Lon L. Fuller's Lessons for Legislators[1]

Wibren van der Burg[2]

1. Introduction: Law and the Regulatory State

Modern regulatory states produce enormous amounts of black letter law, through legislation and various types of subordinate regulation. We may call this the regulatory explosion. The idea that everyone is supposed to know the law has become a fiction more than ever – not even every lawyer can know all the black-letter law relevant to his field.

As a side remark, I would like to notice that a similar explosion may be found outside the state, in international law, EU-guidelines, but also through extremely detailed contracts and covenants, often consisting of hundreds of pages. However, I will not discuss this non-state law but focus on legislation and regulation by central state organs, both the formal legislative powers (parliament and government), as well as the government departments and agencies that produce and enforce subordinate regulations.

In such a context, legislation and regulation may seem an instrument for politicians and nothing more. An instrument that is pliable, and thus can easily be used – and abused. An extreme example of the latter was the former Prime Minister Berlusconi in Italy, who introduced many new laws with the sole purpose of protecting his personal interests, his commercial interests and his political interests – in that order. Every state, however democratic and decent it may be, has continuously to fight the risk of instrumental use and abuse of legislation.

Especially in Civil Law countries, this instrumentalist approach is often reinforced by positivist attitudes among lawyers: law is what has been codified, directly or indirectly, by formal legislation, that is, through cooperation of parliament and government. Law is seen as a top-down enterprise: the powerful can wield it as an instrument to further whatever purposes they may have.

I will not deny that law can often be an instrument in the hands of political powers. But there is another side to the story, a side that is especially important for the legal

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[2] Wibren van der Burg is Professor of Legal Philosophy and Legal Theory at the Erasmus School of Law, Erasmus University Rotterdam, the Netherlands. Website: www.wibrenvanderburg.eu.

profession. Law also has an inner morality, a built-in tendency of its own, which makes it resistant to pure instrumentalism.

2. Lon L. Fuller (1902-1978) and the Internal Morality of Legislation

For this other side, for a non-instrumentalist approach to law, we may learn much from Lon Fuller. Fuller was one of the leading non-positivists in the past century in the USA.[3] He is most famous for his debate with H.L.A. Hart.[4] However, the dominant interpretation of this debate as a debate on legal positivism and especially on the concept of law does not do justice to the rich inspiration that his work may offer on a wide variety of topics.[5] Recently, there has been a modest revival of interest in his work.[6] I believe that we may discover that his work offers much inspiration for topical problems. Examples are the understanding of international law[7] and especially of multi-level legal orders and global legal pluralism – as he is one of the few legal philosophers who wholeheartedly embrace legal pluralism.[8] Other examples are our understanding of legal professional ethics[9] and of legal fictions.[10]

Lon Fuller sees law in a way that many lawyers from Civil Law countries may find counterintuitive – as a purposive enterprise. In his book *The Morality of Law*, he focuses on the legislative enterprise. Usually in legal theory, the focus is on the product – statutes – but

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[3] His most important works are *The Morality of Law*, New Haven: Yale University Press 1969 [1964].; *Anatomy of the Law*, New York: Praeger 1968; Westport, Conn.: Greenwood Press 1976; *The Principles of Social Order*. Selected Essays of Lon L. Fuller (edited by Kenneth I. Winston), Oxford: Hart Publishing 2001 [1981].

[4] The various stages in this debate were H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) 71 *Harvard Law Review* 593; Fuller's reply in the same issue "Positivism and Fidelity to Law. A Reply to Professor Hart" (1958) 71 *Harvard Law Review* 630; the publication of Hart's *book The Concept of Law* (Oxford: Clarendon 1961, 3rd edition 2012); Fuller's book *The Morality of Law* in 1964; Hart's book review of *The Morality of Law* in (1965) 78 *Harvard Law Review* 1281; it was concluded with Fuller's "Reply to Critics" added to *The Morality of Law* in 1969. On this debate see Peter Cane (ed.), *The Hart-Fuller Debate in the Twenty-First Century* (Oxford: Hart 2010).

[5] Kristen Rundle, *Forms Liberate. Reclaiming the Jurisprudence of Lon L. Fuller*, Oxford: Hart Publishing 2012.

[6] For an overview, see Wibren van der Burg, 'The Work of Lon Fuller: A Promising Direction for Jurisprudence in the 21st Century', *University of Toronto Law Journal* (2014 forthcoming), also available on SSRN.com. I have understood that recently a book in Turkish on Lon Fuller has appeared; this year, Irem Aki will also finish her dissertation on Fuller's morality of law.

[7] On international law, see Jutta Brunnée and Stephen John Toope, *Legitimacy and Legality in International Law. An Interactional Account*, Cambridge: Cambridge University Press 2010.

[8] For how Fuller may help us to understand global legal pluralism, see Wibren van der Burg, *The Dynamics of Law and Morality. A Pluralist Account of Legal Interactionism*, Farnham: Ashgate (2014, forthcoming).

[9] David Luban, "Rediscovering Fuller's Legal Ethics", in Willem Witteveen & Wibren van der Burg (eds.), *Rediscovering Fuller. Essays on Implicit law and Institutional Design* (Amsterdam: Amsterdam University Press 1999), 193-225.

[10] Frederick Schauer, 'Legal Fictions Revisited', in Maksymilian Del Mar and William Twining (eds.), *Legal Fictions in Theory and Practice*, Dordrecht: Springer (2014, forthcoming); Peter J. Smith, 'New Legal Fictions', *Georgetown Law Journal* 95 (2007), 1435-1495.

Fuller focuses on the process of lawmaking. His question is: how can a legislator effectively guide society? How can legal rules really govern human conduct?

Fuller tells the story of a fictitious king Rex who failed to produce any law at all despite eight serious attempts.[11] Fuller uses this as an illustration to show how a legislator can fail in at least eight ways, for example, by producing no general laws at all, by keeping them secret, or by making unclear and inconsistent laws. From these failures, he derives an internal morality of law, consisting of eight principles or demands that legislators should meet in order to produce law at all.[12]

1. Laws should be general
2. Laws should be published
3. Laws should be non-retroactive
4. Laws should be clear
5. Laws should be non-contradictory
6. Laws should not require the impossible
7. Laws should be constant through time (stability)
8. There should be congruence between official action and the declared rules

According to Fuller, the lawgiver must respect these principles. In order to make law that can act as guidance to those subject to it, the lawgiver must respect the eight principles of legality; otherwise he will simply fail to draft a law that can guide behaviour. For example, if the legislator does not publicise the laws, the citizens cannot act on them; if the laws are inconsistent or vague, they will simply not know what they are expected to do. The basic idea is that law has to function as an action-guide for citizens and that citizens cannot guide their behaviour in light of a law that is secret, unclear, vague, self-contradicting and so on.

It seems a quite simple – and perhaps even trivial – list, but they have important practical implications for the quality of legislation. I'll discuss each of them.

1. Generality

The simple message is that we should avoid too detailed statutes aimed at particular cases – what the Germans call *Gesetzgebung für den Einzelfall*, that is, legislation for single cases. This would make law much too complex and easily inconsistent. The moral implication is at least a minimum form of justice, namely formal justice, treating like cases alike. Moreover,

[11] Fuller, *The Morality of Law*, 33-38.
[12] Fuller, *The Morality of Law*, 39-94, esp. at 39.

the requirement of generality also provides a certain guarantee against arbitrariness and political manipulation of law to favour specific interests. Therefore, generality is more than trivial: it guarantees minimal justice and non-arbitrariness.

2. Publicity

The core idea of this principle is that secret laws cannot help citizens to guide their action. If they do not know the law, law does not become a guideline for action *ex ante* but rather an instrument for arbitrary punishment *ex post*. However, there is something more to it: law should also be practically knowable, and not only be accessible to the initiated. The more law there is, the more difficult it will be to know it and to take it as a guideline for action. Therefore, legislators should be critical against overproduction of law – it easily becomes counterproductive. Or to put it simply: the legislator should produce less law and less detailed law in order to produce law at all.

3. Non-retroactivity

For law as an action-guide, this is an obvious desideratum; citizens cannot be guided by laws that do not yet exist. However, for politicians retro-active legislation is an ideal instrument to amend mistakes and use law to further their own interests, for example by introducing more lenient legislation to make themselves immune against prosecution – look again at Berlusconi. Therefore, this principle provides an important guarantee against arbitrariness and political manipulation of the law.

4. Clarity

Open norms are indispensable in law: we cannot foresee every possible instance. But sometimes, laws are so vague or ambiguous that they can be interpreted in highly diverse ways. This occurs especially in the field of anti-terrorism laws. I have written a book about civil disobedience, in which I argued that resisting the political order is sometimes morally justified.[13] However, a draft proposal for the Dutch anti-terrorism law was so broadly formulated that an unsympathetic prosecutor could try and prosecute me for supporting terrorism when advocating such a position. Or to take some other examples, an attorney defending a suspected terrorism or a journalist arguing that terrorist attacks in London must be understood as a reaction against the invasion of Iraq might be considered to play down

[13] Wibren van der Burg, *Een andere visie op burgerlijke ongehoorzaamheid* (Kluwer Post Scriptum 1986), Deventer: Kluwer etc 1986.

terrorism and thus be prosecuted under this proposal.[14] Although this proposal, in the end, was not accepted it shows how easy in the fight against terrorism such vaguely and widely phrased laws may occur. Many countries know this kind of vague laws on terrorism that, if prosecutors and judges are not sufficiently independent from political pressure, may easily be abused to silence political opponents.

5. Non-contradiction

This may seem a trivial requirement, but it is more than that. I assume that it is not only in the Netherlands that the quality ánd the influence of legal staff at government departments is sometimes too low, resulting in badly drafted legislation. Badly drafted legislation easily contains contradictions, which means that it is unclear what precisely is required from citizens. Nowadays, contradictions may easily arise in the legal system for two reasons. First, we must include European and international law in the legal system. Too often, politicians don't want to accept that they are bound to international treaties, and too often legal professionals simply do not know European or international law. In the Netherlands, most judges have a reasonable knowledge of the Strasbourg Court and the European Convention of Human Rights, but few have adequate knowledge of EU-law. As a result, many statutes and judicial interpretations may conflict with European or international law, thus leading to contradictions in the law and possible nullifications. To avoid this, there is a great responsibility for legislators – including lawyers at government departments – to promote consistency as one of the elements of the legal quality of legislation. A second reason seems to be quite familiar in the Turkish legislative practice, if I understand it well, but it may also be found in other systems like that of the USA or Canada. It is the use of omnibus legislation in which a great number of unrelated legislative changes are combined in one large bill. The use of this type of legislation may more easily lead to inconsistencies in the legal system, because there will usually be less systematic reflection on how these changes fit together into a coherent legal system.

6. Not requiring the impossible

Again, this may seem obvious, but in the modern regulatory state, it may often be impossible to know, let alone live up to the enormous body of detailed rules. The more detailed and broader regulations are, the more difficult it will be to live up to them. Economic and

[14] E.J. Dommering, 'Strafbare verheerlijking', *Nederlands Juristenblad*, 32 (2005), 1693-1696.

environmental regulations are examples. Again this implies that legislators should show self-restraint in producing too much and too detailed regulations.

7. Stability

If laws change too frequently, citizens will no longer take them seriously as action guides. Especially in economic and administrative law, stability is important. If companies cannot reasonably foresee what the tax rate or environmental regulations will be in five years, they cannot make long-term investments. Yet, special regulations are tempting for politicians, as instruments for realizing their political agenda. But if, for example, subsidies for solar energy change every half year – as in the Netherlands they have done – they will not be able to influence investment decisions. The subsidies then are merely an unexpected bonus for those who had already made the investment decision before the regulations took effect.

8. Congruence between the law and official action

The first seven principles apply to characteristics of the laws or statutes themselves, the eighth principle, however, has a different character as it focuses on the legal practice in which those laws function.

Law is not only for the citizens, it also binds legal officials. This is one of the most important desiderata of the rule of law. The core idea is that they should interpret and enforce the law as announced, in order to make government action reliable and predictable. But it goes beyond that. If there are laws against corruption, they should be enforced. This requires an independent judiciary, but also politically independent police and prosecution authorities. If those authorities become too clearly subservient to political authorities, the rule of law is in serious danger. If politicians like Berlusconi use political immunity as a shield against legitimate prosecution of ordinary crimes such as fraud and corruption, this weakens the bond between state and citizens.

3. Not a Mere Checklist

These eight principles have often been regarded as a mere checklist for effective legislation. But that is only a part of the message.[15] Fuller's central idea was that law must be built on a relationship of reciprocity between lawgiver and citizens. Only in the light of this underlying collaborative relationship can we understand how the forms of law embody an internal

[15] For a similar critical position against this reduction of Fuller's message, see Rundle, *Forms Liberate.*

morality. Positivist critics of Fuller usually reduce this internal morality to eight criteria of efficacy, but Kristen Rundle convincingly demonstrates that there is much more to it.[16] The underlying relationship of reciprocity is reflected in these eight principles but is not exhausted by them. Fuller has a deeper insight to offer: the principles also have a moral dimension – in four respects.

1. The first is that these principles guarantee a minimal moral quality of the law. For example, the requirement of generality provides a guarantee against arbitrariness. The requirements of publicity, non-retroactivity, and stability make it possible for citizens to plan their actions; if the law does not prohibit their plans they are free to do so. Moreover, if these principles are respected, we can predict the behaviour of fellow-citizens and public authorities, which provides security and freedom.

2. The second moral dimension is closely related to the first, but goes beyond it. Law is not merely a pliable instrument in hands of the powerful; it may also turn against them. The German philosopher Georg Wilhelm Friedrich Hegel coined the phrase 'the Cunning of Reason' (in German: *die List der Vernunft*). Adapting his phrase, we may call this the Cunning of Law. The requirement of congruence implies that no one is above the law, not even politicians, the military, or the rich. As we need to make general guidelines rather than individual commands, it is difficult to make rules that do not apply to the powerful themselves – although of course not fully impossible. The requirements of publicity and clarity make law an object for critical discussion: if the laws are public and it is clear what the implications are, we can discuss them and criticise legislators who made inadequate laws. So using law as an instrument may turn against those who try to use it.

3. The third dimension goes one level deeper. For Fuller, law is not merely a one-directional command by legislative authorities; it is a cooperative enterprise built on relations of reciprocity. If a sovereign embarks on the process of legislating, he has to do this through general rules. That is what is distinctive for law, the governance of human conduct by general rules. Moreover, in order to govern through legislation, a sovereign must treat the legal subject with respect as a responsible human agent who has the capacities to interact with general rules. The lawgiver has to respect the free agency of the citizens, and show that it respects them as autonomous citizens; otherwise the citizens may not feel bound to obey the law. Fidelity to law on the side of citizens requires fidelity to legality on the side of the lawgiver and the public authorities.[17] Obedience to authority can be gained by dictators using

[16] Rundle, *Forms Liberate*, 92.
[17] For a discussion of the centrality of fidelity to Fuller's theory, see Rundle, *Forms Liberate*, 58-59.

brute force. But fidelity to law requires something else: it can only be grounded in a reciprocal relationship of mutual respect.

4. The fourth dimension is the most fundamental one. In order to communicate law to citizens, there must be open channels of communication. In order to see that law is not a mere one-directional command, but based on a cooperative reciprocal relationship between lawgivers and citizens and between citizens, we must be able to see how it works, whether corruption is punished or not, whether the police respects the rights of suspects, whether open norms are not abused to silence political opponents, and so on. So a good functioning of law requires open channels of communication, both in the public sphere, in the parliamentary sphere and in the sphere of court proceedings. Fuller even argues that if there is anything that might be called substantive natural law it is this principle: "Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire."[18] The reason why this is so central to Fuller is that without free communication, law cannot be effective.[19]

4. Conclusion

Let me summarize the argument. Law can function as an instrument, indeed, but is never a mere instrument. It has an internal morality of its own that provides some minimal moral quality and some resistance against abuse by the powerful. It presupposes and reinforces a relation of reciprocity between lawgiver and subjects. And in order to function properly, we must guarantee open channels of communication between citizens and between citizens and the public authorities. This is Fuller's deeper insight: if we do not respect law's internal morality, legality weakens, law weakens, respect for the law weakens, and the bond of reciprocity between citizens and lawgiver weakens.

In a more positive tone, law always holds the promise of a higher quality of law, of resistance to abuse by the lawgiver, of at least a minimal reciprocity and openness. To realize this promise and to protect its achievement, the legal professions have a heavy responsibility. Attorneys have a role in defending their clients which often requires uncovering and criticizing the abuses of power. Judges and prosecutors have to uphold their independence and uphold the values of legality. Civil servants involved in legislation should uphold the quality

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[18] Fuller, *The Morality of Law*, 186.

[19] See Wibren van der Burg, 'The Morality of Aspiration. A Neglected Dimension of Law and Morality', in Willem Witteveen & Wibren van der Burg (eds.), *Rediscovering Fuller. Essays on Implicit law and Institutional Design* (Amsterdam: Amsterdam University Press 1999), 169-192.

of their products by respecting law's internal morality against the pressure of instrumentalist uses of legislation by politicians. Finally, legal scholars should critically discuss the possible lack of quality in legislation.

Each of these professions can appeal to the internal morality of law in opposing extreme instrumentalism and even political abuse. They can also find support there for their independent professional role, as – in turn – they have the responsibility to reinforce the quality of law in light of the ideal of legality.