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ABSTRACT

In Germany, there is no exhaustive institutionalised process of scrutiny for parliament to ensure the quality of laws. Neither the members of parliament nor the parliamentary administration are tasked with this quality review. In fact, the German legislative procedure draws on a pluralistic concept of quality review: all organs and persons involved in legislation are called upon in order to ensure good legislative quality. This concept stresses the political reality of the principle of democracy, rather than the legal rationality resulting from the rule of law, and therefore accepts inferior laws based on democratic legitimacy rather than good laws that in turn do not rely upon the expertise of democratically non-legitimated committees. An equilibrium between these poles can only be found in time: after all, laws are amendable, thus adaptive and improvable.

KEYWORDS Legislation; quality; legal formality; regulation; parliament

1. Introduction

From the perspective of German domestic law, the topic of the special issue 'Parliamentary scrutiny of the quality of legislation' is ambiguous in several ways: Firstly, viewed in the context of legislation, the term 'parliamentary scrutiny' is striking. That is because the parliament itself is the legislator, not its own supervisor. Its monitoring function is mainly directed towards the activities of the government.[1] Certainly, this can include scrutiny of bills initiated by the government, however, this is usually exerted by a parliamentary minority in these instances, i.e. the respective opposition. What is more, they apply a benchmark of scrutiny that is primarily of a political nature. Inasmuch as the term 'scrutiny' is applied in a legal context, associations are regularly made to the *Bundesverfassungsgericht,* the German

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[1]Cf. Hans Hugo Klein in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts* (3rd vol, C.F. Müller 2005) § 50 Rn. 34.

Federal Constitutional Court, which indeed is – constitutionally and practically – the most rigorous authority for the scrutiny of German legislation.[2]

Secondly, the thematic link between parliamentary scrutiny and the specific standard of quality of legislation is somewhat surprising, since at least at first glance, the German parliament appears to be the root of the poor quality of passed Acts that it endorsed, rather than the potential entity that ensures a good standard of laws. That is because the parliament is the place where political compromises are cast into bills and where coherent drafts are watered down. A place where time and, to an extent, expertise are lacking, both of which are essential to address and, if need be, eliminate not only political and often pithy aims with audience appeal, but also unwanted side effects in general, be it polarising instead of polishing contents of bills, be it fathoming constitutional boundaries instead of adhering to them.

Against this backdrop, the theme of this special issue forces the German perspective to apply a more stringent view which – in line with the ambition of this issue – will furthermore provide foreign readers with an insight into the constitutional framework of German legislation.

Therefore, it is necessary to become explicit about the criteria that constitutes (good) quality of laws (2.). Once this touchstone is well-defined, the legislative procedure within the parliamentary regime of Germany shall be outlined (3.) and the most important instruments of quality management of the drafting phase shall be introduced (4.). Having discussed these parameters, special emphasis will be placed on the function of the parliament within the legislation (5.), before examining the interparliamentary distribution of roles (6.) and the role of the parliamentary administration (7.). Lastly, the parliamentary quality inspection shall be briefly assessed (8.).

2. Criteria for the quality of legislation

At first, the criterion to which the parliamentary scrutiny refers must be determined. That is because this criterion is far from clear. What is the 'quality of laws' and how is it being measured? When does a good statute exist,[3] when is it a better one?[4] What constitutes ideal legislation? Is the

[2]Cf. Andreas Heusch in Winfried Kluth and Günter Krings (eds), *Gesetzgebung* (C.F. Müller 2014) § 36, Rn. 1.

[3]Cf. Alain Griffel, *Vom Wert einer guten Gesetzgebung* (Staempfli 2014); Axel Burghart, *Die Pflicht zum guten Gesetz* (Duncker & Humblot 1996); Ortlieb Fliedner, *Gute Gesetzgebung* (Analyse Verwaltungspolitik der Friedrich-Ebert-Stiftung 2001); Gunnar Folke Schuppert, 'Gute Gesetzgebung, Bausteine einer kritischen Gesetzgebungslehre' (C.F. Müller 2003) ZG Sonderheft.

[4]To this purpose see Maximilian Mödinger, *Bessere Rechtsetzung* (Mohr Siebeck 2020) passim; Peter Blum, Gutachten I zum 65. Deutschen Juristentag (C.H. Beck 2004); Jörg Ennuschat, 'Wege zu besserer Gesetzgebung – sachverständige Beratung, Begründung, Folgenabschätzung und Wirkungskontrolle' [2004] Deutsches Verwaltungsblatt 986; Helmut Schulze-Fielitz, 'Wege, Umwege oder Holzwege zu besserer Gesetzgebung – durch sachverständige Beratung, Begründung, Folgeabschätzung und

quality of laws being measured upon the adherence to constitutional boundaries? And if there are several criteria that determine the quality of laws, which of these is the essential one? And which can the German parliament influence?

2.1 The abundance of criteria and systematisations

These questions cannot be answered with certainty, since – depending on the level of expectations and the discipline – there is an abundance of criteria and almost as many systematisations for quality standards.[5] They themselves are dependent on the functions that the laws have been given, and against this backdrop, myriad potential functions are determinable – from the pure normative regulatory function to a political design function, linked with a socio-political enhancement function, to political science-based attributions of functions that rely upon a representative function, an integration function or even an identification function.[6] Others encompass – especially in regard to criminal law norms – a sanction function or – in respect to technical development – an innovative function. This brief, and by no means exhaustive, overview demonstrates that laws can fulfil a great variety of functions.[7] In view of these differing functions, it remains doubtful as to whether it is feasible to postulate consistent quality standards that are applicable for all laws.

A more promising approach is rather to demand different quality standards depending on the respective ambitions. In doing so, the various characteristics of laws must be taken into account. Unlike in a night-watchman state, laws do not only constitute 'crash barriers' anymore, wherein individual freedoms can fully unfurl. Even the legislator of the twentieth century welfare state, and especially the regulating lawmaker within the multi-level-governance system of the twenty-first century, set forth a variety of rules in differing forms while utilising even formal statutes merely as soft guidance, make recommendations, create incentives,[8] and draw on so-called 'nudging' in order to obtain the desired steering effect.[9]

Wirkungskontrolle?' [2004] JuristenZeitung 862; Wolfgang Thierse, 'Wege zu besserer Gesetzgebung' [2005] Neue Juristische Wochenschrift 153.

[5]For instructive comments see Klaus Meßerschmidt, 'Gesetzgebungslehre zwischen Wissenschaft und Politik. Entwicklungstendenzen der Legisprudenz' Zeitschrift für das juristische Studium 2008, 111 et seqq. (part I) and 224 et seqq. (part II).

[6]Cf. Hermann Hill, *Einführung in die Gesetzgebungslehre* (C.F. Müller 1982) 33 et seqq.; Hans-Joachim Mengel, *Gesetzgebung und Verfahren* (Duncker & Humblot 1997) 229 et seqq.; on the topic of the functionality of the universality see Gregor Kirchhof, *Die Allgemeinheit des Gesetzes* (Mohr Siebeck 2009).

[7]Vgl. Helmut Schulze-Fielitz, *Theorie und Praxis parlamentarischer Gesetzgebung* (Duncker & Humblot 1988) 184 et seqq.

[8]On the significance of indirect controlling elements see Michael Kloepfer, *Umweltrecht* (4th edn., C.H. Beck 2016) § 5 Rn. 759 ff.

[9]Cf. Stephan Gerg, *Nudging* (Mohr Siebeck 2018).

Consequently, the legal order is permanently in a state of flux: altered factual realities (e.g. the environmental status), modified technical circumstances (e.g. the possibilities and conditions of digitisation) and, lastly, changing political majorities (visible in the party-political composition of parliaments, or even in an altered 'public opinion') altogether account for the need for continuous amendments of the current laws.[10] Occasion-dependent individual laws which promise political success in the short term – and at any rate confirm political activity in the first place – are slowly superseding codification that is designed to operate in the long term.[11] Considering this flood of norms,[12] or rather the amendment of norms, challenges inevitably arise as to how to comprehend the 'overall legal system' as an entity[13] as well as how to apply it consistently.[14] Or more concisely: with the inflation of norms, the legal certainty declines.[15]

In the light of the desired quality of laws, two distinct features become apparent: firstly, quality standards are often orientated towards respective characteristics of laws; the latter following certain functions themselves. Since criminal law norms are eminently interfering with individual freedoms, the quality of these is perhaps aligned more to constitutional standards than to economic-directed guidelines. In regard to provisions with numerous addressees, acceptance is potentially an imperative criterion in contrast to norms with only few specific addressees since the behaviour of the latter is easier to control. Finally, for socio-political provisions the actual impact is crucial.

Bringing an order, let alone a hierarchic order, to the flood of quality criteria, appears to be an unviable challenge. Nonetheless, the so-called Mandelkern-Report of 2001 attempted to bring about criteria for the European Union and its Member States. It stipulated seven general principles, all of which combined are the prerequisite for 'good legislation', i.e. necessity, proportionality, subsidiarity, transparency, accountability, accessibility, and simplicity.[16]

Irrespective of the question of whether EU legislation complies itself with these principles, they can be derived from tenets that constitute

[10]Cf. Thilo Brandner, *Gesetzesänderung* (Berliner Wissenschaftsverlag 2004) 89 et seqq.
[11]Ivo Appel, 'Zur Aktualität der Kodifikationsidee' in Arnd Koch and Matthias Rossi (eds), *Kodifikation in Europa* (Peter Lang 2012) 7; Florian Schärdel, *Die Bücherkodifikation* (Nomos 2011).
[12]Franz Reimer, 'Das Parlamentsgesetz als Steuerungsmittel und Kontrollmaßstab' in Wolfgang Hoffmann-Riem and others (eds), *Grundlagen des Verwaltungsrechts* (1st edn., C.H. Beck 2006) vol 1 para 9 subpara 100.
[13]Cf. Dagmar Felix, *Einheit der Rechtsordnung* (Mohr Siebeck 1998); Phillip Hellwege and Marta Soniewicka, *Die Einheit der Rechtsordnung* (Mohr Siebeck 2020).
[14]Cf. Matthias Rossi in Daniel Oliver Lalana and Klaus Meßerschmidt (eds), *Rational Lawmaking und Review*, 148 et seqq.
[15]Cf. Klaus-Peter Sommermann in Hermann von Mangoldt and others (eds), *Das Bonner Grundgesetz, Kommentar* (7th edn., C.H. Beck 2018) vol 2 art 20 subpara 298, indirectly referencing Tacitus (Annales III, 27): 'Corruptissima respublica plurimae leges'.
[16]Mandelkern Group on Better Regulation, *Final Report* (2001).

indispensable pillars for a state under the rule of law, it can be assumed that there is a general consensus about their application within Europe, and perhaps even, worldwide. However, applying this specific legal perspective is inevitably coupled with a limitation of criteria of quality. That is because they can similarly be assessed from an economic, a social, a linguistic[17] or a logical point of view. Moreover, in a democratic state it remains debatable whether the quality of law should be primarily measured on the adoption of the law or rather on its outcome; whether brevity and universality are parameters of quality rather than differentiation and wealth of detail; whether emphasis should be placed upon systematic consequence or democratic compromise; whether primary rational criteria are to apply in the first place,[18] rather than giving free rein to the imagination of the legislator.[19]

2.2 Formal and substantive requirements of quality

Out of the various systematisations of differing quality criteria, one in particular is worth examining in more depth: the differentiation between formal, that is to say 'technical', requirements on the one side and substantial aspects on the other side. Since both criteria are not distinguishable with certainty, it is significant which quality criteria can be scrutinised by parliament in a sensible manner.

Formal quality criteria are first and foremost those that refer to the drafting elements of laws. In detail, they concern the legal technique, the legal formality. In Germany, there exists a handbook ('Handbuch der Rechtsförmlichkeit')[20] published by the *Bundesministerium der Jusitz*, the Federal Ministry of Justice, comprising 'recommendations' and thereby providing answers to questions as to how to divide norms, how to stipulate them, whether cross references to other provisions are required, and if so, how to realise these. It further deals with the question of when a completely new statute should be enacted and when these statutes are only to be amended or recast by amending law.

The handbook bears little mention of substantive quality requirements, although when it does, there are certain overlaps with formal requirements.

[17] Cf. Otto Depenheuer in Winfried Kluth and Günter Krings (eds), *Gesetzgebung* (C.F. Müller 2014) § 6 Rn. 14 ff.

[18] Cf. Armin Steinbach, *Rationale Gesetzgebung* (Mohr Siebeck 2017) passim.

[19] On imagination in legislation cf. Matthias Rossi, 'Phantasie in der Gesetzgebung' in C Franzius and others (eds), *Beharren. Bewegen. Festschrift für Michael Kloepfer zum 70. Geburtstag* (Duncker & Humblot 2013) 851 et seqq.

[20] Bundesministerium der Justiz, *Handbuch der Rechtsförmlichkeit*, available at <https://www.bmjv.de/SharedDocs/Downloads/DE/PDF/Themenseiten/RechtssetzungBuerokratieabbau/HandbuchDerRechtsfoermlichkeit_deu.pdf?__blob=publicationFile&v=1>, for English see <https://www.bmjv.de/DE/Themen/RechtssetzungBuerokratieabbau/HDR/HDR_node.html>, accessed 8 March 2021.

These are, for instance, the requirements that are derived from the rule of law and the constitution itself. Worth mentioning in particular are the principles of legal certainty and proportionality which both manifest themselves in formal requirements (e.g. precise language[21] leading to the comprehensibility of legal texts[22]) as well as substantive standards. Conversely, the clear regulation of the material and temporal scope of the application of laws, as well as its relation to other laws are not only formal matters, but equally affect the content of laws.

Nonetheless, in view of the parliamentary scrutiny of the quality of legislation, it cannot be denied that, due to its composition – comprising solely political representatives as members of parliament (MPs) – the parliament is perhaps not most suitable for scrutinising such technical-formal criteria. In order to overcome this predicament, an independent authority would need to exist within the parliamentary administration, which is not the case however in the *Bundestag*, the German parliament.

2.3 The constitutional framework of legislative prudence

Another method of categorisation can be viewed from a legal perspective, i.e. the differentiation between 'hard' constitutional requirements on the one side and 'soft' prudential regulations on the other.[23] This comparison constitutes another example of differentiations that cannot easily be made. For the scrutiny of legislation, it is nonetheless imperative.

That is because the 'hard' constitutional standards are quality requirements that are not only binding but are also essential in terms of compliance with the constitution, and hence regarding the question of whether laws can achieve their effects in the first place or whether the *Bundesverfassungsgericht* will declare them void. These requirements encompass those that refer to legislation in the sense of process, wherein constitutional provisions regarding the competence, procedure, and form standards are to be taken into account. Noteworthy in this regard is that, by seizing on the principle of subsidiarity, the Mandelkern-Report points out an essential legal benchmark for the federal state as well as the multi-level governance system of the European Union. Furthermore, part of the constitutional standards are substantive boundaries resulting from the application of *Grundrechte*, the German basic rights. What is more, these substantial boundaries are based on the rule of law: the principles of legal certainty, of legitimate expectations, and of proportionality are altogether quality requirements that are 'non-

[21] *ibid.*

[22] Cf. Felix Uhlmann and Stefan Höfler, *Gute Gesetzessprache als Herausforderung für die Rechtsetzung* (DIKE 2018); Theo Öhlinger, *Recht und Sprache* (Fritz Schönherr 1985); Emanuel Towfigh, 'Komplexität und Normenklarheit – oder: Gesetze sind für Jursiten' [2009] Der Staat 29.

[23] Implicitly distinguishing Maximilian Mödinger, *Bessere Rechtsetzung* (Mohr Siebeck 2020) 87.

negotiable'. That is to say, they constitute the minimum standard of the quality of laws.

Beyond these minimum standards there are several 'rules of prudence' that laws should adhere to. Having said that, neglecting any of these rules will not result in any (legal) consequences, partly due to the fact that determining the neglect is not always straightforward. By way of example, necessity, practicability, acceptance, flexibility, educability, coherence, and efficiency are some of the prudential criteria that are well-recognised. However, identifying whether they apply or not lies in the eye of the beholder, hence why the determination of neglect is not always possible.

Besides these hard and soft requirements there are also binding state-political objectives and maxims. That said, they usually grant such a wide margin of discretion that they technically become non-binding. These requirements are, *inter alia*, state objectives concerning the environment and animal welfare (Article 20a of the *Grundgesetz*), the compliance with the macroeconomic balance (Article 109 (2) of the *Grundgesetz*), the principle of economic efficiency (Article 114 (2) of the *Grundgesetz*)[24] or, in the context of European Union Law, the various clauses aiming at high environmental standards (Article 11 TFEU) or high data protection standards (Article 16 TFEU).

2.4 Standards for laws and prerequisites of the legislative procedure

Finally, and of upmost importance to the performance of parliamentary scrutiny of the quality of laws, a distinction is to be made between standards or guidelines for laws on the one hand, and prerequisites of the legislative procedure on the other. This procedure can be understood in a more instrumental sense, as is the case within administrative law. That is to say the procedure has more than solely a serving function, but in fact offers added value to the landscape of quality requirements as it either provides transparency due to hearings or establishes acceptance through deliberative procedures.[25] Thus, the key to the quality management of laws through parliament lies in the influence and embodiment of the specific procedure in question.

3. Legislation in the parliamentary regime

In order to comprehend the (limited) role of the *Bundestag* in the context of quality management as well as the influence of the legislative procedure on

[24]On the significance for the scrutiny by the audit court see Matthias Rossi, *Möglichkeiten und Grenzen des Informationshandelns des Bundesrechnungshofes* (Nomos 2012), 17 et seqq.
[25]Cf. Hans-Joachim Mengel, *Gesetzgebung und Verfahren* (Duncker & Humblot 1997).

the quality of laws, the legislation in the parliamentary regime shall briefly be presented.

3.1 Overview of the governmental regime in Germany

Above all, the parliamentary governmental system in Germany is characterised by its federal structure. The German Constitution, the *Grundgesetz*, allocates binding competencies to either the federated lands, the *Länder,* or the state itself. In Article 30 of the *Grundgesetz,* and in Article 70 of the *Grundgesetz* specifically for the legislative procedure, it stipulates the tenet that the *Länder* are the competent entities for legislative procedure in Germany, however derogations in favour of the state are plentiful. That is to say, in terms of legislation, the state is authorised inasmuch as the *Grundgesetz* provides it with respective competencies. In fact, the *Grundgesetz* allows for an extensive devolution of legislative capacity to the central level. Nonetheless, this tenet-derogation ratio in favour of the *Länder* is quite significant. Insofar as it can be understood as a manifestation of the principle of subsidiarity (recall the Mandelkern-Report that acknowledges this very principle to be a key feature of good legislation), it becomes clear that the *Bundestag,* as the parliament at the state level, is not a suitable organ for the scrutiny of adherence to the principle of subsidiarity since its own power-political rationality is directed towards a maximisation, not a limitation of its competencies.

Apart from this federal exception, the democratic system is characterised by a one-dimensional legitimisation of state organs through the people. The people only elect the *Bundestag*, the *Bundestag* then elects the federal chancellor. There are no other ways in which the people could influence the composition of state organs or the content of laws on state level.[26] There is neither a direct election of the president, nor does the *Grundgesetz* provide for instruments of pure democracy. What is more, the composition of the government is not only beyond the control of the people, but even beyond the influence of the parliament since the ministers – at least by applying a solely legal point of view – rely on the trust of the chancellor.[27]

Moreover, when examining the parliamentary scrutiny of the quality of legislation, it is worth highlighting the role of political parties, that do not only influence the legislation in an institutional-personal manner, but also in a material-substantial way.

Although the *Grundgesetz* does not grant parties a monopoly, it does acknowledge that they have a privileged status for the formation of a political

[26]This does not take into account the *Bundesrat*. The *Bundesrat* consists of members of the governments of the *Länder*, of whom at least the minister president or the governing mayor are elected by the state parliaments.

[27]Article 64 (1) of the *Grundgesetz*.

opinion.[28] Essentially, this status is largely shaped by electoral law, that in turn lies in the hands of the *Bundestag's* majority, i.e. political parties. Specifically, German electoral law is characterised by a combination of a plurality and a proportional representative voting system. In order for the parliament to influence the quality of laws, it is imperative that the party-political composition of the *Bundestag* is dependent on the ratio of votes that the parties have achieved. Due to the fact that there are around six parties that are able to represent the parliament, it comes as no surprise that coalitions are needed to form a government, let alone to elect a chancellor. By concluding a coalition agreement, they agree on an agenda for the respective legislative period, leading to practically – not legally – curtailing the parliament's scope of action.[29] Applying a constitutional or democratic-theoretical point of view seems even more unfavourable, since not only are rough guidelines part of the agreement, but also detailed standards. It must be emphasised again that these standards are not concluded by elected MPs but the respective representatives of the political parties.

In summary, the parliamentary regime in Germany is characterised by a strong dominance of political parties that do not only determine the composition of the parliament but in fact the composition of the government too, and that also set forth substantial standards of legislation within the next legislative term.

3.2 Overview of the legislative procedure

The legislative procedure in Germany is characterised by the participation of three organs: the *Bundesregierung* (the German government), the *Bundestag*, and the *Bundesrat* (the upper house of German legislative) are equally entitled to present bills. The *Bundesrat* can comment on bills tabled by the *Bundesregierung*, which will subsequently be forwarded to the *Bundestag*. The *Bundestag* is the main organ of legislation as without its consent no laws can be passed. Without this being specifically established by the constitution, the *Bundestag* forwards bills to one or more panels of experts to be read before adopting their final recommendations in a second or third reading.[30] The influence of the *Bundesrat* varies depending on the specific content of the law. Technically, the *Bundesrat* can object to laws that have been passed by the *Bundestag*. That said, the *Bundestag* – provided it meets strict majority requirements – can overrule this objection.[31] In certain instances, i.e. when interests of the *Länder* are especially affected,

[28] Article 21 of the *Grundgesetz*.
[29] Article 64 (1) of the *Grundgesetz*.
[30] Specified Horst Risse Michael Wisser, in Winfried Kluth and Günter Krings (eds), *Gesetzgebung* (C.F. Müller 2014) § 18 Rn. 41 ff.
[31] Article 77 (4) of the *Grundgesetz*.

laws can only be passed if the *Bundesrat* consents. The *Bundesrat* does not exert its veto power in a destructive manner, as to avoid laws from being passed, but rather in a constructive manner, so it can influence the substantial questions of particular laws. Another mechanism for achieving compromises between the *Bundestag* and the *Bundesrat* is the so-called *Vermittlungsverfahren*, an equally represented committee composed of 16 members of the *Bundestag* and the *Bundesrat,* respectively. It can always be initiated by the *Bundesrat*, and in certain cases, when laws require consent by the *Bundesrat*, by the *Bundestag* or the *Bundesregierung*. The *Vermittlungsverfahren* is a non-public procedure that aims to elaborate on a version of the bill that both the *Bundestag* and *Bundesrat* will consent to.[32] Lastly, the president is tasked with reviewing the bill and ensuring it meets constitutional standards, and eventually issuing and declaring the law.

4. Quality management of governmental bills

Although the *Bundestag* and *Bundesrat* are equipped with an extensive legislative capacity, the actual legislative capacity lies in the hand of the *Bundesregierung*. Approximately 80% of all bills are initiated by the *Bundesregierung*, which itself can draw on personnel and factual resources from the ministerial administration. Although the subject of preparation of bills is not set forth by the constitution, provisions are stipulated in the *Geschäftsordnung der Bundesregierung*, the rules of procedures for the government.

4.1 Intergovernmental standards (joint rules of procedures)

In Chapter 6 (§§ 40 et seqq of the GGO) of these Joint Rules of Procedures, various provisions concerning the legal enactment are set forth, though they are limited to standards binding the *Bundesregierung*. That is because the GGO lacks appropriate regulating capacity, thus cannot stipulate standards that are binding for the *Bundestag* and the *Bundesrat*. However, they themselves have put rules of procedures into writing that contain internal standards for legislation.

In spite of this, only the GGO contains detailed requirements in terms of the preparation, form, and procedure of bills, though it does not clarify the origin of impulses of legislation. Therefore, it is worth mentioning that there are several sources that can establish obligations of legislation, be it due to transposition obligations arising in the context of European Union or international law, or be it due to case law rendered by the European Court of

[32]Cf. Claus Koggel, in Winfried Kluth and Günter Krings (eds), *Gesetzgebung* (C.F. Müller 2014) § 19 Rn. 24 ff.

Justice or the *Bundesverfassungsgericht*.[33] Nonetheless, the legislator, or more precisely, the *Bundesregierung* in its capacity as the legislator, is relatively free to decide which substantive area shall be subject to its legislation. Admittedly, this legal freedom is overshadowed by political commitments, which ultimately generate the coalition agreements.

Regardless of how an impulse within the *Bundesregierung* develops into a bill, the Joint Rules of Procedures provide for a range of provisions that all aim at quality management of laws.

4.2 Involvement of several ministries

The GGO stipulates that (and which) ministries must be involved in the elaboration of bills. This interdepartmental participation shall not be underestimated since it is not only essential for the quality of laws, but also for the political separation of powers. In particular within coalitional governments, the actual opposition does not take place between political parties but between the interests of the respective ministries.

4.3 Investigations of facts and hearings

Beyond that, the GGO includes several procedural requirements that are aimed at the investigation of facts and the interests of parties concerned. Ultimately, legal decisions can only be as good as the quality of facts they are relying upon. This is why the GGO does not only require that the *Länder* and the councils are to be consulted before drafting the bill, but also central associations of the respective economic branches as well as the press. This involvement of the concerned parties features a reciprocal information function, ensures the quality of laws (inasmuch as the laws are not being passed while overlooking the current realities), builds confidence, ensures acceptance and thus law enforcement.[34]

4.4 Legislation impact assessments

Moreover, the GGO requires comprehensive legislation impact assessments. These are to ensure that the effects that the laws are supposed to bring about actually materialise with as little side effects as possible. At the same time, the enforceability of laws should be guaranteed while the costs of the implementation of laws should be kept low.

[33] On the systematisation of legislative obligations see Thilo Brandner, *Gesetzesänderung* (Berliner Wissenschaftsverlag 2004) S. 243 ff.

[34] Cf. Frank Daumann, *Interessenverbände im politischen Prozeß* (Mohr Siebeck 1999), 219 et seqq.; Matthias Rossi, 'Betroffenenbeteiligung im Gesetzgebungsverfahren' (2014) 62 Jahrbuch des öffentlichen Rechts 159.

The legislative impact assessment is a multi-disciplinary procedure to investigate the consequences of legal norms, the development of alternatives, and the comparative assessment of the latter. It constitutes a procedure aimed at legal optimisation, which is supposed to contribute towards the minimisation of regulatory density, the avoidance of loss of acceptance, and the conservation of resources.[35]

The impact assessment is complemented by the regulatory control council. The regulatory control council is an authority based in the federal chancellery and is tasked with supporting the *Bundesregierung* in implementing its measures in the area of the reduction of bureaucracy and better legal enactment. On the basis of plausibility and methodology, it reviews the costs of compliance for citizens, the economy, and public administration as well as other costs for the economy, specifically for mid-sized enterprises.

4.5 Review of legal formality

Thereupon, the legal formality has to be reviewed. The legal formalities of every bill introduced by the *Bundesregierung* must be scrutinised by the federal ministry of justice before being forwarded to the official legislative procedure.

4.6 Reasoning

Lastly, bills initiated by the *Bundesregierung* must be substantiated. Pursuant to § 43 (1) of the GGO, this reasoning shall encompass the following aspects:

(1) The purpose and necessity of the bill and its provisions
(2) What facts the bill is based upon and on which sources of knowledge it relies
(3) Whether there are alternatives to resolve the respective issue, whether this task can be completed through the private sector and, if not, which considerations led to the refusal of private sector involvement
(4) Whether there are duties to report, other administrative obligations, or the introduction or extension of provisos on permissions with respective surveillance- or permission-obligations and reasons against a self-commitment of the norm addressee to resolve this issue
(5) The legal consequences (§ 44 of the GGO)
(6) Whether the law can be in force temporarily

[35] Comprehensively elaborating Carl Böhret and Götz Konzendorf, *Handbuch Gesetzesfolgenabschätzung* (Nomos 2005); on the theoretical principles see Margrit Seckelmann, *Evaluation und Recht* (Mohr Siebeck 2018), 158 et seqq.

(7) Whether the bill leads to a legal or administrative simplification, especially whether it simplifies or makes redundant applicable regulations
(8) Whether the bill is consistent with EU law
(9) Amendments to valid legal positions

4.7 Shortcomings of the intergovernmental quality management

The requirements set forth by the GGO contain viable instruments for ensuring the quality of laws, both in a formal way and – by incorporating internal and external expertise – in a substantial way. Therefore, the quality of bills initiated by the *Bundesregierung* is often relatively good, although, when applying a distant constitutional science-based perspective, the constitutional boundaries are often extended and sometimes exceeded. Ultimately, bills always reflect the inherent power of its ministries, i.e. sometimes the fingerprints of the environmental ministry are visible when it is responding to matters of the economic ministry, sometimes the financial ministry asserts against the argumentation of the social ministry, to name a few examples which can naturally be applied *vice versa*.

Apart from these rather specific problems, the quality management of the GGO has two more shortcomings that are worth highlighting.

Firstly, the requirements of the GGO are binding for the *Bundesregierung*, however, there is no legal external effect of these provisions.[36] That is to say, non-compliance with the provisions of the GGO has no legal consequences, let alone leads to unconstitutionality and thus to the non-applicability of laws that have come into force while disregarding the GGO.

Secondly, in practice the internal obligation of the GGO is frequently circumvented: often a bill is elaborated by the ministerial administration but is subsequently not forwarded to the *Bundestag* by the *Bundesregierung*, but by the parliamentary groups that are carrying the *Bundesregierung*.[37] Technically, this constitutes an initiative by the *Bundestag*, not by the *Bundesregierung*, with the *Bundestag* not being bound by the requirements of the GGO. These so-called 'artificial *Bundestags* initiatives' do not only target the evasion of the GGO, but also a shortening of the legislative procedure by three to six weeks, since the forwarding to the *Bundestag* becomes superfluous. Notwithstanding these practices, this form of legislative initiative is exempted from the provisions of the GGO.

[36] Also the Fededral Delegate in the matters of Administrative Efficiency criticises the insufficient consideration of the GGO, see Der Präsident des Bundesrechnungshofes als Beauftragter für die Wirtschaftlichkeit in der Verwaltung, *Gutachten über Maßnahmen zur Verbesserung der Rechtssetzung und der Pflege des Normenbestandes* (Kohlhammer 2010).

[37] Cf. Jens Kersten, in Theodor Maunz and Günter Dürig and others (eds), *Grundgesetz Kommentar* (C.H. Beck 2019), Art. 76 Rn. 52.

5. The role of parliament in legislation

Having introduced the 'artificial *Bundestags* initiatives', this paper can finally turn to the essential point: the quality management of laws by parliament. Yet, demonstrating the realities of the quality management by the *Bundesregierung* was imperative to illustrate that the actual quality management of laws in Germany lies in the hands of the respective initiator. That said, the subsequent formal legislative procedure in the *Bundestag* and *Bundesrat* can lead to the enhancement of bills. Nonetheless, this procedure does not require a formal, let alone an exhaustive, review of the quality of laws, but conversely often leads to an 'improvement for the worse'.

5.1 The capacity of legislative initiatives

As mentioned, the *Bundestag* too has the capacity to initiate bills. Article 76 of the *Grundgesetz* reads that bills can be initiated by the 'centre of parliament'. The *Geschäftsordnung des Bundestages*, the rules of procedures for the *Bundestag*, specifies this provision, clarifying that those bills have to be initiated by at least 5% of MPs. This quota draws on the election threshold on the one side, and the definition of parliamentary groups on the other.

Beyond these quantitative requirements, neither the *Grundgesetz*, nor the rules of procedures contain any qualitative requirements for bills. Thus, there are no binding provisions whatsoever that could potentially clarify how bills must be shaped, whether they must be substantiated,[38] whether they are based on empirical examinations, and whether a legal impact assessment has been completed. In other words, there are no mechanisms whatsoever to ensure the quality of laws, nor is there any form of official or institutional assistance to facilitate the drafting of bills. The only exception is the so-called *Redaktionsstab* of the *Bundestag*, an editorial staff offering advice to parliamentary groups and MPs regarding orthography, punctuation, grammar, and linguistic issues more generally.[39]

However, in the political reality the lack of normative requirements and institutional assistance does not affect the quality of bills negatively. Essentially, this is due to two reasons:

As far as bills are initiated by MPs of the governmental parliamentary group, they can take recourse explicitly, or at least implicitly, to the preliminary work of respective ministries. As suggested earlier, the possibility of inter-parliamentary legislative initiatives is often harnessed by deploying 'artificial *Bundestags* initiatives' where MPs of the governmental

[38]Comprehensively elaborating Henrik Gartz, *Die Begründungspflicht des Gesetzgebers* (Nomos 2016); see also Kyrill A Schwarz and Christoph Bravidor, 'Kunst der Gesetzgebung und Begründungspflichten des Gesetzgebers' [2011] JuristenZeitung, 353 et seqq.

[39]See § 80a of the GO-BT.

parliamentary group initiate bills that have been drafted by the ministerial administration, which in turn are politically steered by the parties of the governmental coalition. Hence, they are practically trained at drafting bills, though they are not directly bound by the requirements of the GGO.

Very rarely, MPs of the governmental parliamentary group initiate bills against the will, and therefore without the support, of the government. In these instances, they are reliant on their own expertise and the support of the MP's assistants. Since they will subsequently decide upon their own draft, these drafts do not demand an elevated standard. The only hurdle is to convince the *Bundesrat*, which is relatively feasible in terms of *Einspruchsgesetzen*, laws that do not require the consent of the *Bundesrat*. As for the rest, the *Bundesrat's* decision is dependent on its party-political composition. Particularly in the era of the 'Große Koalition', a so-called great coalition comprising the two major parties, it can be expected that there will not be any objection nor the involvement of the *Vermittlungsausschuss*.

Insofar as bills are initiated by oppositional parliamentary groups, recourse to the ministerial administration of the state is generally not available. Surprisingly, this absence does not lead to inferior quality. That is because they either draw on the preliminary work of political parties and their assistants, or employ external assessors – law firms, professors, or think tanks – to draft the bills.[40] To some extent – when they hold the governmental responsibility in a *Land* – they are able to take recourse to the ministerial administration of the respective *Land*. It is noteworthy that bills initiated by the opposition do not typically have majority appeal, though every initiator has a right that the legislative organ deals with its bill. This right would be violated if the parliament would not (in a timely manner) deal with initiatives by oppositional parliamentary groups without providing objective reasons.[41]

5.2 Legislative advice

Regardless of which organ has initiated a bill, during the legislative procedure the *Bundestag* has the opportunity to review and, as appropriate, enhance the quality of the laws.

This is due to the procedure of respective commissions of the *Bundestag*. These commissions are relatively free within their procedures. That said, § 70 of the GO-BT enables the implementation of public hearings of assessors and stakeholders. To ensure democratic minority rights, commissions in charge are obliged to perform such hearings provided that a quarter of the commission members require this.

[40] Cf. Michael Kloepfer, *Gesetzgebungsoutsourcing* (Nomos 2011).
[41] BVerfG, Order of the Second Senate of 20 June 2017, 2 BvQ 29/17, paras. 1–42.

These hearings of the concerned parties and the assessors are quite significant in practice. That is because the assessors in particular study the bill thoroughly and point out legal loopholes, contradictions, and other inconsistencies. Many hearings contribute to the modification of final recommendations or even the entire content of the bill. It is essential that these hearings illustrate the specific impact of the proposed law, along with its side effects. Therefore, these hearings are virtually indispensable in cases where the involvement of concerned parties has not yet taken place.

Having said that, hearings should not be overvalued. Assessors are usually designated by parliamentary groups in accordance with their proportional representation in parliament. Moreover, the hearing is performed in line with proportionally allocated rights of the MPs to question. This influence of the selection of assessors by the parliamentary groups often leads to the predicament that no new and independent arguments can be alleged by the respective assessor. This in turn seems somewhat irrelevant in terms of the subsequent legislative procedure since the second and third discussions within the plenary assembly are scheduled so close to the sessions of the commissions, that the examination of new arguments is practically impossible from the outset. Therefore, in several instances these hearings are mere acts of pretence that preserve the appearance of a transparent and communicative legislative discussion rather than enhancing the actual content of a bill.

5.3 Legislative power

Ultimately, the parliament exerts its strongest influence on the quality of laws by holding the legislative power, meaning that no laws can enter into force without it. In theory, this parliamentary right allows for the fine-tuning of initiated bills until they have achieved the desired quality. From a legal point of view, the *Bundesregierung* cannot exceed this power.

6. The interparliamentary distribution of roles

In practice, however, the *Bundesregierung* does not harness this capacity. That is not only because of the party-political entanglement of the government on the one side, and the majority in parliament on the other, but also because of the interparliamentary distribution of roles that results thereof.

6.1 The discipline of parliamentary groups

To a great extent, this interparliamentary distribution of roles is determined by political parties that do not only influence the *Bundestag*, but also the

Bundesregierung and the *Bundesrat*, and that modify the institutional separation of powers in this respect.

In particular, the political parties influence the relationship between the *Bundesregierung* und *Bundestag*. That is because it reflects the standard practice that MPs – although they hold a free mandate pursuant to Article 38 (2) of the *Grundgesetz*, meaning they are not bound by assignments and directives – coordinate their votes amongst each other in order to vote unanimously.

This discipline of parliamentary groups is not only sensible when applying a party-political point of view, but also a subjective perspective of the individual MPs, in order to guarantee the governmental majority or the oppositional strength respectively. In most instances, the appearance of a consistent political attitude is for the MPs own interest. Even when applying a distant 'objective' angle, this discipline comes with a range of advantages since it ensures the predictability of political votes and the *Bundestag's*, and ultimately the *Bundesregierung's*, capacity to act. This discipline meets its limits when shifting towards a compulsion of the political parties, which is identifiable when hard political sanctions are followed by split voting.[42]

Regardless of these abstract limitations and the sensibility of the discipline of parliamentary groups, in view of the parliamentary scrutiny of the quality of laws it is noted that in specific individual cases this discipline constitutes an obstacle to effective scrutiny. It is due to its inherent effects that a bill will not be criticised that has been initiated by the government (which has been voted in by the supportive parliamentary majority). Thus, the parliamentary majority lacks distance which is imperative in order to effectively exert parliamentary scrutiny.[43]

Worth highlighting is the exemption of coalitional governments wherein the involved parties do not only have divisive political objectives, but do also occupy different ministries. In this case, the inter-ministerial opposition continues to have an effect when different commissions (e.g. the environmental commission on the one hand, and the economic commission on the other) provide differing recommendations. However, the necessary distance to governmental bills usually does not affect the quality of laws positively, in fact it has a negative effect. Two reasons in particular are noteworthy: firstly, in order to satisfy differing interests of the coalition partners, there will usually be few alterations to the initial bill with these being frequently outside of the statutory system and containing differing state objectives. These 'foreign bodies' in laws are often the result of political compromises

[42]Cf. Hans Hugo Klein, in Theodor Maunz and Günter Dürig and others (eds), *Grundgesetz Kommentar* (C.H. Beck 2020), Art. 38 Rn. 214 ff.

[43]Elementary Michael Kloepfer and others, 'Gesetzgebung im Rechtsstaat. Selbstbindungen der Verwaltung' (1982) 40 VVDStRL 65, 66, see also Eberhard Schmidt-Aßmann, in Eberhard Schmidt-Aßmann and Wolfgang Hofmann-Riem (eds), *Verwaltungskontrolle* (Nomos 2001) 291, 299.

between coalition parties. Secondly, these compromises are usually achieved through irrelevant considerations. Often, the consent to a bill by one of the coalition parties is only given because the other party signals its willingness to consent to another bill. Naturally, these compromises reflect the political rationality, though they often constitute an obstacle towards the rationality of the respective law.[44]

6.2 Competencies and responsibilities of the opposition

Due to the party-political entanglement of government and parliamentary majority, the actual parliamentary scrutiny lies almost exclusively in the hands of the opposition. Indeed, the opposition has various legal instruments that it can harness in order to enhance the quality of laws. Most of these rights are of a political nature, e.g. by reference to its right to speak, right to ask questions, and right to vote the opposition can attempt to influence the decision-making directly or indirectly, by influencing public opinion. Frequently, the direct oppositional influence is undermined by the principle of majority and the discipline of parliamentary groups. Only in instances where the discipline of the parliamentary groups is suspended because highly ethical questions are to be discussed (e.g. regarding organ donations or the culpability of euthanasia) is it possible that the opposition asserts its arguments against the party-political majority of the governmental parliamentary groups.

Whether laws will be enhanced in these instances remains debatable, and is also dependent on which criteria determine the quality of laws. At any rate, the opposition does not have any special instruments it can utilise to work towards the punctual enhancement of bills. It can move amendments, though – due to party-tactical deliberations – they are usually discarded without consideration. However, it must also be noted that not every proposed amendment actually leads to an enhancement, but in certain instances to a dilution.

Besides these political instruments, the opposition can further profit from viable legal instruments.[45] Worth highlighting in particular is the capacity to invoke the legal review of a bill by the *Bundesverfassungsgericht*. This capacity is important because the *Bundesverfassungsgericht* will only take action when requested to, meaning that if there is no inquiry into the legal review of the bill, a law contrary to the constitution might enter into force. The function of scrutiny that is intended to lie in the hands of the parliament in its entirety but is actually transferred to the

[44]Cf Armin Steinbach, *Rationale Gesetzgebung* (Mohr Siebeck 2017) 164 et seqq.
[45]Albeit specific oppositional rights are not directly derived from the constitution, cf. BVerfG, Judgment of the Second Senate of 3 May 2016, 2 BvE 4/14, paras. 1–139.

opposition, does not only express itself in an oppositional right, but in a significant responsibility. Nonetheless, the decision of whether to involve the *Bundesverfassungsgericht*, is at their political discretion. What is more, the importance of this instrument for the scrutiny of the quality of laws must be put into perspective. Firstly, this inquiry requires the votes of one quarter of MPs, a quorum that is usually not met by individual oppositional parliamentary groups, hence why the cooperation of different oppositional groups becomes necessary, which is rarely feasible due to party-political reasons. Secondly, strictly speaking this instrument does not enable parliamentary scrutiny since the *Bundesverfassungsgericht* decides upon the law's constitutionality. And lastly, the court only applies a constitutional perspective. In cases where bills are technically within the boundaries of the constitution but of inferior quality, this will not be sanctioned.

6.3 The role of the consulting commissions

Despite striking this rather sobering balance, the parliamentary scrutiny of the quality of laws in Germany shall not be underestimated. For most of the quality criteria it has little to no influence, and in certain instances even a negative influence. However, in terms of determining the effects of laws – not only intended objectives, but also possible side effects – the parliamentary procedure is capable of improving the quality of laws. Therein, the involvement of additional commissions alongside the leading one, is undoubtedly positive. Certainly, these commissions merely reflect the material competencies of the individual ministries which were often involved in the intergovernmental drafting process. Nonetheless, these consulting commissions must firstly be involved in instances of 'artificial *Bundestag's* initiatives', i.e. in cases where an inter-ministerial vote has potentially not yet taken place. Secondly, this involvement leads to the participation of the public, meaning it offers transparency. This in turn results in addressing all possible effects the law could give rise to, in contrast to only those effects that have been presented by the initiator.

7. The role of the parliamentary administration

Along with the MPs, the parliamentary administration can also contribute to the scrutiny of quality of laws. That said, this administration almost always operates indirectly in the background by ensuring the smooth performance of parliamentary work. However, in the German parliament there is no specific authority that deals exclusively with the quality of laws or that reviews their legal formality, nor is there an office of parliamentary

counsel as is the case in the United Kingdom[46] and Australia. Having said that, there are three institutions that are worth mentioning which can – at least in certain instances – influence the quality of laws.

7.1 Academic service subdivision

The 'academic service' subdivision is of particular significance.[47] It comprises ten departments which provide a wide range of details to MPs, parliamentary groups and commissions. Although they do not constitute an assistance agency for legislation, they can still assess and influence specific legislative projects by providing their expert opinion. That said, these expert opinions are not binding, in fact they are not even required to be substantiated. Rather, they simply constitute a piece of advice within the abundance of assessments of intended bills. The independence of the academic service towards the MPs as well as the quality of its assistants has contributed to a good reputation hence why their expertise is not only demanded in the *Bundestag*, but is also referenced by the general public. Therefore, whenever the academic service criticises or comments on a bill during the legislative procedure, their opinion is usually taken seriously.

7.2 Europe subdivision

Besides the academic service, there is also the 'Europe' subdivision that was established in 2013. This division accounts for the increasing legislative activity of the European Union which requires domestic parliaments to be informed of pending laws at EU level so that they have the chance to influence them. The enhanced involvement of national democracy in the legislation process of the EU, which in turn is reserved by the European parliament and the assembled governments of the member states within the council, are some of the innovations that have been entrenched in Article 12 of the TEU by the Treaty of Lisbon.[48] Therefore, the 'Europe' subdivision has an informative role in that it monitors numerous projects of EU-legislation, filters information and, if appropriate, edits and forwards these to the respective commissions of the *Bundestag*. Although its influence on the quality of laws is only indirect, it enables a timely decision-making process in respect to legislative projects of the EU, when there would otherwise be only a short time for transformation periods.

[46]Cf. Enrico Albanesi, 'Parliamentary Scrutiny of the Quality of Legislation within Europe' [2020] Statue Law Review 1.

[47]Specified Sven Hölscheidt, 'Die Wissenschaftlichen Dienste des Deutschen Bundestages' [2010] Deutsches Verwaltungsblatt 78.

[48]Cf. Matthias Rossi, 'Interparlamentarische Demokratie? – Zur Einbindung der nationalen Parlamente in die Rechtsetzung der EU' in Michael Kloepfer (ed), *Gesetzgebung als wissenschaftliche Herausforderung* (Baden-Baden 2011) 47.

7.3 Linguistic advice 'Redaktionsstab'

Lastly, pursuant to § 80a of the GO-BT there is the so-called '*Redaktionsstab Rechtssprache*' that exists within the German parliament. It is conducted by the Association of German Language, the *Gesellschaft für deutsche Sprache*, that – as a registered association – is organised under private law. Its place of business is in Wiesbaden, though there are several offices within the *Bundestag*. Therein, it supports the parliamentary administration, the MPs and its assistants. The advice of the *Redaktionsstab* exclusively concerns the correct application of the German language, rather than the formal drafting of laws. Nonetheless, punctuation can be significant for the correct meaning of a provision, hence why the *Redaktionsstab* contributes (to a very small extent) to the quality of laws. However, it only acts upon request, not proactively.

8. Assessment of the parliamentary quality scrutiny

Considering all the legal requirements and political practices, a review of the legislative procedure at a federal level seems to reveal that the control and inspection of the quality of legislation is not (or hardly) up to the parliament. MPs might campaign for the content of legislation, but the political rationality of the legislative procedure leaves little incentive for MPs to advocate for legislation of a particularly good quality.

In order to undertake an overall evaluation of parliamentary quality scrutiny, the terms 'control' and 'legislative quality' need to be considered. Insofar as control is to be understood in a restrictive sense, as in the French 'contre-rôle' which is directed to the closing evaluation of a finalised bill, there is no such thing in German legislative procedure. The parliament takes an active part in the legislative proceedings: The direct democratic legitimisation of the *Bundestag* – and indeed, the fact that no law can be passed without its involvement – ensures that the parliament is always capable of shaping and changing bills. In the sense of the term 'controlling', the parliament has a crucial influence on the legislation overall and thus on its quality. In reality – and quite understandably – this influence is primarily used to change the content of legislation in accordance with party politics. Any such efforts are at best shaped by objective aims, but also by political beliefs and the desire to win more votes. However, championing 'good legislation' is unlikely to result in winning votes.

The political rationality of MPs might suggest the need for an independent institution to inspect the quality of legislation based on qualitative and long-term rationale. However, any such considerations can be countered with the perspective of democratic legitimacy. An independent and therefore apparently objective and neutral institution might seek to change the content

of the law under the pretence of quality inspection. This would amount to the possibility of shaping legislation without democratic legitimacy. This theoretical argument can also be supported by a more practical perspective: an institutionalised quality inspection of legislation that has already been passed will take additional time.

As this special issue shows, both these aspects can be solved. In Germany, however, a different culture of quality scrutiny has evolved. Rather than a central and institutionalised quality scrutiny, the concept of controlling legislative quality is open and pluralistic. This concept may put into perspective (within constitutional boundaries) the requirements for good legislation arising from the rule of law. However, this emphasises the democratic means of influencing legislation.

The legislative procedure in Germany is characterised by a variety of potential ways to influence laws, even and especially through the *Länder* and the municipalities enforcing federal laws. The role of political parties, present across and beyond the individual institutions, must also be considered, so that one cannot simply speak of parliament as the legislator, but instead must almost speak of 'the legislators'. They have all been entrusted with the control of legislation, as well as a responsibility for its quality. More often than not, this responsibility is not met. This is indeed the cost of a democratic and federal legislative procedure. But this same democratic legislative procedure allows for consolation: after all, legislation can be changed.

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