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Engel, Christoph

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The Constitutional Court - applying the proportionality principle - as a subsidiary authority for the assessment of political outcomes

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The Constitutional Court – applying the proportionality principle – as a subsidiary authority for the assessment of political outcomes

von
Christoph Engel

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If asked which elements of their cultural heritage they regard highly, most people would name the fine arts, maybe also language or man-made landscape. But political and legal institutions are also part of that heritage. They could not exclusively be explained on functionalist terms; for they are partly the result of national history. This statement holds particularly true for a highly esteemed element of the institutional framework for German politics, the Federal Constitutional Court. It is among the most powerful courts of the world, considerably more influential than its US counterpart. It has power to invalidate any governmental act, including any statute. More importantly even, it disposes of an all-encompassing set of fundamental freedoms. No intervention into freedom or property escapes its control. A comparison to their own constitutional jurisprudence will help American readers sense the difference. The German constitutional court lives in the era of the Lochner jurisprudence[1]. The court was able to gain this plenitude of powers, since after World War Two, the German public cherished an almost naive belief in the beneficial abilities of law. The text of the Basic Law made the first decisive step in transforming fundamental freedoms from slim principals into litigable rights. The constitutional court itself, together with a number of daring academics, seized the opportunity. Within little more than a decade, they transformed some five pages of text into a coherent constitutional framework for policy making[2].

History has thus provided Germany with an institutional opportunity structure that has the potential to address a long-standing concern of political scientists. Starting in the 70's, they developed a rich set of tools for assessing political outcomes[3]. The basic idea is straightforward. Political action is interpreted as a problem solving exercise. A policy is evaluated in light of its outcomes and, if necessary, improved. But the initial fascination of political scientists with this idea quickly turned into deception. Policy makers did not seem very attentive to the results[4]. We will see why this is not surprising. This state of affairs makes it particularly attractive to transform the proportionality principle, as applied by the constitutional court, into a tool for policy evaluation. For in contrast to academics, the constitutional court is a powerful actor. If academic evaluation demonstrates that a statute has a poor record, the court can use its powers to invalidate it.

This is the hypothesis from which this articles starts (I). It will quickly turn out to be grossly simplistic. Qualifications come both from the political sciences (II) and from law (III). Both qualifications do not, however, entirely disempower the assessment potential of the proportionality principle. Modest expectations for such a role of the constitutional court are still warranted (IV). But is it worth pursuing this solution once all the qualifications are properly addressed? Possibly, but only after a demanding endeavour to bridge the conceptual and practical divide between academia, politics and law (V). A number of dogmatic consequences for the interpretation of the proportionality principle can be derived from this (VI).

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1 Lochner v. New York, 198 U.S. 45 (1905).

2 For a comparative analysis see *Winfried Brugger*: Grundrechte und Verfassungsgerichtsbarkeit in den Vereinigten Staaten von Amerika (Tübinger Rechtswissenschaftliche Abhandlungen 65) Tübingen 1987.

3 For a recent overview see *Werner Bussmann/Ulrich Klöti/Peter Knoepfel (eds.):* Einführung in die Politikevaluation, Basel 1997; for more literature see the footnotes below.

4 Out of the many pessimistic voices see only *Klaus F. Röhl:* Rechtssoziologische Befunde zum Versagen von Gesetzen, in: *Hagen Hof/Gertrude Lübbe-Wolff (eds.):* Wirkungsforschung zum Recht I. Wirkungen und Erfolgsbedingungen von Gesetzen (Interdisziplinäre Studien zu Recht und Staat 10) Baden-Baden 1999, 413-438 (422); *Stephan Wolff:* 10 Thesen zur Wirkungsforschung aus der Sicht eines sozialwissenschaftlichen Beobachters, id. 459-499 (469); *Gertrude Lübbe-Wolff:* Schluß-Folgerungen zur Rechtswirkungsforschung, id. 645-685 (451).
For a history of scientific policy evaluation see *Carol Hirshon Weiss:* Evaluation, New Jersey (2. ed.) 1989, 10-15; *Helmut Wollmann:* Implementationsforschung – Eine Chance für kritische Verwaltungsforschung?, in: *id. (ed.)*. Politik im Dickicht der Bürokratie. Beiträge zur Implementationsforschung, Opladen 1980, 9-48 (10-23).

I. The Simplistic Hypothesis

The stark and simplistic hypothesis runs like this: The constitutional court fulfils the dreams of the seventies. Relying on the proportionality principle, it rationalises politics by providing a reliable and powerful mechanism for the assessment of its outcomes. It is indeed attractive both to interpret the proportionality principle as an evaluation tool for regulative policy and to interpret the constitutional court as an evaluation authority. It would fence evaluation initiatives off from those interested in political control. And the evaluation procedure would have teeth, given the power of the court to invalidate statutes and to reinterpret them "in the light of the constitution"[5].

The dogmatics of the proportionality principle would allow it to be interpreted in a way that turns it into an evaluation tool. It consists of four tests, which are applied cumulatively[6]. The interference with freedom or property must serve a legitimate end. The interference must be conducive to that end. It must be the least intrusive intervention. And it may not be overly intrusive.

If the legislator explicitly states its goal, the constitutional court starts from this statement. It asks whether the constitution has given the legislator the freedom to choose this end. If the legislator is silent or equivocal, the court engages in reconstructing the purpose from the means and the context of the statute. The remaining three tests view the interference with freedom or property as a means for reaching an end.

The first test is concerned with causality. Does the means have the potential to bring reality closer to the regulative end? In constitutional jargon: is it conducive to that end[7]?

The second test calls for comparing institutions. The operation is threefold: Does the legislator have other means for reaching its goal at its disposal? If so, are they at least as effective as the chosen means? And if so, do any of them grant more room to exercise the fundamental freedom that the actually chosen means interferes with? In constitutional jargon: is it the least intrusive measure[8]?

More often than not these strengths and weaknesses of alternative institutions fall into different normative categories. One institution precisely removes the disincentives for doing what is socially beneficial; but it has no access to the cognitive models of its addresses. Another is flexible and thereby more likely to be evolutionary stable, but it comes at a high regulatory cost. A third one leaves the ability of markets to readjust to changing circumstances largely untouched, but it has an unfavourable distributional effect[9]. In this case, the second test becomes moot. For

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5 Out of the rich literature see only *Karl August Bettermann*; Die verfassungskonforme Auslegung, Heidelberg 1986; for the respective question on the US law see *Emely Shirwen*: Rules and Judicial Review, in: Legal Theory 6 (2000) 299-321.

6 For an overview see *Jörn Ipsen:* Staatsrecht II (Grundrechte), Neuwied 3rd edition 2000, R 169-182; *Bodo Pieroth/ Bernhard Schlink*: Grundrechte Staatsrecht II, Heidelberg 16th edition 2000, R 279-297.

7 „geeignet"; Clear on this Friedrich E. Schnapp: Die Verhältnismäßigkeit des Grundrechtseingriffs, in: JuS 1983, 850-855 (852): „Eine Maßnahme ist dann zur Zweckerreichung geeignet, wenn mit ihrer Hilfe der gewünschte Erfolg näherrückt. Sie ist ungeeignet, wenn sie die Erreichung des beabsichtigten Ziels erschwert oder im Hinblick auf das Ziel überhaupt keine Wirkungen entfaltet".

8 „erforderlich"; BVerfGE 30, 292, 316: „wenn der Gesetzgeber nicht ein anderes, gleich wirksames, aber das Grundrecht nicht oder doch weniger fühlbar einschränkendes Mittel (Maßnahme) hätte wählen können".

9 For a more comprehensive analysis of normative criteria for comparing regulatory institutions see *Christoph Engel*: Abfallrecht und Abfallpolitik [*** B V 2 and passim ***].

it is not possible to translate all these criteria into one uniform normative currency[10]. In such situations, the court is forced to make a political decision. It must weigh the competing normative criteria against the degree to which they are affected in the case at hand. In constitutional jargon: the means may not have been overly onerous[11]. This may also be the case if an alternative means is a little less effective in reaching the regulatory goal, but it is also much less intrusive[12].

This proportionality principle could serve as a vehicle for what political scientists call the positivistic evaluation model. This model interprets policy as a form of problem solving under limited knowledge. Assessing outcomes enlarges the knowledge base. A policy cycle is expected to come back to the issue and improve the solution, using the additional knowledge[13]. Within this model, the constitutional court could serve a double purpose: It is an evaluation authority. And by the decision to invalidate the statute, it puts the issue back on the political agenda[14].

II Qualifications from the political sciences

As mentioned earlier, this hypothesis is grossly simplified. It meets qualifications from both the legal and the political arena. Political scientists have assembled a long list of qualifications for the positivistic evaluation model. They point to the limited role of rationality in analysis (1); to the

10 More on conceptionally incompatible normative criteria from *Christoph Engel*: Offene Gemeinwohldefinitionen (Preprints aus der Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter Bonn 2000/16).

11 „angemessen"; BVerfGE 9, 338, 345; BVerfGE 30, 292, 316 uses the following formula: „Bei einer Gesamtabwägung zwischen der Schwere des Eingriffs und dem Gewicht und der Dringlichkeit der ihn rechtfertigenden Gründe muß die Grenze der Zumutbarkeit noch gewahrt sein".

12 For an example see BVerfGE 7, 377, 406; a classic formulation is to be found in BVerfGE 67, 157, 163: „Nach dem Grundsatz der Verhältnismäßigkeit muß die hier in Frage stehende Grundrechtsbegrenzung (strategische Überwachung) geeignet sein, den Schutz des Rechtsguts (rechtzeitiges Erkennen und Begegnen der Gefahren eines bewaffneten Angriffs auf die Bundesrepublik Deutschland) zu bewirken. Sie muß dazu erforderlich sein, was nicht der Fall ist, wenn ein milderes Mittel ausreicht. Schließlich muß sie im engeren Sinne verhältnismäßig sein, das heißt in einem angemessenen Verhältnis zu dem Gewicht und der Bedeutung des Grundrechts stehen".

13 *Eric Albaek*:Policy Evaluation. Design and Utilization, in: *Ray C. Rist* (ed.): Policy Evaluation, Brookfield 1995, 5-18 (6 s.); on the classic model for the policy cycle see *Renate Mayntz*: Die Implemetation politischer Programme. Theoretische Überlegungen zu einem neuen Forschungsprogramm, in: *id. (ed.)*: Implementation politischer Programme, Königstein 1980, 236-249 (236 and 238).

14 The similarity between the proportionality principle and policy evaluation is patent in the following quote from *Stuart S. Nagel*: Systematic Policy Evaluation, in: *id. (ed.):* Encyclopaedia of Policy Sciences, New York 1994, 31-48 (31). His model of policy evaluation has the following five steps: "(1) goals to be achieved; (2) alternatives available for achieving them; (3) relations between goals and alternatives; (4) tentative conclusions as to which alternative, combination, or allocation is best; and (5) what – if analysis designed to show the effects and tentative conclusions of chancing the inputs". Occasionally, this interpretation also finds explicit support in the legal community. *Karl F. Schumann*: Experimente mit Kriminalitätsprävention, in: *Hagen Hof/Gertrude Lübbe-Wolff (eds.):* Wirkungsforschung zum Recht I. Wirkungen und Erfolgsbedingungen von Gesetzen (Interdisziplinäre Studien zu Recht und Staat 10) Baden-Baden 1999, 501-513 (510) claims, „dass gerade bei strafrechtlichen Maßnahmen eine strikte Wirkungsforschung unverzichtbar ist, weil mit ihnen regelmäßig Grundrechtseingriffe verbunden sind, die dem Verhältnismäßigkeitsprinzip unterliegen, das unwirksame Maßnahmen verbietet"; see also *Herbert Helmrich*: Notwendigkeit der Rücksichtnahme des Gesetzgebers auf die Motivation der Gesetzesadressaten, id. 515-522 (521); „Ich behaupte, dass das derzeitige Handwerkszeug staatsrechtlicher Argumentation die wahren Probleme nicht mehr erreicht und sehe deshalb die herkömmliche Argumentation des Bundesverfassungsgerichts als unzureichendes, verkrustetes Werkzeug an".

limited role of rational problem solving in politics (2); to the fact that evaluation is itself political action (3) ; and to a number of normative counter arguments (4).

1. The Limited Role of Rationality for Analysis

The positivistic evaluation model in essence calls for the rationalization of politics[15]. A strong belief in the feasibility of planning and governance stands behind this. It had been expected that the challenge boils down to "making the apparatus more intelligent"[16].

History and science have had a sobering effect. Full rationality is not for us humans. Bounded rationality is best we can do. We often use heuristics as mental shortcuts[17]. Problems fall into mental compartments, and they stand little chance of being transformed into a neighbouring compartment[18]. Formalized organisations and procedures, like the legislative process, fare somewhat better. They can overcome some of the individual limitations by selection, training and the division of labour[19]. But even these efforts can at best yield gradual improvements.

Moreover, the right intentions are not enough. Even if the legislator correctly analyses the policy problem, it can be hard to predict the effect of the intervention. For real world conditions are not likely to follow a simple stimulus-response model[20]. Causality is not likely to prevail. The intervention will hardly ever be the sole change in the addressees' environment. Given that, the legislator will only be able to predict the effect if he knows the other changes and how they interact[21]. Complexity will quickly push the issue beyond predictability. This is even more likely if the desired effect has a certain duration. For then both the problem and the addressees' reaction to it evolve over time[22].

All these observations would even hold in a world populated by machines. But regulation targets humans. And humans are not programmed to mechanically re-adapt, once restrictions change. They make decisions by way of their cognitive and motivational apparatus. They have to learn what political intervention means for them in specific cases[23]. And they can react creatively. Such unexpected moves are almost unpredictable. They can harmonize with legislative intent just as

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15 Explicitely *Weiss* Evaluation (*supra* note 4) 10 with references; *Helmut Wollmann*: Evaluation research in politics. Between a Science-Driven and Pluralist Controversy-Responsive Policy-Making Model. Potential and Limitations, http://www.uni-koeln.de/ew-fak/Wiso/doku/wollman.html, visited on November 7, 2000; critical *Albaek* in *Rist* (*supra* note 13)17; *Ray C. Rist*: Introduction, in: *id. (ed.)*: Policy Evaluation, Brookfield 1995, XIII-XXVI (XVI with refs.)

16 Reported by *Renate Mayntz*: Steuerung, Steuerungsakteure und Steuerungsinstrumente. Zur Präzisierung des Problems, 70 HiMon, Universität Gesamthochschule Siegen 1986, 11.

17 Stimulating on both *Gerd Gigerenzer/Peter M. Todd:* Fast and Frugal Heuristics. The Adaptive Toolbox, in: *id. (ed.):* Simple Heuristics That Make us Smart, New York 1999, 3-36.

18 This is the basic tenet of deontic reasoning, for an evolutionary analysis see *Leda Cosmides/John Tooby:* Better than Rational. Evolutionary Psychology and the Invisible Hand, in: AIA Papers and Proceedings 84 (1994) 327-332.

19 See in greater detail *Christoph Engel:* Legal Responses to Bounded Rationality in German Administration, in: Journal of Institutional and Theoretical Economics 150 (1994) 145-162.

20 *Wolff* in *Hof/Lübbe*-Wolff (*supra* note 4) 495 s.

21 *Hans-Peter Krüger:* Methodische Desiderate zur Wirkungsforschung, in: *Hagen Hof/Gertrude Lübbe-Wolff (eds.):* Wirkungsforschung zum Recht I. Wirkungen und Erfolgsbedingungen von Gesetzen (Interdisziplinäre Studien zu Recht und Staat 10) Baden-Baden 1999, 489-494 (489).

22 *Gerd Schmidt-Eichstaedt:* Unter welchen Voraussetzungen erfüllen Gesetze ihren Zweck? , in: *Hagen Hof/Gertrude Lübbe-Wolff (eds.):* Wirkungsforschung zum Recht I. Wirkungen und Erfolgsbedingungen von Gesetzen (Interdisziplinäre Studien zu Recht und Staat 10) Baden-Baden 1999, 617-626 (617 s.).

23 Basic on the multiplicity of learning mechanism *Michael Domjan:* The Principles of Learning and Behavior, Pacific Grove 4th edition 1998.

well as they can counteract it[24]. This being the case, the legislator would be wise to switch from a concept of causality to one of systemic connection. Legislative intervention is an impulse for social behaviour; social behaviour is an impulse for legislative action[25].

Finally, humans do not live in isolation. Their behaviour is socially embedded[26]. This does not mean that there is no room for individual will. But the way they perceive the world around them, and the solutions they can think of, are shaped by culture and history[27]. The legislator may therefore not confine itself to affecting individual utility. It has to envisage group behaviour[28] and the political force of ideas[29].

2. The Limited Role of Rational Problem Solving in Politics

Political actors might not only be unable to engage in fully rational problem solving, they might also be unwilling to do so. However, even if a single actor were willing and able to do so, he would have to take the logic of politics into account. Politics is about interest aggregation and conflict resolution[30]. Politicians are experts of the politically feasible[31]. They have to cope with political veto points[32]. Moreover, the political arena is not entirely populated by idealists. The typical policy maker does not only react to power exercised by his colleagues. He too wants one interest to dominate over competing ones[33].

A scientifically sound recommendation to the legislator shows how large the gap between pure problem solving and politics actually is. This observer counselled the legislator to start statutes with sentences like: This statute is meant to lower the number of socially detrimental cases by 10% over a period of two years[34]. Political reality is miles away. It almost never quantifies goals. If it explicitly formulates a goal, it tends to be rather vague. The lack of clarity makes it possible to gloss over the fact that advance consensus was out of reach[35]. Small inconsistencies can be better than the total failure of a policy[36]. Hammering out imprecise goals can be the task of implementation rather than policy formulation[37]. Behind the explicit goals there may be a hidden

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24 *Gerhard Wegner:* Wirtschaftspolitik zwischen Selbst- und Fremdsteuerung - Ein neuer Ansatz (Contributiones Jenenses 3) Baden-Baden 1996.

25 *Krüger* in *Hof/Lübbe-Wolff* (*supra* note 21) 498.

26 *Mark Granovetter:* Economic Action and Social Structure. The Problem of Embeddedness, in: American Journal of Sociology 91 (1958) 481-510.

27 For a stimulating juxtaposition of rationalist and constructivist views see *Tanja A. Börzel/Thomas Risse:* Die Wirkung internationaler Institutionen. Von der Normanerkennung zur Normeinhaltung (Preprints aus der Max-Planck Projektgruppe Recht der Gemeinschaftsgüter Bonn 2001/***).

28 Graphic *Timur Kuran:* Ethnic Norms and their Transformation through Reputational Cascades, in: Journal of Legal Studies 37 (1998) 623-659.

29 On the relationship see *Victor Vanberg/James M. Buchanan:* Interests and Theories in Constitutional Choice, in: Journal of Theoretical Politics 1 (1989) 49-62; *Albert S. Yee:* The Causal Effects of Ideas on Policies, in: International Organization 50 (1996) 66-108.

30 *Wollmann* Science versus Controversy (*supra* note 15) 1.

31 *Michael Kloepfer:* Gesetzgebung im Rechtsstaat, in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 40 (1982) 63-98 (98).

32 This concept has been developed by *Ellen M. Immergut*: Health Politics. Interests and Institutions in Western Europe, Cambridge 1992.

33 Graphic Rist in Rist *(supra* note 15) XVII: the exercise of power is not to be equated with the interpretation of data; see also *Mayntz* in *Mayntz* Implementation (*supra* note 13) 240: the assessing outcomes perspective has an effectiveness bias; for a conceptual perspective of how problem solving and power politics are linked see *Jack Knight:* Institutions and Social Conflict, Cambridge 1993.

34 *Krüger* in *Hof/Lübbe-Wolff* (*supra* note 21) 491.

35 *Albaek in Rist* (*supra* note 13) 11.

36 *Mayntz* in *Mayntz* Implementation (*supra* note 13) 245.

37 See *Mayntz*, id., pointing to the complex and procedural character of implementation.

agenda[38]. Tentative formulations do make it easier to change the goal over time[39]. Not so rarely, policy makers even shun such modest attempts at rationalisation. They go directly for a muddling through approach[40]. Occasionally, it is even the other way around. It is not the policy problem that looks for a solution; instead a viable solution looks for a pertinent policy problem[41].

3. Evaluation is Political Action

In the simplistic model from which this paper starts, evaluation is an innocent service for policy makers. It provides them with something inherently valuable, with information about whether they have reached their goals. This perspective is naive. A rational policy maker will envisage the detrimental effects of negative evaluation on addressees. If such a study documents an important implementation deficit, the willingness to voluntarily abide by the norm might erode[42]. Knowing that others disregard the statute without being punished hurts a strong fairness norm[43]. Erosion can also result if an official study reveals that a statute, although it is implemented, does not attain its stated goals. The addressees would rightly feel that their efforts are useless.

The effects of policy evaluation on policy makers themselves are even stronger. This is obvious if some actors want the statute not to become effective[44]. Even if they still believe in the use of the statute, they can fear for the effect of the initiative or its results on the political process[45]. They can be afraid of putting a controversial issue back on the political agenda[46]. And policy evaluation is a weapon that can be used in the political struggle to hurt the opponent[47]. A favourable outcome makes government stronger, an unfavourable one gives the opposition clout. If the outcome is spectacular, or if the media jump on it, it can open up a new political window of opportunity. Conversely, a call for proper evaluation is a frequent tool of those who dislike an initiative but feel impeded by public attention to say so openly. They can hope that the political climate has changed once the evaluation results arrive[48]. Finally, even if no interested actors wish to play their own game, the results of policy evaluation have to be fed back into the political process. This is not a merely technocratic exercise; in its best moments it is an instance of organizational learning[49]. Whether it will be effective is also a question of timing[50]. The older

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38 *Edmund Brandt:* Vergleich zwischen den Zielsetzungen des Gesetzgebers und den tatsächlichen Wirkungen des Gesetzes, in: *Hagen Hof/Gertrude Lübbe-Wolff (eds.):* Wirkungsforschung zum Recht I. Wirkungen und Erfolgsbedingungen von Gesetzen (Interdisziplinäre Studien zu Recht und Staat 10) Baden-Baden 1999, 23-34 (28); *Albaek* in *Rist* (*supra* note 13) 11: "Thus a program that is a failure at the manifest level (i.e. does not fulfill explicitly stated policy ends) may well be a success at the latent level".

39 *Rist* in *Rist (supra* note 13) XXII.

40 *Albaek in Rist* (*supra* note 13) 10.

41 This is the basic idea of so-called garbage-can models of policy making. Basic *Johan P. Olsen/James G. March:* Ambiguity and Choice in Organizations, Bergen 1976.

42 *Röhl* in *Hof/Lübbe-Wolff* (*supra* note 4) 431 s.

43 On the role of fairness norms see *Ekkehart Schlicht*: On Custom in the Economy, Oxford 1998.

44 *Lübbe-Wolff in Hof/Lübbe-Wolff* (*supra* note 4) 651; see also *Mayntz* in *Mayntz* Implementation (*supra* note 13) 741.

45 See *Rist* in *Rist (supra* note 15) XXIV: "Policy evaluation becomes part of a web of interacting forces, sources of information, power systems and institutional arrangements".

46 See *Thomas Raiser*: Wirkungen des Mitbestimmungsgesetzes, in: *Hagen Hof/Gertrude Lübbe-Wolff (eds.):*. Wirkungsforschung zum Recht I. Wirkungen und Erfolgsbedingungen von Gesetzen (Interdisziplinäre Studien zu Recht und Staat 10) Baden-Baden 1999, 107-120 (107); for this reasons, the official evaluation of co-determination legislation is unlikely.

47 See *Wolfgang Bruder:* Forschungsanalytische Defizite der Implementationsforschung, in: Die Verwaltung 1984, 129-142 (131): implementation is strategic interaction.

48 This is what apparently happened in Germany with the idea of transforming some prisons into institutions of social therapy, see *Schuman*n in *Hof/Lübbe-Wolff* (*supra* note 21) 504-508.

49 *Rist in Rist* (*supra* note 15) XXIII s.

issue has to compete for attention with more recent ones. It also has to compete for the limited problem solving capacity of political institutions.

The third reason for the inevitably political nature of policy evaluation is derived from elements already mentioned. There is more than one normative currency. Typically there is quite some factual and conceptual uncertainty and complexity. Often, a political decision is even on purpose unclear, since this had been the only way to overcome controversy. A frequent way to do so is to ground it on more than one, overlapping or even contradictory set of reasons. In any of these situations, an evaluation body must artificially clarify the intentions of the political measure as a technical precondition for assessing it. This clarification is in itself bound to be a political decision.

4. Normative Counter Arguments

Why should making a policy better be objectionable? For this is what normative counter arguments must oppose[51]. At close sight, however, there are many reasons. The policy may have had a questionable goal from the outset. It may have overlooked important ideas or interests. It may be counter-productive, given its own ends[52]. The cost of a policy may exceed its benefits, given the out of pocket costs of government or the addressees, opportunity costs or intrusions into individual freedom. Better public control over policy makers, a better balance of political powers, more checks and balances or more active public participation in policy making can all justify the sacrifice of some effectivity[53]. Moreover, too strong a policy can be detrimental in the long run. It can keep resistance alive, where mere symbolic policies might have paved the way for a change of values over time[54].

From a scientific or technocratic perspective, it seems obvious that policy programs should be precise. That reality is often different, looks like failure[55]. From an evolutionary perspective, things look quite different[56]. In an environment characterised by frequent and unpredictable change, a policy that perfectly remedies a social problem at the moment of its formulation may quickly become disfunctional. Psychologists have a graphic term for the danger. They call it overfitting[57]. For lawyers, this does not come as a surprise. They are accustomed to applying rather general rules to their specific cases. They frequently experience how the meaning of the rule gradually changes in light of the experiences during implementation[58].

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50 *Weiss* Evaluation (*supra* note 4) XIII.

51 Explicitly *Mayntz* in *Mayntz* Implementation (*supra* note 13) 240.

52 *Adrienne Windhoff-Héritier*: Politikimplementation. Ziel und Wirklichkeit, Königsstein 1980, 6; *Mayntz in Mayntz* implementation (*supra* note13) 240.

53 See *Windhoff-Héritier* (*supra* note 52) 79: *Nagel* in *Nagel* (*supra* note 14) 32.

54 The classic text on symbolic politics is *Murray Edelman*: The Symbolic Use of Politics, Urbana 1985; see also *Bernd Hansjürgens/Gertrude Lübbe-Wolff (eds.):* Symbolische Umweltpolitik, Frankfurt 2000; For the link to policy evaluation see e.g. *Röhl in Hof/ Lübbe-Wolff* (*supra* note 4) 421.

55 *Mayntz in Mayntz* Implementation (*supra* note 13) 242 and 245 seems to think along these lines, if she points to the danger of goals being tacitly altered; see also *Gerd-Michael Hellstern/Helmut Wollmann*: Wirkungsanalysen. Eine neue Variante wissenschaftlicher Politikberatung, in: *Carl Böhret et al. (eds.):* Planungen in Öffentlicher Hand (transfer 4) Opladen 1977, 157-168 (160).

56 For an overview of evolutionary theory as applied to social and political actions see *Robert Nelson:* Recent Evolutionary Theorizing about Economic Change, in: Journal of Economic Literature 33 (1995) 48-90; *Ulrich Witt:* Evolutionary Economics. Some Principles, in: *id. (ed):* Evolution in Markets and Institutions, Heidelberg 1993, 1-16.

57 See *E. G. Laura Martignon/Ullrich Hoffrage*: Why does One-Reason Decision Making Work? A Case Study in Ecological Rationality, in *Gerd Gigerenzer/Peter M. Todd (eds.)*: Simple Heuristics that Make us Smart, New York 1999, 119-140 (127-129).

58 More on this from *Christoph Engel*: Die Grammatik des Rechts, in: *Hans-Werner Rengeling/Hagen Hof (eds.)*: Instrumente des Umweltschutzes im Wirkungsverbund, Baden-Baden 2001, 17-49 (23-34).

Finally it can even be appropriate to stick to a policy, although evaluation has highlighted both that and why is not fully satisfactory. The first reason is borrowed from the theory of sciences. Scientists do not give up a paradigm once they find the first phenomenon that is hard to explain with it. Instead, they try to improve the paradigm, or to divert their interests to issues where it seems to have greater explanatory power. This conservatism is reasonable as long as competing paradigms are not well developed[59]. *Mutatis mutandis*, the same holds true for governance tools. If policy makers know how a certain tool works in a certain policy area and in a certain polity, it may be quite reasonable not to exchange it for theoretically more promising, but unexplored alternatives.

The second normative reason for conservatism in regulation is a long-standing issue in constitutional law. The addressees can have legitimate expectations in the stability of previous rules[60]. This is not only a distributional concern. If they cannot reckon with the protection of their expectations, addressees will anticipate unpredictable changes and shy away from the activity.

III. Qualifications from the Law

The respective list of qualifications from the law is no shorter than the one proffered by political scientists. Since the law is in essence a hermeneutical exercise, the legal qualifications translate themselves into dogmatic limitations to the proportionality principle (1). Part of the underlying rationale is close to the objections raised by political scientists, part of it goes back to the specifics of law and of court procedure (2).

1. Dogmatic Limitations

The large majority of constitutional lawyers are not engaged in extending the power of the constitutional court, but in limiting it[61]. They stress the limits of fundamental freedoms in general and the proportionality principle in particular. These dogmatic tools do not determine the legislator, but they do narrow the framework within which the legislator remains free to act[62]. This gradual effect can be couched in terms of density of constitutional control[63]. Thus the constitutionality of a legislative act by no means implies that it is appropriate or reasonable. The court will only intervene if the unconstitutionality is obvious. Defining a legitimate aim is primarily a task for the legislator, not the court[64]. A court can invalidate the statute only if it is "evidently" not conducive to the legislative aim[65]. It is sufficient for a legislative measure if it is

59 Neoclassical economics is a good illustration. Most economists are only too willing to admit to its shortcomings. They nonetheless continue to use it, because it is so elegantly developed.

60 Out of the rich literature see only *Stefan Muckel*: Kriterien des verfassungsrechtlichen Vertrauensschutzes bei Gesetzesänderungen (Schriften zum Öffentlichen Recht 576) Berlin 1989.

61 Characteristic: *Klaus Meßerschmidt* : Gesetzgeberisches Ermessen [*** forthcoming***]; a noteworthy exception is *Helmut Simon*: Verfassungsgerichtsbarkeit, in: *Ernst Benda / Werner Maihofer / Hans-Jochen Vogel (eds.)* : Handbuch des Verfassungsrechts der Bundesrepublik Deutschland, Berlin 1995, 1637-1680, R 44.

62 *Ernst-Wolfgang Böckenförde:* Die Methoden der Verfassungsinterpretation. Bestandaufnahme und Kritik, in: Neue Juristische Wochenschrift 46 (1976) 2089-2099 (2091-2099).

63 See e.g. *Thomas von Danwitz*: Die Gestaltungsfreiheit des Verordnungsgebers. Zur Kontrolldichte verordnungsgeberischer Entscheidungen, Berlin 1989.

64 Characteristic *Wolfgang Martens:* Öffentlich als Rechtsbegriff, Bad Homburg 1969, 186 ss.

65 BVerfGE 39, 210, 230; Consequently the court, until 1994, only found three cases where the test of conduciveness had not been met, *Klaus Stern*: Das Staatsrecht der Bundesrepublik Deutschland III Allgemeine Lehren der Grundrechte, 2. Halbband, München 1994, 777, citing BVerfGE 17, 306, 315 ss; 19, 330, 338 s.; 55, 159, 165 ss.

only partly conducive to the end[66]. Under the next test, the court will only intervene if the alternative means is "evidently" less onerous[67]. It gives the legislator room to assess the facts[68], more room for its own prognostic judgement[69] and for running experiments[70].

2. Underlying Rationale

There are a whole bunch of reasons for such constitutional self-restraint. Some of these reasons *grosso modo* coincide with qualifications brought forward by political scientists. Constitutional courts are not the only rational demons of this world[71]. Moreover, constitutional courts are aware of the political effect of their judgements[72]. But there is no reason to think that constitutional courts are the last benevolent dictators of this world. Controlling the political power of a constitutional court is itself a constitutional issue[73]. The court must not abuse its legal predominance to twist the constitutional balance of power. It must be aware of the fact that it lacks direct democratic legitimacy.

More specific reasons for caution stem from the character of the task the constitutional court has when applying the proportionality principle. The evaluation of a policy is implicit in hermeneutical action. It is part of applying a constitutional rule to a "case", namely the statute. At most, the court tests the whole statute, not other elements of a larger policy of which the statute is part and parcel. As a rule, the test is even limited to isolated provisions of the statute. Frequently, the test of the rule is even embedded in a test of its effects in a concrete case. Moreover testing always happens ex post. And the court has to wait for an outside initiative before engaging in testing. The right to sue is limited to a number of political actors and to those individuals who can claim to be directly affected in their constitutionally protected freedoms. Finally, even if some court action is interpreted as policy evaluation, this is not its primary purpose[74]. First and foremost, the court has to protect individuals from disproportionate interference with their fundamental freedoms. It accordingly looks at a policy from a very specific angle. For policy makers, this is no more than one of the restrictions with which they have to cope.

A further set of qualifications originates in the properties of the court procedure. Court procedure is not a scientific exercise. It is tuned to decide cases with state authority and to do so in a reasonable period of time. This makes it impossible for the court to seriously engage in

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66 BVerfGE 30, 350, 363 s.

67 BVerfGE 17, 232, 244 s.

68 BVerfGE 30, 250, 263: more from *Meßerschmidt (supra* note 61) 845-949.

69 BVerfGE 16, 147, 181 ss; more from *Meßerschmidt* (*supra* note 61) 880-916.

70 BVerfGE 74, 297, 313-339 354, more from *Meßerschmidt* (*supra* note 61) 926-948.

71 Cf. *Meßerschmidt* (*supra* note 61) 729: "Wissenschaftliche Rationalitätsprofile statuieren ein Ideal, dem Rechtssetzungsverfahren aus unterschiedlichen, nicht nur praktischen, sondern auch [...] normativen Gründen nur eingeschränkt zu entsprechen vermögen".

72 Out of the many voices see only *Josef Isensee*: Bundesverfassungsgericht – Quo Vadis? ,in: Juristenzeitung 51 (1996) 1085-1093 (1085) and – with a sceptical attitude – *Wolfgang Böckenförde*: Zur Lage der Grundrechtsdogmatik nach 40 Jahren Grundgesetz, München 1990, 67.

73 *Christoph Engel*: Delineating the Proper Scope of Government – A Proper Task for a Constitutional Court?, in: Journal of Institutional and Theoretical Economics 157 (2001) 187-219 tries however to demonstrate that the court is a very specific political actor.

74 Many constitutional lawyers would even claim that policy evaluation is not the courts business at all. But a growing number of constitutionalists think that constitutional law is not exclusively about protecting citizens from government interference. The plead for balancing effective governance against rule of law, characteristic *Wolfgang Hoffmann-Riem*: Vorüberlegungen zur Rechtswissenschaftlichen Innvoationsforschung, in: *id./Jens-Peter Schneider (eds.)*: Rechtswissenschaftliche Innovationsforschung. Grundlagen, Forschungsansätze, Gegenstandsbereiche (Schriften zur Rechtswissenschaftlichen Innovationsforschung 1) Baden-Baden 1998, 11-28 (22).

scientific policy evaluation[75]. Political scientists would, for instance, check for context dependence and selection bias and would therefore conduct experiments with randomised control groups[76]. Outside scientific evaluation does not offer a way out. Even if there were a realistic chance of the study arriving early enough, the court would be rightly reluctant to ask for it. For assessing the policy behind the attacked statute is not merely a useful technical clarification, it is tantamount to giving the court's core task away to scientists, who themselves are neither democratically nor legally controlled. Relying on outside evaluations that have been ordered by one of the parties of the dispute is even more problematic. For these actors have been driven by their own purposes. Or at the very least, the other party and the public might believe that the study has been biased in their interest.

IV Modest Expectations

The simplistic hypothesis from which this paper started is thus untenable. But there is no reason to throw the baby out with the bathwater. What is called for it is not resignation, but modesty. A modest rationalization of politics is feasible (1), as is a mandate for the constitutional court to act as a subsidiary authority for the assessment of the political outcomes (2). And both are desirable, too.

1. Modest Rationalization of Politics

The rationalization of politics is a matter of degree, not principle. The basic idea from which policy evaluations started has not become wrong over time:

> "Many people want (and need) to know: How is the program being conducted? How well is it following the guidelines that were originally set? What kinds of outcomes is it producing? How well is it meeting the purposes for which it was established? Is it worth the money it costs? Should it be continued, expanded, cut back, changed, or abandoned?"[77].

Currently, there is even a renewed political demand for policy assessment. The recommendations of what is known as the *Schlichter* Commission, "Government on Diet"[78] have probably had the highest visibility.

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75 For an overview of legitimate scientific standards for evaluation see *Lars Brocker*: Gesetzesfolgenabschätzung und ihre Methodik, in: *Hagen Hof/Gertrude Lübbe-Wolff (eds.)*: Wirkungsforschung i^m Recht I. Wirkungen und Erfolgsbedingungen von Gesetzen. (Interdisziplinäre Studien zu Recht und Staat 10) Baden-Baden 1999, 35-42 (36-39).

76 For an overview see *Robert F. Boruch*: Randomised Experiments for Planning and Evaluation. A Practical Guide, Thousand Oaks 1997; for other equally legitimate methodological demands see *Krüger* in *Hof/Lübbe-Wolff (supra* note 4) 489-493.

77 *Weiss* Evaluation (*supra* note 4) 6.

78 Sachverständigenrat "Schlanker Staat", Abschlußbericht, Materialband, Leitfaden zur Modernisierung von Behörden, 2. Aufl., Bonn 1998. The follow up project of the new government called "Moderner Staat – Moderne Verwaltung, http://www.staat-modern.de/programm/index.html (May 5, 2001), sticks to the idea of policy evaluation, see page 6.
For a legal voice, see *Peter Lerche*: Übermass und Verfassungsrecht. Bindung des Gesetzgebers an die Grundsätze der Verhältnismäßigkeit und der Erforderlichkeit, Goldbach (2nd edition) 1999, 12: „Intensiver als früher wird der Gesetzgeber an rationale, als vernünftig einsehbare Rechtfertigungserfordernisse gebunden gedacht [...]. Das geht Hand in Hand mit dem allgemeineren Verblassen vorgegebener gesellschaftlicher Übereinstimmungen bei materialen Bewertungen".

It exists a considerable "no regret space"[79], where explicit policy evaluation either hurts no interests, or where the opposing interests are not legitimate. And, in principle, there is even the possibility of going beyond that line, if rationalization is more valuable than the costs of assessment that it entails.

Explicit assessment is particularly helpful for the prospective evaluation of an untested rule design[80]. Ex post testing is quite natural if a rule design has been exclusively based on a model, on experiences or on remote circumstances. The evaluation may uncover the degree of concordance between legislative intent and implementation practice. There might have been a mismatch between both[81]. The decision routines of implementation authorities might counteract the policy design[82]. The political intervention might no longer be necessary, since the environment has changed. Policy evaluation might uncover unexpected side-effects or unexpected creative reactions by the addressees[83]. Moreover, explicit policy evaluation not only has instrumental value[84]. It can also give the rule-design and rule-application authorities additional output-legitimacy[85]. Assessment also works as a check and balance for interested policy making and as an indirect voice mechanism for the electorate[86].

Finally, there is a pragmatic reason for explicit policy evaluation. It collects the experiences from the experiments of life. The information inherent in these experiences is not wasted. Systematic mistakes are a particularly cheap mechanism for generating information[87].

The forgoing has been a list of beneficial effects that evaluation can have on the evaluated policy itself. But frequently, the benefits stretch beyond the policy under review. They contribute to the generation of governance knowledge in general[88]. To the extent that such knowledge is uncovered, the evaluation of a specific policy has, economically speaking, positive externalities. It helps improve other policies. In particular, it lays the foundations for anticipating a lack of efficacy in future policies[89]. The outcomes of policy evaluation can thus not only be put to instrumental use, they can also be put to conceptual use[90]. They are an element of organizational learning[91].

One example must suffice. In the GDR, driving after the consumption of any alcohol whatsoever was absolutely prohibited. The Federal Republic had relatively lenient drinking limits. Directly after reunification, the total ban remained in force in the Eastern parts of the country. But there was little enforcement, due to the break down of the police system. Some years later, the standard

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79 I owe the graphic formula to Thomas Helller, who applies it to the negotiations for climate change.

80 See *Helmrich* in *Hof/Lübbe-Wolff (supra* note 14) 515.

81 *Windhoff-Héritier* (*supra* note 52) 118.

82 *Wollmann* in *Wollmann* 1980 (*supra* note 4) 36.

83 Basic on the latter *Wegner (supra* note 24); see also *Windhoff-Héritier* (*supra* note 52) 19 and for an illustrative example *Raiser* in *Hof/ Lübbe-Wolff* (*supra* note 46) 116: shareholders have circumvented codetermination by transferring decisions into commitees; the representatives of workers have breached their premise of confidentiality, claiming they had to justify themselves towards their electorate.

84 *Rist* in *Rist* (*supra* note 15) XIII and XVII.

85 Basic on the distinction between input-legitimacy and output-legitimacy *Fritz W. Scharpf*: Regieren in Europa. Effektiv und demokratisch? (Schriften des Max-Planck-Instituts für Gesellschaftsforschung) Frankfurt 1999, 16-28.

86 Basic on voice *Albert Hirschmann*: Exit, Voice and Loyalty, Cambridge 1970.

87 *Reiner Eichenberger*: Wissen und Information in ökonomischer Perspektive, [***forthcoming in *Engel/Halfmann/Schulte* Wissen, Nichtwissen, Unsicheres Wissen, Baden-Baden 2001 *** forthcoming *** 4].

88 *Rist* in *Rist* (*supra* note 15) XIX

89 *Windhoff-Héritier* (*supra* note 52) 3.

90 *Albaek* in *Rist (supra* note 13) 8.

91 *Rist* in *Rist* (*supra* note 15) XXIII – XXV.

was changed to agree with the more generous Western norm[92]. This natural experiment helps evaluators uncover a number of generic insights. Although the total ban remained in force in the first period, the number of incidents of driving under the influence of alcohol and the number of accidents occurring under the influence of alcohol jumped[93]. After the change in the standard, driving after consuming alcohol became more frequent among young drivers[94]. If one wants to explain these findings, one has to distinguish three groups of drivers. A strong group is principally motivated not to drive under the influence of alcohol. A small group of heavy drinkers is hardly influenced by the legal standard. When the legal rules become more lenient, they drink even more. And there is a group in between, which can, in principle, be reached by legal provisions. Those in this group are characterized by a conflict between their wish to drink and their wish to drive. If it becomes less likely that they will be sanctioned, they do not drive more often under the influence of alcohol; but they drink more if they do[95]. Older drivers are not likely to switch from one of these groups to another. However, this is different with young drivers[96].

For such knowledge to be useful in other policy domains, one precondition is that governance knowledge have a generic character. The three categories are not likely to be the same for murder or fraud. Social norms, even genetic mechanisms, might make it unlikely that the young will try out killing the same way they try out drinking under the influence of alcohol[97]. On a more abstract level, the findings are more likely to hold across policy domains. There will always be a number of people who play by the rules, others who ignore them anyhow, and others still who might be tempted. If the legislator targets this last group, he should not overlook beneficial of detrimental side effects on the other two groups. Generic governance knowledge is thus not a mechanical toolbox. But most policy problems and most solutions are not entirely specific. A cross fertilization among policies is normally feasible. If it does no more, the governance knowledge at least generates hypotheses for rule design in other areas.

2. The Constitutional Court as a Subsidiary Assessment Authority

Along the same lines, it is appropriate to regard the constitutional court not as a primary, but as a subsidiary authority for policy evaluation. Assessing political outcomes should thus be viewed as a subsidiary task of the proportionality principle. For the proportionality principle, as applied by the constitutional court, has a specific potential to modestly rationalise politics.

In a number of respects, the application of the proportionality principle by the constitutional court differs from evaluation executed or ordered by policy-makers themselves. The court is a disinterested actor. It is not directly politically controlled, and therefore it is relatively independent from the political veto players[98]. Moreover, this actor cannot itself start an evaluation. Instead, it depends on outside initiative. Since the constitutional court is no longer allowed to give advisory opinions on legislative bills[99], it has to evaluate the policy after the

92 More on this case from *Hans-Peter Krüger*: Verzicht auf Sanktionsnormen im Straßenverkehrsrecht – Ein Beitrag zur Effektivität von Verhaltensnormen?, in: *Hagen Hof/Gertrude Lübbe-Wolff (eds.)*: Wirkungsforschung zum Recht I. Wirkungen und Erfolgsbedingungen von Gesetz (Interdisziplinäre Studien zu Recht und Staat 10) Baden-Baden 1999, 223-233; *Heinz Schöch*: Verzicht auf Sanktionsnormen im Straßenverkehrsrecht – Ein Beitrag zur Effektivität von Verhaltensnormen?, id. 235-244.

93 *Krüger* in *Hof/Lübbe-Wolff* (*supra* note 92) 232.

94 Id. 232 s.

95 Id. 231.

96 Id. 231 s.

97 But a visit in some parts of the US casts some doubt on this hypothesis.

98 For the concept of veto players see again *Immergut* (*supra* note 32).

99 It had this power until 1956, *Christian Pestalozza*, Verfassungsprozeßrecht, 3. ed., München 1991, § 17 Rn. 4-6.

legislator has passed the bill. Normally, the bill has already been implemented as well[100]. This presupposes, however, that the statute itself impinges upon the fundamental freedom in question, not only its later implementation[101]. On the other hand, the constitutional court normally decides while the statute is still in force[102]. This timing makes the constitutional court a particularly valuable assessment authority. For it implicitly engages in reflexive evaluation[103]. The court intervenes during the implementation of the program. The result of its assessment activity can thus be fruitfully fed back into the process for the further implementation of the rule.

A further advantage of the assessment activity by the court is that the court is particularly well-suited for detecting unexpected outcomes and atypical cases. This is so, since the main task of the court is to settle individual cases. Since the party has a realistic chance for redress, they have a strong incentive to bring such cases before the court. It is obvious that academic evaluators do not have similar incentives. And even policy makers themselves are disadvantaged. If the person atypically affected has a vague understanding of a political process, they will rightly find it unlikely that the legislator react to some cases on the fringe of a policy.

A related advantage stems from the fact that the basic task of the court is to settle conflicts between the citizen and the state. Conflicts in real life are likely to generate credible information. Since the court has power to decide the conflict, it is in the interest of both the complainant and government to give the court as pertinent and as reliable information as they can.

The court does not only have a specific and helpful assessment program, it also possesses specific ways of affecting politics. To be sure, it has the repeatedly mentioned power to invalidate statutory provisions. In practice, however, this is rarely invoked. The court would much rather rely on the plasticity of the statute as an option for piecemeal engineering. To that effect, it would interpret the statute "in accordance with the constitution". According to the rhetoric of the court, this is a means for going easy on the legislation. But it has a less benevolent side. It allows the constitutional court to actually rewrite a statute. This technique thus transforms a negative into a positive, formative power. And it frees the court from the original all-or-nothing situation. It no longer has to risk a highly politicised conflict with the legislator. Instead, it usurps a small part of its powers.

Even if the court forgoes this option and upholds a statute, it can have an impact on politics. For the operative judgement is not the only way to become politically active. The court can also use the reasons for the judgement to coin new regulative ideas. An illustrative example is the court's judgement on census. There, it practically coined a new fundamental freedom – for informational self-determination[104]. The judgement triggered a legislative avalanche, introducing data protection into almost every other policy area.

The latter is an example of how the court can indirectly change politics. Political actors know that any statute could be taken to court. The opposition can threaten government with a

100 The latter is not necessarily the case. Under exceptional circumstances constitutional complaints can be directed against the statute itself.

101 In procedural jargon the statute must have immediate effects on a fundamental freedom of the claimant, and there must be reason to make an exception from the rule that a constitutional complaint against the statute itself is subsidiary, BVerfGE 71, 305, 335 s, see also BVerfGE 60, 369 s.

102 Unlike the US Supreme Court, the German Constitutional Court has no explicit doctrine of mootness. Once the statute is no longer in force, the complainant is typically no longer presently affected, *Ernst Benda/Eckart Klein*, Lehrbuch des Verfassungsprozessrechts, Heidelberg 1991, Rn. 492.The main exception concerns claims to be compensated for an injury suffered from the implementation of the purportedly unconstitutional provision.

103 The term is coined by *Wolff in Hof/Lübbe-Wolff* (*supra* note 44) 497. He describes it as the retrospective and situational reconstruction of the policy program during its implementation.

104 BVerfGE 65, 1 (43).

constitutional complaint; so can social and individual actors. Game theory has a precise way of describing the mechanism; namely, as changing the payoffs off the equilibrium path [105].

V. The Proper Role of the Constitutional Court in Assessing Political Outcomes

The previous section demonstrated the feasibility of modestly rationalising politics and the feasibility that the constitutional court modestly contributes to assessing political outcomes. What it has not yet demonstrated is that these two elements should be linked. If some rationalization of politics is possible, fine. But why not leave it to the experts, be they political, bureaucratic, or academic agents? And for the constitutional court, does it put its primary tasks at risk if it uses its potential as a subsidiary assessment authority? What is, in other words, the proper role of the constitutional court in assessing political outcomes?

A first solution is in fact a non-option. It would import scientific standards of policy evaluation into the procedure of the constitutional court whenever its application of the proportionality principle had an effect on evaluation. The organization and procedure of the court is not prepared to conduct extensive scientific studies, let alone experiments or investigations in the field. In order to improve its subsidiary assessment function, the court would have to perform its primary function less ably. For the already-mentioned reasons, ordering studies by outside academics would not offer a way out either. That would be tantamount to delegating the court's task to actors who lack the authority and legitimacy of the court.

The second solution directly follows from the first. If full scientific standards are impossible for the court to meet, one apparently has to make a trade off. There is a pessimistic and an optimistic version of this trade off. The pessimistic version interprets the court as a second rate evaluator. In this perspective, poor evaluation quality is the price for having a greater evaluation impact on politics. But if that were the truth, why not replace poor legal assessment with good scientific assessment? If greater power for the assessment authority is a good thing, the legislator could create an independent scientific assessment authority, as it created a court of auditors and a central bank. Admittedly, it might not be easy to reconcile such an authority with the principle of democratic legitimacy. More importantly, the legislator might not be very likely to create a new authority that siphons the legislator's own power. But in this perspective, the normative argument in favour of policy evaluation by the constitutional court would be rather weak. It would boil down to the insight that the court is already in place, and it is competent to interpret the constitution in a way that has an assessment effect.

The optimistic version of the trade off argument works a little better. It does not frame the trade off as one between quality and impact, but as one between theory and practice. It points to the fact that what is feasible *lege artis* tends to be politically irrelevant[106]. This problem is not new. Among themselves, scientists distinguish bad work from good one by methodological rigor and

105 See on that idea *Douglas G. Baird/Robert H. Gertner/Randal C. Picker*: Game Theory and the Law, Cambridge 1994, 17 and passim.

106 *Lübbe-Wolff* in *Hof/Lübbe-Wolff (supra* note 4) 656 does not mince her words; "Meine wenigen eigenen Versuche, empirische Sozialforscher für Rechtswirkungsfragen zu interessieren, die mir umweltrechtspolitisch wichtig schienen, sind fast durchweg am Meer des Unerforschlichen gescheitert. [...] Dann gehört die lex artis auf den Prüfstand [...] ob nicht, wo Ideale der wissenschaftlichen Beweisführung gegenstandsbedingt unerreichbar sind, offene Imperfektikon und bloße Plausibilisierungen in der empirischen Absicherung von Wirkungshypothesen, die für die Praxis wichtig sind, immer noch hilfreicher wären als gar nichts".

originality. The pull of these standards is strong when scientists select issues. If a scientist disregards this pull and takes political relevance to be the prime selection criterion, he risks his reputation among his peers. The constitutional court, on the contrary, is certainly not tempted to become politically irrelevant. But the argument still remains somewhat unsatisfactory. A more obvious solution might seek to change the incentive structure of the disciplinary cultures of scientists in a way that gives politically relevant work higher esteem.

A fully satisfactory solution is offered by systems theory, very liberally employed. It interprets the constitutional court as a borderline actor between the political and the legal system. The argument needs some conceptual preparation.

According to the founding father of systems theory, *Niklas Luhmann*, modern society is reacting to increasing complexity by structural differentiation. Subsystems organise themselves along specific codes. Among them is politics, with its code of formal power, and the law with its code of legality. Each subsystem, through communication, constructs its environment. It autonomously decides whether it pays any attention at all to the activities of other subsystems. If it does not, it treats them as irrelevant noise. If it pays attention, it does so as an outside observer. It autonomously decides how to react to perceived changes in the environment. The central criterion for this choice is its resonance for the change. It must be able to make something useful out of it for its own proper functioning, its autopoiesis, as systems theorists have it[107]. From this, Luhmann concludes that any attempt of one subsystem to deliberately govern another is bound to fail[108].

Some of Luhmann's successors are less sceptical. The most prominent is *Gunther Teubner*. His basic difference from Luhmann on this issue concerns the autonomy of subsystems. Teubner regards it as a matter of degree, not of principle[109]. In his view, it is thus feasible that the legal system could be politically governed[110]. By the same token, politics could, in principle, be governed by a constitution. In this perspective, systems theory is not so much concerned about the possibility of governance as about its form. It insists that governance is not causal. The link between subsystems is systemic. This works on both sides. Whether and how a system reacts to governance attempts still depends on the resonance of the target subsystem. And in its governance activities, the originating subsystem is geared toward its own, internal needs. "The law governs society by governing itself"[111]. Not surprisingly, this strand of systems theory has been much attracted to the now fashionable theories of "governed self governance"[112]. These theories herald "reflexive law" or "contextual governance"[113]. They advise striving for substantive regulatory goals by influencing the organization or procedure of the target group[114]. In the

107 For a comprehensive overview of Luhmann's systems theory see *Niklas Luhmann*: Ökologische Kommunikation. Kann die moderne Gesellschaft sich auf ökologische Gefährdungen einstellen? Opladen (3rd edition) 1990.

108 *Niklas Luhmann*: Einige Probleme mit "Reflexivem Recht" in: Zeitschrift für Rechtssoziologie 6 (1985) 1-18 (4).

109 *Gunther Teubner*: Recht als autopoetisches System, Frankfurt 1989, 95.

110 Id. 83 s with references for similar voices.

111 Id. 82: "Das Recht reguliert die Gesellschaft, indem es sich selbst reguliert".

112 Id. 85: For an influential voice heralding governed self-governance that is not influenced by systems theory see *Georg Hermes*: Staatliche Infrastrukturverantwortung. Rechtliche Grundstrukturen netzgebundener Transport- und Übertragungssysteme zwischen Daseinsvorsorge und Wettbewerbsregulierung am Beispiel der leitungsgebundenen Energieversorgung in Europa (Jus publicum 29) Tübingen 1998, 128-399, in particular 334-342.

113 *Gunther Teubner*: Reflexives Recht. Entwicklungsmodelle des Rechts in vergleichender Perspektive, in: Archiv für Rechts- und Sozialphilosophie 68 (1982) 13-59.

114 More on this from *Christoph Engel*: Regulierung durch Organisation und Verfahren, in: Festschrift Ernst-Joachim Mestmäcker, Baden-Baden 1996, 119-138.

terminology of systems theory, this is a way of increasing the resonance of the target subsystem for governance attempts[115].

There is no categorical reason, however, that governance across subsystems should be limited to this. Attempts at direct substantive governance do not only serve the purposes of the originating subsystem, they can also have an effect on the target subsystem. One possibility is even that the target subsystem interprets the intervention as a new restriction, and that it incrementally adapts to it. The standard assumption of the economic model of policy making is thus not excluded from the list of possibilities. But systems theory rightly insists that it is no more than one possibility. In advance, the originating subsystem can not be sure whether the target subsystem will simply ignore the intervention, or whether it will react in some unpredicted, creative way[116].

Thus prepared, we can come back to the role of the constitutional court in applying the proportionality principal to statutes. Systems theory opens up two ways of conceptualising this role. One could call them a one-way an a two-way solution. The first solution interprets the court as an adaptation actor for the legal system. The second solution interprets the court as a borderline actor for both the legal and the political systems.

In the first perspective, the court is not an assessment actor. Court decisions invalidating or reinterpreting statutory provisions are mere irritations for the political system. The political system remains entirely free to observe and to react to them. What looks like policy assessment is actually a reaction of the legal system to its irritation by statutory provisions. The application of the proportionality principle is part of the effort of the legal subsystem to construct its own environment, "legal reality"[117]. The legal order rightly engages in this activity. For statutes originate in the political, not in the legal subsystem. Their authors intend for them to be "regulative politics". Consequently, they are oriented towards the logic of the political, not the legal system. In politics, internal coherence, predictability, ease of judicial control or respect for fundamental constitutional values are not of prime concern. Conversely, in the legal system, reacting to public unrest, exploiting a narrow window of opportunity, beating veto players or fulfilling obligations from logrolling have no value. Partly reinterpreting a statute by way of the proportionality principle is therefore a powerful means for the legal order to reconstruct its political environment[118]. The need for such construction is all the greater, the more pluralistic society becomes. For then, political consensus-building on the text and the demands of the legal order for the quality of new statutes drive more and more apart.

In itself, this view is convincing, but it is too narrow. Actually, when it applies the proportionality principle to statutes, the constitutional court does not only fulfil a task for the legal order, but also one for the political order. The latter can be interpreted in different ways. From one viewpoint, the constitutional court appears to be a subsidiary political actor, entrusted with de-blocking blockades[119]. From a second viewpoint the court is interpreted as a subsidiary political arena for the parallel legal discourse on political issues. The advantage of this second discourse is twofold. Actors who are excluded from the ordinary political arena can raise their voice. This is

115 *Teubner*: Autopoetisches System (*supra* note 109) 101.

116 Stimulating on these options *Wegner* (*supra* note 24).

117 In German legal jargon "Rechtswirklichkeit" is a standard term, see *Teubner*: Autopoetisches System (*supra* note 109) 82.

118 *Gunther Teubner*: Privatregimes. Neo-spontanes Recht und duale Sozialverfassungen in der Weltgesellschaft?, in: Liber Amicorum Spiros Simitis, Baden-Baden 2000, 437-453 (444) „Typische Distanzierungstechniken: Entpolitisierung und Neutralisierung von parteipolitischen Entscheidungen, Rekonstruktion von ergebnisorientierten policies als universale Rechtsprinzipien, modifizierendes Einpassen von politischen Entscheidungen in die Rechtsdogmatik nach juristischen Konsistenzkriterien und am massivsten natürlich die verfassungsrechtliche Überprüfung von Gesetzgebungsakten".

119 More on this from *Christoph Engel* , JITE 2001, (*supra* note 73) 194 s. and 214-216.

particularly important for the representation of diffuse interests. This term characterizes interests that are hard to organize[120]. The second advantage relies on the distinction between interests and ideas[121]. Both are necessary for a political system to work properly. Were there no formal representation of interests in an elected parliament, the theoretically incompatible normative starting points would paralyse the polity. Were there no struggle of ideas, powerful groups would abuse the majority vote and exploit less powerful minorities[122]. Although ideas play an important role in the ordinary political arena, the institutional framework is biased in favour of interests. Here, one reason must suffice. Election periods are meant to make political power precarious. But this healthy mechanism forces elected politicians into short-termism. If they fear loosing the next election, they take that chance now. If they see an opportunity for staying in power, this secondary aim tends to become more important for them than the substantive issue that brought them into politics[123]. Understanding the constitutional court as a subsidiary authority for the assessment of political outcomes can help restore the balance between interests and ideas. For in court procedure, pure interests do not count. At the very least, interests must be couched in terms of ideas. The clearer the text of the pertinent legal provision, the more opposing interests can entirely lack standing in court.

All three of these political functions turn the constitutional court into a borderline actor between the legal and the political subsystems[124]. The application of the proportionality principle is ambivalent. Systems theory has extensively analysed such bivalent action. On the positive side, it improves the responsiveness of the two subsystems to signals from the other. But this comes at a price. Each subsystem pays for the increased openness to the other with a partial loss of internal strength. In the language of systems theory, the price is partial de-differentiation[125]. In our case, this results in the politisation of law[126]. The original purpose of fundamental freedoms – i.e. to protect individuals against governmental interference – becomes more and more tainted with the idea of legally contributing to the attainment of legitimate regulatory ends.

This lengthy excursion into the territory of systems theory finally brings us back to the initial question. We know now that turning the constitutional court into a full-fledged assessment authority would not only be impractical, it would also be a mistake. If the court lopsidedly and exclusively viewed the application of the proportionality principle as an assessment program, it would interfere with the functions necessary for it in the legal order. If it adopted the scientific evaluation standards as its own methodology, the result would be even worse. For thereby it would interfere with its functions in both the legal and the political order. This would essentially

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120 Basic *Mancur Olson*: The Logic of Collective Action. Public Goods and the Theory of Groups, Harvard 1965.

121 The point has been made independently in public choice and in political sciences, see again *Vanberg/ Buchanan* Journal of Theoretical Politics 1989 (*supra* note 29); *Yee* International organization 1996 (*supra* note 29).

122 More from *Engel* Gemeinwohldefinitionen (*supra* note 10).

123 Institutional economics offers a conceptual foundation for the thesis. One can transpose the concept of property rights from the economic to the political sphere. In the economic sphere, it is hardly doubted that the duration of a temporarily limited property right changes incentives. A classic example is a temporarily limited right to hunt. If the period is short, the holder of the right is likely to shoot as much game as he can. If, however, he holds the right for a decade, it is in his own interest to see after a healthy evolution of the stock. I take the idea of applying the property rights theory to political institutions from Giandomenico Majone. One application is *Giandomenico Majone*: Non Majoritarian Institutions and the Limits of Democratic Governance. A Political Transaction-Cost Approach, in: Journal of Institutional and Theoretical Economics 157 (2001) 57-78. ,

124 The concept has been developed by *Michael Hutter*: Die Produktion von Recht. Eine selbstreferentielle Theorie und der Fall des Arzneimittelpatentrechts, Tübingen 1989, 111-126 .

125 *Teubner* Autopoetisches System (*supra* note 109) 106-117.

126 *Teubner* Festschrift Simitis (*supra* note 118) 444: "Die Programme des Rechts, nicht nur die Norminhalte, sondern auch die Methodenprogramme [sind] drastisch politisiert [worden]: Von der teleologischen Interpretation über Policy-Orientierung und Interessenabwägung bis hin zu Impactassessment [sic!] und Folgenorientierung".

turn the court into a borderline actor with yet another subsystem of society; namely, science. But systems theory also shows why there is no reason to throw the baby out with the bathwater. The constitutional court can and should understand itself as a subsidiary authority for policy assessment. It cannot replace strict scientific assessment. But it has the considerable advantage of not being outside of politics and law. It is part of both subsystems and makes them more resonant to each other. It does so precisely by assessing the outcomes of regulatory politics in the light of the cases before it and from the perspective of the proportionality principle.

VI. Dogmatic consequences

What does all this mean for the practicing lawyer? He rightly has no direct interest in theoretical concepts from the social sciences. For his business, only dogmatics count. For him, conceptual links between law and political science are pointless unless the results are translated into dogmatics. This last section purports to take precisely this step. In so doing, the four dogmatic elements out of which the proportionality principle is composed shall be taken up in turn. What does the role of the constitutional court as a subsidiary authority for policy assessment mean for the interpretation of legitimate aims (1) ? What can constitutional law learn for determining whether the legislative action is conducive to that end (2), whether it is the least intrusive measure (3) and whether it is overly onerous (4) ?

1. Legitimate aim

When political scientists engage in policy evaluation, they start by determining the program of the policy to be tested[127]. If they are not hard-nosed constructivists[128], they start from the assumption that the policy aims to address a problem, or a social dilemma, as they often put it. Amazingly enough, there are almost no dogmatics for the legal equivalent, the concept of a legitimate aim[129]. This is surprising, since the following three tests are all relative. How much bite they have is fully determined by the character of the aim selected. Normative theories borrowed from neighbouring disciplines like philosophy offer one possibility for filling the gap. Such attempts are often elucidating. But they inevitably run into the problem of fundamental normative relativism[130]. A further challenge stems from the gap between such broad theoretical concepts and the complexity and unpredictability of reality. Even if the legislator were conceived of as an enlightened prince, it would have to face pervasive uncertainty[131]. Both elements help explain why there is such a strong reluctance to formulate a consistent legal theory of what government is entitled to or even asked to do[132]. A much more modest problem solving approach might be a way out. There would still be political, social and academic discourse about such fundamentalist, all-encompassing normative approaches. But the constitutionalization would be limited to much narrower political problems[133]. The difference between both approaches rests in the role context

127 Windhoff-Héritier (*supra* note 52) 4.
128 On constructivism see immediately below.
129 For an overview see *Stern* (*supra* note 65) 301.
130 See on this again *Engel* Gemeinwohl (*supra* note 10).
131 See on this *Indra Spiecker genannt Döhmann*: Staatliche Entscheidungen unter Unsicherheit. Juristische und Ökonomische Vorgaben, in: *Joachim Lege (ed.)*: Gentechnik im nicht-menschlichen Bereich – was kann und was sollte das Recht regeln ? (Schriftenreihe des Instituts für Technik- und Umweltrecht der Technischen Universität Dresden 3) 51-88.
132 Characteristic *Dieter Grimm* (ed.): Staatsaufgaben, Baden-Baden 1994.
133 See *Engel* Gemeinwohl (*supra* note 10) [*** 18-21***] on the advantage of a problem solving approach for overcoming fundamental relativism.

plays in them. The grand normative theories are fully decontextualised. A problem solving approach takes a good deal of context for granted and purports to improve this situation.

Even if they are willing to start from a "real" political problem, political scientists are eager to point to the impact of the political process on the definition of the problem[134]. This is a considerable challenge to constitutional lawyers. Historically, fundamental freedoms are constitutionalized human rights. The *raison d´être* of human rights is to protect individuals from despotism and arbitrariness. If applied to a democratic government, human rights protect an individual from the terror of the political majority. Now remember that the other three tests of the proportionality principle become pointless if the legislator is free to define the legitimate aim. From this it follows that if fundamental freedoms are not to lose their original, protective function, the constitutional court cannot just start from the political definition of the problem. But the opposite solution would not work either. If the court simply ignored the political definition of the problem and replaced it with its own, the ultimate legislative jurisdiction would shift from the elected parliament to the constitutional court. Along with this, the constitutional court would be useless as an authority for policy assessment. For it would assess what it thinks might have been a good alternative policy.

One way out would have two possible steps. If the legislator has explicitly formulated a consistent program, constitutional oversight could start out there. To put it in our terms: At this first step the court would interpret its role as one of policy assessment. But the court must remain free to reach the second step. At this step, the political problem definition is no longer taken for granted. This is where a second, constitutional discourse of the policy problem takes place. This is also where a potential bias in the ordinary political process towards interests might be de-biased by concentrating on ideas. At this second step, the court is no longer a mere assessment authority. It is a subsidiary political arena. If this discourse before the constitutional court leads to court intervention, it finally acts as a political actor.

In reality, the problem is typically compounded by timing complications. Once the constitutional court makes its decision, there is more knowledge about the policy problem than when parliament passed the law. This additional knowledge is created precisely by the attempts to implement the policy that is laid down in the statute. The constitutional court procedure itself can further increase the bulk of knowledge. Is the court entitled to use this knowledge when deciding upon the legitimacy of the regulatory aim? Is the court thus allowed to judge in hindsight?

The answer partly depends on how one interprets the role of the court in assessing policy outcomes. One can distinguish between a control and a betterment perspective. According to the control perspective, the court generates information about how the legislator did his job[135]. Such information helps citizens make an informed choice on election day. In this perspective, the court would strictly decide from an ex ante perspective. If the court knows in hindsight that the legislator has not properly defined the policy problem, it would still say so. It would conclude from that, that the legislative infringement into the freedom did not serve a legitimate end. But the court would be confined to invalidating statutory provisions. Since, according to this perspective, it is not the task of the court to repair flawed statutes, invalidation is also paramount to protecting freedom. For the constitution could not expect further addressees to tolerate interferences with their fundamental freedoms for a purpose which is now known to be faulty.

Both the dogmatics and the result change once the assessment role of a court is interpreted differently. This second interpretation is implicit in the already-mentioned idea that the court is

134 Windhoff-Héritier (*supra* note 52) 29-33.

135 For this interpretation of assessing outcomes see *Rist* in *Rist* (*supra* note 15) XIV; *Weiss* Evaluation (supra note 16) 5; *Klaus Schubert*: Politikfeldanalyse, Opladen 1991, 75.

an authority for reflexive evaluation. Reflexive evaluation is a tool for social learning. The experiences gained from implementation are used to re-process a policy while it is operative. In accord with this perspective, assessing policy outcomes is not a tool for controlling the legislator, but one for social betterment[136]. If social betterment is the purpose, ex post evaluation is paramount. The legitimacy of the regulatory aim is thus to be interpreted in the light of the better knowledge acquired in the meantime. Occasionally the legislator was wiser than it realised. It chose a regulatory tool that would fail under the proportionality principle if tested against the stated or implicit intentions of the legislator itself. But it becomes proportional if one takes the knowledge about the social problem into account that has been uncovered in the meantime. This is not a very frequent scenario however. More often, the improved knowledge about the policy problem calls for an adaptation of the solution as well. Not so rarely, the constitutional court has a technical possibility to repair the statute. It can do so if the text of the statute under review can be reinterpreted *lege artis* in a way that brings it in line with the redefined policy problem. The court can thus use the hermeneutical latitude. But if the court engages in this exercise, it inevitably adopts some autonomous power to legislate. There is a fine line between helping the legislator out and siphoning power from it.

The conflict between the legislator and the constitutional court inherent in reflexive evaluation intersects with a conflict between the community and the individual. Effective reflexive evaluation opts in favour of those whose suffer from the true social problem. It conversely opts against the freedom of the addressees of the repaired rules. In the relationship between the legislator and constitutional court, the problem is basically one of the contents of the decision, not so much of the dogmatics of the proportionality principle. For the intersecting conflict between community and individual, it is the other way around. The addressees would profit from a court that invalidates a statute and does not just reinterpret it. It at least takes time before the legislator comes back with a constitutionally acceptable statute. Once it is invalidated, the addressees even have a good chance that the statute will never come back. This is so, precisely because the political process is not exclusively engaged in problem solving. The struggle between interests starts anew. The issue must find a new political window of opportunity. It must compete with other issues for the scarce problem-solving capacity of the ordinary legislative process. But from a constitutional perspective, all these are windfall profits for the addressees of the original rules. When choosing between invalidation and reinterpretation, the court may therefore ignore these effects on individual freedoms.

But the court may not ignore the effects of reflexive evaluation on individual freedom when determining the legitimacy of the regulatory aim. The effects are ambivalent. If later experience proves that there exists no real social problem, the addressees have an obvious interest that the court takes this knowledge into account. The same is true if experience shows that the problem exists, but is smaller than expected. However, the addressees will be opposed to reflexive evaluation if it demonstrates that the social problem is even greater than the legislator thought. The same typically holds true if the constitutional court finds out that the actual social problem is different from what the legislator perceived it to be. In both these cases, the addressees would desire that the court use this knowledge only to invalidate the statute.

In one class of constitutional cases, this latter solution is hard to avoid. In these cases, the constitutional test of the statute is implicit in testing the acts implemented on the basis of it. Such cases must make their way through the ordinary channels of the judiciary before they finally come to the constitutional court. The complainant will find it patently unjust if the infringement upon his freedom is upheld when corroborating knowledge has surfaced that was not present when the infringement upon his freedom began. There is little conflict with the idea of reflexive evaluation in such cases. For the court is not prevented from bringing the statute in line with more sufficient

136 See *Windhoff-Héritier* (*supra* note 52) 2; *Weiss* Evaluation (*supra* note 15) 4 s.

knowledge for the future. It can thus split its action: it squashes the individual act based on the statute, and it reinterprets the statute for the future.

A true constitutional challenge surges if the court reinterprets a statute in a way that makes it more severe or that re-orients it. The problem stems from the fact that the court cannot rely on direct democratic legitimacy. Nonetheless, in principle the court should not be prevented from doing so. Given the methodological ties to the text of the statute, the democracy deficit is not strong. But the court must strike a balance between social betterment and the degree of interference with fundamental freedoms. Implicit court legislation that interferes with fundamental freedoms must obey a stricter standard than the legislator itself.

Along the same lines, the solution to a related problem can be sketched out. Subsequent experience in general, and court procedure in particular, might uncover that the original social problem has changed in the meantime. In this case, the legislator may have correctly perceived what the earlier problem was. But between then and now the social reality on which the statute has an impact has changed. One intermediate case is a subsequent change in the public perception of the policy problem[137]. The case is an intermediate one because the improved knowledge about the character of the problem, which has been the topic of the previous paragraphs, could also be framed as problem perception by professionals, be they lawyers, policymakers, social or natural scientists.

In principle, a change in the policy problem itself confronts the constitutional court with the same problems as increased knowledge about an unchanged problem. Insofar, reflexive evaluation would call for adapting the statute. Playing the ball back in the legislator's court by invalidating the statute is no more promising here than it is when dealing with better knowledge about the regulatory problem. The outer boundary for a court adaptation is again drawn by the text of the statute. Clearly the court has no power to write new provisions. The most it can do is reinterpret the existing ones.

The conceptual tool necessary in order to choose between invalidating a statute and reinterpreting it is thus the same for a change of the regulatory problem as for a change of our understanding of an unchanged problem. The difference between the two situations must manifest itself, however, when it comes to balancing the value of the adaptation with the autonomy of the legislator and the freedom of addressees. If the problem itself has changed, the court can no longer start from the fact that the legislator indeed wanted to address the problem. The most the court can claim is that the legislator would have wanted to address the related problem, had he anticipated the change. This is a particularly weak basis for implicit legislative action by the court. The change in the problem must indeed have been pretty marginal for the court to justify the adaptation.

2. Conduciveness

Conduciveness is a feeble test. It is even met if the regulatory tool brings social reality just a little closer to the normative idea. A legislative measure can fail under this test in one of two situations. In the first situation, experiences with the implementation of the tool show that it does not further the legislative end at all. This is an instance of ex post evaluation. Since the court can rely on empirical evidence, it would not face any legitimacy concerns if it invalidated the statute on this ground. The second situation is more demanding. The court is in this situation when it has to test a newly adapted statute. In this case, it must engage in prognostic evaluation. Such evaluation

137 See *Mayntz* in *Mayntz*(*supra* note 13).

must either be based on models or on experiences of related fields or jurisdictions. Models need simplifying assumptions. Experiences from other fields or jurisdictions are inevitably tainted with the impact of the other context. Unless it is strongly convinced, the court is therefore rightly reluctant to find inconduciveness in such situations.

3. Least Intrusiveness

The next test looks straightforward. The proportionality principle is violated if government could have reached the legislative aim by another equally effective but less intrusive tool. Recasting constitutional dogmatics in terms of policy evaluation demonstrates why constitutional practice has such a hard time with this test. The test calls for institutional comparisons. But the comparison is limping. For the efficacy of the tool actually employed, the court has evidence from the experiments of life made during implementation. For the comparative assessment of alternative means, however, the court must rely on prognostic evaluation. From theoretical models and from experiences in other policy areas, the court must derive generic knowledge about the potential of such governance tools. As with conduciveness, generic knowledge is less creditable than empirical evidence. This biases the application of the test in favour of the legislator.

4. Not overly onerous

As mentioned in the introduction, in constitutional practice, cases normally are decided under the fourth and last test. It forbids overly onerous interferences into the fundamental freedom in question. Typical situations are these: The legislator can demonstrate that a statutory provision is not entirely devoid of effect. But the provision has no more than a small effect, coupled with a deep cut into a fundamental freedom. Another scenario couples a high degree of uncertainty about the success of a statute with certain and deep interferences with freedom.

The work of political scientists on the evaluation makes it possible to give this test a conceptual underpinning. To start with, political scientists distinguish a simple assessment of efficacy from true evaluation. The former looks exclusively at implementation. It wants to know whether the legislative output generates the intended outcome. If addressees abide by the rules, it is content[138]. For the proportionality principle, this is not enough. For obedience alone cannot solve a social problem. When applying the proportionality principle, the constitutional court must therefore engage in what political scientists call assessing impacts, as opposed to a mere assessment of outcomes. This true policy evaluation looks at social reality[139].

Impact analyses has a second implication, which is equally important for proportionality. It insists on the difference between mere co-variation and causality. It is therefore not enough to compare social reality before and after the legislative intervention. If nothing has changed, this does not prove that the intervention was useless. Parallel to the intervention, the environment may have undergone developements in the opposite direction. Conversely, if social reality looks better, this does not prove that the intervention had any impact on it at all. The environment might simply have changed favourably[140].

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138 *Theodor Geiger*: Vorstudien zu einer Soziologie des Rechts, Neuwied 1964, 17; *Weiss* Evaluation (*supra* note 4) 8; *Lars Brocker*: Gesetzesfolgenabschätzung und ihre Methodik, in: *Hagen Hof/Gertrude Lübbe-Wolff (eds.):* Wirkungsforschung zum Recht I. Wirkungen und Erfolgsbedingungen von Gesetzen (Interdisziplinäre Studien zu Recht und Staat 10) Baden-Baden 1999, 35-42 (37): ob „eine Norm [...] so wirkt, wie es der Gesetzgeber beabsichtigt hat"; *Röhl* in *Hof/Lübbe-Wolff (supra* note 4) 419.

139 Out of the many voices see only *Weiss* Evaluation (*supra* note 4) 4; *Bruder* Verwaltung 1984 (supra note 47) 129 s.; *Raiser in Hof/Lübbe-Wolff* (*supra* note 46) 118.

140 Again only a small selection of the many voices can appear, *Windhoff-Héritier* (*supra* note 52) 4 and 20; *Raiser* in *Hof/Lübbe-Wolff* (*supra* note 46)118; *Elmar Lange*: Evaluationsforschung, in: *Günther Albrecht/Axel*

The distinction yields a number of constitutional questions. Can statutes be upheld if the complainant claims they do not contribute to performance: probably not. Can statutes be upheld if the legislator claims that bad performance is to be attributed to outside influences: not if these influences are likely to continue; and not if the constitution wants the legislator to foresee such influences.

Finally, the work of political scientists helps constitutional law when the test of least intrusiveness calls for prognostic evaluation[141]. How much leeway should the legislator have for prognostic judgement[142]? The answer should depend on the quality of the generic knowledge about the performance of regulatory tools and, at a yet more abstract level, on the generic knowledge about the reliability of comparisons to related fields or foreign jurisdictions. Should the legislator have greater prognostic leeway or more room that is constitutionally uncontrolled if it voluntarily adds mechanisms for simultaneous policy assessment, or if it voluntarily adds mechanisms for ex post assessment? Does experimental legislation give the legislator more freedom[143]? The answer should depend on generic knowledge about the quality and impact of feedback from simultaneous or ex post assessment.

VII Conclusions

Linking political scientists' work on policy evaluation with constitutional lawyers' work on the proportionality principle is not only stimulating in itself, it also demonstrates one way of fruitfully linking both fields. Since this author is a lawyer by training, the paper takes the political scientists work as given and investigates how it can enrich the understanding of the proportionality principle, and of the constitutional court that applies it. It demonstrates that the concepts from the political sciences cannot simply be implanted in legal dogmatics or legal theory. The precondition for profiting from the neighbouring discipline is thoroughly understanding the nature of one's own discipline. The confrontation with the methods and results of the neighbouring discipline is similar to a frequent experience of travellers: only when confronted with foreigners, do they learn how much their own character has been shaped by the culture of their home country. In all likeliness the political scientists would have the same experience. Once they realise how similar the constitutional court's application of the proportionality principle to statutes is to policy evaluation, they can begin to judge a lot of evidence which their discipline seems to have largely ignored so far. Admittedly, this evidence is not easy to use. It is almost never quantitative. And the qualitative insights must be detected by comparing two biased statements of the parties with the hopefully unbiased decision of the court. But the extra effort would pay off. For struggling with the appropriate application of the proportionality principle is no academic exercise. The parties know that the court has the power to change or even squash a policy. The information to be found in these judgements is therefore likely to be highly credible. But this is another story, and one to be written by a political scientist.

Groenemeyer / Friedrich W. Stallberg (eds.): Handbuch sozialer Probleme, Wiesbaden 1999, 907-918 (909): "Ausgangspunkt ist ein bestimmtes (soziales) Problem, das dadurch gekennzeichnet ist, dass einem wahrgenommenen Ist-Zustand ein Soll-Zustand gegenübergestellt wird. Die Konkretisierung und Ausdifferenzierung des Soll-Zustands erfolgt in einem Programm, das die Ziele und damit die beabsichtigten Wirkungen enthält. Zur Realisierung des Programms werden materielle, finanzielle und personelle Ressourcen bereitgestellt und an konkrete Einzelmaßnahmen gebunden. Mit diesen Maßnahmen ist dann das Problem in der Weise zu lösen, dass der beobachtete Ist-Zustand in den Soll-Zustand überführt wird".

141 Four political scientists work on this see *Windhoff-Héritier* (*supra* note 52) 6, 15 and passim.

142 For an overview of dogmatic statements see again *Meßerschmidt* (*supra* note 61) 845-949.

143 For an overview of the dogmatic treatment of the questions see again *Meßerschmdtt (supra* note 61) 926-948.