



Evaluation of legislation and judicial review

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Central Question

**What is the role of courts
in the evaluation (ex ante and ex post)
of legislation?**

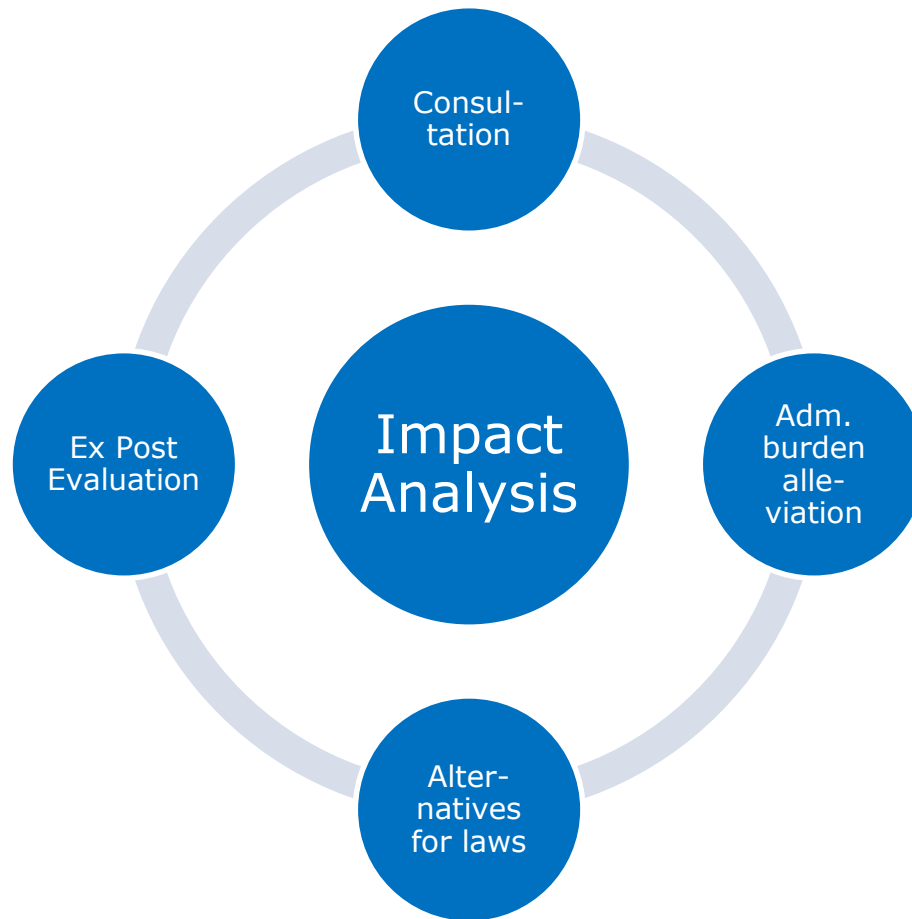
Overview

- I. Evaluation ex ante and ex post in contemporary legislative policy programs
- II. The role of courts: pros and cons of judicial enforcement
- III. Judicial review and evaluation ex ante
- IV. Judicial review and evaluation ex post
- V. Judicial review as an instrument of evaluation ex post
- VI. Conclusion

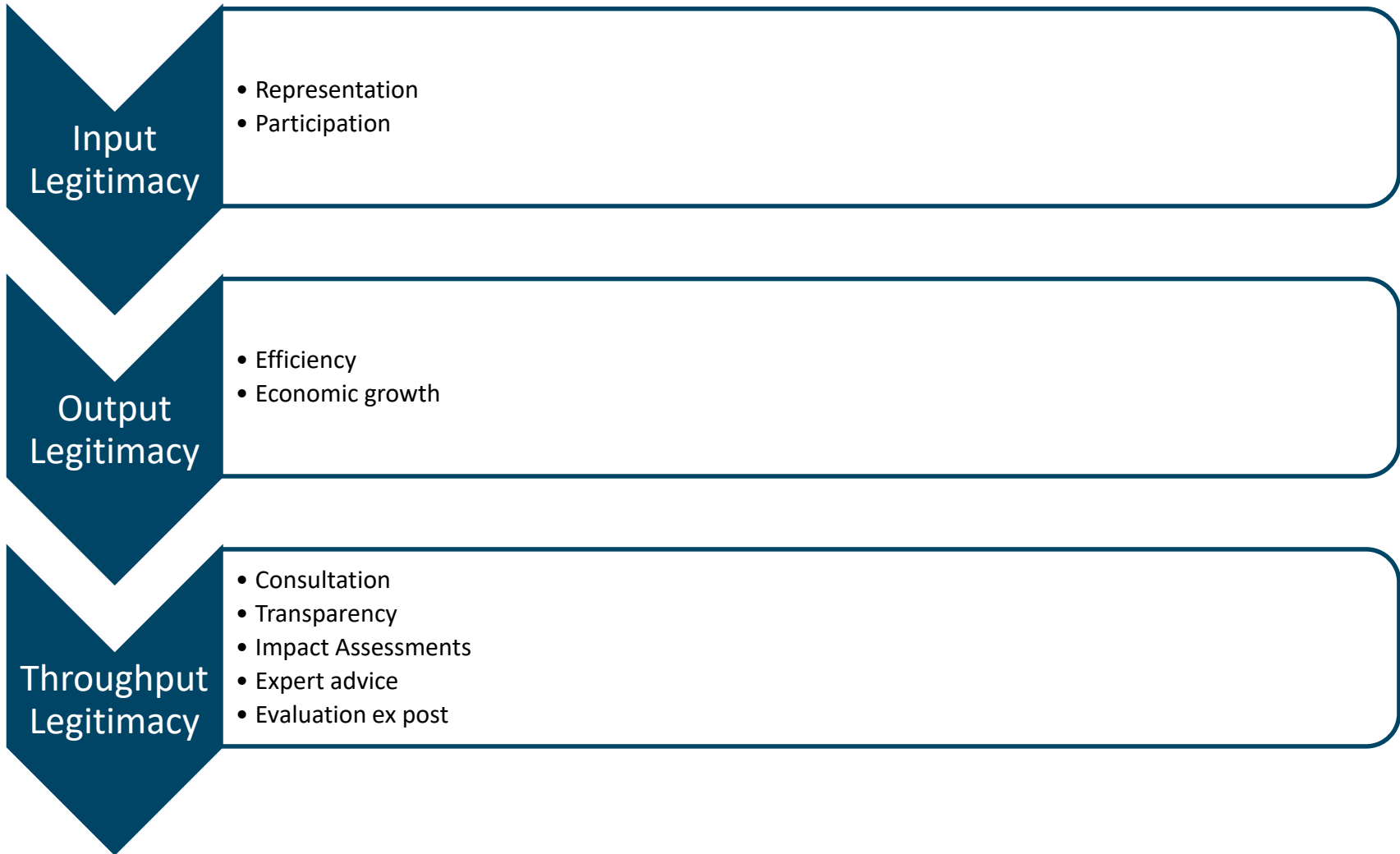
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Blueprint for an Evidence-Based Legislative Policy Program



Fundamental drivers: legitimacy and efficiency concerns in governance theories



Institutional Isomorphism

Coercion

- Pressure in dependency-relations
- Expectations within society

Mimetism

- Copying from legitimate or well-performing institutions
- Dealing with difficult issues

Normative Pressure

- Professional organizations
- Framework of organizational norms
- COURTS?

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Why the role of courts should not be ignored

1. Policy Divergence

‘There are large differences across countries in the focus of the policies, as well as their scope and the detail of suggested actions’

(Regulatory Policy Committee, *Indicators of Regulatory Management Systems*, OECD 2009, 21)

Why the role of courts should not be ignored

2. Assumptions regarding Parliament

Direct
Legitimation

- presupposes that a substantive debate has taken place

Better
Placed

- presupposes that this was an informed debate, based on evidence and knowledge

“While the legislative process tends to systematically undervalue and deemphasize procedural considerations, the judicial process provides a forum in which the procedural norms governing lawmaking come to the centre of the stage.”

(Bar-Siman-Tov, *TPLeg* 2015)

Judicial Review of the Legislative Process: Methods

Formal or Procedural Review

- Conformity with procedural requirements
- No value loaded judgment
- Risk of Pirrhic victory

Semi-Procedural or Procedural Rationality Review

- Part of Proportionality or other substantive test
- No specific blueprint: safeguards for informed balance of interests
- Risk of double standards (see further)

Pros and Cons of Judicial Review of the Legislative Process

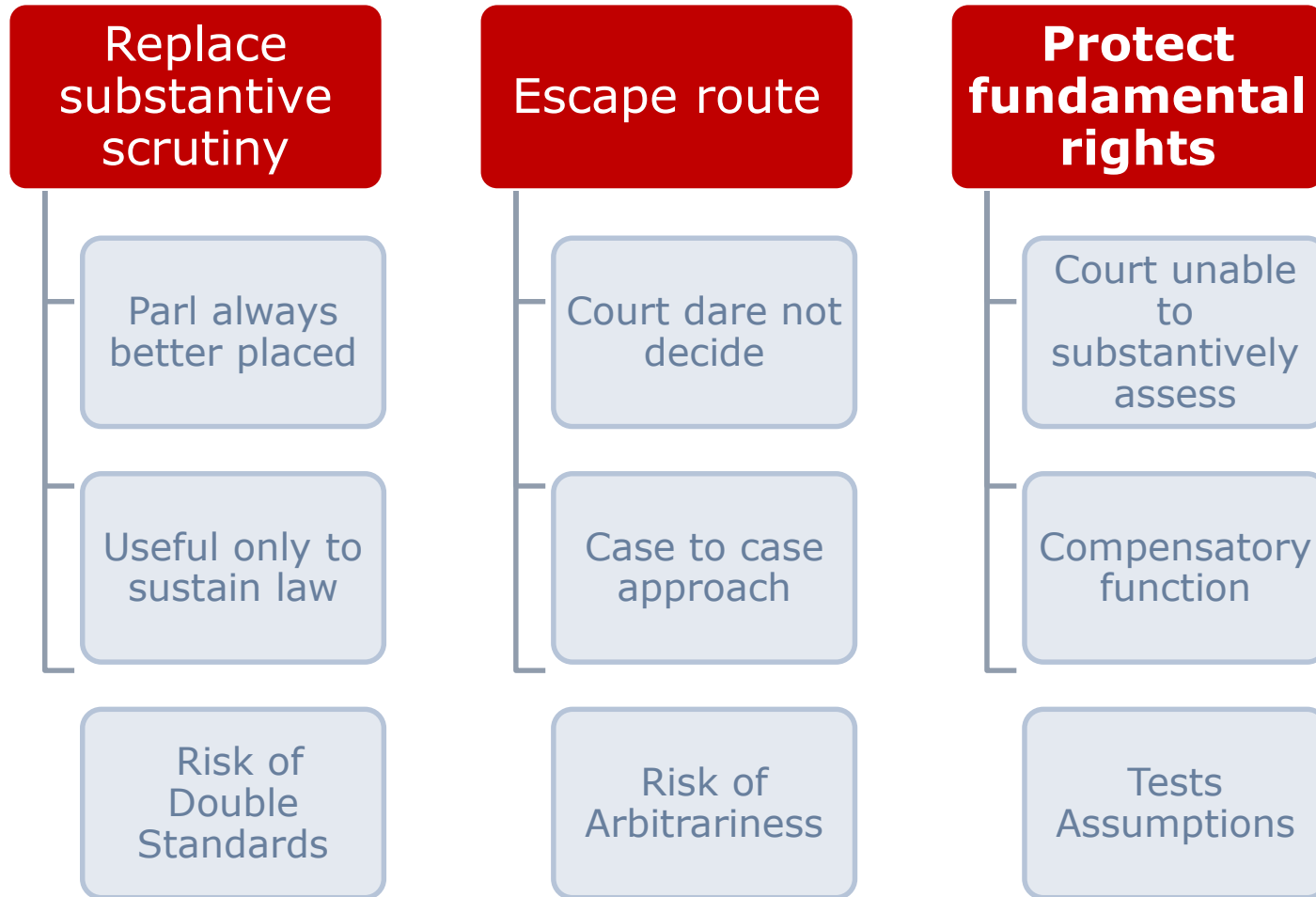
Arguments contra

1. The political primacy argument
2. Market-liberal bias instead of neutrality
3. Efficiency: the over-judicialization difficulty
4. The competency problem

Arguments pro

1. Enforcing a public, inclusive and informed debate, leading to more legitimate and rational lawmaking
2. HR perspective: proportionality test
3. Improve regulatory reform and change the administrative culture
4. Training, criteria, and deference: guarantee against arbitrary interference

Pros and Cons of Procedural Rationality Review in Human Rights Adjudication



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Procedural Rationality Review: The ECtHR

- = part of a substantive check
- where the Court takes into consideration the quality of the decision making procedure
- As a decisive factor for assessing whether government interference was justified

→ Looking for procedural guarantees for an informed and inclusive balancing exercise



B. Procedural Rationality Review: the ECtHR

- (1) References to scientific and statistical evidence in general – e.g. no significant judgments on RIA
- (2) PRR usually leads to the verdict that the law is proportional – sometimes quality of the parliamentary process as key to width of MoA
- (3) Not required to have comprehensive and measurable data for each and every aspect of the matter
- (4) Violation if the measure is based on an assumption for which there is no evidence at all, or that goes counter the unanimous view of experts
- (5) Violation if the evidence produced was manifestly biased



Procedural Rationality Review and RIAs: the ECJ

- (1) EU legislature has broad discretion, but choices must rely on objective criteria
- (2) Discretion as to the finding of facts: examination of various options suffices
- (3) ... but also options that are less harmful to fundamental rights should be examined
- (4) Assessment of future effects is open to criticism only if manifestly incorrect in the light of information available at the time of adoption
- (5) ... but EU legislature has to take into consideration all the relevant factors and circumstances and must produce the basic facts on which the measure relies



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Judicial Review and Evaluation Ex Post

Monitoring Duty: Caution

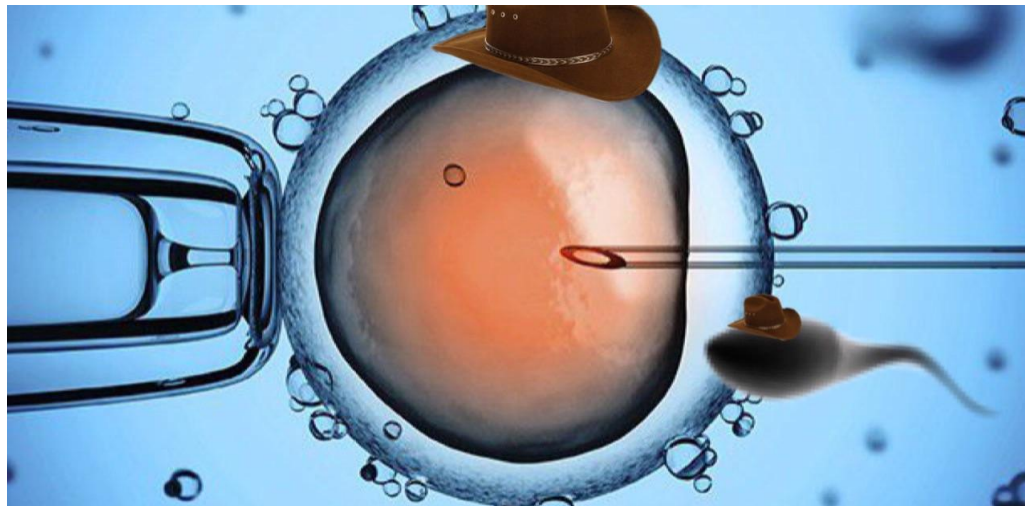
Impact Review

Monitoring Duty (Caution)

“Nevertheless, the Court observes that the Austrian **parliament has not, until now, undertaken a thorough assessment of the rules governing artificial procreation, taking into account the dynamic developments in science and society** noted above. [...] This area, in which the law appears to be continuously evolving and which is subject to a **particularly dynamic development in science and law**, needs to be kept under review by the Contracting States.

(S.H. v. Austria, 2011)

Prohibition of sperm donation for in vitro fertilisation



Monitoring Duty (Caution)

“the Court takes note of the Government’s argument that **in the light of all the scientific findings known** to them, and even though home delivery might be more pleasant for mothers-to-be, it still represented an option that was not as safe as a full hospital delivery. [...] On that background, the Court finds it appropriate to **invite the Croatian authorities to make further progress in such matters by keeping the relevant legal provisions under constant review** so as to ensure that they **reflect medical and scientific developments** while fully respecting women’s rights in the field of reproductive health, notably by ensuring adequate conditions for both patients and medical staff in maternity hospitals across the country.”

(Pojatina v Croatia, 2018

Grand Chamber, Dubska and Krejzová v Czech Republic, 2016)



Impact Review: confirmation

“The Court considers that this system in Italy provides sufficient protective measures for society. **It is confirmed in this view by the statistics supplied by the respondent State**, which show that the percentage of crimes committed by prisoners subject to a semi-custodial regime is very low, as is that of prisoners absconding while on prison leave.”

(Grand Chamber, *Mastromatteo v Italy*, 2002)



Impact Review: confirmation

“On the **procedural aspect** of the case, the Court notes that a governmental decision-making process concerning **complex issues of environmental and economic policy** such as in the present case must **necessarily involve appropriate investigations and studies** in order to allow them to strike a fair balance between the various conflicting interests at stake. However, **this does not mean that decisions can only be taken if comprehensive and measurable data are available** in relation to each and every aspect of the matter to be decided. In this respect it is relevant that the **authorities have consistently monitored the situation**, and that the 1993 Scheme was the latest in a series of restrictions on night flights which stretched back to 1962. The position concerning research into sleep disturbance and night flights is far from static, and it was the government's **policy to announce restrictions on night flights for a maximum of five years at a time, each new scheme taking into account the research and other developments** of the previous period.”

(Grand Chamber, *Hatton v the UK*, 2003)



Impact Review: Sanction

“the Court has, on several occasions since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review. [...] Since then, a report has been issued in April 2000 by the Interdepartmental Working Group which set out a survey of the current position of transsexuals in inter alia criminal law, family and employment matters and identified various options for reform. **Nothing has effectively been done** to further these proposals and in July 2001 the Court of Appeal noted that there were no plans to do so. [...] **the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation.**”

(Grand Chamber, Christine Goodwin v the UK, 2002)



Judicial Review of Ex Post evaluation of Legislation: Assessment

Enhancing the protection of fundamental rights by
smoothing the way for judges to second-guess the
constitutionality of statutes in retrospect

OR

A persuasive expedient playing mainly a rhetorical role?

(D. Oliver-Lalana, 2016)

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A Constitutional Dialogue between Courts and Parliament

Assessment of the
constitutionality and
impact of legislation
in real life cases



CHANNELS



Taking into account the
courts' case law and
argue deviations

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Conclusion

