehicle 'law' and not its content per se. See above at

[7] Fuller thought that law was specific elevated means of ordering, therefore laws had to have these features otherwise they would fail that.

[8] Forum interna here is meant in the basic sense that there is a physical barrier between outside regulation and the ability to bear internal thoughts. This is outside the legal framing of the right to the *forum internum* within human rights discourse.

mention what was taken care of or neglected, nor the details of legislating. Just what came out of this process. Today's legislatures cannot fit this picture, given the elevated publicity and the fact they are (mostly) democratic assemblies.

These two points alone point to the need to drop the allegory of Rex. Rex II's story, however, is still valuable in several ways. The story illustrates how functional and formal mistakes can lead a purposive process astray, even in the presence of good intentions. Fuller utilized this coupling of form and mistake to underline what is needed to not fall astray, essentially making an *argumentum ad absurdum*. Methodologically, this chapter borrows from the illustrative aspect of the allegory of Rex yet simultaneously retains a tangible approach to finding misfires in their native practice-based environment. Practice, especially concerning the constitutive acts that make law, is a thorny subject at the intersection of law, politics, political economy, and material conditions. But, as Kyritsis and Lakin have pointed out,[9] the fact that there are multivalent enterprises simultaneously affecting constitutional practice does not mean that useful frameworks cannot be developed. Consequently, at least at first instance, the undertaking of this chapter to provide 'dispassionate'[10] points of attention to lawmakers is still possible. If the idea is to learn from the pitfalls of those making law, then there is room for a list of points of attention on how to avoid them.

7.3 Rex-As-Assembly and Rex *In Situ*

The idea of a king like Rex II in today's world seems relatively outdated. It is much more fitting for Rex to be subject to institutional constraints and thusly resituated to match today's world. This can happen on two fronts: first, we need to imagine Rex as an assembly, and second, to understand what the form of legislation entails, we need to investigate legislating in reference to its material context.

[9] Lakin, S. and D. Kyritsis (2022). The Methodology of Constitutional Theory. London [England], Hart Publishing. P.2
[10] Ibid

Nowadays, there is an evident tendency to step away from monarchies and hereditary heads of state on a global level. [11] It is true that rule-of-law states have more lawmaking assemblies than not. For instance, 19 of the 20 G20 states have legislative assemblies,[12] capable of producing and promulgating legal arrangements with autonomy in various degrees. Rex, therefore, today is not one Rex but best thought of as an assembly in the space of representative democracies.

What is more, tailoring the scope of this chapter to the model of representative democracy is needed to ease the articulation of the dignity of legislating. The reason behind tailoring the scope is that the typical form of governance and, as argued below, the inclusion of democracy *latu sensu* acts as one of the contextual limits to lawmaking.[13] Apart from the abundance of formal democracies, it is uncontroversial to say that it is the most prevalent and prized type of governance in the Global North. This should not necessarily be understood as a defense of democracy but as a recognition that representative democracy is the system of governance *par excellence* and considered a prized achievement.[14] Therefore, whatever follows is best seen as examples of how a representative democracy fails at meeting the formal requirements of lawmaking.

For the second point, there is an oft-quoted saying that those who like law or sausage should not inquire into how they are made.[15] This phrase means that

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[11] According to the V Dem quality index, there are more countries with universal suffrage and democratic governance than 15 years ago. See Lührmann, A., M. Tannenberg and S. I. Lindberg (2018). "Regimes of the World (RoW): Opening New Avenues for the Comparative Study of Political Regimes." Politics and Governance **6**(1): 60-77. Incidentally, there is one less monarchy in the world compared to 2 years ago, with Barbados becoming a republic as of November 2021.
[12] G20 is the tactical meeting of the world 20 biggest economies. It is controversial to dub all G20 states as democracies, but only Saudi Arabia does not have a formal legislative assembly (The Kingdom of Saudi Arabia has a "Consultative Assembly" which can suggest legislation to the King and his Cabinet)
[13] See Section 0
[14] That Democratic legislation is considered an achievement and a good thing is one of the key contentions/inspirations of Jeremy Waldron writing Dignity of legislation.
[15] Waldron, J. (1999). Law and Disagreement. Oxford, Clarendon Press. p.88 footnote 2 provides a nice hunt of this quote's provenance: Through an opinion of Justice Scalia (appeals court judge at the time) in Community Nutrition Institute v. Block, 749 F.2d 50 (D.C. Cir. 1984) traces it to Otto van Bismarck, although notes that both Benjamin Disraeli and Winston Churchill have both gotten it attributed to them. Since Waldron made this search, Joseph Coohill, a quote hunter has found it attributed to the American poet John Godfrey Saxe as early as 1869, Coohill, J. (2018). "Otto von Bismark, "Laws Are Like Sausages. It Is Best Not to See Them Being Made." Quote or No Quote? - Professor Buzzkill." Proffessor Buzzkill https://www.professorbuzzkill.com/bismarck-laws-and-sausages/.. Also Hans A Linde is quoted in Fowkes, J., S. Egidy and S. Rose-Ackerman (2015). Due Process of Lawmaking: The United

there is much to be disgusted about when looking into how legislation is made and passed. A feeling that gets amplified when documenting the day-to-day life of lawmaking- complete with close door lobbying, abuses of the whip, and often painful quid pro quos.

However, this opinion seems out of place in a constitutional regime, where even making rules is itself bound to rules. If lawmaking ceases to be an object of scrutiny, then that equates to putting on blinders and hoping for the best outcome. It is analogous to having a car whose engine belt may have snapped and not popping the hood to investigate. A society should aspire for more than turning a blind eye. It is, therefore, of utmost importance to make the inner workings of lawmaking a central focus. To make it more intelligent,[16] it is necessary to explore everything 'under the hood,' including the teleology and actual practice of lawmaking.

The present analysis is a challenge to the well-circulated quote from above. It will forward the viewpoint that what happens in the legislature is integral to law and ordering. It aims to show that we can learn from when legislatures fall short of their goals of making legislation proper. Through these failures, what needs to be attended to can be seen. As such, the contention is that if there is no inquiry into how law is made, no attention paid to how legislation is meant to function while making it, and no pondering about what form requires within the lawmaking process, then to service the scope and purpose of legislation becomes even more difficult, if not impossible.

The examples provided by the following cases are designed to illustrate that if the features of the legislative process are not observed, the form of legislating suffers. Before entering the discourse of lawmaking mistakes, what follows introduces the stage that will showcase the shortcomings of practice. The analysis of conditionality that follows will provide a working definition, historical information, and social and geographical context but will also delve into a pre-analysis indicating where problems can arise. All of this should justify the choice of conditionality as a premier challenge and test case for legislating.

States, South Africa, Germany, and the European Union. Cambridge, Cambridge University Press.

[16] In the Deweyan way

The writing will identify the plane in which conditionality works and how it can come to usurp the formality of legislation, which is empowered by the polity.

7.4 A Limital Case: Conditionality

7.4.1 Getting To Know Conditionality

As foreshadowed, we will look more closely at the concept of conditionality and explore the ways in which it can illustrate legislative limits, tensions, and frictions.

To begin, the general legal idea of conditionality is when a contractual or negotiatory relationship is formed between two parties aimed at completing the agreement, and the contractual performance of one party is subject to the fulfillment of a stipulated condition. In lay terms, one of the parties withholds their end of the deal until the other party fulfills the agreed-upon condition.

This definition provides the following componentry of conditionality: the parties, an agreement, the conditions, and the fate of the agreement pending the completion of the set conditions. Several non-essential elements often are companions to such agreements, usually put in place for mutual assurances that conditions will be fulfilled. Such add-ons include agreements include appointing who will evaluate the conditions and agreements that dictate if and how continual consultation will follow.

Conditionality becomes important for legislative form when at least one of the parties is a state, and the conditions of the agreement are to create legal arrangements with specified content. The archetypical way this occurs is that the other party can withhold its agreed performance until the contracting state passes legislation or equivalent legal arrangements with agreed-upon content. The grafting of the conditionality framework onto legislation, therefore, gives the following scheme:

- The agreeing parties are a legislating state and another party from outside of the polity.[17]

- The state and the other party create an agreement. This is often codified in a Memorandum of Understanding (MoU)[18] or a treaty.[19]

- The conditions pertain to the state creating legal arrangements with specific content and/or legislating/conducting official acts in the agreed way.[20]

- If the conditions are not met, the other party then withholds or changes the performance of its agreed actions.[21]

The contingent features are:

- Agreement for who evaluates;

  Because evaluation is undertaken based on benchmarks or substantive criteria, the legislating state and the other party agree on which party can scrutinize whether the conditions are met. This is often a third party or an ad hoc committee comprised of selected individuals.[22]

- Agreements for shifting conditions;

  Since economic markers are the benchmarks typically used for the conditions,[23] there are typically ongoing consultations to adjust the conditions reflecting ongoing performance or market shifts.

- Power imbalances;

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[17] The other party is not limited by being a state or not. The differentiation is then between the legislating state and the other party, which can be a state, collective of states, IGO, NGO, another non-state actor, a corporation, or an individual

[18] MoUs are not reserved just for agreements that feature Conditionality for instance see the UK's Memorandum of Understanding for devolution. They are, however, are what is usually used by the IMF for its loan agreements, indicatively see the figure Ketekelenis, et al, below at

[19] For instance, The International agreements of the EU towards third parties have used Conditionality in respect of Human rights since the nineties. See Bartels, L. (2005). Human Rights Conditionality in the EU's International Agreements. Oxford, Oxford University Press.

[20] Loan agreement citation

[21] See Euro entry Conditionality examples.

[22] See the troika generating documents example

[23] For instance, debt to GDP ratios, inflationary rates, and deficits.

> Conditionality offers fertile ground for the development of a power imbalance, by which one party or the other needs the specific performance of the agreement more than the other. This creates an asymmetric relationship where one party has the upper hand and may create situations of duress, as has been argued in great depth by Mitropoulos and Passas. [24]

The following process graph shows what conditionality looks like in the realm of legislating:

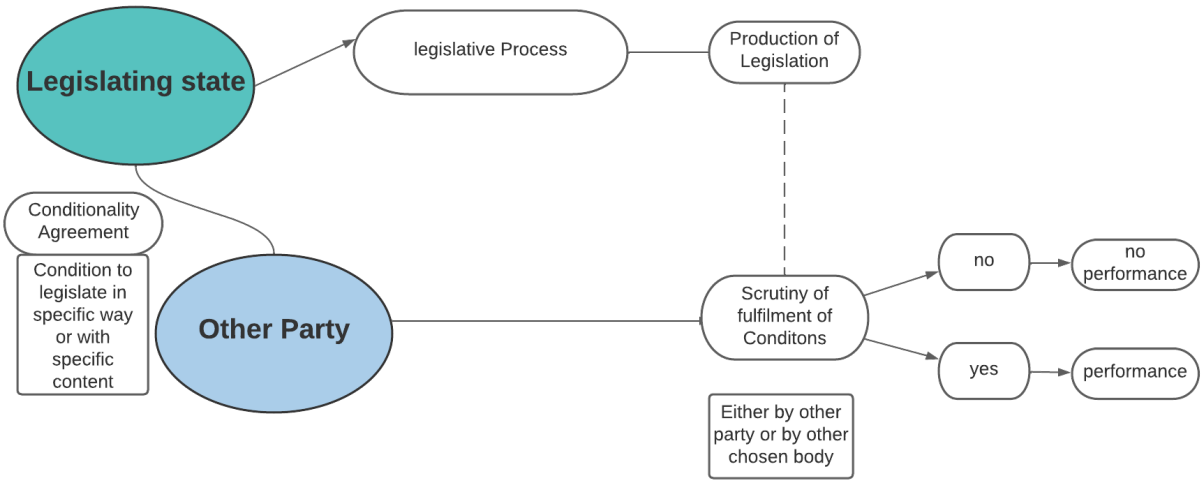

Figure 1 Conditionality as a scheme

7.4.2 The Social Importance Of Conditionality and Its Potential To Usurp Lawmaking

So far, conditionality has been defined as a complicated *quid pro quo* between two parties. As a framework, however, it seems oddly human. If conditionality were set into an interpersonal context, it would appear normal for everyday dealings. For instance, it does not seem particularly odd if a friend will only pass on information if another friend shows general goodwill or if a teacher allows the pupils to play only after they finish their lesson. Generally, withholding one's part of a deal while waiting for the other person to perform their side of the deal first is not out of the ordinary. Another example, which has a less loaded environment than parenting, can be seen in a supermarket. Patrons pay for

[24] see Dimitrakopoulos, D. and A. Passas (2020). The Depoliticisation of Greece's Public Revenue Administration: Radical Change and the Limits of Conditionality. Cham, Springer International Publishing. P 43

their groceries first before loading them into the panniers of their bicycles outside. Gauging from these examples, if conditionality is typical for day-to-day dealings, what makes conditionality so challenging for lawmaking?

The answer offered to this in what follows does so on two accounts: conditionality can become a backdoor to change vital elements of what the polity has built legislatively. Large parts of state apparatuses and features, including lawmaking, sovereignty, and constitutional design, become fair game to conditionality. The second and perhaps more important account is that conditionality has the potential to undo the cornerstone of the rule of law and the democratic foundations of a modern constitutional state that lawmaking resides at the center of. These answers will now be taken one by one.

7.4.2.1 Salient Positions and Subject Matter

The first component of the answer arises from the ability and potentiality of conditionality to change vital elements of legislative workings without corresponding changes in form. This becomes apparent when the means it employs to produce its designed effects and the kinds of subject matter it deals with. In short, vital areas of state competence are instrumentalized to deliver measures on sensitive issues such as fiscal policy and formal sovereignty.

To explain what this could look like in practice, an often-seen instance of conditionality is when, for example, the International Monetary Fund (IMF) executes nearly all its credit programs (most notably "structural measures") through conditionality schemes.[25] Such an application of conditionality is not a rare occurrence but instead comprises the IMF *modus operandi*. Characteristically, between 1985 and 2015, the IMF utilized conditionality agreements with 131 states featuring 55,465 individual conditions.[26] With these conditionality programs, the IMF and other creditors sought to 'ensure economic viability of states' to use their language. In other words, they intended to help

[25] These policy adjustments are conditions for IMF loans and serve to ensure that the country will be able to repay the IMF. This system of Conditionality is designed to promote national ownership of solid and effective policies. International Monetary Fund. (2016). "Conditionality." from https://www.imf.org/en/About/Factsheets/Sheets/2016/08/02/21/28/IMF-Conditionality.
[26] Kentikelenis, A. E., T. H. Stubbs and L. P. King (2016). "IMF conditionality and development policy space, 1985-2014." Review of International Political Economy **23**(4): 543-582, ibid.

debt-stricken states to avoid defaulting on payments to their creditors. While the expediency and efficacy of such measures is still largely a matter for debate,[27] the weight that conditionality can carry remains quite evident.

The scheme of conditionality seems like an effective way for the IMF and other actors to try to cover their bets. It offers a way to hedge the success of financial programs by taking measures that will not easily be broken. The relative entrenchment provided by lawmaking offers the creditors an added layer of security and perhaps symbolism of willingness on behalf of the loan-seeking state to be on the same page with what the creditors want.

Given the scale of IMF application of conditionality, the IMF can be considered the main propagator of such conditionality. Yet conditionality was not in the public eye until the 2008 Financial Crisis.[28] It was then that conditionality entered the vocabulary of the non-specialist audience and gained much notoriety. This was partly due to the political importance of the material, breadth, and scope of what conditionality regimes aimed at. To briefly outline the complex history of this period, the fiscal situation of Portugal, Ireland, Spain, and, foremostly, Greece was deemed non-sustainable, and a possible default was imminent without intervention. This caused intense worry across the EU about a possible collapse of the common currency, the euro. In this environment, it was decided that an intervention in fiscal policies was needed to rectify the fiscal issues at hand in the debt-stricken states. Initially, EU member states, individually[29], and the IMF stepped in to stabilize and prevent default. After the initial loans, the place of the individual member states as creditors was then taken first by temporary bodies such as the temporary

[27] Guzman et al edited a whole volume on how these programs did not work. Guzman, M., J. A. Ocampo and J. E. Stiglitz (2016). Too little, too late: the quest to resolve sovereign debt crises. New York, NY, Columbia University Press.
[28] Also known as the Eurocrisis or the great recession
[29] Individually, here means that the member states could not act legally and provide facilities qua member states due to the prohibition of bailouts under art 125 of the TFEU. But they could act as individual lenders towards the states in trouble, with interest. Additionally, at the time, there were also no stability mechanisms founded. The workaround that was preferred was to have individual state-to-state loan facilities.

EFSF[30] and the EFSM[31] and then, as a permanent solution, the ESM. These mechanisms were all built from the ground up in response to the crisis.

Conditionality was employed to ensure the intended outcome and the creditors' trust, and it applied a layer of securitization through conditionality schemes, which involved passing legislation. One might ask, did the fulfillment of the conditions call explicitly for legislation as the means of creation for the legal arrangements that were called for? No. But, while the form of legislation was neither mandated nor a prerequisite officially, the required measures needed the equivalent effect of formally making law to materialize. This is both for reasons of expedience and constitutional necessity. First, the desire for some measure of entrenchment within the legal order offers creditors assurances. This can be seen in the close reading of the materials produced by the IMF[32], where the language used calls for "policy commitments"[33] to fulfill conditionality. Superficially, this does not seem like a call for legislation. Yet, simultaneously, the IMF requires "demonstrable policy actions."[34] If we factor in the context of rule-of-law states, legislation becomes the sole 'demonstrable' means to both execute any condition and maintain the rule of law. This is necessary because, without the deliberate establishment of new law, the commitment to democracy and the rule of law[35] becomes moot. Further, if the measures of the IMF were enforced without legislation, there would be a complete capitulation of the state as an institution and a handing over of executive and decision power to an actor outside the polity, like the IMF.

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[30] European Financial Stability Facility was a 'special purpose vehicle' founded in 2010 which deployed programs to Portugal, Ireland, and Greece. With the latter's bonds being transferred to it retrospectively.

[31] European Financial Stabilization Mechanism was a temporary emergency fund that provided financial assistance to Ireland and Portugal and only exists for legacy payments now.

[32] International Monetary Fund. (2016). "Conditionality." from https://www.imf.org/en/About/Factsheets/Sheets/2016/08/02/21/28/IMF-Conditionality.

[33] Ibid

[34] Ibid

[35] the thin sense of the rule of law is often attributed to Sir John Laws: "one aspect there is general agreement. The rule of law at least means that state power should be exercised in accordance with promulgated, non-retrospective law made according to established procedures. One school of thought holds that that is all it means. This view is often described as the "thin" theory of the rule of law" see Laws, S. J. (2017). "The Rule of Law: The Presumption of Liberty and Justice." Judicial Review **22**(4): 365-373.

Under this view, it becomes unimaginable for rules to be set forth without the intervention of the legislature. If that were to happen, even feigning democracy would be impossible. Executive action without legal backing is thoroughly arbitrary as per even the thinnest conception of the rule of law. That is presumably why promises to legislate are found in the letters sent to the head of the IMF, known as letters of intent, [36] in which promises to fulfill the conditions are laid out. These letters are mandatory for IMF programs. In these, we can see a pattern that suggests the primacy of legislation amongst all other legal arrangements with similar effect. Indicatively, two Letters of intent can be singled out: the August Sixth, 2010, Letter of Intent, sent by the Hellenic Republic to the then head of the IMF Dominique Strauss-Kahn, and the December 3, 2010, Irish Letter of Intent sent to the same recipient. Mining the text of these letters reveals that legislation is the sole means mentioned-specifically, in the Greek letter, 58 times in a 55-page document[37] and in the Irish letter, 20 times in a 28-page document.[38] In both instances, all other means were not referred to in the context of condition fulfillment.

Apart from this element of the necessity of legislation for reasons of formal completeness, there are constitutional provisos, which also create a substantive need for legislation. This is particularly prevalent in constitutional orders that feature provisions that mandate legislation for a specific subject matter. A relevant example is that any new taxes in Greece must be promulgated through a formal law,[39] much like the well-known 'Power of the Purse' found in the United States, where federal laws control federal spending.[40] In cases like these, there is no way of engaging the public apparatus to apply policy without first promulgating formal legislation. With these concerns in mind, the connection between legislation and conditionality begins to materialize. There are both necessary and contingent bonds. Therefore, it can be generally concluded that the conditions included in these agreements are fulfilled through lawmaking

[36] The IMF has an open access database of such letters, for instance, the search query for Ireland produces all nine letters of intent. Url: https://www.imf.org/en/Publications/CPID
[37] Available at https://www.imf.org/external/np/loi/2010/grc/120810.pdf
[38] Available at https://www.imf.org/external/np/loi/2010/irl/120310.pdf
[39] Σ 78
[40] US Constitution Article I, Section 9, Clause 7, (Appropriations Clause) and Article I, Section 8, Clause 1 (Taxing and Spending Clause)

procedures but also that they must ensure the rudimentary workings of the rule of law.[41] Even administrative acts, i.e., executive acts that have the equivalence of formal law, are empowered by the rule of law via formal legislation.

The attached conditions, however, are not satisfied merely with promises to make law. These agreements often include follow-up and surveillance mechanisms to ensure that the creditors have their conditions met. Regarding IMF-type credit programs, performance is regularly assessed as per the completion of the conditions. In the case of the response to the 2008 Eurocrisis, each recipient of the programs had an ad hoc oversight body of the respective conditionality scheme known as the troika,[42], which later was rebranded as the "institutions."[43] This body comprised representatives of the European Commission, the European Central Bank, and the IMF. Its tasks were tethered to both the benchmarking for the conditions of the release of the financial help and evaluating the completion of fiscal targets. The Troika was an informal institution set up with operational bases within the states it monitored and had constant contact with the loan-receiving states. Although it has since disbanded, the idea lingers through the Troika's successors. This can be seen with the "Surveillance reports,"[44] which were published as recently as November 2022, despite formal surveillance having expired.

The specific example of conditionality that has just been described will provide the backdrop of the inquiry into practice to show the limits of the form of lawmaking and its dignity in the next chapter. For that reason, it is helpful to name it the creditor model of conditionality. Creditor conditionality does not exhaust the types of conditionality, as there are many variations, for instance, when state organizations set benchmarks in view of accession to international organizations, such as the accession criteria of the EU, known as the

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[41] For instance, the laws of the Hellenic republic: v 3845/2010, 4046/2012, 4336/2015. In my opinion granting deference to the executive branch to 'legislate' according to a proviso in formal law is also legislation.

[42] European Stability Mechanism. "Enter the Troika." from https://www.esm.europa.eu/publications/safeguarding-euro/enter-troika-european-commission-imf-ecb.

[43] George Georgiopoulos and K. Tagaris (2015). Tsipras declares victory as Greece dodges financial ruin. Reuters.

[44] Directorate-General for Economic and Financial Affairs (2022). Post-Programme Surveillance Report. Greece, Autumn 2022. Institutional Paper Brussels, European Commission. **191**.

Copenhagen Criteria.[45] This multiplicity of applications of conditionality shows its wide range. Still, creditor conditionality stands as the best example of how far the form of lawmaking can be pushed before being thoroughly compromised.

In all, these are the primary parties and mechanics of conditionality agreements of financial programs. Many parties come together with distinct roles: others agree to policy dictates, others legislate, and others surveil and evaluate. It is evident that the web of obligations and the role assignment that stems from these agreements are complex. Yet, all parties fall between two broad camps: on the one side is the creditor side, including states, IMF, EU, and the organs that organize and set the conditions, and on the other side, the debt-stricken states, who were charged to make rules dictated by the agreements.

These complex agreements are not just in the background, nor are they just legal acrobatics to satisfy a trivial end. The policies implemented at the behest of conditionality have resulted in heavy implications for public health[46] and social protection.[47] The key policy directions of the content was the implementation of austerity measures. The measures covered rampant pay cuts across public and private sectors, pension cuts, and cutting financial support to vital social institutions, such as health and education. These measures featured prominently as policy executions of conditionality agreements created by the state's own lawmaking facilities.

Conditionality is a modern development that challenges the enterprise of legislation's very roots and the act of lawmaking altogether. Therefore, the intersection of conditionality and form is meaningful because of the high stakes

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[45] Summary available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14536

[46] See: Kentikelenis, A., M. Karanikolos, I. Papanicolas, S. Basu, M. McKee and D. Stuckler (2011). "Health effects of financial crisis: omens of a Greek tragedy." The Lancet **378**(9801): 1457-1458.

[47] Social cost is a treacherous thing to measure, however there have been attempts to measure happiness in reference to conditionality-induced austerity. These studies suggest that there was a statistical dip of unprecedented proportions during peacetime after the outbreak of the crisis. Although the authors stress that austerity is compatible with the Easterlin paradox (that short term happiness is related to income levels, whereas long-term it isn't), they conclude there is a big dip in happiness simultaneously with Conditionality's policies. See Clench-Aas, J. and A. Holte (2017). "The FInancial Crisis in Europe: Impact on Satisfaction With Life." Scandinavian Journal of Public Health **45**(18_suppl): 30-40.

and the nature of what can go wrong if lawmaking is misused because of conditionality.

7.5 Purpose, Form, and Social Importance

With an idea of conditionality set, this section demonstrates the nature of the fundamental challenges brought by conditionality. The questions used to guide the articulation of the challenge are:

- Why does conditionality pose a risk for lawmaking?
- Where does the conflict lie between conditionality and the underlying theory of form?

The short answer to both questions can be found in the most volatile potentiality of conditionality. Conditionality develops into an explicit dictation of the content of rules which must be legislated. In doing so, conditionality has the potential to undercut the act of legislation at the level of its crucial dimension, as analyzed earlier under the 'by-assembly' idea of collective *self*-legislation. It introduces new actors and pressures that are not part and parcel to lawmaking as it has been instituted in a particular polity. In doing so, conditionality lends itself to becoming a test to pinpoint the limits of the form of lawmaking in practice. By exhibiting conditionality's challenge, the hope is to make the boundaries of form evident.

We must first furnish the domain where this undermining can happen to make the identification more plausible. To this end, what follows unpacks the constituent components of the enterprise of legislating. It wants to show how conditionality creates an impasse with collective legislating. Through unpacking the form of legislation and the environment created by conditionality, the analysis seeks to show where the dignity of legislating can come to show the way through this impasse. The first key to unlocking the entire scheme is the role of the contextual purpose of legislation, which relies on the constitutional commitments in the specific polity.

7.5.1 Conditionality and Its Clash With Purpose

The first point that needs to be made is that the relationship between conditionality and the process of lawmaking has a contingent character. It is not inherently conflictual and friction-generating. It is easy to imagine a situation where lawmaking seeks the same exact policy choices with the conditions of a MoU agreement. E.g., if both a state and an international organization want the state to accede, then there is a confluence of interest.

The engagement with this idea starts with the legislature within a state. In principle, the legislature is doing all the lawmaking, not any foreign actor. Even in conditionality, the legislature is satisfying protocolar form while servicing conditionality. The legislature took all the necessary steps and voted. Thus, at first glance, legislation born of conditionality and legislation born organically without the intervention of a foreign actor look the same. In this light, pinpointing the challenge of conditionality looks even more difficult.

When lawmaking follows its intended design, it contrasts with the lawmaking conducted at the behest of conditionality. That is because the latter goes beyond the scope of the constitutional design for legislation. Further, if lawmaking surpasses certain material boundaries, it might very well usurp the entire system on a fundamental level. If a state is constitutionally bound to create legislation democratically, then it is a fundamental concern that democracy must be respected on a formal level while making legislation. This picture of the intersection of lawmaking and conditionality needs a detailed description to be convincing. We must identify what is at stake and how much conditionality produces a constraining context.

At first glance, we can see the explosiveness of the challenge for legislation posed by conditionality. The stakes are high on a fundamental level since they deal with the core workings of the state and sensitive social topics. Conditionality gives rise to the hollowing out of the form of legislation. Through its exploration, it can demonstrate why the dignity of legislating is essential.

The first key is to consider the idea of purpose within the confines of legislation. Purpose on the abstract level seems especially awkward to pin down. So far, it

has been asserted that it is indeed a prominent forming feature of lawmaking. The idea of purpose then becomes institutionalized and embedded in tripartite[48] form. Purpose as an abstract idea, to reiterate, is fundamental since lawmaking is a purposive task to explicitly make law through a process that has been agreed upon. Thus, lawmaking is teleological because it is a process that is tailored and aimed at a given output that is carried out in a specific way. It is not accidental or habitual practice but blatant actions which are designed for a specific purpose. Conditionality then comes to undercut the basal purpose of lawmaking. But first, we need a conception of legislative purpose to build upon.

7.5.2 Legislating and Constituent Purpose

There is scholarship that have taken up the challenge of arguing the significance of purpose within the legislative environment, and most prominently in drafting studies.[49] Specifically, Maria Mousmouti's work in the design of legislation aims to offer a tangible conceptualization of 'purpose' for Legislating. Her approach is to articulate recommendations for best practice in legislating, which she pins around a study of effectiveness.[50] While there are definite divergences between her understanding of legislating and the aims of this project, there are important takeaways from the ample attention to the role of purpose in legislation. This foremostly will consist of scaling up her ideas from the specific to the general purpose of legislation. Apart from this, this section will also navigate the fundamental tension between Mousmouti and Fuller's work, from whom she draws extensively from.

To begin, the salient proposition in this work is that effectiveness, not efficiency nor efficacy, should be the guiding principle of lawmaking.[51] The effectiveness of legislation, however, should not just be classified as an implementation issue. Instead, her view is that the production of legislation should involve and keep effectiveness as a principle of lawmaking. It becomes a central pillar because

[48] Meaning the Protocolar, normative, and evaluative form as explicated in Section 0
[49] Zamboni calls this field micro level theory of legislation or legislative-drafting. For a prominent example: Xanthaki, H. (2022). Thorton's Legislative Drafting. London, Bloomsbury Professional.
[50] Mousmouti, M. (2019). Designing Effective Legislation. Northampton, Edward Elgar Publishing.
[51] "lawmaking" is used here to reflect Mousmouti's vocabulary and denotes the making of legislation

the purpose for which legislation is made is the primary determinant of effectiveness. 'Purpose' then becomes an institutional orientation as it has a deep connection with understanding and applying effectiveness during lawmaking activities and scrutinizing them afterward. As Mousmouti puts it, "Purpose is the main compass for shaping the content of the law. It links the problems addressed, the broader policies, the means chosen to serve them, and the state to be achieved."[52] This sets quite a broad role for purpose, but what makes it relevant to this study is that Mousmouti orients this examination of effectiveness on the lawmaking procedure itself and not on the implementation.

Within lawmaking, Mousmouti organizes her concept of effectiveness around four conscious and deliberate decisions inherent to the lawmaking process: purpose, content, context, and results. This gives her theory an orientation that grants purpose a significant role and creates the key takeaway: that practice and purpose must align to bring a better outcome. And in that there is an agreement that organizing lawmaking around purpose and reflecting on practice will create lawmaking with greater quality.

Mousmouti's conceptualization of effectiveness,[53] hinges on the political will of the singular piece of legislation rather than the effectiveness of making law at large. This might be a necessity for the study, but it arguably cuts off the systemic embeddedness of any legislative procedure. For legislating to take place, it typically needs a communal effort that has been institutionalized and referring to effectiveness of a single piece of legislation on its own instead of it as a repetition of systemic act, loses view of the system and the normative implications that the system of legislating has.

This does not mean however that the conclusions she draws can be used for the entire communal practice of lawmaking. Despite that the effectiveness

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[52] Op.cit. 50

[53] There is an evident Fullerian backdrop to this, as she also cites Fuller as a primary inspiration for this work; however, there is a divergence from him in that her goal of effectiveness is quite managerial (page xii). Managerialism in a Fullerian context is when the lawfollowers are treated as goods/means to get to an end by the law. This was a major bugbear for Fuller as he believed it demoted lawfollowers to subordinates rather than equal partners in the reciprocal relationship at the center of law, thereby undoing part of the distinctiveness of law as a system of ordering (for commentary See Summers, R. S. (1984). Lon L. Fuller. London, Edward Arnold.) 86-89

Mousmouti focuses on is more on legislative content rather than legislating-as-craftmanship and her output-based framing cannot answer how the practice of lawmaking can be made better *per se* because of its objective is a specific output, with some adjustment, it can be broadened to encompass the entire craft of legislating. Further, this can be done in line with form. While she speaks about the specific purpose of legislation, and I speak of general purpose. For her this means the purpose of a specific piece of legislating whereas this project speaks about the purpose of good crafting legislation

To this end, we can pull other ideas from her stream of thought. Firstly, it is unavoidable to make law without purpose. In support of this point, she quotes a common law maxim, taken from W. Twining and David Miers, to bolster this: "When the reason of the law ceases, so does the law itself."[54] This maxim, of course, pertains to substantive provisions of rules. Still, analogously, it illustrates that if the deliberate task of legislating is not carried out with a purpose in mind or the law cannot serve its purpose, it, too, is lost.

This is complemented by another idea that lingers in Mousmouti's work: the vital importance of a polity's deliberate choice to use legislation instead of any other model of making its rules.[55] The choice to elect a certain type of lawmaking is not without consequence for the polity generally and the enterprise itself. Purpose, along the lines of this idea, creates a teleology and along with it comes the assumption of responsibility to take the task to its respective end. Thus, the choice of legislation as a means to order has purposive and normatively loaded elements and exerts constraints on the procedure itself. Mousmousti suggests that purpose becomes a primary determinant of the assessment of legislation. This suggestion can be transferred from the particular legislation to the choice of legislation in the first place. In other words, when the partakers enter the enterprise of lawmaking, they do so for a specific reason.

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[54] Op.cit. 31

[55] This choice regards the very choice of legislating by assembly, which is compatible with delegating legislative decisions to the administrative states and the courts. It is a choice that precedes What Zamboni and Refors Legg name as a choice of ideal-typical model of legislating, whereby who (the legislature, the administration, or the judiciary) makes the final rules gets chosen. Zamboni, M. and M. R. Legge (2020). "Legislating Education: Finding the Right Model… But Not in Sweden!" KLRI Journal of Law and Legislation **10**(2): 300 305.

The initial choice colors and gives mandates to all those who partake to legislate in the contextually asserted way. When lawmaking does not follow this initial choice and the purpose it creates, there is a fracture and a tacit denial of the responsibility to legislate along the lines that the polity sets.

Regarding the deliberate choice of legislation, there is a way to articulate how this choice can be established. Lon Fuller distinguished between 'made law' and implicit 'law' in *the Anatomy of Law*[56], which can show this very thing. "Made," as the name implies, is the law that is purpose-built to regulate, whereas implicit law is what is those rules that are forged by practice. Along Fullerian lines, when legislation is made, it is necessarily linked to a purpose because otherwise, the undertaking to make it would aggregately be aimless, frivolous, and moot.

Gathering these thoughts into an interim conclusion, purpose is both intringsically connected and largely governs lawmaking. The deliberate nature of lawmaking instals a specific aim to create legislation, and with that aim comes the responsibility to carry it out as intended. But purpose can be understood in two distinct ways, a general and a specific purpose, which differ between the general task to create competent legislation and the specific task to make the legislation work well. This articulation of purpose is helpful in the present inquiry into the form of legislating through the idea of general purpose. The challenges to the enterprise of form will be detailed in the next chapter and arise in reference to the general purpose of lawmaking. These challenges ultimately become problems when the general purpose of legislation as it is found within its constitutional context is disappointed.

Mousmouti gave the spark to bring 'purpose' into the discussion. To bring this discussion of purpose in line with form, we must consider how the purpose of legislative lawmaking is distinct from other forms of lawmaking. Purpose becomes yet another distinguishing feature of legislative lawmaking. In becoming such a feature, it becomes yet another condition of distinctiveness of legislating. Without a corresponding purpose, legislative lawmaking would just

[56] See above Section 7.1

collapse into another form. The connective tissue, therefore, is within the direction that purpose provides as to keep the .

We have already seen how protocolar form materializes legislation; substantive form gives the quality of acts necessary, and normative form gives the direction needed for the partakers to align themselves with legislation. These also provide corresponding purposes to the legislative process. When these purposes are adhered to, we adequately serve the dignity of legislating.

7.5.3 When Does Conditionality Cross The Line

Conditionality presents its potential to challenge legislating. The danger becomes a tactile problem when conditionality precludes the making of legislation in the way form requires. Conditionality, in short, comes to throw a spanner in this complex framework.

This usurpation happens when form is discounted and pushed aside. This is a challenge to the very foundations of lawmaking. We can see the usurpation in contexts of conditionality when the entire legislative process shifts outside of its usual constraints; here, we see things like new prominent external actors, setting aside democracy or other native mechanisms, and the dictation of legislative content, to name a few. When conditionality garners sufficient leverage to push aside legislating how the polity intended. This is what makes it so dangerous for the act of legislating. It has the potential to become the arbiter for what normative direction lawmaking must follow, thereby supplanting and replacing form.

It is difficult to see this formal challenge of conditionality without simultaneously considering the depth and breadth of the measures brought by conditionality. After all, they are eye-watering and show the immense impact conditionality imposes on the lives of a polity. Yet, commenting on their efficaciousness is not what the present inquiry is about. Instead, it aims to identify how this incision becomes a problem for the very enterprise of

legislation. To illustrate this more concretely, we can take the example of structural measures[57] as seen in creditor conditionality.[58]

The structural measures introduced by conditionality were intensely invasive for the polity's central workings. Whether for better or worse, their depth and breadth are by no means ignorable. In Greece, the promulgating law of the first MoU[59] instituted a scheme of structural measures between the Hellenic Republic and her creditors. It reads, "budgetary policy should become the cornerstone of the program" and that "income policy and social protection policies must support the effort for fiscal adjustment and to restore competitiveness."[60] The language of the agreement lays a foundation of primacy to the conditions of the loan via hazy but powerful phraseology mixing "should" and "will" with "fiscal adjustment" and "competitiveness." In this sense, conditionality becomes the primary arbiter of lawmaking since it dramatically narrows the legislature's ability in a way that is foreign to the native constraints. It becomes an arbiter of what legislation can do when it should do it, and whether it is successful. This role is, however, normally reserved for the foundational form of conditionality as any (and all) constraints are made of the native form[61] of lawmaking and established by the choices or habitual practice of the polity.

The question arises about where exactly to put the threshold beyond which conditionality becomes challenging. Can it not be the case that conditionality is an acceptable confine of the political situation? Why is it not just a circumstance of politics[62] or considered another material constraint?

This is a tricky limit to set. Reflecting the loan conditions between the Hellenic Republic and her creditors, we see austerity, fiscal hardship, and economic

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[57] Economists define them as policies aimed "at reducing or dismantling government-imposed distortions or putting in place various institutional features of a modern market economy." Goldstein, M. (2003). IMF structural programs. Economic and Financial Crises in Emerging Market Economies. M. Feldstein. Chicago, University of Chicago Press**:** 362-457, ibid. 366 via Ketekelenis, supra at 7,

[58] Ketekelenis Supra at 7

[59] Law v. 3845/2010, p 1337 of the Official Gazette of the Hellenic Republic (ΦΕΚ) issue A' of 2010, volume 65

[60] Ibid

[61] Native form here means the form of legislation that is incumbent and currently used in a given polity.

[62] Supra Waldron see more in Mason, A. (2010). "Rawlsian Theory and the Circumstances of Politics." Political Theory **38**(5): 658-683.

depression. The recession was long and unyielding, unemployment, especially in young people[63], was unprecedented, and the less prosperous economic classes felt the brunt of the downfall. Two of the fourteen yearly wage payments were cut,[64] VAT taxes were raised, and all civil servants were to head counted. These are not typical conditions, a normal barter of goods, or just a dip in economic situation. There are huge leverages in play, and the incisions made run much more profound. It is through pondering the gravity of the outcome that a limit begins to surface. These conditions are not as simple as fulfilling an agreement or gaining the benchmarks of a quota. They are harsh measures indicative of an overarching danger or threat that allows conditionality of this kind to grab a foothold.

Taking account of that situation, it seems conditionality needed to be powerful enough to gain the necessary leverage to usurp normal legislative processes. The answer to how conditionality becomes a problem lies in pinpointing when what is normally constituted through the form of legislation and when it can be flipped on its head. Legislation is widely understood as how states create rules to function, which are needed for constituting the bare-bones meaning of the rule of law.[65] But in this situation, conditions come from a non-partaker, an entity that was never included in the form of the legislative enterprise. The non-partaker exerts and dictates how and what will be legislated, setting aside the form that the polity had intended and designed. Conditionality, therefore, strips away the agency of lawmaking and subverts the implicit and explicit rules of lawmaking that are set by the legislative form.

By wedging themselves into legislative actions, the non-partakers create a peculiar challenge to the rule of law, specifically the part of the rule of law particular to lawmaking. This part of the rule of law refers to the expectations of how law is created, in that the rule of law is formed in the way polity intends it to be made. A conditionality rule that forces its way in through leverage has evident differences from any other law made within the polity. The differences

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[63] Statista (2023). "Greece - Youth Unemployment rate 2003-2022." Statista.

[64] Chatzinikolaou, P. (2010). Income Deductions of 35% in the Public Sector in 2010. Kathimerini.Which was also accompanied by an across the board 8% cut to wages (Art. 3 §1 v 3845/2010)

[65] Like that of John Laws, op. cit. 35

do not lie in the content but in how it was made. The normative expectations of how a law is made are not served, and the normative that pushes it along is not created by the polity at all. The creditors create it.

When laws are created, the way dictated by the polity and the rule of law, the process, and the product are native to the polity. By hijacking this process, conditionality carries out legislation in a new foreign way, essentially different and incompatible with the form built into the polity.

All this danger and potential to derail legislation circles all the way back to the general purpose of lawmaking. That is because conditionality comes to second-guess or even usurp the very reason for legislating in the first place, i.e., to give content to the rule of law. If legislating cannot make law according to its own terms because it is precluded from doing so, it becomes a farce. Conditionality can come to weaponize legislation for its own expedience, which has no place in the lawmaking mechanisms of an established polity.

The summary of the propositions laid out in this chapter is the following:

- If we examine practice, we can see where the form of legislation runs out.
- A critical situation that can stand to exhibit this in practice is conditionality schemes, specifically creditor conditionality.
- These schemes have the potential to usurp legislative form because they go against the general purpose of lawmaking, which is to deliberately make rules in a way that the polity intends them to be made.
- The General purpose of legislating is to give shape to the rule of law by creating law the way that is intended by the polity. The specific purpose of lawmaking is to make a law in a way that can make it work as intended.
- Conditionality is not always a challenge to lawmaking. It becomes a challenge when it usurps form in dictating how legislation is to be made.
- This usurpation happens when the specific application of conditionality gains enough leverage to displace form. This leverage must be significant

enough that those making law are pushed to follow conditionality's demands instead of native form.

With this complex and challenging contextualization in place, we can see how theory can start to inform practice. Conditionality's potential to usurp legislation became evident; it does so by displacing form. Displacing form is also how lawmaking does not get its due dignity. This idea will be developed further in the next chapter. The limital cases that will be discussed are when conditionality pushed lawmaking beyond the limits of form in practice. They are instantiation of this general idea of displacement of form. If the description of these displacements is combined with the methodology from the approach of allegory and pitfalls, room for concrete improvements will arise

8 Instances of Limits

The history, definition, and contextualization of legislation and conditionality sets the stage for marrying form, practice, and dignity. The analysis that preceded was meant to relay what conditionality is, how it works, and how it has the potentiality to undercut legislation. Conditionality stands as a key real-life phenomenon in which the dignity of legislating is trampled, and, with its details now evident, it can become an adequate laboratory to see the limits of form. The focus now shifts from the exegesis of the theoretical potentiality of conditionality to how it manifests in practice.

This chapter looks at specific pitfalls that undercut the enterprise of legislation. Six examples of legislative practice have been identified. They will be described to show where the dignity of legislating was not given due esteem to the point of compromising the legislation as a matter of form. Each example will correspond to a pitfall. Each pitfall indicates what must be avoided if we want to give legislating its due dignity. The aim is to make legislative practice more intelligent by learning from past mistakes. Making practice better is the last step in the trajectory from abstract theory to practice, which was hinted at in the introduction.

Therefore, the following will track the trials and tribulations of individual cases of legislating done poorly and how they became failures in a formal sense. In every case, the dictates of form were (a)voided. The lawmaking that took place was never capable of reaching the most rudimentary intention for lawmaking, viz, to make something that could be competent legislation. The approach utilized would mirror what Lon Fuller did with the story of Rex II, where every mistake revealed a fatal error that Fuller's Canons nullified. Likewise, each of our examples was chosen to show a particular instance of failing the dignity of legislation, thereby showing what guidance can prevent.

To explain this more, The six key concerns that have been identified are not to be understood as constituent parts of lawmaking. Instead, the view is to identify what to avoid and what to pay attention to from past legislative practice. The aim is not to provide a checklist of mandatory features or of necessary

components to identify legislation proper. Instead, they point to the limits that, when crossed, compromise the function, the integrity, and, in the way that we have framed the inquiry, the very dignity of legislation.

To reiterate, the dignity of legislating has to do with the process and the craft of legislation. It is not meant to test the validity of the law created, the substantive correctness, or the political mission. It has to do with how the legislating is taking place and whether the process itself is taking place and treated. Dignity can become a standard of proper performance of the craft of legislating. The examples seek to identify how to craft law better by bolstering the dignity of legislating altogether.

With this aim in mind, each of the six concerns will be structured around practical examples from conditionality, where lawmaking was precluded from reaching its goal as a communal enterprise by not being given its due dignity. Using each example as a guide, we can identify the following concerns: double cognizance of form, time, fidelity to the enterprise, independence/ non-duress, non-impossibility, and self-scrutiny. Each of these is organized into its own section, split into two parts: one an explanatory one and a section dedicated to guidance.

8.1 Double Cognizance Of Form

8.1.1 Concept and Example

This section showcases an example where the Hellenic Parliament, as a new Rex II, failed to show due epistemic care of form and how this led to a shortfall in dignity. From this example, we can identify a formal pitfall that can be avoided by heeding what is dubbed: "the double cognizance of form."

The Greek law 3845/ 2010[1] titled "Measures for the Application of the Support Mechanism of the Hellenic Economy from the Member-States of the Eurozone and the IMF." It was the legal arrangement used to usher in the first Conditionality agreement for the loans given to the Hellenic Republic after the

[1]The full title in Greek: N. 3845/ 2010 Hellenic Republic (2010). Μέτρα για την εφαρμογή του μηχανισμού στήριξης της ελληνικής οικονομίας από τα κράτη–μέλη της Ζώνης του ευρώ και το Διεθνές Νομισματικό Ταμείο. Athens, ΦΕΚ. **3845/2010**.

fiscal crisis of 2008. Its subject matter covers a vast array of topics, introducing many new provisions and instituting a broad revision of existing legislation. Also, many of its provisions survive today. Most notably, however, this law is known for introducing unprecedented austerity measures. However, its relevance to our subject was the inclusion of the first Memorandum of Understanding (MoU) between Greece and her creditors. The First MoU detailed the commitments on each side of the Conditionality agreement. What is interesting about this piece of legislation for the limits of the form of legislation is that the MoU agreement was not in the text of the law per se. It was merely included in the annex of the law.[2] The MoU itself lined out some of the purposes and the content of the conditionality between creditors and Greece.

As a matter of normal legislative practice, attaching annexes to legislation does not create an issue in principle. Typically, annexes contain supporting information, tables, and other explanatory devices. The annex of v. 3845/2010, however, is demonstrably different. There are joint declarations of Greece and other Eurozone states that regard the formation of state policy, which include language such as: "inflation will be reduced"[3], that "Our fiscal strategy has its central axis on the placement of the debt to GDP ratio on a declining trajectory from 2013 onward and that the budget deficit will be considerably under 3% of GDP by 2014"[4], "Spending will be reduced by the equivalency of 7% of GDP by 2013"[5]. The striking element of the Annexes is that they do not read as auxiliary or explanatory material. Contrarily, it calls for executable policy objectives and features agreements with the international community. They read like legal provisions typically found within the strict text of legislation. Yet, in terms of formality, the annexes are not promulgated as law; they are not debated, deliberated, or scrutinized. They are typically promulgated *alongside* law in a non-executable fashion. Contrarily, in this context, they call for execution as if they were part of the legislation itself.

The provenance of the annexes makes them additionally salient. Provenance is meant here as locating where and when they were devised. These provisions

[2] Ibid, Annex II p 1332
[3] At Point 6, 1336 Ibid
[4] At Point 10 Ibid 1339
[5] At Point 12 Ibid 1340

were developed, discussed, and agreed upon outside formal lawmaking. They were created in the context of arranging a conditionality agreement between the government and the creditors between governments. The composition of the MoU in the annex took place before the legislative procedure ever began. It strikes as counter-intuitive to think that quasi-executable provisions of the legislation were never discussed, never voted on, and are separate from the text of law. Yet, they are included in it and create at least vaguely directives for official action. In terms of formal recognition, these provisions are neither law nor a treaty. This latter point was also the conclusion of the Greek Council of State, the highest administrative court.[67] So, in terms of formality, they are an anomaly. This was a characterization that did not go unnoticed by the parliamentary proceedings of the day, which showed at least 6 MPs of various parties having addressed the questionable nature of the Annex in their speeches. [8]

Apart from an evident curiosity generated by this case, it can be translated into an illustration of how the limits of the form are stretched to their breaking point and how that can be detrimental to lawmaking. The case of the annexes of this law dealt a wildcard to what the archetype of law should formally be like. To reiterate, the form of legislation and lawmaking create an archetype according to which dignity is measured. The elements of form- protocolar, evaluative, and normative- give form its content. When all three of these are respected, the dignity of legislating is upkept. These elements work together to produce the dictates that legislative practice can be contrasted against. The problems with the dignity of legislating arise when any one of these three is lacking or ignored.

But suppose form is to have true meaning for the partakers of the lawmaking enterprise, especially for lawmakers. In that case, knowing the contents,

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[6] ΣτΕ 668/2012, further details infra Section 8.1.1

[7] As opposed to agreements like the Protocol Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part which was entered into law through N. 5017/2023 and even had its preamble included in the text of the formal law.

[8] For instance: an opposition left leader at the time Panagiotis Lafazanis: "As I was saying it is unprecedented in the parliamentary history of this country that an annex is set forth in a legislative bill which are- substantively- an ideological manifesto of neoliberal policy and which bind the Parliament of the Greek People for policies they must follow." (self-translated) Parliament of the Hellenic Republic (2010). Proceedings of the Hellenic Parliament: Thirteenth Period of the 115th Convention, Hellenic Republic. P.6727

meaning, and application of form within this legislative context is necessary. The knowledge of form can be granted by carefully considering each of the three elements of form. This can be spelled out by becoming cognizant of the pertinent rules encapsulated in protocolar form and how those translate into action. Next, evaluative form is employed to critically assess what is at stake and the quality of the actions that the lawmakers are carrying out. Based on the outcome of that assessment, the normative element of form comes to give the normative push that helps complete the legislative enterprise.

Applied to the case at hand, form dictates that rules must be derived from acts of parliament. Using the three elements that were distinguished before: First, protocolar form furnishes the principle of legality.[9] In this case, legality refers to the qualification and completion of lawmaking action and provides that all state law is found in promulgated legislation or empowered by it. After this consideration, it is time to engage evaluative form. Evaluative form can give the necessary attitude to determine whether there are executable provisions in the annex of 3845/2010. Depending on the outcome, the normative element of form creates a push for the partakers in the legislative enterprise.

Therefore, in this instance, creditor conditionality introduces doubt into legislative form. If we look at the case, conditionality comes to supply executable law through a back-door process. It does not matter if this happened by design or by oversight, but this inclusion equates to a real-time distortion of the form of legislation. This is a formal issue because it has to do with the distinct external form of legislation and is substance-independent. The inclusion of the agreements in the annex creates a contrast between what was promulgated and the ingrained notions of how legislation is supposed to be. Law is known to be democratically enacted through processes that happen in an assembly, but with this conditionality, it did not. This position could also be bolstered by the

[9] The principle of legality is enshrined in the Greek constitution as interpreted through articles 2 par, 16 par 1, 25 par 3, 93 par 4, 103 and 120 of the Greek Constitution see Prevedourou, E. (2014). Αρχή Νομιμοτητας (translated: Principle of legality). Γενικες αρχες Δημοσίου δικαιου (translated: General principles of Public Law). T. Antoniou. Athēns, Nomiki Bibliothiki**:** 450.

discomfort of lawmakers as was in the chamber proceedings,[10] but also in its aftermath.

What the courts had to say about this matter is also interesting. First, whether this was legal or not cannot be judicially reviewed by the Greek administrative courts because of material competence.[11] That did not stop the court from making *obiter dicta* remarks regarding the nature of the annexes. In the 668/2012 case of the Greek Counsel (ΣτΕ),[12], the plenary formation came back with multiple decisions on the nature of the annexes. The majority decided that it was merely a "panegyric way to give publicity to the content and timeframe of the implementation of the program."[13] Two dissents, however, believed that the annexes contained international treaties. This is because the language was that of primary rules[14], and, in conjunction with the fact that the other parties were states and the IMF, it can be concluded that the annex contains an international treaty. The repercussion of this position is that as the agreements in the annex were international treaties, formal constitutional requirements could not be adhered to, making the annexes unconstitutional.

From this broad spectrum of opinion, we can discern that the case of annexes compromised the dignity of legislating. When the Council of State examined the MoU's constitutionality, it could not assess the annexes as they evaded the strict text of the law. This is a case of indignity because what was being promulgated was different from what is expected from legislative form. It can be inferred that neither the Parliament nor practice afterward had ever dealt with such a scenario. What results is a lack of cognizance. The form of the 3845/2010 was different than anticipated, and difficulties arose as to how it should be handled in practice, as seen through the judicial challenges to the law.

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[10] Supra note 75.

[11] Art. 45 paragraph 1 of ΠΔ 18/1989, and Art. 63 paragraph 1 of the Code of Administrative Procedure foresee that Acts of government that fall within the application of political power are not subject to writs of recourse in the administrative courts. This is idea has been imported into Greek law from similar structures in France surrounding: *Actes de gouverment* see Costa, D. (2021). Administrative Procedure and Judicial Review in France. Judicial Review of Administration in Europe. G. della Cananea and M. Bussani, Oxford University Press**:** 51. Also, as per the *interna corporis doctrine,* formal constitutionality cannot be a basis for judicial review.

[12] Available in the original Greek at the official repository of the court: https://www.adjustice.gr/webcenter/portal/ste/ypiresies/nomologies

[13] Ibid paragraph 28

[14] This is meant in the Hartian sense whereby primary rules are those that direct behavior.

In the aftermath of v.3845/2010, lessons were learned from the difficulty that arose. The second MoU law, which came two years later, illustrates this. When that law, v.4046/2012, came to Parliament, the formal itemized content of the bill included the text of all relevant agreements. The annex did not have any agreements or policy directives. Against the second MoU law, another constitutional challenge was launched against it,[15] but this time, neither the nature of the annex was neither part of the application nor a substantial part of the plea. This proves that the lawmaking practice learned from the experience of v.3845/2010.

Pushing aside how the polity found solutions later, the intervention of the conditionality became a challenge of the form of legislation. As conditionality is aimed at the achievement of the agreed conditions, it could not have any derogations, and this resulted in a novel variation of form, which was not produced by or native[16] to the polity. This novelty could be understood as an undercutting of legislation because conditionality purposively evaded the normative provisions of the legislative procedure and instrumentalized it to promulgate the reforms that were forced upon the Greek polity. Consequently, this workaround undermined the lawmaking procedure, resulting in indignity. The Hellenic Parliament, as Rex, needed to know what must be done to act in line with form and ensure that that is what their actions amount to.

8.1.2 Guidance

The story of the Annexes of 3845/2010 makes evident that something went wrong. Just like Rex II failed to heed the call of law, Parliament did not heed the call of form by including the executable directives outside the text of the formal law. What was voted for was not the same as what was executable, thereby making a question of form. The shortcoming is, therefore, one of knowledge of what the form is and whether there is a match between form and practice. This is not to say that adherence to form was abandoned entirely; the external and superficial form took place, a majority was achieved,[17] and a final law was published. But it is to say that form was not followed to the extent

[15] *ΣτΕ* 2307/2014
[16] Native in the sense of organically created and already installed in the polity.
[17] As seen in the minutes of the legislative session

needed to show due dignity to the institution of lawmaking. Yet, the lack of the double cognizance of form illustrated by the story of the annexes was that the produced legislation did not look like anything that was made before, and executable provisions of law were passed by law without being included in the strict test of the law.

The lesson that can be learned for the dignity of legislating is maintaining the cognizance of form. This cognizance refers to two things and is this way double: legislatures must have cognizance of what form of legislation asks for and that the legislative practice implements it.

The first step of this double cognizance calls for lawmakers to be fully aware of the form in place. As argued previously, form is shaped by the constitutional landscape of the relevant polity. Constitutional landscape refers to the body of explicit and implicit rules that organize the polity's basic function in applying political power, including lawmaking. From the very existence of this body of rules, we can deduce that the polity has entrenched a specific character in lawmaking. It is the lawmaking it wants. Whether through democratic lawmaking or the decrees of a theocratic ruler, there is knowledge to be had of what character of legislating is demanded by the polity. The act of ascertaining this character gives specific formal content to the lawmaking process and, with it, a purpose to complete this character. Therefore, the first part of this cognizance underlines the necessity for knowledge of the form of legislation in each state context. Form, though, changes over time, meaning that a singular assessment is neither enough nor un-revisable. Hence, it becomes imperative to ascertain what form asks for and repeat this ascertainment adequately.

The second part of the double cognizance is self-reflective in nature. It is utilizing the first cognizance of what is asked and self-assessing whether lawmaking practice lives up to it. The lawmakers are called to evaluate whether their actions correspond to their knowledge of form. To ensure that dignity is respected, the choice must be to change the course of action if there is a discrepancy between the two. An example of failure to match 'cognizances' is the

recent development of the "Illegal Migration Bill"[18] in the UK. In this case, there are preliminary rulings of the ECtHR[19], which recognize an incompatibility between the legislation's content and the UK's commitments to uphold the European Convention on Human Rights.[20] However, the MPs chose not to shift their position. From a formal perspective, this is treating lawmaking with indignity because even though there is a constraint on the enterprise, it is being ignored. Treating lawmaking with dignity would mean knowing the constraints and paying them due heed, which is obviously not the case.

Respecting dignity with respect for double cognizance would mean ascertaining that legislating follows the dictates of form. If there is a clash with form, their options would be to either continue and undermine the dignity of legislating or change its form. This is always possible since form is relative to the polity and the temporal moment. It has a certain reflexivity. It is not unchanging nor permanent. This allows for institutional imagination to change form and still maintain the dignity of legislation.

An example of this could be the inclusion of later Conditionality agreements in the strict text of the law in v.4046/2012. Another instance could be the 30th amendment of the Irish Constitution[21] where the Republic of Ireland amended its constitution to make sure parts of Conditionality agreements would not fail constitutionality. In this case, the legislature chose to change form instead, not wanting to legislate something not allowed by form. So, instead of continuing a course that would undermine dignity and legislate in a manifestly unconstitutional way, the Dáil Éireann and a referendum permitted a change

[18] UK Parliament (2022). Illegal Migration Bill. HL Bill 133. To fully grasp what this recognition of incompatibility means for the form of lawmaking, we need to forget about the content of the law and remain on the recognition of incompatibility itself, not why it is incompatible. Namely, that with the preliminary judgements there is a clear contraindication of legality writ large. Court says action "X", lawmakers want to do the exact opposite of action "X". Despite the cognizance that the measure is formally problematic, the parliament members who are sponsoring this bill have decided against changing its content to be in line with the HRA 1998. After the rulings of the ECtHR, it has been made known that there is an incompatibility.

[19] There are many interim protection measures that have been approved Syal, R. and N. Badshah (2023). UK to ignore ECHR rulings on small boats 'after Sunak caves in to Tory right'. The Guardian. For instance, in the case of the application N.S.K. v. the United Kingdom (no. 28774/22) see European Court of Human Rights (2023). Notification of Case Concerning Asylum Seeker's Removal from the UK to Rwanda. Strasbourg.

[20] Human Rights Act 1998 (1998 c. 42)

[21] Republic of Ireland (2012). Thirtieth Amendment of the Constitution (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) Act 2012. Ireland.

in form and maintenance of its dignity. Such a position should not be read as advocating that it was a promising idea politically or if it was even economically expedient. Still, it was a way that form was respected, and what the legislature wanted was done.

Therefore, partakers in the lawmaking process need both to know what the form dictates and whether their actions can meet those dictates. In this way, they must show double cognizance to keep the dignity of legislating.

8.2 Time

8.2.1 Concept and Example

Time is always said to be of the essence, that it flies or is money. The following example will outline how time is paramount for the dignity of legislating. July 2015 found Greece under intense fiscal pressure; Greece's financial plans were clamped in a vice. The way out was a credit arrangement for which a deadline was set. The agreement would be between the Hellenic Republic and her creditors for another bailout package for the 12th of August. At the 11th hour, which was the 11th of August, an agreement was finally reached after marathon negotiations.[22] A third package of financial measures would be implemented in line with this agreement, again through a scheme of Conditionality. This time, however, instead of individual eurozone states, the funds were bundled up in a separate legal person, the European Stability Mechanism (ESM), which provided the funds. The European Commission and the IMF still maintained monitoring roles. 2015 was already an especially charged and tumultuous year for Greece, with a change of government, the installation of capital controls, a loan repayment default, and a rare-for-Greece referendum. The political landscape was especially uncharted territory. But that explosiveness was not how Conditionality pushed the form of lawmaking to its limit that summer.

[22] Newsroom, B. (2015, 2015/08/11/). "Greek Bailout Deal Agreed 'In Principle'." BBC News, from https://www.bbc.com/news/business-33858660.

The lawmaking aspect of this credit agreement between the Hellenic Republic and her Creditors took place through v.4336/2015[23], which was voted into law on August 14th. This law included the agreement, a further cost-cutting pension reform, and other public expenditures that were part of the conditionality scheme. The critical element to show the importance of time is the timeframe of v.4336/2015 through the legislative process. The negotiations, the production, the dissemination, and the voting procedure created a mismatch between the allotted time and what was needed to reach an adequate level of dignity. It produced a fatal mismatch that undercut the dignity of the entire social enterprise.

Under normal circumstances within the Greek context, the legislative process requires months to materialize, given the legal necessities for drafts, committees, deliberation, and final voting procedures.[24] For v. 4336/2015, however, the mounting fiscal pressure condensed the lawmaking process considerably. Negotiations of the conditionality framework were being pushed through with intense haste. The leverage was very pressing, as evidenced by the breakneck timeframe. The backing for the leverage was provided by a looming second default and the necessity for a financial facility to keep the state running.

The critical moments that show the situation's intensity already started in July. The negotiation deadline was set for the 12th of August and adoption by the 15th, leaving the fate of a polity with less than 5 weeks to get this agreement drafted and enshrined in law. Ultimately, the agreement was reached on the 11th, leaving less than 60 hours until the discussion on the parliamentary floor started. The bill was introduced to the Parliament using the provisos for the hastened bill protocol,[25] which forgoes the committee stage. This protocol also gives the voting session a 10-hour deadline to complete the discussion and for

[23] Official title in Greek hellenic Republic (2015). N. 4336 Συνταξιοδοτικές διατάξεις – Κύρωση του Σχεδίου Σύμβασης Οικονομικής Ενίσχυσης από τον Ευρωπαϊκό Μηχανισμό Σταθερότητας και ρυθμίσεις για την υλοποίηση της Συμφωνίας Χρηματοδότησης. 4336/2015. Greece.
[24] As can be seen by the very detailed description in the Parliament of the Hellenic Republic (2010). Κανονισμός της Βουλής (Standing orders of parliament). P. o. t. H. Republic. Athens, Antonis N Sakkoulas
[25] In Greek Διαδικασία του κατεπείγοντος art 109 and 110 of ibid.

voting to take place.[26] The exact local time the session started at 01:32(AM),[27] just an hour into August the 14th. In the time that followed, the Parliament had 10 hours to discuss the text of the law,[28] which consists of 108 two-column pages[29] in final form. Within these pages, there are over 240 changes to existing laws[30]. The supporting documents for this piece of legislation, including tables, timeframes, economic data, modeling, and other supplementary information, were contained in roughly 4000 pages.[31]

Simple bar napkin math shows that those who voted on this legislation could not fully gain knowledge and evaluate what they were called to decide upon. It becomes evident that it was simply impossible to gain the cognizance of the materials they had to vote on within the given timeframe. This is a formal problem because the polity has formal goals for the lawmaking process that need knowledge of what is being voted on. It is not farfetched to think that a polity that employs representative lawmaking would expect the representatives of the people to have adequate time to fulfill that role. The complete inability to interact with proposed legislation, to deliberate, read, or gain knowledge of what is in it, is something different: it is an institutional problem. It goes against the very purpose of legislating. If one of the aims of legislation is to fulfill formal requirements and service general state purposes like democratically, then not having physically enough time to do so becomes an indignity to the very institution of lawmaking and the polity overall.

To restate this more clearly, the dignity of legislating calls for a consideration regarding time. Namely, that there is a functional and formal necessity to have enough time to fulfill all the tasks mandated by form to allow lawmaking to remain in sync with processes of collective will-formation, which in turn requires at least that the representatives of the people have the time to read, deliberate or consult on the matters that they are deciding. Time allocation does not mean

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[26] Ibid para 4 of 109, 10 hours total of which 6 are discussion.
[27] As seen after 00:32 of the video of the session. Parliament of the Hellenic Republic (2015). Συνεδρίαση Ολομέλειας 14/08/2015 ΠΕ' (Α'Μέρος). Athens. **1**.
[28] Supra note 94
[29] Using the official Gazette of the Hellenic Republic.
[30] This number reflects the amount of "«" symbols that are used in the text, after which new text in the existing law is noted.
[31] Around 12 minutes into the video of the session there is even an incidental request from two MPs that said that some of the annexes referred to in the documents were never given to them.

haste, political pressure, or any other things capable of accelerating legislation should lawmaking be ignored. It does mean, however, that within a specific polity with specific legislative form, there should be a minimum consideration of time when trying to fulfill policy goals and the practice of making law in line with what the form of lawmaking demands.

8.2.2 Guidance

If there is a necessity for adequate time, the question becomes when is there enough time for the dignity of legislating? To find this answer, the first place to look is the form of legislation in place and understanding the material needs of form and the polity's chosen system of legislation.

Taking the elementary example of Lon Fuller's allegory of Rex II, the time necessary for an absolute monarch's thoughts to become law was relatively short. The form of that legislation was exhausted by his internal deliberations, which then needed to be communicated. Legislation by assembly and democratic processes is not that brief in nature. Representative democracy needs process, and processes need time, something that can be seen as a functional representation of what Hartmut Rosa calls "the temporal preconditions of democracy"[32] It is not uncommon for significant legislation to take years to reach the stage of promulgation.[33] The Greek process of legislation mirrors many representative democracies and typically has a production phase that a committee and a plenary vote then follow. During these stages, scrutiny and augmentations are conducted alongside open consultations. Constituents and interest groups can be heard through direct means like www.opengov.gr[34] before a final text is introduced in the plenary. Even with the accelerated emergency process used in the summer of 2015,[35] a specific amount of time is still required for the process to be done with seriousness. As such, if specific acts are

[32] In short the relevant temporal preconditions are "time in politics" which refer to the time needed for a democracy to function democratically, see Rosa, H. (2005). "The Speed of Global Flows and the Pace of Democratic Politics." New Political Science **27**(4): 445-459.
[33] For instance, the new penal procedure code took over four years to be passed, from the creation of the committee in 2015 (decision 38882/18-05-2015, ΦΕΚ ΥΟΔΔ 375/26.5.2015) to the passing of the law v 4620/2019.
[34] This is the official government portal in which citizens can submit direct comments on articles of proposed legislation.
[35] Op.cit. 25

requested, it inheres that a minimal amount of time must be allotted for them to be completed.

To determine how much time is needed, one must reflect on the dictates of form and make a sum of the time required to complete the corresponding tasks. Therefore, the time accounting can be calculated on the material needs of tripartite form. So, the mechanism to judge how much this is relies on the context of the polity to show what is asked for and evaluative judgment. The time could be almost instantaneous (in an absolute monarchy) or a slow process in a complex democratic arrangement. For the dignity of legislating to be respected, the necessary time is at least what is needed to fulfill all the dictates of form.

To apply this to the case of v.4336/2015, we need to assess the time needed to get to dignity. For this, the cognizance of the form in place must be in place. The first step, then, is to consider the relevant protocolar form in place: standing orders of parliament, the Constitution, and all other applicable constitutional legislation as per the competences of the Parliament. After this, the next step is identifying form's contextual and normative implications. The legislative power is vested solely in the legislature, and the legislature is assembled democratically. The Hellenic Republic creates several objectives through its form-providing framework, e.g.: majority voting, party-political cross-interrogation, and representative lawmaking.[36] The time allotted, therefore, must suffice to meet the requirements of protocolar, evaluative, or normative form. Once such precautions have been taken, the final step is to evaluate whether the bill's creation timeline was adequate. Whether the 60 hours between knowledge of the bill and voting were enough to gain knowledge of the myriad of measures being legislated. In the case at hand, this was obviously not enough. Therefore, the whole enterprise of lawmaking was not given its due dignity.

Any allotment of time would require both reflexivity and planning. But planning, too, has its dangers. As Kahneman and Tversky have proposed,[37]

[36] All of which are found in the fourth chapter of the Constitution (art 64-72 Σ)
[37] Kahneman, D. and A. Tversky (1977). Intuitive prediction: Biases and corrective procedures, Decisions and Designs Inc Mclean Va.

humans are over-optimistic when planning things, often succumbing to the cognitive bias known as the planning fallacy.[38] So, not everything can be a matter of foresight. Constitutional life is sometimes unpredictable; external factors beyond human control can affect the time needed. For instance, in our case, the time necessary would have to reflect that there was no committee work, so any incidental knowledge of the provisions was precluded. The law's provisions were in the dark until they were agreed to in the scheme of Conditionality. This would elongate the necessary time but also illustrate that there must be flexibility when ascertaining how much time is needed.

But if the history of this law can teach lawmaking something, it is that not accounting for enough time to complete the enterprise at hand leads to a mockery of the enterprise altogether. Our example features voting on something for which there was no possibility of becoming acquainted with it. The parliament not giving the minimum practicable time indicates an unabashed indignity towards the very institution of legislating. Thus, an adequate amount of time must be allotted to fulfill form that enables legislating the way the polity intends.

[38] Buehler et al give this definition: "Planning fallacy refers to a prediction phenomenon, all too familiar to many, wherein people underestimate the time it will take to complete a future task, despite knowledge that previous tasks have generally taken longer than planned" Buehler, R., D. Griffin and J. Peetz (2010). The Planning Fallacy: Cognitive, Motivational, and Social Origins. Advances in Experimental Social Psychology. M. P. Zanna and J. M. Olson, Academic Press. **43:** 1-62.

8.3 Fidelity To The Enterprise

8.3.1 Concept

In the analysis of form in Chapters 2 and 3, it was said that the teleology of the enterprises of lawmaking creates normative pushes as it provides direction to legislating. Driving towards a given end drives the partakers to follow form and create law in the contextually foreseen manner. In line with this thought, the next concern that will be highlighted is how it is necessary to maintain a relationship of fidelity with the enterprise. The argument is that maintaining a minimum amount of fidelity to the enterprise of lawmaking becomes a functional necessity to bring about the intended end.

To exhibit this point, the example will be the intentional circumventions of the formal constraints of legislation. Specifically targeted are the circumventions of entrenched provisions in post-2008 conditionality schemes. At the time, statutory provisions of form in EU law were pushed to their limits to expedite specific policy choices. The following paragraphs will outline this in detail, but a base assumption is necessary for this example to work. The assumption entails muddling the boundaries of form and substance. Specifically, formal dictates are found in substantive laws that limit what can be legislated and what cannot. When a law describes the legislative competences by dictating or omitting specific subject matter, it becomes a matter of form and not (solely) substance. If, for instance, there is a higher legal norm such as a constitutional provision that says the lawmakers cannot legislate on subject X and knows no curtailing, then it is a formal mistake for lawmaking to legislate such a thing.

The example, in this case, starts with the no-bail-out clause[39] found in EU law, Art. 125 TFEU:

> *1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or*

[39] See Chalmers, D., G. Davies and G. Monti (2019). European Union Law: Text and Materials. Cambridge, Cambridge University Press. 677-680

> *other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.*

A careful reading of this provision leaves a clear idea of what it regulates and forbids. It is unequivocal in stipulating that any and all financial assistance between member states or member states and the EU is prohibited. Neither a member state nor the EU is allowed to underwrite or undertake other indemnity on behalf of another state. But, given the history of the financial crisis in Europe, this creates a cognitive dissonance, especially considering the vocabulary used in the press and society at the time. The actions of the EU nations were described as bailouts,[40] loans, direct bank capitalizations, and debt haircuts, which were all descriptors of the actions taken to solve the credit problems at hand. The Eurocrisis is still relatively fresh in collective memory, and these characterizations are not controversial given that the EU provided some direct monetary support between 2010 and 2018 to the EU member states Greece, Ireland, Portugal, and Spain.

If we reread TFEU 125 after reminding ourselves of the Eurocrisis, there is a bit of a conundrum. TFEU 125 is seemingly straightforward in confining what can be legislated, so how can it be the case that bailouts happened? It seems quite evident that the financial programs did not align with the legal framework[41] before the Eurocrisis. This is not a fringe opinion as even mainstream EU law textbooks seem to agree that at least the financial schemes implemented in the Greek case (especially those given through the ad hoc facility to Greece, the EFSF, and the EFSM) are all said to have questionable legality.[42] One might contend that these were a functional anomaly given that they were temporary in nature and seen as necessary firefighting measures. Yet, even the permanent solution, the ESM, necessitated a treaty change and the

[40] For instance, dw.com "Greece Bailout Formally Ends."
[41] Wilsher, D. (2013). "Ready to Do Whatever it Takes? The Legal Mandate of the European Central Bank and the Economic Crisis." Cambridge Yearbook of European Legal Studies **15**: 503-536.
[42] "Some interpreted this clause as a ban on any form of financial assistance, including the creation of loan facilities. In short, a Treaty amendment was considered necessary. "see Hinarejos, A. (2020). Economic and Monetary Union. European Union Law. C. Barnard and S. Peers. Oxford, Oxford University Press**:** 1032. 594.

amendment of Art 136 of the TFEU[43] for it to be compatible beyond doubt, as verified by the outcome of Pringle v. Government of Ireland.[44]

Some authors go even further. Daniel Wilsher argues that it goes against the very heart of the fundamental framework of EU monetary integration, the European Monetary Union: "The neoliberal orthodoxy at the heart of Economic and Monetary Union (EMU) held that moral hazard and inflationary risks militated against anything resembling 'illegal monetary financing"[45] but yet they did. If not what else, bailouts could very well be 'illegal monetary financing' described in TFEU 125. Yet, it remains that bailouts did happen empowered through formal legal arrangements. How can it then be that something formally off the table becomes the case?

This case exhibits a stretching of form where the formulated rules say one thing, and practice says the direct opposite. Rules say 'X,' but political expedience is dictating the exact opposite: –X. Ultimately, it is –X that prevails. For the EU and the member states, this meant providing indemnity and bailouts, thereby working around what the form explicitly dictates. A practice such as this shows a measure of indignity towards lawmaking due to the evident avoidance of the content of its form. While the argument can be that the letter of the law was not infringed by all the parties involved by adding interest to the loans or that the ESM did not undertake any underwriting of the financial packages,[46] the material effect of these policy choices was a bailout, in reality. And as the TFEU reads, these facts and events are the exact opposite of what the form of lawmaking calls for.

Now, it might not initially seem fitting to describe this concern as fidelity. Trying not to undercut form seems foreign to fidelity since it is a term typically

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[43] See 2011/199/EU: European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union regarding a stability mechanism for Member States whose currency is the euro.

[44] *Pringle v. Government of Ireland,* C-370/12, EU:C:2012:756, An Irish MP named Pringle challenged the legality of the European Stability Mechanism (The Permanent body set up by the EU to assist with future financial crises) and one of the claims was that it was not compatible with art 125. The court disagreed.

[45] Wilsher, D. (2013). "Ready to Do Whatever it Takes? The Legal Mandate of the European Central Bank and the Economic Crisis." Cambridge Yearbook of European Legal Studies **15**: 503-536.

[46] Wilsher, Ibid

reserved for close, trust-bound relationships between humans. But, it can be reconciled with the scale and nature of lawmaking. A way to show this is by likening it to the similar legal concept of fiduciary duty, which is entrusted to investors[47] and directors[48] in profit-driven enterprises.[49] Fiduciary duty is legally mandated[50] to those entrusted to make the executive decisions to decide in a way that aligns with the best interest of those who partake in the enterprise. Best interest is context-specific but ranges from the lack of conflicts of interest to corporate social responsibility/ESG ideas or even sustainability.[51] The parallel between fidelity and these fiduciary duties is that they cover people who guide communal welfare and play a constitutive role in the enterprise. These roles must act with the enterprise's best interest in mind to complete their goal. In both cases, acting with 'best interests in mind' equates to not undercutting the teleology of the task as encapsulated in the corresponding form.

Form is key to the concept of fidelity because it does not stifle policy choices or democratic directions. The fidelity does not tell the lawmakers what to make, but rather what steps to take to make it. Therefore, this fidelity is not substantive as its focal point is the acts that make law and whether lawmaking is allowed to deal with specific subjects. Assessing whether the policy choices were politically adequate is not the target of the current examination. The argument is formal and tries to show that the "in-fidelitous' actions undermined the very enterprise of lawmaking through the example of purposeful avoidance of TFEU 125. Although the actions took place in an overcomplicated multilevel way, form was contravened willfully. What was formally off the table as per TFEU 125 also happens to be what was done in practice. Essentially, this is what is meant as a lack of fidelity to form. The infidelity favored political expediency over giving the due treatment to form. Indignity amounts to

[47]See e.g https://www.unepfi.org/industries/investment/fiduciary-duty-in-the-21st-century-final-report/

[48] See Licht, A. N. (2018). Culture and Law in Corporate Governance. The Oxford Handbook of Corporate Law and Governance, Oxford University Press**:** 129-158.

[49] ibid

[50] This is legislated explicitly in some jurisdictions, whereas in others it is an extension of the company form. Teubner, G. (1984). Corporate Fiduciary Duties and Their Beneficiaries. Corporate Governance and Directors' Liabilities : Legal, Economic and Sociological Analyses on Corporate Social Responsibility. K. J. Hopt and G. Teubner. Berlin, De Gruyter, Inc.

[51] Reiser, D. B. (2019). Progress Is Possible: Sustainability in US Corporate Law and Corporate Governance. The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability. B. Sjåfjell and C. M. Bruner. Cambridge, Cambridge University Press**:** 131-145.

implementing a circumvention that superficially serves form while actively undermining it.[52]

8.3.2 Guidance

To clarify this idea of fidelity, it concentrates into something almost truistic. If one undertakes the task of lawmaking under a specific formal framework, then knowingly and willingly creates a circumvention for reasons of expedience, which shows a lack of fidelity. Underlying such workarounds is a contradiction. Form is being undercut by policy choice, while the formal constraints that create the impasse are being maintained (in our example TFEU 125). Thus, if legislatures want to refrain from acting with indignity, they must either not undermine form or take the necessary steps to change the part of form that is constraining their politics.

Moreover, the guidance regarding this fidelity to the enterprise should not be understood as a defense of traditionalism or conservatism, in line with Hayek or Oakeshott.[53] Legislatures need not follow form blindly; dignity is maintained if there is a change in the form of legislating. Whether form is followed or changed, there is dignity to be found. Doing neither is when legislating becomes a farce.

The ability to change form and protect dignity is especially salient. It is quickly forgotten that the content of form is *not* immutable. It can change when the polity deems it so. Many democratic states in the West became democratic after a revolution, bringing corresponding changes to the form of lawmaking. A tangible example is the previously mentioned 30th Amendment of the Irish Constitution.[54] This amendment allowed the legislation that would ratify the Treaty on Stability, Cooperation, and Governance (TSCG) with the other EU member states. Until that point, the substance of this treaty was a subject matter that was off the table. However, this formal stance was changed when the Irish polity through a referendum. The TSCG could then be constitutional.

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[52] E.g. the conclusion of Re Wünsche Handelsgesellschaft (22 October 1986) BVerfGE 73, 339, (also known as Solange II)

[53] In the sense that was detailed above in Chapters 2 and 3 that regulations made organically over extended periods of time are better

[54] Op.cit. 21

[55] This move to amend the Irish constitution changed form in such a way that what was wanted politically could be done while maintaining the dignity of legislating.

In this instance, form was respected because Ireland took the proper steps to both service policy goals and form, whereas the European experience of Art 125 did not. The choice of preserving form, even by implementing a change, is preferable. That is because it ensures the integrity and the dignity of the enterprise. What form forbids in one era might become vitally useful to society in the next. So, that does not mean form should be set in stone. However, suppose lawmaking is to upkeep the commitment to the polity to legislate in a specific way. In that case, it is necessary to keep fidelity to form as it is or keep the respect for form by going through the steps to change it.

The guidance offered by fidelity to the enterprise is that legislating should be carried out in line with form, and legislators should not be satisfied with mere superficial completion. If form creates friction with their legislative need, they can change the form of legislation or the procedural necessities of form. But proceeding while obviously moving against form will make a mockery of the institution of legislating.

8.4 Independence/ Non-Duress

8.4.1 Concept and Example

The next concern covered is independence/non-duress while legislating is carried out. To understand this concern, it deals with those legislating and posits that they must be given the autonomy necessary to conduct legislation in line with the dignity of legislating. In a practical sense, this autonomy equates to the ability to decide when, how, or whether to legislate at all. Nominally, autonomy is a given; when external pressure is applied, things change. To explain this idea, let us draw from a well-known argument about the differentiation of law from non-law from HLA Hart. Through this metaphor, we

[55] Doyle, O. (2018). The Constitution of Ireland : A Contextual Analysis. London, UNITED KINGDOM, Bloomsbury Publishing Plc. 105

can see an analogous contrast through which this concern will become more apparent.

Hart famously argued that the first modern positivist theories had the misgiving of equating the law-giver to a gunman.[56] A summary of the gunman argument is that a rule which is supported by a coercive threat does not suffice for something to be counted as law; there needs to be a level of systemic recognition for a rule to reach the status of law. Hart says that a gunman in a bank asking for money fulfills Austin's definition of law,[57] but it is obvious to most that the gunman's orders cannot be counted as law. Although Hart meant it as a fatal critique of John Austin's command theory of law, there is an incidental angle that could be useful for seeing the limits of the form of legislation. Namely, if legislating is happening under the gun instead of self-actualization, then it cannot be classified in the same manner as a process without such duress. If legislation succumbs to such compulsion, it loses what makes it distinct as legislation and collapses into a different type of ordering. The idea is that instead of a literal gunman, there are specific types of duress that surface from conditionality and act like Hart's bank-robbing gunman. The question arises: what is it about duress and the lack of autonomy that changes the form of legislating?

To answer this, the idea of duress must be isolated and tied into another of Hart's thoughts: the differentiation between having an obligation and being obliged, which he expounded in a different part of his *Concept of Law*. Per Hart, being obligated is when: "the prospect of what would happen to the agent if he disobeyed has rendered something he would otherwise have preferred to have done […] less eligible."[58] Whereas having an obligation does not have to do so much with motives and performance of an act but instead has to do with two things: "First, the existence of such rules, making certain types of behavior a standard, is the normal, though unstated, background or proper context for such a statement; and, secondly, the distinctive function of such statement is to apply

[56] Hart, H. L. A. (1994). The Concept of Law. Oxford, Clarendon Press. pp 6,7,21-24, 80-85
[57] Which can be summarized as "law is the command of the sovereign, backed by a threat of sanction if not complied with"?
[58] Op.cit. 56, p82

such a general rule to a particular person by calling attention to the fact that his case falls under it."

The connecting argument is that conditionality falls firmly in the camp of 'obliging' instead of obligation. Legislating under these terms fails at respecting the dignity of legislating. The indignity occurs when the threat of non-performance from the other party crosses the threshold into duress and goes beyond the limits of the form of lawmaking. The critical element to reach the threshold of duress is the amount of leverage exerted by conditionality on the lawmaking process. If this leverage is powerful enough, it transcends the functional limits of form. That happens when conditionality precludes legislating according to form. When form is precluded, there is no way to service the dignity of legislating.

To exhibit this further in the context of creditor conditionality, duress rests on the idea of non-performance from the creditor. Non-performance in and of itself has no specific value attributed to it in reference to lawmaking. But there comes a point when the threat of the repercussions of non-performance becomes so severe that it cancels out many formal and formative elements of legislation—for example, the third memorandum law mentioned above. During the plenary discussion of the law in Parliament, form dictated that law was to be made, discussed, and voted on. Yet most of the political dialogue[59] focused on passing this law under the massive pressure of financial catastrophe. The looming catastrophe was the inability of the state to function without the funding provided by the conditionality scheme. The severity of the situation can be inferred from the content of the speeches during the marathon session when the law was discussed and voted on. The pervading general sentiment, regardless of whether the parties favored the measures or not, was not about creating legislation but whether or not to accept the conditions as damage-limitation.

In situations such as the August 14th session of the Vouli, it becomes evident that conditionality schemes can become a gunman and obligate the legislature to do as the scheme pleases. The traversing of the threshold of duress happens when the withholding of the performance becomes so severe that the lawmakers

[59] Supra at note 90, the whole 9-hour session is available.

feel obliged to follow them. That lawmakers feel like they do not have a choice. An example is the pressure created by the threat of access to vital items, such as food and medicines, during conditionality. While it is difficult to identify if the lawmakers felt duress, there is some evidence in the parliamentary discussion.[60] The speeches reflect an agree-or-don't-survive ultimatum. The ability to legislate when accepting such stark conditions is significantly reduced to tweaking the law's text but not amending its principles.

Another instance that has a similar mechanism with this ultimatum is what Zaid Al-Ali 61 expounds regarding external actors' role in constitutional drafting. Al-Ali described how the international community pushed specific ideas onto states that were (re)establishing themselves, compiled in three case studies: Iraq, Afghanistan (pre-2022), and Bosnia and Herzegovina. He details how foreign pressure gave normative direction for substantive constitutional provisions in these states' respective constitutions. The external actors, be it the UN, IMF, or other states, relied on a notion of "international best practice"[61] to create leverage to force the states to adopt these measures, irrespective of how applicable they were in each context. A latent ultimatum generated the leverage in this case: either accept these best practices or be shunned by the international community,[62] thus creating a comparable situation to the above. The danger is that forcing a specific regulatory regime on a context makes fundamental political objectives impossible. Al-Ali describes this as the case when the constitution was formed in Bosnia and Herzegovina, where Western election laws call for absolute universal suffrage/equal representation. However, this would be mutually exclusive with the constitutional entrenchment of the local need for power-sharing between the country's dominant religious communities.[63]

[60] Ibid
[61] Ibid 87
[62] Or "never be rid of us" in the case of the US, UK, and NATO occupation.
[63] Ibid 82-84, 91, by way of a specific quorum requirement, each of the three ethnic groups (Serbs, Croats, and Bosniacs) enjoys a de facto veto right. If an ethnic group does not reach its designated representation, then a decision cannot be made in its absence. But this system is/was numerus clausus in that any other ethnic group is not allowed to stand for election, making this voting regime "clearly discriminatory." Something that the ECtHR agreed with in Sejdić and Finci v. Bosnia and Herzegovina, where a Romani and a Jew applied to the court for protection of their ECHR Art. 1 of Prtcl. 12 and Article 14 rights.

Although substantially different in scope,[64] Al-Ali's intervention provides added support because it concludes that the dynamics created by the interaction of external actors and internal rule-makers are understudied despite their impactful implications. More importantly, he notes that polities need a certain amount of autonomy and should not be steamrolled when making such fundamental decisions because "there is a cause to be concerned about the ramifications of [the foreign actors] involvement, particularly in the case of foreign state actors that have a vested interest in the outcome."[65] All in all, this is another instance of possible non-independence and how external ideas might not play well with internal will.

The example of conditionality did the opposite: Instead of providing a motivation to respond to a crisis by making laws, conditionality corralled the lawmaking process into a specific direction and set aside many crucial elements of form. It offered a binary, and instead of making law, the parliament just was dealt an ultimatum to the effect of "Legislate the conditions or perish into bankruptcy," to which the legislature acquiesced. That is why the limits of form were transgressed, and that is why legislative practice fell short. Even though the situation created by the conditionality schemes post-2008 was not as intense as the 1981 23-F coup d'état attempt,[66] where machinegun fire compelled the parliamentary chamber in Madrid to act, the mechanics of ultimatums are the same.

Whether it regards the range of agency or avoiding gunfire, the concern of independence/non-duress regards the lawmakers' ability to craft law. Respect for legislating must give the necessary recognition to the authorship of the lawmakers. If lawmaking is to happen as intended, the lawmakers should recognize the need for the autonomy demanded by the form of legislating. If some non-partaking body gains enough leverage to take the reins and steer the enterprise, it undercuts a vital formal feature of legislating. Hence, for a

[64] Ali focuses on constitution building rather than law making and the tensions between acceptance in the international rather than policy choices to be fulfilled to execute a lone.
[65] Ibid 91,
[66] Where Intruders entered the parliamentary chamber shooting automatic weapons

legislature to work in conditions of true dignity, it must be free of pressure and manipulation from non-polity actors.

Ascertaining the limits between acceptable pressure and duress will be difficult in practice. The limit should be seen as different in every context. Instead, it should be understood as form- and context-dependent. If the form of legislation is mandating a specific kind of lawmaking with a range of possible products, then the lawmakers must have the agency necessary to produce them.

8.4.2 Guidance

The guidance that is borne of this example is an invitation to lawmakers to favor form over force. To take ample care and attention[67] to make sure they are not being instrumentalized in a way disparate to what form foresees; in a way that is not what the polity wanted. Lawmaking will always have pressing situations that need legislative action to be dealt with. But also, not all pressing cases cross the threshold into duress. The guidance necessary, therefore, is to find that threshold.

The moment when influence spills over into enough leverage is difficult to ascertain. Legislative practice, particularly the attitude of lawmakers and citizens alike, can show us when it is a case of duress. Namely, if the lawmaker's will is to do others' bidding in fear of a bad outcome instead of legislating, that is a case of duress. Critical social issues indeed create immense pressure at times. Still, this pressure does not necessitate creating a workaround and undercutting form, nor does it mandate stripping the lawmakers of their agency or creativity. Form still contains the means and the matter that drives lawmaking forward.

However, if it is like creditor conditionality, very minimal amounts of agency or creativity are allowed during the lawmaking phase. Those exist, if at all, in the realm of the initial condition-setting negotiations. Therefore, the only choice

[67] To attend to legislation is best understood how Simone Weil understood it "detached, empty, and ready to be penetrated by the object" with corresponding renunciation of the ego and the personal gain. See Rozelle-Stone, A. R. and B. P. Davis (2021). Simone Weil. The Stanford Encyclopedia of Philosophy. E. N. Zalta and U. Nodelman, Metaphysics Research Lab, Stanford University.

available during legislating is to fulfill the pre-stipulated conditions. It is then that the situation has transcended into duress. At that moment, the question is different from how to apply form and the teleology of making rules through legislation; the question becomes whether to fulfill conditionality or run the risk of chaos.

Suppose lawmaking is to upkeep the commitment to the polity to legislate in a specific way according to form. In that case, it is necessary to make sure that the legislature retains some element of agency and choice. The dignity of legislation can be fulfilled only if the partakers have the choice to do so. This is only possible when the partakers are not obliged to pass specific things under duress; that limit must be respected.

8.5 Non-Impossibility

8.5.1 Concept and Example

Throughout this project, it has been submitted that form has a teleological orientation in which lawmaking is tasked with reaching its end: producing law. Legislating employs form to carry out its goal of creating legislation in a manner that aligns with the contextual environment of form. But does it mean for the dignity of legislating when the product is a priori materially impossible to produce any results at all? This is not a question of efficacy, validity, or even expedient. The question then becomes whether the dignity of legislating is compatible when it is materially impossible for the laws being made to have the intended outcome.

The example to explore this question comes from a conditionality law that governs taxation. On January 1, 2014, the Greek Law v.4172/2013[68] came into force. Its translated title reads "Taxation of Income, emergency measures of application of the laws v.4093/2012 and v.4127/2013 and Other Provisions" and was part of the MoU obligations of Greece to overhaul and improve its tax regime. It installed a new tax code and provided a multitude of measures governing the calculation of payable taxes in every domain, corporate,

[68] Published in the Gazette of the Hellenic Republic ΦΕΚ 167/A/23-07-2013, 7

individual, and various other taxes. The law executed conditions outlined in the second MoU between Greece and her creditors. These were hastily passed to reach tax collection goals per the agreed conditions. From this law, two provisions raise the concern of impossibility in reference to the form of legislation, Article 21§3 and 41§1.

> *Article 21: Profits from Commercial activity: §3 "For the purposes of the present article, "commercial activity" is considered any singular or incidental act by which a transaction is complete and/or the systematic acts in the market with the goal of profit.[…] Systematic acts are any three similar acts in six months or if these acts are associated with immovable property within two years"* [69]

> *Article 41 "Transfer of Immovable property": §1 Every income that comes from capital gains from the transfer of immovable property with exchange of pecuniary interests or fractional shares thereof or from other property rights on immovable properties or fractional shares thereof or shareholding which draws over 50% of its value directly or indirectly from immovable property and is not a commercial activity is subject to income tax for individuals"* [70]

In conjunction with these provisions, this law had umbrella provisions that explicitly cancelled out any previous legislation[71] on the subject of taxation, leaving any legacy provisions inoperable.[72] There is an additional general principle that dictates that a single taxable event cannot be taxed twice. Thus, a textual reading of these provisions, especially the annotated segments, shows that according to Article 21, any transaction associated with immovable property is considered a commercial act and, therefore, taxable as commercial profits. Conversely, if we read Article 41, then we see that capital gains from transactions regarding the disposition of immovable property are taxed as individual income. The result of reading these two provisions is that a single act of disposing of immovable property could be categorized into two separate categories. Within the system of tax rules in place, this created a quagmire in which tax could not be collected because it was not clear which category was the correct one, and, secondly, there were no mechanisms to correct this double

[69] Ibid Translated by the Author 3
[70] Ibid
[71] Art 72-75
[72] Much like what is being discussed in the UK now in Spring 2023 as the Brexit-Delete bill, albeit on a smaller scale

categorization. If Schrödinger's Cat were a legal provision, these provisions perhaps could be it; something was simultaneously considered to be two mutually exclusive things for legal purposes.

To make matters worse, there is a statutory requirement that all applicable taxes are paid before any property transfer is finalized. The capital gains tax system, along with this requirement, caused an absolute dead end. The notary publics of Greece sent numerous warnings through their collective bodies [73] to the government, forewarning the danger that would come, and indeed, the danger materialized. Specifically, the outcome was that from entry into force of the law on 01/01/2014, there were zero transfers of real property until the changes that had to be made to rectify it in March of that year; absolutely zero.[74] To put this into context, a country of nearly 11 million had zero transfers, whereas the city of Glasgow, which has 10% of the population, would have had thousands in the same period.[75] So not only did the intended legislative outcome fail, but so did the fiscal goals intended to be achieved by the conditionality scheme.

While many of these outcomes seem like efficacy issues or problems with substantive tax law implementation, neither of these approaches can reach the root of the problem of impossibility. To be more specific, it is an issue of form. If lawmaking does not consider a minimal level of possibility when passing legislation, this law was doomed to fail before it was even promulgated. It is a legislative stillborn of sorts, making any application *a priori* impossible.

To make the case of this tax provision a generalizable rule, if what is legislated (legal object (x)) is simultaneously two mutually exclusive things, the problem lies before any question of substantive application even enters the picture. That

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[73] For instance, the internal Encyclical (794/27-11-2013) of the regulatory body (in Greek) available at https://www.notarius.gr/encyclical/general/794_27-11-13

[74] Newspaper articles: Chatzinikolaou, P. (2014). Στον «Πάγο» Οι Μεταβιβάσεις Ακινήτων Λόγω Του Νέου Φόρου Υπεραξίας (Translated Title: New Transfers Of Real Estate On Ice with New Capital Gains Tax). Kathimerini. Athens. and Giabanis, A. (2014). "Νέκρωσε την αγορά ακινήτων ο φόρος υπεραξίας - Δύο μήνες χωρίς συναλλαγές (translated title Necrosis in the real estate market from captial gains tax - 2 months without transactions)." newmoney.gr.

[75] This number is calculated on the data from the Registers of Scotland available at https://www.ros.gov.uk/data-and-statistics/house-price-statistics/property-market-report-2021-22. The thousands claim is based on the average bimonthly total of transactions of *only* residential property over the last five complete financial years ending in 2022. The specific number is 1801, to which we can add 90 commercial properties by month.

makes the problem formal, as the impossibility associated with the provision denotes a structural error in the production of legislation itself, not its substance. That substance never had the chance to act; it was precluded from ever coming into being. The concern, therefore, that is being forwarded is formal. And the formal root of the issue is that if form were taken seriously, then the legislature would not have produced something blatantly ipso facto impossible. The law in question was made in a pressing legislative environment of conditionality. Still, the associated haste itself was not the determinate of the outcome, as the legislative project for a new tax code was developed over an adequate period of time.[76] Therefore, what is problematic for the dignity of legislation is the impossibility of the measures *per se*.

Another situation that could exemplify the concern of impossibility is the regulation used to approve leaders of Tibetan Buddhism by the People's Republic of China (PRC).[77] This rule covers several issues, but impossibility arises in its scope to regulate the reincarnation of the Tulkus.[78] This Bureau order regulates how a reincarnated leader can become state-recognized as being reincarnated as a specific Tulku. This includes the application procedure, who is eligible to apply, and which governmental bodies must approve. Tulkus who fail to get approval are considered "illegal or invalid." However, regulating reincarnation is impossible, whether the state believes in reincarnation or not. This is because reincarnation works in a plane of thought that is impervious to direct legislation the *forum internum*[79] given the manifest material inability to *be* regulated. The generation of ideas and beliefs cannot be materially caused or omitted by legislation. Reincarnation is a belief, and beliefs happen to be outside the corpus of possibly regulatable human actions. If a group of people believe someone is a reincarnate of a specific lineage, what approval mechanism is available to change that? Well, simply put, nothing; it is a matter of thought. Of

[76]It began during the previous government. Newsroom (2012). Αυτό είναι το δεύτερο Μνημόνιο. iefimerida.gr.

[77] State Religious Affairs Bureau Order No. 5 officially named Measures on the Management of the Reincarnation of Living Buddhas in Tibetan Buddhism conference of the State Administration for Religious Affairs, see Aroon, P. (2007). China Bans Unauthorized Reincarnations. Foreign Policy.

[78] individuals who have been reincarnated of specific lineages of Tibetan Buddhism, most prominent example being the Dalai Lama

[79] See section 7.2

course, it is well within the prerogative and competences of the PRC to want to approve religious leaders and develop regulations. But the ailment of this regulation does not rest on that legislative will; it rests on the formulation, and in that sense, this regulation is a formal misfire. Creating a law that can regulate reincarnation is materially impossible. It creates an indignity to the institution of legislating because there is no way the rule can reach its desired function of ordering. This comes before any gauging of its worth as law if it can even work as one. It is comparable to legally forbidding gravity.

From both examples that preceded, the concern being forwarded here is that lawmakers must give due dignity to the lawmaking process by making law that is not impossible *a priori*. It is a formal concern because it is not anchored on the productive outcome of the measures, but by the fact the measures are self-defeating. The reason for which this happens is not of material importance, whether that is haste, pressure from conditionality, or just incompetence. Nor is the underlying justification of why it took place at all. What remains is that making legislation that cannot even begin to unfurl its purpose to order via law and give content to the rule of law makes it a farce. Therefore, non-impossibility is a concern for the dignity of legislation.

8.5.2 Guidance

The guidance that can be borne from non-impossibility is that there must be a consideration of the basic material possibility of law to produce any results at all. The lawmakers should reflect upon whether the product they are assembling will ever be capable of acting as the lawmaking enterprise intends it to in a material/formal perspective. This is a distinct idea of whether it succeeds or fails as a political choice or if the law reaches the intended levels of performance. It is a matter of not being ever precluded. It is a low threshold and stems from the quality of their carrying out the strict lawmaking portion of their task. To legislate with dignity, the product must be given the essential functional ability to perform, as this is a manifestation of taking the enterprise of lawmaking seriously. To craft law in a serious manner equates to giving due respect to the dignity of legislating.

Suppose we return to Lon Fuller's[80] analogy to carpentry, where "a carpenter who wants the house, he builds to remain standing and serve the purpose of those who live in it."[81] This metaphor can speak to legislating as well. It does not matter whether the house is aesthetically pleasing or has all the modern features. What matters is that it is capable of standing as a house. Likewise, whether the product is a good or bad policy choice, well thought out, or even prudent is a different concern than the idea of non-impossibility. The concern here is for the law not to be a priori moot. Creating a priori moot legislation is not compatible with respect to the institution of lawmaking. To show dignity, the legislation that takes place must have a minimum ability of actual implementability. Whether the law is successful or not is not important for this concern. What is important is that the legislation can be applied at all. Therefore, dignity is served by a formal consideration of ability, not a substantive measure of performance.

In the cases at hand, adequate dignity would mean securing a base level of ability that would allow the law to unfurl its potential for better or worse. Returning to Greek tax law, dignity would indicate choosing only one of the categorizations of capital gains within v 4173/2013 or even making a stand-alone regulation. The options within the available range allow for great creativity. Therefore, to serve dignity, if the Greek state wanted to tax capital gains from the sale of real estate, it should have done it in a way that is formally possible.

To recap this concern, the Greek state made a tax law with two mutually exclusive and contradictory provisions. The impossibility of following the law negatively impacted society, with the transfers of real estate being blocked for months. This instance shows that if due care is not taken to ensure a minimal non-impossibility of the law under production, then the law is due to fail formally. The lack of care indicated by the impossible provisions of v 4173/2013 exhibits an indignity to legislation and exemplifies what not to do when making law.

[80] See section 0
[81] *Morality* 96

8.6 Self-Scrutiny

8.6.1 Concept and Example

The final concern is about showing self-scrutiny when legislating. This concern has to do with the stance of the partakers. It is peculiar compared to the previous problems on two accounts: that it is dispositional and can be retrospective. It is dispositional because it deals with the stance (disposition) of the partakers of the lawmaking enterprise and, as such, sets the base attitude for other concerns for maintaining dignity. It sheds light on what type of attitude is needed to keep attention on keeping form. In situations where the dignity of legislation could have been served but was not, having lawmakers' attention turned to this attitude of self-scrutiny will help prop up dignity by ensuring due attention is given.

Furthermore, it is optionally retrospective because it is useful in real-time during active lawmaking and allows the transfer of insight from previous practical experience. This may happen when older mistakes are revisited to create better guidance for the future. Therefore, institutionalizing a concern of scrutiny gives two points of attention to the partakers: a general dispositional attitude and an informative practice that could fix previous misfires regarding form.

At this point, there needs to be a preëmptive decoupling of self-scrutiny with what scrutiny typically means in constitutional and legislative settings. The latter has less to do with formal scrutiny within the lawmaking enterprise. Instead, it refers to the scrutiny by lawmakers on other branches of government. Scrutiny is mainly associated with the institutionalized practice of parliamentary scrutiny of government[82] or its equivalent in presidential systems[83] as a check & balance mechanism. This, however, should not be confused with the self-scrutiny of the lawmaking process that is being

[82] When with questions, votes of (non) confidence, and other means, members of government must answer to parliament.
[83] For instance, the institution of Congressional Oversight in the United States

forwarded. This concern governs the partakers' self-reflection to see where they stand in reference to thick notions of the form of lawmaking.

Examples of legislative practices that can help make the idea more tangible are drawn from the corrective actions implemented after the pitfalls identified above. A pitfall was seen, noted, and not repeated in these situations when similar circumstances arose later.

As a first example, let us take the situation that arose around the law v.3845/2010 mentioned above case, lawmakers created a challenge for the form of law by adding executable provisions in the annex of the law, which were left to the implementers and the judiciary to solve. In this case, self-scrutiny would mean to take head and match the legislative actions to form.

Such an approach would account for the real-time aspect of self-scrutiny. The retrospective aspect would need a later situation to arise. Given all the implementation and judicial issues after v.3845/2010, there was good reason to improve formal legislative practice in the future. This could be observed during the formation of the second MoU law, v.4046/2012.[84] In this formal law, all provisions of the agreement between Greece and her creditors were included in the executable text of the law. Additionally, it passed with the corresponding supermajority necessary for passing international treaties. Whether the link between the two practices is correlative or causal, the mechanism by which self-scrutiny could be employed is evident. If similar circumstances arise, the formal problems of the past are best not repeated. It might seem the experience of the annexes and the choice to include the agreements in the text of 4046/2012 as political hedging/troubleshooting. Despite the difficulty of establishing the political motivation behind the inclusion one way or the other, the legal-theoretical improvement of practice that could be had with self-scrutiny is not dissolved. If self-scrutiny is observed, then the form of lawmaking is better respected.

In all, self-scrutiny improves legislative practice by not allowing old mistakes to be repeated, and making new mistakes becomes more difficult. Self-scrutiny

[84] The first Article is named "Approval of the Planned Budgetary Loan Facilities, planned Memorandum of Understanding, and Mandate for Signing Them."

establishes ways to learn from previous mistakes and be dispositionally keen on pointing out mistakes in legislating. It leads lead to an enhanced state of dignity. It is not a call to be apolitical but a call to not bow to sloppiness in the face of political expediency.

8.6.2 Guidance

When thinking of scrutiny generally, there are two ways of implementing it: self-actuated and delegated. Self-actuated in this context means that the legislators will drive the self-scrutiny within their legislative acts. In contrast, the delegated implementation will additionally use distinct (and perhaps *ex officio)* actors to supplement the partakers.

To explain this in greater detail, implementing self-actuated self-scrutiny would mean identifying the pitfalls and generating the beginning of any meaningful change that would be initiated and carried out from within the lawmaking process. The actors involved would solely be those who are already part of the lawmaking process through their regular legislating activities. The time frame for carrying this out would be simultaneous with legislating. Delegated self-scrutiny is a bit more complicated. Initially, it sounds self-defeating, if not contradictory to the concern of independence mentioned above. Commonly, if something is delegated, it is carried out by something which is not "self-."

However, it is called delegated because it will be entrusted to a specific actor with a competence to scrutinize. Contrarily, the disposition, and the implementation remain internal to lawmaking. What is left to the actor is identifying and communicating what specific items need attention from the partakers.

Both implementations share the same teleology, which is to improve lawmaking by improving the dignity of legislating. This can be achieved by self-scrutiny and learning from past and concurrent mistakes. So, If institutionalized self-scrutiny of legislating can exist, what could they look like?

This thought is too large to cover at depth in the remaining space and the practical confines surrounding it, so what follows is a brief and condensed look into selected ideas. To avoid confusion, the scrutiny mechanisms used will be

called 'checks.' As such, the checks that are currently prevalent in representative democracy are external to the partakers of lawmaking and stand as a good entry point for theorizing.

Currently, the most powerful of the checks is judicial review, and in our case, judicial review of legislation. Implemented in the space of legislating would mean that courts could conduct an ex-ante review of legislation based on formal shortcomings and indicate where legislation errs, perhaps even striking it out. However, the judicial review needed to do this is not particularly suited to the dignity of legislation. For one, self-scrutiny is aimed at making legislatures treat legislating better. Involving a separate branch of government makes this a self-defeating proposition. Judicial review is meant to solve disputes before a court. It tests the legality of legal arrangements contrasted against higher norms, like treaties and constitutions. These features of judicial review fundamentally differ from the aim of the self-scrutiny, so much so that they are incompatible. What is more, even if it could become the basis for judicial review, there are doctrines like *interna corporis*[85] that disallow any such intervention from courts [86] in view of the separation of powers in modern democracies. The only visible exception for such judicial review is when the parliament legislated on something the courts consider *ultra vires*, outside of the legislature's general competence.[87] This kind of judicial review regards the 'strong' systems, where courts can cancel out legislation.[88] Opposite to these, there are weak systems of judicial review, where "courts assess legislation against constitutional norms, but do not have the final word on whether statutes comply with those norms."[89] Since courts in weak systems do not cancel out legislation but refer incongruities

[85] In short that, the majority voting of a law is enough to cure the ailments of the procedure.
[86] There is a large discussion weighing pros and cons of judicial review for faults in the lawmaking procedure orbiting. Suzie Navot navigates this theoretical landscape using key cases from Israeli Supreme Court, which arguably is features the most expansive judicial review of legislative procedure in Navot, S. (2006). "Judicial Review of the Legislative Process." Israel Law Review **39**(2): 182-247.
[87] like when the Supreme Court (US) has struck down legislation for going beyond the Commerce Clause of the United States' Constitution, see Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), United States v. Alfonso D. Lopez, Jr., 514 U.S. 549 (1995)
[88] See Tushnet, M. (2003). "Forms of Judicial Review as Expressions of Constitutional Patriotism." Law and Philosophy **22**(3/4): 353-379. and ibid., Tushnet, M. (2011). The Rise of Weak-form Judicial Review. Comparative constitutional law. T. Ginsburg and R. Dixon. Cheltenham,, Edward Elgar.
[89] Tushnet, M. (2008). Weak courts, strong rights: judicial review and social welfare rights in comparative constitutional law. Princeton, New Jersey, Princeton University Press.

onward, there is space to institutionalize self-scrutiny. A referral mechanism that indicates to the legislature how it did not follow form could be more fitting for both the dispositional and retrospective aspects of self-scrutiny.[90]

However, institutional imagination for external self-scrutiny should not be limited to the judiciary. There is ample room for experimentation in other branches of government or sui generis bodies. Some quasi-executive bodies could fulfill a similar role to weak-form judicial review. For instance, to my knowledge, the idea of a procedural ombudsman remains something that has not been implemented anywhere.[91] There is a Parliamentary Ombudsman in the UK. Their role, though, is entirely different. It is to work through the complaints of the general public for government actors who have improperly or about the National Health Service,[92] leaving them outside the scope of self-scrutiny. On the other hand, an ombudsman of form would deal solely with how legislation is carried out. Their task would be to indicate where the legislature would be in danger of abusing form, by petition or by the ombudsman's initiative. The possibilities remain open. Any institutionalization of such a mechanism would improve the quality of legislative practice. Additionally, an ombudsman would offer the benefit of isolation from the political pulls of policy. They would allow greater opportunity to be impartial since their role is not on substance and making sure no corners are cut.

Moving onto the self-actuated implementation of self-scrutiny, it seems much more straightforward. Self-actuated self-scrutiny lies squarely on the shoulders of the partakers in the lawmaking enterprise. To translate this into more tangible practice it means garnering attention to form as a directive of legislative action. Simultaneously, it means prodding lawmakers to question the present and past practice to see if it aligns with the dictates of form, with all its protocolar, evaluative, and normative senses.

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[90] Ibid

[91] In the US House of Representatives there is a position called "Parliamentarian" that can give limited scrutiny. They are a non-partisan office that acts as a resource base for identifying and implementing house rules. See US House of Representatives. "Parliamentarian of the House." US House of Representatives, from https://www.house.gov/the-house-explained/officers-and-organizations/parliamentarian-of-the-house.

[92] For more information see https://www.ombudsman.org.uk/about-us/what-we-do

Self-reflection also extends to isolated acts in the chain of legislating, such as the work of committees, experts, and consultations. These actions are meant to develop specific reasons and justification for the law that is going ahead. This may be seen as a particular scrutiny type because these legislative actions answer the question lawmakers should ask themselves: “Should I be legislating like this?”

If lawmakers do not want to engage in lawmaking without stepping outside the bounds of form, then it is in their- and the polity’s- best interest to try not to repeat the mistakes of form made in the past and prevent their own in the moment. In all, self-scrutiny is a concern that shields from repeating the same pitfalls. By doing so, the dignity of legislating will be elevated as the form of legislating would have more means of protection, and the legislature's role would become more robust.

8.7 Custom Fitted Concerns

The Deweyan adage that the job of theory is to make practice more intelligent gives framing to this chapter's objective. The chapter gathered points of guidance on improving legislation using true stories of legislative pitfalls. In doing so, it became visible when practice treated the enterprise of legislating with indignity and, in contrast, how to avoid that. The epimyth of these examples is that dignity can still be respected through the upkeep of form, even if new developments create challenges. The chapter identifies opportunities for improvement, which were cataloged in the instantiation of concerns, which, if implemented, can offer legislative practice closer to form. Those are maintaining a double cognizance of form, giving form adequate time, showing fidelity to the enterprise, creating laws not made under duress, and exercising both retrospective and concurrent self-scrutiny.

Each of these concerns holds a unique position in the normative environment of legislating. They point out where attention needs to be turned to. They are not meant to be a finite and conclusive list but are just an opening toward more specific points of attention for legislating. More items naturally can be added to the list. Their view covers just some of the ways the faults in form can be transferred to practice in the real world.

The Chapter's concerns pivot on the idea of the form of legislation. They regard the way things are done, not what is made. In that sense, they are procedural and formal because they encircle the actual making of the law and involve content only as much as it reflects on the quality of the lawmaking process itself. Apart from this, the concerns are normative because they should be paid attention to if the legislature is keen to follow form. They act as normative alignment tools towards the rudimentary teleology of lawmaking within the descript context of that specific polity. The goal is to maintain the dignity of legislating by being true to form and, to that end, being guided by these concerns in this direction.

There could be many objections to how these concerns arose since they are a product of an ethological view of the workings of a parliament. Such criticisms might be that all the issues that arose were not even formal problems. It was just another case of politics overpowering form with its expedience or that these were times of exception in a Schmittian sense.[93][94] Another objection may be against making inductive arguments from fringe examples. I answer the same to both: This chapter is about creating practical guidance to bring legislative practice closer to form, thickly understood. The concerns can bring forth progress and improvement in a generalizable way to most polities.

In all, if the polity decides to make rules for itself in a certain way, then there is an inherent normative drive to complete the task it set for itself. To undercut that is to undermine the assumption to make law in a specific way and to a particular end. Maintaining a double cognizance of form, giving form adequate time, showing fidelity to the enterprise, creating laws without under duress, and exercising both retrospective and concurrent self-scrutiny offer guidance and tangible points of attention in favor of the dignity of legislating.

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[93] Schmitt, C. (2005). Political theology: four chapters on the concept of sovereignty. Chicago, Ill, University of Chicago Press.

[94] The MoU agreement was likened to an act of Political Theology in a Schmittian sense by Giannakopoulos. He sets this aside as a unsubstantiated justification for what happened, and I agree. See Giannakopoulos, K. (2011). Μεταξύ εθνικής και ενωσιακής έννομης τάξης: το «Μνημόνιο» ως αναπαραγωγή της κρίσης του κράτους δικαίου (between national and EU legal orders: the MoU as a reiteration of the crisis of the Rechtstaat). constitutionalism.gr.

9 Conclusion: Dignity and Improving legislating

"Discussions of social theory do come to an end, but they are rarely, if ever, conclusive. There are no last words on this subject, and one ought not to expect them."[1] Judith Shklar offers an interesting thought with this phrase. It intuits with what goes through the mind while authoring a theoretical Ph.D. While I disagree that meaningful theoretical conclusions cannot be had, this project's central objective and spirit was to seek improvement of lawmaking by informing it with theory. The intended contribution is to add or even open a long-lasting discussion. The field of legal theory must gravitate towards the act of legislating since legislating is so crucial to our legal and political cultures. In the following pages, I intend to recapitulate this thesis's content, explain its underlying thoughts, and argue for its contribution to legal theory.

Throughout this thesis, the aim has been to produce insights for improving legislating as a craft. As a theory-based work, it was inspired by Deweyan pragmatism for inspiration, to 'make practice more intelligent.'[2] Not to say that lawmakers are not intelligent. Still, their actions focus primarily on pursuing political objectives, not craftsmanship. This thesis intends to develop tools by unpacking and applying the normative directions found in the form of legislating. The form of legislating was the point of intervention because it meaningfully contributed to the theory of lawmaking without the need to turn to politics for grounding. Methodologically, therefore, it became imperative to avoid peripheral concerns to concentrate on the craft of making legislation itself. Politics, drafting, economics, and social rights are all important in their own rights, but co-analyzing them would muddle the waters. For this reason, the thesis's viewpoint espouses Zamboni's vision for a middle-range theory of legislation. The aim was to theorize a dignity of legislating along these lines as a "structure capable of channeling the messages coming from the political world into viable and concrete legislative products."[3] In the space of this work, middle-

[1] Shklar, J. (1964). Legalism. Cambridge, Mass, Harvard University Press. 222
[2] See Section 6.1.
[3] Zamboni, M. (2019). "A Middle-range Theory of Legislation in a Globalizing World " Stockholm University Research Paper No. 70,(Available at SSRN: https://ssrn.com/abstract=3373134 or http://dx.doi.org/10.2139/ssrn.3373134). p 3

range is interpreted as looking for a middle ground in which something is in the process of becoming part of the rule of law, where both the technique 'law' finds a balance with its substantive content in the volatile space of a polity. Therefore, the thesis had to isolate the craft of legislating from the expediencies of politics and morals to attempt to improve legislative practice to an improved state.

With this narrowing of focus in place, the view of the project was one of heuristic examination of the specific subject area of legislating. The examination centered on the form of legislating as the tool capable of orienting legislatures towards improving their craft. Form is important because it sets the means and the boundaries for legislation. Without form, legislation can have no shape, direction, or reason for being. Form gives substance and allows legislation to be distinct from other means of ordering. Form connects legislation with larger entrenched political schemes in a polity, like democracy, the rule of law, and legislation-by-assembly.

The dignity of legislating is the normative conceptual vehicle to connect practice to form. In simple terms, if the dignity of legislating were respected, then legislating would be improved by adhering to form in the best way possible. The standards and guidance that spout from the dignity of legislating cannot be universal, nor does this dignity create a sole referential paradigm for legislating. Instead, it gives perspective to improve practice through a better articulation of the form of legislating already in place.

Hopefully, the previous paragraphs adequately show this project's overall aim and give a good elevator pitch. Moving on to the strategy and the methodological scope, the thesis began from the abstract and unhandled idea of form and then descended layers of theory into practice. Legislation is inextricably linked with its product: law. Thus, the intervention was meant to be from a legal theoretical perspective. The tools and ideas used to descend from abstract to practice would also be legal-theoretical. That is why the analysis encircles (mostly) legal thinkers, first with Lon Fuller and then with Jeremy Waldron. Both syllabi of their work are benchmarks for the ideas of form and the dignity of legislation, respectively.

These thoughts shape the aim and the methodological ambition that pervades the three parts of the thesis. As stated in the introduction, the plan was to transverse from the abstract theory of legal form to the improvement of legislative practice. Each part of the project descended a layer of abstraction towards tangibility. The following paragraphs trace each part of the thesis alongside some thoughts that underpin them.

Part I was meant as the beginning, the gathering of tools for the expedition. Seeking to add to its legal-theoretical quiver, it gravitated towards Lon Fuller's work because of its attractive perspective. Fuller was a lawyer *qua* theorist. The common thread throughout his work is the search for what allows law to be law. He sought those features that enable law to reach its distinctiveness as a means of ordering. As a body of work, his scholarship aimed to articulate the material constraints of law, which enable law's very existence. The inner morality of law, Fuller theorized, is that which allows law to *be at all.* This basic thought of enabling and anti-preclusion attracted my thoughts to his theory. His work also explains the type of morality and form that feature throughout my project. For the former, the aim is a low-floor morality that merely sets normative directions, not value judgments of the quality of law. For the latter, it was the form of a collective enterprise centered on completing a communal end. A final motivation provided by Fuller is his unfinished 'Eunomics'[4] project. His will was to study what makes for good law, which I take to mean give theoretical foundations for legal improvement, to make the '-nomics' more 'eu-.'[5] These basic ideas, motivations, and tendencies from Fuller gave the theoretical base of the gathering stage. However, as Fuller's work engages law differently from the legal-theoretical orthodoxy of his time, there needed to be considerable explication to clarify and engage his ideas. Especially important was to carefully articulate its framing outside the binary of the classical natural law-positivism rift.

After gathering and clarifying what to distill and how to get the most from reading Fuller, the intervention of Kristen Rundle became poignant to move the

[4] " the science, theory or study of good order and workable arrangements" Fuller, L. L. (1953). "American Legal Philosophy at Mid-Century." Journal of legal education **6**: 457.
[5] Eunomics as a word is derived from the Greek Εὖ, which means well or better, and νόμος which broadly speaking means law.

work forward. Through her work, the analysis gained entry to articulate several formal aspects that are unique to Fuller's work. Her research unearthed some points that were underlying and -perhaps- undertheorized by Fuller. Rundle started from the prominent idea of law's distinctiveness as a means of ordering. She argued that law has a better position amongst the forms of ordering because of the agency it enables. By empowering those involved in law to make choices, Fuller's positions could be morphed into more tangible and applicable ideas to legislative practice. The logic of the material ability of Fuller's ideas needed an extra step to be transferred onto lawmaking, and Rundle provided it. Generally, the constraints on legislating are not always evident, but Rundle's work takes us one step closer.

Borrowing Rundle's strategy to open concepts found in Fuller's work, the thesis went deeper to analyze three normative pushes. These normative pushes describe how normative direction-setting develops within the purposive environment of lawmaking. These three, reciprocity, ethos, and agency, articulate how normative constraints develop for the partakers in the legal enterprise. Normative pushes act like constraints in that they tell the partakers what to do. They might be worked around, willfully contravened, or even ignored, but the description of normative pushes shows how directives work within lawmaking acts. Thus, reciprocity, ethos, and agency show what normative pressures are exerted on all within lawmaking, including lawgiver[6] and lawfollower. Irrespective of these roles, the analysis additionally showed that if a *telos* is ingrained into the process, then necessarily some normative pushes will arise to enable that *telos*. This telos is double in a way; telos to finish the process but also to finish it in a manner and using the means as found in form the polity puts forth.

The necessary connection between *telos* and normative pushes holds for the legislative frameworks in which normative pressures arise. The dignity of legislating is then meant to articulate how these normative pressures can provide footing to legislate in a better fashion by allowing. Part II's task then

[6] The classification of 'partaker' as word needs a little clarity. The focus is more on one of the two roles; the lawgiver. But what has not been covered is that during lawmaking the lawgiver is a hybrid role, in which that class of partaker are both those people who make the law but also lawfollowers for how the rules which govern how laws are made.

was to show what the dignity of legislating means, where it comes from, and why it is a good practical guide for lawmaking.

Part II made the in-between step and went from grand theory to more specific theory. The discussion accordingly made the conceptual transition from the ideas of Form and morality to the concept of dignity. Dignity would act as the conceptual intermediary that connects form with practice. Dignity is a notoriously thorny concept; thus, it requires plenty of qualifications to become functional. Luckily, there was already a sizeable amount of theorizing at the intersection of law, dignity, and legislation (as the act of making law). Jeremy Waldron has dedicated copious efforts in this direction. Starting from the point that we- legal theorists- are too quick to forget the act of legislating, his theory on the dignity of legislation would become a point of entry as it provided the materials to create a new concept of dignity. The new dignity, however, would need to be tailored to the project's outlook to make lawmaking better and, thus, take what it can from Waldron to head in a new direction.

The first actions taken to hone Waldron's theory of the dignity of legislation were to identify how legal scholarship deals with the general idea of dignity and how it factors with the law. The resulting literature review showed a plethora of intertwinements between law and dignity. The range of the scholarship was broad, covering everything from the regulation of dignity by law (e.g., euthanasia) to theories on how the law is an expression of dignity (e.g., universal human rights discourse). There is no universal agreement on the meaning or function of dignity nor how dignity should be legislated. Most of these approaches to dignity have a commonality: they consider dignity a regulatory object governed by law. However, as the thesis is framed as an inquiry into a communal enterprise, this view is unsuitable. Luckily, recent legal scholarship on dignity showed a different, more helpful direction. This area recognized a constitutive role for dignity as a building block of law. The work of Rupniewski[7] and Weinrib[8] are especially valuable in this regard. After the exposition of their

[7] Rupniewski, M. (2023). Human dignity and the law: a personalist theory. Abingdon, Oxon;New York, NY;, Routledge.
[8] Weinrib, J. (2016). Dimensions of dignity: the theory and practice of modern constitutional law. Cambridge, Cambridge University Press.

respective ideas, the strategy was to take their commonality in approach and use it to update the work of Waldron.

The second set of actions was then oriented to describe, evaluate, and update Waldron's Dignity of Legislation concept through this lens. The key takeaways from Waldron's work are his depiction of the harmful status quo towards legislation (which is either willful or by omission), pinpointing the chief theoretical opponents of legislation as a dignified means of ordering, and how legislation itself is dignified. Waldron's concerns are in the correct direction, yet they do not offer guidance on legislating better. Instead of fighting against certain positivist and conservative ideas, the theoretical work is more impactful if oriented towards legislative practice. Therefore, it would be best to address the inquiry directly to those who can change the course of legislative practice. Given this and other incidental points on the dignity of legislation, it was thought best to rebrand dignity in a manner that builds on Waldron's work and is addressed toward practice. The result was rethatching the idea under the term 'dignity of legislating." This concept is complementary to the dignity of legislation but differs in scope, audience, and context. It aimed to set a standard against which legislating could orient and improve itself.

With the base idea of the concept set, the next chapter in Part II was meant to articulate this dignity. The second chapter in Part II was a step-by-step development of a definition of the dignity of legislating. The tactic for making the definition was to start with an intuitive version and then discuss it to find improvement. The structure would be a traditional definitional three-part formula= term + *genus* + *differentiæ specificæ.* The definition had to be fit for purpose, namely, to be useful for improving legislation. It also must be able to deliver the promise of helpfulness by indicating to lawmakers where to look for guidance for improvement. The final definition read as follows:

> *The dignity of legislating is the measure of practice when the normative, evaluative, and protocolar features of form are adhered to in such a way that allows lawmaking to fulfill its contextually determined purpose.*

.[9]

Arriving at this definition necessitated an amount of backtracking after its completion as form needed to be clarified further. Form was conceptually vital to the definition, consequently, it needed to become more understandable and adequately itemized to be so. For this reason, the completion of the definition was complemented with the theorization of three elements of form: protocolar, evaluative, and normative. These are three elements of form that lawmakers can rely on to direct their efforts to act in line with the dignity of legislating. The analysis picked at each one to explain and show how they could be utilized to create a chance for improvement. Therefore, the utensils needed had been gathered with all this groundwork, and the project could move on to its laboratory, Part III.

Part III is the last step on the journey to make lawmaking better. The scope was to examine practice and make an operational model of dignity for legislating. It wanted to bring the analysis from the most abstract ideas of form and make it available for practical applications. This would occur through detailed instantiations of lawmaking practice. The approach emulates that of Lon Fuller when he crafted the allegory of Rex II. Fuller produced scenarios that described how Rex II failed to legislate. Each mistake corresponded to something that needed fixing. The project would bring this idea to a more real-world application; instead of crafting a thought experiment, the inquiry drew examples from real practices of lawmaking under regimes of conditionality. Such an approach brought together observations of the practice of legislating with the engagement of the theory of legislation. The intended nexus between the examples was the dignity of legislating. This dignity could only be respected by lawmaking if its terms were met. And the examples taken from conditionality showed how the lawmakers failed to do so. In each failure, another concern surfaced and, simultaneously, a corresponding direction for improvement.

The analysis proceeded with such a problem-centric approach in mind. The first chapter of Part III was dedicated to laying out this approach, introducing conditionality, showing where the danger for lawmaking lurks within

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conditionality, and justifying the choice of conditionality as the 'laboratory' for this inquiry. The backdrop was then complete, and we could proceed to the examples of practice that epitomize the maltreatment of the dignity of legislating. Conditionality, as argued, threw a spanner into the works of legislating, as evidenced by the examples in Chapter 8. All the failures corresponded to failures to respect elements of the form of legislating.

As the inquiry was meant to improve lawmaking, identifying the problem was not enough, and it needed to proceed towards guidance. Such was conveyed on the back of the formal failures in the examples. The structure chosen to articulate this was to bifurcate the text of each example into two sections. The first part of each concern was meant to describe the setting in which the problem arose, the actions that led to it, the nature of the problem, and why it is dangerous to the dignity of legislating. The second part of each section was meant to turn each failure into guidance and how to improve lawmaking by taking lessons from the failures.

Ultimately, the list of concerns that precipitated from this inquiry was the double cognizance of form, time, fidelity to the enterprise of lawmaking, independence/ non-duress, non-impossibility, and self-scrutiny (internal and external). As Lon Fuller's inner morality of law was meant to be the "morality that makes law possible,"[10] this list wants to offer the dignity that makes lawmaking possible. The spirit is to take theoretical ideas and make them operable to improve legislative practice by empowering the actors. If lawmakers give due attention to these six points, the practice of legislating can be improved. The standard by which 'better' is found in the definition of the dignity of legislating above is stipulated by form. By basing the benchmark for improvement on form, there is a way to create a tailored standard that reflects the inherent sociolegal individualities of each polity. Not every polity is built the same. An improvement for one might be a defeat for the dignity of another. Therefore, the dignity of legislating makes for better lawmaking, in a tailored and reflexive way. These 6 are not meant to comprise a finite list but are best seen as an invitation to interrogate further what it means to serve lawmaking

[10] *Morality* Chapter II

during the legislative process. The arising issues are complex and not squarely within any discipline of study, but this can be the start of a legal perspective on the issue of good lawmaking. Therefore, a new angle for future research is introduced by this inquiry.

The central contribution of this thesis was to give lawmakers a method to improve their practice. The contribution was also meant to offer improvement in a fashion that could be applied to every context of communal lawmaking. It seemed intuitive that the way to go about this was to start with a basic idea and go narrower. That means breaking down some of the legal building blocks that constitute lawmaking and transforming them into tangible modes of improvement. The choice started from the ideas of form and distinctiveness of law (as a type of ordering). These ideas ran their course and resulted in some viable suggestions for improvement of the acts of lawmaking brought together in the concept of the dignity of legislating.

The view being forwarded is that a quality control mechanism can be placed between the political input for law and the legal output as promulgated law. Accordingly, the dignity of legislating can be considered a "middle-range theory,"[11] whereby political ideals turn into viable legislative products through the normatively-minded viable application of lawmaking. However, a few augmentations are needed to classify this thesis as middle-range. As the analysis precipitated, it became evident that the 'viable legislative products'[12] sought after by the middle-range would be meta-legislative in our context. They would be meta-legislative in that they would concentrate on what goes on in legislating and not the content of the laws themselves. More specifically, the sought-after viability is gauged on the basis of the quality of legislative actions contrasted against the polity's intended form. The suggestions that were formulated were aimed at ensuring that law will have the ability to unfurl its potential. The legislature's job is to make law that is not *a priori* precluded from becoming law due to technical failure. Essentially, the dignity of legislating means that if legislating is to be taken seriously, the legislature must keep a

[11] Zamboni, M. (2019). "A Middle-range Theory of Legislation in a Globalizing World " Stockholm University Research Paper No. 70,(Available at SSRN: https://ssrn.com/abstract=3373134 or http://dx.doi.org/10.2139/ssrn.3373134).
[12] ibid

certain esteem towards the process. This means not letting external pressures hijack the process and not shooting itself in the foot. Legislators, consequently, must act in a way that makes legislation possible in the way form ascribes, and the compiled list can effectively improve that task.

While what is being argued might seem to some as very modest gains, drawing attention to form can make lawmaking better at fulfilling its most basic purpose: to make legal arrangements competently. Competent legal arrangements are vital not only for making policy goals a reality but also not to disappoint the trust instilled in lawmakers by the polity.

The trust between a polity and its legislature to fulfill its purpose is self-evident. However, if we draw our attention to Greece under conditions of conditionality, then it becomes rather manifest that this essential trust was betrayed by abusing the form of legislation. The parliament legislated in a way that manifestly abused legislative form. This abuse was not a consequence of policy choices but that the lawmaking itself was carried out in an undignified manner. During conditionality, the pressure from creditors and the markets, the breakneck speed demanded, the novel sources of input that created law, and the multiple dead ends created by the abuse of form were plentiful. My hypothesis is that the cause for these legislative dead ends was that the form of legislating and the normative directions it creates were ignored. Legislative practice at the time became discombobulated without the extreme conditions of war or natural disaster. The form of legislation shifted without any formal changes in the framework for legislative production.

The laws passed under conditionality were not typical legal arrangements as they were enacted and were dealt with differently to previous laws, resulting in indignity towards legislating. This situation produced many problems, which led to the guidance of chapter 8. The toolkit that was crafted took note of the indignity and highlighted key points that, if taken care of, would underpin and support the dignity of legislating. The six concerns that were pointed out for lawmaking are useful in any legislative context.[13] The dignity of legislating, with these specific concerns under its umbrella, ensures that the commitment of the

[13] Granted that in a theocracy, they would need much supplementation.

lawmakers to uphold the rule of law in lawmaking is respected and their actions can be improved. It gives a new way to improve legislating as a craft. In final analysis, this point provides the thesis with its main contribution.

This thesis also contributed to existing debates with legal scholarship. First, it added another facet of the existing argument regarding the nature of form, namely that form for legislation is not exhausted by its protocolar elements and, in a Fullerian direction, includes things outside the strict control of human action, which are set by the context in which the legislation is being created. This compiles into a thicker normative environment for those creating law. Next, the thesis embellished the existing argument in Waldron and others that legal theory needs to more attention to legislation. Legislation is the pinnacle of legal change, and ignoring its central position is to leave too much in the dark. A final doctrinal contribution is that addressing theoretical concerns to those making law is beneficial. Legal theory has much to offer to the meta-level of practice. Therefore, this work can be added to a new direction for legal theoretical scholarship to give theoretical tools that let purpose line up with practice.

The call to author this thesis came from witnessing how conditionality challenged the form of legislation and pondering what allows legislation to be created as intended and hone the craft of legislating. It looks to give answers to what needs to be in place for legislation to *be* legislation, what enables it, and what allows it to unfurl its political potential and fulfill the trust of the polity which the legislation will govern. As such, this work is meant to add to such a discussion and provide fodder for further inquiry in this direction.

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