Legal Certainty and Principles of Proper Law Making

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A. Introduction

This article is the summary of a doctoral thesis, presented at the University of Antwerp on 4 July 1997, which examined the uncertainty of the law and the principles of proper law making which can be deduced from that principle.[1] In Belgium, a theory of 'principles of proper law making' directed to the law makers – including Parliament – is developing *and* enforceable, thanks to the far reaching possibilities of judicial review. What follows is only a selection concerning the debate about the principle of the certainty of the law and about the principles of proper law making. The article will focus on the development of the principles of proper regulation (Section B below), the meaning of the principle of the certainty of the law (Section C below) and on its enforceability before the Belgian and European courts (Section D below). Section E will draw conclusions from the foregoing, explaining some of the paradoxes concerning the principle of the certainty of the law.

B. The Development of a Theory of 'Principles of Proper Law Making' in Belgium

In *The Morality of Law*, Lon Fuller, using the 'allegory of King Rex', describes eight 'principles of internal morality' which are, according to the author, inherent qualities of a legal system. These eight principles concern:

(1) the generality of laws;
(2) the demands that laws are published;

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1 P. Popelier, *Rechtszekerheid als Beginsel van Behoorlijke Regelgeving* (Antwerp, Intersentia, 1997), p. 663.

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(3) that laws are not retroactive;
(4) the clarity of laws;
(5) the consistency of laws;
(6) the demands that the laws do not impose duties that are impossible to perform;
(7) that laws are not changed frequently; and
(8) the demand that governmental action is in accordance with the general laws which are laid down beforehand.[2]

These principles have later in Belgian doctrine been cited as tests to measure the good quality of laws.[3]

Another influence for the emergence of a Belgian doctrine of 'principles of proper law making' comes from The Netherlands. There, the idea of a 'doctrine of principles of proper law making' emerged in the 1970s and found its highlight in Van der Vlies' doctoral thesis, which was published in 1984.[4] She sums up nine 'principles of proper law making'. These are as follows:

(1) the setting of a clear purpose of the law;
(2) the principle of the appropriate regulating body;
(3) the principle that the law is necessary and can be executed;
(4) the 'consensus' principle – interested parties must be heard;
(5) the principle of a clear terminology and coherence;
(6) the principle that the law can be known;
(7) the equality principle;
(8) the principle to take notice of every individual case; and
(9) the principle that legitimate expectations be honoured.

Some hesitation was evident concerning the possibility and the utility of formulating such principles, bearing in mind the limited possibilities of judicial review of legal rules, especially where Acts of Parliament were concerned. The principles however gained practical use when they were placed in an institutional framework. In the 1980s and 1990s the Dutch government developed a policy aimed at the quality of the law as such. This included the promulgation of 'Directives for Regulations', a practical tool for everyone involved in the preparation of rules. These Directives

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2 L. Fuller, *The Morality of Law* (revd edn, New Haven, Yale University Press, 1973) p. 262.

3 See J. de Jonghe, *De Staatsrechtelijke Verplichting tot Bekendmaking van Normen* (Antwerp, Kluwer, 1985), p. 4; K.L.M. Mortelmans, *De Invloed van het Europees Gemeenschapsrecht op het Belgisch Economisch Recht* (Antwerp, Kluwer, 1978), p. 581; K. Rimanque, *De Regel is Niet Steeds Recht* (Antwerp, Kluwer, 1990), p. 13; and G. Schrans, 'The Instrumantality and the Morality of European Economic Law' in *Miscellanea W.J. Ganshof van der Meersch* (Brussels, Bruylant, 1972), II, pp. 383–434. See also W. Van Gerven, *Het Beleid van de Rechter* (Antwerp, Standaard Uitgeverij, 1976), pp. 120–128.

4 I.C. Van der Vlies, *Het Wetsbegrip en Beginselen van Behoorlijke Regelgeving* ('s Gravenhage, VUGA, 1984), p. 182.

implied six criteria for the quality of rules, summed up in an official report on legislation, as follows:[5]

(1) the legality and realization of the principles of law;
(2) effectiveness of the principles of law;
(3) subsidiarity and proportionality of the principles of law;
(4) the possibility to execute and maintain the law;
(5) coherence of the principles of law; and
(6) simplicity, clarity and accessibility of the principles of law.

In Belgium, Van der Vlies' principles in particular served as an inspiration to formulate our own 'principles of proper law making'. At the forefront was Coremans and Van Damme's book on 'Principles of the Technique of Legislation and Proper Law Making'.[6] They repeated most of Van der Vlies' principles, rejected her 'consensus' principle and the principle to take notice of every individual case, but introduced the principle that every law formulates a rule – a command, a prohibition or a permission.

At this period, interest concerning the quality of the rules grew in doctrinal and political circles. Soon various authors made up their own lists of 'principles of proper law making', inspired by either Fuller, Van der Vlies or Coremans and Van Damme, and often introduced new principles as well.[7] The result is an inventory of about 36 'principles of proper law making', sometimes overlapping, sometimes differing in meaning according to the individual author, and seldom upheld by all or most authors.[8] The practical use of these lists can be discussed and often the discussion usually centres on the authority and weight of the author – e.g. as a member of the Council of State, division legislation, which gives advice on the bills and proposals of laws and regulations – or the way in which the principles are institutionalized. For example, the principles as summed up by Van Humbeeck, are also used by the

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5 *Zicht op Wetgeving* (1990–1991) 2 *TK*, 22 008.

6 H. Coremans and M. Van Damme, *Beginselen van Wetgevingstechniek en Behoorlijke Regelgeving* (Bruges, Die Keure, 1994), p. 154.

7 See, besides the authors already mentioned, also S. Debaene, R. Van Kuyck and B. Van Buggenhout, 'Normen Voor Goede Kwaliteit van Wetgeving' (1997–1998) *RW* pp. 833–847; M. De Jonckheere, *De Gemeentelijke Belastingbevoegdheid, Fiscaaljuridische Aspecten* (Bruges, Die Keure, 1994) p. 217; M. Storme, *Algemene Inleiding tot het Recht* (Antwerpen, Kluwer, 1994) pp. 160–172; P. Van Humbeeck, 'Algemene Beginselen van Behoorlijke Regelgeving, Met een Toetsing van het Vlaamse Milieurecht' (1997) *TBP* pp. 371–380; E. Vermeiren, ''Pleidooi Voor een Volwaardig Regelgevingsbeleid' (1998) *De Gemeente* pp. 48–54, E. Vermeiren, 'Van doelstelling tot norm' in M. Adams and P. Popelier (eds), *Wie Waakt over de Kwaliteit van de Wet?* (Antwerp, Intersentia, 2000), pp. 245–255, and the introduction to the Proposition to establish a cell for the evaluation of legislation at the services of the Senate, (1996–1997) *Gedr.St.*, Senate, I–643/1.

8 See for this inventory P. Popelier, 'De kwaliteit van de Wet', in S. Debaene en B. Van Buggenhout (eds) *Informatietechnologie en de Kwaliteit van Wetgeving* (Antwerp, Intersentia, 2000), pp. 1–32.

Flemish Social Economic Council when asked to advise on a Bill before its introduction in the Flemish Parliament.[9]

The problem here is that principles are formulated, without explaining the frame of reference from which they infer. Often this frame of reference is merely implicitly present, but it can explain differences in the demands which are set to measure the good quality of laws. For example various authors are pleading for a sufficient 'democratic' quality of the law. Some authors start from the concept of the 'Sovereignty of Parliament', which focuses on the Parliament and thus on the formal law, namely Acts of Parliament. The demands then focus on the position of the Acts of Parliament and question how far the legislative function can be delegated. Other authors commence from the stance of a participatory concept of democracy, which leads to the 'consensus' principle: the participation of the actual citizens in the decision-making process is more important than Parliament itself deciding on a rule.

In Belgium however there is a possibility of finding a generally acceptable frame of reference, leading to the formulation of generally accepted 'principles of proper law making', thanks to the far reaching possibilities of judicial review of both laws (Acts of Parliament) and rules (governmental). The Court of Arbitration – the Belgian Constitutional Court – has only a limited power to review federal acts and acts of the federated Parliaments, but via its power to review in the light of the equality principle, it also reviews laws in the light of the unwritten principles of law. An analysis of doctrine, positive law, jurisdiction and advices of the Council of State, division legislation on the quality and legality of bills and proposals, clarifies the meaning of these principles of law, their constitutional frame of reference and the actual demands they are leading to. This makes possible the formulation of 'principles of proper law making', which must be generally accepted since they are enforceable before a court. The threat of a judicial sanction also brings about a preventive effect: the legislator will be more interested in obeying the principles of proper law making. Also, the development and application of these principles of law in the courts becomes more predictable when their constitutional frame of reference is made explicit.

This research has been done with relation to the 'principles of proper law making' deduced from the general principle of certainty of the law.[10] The Belgian jurisdiction shows that further research would detect more 'principles of proper law making', deduced from various other principles of law. A first analysis points out six other principles, which lay down certain quality-standards for legislation: the principles of equality, proportionality, legality, due care, reasonableness and due motivation.[11] This article however is only concerned with the certainty of the law.

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[9] See the report of the SERV, *Advies in Hoofdlijnen over het Voorontwerp Decreet Milieubeleid. Toetsing van het Voorontwerp en de Reeds in Wetgeving Omgezette Onderdelen van Algemene Beginselen van Behoorlijke Regelgeving* (Brussels, 1997) p. 52.

[10] See P. Popelier, *supra* note 1, at p. 663.

[11] See P. Popelier, 'De Kwaliteit van de Wet', *supra* note 8, and also see 'Beginselen van Behoorlijke Wetgeving in de Rechtspraak' (1995) *TPR* pp. 1049–1114.

C. The Certainty of the Law

Fuller stated that his eight 'principles of internal morality' were self-evident.[12] However, even these principles can only be seen as obvious within the context of a specific frame of reference. For Fuller, this framework is the legal system itself, defined as 'the enterprise of subjecting human conduct to the governance of rules'. In fact this is only one of the many functions of a legal system, namely the *allocative* function, focusing on the predictability of the relations between subjects of law.[13] The legal system must enable one to live in an ordered community, where persons can realize their own plans, within the limits of the law which coordinates the relations between these persons in a clear and logical way. Legal rules can only canalize people's activities when these persons can integrate these rules into their personal plans. The eight principles of internal morality are solely directed to the purpose of making these rules known, reliable and executable. Principles which can be deduced from other functions or aims of a legal system, for example the democratic quality or the functions of a social welfare state, are not defined as 'principles of inner morality'.[14]

Fullers' definition of a legal system thus corresponds with the meaning of the principle of the certainty of law, as accepted in the Belgian and the German legal systems and in the legal system of the EC.

I. The 'Rechtsstaat' or 'Rule of Law'

The principle of the certainty of law is deduced from the constitutional principle of the 'rule of law' or, rather, the 'Rechtsstaat'.[15]

The English concept of 'the rule of law', as explained by Dicey, concerns equality before the law, the guarantee of individual rights and the absolute supremacy of the law as a means to protect the individual against an arbitrary government.[16] The Belgian concept is however not only inspired by the more pragmatic English principle of the 'rule of law', but also by the German doctrine of the 'Rechtsstaat'. This 'Rechtsstaat' emerged as a liberal concept, and centred around fundamental rights. With the emergence of the 'democratic state' however, the 'Rechtsstaat' was defined mainly as a 'Gesetzesstaat', directed against the government, which is subordinate to the law as laid down by Parliament. This was a reaction against the

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[12] L. Fuller, *supra* note 2, at p. 98.
[13] Ibid. at p. 207.
[14] See e.g., the supplementary principles proposed by R. Summers, 'Professor Fuller on Morality and Law' in R. Summers (ed.), *More Essays in Legal Philosophy, General Assessments of Legal Philosophy* (Oxford, Blackwell, 1971) pp. 121 *et seq*.
[15] For the German concept of the 'Rechtsstaat', the Anglo-Saxon concept of the rule of law and the Belgian notion, see P. Popelier, *supra* note 1, at pp. 35–106.
[16] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, London, MacMillan, 1968) pp. 187 *et seq*.

past, when the King could rule in an arbitrary way, whereas nowadays all trust is placed on Parliament which is in turn elected by the people.

A flexible principle of the 'Rechtsstaat' however can be directed against *any* body in power – even Parliament itself. The national socialist state of the *Third Reich* clearly showed that even Parliament cannot always prevent arbitrariness.

The 'Rechtsstaat' can then be defined as a *dualistic vision on the relation between the law and the state, implying an ongoing attempt to limit the arbitrariness of governmental power by binding all bodies in power to the law, in function of the personal freedom.*

This means that a legal framework must exist to which not only the executive, but also the legislator is subordinate. No body in power should have the sole discretion to change, amend or widen its own limits. This leads to a pluralistic legal system, where rules are set by various bodies (e.g., additional to Parliament and government, the constitional assembly, international or supranational legal bodies, federated and decentralized legislators) or constructed as unwritten principles of law, which can even have priority over Acts of Parliament. The aim of this 'Rechtsstaat' is the personal liberty of the individual, who can rely on the legal system to develop his personal projects and protect him against possible arbitrariness of the government *and* the legislator. This is where the 'principle of the certainty of the law' becomes important and evident.

II. The Certainty of the Law

The 'Rechtsstaat' emerged as a liberal concept, according to the logics of a 'natural law'. Within the concept of natural law, the law offered a frame where the 'free, rational citizen' could unfold and develop. Fundamental rights were considered as highly relevant, seen as static and absolute, embedded within the right of property. In that concept certainty of law was defined as the guarantee to keep what was once attained – the 'vested rights'. This concept of the certainty of law has gained much influence today in Belgian doctrine and jurisdiction.

The concept of the 'Rechtsstaat' as a 'Gesetzesstaat' leads to a concept of the 'certainty of the law' which focuses on the predictability of the *application* of the formal law by the judge, the government and the administration, who are in turn bound by the law. The acts of parliament are *presupposed* to be rational, general and transparant.[17] Their existence is supposed to guarantee personal freedom and certainty within a society.

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[17] For the 'doctrine of the rational law maker' see N. Bobbio, 'Le Bon Législateur' in H. Hubien (ed.), *Le Raisonnement Juridique* (Brussels, Bruylant, 1971) pp. 243–249; L. Nowak, 'De la Rationnalité du Législateur comme Elément de l'Interpretation Juridique' (1969) *Logique et Analyse* pp. 65-86; F. Ost, 'L'Interprétation Logique et Systématique et le Postulat de Rationnalité du Législateur' in M. Van de Kerchove (ed.), *L'Interprétation en Droit* (Brussels, FUSL, 1978) pp. 97–184; F. Ost and M. Van de Kerchove, 'Rationaliteit en Soevereiniteit van de Wetgever: "Paradigma's" van de Rechtsdogmatiek?' (1986) *R&R* pp.

In Dicey's system of the rule of law, certainty of the law is guaranteed by the courts, who define and enforce the rights of the citizens, and by the law maker who clearly and in advance prescribes which actions will be sanctioned.

In the United States, the principle of the certainty of the law is given form through the 'due-process' clause. There, the 'vested *rights*' doctrine slowly evolves into a doctrine of the protection of legitimate *expectations*.

In Europe, the modern concept of the certainty of law, as acknowledged by the European Court of Justice (ECJ), is based on the German doctrine and jurisprudence, defined as 'Dispositionssicherheit'. At the core of this concept is the personal freedom to decide and develop oneself, made possible, amongst other things, by the predictability of the whole legal framework. This legal framework makes possible and facilitates personal choice and realization of decisions and projects.

The overriding objective is always the right of personal freedom: the freedom of a person, who is socially bound, to decide and act for himself. A person makes a decision on the basis of certain calculations and expectations. He takes into account the legal context by which also other agents – private parties and governments – are bound. Also in this way the actions of relevant third parties become more predictable. All this presupposes that the legal framework is sufficiently accessible to enable a person to take the framework into account. The question then arises concerning how far one can have future expectations in relation to the legal context. This question is especially relevant when decisions are taken over a long period of time.

This is the concept one finds in the definitions of the 'principle of the certainty of law' as acknowledged by the highest courts.

The Belgian system has three 'highest' courts: the Court of Cassation (on top of the ordinary courts), the Council of State (administrative court) and the Court of Arbitration (review of Acts of Parliaments). The Council of State and the Court of Cassation define the certainty of the law as a principle of law which implies the 'principle of legitimate expectations'. A person must be able to rely on an established administrative practice or policy. If the government or administration raises certain expectations it must honour them.[18] The Court of Arbitration formulates the principles of the certainty of law – also directed to the formal law maker – as a requirement of predictability and accessibility of the law, so that a subject of law can

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125–140; P. Popelier, supra note 1, at pp. 181–190; J. Wroblewski, 'Rational Law-Maker and Interpretative Choices' (1985) *Riv.intern.fil.dir.* pp. 129–147 and 'A Model of Rational Law-Making' (1979) *ARSP* pp. 187–201; and Z. Ziembinski, 'La Notion de Rationnalité du Législateur' (1978) *Arch.Phil.Dr.* pp. 175–187.

[18] Cass, 27 March 1992, *Arr. Cass*, 1991–1992, 727; Council of State, Vermeulen, No. 27.685, 17 March 1987.

reasonably foresee the consequences of its actions.[19] The law maker cannot harm a subject of law in its interest to foresee the legal consequences of its actions, *unless* an objective and reasonable justification exists.[20] This indicates the relativity of the principle of the certainty of law and the balance of interests which are central in the process of the applying judicial review to this principle.

This is also the concept behind the jurisprudence of European courts which have a direct influence in the Belgian legal order, such as the ECJ and the European Court of Human Rights (ECHR).

The ECJ considers certainty of the law and its predictability as necessary requirements, especially for rules which can have financial consequences.[21]

The ECHR integrates the principle of the certainty of law in the articles of the European Convention of Human Rights, especially in Clause 1 of the First Protocol (the right of property) and in the qualitative definition of the 'law' which is necessary to restrict human rights in accordance with the Treaty. The 'law' must be formulated with sufficient precision to enable the person concerned – if need be with appropriate advice – to foresee, to a degree which is reasonable in the circumstances, the consequences that a given action may entail.[22]

D. Principles of Proper Law Making, Deduced from the Principle of the Certainty of the Law

The principle of the certainty of the law is also directed to the law maker, which includes Parliament itself. First the law maker must lay down a legal framework, the basis on which a person can construct a personal decision model. This legal framework must be sufficiently accessible to enable a subject of law to discover what options are available to him and what the legal consequences are of each possible action. It must be sufficiently reliable to enable a subject of law to base longer-term projects within this legal framework. Last, but not least, it must be executable, so that a person can also realize his options and that the legal consequences he wishes to attain, can indeed occur.

The Belgian doctrine and jurisdiction and the advices of the Council of State,

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[19] See, Court of Arbitration, No. 25/90, 5 July 1990, BS, 6 October 1990, No. 36/90, 22 November 1990, BS, 28 December 1990, No. 10/93, 11 February 1993, BS, 9 March 1993.

[20] Court of Arbitration, No. 10/93, 11 February 1993, BS, 9 March 1993.

[21] Established jurisdiction, see ECJ, 15 December 1987, Case 325/85, Ireland/Commission, Jur., 1987, 5041 and Case 326/85, Netherlands/Commission, Jur., 1987, 5143 and ECJ, 13 March 1990, Case 30/89, Commission/France, Jur., 1990, I–691.

[22] See ECHR, Sunday Times, 26 April 1979, *Publ.E.C.H.R.*, Series A, No 30; Müller, 24 May 1988, *Publ. ECHR*, Series A, No. 133; Ezelin, 26 April 1991, *Publ. ECHR*, Series A, No. 202; Worm, 29 August 1997, Rep., 1997–V.

division legislation, can be fit into this model. They uphold the following 'principles of proper law making', which can be deduced from the principle of the certainty of law. These are the principle that legal rules:

(1) are sufficiently accessible;
(2) are calculatable and reliable;
(3) can be executed and maintained.

I. The Accessibility of the Legal Rules

1. The Requirements

In order to base his conduct on a certain regulation, a person must know that there are rules applicable and relevant to his situation, and he must be able to find these rules and to understand their content. This means that the legal rules must be known and be sufficiently clear in order to orientate a person's conduct and to make the consequences of his conduct predictable.

According to Article 190 of the Belgian Constitution, every rule must be published before it can be binding upon a subject of law. This is necessary to give certainty about the actual, authentic version of the text and about its date. This is called the *documentary* function of the publication.[23]

The *informative* function of the publication implies that subjects of law are made aware that a certain rule has come into force.

However one cannot expect everyone to read daily the Official Gazette – and to even catch up with all the Official Gazettes previously published – to garner information concerning which legal rules are in force. Similarly, one cannot expect everyone to *understand* every rule and all its implications merely from reading about it in the Official Gazette. According to Article 190 of the Belgian Constitution, everyone is *bound* by the law once it is officially published, but there still exists the possibility that a legal rule is *not* applied in an individual case because an individual could not have possibly known about the rule.

It is of course necessary for a legal system to uphold the presupposition that once a legal rule is published, everyone is bound by it and must obey it. Otherwise, a legal system cannot exist. Such a legal system would provide little or no confidence in the rules and the actions of other parties would be left as unpredictable.

However it is impossible to reach every person. Even lawyers – law makers themselves – do not keep up with all existing legislation. It is also impossible to formulate every legal rule in such a way, as is traditionally required by the rules of legal technique, that every person understands its content. Sociological research has proven that persons do not read the law itself – they follow what others do, or they get

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[23] G. Holzinger, 'Kundmachung von Rechtsvorschriften in Österreich' in H. Schaffer (ed.), *Theorie der Rechtssetzung* (Vienna, Manz Verlag, 1988), p. 313.

information through the media, organizations or lawyers.[24] The government should try to reach these *intermediary* groups, who select and explain the legal rules which are relevant to their clients, and the government should set up its own information service to reach individuals who do not have access to a relevant intermediary group.

Not only is the publication and clarity of a legal rule of upmost importance in itself, but so is the accessibility of a whole complex of legal rules. Deregulation is, in the light of the certainty of the law, a false answer to that problem. Deregulation concerns, in political economy terms, the relationship between government and market and the intensity and degree to which the government can interfere. This is a political question – an option for deregulation is in fact an option to leave things to the spontaneous working of the free market. Certainty of law on the other hand concerns the question, *given* and irrespective of the intensity of governmental interference, how the law maker can build up an adequate decision-making model for each person. Deregulation seeks to *reduce* the impact of legislation as an orienting framework whilst the certainty of law seeks to *strengthen* it.

The answer, in the light of the certainty of law, to the complexity and quantity of legal rules is thus one of a more technical nature. One must try to purify legislation – to dispose of ineffective, obsolete or invalid rules – and to structure it in a coherent and systematic way, so that it is clear which rules belong together.

2. *Applications in Jurisdiction*

The courts are quite reluctant to sanction a rule on the basis of this principle of accessibility. They accept that – even in matters such as penal law – the law maker cannot foresee every situation and that vague wordings are often inevitable and can help to keep pace with changing circumstances or meet particularities of an individual case; the administration and the courts are essentially there to make these rules more concrete and to interpret them in an individual case.[25]

Echoes of these requirements can still be found in jurisdiction. Legislation must be sufficiently clear, in order that a person can – if need be with some advice – understand its content and consequences. The requirements concerning the clarity of rules are stricter when the rules formulate exceptions or when the matter becomes more technical.[26]

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[24] See V. Aubert, 'Enkele Sociale Functies van Wetgeving' in P. Peper and K. Schuyt (eds), *Proeven van Rechtssociologie* (Antwerp, Standaard Wetenschappelijke Uitgeverij, 1971), pp. 46–74; C.J.M. Jansen and M.F. Steehouder, *Taalverkeersproblemen Tussen Overheid en Burger* (Den Hague, SDU Uitgeverij, 1989), pp. 30–31; A.T. Marseille, *Voorspelbaarheid van Bestuurshandelen* (Deventer, Kluwer, 1993), p. 360.

[25] See ECHR, Sunday Times, 26 April 1979, *Publ. ECHR*, Series A, No. 30; ECHR, SW, 22 November 1995, *Publ. ECHR*, Series A, No. 335–B; ECHR, Cantoni, 15 November 1996, Reports, 1996–V, Court of Arbitration, No. 45/96, 12 July 1996, BS, 27 July 1996.

[26] See ECJ, 20 April 1978, Cases 80 and 81/77, Commissionaires Réunis, Jur., 1978, 927, ECHR, 24 April 1990, *Publ. CEDH*, Series A, No. 176–A.

The ECJ formulates 'clarity' as an aspect of the principle of the certainty of law, aimed at informing the subject of law about his rights and duties and at making the rules predictable.[27] This is especially so in relation to Member States: the execution and implementation of European Union (EU) law by Member States must be sufficiently clear and precise in the light of the principle of the certainty of the law.[28]

The ECJ is however severe for the undertakers. They are supposed to be 'informed professionals', who keep themselves informed *via* their professional organizations, the general and specialized media, contacts with national and European authorities and the Official Gazette.[29]

The ECHR is less severe, because its context of functioning is not specifically financial; it concerns every individual and bearer of individual fundamental rights. These individuals must, if necessary, seek appropriate advice.[30] The Court however expects more initiative and knowledge concerning the law when the case in question concerns a person or a company carrying out a professional activity.[31]

The Court has, within its jurisdiction, also integrated the requirements concerning a number of complex legal rules. It stated that the legal rules in France, concerning the protection of landscapes and jurisdiction about the classification of administrative acts, were so complex that they brought about uncertainty concerning the nature of a rule to classify a domain and the calculation of the term to appeal. As a consequence, access to justice was denied, contrary to Article 6 of the Convention.[32]

Belgian courts start from the viewpoint that every person *should* know the law once it is published. In very complex matters, however, it is sometimes accepted that a person can be excused or can rely on the interpretation of the administration.

In one case, for example, the fiscal administration accepted for some years the invoices of a garage holder who sold cars. The garage holder got back tax rebates, although the invoices were not completely filled out as required by the law. Even though under the law the invoices were considered as invalid and obliged the fiscal administration to claim back the taxes, the Court of Cassation still maintained that the principle of the certainty of law could out weigh that obligation.[33] The garage

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[27] See ECJ, 9 July 1981, Case 169/80, Adm. Customs/Gondrand Frères, Jur., 1981, 1931, ECJ, 21 June 1988, Case 257/86, Commission/Italy, Jur., 1988, 3249, ECJ, 13 February 1996, Case 143/93, Van Es Douane Agenten, Jur., 1996, I–431.

[28] See ECJ, 30 January 1985, Case 143/83, Commission/Denmark, Jur., 1985, 427, ECJ, 15 June 1995, Case 220/94, Commission/Luxembourg, Jur., 1995, I–1589.

[29] See ECJ, 1 February 1978, Case 78/77, Lührs, Jur., 1978, 169, ECJ, 12 July 1989, Case 161/88, Binder, Jur., 1989, 2438.

[30] See ECHR, Sunday Times, 26 April 1979, *Publ. ECHR*, Series A, No. 30, Malone, 2 August 1984, *Publ. ECHR*, Series A, No. 82, Cantoni, 15 November 1996, Reports, 1996–V, Worm, 29 August 1997, Reports, 1997–V.

[31] ECHR, Groppera Radio AG, 28 March 1990, *Publ. ECHR*, Series A, No. 173, Cantoni, 15 November 1996, Reports, 1996–V.

[32] ECHR, de Geouffre de la Pradelle, 16 December 1992, *Publ. CEDH*, Series A, No. 253–B.

[33] Cass, 27 March 1992, *Arr. Cass*, 1991–92, 727.

holder could have relied on the fiscal administration and could have believed his invoices were filled out in conformity with the law.

Also in social security law it is sometimes accepted that a person cannot know the relevant law unless he is informed by the official services. For that reason the Council of State annulled a refusal to give a starting undertaker exemption of the obligation to pay social contributions.[34]

The figure of 'error about the law' is accepted in Belgian jurisdiction, but not easily applied. When accepted, a person can evade a civil or penal responsibility or can obtain, or avoid, the annulment of a contract. This person must in all cases establish that he displayed sufficient initiative to obtain reliable advice about the law.[35]

There is also a trend towards the administration taking on the broader obligation, namely to inform the people about the law and towards the acceptance of the civil responsibility of the government to compensate for damages caused by incorrect information.[36] This is strengthened by recent legislation concerning the transparency of the administration.

Therefore it seems that the accessibility of legal rules is not the sole responsibility of the law maker, but on the other hand every person is not required to select and read the authentic text of legal rules himself. A person must take the initiative to get information and inform himself about the law through seeking the advice of lawyers, professional organizations and/or the administration. Should he obtain the wrong advice, he could claim that the responsibility lies with his advisers. This is also fairer to the other party, who *did* know the law and relied on its application. The courts are sooner willing to sanction a legal rule in matters such as fiscal law and social security law. In these matters, the legislation is very complex and individuals depend on its application by the administration. Moreover, in these cases usually no third private party is directly concerned and involved.

II. The Calculatability and Reliability of Legal Rules

1. The Requirements

It is important for a subject of law to know when he is bound by a legal rule and the time within which he must establish certain facts in order to attain or avoid certain

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[34] Council of State, Klopfert, No. 32.319, 24 March 1989.

[35] See the jurisdiction analysed by B. de Smet, 'De Onoverkomelijke Rechtsdwaling als Wapen Tegen Overregulering en Artificiële Incriminaties' (1992–1993) *RW* pp. 1288–1295 and M. Faure, 'De onoverkomelijke rechtsdwaling in milieustrafzaken' (1991–1992) *RW* pp. 937–950.

[36] See the jurisdiction analysed by J. Gijssels, 'De overheidsaansprakelijkheid i.v.m. informatie' (1979–1980) *RW* pp. 1207 et seq. and W. Lambrechts, 'Het Zorgvuldigheidsbeginsel' in I. Opdebeek (ed.), *Algemene Beginselen van Behoorlijk Bestuur* (Antwerp, Kluwer, 1993), p. 47.

legal consequences. The law must be clear on this matter. Where the law is silent, the principles of temporal law are applied.

The principles of temporal law state that, unless the law stipulates otherwise, a legal rule has immediate application; the exemptions to this are retroactivity, deferential and delayed application.[37] The principle behind this is not the certainty of law, but the *unity* of law. Immediate application means that the new law gives new legal consequences to certain legal facts, which occur from the moment the new law comes into force. The coming into force, the legal facts and the legal consequences take effect simultaneously. Retroactivity on the other hand is not legal fiction, but merely means that the new law gives new legal consequences to certain legal facts, which have occured *before* the new law came into force. So a retroactive law does not pretend the past was different than it actually was, but lays down, *for the future*, new consequences which are difficult to avoid, even though the facts of the case have already occured.

The principle of the certainty of the law, in its aspect of the requirement of *reliability* of the law, can correct these principles of temporal law. In the light of this principle, it is possible to see that retroactive law poses no problem, for example because it comes as no surprise, the subjects of law having been informed in advance or the rule repeating merely a jurisdiction or administrative practice which was already applied before. On the other hand, immediate application *can* pose a problem in the light of the principle of the certainty of the law. This is especially so when a project is undertaken over a long period of time, investments are made before the decisive legal act is undertaken and then suddenly the law changes.

2. *Applications in Jurisdiction*

In jurisdiction, the application of the principle of the certainty of law usually concerns the aspect of reliability of the law. In that light, the court will consider the temporal function given to a legal rule. The method of review ultimately finishes with a weighing up of interests. On the one hand, the court looks at the general interests the law maker is attempting to meet. On the other hand, it looks at the personal interests of the individual and more so the legitimacy of his expectations. An analysis of the jurisdiction of the European and Belgian courts[38] shows that the courts take ten criteria in consideration in the weighing up of these interests.

(A) THE GOVERNMENTAL ACTION AS A DECISIVE FACTOR

If the government consciously reduces a person's options and tries to make him act in a certain way, then the responsibility is on the government to ensure that this

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[37] See about the principles of temporal law, P. Popelier, *Toepassing van de Wet in de Tijd* (Antwerp, Kluwer, 1999), p. 215.

[38] In the above cited doctoral thesis also the jurisdiction of the German Bundesverfassungsgericht was analysed, leading to the same conclusions.

person is not penalized by the new legislation merely because he acted in the way the government wanted him to act. In practice, this is especially the case when legislation promises fiscal stimuli for companies provided they make certain investments.

This is illustrated by the European milk quota cases.[39] EC regulations stimulated producers of milk to suspend their production for a certain period of time. Afterwards, when trying to take up their production, new EC legislation had introduced the milk quota, referring to the period when they suspended their production. The ECJ decided that this was contrary to the principle of the certainty of law: the producers could legitimately expect that they would not be penalized by the new legislation only because they had followed an option advanced by earlier legislation.[40]

An example from Belgian jurisdiction concerns a law of 31 July 1984 which promised fiscal advantages to companies for a period of ten years, provided they settled in a certain area; the law was aimed at stimulating industrial investments in that area. During these ten years, the law changed frequently – with immediate application – so that the fiscal advantages which were promised were significantly reduced. The Brussels court found that this was contrary to the principle of the certainty of law, and that the civil responsibility of the Belgian state would be possibly engaged.[41]

(B) THE POSSIBILITY TO ADAPT TO THE NEW LEGISLATION WITHOUT THE LOSS OF INVESTMENTS

A person must be flexible when operating in a changing environment. He is expected to try and adjust himself to new legislation. However, due to governmental action, it may be impossible for such a person to adapt himself without considerable loss of investments.

The ECJ requires that when introducing new legislation the government considers the normal calculations and production schemes of the concerned economic sector. For example, when the European Community (EC) reduces the guaranteed maximum amount for the harvest of tobacco, it must take into consideration the fact that certain tobaccos have to be planted before the end of the month of April, and as such this entails considerable costs.[42]

In Belgian jurisdiction, this criterion is also applied in cases where a person

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[39] See, E. Sharpston, 'Legitimate expectations and economic reality' (1990) *Eu Law Rev.* pp. 10 et seq.

[40] See, ECJ, 28 April 1988, Case 120/86, Mulder, Jur., 1988, 2321 and Case 170/86, Von Deetzen, Jur., 1988, 2355, ECJ, 11 December 1990, Case 217/89, Pastätter, Jur., 1990, I–4585; ECJ, 5 May 1994, Case 21/92, Kamp, Jur., 1994, I–1619.

[41] Brussels Court of First Instance, 17 March 1997, (1997–1998) *RW* p. 257. Because the court was not competent to review an act of Parliament directly in the light of an unwritten principle of law, the case was adjourned to enable the parties to defend their cases in the light of Art. 1, First Protocol of the European Convention of Human Rights.

[42] ECJ, 11 July 1991, Case 368/89, Crispoltoni, Jur., 1991, 3695.

decides to follow a certain education, which has long-term consequences. The Court of Arbitration annulled part of an exam which was introduced at universities for medical students, but only for academic year 1997–1998. This was due to the reason that in the last year of secondary school, scholars, who later wanted to become doctors, might have followed a direction which was deemed insufficient to prepare them for the necessary exam. This did not count for other scholars, in lower years, since they could still re-orientate their direction at school and have more time to prepare themselves for the exam.[43]

Also, the Labour Court in Antwerp ruled that the government, by introducing a favourable regime for unemployed students, had raised the expectation that these students could end their studies in more or less the same financial situation. When the government repealed this regime, the students were not entitled to unemployment allowance, because they were studying and were not free for the labour market. The Court therefore ordered the Public Centre of Social Aid to award these students the necessary allowances; it could not state that they should give up their studies in order to gain an income.[44]

(C) SPECIFIC INDICATIONS IN A RULE ABOUT ITS DURABILITY

When a legal rule indicates the length of time for which certain consequences will be tied to the occurance of certain legal facts, one can legitimately expect that the legal rule will indeed remain in force for that period of time. An example has already been discussed above concerning the Belgian case in relation to the fiscal stimuli for certain companies, promised over a period of ten years. On the other hand, when certain legislation changes frequently, one cannot expect in such an instance that the legislation will remain in force for a long period of time.

(D) THE LEGAL CONTEXT

Changes in the legal rules can be predictable, when they fit into a coherent part of legislation or when they are necessary steps for reform which is introduced gradually.[45] Also, higher regulation – for example EU regulation – can oblige the government to change its legislation.

(E) EXTERNAL CIRCUMSTANCES

A person must keep pace with new evolutions in legislation and must follow social and political discussions concerning existing legislation in order to predict possible

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[43] Court of Arbitration, No. 32/97, 27 May 1997, BS, 31 May 1997 and Court of Arbitration, No. 47/97, 14 July 1997, BS, 7 August 1997.

[44] Labour Court, five decisions of 26 May 1993, 30 April 1993 and 11 June 1993, not published.

[45] See, e.g., ECJ, 12 March 1986, Case 10/85, Milac, Jur., 1986, 1027, Court of Arbitration, No. 59/92, 8 October 1992, BS, 28 October 1992.

forthcoming changes to legislation. The ECJ will impose strict penalties on infringing parties since they are expected to keep pace with changes and should be also aware of changes in EU legislation.[46]

(F) THE CLARITY OF THE OLD LEGAL SITUATION

When the old legal rule was obscure, it was extremely difficult for one to extract which legal facts would lead to which legal consequences. One could not expect, with any certainty, the achievement of certain consequences, so that new legislation could not be considered to harm legitimate expectations. For that reason, interpretative laws, which retroactively clarify obscure legislation, are not considered to be contrary to the principle of the certainty of law.

Confusion is also possible concerning the validity of a legal rule, for example when the ordinary courts consider a royal decree invalid and the Council of State considers it valid. Parliament can then interfere to confirm retroactively the validity of the legal rule.[47]

(G) THE VALIDITY OF THE OLD LEGAL RULE

If a legal rule is found to be invalid, the weighing up concerns on the one hand the principle of the certainty of law – a person relied upon this rule and was unaware of its invalidity – and on the other hand the legality principle, which requires the repair of the legitimate situation.[48] Usually, though not always, the legality principle takes priority.

(H) THE DECLARATIVE NATURE OF THE NEW LEGAL RULE

A legal rule which in fact merely repeats an old legal rule, or an established jurisdiction or administrative practice, does not really bring anything new which may surprise a person in his calculations.[49]

For example, the Belgian courts had always accepted that the state bore a reduced civil resposibility for its pilots, taking ships into or out of a harbour. Then suddenly the Court of Cassation changed its jurisdiction in 1983. Parliament voted in a law which explicitly reduced the responsibility of the state for its pilots again, with a retroactivity of 30 years, since a civil action could be initiated during that time. The Court of Arbitration upheld the legislation, taking into consideration that the law

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[46] E.g. ECJ, 1 February 1978, Case 78/77, Lührs, Jur., 1978, 169, ECJ, 14 December 1989, Case 3/78, The Queen/Ministry of Agriculture, Fisheries and Food, Jur., 1989, 4459.

[47] Court of Arbitration, No. 84/93, 7 December 1993, BS, 28 December 1993, Court of Arbitration, No. 5/94n 20 January 1994, BS, 10 February 1994.

[48] See for this weighing up, Court of Arbitration, No. 7/96, 18 January 1996, BS, 28 February 1996, No. 82/96, 18 December 1996, BS, 13 February 1997, No. 7/97, 19 February 1997, BS, 28 March 1997.

[49] E.g. Court of Arbitration, No. 6/98, 21 January 1998, BS, 4 April 1998.

only restored the old, existing legal situation and therefore could not be contrary to the principle of the certainty of the law; it only introduced something new for the period between 1983 and the coming into force of the new law.[50] The ECHR however condemned the law in the light of Article 1 of the first protocol of the European Convention (the right to property), because it thought the decision of the Court of Cassation had in itself been predictable to the law maker.[51]

This criterion is also taken into consideration when a court upholds a retroactive legislative validation of an old legal rule, which was considered to be invalid merely for formal reasons.[52]

(I) THE POSSIBILITY TO EXECUTE THE LEGAL RULE

The second criterion is aimed at the possibility of adapting oneself to a new rule so that an investment could be recovered. However, also when no earlier investment was made, it must be possible to adapt oneself to the new rule. This may require a legal transition instead of immediate application. In any case, the rule may not require the fulfilment of a condition to obtain a certain advantage or avoid a certain sanction, when this condition could only be fulfilled in the past, when no one was aware of it.[53]

(J) THE COMMON INTEREST

The court can be of the opinion that the common interest, which the law maker tries to serve, must be balanced against the legitimate expectation of an individual. The Belgian Court of Arbitration accepts the good functioning of the public services and budgetary reasons to justify retroactive laws.[54] In practice, however, the judicial motivation for the priority of this common interest is often lacking.

III. The Possibility to Execute and Maintain the Legal Rules

A legal rule may not require the impossible. A person cannot make plans and take actions based on impossible demands. This is an aspect of the proportionality test, which is part of the weighing up of interests when a legal rule is reviewed in light of a

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[50] Court of Arbitration, No. 25/90, 5 July 1990, BS, 6 October 1990 and No. 36/90, 22 November 1990, BS, 28 December 1990.

[51] *Publ. CEDH*, Reeks A, No. 322.

[52] See, Council of State, cv 'Le logis', No. 11.333, 25 June 1965, Court of Arbitration, No. 67/92, 12 November 1992, BS, 8 December 1992, ECJ, 13 November 1990, Case 331/88, Fedesa, Jur., 1990, 4023.

[53] See e.g. ECJ, 21 March 1991, Case 314/89, Rauh, Jur., 1993, 1647, Court of Arbitration, No. 32/93, 22 April 1993, BS, 20 May 1993.

[54] See the Court of Arbitration, No. 64/97, 6 November 1997, BS, 17 January 1998 and No. 3/98, 14 January 1998, BS, 14 February 1998 and Court of Arbitration, No. 25/90, 5 July 1990, BS, 6 October 1990, No. 36/90, 22 November 1990, BS, 28 December 1990, No. 67/92, 12 November 1992, BS, 8 December 1992.

principle of law or a fundamental right. A legal rule which requires the impossible is not adequately achievable.[55] A person also loses confidence in the law when this law cannot be maintained, so that expected legal consequences do not occur or third parties benefit because they did not obey the law and are not sanctioned for it.

In this respect freedom of enterprise and technical possibilities are important. A law, which introduced certain maxima for the noise inconvenience produced by construction works, could not be obeyed because the sources of the noise could not technically fulfil the requirements, and was therefore annulled.[56]

This principle is also applied with respect to retroactive laws which require that a condition has already been fulfilled in the past.[57]

E. Conclusions Concerning the Principle of the Certainty of the Law, the Principles of Proper Law Making and their Application in Jurisdiction

All this leads to three sets of conclusions. One set concerns the nature of the principle of the certainty of the law and can be formulated in terms of two paradoxes (see Section I below). The second set concerns the principles of proper law making deduced from the principle of the certainty of the law (see Section II below). The last set concerns the jurisdiction of the courts which apply these requirements. This also leads to the formulation of two paradoxes (see Section III below).

I. Two Paradoxes Concerning the Principle of the Certainty of the Law

The first paradox concerning the principle of the certainty of the law, is that this principle demands certainty, whereas uncertainty is an inherent part of the legal order. Frank already spoke about the 'inherent uncertainty of law' seeing this as a positive value.[58] Mazen proved this proposition in an extensive fashion.[59] Legislation is complex, it uses a specific terminology and the law maker cannot foresee everything.

All law and legislation is in some way uncertain. Legislation comes into force in

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[55] E.g. Court of Arbitration, No. 13/94, 8 February 1994, BS, 22 February 1994, No. 13/94, 8 February 1994, BS, 22 February 1994, No. 30/96, 15 May 1996, BS, 6 June 1996; ECJ, 15 December 1976, Case 41/76, Donckerwolcke, Jur., 1976, 1921.

[56] Court of Arbitration, No. 29/96, 15 May 1996, BS, 10 July 1996.

[57] See *supra* note 40.

[58] J. Frank, *Law and the Modern Mind* (New York, Coward-McCann, 1949), p. 7.

[59] N-J. Mazen, *L'Insécurité Inhérente au Système Juridique* (Dijon, Université de Dijon, 1979), p. 665.

an uncertain and variable environment. It is formulated *in abstracto*, but only achieves meaning when applied to concrete situations which are yet unknown to the law maker. It depends upon its execution on actors and instances which interpret the law in light of their own specific, but equally uncertain and variable, environment.

For these reasons, it cannot be expected that legislation offers complete security. This would be unrealistic and unenforceable. It would either lead to paralysing governmental action or have no more than a mere rhetorical value.

However, the principle of the certainty of the law takes all this into consideration. It does not require absolute certainty. This was the illusion of the old, static concept of the doctrine of 'vested rights'.

A more dynamic concept no longer aims at the sole maintenance of what was once gained. It sketches a model of interaction between the legislator and the subject of law, both active in an evolving world. The legislator offers a framework of options; a subject of law bases his decisions on that framework. Both the legislator and the subject of law however must keep some space to adapt themselves to new evolutions.

The principle of the certainty of law not only protects 'vested rights', but also 'legitimate expectations'. Whether an expectation is legitimate and how strong its weight is, depends on the concrete situation and the possibilities of adaptation. Technical and factual possibilities and the concrete *need* of certainty of the law are all taken into consideration. However the need for certainty of the law is not always considered to be of upmost importance. Many decisions are taken daily without any consideration of the law, and, for a great part, irrespective of the legal consequences.

Another paradox is that the review of legislation in the light of the principle of the certainty of law is itself unpredictable.

This lies in the nature of the principles of law, which does not contain a clear deontological proposition, but merely give directions and ultimately end up in a weighing up of interests. This makes possible the realization of a more dynamic concept of the certainty of the law. It is not really a contradiction that a principle of law such as the principle of the certainty of the law does not offer absolute certainty, since it does not demand such absolute certainty.

II. The Principles of Proper Law Making

From the principle of the certainty of law, three principles of proper regulation were deduced, concerning the accessibility, reliability and executability of the legislation. These principles can be formulated into more concrete requirements. A legal rule must:

(1) be properly published;
(2) be sufficiently clear about its content;
(3) comply with other legislation;
(4) be clear about its application in time;
(5) respect legitimate expectations;
(6) not ask the impossible and must be executable.

This will in practice force the legislator to carefully draw up his legislation. He has to look at the judicial context in which his rule will come alive, he has to find out what are the consequences of a change in the legislation, he has to weigh up these consequences against the general interests he wishes to serve, and he has to look at the technical and factual possibilities and evolutions on which the executability of his legislation depends. This obligation to carefully draw up legislation is materialized into an obligation to motivate a legal rule. For legal rules generated from the government and the administration, it is accepted as a principle of law that these rules must be motivated; the court must find this motivation in the administrative dossier. For formal laws, this obligation to justify a legal rule appears *a posteriori*, as part of the defence of the government before the Court of Arbitration. The Court however checks a given explanation with what is written in the preparatory documents of the law. Retroactive laws especially must be carefully justified.

III. Two Paradoxes Concerning the Application of the Principles of Proper Regulation in Jurisdiction

The analysis of the jurisdiction above also showed that unjustified uncertainty of the law can lead to more, but this time, *justified* uncertainty of the law.

This is because the *objective* certainty of the law is more difficult to enforce than the *subjective* certainty of the law. The objective certainty of the law concerns the existing legal framework, its accessibility and calculatability. The subjective certainty of the law concerns the respect of legitimate expectations: the certainty a subject of law has about the realization of his own expectations and what legal consequences will follow from his actions. This is what most jurisdiction deals with when applying the principle of the certainty of the law.

The criteria which determine the balance of interests in the relevant jurisdiction illustrate the acceptance that the circumstances when legitimate expectations are harmed depend significantly on the existence of an objective certainty of law. The more certain a set of rules are, the easier it is to sanction a specific legal uncertainty, and vice versa. For example when certain legislation frequently changes, one cannot expect that in this instance, it will remain in force for a long period of time – one must, on the contrary, take into account the unreliability of the legislation (criterion 3). When the old rule is obscure, one cannot rely on the legal consequences one had originally infered from it, so one cannot be surprised by new legislation (criterion 6).

The last paradox is that the sanctioning of a legal rule, for being contrary to the principle of the certainty of the law, leads to even more legal uncertainty. The annulment or non application of a legal rule can lead to a *lacuna* in the legislation and to uncertainty for those who relied on the sanctioned rule.

This is one of the reasons why the courts are somewhat reluctant to apply the principle of the certainty of the law. In any case, it will be more likely be applied in a case between a private party and the government than in disputes between two private parties.

This does not mean that the principle of the certainty of the law has no practical

meaning. The principle sometimes finds application through less drastic figures and sanctions, such as the interpretation of a legal rule or the granting of an indemnification. Also, the threat of a judicial sanction is not just a theoretical hypothesis, as is shown by the examples above – there are many more which could have been cited. This threat is at the same time a stimulus for the law maker, to regulate in conformity with the requirements set by the principle of the certainty of the law. The principles of proper law making are indeed primarily directed to the law maker himself so that future conflicts are avoided.

F. Final Conclusion

In the Belgian legal system the certainty of the law is acknowledged as a principle of law from which principles of proper law making, directed to the law maker, can be deduced. This is only a limited research in the building up of a whole theory of principles of proper law making. One reason is that other requirements follow on from other principles, such as the principle of the democratic state, demanding a certain democratic quality.[60] Another reason is that legal rules cannot be isolated in legal practice. A legal rule gains actual meaning through its interpretation and application, through its use in practice and legal discourse generated from legal arguments. Certainty of the law can never be realized when directed only to one level – legislation. It must also be directed to, for example, the administration and the courts. The principles of proper administration are already established in jurisdiction. A theory concerning 'principles of proper jurisdiction' is already gaining momentum.[61]

More important than the possibility to attack the uncertainty of a legal rule before a court is the concern of the law maker about the quality of his legislation and his efforts to make it as accessible and reliable as possible. The enforceability of the principles of proper law making can stimulate this concern.

In Belgium, the government is now gradually developing policies concerning the quality of its legislation. To this end however it needs a scientific basis. At an academic level, interest in a theory or science of legislation as such is developing. A theory about the principles of proper law making is seen as a part thereof. At this moment, the viewpoint is from a mainly legal perspective. A science of legislation should however be interdisciplinary. This is also important for the realization of the

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[60] The FWO-Flanders makes possible a pending research about the principles of democratic regulation.

[61] See e.g. B.W.N. de Waard, *Beginselen van Behoorlijke Rechtspleging* (Zwolle, Tjeenk Willink, 1987), p. 450; J.M. Polak, 'Algemene Beginselen van Behoorlijke Rechtspraak' (1968) *NJB* pp. 417–422 and P. Van Orshoven, *Behoorlijke Rechtsbedeling bij Geschillen over Directe Rijksbelastingen* (Antwerpen, Kluwer, 1987), p. 588.

principles of proper law making, deduced from the principle of the certainty of the law. For example, research in linguistic and communication sciences can improve the accessibility of legislation. Sociological research can do the same by clarifying the intermediate groups through which other persons are informed about legislation. So this research can only conclude with a provisional end.

As a theory, this article only offers a starting point for further research. At least this article has attempted to throw light on statements which are sometimes put forward as 'obvious', for example that retroactivity is always a 'monstrosity', or that deregulation is the obvious answer to the uncertainty of the law.

On a practical level, this article offers arguments which can already be used in the legal discourse held before a Belgian or European court. The development of that discourse and the acceptance of these arguments by the courts will determine its actual value and further development. In Belgium at least, the principle of the certainty of the law seems to be gaining importance in jurisprudence; at the same time, the political concern about the quality of the law is similarly growing.