

Invited Address:

Making Sense of Coherence

The Level Theory of Coherence

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1. The Problem Framed

The use of logic in legal system has seduced a number of lawyers and logicians. Legal systems are thought to be expressible in logical language. The presupposition of this is that law is fit for logical treatment. Roughly two groups can be distinguished, the formalists and the non-formalists. The former hold that law is fit for logical or formal treatment, while the latter deny that.

The formalists are right in that at least some parts of the legal system can be expressed in formal language. The problem raised by their approach consists of “sinning by exaggeration”. The belief in the possibility of some formalisation raises the hope that (1) the whole of a legal system can be formalised and, in a more abstract and stronger version that (2) any legal system can.

The non-formalists hold that formalisation is possible for parts of a legal system, or for some section of its operationalisation, though (1) not for the system as a whole and *a fortiori* (2) not for any legal system.

The formalist has a point in that the final result of the application of the rules of the system to a *casus* must, for reasons of justice, be similar in similar cases. If it were not, the legal system as a set of rules would not make sense. The rule character of law expresses a concern for equality as a core element of justice. That is why a legal system consists of general rules, the application of which does not depend on the officials dealing with them. The non-formalist approach for its part has a point in holding that the “application” of rules in chess or logic is different from “following rules” in normative action. The formalist and the non-formalist approach are opposed on at least this point. The former claim that consistency is a necessary condition for coherence while the latter hold that it is not. This paper argues for the non-formalist approach. According to a current view, the consistency of a legal system is a necessary condition for its coherence. A system then is coherent when it is completely consistent. Consistency and coherence are substitutable terms. It follows that a legal system containing one contradiction is not consistent, hence not coherent. This is an implausible conclusion, which is connected to the formalistic approach.

Therefore, I argue that the relation between consistency on the one hand and coherence on the other is in need of reconsideration. Consistency is not a necessary condition for coherence. Coherence is a form of “making sense”. Consistency on its turn is a specific form of making sense. The absence of contradictions makes a set of propositions consistent. It does not follow from that that this set of propositions “makes sense” in some ordinary understanding of it. It may be coherent in a *specific* sense, that is, *free from contradictions*.

The foregoing points to a re-calibration of the relation between coherence and consistency in what I propose to call the “level theory of coherence”. This theory sets out the framework of a decision theory for not formalised sets of propositions, typically a legal system.

2. The Level Theory of Coherence Articulated

The level theory of coherence consists of four levels. The four levels are : the level of internal coherence; the level of consecutive coherence; the level of system coherence; and the level of environment coherence. Any form of rational discourse has to correspond to a level of coherence below which it makes no sense at all. This is the first level of coherence, the level of *internal* coherence, or coherence₀. The level of coherence₀ is formally universal, in that it makes part of any form of rational discourse. It is though not materially universal in that it is not identical for every type of rational discourse.

The operationalisation of the existing set of propositions (that is, e.g., a legislator creates a new rule; an executive promulgates an executive order; a judge decides a case by giving his sentence) shows coherence in a different light. Judges are to decide cases by applying a rule or a precedent, which is required by formal justice. The same holds for the members of the executive or their administration. Yet, legislators cannot decide A and shortly after decide non-A. This requirement of stability in legislative ruling has a counterpart in judicial ruling where it is labelled “formal justice”. The common platform is a form of coherence called *consecutive* coherence, coherence over time, or the first level of coherence (coherence₁).

System coherence or the level of coherence₂ comes into play when judges interpret rules systematically. This comes to read or interpret a rule (or principle) in the light or with the help of another rule (or principle). Legislators argue on the level of coherence₂ or system coherence when they take other rules of the legal system into account in order, e.g., not to annul the effects of existing rules without explicitly revoking them (typically: the unemployment trap). The level of coherence₃ or *environment coherence* comes into play when a legal system’s environment is taken into consideration. Judges and legislators typically use arguments like “values found in society”. This suggests that they lean over the edges of the legal system. In doing so, they import cognitive or normative contents into the legal system. In order for the legal system “to make sense as a whole”, that is, to be coherent, the rationality of this import operation is to be showed. The relation between a legal system and its “environment” has several and different aspects: the environment of a legal system is theoretical (or can only be known as a theory; this makes that legal interpretation (e.g. on the level of coherence₂) is not (1) independent of or external to nor (2) purely internal to the legal system. It depends on a theory of language that makes the legal system make sense. The more general claim that is argued for is that the legal system is itself a theory that is dependent on other theories. This variant of the Gödel theorem in number theory is helpful in showing (1) the connection between different levels of coherence and (2) the possibility and the necessity of working with a level of coherence located “outside” the legal system. With the help of the level of coherence₃, some problems of rule making and rule interpretation can be articulated and eventually be solved.