www.rphz.de

RECHTS PHILOSOPHIE

Zeitschrift für die Grundlagen des Rechts

Sonderdruck
Raquel Lima Scalcon

RphZ

1 | 2019

5. Jahrgang | Seite 1–114
ISSN 2364-1355

Thema:
Recht und Moral als soziale Praxis – Teil 2

Beiträge

Rezensionen

Nomos

ACADEMIA

RECHTS PHILOSOPHIE

1/2019
5. Jahrgang
Seite 1–118

Zeitschrift für die Grundlagen des Rechts

Schriftleitung: Prof. Dr. Joachim Renzikowski (V.i.S.d.P.), Martin-Luther-Universität Halle-Wittenberg, Lehrstuhl für Strafrecht, Rechtsphilosophie/Rechtstheorie, Universitätsplatz 6, D-06108 Halle (Saale), Tel. 0345/5523130, E-Mail: Joachim.Renzikowski@jura.uni-halle.de

Inhaltsverzeichnis

Thema: Recht und Moral als soziale Praxis – Teil 2

Beiträge:

Rezensionen:

Impressum RphZ – Zeitschrift für die Grundlagen des Rechts

Herausgegeben von: PD Dr. Alexander Aichele, Martin-Luther-Universität Halle-Wittenberg | Prof. Dr. Martin Borowski, Universität Heidelberg | Univ.-Prof. Dr. Elisabeth Holzleithner, Universität Wien | Prof. Dr. Joachim Renzikowski, Martin-Luther-Universität Halle-Wittenberg

unter Mitarbeit von Prof. Dr. Wolfgang Ertl, Keio University Tokyo | Prof. Dr. Jean François Kervégan, Université Panthéon-Sorbonne (Paris 1) | Prof. Dr. Christian Krijnen, Vrije Universiteit Amsterdam | Dr. Anne Kühler, Universität Zürich | Prof. Dr. Joachim Lege, Universität Greifswald | Prof. Dr. Georg Mohr, Universität Bremen | Prof. Dr. Stanley L. Paulson, Universität Kiel | Prof. Dr. Beate Rössler, Universiteit van Amsterdam | Prof. Dr. Kurt Seelmann, Universität Basel

Schriftleitung: Prof. Dr. Joachim Renzikowski (V.i.S.d.P.), Martin-Luther-Universität Halle-Wittenberg, Lehrstuhl für Strafrecht, Rechtsphilosophie/Rechtstheorie, Universitätsplatz 6, D-06108 Halle (Saale), Tel. 0345/5523130, E-Mail: Joachim.Renzikowski@jura.uni-halle.de

www.rphz.de

Erscheinungsweise: Vierteljährlich

Bezugspreise 2019: Jahresabonnement incl. Onlinezugang für Privatbezieher 155,– € ; für Institutionen 219,– €; für Unternehmen Preis auf Anfrage; Einzelheft 41,– €. Alle Preise verstehen sich incl. MwSt., zzgl. Vertriebskostenanteil 12,– €, plus Direktbeorderungsgebühr Inland 1,65 € p.a. Beihefte, die zu diesem Titel erscheinen, werden den Abonnenten und Abonnentinnen mit einem Vorzugspreis automatisch zugesandt und können bei Nichtgefallen zurückgegeben werden.

Bestellmöglichkeit: Bestellungen beim örtlichen Buchhandel oder direkt bei der Nomos Verlagsgesellschaft Baden-Baden

Kündigungsfrist: jeweils drei Monate vor Kalenderjahresende

Bankverbindung generell: Zahlungen jeweils im Voraus an Nomos Verlagsgesellschaft, Postbank Karlsruhe: IBAN DE07 6601 0075 0073 6367 51 (BIC PBNKDEFF) oder Sparkasse Baden-Baden Gaggenau: IBAN DE05 6625 0030 0005 0022 66 (BIC SOLADES1BAD).

Druck und Verlag: Nomos Verlagsgesellschaft mbH & Co. KG, Waldseestr. 3–5, D-76484 Baden-Baden, Telefon (07221) 2104-0/Fax (07221) 2104-27, E-Mail: nomos@nomos.de

Anzeigen: Sales friendly Verlagsdienstleistungen, Pfaffenweg 15, 53227 Bonn, Telefon (0228) 978980/Fax (0228) 9789820, E-Mail: roos@sales-friendly.de.

ISSN 2364-1355

RphZ – Rechtsphilosophie

Zeitschrift für Grundlagen des Rechts

Editorial

Vielleicht ist Ihnen etwas aufgefallen? Im 5. Jahrgang verändert sich die RphZ äußerlich. Das sieht man an der veränderten Umschlaggestaltung und daran, dass die Zeitschrift nicht mehr im C.H. Beck Verlag erscheint, sondern bei Nomos und Academia. Wir erhoffen uns von dem Wechsel eine deutlich verbesserte Sichtbarkeit, da die Zeitschrift in Zukunft auch über die Nomos eLibrary elektronisch verfügbar sein wird. Diese Plattform ist national und international gut eingeführt und enthält neben dem kompletten Buchprogramm von Nomos (mit einer Schriftenreihe zur Rechtsphilosophie!) und einer stetig wachsenden Zahl weiterer Wissenschaftsverlage (unter anderem Velbrück Wissenschaft und Wallstein) auch mehr als 40 wissenschaftliche Zeitschriften. An der inhaltlichen Ausrichtung der RphZ ändert sich jedoch mit dem Verlagswechsel nichts: Programm, Schriftleitung und Editorial Board bleiben wie gehabt.

Ein Ausdruck der Kontinuität ist die Fortsetzung des Themas „Recht und Moral als soziale Praxis". Im zweiten Teil, den Veranstalter der gleichnamigen Tagung des Jungen Forums Rechtsphilosophie vom September 2017 in Regensburg in einer kurzen Einleitung vorstellen, geht es um das autonome Subjekt als Voraussetzung oder als Produkt sozialer Praxis. Der erste Beitrag ist gewissermaßen der konservativste: Hier verteidigt Calvin Kiesel die klassische Vorstellung eines autonomen Subjekts gegen praxeologische Einwände, indem er zeigt, dass die mit Foucault gemachten Vorwürfe gegen Kant zumeist auf Missverständnissen beruhen. Der zweite Beitrag bewegt sich dann ein kleines Stück auf die Praxeologie zu. Konstantina Papathanasiou argumentiert wie Kiesel gegen die Praxeologie und für das klassische Verständnis des autonomen Subjekts – aber nur insoweit, dass man das autonome Subjekt innerhalb des Strafrechts als eine Art Axiom *voraussetzen* muss. Dafür führt sie neben normativen (rechts)philosophischen auch deskriptive psychologische und rechtssoziologische Argumente an. Ein deutlich größeres Stück auf die Praxeologie zu bewegt sich der dritte Beitrag. Genau wie Papathanasiou geht Martin Weichold davon aus, dass man innerhalb des Strafrechts die Annahme des autonomen Subjekts voraussetzen muss. Aber im Geiste der Praxeologie und unter Rückgriff auf Kognitionswissenschaften und „labeling theory" analysiert Weichold das Strafecht als eine (reformbedürftige) soziale Praxis, in deren Rahmen menschliche Körper durch Subjektivierungen gewissermaßen zu autonomen Subjekten werden. Der vierte Beitrag steht den Grundgedanken der Praxeologie von allen hier versammelten Beiträgen am nächsten. Sven Zedlitz verwirft die *klassische* Konzeption eines autonomen Subjekts ganz, entwickelt dann aber eine alternative, *genuin praxeologische* Konzeption eines autonomen Subjekts. Zu diesem Zweck stellt er zunächst Foucault und Habermas gegenüber, um subjektive Prägung als Dialektik von Machteffekten und Autonomiebestreben zu konzipieren. Diese Debatte aktualisiert er anschließend, indem er Butler und Korsgaard miteinander ins Gespräch bringt. Der fünfte Beitrag bewegt sich dann schon über die Praxeologie hinaus. Laut Marion Stahl

geht die praxeologische Kritik am autonomen Subjekt nicht weit genug, sodass der Praxeologie Ressourcen der Subjektkonzeption der feministischen Fürsorge-Ethik zur Seite gestellt werden sollten. Der sechste Beitrag ist dann der radikalste. Wird die praxeologische Kritik mit Hilfe des sogenannten Agentiellen Realismus (Barad) weiter und zu Ende gedacht, dann zeigt sich, so Lorina Buhr, dass es so etwas wie Autonomie überhaupt nicht und Subjekte bestenfalls als fragile Emergenzphänomene gibt.

Der Beitragsteil enthält einen Aufsatz einer brasilianischen Rechtswissenschaftlerin. Raquel Lima Scalcon beschäftigt sich mit einer Gesetzgebungslehre auf verfassungsrechtlicher Basis.

Zuletzt stellt Ulrich Jan Schröder den Sammelband von Borowski und Paulson über die Natur des Rechts bei Gustav Radbruch vor.

Im nächsten Heft wird das Thema „Recht und Moral als soziale Praxis“ fortgesetzt und abgeschlossen. Auch weiterhin freuen wir uns jederzeit über Anregungen für Themen und über Beiträge, gerne auch außer der Reihe. Bitte reichen Sie zahlreich Texte in elektronischer Form bei renzikowski@jura.uni-halle.de ein. Auf der Homepage renzikowski.jura.uni-halle.de/rphz/ finden Sie auch einen Link zu den Hinweisen für die Autoren, deren Beachtung die redaktionelle Arbeit erleichtert.

Halle/Heidelberg/Wien, Februar 2019

Alexander Aichele,
Martin Borowski,
Elisabeth Holzleithner,
Joachim Renzikowski

Rationality of the Legislative Process as a Material Element in Constitutional Control

Raquel Lima Scalcon

This essay will analyze the possible relations between the rationality of the legislative process and the constitutionality of a new law. The analysis is founded on the following question: should the rationality of the legislative process be a material element in the control of constitutionality? Bearing in mind that the technical complexity of lawmakers' choices will not eliminate the overtly political nature of that choice, we will start with the hypothesis that laws would potentially be *better* written if they are the outcome of a more rational legislative process. Similarly, lawmakers will have additional responsibility for the decisions they made, as well as for the *material effects* that new legislation will have on fundamental rights.

As such, the factual characteristics of a particular legislative process (aside from the rules governing this legislative procedure) should act as important indicators, a type of „thermometer" of the degree of its rationality, i.e., *its coherence with social realities and its ability to effectively mold that reality to achieve its intended (constitutional) goals*[1]. There are three suggested parameters for this proposed evaluation: (i) the rationality of the *drive* behind the legislative process; (ii) the rationality of the *timing* of the legislative process and (iii) the rationality of the *way* the legislative process itself is conducted.

This leads us to conclude that if legislators have access to a wide range of information and tools to produce a new law (for example, a new crime), their refusal to provide a better basis for this law would signal at least one of two problems: either (i) lawmakers do not want to use the information or tools available to them because they fear an unfavorable outcome, or (ii) they are not concerned about the actual outcome of their choices on society. Either alternative would result in a lack of support for the new law and, so, any presumption of constitutionality should be *mitigated*.

This clear struggle between political freedom and legislative technique (the fast pace of political power *versus* the measured pace of reflection) should be synthesized in the constitutional control. If we are faced with an accelerated, confused and irresponsible legislative process, which is unaware of the actual problems it is trying to address, which does not limit or state its intended objectives and ignores the wide range of measures that exist and would allow it to do so, there is a *significant likelihood* the outcome (the law) will contain *material* constitutional defects. The means elected by legislators may be inadequate or unnecessary to promote the desired goal. The law, *per se*, may be a failure, not achieving its stated objectives and affecting fundamental rights far more than it was expected to, or far more than it should. The opposite is also true. If we have a mature legislative process capable of accurately identifying problems and goals (diag-

---

[1] There may be various rationality criteria. The one used in this work is called „teleological" by *Atienza* and „pragmatic" by *Díez Ripollés*. For further information, see, respectively, *Atienza*, Contribución a una teoría de la legislación, 1997, 46, and *Díez Ripollés*, La racionalidad de las leyes penales, 2003, 86–87, 95.

nosis and prognosis), it is most likely that the outcome (the law) will be also accurate and justified.

To illustrate this, let us imagine two criminal laws that restrict fundamental freedoms: one is the outcome of a hurried, imprecise and obscure legislative process; the other is the result of a mature, precise and clear legislative process. There is no reason why we should attribute an identical presumption of constitutionality to both the laws described above, as they are the product of legislative processes with widely differing degrees of rationality. Briefly, in response to the question posed at the start of this essay, our statement is that the rationality of the legislative process should be a relevant material aspect of constitutional control. Therefore, *the lower* the degree of legislative rationality*, the lower (should be)* the presumption that the new law is constitutional and *the higher (should be)* the rigor of constitutional control.

I. Rationality of the *drive* behind the legislative process (degree of clarity and accuracy of the lawmaker's basis for prognosis)

The expression *prognosis* is usually employed to mean the prediction of a *future event* occurring.[2] In these brief remarks, this concept will be reduced to the idea of *a hypothetical/causal judgment regarding the occurrence of a future fact which, in this case, is the promotion of certain goals (objectives) using a criminal law to, for example, protect legal interests*. There is no certainty in this area, merely degrees of possibility. The German philosopher C. F. v. Weizsäcker succinctly described prognosis as the „art of the probable" (*Kunst des Wahrscheinlichen*).[3] Furthermore, when lawmakers use this type of reasoning, it is commonly referred to as *legislative prognosis*.

Therefore, legislative prognosis can be broken down analytically into three elements: (a) the *basis* for the prognosis or diagnosis; (b) the *method* of prognosis and (c) the *outcome* of the prognosis. The *basis* represents the factual data lawmakers have collected that define the material problem and are used to select appropriate methods of remedying it. If the basis underpinning a prognosis is not well constructed, it will be impossible to clearly identify the social dysfunction or make a meaningful choice of the means to effectively intervene in that dysfunction. In this context, a prudent examiner would take a *suspicious* view of any legislative prognosis whose basis is defective.

For this reason, it is important to assess the „rationality behind the drive to legislate", i.e., the degree of clarity and accuracy in the underlying *basis of a particular prognosis*. Here, two types of inconsistency might arise. The first is that the „problem" itself could possibly be false. In other words, the facts that define the issue do not exist or the issue is not as serious as the legislator claims. The second is that the issue may be a „non-problem", a product of the legislator's inability to formulate the problematic issue in any minimally clear way. In this case, the alleged problem may either be very vague or

---

[2] From the Greek: *pro,* which means „before", and *gnonai,* which means to „recognize". Therefore, prognosis means recognizing or understanding something *in advance* (see *Sousa*, „Conceitos Indeterminados" no Direito Administrativo, 1994, 115). For a similar concept to prognosis in German doctrine, see the classic works by *Ossenbühl*, Die Kontrolle von Tatsachenfeststellungen und Prognoseentscheidungen durch das Bundesverfassungsgericht, Festgabe aus Anlass des 25-jährigen Bestehens des Bundesverfassungsgerichts, Teil 1 (Verfassungsgerichtsbarkeit), 1976, 461, and *Philippi*, Tatsachenfeststellungen des Bundesverfassungsgerichts, 1971, 28.

[3] *Weizsäcker*, Über die Kunst der Prognose, 1968, 11.

even contradictory, or indeed the boundaries of the problem may be unclear, consequently making it particularly difficult to elect a means of resolving it. When there is no clear destination, any road will do.

As an illustration, we can look at a famous example in German law. This is the *Apotheken-Urteil* (or the „Pharmacies Case“).[4] At that time, a case had been brought before the German Constitutional Court disputing the validity of a law that had come onto the statute books in the state of Bavaria, restricting the number of permits being issued to open new pharmacies. The law stated that new businesses must be commercially viable and should not financially undermine nearby competitors.[5] The idea was to protect public health; lawmakers argued that if the rule were not put in place, it would be impossible to control consumption of medicines because they would be so widely available (*prognosis*).[6]

In this case, we can identify the *basis for prognosis* (the lawmakers' hypothesis) as „the excessive use of medicines is caused by unfettered freedom to set up new pharmacies“. However, the Constitutional Court held that this was an erroneous interpretation of the facts. The *cause* of the problem was false. The increase in the use of medicines that had been observed was *not* caused by the number of new pharmacies opening, it was caused by changes in people's standard of living following the Second World War.[7]

This simple example illustrates the importance of examining the *rationality* behind the drive to legislate, particularly in criminal matters. The reason is nearly trivial: mistakes in the basis for prognosis could seriously contaminate the lawmaker's judgment. It could also lead lawmakers to pass legislation incapable of solving the problem or might even lead to a deeply flawed prognosis. This situation is even more serious in criminal law, given that restrictions to fundamental freedoms would be supported by inconsistent arguments, that is, arguments allegedly founded on the intention of promoting certain objectives that are, in fact, unachievable.

II. Rationality of the timing of the legislative process: level of maturity in the decision-making process and legislative change

In legislative processes, it is quite common to see „the time constraints of political power overriding the time needed for reflection“.[8] A number of real-life examples illustrate this very well. One of them came from the Brazilian criminal law. This is the decision to approve Brazilian Law 9677/98, which, among a number of measures, (i) separated the acts of corrupting, adulterating, falsifying or altering *a food product or substance intended for consumption* (a crime under Article 272 of the Brazilian Criminal Code) from other identical acts, but which were related to *medicines* (a crime under Article 273 of the Brazilian Criminal Code) and (ii) and increased the penalties to 4 to

---

[4] BVerfGE 7, 377.

[5] Critical excerpts of the judgment are commented in: *Kommers/Miller*, The Constitutional Jurisprudence of the Federal Republic of Germany, 3rd ed., 2012, 666–672.

[6] Ibid.; see also *Mendes*, Controle de Constitucionalidade, Revista dos Tribunais, 766 (1999), 22–23.

[7] BVerfGE 7, 377. See also *Mendes*, Revista dos Tribunais, 766 (1999), 22–23.

[8] *Pires*, Diálogos e conflitos no processo de elaboração das leis in Coelho, Congresso Internacional de Legística, 2009, 145 – my translation.

8 years' imprisonment and a fine for felony crimes committed under Article 272, and an incredible 10 to 15 years imprisonment and a fine for crimes committed under Article 273.

Brazilian Bill (PL) 4207/98, which resulted in the aforementioned statute, had been making its way through Congress since March of that year (1998). However, it got stuck in the Constitution and Justice Committee. The subsequent rush to approve the bill was mainly driven by the *Microvlar* scandal (the famous case of the flour-filled pill manufactured by *Schering Brazil*). This drug was Brazil's biggest-selling contraceptive pill and was used by nearly two million people. On 24/6/1998, just a week after the scandal was reported in the national news, the bill was *fast-tracked* for a vote in the Brazil's Chamber of Deputies.[9] It then moved on to the Brazil's Federal Senate and was sent for presidential sanction on 1/7/1998. It became law on 2/7/1998 and immediately took effect.[10]

There is also a case involving Portuguese legislative process clearly illustrating such kind of problem. This involved Portuguese Law 48/2007, which made significant changes to the Portuguese Code of Criminal Procedure (introducing more than 200 new items and amendments). Surprisingly, it came into effect just 15 days after it was published in the Federal Register, which, in the heated words of Costa Andrade, meant it could not be „read, considered, theorized or discussed on a consensual and consolidated basis".[11] Additionally, further changes of equal import had also been introduced into the Portuguese Criminal Code a little over a week before (Law 59/2007) resulting in a one-of-a-kind mass reform of both Codes unlike anything previously seen in the history of Portuguese law.[12]

Other cases show the opposite side of the problem: *tardiness* instead of *haste*. Difficulty reaching a minimum political consensus or even lack of political interest in a particular problem can bar approval for a new piece of legislation. In Brazilian law, for instance, this arises even in relation to constitutional obligations to legislate on criminal matters. The Article 7, section X of the Brazil's Federal Constitution is a criticized example.[13] Surprisingly, a bill of law intended to criminalize the „malicious retention of workers' salaries" has been struggling through Congress since 1989. At this point, even if the bill is approved, it will be impossible to make up for these many years of dawdling.

In this context, one could argue that the duration of a *rational* legislative process should *reflect* the tension between the level of complexity of a particular issue and the degree of urgency with which a decision needs to be made. Therefore, processes that are either too short or too long will make it difficult to construct appropriate legal solutions

---

[9] As Mendes de Paiva rightly explains, fast tracking is a marked characteristic shared by various bills of law approved in the 1990s, which significantly increased the power to punish in Brazil (*Paiva,* A fábrica de penas, 2009, 113).

[10] Helena Lobo da Costa notes that this is an example of a *crisis or alibi law*, in other words, a piece of legislation intended to calm the population and show speed, resolve and readiness to act when faced with a particular crisis or problem (*Costa,* Proteção Penal Ambiental, 2010, 129–131).

[11] *Costa Andrade*, „Bruscamente no verão passado", a reforma do Código de Processo Penal*,* 2009, 13 – my translation.

[12] Ibid.

[13] Constitution of the Federative Republic of Brazil, Article 7 – „Article 7. Urban and rural workers, and others, seeking to improve their social condition, are entitled to the following: [...] X – salary protections as provided by law, the malicious withholding of which constitutes a crime".

to a particular material issue. For instance, let us imagine concrete problems where criminal law intervention seems to be required. If the legislative process is too short, legislation that is rushed through is unlikely to have any effect beyond the symbolism of its sentencing outcomes (even if this has materially pernicious and costly effects in terms of secondary criminalization). On the other hand, if the process takes too long, its result might not be useful. As Delley explains: „if an examiner asks to spend 10 years studying the effects of a particular piece of legislation, the politicians will rightly say that in 10 years the problem will have changed".[14] In other words, the law will likely be obsolete, given our constantly changing and increasingly unstable social context.

III. Rationality in the way legislative processes are managed

The *form* or *way* legislation is produced can either increase or reduce its constitutional validity. Therefore, some portion of a law's legitimacy must be derived from whether or not the legislative process that created it meets minimum rationality requirements.

The idea is that legislative authority is based not only on the quality of the outcome (new law) but also on the correctness of the procedure that led to it. If this assertion is right, then the characteristics and levels of rationality in legislative processes should, to some extent, be taken into consideration by the Courts during constitutional reviews (especially through the examination of proportionality, as we will suggest). This is true even if, hypothetically speaking, the final outcome (the new law) is identical, i.e., it remains unchanged. Indeed, it is insufficient to have a new law with the appearance of „good quality" merely for contingent and non-repeatable reasons that bear no relationship to the legislative process that created it. It is not enough that lawmakers make a good law merely by coincidence or luck. The opposite is also true: nor is it sufficient for the legislative process to be highly rational, if the outcome is not. But there is an expectation – a legitimate one, in our opinion – that the outcome of the legislative process will improve as the process itself becomes more rational.[15]

This analysis, which is based on the foregoing assumptions, will measure the degree of rationality in the *way* the legislative process is managed based on two criteria: (i) the degree of publicity and inclusion in the legislative process and (ii) to what extent the legislative process is based on technical studies and prospective legislative impact assessments.

1. The degree of publicity and inclusion in the legislative process

Given the normative content of the democratic principle, it is widely held that any legislative process should be based on public arguments, i.e., „explicit and well-defined

---

[14] *Delley*, Lei e políticas públicas, Congresso Internacional de Legística, 2009, 184.

[15] The debate on the basis for legislative authority is highly complex and could not be encompassed within this brief study. For more on this discussion, see the procedural/epistemological positions of Waldron, The Dignity of Legislation, 1999, Chapter 6 (in fine) and *Raz*, The Morality of Freedom, 1986, Chapter 1. For a different view, see the „substantive" position of *Michelon*, Politics, Practical Reason and the Authority of Legislation, Legisprudence, vol 1, n. 3, 2008, section A.

arguments that are open to debate".[16] In turn, actually meeting this requirement means fulfilling three fundamental duties: (i) the „duty to justify", (ii) the „duty to inform" and (iii) the „duty to include and consult stakeholders".[17] This means lawmakers are obliged to (i) provide material justification for their proposed changes to legislation, (ii) ensure that the legislative process is transparent, and (iii) offer a greater opportunity for parliamentary minorities and particularly non-parliamentary third-party stakeholders and/or affected parties to have their voices heard.

For instance, checklists would be a good way of fulfilling the first two duties. These documents would set out the main facts related to the matter being regulated, the intended goals, the fundamental rights and/or constitutional guarantees that could be bolstered or affected, the means available to achieve this, justifications for the option chosen, etc.

One problematic issue notably in criminal legislative process, for example, is whether lawmakers are required – or not – to clearly specify the possible „legal interests" they seek to protect through approving a new criminal legislation, as well as the consequences of not affording that clarification.[18] Here, some argue that, although providing this information is highly recommended, there is no requirement to do so, while others argue that this absence of information does not immediately mean that the planned legislation is unconstitutional. There are also those who argue there aren't „protected legal interests" behind a criminal law, i.e., this idea would be, in itself, wrong.

Let us consider (rightly or wrongly) that the protection of legal interests (*Rechtsgüter*) should be one of the goals of Criminal Law. Then, we can present an incipient solution for the problem by suggesting a reasoning based on *degrees*, rather than an *all* or *nothing* approach. In other words, it is one thing for lawmakers not to identify the legal interests being protected by establishing a new category of felony homicide; it is something quite different if they fail to do so for crimes with a high degree of technical complexity, such as those that fall within the sphere of „Secondary Criminal Law" (*Nebenstrafrecht*), such as economic crimes, bankruptcy crimes, IT crimes etc.

The harder it is to identify the legal interests being protected under new criminal legislation, the greater the lawmakers' obligation to define them as soon as possible (as an idea of accountability). The reason is simple: this is the logical outcome of the duties to *justify* and *inform*. Therefore, when a new type of crime is created and if the possible legal interests being protected are controversial, unclear or possibly nonexistent, the lawmaker's silence shows not only a lack of any proper basis for the criminal legislation, but it also attests to the fact that the lawmaker does not understand the crime being characterized. Whence, if the law comes under constitutional review, there will be an

---

[16] *Carvalho Netto*, A contribuição da Legística para uma política de legislação, Congresso Internacional de Legística, 2009, 112 – my translation.

[17] *Voermans,* Quality of EU Legislation under Scrutiny, in: Mader/Tavares de Almeida (eds.), Quality of Legislation. Principles and Instruments. Proceedings of the Ninth Congress of the International Association of Legislation (IAL), 2011, 37.

[18] Here, Marta Romero argues that because of the extent to which fundamental rights are affected by criminal legislation, it is not only essential to explain the lawmakers' reasoning in this particular case, there should also be evidence of redoubled attention being paid. The author is of the opinion that it should be *mandatory* to explain the legal interests being protected, the harm caused by the regulated conduct and the fundamental rights involved (*Morales Romero*, El Legislador Penal Europeu, 2011, 587).

even greater difficulty overcoming the principle of proportionality, as there will be extensive evidence that the law is both inadequate and unnecessary.

Just as important as justifying the legislation and identifying the legal interests involved is the preemptive assessment of legislative impact, which could anticipate and prevent future difficulties, or even support the legislative decision to choose one particular path forward rather than another.[19] As far as the third and final duty is concerned, public hearings held during controversial or highly complex legislative processes would be a useful way of giving minorities or other stakeholders a bigger voice.

Indeed, these obligations are inextricably linked to one another. Failure to discharge the duty to provide reasons (justify) and inform (make the legislative process accessible and transparent) will diminish the actual involvement of interested/affected parties in parliamentary discussion. Additionally, the fact that these duties were fulfilled – or not – will have a significant legal impact. The lower the degree of justification, publicity and inclusion in the legislative processes, the more likely it is that a Constitutional Court will be used as a „third" political arena by those whose voices were not heard.[20]

A case in Portuguese law can be used to illustrate the constitutional repercussions of legislative decisions that ignore the three duties described above. The case was Appellate Ruling 377, 2015, handed down by the Portuguese Constitutional Court.[21] In this case, the Court was asked to analyze the constitutionality of the crime of „*unjustified* enrichment", which had been included in the Criminal Code (misdemeanor) and in the Criminal Liability Act that applies to holders of public office (malfeasance) after the federal legislature approved Decree 369/XII. It is interesting to note this was something the court had indeed discussed on a prior occasion.[22] Earlier (in 2012) Portuguese Parliament had approved the crime of „*unlawful* enrichment" (Decree 37/XII), which was submitted to preventive constitutional review at the request of the President of the Republic.[23]

At the time, having analyzed the text characterizing the crimes, the court held the criminal laws were not constitutional, particularly after finding that the laws were

---

[19] According to Marta Romero, prior impact assessments are, in the legal world, „a standard procedure legitimizing the regulatory decision in one direction or another" (*Morales Romero*, El Legislador Penal Europeu, 2011, 587 – my translation).

[20] Similarly, see *Engel*, The Constitutional Court – applying the proportionality principle – as a subsidiary authority for the assessment of political outcomes in Gemeinschaftsgüter: Recht, Politik und Ökonomie. Preprints aus der Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter, 2001, 17.

[21] Constitutional Court of Portugal, case N. 658/2015, Appellate Ruling N. 377/2015, by majority, published on 12/8/2015. The full text of the decision can be seen here: <http://www.tribunalconstitucional.pt/tc/acordaos/20150377.html>.

[22] This is an extract from the crimes described in Decree 369/XII: Article 335-A, added to the Portuguese Criminal Code. Unjustified enrichment. 1 - Anyone who, by themselves or through an intermediary, individually or collectively acquires, possesses or holds assets incompatible with the goods or incomes they have declared all should have declared is punishable by up to 3 years imprisonment. [...]; Article 27-A, added to Law N. 34/87. Unjustified enrichment. 1 – The holder of a public office or higher public office who, during the period they are carrying out their public office or in the three following years after they have given up that office, by themselves or through an intermediary, individually or collectively acquires, possesses or holds assets incompatible with the goods or incomes they have declared all should have declared is punishable by up to 5 years imprisonment. [...].

[23] This is an extract from the crimes described in Decree 37/XII: Article 335-A, added to the Portuguese Criminal Code. Unlawful enrichment. 1 - Anyone who, by themselves or through an intermediary, individually or collectively possesses or holds assets of no specific lawful origin that are incompatible with their lawful assets or incomes, is punishable by up to three years imprisonment, pro-

unclear and did not define the legal interests they were intended to protect.[24] After the 2012 verdict, Portuguese lawmakers waited three years before legislating a new crime, which was no longer one of *unlawful* enrichment, but one of *unjustified* enrichment, even though the crime was described in very similar terms. In fact, lawmakers wanted to put the criminal policy created in 2012 into effect, but had to overcome the deficiencies described by the Constitutional Court.

One of the steps they took was to specifically list the reasons leading the federal legislature to create that particular crime and to list the legal interests the new legislation was intended to protect. The legislation stated that the criminal activity it was intended to curb undermined „confidence in institutions and in the market, transparency, probity, integrity regarding the sources of assets and income, equity, competition and equality of opportunity". We can see that, unlike the 2012 legislative process, lawmakers were now aware of the difficulties involved in defining this crime and took pains to fulfill their duties of *justification* and *information*.

As rightly argued in the lead opinion for Appellate Ruling 377, 2015, comments from lawmakers' explaining their reasons for creating a particular piece of legislation are very helpful for historical interpretation.[25] Additionally, they help identify how certain issues were weighed and allow the court to judge whether criminal protections were „indispensable [...] as a means of achieving a sufficiently valuable goal",[26] and therefore constitutionally justified. However, there is one proviso we should make: Although lawmakers took steps to establish the legitimacy of the new law, listing the legal interests it was supposed to protect and the reasons for changing the law, it is the Courts that metaphorically „approve" these explanations, analyzing whether they are coherent in terms of the criminal activity being put into law.[27]

Portugal's Constitutional Court ended up ruling that, despite the alleged basis for the legislation, it was unable to see how the crimes it was asked to analyze (the misdemeanor and malfeasance based on unjustified enrichment) could protect legal interests. Therefore, even though lawmakers had fulfilled their duty to *justify* their decision to legislate and to *inform* people of the content of the proposed legislation, the law still ended up constitutionally invalid. And rightly so. We need to understand that simply fulfilling these duties is not, *in and of itself,* sufficient to validate a piece of legislation. Conversely, however, ignoring these duties will undoubtedly make such legislation vulnerable to constitutional review.

---

vided a stricter penalty does not apply under another legal provision [...]; Article 386, added to the Portuguese Criminal Code. Unlawful enrichment by an employee. 1 – An employee who, during the period they are carrying out a public function or in the three years after they have given up that function, by themselves or through an intermediary, individually or collectively possesses or holds assets of no specific lawful origin that are incompatible with their lawful assets or incomes, is punishable by up to five years imprisonment, provided a stricter penalty does not apply under another legal provision [...].

[24] Constitutional Court of Portugal, case n. 182/2012, Appellate Ruling n. 179/2012, by majority, published on 19/4/2012. The full text of the decision can be seen here: <http://www.tribunalconstitucional.pt/tc/acordaos/20120179.html>.

[25] Constitutional Court of Portugal, case N. 658/2015, Appellate Ruling N. 377/2015, Justice Maria Lúcia Amaral, 8. About historical interpretation in Law, cf. *Dworkin*, La lectura moral y la premisa mayoritarista, in: Koh/Syle (eds.), Democracia deliberativa y derechos humanos, 2004, 113; *Raz*, Between Authority and Interpretation*,* 2009, 265, and *Guastini*, Interpretare e argomentare*,* 2013, 100.

[26] Constitutional Court of Portugal, case N. 658/2015, Appellate Ruling N. 377/2015, Justice Maria Lúcia Amaral, 12.

[27] Ibid., 3.

In light of this, we can say that when the federal legislature was invited to rethink the criminal legislation it had proposed, this increased the rationality in the *way* that the second legislative process was *managed* compared with the first. True, the outcome in the latter case was also unconstitutional. However, when they are forced to publicly justify a decision to pass criminal legislation, lawmakers become much more responsible for it. Indeed, in the latter case, it was precisely because the process was more transparent and accessible to third parties that it led to a much deeper and more complex constitutional discussion at the Portuguese Constitutional Court.[28]

2. The degree the legislative process is based on technical studies and prospective legislative impact assessments

The following analysis is based on the assumption that, at least in the criminal sphere, prospective assessments of legislative impact addressing the possible material effects laws should be mandatory in any legal system.[29] This is a fundamental step towards increasing the (always modest) rationality underpinning criminal intervention. If the State is prohibited from acting arbitrarily (concept of Rule of Law), then the Legislature must likewise ensure the laws it passes are at least minimally appropriate in light of their intended goals (efficacy). In this context, the outcomes of prospective impact assessments will have a sort of „regulatory force" limiting the ways lawmakers can intervene, by showing that many of the ways available to them would be clearly and undeniably ineffective.[30]

Using these assessment tools not only helps increase the degree of rationality in political decision-making, but it also increases the value of academia or experts as parties in the legislative process. Ideally, these agents should be independent third parties, selected, for example, by soliciting interest from groups of researchers. At a secondary level, legislative consultants themselves could carry out some sort of simplified version of this assessment. However, the more impartial the assessment, the better, which means the first hypothesis – using outside assessors – is more consistent with our intended goals.

In any event, we should be aware that even impact assessments carried out by academic experts (political scientists, sociologists, etc.) will have a not insignificant political undercurrent. Engel rightly warned us that such assessments could be used as weapons against legislative opponents.[31] For this reason, these assessments will not make political decisions wholly rational, because they also present several limitations

---

[28] Marta Romero also explains that justify or explain the reasons behind legislative decisions is an essential tool allowing the courts to assess their legitimacy (*Morales Romero*, El Legislador Penal Europeu, 2011, 587).

[29] Similarly, see ibid., 587–588.

[30] *Delley*, Pensar a Lei. Introdução a um procedimento metódico, Cadernos da Escola do Legislativo, 7/12 (2004), 136.

[31] *Engel*, The Constitutional Court – applying the proportionality principle – as a subsidiary authority for the assessment of political outcomes in Gemeinschaftsgüter: Recht, Politik und Ökonomie. Preprints aus der Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter, 2001, 17.

(epistemological, democratic, hermeneutic).[32] However, this does not mean we should stand idly by; it simply means we should not be too optimistic in our attempt to make legislative outcomes more rational.[33]

Based on these premise, we can now return to the main argument. In many legal systems (specially in Latin America), impact assessments are, even in the best of worlds, an option rather than a requirement, even for criminal law bills. In this context, what could be the legal consequences of *including or not including* impact assessments evaluation as part of a legislative process? The possible answers are controversial. We consider that such impact assessments should be used as a sort of thermometer or indicator of the degree of rationality in a legislative process.

This means that if a specific procedure does not include an impact assessment, or a similar tool, this would be indicative of a highly arbitrary legislative decision-making process.[34] This conclusion, in turn, should affect not only the presumption of a law's constitutionality but also the intensity of subsequent constitutional review. In the first case, this is a directly proportional relationship; in the second case, the relationship is inverted. In other words, the *less* rationality there is in a legislative process, the *lower (should be)* the presumption of constitutionality of the resulting legislation and the *higher (should be)* the rigor of constitutional review.

IV. Final remarks

The act of legislating is (and will continue to be) based on decisions that attempt to synthesize the inevitable disputes that take place in the context of political processes. The technical complexity of a particular choice in no way diminishes its overtly political nature. However, laws will potentially be *better* if they are the product of a more rational and careful legislative process. Similarly, lawmakers will also have additional responsibility for the decisions they make, as well as for the *material effects* new legislation will have on fundamental rights.

The difficulty resides, as always, in trying to see whether a chosen path is indeed capable of achieving the intended goal and whether there are any other equally effective measures available that would result in fewer restrictions on countervailing fundamental rights (*proportionality* in its sub criteria of *adequacy* and *necessity*). Based on the above, we argue in conclusion that there is no consistent reason why we should attribute an identical presumption of constitutionality to both types of legislation described above, as they are products of legislative processes with widely differing degrees of rationality. Based on that, we reinforce the statement already suggested: *the lower* the

---

[32] For more on these limits, see *Delley*, Cadernos da Escola do Legislativo, 7/12 (2004), 136. *Garoupa*, Regulatory Impact Assessment, in: Mader/Tavares de Almeida (eds.), Quality of Legislation. Proceedings of the Ninth Congress of the International Association of Legislation (IAL), 2011, 205–206; *Mader*, Legistic training and Education in Switzerland, in: ibid., 47.

[33] *Engel*, The Constitutional Court – applying the proportionality principle – as a subsidiary authority for the assessment of political outcomes in Gemeinschaftsgüter: Recht, Politik und Ökonomie. Preprints aus der Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter, 2001, 11.

[34] *Keyaerts*, Interaction between *ex ante* evaluation and judicial review by EU courts, in: Mader/Moll (eds.), The Learning Legislator. Proceedings of the Seventh Congress of the European Association of Legislation (EAL), 2009, 116.

degree of legislative rationality, *the lower (should be)* the presumption of the new law's constitutionality and *the higher (should be)* the rigor of constitutional control.

Raquel Lima Scalcon,
Centro Universitario Ritter dos Reis, Porto Alegre,
E-Mail: raquelscalcon@gmail.com