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Institutional response to criminalization decisions

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ABSTRACT

Criminalization decisions are often connected with political conflict. When linked to a legislative decision, criminalization emanates from a relevant political input: a politically significant group seeks to criminalize a conduct out of interest-, value- or knowledge-commitment. The institutional system has to work that input in such a way that conflict can be absorbed. The article provides a typology for the analysis of the strain that criminalization demands and criminalization decisions imply for the institutional system and the way in which the legislature and control organs such as constitutional courts can react to it. By focusing in the US and German systems, the article then attempts to reconstruct the effects that different reactions have on the institutional system. By proceeding this way, the article aims at showing the shortcomings of the traditional, justice-centered critical analysis of criminalization and the performance that an alternative approach, centered on institutional and political analysis, can have.

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1. Introduction

Criminalization has been at the forefront of legal discussions related to the criminal law in the last decade (Duff et al., 2011, 2010, 2014; Husak, 2008; Ripstein, 2006). In general, legal literature tends to be interested in criminalization adopting one of two critical approaches: a substantive justice approach or an institutional-output approach.

The first approach is the most popular one: abstract, justice-related conditions of legitimacy are posited and recent trends of criminalization are criticized using that framework (Duff et al., 2010, 2014). Substantive conditions such as the harm principle, Kantian liberal sovereignty (Dubber, 2010; Ripstein, 2006), legal moralism (Duff, 2010, 2007, chaps. 4–6), the *Rechtsgutslehre* (Dubber, 2011a, 2005; Engländer, 2015; Greco, 2008; Kudlich, 2015; Martins, 2015; Schünemann, 2016, 2003), the operative construction of constitutional rights (*Grundrechtsdogmatik*) (Appel, 1996; Gärditz, 2010; Stuckenberg, 2011), or any other specification of principles of justice or general legal values are thus applied to establish the limits of good criminal law legislation. Any criminalization decision that does not fulfill the respective requirements of substantive justice or is not compatible with the correspondent legal values would thus be illegitimate according to such an approach.

The second type of approach is substantially less popular in both the common law and civil law literature. It aims at analyzing the institutional effects of certain criminalization trends and to criticize those trends when linked to their

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institutional outcome. Its central question is therefore not “when is it legitimate to criminalize a certain behavior?” but rather “what effects will take place in the system under current or hypothetical trends of criminalization?” Concepts such as overcriminalization (Husak, 2008), mass incarceration, or the analysis of the power of prosecutors and their integration in the political system (Chalmers and Leverick, 2014; Stuntz, 2006, 2002) are thus put at the center of the legal analysis of criminalization.

Although both approaches have their uses and merits, they tend to leave out of consideration the very process of criminalization. This is especially clear in the case of the substantive justice approach. The main assumption of such an approach is the possibility of clarity and its main goal is to obtain clear standards of judgment of the merits of a criminalization decision. Once a framework is established to make such a clear legitimation judgment possible, one would at least theoretically solve the main issues linked to criminalization. The whole political (and that means: contemptuous) nature of the problem and of its processes is thus left out of the picture under the claim that a “normative” theory of criminalization ought to be developed.

For an institutional and democratic system, such an approach has limited uses. It relies on the assumption that substantive justice is not a political issue but rather an applicable standard to take political decisions non-politically. This is not only incompatible with our strong and sincere disagreements on notions of justice and the meaning of most rights (Waldron, 2016; chap. 1; 7) that is especially sensitive in criminalization discussions, but it is also something that a democratic system cannot and indeed does not assume. The very fact that the traditional criminalization literature constantly expresses irritation regarding the development of the subject in most systems but fails to name institutional solutions to it is symptomatic of its inability to cope with the very problem it aims at denouncing.

Of course, the substantive-justice approach can be understood as the mere development of a sophisticated political language to rationally judge criminalization decisions. Given its political nature, it would be thus normal for such an approach to fail to name any institutional solution to the problem it denounces: political theories can be simply critical. But the very assumption that the language of “harm”, “sovereignty” or “*Rechtsgüter*” is enough to apprehend the political issues at stake in criminalization comes short, as we will see in detail after we analyze the dynamics and origins of criminalization processes.

The institutional-output related approach is certainly much more aware of the political nature of the process of criminalization and thus very much related to the real practices involved. It also aims at evaluating the way in which criminalization processes relate with the institutional system. But it is mainly concerned with the outcome, i.e. with the effects that criminalization decisions have on the institutional system. The analysis of the political process itself that leads to criminalization is thus put in the background: it is only important in the measure in which it reveals irrational institutional dynamics, including a tendency to excessive criminalization. This is, for instance, the assumption behind the very insightful works of William Stuntz (2006, 2002): criminalization has acquired an exponential tendency to expansion in the US because of the community of interests between politicians and prosecutors. Criminalization is both the source and the expression of an irrational institutional design.

As important as such an approach can be held to be, it suffers from reducing the analysis of politics to the analysis of institutional designs. As the criminological and sociological literature on criminalization show, it is far from true that criminalization is only related to the logics of legal institutions or instrumental policymaking. Criminalization tends to arise from claims of social movements (Boyle and Preves, 2000; Grattet et al., 1998; Jenness, 2004, 1999; Jenness and Grattet, 1996) and interests groups (Savelsberg, 1987; Savelsberg and Brühl, 1988); it originates in ideologies (Noll, 1969), group identities (Gusfield, 1986; Kahan, 1999), conflicts of material (Bernard et al., 2010; Chambliss, 1964; Hall, 1952; Hay, 1975; Quinney, 2001; Rusche and Kirchheimer, 1968; Turk, 1969; Vold, 1958) or symbolic interests (Carson, 1974).

In general, it can be thus claimed that criminalization arises from the use of a certain meaning framework by a politically relevant group that confronts its judgment frameworks with what the law provides for and, by realizing that significant differences are given, aims at imposing that very same framework in symbolically or instrumentally relevant areas. Although this does not leave justice out of the picture, the group tends to link justice directly to the criminalization claim itself. In short: criminalization is a political process in its most broad sense and, as such, it is strongly linked to the conflictive nature of our judgment disagreements. The assumption that the problems linked to criminalization can be solved through the search of clear and well-defined set of substantive conditions of legitimate criminalization not only leaves out of the picture the fact that it confronts itself with a process about the definition of our judgment frameworks, but most importantly it also ignores the fact that criminalization often arises from conflict and that a major institutional preoccupation is precisely overcoming the conflict and not deepening it.

In this context, we are neither interested in reconstructing the purely sociological dynamics of criminalization processes nor in the institutional analysis of the outcome of those processes. Our aim is rather to analyze the burdens and demands that criminalization processes make on the institutional system and the way in which the system can *absorb* those demands. In short: it is about analyzing (i) the structure of criminalization claims; (ii) the strains that the political input related to each structure implies for the institutional system; and (iii) the way in which the system can work out (accept, control, modify) such a *political input*. Although we do not aim at claiming that this is the only legal approach that is relevant to criminalization decisions, we aim at showing both its importance and some consequences that can be obtained from it.

For this purpose, we will assume a rather simple and clean methodological framework, which aims at analyzing the criminalization processes in three levels, each one of them made possible by the previous one. On the first level (section 1), we aim at reconstructing the *structure of different criminalization processes* in what is relevant to establish how stressful the

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