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Klaus Meßerschmidt
A. Daniel Oliver-Lalana *Editors*

Rational Lawmaking under Review

Legisprudence According to the German Federal Constitutional Court

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Foreword

This new book in the *Legisprudence Library* focuses on the process of rational law making according to the review practice of the German Constitutional Court. The tradition of German constitutional law has, in many respects, provided the inspiration for the theory of legislation widely labelled 'legisprudence', and we think that now is an apt time to share and feed back into practice the accumulated body of research on this topic. The editors of this volume have brought together a number of contributions, each one reflecting the unique perspective of its author, be that academic, legislative or judicial, to expose the intricate connections between judicial review and the drafting and evaluation of legislation.

The idea of rational law making is not new, and the use of deductive reasoning as a method in rational law making can be traced back to the seventeenth century when natural law predominated in the European intellectual climate. These days, deductive reasoning and a priori thinking are less explicit in our legal discussions, but that does not mean the attraction of 'rational law making' has diminished. What makes the legislative process 'rational' is hard to pinpoint but not—however—impossible to examine or consider.

Legisprudence as a theory of rational legislation is conceived of as a theory of a practice, that is, a theory that cannot survive without practice. Practice, then, consists in what courts do with rationality requirements. By uncovering the impact of the German Constitutional Court on rational law, making this book fills a gap in expertise and presents a nuanced view that balances constitutionalism, democracy, proportionality, and separation of powers among other parameters.

Furthermore, and importantly, this book opens up to non-German speaking audiences the practice of the German Constitutional Court. I applaud the editors for their efforts to deliver a well-rounded, bird's eye view of the Court's contribution to rational law making and to give the reader a comprehensive account of a complex process of legislation that no longer exclusively belongs in the domain of the sovereign legislator as an exclusively political agent.

In the following 14 essays, ranging over rational legislation from the viewpoints of MPs, academic and judges themselves, the German, non-German and non-European reader alike will discover a rich source of inspiration to reflect on the rationality of norm production.

Leuven, Belgium Luc J. Wintgens

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Chapter 1
On the "Legisprudential Turn" in Constitutional Review: An Introduction

A. Daniel Oliver-Lalana and Klaus Meßerschmidt

Constitutions are not laid down in an attempt to transform any theory of rational lawmaking into positive constitutional law but to settle the procedures by which laws can be validly enacted, to enshrine those basic values and fundamental rights that laws have to respect or protect, and to establish which policies and collective goods lawmakers are expected to foster. Yet, what may be derived or not from constitutional texts—or analogously ranked legal documents—largely depends on their authoritative interpreters, most notably constitutional judges. And these judges may well construe the substantive, formal and procedural mandates of a constitution in a way that obligates lawmakers to legislate better, i.e. more rationally. When embarking on such a construal, courts are juridifying tenets and insights that usually belong to the aspirational realm of legisprudence (cf. Wintgens 2012). Thus constitutional texts—enriched through judicial doctrines—might turn out indeed to comprise a normative theory of lawmaking, at least in outline. Seen from the reverse angle, it would appear that there exists a constitutional, legally binding dimension to legisprudence. The aim of this book is to explore this dimension in the light of the case law of the German Federal Constitutional Court (*Bundesverfassungsgericht*, hereinafter BVerfG) and the approach to rational lawmaking which underlies it.

Over the last decades, the German Court has been remarkably active in applying legisprudential criteria or yardsticks when reviewing parliamentary laws that affect fundamental rights and key constitutional norms such as the principles of proportionality and subsidiarity. On certain occasions, it has even taken the 1949 Bonn

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Basic Law or *Grundgesetz* (GG) to entail an obligation of public justification on the part of lawmakers. By doing this the Court has entered the core of legislative decision-making—i.e. the "internal" or "material" process of legislation, as it has been termed by the German scholarship—and pushed for a due investigation into and consideration of the socio-empirical premises and expected impacts of statutes; for an adequate and comprehensive weighing up of the affected interests; or for consistent and transparent legislative choices. And it has in addition imposed follow-up and revision requirements on lawmakers. As a consequence some major tenets of rational lawmaking have been converted into judicial review standards which the Court may utilise to strike down ill-founded legislative measures. This strand is reducible neither to the classical substantive review of statutory contents as result from the lawmaking process, e.g. with the firmly established proportionality tests, nor to the purely procedural control of the formalities of legislation. Within judicial scrutiny is to be detected, rather, the question of whether lawmakers have *actually* followed a proper legislative method and have *actually* grounded their policy choices in a sound and coherent manner. Although a current of similarly-minded judicial review can certainly be observed in other jurisdictions—the Court of Justice of the European Union (ECJ), the European Court of Human Rights (ECtHR) or the US Supreme Court may be named as examples—, German case law supplies unique material to analyse the various aspects of the lawmakers' *duty* of rational norm giving, as well as to assess the virtues and drawbacks of the judicial oversight of legislative rationality in a constitutional democracy.

As such, this theme presents no novelty. For a start, it has been vividly discussed in Germany since the late seventies. In a seminal piece on the constitutional mandate of due legislative care, Gunther Schwerdtfeger (1977) prompted a dispute as to the judicial review of the process of legislative justification which has lasted to the present moment. Drawing on Peter Noll's (1973) theory of lawmaking, Schwerdtfeger claimed that the Basic Law should be interpreted as requiring legislators to follow a rational legislative method, whereby it would be incumbent on the BVerfG to control whether this method has been duly observed. Challenging this interpretive standpoint, a number of leading constitutional scholars have since stressed that the Basic Law does not entitle the Court to review how well or badly legislation has been prepared, formed or justified, but only whether it has been enacted in a formally valid manner, and whether its contents remain within the substantive boundaries defined by the Constitution—say, whether the law is materially compatible with the fundamental rights. In this connection, Willi Geiger (1979) and Klaus Schlaich (1981) even coined the motto that, legally speaking, "the lawmaker owes nothing more than the law"—a law which is respectful of the Constitution, of course—, whereby any further demands of legislative rationality are just political or ideal aspirations and hence fall outside of the Court's review powers. For many years, this has been the predominant stance among German lawyers, be they academics or judges.[1] Yet, the rulings of the BVerfG have from time to time vivified the

[1] With significant exceptions, though: see e.g. Lerche (1984); Hoffmann (1990); Kloepfer (1995); Mengel (1997); or Lücke (2001). Whether Volkmann (2013: 120) is right to state that the purist

debate about the judicial oversight of rational lawmaking. The 2010 decision on the regulation of the subsistence minimum subsidy *(Hartz IV)* can be highlighted as a salient milestone.[2] In this judgment, the Court resorted to a doctrine which set out to control whether lawmakers had consistently, plausibly and transparently deployed the legislative fact-finding method they had previously opted for, and subsequently pronounced the regulation unconstitutional because of shortcomings in all those respects. As discussed throughout the book, a number of judgments delivered in recent years have further helped to shape this strand of review. Whether, why, and to what extent a court of justice like the BVerfG should set a critical focus on legislative rationality is obviously a controversial matter. Even the judges themselves have commented on this issue. As stated in the 2012 decision on the salary of university professors, the Court largely shares the view that, "pursuant to the Constitution, the lawmaker owes only a valid law", but also points out that this view only holds "in principle", since the protection of fundamental rights and basic constitutional norms may eventually require "compensatory" checks in order to make sure that legislative choices have been sufficiently and openly justified—e.g. in that they have been premised on well-made diagnoses and prognoses about the legislative facts and impacts.[3]

Curiously enough, the theory of legislation has been losing force amongst German legal academics for a number of years, but this sort of disinterest has been more than compensated for by the legisprudential turn that has taken place within the BVerfG. Now it is precisely the Court which draws jurists' attention to the problems of legislative rationality and to the *due* process of legislation. This—we think—cannot be but welcome, for it may counterbalance the widespread juristic and legal-theoretical disregard of the production of law and the paramount role of legislators, regulators and policymakers within the legal system. Moreover, the Karlsruhe case law on rationality review conforms to the theoretical distinction of "rationality as consistency" and "rationality as efficiency" (Elster 1982)—which, it may also be noted, underlies the separation of parts III and IV of this volume. The growth in the analysis of rational behaviour, rational beliefs and rational choice does not leave the legal order unaffected and the notion of rationality is perhaps the most important unifying element in contemporary interdisciplinary research. Since the quest for rational lawmaking encompasses both intrinsic formal rationality and extrinsic substantial rationality (Flores 2005: 37) as well as instrumental, technological, and discursive rationality (Cyrul 2005: 94) this volume unites contributions on a variety of aspects of rational lawmaking.

To readers who question our focus on Germany we have two answers. First, as indicated above, the singular role played by the German Federal Constitutional

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teory is no more valid must be left open because it entails both an analysis of German constitutional law and an evaluation of current literature which exceeds the objective of this introduction by far.

[2] BVerfG, Judgment of 9 February 2010, 1 BvL 1/09, para 139 ff. For a discussion of this ruling, see Meßerschmidt (2013a: 235 ff.) and Rose-Ackerman et al. (2015: 178 ff.).

[3] BVerfG, Judgment of 14 February 2012, BvL 4/10, para 163 ff.; cf. Judgment of 23 July 2014, 1 BvL 10/12, para 77 ff.

Court in expounding the multi-faceted concept of legislative rationality merits cross-border interest. Thus, the German literature is interesting because it has both paved the way to rationality review and accompanies the case law of the Court in a mostly supportive but sometimes critical vein. Second, the book endevours to come to terms with a fascinating paradox. German public law stands on the shoulders of the Constitutional Court but it also sits in its shadow. The latter should not be taken to imply, however, that German public law has not been able to influence Karlsruhe case law for indeed it has successfully done so in the past on a number of occasions. Whilst the German literature on judicial review and legislation is vast, the strongholds of European legisprudence are definitely not in Germany, but rather in neighbouring countries. The dependency of German public law academics on the case law of the Constitutional Court supported, for many years, a kind of splendid isolation and led both to the neglect of interdisciplinary research and to the impeding of international exchange.

The fact that so many public law teachers in Germany participate in this debate is, consequently, an asset that also presents a predicament. It cannot be denied that the notion of rational lawmaking is not a "main course" but rather a "side dish" in the German debate being more widespread and less enduring than the debate in international legisprudence. Its "issue attention cycle" largely depends on events such as the choice of conference topics hosted by well-known institutions. The Association of German Constitutional Law Professors (*Vereinigung der Deutschen Staatsrechtslehrer*) twice chose problems of legislation as the key subject of its annual meetings (1982 and 2011) and the likewise prestigious German Legal Council (*Deutscher Juristentag*) chose in 2004 "Better legislation" as one of its prime topics. Consequently, the academic debate is characterised by fluctuations in activity and popularity and has been influenced in recent years even more by the case law of the Constitutional Court.

Needless to say, both the claim and the denial that standards of legislative rationality and due process of lawmaking can be inferred from the constitution and controlled by courts are familiar in many jurisdictions. Our topic has a long and noble history in the constitutional law literature, particularly in the USA,[4] but it is only recently that the constitutional review of rational lawmaking has emerged internationally as a topic in its own right, prompting a wealth of scholarly works. This seems particularly noticeably in the European Union, where the political initiatives of regulatory improvement and rationalization have probably influenced the way in which the ECJ reviews legislation—the case law of the ECtHR has also contributed to the growing normalization of this strand of review.[5] Such a convergence of legisprudence and constitutional control receives a diversity of names, ranging from *rationality* or *regulatory* review, to *procedural* (rather, *semi-procedural*, or *semi-substantive*) *review*, and to the *due deliberation* (and *due process of lawmaking)*

[4] For the USA, see, in particular, Tribe (1975); Linde (1976); Sandalow (1977); cf. also Barber and Frickey (1991). More recently, to name just some examples, see Frickey and Smith (2002); Coenen (2001, 2009); Bar-Siman-Tov (2011, 2012); or Araiza (2013).

[5] See e.g. Alemanno (2011, 2013); Popelier (2012, 2013) and Keyaerts (2013).

model of judicial review or, more simply, *process review*. In spite of this variety of denominations, the underlying concept seems quite simple. Consider the following passages:

> The criterion [of the quality of the decision-making process] relates to arguments of procedural rationality. Procedural rationality review (…) rests on the idea that *discretion does not dispense the lawmaker from the duty to act rationally*. (…) A procedural conception of rationality enables the courts to *assess the rationality of government action, while avoiding operating a substantive balancing* of interests. Instead, the court verifies whether the lawmaker has based his decision on a solid and wide balance of interests, or whether the conditions for this exercise were present. This does not impose upon the government the duty to follow a well-defined procedure, but merely requires minimum *guarantees for balanced, evidence based decision making* (Popelier 2013: 252, emphasis added).

In the same vein, the current president of the ECJ said once that this strand of review

> is an interesting way of making sure that, *in areas where the (…) legislator enjoys broad discretion, the latter does not commit abuses*. [It] increases judicial scrutiny over the decision-making process (…). However, *it prevents the [court] from intruding into the realm of politics*. (…) Moreover, process review should (…) allow the [court] to make use of its 'passive virtues' by avoiding unnecessary substantive conflicts with the (…) political institutions. In my view, *the [court] is more respectful of the prerogatives of the political institutions* (…) if it rules that, when adopting the contested act, those institutions failed to take into consideration all the relevant interests at stake, than if it questions their policy choices by reference to its own view of the issues involved (Lenaerts 2012: 15–16, emphasis added).[6]

Although the scrutiny of legislative rationality needs not necessarily be restricted to process-oriented doctrines, both approaches raise similar issues. Is judicial review of the process of legislative justification and the rationality of lawmaking a feasible way to overcome the conflict between juristocracy and democracy, between courts and parliaments, and between rights and regulators? What are the merits and the problems of these emerging variants of constitutional control? And how to conciliate rationality or process checks with the substantive analysis of laws? These are the kind of questions we pursue. By bringing together legislation and public law scholars to elaborate on legisprudence *under review*, this contributed volume aspires to shed light on the constitutionalisation of rational lawmaking as a controversial trend gaining ground in both national and international jurisdictions. A critical focus is also placed on the theoretical and methodological difficulties posed by this sort of "legisprudential activism" on the part of courts—that rational lawmaking can or should be imposed by judges is far from evident.

The pieces collected here cover a wide spectrum of the legal scholarship in Germany, and we have tried to assure that the plurality of views is represented, stressing both the virtues and the drawbacks of the constitutionalisation of legispru-

[6] As a recent monograph on the due process of lawmaking concludes, "if we take seriously the importance of democratically legitimate policymaking and if we have confidence in the restraint of the courts, a move toward more review of process is worth putting on the table for debate" (Rose-Ackerman et al. 2015: 275).

dence. When we started to work on this anthology we felt that it could be interesting to present a controversial discussion focussing on opposing conceptions. We rejected, however, the idea of selecting authors purely because their views represented polar ends of the spectrum, e.g. rational technocrats vs. judicial purists, and elected to focus instead on their individual academic standing. Thus, all contributions turned out to be well balanced, weighing carefully the pros and cons of "rationality review" by the German courts. With a view to gaining influence, most contributions to the German debate tend to aim at consensus rather than intensifying discord. Therefore, readers outside Germany may even be a bit disappointed not to find in the volume fierce adherents of maximum rationality standards but authors who take into account the "political costs" of judicial activism with a focus on rationality review. One may indeed wonder if German scholars are too addicted to the democratic legitimacy of lawmaking at a moment when the charms of European and German representative democracy are beginning to fade and might benefit from the counterbalancing point of view of rationality review.

Notwithstanding this we try to connect the German debate with the international discussion, where the topic of the rationality of legislation—in connection with judicial review—is being paid more and more attention. It should be stressed, however, that this book by no means tries to export the attitudes and perspectives of German scholars, but merely attempts to contribute to the emerging transnational dialogue on this matter. Given that the legal-constitutional import of legisprudence remains understudied, this volume aspires to offer both a useful and critical picture of the judicial control of rational lawmaking as a cycle, thus showing the "practical" applications and the "many faces" of "legisprudential review". Not all problems related to this legisprudential turn, however, can be dealt with in a single volume. In particular, we have left aside the interesting and far-reaching issues of legislative authenticity, interest-based legislation and legislative capture, for this would have led us too far away from our original objective. It should, however, be noted that this is a key aspect of the quality of legislation (Reicherzer 2006; Meßerschmidt 2013b; Petersen 2014). The book also tries to leave, as far as possible, the most complex aspects of constitutional dogmatics in the background—authors have therefore tried to avoid going into technicalities of German law. We could say, therefore, that the book is hence more about the theory of legislation and its intertwinement with judicial review than one about constitutional law.

The present volume is organised in five parts. Part I frames the two central issues pervading the whole collection: the intricate relation between judicial review and democracy in constitutional states, on the one hand, and the possibility of improving and rationalizing the task of legislation under the current circumstances of politics, on the other. While the two chapters in this part are largely written from a German perspective—which will make it easier for non-German readers to comprehend how the German Parliament and the BVerfG jointly contribute to the lawmaking process—, they also provide us with more general insights into the interrelations between judicial review, democracy and legisprudence. In Chap. 2, Gertrude Lübbe-Wolff elaborates on the constitutional control of legislation as a double-edged sword within democratic states. In her view, the institution of judicial review contains an

inherent dilemma for it has been conceived to protect rights, values and processes, which are, in their turn, essential to democracy. At the same time, however, the regular practice of constitutional review necessarily leads to judicial interference with the very principle of democracy. There is, thus, no "one and only" proper solution to this endless democracy dilemma as it derives from the very nature of constitutional review. Drawing on her experience as a former Justice of the German Federal Constitutional Court, the author convincingly argues that, in the last analysis, there is and can be no clear-cut boundary between the legitimate exercise of judicial review and the overstepping of the decisional competences constitutionally accorded to the BVerfG, which may sometimes unduly block legislative actions. One should bear in mind that, unlike other legislatures, the German Parliament inhabits and must operate in a normative environment where there exists a very strong constitutional court which benefits from a huge public support. That is not the biggest challenge that German lawmakers have to face, though.

As discussed in Chap. 3, attempts to improve the quality of legislation may fall at several hurdles. The piece by Helmuth Schulze-Fielitz delves into the difficulties that rational lawmaking and better regulation initiatives are faced with in a democratic political system which is characterised by the search for balance between competing interests. According to the author, quality standards of lawmaking must serve the ideal of parliamentary democracy; the opposite view, which gives the effectiveness and efficiency of legislation priority over democratic legitimacy, should be rejected. Improving lawmaking for the sake of a pre-existent public interest or rationality standard must not narrow democratic choice. The author is consequently skeptical of any guidance offered by substantive and procedural standards for good lawmaking, and criticises those proposals to regulate the legislative process which go beyond the usual standards already governing parliamentary proceedings. He recommends, instead, strengthening those interests in better regulation which are rooted in social life, as well as bolstering the role of the different actors taking part in legislation. Having regard to the various legislative players—ranging from politicians to vested interests and from legal scholars to courts—, Schulze-Fielitz concludes that only government officials in charge of legislative drafting take a professional interest in good lawmaking and that time pressures and the need for fast lawmaking prevent ambitious improvements of legislation. To be sure, proposals to improve legislative rationality and evidence-based lawmaking merit closer attention. In the end, however, the author sees little chance to overcome the rationality deficits of legislation which he says should, after all, be accepted as an expression of the imperfection of democracy.

Within the framework delineated in Part I, the rest of the volume sets out to address the many faces of the legisprudential turn of constitutional control in Germany. Part II provides a broad overview of the judicial review of the rationality of legislation, laying special emphasis on the controversial duty of legislative justification that the BVerfG has sometimes imposed on lawmakers.[7] In Chap. 4, Bernd Grzeszick gives an account of the variety of rationality requirements that

[7] For a discussion of this particular topic, see also Kluth (2014) and Gartz (2015).

constitutional courts—in particular, the BVerfG—increasingly set on parliamentary legislation. Straying away from their traditional reluctance to check laws for rationality the courts have, he argues, incorporated the rational lawmaking discourse into constitutional reasoning. One might take this shift to imply that lawmakers are now subject to a general obligation to legislate consistently and rationally, but, in general, significant scholarly criticism has been levelled at rationality-driven case law. So the author explores to what extent this criticism is justified and, focusing on the consistency principle as developed by the BVerfG, he argues that it is indeed well-founded. Considered from the point of view of the rule of law, the judicial exigencies of rational lawmaking are to be criticised on three major counts: they do not conform to the traditional judicial review doctrines; their standard of review is insufficiently determined by positive constitutional law; and their effects on the protection of fundamental rights are incalculable. Moreover, Grzeszick goes on, these exigencies work quite often to the detriment of democracy, for they restrict too much the leeway for legislative decision-making even in cases where there exists no need for the Court to correct any legitimacy deficit in legislation. Finally, the author concludes, when applied by the ECJ rationality requirements run the risk of unbalancing the division of competences between the European Union and the Member States.

The judicial control of the formal qualities of legislation also has an important bearing on the rationality of lawmaking. That is the core thesis we find in Chap. 5, where Gregor Kirchhof takes up the issue of the generality of laws and hence one of the chief aspects of the rule of law—at least for the standard, formal conception. Nowadays, the author argues, we inhabit such an intricate social and regulatory landscape that the very idea of co-ordination through law is at risk. Clinging to both an instrumentalist paradigm and a government-by-goals approach, lawmaking institutions often try to catch up with a complex and ever-evolving social world by producing a large quantity of special legislation which results in an increasing deficit of legal certainty and confidence in law. For Kirchhof, the huge regulatory production, springing from national, international and supranational sources, renders the law less comprehensible, less consistent and hence less authoritative—a problem that intensifies, in his view, because of the public sector's tendency to equate the common good with specific regulatory goals, and ultimately to the tasks falling within the State's functions. A likely solution to the decreasing import of "Law and order"—Kirchhof's argument continues—is to recover the notion of the "generality of law", which is one of the most significant legacies in the history of our legal ideas, particularly of those which flourished in the Enlightenment. The German Basic Law and European legislation make demands in terms of generality which differ as to the degree to which they are binding and justiciable. Yet, as the author recalls, the formation of general rules provides major opportunities when it comes to protecting fundamental rights and democracy. The attempt to reinvigorate the old idea of the law is therefore worthwhile.

It has often been claimed that democratic decision-making involves disclosure of the reasons on which a legislative enactment is based (cf. Ely 1980) and in Chap. 6 Christian Waldhoff takes this idea further, examining the constitutional duty to

justify legislation and raising the puzzling question of whether and how the legislator is bound to give reasons for its decisions. The author analyses, firstly, whether such a duty to give reasons may actually increase the rationality of legislation. Secondly, he discusses the role that legislative materials and records play within the judicial review of statutes, particularly as far as concerns the investigation of the so-called legislative purpose, which is at the heart of the proportionality test. Thirdly, the article points out that the BVerfG requires the legislator to give reasons only in those fields of law in which legislation is reviewed deferentially, such as those regarding economic and social policy, or the need to issue nationwide regulations on a federal level. Against this backdrop, Waldhoff thinks that the aforementioned thesis of Geiger and Schlaich —the legislator only "owes" the statute and not the reasons for it—is largely correct, and that the core policy decision in a legislative act does not require justification. In contrast, German law does impose proper legal duties of justification on the acts of the administration, and this raises a parallel issue: To what extent must administrative rule-making be justified? If there exists, legally speaking, no duty to justify statutes, should that be different for regulations or other kinds of non-statutory law that might be qualified as "political decision-making"?

One of the major concerns in legisprudential review is systematicity and it is not for no reason that legislative rationality has been defined for centuries as a systematic attribute. Part III is thus devoted to the judicial review of the systemic rationality of legislation, in particular to the requirements of legislative consistence and coherence—say, of "systematic justice" (*Systemgerechtigkeit*)—as developed by the BVerfG.[8] Since lawyers' methodological toolbox is knowingly suited to deal with this kind of problems, one would expect that the systemic reading of rationality garners the greatest support from public law academics. Naturally, nobody is in favor of contradictory norms and legal disorder. However, the agenda of better regulation and the "art of legislation" cannot be translated into judicial review on a one to one basis, and the notions of coherence and consistency are far less consented than might appear at first sight.

In Chap. 7, Christian Bumke pursues the question whether the Basic Law comprises a duty to legislate consistently and, if so, what the possible contents of "consistent legislation" are. His starting point is the realignment that has taken place in the past few years in the BVerfG's case law regarding the constitutional requirements to rationalise content and which has led to both a concretion and a broadening of these requirements. Bumke critically discusses this trend, holding that the main challenge when establishing consistency requirements is to integrate the demands of rationality and of the rule of law into the overall conception of a democratic, constitutional state, because this conception is based on limited rationality and political compromise. This implies a cautious handling of consistency requirements in judicial review. Interestingly, the milestones of this development are decisions on gambling law and smoking bans. Judging from ECJ lighthouse decisions such as Dassonville and Cassis de Dijon, however, the experience that legal progress

[8] In this context, consistency and coherence are sometimes used as interchangeable notions.

sometimes relates to human weakness is not at all new. Taking into account the high number of judgments of the ECJ on the question of gambling regulation, major progress in the field of constitutional law goes back to the intense legal battle of the gambling industry. In this connection, it becomes clear that the notions of consistency and coherence are more than manifestations of the ideal of systemic rationality but closely related to the legitimate attempt to fence in regulation, while it is hard to deny that some reading of consistency suffers from a neoliberal bias. This leads to the more general question whether it is possible to construe rationality beyond ideology, which, however, is outside the scope of this edited volume.

Whereas Bumke approves of the obligation to legislative consistency and even rejects the idea that rationality of lawmaking could be treated as a variable concept, the two next pieces in this part take the opposite view. In Chap. 8 Matthias Rossi embraces a more critical attitude towards the "principle of consistency". In his view, this principle confuses the relative standard of equality rights with the absolute standard of freedom rights. Moreover, it causes the law to transform from an object in a yardstick for judicial review, thereby turning it into a standard reviewing itself. Among other objections, Rossi refers to the separation of powers between the legislature and the Federal Constitutional Court, which stands opposed to the principle of consistency. Admittedly, the principle of consistency helps to strengthen the rationality of the law, at least as a reflex, but it also fortifies the position of the Court within the structure of the constitutional bodies. It focuses on the self-obligation of the legislature and is tied to a selected regulatory concept to such a degree that any deviation is to be deemed contradictory, and hence unconstitutional. Thus this very principle helps to radicalize the legal system because political consistency is now required where practical concordance was previously called for. While Bumke cannot imagine reasons why the legislator should be allowed to act irrationally, Rossi emphasizes that democratic legislation is always inconsistent legislation. Therefore, he rejects to convert the item on the "political and legislative wish list" into a principle underlying the rule of law. This, in his own words, vehement criticism and at the same time sober appraisal of rationality review stands in line with the way of thinking of Schulze-Fielitz, as expounded in Chap. 3.

In Chap. 9, Roland Ismer concentrates on another—and even more complex—strand of coherence review: taxation law, which is, on the one hand, his special area of expertise and, on the other hand, an as important field of application of the notion of legislative consistency as the aforementioned examples. Ismer argues, perhaps less vehemently than Rossi, but also unambiguously that the principle of coherence should not be considered as a binding principle of constitutional law. He demonstrates in detail that the principle of equality is sufficient to solve most of the problems, which gave rise to the impression that the impact of the coherence requirement in the recent case law of the Karlsruhe Court can hardly be overestimated. Opposite to Bumke, the author speaks out in favor of varying the intensity of rationality control, depending on the decision at hand, and suggests that many problems dealt with by the coherence requirement so far could be discussed within the framework of EU state aid rules. Ismer thus privileges precise doctrines over general standards such as consistency and rationality.

In Part IV, contributions revolve around the judicial scrutiny of the socio-empirical elements of rational lawmaking: in this regard, the control of the factual premises underlying statutes (the so-called "legislative facts") and lawmakers' duties to follow-up legislative impacts and to correct legislation, as well as the control of symbolic laws, emerge as key issues. In Chap. 10, Christian Bickenbach tackles one of the most puzzling problems in constitutional law, that of legislative "margins of appreciation", and discusses whether these margins should be derived from the (more or less) rational behavior of lawmakers. He starts by recalling the ambivalence of rights-protecting judicial review—its dilemmatic nature, in Lübbe-Wolff's terms. On the one hand, laws influence the future of people, and these people are accorded the right to determine their future on their own, for which fundamental rights can operate as barriers for the lawmaker. On the other hand, however, the lawmaker is allowed to interfere with these rights provided that it does so proportionally—otherwise legislative action breaches the constitutional order. The basis of a proportional, rights-affecting law is made up of logical reasons based on legislative fact-finding and prognoses. The BVerfG has the authority to control legislative power, but if it controls parliamentary laws too strictly, it is in danger of breaking the separation of powers and the principle of democracy. If its control is too weak, it may fail to protect fundamental rights. Legislative margins of appreciation are a line of reasoning in rulings by the BVerfG to find a way between judicial activism and judicial restraint. German constitutional law does not have a political question doctrine that accounts for the importance of legislative margins of appreciation. One of the pending tasks in German constitutional law must therefore be the systematization of legislative margins of appreciation. The article shows that the "internal" legislative process influences legislative margins of appreciation and, consequently, that the Court has to control legislative fact-finding and prognoses as a part of the process of legislation.

Following this line of thinking, Daniel Oliver-Lalana discusses in Chap. 11 how the BVerfG has construed the Basic Law as requiring lawmakers to monitor the impacts of statutes and to revise or adjust them in the light of evolving legislative facts, which compensates for the Court's deference to legislative prognoses under conditions of high epistemic uncertainty. The legisprudential tenets of retrospection and correction are thus converted into legal-constitutional duties (supposedly) binding on legislatures. Drawing on German case law, the author discusses the rationale, scope and shortcomings of this doctrine, and underlines the difficult role of ex post evaluation in the judicial control of legislation. Oliver-Lalana puts forth a twofold thesis. On the one hand, a post-legislative doctrine may be expected to provide a dynamic protection of fundamental rights by smoothing the way for the courts to second-guess the constitutionality of statutes in retrospect without intruding into lawmakers' primary competences to deal with social complexities. But, on the other hand, the German experience illustrates that such a doctrine is not easy to apply and remains under-enforced for the most part, which casts doubts on whether it is an effective safeguard of fundamental rights over time or whether it has a merely rhetorical or dilatory function. Finally, the author argues that approaches to the constitutionalization of ex post evaluation like that of the BVerfG, while being positive on

the whole, should not eclipse the problem of the ex ante perspective under which legislation is usually reviewed, and suggests making more space for evaluation and impact arguments in constitutional review.

In Chap. 12, Ulrich Karpen elaborates on three important attributes of a good law, namely efficacy, effectiveness and efficiency, which he conceives of as an expression of the economic or "managerial" rationality currently pervading post-welfare states. Yet, this outcome-oriented view of legislative rationality must be reconciled with those demands that derive from legal rationality—as a precondition of legitimate state action—and constitutionality, which are to be controlled by courts. As a consequence, the judicial review of legislation is no longer a mere safeguard of the quality standards of legal rationality, but is increasingly broadened to cover the evaluation of legislative outcomes. In this regard, the author critically observes a juridification of lawmaking which leads to an unbalance between the legislative and the judicial branch of government by giving the latter too much power in the policy cycle. In many countries, judges are thus becoming regular "partners" in the lawmaking process who assess goals, instruments, form and procedure of legislation in the light of the constitution. This trend—Karpen argues— is particularly noticeable in Germany, where we can witness a sort of "hybridization" of the representative-democratic and the juridical rule of law elements of the constitution. Against this backdrop, the author underlines the need to restore the balance between the legislative branch and the judiciary, and vindicates the conception of the constitution as a framework for state's action, the centrality of legislative discretion in the democratic rule of law state, and hence the limitation of judicial interventions into the political and legislative arena.

In Chap. 13, Angelika Siehr raises the problem of the judicial control of symbolic legislation. She begins by discussing how the due fulfilment of standards of legislative rationality may often enter into conflict with the majority-based, democratic legitimacy of legislation—it is *voluntas*, not *ratio*, which legitimises lawmaking. As the author aptly recalls, this well-known tension intensifies in the case of symbolic laws. These laws are usually characterised by reference to an element of deception, that is, to lean on Merton's distinction, to a discrepancy between their "manifest" purposes—that cannot be actually achieved—and certain "latent" purposes that remain hidden. The Chapter examines the different notions of symbol as well as the different conceptions and standards of rationality that can be derived from the German Basic Law, looking to whether judicial review is able to tackle the problem of (deceptive) symbolic legislation. Siehr shows that the constitutional requirement of "truthfulness of legal norms" *(Normenwahrheit)* is specifically tailored to resolve this problem. Still, as Siehr observes, this requirement is only enforceable in a limited way by the BVerfG. This leads to the question of how the grey area between justiciable constitutional principles and "internal" standards of legislation with no bearing on constitutionality (but on its quality) can be dealt with. The author concludes by suggesting that a lawmaking-oriented jurisprudence—legisprudence—could provide us with some guidance in this task.

As shown in Part V, the case law of the BVerfG also constitutes an excellent research area to analyse the links between rational lawmaking, balancing and

proportionality, and to discuss the interrelations between process review and substantive review. In Chap. 14, Jan Sieckmann defends that balancing is the core of rational lawmaking, as well as a keystone of the democratic legitimacy of laws, for the adequate representation of the interests of the governed requires the balancing of these interests: this makes proportionality the most relevant constitutional standard to assess legislation. After giving a general account of balancing as rational method to establish a priority amongst conflicting arguments according to their weight, Sieckmann investigates the distinctive features of legislative balancing in contrast with judicial balancing (as practiced e.g. by the German Constitutional Court), delving into its "openness", "purity", and "complexity". Legislative balancing—he argues—is open in the sense that the legislator may, within the limits of the constitution, choose the objectives she wants to pursue and may consider any option she thinks suitable for achieving them; it is pure balancing, which is not constrained by previous balancing results or by the perspective of constitutional control that courts are bound to follow; and it is complex inasmuch as it may include not only a single-scale conflict but a choice among multiple options.

Finally, in Chap. 15, Klaus Meßerschmidt aims to clarify the relationship between the substantive and procedural reviews of legislation in the case law of the German Federal Constitutional Court. While substantive review, owing to the constitutional guarantees of Article 93 of the Basic Law, is beyond question and makes up the bulk of BVerfG adjudication, process review still encounters objections. Nevertheless, the German Federal Constitutional Court has adopted the idea of procedural review while upholding substantive review as its main tool. This contribution argues that the Court only uses procedural arguments as an adjunct to substantive review. This raises questions concerning the functioning of a model that merges standards deriving from different philosophies that are not necessarily mutually reinforcing. The article demonstrates that the regular dual assessment of the procedural and substantive merits and downsides of a piece of legislation requires a preference rule that informs the judiciary on how to handle the subsequent conflicts. The Court evades this difficulty by shifting judicial review to the process of lawmaking only when the substantive merits of a law are hard to assess because of the complexity of the matter. Whether the standards of substantive review are likely to relax owing to the emergence of procedural review requires a decision of fundamental significance, carefully avoided so far by the Courts and academia.

The contributions to this volume cover a wide range of topics within the overall theme of rational lawmaking and unite a multitude of authors. It is nevertheless but a selection. Since the notion of rational lawmaking fits into the secular debate on judicial review many more German authors merit attention than the small number those presented in this volume. It is needless to say, however, that exploring the views of other participants in the German debate is too large a task for a single volume and that we must instead confine ourselves to duly referencing in the contributions that follow those authors we have not been able to include. Readers of the book will in this manner quickly understand the wide-ranging and multi-faceted nature of the debate.

All in all, the fourteen pieces collected here demonstrate that the theory of rational lawmaking and the constitutional control of legislation can no longer exist separately from one another. Simply put, they have too much in common. In particular, judicial review goes far beyond the formal, procedural and substantive qualities of laws, and covers also a legisprudential aspect. Whether legisprudence offers a way-out from criticisms of a value-laden, arbitrary case-law remains open but it is no casualty that this trend emerges in an era not only of balancing, but of balancing criticism. By making *legisprudence under review* the central topic of this contributed volume, we hope not only to cultivate discussion of the German experience in the constitutionalisation of rational lawmaking, but also to foster reflection on a topic which has profound legal-political and institutional implications. It goes without saying that we would all like "better" legislation, but the challenge is whether and how the judicial review of the rationality and justification of legislation can be developed in a feasible and democratically sympathetic manner to encourage or even compel lawmakers to legislate (more) rationally.

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Part I
Judicial Review, Democracy, and Legislation Theory

Chapter 2
Constitutional Courts and Democracy. Facets of an Ambivalent Relationship

Gertrude Lübbe-Wolff

Abstract This chapter addresses the ambivalence of judicial review as a safeguard for and constraint on democracy. On the one hand, constitutional review provides an important safeguard for rights and procedures which are essential to democracy. On the other hand, an institution which is able to protect democratic rights and principles will necessarily – at least now and then – come to be seen as overreaching, and thereby itself intruding upon principles of democracy. The chapter also draws attention to factors promoting the institutionalisation of constitutional adjudication worldwide, and to institutional frameworks shaping the more or less activist approach of courts in constitutional matters. It shows why German democracy has fared well, so far, with a powerful constitutional court which has, to a certain extent, assumed the role of a guardian of rational lawmaking, and why there is no "one and only" proper solution to the democracy dilemma implicit in the question of constitutional review.

Keywords Constitutional courts • Judicial review • Democracy • Interpretation • Standards of scrutiny • Ambivalence • Federalization • Proportionality • German Federal Constitutional Court

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2.1 The Ambivalence of Judicial Review

Constitutional courts – apex courts with the competence to review statutory legislation for compatibility with constitutional law[1] – are a widely accepted part of many democratic political systems. Whether a judicial institution with the competence to declare legislative acts unconstitutional is compatible with the principle of democracy is, however, contested.[2] The late Robert Bork even saw constitutional courts as an institutionalised conspiracy of leftist elites, designed to fence their queer political agenda off against the common voter.[3]

In fact, there are two perspectives from which the operation of constitutional courts can be analysed: either with a focus on their possible or actual safeguarding and fostering function with respect to democracy, or with a focus on how they may or do restrict democratic decision-making. To get a complete picture, both aspects must be considered.

Democracy depends on a framework of rules. These rules are themselves an object of democratic decision-making, but they cannot be established, changed or disregarded *ad libitum* if the system in which they apply and which they constitute is to be a democratic one. Constitutional courts are commissioned to protect the constitutional framework of democracy. In that respect, they appear as instruments of securing, rather than restricting, democracy, even if their task includes defending the rules of democracy against the will of a ruling majority.[4] It goes without saying that complying with certain constitutional rules is not undemocratic but a necessary prerequisite for the functioning of democracy as such, as well as of the particular type of democracy established by the relevant constitution.

On the other hand, a court with the power to bring constitutional rules to bear even against a legislative majority will necessarily also come to attention as a factor limiting democratic decision-making. The power of a constitutional court can be misused. And, to make it worse, it is in the nature of things that in the usually difficult cases decided by constitutional courts, opinions on whether this power has been used properly or misused will typically be divided. There are no perfectly operational, invariable and cross-culturally valid standards determining a dividing line between reading something out of the constitution (or any other legal rule) and reading something into it, between interpretation and rule-making, or between

[1] For alternative – strong or weak – forms of such review see Tushnet (2008: 18 et seq.). The above definition includes courts that are not specialized in constitutional review.

[2] Waldron (2006), concerning judicial review in countries with basically functional legislative institutions; Waldron acknowledges that judicial review may be in place where this condition is not met.

[3] Bork (2003). By contrast, Hirschl (2004) sees the transfer of power which judicially administered constitutionalism implies as the result of a self-interested strategy of conservative ruling elites designed to insulate their hegemonial position against democratic majorities.

[4] On constitutional jurisdiction as a safeguard of the democratic constitutional system see Böckenförde (1999: 10 et seq.); for more extensive analysis of the role of the German FCC with respect to the consolidation and quality of democracy in Germany see Kneip (2009, 2013).

applying the law and making policy.[5] Once a constitutional court has been established or – as in the case of the Supreme Court of the United States and the Supreme Court of the German *Reich* (*Reichsgericht*) under the *Weimar* constitution[6] – has established itself by assuming a competence for judicial review which the constitution has not conferred upon it explicitly, accusations of excess of power will inevitably arise. And opinions on whether such accusations are justified or not will inevitably be divided. Where "political question" doctrines have been devised to avoid trespassing on the terrain of other constitutional powers,[7] there is as much controversy over their proper area of application as over the reach and limits of judicial power in general.

2.2 Cultural Differences and Current Trends

Whether and to what extent the operation of a given constitutional court will be criticised for transgressing judicial power depends not only on the behavior of that court and the contents of the constitution which it interprets, but also on expectations of the observers which are shaped by the legal and political culture to which they belong. In the historical circumstances in which the Basic Law (*Grundgesetz*, the German Constitution) and the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*) were created in 1949 and 1951, respectively, it is hardly surprising that strong precautions to secure democracy and the rule of law were held necessary, and that the Federal Constitutional Court (FCC) was accordingly established as a powerful veto player. The experience of the dimensions of evil which neglect and destruction of institutions securing human rights and the rule of law had set free, militated for a minimax strategy in legal policy – a strategy that would as safely as possible prevent another worst case. The decision to establish a powerful constitutional court was part of such a strategy, and it was taken consciously,[8] although contemporary political actors did not grasp the full implica-

[5] On the tradition of confronting "law" and "politics" in German constitutional thinking see Haltern (1998: 81 et seq.); Kau (2007: 130 et seq.).

[6] See Lübbe-Wolff (1990). For the jurisprudential background Gusy (1985).

[7] Cf. Burchardt (2004: 32 et seq.).

[8] This is common wisdom and one of the reasons why the FCC, in spite of its rather extraordinary role in the German political system, is accepted as an integral part of it. As an illustration, see the following remarks from a presentation of the FCC on the website of the German diplomatic missions in France: "Quel est le point commun entre les missions de l'armée allemande à l'étranger, le droit à l'avortement, la fermeture des magasins le dimanche, le traité européen de Lisbonne et le montant de l'aide sociale ? Dans tous ces domaines, les responsables politiques allemands ont, un jour, dû se plier à un arrêt de la Cour constitutionnelle fédérale. Cette dernière veille au respect de la Loi fondamentale. Mais ses arrêts revêtent parfois une grande portée politique. Ainsi, en 2011, elle examinera la constitutionnalité du plan de sauvetage de l'euro, mis en place en mai 2010. Historiquement, le rôle qui est assigné à la Cour constitutionnelle fédérale est la conséquence des expériences vécues entre 1930 et 1945. En 1949, les pères de la Loi fondamentale ont ainsi voulu fixer des limites au pouvoir politique au sein de l'État. Pour ce faire, ils ont doté la Cour

tions of their decision to set up a powerful court, as chancellor Adenauer's famous remark on the role of the Constitutional Court in the dispute over the European Defense Community Treaty ("That ain't what we imagined!"[9]) nicely illustrates.

Besides the strongly felt need to fortify the new constitutional order, remainders of a widespread scepticism towards western concepts of democracy[10] contributed to acceptance of, and even a demand for, a strong countermajoritarian institution. In addition, the establishment of a potent constitutional court fitted in with the new Republic's federal organisation, which was itself regarded as an essential rampart against the resurgence of totalitarianism. The Swiss example shows that judicial competences to review federal legislation are not a necessary concomitant of federalism,[11] but there obviously is an affinity between the two.

To most British observers, a constitutional court operating as the German one does would appear as an unacceptable restriction of parliamentary sovereignty. Between the traditional British model of parliamentary sovereignty and the German post-war-model of a parliamentary democracy flanked by extensive constitutional adjudication, there is extensive middle ground. In France, for instance, the perspective of a "gouvernement des juges" is traditionally dreaded,[12] but an *a priori* review of legislative acts by the *Conseil Constitutionnel* (CC), and an additional competence of the CC, introduced in 2008, to review the constitutionality of legislative provisions upon referral by ordinary courts ("*question prioritaire de constitutionnalité*") have come to be accepted.[13] Much of what the German FCC does, however, looks like a judicial *excès de pouvoir* to French observers, and in past discussions in France concerning the introduction of an individual constitutional complaint, the role which the German FCC has been able to assume due to the popularity accrued to it from its competence to hear individual constitutional complaints[14] has served as a deterrent example.[15]

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constitutionnelle fédérale de compétences étendues, exposées dans l'article 93 de la Loi fondamentale…", at http://www.allemagne.diplo.de/Vertretung/frankreich/fr/03-cidal/09-dossiers/Karlsruhe/00-karlsruhe-seite.html (retrieved 30 August 2015). For the establishment of the FCC as a reaction to the atrocities of the Nazi period see Benda/Klein (1991: 1, 7); Anzenberger (1998: 6–7). When in 1951 the law on the FCC was passed, vesting the court with the power to hear individual constitutional complaints, a strong safeguard for and symbol of the rule of law was also favored in opposition to Bolshevism, see Deutscher Bundestag, minutes of the 112th session, 18 January 1951, 4195 (4218 C) (http://dipbt.bundestag.de/doc/btp/01/01112.pdf).

[9] On that remark and its background Bommarius (2009: 219 et seq.).

[10] Günther (2004).

[11] Even in Switzerland, however, the supremacy of all federal law over cantonal law is buttressed by federal judicial review. For an example see below, text with note 31.

[12] The constitutions of 1791 and 1795 explicitly ruled out judicial review of legislative acts, see Kielmansegg (2013: 148).

[13] For details on the successive development of competences of the Conseil Constitutionnel see Stirn/Aguila (2014: 633 et seq.); on the *question prioritaire de constitutionnalité* Walter (2015).

[14] See Lübbe-Wolff (2011: 133–137).

[15] Joop (2006: 588 et seq.).

Worldwide, constitutional adjudication is on the advance. The number of states with democratic constitutions – democratic at least on paper – has increased tremendously in recent decades. The "new democracies" have not developed in a long and essentially continuous process of political modernisation. Unlike, for instance, the United Kingdom or Switzerland, they could not rely on deeply entrenched democratic traditions, fully developed civil societies, a culture of compromise, or a broad popular awareness of the importance of procedural rules and other institutional framework. Accordingly, in their constitutional policies, as in the constitutional policies establishing the Federal Republic of Germany after World War II, the safeguarding function of constitutional jurisdiction usually carried greater weight than the so called "counter-majoritarian difficulty"[16] which it raises.[17] Most of the new democracies have, however, opted for a somewhat less pervasive type of constitutional jurisdiction than was chosen for post-war Germany. The great majority of Middle and Eastern European countries, for instance, have created specialised constitutional courts but have not endowed them with a competence to hear individual constitutional complaints against the judgments of other courts (within the EU, the Czech Republic and Slovenia are exceptions), which leaves the judiciary out of direct control by the relevant constitutional court, and the constitutional court without the popularity, prestige and – as a result – power to be gained from that competence.

Besides the demand for institutional safeguards stabilising new political systems, two more factors have promoted the propagation of constitutional adjudication, and will probably promote it further: the tendency towards federalisation or similar forms of autonomisation of regional entities within nation states, and the increasing importance of transnational integration, particularly integration into international treaty systems for the protection of human rights.

The affinity between regional autonomy structures and judicial safeguards that will protect them from unilateral distortion has already been mentioned above. In line with this affinity, not only Germany (Art. 93 GG), but also, for instance, Italy in its constitution of 1948 (Art. 134), Spain in its post-Franco-constitution of 1978 (Art. 161), and the Russian Federation in its constitution of 1993 (Art. 125) have provided for constitutional courts with competences to secure the constitutional distribution of powers among the central state and decentralised regional units. The autonomisation of regions (Scotland, Wales and Northern Ireland) within the United Kingdom, on the other hand, irreversible as it may be as a matter of fact, is not constitutionally, let alone judicially, protected against cutbacks by Westminster legislation. It is, however, protected against overreaching acts of the national executive; just as national competences are protected against overreaching regional legislation.[18] These are matters of supremacy of central legislation over acts of the executive as well as over regional legislation, and therefore matters within the ambit of

[16] Bickel (1986).

[17] In some cases, a mere signalling function may have been dominant, instead, see Stone Sweet (2012: 820).

[18] von Andreae (2005: 490 et seq., 495 et seq.).

judicial control. Judicial review of regional legislation is a traditional element of federal or otherwise decentralised systems even where these do not allow for judicial review of legislative acts on the national level. Regional autonomisation, which is on the rise worldwide, has been and will continue to be a driving force in the ascent of constitutional adjudication.

Moreover, the growing importance of integration into transnational legal systems promotes the creation of domestic mechanisms of judicial review that will ensure conformity of national acts, including legislative ones, with international obligations, and lower the risk of being caught in violation of treaty obligations by international courts. British, French and Turkish adaptions to the system of judicial protection established by the European Convention on Human Rights (ECHR) can serve as examples.

The United Kingdom, although traditionally averse to judicial review of parliamentary legislation, has created judicial competences to review the compatibility of legislative acts with the Convention. In 1998, the Human Rights Act (HRA) made the Appellate Committee of the House of Lords – which has since been transformed into the Supreme Court of the United Kingdom – and a few other judicial bodies guardians of the compatibility of UK legislation with the guarantees of the ECHR. According to Sec. 4(2) HRA, the empowered courts, if satisfied that a provision of (primary) legislation is incompatible with the Convention, may make a statement of that incompatibility. Parliamentary sovereignty was and is preserved in that the new judicial competence does not extend to voiding a provision which has been found incompatible. It will be for Parliament to decide whether or not to repeal or amend it.[19] Nevertheless, and although the HRA is not a constitution, review of compatibility under Sec. 4 HRA very much resembles constitutional adjudication.

The French *question prioritaire de constitutionnalité* also came into being as a consequence, at least indirectly, of the growing importance of the European Convention on Human Rights. Under the French Constitution of 1958 (Art. 55), treaties or agreements duly ratified or approved prevail over acts of parliament (subject to a condition which does not exclude the ECHR). Due to this elevated rank of the Convention, and due to a decision of the *Conseil Constitutionnel* in 1975 leaving the resulting task of *contrôle de conventionnalité* (review of compatibility with the convention) with the regular courts exclusively,[20] the growing importance of the Convention brought about an untenable asymmetry of reviewing functions in the French judiciary, as well as ensuing changes in the perception of judicial reviewing tasks, which eventually led to the invention of the *question prioritaire de constitutionnalité*.[21]

The nexus between protection of human rights by international instruments and expanding constitutional adjudication on the national level is particularly obvious in

[19] Judicial review as established by the HRA is therefore classified as a weak form of review, see Tushnet (2008: 24, 27 et seq.).

[20] Decision n° 74–54 of 15 January 1975, http://www.lexinter.net/JPTXT2/loi_relative_a_l%27interruption_volontaire_de_grossesse.htm

[21] See Walter (2015: 93 et seq.).

the case of Turkey, where in 2010, the institution of a "constitutional complaint" was introduced which, however, allows alleged violations of individual constitutional rights to be brought to the Constitutional Court only insofar as the relevant right is "within the scope of the European Convention on Human Rights".[22] The function of the new constitutional remedy to filter out occasions for embarrassing decisions of the European Court of Human Rights could not be more clearly expressed.

EU membership must also be mentioned. It is the source of the greatest increase in reviewing competence ever witnessed by the judiciaries of EU Member States. Due to the primacy of EU law, national law which is incompatible with directly applicable EU law is not to be applied in the Member States. The competence to check the compatibility of national legislation with EU law and, if the finding is negative, leave it unapplied, is not a monopoly of apex courts. As the European Court of Justice (ECJ) has put it, "every national court must, in a case within its jurisdiction, (…) set aside any provision of national law" which may conflict with directly applicable EU law.[23] The "compatibility review" thus incumbent upon all Member State courts bears even more resemblance to the review of national legislation typically exercised by constitutional courts than the above-mentioned compatibility review resting with the UK Supreme Court with respect to the European Convention of Human Rights.[24]

2.3 Institutional Frameworks

Whether a given constitutional court will make extensive use of its competences depends not only on the culture of legal interpretation in the respective country, but also on the institutional framework. "Integrated" constitutional courts, i.e. supreme courts which are not specialised in constitutional adjudication, will, *ceteris paribus*, tend to be less expansive in their constitutional case-law than specialised ones with extensive competences, mainly because they have other fields to cultivate and build upon in a way that will make their work visible and gain them reputation. And the extent of judicial activism in specialised constitutional courts is, at least in the long run, likely to be influenced by the extent of their respective competences. Those without a competence to hear individual constitutional complaints, including complaints against judgments of the regular courts, will be likely to exercise more judicial restraint (be it *generally* or at least *more often*), simply because without the

[22] Art. 148 (3) of the Constitution of the Turkish Republic. For details see Göztepe (2010: 693 et seq.); Göztepe (2015: 487 et seq.).

[23] C-106/77, Simmenthal II, ECR 1978, 629.

[24] In both cases, the standard against which national statutory law is measured is not national constitutional law but transnational law. Review of compatibility with EU law comes closer to traditional judicial review by constitutional courts in that it has immediate consequences for the applicability of legislation which is found incompatible.

prominence and popularity to be gained from such a competence[25] they will, *ceteris paribus*, have greater reason to fear disrespect on the part of the political powers.[26] Procedural details like the amount of time a constitutional court can take to pass judgment[27] or the majority which it needs to declare a piece of legislation void or incompatible with the constitution[28] also affect the likelihood of judicial interference with parliamentary majority decisions.

2.4 Costs and Benefits of Constitutional Adjudication: The German Case

The institutional framework and the dominant view of what is 'proper' interpretative judicial behavior are obviously interrelated; they shape each other mutually. The different outcomes of different national histories in this field each have their advantages and disadvantages, their costs and benefits. Benefits in terms of protection, integration and stabilisation which democracy may derive from the existence of an effective constitutional court inevitably come at some cost to the relevance of the political arena and perhaps also to the vividness of genuine political debate.[29] Besides, such a court will inevitably, at least *sometimes*, make decisions which a substantial or even the greater part of the public and its parliamentary representatives (and/or, visibly or not, a smaller or greater minority of the sitting judges) will regard as exceeding judicial competence and interfering with democracy.[30] At best this will, as in the case of the German FCC, be the exception rather than the rule,

[25] For the case of the German FCC see Lübbe-Wolff (2011).

[26] For the relationship between public support and the power of a constitutional court see Vanberg (2005: 119 et seq.), concerning the German FCC.

[27] The French *Conseil Constitutionnel*, for instance, has one month, or even just eight days in cases that have been declared particularly urgent, to decide in cases of *a priory* control of constitutionality (Art. 61 (3) of the Constitution of the French Republic) and three months to answer a *question prioritaire de constitutionnalité* (Loi organique n° 2009–1523 du 10 décembre 2009 relative à l'application de l'article 61–1 de la Constitution). Such time constraints put a narrow limit on what the court for which they hold can do.

[28] Renate Jaeger, former ECtHR judge, has suggested a 2/3 majority requirement for decisions of the European Court of Human Rights holding legislation incompatible with the European Convention on Human Rights, Jaeger (2014a: 9 et seq.). For critical comments on the suggestion that a qualified majority ought to be required for FCC decisions see von Danwitz (1996: 481 et seq.); Sacksofsky (2014: 716 et seq.).

[29] Tushnet (1999). Bickel (1986), at 22, suggests that judicial review might also promote sloppiness on the part of the legislature with respect to the constitutionality of its acts. This is definitely far from reality. Legislatures are much more afraid of being corrected by judicial review than they would, absent judicial review, be afraid of producing unconstitutional law. The effect of judicial review is that parliaments pay *more* attention, not less, to the compatibility of legislation with the constitution; cf., for the German parliament, Landfried (1994: 117).

[30] I myself have more often found decisions of the German FCC overly activist than overly restrained.

and varying parts of the political and societal spectrum will suffer from that impression. The likeliness of such a lucky outcome is again influenced by institutional framework conditions as well as by mindsets of the judges involved who are themselves to a great extent influenced by such framework conditions.[31]

On the whole, German democracy – as such – has gained more than it has lost from the operation of that Court, so far.[32] In Germany, policy decisions certainly are to rather a great extent restricted by the case-law of the Federal Constitutional Court. On the other hand, without the FCC, German democracy would be far less open, less transparent, and less secured against abusive efforts of those in public power to keep themselves in that position, than it actually is. By way of just a few examples: If it weren't for the Federal Constitutional Court, German political majorities would have barred competitors from parliament by exclusion clauses with thresholds of 7,5 % or more[33] and reserved public financing of political parties to those already represented in parliament.[34] Governments would dominate public TV,[35] use taxpayers' money to finance re-election campaigns,[36] conceal a great deal more information from parliament (or keep it secret longer),[37] and enjoy considerably greater manoeuvring room to obstruct unwelcome media outlets or otherwise

[31] For relevant institutional details in the German case and for the nature of the nexus between institutional framework conditions and judicial attitudes see Lübbe-Wolff (2014a: 509 et seq.).

[32] That seems to be the prevalent perception in Germany. In opinion polls, the FCC usually ranks as the most highly trusted public institution or as one of the most highly trusted public institutions (together with the president of the republic and, notably, the police). For the empirical data see Limbach (1999: 7–8); Vorländer (2006: 199); Köcher (2014); Bruttel/Abaza-Uhrberg (2014: 510 et seq.).

[33] BVerfG, Order of 5 April 1952, 2 BvH 1/52, 1 BVerfGE 208. For more controversial judgments invalidating 5 %- and 3 %-thresholds in the German EP election laws see BVerfG, Judgment of 9 November 2011, 2 BvC 4/10 et al., 129 BVerfGE 300, and BVerfG, Order of 26 February 2014, 2 BvE 2/13 et al., 135 BVerfGE 259. Observers have spotted in the latter decisions a lack of understanding of the importance and democratic dignity of the EP on the part of the majority of FCC judges. The 2011 judgment on the 5 %-threshold contains passages on which such an assessment might be based. It should be noted, however, that these passages, as well as similar ones, are absent in the order concerning the 3 %-threshold, and that a passage in an FCC judgment does not necessarily express the opinion of most of the majority judges in the relevant case (why that is so, is explained in Lübbe-Wolff 2014a).

[34] BVerfG, Judgment of 19 July 1966, 2 BvE 1/62 et al., 20 BVerfGE 119 at 132, with further references; cf. also BVerfG, Order of 21 February 1957, 1 BvR 241/56, 6 BVerfGE 273 at 279 et seq., concerning equal treatment of political parties, irrespective of whether or not they are represented in parliament, with respect to tax deductibility of donations to them.

[35] For a short account of some important FCC decisions on broadcasting see Kommers/Miller (2012: 510–518).

[36] BVerfG, Judgment of 2 March 1977, 2 BvE 1/76, 44 BVerfGE 125 at 147et seq.

[37] To pick just a few recent examples: BVerfG, Order of 17 June 2009, 2 BvE 3/07, 124 BVerfGE 78 at 114 et seq.; BVerfG, Order of 1 July 2009, 2 BvE 5/06, 124 BVerfGE 161 at 188; BVerfG, Judgment of 19 June 2012, 2 BvE 4/11, 131 BVerfGE 152 at 194 et seq., all concerning governmental disclosure or sufficiently early disclosure of information (to MPs, party groups or a parliamentary investigation committee, respectively).

suppress what they find will not help them retain their power.[38] And, what is perhaps even more important in view of the German historical background, without the FCC and its prominence in the German institutional architecture, German citizens would be much less aware than they currently are of the values of democracy, human rights and the constitution which provides for both.[39]

There is something admirable about democracies which proudly rely on their citizens or their elected representatives to prevent deterioration of the constitutional order, rather than on constitutional adjudication. It should also be remembered, though, that in Switzerland, it needed constitutional adjudication to eventually provide women with the right to vote in the canton of Appenzell-Innerrhoden in 1990.[40]

The German FCC has often been criticised for being overly activist and, particularly in applying equality and proportionality standards, exercising a rationality control that goes beyond the proper limits of judicial power. Proportionality and equal treatment (in the sense of treatment without unjustifiable differentiation) are, however, both standards of practical rationality and necessary elements of democracy. Where an active constitutional court administers these standards, this will sometimes lead to judicial decisions censuring deliberate political choices that have been made by the legislative and executive powers. But that is not the only effect, and not even the most important one. In the case-law of the German FCC, for instance, equality and proportionality standards have also been used to correct many irrationalities in the legal system which had simply escaped political attention, i.e. where a conscious democratic decision on the specific matter in question had not really been made.[41] Moreover, and more importantly, the case-law of the FCC has infused the German legislative, administrative and judicial systems as well as the public at large with an awareness of and attention for issues of equality and proportionality that had not existed previously.[42] Such indirect effects have not only enhanced the rationality of legislation in important respects. They have also enhanced its democratic quality.

The costs and benefits, with respect to democracy, of constitutional adjudication can be optimised by differentiated standards of judicial review, with stricter scrutiny applying in matters affecting the democratic character of the system[43] and/or in

[38] For a short account of some important FCC decisions on freedom of the press see Kommers/Miller (2012: 502–5 10).

[39] See Lübbe-Wolff (2011).

[40] Swiss Federal Court, Judgment of 27 November 1990, BGE 116 Ia, 359.

[41] For an overview of the application of the principle of proportionality by the FCC, and for and criticism that has been voiced against the Court's case-law see Lübbe-Wolff (2014b).

[42] For paramount importance of the preventive rather than the repressive effects of the Court's case-law cf. also Grimm (2001: 28). For the preventive role of national constitutional courts in an international human rights context Jaeger (2014b: 127).

[43] See, e.g., Kneip (2009: 311). Kneip advocates strict scrutiny with respect to legislation directly affecting the "core of democracy", and counts fundamental liberties, but not constitutionally guaranteed social rights, among the core elements of democracy. For a more restrictive view of the core elements of democracy that should be protected by constitutional adjudication see Waldron (2006).

matters where the democratic decision-making process is for systemic reasons particularly prone to fall short of democratic values,[44] and less stringent review in other areas. There is also an argument in favour of stricter scrutiny where a problem seems to have been overlooked in the legislative process and, conversely, in favour of greater judicial restraint in the face of legislative decisions insofar as these are the result of pondered option.[45] Such differentiations are but fine-tuned elaborations of the idea underlying the institution of constitutional courts as such, as well as other intra-commonwealth institutions equipped with a degree of independence or autonomy. The underlying idea is that a democratic system may, perfectly in line with democratic values, find certain risks or undesirable tendencies in the regular process of representative or direct democratic decision-making and choose to counteract them by counter-majoritarian elements, just as an individual may use his liberties to commit himself and still be considered a free person.[46] Neither liberty nor democracy, neither individual nor collective self-determination are incompatible with self-restrictions.

2.5 Conclusion

A rather powerful constitutional court, a supreme court with limited constitutional court competences, no constitutional court at all – none of this is in principle incompatible with democracy. In the area of constitutional jurisdiction as in many others, democracy can take various forms. Views on the acceptable range of competences of independent institutions – be it courts, accounting offices, regulatory agencies or central banks – as well as on the acceptable or necessary degree of their independence differ, depending on traditions and experiences. Democracy requires *limited* judicial competences, but the exact demarcation of the limits may vary according to legal culture and historical circumstances. Democratic countries ought to mutually

[44] This might include matters where self-interest of ruling majorities concerning the chances of competitors for power is involved (this is why FCC scrutiny has been strict in the much-debated decisions on electoral thresholds in the national legislation on EP elections, see BVerfG, Judgment of 9 November 2011, 2 BvC 4/10 et al., 129 BVerfGE 300 at 322, and BVerfG, Order of 26 February 2014, 2 BvE 2/13 et al., 135 BVerfGE 259 at 289), the protection of structural minorities (cf. BVerfG, Order of 7 May 2013, 2 BvR 909/06 et al., 133 BVerfGE 377 at 408, with further references, concerning differentiated standards of review with respect to discrimination), and matters which are by nature or circumstances disadvantaged with respect to the chance of becoming politicised.

[45] For an example see, BVerfG (Plenary), Order of 2 July 2012, 2 PBvU 1/11, 132 BVerfGE 1 at 23, declaring that only strict construction of a constitutional norm is appropriate where that norm was adopted after extensive debate by way of political compromise in a highly controversial matter.

[46] On the comparison of a democratic society subjecting itself to constitutional review to Ulysses tying himself in order to be able to resist the seductive chant of the sirens see Cassese (2011: 7 et seq.).

respect the differences obtaining between them in this respect, and national as well as transnational courts must take them into account in dealing with matters of transnational importance.

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Chapter 3
Paths Towards Better Legislation, Detours and Dead-Ends

An Appraisal of Consultation with Independent Experts, Justifications for Legislation, Impact Assessments and Controls of Efficacy

Helmuth Schulze-Fielitz

Abstract This essay sees the debate on rational lawmaking and better regulation in the light of the democratic idea of legislation as a trade-off of competing interests. According to the author, quality standards of lawmaking must serve the idea of parliamentary democracy; the opposite view, which subjugates input legitimacy to output legitimacy of legislation, should be rejected. Improving lawmaking for the sake of a pre-existent public interest or rationality standard must not narrow democratic choice. The author is consequently skeptical of any guidance offered by substantive and procedural standards for good lawmaking, and opposes proposals of a legal regulation of the legislative process going beyond established standards of parliamentary proceedings. He instead recommends strengthening those interests in better regulation which are rooted in social life, as well as the role of the different actors taking part in legislation. Having regard to the various legislative players (ranging from politicians to vested interests and from legal scholars to judges), the author comes to the conclusion that only government officials in charge of legislative drafting take a professional interest in good lawmaking. Yet, time pressure and the need for fast lawmaking prevent ambitious improvements of legislation. Nevertheless, proposals to improve legislative drafting, such as expert panels and consultations, use of check-lists of good lawmaking, the obligation to state reasons, impact assessments, and the establishment of an "office of legislation" (which does not exist in Germany so far), merit closer attention. In the end, however, the author sees little chance to overcome the legislative technique of "muddling through",

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which, after all, should be accepted as an expression of the imperfection of democracy.

Keywords Balancing of interests • Compromise • Criteria of good legislation • Institutionalisation • Legistic process • Time pressure

3.1 The Dual Nature of Legislation

Every successful path towards "better" legislation on federal level must take account of the dual political and legal nature of the German parliamentary legislative process. As is the case in most legal systems, laws result first and foremost from a *political* process involving a balancing of interests characterised by compromise[1]: this involves the selection of one out of a range of regulatory alternatives and is dominated by party political preferences over what form the law should take and the interests of highly different segments of the population represented by parties. Political compromises of this type become apparent in the wording of legislation[2]: political decision making, which may in some cases take years, is a decisive and unavoidable factor within the legislative process in a democracy. It must in principle be accepted by legal science and legal practitioners following the formal adoption of a position commanding a majority, as a process involving the democratic concretisation of the common good.[3]

Secondly, laws (and also regulations) are the result of a *legistic* process (to use terminology which is commonplace above all in Austria) concerning the development of rules: it is thus necessary to make a choice between the alternative normative regulatory options that characterise "formal" legislative norm creation with reference to linguistic, systematic, legal dogmatic, constitutional, historical or other qualitative criteria. Legistic quality standards of this type serve an *auxiliary function* within democracies: they must in principle be modelled around the content of political compromise, and not vice versa, as much as this might constitute an annoyance for the legal profession and/or political purists.

However, this is by no means to imply that legistic qualitative criteria do not have any influence within the implementation of political compromises and that they could or should play a part in shaping political decisions. Nevertheless, any attempt to *replace* the processes of democratic compromise by legalistic-legistic "superior" technical expertise would be destined to failure.[4] By contrast, any improvement in the legislative process can only have any chance of success if it is able to bring such legistic qualitative criteria to bear within the political decision making process,

[1] On "politology", see the summary by Tils (2002: 270 et seq.).

[2] Cf. Blum (2004: l9 et seq.); Schuppert (2003: 14 et seq.).

[3] Morlok (2003: 61 et seq.); Schulze-Fielitz (1983: 711 et seq.); Häberle (1970: 251).

[4] Cf. Blum (2004: I 19 et seq.); Schulze-Fielitz (1988a: 36 et seq.).

without at the same time neglecting political requirements. The question regarding better legislation thus seeks to enhance the legistic quality of laws (legal norms), irrespective of their political aims, such as by imposing the requirement that they be necessary, appropriate, commensurate, technically impeccable and understandable.[5] However, above all during the examination of necessity very slight political assessments creep in, suggesting not that the new rule is not indispensable itself, but rather that the political regulatory goals are not actually necessary (for example when considered alongside regulation contained in existing cross-sectoral legislation): anyone who does not take care to eschew a purely political (and/or legal) know-it-all attitude[6] will be doing a disservice to any attempt to improve legislation. Also from the viewpoint of legislative theory, the quantity of laws has (almost) nothing to do with their quality,[7] although criticism of the quantity of legal norms is frequently mixed up without distinction with criticisms of their quality.

3.2 Criteria of Good Legislation

3.2.1 Substantive Quality Criteria

The desire for "better" legislation presupposes standards that enable a status quo to be assessed as good (or bad) and an alternative as better. In abstract terms, a broad consensus may quickly be achieved around a range of such quality criteria for "relatively good" laws.[8] Laws and/or their individual regulatory provisions should for example aim to enhance the political quality of compromise, with the general aim of strengthening the "credibility of democratic legitimation"[9] and with reference to their political decision content (1), they shall be socially just, well-balanced and represent a *politically good* compromise. With reference to the aim of the law, this should be (2) necessary, expedient and *commensurate* (functional). For the authorities charged with their implementation (for example the administrative authorities), laws should be (3) effective, efficient, *fit for purpose* and manageable without bureaucratic effort, whilst as regards legal practitioners (for example the administrative authorities, the courts and lawyers) laws should be (4) complete, not contradictory, framed in sufficiently decisive language, clear, systematically consistent and

[5] Blum (2004: I 9 et seq.); in this regard, inspection criteria have apparently been implemented throughout Europe, cf. Karpen (1999: 407, 409, 420), although their relevance in practice does not appear to have ever been examined empirically.

[6] See most recently Dauner-Lieb and Dötsch (2004: 179 et seq.).

[7] See also Schulze-Fielitz (1988a: 1 et seq., 17 et seq., 379 et seq.).

[8] For systematic requirements for good "legislative technique" in the literature, see e.g. Ennuschat (2004: 987 et seq.); Schneider (2002: para. 55 et seq., 329 et seq., 423); Müller (1999: 82 et seq.); Karpen (1998: 440 et seq.); Hotz (1983: 97 et seq., 121 et seq.); Hugger (1983: 267 et seq.); Hill (1982: 96 et seq.); for a fundamental overview, see Noll (1973: 164 et seq.).

[9] See Blum (2004: I 12 et seq., 115 et seq.).

also otherwise *technically impeccable in legistic terms*, without giving rise to judicial disputes. Finally, (5) with reference to the *addressees*, laws should *do justice to them* and be simple, (generally) understandable, transparent and accepted.

Such (partly overlapping) quality criteria give rise to substantive requirements, the manageability during concretisation of which confronts legislative practice with (at least) six partly intractable problems. (1) Political quality standards in the former sense may be formulated with a high level of abstraction, but not as standards for action for politicians and legislative draughtsmen within everyday politics. This is because in view of the fact that within a pluralist democracy the content of the common good is not an a priori given, but may only be regarded as being revealed *ex processu* and determinable *ex post*, the political quality of a process of compromise through law is determined by this result as chosen by the political process, i.e. the political parties and their elected representatives (or indeed the electorate). (2) Since differentiation between quality standards is a matter for discretion, they cannot be hierarchically ordered and classed under a single ranking order that is capable of guaranteeing certainty regarding decisions. (3) They often contradict one another (for example, simple solutions are often regarded as being socially unjust) and in this respect do not contain any rules of precedence. (4) Their concretisation is heavily influenced by the type of law (special or general, codification-type law) and above all by the substantive characteristics of a given regulatory area, which makes generalised treatment practically impossible. (5) Their operational implementation quickly comes up against impediments; the state of the art within research often does not enable valid assertions to be made, not even over whether normative texts are understandable or not.[10] (6) A large number of conflicts between quality standards/rules of priority imply political – i.e. contingent – assessments which cannot be unequivocally decided in scientific terms or according to practical common sense rules.

Conclusion: All quality criteria are ultimately nothing more than topical points of view, under which draft legislation can be examined in the light of its intended design and, as the case may be, *in part* optimised ("improved").

3.2.2 Quality Standards for Procedures

A decisive factor in the implementation of (substantive) legislative framing is the organisation of the legislative procedure in such a way that incentivises the consideration of such qualitative criteria. A statutory assertion of rules of good legislation[11] is neither necessary nor even expedient for this purpose: statute law is just as incapable as constitutional law and the rules of procedure of the federal bodies involved in the legislative process (federal government, *Bundestag* and *Bundesrat*) of providing such *material* requirements itself directly; the legal rules enacted by

[10] Schendera (2000: 99 et seq.).

[11] Cf. in this regard Hill (ed.) (2001); more reticent Blum (2004: I 29 et seq.).

them primarily create the framework conditions through a form of indirect "context control" for enabling these kinds of viewpoints to become incorporated into the legislative process. In order for this to occur the forces that can enable a sustained interest in good or improved legislation must be activated; in this regard, the circuitous route through statutory regulation does not appear to be advisable,[12] although the desire to comply with long standing existing formal requirements may bear fruit.[13] This is the case throughout Europe.[14]

3.3 Framework Conditions

3.3.1 Heterogeneous Interests

It is only at first sight that all parties involved in the legislative process need to have a high interest in "better" legislation. When considered more closely, there are however also serious counter-arguments which largely negate any interest in legistically good legislation. For instance, groups (1) comprising expert politicians and (2) the representatives of vested interests certainly have an interest in not being held responsible for bad laws that require amendment or the practical implementation of which is associated with high bureaucratic costs. Nonetheless, within the political legislative process it is the intended (real or symbolic) design that is dominant for these parties along with the related political reconciliation of interests through sensitive compromise settlements, which are hard-fought down to the last detail, where legistic considerations play (at best) a subordinate role.[15] In addition, any rationalisation – through for instance a precise impact assessment – "threatens" to subject the successes (and failures) of politics and politicians to public measurability.[16] This is because the social, economic and cultural interests (3) of citizens as the addressees of the law constitute the decisive yardstick against which political success may be measured in a representative manner with public opinion, however much citizens and economic operators may be required to suffer economically tangible costs – which are often not very visible externally – as the addressees of bad laws.[17]

Bad laws – such as those that are contradictory or entail excessive bureaucratic costs – also affect legal practitioners (4), the law enforcement authorities, (5) the jurisprudence of precautionary measures and contractual covenants

[12] Blum (2004: I 39 et seq., see also p. I 102 et seq.).

[13] P. Kirchhof (2002: 8).

[14] Cf. Federal Ministry for the Interior (2002: 20 et seq., repeatedly); Smeddinck (2003: 641 et seq.).

[15] Cf. also Hill (1993: 7).

[16] Blum (2004: I 57); Kettiger (2001: 231).

[17] The pan-societal consequences in terms of the costs of legislation are estimated throughout Europe to account for between two and five percent of gross domestic product (Federal Ministry for the Interior 2002: 9).

(*Kautelarjurisprudenz*) or (6) the courts; these laws do not only provide a continuous source of legal-political criticism but must be, due to Article 20(3) of the German Basic Law, routinely applied within everyday life – although more frequently with an unsatisfactory outcome – and even increase the practical significance of entire professional groups (such as tax consultants).

The legal-dogmatic processing of positive law is also prominent within (7) legal science in the universities, whereas the theory of legislation does not play a major role within research and teaching in Germany,[18] aside from "individual fighters" motivated by scientific or political reasons. Leaving aside the fact that legal-political and scientific (dogmatic-systematic) criticism of laws and legislators appears to have become a habitual pastime, we do not even know whether parliamentary laws are really worse in legistic terms than secondary regulations, which are four times as predominant, or whether tax and social law, which is highly sensitive above all in fiscal terms, might not represent the main source for current criticism of the law on substantive grounds. There is also a lack of scientific institutions that can teach legistic quality criteria, which are fundamentally known within the science of legislation, rendering them retrievable or workable in such a manner that they can also take practical effect within the everyday legislative process, thereby closing the gap between the theory and practice of legislation.

Thus it ultimately appears that only (8) the ministerial bureaucracy, where the hard-headed self-interest in good and above all systematically consistent legislation is so strongly rooted in the process of devising draft legislation that it attempts to recast political standards into good laws; this applies in particular to the units from justice ministries or cabinet offices specialising in basic issues of regulation and lawmaking. Every route towards good legislation must pass through the needle's eye of the ministerial bureaucracy – and thus take account of its organisational self-interest. This is because here too, the (specialist) consultations between members of the government with equal status under § 45 of the Joint Rules of Procedure of the Federal Ministries[19] – whether on the level of case officers and advisors or on the level of heads of department and state secretaries – will consistently lead to compromises in the drafting of legislation, in which each of the participants will at least in part strive to save face.[20]

This frequently results in the inclusion of rules in the same law that do not fit together and compromise formulations within individual legislative texts that stand in the way of clear and unequivocal norms.[21] The negotiation dynamic of *do ut des* along to some extent with bad coordination within the federal government can thus be directly reflected in legislation; even the ministerial bureaucracies do not per se appear to be guarantors of good legislation.

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[18] See contra Karpen (1999: 406).

[19] Joint Rules of Procedure of the Federal Ministries of the Federal Ministries of 9.8. 2000, GMBl. 526, printed in extract form also in Schneider (2002: 403 et seq.).

[20] See also Tils (2002: 282 et seq.).

[21] Cf. Blum (2004: I 89 et seq.).

3.3.2 Time Pressure Within the Legislative Process

The greatest enemy of good legislation is time pressure within the legislative process, which is often extraordinarily high and underestimated from the outside.[22] Whilst it encourages (or even facilitates) decision making, it can also easily degenerate into short-term, error-prone decisions to make last-minute amendments, even within the government prior to approval of draft governmental legislation. There are various structural reasons for such time pressure, which result from the autonomy of the legislature within a pluralist and collaborative democratic decision-making process.

All proposals on how to improve legislation must take reasonable account of these grounds. High time pressure may in some cases already arise during the course of legislative drafting within the (federal) government in cases in which the ability or willingness to take quick political action needs to be demonstrated to the public at large – for instance in response to problems hyped up by the mass media[23] or by implementing in political terms initiatives announced to the public independently by members of the government. In this regard it must be remembered that a large number of legislative amendments are only drafted and managed by one or two officials at unit level, and that the resulting high political demand for coordination within the ministry and between the various ministries comprising the federal government (involving specifically a legal examination by the Federal Ministry of Justice) imposes just as heavy demands on time as discursive *ex ante* coordination with the interested specialist and political circles on the basis of a draft from a ministerial unit; moreover, the fact that windows of opportunity for political action are distributed unevenly within the same legislative period and the dates of state elections can also affect the timing.

Time pressure is regularly enhanced significantly if the political decision concerning the whether and how of a new regulation has in principle been taken at the time the governmental draft is presented (in many cases having already been coordinated with the governing parties). Since the schedule for consultation is planned in advance every week with reference to the periods when the *Bundestag* is in session, to the other procedural stages and with a view to a deadline for entry into force, this has the result of placing decision making bodies under objective time pressure.[24] Whilst the governing majority often needs to enact the draft legislation as quickly as possible, often attempting to frustrate from the outset the deadlines set forth in Article 76(2) of the Basic Law by proposing verbatim identical drafts from different parliamentary groups, on the other hand the opposition regularly engages

[22] Cf. also Blum (2004: I 17, 76 et seq., 90); Mandelkern Report (Federal Ministry for the Interior 2002: 59); Schulze-Fielitz (1988b: 762 et seq).

[23] See further Thüsing (2003: 3246 et seq.) [Editorial Note: In the original German language version the author refers to the "Florida Rolf" case – a major news story from 2003 on a German citizen who lived on German welfare payments in the State of Florida, giving rise to criticism of too generous welfare-state services].

[24] Cf. Blum (2004: I 103 et seq., 119 et seq.); Schulze-Fielitz (1988a: 398 et seq.).

in political delaying tactics. It is less the arrangements governing the parliamentary consultation process (which involve a considerable investment of time, for instance for hearing specialist experts) than the pressure to make trade-offs resulting from politics, or in some cases legal circles (due to the involvement of the *Bundesrat*) and the large number of persons directly and indirectly involved in this process that spin out the process of reaching agreement and may result in the striking of compromise agreements – which may even be fundamentally important in conceptual terms – by politicians acting on their own initiative, even a few hours before a legally binding vote on the law is held in the *Bundestag*, the *Bundesrat* and/or the conciliation committee,[25] without giving any consideration to legistic quality.

3.3.3 Enhancement of Legistic Standards

The routes towards better legislation primarily involve prevention, which means improving the procedure and enhancing the quality of draft legislation *before* it is officially enacted; this means that the interest in good legislation needs to be enhanced on institutional level, preferably at an early stage so as to ensure that politicians and ministerial officials participating in the legislative process can still exercise an influence on the legislative design. This does not exclude the possibility that experience from legal practice may be drawn upon more systematically when amending legislation. However, even similar results gained from consultation with independent experts can ultimately only play an effective role within the legislative process once they have passed through the filter of politicians and ministerial officials.

The routes towards better legislation also involve the more exacting application of legistic quality criteria within the political process. The legislative autonomy of political agenda setting and the process of political compromise formation will not even take account of such quality criteria unless they can be incorporated from the outset in as formalised a manner as possible; this is only possible if political conflicts of interest can be resolved through negotiation *ex ante* by striking compromises in accordance with legistic standards. A conflict between the need for political compromise and legistic quality standards will otherwise be resolved in most cases to the detriment of the latter.[26] The time-frame available for this becomes more restricted the later the decisive compromise process occurs within the legislative process – including at the very last minute in the conciliation committee pursuant to Article 77(2) of the Basic Law. Thus, decisions based on the consultation of the conciliation committee should only be taken on an abstract and political level. This means that the principal political decision should be made public first whereas the wording of legislation should be drafted later and any draft legislation should be

[25] Cf. for a current example of changes in legal process for social welfare disputes, Decker (2004: 826 et seq.).

[26] Cf. Blum (2004: I 70).

presented subject to the reservation that it is open to review with the possibility of (editorial or substantive) amendment – for at least 48 hours before it is officially confirmed as the result of the conciliation procedure by the "conciliation committee wearing its legislative hat"[27]; this procedure should be regulated under the rules of procedure.

On the other hand, proposals to achieve improvements in the legislative process across the board relate to different stages of the legislative process: either the development of draft legislation through to its approval by the cabinet (Sect. 3.4) or modally to supplementary consultation with independent experts throughout all stages of the legislative process (Sect. 3.5). In any case, the formalised institutionalisation of any such proposals for improvement is of decisive importance (Sect. 3.6).

3.4 Improvement of Draft Legislation?

3.4.1 Consultation with Independent Experts Within the Policy Making Stage?

Consultation with independent experts in relation to the development of (party) political concepts would at first sight appear to breach systemic rules. Nevertheless, it is a genuine task of the political majority within Parliament, the Government and party bodies.[28] However, there are supposedly increasing numbers[29] of independent think tanks producing policy proposals, which the Federal Government then largely endorses as its own. It is something of a stereotype within current discussion in journalistic and academic circles to discern within this dynamic a transfer of political decision making to para-constitutional bodies, criticising it as a crisis-ridden process of "de-parliamentarisation".[30] It is asserted that political decisions are taken in pre-legislative expert committees made up of scientists or working groups and consensus building bodies *(Konsensrunden)* involving lobbyists such as for example the "Hartz Commission", the "Rürup Commission" or the consensus round on the phasing out of nuclear energy, and that these decisions turn the Bundestag into a "rubber stamp" resulting in its political disempowerment.[31] This widespread purely theoretical *(modellplatonisch)* perspective may draw on a feeling of

[27] Schulze-Fielitz (1988b: 768). The procedure (which is moreover not entirely unproblematic from a constitutional law perspective) relating to the recent agreement concerning the Immigration Act from 2004 thus had an inherent technical logic: first the compromise political decision and then the technical articulation and concretisation through legislation, and only then the final decision.

[28] Cf. von Beyme (1997: 92 et seq.).

[29] For empirical evidence to the contrary, see Sebaldt (2004: 189); Siefken (2003: 491 et seq.).

[30] Cf. e.g. Klein (2004: 6 et seq.); Papier (2003: 8); P. Kirchhof (2001: 1332 et seq.).

[31] Klein (2004: 8, 13 et seq., 26); see also Herdegen (2003: 15 et seq.); Grimm (2001: 503).

helplessness currently prevalent on the part of individual members of the majority groupings in the *Bundestag*; however, it is empirically and theoretically misconstrued.

It is empirically misleading because, since the Basic Law was adopted, Parliament has at no time been willing or able to develop politically fundamental structural decisions into legislation; it is and has always been the task of government or the minister with political responsibility and ministerial officials to draft and table legislation that can attract a majority in line with the political directions of the minister (and only indirectly of the governmental groupings)[32]; Parliament is and has always been a control body.[33] The more such politically fundamental decisions seek to change the status quo the more difficult they become as they run up against various sources of opposition, such as inertia on the part of bureaucratic fraternities of specialists and epistemic communities, professional lobbyists representing parties affected or the objections of political specialists with differing views, whether within the governmental majority or throughout Parliament as a whole. It is theoretically misleading because the commissions referred to are more inclined to erode the significance of the minister with political responsibility and his or her officials within the legislative process rather than that of Parliament. There are various reasons for this: the unwillingness of cabinet ministers (*Fachminister*) to shoulder sole responsibility for drafts, necessarily laying themselves open to criticism from their own side, due precisely to the political strength of the majority groupings, at any rate vis-a-vis their own ministers; the innovative weakness of the ministerial bureaucracies on a political level when confronted with such redrafts reflects their strong orientation exclusively around the political direction set at senior ministerial level or the status quo; temporal restrictions on fundamental rethinks by the ministerial bureaucracy result not only from the regular downsizing of staff within the ministries, but also and above all in the short-term focus of the political public (driven on also by the mass media); their substantive structural conservatism often establishes "their own" clientèle, often centred also around individual ministries or their organisational units: for example, the social interests of employees were previously considered to be "in good hands" at the Ministry for Employment, entirely irrespective of the party of which the minister was a member, just as any attempt to introduce environmental protection in the area of transport ran up against the opposition of the Transport Minister who acted as an "advocate" for the transport industry; the lack of any real distance from sectoral interests often ends up vesting those interests with an insurmountably strong position.

The para-constitutional agenda-setting bodies[34] within the "informal state governed by constitutional law" should ultimately give clout to political concepts

[32] For the most recent comprehensive statement see Tils (2002: 297 et seq.); see also Mengel (1997: 24 et seq.); von Beyme (1997: 139 et seq.)

[33] See comprehensively Schulze-Fielitz (1988a: 292 et seq.); see also Lösche (2000: 929); Zeh (1998a: 29 et seq.).

[34] See in greater detail Blum (2004: I 61 et seq.); von Blumenthal (2003: 9 et seq.); see also von Beyme (1997: 73 et seq.).

involving fundamental reformulation: vis-a-vis their own parliamentary groupings, the ministerial bureaucracies and sectoral interests, the representatives of which are thus personally involved in the process of compromise. They are essential for certain formulatory tasks,[35] even if they are ultimately unsuccessful.[36] In this regard, the underlying interest-clearing may be classed (also) as political "consultation with independent experts", provided that the Federal Chancellor or the Federal government deems them as politically essential. Such forms of consultation with independent experts are however often not intended by hopes for "better" legislation.

3.4.2 The Institutionalisation of Reflection?

A recent report for the Federal Ministry of Justice called for an improvement in the quality of (draft) legislation through institutionalised self-reflection by the legislator with reference to the crucial choices that are to be made during the legislative process; the legislator is thus subject to a specific duty of care in at least ten typological scenarios involving choices.[37] These are: (1) whether legal regulation is required or not; (2) the choice of the "regulatory sector" (regulation according to the sovereign power of the state, social self-regulation or mixed forms of co-regulation); (3) the alternatives between parliamentary or sub-legislative regulation or; (4) between federal, state or self-administrative regulation; (5) the form of legal acts (e.g. legislative ordinance or administrative regulations); (6) the location of a regulation within a special law or within a codifying law; (7) the regulatory density of the individual norms[38]; (8) the rigidity of the regulations; (9) the choice between fixed-term and lasting regulations; and (10) the type of regulatory instruments (e.g. obligations, prohibitions or incentives for action).

Whilst the scenarios involving choices mentioned may be analytically significant for the quality and balance of the legal order as a whole, they are however difficult to classify under specific temporal decision making stages within everyday legislative practice. This is because most of these scenarios involving choices have largely already been decided: either by the terms of European case law or legislation (e.g. the choice pertaining to the form of legal acts), by the Basic Law (e.g. the division of legislative competences), by the case law of the Federal Constitutional Court (e.g. by the theory of legislative reservation or *Wesentlichkeitstheorie* with regard to the forms of legal acts or the relationship between parliamentary and sub-parliamentary norms), by previous legislators (e.g. in relation to an existing authority to issue regulations) or by the constraints of politics itself (e.g. with regard to

[35] Blum (2004: I 66 et seq., 118 et seq.); see also Morlok (2003: 67 et seq., 72 et seq.); Kropp (2003: 23 et seq.); contra Klein (2004: 13).

[36] Sebaldt (2004: 191 et seq.).

[37] See comprehensively Schuppert (2003: 31 et seq.); see also Kettiger (2001: 230).

[38] Cf. also Hill (1982: 108 et seq.); Müller (1999: 46 et seq.).

whether regulation[39] is required and in part also regarding the type of regulatory instrument). The scenarios involving choices also largely overlap with the "Blue Test Questions" *(Blaue Prüffragen)* adopted in 1984 (replaced in 2000),[40] which were however unable to have a significantly positive effect on legislative practice.[41] It is also necessary to mention the "path-dependence" of legislative development and practice. Since "legislative amendment" nowadays seldom entails the drafting of completely new laws, but rather predominantly amends, repeals or supplements existing laws, new laws (or legislative amendments) are modelled on the structure of existing laws, which they only amend with regard to individual points; a comprehensive new draft of a law that links up with new and changing regulatory elements often runs the risk of generating even more new friction than mere embedding within existing and tried-and-tested systematic regulatory frameworks. Finally, all of these decisions regarding choices are themselves also subject to the constraints of political compromise.[42]

After all, the practical process of drafting can hardly be broken down into these ten "situation-specific procedural stages", especially as they overlap with one another: Decisions concerning a (partial) waiver of regulatory power, delegation of regulatory power, the forms of legal acts, regulatory density and rigidity along with their review constantly merge into one another within the practical drafting process. Those ten rather abstract stages of reflection however prove to be legistic quality criteria according to which draft legislation must be amenable to assessment *(begründbar)* as the result of a range of such decisions concerning choices. In this respect, they should in actual fact always be (capable of being) grounded, alongside and in addition to the substantive decisions relating to any given law. It remains an open question as to *how* they should be taken into account within the practical process of legislation.

3.4.3 Justificatory Quality

Another impulse for improvement is thus aimed from the outset at the written justifications provided by advisors or in governmental drafts.[43] The provision of clarification in the preambles to legislation,[44] the inclusion of teleologically oriented rules

[39] On the relatively limited practical significance, see also Blum (2004: I 24, 73 et seq., 79 et seq., 89).

[40] Joint Ministerial Gazette (GMBl.) 1990: 449; also printed in Federal Ministry of Justice (1999: annex 3, para 37).

[41] Cf. Zypries and Peters (2000: 324 et seq.); contra Fliedner (1991: 49).

[42] Thus, for the recant law on trade in greenhouse gas emission licences (TEHG), instead of the accompanying regulations which were not accepted by the *Bundesrat*, their content was incorporated into the law.

[43] See further Blum (2004: I 85 et seq., 123 et seq.).

[44] Cf. Hill (1988).

within the law[45] and exhaustive justifications for draft legislation should enhance the legislator's self-awareness of what it is doing and make its considerations clearer and more understandable for third parties. The aim is to optimise the intentions lying behind the actual legislative text as it is evident that this regulatory text on its own is increasingly not regarded as sufficient. This is the case not only for the practically predominant form of the regulations, which from a strictly legal point of view is as such largely incomprehensible for interested citizens, but rather also for parent statutes *(Stammgesetz)* themselves: This appears to reflect a structural weakness or even an over-burdening of parliamentary legislation as an instrument for action.[46]

In particular the justifications provided in draft legislation as to why EC [EU] directives are transposed in one way and not another often appear to be inadequate and point to "practical constraints", which are however more akin to political wishes on the part of the author of the draft. Otherwise, more restrained justifications are widespread,[47] especially in relation to assertions regarding the financial consequences. A variety of reasons nonetheless indicate that these types of justificatory comment are not meaningful, or at any rate have little prospect for success, especially if they are to be construed more widely than the extent suggested by the Constitutional Court[48] *de constitutione lata*[49] or – according to the model of Article 253 of the EC Treaty [Article 296 TFEU][50] – *de constitutione ferenda*[51] in a stronger manner than previously as a formal requirement.[52] (1) Even now, the comprehensive duty to state reasons under § 43 of the Joint Rules of Procedure of the Federal Ministries amounts to a theoretically unachievable requirement; it must inevitably and in any case leave the legislator with very broad scope for assessing how to construe its duty.[53] (2) The level of abstraction of legal norms – especially those structured in their final form – means that it is only ever possible to a limited extent to grasp all conceivable applicatory scenarios and to justify the various intended solutions; even detailed administrative provisions are regularly incomplete. The need for justification increases precisely in line with the level of abstraction of the law; in such cases the statutory normative content could (or should?) also be framed in

[45] Lötscher (1996: 92 et seq.) takes a sceptical view.

[46] See generally in greater detail Grimm (2001: 494 et seq.).

[47] Blum (2004: I 86 et seq.).

[48] Cf. e.g. the summary in Meßerschmidt (2000: 713 et seq.), and Skouris (2002: 134 et seq., 145, 161 et seq., 166 et seq.).

[49] Lücke (1987: 37 et seq., 96 et seq., 104 et seq.); contra the entirely predominant view, cf. the detailed presentation e.g. in Skouris (2002: 119 et seq.); Kischel (2003: 260 et seq., 400 et seq.).

[50] See comprehensively Skouris (2002: 65 et seq.).

[51] See further Blum (2004: I 126 et seq.).

[52] Skouris (2002: 174 et seq, 180 et seq.).

[53] For this reason (and not only due to the consequences for parliamentary bills tabled by members of Parliament), a sanction under the law governing legislative procedure of breaches against the requirement to provide justification would likewise be the wrong approach; for a different view, see Schneider (2004: 109, 112 et seq.).

more concrete terms. (3) The political intentions of norm creators are often divergent and contradictory, and especially formal compromises cannot be resolved in abstract terms; even explanatory texts themselves may be based on compromise.[54] (4) For the sake of ensuring the political enforceability of the draft, authors of justifications do not seek to accentuate problems that could impair its enactment into law; where impact analysis appears to be costly, formulaic approaches predominate. (5) Justifications for legislation are intended primarily not solely for the purpose of legal dogmatic systematisation, but rather also in order to pursue political design goals; the same text – and indeed the same legislative text – may conceal many different motives, which must be sufficiently comprehensible in the event that the sanction of unconstitutionality is applied. (6) The intention behind with enhanced justification requirements overstates the rationality of political decision making processes and the foreseeability of future problems in the application of legislation; where justification is entirely lacking, this is mostly where informal bodies or bodies that do not sit in public – such as the conciliation committee – have decided, in which case it would be particularly difficult to provide justification for the compromises reached.

Conclusion: As a practical result, an explicit requirement for justification will ultimately be no more effective than the hitherto standard reliance on the mostly heterogeneous preparatory works[55]; all in all, this does not offer a panacea for achieving better legislation.

3.5 Consultation with Independent Experts

3.5.1 Different Manifestations

Another approach expresses the hope that the legislator can be supported by consultation with independent experts "from the outside", thereby improving its legislative output. Confidence in consultation by the government or Parliament with independent experts as a way of achieving better legislation is beset with assumptions – especially as there are good reasons to regard lawmakers themselves, i.e. the ministerial bureaucracies, professional politicians and the various stakeholders involved largely as experts. Lawmakers have always looked for and found independent consultation from external sources. Even prior to the start of the legislative procedure with its introduction as a governmental bill (Article 76(1) of the Basic Law), and at the latest at the time when the draft prepared by the civil service is made known (§§ 47, 48 of the Joint Rules of Procedure of the Federal Ministries), every significant law has been discussed and agreed upon with the relevant expert circles; every significant law is thus already subject to review by independent

[54] Indeed, even the introductory justificatory comments provided in European directives may also run contrary to individual norms during interpretation.

[55] See also Blum (2004: I 130).

experts during committee stage. Moreover, practical tests involving pre-enactment simulations form part of the repertoire.[56] Nevertheless, specialist scientific advice does not have much influence.[57] How can such consultation thus be improved further?

"Independent consultation" may be schematised in parallel with the criteria set out above for "relatively good" laws: It may relate to: (1) the *political feasibility* characterising the content of the law; (2) the *appropriateness* of its aims; (3) its *suitability for enforcement*; (4) its *legistic quality* and (5) the *extent to which it is adequate* to the target group of the regulation *(Adressatengerechtigkeit).* Under existing processes involving consultation with independent experts, the focus regularly lies on appropriateness and suitability for enforcement (the later albeit to a more limited extent); in this respect above all representatives from associations, the administrative and judicial authorities and academics are questioned with reference to the suitability for enforcement, whilst the senior levels of the civil service are almost never consulted. It is regularly "politics" itself which decides on political feasibility (subject to the limitations referred to in Sect. 3.4.1); legistic quality and securing of justice for addressees are mainly absent from the matters subject to examination during the legislative procedure, and are at most incorporated into the discussion of the appropriateness and suitability for enforcement of the law.

Any enhancement of consultation with independent experts must draw on the viewpoints which have been underexposed within previous legislative and consultative practice, such as legistic quality criteria and justice for addressees. On account of the autonomous status of the political legislative process, the later political decisions are made, the more difficult it is to review them; consultation with independent experts must therefore occur as early as possible, i.e. if possible before the governmental draft is finalised. In this regard, one might on occasion wish there to be a greater willingness to engage in experiments with legislative procedure, for example discussions of intended legislation involving a panel of those charged with applying the law and those affected by it (in order to counter the lack of any experience of application within the ministerial bureaucracy) or – following the model of foreign examples – the involvement of the general public affected by the law,[58] for instance over the internet, although the reservations regarding such an approach are understandable (in view of the potential pressure exerted by the mass media on the core area of governmental responsibility).

[56] Cf. recently for example the 2004 amendment of the Construction Code in Planspiel-Test A. Bunzel (2004: 328 et seq.), with further references; for an overview of previous practice, see Schindler (1999: 2538 et seq.).

[57] Morlok (2003: 74 et seq.); see also Mengel (1997: 304 et seq.); for the background, see Eichhorst/Wintermann (2003: 163 et seq.).

[58] See in greater detail Linck (2004: 140 et seq.).

3.5.2 Internal Classificatory Steps

In view of the limited scientific and above all legistic expertise of highly specialised technical units,[59] a qualification offensive within the government would already itself be particularly effective and crucial: no section or department of a Ministry should be allowed to draw up draft legislation if none of its civil servants has participated in the legislation training courses held by the Federal Academy of Public Administration; however, practice does not reflect this by a long way. Due to the enormous differences in performance between specialist case officers, (also) depending upon the frequency with which legislative projects are assigned, there is a need for much stronger systematic training in legistics; until now, this has largely been left up to the (rather contingent) individual advanced training requirements of individual civil servants.

3.5.3 External Preparation of Draft Legislation

On occasion, the preparation of draft legislation outside the ministerial bureaucracy is regarded as a sustainable way of enhancing rationality. This has been the case in the past for the drafting by independent experts over a number of years of draft versions of the Environmental Code (UGB) or the Insurance Contracts Act (VVG); in addition, the reform of the law of obligations was significantly facilitated by several years of "stock-taking appraisal". Such drafts, which are often framed in professorial terms (although the position is now different for the Commission on the Insurance Contracts Act) might at first sight appear to offer a technically "ideal solution". However, upon further examination it is clear that further nuancing is required. (1) Purely professorial drafts often end up being unsuccessful where they do not take adequate account from the outset of any countervailing political interests that are affected (and organised); e.g. an income tax act that is perfect in legistic and systematic terms may not have any prospects for implementation if it does not achieve a social balance.[60] Nevertheless, this type of preliminary work provides an important basis for later successful approaches. (2) In more "apolitical" areas (e.g. the reform of the law of obligations) purely technical advice may be more successful than in areas in which political and social interests are highly significant or (merely) more visible. (3) Preparation by committees of professors tends to be more cost-intensive than in-house drafting and accordingly requires the appropriate costs and benefits to be weighed up. (4) Drafts by committees end up proposing fewer

[59] See further Blum (2004: I 77 et seq., 89).

[60] [Editorial Note] In the original German version the author refers to the proposal of the former Federal Constitutional Court judge and renowned specialist in taxation, Professor Paul Kirchhof, which has been appraised by a sympathising politician for its merits of simplification. The author's original wording "Bierdeckel-Charme" is an ironic allusion to the utopian promise that the declaration of income might not require more than one page or even fit on a beer mat.

amendments than independently devised new conceptual drafts, which are less commonplace during the current period of legislation by amendment. (5) External preparation of legislative drafts will thus always be an (albeit rare) exception from the process of legislation as a democratic political process, and not the rule[61]; it does not appear that there is any particular scope for improvement here.

3.5.4 Consultation in Relation to the Impact Assessment

Pursuant to § 44(1) of the Joint Rules of Procedure of the Federal Ministries, which is based on the model used by the state of Lower Saxony (1998),[62] every bill tabled by the Federal Government must be accompanied by an assessment of the most significant impacts of the law, which must be determined and stated within the justification for the law (§43 (1) no. 5 of the Rules); this requirement expressly covers both intended *and* unintended (!) side-effects, including financial consequences. A legislative impact assessment (LIA) or "evaluation of the law" of this type (primarily in the sense of an analysis of normative efficacy and enforcement costs) has come as a response to long-standing and in part more far-reaching legal and political requirements.[63] It was introduced on the basis of the recommendations regarding § 44(1), paragraph 4 of the Joint Rules of Procedure of the Federal Ministries,[64] which draw on the results of legislative science[65] in order to enhance the directive power of impact-oriented legislation through a regulatory loop covering the legislative and enforcement processes.[66]

Until now, this approach has been of minor importance insofar as it seeks to alter significantly the status quo of the practice of examining legislative drafts.[67] The reason is probably less due to the absence of a ministerial handbook on the assessment of the consequences of legislation – which is being prepared[68] – as this would

[61] The position of Dauner-Lieb and Dötsch (2004: 179) is far-fetched: "for a long time a standard procedure for almost every legislative proposal".

[62] See further Witthohn (2004: 38 et seq.); for a detailed account Neuser (1998: 249 et seq.).

[63] Cf. e.g. Mandelkern Report (Federal Ministry for the Interior 2002: 28 et seq.); Köck (2002: 3 et seq., 8 et seq.); Sachverständigenrat "Schlanker Staat" (1997: 16 et seq.); Scholz and Meyer-Teschendorf (1996: 406).

[64] Cf. Böhret and Konzendorf (2000); for Lower Saxony: Vorläufige Grundsätze für die Durchführung von Gesetzesfolgenabschätzungen, NdsVBl. 1998, 759.

[65] For a basic overview, Böhret and Hugger (1980); see also the overview in Böhret and Hugger (1986: 135 et seq.); Böhret (1992: 193 et seq.; and 1997); Karpen (2002: 443 et seq.); Brocker (2002: 462 et seq.); recently Edinger (2004: 149 et seq.); for a comprehensive account see Karpen and Hof (2003); Böhret and Konzendorf (2001).

[66] See in greater detail Kettiger (2000: 17 et seq.).

[67] Redeker (2004: 161 et seq.); for Lower Saxony see also Blum (2004: I 54 et seq.).

[68] [Editorial Note] So far apart from the above mentioned handbook only a newer booklet ("Arbeitshilfe zur Gesetzesfolgenabschätzung"), issued in 2009 by the German Home Office *(Bundesministerium des Innern)* exists.

only be able to impose relatively limited standardisation on the hitherto relatively open system and methodology for the analysis of consequences in relation to all types of legislation. A significant impediment, especially for a "prospective" assessment of consequences prior to enactment but also for a "parallel" analysis testing the consequences of an existing draft, is the lack of time for arranging for such an analysis to be carried out, either before or after enactment of a governmental draft.[69] Furthermore, prospective analyses of the consequences of legislation prior to enactment of a legislative draft may take several years; however, even the merely parallel analysis after the preparation of a civil service draft [70] (and prior to enactment of a governmental draft into which its results must be incorporated) is time-consuming. A further difficulty lies in the high cost intensity of an LIA, depending upon the intensity of the examination programme,[71] which Parliament would have to appropriate sufficient means to cover. A third impediment lies in the fact that political compromises are often either unclear or at any rate not called into question by an LIA. Finally, in view of the complexity of the regulatory effects, every LIA is subject to structurally inevitable and significant substantive limits.[72] Thus, on both federal level and on state level in Lower Saxony, the LIA is in practical terms limited to an assessment of enforcement costs.[73] All of these impediments would therefore subsist in relation to a parliamentary LIA.[74]

Even these already watered down requirements would significantly impair the legislative process. The surge in legislative drafts in Lower Saxony that have only apparently been drawn up purely by Parliament is ultimately merely a reflection of the legal duty applicable in that state to carry out an legislative impact assessment prior to the approval of a governmental draft, which can be circumvented in political terms by its tabling as a draft by a governing party.[75] This is also based on the conviction that the legislature has in all cases foreseen the effects of the planned legislation (which it is required to forecast as a matter of constitutional law), albeit in a less systematised manner.[76] This is in addition to the practical need for differentiation: there are laws with a narrow applicatory scope (e.g. the adjustment of the rules

[69] Edinger (2004: 156), with further references; Zeh (1998b: 371).

[70] Model case: Böhret and Konzendorf (1998: 33 et seq.); it could be possible to draw on a previous prospective LIA.

[71] Cf. Karpen (2002: 445): between € 30,000 and € 330,000.

[72] Köck (2002: 10–11); Schulze-Fielitz (2000: 310); see also Meßerschmidt (2000: 837 et seq.); Lübbe-Wolff (1999: 652 et seq.).

[73] Cf. Bundestag official printed record (BT-Drs.) 15/2131 (Federal Government answer of 4 December 2003 to a minor request) and Neuser (1998: 251).

[74] For the difficulties see Kretschmer (2003: 22 et seq.); for a parliamentary legislative impact assessment in general see Edinger (2004: 159 et seq.); by the responsible technical committees Grimm and Brucker (1999: 61 et seq.); by a "Committee for Legislation" most recently Gericke (2003: 279 et seq.); by a "Council for Legislation" as a new organ comprised of representatives from the Federal Government, the *Bundesrat*, the *Bundestag* and (one half) science, see Schneider (2004: 115).

[75] Blum (2004: I 54 et seq., 82 et seq.).

[76] See further Karpen (1999: 408 et seq.).

governing social benefits which have been ruled by the Constitutional Court to breach equality requirements and only affect a couple of hundred people), which can render a comprehensive legislative impact assessment apparently superfluous or disproportionate. Laws and specific individual legislative provisions often pursue a number of disparate goals, which often cannot be measured in terms of precise operational effects. Indeed, contextualising laws that only have indirect effects of systemic importance, decisions incorporating a political and worldview *bias* (e.g. the policy of equal treatment for same-sex partnerships) or norms with a high level of abstraction may hardly be evaluated sufficiently in terms of their informational content,[77] not to speak of drawing up a reasonable calculation of the costs on society for industry and private operators. In practical terms a thorough LIA is only carried out in relation to laws of minor political significance.[78] None of these is valid as a general objection against an LIA, but rather against the detailed regulation of such a procedure[79] and against the imposition of excessive requirements; ultimately, the process is dependent upon the weighing up of the expected cost against the potential benefits of an analysis: part of the requirement of justification involves departing from particular justificatory requirements.

3.6 Institutionalisation

3.6.1 Enhancement of Legal Examination Within the Federal Ministry of Justice?

A step towards reform in the institutionalisation of processes of self-reflection on the part of the legislature was made by the further development of the examination of legistic quality *(Rechtsförmlichkeitsprüfung)* within the Federal Ministry of Justice towards a legal examination and the enhancement of the requirements applicable to the examination of alternatives in the reform of the Joint Rules of Procedure of the Federal Ministries in 2000. The practice of examining legistic quality, which has existed since 1949 and currently involves 22 Units within the Federal Ministry of Justice, may be framed as an institutionalised guarantee of improved legislation, in the light of the Handbook on the Examination of Legistic Quality drawn up by the Federal Ministry of Justice; thus, if "ex post improvement" only occurs during the parliamentary stage, this will be an indicator of a sub-optimal solution. Here too however, a large number of political framework decisions are not subject to this highly effective (in practical terms) examination during parliamentary debate of a governmental draft, as time pressure or the formal classification of the legislative

[77] On the methodological possibilities for calculating the consequential costs in Lower Saxony, cf. Neuser (1998: 252, 253–54).

[78] Edinger (2004: 158).

[79] On the forms of institutionalisation, cf. Hartmann (2003: 74 et seq.); Böhret (1999: 57 et seq.).

procedure (irrespective of the various ministerial "formulatory help" provided during committee stage) no longer allow for such an examination. It is thus conceivable that legislation may be improved by a further formal enhancement of competences and the procedural involvement of an examination of legistic quality by the Federal Ministry of Justice (along with the corresponding offices for examining legislation within the state governments).[80] However, this may be held back by reservations on the one hand on the part of other departments objecting to an excessive power of the Federal Ministry of Justice as an alleged troublemaker standing in the way of the political policy making demands of the department with substantive competence, and on the other hand by members of Parliament who regularly consider their political choices to be limited unreasonably by officials.[81]

3.6.2 Parliamentary "Office for Legislation"?

It would thus appear that the best balance between these countervailing interests is a legislative control by Parliament, as proposed by the experts at the 65th German Jurists' Conference *(Deutscher Juristentag)* on the basis of long-standing specific practical experience in Lower Saxony,[82] drawing also on foreign models[83]: according to this view, the Technical Service *(Wissenschaftliche Fachdienst)* of the German *Bundestag* should be expanded into an advisory service along the lines of a "statutory drafting auxiliary service".[84] Its politically neutral, highly qualified and well paid members are not only available to provide advice to all members of Parliament and committees throughout all stages of political discussion, drawing on their legistic expertise, but are also subject to an automatic duty to repeat the entire ministerial examination of legistic quality and to examine all laws brought before the State Parliament (*Landtag*) in order to ascertain whether the proposed rules are capable of achieving the intended goals.[85] The positive practical experience and the underlying arguments appear to speak for themselves[86]; nevertheless, the reconstitution of such an auxiliary service on a scale commensurate with federal legislation would (inevitably) lead to the creation of a new type of parliamentary bureaucracy, which could not be "conjured up" within a short space of time. A more realistic first step in this

[80] See further Blum (2004: I 88 et seq.).

[81] Cf. Blum (2004: I 138 et seq.).

[82] See further Blum (2004: I 139 et seq.).

[83] On the role of the "supreme office for legislation" in the United Kingdom see Blum (2004: I 91 et seq.).

[84] For a thorough review of the arguments in favour and against, see Blum (2004: I 150 et seq.). This is a specific embodiment of the general conception of "legislative coaching" in which the technical unit is advised for a period of time in relation to a legislative project by individuals with major experience in legislative processes, see Kettiger (2003: 80 et seq., 88).

[85] Blum (2004: I 144 et seq.).

[86] Blum (2004: I 144 et seq.).

direction would thus be to establish a new division within the Technical Service of the Bundestag tasked with subjecting at least all amendments to draft legislation approved during committee stage to a mandatory legistic review prior to referral for the final reading along with a right, based on a obligation voluntarily accepted by the committees, to require that new votes be held concerning any objections raised by the parliamentary auxiliary service. Depending upon how successful it turned out to be, which would also be dependent upon its strict political neutrality, such a department could be expanded or adjusted over the years.

3.6.3 Expertise in the Science of Legislation

The proposal to consolidate expertise in the science of legislation, whether at a university centre for legislative theory (according to the Swiss models) or within an independent Institute for Legislation[87] focusing on the practice of government and Parliament, appears to speak for itself and would cancel out the German deficit in university-level theory of legislation and the literature on legislative practice; however, actual developments are pointing in the opposite direction. In order for such new institutions to gain practical significance beyond the bounds of research promotion, they would have to engage with the practical processes of legislative drafting – whether by providing additional services or by creating institutionalised forms of linkage. Even in the event that examination of legislation within the government or Parliament were expanded, this could make a meaningful contribution to fulfilling the functions of technical control and detailed consideration.

3.6.4 Control of Efficacy

Under current rules, specifically according to § 44 (6) of the Joint Rules of Procedure of the Federal Ministries, an efficacy control ("retrospective legislative impact assessment") must also be included in the justification for draft legislation, and is also required under legislation in the form of reporting duties or evaluation clauses (e.g. § 127 of the Federal Social Aid Act [BSHG] [now: § 121 SGB XII]; § 8 of the Energy Act [EnWG] [now: § 21 g EnWG]) in numerous laws, and appears to suggest the conduct of costly social scientific research programmes by commissioned experts.[88] Due to financial constraints, a (rough) evaluation by the (ministerial)

[87] See in this regard Schuppert (2003: 100 et seq.); on existing institutions, Blum (2004: I 49 et seq.).

[88] Cf. Böhret and Konzendorf (2001: 257 et seq.), with examples concerning the Nursing Care Insurance Act (p. 273 et seq.) and the Rhineland-Palatinate State Act on Protection against Fires and Natural Hazards (p. 299 et seq.); Böhret (2000: 136 et seq.); see also Smeddinck (2004a: 104 et seq.); for an overview of previous practice see Schindler (1999: 2546 et seq.). For the rooting of

administration itself would still be more significant in practical terms; in this regard, a stronger weighing up of the options for systematic legislative critique consisting in a formal examination and survey by the state bodies, which are constantly involved in the collection of practical experiences across the board, would appear to be useful. According to the model of the Swiss Federal Supreme Court for instance, all Federal Supreme Court judges must publish summary reports based on experience of problematic statutory rules and suggest scope for their improvement, which are then forwarded to the ministries concerned; in this systematic manner, legislative critique and proposed amendments could for instance be solicited from courts of auditors, chambers of commerce, the Committee on Petitions and specialist legislative simplification bodies and systematically developed. Here too, a prerequisite is the establishment of formalised routines.

3.7 Outlook

Laws and legislation can only be as good as the society that enacts them: efforts to improve legislation and its consequences reflect the overall public condition of the community. There is no Archimedean point for achieving improvements. The desire for far-reaching changes will necessarily involve high strain on all sides – but is this strain really (already) so high?[89] Armchair rhetoric or reflections by lawyers at half-day symposiums alone will be unable to achieve it or to ensure that it is remedied on a sustainable basis. Leaving aside traditional alarmism on the part of professional critics of legislation, for the time being it is likely that the approach of "muddling through" will continue; this could perhaps (even) be seen in a positive light – as an expression of the human, incomplete dimension of democracy.[90]

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a duty to evaluate in constitutional law according to the Swiss model, see Smeddinck (2004b: 111 et seq.).

[89] Blum (2004: I 102) is sceptical.

[90] Written during my time at the Institute for Advanced Study, Berlin.

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Part II
Judicial Review of Legislative Rationality and Justification

Chapter 4
Rationality Requirements on Parliamentary Legislation Under a Democratic Rule of Law

Bernd Grzeszick

Abstract For a long time rationality requirements have not figured prominently in judicial reasoning. In recent years, however, courts have increasingly overcome their reluctance to measure legislative acts against specific standards of rationality. Under the guise of the rule of law not only the German Federal Constitutional Court, but also the European Court of Justice have developed detailed rationality requirements that some consider to amount to a general obligation to consistent and rational legislation. In scholarly commentary this jurisprudence has attracted severe critique. But is criticism really warranted? Drawing upon the principle of consistency as developed by the German Federal Constitutional Court, as an example, this contribution argues that at least in parts it is. Under a rule of law-perspective judiciary-developed rationality requirements suffer from several flaws: they do not sit well with traditional doctrine, their standard of review is insufficiently determined by constitutional law, and their effects on the protection of fundamental rights are incalculable. Moreover, such requirements are often democratically uncalled-for, in particular because they restrict the leeway for legislative decision-making without there being any general need to compensate for legitimacy deficits. Finally, when applied by the ECJ, rationality requirements run the risk of unbalancing the division of competences between the European Union and the Member States.

Keywords Democracy • Legislation • Legitimation • Rationality • Rule of Law

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4.1 Rationality as the Guiding Principle of Modern Constitutional Law

Rationality[1] is the universal healing promise of modernity. The Enlightenment era indicated the shift from self-imposed immaturity to maturity[2] in western civilisations and was only possible through and by means of reason. Only rational behaviour can claim to be right and good. The rationality requirement also applies to the law: only if and insofar as its provisions are reasonable can the law meet its inherent claim to be binding on the citizens within its jurisdiction. And since it is the state that makes and enforces the law that is binding for all, the rationality requirement also applies to the state. From being merely a historically given fact the state becomes an institution that needs reasons and justification and that has to be reasonable in order to meet the claim of authoritatively ordering social coexistence.

As to the question of what precisely is meant by 'rationality' there is no consensus in modern societies.[3] The aspiration of the constitution to be the rational basic structure of the state, therefore, can only be met indirectly and in a differentiated way. The autonomous individual, acting as the origin and endpoint of the legitimation of both state and law,[4] is offered two principle routes to legitimising the state and law: democracy and rule of law. While the rule of law with its close connection to the idea of fundamental rights aims at individual self-determination, democracy is a form of collective self-determination.[5]

Fulfilment of the expectation that the state should be a rational institution is a core component of the rule of law and rationality is seen as the main promise[6] of the modern rule of law. In modern constitutions the rule of law is routinely realized in two ways. First, there are individual rules that are understood as specific manifestations of the rule of law; for parliamentary legislation these are mainly fundamental rights and rules on competence and the procedure of legislation. Second is the more general idea of the rule of law, as shown in the *Rechtsstaatsprinzip* or in the principle of the rule of law. But the general rule of law is not just an abstract idea, it also shapes positive law: it can find entrance into the interpretation of certain terms of constitutional law and as a general precept[7] it can give rise to independent requirements. Even in legal orders that are entirely positivised, the rule of law continues to

[1] On the history and content of the criterion of rationality in the philosophy and theory of the State, see for example Krüger (1964: 53 ff.); Würtenberger (1979: 372 ff.); Schluchter (1998); Herdegen (2010: 14 ff.), all with further references.

[2] Kant (1784: 481).

[3] On this see Kriele (1963: 70 ff.); Poser (1981); Schnädelbach (1984); Lenk (1986); Schulze-Fielitz (1988: 454 ff.); Homann (1988: 23 ff.); Welsch (1995); Meßerschmidt (2000: 777 ff.); all with further references.

[4] Böckenförde (1991: 107).

[5] On this and on the following Möllers (2005: in particular 27 ff.).

[6] Bumke (2010: 93).

[7] Explicitly provided for in Art. 20 Basic Law as well as in Art. 2 TEU and Art. 67 TFEU.

have the force to form the law and, thus, to fulfil the expectation that public authorities are rational institutions.

Again and again, the requirements of the rule of law are therefore the starting point for attempts to import concepts of specific rational obligations of the legislator into the law. In German constitutional law this tendency is evident, too. In the 1970s and 1980s discussion about the system of equity (*Systemgerechtigkeit*) of the law was mostly limited to science,[8] and the rule of law-based principle of the consistency of the legal order was introduced into the jurisprudence of the Federal Constitutional Court (BVerfG) towards the end of the 90s; as a rule, however, this development has remained limited to the federal distribution of competences.[9]

In recent years the courts seem, however, to have abandoned their previous restraint. In addition to judgments which are in line with well-known constitutional requirements, the constitutional courts of a number of countries, the German Federal Constitutional Court and the European Court of Justice are increasingly making decisions in which they actively develop general constitutional requirements on parliamentary legislation. These requirements go beyond known constitutional commitments to the rule of law, they relate to various matters,[10] and their scope and intensity reach so far that they can be understood as a paradigm shift towards a comprehensive duty to rational and consistent legislation.[11]

According to the courts, the legislator must now consistently implement and design its own self-imposed main decisions[12]; justify exceptions to the basic decision with a specific objective reason[13]; correctly and accurately determine the current situation requiring a careful weighing of the relevant facts[14]; introduce less intrusive alternatives into the legislative procedure[15]; and demonstrate that proposed new rules serve to achieve the intended goal in a coherent and systematic manner.[16]

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[8] See on this Degenhart (1976); Peine (1985); both with further references. Substantively echoed in jurisprudence, first and foremost, in BVerfGE 13, 331 (340); 34, 103 (115).

[9] BVerfGE 98, 83 (97); 98, 106 (118–19, 125 ff.); 108, 169 (181–82).

[10] For a survey see Payandeh (2011: 593 ff.).

[11] Bumke (2010: 80); in principle agreeing Cornils (2011: 1054).

[12] BVerfGE 99, 88 (95); 99, 280 (290); 105, 73 (125–26); 107, 27 (46–47); 116, 164 (180–81); 117, 1 (30–31); 121, 317 (362, 367–68); 122, 210 (231); 123, 111 (120); 126, 400 (417); BVerfG, judgment of 5 November 2014, 1 BvF 3/11, para 41.

[13] On this BVerfGE 122, 210 (231).

[14] State Court of Lower Saxony, Judgment of 6 December 2007, StGH 1/06, NdsVBl. (Niedersächsische Verwaltungsblätter) 2008, 37 (41); also available at: www.rechtsprechung.niedersachsen.de

[15] Constitutional Court of the State of Mecklenburg-Vorpommern, Judgment of 6 July 2007, LVerfG 9 – 17/06, NordÖR (Zeitschrift für öffentliches Recht in Norddeutschland) 2007, 353 (358, 361–62); also available at: www.landesverfassungsgericht-mv.de.

[16] ECJ Case C-67/98, *Zenatti*, Judgment of 21 October 1999 (ECR I-7289), para 35–36; Case C-243/01, *Gambelli and Others*, Judgment of 6 November 2003 (ECR I-13031), para 67; Case C-372/04, *Watts*, Judgment of 16 May 2006 (ECR I-4325); Joined cases C-338/04, C-359/04 and C-360/04, *Placanica, Palazzese* and *Sorricchio*, Judgment of 6 March 2007 (ECR I-1891), para 53, 58; Case C-169/07, *Hartlauer*, Judgment of 10 March 2009 (ECR I-1721), para 55 ff.; Joined cases C-159/10 and C-160/10, *Fuchs* and *Köhler*, Judgment of 21 July 2011 (ECR I-6919),

In addition the legislature must integrate all relevant aspects of the matter in question into a transparent and appropriate procedure as when it, for example, specified an entitlement to benefits resulting from the constitution.[17]

A transparent and appropriate legislative process means that the advantages and disadvantages of a regulation can be properly surveyed. This process contains the requirements of producing logical, coherent and realistic laws; of consisting of clear norms; and having a recognizable, coherent and viable justification. Within these requirements, moreover, the facts and *rationes decidendi* are comprehensively and verifiably specified and are in general less invasive than the alternatives. With these requirements, the ideal of the modern, rational constitutional state seems to have been reached. What objections, we must then ask, could be raised against these legislative obligations?

Well, there are several objections, a number of which relate to the paradigm shift heralded by the case law. It is assumed that the rules established by jurisprudence do not find a sufficient basis in the existing law.[18] With the dynamic generation of general requirements, the courts have undermined basic decisions of constitutional law[19] and European law,[20] and placed their own conceptions of rationality above the decisions of the competent legislator.[21] Consequently, they have increased the risk of paternalism,[22] shifted the balance from the legislature towards the judiciary,[23] and threatened the capacity of politics to enact reforms.[24] In addition it is feared that in the sphere of EU law, the national competency of Member States for areas not falling under EU competence is overridden by a Europeanization following from the requirement of coherence.[25]

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para 85; Case C-42/07, *Liga Portugesa*, Judgment of 8 September 2009, para 61; Case C-153/08, *Kommission/Spanien*, Judgment of 6 October 2009, ZfWG (Zeitschrift für Wett- und Glücksspielrecht) 2009, 336, para 38; Case C-169/08, *Regione Sardegna*, Judgment of 17 November 2009, EWS (Europäisches Wirtschafts- und Steuerrecht) 2009, 522, para 42; Case C-544/11, *Petersen*, Judgment of 28 February 2013, para 53, 61; Case C-46/08, *Carmen Media*, Judgment of 8 September 2010 (ECR I-08015), para 55, 63 ff.; Case C-316/07, *Markus Stoß and Others*, Judgment of 8 September 2010, *DÖV (Die Öffentliche Verwaltung)* 2010, 940 (LS 906), para 98; Case C-409/06, *Winner Wetten*, Judgment of 8 September 2010; Case C-470/11, *SIA Garkalns*, Judgment of 19 July 2012, para 37; Joined cases C-186/11 and C-209/11, *Stanleybet International Ltd*, Judgment of 24 January 2013, NVwZ (Neue Zeitschrift für Verwaltungsrecht) 2013, 785, para 27; Case C-476/11 *HK Danmark*, Judgment of 26 September 2013, para 67; Joined Cases C-184/13 to C-187/13, C-194/13, C-195/13 and C-208/13, *Anonima Petroli Italiana and Others*, Judgment of 4 September 2014, para 53.

[17] BVerfGE 125, 175 (225), with further references.

[18] Bumke (2010: 93 ff.) with regard to consistency, but only as an example.

[19] Lepsius (2009: 262).

[20] Axer (2010: 137 ff. and 140–41).

[21] Dann (2010: 638).

[22] Dissenting Opinion J. Masing BVerfGE 121, 317, 381 (384 ff.).

[23] Dann (2010: 638).

[24] Dissenting Opinion B.-O. Bryde BVerfGE 121, 317, 378 (380–81).

[25] Axer (2010: 141, top of the page).

Is this criticism justified? Does the promise of salvation that lies in rule of law-based rationality actually lead to a judicial state that overrides positive law when generally applied to the legislature?[26] Or are these new juridical requirements generally appropriate implementations of the rule of law-based paradigm of rational legislation[27] that provides laws with the level of evaluative and justificatory rationality[28] that is necessary from the perspective of the citizen,[29] and that simply require careful integration with the traditional doctrine of constitutional and European law?[30]

In the following these questions will be examined in a step by step approach and the extent to which general rule of law requirements on parliamentary legislation can be justified under constitutional and EU law will be set out. First, the characteristics of the rule of law are established using the requirement of consistency as an example[31] and thereafter its relation to the principle of democracy is outlined. Finally, it is discussed whether the insights obtained are also applicable to the coherence requirement of European Union law.

4.2 Aspects Concerning the Rule of Law

Let us take aspects of the rule of law first. These aspects can be explained using the requirement of consistency as an example. The requirement of consistency that has been developed by the courts obliges the legislator to consistently implement and flesh out its main decisions, and its exceptions to the main decisions must be justified with objective reason.

This requirement is intended as a rule of law-based containment of parliamentary legislation but criticisms may already be raised; it is said, first and foremost, that the gains with regard to the rule of law are opposed by corresponding losses, so that on balance the effects of the rule of law were significantly less favourable than thought.

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[26] Bumke (2010: 95).

[27] Bumke (2010: 95, bottom of the page).

[28] Osterloh and Nußberger (2014: mn. 98).

[29] On this with regard to the principle of consistency in tax law, Kirchhof (2007: § 118 mn. 178–79; 2000: 322; 2003: 44–45).

[30] Bumke (2010: 105), however, excludes the possibility of a differentiation of standards that is necessary for this integration into traditional doctrine, and he thus argues in favour of a change in the system towards a duty of the legislature to enact consistent sets of regulations.

[31] The question of the extent to which general rationality requirements with regards to the rule of law can be based on constitutional law and EU law, can be considered from different perspectives. Given that general rationality requirements on the legislator are expressions of the idea of the rule of law, it is appropriate to descriptively systematise the different aspects according to their relation to the precept of the rule of law. Accordingly, there is a distinction to be made between, on the one hand, aspects that raise questions in respect of the rule of law and fundamental rights and, on the other hand, aspects that touch upon the relationship of democratic legitimation to the legislature.

4.2.1 Anchorage in Positive Law

One reason for the negative effect of the rule of law is held to be the fact that the requirement of consistency is not sufficiently embodied in positive law.[32] When put this way, however, this criticism is not convincing. There may be only limited evidence of the requirement of consistency in the legal texts of Federal State constitutions, the Basic Law and the treaties of the European Union but this equally applies to almost all general requirements of the rule of law. Thus, principles on the protection of legitimate expectations and on non-retroactivity, and requirements as to legal certainty as well as the principle of proportionality are at most marginally embodied in the relevant legal texts. Nevertheless, these principles and requirements have reached the status of recognized legal propositions and remain unaffected by recent case law. Therefore, the principal constitutional embodiment of the requirement of consistency does not pose the real problem.[33]

4.2.2 Hierarchies of Norms

The criticism that the requirement of consistency undermines gradations in the hierarchy of norms[34] does not apply either. The reasoning but also the spuriousness of this criticism becomes obvious in the decision of the Federal Constitutional Court concerning the commuter tax allowance.[35] This judgment concerned an amendment to the Income Tax Law. According to the amendment the costs for travelling between home and one's place of work would in the future be treated like income-related expenses on distances of 21 km and above and would no longer be tax deductible from the first kilometer, as had been in the past. According to the Federal Constitutional Court, past decisions concerning tax burdens must be consistently implemented in order to reach the goal of equality of burden, and exceptions to implementation require a specific objective reason.[36]

The income tax law is said to contain the basic decision of the legislator that financial performance will be measured in line with a main principle according to which professional expenses and existence-securing expenses are deductible from tax.[37] The new amendment was considered to contain a deviation from this principle[38]

[32] Likewise – with regard to the principle of consistency, but generalisable – Dann (2010: 633, 635).

[33] Cf. also Bumke (2010: 93, also on 95: "appropriate manifestation of the model of rational legislation").

[34] Dann (2010: 633–34).

[35] BVerfGE 122, 210 ff.

[36] BVerfGE 122, 210 (230–31)

[37] BVerfGE 122, 210 (233).

[38] BVerfGE 122, 210 (236).

and the passing of it was therefore held to need a specific objective reason, which had not been provided.[39] Hence, the amendment was held to be incompatible with the Constitution.[40]

In this argument critics have spotted an unacceptable blurring[41] of the distinction between statutory and constitutional law. The basic legal regulation of the tax burden decision, namely the assessment of performance according to the main principle, was used to shape a constitutional review of the law.[42] The law was not measured according to the Constitution but it itself provided the framework for the substantive examination. The question, thus, was not whether the legislature had sufficiently considered the Constitution, but whether it had consistently implemented its own decisions since the ultimate result of the court's control was that a sub-constitutional decision became part of constitutional law.[43]

When evaluating this criticism it must be acknowledged that the argumentative recourse of the court to basic statutory law within the framework of the requirement for consistent laws is not without problems. However, it only becomes a constitutionally impermissible blurring or reversal of the distinction of statutory law and the Constitution if constitutional law contains no requirement for consistency. Since in this regard requirements for consistency can be drawn from fundamental rights and, moreover, from the principle of the rule of law, this criticism cannot be sustained.[44]

4.2.3 Impacts on Fundamental Rights

In another respect, however, the obligation of consistency with regard to the rule of law accounts for negative aspects. This becomes clear when looking at the impact of consistency on fundamental rights. The corresponding effects can be illustrated by the decision of the Constitutional Court concerning the protection of non-smokers.[45]

This decision concerned a law that prohibited smoking in restaurants and allowed a limited number of exemptions, one of which concerned adjoining but

[39] BVerfGE 122, 210 (235 ff.).

[40] BVerfGE 122, 210 (245).

[41] Going even further, in the sense of a reversal Lepsius (2009: 262). Leisner-Egensperger (2013: 538) tries to prevent this risk through a restricted understanding of consistency.

[42] Lepsius (2009: 262).

[43] Dann (2010: 633).

[44] In agreement, Dieterich (2014: 262). It is entirely possible and even common to preform constitutional control utilizing non-constitutional decisions of the legislature, if and insofar as the Constitution contains a basis for doing so; the prime example for this is the general principle of equality pursuant to Art. 3 para. 1 Basic Law. When applying this principle, non-constitutional legislation serves as a starting point for the comparison that is necessary to establish the equality or inequality of treatment.

[45] BVerfGE 121, 317 ff.

partitioned rooms.[46] In the opinion of the Court the significant encroachment on the professional freedom of innkeepers was opposed by an exceedingly important public welfare concern, namely the health of the citizens. When determining the level of protection the legislature therefore enjoyed a margin of assessment, appreciation and discretion so that, as a consequence, it was left to the legislator to establish a concept of protection.[47] Hence it was held that the legislature was entitled to impose a total smoking ban. Since a strict smoking ban was justified in the name of important public welfare concerns, the legislature did not have to accept exemptions even in cases where small food and drink establishments were likely to be threatened.[48]

In the case of a relative ban, i.e. a smoking ban with exemptions, however, the situation was different. When balancing legally protected interests the burdens on small food and drink establishments received greater emphasis due to the planned exemptions from the ban.[49] The protection of non-smokers that was weakened by separate rooms for smokers, therefore, had to be balanced with the interests of those establishments likely to be affected by the ban. Since the law had not done this, it was declared unconstitutional.

From the perspective of the freedom of occupation, the decision delivers a remarkable result[50]: an absolute smoking ban that constitutes a comprehensive interference is constitutional, while a relative and thus milder smoking ban is unconstitutional.

This result is not an atypical case of exception but is, in principle, inherent to the requirement of consistency. For the requirement of consistency differs from the traditional doctrine of fundamental rights, and therefore it cannot only lead to results that strengthen, but also to results that weaken the protection of fundamental rights in comparison to the standard of protection offered by the traditional doctrine.[51]

The reason for this lies in the procedure peculiar to the requirement of consistency, namely to consider a specific provision of the law as a basic decision or systematic decision which has to be consistently implemented and fleshed out in the further provisions of the law. That is why deviations from the basic decision require a justifying reason.

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[46] There were further specific exception clauses for discotheques as well as for beer, wine and party marquees.

[47] BVerfGE 121, 317 (356–57).

[48] BVerfGE 121, 317 (357–59).

[49] BVerfGE 121, 317 (359–60, 363).

[50] Dissenting Opinion J. Masing BVerfGE 121, 317, 381 (384 ff.); Gröschner (2008: 405–06).

[51] Contrary to this, however, Osterloh (2013: 440–41) states that "the control of consistency blends in seamlessly with the general equality control with regard to the legislature"; Payandeh (2011: 605 ff.) considers the outlined effects to be a "logical consequence of the construction of the principle of proportionality"; and according to Thiemann (2011: 211) "The requirement of consistency is […] in accord with the structure of the equality principle".

This approach focusses on the justification for the deviation, and not on the justification of the basic decision. This can strengthen the protection of fundamental rights. In this vein, the Federal Constitutional Court in its decision on the commuter tax allowance criticized the lack of a justifying reason for the exemption of the first 20 km, as required by the principle of consistency. In this case the additional burden of justification considerably enhances the fundamental rights-based protection of citizens.

The requirement of consistency can also strengthen the protection of basic rights, when the deviations are understood as part of the basic decision. This is evident in the case concerning the protection of non-smokers. Due to the exceptions of the prohibition, the Federal Constitutional Court held that the basic decision of the legislature was not, in principle, a strict prohibition with exceptions but only a relative prohibition, with the result that the necessary justification for partial strict prohibitions was missing. Also in this instance the precept of consistency leads to greater protection of fundamental rights.

However, the requirement of consistency can also weaken the protection of fundamental rights. In the framework of the equality assessment, as commonly practiced by the Federal Constitutional Court, all features of a regulation that have an impact on equality are to be identified and their relevance as reasons for the differential treatment is to be determined; furthermore, in an intensive examination, the differences and impacts are to be balanced against the weight of the considered justificatory reasons. The precept of consistency leads to the fact that, first and foremost, deviations from the basic decision require justification. The shift that is inherent in the precept of consistency and that moves the burden of justification from the main decision to the exceptions can entail the consequence that the main decision is protected[52] from being called into question by the substantive reasons underlying the further individual legal provisions and that it is, thus, constitutionally justified. This effect is also evident in the decision concerning the protection of non-smokers: according to the Federal Constitutional Court, by enacting a strict ban on smoking the legislature can emphasize the importance of the protected legal interest to such an extent that a total ban would be constitutional, whereas the relative smoking ban was unconstitutional due to its narrow and therefore inconsistently designed exceptions!

With regard to basic rights it must therefore be noted that the shift of the burden of justification from the basic decision to exceptions caused by the precept of consistency not only complicates differentiated solutions and thus impedes legislative compromises but also has a tendency to favour all-or-nothing solutions. In addition, the constitutional protection of the citizens against state interference and their freedom from unequal treatment by the state is partly strengthened, but also weakened to some extent.

[52] Cornils (2011: 1056 ff.).

4.2.4 Selection and Creation of the Standard of Review

A comparison of the judgments on the commuter tax allowance and the protection of non-smokers leads to another fundamental problem of the precept of consistency: constitutionally, the choice and creation of the standard of review are only very weakly determined.

The main point of the precept of consistency is the assumption that there is a basic decision of the legislature, which is to be consistently and coherently implemented in the law. The aforementioned judicial decisions, however, do not provide any generalizable criteria as to how to determine basic decisions and exceptions.[53] This is not a coincidence since fundamental rights provisions do not contain any reliable criteria guiding how to determine a basic decision of the legislature; by means of fundamental rights the precept of consistency can only be very weakly outlined.[54] As has been shown, the corresponding doctrine differs from the traditional fundamental rights doctrine and cannot be underpinned by it.[55] This uncertainty also precludes a coupling with the doctrine of fundamental rights; since it is not sufficiently certain whether the requirement of consistency strengthens or weakens the protection of fundamental rights, the requirement cannot be integrated into the current fundamental rights' doctrine.

4.2.5 Enhancement of Judicial Powers in Relation to the Legislature

The precept of consistency turns out to be problematic from the perspective of the rule of law for a number of reasons that include: inadequate doctrinal compatibility; an insufficient outline of the standard of review; and divergent effects on the protection of fundamental rights. Overall, the uncertainties that arise are considerable to such an extent that they have repercussions for the institutional relationship between the legislature and the judiciary. The judicial review of legislative activities exercised by means of the precept of consistency is so weakly determined that the courts have considerable substantive discretion in the choice, creation and use of the standard of review. Thus, the precept of consistency, at least potentially,[56] leads to a significant enhancement of the courts' powers in relation to the legislature.[57]

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[53] Cf. Thiemann (2011: 191); also on this problem Payandeh (2011: 590).

[54] Dann (2010: 633).

[55] Analysis at Cornils (2011: 1056 ff.); Dieterich (2014: 403 ff.).

[56] Insofar as courts make use of this margin.

[57] Dieterich (2014: 277–78, 281–82); Lepsius (2009: 262); Payandeh (2011: 612–13); differently, however, Petersen (2013: 133).

4.2.6 No Change from a Procedural Understanding

This effect will remain unchanged, if the precept of consistency is primarily understood as a procedural requirement.[58] Although the precept of consistency can certainly be seen as a justification obligation (*Begründungsobliegenheit*) as it does not strictly exclude the legislator from making exceptions to the basic decision, but only requires a specific objective reason for doing so. From this perspective the precept of consistency contains requirements particularly relating to the justifiability of laws,[59] and not directly with regard to the content of laws.[60]

[58] On this Mehde and Hanke (2010: 381 ff.); Hebeler (2010: 754 ff.); Schwarz and Bravidor (2011: 653 ff.); Petersen (2013: 110, 114 ff.). According to this opinion the new or increased procedural obligations (*Pflichten* and *Obliegenheiten*) are only weakly embodied in positive constitutional law (Waldhoff 2007: 329 ff., 336–37; Mehde and Hanke 2010: 384); this is why on this basis, too, the choice and formation of the respective standard of review cannot be sufficiently deduced from constitutional law.

[59] For a comprehensive account on this see Kischel (2003: in particular 63 ff., 303). The assumption that there is a general obligation under constitutional law to state reasons for legislative enactments (in this vein Pestalozza 1981: 2081 ff.; Lücke 1987: 214 ff.; Lücke 2001: 1 ff.; Redeker and Karpenstein 2001: 2825 ff.) is not convincing. The process of democratic legislation as it is outlined in the Constitution and further specified in the respective rules of procedure is one in which different eligible participants take part and in which they take on different roles; the interplay of their contributions as well as their effects on the final law is, with regard to the procedural positions and procedural steps, arranged as a political-democratic will formation (Mehde and Hanke 2010: 383–84; Dann 2010: 640 ff.; Cornils 2011: 1058; differentiating between the rule of law-related or administrative process of concretisation of a guiding principle – that is generally predetermined – and a system of rules, Waldhoff 2007: 329, 330 ff.; differentiating from a process that produces a specific substantive and "correct" knowledge, Dann 2010: 640–41); as a general and future-oriented legal provision the law is therefore based on its justifiability, and not on its historically influenced, heterogeneous and contingent reasoning. These arguments also preclude the assumption that it is incumbent on the legislature to state reasons *(Begründungsobliegenheit).* Even if it were merely incumbent on the legislature to give reasons, the law would not become unconstitutional on the sole ground that a statement of reasons is lacking. In the case of judicial review, however, the fact that it is incumbent on the legislature to give reasons is tantamount to there being an obligation. The reason for this is that in judicial review proceedings the law needs to be justified, so that it also will be held unconstitutional if it lacks a convincing reasoning. Due to this effect a situation in which it is generally incumbent on the legislature to give reasons is to be equated with the – unconvincing – general obligation to state reasons; on this approach, Höfling (1993: 298–99).

[60] Pestalozza (1981: 2086), Lücke (1987: 98), and Redeker and Karpenstein (2001: 2827) go even further and assume that obligations to state reasons are consistent with the principle of democracy and that therefore there is the possibility that the respective obligations enhance democratic rationality, too. Explicitly dissenting, see Schwarz and Bravidor (2011: 659). Furthermore it has to be taken into account that the procedural obligations postulated in more recent jurisprudence emphasize the commitment of the legislature to the rule of law. The various requirements do not refer to the formation or the composition of the majorities that support the law, instead they obligate the legislator to state specific substantive reasons. While this may indeed have effects on the formation of a majority from the perspective of democratic rationality, however, it is not fundamentally different from material requirements like that of consistency, as both refer to the content of laws.

However, this does not reduce the effects of the precept and the resulting enhancement of the authority of the courts in relation to the legislature. Even as a procedural obligation (*Obliegenheit*) the precept of consistency is binding on the legislature and shifts the balance between courts and legislature in the shown manner; this is why the precept of consistency at least potentially leads to a considerable enhancement of the courts' powers in relation to the legislature.

4.3 Principle of Democracy

This finding marks the transition to questions relating to the principle of democracy. The seemingly triumphant advance of the rule of law appears to leave the legislature behind as the underdog since the various judicially-developed requirements involve a closer scrutiny of the legislature through the courts. By drawing on general provisions such as, e.g. the rule of law, fundamental rights and freedoms, courts have dynamically widened the scope of their supervisory powers and reduced the discretion of the legislature.

This is where the fundamental criticism comes in: the development described above is said to unbalance the democratic balance of powers. The increasing adjustment of parliamentary decisions by rule of law-requirements is held to lead to a superimposition of the principle of democracy by the rule of law.[61] Democratic principles and the rule of law are considered to no longer enjoy equal status. By one-sidedly stressing the obligation of the legislature to honour the rule of law, courts – so it is said – have made themselves the sole guardian of legal rationality.[62] This is held to be wrong: courts should reduce the density of their control and should increase their trust in the political and legislative process.[63]

4.3.1 Relationship Between the Rule of Law and Democracy

The question of how the relationship between the rule of law and democracy is to be conceived is a key one. Both the rule of law and democracy can be traced back to the common fundamental idea of the concept of self-determination.[64] This concept is implemented in different ways; while the rule of law with its close connection to the idea of basic rights aims at individual self-determination, democracy is a form of collective self-determination. The basic *ratio* of the latter is obvious; the opinion of the majority is decisive. Thereby democratic rationality entails a direct link to political rationalities. What from a rule of law-perspective appears to be arbitrariness

[61] Dann (2010: 634); Dieterich (2014: 257).

[62] Dann (2010: 642).

[63] In this vein – with regard to the Federal Constitutional Court – Lepsius (2009: 261–62).

[64] On this as well as on the following Möllers (2005: particularly 27 ff.).

guided by individual interests and not capable of universal justification, turns into the irreducible will of the people when looked at from the perspective of democracy.[65]

However, the fundamental idea of self-determination is realized in both the judicial and legislative types of legitimation.[66] The pretension of the rule of law to set limits on public authority coexists with the pretension of democratically legitimized institutions to implement the will of the majority. In principle, both types of legitimation are fundamental principles of modern constitutions with equal status.

On the basis of this legitimation-based conception of the rule of law and democracy, the rule of law requirements developed in jurisprudence and the criticism levelled against them can be regarded in a different way. The idea that the new or at least strengthened demands of the rule of law are based on a mistrust towards the capabilities of the political process can be translated into the assumption of a legitimacy deficit. From this perspective, the judicially developed rule of law requirements appear as an attempt to provide compensation for a supposed legitimacy deficit through an increase in legitimation via the rule of law.

This explanatory approach is confirmed by the fact that the judiciary has developed and applied the new rule of law requirements especially in areas in which, pursuant to traditional doctrine, the rule of law sets only few limits on the legislature.[67] However, the only reason why this state of affairs appears to be a shortcoming is that the legitimation of the statutory provisions is, first and foremost, considered from the perspective of a rule of law-based rationality.[68]

In that regard, the respective jurisprudence is founded on a restricted understanding of rationality and legitimation that tends to reduce those concepts to their rule of law aspects; it loses sight of the specific democratic rationality and legitimation.

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[65] On this Kelsen (1929: 98 ff.).

[66] Critics object that a rule of law-based review is not an instrument to increase the legitimation of a decision. They claim that a decision that is democratically legitimised by having been taken by the parliamentary legislator is delegitimised by subjecting it to a rule of law-based judicial review. Inversely they argue that if objections with regard to the rule of law do not exist and if, as a consequence, the parliamentary decision remains in force, the decision does not draw any further legitimation from the fact that it has not been corrected by the judiciary; instead the lack of a judicial correction is said to leave the legitimation of the decision unaffected, so that positive legitimation could not possibly be a task of judicial control by rule of law standards. When put forward in these terms, this objection is unconvincing. On the one hand it disregards the fact that the limits that the rule of law places on state action are meant to influence the legislative decision and that, as a general rule, they actually do so; on the other hand, a decision that nullifies a law also has a shaping effect.

[67] In this vein with regard to tax law Lepsius (2009: 261, in the middle of the right column).

[68] The one-sided orientation towards the rule of law also shapes the expectations with regard to the law; the conception of law as a clear, systematic, consistent and coherent codification that is subject to the requirement of consistency is based on the ideals of codification of the 19th century, in this vein Lepsius (2009: 262); Dann (2010: 639–40); however, this fails to recognize that in democracies laws are neither necessarily nor mainly procedures that lead to technical and substantive insights, but are always procedures of political decision-making, in this vein, Dann (2010: 639–40).

The further consequences of this finding depend on how constitutional orders determine the relationship between the rule of law and democracy. Usually the two types of legitimation do not stand side-by-side unconnectedly but form a relation of interdependency.[69] The rule of law limits the democratic governance of the majority for a certain time; at the same time the democratic will of the majority is a condition of conduct in accordance with the rule of law. Through the provision of fundamental rights the rule of law draws boundaries to democratic self-determination; at the same time democratically legitimized laws restrict the exercise of individual freedom.[70] Despite their dichotomous positions within a constitutional framework governed by a democratic rule of law, the principle of democracy and the rule of law have to be merged and conceived as one.[71]

However, it does not follow that both precepts are to be understood as principles that, from the outset, seamlessly complement each other. Rather, in respect of rule of law and democracy constitutions can feature not only commonalities but also open tensions.[72] These tensions entail the need to align the structural differences between the principle of the rule of law and the principle of democracy.[73] In doing so, the legitimatory equality of the rule of law on the one hand and democracy on the other suggests the introduction of the principle of democracy into doctrinal considerations as a counterweight to the principle of the rule of law, in order to counteract an understanding of constitutional law that onesidedly favours the principle of the rule of law.[74]

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[69] See on this Böckenförde (2004: § 24 mn. 82 ff.); Schmidt-Aßmann (2004: § 26 mn. 96); both with further references.

[70] Möllers (2005: 30).

[71] Bumke (2010: 94).

[72] Also in this direction Schmidt-Aßmann (2004: § 26 mn. 91–92, 96).

[73] In this vein with regard to the relationship between the fundamental rights-related idea of freedom and the democratic idea of freedom Schmidt-Aßmann (2004: § 26 mn. 96).

[74] That and how within a specific constitutional doctrine the opposing claims to rationality made by the rule of law and democracy are related to each other, picked up, substantiated and differentiated in specific areas so that the tension between them (their) antagonism is reduced, can be seen from the principles of proportionality and legal certainty as well as from the principle of protection of legitimate expectation and the prohibition of retroactivity. Arguing that the requirement of rational legislation is unsuitable for a variable formation of standards, however, it is often disputed that it is possible to develop such differentiated solutions for requirements of rational legislation. Since individual elements of the rationality judgment vary, rationality does not constitute a fixed standard; but according to Bumke (2010: 105, particularly footnote 140) the standard that is considered to form an appropriate level of rationality demands a blanket and unvarying implementation (to be followed everywhere and in the same way). As a matter of fact, these considerations are unconvincing. On the one hand, it is unclear why the acknowledged openness and relativity of rationality judgments is, as a matter of principle, not supposed to apply to the level of rationality. On the other hand, these considerations omit the insight from the theory of legitimation that the respective rationality of a democratic order under the rule of law results from both democracy-based rationality and rule of law-based rationality, that partially work in opposite directions, so that the resulting level of rationality can well be variable and differentiated.

4.3.2 The General Principle of Democracy

The general principle of democracy embodied in Art. 20 of the Basic Law constitutes the starting point for an interpretation of constitutional law that allows the development of democracy-based legitimacy as a counterbalance to the legitimacy conveyed by the rule of law. Alongside the requirement that all state authority has to be democratically legitimized through elections and other votes (Art. 20 para. 2 sentence 2 Basic Law), this provision contains, in its first paragraph, the general determination that Germany is a democratic state. Both the wording and system of the provisions of the Basic Law are open to an integral[75] understanding of the general principle of democracy as an autonomous legal principle that constitutes the basis for the deduction of independent requirements which themselves can exceed the further requirements of democratic legitimation.[76] In terms of constitutional law this marks the starting point for a doctrinal reconstruction of the judicially developed requirements in the area of conflict between the rule of law and democracy.

4.3.3 Outline of an Appropriate Doctrine

Since both the principle of the rule of law and the general principle of democracy are to be understood in a way that furthers mutual recognition and respect, and since both principles are placed on the same level of the hierarchy of norms,[77] the specific

[75] This is contrary to the principle of the rule of law which, insofar as it is embodied in the Constitution, is considerably weaker; on this, above all, Sobota (1997).

[76] On this Unger (2008: particularly 104 ff., 170 ff., with further references).

[77] Given this, the general principle of democracy provided for in Art. 20 para. 1 Basic Law indeed stands independently beside the principle of the rule of law; the effects of the integrative conception of Art. 20 para. 1 Basic Law are, however, limited by the fact that it cannot override the further provisions of the Constitution, which is why the general principle of democracy cannot be understood as a normatively charged optimization command that overrides other constitutional arrangements. Hence, the general principle of democracy cannot be played off against the specifications of Art. 20 para. 2 Basic Law. Insofar as Art. 20 para. 2 Basic Law contains – on its own or in conjunction with further constitutional provisions – conclusions on the democratic legitimation of state authority, these conclusions cannot be undermined by referring to the general principle of democracy of Art. 20 para. 1 Basic Law. This is particularly so with regard to the legitimation requirements developed by the Federal Constitutional Court and the criticism levelled against them, so that it must be assumed that Art. 20 para. 1 Basic Law leaves the state of the discussion concerning the legitimation requirement established by Art. 20 para. 2 Basic Law unchanged, even if Art. 20 para. 1 Basic Law is understood as an independent demand for democracy. The opposite view that conceives of the principle of democracy as a – in parts normatively charged – uniform principle that tends towards optimization is unconvincing as it allows for a detachment from the principles regarding the democratic legitimation of the executive as they have been developed in respect of departmental administration, without being capable of limiting this detachment via criteria that are sufficiently founded in constitutional law. In this vein, Ehlers (2002: 136); Sommermann (2010: mn. 194); Grzeszick (2009: 115 ff.); Heinig (2008: 484 ff., particularly 485–86). This deficit becomes apparent when looking at the constitutional foundations and corresponding

relationship between the two precepts depends on the reasons that argue for or against an assignment of rationality requirements either to the principle of the rule of law or to the general principle of democracy.

Assignment by Institution and Procedure

The answer to the question about a correct assignment does not directly follow from the pertinent principles at issue. Basically, every substantive issue can be decided by parliament as well as by a court. Hence, the procedures and institutions available for decision-making are of central importance for the assignment of a decision to one of the two types of legitimation. In this regard there are significant differences between parliaments and courts.[78]

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criteria of plural and autonomous concepts of democratic legitimation respectively. The corresponding constitutional embodiment of plural or autonomous democratic legitimation of state authority starts with the assumption that the principle of democracy is a principle *qua* type of norm. Its content is said to consist in an only relatively set objective, that is, to be achieved as optimally as possible, whereas rules are said to contain strict requirements incapable of any relativisation. The interpretation of the requirement of democratic legitimation in the sense of a rule model of chains of legitimation fails – so it is said – to recognize the character of democratic legitimation as a principle and is said to reduce the requirement of democratic legitimation to a monistic-hierarchical legitimation via chains of legitimation; in this vein, Bryde (1994: 323–24; and 2000: 61 ff.). But this argumentation is unconvincing. First, the distinction between rules and principles only provides a theoretical framework for the description and systematization of the normative contents of a legal order and, thus, presupposes their existence. Therefore, as a matter of principle, the distinction between principles and rules cannot generate normative standards for positive constitutional law – that it presupposes – and its interpretation; on this Grzeszick (2002: 305 ff., in particular 317 ff.); with regard to democratic legitimation particularly, Köller (2009: 68 ff., 71 ff.). Moreover, this objection cannot be sidestepped solely by understanding Art. 20 para. 2 Basic Law as a rule and the general principle contained in Art. 20 para. 1 Basic Law as a principle, as proposed by Unger (2008: 104 ff., 228 ff., 249 ff.). Inherent in this relationship is the possibility to go back to Art. 20 para. 1 Basic Law when interpreting Art. 20 para. 2 and other individual provisions of the Basic Law that are specifically relevant to the principle of democracy (Unger 2008: 297 ff.). For an opposing stance to a recourse to Art. 20 para. 1 Basic Law, see Kluth (1997: 369 ff.); this possibility, however, is not restricted in any detail by constitutional law and is therefore in principle capable of invalidating the character of Art. 20 para. 2 Basic Law as a rule, although this character is, at first sight, respected by this approach. This is particularly apparent when the reconstruction of the principle of democracy from the democratic idea of freedom that underlies the conception of Art. 20 para. 1 Basic Law as a principle, tends to result in an interpretation that – also in the context of Art. 20 para. 2 Basic Law – perceives the principle of democracy as an optimization command, (Unger 2008: 283 ff., in particular 298; Droege 2009: 654; Krüper 2009: 763; likewise in the direction of an optimization command, but extenuating Müller-Franken 2005: 492) that pushes for an opening of the forms of democratic legitimation (Unger 2008: 298) and thereby largely overrides the limiting effects of Art. 20 para. 2 Basic Law. Also opposed to understanding the principle of democracy as an optimization command, Bowitz (1984: 51); Lerche (1997: 197 ff.); Reimer (2001: 329 ff.); Hillgruber (2002: 469); Waldhoff (2009: 146–47).

[78] On this – from the perspective of the separation of powers –, Möllers (2005: 88–89), with further references.

In courts the vast majority of decision makers are legal professionals who take their decisions in this capacity. The focus is on alignment with legal standards, and non-legal specialist questions are covered by external expertise. As a rule, final decisions are made by a small group of judges acting in concert and the procedure usually concerns a single case which severely limits the number of persons involved and which results in a perception of problems that is rather retrospective in character. As a rule, the law thereby produced is considerably more concrete and individualised than in the case of parliamentary law-making.

When it comes to parliament the decision makers are less defined by their vocational education or their prior professional activities. The focus of the decision is on the right policy; the law is, first and foremost, the framework and medium of political discretion. The parliamentary body consists of many persons and if subsidiary bodies, for instance committees, are involved, their compositions are normally representative of the whole body. Insofar as technical questions are not discussed by the members of parliament alone, external expertise is introduced through input by the ministries or via committees so that the content of the information introduced is regulated. The law making procedure usually deals with broader topics and affects a large number of persons.[79] The perspective is more prospectively oriented, that is it focuses on developments that are to be prevented or promoted. And, as a rule, the law produced is more general than is the case with judicial rulings.

The significant differences in the procedures and institutions available to decision-makers,[80] provide information on whether in cases of conflict between democracy and the rule of law[81] a decision should be subject to decision-making mechanisms that – following a rule of law-paradigm – aim at substantive correctness, or if it should rather be taken according to democratic decision-making processes that orient themselves to political majorities. Decisions which refer to a subject-matter that is highly determined by law, that are likely to have a considerable bearing on individual cases, that intensively affect a certain group of persons and that suggest a retrospective perception are, as a general tendency, to be allocated to the rationality of the rule of law. Decisions, however, that refer to a subject-matter which is only lightly determined by law, that are strongly likely to be generalisable, that affect a multitude of persons and that entail a forward-looking perspective are, as a general tendency, allocated to the rationality of the principle of democracy.

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[79] As a general rule, however, they are not involved in the proceedings but are represented.

[80] Indeed, for the highest courts this distinction must be qualified inasmuch as with regard to the respective decisions more general and future-related aspects are more often relevant; in principle, however, due to the differences that exist even in these cases, the distinction remains valid insofar as it designates a tendency of allocation even if, as the case may be, it is on a lower level. The allocation of administrative activities, however, can be considerably less clear-cut.

[81] Cases of conflict most notably occur when the general principle of democracy and the general principle of the rule of law collide. Insofar as individual constitutional provisions dictate the allocation to the rule of law, as with the case particularly with regard to fundamental rights, this allocation cannot be circumvented by solely referring to the general principle of democracy; the standard of review can, however, be open to a number of other considerations, as illustrated by the Federal Constitutional Court's restraint when it comes to the review of proportionality in the narrow sense.

The Principle that Existing Constitutional Requirements on Legislators Are Sufficient

It follows from this allocation based on the procedures and institutions available for decision-making that with regard to the legislature rule of law-requirements exceeding the status quo are to be developed with great caution only. The tendencies of allocation suggest that statutory laws are generally to be allocated to democratic rationality. In principle, the rule of law requirements that have already been developed with regard to the legislature are therefore to be considered as a sufficient commitment to the rule of law. Together with the demands that the principle of democracy places on the legislature they are able to provide statutory laws with sufficient legitimation.

The principle that existing rule of law-requirements on the legislature are sufficient is of importance, in particular, when it comes to the handling of extra-legal conditions and value judgments. Insofar as constitutional law does not set any specific standards that authoritatively prescribe the nature and extent of the commitment to the rule of law,[82] and insofar as traditional doctrine does not provide review criteria[83] with regard to the rule of law,[84] the question where to assign the handling of extra-legal conditions and value judgments depends on where the issue falls on the matrix just sketched. If extra-legal conditions and value judgments are relevant in conjunction with decisions that refer to a subject-matter which is only lightly determined by law; that are likely to be generalisable; that affect a multitude of persons, and that entail a forward-looking perspective they are, as a general tendency, to be assigned to the rationality of democracy. It is therefore right to assume that, in principle, the legislator has considerable discretion when it comes to accessing and dealing with extra-legal or legally undetermined conditions, value judgments and assessments.[85]

New Requirements as a Compensation for Legitimation Deficits

It further follows from the basic assumption that requirements that intensify the rule of law-commitments of the legislature beyond the *status quo* require particular justification.[86] The respective requirements can only reach as far as it is justified by specific reasons that are determined in turn by the two types of legitimation.

[82] On this only Meßerschmidt (2000: 908 ff.).

[83] Comparable considerations are formulated by Englisch (2010: 199 ff.), who also bases his argument on the assumption of a collision in the sense of the so-called "external theory" (*Außentheorie*), but who focuses on the density of control.

[84] See on this and regarding instances where the legislature is mistaken in its assessment of facts Bumke (2010: 97–98).

[85] On this as well as on the distinctions Bumke (2010: 98).

[86] For a critical appraisal see Osterloh (2013: 430).

However, the generation of new rule of law requirements on the legislature as a way to compensate for a legitimacy deficit is only permissible within narrow confines.

(a) Failure to achieve the constitutionally required level of legitimacy

Since in combination with democratic requirements existing rule of law standards guarantee sufficient legitimacy, an intensification of requirements with regard to the rule of law through constitutional interpretation is permissible only on the condition that the performance of one of the two types of legitimation is impaired, so that the constitutionally required minimum level of legitimation with regard to democracy or the rule of law is no longer achieved. In terms of constitutional law, additional requirements like the standard of consistency can only be justified if and insofar as the performance of either the rule of law-based or the democracy-based mode of legitimation is reduced and if, as a consequence, the level of legitimation with regard to democracy or the rule of law falls below the constitutionally required minimum, even if the existing requirements of constitutional and non-constitutional law are followed. As a general rule, it can be assumed that the standard requirements of constitutional law with regard to the types of legitimation convey sufficient legitimation if they are ensured.

One should therefore be reluctant to assume that there is a deficit of legitimation that needs to be compensated. In particular, when assuming a deficit of rule of law-based legitimation it might be disregarded that, if a decision is weakly determined by the principle of the rule of law and, consequently, has only little steering effect, this can be due to legal specifications that are correspondingly open and restrained and has, from the perspective of constitutional law, thus to be accepted. Accordingly, with regard to tax law some take the position that the relatively low restrictions that fundamental rights place upon the legislature when it comes to tax legislation do not constitute a deficit of rule of law-based legitimation but are, in principle, to be accepted as a consequence of existing constitutional law. Therefore, with regard to tax legislation the substantive review of the legislature has, according to this view, to be effected on the political-democratic level[87] and not by way of an intensification of the commitment to the rule of law.

Only if, and given the condition that traditional requirements are ensured, the performance of one of the types of legitimation is impaired so that the constitutionally required level of legitimation is no longer guaranteed, this legitimacy deficit can possibly be compensated for by developing new rule of law-based requirements that exceed the traditional commitment of the legislature to the rule of law and that, as a consequence, provide compensation for and remedy the legitimacy deficit.

[87] Lepsius (2009: 261). However, shortcomings may, for instance, exist with regard to interests held by the minority. If, within the framework of democratic decision-making, these interests are structurally underrepresented (Lepsius 2009: 261), it is possible that the political process cannot provide a sufficiently effective control. If this is the case, it may provide an argument in favour of increasing the emphasis on rule of law-based rationality and of developing or intensifying corresponding requirements.

(b) A legitimation deficit can, in principle, be compensated for

The generation of new rule of law requirements on the legislature to compensate for a legitimation deficit is not possible, however, without further effort. The reason for this is that new or increased requirements on the legislature qualify as a means to compensate for an otherwise existing legitimacy deficit only insofar as these compensations are permissible under constitutional law. The question if and to what extent this is the case cannot be assessed by general terms, but requires a differentiated analysis of the particular case, of the types of legitimation affected, and of any specific requirements that might be applicable.[88]

(c) Compensation options

Moreover, it has to be taken into account that a legitimacy deficit cannot only be compensated for by creating further rule of law requirements; it can also be compensated for by strengthening the democratic mode of legitimation. Daily expense allowances of members of parliament provide one example for this. As the members of parliament have considerable discretion when deciding on the level of their daily expense allowances, the danger exists that their decision will trend towards their financial advantage. In the opinion of the Federal Constitutional Court this danger has to be met by strengthening the democratic elements of legitimation. The Court requests that parliament discusses every change in the level of daily allowances in plenary and that it makes its decision in full public view, treating the matter as a nonpartisan political question.[89] This specification is meant to allow for political control over parliamentarians that is sufficently intense and is meant to thereby strengthen the democratic legitimation of the decision on the level of daily allowances.

(d) Compensation effect

Finally, it should be taken into account that additional rule of law requirements are not always capable of compensating for assumed or existing deficits of legitimation.

This is clearly illustrated by the efforts of the Federal Constitutional Court with regard to the federal system of fiscal equalisation, whereby the Court has tried to persuade the legislator to move from merely interest-guided agreements on amounts of money[90] to the permanent, long-term and future-facing allocation of financial resources. The approach of compensating for the lack of directly enforceable standards in the constitutional provisions on public finances through a constitutional obligation to enact a law containing such standards (so-called *Maßstäbegesetz*) has turned out to be ineffective. This is particularly because by retroactively and abstractly paraphrasing an allocation that previously had been politically negotiated

[88] In detail on the principle of democracy Grzeszick (2010: mn. 127 ff.), with further references. On compensations in public law in general Voßkuhle (1999).

[89] BVerfGE 40, 296 (316–17).

[90] BVerfGE 101, 158 (217).

the *Maßstäbegesetz*, in substantial parts, merely confirmed a political compromise. The idea of an obligation to enact a *Maßstäbegesetz* that makes up for a lack of substantive specifications in the constitution can therefore be considered to have failed.[91]

(e) Compensation of legitimation deficits: specific and limited

The considerations outlined above confirm that courts should be very reluctant to develop rule of law requirements that go beyond the developed state of rule of law standards with regard to the legislator. In principle it should be assumed that existing requirements on the legislator with regard to the rule of law and democracy provide sufficient legitimation. Further requirements that exceed the legislator's already existing constitutional obligations are permissible only in order to compensate for a specific and limited deficit and, hence, can only be established to a very limited extent.[92]

It is possible that such a permissible compensation are subject to the decision of the Federal Constitutional Court on the constitutional standards concerning sovereign debts.[93] In the opinion of the Court the legislator enjoys discretion when assessing whether the constitutional requirement that a disturbance of the macroeconomic equilibrium (i.e. an economic development that deviates from the normal situation) exists or is imminent, is fulfilled and when assessing whether increased borrowings are suitable to oppose this disturbance or risk of it.

According to the Court's opinion, however, if the legislator utilizes its powers to increase borrowing it carries the burden of demonstrating that the constitutional requirements are satisfied. This burden of demonstration allows for a minimum of substantive review by the Court, without forcing substantive demands upon the legislature that are not provided for in the Constitution.

Indeed, concerns have also been expressed with regard to this. In addition to the question whether requiring the budgetary legislator to give a demonstration of proof does not amount to an extenuated obligation to give reasons –an obligation that conflicts with the fact that a general constitutional obligation to give reasons does not exist–,[94] the *effect* of the legislator's burden to provide proof is also questioned.[95] Against this critique the objection is raised that the explanation and justification of the increased net borrowings can have a political feedback effect that could sensibly complement first, the general publicity function of the constitutional requirement to

[91] Waldhoff (2006: 161 ff.).

[92] Therefore, the principles developed with regard to the requirement of consistency are also applicable to the assumption of general procedural obligations (*Pflichten* and *Obliegenheiten*). The principle that the existing rule of law requirements on the legislature are sufficient applies to them as well. Only if and insofar as constitutional law requires the legislature to determine specific facts or to render a particular forecast is there a specific obligation (*Obliegenheit*) in the sense of a burden of demonstration.

[93] BVerfGE 79, 311 (344–45).

[94] Maunz (1989: 499); Janssen (1989: 618–19); Höfling (1993: 298–99).

[95] Patzig (1989: 1027).

enact a specific statute when it comes to the regulation of sovereign debts and, second, the alert function with regard to the estimation of the investment, so that the burden of demonstration could be conceived as a chance for a more rational engagement with the subject of sovereign debts.[96]

4.4 EU Law

The trend for courts to lay down general rule of law requirements for parliamentary legislation that are detached from individual guarantees and that intensively bind the legislator is also noticeable in other areas of law, particularly EU law.[97] In some cases[98] the European Court of Justice has examined in considerable detail whether national rules that interfere with fundamental freedoms or entail discriminations, actually serve the purpose of coherently and systematically achieving the goals offered as a justification for the respective regulations.

The requirement of coherence in EU law gives rise to a number of problems that broadly echo the corresponding requirement under German constitutional law.[99] Therefore, the principles developed with regard to the latter can be transposed to the requirement of coherence under EU law.

However, when it comes to EU law there is one additional aspect to take into consideration, namely the distribution of competences between the EU and its Member States. The review of national rules as to the coherent application of EU law enables the ECJ to intensively examine national law. Admittedly, the criteria of coherence of the national rules seems to protect the competences of the Member States since they maintain the prerogative to establish their own regulatory frameworks. Yet, when performing a review the European Court of Justice can extensively intervene in national regulations as well as their enforcement. Therefore, in conjunction with the passive side of fundamental freedoms and the regulations concerning protection against discrimination, the verification of coherence enables the European Court of Justice to extensively and intensively review the rules of the Member States.[100]

If a rule concerns a subject matter that falls within the competence of the Member States an intensive review by the European Court of Justice may shift the balance

[96] Höfling (1993: 300).

[97] At length on this development in EU law Dieterich (2014: 559 ff.). On the development of a requirement of coherence in the area of the ECHR see ECtHR (Grand Chamber), Judgment of 28 May 2009, *Bigaeva v. Greece*, para 35, and Judgment of 3 November 2011, *S.H. and others v. Austria*, para 74; on this Wollenschläger (2011: 25 ff.); on consistency arguments in the jurisprudence of the WTO Appelate Body, Petersen (2013: 119 ff.).

[98] Explicitly ECJ, Case C-372/04, *Watts*, Judgment of 16 May 2006 (ECR I-4325); Case C-169/07, *Hartlauer*, Judgment of 10 March 2009 (ECR I-1721).

[99] On this with further details, Axer (2010: 142), with further references.

[100] Axer (2010*:* 137–38), particularly in the area of health insurance and social security.

between Member States' competence for the subject matter on one hand, and the application of fundamental freedoms and EU regulations concerning protection against discrimination on the other. There is, here, the danger of Europeanization by coherence[101] and this danger is clearly evidenced in health insurance legislation and social security law. Although the area of health care principally falls within the competence of the Member States, the intensive review as to the coherence of national rules allows the European Court of Justice to become involved at a profound level in Member States' margin of manoeuvre and to require them to make drastic adjustments to their legal orders.

An example of a competence-endangering review of coherence is the decision of the European Court of Justice in the "Hartlauer-Case".[102] The Court had decided to refuse a based-on-need allowance-regulation for dental outpatient clinics in Austria because it regarded the regulation as imposing a restriction on the European freedom of establishment. A considerable endangering of the financial balance in the health care system was put forward by the Austrian government as justification. The ECJ rejected this indicating that since in Austria group practices are not subject to any system of permits the need for an approval in the case of outpatient dental clinics is not appropriate to justify a limitation on the freedom of establishment.

In the opinion of the Advocate General involved in the case the question whether group practices and outpatient dental clinics are comparable regarding the aim of the system of permits should be judged by the referring national court with due regard to the directions given by the European Court of Justice. Thus this ensures that the analysis of effects that is necessary to evaluate the comparability of group practices and outpatient clinics is made in concert with the evaluations and assessments of the Member State concerned.[103]

However, the Court of Justice simply assumed in its decision that outpatient dental clinics and group practices are not comparable. Here its decision was based on its own evaluations and without considering the competency of the Member States for the area of healthcare.

But the problem of a competence-endangering review of coherence can also be handled using the principles developed above. According to these principles it must be assumed that the traditional obligations of the legislator under EU law are, in principle, sufficient. In this case the result for EU law is that an extensive and intensive review with regard to the coherence of national legislation must be justified as an area-specific deficit compensation and has to be narrowly limited in terms of conditions and range. Thus, the competence of the Member States for the area concerned is sufficiently protected against Europeanization by coherence.[104]

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[101] Axer (2010*:* 139, 141–42).

[102] ECJ Case C-169/07, *Hartlauer*, Judgment of 10 March 2009 (ECR I-1721).

[103] Opinion GA Y. Bot, ECJ Case C-169/07, *Hartlauer* (ECR I-1721), para 111 ff.

[104] An example of such an area is that of laws relating to gambling. On this see van den Bogaert and Cuyvers (2011: 1201).

4.5 The Nature and Value of Democracy in the Modern State Governed by Rule of Law

In light of all the above considerations, rationality is and remains the guiding theme of the modern state. Only if and insofar as the law is rational it can permanently meet its claim to be binding. There is no way back to the condition of irrationality.

In modern constitutions, however, rationality is neither limited to the rule of law nor can it be equated with it. The rationality of the rule of law is supplemented by democratic rationality. In principle, in a democratic state governed by the rule of law both types of legitimation are fundamental principles of equal standing.

In cases where rule of law and democracy do not have a complementary but a contrary effect, tensions can arise. In these constellations the competing claims of the principles of the rule of law and democracy must be reconciled. The procedures and institutions of the two types of legitimation thereby justify the principle that, generally, the existing constitutional obligations of the legislator are sufficient. The legal obligations of the legislator go beyond the need for justification as sector-specific compensations of a deficit and are strictly limited as to preconditions and scope.

Insofar as the national and European courts, relying on the power of a rule of law-based rationality, tend to formulate general rules of law requirements concerning parliamentary legislation that are detached from individual guarantees, they need an enlightenment themselves; an enlightenment about the nature and value of democracy in modern states. The requirements of rationality on parliamentary legislation in a democratic state governed by the rule of law can only be correctly determined if the rule of law and democracy are taken into account.

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Chapter 5
The Generality of the Law

The Law as a Necessary Guarantor of Freedom, Equality and Democracy and the Differentiated Role of the Federal Constitutional Court as a Watchdog

Gregor Kirchhof

Abstract Social expectations, technical progress, European legislation and other international cooperation mechanisms are making difficult demands today in terms of legal coordination. The reaction to this difficulty is frequently a large quantity of special legislation which tends to do more to weaken legal certainty and confidence in the law than to strengthen them. The tightly-woven web of non-constitutional statutes, springing from national as well as international and supranational sources, renders the law less comprehensible, consistent and authoritative. This is related to the public sector's tendency to focus on pursuing specific goals – for example of environmental or consumer protection, energy or economic policy. The common good is equated to specific regulatory goals, and ultimately to the tasks falling within the functions of the State. The fundamental mandate as expressed in European legislation, namely to create an area of freedom, security and justice, is however neglected in this process. Here, the idea of the law is capable of offering a solution. The idea of the law is that of generality. This finding in ideational history, which was already in evidence in the law in ancient times, and which was particularly stressed in the thirteenth and eighteenth centuries, is now forgotten. Binding requirements of generality, such as those in Art. 19 para. 1, sentence 1, of the German Basic Law (GG), are hardly followed. People can only be equal before a general law. The generalising rule guarantees freedom. It satisfies the principle of the separation of powers because it clearly distinguishes the mandate of parliament from that of the administration. The generality of the law makes the law more comprehensible, the legal system more consistent, and the laws, and hence parliamentary democracy, more effective. The Basic Law and European legislation make demands in terms of generality which differ as to the degree to which they are binding. Some of them are justiciable requirements, whilst others are also only legally-binding standards for

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the executive and the legislative, but not for judges. The generality of the law furthermore gives rise to rules of wisdom which are derived from legal tradition and which address the legislative bodies, wishing to impart to them new knowledge. Legal calls for the formation of general rules provide major opportunities when it comes to protecting fundamental rights and democracy. The attempt to reinvigorate the old idea of the law is therefore worthwhile.

Keywords Law • Generality of the law • Democracy • Rule of Law • Freedom • Equality • European Legislation

5.1 The Mandate and the Formal Nature of the Law

The law is the general rule which goes beyond the individual case and is binding on all, secures peace, develops democracy based on the rule of law, sets boundaries on individual freedom, and facilitates equality. The law is a precondition for justice, and even a part of justice. Laws form the basis of legitimate public power. Without a legal empowerment, the executive and the judiciary may not address major issues. Laws set the standard for lawful action, provide a legitimisation of the authority of the legislature and of the Constitution as the source and framework of the law.

This central role played by the law is stressed by analyses of ideational history, of democracy, and of the rule of law. The law is a guarantor of justice[1] and of a freedom-based legal order,[2] it is a condition for equality[3] and impartial expedience.[4] Its form is "the sworn enemy of arbitrariness".[5] The law creates security and peace,[6] is the relevant regulatory instrument in a freedom-based democracy,[7] forms the core[8] which expresses the "will of the people",[9] and provides democratic legitimacy.[10] It is the predicate for the separation of powers[11] and the "guarantor of predictability,

[1] Aristotle [between 329 & 326 BC] (2003: 1287b); von Jhering [1852–1865] (1954: 35); Radbruch [1932] (1999: 26) [19 et seq.]; Hart (1961: 20); cf. all in all on this and on the following: G. Kirchhof (2009).

[2] Kant [1793] (1992: A 234 et seq., esp. A 234); Rawls (1975: 266, 271).

[3] Kant [1793] (1992: A 238 et seq.).

[4] Di Fabio (2004: No. 52).

[5] von Jhering [1852–1865] (1954: 471), also for society.

[6] Cf. Badura (1992: No. 36).

[7] Schulze-Fielitz (1988: 152 et seq.); H. Dreier (1991: 160 et seq.).

[8] Böckenförde (1981: 381); Hesse (1999: Nos. 508 et seq.).

[9] Ossenbühl (2007: No. 4).

[10] Reimer (2012: Nos. 10 et seq.); Ruffert (2012: No. 55); cf. also Ruffert (2002).

[11] Cf. already Aristotle [between 340 & 335 BC] (2005: 1354a31 et seq.); Locke [1689] (1977: 11th Chapter § 142); Kelsen [1925] (1966: 231 et seq.).

uniformity and stability". "In its structuring, transparency-creating function", it is an "irreplaceable cornerstone" of legitimate public power.[12]

In contradiction to this central role that is played by the law, there is a widespread hypothesis that the legal definition of the Basic Law and of European law is void of content, defining itself solely from the source, namely the legislature.[13] The law is simply said to be what the legislative body hands down as law.[14] This formal legal definition stresses parliament's core competence, however, it neglects the great promise of freedom and equality which has been founded in general law since time immemorial.[15] The mandate of the law is questioned by current legislative practice, which hardly achieves the quantity and quality of the necessary measure and too seldom enacts laws that create a structure. The legislative practice risks its authority in detailed stipulations. The law can frequently only be understood with specialist knowledge.[16] The criticism of the "flood of law" is almost as old as non-constitutional law itself.[17] However, the crisis in the growth of non-constitutional law appears to be coming to a head. At present, law arises from a large number of sources, when international and supranational law, national federal and *Land* law applies.[18] There are pressing warnings of the return of "pre-state legal pluralism" which could also spark the "return of the pre-state evils".[19] The task at present is once more that of Johann von Buch who, in the fourteenth century, attempted to avoid conflicts of the sources of the law, or at least to reveal them, by cross-referencing the *Sachsenspiegel* (the Code of the Saxons) to Roman and ecclesial law. The more than 6,500 comments on the *Sachsenspiegel* make clear the considerable challenge posed by this endeavour, which was virtually impossible to complete.[20] The question arises as to how many comments it would require to coordinate the law that is applicable today. Having said that, the coordination of the law begins in legislation. Cohesion, system and comprehensibility are to be enforced by the law.

To put the issue in context, the German Federation handed down roughly two laws and ordinances per day from 1998 to 2004 whilst in the same six years the

[12] Schmidt-Aßmann (2004b: 81, 183 et seq.); altogether: Starck (1987: 5 et seq.).

[13] Cf. on this the indications in Ossenbühl (2007: No. 13); cf. Ruffert (2012: Nos. 33 et seq. and 81 et seq.).

[14] Cf. on this Scheuner (1960: 601); Böckenförde (1981: 381); for a critical view at a distance of this common interpretation see Starck (1970: 21 et seq., 234 et seq.); more critical: Horn (1999: 59 et seq.); Vesting (2008: 243): The "prevalent doctrine has to a certain degree decided against a 'rational' legal definition and in favour of a 'political' one". The law then becomes a "medium of political legal formulation" pure and simple; Schulze-Fielitz (1988: 157) notes that the legal debate does not aim to create a legal definition; G. Müller (2013: 11 et seq.) takes as a basis the functions of legislation because of the lack of a legal definition.

[15] Cf. on this at Sect. 5.3.

[16] Clearly Maihofer (1981: 4); Eichenberger (1982: 15 et seq.); H. Schneider (2002: Nos. 427 et seq.); Müller-Graff (1998: 111 et seq.), with further indications.

[17] Schulze-Fielitz (1988: 17 et seq. and 132 et seq.).

[18] Mandelkern et al. (2002), OJ C 321, p. 1 et seq.

[19] Stolleis (2008: 428).

[20] F.-M. Kaufmann (2008: 75); Lück (2005: 17 et seq.); Kroeschell (1998: 68 et seq.).

European Union enacted more than eight regulations per day.[21] These figures also include minor legal amendments and detailed regulations. Nonetheless, they appear to prove the sobering finding that it is impossible both for ordinary citizens and "the legal profession to gain an understanding of or, in practical terms, even to get a general overview of all the rules of law which affect them."[22] Thus, the rule of law criticises the fact that the applicable law is virtually beyond its grasp. The democratic principle asks who is responsible for the laws and whether the law still expresses the will of the legislature.

5.2 The Law: A Neglected Instrument of Fundamental Rights Protection and a Category of Thinking

5.2.1 A Necessary Guarantor of Fundamental Rights

The grounding idea of the law is that of generality.[23] This notion in legal and ideational history, which can be traced back to ancient law and was particularly stressed in the thirteenth and eighteenth centuries,[24] is taken up by current legislation in a remarkable level of clarity. As per the explicit stipulations,[25] laws and European regulations which impair human rights must be general. Equality is only possible before a general law.[26] The generality of the rule prevents privileges from arising. Democracy evolves through comprehensible laws which are free of contradiction. These legal postulates of generality,[27] including the warnings of ideational history regarding the generalising formation of rules,[28] are currently being neglected.

Since the epochal change to the individual protection of fundamental rights which took place in the eighteenth century, this protection was particularly refined in Germany and made to apply tailored to the individual. The classical defensive right function was added to by guarantees enjoyed by institutions vis-à-vis the legislature, protective rights and rights to participate as well as the third-party effect of fundamental rights.[29] In this orientation towards the concrete, the generality of the

[21] Bundestag printed paper (*BT-Drs.*) 15/5434, 15.

[22] Mandelkern et al. (2002), OJ C 321, 52.

[23] Cf. on this G. Kirchhof (2009: 67 et seq.), and at Sect. 5.3 immediately below.

[24] Cf. at Sect. 5.3 immediately below.

[25] Art. 19 § 1, sentence 1, of the Basic Law; Art. 288 § 2, sentence 1, TFEU.

[26] Cf. Art. 3 § 1 of the Basic Law; Art. 20 of the CFR; Kant [1793] (1992), A 289 et seq. and 349 et seq.; cf. at Sect. 5.3 immediately below.

[27] Cf. at Sect. 5.4 immediately below.

[28] Cf. at Sect. 5.3 immediately below.

[29] Nettesheim (2005), 168, recognises in the research an "imposing character" which reminds one of a "Gothic cathedral"; Klein (2004: Nos. 70 et seq., "expanding interpretation of fundamental rights"); Bryde (2004: § 38, Nos. 5 et seq.).

law, a tool indispensable to the protection of fundamental rights and democracy, was pushed to one side.[30] The eighteenth century developed fundamental rights and democracy based on the rule of law, but also the generality of the law as a guarantor of freedom and equality. Whilst under Absolutism the law had consisted simply of the will of the Prince, the legal definition of the Enlightenment, that is the general law, was per se to have the effect of something new, namely that of ensuring freedom.[31] Many legal texts from this time stressed the concept of the law as a permanent, general and abstract, and hence freedom-securing, rule.[32] In the ensuing period, it was not fundamental rights but the generality of the law which achieved gains in terms of legal freedom and self-determination.[33] The individual provision restricts the legal scope of freedom, whilst the general rule broadens it.

Fundamental rights protect individuals in terms of their individual affectedness, focus on the particularities of the specific case, serve justice in single cases, and lay responsibility on judges to uphold them. Such a focus on the individual[34] runs the risk of neglecting the view of the Whole, of the legal order based on freedom. Democracy is inconceivable without the protection of individual fundamental rights. Nonetheless, subjective laws alone cannot guarantee freedom and equality.[35] Owners may defend themselves against the expropriation of their land. But it is virtually impossible to develop a property system including ownership rights, planning regulations and environmental protection in terms of individual rights. The needy can take legal action with regard to their right to social assistance. So, the general law supplements the protection of human rights, which focuses on single cases, by orientating the actions of public authorities towards the whole, and moderates and shapes them in generality.

The generality of the law can be compared with a wall which prevents factory or street noise directly reaching individual houses in the neighbourhood. Nuisance-causing noise is thus hindered, but so are pleasant sounds; both are spread and thus

[30] Starck (1970), 195 et seq., esp. 241; H. Hofmann (1987), esp. 11, 48; Stern (1988), 712 et seq., esp. 733; H. Schneider (2002), Nos. 32 et seq., esp. Nos. 44 et seq.

[31] H. Hattenhauer (2004: No. 1527).

[32] Cf. sections 5 and 7 of the Virginia Bill of Rights of 12 June 1776 and section 1 of Article Four of the Constitution of the United States of 17 September 1787; Art. 6 of the Déclaration des Droits de L'Homme et du Citoyen of 26 August 1789 (on the legal texts: Gosewinkel and Masing 2006: 134 et seq., 146 et seq., 165 et seq. and 193 et seq.). In accordance with section 5 of the Introduction to the General State Law for the Prussian States of 1794, the "ordinances handed down by the sovereign in individual cases, or with regard to individual objects […] may not be regarded as laws in other cases, or with regard to other objects." cf. altogether Grimm (2003: Nos. 9 et seq.); Grawert (1975: 901 et seq.); Jellinek [1887] (1919: 73 et seq.); Schreckenberger (1995: 106 et seq.); Fischer (1984: 257).

[33] H. Hofmann (2001: 7; and 1989: 3181); Böckenförde (1999: 16 et seq.); cf. on the "cult of the law" at that time Schlette (1984: 281), with further references.

[34] Di Fabio (1994: 16, 19); with Jestaedt (1999: 54 et seq.) made the state based on the law into a state based on fundamental rights; Starck (1987: 5); Volkmann (1998: 7 et seq.), speaks of a "symbol of individualisation".

[35] Di Fabio (2004: No. 84); for a thorough analysis of the law as a guarantor of freedom see Lerche (1961); Häberle (1983).

made acceptable for all. The parliamentary majority decision does not directly affect the individual with legal mandatory effect. The strong democratic legitimisation of the majority decision does not run the risk of neglecting the interests of those concerned.[36] The generality of the law also strengthens the competences of the legislature, which should and does cover legal issues using single cases. The binding parliamentary response to legal issues must, however, generalise. General law distributes both advantages and disadvantages among all citizens, only imposing on individuals the burden which all must bear. "Generality and abstractness of the norms" create a "healing distance between persons and situations", first and foremost giving rise to "legal structures", and they provide "something average as a standard".[37] A protective wall is created which prevents noise impacting a house unhindered and thus making it uninhabitable. What is more, there must be protective measures orientated towards the individual case, sound-proofed windows and doors. These would not be sufficiently effective without the wall; the wall alone is however unable in turn to guarantee quiet in each individual house. The general law and the guarantees of fundamental rights, protection provided by parliament and judges, complement one another.

5.2.2 The Need for Specialisation in the Law

International cooperation, social regulatory expectations, progress in natural science and technology, and the differentiation of society, provide complicated regulatory mandates and necessitate legal coordination. The legal community frequently reacts to this with complicated regulations focusing on single cases. According to a common finding in the literature, the legislative mandates of regulatory law, social law, fiscal law and the law on technology, cannot be fulfilled by general categories. In light of these legislative mandates and of the wrestling which needs to be carried out in parliamentary democracies to reach political compromises, the era of the great codes of law is said to be replaced by a "normality" of "fragmentary and periodic" law.[38] Is the "flood" of legal provisions therefore an unavoidable by-product of the social welfare state in the age of the industrial society,[39] or does the modern state need more than ever the codification concept, the generality of the law? Does the postulate of generality constitute a source of strength of parliamentary democracy and a guarantor of freedom and equality particularly in industrial societies at a time of increasing international cooperation?

[36] On fiscal law, Di Fabio (2007: 752), emphasises: "What is the import of the minor interest in the defence of one's own property against the overall whole of the state that is wrestling to remain functional?"

[37] H. Hofmann (1987: 46), with further references.

[38] Kübler (1969: 645 esp. 649 and 651); K. Huber (1963: 166 et seq.); von Bogdandy (2000: 47 et seq.).

[39] Cf. on this question Ossenbühl (2007: § 100, Nos. 77 et seq.).

In fact, it would be naïve and would endanger freedom to ban specialisations from the law. A society which divides functions facilitates freedom. An individual alone is virtually unable to build a house, manufacture a motor vehicle and supply their family with medicines. This is however possible with the assistance of the others in a society where tasks are divided. This specialisation is followed by the law. The legislature hands down regulations on for instance the construction of buildings and the registration of motor vehicles and medicines. This specialisation is a precondition for the development of freedom. Individuals are not overtaxed by the paralysing demand of understanding the law as a whole, but may devote themselves to those legal standards which directly affect them. Their legal responsibility is hence limited. This necessary specialisation however predicates legal cohesion so that special laws are incorporated into the overall legal system and legal contradictions are avoided. General legal structures therefore become more binding.[40] The value and future of the codification idea[41] are rightly stressed. To state the matter in deliberately exaggerated terms, the legal community may not become loyal administrators of Kafka's estate.[42] Laws referring to single cases only cover a small numbers of cases, and therefore expect further laws for the areas that are not regulated. Special provisions lead to a deeper flood of legal provisions. Special laws neglect legal structures, create conflicting regulations and deprive parties of their rights.[43] In this special legislation, the generality of the law can supplement the protection of human rights, strengthen the cohesion of the legal community and renew parliamentary democracy.

5.2.3 A Category of Thinking

According to Aristotle,[44] science covers the general. This hypothesis is confirmed by scientific theory,[45] but also by descriptions of everyday thinking. The "mental process of abstraction" is immanent to "human reason and comprehension activity".[46] According to Hegel, "thinking knowingly" is "creating an awareness of

[40] Grimm (1990: 301); Di Fabio (1998a: 450); Starck (1987: 5).

[41] K. Schmidt (1985); Sellner (2008: 191); Schulze-Fielitz (2008: 147 et seq.), in which the "formation of unity through the law" is the "classical fundamental concept of the generality of the law", but the danger is great "that any new attempt at codification does less justice to interests or sectors than a large number of special sub-statutes can do at present."

[42] Holländer (2008: 95).

[43] Liebs (1992: 11); H. Dreier (1991: 172 et seq.); Reimer (2012: Nos. 97, 102), with further references.

[44] Aristotle [between 335 & 323 BC] (2006: 1140b30 et seq.).

[45] Bunge (1968: 145); Baumgartner (1974: 1740); Welcker (1847: 695); Stegmüller (1966), 649 et seq., 653; Drath (1966: 680 et seq.); Stamatescu (2006: 169); Grawert (1975: 863); Wohlgenannt (1969: 197); cf. also Sacharow (1975: 82), on the scholarly mandate which relates to the general and the fundamental, and not to the specific implementation.

[46] Kopp (1958: 407 et seq.).

something general".[47] "Our legal conviction is based, be it consciously or unconsciously, on great thoughts, on general truths, and the legislature is entirely unable to deepen and consolidate the impression of its workings except when it is able to give expression to this".[48] In this sense, the generality of the law could make clear the mandate of jurisprudence to seek proper generalisations and to draft general laws. "Just law is contingent on principles, and on regulations which implement these". The principle of generalisation and the concept of justice depend closely on one another.[49] General laws "tend" per se "towards a just solution".[50] In particular in the explicit postulates of generality, the Basic Law and EU law also concur with the realisation that the law "in terms of its form is to be understood as general legality", and the reason for this form of the law lies in freedom.[51] Art. 19 § 1, sentence 1, of the Basic Law (GG) is a "mandatory" provision "with no historic model". If it is violated, this gives rise to a "problem of justice".[52]

5.3 The Idea of the Formation of Generalising Rules

An analysis of the idea of the law is ambitious, as the concept of the law is taken from a multiplicity of ideational and legal history, from a variety of sources and legal statements,[53] which are to be interpreted in the respective historical contexts, and from the specific roots of legal culture.[54] It is a natural consequence that the law does not follow a pre-defined, timeless legal definition, but sets and develops its own statements regarding the law.[55] Nonetheless, an attempt may be made to "schematically structure the variety of meaning".[56] Reasons are being given for what knowledge and demands lie in the general law, and what cultural roots contribute to the current understanding of the law. The search for this system cannot trace, and is

[47] Hegel [1819/1820] (2000: § 211, emphasis not retained); H. Hofmann (1987: 19) speaks of "rational legal thinking in general rules"; taking a legal philosophical look at Kant: Braun (2006: 228): "For Kant, reason is none other than the general on which the thought of all people is based, ultimately therefore the *form of thinking* itself".

[48] E. Huber (1901: 9); Tipke (2007: 219): "As a result of the neglect of legal principles, the flood of laws has increasingly washed away the idea of the law."

[49] Tipke (2009: 534 et seq. with further references).

[50] Starck (1987: 5).

[51] Maihofer (1982: 580 et seq.).

[52] Stern (1994: 727, 731, 742 and 744).

[53] Cf. altogether G. Kirchhof (2009: 67 et seq.).

[54] H. Hofmann (1987: 48); H. Dreier (1986: No. 1); Bleicken (1975: 52 et seq.); J. Wolff (2005: 9); Ebel (1958); Stern (1980: 560 et seq.); Karpen (1987: 137); Köbler (1971); Fögen (1987: 349); Diestelkamp (1988: 427); Böckenförde (1981); Gagnér (1960); Zeidler (1959: 77 et seq.); Roellecke (1969); Starck (1970); Mertens (2004); Emmenegger (2006).

[55] Ossenbühl (2007: Nos. 4 et seq.); Hesse (1995: No. 127, cf. altogether Nos. 49 et seq.); Böckenförde (2004: No. 4).

[56] H. Hofmann (1987: 15).

not intended to trace in detail, the history of the law in its different understandings, for instance understandings of the common good or freedom. Rather, a foundation is to be laid which opens up the historic sources of today's legal analysis. Those who postulate generality particularly stress its orientation towards the general good, and understand generality in a personal, object-related, and in some instances also a temporal manner.[57] The multiplicity of meanings of the generality of the law however gives rise to four further consequences.

5.3.1 *Generality as an Essential Characteristic of the Law: The 'Roman Enlightenment'*

A secular codification was created in 450BC in the shape of the Roman Law of the Twelve Tables.[58] This 'Roman Enlightenment' created on twelve tablets a comprehensible codification of the law which was announced at the *Forum Romanum* and which hence reached Romans directly (*linguistic generality*). The Law of the Twelve Tables was cast in bronze, making it virtually impossible to amend. It was considered to be everlasting,[59] to have a permanent impact, and hence create legal security and confidence in the law, thus serving the purpose of equality in a period[60] (*temporal generality*). The written nature of the law was a guarantor of legal certainty, and later of freedom.[61] In time, children learned the Law of the Twelve Tables by heart and it became taken for granted as a part of life, common to all.[62] The Twelve Tables were a key stepping stone on the way to Rome becoming a global empire, setting a standard for legislation down to the present day. Detailed written provisions and incomprehensible codifications were soon recognised as risks endangering the imparting of the law to citizens.[63] Legislative practice contradicted the scholarly conviction that a law based on "long considerations", not arising from "the moment", has a long-term effect[64] and creates both confidence and legal certainty. At an early date, the generality of the law indicated a state based on the rule of law.

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[57] H. Hofmann (1987: 34 et seq.) develops the personal, object-related and temporal scope of general law; Starck (1970: 49 et seq., 109 et seq. and 195 et seq.); Stern (1988: 692 et seq.); H. Schneider (2002: Nos. 22 et seq.); Jaag (1985); G. Müller (2013); for an additional territorial element Kopp (1958: 384 et seq.).

[58] Düll (1995: 1 et seq.); Behrends (1987: esp. 93 et seq.); Liebs (2004: 20 et seq.); Hattenhauer (2004: Nos. 221 et seq.); Meder (2005: 13 et seq.); Bretone (1998: 59); Kunkel/Schermaier (2005: 31 et seq.); with doubts: Fögen (2002: 63 et seq.), with further references.

[59] Fögen (2002: 79 et seq.; and 2007).

[60] Tertullian but cf. also Ulpian and Paulus (in Behrends et al. 1995: altogether D. 1–10, esp. D. 1.3.27, as well as 22 and 23).

[61] Hegel [1819/1820] (2000: §§ 185 et seq. and 211 et seq.).

[62] Montesquieu [1748] (2003: 29th Book, chapter 16).

[63] Montesquieu [1748] (2003: 29th Book, chapter 16); Liebs (1992: 11); Drath (1966: 683).

[64] Aristotle [between 340 & 335 BC] (2005: 1354a31 et seq.).

Roman legislative practice developed the notion of generality without any theoretical foundation. In Ancient Greece, by contrast, Aristotle developed an initial doctrine of general law without achieving much impact on legislative practice. According to Aristotle, a law is just if it regulates not a single case but all people and objects, covering many cases (*personal and object-related generality*). Man is said to give "better counsel in individual cases" than the law, which however must "adequately instruct" him. "The law must rule over everything, but the offices must adjudge the individual cases".[65] Long before Locke and Montesquieu, Aristotle drew up a separation of powers.[66] This follows from the generality of the law, from the need to give concrete form to abstract and general norms. In these generality requirements, which were developed out of considerations of justice, lies the modern principle of equality before the law. According to Locke, it is *a* measure that is to be applied to the rich and the poor, to the favourite at court as well as to the farmer at his plough".[67] Kant later stresses that all cannot be equal before single-case law.[68]

The elements of generality typified by Aristotle were later linked by Thomas of Aquinas to form a new and expanded doctrine of general law. Following the then personal reign of monarchs, he did not develop *territorial generality* as a separate characteristic. Nonetheless, this element too is recognisable in his writings. Thomas of Aquinas made clear the personal, object-related, temporal and territorial generality, and hence the four classical generality requirements. He added a further element, which was also covered by Ulpian and Papinian,[69] namely *final generality*. Each law must be "clever" and "sensible", and must serve the common good. The laws are orientated towards this noble but virtually unattainable goal if they are general. In particular, the object-related generalisation creates rationality and scholarliness. The general law serves per se the freedom of man and the general good.[70]

The element of final generality was also made clear by Kant, according to whom the law must serve the freedom of all. The freedom of a person may only be restricted where this is necessary for the freedom of all and is possible in accordance with a general law. Each person will agree to such a law in the interests of his/her own freedom.[71] Montesquieu, Wilhelm von Humboldt and de Tocqueville demanded in this sense that the legislature restrict itself to the fundamental, to the necessary, and leave scope to the individual to develop in freedom and on their own responsibility.[72]

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[65] Aristotle [between 340 & 335 BC] (2005: 1354a31–1354b15) and [between 329 & 326 BC] (1989: 1269a11, 1282b1 et seq., 1286a10 et seq., 1287a25, 1287b15 et seq., 1292a34).

[66] Cf. on this Maier (2006); Jellinek (1919: 39).

[67] Locke (2003: chapter 11, § 142).

[68] Kant [1793] (1992: A 289 et seq., 349 et seq.).

[69] Ulpian and Paulus (in Behrends et al. 1995: altogether D. 1–10, esp. D. 1.3.1 and 8).

[70] of Aquinus (2004: Question 90 Art. 2 and 4, Question 92 Art. 1, Question 95, Question 96 Art. 1 and 6, as well as Question 97).

[71] Altogether Kant [1793] (1992: A 289 et seq., 349 et seq., cf. here esp. also footnote 350).

[72] Montesquieu [1748] (2003: Foreword, 1st, 5th and 29th Books, here esp. chapters 1 and 6); von Humboldt (2006: esp. 30 et seq. and 201 et seq.); de Tocqueville [1835–1840] (1985: 343 et seq. and 364).

Public authorities which – according to de Tocqueville – form a "network of interwoven, strict and uniform rules", are "constantly in the way of action", and paralyse the freedom-based strength of the individual.[73] According to Montesquieu, "the spirit of the legislature" must "be the spirit of moderation".[74]

Montesquieu developed a doctrine on the "nature of drafting legislation" and developed *instrumental generality*. He believed that the regulatory goal and the regulatory instrument must be worthy of a law which has the "greatest innocence". The law must be written concisely, must create the same understanding in terms of its language and the regulatory structure in general, and where possible it should not provide for any exceptions. Superfluous laws and special agreements weaken the law.[75] As had previously been stressed by Pomponius[76] and Thomas of Aquinas,[77] the formation of legal regulations is orientated in line with the standard case. Montesquieu no longer considered laws to originate from a divine right, or from a natural right, but to constitute the nature of things; it constituted reality. The development of the idea of the law took on a rational and tangible starting point, a claim to rationality[78] which was also adopted in Germany in the eighteenth century[79] and which aimed to bring about generality.[80]

5.3.2 *The Diversity of Meaning and the Structure of the General Law: Seven Characteristics*

The idea of the generality of the law was an Enlightenment-related one, and can be described as having seven characteristics.[81] (1) Understandable laws will reach individuals, and are responsible for the legislature (*linguistic generality*). (2) They create a natural legal awareness and legal trust, and are common to all if they apply permanently (*temporal generality*). (3) *Territorial generality* stresses that the law reaches the entire regulatory area, so that it prevents the law becoming fractured, and guarantees the uniformity of the legal system. (4) The general law prevents privileges and exceptions, and retains the same standard for all (*personal generality*). (5) This task is however only carried out if the law covers all regulatory objects, avoiding both personal and object-orientated special treatment (*object-related generality*). (6) A law follows the *final generality* if it sets stipulations which are fundamental and necessary. It takes a back seat and is orientated towards the whole, to the

[73] de Tocqueville [1835–1840] (1985: 343 et seq., 364).

[74] Montesquieu [1748] (2003: 29th Book chapter 1).

[75] Montesquieu [1748] (2003: Foreword, 1st, 5th and 29th Books, here esp. chapters 1 and 6).

[76] Therefore cf. also Celsus, Paulus and Julian (in: Behrends et al. 1995: esp. D.1.3.3 to 6 and 10).

[77] of Aquinus [1265–1273] (2004: esp. Question 96 Art. 6).

[78] Kopp (1958: 177).

[79] Dilcher (1969: 3), with further references.

[80] Hegel [1819/1820] (2000: § 131); H. Hattenhauer (2004: Nos. 1524 et seq.).

[81] Cf. on this G. Kirchhof (2009: 160 et seq.).

common good. (7) *Instrumental generality* demands a clear regulatory structure which avoids exceptions and detailed stipulations, and consequently brings legal issues to a solution. The formation of regulations is to be carried out with regard to the standard case of achieving the right degree of generalisation. Through these characteristics generality seeks to be a guarantor of the law that is orientated to the common good and to the 'right' or 'just' law.

5.3.3 The Source of the Strength of Democracy

The teachings of general law were unable to become established in Germany in the nineteenth century. According to the predominant view taken by Paul Laband, there is "no object of the life of the State, one might say no thought, which could not be made the content of a law".[82] The law was defined in terms of its source, simply as the form of activity of the legislature. The statutory reservation became the reservation of powers.[83] This interpretation originated in a time when the influence of the representative body was to be strengthened and democracy was to be established.[84] The stipulation that parliament only had to consent to general rules led to a situation in which each rule was to be regarded as general in order to broaden the scope for parliamentary consent and hence democracy. Even with regard to encroachments on "freedom and property",[85] fundamental rights tended to be protected more by the decisions of the representative body than by a general formation of regulations.

In substance, however, the generality of the law remained the guarantor of inner peace, of the legal and social infrastructure of democracy, and of freedom and equality before the law. Legislative practitioners were aware of this when they created the great codifications in the second half of the nineteenth century. The legislation exceeded "in terms of its scope, significance and ongoing impact […] all other legislative work done in Germany in comparable periods".[86] The general formation of rules strengthened the impact of the laws, and hence of parliamentarianism – it became a source of strength of democracy. In particular the Criminal Code and the Civil Code – and in the twentieth century also general administrative law – are valid to the present day, and also currently form the legal basis for peace, prosperity and freedom.[87] The legislative work that was carried out in Germany in the nineteenth century is regarded as unique.[88] Even if scholars neglected the generality of the law, Parliament discovered general law as a tool with which to shape democracy.

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[82] Laband (1911: 62 et seq.; and [1871] 1971: 3 et seq.).

[83] Cf. already at Sect. 5.1 with further indications esp. in footnote 14.

[84] Ossenbühl (2007), Nos. 11 et seq.

[85] Cf. on this Ossenbühl (2007: Nos. 21 et seq.); Grimm (2003: Nos. 51 et seq.).

[86] E. Huber (2003: 43 et seq.).

[87] Cf. on this, as well as on further major legislative acts of the Federal Republic H. Schneider (2002: Nos. 427 et seq.).

[88] P. M. Huber (2010: Nos. 43 et seq).

5.4 Postulates of Legal Generality

The creative power of parliamentary law is an indicator of the vitality of democracy and parliamentary law, and it stands at the core of the freedom-based systems, democracy, the separation of powers and the rule of law.[89] This virtually unanimous finding indicates a substantive law content, not a legal definition which is poor in terms of its content. The explicit generality demands of the Basic Law and of EU law,[90] equality before the law,[91] the right to freedom and the structural decisions for democracy based on the rule of law, pose their own expectations in terms of generality as to the legal principles. The Basic Law and EU law do not simply adopt doctrines of the law, but make their own demands in terms of generalisation within the respective structures and rationality of the regulatory system. The law does not break with the ideational and legal history-based experience and knowledge which is contained in the definition of general law, but takes them as rules of wisdom, as binding legal mandates, and also as justiciable standards in a small number of core demands.[92]

5.4.1 Three Levels of Constitutional Law: The Differentiated Judicial Review Standard

The Basic Law is aware of this threefold distinction between justiciable legal stipulations, legally-binding standards not reviewed by judges, and non-binding wisdom rules. Art. 102 of the Basic Law strictly and justiciably prohibits the death penalty, and Art. 5 § 1, sentence 2 of the Basic Law bans censorship. The protection of the natural basis for life,[93] the mandates to engage in international cooperation,[94] in European integration[95] and in budget planning,[96] by contrast, give to the legislative and the executive – hardly to judges – binding mandates for action. The Constitutional Court is left here with a reserved, tracing review competence.[97] In accordance with Art. 80 § 1 of the Basic Law, the Bundestag can authorise the Government to issue

[89] Starck (1970); Böckenförde (1981: 381); Eichenberger (1982: 10); Badura (1992: § 159, No. 36); Stern (1994: 742); Schulze-Fielitz (1986: 123); Ruffert (2012: No. 55); Ossenbühl (2007: Nos. 4, 19 et seq., 85); Di Fabio (2004: Nos. 50 et seq.); Hoffmann-Riem (2005: 69); Schmidt-Aßmann (2004b: 81, 185); Lepsius (1999: 157 et seq.); Grzeszick (2007: 109 et seq.).

[90] Art. 19 § 1, sentence 1, of the Basic Law; Art. 288 § 2, sentence 1, TFEU.

[91] Art. 3 § 1 of the Basic Law; Art. 20 of the Charter of Fundamental Rights.

[92] Cf. on this G. Kirchhof (2009: 174 et seq.).

[93] Art. 20a of the Basic Law.

[94] Vogel (1964); Tomuschat (1992); Di Fabio (1998b).

[95] Art. 23 of the Basic Law; clearly recently BVerfGE 123, 267 – Lisbon.

[96] Art. 110 § 1, Art. 109, Art. 115 of the Basic Law.

[97] BVerfGE 37, 271 – Solange I; 73, 339 – Solange II; 89, 155 – Maastricht; 123, 267 – Lisbon; Federal Constitutional Court NJW 2010, 3422 – Honeywell; BVerfGE 79, 311 – Staatsverschuldung I; 119, 96 – Staatsverschuldung II.

statutory instruments. This authorisation does not impose an obligation to delegate a legislative mandate. However, the wisdom rule of Art. 80 § 1 of the Basic Law suggests making use of the possibility of delegation, of distinguishing between a further generality of parliamentary law and a narrower generality of the statutory instrument. The Basic Law permits and demands that consideration be given to the legal tradition if one is, for instance, to understand the development of the democracy principle at the end of the eighteenth century,[98] or a large, multifaceted "legal tradition resonates" in the legal definition of the general law.[99] These traditions are not ordered bindingly. The Basic Law does not however place itself in the way of their wisdom, from which legal knowledge can be won.

The justiciable stipulations contained in the Basic Law are ultimately reviewed by the Federal Constitutional Court. The merely binding standards do not make obligations upon the Federal Constitutional Court but oblige the other constitutional bodies, namely the Bundestag, the Bundesrat and the Federal President. This also applies to the wisdom rules. They do not, however, set any binding stipulations but attempt to trigger a legal debate and to lead to new legal knowledge. By contrast, pressure is applied to bring about a clear dichotomy of standards for action and control norms, including for the broad justiciability of the constitutional stipulations.[100] However, such interpretations rightly meet with resistance.[101] The Basic Law is binding on all state powers,[102] but transfers to Parliament and Government a constitutional responsibility for their decisions, which is reviewed by the Federal Constitutional Court only in certain cases. Were the legislature and the executive to be pushed into the role of completely-controlled powers, the constitutional state would lose the ability to shape itself. According to the legal interpretation, it is only when a legal statement has been established with adequate certainty that one may speak of a binding legal statement; only when a legal principle accordingly also tasks the judge is it justiciable.[103] In the case of justiciability, the mandate of the Federal Constitutional Court varies between a content review, a justifiability review and a review of evident failure – the transitions are in flux.[104] The consequence of the constitutional decisions for democracy and the separation of powers is that the constitutional standard for action reaches further than the review standard does. The generality postulates of the Basic Law act as wisdom rules, as binding, justiciable standards.

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[98] Böckenförde (2004: No. 4).

[99] H. Hofmann (1987: 48).

[100] Cf. on this discussion Kischel (1999: 193 et seq. and 209 et seq.).

[101] Starck (1992: No. 8); Wahl (1981: 507); Rupp (1976: 175); Isensee (1992: No. 63); Papier (1989: Nos. 59 et seq.).

[102] Art. 20 § 3; Art. 1 § 3 of the Basic Law.

[103] BVerfGE 106, 62 (148 et seq. with further references) – Altenpflegegesetz; Böckenförde (1976: 2089); Starck (1992: Nos. 16 et seq.).

[104] Ossenbühl (2000: 183 et seq.); Merten (1980: esp. 777 et seq.); Steinberg (1980: 385); H.-P. Schneider (1980: 2106 et seq.); Isensee (1992: Nos. 63 et seq.); Korinek (1981: 24, 26 et seq.); Schlaich (1981: 111 et seq.); Bryde (2001: 533).

5.4.2 Art. 19 § 1, Sentence 1, of the Basic Law

The General Law as a Necessary Guarantor of Freedom

Art. 19 § 1, sentence 1, of the Basic Law explicitly stipulates that a fundamental right may only be restricted on the basis of a law that applies generally and not merely to a single case. The wording, the history and the first scholarly statements prove that these generality requirements were deliberately intended to be binding on the legislature. In particular Thomas Dehler emphasised in the controversial discussion in the Parliamentary Council the significance of the postulate of generality and of the prohibition of "special law", these particular "chains" of the legislature. This was followed by the Main Committee, which accepted the articles initiated by the Editorial Committee with eleven votes to seven.[105] The deliberations made it clear that safeguarding freedom and equality connected "directly to the quality of the law" was intended.[106] Hermann von Mangoldt – who was a critic of the provision in the Parliamentary Council – points out in an early commentary on the Basic Law that fundamental rights did not adequately protect individual human rights. Art. 19 § 1, sentence 1, of the Basic Law was said to constitute a necessary addendum here – this may remind us of Kant's spirit of the freedom of the law[107] – "one of the most important provisions of the constitution", "the pillar of the principle of the separation of powers", and "the true, previously ignored cornerstone of the rule of law".[108] The core significance of the article was stressed in the 1950s by both its proponents and its critics. The objection was in particular that the stipulation was too easy to circumvent by the legislature's art in formulation, and a single-case law could be handed down in the guise of a general provision.[109] In fact, Art. 19 § 1, sentence 1, of the Basic Law is not satisfied with merely generalising wording. The guarantees of fundamental rights focus on the single case. The demand of generality supplements this individualised protection via orientation towards the whole, towards the multiplicity of affected individual parties which cannot yet be specifically predicted, by a protective wall which has an advance effect.[110] The provision has yet to perform this important job, however. The Federal Constitutional Court

[105] Deutscher Bundestag/Bundesarchiv (2002), Vol. 5/II, 951 et seq.; altogether Stern (1988: 712 et seq.), with further references.

[106] Stern (1988: 713).

[107] Kant [1793] (1992: A 289 et seq., 349 et seq., cf. here esp. footnote 350).

[108] von Mangoldt and Klein (1955: Art. 19, Note III); Dürig (1954: 5 et seq., Quote: 7), previously emphasised that now "the famous dispute question of German constitutional law, namely whether individual statutes are possible […] – is clearly negated, at least when it comes to laws which restrict fundamental rights".

[109] Krüger (1955: 760) – without emphasis; Fleschutz (1958); H. Schneider (1959: 159); Zahn (1963: 155 et seq.); Volkmar (1962: 227); cf. altogether Bücker (1965: 41 et seq.); Starck (1970: 53 et seq.); Stern (1988: 692 et seq.).

[110] Cf. at Sect. 5.2.1 above.

neglected Art. 19 § 1, sentence 1, of the Basic Law from the outset.[111] The provision is hardly regarded today, according to a virtually unanimous finding in the literature.[112] This discrepancy between the regulatory principle and regulatory reality gives cause to revive the postulate of generality.

The Principle of Generality and the Prohibition of Single-Case Laws

Art. 19 § 1, sentence 1, of the Basic Law regulates the principle of generality and the prohibition of the single-case law. This is not – as frequently presumed – "a tautology"; it does not describe "positive and negative", "one and the same".[113] The Basic Law explicitly orientates to the legislature two stipulations linked with an "and", each of which is to be interpreted with separate regulatory content. Both alternatives were included in the Basic Law at different sessions by the Editorial Committee.[114] However, no addendum is explicitly added to repeat the existing regulation, but to expand it. The dual character of a law is rightly stressed which is said to provide a life system and at the same time to be a regulatory instrument, and consequently always includes breadth and narrowness at the same time.[115] This dual perspective is taken up by Art. 19 § 1, sentence 1, of the Basic Law. The prohibition of single-case laws precludes the excessive narrowing of the regulation. The principle of generality, by contrast, issues a mandate to set general rules.

The rejection of single-case laws constitutes a mandate to the judge as a legal prohibition. The prohibition is to be enforced as a justiciable standard. According to the common interpretation, personal and object-related generality combine to form the counter term of the individual case.[116] A law which relates only to a person or an object, only obliging a petrol station operator or a petrol station to take special safety precautions, regulates only one case, only relates to an event which gives rise to a legal conflict. What is more, the temporal or territorial context of a regulation can be reduced to a single case. If a specific levy were to be charged for cable cars

[111] BVerfGE 4, 219 (245 et seq.) – Junktimklausel; 25, 371 (398 et seq.) – lex Rheinstahl; 74, 264 (297) – Boxberg; 85, 360 (374) – Akademie-Auflösung; 95, 1 (17) – Südumfahrung Stendal; Hesse (1995: No. 330); this finding is confirmed – albeit frequently critically – by scholarly analyses which address general law: Starck (1970: 195 et seq., esp. 241); H. Hofmann (1987: esp. 11, 48), who however finally refers to the urgent role of the protection of fundamental rights and of the primacy of the Constitution; Stern (1988: 712 et seq., esp. 733); H. Schneider (2002: Nos. 32 et seq., esp. Nos. 44 et seq.).

[112] Hesse (1995: No. 330); Stern (1988: 721 et seq.); H. Hofmann (1987: esp. 44, 48); in each case with further references; more recently: Franz (2008: 160); Möllers (2008: 97).

[113] H. Hofmann (1987: 46); Kunig (1993: 311).

[114] Draft Basic Law in the version edited by the General Editorial Committee, version of 13-18 December 1948 (Deutscher Bundestag/Bundesarchiv 2002, Vol. 7: 144); Vorschläge des Allgemeinen Redaktionsausschusses, version of 2-5 May 1949 (Deutscher Bundestag/Bundesarchiv 2002, Vol. 7: 501).

[115] Scheuner (1935; and 1952: 253).

[116] Cf. on this Stern (1988: 739 et seq.).

reaching a height of 2,900 m above sea level, geography reduces the scope of application of the law to cases relating to the Zugspitz railway. If processions are banned on a specific day on which a large town fair is traditionally held with a procession in one place only, then because of its temporal scope this law only applies to this one fair. As a justiciable standard, Art. 19 § 1, sentence 1, Alt. 2 of the Basic Law prohibits the geographical, temporal, object-related or personal restriction of a rule which hardly applies to more than a one-off, single case.

By contrast, the principle of generality is less determined and does not give rise to a justiciable prohibition, but to a fundamental mandate to form a regulation. Were the Federal Constitutional Court to judiciate this mandate, it would review the quality of the formation of regulations in detail, and hence encroach too intensively on the legislature's latitude to decide. Object-related, personal, territorial and temporal generality are binding. They are contained directly as the classical four principles of generality,[117] and also in the prohibition of single-case law in the legal definition of the general application. This binding generality applies beyond the justiciable refusal of single-case law. There is a prohibition to restrict to small numbers of cases, and a generalisation must take place. The non-justiciable constitutional mandate is confirmed by the general understanding of constitutional law, according to which a law creates an abstract-general regulation. As a wisdom rule, the principle of generality contained in Art. 19 § 1, sentence 1, Alt. 1 of the Basic Law takes up the ideational history, thus advising that general laws are also issued in the linguistic, instrumental and final senses.

These stipulations to the legislature are not to be understood in a formal and schematic manner, but substantively. The generality of the law does not demand a specific linguistic technique or legal formality,[118] but a content-related breadth which, despite differentiating individual statements as a matter of principle, permits the law to become binding as law for all. These standards do not overly restrict parliament; demanding regulations of markets, privatisations or the technical safety of power plants are still possible. In the law, parliament should take defining, fundamental decisions which it can justify, but through delegation it can use the Government's competence to hand down statutory instruments to regulate specialist details, technical regulations and short-term issues in an abstract and general sense. Art. 80 § 1 of the Basic Law obliges the legislature to establish a fundamental structure which the Government completes through statutory instruments. The general structure enables the consistency of the legal system, including of statutory instruments. When handing down such instruments, modified generality requirements adjusted to the special legislation are to be respected.[119] The fundamental structure of parliamentary law and these stipulations avoid the problem of legal "overnorming" and inconsistency being shifted to the level of statutory instruments.

Particularly because of their personal, object-related, territorial and temporal generality, civil law, criminal law and general administrative law have become

[117] Cf. at Sects. 5.3 and 5.4.2.1 above.

[118] Cf. already at Sects. 5.4.2.1 and 5.3.

[119] Cf. on this G. Kirchhof (2009: esp. 288 et seq.).

guarantors of peace and prosperity in Germany. Contractual freedom which covers all contracts of economic life and all markets, criminal law which applies to all individuals in the long term, or administrative procedural law which regulates the stipulations for fundamentally all official measures with no regard for the addressee, build a fundamental order ensuring freedom, and are accepted on the basis of the generality of the regulations.

The substantive content of the generality postulate is made clear by the law relating to pacified precincts, the Budget Act (*Haushaltsgesetz*) and the conclusion of peace. The law on pacified precincts is intended to protect the activity of the Federation's constitutional bodies, and the assembly of persons is prohibited in the immediate vicinity of these bodies as a matter of principle. A permit is however given if there is "no concern" that a certain activity will be impaired.[120] The pacified precincts are determined by law, stating street names.[121] This does not violate the stipulation of territorial generality. The territorial restriction implements the general rule that assemblies may influence the decisions made by the constitutional organs, but may not threaten or hinder them. Were – without this regulatory context, including without the possibility of the exceptional regulation – any demonstration for instance on the Alexanderplatz in Berlin to be prohibited, this would serve neither democracy nor freedom, and territorial generality would be breached. The postulate of generality does not contradict the succinct designation of an object or place, and also does not as a matter of principle go against a law only applying to one case in practice. It does however require that a general rule be detailed which as a matter of principle is applicable to a large number of cases that a reliable, generally-comprehensible and enforceable statement is made.

The substantive content of the postulate of generality also becomes clear in the Budget Act or in the conclusion of peace, neither of which regulate individual cases. The Budget Act creates a long-term basis for funding at annual intervals. The Government's financial policy statement, this "fate of the nation",[122] concerns the whole State and all its citizens; it is a general regulation. In accordance with Art. 115 l § 3 of the Basic Law, the conclusion of peace is decided by a federal law. The conclusion of peace follows on from a historic event, but is not a single-case law.[123] There is hardly a more general provision than the conclusion of peace because it permanently rejects war for everyone, for the entire regulatory area, and hence fulfils the State's most significant task. Questions as to the need for object-related generalisation and as to the permissible statutory detailing of a general rule cannot be answered in general terms, but depend on the respective regulatory mandate. Consequently, there is a need to carry out a closer analysis of the permissible and necessary degree of generalisation which corresponds to the regulatory mandate to

[120] Sections 1, 2 and 3 subsection (1) of the German Act on Pacified Precincts (*BefBezG*); cf. also section 16 of the German Assembly Act (*VersG*).

[121] Section 1, sentence 2, of the Act on Pacified Precincts in conjunction with the Annex to this Act.

[122] Stern (1980: 1189).

[123] Cf. for this interpretation and further examples H. Schneider (2002: No. 18), with further references.

be performed by Parliament and is led by the statutory detailing of this mandate.[124] The substantive generality demands entail delimitation problems. This is a reason why the Federal Constitutional Court exercises caution when forming the standards of Art. 19 § 1, sentence 1, Alt. 2 of the Basic Law, and when handing down judgments, in order not to overly restrict the scope of the legislature. The fundamental generality demands need to be developed gradually, but in a large number of cases.

Scope

Art. 19 § 1, sentence 1, of the Basic Law applies to all fundamental rights and to each encroachment on fundamental rights.[125] A restricted scope[126] is opposed by the history, the wording and the systematic position at the end of the Part of the Basic Law on fundamental rights. It is particularly objected by scholars here that Art. 14 § 3 of the Basic Law is said to permit a legal expropriation. If the Basic Law permits expropriation *by* a law, this is said to only be able to mean a single-case law. As a special provision, Art. 14 § 3, sentence 2, of the Basic Law is said to displace Art. 19 § 1, sentence 1, of the Basic Law.[127] In accordance with Art. 14 § 3, sentence 2, of the Basic Law, expropriation may only be ordered "by or pursuant to a law". This statutory reservation corresponds word for word to the scope of Art. 19 § 1, sentence 1, of the Basic Law. According to Thomas Dehler in the Parliamentary Council, the latter also rules out "special expropriation laws".[128] This does not place obstacles in the path of legal expropriation, but does require a generalisation of the prerequisites for legal expropriation. For safety reasons, the legislature may for instance expropriate by law an animal which is infected with a highly-contagious disease and which is threatening to human life. Unlike the non-permissible single-case law, which only regulates the expropriation of one animal, the provision must go beyond the individual case and must generalise the source of the danger and the defence against the disturbance. By the general circumstance, it then also covers future cases where the circumstances may be different. The generalising rule anticipates corresponding dangers, enhances security and legal clarity. According to Fritz Ossenbühl, "Art. 19 § 1, sentence 1, of the Basic Law does not prohibit a direct encroachment by the law, but only the individualised encroachment by the law, that is […] the 'administrative act in legal form'".[129]

Art. 19 § 1, sentence 1, of the Basic Law applies to all fundamental rights, and this breadth of application provides an opportunity. The broad area protected by Art.

[124] Cf. on this G. Kirchhof (2009: 215 et seq.).

[125] Stern (1988: 727 et seq., esp. 732); Dürig (1954: 5).

[126] Cf. on this BVerfGE 24, 367 (396) – Hamburger Deichordnungsgesetz; 42, 263 (305) – Contergan; 95, 1 (26) – Südumfahrung Stendal.

[127] BVerfGE 24, 367 (396 et seq.) – Hamburger Deichordnungsgesetz; 74, 264 (296 et seq.) – Boxberg; 95, 1 (22) – Südumfahrung Stendal.

[128] Cf. on this Huber (2010: No. 4) with further references.

[129] Ossenbühl (2007: 191).

2 § 1 of the Basic Law has extended the statutory reservation so that virtually any conduct – for example riding in the forest or feeding pigeons in the park[130] – needs to be regulated by law. According to the criticisms levelled, the special guarantees which a law must respect once the single cases relating to fundamental rights have been analysed here lead to a large number of special norms. Hence, the broadening of the protected area is said to ultimately lead to a legislative mandate which endangers freedom.[131] The postulate of generality takes up this objection and counters statutory restrictions. If the statutory reservation makes demands on the law in many cases, freedom is not endangered under the flag of this stipulation by detailed regulations, but is strengthened by the general rules.

The breadth of the impact of general law is moderate. It is intended to resist the pull of the fundamental-rights review of proportionality to set narrow statutory stipulations. In particular, the necessity appears to frequently force "legislative individualisations"[132] if, in the detailed view of the individual case, the less incisive but equally effective provision is selected. According to the criticism, this forces the legislature to enact complicated provisions, to make differentiations. The Federal Constitutional Court develops fundamental right-specific stipulations, for instance in the inner and outer social spheres of the general right of personality.[133] These differentiations appear to push the legislature to adopt the differentiations, and hence to enact special provisions which – also after judicial review – tend towards further specialisations within fundamental rights and their statutory manifestations. A tendency arises towards more and more detailed provisions. Art. 19 § 1, sentence 1, of the Basic Law shows the way here towards the formation of general statutory rules which is orientated towards differentiated enforcement. The law retains its future-shaping and awareness-forming power; differentiations in the individual case are a matter of the application of the law. The legislature defines the standard case by the standard of fundamental rights, and respects fundamental rights in general standards.

Generality and Equality Before the Law

The review of proportionality develops in application to the individual case. The general law is, by contrast, orientated towards the generality of those who are affected by the law. This difference also demonstrates the distinction between the generality of the law, the prohibition of single-case law, and Art. 3 § 1 of the Basic Law. The principle of equality asks in the individual comparison perspective whether an entrepreneur was unconstitutionally denied a subsidy. The prohibition

[130] BVerfGE 80, 137 (152 et seq.) – Reiten im Walde; 54, 143 (144 et seq.) – Taubenfütterungsverbot; details already in BVerfGE 6, 32 (36 et seq.) – Elfes.

[131] Details Sondervotum Grimm, BVerfGE 80, 137 (164 et seq.) – Reiten im Walde; Böckenförde (Böckenförde 2003: 170); Hoffmann-Riem (2004: 230); cf. on this also Di Fabio (2001: Nos. 12 et seq., esp. Nos. 13 et seq.); in each case with further references.

[132] Hofmann-Riem (2005: 40); Evers (1987: esp. p. 137).

[133] Clearly BVerfGE 80, 367 (373 et seq.) – Tagebuch.

of single-case law supplements the guarantee of equality, in particular if the necessary comparison is not possible because of the singularity of the case if a genuinely unique enterprise is subsidised. The generality of the law goes further because it turns its gaze not only towards a case, to a comparison pair, but to the entire legal community. Equality before the law guarantees a minimum of individually-effective generalisation. Art. 19 § 1, sentence 1, of the Basic Law, by contrast, seeks to bring about a general rule formation, a general basic system. In this collaboration, fundamental rights and the general law adopt the realisation made by Hegel that the community and the individual are independent members of an inter-reliant whole.[134] Freedom does not develop in isolation, but in the community. It relies, in a "fruitful paradox", on the individual taking up bonds in a freedom-based community,[135] on fundamental rights and general law.

5.4.3 Structural Principles

As with Art. 5 § 2 of the Basic Law,[136] Art. 19 § 1, sentence 1, of the Basic Law also explicitly demands the generality of the law. In the structural principles and fundamental rights in differing densities and intensities, the Basic Law furthermore opts for a generalising rule formation in the materiality doctrine, in the principle of determinedness, and in the statutory reservation related to fundamental rights. These generality demands are briefly outlined below.[137]

Democracy, Statutory Reservation, Materiality Doctrine: The Paradox of Disempowerment

The generality of the law strengthens the impact and the comprehensibility of the law, and hence the core concerns of democracy and the statutory reservation. Only if the Members of Parliament understand the laws that are passed can they take responsibility for them, and a parliamentary debate then takes place on the issue. The legislation is currently determined by legal initiatives that are taken by the Government, specialist advisors,[138] many associations per delegate,[139] and specialist knowledge[140] leading to special laws for which Parliament can hardly take responsibility. The specialist preparation of laws is indispensable, and has been demanded

[134] Hegel [1819/1820] (2000: §§ 185 et seq., 211–216); Welzel (1962: 178).

[135] Di Fabio (2005: 71 et seq.).

[136] Cf. on this G. Kirchhof, (2009: 238 et seq.).

[137] Cf. altogether G. Kirchhof (2009: 242 et seq.).

[138] Voßkuhle (2005).

[139] Feldkamp (2005: 508); Horn (2005: Nos. 47 et seq.).

[140] Altogether Fassbender (2006: § 76).

since time immemorial.[141] If this preparation however leads to special regulations, it strengthens the flood of legal provisions which has been rightly complained about in many cases.[142] The Bundestag disempowers itself if it does not hand down comprehensible, fundamental provisions which are binding on and guide other powers, if its laws do not develop their effect because of their structure or of the complicated legal system. Detailed provisions lead to the administration and the courts deciding on specialist legal matters. The courts – with the Federal Constitutional Court taking ultimate responsibility – then have to adjudge according to these special standards and to interpret the Basic Law without detail being provided by general laws. The specific constitutional responses are binding on parliament and reduce its scope to forming regulations. If the legislature issues many single-case laws, whilst the Federal Constitutional Court has to enact rule formulations, the competences system of the Basic Law is reversed. The special laws provide precise instructions to the administration and the courts, thus also restricting their scope for decision-making, but refuse to give the interpretation-leading rule. Detailed statutory provisions can disempower all three powers, and this constitutes the paradox.

In accordance with Art. 38 § 1, sentence 1, of the Basic Law, Members of Parliament are representatives of the whole people. The Bundestag accordingly represents the people through all its Members. Each Member represents neither his or her constituency, nor even a specific group or only those eligible to vote, but the whole community.[143] The concept of temporal generality is recognisable in this representational mandate because Parliament and its Members are also obliged to serve the interests of those who are not yet eligible to vote, especially the next generation. What is more, an aspect of the final generality becomes clear which is also emphasised by the materiality doctrine. According to the Federal Constitutional Court, "details" are accordingly "as a matter of principle not the preserve of statutory instruments"; Parliament enacts fundamental regulations.[144] The republican principle confirms this consideration of final generality if it orientates public authorities towards the community, to the *res publica*.[145]

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[141] Cf. on this already Aristotle [between 329 & 326 BC] (1989: 1282b1 et seq., 1286a10 et seq. and 1287b15 et seq.).

[142] Schmidt-Aßmann (2004a: No. 34); Reimer (2012: No. 102); Winkler (1981: 125 et seq.); H. Schneider (2002: Nos. 426 et seq.).

[143] Cf. BVerfGE 44, 308 (315 et seq.) – Beschlußfähigkeit.

[144] BVerfGE 47, 46 (79 and 82 et seq.) – Sexualerziehung; 33, 303 (346) – Numerus clausus; 34, 165 (192 et seq.) – Förderstufe; 49, 89 (129) – Kalkar I; 61, 260 (275) – Organisationsgesetze im Hochschulbereich; 83, 130 (152) – Josefine Mutzenbacher; 101, 1 (34) – Hennenhaltungsverordnung; Karpen (2008: esp. 100).

[145] The awareness remains here that after the turmoil of the eighteenth century the State "no longer obtains its *raison d'être* from the enforcement of a material common good that is known and entrusted to it, but rather freedom itself has now become a precondition for the common good" (Grimm 2003: Nos. 11 et seq., esp. 16 and 22).

The Separation of Powers

The principle of the separation of powers also anticipates contents of substantive law which separate the function of the executive from that of the legislature. This notion, originally articulated by Aristotle,[146] was subsequently explicitly stressed by Hans Kelsen, according to whom the law in the sense of the "doctrine of powers" means "only the general norm".[147] The legislature, executive power and the judiciary obtain from the law their mandate to act. Without a substantive understanding of the law, the separation of powers is at risk of becoming a legal principle which only designates bodies. Without any certainty as to the subject of the enforcement, it does not become clear what the mandate of the executive power is.

The concept of the functional separation of powers transfers to the bodies the mandates which they can carry out according to their procedure and composition.[148] The legislative procedure aims to bring about a public debate in the plenary involving the people. It always involves three constitutional bodies, namely the Bundestag, the Bundesrat and the Federal President, and is therefore to regulate the standard case, not exceptions. The roughly 600 members of the Bundestag are less narrowly orientated towards taking special decisions – this is a matter for the administration and the courts –, but develop their joint specific knowledge in response to fundamental questions (final generality).

The Social State Based on the Rule of Law

Legal certainty is a necessary condition for freedom.[149] The state based on the rule of law hands down regulations which are comprehensible, clear, determined, non-contradictory and logical, which are valid permanently, properly announced and take their place in the legal system to form a consistent overall structure. The principle of the state based on the rule of law requires direct linguistic and instrumental generality. The concept of legal certainty and the consideration that those concerned by the law must take up the law, furthermore, push for moderate, permanent provisions for a moderate legislative mandate (temporal and final generality).[150] These

[146] Cf. note 11 above.

[147] Kelsen [1925] (1966: 232); Imboden (1954: 39 et seq.); Horn (1999: 63).

[148] BVerfGE 68, 1 (86) – NATO-Doppelbeschluß; 98, 218 (251 et seq.) – Rechtschreibreform; altogether Ossenbühl (2007: Nos. 60 et seq.) with further references.

[149] Hegel [1819/1820] (2000: §§ 185 et seq., 211-216, 260 and 299); Lücke (2001: 4 et seq.) with further references; Hanebeck (2002: 429); Pestalozza (1981: 2081); Korinek (2007: 277).

[150] Thomas of Aquinas and Montesquieu demand that any legal amendment compensate for the disadvantage arising for the common good simply by virtue of the fact of the law being amended (of Aquinas [1265-1273] (2004), Questions 96 et seq.; Montesquieu [1748] (2003), 29th Book, here esp. chapters 1 and 6).

stipulations adapt to the circumstances which are to be regulated, and become concentrated with the intensity of encroachments on human rights.[151]

The state based on the rule of law anticipates a proper degree of generalisation because a too general regulation does not create legal certainty and is not sufficiently determined. The principle of determinedness does not have a contrary structural impact on the postulate of generality and does not push for the issuance of a single-case regulation. Determinedness does not mean concreteness. Anyone who wishes to take a panoramic photograph from a hill top does not zoom onto the river of the landscape, thus narrowing the field of view, but tries to incorporate the river, the village and other hills. In this sense, the determined law does not neglect the postulate of generality but expects a precise generalisation with considerable depth of focus. The individual is not above the law, but is also not in the law.

The social welfare state based on the rule of law understands each individual as forming part of the legal community, is bound by personal, territorial, and – in the enforcement perspective – instrumental and linguistic generality. The social goal is opposed to "particularisation" and to a "disproportionate neglect of the general".[152] A concept of equality in time, of temporal generality, also becomes clear here. The statutory plan must ensure that the public authorities can provide benefits in the long term, that tomorrow's needy will also receive benefits. The considerable state debt becomes a current and future social problem. The generality of the law here supplements the fundamental right of protection of equality. A comparison with the future is fundamentally too undetermined to be measured by the standard of Art. 3 § 1 of the Basic Law. The protection of legitimate expectations as a whole uses as its source the law that exists today.

The postulates of generality are binding constitutional law. However, only the core demands of linguistic and instrumental generality are justiciable. Having said that, a law that is incomprehensible in terms of its language or regulatory structure will only seldom be declared null and void by the Federal Constitutional Court, and is in fact more likely to be declared incompatible with the Basic Law. Otherwise, the legal system would lose considerable parts, and the remaining corpus would do more wrong than right. This outcome would, ultimately, be further away from the Basic Law than incomprehensible laws. This once more makes it clear – and this is something which the Federal Constitutional Court has explicitly stressed[153] – that

[151] The "boundary between generally-understandable language and specialist language" is currently "disregarded in very many norms. Norms targeting specialist addressees can and must use a specific language, but may not drift into wording that is completely inaccessible for non-experts" (Karpen 2008: 100); Towfigh (2009: 39 et seq.), with further references. According to the "Brain-teaser ruling" of the Austrian Constitutional Court, the principle of the rule of law is contradicted if a law "can only be understood with subtle knowledge of the matter, extraordinary methodical skills and a certain desire to solve brain-teasers" (G 81/82/90 et al., VfSlg 12.420/1990 [1st headnote]). Altogether: BVerfGE 83, 130 (145) – Josepfine Mutzenbacher; 102, 254 (337) – EALG; 103, 332 (384) – Naturschutzgesetz Schleswig-Holstein; 108, 52 (75) – Kindesunterhalt.

[152] For instance observation of the current system in Zacher (2004: No. 119).

[153] BVerfGE 65, 283 (290) – Inkrafttreten des Bebauungsplanes.

the mandate of creating a comprehensible, consistent legal system targets the legislature and not the judge.

5.4.4 Freedom

The generality of the law seeks to protect freedom. A general law per se keeps its distance from individuals, opening up for each person a space for free, even unconventional shaping and distinction.[154] A protective wall is erected that ensures freedom.[155] Legal violations and litigation are avoided by way of prevention. In structural terms, the generality of the law hence serves to further fundamental rights. It furthermore considerably supplements the protection of human rights, if the examination of proportionality develops from the general rule. Public authorities are currently paralysing the development of freedom by complicated, overly-detailed laws. There is hardly any area remaining in which citizens can see what is "right" in the law simply by looking at the regulation, but they have to rely on explanatory texts, administrative provisions, information from associations, contractual standards and professional advice. Fundamental rights currently offer little protection against these obstacles to freedom. Seen in isolation, the difficulties are too slight to overstep the threshold of encroachment, or are easily justified by the public interest as only slight encroachments. The danger to freedom however lies not in the individual encroachment – *one* regulatory concept which is virtually incomprehensible appears not to overstep the boundaries of acceptability –, but in the accumulation of obstacles. However, even if the fundamental rights dogma is modified and takes up the fact that fundamental rights also prevent unacceptable accumulative burdens,[156] not all encroachments which supplement one another are to be taken up in terms of fundamental rights. The general law seeks here to preventively supplement the protection of fundamental rights. Linguistic and instrumental generality counter incomprehensible, overly complicated laws and an uncoordinated legal system. Final generality takes back the legislative mandate, and prevents from the outset burdens on which the community does not rely.

[154] Clearly von Humboldt [1791] (2006: esp. 30 et seq., 201 et seq.); de Tocqueville [1835–1840] (1985: 343 et seq., 364); Mandelkern et al. (2002: 63 et seq.); Inter-institutional agreement on better law-making of 31 December 2003, OJ C 321, 10 et seq., 18 et seq., 24, 42, 47, 52 et seq., 63 et seq.; von Hayek [1945] (2003: 110, 116): "It is even possible to say that for a real state based on the rule of law the existence of a norm which is always applied without regard for the individual is more important than the nature of this norm itself. In fact, the content of the norm is frequently of subordinate significance as long as it is applied equally in all directions."

[155] Cf. at Sect. 5.2.1.

[156] G. Kirchhof (2007: esp. 27 et seq.; and 2006: 732).

5.4.5 Equality Before the Law

Equality before the law[157] demands generalising rule-formation. Equality before a single-case law is not possible.[158] The principle of equality requires personal, object-related, territorial and temporal generality.[159] Depending on the sphere of life and degree of affectedness, the standard under the law on equality is transferred from the prohibition of arbitrariness[160] to a principle of relative equal treatment.[161] As a prohibition of arbitrariness, it expects an object-related reason for differentiation. Nonetheless, the law does not fall unfiltered on all beneficiaries of fundamental rights equally. The generality of the law, this firewall,[162] offers a guarantee that goes far beyond the moderate constitutional review. If the principle of equality develops in the review of proportionality, a fundamental legal ruling is to be taken on a personal, object-related, territorial and temporal scale which is to be made understandable, long-lasting and consistent, and which offers to the equality review the approach for the "justifying ground".

Equality requires that a distinction be made, and hence necessitates a proper degree of generalisation. Generalisation is, for instance, too narrow and violates both the principle of equality and the principle of generality when legal hearings before a court are restricted to German-speaking individuals. It would be going too far if a requirement were introduced for pedestrians to have "driving licences". Equality before the law gives rise to principles of distinction, prohibitions of differentiation and empowerments to distinguish. The principle of equality refers here to the comparison pair that is relevant to the case. The postulate of generality broadens the legislature's perspective to the whole group concerned by the legal material, which through the concept of generality is stressed from the generality of the legal community. In comparison to the protection of freedom, the concept of generality develops a general standard here which does justice to equality, and also a prevision, because the legislature is unable to take all cases into consideration and must form its rules on the basis of the standard case.

5.4.6 The Concept of Generality in European Law

EU law also follows the mandate for generalising rule formation.[163] It is designated by means of a special rationality, by rule formation which is connected with the Member States' legal systems. It is intended to apply in 28 Member States with dif-

[157] Art. 3 § 1 of the Basic Law; Art. 20 of the Charter of Fundamental Rights.

[158] Kant [1793] (1992: A 289 et seq. and 349 et seq.).

[159] Cf. No. 34 on the distinction between the postulate of generality, the prohibition of single-case law and equality before the law.

[160] BVerfGE 102, 254 (299) – EALG; 116, 135 (161) – Schwellenwerte, Vergaberecht.

[161] BVerfGE 75, 108 (157) – Künstlersozialversicherung; 93, 319 (348 et seq.) – Wasserpfennig; 113, 167 (215) – Risikostrukturausgleich.

[162] Cf. at Sect. 5.2.1.

[163] Cf. G. Kirchhof (2009; 386 et seq.).

ferent legal systems and cultures. Decisions need to be taken as to how to adapt and avoid legal frictions. This characteristic of EU law is particularly taken up by directives which are only "binding, as to the result to be achieved", but leaves "to the national authorities the choice of form and methods" (Art. 288 § 3 TFEU). Member States retain scope for decision-making in order to take up stipulations of EU law in national legal systems and serve the consistency of the overall legal system (instrumental generality). The decisions of national parliaments strengthen democracy because it is fully legitimated in democratic terms. The directive is the first legislative instrument of European law. In reality, however, we see far more regulations than directives.[164] European law currently provides for virtually no real directives in the shape of guidelines which only define an objective.

In accordance with Art. 288 § 2, sentence 1, TFEU, regulations have general application. Also in terms of the degree to which it is neglected, this binding stipulation calls to mind Art. 19 § 1, sentence 1, of the Basic Law, but – as European law as a whole – is to be dealt with separately. Nonetheless, this rejection of the single-case regulation is also a justiciable minimum standard of personal, object-related, territorial and temporal generality. Regulations may not distribute privileges among individuals. As part of a legal system that is wrestling for consistency, European legislation, which is orientated towards transferability into many legal systems and legal languages, furthermore requires a clear language and regulatory structure, as well as particular moderation (linguistic, instrumental and final generality). The legislative practice does not follow these stipulations and expectations. It hands down large numbers of special provisions and single-case regulations, and even confuses the differences required under primary law between the two regulatory instruments, handing down regulations in the guise of directives. This legislative practice contributes towards the inconsistency of the overall legal system. Primary law defends itself against this.

The competences of the European Union have increased considerably since the introduction of the Single European Act, and the number of Member States now stands at 28. The Union has become both deeper and wider. This remarkable, but not particularly organic, development raises the question of democracy based on the rule of law for the European Union with fresh urgency. The Treaty of Lisbon attempts to partly answer this question.[165] Primary law provides a high degree of democratic legitimisation. In times when European democracy must prove itself, primary law, and its principles of generality, are hence to be particularly complied with. The principle of conferred powers and the "institutional balance", which also covers the Member States, determine that the ability of Member States to make decisions be respected, and that European law restrain itself. The principle of subsidiarity adds a fundamentally justiciable demand to these concepts of final generality: similar to *Montesquieu's* spirit of moderation,[166] only necessary regulations may be handed

[164] Twenty four times more regulations were enacted than directives from 1998 to 2004 (Federal Government Bundestag printed paper [*BTDrs.*] 16/6672).

[165] Cf. on this BVerfGE 123, 267 – Lisbon.

[166] Montesquieu [1748] (2003: Foreword, 1st, 5th and 29th Books, here esp. chapters 1 and 16).

down. The principle of subsidiarity is highly effective in supporting the concept of generalising rule formation in Europe, and is developed in real guidelines which rely on different realisations of the legislative goal by the Member States.

The fundamental freedoms and prohibitions on discrimination operate within a sectorally-limited scope, which however has considerable breadth under the case-law of the European Court of Justice. Such measures prohibit open and latent discrimination as well as restrictions of any kind,[167] thus justiciably demanding a broad range of object-related and personal generalisation in substance as well as in terms of their effect. The fundamental freedoms guarantee freedom and generality which the Member States are unable to guarantee.

European protection of fundamental rights is moderate in comparison to the level of protection awarded in Germany. The fundamental-right guarantees of European law demand a threefold measure. First a too high level of protection would endanger the uniform European area of freedom and the advantages of integration – and hence a freedom which can only be guaranteed at European level, and not by the Member States. Particularly in a Union with roughly 500 million inhabitants, fundamental rights by themselves cannot, and judges in particular can hardly, guarantee freedom ex post. Fundamental rights are restrictions on the exercise of competences so that they provide a generalising effect within a competence. In binding to the respective competence, they also counter the danger that the ECJ may act in such a manner as to expand competences in fundamental rights. Were the protection of fundamental rights to be excessively reduced – secondly –, European integration would advance at the expense of individual freedom. What is more – thirdly – the guarantees of the fundamental freedoms, the prohibitions on discrimination and fundamental rights, are to be brought into a free balance. European law appears to only be at the beginning with regard to seeking this necessary balance, but of necessity reduces the protection of individual rights. For this reason, European protection of freedom and equality relies on a further, preventive element supplementing fundamental rights, namely the generality of European legal principles.

5.5 The Necessary Guarantor of Freedom, Equality and Democracy

When national parliaments and the bodies of the European Union hand down general legal principles, they are serving freedom, equality and democracy. The generality of the law facilitates equality before the law. It strengthens the effectiveness of the law, and hence of democracy, but at the same time reduces the law in order to

[167] ECJ, Case 8/74, Dassonville, European Court Reports 1974, 837 No. 5; Case C–470/93, Mars, European Court Reports 1995, I–1923 Nos. 12 et seq.; Case C–415/93, Bosmann, European Court Reports 1995, I–4921 Nos. 94 et seq.; Case C–190/98, Graf, European Court Reports 2000, I–493 Nos. 23 et seq.; Case C–79/01, Payroll, European Court Reports 2002, I–8923 Nos. 26 et seq.; Case 33/74, van Binsbergen, European Court Reports 1974, 1299 Nos. 10/12.

ensure freedom because only necessary regulations are handed down. The parliamentary scope and the sphere of society are broadened – and hence two elementary sources of strength of democracy and community are strengthened. The law should once more become to a greater degree a generally-understandable – just – system. The detailed German and European special provisions restrict the scope of the European Union, of Member States and of citizens. They weaken – this paradox runs parallel in German and European law[168] – the state and European bodies, as well as society, and further the process of deprivation of rights. General national laws, general European regulations and real guidelines, by contrast, strengthen the enforceability of the law, and hence the democratic state based on the rule of law and European integration. In the consistency, comprehensibility and reliability of the general system thus set, the necessary specialisation of the law[169] can be achieved by delegated legal acts to a considerable degree.

General laws are better understood and answered for by legislative bodies; they require fundamental regulations, elementary parliamentary decisions, and permit broad parliamentary debates which take up copious amounts of time. The number of parliamentary laws is reduced, but democracy is made much stronger. The key concept of the European directive only to set the goal and to leave transposition up to national parliaments should become the guideline of European legislation. At present there are virtually no directives which deserve this name because they only set an objective. Real guidelines would however not only require copy-cat decisions on the part of national parliaments, but would also demand that they make decisions on their own. The strong democratic legitimisation of national parliaments would be effective for European law, and would also strengthen the decisions of these parliaments in democratic debates relating to democracy, consistency, acceptance and implementation of the law. Differences in legislation which are caused by directives as a rule do not endanger European law in the sense of equality before European law, but are rather the natural and necessary consequence of a combination of 28 different Member States with 500 million inhabitants. Were the European Union once more to hand down real guidelines not in all areas, but in many areas – contrary to current practice –, recalling this first European legislative instrument, it would strengthen the state based on the rule of law and democracy in the long term – in the hope of also strengthening the concept of European unification, which is currently on a defensive footing.

The core concepts of the generality of the law do not draw up a schematic-formal framework which excessively restricts the scope open to the bodies; in fact they are characterised by the individual regulatory mandate,[170] demanding from the democratic legislature justifiable, expedient decisions based upon it. Democracy relies on the formation of rules by the legislature. The latter is the first addressee of generality demands. The common-good interest of general law is not fulfilled until non-constitutional and constitutional law are removed from individualisation that is determined by the protection of fundamental rights and single-case application,

[168] Cf. at Sect. 5.4.

[169] Cf. at Sect. 5.2.2.

[170] Cf. at Sect. 5.4.

they are removed from the judicial perspective of the protection of individual rights, and the parliamentary shaping mandate is orientated towards generality. The explicit postulates of generality,[171] the structural principles of the Basic Law, the principle of equality[172] and the stipulations of European law, apply all seven postulates of generality bindingly. However, only core demands of the four classical postulates of generality, as well as linguistic and instrumental generality, are justiciable in accordance with the final generality of European law.

Public authorities are currently faced with the demanding task of combining the various sources of law, *Land* and federal law, international and supranational law, in addition to the rules set by local authorities and private individuals, to become a consistent overall legal system, and thus to create a space of freedom and of the law. This mandate is barely being fulfilled today. It would however be easier to fulfil it if German laws and European legal principles were to follow the respective principles of generality. Thus, the hoped-for return to a "new European legislative culture" appears to lead back to the old idea of the generality of the law. European legal history and German and European stipulations as to legislation, teach that generality is a precondition for handing down fewer legal acts, systematising the law as it stands, and thus strengthening it, vitalising the democratic state based on the rule of law. They confirm Kant, who regarded the general secret of simplifying the law as lying in seeking out and codifying the general principles of the law.[173] This finding calls on legal scholars to draw up general rules which can be cast in legal texts. The democracy based on the rule of law contained in the Basic Law and in the European Union will revitalise the realisation that was stressed at the end of the eighteenth century,[174] namely that the generality of legal principles is a necessary guarantor of freedom, equality and democracy based on the rule of law.

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[171] Art. 19 § 1, sentence 1, of the Basic Law; Art. 288 § 2, sentence 1, TFEU.

[172] Art. 3 § 1; Art. 20 of the Charter of Fundamental Rights.

[173] Kant [1781] (1974: B 358).

[174] Cf. at Sect. 5.3 above.

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Chapter 6
On Constitutional Duties to Give Reasons for Legislative Acts

Christian Waldhoff

Abstract This chapter will argue that, as a general rule, the legislature is under no constitutional duty to give reasons for legislative acts. The argument put forward to justify this proposition will point out that it is because of the political nature of legislation that reasons are ultimately not required for legislative acts. Nonetheless, a multi-step legislative procedure, in which several institutions are involved, more or less automatically produces legislative materials and thereby yields normative reasons for legislative acts and statements of legislative intent. In contrast, German public law contains numerous duties to give reasons for administrative acts as well as judicial decisions. European Union Law even provides for a general duty to give reasons for legislative acts. Against this backdrop the extent to which legislative acts of the executive are subject to a duty to give reasons needs to be examined: if there is no duty to give reasons for statute law, does that equally apply to delegated legislation and other kinds of administrative law-making? This leads to the question whether administrative rule-making falls into the category of "political decision-making".

Keywords Duty to Give Reasons • Legislative Process • Delegated Legislation • Administrative Rule-Making • Political Decision-Making

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Is parliament under a constitutional duty to give reasons for and when enacting new statutory law?[1] This article seeks to answer this question by analysing the relevant jurisprudence of the Federal Constitutional Court, which will be explained and assessed in the light of constitutional and legal theory. This controversial issue is significant for several reasons: first, it is often argued that the constitutional duty to give reasons increases the rationality of legislation. Second, legislative materials play an important role in the judicial review of statute law. This applies particularly to the principle of proportionality, which is often *the* decisive test when the Federal Constitutional Court reviews the constitutionality of parliamentary statutes. The important question to be answered in this regard is whether legislative materials must or should indicate the purpose the legislature seeks to pursue, and whether this should inform the court's application of the proportionality test. Third, the Federal Constitutional Court exceptionally requires the legislature to give reasons for the enactment of new laws in those fields of law in which the Court has traditionally exercised its right to judicial review only deferentially. This particularly pertains to the judicial assessment of legislative acts concerning controversial issues of economic and social policy. This poses the question of if and how the jurisprudence of the Federal Constitutional Court can be reconciled with the proposition put forward in this chapter that the parliamentary legislature is generally under no constitutional duty to give reasons.

After preliminary remarks on the concept, history, and different types of duties to give reasons and/or duties to justify (Sect. 6.1), this chapter will closely examine the jurisdiction of the Federal Constitutional Court (Sect. 6.2), before discussing constitutional arguments for and against a duty of the parliamentary legislature to give reasons under the German Constitution (Sect. 6.3). Having thus established a constitutional and theoretical framework to assess such potential duties of the legislature the chapter will compare these with the respective duties of the other two branches of government (Sect. 6.4) and duties to give reasons under European Union law (Sect. 6.5). The results of the argument will then be applied to a particular case of delegated legislation (Sect. 6.6) and, finally, the potential chances for and limits to the giving of reasons for statutory legislation in parliamentary democracies will be summarised (Sect. 6.7).

6.1 The Duty to Give Reasons: Concept and History

German legal language traditionally uses only one term for both duties to give reasons and duties to justify, whereas English legal language seems to employ at least two. On the one hand "*Begründung*" and the corresponding verb "*begründen*" denote the formal procedural duty of public authorities to give reasons for their decisions. On the other hand the term also refers to the broader philosophical

[1] Cf. Kluth (2014), Hebeler (2010), Mehde and Hanke (2010) or Schwarz and Bravidor (2011), as well as Waldhoff (2007).

question of justifying a legal norm in terms of its moral desirability. It can, thirdly, also describe the process of deducing norms from superior norms, i.e. discussing the normative validity of a given legal norm. This chapter is primarily concerned with the first question only, namely whether parliament is under a constitutional obligation to give reasons for and when passing new statutory legislation. It will be argued, however, that although these questions should be distinguished from one another, one can hardly be answered without having due regard to the other. So, discussion about procedural duties to give reasons must also take into account the other dimension of "*begründen*", i.e. the normative justification of the law.

From the middle ages to the times of late absolutism, reasons were given for legislative acts,[2] mostly in the form of preambles and commencement clauses.[3] With the rise of modern parliamentary legislation this legislative technique of providing reasons within the statutory document itself has almost completely fallen out of use, at least within the German-speaking legal sphere. During the time of National Socialism and later under the regime of the German Democratic Republic, however, legislative preambles saw a remarkable renaissance. In some cases, their reasoning was even given preference over the actual imperative text of the statute.[4] Over the past decades, claims have once more been raised, partly *de constitutione lata* and partly *de constitutione ferenda*, for a general constitutional duty to give reasons to be equally imposed on all branches of government which would therefore also apply to the legislature.[5] More often than not, these claims are fostered by general scepticism towards the directive force and regulatory effect of statutory law.[6] These claims have emerged under various guises and in different theoretical contexts such as in the context of discussions about "New Public Management" or the "*aktivierender Staat*" (activating state).[7] Some writings even conceive legislation to be no more than a "service" provided by the legislature to the "customer-citizen".[8] Considering the widely noted and often lamented "decline of legislation"[9] and the "tide of norms"[10] floating from national and European legislators, a constitutional duty to give reasons for new legislative acts is thought by some to be an effective means to rationalise the process of legislation.[11]

Technically, there would be several and equally feasible ways to implement such a constitutional duty to give reasons when enacting new statutory law.[12] Possible techniques comprise among others: a duty to insert specific clauses into legislative

[2] Immel (1976: 3, 26); Kischel (2003: 35 sqq.).

[3] Rethorn (1976: 298 sqq.); Immel (1976: 26); Lücke (1987: 11).

[4] Nunius (1975: 115).

[5] Kischel (2003: 260 sq.).

[6] Lepsius (1999a).

[7] Köck (2002: 12).

[8] Pestalozza (1981: 2086).

[9] Müller and Uhlmann (2013: para 62); Tipke (1988: 865).

[10] Ossenbühl (1996: para 55 sqq.).

[11] For an early proponent of this view cf. Dürig (1973: para 316).

[12] Schulze-Fielitz (2004: 867); cf Skouris (2002: 121).

measures, which would require the legislature to state the purpose of the statute (these are sometimes termed "principle paragraphs"[13]); a modern form of a preamble[14]; or even attachments to the statute, which would be promulgated with the actual statute in the Federal Law Gazette (*Bundesgesetzblatt*).[15]

6.2 The Jurisprudence of the Federal Constitutional Court

"All the legislature owes to the public is legislation".[16] Compared with this famous dictum of former judge Willi Geiger, the jurisprudence of the Federal Constitutional Court on constitutional duties to give reasons for legislative acts appears to be at least ambivalent.

In its judgment on the inter-state fiscal adjustment (*Länderfinanzausgleich*) from 1992, the Court strictly denied any constitutional obligation of the legislature to give reasons: "The legislature is not obliged to state its reasons [for adopting a specific economic model on which the inter-state fiscal adjustment is based]; in designing the inter-state fiscal adjustment, the legislature is not exercising statutory discretion like an administrative authority."[17] To deduce from this reasoning that the Federal Constitutional Court generally "does not appreciate"[18] claims for a constitutional duty to give reasons would, however, mean leaping to a conclusion all too hastily. In its subsequent judgment on the inter-state fiscal adjustment from 1999, the Court provided an explanation that could not seem more contradictory: "If the federal legislature decides to co-finance special expenses of federal states by way of an additional allocation of federal funds, such funds may in effect lead to the federal state's financial resources rising above average [without violating the constitution], if and as long as exceptional circumstances demand such funds to be allocated to the federal state. These circumstances must be stated by the legislature and reasons must be given which prove the exceptional character of such circumstances."[19]

In one of the most recent judgment on constitutional limitations upon taxation, in which the Court rejected the principle that the amount of taxes to be paid must not total more than half of the income so taxed (*Halbteilungsgrundsatz*), the Court stated that the legislature may under certain circumstances be under a constitutional duty to give reasons to justify why the tax under scrutiny is still appropriate although being exceptionally high.[20]

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[13] Müller (1968: 37, 140 sqq.).

[14] Rethorn (1976: 315).

[15] Hill (1982: 73); von Buch (1973: 64).

[16] Geiger (1979: 141).

[17] 86 BVerfGE 148 at 241 (2 BvF 1/88). Unless otherwise indicated, all translations are mine.

[18] That is the conclusion of Meßerschmidt (2000: 923).

[19] 101 BVerfGE 158 at 224 sq. and 234 sq. (2 BvF 2/98).

[20] 115 BVerfGE 97 (2 BvR 2194/99).

As early as 1958 and its famous judgment on concessions for pharmacies (*Apothekenurteil*), the Federal Constitutional Court held that "this Court will not be satisfied if the object and purpose of legislation challenged in this Court are only stated in general terms and keywords by the legislature". Rather, it continued, "the relevant and decisive reasons must be analysed specifically and in some detail."[21] The Court itself, however, assumed the task of ascertaining these reasons "if necessary with the help of expert witness".[22] Similar dicta can be found in many other judgments of the Federal Constitutional Court[23] without giving a clear answer to our question of whether or not the legislature is under a constitutional *duty* to give such reasons.

Concerning taxes which seek to influence people's behaviour (*Lenkungssteuer*), the Court held that the purpose of such taxes must go back to a clear and identifiable decision of the legislature.[24] Thus, the Court concluded, the purpose of such taxes must be stated within the text of the statute with appropriate clarity.[25] This, however, is only a specified application of the general principle that norms must be sufficiently clear, certain and understandable. The question this article seeks to answer, however, is concerned with reasons that are given *outside* the text of the norm.

In contrast, the reasoning of the Court in its judgment on the limitations imposed on government debt by Art. 115 of the *Grundgesetz* (GG) provides helpful insights on how to approach the question. In the interpretation given by the Court, this provision of the Basic Law shifts the burden of proof onto the legislature to produce sufficient evidence within the legislative process as to why and how it is exercising the right under Art. 115 GG to incur national debt.[26] The Federal Constitutional Court conceptualises this burden as a so-called secondary obligation (*Obliegenheit*).[27] To discharge this secondary obligation no specific conduct of the legislature is prescribed by the constitution. Rather the necessary statement can, in the view of the Court, be given by any of the institutions which take part in the legislative process of enacting the budget, for example during plenary sessions of either the *Bundestag* or the *Bundesrat*, as long as it becomes evident from the process that the parliamentary majority ultimately voting in favour of the budget also takes full responsibility for the reasons given to specifically justify the amount of debt proposed by the

[21] 7 BVerfGE 377 at 411 sq. (1 BvR 596/56).

[22] BVerfGE 7, 377, 412.

[23] cf. Skouris (2002: 119 sqq.).

[24] 108 BVerfGE 1 at 19 (2 BvL 9/98).

[25] 93 BVerfGE 121 at 148 (2 BvL 37/91); 99 BVerfGE 280 at 296 (2 BvL 10/95); 101 BVerfGE 1 at 18 (2 BvF 3/90); 105 BVerfGE 73 at 112 (2 BvL 17/99).

[26] 79 BVerfGE 311 at 344 (2 BvF 1/82).

[27] Ibid. In general, secondary obligations are such obligations that cannot be enforced directly (be it specifically or in the form of damages), but which, if not met, will lead to the party being under such secondary obligations as to find its own rights diminished. For example, a party having suffered damages is under a secondary obligation to mitigate its loss in order to remain entitled to claim full compensation.

budget under Art. 115 GG.[28] It appears from the reasoning of the judgment that the Court cautiously seeks to refrain from adjudicating on the potentially highly controversial matter of how much money precisely the government is entitled to borrow.

Another area of law in which the Court has resorted to the technique of imposing secondary procedural duties to elicit evidence that standards of rational decision-making were met during the process of legislation, concerns the demarcation of legislative competences between the federal government and the federal states. In certain areas the federal legislature needs to establish under Art. 72(2) GG that it is legally or economically necessary to regulate an issue on the federal level. In its fundamental judgment from 2002 (*Altenpflege*)[29] on how to interpret this provision the Court held that the legislature, in order to demonstrate that something is legally or economically "necessary" as required by Art. 72(2) GG, is obliged to sufficiently demonstrate that rational *methods* were employed to assess the economic or legal matters involved. More specifically, the Court held it necessary that such methods of rational decision-making either became apparent during the process of legislation *or* could potentially become evident in court. It is clear that although this bears some resemblance to primary procedural duties to give reasons, it is in fact a slightly distinct legal concept.

Comparing these decisions of the Federal Constitutional Court (on limitations of taxation, of government debt, and on the allocation of legislative powers between the federal government and the federal states), they all feature certain common characteristics. They all concern politically controversial issues and areas of constitutional law which lack clear and settled legal standards. This particularly pertains to cases in which the Court would, in fact, have to critically assess the economic and social policies of the government of the day. It is still not settled law whether this idea of secondary procedural obligations is a specific requirement applying only to the question of constitutional limitations upon government debt[30] and others areas of law discussed above, or whether it is a general requirement applicable to all statutes passed by the legislature. The rationale of these decisions, however, clearly points towards the former interpretation.

6.3 The Constitutional and Epistemological Framework of Parliamentary Legislation

Apart from the political discussion and the, as some scholars suggest, potentially inconsistent jurisdiction of the Federal Constitutional Court, the question still remains for constitutional lawyers whether the legislature is under a constitutional duty to give reasons when passing statutes.

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[28] Ibid. 345.

[29] 106 BVerfGE 62 at 152 sq. (2 BvF 1/01); cf. now the latest judgment of 21 July 2015 (BvF 2/13).

[30] Isensee (1996: 716); Blum (2004: 124).

To begin with, the German Constitution does not explicitly provide for a constitutional duty of the legislature, neither in the Basic Law itself nor in the rules of procedure (*Geschäftsordnung*) of the *Bundestag*. The fact that reasons must be given when *draft* legislation is introduced into the parliamentary process is a separate matter.[31] For this particular case the rules of procedure of the *Bundestag* (GOBT) require that reasons are to be given for new legislative measures (§ 76 (2), § 96 (3) GOBT, § 43 GGO). Apart from the question of whether these obligations stated in the rules of procedure of the *Bundestag* comply with the superior norms of the Basic Law,[32] they are of little relevance to us and the question at hand. First, draft legislation is often fundamentally altered during the legislative process. Second, there is no reason to assume that the legislature necessarily subscribes to the reasons given for a *draft* introduced by the government. These statements, therefore, lack the relevant legislative "authenticity".[33] Like most other legislative materials these statements of reason are primarily addressed to other institutions involved in the process of legislation and thus remain an "instrument of internal control within the state".[34] They refer to the initial state of the legislative process rather than to the final outcome.[35] That does not, of course, prevent judges and commentators from resorting to these materials when interpreting the law, which occasionally may in fact indicate what the legislature actually intended.

Even if, as we have seen, there is no explicit constitutional duty to give reasons for the legislative measure passed, the question still remains whether such a duty may be inferred from broader constitutional principles. It is safe constitutional knowledge, on which the argument can advance, that a number of constitutional principles, prominently the rule of law (*Rechtsstaatsprinzip*), the principle of democracy, and fundamental rights point towards a constitutional duty to give reasons.[36] This is at least true for executive and judicial acts. Concerning these two branches an obligation can, therefore, be deduced from the named constitutional principles to state the reasons on which a particular decision was based.

That such a general duty is imposed on the executive and the judiciary, must not, however, lead to the conclusion that it equally applies to the case of statutory legislation.[37] It simply does not follow that what is a constitutionally valid argument for executive and judicial acts is necessarily also true for the legislature. Based on this doubtful and misleading assumption, arguments from administrative law contexts have frequently been transferred to constitutional law without due consideration being given to the administrative specifics from which these arguments originally stem.[38] More often than not, the question of whether or not such arguments are

[31] von Buch (1973: 64); Blum (2004: 85 sqq.).

[32] Stettner (2006: para 16); Troßmann (1977: para 4); Schürmann (1987: 41).

[33] Lücke (1987) 13, 146 sq.; Meßerschmidt (2000: 920 sq.); Lücke (2001: 32).

[34] Waldhoff (2013b); Lücke (1987: 13); Baden (1976: 389); Mengel (1984: 159).

[35] Rixecker (1999: 128).

[36] See in greater detail Sect. 6.4; Kischel (2003: 63 sqq.); Lücke (1987: 37 sqq.).

[37] For the opposite view cf. Lücke (1987: 214 sqq.); Pestalozza (1981: 2086); Dörner (1999: 38.).

[38] For a typical example cf. Köck (2002), for an early critique of this view Schlaich (1981: 109 sq.).

generally applicable to all branches is not even discussed. The particular legislative procedure and its close relation with the political process is so specific as to make it inappropriate to treat the legislature in just the same way as the other two branches. Over the last decades, constitutional scholars have witnessed and described the general phenomenon that legal devices and constitutional arguments which were originally designed to control executive authorities, notably police forces (e.g. a rigidly applied test of proportionality), have been transformed into constitutional restraints imposed on the legislature.[39] Instead of neglecting fundamental differences between the different branches of government by applying purportedly general principles regardless of their original meaning, it is therefore necessary to stress the separation of powers in this particular respect and emphasise functional and procedural specifics of each branch. Indeed, any such argument from administrative law contexts must strictly be proven to be constitutional law and it must be shown that the legal principle evoked actually applies to the legislative process and binds the legislature. Functional differences between the three branches become particularly evident and relevant considering procedural and formal rules. Objective procedural rules, for instance, must therefore not be reinterpreted so as to eventually impose personal obligations on office-holders.[40]

Bearing these general considerations in mind, the first question to be answered is whether it is factually and theoretically possible to impose a general duty on the legislature to give reasons for legislative acts. It is scarcely convincing to dispute such a duty exists for the sole reason that the particular way in which the legislative will is formed, namely through *collective* formal and informal interactions between different members of the legislature, precludes any unified account of the reasons which eventually informed their decision.[41] Some state courts resorted to this kind of argument by pointing to the "potentially various and diverse motives of the individual members of a legislative body voting for the same legislative measure".[42] Following this argument, any duty to give reasons for collegial bodies consisting of more than one member would have to be rejected. The everyday experience that collegial bodies do successfully issue such statements of reasons proves this objection to be factually wrong.[43] Even if any comparison between elected members of legislative assemblies and office-holders of the other two branches remains inappropriate in so far as it does not take into account the particular representative function of members of parliament, it has to be noted that neither executive authorities nor collective bodies have a will in the ordinary psychological sense of the word.[44] For the question of the constitutional duty to give reasons does not so much concern the actual will of the particular office-holder or individual elected member of

[39] Groß (2006: 856 sqq.).

[40] Cornils (2005: 659).

[41] Rixecker (1999: 131); Koch and Rüßmann (1982: 211 sq.).

[42] StGH Baden-Württemberg 1975 NJW 1205 at 1214 (GR 11/74); 12 BVerwGE 20 at 27 (II C 129.59); cf. Dolzer (1985: 17 sq.).

[43] Kischel (2003: 360); Müller-Ibold (1990: 222).

[44] Forsthoff (1973: 207); Kelsen (1929: 34 sq.; 1911: 97 sqq.; and 1925; 65 sqq.).

parliament, but rather the objective meaning conveyed by their collective action.[45] As Kelsen has noted, "the objective norm is only the constructive result of an intellectual process of objectification", of which the "real basis" is "the will of the individual".[46] Given that talking about the "will" of the legislature and other state organs is in one sense nothing more than a fiction, it would well be possible to also construe a fictitious will of parliament as a collective body. The problem would still remain, however, that members of the legislature technically do not vote on their mutual motives for passing a certain legislative act during the legislative process. Even if the fact is conceded that motives of members of parliament can be made public (and are in fact commonly published), nothing has been said, however, to answer the question whether such publicly accessible motives of parliamentarians or even parliament as a collective body are in fact a statement of reasons in the formal and technical sense. There is a fundamental and important difference between motives and statements of reasons which cannot easily be shrugged off as being no more than an "anachronism of scientific theory".[47] Whereas for something to serve as a *motive* for something else, it is sufficient that a statement (or series of statements) (s^1) cause someone to accept a particular statement (s^2), the notion of something being the *reason* for something else is inseparably connected to, but not identical with the idea of a logical conclusion.[48] A statement of "reasons" in the legal context as well as in other contexts thus implies the idea to justify something in the normative sense of deducing a result from given normative premises.[49] It is this very relation between the formal duty to give reasons and the substantive idea to justify something in normative terms that renders the notion of a constitutional duty to give reasons conceptually inappropriate for the legislature. The parliamentary legislature does not "deduce" its legislation either from the Constitution or from any superior normative premise.[50] Despite – or rather because of – being strictly bound by the Basic Law, the legislature does not simply "execute" the Constitution.[51] The Constitution does not determine the legislative process other than by imposing ultimate limits.[52] Legislation cannot properly be understood as a process of "balancing conflicting constitutional principles",[53] which would see the legislature effectively caught between the requirement to act proportionally, i.e. not to exceed what is necessary under given circumstances (*Übermaßverbot*), and the requirement to set minimum standards to protect fundamental rights (*Untermaßverbot*). Some even argue that being subject to these two requirements of not intervening too much and not intervening too little, there is only one right

[45] Dolzer (1985: 16); cf. Forsthoff (1973: 207).

[46] Kelsen (1911: 24).

[47] Kischel (2003: 8).

[48] Alexy (2003: 11).

[49] Christensen and Kudlich (2001: 41).

[50] Merten (1991: 55); Müller and Uhlmann (2013: para 54).

[51] Hesse (1995: para 30); Meßerschmidt (2000); but cf. Kelsen (1960: 237).

[52] Böckenförde (1981: 402); Kischel (2003: 4 sq); Müller and Uhlmann (2013: para 61).

[53] Schwerdtfeger (1977: 179).

answer left for the legislature.[54] The legislative process is, however, not the same as the judicial process. The legislature does not subsume facts under pre-existing rules of law, but anticipates facts of life to establish rules of law.[55] The legislature thereby proves to be the branch of government that is genuinely orientated towards the future.[56] From these particular characteristics of the legislative process certain epistemological consequences follow. Legislation appears as a process that "not so much seeks to depict an object of reality, but rather constructs an abstract, but consensual new object out of multiple real phenomena."[57] From this epistemological point of view, legislation is an "inter-subjective process of constructing notions".[58] The legislative process, therefore, operates inductively and can be distinguished from the generally deductive proceedings of the other two branches of government. Legislating, on the one hand, and applying the law through the judicial or administrative processes, on the other hand, rest on fundamentally different epistemological footings.[59] Legislation is no cognitive act, but rather determines the "cognitive principles" that are relevant for a particular area of life.[60] Legislating is "a volitional function, not a cognitive one"[61]; a means "to voluntarily and wilfully shape the social order".[62] Legislation thus ultimately thwarts any rational justification: the legislative process cannot be reformulated and reinterpreted as a cognitive process of deducing norms from superior norms.[63]

The argument put forward in this chapter, however, must not be mistaken as one that contributes to the mysterious vision of an "omniscient and almighty legislature".[64] Under the realm of democratic constitutionalism, statutes are no more, but also no less, than the technical means to reach the end of political compromise.[65] Parliamentary statutes thereby guarantee the democratically necessary link between the ultimate sovereign, the people, and any exercise of public power.[66]

To ask for further justification of statute law would inevitably lead into an infinite regress, or into circular or axiomatic arguments to cut off the chain of reasoning.[67] This problem, famously known as the Münchhausen trilemma,[68] makes obvious why the two meanings of "*begründen*", namely justifying a result in normative

[54] Epping (2005: para 85 sq.); Lenz and Leydecker (2005: 849).

[55] Maihofer (1981: 25); cf. von Rotteck (1840: 328 sq.).

[56] Husserl (1955: 42 sqq.); Möllers (2005: 90 sqq.).

[57] Lepsius (1999b: 160).

[58] Ibid.

[59] Lepsius (1999b: 168), arguing against Kelsen (1929: 35 sq.).

[60] Lepsius (1999b: 152 sqq.)

[61] Kelsen (1960: 415).

[62] Kelsen (Kelsen 1925: 152).

[63] Gusy (1985: 298); Jestaedt (1999: 229 ff.).

[64] Lepsius (1999a: 12).

[65] Lepsius (1999b: 154, 167); Baden (1976).

[66] Lepsius (1999b: 123).

[67] Sieckmann (1994: 242).

[68] Albert (1991: 13, 15 sqq.).

terms on the one hand and formally stating reasons on the other, ultimately correlate with one another. Both semantic dimensions of "*begründen*", justifying as well as stating reasons, potentially lead into infinite regress: imposing a constitutional duty to give reasons on the legislature when enacting new statutory law inevitably begs the question how such a constitutional duty can be justified, and which reasons can and must be given for it.

To postulate a constitutional duty to give reasons to be imposed on the legislature does not only methodologically lead into infinite regress. The practical ramifications of this claim become apparent when, as some proponents of this view claim, the very normative principles that should guide legislation, for instance the principle of clarity and intelligibility of norms, are said to equally apply to the statement of reasons itself. The duty to give reasons is imposed on the legislature in the first place to safeguard these very principles, which must then serve again to critically assess the statement of reason, and so on *ad infinitum*.

To overcome this twofold dilemma of infinite regress, i.e. the substantial one of asking for further and further normative justification of norms and the procedural (formal) one of requiring the legislature to give reasons, it is necessary to resort to the principle of democracy itself and the normative idea embodied in the notion of popular sovereignty. Democracy, all the more so in its parliamentary and representative form, is the ultimate answer to the question of normative validity, and more particularly to the absence of any pre-existing and uncontested normativity that has become the defining characteristic of modern societies.[69] Under the reign of modern, secular constitutionalism, popular sovereignty is the ultimate justification, from which any statute passed by the legislature lends its normative force. The sovereign people and its constituent power do not disappear once the constitution has been established. It remains the normative anchor and ultimate point of attribution, from which all constituted power flows.

The epistemological and constitutional framework of legislation, as it has been outlined so far, also marks the fundamental difference between modern legislation and "legislation" as it was understood in the middle ages and early modern times. During this period, "legislation" served to "apply and enforce the law, to codify and, at the most to cure defects of the law".[70] Legislating was not about building intersubjective consent inductively, but was meant to deduce "statutory" norms from the superior legal order of divine or secular natural law. Any alteration of the law had therefore to be strictly justified: "*quod semel est lex*, *semper debet esse lex*".[71]

In the narrow legal sense the parliamentary legislature cannot be subject to a duty to give reasons when enacting new statutory law. Only through employing a wide notion of "reason", which would also include the account of different motives, could a duty to give "reasons" be imposed on the legislature. The obligation to give reasons would then in effect be restricted to a duty on the legislature to provide an

[69] Kelsen (1929: 98 sqq.).

[70] Kischel (2003: 36); Gagnér (1960: 107 sqq.); Schulze-Fielitz (1988: 184 sqq.).

[71] Aquinas (1882: 594).

explanation as to why it acted in a particular manner and passed a particular statute.[72] Even this rather unspecific and wide notion of a duty to give reasons would, however, run the risk of undermining the sophisticated and differentiated concept of the separation of powers enshrined in the Basic Law, which not only attributes different functions but also different cognitive procedures to the different branches of government.[73]

Even though the constitutional rights and duties of constitutional actors may in general be inferred from broader constitutional principles, this can only be done with caution lest the constitution be subverted by its own principles. As long as the constitution provides explicitly for a specific legal question, these norms therefore need to be regarded as conclusive.[74] Converse arguments are therefore of particular relevance in this respect.

For our purpose, it is necessary to examine whether the specific procedural rules provided in the Basic Law for the process of legislation preclude inferring additional procedural requirements from broader constitutional principles. At a first glance, the procedural rules of the Basic Law concerning the process of legislation may indeed seem inchoate and even fragmentary.[75] It has to be taken into account, however, that to postulate a general duty to give reasons would effectively amount to claiming ideal methods of legislation.[76] Such claims, however, contradict the procedural autonomy to regulate internal parliamentary proceedings, which the German Parliament enjoys under Art. 40(1) GG. Following the tradition of many other parliamentary democracies, the German Constitution does not prescribe specific methods as to how the legislature should operate, rather the legislature is entitled to establish autonomous rules of procedure and standing orders. The Federal Constitutional Court has summarised this position as follows: "It is for the legislature and the other organs of state participating in the process of legislation to specify the legislative procedure within the boundaries set up by the Constitution".[77]

Even *if* it were deemed possible to deduce rules from the Constitution for the "inward process of legislation",[78] i.e. for the genuinely informal political process that ultimately shapes the legislative agenda and decision-making, nothing would follow for the question we are concerned with. Formal duties to give reasons concern the "outward process of legislation", which is in fact subject to a set of comprehensive rules in the Basic Law which are more detailed than a first glance might suggest. There is not even the slightest textual evidence for a duty to give reasons. Rather Art. 19(2) GG, which prescribes that a statute interfering with a particular constitutional right has to cite the respective article of the Constitution, points

[72] Kischel (2003: 8); Horak (1974: 2 sq.).

[73] Lepsius (1999b: 26 sq.).

[74] Reimer (2001: 306, 445 sqq.).

[75] Schulze-Fielitz (1983: 712).

[76] Meßerschmidt (2000: 921); Cornils (2005: 659).

[77] 36 BVerfGE 321 at 330 (1 BvR 712/68).

[78] Hill (1982: 62 sqq. and 82 sqq.).

toward a converse argument.[79] Instead of requiring a formal statement of reasons, legislation is publicly debated in the Bundestag (Art. 42(1)(1) GG) and within the general political process before the legislative proposal is finally passed (Art. 77(1)(1) GG). The public nature of the legislative process may also account for the fact that duties to give reasons are generally imposed on the other branches of government, which typically do not have their decisions publicly debated before they have actually been taken. Consequently it could be argued that statements of reasons prove to be a kind of substitute for the non-public process in which decisions of the judiciary and the executive are reached.[80] The transparency that is ensured by parliamentary public debate by far exceeds the transparency of any subsequent statement of reasons, which are generally only concerned with results rather than process.[81] As former judge of the Federal Constitutional Court Konrad Hesse remarked, parliamentary democracy "ensures rational decision making by the publicity that comes with the political process and that is embodied in parliamentary proceedings. Democratic procedures […] do not leave the political process in the dark of closed door agreements and political decisions in the hands of unfettered rulers".[82] Kant famously expressed this nexus in what he describes as the "transcendental formula of public law": "All actions relating to the right of other men are unjust if their maxim is not consistent with publicity".[83] Yet even transparency is not given unlimited precedence by the nuanced procedural rules of the Basic Law, as Art. 77(2) GG makes obvious, which provides the possibility for the joint committee of the *Bundestag* and *Bundesrat* to meet and work non-publicly.

To summarise the argument of this section: imposing an unlimited and general duty to give reasons for legislative acts on the legislature when enacting statutory law would not only conflict with the very notion of giving reasons, but would also contradict the procedural rules of the Basic Law.

6.4 Comparison I: The Other Two Branches of Government

The constitutional and epistemological framework for the judiciary and executive are fundamentally different to that of the legislature. Whereas the legislature is free to politically shape the law, both the executive and judiciary are bound by the law. The individual cognitive act, by which judicial and administrative decisions are informed, is therefore always subject to an obligation to give reasons.[84] The general duty to gives reasons imposed on both the executive and the judiciary first and foremost serves to demonstrate that their findings have been reached in accordance with

[79] Cornils (2005: 659).

[80] Kischel (2003: 300 sqq.); see in greater detail Sect. 6.4.

[81] Bröhmer (2004: 98); Kissler (1989: para 16).

[82] Hesse (1995: para 138).

[83] Kant (1912: 381).

[84] Lepsius (1999b: 161).

the law. Citizens shall be assured that decisions of public authorities comply with Art. 20(3) GG and the statement of reasons is supposed to demonstrate this compliance.[85] To emphasise the functional, procedural and epistemological differences between the legislature and the other two branches of government does not mean subscribing to an out-dated understanding of statute law or to the methodological atavism that regards judges as no more than a mere "*viva vox legis*",[86] "*bouche de la loi*"[87] or even as a "*Subsumptionsautomat*"[88] (judicial robot). Even if, as it is often correctly pointed out, any interpretation and application of the law necessarily implies a certain degree of volitional decision-making and even creativity, there still remains a fundamental difference to the political process and the political decision-making of the legislature. It is, of course, true that judicial decisions are not deductive strictly speaking. A variety of different factors, such as the prejudices of a particular judge viewing the facts of a particular case, influence decisions taken by individual judges. The duty to give reasons, however, is not concerned with the actual process of reaching a conclusion and finding a decision, but with retrospectively stating the reasons that normatively should have lead to a particular decision. The distinction of Karl Popper between context of discovery and context of justification,[89] which has become common knowledge in scientific theory, applies here as well. Judicial and executive statements of reasons, the context of justification in Popper's terminology, are not meant to disclose the entangled paths on which a court or an administrative agency has actually reached a particular decision in terms of their psychological motivations. Deciding individual cases with respect to abstract norms and the artificial technique of legal reasoning both serve to ensure that the judicial outcome of individual cases fits into the broader context of the law.[90] This clarifies the specific judicial and executive function, as opposed to the legislative function, within the common process of making the law binding: judges and executive decision-makers specify the law for particular cases of individual citizens. "The individual and specific decision [by the judiciary and the executive] thus epistemologically corresponds with the general, abstract and inter-subjective consent of parliamentary statutes."[91] To claim a general duty to give reasons for the legislature in order to facilitate the application of the law according to the will of the legislator[92] proves almost circular in this respect as long as one accepts, along with most traditional theories of interpretation, other interpretative criteria besides the fictitious "will of the legislator". Judicial and executive bodies are particularly

[85] Kischel (2003: 10); Christensen and Kudlich (2001: 41); cf. also Hocks (2004) and Waldhoff (2013a).

[86] Laband (1911: 178).

[87] Montesquieu (1956: 149).

[88] Ogorek (1986).

[89] Popper (1982: 6 sq.).

[90] Brüggemann (1981: 70 sq.)

[91] Lepsius (1999b: 155).

[92] Redeker and Karpenstein (2001: 2825 sqq.); Hill (1982: 79); Fliedner (1988: 18 sq.).

well-equipped for the task of reaching individual normative decisions and specifying the law for particular cases. Regular and approved patterns of decision making, the wisdom of precedent, proven arguments, and legal scholarship serve to ensure that executive and judicial authorities can properly fulfil their specific task.

This argument must not be mistaken as perpetuating the in fact old-fashioned view which categorically distinguishes between legislation and application of the law. Instead of drawing from a purportedly logical dichotomy where there is none, it rather draws from the procedural and political specifics of parliamentary legislation in representative democracies.

6.5 Comparison II: European Union Law

European Union law appears to abound with statements of reasons. The general duty to give reasons for legislative acts, enshrined in Art. 296 TFEU, is both a founding provision of European Union law and forms part of all previous treaties (see Art. 15(1) ECSC and Art. 190 EECT). It is, moreover, interpreted by the European Court of Justice as being a general principle of EU law.[93] Noting this phenomenon does not, however, vitiate the argument put forward so far. The general duty to give reasons under EU law arises from the unique legal nature of the European Union, which can best be described as a supranational legal entity *sui generis*. Just as the system of multi-level governance, established by the EU, is a historically unprecedented phenomenon, so is the general duty to give reasons, hitherto unknown in the (modern) legal systems of the different member states.

This relation between the unique legal nature of the EU and the unique general duty to give reasons enshrined in the treaties is not a mere coincidence but an inherent consequence of the legal status of the EU for two reasons. First, every norm of secondary EU law ultimately still remains a unique form of delegated legislation. This precludes any meaningful comparison to forms of traditional parliamentary legislation within the member states.

Second, the European Union still lacks *Kompetenz-Kompetenz* and is therefore deprived of an essential feature of modern states. Instead it is founded upon the principles of conferral, subsidiarity and proportionality, which all bind European legislation. European legislation is therefore, unlike national parliamentary legislation, not free to choose its political aims and means. On the contrary, every European legislative act has to be expressly justified with reference to the European treaties and in that sense normatively deduced from sources of primary law. National and European legislation therefore remain distinctly different phenomena. To talk about European laws without further qualification, as the Treaty establishing a Constitution for Europe (TCE) did, would tend to blur these important differences.

[93] Joined cases 43/59, 45/59, and 48/59 *Von Lachmüller and others* v *Commission* 1960 ECR 989 sq.

The connection between a general duty to give reasons and the foundational principles of EU law, particularly the principle of subsidiarity, has become ever more apparent through the practice of European legislation. Art. 5 of the protocol (No 2) on the application of the principles of subsidiarity and proportionality requires that any draft legislation shall be justified with reference to the principle of subsidiarity. Furthermore, Art. 296(1) TFEU expressly refers to the principle of proportionality. Both principles not only protect the individual citizen from interference with their constitutional rights, but also serve to ensure that the rights of member states remain unimpaired. Statements of reasons shall therefore include an explanation why the particular legal form (directive or regulation) of a legislative measure was chosen in order to protect member states from European regulatory interference stricter than necessary. This normative function of both the principle of proportionality and the principle of subsidiarity was particularly emphasised by the Federal Constitutional Court in its *Maastricht* judgment.[94] This particular function of the duty to give reasons under EU law to protect member states from excessive regulatory intervention becomes even more apparent when compared to the corresponding provision in the Charter of Fundamental Rights of the European Union. Art. 41(2) CFR provides for a duty of executive authorities to give reasons for their decisions; and whereas Art. 296 TFEU refers to legislative acts, Art. 41 CFR is only concerned with administrative decisions strictly speaking. The different scope of the duty to give reasons embodied in the TFEU and the corresponding duty in the Charter results from the different normative purposes of each duty. If interpreted systematically and in accordance with its purpose, the Charter of Fundamental Rights only establishes and protects the individual rights of citizens. Thus, duties to give reasons under EU law are a different phenomenon that does not refute the proposition advanced in this chapter.

6.6 Case Study: Delegated Legislation of the Joint Federal Committee (*Gemeinsamer Bundesausschuss*)

Apart from the particular case of EU law, the argument of the chapter so far has only concerned the rather clearer cases of parliamentary legislation on one hand and individual decision-making of the executive (or the judiciary) on the other. Most modern constitutions, however, feature various types of executive law-making which do not fit easily into the theoretical model developed above. Delegated legislation, for example, takes an intermediate position between parliamentary legislation and individual executive decisions: while "procedures of delegated legislation presuppose the inter-subjective consent of statute law",[95] they are far from being fully determined by that consent. While bound by the empowering statute under

[94] 89 BVerfGE 155 at 212 (2 BvR 2134/92).

[95] Lepsius (1999b: 170).

which delegated legislation is exercised, executive legislators typically enjoy much greater freedom than individual executive or judicial decision-makers. Although delegated legislation generally lacks the public scrutiny of parliamentary debate and is institutionally determined by executive proceedings, various elements of publicity can and have been introduced into the process of different types of delegated legislation by virtue of statutory procedural rules. The rules of procedure of the *Bundesregierung*, for instance, in some parts even adopt proceedings similar to the legislative process of the *Bundestag*.[96]

So far, administrative law courts have only rarely adjudicated on the matter of the duty to give reasons for delegated legislation and other forms of administrative rule-making.[97] Not surprisingly, the subject is highly controversial amongst legal scholars. Some argue that all forms of executive legislation are subject to a general duty to give reasons[98] and, as in the case of other executive decisions, they consider that the duty to give reasons for legislative acts of the executive likewise serves to attest and ensure that the pertinent statutory requirements have been complied with. This camp thus stresses the institutional settings of administrative rule-making which, these observers say, remains a form of public power exercised by *executive* authorities.

Others have proposed more nuanced solutions to this problem. *Kischel* for instance argues that duties to give reasons generally have a twofold rationale and serve two different functions.[99] First, statements of reasons facilitate subsequent interpretation by the courts and thereby enhance the accuracy of statutory construction. Second, they serve to justify legislative measures in normative terms. Concerning parliamentary legislation, both rationales fail to establish a constitutional duty to give reasons. As was argued in Sect. 6.4 of this chapter, general laws enacted by the parliamentary legislature neither need to resort to auxiliary devices that explain their provisions and communicate their purpose, nor does the parliamentary legislature generally need to justify its legislation. Concerning delegated legislation, the first rationale equally fails. Delegated legislation is still *legislation* – (albeit delegated to the executive). When enacting delegated legislation, executive authorities are not just exercising their statutory discretion but are entitled to actively seek and find political compromise.

As to the second rationale, unlike parliamentary legislation, delegated legislation by executive authorities can be and often is subject to detailed statutory rules of procedure. Such procedural requirements could be said to point towards a duty to issue statements of reasons to ensure that these requirements and the methods of legislation they prescribe have actually been complied with.[100] To satisfy these procedural requirements it is, however, sufficient to impose secondary obligations on

[96] Uhle (1999: 296 sqq.).

[97] 70 BVerwGE 318 at 335 (7 C 3.83).

[98] Ossenbühl (1986: 2809 sq.); von Danwitz (1989: 138 sqq.).

[99] Kischel (2003: 304 sqq.); cf. also Kischel (2004).

[100] Ibid.

the executive to produce sufficient evidence if the validity of delegated legislation is actually questioned in court.[101] While to some extent similarities between parliamentary and delegated legislation exist, these must not be over-emphasised. Most importantly, the democratic legitimacy of parliamentary proceedings ensured by full public debate between elected representatives of the people fundamentally distinguishes parliamentary legislation from all other forms of legislation. The German Constitution provides for different types and forms of delegated legislation and administrative rule-making, notably the autonomy of self-government for local communities (Art. 28(2) GG), and the right of the legislature under Art. 80(1) GG to empower certain named executive authorities to legislate by way of statutory instruments (*Rechtsverordnung*). Other forms of delegated legislation must satisfy a test to establish whether they are based upon sufficient democratic legitimacy.[102] The more fundamental question to be answered concerning delegated legislation is therefore rather one of democratic legitimacy. It appears that the controversy around duties to give reasons for delegated legislation actually concerns this underlying issue of democratic legitimacy and that a duty to give reasons is supposed, at least by some, to compensate for such a lack of legitimacy.

In recent years, this question has gained considerable practical relevance with respect to the delegated legislation of the Joint Federal Committee (*Gemeinsamer Bundesausschuss*). The JFC has not attracted much public nor indeed scholarly attention so far. It is, however, the highest autonomous decision-making body governing health insurance organisations, hospitals, physicians, and dentists to regulate their mutual affairs. It must be noted, however, that patients are not represented in this body. Its most important task is to establish binding standards and rules that define when and under which circumstances hospitals and other medical service providers are entitled to be reimbursed by health insurance funds for medical care provided to patients. As it sets binding standards for millions of patients covered by public health insurance, and thereby effectively directs enormous sums of public money, the JFC has considerable power and influence. The JFC was empowered to set these standards by primary legislation. The precise legal nature of these standards was long disputed, but it is now settled that they in fact constitute generally binding legal norms.[103] It follows that the JFC is a law-making body and that it exercises a genuinely legislative function. For this reason it is not subject to a general duty to give reasons. Imposing a duty to give reasons cannot compensate for the potential lack of democratic legitimacy of the JFC, a body of collective self-regulation, in which the most concerned party (i.e. patients) does not have a voice. Questions of legitimacy, however, must be addressed directly, rather than under the guise of a duty to give reasons.

[101] See in greater detail Sects. 6.2 and 6.7.

[102] 33 BVerfGE 125 (1 BvR 518/62).

[103] 78 BSGE 70 (6 RKa 62/94).

6.7 Conclusion

Rejecting claims for a general duty to give reasons does not necessarily mean embracing the view of Gustav Radbruch who held that, "it is the very nature of a statute that even if passed to serve a particular purpose it does not receive its normative force and validity from this purpose. A modern legislator never utters the word "because". The language of modern legislative acts has adopted the harshness of military commands, and both equally refrain from giving any reasons."[104] Under the constitutional rule of the Basic Law the legislature has lost its former "self-aggrandisement".[105] The legislature is well entitled to give reasons and to use the word "because"; maybe it even ought to – however, it is not obliged to do so.

To sum up the argument, the "duty to give reasons", and more precisely the duty to explain legislative motives, is not a legal duty under current German constitutional law but only a moral precept of political prudence.[106] Under exceptional circumstances it may be regarded as a secondary constitutional obligation (*Obliegenheit*) which is not directly enforceable against the legislature, but only imposes a duty on the legislature to provide evidence.[107] This is just one more example of where legislative studies, i.e. legisprudence, can point out the political virtues of good legislation but cannot stipulate constitutional obligations.[108] If the legislature refuses to disclose its motives it bears the risk of being misinterpreted. That may not only thwart the political aims pursued by the statute, but may potentially even lead to the statue or a certain provision therein being declared incompatible with the constitution. In this narrow legal sense, transcripts of parliamentary debates and other legislative materials do have a role to play when it comes to the constitutional question of whether a statute is compatible with the constitution.[109] The precept of political prudence to give reasons may occasionally and under special circumstances gain additional normative strength and become a secondary constitutional obligation if the constitution requires the legislature to evaluate certain facts or make certain forecasts during the process of legislation. The legislature, under such exceptional circumstances, may forfeit its margin of appreciation and become subject to a full review of the relevant facts by the Court. Even then the secondary obligation to give reasons only gives rise to intensified scrutiny by the Court, but does not imply that a statute passed without giving reasons is unconstitutional *per se*. The jurisprudence of the Federal Constitutional Court on the inter-state fiscal adjustment or on limitations upon national debt (Art. 115 GG) discussed above falls into this category of secondary obligations. The argument put forward in this chapter thus can be reconciled with the jurisprudence of the Federal Constitutional Court and also seems to

[104] Radbruch (1959: 86).

[105] This phrase was coined by the Reichsgericht in RGZ 118, 325, 327; 139, 177, 184.

[106] Meßerschmidt (2000: 922).

[107] Meßerschmidt (2000: 923 sq.); Rixecker (1999: 133 sq.); Skouris (2002: 182 sq.).

[108] Gusy (1985) 298; Kloepfer (1982: 88 sq.).

[109] Cf. Waldhoff (2013b).

be in line with a broader approach taken by the Court: "The Court puts possibilities to act before obligations to act."[110] Even if the Court tends to reason in terms of the "obligations" of a personalised "legislator", a closer look at the relevant decisions reveals that ultimately only the legislative act itself is relevant for the Court's decision. The jurisdiction of the Court in this particular respect seems in accordance with the broader trend to impose procedural obligations to produce sufficient evidence on litigants instead of adjudicating on potentially highly controversial issues.[111] In any case, both the precept of political prudence and its stronger equivalent, the secondary obligation to produce evidence in court, must not be interpreted as effectively amounting to a *duty* to give reasons.

Historically, duties to give reasons can be observed in authoritarian and even totalitarian states. Complex and potentially intransparent systems of multi-level governance likewise resort to duties to give reasons. Some of the well-known features that characterise the European Union, namely a system of rather vague competences, the lack of central administrative authorities to equally apply the law, and the potential danger of EU law being enforced by different member states only incoherently, may seem to make it necessary that European legislative acts offer particularly convincing reasons to be enforced. The confident and self-assured legislatures of stable parliamentary democracies do not need to resort to such additional measures to appeal to their own people and convince them with statements of reasons. The democratic state bound by the rule of law relies on different, and more distant forms of law enforcement.

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[110] Schorkopf (2005: 472).

[111] Schorkopf (2005: 480 sqq.).

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Part III
Judicial Review of Legislative Consistency and Systematicity

Chapter 7
The Obligation of Consistency in Lawmaking

Using the Example of the Ban on the Private Sale of Public Lottery Tickets and Its Review by the Federal Constitutional Court

Christian Bumke

Abstract Using the example of the ban on the private sale of public lottery tickets and its review by the Federal Constitutional Court the study examines the question whether the German Constitution comprises a duty of consistent legislature and, if so, what its contents might be. The starting point is the realignment of the Federal Constitutional Court's jurisdiction that has occurred in the past few years regarding constitutional requirements of rationality in law. This development has led to both more concrete and broader requirements. The realignment shows particularly in the Court's ruling on the smoking ban in restaurants where the Court made an important step towards establishing a general requirement of consistency. The main challenge when establishing such a requirement is to integrate the demands of rationality and of the rule of law into the overall conception of a democratic, constitutional state. This is because this conception is based on the realization of limited rationality and of the necessity of political compromise.

Keywords Consistency • Rationality • Lawmaking • Judicial Review • Federal Constitutional Court

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I was inspired to write this piece by a legal opinion I prepared on behalf of the Tipp 24 AG, which deals with the Federal Constitutional Court's dismissal decision, BVerfG, Order of 14 October 2008, 1 BvR 928/08 – Interstate-Treaty on Gambling, (fully published at juris; partially published at 14 BVerfGK 328). Many thanks go to my academic assistant Johannes Gerberding for his support, especially for working through the factual aspects and the legal questions related to the private resale of lotteries.

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7.1 Rational Lawmaking in the Democratic Constitutional State

7.1.1 Traditional Reluctance Towards Rationality Review

Since long ago, it has been demanded that legislation be reasonable and adequately tailored to the subject matters it addresses.[1] It is only recently, however, that such demands have been recognized within the doctrine of German constitutional law. The Federal Constitutional Court issued its first decision, in which legislative rationality formed a central component of its analysis, in 1957. In the famous Pharmacy-Judgment (*Apothekenurteil*)[2] it reviewed provisions of the Bavarian pharmacy according to the principle that amongst several equally effective alternatives the least invasive must be chosen (*Grundsatz der Erforderlichkeit*) and examined whether the targets and prognoses underlying the rules were reasonably justifiable.[3] What today seems like a matter of course for every German lawyer was at the time an epochal step towards constitutionally restraining the legislator and establishing a minimal required standard of reason in legislation.[4]

Especially in times where the regulative idea behind central parts of the legal system is to ensure the appropriate functioning of complex societal and technical structures – such as the financial markets –,[5] rationality forms an essential foundation for legitimacy.[6] We adhere to the public legal order because it is rational and contains adequate solutions to the problems it aims to address.[7] The constitution

[1] Scheuner (1978: 532, 537, 539); Siehr (2005: 541 et seqq.); Grawert (1975: 864 et seqq.); Schulze-Fielitz (1988: 458): "Since the enlightenment, rational legislation has been a pleonasm and a standard that cannot be deserted at will but that is unavoidable for all contemporary forms of lawmaking." (Translation by the author.)

On the search for expectations of rationality towards legislation, one finds a variety of ideas. Some conceptualize the law so that it by definition has to fulfill specific requirements of rationality. Others understand the law in an instrumental sense. Among the latter approaches, some formulate demands of rationality towards the content of the law (as for example the normative economic analysis of law does) and others concentrate on the procedure of lawmaking.

[2] BVerfG, Order of 11 June 1958, 1 BvR 596/56, 7 BVerfGE 377 at 409 et seqq. – Pharmacy-Judgment.

[3] Bumke (1998: 144 et seq.).

[4] Scheuner (1958), 849. See also the considerations of Forsthoff (1955: 233, 235). Lerche (1961: 98 et seqq.) suggests that the requirement to choose the least invasive amongst several equally effective options (*Gebot der Erforderlichkeit*) may vary in scope depending on context, and regarding the Pharmacy-Judgment, Lerche (1958: 232 et seq.).

[5] See Bumke (2008: 228 et seq. in a general sense and 232 et seq. with regard to the capital markets).

[6] Idea of output legitimacy, seminal work by Scharpf (1970: 21 et seqq.), summarizing presentations by Rumler-Korinek (2003: 328 et seqq.).

[7] Regarding legislation in the international sphere, this is one of the major approaches for the compensation of seemingly or actually existing democratic deficits, see Scharpf (2005: 705 et seqq.; and 1999: 20 et seqq.); Slaughter (2004: 108 et seqq., 193 et seqq.). Regarding the state of the debate, see Kirsch (2008: 87 et seqq.).

expresses this rational conception of the law in several different ways – most importantly through the principle of proportionality, which allowed to effectively bind the legislative to the Constitution's basic rights.[8]

But rationality also has its dark side. First of all, it is inherently limited[9]: Our knowledge about ourselves, our society and the dynamics at play within it does not reach far and our future is often uncertain. This alone shows that those who make general rules designed to shape societal future should be granted some leeway with regard to their decisions and the assumptions they base these decisions on.[10]

Besides recognizing these immanent limitations it is important not to separate the idea of rationality as a guiding standard for the provision of societal order from the conceptual world of the democratic constitutional state, but to develop it as one component within that world.[11] Like the market, the democratic constitutional state is a response to our bounded societal knowledge. Both institutions serve the purpose of solving central societal knowledge problems. While the market answers the question of which goods a society should produce and how societal resources and goods should be distributed,[12] the democratic constitutional state defines the common good and answers how political power is organized and distributed.[13] Separating the idea of rational order from this context may not only lead to a misconception of the knowledge problem but also to a questionable dichotomy between an assumed regulatory rationality and the democratic decision-making process.[14]

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[8] Dreier (2004: Vorb. marginal no. 144 et seqq.); Grzeszick (2006: Art. 20 marginal no. 107); Kraft (2007: 578 et seq.); Bumke (1998: 40 et seq., 124 et seqq., 144 et seqq.).

[9] These inherent limitations are less about the correct definition of rationality (cf. side remarks on various conceptions of rationality regarding the rationality of lawmaking as a research interest by Meßerschmidt 2000: 795 including footnote 85; and Schulze-Fielitz 1988: 454 et seq., both with further references), but more about the fact that any conception regardless of its design quickly reaches the limits of what it can achieve.

[10] Of course, the legal system can chose not recognize this insight and grant another government body, such as a constitutional court, the competence to replace the legislator's judgments with its own.

[11] This requires viewing the institution of the democratic constitutional state not solely as a question of the form of government, but as an independent construct of political community, see Möllers (2008: 80 et seqq.).

[12] Regarding the functions of the market, cf. Homann and Suchanek (2005: 213 et seqq.). Conceptually prior to the market mechanism is the question of how the resources and goods present within a society can be organized and distributed fairly. The market is an important instrument, but not the only one, for answering the distributive question.

[13] The thoughts of Isensee (2003: marginal no. 109 et seqq.) point in a different direction.

[14] This is not to deny the possibility of frictions between rational order and democratic lawmaking. But the fact that what is rational tends to be determined by reference to discourse and proceduralization (see Scheit 1987) shows how closely together both modes of generating order lie, see Homann (1988: 266 et seqq.); Karpen (1989: 43); Noll (1973: 70); Meßerschmidt (2000: 811 et seqq.).

7.1.2 Fundamental Change in Rationality Review

The substance of the concept of rational legislation largely depends on the scope and intensity of judicial review exercised by the Federal Constitutional Court. Since the end of the 1990s, this field has undergone change to such an extent that we are justified in talking about a paradigm shift.[15] The transformation becomes especially clear if one considers the recent decision regarding the smoking ban in bars and restaurants, with which the Federal Constitutional Court has set a further milestone on the path towards a universal constitutional obligation of consistency.[16] In this decision the Court for the first time used the legislator's own conceptual ideas underlying the laws under review to determine the magnitude of the benefits and drawbacks of the smoking ban for public and private interests.[17] What may at first sight look like additional room for the legislature to manoeuvre turns out to be part of a tightening web of constitutional restraints. The Court ruled that measured against the legislator's concept the ban on smoking in small neighborhood pubs constituted an unacceptable restriction of liberty. A coherent realization of the legislative concept would have required the introduction of an exception from the ban for these small venues.[18]

While individual fragments of the judicature, such as the recent obligation of "truthful" lawmaking (*Gebot der Normenwahrheit*),[19] have repeatedly been the subject of dogmatic analysis, the fundamental conceptual shift, which is only roughly sketched out in the present piece, has in the literature so far neither been described nor appreciated in its entirety. A further reason for this study was the observation that the Court's treatment of the subject lacks uniformity. The standards applied by the different decision-making bodies within the Court – the two large Senates and the several smaller Chambers – differ. The Senates apply the strict requirements of the principle of consistency or, respectively, its components. In contrast, some Chamber-decisions stick with the traditional reluctance towards rationality review and a generally broad leeway for the legislature. As the example of the ban on the private sale of public lottery tickets through the internet will show, this variance in determining the scope and intensity of judicial review may lead to varying decision outcomes.

With that, the framework for the present study is set. After a brief introduction to the laws governing the private sale of lottery tickets and the approach of the Constitutional Court towards them, I first describe different lines of development within the Court's legal practice. The constitutional obligation of consistency, which

[15] A more detailed account can be found below, Sect. 7.3.2.

[16] BVerfG, Order of 30 July 2008, 1 BvR 3262/07, 1 BvR 402/08, and 1 BvR 906/08, 121 BVerfGE 317 et seqq. – Smoking Ban, analyzed among others by Michael (2008); Bäcker (2008); Gröschner (2008).

[17] BVerfG, 121 BVerfGE 317 at 359 et seqq. (Footnote 16).

[18] Ibid., 365 et seqq.

[19] Drüen (2009); Meyer (2009). For a closer look, see below, section "Re-orientation of Established Obligations of Rational Lawmaking".

emerges from this review, will then be examined with regard to its foundations in constitutional law and its normative substance. I subsequently return to the ban and assess its constitutionality based on the obligation of consistency.

7.2 Law of the Private Sale of Lottery Tickets

7.2.1 Core Characteristics and Development of the Legal Framework

Gambling is generally governed by the Interstate Treaty on Gambling in Germany (*Staatsvertrag zum Glücksspielwesen in Deutschland, GlüStV*).[20] The Treaty covers lotteries, sports betting as well as some aspects of the casino business.[21] It mandates that only the Federal States (*Bundesländer*) may host economically significant lotteries.[22] The States organize their lotteries in different legal forms, traditionally mostly as private entities.[23] Private commercial vendors may participate in the sale of lottery tickets.

In recent years, the legal framework governing the commercial sale of lottery tickets has undergone substantial change. Until the end of 2007 this field was governed by the Interstate Treaty on Lotteries (*Staatsvertrag zum Lotteriewesen in Deutschland, LoStV*).[24] Commercial lottery vendors could operate without a license, but had to fulfil certain requirements regarding their operation and the organization of their business.[25] Under the new Interstate Treaty on Gambling, commercial lottery vendors must obtain a license, to which they are legally not entitled.[26]

[20] In effect since January 1, 2008. Discussions of the technical terms by Korte (2008: § 18 marginal no. 7 et seq.); Dietlein and Hüsken (2008: § 2 GlüStV marginal no. 4 et seqq.).

[21] Cf. § 3 Section 3 Sentence 1, § 2 Sentence 2 of the Interstate Treaty on Gambling. For reasons of legislative competence the Treaty does not cover the law on gambling machines (covered in § 33c of the Commercial Act [*Gewerbeordnung, GewO*]) or betting on horse races (which is covered by the Race-Bet and Lottery Act [*Rennwett- und Lotteriegesetz, RennwLottG*]), see Dietlein (2008b: Vorbemerkung GlüStV marginal no. 3). Further, it does not cover the law on amusement arcades due to a dispute about the content and scope of the constitutional provision regulating legislative competence in this respect (Art. 74 Section 1 No. 11 of the Basic Law), see Dietlein (2008a: Grundgesetz, Art. 70 ff., 123 ff. GG marginal no. 14).

[22] § 10 Sections 1, 2 and 5 of the Interstate Treaty on Gambling. For details, see Ruttig (2008), § 12 GlüStV marginal no. 5.

[23] Schlund (1972: chapters 5 and 6; 29 et seqq.); Diegmann, Hoffmann and Ohlmann (2008: Appendix 9 no. 6; 197 et seqq.).

[24] In effect as of July 1, 2004 pursuant to § 18 Sentence 1 of the Treaty. Repealed effective from January 1, 2008 by § 29 Section 2 of the Interstate Treaty on Gambling.

[25] § 14 Section 2 Nos. 1–5 of the Interstate Treaty on Lotteries.

[26] § 4 Section 1 and Section 2 Sentence 3 of the Interstate Treaty on Gambling. The previous requirements of § 14 Section 2 Nos. 1–5 of the Interstate Treaty on Lotteries remain effective with hardly any changes according to § 4 Sections 2 and 3, § 19 of the Interstate Treaty on Gambling. In greater detail Postel (2008: § 4 GlüStV marginal no. 64 et seqq.).

Furthermore, a ban on the organization and sale of lottery tickets through the internet has been introduced.[27] Only during a 12 month transition period in 2008[28] could the States allow the organization of lotteries and sale of tickets through the web under certain restrictive conditions.[29] In addition to the general provisions of the Interstate Treaty on Gambling, the States decided on the specifics of the Treaty's execution in Executionary Statutes (*Ausführungsgesetze*). As far as the ban on internet-based gambling is concerned, these laws differ only marginally with regard to the transition period in 2008.[30]

7.2.2 The Constitutional Court's Approach Towards the Ban

The Federal Constitutional Court has opted not to carry out a detailed examination of the new restrictions, especially the ban on the sale of lottery tickets through the internet, and based its decision not to admit a constitutional complaint (*Verfassungsbeschwerde*)[31] on this matter largely on the traditional standards used for the review of economic legislation. Its core line of argument can be summarized as follows. The purpose of public gambling laws, i.e. to prevent gambling addiction, qualifies as a preeminently important goal in the common interest.[32] Despite the lower addictive potential of number pool lotteries, there was no obligation to exclude them from the gambling ban. Since the lawmakers enjoy some degree of freedom in assessing the subject matters they regulate, it was permissible for them to conclude that these lotteries could nevertheless cause gambling addiction.[33] They could further legitimately assume that increased opportunity to gamble would commensurately lead to a greater risk of addiction.[34] Preventing such an increase justifies both a ban on the internet-based sale of lottery tickets and on commissions earned on offline sale.[35] Because it makes games more easily accessible and belittles their dangers, sale through the internet would further increase the risk of addiction.[36]

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[27] § 4 Section 4 of the Interstate Treaty on Gambling.

[28] § 25 Section 6 of the Interstate Treaty on Gambling.

[29] § 4 Section 2, § 26 Section 6 Nos. 1–5 of the Interstate Treaty on Gambling.

[30] Postel (2008: § 25 GlüStV marginal no. 40), provides an overview of the provisions of States' Executionary Statutes.

[31] BVerfG, 14 BVerfGK 328 (see footnote in the chapter opening page). Another dismissal decision of similar content followed, BVerfG, Order of 17 December 2008, 1 BvR 3409/08, juris.

[32] BVerfG, 14 BVerfGK 328 at 330 et seq. (see footnote in the chapter opening page). The pursuit of such a "preeminently important goal" is a necessary condition for the justification of grave interferences with the Freedom of Profession (*Berufsfreiheit*), such as the interference at hand.

[33] Ibid., 331.

[34] Ibid., 331. In this quite relevant point, the Court errs. Since the possibility of private resale through the internet had existed for years and during this period the number of players had shrunken slightly, the game relocated but did not expand.

[35] Ibid., 333.

[36] Ibid., 333, 335.

Finally, less invasive but equally effective alternatives had not been available[37] and considering the common interests at stake, the ban was also proportional.[38]

Several aspects in the Chamber's analysis are worth questioning.[39] Especially the assumption that lotteries lead to a socially relevant risk of addiction seems odd. Millions of people participate regularly in lotteries and while some suffer from a gambling addiction.[40] Almost never, though, do gambling addicts name lotteries as the sole reason of their troubles and rarely do they place them at the top of their personal hierarchy of problems. Specifically because the phenomenon's significance in medical practice is marginal, relatively few empirical studies examine the issue. In addition, it is uncertain whether diagnostic methods, which are long established but were developed for different purposes, are applicable to lottery games.[41] Unlike addiction to alcohol, nicotine, gambling machines, shopping, over and under eating, lottery-addiction plays no role in public opinion. And while the law addresses all these addictions barely or not at all, the State legislators have selected, of all things, lottery addiction as a central regulatory matter and even decreed occupational bans in order to fight it. One may chose to disregard these doubts together with the unmasking legislative history of the interstate treaty[42] on

[37] Ibid., 335. Considering the transitionary provision of § 25 Section 6 of the Interstate Treaty on Gambling and the lack of any indication of its inadequacy, this statement seems strange. This is especially true since the Court had pointed out earlier that a law contravenes the requirement to chose the least invasive of several equally effective options (*Grundsatz der Erforderlichkeit*) only "if according to the facts available to the legislator and considering previous experiences it can be determined that restrictions suitable as possible alternatives promise the same effectiveness but afflict aggrieved individuals less" (ibid., 334. Translation by the author.). The Court's self-restraint seems comprehensible only against the background of its flawed assumption that the legislative measures serve the purpose of preventing an expansion of gambling and subsequently of gambling addiction.

[38] Ibid., 335 et seqq.

[39] See the criticism by Korte (2009) as well as the objections pointed out in footnotes 34 and 37.

[40] After decades of lotto playing by millions of participants, existing studies (cf. the compilation by the Administrative Court of Berlin, VG Berlin, Order of 22 December 2008, 35 A 15/08, juris) conclude that the addictive potential of lotteries "is to be estimated as low" and "of marginal significance" (translations by the author), as Hayer and Meyer (2005: 52) point out with references also to contradicting observations. The authors summarize their findings as follows (ibid., 54): "The proportion of problematic players amongst all players, who in terms of the frequency of their playing favor the lottery, is 0.4 % (4 out of 1,067 people)" – relativized because of the small sample size. Also Hayer and Meyer (2004: 296); Stöver (2007: 50) characterize "lottery addiction" as a clearly lower-ranking gambling addiction problem. Becker (2008: 93), estimates that there are between 500–1,500 individuals in Germany whose primary gambling addiction is to the lottery. Especially incorrect is putting lotteries and sports betting on the same level in terms of their addictive potential, see Hayer and Meyer (2003: 214).

[41] Stöver (2007: 45 et seqq.), with regard to the diagnostic schemes "SOGS – The South Oaks Gambling Screen" and "DSM-IV – Diagnostic and Statistic Manual of Mental Disorders".

[42] One reason for the legislative proposal was the "Sports Betting Decision" by the Federal Constitutional Court, which stated that a public monopoly on betting could not be justified by fiscal interests. Of course, the public monopoly on lotteries has a clear tradition of fiscal justification (see Klenk 1976: 363 et seq.; Rüpig 2005: 234 et seq.). The second reason was that a few months after the Sports Betting Decision the Federal Competition Office (*Bundeskartellamt*) decided (see

the grounds of the legislator's prerogative in estimating future developments[43] as well as the State's limited competences for lawmaking.[44] But fundamental skepticism regarding the legislative goals remains.[45]

Other features of the decision, such as the absence of any equality-related arguments,[46] are explainable: The Chamber arrives at the assessment that the laws' severe interferences with personal liberty are justified on the basis of the constitutional principle of proportionality.[47] According to the court's longstanding practice, an assessment of violations of the General Principle of Equality in Article 3 Section 1 of the Basic Law (*Grundgesetz, GG*) was therefore unnecessary.[48]

BKartA [2006], essentially upheld by the Higher Regional Court of Düsseldorf, [OLG Düsseldorf, Order of 8 June 2007, VI-Kart 15/06, *Zeitschrift für Wett- und Glücksspielrecht (ZfWG)* 2007: 277], and the Federal Supreme Court [BGH, Order of 14 August 2008, KVR 54/07, *Zeitschrift für Wett- und Glücksspielrecht (ZfWG)* 2008: 359]) among other things that the mutually-consensual division of the market by public lottery companies violated §§ 1, 21 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*) as well as Art. 81 of the Treaty of Rome and repudiated the argument of preventing addiction as a justification for the territorial cartel (BKartA 2006: marginal no. 295 et seqq.). The preservation of traditional gambling businesses, which had been forced into a defensive position by these decisions, was at least the factual consequence of the Interstate Treaty on Gambling (regarding the preservation of the monopoly structure see § 10 of the Interstate Treaty on Gambling and Dietlein/Postel 2008: § 10 GlüStV marginal no. 1 et seq.; Ruttig 2008: § 12 GlüStV marginal no. 5 et seqq.; regarding the regionalization, see Schmitt 2008: § 19 GlüStV marginal no. 38 et seqq.; Ristelhuber/Schmitt 2008: marginal no. 22 et seqq.).

[43] It is conspicuous that the statement of grounds in the proposal lists the "opinions of addiction experts" (see for example in Baden-Wuerttemberg, Reports of the State Parliament [LT-Drs.] 14/1493, 34, 37) in a strongly abbreviated, if not distorted, table form. In the case of some States, it is not apparent that the table was even available to the representatives in the forming of their opinion (see for example the structure of the Reports of the Hamburg State Parliament [Bü.-Drs. 7229]).

[44] For most of the areas at hand, state and federal legislators have concurrent legislative powers according to Art. 72 of the Basic Law, which means that the States can regulate a subject matter only insofar as federal law does not govern it. Since the federal legislator has not created rules for *all* the areas, though, action on the state level remains possible in some. Whether the states have any legislative authority is doubted by Pieroth (2007: 18 et seq.); Horn (2006: 792).

[45] In many statements made during legislative procedures in the states, financial interests have played a prominent role (see for the example of the State of Berlin the remarks made by the Administrative Court of Berlin, VG Berlin, Order of 2 April 2008, 35 A 52/08, juris). It fits together with this observation that mainly the finance, budget and sports committees have been concerned with the Ratification and Executionary Acts. In Thuringia, a motion to move the proposal for the Interstate Treaty on Gambling to the Committee for Social Affairs and Health was dismissed and the issue transferred to the Budget and Finance Committee (Record of the State Parliament of Thuringia [Plenarprotokoll], 4/67 from September 20, 2007, 6779).

[46] More about this below, Sect. 7.4.2.

[47] More about this below, Sect. 7.4.3.

[48] When assessing violations of the General Principle of Equality in cases of a grave interference with individual liberty, like the one at hand, the Court does not simply ask whether the measure is arbitrary, but "whether reasons of such kind and weight exist for the intended differentiation that they can justify the unequal legal consequences" (BVerfG, Order of 26 January 1993, 1 BvL 38/92, 1 BvL 40/92, and 1 BvL 43/92, 88 BVerfGE 87 at 97 – Transgender, continuous jurisprudence.

The decisive point, however, lies elsewhere: It is the question whether the Chamber should have arrived at a different conclusion had it oriented its analysis towards the requirements of rational lawmaking, which the Senates of the Federal Constitutional Court have developed over the recent years. It must be determined, then, whether the Court actually has such standards of review at its disposal and, if so, what obligations for the legislator they entail.

7.3 The Constitutional Obligation of Consistency

7.3.1 Conventional Rejection of a Requirement to Make "System-Coherent" Laws

For some time it has been argued in legal scholarship that the minimum standard of rational lawmaking constituted by the principle of proportionality should be raised through further-reaching requirements for procedures, intelligibility, coherency and consistency of laws.[49] Such approaches culminate in an "obligation of good legislation".[50] Within the Constitution these ideas are derived from the Principle of the Legal State (*Rechtsstaatsprinzip*), a concept related to the Rule of Law in common law jurisdictions, and the General Principle of Equality and tend to involve a notion that the legislature can be bound by its own decisions.[51]

In contrast, the Federal Constitutional Court used to take a reluctant stance.[52] It reviewed the inner coherency and consistency of legislation only where it found an

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Translation by the author; for a more detailed account see Bumke and Voßkuhle (2008: 96 et seqq.). Hence, at this point there would have been cause for critical questions of constitutional law by the Federal Constitutional Court (cf. below, Sect. 7.4.2.). Still, it is not unusual for the Court to focus its examination on certain central points.

[49] For now, see the references made by Meßerschmidt (2000: 781 et seqq., 843 et seqq., 930 et seqq., 969 et seqq.); as well as Heckmann (1997: 265 et seqq.).

[50] This is the title of Burghart's (1996) dissertation (translation by the author).

[51] Degenhart (1976); Haack (2002: 75 et seqq.). Differentiated representation of this approach by Bumke (2004: 83 et seq.). However, postulates of legislative self-fixation do not necessarily aim at guaranteeing rationality; another influential idea lies in the protection of legitimate expectations and the provision of continuity, see Leisner-Egensperger (2004: 31 et seqq.), who introduces numerous further approaches for explaining legislative self-fixation.

[52] Despite having mentioned the idea of system-coherency since its early days, the Federal Constitutional Court usually denied to meet system-incoherencies alone with consequences (see the references in footnote 56). Summaries of this judicature can be found in Peine (1985: 53 et seqq.), Pöschl (2008: 296); Hanebeck (2002: 432 et seqq.), who sees a trend of increasing judicial self-restraint; Prokisch (2000: 293 et seq., 296), who identifies several points in the later judicature, to which the legislator may be bound.

An exception is the Court's review of laws for the territorial restructuring of local communities, where it recognized "the obligations of adequacy towards the subject matter and system-coherency" (translation by the author) and also obliged the legislator to correctly and completely gather all relevant facts and base his decision on them (BVerfG, Order of 27 November 1978, 2 BvR

unequal treatment.[53] In such a case, it initially only asked whether differentiations were arbitrary. Any objective reason behind a law, for example the fact that alcoholic beverages were socially accepted as intoxicants whereas a drug like cannabis was not, was considered sufficient to comply with the Principle of Equality from Article 3 Section 1 of the Basic Law.[54] Inconsistencies within a given set of legal rules, usually referred to as System-Incoherencies (*Systemwidrigkeiten*),[55] were by themselves deemed constitutionally insignificant. They could at most suggest the arbitrariness of an already diagnosed unequal treatment.[56] Later, the Federal Constitutional Court modified the Equality Principle into a variable standard, which depending on the case reaches from a mere arbitrariness review to the detailed assessment whether a differentiation adequately reflects any differences in the interests at play.[57] However, the purpose of these efforts was not to improve legislative rationality but to combat discrimination against groups of individuals more effectively.[58] Consequently, the Court remained reserved towards further-reaching suggestions pointing into the direction of an obligation to pass good, consistent and target-driven legislation. Nor has it established any serious requirements regarding the drafting of statutes or the prevention of ambiguities within them.

165/75, 50 BVerfGE 50 at 51 – Local Self-Government). With regard to this decision, see Peine (1985: 63).

[53] Peine (1985: 54).

[54] See BVerfG, Order of 9 March 1994, 2 BvL 43/92 et. al., 90 BVerfGE 145 at 195 et seqq. – Use of cannabis.

[55] Canaris (1983: 121 et seqq.), who also mentions the term "contradiction of principles" (*Prinzipienwiderspruch*); Kirchhof (2000: marginal no. 231 et seqq.); Smeddinck (2006: 126); Jarass (2007: 112); Merten (1994: § 20 marginal no. 71–72); Becker (2004: 86 et seqq.).

[56] See BVerfG, Order of 10 November 1981, 1 BvL 18/77 and 1 BvL 19/77, 59 BVerfGE 36 at 49 – Service Group; Order of 9. February 1982, 2 BvL 6/78 and 2 BvL 8/79, 60 BVerfGE 16 at 43; Order of 19 October 1982, 1 BvL 39/80, 61 BVerfGE 138 at 149; Order of 6 November 1984, 2 BvL 16/83, 68 BVerfGE 237 at 253; Order of 16 June 1987, 1 BvL 4/84 and 1 BvL 6/84, 75 BVerfGE 382 at 395 et seq. – Unemployment Aid; Order of 1 July 1987, 1 BvL 21/82, 76 BVerfGE 130 at 139 et seq. – Flat Charging Scheme of Social Lawsuits; Order of 26 April 1988, 1 BvL 84/86, 78 BVerfGE 104 at 122 et seq. – Legal Aid; Order of 23 January 1990, 1 BvL 44/86 and 1 BvL 48/87, 81 BVerfGE 156 at 207 – Employment Promotion Act; Order of 11 February 1992, 1 BvL 29/87, 85 BVerfGE 238 at 246 et seq.

[57] Heun (2004: Art. 3 marginal no. 19, as well as the references to the judicature there in footnote 131); Kalina (2001: 73 et seqq.).

[58] Especially clear BVerfG, 88 BVerfGE 87 at 96 (footnote 48); see also BVerfG, Order of 7 October 1980, 1 BvL 50/79, 1 BvL 89/79, and 1 BvR 240/79, 55 BVerfGE 72 at 88 – Preclusion in Civil Procedure; Gubelt (2000: Art. 3 marginal no. 14); Schoch (1988: 875 et seqq.). Summarizing the discussion and differentiating between different streams within the judicature Kischel (2009: Art. 3 marginal no. 38 et seqq.).

7.3.2 *Re-alignment and Development of a Constitutional Obligation of Consistency*

The late 1990s mark the beginning of a fundamental re-alignment of the constitutional requirements for legislative rationality. Sporadically and fragmentarily at first, and without an overarching concept, the Court has entered an ever expanding and intensifying process, which is still ongoing.

Obligation of Consistency in Tax Law

The first profound adjustment in this process occurred in the field of tax law. In this field, where a sketchy constitutional regime makes judicial oversight difficult, the Court had developed the requirement that tax dues must be determined based on the taxpayer's financial capacity and thereby effectively bound the legislator to the General Principle of Equality.[59] But in the complicated arrangement of rules, exceptions and counter-exceptions among the various tax-provisions, the obligation had quickly lost its instructive power. To enforce the idea of tax equality both horizontally and vertically, the Court therefore ruled that once the legislator has made a basic decision to tax certain items at a certain rate, individual tax provisions must carry out this decision consistently.[60] How powerful this obligation is, may be observed in a recent judgment regarding an exception from the taxpayers' entitlement to a lump sum deduction from their taxable income as compensation for expenses incurred on their way to work. The principle allowed for an elaborate examination not only of the inner consistency of the legislative concept,[61] but also

[59] Still reluctant BVerfG, Order of 3 November 1982, 1 BvR 620/78, 1 BvR 1335/78, 1 BvR 1104/79 and 1 BvR 363/80, 61 BVerfGE 319 at 343 et seq. – Tax Splitting for Married Couples; Order of 22 February 1984, 1 BvL 10/80, 66 BVerfGE 214 at 223 – Necessary Maintenance Costs; more explicit then BVerfG, Order of 23 January 1990, 1 BvL 4/87, 1 BvL 5/87, 1 BvL 6/87 and 1 BvL 7/87, 81 BVerfGE 228 at 236; Order of 29 May 1990, 1 BvL 20/84, 1 BvL 26/84 and 1 BvL 4/86, 82 BVerfGE 60 at 86 – Child Benefit Judgment; Order of 26 January 1994, 1 BvL 12/86, 89 BVerfGE 346 at 352 – Tax Exemption for Education; Order of 10 November 1998, 2 BvL 42/93, 99 BVerfGE 246 at 260 – Subsistence Minimum for Children I; Order of 6 March 2002, 2 BvL 17/99, 105 BVerfGE 73 at 125 et seq. – Taxation on Pensions; Order of 16 March 2005, 2 BvL 7/00, 112 BVerfGE 268 at 279 – Childcare Costs; from the literature, see Birk (1983: 259 et seqq.); Lang (1988: 97 et seqq. with comprehensive references there in footnote 315). Summary by Wernsmann (2005: 267 et seqq.).

[60] See in this regard from the judicature BVerfG, Order of 13 February 2008, 2 BvL 1/06, 120 BVerfGE 125 at 164 et seqq. – Health Insurance Contributions as Exceptional Expenses; and from the literature Kirchhof (2007: marginal no. 95, 178 et seqq.; and 2006: 14 et seq.). Summary at Schwarz (2007: 957 et seqq.). Even further-reaching restraints for the legislator are suggested by Tipke (2008: 19 et seqq.; and 2007: 207 et seqq.), whose concept of consistency extends across different taxes.

[61] BVerfG, Order of 9 December 2008, 2 BvL 1/07 et al., 122 BVerfGE 210 at 230 et seqq., 235 et seqq. – Commuter Allowance.

of the phenomenon of a legislative "system-change"[62] and enabled the Court to impose an obligation to ensure consistency in the field of tax law.

Obligation of a Contradiction-Free Legal Order in the Federal State

The second important modification is the recognition of a requirement that the legal order be free of contradictions. The first respective decision had merely served the purpose of attuning steering tax provisions issued on the state level to federal law, where the actual legislative competence to regulate the subject area lay.[63] Since then, the requirement has evolved into a general principle of a coherent order of competences in the federal state. For example, the federal legislator has to observe the rule when allocating administrative responsibilities.[64] If the approval of proposals to change telecommunication lines is placed within the jurisdiction of the States, sufficient objective reasons are required to justify reserving this decision to the federal administration for cases where several competitors are at play.[65] This example shows that the obligation to prevent contradictions not just intensifies the Principle of Loyalty amongst States and the Federation (*Gebot der Bundestreue*) but involves the aspect of consistency in lawmaking.[66]

Obligation to Consistently Realize Legislative Concepts

The last significant alteration lies in the duty to realize underlying legislative conceptions consistently. The legislator is relatively free when it comes to setting legislative goals but once a goal has been determined, a coherent concept for its realization has to be developed and put into effect accordingly. This duty was first developed in the dissenting opinion regarding the constitutionality of legally limited shopping hours.[67] There, as in the later decision on the smoking ban, it served the purpose of determining the weight of involved public interests based on the legislative conception. Relative to this weight, some restrictions on personal liberties brought about

[62] Ibid., 241 et seqq.

[63] BVerfG, Order of 9 May 1998, 2 BvR 1876/91 et. al., 98 BVerfGE 83 at 97 et seq. – Eco-Tax; Order of 9 May 1998, 2 BvR 1991/95, and 2 BvR 2004/95, 98 BVerfGE 106 at 118 et seq. – Packaging-Tax. Regarding this decision, Bumke (1999); Jarass (2001); Haack (2002: 210 et seqq.).

[64] BVerfG, Order of 14 May 2007, 1 BvR 2036/05, 11 BVerfGK 189 at 193 et seq. – Emissions Trading.

[65] BVerfG, Order of 15 July 2003, 2 BvF 6/98, 108 BVerfGE 169 at 181 et seq. – Telecommunication Access Rights.

[66] Only very rarely does the Court separate the principle of a contradiction-free legal order from its context in the federal state. In that case, it has no independent normative content, though. See BVerfG, Order of 9 April 2003, 1 BvL 1/01, and 1 BvR 1749/01, 108 BVerfGE 52 at 75 – Subsistence Minimum for Children IV.

[67] BVerfG, Order of 17 June 2004, 2 BvR 383/03, 111 BVerfGE 10 at 45 et seqq. – Party Financing X.

by the laws under review – which were seen as inconsistent with regard to the general legislative concept – turned out to be unproportional and hence unconstitutional.[68] Ultimately, the requirement forces the legislator to remain true to his regulatory agenda.[69]

Re-orientation of Established Obligations of Rational Lawmaking

Aside from the development of new standards,[70] the momentum of the described change becomes clear when looking at some fundamental modifications the Court has undertaken in its use of traditional standards.

For many years the principle that statutes have to be intelligible and unambiguous (*Gebot der Normenklarheit und Bestimmtheit*)[71] constituted no serious burden for the legislator. A law was found to be sufficiently precise already if the courts

[68] BVerfG, 121 BVerfGE 317 at 357 et seqq. (footnote 16). Perhaps, the Court's notion developed in the decision on sports betting fits in the thematic context of this decision that an interference with individual rights can become unproportional, if a sufficiently important public interest is pursued as a legislative goal, but the rule under review is not sufficiently "consequently" tailored to this goal and it even serves contravening purposes (BVerfG, Order of 28 March 2006, 1 BvR 1054/01, 115 BVerfGE 276, key statement and at 310 et seq. – Sports Betting Monopoly). Lindner (2007: 188), builds on this point and develops it further based on his own conception.

[69] At the same time, the Smoking Ban Judgment shows very clearly how it is possible to end up on shaky ground when creating new obligations of rationality. In his dissenting opinion Judge Masing developed a legislative concept of the smoking ban that diverged from the opinion of the majority (BVerfG, 121 BVerfGE 317, 381 et seqq. [Footnote 16]; the dissenting opinion of Judge Bryde [Ibid., 378 et seqq.] stresses that the law under review is the result of a compromise). If the legislator had been obliged to realize this concept coherently, the smoking ban for small venues would have turned out to be constitutional. Which concept was the right one, though, and how is this determined? A legislative concept is a construct that is significantly harder to encompass than the purpose of an individual legislative directive. It requires a dogmatic analysis of the legal framework and can often be developed alongside several differentiations. This in mind, one will even have to ask whether the legislator is obliged to develop concepts at all. Outside of legal doctrine, the legislator uses the notion of a concept to ensure rational planning by the public administration and private entities. Regarding this, see Hoffmann-Riem (2006), marginal no. 115; Eifert (2006), marginal no. 101.

[70] The obligation to decide in a separate act of parliament the criteria according to which finances are redistributed among the States pursuant to Art. 107 of the Basic Law also counts as one of the new standards that increases rationality. See BVerfG, Order of 11 November 1999, 2 BvF 2/98, 2 BvF 3/98, 2 BvF 1/99 and 2 BvF 2/99, 101 BVerfGE 158 at 215 et seqq. – German Interstate Fiscal Equalization Scheme III; as well from the predominantly critical literature Schmalenbach (2001: 256 et seqq.); Waldhoff (2000: 208 et seqq.); Linck (2000: 326 et seqq.).

[71] The Federal Constitutional Court often mentions the intelligibility and unambiguity of laws together, see BVerfG, Order of 3 March 2004, 1 BvF 3/92, 110 BVerfGE 33 at 52 – Federal Act on Foreign Trade; used as one also by Di Fabio (2001: Art. 2 Abs. 1 marginal no. 41). For a unitary approach also Reimer (2006: marginal no. 62). Critical towards mixing both criteria Lücke (2001: 9 et seq.).

managed to establish a reliable practice of interpretation.[72] And even on the rare occasion that courts failed to do so – which happened in the case of the term "violence" (*Gewalt*) in § 240 of the Criminal Code (*Strafgesetzbuch, StGB*), where illegitimate coercion is banned – the courts' practice, not the law, was found too ambiguous.[73] Meanwhile, though, this blunt weapon has evolved into a sharp sword, to which the legislator had to surrender in as many as seven Senate-decisions over the past 4 years.[74] Besides demanding of the democratic legislators to take greater responsibility, the court sees as the purposes of the intensified scrutiny more reliable steering of the executive, improved predictability for the citizens and better possibilities of review for the courts; in other words, that laws become more rational.[75]

The obligation of "truthful" lawmaking (*Gebot der Normenwahrheit*), which these days the Court derives from the principle of intelligibility,[76] follows the same

[72] BVerfG, Order of 17 November 1992, 1 BvL 8/87, 87 BVerfGE 234 at 263 et seqq.; Order of11 January 1994, 1 BvR 434/87, 90 BVerfGE 1 at 16 et seq. – Publications Harmful to Young Persons; order of 9 August 1995, 1 BvR 2263/94, 1 BvR 229/95 and 1 BvR 534/95, 93 BVerfGE 213 at 238 – GDR-Lawyers; Order of 12 December 2000, 1 BvR 1762/95, 1 BvR 1787/95, 102 BVerfGE 347 at 361 – Benetton Avertising; Order of 18 May 2004, 2 BvR 2374/99, 110 BVerfGE 370 at 396 et seq – Sludge Compensation Fund.

[73] BVerfG, Order of 16 March 1994, 2 BvL 3/90 et. al., 92 BVerfGE 1 at 16 et seqq. – Forensic Commitment.

[74] BVerfG, Order of 11 March 2008, 1 BvR 2074/05 and 1 BvR 1254/07, 120 BVerfGE 378 at 407 et seq. – Recording of Motor Vehicle License Plates; Order of 27 February 2008, 1 BvR 370/07 and 1 BvR 595/07, 120 BVerfGE 274 at 315 et seqq. – Online Search; Order of 20 December 2007, 2 BvR 2433/04 and 2 BvR 2434/04, 119 BVerfGE 331 at 366 et seqq. – Joint Working Partnerships by Federation and Local Communities According to § 44b of Book II. of the Social Code; Order of 13 June 2007, 1 BvR 1550/03, 1 BvR 2357/04 and 1 BvR 603/05, 118 BVerfGE 168 at 188 et seqq. – Account Checks According to § 93 Section 8 of the Tax Code; Order of 27 July 2005, 1 BvR 668/04, 113 BVerfGE 348 at 378 et seqq. – Telecommunication Surveillance; Order of 26 July 2005, 1 BvR 80/95, 114 BVerfGE 73 at 92 et seqq. – Capital Building Life Insurances: Participation in Profits; Order of 26 July 2005, 1 BvR 782/94 and 1 BvR 757/96, 114 BVerfGE 1 at 53 et seqq. – Capital Building Life Insurances: Transfer of Existing Stock. Also see the dissenting opinion in BVerfG, Order of 24 May 2006, 2 BvR 669/04, 116 BVerfGE 24 at 65 et seqq. – Revoking of Citizenship. Before, similar decisions took place far less often, see BVerfG, Order of 3 March 2004, 1 BvF 3/92, 110 BVerfGE 33 at 57 et seqq. – Act on Foreign Trade/Customs Criminal Office; Order of 20 March 2002, 2 BvR 794/95, 105 BVerfGE 135 at 163 et seqq. – Confiscation of Property as a Criminal Punishment against the Background of Art. 103 Section 2 of the Basic Law; and from volumes 90-99 of the court reports only BVerfG, Order of 11 November 1988, 2 BvL 10/95, 99 BVerfGE 280 at 298 – Expense Allowance East.

[75] In my opinion, the key fault of this re-orientation is that without practical necessity it sacrifices the well-tried and very successful practice of concretizing what is legally required by means of dividing labor between the legislator and courts. Not only are the advantages of a decentralized generation of knowledge through expert courts for specific fields of the law sacrificed, but the legislator is also quickly overburdened. For a critical view of the notion that the obligation of intelligibility of norms serves the purpose of increasing predictability for citizens, see Towfigh (2009), with a summary at 71–73.

[76] BVerfG, Order of 12 February 2003, 2 BvL 3/00, 107 BVerfGE 218 at 256 – Civil Service Salary East I: a provision denominated as provisional may not be a permanent rule; Order of 19 March 2003, 2 BvL 9/98, 2 BvL 10/98, 2 BvL 11/98 and 2 BvL 12/98, 108 BVerfGE 1 at 20 – Re-Registration-Fee Baden-Würtemberg: purposes of fees must be disclosed; Order of 13

logic. It follows from this principle that "the legislator is bound by what is apparent as a norm's legal consequences for those regulated by it".[77] Thus, the requirement contains elements of the protection of legitimate expectations in the law and of consistency.[78]

Establishment of a Constitutional Obligation of Consistency

Considered separately, each of these changes may be understood as a fruitful and effective improvement of rational judicial oversight. Together, though, they do not just amend the conventional model of rational lawmaking, but essentially introduce a new fundamental conception. The idea that a minimal standard of rationality should be guaranteed and that excessive rationalizing constraints should be prevented is replaced by a comprehensive obligation of rational and consistent lawmaking: The legislator has to develop a coherent basic concept, which he realises clearly, precisely and self-consistently – in the relationship of rules, exceptions and counter-exceptions as well as between the various rules. So far, the Federal Constitutional Court has not established an obligation of consistency in this comprehensive sense. But such an obligation is nothing more than the inevitable end point of the development just described.

7.3.3 Constitutional Foundations

The Right Amount of Rationality

Nobody can ignore the ideal of rational lawmaking. An attempt to specify the degree, to which it is recognised in the constitution, should therefore not be guided by a black and white stance on the matter, but rather by a nuanced view that seeks to find the 'right' amount of rationality.[79]

September 2005, 2 BvF 2/03, 114 BVerfGE 196 at 236 – Discount for Pharmacies and Order of 27 September 2005, 2 BvL 11/02, 2 BvL 12/03 and 2 BvL 13/02, 114 BVerfGE 303 at 312 – Second-Home-Tax: within the text of an executive rule there may be no ambiguity with regard to the rank of any provision as executive or formal legislative law; see, however, the dissenting opinion, Order of 13 September 2005, 2 BvF 2/03, 114 BVerfGE 196 at 253. From the literature see fundamentally Mellinghoff (2003), 15; id. (2004), 36 et seq.; summarizing Drüen (2009), 60 et seqq.

[77] BVerfG, Order of 2 June 2008, 1 BvR 349/04, and 1 BvR 378/04, Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2008: 1229 at 1230. Translation by the author.

[78] Drüen (2009: 60 et seqq.) sees the core subject of the obligation in divergences between what citizens can legitimately expect a provision's meaning to be and the rule's actual effects. Presently, the principle switches back and forth between a non-enforceable expectation and a real constitutional duty (ibid., 71 et seq.). Meyer (2009: 278 et seqq.) sees the significance of the principle as very low.

[79] Schmidt-Aßmann (2004a: chapter 2 marginal no. 75 et seqq.); Schulze-Fielitz (1988: 454 et seqq., especially 554 et seqq.); Meßerschmidt (2000: 777 et seqq.). The difficulties Meßerschmidt

To find this amount it is not enough to look for the limits of rationality. For the process of lawmaking and its review, these barriers cannot be drawn with sufficient precision. Clearly, 'reason' also in the law means more than just understanding things in their logical structure. Nevertheless, judgments of very different degrees of reliability can be classified as rational.

A good example is the idea of a legislative concept used by the Federal Constitutional Court: Usually, such a concept – or in traditional terms: a system – is the subject of legal doctrine. Over time, legal rules, court practice and dogmatic work evolve into a theoretical structure consisting of basic terms, guiding principles, common standards of application, as well as individual frameworks and theories. Delineating legislative systems and concepts belongs to the core business of legal doctrine.[80] Exactly because this process stretches over time, achieves growing levels of thematic differentiation and includes numerous actors, it provides for a high degree of stability and reliability – hence: of juristic rationality. Because of this complexity and openness, the idea of a legislative concept loses much of its reliability if it is separated from the dogmatic process and used as a standard for judicial decision-making in individual cases. Still, such an approach cannot offhandedly be dismissed as irrational. It is this structural reliability-deficit though, and not just the inevitable uncertainty associated with every legal assessment of a particular situation, that becomes apparent in the dispute about the legislative concept of a smoking ban.

Much more than the disclosure of assumptions, perspectives on societal reality, theories about the functioning of societal mechanisms as well as an honest attempt to appreciate and adequately value conflicting arguments, one will not be able to demand. In doing so, it is crucial not to view the law, its development and dogmatic analysis as a battle.[81]

Constitutional Basis of the Obligation of Consistency

Even more important than knowing the limits of rationality is having a clear conception of the constitutional basis of the obligation of consistency. To what degree does the Principle of the Legal State demand rational lawmaking and how do such requirements fit within the constitutional structure of a democratic constitutional state?

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sees find their reason in the fact that the idea of rationality itself is not constitutionally recognized but surfaces in a multitude of different principles, the most comprehensive of which is the principle of the Legal State.

[80] Bumke (2004: 7, 249 et seqq.; and 1998: 26 et seqq.).

[81] This perhaps forms the core of the demand for freedom from value judgments and self-restraint to descriptive statements that has to be followed in legal science.

The Federal Constitutional Court bases all components of the obligation of consistency on the Principle of the Legal State.[82] The purpose of the Legal State is to discipline political authority through law.[83] Sovereign power is meant to be exercised within the forms and through the instruments of the law.[84] It is meant to be as free from arbitrariness and as impartial as possible. Rule through law is meant to stabilize expectations, allow for the coordination and cooperation of behavior, and thereby achieve societal order.[85] Objectivity, predictability, adherence to rules, and freedom from arbitrariness are not solely, but always partly, embodiments of rationality. In that sense, the Principle of the Legal State represents the promise of rationality that modern government makes.[86] This promise is too general, open and indefinite, though, to recognize it as a constitutional principle of its own. Constitutional court and constitutional doctrine have instead chosen the path of developing and recognizing more specific sub-principles. It should be possible to classify also the Obligation of Consistency as such a sub-principle.

Considering the obligation of consistency with the formerly predominant reluctance towards far-reaching demands of rationality, it quickly becomes apparent that the problem does not lie in the constitutional provisions the new principle could be derived from, but in the consequences its establishment entails for the arrangement of powers and the democratic order as laid down in the Basic Law.

Surely nobody today would – like Carl Schmitt did – draw a strict dichotomy between the apolitical civil sphere of the Legal State on the one hand and the political sphere of the constitution on the other.[87] But the current predominant interpretation of constitutional norms as 'principles' also brings with it the tendency to view the constitution's various basic values as more-or-less isolated concepts.[88] Understood as an optimization-seeking principle, the Legal State would mandate that the political decision-making process be rationalized as far as possible.[89] On the

[82] Occasionally, the Court also bases the principle of intelligibility and the closely connected obligation that laws must be unambiguous on the principle of democracy (*Demokratieprinzip*) and the responsibility of parliament to shape society through law emphasized there (BVerfG, Order of 27 February 2008, 1 BvR 370/07, and 1 BvR 595/07, 120 BVerfGE 274 at 317 – Online Search).

[83] Hesse (1962: 560 et seqq.); Schmidt-Aßmann (2004b: marginal nos. 1 and 21 et seq.).

[84] See the differentiated summary by Sobota (1997: 472 et seqq.). Critical remarks by Kunig (1988: 326).

[85] Schmidt-Aßmann (2004b: marginal no. 22).

[86] In greater detail Voßkuhle (2008: 640 et seq.); Meßerschmidt (2000: 780). As Meßerschmidt points out, it is a circular argument to deduct the idea of rationality from the Legal State and at the same time base the Legal State on the idea of rationality (781 et seqq.). This is unavoidable but also harmless, because both principles are situated on different normative levels. While the Legal State is part of positive constitutional law, the idea of rationality is the model of modern statehood that receives another peculiar twist in the ideal of the democratic constitutional state.

[87] Schmitt (1928: 200 et seqq.; and 1926: 13 et seqq. and throughout).

[88] Achterberg (1969: 159); Kunig (1988: 283); see also Unger (2008: 231 et seqq.).

[89] The foundations of an interpretation of principles as "obligations to optimize" (*Optimierungsgebote*) are laid by Alexy (1979: 80; and 1985: 75 et seqq.). On the other hand, regarding an understanding of optimization-obligations as rules Sieckmann (1990: 64 et seq.; and

other hand, the Principle of Democracy (*Demokratieprinzip*) would demand the strongest possible realization of the political majority-will. I see as the fundamental weakness of such a view the fact that that it misses a crucial step. Before meaningful results can be derived from principles and the conflicts between them, it is necessary to develop a basic understanding of the constitution, i.e. to construct a conception of the democratic constitutional state in the specific shape it has received under the Basic Law.[90] Only from such a mutual starting point is it possible to understand the Legal State and Democracy as principles that complement one another and to substantiate their content.[91] At the same time, outer boundaries for the arrangement of powers come about.

Also from this starting point, the Principle of the Legal State must be understood as a demanding, limiting and structuring part of the democratic process. But legal rationality is only one element amongst others. The magical polygon of the democratic constitutional state comprises diverse parts such as basic rights, political participation, democratic decision-making processes, public opinion, party compromise, judicial review, social welfare, rationality and reliability of the legal system. The democratic constitutional order embodies the deeper rationality of the historical-political insight that the decision-making capacity of elites and experts is limited and that democratic structures are never complete. This incompleteness must be taken into account by all requirements of rationality and it is the reason why an ever-expanding rationalization of the legal system will not lead us into the kingdom of reason but up the blind alley of an incalculable jurisdictional state.

What follows from these thoughts for the question of an obligation of consistency within the Basic Law? The obligation of consistency intensifies the requirements of rational lawmaking significantly. Unlike other facets of the constitutionalization process,[92] though, it does not contain any substantive requirements. Its special feature is that it establishes no constraints with regard to the content of the law, like the priority of the freedom to form one's opinion over individual personality rights or the obligation of the legislator to regulate media broadcasting.[93]

2009: 21 et seqq.); Borowski (2007: 76 et seq.). Modification of the theory by Alexy (2000: 38 et seqq.); Borowski (2000: 77).

[90] This involves more than the question whether the constitution as a "fundamental order" (*Grundordnung*) provides the value basis for the entire legal system or merely contains a fractional system of restraints (*Rahmenordnung*), within which the democratic legislature is completely free to shape the law on its own (see in this regard Böckenförde 1990: 1; and 1999: 13; Alexy 2002: 14–15; relativizing the dichotomy is Lerche 1997: 203 et seq.). Both constitutional conceptions are compatible with the Basic Law's version of a democratic constitutional state. What counts is the notion that individual and democratic liberty originate in the same point and that the political community is constituted with the help of a constitution binding for all branches of government and a constitutional judiciary.

[91] On this starting point, also the notion of the "unity of the constitution" (*Einheit der Verfassung*) builds. Closer Hesse (1995: marginal nos. 20, 70 et seq.); Roellecke (1976: 32 et seq.); Stern (1984: 131 et seq., there with footnote 148); Herzog (1980: Art. 20 GG marginal no. 36 et seqq., especially 44).

[92] In greater detail Schuppert and Bumke (2000: 10 et seqq.); Wahl (2006: 35 et seqq.).

[93] In greater detail Bumke (2009: 49 et seqq.).

The lawmaker retains the political choice for a legislative goal and the necessary means to achieve it. The regulatory decision just has to be realized consistently.[94] Even if this structural requirement may substantially curb the political negotiation process, opportunities for political compromise can generally be expected remain. Overall, therefore, the obligation is an adequate actualization of the ideal of rational lawmaking.

7.3.4 Giving Shape to the Constitutional Obligation of Consistency

Consistency as a Form of Inner Coherency

In the search for a more precise idea about the implications of the obligation of consistency, the notion of inner coherency is an especially promising place to start. The analysis should be based on the question whether the various provisions within a piece of legislation fit together and are arranged in a manner adequate to the regulatory subject. Do they establish a comprehensible order? Can especially the relationship between rules, exceptions and counter-exceptions be explained?

In contrast, greater caution is advisable with regard to the obligation to prevent contradictions within the legal system. In numerous ways, modern legal systems produce relative judgments of unlawfulness and occasionally also value contradictions.[95] This a technique to reduce the complexity of regularity tasks to a manageable degree. If grave value contradictions occur, legal practice has the capacity to deal with them.[96] Further-reaching demands to prevent contradictions not only overburden the legislator, but also have dysfunctional effects on the ability of the law to provide order.[97] Thus, the obligation to prevent contradictions should not be expanded beyond its current context in federal-state-relations.

Reluctance should also be used with regard to the obligation of concept realization – at least as far as it leads to greater restrictions for pieces of legislation or the legislator than the obligation of consistency. To define a coherent concept is the target legal doctrine achieves through continuous and open scholarly debate, in which it analyzes and systematizes the law. Why this task should have evolved into a constitutional obligation would first of all have to be proven. The main argument against recognizing such a requirement, though, is that hardly any way exists to reliably assess compliance with it.

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[94] The procedural requirements also generally remain the same, so that the room for the legislature to make decisions is also not limited in this regard.

[95] In greater detail Bumke (2004: 51 et seqq., 95 et seqq.). A very strict principle of a contradiction-free legal order is suggested by Sodan (1999: 868 et seqq.).

[96] See Bumke (2004: 60 et seqq., 77 et seqq.).

[97] Bumke (1999: 381 et seqq.; Hanebeck 2002: 439 et seqq.).

The obligation of consistency can be divided up into two complementary standards of analysis. The first is the question whether the legislative concept has been realized consistently; whether a piece of legislation contains any conceptual irregularities, especially whether rules and exceptions are arranged in a coherent manner. The second standard of review consists of a comparison between the different behavioral patterns regulated by the law, since a structure of rules cannot be called consistent unless differences in their treatment of cases can be justified by actual differences between the behavioral alternatives.[98]

Legislative Leeway

To ensure that the requirements of the Legal State do not amount to unrealistic perfectionism, the next question will have to address how much freedom the legislator requires in order to make decisions without judicial interference. In this respect, different arguments apply for substantive, factual and prognostic questions.[99]

Shaping the content of the legal system is the responsibility of the legislator who chooses the legislative goals,[100] determines the public interest, and decides how conflicting public and private positions are to be reconciled. Here lies the core of his decision-making authority.[101] The extent of this authority depends on the requirements of the constitution which can point in different directions. For example, the constitution dictates in great detail, how the Freedom of Opinion (*Meinungsfreiheit*) and the Universal Personality Right (*Allgemeines Persönlichkeitsrecht*) must be balanced.[102] In contrast, a large degree of freedom remains in questions of social and economic policy.[103] Most of the time, at least the principle of proportionality has to be followed.[104] The intensity of judicial review depends on these standards specific to the constitution. Weak requirements, for example that decisions may not be arbi-

[98] The standard to assess compliance with the obligation of consistency should be identical with the review standard of the General Principle of Equality in its most intense "person-related" form. See in this regard BVerfG, Order of 2 March 1999, 1 BvL 2/91, 99 BVerfGE 367 at 388 et seqq. – Coal and Steel Co-Determination System ; and from the literature Kischel (2009: Art. 3 marginal no. 38 et seqq.).

[99] Same categorization – with further sub-differentiations – by Meßerschmidt (2000: 911 et seqq.; 930; 932 et seqq.; 964 et seqq.).

[100] In Meßerschmidt's opinion ([2000], 908 et seq.), how legislative leeway is to be measured depends on the question whether the targets (or purposes) are determined subjectively – according to the legislator's will – or objectively – according to the purpose of the law, which he wants to ascertain among other things based on the law's effects (its actual consequences). However, for assessing whether and to what extent deciding the content of the law lies within the legislator's discretion, it is irrelevant whether the purpose is determined subjectively or objectively. In any case, the law has to follow the substantive requirements of the constitution.

[101] In greater detail Meßerschmidt (2000: 881 et seqq.), where he apostrophizes it as an "essential aspect of legislation" (translation by the author).

[102] In greater detail regarding this point Schulze-Fielitz (2004: Art. 5 I, II marginal no. 161 et seqq.).

[103] For a strong account see Wieland (2004: Art. 12 marginal nos. 117 et seqq., 135).

[104] In greater detail Bumke (2009: 50 et seqq.).

trary, leave freedom for the legislator; strong requirements, like the general primacy of the freedom to express one's opinion over the Universal Personality Right in the case of public opinion forming, can even lead one specific outcome being mandated.

If legislative decisions are based on flawed evidence, the constitutional response depends on the effects of the misconception. Such a mistake can be insignificant or render a measure unproportional. The question of legislative leeway has to be asked before dealing with the consequences of the mistake. It concerns the intensity, with which the Federal Constitutional Court assesses if wrong or doubtful assumptions have become part of the legislative work.[105] This intensity can vary greatly. As with the review of prognoses, it depends on the kind of issue regulated, the kind of regulatory instrument and the intensity with which it legally and factually affects people, the subject matter at large, the legislative target, and finally the constitutional value affected.[106] The possible variety of standards for the assessment of factual mistakes is so large that judicial oversight is at danger of becoming unpredictable. To avoid getting lost in between the many possibilities, the Federal Constitutional Court has summarized the possible review standards into three possible levels of scrutiny: On the first, it merely asks whether an error is evident. On the second, it checks if the legislative decision is justifiable. On the third, it conducts an intense substantive analysis, in which its own judgment replaces that of the legislator.[107]

A prognosis does not become wrong just because a situation develops differently than expected.[108] In such a case, though, the legislator can still be obliged to correct the prior decision.[109] Nevertheless, prognostic leeway is necessary, because most of the time there is controversy about the causal dynamics and probabilities at play. As

[105] Legislative leeway in this context includes not only individual facts, but also complex situations and causal dynamics.

[106] BVerfG, Order of 1 March 1979, 1 BvR 532/77 et. al., 50 BVerfGE 290 at 332 et seq. – Employee Participation; Meßerschmidt (2000: 990 et seqq.), with further references.

[107] BVerfG, 50 BVerfGE 290 at 332 et seq. (Footnote 106); more recently BVerfG, Order of 10 June 2009, 1 BvR 706/08 et. al., 123 BVerfGE 186 at 241 – Private Health Insurance Base-Rate. Sometimes the Court requires the legislative judgment to be "reliable" (BVerfG, Order of 28 May 1993, 2 BvF 2/90, 2 BvF 4/92, and 2 BvF 5/92, 88 BVerfGE 203 at 262 – Abortion II. Translation by the author.). This, however, is not a new standard of review. The reliability of a judgment can be larger or smaller, depending on requirements that have to be followed. The judgment of reliability therefore has to be defined more closely, for example, with the three levels of scrutiny postulated by the Court. Schlaich and Korioth (2007: marginal no. 538) overlook this circumstance in their critique.

[108] In the case of a prognosis, that the situation developed differently than expected is not enough to constitute an error. A prognosis is a judgment of probability (Poscher 1999: 83 et seqq., on the judgment of dangers in public security law), which – unless the probability very exceptionally is a hundred percent – can also turn out differently. Errors are possible, though, with regard to the value of the probability and especially the assumed causal relationship.

[109] BVerfG, Order of 31 May 2006, 2 BvR 1673/04 and 2 BvR 2402/04, 116 BVerfGE 69 at 91 – Displaced Persons Pension Act; Order of 16 March 2004, 1 BvR 1778/01, 110 BVerfGE 141 at 158, 166 – Fighting Dogs; Order of 11 March 2003, 2 BvK 1/02, 107 BVerfGE 286 at 296 – Municipal-Election-Threshold Schleswig-Holstein, in procedures according to Art. 99 of the Basic Law; further references by Bumke (2004: 168). Critical remarks by Meyer (2009: 292 et seq.).

a general rule, it is therefore sufficient, if the legislator's conception of the future developments is justifiable. Evaluative leeway is definitely recognized for the assessment of dangers and measures aiming to address them.[110] Legislative considerations overstep the limits of this leeway at the latest if they are unambiguously erroneous.[111] Less clear are the requirements for the evidentiary base itself: Sometimes, the Federal Constitutional Court is satisfied with the facts, which are known to the legislator, including those from past experiences.[112] Sometimes though, – for example when assessing whether a situation according to Article 72 Section 2 of the Basic Law requires legislation on the federal level – it demands that all facts relevant to the decision are gathered.[113]

When applying these principles to the obligation of consistency, it seems sound to begin with the statement that the consistency of a piece of legislation depends crucially on the legislator's ideas about facts, causal dynamics and future developments What are the typical cases; how do they differ from exceptional situations; which goals does the legislator aim to accomplish; and does he apply his strategy for their pursuit consistently? When reviewing laws in the light of these questions, it will not suffice to ask whether the provisions are obviously inconsistent. Otherwise the obligation of consistency would hardly have any effect. On the other hand, the intensity of review cannot lead to the point where the Federal Constitutional Court replaces the legislator's conceptions with its own. Because the judgment of coherency is open and vague, this would lead to the Legal State overpowering the legislator. Normally, therefore, the adequate standard of review asks whether the legislator's choices are justifiable.

[110] BVerfG, Order of 26 February 2008, 2 BvR 392/07, 120 BVerfGE 224 at 240 – Incest between Siblings, with reference to 90 BVerfGE 145 at 172 et seq. (Footnote 54); Order of 3 March 2004, 1 BvR 2378/98 and 1 BvR 1084/99, 109 BVerfGE 279 at 336 – "Big Eavesdropping"; 110 BVerfGE 141 at 157 et seq. (Footnote 109).

[111] The Court speaks of them being "so erroneous that reasonably they cannot form a base for measures as such" (BVerfG, 110 BVerfGE 141 at 158 [Footnote 109]; see also Order of 10 February 2004, 2 BvR 834/02 and 2 BvR 1588/02, 109 BVerfGE 133 at 158 – Supplementary Preventative Detention. Translation by the author.). However, this broad leeway does not prevent the Court, for example, from very intensely including the factual consequences of measures when assessing proportionality (Order of 3 July 2007, 1 BvR 2186/06, 119 BVerfGE 59 at 84 et seqq. – Horse-Shoeing-Act) or from analyzing individual legislative considerations and asking for their persuasiveness (110 BVerfGE 141 at 164 et seqq [Footnote 109]).

When assessing whether the necessity of a uniform nationwide rule justifies action by the federal legislator according to Art. 72 Section 2 of the Basic Law, the Court occasionally even makes far greater demands. For example, it has pointed out that the factual basis for a prognosis is "not sufficiently documented" (Order of 26 January 2005, 2 BvF 1/03, 112 BVerfGE 226 at 247 – Tuition Fees).

[112] BVerfG, 115 BVerfGE 276 at 309 (Footnote 68).

[113] BVerfG, Order of 24 October 2002, 2 BvF 1/01, 106 BVerfGE 62 at 144 – Geriatric Care Act, even though this very far-reaching demand can be found only once in volumes 100–120 of the official reports of the Federal Constitutional Court.

7.4 Obligation of Consistency and the Lottery Sale Ban

Now that the constitutional fundament has been laid, the next step is to analyze the legal consequences following from the obligation of consistency. For the example chosen here – the ban on the private sale of lottery tickets through the internet –, this means, first, that there must be an assessment as to whether the basic decisions established in the Interstate Treaty on Gambling have been realized consistently. Second, it has to be asked whether sufficiently grave reasons justify the differentiation between retail channels.

7.4.1 Inconsequent Implementation of the Basic Decision Established in the Interstate Treaty on Gambling

The goals of the Interstate Treaty on Gambling are to combat addiction, to protect young people and to ensure sufficient opportunities for gambling.[114] Gambling addiction is fought through the state's monopoly on organizing economically significant lotteries, which receives protection through criminal law in §§ 284 and 287 of the Criminal Code.[115] Adolescents are barred from participating in public gambling.[116] People at risk of becoming addicted to gambling or unable to settle their gambling debts must be excluded from games and added to a database of barred individuals.[117] In addition to their protective tasks, the States are obliged to guarantee a sufficient supply of gambling opportunities. To serve this aim the state operates public games, especially several number lotteries, which are distributed through retail points. The obligation to provide games takes into account the deficiency of human decision-making. Its function is to combat addiction by channeling the human passion for games.[118] For this reason, the Interstate Treaty on Gambling limits the number of retail points[119] and bans the online games and ticket sales.[120]

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[114] § 1 Nos. 1–3 of the Interstate Treaty on Gambling. The fourth goal (§ 1 No. 4 of the Interstate Treaty on Gambling), fighting crime as an after- or side effect of gambling, is irrelevant for the matter at hand and is not considered here.

[115] § 10 Sections 1, 2 and 5 of the Interstate Treaty on Gambling. Strict requirements (§§ 4, 12 et seqq. of the Interstate Treaty on Gambling; see § 18 though) also apply to the offering of "lotteries with a low danger potential" (translation by the author), which are governed by the third part of the Interstate Treaty on Gambling (§§ 12 et seqq.). There is no entitlement to a license (§ 4 Section 2 Sentence 3 of the Interstate Treaty on Gambling).

[116] § 4 Section 3 Sentence 2 of the Interstate Treaty on Gambling.

[117] §§ 8, 23 of the Interstate Treaty on Gambling. Finally, the States have committed themselves to pursue research on addiction (§ 11 of the Interstate Treaty on Gambling).

[118] In contrast fiscal interests cannot, according to the Federal Constitutional Court, justify the state's privileges in the gambling sector (BVerfG, 115 BVerfGE 276 at 307 [Footnote 68]).

[119] § 10 Sections 1 and 3 of the Interstate Treaty on Gambling.

[120] § 4 Section 4 of the Interstate Treaty on Gambling.

Additionally, advertising for public games is limited to information and education about gambling risks.[121]

A closer look at the legal framework shows that the Interstate Treaty on Gambling pursues its primary goal of combatting addiction insufficiently and inconsequently. To participate in lotteries is possible without age or identification checks at an unlimited number of retail points and without limitations on the sums of money spent. With one retail point for every 3,200 citizens, more gambling locations are available to the population than the legally required number of post offices or pharmacies.[122] Even the protection of the youth depends solely on the judgment of the employees at the retail points. The deficiency becomes especially clear considering the situation of individuals in the barred players' database. In lotteries, they may participate without any limitations![123] Besides, the ban on organizing and reselling tickets to lotteries has only seemingly contributed to the battle against addiction. The online sale of lottery tickets, which had been legal for years, did not lead to an increase, but merely to a relocation of lottery games from local shops to the internet.[124] The inconsistency of the legal framework becomes even more evident if one compares the provisions on retail points with the transition rule on online resale in § 25 Section 6 of the Interstate Treaty on Gambling. According to this provision, a resale license could only be issued if it was guaranteed that underage and barred players would be excluded through identification and authentication procedures and if the stakes were limited to €1,000 per month.[125] Unlike the resale through resale points, online resale designed as such contributed significantly to the fight against

[121] § 5 of the Interstate Treaty on Gambling.

[122] Regarding the number of lottery retail points (about 26,000), see the findings of the Federal Competition Office (Resolution of 23 August 2006, B 10-92713-Kc-148/05 [Footnote 42]), marginal no. 328. Regarding the number of pharmacies (19,892 as of December 31, 2005), see Federal Office of Statistics (*Statistisches Bundesamt*, 2008), 409; the Federal Association of German Organizations of Pharmacists (*Bundesvereinigung Deutscher Apothekerverbände*) indicates a slightly higher number of 21,476 as of the year 2005, see ABDA (2015). Regarding the required number of post offices (at least 12,000), see § 2 No. 1 of the Postal Universal Service Directive (*Post-Universaldienstverordnung*), with further requirements regarding the supply in the following numbers.

[123] § 22 Section 2 Sentence 1 of the Interstate Treaty on Gambling. With this rule, the legislator shows that he himself does not take lottery addiction very serious. Apparently, he believes that participating in the number lottery does not lead to any significant addiction damage, so that the lack practicability of a stricter approach and the greater burdens following from it for the retail points weigh heavier.

[124] The overall revenue for lotteries, special lotteries and other number lotteries decreased during this time period with only slight variations, see the "Notice by the Government of the Federal Republic of Germany to the Commission of the European Communities in the Infringement Procedures No. 2007/4866 from May 20, 2008" (translation by the author), there Appendix 4, 21 et seqq.

[125] § 25 Section 6 Nos. 1 and 2. Also the further requirements named in Nos. 3–5 serve the purpose of fighting addiction: No. 3 limits the organizing and resale largely to the classic offerings of the lottery, No. 4 establishes an obligation to localize, Nr. 5 obliges the private entity to develop a social concept tailored to the internet. In greater detail Postel (2008: § 25 GlüStV marginal no. 42 et seqq.).

addiction. Instead of strengthening this resale method, which decreased the danger of addiction, it was banned and the existing protection removed.[126]

7.4.2 Comparability of Retail Channels

Perhaps, though, online sale brings with it a specific risk potential for gambling addiction that justifies treating the two retail channels differently. This was the view of the Federal Constitutional Court, which pointed to the easy accessibility of online purchases and internet-specific dangers to underestimate the significance of gambling and the potential level of gambling addiction.[127]

Web-based games can have characteristics that lead to a significant increase in their addictive potential. These include an increase in the number of games supplied; the supply of new kinds of games; the absence of physical and psychological barriers as compared, for example, to visiting a casino; and the possibility of deeper losses. None of these characteristics apply to the online sale of lottery tickets. Since winners in the offered lotteries are drawn only twice a week,[128] even the aspect of availability at all times is reduced to domestic availability in one's home.

Thus, as specific features of online sale only, domestic availability, greater anonymity on the internet and the subsequent lack of social control, as well as easier accessibility remain. Assessing the consistency of the legal framework requires determining the weight of these four aspects and putting it into relation with the characteristics specific to ticket sale at retail points. Ease of access is relative. Surely, it is easy to participate in the lottery from one's home instead of having to visit a nearby retailer. On the other hand, most people have to leave their homes at least twice a week for shopping and other things, which gives them an easy opportunity to purchase a lottery ticket. Besides, it is worth considering whether the online channel actually *is* the easier one since it requires entering and storing bank details and opening an account with one's name and email address. This also leads to the second aspect i.e. anonymity. In the case of retail points, anonymity is not at all weaker than in online resale. Lottery tickets are security papers according to § 807 of the Civil Code (*Bürgerliches Gesetzbuch, BGB*).[129] They are anonymized and

[126] Nor can this inconsistency be justified by pointing to the task of ensuring a sufficient supply of games, since the exclusion of one or two retail channels in no way furthers the supply of games.

[127] BVerfG, Order of 14 October, 1 BvR 928/08, juris marginal no. 58 et seq. (see footnote in the chapter opening page). It is not the case, though, that – as claimed in the grounds of the proposal for the Interstate Treaty on Gambling (Reports of the State Parliament of Baden Wurttemberg [LT-Drs.] 14/1493) – 'addiction experts' advocate a ban on internet resale. Rather, their criticism aims at games, which can be expected to lead to a significantly increased potential of addiction, and Meyer and Hayer (2005: 165) even advocate, as mentioned above, a publicly licensed online supply of games (165); as well as Meyer and Hayer (2006: 5).

[128] A higher frequency is already impossible because of § 25 Section 6 No. 3 of the Interstate Treaty on Gambling.

[129] See Sedatis (1988: marginal no. 326).

usually also the prize is paid out anonymously. In the case of some individual retailers, people may over time develop personal contacts but outside of rural communities, it remains hidden from other people how many different retail points an individual attends, especially since there is no obligation to register or identify oneself.[130] Online sellers, on the other hand, have to ensure according to § 25 Section 6 of the Interstate Treaty on Gambling that underage and barred players do not participate in public games.[131] From that perspective, the high street retailer does not offer a greater deal of social control.[132] This is especially true since public lottery companies, unlike online sellers, have no instruments at their disposal to guarantee that players do not purchase an excessive number of tickets or bet exorbitant sums of money.[133] Finally, in the case of online sales neither the process of playing nor the payment is less "materialized" than playing at retail points that accept credit or debit cards.

Taken together, these observations are sobering. The sale of lottery tickets through the internet is not more dangerous than through retail points.[134] If participating in lotteries is seen as potentially addictive gambling, then sale through retail points increases the danger of addiction significantly more than the alternative of online sale.

7.4.3 Disproportionality of a Ban on Online Resale

The greater intensity of review also affects the assessment of the ban's proportionality.[135] Even without a detailed reiteration of the previous results, it should be clear that the ban on online resale in § 4 Section 4 of the Interstate Treaty on Gambling does not even meet the most basic requirement of proportionality, suitability to fur-

[130] § 22 Section 2 Sentence 2 of the Interstate Treaty on Gambling.

[131] Technologically, this is possible, for example, with the method offered by the German General Credit Protection Association SCHUFA under the brand name "SCHUFA-Q-Bit", see SCHUFA (2015).

[132] This may be different when comparing online resale with casinos, but a casino is fundamentally different from online resale, since it is not a kind of resale, but of product. Only the organization of games online can be compared to the casino.

[133] According to § 25 Section 6 No. 2 of the Interstate Treaty on Gambling, it must be ensured for the case of online resale that the stakes do not exceed €1,000 per month.

[134] It fits with this observation that several lottery companies (Westdeutsche Lotterie GmbH & Co. OHG, Sächsische Lotto-GmbH, Lotto Hamburg GmbH) have by now established electronic self-service terminals (in Hamburg under the brand of "JackPoint"), which allow the public to participate in games. This fact emphasizes once more that when banning private internet sales, the legislator does not have the fight against the dangers of addiction in mind.

[135] At first, one might think that the requirements of a proportionality review must always be the same. However, considering that the proportionality of a measure depends on the size of the legislative leeway, it becomes understandable why, if the review's standard and intensity become stricter, the outcomes of the proportionality review are influenced. The Federal Constitutional Court also knows different degrees of intensity in the assessment of proportionality (see BVerfG,

ther the legislative goals at least to some minor degree. As long as the far from risk-free supply channel of retail points is available without any noteworthy restrictions, a ban on another retail channel leaves the risk potential unchanged. At the same time, the previous considerations show that in the form of the transitionary provision of § 25 Section 6 of the Interstate Treaty on Gambling a less invasive alternative exists, that has already been tested in practice. This alternative is also at least equally effective, since it can be expected, based on prior experiences, that online players will not stop playing as a result of the ban, but merely switch retail channels.[136]

7.5 Cluttered Up Judicial Review

Nobody will find it astonishing that – as the example of the resale ban shows –the design and choice of a standard for judicial review affect whether a scrutinized decision is found to be constitutional. Rather, it is surprising that the Federal Constitutional Court offhandedly applies the traditional standards for the review of economic legislation and not, for example, the obligation to consistently realize legislative concepts. The Court does not name any grounds for its decision and does not give the impression that it even knows about the choice it has to make. Is this choice left to chance or is it a matter of judicial capriciousness?[137]

Before searching for criteria to rationalize the choice, however, it must be considered whether the obligation of rational lawmaking is at all compatible with being used a variable standard. Shifting standards as such are not alien to the legal sys-

115 BVerfGE 276 at 308 [Footnote 68]; as well as Raabe 1998: 332 et seqq., regarding the interconnection between prognostic leeway and the assessment of proportionality).

With regard to the earlier discussion concerning the possibility and necessity of a graded proportionality review exemplarily Grabitz (1976: 94 et seqq.); as well as the considerations by Lerche (2000: marginal no. 16 et seqq.).

[136] Against this judgment one can argue with the legislator's prerogative to assess the situation at hand. But this prerogative also has to build on some factual basis and the only known facts indicate that online resale has not led to an increase in players (see footnote 124), so that no sensible reason is apparent why the ban should lead to a decrease.

A measure, for which an equally effective but less invasive alternative exists, is also always unproportional or unacceptable for those negatively affected by it. Since the weight of the public interests, which justifies the restriction, depends fundamentally on the effectiveness of the ban and the possibility of a less invasive alternative, the third step of the proportionality review leads to no change in the constitutional assessment. If one reaches a different judgment on the first two steps, one would on the third step not arrive at the conclusion that the measure is unproportional. See in this regard the considerations of the Federal Constitutional Court, BVerfG, Order of 14 October 2008, 1 BvR 928/08 (see footnote in the chapter opening page).

[137] One could try to manage with the idea that a more intense rationality review would be reserved to decisions by the Senates of the Federal Constitutional Court, while in the daily mass business of Chamber-decisions the traditional standards would have to be used. Since the standard one chooses can affect the result, though, such an approach would be arbitrary.

tem.[138] A well-known example is the variable standard of the General Principle of Equality.[139] If reluctance nevertheless remains to treating the idea of rationality as a variable concept, the reason lies within the concept itself. Rationality may not be a definite measure but the degree of rationality, which is considered appropriate, demands adherence everywhere and in the same way. Legislative measures that fall short of these requirements are irrational – and it is hard to imagine reasons why the legislator should be allowed to act irrationally.[140] In that sense, the obligation of consistency is similar to the principle of proportionality. Since the standard of review can subsequently not be differentiated, the Federal Constitutional Court should end the chaos in its rationality review and oblige the legislature to design a consistent legal system.[141]

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[138] In greater detail Bumke (2004: 147 et seqq.).

[139] See above, Sect. 7.3.1.

[140] Individual parts of the judgment of rationality, as for example the prerogative of the legislator to assess the situation at hand, vary according to subject matter, constitutional provision affected and legislative goal. This, however, does not affect the required level of rationality itself.

[141] Consequently, the Federal Constitutional Court should also revise its constitutional assessment of the ban on the private resale of lotteries.

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Chapter 8
Inconsistent Legislation

Matthias Rossi

Abstract In a number of rulings, the German Federal Constitutional Court has called on the legislature to show consistency, and has declared null and void statutes which it considered to be inconsistent. This "principle of consistency" helps to strengthen the rationality of the law, at least as a reflex, but also to fortify the position of the Federal Constitutional Court within the structure of the constitutional bodies. It focuses on the self-obligation of the legislature: It is to be tied to a selected regulatory concept to such a degree that any deviation is to be classified as contradictory, and hence at the same time as unconstitutional. The paper portrays the development of the constitutional court case-law on the "principle of consistency", and then goes on to criticise it vehemently: Firstly, a "principle of consistency" confuses the relative standard of equality rights with the absolute standard of freedom rights. Secondly, it causes the law to transform from an object into a yardstick for constitutional review, thereby turning it into a standard reviewing itself. Thirdly, the "principle of consistency" helps to radicalise the legal system because political consistency is now required where practical concordance was previously called for. However inconsistent proportionate legislation may at times be, consistent legislation tends to be disproportionate. Fourthly, it remains unclear how the regulatory or protective concept of a statute can be determined which is to serve as a standard for the law as a whole. Fifthly, and finally, the separation of powers between the legislature and the Federal Constitutional Court stands opposed to the idea of a principle of consistency. Democratic legislation is always also inconsistent legislation. A principle of consistency may therefore only be understood as an item on the political and legislative wishlist, but not as a principle underlying the rule of law.

Keywords Consistency • Latitude of legislator • Democratic legislation

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In a number of rulings, the German Federal Constitutional Court has called on the legislature to show consistency, and has declared null and void statutes which it considered to be inconsistent. In addition to collision rules derived from the system of federal competences and from the democracy principle, as well as from the primarily rule-of-law-based *topos* of ensuring that the legal system is free from contradictions, a further element is now evident in recent case-law in the shape of a "principle of consistency". This principle helps to strengthen the rationality of the law, but also to fortify the position of the Federal Constitutional Court within the structure of the constitutional bodies. This "principle of consistency" focuses on the self-obligation of the legislature as much as it ties the legislature to a selected regulatory concept to such a degree that any deviation can be classified as contradictory, and hence unconstitutional.

The current chapter charts the development of the principle of consistency within constitutional court case-law, and then goes on to criticise it vehemently on the following grounds: First, a "principle of consistency" confuses the relative standard of equality rights with the absolute standard of freedom rights, and, second, it causes the law to become a yardstick for constitutional review, thereby turning it into a standard reviewing itself. It consequently enables the legislature at the same time to exert an influence on this standard. Third, the "principle of consistency" helps to radicalise the legal system because political consistency is now required where practical concordance was previously called for. However inconsistent proportionate legislation may at times be, consistent legislation tends to be disproportionate. Fourth, it remains unclear how the regulatory or protective concept of a statute can be determined which is to serve as a standard for the law as a whole. The burden of explanation and reasoning cannot make the situation any clearer here because it cannot be determined in the political-pluralist genesis of the law *who* the responsible legislator actually is. It furthermore remains unresolved whether it is the wording of the law or the grounds for a statute that should serve as the yardstick for consistency. Fifth, and finally, the separation of powers between the legislature and the Federal Constitutional Court stands opposed to the idea of a principle of consistency. Strictly speaking, it is not the law that becomes a standard review itself, but its interpretation by the Federal Constitutional Court. As the review gains in depth, the risk grows that the Federal Constitutional Court will hand down rulings which are reserved for the legislature, particularly since, in a Senate comprised of eight legal experts, rationality aspects based on the rule of law have always played a more prominent role than democratically-decided prioritisation.

8.1 Recent Rulings

In many recent rulings, the Federal Constitutional Court requires the legislature to be consistent. The headnotes of the ruling on the Bavarian State Lottery Act (*Staatslotteriegesetz*) for example read as follows:

> A state monopoly on sports betting shall only be deemed to be compatible with the fundamental right freely to choose an occupation or profession stipulated by Art. 12 para. 1 of the Basic Law if it is consistently orientated towards the goal of combating the dangers of addiction.[1]

In the view of the Federal Constitutional Court, the Act was not so orientated given that it remained unclear how a state monopoly could restrict betting fervour and combat betting addiction if, at the same time, the State had a considerable fiscal interest in offering monopolised sports betting, and hence could succumb to the temptation to use, and even misuse, its monopoly in such a way as to not only restrict betting fervour, but also to ensure a steady revenue stream. Were the State however not to consistently implement the concept of restricting betting fervour and combating betting addiction, it would actually not be justified in completely excluding private providers from offering sports betting.

In another ruling on the protection of non-smokers in Baden-Württemberg and Berlin, the Federal Constitutional Court again demanded consistent legislation albeit this time in somewhat different wording:

> If the legislature, given its particular latitude, has decided on a specific assessment of the potential risk, assessed the interests concerned on this basis and selected a regulatory concept, it must also pursue this ruling consistently. Risk assessments are not conclusive if different weights are allotted to identical risks in the same Act.[2]

What did the Federal Constitutional Court mean by this? In order to obtain a better understanding, let us briefly call to mind that the *Land* legislatures have not issued an absolute smoking ban for pubs and restaurants, but rather they have provided exceptions from the smoking ban for separate adjoining rooms and for outdoor catering. Having said that, it is not possible for factual reasons for all pubs and restaurants to benefit from such legal exceptions. The qualified ban contained in the non-smoker protection laws therefore has had the effect of an absolute ban for those pubs and restaurants, and for such "corner pubs". The accusation which the Federal Constitutional Court has levelled at the legislature, and which has led to rulings on the unconstitutionality of the law, emanates from the fact that the health hazards caused by passive smoking took on a different weight in the weighing up process vis-à-vis the right of innkeepers freely to choose their occupation or profession.

To put it figuratively: the legislature had not sufficiently considered all aspects of the protection of life and health, even though this would have been possible in terms of the Constitution given that the protection of the population from dangers to life and limb constitutes a prominently important, common and good-related interest. Rather, it balanced it up opposing interests, such as the right of innkeepers freely to choose their occupation or profession and the right of smokers to pursue a pastime – rights that are both protected by the general freedom of action. And as an outcome of this process of weighing up, the legislature decided to allow exceptions – a decision which appeared not only to be constitutionally unobjectionable, but which

[1] BVerfGE 115, 276 (headnotes & 310).

[2] BVerfG NJW 2008, 2409 (2415).

brought about a practical concordance between several contradictory fundamental right positions in a practically exemplary way. The Federal Constitutional Court, however, concluded from this equalisation that the legislature had only in a limited way pursued the protection of life and limb. And for this reason the legislature should be permitted to take into consideration only this reduced weight when weighing up health protection against the interests of operators of one-room pubs and discotheques – anything else was said to be incoherent, inconsistent, and hence disproportionate and unconstitutional.

In particular, therefore, the ruling on non-smoker protection raises the question of whether there are constitutional principles of coherence and consistency, disregard for which leads to laws being unconstitutional.

Were this indeed to be the case, a whole number of further statutory provisions would be unconstitutional because of inconsistency. An example that one might mention is the provisions contained in the German Freedom of Information Act (*Informationsfreiheitsgesetz*). This Act provides as a matter of principle every citizen with the entitlement to obtain all their personal data that is available to the administration. However, this fundamental right of access is in turn restricted by a number of exceptions. For instance, in accordance with section 5 of the Act, access to personal data may only be granted where the applicant's interest in obtaining the information outweighs the third party's protected interests warranting preclusion from access to the information, or where the third party has provided his or her consent. In other words, a process of weighing up takes place between the interests of the data subject, which – in terms of fundamental rights – is protected by the right to informational self-determination, and the applicant's interest in the information. By contrast, in accordance with section 6 of the Freedom of Information Act, business or trade secrets are always precluded from the right of access to information without there being a need in individual cases for any weighing up. This is already inconsistent in the sense that the right to informational self-determination is more closely linked to human dignity than is the protection of business or trade secrets, so that as such this right would require more intensive protection. However, according to the prevalent constitutional understanding, the configuration of different levels of protection can still fall within the freedom of the legislature to shape legislation. Things would look different were one to apply the principle of consistency to exemption clauses. One could then argue that it would be inconsistent to lend primacy to the interest in gaining access with regard to personal data than with regard to business or trade secrets, so that the provisions would be unconstitutional in this regard.

8.2 Consistency and Freedom from Contradictions in the Legal System

If the intention is therefore to examine whether inconsistent laws are always also unconstitutional, the subject-matter of the investigation must be initially restricted and delimitated. There is, for example, a need to delimitate the principle of consistency, with its demand for laws that are coherent and consistent, from the freedom from contradiction of the legal system as a whole.

Contradictions in the overall legal system can be differentiated and systematised according to a variety of different criteria. A distinction is, for instance, made in jurisprudence between the following:

- technical legislative contradictions which arise as a result of non-uniform linguistic usage, and particularly from an uncoordinated use of terms;
- conflicting regulations where two provisions create different legal consequences for the same offence;
- contradictions of values where new provisions neglect the values underlying the applicable law;
- teleological contradictions which occur when the achievement of the purpose pursued by a provision is prevented by other provisions;
- and contradictions between principles, i.e. between the fundamental principles that are relevant to a provision.[3]

This will not be pursued further at this point. The vital issue is to stress the difference between contradictions between laws and inconsistencies within laws.

8.2.1 Contradictions Between Laws Within the Legal System

Collision Rules

Contradictions between laws are largely remedied with the aid of the rules on collision. Such contradictions can for instance occur in relation to the legal acts of other public authorities, such as in the relationship between *Land* law and Federal law, or in a comparison between the law of Member States and EU law. Attempts are made to avoid such contradictions by attributing competences as precisely as possible and otherwise to resolve them via "*lex superior derogat legi inferiori*" reasoning – according to which higher-ranking law prevails over lower-ranking law.

Contradictions between laws can however also occur between legal acts emanating from the same public authority. The *lex specialis* or the *lex posterior* principle is applied here.

[3] Cf. on the following Müller (2006: 175).

The legal nature of these conflict resolution rules may be controversial. They are characterised in some cases as general legal principles, as interpretation rules, as legally-logical principles or as presumption rules.[4] What is decisive is, ultimately, the question of whether they are legally binding. In this regard, at least for the *lex superior* rule, it is possible to invoke Art. 1 para. 3 and Art. 20 para. 3, as well as Art. 31 and Art. 93 para. 1 No. 2 of the Basic Law, which virtually constitute the entire national hierarchy of statutes. And with regard to the *lex posterior* rule, it is possible to refer to the principle of democracy, which would be insignificant if subsequent generations were unable to change the rules of previous ones.

Freedom from Contradictions in the Legal System

The Federal Constitutional Court for a time juxtaposed the topos of freedom from contradictions in the legal system with the collision rules. In accordance with the relevant ruling, waste charges under *Land* law and municipal packaging taxes, because of their steering function, contradicted the cooperation principle which the Federal legislature stipulated as a fundamental decision in the Federal Imission Control Act (*BImSchG*) and in the Act for Promoting Closed Substance Cycle Waste Management and Ensuring Environmentally Compatible Waste Disposal (*KrW-/AbfG*). The legislature handing down tax legislation was not permitted to falsify the rulings for cooperative, indirect forms of steering made by the legislature handing down legislation on the subject-matter by means of steering regulations the implications of which would run counter to the cooperation principle.[5] As far as one can tell, this legal figure has however not been taken up by the Federal Constitutional Court since then, or at least not to the degree as to make it decisive in a dispute.

8.2.2 Consistency Within Laws

There is little benefit to be gained from discussing further consistency between laws given that the principle of consistency – at least as it is described in the ruling on non-smoker protection – is not concerned with the freedom from contradiction in the overall legal system, but – much more modestly – merely about the consistency of a single statute. If not the entire legal system, at least each statute should be intrinsically consistent.

The principle of consistency is nothing new. Already in first volume of the collection of its rulings, the Federal Constitutional Court ask

[4] Cf. the summary in Vranes (2005: 393).

[5] Taken up once more, but found not to be decisive to the dispute, is the principle of freedom from contradictions in the legal system in BVerfGE 116, 164 (186).

> whether specific provisions of a certain Act [on the reorganisation of the *Länder* Baden, Württemberg-Baden and Württemberg-Hohenzollern] are contradict one antoher, and hence [are] null and void.[6]

The causality expressed in the wording, "contradict one another, and hence [are] null and void" voices the actual question: is inconsistent legislation *per se* null and void? The Federal Constitutional Court did not have to answer this question at that time and the first Reorganisation Act (*Neugliederungsgesetz*) was found null and void for other reasons. The court did subsequently find a multi-faceted answer to this question, however.

Before we go on to discuss this a second ruling should first of all be mentioned, also from the first volume, in which the Federal Constitutional Court made fundamental statements on the shaping of the election law. According to these statements, which remain valid today, the Basic Law, in the underlying case of the then *Land* Statute for Schleswig-Holstein, leaves it up to the legislature to arrange electoral law according to the principle of majority voting or proportional representation. […] Within each stage of the election [however] consistency must prevail." It was hence said to be inappropriate to justify unequal utilisation of the votes in the balancing of the proportion of votes by arguing that the parties would be placed at a quite different disadvantage in a majority vote.[7]

This wording, firstly, sets the basic pattern which is also expressed in Goethe's saying, "In the first we are free, in the second slaves to the act." The principle of consistency reveals itself in this regard as a typical type of self-binding on the part of the legislature.[8] Secondly, however, it is already stated here that the principle of consistency does not apply in absolute terms, but is obviously not breached if adequate *de facto* reasons justify not complying with it.

In later rulings, the Federal Constitutional Court applied the principle of consistency to highly-varied fields of law, including to social insurance law, the law on unemployment assistance and to economic law, and made it more specific in doing so. On the one hand, the Federal Constitutional Court enhanced the significance of the principle of consistency by making clear that if the legislature did not consistently hold on to a principle once it had been selected, it was said to breach the inherent rules which it itself had determined. On the other hand, however, the Federal Constitutional Court weakened the significance of the principle of consistency in that it attenuated the question that was raised in the first volume as to the consequences of a *systemic caesura. Systemic caesuras* – understood as breaches of the principle of consistency – are said not to be simply non-permissible and not to always lead to unconstitutionality, but to indicate only a case of unequal arbitrariness. In other words, they trigger an obligation to justify, but they also provide an opportunity to justify.

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[6] BVerfGE 1, 15 (45).

[7] BVerfGE 1, 208 (246).

[8] Cf. on this Meßerschmidt (2000: 30).

8.2.3 Justice of the System; Consistency of the System

This understanding of the principle of consistency was also prevalent in the literature which prepared the way for the concept of systematic consistency, and which commented on it over a period of several decades. Later, released from the burden of the term "justice", only the term 'systematic consistency' was used.

It was Canaris in particular who played a vital role in this process. He did not leave the "ideal of the century" of the great unity of all legal rules and terms – as had been developed in the nineteenth century from the civilistic dogma – as a general scientific and theoretical, hermeneutic postulate, but linked it with the constitutional tying of the legislature to the principle of equality.[9] In his view, a *system caesura* will as a rule constitute a breach of the constitutional principle of equality.[10] The consequence is that statutory contradictions of values were understood not merely as constituting a disturbance in terms of legal theory and legislation, as an object of interpretation skills or as postulates of legal policy, but were also penalised with the sanctions applying to unconstitutionality, and hence as a matter of principle were declared null and void.

Other renowned authors also devoted themselves to the topos of consistency. Forsthoff for instance spoke of the legal obligation incumbent on the State to remain consistent, and Denninger derived from the principle of equality a conditional constitutional mandate in the sense of "in for a penny, in for a pound", i.e. one might as well undertake the whole job, as just a part of it.

The question arose sooner or later in all these debates of whether the concept of consistency took on a substance going beyond that of the general principle of equality. This principle of equality, given that it was both founded in the rule of law and guaranteed in terms of fundamental rights, demanded with binding constitutional force, that – as a matter of principle – the legislature must regulate identical circumstances equally and may not arrange differences arbitrarily. In this regard it is necessary to stress that Canaris, as with the Federal Constitutional Court, also considered the violation of the principle of equality to lie in the violation of the ban on arbitrariness. It was not overlooked that the Basic Law provides a subjectively-demandable fundamental right to equal treatment in the shape of the general principle of equality which prohibits arbitrarily treating as unequal that which is essentially equal – this prohibition also, and in particular, applies to the legislature. In this regard, the question always arose as to whether the principle of consistency was able to lend itself to the general principle of equality, which initially was simply a ban on arbitrariness, a new and more precise standard.

[9] Cf. the assessment of Battis (1977: 15).

[10] Canaris (1969: 128).

8.2.4 *Fiscal Law*

This was and is the case in fiscal law, where the principle of consistency assumed, and continues to have, particular significance. In addition to the principle of ability to pay, as a rule it is used as a constitutional standard by which taxable events must be measured. This is understandable but it is also, however, surprising. It is understandable in the sense that fiscal law suggests system-transcendental comparisons at the intersection between public and private law. It is surprising in the sense that one may ask oneself *which system* underlies fiscal law that should be realised consistently. It is sufficient to be a taxpayer, and not a fiscal law specialist, to realise that the applicable fiscal law has no system whatsoever.[11] Cynics therefore also claim that the *entirety* of fiscal law would have to be declared unconstitutional if one were to apply the concept of consistency to it.

Fiscal law indeed offers numerous examples of inconsistent legislation, in particular in the fields of transport and consumer taxes.[12] The fact that there is still a coffee tax, but no longer a tea tax, might be just about acceptable but there are no obvious reasons why coffee, on the one hand, is taxed by this special consumption tax, whilst on the other hand it is only taxed at the reduced rate of value-added tax, i.e. 7 %.

This one example admittedly does not hold up where there are inconsistencies between the various taxes and different laws, so that the principle of consistency does not apply with regard to the requirement of applying it only to a single statute. However, firstly, distinguished figures demand that in fiscal law consistent derivations should be permitted across different taxes,[13] and secondly there are also examples where the principle of consistency, related to an individual tax or tax exemption, has led to unconstitutionality. The declaration of nullity of the newly-worded commuter tax allowance is one such example:

> The general exclusion of these travel expenses from the element of work-related expenses while ordering that the costs for distances from 21 kilometres onwards be treated "like" work-related expenses and assessing a mileage allowance for it which is unrelated to expenditure actually incurred is characterised by a contradictory connection and interlinking of different regulatory contents and objectives, and is not based on a comprehensive concept.[14]

This ruling hints at two different issues. The first is that it indicates a collateral problem of the principle of consistency, namely that it makes it more difficult for the legislature to deviate from a concept once it has been selected. I will come back to this. The ruling, however, goes on to also make clear the particular consequences of the connection between the principle of consistency and the general principle of equality; the commuter tax allowance failed due to the inconsistent application of

[11] Accurately Battis (1977: 18).

[12] Cf. for instance Tipke (2008: 9 ff.).

[13] Tipke (2008: 23).

[14] BVerfGE 122, 210 (230).

the factory gate principle, because of the unequal treatment of the first 20 km of the journey to work and of journeys above this. Had the legislature been more courageous and abolished the commuter tax allowance altogether, this would not have led to unconstitutionality in this regard.

8.3 Consistency as a Constitutional Principle

Despite the particular significance of the principle of consistency in fiscal law, the question arises whether the principle of consistency is a general constitutional principle, with the consequence that compliance with it can be reviewed by the Federal Constitutional Court and its violation can lead to the unconstitutionality of the law in question.

8.3.1 Consistency as a General Legal Principle

The principle of consistency is understood to a certain degree as a general legal principle. Reference is made here to the figure of the "*venire contra factum proprium*", and a ban on contradictory conduct on the part of the legislature is also arrived at, a "*venire contra factum proprium legislatoris*".[15]

Admittedly, there are considerable reservations when it comes to basing far-reaching obligations on the legislature on an undetermined general legal principle, and thereby further restricting the principle of democracy beyond the written constitution. In this regard, it may be possible to derive parallels with, and political postulates from comparisons with, the ban on contradictory conduct; this cannot however lead to the establishment of a constitutionally binding effect.

8.3.2 The Principle of the Rule of Law

Insofar as the principle of consistency aims to bring about adequate determinateness and legal certainty, it is furthermore subsumed under the principle of the rule of law. Lerche, who played a major role in establishing this school of thought, is primarily concerned in his much consulted book "*Übermaß und Verfassungsrecht*" (Excess and Constitutional Law) with the concept of predictability, and also demands consistency from the legislature in the sense that a sudden change of track towards another guideline could be constitutionally questionable. At the same time, however, he also warned that neither every legislature of the moment may be bound by

[15] Positioning himself as a sceptic, Lerche (1961: 273) regards the small number of possible (extreme) cases as being adequately covered by the principle of predictability.

the ideas of its predecessors, nor that considerations of expediency may indiscriminately advance to become legal issues.[16]

8.3.3 Consistency as a Standard of Equality Rights

The principle of consistency is predominantly understood as an expression or part of the general principle of equality, the question being unresolved, however, as to the degree to which it enriches it or lends it concrete form. A ruling from 1959 with regard to the question of whether headache tablets may be sold in drugstores contains the following wording:

> It is left up to the legislature whether to take action against advertising for medicines, or to restrict their sale, in order to combat medicine abuse, or to take both measures. If it restricts itself to a ban on sales, at best it may not act entirely consistently, but certainly not arbitrarily.[17]

The Federal Constitutional Court had to rule in the same year on the permissibility of the age limit for midwives. It ruled at that time:

> If the law ensures […] a minimum standard of midwifery services, it is legitimate that it also attempts to fully guarantee the ability of midwives to perform, an age limit being one way to achieve this. The principle of equality then does not force one to either restrict this guarantee by foregoing the age limit or to extend it to include midwifery provided by physicians, even if such an extension would make the provision for good legislation more perfect.[18]

This wording makes it clear that the Federal Constitutional Court did not initially regard consistency as constituting a constitutional standard, but in fact only the ban on arbitrariness was applied as a constitutional standard. As has already been stated, the Federal Constitutional Court later at least regarded inconsistent legislation as constituting an indication of a violation of the general principle of equality.

With the "New Formula" in 1980 the Federal Constitutional Court increased the value of the principle of consistency to a certain extent from a dogmatic point of view. According to the New Formula, if a statutory system is violated, and if this violation takes on a certain intensity, it can only be justified by interests related to the common good which are appropriate in proportion to the unequal treatment.[19]

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[16] Lerche (1961: 272).

[17] BVerfGE 9, 73 (81).

[18] BVerfGE 9, 338 (353).

[19] BVerfGE 55, 72 (88): "Accordingly, this fundamental right [Art. 3 para. 1 of the Basic Law] is violated above all if a group of addressees of the provision is treated differently from other addressees of the provision although no differences of such a nature and weight exist between the two groups such that they could justify the unequal treatment (cf. BVerfGE 22, 387 [415]; 52, 277 [280]). The Federal Constitutional Court in fact emphasised the regulatory content of Art. 3 para. 1 of the Basic Law in connection with attempts to derive from the legislature inherent rules made by the law itself that is binding on the legislature and *to complain about the fact of being incompat-*

8.3.4 Consistency as a Standard for Freedom Rights

If the principle of consistency is therefore attributed as such to the general right to equality, the particular significance of the ruling of the Federal Constitutional Court on non-smoker protection is explained. This significance lies in the fact that the principle of consistency was not applied – as in fiscal law – within the scope of the right to equality, but as a standard in reviewing a freedom right, namely the right freely to choose an occupation or profession, and that – ultimately – it has even caused a provision to be ruled unconstitutional.

We may recall that the violation of the Constitution was founded not on a violation of the right to equality, at least with regard to "corner pubs", but on a violation of the right to freely choose an occupation or profession. The inconsistent weighting and, moreover, the allegedly inconsistent weighting of health protection, was said to lead to a lack of proportionality in the strict sense of the word.

The literature reacts in various ways to the transfer of the principle of consistency to freedom rights, if this transfer is consciously registered at all. Similar to in the discussion on systematic justice and systematic consistency, two sides face one another, and the old arguments are brought out once more.

Three functions are stressed in this regard which, in parallel, are considered to constitute advantages of the consistent application of the principle of consistency to the evaluation of statutes.[20]

Firstly, a consistency verification of the regulatory concept underlying a statute is called for particularly if this regulatory concept acts as a brake on fundamental rights and is hence in need of justification. No arbitrary encroachment on fundamental rights is in need of justification when in isolation, but a justifying effect is said to be developed only by an "inherently consistent overall concept".

What is more, a rights-affirming function also attaches to the principle (a function which other consider to have adverse effects). Self-contradictions are said to weaken the legitimatisation of the law, which is materially based on acceptance and recognition. The fact of ruling out inconsistent legislation by virtue of consistently observing the principle of consistency is said to once more strengthen confidence in the law.

Finally, it is also considered an advantage that the combination of the ban on excessiveness and the principle of consistency require the legislature to provide adequate grounds in future, thus obliging it to be accountable both to itself and to citizens.

To sum up, proponents of the principle will presumably recognise a general principle of consistency as constituting a major step towards "rationality as a standard

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ible with the system as a violation of the principle of equality (BVerfGE 34, 103 [105])."(author's emphasis). cf. also BVerfGE 46, 97 (107 ff.). Further Stern (1988: 1830): "All in all, the principle of equality is intended to ensure objectiveness, expedience, system constancy and consistency of legislative action with regard to fundamental matters."

[20] Lindner (2007: 195).

of legislation".[21] In this sense, "freedom from contradiction in terms of wording and values"[22] is identified as a criterion for rational legislation. The doctrine of good legislation,[23] the obligation to enact good laws,[24] also accommodates these criteria.

8.4 Objections to a Transfer to Freedom Rights

Considerable doubts are however justified vis-à-vis the almost joyful consent to rulings of the Federal Constitutional Court, as they ignore the political aspect of democratic legislation. The transfer of the principle of consistency from equality rights to freedom rights, the consideration of this principle when weighing up individual interests protected by fundamental rights, and the politically-defined interest of the public good carried out within the review of proportionality, are to be vigorously rejected. Six reservations, in particular, may be put forward and which can be seen to some degree in the dissenting opinions of judges Bryde and Masing (below).

8.4.1 Confusion of Equality and Freedom Rights

Firstly, the inclusion of the principle of consistency in freedom rights blurs the distinction between equality and freedom rights. It hence fails to do justice to the different levels of protection granted by the different types of fundamental right. Whilst equality rights in fact only offer relative protection, freedom rights offer absolute protection.

Whilst such dogmatic reservations alone should normally not be decisive, the distinction between equality and freedom rights nonetheless also, and in fact especially, manifests itself in the consequences of the finding of unconstitutionality. Whilst, as a rule, violations of freedom rights lead to the nullification of statutes, the Federal Constitutional Court is cautious when it comes to the finding of nullity because of the violation of equality rights in consideration of the scope of the legislature to shape legislation. As is known, the latter the legislature can solve a breach of equality in three different ways, i.e. by treating the previously badly-treated group in the same way as the better-treated one in future; by treating the previously better-treated group worse in future; or by treating both groups in a new manner. This is also shown in the non-smoker ruling, in which the Federal Constitutional Court unambiguously communicated to the *Land* legislatures that they could also resolve the violation of equality by imposing an absolute smoking ban.

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[21] Comprehensively Schulze-Fielitz (1988: 454); cf. also the individual contributions in Schäffer and Trifterer (eds.) (1984).

[22] Schulze-Fielitz (1988: 515).

[23] Federal Ministry of the Interior (publisher) (2002); Schuppert (2003).

[24] Burghart (1996: passim).

Secondly, there is no need at all to tighten up the standard of the review of proportionality for freedom rights. The significance of the principle of consistency for the application of equality rights to fiscal laws is not to questioned, but at the same time there should be an awareness of *why* this significance exists: Since the Federal Constitutional Court operated for many years using the presumption and in some aspects still presumes, that the collection of taxes does not constitute an encroachment on the freedom of ownership, there simply is no adequately-determined constitutional standard by which to evaluate the constitutionality of taxes. The general principle of equality can be considered as a standard, but with its arbitrariness formula it provides little protection against the parliament enacting the fiscal legislation. There was, hence, a need with the principle of consistency in fiscal law to find a more precise constitutional standard. But there is no need to find a more precise constitutional standard to other laws, to pertinent laws, considering that there is a very precise constitutional standard available here, namely the standard of freedom rights.

8.4.2 From the Object to the Standard of Constitutional Review

A second objection turns against the interests that are to be equalized: If the Federal Constitutional Court leaves it up to the legislature to determine the value and weight of the public interest in cases in which this interest is protected by the Constitution itself, as for instance with regard to the protection of life and limb of the population, the Federal Constitutional Court surrenders to the legislature.[25] The legislature would then not only be able to place into perspective the objective being pursued by the provision by means of a large number of exceptions, thus weakening it, but conversely it could also increase its status by selecting a protection concept that was as stringent and uncompromising as possible, which would then be self-supporting.

It is then only a short step from the constitutionality of statutes to the lawfulness of the Constitution. In this regard Masing, who considered in a dissenting opinion that the constitutional weight of health protection is not a consequence of statutory values, but in fact creates their standard, may be concurred with.[26] Otherwise, the principle of consistency would have considerable potential to place freedom at risk.

If, for instance in the sports betting judgment, the review of proportionality in the strict sense failed because the law lacked the consistency needed to achieve its objective, this can, conversely, also be read such that a provision is always (and already) proportionate in the strict sense only if the purpose is pursued consistently. The Federal Constitutional Court does not carry out any weighing up at all in the

[25] Related to the determination of the starting point of consistency in fiscal law cf. Tipke (2008: 10).

[26] Masing (2008: 2421).

ruling between the interest that is placed at a disadvantage by the objective-achieving measure – in this case the interests of a private sports betting provider – and the objective to be achieved – the fight against betting addiction. Rather, it replaces the principle of proportionality in the stricter sense with the figure which is indifferent in terms of weighing up, i.e. the consistent pursuance of the objective.[27]

This consideration is admittedly only theoretical, and – probably incorrectly – draws conclusions as well as reverse conclusions from an individual ruling to possible future rulings. However, the risk of too strongly emphasising the objective in the framework of reasonableness cannot be dismissed. If the principle of consistency were to be included in the review of proportionality at all, it makes more sense to, for instance, locate it at the first level, for example at the level of the suitability of resources. Firstly, it is the encroachments on fundamental rights, that is the means, which are reviewed for their consistency, and secondly the possibility remains within the framework of necessity and suitability for correcting the outcomes of the weighing up process.

8.4.3 The Radicalisation of the Legal System

Probably the strongest objection to the transfer of the principle of consistency to freedom rights lies in their potentially radicalising effect. This idea was in the *obiter dictum* of the ruling, according to which an absolute smoking ban is said to be constitutional but not the graduated concept.

It can however also be expressed, somewhat exaggeratedly, in the hypothesis that the inclusion of the principle of consistency in the review of proportionality calls for political consistency where practical concordance was previously called for. If proportionate legislation is inconsistent, as in the case of the non-smoking laws, then consistent legislation tends to be disproportionate.

Also put somewhat exaggeratedly, the consistency principle focuses too much on the consequences, that is on the second step. What is the point of being consistent or, in other words, what is the point of being correct in terms of the logical conclusion, if the premise is wrong? "Wrong but consistent" in this regard seems to come closer to the principle of consistency than "correct but inconsistent".[28]

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[27] Lindner (2007: 194).

[28] The precise opposite, however, Bulla (2009: 321; and 2008: 590): As the principle of proportionality in the shape of the new formula is said to impact the dogma of equality rights, conversely, the principle of consistency is said to impact the dogma of the principle of proportionality, and hence the freedom rights. To put it another way, as disproportionate unequal treatment triggers a violation of equality rights, a violation of the principle of consistency is said to lead to a disproportionate encroachment and hence to a violation of freedom rights based on fundamental rights.

8.4.4 The Concrete Purpose

To address a fourth objection, which is not quite so serious, it is therefore decisive) that the first step be precisely examined, given that, according to the principle of consistency, it operates as a standard for the second step. Adjudging the protective concept of a statute however causes considerabe problems. With all due respect for majority voting in a collegial panel of judges, the two dissenting opinions of judges Bryde and Masing show how difficult reaching a consensus decision can be. The Federal Constitutional Court was furthermore also not able to do so, as will be shown below.

The literature considers tightening up the burden of proof and the obligations incumbent on the legislature to provide grounds in order to make the system and the first step easier to understand, which then serves as a standard of consistency.

There is however room for doubt here. Firstly, the legislature is tempted, and would also be well advised, to secure its rulings via several grounds, that is in a multi-final way. It must do so because, unlike the administration in some cases – it cannot subsequently provide reasoning for its rulings. This is already frequently the rule, given that it is not always simple to crystallise the actual motives for a statutory provision.

Such obligations to provide grounds however do not hold up. There has also been disagreement in this regard for quite some time as to whether, to what degree and with what consequences a statute must be reasoned. That the legislature owes nothing but the law, and thus in particular that it does not have to provide grounds, is one of the extreme positions put forward in this regard. On the other hand, there are legal policy demands for obligatory reasoning that would be far-reaching, in some cases constituting criminal offences. There is no contesting the fact that such grounds are expedient and may also take on constitutional significance in particular to determine legislative competence and to adjudge proportionality. The problem, however, starts with the question of who actually is the legislature and who is it that must therefore provide grounds for the law, and continues with the question of what is the standard of consistency – the wording of the law or the grounds of the law In any case, the grounds may not advance so far as to set the standard for the wording of the law.

Even though grounds may be welcome for this reason, they will contribute little towards the desired clarity for statutory purposes. In a possible examination by the Federal Constitutional Court, the singular purpose or the plural objectives of a statute are left to interpretation by the Court. It is then the wording of the law that remains decisive, as is also proven by the judgment on the non-smoker protection laws. The two *Land* statutes which have so far been reviewed state in their grounds the effective protection of the life and limb of non-smokers, but nevertheless, the Federal Constitutional Court reads from the individual statutory provisions a relativized protection concept.

8.4.5 The Separation of Powers

A fifth argument may be otlined at this juncture[29] – it relates to the separation of powers between the legislation and the Federal Constitutional Court. The principle of consistency tends to amplify the density of review of the Federal Constitutional Court, and increases the danger of the Federal Constitutional Court promoting itself to become an *ersatz* legislature. This danger is all the greater given that it will be much simpler for a panel made up of eight judges to design a cohesive overall concept for a statute, or at least to advertise it as such, than is the case in democratic decision-making in legislative bodies. Since, furthermore, all its members are lawyers, rule-of-law rationality aspects will certainly be more likely to play a role here than democratic determinations of priority.

8.4.6 The Principle of Democracy

The democracy principle is the final argument put forward in the shape of the hypothesis that democratic legislation is inconsistent legislation.

This result does not yet emerge from the principle of a limited period of governance since the principle of consistency has (so far) been applied within statutes and, as a rule, does not cover any legislation lasting more than one parliament.[30] It also does not emerge *per se* from the fundamental concept of democratic legislation given that democratic primacy, too, is governance that is tied into the constitutional state. Democratic legislation is not free, it is bound by the Constitution and it is above all subject to fundamental rights.

In reality, the result that democratic legislation is inconsistent legislation emerges from the essence of democratic legislation and from its concrete development. Contradictions in statutes are in fact frequently the outcome of compromises, and compromises are a sign of democratic legislation.[31] Any assertion, in contrast, that democratic legitimisation does not constitute an empowerment to hand down irrational rulings,[32] does not hold up. Rationality is not a standard for evaluating democratically-legitimated rulings, or at least not a legal one. If the legislature's political latitude for action is not to be restricted even further, rationality requirements over and above constitutional ties should only be attached to legislative

[29] By the time of going to press a large numbers of articles have been published which take a closer look at this aspect, cf. Bumke (2010: 77 ff.), Dann (2010: 631 ff.); Payandeh (2011: 578 ff.), as well as the reports by Lienbacher and Grzeszick at the 71st Annual Conference of the Association of German Constitutional Law Teachers 2011 in Münster.

[30] In this regard, the application of the principle of consistency to amending statutes is said to contrast with further problems which once more, however, have resulted in the question of who determines the purpose of the statute which is to become a standard of itself, and when this takes place.

[31] Equally Bryde (2008: 2420).

[32] Cf. Frenzel (2004: 107); referring to Öhlinger (1982: 1 ff.).

activity extremely cautiously. The scope for political design is in any case already restricted by a European and a global flow of regulation. If in this interdependent relationship between the various regulatory levels additional rationality wishes are enriched with legal obligations, not only the democratic design process is paralysed, but the law conversely also runs the risk of losing its binding effect for a lack of practical enforceability. In this regard, the principle of consistency can and should be understood as politically and logistically desirable in terms of policy and legislation, but not as a rule-of-law principle. The ambition of the inventive spirit of jurisprudence and constitutional case-law should be reigned in, and should focus more closely on recognising the political dimension of democratic legislation.

Klaus Meßerschmidt observes on this that "scholarly creativity […] is frequently proven by the refinement of constitutional law, frequently also via theories which culminate in an intensification of the constitutional commitment of the legislature to the Constitution".[33] A constitutional conwould hence be a further example of a theory, a doctrine which "tends more to prevent than to open up the scope for political action".[34] This is all the more serious given that a consistent principle of consistency would have a highly-preservative effect not only for a new statute, but in particular also for any legal amendments. This is because the principle of consistency makes it more difficult for the legislature to leave a course once it has been set and to change direction. In the concrete case of the Non-Smokers Act, Masing also points beyond legal considerations to the fact that stipulations of consistency in fact stipulate market forces.[35]

8.5 The Significance of the Premises for Consistency

Anyone who is bound by the second step should consider the first. This is the structure of the principle of consistency. It however also applies to the Federal Constitutional Court. Unlike the ruling quoted from the first volume, the Federal Constitutional Court was not clever enough to recognise that the issue of consistency is first and foremost also a matter of the premise.[36] It thus based its ruling on an incorrect assessment of the Non-Smokers Act.

In order to explain this it is necessary to refer once more to the image of weighted interests since this can help to illustrate where the error of the ruling of the Federal Constitutional Court lies. The Court accuses the legislature of allotting different evaluations to the protection of life and limb within the same statute; it was said not to throw the full weight onto the scales for this extremely important community asset, but used only a very limited version of the notion.

[33] Meßerschmidt (2000: 424).

[34] For instance Bryde (1982: 215); cf. also Meßerschmidt (2000: 424).

[35] Masing (2008: 2422).

[36] BVerfGE 1, 15 (46).

This presumption is however not correct. The legislature particularly did not presume a reduced weight of health protection, but assigned to it the full weight allotted by the Constitution. The reduced weight is a result only of the weighing up with contrasting interests; it is an outcome of the weighing up.[37] In this sense, it is particularly not consistent to now place on the scales this attenuated weighting of the protection of life and limb against commercial interests, such as those of the landlords of one-room pubs or of discotheques. Rather, this new weighing up makes it necessary once more to attach the full weight to the protection of life and limb – and such protection would probably have very clearly asserted itself vis-à-vis other interests, as the Federal Constitutional Court made recognisable in an *obiter dictum*.

What is paradoxical about the ruling is, therefore, that in order to guarantee alleged equal treatment regarding exceptions from the fundamental smoking ban, the Federal Constitutional Court itself became guilty of unequal treatment. When it comes to one-room pubs, the Federal Constitutinal Court attached less importance to the protection of life and limb than it did when considering other kinds of pubs and restaurants. It is not the legislature that attaches differing degrees of importance to an identical hazard, but the Federal Constitutional Court; it is not the legislature's allegedly inconsistent concept of protection which leads to the unconstitutionality of the law, but its incorrect evaluation by the Federal Constitutional Court.

If the ruling is therefore an incorrect ruling, a mistaken ruling, it can be hoped that the Federal Constitutional Court will apply the principle of consistency without being consistent[38] In these terms, this article should be regarded not only as a plea for inconsistent legislation, but in particular also for inconsistent constitutional case-law. This does not question the fact that the consistency of statutes can and should be something that is desirable in political and legislative terms.[39] However, inconsistent law can and should only be corrected by political means on this side of a contravention of the general principle of equality.

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[37] Judge Bryde recognised this and indeed expressed it in his dissenting opinion: "I am unable to recognise that the *Land* legislatures had placed the goal of non-smoker protection into perspective, so that protection of life and limb could also be placed into perspective as a weighing up position vis-à-vis commercial interests."

[38] For instance the finding on the application of the concept of systematic consistency, cf. Battis (1977: 14), with further references.

[39] For instance in relation to an obligation to enact a good or indeed perfect law Meßerschmidt (2000: 787).

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Chapter 9
Judicial Review of Tax Laws: The Coherence Requirement *(Folgerichtigkeitsgebot)*

Roland Ismer

Abstract With the Coherence Requirement *(Folgerichtigkeitsgebot)*, the German Federal Constitutional Court *(Bundesverfassungsgericht)* has created a far-reaching demand on the legislator regarding the rational design of tax laws. The court considers the legislator to be free in its choice of the taxable object, i.e. in its decision of what to tax. However, once the legislator has taken that decision, the court examines whether such decision has been implemented in a coherent manner. The Court sees this obligation as an emanation of the constitutional equality principle. The impact of the Coherence Requirement in its recent case law can hardly be overestimated. This contribution presents the Court's case law and gives an overview of pertinent contributions in the scholarly literature. It also critically offers a critical appraisal of the general question whether the Coherence Requirement can truly be considered as a binding principle of constitutional law.

Keywords Coherence requirement • Tax Law • Rational legislation • Equality Principle

9.1 Introduction

Is its understanding by the German Federal Constitutional Court, the equality principle laid down in Article 3(1) of the Basic Law (*Grundgesetz*) stipulates that the tax legislator act in accordance with the equal burden principle (*Prinzip der Lastengleichheit*).[1] This rather abstract principle is construed as imposing two slightly more concrete requirements, namely (i) taxation in accordance with financial ability to pay (*Besteuerung nach der finanziellen Leistungsfähigkeit*) and (ii) a

[1] Permanent jurisprudence, see e.g. BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50, m.no. 123 with further references.

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Coherence Requirement, which demands that the legislative implementation of tax laws be coherent (*Gebot der folgerichtigen Ausgestaltung des steuerrechtlichen Ausgangstatbestands*, or simply *Folgerichtigkeitsgebot*). Under the latter principle, the legislator is considered to be generally free in its choice of the taxable object, i.e. in the decision of what to tax (fundamental charging decision) and of tax rates.[2] Yet once it has taken that decision, such decision needs to be implemented in a coherent manner.[3] Deviations from the decision can be justified only if they are based on a particularly good reason (*besonderer sachlicher Grund*),[4] the weight of which increases with the scope of the deviation.[5]

Taxation in accordance with financial ability to pay is a long established concept.[6] By contrast, the Coherence Requirement, which so far has been largely confined to taxation,[7] is a relatively recent innovation.[8] It was first postulated in the scholarly literature in the 1980s and started to make inroads into the Federal Constitutional Court's jurisprudence not until the 1990s.[9] Yet such was the impact of the principle that the court has repeatedly relied on it when qualifying tax law

[2] BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50. The same freedom applies to the determination of the tax rate.

[3] On details regarding the delimitation between the choice of the taxable object and the implementation of that choice see e.g. Wernsmann (2005: 311 et seqq.).

[4] Permanent jurisprudence, see e.g. BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50, m.no. 123 with further references.

[5] Ibid.

[6] For comprehensive treatises on this principle see Birk (1983); Lehner (1993); Tipke (2000: 2000 et seqq.); See also BVerfG, Decision of 27 June 1991, 2 BvR 1493/89 (Taxation of Income from Capital), 84 BVerfGE 239 at 269.

[7] But see BVerfG, Decision of 30 July 2008, 1 BvR 3262/07 et al. (Prohibition of smoking in pubs and restaurants), 121 BVerfGE 317; Decision of 9 February 2010, 1 BvL 1/09 et al. (Calculation of subsistence level for social welfare), 125 BVerfGE 17; Decision of 25 July 2012, 2 BvF3/11 (Equality principle in elections), 131 BVerfGE 31.

[8] On this see Dann (2010: 630); Drüen (2011: 29); Englisch (2010: 167); Hey (2009: 2561); Kischel (2008: 175); Kirchhof (2008: 14 et seq.), (2010: § 181, m.nos. 209 and 226 et seqq.); Leisner-Egensperger (2013: 533); Mellinghoff (2012: 369); Payandeh (2011: 579); Prokisch (2000: 293); Schwarz (2007: 949); Thiemann (2011: 179); Tipke (2007: 201). On the preceeding discourse on systemic rationality (*Systemgerechtigkeit*) see inter al. Battis (1977: 11); Canaris (1983); Degenhart (1976); Peine (1985) as well as Ismer (2005: 102 et seqq.); Kischel (1999: 174). The Coherence Requirement (*Folgerichtigkeitsgebot*) should be separated from the prohibition of contradictions in the legal order (*Gebot der Widerspruchsfreiheit*), which has its legal base in the Rule of Law Principle (*Rechtsstaatsprinzip*) and which refers not to coherence within a tax law, but with respect to the legal order as a whole (see in particular BVerfG, Decision of 7 May 1998, 2 BvR 1991/95 et al., 98 BVerfGE 106, at 118 et seq.; as well as Felix (1998); Hanebeck (2002: 429); Sodan (1999: 864) and Wernsmann (2005: 183 et seqq.), which becomes particularly relevant in the federal state, see e.g. Haack (2002). Finally, it should be noted that the German discourse on the Coherence Requirement is lamentably largely disjunct from the international discourse on the role of coherence beyond Ronald Dworkin, see e.g. Raz (1992: 273).

[9] BVerfG, Decision of 27 June 1991, 2 BvR 1493/89 (Taxation of Income from Capital), 84 BVerfGE 239, m.no. 108; Decision of 22 June 1995, 2 BvL37/91 (Net Wealth Tax), 93 BVerfGE 121; Decision of 22 June 1995, 2 BvR 552/91 (Inheritance Taxation I), 93 BVerfGE 165.

provisions as unconstitutional.[10] It held, for example, that the legislator was not allowed to exclude certain commuting costs as expenses from the income tax base.[11] It also considered in several decisions spanning more than two decades that the valuation provisions in the inheritance tax act violated the Coherence Requirement.

Despite its importance in recent case law, the Coherence Requirement is not universally accepted.[12] Instead, both the principle itself[13] and individual decisions relying on the principle[14] have met strict opposition in the scholarly literature. In particular, the Court has been accused of trying to educate the legislator without a sufficient constitutional basis.[15] A shift of power from the legislature to the courts has been deplored.[16] Others want the Court to profess that the foundation of the Coherence Requirement lie in the ability to pay principle, which would mean that the requirement would no longer constitute an additional criterion,[17] or that the Coherence Requirement has its foundations in the principle of the Rule of Law (*Rechtsstaatsprinzip*).[18] Yet others argue that the Coherence Requirement is no distinct constitutional principle but merely represents a helpful tool for structuring the argumentation regarding the equality principle.[19]

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[10] Cf. BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50, Decision of 7 May 2013, 2 BvR 909/06 et al. (Discrimination of registered same-sex partnerships under income tax), 133 BVerfGE 377; Decision of 21 July 2010, 1 BvR 611/07 et al. (Discrimination of registered same-sex partnership under inheritance tax), 126 BVerfGE 400; Decision of 6 July 2010, 2 BvL 13/09 (Home office), 126 BVerfGE 268; BVerfG, Decision of 9 December 2008, 2 BvL 1/07 et al. (Commuting Expenses), 122 BVerfGE 210; Decision of 13 February 2008, 2 BvL 1/06 (Health insurance contributions), 120 BVerfGE 125; Decision of 7 November 2006, 1 BvL 10/02 (Inheritance Taxation II), 117 BVerfGE 1; Decision of 4 December 2002, 2 BvR 400/98 et al. (Maintenance of two households), 107 BVerfGE 27; Decision of 6 March 2002, 2 BvL 17/99 (Taxation of Pensions), 105 BVerfGE 73; Decision of 11 November 1998, 2 BvL 10/95 (Additional Remuneration for Activity in Eastern Germany), 99 BVerfGE 280; Decision of 30 September 1998, 2 BvR 1818/91 (Loss relief for other income), 99 BVerfGE 88; Decision of 22 June 1995, 2 BvL37/91 (Net Wealth Tax), 93 BVerfGE 121; Decision of 22 June 1995, 2 BvR 552/91 (Inheritance Taxation I), 93 BVerfGE 165; Decision of 27 June 1991, 2 BvR 1493/89 (Taxation of Income from Capital), 84 BVerfGE 239.

[11] BVerfG, Decision of 9 December 2008, 2 BvL 1/07 et al. (Commuting Expenses), 122 BVerfGE 210. See below at II 1 c).

[12] Generally in favour of the principle e.g. Mellinghoff (2012: 369).

[13] Dann (2010: 630); Payandeh (2011: 579); Wernsmann (2014: § 4 AO m. nos. 516 et seqq.).

[14] On the Commuting Expenses Case: Müller-Franken (2009: 48 et seq.), plausibly arguing that the Constitutional Court itself was incoherent; Wernsmann (2014: § 4 AO m.nos. 519 et seq.).

[15] Lepsius (2014: 495 et seq.).

[16] Dann (2010: 630).

[17] Englisch (2010: 172 et seqq.); Hey (2009: 2563), (2015: § 3 m.no. 119); Tipke (2007: 208), (2009: 535).

[18] Prokisch (2000: 306 et seqq.).

[19] Birk et al. (2014: m.no. 187); Musil (2014: 136 et seqq.). Similarly regarding the equality principle Prokisch (2000: 308). This is in line with the jurisprudence of the Constitutional Court on systemic rationality (Systemgerechtigkeit), see BVerfG, Decision of 5 March 1974, 1 BvL 17/72 (Equalisation mechanism), 36 BVerfGE 383.

Against this background, the present contribution will first analyze the impact of the Coherence Requirement in the jurisprudence of the German Federal Constitutional Court. For that purpose, it will present major cases, before extracting by way of abstraction, the implications and prerequisites of the Coherence Requirement (Sect. 9.2). It will continue by tracing the roots and reception of the concept in the scholarly literature (Sect. 9.3). It will then proceed to argue that the coherence principle represents an inductive form of reasoning. Great care therefore needs to be taken in order to ensure that the legislator's decision, which is taken as the inductive basis for the Coherence Requirement, really exists. The contribution will moreover contend that the Coherence Requirement is not itself a binding principle of constitutional law, but a shorthand for general obligations under the equality principle. It will argue that the key distinction of the Coherence Requirement between the fundamental charging decision as well as to the setting of tax rates on the one hand and the implementation of the fundamental charging decision on the other hand is convincing. Regarding the former, wide discretion afforded to the legislator appears inevitable. One may doubt, in contrast, what stringency of control of the implementation of the fundamental charging decision is really warranted by the constitution (Sect 9.4). A short summary with an outlook on parallel arguments in the jurisprudence of the European Court of Justice concludes (Sect. 9.5).

9.2 The Coherence Requirement *(Folgerichtigkeitsgebot)* in the Jurisprudence of the German Federal Constitutional Court

The Coherence Requirement has, as indicated above, played a significant role in the Constitutional Court's supervision of the tax legislator, turning the constitutional equality principle into a sharp sword in the hands of the Court. Recent years have seen a true proliferation of corrections demanded by the Constitutional Court, many of which were based on the equality principle and in particular on the Coherence Requirement.[20] In the following, the most important cases will be presented with the aim of providing an intuition with respect to the actual functioning of the requirement when it comes to deciding individual cases. Then by way of abstraction, the implications and prerequisites of the Coherence Requirement will be shown.

[20] See fn. 10.

9.2.1 Overview of the Constitutional Court's Case Law

The Constitutional Court's case law on the Coherence Requirement, which started only in the 1990s, has a strong focus on direct taxation.[21] The first case where the Court referred to the Coherence Requirement was a case on the taxation on income from capital (Sect. 9.2.1.1).[22] Yet it was only some years later in the cases on valuation for inheritance and wealth tax purposes that the Court really based its decision on the requirement. As a consequence, the wealth tax was abolished. By contrast, the inheritance tax was subsequently repeatedly modified, without, however, satisfying the constitutional requirements, so that it was rejected two more times by the Constitutional Court (Sect. 9.2.1.2).[23] The 2009 decision on commuting expenses[24] not only had the largest effect on state revenue, but also shows the perils of using the Coherence Requirement in an environment where the legislator pursues several goals at the same time (Sect. 9.2.1.3). The case on the provisions for gratifications to long-term employees (*Jubiläumsrückstellungen*)[25] finally demonstrates the limits of the Coherence Requirement (Sect. 9.2.1.4).

Case on Taxation of Income from Capital

In the 1991 decision on taxation of income from capital,[26] a taxpayer had derived and declared interest income. He subsequently filed a constitutional complaint with the Federal Constitutional Court against his assessment for income tax. He argued that tax evasion of such income was widespread, given the possibility of simply not reporting the income and the lack of verification. As the legislator had failed to address the problem, the taxation of income from capital, in his view, violated the equality principle and was unconstitutional. In a ground-breaking decision, the Court followed his reasoning. It ruled that the legislator was under the obligation of legislator to ensure effective taxation.

The case must nevertheless be considered as being somewhat atypical: The ruling was based on the structurally deficient implementation of the income tax act.

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[21] For a notable exception on VAT see BVerfG, *Decision of 29 October* 1999, 2 BvR 1264/90 (Healing eurythmy), 101 *BVerfGE* 132, which, however, could also have been resolved based on the neutrality principle under the VAT Directive.

[22] BVerfG, Decision of 27 June 1991, 2 BvR 1493/89 (Taxation of Income from Capital), 84 BVerfGE 239.

[23] A new attempt is currently going through the legislative process, which, however, is likely to constitute state aid prohibited by European Union law, see Ismer and Piotrowski (2015a: 1998).

[24] BVerfG, Decision of 9 December 2008, 2 BvL 1/07 et al. (Commuting Expenses), 122 BVerfGE 210.

[25] BVerfG, Decision of 12 May 2009, 2 BvL 1/00 (Provisions for Gratifications), 123 BVerfGE 111.

[26] BVerfG, Decision of 27 June 1991, 2 BvR 1493/89 (Taxation of Income from Capital), 84 BVerfGE 239.

The decision for a comprehensive income tax was implemented in the act as income from capital was covered. The rules defining what was subject to income tax thus were not incoherent. The problem rather consisted in the lack of verification and as such was primarily of a factual nature. It became a normative problem only through the enormous scope of the problem, which then called the taxation of income from capital into question altogether. In other words: The problem was not that the legislator wanted to tax income from capital; this was totally consistent given that they had opted for comprehensive income taxation. Instead, the decision to tax income from capital could only be considered to have been implemented in a coherent manner when the legislator had also taken measures to ensure a level of effective taxation that was not to be regarded as structurally flawed.

Cases on Valuation for Inheritance Tax I-III and Wealth Tax

The real break-through for the Coherence Requirement, however, came a few years later in 1995, when the Court declared both the inheritance tax[27] and the former net wealth tax[28] unconstitutional. The underlying problem with respect to the equality principle[29] was that different assets were valued differently. While cash and other financial assets were assessed at market value, other assets such as real estate were valued at huge discounts. The Court held that the legislator had decided on a comprehensive inheritance tax, respectively a comprehensive net wealth tax, with a single tax rate for all assets. Given this decision, the legislator was obliged to be coherent, which would have necessitated a valuation system that would yield similar values for all asset classes.[30] It also ruled that justifications for instances of unequal valuation would require an explicit decision on the part of the legislator.[31] The Court set the legislator a deadline to remedy the deficiencies.

The legislator chose not to modify the net wealth tax in the following so that it lapsed. By contrast, a new inheritance tax act was approved, which sought to address the concerns of the Constitutional Court. Yet the legislator introduced provisions according to which certain types of property were given explicit valuation discounts. New concerns, again based on the Coherence Requirement were voiced and a new case was brought before the Constitutional Court.[32] The Court held that the fundamental charging decision in the inheritance tax obliged the legislator to stipulate the

[27] BVerfG, Decision of 22 June 1995, 2 BvR 552/91 (Inheritance Taxation I), 93 BVerfGE 165.

[28] Decision of 22 June 1995, 2 BvL37/91 (Net Wealth Tax), 93 BVerfGE 121.

[29] Both decisions also rely on the constitutional freedoms for further monita.

[30] Decision of 22 June 1995, 2 BvL37/91 (Net Wealth Tax), 93 BVerfGE 121at 136.

[31] Decision of 22 June 1995, 2 BvL37/91 (Net Wealth Tax), 93 BVerfGE 121 at 147 et seq. This is pursued in BVerfG, Decision of 6 March 2002, 2 BvL 17/99 (Taxation of Pensions), 105 BVerfGE 73 at 112 et seq.

[32] BVerfG, Decision of 7 November 2006, 1 BvL 10/02 (Inheritance Taxation II), 117 BVerfGE 1.

valuation of all property at the fair market value.[33] Social policy goals might not justify a departure from this, but could only warrant exemptions.[34] Once again it thus struck the law down and set the legislator another deadline to amend the inheritance act.[35]

The legislator followed suit, but decided on a wide-spread exemption for entrepreneurial assets, where the enterprise was continued by the donee or heir for a period of seven years. The tax exemption was widely regarded as excessive. The German Federal Tax Court (*Bundesfinanzhof*) heard a case on the inheritance taxation of non-privileged assets. It considered that the excessive exemptions amounted to unequal taxation for the recipient of non-privileged assets. The inheritance tax act was therefore referred to the Constitutional Court for a third time. In an ever longer decision from December 2014,[36] the Court shared the concerns and once again declared the Inheritance Tax Act as such unconstitutional.[37] It gave the legislator time until June 2016 to remedy the constitutional deficits.

The 2014 ruling is not very clear as it shows visible signs of compromise-making within the Court. Without going into the technicalities, it develops, or at least provides hints for, its understanding of the significance of the equality principle regarding exemptions. The Constitutional Court explicitly states that as exceptions to the general fundamental charging decision, tax exemptions need to be justified. The Constitutional Court transfers the familiar two-step logic from the fundamental charging decision to the exemptions: Just as the legislator is free in its decision of what to charge, it enjoys great discretion regarding the decision of what goals to pursue with exemptions, i.e. the relief decision.[38] In particular, it may introduce tax exemptions where it considers that taxation would otherwise result in harm to the public interest. This discretion regarding the first step is only limited by the prohibition of acting arbitrarily.[39] By contrast, the implementation of the relief decision through the tax exemptions can be subject to more intensive scrutiny by the Constitutional Court.[40] The Constitutional Court then undertakes a proportionality test regarding the exemptions. By looking at legislative history[41] and relying on

[33] BVerfG, Decision of 7 November 2006, 1 BvL 10/02 (Inheritance Taxation II), 117 BVerfGE 1 at 33 et seqq.

[34] BVerfG, Decision of 7 November 2006, 1 BvL 10/02 (Inheritance Taxation II), 117 BVerfGE 1 at 35.

[35] BVerfG, Decision of 7 November 2006, 1 BvL 10/02 (Inheritance Taxation II), 117 BVerfGE 1 at 69 et seq.

[36] BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50.

[37] On the procedural problems see Crezelius (2015: 2).

[38] BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50, m.no. 125.

[39] BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50, m.no. 125.

[40] BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50, m.no. 126.

[41] BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50, m.no. 134.

systematic arguments,[42] it establishes the prevention of liquidity problems for enterprises as the purpose pursued by the legislator and considers this to be a legitimate aim.[43] It sees the exemptions as apt (*geeignet*)[44] and also necessary (*erforderlich*)[45] to pursue the purpose. In the context of the latter criterion, it performs a surprising volte-face relative to the Commuting Expenses Case, which it unfortunately does not discuss: it no longer requests a case-by-case examination that the exemption is necessary in the individual case at hand.[46] Finally, the exemption must be appropriate (*angemessen*).[47] The Court states that the weight of the justifying reasons needs to increase with the extent of the deviation from the fundamental charging decision and with the effect of the exemption on the equal levying of the tax. Thus the exemption for small and medium sized enterprises is generally deemed to be acceptable. By contrast, such exemption may only be granted for larger enterprises when an actual need for it has been confirmed (in the sense that there are no sufficient funds available to pay the tax otherwise due).[48] The legislator is also under the obligation to prevent excessive tax-planning opportunities.[49]

Case on Commuting Expenses

The Constitutional Court also relied upon the Coherence Requirement to strike down an amendment to the income tax regarding expenses incurred for commuting between home and the workplace.[50] Such expenses were by virtue of that amendment no longer deductible. A rather complicated exception, however, applied for long distance commuters. For the distance between home and the workplace that exceeded 20 km, they could deduct a fixed amount of 0.30 Euro per kilometer per

[42] BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50, m.nos. 135 et seqq.

[43] BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50, m.no. 138.

[44] BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50, m.no. 139.

[45] BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50, m.nos. 140 et seqq.

[46] BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50, m.nos. 150 et seqq.

[47] BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50, m.nos. 155 et seqq.

[48] BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50, m.nos. 170 et seqq.

[49] BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 *BStBl* 50, m.nos. 253 et seqq. Further technical points have also been declared unconstitutional, see m.nos. 201 et seqq. and 231 et seqq.

[50] BVerfG, Decision of 9 December 2008, 2 BvL 1/07 et al. (Commuting Expenses), 122 BVerfGE 210. On this see e.g. Dann (2010: 632 et seqq.); Hey (2009: 2363 et seqq.); Lehner (2009: 185); Lepsius (2014: 488 et seqq.); Payandeh (2011: 593 et seqq.); Tipke (2009: 533); as well as from a law and economics perspective Ismer et al. (2008: 56).

day of commuting. A commuter with a commuting distance of 25 km could thus deduct 1.50 Euro[51] per day commuted.

The Constitutional Court considered the rule to be incoherent. It decided that in the income tax act there was the underlying general principle that expenses caused by the taxable activity, such as the employment or the business activity, should be deductible from the tax base (so called *Veranlassungsprinzip* or relevant causation principle) and that the rule at issue departed from that principle.[52] The departure could not be justified: The mere purpose of raising additional revenue for the government was excluded *per se* as a ground for justification.[53] Neither could any additional societal purposes, such as environmental purposes, be relied upon as there was no recognizable legislative decision to that effect.[54] The exception for long distance commuters could in the eyes of the Constitutional Court not be justified as a hardship clause, as this would have required that such hardship be established for the individual case at hand.[55] Finally, the new rule could not be understood as a modification of the initial fundamental charging decision, as such system change would have required a minimum of coherence.[56] Or in the words of the Court: A permissible system change cannot occur without a minimum of orientation to a new system.[57]

Case on Provisions for Gratifications to Long-Term Employees (*Jubiläumsrückstellungen*)

The Constitutional Court showed more restraint in its decisions on provisions for gratifications to long-term employees (*Jubiläumsrückstellungen*).[58] After the Federal Supreme Tax Court had changed its jurisprudence and allowed such provisions, the legislator created a special rule and once again disallowed them; however, this was conceived as a temporal suspension, as it was *ab initio* limited to a period of five years, at the end of which the provisions were to be allowed again under certain,

[51] 25–20 = 5 kilometers times 0.30 Euro.

[52] BVerfG, Decision of 9 December 2008, 2 BvL 1/07 et al. (Commuting Expenses), 122 BVerfGE 210, m.nos. 66 et seqq.

[53] BVerfG, Decision of 9 December 2008, 2 BvL 1/07 et al. (Commuting Expenses), 122 BVerfGE 210, m.no. 69.

[54] BVerfG, Decision of 9 December 2008, 2 BvL 1/07 et al. (Commuting Expenses), 122 BVerfGE 210, m.no. 70.

[55] BVerfG, Decision of 9 December 2008, 2 BvL 1/07 et al. (Commuting Expenses), 122 BVerfGE 210, m.no. 81.

[56] BVerfG, Decision of 9 December 2008, 2 BvL 1/07 et al. (Commuting Expenses), 122 BVerfGE 210, m.no. 79 et seqq.

[57] BVerfG, Decision of 9 December 2008, 2 BvL 1/07 et al. (Commuting Expenses), 122 BVerfGE 210, m.no. 80: "Einen zulässigen Systemwechsel kann es ohne ein Mindestmaß an neuer Systemorientierung nicht geben."

[58] BVerfG, Decision of 12 May 2009, 2 BvL 1/00 (Provisions for Gratifications), 123 BVerfGE 111. On this decision see Hey (2009: 2365 et seqq.); Mellinghoff (2012: 372 et seq.).

more stringent conditions. The question arose whether such special rule was compatible with the Coherence Requirement. *Prima facie*, the case did not concern the fundamental charging decision, but the determination of taxable profits. One might therefore have expected the Constitutional Court to require a particularly good reason (*besonderer sachlicher Grund*) for the rule. Yet the Court came to a different conclusion: It held that the development of convincing dogmatic structures through the systematically coherent and practicable design of legal norms must be left to the legislator and the courts. It is not for the Constitutional Court to decide upon complex dogmatic questions.[59] As the rule in question constituted a technical rule in a complex area of law, which furthermore only determined when (but not: whether) expenses for long-term employees would reduce taxable profits, the rule was only tested for arbitrariness. The Constitutional Court denied this as the tax courts had originally decided differently and that the temporary suspension served the purpose of treating equally those who had made provisions in the past and those who had not.[60]

9.2.2 Implications and Prerequisites of the Coherence Requirement

The Coherence Requirement is certainly closely related to, but may not be identical with the concept of systemic rationality (*Systemgerechtigkeit*),[61] which had received a lukewarm reception in the jurisprudence of the Constitutional Court.[62] In any event, the Coherence Requirement has inspired the Constitutional Court to subject tax laws to fairly intense scrutiny. The above cases make clear that the Constitutional Court has relied on the Coherence Requirement to demand wide-ranging corrections to tax legislation, even where a tax is highly political as is the case for the net wealth tax or the inheritance tax.[63]

Under the Coherence Requirement, the Court follows a two-step reasoning. In the first step, the legislator is afforded large discretion as to what the fundamental charging decision is and what tax rates to set. It may choose to levy a special tax on trade income.[64] Yet once it has taken that decision, it is bound to abide by it. Regarding the second-step, there generally is a more intensive control. By contrast, such stringent control does not extend to the technicalities, especially when they are

[59] BVerfG, Decision of 12 May 2009, 2 BvL 1/00 (Provisions for Gratifications), 123 BVerfGE 111, at m.no. 32.

[60] BVerfG, Decision of 12 May 2009, 2 BvL 1/00 (Provisions for Gratifications), 123 BVerfGE 111 at m.nos. 40 et seqq. and 45.

[61] See the discussion in Drüen (2011: 42 et seqq.).

[62] BVerfG, Decision of 5 March 1974, 1 BvL 17/72 (Equalisation mechanism), 36 BVerfGE 383.

[63] See above at fn. 10.

[64] BVerfG, Decision of 15 January 2008, 1 BvL 2/04 (Local Trade Tax), 120 BVerfGE 1. On this decision see Hey (2009: 2563).

only relevant for the question at what time the tax is levied. In other words: The Coherence Requirement is limited to the fundamental charging decisions.[65]

Deviations from the self-taken decision, i.e. instances of incoherence, may be justified. However, for such justification, there are two qualifications: first, reasons, such as the promotion of employment or protection of the environment, that have nothing to with the nature or internal structure of the tax system, but are external to it, are only taken into account as a justification for the deviation if they can be related to a recognizable legislative decision.[66] Second, the reason justifying the deviations from the decision is subject to a rather stringent test. The Court usually states that the deviation can be justified only if they are based on a particularly good reason (*besonderer sachlicher Grund*).[67] The weight of the ground supporting the deviation requires particular weight which increases with the scope of the deviation.[68] The mere purpose of raising revenue is not deemed to be sufficient.[69] Closer inspection, however, reveals that the Court demands not only that the reason have particular weight, but that the pursuit of the purpose be proportional and coherent. This has been amply demonstrated by the recent Inheritance Tax Act III decision. This ruling is also of interest as it applies to tax exemptions a reasoning that is similar, but somewhat less stringent reasoning to the Coherence Requirement as a whole, which one may consider to be a sort of Mandelbrotian self-similarity.

In theory at least, the legislator may revisit the initial decision and opt for a different fundamental charging decision. Yet the Constitutional Court has distanced itself from the possibility of simply destroying the system by fragmenting the fundamental charging decision.[70] This is not enough as the Court has ruled in the Commuting Expenses Case. Instead the Court has imposed rather strict demands for such "system change"[71]: such system change requires a minimum of coherence.[72]

[65] Mellinghoff (2012: 373).

[66] BVerfG, Order of 22 June 1995, 2 BvL 37/91, 93 BVerfGE 121 at 147 et seq.; Order of 11 November 1998, 99 BVerfGE 280 at 296.

[67] BVerfG, Order of 7 November 2006, 1 BvL 10/02, 117 BVerfGE 1 at 31; Order of 21 July 2010, 1 BvR 611/07 et al., 126 BVerfGE 400 at 417; Order of 18 July 2012, 1 BvL 16/11, 132 BVerfGE 179 at 189, m. no. 32.

[68] See BVerfG, Order of 7 November 2006, 1 BvL 10/02, 117 BVerfGE 1 at 32.

[69] See e.g. BVerfG, Decision of 9 December 2008, 2 BvL 1/07 et al. (Commuting Expenses), 122 BVerfGE 210, m.no. 61.

[70] A possibility which was discussed by Battis (1977: 21).

[71] BVerfG, Decision of 9 December 2008, 2 BvL 1/07 et al. (Commuting Expenses), 122 BVerfGE 210, m.no. 79 et seqq.

[72] Mellinghoff (2012: 373).

9.3 The Coherence Requirement (Folgerichtigkeitsgebot) in the Scholarly Literature

The Coherence Requirement is thoroughly anchored in the case law of the Constitutional Court. Yet it is still subject to – sometimes severe – criticism. The motivation for the Coherence Requirement by its proponents, namely the perceived weakness of constitutional limits to tax legislation – will be presented in the following (Sect. 9.3.1). The objections raised in the scholarly literature will then be presented. While the exact criticism of the literature regarding individual decisions is beyond the scope of this text, it does deal with general criticisms of the concept (Sect. 9.3.2).

9.3.1 Motivation: Perceived Weakness of Limits to Tax Legislation

The Coherence Requirement is motivated by the desire to subject the legislator to rationality review.[73] This becomes apparent e.g. when *Paul Kirchhof*, a highly distinguished academic and former judge at the German Federal Constitutional Court writes that the expression of the legislator's will in the law is "merely arbitrary" where it does not fulfill additional rationality criteria.[74] Thus, the mere will of the – democratically legitimized – legislator is not always deemed sufficient.

Point of departure is the distinction between constitutional liberties (*Freiheitsrechte*) on the one hand and the equality principle on the other. Since the liberties generally cannot impose far-reaching limits on the tax legislator beyond the rather theoretical case of taxes suffocating economic activity (*Erdrosselungssteuer*), the brunt of constitutional review of tax legislation has to be based on the equality principle. Yet this requirement again is deficient given that the proportionality of ends and means is hard to establish in this area: Under the principle of non-affectation (*Nonaffektationsprinzip*),[75] revenue raised by a tax must go to the general budget rather than be ear-marked to specific purposes. This means that the (general) end of raising revenue would have to be balanced against any specific inequality, which is hardly possible.

Instead of drawing the conclusion that the democratically legitimized legislator hence enjoy discretion, the Coherence Requirement is brought in to mitigate the perceived deficiency. The Coherence Requirement is seen as an attempt by the Constitutional Court to limit interventions with respect to tax law by favouring certain interest groups and its "proneness to compromise".[76] The standards against

[73] See Mellinghoff (2012: 372).

[74] In this vein Kirchhof (2010).

[75] Waldhoff (2002: 285).

[76] Kirchhof (2008: 14).

which to measure the tax laws then have to be taken from the fundamental charging decisions by the legislator.[77]

A similar motivation for the Coherence Requirement has recently been offered by Petersen[78]: In his view, constitutional courts should police interest group capture. As direct control of such capture is impossible, the courts are seen as relying on what he calls "second-order criteria", i.e. proportionality and consistency of legislation, which help to promote rationality of the legislation. Yet as the above analysis of the German Federal Constitutional Court's case law has shown, the control of rules granting tax relief is to date still less strict than that of rules increasing the tax burden.

9.3.2 Objections Raised in the Scholarly Literature

Some contributions in the literature argue that the Coherence Requirement lacks a sufficient constitutional basis.[79] Thus, the Coherence Requirement is seen as part of a wider set of demands that serve to unduly reign in legislative discretion and to grant wide powers of review to the courts.[80] Such strict review, it is argued, fails to take sufficient account of the needs of the legislator, who oftentimes needs to act quickly and, reflecting pressures of public opinion, with a focus on particular problems.[81] At the same time, the legislator has to cope with resistance by powerful lobbies and needs to find political compromises, which task becomes even more tedious given the constitutional division of powers between the federal level and the state (*Länder)* level.[82] These concerns are held to be even more important in the field of taxation where laws are seen as particularly transient rather than permanent in nature and subject to constant change driven by political and economic motives. Thus, it is claimed, the Court wants to educate the legislator to pursue the ideal of rational and perfect law-making, thereby imposing a utopian model of permanent and coherent codification which has little to do with legislative reality.[83] In short: The Court must not make demands regarding the coherence or "systemic purity" of laws that cannot be met by any democratic legislator.[84]

Furthermore an impossibility objection is raised: It is proposed that the identification of what constitutes the system and what constitutes an exception can but

[77] Mellinghoff (2012: 372).

[78] Petersen (2014: 650–669).

[79] See e.g. Kischel (2015: Article 3 m.no. 95 et seqq.); Lepsius (2014: 495 et seq.).

[80] Lepsius (2014: 495 et seq.).

[81] Lepsius (2014: 495).

[82] Lepsius (2014: 495). Under Article 105(3) of the Basic Law, approval by the Second Chamber of Parliament (*Bundesrat*) is needed for legislation on all major taxes except excises.

[83] Lepsius (2014: 496).

[84] Lepsius (2014: 496).

rarely be based on rational grounds.[85] An exception would only apply in monolithic systems, i.e. those that are the expression of a single principle. Yet such monolithicism is in the view of these authors rare, as legal norms usually reflect a multitude of pertinent, but conflicting principles. Reflecting all these principles then implies that in most cases a plethora of results are possible, with the choice among them being indeterminate on rational grounds. A further argument against the Coherence Requirement is based on the danger of ossification: When the legislator has to abide by the requirement, they can no longer react in a flexible manner, but are forced to replace the whole system with another, then change will be hard to implement. This may entail that the current will of the people as the sovereign cannot be implemented.[86]

9.4 Critical Appraisal

The critical appraisal first demonstrates that the Coherence Requirement does not follow from the ability-to-pay principle, but in the view of the Constitutional Court imposes an additional requirement, which is to be gained through inductive rather than deductive reasoning (Sect. 9.4.1). However, one may doubt whether the Coherence Requirement really imposes a distinct criterion. Indeed, the main function of the Coherence Requirement seems to be to delimit areas where the equality principle is seriously affected so that intense scrutiny is warranted from those areas where the review is reduced to mere checking for arbitrariness. The Coherence Requirement can thus be understood as being primarily a shorthand for different degrees of control intensity (Sect. 9.4.2).

9.4.1 The Coherence Requirement as Inductive Rather than Deductive Reasoning

From the above cases, it becomes apparent that the Coherence Requirement creates a far-reaching demand on the legislator regarding the rational design of tax laws. What is particular about the structure of the Coherence Requirement is that these rationality requirements are not derived as external obligations from legal sources of a higher order. Instead, they measure the legislator against its own decisions. Or, in other words: They demand internal consistency.

The Constitutional Court is clear in its assessment that the Coherence Requirement imposes a requirement additional to the ability-to-pay-principle. While a law is not *per se* in accordance with the constitution's equality principle simply because it

[85] Kischel (2015: Article 3 m.no. 96).

[86] Leisner-Egensperger (2013: 539).

satisfies the Coherence Requirement,[87] the Coherence Requirement can in turn not be reduced to a variant of the ability-to-pay-principle. This is because the ability-to-pay-principle itself is not sufficiently clear to fulfill such a task.[88] Instead, the Coherence Requirement must be seen as imposing an additional requirement: The legislator is largely free in its choices regarding the fundamental charging decision and tax rates. Only once it has taken that choice, it needs to implement such choices in a coherent manner.

This structure translates into a structure of reasoning: If the Coherence Requirement were but a concretization of the ability-to-pay principle, the tax object would be derived – admittedly with some degrees of freedom – by way of deductive reasoning from such principle. Yet this is not how the Constitutional Court construes the Coherence Requirement: Unlike the ability-to-pay principle, the Coherence Requirement is not based on values that would be prior to the tax act in question and it is not about the concretization of such values. Rather, the tax legislator takes fundamental charging decisions, which then must be implemented in a coherent manner.

The approach entails reduced scrutiny in the first step regarding the fundamental charging decision and tax rates, which can be controlled for arbitrariness only, unless there are other constitutional grounds determining these decisions.[89] This appears convincing: these decisions not only reflect core political choices so that the democratic principle supports judicial restraint in this area. A control beyond mere control for arbitrariness and for distinction criteria disallowed under special equality principles would also be hardly feasible: The fundamental charging decision and the setting of rates also involve the complicated evaluation and balancing of several competing factors. Given that this is bound to produce winners as well as losers, there cannot be a meaningful scrutiny for necessity. Moreover, the fact that revenue raised through taxation goes to the general budget and must not be ear-marked, means that there is no value for tax which could be used for appropriateness control.

This leaves the question how the fundamental charging decision is to be ascertained. The answer is not one of hierarchy of norms between the fundamental charging decision and the rules in the respective tax law.[90] It cannot lie in the constitution, but must be found in the tax law itself. The tax law lays down the fundamental charging decision, which must be brought to light through an evaluation of the respective statute as a whole. The charging decision translates into a principle which then serves as a standard against which to measure the specific provision of the tax law in question. Such analysis may rely on the stated objectives in the legislative procedure. The legislator, however, but in rare cases explicitly explains what the internal system and its guiding principle or principles are supposed to be. The system must therefore be excavated from the text of the law and from materials

[87] Lehner (2002: 774), (2009: 187).

[88] See Ismer (2005: 102 et seqq.) with further references.

[89] Drüen (2010: 94); Lehner (2009: 191).

[90] Leisner-Egensperger (2013: 539).

accompanying the legislative procedure. In other words: The decision is to be found through inductive rather than deductive reasoning. Ideally, this is a discovery process as the legislators decisions are brought to the daylight and laid bare. Yet in truth, it must be seen that establishing what the system is, frequently requires value judgments.

Such inductive reasoning is not, as the proponents of the impossibility contention would have it,[91] infeasible. It is of course true that within a law, all norms are *a priori* of an equal rank. Yet the Coherence Requirement does not dispute this, but rather seeks to distill the principle behind these rules. The Impossibility Contention also ignores that similar problems pose themselves and are solved in other contexts. Statistics for example faces the problem of identifying outliers. Outliers are defined as extreme data points which are distant from other observations. An outlier may be an atypical observation which has an exceptional position or be the result of measurement errors.[92] It is possible to eliminate such outliers using *inter alia* the Maximum-Likelihood-Method or the Reweighted-Least-Squares-Method.[93] Just like identifying outliers, the identification of underlying principles requires value judgments as to what the principle is and what deviates. The identification will not always be unambiguous, but there undoubtedly are cases where such identification is possible.

The identification becomes even more difficult when there are several principles that the legislator pursues. In particular, the legislator's decisions are not necessarily monolithic, but may reflect the balancing of several principles. While the Constitutional Court also stated that the Coherence Requirement in itself does not allow the correct resolution of complex and disputed dogmatic questions,[94] this does not mean that the Coherence Requirement excludes that the legislator pursues several, conflicting purposes at the same time. The Court thus accepted the electricity tax rebates for energy intensive industries, which contravened the environmental purpose of the electricity tax, but were deemed necessary for protecting the competitiveness of domestic industry.[95] In theory, this does not imply that it is impossible to derive a system on rational grounds in this situation. Nevertheless, in practice, judicial restraint needs to be exercised so that the balancing of principles is left to the legislator.

Moreover, it must be seen that such reasoning requires a sufficient degree of coherence of the underlying laws. The dots of individual norms can only be connected to a coherent whole, which then becomes the standard against which to

[91] See above at 9.3.2 at the end.

[92] Auer and Rottmann (2015: 32).

[93] Dreger et al. (2014: 250 et seqq.).

[94] BVerfG, Decision of 12 May 2009, 2 BvL 1/00 (Provisions for Gratifications), 123 BVerfGE 111 at 123.

[95] BVerfG, Decision of 20 April 2004, 1 BvR 905/00, 110 BVerfGE 274 at 298 et seqq. Same view held by Wernsmann (2014: § 4 AO m.nos. 519 et seq.). For more details on the tax rebates see Ismer (2014).

measure the individual norms, when the law is not fragmented and devoid of unifying principles. Otherwise, the law can only be controlled for arbitrariness.

At the same time, the importance of the distillation of the principle for the outcome of the constitutional assessment means that great care needs to be taken that the legislator's decision, which forms the inductive basis for the Coherence Requirement, really exists. Otherwise, the reasoning would change from measuring the legislator against its own standards into measuring the tax law against an externally imposed standard. The Commuting Expense Case demonstrates the perils of determining what the legislative decision is. The Constitutional Court considered the deductibility of expenses related to the profession or business to be the relevant decision, which in its view had as a matter of principle to be deductible from the tax base. Yet scholars have, in my view convincingly, argued that commuting expenses involved an element of private consumption as the private sphere was also touched and that such mixed expenses have traditionally been considered as non-deductible.[96] Another currently pending case[97] concerns the deductibility of education and vocational expenses. The Constitutional Court will have to pronounce on the true meaning of the relevant causation principle (*Veranlassungsprinzip*): To what extent and under what conditions does it require that future professional activity be taken into account when assessing whether educational expenses must be deductible from the income tax base? The income tax act itself is mute on the matter. General doctrine would suggest the deductibility provided the connection between the expenses and the future activity is sufficiently close. Yet it may well be left for the legislator to decide when this condition is fulfilled for educational expenses.

The importance of establishing the fundamental charging decision is moreover underlined by the factual impact on the Constitutional Court's case law: Once the Court has determined what the fundamental charging decision is in a particular tax law, there can be a proliferation of rulings on deviations from such principle. Thus, the Coherence Requirement has had most impact on the income tax regarding the delimitation of private consumption and professional expenses. One may see also a certain penchant for relatively simple cases. Such penchant, however, should not be criticized. Quite on the contrary: This reflects the necessity of judicial restraint.[98] Interventions on the basis of the Coherence Requirement appear only justified where there is a clear basis for this.[99] While this does not imply that whole areas of tax law should be beyond the Court's coherence control, it also explains the clustering of income tax cases.

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[96] Müller-Franken (2009: 48 et seq.).

[97] BVerfG, 2 BvL 23/14 (not yet decided) following the referral by the BFH, Decision of 7 November 2014, VI R 2/12, 247 BFHE 25. On this see e.g. Thiemann (2015: 866).

[98] Such clarity requirement goes beyond a mere constituto-political argument, to which calls for judicial restraint often amount, see Thiemann (2011: 188 et seqq.).

[99] See also Dann (2010: 643 et seq.), who generally proposes to limit the control by the Federal Constitutional Court to instances where the Court is the most apt institution for fulfilling the task at hand.

9.4.2 Status of the Coherence Requirement: Shorthand Rather than Distinct Criterion

If one accepts the inductive nature of the reasoning of under the Coherence Requirement there still remains the question what its status is. Does the Coherence Requirement establish an obligation that goes beyond what would be binding under the general equality principle? The Federal Constitutional Court considers the Coherence Principle to be a concretization of the obligation that the tax legislator act in accordance with the equal burden principle (*Prinzip der Lastengleichheit*), which again follows from the constitutional equality principle. Yet it appears hardly conceivable that such process of concretization should create additional obligations. Otherwise, a different equality principle would exist for each area of law.[100] All this means that the Coherence Requirement should be regarded as a shorthand, which sums up certain aspects of the obligations that follow from the constitutional equality principle rather than a distinct criterion.

More important, however, is the ensuing question of how stringent the control is to be. As the above arguments advanced to demonstrate that the fundamental charging decision should be controlled for arbitrariness only do not apply regarding the implementation decisions, it is possibly to apply a proportionality test rather than a mere test for arbitrariness. The control of the implementation of the fundamental charging decision may thus be more stringent. Yet one may well wonder whether the need for a particularly good reason (*besonderer sachlicher Grund*) is really warranted by the constitution. The fact that a rule departs from a fundamental charging decision can arise both with respect to differentiations between persons and between situations, which under traditional equality principle would lead to very different control intensities.[101] One may also doubt the need for extra rules with respect to taxation. The near annihilation of the liberal party in the 2013 elections to the federal parliament, which was influenced by its successful calls for a totally unwarranted VAT privilege for hotels, shows that the democratic process does at least from time to time punish those who are responsible for the most egregious instances of incoherence. In any event, as the Coherence Requirement is but a shorthand for the constitutional requirements, the term "particularly good reason" should be interpreted so as to reflect the usual nuances regarding the control under the equality principle. Thus, the control intensity is influenced by the extent that (i) the rule is connected to personal characteristics with additional intensification when these characteristics are not disposable by the individual or approach the discrimination criteria prohibited by special equality provisions such as Article 3(3) of the Basic Law; (ii) that constitutional freedoms are involved; and (iii) the extent to which the person concerned can influence the criteria of differentiation. When interpreted in this way, the Coherence Requirement is a useful shorthand, which allows the structuring of the control of tax laws with respect to the constitutional equality principle

[100] Payandeh (2011: 611); Schmehl (2013: 470).

[101] Payandeh (2011: 593).

by serving as a *tertium comparationis* for identifying instances of unequal treatment.[102] At the same time, the shorthand should not get in the way of realizing that other more far-reaching constitutional requirements must be observed.[103]

A word of caution regarding the demands for system change seems warranted: It seems too far-reaching when the Court stipulates that the modification of an initial fundamental charging decision requires a minimum of coherence.[104] The democratic legislator needs to build consensus, which may often be of a fragmented nature. The resources available to it moreover will not always allow coherent reforms, but may take on a piecemeal character.[105] The position by the Constitutional Court moreover appears hardly logical: why should the destruction of a unifying fundamental charging decision run afoul of the equality principle when there is no obligation to create such a coherent system in the first place? The *actus contrarius* doctrine would certainly suggest otherwise. Lest not to endanger the democratic principle, the Court can thus only be understood as meaning that the legislator, when revisiting the fundamental charging decision, must not create outliers.

Finally, reasons to be skeptical may also exist with respect to the requirement of an explicit decision.[106] This unwritten criterion is gives particular value to legislative history and drafts, even though they are strictly speaking not part of the law. Yet it may be justified. This is not so much by its contribution to a focused decision

[102] Different view held by Payandeh (2011: 595 et seqq.).

[103] See Lehner (2009: 187).

[104] BVerfG, Decision of 9 December 2008, 2 BvL 1/07 et al. (Commuting Expenses), 122 BVerfGE 210, m.no. 79 et seqq.

[105] The judge Bryde has put such concerns succinctly when he writes in his dissenting vote on BVerfG, Decision of 30 July 2008, 1 BvR 3262/07, et al. (Prohibition of smoking in pubs and restaurants), 121 BVerfGE 317: "Kompromiss ist geradezu Wesensmerkmal demokratischer Politik. Das Bundesverfassungsgericht darf keine Folgerichtigkeit und Systemreinheit einfordern, die kein demokratischer Gesetzgeber leisten kann. Zwingt man den Gesetzgeber unter solchen politischen Rahmenbedingungen in ein alles oder nichts, indem man ihm zwar theoretisch eine – politisch kaum durchsetzbare – Radikallösung erlaubt, aber Ausnahmen und Unvollkommenheiten benutzt, die erreichten Fortschritte zu kassieren, gefährdet das die Reformfähigkeit von Politik." (Compromise is an essential feature of democratic politics. The Federal Constitutional Court must not require coherence and systemic purity which no democratic legislator can provide. When the legislator is forced to choose between all or nothing in such a situation by theoretically permitting a – politically hardly realizable – radical solution, but by using exceptions and imperfections to undo any progress made, this endangers the capacity of politics to undertake reforms. [My translation].). This view is shared by Schmehl (2013: 480). See also Vogel (1977: 103): "Eine Rechtsordnung lebt; ihr System gleicht nicht einer Konstruktionszeichnung, sondern weit eher einem Garten – meist einem etwas verwilderten –, in dem sehr verschiedene Gewächse nebeneinander gedeihen, sich oft auch gegenseitig in die Quere kommen, einander gelegentlich sogar erdrücken. Der Gärtner – der Gesetzgeber – ist mit Arbeit so überlastet, dass er nicht ständig an allen Enden für Ordnung sorgen kann." (A legal order is alive; its system does not resemble a construction plan, but a garden – mostly a wild one – in which very different plants grow alongside each other, oftentimes obstruct and sometimes even suffocate each other. The gardener – the legislator – is so overburdened with work that he cannot maintain order at all ends all the time. [My translation].).

[106] Musil (2014: 138 et seq.).

making process, but by the need for keeping the Coherence Requirement operational in a setting where a multiplicity of purposes exists and where the inductive reasoning of what the underlying principle pursued by the legislator really is.

9.5 Summary and Outlook

The German Federal Constitutional Court can be qualified as an activist court when it comes to the control of tax legislation.[107] This reflects widespread unease regarding the capability of legislators to produce tax laws of a sufficient standard.[108] The Coherence Requirement then hails better, more rational legislation.[109] In particular, it promises both to fend off excessive privileges and singular rules leading to a higher tax burden that are merely revenue motivated. Yet it is not clear whether the Court can live up to this ideal: Even leaving aside concerns about the legitimacy of "political decisions" from the Court, the practical results give grounds for concern. This is because the interventions of the Karlsruhe Court have at best a mixed track record with regards to improving rationality: inheritance taxation, which has been struck down three times in the last two decades, has become more complex and at the same time more unequal as exemptions for certain types of property with significant political clout have become more important. One may even wonder whether given the demands by the European Union prohibition of granting State Aid[110] the inheritance tax will survive at all – despite its credentials as being a highly progressive tax (at least in the next to top category, where inheritance tax planning is still too expensive) warranted by the constitution's social state principle (*Sozialstaatsprinzip)*.[111] This may also have to do with signs of compromise-making within the Constitutional Court. Indeed, the Court is challenged by the same demands of reaching consensus as the legislator.

All this means that the Court should exercise restraint and take into account whether its intervention can really be expected to lead to a more rational outcome. Particular care should be taken in order to ensure that the legislator's decision, which is taken as the inductive basis for the Coherence Requirement, really exists. Moreover, it has been shown that the Coherence Requirement does not impose demands of its own, but only serves as a shorthand for the demands by the equality principle. Such shorthand must not block the view of the underlying question of the intensity of control. In particular, there is a higher degree of control where exercise

[107] See Sect. 9.2 for a list of cases where tax legislation was struck out by the Court.

[108] See the references in Englisch (2010: 168).

[109] On this, see in particular Petersen (2014: 650–669); skeptical of such promises Dann (2010: 630).

[110] Ismer and Piotrowski (2015a: 1998).

[111] See the Dissenting Vote by Judges Baer, Gaier and Masing in BVerfG, Decision of 17 December 2014, 1 BvL 21/12 (Inheritance Taxation III), 2015 BStBl 50.

of constitutional freedoms is involved or where unalterable identity of persons is concerned.

Finally, it should be noted that the Coherence Requirement is not confined to German constitutional law.[112] Instead, parallel concepts can be found in the jurisprudence of the European Court of Justice on the Fundamental Freedoms.[113] Possibly even more importantly, it is becoming increasingly important in the context of EU State Aid law: Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) generally prevents Member States from granting advantages – including tax benefits – to certain enterprises, where such aid distorts or threatens to distort competition and affects trade between Member States. As the term "certain" indicates, the granting of advantages is prohibited by the provision only when it is selective.[114] In its landmark decision in the *Paint Graphos* case,[115] the ECJ has developed a very wide understanding of the concept of selectivity when it comes to taxation, by establishing a three-step test for selectivity. In the first step, the "normal taxation" under the national reference system, against which any derogations are measured, is determined.[116] The second step examines whether the measure in question constitutes a derogation from the reference system so that undertakings which are in a legally or factually comparable situation in light of the objective pursued by the tax system are treated differently.[117] Finally, in a third step, the ECJ examines whether it is possible to justify such derogation by the nature or internal structure of the reference system laid out in the first step. This three-step test can be understood as imposing a requirement of consistency on Member States: While the choice of tax base lies with the Member States, they have to transpose this choice in a logically consistent manner.[118] The exact portent of this requirement is currently not fully clear, but may well go beyond even the tremendous significance of the Coherence Requirement (*Folgerichtigkeitsgebot*) under German constitutional law.

From an institution design perspective, one may indeed consider tailored subsidy control instruments such as European Union state aid law, but also subsidy control under WTO law, superior when it comes to fend off excessive privileges. Whereas privilege control under the equality principle is aimed at extending the privilege and

[112] Drüen (2011: 44 et seqq.).

[113] Haslehner (2013: 737).

[114] On this and the following see Ismer and Piotrowski (2015b: 559).

[115] ECJ Joined Cases from C-78/08 to C-80/08, judgment of 8 September 2011, ECR I-7611 – *Paint Graphos*.

[116] ECJ Joined Cases from C-78/08 to C-80/08, judgment of 8 September 2011, ECR I-7611 – *Paint Graphos*, para. 49; ECJ Case C-6/12, judgment of 18 July 2013, not yet published – *P Oy*, para. 19.

[117] ECJ Joined Cases from C-78/08 to C-80/08, judgment of 8 September 2011, ECR I-7611 – *Paint Graphos*, para. 49; ECJ Case C-6/12, judgment of 18 July 2013, not yet published – *P Oy*, para. 19. Along similar lines: ECJ Case C-143/99, judgment of 8 November 2001, ECR I-8365 – *Adria Wien Pipeline*, para. 41; ECJ Case C-75/97, judgment of 17 June 1999 ECR I-3671 – *Belgium/Commission*, paras. 28 et seqq.; ECJ Case C-88/03, judgment of 6 September 2006, ECR I-7115 – *Portugal/Commission*, para. 54.

[118] Ismer and Piotrowski (2015b: 559).

thus always faces the problem of admissibility of the complaint – the legislator generally has two ways to remedy breaches of the equality principle and a taxpayer who is discriminated against is mostly not entitled to request extension of the privilege – subsidy control is triggered simply because the privilege is granted, and is directed at removing the privilege, not extending it. Regarding subsidy control, there is moreover no open rule of reason for justification; only a limited number of codified external reasons, if any, is provided. All this implies that rationality control might oftentimes work better using special instruments targeted at the problem than the rather general equality principle in its form as the Coherence Requirement. This not only calls for judicial restraint regarding privilege control under the equality principle, but also allows the Coherence Requirement to focus the attention on disadvantages, the intensity of which should increase not so much in line with the "enormousness" of the fiscal consequences, but follow recent general equality principle jurisprudence of the Federal Constitutional Court[119]: Such connection to the general dogmatics of the equality principle reduces the centrifugal powers of constitutional subsystems[120] and ensures rational decision making and wide-ranging coherence in the jurisprudence of the Constitutional Court.

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[119] BVerfG, Decision of 21 June 2011, 1 BvR 2035/07 (Student grants for students of medicine), 129 BVerfGE 49.

[120] Which are present in the jurisprudence of e.g. BVerfG, Decision of 9 December 2008, 2 BvL et al., 122 BVerfGE 210 at 230 with further references calling for a concretization of the equality principle depending on the area of law in question.

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Part IV
Judicial Review of Legislative Facts and Impacts

Chapter 10
Legislative Margins of Appreciation as the Result of Rational Lawmaking

Christian Bickenbach

Abstract Lawmaking means trying to influence the behaviour of citizens and the course of their lives, and one of the functions of the modern state is to improve the living conditions of its citizens. It is, however, the right of citizens to determine their own future and for that reason, Fundamental Rights can be barriers for the lawmaker. The lawmaker is allowed to intrude upon Fundamental Rights. However, every act has to be proportional and, in particular, suitable and necessary. Failing this, an act is unconstitutional. Logical reasons based on legislative fact-finding and prognosis are key elements of proportional law. The Federal Constitutional Court has the authority to control legislative power but if it controls parliamentary acts too harshly, it is in danger of breaking the separation of powers and the principle of democracy. If it controls parliamentary acts too cautiously, it is in danger of disregarding the protection of fundamental rights. Legislative margins of appreciation are a means of reasoning used in rulings by the Court to find a path between judicial activism and judicial restraint. German constitutional law does not contain a 'political question doctrine' that clearly points at the margins of appreciation to be granted to lawmakers. One of the most interesting questions of constitutional law is how to find and justify a system of legislative margins of appreciation that can be applied by the Federal Constitutional Court. This contribution tries to show that the internal legislative process influences legislative margins of appreciation and that, therefore, the Court has to control two key elements of the legislative process, i.e. legislative fact finding and prognosis.

Keywords Legislative margins of appreciation • Procedure of legislation • Legislative obligation • Separation of powers • Federal Constitutional Court

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10.1 Introduction

Legislative margins of appreciation are computationally easy to identify. They result from the binding force of the constitution over the lawmaker (X) divided by the density of judicial scrutiny exercised by the Federal Constitutional Court (Y). Margins exist whenever Y is less than X and the result is greater than one. If Y equals X, i.e. constitutional bindingness and the density of judicial scrutiny are congruent, the result is one and legislative margins do not exist. However, mathematics cannot solve the legal conflict that is inherent in the judicial review of legislative acts. Mathematics highlights the problem but does not replace constitutional interpretation or lead to rationality. The principles of democracy and the separation of powers can just as much be represented in figures as can the cognitive possibilities of Parliament be compared with those of the Constitutional Court. In fact, legislative margins of appreciation have to be determined in a "two-stroke procedure"[1] which has its starting point in the supremacy of the constitution over the legislation and finds its endpoint in the control exercised by the Constitutional Court, taking into account the possibility for and parameters of constitutional interpretation.

The constitutional limitation of legislation depends on the content of the constitution. To the extent that the constitution contains no directives and standards for legislative action the yardsticks for judicial review are also missing. The key for determining the contents of the Constitution, however, lies in the method of interpreting it, which in turn reflects the conception of the Constitution that the interpreter previously has *(Vorverständnis)*.[2]

The supremacy of the Constitution is enshrined in Art. 1 § 3, Art. 20 § 3, Art. 93 § 1 and Art. 100 of the Basic Law (Articles without reference to a law hereinafter refer to the Basic Law). Art. 20 § 3 binds the legislation to the constitutional order and for historical reasons Art. 1 § 3 highlights the direct binding of legislation to the Basic Law. Any legal action against legislation can be brought before the Federal Constitutional Court for review pursuant to Art. 93 § 1 (constitutional complaint) and Art. 100 (abstract and concrete norm review procedures), whereby the Court may declare a parliamentary act that violates the Basic Law null and void. On the other hand, however, constitutional law has a key political dimension, and is thus related to (and dependent on) reality, i.e. to societal circumstances. The normative force of the Constitution declines relative to the degree that citizens consent to it and, so, when the Constitution completely ignores social reality or is not able to cope with it, citizens' acceptance of the Constitution and hence its normative force may become compromised.[3] Therefore, the task of constitutional interpretation always comprises the substantiation of the Constitution in view of the current problems and cases to be solved by the Court.

[1] Jestaedt (2001: 1318); Lepsius (2011: 163–64).

[2] Hesse (1995: recital 1).

[3] Hesse (1995: recitals 42–43); Hesse (1959: 9 ff.).

This contribution follows the aforementioned "two-stroke procedure" by focusing first on the constitutional limitation of legislation. The Constitution provides the foundation and the boundaries for rational lawmaking. The focus of this paper is on the question of the relationship between legislative margins of appreciation and rational legislation exemplified in the adjudication of the German Federal Constitutional Court, i.e. the commitment to the Basic Law and the conditions of legislation necessary for the exercise of competing legislative authorities. The Court watches as a guardian over the Constitution[4] to ensure the supremacy of it and this control forms the counterpart to the bindingness of the Constitution over the lawmaker. The requirements exerted by the Constitution on the process of its concretion sets the pace for procedural rationality. The existence of legislative margins of appreciation is then no longer only a matter of substantive law, but the functional assignment of first and third power.[5] The following remarks build on the considerations above, which I have explained in more detail elsewhere.[6]

10.2 The Constitutional Limitation of Legislation as a Reason for Rational Lawmaking

Parliamentary laws are the result of political will. This will can be used to legitimate, induce or prevent changes. In any case, legislation is, more or less, always aimed at the future. This is what citizens expect from the State and representatives in Parliament.[7] But content and competence are limited and this can be seen in two legal matters which are extremely important in the case law of the Constitutional Court on legislative margins of appreciation: Fundamental Rights and the distribution of legislative power. Fundamental Rights protect the autonomy of individuals. Due to the federal structure of the German Federal Republic, the Federation and the States *(Länder)* work together in the exercise of legislative power for certain matters. The limits of legislative power are in general elastic because the Basic Law provides only a framework, however, if the (federal) legislator wishes to act or, conversely, not to act, it needs reasonable grounds. Otherwise it can be charged with arbitrariness and also risks correction by the Court.

[4] BVerfG, Judgment of 20 March 1952, 1 BvL 12/51, 1 BVerfGE 184 at 195, 197.

[5] Baer (2014: 122).

[6] Bickenbach (2014: passim).

[7] Meßerschmidt (2000: 153 ff.); Steinbach (2015: 268).

10.2.1 Fundamental Rights

For citizens the most important component of the Basic Law is Fundamental Rights. According to Art. 1 § 3 they bind the legislator and direct constitutional control.[8] Many of the Fundamental Rights have multiple and different functions. However, two functions are worth highlighting: the defensive function, which is the heritage of western liberal state thinking, and the protection function, which has been implemented and disseminated by the Court as well as by constitutional jurisprudence, but is also a legacy of modern state theory. Both functions express the supremacy of the Constitution which applies to all state bodies in terms of their legal obligations.

The Defensive Function

The legal obligation which is expressed in the defensive function is the duty of omission.[9] This means the duty of the legislature to abstain from making unnecessary legislation.[10] The reason for this requirement lies in the central role of the individual and in the importance of individual autonomy and reasoning, and it finds its legal basis in Article 1 § 1 (human dignity) and Article 2 § 1 (general freedom of action). Additionally, Article 1 § 2, which is based on the idea that every human being has inalienable rights, is the first and foremost right of freedom. Freedom is not a disorganized state of nature but a state of law that precedes the State. Fundamental Rights, which are standardised by the State, are based on this legal status. The natural right of freedom and the fundamental duty of omission originate from different places but are related and connected to one another.

Because of Article 1 § 3, the content and scope of the fundamental duty of omission must result from the Basic Law itself[11]; the supremacy of the Constitution and the justiciability guaranteed by Arts. 92 and 93 are otherwise difficult to ensure. To ensure effective binding, Fundamental Rights require therefore not only interpretation, but also adequate concretion *(hermeneutische Konkretisierung*) by the bodies involved in legislation. The text of any provision of the Basic Law is the starting point for this operation and, therefore, it is of great importance. But only together with the real-world fact situation related to the constitutional provision the scope of protection of a fundamental right will be sufficiently contoured. The reason for this approach is the epistemological premise that you cannot fully separate the knowledge and the application of law because it is a structured process.[12] The norm is a

[8] Breuer (1977: 38).

[9] Ossenbühl (2004: § 15 recitals 45–46).

[10] Poscher (2003: 156 f.); Baumeister (2006: 24).

[11] Dürig (1958: marginal no. 93, original first edition commentary).

[12] Müller and Christensen (2009: recital 191, 225).

result of specification.[13] This method has two consequences. First, it is inevitably case-related.[14] Second, the content and scope of a fundamental right are not fixed *a priori* and invariably for all time, but can change depending on the wording of the law.[15]

The standard for the content and scope of the concretion concretization of the fundamental duty of omission is the observance of the principle of proportionality by the legislature *(Übermaßverbot)*.[16] Its function is to limit the exercise of sovereign power on the basis of a fit-for-purpose test. The Basic Law contains no express legal provisions on this, however the constitutional validity of this principle is indisputable.[17] Jurisprudence and adjudication consider "Übermaßverbot" a constitutional requirement based on the rule of law and Fundamental Rights that is also addressed to the legislative bodies.[18] The Court has, over the course of time, developed a four-step control based on scientific considerations[19] which not only specifies and streamlines the defensive function of Fundamental Rights, but also operationalises the legislative margins of appreciation. A law is constitutional if: (1) it serves a legitimate purpose from the legal point of view; (2) the chosen means is suitable to promoting the achievement of this purpose; (3) the use of this means is necessary because no equally suitable, but less restrictive measure is available; and (4) the consequences for those who are affected are not disproportionate to the desired purpose.[20] If the legislator misses just one of these requirements, the individual is able to apply for sanctions for breach of the duty of omission, and to apply for the relevant piece of legislation to be repealed.[21]

The Protection Function

The legal obligation, which is expressed in the protection function, is the obligation to act (i.e. the obligation on the legislature to enact laws).[22] The reason for this obligation is the original purpose of the State and classic tasks include the protection of individual and collective legal interests from threats emanating from third parties and natural events. Freedom needs security and the basic prerequisite for this is the monopoly of state power.[23] However, the State has appropriated for itself over the

[13] Müller and Christensen (2009: recital 274 ff.).

[14] Hesse (1995: recital 45).

[15] Hesse (1995: recital 46).

[16] Extensive Bickenbach (2014: 297 ff.).

[17] Stern (1993: 165); Ossenbühl (1993: 154).

[18] BVerfG, Order of 15 December 1965, 1 BvR 513/65, 19 BVerfGE 342 at 348–49.

[19] Fundamental Lerche (1961: passim).

[20] For example BVerfG, Order of 13 June 2007, 1 BvR 1550/03, 118 BVerfGE 168 at 193; BVerfG, Order of 4 April 2006, 1 BvR 518/02, 115 BVerfGE 320 at 345.

[21] Bickenbach (2014: 348–49).

[22] Calliess (2006: § 44 recital 2).

[23] Extensive E. Klein (2010: § 19).

centuries more and more tasks whereas the individual is less able and willing to secure his own livelihood. The modern State is therefore, at least in much of Europe, also a welfare state and a State that aims to eliminate risks in order to ensure the well-being of it citizens (*Sozial- und Risikovorsorgestaat*).

The German Federal Constitutional Court was instrumental over the years to extend the meaning of the Fundamental Rights to become the legal basis of the legislator's obligation to act also – maybe even primarily – in the interest of the protection of individual rights. Relying on the Basic Law, the Court referred, in particular, to Article 1 § 1 sentence 2 according to which the Basic Law obliges all state authorities to respect and protect human dignity.[24] But if human dignity is the maximum value of the Basic Law around which the interpretation and application of all other constitutional standards must orient themselves, then it is obvious that the protection function of the State should be extended to those Fundamental Rights that are closely related to human dignity. This applies in particular to the protection of the rights to life and health according to Art. 2 § 2 sentence 1. The Court made this reference in its first decision on abortion where it required the state to protect and promote the unborn life.[25] In this context, it built on its own case law which considered Fundamental Rights not only as subjective rights of individuals, but also as an objective system of values that equally affects state and society.[26] But when Fundamental Rights have such an effect, they also need to contain obligations; otherwise the requirement to make a commitment to them is absent.

The content and scope of the obligation to act differs from the duty of omission in one main way. While the duty of omission is always sufficiently determined, since a piece of legislation or a measure of the state that affect the Fundamental Rights of citizens already exist, the content of the obligation to act is, however, mostly undetermined. The legislator has a number of means to protect legal interests from impairments. Art. 1 § 3 also applies to the protective function of Fundamental Rights but the legislative margin of appreciation is significant and in practice this leads to a mediatisation of the validity of Fundamental Rights. The breach of the obligation to act is therefore rare. An omission is only illegal if a particular regulation is necessary in order to provide a sufficient level of protection, or, if existing measures are evidently inadequate. In both cases the legislator violates "Untermaßverbot" (i.e the prohibition on insufficient action) which the Court established in its second decision on the criminalisation of abortion as a yardstick for the legislative obligation to act.[27] What requirements are placed by "Untermaßverbot"

[24] Cremer (2003: 235 ff.).

[25] BVerfG, Judgment of 25 February 1975, 1 BvF 1/74, 39 BVerfGE 1 at 41 – Abortion I; Bickenbach (2004: 374–75).

[26] Fundamental BVerfG, Judgment of 15 January 1958, 1 BvR 400/51, 7 BVerfGE 198 at 205 – Lüth.

[27] BVerfG, Judgment of 28 May 1993, 2 BvF 2/90, 88 BVerfGE 203 at 254 – Abortion II.

on the legislator can be only determined in the particular case because of the low imperative force of the obligation to act.

10.2.2 Competing Legislative Powers of the Federation and States

The Federal Republic of Germany is a federal state and therefore legislative powers are divided between the Federation and the States; but according to Arts. 72 § 1 and 74 § 1 many areas of legislation are subject to the dual legislative authorities of the Federation and States. In these areas the States have the authority to legislate as long as and to the extent that the Federation has not exercised its legislative power by enacting a law. The Federation does not have, however, an unlimited right to exercise its competence. For a number of areas of law, for example those listed in Art. 74 § 1, the Federation has, according to Art. 72 § 2 legislative authority only if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.[28]

Three points may be emphasised here. First, Art. 72 § 2 speaks of equivalence, not homogeneity. Second, the fact that there are different rules in the States cannot justify action on the part of the Federation.[29] Otherwise, Art. 72 § 2 would be as a barrier ineffective and the idea of federalism would be carried on ad absurdum. Third, the Court attaches to the term "require" a similar content as that given to it in the context of "Übermaßverbot". In this regard it is important to note that without federal regulation the targets in Art. 72 § 2 cannot be achieved at all, or at least only insufficiently.[30] In cases where the States have authority to enact rules, the Federation must, as in the case of the fundamental duty of omission, abstain from making regulations. Thus, the right of the Federation to legislate largely depends on the fact-finding carried out by the legislator. Moreover, the notion of "necessity" refers to the prognosis provided, because the improvement of living conditions and the impact of differing regulations on society and the legal and economic unity always look to the future.

[28] Extensive Herbst (2014: 317 ff.).

[29] BVerfG, Judgment of 24 October 2002, 2 BvF 1/01, 106 BVerfGE 62 at 145.

[30] BVerfG, Judgment of 24 October 2002, 2 BvF 1/01, 106 BVerfGE 62 at 149.

10.3 Legislative Procedural Obligations and Constitutional Bindingness

10.3.1 The Concretion of Constitutional Bindingness Through Rational Legislative Proceedings

Negative rights (for example the right of liberty and the duty of omission), positive rights (representing a claim the individual may have on the State, and the duty to act), and the conditions of legislation on matters of competing legislative authority (Art. 72 § 2) need to be concretized. Requirements imposed by the rule of reasonableness (principle of proportionality), the prohibition on insufficient action and Art. 72 § 2, which is a federal competence barrier, are based on fact-finding and prognosis. This implies knowledge of facts and resistance towards the charge of uncertainty. Most legal norms are forward-looking and based on forecasts.[31] Forecasts, however, may prove incorrect,[32] especially when they apply to a legitimate purpose, such as a hazard posing a risk to life and physical integrity–, or the suitability and necessity of a statute.[33] Constitutional concretization must also be rational concretization. Acknowledging where gaps lie in understanding is part of the process of augmenting knowledge and legislation is a procedure that helps to structure and control the process of gaining knowledge. Due to the supremacy of the Constitution the requirements of the procedure are not at the discretion of Parliament. If they were then Parliament would be largely able to determine the primacy of individual basic rights with its own procedure of application. For this reason the supremacy of the Constitution must be reflected in legislative proceedings. Constitutional jurisprudence in this context distinguishes between 'external' and 'internal' legislative processes.[34]

External Legislative Process

The Basic Law regulates legislative procedure in Articles 76–78 and in Article 82. Legislative procedure includes stipulations about: who can introduce a bill in the Federal Parliament *(Bundestag)*; the adoption of legislation by the Federal Parliament; the participation of the Federal Council *(Bundesrat)*; and certification by the Federal President *(Bundespräsident)*. The question of whether and to what extent the Federal Constitutional Court has to heed legislative margins of appreciation concerns only the procedure in the Federal Parliament. The great majority of bills introduced in Parliament are led by the Federal Government *(Bundesregierung)* but the democratic authority conferred on Members of Parliament gives Parliament

[31] Leisner (2015).

[32] Gusy (1985: 116 and 173); Breuer (1977: 38); Ossenbühl (1976: 501).

[33] Baer (2014: 121).

[34] Fundamental Schwerdtfeger (1977: 173 ff.).

a key role in legislation. The external legislative process of the Federal Parliament is described in Art. 77 § 1 sentence 1 according to which, "(f)ederal law shall be adopted by the Bundestag". This means that the application of Fundamental Rights is carried out by a constitutional body, although the Basic Law does not dictate how this must be done, and Art. 1 § 3 binds the legislature directly to basic individual rights.

Internal Legislative Process

The provisions enshrined in the Basic Law are silent on how intensively a bill must be considered, whether alternatives must be taken into account, or how informed Members of the Parliament must be before they are allowed to adopt a bill. Nor does the external legislative process say anything about whether or how legislative procedures should take care of practical (empirical) requirements such as the reasonableness rule, "Untermaßverbot", or the conditions for the right to legislate on matters of competing legislative authority. It gives a shape to legislative margins of appreciation, but no content. If the legislator wants to claim to have adopted a rational law, then it must carry out fact finding and prognosis. Otherwise, it risks being accused of wandering off track.

This gap of the Basic Law means that it lacks of a rationality proof in case of legislative proceeding. Debates in the theory of legislation about the existence of an internal legislative proceeding and the level of its binding effect focus on this point. There is agreement that the internal legislative process concerns the method of the decision-making process, questions of transparency as well as questions of procedure and voting.[35] On the one hand, the internal legislative process is concerned with requirements for parliamentary procedures in the form of statements about fact-finding, hearings and the justification of statutes.[36] On the other hand, it is concerned with the evaluation of alternatives, which presupposes the identification, integration and assessment of relevant interests.[37] Particularly interesting are the possible consequences that might result from a norm. Therefore, prospective legislative impact assessments are common in legislative procedures. They contain, for example, a prognosis as to the extent to which a statute is suitable and necessary to achieve the desired purposes. Indeed, such impact assessments are only one element of an internal legislative procedure, but nevertheless they make a contribution to the concretization of the rule of reasonableness, "Untermaßverbot", and the conditions for the right to legislate on matters of competing legislative authority. Therefore, they can contribute to rational lawmaking itself.

The relationship between internal legislative procedures and legislative margins of appreciation is evident. The greater the effort to secure facts and to evaluate

[35] Hölscheidt and Menzenbach (2008: 140).

[36] Meßerschmidt (2000: 828 ff.).

[37] Schwerdtfeger (1977: 178).

forecasts, the better the legislator is able to explain and to argue before the Federal Constitutional Court.

10.3.2 Rational Lawmaking Between the Duty and the Obligation to Reflect

Prospective legislative impact assessments are common in legislative procedures but that does not mean the constitutional bodies involved are committed to implementing them. Symbol for commitment of prospective legislative impact assessments and of comprehensive internal legislative proceedings is the question of the legislator's duty to reflect and to adopt 'good' law. The constitutional basis of these duties could be the direct subjection *(Bindung)* of the legislature to Fundamental Rights, the principle of democracy and the federal structure of the German State.

The commintment of the legislature to basic rights is a convincing reason for implementing regulatory impact assessments. Despite the duty of omission, the legislator may be forced to intervene in Fundamental Rights by the rule of reasonableness. In this case, however, the legislator may only act in full conscience, using all available knowledge, and considering all points of view and interests.[38] The same applies to the duty of the legislator to act, because legislative implementation regularly causes interventions into Fundamental Rights. In the context of democracy, however, the duty to protect means the protection of individual basic rights through rational and transparent procedures. Moreover, in the case of a parliamentary democracy the interactions between members of parliament and their efforts to reach consensus must also be considered. Federalism multiplies state structures and their coexistence and interaction is therefore complicated and needs careful concretization. This applies to both the executive and legislature.

It is doubtful whether Art. 1 § 3, Art. 20 § 3 and Art. 72 § 2 in conjunction with Art. 70 give reasons for a duty to reflect. Such a requirement would legalize political procedures,[39] require statements of reason for statutes, and the comprehensive documenting of procedures.[40] In contrast to the duty to reflect is the opinion, summarised in one sentence, that "The legislator owes nothing except the law."[41] Only the result counts. The decisive factor is whether or not the adopted law is constitutional. Further methodological and substantive requirements to legislative procedures do not exist according to this point of view. One argument in favour of this view is that the Basic Law says nothing about procedural obligations.[42] The concise formulation of Art. 77 § 1 could be a conscious decision of the constitutional legislator. There is

[38] Steinbach (2015: 272); Hölscheidt and Menzenbach (2008: 140).

[39] Meßerschmidt (2000: 819, 866–67).

[40] Hebeler (2010: 760).

[41] Geiger (1979: 141–42).

[42] Steinbach (2015: 271).

no need for the Constitution to say more about the adoption of laws, because it is a final regulation. It is possible to underpin this argumentation referring to the principle of democracy on both levels of constitutional law and theory of law, based on the principle of democracy constitutionally and theoretically. Parliamentary legislature takes place within the context of political discussions[43] and these discussions follow specific rules. State authority is based on democratic pluralism. Democratic-pluralistic state domination receives its impulses from society and is not committed to a specific rationality. The Basic Law does not transform legislation into an act of deduction and mere enforcement of the constitution *(Verfassungsvollzug)* but, for the most part, into an act of induction.[44] Legislative openness has so far share of constitutional openness. Hence, it suffices to say that, as shown above, the legislative duty to reflect faces many counter arguments.[45]

The direct subjection of the legislature to Fundamental Rights and the federalist system require on one hand concretization with an impact on legislative procedures. Methodological and procedural efforts are necessary to fulfil the constitutional requirements. On the other hand, parliamentary legislature is, as mentioned above, not an act of deduction and therefore the required inter-subjective consensus must be renewed again and again. This synthesising of views results from the obligation to reflect during legislative proceedings and is a consequence of constitutional concretization. An 'obligation' may be read as a duty to behave in a particular way. Obligations do not force, but the violation of a duty results in disadvantages. An obligation is violated if someone contravenes in a way attributable against its own best interests.[46] In the constitutional law literature many writers recommend legislative obligations.[47] Because of the direct subjection of the legislature to individual basic rights these obligations especially apply to the disclosure of pursued purposes and the justification of the suitability and necessity. Because of the requirements contained in Art. 72 § 2 the obligations apply to the necessity of a federal act. Legislative obligations particularly refer to legal fact-finding and standards of forecasts, especially the basis and methods used. As a result, they protect Fundamental Rights as well as the requirements of Art. 72 § 2 and compensate preferably knowledge deficits.

[43] Cornils (2011: 1059); Hoffmann-Riem (2005: 31 ff.).

[44] Waldhoff (2007: 333); Hesse (1995: recital 20).

[45] See also BVerfG, Judgment of 18 July 2012, 1 BvL 10/10, 132 BVerfGE 134 at 163.

[46] 57 BGHZ 137 at 145; Merten (2015: 359).

[47] Hofmann (2007: 395), 440; Meßerschmidt (2000: 875 ff.); von Arnim (2015: 542) Schwarz/Bravidor (2011: 659); Brandner (2009: 215); Waldhoff (2007: 343).

10.4 Control by the Federal Constitutional Court of the Lawmaker's Subjection to the Constitutional Order

10.4.1 The Federal Constitutional Court, Guardian of the Constitution

The Constitutional Court according to Article 92 is part of the judicial power and according to § 1 section 1 of the Federal Constitutional Court Act, the Court is an autonomous and independent court of the Federation. The judges of the Court are personally and objectively independent and subject only to the law. Arts. 93 and 100 of the Basic Law give the Court the authority to verify the constitutionality of actions of all state powers. The control of parliamentary acts is an exclusive competence of the Constitutional Court. Only the Court may declare legislation unconstitutional. Its task is to maintain the integrity of the Constitution [48] and this consists in bringing the supremacy of the Constitution to bear on all public authorities.[49] For this reason, the matters it deals with are often politically significant, the scale for decision-making is normative, and its judgments and orders have political impacts. Therefore, the Constitutional Court is not only a court, but also a supreme constitutional body with powers directly delegated to it by the Constitution. Furthermore, it is equal to the other constitutional bodies of the Federal President, Federal Parliament, Federal Government and Federal Council. The Constitutional Court is, hence, not just a court but an instrument of government, though its share in governance is restricted.[50] Therefore, one of the key topics in German constitutional law is the relationship between law and politics.[51]

The Federal Constitutional Court sets its standards by one yardstick: the German Basic Law. The Court is the guardian of the Constitution and must at the same time interpret the Constitution. To avoid a violation of fundamental structural principles, especially the separation of powers and the principle of democracy, legislative control has to take place by a concretization, which is juridical and objective. What does that mean? First, the Court has to observe the wording of the Basic Law and its system.[52] Consequently, the powers of the Court are limited to judicial review and the annihilation of pieces of legislation. Legislation is not the task of the Court. Second, the Court has to consider the economic and social development of society, because the normative power of the Constitution is based on the validity of the Constitution, though normative power is not guaranteed by validity alone.[53] For that

[48] BVerfG, Judgment of 20 March 1952, 1 BvL 12/51, 1 BVerfGE 184 at 195, 197.

[49] Grigoleit (2004: 62–63).

[50] Hesse (1995: recital 566, 669).

[51] Grigoleit (2004: 64 ff.).

[52] Schulze-Fielitz (1997: 14).

[53] Hesse (1995: recital 43).

reason the Constitutional Court has not only to control the duties and procedural obligations of the Parliament, it also has to control the factual premises underlying statutes including the methods and prognoses. As with legislation, the judicial review of compliance with the principle of proportionality and the rule of reasonableness ("rule of reason"), "Untermaßverbot", and the conditions for the right to legislate on matters of competing legislative powers, needs facts and information.[54] It is not possible to demonstrate *ex ante* the accuracy of a prognosis, however, we can judge whether it is founded on rational methods. The Constitutional Court is not only a court of appeal, it is also a court of trial. This result may be surprising at first glance, but it is compulsory and has a clear legal basis. In accordance with § 26 section 1 sentence 1 of the Federal Constitutional Court Act the Court has to use all necessary evidence to attain the truth.[55]

Because of the number of proceedings and the extent of its workload, the Court cannot examine all evidence in detail; such a requirement would place an intolerable strain on its resources. The rule "impossibilium nulla est obligation" applies to the Constitutional Court, too. In addition, the Court does not want to give rise to the accusation of "usurpation of competences, since if judges indulge in extensive activities of concurring prognoses in every case[56] the legislative power of the Parliament would be severely compromised. In fact, this is where legislative margins of appreciation come into play.[57] The scope of these margins depends also on the fulfilment of the obligations in legislative procedure, and fulfilment of the obligations is furthermore important for the judicial duty of fact-finding.

10.4.2 Legislative Margins of Appreciation in the Jurisdiction of the German Federal Constitutional Court

Legislative margins of appreciation are a very important line of reasoning in rulings by the Constitutional Court. They allow the Court to declare legislative acts constitutional which, without this line of reasoning, could be claimed unconstitutional. Generally they are synonymous with the scope and period of time allowed to the Parliament in situations of uncertainty, and provide the necessary latitude for the necessary fact-finding and prognosis required by legislative acts.[58] The scope of the margins of appreciation generally depends on the affected legal interests and the number of areas and factors touched on by the proposed statute.[59] Normally the

[54] Meßerschmidt (2000: 937 ff.); Baer (2014: 121).

[55] Extensive Brink (2009: 3 ff.).

[56] Steinbach (2015: 273).

[57] Gusy (1985: 32).

[58] Bickenbach (2014: 134); Raabe (1998: 113).

[59] For example BVerfG, Judgment of 17 December 2013, 1 BvR 3139/08, 134 BVerfGE 242 at 338.

Court determines the scope case by case, while routines of handling evidence review, which might provide more legal certainty, do not exist.

Legislative margins of appreciation were originally the hallmark of constitutional adjudication in economic matters and policies. Therefore the freedom of occupation and profession (Art. 12 § 1) has lost part of its binding impact. The Court wanted to avoid imposing on the legislature too many requirements in the field of economic legislation, and during the 1960s declared many restructuring and measure acts constitutional with respect to legislative margins of appreciation.[60] From this point the Court proceeded to apply the notion of margin of appreciation to other fields beyond economic issues. One such issue where this occurred was the matter of public and private health insurance where,[61] once again, the freedom of occupation and profession was affected. Today the Constitutional Court has openly stated that the Parliament has considerable margins of appreciation in matters of the labor market, social justice and finance.[62] It is important to note, however, that the Court, whilst accepting the margin of appreciation, does not tolerate violations of the aforementioned freedoms.[63]

Issues where legislative margins of appreciation in the jurisdiction of the Constitutional Court have played a role beyond economic regulation include the classification of cannabis use as illegal and sibling incest as a criminal offence.[64] Other subjects include the legal organization of universities in view of structural hazards for the academic freedom (Article 5 § 3 sentence 1)[65] and even the protection of life and physical integrity (Article 2 § 2 sentence 1). The latter is remarkable for two reasons. The first is criminalisation of the act of carrying out abortion. In 1975 the Court declared the time-phase solution for the termination of pregnancy unconstitutional – the relevant parliamentary act was declared void – and abortion was asserted to be a criminal offence.[66] In its second judgment in 1993 the Court answered in the affirmative for legislative margins of appreciation in relation to a new protection concept without punishment.[67] The 18 years between 1975 and 1993 had shown that criminal law was not an effective instrument to fulfil the state duty to protect unborn life. The second point is the protection against technical risks. On the one hand, the Constitutional Court is willing to declare the use of dangerous

[60] Bickenbach (2014: 23 ff.).

[61] BVerfG, Order of 31 October 1984, 1 BvR 35/82, 68 BVerfGE 193 at 220; BVerfG, Order of 13 September 2005, 2 BvF 2/03, 114 BVerfGE 196 at 244 ff.

[62] BVerfG, Order of 23 October 2013, 1 BvR 1842/11, 134 BVerfGE 204 at 227.

[63] BVerfG, Order of 14 January 2014, 1 BvR 2998/11, 135 BVerfGE 90 at 118; BVerfG, Order of 3 July 2007, 1 BvR 2186/06, 119 BVerfGE 59 at 87.

[64] BVerfG, Order of 9 March 1994, 2 BvF 42/93, 90 BVerfGE 145 at 181; BVerfG, Order of 26 February 2008, 2 BvR 392/07, 120 BVerfGE 224 at 245.

[65] BVerfG, Order of 31 May 1995, 1 BvR 1379/94, 93 BVerfGE 85 at 95; BVerfG, Order of 26 October 2004, 1 BvR 911/00, 111 BVerfGE 333 at 355; but otherwise BVerfG, Order of 24 July 2014, 1 BvR 3217/07, 136 BVerfGE 338 at 361–62 and BVerfG, Order of 20 July 2010, 1 BvR 748/06, 127 BVerfGE 87 at 124.

[66] BVerfG, Judgment of 25 February 1975, 1 BvF 1/74, 39 BVerfGE 1 at 59–60 – Abortion I.

[67] BVerfG, Judgment of 28 May 1993, 2 BvF 2/90, 88 BVerfGE 203 at 265–266 – Abortion II.

technologies constitutional if there is a legal basis.[68] The proverbial "German Angst" is nevertheless common because the Court is, on the other hand, willing to accept strictly precautionary acts. It argues with legislative margins of appreciation for rating the risks.[69]

Finally it is worth highlighting that the Court approves legislative margins of appreciation not only to fulfil the constitutional duty of omission and the duty to act on the basis of Fundamental Rights, but also with regard to the existence of the requirements of Article 72 § 2 in the context of competing legislative powers.[70]

10.4.3 The Connection Between Legislative Margins of Appreciation and Rational Legislation: Fact-Finding and Prognosis Proceedings in the Case Law of the German Federal Constitutional Court

Requirements for a Rational Internal Process of Legislation

The jurisdiction of the Federal Constitutional Court in the domain of creating a rational internal process of legislation was marked for a long time by great restraint. The Court has repeatedly emphasized the autonomy of the Parliament in legislative proceedings and regarded even laws that were adopted quickly under pressure as constitutional. It has tended to be the view of the Court that if the Parliament needs more time, the lawmaker is free to discard a bill, when the pressure of time prevents proper consideration of it.[71] Judicial restraint has extended to arranging hearings with experts and the scope of fact-finding, and the Court refused to recognise a duty of Parliament to hear stakeholders and interest groups during proceedings.[72] On occasion it has even been unnecessary for the reasons in favour of so-called 'constitutional' acts to be discussed or documented in preparatory materials.[73] The Court has regularly only controlled the compliance of the external legislative procedure which is determined by Arts. 76, 77 and 78. In the eyes of the judges the internal process of legislation was for a long time basically treated as a political question.

[68] BVerfG, Order of 8 August 1978, 2 BvL 8/77, 49 BVerfGE 89 at 90 – Kalkar; BVerfG, Order of 20 December 1979, 1 BvR 385/77, 53 BVerfGE 30 at 55–56 – Mülheim-Kärlich.

[69] BVerfG, Judgment of 24 November 2010, 1 BvF 2/05, 128 BVerfGE 1 at 39 – Genetic Engineering.

[70] BVerfG, Judgment of 28 January 2014, 2 BvR 1561/12, 135 BVerfGE 155 at 204; BVerfG, Judgment of 24 October 2002, 2 BvF 1/01, 106 BVerfGE 62 at 145.

[71] BVerfG, Order of 14, 1 BvR 307/68, October 1970, 29 BVerfGE 221 at 233.

[72] BVerfG, Judgment of 5 March 1974,1 BvR 712/68, 36 BVerfGE 321 at 330.

[73] BVerfG, Order of 19 December 2012, 1 BvL 18/11, 133 BVerfGE 1 at 14.

Two newer judgments of the Constitutional Court have changed this view. The problem of the parliamentary obligation of reflection as a part of the internal process of legislation is now in the limelight of constitutional jurisprudence in Germany.[74]

The first judgment deals with the grade and salary of tenured university professors. The view of the Court:

> The legislature has broad freedom of drafting when putting into concrete terms the state's obligation, resulting from Article 33.5 GG, to take care of civil servants' welfare in a manner that is in keeping with their office. The guarantee, contained in Article 33.5 GG, of a maintenance that is 'in keeping with the office' merely constitutes a constitutional directive for concretisation that establishes an obligation for the legislature enacting laws on remuneration. A cautious review of the non-constitutional provision by the Federal Constitutional Court, which is restricted to applying the standard of evident inexpediency, corresponds to the legislature's broad freedom of drafting. For the concretisation directive of Article 33.5 GG being observed all the same, procedural safeguards in the shape of obligations to state reasons, to examine and to observe are required; such obligations apply with regard to the continuous updating of the amount of the salary in the shape of regular adaptations of salary as well as with regard to structural reorganisations of the law on remuneration in the shape of system changes.[75]

In this judgment the Court refers to its previous judgment on the obligation of the legislator to grant social benefits on the minimum substance level considering the constitutional value of human dignity. The view of the Court:

> To lend concrete form to the claim, the legislature has to assess all expenditure that is necessary for one's existence logically and realistically in transparent and expedient proceedings according to the actual needs. To this end, it must initially assess the types of need, as well as the costs to be expended for them, and on this basis must determine the amount of the overall need. The Basic Law does not prescribe to it a specific method for doing so; it may, rather, itself select the method within the bounds of aptitude and expedience. Deviations from the selected method however require a factual justification. (…) However, it requires a review of the basis and of the method of the assessment of benefits in terms of whether they do justice to the goal of the fundamental right. The protection of the fundamental right therefore also covers the procedure to ascertain the subsistence minimum because a review of results can only be carried out to a restricted degree by the standard of this fundamental right. In order to ensure the traceability of the extent of the statutory assistance as commensurate with the significance of the fundamental right, as well as to ensure the review of the benefits by the courts, the assessment of the benefits must be clearly justifiable on the basis of reliable figures and plausible methods of calculation.[76]

The Federal Constitutional Court has confirmed this jurisdiction by this judgment in case of the necessary payments according the Asylum Seekers Benefits Act.[77]

However, these judgments are not as remarkable as it may seem at first. The Court has previously provided comparable judgments in other areas. In cases, for instance, which dealt with local territorial reforms and in the case of the South

[74] Merten (2015: 357).

[75] BVerfG, Judgment of 14 February 2012, 2 BvL 4/10, 130 BVerfGE 263 at 301–302.

[76] BVerfG, Judgment of 9 February 2010, 1 BvL 1/09, 125 BVerfGE 175 at 225–226.

[77] BVerfG, Judgment of 18 July 2012, 1 BvL 10/10, 132 BVerfGE 134 at 162 ff.

Bypass in Stendal it noted that the legislator has a duty to determine all applicable facts and has to weigh all the interests of those involved against each other.[78] In a similar fashion the Court has made findings regarding the proof of the defining characteristics for legislation on matters of competing legislative authority. The legislator has the obligation to determine carefully the required facts.[79] These cases share the fact that in the Court's consideration of them the rule of reasonableness was not checked or was not important. The constitutional judicial review of planning laws or under Art. 28 § 2 (autonomy of municipalities) and Art. 72 § 2 do not include the principle of proportionality in the same manner as in the review of legislative interventions into Fundamental Rights. The legislative proceedings seem to be thus higher the more that the strict requirement of the rule of reasonableness is lacking.[80] Herein lies the commonality with the judgments in the case of the salary of tenured university professors and the case of entitlement to a minimum subsistence level. Art. 1 § 1 (human dignity) prohibits all interventions and the principle of proportionality is not applicable. Art. 33 § 5 and the traditional principles of the professional civil service enshrined in this provision include and protect the right of adequate remuneration, which does not lend itself to concretion within the framework of the proportionality test.

The Influence of Internal Legislative Proceedings on Legislative Margins of Appreciation

On the question of what impact internal legislative proceedings have had on legislative margins of appreciation, especially in the field of Fundamental Rights, the Constitutional Court has answered twice: in the Corporate Co-Determination judgment and the Second Abortion judgment. The legislature may assume that its prognosis is acceptable when it has collected the available material for a proper and reasonable assessment. The view of the Court is, however, that the legislator must exhaust the material and sources in order to estimate the expected impacts of legislation as reliably as possible and to avoid a violation of constitutional law. These are procedural requirements. If the legislator follows these requirements, its prognosis in the matter is acceptable. Thus, procedural requirements establish legislative margins of appreciation, which the Constitutional Court has to note in its judgments.[81] In order to successfully pass the stage of judicial review the legislator has to use and evaluate the available material with care to achieve a reliable prognosis about the

[78] BVerfG, Order of 27 November 1978, 2 BvR 165/75, 50 BVerfGE 50 at 51; BVerfG, Order of 12 May 1992, 2 BvR 470/90, 86 BVerfGE 90 at 112; Constitutional Court of Rhineland-Palatinate, Judgment of 8 June 2015, VGH N 18/14 (DVBl. 2015, 1057).

[79] BVerfG, Judgment of 24 October 2002, 2 BvF 1/01, 106 BVerfGE 62 at 144; BVerfG, Judgment of 27 July 2004, 2 BvF 2/02, 111 BVerfGE 226 at 255.

[80] In a similar vein Lepsius (2011: 207–208).

[81] BVerfG, Judgment of 1 March 1979, 1 BvR 532/77, 50 BVerfGE 290 at 333–334 – Corporate Co-Determination.

possible impacts and only then is it possible to estimate whether the legislative assessment is sufficiently grounded.[82] In both judgments referred to above, the legislator fulfilled these requirements.[83] Legislative margins of appreciation are thus not only temporary margins depending on the judgment of the Court, but they are also substantive margins.

10.5 The Normative Connectivity Between Legislative Margins of Appreciation and the Fulfilment of Legislative Obligations During the Internal Process of Legislation

The Federal Constitutional Court has so far not interpreted the relationship between legislative margins of appreciation and legislative obligations in the sense of 'normative connectivity'. But there are good reasons for such a normative connection and a corresponding judicial practice in all judgments.

The starting point for such a view is the connection between the obligations of the legislator in the legislative procedure and judicial fact-finding (see above Sect. 10.4.1). Due to the workload involved, the Court, on the one hand, cannot examine the evidence in all procedures in detail. On the other hand, normativity must not surrender in front of factuality. Therefore, the Court needs a legal reason for the substantive reduction of § 26 section 1 sentence 1 Federal Constitutional Court Act. This follows from the principle of the separation of powers, which requires a clear definition and adequate allocation of the responsibilities of the three state powers in order to make them work like a system of communicating tubes. Just as no constitutional body is allowed to prevent the exercise of competences which are conferred upon another constitutional body, no competence may be transferred to a constitutional body which is not entitled to receive it. The prohibition of transfer corresponds to a prohibition of taking inadequate tasks, amounting to an abuse of powers.[84] The control of legal fact-finding and prognosis for accuracy and rationality by the Constitutional Court is a sensible task but its scope is limited. The same applies to the Parliament as the authoritative legislative institution. Know-how, organizational equipment, the ability to prognosticate, composition and procedural rules[85] indicate a potentially substantial expertise. However, parliamentary capacities to gather and process information are limited, moreover nothing that is impossible can be required by law.[86] Therefore, last but not least, no duty but only an obligation to reflect exists (see above Sect. 10.3.2).

[82] BVerfG, Judgment of 28 May 1993, 2 BvF 2/90, 88 BVerfGE 203 at 263 – Abortion II.

[83] The reformed § 218 StGB was unconstitutional for other reasons.

[84] Hesse (1995: recital 489).

[85] Cf. Schulze-Fielitz (1997: 10).

[86] Steinbach (2015: 274).

The prohibition on the transfer of powers and the prohibition on the misuse of transferred competences between institutions, which follows from the principle of separation of powers, do not modify Art. 1 § 3 or Art. 20 § 3, i.e. the direct binding effect of Fundamental Rights to the legislature, executive and the judiciary as well as their commitment to law and order. A constitutional body or – in the case of the legislature – a group of constitutional bodies (i.e. the Federal Government, Federal Parliament, Federal Council and Federal President) must provide a constitutional concretization. The need for constitutional concretization is prescribed by the Basic Law and makes clear why the relationship between the judicial duty of fact-finding and the obligation of the legislator in the legislative procedure is not only useful, but a manifestation of normative connectivity. The fact-finding by the Constitutional Court is thus temporally and functionally complementary to the obligations of the legislator in the legislative procedure.[87] In consequence, this leads to the idea of compensation.[88] Under the premise that parliamentary legislative proceedings and judicial review are equivalent, deficits in constitutional concretization in the legislative proceedings may and must be compensated for by the Constitutional Court.

To what extent the Court has to compensate for missing facts to judge the rationality of a legislative prognosis depends on the substantive constitutional law, for example on Fundamental Rights and the distribution of competences between the Federation and the States. The scope of legislative duties based on the material constitutional law (for example the duty of omission and the duty to act) determines the obligations in legal proceedings and is therefore prejudicial for the scope of judicial review by the Court. In particular, the extent of the legal proceeding obligation depends on which fundamental right and which function of a basic right (negative or positive) is involved. It also depends on the specificity of the particular subject area, the possibilities to make a sufficiently secure judgment and the importance of the legal interest at stake.[89] When the legislator fulfils its obligations and is able to prove this (*Darlegungslast*), the Federal Constitution Court may limit its review to a plausibility check.[90] The density of judicial scrutiny is then less than the substantive standard. In other words, the legislator may take advantage of legislative margins of appreciation.

The impact of normative connectivity can be illustrated clearly in cases involving the rule of reasonableness that regularly based on prognosis: the existence of at least a legitimate purpose–such as a hazard or risk to life and physical integrity –, the suitability of a statute to promote the achievement of a particular purpose and the necessity of a statute. Depending on the possibilities that the subject area offers, the legislator has to make for these levels of the rule of reasonableness in the legislative proceeding rational and reasoned statements. Once this is done the Constitutional Court is allowed to limit its review to a plausibility check and in situations where the

[87] Cf. Meßerschmidt (2000: 865 ff.).

[88] See in general Voßkuhle (1999: 49–50).

[89] BVerfG, Judgment of 1 March 1979, 1 BvR 532/77, 50 BVerfGE 290 at 333 – Corporate Co-Determination.

[90] In the same vein Meßerschmidt (2000: 875 ff.).

legislator has not fulfilled its procedural obligations the Court has an obligation of investigation. If judges feel overcharged, they have to decide based on the burden of proof. The State, i.e. Members of Parliament or judges, need to explain the legality of interventions into individual basic rights and if they are unable to do so, the intervention is unconstitutional.[91]

10.6 Conclusion

It is not possible to explain or to understand the existence of legislative margins of appreciation without explaining and understanding the content and supremacy of the Constitution. The supremacy of the Constitution is the reason for the obligations attached to internal legislative proceedings. It is important to note, however, that these obligations are not duties. The lack of fact-finding and the lack of reflection by Members of Parliament do not force the Constitutional Court to declare a statute unconstitutional; but without reflection the legislative margins of appreciation do not exist. The relationship between the legislative margins of appreciation and the fulfilment of legislative obligations is characterised by normative connectivity, based on the principle of the separation of powers and the idea of compensation. Thus, legislative margins of appreciation, procedural standards and compensatory interventions by the Constitutional Court work like a system of communicating tubes.

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[91] Bickenbach (2014: 520).

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Chapter 11
Due Post-legislative Process? On the Lawmakers' Constitutional Duties of Monitoring and Revision

A. Daniel Oliver-Lalana

Abstract In a considerable series of rulings the German Federal Constitutional Court has construed the Bonn Basic Law as requiring lawmakers to monitor the impacts of statutes and to revise or adjust them in the light of evolving legislative facts, which mostly compensates for the Court's deference to legislative prognoses under conditions of high epistemic uncertainty. The legisprudential tenets of retrospection and correction are thereby converted into legal-constitutional duties (supposedly) binding on legislatures. Drawing on German case law, this chapter discusses the rationale, scope and shortcomings of this strand of review, and underlines the difficult role of ex post evaluation in the judicial control of legislation. A twofold thesis is submitted. On the one hand, a post-legislative doctrine may be expected to provide a dynamic protection of fundamental rights by smoothing the way for the courts to second-guess the constitutionality of statutes in retrospect without intruding into lawmakers' primary competences to deal with social complexities. But, on the other hand, the German experience illustrates that such a doctrine is not easy to apply and remains under-enforced for the most part, which casts doubts on whether it is an effective safeguard of fundamental rights over time or whether, instead, it has a merely rhetorical or dilatory function. Finally, I argue that approaches to the constitutionalization of ex post evaluation like that of the German Constitutional Court, while being positive on the whole, should not obscure the problems that arise from the ex ante perspective under which legislation is usually reviewed, and suggest making more space for evaluation and impact arguments in constitutional review.

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Retrospective evaluation of legislation, ex post regulatory impact assessment or post-legislative scrutiny are not only familiar topics in lawmaking, regulation and public policy scholarship, but have also reached the agendas of many institutions on the national and international level. Insofar as legislative actions must be taken under conditions of uncertainty and risk, follow-up controls and eventual adjustments in the light of ongoing social or techno-scientific developments belong to the essential tasks of reasonable lawmakers. For one thing, whether and how these tasks are actually fulfilled, and who carries them out, is a matter of political discretion. Yet, judges may also interpret constitutions or charters of rights as imposing legal requirements in this respect. That is what the German Federal Constitutional Court (hereinafter, BVerfG) has done in a series of rulings dating back to the 1960s. The "duties" to observe or monitor the evolution of legislative facts and the impact of statutes, as well as to revise or adjust them accordingly *(Beobachtungs- und Nachbesserungspflichten)*[1] are so often asserted in German constitutional case law that one would think that a standard of due post-legislative care has been added to the pool of judicial review doctrines, which could eventually make the fate of a piece of legislation dependent on whether such duties are honored or not. A discussion of the extent to which this impression is correct shall be my focus here. I shall concern myself with the scope, rationale and feasibility of the monitoring and revision demands the BVerfG makes as a compensation for prognostic uncertainties about legislative facts and impacts, taking these demands as an example of the difficult place of evaluation-related criteria within the judicial control of legislation. In this connection, a twofold thesis is advanced. On the one hand, I argue that a post-legislative doctrine is a positive turn in judicial review inasmuch as it enhances the protection of rights over time by smoothing the way for judges to second-guess the constitutionality of certain statutes in retrospect, whereby the prior competence of legislatures to deal with complex social problems does not become eroded. On the other hand, however, this doctrine proves difficult to apply and remains largely under-enforced, so that doubts arise as to whether it really assures a dynamic protection of rights or is used, rather, as a persuasive expedient playing mainly a rhetorical role. To flesh out these claims, I shall proceed as follows. After touching upon the seemingly obvious legisprudential tenets behind this doctrine (Sect. 11.1),

[1] In this piece, *Beobachtung* is translated as monitoring or observation; *Nachbesserung* as revision; and *Korrektur* as correction, whereby the two latter notions are used synonymously (dissenting, Choi 2002: 79 ff.; cf. Mayer 1996: 22 ff). A range of related terms appears in this context with slightly different meanings or connotations, e.g. *Überprüfung* (checking); *Prüfung* (examination); *Anpassung* (adaptation); *Verbesserung* (improvement); *Beseitigung* (removal); or *Berichtigung* (correction), but I will not enter into further terminological clarifications. As explained below (Sect. 11.2), the monitoring and revision duties are here considered jointly as "the post-legislative doctrine". On the phrase "duty" as applied to lawmakers, see Sect. 11.4.

I introduce several cases that have helped to shape it (Sect. 11.2), and try to elicit the presuppositions of the lawmakers' duties to monitor and revise, making sense of them as a prolongation of the due legislative method standard which has also been developed by the BVerfG (Sect. 11.3). Following this I address some of the major obstacles posed by these duties (Sect. 11.4). While not all of them are likely to be surmounted, the increasing weight of the "due post-legislative process" in judicial review can be expected to contribute to a better protection of fundamental rights, particularly if the courts extend the ex ante temporal perspective under which they normally examine legislation, thus broadening the room for the argument "from evaluation" (Sect. 11.5).

11.1 The Prognostic Fallibility of Lawmakers

In attempting to shape social reality, legislation presents an inherently prospective enterprise, for it always relies on implicit or explicit assumptions about the evolution or the continuation of states of affairs, as well as about how the enacted law will affect these. Since human cognitive and predictive capacities are finite, one can never be certain beforehand that such expectations will hold true—even the best legislators are fallible. That is why responsible lawmaking does not merely require passing well-grounded statutes after careful deliberation, but also entails attentiveness to their actual impacts and responsiveness to changing or emerging circumstances.

Under various headings, legislation theorists have long emphasized this apparently simple point.[2] Luc Wintgens, for instance, has recently phrased it in terms of time-boundedness, which he takes to be the source of lawmakers' rational duties of retrospection and correction.[3] In his account, according to the legisprudential principle of temporality, the justification of a piece of legislation cannot be settled once and for all at the moment of enactment, but "must also stand over time". While not limited to factual prognoses this tenet concerns, in the first instance, estimates about the effects of laws, and thus makes it incumbent on legislators to evaluate them retrospectively. If this evaluation yields evidence of legislative failure or harmful consequences, or reveals new legislative facts which the current legal framework does not cope with, the law is no longer justified and "should then be abolished or changed", i.e. corrected. Lawmakers must therefore embark on another legislative process whereby they are ideally expected to meet, on a renewed basis, the same requirements of procedural rationality applying to the production of laws, which Wintgens typifies as the legisprudential duties to carry out "relevant fact-finding", "problem formulation" and "prospection", and to "weigh and balance alterna-

[2] See e.g. Noll (1973: 146 ff.). Of course, the gist of this thought is much older (cf. Meßerschmidt 2000: 1008 n. 343).

[3] Wintgens (2012: 267 ff., 302 ff.).

tives"—further requirements on legislative authenticity, debate and transparency should possibly be added.

Few will dispute that retrospection and correction form a key dimension of rational lawmaking.[4] Yet, while being uncontroversial in the abstract, these tenets face endless difficulties on the practical level.[5] For a start, they may fall at the hurdle of budgetary scarcities, insufficient allocation of resources, feeble institutionalization or, more simply, lacking interest to politicians. Leaving these difficulties aside, there are two major and interwoven aspects that make the ex post evaluation of statutes—let alone that of public policies—a thorny issue: on the one hand, this form of evaluation can be desperately problematic from a methodological viewpoint; on the other, it is a political undertaking where values and interests play a major part, so that it gets burdened with problems comparable to those raised by legislation itself.[6] This, of course, goes for correction as well, since it is triggered by a political appraisal of the findings of evaluation and restarts the lawmaking process.

Complications in ascertaining the impacts, failure or success of laws vary depending on the piece of legislation, the social field and the subject matter in question. Sometimes, the effects that can be accorded to legislative measures are fairly clear, or retrospection is planned thoroughly and conducted on the basis of widely accepted criteria and methods, thus providing informative results and empirically supported evidence as to legislative errors or shortcomings. Also variable is the necessity for post-legislative scrutiny: legislation may not be intended to shape social reality in a particularly critical way; certain legislative facts evolve at a slow pace; or impact prospects may occasionally be pretty reliable, for which many laws do not raise, at the time of their passage, any special concerns in this respect. In general, retrospection is nonetheless central for one simple reason: since any statute is allegedly made as a (legitimate) set of legal means to achieve some (legitimate) ends, its legitimacy cannot but depend, at the end of the day, on whether it can be said to have attained the stated goals without provoking unacceptable consequences or excessive sacrifices of socially valued goods. And that is precisely what ex post evaluation should contribute to determine.

It is quite obvious that we inhabit complex and interconnected societies where the steering, problem-solving and guiding capacity of statutes is limited, and where

[4] On the need for legislative evaluation see, for example, van Aeken (2011: 42 ff. and 2005: 83 ff.).

[5] See e.g. Bussmann (2010: 279 ff.), van Aeken (2011: 50 ff.), Böhret and Konzendorf (2001: 255 ff.), Morand (1994: 134 ff.). Delving into the varied typology of laws, regulatory strategies and legislative impacts, or into the requisite tailoring of evaluations (Rossi et al. 1999: 38 ff.) would take us too far. Suffice to say that retrospective evaluation should not be seen as a purely "ex post" task, but linked to specific, measurable and time-tied goals and prior prospective assessments, i.e. the evaluation of laws and their implementation should be the last stages of a cycle or process already begun at the pre-legislative stage.

[6] Since retrospective evaluation is both an epistemic and a decisional process, hopes for a totally neutral ascertainment of legislative impacts get often dashed—whether or to what extent evaluations respond to the caprices of politics shall not be discussed here, though (cf. Howlett et al. 2009: 178–179).

legislative impacts largely respond to factors beyond lawmakers' reach. Still, parliamentary legislation must render a vital normative role in constitutional democracies. Not only are legislatures constantly pressured to provide regulatory solutions and strategies for a variety of intricate issues, they are also bound to safeguard, protect and develop fundamental rights and other substantive principles enshrined in the constitution, which commits them to taking anticipatory or reactive decisions on almost every technological and societal development. Such decisions must often be premised on inconclusive scientific data or very imperfect information—uncertainty alone cannot justify legislative inaction nor self-restraint, for this might have detrimental effects as well.[7] In this context, retrospection and correction prove crucial. It comes as no surprise, then, that specific legal instruments or frameworks which formally set the objectives, criteria or methods for the evaluation of legislation are proliferating. So far the main focus has been on ex ante assessments, but ex post controls are also becoming progressively juridified and institutionalized, and statutory clauses stipulating them are now usual. Yet this sort of *evaluative law* is mostly unenforceable, being perceived as not properly binding on lawmakers, and thus retrospection remains a sheer political responsibility. Since legislation is legally conditioned only by constitutional—or analogously ranked—norms, and these do not usually include explicit mandates of ex post evaluation,[8] judicial review does not seem an appropriate place to deal with this legisprudential tenet. As long as statutory contents stand within the substantive limits of the constitution, the prognostic fallibility of lawmakers is outside the concern of judges. In some jurisdictions, however, things might look different.

As early as 1963, the BVerfG addressed the evaluation issue for the first time. While upholding a law increasing the *works transport tax*—which was pronounced constitutional "at least at the moment" of the judgment— the Court noted in passing that, in view of the regulatory difficulties caused by rapidly evolving technical conditions, the lawmaker must be granted a sufficient period "to observe the effects" of the new tax as a basis "for further resolutions" to be eventually taken in the future. Although no retrospective duty was mentioned, the Court did state that if the effects of the tax turned out to be discriminatory, there would be occasion to reassess whether it should be upheld or whether, rather, the lawmaker should pursue her goals through other means.[9] Fifty years later, that somewhat cautious remark has

[7] On the precautionary principle(s) e.g. Majone (2002), Jordan and O'Riordan (2004: 31 ff.), Sachs (2011: 1292 ff.).

[8] There are exceptions, though: for instance, Art. 24 of the French Constitution states that "the Parliament (…) evaluates public policies"; or, according to Art. 170 of the Swiss Constitution, "The Federal Parliament shall ensure that the efficacy of measures taken by the Federation is evaluated".

[9] BVerfGE 16, 147 (188). A duty or commitment "to repeal or change" a law upon a "factual development" rebutting legislative prognoses was introduced by the *mills act* decision of 1968 (BVerfGE 25, 1, 12–13), whereas requirements on the monitoring of legislative impacts and facts can be already identified in the *surviving dependents* case of 1975 (BVerfGE 39, 169, 181 ff. and 193 ff.) and, more clearly, in *Kalkar* (1979) and *aircraft noise* (1981) (see below Sect. 11.2), as well as in the *census* decision of 1983 (BVerfGE 65, 1, 55–56).

turned into assertions like this: the lawmaker—the BVerfG argues—is "obliged" to revise a norm affecting fundamental rights whenever its "constitutional justification is called into question" by changes in the empirical or normative premises underlying the original decision or if its prognosis of impacts proves to be erroneous; since measures infringing upon rights may be permissible with regard to one context or moment but not with regard to another, they cannot be upheld "abstractly" or "for all times"; in sum, the "constitutional judgment may vary upon essentially changing circumstances".[10] Moreover, experience shows—as noted in a ruling on an act fostering *solvency in the building sector*—that the "adequacy and effects" of certain legislative measures are predictable only limitedly, being "precisely because of such imponderabilities" that lawmakers deserve a special margin of appreciation; yet from that it follows that they are subject to a duty to observe the evolution of regulated area "even more carefully" and to "intervene correctively" if needed.[11]

The parallels with the legisprudential tenets of retrospection and correction are striking. It makes a big difference, though, that a court of justice asserts them as "duties" or "obligations", for this seems to mean that they are legally binding on lawmakers. Once these theoretical postulates are anchored in the constitution and fall within the scope of judicial review, a piece of legislation interfering with fundamental rights might thus be struck down because or in view of a defective post-legislative process. And behind this change of approach there is plenty of puzzling questions. One wonders, first of all, what such assertions may possibly imply, and why they are made in which kind of situations. Are monitoring and revision duties ("the post-legislative doctrine") an instance of judicial activism, an inevitable result of the protection of rights in a regulatorily uncertain world, a mere rhetoric appeal to rational lawmaking, or perhaps some of each at once? Let us consider some of the judgments delivered by the BVerfG in more detail before trying to reach an answer.

11.2 Legislative Monitoring and Revision as Constitutional Duties

The BVerfG has affirmed legislative monitoring and revision requirements in a variety of cases: while we often find just succinct allusions, these requirements play now and then a central role in the court's reasoning. This may be illustrated with the help of its judgments on: the protection of the right to personal integrity against certain technological risks *(Kalkar, aircraft noise)*; the repercussion of *life imprisonment* on human dignity; the protection of the unborn life *(abortion)*; the proportionality of the criminal ban on *cannabis*; the interference with the professional freedom of insurance companies caused by the imposition of a *base tariff*; the *parental custody*

[10] This is a steady opinion of the Court as to electoral thresholds: BVerfGE 120, 82 (108–09); 129, 300 (321–22); 82, 322 (338); and BVerfG, Judgment of 26 February 2014, 2 BvE 2/13 et al., para 53. See below Sect. 11.2.

[11] BVerfG, Judgment of 27 January 2011, 1 BvR 3222/09, para 51.

of children born out of wedlock; and the compatibility of a *barrier clause* with the equality principle in electoral law. This sample suffices to gather the pieces we need for a model reconstruction of the doctrine in cases involving insecure legislative prognoses. It must be noted that the revision or correction duty need not be linked to monitoring: it may be regarded as a duty on its own from the viewpoint of constitutional law, and also applies in contexts where monitoring is not required.[12] However, I will concentrate on decisions where both duties combine, regardless of the name by which they are called, even if the duty to monitor is only implicit in the Court's considerations. For the present purposes it will be assumed that if lawmakers are constitutionally obliged to revise a law *in the event* that their fact-finding no longer holds or their prognoses prove wrong, such a revision presupposes (due) retrospective evaluation.[13]

In the 1979 *Kalkar* case, the BVerfG had to decide whether the nuclear energy act infringed upon the Basic Law (GG) in entitling the administration to authorize the installation of reactors within broadly phrased parameters (the permit to install a breeder reactor prototype, to be generalized in the medium run, had been granted already). The referring court framed the case in terms of legal certainty and separation of powers, but a focus was placed on whether the act violated the state's duty to protect human dignity and citizens' personal integrity (Art. 1.1 and 2.2 GG).[14] The BVerfG did not find itself in the position to settle the issue by determining whether breeder reactors actually entailed unconstitutional risks, for "reasonable doubts" existed in this respect which could not be solved. The judges took the view that not even a hearing of evidence would "decisively help" to clear them out: at most, experts could only offer "empirical clues" of potential impacts that could be discounted, but this was deemed insufficient to sustain a judicial conviction that breeder reactors put human dignity or integrity at risk—"only the future" will tell. In such circumstances, "necessarily loaded with uncertainty", the BVerfG considered that the appreciation of the risk was incumbent on lawmakers. Requiring them to regulate the installment or operation of technical plants in a way that rules out any threat to basic rights "with absolute certainty" would neglect "the boundaries of human epistemic capacity" and hamper the very use of technology: beyond the "threshold of practical reason", uncertainties are "inescapable" and must be accepted "as socially adequate burdens by all citizens". This argument, however, included two conditions. The first was that up to the moment of the ruling lawmakers must have taken their constitutional obligation to safeguard citizens' rights seriously. For the BVerfG, that was the case: not only had the legislature been concerned with the

[12] So, if the BVerfG declares a statute incompatible with the Basic Law instead of voiding it, this entails a duty of revision or correction on the lawmakers' side (Choi 2002: 169), which is often accompanied by a timescale set by the Court.

[13] On this intertwinement, Bickenbach (2014: 363 ff., 405 ff.), defining monitoring as a "fore-duty" *(Vorpflicht)*; or Meßerschmidt (2000: 1008), arguing that revision implies a previous check (*Prüfauftrag)*; cf. Tekin (2013: 41 ff.); Flückiger (2007: 159); Albers (2006: 28); Choi (2002: 77); Augsberg and Augsberg (2007: 308). That lawmakers should be bound to observe legislative impacts or facts without being likewise bound to act accordingly makes little sense.

[14] BVerfGE 49, 89 (130 ff., 142 ff.).

issue of nuclear security on a regular basis, e.g. through discussing relevant reports in depth, but also a wide number of precautionary measures had been adopted in previous years and public research programs bore witness to the "seriousness of the efforts" in this area. While the act was upheld on these grounds, the citizens' right to protection was not yet exhausted: in a second move, the Court extended it to comprise a duty on lawmakers to take "all efforts to detect early on potential risks and fight them with the necessary means", arguing that if new data came to light which challenged the justification of the law now upheld, it would be constitutionally obliged to revise it.[15]

Two years later, in *aircraft noise*, the BVerfG repealed the constitutional complaint of two citizens living within the environs of Düsseldorf airport with similar arguments.[16] The appellants claimed that the federal lawmaker and federal and state authorities had failed to protect the right to personal integrity (Art. 2.2 GG) and hence infringed it by omission. The problem was not a wholesale omission but an insufficient protection, for a range of measures against aircraft noise had indeed been taken since the late 50s—including the 1971 act on the protection against aircraft noise. The Court thus looked to whether the legislator had violated its duty to revise the legal framework. In spite of significant amendments, this framework might have become unconstitutional as a result of the huge increase in acoustic pollution in densely populated airport districts. The judges denied that. They first recalled that the alleged inappropriateness of the legislation in force presented "a highly complex question" to be mainly left to political deliberation; and, dwelling on the lack of "reliable scientific knowledge" as to noise levels that can be considered dangerous, they further underlined that lawmakers must be granted "reasonable margins of adaptation and experience". This was not meant to exclude, but to minimize judicial control: as "rights of the utmost importance" were not affected in the case, legislation could be reviewed merely for a "manifest" or "self-evident" protection failure.[17] By this yardstick, the BVerfG examined all legislative activities carried out up to 1981 to safeguard citizens' integrity against aircraft noise and concluded that they were not manifestly insufficient—which did not imply, the Court noted, that an optimal protection had been achieved. Both the parliament and the government had taken sufficient steps concerning fact-finding and consultation (including a comprehensive hearing in parliament) and, on this basis, had passed or at least planned a wide range of protective measures,[18] which persuaded the Court that they had not evidently violated their duty to legislative correction.

[15] "If signs appear in future" that breeder reactors pose such risks "with certain probability" (it would be primarily incumbent on the political state organs to appreciate it), "the lawmaker would be obliged to act again" (BVerfGE 49, 89, 132).

[16] BVerfGE 56, 54 (71–72, 78 ff., 81 ff.), drawing on *Kalkar* as concerns personal integrity.

[17] The Court can ascertain such a violation only "when it is evident" that a regulation, being originally in accordance with the Basic Law, "has become constitutionally intolerable" due to changes in circumstances, and "the lawmaker has nonetheless remained inactive" or adopted "manifestly erroneous revision measures" (BVerfGE 56, 54, 81).

[18] Although the term 'monitoring' is not mentioned, the commission of research, the appointment of expert boards or the elaboration and discussion of governmental reports amounted to due moni-

Non-technological risks have also activated the post-legislative doctrine and penal law provides some good examples. In 1977 the BVerfG upheld the sentence of life imprisonment for murder introduced by the criminal code on the condition that, besides an eventual pardon, specific options to suspend the sentence would be regulated.[19] While the Court conceded that life imprisonment as such violates human dignity, it could not be said whether *reversible* life imprisonment also "leads to irreparable damages of a psychical or physical kind" that are incompatible with this supreme constitutional value, i.e. the unconstitutionality was doubtful given the possibility of suspension. Since matters like this are still "at the stage of development", they call for "a reasonable period to collect experiences"—a margin that the lawmaker should be allowed. A constitutional breach would only occur if, after having gathered enough experiences which point at a better solution, the lawmaker omits a proper control or "checking *(Überprüfung)* and improvement" of the law.[20] For the Court, in other words, there was no sufficient scientific evidence as to the effects of reversible life imprisonment; valid arguments were possible "for either standpoint", and none of the two stances were supported by "reliable research"—the Court did, however, admit that damage to dignity was not unlikely in some cases. So, provided that the law could only be overruled if the empirical and value judgments of the lawmakers were refutable,[21] and they were not in the judges' opinion, the BVerfG pronounced the penalty of reversible life imprisonment constitutional upon the aforesaid condition: lawmakers were obliged to monitor the impacts of this penalty and to abolish or correct it if it turns out that human dignity is compromised.

Most prominently, the post-legislative doctrine was shaped in the second ruling on *abortion* of 1993.[22] The core of this case was the question of whether the depenalization of abortion and the adoption of an advisory model—replacing one of indications—breached the underprotection ban *(Untermaßverbot)* with regard to the right to life. The Court held the depenalization unconstitutional, struck down the reform of the criminal code along with some accompanying measures, and required the legislature to restore the prohibition (mainly for symbolic purposes). It nevertheless declared that, in view of drastic socio-cultural changes and of shortcomings in the previous legal framework in reducing abortion rates, an advisory model would be in line with the Basic Law—even though it was uncertain, in the Court's view, whether it would actually prove better. However, should the lawmaker decide to

toring of legislative facts (BVerfGE 56, 54, 82), whereby the measures passed and planned were seen as due adjustments of the legal framework.

[19] BVerfGE 45, 187 (227 ff., 237 ff., 252).

[20] BVerfGE 45, 187 (252), referring to the second judgment on *numerus clausus*, where the Court asserted a duty to amend the law *(Änderungspflicht)* if evidence arises that there exists a more correct solution (BVerfGE 43, 291, 321).

[21] In contrast to *Kalkar*, the Court noted that in cases of severe infringements of basic rights, it is questionable whether the burden of uncertainty must lie with the citizen (BVerfGE 45, 187, 237–38).

[22] BVerfG 88, 203 (203 ff., 251 ff., 269, 308 ff.).

introduce such a model it would be "obliged to keep an eye on the effects" of the new concept and meet its duties to monitor and revise. The ruling includes two sets of considerations in this regard. On the one hand, in reviewing the prospects underlying the reform, the Court not only focused on content, but also on process requirements. Inasmuch as the intended reform relied on "prognoses about the evolution of facts, particularly about the effects of the regulation", such prognoses "ought to be reliable"; and, given that the possibility to make safe predictions is naturally limited, and experiences in comparative law do not provide for much guidance, the legislator must "resort to the essential material available" and assess it "with due diligence" (*gebotene Sorgfalt*) to make sure that it sufficiently supports its appreciations.[23] On the other hand, the Court delved into the post-legislative obligations connected to uncertain, albeit duly made predictions and found that the duty to protect the unborn human life is not fulfilled "once and for all" by passing a law with a plausible foundation, but further includes the duty to guarantee that "effective protection" is "actually" provided. If, after a "sufficient monitoring time", the regulation proves under-protective (i.e. it can be said to encourage abortions), the lawmaker is "obliged to work towards removing the deficiencies". This duty to correct or remedy unconstitutionalities as soon as possible applies particularly when a law that initially respected the Basic Law "becomes unconstitutional afterwards" because of significant changes in the states of affairs affected by it, or because the impact prognoses turn out to be "totally or partially wrong". The bindingness of the constitutional order on the legislator (Art. 20. 3 GG) implies the "responsibility that passed laws remain in accordance with the Basic Law".[24] Having remarked that it is not constitutionally mandated that all laws be constantly controlled,[25] the Court argued that the high weight of the duty to protect life gives rise to a "permanent obligation" to observe, and that this entails specific tasks including an obligation on the part of the lawmaker to check at adequate intervals—e.g. by analyzing periodic government reports—whether the expected protection effects have been achieved, or whether deficits in the new model or in its application entail a breach of the underprotection ban. Since statistical data are of the outmost importance ("indispensable") to meeting this observation requirement, the Court also found it unconstitutional that the reform had dispensed with the official abortion statistics. An advisory model, in sum, was acknowledged as a legitimate strategy to surmount the flaws of the former legal framework but, since there were "uncertainties" about its impacts, "the lawmaker" was obliged to carefully observe or monitor "the actual

[23] BVerfG 88, 203 (262–63).

[24] BVerfG 88, 203 (309), referring to its previous decisions on *co-determination*, *Kalkar* and *donations to political parties*; see, respectively, BVerfGE 50, 290 (335 and 352), 56, 54 (78–79) and 73, 40 (94).

[25] "The duty to revise does not include, in general, a permanent control of laws (…). Frequently, it becomes patent only when the unconstitutionality of a law is recognized or is at least clearly recognizable" (BVerfG 88, 203, 310).

effects of the new law and to investigate, with the greatest possible reliability", those data "which are necessary for an empirical evaluation" of the law.[26]

In the *cannabis* judgment,[27] given a short time after *abortion*, the lawmaker's post-legislative duties played a chief role as well. The Court was requested to decide on the constitutionality of the criminal penalties for cannabis possession and consumption. At the heart of the case was, again, the appreciation and prognosis margin that should be granted to the lawmaker. In 1971, the legislature justified the penalization on the assumption that cannabis presents an extreme risk to health and thus to society. Even though—the Court admitted—contemporary research shows that such a risk was notably less, considerable dangers could not be excluded. In 1994, there still existed "uncertainty" about the correctness of the factual assumptions and prognoses made by supporters of both penalization and depenalization: "scientific knowledge" revealing "the correctness of either strategy was not available".[28] One dissenting opinion convincingly challenged this view,[29] but the majority upheld the interference with the citizens' rights, granting a legislative leeway as to the empirical considerations and predictions underlying the ban. Yet, the Court realizes that these appreciations might turn out to be false, in which case the interference now permitted would be based on wrong premises, and thus precautionary measures were deemed mandatory. Having regard to the fact that "the criminal-political and scientific discussion on the dangers resulting from cannabis consumption and the right way to combat them" remained "open", "the lawmaker (must) monitor and control" the impact of its decision, take account of international experiences and, in particular, assess "whether and to what extent the liberalization of cannabis leads to a split in drug markets and hence to limit the overall consume of narcotics", or whether, on the contrary, the criminalization of cannabis proves to be a feasible strategy to fight the illegal drug market as a whole.[30]

The doctrine has likewise been applied to cases that do not involve protection rights. Take three recent examples. The first one concerns an alleged interference with the fundamental right to professional freedom (Art. 12.1 GG) of private insurance companies. After a reform of the legal framework of health insurance, they were bound to offer a base tariff or category *(Basistarif)* at a low cost, so that medical care was more easily available to economically disadvantaged people.[31] The companies claimed that financing such a tariff would force them to increase the rates of regular policies due to the huge number of people expected to take up the

[26] BVerfG 88, 203 (309–311).

[27] BVerfGE 90, 145. The 1971 narcotics law was alleged to violate the principles of equality (in that it proscribed cannabis, but not alcohol and tobacco) and proportionality (for imposing an excessive penalty); and human dignity (as cannabis consumers were led to opt for "legal" drugs).

[28] BVerfGE 90, 145 (182–83, 177).

[29] BVerfGE 90, 145 (212 ff.), where Justice Sommer, on the very same constitutional rationale, claims that lawmakers were already obliged to correct the current legislation (see below Sect. 11.4).

[30] BVerfGE 90, 145 (194).

[31] Judgment of 10 June 2006, 1 BvR 706/08 et al. (BVerfGE 123, 186).

new option, and that this in turn would provoke an intolerable damage to their business model. Again, the impact of legislation was key. Drawing on fixed precedents, the Court granted lawmakers a wide margin to prognosticate and appreciate the evolution of facts and the effects of their measures, but also wanted to ascertain whether such prognoses relied on a "safe-enough foundation". How intensively this is reviewed depends on several factors;[32] and here the Court did not demand that lawmakers demonstrate a "sufficient probability" that their prognoses would be realized, but just to offer "plausible arguments" challenging the feared impacts. And, according to the judges, such arguments were indeed supplied: in view of previous experiences with the so-called standard tariff, the limited benefits associated with the new base tariff, and the small group of uninsured, the legislature could plausibly assume that, in the short run *(auf absehbare Zeit*), no significant damage would arise for the companies—long-run impacts were discounted for they depended on intricate legal, economic and demographic factors. This sufficed for the BVerfG to declare the plausibility of the legislative assumptions and hence to uphold the act, "even if" the prognosis was later shown to be totally or partially misguided. Should this be the case, however, "the lawmaker" would be "obliged to correct", i.e. it remains subject to a monitoring duty and must see to it that the whole reform "does not have unreasonable (*unzumutbar*) consequences for the insurance companies and their insureds".[33]

In 2003, the BVerfG upheld the civil code rules governing the parental custody of children born out of wedlock.[34] These rules, while allocating custody on the mother's side by default, allowed for joint custody upon a formal declaration agreed by the parents. But if the mother refused to enter into any agreement, the father lost the legal chance to have a say on his child's affairs following separation, which allegedly infringed his parental rights (Art. 6.2 GG). Lawmakers had premised this framework on the twofold hypothesis that most parents would sign a joint custody declaration and that, in the event of a non-amicable separation, joint custody would compromise the child's superior interest (since parents unable to agree before separation could barely handle the problems involved with joint custody after). The Court did not object to these prospects, particularly because there was no "firm knowledge" that there would be a significant number of cases in which unmarried

[32] Such as the subject matter and the importance of the legal goods at stake (Judgment of 10 June 2006, para 169). On the variable prognostic and appreciative margins see, in particular, the decisions on *codetermination* (BVerfGE 50, 202, 332–33), *compulsory quotas for severely disabled* (BVerfGE 57, 129, 159–60), *census* (BVerfGE 65, 1, 55–56), *abortion* (BVerfGE 88, 203, 262), and the federal law on the *care of the elderly* (BVerfGE 106, 62, 151–52). I turn to this in Sect. 11.3. For a critique of the review intensity scale introduced in *codetermination* (self-evidence test, plausibility test, and intensified content control) and also used in *base tariff*, see Bickenbach (2014: 135 ff.).

[33] Judgment of 10 June 2006, para 170 and 241.

[34] Judgment of 29 January 2003, 1 BvL 20/99 and 1 BvR 933/01, para 73 ff. Those rules had been reformed in 1997 as a result of the 1996 annulment of the provisions allocating custody only on the mother's side. While the reform was upheld, the lack of a transitional regulation for parents separated before its entry into force was deemed unconstitutional.

parents did not use this possibility and why they do not; neither was there statistical data or solid evidence as to the current situation in this respect—the new concept needed time to penetrate society. So the Court upheld the law but, once again, not unconditionally. Since the constitutionality of the rules depended on the rightness of the prognostic assumptions, "the lawmaker" was "obliged to observe and examine *(prüfen)* whether its premises held before reality"; otherwise it would have to correct the law to make sure that unmarried fathers are granted access to custody. A few years later, however, an individual appeal against the decision of a local court applying the civil code reached the ECtHR, which declared that it was against the Convention to bar a father from the very opportunity to defend before a judge that his participation in custody (despite the mother's unwillingness) was not detrimental to the child.[35] Shortly after this ruling the BVerfG had to reassess the civil code rules, and declared them incompatible with the Basic Law.[36] While this declaration seems largely motivated by the ECtHR's ruling, the post-legislative doctrine played its part: for the BVerfG, recent empirical and statistical evidence—collected in compliance with the monitoring duty—rebutted the initial legislative assumptions. In the meantime, "sufficient data and material are available" to show that these were wrong as to both the expected number of declarations and the claim that the mother's unwillingness to accept joint custody commonly responds to the interest of the child, with the latter having proven false in a "not inconsiderable number of cases". In view of the monitoring findings, therefore, the Court struck the regulation down.

The case law on barrier clauses also shows how the BVerfG applies its post-legislative approach, dynamically, to the same problem. Take the example of the 5 % threshold established by the German law on elections to the European Parliament. The Court upheld this threshold in 1979 but voided it as a violation of the electoral equality principle in 2011; and, in spite of legislative reform reducing the threshold to 3 %, the judges declared it unconstitutional again in 2014. Barrier clauses are normally permitted on the grounds that the proliferation of small parties makes majority-building very difficult and hampers the functioning of democratic assemblies, which outweighs the interference with the electoral equality principle. This argument served to justify the original clause,[37] but fell short three decades later: the transformation experienced by the EU Parliament since then called, at least, for a reconsideration. The Court, after recalling that it was not its task to analyze the empirical and legal data behind legislative prognosis nor to weigh the interests involved, verified that lawmakers had failed to examine whether the originally valid justification still applied under "current conditions"—with these being the decisive factor for a constitutional assessment—and that they had not provided any compelling reasons to uphold the threshold. By 2011, therefore, the underlying prospect of

[35] *Zaunegger v. Germany* (App. 22028/04), Judgment of 3 December 2009, para 58 ff. The appellant was discriminated against as compared with married parents or unmarried parents who had signed a joint custody declaration.

[36] Judgment of 21 July 2010, 1 BvR 420/09, para 18 ff., 24–25, 37 ff., 54 ff. and, especially, 59 ff.

[37] BVerfGE 51, 222 (249).

dysfunctionality could no longer justify the clause.[38] Here, as we see, the duties to check *(überprüfen)* and amend *(ändern)* the electoral act operate, in the first instance, retrospectively—unlike the above cases—, but the Court also affirmed them for the future. After the annulment of the 5 % threshold in 2011 it was up to the lawmakers whether to suppress or reduce it, and they opted for the latter: a 3 % barrier was thus set. Yet, the new clause was challenged and voided again in 2014.[39] The Court conceded that this reduced threshold interfered less with equality, but this was not the point. Since lawmakers had not demonstrated any relevant change in the factual and legal circumstances since 2009, no convincing reason existed to justify the still serious manner in which the principles of electoral equality and equal opportunities of political parties were being affected. The BVerfG stressed that new events or circumstances might lead to another assessment, but these became relevant only if "they can already be reliably predicted at present" in view of sufficient factual data. As the ongoing developments adduced to justify the clause were only "at the very beginning", the Court considered that the variety of negative effects allegedly resulting from the absence of a barrier clause—an impairment of parliamentary functions—were rather "speculative", and could not be anticipated with "the necessary probability", whereas there were also good reasons to expect no negative impacts at all.[40] This persuaded the judges that there was no need to uphold the threshold in whatever percentage. Yet, having regard to such uncertainties, the Court committed lawmakers, again, to the duty of observation: if signs emerged of specific undesirable effects or developments, the legislature should take this into account and, eventually, restore the threshold—even the original 5 % clause, provided that this was necessary.

11.3 A Legisprudential Reconstruction of the Post-legislative Doctrine

In legisprudence, retrospection and correction are the post-enactment stages of the due process or method of lawmaking and correlate with the bounded-rationality demands on the production of laws, especially with that of prospection.[41] With some

[38] BVerfGE 129, 300 (321–22). By 2009 this doctrine on thresholds for local elections had been settled by the BVerfG and several state constitutional courts, and the BVerfG had applied it to other issues of electoral law: cf. BVerfGE 120, 82 (108); 73, 40 (94); 82, 322 (338–39); 107, 286 (294–95), as well as the text accompanying footnote 10.

[39] BVerfG, Judgment of 26 February 2014, BvE 2/13 et al., para 36 ff. 47 ff. 56 ff., 70 ff., 83.

[40] BVerfG, Judgment of 26 February 2014, para 65 ff., 75–76, 83, as well as para 62-64 (clinging to the justification requirements imposed on the lawmaker and denying that the intensity of the review may be reduced).

[41] "Rule change in the light of the duty of retrospection goes hand-in-hand with the duty of fact finding on a renewed basis. The achievement of the intended state of affairs (…) must be assessed, and this assessment is, in turn, a matter of fact finding", which may reveal "that a refinement of the problem formulation" is needed; "on this point, the duty of problem formulation and the duty of retrospection are consistent with one another" (Wintgens 2012: 303).

restrictions, this view may well be adapted to the parallel duties as defined by the BVerfG, taking them as ex post procedural requirements counterbalancing the (temporary) permissibility of those interferences with fundamental rights which have been grounded on insecure prognoses. Interpreting a doctrine developed over half a century, and invoked in quite disparate situations,[42] is certainly no easy task. Still, leaning on the previous examples, an ideal-typical, simplified reconstruction may be essayed around five major aspects: *dynamicity, factual (prognostic) dependence, uncertainty, deference* and *compensation.* On this basis, I will address the procedural content of the post-legislative duties, and link them to the due lawmaking method standard that the BVerfG has long relied on to waive difficulties in the substantive control of laws.

On paper, the most distinctive feature of a post-legislative doctrine is its *dynamic* character. Other judicial yardsticks focus solely on past or present conditions and become exhausted once applied, whereas this one is characteristically future-oriented. The constitutional analysis of legislative facts and impacts is postponed for as long as they remain unclear, and the Court's provisory and conditional verdict on them is to be completed after some (unsettled) period of time. The doctrine is thus designed to come into play at different moments with regard to the same piece of legislation. The Court may resort to the duties of monitoring and revision both when reviewing a statute for the first time (R_1) and in a subsequent constitutional review (R_2) or reviews (R_n) of that statute. In this account, the assertion of the duties at R_1 goes along with the—temporary—upholding of the law; at R_2 (or R_n), the Court should, retrospectively, keep or revert its original judgment in view of the post-legislative process and the available evidence about legislative facts and impacts.[43] For now, let us concentrate on the assertion of the doctrine at R_1.

[42] Including e.g. the assertion of the duties with regard to non-existing legislation which the Court requires lawmakers to pass: so the 2006 decision on the absent statutory regulation of *juvenile justice* (BVerfGE 116, 69, 90–91); in *subsidies to the agrarian market* (BVerfG, Judgment of 14 October 2008, 1 BvF 4/05, para 121–22), there even seems to be two joint addressees of the duties, namely German and European Union lawmakers.

[43] Note that I limit the scope of the doctrine to cases where there has been a previous move on the Court's side (which excludes the possibility of the doctrine being enforced without having been asserted before). It will be objected that this depiction does not square with *barrier clause*, where no mention was made of the post-legislative doctrine at R_1 (1979), and this was applied directly at R_2 (2011). Yet, the doctrine was indirectly asserted in the meantime in other electoral threshold cases: *all-German elections* (BVerfGE 82, 322, 338–39) and *local elections* in Schleswig-Holstein (BVerfGE 120, 82, 108–09, and 107, 286, 293: while this latter case was repealed for formal reasons, the Court noted that in view of the reform introducing the direct election of mayors and administrative officers in 1995, the prognostic assumptions sustaining the barrier clause could have possibly become unsustainable, which could have been generated "a duty to check and revise"). Nor was the doctrine invoked at R_1 in *surviving dependents* (BVerfGE 39, 169, 181 ff. and 193 ff.), but ten years later (i.e. at R_2), when the Court identified factual changes calling the initial legislative assumptions into question, and suggested that the law was drifting into unconstitutionality *(in Richtung auf die Verfassungswidrigkeit*). Yet, instead of voiding the law, the BVerfG required lawmakers to legislate again in the light of such changes, for which these were granted a long period of time ("by the end of legislature period after the next one") because of the complexity of the subject matter—this has been called a "preventive" or "prophylactic" revision duty (Mayer 1996: 180).

Obviously enough, the activation of the doctrine presupposes that the constitutional judgment is *fact-dependent*: in the judges' opinion, the permissibility of an interference with basic rights must decisively depend not on norm interpretations but, rather, on the evolution of legislative facts or the impacts of legislation. This may concern almost any judicial review criteria, ranging from the suitability, sufficiency or necessity of legislative measures to the degree of affection of the goods or interests at stake. Moreover, when it comes to determining whether a provision interfering with rights is phrased precisely enough to conform with the constitutional mandate of determinacy *(Bestimmtheitsgebot)*, the ever-evolving nature of the underlying legislative facts may lead the Court to resort to the duties of monitoring and revision.[44] In this regard, it is worth noting that although these duties are sometimes asserted in connection with basic rights to positive action (protection rights),[45] or in constellations of cases where the Court does not carry out a balancing or strict proportionality test,[46] both the permissibility of interferences with defense rights and the results of balancing may likewise depend on facts that are yet to come—actually, the chief role of prognostic premises within balancing often paves the way for the assertion of the doctrine.[47]

Thirdly, the duties to monitor and revise are affirmed only in view of some characteristic epistemic *uncertainty*. The Court's decision as to whether legislative prognoses are so uncertain that post-legislative requirements are in order may often be explained as a result of two major, often intertwined, factors: a subject matter or social area qualifying as extremely complex or dynamic, on the one hand, and the absence or the insufficiency of factual evidence—or the controversial, inconclusive

[44] To safeguard, for instance, the principles of democracy and separation of powers *(Kalkar)*, or the right to (judicial) due process as to the collection of criminal evidence, as in the 2005 *GPS* case (BVerfGE 112, 304, 316–17). Stressing the link between monitoring (and revision) and the mandate of determinacy, see Albers (2006: 31). Notice that I limit myself to interferences with fundamental rights. Further constitutional goods such as subsidiarity may also be protected by the post-legislative doctrine: see e.g. the third decision on *stores closing time* (BVerfGE 111, 10, 42).

[45] Despite some overlap (e.g. as to the criterion of self-evident or manifest violation: see Sect. 11.4), the post-legislative doctrine must be distinguished from that of legislative omission, which refers only to protection rights—besides, the former presupposes a previous valid law, so that a total or absolute legislative omission is excluded at R_1.

[46] Notably, in cases involving the quantification of benefits (*Hartz IV)* or wages (*professorial salaries)*, where the weakness of the substantive criteria to assess legislative results leads the Court to focus on the lawmaking process: BVerfGE 125, 175 (para 139 ff.) and 130, 263 (para 163 ff.).

[47] The idea of a dynamic (and process-oriented) proportionality test is clear in *census*: "the lawmaker must (…) account for uncertain impacts (…) by exhausting the knowledge sources (*Erkenntnisquellen)* available" in order to assess such potential impacts "as reliably as possible"; afterwards it must likewise examine "the available material" to see whether a total survey *(Totalerhebung)* "still remains proportional" despite eventual progresses in statistical and social-scientific methods; in this regard, "the lawmaker" will have e.g. "to attentively follow" national and international debates as to whether such a total survey may be replaced with less intrusive measures (BVerfGE 65, 1, 55–56).

scientific assessment of it—, on the other.[48] Besides those fields usually associated with regulatory intricacies (e.g. socio-economic, risk-prevention or public security policies), the introduction of new legislative concepts constitutes a typical instance of prognostic difficulties.[49] When faced with prognostic uncertainty, the BVerfG may conduct a hearing of evidence but this is unlikely to be of much help in our context.[50] Still, uncertain legislative effects do not constitute a blank cheque: lawmakers are not free to engage upon epistemic speculation, nor can they handle prognoses at will.[51] At least a reasonable disagreement on future developments or impacts is needed: "sufficient grounds" must exist to endorse lawmakers' appreciations,[52] whereby the exact justificatory effort demanded from lawmakers may vary. This is tightly linked to the next point.

The fourth element of the post-legislative doctrine might be termed *deference*. Hereby I mean that the Court does not see itself in the position of settling the case regardless of epistemic uncertainty. It must place the factual prospects within the epistemic and decisional sphere of lawmakers, thus deferring to their competence and legitimacy to take legislative action. In this manner the Court applies a formal principle favoring legislators on institutional reasons. Most clearly this happens under the form of a prerogative of appreciation or a prognostic margin. The explication and justification of the substantial boundaries of this prerogative (and its temporal limits, i.e. for how long it is granted) is one of the biggest problems in constitutional law, and cannot be tackled here (cf. Bickenbach 2014). Suffice to

[48] As stated in *fighting dogs* (BVerfGE 110, 141, 158 ff.), lawmakers passing a regulation may not be able "to form a sufficiently reliable opinion" on its factual premises or impacts, for they have to assess complex risk situations about which no reliable scientific evidence exists—but the prognostic uncertainty must be "significant" *(erheblich)*.

[49] On certain occasions what is in doubt is not *whether* but *to what extent* new legislative facts will emerge (e.g. variations in the cost of living will occur, but can be quantified only ex post), in which case the Court calls for constant legislative fact-finding. In *asylum seekers*, this came to a "duty of actualization" or updating (BVerfG Judgment of 18 July 2012, 1 BvL 10/10, para 105), albeit that the appellants framed the complaint in terms of due monitoring and revision (para 82).

[50] So e.g. in *Kalkar* (BVerfGE 49, 89, 131), the Court decided not to conduct any further fact-finding in the conviction that this would not remove the uncertainty.

[51] "If the lawmaker were allowed to decide freely" on probability degrees, the judicial control of "legislative prognostic decisions including their factual foundations" would be "impossible" (BVerfGE 129, 300, 323, *EU barrier clause*). In *care of the elderly* (BVerfGE 106, 62, 151–52), the Court recalled that: unconstitutionality may respond to "defective fact-finding" or to defective "fact-finding taken as a basis for prognostic decisions"; uncertainty about "future developments" does not open an "entirely control-free decisional space"; "prognostic judgments rely on fact-finding which are in turn susceptible to review and assessment"; as with past or present states of affairs, the Court controls "whether the lawmaker has based its decision on investigations which are as comprehensive as possible or has overlooked relevant facts"; "under certain limits", it is up "to the lawmaker how to investigate" such facts". Yet, as far as prognostic uncertainties can be eliminated "through firm empirical data and reliable experiential knowledge, the prognostic margin" vanishes.

[52] So e.g. in *fighting dogs* (BVerfGE 110, 141, 160).

remark that prognostic margins are flexible. As stated in *codetermination*, various factors determine their scope in each case.

> Uncertainty about the impacts of a law in an uncertain future cannot exclude the authority of the lawmaker to enact a law, even if this law has far-reaching consequences. Conversely, uncertainty as such does not suffice to justify that a margin of prognosis be not susceptible to constitutional control. Prognoses always entail a probability judgment, the foundations of which can and must be demonstrated; these do not escape assessment. The prerogative of appreciation of the lawmaker depends, in detail, on factors of a different kind, especially on the particular nature of the field in question, the possibilities of forming a sufficiently safe opinion, and on the importance of the legal goods at issue.[53]

In other words, the requisite degree of prognostic reliability may oscillate—e.g. sound arguments sufficed in *base tariff*, whilst as much certainty as possible was required in *abortion*. And not only the intensity but also the mode of prognostic review varies: the BVerfG may validate legislative prospects as plausible—or discard them—depending on *how* these were formed, i.e. by checking the prognostic method deployed in the lawmaking process. The Court may also, however, do its own substantive appraisal of the plausibility of the prognostic arguments—be they recovered from the legislative process or generated from within constitutional review proceedings.

The assertion of monitoring and revision duties usually goes along with the recognition of a prognostic prerogative.[54] Yet, since a court may grant such a prerogative without setting them, as happens in many jurisdictions, we need another key to grasp the post-legislative doctrine.[55] This is the idea of *compensation*: when asserting

[53] BVerfGE 50, 290 (332–33). In *care of the elderly*, the Court recalled that, "when events evolve differently as assumed, as often happens", the risk is just actualized which is "typical for prognoses and inherent to any estimation" about complex facts in the future; "wrong prognoses cannot be excluded even if the utmost prognostic care has been taken". A lawmaker "who cannot do without prognoses must be allowed, within certain limits, to take this risk without having to fear a negative constitutional assessment. The fixation of a prerogative of appreciation in case of prognoses" responds "to the empirical and normative presuppositions under which legislation takes place. There can be no unitary (…) answer, but only differentiated solutions. What criterion is adequate in the concrete case depends, especially, on the particularities of the state of affairs and the prognostic difficulty, whereby a sharp demarcation is barely possible"; the prognostic margin can be ascertained only after an overall consideration of "the subject matter" in the light of "the interests which are to be protected, without ignoring the extent to which the expectations underlying the law" can be said to be objective and rational (BVerfGE 106, 62, 151–52); cf. also *junior professorship* (BVerfG 111, 226, 255).

[54] "Insecurity and uncertainty stand at the beginning of the prerogative of appreciation. The duty to monitor and to eventually intervene stand at the end. As a provisional right of the lawmaker to take the final evaluative decision, "the prerogative of appreciation (…) is the connecting link" (Bickenbach 2014: 159).

[55] For instance, in *Mutzenbacher* this prerogative was granted as to the impact assessment of pornographic novels on minors, but no specific monitoring was due (BVerfG 83, 130, 140–41); in *genetic engineering* (BVerfG Judgment of 24 November 2010, 1 BvF 2/05, para 123 of the English version, para 142 of the German version), the Court stated that when "scientific knowledge is uncertain", the legislature has a prerogative "to assess the potential dangers and the risks", which "does not require any empirical scientific evidence" of the potential danger of GMOs, "particularly since the protected legal interests are enshrined in the Constitution and carry great weight"

the duties, the Court tries to compensate for the prognostic leeway granted to lawmakers, for this leeway amounts to permitting an interference with rights on insecure (albeit non-arbitrary) prospects. The judges must thus contemplate the notion that plausible or even not manifestly wrong prognoses can be accepted only conditionally, i.e. they must decide not only that these fall within a prognostic prerogative, but also whether an additional condition (monitoring and revision) must be set, and how precisely this is to be defined.[56] At first sight, the most likely candidates for triggering such a decision are the legal good affected and the gravity of the potential affection. The Court itself made them the key criteria for imposing rather specific monitoring duties in *abortion* and *juvenile justice*. But, as explained below (Sect. 11.5), the importance of either rights or affections is not the only catalyst of our doctrine.

All four conditions leading to the assertion of monitoring and revision duties at R_1 (fact-dependence, uncertainty, deference and compensation) may play as well when it comes to reassessing the law at a later moment (R_2, R_n). The doctrine, previously activated as a part of the prognosis review, then turns into impact review. So, the Court must evaluate whether legislative prospections remain uncertain, or whether sufficient evidence has been gathered through due monitoring which corroborates or refutes them.[57] In the latter case, other things being equal, the first verdict ought to be overruled (whereby the judges, in addition to the formal principles of democracy and the separation of powers, must also consider that of legal certainty). This structure could be extended to cases in which the original law has been already corrected, and the Court must decide whether this correction relied on due retrospection—formally, though, it is another statute which is examined. Whereas most decisions of the BVerfG are limited to asserting the duties to monitor and revise, their "enforcement" (i.e. the constitutional reassessment in view of the post-legislative process) has been rare so far: only *parental custody* and *barrier clause* may be regarded as examples of application of the doctrine at R_2—I will return to this point below.

(that this act was a precautionary one seemed to make monitoring and revision unnecessary); in the *incest* case (BVerfGE 120, 224, 244–45), the prospect that relationships between brothers and sisters provoke "severe detrimental effects on families and society" is deemed plausible despite the difficulties in ascertaining such impacts, but no monitoring duty is set as to the criminal ban on those relationships; or, in *hoof supply* (BVerfGE 119, 59, 86), the Court recognized a prerogative of appreciation with regard to the necessity test, but thought it unreasonable to call on the lawmaker for a "strict surveillance" and a "comprehensive preventive control" because of the extreme costs involved—the act, nevertheless, was held disproportionate and voided. See also the 2002 decision on *barrister registration* at the Federal Supreme Court (BVerfG 106, 216, 222).

[56] In the theory of formal principles, the compensatory function and the dynamic aspect of the post-legislative doctrine seem to go unnoticed: cf. e.g. Alexy (2014: 520 ff.), elaborating precisely on the *cannabis* case.

[57] Prognostic failures triggering the duty to revise may be total or partial. As recalled in *fighting dogs* (BVerfGE 110, 141, 166), legislators must collect evidence as to the risks involved and their causes, and will have to adapt the law if their prognostic appreciation "is not or not entirely confirmed".

A critical question is what lawmakers are required to do between the two review milestones (R_1 and R_2). In general, the evolution of legislative facts and the impacts of the law constitute the twofold object of due monitoring, and it is the respective findings that should be reassessed as a basis for an eventual correction of the law.[58] Yet, the specific content of the duties—what and how exactly is to be monitored, and who should do it—is normally left open, or can only be inferred from the context. For instance, "the lawmaker" may be bound to observe the judicial application of a new act *(plea bargaining)*, to follow social-scientific progresses both on the national and international level *(census)*, to compare the evolution of legislative facts abroad *(cannabis)*, or to calculate the economic impact of its measures *(base tariff)*.[59] Yet, detailed instructions are given seldom: how to comply with the Court's requirements remains mostly unspecified. Only in cases where "the high rank" of the legal good at issue, the kind of risks implied and the evolution of societal views on the matter make it due "to monitor" legislative impacts—so in *abortion*—, this duty obliges legislators to assure

> the systematic production, collection, and analysis and evaluation of the data which are necessary to assess the impacts of the law. Reliable statistics with sufficient informative value—e.g. about the absolute number of abortions, about the relative quotes resulting from the proportion of that number with regard to the whole population, to the number of women of a fertile age, to the number of pregnancies or to the normal and still births, as well as about the distribution of the non-penalized terminations of pregnancy upon the different legal bases—are indispensable for that. It is up to the lawmaker to what further relevant facts (e.g. multiple abortions, age of women, family status, number of children) it extends the statistical surveys and how it regulates in detail data capture, analysis and evaluation.[60]

Notice that even such a detailed *due* monitoring of legislative impacts covers only aspects which are pertinent to constitutional scrutiny, and is not coextensive with a *legisprudential* or *regulatory* retrospection. In other words, what may be legally required is not a full ex post evaluation of statutes, or a comprehensive inquiry into their failure or success, but merely the observation of facts and impacts

[58] One might distinguish between legislative impacts and unexpected developments of legislative facts. Yet both can be tackled jointly. Cf. Meßerschmidt (2000: 1007–1008), Höfling and Engels (2014: 858) or Flückiger (2007: 161).

[59] See, respectively, BVerfG Judgment of 13 March 2013, 2 BvR 2628/10, para 64 and 121; BVerfGE 65, 1, 55–56; and Judgment of 10 June 2006, 1 BvR 706/08 et al., para 170 and 241.

[60] BVerfGE 88, 203 (310–11). In *juvenile justice*, the Court remarked that: "in view of the particularly high weight" of the rights affected by the confinement of minors, "the lawmaker is obliged to monitor and to revise [the law] according to the monitoring results"; it "must assure itself" and the involved authorities of "the chance to learn from experiences" about the way in which "legislative provisions are applied" and from the comparison with experiences outside its own territorial area of competence. So, the lawmaker must collect "informative" *(aussagefähig)* and comparative data which make it possible "to ascertain and assess the successes and failures" in the execution of juvenile criminal sanctions, and to conduct a "specific investigation of the factors" bearing on the legislative impact (BVerfGE 116, 69, 90–91).

that are constitutionally relevant. So, even when the doctrine applies, a wide range of retrospective problems remain within the total discretion of the lawmakers.[61]

Monitoring and revision duties do not predetermine any particular legislative content, but refer to *how* lawmakers should act or what steps they should take after passing a bill. They are hence a subset or variant of the rational lawmaking requirements which characterize the judicial control of the process of legislative justification (process review). The BVerfG has inspected legislation under this procedural aspect since the 1970s, mostly in a semi-procedural (Bar-Siman-Tov 2012) or semi-substantive (Coenen 2001) guise, i.e. by combining process and substantive criteria. Judicial control gets thereby extended to the so-called "internal" or material lawmaking process (*inneres Gesetzgebungsverfahren*).[62] Such qualifiers point at features of this process that are not covered by the constitutive rules for the valid production of statutes, laid down in the Basic Law (Art. 76 ff. GG) or the standing orders of the parliamentary chambers—these rules would be the "external" or formalized dimension of the process. When the Court resolves to control the internal side, it looks to whether legislators have prepared and justified a statute according to a method *(Methodik)* of a certain quality, say, with due care *(Sorgfalt)* and reflection *(Nachdenken).* Deficits (or merits) in this respect may lead or incline the judges to strike down (or to uphold) a law. Roughly, this method comprises basic rationality requirements such as the adequate construction of diagnoses and prognoses, specific goal-setting, inclusive and well-made balancing, consistency, or the proper documentation and transparency of legislative reasons—pluralism of viewpoints and authenticity of the legislature's choices, as virtues preventing legislative capture, also belong here.

Demands on the process of legislative justification render a compensatory function. They may compensate for the impossibility to review the end contents of a law, i.e. the outcomes or results of the lawmaking process,[63] or for the low intensity of review that the Court, in the absence of further yardsticks, applies to these results—the "manifest unconstitutionality" test.[64] Furthermore, when the Court performs a

[61] In *co-determination*, upon endorsing legislative fact-findings and prognoses as plausible, the Court recalled that it only examines whether the challenged provisions are constitutionally permissible, whereas it is solely incumbent on the lawmaker "to improve technically the act upon scrutiny, to regulate open questions, and soften eventual frictions" which may emerge in the future (BVerfGE 50, 290, 335–36).

[62] Process requirements appear already in the 1958 *chemistries* decision (BVerfG 7, 377, 411–12), but the starting point for (semi-)procedural review is usually placed in *mills structure act* (1975) and *codetermination* (1979). See further Schwerdtfeger (1977: 173), as well as the pieces by Waldhoff, Gzreszick and Meßerschmidt in this volume.

[63] BVerfGE 119, 181, 236 (*broadcasting fees*).

[64] An outstanding example is the 2010 *Hartz IV* decision on social benefits (BVerfGE 125, 175, para 139 ff.). As elaborated in the 2012 ruling on *professorial salaries*: "to a particularly high extent", a change of the wage system "is marked with uncertainties and exposed to prognostic mistakes", and therefore "it is the observance of procedural requirements" that matters, with these operating as a "second pillar" of protection that flanks and reinforces the limited material control (manifest unconstitutionality test) exerted on the legislative results (BVerfGE 130, 263, para 163–64).

substantial review, e.g. a strict proportionality analysis, procedural checks provide a counterweight to its limited capacity—or readiness—to assess the content of legislative diagnoses and prognoses in "complex and hard to assess" *(schwer übersehbar)* regulatory scenarios.[65] In all these cases, lawmakers' appreciations qualify as plausible if they were methodically well-formed (and exhibit no manifest substantial error), which often prefigures a judgment *pro legislatore*. That seems the natural place for post-legislative exigencies. Actually, both procedural doctrines are usually coupled. The 1979 ruling upholding the act on *codetermination* in the coal and steel industry offers an early example.[66] For the BVerfG, the matter was so complex and dynamic that reliable predictions about the impacts of the act were not possible. As no especially weighty right was compromised, the Court reviewed the prognosis sustaining the act rather procedurally, verifying that legislators had "exhausted the available knowledge sources" and aptly grounded their prospects on the "material at hand", for this is what "sets up" their prerogative of appreciation. But the Court likewise committed legislators to correct the law if their prognoses were showed to be totally or partially wrong. Such a conversion of legislative into post-legislative process demands recurs.[67] The BVerfG has even stated that the methodological criteria it applies to the pre-enactment process of lawmaking, especially concerning prospective evaluations, fact-finding and balancing do "hold in the future as well".[68] Post-legislative duties seem thus the logical extension or "dynamization" of process review under conditions of high regulatory complexity and uncertainty.[69] This should imply that, if lawmakers have not done their "procedural due" before passing a law, they are not to be granted any prognostic prerogative, even if this is made

[65] BVerfGE 50, 292, 333 *(codetermination)*.

[66] BVerfGE 50, 292, 332 ff.

[67] *Hartz IV* and *professorial salaries* illustrate well this intertwinement. In the former case, the Court recalled that the factual estimations of the lawmakers must respond to a proper fact-finding method transparently and consistently applied, whereby the results of such a method "must be checked continuously and further developed": "the lawmaker has to take measures which topically *(zeitnah)* react to changes in economic conditions, such as increases of prices or consumer taxes, in order to assure that the current [existential] needs are met" (BVerfGE 125, 175 para 140). In *professorial salaries*, we read: "procedural requirements in the form of justification, checking and monitoring duties" particularly apply to structural changes in the regulatory model; since the impacts of such changes can be known only as time lapses, the lawmaker is granted a "prognostic and appreciative margin", but, "in return for that", is subjected, "in addition to the justification duty, to the duty to monitoring and eventual revision", being "obliged to undertake corrections" if actual and prognosticated developments considerably deviate from one another (para 165). Even where no method review is apparent, like in *aircraft noise*, due legislative care played its part.

[68] BVerfGE 116, 69, 90–91 *(juvenile justice)*.

[69] The monitoring duty is a "*pro futuro* complement" to the margin of appreciation "which temporarily extends the maintenance of procedural requirements" (Augsberg and Augsberg 2007: 292–93); as Bickenbach (2014: 159) notes, "the burden of justification *(Darlegungslast)* and the duties to monitor and revise clearly behave in a complementary manner with regard to prognostic legislative decisions under uncertainty". In the early 80s, Kloepfer (1982: 90) had similarly argued that "legislators' duties of adequate fact-finding" and "rational prognosis" transform "into an ongoing duty to control the success" of the law after enactment. On such dynamization, Huster (2003: 12); cf. Höfling and Engels (2014: 860).

conditional on ex post monitoring and revision—otherwise the post-legislative doctrine would recompense negligent lawmakers.[70]

All in all, monitoring and revision duties offer a way out of an awkward situation. On the one hand, the BVerfG ought to void laws violating fundamental rights, but this violation may depend on events that cannot be reliably prognosticated. On the other, the principles of democracy and separation of powers push judges to respect the primary competences of lawmakers to address difficult societal issues. To strike a balance between blocking legislation and simply deferring to legislative prognoses (placing them within the prerogative of appreciation without reservation), the Court resorts to the post-legislative doctrine and calls on lawmakers for a responsible observation of the impacts of legislation. This strategy should hence avoid the usurpation of legislative functions (institutional success), assure dynamic rights protection (iusfundamental success), and even fuel better lawmaking cycles (legisprudential success). But that is perhaps too ideal an expectation.

11.4 Calling the Post-legislative Doctrine into Question

Original strands in judicial review are contentious by definition. The BVerfG's post-legislative approach is no exception and has been criticised on many counts. These always refer either to its legal incorrectness or to its normative illegitimacy, or to both: our doctrine may be claimed to base on a wrong interpretation of the constitution, or from a censorial perspective it may be reproached for being just an undesirable or pointless trend. After a few words on the constitutional basis, I will focus on four major, interrelated, sets of difficulties that have a bearing mainly on the legitimacy aspect. Let us call them the: *activation; profile; enforcement;* and *disturbance* problems.[71]

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[70] Asserting the doctrine irrespective of the quality of the lawmaking process viz. the method of legislative justification seems contradictory: retrospective exigencies are a meaningful complement to, not a substitute for, due legislative care. Yet, even if the Court finds fault with the legislative process, lawmakers may defend the reliability of their prognoses within the constitutional proceedings. For the Court, prognoses must be based on factual assumptions which have been carefully investigated "or at least can be confirmed in the framework of the judicial examination", and the prognostic result must be controlled as to whether the viewpoints sustaining it were revealed with sufficient clarity "or at least it is possible to reveal them in the review proceedings" (BVerfGE 106, 62, 151–152, *care of the elderly*). This might open up the gate to impact review. In this vein, the ECtHR, in *Zammit Maempel v Malta*, reproaches careless lawmakers for not having conducted "any impact assessment studies", but welcomes that they allowed for monitoring through the appointment of a group of experts (App. 24212/10, Judgment of 22 November 2011, para 70); cf. below, Sect. 11.5.

[71] Criticism may be levelled at the doctrine as such or at the way it is handled by the Court, with the latter being my concern now. Problems may appear in different proportions or intensify in some cases or with regard to one or other of the duties, but I confine myself to an overall appraisal. Roughly, these difficulties are concretizations of classical objections against judicial review: the first two point at features that judicial doctrines are expected to have (predictability, coherence, precision); the third has to do with the under-protection of rights, and the fourth with the disruption of the policy process.

That no reference to retrospection or correction can be found in the Bonn Basic Law prompts the question of what the legal basis of the post-legislative doctrine is. Without delving into details of German constitutional dogmatics, three interwoven points are worth mentioning in this regard. First, the post-legislative doctrine relies on a dynamic understanding of the bindingness of the constitution on lawmakers (Art. 20.3 GG: "the legislature shall be bound by the constitutional order"): the compatibility of legislation with the fundamental rights enshrined in the Basic Law ought to stand over time. More concretely, a monitoring duty should assure that interferences which are temporarily permitted in view of epistemic uncertainties do not prove unconstitutional once these uncertainties are cleared up. So, without discarding other feasible foundations (ranging from the principles of democracy and separation of powers to the right to access publicly-held information), one may say that the doctrine draws on the material force of the constitutional rights or goods affected in each case (Höfling and Engels 2014: 858).[72] A second issue is whether the post-legislative duties can be considered proper duties legally binding on lawmakers, or are to be seen just as prudential or natural obligations *(Obliegenheiten).* This "status question" plagues scholarly debates about the due legislative and post-legislative methods of legislation, but may be left aside here. Possibly, the notions of "duty" or "obligation" are better taken in a transferred sense in our context; anyway, the decisive point is whether monitoring and revision play some argumentative role when it comes to pronouncing a law (un-)constitutional. And there is no doubt that the Court accords them such a role in certain cases.[73] This raises the problem of whether retrospective diligence is constitutionally due only once the Court has affirmed it, or whether it presents, rather, a baseline requirement on any post-legislative stage. The latter option is implausible and the BVerfG denied it explicitly in *abortion:* lawmakers are not constitutionally obligated to monitor legislative facts and impacts by default. This does not necessarily mean that they may not be subjected to post-legislative "duties" without the Court's interposition,[74] for the judges do not "create" any "duties" but only specify or actualize them—according to conventional legal fiction, the BVerfG is entitled, at most, to elicit what is already contained in the Basic Law.[75] Ultimately, however, it is within the Court's powers to determine to which laws and in which scenarios retrospective duties apply. And revolving around this activation we encounter a first set of difficulties.

[72] Mayer (1996: 155) connects the duty to revise to a supra-positive restitution principle which also applies in constitutional law.

[73] The once dominant view that "the lawmaker owes nothing but the law as such" (Geiger 1979: 141) no longer holds without more ado. In view of the case law, lawmakers may owe something more. While no general duty to a legislative due process of justification (at least, no definitive rule) can be claimed to exist, it is undeniable that process requirements apply to certain cases or to "constitutionally special situations" (Schlaich and Korioth 2012: § 343).

[74] Pabst (2012: 401) speaks of an "unspecific duty" which is actualized upon assertion by the Court.

[75] If the source of a post-legislative due process is the Basic Law, with the Court being a mere admonisher (not a duty-giver), it might be claimed that the content, scope and occasion of the doctrine should be extended to issues not covered by the Court's interpretation. On this dogmatic viewpoint, see Tekin (2013: 13 ff., 86–87).

The post-legislative doctrine has been invoked on so different occasions and connected with so many rights that one wonders what exactly triggers it, i.e. when and why prospective margins on the lawmakers' side must be compensated for with retrospective exigencies. Activation criteria like the high weight of the legal good at issue (e.g. life, personal integrity, human dignity) and the severity or irreparability of potential damages may well explicate some judgments, in particular those which instruct lawmakers how to monitor, but do not square with a number of others.[76] Neither is the intricacy of the regulated area the conclusive factor. One would expect retrospective requirements to be a precaution against prognostic uncertainties associated with very dynamic social fields or techno-scientific advances. These requirements seem, however, to fit with virtually any legislation on almost every field. As Huster (2003: 21) remarks, it would appear that "everything has to be observed", whereby the monitoring duty loses its "distinctiveness". When justifying its epistemic doubts, the Court refers e.g. to very "complex" states of affairs, to "still evolving" matters, or to "insufficiently" reliable evidence or scientific "disagreements" on it. Yet, this is of little help to predict when the doctrine will be activated, for such attributes correspond with many regulation areas in today's society. In the end, it is the judges who, case by case, must decide whether a legislative scenario is so uncertain that retrospective duties are needed.[77] Even if these duties were asserted whenever a prerogative of appreciation is granted, this would not make them more predictable since such a prerogative depends on various factors that must be assessed in each situation.

The activation problem has other faces, though, such as the incomplete or even inconsistent assertion of the doctrine. The dissenting opinions in two landmark cases illustrate this aspect. In *abortion*, the judges disagreed as to the scope of the review and—indirectly—as to the monitoring and revision duties. For the majority, these covered only the protection right (the duty to protect unborn life), not the mothers' rights. Given that the BVerfG has used this doctrine to safeguard defense rights as well, there is no apparent reason for such a restriction on the scope of retrospection.[78] The other example is *cannabis*, where the Court's handling of the doctrine looks somewhat inconsequential. When reviewing the 1971 narcotics act,

[76] With cases involving e.g. professional freedom *(base tariff)*, the right of public servants to an adequate wage (*professorial salaries*) or, to name just two further examples, the freedom of science (BVerfGE 111, 333, 360, *University Act of Brandenburg*), or the right to property—which was allegedly affected by the cost of *extra-judicial requests* for IPR protection (BVerfGE, Judgment of 20 January 2010, 1 BvR 2062/09, para 22–23).

[77] What a "complex" state of affairs is "remains practically within the discretion *(Belieben)* of the constitutional judges" (Mayer 1996: 131–32). Probably, the notion of regulatory (non-)complexity can only be stipulated: cfr. Vanberg (2005: 104), basing this notion on how easily legislative decisions can be monitored.

[78] For Justices Mahrenholz and Sommer, the duty to protect unborn life was also constrained by the iusfundamental status of the woman—whose rights to dignity, personal integrity and personality were undervalued by the majority (BVerfGE 88, 203, 339–340). While this dissenting opinion does not go into the duties to monitor and revise, it can be assumed that, if it is incumbent on lawmakers to balance all competing interests, then the effects of the law on all these interests should also be monitored. On the biased scope of the doctrine in this judgment, see Tekin (2013: 112 ff.).

the BVerfG in 1994 decided that lawmakers could still benefit from a margin of appreciation: although the risks of cannabis use were admittedly lower than assumed when the act had originally been passed, the majority thought that relevant dangers could still not be discounted, held the criminal ban to be proportional and, in return, asserted the duties to monitor and revise. But the recourse to retrospection might have operated otherwise—more in line with *Kalkar* or *aircraft noise*. As dissenting Justice Sommer defended, requiring to observe "in the future" was not enough: given that "weighty doubts" had been aired "from different flanks" over the years, lawmakers should have met their "monitoring, examination and revision" duties by forming, "on the basis of reliable sources", their "own comprehensive picture of the continuation of the empirical foundations" of the 1971 decision. Since no such retrospection existed, Sommer called for corrections to be made "at the present time", arguing that the lowered danger estimation of cannabis use had rendered the ban disproportionate.[79] The majority, however, contented itself with asserting retrospective duties from 1994 onwards, thus being rather indulgent with a flawed post-legislative process. As noted below, cases like these suggest that extra-constitutional factors (e.g. the sensitivity of the topic) influence both the activation and the scope of the doctrine.

A second set of difficulties results from the undifferentiated profile of the doctrine, especially as concerns monitoring. Whatever status or binding force is accorded to retrospective requirements, these presuppose some structure; however, the BVerfG leaves structural details (such as who is required to monitor exactly what, by which instruments, how intensively, or for how long) largely unspecified.[80] In this respect, the practice of asserting post-legislative duties as a sort of formula that accompanies the recognition of prognostic prerogatives is particularly objectionable. But even in the few cases where the requisite evaluation is defined with some precision—say, when the Court tailors the monitoring duty—, significant aspects remain unclear. One of them is the role the legislature is supposed to play in the post-legislative process. As the parliament is ill-equipped to perform evaluations by itself, these fall normally within the competences of the government or the administration, or else must be commissioned to third parties.[81] Thereby the

[79] In his view, the judgment should have been based on "a wider, updated and hence more convincing factual basis"; the Court did not require "any further explanations" from the lawmaker about how it complied with that duty nor call for a hearing of evidence in order to obtain a "wide enough" and "updated factual basis" for its decision (BVerfGE 90, 145, 216–17, 219 ff.). On Justice Sommer's dissenting vote, see Hillenkamp (2009: 305–06); on the—missing—link between due legislative and due post-legislative process, see note 70.

[80] For the opposite view, Hillenkamp (2009: 308): "how the monitoring and revision duty is to be met is easy to answer".

[81] Upon noting that the Court is unclear as to the whole due evaluation process (actors, methods, processing of results…), Gusy and Kapitza (2015: 25 ff., 35) hold that the legislature's operative incapacity to retrospection does not imply that monitoring be necessarily made by the government. Referring to *Hartz IV* and *asylum seekers*, these authors further note that in mandating the evaluation of the law, the Court leaves open who should conduct it, but the parliament is not the envisaged actor: extra-parliamentary and even non-official evaluations may be resorted to, in which case it should be granted that legislators assess them "objectively and non-arbitrarily", and duly justify

conventional allusion to "the lawmaker" as the addressee of retrospective requirements is misleading, and may pose issues of attribution and authenticity of evaluative activities. Another critical point is the duration of the retrospective duties. Monitoring periods (the "adequate" or "reasonable" time to gather experiences) considerably vary depending on the measure at hand or the complexity of the regulated area. Unless a deadline is set, monitoring thus presents a continuous task which terminates only when enough evidence is collected to confirm that legislative impacts or facts stray (totally or in part) from the lawmakers' prognoses—or, conversely, these have been corroborated. Since such deviations are typically a matter of degree, the moment at which corrections must be undertaken, or their extent, remains open to interpretation: criteria such as the emergence of a manifest unconstitutionality work in the abstract, but provide little practical guidance.[82] Obviously, a court cannot prescribe a detailed blueprint indicating all steps to be taken after the law is enacted, for this would intrude upon the lawmaker's procedural autonomy. But insufficient or lacking concretization may obscure how legislators should comply with their retrospective duties, and further raises the problem of the meta-evaluative yardstick the Court should use to review a post-legislative process. It is all but clear by what method it will check that retrospection has been duly conducted. Not only must judges ascertain whether monitoring actually took place or not, but also whether it was good enough to honor the constitutional standard: they should take on the stance of meta-evaluators. However, no monitoring-*specific* assessment criteria have been developed to date. Finally, the indeterminacy of retrospective duties gives these an appearance of non-binding appeals without legal consequences.[83]

Within the realm of politics, lawmakers can dispense with the task of retrospection. Inasmuch as this task is asserted as a constitutional duty, one would expect it to be done, otherwise this should have an effect on the BVerfG's appraisal of legislation. In neither respect—compliance or enforcement—, has the post-legislative doc-

differentiations or deviations. Governmental monitoring might further distort institutional roles, for "it is no longer the executive who is bound by the law, but the parliament who seems bound by the executive's evaluation". The problem of "who evaluates the evaluators" worsens if evaluation is "privatized" by the hiring of consulting firms, which raises "potential conflicts of interests". Probably, the point is to assure some parliamentary supervision of evaluation: non-parliamentary instances may well monitor, but at least the basic decisions on criteria, guidelines and methods, as well as the assessment of the findings are incumbent on the legislature, i.e. the results of extra-parliamentary monitoring can have just an informative value for elected lawmakers (cf. Albers 2006: 34 ff.; Morand 1994: 133). Finally, one wonders whether independent or academic evaluation research qualifies as due monitoring by *the lawmaker* (see Tekin 2013: 74 ff.).

[82] On the so-called "evidence clause", Meßerschmidt (2000: 1009 ff.), Mayer (1996: 141 ff., 171 ff.) and Bickenbach (2014: 353 ff.). As mentioned in Sect. 11.1, the assessment of evaluation findings is often highly controversial, even for the judges themselves—a striking instance is provided by the dissenting opinions of the ECtHR's Judges Jungwiert and Borrego in *D.H. v. the Czech Republic* (App. 57325/00, Judgment of 13 November 2007, para 194–95).

[83] Unless the Court, instead of asserting the doctrine in general, graduates it depending on the gravity of risks and the weight of legal goods, it may be pointless: thus Nagel (2010: 275), calling for a "differentiated monitoring duty".

trine been very effective so far. When asserted in return for prognostic margins (R_1), the doctrine implies postponing a definitive constitutional judgment to an unsettled, even remote moment, and this favors the perception of non-bindingness. As a commentator puts it, to compensate for "leniency" with legislative prognoses, the BVerfG "plays the constitutional ball", in the form of imposing monitoring and revision duties, back to a lawmaker who refuses to get it: "an intensive influencing of the legislative behavior cannot be detected" and was actually "not intended" (Nagel 2010: 274, 269).[84] Probably, the most striking example of this problem is *life imprisonment*. In the more than 30 years that has passed since this ruling, due monitoring could have possibly revealed clues for "a better solution" and hence led to amendments to the penal code. Yet, neither has such monitoring been undertaken nor has the law been revised. When asked in parliament for evidential, statistical information as to the impacts of this penalty, the federal government could not provide it because exhaustive data were not (or only limitedly) available, or because it did not see itself bound to an obligation to collect them.[85]

If the post-legislative process does not conform to what is constitutionally required, the BVerfG might be expected to intervene, but it is not obvious that a violation of retrospective duties can be successfully brought before the Court. For one thing, there exists no specific remedy in German constitutional law to react against such a violation. A compliance check can be performed only indirectly, if the law that was conditionally upheld in a former judgment gets re-examined, which presupposes the acceptance of a new constitutional appeal for consideration. The focus will then be on whether the law has become unconstitutional *because of supervening circumstances*, yet not exactly because of the infringement of any obligation by lawmakers.[86] In view of such circumstances, a failure to revise the legal framework—e.g. a legislative omission when basic rights to positive state's action are at stake—should lead the Court to void the law or to call for legislative correction. Yet, monitoring or evaluation deficits alone can hardly sustain a verdict of unconstitutionality. Anyway, the BVerfG follows a somewhat strict policy on the review of laws which have allegedly become unconstitutional over the course of time, and this policy seems even more rigid if these laws have been previously pronounced consti-

[84] Even when the Court makes specific monitoring requirements, as it did in *abortion*, the effectiveness of this duty seems questionable (see e.g. Höfling and Engels 2014: 860–861; cf., however, Hillenkamp 2009: 318 ff.).

[85] See Bundestag official printed record (BT-Drs.) 14/4830 (11 June 1996) and 16/5515 (14 June 2007). Tekin (2013: 76 ff.) argues that "the deficit of data" and the "unsatisfactory answer of the federal government possibly respond" to the conviction that it is "not obliged to collect evidence". See further Hillenkamp (2009: 315–316). Meßerschmidt (2000: 1040) reproaches the Court for not having settled this issue in 1977, and denies that the doctrine was even asserted as a "dilatory" formula; in his view, the BVerfG's "empirical reservations should be examined carefully to detect to what extent they are seriously meant or just serve to avoid clear constitutional statements".

[86] Lacking monitoring or revision may lead to an unconstitutional situation, in which case the BVerfG may pronounce the law unconstitutional in the framework of a new review (Höfling and Engels 2014: 862). For Pabst (2012: 397), if the law relied on prognoses which are shown to be wrong afterwards, then it was already unconstitutional when it was conditionally upheld—i.e. at R_1.

tutional.[87] As we saw in *aircraft noise*, legislative actions in complex areas are retrospectively checked just for a manifest insufficiency.[88] On the other hand, the procedural options available to enforce monitoring and revision duties are managed rather restrictively, and a special burden of justification is placed on those who challenge the law in retrospect. While in regular cases this is wholly understandable,[89] it is not when the doctrine has been previously asserted, for a new review is part of the conditions under which the law was upheld. Take for instance the request of a local court to get the 1971 narcotics act—which had been pronounced constitutional in 1994—reassessed in 2002. The request pointed at new evidence which had become available, including governmental materials, but the BVerfG—dismissing the case on procedural reasons—recalled that the referring court had simply opposed its own view to that of the lawmakers without actually *demonstrating* that the use of cannabis entailed no dangers.[90]

In sum, the duties of revision and especially of monitoring suffer from a "defective procedural protection" (Pabst 2012: 401; see also Mayer 1996: 195 ff.).[91] As a result, the judicial control of the post-legislative process is scarce, and these duties remain largely under-enforced. This bears on the legitimacy of any judicial doctrine which is meant to protect fundamental rights. Permitting interferences with rights on uncertain factual premises can be accepted for institutional reasons (e.g. pursuant to the formal principle of democracy), but a defective enforcement is harder to justify. If the doctrine is claimed to protect rights dynamically, it must be feasible to allege retrospective failures at a later moment (R_2), so that the Court, in view of the post-legislative process, can reassess the case. As long as this is not established, it comes as no surprise that the assertion of monitoring and revision duties is often regarded as an unbinding appeal to lawmakers,[92] having thus a merely rhetorical value. Yet, such appeals are never pointless and often render a pacifying function: the post-legislative doctrine may serve as a means to soften internal divergences

[87] Cases like *barrier clause*, however, provide the exception.

[88] See above Sect. 11.2, and also BVerfG, Judgment of 18 July 2012, 1 BvL 10/10, para 103 ff. *(asylum seekers).*

[89] There are good reasons (related e.g. to legal certainty) for a limited enforcement of time-tied constitutional doctrines. On the problems posed by an eventual annulment of the law at R_2, see e.g. Mayer (1996: 174 ff.).

[90] Decision of 29 June 2004, 2 BvL 8/02, request submitted by the local court of Bernau. For this court: "the prerogative of appreciation and hence the legislative margin of configuration attached to it reduces to zero" if—as it was claimed—it is "scientifically demonstrated that cannabis [use] results solely in low risks for only a few people" (para 23). For a critique of the BVerfG's refusal to re-examine the law, see Hillenkamp (2009: 316–317) and Tekin (2013: 126 ff.).

[91] Pabst (2012: 399–400) even suggests suppressing the one-year period to lodge an individual constitutional complaint (Art. 93 GG) and makes a statistical estimate about the bearing of this suppression on the Court's workload.

[92] Since the monitoring duty is not always set "as a correlative of all or at least certain legislative prognostic decisions" and there is neither a procedural way to enforce it nor a sufficient institutionalization of ex post evaluation, this doctrine "appears to be toothless" (Augsberg and Augsberg 2007: 308, arguing further that, since no clear parameters exist to identify ex post unconstitutionalities, the duty to revise also remains within political discretion).

among judges[93]; offer a way-out to avoid a court's clear positioning on very sensitive topics; or minimize the political or social struggles underlying the case—if those who have unsuccessfully claimed a constitutional violation can be comforted by the vague expectation of challenging the law again. And, more importantly, the Court draws the attention of lawmakers and of the public opinion to the need for ex post evaluations. But this may still be criticised, from another flank, by arguing that the constitutionalization of the post-legislative process disturbs the policy cycle.

That monitoring and revision are vital tasks of responsible lawmakers is one thing; that these tasks become obligatory or must be carried out upon a judicial decision is quite another. Viewed from a political standpoint, the main pitfalls of this constitutionalization are, probably, the alteration of regulatory priorities in evaluation, and the undermining of the integrative role of legislation (see Huster 2003: 20 ff.). As political and hence legislative attention and responsiveness is a scarce resource, to have a court pushing for a particular distribution of it can be dysfunctional. Courts—so the objection runs—look at legislation only through the lens of fundamental rights, whereas policymakers have a much wider perspective and are better placed, in institutional terms, to decide how to allocate retrospective efforts. The high financial costs of ex post evaluation, for instance, may lead policymakers to target only certain critical areas. By contrast, a judicial post-legislative doctrine can be applied in areas of low regulatory significance, which might impair the monitoring of the impacts of legislation with less constitutional and more political import. Moreover, a wide range of evaluative issues falls outside the scope of this doctrine, so that *due* monitoring does not guarantee any wholesale improvement of the quality of legislation. But mismatches between regulatory constitutional and regulatory retrospection are not the major obstacle: the doctrine may also force legislators to reconsider policy options that result from difficult political compromises and arrangements. The integrative, stabilizing function of legislation is put at risk if sensitive issues, once settled, have to be revisited or thematized from time to time pursuant to judicial retrospective requirements. It would then appear that the constitutionalization of retrospection unduly interferes with the political process.

This criticism presupposes, however, two conditions. First, retrospective duties must be actually complied with, or else be enforced, so that their assertion does make a difference for legislators. Whether these see themselves bound by the BVerfG's requirements remains, however, an open question. Second, legislators must have an actual interest in retrospection. Such an interest cannot be hastily excluded, for the legitimation and social acceptance of policy decisions increasingly depends on outcomes and impacts. Still, it may be advisable not to leave the monitoring of legislation entirely to political discretion. Judicial impulses to carry out ex post evaluation, if properly tailored and administered, may be needed when fundamental rights are at stake. Furthermore, the post-legislative doctrine goes hand in hand with the recognition of prognostic prerogatives on the legislators' side, which can hardly be disqualified as politically dysfunctional: the BVerfG just steers

[93] See e.g. the third ruling on *stores closing-time* (BVerfGE 111, 10, 42–43). On these "pragmatic" functions of the doctrine, see Huster (2003: 24–25).

the focus of policymakers to special monitoring needs. This sort of signaling may also raise the public's awareness that certain measures are potentially harmful in constitutional terms, so that the chances increase of having a societal eye kept on their impacts. By constitutionalizing ex post evaluation—even as a rhetorical recourse—, the BVerfG may thus sensitize society to pressure for better lawmaking cycles. At least, this seems to be the hope of the judges themselves.[94] To be sure, one cannot expect politicians to "passionately" embrace the evaluation of legislative impacts and facts as a consequence of a judicial doctrine (Nagel 2010: 274), but the constitutional duties of monitoring and revision should help to rectify political attention deficits and to foster post-legislative reflection.

11.5 Dynamic Protection of Rights and Impact Review

Underlying our theme stands the general question of what role the post-legislative process should play in the review of statutes. One might see the constitutionalization of retrospective legisprudential tenets as another example of judicial activism. Upon a closer look, however, we see that it is a quite natural development. Like lawmakers, who must often decide in view of high epistemic uncertainties, judges must deliver constitutional verdicts on the basis of *very* imperfect factual information, for which they attempt to assure the protection of fundamental rights through monitoring and revision exigencies.

Of course, the constitutional role of retrospection does not get exhausted with the post-legislative doctrine as construed here: the BVerfG draws on the same precautionary rationale in other ways. Sometimes, for instance, it accepts constitutionally dubious measures on the condition that monitoring clauses are added to the law: in *antiterrorism database*, the Court required lawmakers to amend the statute—which was upheld on the whole—so as to impose on the Federal Criminal Office duties to report to parliament and the public about how personal data processing tools were being used to counteract terrorist threats.[95] Conversely, the BVerfG may pronounce it unconstitutional that lawmakers suppress monitoring clauses when reforming legislation (as happened in *abortion* with regard to the provision regulating official statistics). In other jurisdictions similar paths are also followed occasionally, and the inclusion of evaluation clauses is deemed a relevant argument for upholding legislation.[96] Monitoring thus functions as a post-legislative process review argu-

[94] As stated in *juvenile justice*, due monitoring does not only contribute "to scientific and political knowledge-building, as well as to a public debate that fosters the search for the best solutions", but also reinforces "democratic responsibility" and accountability (BVerfGE 116, 69, 90–91).

[95] BVerfG, Judgment of 24 April 2013, 1 BvR 1215/07, para 221–22.

[96] For example, in *Arcelor*, the ECJ (Case C-127/07, Judgment of 16 December 2008, ECR 1-9895, para 61–62) argued: "in view of the novelty and complexity of the scheme, the original definition of the scope of Directive" and "the step-by-step approach taken, based in particular on the experience gained during the first stage of its implementation" were within the lawmakers' discretion; while "the legislature could lawfully make use of such a step-by-step approach", it was obliged "to

ment to incline the Court to sustain or void a law. Nonetheless, ex post evaluation usually finds no place in judicial review because courts assume that legislation must be controlled from an ex ante perspective, placing themselves in the position of lawmakers at the time of enactment. The BVerfG also embraces this ex ante viewpoint: at the moment of the review, the argument that the expectations of legislators have not been fulfilled is not decisive, i.e. wrong legislative prognoses alone do not lead to unconstitutionality. As established in *mills act* (1968), the Court, on principle, balances constitutional goods taking into consideration

> the assessment that was possible for the legislator to make when it prepared the law. Errors about the course of the economic development have to be accepted, because the lawmaker is also obliged, within its possibilities, to combat *(zur Abwehr)* future risks, whereby the course of events which could be originally predicted may well take, for the most different reasons, an unforeseen turn (…). A [legislative] measure that has been taken on the premise of a wrong prognosis cannot be deemed unconstitutional just because of that.[97]

Leaning on this steady opinion, the BVerfG refuses to assign a special weight to the prognostic mistakes of lawmakers: so to speak, legislative facts and impacts that occur after enactment do not count. Such a tolerance—an "error theory" in favor of legislators (Mayer 1996: 134)—is not easy to grasp, but the BVerfG has clung to this ex ante perspective until today, and rarely deviates from it.[98] So, in the 2007 ruling on *broadcasting fees*, the Court detected such a "thick" prognostic mistake that it was persuaded the law was ill-founded even at the time it was passed, which served as a "complementary" argument to pronounce it unconstitutional.[99] But, in general, a proper review of impacts is omitted. This judicial reluctance to assess

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review the measures adopted (…) at reasonable intervals, as is moreover provided for" in the Directive in question. See Keyaerts (2013: 284), who also refers to the opinion of Advocate General Maduro in *Vodafone and others* (Case C-58/08, Judgment of 8 June 2010, ECR 1-4999, Opinion delivered on 1 October 2009, para 42): "the existence of a sunset clause reduces" the "impact on the rights of the economic operators" and makes the interference "more readily acceptable" by ensuring that the legislature "will periodically reassess its interventions in areas (…) that are undergoing rapid social and economic change". Similarly, for the ECtHR's case law, Popelier (2013: 261, 254), referring to the Grand Chamber's decision on aircraft noise in *Hatton* v. *UK*, App. 36022/97, Judgment of 8 July 2003.

[97] BVerfGE 25, 1 (12–13).

[98] As mentioned earlier in connection with *aircraft noise* (Sect. 11.2), the doctrine about relative legislative omissions and the under-protection ban lead the Court to assume an ex post perspective and to assess forgoing legislative fact-findings (monitoring) and adjustments in order to determine whether the duty to revision was violated—the Court acted similarly in *Kalkar*.

[99] But even then the Court notes that "observations made in retrospect" *(nachträglich getroffene Feststellungen)* are "not decisive for the constitutional assessment" of prognoses: it all depends, rather, on the state of knowledge at the moment of legislative decision, ex ante; however, now the question is "whether both the substantive and the procedural requirements" on the deviation from the findings of the independent commission have been met, whereby "it is not clear what the basis of the prognosis was"*;* when "the prognosis, with hindsight, proves to be that grossly erroneous" *(derart grob unzutreffend)*, this can be "a complementary sign" *(ein ergänzendes Indiz)* that "the lawmaker, ex ante, had no constitutionally sufficient technical *(fachlich)* foundation for its prognosis" (BVerfGE 119, 181, 236).

legislation in the light of its effects, or of the evolution of underlying social realities seems firmly settled, and the BVerfG does not take advantage of the lapse of time by considering events that were unknown to lawmakers—as if that were unfair. And nor is this a German peculiarity. The ECJ, for example, also endorses this approach by recalling that the proportionality of a measure "cannot depend on a retrospective assessment of its efficacy":

> Where (…) the European Union legislature has to assess the future effects of legislation to be enacted although those effects cannot be accurately foreseen, its assessment is open to criticism only if it appears manifestly incorrect in the light of the information available to it [the legislature] at the time of the adoption of the legislation.[100]

This perspective does not precisely strengthen the protection of fundamental rights against laws based on uncertain premises. Fairness cannot ground a rejection of judicial hindsight. Certainly, it is a general principle of law that nobody can be held responsible for consequences which could not be foreseen, even if one had acted most carefully. But this principle does not hold in judicial review. If evidence of prognostic mistakes are already available to the Court—or can be convincingly adduced before it—, whether or not lawmakers can be held responsible for them should not matter. The unconstitutionality of laws has little to do with the culpability or negligence of their authors: constitutional violations are objective in the sense that they are to be determined irrespective of subjective factors. Inasmuch as circumstances occurring between the enactment and the review of a statute call the correctness of legislative prospects into question, evaluation-based arguments should be perfectly valid. Albeit that a court cannot reproach lawmakers for a failed prospection, it should not try to abstract from supervening facts when reviewing for constitutionality. Besides being a somewhat "absurd operation" (Meßerschmidt, Sect. 15.5.2 and 2012: 368), such an abstraction leads judges to uphold a constitutionally objectionable or failed statute whenever lawmakers had plausible reasons to believe that it would not excessively infringe fundamental rights. Yet, that lawmakers tried hard to carry out a rational prognosis and could not foresee unconstitutional impacts or developments is surely of "little consolation" for those whose rights have been sacrificed.[101]

Against this background, the post-legislative doctrine seems a positive shift, for it opens one door to an ex post scrutiny of legislative impacts. By widening the

[100] ECJ, Judgment of 15 October 1994, *Crispoltoni and Others* (C-133/93, ECR I-4863) para 43; Judgement of 12 July 2001, *Jippes and Others* (Case C-189/01, ECR I-5689), para 84; and, more recently, Judgment of 17 October 2013, *Billerud v Naturvårdsverket* (Case C-203/12), para 37.

[101] Whenever it is possible for the Court to determine "that the lawmakers' expectations were misguided", there exists a good argument to void legislation; "certainly, the lawmaker can be demanded to make only a rational prognosis", yet, if the prognosis fails, "it can no longer count as rational", not even "if it was methodologically" correct at the time of enactment: as soon as the prognosticated events are no longer likely to occur due to changing factual or legal conditions, "an unconstitutional state of affairs emerges which deprives the regulation of its justification", and the lawmaker, "behaves unlawfully" if it leaves this state of affairs uncorrected (Bickenbach 2014: 502–503, see also 497–498).

temporal framework for review, this doctrine avoids that (inculpable) prognostic failures must be borne by the right holders, and enhances the protection of fundamental rights over time by smoothing the way for the BVerfG to assess the constitutionality of statutes in retrospect. That happened at least in *parental custody*, where the Court—with the help of the ECtHR—drew on the findings of retrospective evaluation to strike down the law. The duties to monitor and revise could thus be the way to allow for the ex post perspective and the review of impacts. However, there are two snags. First, impact review and evaluation arguments would be then confined to cases or areas in which the Court has previously asserted retrospective duties. Second, these duties remain under-enforced for the most part, which casts doubts as to whether they assure a dynamic protection of rights. With the ex ante perspective being the default setting—prognostic mistakes do not count and impact review is largely excluded—, eventual control of the repercussions of laws should at least be granted through the post-legislative doctrine. Yet, if this proves to be ineffective or unfeasible, then perhaps a better solution is to broaden the room for impact arguments on the first occasion that legislation is checked (R_1).

When it comes to assessing the constitutionality of legislation, no weighty reasons are apparent to dispense with available ex post evaluation data.[102] It will be rightly objected that any review of impacts presupposes that sufficient time has elapsed after the entry into force of the law; otherwise evidence is unlikely to have been collected or be informative enough. For those laws which the Court examines shortly after passage, impact review is pointless. But as the lapse of time grows, tentative and provisional evaluation findings may prove to be valid arguments either for or against legislative prognoses and choices. Likewise, the lack of such findings or the failure to initiate any serious monitoring may also have a bearing on the constitutional verdict (as a procedural review yardstick). If infringements of basic rights rely on insecure prognoses, due legislative care goes beyond a law's enactment: the least legislators should be required to do is to observe the effects of their decision. Otherwise it would appear that they are not interested in making sure those infringements were justified. In this connection, there is no unfairness in using constitutional review proceedings to consider legislative reasons in retrospect. Of course, the Court itself is ill-equipped to conduct ex post evaluations, but lawmakers, appellants and other involved parties can supply evaluative materials to defend or to challenge the

[102] As for the ECtHR, see Popelier (2013: 263 ff.), arguing that evaluation arguments may put the burden of proof on the lawmaker's side e.g. in cases of suspect differentiations: "if the applicants give sufficiently reliable and significant evidence to give rise to a strong presumption of indirect discrimination, the burden of proof shifts to the Government, which must give evidence that the difference in the impact of the legislation was the result of objective factors" (referring to *D.H. v. the Czech Republic*, App. 57325/00, Judgment of 13 November 2007, para 194-95). Moreover, "monitoring and evaluation reports are helpful to convince the Court of the proportionality of legislation which has become the target of criticism after a specific incident", as happened with the Italian law providing for a progressive social reintegration of detainees: the government provided the Court with (ex post) statistical evidence to demonstrate that the percentage of crimes committed by prisoners subject to a semi-custodial regime was very low (*Mastromatteo v. Italy*, App 37703/97, Judgment of 24 October 2002, para 49, 72).

constitutionality of legislative (in-)action, and the Court can develop specific procedural, meta-evaluative criteria to assess the quality of these materials—and, eventually, to sort out bogus or manipulated retrospections. That is not a problem of judicial activism provoked by a court inventing constitutional duties: the point is, rather, how much weight is to be accorded to the "argument from evaluation" within constitutional reasoning, and how good, bad, or absent retrospection influences the upholding or voiding of a statute. The constitution may be silent about this, but it is implausible that actual legislative impacts should not play any relevant part in determining, with the benefit of hindsight, whether an interference with rights is permissible or not.

11.6 Concluding Remarks

Any legislation attempting to steer society is predestined to be amended or derogated: sooner or later it will become obsolete, unable to keep pace with changing or emerging realities. It is thus a basic legisprudential claim that its justification must be conceived of as an ongoing process: the reasonableness of laws is not a static attribute, for it may depend on facts which could not be anticipated nor assessed at the moment of their enactment. By the same token, a temporal aspect of constitutionality is recognized as well in many jurisdictions: statutes may become unconstitutional if, as time goes by, new empirical or normative conditions arise which make them no longer compatible with fundamental rights. While legislative obsolescence checks by the judiciary are not new, this general insight has acquired a special significance, on both the legisprudential and the constitutional level, as a result of the current circumstances of lawmaking. Increasingly, legislators are asked to contend with complex and rapidly shifting social environments or issues, and must often rely on uncertain prognoses. In this context, ex post evaluations providing continuous feedback as to the impacts of statutes are a dire and almost ubiquitous need from a policy perspective. Yet, in our troubled regulatory era, the post-legislative stage of the lawmaking cycle can no longer be regarded as a purely political matter. When the constitutionality of a piece of legislation depends on the verification of prognostic assumptions, the assessment of events and impacts occurring after its passage must have a place in judicial review. The transition from legisprudential ideals to legal-constitutional requirements is not obvious, however, and therefore this chapter has pursued the question of how retrospective evaluation has been embedded into constitutional review by the BVerfG. The case law of the German Court offers one of the most interesting experiences in this respect, and serves to illustrate and provide opportunity to discuss some major problems of a post-legislative judicial doctrine. While drawing only on a limited sample of decisions, I have tried to reconstruct the duties of monitoring and revision as a compensation for the lawmakers' temporary prognostic prerogative in complex scenarios, and as an extension of the legislative method standard which the Court applies to waive complications in substantive review. In its two-step approach, the BVerfG first requires lawmakers—often in

rather vague terms—to collect or produce evidence in the future, while a definite constitutional judgment is postponed to an undetermined moment. This structure goes along with a number of application problems, which nurtures the objection that the doctrine has no binding force and is used mostly as a rhetorical tool that, at best, softens internal conflicts among judges or saves them from having to take sides on controversial issues. Still, even unbinding appeals to lawmakers can also be productive: not only do certain statutes become thereby marked as constitutionally precarious, but also, and above all, ex post evaluation finally enters the constitutional discourse—thus filling an old gap in juristic accounts of lawmaking. When the Court reviews legislation premised on sound, albeit uncertain prospects, it confronts a constitutional quandary, and the recourse to monitoring and revision duties presents a convenient solution to escape it. Without enforcement, however, our doctrine works to the detriment of the right-holders, for interferences with rights are permitted on a condition—monitoring and revision—which remains largely left to political opportunism. Fortunately, upholding a law upon assertion of these duties is not the only option to incorporate retrospective evaluation into judicial review. Broadening the temporal perspective to make impact review a normal battlefield within the constitutional proceedings would significantly help to complete the constitutionalization of the legisprudential due post-legislative process. Should this be the case, it could be reasonably prognosticated that the synergy between legislation theory and constitutional review will bear positively on the practice of lawmaking and hence on the protection of fundamental rights.

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Chapter 12
Efficacy, Effectiveness, Efficiency: From Judicial to Managerial Rationality

Ulrich Karpen

Abstract Practical legislation and legisprudence strive for reducing the quantity and improving the quality of law. Qualified legislation is legitimized to safeguard public order and to shape the common good. Legitimacy of law flows from four main sources: rationality as a prerequisite of every state action, juridical rationality as conformity with the constitution, economic rationality and review and control of the law. This chapter focusses on economic or managerial rationality: efficacy, effective and efficient legislation. These goals and means of productive state action is, however, embedded in the democratic rule of law state and must obey the directives and limits of the constitution. Finally, it is legal, economic and political rationality which concretizes the common weal. The study comes to the conclusion that constitutional norms, namely their interpretation, as a value order, are important red ropes for targets and instruments of legislation. They are, however, not strictly binding on the legislator in the sense that constitutional judiciary may declare laws as void, if they fail to meet the guidance of rationality, legality, efficacy, effectiveness and efficiency. This finding grants exceptions in case of grossly missing democratic rule-of-law- and human rights-principles and arbitrary regulation. Parliament may and should improve self-control of laws according to these principles. The final "watchdog" is the Constitutional Court. The author observes a juridification of legislation, a sort of a "hybridization" of the representative democratic and juridical rule-of-law-elements of the Constitution. A re-balancing of the first and third power in the constitutional and political arena is needed.

Keywords Quality of Law • Rationality • Effectiveness • Efficiency • Regulatory Impact Assessment • Judicial Review

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12.1 What Does This Chapter Want?

Practical legislation and legisprudence strive to reduce the *quantity* and improve the *quality* of law. Qualified legislation is legitimized to safeguard public order and to shape the common good. Legitimacy of law flows from four main sources: rationality as a prerequisite of every state action (Sect. 12.2), juridical rationality (Sect. 12.3), economic rationality (Sect. 12.4) and review and control (Sect. 12.5). This chapter focuses on economic or managerial rationality. Efficacy, effective and efficient legislation and means of productive state action are, however, embedded in the democratic rule of law state and must observe the directives and limits of the constitution. Finally, it is legal, economic and political rationality which concretizes the common weal.

Legislation is an instrument of social guidance and control, as well as a tool of social engineering. A law is aimed at realizing a special purpose of goals, using appropriate instruments at achieving special results in special reality. Although following guidelines and barriers of the constitution, legislation is nothing less than implementing norms. The law is, however, a product of a *political process*, the result of an "institutionalized compromizing". The legislator must strive for good, qualified laws. Legal quality standards are, however, not deciding criteria for compromising (rational legitimation). The legislator has to take into account primarily the political situation namely majorities (democratic legitimation). If they go alongside: the better. If the latter is prevailing, it is decisive.[1]

Legislation as releasing general rules by democratic parliaments (or other authorities) is a specific form of *regulation*. It is high-ranking in the hierarchy of other tools of regulation, like delegated or administrative regulation or non-governmental, even private setting of standards. Regulation like legislation, bears with it the notion of general measures, aimed at institutions or behavioral change or control. The notions of regulation and legislation have different roots and also different meanings. The concept of "legislation" is predominantly a legal concept drawing on scholarship of law whereas "regulation" is a concept stemming from and rooted in economics scholarship as well as (more recently in social sciences).[2] "Better Regulation" is a permanent programme of the EU[3] and OECD.[4]

Legislation in an ever broadening perspective is an essential element and instrument of *governance* as the traditions and institutions by which authority in a country is exercised for the common good.[5] The World Bank listed some eight criteria,[6]

[1] Schuppert (2011: 16); Karpen (1989: 42, 43); Xanthaki (2014: 53); Mader (2001: 122); Meßerschmidt (2000: 365; the author is indebted particularly to this great study).

[2] Voermans (2016: 2); cf. also Karpen and Xanthaki (2016).

[3] *Smart Regulation in the European Union*, COM/2010/0543 final 3.

[4] The *OECD Report on Regulatory Reform 1197, Synthesis*, Paris: 8.

[5] This is the definition of the World Bank: http://go.worldbank.org/MKOGR258VO, 2009-10-25; see Karpen (2010: 16).

[6] Accountable, transparent, responsive, equitable and inclusive, effective and efficient, rule of law, participatory, consensus-oriented.

including legal, economic and review rationality. New catalogues of Human Rights cover a "Right to good governance/good administration", which is finally the modern version of the centuries-long demand for "good policey" or "good rule of a just and peaceful commonwealth".[7] The values of Good Governance are visible in the quality standards formulated by national governments, the European institutions[8] and the OECD.[9]

Legal drafting has to meet quality standards. Today it is widely accepted that the constitution and law of a given country establish standards for procedure, goals, methods and forms of laws. They must not all be listed here. It might be sufficient to mention the most important – and obvious – ones. The goal of the law-making process is the "right", "good", "just" and "fair" norm.[10] The means and instruments should be effective, appropriate, the form should be clear and the procedure transparent and participatory.

Traditionally, judging the quality of a law started from the principle of legality. The Swiss Constitution postulates: "All activities of the State are based on and limited by law."[11] State activity is compared to the prescription of law. Where they are congruent, the activity is legal and therefore considered legitimate. Where they diverge, legality and legitimacy end.[12] The advent of the Managing State extends the analysis in terms of effectiveness. It is no longer simply the comparison with the terms of law that legitimates State action, but in addition the differential between the goal of a public policy and the actual effects observed in the field. These are aspects of economic rationality; the primordial quality standards, in this perspective, are now:

- There is a hybridization of the *logic and rationality* governing the public right of action (Sect. 12.2).
- *Legal rationality*, which is a precondition of any State action (Sect. 12.3).
- It is imbued with that of *effectiveness* (Sect. 12.4). "Conversely, managerial [economic] rationality is amended by the principle of legality".[12]
- Consequently, *control and review*, as measures of securing the quality standards of legal rationality, are widened by evaluating the results achieved by legislation. The evaluator cooperates with the judge (Sect. 12.5).

[7] Merten (2015: 349).

[8] European Commission, *White Paper on European Governance*, COM (2001) 428 final: 10, 11.

[9] OECD, *Recommendation of the Council on regulatory policy and governance* 2012, Paris, 4.

[10] Merten (2015: 349).

[11] Art. 5 para 1 of the Constitution of 18th April 1999, Off Coll 1999: 2556.

[12] Flückiger (2009: 184).

12.2 Rational Law-Making

Rationality is the capacity to know and to act according to reasons.[13] Rationality is a quality criterion for good action and choice. Irrational acts who take decisions without arguments and without clarifying beforehand the facts, considering the consequences of the decision and weighing the pros and cons of alternatives.[14] The best definition of acting in the light of rationality is Kant's "Imperative": "Therefore, every rational being must act so as if he were through this maximum always a legislative member in the Universal Kingdom of ends."[15] Indeed, rationality is the first legitimation of legislation.[16] Since rationality has different facets – legal, economic, political, rationality – democratic decisions of people and legislations do not contradict, but confirm the rational basis of the law. Rational legislation requires a political decision on the policy and targets of the law, information on the effects and (positive and/or negative) side effects and on the ways and means by which the goal could be reached, taking into account the side effects.[17] The procedure of legislation must follow constitutional regulations and established legislative practice.

Legislation runs through some *phases*, which are in different depths accessible for rationality. First, considerations of what has to be done to solve a problem by means of a law, start from state's end. It is the responsibility of the legislator – government as initiator and parliament – to analyse the problem and the facts and to develop a policy. From there, the goals and purposes of the draft can be designed as well as instruments to implement problem solving means. Since Max Weber,[18] we know that it is impossible for social sciences to decide on a rational basis between different final values. *Value rationality* can only be – if at all existent – individual choice, probably assisted by philosophy.[19] This is the main reason why § 1 para 4 of the Act of the German National Control Council reads: "The aspired goals and purposes of regulations are not subject to control of the National Control Council".[20] It is, however, an open question whether the constitution contains value directives for state actions, including legislation, whether – in other words – it is a normative constitution (Sect. 12.3). The means to reach the goals and ends are subject to *goal-oriented rationality*.

Although this chapter focusses on substantive aims of good legislation – legality, effective and efficient output –, it may be advisable to shed some light on *procedural criteria* of law-making. This is based, first, on the assumption that if one is

[13] Gerhard (2014: 30); BVerfGE 94, 166 (194) ("asylum").

[14] Meßerschmidt (2012: 308).

[15] Kant (1993: 30).

[16] Karpen (1986: 26).

[17] Hopt (1972: 68).

[18] Weber (1956: 12, 13).

[19] Weber (1956: 12, 13).

[20] Act of 14 August 2006, as amended on 16 March 2011 (Off Gz I, 2011, 420).

compelled to act in a right way, he will generally do the right thing.[21] Second, it could be shown that in judicial review there is a connection between material and procedural control of norms: broader leeway for content is compensated by strict procedural examination and vice versa. Rational as methodological rules are important not only for designing targets and means, but for procedural steps as well. Formal aspects of the legislative process – initiative, deliberation, enactment, signature, publication – are regulated on in the Constitution (e.g. Arts. 70, 77, 78, 82 of the Basic Law of Germany). The material process of making laws is not prescribed in most constitutions, but developed by methodology.[22] Rationality is the core of material legislation. It is controversially discussed, whether the legislator under the constitution (which is silent in the matter) is obliged to follow procedural methodology at all. Some say, the legislator has to provide for "optimal methodology".[23] Others are of the opinion that the legislator is in debt only for the product.[24] And some are of the opinion that he has to keep a minimum standard of material methodological rules.[25] Meßerschmidt[26] considers, whether the quest for optimal method suffers from a lack of methodological formation due to the one-sided training of the proponents, who neglect the inclusion of decision, choice and management theory in the construction of rational legislation.

Is rationality – be it legal, be it economic, be it procedural – a *wisdom rule or a constitutional directive*? On the one hand, a law may be seen, sometimes, as a more or less fortuitous result of political debate and compromise, rather than as a rational effort to bring about social change. In this sense the rational view of legislation underlying the methodological approach has only a partial validity.[27] On the other hand, rationality is a self-evident basis and tool of day-to-day communication of individuals and the state. In this sense, one could say that it is a supra-positive idea of right state's action.[28] It is one foundation of legitimacy of our constitutional system.[29] What else could the directive of rationality be as an essential element of common weal, democracy and rule of law.[30]

[21] Meßerschmidt (2000: 826).

[22] Karpen (1989: 41); Hill (1982: 62).

[23] Schwerdtfeger (1977: 173); Burghart (1996: 147).

[24] Schlaich (1981: 110); BVerfGE 130, 263 (301).

[25] Schuppert (2011: 16).

[26] Meßerschmidt (2012: 353).

[27] Mader (2001: 122).

[28] Meßerschmidt (2000: 891).

[29] Kriele (1976: 182); BVerfGE 45, 187, 227; BVerfGE 23, 127 (133) ("business basis of law").

[30] von Arnim (1984: 232).

12.3 Legal Rationality: Free Democratic Basic Order

Legislation is a rational activity aimed at realizing special purposes or goals at achieving special results in social reality. German law, mainly the constitution, lacks implicit standards of good law-making. There is, however, no debate in Germany, as there is in the United States and other countries,[31] over whether the constitution is primarily value-oriented or primarily procedural.[32] Germans no longer understand their constitution as the simple expression of a basic order of power. They commonly agree that the Basic Law is fundamentally a normative constitution, embracing values, rights and duties, that *the Basic Law is a value-oriented document*, which establishes a hierarchial value order. At the core is Art. 1 I: "Human Dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." The Federal Constitutional Court (FCC) held: "There is no doubt that the main purpose of basic rights is to protect the individual against the encroachment of public power (…). It is equally true, however, that the Basic Law is not a value-neutral document. Its section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights (…). This value system centers upon dignity of the human personality."[33] A Basic Right is a negative right against the state, but this right also represents a value, and as a value it imposes a positive obligation on the state: to ensure that it becomes an integral part of the general legal order. And the FCC also held: "In exercising its powers to introduce legislation, the legislature must take account of both the inviolability of human dignity (Art. 1 I), which is the highest value of the constitutional order, as well as the principles of equality (Art. 3 I), the constitutional state and the social state (Art. 20 I)."[34]

The standards of good legislation are more or less judge-made.[35] The teleological approach to constitutional provisions is a gateway through which considerations of social policy and even political philosophy of the judges flow into the interpretation.[36] Even when value-oriented methods fail or if the court is faced with a dispute involving competing constitutional values, the Court – by balancing the values – is to arrive at a fair decision.

Explicit provisions for goals, means and procedures (in a material sense) are rare in the Basic Law. They are more often to be found by the FCC in principles, Basic Rights and in unwritten value standards.

Explicitly regulated is the formal procedure of legislation (Art. 76, 77, 78, 82 Basic Law).[37] Moreover, the German constitution contains compliance norms with

[31] Karpen (2012: 160).

[32] Kommers and Miller (2012: 44).

[33] BVerfGE 7, 198 (205) ("Lüth", freedom of speech).

[34] BVerfGE 45, 187 (223) ("life imprisonment").

[35] Meßerschmidt (2012: 365).

[36] Kommers and Miller (2012: 63).

[37] Comp. Art. 296 I, II, III TFEU.

a goal-oriented tendency[38] and even outlines of the law.[39] Merten[40] registers some two dozen mandates for the legislator with (partial) content directives. The Basis Law, in addition, covers conceptual, limiting and directing norms for state activity. Limits and purposes: a good example is Art. 5 I, II of the Swiss constitution: "I. The Law is the basis and limitation for all activities of the State. II. State activity must be in the public interest and proportionate to the ends sought." The main conceptual provision is that Germany has a "free democratic basic order". Democracy, rule of law and Basic Rights are presented in a nutshell: "Laws are not constitutional merely because they have been passed in conformity with procedural provisions (…). They must be substantially compatible with the higher values of free democratic order and must also confirm to unwritten fundamental constitutional principles as well as the fundamental decisions of the Basic Law, in particular the constitutional and social state principles."[41]

Democracy (Art. 20 I Basic Law) is a constituent element of the State. It is the goal of democracy, to institutionalize a political procedure in which all people with equal vote and weight can participate and by which decisions (which are binding on all) are taken.[42] For the legislative procedure, democratic requirements are transparency and publicity of the decision-making process, discussions and deliberations which are oriented towards consensus, and finally majority decisions. Due process is an element of democracy. Legislation (Art. 20 II, III Basic Law) must follow the principle of *rule of law*. The FCC understands this principle as frame and directive, as a guarantee that the law in its formal generality is based on rational, scheduled, understandable reasons, that it is calculable, predictable and not retroactive.[43] These elements of *rule of law* make the *due process*, in formal and material understanding. The *Social State Principle* is of particular importance because it establishes the boundaries and infuses the meaning of economic rights (Art. 6 II, IV, 14 III, 15 Basic Law).[44] The Social State is an essential part of what is described as Germany's "constitutional identity", a distinctness that cannot be sacrificed to any other value of the Basic Law. It is the duty of the state to promote a just social order. The Social State Principle – as well as the duty of the State to protect the environment in view of the rights of future generations (Art. 20a)-is a dynamic target-setting in view of solving future social issues. It is, in particular, an "open norm", which requires concretization by the legislator. It is part of the binding character of the constitution, not just "rhetorics". Goals and ends – provisions of the constitution enjoy priority over

[38] Art. 74 I, No. 1, 16, 17, 19 Basic Law.

[39] Art. 16a is a sort of draft of an Asylum Law.

[40] Merten (2015: 359 n. 6).

[41] Art. 18, 21 II Basic Law, BVerfGE 6, 32 ("Elfes" – freedom of movement).

[42] Meßerschmidt (2000: 828); BVerfGE 37, 125 (159); BVerfGE 93, 37 (66); BVerfGE 107, 59 (94); BVerfGE 131, 152 (205).

[43] BVerfGE 6, 32 (41); BVerfGE 36, 146 (163); BVerfGE 112, 118 (147), BVerfGE 133, 277 (337); BVerfGE 134, 33 (72).

[44] Kommers and Miller (2012: 622); BVerfGE 35, 202 (235), BVerfGE 59, 231 (262).

general political target-setting, insofar as they are limiting the discretion of the legislator.

Finally, legislation has to concretise the *common weal* (Art. 14 I, II). The law is a piece of the public good, as having been formulated by the legislator.[45] The public interest is the sum of partial interests, which have to be balanced and brought to a compromise. This has to be done by the legislator. The obligation of state organs to decide on the public welfare in the specific case of a law includes the duty to act rationally[46]; which is the essence of the state of the Basic Law. It is the final end of the state to work for the common good. It is part of the *Republican Principle*[47]: Article 5 II of the Swiss Constitution reads. "State activity must be in the public interest and proportionate to the ends sought." In a republic, the public interest in a special case is decided by people and parliament in the democratic procedure. The result is "legitimation by procedure".[48]

The Basic Rights and public rules of the constitution are directives and border for legislation, administration and judiciary in the state "as directly applicable law" (Art. 1 III). Constitutional interpretation establishes that Basic Rights may be understood in different perspectives: negative rights ("man vs. the state"), positive rights (i.e. claims of the individual against the state, e.g. for social needs or to a minimum standard of living)[49] or sharing rights (i.e. to share state offerings, e.g. education),[50] moreover as objective values, structural or institutional principles[51] and participatory rights (i.e. to be active in social, cultural and political life).[52] The main constitutional principles, democracy and social rule of law state, are thus reflected in the Basic Rights. Pillars of the Basic Rights' section are Arts. 1, 2, 3 Basic Law. Article 1 protects, as already mentioned, the dignity of the individual. Again, the best interpretation is vested in Kant's *Groundwork for the Metaphysics of Morals*: "Act in such a manner that You treat humanity whether in Your own person or in the person of another, never merely as a means to an end, but always at the same time as an end."[53] The FCC underlines that Art. 2 ("freedom of personality") is not only a Basic Right to be left alone, free of state interference, but also a claim to enjoyment of the right in a material manner.[54] Article 3 ("equality before the law") prohibits a distinction of persons, for which there is no rational basis. It guarantees for legal rationality, appropriateness, system compatibility, a ban on every form of arbitrariness[55] and in fact is an important element of due process.

[45] BVerfGE 24, 367 (406); BVerfGE 30, 292 (317).

[46] von Arnim (1988: 76).

[47] Nowroth (2014: 362).

[48] Luhmann (1969: 174).

[49] BVerfGE 27, 360 (362).

[50] BVerfGE 33, 303 (333).

[51] Kommers and Miller (2012: 60).

[52] BVerfGE 123, 276 (330) ("Co-determination in Business").

[53] Kant (1993: 36); BVerfGE 1, 14 (61); BVerfGE 23, 98 (106); BVerfGE 45, 187 (227).

[54] BVerfGE 72, 91 (109); BVerfGE 80, 365 (375).

[55] BVerfGE 89, 132 (142); BVerfGE 118, 79 (101); BVerfGE 117, 302 (311).

The FCC affirmed the existence of *supra-positive principles* of the law which are binding for legislators and other political decision makers, such as individual autonomy, moral duties and human rationality,[56] the duty to balancing rights, the proportionality principle and subsidiarity. Indeed, *balancing* rights and values is a special case, and *subsidiarity* (as precedence of the lower instance to solve a problem) is a peculiarity of *proportionality*. Proportionality means that the legislator must not overshoot the target and must not intervene more than necessary.

Again, Art. 5 II of the Swiss Constitution may be mentioned: "State activity must … be proportionate to the ends sought." the idea of forbidding any excess is a matter of any modern language. The idea is an interlock of rule of law, Basic Rights and rationality. The leading case is the "pharmacist" case. The objective of the law to limit access to pharmacy studies, which conflicts with the freedom of profession (and in the study for that) is to ensure adequate pharmaceutical services everywhere and to prevent the concentration of pharmacies in certain attractive locations. The Court developed a three-steps-theory.[57] First, the law must be justified by a compelling public interest. Second, the regulation must be necessary to achieve the legislative purpose and, third, the means must not be disproportionate to the accomplishment of the task. As a standing unwritten principle, the FCC developed the interpretation that every state action (which has an impact on Human Rights) under the proportionality principle must be apt to reach the end, suitable, necessary and proportionate in a narrow sense, which means that there must be a proper balance between effects of limiting measures and legislative objects.[58]

If it is decided that the legislator in contents and procedure has to follow constitutional directives, there remains the question whether these constitutional *guidelines are binding or wisdom rules*. To understand all directives of the free democratic order, as expounded, as strictly binding law would be unpolitical thinking. That would mean to read the Constitution as "target specification literature".[59] One could, altogether, write a "law on legislative procedure", which Lücke suggests.[60] And in view of the multi-faceted interpretation of state organisation and basic rights it is no longer a good argument that the legislator does not owe to the people more than just the law.[61] The conclusion, however, is that the constitution imposes a minimum standard of directives on the legislator, which is – in view of its democratic legitimacy – transparency and participation, rule of law-standards and due process and the main guidelines of Human Rights.[62] These directives regularly are not duties, in the way, that a breach entitles the FCC to declare the law null and void. They are

[56] BVerfGE 1, 14 (61); BVerfGE 23, 98 (106); BVerfGE 45, 187 (227); Kommers and Miller (2012: 66, 67).

[57] BVerfGE 7, 372 (377); Kommers and Miller (2012: 67).

[58] BVerfGE 30, 227 (246); BVerfGE 23, 98 (106); BVerfGE 45, 187 (227); BVerfGE 85, 238 (245); BVerfGE 115, 25 (43).

[59] Which Burghart (1996) sometimes does.

[60] Lücke (1987: 87).

[61] BVerfGE 130, 132 (134); BVerfGE 130, 263 (301).

[62] Schuppert (2011: 11); Xanthaki (2014: 20, 46); Karpen (1989: 42).

obligations, however. If the legislator breaches one obligation, he shall be liable for all costs resulting from this non-compliance and suffer from a reversal in the burden of the proof. If the breach of the constitutional directives is evident, the law may be declared void.[63]

12.4 Managerial Rationality: Efficacy, Effectiveness, Efficiency

Today, the legitimacy based on the regularity of implemented procedures and on compliant conduct of behaviour is enlarged by the legitimacy based on the *effectiveness of actions* and on the ability to achieve objectives set in advance.[64] It should be stressed: legitimacy of a law is not exclusively measured by its efficacy, effectiveness and efficiency. These criteria are additional ones. It is also, and with priority, essential for a rule to function to produce a balance between justice and security, in accordance with the legal forms which are guarantees for Human Rights and against arbitrariness.[65]

The advent of the call for performance rationality and managerial quality criteria may have several reasons. It is a general economization of thinking which affects social life and governance. Partly, this is induced by doubts on the capacity of traditional institutions to manage new problems ("governability", namely under the pressure of globalization and international competition, not only in the public sector). And finally, the acceleration and speed of changes in the modern world, which make it more difficult for laws, as general directives in the frame of the constitution, to produce long-lasting regulations which guarantee equality. § 7 of the German Budget Code reads: "In drawing up and implementing the budget, the principles of efficiency and parsimonity have to be observed." In § 90 of the German Code of Federal Budget the criteria for auditing the budget are named. These criteria may be used as quality elements of good legislation. There are five of them: First, the Federal Court of Audit checks – with priority – the legality, then the regularity, the efficacy (of a regulation according to the intended purpose), the effectivity (as to the extent to which the target is achieved), and finally the efficiency. As sub-principles of the latter, the law mentions the productivity principle (maximum principle, which means to produce as large as possible the outputs with fixed means) and the parcimonity principle (which is to realize a fixed output with as few means as possible). In auditing the budget, the principles of legality and regularity – the latter as accuracy of the accounting system – preceed all efficiency arguments, which means, in effect, that if inefficient action is prescribed, the executive in principle must follow. It has to be studied whether this procedure applies to evaluations of legislation as

[63] BVerfGE 120, 56 (79); Merten (2015: 349) is of the opinion that evidence must not be evident, at least for the democratic requirements. Every violation leads to nullification of the law.

[64] Flückiger (2009: 190), with further references.

[65] von Arnim (1988: 33, 43).

well. Effectivity is binding and constitutes a control norm.[66] Governance models and practices are interpreted by the economic principle as well. "New Public Management" means enabling government and administration to reach high effectivity and efficiency in producing public services. – "Do more and better with less." The final goal is the "slim" and "smart" state.[67]

Efficacy[68] is the extent to which legislative action achieves its goal: A law has a high level of efficacy if it – when implemented – comes closest to the legislator's intent. It should be functional to a high degree, e.g. a law intended to change the behaviour of individuals or groups. It can both give property rights (e.g. equal opportunities) and restrict their behaviour (e.g. compulsory use of seatbelts).[69] It must avoid unintended side-effects. This does not necessarily mean that the goals have to be explicitly mentioned in the normative act. They may also express the arguments for the draft or be formulated during the parliamentary debate. There is no constitutional provision that the draft must be accompanied by arguments, in contrast to acts of administration or court judgments. However, according to § 40 Rules of the Government and § 71 Rules of Procedure of the Federal Diet, proposals of government and from the floor require arguments. Without such a politically "authorized" definition of goals, implementing instances and evaluations have to define themselves, what they consider to be relevant goals of particular legislation. Mostly, it is clear what the target of the legislator is. The seatbelt-fastening duty, e.g., was and is intended to reduce accidents with lethal or severely injuring consequences. As far as one knows, the seatbelt-fastening provision has had that effect. So the efficacy of the law is confirmed by reality. Sometimes the target of a law is difficult to determine. Many goals – e.g., in administrative matters – are mutable, in terms of quantity and quality.[70] Some laws, namely "shopwindow-laws", have a more psychological goal: they intend to show, that the government "understood a problem", that "something is done". As far as unclear goals of a law are concerned: which is the target for regulating tobacco-consumption: health care or raising taxes tacidly? It is difficult to check the efficacy of that sort of laws. The rule of law-principle forbids burdensome laws, which are not efficacious, since the inroad into Basic Rights must be legitimized in an un-ambivalent manner.[71] The FCC, however, did not declare a law as void, which regulated on work transport-vehicles to disburden roads, but reached the target not or unsuccessfully, even after many years of evaluation.[72] The Court left the efficacy-shortage to the legislator. Similarly, it found a law not to be inefficacious or arbitrary if the initial economic prognosis of the

[66] von Arnim (1988: 60); BVerfGE 84, 239 (273).

[67] http://ec.europa.eu/smart_regulation/index_en.htm

[68] Mader (2001: 126); de Benedetto (2016); Müller and Uhlmann (2013: 81).

[69] (UK Better Regulation Commission and) Better Regulation Task Force *Principles of Good Regulation*, 2006 and 2012.

[70] Leisner (1971: 44).

[71] BVerfGE 80, 250 (250).

[72] BVerfGE 16, 140.

legislator was wrong.[73] Usually, the subjective discretion of parliament – whether a law is efficacious – prevails over the objective prognosis.[74]

Effectiveness as the second criterion of managerial rationality is the extent to which the observable attitudes and behaviours of the target population (individuals, enterprises, public officials in charge of the implementation or enforcement of legislation) correspond, and are a consequence of, the normative model of the law that is the purposes of behaviour, which the legislator strives for.[75] A law is effective if it is implemented, executed and obeyed by as many addressees as possible.[76] The effectiveness of a law is measured in terms of outcomes, that is, a series of effects that are causally attributable to a specific policy.[77] Effectiveness is impact in the real world, implementation of norms, realisation of law. Effectiveness nowadays is the renunciation of a restricted economic meaning, oriented mainly towards numbers. It covers social, psychological and political effects. Effectivity differs from effects, which may be described in different categories, as intentional/unintentional, beneficial/adverse, direct/indirect, immediate/delayed a.s.o. The principle of rationality is closely linked with effectivity. It is no longer sufficient, that a law is rational "internally". Conclusively, it has, however, to be rational "externally" as well, which means that it has to be appropriate in the world of facts.[78] Effectiveness of legislation is clearly in the centre of law drafting. A law, which has no causal consequences – the targeted ones! – makes little sense.

The German constitution does not mention "effectivity" explicitly. It needs to to be studied, whether it does contain it implicitly. The Swiss Constitution of 1999 reads in Art. 170: "Evaluation of Effectiveness. The Federal Assembly shall ensure that Federal measures are evaluated with regard to their effectiveness." The means to reach effectiveness of the law are quite diverse: punishment, civil damage or penalties, rewards, indirect measures (like regulations, licensing, registration), prohibitions, declarations, a.s.o.[79]

The individual may have a claim on the state to effective realization of certain personal liberties. For instance, in the "Numerus Clausus Case"[80] universities were required to expand their facilities to make good on the Basic Right to choose one's occupation (Art. 12 Basic Law). The Constitution's objective values reinforce the effective power of these rights, extending their reach indirectly into the domain of private law reflecting the relation between private parties ("third party effects").[81] The legislator primarily has to decide in which manner the state fulfils his duty to

[73] BVerfGE 18, 315 (332).

[74] BVerfGE 109 (117), similar BVerfGE 39, 1 (151) ("abortion case").

[75] Mader (2001: 126).

[76] Karpen (2012: 78).

[77] Flückiger (2009: 186).

[78] Meßerschmidt (2000: 798).

[79] Xanthaki (2014: 56).

[80] BVerfGE 33, 303 (333).

[81] BVerfGE 7, 198 ("Lüth").

effectively protect the developing live ("abortion").[82] The state authorities are basically free to decide, which measures are useful and necessary to guarantee effective protection of live.[83] Moreover, as the "rag-collection" case[84] teaches, if freedom of religion is to be rendered an effective right under the Basic Law, then its expression cannot be limited to the sanctuary. To measure the effectivity of a law and to evaluate the suitability for implementation, the law must under all circumstances be clear, precise and free of contradictions.[85]

The last of the three-quality "E's" is *efficiency*. Back to the seatbelt-fastening rule: the costs of this measure (altering the technical equipment of cars, ensure implementation activities of the public authorities, in a broader sense also the physical or psychological constraints for drivers and passengers) are not *disproportionate*, as compared to the extent to which this measure contributes to the reduction of injuries.[86] The efficiency-principle is laid down in Art. 3 VI EUT, Art. 114 II Basic Law, §§ 7 I, II, 90 Federal Budget Code and § 6 Federal Laws on Budgetary Procedures. There are three elements of the efficiency: the law must be *suitable* (adapt), *required* and *acceptable* (reasonable). The law is not suitable, if it does not reach the ends which the legislator intends; it then lacks the quality to steer the social reality. Second, if it is not required, that is the means used to achieve a valid purpose don't have the least restrictive effect on (constitutional) rights. Third, the law is not acceptable, if the means are not proportionate to the stipulated end. The burdens on the (constitutional) right are excessive relative to the benefits secured by the state's objective. The law must try to optimise the relation between means and ends, must envisage a good cost-benefit-ration.[87] The efficiency principle finally is "coined rationally". Efficiency may be expressed as productivity – maximum of the prescribed target with limited means – or parsimonity (saving economy, thrift) – minimum investment to reach a prescribed target –. Legislation-practice usually has to do with the second. To evaluate in advance costs is relatively easy. More difficult is to evaluate benefits. Each government – of course – in introducing a bill assumes that benefits outweigh costs. But it is more difficult to calculate benefits: which are the benefits of social legislation? Calculated in realistic numbers? Which are the quantifiable benefits of prohibiting or restricting smoking? Most countries nowadays have introduced Regulatory Impact Assessment-Mechanisms (RIA), but has benefit calculation a benefit yet?

Economic rationality as efficacy, effectiveness and efficiency constitutionally is no *principle of law*.[88] Since the constitution covers no economic order – be it social

[82] BVerfGE 39, 1 (51), BVerfGE 81, 214; BVerfGE 89, 214; BVerfGE 103, 89.

[83] BVerfGE 46, 160 ("Schleyer"); BVerfGE 77, 170 ("Security of aircrafts"). For the question of a constitutionally based effective protection of law (§ 35 FCC-Code), see Leisner 1971: 81 and Hartmann (2013: 182).

[84] BVerfGE 24, 236; Kommers and Miller (2012: 544).

[85] Schuppert (2011: 311).

[86] Mader (2001: 127); Hartmann (2013: 37); Flückiger (2009: 186).

[87] Kommers and Miller (2012: 66); BVerfGE 119, 59 (86); BVerfGE 120, 274 (321).

[88] Eidenmüller (1995: 443); Leisner (1971: 52); BVerfGE 50, 290 (337).

market economy or other – it could not bind the citizen to pursue economic goals with particular intensity up to optimality, and cost-effect ratio transcends even social market economy as a binding standard. State regulation, also in this field, due to basic rights may only be restricted by explicit legislation (Art. 13 VIII Basic Law). The Basic Law only binds the Audit Court (Art. 174 II Basic Law), as a state organ, to apply efficiency rules. The constitution is basically efficiency-neutral.[89] There is no law that requires for a goal to be reached fast, radically, completely, "without regard to losses". It should be added, however, that – practically speaking – an end-means optimum is difficult to achieve.

Nevertheless, cost-effect-rationality became a standard. The law became a major part of more performance-oriented, effectiveness-driven governance.[90] In the hierarchy of goals set for the drafter and consequently principles which drafters abide, effectiveness in the broad sense comes at the very top. "Effectiveness is the ultimate pursuit, the ultimate measure of quality, and the ultimate principle in both systems of law."[91] Kloepfer[92] calls it "an unwritten principle of the constitution". Article 170 of the Swiss Constitution made it a binding principle. In European law and jurisprudence, the *effet utile* is mandatory. European courts assess whether European legislation is appropriate for attaining the objectives pursued by the legislation at issue.[93] And one could not think about the common good and Art. 1 and 2 Basic Law without including rationality, and economic rationality is a form of rationality. Anyhow, a signally deficit of executing a law and implement it would be accounted for as a breach of the principle of arbitrariness, because "inarbitrariness" is vested in Art. 3 and 20 Basic Law.[94] The FCC applied principles of economic rationality.[95] In one of the many decisions concerning financing public broadcasting, the Court examined whether the legal basis of the broadcasting budgets fulfil the requirements to serve the objective information needs of the population.[96] This includes effectiveness and parsimony. There cannot be, however, a complete cost-effect-analysis by courts.[97] What the court could do to check transgression of the border of open irrationality.

[89] Leisner (1971: 66).

[90] Xanthaki (2014: 343).

[91] Xanthaki (2014: 16).

[92] Kloepfer (2014: 336); similar von Arnim (1988: 15, 42).

[93] Meßerschmidt (2012: 369).

[94] Wischmeyer (2015: 59).

[95] BVerfGE 4, 7 (investment); BVerfGE 50, 290 (337).

[96] BVerfGE 90, 60.

[97] Wischmeyer (2015: 59).

12.5 Rationality by Control: RIA and Judicial Review

Control is an important instrument to increase the rationality of legislation. RIA should be used for improving legality and economic rationality by evidence-based empirical review. It strengthens the responsibility of the legislator for making better regulations and keeps it under control. RIA as an assessment of the effects of legislation is a pragmatic attempt to produce more relevant and more accurate information about the potential and causal relations between legislative action and obsevable social attitude, behaviour or circumstances.[98] Pre-legislative scrutiny gives parliament and stakeholders in the wide society an opportunity to influence the bill's content before it is passed, thus offering the opportunity to address issues of legislative quality *ex ante*.[99] Ex-post RIA is required for every court's dealing with the law and for possible amendments of the law. It looks, namely, for efficacy and undesirable and unintended consequences. In Hartz IV[100] the FCC struck down a reform of the Federal Social Assistance Act because parliament failed to consistently apply its methodology for establishing a "subsistence minimum", the level of public support necessary to be consistent with the principle of human dignity. RIA merits full support.[101]

Parliament and government are the first censors of legislation. They have much more responsibility and legitimacy to self-critics to the extent, that their action should incorporate an evaluation of findings without provoking political debate.[102] Also, it is parliament's responsibility to amend failed laws. In the process of RIA, parliament is supported by hearings, enquêtes, and the scientific services of the parliament. Parliament and government enjoy the analysis of drafts by the National Norm Control Council,[103] which checks drafts in view of their economic effects on business, citizens and administration.

Finally, the FCC is the "watchdog" of good legislation. The *Constitutional Court* is the epicentre of Germany's democracy.[104] It has a breath-taking mandate both in scope and depth. It is one of the world's most important constitutional tribunals. It is a "quasi-legislative institution"[105] The Basic Law is now virtually identical with the Court's interpretation. There is a strong feeling that the legislator merits less trust than the judiciary, although there is no logical reason to do so. It acts, partially, as a "replacement legislator", if the legislator fails to solve a problem. The strengths of the FCC is indeed a challenge for separation and balance of powers in Germany's rule of law state.

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[98] Mader (2001: 123).

[99] Xanthaki (2014: 351).

[100] BVerfGE 125, 175; Kommers and Miller (2012: 50).

[101] BVerfGE 95, 267 (314); BVerfGE 87, 348 (358).

[102] Flückiger (2009: 189); Karpen (2016).

[103] Karpen (2006: 7); Merten (2015: 353).

[104] Kommers and Miller (2012: 38).

[105] Kommers and Miller (2012: 40).

The German Constitutional Court Law provides the FCC with the power to review, to some degree, both the enactment process and the substantial quality of legislation, to scrutinize facts, prognoses and to make impact assessment.[106] The Court, however, has granted the legislator discretion in establishing the facts of the law and leeway (discretion in prognosis),[107] as well as parliamentary discretion in making legislative decisions. Discretion is finally controlled by the Court. There is a graded approach in judicial review, from a broad rational basis to a much stricter "clear and present danger" test, on to a more refined scrutiny test.[108] Discretionary decisions which obviously suffer from an error of law or are arbitrary[109] are rejected by the Court.

However, in three recent rulings[110] the FCC went deeply into the substance of goals and means, without leaving too much of discretion to the legislator. Altogether, the control of discretion in substance is less stringent in leeway, amendment decisions and experimental legislation.[111]

One can make a similar observation for controlling the *substantive procedure* of law-making. The court has unlimited control of the formal requirements of legislation, since they are regulated on explicitly in the Basic Law. This is not the case for the substantive procedure. The Constitution is lacking a procedural directive for law-making as the procedure within the rules of Basic Law and, behind its screen, in different sets of rules of procedures for administrative actions and the court's procedures. This fact is indeed a deficit of constitutional law, since time pressure, the creation of *faits accomplis* and hasty debate on compromise drafts all impede good legislation. The Court looks into these proceedings as well, although this is particularly a matter of parliament. It is, in fact, not true, that the legislator just "owes a law" and not a good procedure to produce it.[112] There are many decisions which contradict this statement. The FCC feels entitled for its scrutiny by democracy, due process/rule of law and basic rights as pillars of the constitutional order. Democracy indeed requests publicity, transparency and participation. Due process, in legislation, results in clarity, certainty and practicability, RIA, proportionality.[113] Basic rights must be observed in every state's action,[114] namely the ban of arbitrariness (Art. 3).

How to rebalance the endangered separation of powers-relation between legislature and judiciary? How to avoid a shift of powers[115] from democracy to a government

[106] Meßerschmidt (2012: 372).

[107] Mader (2001: 131); Xanthaki (2014: 351 n. 1).

[108] Meßerschmidt (2012: 366).

[109] BVerfGE 50, 50 (51); Merten (2015: 355).

[110] BVerfGE 125, 175 (226) ("Hartz IV", social security); BVerfGE 128, 1 (37) ("Genetic Technology"); BVerfGE 132, 154 (162 et seq.) (alimentation of asylum-seekers).

[111] Mader (2001: 125).

[112] Merten (2015: 349).

[113] BVerfGE 130, 212 (234); Merten (2015: 353).

[114] BVerfGE 39, 69; BVerfGE 99, 109.

[115] Flückiger (2009: 188).

of judges ("Gulliver enchaîné")?[116] The main instruments are *judicial restraint*[117] of the Constitutional Court and decisive and a clear *(self-)empowering of parliamentary discretion*. The Court may strengthen its "passive virtue" to not exceed its functions by acting instead of the legislator.[118] This is important, since if there are errors in fact-finding or prognosis, a court decision is more difficult to amend than parliamentary legislation. The Court must be aware that it is the *final interpreter of the Constitution*. Constitutional interpretation forms a part of what one might call the eternal struggle for the self-realization of constitutional law in the life of the community. The FCC determines the law with binding effects, when it is disputed, doubted or under attack. In doing so, the Court bears no political responsibility, though its decision may have great political significance. This is different for parliament, which is the primarily legitimized legislator. This is a crucial point of every construction with a (strong) constitutional judiciary. There is no clear line between law and politics. Whoever controls interpretation of constitutional directives and, in that, the order of its values, controls the Constitution.[119] The second instrument to avoid conflicts between legislator and judiciary, first and third power in the separation of powers scheme, is to accept the *priority of the discretion of parliament*.

The Constitution is not more than a frame for state's actions. From some uncertainties of the text it is necessary to conclude that it is the legislator's mandate to assess facts and prognoses and to decide. Legislative discretion is a structural element of the democratic rule of law state. It requires less (rather than more) judicial intervention of the Court into the political and legislative arena. There is no logical reason for believing that the Basic Law is safer in the hands of a constitutional court than in the hands of parliamentary bodies.[120]

12.6 And Finally

From a comparative law viewpoint, some trends of legislation in modern states may be noted. Legislation and law change significantly in the "activating state". The law is no longer primarily an instrument of keeping order in a somewhat distanced rule of law-state. Legislation is more and more an instrument of *social guidance* and a tool of *social engineering*. The law is often aimed at realizing special purposes or goals, at achieving specific results in a given social reality. Efforts to reduce the quantity of laws seem to be futile in the social and technical state. With more measurement-laws and permanent amendments it is difficult to maintain the *quality*

[116] Morand (1999: 43).

[117] Landfried (1988: 147).

[118] BVerfGE 36, 1; BVerfGE 79, 148 (150); BVerfGE 136, 338 (382).

[119] Kommers and Miller (2012: 47); Meßerschmidt (2012: 373); BVerfGE 34, 269 ("Soraya"); BVerfGE 96, 375 (399) (unwanted child).

[120] Kommers and Miller (2012: 38); Flückiger (2009: 185); Wischmeyer (2015: 52); Merten (2015: 310).

of legislation as a rational, effective and efficient tool of governance. The purposes and means of the setting function of the constitution, which is the basis for long-lasting policy, are shrinking.

The importance of *parliament* changes. It will remain the centre of power in a democratic state. It is under permanent political pressure to guarantee stability and flexibility of the law at the same time. Effectivity of the law must be the primordial goal. Insufficient transparency, increasing participation and a permanent lack of time impound the modern *legislative process*.

The *juridification of legislation* will proceed. The judge, in many countries, is a partner of the legislative process. He finally measures goals, instruments, form and procedure against the constitution. We are faced, at least in Germany, with a "hybridization"[121] of the representative-democratic and juridical rule of law elements of the constitution. Less than more of the latter would be desirable.

Finally, constitutional law-skills and *legisprudence* should be aware of their limits. Legislation, in the frame and orientation of the constitution, should be as good, precise, effective and efficient, as *rational* as possible, but it will never be mathematics.[122] As John Dickinson said on 13 August 1787 in the Assembly of the United States in Philadelphia: "The life of the law has not been logic: it has been *experience*."[123]

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Chapter 13
Symbolic Legislation Under Judicial Control

Angelika Siehr

Abstract Since the Enlightenment the claim of law to rationality has become an indispensable standard for all current forms of law-making. However, the well-known tension between certain standards of rationality and legislation on the basis of democratic majority rule – that legitimizes law-making in view of *voluntas* not *ratio* and that takes place in the realm of politics – is tested to its limits by symbolic laws. Those laws, by definition, are characterized by an element of deception, a discrepancy between their manifest purposes that cannot be achieved and latent purposes that remain hidden. This paper examines the different notions of 'symbol' as well as the different conceptions and standards of rationality under the German Basic Law and asks whether judicial review is able to tackle the problem of (deceptive) symbolic laws. It will show that the requirement of *Normenwahrheit* (truthfulness of legal norms) is specifically tailored to capture this problem. Nonetheless, *Normenwahrheit* as well as other internal standards of legislation are only enforceable to some extent by the German Federal Constitutional Court. This leads to the question of how to deal with the legal grey area between justiciable constitutional principles and internal standards of legislation that do not determine the constitutionality of a law but that are relevant for the law's quality, and to the question of whether legislative jurisprudence ('legisprudence') can provide an answer.

Keywords Symbolic laws • *Normenwahrheit* (truthfulness of legal norms) • Judicial review • Rule of law • Principle of democracy

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13.1 Symbolic Laws: A Litmus Test for Rational Standards of Law-Making

13.1.1 Symbolic Laws and the Process of Law-Making: Between the Claim of Law to Rationality and Politics

Cicero demonstrated, especially through his use of the term 'ratio scripta',[1] the long established nexus between law and reason.[2] Today the term is used as a synonym for the general claim of law to rationality which, of course, no longer refers to predetermined standards but to the way different areas of life are systematically shaped and future-oriented regulated by legislative means. The claim of law to rationality gained a new quality during the Enlightenment as proponents of different social contract theories searched for an answer to the difficult problem of the legitimacy of political authority. On the premise that human freedom has to be ensured and that therefore the legitimate authority of government must derive from the consent of the governed (who are assumed to act rationally) these Enlightenment theorists assigned a central role to the law: only on the basis of a universal law which mediates between individuals' co-existing rights to freedom can, according to their theoretical approach, the model of self-legislation of the autonomous and reasonable subject come true. These days we no longer rely on rationalist natural law and instead content ourselves with a "positivistic bisected rationalism" (Jürgen Habermas) that is based on positive law. Still, the continuing legacy of natural law cannot be negated; it nourishes the roots of the constitutional state in general and, framing the principle of liberty, is reflected in certain principles of German Basic Law, such as in the *Rechtsstaatsprinzip* (which is not the same as but comes close to the rule of law) with its sub-principles (separation of powers etc.) as well as in the idea of democracy and in the postulate of the generality of the law. Moreover, since the Enlightenment the claim of law to rationality has become an indispensable standard for all current forms of law-making.[3]

This claim of law to rationality is, however, strongly challenged by so-called symbolic laws. Although there is no consensus about what the term stands for, Blankenburg and Noll use the term "symbolic acts of legislation" to describe the situation that the legislator has a normative claim but is not willing (or is unable) to take responsibility for its effectiveness.[4] Despite the law's ineffectiveness the

[1] For Cicero this term meant that the Roman law expressed and realized the eternal and unalterable law of nature and the reason governing it. Later Francisco Suárez systematically incorporated the notion of reason into the notion of law. See Suárez (1613/2002: 19, 44–45, 95 et seq, 171, 185–186, 192; on Cicero: 96, 172, passim).

[2] In great detail: Bastit (1990). See also Grawert (1975: 864 et seq).

[3] As Schulze-Fielitz (1988: 458) correctly points out: "Rational law making is, since the Enlightenment, a pleonasm; it is not a standard we are free to abolish but an indispensable standard for all current forms of law-making." Grzeszick (2012: 51) describes rationality as "the universal promise of salvation of the modern age".

[4] Blankenburg (1977: 43–44). See also Blankenburg (1986: 118–119).

legislature holds on to it for motives that lie beyond the law itself.[5] Thus, these laws appear to be irrational in the light of an 'optimal impact' ("*Wirkungsoptimalität*") if compared to the *alleged* legislative intent.[6] For instance, in 2005 the German legislature amended the law of assembly[7] to prohibit the gathering of neo-Nazis at certain places in order to send a message to right-wing extremists. But because of the fact that freedom of assembly is granted in Art. 8 of the German Basic Law the scope of application of the new rules is much more limited than it might seem at first glance and is, consequently, mainly of symbolic value.[8]

The same can be said for penal laws that purport to fight crime and enhance security but that in reality only enhance the *feeling of security* and have a minimal impact in terms of the factual safety situation. These laws represent a new tendency to 'subjectify' the thinking about security.[9] However, doubts about the constitutionality of such laws arise when they serve to restrict personal liberty, for example, prolonging the length of time that an offender may be held in preventive detention.[10] Is the legislator really free to address with his laws either the real, objective security situation or the mere perception of security in the populace, even if this perception is not supported by facts? Should legislative restraints on liberty not rather be based on objective necessity instead of feeding on the fear of crime which, by its very nature, cannot effectively be targeted through laws?

If we rely on Kant's notion of law (*Rechtsbegriff*) there can be no doubt about the answer to these questions: From the ultimate value of freedom Kant derives the universal principle of justice (*Recht*) whereupon an action is right if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law. Duties of right can appropriately be enforced by means of the public, juridical use of coercion.[11] Since for Kant freedom is the chief value, coercion is permitted only where it is both necessary to preserve freedom and possible for it to do so. Only then coercion as a "hindrance to a hindrance of freedom" is itself a means to freedom that stands up to human reason. But coercive legislation that does not prevent a hindrance to freedom because such a hindrance

[5] Noll (1981: 353, 355–356).

[6] See Voß (1989: 25).

[7] Amendatory Act, 24.3.2005, *Bundesgesetzblatt* I (Federal Law Gazette of Germany), 969.

[8] See Enders and Lange (2006: 105 et seq).

[9] See Gusy (2004: 159 et seq), Kötter (2004: 371–373 et seq), both with further references.

[10] The German Federal Constitutional Court (BVerfG) seems to approve this development. In a decision of 5 February 2004, 2 BvR 2029/01, 109 BVerfGE 133 at 157–158 the Court states: "Whether the tightening of the law of preventive detention was triggered by an actual increase of violent crime or simply by an enhanced feeling of threat among the population is not for this Court to decide." A similar development could be observed in the United States in the 1990s during which time crime rates decreased but rates of imprisonment continued to soar. As Zimring (2001: 163, 165) points out, for "most members of the public the symbolic functions of penal legislation are the most important aspect of new legislation" which causes the "incarceration boom."

[11] See on this and the following Kant (1797/1983, vol 7, "Einleitung in die Rechtslehre", § B, § E: 337, 339–340, "Einleitung in die Metaphysik der Sitten": 331 et seq), and Kant (1793/1983, vol 9, II. Vom Verhältnis der Theorie zur Praxis im Staatsrecht [Gegen Hobbes]: 144–148).

does not even exist, would be unnecessary and therefore entirely unjustified. Thus, symbolic legislation that addresses the mere feeling of security is from this perspective irrational.

However, this is only one side of the coin; the other side is that law is, concomitantly, a "solid aggregate state of politics" which is temporarily binding.[12] And politics has its own rules and dynamics that also influence the legislative process. Representatives naturally react to the wishes and (sometimes irrational) fears of the electorate, partly in view of their own re-election. Therefore, the key question in this context is whether the principle of democracy aims at the people in an empirical sense with their real and perhaps occasionally irrational fears, or whether the mode of representation operates on the basis of a fictitious and purely reasonable will of the people (as Kant suggested). Whilst symbolic laws are passed on the basis of democratic majority rule and the democratic legislator reacts to the empirical demands of the people there is, nonetheless, a conflict with the claim of the law to rationality. In fact, if the legislator ignores the objective facts and uses the law as a sedative to calm the irrational fears of the people, he betrays or negates the idea of self-legislation of the reasonable subject.

13.1.2 The Response of Legislative Theory

The tension between the claim of law to rationality on the one hand and the democratic principle on the other hand, of course, also exists with respect to laws other than so-called 'symbolic laws'; in fact, complaints about the 'deluge of laws', their inconsistency, incomprehensibility, poor drafting and respective legislative shortcomings are hardly new and nor are attempts to fix these problems.[13] Legislative theory seeks to lower this tension and to enhance the standards of rationality in the law-making process. Scholars of constitutional law, sociology of law and legal theory have all tried in different ways to explore the question of proper law-making. As a result there is, firstly, a procedural approach; secondly, a substantial constitutional law approach; thirdly, a legal sociology approach; and, fourthly, a legal theory approach.[14]

The discussion of questions of the legislative procedure is rather common for it is assumed (and rightly so) that the proper organization of the legislative process creates a rational distance and may thereby improve the rationality of legislation.[15] Or, in other words, that "a structured procedure enhances the chances for a high

[12] Schulze-Fielitz (1988: 378).

[13] See Siehr (2008: 271–271).

[14] These four approaches, of course, are also relevant outside the context of legislative theory; many scholars would not even bring the commonly accepted 'constitutional law approach' into line with 'legislative theory'.

[15] Schulze-Fielitz (1988: 457–458). See for a specification which kind of 'distance' is meant below n 66.

quality statute".[16] The second approach concentrates on the substantial constitutionality of a law: the Basic Law postulates the primacy of the Constitution over all other laws and, at the same time, provides for a very strong Federal Constitutional Court (*Bundesverfassungsgericht*). In order to avoid situations where a law is declared incompatible with the Basic Law or even null and void, the constitutionality of a law has to be examined during the legislative process which will help to produce 'better laws', too. Both approaches[17] are commonly accepted in Germany – which cannot be said about the following approaches.[18]

The legal sociology approach underlines that the quality of a law depends on a thorough compilation and appropriate assessment of the underlying factual material. Therefore, it focuses on a scientific analysis of the factual material, an estimation of the consequences of a law, an evaluation of the effects of a law, and monitoring compliance with a law. Nevertheless, there will be laws that have already passed the 'filter' of the first three approaches but that are still far from being 'good' laws.[19] At this point we enter the realm of 'legisprudence' which seeks to improve law-making by applying a systematic and theoretically demanding approach to legislating from a legal theory perspective.[20] This approach formulates 'internal standards of legislation'[21] that do not decide the question of constitutionality of a law but which are relevant for its quality such as, for example, a certain level of doctrinal coherence.[22]

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[16] Blum (2004: 22, 29 et seq). For further references on the procedural approach see Emmenegger (2006: 300, n 9).

[17] For a detailed analysis and the relation between these two approaches see Meßerschmidt in this volume.

[18] However, different countries with a continental law tradition put emphasis on different aspects of legislative theory. For instance, Austrian legal scholars seem to be considerably more open to the sociological approach (see Winkler and Schilcher [1981] and Schäffer and Triffterer [1984]) than German legal scholars. Yet, the substantial constitutional law approach is less powerful in Austria than in Germany, also because the Austrian Constitutional Court (*Verfassungsgerichtshof*) uses the instrument of abrogation of laws in accordance with Art. 140(3) *Bundes-Verfassungsgesetz* more restrictively. The Swiss Federal Court (*Bundesgericht*) – although it *de facto* reviews federal laws for their constitutionality – has to apply laws even if it finds them to be unconstitutional, cf Art. 190 of the *Bundesverfassung* (Federal Constitution).

[19] As Blum (2004: 9) stated at the German Lawyers' Conference: "Not every botched law is necessarily unconstitutional."

[20] Wintgens (2006: 1).

[21] This distinction between the external legislative process, i.e. the proceedings as set out in the Constitution (for Germany see Art. 76–78 and 82 of the Basic Law), and the internal legislative process which encompasses the preparation of bills as well as the method and certain standards of decision-making, was first made by Schwerdtfeger (1977: 173 et seq). See also Hölscheidt and Menzenbach (2008: 139–140). Schwerdtfeger (1977: 173 et seq) also postulated a constitutional duty for optimal legislation. See for the opposing view Gusy (1985: 298). Schlaich and Korioth (2007: margin note 529–530) put it bluntly: "The legislator does not owe anything but the law".

[22] See for a subtle analysis of the question of coherence Wintgens (2006: 15 et seq); Bumke (2010); id in this volume. The addressees of internal standards of legislation are mainly the bureaucracies that entrust their lawyers with the preparation of bills. Though, if the application of particular internal standards of legislation does not presuppose specific legal knowledge – as is the case with

Of course, the efforts of scholars to spell out the principles of law-making as well as the practice of judicial review have to respect the broad discretion of the legislature and the dynamics of the political process, too. It will always be a challenge to strike the right balance between the principle of democracy and the rule of law (*Rechtsstaatsprinzip*), between the competences of the German Federal Parliament (*Deutscher Bundestag*) and the German Federal Constitutional Court (*Bundesverfassungsgericht*), and between the claim of law to rationality and its function as a political instrument. Still, symbolic laws push this tension, which is inherent in the law-making process in general, to its limits. But against this background it may become clearer what the appropriate means are to cope with the problem and to what extent judicial review is able to deal with it. In this sense, the (alleged) 'irrationality' of symbolic laws serves as a litmus test for rational standards of law-making and the possibilities and the limits of judicial review.

13.2 The Symbolic Dimension of Law and Legislation

13.2.1 The Concept of Law and the Notion of Symbol: An Ambiguous Relationship

On closer inspection the conflict examined here is not merely caused by a bipolar tension between the rational potential of the law, based on the idea of self-legislation of the autonomous, reasonable subject on the one hand, and its symbolic dimension on the other. Rather, there are many different aspects to the notions of 'rationality in law' and 'symbol', and their refractions, reflections and entanglements create a multi-faceted image. Law in the modern state has a dual character: corresponding to the idea, inherent in the concept of law, of giving systematically and in a rational manner a structure to society and other areas of life (natural environment etc.), it establishes an order of life (*Lebensordnung*), but it also serves as a governmental instrument for political purposes.[23] It is particularly when law is used as a political instrument that symbols are employed deliberately. However, the notion of 'symbol' is equally complex and ambiguous.

symbolic laws – the respective standards also aim to enhance the sensitivity of the representatives and of the Federal Council of Germany (*Bundesrat*).

[23] See Hofmann (1995: 264–265) who refers to Ulrich Scheuner.

13.2.2 The Broad Notion of Symbol

In a broader sense, which extends beyond the narrow definition given by Noll and Blankenburg, every law has a symbolic dimension because it refers to the interpretative construction of our shared world, plays a role in processes of social interaction, and expresses common values.[24] Such a broad notion of the term 'symbol' includes every human action, every object or system that carries or mediates meaning[25]; and "(e)very symbol contains cognitive, affective, and evaluative elements" (Alexander Blankenagel).[26] In politics – and therefore also in the political act of law-making – so-called "condensation symbolism" most notably plays a significant role. The term describes a form of symbolism that evokes emotions by condensing patriotic pride, fear, recollections of fame, defeat or myths surrounding the foundation of a state to a symbolic sign or a symbolic action.[27] Between the law's claim to rationality and the affective aspects of these symbols there is a tension which may be more present or less present but that, ultimately, is unresolvable. Collective identity can even be defined as the permanence of symbols of a group despite fluctuation of its members,[28] and thus the use of symbols is indispensable for any community. This is equally true for the idea of a *Staatsbürgernation*,[29] i.e. a nation that constitutes itself through democratic practice, for in this case the notions of 'democracy' and 'liberty' describe not only political structures but also serve as symbols for the self-conception and identity of this particular society – as the Statue of Liberty in New York City perfectly illustrates.

Starting off from this broad notion of symbol it becomes clear that the term 'symbolic law' is a comparative one: a law is more or less symbolic, not either symbolic or non-symbolic.[30] Furthermore, this broad notion shows that apart from the narrow definition of 'symbolic law' that follows a critical intent, there is a positive symbolic dimension of law, too; one that conveys an additional meaning to law and ensures its socio-integrative, stabilizing impact. Legal norms are part of our cultural-intellectual reality. If we follow Ernst Cassirer this reality consists of

[24] Voß (1989: 2, 40 et passim); regarding the Constitution also Lübbe-Wolff (2000b: 224–225). On Blankenburg and Noll see above, n 4 and 5.

[25] Cf Gusfield and Michalowics (1984: 419 et seq). Alexander Blankenagel cites language as an example, see Blankenagel (1987: 358). From the point of view of the social working approach see also Griffiths (2004: 151). For a profound elaboration on language as a symbolic form see Cassirer (1923: 12–13, 18–25, 44 et passim); Cassirer (1925/1959: 71–79).

[26] Blankenagel (1987: 360; see also 361 et seq, with further references).

[27] The distinction between "referential symbolism" and "condensation symbolism" was first made by Sapir (1934: 493), and was taken up esp by Edelmann (1964: 5 et seq, 119, 175 et passim). On the symbolic dimension of politics see also Gusfield (1963); Gusfield and Michalowics (1984: 423–424 et passim). On other forms of symbolism see Voß (1989: 41–42).

[28] See Blankenagel (1987: 350 et seq) who cites Erikson's definition of collective identity, for further details Blankenagel (1987: 345, 348 et seq, 361); Voß (1989: 40–41).

[29] For the idea of a *Staatsbürgernation* see Siehr (2001: 237–238, 240 et seq).

[30] Hassemer (1989: 555–556); Lübbe-Wolff (2000a: 27). On the symbolic working of law as well as of legislation see also van Klink (2005: 113, 128 et seq) and other contributions in this book.

various "worlds of images" (*Bildwelten*).[31] Their symbolic forms[32] – he distinguishes between language, scientific knowledge, myth, art, and religion – are an "autonomous (…) creation of the mind"[33] that shapes appearances so that they become the world as an objective and coherent ensemble of meanings (*Sinnzusammenhang*)[34]; symbols, according to Cassirer, are "mirrors of life". Legal norms participate in this process in a special way: as products of human action, and like all meaningful action, they rely on symbolic mediation.[35] But, moreover, they are part of an order that is only able to enter our consciousness and to provide for orientation because it is, concomitantly, a *symbolic representation* as well as an *institutionalized idea*.

The law as a means of governance employs the entire scale of symbols from broad to narrow and uses them not only to meaningfully shape the social environment, as an offer for integration and identification, but also to reach political strategy goals. Consequently, the question is not whether symbolic laws are in general permissible or not, but rather in what respect (and up to what extent) they are legitimate. Since the broad notion of the term 'symbol' lacks any critical potential in this respect, this question has to be answered on the basis of the narrow notion of 'symbol' and 'symbolic law'.

13.2.3 Symbolic Law and Symbolic Legislation in a Narrower Sense

Among symbolic laws the following categories exist with reference to the genesis or effects of these laws: the legislative affirmation of certain values (e.g. in the field of abortion), laws with the character of a moral appeal (e.g. in the field of environmental law), laws that serve as an 'alibi' (as with some of the laws that aim to address a crisis, e.g. anti-terrorism laws), and laws that contain entirely undefined, contradictory statements or that lack means of implementation.[36] Only the last two categories are clearly symbolic laws in the narrower sense since the affirmation of values and the expression of moral appeals may oscillate between positive moments of social integration and the support of certain strategic goals. More often, the problem is a result of the combination with elements of the other aforementioned categories, for instance, if in the case of an environmental law the moral appeal stands alone because of a lack of implementation.[37]

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[31] Cassirer (1923: 5 et seq, esp 9, 19 et seq, 47, 50 and passim).

[32] Cassirer (1923: 9, 12–13, 22, 24 et seq, 31, 41–42, 48, 50–50). See also Vandenberghe (2001: 484 et seq).

[33] Cassirer (1923: 47). See also Cassirer (1923: 23): "an original and autonomous achievement".

[34] Cassirer (1923: 6 et seq, 10–11 and passim).

[35] Cassirer (1923: 6): "All objectivation […] is in reality mediation and [must] remain mediation."

[36] On these different categories of symbolic statutes see Voß (1989: 26–34). Cf for different aspects of symbolic laws also Griffiths (2004: 150 et seq).

[37] See for a closer examination Lübbe-Wolff (2000a: 28 et seq).

Albeit a consensus on a general definition for a symbolic law has not yet been reached, there is agreement with respect to one point: the legal norm is not what it pretends to be; it contains an element of deception.[38] In this sense it contradicts the notion of truthfulness of legal norms (*Normenwahrheit*).[39] In particular, it is seen as critical if the latent functions of a law dominate the manifest functions and if, at the same time, the norm suggests a capacity to solve problems that it does not actually have.[40] The term 'manifest function' refers to the objective realization of the obvious purpose of the norm, for example, to safeguard a legally protected interest as aimed at in the wording of the law. The 'latent functions' of a law are to be seen in connection to the law's function as an instrument of governance.

In political dramaturgy the (latent) symbolic dimension of a law is used to achieve political strategy goals. Apart from strengthening the feeling of security among the population these latent functions include a demonstration of the political competence and power of the government, especially in view of the threat of terrorism or other potentially mortal perils. This latent message about the government's capacity to act may be combined with a substantive switch in policy, as in the case of the German government's reaction to the atomic disaster in Fukushima in March 2011. In record-breaking speed the German government decided in favor of Germany's nuclear phase-out and parliament passed the relevant law, despite the fact that the nuclear safety of German atomic plants did not urge such an unprecedented acceleration of the decision-making process in a highly complex as well as fundamental question. Even if one welcomes the decision itself it has to be conceded that from the perspective of 'good law-making' it certainly would have been better to take some time for deliberation and to search for a more sustainable policy. Instead, the German law that regulates the nuclear phase-out was hurriedly passed by parliament on 31 July 2011.[41]

Terrorist attacks, too, create enormous political pressure and often so-called 'alibi'- or crisis-laws[42] serve as vents. It is well known that the tightening of penal laws does not help much in terms of decreasing crime rates and, yet, whenever a horrific crime is committed this is followed by vehement calls for stricter laws. As Tushnet and Yackle have shown with regards to the Antiterrorism and Effective Death Penalty Act (AEDPA) and to the Prison Litigation Reform Act (PLRA),

[38] See Hassemer (1989: 556); Lübbe-Wolff (2000a: esp 25, 28; 2000b: 218); Führ (2003: 6–7, 9 et seq, 19–20); Voß (1989: 72 et seq, 75–76); Newig (2003: 26; on 'societal *self-deception*': 276).

[39] Concerning the issue of *Normenwahrheit* see S. Meyer (2009: 294–303); Drüen (2009) and below in this text under Sect. 13.4.

[40] Cf Hassemer (1989: esp 556); Voß (1989: 6, 63 et seq). See also Führ (2003: 5–6); Schmehl (1991: 253) points out that the achieved sedative effect might even block the mobilization of potential for social action. Newig (2003: 277) argues in the same direction.

[41] „Dreizehntes Gesetz zur Änderung des Atomgesetzes" of 31 July 2011, *Bundesgesetzblatt* I (Federal Law Gazette of Germany), 1704. See for further details Reyes y Ráfales (2013: 599–600).

[42] Noll (1981: 361). The rapidly adopted German Anti-Terrorism Act of 2001 is a perfect example, see Rublack (2002: 202). Dwyer (1990: 233) gives another example: legislation addressed to exotic and particularly dreaded health threats.

which were enacted in the United States in 1996, symbolic statutes of this sort are unlikely to have large-scale, systematic effects on the outcomes in habeas corpus or prison cases.[43] Still, they are real laws and do affect individual liberty – unfortunately in an essentially random way, and randomness itself is a constitutional concern (even more so if the death penalty is involved!). However, the limitations of penal laws are not only reached if and when the law itself poses a constitutional problem. Symbolic laws are problematic whenever they are designed to regulate society on a grand scale: if legally protected universal interests that are difficult to capture – e.g. the environment or the operation of capital markets – are to be safeguarded it is no surprise that issues such as accountability and liability for actions will be at stake. Furthermore, the moral appeals embedded in these laws often mask the underlying grave conflicts between different interest groups, which vigorously fight their effective implementation. Ultimately, all these factors contribute to the above-mentioned lack of implementation as, for instance, in the area of environmental (penal) laws.[44] As a result, hopes for solutions to (apparently addressed) societal problems are – at least to a great extent – frustrated by symbolic laws in the narrower sense. At the same time the law's latent functions have to remain hidden. For this is precisely the point: if the merely symbolic effect of a statute is detected, that statute becomes ineffective with respect to its latent function. In other words: only the 'deceptive' character ensures its effectiveness. It is for this reason that such a law's expressive goals typically interfere with whatever instrumental goals it aims to achieve; since the instrumental ends are beneath the surface and the ostensible ends cannot be taken at face value, conflicts are foreseeable.[45]

13.3 Different Conceptions and Standards of Rationality Under the German Basic Law

13.3.1 Rationality or Irrationality of Symbolic Laws—A Matter of Perspective?

Branding symbolic laws (in the narrower sense)[46] simply as 'irrational' does not sufficiently tackle the relevant issues. The qualification of a law as 'irrational' is often a question of perspective as it is not *per se* 'irrational' but only in relation to a

[43] Tushnet and Yackle (1997: 1–86, conclusion: 85–86). As they point out the Supreme Court saw the problem of randomness, too, and held that the freakish imposition of the death penalty violated the Eighth Amendment's ban on cruel and unusual punishment, cf *McKoy v. North Carolina*, 494 US 433, 454 (1990).

[44] Hassemer (1989: 557 et seq); Seelmann (1992: 456 et seq); Lübbe-Wolff (2000a: 28 et seq); Newig (2003: 40 et seq).

[45] Cf Tushnet and Yackle (1997: 4); Dwyer (1990: 316).

[46] Subsequently, the term "symbolic laws" is always meant in the narrower sense.

certain rational 'benchmark'.[47] For example, from a viewpoint concentrating on the alleged objective of a statute – that is to say its manifest functions – it will seem irrational if the latent functions of the statute in question actually dominate. Concentrating on the latent functions of a statute the verdict of irrationality will only be made if its latent functions cannot be realized; otherwise the statute would be viewed as 'rational'. Still, this does not necessarily mean that such a statute is 'good law'. However, any evaluation – either of the quality or, more specifically, of the constitutionality of symbolic laws – presupposes that we first understand the way in which notions of rationality are operationalized under the German Constitution.

The relationship between law and rationality is, as it turns out, a more complex one: First of all, it is necessary to differentiate between different forms of rationality in view of their adequacy regarding the law itself and the process of judicial review on the one hand and the political process of law-making on the other hand. Referring to Max Weber's model of "occidental rationalism"[48] one form of rationality may be described as *Grundsatzvernunft* (principle-based rationality) in opposition to what Helmut F. Spinner in his theory of rationality calls *Gelegenheitsvernunft* (occasional rationality).[49] These two forms of rationality are related to two basic constitutional principles, i.e. to the *Rechtsstaatsprinzip* and its sub-principles on the one side and to the democratic principle on the other side. As we will see, especially from the linkage between the notion of *Grundsatzvernunft* and the *Rechtsstaatsprinzip*, other, more specific standards of rationality can be derived that are of particular interest in view of symbolic laws. Additionally, certain other procedural and substantive elements of constitutional law can be identified that foster rationality in the legal order (on this see Sect. 13.3.2). Against this background it will become clearer how to put the problem of symbolic laws in a legal perspective and how to describe the conflict with certain standards of rationality more precisely (Sect. 13.3.3). Furthermore, since the process of law-making takes place in the realm of politics, a well-balanced assessment of the phenomenon of symbolic laws demands a closer examination of this process and of how the democratic principle has been elaborated under the German Basic Law (Sect. 13.3.4). At the completion of this examination we will be ready to approach the issue raised at the start of this paper, i.e. the question of whether, and under which circumstances, symbolic laws that do not meet these standards of rationality – and therefore are not 'good law' – may be declared unconstitutional by the German Federal Constitutional Court (Sect. 13.4).

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[47] Spinner (1986: 924).

[48] Weber (1921–1922/1972[5]: 397, passim); Weber (1915/1946: 293 et seq, 299, passim, see other essays in this volume, too). There is a perceived difference between modern and primitive societies: modern life is viewed as being dominated by a secular, matter-of-fact as well as rational culture. Max Weber's view of a disenchanted, non-magical, rationalized world has been very influential, see Gusfield and Michalowics (1984: 418). For a detailed account of Max Weber's occidental rationalism see Schluchter (1998: 181 et seq, 205 et seq with further references).

[49] Spinner (1986: 923, esp 925 et seq).

13.3.2 Grundsatzvernunft (Principle-Based Rationality) and Gelegenheitsvernunft (Occasional Rationality)

Generally speaking, *Grundsatzvernunft* (principle-based rationality) is omnipresent in the legal order as a disciplining, rationalizing force. *Grundsatzvernunft* is taken to mean the principal rationality of human action that adheres to general, abstract standards that are independent of people or circumstances.[50]

This description indicates a nexus between principle-based rationality and the idea of objectivity, a term that can also be used in connection to truth[51] and which is mirrored in its antonym 'subjectivity'. Therefore, we will start with an outline of conceptions of objectivity, viewed in relation to conceptions of rationality on one side and to the idea of law as well as the process of law-making on the other side.

Epistemologically speaking 'objectivity'[52] – which became the foundation of all science – stands for the supra-individual truth of a certain object or issue that exists independently of the subject. It contrasts sheer belief, subjective persuasion, and assumed truths with a radically secular and purely rational concentration on verifiable facts and causal relationships. In science and research, objectivity serves as a criterion for the inter-subjective validity of scientific methods, findings, and their depiction. We assign to objectivity attributes such as strictly 'fact-based', 'neutral', 'impartial', 'void of emotions, biases, prejudices, and self-interest', or we use the term to mean that a conclusion has been derived from an empirically reliable basis of knowledge. Different sciences draw on different aspects of objectivity and, in fact, there is not one monolithic and immutable concept of objectivity[53] but various conceptions of objectivity – as indeed there are different conceptions of rationality.[54] Lorraine Daston identifies – without any claim to completeness – at least three different forms of objectivity: mechanical objectivity, aperspectival objectivity, and ontological objectivity.[55] In the present context of a depiction of '*Grundsatzvernunft*' we will only deal with the first two forms of objectivity; its ontological aspect (which is about the fit between theory and the world) shall be omitted. Although conceptions of objectivity have changed in the course of history due to changing scientific ideals and practices, these conceptions all show a common pattern: they are all negatively defined, in opposition to specific aspects of subjectivity that, at a certain point of history, came to be seen as 'dangerously

[50] Spinner (1986: 923–924, esp 925 et seq).

[51] See on the relationship between law and truth Decker (1992: 43); Patterson (1996); Poscher (2003: 200); Moore (2004).

[52] See for a profound analysis Daston (1992: on the following esp. 597–98) and Daston and Galison (1992).

[53] From a history of science perspective see Daston (1992: 597–98) who points out that for a long time it has been assumed that objectivity is and has been a monolithic and immutable concept.

[54] See with respect to rationality Schulze-Fielitz (1988: 454 et seq, 459 et seq); Meßerschmidt (2000: 777 et seq); Engel (2001b: 28); Grzeszick (2012: 51 et seq, 76). See from a philosophical perspective also Putnam (1981).

[55] Daston (1992: 599).

subjective'. As Daston and Galison put it: "Objectivity is related to subjectivity as wax to seal, as hollow imprint to the bolder and more solid features of subjectivity. Each of the several components of objectivity opposes a distinct form of subjectivity; each is defined by censuring some (by no means all) aspects of the personal."[56]

The ideal of mechanical objectivity was developed under the influence of the technical innovation of photography. Until the middle of the nineteenth century scholars as, for instance, scientific atlas makers had believed that for a 'true to nature' portrait of an object a scientist would have to capture its essence, relying on his cumulated experience on the basis of series of observations and his skilled ability to judge.[57] But in the second half of the nineteenth century drawings were replaced by photographs due to technical progress and the rise of the ideal of mechanical objectivity which attempted to eliminate the presence and all the more aestheticizing judgments and interpretations of the observer. By 1900, the photograph exercised a powerful ideological force as the very symbol of neutral, exquisitely detailed truth – a rather delusive 'image', at least in the digital age.

Aperspectival objectivity first made its appearance in the moral and aesthetic philosophy of the latter half of the eighteenth century; it targeted the subjectivity of idiosyncrasies, biases, one-sided approaches, and affections of individuals or groups.[58] Only in the middle decades of the nineteenth century aperspectival objectivity became part of the ethos of the natural sciences, "as a result of a reorganization of scientific life that multiplied professional contacts at every level" and fostered communications across "boundaries of nationality, training and skill. Indeed, the essence of aperspectival objectivity is communicability, narrowing the range of genuine knowledge to coincide with that of public knowledge"[59] and transcending the individual viewpoint in deliberation and action. The idea of aperspectival objectivity dominates contemporary notions of objectivity: it is omnipresent in our everyday speech in phrases like 'seeing something from another angle' or 'point of view', 'climb[ing] outside of our own minds' or 'taking a bird's eye view'. Thomas Nagel introduced the brilliant oxymoron "view from nowhere"[60] and, of course, we also think of John Rawls' "veil of ignorance".[61]

But to what extent can we draw a line between these two forms of objectivity and the concept of law, the question of its legitimacy or the process of law-making? Mechanical objectivity not only stands for the ideal of truthfulness and the

[56] Daston and Galison (1992: 82).

[57] Daston and Galison (1992: 84–117). Accordingly, scientists had searched for the underlying 'type' (or even 'archetype') of a genus, an example which possesses all the leading characters of that genus and represents a 'true to nature' abstraction from coincidental individual deviations – as Goethe did when he drafted his *ur*-plant. See for references and for other exemplary illustrations Daston and Galison (1992: 84–117).

[58] Daston (1992: 597, 599, 607; see on the following, including the citation: 600).

[59] Daston (1992: 600; see on the following 599). On the relation of objectivity to inter-subjectivity see also Nagel (1986: 63 and passim).

[60] Nagel (1986: esp. 5 et seq, 60 et seq: "centerless view", passim). See on Nagel also Daston (1992: 599).

[61] Rawls (1971: 29, 36–37, 159 et seq, 228–229, 284, passim).

commitment to verified facts,[62] it also shares with the social contract theories of the Enlightenment a certain scientific ideal and, in particular, a trust in the laws of mechanics as well as the assumption that their 'objective' character and rationalizing force can be transferred to other sciences. As we know, those social contract theories foster the idea of rationality of the law in its purest form – Kant's notion of law as a postulate of reason is a perfect example – and they focus mainly on the question of the law's and the government's legitimacy. The common methodical starting point of the different Enlightenment social contract theories is the methodic individualism. This is very much in line with the ideal of science of the age, and was shaped by Descartes' – erroneous but very influential – equation of the laws of nature with the laws of mechanics. Starting off with the individual as the smallest entity and autonomous manufacturer of its historical lifeworld, situated in a hypothetical state of nature, the theorists of the Enlightenment developed *more geometrico* a rationale for legitimate political authority. The process of transformation from the state of nature to the political state on the basis of a (likewise hypothetical) social contract is described as a "mechanism of socializing".[63] This way of proceeding springs from the same root as mechanical objectivity; both give weight to the rationality of thinking in abstract, general laws – whether physical, mechanical or social – that are universally valid or, at least, universally comprehensible. Since the latter is also typical of the notion of '*Grundsatzvernunft*' and its adherence to general, abstract rules, this approach has proven to be very fruitful for the belief in the rationality of the law and its role in the rule of law state.[64]

However, compliance with the standards of *Grundsatzvernunft* also ensures the inter-subjective communicability, comprehensibility and accountability of actions and results, thereby creating distance and fighting subjectivity in terms of aperspectival objectivity. This is especially true for highly differentiated legal orders: Different manifestations of the idea of *Grundsatzvernunft* like the orientation towards certain principles, rules and methods of construction, the development of a sophisticated legal doctrine as well as a theory of judicial reasoning[65] all enhance (aperspectival) objectivity in law. Since parliamentary norm-setting itself has to observe certain constitutional norms – even though they only constitute a legal framework for the legislative process and respect the wide discretion of the legislator – these rationalizing elements *in law* also influence the *creation of law.*

More particularly – on a lower level of abstraction that corresponds to the substantial constitutional law approach of legislative theory – we find constitutional principles as well as constitutional precautions on the institutional level that help to preserve rational standards in law. First of all the *Rechtsstaatsprinzip* laid down in

[62] Of course, today we know that – contrary to the ideal of mechanical objectivity – value-judgements necessarily form part of the application of law. See on ethical/moral judgements Sieckmann (2005: 284 et seq).

[63] Hofmann (1986: 101–102); see also Siehr (2001: 80–81, 188–189, 262).

[64] See Grawert (1975: 894–899); Hofmann (1995: 9, 23–24 with n 88).

[65] See Alexy (1983).

Art. 20(3) of the German Basic Law virtually embodies the idea of *Grundsatzvernunft*[66] and shapes it through a series of sub-principles such as the principle of legality of all state action with the further sub-principles of the precedence of statutes and the reservation of statutory powers (*Gesetzesvorrang* and *Gesetzesvorbehalt*). Likewise, there are the postulates of the generality of law,[67] transparency and publicity[68] of all state actions, and the necessity for clarity and certainty in legal norms, especially in coercive laws. More recently, the requirement of truthfulness of legal norms (*Normenwahrheit*) has been formulated, too.[69] *Normenwahrheit* is of specific relevance to the matter of symbolic laws; therefore we will come back to this issue. Furthermore, of course, all the constitutional precautions to secure liberty, mainly the principle of separation of powers, the guarantee of (justiciable!) fundamental rights and the establishment of a powerful Federal Constitutional Court are important in this context. Last not least, the notion of *Zweckrationalität*, i.e. purposive rationality, has to be mentioned. This type of rationality that, according to Max Weber, is inherent in the principle of proportionality – the way in which the end, the means, and the secondary results are all rationally taken into account and weighed –, is also an expression of the idea of *Grundsatzvernunft*.

But rationalizing elements in the legal order and legal standards of rationality that are relevant to the process of law-making are not only rooted in the *Rechtsstaatsprinzip*. They can also be found in the principle of democracy as established in Art. 20(2) of the German Basic Law. For instance, they are located in the legal structure of the legislative process itself which creates, through procedural means, a distance – as demanded by aperspectival objectivity – between political needs and urges on the one hand, and legal obligations on the other hand.[70] This potential of rationality is of particular interest for the procedural approach within legislative theory. Due to the participation of different constitutional bodies at different procedural stages, the exercise of mutual influence, constraints and control in the process of law-making is ensured.[71] Moreover, the publicity of the law-making

[66] Grzeszick (2012: 51–52) rightly points out that the expectation of rationality is mainly attributed to the *Rechtsstaatsprinzip*. Kloepfer (1982: 65) describes the state governed by the rule of law as a form of government that is characterized by the keeping of "distance". For example, it ensures distance between private interest and public decision, between the creation of law and its application, and between political will and the binding law.

[67] Grimm (2001: 491) stresses that the law has a rationalizing power merely because of its *generality*, independent of its content.

[68] On the significance of objectivity as publicity, see Postema (2001: 125 et seq).

[69] BVerfG, Order of 12 February 2003, 2 BvL 3/00, 107 BVerfGE 218 at 256 – Different Salary in East and West Germany; BVerfG, Judgement of 19 March 2003, 2 BvL 9/98, 2 BvL 10/98, 2 BvL 11/98, 2 BvL 12/98, 108 BVerfGE 1 at 20 – Fees for Re-registrations of Students; BVerfG, Order of 13 September 2005, 2 BvF 2/03, 114 BVerfGE 196 at 236–237 – Contribution Rate Safeguarding Act; BVerfG, Judgement of 4 July 2007, 2 BvE 1-4/06, 118 BVerfGE, 277 at 366–367 – Legal status of MP (German *Bundestag*). See also Lübbe-Wolff (2000b: 231–232); S. Meyer (2009: 294 et seq); Drüen (2009: 60 et seq); Cornils (2011: 1055).

[70] See Degenhart (1981: 479); Kloepfer (1982: 65); Schulze-Fielitz (1988: 378, 459 et seq).

[71] Degenhart (1981: 479); Schulze-Fielitz (1988: 457–458); Dann (2010: 645); Reyes y Ráfales (2013: 604–605). However, according to Lienbacher (2012: 32–34), with regard to Austria the internal controls within the law-making process are rather blunt weapons.

procedures in parliament re-enforces its function as an assembly of the people because this allows political agendas to be evaluated in a free debate and guarantees a certain control and participation of the public. Thereby a communicative relationship is established that embeds the statute, as a tool of politics, into the legitimizing process of the transformation of the political will into law in a representative democracy.[72] To the extent to which this condition is met in practice – and, of course, there is a significant discrepancy – it brings the legislative process at least a bit closer to the standards of aperspectival objectivity. At the same time, the fact that the outcome of the law-making process is generally binding, so that the 'authors' of the laws are also its addressees, establishes a nexus that helps to restrain self-interest.[73]

Lastly, the rationalizing force of a representative democratic system has to be considered. According to Art. 38(1) sentence 2 of the German Basic Law the Members of Parliament, the German *Bundestag*, shall be representatives of the whole people, not bound by orders or instructions, and responsible only to their conscience. In this way a certain distance is created and the factual ties and dependences of the voters or the party to which a representative is attached are put into a legal perspective. It is conceded, however, that this approach to rationality, which counts on the legal protection of the free mandate of the representative in the political process of law-making, does not match the conception of '*Grundsatzvernunft*' (principle-based rationality). It rather corresponds to what Helmut F. Spinner in his theory of rationality calls '*Gelegenheitsvernunft*' (occasional rationality). According to Spinner the latter is not aligned to general, abstract, anticipated principles but takes an occasional-rational approach in the sense that on a case-by-case basis a "changing, occasional rationality is created", depending on the circumstances, "as specific means […] to solve a particular case *occasional-rationally*, without any generalization".[74] The (one-sided) 'occidental' conception of rationality as an orientation towards general principles, which has been promoted by Max Weber, is thereby contrasted with an orientation towards occasion and opportunity.[75]

As already mentioned, the law itself seeks the highest possible degree of compliance with the conception of *Grundsatzvernunft*, with Kant's notion of law as a postulate of reason marking the pinnacle. However, politics shifts as a 'wavering figure' between principle-based and occasional rationality: on the one hand, it is in the interest of politics to enact laws that organize and shape life according to certain principles, i.e. to create a *Lebensordnung* on a legal basis. On the other hand,

[72] Grigoleit (2004: 20). On the function of members of parliament as representatives see H. Meyer (1989: 117 et seq, margin note 9 et seq).

[73] Grimm (2001: 491).

[74] Spinner (1986: 925).

[75] Spinner (1986: 933).

politics – under the pressure of time and the pressure to act – also seeks flexible solutions for political problems. If these problems cannot be solved in the short-run, laws are supposed, at least, to send programmatic signals and to demonstrate the political ability to take meaningful action; symbolic laws (in the narrower sense) fulfil exactly this function. Thus, next to substantive fact-based objectives emerge tactical political aims. Considering that certain tactical goals are not revealed, because doing so could jeopardize their achievement, such legislation comes into conflict with principle-based rationality.

It becomes clear at this point that objectivity and rationality in legislation are linked but not congruent: the modern scientific ideal of objectivity rules out both the natural law notions of 'reason' and of '*Gelegenheitsvernunft*' but it harmonizes with '*Grundsatzvernunft*' (especially as the latter overlaps with 'aperspectival' objectivity).

13.3.3 Specific Conflicts of Symbolic Laws with Standards of Rationality and Their Consequences

As we have seen, there is a conflict with *Grundsatzvernunft* (principle-based rationality) that seems to be typical of symbolic laws and this conflict bears consequences that should be taken seriously. Firstly, the concealment of the latent functions of a statute contradicts aperspectival objectivity, for the 'view from nowhere' presumes equal knowledge of everyone involved in the public discourse. Or to re-phrase it in the words of Kant's famous "Treatise on Eternal Peace": "All actions relating to the right of other men are unjust if their maxim is not consistent with publicity".[76] Thus, symbolic statutes lack publicity in view of their latent intentions which renders them 'unjust'.

It is this conflict with aperspectival objectivity that is visible under the surface of the constitutional requirement of *Normenwahrheit* (truthfulness of legal norms). *Normenwahrheit* as a standard of rationality that legal norms have to meet has been formulated in the jurisdiction of the German Federal Constitutional Court only quite recently.[77] It has been partly approved in literature[78] but it has also encountered sharp criticism. Those who are critical have found no real difference between *Normenwahrheit* and *Normenklarheit*, i.e. the clarity of a legal norm.[79] Actually, the

[76] Kant (1795/1983, vol 9, Appendix II: "Of the Harmony which the Transcendental Idea of Public Law Established between Morality and Politics", 244–245).

[77] See supra n 69.

[78] Drüen (2009, see for a summary: 74); Bumke (2010: 91); Merten (2015: 351).

[79] See Cornils (2011: 1055). However, Drüen (2009: 64 et seq, 74) defines the difference clearly. The position of S. Meyer (2009: 294 et seq, esp 298/302) is ambiguous: on the one hand, he does not see a doctrinal innovation in relation to *Normenklarheit*, on the other hand, he explains why this requirement may lead to a different result.

requirement of clarity of a legal norm ensures that the addressees are able to grasp the legal situation on the basis of the said legal norm, whereas the idea of *Normenwahrheit* aims at the element of deception which is crucially characteristic of symbolic statutes in the narrower sense. The manifest message of a symbolic statute may be very clear, yet not enforceable, while its latent aims remain hidden. This shows that, in fact, the two standards are different and that the development of the requirement of *Normenwahrheit* is a very specific response to the phenomenon of symbolic laws.

Secondly, symbolic laws, in line with the infringement of the requirement of *Normenwahrheit*, often lack means of implementation. But if the manifest objective of a norm is missed this undermines, at least in the long run, the normativity of the law,[80] and the objectifying aspects that allow the law to appear as an expression of '*Grundsatzvernunft*' (principle-based rationality) lose their foundation. This is a serious danger to the law but it is not triggered by a single statute or a few symbolic laws. It depends rather on the question of how often symbolic laws are passed and to what degree they may be described as symbolic laws[81] in the narrower sense.

Thirdly, as mentioned above, in symbolic legislation the idea of the preservation of liberty through self-legislation of the autonomous subject is betrayed. If the people do not discover the deception they are deprived of taking part (virtually, through representation) in legislation.[82] In the opposite case the consent of the people to a law that actually does not serve its manifest purposes contradicts the notion of reason that is inherent in law and, as Kant notes: "what the whole people cannot decide upon for itself the legislator also cannot decide for the people."[83] – But how should we counter the argument that the legislator is, through a symbolic statute, merely reacting to the demands of the people? This question shifts our attention from the *Rechtsstaatsprinzip* (rule of law) to the second main constitutional principle that can be seen as counterpoint in this context, i.e. the principle of democracy.

[80] This poses a problem for the legal culture as Enders and Lange (2006: 112) correctly point out. On the specific value of normativity as a counterbalance to political and social power, see Engel (2001b: 39). In more detail Engel (2001a: 23 et seq).

[81] See on this issue above in the text near n 38.

[82] In addition, the generality of law in the sense of its impersonal abstractness, an idea that was elaborated by Rousseau for the first time, is lost: according to Rousseau a law is not general if a single voter is excluded, irrespective of its content. However, deception is a form of exclusion; see for details Siehr (2008: 286 et seq).

[83] Kant (1797/1983, vol 7, Rechtslehre, Allgemeine Anmerkung C: 448). Cf also Kant (1797/1983, vol 9, II. Vom Verhältnis der Theorie zur Praxis im Staatsrecht [Gegen Hobbes]: 150).

13.3.4 Symbolic Laws and the Principle of Democracy

The Process of Law-Making and the Principle of Democracy: Voluntas, Instead of Ratio

The principle of democracy, enshrined in Art. 20(2) of the German Basic Law, is a dynamic principle.[84] Among all state organs the German *Bundestag* is connected closest to this principle. In view of its right to legislative initiative and its influence on the creation as well as the control of the government the parliament can be described as the "center of gravity" in the constitutional state.[85] The German Parliament is the only state organ elected directly by the people and Members of Parliament are, as previously mentioned, "representatives of the whole people" (Basic Law, Art. 38[1] sentence 2) in the process of forming the will of the state. This will, as articulated in Parliament, is not valid because it embodies a predetermined, objective reason that only needs to be discovered. It is valid because it is the will of the majority of the representative body that is directly democratically legitimatized: "*voluntas*, rather than *ratio*".[86]

The Principle of Representation: Elitist and 'Democratic-Egalitarian' Conceptions

However, the fact that the principle of democracy is based on *voluntas*, rather than *ratio* does not mean that input-oriented democratic legitimacy of democratic law-making cannot be enhanced through the output-oriented reasonableness of 'good law'. On the contrary, it is clear from what has been stated above that from the rationalizing and distance-creating effects of the organization of the legislative process a – but yet rebuttable – presumption follows that a law created by parliament *is reasonable*.

But how exactly does the disciplining power of representation work or, more specifically, what may be expected in this respect from the individual representative who exercises his or her free mandate in accordance with the Basic Law, Art. 38(1) sentence 2? Is the representative, aligned with the ideas of Rousseau,[87] obliged to abstract him- or herself from all private interests, including those of the voters, and to act strictly in concordance with what he or she perceives to be the 'general will' or, in common parlance, the common good? Though some statements in the

[84] See H. Meyer (1989: margin note 7). On the following see H. Meyer (1989: margin note 8).

[85] Hofmann and Dreier (1989: margin note 24).

[86] Dreier (1988: 457). On the majority rule Dreier (1986: 94); Schulze-Fielitz (1988: 443 et seq).

[87] For Rousseau the law is the expression of the general will (*volonté générale*) as a substantial figure which focuses on the common good, and is different form the will of all (*volonté de tous*) as a sheer numeric figure. According to his "contrat social" the general will is determined in an assembly of free and equal men and is equally binding for all.

literature apparently point in this direction, this position is not really persuasive.[88] Actually, in this context it is not Rousseau – who strictly opposed the idea of representation – we are close to, but the American 'Federalists': They drafted (in the form of political journalism) in view of the Constitution of the United States of America the first model for a representative and democratic system of government in a large territorial state.[89] The Federalists considered pluralism, arising from the demands of different interest groups, not as a disturbing factor but as the basis for the procedure of representation.[90] In their view the process of gradual communicative expansion leads to the mutual abrasion of private interests and in the end the common interest that is at the core of all singular interests is revealed.[91] Although modern criticisms of pluralism have disclosed relentlessly shortcomings in the process of the articulation of different group interests,[92] this model is still superior to an over-idealization of the representative. And this is precisely what is being done when the representative is expected to go through the entire process of balancing and adjusting diverse interests in his/her person – knowing very well that the reality is quite different.

So, in fact, every single Member of Parliament may represent group interests since it is not he or she as an individual that represents the whole people; instead, we rely on the principle of collective representation through the German *Bundestag* as the representative body.[93] In practice, this is certainly still far from the ideal of aperspectival objectivity. It should be noted, however, that there is nothing *per se* 'irrational' about the representation of group interests since solutions to a particular problem may be found on the basis of *Gelegenheitsvernunft* (occasional rationality) as outlined above. To sum it up: it is the process of forming the will of the legislator under the conditions of pluralistic diversity of opinions and interests as a whole that counts here. This process leads to a selective legal concretization of the common good[94] which will be valid for a certain period of time.

Anyhow, for a better understanding of symbolic laws we must tackle the 'hard cases' in terms of standards of rationality. For example, how should the legislator deal with the situation mentioned above of a general perception of a threat amongst the populace; a perception that is not justified by the state of affairs but in response to which the populace nevertheless calls for the – needless and therefore ineffective –

[88] Strongly opposing H. Meyer (1975: 93); Dreier (1988: 464 et seq); Hofmann and Dreier (1989: margin note 27). The position of Schneider (1989: margin note 4 and 18) appears ambiguous and unclear.

[89] See Hamilton, Madison and Jay (1787–1788/1961).

[90] See Dreier (1988); Hofmann and Dreier (1989: margin note 12).

[91] See Dreier (1988: 462); Hofmann and Dreier (1989: margin note 12).

[92] See for example Lehner (1985: 95 et seq).

[93] Cf BVerfG, Order of 10 May 1977, 2 BvR 705/75, 44 BVerfGE 308 at 316 – decision-making capacity of the German *Bundestag* –; Schneider (1989: margin note 18); Hofmann and Dreier (1989: margin note 27).

[94] In a democracy the common good is not pre-determined but its definition is subject to an open pluralistic process which follows strict procedural rules, see Münkler and Fischer (2002: 9–11, passim).

tightening of penal laws? Naturally, elitist conceptions of representation that are based on the idea of the superior ability to reason of particularly qualified representatives would have no difficulty in conceding a discrepancy between the reasonable insight of the representative body and the unreasonable empirical will of the people. Such a conception had previously been invoked by Sieyès, the genius constitutional theorist of the French Revolution[95] and surfaced again, albeit in a modified version, in Carl Schmitt's disputable idealism of representation. He defined representation virtually as the "non-democratic [element] of this democracy" for democracy, according to Schmitt, is defined as the identity of ruler and ruled.[96] Lastly Schmitt's highly idealizing conception of representation, in which "a higher form of being is concretely manifested",[97] served to nourish his criticism of parliamentarism.[98] Since the various elitist models of representation are not compatible with the egalitarian democratic foundation of the sovereignty of the people in the German Basic Law and the universal and equal right to vote inherent in it, they shall not be examined further in this context.

Under the German Basic Law it proves necessary to differentiate: On the one hand, it follows from the Parliament's basic function of representation that its Members have to maintain a close connection to the people[99] in a way that allows for supervision and criticism, so that the democratic ideal of self-rule of the people through elected representatives can become reality.[100] This means that although the representative, according to Art. 38(1) sentence 2 of the Basic Law, obtains a free mandate and is not bound by orders or instructions, the empirical will of the people is certainly of relevance.[101] On the other hand, however, the representative is, according to Art. 48(2) sentence 1 of the Basic Law, the holder of a public office[102] and is therefore bound by the Constitution which also sets limits to the empirical will of the people. Furthermore, the representative does not only have to bear in mind the question whether a new law may lead to a clear (and therefore justiciable) breach of the Basic Law but he or she has also to consider the spirit of the Constitution that gives life to the idea of the free mandate. In the following sections it will be examined more closely under which circumstances issues that are linked to the

[95] In detail on Sieyès see Herbst (2003: 66–78).

[96] Schmitt (1983: 204 et seq, 218). Cf Hofmann and Dreier (1989: margin note 10); Hofmann (2002: 148 et seq).

[97] Schmitt (1983: 210). On the elitist-aristocratic character, ibid, 219.

[98] Schmitt even concludes that, actually, a "powerful representation" is only conceivable against the Parliament, (1983: 315). Cf Hofmann and Dreier (1989: margin note 10, 31); for a thorough analysis of Schmitt's criticism of parliamentarism see Hofmann (2002: 96 et seq).

[99] See on this H. Meyer (1989: margin notes 9–11), also on the following.

[100] Cf Dreier (1988: 483 with n 91, including further references).

[101] The German Basic Law clearly dismisses both: conceptions of democracy that are based on the identity of rulers and ruled as well as mystifying notions of representation, see Schneider (1989: before article 38, margin note 2–3), and Dreier (1988: 482–483).

[102] Evidently the representative does not hold an office within public service but a state office (*oberstes Staatsamt*) that, in fact, is incompatible with a public service position, see Schneider (1989: margin note 20).

'symbolic character' of laws may be subject to judicial review, and what we may expect from the representative with regards to symbolic law-making – possibly even beyond the question of enforceable constitutional law.

13.4 Symbolic Laws Before the German Federal Constitutional Court (*Bundesverfassungsgericht*)

As we have seen, symbolic laws (in the narrow sense) pose specific problems; their specific features are also relevant with respect to judicial review. However, it is necessary to distinguish between different groups of symbolic laws: Some of them do not constitute the slightest problem. However, it does become problematic if a law that allows the restriction of personal liberty is not fact-based, if it contains unclear, ambiguous or even self-contradictory prescriptions, or if the symbolic character of a law follows from a lack of implementation. Nevertheless, in all these cases the aforementioned substantial constitutional approach of legislative theory will be applied in order to combat the negative consequences of symbolic laws in the narrower sense.

Generally, whether or not an infringement of basic rights is justified depends on the question of what kind of restrictions are compatible with the specific right of liberty; German basic rights theory speaks of *Grundrechtsschranken* that have to be observed. Moreover, the legislative measure has to comply with the principle of proportionality. This requires, firstly, that the statute pursues a legitimate purpose, secondly, that the chosen measure is suited to serve this purpose and, thirdly, that the measure must be necessary in terms of the least invasive means. Fourthly, the measure has to be proportionate (in the narrow sense), meaning that the legislator has to weigh up the infringement of a basic right and the purpose and goals of the statute in question. For example, if a statute aims merely at fortifying the feeling of security the legitimacy of this legislative purpose[103] may already be doubtful. However, if the underlying legislative purpose of such a statute is not identifiable but another, unrealizable, aim is explicitly mentioned, the statute would be unconstitutional because it provides no suitable measure in view of its manifest purpose. Now, if the aim to strengthen the feeling of security is at least visible as a secondary aim of the statute, the necessity of the chosen measure would be problematic if the concerns for security are not based on fact.[104] In this case activities to furnish the public with adequate information, to disseminate knowledge and to

[103] Affirmatively, Kötter (2004: 378); disapproving Gusy (2004: 174 et seq, 181–182), who correctly points out that at any rate protecting the feeling of security cannot be the basis for infringing the rights of others.

[104] In fact, this is exactly the result already achieved on the basis of Kant's notion of law (see Sect. 13.1.1) since Kant also called for the *necessity* of a coercive law in order to justify it. Somehow, the principle of proportionality is a transfer and further elaboration of this idea in terms of legal dogmatics.

raise awareness of the factual situation appear to be the less invasive measures. Information campaigns may not always be effective; nonetheless, politics in a democracy owes the empowered citizen (*mündiger Bürger*) an appropriate effort. In some cases the proportionality (in the narrow sense) of such a statute will be questionable, too, but, indeed, the assessment of this issue depends to some extent on the personal standpoint with regards to a 'subjectified' definition of security.[105] Actually, it should be considered that this development involves a risk since it essentially abandons the liberal rule of law tradition and carries the danger of enhancing the feeling of security at the cost of liberty.[106]

The German Federal Constitutional Court may scrutinize a 'symbolic' law in view of other aspects of the *Rechtsstaatsprinzip* (rule of law), too, which – according to Gertrude Lübbe-Wolff – also encompasses "the *renunciation to instrumentalize the law for false suggestions* and, more general, the *absence of untruthfully suggested aims and meanings of the law*."[107] In other words: the *Rechtsstaatsprinzip* includes the aforementioned requirement of *Normenwahrheit* (truthfulness of legal norms)[108] which targets the core of the legal problem of symbolic laws since this requirement is not met by laws characterized by an element of deception. Besides, as the German Federal Constitutional Court has pointed out in a decision dealing with fees for re-registrations of students, the idea of *Normenwahrheit* is not only linked to the *Rechtsstaatsprinzip* but also to the principle of democracy.[109] Whereas the *Rechtsstaatsprinzip* calls for transparency in view of the purpose of a law since the addressee should know what the law expects him to do, the principle of democracy incorporates the idea of self-government of the autonomous subject; thus, they both oppose deceptive legal norms – just from different perspectives. Therefore, the requirement of *Normenwahrheit* is certainly well-founded in the German Basic Law. Nonetheless, its application poses specific problems, for example, how can the German Federal Constitutional Court know whether the contested law has been instrumentalized to suggest untruthfully aims and meanings that, in fact, it does not

[105] See supra in the text near n 9.

[106] At least, relating to the aforementioned example of a prolongation of preventive detention as means to strengthen the feeling of security (see supra, near n 10), there are certain limits set by the Constitution. These limits follow from the principles that the punishment given to the offender should be limited on the basis of his guilt, and that the danger posed by him (which has to be determined on the basis of a prognosis) limits the duration of preventive detention.

[107] Lübbe-Wolff (2000b: 232): "[…] den *Verzicht der Instrumentalisierung des Rechts für falsche Suggestionen* und, allgemeiner, die *Abwesenheit falscher Suggestionsgehalte des Rechts* als ein Gebot des Rechtsstaatsprinzips anzusehen."

[108] BVerfG, Judgement of 19 March 2003, 2 BvL 9/98, 2 BvL 10/98, 2 BvL 11/98, 2 BvL 12/98, 108 BVerfGE 1 at 20 – Fees for Re-registrations of Students; BVerfG, Order of 12 February 2003, 2 BvL 3/00, 107 BVerfGE 218 at 256 – Different Salary in East and West Germany; BVerfG, Order of 13 September 2005, 2 BvF 2/03, 114 BVerfGE 196 at 236–237 – Contribution Rate Safeguarding Act –; BVerfG, Judgement of 4 July 2007, 2 BvE 1-4/06, 118 BVerfGE, 277 at 366–367 – Legal Status of MP (German *Bundestag*). See for literature supra n 69.

[109] BVerfG, Judgement of 19 March 2003, 2 BvL 9/98, 2 BvL 10/98, 2 BvL 11/98, 2 BvL 12/98, 108 BVerfGE 1 at 20 – Fees for Re-registrations of Students. See for further details also S. Meyer (2009: 294–303).

have? According to the (joint) rules of procedure of the Federal Ministries and the German Bundestag only bills require a specification of reasons.[110] However, even changing the law in order to extend this obligation to specify reasons to the legislator would not be expedient in this instance since the standards of objective interpretation[111] only take those considerations of the 'real legislator' into account that manifest themselves in the respective law (and even then they serve merely as a *subsidiary means* for determining the meaning of a legal norm). For this reason the German Federal Constitutional Court can only declare a breach of the standard of *Normenwahrheit* if such a breach is obvious in view of the *contested legal norm itself*. This might, for instance, be the case if a legal norm is unclear, ambiguous or even self-contradictory. Anyhow, such a legal norm violates concurrently the principles of legal certainty (*Bestimmtheitsgrundsatz*) and the requirement of clarity of a legal norm (*Normenklarheit*).[112]

Finally, if symbolic statutes contain certain prescriptions but their poor instrumentation is very likely to lead to only spotty enforcement, those laws will be incompatible with the principle of equality (Art. 3, Basic Law).[113] The reason for this is that the notion of rationality of the law, of course, opposes all forms of its arbitrary enforcement. But if a law is drafted in a way that its implementation will necessarily be highly selective this certainly is arbitrary, as the German Federal Constitutional Court indeed pointed out in a case in 1991 dealing with the taxation of interest income.[114]

These examples illustrate that the substantial constitutional law approach can adequately deal with certain groups of symbolic laws. But in other cases where the infringement of the requirement of *Normenwahrheit* does not materialize in the legal norm itself and no other constitutional norms or principles can be applied, the German Federal Constitutional Court cannot do anything about the mere symbolic character of the respective law. At this point the substantial constitutional approach of legislative theory that relies on enforcement by the Court reaches its limits.

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[110] See Lücke (1987: 11–13, 33–34, 138), who considers this to be unconstitutional (1987: 216–218, 225). See for the opposing opinion Waldhoff (2007: 325 et seq, 333, 341); Grzeszick (2012: 54, 61, n 57); Reyes y Ráfales (2013: 612 et seq, 614); see also Merten (2015: 360).

[111] Since BVerfG, Judgement of 21 May 1952, 2 BvH 2/52, 1 BVerfGE 299 at 312 – Housing Promotion –, the Court has consistently ruled in favor of an objective interpretation. See in detail S. Meyer (2009: 281 et seq).

[112] 108 BVerfGE 1 at 20 – Fees for Re-registrations of Students – refers explicitly to 105 BVerfG 73 at 112–113 – Taxation of Pensions –, stating that otherwise legitimate incitation effects or other non-fiscal aims of taxation must be based on a transparent and clear decision of the legislator in order to justify new tax burdens.

[113] Führ (2003: 10 et seq); Lübbe-Wolff (2000b: 226–228); Merten (2015: 351–352).

[114] BVerfG, Judgement of 27 June 1991, 2 BvR 1493/89, 84 BVerfGE 239 at 269 et seq – Taxation of interest income. The Federal Constitutional Court argued that this is not a question of the general principle of equality but only of the sub-principle which refers to equal taxation, ibid, at 268. But as Bryde (1993: 6 et seq, especially 20) shows, this decision is generalizable (if we adhere to the lowest level of scrutiny in respect of the broad discretion of the legislator): Symbolic laws that *only* target the honest or unlucky citizen are unconstitutional.

13.5 Standards of Rationality Beyond the Question of Constitutionality of the Respective Symbolic Statute?

As we have seen in the previous chapter, the German Federal Constitutional Court cannot enforce the constitutional requirement of *Normenwahrheit* or other constitutional principles in all cases. This poses the question what will happen in these instances; for example, will the requirement of *Normenwahrheit* lose its significance or operate in a vacuum if it is not justiciable or is it nonetheless of relevance in the process of law-making?

According to the legal theory approach to legislative theory we should bear in mind that as a standard of good law-making the requirement of *Normenwahrheit* as well as other constitutional principles are particularly suited to give orientation to the internal law-making process and therefore should be observed by the representatives. From this point of view the representatives can generally be expected to consider that the German Constitution embodies additional standards for the internal legislative procedure that exceed the question of a clear and justiciable breach of constitutional law. In fact, standards and 'guidelines' for good law-making are the main subject of the legal theory approach to legislative theory. Apart from constitutional principles these standards also encompass general reflections on the notion of law and on the foundation of our legal order in terms of the history of ideas. In general, legal theorists emphasize – and rightly so – that law-making has reached its limit when it begins to undermine the basis of the authority and legitimacy of the law itself. Thus, it follows that with regards to symbolic laws they will point, for instance, to the aforementioned issue that a failure to realize the manifest purpose of a symbolic statute in the long run undermines the normativity of law. Moreover, they will argue that the element of deception inherent in symbolic laws (in the narrow sense) thwarts the idea of autonomous self-legislation of the reasonable subject and, concurrently, counteracts the ideal of aperspectival objectivity. (It should be remembered that aperspectival objectivity does not aim for an 'objective truth' embodied in law but for the *truthfulness and credibility of the legislative process* and presents an input-oriented perspective that can be seen as a complement to the output-oriented standard of *Normenwahrheit*.)

As we have seen, the German Federal Constitutional Court is not able to keep in check the *internal* limits of legislative discretion in the same way as it controls its *external* limits, especially as the danger is not so much caused by a single statute but by the sum of them. Therefore, it is the full responsibility of the legislative bodies, as well as of the single representative, to guard the internal limits of law-making by acting according to the ethos of his/her public office and the spirit of the Constitution on which this public office is based. In the last resort, representatives have to refuse to take part in the making of symbolic laws if they result in "fake-legislation"[115] by invoking their freedom of conscience as guaranteed by Art. 38(1) sentence 2 of the Basic Law.

[115] The wording "*Schein-Gesetzgebung*" is used by Führ (2003: 5–6, passim).

And what is in the process of law-making to be observed before we reach the final limit at which point the credibility of a meaningful legislative process is at stake? The answer is simple: This is the broad field of legislative discretion.[116] Legislative theory with its different approaches may help to cultivate this field by showing the ways and means to improve the technical quality of laws[117] and to enhance the principle-based rationality of the internal legislative process by defining certain procedural and material standards.[118] In the past, these efforts have been criticized as mere "lessons of political virtue" for the democratic legislator.[119] However, during the last three decades legal science has gradually developed from a science of legal construction, concentrated on the application of law, to a science of decision-making, oriented towards law-making.[120] Concurrently, the old notion of a legal science that is mainly concerned with "a nationally introverted exegesis of norms and decisions" (Andreas Voßkuhle)[121] has become shaky because of the increasing importance of European Union law within our legal system as well as ongoing internationalization. Furthermore, mechanisms of cooperative law-making – which pose specific problems to our conceptions of the rule of law and of democracy[122] – gain weight due to the subtle, creeping processes of denationalization and increasing activities of international networks inside and outside the European Union multi-level system. In the light of these new challenges it is time to strengthen, within legal science, the law-making perspective in the broader sense of 'legisprudence'.[123] This would encompass further elaboration of the principles or requirements that embody fundamental elements of our legal culture – i.e. in the same way that the principle of coherence seeks a better fit of statutes in terms of legal doctrine or that of *Normenwahrheit* targets deceptive elements of symbolic laws – in order to improve the 'culture of law-making'.

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[116] See in detail Meßerschmidt (2000).

[117] For instance, in order to evaluate the likely effects of a law, all available sources of skills and knowledge should be fully exploited, so that the legislator has a reliable basis for such a prognosis, cf BVerfG, Judgement of 1 March 1979, 1 BvR 532, 533/77, 419/78 and BvL 21/78, 50 BVerfGE 290 at 333–334 – Employee Participation; BVerfG, Judgement of 15 December 1983, 1 BvR 209, 269, 362, 420, 440, 484/83, 65 BVerfGE 1 at 55–56 – National Census; BVerfG, Judgement of 14 July 1986, 2 BvE 2/84, 2 BvR 442/84, 73 BVerfGE 40 at 91–92 – 3rd Decision on Party Donation; BVerfG, Order of 19 September 1996, 1 BvR 1767/92, Neue Juristische Wochenschrift 1997, 247 – Remuneration for Operators of Photocopiers. Generally on this topic Burghart (1996: 201 et seq, 206, et passim); Schulze-Fielitz (1988: 490 et seq); Kloepfer (1982: 90–91).

[118] However, the functioning and inner logic of the political process do set some limits, cf Schulze-Fielitz (1988: 375 et seq, 553–554); Schuppert (2003: 12 et seq); Dann (2010: 640, 645 [necessity of compromise]).

[119] Gusy (1985: 298–299), who rightly points out that there is no causal link between the 'right' law-making process and the 'right' outcome of this process. – However, it has to be conceded that the chances to get 'good laws' are certainly higher if the quality of the legislative process is improved, see supra in the text near n 15 and n 16.

[120] On this development of legal science see Voßkuhle (2002: 180) and Voßkuhle (2004: 5).

[121] Voßkuhle (2002: 178).

[122] Hoffmann-Riem (2005: 5, esp 11 et seq); Siehr (2007: 129, 135 et seq, 143 et seq).

[123] On legisprudence as a new theory of legislation see Wintgens (2006).

13.6 Summary

As we have seen, in a broader sense all law has a symbolic dimension which is important for its functioning in society. The negative connotation of symbolic laws in the narrower sense is linked to an element of deception: those laws are instrumentalized for hidden latent purposes while their manifest function cannot be realized.

With respect to the judicial review of those laws we must differentiate. The constitutional law approach does prove to be effective, however, only to some extent: In certain cases symbolic laws will be unconstitutional because they violate the principle of proportionality, for instance if they provide no suitable measure in view of their manifest purpose. In other cases, if the mere symbolic purpose of a law finds expression in unclear, ambiguous, or even self-contradicting legal norms, this will be a breach of the constitutional requirement of a clear, unambiguous and precise formulation of the relevant legal norm (*Bestimmtheitsgebot* and *Normenklarheit*). Finally, if the symbolic character of a law becomes visible through arbitrary forms of implementation, the principle of equality may be invoked. Indeed, the requirement of *Normenwahrheit* – that reflects the ideal of aperspectival objectivity and is well-founded in the constitutional principles of the rule of law and of democracy – is specifically tailored to capture the deceptive character of symbolic laws in the narrower sense. But the problem is that, according to the prevailing method of objective interpretation, the requirement of *Normenwahrheit* can only be enforced by the German Federal Constitutional Court if the alleged infringement is manifest in the *contested legal norm itself*. For this reason it would be of no help to extend the legal obligation to give statements of reasons and aims of the law (an obligation which already exists for bills that are frequently submitted by the Federal Government) to the legislature. The idea would be to ensure thereby (with procedural means) the effectiveness of the constitutional law approach (since the requirement of *Normenwahrheit*, of course, flows from substantive constitutional law). But such a procedural measure cannot bridge the gap between a separately given statement of reasons by the legislator and the objective meaning of the legal norm. Thus, in this respect the procedural approach in legislative theory – that, in general, helps to rationalize law-making – cannot contribute to a solution.

As a result of the specific problems which symbolic laws pose to the constitutional (and to the procedural) approach in legislative theory, there may be laws which are, according to the 'history' of the law-making process, only meant symbolically but which the said constitutional principles are not able to tackle. Not every botched or irrational law is automatically unconstitutional; still, if the procedural and material constitutional requirements are met, the job of the Federal Constitutional Court is done. Moreover, it is not the single symbolic law – and judicial review always deals with single laws – that presents a risk to the rule of law state, it is the fact that too many of them may undermine the normativity of law. Of course, the political law-making process lies in the broad discretion of the legislature. Nevertheless, all state authorities as well as the single representative are bound by the Constitution. So, it

is the full responsibility of every single representative to act according to the ethos of his or her public office and the spirit of the Constitution on which this public office is based. The sociological approach in legal theory could be of some help here since it concentrates on the 'diagnosis' of symbolic laws by analyzing whether a (draft) law is fact-based or not and whether it poses a risk to be completely ineffective and therefore merely of symbolic value. In the latter case, the representative should refuse to take part in such 'fake-legislation', in the last resort by invoking the freedom of conscience as guaranteed by Art. 38(1) sentence 2 of the Basic Law. Certainly, obligations that oscillate in the legal grey area between 'hard' constitutional requirements and the 'spirit' of the Constitution are not enforceable by judicial review. In fact, this is an advantage because in this way on the one hand the necessary balance between the legislature and the judiciary is kept. Unless the constitutionality of a law is at stake the modes of law-making always remain within the broad discretion of the law-making bodies. On the other hand, however, the efforts of 'legisprudence' to define the standards of 'good law-making' may enhance sensitivity to the problem of 'fake-legislation' as well as to other issues with regards to our legal culture in which the legislative process is embedded.

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Part V
Legislative Balancing, Proportionality, and Process Review

Chapter 14
Rational Lawmaking, Proportionality and Balancing

Jan Sieckmann

Abstract Law-making, like any normative decision-making, requires justification. A purely formal democratic legitimation by means of voting procedures and a form of majority rule is insufficient, for democratic legitimacy depends on representing the interests of the governed, which requires the balancing of these interests and is only imperfectly reflected in voting procedures. Hence, balancing is the core of rational lawmaking and proportionality is the relevant constitutional standard that guides this balancing. Legislative balancing, however, has features that are distinct from judicial balancing. In particular, it is open because the legislator may, in general, pursue its political objectives without further legitimation and is not necessarily bound to consider only legal principles. It is "pure" insofar as the issue of control and its effects on the structure of balancing is not present in legislative balancing. And it is complex for it is not restricted to claims advanced in a judicial procedure. The aim of this contribution is to analyze the general structure of balancing and to investigate the distinctive features of legislative balancing as a method of rational decision-making.

Keywords Argumentation • Balancing • Legislation • Proportionality • Rationality

14.1 Balancing as a Method of Rational Decision-Making

Any analysis of legislative balancing must start with a general account of balancing as a method of rational decision-making. A first issue hence is the basic structure of the balancing be it judicial, legislative or some other kind.

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14.1.1 Conceptions of Balancing

Balancing consists in determining a priority amongst conflicting arguments according to the weight of these arguments. In law, such arguments are usually called "principles" in the sense of norms that can conflict with each other and figure as reasons for a particular result of the balancing of the competing principles.[1] This core idea of balancing has, however, diverse interpretations. In particular, the conception of autonomous balancing contrasts with that of balancing as interpretation and that of balancing as calculation.[2]

Balancing as interpretation suggests that balancing takes place in the application of abstract criteria that guide a decision. For example, the most abstract criterion of legal balancing concerns the best account of law, or the "soundest theory of law".[3] More specifically, regarding a particular legal problem, one might look for an optimal, reasonable or adequate solution.

One can represent such arguments in a deductive scheme, presenting the basic premise as a conditional:

If x is the best interpretation of the law, then one ought to choose x.

The question then is which interpretation of the law is the best one. If we regard a certain interpretation I_1 as the best, one has to conclude that one ought to choose I_1. Balancing thus takes place within a deductive frame of interpretation.

One might even go further and represent balancing as a mathematical calculation based on certain criteria that determine a preference relation between conflicting goods.[4] In general, formal or axiomatic theories of rational decision-making present an analysis of balancing as calculation. The correct result of balancing, if there is one, follows from given axioms, premises, and rules of calculation, applied to certain data.

These approaches encounter several problems, however. In particular, they will only work if criteria are available that determine the correct, best or optimal solution. If, however, one faces a genuine problem of balancing there are no predetermined criteria that allow one to determine the relative weight of the colliding arguments in an objective manner. Instead, the relative weight must be determined by the balancing itself.

It is important to note that the conception of autonomous balancing suggested here is different to those conceptions of balancing as interpretation or calculation. The conception of autonomous balancing does not presuppose premises that

[1] As to this idea of the "theory of principles", see Dworkin (1978: 24 ff.); Alexy (1985 [2002]); Sieckmann (1990, 2009, 2012a).

[2] See also Sieckmann (2004, 2012a: 85 ff., 2012b: 191) ("rule-based" vs. "autonomous" balancing).

[3] Dworkin (1978).

[4] See, for example, Hurley (1989); Broome (1991).

substantially determine the balancing of normative arguments, but consists in its core in *establishing* a priority relation between the conflicting arguments. According to this conception, the structure of balancing includes three elements: firstly, the arguments to be balanced against each other; secondly, the procedure of balancing aimed at establishing a priority among the conflicting arguments; and, thirdly, the definitive norm that results from the balancing decision.

> For example, if someone says about another person that she is a liar, this will in general count as an insult and hence be legally forbidden. However, one might argue about this issue. On the one hand, there is the right to personal honour, which demands protection against insults. On the other hand, there is the right to free speech, which demands that everyone should be allowed to say what he thinks. Both rights cannot co-exist unrestrictedly. Hence we have a conflict of rights. Both rights apply to the case but cannot dictate the solution. They can hold only in principle, requiring a certain solution, but to be weighed and balanced against other arguments. In order to determine a definitive solution, a priority must be established between the competing arguments.

The priority will depend on the facts of the case and on the relative weights of the competing principles. Thus, the balancing requires not only the conflicting arguments but also supplementary arguments concerning the relative weight and degree of fulfilment or non-fulfilment of the requirements included in the conflicting arguments.

> For example, one might assume that if the insulting assertion was false the right to personal honour deserves priority. Even if the assertion was sincere but nevertheless wrong, and there are no special circumstances that legitimate the insult, the right to personal honour will be given priority over that of free speech. Another priority rule is that if the insult was part of an electoral campaign and was understood as a drastic way of criticising the political opponent, one might think that under these circumstances the right to free speech deserves priority over that of personal honour.

The determination of the priority is, of course, a matter of evaluation. What is of interest here is only the structure of this type of argumentation.

Autonomous balancing includes at least two competing principles. In the example above, these are:

P_1: Everyone ought to have the right to free speech.
P_2: Everyone ought to have the right to personal honour.

The principle P_1 implies a requirement of a particular normative consequent, namely that the speech be permitted (R). The principle P_2 implies a requirement of the opposed consequent (¬R). The normative situation comprises a number of facts of the case F_1, …, Fn. A subset of these facts forms the condition (C) according to which one principle receives priority over the other with respect to the normative issue of whether a particular speech ought to be permitted or forbidden.

The priority relation can be defined in various ways, as a priority among principles or between possible results. One may state a priority among the conflicting

principles with regard to a certain result, that is, a certain legal consequence, and certain conditions.[5] One can represent this as:

$PRIOR(P_1/P_2)C,R.$

> In the example: the principle of free speech receives priority over the principle of personal honour with regard to the permission of this speech under the condition that the speech is not false.

One may also state a priority with regard to the legal consequences, that is, the possible solutions of the balancing. Such a priority depends on certain conditions C and on the conflicting principles or normative arguments. Thus, the notation will be:

$PRIOR(R/\neg R)C,P_1,P_2.$

> In the example: on the balancing of the principles of free speech and personal honour in the case of a speech that is not false, the permission of speech receives priority over its prohibition.

The second notation makes clear that the conflicting principles figure as reasons for a particular result of the balancing, whereas the first notation represents principles as the objects of the balancing. Both notations are possible. However, the second conforms better to the idea of normative arguments as reasons for the particular results of a balancing.

The priority among the competing arguments determines which norm N commands the case in question. This norm supports the consequence R under a certain condition C:

$C \rightarrow R,$

or it may support the opposite consequence Non-R under some alternative condition C':

$C' \rightarrow \neg R.$

The important point is that this rule is only the result of the procedure of balancing and is not derived from pre-determined criteria. Since the rule represents the reasoning of one autonomous individual (A), the type of validity of the balancing result is the following if, for example, R is chosen:

$VAL_{DEF,A}(C \rightarrow R).$

Hence, the result is an individual normative judgment or statement. Thus, it has subjective character and cannot as such claim objective validity. Nevertheless, in spite of this subjective character there are formal criteria of correct balancing which all judgements based on balancing must comply with. These criteria follow from a model of optimisation that allows us to define what the optimal solutions of a balancing are.

[5] Similarly Alexy (1985: 83 [2002: 54]). However, his "law of competing principles" (*Kollisionsgesetz*) does not include a reference to the respective result of the balancing.

14.1.2 The Model of Optimisation

The central problem of balancing is how to justify a priority among normative arguments in conflict. This depends on the criteria that hold for fixing such a relation. These criteria follow from a model of optimisation[6] according to which the determination of the priority among normative arguments must render an optimal solution. Optimality, again, is defined by a criterion of equilibrium. A solution is optimal if it results in a state of affairs where the conflicting arguments are considered to be of equal weight, that is, where one is indifferent between the respective gains and losses in the fulfilment of the conflicting requirements. Accordingly, there is no reason to change the situation and look for a better solution. The central elements of this model are an adaptation of the criterion of Pareto-optimality and the instrument of indifference curves.[7] With these elements one can define what is an optimal solution of a problem of balancing. The following graphic illustrates the structure of a balancing problem:

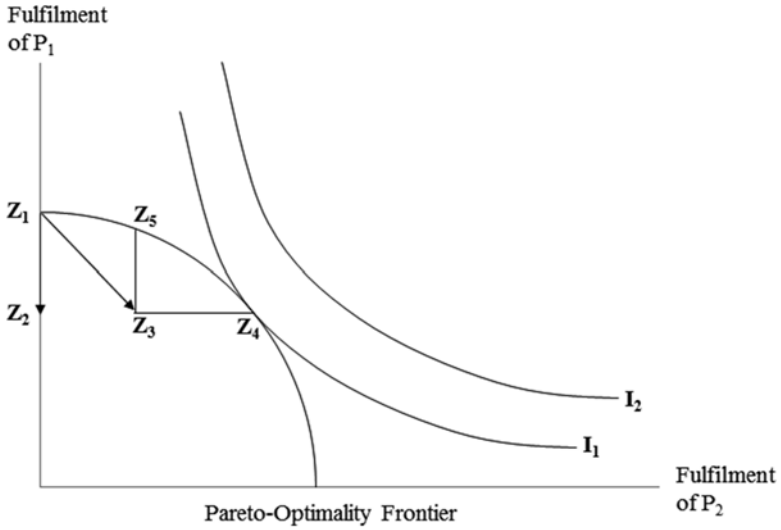

Fig. 14.1 Structure of a balancing problem

[6] The idea of optimisation is ambiguous and contested. For a critique see, for example, Slote (1989). Nevertheless, it seems at least possible to integrate critiques (such as the suggestion that one should choose a second best solution) into a more complex model of optimisation. In addition, it is not clear whether the critiques against optimisation apply to the model of autonomous balancing proposed here.

[7] Hurley (1989: 70); Barry (1990: xxxviii, 7); Steiner (1994: 164); Sieckmann (1995: 49 note 19; 2012a, 90 ff.; 2012b); Jansen (1997: 29 ff., 1998: 112–13); Rivers (2006, 2007).

When a conflict between two principles P_1 and P_2 occurs, the possible degree of fulfilment of one principle is greater the less the other principle is fulfilled.

> For example, the more speech is permitted the less personal honour is protected. The factually possible, feasible solutions can be represented by a curve that connects the points combining a certain fulfilment of P_1 with the highest possible fulfilment of P_2 that is compatible with the respective fulfilment of P_1 (the Pareto-optimality frontier). Given a certain degree of protection of honour, the highest possible fulfilment of the principle of free speech is that any speech is permitted which does not interfere with this protection.

In addition, combinations of a certain fulfilment of P_1 and of P_2 must be evaluated. Obviously, a complete fulfilment of P_1 and P_2 would be best; complete non-fulfilment of both would be worst. Combinations between these extremes can be ordered in classes of combinations with respect to which the person judging is indifferent, that is, he evaluates all classes/combinations to be equally good. This evaluation results from weighing-up a certain loss in fulfilment of P_1 with a certain gain in fulfilment of P_2, e.g. a certain loss of protection of personal honour and a certain gain in free speech. The points representing combinations evaluated as equally good can be connected by indifference curves. The higher an indifference curve in this bundle is placed, the better the combinations represented by this curve are.

There will be a bundle of indifference curves that do not touch or intersect with one another but lie on top of each other. Some of these indifference curves will at some point, or at a set of points, intersect with or touch the curve of factually possible combinations. The indifference curve that does not intersect but only touches the curve of possible combinations is the best available indifference curve. The points situated on both curves are the optimal solutions of the balancing problem. The preference among the conflicting principles is determined by the optimal solutions.

The elements of this model of optimisation are: an adaption of the criterion of Pareto-optimality; the idea of indifference curves; and the definition of optimality based on both of the former elements.

The Criterion of Pareto-Optimality

The criterion of Pareto-optimality defines as optimal those states of affairs that one cannot change without deteriorating the position of at least one of the individuals involved. In order to apply this criterion to normative arguments, instead of considering positions of persons, one has to consider the fulfilment of the claims or principles included in normative arguments.[8] Accordingly, solutions are Pareto-optimal if and only if they cannot be changed without diminishing the degree of fulfilment

[8] This goes beyond the original meaning of this criterion and beyond its use in economics and practical philosophy. However, the criterion explicates a central feature of rational decision-making when choices between incompatible options must be made. There is no need to restrict it to the positions, utilities or preferences of individuals.

of at least one principle involved. Any gain on the part of one of the principles involved must result in a loss in the fulfilment of a conflicting principle.

In Fig. 14.1, Pareto-optimal solutions are represented by the concave curve, bending to the right. The drawing of this curve is arbitrary. It may be drawn as a straight line as well. Also it need not be the case that Pareto-optimal solutions form a continuous line. It may be that in fact only some discrete solutions can be realized. If, in an extreme example, only the solutions lying on the axes are possible, the balancing would amount to an all-or-nothing decision. Still it would be a balancing of normative arguments.

Indifference Curves

The points representing solutions evaluated as equally good can be connected by an "indifference curve". These solutions are hypothetical and not necessarily actually possible combinations of degrees of fulfilment of the conflicting principles. The indifference curves will run from northwest to southeast, that is, each indifference curve will be descending. Since the agent doing the evaluation will not prefer any one of these points to another point of the curve, she will be indifferent to each of the solutions represented by a single curve. However, she would prefer solutions *above* this curve to those lying *on* the curve.

In the graphic, the indifference curves are represented by convex lines, bent to the left, away from the origin of the scheme. As with the Pareto-optimality curve, the drawing is arbitrary.

Optimality

The definition of an optimal solution to a conflict of arguments is as follows. Optimal solutions represent those points situated on the Pareto-optimality frontier as well as on the highest accessible indifference curve, where the indifference curve touches the Pareto-optimality curve but does not intersect with it. The points situated on both of these curves are the optimal solutions of the balancing problem. Indifference curves intersecting with the Pareto-optimality curve cannot be optimal because there is a superior indifference curve that does not intersect but only touches the curve of possible combinations. The points on the touching indifference curve are evaluated as better than those on a lower indifference curve. On the other hand, points on indifference curves above the Pareto-optimality curve are in fact not accessible. They cannot be solutions to the balancing problem. Thus, the optimal solutions must be those situated on both curves, that is, the Pareto-optimality frontier and the highest accessible indifference curve.

14.2 Proportionality as a Model of Balancing

14.2.1 The Standard Test of Proportionality

The test of proportionality applies to conflicts of principles, which may protect rights or other types of goods.[9] In the case of interference with a liberty or defence right, the analysis of the justifiability of this interference (according to constitutional law) includes, firstly:

– the statement that there is an interference with the right and, secondly:
– the justification of this interference according to standards of constitutional law.

Among these standards the principle of proportionality is of crucial importance.[10] It requires or presupposes that the interference pursues a legitimate objective and includes as sub-criteria:

– the demand of adequacy, that is, the interference must be able to promote the objective of the interference[11];
– the demand of necessity, that is, no alternative is available that is less detrimental to the right and that is equally effective with regards to fulfilling the objective of the interference[12];
– the demand of proportionality in a strict sense or, in other words, a demand of balancing, guided by the requirement that the intensity of an interference must maintain a reasonable relation with the reasons for the interference in the concrete case.[13] Whether this requirement is met depends on the degree of interference with, or fulfilment of, the competing principles, and on their abstract (relative) weight, that is, their relative weight without regard to the degree of interference with, or fulfilment of, the respective principle. Both factors, the degree of interference and the abstract weight of a principle, determine its weight or importance in the concrete or particular[14] case. The principle with greater importance in the particular case deserves priority over the competing principle.

[9] On the principle of proportionality, Schlink (1976); Hirschberg (1981); Alexy (1985 [2002]); Clérico (2001). For a formal analysis see Sartor (2013).

[10] See, e.g., BVerfG, Decision 1 BvR 52, 664, 667, 754/66 of 16.3.1971, BVerfGE 30, 292; BVerfG, Decision 1 BvR 536/72 of 5.6.1973, BVerfGE 35, 202; BVerfG, Decision 2 BvL 43, 51, 63, 64, 70, 80/92 of 9.3.1994, BVerfGE 90, 145; BVerfG, Decision 1 BvR 518/02 of 4.4.2006, BVerfGE 115, 320.

[11] See in particular BVerfG, Decision 1 BvR 290/78 of 5.11.1980, BVerfGE 55, 159.

[12] See in particular BVerfG, Decision 1 BvR 249/79 of 16.1.1980, BVerfGE 53, 135.

[13] See in particular BVerfG, Decision 1 BvR 514/90 of 25.3.1992, BVerfGE 86, 1.

[14] Concrete or particular cases must not be understood as a single or individual case. Any description of a case must include general features and hence define a certain type of individual case. Consequently, balancing is aimed at establishing general rules of priority.

14.2.2 Simplifying Proportionality

The balancing according to the requirement of proportionality in a strict sense applies two criteria which are: the degree of fulfilment or non-fulfilment of the principles in question; and the weight or importance of these principles in the abstract, disregarding the degree of fulfilment in the concrete case. This allows one to simplify the account of proportionality. The sub-principles of adequacy and necessity are included in the demand for correct balancing. Thus, the principle of proportionality boils down to the demand for correct balancing.

If a means is inadequate the degree of fulfilment that it brings is zero. Accordingly, the right or objective that is not promoted by the action in question has no weight in the concrete case. The competing argument receives priority. In the same line of argument, if a means is not necessary for the fulfilment of the objective that is meant to justify the interference, there is a clear solution to the problem. Again, this solution wins in the balancing because the alternative has no weight in the concrete case, compared with that solution which respects the right to a higher degree without any disadvantage regarding the competing principle.

It is true that a balancing in the strict sense, based on determinations of relative importance, is not necessary in extreme cases of inadequate or unnecessary interference with a fundamental right. But such a balancing leads to the same result as the direct application of the criteria of adequacy and necessity. Therefore, it is not necessary to apply the criteria of adequacy and necessity separately. Consequently, one can limit the test of proportionality to the balancing of the conflicting principles regarding the alternatives that one can choose in order to fulfil them. The principle of proportionality becomes the simple demand of correct balancing.

On the other hand, the difference between the demands of adequacy and of necessity corresponds to two types of balancing. The first type compares solutions resulting from the performance or non-performance of an intended measure, for example, allowing or not allowing a particular publication. The respective alternatives are given. The other type looks for better alternatives. Instead of merely looking at a certain measure, the issue is whether a third option leads to better results. This may take the form of the demand for necessity, if there is a third option that is better in one respect with no disadvantage in any other relevant aspect. It may also take the form of a balancing that shows that the third option is clearly better than another. For example, regarding a publication that reports a crime, a publication that anonymises names may be a better alternative if there is no public interest in knowing the personal identity of the involved persons.

14.2.3 Criteria of Balancing

The demand for correct balancing includes several criteria. The basic requirement of balancing is to choose an optimal solution. The problem with this requirement is, however, that the criterion of optimality is not applicable independently from the balancing. The preference between possible solutions of a balancing or, as one might also say, between the conflicting arguments in the respective case, is determined by the criterion of optimality. Regarding the above scheme, solutions on the Pareto-optimality frontier below the highest accessible indifference curve are inferior to an optimal solution. If one has to decide between two solutions, e.g. permission or prohibition of a speech, and one of those solutions is inferior to some other solution one has to decide in favour of the superior solution and must accordingly give priority to the argument requiring this solution. However, the weighting of the conflicting principles, as represented by indifference curves, is to be determined by the balancing itself, and cannot provide criteria for this decision.

Nevertheless, there are criteria that constrain correct balancing. The balancing of normative arguments must follow criteria of rationality if it is to count as a rational justification of a normative judgment. There are some general requirements of rationality, like those of consistency and coherence, of correctness of the empirical premises, and of supervenience in the sense that the reasoning should relate to conceivable, empirically verifiable data. Moreover, the optimisation model includes specific requirements of correct balancing.

Requirements of Correct Balancing

The optimisation model offers two negative criteria, negative because they do not determine a correct solution but merely point out possible mistakes.

(C1) According to the criterion of Pareto-optimality, solutions that restrict a principle unnecessarily, without any gain for a conflicting principle, are inadmissible.

In such a case it would be possible to find a better solution regarding the latter principle without any loss regarding the former. Optimal solutions must be situated on the curve indicating the Pareto-possibility frontier. In the graphic, Z_2 and Z_3 are not Pareto-optimal. Z_2 is the result of a restriction of P_1 with no gain regarding P_2. Z_3 receives some degree of fulfilment of P_2, but Z_4 and Z_5 (as well as the solutions on the Pareto-optimal frontier) between them are clearly better (Pareto-superior) to Z_3.

(C2) The indifference curves must be negatively sloped i.e. descending, running from northwest to southeast. They must not be horizontal or vertical.

This follows because the fulfilment of a (valid) principle must be evaluated positively. Hence, a solution that does not gain anything for one principle but is worse with respect to a conflicting principle cannot be evaluated as equally good.

The second criterion is similar to that of Pareto-optimality but is applied not to factual possibilities but to the evaluation of hypothetical solutions.

Decisions that violate these conditions are mistaken. This, however, does not answer the question of how to determine a correct, optimal solution. In order to do this one must try to establish preference rules. This, however, confronts the problem that it is not clear how to determine the relative weight and degrees of fulfilment of the competing arguments. A sophisticated approach would attribute cardinal values to different solutions and calculate the optimal solution. At least with regard to the relative weights, however, this presents an epistemological problem and seems not to be possible in an objective manner, that is, independently from the balancing itself. In fact, the characterisation of autonomous balancing excludes this form of calculation. Regarding the graphical illustration of balancing, there are no objective criteria for determining the indifference curves but these curves simply illustrate the autonomous evaluations of the agent doing the balancing. No objective criteria determine these evaluations. However, one can analyse the factors entering into the balancing in order to define certain constraints on autonomous balancing.

The Factors of Balancing

The relevant factors of balancing are the degrees of fulfilment of the competing claims and the relative weights of these claims, in relation to the concrete case to be decided. They form the basis of the criteria of correct balancing according to the model of optimisation. In order to find a rational basis for the assessment of these factors, one can develop preference rules and preference orderings on a case by case basis; make clear which values are assigned to the factors of balancing, for example, high, medium, or low degree of fulfilment or, respectively, relative weight; and try to give a rational justification for these evaluations which refers to standards independent from the balancing problem to be decided. This approach applies certain requirements of coherence which are specific to the balancing of normative arguments, and ultimately relies on the theory of practical argumentation.[15]

Degree of Fulfilment

In Fig. 14.1 the degrees of fulfilment of the conflicting principles are represented along the axes. The closer a point representing a solution is to the origin the less the respective principle is fulfilled. Degrees of fulfilment may be interpreted in different ways. One can refer to the degrees of fulfilment of the respective principles achieved or lost by a certain balancing result, compared with what would result from the contrary decision. Or one might refer to the overall fulfilment of the conflicting principle. Balancing requires the first option. The "degree of fulfilment" of a principle is hence the difference that results in solution N to the fulfilment of the

[15] See Alexy (1978 [1989]).

respective principle. Accordingly, one has to determine the degree of fulfilment (or non-fulfilment) of a principle by establishing what is gained or lost by a balancing result with regard to the given level of fulfilment of the respective principles. For example, the prohibition of insulting speech detracts a certain degree of fulfilment from that of the principle of free speech, and adds a certain degree of fulfilment to the principle of the protection of personal honour. The degrees of fulfilment can be represented as:

$\Delta FM(P_1,N)$ and $\Delta FM(P_2,N)$.

Relative Weight of Principles

The relative weight of the conflicting principles determines which normative importance is assigned to the degrees of fulfilment of the conflicting requirements. The relative weight of a principle P_1 represents the relation of the degree of fulfilment of a conflicting principle P_2 that is required in order to compensate a certain loss of fulfilment in principle P_1. The relative weight hence is determined only in relation to a conflicting principle, and can be represented by:

$WR(P_1,P_2)$ and $WR(P_2,P_1)$.

Since the relative weight of a principle may depend on the degree to which a principle is fulfilled or not fulfilled, it should be stated in relation to the given level of fulfilment. This is determined by the circumstances of the case. Therefore, balancing is relative to all the circumstances that form the case to be decided, which are presented by F.[16] Hence, the relative weight of conflicting principles can be represented as:

$WR(P_1,P_2,F,N)$ and $WR(P_2,P_1,F,N)$.

Graphically, the relative weight of principles is displayed by indifference curves. An indifference curve shows how much gain for one principle is required to compensate a certain loss of the conflicting principle, given a certain level of fulfilment. If a particular principle is much more important than a conflicting one, a relatively great gain for the latter is required to compensate for a relatively small loss of the former. If conflicting principles are of equal relative weight, an equal degree of gains and losses will be required. The slope of the indifference curve represents the relative weight of the principles. If P_2 is of much greater weight than P_1 the indifference curve will fall steeply. If both are of roughly equal weight the curve will decline at approximately 45°. But all this serves only as an illustration.

The relative weights of the principles are correlated reversely. If one represents the relative weight by numbers, the following equation will hold:

[16] The condition of application C of the norm established as the result of the balancing hence is a subset of the set of circumstances of the case F. In other publications I use "C" as a symbol to represent the circumstances of the case, and do not necessarily draw the distinction between this and the conditions of application of the resulting norm.

$WR(P_1,P_2,F,N) = 1/WR(P_2,P_1,F,N)$.

An important point is that the relative weight of a principle is not an intrinsic property of that principle but depends on which other principle is involved in a conflict.

> For example, the relative weight of the principle of liberty depends on whether it collides with the principle of the protection of health or with reasons related to economics, such as that smoking in a rented flat may require the tenant to re-paint yearly. In the first case, the relative weight of the principle of liberty will be rather low, in the second case somewhat higher.

The relative weight of a principle also depends on the circumstances of the case such as, for example, the strength of interests involved, and the importance placed by society on certain principles. In addition, the degree of fulfilment of the respective principle can be relevant for the relative weight of a principle.[17]

The Importance of a Principle in a Particular Case

By means of the concept of the relative weight of principles one can formulate a third criterion for correct balancing. This criterion refers to the concept of the concrete relative weight of a principle or, perhaps more clearly, the importance of a principle in a particular case. The importance of a principle in a particular case is a function of its relative weight and of its degree of fulfilment or non-fulfilment. The degree of fulfilment of the respective principles depends on the solution chosen, that is, a particular norm N or its opposite, ¬N. Thus, the balancing result depends on four factors, which means that the priority of principles is determined by a function *f* of these factors.

> For example, in a conflict of free speech and protection of personal honour the chosen norm may be N: the permission of the respective speech, or ¬N: the prohibition of this speech. This alternative may be represented as N/¬N. However, as the norm N determines this alternative, the simple use of N suffices. The priority relation among the principles P_1 and P_2 regarding circumstances F depends accordingly on the degrees of fulfilment and the relative weight of the principles involved.

Accordingly, the following rule of balancing holds:

(C3) The priority among conflicting principles P_1 and P_2 regarding a possible result N in circumstances F is a function of the difference of fulfilment (ΔFM) that the choice of N or ¬N makes to the fulfilment of P_1 and, respectively, P_2, and the relative weight (WR) of P_1 against P_2 in circumstances F regarding N.

The importance of a principle in a particular case will be greater or lesser in accordance with the relative weight of this principle, and subsequently the greater or lesser the degree of fulfilment or non-fulfilment of the principles caused by the

[17] Some authors suggest that the relative weight of a principle increases with a diminishing degree of fulfilment. Cf. Alexy (1985: 148); Jansen (1997). Although this may indeed be plausible in many cases, it is not clear whether it can be regarded as a conceptual feature of balancing.

balancing decision will be. A balancing decision will determine a particular solution and, thus, the degree of fulfilment or non-fulfilment of a principle. Alternative decisions will lead to alternative degrees of fulfilment or non-fulfilment. The greater the degree of non-fulfilment caused by the decision, the more difficult it will be to justify this decision. This reflects the importance of the principle in the particular case. Accordingly, the following requirement of coherence holds for the balancing of principles:

(C4) The greater the degree of non-fulfilment of a principle to be justified, the greater the importance of a conflicting principle in the particular case must be in order to justify the degree of non-fulfilment of the first principle.[18]

From this more specific rules follow. Since the importance of a principle in a particular case is proportional to the relative weight of the principle and to the degree of fulfilment or non-fulfilment to be decided upon, the justification of an increase in non-fulfilment of one of the principles requires an increase in one of the other factors.[19]

The Abstract Weight of Principles

The weakness of the criterion of the relative weight of principles is that the relative weight is determined only by means of the balancing itself; it explicates which priority is established among the conflicting principles but cannot serve as a criterion to determine such a decision. A stronger conception of balancing results if weight is assigned to principles independently of the actual balancing. This will still be a relative weight, for it determines the strength of a principle in a conflict with other principles.[20] The abstract relative weight of a principle is distinguished because it must be established independently of the balancing decision to be made, and does not merely explicate which relative weight has been attributed in a balancing. This abstraction allows one to use the relative weight as a criterion for balancing judgments.

This justificatory use of the abstract relative weight of a principle will be more powerful if one defines the abstract weight not with regard to a pair of principles in conflict, that is, as a relational relative weight, but as the relative weight of each principle separately. The difference is that the relational relative weight of a principle must always correlate with the relative weight of the conflicting principle. If

[18] Alexy (1985: 146 [2002: 102]), has called a similar relation “the law of balancing” (*Abwägungsgesetz*), although it is not clear whether this was meant in the same sense as it is used here. Alexy seems to understand this relation as expressing also the increase of the relative weight with diminishing degree of fulfilment of a principle.

[19] For a more detailed elaboration of these rules see Sieckmann (1995, 2009: 91 ff.; 2012a: 99 ff.).

[20] For the view that the notion of weight does not make sense outside the context of a conflict see Barry (1990: 7 n. 2).

the relative weight of a principle is high, the relative weight of the conflicting principles must be low. If it is medium, the relative weight of the conflicting principles must be medium as well.[21] By contrast, one might attribute weight to a principle independently of a conflict with a competing principle and it seems plausible to assume that a principle that always or in many cases receives, for example, a high relative weight has a high abstract weight in a non-relational sense.

> If, for example, the principle of free speech is almost always given high relative weight compared to competing principles, the principle can be considered as having a great weight even without reference to any competing principles.

Still, however, the non-relational weight of a principle is a relative weight since it refers to the relative strength of a principle in conflict with other principles. Such an attribution of a non-relational abstract weight differs from, but is related to, the relational relative weight of a principle. A principle of high non-relational relative weight will have high relational relative weight in conflict with a principle of medium relative weight, but in the case of conflict with a principle that has high abstract relative weight as well, the relational relative weight for both of them will only be medium.

Values of Fulfilment

With the attribution of an abstract weight to principles independently of a concrete balancing decision, a different construction of balancing decisions becomes possible. One can now attach values to the gains and losses regarding the fulfilment of a principle. A certain degree of fulfilment of a principle will correspond to a certain value of fulfilment VF of the respective norm N in case F with regard to one of the principles, P_1, involved in the balancing. This value will depend on the abstract weight WR of the respective principle P_1 against the competing principle P_2 and its degree of fulfilment. The abstract weight may depend on external factors, such as, for example, the urgency that a society attributes to the interest protected by the respective principle, and will not be the same for any and all contexts. Thus the following relation holds:

(C5) The value that the fulfilment of a principle has in a particular case correlates positively to its degree of fulfilment and its relative weight.

Instead of the value of fulfilment, one can also talk of the importance of a principle in a particular case. The value of fulfilment of a principle regarding the facts of the case determines its importance in the concrete case.

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[21] In fact, in this case the relative weight of one principle must be equal to that of the other. More precisely, the relational relative weight of one principle as against another should be expressed as higher, equal, or lower, and the non-relational relative weight of a principle as high, medium, or low.

In addition, one can define the overall value of fulfilment of a certain solution, that is, of the resulting norm N, which depends on the values of fulfilment of the juxtaposed competing principles in conjunction.

(C6) The value of fulfilment of a particular balancing result N correlates positively to the values of fulfilment of the principles in conflict.

A solution that achieves the highest value of fulfilment is optimal. Thus, one can define optimal solutions as those that achieve a maximum (MAX) in the overall value of fulfilment:

DF_{OPT} Optimal results of the balancing of principles are those with the greatest overall value of fulfilment regarding the particular case.

The guiding criterion of the balancing is to choose an optimal result. Accordingly, the following rules of balancing hold:

(C7) The result of the balancing of principles must present an optimal solution to the particular case.

Or, equivalently,

(C7') One must choose, as result of the balancing of normative arguments, a solution with the highest value of fulfilment that can be achieved by the particular decision.

(C7") One must give, as a result of the balancing of normative arguments, priority to that argument with greater importance in the particular case.

Accordingly, the following rule of priority holds:

(C8) In a conflict between P_1 and P_2 concerning case C and consequence R, priority must be given to the principle the fulfilment of which achieves the higher value (is of greater weight/importance) in the circumstances of case F.

The representation of the balancing as a comparison of values of fulfilment, weight or importance in the particular case fits with common intuitions.[22] It implies further, comparative rules of balancing. These apply *ceteris paribus* on the basis of a comparison of cases. Thus, the following relations hold:

[22] Alexy has suggested a "weight formula" as a criterion for the balancing of principles (Alexy 2002: 408), which in some respects is similar to the approach followed here, but also displays considerable differences (see Sieckmann 2010). The "weight formula" defines the relative weight of principles in a concrete case by the quotient of the products of the relative weight (W) and the degree of interference (I) of the competing principles and, in addition, the reliability of the premises included in this ascription. Leaving aside the last factor, one might understand the product of weight and degree of interference as the weight of a principle in a particular case. However, on this assumption it does not make sense to define the relative weight and, accordingly, the relation of priority by the quotient of the importance of the competing principles in the particular case. A simple relation of which value is greater will suffice to determine the priority.

(C9) If P_1 receives priority over P_2 in case C_1, and in case C_2 the value of fulfilment of P_1 is at least equal[23] as in C_1, then, *ceteris paribus*, P_1 receives priority over P_2 in C_2.

As the value of fulfilment of a principle depends on the degree of fulfilment and the abstract weight of the respective principle, rule (C9) is the basis for more detailed rules:

(C10) If P_1 receives priority over P_2 in case C_1, and in case C_2 the degree of fulfilment of P_1 is at least not greater than in C_1, then, *ceteris paribus*, P_1 receives priority over P_2 in C_2.

(C11) If P_1 receives priority over P_2 in case C_1, and in case C_2 the abstract weight of P_1 is at least equal as in C_1, then, *ceteris paribus*, P_1 receives priority over P_2 in C_2.

(C12) If P_1 and P_2 are of equal relative weight in case C_1, and in case C_2 the abstract weight of P_1 is at least equal or the degree of fulfilment of P_1 is at least not greater than in C_1, then, *ceteris paribus*, P_1 receives priority over P_2 in C_2.

Such coherence rules are not applicable, however, if the *ceteris paribus* condition is not fulfilled. This will be the case if the degrees of fulfilment and the abstract weights of P_1 and P_2 vary in different directions, that is, the change of one factor is in favour of P_1, and the change of the other factor is in favour of P_2.

Criteria of Abstract Weight

The evaluation by means of values of fulfilment does not supply criteria that allow one to determine the abstract relative weights of principles, values of fulfilment of single principles, and overall values of fulfilment of solutions that result from balancing decisions, but presupposes that these values are determined. The rules of balancing stated above are side-constrains of correct balancing, not directives which guide the balancing. The determination of these factors forms part of the balancing itself, and statements of relative weights and values of fulfilment only explicate the assumptions underlying a balancing decision. This certainly contributes to the understanding of the balancing of normative arguments as a form of rational justification. However, a stronger form of rational justification would result if the factors involved in the balancing could be determined not only *ex post*, explicating a decision taken, but *ex ante*, as criteria for the balancing decision. Hence, the question is whether criteria exist to determine these balancing factors.

Three factors can determine the abstract weight of a principle. These are, firstly, the strength of the interests that support the respective principle; secondly, other

[23] In such cases the BVerfG applies a fundamental liberty right in conjunction with the principle of equality. See, e.g., BVerfG, Decision 1 BvR 3262/07, 402/08, 906/08 of 30.7.2008, BVerfGE 121, 317.

principles that support a principle involved in a conflict; and, thirdly, prior decisions establishing preference relations.

The interdependence of the abstract weight of principles and the strength of interests backing these principles results from the fact that individual interests are the primary source of the validity of principles. Autonomous individuals demand respect for their interests and this necessitates the acceptance of corresponding principles protecting these interests. As these interests can be more or less strong, the abstract weight of the corresponding principle will differ accordingly.

Accordingly, the weight of normative arguments can be assessed according to the importance of the reflected interests. The importance of an interest is, in the first place, determined by the needs of the person having that interest. These needs can be more or less strong or urgent. One can take the strength or urgency of an interest as a criterion for the *prima facie* importance of an interest. However, this evaluation may need revising regarding the interests of a person in the long run, or with respect to her conception of a good life. The importance of an interest attached to it after a process of reflection can be called 'the value of that interest'.

The evaluation of interests can be carried out by the person whose interest is at stake, but also by other agents. Furthermore, criteria for the rational evaluation of interests may be introduced. Hence one can distinguish subjective evaluations and different kinds of "objective" evaluations or values of interests. At the level of autonomous normative judgments, only subjective evaluations are necessary. The preference relations reflect the relative strength or weight of the conflicting arguments, or the value of those things these arguments require in order to be realized. The balancing forms part of developing a conception of a good life. Someone developing such a conception uses her own judgments on the value of things and the relative weight of arguments. These judgments can reflect the evaluations of other agents as well, e.g. the weight they attach to their interests. But they do not have to. An individual may think that his own evaluations are best and that, for example, there is little pleasure to be had in smoking, no matter how smokers themselves evaluate the pleasure gained from smoking. However, any reasonable agent must consider the empirical strength of needs or preferences.

Hence, the problem of aggregating preferences or interests is not a problem as great as one might think. The problem of inter-subjective comparisons of utilities can easily be resolved as long as only one person is involved in the judging. She can always make judgments about preference aggregations, provided that she has all the relevant information, or at least thinks she does. As the balancing of normative arguments leads to norms which state what people should do (according to the person judging), an autonomous agent can make normative statements about what people should do, and how conflicts of interests among them should be resolved. This is of particular importance for legislative balancing for, apart from constitutional constraints, the legislator does not need an objective justification for establishing preference relations by means of balancing. In this respect, legislative balancing might differ from judicial balancing.

14.3 Lawmaking and Proportionality

Lawmaking must respect the standard of proportionality as a requirement of rationality and, if it is bound by constitutional principles, also as a requirement of constitutional law.[24] Rational lawmaking requires the balancing of competing demands and hence must comply with the requirements of rational balancing.[25] These include the standard of proportionality. As far as constitutional principles apply to a legislative act, there is not only a general requirement of rationality, but a requirement imposed by constitutional law that the legislator complies with the requirement of proportionality.

Compared with judicial balancing, legislative balancing displays special characteristics: it is open in the sense that the legislator may, within the limits of the constitution or higher order-law, choose the objectives she wants to pursue and may consider any option she thinks suitable for achieving these objectives; it is pure balancing, which is not limited by previous balancing results or by the perspective of constitutional control that courts are required to consider; and, it may be complex in the sense that there is not only a single-scale conflict but legislative balancing may include a choice among multiple options.

14.3.1 The Openness of Legislative Balancing

Judicial balancing, as a form of the application of law, is bound to consider legally relevant principles. Courts must not introduce principles according to their own preferences, but must claim that the principles their balancing is based upon form part of the legal order and hence are binding on them. In addition, courts can only decide the dispute brought forward to them, but cannot consider other solutions. In both respects, legislative balancing is different.

In particular, legislative balancing may include principles freely chosen by the legislator. The legislator need not provide a legal justification for pursuing certain objectives. Determining such objectives forms part of the political autonomy the legislator exercises.

On the other hand, the legislator is not free from legal boundaries, and the constitution of the respective political system puts limits on the legislator as well. So far as constitutional principles reach, legislative balancing turns into a form of the application of law, in particular, the application of constitutional principles.[26]

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[24] See also Sieckmann (2013). On rational law-making in general Wintgens (2012); Oliver-Lalana (2014).

[25] See also BVerfG, Decision 1 BvR 52, 664, 667, 754/66 of 16.3.1971, BVerfGE 30, 292, 316; BVerfG, Decision 2 BvL 43, 51, 63, 64, 70, 80/92 of 9.3.1994, BVerfGE 90, 145, 173.

[26] On the limitations of legislative decision-making in general Meßerschmidt (2000).

However, some resistance exists to the idea that the legislator acts as a law-applying organ. The idea that the legislator, in some areas, merely implements constitutional law is regarded as incompatible with the leading political role or the superior democratic legitimation of the legislator, and this incompatibility is evident also in the manner in which legislators argue about or describe their role as legislators.

Against this resistance one might argue that it contravenes the very idea of the constitutional state. Recognition of the legal boundaries of legislation is the crucial point that distinguishes the constitutional state in which the legislator is no longer in the position of a sovereign who can claim to be above the law. Democratic legitimation in the constitutional state means legitimation according to the procedures and competences laid down in the constitution. Political leadership as such is not a relevant constitutional principle, but should respect the boundaries set by the constitution.

A less radical resistance might accept constitutional boundaries of the legislator, but only as external constraints, not as principles to be respected and applied within the process of legislative decision-making. According to this view, the legislator may act for whatever motives it wishes. Constitutional review cannot revise the arguments used by the legislator, but only the results of the legislative process.

This idea of the role of the legislator in the constitutional state seems to be, however, suboptimal. Instead of understanding the political system as an instrument to realize constitutional ideals, it creates unnecessary conflicts between the legislature and the judiciary. This seems to be an inefficient means of implementing the constitutional state.

14.3.2 The Purity of Legislative Balancing

Balancing has been analysed mainly as a method of judicial reasoning. Judicial reasoning underlies, however, certain restrictions which also influence the structure of judicial balancing.

The primary focus of theories of judicial balancing is on the balancing of fundamental rights, which takes place in the context of constitutional review. Thus, the issue is that of the constitutionality of a certain measure under judicial review. In general, courts do not have the competence to make a fresh balancing but may only review the limits of constitutional law. Judicial balancing hence takes the form of a negative control or a critique of a legislative balancing according to the standard of proportionality. Courts need not establish a judgement as to the optimal solution of a particular problem according to constitutional law, but can only disqualify suboptimal solutions of the legislator as unconstitutional.

Sometimes, however, courts base constitutional review directly on their own balancing. In instances where the court makes a positive balancing judgment the issue of the legitimacy of judicial review arises. Often balancing does not lead to a unique

correct result. If a legislative balancing is defensible, why should a court have the power to replace it by its own balancing?

This issue lies beyond the scope of the present analysis. Nevertheless, it is important to note that critiques of judicial balancing often concern the issue of *legitimacy*, not the *rationality* of judicial balancing. Regarding legislative balancing, legitimacy is not a problem.

Another limitation of judicial balancing results from the court's obligation to apply and follow established legal norms. In constitutional cases, this limitation is of less concern for in many cases the constitution does not establish definitive and concrete norms. By contrast, statutes in general aim at establishing definitive norms. Judicial balancing then is restricted to the interpretation and application of these norms, albeit the constitutionality of which is put in doubt. Again, interpretative balancing displays specific characteristics that in general are nor present in legislative balancing.

This results in the thesis of the purity of legislative balancing. Therefore, one can more profitably study balancing as optimisation with regards to legislative balancing than with regards to judicial balancing.

14.3.3 The Complexity of Legislative Balancing

Another aspect of legislative balancing is that it may be, and in general is, more complex than judicial balancing.[27]

First, it may concern multi-scale problems. Judicial balancing concerns a demand that may be upheld or rejected, either completely or in part. But the possible solutions are ordered regarding a single scale, which comprises the extreme solutions and (normally) diverse intermediate solutions. For example, a court might grant protection of the right to privacy against the freedom of the press in a case concerning the unauthorized publication of photographs, or it might deny this right, or it might grant protection under certain conditions because, for example, the matter is in the public interest or because the photographs were taken in a public place. But all possible solutions are on one scale. A court cannot consider options that are not put forward in the respective judicial process. One can also conclude that there must be a solution to the case. Considering the two extremes and moving from one extreme to the other, the priority among the competing demands must change at some point. In cases where the importance of the press is regarded highly, this right will receive priority over the right to privacy. In cases where the right to privacy is regarded highly, this right will receive priority over freedom of the press. But at some point on the scale, the priority must change. One must not assume that this point exists independently and before the balancing, and is discernible objectively. All one can state is that there must be a change in priority, and the balancing must decide where on the scale to place the respective case. One cannot assume that there

[27] See also Hofmann (2007: 408).

is no solution to a balancing problem, *except* in the case of a deadlock or stalemate where the competing arguments are of equal importance in the concrete case.

By contrast, a legislature may consider multiple alternatives. One cannot conclude then that it will always be possible to qualify one solution or several solutions as optimal. For example, in order to combat drug addiction, a legislator may consider penal measures as an instrument to reduce drug trafficking and consumption. Alternatively, one might give assistance to drug addicts or take other measures to reduce drug consumption. Or one might liberalize certain drugs and introduce taxes on them, using the resulting revenues to educate the public or mitigate the detrimental effects of taking drugs. However, penal measures, assistance and taxation are instruments that do not necessarily go together well. Penalising users and taxation are incompatible, and penalization diminishes the efficacy of measures of assistance. Penalization may be the most effective measure against drug crimes, but without penal threats addicts may be more open to accept measures of assistance. And liberalization would eliminate drug crimes, but this can hardly be compared with the success of penalization or measures of assistance regarding the reduction of drug crimes. One could only provide a guarantee of an optimal solution if a scale was defined on which all competing demands could be measured. But even if one should succeed in doing this, the resulting optimal solutions might be very different. For example, severe punishment alongside with assistance might have a similar outcome as liberalization combined with assistance.

The complexity of legislative balancing hence results from:

- the power of the legislature to determine the relevant objectives, as far as these are not obliged by constitutional law;
- the dependence on controversial empirical assumptions;
- the interdependence of diverse objectives, which might result in significant differences among the optimal solutions.

Some measures are, however, incompatible with each other. In addition, there might be a dispute as to whether the legislator is under an obligation to pursue a certain objective, or whether this is a matter of political discretion. In addition, constitutional requirements might compete with mere political objectives.

The balancing in the case of legislative balancing may be much more complicated than judicial balancing. Nevertheless, the basic structure of balancing remains the same. The legislator must consider the relevant factors of balancing, assign certain values to each factor, and aggregate these evaluations to an overall result. It is possible to do this but it becomes more difficult, or even impossible, to get objectively justified results in cases of complex balancing.

In order to cope with complex balancing problems it seems advisable to use mathematical calculations.[28] The factors that enter into such calculations are not determined objectively, however, but are merely assessments of the agent doing the

[28] On this aspect Hofmann (2007: 285 ff.).

balancing. The calculation only guarantees a certain form of coherence, not the correctness of the balancing.

14.4 Conclusion

The analysis of balancing as a problem of optimisation allows a fairly precise account of the formal structure of the balancing of principles and the criteria and factors relevant to it. However, it also makes clear that criteria of correct balancing often will not suffice to determine the result of such balancing. They will exclude certain results as mistaken, which might even necessitate the recognition of certain norms as definitively valid, or the balancing might lead to clear results in some cases, given the circumstances of the case. This weakness of balancing, regarding its objective justification, does not, however, affect legislative balancing, for the legitimacy of legislative balancing does not, in general, depend on an objective justification as to its results.

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Chapter 15
The Procedural Review of Legislation and the Substantive Review of Legislation: Opponents or Allies?

Klaus Meßerschmidt

Abstract This essay aims to clarify the relationship between the substantive and procedural reviews of legislation in the case law of the German Federal Constitutional Court. While substantive review of legislation, owing to the constitutional guarantees of Article 93 *Grundgesetz*, is beyond question and makes up the bulk of *Bundesverfassungsgericht* adjudication, procedural review still encounters objections. Nevertheless, the German Federal Constitutional Court has adopted the idea of procedural review, while upholding substantive review as its main tool. This contribution argues that the Court only adopts procedural arguments as an adjunct to substantive review. This raises questions concerning the functioning of a model that merges standards deriving from different philosophies that are not necessarily mutually reinforcing. The article demonstrates that the regular dual assessment of procedural and substantive merits and downsides of a piece of legislation requires a preference rule that informs the judiciary on how to handle conflicting results. The Court evades this difficulty by shifting judicial review to the due process of lawmaking only when the substantive merits of a law are hard to assess because of the complexity of the matter. Whether the standards of substantive review are likely to relax owing to the emergence of procedural review requires a decision of fundamental significance, carefully avoided so far by the courts and academia.

Keywords Due process of law-making • Procedural review • Rationality review • Reason giving • Semiprocedural review • Substantive review

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15.1 Introduction

The growing interest in the due process of lawmaking[1] and the chances of rationality review by the judiciary[2] has resulted in an increasing number of studies in this field. Since this interest affects a multitude of jurisdictions, it has become a "cross-national phenomenon"[3] and a focal point of comparative public law within short time. Though the quest for due process of lawmaking *under judicial review* needs to be discussed in a principled way, it is also necessary to consider the impact of due process review on pre-existing models of judicial review. Even though the focus of this contribution is guided by the German debate, an attempt is made to translate the domestic experience into general concepts of legisprudence and judicial review, drawing, in particular, on the US debate on the due process of lawmaking. Thus, the paper proceeds on the assumption that the relationship of substantive and procedural reviews is not determined by institutional settings exclusively but lends itself to a structure-oriented analysis, which overcomes isolated national views.[4]

[1] Starting with Linde (1976).

[2] In the adjudication of the German Federal Constitutional Court – see in general Wintgens (2002b: 32 – 34, drawing on literature research) – numerous decisions refer to some sort of rationality review. Key decisions are 7 BVerfGE 377 at 409 et seq. – *Apothekenurteil*; 33 BVerfGE 303 at 351 – *Numerus clausus I*; 39 BVerfGE 1 at 51 et seq. – *Schwangerschaftsabbruch I*; 39 BVerfGE 210 at 226 – *Mühlenstrukturgesetz*; 50 BVerfGE 50 at 52 et seq. – *Neugliederungsgesetz*; 50 BVerfGE 290 at 333 et seq. – *Mitbestimmungsurteil*; 54 BVerfGE 173 at 191 – *Grundsätze der Kapazitätsberechnung*; 65 BVerfGE 1 at 55 et seq. – *Datenschutz*; 66 BVerfGE 214 at 223 – *Unterhaltsaufwendungen*; 68 BVerfGE 143 at 153 – *Atomwaffenstationierung*; 79 BVerfGE 311 at 344 – *Staatsverschuldung*; 82 BVerfGE 60 at 88 – *Kindergeldbemessung*; 88 BVerfGE 203 at 263 – *Schwangerschaftsabbruch II*; 98 BVerfGE 83 at 97 – *Landesabfallabgabe*; 98 BVerfGE 106 at 125 et seq. – *Kasseler Verpackungsteuer*; 106 BVerfGE 62 at 148 et seq. – *Altenpflege*; 111 BVerfGE 226 at 255 – *Juniorprofessur*; 120 BVerfGE 125 at 155 – *steuerliches Existenzminimum*; 121 BVerfGE 317 at 354 et seq. – *Rauchverbot*; 122 BVerfGE 210 at 230 et seq. – *Pendlerpauschale*; 125 BVerfGE 175 at 224 et seq. – *Hartz IV*; 128 BVerfGE 1 at 37 – *Gentechnik*; 129 BVerfGE 124 at 182 et seq. – *Griechenlandhilfe*; 132 BVerfGE 134 at 165 et seq. – *Asylbewerberleistungsgesetz*. Some of these decisions are analysed in this essay and/or in other contributions to this volume. The American debate on rationality review has been summarised and criticised as well by Posner (2014: 900–902).

[3] Alemanno (2013: 3).

[4] It is in this respect that this contribution differs from the approach of Susan Rose-Ackerman. The comparative study of Rose-Ackerman, Egidy, and Fowkes (2015: 4) emphasizes both the role of positive political economy and different constitutional structures of the jurisdictions at issue (United States, South Africa, Germany and European Union). However, as to judicial review, some differences between Germany and the US may be overstated. I cannot help thinking that this is also a way to reconcile the study's sceptical view of the US Supreme Court federalism cases with its far more positive attitude towards procedural review in Germany (cf. p. 161–215). Of course, it cannot be denied that the US debate is more fundamental than the German, in that even inapt methods of achieving the statute's declared purpose, according to the mainstream of US constitutional law thinking should not invalidate it, cf. Posner (2014: 901). Moreover the independent role of due process of law in US administrative law must be taken into account, cf. Lepsius (2010: 46–48), with further references.

Against this background the present essay aims to clarify the relationship between the substantive and procedural review of legislation with an emphasis on the case law of the German Federal Constitutional Court. While substantive review of legislation, owing to the constitutional guarantee of Article 93 of the German Constitution (*Grundgesetz*), is beyond question in Germany and makes up the bulk of *Bundesverfassungsgericht* adjudication, process review still encounters objections upon closer examination of the details. Nevertheless, the Court has adopted the idea of a more demanding procedural review, while upholding substantive review as its main tool. The contribution argues that the Court mainly adds procedural arguments as an adjunct to substantive review. This raises questions concerning the functioning of a model that merges substantive review with procedural review. Whether the tests will be mutually reinforcing or contradictory largely depends on the particular circumstances of each case. It may not be wise to rely on the smooth operation of control standards, which have their roots in different philosophies; substantive rationality on the one hand and procedural rationality on the other.[5] Unlike theory of law and philosophy, the analysis of positive law cannot embrace one concept of rationality and dismiss the opposite view but has to cope with both once they are applied by the legislator or the judiciary and can only aim to reconcile differences in a pragmatic way. The article demonstrates that a regular dual assessment of procedural and substantive merits or shortcomings of a piece of legislation requires a preference rule informing the judiciary how to handle conflicting results. What should the Court do if the law under scrutiny looks good from the substantive point of view, while the parliamentary procedure suffers from several flaws, amounting to a lack of rational debate? The Court evades this difficulty by shifting judicial review to procedural rationality aspects only when the substantive merits of a law are hard to assess. Respect for legislative discretion may be another reason for judicial self-restraint.

Whether the standards of substantive review may relax owing to the emergence of procedural review requires a decision pertaining to a question of fundamental significance, carefully avoided so far by courts and mainstream academia. Thus, even high quality scholarly treatises on the due process of lawmaking do not tackle the problem of the substance vs. process divide[6] and confine themselves to an inventory of adjudication and debates. Therefore, more ambitious approaches for reconciling the procedural account of democracy with substantive values by a deliberative conception of democracy[7] need to be further developed and integrated into the legal debate in order to facilitate the process of implementation by judicial review. In the light of the widespread view that "the relationship between procedure and substance can be seen as one of the most striking issues in political philosophy"[8], the German

[5] See Simon (1979).

[6] See, however, Martí Mármol (2005).

[7] See Cohen (2003: 27–38). The eminent theory of democratic proceduralism by John Hart Ely (1980) cannot be transferred easily to the constitutional system of Germany.

[8] Martí Mármol (2005: 263). Leading political philosophers like Dworkin, Elster, Habermas, Rawls and Raz, to name only a few, have previously commented on this problem.

legal scholarship is conspicuous by its reticence to address this issue. Recalling the fact that just one or two decades ago most European lawyers were not familiar with the juxtaposition of procedural and substantive review,[9] however, this lack of research seems to be less of a surprise.

15.2 Explanation of Terms

Throughout many jurisdictions the distinction between substantive and procedural review has been accepted, though the role of each kind of review differs according to the provisions of the countries which have adopted some kind of judicial review of legislation either explicitly, mostly in their constitutions, or by established case law of their judiciary. In order to facilitate the debate on substantive and procedural review it is wise to start with a preliminary definition of these terms. While "substantive review" may easily be defined by its reference to the contents of a constitution, both as a charter of rights or an instrument of government, serving as a yardstick for judicial review, the notion of "procedural review" has become ambiguous in recent years. Two layers of procedural review should be distinguished: the traditional, formal-legal, procedural review and the newer ("novel") deliberation-oriented procedural review. Both represent rival concepts of procedural duties or, at least, different approaches to judicial review. Whereas the focus of the first approach is on procedural regularity, the second approach calls, in addition, for procedural rationality,[10] which obviously sets the higher procedural bar.

15.2.1 Traditional and Novel Procedural Review

The traditional branch of procedural review focuses on the explicit provisions either of the respective constitution or on parliamentary or statutory rules governing the law-making process.[11] Besides being stipulated in a legal document, such provisions are qualified by the overall objective to define and enforce the specific powers and spheres of influence of different institutions or components of institutions in the law-making process. They refer to the right of initiative; first and second readings; participation of a parliament's second chamber or passage of legislation through both chambers, if required; and majority voting which respects quorum rules etc. Thus, procedural review is never exercised for the mere sake of procedure. This traditional kind of procedural review tends not to arouse debate. Consequently, no advocate of novel procedural review has ever suggested renouncing formal-legal

[9] See Stone Sweet (2000).

[10] See Mazmanyan, Popelier, and Vandenbruwaene (2013: 11); Bar-Siman-Tov (2012: 281), referring also to Frickey and Smith (2002).

[11] Bar-Siman-Tov, *ibid*.

procedural review in Germany.[12] It is beyond doubt that a proposed law is not enacted when the proponents do not gather the necessary majority. These requirements are as strict as the rule that a parliament may not legislate *ultra vires*.

The new reading of procedural review does not intend to substitute traditional procedural review, but to complete it by additional criteria. Novel procedural review is concerned with the public legitimacy of lawmaking and therefore gives courts a role in overseeing the legislatures' internal procedures. Transparency and inclusiveness of the legislative process, on the one hand, and the use of state-of-the art data and the consistency and coherence of legislative texts, on the other hand, are key issues of novel procedural review.[13] "Well-informed and cognitively undistorted deliberation", though a "widely shared criter[ion] for evaluating legislative performance",[14] is not fully recognized as a standard of judicial review as yet, but will certainly gather further momentum. The obvious overlap with rationality review[15] indicates that novel procedural review should be distinguished not only from classical procedural review but also from substantive review.

Traditional and novel procedural review differ both in respect to the way of their establishment and by their scope. While traditional procedural review is enshrined in precise legal, mainly constitutional provisions, novel procedural review hides in the case law of some constitutional courts, thus relying on judicially created requirements. Mostly, novel procedural review is postulated by a growing faction of scholarship. This background is its weakness and strength at the same time. Its weakness, because novel procedural review cannot build on strict legal stipulations. Its strength, because the growing propensity to exercise novel procedural review does not depend on a single decision but on a wave of legal thinking which also explains the cross-national character of this trend. The scope of novel procedural review goes far beyond the traditional policing of the powers of co-legislators in that it includes the deliberative quality of lawmaking. It is a tribute to the ever-increasing attention given to the rationality of the legislative process. The term "legislative due process", which was first established in the United States,[16] adequately expresses this meaning. Whether both kinds of procedural review differ in added ways, would require further discussions.

[12] The international debate may be different, cf. Bar-Siman-Tov (2012: 280–299).

[13] See Rose-Ackerman, Egidy, and Fowkes (2016: 10; quotation from preprint); on the importance of procedural rationality, sufficient factual input and consistency from the EU perspective see Lenaerts (2012: 9–15).

[14] Vermeule (2003: 15).

[15] I use this term in an independent way, not in conformity with the US rational basis test, cf. Meßerschmidt (2000: 621–626), with further references, and Meßerschmidt (2000: 777–807, expounding my own view). See on the notion of rational lawmaking in general Wintgens (2002a); on the various dimensions of legislative rationality see Oliver-Lalana (2005: 248–249).

[16] Overview by Rose-Ackerman et al. (2015).

15.2.2 Semiprocedural Review

In view of the important distinctions between traditional and novel procedural review, a new term to describe the latter has been suggested. The most elaborate concept, Bar-Siman-Tov's "semiprocedural review",[17] is based on a broad case law analysis and is meant to unite substantive and procedural review by giving it a deliberative turn. Under 'semiprocedural judicial review' a court reviews the legislative process as part of its substantive constitutional review of legislation, and only if that content infringes upon constitutional rights or other constitutional values, does the court examine the legislative record to ensure the satisfaction of certain procedural requirements in the law-making process.[18] This concept, which was launched with the objective to "enjoy the best of both worlds",[19] has been criticised by Alemanno.[20] Owing to the fact that Bar-Siman-Tov places the focus on the US debate whereas Alemanno is more involved in the European Better Regulation agenda,[21] the discrepancy of their perceptions does not come as a surprise. While the controversy may boil down to different methodological approaches,[22] the term "semiprocedural review" is not fully convincing for reasons of semantic content. Although the term demonstrates the existence of both common and diverging characteristics of traditional and novel procedural review, it evokes the misleading idea that "semi" could be less and not more than procedural review. Therefore, "semisubstantive review", a term, which has previously been suggested by scholars,[23] seems to be more adequate, though the reference to substantive review may be misleading as well.[24] Thus, neutral terms such as "rationality review" or "due process review" should be privileged, while the term "evidence-based review" appears unduly narrow. Although due process of lawmaking requires evidence-based decision-making[25] this is not its sole focus since minimal deliberation, at least, and proper balancing of interests both matter as well. The same is true of the

[17] Bar-Siman-Tov (2012).

[18] Bar-Siman-Tov (2012: 272–274).

[19] Bar-Siman-Tov (2012: 292).

[20] Alemanno (2013).

[21] Cf. Alemanno (2010); Meuwese and Popelier (2011) and Popelier (2011); on the relationship between "Better Regulation" and the courts Korkea-aho (2012); for further references see Meßerschmidt (2011: 50).

[22] It seems to me that Bar-Siman-Tov concentrates on the methodology of procedural review whereas Alemanno is predominantly interested in its historical roots and practical outcome. Alemanno may be right that the novel procedural review reflects changes in the law-making process. However, this debate evokes the chicken-egg-situation. Moreover, the situation may change from country to country. Suffice to state that better regulation and rationality review develop in tandem.

[23] Coenen (2002).

[24] Therefore, Goldfeld (2004: 373) calls it a misnomer.

[25] For a definition, see van Gestel (2007).

term "impact review" which sits at the intersection between substantive and procedural review.[26]

It should be noted that the problem of terminology is not restricted to the English language. The German debate runs into a similar problem while only little effort is made to demarcate the different aspects of procedural review. In general, the word "prozedural" being less familiar in traditional German legal terminology indicates the wider scope of novel procedural review while "Verfahrenskontrolle" hints at the uncontested review of the basics of the legislative process and culminates in the verdict of holding the law constitutional or unconstitutional for formal reasons. Additional confusion may arise from the more familiar word "prozessual" which may refer to the process of lawmaking but is mostly related to court proceedings. This said, in the following the word "procedural" will be used within in the meaning of "novel procedural review".

15.3 Challenging Relationships

The relationship between substantive and procedural review merits academic and practical interest only on the condition that both are accepted elements of the judicial review of lawmaking. This condition depends on the contents of the constitution and, in particular, on the provisions defining the tasks of judicial review and its construction.

15.3.1 Key Assumptions

While on the abstract level several constitutional settings may be distinguished (no judicial review at all; only procedural review; only substantive review; both substantive and procedural review), which, again, are open for fine-tuning according to the intensity of control, German constitutional law under the "Grundgesetz" has seen in recent decades the rise of procedural review alongside substantive review. Thus, the German experience contributes to the focal points of this contribution while other jurisdictions escape the dualism of substantive and procedural review. The international discussion on the due process of lawmaking and its review, however, shows that the twofold reign of substantive and procedural review is no German peculiarity and that it is acknowledged both as a promise and as a risk. At the start of the debate, Laurence H. Tribe held the optimistic view that "the very phrase 'due process of law' might lead us to consider […] a picture of policy and its formation […] in which [we] are as interested in the process of decision itself as with the

[26] See Meßerschmidt (2012: 353–355).

outcomes produced".[27] In the discussion that followed Victor Goldfeld came up with the recommendation that legislative due process should be applied in combination with the traditional form of substantive review.[28] Hence, the focal point of the present contribution, which is the interaction between substantive and procedural review, emerges from both German and other countries' experiences. Unfortunately, however, the German debate largely neglected the interference of substantive and procedural review, although the coordination of both kinds of review may provide an important argument in favour of or against the adoption of novel procedural review.

The paragraphs that follow do not discuss the principal issue of whether legal theory and practice should adopt or reject procedural review. It neither considers constitutional objections, put forward in Germany and abroad,[29] nor does it examine the doctrinal debate on its legal foundations. Instead, it takes procedural review as a starting point with the sole intention to evaluate its impact on substantive review, and vice versa.

15.3.2 Some Clarifications

Some clarifications and distinctions merit our immediate attention. First, acknowledgement of substantive and procedural review is not meant to confer freedom of choice to the courts. Therefore, the interesting point whether process control is less or more intrusive than substantive review[30] makes no legal difference. Second, the relationship of substantive and procedural review may be defined either as hierarchical or as equal. The hierarchy theory comes in two varieties: either substantive review prevails procedural review or the reverse is true.[31] The equal status theory, on the contrary, presumes a coexistence – either harmonious[32] or conflicting – of the two kinds of review. Unlike the hierarchy theory, even the second ("conflicting") reading of the equal status model does not imply a general rule but only asks for a balancing of procedural and substantive review. Third, different levels of procedural review are available: minimum procedural review, intermediate procedural review and maximum procedural review. Minimum procedural review only refers to the explicit formal-legal requirements of the legislative procedure, such as the provisions on the right to initiative, parliamentary readings, quorums etc. The rele-

[27] Tribe (1975: 290). On structuralism as a theory of US constitutional adjudication Lenaerts (2012: 2), with further references.

[28] Goldfeld (2004: 408)

[29] See Goldfeld (2004: 412).

[30] See Rose-Ackerman et al. (2015: 21).

[31] In this vein, Martí Mármol (2005) argues for the superiority of the procedural view. He distinguishes between "radical proceduralism" and "radical substantivism" and detects intermediate positions (e.g. soft proceduralism), see at p. 263.

[32] See Tribe (1975: 290).

vance of these procedural standards within judicial review is uncontested. Therefore, this kind of procedural review is not at stake when the relationship of procedural and substantive review is under examination. Actually, the debate on this matter only refers to the so-called due process of lawmaking, which goes far beyond the formal requirements exposed in almost all constitutional provisions on the instruments of government. Although the notion of due process of lawmaking sometimes represents something of a black box, inasmuch as its contents are not explained any further, two levels of procedural review may be distinguished. To begin with, both readings of procedural review share the concern for the rationality of lawmaking, which, according to the procedural approach, cannot be ascertained exclusively by reference to formal and substantive standards. In addition, the quality of reasoning of the lawmakers matters. This vital aspect of lawmaking characterises the internal decision-making process as opposed to the external legislative procedures.[33] Since the 1980s when this somewhat debatable terminology was introduced, German legisprudence has clung to it.

Thus, leaving aside the minimalist reading of procedural review as merely a formal compliance check, procedural review boils down to a rationality test. This kind of review encompasses two levels, which may be characterised as "procedural review writ-small" and "procedural review writ-large". The first reading confines itself to minimal standards of rational decision-making,[34] whereas the second tries to enforce a standard of "optimal legislation". While the idea of due process of lawmaking took hold of the case law of the German Federal Constitutional Court in recent years, only a cautious handling of procedural review is compatible with the wide discretion of the legislators, which is upheld, by and large, by the Karlsruhe judges.

15.3.3 Links Between Substantive and Procedural Review

"In its 'pure form', substantive judicial review is not interested in the way in which the legislature enacted the law; it is merely interested in the result or outcome of the enactment process."[35] This statement based on a thorough comparative law analysis echoes the widespread belief in German scholarship, which has been expressed in the following, frequently cited phrase: "Der Gesetzgeber schuldet gar nichts anderes als das Gesetz."[36] Similar statements can be easily found in the adjudication of

[33] See Hill (1982: 61). The Constitutional Court highlights the procedural and transparency aspect of decision-making in *ESM* judgment from 19 June 2012, 2 BvE 4/11, 131 BVerfGE 152 paras 113 et seq.

[34] Goldfeld (2004: 379): "minimally satisfactory level of deliberation".

[35] Bar-Siman-Tov (2011: 1923).

[36] Schlaich (1981: 109). This basically means that it is the sole duty of the legislator to enact the law.

the German Federal Constitutional Court.[37] Basically they only vary the Hobbesian idea "Auctoritas non Veritas facit Legem".

Before looking at the German debate on procedural review in more detail, it should be emphasised that judicial review in Germany concentrates on substantive review, while traditional pure procedural review is uncontested though rarely decisive. Due to the rights-based approach of constitutionalism in general and of the "Grundgesetz" in particular its dominance may not, in any event, be questioned. Nevertheless, observers from Germany and abroad notice that the Constitutional Court has increasingly investigated into the procedural input, empirical assessments, and the reasoning preceding legislation on the one hand and, though to a lesser degree, has abstained from reviewing the legislative output on the other hand.[38]

Though the present contribution does not focus on the doctrinal background of substantive and procedural review, one finding of Susan Rose-Ackerman and her colleagues in their recent study on "Due Process of Lawmaking" is particularly noteworthy in the context at hand. In all jurisdictions examined by these authors, the relationship between substantive and procedural review is much closer than might have been expected. Though *prima facie* substantive and procedural review appear to be alternatives, their genesis reveals that they are relatives. Interestingly enough, procedural review in most cases draws upon substantive review. The constitutional basis of both are substantive rights.[39] Thus, procedural review passes in most instances "through the gateway of subjective rights".[40] Since procedural safeguards are seen as a way to protect fundamental rights[41] it is logical to extend this idea, originally applied to the executive branch and the judiciary, to the legislator. While it is true that procedural review may be construed as a corollary of democratic legitimacy,[42] even the advocates of the participation and transparency-oriented reading of procedure have to admit that the rights-based approach is much more effective. The common heritage of substantive and procedural review facilitates the coordination of both approaches. It also explains why the line between substance and procedure has become so porous, and why substantive and procedural arguments are interchangeable to some degree. Whether the selective scope of novel procedural review following from its close link with the protection of rights satisfies

[37] BVerfG, judgment from 19 October 2006, 2 BvF 3/03, 86 BVerfGE 148 at 241 – German Länder fiscal equalization scheme. See Meßerschmidt (2000: 845).

[38] Rose-Ackerman et al. (2015: 175).

[39] See Linde (1976: 239): "Government is not to take life, liberty or property under color of laws that were not made according to a legitimate law-making process."

[40] Rose-Ackerman et al. (2015: 184). Another catalyst of procedural review is the allocation of competencies.

[41] See Meßerschmidt (2012: 379) for further references.

[42] See Rose-Ackerman et al. (2015: 214–215). See for a detailed analysis Meßerschmidt (2000: 868–870).

the desire for a due process of lawmaking based on the notion of democratic accountability can be left open in the context at hand.[43]

15.4 The German Debate and the Lessons from Hartz IV

The academic debate on procedural review in Germany can be subdivided into the pre-Hartz IV and post-Hartz IV eras. In *Hartz IV*,[44] the Federal Constitutional Court declared in 2010 that the standard benefits for adults and children granted by German social law were unconstitutional. Even though the benefits were not evidently insufficient to ensure a subsistence minimum in line with human dignity, the Court repudiated them, primarily because the provisions were not entirely based on an underlying statistical investigation by the legislature. As the Court held in that case, "[i]n order to ensure the traceability of the extent of the statutory assistance as commensurate with the significance of the fundamental right, as well as to ensure the review of the benefits by the courts, the assessment of the benefits, must be clearly justifiable on the basis of reliable figures and plausible methods of calculation".[45]

Though the *Hartz IV* decision did not represent a paradigm shift,[46] it changed the debate and resulted in a sharp increase in academic writing on this topic. While due

[43] See Popelier (2012: 270).

[44] BVerfG, joined Cases 1 BvL 1/09, 1 BvL 3/09, 1 BvL 4/09 (125 BVerfGE 175); also available in English at www.bundesverfassungsgericht.de/entscheidungen/). For a detailed analysis in English see Meßerschmidt (2013a: 243–244) and Rose-Ackerman et al. (2015: 178–186).

[45] Para 142.

[46] In previous contributions I refer to many examples from the case law of the German Federal Constitutional Court, which rely on evidence and procedural review, e.g. the *Numerus Clausus* case, which deals with the admission to university in view of scarce study places (BVerfG, judgment from 18 July 1972, 1 BvL 32/70 and 1 BvL 2570, 33 BVerfGE 303 at 351; 54 BVerfGE 173 [1980] at 191). Cf. Meßerschmidt (2012: 361–364) and (2000: 723–776, 926–1040). In another landmark decision, the first judgment on abortion law ("Fristenlösungsurteil"), the Court scrutinized whether the legislator has grounded the statute in factual reality (judgment from 25 February 1975, 1 BvF 1/74 etc., 39 BVerfGE 1; English translation in 9 The John Marshall Journal of Practice and Procedure 605 [1976] at 649; available at http://groups.csail.mit.edu/mac/users/rauch/nvp/german/german_abortion_decision2.html). In the equally famous "Mitbestimmungsurteil" on Worker's Codetermination Act respectively board-level employee representation in companies (judgment from 3 March 1979, 1 BvR 532/77 etc., 50 BVerfGE 290 at 331 et seq.) the Court acknowledged the prerogative of the legislator on the one hand, and urged the legislature to draw on existing knowledge by using the available material, consulting experts, and conducting hearings in the preparatory as well as the enactment stage, on the other hand. Cf. Wiedemann (1980). Another interesting example provides the decision on "Mühlenstrukturgesetz", requiring the legislature to ascertain the legislative facts correctly and in a sufficient manner (judgment from 19 March 1975, 1 BvL 20/73 etc., 39 BVerfGE 210 at 226). Although the German Federal Constitutional Court started to publish English translations of landmark decisions, most interesting references are only available in German (e. g. judgment from 27 November 1978, 2 BvR 165/75, 50 BVerfGE 50 – *Neugliederungsgesetz*; judgment from 24 October 2002, 2 BvF 1/01, 106

process of lawmaking and the attitude of the judiciary towards its imperfections, time and again, caught the interest of public law scholars,[47] the topic of due legislative process was not taken up as a key issue of judicial review. In the few years following *Hartz IV* presumably more authors commented on the issues of the legislators' procedural duties, factual grounding, and the duty to provide reasons for statutes than in the four decades as a whole from 1970 to 2010.[48] The debate on the consistency of lawmaking, which attracts as much, if not more interest,[49] was triggered by other key decisions of the Constitutional Court, in particular in the fields of tax[50] and planning law[51] and the regulation of sports betting.[52] Again, scholarly commentary outweighs anything that came before by far. Although decisions of the Constitutional Court, which exert a much larger influence on academic writing in Germany than courts in most other countries could dream of, has changed the playing field, the split that separates public law scholars on this issue persists until today.

The basic objection of the critics of procedural review mentioned above is attributed to different authors, but can reasonably be traced back to the former Constitutional Court judge Geiger[53] and the eminent constitutional law scholar Schlaich. In their view, the legislator owes nothing except the law,[54] an axiom that Christian Waldhoff appraised in detail some years later.[55] At the opposite end of the spectrum authors pleaded for an "optimal method" of lawmaking (Schwerdtfeger),[56] a "law on lawmaking" (Lücke)[57] or suggested to learn from administrative and planning law by closing the gap between legislative and administrative discretion (Kloepfer).[58] Although this brief summary inevitably implies an over-simplification, it is not a misrepresentation of the message of these authors. In my own investigation into the notion of "legislative discretion" I chose an intermediate approach, reflecting the conflicting imperatives of democratic legitimacy on the one hand and rational decision-making and output efficiency on the other hand.[59] Since space does not permit covering the debate to date in detail I will adopt a selective approach.

BVerfGE 62 paras 343 und 347 – *Altenpflegegesetz* – and judgment from 27 July 2004, 2 BvF 2/02, 111 BVerfGE 226 at 255 resp. para 102 – *Juniorprofessur*).

[47] See Meßerschmidt (2000: 777–816).

[48] Brenner (2011); Bull (2014); Cornils (2011); Dann (2012); Lienbacher (2012); Merten (2015); Meßling (2011); Nolte (2013); Reyes y Ráfales (2013); Rixen (2010); Rothkegel (2010); Thiede (2012); Wallerath (2012).

[49] See the contributions of Christian Bumke and Matthias Rossi to this volume.

[50] See the contribution of Roland Ismer to this volume.

[51] See Wallerath (2012:418–421), with further references.

[52] See Bumke (2010).

[53] According to Bickenbach (2014: 430).

[54] Schlaich (1981: 109).

[55] Waldhoff (2007).

[56] Schwerdtfeger (1977).

[57] Lücke (2001).

[58] Kloepfer (1988).

[59] Meßerschmidt (2000: 808–816).

I am going to omit, in particular, all intra-constitutional details of the deduction of procedural duties from written constitutional rules and principles, which are of minor interest in comparative constitutional law, and will instead limit myself to covering the main lines of the arguments. The proponents of procedural review heavily rely on the rights argument and the principle of proportionality, which has turned out as the Trojan horse of procedural review.[60] Nowadays, even the ECJ applies the principle of proportionality "in a procedural fashion".[61] Therefore, Popelier and Verlinden rightly emphasise that the assessment of the proportionality of a law may depend on the performance of due care in the preparatory process.[62]

15.5 The Compensation Model of Substantive and Procedural Review

Against the dual background of the predominance of substantive review and the increasing, yet selective, role of procedural review, some scholars construe procedural review as a compensation for the deficiencies of substantive review or the deference of the Court.[63] This approach attracts interest both in Germany and in the European arena and certainly will gain in importance. In this vein, Lenaerts argues, referring to ECJ case law, "that judicial deference in relation to 'substantive outcomes' has been counterbalanced by a strict 'process review'".[64] In the following, I shall refer to the connection between substantive standards and procedural duties under the name "compensation theory", although "the exact nature of this connection remains uncertain".[65] Absent explicit and fully-theorized pronouncements, most explanations, so far, read like event log records. The following statement seems exemplary for this approach: "In areas where the legislature has wide discretion, the Constitutional Court has increasingly abstained from reviewing the legislative output, but it compensates for this deference by checking the factual bases of statutes and reviewing the decision making process."[66] This observation, which corresponds with a similar statement of Popelier and Verlinden,[67] shares significant similarities with the concerns of semiprocedural review.

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[60] Meßerschmidt (2012: 362–364). This term is not meant to be derogatory. See for further references Bar-Siman-Tov (2012: 274–276).

[61] Lenaerts (2012: 7).

[62] Popelier and Verlinden (2009: 31).

[63] Meßerschmidt (2000: 865–874), distinguishing „Additionsmodell" and „Kompensationsmodell"; Oliver Lalana (2016: 11); Rose-Ackerman et al. (2015: 175), referring to Nolte (2013: 249) and Dann (2010: 630).

[64] Lenaerts (2012: 4).

[65] Rose-Ackerman et al. (2015: 175).

[66] *Ibid.*

[67] Popelier and Verlinden (2009: 33).

15.5.1 Unsettled Issues

The seminal debate on due lawmaking, fueled in Germany by *Hartz IV* and continuing since, will not be elaborated here fully. The contribution will demonstrate, instead, that the compensation theory, though helpful in describing the case law and suggesting a reasonable way to reconcile the substantive and procedural approaches, does not reveal the fundamental conflict of procedure and substance as a focus of judicial review, but rather conceals the difficulty which may arise from this dualism. Before looking for a middle ground between substantive and procedural review, one may carry, as a heuristic device, the possible contradiction to its extreme. Assuming that both substantive and procedural standards matter, two opposite settings merit attention: Imagine, for instance, a legal provision, elaborated according to the most sophisticated standards of lawmaking. Can this legal provision nevertheless breach substantive constitutional law? Now imagine a law, which looks perfect from the substantive point of view but suffers from severe procedural shortcomings. If they amount to a clear violation of so-called external procedural requirements (e.g. the participation of the second chamber in the passing of the legislation has been omitted) even a superb law will not pass the test of constitutionality. Does the same hold true if the input in terms of procedural rationality does not meet sophisticated or, at least, basic standards of decision-making? After all, the proverbial German blind chicken finds a corn once in a while. Is it appropriate to apply this philosophy to the legislator? This trivial question may be generalised in the following way: may constitutional law privilege legislative output over legislative input, in other words does it privilege substance over procedure? Once it recognised that procedural review is a legitimate if not necessary task of the constitutional courts, it is not easy to answer this question in the positive, whereas according to the traditional view the law will stand if the contents is correct, even if the reasoning is wrong. After all, rational decisions are often intuitive.[68] The growing interest in the logic of random selection[69] underscores the need for a more lenient attitude towards suboptimal legislative reasoning.

In order to reach an answer to the problem of dualism we could take the approach of weighing the pros and cons of the contradictory approaches in a pragmatic way. In doing this, however, the background of the competing concepts of substantive and procedural review should be taken into account. Whereas substantive review results from a rights-based approach, procedural review may be linked to the democratic profile of decision-making as well. It has strong links both to the idea of deliberative democracy[70] and to the notion of efficiency, not necessarily founded on

[68] Posner (2014: 17).

[69] Duxbury (1999); Frey (2014); Stone (2008).

[70] Cf. Bar-Siman-Tov (2012: 284); Goldfeld (2004: 376), and Popelier (2012: 264–265); see on deliberative democracy in general Elster (1998), and more recently Suntrup (2010), in particular on the substance-procedure divide Cohen (2003).

democratic values. The concept of rich procedural review is thus multi-faceted, if not Janus-faced.

At the same time, the procedural review runs into similar difficulties as the established substantive review. According to Alec Stone Sweet, "governing with judges also means governing like judges".[71] It is a truism that judicial procedures and techniques do not intend to constitute a framework for legislation but mean to resolve conflicts by way of case-by-case assessment, though spillover effects may occur. Thus, novel procedural review refers to a sort of deliberative rationality beyond judicial expertise. Therefore, a cautious and balanced approach both to procedural and to substantive review is imperative.

15.5.2 Specifying Compensation

The compensation model of substantive and procedural review exhibits, at least, two variations. The radical theory entirely substitutes substantive review with procedural review. The moderate theory mitigates the standards of substantive review and intensifies procedural review as a partial substitute. The first model must be rejected because substantive review is granted by the German Constitution. Therefore, judicial review cannot end up displacing substantive review altogether. There is not the least chance that any strong theory of due process review will become the leading paradigm in German constitutional law. Consequently, scholars who prefer procedural review because it "ameliorate[s] the tensions between judicial review and democracy"[72] will not be completely satisfied with German constitutionalism. Rather, only a less intrusive substantive review may be available and combined with procedural review since the German Constitution does not define the intensity of judicial review precisely. Moreover, the German law does not support the idea that procedural review should always precede substantive review, as has been suggested to the ECJ.[73] It is more probable that novel procedural review only enters the stage after substantive review has failed to give clear direction to the judiciary.

Judicial Self-Restraint

Thus, the question arises whether the merger of substantive and procedural review may be arranged in such a way that both a duplication of standards and a heightened risk of annihilation of statutes could be avoided. Consequently, the Constitutional

[71] Sweet Stone (2000: 204).

[72] Frickey and Smith (2002: 1709–1710). From the European angle Lenaerts (2012: 7–8) welcomes procedural proportionality as "a positive development in the case-law of the ECJ on the sensitive issue of the vertical allocation of powers".

[73] See Lenaerts (2012: 15).

Court might practise judicial self-restraint while reviewing the legislation. However, this would mean that the Court has to depart from previous case law, which is mostly characterised by a strong reading of the constitution and citizen's and human rights in particular. It is quite unlikely that the Court will move in this direction. Apart from the shift in arguments, which courts usually try to avoid, the Court would contravene its own interests as an institution. Since the Karlsruhe Court is eager not to lose ground in the contest with the ECJ it will restrain from such a strategy that would accelerate its degradation, which has already been prematurely linked with the demise of constitutionalism.[74]

Reinforcing Process Review

Against this backdrop it may be more promising, both for the Court and the adherents of due process review, to make no changes to the substantive meaning of the constitution, but to accept legislative discretion relating to the evaluation of facts and the balancing of interests. If this latitude is developed in tandem with a strengthening of the review of legislative due process, thus through the compensation model, the Court may escape criticism from both adherents of substantive review and advocates of procedural review. By establishing due process review the Court can demonstrate that it does not aim to conquer the proper role of the legislator but that it respects the specific task of judicial review more than ever before. Of course, the question arises: how can the Court prove that self-restraint by substantive plus procedural review is not mere lip service?

Waiver of Direct Factual Evaluation

In the first instance, the Court should refrain from evaluating the legislative facts[75] on his own or even with the help of experts. Apart from the fact that it is ill-prepared for this kind of job, it must be cautious not to act as a legislator. The *Hartz IV* decision may be read as an example of this strategy, although it gives rise to doubts whether the standards of empirical evaluation established by the Court in this decision result in an exaggeration of due process of lawmaking.[76] Actually, the Court requests a degree of consistency of lawmaking, which the legislator struggles to match. Moreover, it escaped the Court's notice in *Hartz IV* that even a perfect

[74] See Dobner and Loughlin (2010).

[75] See Bull (2014) and Steinbach (2015); for legislative margins of appreciation see the contribution of Christian Bickenbach to this volume; furthermore Bickenbach (2014) and Meßerschmidt (2000: 926–1040).

[76] See the following case analysis and as an example of the overacting of the Court its negative attitude towards the sunset clause contained in the Code of Social Law which indicates in the Court's opinion that the legislature itself considered that it had not found a lasting, methodologically consistent solution (para 202), whereas in general the establishment of a sunset clause is appreciated as a rational instrument of legislation.

calculation of the material and cultural minimum of social benefits will lead to an unfair result because the uniform calculation of the remuneration – as prescribed in German law – neglects the real costs of living, which differ among regions. In that the Karlsruhe Court insists on statistical investigations but does not take offence at this obvious distortion *Hartz IV* and the following decisions seem to be self-contradictory.

In increasing the stringency of proportionality review, the European Court of Justice will encounter similar problems. According to *Spain vs. Council* judicial review of legislative discretion "presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate".[77] "It follows that the institutions must at the very least be able to produce and set out clearly and unequivocally the basic facts which had to been taken as the basis of the contested measures of the act and on which the exercise of their discretion depended."[78] In *Vodafone* the ECJ pointed out that the exercise of legislative discretion must be based on objective data.[79] Since the German Federal Constitutional Court will readily agree with such pronouncements of the ECJ, new opportunities for cross-fertilisation between the two courts arise.

Reason Giving

Second, the reason-giving rules can contribute to the partial compensation of cutbacks in substantive review by procedural review. As Rose-Ackerman *et al*. have correctly observed, substantive and procedural review overlap in reason-giving.[80] Thus, the transformation of substantive into procedural review and the reverse can easily take place there. So far, however, the German law gives no clear picture.[81] Since only administrative law requires reason giving while the legislator seems to be free to deliver reasons or not, the Constitutional Court does not necessarily investigate into the reasoning of the legislator[82] but looks out for reasons, which might justify the legislative decision. No proof is required that they really correspond to the drafter's or Parliament's intent. Since this method is instrumental to uphold legislation, it rarely provokes criticism. Taking procedural review seriously, the Court, however should renounce on this imputation. Instead, it seems wise to adopt the 'actual purpose review' analogous to *Chenery*. The actual purpose review requests courts to focus on the actual legislative purpose, "rather than whichever

[77] Case C-310/04. ECR I-7285 para 122 – *Spain vs. Council*. See for comments Lenaerts (2012: 8–9).

[78] *Ibid*., para 13. In this Case the ECJ annulled the contested regulation because neither the Council nor the Commission had provided sufficient factual input to back-up their decision to fix the amount of the specific subsidy for cotton at 35% of the total existing aid under the previous scheme.

[79] Case C-58/08, judgment of 8 June 2010, ECR I-4999 – *Vodafone and Others*.

[80] Rose-Ackerman et al. (2015: 15).

[81] Cf. Christian Waldhoff in this volume.

[82] Cf. Oliver-Lalana (2005: 243–251), see also Oliver-Lalana (2013).

hypothetical purposes the court or government lawyers can dream up".[83] In *Chenery*[84] the US Supreme Court held that an administrative agency's action may only be upheld when the agency has provided valid reasons for its decision. Though this principle only applies to administrative agencies and faces little chance to be extended to legislation in the United States (the federalism cases excepted),[85] using it as an example could contribute to the improvement of the quality of legislation in the European Union.

The reason-giving requirement certainly is convincing from a practical point of view insofar as a "decision-maker required to give reasons will be more likely to weigh pros and cons carefully before reaching a decision than will a decision-maker able to proceed by simple fiat".[86] In order to reconcile this principle with the traditional rule, according to which the parliament as a legislator has to give no reasons when enacting laws, the need to give reasons may be construed not as an outright legislative duty but rather as a simple obligation ("Obliegenheit").[87] This concept refers to the theoretical distinction between legal obligations to others and self-regarding duties.[88] On a more practical level, it encourages legislative self-interest through a shift in the burden of proof. Whenever a statute is obviously compatible with the constitution, the quality of legislative reasoning does not matter. However, in borderline cases the accuracy of legislative findings and the sobriety of legislative reasoning may be decisive aspects for the court to uphold a contested law. Thus, the statement may serve simultaneously the self-interest of the legislator and as an "aid to the court".[89] If the legislator fails to give convincing reasons in such cases the court is under no obligation to find reasons *post hoc* on its own and may invalidate the law. Such a reading of the merits of reasoning might counterbalance the perverting effect of the traditional German doctrine; in the absence of reason-giving requirements it may be the wisest strategy for the legislator in many instances to give only vague reasons or no reasons at all and, above all, to hide the true reasons of the legislation. Procedural review could help to change this situation in highlighting the chances of transparent legislative reasoning, but will hardly succeed in suppressing backroom dealing or evading "procedural posture".[90]

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[83] Goldfeld (2004: 400–402), drawing on Justice Brennan's dissenting vote in *United States Railroad Retirement Board vs. Fritz*, 449 U. S. 166 (1980) at 183 and 188.

[84] SEC v. Chenery Corp., 318 U. S. 80 (1943).

[85] The federalism decisions excepted, see Goldfeld (2004: 371).

[86] Shapiro (1992: 180).

[87] See for an explanation in more detail Meßerschmidt (2000: 875 et seq). Meanwhile the German Federal Constitutional Court takes the same view, see 125 BVerfGE 175 at 226 and judgment of 18 July 2012, 1 BvL 10/10, 1 BvL 2/11, 132 BVerfGE 134 at 166 et seq., para 99 (also available in English on *Bundesverfassungsgericht* homepage; unfortunately numberings differ, in the English translation look for para 75).

[88] Austin (1869: 414–415).

[89] Cf. Alemanno (2011: 500).

[90] Goldfeld (2004: 383).

Since the idea of mere "Obliegenheit" applies to other aspects of rational law-making as well, it must be clarified that it is not a panacea but a very useful construction which solves some problems but does not spirit away all.[91] Admittedly, this analysis from a legal-dogmatic angle does not fit easily into other jurisdictions, whereas the more pragmatic approach of the ECJ when asking the Commission to submit an impact assessment, for instance, is all about facilitating the Court's task of determining whether the challenged measure was "manifestly inappropriate".[92] However, both approaches yield similar results. Alemanno's suggestion that "it might turn out to be useful have an IA at one's disposal"[93], is very close to the characteristics of the so-called "Obliegenheit".

Catalysts of Procedural Review

Having stated that substantive and procedural review are not necessarily exclusive but may be construed in an inclusive way which allows a combination of both modes of review, this concept is in urgent need of shaping in order to prove the operability of the compensation model.

To begin with, the theory should clarify further its applicability. Since the suggestion that substantive review should give way to procedural review does not imply a full-scale retreat of substantive review, transparent criteria for applying procedural control more intensely must be available. The open texture of constitutional provisions indicates that the legislative discretion requires a balancing by procedural review. However, the literal interpretation is not a very reliable method. Therefore, the scope of legislative discretion must be defined in a more objective way.

Fundamental Rights and Values

According to one theory, the legislative process only requires review when fundamental values are at stake.[94] The predominant theory of fundamental rights in Germany contrasts the so-called *status negativus*, which seeks to prevent the government infringing into individual privacy as defined by the fundamental rights, and the so-called *status positivus*, which covers the individual's right to protection by the state, even to participation in the multiple services and benefits of the welfare state. Both judiciary and scholars agree that the legislator has a wider margin of discretion in this field. The same is true where the legislator is required to weigh the competing interests of individuals. Defining the boundaries of freedoms is indispensable for organising the peaceful co-existence of conflicting interests, being one of the most distinguished tasks of the legislator. Given the conflicting interests of

[91] This is my main objection to Merten (2015: 359), though I promoted the "Obliegenheit" idea more than a decade earlier.

[92] Case C-310/04. ECR I-7285 para 99 – *Spain v. Council*.

[93] Alemanno (2008: 17).

[94] Goldfeld (2004: 407) drawing on Justice Steven's dissenting vote in *Fullilove vs. Klutznick*, 448 U. S. (1980) at 551–552.

norm addressees, inclusive stakeholder and third party consultation procedures and fair hearings, however, may contribute more to a balanced outcome than a judicial second opinion. By reviewing procedural requirements the court may live up to its responsibility as a regulatory watchdog[95] in a more convincing way than by mere second-guessing. Furthermore, procedural review may prevent circumvention of democratic safeguards such as representativeness, transparency and accountability.[96] German lawyers, some of whom still cling to the Prussian idol of "General Dr. von Staat", as ridiculed by Thomas Mann almost a century ago,[97] might learn from the US debate on special interest groups and the threat of regulatory capture in order to appreciate the need for improved containment by judicial scrutiny.[98] Finally, the legislator often has to take decisions in the absence of complete or, at least, sufficient knowledge. Here, again, substantive review will fail and procedural review turns out to be the last resort. This background explanation of procedural review conforms to the general idea that a procedural rule may be the product of the tension between regulation and discretion.[99] However, the role of procedural review also reflects the growing importance of the Good Governance agenda in the field of legislation. The new interest in procedural review is associated with the insight that the law can regulate through processes aimed at delivering good outcomes, rather than dictating the outcomes themselves *ex ante*.[100] This leads to an even more general aspect of the emergence of novel procedural review, the overall rise of proceduralism.[101] The objectionable aspects of the procedural trend, in particular the risk of total bureaucratization of lawmaking by giving way to the rampant culture of "continually assessing, auditing, measuring, weighing the relative merits of different plans",[102] should not be underestimated. Unfortunately, however, space does not permit discussion here.

An analysis of the case law of the German Federal Constitutional Court proves that the Court applies procedural review mostly in the above-mentioned fields. While an in-depth analysis would go beyond the scope of this study, the *Hartz IV* case may serve as an example.

Ex Ante Evaluation and Ex Post Control

Another stronghold, even a catalyst of procedural review in the case law of German courts is the forecast of legislative effects, which is required now and then. The courts take a closer look at legislative prognosis, in particular, when a statute fails to

[95] Cf. Popelier (2012).

[96] *Ibid*.

[97] Mann (1918/1960: 247).

[98] See Elhauge (1991); Goldfeld (2004); Meßerschmidt (2013b) and Meßerschmidt (2015).

[99] Effron (2014: 140.

[100] Effron (2014: 128).

[101] Cf. the entry "Political Legitimacy" by Peter (2010: part 4.2); Meßerschmidt (2000: 817–818) and Meßerschmidt (2012: 350–351) for a short English summary. On German legal doctrine cf. Lerche, Schmitt Glaeser and Schmidt-Aßmann (1984).

[102] Graeber (2015: 41).

reach its proclaimed objective or, at least, serious doubts are raised as to its efficiency. Major flaws of that sort may affect the constitutionality of the law. In particular, a law restricting individual rights may lack justification and may emerge as disproportionate in failing to promote the otherwise legitimate policy. Policy failure can disqualify the law as an unnecessary and thus unconstitutional sacrifice. Considering legislation retrospectively, *ex post* evaluation seems to be the most reliable method to analyse the outcome of a law.[103] The juxtaposition of *ex ante* evaluation and *ex post* judicial control[104] is not merely about timing, but presupposes a methodological turn. We do not call judicial review "*ex post*" just because it takes place *post festum*, i.e. after the enactment and the implementation of the law, but with reference to the *ex post* perspective, which is richer than the *ex ante* perspective in that it includes the following-up of implementation measures.[105] It offers the opportunity to assess what has actually become of the legislative intentions. Only then, can evaluation be rightfully qualified as 'retrospective'.[106]

The German Federal Constitutional Court, however, rejects this approach and gives precedence to *ex ante evaluation*. This means that the Court only takes an interest in the question of whether the legislator has based the law on a thorough evaluation of the facts and a realistic forecast of future developments, in particular the probable impact of the law. Prospective evaluation has undoubtedly gained a reputation as a cornerstone of rational lawmaking and is the choice for the preparation of laws, even though researchers are increasingly aware of its constraints and the risk of "guesstimating".[107] However, the institutional and functional backgrounds of pre-legislative evaluation and post-legislative review must not be confounded. The reasons for regulatory impact assessment as a means of better regulation do not apply necessarily to judicial review. Apart from the fact that the *ex post* execution of *ex ante* evaluation is an artificial construct and a hypothetical, if not absurd operation[108] the Court thus shifts the focus of review from objective findings to the issue of legislative fault and substitutes output by input as a yardstick. Looking at the input is a common feature of all procedural reviews and therefore, *ex ante* evaluation may be classified as a subgroup of procedural review.

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[103] See Meyer (2009: 293) and van Gestel and Franken (2009: 206). In a similar vein, van Gestel and van Dijck (2011: 552) point out that ex post evaluations should receive a more prominent role in legislative policy.

[104] See Alemanno (2011). Verschuuren and van Gestel (2009: 260) propose to consider both types of evaluation to be complementary.

[105] As the popular wisdom has it: "Hindsight is easier than foresight" respectively "Man ist immer klüger, wenn man vom Rathaus kommt"; also: "Durch Schaden wird man klug" („experience is a hard teacher").

[106] See on retrospective evaluation van Aeken (2005: 83–86).

[107] Cf. Verschuuren (2009) and, in particular, the contributions of Larouche, Bohne and Verschuuren and van Gestel.

[108] It requires the judiciary to judge under a veil of ignorance which may be a fascinating metaphor within der Rawlsian philosophy but hard to accomplish.

Procedural review may be more beneficial for the legislator than substantive review,[109] though under different circumstances the opposite may hold true. In general, the Court gives the benefit of doubt to the legislator, which is very important vis-à-vis the growing problem of predicting the likely outcomes of a law in the fast changing, globally complex, liquid and risky environment of lawmaking.[110] As a consequence, the Constitutional Court may uphold a piece of legislation, at least for a transitional period, even if it is falsified by empirical facts. The Court explicitly states that a statutory measure may not be viewed as being contrary to the constitution merely because the measure might rest on a mistaken prognosis.[111] This, however, is no answer to the problem of how to react to infringements of rights resulting from false premises. In order to illustrate the intrinsic difficulty of the input-output double-bind we may revert to two examples from the case law of the Belgian Constitutional Court as cited by Patricia Popelier and Victoria Verlinden.[112] Both decisions deal with legal provisions dating from the beginning of the twentieth century. In both cases the Court found that the provisions were justified in 1900 and 1908 when they were issued, but no longer justified due changes of the factual circumstances.[113] Fortunately, the Court did not cling to the *ex ante* point of view. Though the procedural approach to legislative prognosis may sometimes lead to incongruous results, it is predominant in Germany and is not likely to give way to *ex post* evaluation as a general standard of legislative review.

In defense of this objectionable handling of prognosis control one might argue that it encourages an inter-branch dialogue between courts and legislators.[114] While the German Federal Constitutional Court relinquishes striking down the law, it will take the opportunity to spell out conditions and directions for a legal amendment or re-enactment of the law. Moreover, the Karlsruhe case law on prognosis may be seen in a more positive light with regard to the parallel, yet less focused efforts of the ECJ. In his analysis of the shaping of the proportionality principle by the ECJ Alemanno comes to the conclusion that "an interesting circular dynamic between *ex ante* analysis of proposed legislation and *ex post* analysis of adopted regulation" might emerge.[115] Indeed, determining the "cross-fertilisation between

[109] This conforms to the suggestion of Bar-Siman-Tov that semiprocedural judicial review should be viewed as more respectful and less intrusive towards legislatures than substantive judicial review (2012: 286).

[110] See Meßerschmidt (2012: 366).

[111] 39 BVerfGE (1975) 1; English translation in 9 *The John Marshall Journal of Practice and Procedure* 605 [1976] at 649.

[112] Popelier and Verlinden (2009: 34–35).

[113] Constitutional Court No. 44/2007, 21 March 2007, Official Gazette 25 May 2007 (www.cour-constitutionelle.be) and No. 79/2004, 12 May 2004, Official Gazette 10 August 2004 (www.cour-constitutionelle.be).

[114] See in general Bar-Siman-Tov (2012: 284).

[115] Alemanno (2011: 20).In a similar vein, Mader (2002: 124–125) and van Gestel and Vranken (2009: 227–228) recommend "a regular and more systemic comparison of ex post and ex ante evaluations".

ex ante scrutiny and *ex post* control methodologies" will be a major challenge for many years to come.

Gradations of Novel Procedural Review

Judicial review occurs by degree. Hence, one more aspect of procedural review is in urgent need of clarification: whereas the pure procedural model applies uniformly to all legislation, the standards employed in novel procedural review cover a broad bandwidth. In general, the Court must establish whether a "rational connection between the facts found and the choice made" exists.[116] Fulfilling this task may require more or less scrutiny, ranging from common, everyday knowledge to a high level of sophistication. State-of-the art investigations require an evaluation of facts as a means to check empirical claims and cost-benefit analysis as a means to improve on the proportionality test, to name only a few methods that may be in place. Some of these standards can be "overly intrusive if they are predicated on a level of rationality and consistency not suitable to the political process of passing statutes".[117] Poor awareness of the conflict between the quest for a rational perfection of lawmaking and the justification of second-best laws through the principle of democratic decision-making are major drawbacks of the theory of procedural duties to rationality.[118] Hence, the levels of intensity of examination matter. Whether they resemble the rational basis test or proceed to a strict scrutiny test (if we may borrow from the US example)[119] will certainly influence the debate on procedural and substantive review. Whereas the ECJ has been praised for applying "always the same" standard of review,[120] the German Federal Constitutional Court has once introduced a three-step model consisting of "Evidenzkontrolle" (a check for manifest error), "Vertretbarkeitskontrolle" (a review of defensibleness), and "intensivierte inhaltliche Kontrolle" (intense substantive review) and still clings to it.[121] It is an interesting fact that the Court compares the second kind of review to procedural review.[122] While this gradation primarily applies to the proportionality test, the Court has

[116] *Motor Vehicles Manufacturers Association of the U.S. vs. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

[117] Rose-Ackerman et al. (2015: 189). See for an in-depth analysis Dann (2010) who suggests a more careful approach to rationality review.

[118] Meßerschmidt (2012: 352).

[119] See Meßerschmidt (2000: 621–622).

[120] Lenaerts (2012: 12).

[121] 50 BVerfGE 290 [1979] at 332 et seq. See for explanatory comments Meßerschmidt (2000: 1045–1052). See also 57 BVerfGE 139 – *Pflichtplatzquote*, paras 75 et seq. [1981]; 88 BVerfGE 203 – *Second abortion case*, paras 187 et seq. [1993]; 94 BVerfGE 115 – *Asylum Seekers case*, paras 87 et seq. [1996]; BVerfG, judgment of 23 July 2014, 1 BvL 10/12, BvL 12/12, 1 BvR 1691/13, 67 Neue Juristische Wochenschrift (NJW) 3425 (2014) paras 82 and 87 – *Regelbedarf*, to name only some.

[122] *Ibid.* at 334: "Es handelt sich also eher um Anforderungen des Verfahrens. Wird diesen Genüge getan, so erfüllen sie jedoch die Voraussetzungen inhaltlicher Vertretbarkeit; sie konstituieren inso-

introduced a similar model in equality review.[123] The differentiating elements, which determine the level of review, do not deviate substantially from those criteria steering proportionality review. Note that all steps respectively subtests of equality and proportionality review, including fact-finding, are open for proceduralisation. This means going one step further and taking one step back from the model proposed by Bar-Siman-Tov, according to which the suitability and necessity subtests should remain basically substantive whereas the final weighing test should be fully replaced

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weit die Einschätzungsprärogative des Gesetzgebers, die das Bundesverfassungsgericht bei seiner Prüfung zu beachten hat."

[123] BVerfG, Order of 24 January 2012, 1 BvL 21/11 – *Smoking ban in restaurants and pubs*, para 41: "Depending on the subject governed and the differentiating elements, the limits imposed upon the legislature by the general principle of equality vary, ranging from relaxed compliance that is limited to a prohibition of arbitrariness to strict adherence to proportionality requirements (see BVerfGE 126, 400 [416]; 127, 263 [280]; established case-law). Differences in treatment always require objective justification which is appropriate to the aim of the differentiation and the degree of the unequal treatment. In this context, a single review standard applies under constitutional law that is based on the principle of proportionality and whose content and limits are not abstract, but can be determined solely on the basis of the differences in the facts and areas of regulation affected in each case (see BVerfG, Order of the First Senate of 21 June 2011 – 1 BvR 2035/07 –, NVwZ [Neue Zeitschrift für Verwaltungsrecht] 2011, p. 1316 [1317], with further references). The legislature may be bound to a more stringent standard, depending in particular on the liberty rights affected (see BVerfG, Order of the First Senate of 21 June 2011, loc. cit.); the more the unequal treatment can negatively impact the exercise of freedoms that enjoy constitutional protection, including the freedom of practice of occupation or profession protected by Article 12.1 of the Basic Law, the narrower the operating latitude of the legislature becomes (see BVerfGE 121, 317 [370], with further references)." In the preceding *Branntweinmonopol* case of 3 July 2010 (1 BvR 2337/00 and 2338/00, 21 Neue Zeitschrift für Verwaltungsrecht [NVwZ] 197 [2002] paras 37 et seq.) the Court pointed out that, "[a]s concerns the unequal treatment of groups of persons, parliament is subject to such a strict obligation. This also applies if the unequal treatment of facts indirectly results in the unequal treatment of groups of persons. In such cases, the Federal Constitutional Court examines in detail whether there are reasons for the planned differentiation that are of such extent and carry such weight that they justify the unequal legal consequences that result from the differentiation (cf. BVerfGE 101, p. 54 [at p. 101], with further references). On the other hand, parliament's legislative discretion is broader in the sphere of state activities that involve the granting of rights than in the sphere of activities that administer encroachments upon rights. This especially applies in cases in which the state grants benefits not because: (1) it wants to counteract an urgent social need; or (2) wants to comply with an (at least moral) obligation of the polity, but on its own initiative promotes, by way of financial grants, a specific behaviour on the part of the citizens that the state regards as desirable under economic policy, welfare and other social policy aspects. Parliament, as the state legislator, is largely free in its decision as to which persons or enterprises to promote. It is true that the state may not use irrelevant standards when distributing its benefits. As concerns subsidies, justifications under the aspect of the public good must be provided if they are supposed to continue to exist when weighed against the principle of equality before the law. However, as regards relevant aspects on which parliament can rely, parliament has a very wide scope of such aspects at its disposal; as long as the regulation in question is not based on an assessment of the respective living conditions that clearly contradicts all experience of life, and especially as long as the group of those favoured by the regulation is appropriately delimited, the regulation cannot be regarded as constitutionally objectionable (cf. BVerfGE 17, p. 210 [at p. 216]; 93, p. 319 [at p. 350])."

by a mere procedural examination of the legislative process.[124] Although there is an element of truth in this conclusion, a more flexible approach is better suited to judicial review. Though the courts should not impose too-demanding procedural requirements on the legislature,[125] these requirements may vary according to the fundamental values at stake and depending on the difficulty of the tasks faced by the legislator.

While it is not possible to shed light on all formal and informal rules governing procedural review in Germany, it seems premature to put the blame entirely at the feet of the Court for contradictions contained in its case law.[126] Certainly, there are still problems that need to be resolved. Above all, the rationality standards, as established in *Hartz IV*, continue to be a problem requiring a solution. From *Hartz IV* it follows, perhaps more urgently than ever before, that it is necessary to define carefully the objective and ambition of procedural review. Should it enforce a maximum vision of rational decision-making or should it only take care of the legislator's obedience to minimum standards of due process and rational decision-making? According to a weak standard of procedural review, only blatantly irrational legislation will be invalidated. Though the review will go beyond the (British) Wednesbury test[127] and the Court will not degrade itself to a "lunacy commission", unrealistically high expectations in rational debate and scientific justification ought to be excluded.[128] When embarking on the second strategy, the judiciary, however, has only to look out for evident mistakes, such as obvious lack of evaluation or misunderstanding of the facts, while it does not matter whether superior methods are available that the Court would prefer if it were in the place of the legislator.[129] This kind of judicial self-restraint, for instance, shapes the judicial review in German land planning law. In view of this prominent example from administrative law, it is hard to find any reasons why the legislator should be submitted to stricter scrutiny. Thus the Court accepted around the same time the *fiat* of the legislator, "as long as the regulation in question is not based on an assessment of the respective living conditions that clearly contradicts all experience of life".[130] This pronouncement differs considerably from *Hartz IV*. Such an obvious contrast in the case law of the Court can only be defended by the aforementioned gradation of legal standards, since it must be conceded that the justification of the spirits monopoly is not as serious an issue as the standard of living of the poor. Above all, however, this example shows that premature conclusions from *Hartz IV* have to be avoided by any means.

Though *Hartz IV* has a reputation as a landmark decision, it should be considered on its own merits. In *Hartz IV* the Court found itself in the difficult situation of hav-

[124] Bar-Siman-Tov (2012: 294).

[125] Bar-Siman-Tov (2012: 291).

[126] E.g. Nolte (2013: 240).

[127] *Associated Provincial Picture Houses Limited v. Wednesbury Corporation (1947)2 All ER 680; Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

[128] See also Popelier and Verlinden (2009: 37).

[129] For a discussion of the "better placed" argument see Popelier (2012: 267) and Vermeule (2006).

[130] BVerfG, judgment of 3 July 2010, 1 BvR 2337/00 and 2338/00 – *Branntweinmonopol*, para 38.

ing to judge on a politically highly contested law that contributed to the defeat of the Schröder Government in the general elections of 2009. While political considerations are no legal arguments, they may explain the preference of the Court to settle cases by compromise. On the one hand, in *Hartz IV* the Court avoided specifying the amount of social benefits to be paid, which would contravene the separation of powers and the parliamentary prerogative. On the other hand, it found a way not to approve the Hartz IV law, which would have exposed the Court to the risk of becoming involved in the fierce debate on this piece of legislation, which had been condemned by the German Left – rightly or wrongly – as a symbol of merciless neoliberalism. The following commentary from abroad confirms this assumption: "One might think that basing a decision on improper procedures would be less confrontational than subjecting social welfare legislation to full substantial control and ordering an increase in benefits."[131] By a less ambitious definition of procedural rationality, the Court might have taken a different stand on the legislator's calculation of the costs of living. Then, however, the legitimate switch to procedural review might have missed its purpose of not jeopardizing the excellent reputation of the Court with the German public. Instead, by virtue of procedural review, the Court returned the issue to the legislator.

The impression that the Court went too far in *Hartz IV* from the legal point of view has been confirmed by later comments from former judges and by the *Asylum Seekers Benefit Act* decision,[132] which dismissed strict procedural standards and returned to the *erreur manifeste* philosophy of review.[133] Since the Court declared the law unconstitutional for substantive law reasons, these statements were *obiter dicta*, which means that the Court placed great importance on qualifying the *Hartz IV* precedent. It is important to understand, however, that criticism does not necessarily affect procedural review as such, but only the overreaching of standards. As Gusy, Schulze-Fielitz, Schuppert, and others have pointed out, the legislative process is a process of decision-making and political bargaining that should not be equated with a process of cognition.[134] Moreover, the judicial imposition of overdemanding lawmaking standards could strangle trial-and-error decision-making and experimental legislation, despite their being important for better regulation.[135] Compared to the *Hartz IV* rationality standards, it is hard to imagine how the Court

[131] Rose-Ackerman et al. (2015: 186).

[132] Bundesverfassungsgericht, judgment of 18 July 2012, 1 BvL 10/10, 1 BvL 2/11, 132 BVerfGE 134 at 166 et seq., paras 72–73, 80–81 (also available in English on Bundesverfassungsgericht homepage). See for the case history Kingreen (2010).

[133] Para 72: "The fundamental right to the guarantee of a dignified minimum existence derived from Article 1.1 of the Basic Law in conjunction with Article 20.1 of the Basic Law does not entail specific obligations regarding the legislative process; the decisive point is whether the legal claim to existential benefits can be substantiated in a rationally differentiated way by realistic, plausible calculations."

[134] Gusy (1985: 292); Schulze-Fielitz (1988); Schuppert (2003: 14–15). In *Asylum Seekers Benefits* the Court acknowledges: "It [the Basic Law] allows for negotiations and for political compromise" (para 72).

[135] See van Gestel and van Dijck (2011).

could, one day, uphold the bulk of the energy reform bills in Germany which are founded on highly debated assumptions and presumably biased expertise. However, the Court is still vacillating between these poles. In the recent decision of 23 July 2014 on the revised social benefit scheme it returned largely to the challenging *Hartz IV* expectations placed on legislative methodology, though it admitted that the legislator enjoys considerable leeway when it comes to political compromise and is not bound by a distinct methodology, thus paying tribute to the principles of the previous *Asylum Seekers Benefits Act* decision.[136]

15.6 Concluding Remarks

It could be shown that German constitutional law and case law apply both, substantive and procedural reviews. Although substantive review is dominant and largely prescribed by the constitution, procedural review is seen to be evident in a growing number of cases. However, substantive and procedural review should not be looked at as strict alternatives or adversaries. Their relationship is reminiscent rather of the process of osmosis. They can be mutually reinforcing, on condition that they are construed not as dual control, but as complementary scrutiny. Thus, the adoption of procedural review helps reduce the burden of substantive review. As the brief analysis of prognosis review has shown, procedural review can be more benign to the legislator. Hence, it is vital to make a choice in the light of principles and criteria that should be as precise as possible. Cherry-picking must be excluded by any means. Therefore, further investigation into the relationship between substantive and procedural review, perhaps even a second-order-approach[137] is necessary. In the end, synergies may prevail over conflicts and make the dream of "semiprocedural review", or whatever one may choose to call it, come true.

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[136] BVerfG, judgment of 23 July 2014, 1 BvL 10/12, BvL 12/12, 1 BvR 1691/13, 67 Neue Juristische Wochenschrift (NJW) 3425 (2014) paras 76 et seq. on the one hand, and para 84 on the other hand – *Regelbedarf*.

[137] Cf. Martí Mármol (2005: 263).

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