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SOME OBJECTIONS TO AN ASPIRATIONAL SYSTEM OF LAW

1. Two perspectives

Both the theory of social working of law and the communicative theory of legislation seem to be united in their criticism of instrumentalism. The Austinian picture of law as a set of commands backed by punishments, issued by a superior in order to change the behavior of subordinate citizens is forcefully criticized by both camps. Yet, these criticisms are different in scope as well as in nature.

The social working theory asserts that instrumentalism is thoroughly misguided in its belief that society can be shaped or changed by legislation. All legislators can hope for is that official rules are selected by semi-autonomous social fields (SASFs) as possible motives for behavior. But if such an effect takes place at all, which is very doubtful, it is surely very different from the effect which is anticipated by the legislator. The genesis, transmission, translation and implementation of rules all take place within the social and cognitive framework of the SASF which provides the main points of reference for the citizen.

The communicative approach, on the other hand, does not deny the possibility that legislators might be able to impose their values on society. Their criticism concerns only the hierarchical and top down manner in which legislators proceed. In their criticism, moral arguments go hand in hand with strategic ones. The plea for a horizontal and interactive dialogue between legislator and addressees as if they are equals is not only deemed morally superior but is also thought to be more successful in guiding human behavior.

These two reasons for attacking instrumentalism are not merely different: they are opposed to one another. Whereas communicative theorists believe that a lot can be done and achieved by the legislator, (provided he proceeds in an interactive manner), social working theorists deny the possibility that 'black ink on white paper' can ever produce the intended effects, whether the legislative process has been interactive or not. Whereas the communicative thinkers believe that lofty ideals and noble aims can be reached by legislation based on persuasion, the social working theorists deny that even minimal standards can be set if these conflict with the standards that are dominant in the relevant social fields.¹

How is it possible that theorists inhabiting the same country seem to maintain such dramatically different views on the effectiveness of legislation? The reason must be found in the different perspectives adopted. The communicative theorist considers matters from the point of view of the legislator. A recent book, edited by proponents of the communicative approach, is called ‘The persuasive legislator’², and this title is revealing in itself. The main concern of the communicative theory is, indeed, to communicate legislative intent and to convince the citizens of the importance of the values cherished by

¹In oral communication, however, the communicative theorists seem to be a lot less confident than their writings suggest.

²Bart van Klink and Willem Witteveen (eds.), De overtuigende wetgever, Deventer, 2000.
the legislator. Marc Hertog\textsuperscript{3} called attention to this fact by noting that the communicative approach can be summarized as 'communicate and control' as a modern version of the old instrumentalist adagium of 'command and control'.

From the perspective of the legislator, the theory of social working can be regarded as a welcome contribution. In order to effectively impose legislation, it is wise to take the empirical findings on the social and cognitive structure of social fields into account. But this knowledge is not sought as a goal \textit{per se}, but as a means in order to be a more convincing legislator. Social fields are regarded as things to be mobilized in order to get the message through.

To the social working theorist the relation between means and ends is exactly the reverse. To his view, not social fields are to be mobilized, but the \textit{rules} are mobilized. According to this theory, the members of the social fields, if they adopt external rules at all, will always interpret and use these rules to pursue their \textit{own objectives}. So although both theories claim to view matters not 'top down' but from the 'bottom up', it is only the social working theorist who consistently carries out that program, since his concern is to provide an analysis of rule-following behaviour by the people on the shop floor; not to increase the chance of success of legislators.

2. \textit{Direct and indirect effects}

According to Griffiths, one of the major flaws in instrumentalist thought is its assumption that rule-conforming behaviour will contribute to the ultimate goals the legislator had in mind when devising these rules. The instrumentalist assumes that there is a straight line linking direct effects of legislation (rule-conformity) to indirect effects (realization of goals). This assumption, Griffiths observes, is simply unwarranted: we can never be sure whether wearing safety belts will actually bring about safer traffic; and even in those cases where people actually wear them and a decrease in fatal injuries is noted, we will never know whether that effect is due to the safety belts or to something else, or whether wearing safety belts brings about still another -unforeseen- effect. Griffiths adds to this observation that a general theory on the relationship between rule-following and the achievement of goals is impossible, since these relationships vary according to the kind of rules and the kind of policies at stake.

The communicative theory on legislation might be understood as an attempt to solve this problem. Although the problem is not adressed explicitly, I think that the communicative theorists agree with Griffiths that the assumption of an unequivocal relation between rules and goals is a spurious one, for almost never do they speak about \textit{rules} as the stuff law is made of. Instead, they talk about \textit{central values and aims} or about \textit{ideals}. The difference between goals, aims, and values is not a fully worked out. It is clear, however, that they conceive of these aims and values in the broadest possible terms, \textit{not} as precisely defined goals. It is maintained that the legislator generates general aims and values to strive for, to be worked out later by the so-called interpretive community into some more concrete form. But even then, the result does not seem to be downright rules, but so-called 'aspirational norms'. These indicate the desirability of certain aims and values and enjoin people to behave in such a

\textsuperscript{3}Marc Hertogh, 'De wondere wereld van de wetgever: feit en fictie van communicatieve wetgeving' in: Van Klink and Witteveen \textit{op. cit.}, pp. 45-60.
way as to realize these aims and values.

That is probably why in the communicative theory the Constitution serves as the paradigm of law. Unlike the social working theorist who deals with rules regulating the behaviour of people in such terrestrial places as hospitals, rain-forests and train compartments, the communicative theorists deal with the principle of equality or the need for bio-diversity. These broad aims are communicated rather than imposed; agreement rather than conformity is sought by means of persuasion rather than coercion.

It seems that this shift from rules to aims and aspirations solves three problems at the same time. The legislator is supposed to formulate and communicate his aims and values in a direct manner: he is therefore no longer forced to work out intricate rules without having the slightest idea whether conformity to these rules will bring about the desired effects. To the citizens the task is entrusted to concretise these broad aims into (aspirational) norms, which reduces the risk that citizens follow norms in ways that diverge from the intentions of the legislator. And finally it is hoped that by this strategy the citizen's willingness is enhanced to contribute to the aims and ideals the legislator has in mind.

The communicative emphasis on values and aims as the central objects of legislation is, however, not a mere normative opinion on how legislation should be conducted; it also reflects the ways legislation is carried out nowadays. There is indeed a growing tendency on the part of the legislator to formulate aims and aspirations, phrased as duties of care and of effort instead of rules. In the abundant literature on the status of 'rules', this shift is insufficiently appreciated. The focus is still on the paradigmatic mandatory rule.

It is therefore time to explore, on a modest scale, how a legal system would look like that largely consists of aims and aspirations. I do not maintain that the communicative theorists assert that such a system is desirable or even possible. The article is rather meant as the kind of thought-experiment, required by the Kantian categorical imperative: how would a legal system look like if all laws and rules would be converted into aspirational guidelines? How would our society look like if the legislator would take the proposals of the communicative theory too seriously?

3. Concretisation of aims

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6. Although 'purposive law' is an appropriate term for describing the kind of legal system central to the communicative theory, I shall instead use the term 'aspirational', since 'purposive' is very often confused with 'functional' (e.g. in L. Fuller's account). I don't deny the merits of a functional system of law; I merely want to point out the dangers of a system which is too heavily loaded by goals imposed by the legislator, since these goals may undermine the very functionality of the system.
Interpretive communities are defined in terms of their job. They are purported to interpret, to 'give meaning' to a law. In the terms of Van Klink and Witteveen, the interpretive community consists of those who contribute to the formulation and concretisation of the law by means of 'a decision or a judgment, an explanatory statement or an article in a scientific journal.' This might suggest that we are somewhat removed here from the patients, nurses and train travellers that inhabit the semi-autonomous social fields (SASFs) of the social working theory.

It is not clear to me to what extent relevant SASFs take part. I first thought that (representatives of) SASFs would have to be invited by the legislator to take part in the discussion. I was reassured, however, that this is not the case. It is hard to assess the degree to which the interpretive process is thought to be directed by the legislator. In Witteveen's contribution to this volume, the 'conditions for membership' of the interpretive community are once more spelled out. It is stipulated that members of the interpretive community should endorse the general aims and values proposed by the legislator and that where there is disagreement on the interpretation of these aims, they should at least agree on how to solve such conflicts, i.e. they should share a common framework of tacit assumptions in order to make a fruitful discussion possible.

In view of these requirements I suppose then that although it is emphasized that these central values do not have a fixed meaning, there can be very little discussion on the importance of the value itself, or on how the various aims relate to one another, or how we should choose in case these broad values or aims should conflict. The discussion seem mainly to revolve around the question what the broad aim or value consist in. And indeed we find that the term 'interpretation' is mostly meant to signify concretisation, by means of which the general aim can be implemented and applied in concrete contexts.

It is not clear to what kind of results this process of concretisation is thought to lead. It is said that the legislator's aims should be converted into 'aspirational norms', but what should we understand by 'aspirational norms'? According to Van Klink and Witteveen, aspirational norms, unlike rules, 'guide, but do not determine the application of the underlying values to concrete cases'. And it is said that these aspirational norms mostly take the form of general clauses, but sometimes they can be translated in clear directives.

In order to clarify both process and results, we should try then to imagine what happens if an interpretive community sets out to concretise the broad aims of the legislator. Let us imagine that such a broad ideal can be stated as:

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8 The view expounded in the article on soft law (see note 7) is here repeated.

9 It is unclear whether these are conditions for the external observer stipulating when someone can be regarded as a member of the interpretive community, or whether it is maintained that a worthy participant of the interpretive community should meet these requirements.

10 Ibid.
a) 'X is a good to be pursued'

(X being either an aim like 'a clean environment' or a value such as 'equality'). Several ways to concretise such an aim present themselves. The first is to determine the *nature* of X by enumerating instances of X: 'equality' is then concretised into 'equal treatment' or 'equal opportunities' or 'equal pay'. The second way is to determine more fully the *scope* of the aim. Here, concretisation takes place by enumerating those who are included by the setting of the aim (women, handicapped, etc.). In each of these cases, the general aim is concretised by listing *sub-aims* as component parts of the overall aim, each with a more modest scope. It should be noted that this type of concretisation does not lead us to the formulation of norms, but merely to statements in which a broad aim is divided into smaller aims:

b) 'X1 - Xn are goods to be pursued'.

The third way to concretise aims is literally to make them more concrete by indicating how they should be implemented: the aim of equality is then converted into guidelines on how to attain aim X. Such kind of concretisation leads to the formulation of recommendations, like: 'in order to attain equal access to paid work, child care facilities should be improved'. So:

a) 'X is a good to be pursued'
c) 'in order to pursue X, one is advised to do y'.

But can proposition c) be regarded as a concretisation of a)? It is possible if the means y can be considered as a *component part* of the aim. For instance, equal access to jobs can both be regarded as a means to attain equality and as a component part of equality. If, on the other hand, y is an independent, neutral means to achieve aim X, proposition c) cannot be said to be a concretisation of the aim, but as an altogether different proposition. Especially where the aim consists of a value, there is a continuum between means which are loosely connected to the aim and means which should be seen as parts of the aim.11

However, the question whether c) is or is not a concretisation of the aim is immaterial, for neither the enumeration of component parts nor the indication of means can be regarded as operations that generate any *norms*. At best these sub-aims, component parts and means can serve as *criteria* for assessing whether a certain kind of behaviour is conducive to the aim or value involved. If a company is required to further equality, items such as child-care facilities, equal pay, equal opportunities all serve as criteria enabling one to gauge the degree to which the firm can be said to have succeeded in fulfilling the aim. But these criteria are not identical with norms.

4. *Obligations*

It is doubtful whether the development of criteria, advices and recommendations is what the communicative theorists have in mind when talking about

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interpretation. We have seen they are wavering on the point. Aspirational norms seem to range from mere 'guidelines' to 'clear directives'. But there is an important difference between guidelines and directives. Whereas the former can be formulated as proposition c), the latter is to be stated as:

d) 'you should do your best to achieve X!'

Such a proposition is, however, not a concretisation of a). In fact, it does not concretise anything at all. It does not even follow from a). It merely converts an aim into an imperative. Such a conversion cannot be regarded as a concretisation. The only way it can be deduced from a) 'X is a good to be pursued' is by adding:

a1: 'you are obliged to pursue X!'

But this additional premiss is suppressed in the account of the communicative theory, for communicative thinkers refrain from thinking in terms of coercion and hope to get round by persuasion alone. But by suppressing a1), aspirational norms cannot be derived from the statement of aims a), without falling in the trap of a modern variety of the naturalistic fallacy. This problem is of course also apparent in formulations such as:

e) 'You should do your best to achieve X1-Xn', or:
f) 'You should do your best to do y'

Neither the aim, nor the sub-aims, nor the means can be properly concretised into rules or aspirational norms. They can at best generate recommendations or advices. If we refrain from adding the undesired premiss a1) they cannot be furnished with the necessary obligatory force.

The only way out is therefore to say that the statement

a) X is a good to be pursued

should be read not as a description or as an indication of an aim, but as a general norm. In this sense a) is equivalent to

a) You should pursue X!

Then there is sufficient obligatory force in the premiss to warrant the derivation of more concrete norms such as:

d) 'You should do your best to achieve X1-Xn!'\(^\text{12}\)

And of course this is how most general clauses should be read. A law which requires a doctor to do all that can reasonably be expected to ensure the health and well-being of his patients, should not be read as the mere expression of the desirability that doctors behave that way. Such a law should be read as an

\(^\text{12}\) But not: e) 'You should do your best to do y' if y stands for an independent means which is not a component part of the end.
obligatory norm, concretised by -among others- the members of the medical profession who have listed the criteria for reasonableness and also have a fairly developed idea of what should count as 'health' and 'well-being'.

I think that the obligatory character of aims should not be hidden under the mask of the benevolent legislator. Communicative theorists should say plainly that legislators, even interactive ones, not only propose but also impose aims and ideals. If they refrain from doing so, and if they seriously think of the aims of legislators as mere proposals they are committed to the view that these proposals gain obligatory force only in the stage of concretisation. That would imply that the level of authority is shifted from the legislator to the interpretive community.

5. Rewards

Reading the injunction "X is a good that is to be pursued" as an obligatory statement rather than as a mere recommendation presupposes a practice in which it is possible to sue those who fail to conform to these standards. The obligatory force of norms is derived from an institutional practice in which sanctions can be imposed.\(^\text{13}\)

In a communicative approach to legislation, there is no room for such negative sanctions:

Negative sanctions, such as fines and imprisonment, are less suited for the job, because it is very important that citizens comply with the norms out of inner conviction rather than for fear of punishment.\(^\text{14}\)

Punishments do not fit in the persuasive style of legislation that is advocated. Instead we are told that, in order to convince citizens, information should be given, institutions for debate should be created and subsidies should be provided. Not the stick but the carrot is the appropriate tool for an interactive legislator, who wishes to influence the mental processes and attitudes of the citizens.

That punishment is not seen as a suitable tool is consistent in two ways. First, it is consistent with the apparent failure of the communicative theory to furnish the central aims and values stated by the legislator with the necessary obligatory force. As Austin remarked long ago, rewards, unlike negative sanctions, fail to impose an obligation.

Second, and more importantly: there is simply no place for punishments in a legal system dominated by values, aims and aspirational norms. As I shall point out in section 6, a norm that induces one to aspire to an ideal or to approximate a certain level of accomplishment does not set a minimum-standard below which punishments can be inflicted. It is hard, if not impossible, to punish someone for failing to aspire to excellence. In this sense, rewards are vital to an aspirational legal system in the same way as prizes and medals are

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\(^\text{13}\) Cf. Schauer, \emph{op. cit.} p. 8, who remarks that the strength of a rule does not reside in its 'logical status or linguistic meaning' but in the 'conditions surrounding its applicability, acceptance and enforcement.'

\(^\text{14}\) Cf. footnote 7.
vital to the organisation of sport. But how does such a system based on rewards work? A host of complex puzzles present themselves.\textsuperscript{15}

The first striking feature of rewards is that they cannot be used in order to encourage conformity to negative rules. It would be very odd, for instance, to reward someone for \textit{not} breaking a contract or for \textit{not} murdering one's neighbour\textsuperscript{16}. Rewards are typically attached to rules that enjoin rather than prohibit certain actions. For instance that those who isolate their homes properly get a tax-deduction of 10%, or that universities who develop an ict-infrastructure get a subsidy of 149 million euro.

Yet, there is an incongruity here that surfaces as soon as we try to imagine a situation in which a reward is \textit{habitually} given to persons who act conforming to rules. Would such a reward still be experienced as a reward? The above-mentioned examples don't help us here, for these are typically non recurring events. It is impossible to isolate your house every month, or to set up an infrastructure every year. Subsidies are given to get things going, but are usually withdrawn as soon as the goal is reached. From then on, the university is supposed to pay for the maintenance of the infrastructure by itself.

These are not bad tricks on the part of a cunning legislator. I think that it belongs to the essential characteristics of rewards that they should be exceptional. As soon as rewards are handed out as a matter of routine, they simply cease to be rewards. Those who are continually rewarded for conformity with (positive) rules, will soon cease to regard it as a reward. In the long run they will rather consider the reward as a \textit{right} they are entitled to. Pensions, for instance, may have been considered, a long time ago, as rewards for a life of hard work. But if we would deprive people of their pensions, they would justly feel deprived not of a reward but of their rights.

The fact that rewards are subject to rapid inflation is probably the reason that they are traditionally considered to be more costly than penalties. Of course, this argument no longer applies: prisons and staffing personnel are probably more expensive than subsidies for good behaviour. But the problem lies in the inner dynamic of a system of rewards: as soon as the promise of reward is a successful motivating force, and the intended behaviour becomes indeed widespread, the reward should be generalised as well. But that generalisation reduces its effectiveness in the long run. After that, a negative spiral sets in, which can only be reversed by more enticing rewards.

It is probably superfluous to remark that this inner dynamic is absent in the case of punishment. Initially, the same kind of inflation can be discerned: the more people are punished, the less it is felt as a punishment. But the legislator who relies on punishments does not intend to make the punishable behaviour universal. On the contrary. His aim is to keep that kind of behaviour exceptional. His aim is therefore in line with the nature of penalties to remain effective as long as they are exceptional.

In fact, if we come to think about it: the mere act of attaching a reward to a rule already suggests that conformity to that rule is regarded as exceptional. That is why it is so odd to reward someone for not committing murder. Where

\textsuperscript{15}The literature on rewards is very scarce. An exception is Aubert's unsystematic but highly stimulating account. V. Aubert, 'Punishment and Reward. Control and Creation'. in: \textit{Continuity and Development in Law and Society}, Norwegian U.P., 1989, pp. 137-157.

\textsuperscript{16}See Aubert, \textit{op.cit.} Also Fuller, \textit{Anatomy of the Law}, Middlesex, 1968, p. 46.
the signal should be given that compliance with such a rule is the most normal thing on earth, a reward performs the opposite. It seems to me, then, that rewards play a limited role in inciting people to act according to the rules. They not only fail to *oblige*, they also fail to *motivate* people in the long run.

But Aubert noted another aspect in which rewards are not symmetrical to punishments, and that is that most rewards, unlike punishments, are not so much reactions to past behaviour but incitements to future behaviour. The subsidy one gets for a good research proposal or the stipendium an artist gets for going on with his excellent work are only loosely linked to past performance and serve mainly as a necessary means in order to achieve well in the future: here rewards function at the same time as *investments* in future achievements.

One may object to this that, at least from a utilitarian point of view, penalties should also be inflicted with an eye to future effects. And one could express the desirability that punishments should also be seen as a means to those future effects, as is the case for instance with the penalty that consists in forced education, which enables the delinquent to acquire a job that prevents him from stealing. But of course, one should keep in mind that even this kind of utilitarian punishment is never inflicted with an eye on the future *alone*. It is always *also* a reaction on some past behaviour. A practice in which punishments are inflicted merely to prevent some future misbehaviour is commonly associated with totalitarian regimes.

The subsidies for artists and scientists, as well as the tax-deduction for those who isolate their homes cannot be seen as reactions at all but merely as stimuli for future behaviour. The only reason that we commonly do not associate subsidies with totalitarian practices, is that subsidies are felt as benefits and not as burdens, but this fact may not deflect us from seeing that *at its core*, these future-oriented rewards boil down to the same manipulative strategy. Even worse: by a system of subsidies society can be steered to an extent that is beyond the powers of a system based on punishment. The legislator (or, for that matter the interpretive community) can formulate the desired ends in a highly precise way, just as the way requirements for research proposals are spelled out in more detail every year. Induced by the benefits bestowed on them to the extent they fulfill these requirements, people will do indeed their utmost to comply with them.

Needless to say that such a system has very little to do with motivation or persuasion. Manipulation is a term that comes closer to what is going on here. This is not to say that it is or has been the intention of communicative theorists to devise a manipulative system. They repeatedly emphasize the open character of legislative procedures. But manipulation is the -unintended- effect of a system largely based on aspirations and rewards. The intentions of the communicative theorists may have been noble, but in a curious reversal of Mandeville’s famous maxim, we might say that private virtues are here converted into public vices.

6. **Aspirational norms and positive rules**

In a system based on penalties for the violation of negative rules, it is of the utmost importance that these rules should be as precise as possible. However, this kind of precision should be avoided in a system based on aims and rewards.

In order to make my point clear, it is worthwhile to distinguish between
aspirational norms and positive rules. If we ask whether someone has complied with a positive rule, we can answer that question with either yes or no. The norm to isolate your house, or to attain a quota of 50% women in the department of philosophy can be seen as binary norms allowing for a relatively easy determination of whether someone complied with that rule or not. Aspirational norms, on the other hand, indicate a certain aim to be approximated. A norm indicating that an employer should have a policy on labour conditions which is 'as good as possible' is such an aspirational norm. On the question whether an employer complied with it, one can answer that he complied with it to a more or lesser degree. Aspirational norms are not binary, but gradual.

It is obvious that the difference between positive rules and aspirational norms does not rest in the contents of the rule. Both positive rules and aspirational norms are 'aspirational' in the sense that they refer to a desirable aim. But that is not the point. They function in a different way and that difference is due to the degree of clarity of the criteria involved. For instance, in the absence of clear norms regarding what counts as 'isolation', the now positive norm would have to be rephrased as an aspirational one: 'do your best to isolate your house as good as possible' allowing for a gradual approximation to the ideal, which runs from double glazing only to isolating walls and ceiling as well. Conversely, if there are clear criteria for what a good labour policy consist in, there is no reason why the aspirational norm should not be converted into a positive one.

It is commonly thought nowadays that to formalise these existent criteria into a legal rule, (i.e. to convert aspirational norms into positive rules) would unnecessarily limit the flexibility of the law. One should be able to adapt criteria to the everchanging needs and desires of complex modern society. Since opinions on what counts as a good labour policy vary and change constantly, the aspirational norm should remain aspirational.

This view, however, can only be defended on the basis of the assumption that it is good to have a legal system based on rewards (which is, as we saw, doubtful). In a system based on punishment, aspirational norms violate the requirements of predictability and certainty of the law. The reason for that is that the ordinary citizen wants to be safe from unexpected demands and new requirements if the violation of these requirements implies the risk of incurring a penalty. One of the reasons for wanting to know the precise contents and scope of rules, is that one can rest assured not to be punished if one does not violate the rules. In a system based on aims and rewards, on the other hand, we have seen that a detailed description of positive requirements to be met by those who want to be subsidised or rewarded, boils down to downright tyranny. Here, precision serves manipulation rather than freedom.

So we may be assured by the communicative emphasis on the vague, open and flexible character of aspirational norms. In an aspirational system of law, the vagueness of criteria, despite their uncertainty, seems to be indeed the only safeguard against overt manipulation.

But even here, some doubts may be raised. For many positive rules look like aspirational norms (couched as they are in gradual terms) but are in fact being used and applied as binary positive rules. This happens for instance when the relevant SASF (or the interpretive community at large) has succeeded in establishing clear criteria which are not (yet) comprised into the formulation of the law. What counts as 'reasonable' may then be clear to those involved and the aspirational norm can then be applied in a binary fashion.
If this kind of aspirational norms (which are in fact applied as positive rules) are used in a system where violation of the rules is accompanied by punishments, the norm addressee (if he is informed on the criteria that are developed by the SASF or interpretive community) can rest assured: for all he wants to know is how to avoid punishment.

However, where these aspirational norms (which are applied as positive norms) function in a system based on rewards, they will serve as tools for manipulation. The vagueness of the aspirational norm is only used as a mask to cover up the very detailed and precise regulations concerning what should be done in order to achieve the desired aim. This state of affairs can be compared to a situation in which for instance broadcasting companies are officially merely asked to provide for a 'balanced' news service, but are actually drowned in a host of unofficial directives, emanating from the SASF (or interpretive community), that stipulate exactly what should be said and done and how the news should be acquired and broadcasted, if the company should want to get or retain subsidy.\footnote{Note that the withdrawal of a subsidy may be felt as a punishment.}

7. Conclusion

If we take the proposal of the communicative approach to the extreme, and ask ourselves how a legal system would look like that entirely consists of aims and aspirational norms accompanied by rewards, we are alerted to some risks that usually remain covered under the friendly face of the persuasive legislator.

It is indeed true that an aspirational system solves the problem to which I referred in the beginning of this article: the problem of direct and indirect effects of legislation. But we might wonder whether we should want this problem to be solved. From the point of view of the legislator it is a disadvantage of rules that their relation to the effects intended is doubtful. But from the point of view of the norm-addressees that is exactly the advantage of rules. The social working theory provides numerous examples of the ingenuity and creativity with which members of SASFs succeed, consciously or not, to bend the law to their own objectives. Rules act as a point of reference, enabling people to pursue their own aims. In this respect rules differ from aims and values.\footnote{One of the few who notes the risks inherent in purposive law is David M. Trubek, ‘Toward a Social Theory of Law: An Essay on the Study of Law and Development’, in: The Yale Law Journal, Vol. 82, No 1, Nov. 1972, pp. 1-50. However, he thinks that these dangers can be mitigated by political pluralism. I do not share his optimism: precisely in the absence of shared commitments, rules are indispensable.} The latter may be appropriate in guiding and stimulating political or moral debate, especially when they are discussed in relation to one another. But when they are used as a mechanism for the co-ordination of actions, a plurality of values breed conflict and confusion. A hierarchical ordering of values is called for, in which one value or aim should gain priority. And indeed we see that in the communicative theory, it is emphasized that one central aim or value should be adopted and endorsed. The predominance of this one value, unchecked by others, will soon exert its tyrannical power, which is most acutely felt in its concretisations into
It looks as if the shift from rules to aims and aspirations somehow changes the entire direction of a legal system. If the value of precision alone is so thoroughly affected by this shift, what then would be the implications for the traditional values of the Rule of Law? Do values like generality and certainty play the same role or would they amount to sheer nonsense in an aspirational system? Further analysis seems to be required in order to assess the full implications of the current tendency towards purposive law.

19 That Fuller is often quoted as an advocate of aspirational norms rests on a mistake. Although he thought that legal systems can be judged by the degree to which they live up to their aspirations, he did not think that legal systems could do so by containing aspirational norms. On the contrary; his 8 requirements all point to the necessity of clear and understandable rules.