The authority of the judge: a real balance of powers: Why the implications of legal positivism lead to an incoherent legal system of public law

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The authority of the judge: a real balance of powers

Why the implications of legal positivism lead to an incoherent legal system of public law

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“Justice being taken away, then, what are kingdoms but great robberies? For what are robberies themselves, but little kingdoms? The band itself is made up of men; it is ruled by the authority of a prince, it is knit together by the pact of the confederacy; the booty is divided by the law agreed on.” – Aurelius Augustine, Bishop of Hippo: The City of God, 426 n. Chr.

“The subordinate Judge, ought to have regard to the reason, which moved his Soveraign to make such Law, that his Sentence may be according thereunto; which then is his Soveraigns Sentence; otherwise it is his own, and an unjust one.” – Thomas Hobbes: Leviathan, 1651.

General Introduction

On 1 March 2023, the highest administrative court in the Netherlands ('De Grote Kamer' represented by the five highest courts') made a significant ruling in the aftermath of the Dutch childcare benefits scandal. In March, the court decided that due to the relation between the judiciary and the legislator, administrative judges were not allowed to assess legal statutes against legal principles such as the proportionality principle ('het evenredigheidsbeginsel'), a principle that can be seen as a principle of fairness - Aristotle discusses the principle as a fairness exception that is necessary in law to correct general laws that have disproportionate effects in specific cases.[1] The court argued that the judge should not take a decision that could intervene with the legislature's will. The Dutch childcare benefits scandal has triggered a debate on the judiciary's role and its relation to the legislator. Laws must not conflict with higher legal principles, such as the general principles of administrative law. The word 'Principle' is derived from the Latin 'principium,' which itself comes from 'princeps,' translating literally to 'he who takes the first place.' As such, legal principles occupy a hierarchically high, 'first' position. Examples of such principles in administrative law include 'het evenredigheidsbeginsel', 'het rechtszekerheidsbeginsel', and 'het vertrouwensbeginsel'. In addition to holding a high position, these principles are also self-sustaining. Originally, these principles were 'found' in case law, thus serving as unwritten law discovered by judges. Over time, certain principles have been codified in specific laws.[2]

In the current Dutch system of administrative law, it is the legislator's task to ensure that conflicts between rules and principles cannot arise. It is the legislator, and not the judge, who has the final say if a law is contradicted by a principle. This was determined in 1989 by 'de Hoge Raad' based on Article 120 of the Dutch Constitution, which states that laws enacted by the first and second chamber together are inviolable. The Childcare benefits scandal illustrated for many why the prohibition of judicial review in Article 120 of the Constitution hinders judges from providing legal protection in cases where legislation in formal terms disproportionately affects practice. The scandal led to a re-discussion on the expansion of the judiciary's powers to review laws against principles of law. Should a judge always respect the legislature's authority and follow the law? Or is the judge a guarantor of coherent law, ensuring that laws do not conflict with legal principles?

In constitutional democracies like the Netherlands, the relationship between the judiciary and legislature remains complex. There is no consensus on how to shape the relationship between the judiciary and the legislator. To demonstrate that this debate is not just theoretical and how it has implications for the legal protection of citizens, let me first briefly describe the elements of the case at hand. In the thesis, I will use this description as a blueprint for a specific form of judicial interpretation. How the law is interpreted depends on legal philosophical presuppositions. This thesis aims to provide a clear conception of these presuppositions and to argue in favour of one over the other. After this brief discussion of administrative law, I will introduce the philosophical question central to this thesis and the debate.

The case I am discussing relates to childcare allowance. The case involved parents who had been living there only for a short time. The mother, whose name is unknown, applied for a childcare allowance for her son for 2017 in early 2018. While it is legally possible to apply for childcare allowance retroactively, the law stipulates a strict three-month deadline for doing so. The legislator recognised no exceptions; the deadline was a mandatory provision. The mother was unaware of this provision and was poorly informed about it. Consequently, she was under the impression that the advance payment of €4,657 was the allowance for the entire year of 2017. However, her son had barely attended childcare during the three months - October, November, and December. Therefore, the Tax Administration's Allowances Division

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[1] Aristoteles, *Ethica Nicomachea,* V, 10, 1137b7 – 1138a3, translation Hupperts & Poortman 2005, p. 185
[2] Vermeulen, *Rechtsbeginselen in het onderwijsrecht. Een inleidende beschouwing,* 24 november 2023, p. 2-3

demanded the repayment of most of the amount, including interest. The mother appealed to the principle of proportionality. Are the consequences of the law proportional to its objective - combating fraud?[3]

Nevertheless, the judge disagreed with the mother's argument based on her appeal to the principle of proportionality. The legal protection offered by the principle of proportionality is limited in situations of mandatory law to particular circumstances that the legislator did not take into account. Only in the rare case where these circumstances were unforeseen by the legislator when drafting the law, and if applying the law to these cases would be disproportional, could the administrative judge protect the citizen against unreasonable consequences. The judge looked at the behaviours the legislator essentially intended to regulate, which is the application for childcare allowance. The judge interpreted this law and its legislative history in such a way that the legislator intended the three-month deadline to apply to all cases where an allowance was requested.[4] Suppose the consequences had been much more severe; for example, if the family had fallen into acute financial distress, then the legislator would still have intended this with the law. The judge determines, based on the relationship between the legislator and the judge in the constitutional system, that the judge may not correct the legislator's will based on legal principles. The text of the law binds the judge in his ruling. The concrete reality that the judge sees before him cannot change this in his decision.[5]

The judge's lack of power to correct (possibly) unproportionate laws has no severe consequences in this case. The amount of money is relatively low. However, in the childcare benefits scandal, this was different. The mandatory legal provision in these cases was that if a parent made an error in the application, the parent would no longer be entitled to the allowance and had to repay the entire amount. This happened even with minor errors. The most striking example is a case where a parent failed to account for 190 euros out of a total of 17,061 euros received (thus 1.1%).[6] As a result, 100% of the amount had to be repaid. Many families suffered severe financial hardship due to this interpretation of the law. This led to financial ruin for some, including loss of homes, accumulation of debt, and enduring stress and emotional trauma. If we want a judge to prevent such injustices, a change in the constitutional relationship between the legislator and the judge is necessary. The judge must then be able to set aside laws that conflict with the principle of proportionality. This deserves further discussion in a broader context.

The fundamental questions underlying these rulings are: Who should have the last word on the law, and what is the basis for such authority? These questions are important because when the judge is bound by the text of the law, then only the legislator decides with general laws what is fair in a specific case. These questions shift the conversation between the judge and the legislator from legal questions towards more philosophical ones. Philosophers have provided many different answers to these questions. In the given answers, two main standpoints can be observed, namely legal positivism and natural law. In legal positivism, all law has a specific source, a starting point, a master rule.[7] This master rule determines the rules of change, which enable a purposeful modification of existing rules, and rules of adjudication, which allow for authoritative conflict resolution by (primarily) judges. The master rule is directed at these judges, obligating them to apply the outcomes of the use of these rules, primarily consisting of legislation and judicial precedents.

Others argue that the judiciary should function as a check on the legislator and not apply laws contrary to our society's more fundamental principles. In this vision, there is no such thing as a specific source of law. Before there was such a thing as a democratic legislator or a legal code like the Napoleonic Code, there were already legal principles. These legal principles have authority based on a society's moral principles and traditions. They guide the judge in his legal interpretation of the law. There is no single source of authority of the law anymore. Two authorities work together in a dialogue. The role of the administrative

[3] 1 maart 2023, ECLI:NL:RVS:2023:772, R.O. 9.1-9.6

[4] Ibid, R.O. 9.11-9.16

[5] Ibid.

[6] 17 januari 2018, ECLI:NL:RVS:2018:136

[7] Shapiro, *The Hart-Dworkin' Debate: A Short Guide for the Perplexed,* p. 25

judge here is that of an intermediary, someone who can correct the legislator with the help of the (unwritten) legal principles and, based on that, seeks to arrive at a just decision which fits the concrete social reality that he or she sees before him or her.

This thesis aims to provide a clear conception of legal positivism and its implications for administrative law. It argues that legal positivism, as a foundation in legitimising mandatory law, creates inconsistent, incoherent, and dysfunctional administrative law. The problem I want to highlight in this thesis is a specific form of legislation in administrative law, which is mandatory law. Mandatory laws are legal statutes that are established by the government ('regering') and the first and second chamber of the legislator. The judge is strictly bound to these rules for two reasons. First, these rules are in the highest rank under the Constitution in the hierarchy of laws. Second, the text of the law is written down in direct terms. Therefore the text leaves no room for interpretation to the judge. The problem with this kind of law is that when the conditions for their application are met, the judge always must apply them. From the current relation between the judge and the legislator follows that the legislator has primacy, therefore, the judge can't assess if mandatory law is inconsistent with legal principles. At the end of the thesis, I propose a new theoretical framework for the relation between the judge and the legislator. A framework that is more successful in protecting the rights of citizens to the impact of general laws with unfair outcomes.

Legal positivism has of course not only implications for administrative law. It is a theory about law in general, so it also has implications for other fields of law such as civil law and penal law. How are the implications for administrative law different? Administrative law is part of public law. Public law codifies all the powers ('bevoegdheden') of the state granted by law to realise the common good. In this field of law, the parties are not in a horizontal relationship, but a vertical one. Therefore it differs from civil law (private law) because in this field all the subjects are equal and in a horizontal relationship. This implies that the government can never be considered as a mere 'subject' in legal traffic. The government has more power in the legal traffic. Therefore, it always requires that its actions have adequate legitimacy, that it serves only the public interest with its actions, and that it adheres to different (stricter) norms than citizens and private organizations. However, these stricter norms are mainly norms established by the democratic legislator in administrative law. This is not the case in private law. In private law, the subjects have a reciprocal legal relationship with each other that must always be reasonable and fair. Therefore, the judge also has the authority to correct laws in private law that turn out to be unfair to one of the parties. However, in public law, the judge does not have this authority. In this area of law, the statute prevails over an (unwritten) legal principle such as the principle of proportionality. The legislator has the final say over the extent of the state's powers in pursuing the public interest. The relationship between the government and the citizen differs fundamentally too much from the horizontal relations between citizens. Therefore, the unwritten legal principles that exist in the relationship between citizens, such as reasonableness and fairness, or proportionality, cannot simply be applied to the relationship between the government and the citizen. The prevailing thought that the legislator has the last word on the relations between the government and the citizen is, as I will argue, based on legal positivism. It assumes that the legal principles regulating the relations between the government and the citizen did not exist before the state and the legal order. However, I will argue that the state, despite the factual differences in the relations, is indeed regulated by unwritten legal principles such as fairness and proportionality in its relationship with the citizen.

The legal principles, such as the proportionality principles, have a special place in administrative law. They are pivotal for one of the main goals of administrative law, namely, to solve citizens' problems in their dealings with the government and to protect their rights in this regard. Citizens need to experience *the rule of law* as something that protects them against abuse of power. At the end of the thesis, I will argue for a *trias politica* that is successful regarding the goal of administrative law to protect the rights of citizens. I will construct a balance of powers like Montesquieu meant it to be in a rule of law, which is something

different as a legislator with primacy, a legislator as an absolute authority (a sovereign) in the *trias politica*. The goal to protect the rights of citizens is a counterpart to another goal of administrative law, namely legal certainty, and the question of whether a decision by the government has been taken legally correctly.[8] When the government acts according to disproportionate, unfair laws, administrative law is successful in the latter goal, but not in the first one.

Legal principles are crucial for legal protection because, in many cases in administrative law, higher rules such as the ECHR or EU law do not provide this legal protection.[9] Also, creating the possibility of testing laws by the administrative judge against the constitution will contribute little to the successful legal protection of citizens against disproportionate laws.[10] Therefore, I leave the discussion about testing against higher law, such as constitutional testing, out of consideration. The focus of this thesis remains on legal principles as the foundation of the national legal order.

In the first chapter, I will discuss the roots of legal positivism and its implications in current administrative procedural law. First, I will discuss a standard definition of legal positivism. Then, I will discuss a classical legal positivist, Thomas Hobbes, and show how legal positivism affects the judge's interpretation method. Thomas Hobbes is important because later, many legal positivists reacted to his theory. Hart refined legal positivism into a more abstract theory, enabling its application to diverse legal systems. I will discuss this reaction to Hobbes. Finally, I will discuss how legal positivism relates to the interpretation method used by the judge in the case of the Grand Chamber. The sub-question I will answer in this chapter is: How is the role of the judge in administrative law related to the concept of law in legal positivism?

In the second chapter, I will first delve into Paul Scholten's critiques of Thomas Hobbes's theory. I will argue that a certain degree of judicial discretion is inevitable in applying the law. Therefore, the notion in Hobbes that the legislator (the sovereign) should always have the last word about the meaning of law, is inconsistent. Then, I will discuss Hart again, as he incorporates this discretion in his legal philosophy. However, for him, this is strong discretion; while for Dworkin it is weak discretion. I will argue for the latter. At the end of this chapter, I will present Dworkin's interpretation of law based on legal principles and discuss how this principle-based system of law would change administrative law.

In the third and last chapter, I will first discuss some counterarguments that try to defend legal positivism. These counterarguments are mainly that legal positivism does not necessarily mean that all laws should have one institution as the authoritative legislative source. Second, legal positivistic interpretation does not mean it should accept unreasonable laws. However, I will argue that this counterargument makes it doubtful if this position still aligns with legal positivism. Then, I will show how the implications of this nuanced legal positivism still negatively affect a coherent, successful administrative law. One of the objectives of administrative procedure law is to defend the rights of citizens. The authority of mandatory laws can harm the legal protection of citizens. Finally, I will argue that, therefore, a new constitutional balance needs to be formed between the judge and the legislator. This balance will be based on a principle-based system of law. In arguing for such a foundation, I will draw inspiration from Montesquieu and the theories discussed.

[8] M. Scheltema, 'Rechtseenheid of rechtsstaat als doelstelling van de Awb', *NJB 2015/814*
[9] T. Barkhuysen, 'Toetsing van formele wetgeving aan rechtsbeginselen: de rechter moet de harmonisatiewetblokkade opheffen', *NJB 2022/2095*
[10] Ibid.

Chapter one: legal positivism

To create clarity in the debate on the relation between the judiciary and the legislator, we need a clear and good definition of legal positivism. The jurisprudential positions grouped under the term 'legal positivism' come in many variants. Because these involve fundamental differences in perspective, one cannot really speak of a singular 'legal positivism'. Despite the numerous differences, some common principles are identifiable in the positions of Hobbes, Hart, and Raz, to name a few of the most famous legal positivists discussed in this thesis. The common principles aim to enable recognition of the implications of legal positivism for administrative law. It must be able to appoint how the judge interprets the law, where his authority is limited and what its role is in a legal system based on legal positivistic preconditions. Therefore, the criteria that flow from the principles must be formulated in such a way that they can be applied to the ruling of the administrative judge presented in the introduction – I will call this case from now on the Childcare Legislation Case. This is important to discuss the consequences of legal positivism for administrative law. Before I delve into Hobbes, who constructed the classical legal positivistic legal system, I will first explain the common principles of legal positivism to see how they resonate with the different forms of legal positivism that we will discuss.

1.1: The general principles of legal positivism.

Legal positivism briefly holds four principles. The most important of these starting points is undoubtedly that the validity of a legal norm is based on another legal norm, which grants the authority to establish norms or imposes the obligation to recognise certain duly given norms as binding (in the latter case, one usually speaks of rules of recognition).[11] This norm-creating authority in the Netherlands is the democratic (constitutional) legislator. A moral norm in this system is not automatically a legal norm. Moral norms can belong to law, but they only acquire this status when they are incorporated into positive law by authoritative bodies or when such bodies recognise them as legally relevant standards.

Closely connected to this first principle is a second one. For legal positivism, there is no conceptually necessary connection between law and morality. Legal positivists thus deny that the 'non-est lex' in the natural law maxim 'lex iniusta non est lex' should be taken literally. Even unjust, immoral law can be law.[12]

Closely connected to this second principle is the third principle, which states that the validity of a legal norm does not depend on the content of the norm. If the validity of a legal norm depended on moral convictions, then the law would not simply have validity based on a statement by an authoritative body. The content of the applicable law can be determined based on facts. Whether a particular norm has been expressed in the legislative decision of the legislator, or whether an existing norm has been recognised by them, can be established as a fact. The same applies to the recognition of a legal principle by a judge.[13]

Finally, a legal positivist must have a theory about meaning. The law cannot be known other than through interpretation. However, a broad scope of interpretation could undermine the connection with the authoritative source. For example, the interpreter, the judge, could choose a moral interpretation of how he thinks the meaning of a specific legal text should be. This meaning would probably differ from the meaning that the authoritative source intended. Therefore, the legal positivist says that the interpretation of the explanation of legal norms must correspond to what authoritative bodies have 'said'. The meaning the interpreter discerns in a legal text must actually be attributable to the legislative authorities.[14] Otherwise, the interpretation that deviates from this would not yield knowledge of the applicable law.

[11] H.L.A. Hart, *The Concept of Law,* p. 63
[12] Brouwer, *Rechtsbeginselen en rechtspositivisme,* p. 45-47
[13] Ibid, p. 46
[14] Raz, *Ethics in the Public Domain*, p. 215

The core propositions of legal positivism that have been briefly touched upon here serve as mere starting points. They raise several questions and problems, such as the implications of these principles on the relationship between a legislator and a judge. To start looking into this, we will now continue the analysis with Hobbes' legal positivism.

1.2 One of the founding fathers of legal positivism: Thomas Hobbes

Thomas Hobbes primarily introduced legal positivism. Through the analysis of his philosophy, it becomes evident that his views on correct legal interpretation are very similar to the approach taken by the Grand Chamber ('Grote Kamer van de vijf hoogste bestuursrechters') in the case introduced earlier. Before describing his legal philosophy, I start with a general background of his philosophy.

As a materialist, Hobbes thought that the universe consisted of matter in motion and, therefore, thought that political behaviour – just as physics - must be analysed as matter in motion. From a scientific point of view of the human condition, according to Hobbes, humans are driven in their motion by their infinite desires:

> "But whatsoever is the object of any man's appetite or desire that is it, which he for his part calleth good; and the object of his hate and aversion, evil; and of his contempt, vile and inconsiderable. For these words of good, evil, and contemptible are ever used with relation to the person that used them, there being nothing simply and so, nor any common rule of good and evil to be taken from the nature of the objects themselves."[15]

Good and evil are, therefore, nothing more than subjective preferences that depend on personal desires. There is no objective moral order. Hobbes argues that there is one thing desired by everyone and one thing that arouses aversion in everyone. What everyone desires is self-preservation; what arouses aversion in everyone is death. Self-preservation is good; death is evil. In 'De Cive', Hobbes states:

> 'Every man is desirous of what is good for him, and shuns what is evil, but chiefly the chiefest of natural evils, which is death; and this he does by a certain impulse of nature, no less than that by which a stone moves downward.'[16]

Assuming that self-preservation is desirable, peace and security are also desirable because peace is the opposite of war and always serves the goal of self-preservation. Therefore, the things that bring peace closer are good. According to Hobbes, the desire for peace prompts people to obey a common power. How does this common power come into being?

1.2.1 The Social Contract

According to Hobbes, the political order is established through a social contract. The social contract is a covenant. Covenants are contracts made in the present, promising to uphold the agreed-upon terms in the future. The social contract is made by individuals, future citizens who jointly establish a sovereign who is not a party to the contract. The social contract creates an agreement which gives a person or group the authority to make decisions for everyone and which ensures everyone complies. The person or group that holds this authority is known as the sovereign. The authority exercised by the sovereign involves three things. Firstly, the sovereign makes decisions and uses force to ensure compliance with these decisions. Secondly, citizens have a duty not to resist the decisions and actions of the sovereign. Thirdly, citizens have to assist the sovereign actively. After all, the sovereign cannot raise taxes by themselves/without the citizens' cooperation, for example.[17]

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[15] Hobbes, *Leviathan*, VI, p. 45
[16] Hobbes, *De Cive*, I, 7, p. 115
[17] R. Janse, *De Rechtsfilosofie van Thomas Hobbes*, p. 39

1.2.2 Justice and the laws of nature

Once the social contract is established, justice also will emerge, Hobbes believes. Justice for Hobbes is nothing more than what he calls the third law of nature, that people must fulfil their agreements.

> "For where no Covenant hath preceded, there hath no Right been transferred, and every man has the right to everything; and consequently, no action can be unjust."[18]

Therefore, citizens adhere to the social contract based on the third law of nature, which says: "that men performe their Covenants made".[19] In addition to this third law of nature, Hobbes distinguishes many natural laws inspired by reason, such as the fundamental first law of nature: "to seek Peace, and follow it."[20] and the second law of nature: "That a man be willing; when others are so too, as far as for Peace and defence of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself."[21] The second law of nature concerns the right to self-preservation. There will always be conflict as long as individuals are free to do whatever they believe is necessary to protect themselves. Therefore, the second law of nature dictates that individuals must relinquish their right to things that hinder peace. Natural laws impose on individuals the obligation to strive for peace and do everything necessary to preserve their own lives. The second law of nature binds always *in foro interno* meaning they always have a duty to follow it. This law also binds *in foro externo*, meaning the obligation to really *act* according to the law, but only if others also agree to follow it and seek peace. Without this condition, citizens could be forced to put themselves in danger, which could never be justified by the laws of nature. The obligation to obey the laws of nature rests on self-interest, on self-preservation: "The…Lawes of Nature, which tend to Nature's preservation".[22]

1.2.3 Hobbes' philosophy of law

Hobbes elaborates on the implications of this model regarding the law as follows. He believes that when humans use their reason, they will opt for power to be as centralised as possible because otherwise, there is a constant danger of an internal power struggle in which authorities fight one another for power, which is bad for keeping the peace. The division of the sovereignty will introduce war.[23] Therefore, only a central power with (virtually) unlimited authority - a sovereign - can maintain the peace.[24] The sovereign maintains peace by enacting civil laws and enforcing them with the sword.[25] The sovereign transforms the laws of nature into civil laws. With civil laws, the sovereign, and only the sovereign, determines the content of the laws and interprets them. What are laws according to Hobbes?

> "A law is the command of him, or them that have sovereign power, given to those that be his or their Subjects, declaring Publicly, and Plainly what every one of them may do, and what they must forbear to do."[26]

A law is a command originating from the sovereign and adequately announced. A command is an order to execute the commander's will without question. Since only the sovereign can maintain peace and order, he should have a monopoly on legislation, i.e., law creation, and the legislative, executive, and judicial powers

[18] Hobbes, *Leviathan*, XV, p. 110
[19] Ibid, XV, p. 110
[20] Ibid, XIV, p. 100
[21] Ibid, XIV, p. 101
[22] Ibid, XV, p. 208
[23] Janse, *De rechtsfilosofie van Hobbes* en *Elements,* II, I, 16, p. 115
[24] Leviathan, XXIX, p. 240
[25] Ibid, XXVI, p. 199
[26] Hobbes, *Dialogue,* p. 72; R. Janse, *De Rechtsfilosofie van Thomas Hobbes*, p. 60

should be united within it. “Law is the command of the law-maker”.[27] What does this mean for the role of the judge in Hobbes's legal philosophy?

With civil laws, behavioural rules are provided that regulate the mutual relations of citizens. However, the mere existence of laws is not a sufficient condition for peace. Disputes will arise among citizens over whether or not someone has done something wrong and whether this act is or is not contrary to civil law. Moreover, if these disputes remain unresolved, vigilantism will rise. Therefore, according to Hobbes, decisions from judges are a necessary complement to legislation.[28] Citizens need to abide by these laws and verdicts of the judge, otherwise, the sovereign will use force to maintain order.

1.2.4 Judges and Judicial Interpretation

Hobbes asserts that the right of judgment belongs to the sovereign. “The right of judicature, that is to say, of hearing and deciding all controversies which may arise concerning law (either civil or natural) or concerning fact.”[29] The reason is simple. If the sovereign did not have the power to judge, so if there was an independent judiciary, judges could interpret the law in a manner that contradicted the sovereign's decision. This would create conflicts, which would ultimately lead to violence and chaos, according to Hobbes' reasoning.

However, the sovereign cannot possibly exercise this right himself. '... no man is able to execute an office of so much business...'.[30] Therefore, the sovereign will appoint judges whom he tasks with dispute resolution. However, this raises the question: How does the sovereign ensure that judges do not interpret the law their way and then apply it to the case?

This situation will not arise because his conception of law excludes any form of judicial law. Hobbes' laws are based on the following logical form: If A is the case, then B follows. Anyone who does A must, based on the sovereign's command, state B. Hobbes believes that all occurring cases can be subsumed under such provisions of the law. Nonetheless, he recognises that a human sovereign cannot foresee all occurring cases by law. It is '... impossible to prescribe such universal rules, whereby all future contentions, which are perhaps infinite, may be determined.'[31] However, if civil law has a gap, it can be filled with the laws of nature, according to Hobbes.[32] However, does the application of natural laws by the judge exclude judicial laws? Aren't these natural laws inherently ambiguous in their meaning if they are expressed in words? What does this say about the relationship between legislator and judge?

Hobbes recognises that both the civil and natural laws cannot be applied blindly: 'All laws, written and unwritten, have need of interpretation'.[33] This blurs the line between legislation and jurisprudence. While the judge may not create new laws that he then applies to the case, he does determine the precise meaning of those laws. There is a risk that the law undergoes a modification that conflicts with the sovereign's will, effectively placing the judge in the legislator's seat. Hobbes is acutely aware of this danger: 'by the craft of an interpreter, the law may be made to bear a sense, contrary to that of the sovereign, whereby the interpreter becomes the legislator'.[34]

Hobbes believes that this problem can be solved by restricting the judge's methods of interpretation in a manner very similar to the discussed case, where the judge interprets according to the law's letter or the legislator's intention. Both in civil and natural law, the judge is bound to provide an interpretation

[27] Hobbes, *De cive*, XIV, 13, p. 279
[28] Hobbes, *Leviathan*, XVIII, p. 125
[29] Ibid, p. 125
[30] Hobbes, *Dialogue*, p. 74
[31] Hobbes, *De cive*, XIV, 14, p. 281
[32] Ibid, XIV, 14, p. 281
[33] Hobbes, *Leviathan*, XXVI, p. 205
[34] Ibid, p. 204

substantively consistent with the legislator's intent. In interpreting the meaning of civil law, the judge should be guided by the sovereign's intention when drafting the law.

> "In all courts of justice, the sovereign is he that judgeth; the subordinate judge ought to have regard to the reason which moved his sovereign to make such a law, that his sentence be according thereunto; which then is his sovereign's sentence; otherwise it is his own, and an unjust one."[35]

According to Hobbes, grammatical interpretation does not clarify the legislator's intent. The judge must trace the legislator's intent through a historical interpretation of the law. He should ask himself why the legislator made the law and what difficulties the legislator wanted to address with the law. The intent of the legislator 'can be found out by the Preamble (nowadays called 'de memorie van toelichting', the time when it was made, and the inconveniences for which it was made.[36]

However, what about interpreting natural laws, which have no legislative history? Hobbes argues that in cases where a judge is confronted with a case in which the civil law is unclear, and 'de memorie van toelichting' offers no solution, the judge must in such cases supplement the law with natural law [37] What is natural law here? Certainly not a critical test of civil law, since according to Hobbes, natural law can never justify a verdict that goes against civil law. Natural law, according to Hobbes, is the proper use of one's natural reason.[38] Hobbes also talks about 'equity'. For a judge, equity means being impartial. This is important because a biased judgment contributes to deterring people from appealing to judges, thereby inciting war (Leviathan, XV, p. 118).[39] Therefore, when the judge must rule on a case where no clear command is present, the judge must make a judgment that is at least impartial. The judge is indeed engaged in law-making here, but it is not a personal statement; he or she does this on the authority of the sovereign. In the case of an unclear law, the judge, therefore, has strong discretion, which means that the judge creates a new law. One could also say that the judge here does not create new law, but merely interprets natural law. But in my opinion, natural law here is so generally formulated, 'impartiality' and 'natural reason', that this cannot be the case. I interpret this to mean that in cases where the Sovereign has not issued a command, the judge creates new law through natural reason and in an impartial manner. Hobbes argues that the ultimate guarantee for the consistency of jurisprudence and laws lies in the sovereign's command. After all, the sovereign is both authorised and capable of overturning the judgments of lower courts if he disagrees with them.[40] Ultimately, it is the sovereign who determines how judges interpret the laws. Judges cannot usurp the legislator's role; in fact, the judge only has a seat to the extent that it has been delegated to him by the legislator (the sovereign).

The way Hobbes frames judicial interpretation of the law corresponds with the current situation in administrative law. If the legislator has already deemed it proportional that people can only apply for childcare allowance retroactively for three months, and that any overpaid amount must be immediately repaid, then this is leading to the judicial judgment. The judge cannot retest against the principle of proportionality in this context. Although in current administrative law, there still exists an exception for cases where circumstances arise that the legislator did not foresee, even in such cases, what the legislator fundamentally intended with the law is considered. This aligns with Hobbes' theory. The judge's test of proportionality can never go against the will of the legislator (the Sovereign). The judge can only create new laws in situations where the legislator has not expressed a will in a civil law.

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[35] Ibid, p. 201
[36] Hobbes, *Dialogue*, p. 56-7; 97-8
[37] Leviathan XXVI, p. 209
[38] Ibid, p. 210
[39] Leviathan, XV, p. 118
[40] Leviathan, XXVI, p. 207

1.3 Law as primary and secondary rules – Hart

In modern positivist theories, the role of the sovereign is less significant. Hart's legal positivism focuses on the structures and recognition of legal rules. For him, contrary to Hobbes, law is not a command from a sovereign. Hart argued that the mark of a legal system is the capacity of a community to articulate and change its rules and practices deliberately. "it is characteristic of a legal system that new legal rules can be introduced, and old ones changed or repealed by deliberate enactment."[41] The ability to change rules deliberately is a striking characteristic of the contrast in Hart's jurisprudence between 'pre-legal' societies and any legal system. Other characteristics include rules of adjudication, which enable authoritative resolution of conflicts by judges, and the ultimate rule of recognition, which is directed at those judges, obliging them to apply the outcomes of the use of valid legal rules, primarily consisting of legislation and judicial precedents.

A 'pre-legal' society is governed by a set of conventional moral rules or principles, which, in contrast to legal rules, *cannot* be brought into being, changed or eliminated by human *fiat*. Everyone in this society knows the moral rules and principles, for the rules exist only as practices whose normativity is 'internal' to the lives of those governed by them. The rules are the rules *of these people,* not just in the sense that these are the people to whose conduct they apply, but in the sense that these are the people in whose consciousness and interaction the rules consist. Legal change is not unthinkable for such a society, but it will involve, according to Hart, a "a slow process of growth, whereby courses of conduct once thought optional become first habitual or usual, and then obligatory, and the converse process of decay, when deviations, once severely dealt with, are first tolerated and then pass unnoticed."[42] Such a simple form of society is organised solely based on what Hart calls primary rules.[43] Primary rules are rules that solely regulate conduct; they prescribe or forbid specific behaviour.

When a society becomes too large and complex to be governed by primary rules based on internal morality, the transition to distinctively *legal* governance becomes necessary. This transition involves the gradual institution of practices of more deliberate legal change. It involves establishing *secondary rules* specifying the basis on which new rules are to be enacted and a basis on which duly enacted rules can be recognised as such. Secondary rules are rules that determine how primary rules come into existence (rules of recognition), develop over time (rules of change) and must be applied (rules of adjudication).[44] The supreme rule of recognition, according to Hart, is a complex practice among judges and other officials whereby rules are identified as law by reference to specific criteria.[45] The supreme rule of recognition forms the foundation for other rules of recognition that determine which institutions or individuals are recognised as authoritative bodies that can legislate and recognise which moral rules and principles are legal rules/principles. Here, we can see why the apparatus of secondary rules and rules of recognition form Hart's specific form of legal positivism. The apparatus aligns with the first prescription given in the introduction of legal positivism – which is that the validity of a legal norm is based on another legal norm, which grants the authority to establish or recognise legal norms to a legislative body. This means that members of society no longer have access to the rules "instinctively" or "intuitively" or just by their socialisation and upbringing. The legal rules now have another source, namely the authoritative bodies based on a rule of recognition, which is the acceptance among a corps of officials of rules about rule interpretation and rule-making.

Hart's apparatus of rules of recognition and secondary rules brings a specific contrast with Hobbes's theory. For Hobbes, all citizens and officials obeyed the laws of the sovereign based on the social contract.

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[41] Hart, *The Concept of Law,* p. 175
[42] Ibid, p. 92
[43] Ibid, p. 202
[44] Ibid, p. 165 - 166
[45] Ibid, p. 110

However, for Hart, this acceptance of authority differs between citizens and officials. Hart cites legislation as a substantive basis for his separation of law and morals. The transition to legal governance and establishing rules of recognition inevitably involve the emergence of a corps of specialist officers who know the marks of legislation and know how to tell which rules have deliberately been given social authority and which have not. They can acknowledge explicitly the legislative authority because they understand its fundamentals. Since, contrary to officials, "a great proportion of ordinary citizens - perhaps a majority - have no general conception of the legal structure or of its criteria of validity,"[46] the emergence of deliberately enacted law brings us face-to-face with citizens who know nothing more about laws than they are 'the law'. They follow the law merely because they know it forbids things they want to do, and they know they might get punished for doing it.

The dominance in the social life of deliberately enacted law means that those who make and can recognise the law may misuse this advantage over the citizens. Hart's theory does not set a moral criterion for legal validity. A legal system with a Hobbesian rule of recognition, meaning that the Sovereign determines the secondary rules of the system, is still a legal system. The only two necessary and sufficient conditions for a legal system are first that the citizens generally obey the laws enacted by the authoritative body and second, that its officials effectively accept the criteria of legal validity specified by the rules of recognition.[47] In an extreme case, Hart concluded, only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system.[48] For Hart, it doesn't matter if the source is a judge, a sovereign, or an assembly of theocrats. All that matters is if there is an organised set of norm-applying institutions that recognise norms as valid by the same source-based criteria.

1.4 Legal Positivism and How it Relates to the Childcare Legislation Case

Until now, I have analysed legal theories that say only something about law in general, not about a specific field of law. Since my thesis focuses on administrative law, I will analyse which characteristics of current administrative law overlap with legal positivism in this paragraph. How is the influence of legal positivism visible in current Administrative law? I will answer this in the light of the Childcare Legislation Case.

As we have seen must the law be posited by some law-making, or norm-creating body according to the positivist school of thought. The law has a specific source, which divides it from other norms. This creates a formal distinction between what is law and what is not. A legal rule is valid if it has been established according to a secondary rule and meets the criteria of a rule of recognition. The ultimate rule of recognition is an unwritten social norm that is evident in the behaviour of authorities. This rule of recognition is in a certain sense the highest rule of the legal system, as it grants validity to the legal rules, but is neither valid nor invalid. For Hart, the existence of law is thus a sociological issue: it is about when that existence can be observed in sociological reality. For Hart, there is no logical and necessary connection between law and morality.

The judge interpreted the Childcare Legislation Case exactly as a Hartian judge would. Although Hart does not have a clear theory of interpretation, one can indeed be derived from his theory. If the law is based on consensus and conventions, then the judge must also give a conventional interpretation of the legal rules. If he does not do this, then his interpretation is not based on any knowledge of the law. The law can only be known by social norms.

As we saw in the Childcare Legislation Case, there is the following convention in Dutch Administrative Law when it comes to testing laws against legal principles. Let's set out this convention in a slightly more

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[46] Ibid, p. 114
[47] Ibid, p. 116
[48] Ibid, p. 117

extended form. Dutch Public Law has a hierarchy of laws, just like Hart has a hierarchy of rules of recognition. Legislation at a lower level can only exist if it is recognized and not in conflict with laws at a higher level. At the top are international treaties such as the ECHR and European Law. Then comes the national constitution. Below that are laws made jointly by the first and second chambers (these are the childcare allowance laws), and below that are lower regulations such as a 'Algemene Maatregel van Bestuur', which is made by the government alone, and a 'ministeriële regeling' which is made by a minister.

In the Netherlands, until the Childcare Legislation case, there was a convention that based on the constitution and jurisprudence, laws could not be tested against legal principles by the administrative judge. This was based on a rule of recognition between the judge and the legislator, which in concrete terms means that the judge has no authority to correct the legislature when it enacts law by approval of all the organs of the democratic legislator. Yet, the parents appealed to the principle of proportionality in the Childcare Legislation case, hoping that the judge might deviate from this convention. Because of the Childcare Allowance scandal, there was a discussion about the convention that the judge is bound by legislation of this level. After all, the legislator cannot foresee all the consequences of general laws. If a legislator then formulates legislation in a mandatory way, in the form of "only childcare allowance with retrospective effect for three months," then neither the administration nor the judge can deviate from it if the law applies in a specific situation. A mandatory law differs, for example, from a legal provision that says 'you cannot destroy state property'. The judge can then still decide that removing weeds from a state-owned flowerbed is not destruction. The judge has some interpretive space. A mandatory formulated law does not give this space. If a mandatory formulated law, therefore, has disproportionate consequences for specific cases, then the judge cannot do much for legal protection in administrative law. The judge decided in the Childcare Legislation case to adhere to the standing convention anyway. Mandatory law, meaning a law from the first and second chambers of the legislator and stated as a command, cannot be tested against legal principles by the administrative judge. The judge interpreted the law according to the conventional interpretation.

Conventional interpretation aligns with the first goal of Administrative Law, which is that the State should act according to the authority granted by the law. When a state organ is granted the authority by law to provide parents with childcare allowance, it should only do so based on the criteria established by legal statutes. In this way, the State functions within the rule of law and with legal certainty and equality. The judge controls only if the government is acting legally valid.

The second objective of administrative law, namely the legal protection of individuals, stands in the background in the Childcare Legislation Case. The reason for this is that the legal principles are not applicable. At least, not initially. The only exception is when there are circumstances that the legislator did not take into account when making the law. If these circumstances are also in conflict with a legal principle, then the administrative judge may declare the law inapplicable. In law, this is called the *contra legem* application of legal principles. Nevertheless, this rule is interpreted very Hobbesian by the Grand Chamber. For Hobbes, a judge only has discretion when there is no command from the sovereign. The judge can never go against the will of the legislator. If the legal command is very general, then the will of the legislator also applies in many cases, such as in the childcare allowance scandal in the form of: all parents who make a mistake in the application for childcare allowance must repay the entire amount. In such a case, this law applies to every mistake in the application for childcare allowance. The legislator has then as it were already determined that this is proportional and fair. Then the Hobbesian judge can no longer correct this, just as the administrative judge cannot either. Also in administrative law, this rule is handled in such a way that the judge can only correct the rule in cases where the will of the legislator does not apply. Such a case is practically impossible if the will of the legislator applies to every application for childcare allowance. Therefore, in administrative law, just as in Hobbes' theory, only the legislator has authority and determines the extent to which the rights of citizens are protected in situations of mandatory legislation. The sovereign (the legislature) determines what fairness and proportionality is, not the judge.

Chapter two: the criticism of legal positivism

In the previous chapter, I examined the roots of legal positivism and scrutinised the interplay between the legislator and the judge. This chapter delves further into legal positivism, questioning the sustainability of viewing law as a collection of rules laid down by the sovereign. The ongoing debate between Hart and Dworkin regarding the essence of law will shed additional light on this inquiry.

The structure of this chapter is as follows: Among the philosophers discussed thus far, Thomas Hobbes has most explicitly elaborated on the relationship between the legislator and the judge within the framework of legal positivism. Therefore, his theories on law and interpretation will be the focal point, representing the legal positivist perspective. I will challenge Hobbes' theory, drawing upon the critiques posed by Paul Scholten.[49] Since rules and norms are inherently abstract, interpretation is indispensable for their application. Consequently, a certain degree of judicial discretion is inevitable in applying the law. This perspective, I maintain, is inconsistent with the notion of a single authority as a common source of law. Hobbes' proposal that natural law could aid judges in cases of unclear legislative intent seems to contradict his legal positivism, which asserts that judicial decisions derive their legitimacy solely from the legislature's intent.

Hart concedes that judges possess discretionary power, especially in complex cases demanding a broad interpretation of the law. He contends that legal positivism is compatible with judicial discretion, asserting that law, conceptualised as a set of rules, can coexist with discretionary practices. Despite this, I will argue that Hart's approach to legal reasoning gives judges strong discretion, effectively turning them into legislators. In contrast to the idea that judges have strong discretion, Ronald Dworkin argues that they exercise weak discretion by interpreting the law through legal principles rooted in morality. At the end of this chapter, I will present Dworkin's interpretation of law based on legal principles and discuss how this principle-based system of law would change administrative law.

2.1 Paul Scholten and discretion

Scholten disagreed with the theory proposed by Hobbes, which stated that judges should always be bound by the law. Scholten is well-known for rejecting this idea and, instead, emphasising that the law created by the legislator is not the only source of law in a legal system. This perspective aimed to create a jurisprudence that is not solely based on the will of the sovereign but prioritises the legitimation of the judge's decision.

Scholten argued that the law as a system of general rules does not entirely determine legal practice, as it involves decisions and actions that require interpretation. Hobbes acknowledged this by admitting that rules need interpretation, and he believed that judges should follow the legislator's intent when the text of a legal statute is ambiguous. However, Scholten argued that this way of interpretation does not necessarily exclude the judge's decision. Scholten did not mean that judges frequently deviate from the rules but rather that following them in the literal sense of the word is impossible. Abstract, generally formulated legal rules cannot precisely dictate how one should act in a specific case. Even if a legal rule is evident in the abstract, it cannot determine its exact meaning when action is required. The judge always *decides* to follow the rules in its legal interpretation. Between the system of legal rules and the circumstances of a specific case, there is a conceptual gap, and applying the rules requires bridging this gap:

> "The concretisation of general standards, the conclusion from the general rule to the specific case, is always more than pure logical work. [...] Here, there is a choice, an act that cannot be logically

[49] Scholten, *Algemeen deel,* Zwolle: Tjeenk Willink 1974

> justified as a scientific judgment. [...] Ultimately, that decision is a leap ('een sprong'), which always requires courage."[50]

According to Scholten, the law is not deduced from a rule, as in the modus ponens, but is found in the facts of the specific case within the context of the law - *Jus in causa positum*. The law resides in the facts themselves, not as a conclusion of a logical deduction from a set of facts subsumed under a given legal rule. When he asserts that the law can be situated in the facts, he does not mean that the law directly follows from the facts; in such cases, it is about evaluating the case as a whole. The judge's decision cannot directly follow from the facts, as the legal decision must be generalizing by definition. The law always applies universally and not specifically to an individual. The judge must find a formula that on one hand is just to the facts and on the other hand, is sufficiently general.

This formula, Scholten believes, cannot always be a reconstruction of the legislator's intent, as Hobbes advocates in judicial decisions.[51] The law, as an abstract system of rules, states what is generally desirable, but it does not determine what must be decided in this specific case at hand. It is the judge who determines and who acts. The law is not passively applied but requires an active decision that applying the law in this case is correct.

> "Finding the law is always simultaneously intellectual and intuitive moral work. It is the decision about what is and what ought to be in one, and thereby distinguished from both moral and scientific judgment."[52]

This decision about what is and what ought to be means that a judge has to combine ideal law, like legal principles such as 'the principle of good faith', or 'the principle of proportionality', or 'no punishment without guilt', with real law, the law enacted by the authoritative bodies. The law binds the judge in his or her decision. However, in specific cases where the real law contradicts the ideal law and is therefore unjust, the judge cannot base their decision solely on the real law. The Scholtenian judge would therefore have ruled in the cases of the benefits scandal, where the law had disproportionate consequences, that the rule 'that everything must be repaid in case of errors' remains inapplicable.

The meaning of the norm formulations in which the law is laid down is (for a significant part) unproblematic. There are lots of straightforward cases. The rules of language, by which the legal statute is necessarily formed, can establish clarity in many situations but not in every situation beforehand. A series of typical cases can be named for most legal norms that can undoubtedly be subsumed under the norm. For example, a case where someone is fined for speeding without exceptional circumstances. It can be assumed that this meaning is usually also the one intended by the legislator. In cases where it is doubtful whether the respective authoritative instance intended the conventional meaning, the conventional meaning does not provide a clear answer because it can allow for multiple interpretations, or this meaning provides no answer at all. An example is a case about article 225 Sr, which forbids 'valsheid in geschriften'. The question was if a computer could also be a 'geschrift'.[53] The judge decided that a computer also falls under Article 225 Sr, making this law broader than it was before the ruling.

The meaning of a legal norm cannot determine its scope in every case based on its formulation. Ambiguities will rise when society develops. Hobbes recognises this too; when civil laws have a gap, it can be filled with natural laws.[54] It should be clear, however, that natural laws do not provide a meaning for every case. The question of whether a surfboard is considered a vessel under legal provisions cannot be determined solely based on the law's meaning, and natural law will not help here either. Since the judge is

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[50] Scholten, *Algemeen deel,* Zwolle: Tjeenk Willink 1974, p. 130
[51] Ibid, p. 9
[52] Ibid, p. 132
[53] HR 15 januari 1991, *NJ* 1991, 668.
[54] Hobbes, De cive, XIV, 14, p. 281

generally not allowed to refrain from deciding by invoking the incompleteness of the law, the inevitable consequence is that he or she must refine the meaning of the legal statute. This refinement constitutes a law-making process by judges, granting discretion to individuals who must make decisions without clear legal guidance. I call this a legislative process because the law gets another meaning after the judge's decision, like in the case of article 225 Sr, where this law becomes applicable to computers too. The judge and not the legislator have the last word here on the meaning of the law. However, can't it not be that the legislator grants the judge the authority for this discretion? In the same way, Hobbes's sovereign granted the judge authority to decide on cases where the law and the legislative intent are unclear. That could be a possibility, but from that, it follows that the judge is not always bound by the law in its decision.

Scholten's assertion that the law is found in the facts means there are limits to what the law determines. Where the law no longer speaks, it remains silent. The legislator cannot possibly foresee every situation the law pertains to in advance. Moreover, where the law remains silent, it can no longer determine the choice. This is the inconsistency of legal positivism. Since the legislator cannot possibly dictate the judicial decision in every situation, a discretionary authority remains for the judge to decide which, in the judge's opinion, is just in the specific case. Hobbes' assertion that natural laws can fill this interpretative space[55] is incorrect, as these laws of reason are too general to determine the judge's choice in a specific case. Besides, it is not plausible that the sovereign will tacitly consent to every interpretation, as Hobbes mentions as a last resort, because the sovereign would, in that case, have to know every refinement made by the judge, which is impossible.

Hart has a stronger position on this point. He acknowledges the discretion of the judge in a legal system. Therefore we go back to his improved version of positivism.

2.2.1 Hart and the penumbra cases

Like Scholten, Hart acknowledges that the legislator cannot possibly dictate the judicial decision in every situation. Not every situation will be covered by the primary rules. The meaning, scope and reach of rules are evident at the core but become unclear the more the penumbra of the rule comes into view. Hart's textbook example is a legal rule that proscribes the use of vehicles in a park. It is clear, he argues, that the rule prohibits the entry of regular vans, motorcars and motorbikes. Should a legal dispute arise regarding any of these vehicles, judges would hardly have to think twice to ascertain whether the facts fall under the scope of the legal statute. But the same would not be the case if some complaint was raised about using toy motorcars in the park. The judge who needs to determine whether the proscription applies to toy vehicles would be unable to decide the matter with the certainty available to her in the case of regular motorcars, etc. In these cases, contends Hart, the judge would need to rely on discretion to make a good decision.

Hart seeks a balanced mid-position on the question of interpretation. Law is neither the 'noble dream' of a consistent, complete set of rules the meaning of which is ultimately conclusively determinable nor the 'nightmare' of rule-free judicial discretion.[56] The reality of an excellent legal system – for which Hart invokes the metaphor of "a good night's sleep" – lies somewhere between this dream and nightmare.[57] The rare cases in which judges have to resort to discretion are exceptional enough not to threaten the stability and proper functioning of a legal system that is appropriately constructed based on a solid combination of primary and secondary rules. Therefore, Hart could provide an answer to the objections of Scholten.

[55] Ibid, p. 281
[56] Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream* 1977
[57] Hart, *Essays in Jurisprudence and Philosophy*, Oxford: Oxford University Press 1983, p. 123 -144

2.3 Law as rules and principles – Dworkin

If judges have some discretion when they decide cases, it is only a weak discretion, argued Dworkin in response to Hart. For the legal positivist, the judge will always first look at the conventional interpretation of the law. If there is no such convention in a case, for instance, because the rule or the intention of the legislator is unclear, then the judge, for the legal positivist, will have strong discretion. However, for Dworkin, the judge forms the final piece in the interpretation of the law. The identification of law occurs in a process of interpretation, aimed at justifying the law in terms of political morality. The law must ultimately be just, allowing for exceptional cases where immoral law need not be followed by the judge.[58] In those exceptional cases where the law results in injustice, the judge is bound by legal principles. Legal principles form the basis of political morality. These principles are always legally binding standards. Legal principles imply that judges almost never possess strong discretionary power. An example Dworkin provides is the case of Riggs versus Palmer. In this case, Elmer Palmer, a young man, murdered his grandfather to ensure he would inherit under the grandfather's will. Under a strict legal positivist view, Palmer was entitled to the inheritance since the statutory law regarding wills did not explicitly disqualify beneficiaries who murdered the testator. In Riggs v. Palmer, the court ruled against Palmer, citing the principle that no one should benefit from their own wrongdoing. This decision reflects a moral judgment that overrides the literal interpretation of the statute.

This case demonstrates why judges do not have strong discretion when there is no conventional meaning of the law. Instead, judges are bound by legal principles that encompass both the written law and underlying moral standards. These principles guide judicial interpretation and limit the scope of judicial discretion, ensuring that legal decisions align not just with the letter of the law, but also with broader principles of justice and morality.[59]

In other words, legal principles already contain the selection of criteria that must be applied when all applicable legal rules fail to provide a conclusive assessment of the facts under scrutiny. Dworkin distinguishes between rules and principles along two interconnected lines. The first is that rules generally take the form: if p, then q must follow (modus ponens). If p is the case, then with true rules, it follows that q must occur. If, for some reason, q does not have to occur, then evidently, the rule is not valid. Rules, according to Dworkin, have an all-or-nothing character. This trait is absent in principles. The principle that no one should profit from their own wrongdoing can very well coexist with various exceptions without affecting the status of the principle within the legal system.[60]

The second distinction is that principles, unlike rules, have a dimension of weight. They do not dictate; they indicate a specific direction. It may be that competing principles point in a very different direction. Then, we must determine which principle carries the most weight. However, even the principle that loses out to another in a specific case remains a principle with weight, which might again be decisive in other situations. On the other hand, a rule that is not applied is not valid and disappears into the vast legal void. In the example of Riggs v. Palmer, the rule is valid, but not applicable because the legal principle prevents it. In this case, the principle of following the law is outweighed by the applicable legal principle. If rules conflict with one another, then at least one must be invalid; principles that point in different directions can both remain valid.[61]

Dworkin argues that legal positivism cannot account for the manifest existence of legal principles. Hart's theory is a "model of and for a system of rules"[62] and, as such, must be rejected. Dworkin begins his

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[58] Dworkin, *Laws Empire,* p. 190-192, 214, and 218-219
[59] Dworkin, *Taking Rights Seriously,* London: Duckworth 1978, p. 31-39
[60] Ibid, p. 24 - 28
[61] Ibid, p. 24 - 28
[62] Ibid, p. 22

critique by arguing that strong discretion, Hart's form of discretion where judges make law in penumbra cases, is implausible insofar as it ignores the many cases where judges regard themselves as bound by law even though no rules are applicable. In *Henningsen v. Bloomfield Motors*, the court was asked to hold an automobile maker liable for injuries sustained due to defective manufacturing even though the injured plaintiff signed a liability waiver.[63] The court could find no explicit rule that would authorise it to ignore such a waiver but nevertheless held for the plaintiff. In support of its decision, it cited several legal principles, including "freedom of contract is not such an immutable doctrine as to admit of no qualification in the area in which we are concerned" and "in a society such as ours, the automobile manufacturer is under a special obligation in connection with the construction, promotion and sale of his cars." These principles, the court reasoned, were of such great importance that they outweighed contrary principles, such as those supporting the freedom to contract, which militated in favour of enforcing the waiver.[64]

According to Dworkin, legal principles are at play in hard cases, where they guide and constrain judicial decision-making without legal rules. Legal positivism ignores the existence of these principles precisely because it holds that cases such as *Henningsen* are not governed by law. Legal positivism, in other words, is a model of rules only and, therefore, incomplete. Dworkin does not deny the need for 'weak' discretion - by which he means merely creative judgment in the application of legal doctrine, whether rules or principles. But he denies the existence of 'strong' judicial discretion. Judges do not *make* law because all the resources for their proper decisions are provided by the existing law as correctly understood. A judge does not decide a case in a legal vacuum, but its verdict is based on existing rules which express and, at the same time, are informed by underlying legal principles. The task of the judge faced with a hard case is to understand what discretion is required by the whole doctrinal structure of existing law. Though rules, understood in a positivistic fashion, seem to give the judge no guidance, a broader understanding of the patterns of values which have gradually developed in the legal system and are expressed in the combination of rules and principles, does offer that guidance. The judge's task is to understand the content of the legal system in this broad sense and apply it in his judgements to the best of his ability.

2.3.1 a quick response of legal positivism to legal principles.

Positivists after Hart responded to the critique of Dworkin against Hart. These positivists tried to ground the principles in Hart's rule of recognition. In this section, I will examine this response and formulate a response against this argument as to why the positivists do not succeed. I end this chapter by highlighting how the position of Scholten and Dworkin changes the legal interpretation of the administrative judge.

As a social rule in Hart's conception, the ultimate rule of recognition lies at the foundation of a legal order. This rule obliges judges and other officials to apply specific standards. The standards to which this rule refers, in many cases, the law, custom, and judicial decisions, constitute law. It then seems clear that legal principles might also be counted among these standards, as Hart suggests in the Afterword of the Concept of Law.[65]

Dworkin has rejected this notion. In his view, the validity of legal principles (their binding nature as law) cannot be based on the ultimate rule of recognition. After all, that rule merely refers to standards that are identified based on their origin. Laws or rules formulated by judges can be identified in this way. This does not hold for legal principles:

[63] Ibid, p. 25-6
[64] Shapiro, Scott J, *The 'Hart–Dworkin' Debate: A Short Guide for the Perplexed.*, p. 27
[65] Hart, *The Concept of Law,* p. 265

> The origin of ... legal principles does not lie in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time.[66]

The fact that judges, administrators, and legislators invoke a principle indicates that it concerns a legal principle. However, whether something is a legal principle and what the weight of this principle is, is relative to legal rules and other legal principles cannot simply be deduced from the degree of acceptance by such authorities.

The essential claim that Dworkin makes concerns Dworkin's insistence that principles always exist before any legal dispute that may come to the fore. They are real. They are not just the product of judicial discretion. They are also never simply the product of legislation or legal convention. If the institutional and moral character of a legal community accepts a principle, not even a legislator can overrule that principle without falling foul of the fundamental law of that community. The acceptance of legal principles as part of the law implies that legislation can only constitute coherent law when the weight of legal principles does not contradict it.

When the idea of coherence is linked to a legal order in which judges recognise (unwritten) legal principles, we can observe the following. Coherence requires that decisions in individual cases are based on general legal norms, which, in turn, must be founded on the values and principles of the respective legal order. This deductive structure determines what should be considered as 'based on.' It would ensure that no legal norms are derived for which the law has an insufficient basis. If legal principles form the principles of the respective legal order, then no law that conflicts with these principles can be derived. In a (perfect) coherent legal system, there are, therefore, no laws that are contrary to legal principles. Also, no law stands outside the principles, thus excluding the option of strong discretion. Since the legal positivist authority of the legislator to enact mandatory law allows the legislator to create legislation contrary to legal principles, this authority can lead to incoherent law. Therefore, the authority to enforce mandatory law by excluding legal principles as a fundamental source is contrary to a coherent legal system.

In a principle-based system, judges are granted legal authority to decline the application of statutes which are contradicted by legal principles. An example is the Riggs v. Palmer case. In some cases, it may be necessary for judges to refuse to follow a rule if its effect seems absurd or unjust. A hard case is here, not one where existing rules do not cover the events or where the statutory rules are unclear. Rather, it is a case where the applicable rule has an unjust outcome. In such cases, the judge must demonstrate courage in refusing a statute that the majority rule has accepted. An example could be the Childcare Legislation case. When focused on the circumstances of the case, the fact that the parents had just arrived in the Netherlands and were confronted with a complicated system could imply that following the rule would give an unproportionate outcome that is morally hard to swallow. To prevent this outcome, the judge could use the principle of following formal laws against the principle of proportionality. The principle of proportionality would outweigh the other principles when this fits best the moral character of the legal community. In this way, the administrative judge is more successful in its responsibility to the general objective of administrative law: to protect the rights of citizens. This would not mean that a judge squashes the specific legislator's law but that the judge reformulates the rule-following legal principles. It would say after the verdict that there is a period of 3 months for retrospective requests, except in situation x. From this, it would not follow that rules do not have an all-or-nothing logic anymore, as Dworkin argued. The incorporation of a previously unrecognised exception leads to a different rule, which in turn has an all-or-nothing character.

However, this legal interpretation is currently vulnerable to a fatal constitutional objection in administrative law. According to our current balance between the legislator and the judge and the principle

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[66] Dworkin, *Taking Rights Seriously,* London: Duckworth 1978, p. 40

of legislative supremacy, courts are legally required to obey any constitutionally valid statute. Legal statutes are, therefore, not subordinate to legal principles. If there is any inconsistency between them, the principle rather than the statute must give way. This position reflects the Hobbesian system, where interpretation regarding legal principles is only allowed when the sovereign accepts this. This is the position in the Netherlands, Britain, and the United States.[67] Suppose we want to clear administrative law from its inconsistent, incoherent and unsuccessful legal positivistic elements. In that case, we need to reform the system from a system of rules to a system of rules applied in accordance with legal principles. To do this, we need to rethink the balance between the legislator and the judge, which we will examine in the next chapter.

[67] J. Goldsworthy, "Legislative Intentions, Legislative Supremacy, and Legal Positivism," San Diego Law Review 42, no. 2 (2005), p. 506

Chapter three: a new balance of power

So far, I have outlined the different principles of legal positivism. I have shown how some of its characteristics overlap with the Childcare legislation case, and illustrated the current relation between the legislator and the judge. I argued that a rule-based system based on a supreme rule of recognition fails to take legal principles into account. The legislator can't oversee all possible situations in which the law will be applied. Therefore, a legal system based on the ultimate rule of recognition implicates the possibility of incoherent law. The legislator has the authority in such a system to enact law that contradicts the weight of legal principles. In such a system, the judge has only the authority to correct the legislator if the legislator, the highest legal authority, decides so. Suppose it did not; like in Dutch administrative law, it led to a system where the protection of the rights of citizens has been unsuccessful. Now that it is clear what the main critique against legal positivism is and how its interpretation method leads to inconsistent, incoherent and unsuccessful law, the question of whether legal positivism successfully countered this critique can be addressed.

I begin this chapter with a critical comment for Scholten and Dworkin. This is because a legal system not only relies on the judge's decision but also on the authority of law over citizens. In my discussion of the reaction of legal positivism, I will focus on Joseph Raz. He argues that legal positivism does not determine a specific interpretation method or a legislator as the *only* source of law. A strict, literal interpretation method of the law is not necessarily connected to a legal positivistic theory of law; therefore, it would be a category mistake to formulate these characteristics of a legal system as part of the concept of legal positivism. Although Raz's theory is very sophisticated, I will argue that his reaction does not succeed in reviving legal positivism in our specific legal situation. My main argument is that his theory of legal interpretation and incorporation of legal principles does not align with the principles of legal positivism provided in the first chapter. In other words, Raz's reaction is, in my opinion, not legal positivism.

After this discussion of the counterarguments, I will conclude that the (negative) implications of legal positivism still stand for administrative law. Therefore, I will argue that a new constitutional balance needs to be formed between the judge and the legislator. This balance will be based on a principle-based system of law. The central question now is: What theoretical-constitutional foundation can be formulated for a balance of powers that successfully protects the rights of citizens? In arguing for such a foundation, I will draw inspiration from Montesquieu and the theories discussed so far.

3.1 Raz's response

Before I delve into Raz's response, let me first make some critical remarks on the points made by Scholten (and Dworkin). Scholten argues that there are good reasons to support the assertion that one cannot fully understand what law is, unless one understands the responsibility that comes with justifying legal judgments and the problems that arise in doing so. The justification means that the judge cannot justify its decision by the letter of the law only. The judge is bound by the law, but he or she needs to check if the law has a just outcome in the specific situation too. If the application of a generally formulated law has unjust implications, the judge needs to correct this to come to a just decision. If a judge decides that the law is applicable, then he or she has also decided that the law is a just one. At the same time, exclusive focus on this justification can be blinding, especially when the attention is also limited to the justification of judicial decisions. In Scholten's theory, there is a strong focus on this judgment of the judge. As a result, certain aspects of law are systematically overlooked. A normative theory about judicial legal discovery tends to see law as the collection of all those norms that judges are supposed to apply by virtue of their function and that can justify their actions. The attention is solely focused on the reasons that can support the decision of the judge.

This does not include the authority of the judge, which makes his decision binding for the parties even when it is not justified. The perspective of Scholten leans towards a form of judicial activism, which would mean that the judiciary receives a free pass to judge as it likes. However, a normative theory about judicial legal discovery by the judge cannot simply be equated with a theory about law. Law cannot be well understood, unless one examines those other aspects with a certain distance from the internal justification (of the judicial judgment). Other aspects are for example the authority of the law or judge, meaning that a law and a ruling of a judge have authority and need to be followed, unless the law or the decision is not justified. A moderated legal positivist view on law that states that, in principle, the law issued by the legislator should have authority, can provide a useful addition in this respect.[68] Raz offers such a moderate perspective, which I will return to later.

In the first chapter, we have seen that in positivist theory, a norm belongs to the law if it:

a) is established by a legally competent body;
b) belongs to the norms that, according to a rule of recognition, should be applied by judges; or
c) belongs to a category of norms referred to in a norm of positive law.

Insofar as legal principles are explicitly formulated in, for example, the law, they thus derive their legal force from it: they are established by a competent body. Equally unproblematic are the legal principles that are legally binding based on a reference in a valid legal norm. If, as we established in the previous chapter, legal principles do not rest on a rule of recognition, but on a sense of appropriateness developed in the legal profession and the public over time, this poses problems for legal positivism. Is in that case all law still traceable to a factual source, the first principle of legal positivism that I mentioned in the introduction of the first chapter? The first principle was that all law is law because it is recognised as law by an authoritative institution according to secondary rules. Legal principles bind because they are accepted as (morally) correct, not because they are accepted by another legal norm – The principle accepted in Riggs v. Palmer was not mentioned before by legal officials. Is the recognition of legal principles incompatible with what I earlier referred to as the core of legal positivism? According to Brouwer, some doubt is appropriate. According to Brouwer, what a legal principle means is a factual, not a moral question. Principles are legal principles if they are considered as law by judges or other authorities. If that is not the case, they are not legal principles. This, and not the content, determines whether it is a legal principle. This thought is in line with what Raz calls 'the source thesis' of law.[69]

Raz distinguishes norm-creating and norm-applying institutions. Raz criticises norm-creating institutions and favours norm-applying institutions. The norm-creating institutions are central in legal systems as systems of a common origin. A variant of this type of system is most notably Hobbes, who defines a legal system as the set of all the norms issued, directly or indirectly, by one legislator. Raz's main objection against such systems is that they cannot account for multiple complexities in a legal system. They fail to explain the unity and the existence of these complex systems. In Britain, for example, there is more than one ultimate legislative authority: the authority of Parliament is not derived from the Common Law nor the authority of the Common Law from Parliament. The court and the Parliament both have legislative powers.[70]

What makes a legal system a *system,* Raz argues, is not the dominating position of a legislature but the fact that there is an organised set of norm-applying institutions which recognise norms as valid in virtue of the same source-based criteria. On the traditional positivist understanding, such as Hobbes's, a phrase like 'source-based criteria of validity' would refer us automatically to a legislator. But in principle, Raz says,

[68] Brouwer, *rechtspositvisme*, in coherentie, rechtszekerheid en rechtspositivisme, p. 139-140,
[69] Ibid., p. 166-167
[70] Raz, *Practical Reasons and Norms*, p. 129-131

there is no reason why courts need to orient themselves towards a legislature at all.[71] The criteria of validity shared by a system of courts may refer simply to a heritage of earlier decisions by similar norm-applying institutions. Suppose the following two things are true of a legal system: (1) it is the task of the courts to apply pre-existing norms (such as principles in Hart's simple pre-legal society); and (2) any determination by a court as to what those pre-existing norms are is binding.[72] A system of courts governed by these principles might develop a complex and evolving body of law solely based on legal principles, each constituent norm of which would be valid by its source (in a determination by a court as to what some preexisting norm amounted to), without any institution thinking of itself or being perceived as a legislative body, that is, as a body whose function it was to change the law or to enact new law deliberately. Of course, the law in such a system would change, and new laws would be created. Still, it would be created by mistakes by courts in the application of the task laid down in (1), mistakes which would nevertheless acquire the status of existent legal norms under the doctrine of authority laid down in (2). Such a system would satisfy Raz's own 'sources thesis'.[73]

Raz acknowledges with his 'sources thesis' that norm-applying institutions, such as judges, are not only applying the law in their decisions. As a critic, I have already argued that judges, in justifying their judgments, are constantly compelled to take into account, alongside the considerations of the authoritative legislator, other considerations as well. The existing law is always unfinished and imperfect, and where decisions must be made, further substantive grounds are indispensable. These grounds belong to the law, too. According to Brouwer, a legal positivist will neither acknowledge nor deny the necessity of these other considerations.[74] But he concludes that if this necessity exists, which in his view can only be the case based on extra-legal standards, there is no longer a judgment based on existing law but the creation of new law. For the legal positivist, there is, in such cases, a fundamental difference between what existing law is and what the judge must do based on the law. What the judge must do based on the law is not always the application of existing law. In the words of Raz:

> 'Nor should one…assume that reasoning about how cases should be decided according to law is merely reasoning aiming to establish what is the law regarding the case. The courts may have legal discretion to modify the law, supplement it, or to use equitable jurisdiction to deviate from it, or to supplement it where it is unsettled.'[75]

So when a judge is confronted by an unjust law, like in the childcare benefits scandal where parents had to repay 17000 euros when they made a mistake in explaining 1% of the total amount, then Raz argues that a judge can deviate from this law. In his or her decision he or she can introduce a new legal principle and make new law. All this falls into the scope of the 'sources thesis' because it doesn't matter if the legislator or the judge is the norm-creating institution.

3.2 Legal positivism and legal principles

Having abandoned some of the classical points in legal positivism in favour of a more nuanced and sophisticated version of legal positivism, which allows space for the judge as a norm-applying institution to apply legal principles, we can now return to a brief examination of the objections to legal interpretation in legal positivism.

When the legal positivist identifies legal principles based on the acceptance of these principles by judges (and other authorities), this does not, according to Dworkin, take him much further since the interpretation of the principles differs. Both the legal principles themselves and their weight are often

[71] Ibid, p. 132-148; and Raz, *The Authority of Law*, p. 105-111
[72] Waldron, *Law and disagreement*, p. 34
[73] Raz, *The Authority of Law,* p. 47
[74] Brouwer, *rechtsbeginselen en rechtspositivisme*, in coherentie, rechtszekerheid en rechtspositivisme, p. 53
[75] Raz, 'The Autonomy of Legal Reasoning', in *Ethics in the Public Domain,* 1994, p. 312

disputed. For instance, 'de Hoge Raad' in the Eelman-Hin case may give more weight to the principle of trust under certain circumstances than to the principle of autonomy, whereas another judge might have come to a different conclusion.[76] Some judges accept a legal principle in a specific situation as a binding standard; others do not. And if they are accepted, their weight is not the same for all judges. In this situation, the legal positivist can only conclude that there is no law. This is so because, for a legal positivist, there must be some convention which determines what the law is. There must be a convention that determines that some principles are *legal principles* and not moral principles. If a legal positivist accepts that a judge can introduce a new legal principle, such as in the Riggs v Palmer case, how can they still maintain an ultimate rule of recognition? There seems to be a tension here. The judge in the Riggs v Palmer case introduced the legal principle because he believed it was fair in the particular situation. The principle was applied because of its normative content and because it represented justice in that specific circumstance. Therefore, the principle falls outside any convention or rule of recognition. The principle wasn't recognised as a legal principle before the case.

Dworkin believes that these principles resonate with the moral community in a society. As Hart described, these principles can indeed change. But this change, unlike the change of laws, is gradual and not the result of a decision by a legislator. Dworkin's criticism mainly amounts to, as I argue, contrary to what Hart stated, that there is no fundamental change in the force of legal principles between the simple society he mentioned and a legal system. Legal principles were already law before there was a legal system with a rule of recognition. Therefore, when a judge rules based on a legal principle, it is not a case of new law. The judge in a principle-based system is never free to use principles whenever it likes to. The judge is bound by these principles. When a law has an unproportionate outcome, the judge must decide that this law is inapplicable. The judge must provide the correct answer to the application and weight of legal principles and is therefore not legally free to do otherwise. Therefore, the judge has a weak form of discretion, and not the strong discretion that, according to legal positivism based on the sources thesis, would exist.

This discussion is not merely theoretical. I believe that it has implications for how the administrative judge interprets the law. When the law contains legal principles outside of the converging practice of action among authorities, this opens the way for an administrative judge to weigh these principles against the principle of respecting the authority of the legislature and its enacted legal statutes. We saw that Hobbes rejected such a form of interpretation. The judge should not assess the content of the law but retrospectively interpret it to the intention of the legislator. How has legal positivism reacted to the critique that judges are, according to legal positivism, obliged to follow unjust or absurd laws? For Raz, such an interpretation method does not follow from legal positivism.

3.3 Raz's Authoritative Intention Thesis

Raz tries to formulate a legal interpretation method that holds a middle ground between a strict conventional interpretation of the one side, and a complete freedom of the judge from the other. If a judge has the freedom to deviate from the law whenever he or she thinks this is necessary, then problems will arise with the ultimate rule of recognition. The ultimate rule of recognition is directed at judges and obliges them to apply the existing rules, primarily consisting of legislation and judicial precedents. However, what to do when these existing rules are unjust and contradicted by moral principles?

Raz holds what he calls the Authoritative Intention Thesis (AIT). The AIT dictates that legislation should be interpreted according to the legislator's intent to create and enforce a specific law. Only when legislation is interpreted this way does the authority have control over the law.[77] According to Raz, the

[76] HR 11 December 1959, ECLI:NL:HR:1959:AG2042
[77] Raz, *Between Authority and Interpretation,* p. 285

Authoritative Intention Thesis is crucial for legitimating legislation. An enactment which is not interpreted as it was meant or intended to be cannot rest on the authority of the legislature (at least it cannot rest on that authority alone). However, Raz acknowledges that there could be reasons for deviating from the AIT in some instances. When they do, the AIT is not abandoned completely; it loses its force because it depends on the reasons for obeying the legislator, and sometimes those reasons run out, according to Raz. To understand this fully, let me briefly explain how Raz legitimises authority. For Raz, authority is legitimate when it acts according to the Normal Justification Thesis (NJT). The NJT suggests that the authority is legitimate when two conditions are met: First, that the subject would better conform to reasons that apply to him anyway (that is, to reasons other than the directives of the authority) if he intends to be guided by the authority's directives than if he does not. Second, that the matters regarding which the first condition is met are such that with respect to them, it is better to conform to reasons than to decide for oneself, unaided by authority. Simple examples of regulations regarding dangerous activities or materials illustrate the matter. I can best avoid endangering myself and others by conforming to the law regarding the dispensation and use of pharmaceutical products. I can rely on the experts whose advice it reflects to know what is dangerous in these matters better than I can judge for myself, a fact that is reinforced by my reliance on other people's conformity to the law, which enables me to act with safety in ways that otherwise I could not. Of course, none of this is necessarily so. The law may reflect the interests of pharmaceutical companies, and not those of consumers. If that is so, it may be a reason for the judge to not apply the law because it fails to meet the normal justification condition.[78]

Another reason for Raz deviating from the AIT is that the legislator could have misunderstood the legal impact the statute will have, given the doctrinal and bureaucratic legal environment in which it will operate. This could be the case in the Childcare Legislation Case. The unexpected repayment of childcare allowances can have a severe impact on citizens' lives. Raz comes here very close to this case. In such situations, Raz argues, it seems pointless to interpret the statute in accord with the legislator's intention. The doctrine of authority suggests that legislators were given authority to make the law they thought for good reasons to be right.[79] Raz concludes that, in principle, legal principles are an appropriate basis for interpretation in preference to the standard intention, provided that the law's impact is unreasonable and unjust.[80]

However, Raz acknowledges that deviating from the AIT may be constitutionally inappropriate. That is exactly why the administrative judge in the Netherlands cannot deviate from the legislature's authority. Article 120 GW prevents it. Raz's theory of interpretation aligns here with the current legal reality in administrative law. However, I question if it aligns with the principles of legal positivism. In a certain way, Raz suggests that there is more to law than positivist law. The judge is not bound by the law when the provision conflicts with the Normal Justification Thesis and also not when the law turns out to be unreasonable. I think there is a tension here.

I would argue that for a legal positivist, all norms that judges perceive as binding should be applied based on the ultimate rule of recognition. The ultimate rule of recognition, in line with the first principle of legal positivism, determines which rules are part of the law and which are not. Raz's critical examination of the legal impact, I believe, falls outside the ultimate rule of recognition. In the case of Riggs v. Palmer, the law was found to conflict with the principle that one should not profit from wrongdoing. However, in this case, this principle fell outside the ultimate rule of recognition. No institution had yet considered this principle and determined that it is not only a moral principle, but also a legal principle. Therefore, the recognition of legal principles as Raz proposes is difficult to reconcile with the doctrine of the ultimate

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[78] Raz, "The Problem of Authority: Revisiting the Service Conception," Minnesota Law Review 90, no. 4 (April 2006): p. 1014-1015

[79] Raz, *Between Authority and Interpretation*, p. 292

[80] Ibid, p. 293

rule of recognition. Thus, legal positivism might need to abandon this doctrine. Does legal positivism then still stand? Could one not say that it is more or less clear which rules belong to the law and which legal principles have been recognised as such? A legal positivist could also acknowledge that judges do not have strong discretion in applying legal principles. However, I think this position is weak for the legal positivist. The distinction between morality and law is not sufficiently clear anymore when the ultimate rule of recognition, the first principle of legal positivism, is abandoned. It is undeniable that legal principles have a moral content. If these legal principles are also recognised as law, then any legal principle with a moral content could potentially become part of conventional law. As a result, it becomes impossible to make a prior distinction between law and morality. Either you are a positivist, or you accept the authority of principles, even if they are not in a legal source. Both seem incompatible to me.

3.4 The implications of legal positivism for administrative law

With this defence of Raz's legal positivism and the accepted combination of ideal and retrospective interpretation prescribed by this 'improved' legal positivism, we have introduced a new problem. How can the existence of legal rules, which compulsorily fix the decision as soon as the application conditions of those rules are met, be reconciled with a (limited) authority of judges to create new exceptions to those rules? The application of legal rules seems to presuppose that the addressees, including the judge, should disregard the reasons they might have to act differently than the rule prescribes. In this way, legal rules can contribute to legal certainty and equality and prevent the citizen and the judge from being exposed to the constant 'temptation of special pleading.' If a legal rule allowed those reasons to be freely involved in the considerations, it would not be able to fulfil that function. This is probably one of the reasons why considerations that justify a change of the rule are usually not included in the rule itself. I say 'usually' because there are legal rules with so-called hardship clauses, which allow the legal consequence not to occur on the grounds of fairness, even though the conditions normally sufficient for it have been met. In the Childcare legislation case and the Childcare benefits scandal, however, there were no such hardship clauses. Therefore, the legislature intended that the harsh consequences would occur in every case that met the conditions.

Outside the cases involving hardship clauses, we must now, I think, distinguish between two types of questions that can arise for a judge who is, in principle, bound by rules of law. On the one hand, the question of whether he is bound by a certain rule, and on the other hand, whether that rule applies to the case to be decided. There is a strong interaction between both questions. Dissatisfaction with the results of a rule in a particular case can be a reason to take a closer look at the rule itself. The benefit of the distinction is, in my opinion, that it draws attention to considerations that are typical for answering the question of whether the rule binds but which would not be relevant if it were solely about the question of what consequences that rule has for the case to be decided. There are various such considerations. Some are concerned about the intrinsic value of the rule and whether the rule and its outcome are reasonable. Others are derived from the importance of the existence of a rule as such and the certainty that flows from it compared to the situation where rules are changed carelessly. Furthermore, some considerations have to do with the status of the rule, which may come from a democratically elected legislator but can also be based on delegated legislation or consistent jurisprudence. It can also happen that there is a good reason not to apply the rule in a particular case but no reason to change the rule itself. This is the case when the rule has an unreasonable outcome in a very specific case.

A complete overview of such considerations would undoubtedly have to include more. Still, the brief enumeration of some examples should suffice to show that there is every reason to distinguish between the question of what a particular rule leads to and the question of whether that rule should be applied.[81] When this distinction is accepted, then the limited freedom of the judge to create new exceptions and

[81] Brouwer, *Rechtsbeginselen en rechtspositvisme,* p. 38

thereby change existing rules implies that there is no legal rule that says legal rules must be (unconditionally) applied. Now, the problem I want to highlight in this thesis is that in administrative law at the moment, such a legal rule does exist. Namely, when there is a question of mandatory law, the judge is prevented from freely weighing the reasons that argue for not applying the mandatory rule against the reasons that argue against it. In administrative law, there is a rule with an all-or-nothing character. When the conditions for this rule's operation are met, the judge must apply it. Examples of such rules are the rule that someone can only retroactively ask for Childcare allowance for three months, and the rule in the childcare benefits scandal where someone has to repay the full amount of childcare allowance when someone made a minor mistake. The last rule especially had unjust consequences.

3.5 Inconsistency and incoherency in public law

The authority of the legislator in Dutch public law to enact mandatory law is, in my opinion, a significant problem. As seen in the previous chapter, it has the potential to lead to inconsistencies. In a legal order where the 'will of the legislator' is decisive in cases of possible vagueness in the text of the law, certainty about the norm may exist, but this rule does not provide real legal certainty. The will of the legislator is also characterised by an 'inevitable element of interpretation.' As long as we need language to clarify what we can legally expect from each other in mutual interactions, some vagueness is unavoidable. Hence, the classical legal positivist ideal of adjudication through a single source of authority, such as the will of the legislator, is inconsistent. It was an illusion of Hobbes that this vagueness could be eliminated by appointing a single source of legal authority. Cases not regulated by law will always exist. Interpretation methods and legal principles can reduce the number of these cases.

Moreover, mandatory law often results in incoherent legislation. The recognition of (unwritten) legal principles creates a source of authority for law that precedes the authoritative bodies in society. Broadly, there are two views on this point: one aligns with the theory of Hobbes and Hart, while the theory of Scholten and Dworkin inspires the other. In the first view, the authority of the law cannot be limited by legal principles preceding (positive) law. The law is sovereign and cannot be subjected to norms of other origins. The decisions of authoritative bodies are constitutive and create those rights. There is a foundational norm among authorities to respect the highest law, the Constitution (written or unwritten). Legal principles are what the authoritative bodies make of them, and an authoritative body cannot make legally incorrect decisions. In the other view, authoritative bodies are bound by limits they did not create themselves, which are recognised as pre-given limitations of their authority. In exercising that authority, those limits of legal principles must be observed. To the extent this is the case, the decision is declaratory and recognises pre-existing rights. If the authoritative body does not observe these limits, the decision is legally incorrect. However, that does not mean that even a legally incorrect decision is not binding until another authoritative body undoes it. The correction by legal principles is not possible with the concept of mandatory law.[82] In the case of mandatory law, it must always be applied by a judge in administrative law. Therefore the current situation in administrative law conflicts with the principle-based system of law I argue for. Mandatory law allows the democratic legislator to create legislation that conflicts with legal principles. Thus, the authority of the democratic legislator to enact mandatory law can lead to incoherent law.

[82] Mandatory law is a legal statute enacted by both the first and second chambers of the legislator and written down as a command. Because of its legal status – it is the highest form of law below the constitution – the judge cannot correct them with legal principles. Also, the judge cannot interpret the text close to the meaning of legal principles, since the text is written down as a command, so it does not leave any room for interpretation. These two elements make mandatory law a form of law binding the judge strictly. This is currently the relation between the legislator and the judge. The legislator has the primacy. An example of mandatory law was the legal statute in the childcare benefits scandal where every mistake resulted in a repayment of the full amount of received money.

The incoherence argument is based on the assumption that there are legal principles in a legal order, as Hart imagined in a simple society without a legal order. An indication of the existence of such legal principles is the fact that there are unwritten legal principles alongside those created by the legislator. A rule of recognition does not cover these legal principles, or only some of them. The origin of legal principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time. Therefore, when we acknowledge the existence of legal principles, we also acknowledge that a judge can discover over time a legal principle that was not part of any convention based on the ultimate rule of recognition. Legal principles do not possess binding force based on another legal norm or ultimate rule of recognition but bind through their connection with morality in a specific society, like in the Riggs v Palmer case.

How can we demonstrate that these legal principles existed before an ultimate rule of recognition? Since I also need language to provide a description here, absolute clarity is impossible. Yet, that does not mean there are no indications of the existence of such legal principles. The principle of proportionality regulates not only the actions of officials. We also use this principle in daily life. When it comes to raising children, we discipline them in proportion to the severity of their misbehaviour. We ensure that the punishment fits the crime, so to speak. This is necessary for the effectiveness of the punishment. Of course, the thinking about this proportionality is not set in stone. Dutch parents in 2023 find very different punishments proportional compared to parents in Sparta at the end of the 6th century BC. Yet, this principle continues to exist in society despite many revolutions, different sovereigns, and various legal systems throughout history.

The principles ensure that legal rules fit in society and that the regulatory authority maintains trust among the subjects. It's similar to classical music, where a principle exists that the tempo of a performance must be in proportion to the general musical experience of the audience. Nobody knows exactly how the correct performance of the St. Matthew Passion as intended by Bach sounds. We only have interpretations which are adapted to the audience. The performance is well received and evokes emotions in the audience only if the principle is taken into account. The emotion itself is not part of the music. Similarly, trust in the rules is not part of the law itself, but it's necessary for the regulation of arbitrary actions or omissions of persons under the legislative authority. Legal principles play a crucial role in creating this binding trust. Violating trust by changing the law too frequently or abruptly, or disregarding the applicable law for the wrong reasons can lead to a loss of trust. Without trust, no violation of trust is possible. The trust was based on the principle of legal certainty, which existed before the trust. It is the task of the judge (together with the legislature) to uphold these legal principles as norms for the officials in a legal system.

Finally, the authority to enforce mandatory law undermines the legal protection of the citizen. When the judge cannot weigh the application of a rule against other principles, then the judge is also unable to protect the citizen against utterly unreasonable outcomes of mandatory legislation. In such cases, the judge cannot find support in legal principles to declare legal rules inapplicable due to utterly unreasonable outcomes. If one of the objectives of administrative law is legal protection, then administrative law, when it concerns mandatory law, may be unsuccessful in achieving this goal.

3.6 The balance of powers in a principle-based legal system

If we accept, contrary to legal positivism, that legal principles are a fundamental part of administrative law, then the legislator also loses the authority to enact mandatory law. This is because, based on legal principles, judges always have the authority to declare laws that violate principles such as the principle of proportionality inapplicable. In such a balance of powers, the legislator no longer holds primacy. The legislator does not stand, as in Hobbes' system, as a sovereign above the judge, but alongside the judge. The judge is bound by the law but can review legislation against legal principles to ensure a fair outcome. The judge can, as Aristotle also endorses, correct legislation that has an unreasonable application. This

correction is necessary, as the legislator can never foresee how general legislation will apply in every specific case. This prevents the continuation of incoherent law, incoherent in the sense of general laws that contradict legal principles in specific cases.

If we abandon the ultimate rule of recognition and thus embrace legal principles, it directly affects the balance of power between the legislator and the judge. The judge then gains, in their relation to the legislator, the ability to correct laws enacted by the full legislature, even in public law.

The central question now is: What theoretical-constitutional foundation can be formulated for this relationship? In shaping this foundation, I will draw inspiration from Montesquieu and the theories discussed so far.

3.7 Montesquieu: balance of powers

In my thesis, I do not propose a new version of the *trias politica*, also known as "*trias politica* 2.0," that would establish a different relationship between the legislator and the judge. Instead, I argue for a return to Montesquieu's original doctrine of the separation of powers, taking a step back instead of making a leap towards a new paradigm. This step back will provide a *trias politica* that is more successful in the protection of the rights of citizens, one of the main goals of administrative law. A successful administrative law needs a judge who controls the legislature in the *trias politica,* mainly by checking if the general laws have fair outcomes in the specific situations to which it applies.

Montesquieu's perspective diverges significantly from thinkers like Hobbes. He posited that a judge is not just an executor of formal law. In Montesquieu's terms, law extends beyond statutory regulations, embodying a broader concept. He asserted that both the state and law are not merely the products of autonomously operating individuals. At its core, Montesquieu believed law consists of fundamental relationships inherent to human existence, including both human-enacted statutes and norms that bind humans beyond their will. He suggested that these relationships inherently precede humanmade law. This a priori nature of law links closely to Dworkin's views. For Montesquieu, to say that there is nothing just or unjust but what positive laws ordain or prohibit is to say that before a circle was drawn, all its radii were not equal. In his view, 'relationships of equity' predate the establishment of positive legal rules.[83] Just as there was already oxygen before human beings were alive, legal principles existed as necessary parts to construct positive legal rules.

This perspective on law is directly connected to Montesquieu's analysis of the *trias politica*. He argued that political freedom is incompatible with undivided sovereignty and defined freedom as the ability to do what one ought to want. An actor's freedom is compromised if they cannot act, constrained by absolute external power or coercive law. Montesquieu advocated for 'gouvernements moderés,' systems not characterised by undivided sovereignty but by shared sovereignty among equal actors who must relate to each other.[84]

Montesquieu also warned against democracies collapsing due to an excessively egalitarian spirit, which could manifest in a *trias politica* where law comprises only statutes arising from equal votes. Suppose such laws are interpreted solely in the spirit of a majority decision, with judges unable to assess their application against legal principles in cases of mandatory legislation. In that case, the tyranny of the majority might threaten democracy. Thus, democracies require boundaries to sustain the legal order they create, as this order is jeopardised when it becomes self-referential and detaches from its inevitable societal relations, with the law being legitimised solely by majority rule.[85]

Montesquieu proposed that legislators need a countervailing power embodied in a moderate constitution to counter this. In such a framework, sovereignty is not concentrated in a single body but distributed among various organs in a delicate balance. He identifies the 'legislative power,' 'executive power,' and

[83] Montesquieu, *Over de geest van de wetten,* Boek 1, hfdst 1, p. 41-43
[84] Ibid, Boek 11, hfdst 3, p. 217
[85] Ibid, Boek 11, hfdst 4, p. 217-218

'judicial power' as functions in mutual dependency. Each power must recognise its limitations and not claim 'primacy,' ensuring they individually contribute to a precarious mutual balance. This balance is vital, as general legislation does not invariably lead to coherent law.[86] Sometimes, general laws have an unproportionate impact on the freedom of citizens, such as in the childcare benefits scandal. Therefore a successful administrative law needs a judge who has the power to correct the legislator and to decide that a rule with an unfair outcome in a specific situation, should not be applied.

In a *trias politica* in the spirit of Montesquieu, Article 120 of the Dutch Constitution will be abandoned. Therefore, the judge retains the capacity to correct legislative actions based on legal principles, especially in cases where legislation yields unreasonable outcomes. The law's authority is acknowledged but not absolute. Judges are empowered to protect societal relations based on legal principles when the law's consequences stray from these essential relationships.

A nuanced understanding of Montesquieu's doctrine offers a theoretical foundation for such a judicial review model. His legal doctrine, premised on essential intersubjective involvement that predates written law, advocates for a balanced interplay of powers, rejecting the notion of omnipotent authority within the balance of powers. Montesquieu envisioned a system where 'le pouvoir arrête le pouvoir,' ensuring no single power dominates.[87] Each actor retains its distinct position in this system, preventing incoherent law. Thus, Montesquieu's original doctrine of the *trias politica* addresses a pressing contemporary need in administrative law, calling for shared sovereignty among the legislator, administration, and judge, fostering an unceasing mutual dialogue.

[86] Ibid, Boek 11, hfdst 6, p. 219-221
[87] Ibid, Boek 11, hfdst 64, p. 218

Conclusion

In this thesis on legal positivism and administrative law, I have presented a comprehensive critique of the way mandatory laws, as established by the government and legislative chambers, lead to inconsistencies, incoherency, and dysfunction in administrative law. The key argument is that legal positivism, as a foundation legitimising mandatory law, confines judges to the literal text of these laws, stripping them of the ability to consider broader legal principles when these laws are applied. This rigidity results in a misalignment between the application of law and the principles of fairness and proportionality that should ideally govern the relationship between the government and its citizens.

The thesis underscores the unique challenges in administrative law, a subset of public law where the government and citizens are not in an equal, horizontal relationship, unlike in private law. In administrative law, governed largely by norms established by democratic legislators, the statutes often prevail over (unwritten) legal principles like proportionality. This dominance of legislative supremacy over legal principles, a characteristic of (Hobbesian) legal positivism, leads to a situation where the government, in pursuing the public interest, might inadvertently or otherwise, impose disproportionate laws, without the possibility of judicial rectification or moderation.

We have seen in the legal positivism of Thomas Hobbes that the legislator should have the last word about the law in every case. This leads to an inconsistent legal system, as situations will inevitably arise where it is unclear what the law stipulates. According to Hobbes and Hart, in such scenarios, judges have strong discretion, meaning that they must create new law in these situations. In my opinion, this is a misrepresentation, as the judge in such cases uses legal principles. Legal principles are the tools that the judge uses to arrive at a proper legal judgment when the law is unclear or if it has unreasonable outcomes.

The recognition of legal principles poses problems for the legal positivist. If these principles are found by a judge, without ever being recognised as law by a previous judge or legislator, then they are not traceable to an ultimate rule of recognition. The ultimate rule of recognition dictates that only those legal principles that can be traced back to conventions from the legislator or previous judicial decisions are law. A judge cannot just apply a legal principle in a way that has not been done before by a judge or prescribed by a legislator. This is inconsistent with legal principles, as they are applicable based on their moral significance in a community over time, and not because they are traceable to an ultimate rule of recognition.

Since legal principles cannot be fully integrated into a legal positivist legal system, legal positivism leads to incoherent law. The legislator can never fully foresee how each law plays out in a specific situation. If a judge can only interpret according to existing conventions, primarily consisting of legislation and case law, then the judge cannot correct conventions that come into conflict with fundamental legal principles. The judge is then not authorized to correct legislation that turns out to be disproportionate in a specific situation. As a result, legislation that contradicts higher law, namely legal principles, continues to exist and be applied until the legislator changes their mind. In a coherent legal system, bad legislation is declared inapplicable by a judge based on legal principles.

Legal positivists like Raz, who try to make this fairness correction part of a legal system, find themselves in tension with the principles of legal positivism. They might say that the judge constructs new law if it uses new legal principles or a new interpretation of a legal principle for a fairness correction in disproportionate legislation. However, this does not align with legal positivism, as it puts the separation between morality and law under strain. Ultimately, an ultimate rule of recognition and the subsequent use of recognised laws and legal principles create a separation between morality and law. If, however, the judge can still recognise moral principles as law, without them being traceable to an ultimate rule of recognition, then I cannot understand how the separation between morality and law remains intact. Ultimately, a very moderate legal positivism will remain, where it is more or less clear which legal principles and legal norms belong to the law and which do not. This moderate legal positivism is indistinguishable from a principle-based system as described by Dworkin.

Towards the end of the thesis, a reimagined framework is proposed, advocating for a principle-based system of law within administrative law. This new framework seeks a balance of powers akin to Montesquieu's *trias politica*, ensuring that the rights of citizens are adequately protected against the potential abuse of power by the government. The author argues for a system where legal statutes are applied in harmony with fundamental legal principles, ensuring both legal certainty and the protection of citizens' rights. This approach aims to address the shortcomings of the current system, which, influenced by legal positivism, tends to favour legislative supremacy, often at the expense of fairness and proportionality in administrative law.

My argument leads to the conclusion that the current interpretation of Article 120 of the Dutch Constitution needs to be abandoned. This will grant the authority to judges to correct incoherent, unreasonable laws. My proposed balance of powers does offer room for a strong judiciary that can form a check onto the legislator. In this way, administrative law will be successful in one of its main goals: to protect the rights of citizens against governmental power and the tyranny of the majority. This will strengthen the legitimacy of courts and provide more clarity on what courts ought to do and what not, and the authority and the role we have attributed the courts.

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