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SYMBOLIC LEGISLATION, EFFICACY, EFFECTIVENESS AND LEGISLATIVE ERROR**

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Symbolic legislation is often described as "irrational" and "deceptive". However, this characterization fails to recognise that symbolic legislation is always a matter of degree and that these adjectives can only apply to primary or predominantly symbolic legislation. A characteristic pattern for predominantly symbolic legislation is a problem with the efficacy and/or effectiveness of the norms in connection with a symbolic aspect. In other words, lack of efficacy and/or effectiveness is not the only characteristic of primary symbolic legislation. In this paper, after attempting to characterise predominantly symbolic legislation in more detail, two analyses of legislative activity are presented: The entrenched notion that predominantly symbolic legislation is always intentionally created is challenged, thereby refuting the notion that it is necessarily "deceptive". An assessment of its quality is then made based on certain parameters proposed by legislative theory; based on this analysis, the idea of irrationality or lack of quality - mainly due to the lack of efficacy and effectiveness - is accepted.

Key words: *symbolic legislation, effectiveness, efficacy, legislative quality, legislative error*

1. INTRODUCTION

Symbolic legislation receives a great deal of attention in politics, academia and the press. Social activists often claim that certain laws are "purely symbolic". For example, cases of purely symbolic legislation include those that impose fines on beggars or illegal immigrants, those that prohibit sexual relations between people of the same sex, among other cases that we will see throughout the text. Although there is a common thread running through all references to symbolic legislation, there is no clarity or precision as to what symbolic legislation means. This lack of clarity also extends to the definition of what "symbolic" means in this type of legislation.

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I will try to find a possible approach to this last point, but it is undoubtedly not the only acceptable one.[1]

A first, not entirely inaccurate but imprecise approach, which captures most intuitions on the subject, allows us to associate symbolic legislation with the idea of non-compliance with norms or their lack of application (inefficacy) and/or with the failure to achieve the objectives for which it was enacted (ineffectiveness). However, despite the non-compliance or non-achievement of its objectives, this type of legislation has another effect: it has a relevant symbolic or expressive value. Typically, symbolic legislation is understood as "irrational" and "deceptive" (or similar qualifications in terms of its lack of quality and transparency).[2]

A starting point of this paper is that symbolic laws are a matter of degrees. Laws are hardly only "symbolic" or "non-symbolic". This distinction is generally overlooked, and I understand that this does not help to clarify the phenomenon, because all laws or norms have a symbolic dimension or effect- that is more or less important depending on the case. When the doctrine speaks of symbolic laws and questions their quality and transparency, it refers to what I will call here predominantly (or mainly) symbolic legislation, and this type of legislation is the focus of this work. [3]

I will limit myself to characterising and analysing predominantly symbolic legislation in primary prescriptive norms, i.e. those that impose prohibitions or obligations, as they pose the greatest problems.[4] Furthermore, I will adopt an instrumentalist view of law, in which "Law" is conceptualised as a set of norms

[1] This problem does not only concern law, because the definition of "symbol" and "the symbolic" was and is problematic for all disciplines. Umberto Eco explains in this regard: "One of the most pathetic moments in the history of philosophical terminology occurred when the contributors to Lalande's Dictionary of Philosophy (1926) gathered to discuss the definition of 'symbol' (...) Lalande's effort was not in vain; it suggests that a symbol can be everything and nothing" (Eco, U., *Semiotics and philosophy of language*. Bloomington: Indiana University Press, 1986, p.p. 131-132).

[2] See Hassemer, W., Derecho penal simbólico y protección de bienes jurídicos. In *Pena y Estado*. Santiago de Chile: Editorial Jurídica Conosur, 1995, pp. 23-36; see also Ferraro, F., Deception and expression: The puzzling rationality of symbolic legislation, in F. Ferraro & S. Zorzetto (Eds.), *Exploring the province of legislation*. Amsterdam: Springer, 2022, p.103.

[3] In addition to the attempt to identify symbolic legislation, topics such as the symbolic effects of laws, the symbolic functions of law, the symbolic use of law, etc. are often treated. I believe that this joint treatment has led to difficulties in understanding the phenomenon of predominantly symbolic legislation. Therefore, I will refrain from treating these derivative topics and focus exclusively on the characterisation of predominantly symbolic legislation.

[4] Somewhat vaguely, the authors refer to symbolic "laws" or "legislation". These references seem to mention a set of norms contained in a law that is entirely symbolic. While this occurs occasionally, it is unusual. It is more common to find "norms" that are predominantly symbolic within laws or groups of symbolic norms within laws that are not entirely symbolic. I will generally follow common usage and continue to use the terms symbolic "laws" or "legislation". However, in cases where a "single norm" is predominantly symbolic, I will refer to it as a "symbolic norm".

and rules that Parliament sanctions to achieve certain public policy goals.[5] We can extend the idea also to the executive power when it assumes legislative functions inherent to its activity.

To summarise, in this paper I will mainly characterise symbolic laws and norms and analyse whether they fulfil certain parameters of legislative quality used by legislative theory. Furthermore, I will ask the question whether they are always deceptive and therefore always due to an active mistake of the legislator.

2. SYMBOLIC LEGISLATION, INEFFICACY, AND INEFFECTIVENESS

As mentioned above, there is no precise agreement on what we mean when we speak of predominantly symbolic legislation, although there are some common intuitions. Van Klink, following critical sociology studies, understands that symbolic legislation is mostly ineffective and serves other social objectives than those officially proclaimed[6] and that a law is symbolic if it is enacted predominantly to function as a symbol. [7] Winfried Hassemer, on the other hand, argues that "there is a global agreement regarding the direction in which the phenomenon of symbolic law is sought: It is an opposition between 'reality' and 'appearance', between 'manifest' and 'latent', between 'truly desired' and 'otherwise applied' (...) Symbolic is associated with 'deception', both in a transitive and a reflexive sense"[8]. It has also been said that symbolic legislation can be understood as a type of legislation that serves the propagandistic purposes of politicians, regardless of the actual need for legislation. In this sense, it is often associated with "populism" and

[5] See Van Klink, B., Legislación, comunicación y autoridad: ¿Cómo dar cuenta del carácter vinculante del derecho? In D. Oliver-Lalana (Ed.), *La legislación en serio*. Valencia: Tirant lo Blanch, 2019, p. 173; also see Xanthaki, H., Malentendidos sobre la calidad de la legislación: Un enfoque fronético del drafting legislativo. In D. Oliver-Lalana (Ed.), *La legislación en serio*. Valencia: Tirant lo Blanch, 2019, pp. 63-118. In recent years, a new type of symbolic legislation has been described and analysed that is not directly related to the one discussed here. It is a model of "positive" symbolic legislation that corresponds to the concept of "Law as Symbol" (LAS). The main difference with the traditional model of legislation is that the legislature will no longer issue commands backed by severe sanctions, but open and aspirational norms that aim to modify behavior not through threats, but indirectly through debate and social interaction (see Poort et al., Introduction: Symbolic dimensions of biolaw. In L. Poort, B. van Beers, & B. van Klink (Eds.), *Symbolic legislation theory and developments in biolaw*. Amsterdam: Springer, 2016, p. 2; see also Van Klink, B., Symbolic legislation: An essentially political concept. En L. Poort, B. van Beers, & B. van Klink (Eds.), *Symbolic legislation theory and developments in biolaw*. Amsterdam: Springer, 2016, p. 24). I understand that the model of "positive" symbolic legislation is not opposed to an instrumentalist model. On the contrary, I believe that the model of open and aspirational norms, or norms that aim to achieve goals without specifying the means to achieve those goals, is an instrumentalist model, as opposed to purely expressivist theories as described by Adler (Adler, M., Expressive theories of law: Skeptical overview. *University of Pennsylvania Law Review, 148*(5), 2000). However, in the context of positive symbolic legislation, the notions of efficacy and effectiveness that I am working with here are not fully applicable.

[6] Van Klink, B., *Ibid*, p.19.

[7] Van Klink, B., *Ibid*, p. 21.

[8] Hassemer, W., *op. cit.* note 2, p. 27.

"demagoguery"[9]. Manuel Atienza understands symbolic legislation to mean that the legislator enacts "laws that are not intended to be complied with".[10]

As can be observed, all approaches, have in common as a core idea that predominantly symbolic legislation fails in terms of efficacy (understood as compliance or application) and/or effectiveness. I agree with this central idea of the authors and will adopt it as a defining part of symbolic legislation, but I will propose a more complete and precise analysis. To do so, it is important to consider which notions of efficacy and effectiveness I will take into account.

2.1. Two senses of Efficacy and the idea of Effectiveness

Efficacy in the first sense is linked to the relationship between norms and the behaviour of subjects. To understand that a prescriptive norm is efficacious in this first sense, the behaviours that reflect what the norm prescribes must be connected to that norm in some way. The nature of the connection varies depending on whether we adopt a lax or a strict version. Three types of connection between norms and the realisation of the prescribed behaviours or states are usually distinguished. The first is the laxer and the last the stricter. Pablo Navarro identifies these three cases as follows: [11]

A norm (N) prescribes the state or action C1, and subjects produce C1 (correspondence).

A norm (N) prescribes the state or action C1, the subjects know the existence of (N) and produce C1 (compliance).

A norm (N) prescribes the state or action C1, the subjects know the existence of (N) and they produce C1 by virtue of (N) (fulfilment).

In the case of correspondence, only a coincidence[12] between the content of N and C1 is required. Whether the coincidence is causal, or accidental is irrelevant in this first approach. In the case of compliance, in addition to the coincidence between N and C1, there is the requirement of knowledge of N by the subjects (coincidence and knowledge). In this case, although it is not necessary that the relationship between norm and behaviour to be permanent, it is necessary for the norm to ultimately enter the practical reasoning of the subjects when they perform the behaviour described by the norm. Finally, in the case of fulfilment, in addition to the coincidence between N and C1 and the subjects' knowledge of N, it is necessary that the motivation to perform C1 comes from N (the subject performs C1 because N prescribes C1).

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[9] Marcilla Córdoba, G., La importancia de la proporcionalidad en la legislación: Un intento de fundamentación desde una concepción constitucionalista y no positivista del derecho. In D. Oliver-Lalana (Ed.), *La legislación en serio*. Valencia: Tirant lo Blanch, 2019, p. 316.

[10] Atienza, M., *Contribución a una teoría de la legislación*. Madrid: Civitas, 1997, p. 44.

[11] Navarro, P. *La eficacia del derecho*. Madrid: Centro de Estudios Políticos y Constitucionales, 1990, p. 16.

[12] Hierro, L., *La eficacia de las normas jurídicas*. Barcelona: Ariel, 2003, p. 76.

From an instrumentalist perspective and for the identification of symbolic legislation, I consider the standards of compliance and fulfilment to be more useful than mere correspondence. This is because the weakest relation of correspondence or coincidence (N prescribes the state or action C1 and the subjects produce C1), which is less demanding than the others (compliance and fulfilment), can include the cases that are also covered by the other relations, but it also includes the situation of mere coincidence, in which the subjects' knowledge of N or their motivation in N is irrelevant. This version of efficacy is not a useful tool to assess the contribution (or lack of contribution) of N1 to the solution of a given problem, i.e. it is not useful to assess the quality of legislation or to understand the relationship between efficacy and effectiveness. This version is also not suitable for identifying symbolic legislation, as in the case of inefficacy it is not clear whether subjects do not comply with the norm because they are not aware of it or because they do not motivate their behaviour accordingly. Furthermore, this version does not help to solve the problem of the "incommensurability of obedience".[13]

The intermediate relation (compliance) adds another element to the relation, since it requires knowledge of N1 by the subjects in addition to corresponding behaviour. This version seems to be the most appropriate when it comes to evaluating the ability of norms to motivate the behaviour of inhabitants and citizens and/or private legal entities, because it allows situations to be understood as compliance in which N1 is a subsidiary cause for the realisation of C1, but it does not require a necessary and permanent link between N1 and C1. The causal relationship (fulfilment) is not excluded, but it is not required either. The compliance relationship captures variations in motivation: N1 is considered efficacious when it is known by the subject, but it is not required for N1 be the permanent motivation for the performance of C1.

An example can help to understand the fluctuation or overlap of motivations: Maria is the owner of a restaurant and knows N1, which prohibits smoking in enclosed spaces such as her restaurant and knows that she may be fined if she violates it. In general, however, it is not N1 that prevents Maria from smoking in the shop. There are several factors that cause Maria to comply with this obligation, such as not disturbing her employees and customers, setting a good example, smoking less, etc., none of which is usually N1. However, sometimes Maria is so tempted to smoke in the restaurant that she finds it hard to resist, and in these cases N1 is the only reason for her behaviour: Maria refrains from smoking in the restaurant because of the prohibition imposed by N1. To summarise, the norm prohibiting smoking in enclosed public places (N1) has been known and efficacious with respect to Maria (S) for X time, but within this period the nature of efficacy has fluctuated (from

[13] I will not deal with the problem of the incommensurability of obedience in this paper. Very briefly: The incommensurability of obedience occurs with eminently general norms whose observance requires passive behaviour. These are norms that impose general negative duties, *erga omnes* and have an immense number, up to an infinite number of possibilities of compliance (on most occasions, most normative subjects do not kill, do not injure, do not steal, etc.) (Hierro, L. *Ibid.*, p. 79). If we were to create an index for the efficacy of a norm of this type, it would always tend towards 1 (1 being total efficacy) (*Loc. Cit.*).

correspondence to fulfilment). In this example, N1 acted as a subsidiary reason for Maria's behaviour.

Finally, the strictest variant, fulfilment, appears to be too demanding for norms that structure relations between inhabitants and private legal entities. This is because the more demanding version does not allow for fluctuations in motivation and requires that subjects are constantly motivated by the norm. The more demanding version of efficacy would enforce the fiction that the subjects (who have already behaved in this way due to extra legal reasons) have switched to being motivated by the new law from the moment it is published in the Official Gazette. It can also lead to another absurd result by arguing that the law is inefficacious because people are not motivated by the law even though they behave according to it or because the norm does not permanently motivate their behavior. On the other hand, the cases of this more demanding version are included in the intermediate version in the segments where the motivation for the behaviour is N1 and no other extralegal reasons.[14]

In a second sense, which I also consider relevant for the evaluation of symbolic legislation, efficacy is linked to the fact that the norm is applied by legal bodies and, especially, by the courts - that is, that the sanction is ordered and enforced in a specific case.[15]

Finally, an effective norm is one that leads to the social, economic or legal result expected from its sanction, expected with its sanction (R1).

Certainly, both efficacy and effectiveness are present to varying degrees. Thus, when speaking of inefficacious or ineffective laws or norms, this should be understood as having a low degree of efficacy or effectiveness and not as their complete absence (the same reasoning applies in reverse to the claim that a norm is efficacious or effective).

While there is no conceptual relationship between efficacy and effectiveness, there is an important statistical relationship that is conditioned by the proper design of the norm (an appropriateness of the means to the end). That is, effective norms are, in most cases, previously efficacious (subjects perform the ordered behaviour and the intended goals or outcomes are achieved).[16]

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[14] However, I understand that the most demanding option, efficacy as fulfilment, is the most plausible when the norm aims to regulate the activity of employees, officials or agents of the state and imposes a positive obligation or a duty to "do". More details in Fernández Blanco, C., Cuatro versiones de eficacia y su vinculación con la efectividad. Revista Telemática de Filosofía del Derecho (RTFD), 2023a.

[15] Kelsen, H., Pure theory of Law. Los Angeles: University of California Press, 1967, p. 11. Note that Kelsen uses the term "effectiveness" in the way that I use "efficacy" here.

[16] The second side of efficacy "application as efficacy" is not always relevant to the achievement of efficacy as the performance of behaviour, and therefore I omit it as a generally precondition for effectiveness. In another work, I have analysed the relationship between efficacy as application and efficacy as performance of behaviours and also related both aspects with effectiveness (see Fernández Blanco, op. cit. note 14).

Therefore, there is a contingent but statistically strong relationship between efficacy and effectiveness.[17] For example, the norm that prohibits smoking in enclosed public places usually has a high degree of efficacy and has largely achieved the goals predicted for its enactment.[18]

Therefore, by summarising and ordering the intuitions shared by the authors and what I have added here, I will conclude that the first characteristic of the disfunction of the eminently symbolic legislation is the absence of efficacy (as compliance) or as application and/or the absence of effectiveness. Of course, to affirm that a norm or a legislation is inefficacious or ineffective needs some kind of empirical evidence. Although the absence of efficacy and/or effectiveness are necessary conditions, they are not sufficient for a law to be considered mainly symbolic. In addition, it is necessary that a secondary sense is present, and this secondary sense must be positively evaluated by the community or a part of it. This aspect is dealt with in the following section.

3. SYMBOLISM IN SYMBOLIC LEGISLATION

Symbols are understood in semiotics as a special kind of connotative signs that goes beyond their literal or usual meaning and expresses a different secondary meaning or sense.[19] In symbolism, the literal meaning is preserved, and semantic

[17] There are rare cases of norms that are not efficacious but nevertheless achieve effectiveness. In other works, I have labelled this phenomenon "irregular effectiveness" (see Fernández Blanco, C., Normas sociales y problemas de eficacia y efectividad de las normas jurídicas. *Doxa*, 42,2019, p. 274).

[18] The norm prohibiting smoking in enclosed public places is widely followed (although there are of course differences between countries and cities) for various reasons that cannot be explained here (see, among others, Sandoya, E. *et. al*. Impacto de la prohibición de fumar en espacios cerrados sobre los ingresos por infarto agudo de miocardio en Uruguay. *Rev Med Urug 26*, 2010, p. 211). In countries where this has been studied, a reduction in smoking-related diseases has been demonstrated: either due to a reduction in diseases caused by passive smoking - which seemed to be the main objective of the norm - or due to a reduction in the number of smokers because of the restrictions. Effectiveness was demonstrated fairly immediately after introduction (at least in terms of disease reduction). In Scotland and Ireland, for example, a reduction in respiratory disease among passive smokers was observed within two months of the norm's entry into force (see https://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/protection/improve_health/index.htm. Retrieved 4 October 2023). To give you an idea of some other data: In Uruguay, the first country in Latin America to introduce restrictions, a 17.1% decrease in acute myocardial infarctions was observed within the first 48 months after the norm came into force (Sandoya et al, *Loc. Cit.*); in Spain, the legislation was introduced gradually and a 4.2% decrease in acute myocardial infarctions was recorded after the first law (2006), which was complemented by a 3.1% decrease in 2011, when the second law came into force (Bobadilla, J., Dalmaua, R., Galveb, E., Impacto de la legislación que prohíbe fumar en lugares públicos en la reducción de la incidencia de síndrome coronario agudo en España, in *Revista Española de cardiología*, 2014). Globally, published meta-analyses show that the number of admissions for acute coronary syndrome fell by 16-17% in the first year of implementation of the laws, with the most restrictive laws achieving better results (Tan, C. E. y Glantz, S. A., Association between smoke-free legislation and hospitalizations for cardiac, cerebrovascular, and respiratory diseases: a meta-analysis, in *Circulation 126* (18), 2012).

[19] Van Klink, B. (2016), *op. cit*. note 5, p. 21 and Eco, U., *Semiotics and philosophy of language*. Londres: MacMillan Press, 1984, pp. 131-163. Another widely used approach to the concept of symbol is that of Peirce, for whom "A Symbol is a sign that refers to the Object it denotes by virtue of a law, usually an association of general ideas that operate in such a way that they cause the Symbol to be interpreted as referring to the said Object" (Peirce, C., *La ciencia de la semiótica*. Buenos Aires: Nueva Visión, 1986, pp.30-31).

coherence is maintained. We are not dealing with a relationship between reality and fantasy (as in the case of metaphor) or between truth and falsehood, but between reality and meaning.[20]

If we go further, we realise that the notion of symbol necessarily contains an evaluative or axiological aspect. In this sense, Lotman argues that "the most common idea of a symbol is linked to the idea of a certain content that, in turn, serves as a level of expression for another content, usually more culturally valuable".[21] It is true that it is not a necessary condition for something to be symbolic that this secondary content is "valuable"; it could also be the opposite (e.g. Goebbels is a symbol of Nazism). However, in the realm of symbolic legislation, the positive value mentioned by Lotman must be present, at least for a part of the community.

I will propose a very simple formula to characterise a predominantly symbolic legislation, considering the notions from the paragraphs above and combining them with the idea of lack of efficacy and/or effectiveness. I will thus assume that legislation is mainly symbolic if the secondary meaning of the law or norm is more important than its literal or conventional meaning. This secondary meaning must have a content that is considered valuable (culturally or morally) at a given moment by the community or a part of it - who are its main interpreters in this matter - and which can or may not also be shared by the legislators or political representatives.

In predominantly symbolic legislation, the secondary sense becomes the main one. This is because its literal or conventional meaning (even assuming that there may be different interpretations) is pushed back: Individuals do not behave as the norm prescribes (lack of or low efficacy) and/or those who are responsible for applying the law do not apply it (lack of efficacy in the second sense), and in particular the absence of the first form of efficacy generally leads to the absence of effectiveness. The resulting situation is clearly paradoxical, as the attributed value, the highly valued secondary meaning, is ultimately not realised due to the lack of efficacy and effectiveness.

Take the case of the prohibition of sodomy, or sexual relations between adult males. Until 2003, thirteen states in the United States banned consensual sexual relations between men (until the Supreme Court declared it unconstitutional in Lawrence v. Texas (539 U.S. 558 (2003)). This prohibition was obviously violated by homosexual men and almost never enforced in criminal cases.[22]

A hypothetical norm prohibiting such relationships could be imagined as follows: "Any adult male who engages in sexual relations with another adult male,

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[20] García Villegas, M., *La eficacia simbólica del derecho*. Bogotá: IEPRI, 2014, p. 38.

[21] Lotman, I., El símbolo en el sistema de la cultura. *Escritos. Revista del Centro de Ciencias del Lenguaje, 9*, 1993, p. 48

[22] Balkin, J., *Living originalism*. Cambridge-Londres: Belknap Press of Harvard University, 2011, p. 212.

There was an earlier U.S. Supreme Court ruling upholding the constitutionality of this law in "Bowers v. Hardwick, 478 U.S. 186 (1986)". Balkin *Ibid*, p.213, suggests that this decision was related to the fear of the spread of acquired immunodeficiency syndrome (AIDS) and/or human immunodeficiency virus (HIV).

even if consensual, is punishable by imprisonment from six months to one year." The relevance of the literal or conventional meaning can be measured by its efficacy. If adult men refrain from having sexual relations with each other, then the primary meaning of the norm has been achieved. However, if the norm is not observed, but its secondary meaning becomes more important to a relevant group than the primary one, we are dealing with a predominantly symbolic norm (this secondary meaning could, for example, be linked to the idea that homosexuality violates religious commandments or opposes the idea that sexual relations are only for procreation, or even, as mentioned in the previous footnote, the secondary meaning could be linked to the prevention of the spread of HIV).

The possible secondary meanings related to religion or procreation, which have been positively evaluated by a group in society, can be understood as an expression of the social or positive morality. But sometimes the secondary meaning is also linked to social goals that are considered valuable (i.e. teleological aspects and not only axiological aspects of legislation). In the previous case, for example, to stop the spread of HIV/AIDS. Obviously, however, it was not the prohibition of male homosexuality that stemmed the HIV/AIDS epidemic (the norm was inefficacious and ineffective in this respect).[23]

Despite this failure to curb the HIV epidemic and the unsuccess to preserve moral values, many groups continued to oppose the decriminalisation of sodomy, and it was the US Supreme Court (as a counter-majoritarian body) that overturned the norm by declaring it unconstitutional. In cases such as the ban on male homosexuality, it was essentially only the symbolic value of the norm that remained in force: the secondary meaning that was more important than its primary value.

Thus, in the case of mainly symbolic legislation, a secondary meaning becomes more relevant for a group, resulting from the interpretation of a part of the population or social referents and generally independent of its wording (i.e. its literal or conventional meaning). If we visualise the relationship between symbolism, efficacy and effectiveness, we can present these four situations (all of which must be considered as a matter of degree):

a) Predominantly symbolic laws: The secondary meaning becomes the main one, and the conventional meaning (that derived from the text) is relegated. This implies the absence of efficacy and probably the loss of effectiveness, which naturally leads to the secondary meaning not being realised. Examples of this type of legislation are the prohibition of abortion, the prohibition of drug possession for personal use, the increase of penalties for certain crimes,

[23] According to the UN Office on AIDS (UNAIDS), "several methods and interventions have proved highly effective in reducing the risk of and protecting against, HIV infection, including male and female condoms, the use of antiretroviral medicines as pre-exposure prophylaxis (PrEP), voluntary male medical circumcision (VMMC), behaviour change interventions to reduce the number of sexual partners, the use of clean needles and syringes, opiate substitution therapy (e.g. methadone) and the treatment of people living with HIV to reduce viral load and prevent onward transmission" See https://www.unaids.org/en/topic/prevention

the imposition of penalties on beggars[24] or illegal immigrants, the ban on homosexual relationships or the existence of criminal offences with severe evidentiary difficulties.

b) Laws that are not efficacious and ineffective without significant symbolic meaning: Not all laws lacking efficacy and effectiveness have a relevant symbolic value. Consider, for example, certain norms for the protection of intellectual property, jaywalking (in certain cities). In these cases, the norm has no significant symbolic value.

c) Efficacious and effective laws with significant symbolic meaning: It is important to distinguish this case from predominantlty symbolic legislation. In this case, there is no debate about its quality and transparency. The prohibition of genocide (which many like Schiller[25] and Hassemer[26] regard as mainly symbolic) is for me an example of this type. Laws requiring parents to provide basic care for children or prohibiting cannibalism or grave vandalism can also fall into this category. In general, these are laws that find broad support in social norms, which in many cases explains their high degree of efficacy and their also important degree of symbolism.

d) Efficacious and effective laws without significant symbolic meaning: Most of the efficacious and effective laws have no relevant secondary meaning (again, however, it is always a question of degree). Examples include laws prohibiting vehicles from crossing on a red light, laws requiring the filing of tax returns, laws regulating construction safety, municipal building codes, to name just a few of a multitude of laws.

4. PREDOMINANTLY SYMBOLIC LEGISLATION IS NOT (ALWAYS) A LEGISLATIVE ERROR

The explanation for the emergence of symbolic legislation is shared by almost all the authors cited here, that attribute to the legislator, with different degree of emphasis, a deliberate decision to enact symbolic legislation, which for many authors also represents a deception due to the difference between the stated aims and the actual reasons for its enactment. Thus, Hassemer argues that in symbolic legislation the aims described in the regulation of the norm are -comparatively- different from those expected. After all, this concretisation of the symbolic is not only about the process of applying the norm, but frequently already about the formulation and publication of the norm: in the case of some norms (such as §220a

[24] In 2022, a municipal ordinance with this content was passed in Alicante (Spain) with this content. You can read more about it at https://elpais.com/espana/comunidad-valenciana/2022-02-15/alicante-sancionara-a-mendigos-y-prostitutas-con-multas-de-hasta-3000-euros-tras-aprobar-una-ordenanza-pactada-por-pp-y-vox.html)

[25] Schiller, B., Life in a symbolic universe: Comments on the Genocide Convention and international law. *Southwestern University Law Review, 9,* 1977.

[26] Hassemer, W., *op. cit.* note 2, p. 29.

StGB) [genocide], hardly any application is expected.[27] Van Klink similarly argues that a law or legislation is symbolic when it is enacted primarily to function as a symbol";[28] and similarly, Atienza argues that symbolic legislation is generated when the legislator dictates "laws that are not intended to be followed".[29] From another point of view, Marcilla Córdoba understands that symbolic legislation is only aimed at the propagandistic purposes of politicians, without considering the actual need for legislation or not.[30]

While I agree with most authors that problems in the efficacy and effectiveness of norms are among the characteristic features of mainly symbolic legislation, I do not share the view that they must necessarily be created by the legislator with that purpose in mind.

It is true that in many cases the legislature is motivated to enact a law because it is valued by the community or an important part of the community. In these cases, the legislator may even be pessimistic or indifferent to the future efficacy of that legislation. Moreover, in extreme cases, legislators may promote obstacles to the efficacy or effectiveness of the law, e.g., by enacting standards that are difficult or impossible to meet (such as the imposition of fines on illegal residents[31] or imposing fines on beggars, as in Alicante); norms whose violation is established in probatory hurdles (such as proving the "motivation" of hate in certain crimes); norms that do not lead to the objective for which they were intended, extremely vague norms, inoperative norms, among others.

However, for legislation to be symbolic, it is not enough for it to be inefficacious or ineffective, nor is it enough for it to convey values that are considered important by the community. In addition, there must be a high degree of "echo" to these values (the secondary meanings must have an important place in the community's assessment).

But even in extreme cases where the legislature might "erect" barriers to efficacy and/or effectiveness, in some cases these may be reviewed by courts deciding on their constitutionality or other issues. In other cases, it is the executive bodies that, by regulating the laws, give real shape to the legislative programme and make it applicable.[32] The idea that the legislature creates symbolic laws deliberately and at will is therefore not as realistic and simple as it is described.

On the other hand, identifying symbolic legislation by its deliberate origin raises other problems. How can we know that the legislator's intention or desire is for the norm to be violated? It is obvious that the declaration of their true will not appear explicitly anywhere. However, sometimes (not always) the legislator's purpose could be inferred from some internal and external irrationality issues as identified

[27] Loc. Cit.
[28] Van Klink, B. *op. cit*. note 5, p. 21.
[29] Atienza, M. *op. cit*. note 10, p. 44.
[30] Marcilla Córdoba, G. *op. cit*. note 9, p.316
[31] Van Klink, B. *op. cit*. note 5, p. 23
[32] Dwyer, J., The pathology of symbolic legislation. *Ecology Law Quarterly, 17*, 1990, p. 233

by Ferraro,[33] or by the presence of bad legislative techniques that would make the norm imprecise, unclear, or incomplete. However, in these cases, how to distinguish whether it is a bad legislative technique or whether it is the legislator's desire to sanction a norm to be disobeyed?

Moreover, and this is the central argument, there are many laws or norms for which it is not reasonable to assume that they were intended to be primarily symbolic in their origin. Sometimes it appears that it was the failure of the public policies they implemented that caused their transformation into predominantly symbolic norms, along with, of course, a particular valorisation of the secondary meaning of the norm. This seems to be the case with the legislation penalising abortion (which is highly inefficacious and ineffective in the countries that maintain it), which was surely intended as a sincere attempt to protect the life of the fetus.[34]

In these cases of predominantly symbolic laws, however, there is at least ideally an obligation for the legislator and/or the political representatives to reform or repeal the legislation: If rational legislation is intended, the legislation should be reformed to achieve greater efficacy and effectiveness, or it should be repealed if its "reason" is not currently justified (as in the case of the recent legislative repeal of abortion bans in countries such as Argentina, Uruguay, and 50 other countries over the past 25 years).[35] I understand that this duty should be presented as an "ideal", because often even a well-intentioned legislator lacks the political capacity or sufficient majorities to improve the quality of laws or to repeal them. For this reason, symbolic legislation is often not repealed by parliaments. Rather, are the courts, in particular constitutional courts, that declare the unconstitutionality of such laws.[36]

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[33] Ferraro argues that two aspects must be taken into account when evaluating an explicit legislative justification: 1) its internal rationality, i.e. whether it is consistent with the agent's (i.e. the legislator's) system of knowledge and values, whether it respects the rules of logic, contains acceptable conclusions, etc.; 2) its external rationality, i.e. the rationality assessed from the perspective of an external observer, which includes the acceptability of the premises themselves, both normative and factual (prescriptive and descriptive) of the justification. As for the factual premises, good epistemic reasons must be provided for their acceptance (e.g. evidence from the latest scientific research in the relevant field) (Ferraro, *op. cit* note 2, p. 116).

[34] The global statistics show this failure. In middle-income countries, for example, 66% of unintended pregnancies end in abortion. This percentage is lower in low-income countries (40%) and in high-income countries (43%). What illustrates the inefficacy of abortion bans most interestingly is the very small difference in abortion rates between countries that allow them and those that ban them completely (i.e. do not allow exceptions such as maternal health or fetal viability): In the former, the percentage of abortions in unintended pregnancies is 41%, in the latter 39%. Source: Guttmacher Institute, *Embarazo no planeado y aborto a nivel mundial*, 2022, with information from Bearak J et al., Unintended pregnancy and abortion by income, region, and the legal status of abortion: Estimates from a comprehensive model for 1990-2019". *The Lancet Global Health, 8*(9), 2020, e1152-e1161.

[35] Source: Center for Reproductive Rights. https://reproductiverights.org/maps/worlds-abortion-laws/ visited on 1 November 2024. However, it is not clear from the information on the website whether the ban has been lifted in these 50 countries by legislative or judicial means.

[36] In relation to the symbolic laws dealt with in this work, we can mention the declaration of unconstitutionality of drug possession for personal use in Argentina (the last judgement is Arriola, Sebastián y otros s/ Recurso de hecho, causa n° 9080, 2009); the declaration of the unconstitutionality of the abortion punishment in Mexico (Supreme Court of Justice of the Nation, Acción de Inconstitucionalidad 148/2017) and in Colombia in 2022 (Sentencia C-055), or the case "Lawrence vs. Texas" from the U.S. Supreme Court, that I have already mentioned.

The last genetic aspect, which I do not share, is that the reasons put forward by the legislator necessarily differ from those expressly desired. This element also seems to accompany much of the approaches to symbolic legislation. Hassemer, for example, argues that "The purposes described in the regulation of the norm differ - comparatively - from those that were actually expected"[37]. As I understand it, this does not seem to be a necessary condition for symbolic legislation (although it could be indicative to some extent).

To summarise, then, symbolic legislation is characterised by a lack of efficacy and/or effectiveness, by an overemphasis on a secondary meaning that is considered valuable by the community or a part of it at a given time. Finally, symbolic legislation is not always deliberately promoted by legislators and is not necessarily deceptive. In what follows, I will focus on assessing why predominantly symbolic legislation is irrational according to certain parameters for evaluating the quality of legislation.

5. PROBLEMS OF LEGISLATIVE QUALITY IN PREDOMINANTLY SYMBOLIC LEGISLATION

Manuel Atienza has proposed criteria for the correction or quality of norms, that he calls levels of "rationality" I will follow Atienza's use of language and name the levels as he did, but with the understanding that they allow us to evaluate the quality of legislation. The "rationality" or "irrationality" at these levels also generally manifests itself gradually: There are almost not completely irrational or rational laws at all or any of the levels of analysis.

Atienza originally proposed five levels of analysis of legislative rationality, which I will follow here: a level of communicative or linguistic rationality (Nr1); a level of legal-formal rationality or systematicity (Nr2); a level of pragmatic rationality associated with normative efficacy (Nr3); a level of teleological rationality or effectiveness (Nr4); and finally, a level of ethical or axiological rationality (Nr5).[38]

In my instrumental view of law, I agree with authors such as Xanthaki that the most important parameters for the quality of legislation are efficacy and effectiveness[39] and that systematic rationality (if there is a conflict with a constitutional norm or a norm with a higher status in the system) is a condition of validity of the law.

It is worth asking whether the symbolic dimension of legislation is reflected in or can be captured by one of the levels of rationality proposed by Atienza. It seems that what we have presented as the secondary sense of norms can be reflected in two levels: teleological rationality and axiological rationality (this distinction is

[37] Hassemer, W., *op. cit.* note 2, p. 29.

[38] Atienza, M. *op. cit.* note 10. I doubt that it is worth maintaining in an analysis of ethical rationality in an analysis of legislative rationality, but I do not discuss this in this paper (see Fernández Blanco, C., Eficacia y efectividad de las leyes y el nivel de racionalidad material. *Diritto & Questioni Pubbliche*, 1(1), 2023b).

[39] Xanthaki, H. *op. cit.* note 5, pp. 90-91.

not always easy or possible, because sometimes the mere aim or purpose of the norm implies the realisation of a moral value). Thus, it is possible that, at the level of teleological rationality, there are cases in which the objectives (declared or not declared by the legislator but assumed by the interpreters as the purpose of the law) acquire a relevant symbolic dimension (containment of the HIV epidemic in the case of the prohibition of sodomy, protection of health in the case of the prohibition of drug possession, protection of the fetus in the case of abortion, protection of public safety in the case of the tightening of penalties for urban crimes, etc.). However, it can also happen that the majority interpretation, without paying attention to the social or political objectives, overemphasises exclusively the level of axiological rationality, i.e. values that go beyond the social aim and that are considered the ultimate justification of the norm (for example, avoiding the moral self-destruction of the individual in the case of drugs, the affirmation of Catholic morality in the ban on abortion or the ban on sexual relations between men, the rejection of a minority such as immigrants, etc.).

The paradox is that all the above is simultaneously accompanied by a deficit in the achievement of other levels of rationality, especially pragmatic rationality (efficacy), which ultimately leads to the level of teleological and/or axiological rationality not being achieved because neither the goals nor the ultimate values that the norm protects are achieved. We can therefore conclude that predominantly symbolic legislation, as described here, does not fulfil the main parameters for attributing the property of "rational" to legislation (in particular because it is not being efficacious and/or effective, the main indicators of the quality of laws), but neither does it fulfil the values that are its most important property or the reason why it is particularly appreciated by a part of the population.

The case of Lawrence v. Texas confronts us with another problem with predominantly symbolic prescriptive norms, namely their very sporadic application by the judiciary. The two men involved in the Lawrence case found themselves in this situation. These effects of legislation have been described as "perverse" (Hierro[40] reformulating the idea of Fernández Dols[41]). That is to say: generally unfulfilled and unapplied norms, but which are occasionally applied, leading to negative effects and impairment of legal certainty.

6. CONCLUSIONS

In this paper I have proposed a characterisation of predominantly symbolic legislation that encompasses only this phenomenon, without including other notions that are often treated together. I hope to have contributed to the intuitions of most authors by specifying two of the distinctive characteristics of predominantly

[40] Hierro, L, op. cit. note 12, pp. 177-178.

[41] Fernández Dols, J. M., Procesos escabrosos en psicología social: El concepto de norma perversa. *Revista de Psicología Social, 7,* 1992.

symbolic legislation: its lack of efficacy (as compliance or as application) and/or its lack of effectiveness, and I have added the idea that this legislation always has an overemphasis on its secondary sense. I have justified why I think that since these laws do not fulfil the criteria of efficacy and effectiveness, they cannot be considered as reaching legislative quality standards. I also disagree with the authors on almost all points regarding the origin of this type of law: I believe that there is no reason to understand them as necessarily intentionally created or as always containing an element of deception.

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