ARTICLES

A Legal Theoretical Approach to Criminal Procedure Law: The Structure of Rules in the German Code of Criminal Procedure

By Matthias Mittag[*]

A. Introduction

In 1969, the language philosopher John R. Searle published his book "Speech Acts: An Essay in the Philosophy of Language,"[1] wherein he developed the theory of speech acts of John L. Austin[2] into a more normative direction. Though the philosophy of language is not the main issue of this article, Searle spoke out, for the first time, on a fundamental distinction between two different kinds of rules, namely constitutive and regulative rules.[3] Actually, since that time the distinction between these two different types of rules has become fairly common in legal theory,[4] but not in criminal procedure law or in the theory of procedure law. Only

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[1] John R. Searle, Speech Acts: An Essay in the Philosophy of Language (1969).

[2] JOHN L. AUSTIN, HOW TO DO THINGS WITH WORDS (1962).

[3] *See* JOHN R. SEARLE, *supra,* note 1, 33-42. However, in 1955 John Rawls had already distinguished in a similar sense between a "summary view" (his equivalent to regulative rules) and "rules of practice" (his expression for constitutive rules), *see* John Rawls, *Two Concepts of Rules*, 64 PHILOSOPHICAL REVIEW 3, 22 and 25 (1955). Eight years before Searle, H.L.A. Hart described the contrast between rules which are "mandatory in the sense that they require people to behave in certain ways," and rules which prescribe procedures, formalities, and conditions for a certain result (*e.g.* marriages, wills, and contracts), "indicate what people should do to give effect to the wishes they have", *see* H.L.A. HART, CONCEPT OF LAW 9 (1961). We will see that this is very similar to Searle's distinction between regulative and constitutive rules.

[4] *See*, *e.g.*, GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 45 (1996), Anthony Dickey, *The Concept of Rules and the Concept of Law*, 25 AMERICAN JOURNAL OF JURISPRUDENCE 89, 90 (1980), or from German literature KLAUS F. RÖHL, ALLGEMEINE RECHTSLEHRE 205 (2nd ed., 2001): "imperative and constitutive rules". Critical of this distinction, *see* G. J. WARNOCK, THE OBJECT OF MORALITY 37 (1971).

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sporadically have German legal scholars gone into this distinction.[5] This is astonishing with regard to criminal procedure law in particular because, even before 1969, some scholars had construed procedural rules as rules of a game.[6] In doing so, they addressed an important characteristic of constitutive rules, namely the expression of the conditions of a certain result. However, the construction of procedural norms as rules of a game is imprecise because not all procedural norms actually work in this way. This becomes clear when one transfers Searle's distinction to criminal procedure law.

After providing an overview of the distinction between those two types of rules (Sec. B.), the article will show how this differentiation could be beneficial in criminal procedure law (Sec. C.). Thereby, the article deals in particular with criminal procedural bases of authorization for interventions in constitutional rights,[7] or, in Anglo-American diction, "search and seizure". We will see that these measures and the authorizing norms interact with regulative and constitutive rules in a special way. The article will address the following questions: Which norms of the German Criminal Procedure Code (StPO) are regulative rules and which are constitutive rules? Which consequences flow from this distinction, especially in the case of violation of procedural norms? Are there special relationships between regulative rules and constitutive rules? What outcome does this distinction have, exactly?

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[5] *See* Lothar Philipps, *Wann beruht ein Strafurteil auf einem Verfahrensmangel?*, *in* FESTSCHRIFT FÜR PAUL BOCKELMANN 831, 840 (Arthur Kaufmann *et al.*, eds., 1979); Knut Amelung, *Normstruktur und Positivität strafprozessualer Beweisverbote*, *in* FESTGABE FÜR HILGER 327, 330 (Wolter *et al.*, eds., 2003). However, this does not mean that this distinction was not used for other issues, *see* for instance KNUT AMELUNG (IRRTUM UND TÄUSCHUNG ALS GRUNDLAGE VON WILLENSMÄNGELN BEI DER EINWILLIGUNG DES VERLETZTEN 14 [1998]), which made use of the distinction between these two kinds of rules in order to clarify that the rules of the *Willenserklärung* (declaration of intention, see § 104 German Civil Code [BGB]) are not able to solve the problems of the unregulated *Einwilligung* (consent to an injury).

[6] *See, e.g.*, JAMES GOLDSCHMIDT, PROZEß ALS RECHTSLAGE 257 (1925); EBERHARDT SCHMIDT, LEHRKOMMENTAR ZUR STPO vol. 1 annotation 41 (2nd ed., 1964); *see also* NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN 103 (1983); ANDREAS POPP, VERFAHRENSTHEORETISCHE GRUNDLAGEN DER FEHLERKORREKTUR IM STRAFVERFAHREN 259 (2005).

[7] Grundgesetz (GG) (Basic Law) art. 20 para. 3 demands such statutorily authorizations, which are again compatible with the constitution. All statutes mentioned in this article are available at: http://www.iuscomp.org/gla/.

B. Regulative and Constitutive Rules

Regulative rules deal with interests or conflicts that are, in a logical sense, completely independent of the existence of the rule. The (social) problem that is regulated by the rule exists independently of whether the rule itself exists or not. Regulative rules characteristically take the form of (or can be paraphrased as) imperatives. If one does not abide by these rules, one acts illegally and can generally count on special sanctions, *e.g.* punishment or compensation.[8] Therefore, norms which deal with offences or claims for compensation are regulative rules,[9] for instance § 212 German Criminal Code (StGB) which orders "Whoever kills a human being […], shall be punished […] with imprisonment for not less than five years."

Constitutive rules, on the other hand, do not order one to do something. According to Searle, such rules create or define new forms of social behavior, and certain interactions are not explainable without the existence of constitutive rules.[10] For judicial work, not the "creation of behavior," but rather the following aspect establishes the usefulness of this distinction. Constitutive rules, such as those for games, express the conditions of a certain result.[11] If one does not abide by those rules, one will not be punished, but one will also not achieve the aspired result. Regulation of behavior will not be achieved through threat of sanctions as in the case of regulative rules, but rather by the interest of the actor to achieve the aspired result. The legislature is completely unconcerned with whether parties are able to abide by the rules, *e.g.* to achieve a legally effective contract, or not. It merely instructs the actor of the norm: If you want to achieve the aspired result, you have to act in a certain way. Constitutive rules are common not only in private law (*e.g.* rules which deal with the conclusion of a contract, or the execution of a will), but also in public law. In constitutional law, for example, norms that deal with the legislative procedure are clearly constitutive.

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[8] However, there is not a logical connection between a regulative rule and a sanction, but rather a practical connection. See, Anthony Dickey, *supra,* note 4, 101. We will see there are regulative rules without a sanction in a literal sense.

[9] *See*, Knut Amelung, *supra,* note 5, 330.

[10] Searle explains constitutive rules for social interactions through the well-known example of the rules of chess: Moving certain figures on a board can be classified as playing chess if and only if there are rules which make such a classification possible, see, JOHN R. SEARLE, *supra,* note 1, 34.

[11] Constitutive rules thereby do often form complete systems, see, Anthony Dickey, *supra,* note 4, 97.

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The distinction between regulative rules and constitutive rules is disputed.[12] An initial objection challenges the fundamentals of this distinction; some scholars argue that all rules were *regulative rules* because all rules were designed to *regulate*.[13] However, this objection does not concern the distinction as explained before. The point is that regulative rules and constitutive rules deal with different interests. With respect to the regulation of behavior, the two kinds of rules regulate in completely different ways.[14]

A second objection seems to be more sophisticated and concerns the relationship between regulative and constitutive rules. Can regulative rules be constitutive at the same time?[15] This question may not be answered in a general sense and may depend on the respective context. It seems the distinction would hardly make sense if rules could be both regulative and constitutive. We will see, however, for the system of rules of criminal procedure law, a rule has either a regulative or a constitutive character (Sec. C. III. and IV.).

C. The Structure of Rules of the StPO

I. Purposes Inside and Outside of Criminal Proceedings

Understanding the system of rules of the StPO is impossible without an idea of the purposes of procedural rules. One might expect that procedural norms exclusively serve the purposes of the proceeding. However, this is not true for criminal procedural bases of authorization for interventions regarding constitutional rights. They have intended purposes both inside *and* outside of the criminal proceeding.[16]

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[12] For objections from a philosophical point of view *see* Christopher Cherry, *Regulative Rules and Constitutive Rules*, 23 THE PHILOSOPHICAL QUARTERLY 301 (1973).

[13] *See* G. J. WARNOCK, *supra,* note 4, 37; *see also* JOSEPH RAZ, PRACTICAL REASON AND NORMS 109 (1999).

[14] Therefore, it is not accidental whether or not a norm is formulated as a constitutive rule; for a different position see G. J. WARNOCK, *supra,* note 4, 37-38. For the same reasons, the further objections of Warnock can be refused.

[15] This question has been raised and affirmed by, *e.g.*, JOSEPH RAZ, *supra,* note 13, 109; Anthony Dickey, *supra,* note 4, 108; *see also* FERNANDO ATRIA, ON LAW AND LEGAL REASONING 15 (2001).

[16] This must not be confused with the issue of *different* authorizations for interventions in constitutional rights serving different purposes. There are norms that serve, *e.g.*, preservation of evidence, protection of criminal proceeding, or protection of the enforcement. Furthermore, there are even norms which allow averting dangers, *e.g.*, the arrest ground "danger of recurrence" (*Wiederholungsgefahr*) in § 112a para. 1 StPO. In contrast, the following paragraph deals with the issue, which proposes one and the same norm serve inside and outside of criminal proceedings.

They naturally concern the procedural law and are important for the prosecution to bring forward the criminal proceeding. At the same time, these procedural norms have effects in substantive law. If the criminal prosecuting authority takes action, it can restrict constitutional rights. Furthermore, it usually fulfills elements of offences, *e.g.*, breach of the peace of the home (StGB § 123) during a search, or coercion (StGB § 240) during a seizure. The norms, which are the bases for these actions, legitimate these measures and therefore work outside of criminal procedure law as well. As a result, one can call the norms "multifunctional".[17]

II. Constitutive and Regulative Rules in the StPO

Some norms of the StPO give direction, which the concerned parties (or, of course, the judge) must follow if they want to achieve the next "level" of proceeding. Such norms are constitutive rules.[18] The most important "level" to be achieved is the judgment. However, constitutive rules are not only relevant to the result of the proceeding. There are also constitutive rules that do not relate to the judgment, but to, *e.g.*, an arrest warrant, or in general "utilization of information". Nevertheless, the focus of attention is incontrovertibly in the retrospect: What are the consequences for the judgment if one utilizes information which one is not permitted to use in the criminal proceeding? For this reason, it is legitimate to use constitutive rules in the context of criminal procedure in particular reference to the judgment.

Before we determine which norms of the StPO are constitutive rules, it is imperative to point out the two characteristics of constitutive rules that make them work in the context of criminal proceedings.[19] First, constitutive rules were described as rules that express the conditions of a certain result. If one does not abide by a constitutive rule, one will not achieve the desired result. However, in criminal proceedings, a judgment developed from an error of procedure is not *per se* null and void, but simply annullable. According to this, the StPO grants the

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[17] *See* BETTINA GRUNST, PROZEßHANDLUNGEN IM STRAFPROZEß 97 (2002); FRIEDRICH DENCKER, VERWERTUNGSVERBOTE IM STRAFPROZEß 23 (1977). Different from this point of view attributes WERNER NIESE in his book DOPPELFUNKTIONELLE PROZEßHANDLUNGEN (1950) several functions to the measures (not to the norms). However, the norm, not the measure by itself, fulfills, as mentioned above, specific functions. The constable, *e.g.*, does not search a house in order to fulfill elements of § 123 StGB, but rather to secure evidence.

[18] However, the distinction between constitutive rules and regulative rules does not draw the line between substantive and procedural law. Here, it might be sufficient to say that norms of the StPO work in the context of procedural law as well as substantive law, see Sec. C. I. Beyond this, it seems unnecessary to think about such a bright-line between procedural and substantive law.

[19] *See* Knut Amelung, *supra,* note 5, 332.

judgment a leap of faith.[20] Therefore, the failure to abide by constitutive procedural rules must be enforced by a special procedure, the appeal on points of law (*Revisionsverfahren*). Second, not every failure to abide by constitutive procedural rules will lead to the defeasibility of the judgment. Particularly two norms tell us under which circumstances the breach of a constitutive rule of the StPO is relevant for the aforementioned *Revisionsverfahren*. § 337 para. 1 StPO demands that the judgment be based upon the error.[21] The error of procedure must have an effect on the conclusion of the judgment. However, there are errors named by § 338 StPO,[22] which are *per se* "absolute grounds for appeal on law" (*absolute Revisionsgründe*), *e.g.* the violation of the public nature of the proceedings (StPO § 338 no. 6).

Which norms of the Criminal Procedure Code are constitutive and which regulative? As aforementioned, regulative rules tell us how to work with problems and interests that exist, in a logical sense, apart from the rule. Bases of authorization for interventions in constitutional rights are norms that not only allow measures, but also defend the accused from unlawful acts of the state. They regulate the conditions for a measure and thus a conflict, which exists independently of the norm, namely the possibility to intervene in constitutional rights. Therefore, *e.g.* § 102 StPO,[23] which expresses the conditions for the constitutionality of a search, is a regulative rule, as is § 105 para. 1 StPO,[24] which dictates that the prosecuting authority is allowed to search only with a search warrant. These norms are closely connected to constitutional rights.[25] Even though § 105 para. 1 StPO seems to be a constitutive rule because it describes the role of the judge in the criminal proceeding, at closer inspection the norm primarily implements the constitutional

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[20] *Id.*, at 332. Actually, an act of state is generally granted such a leap of faith by the German public law. Other examples are *Verwaltungsakte* (administrative acts) or *formelle Gesetze* (statutes).

[21] § 337, para. 1 StPO has the following wording: "An appeal on law may only be filed on the ground that the judgment was based upon a violation of the law."

[22] § 338 StPO begins with the following section: "A judgment shall always be considered to be based on a violation of the law: …"

[23] § 102 StPO has the following wording: "A body search, a search of the property and of the private and other premises of a person who, as a perpetrator or as an inciter or accessory before the fact, is suspected of committing a criminal offense, or is suspected of accessoryship after the fact or of obstruction of justice or of handling stolen goods, may be made for the purpose of his apprehension and in the cases where it may be presumed that the search will lead to the discovery of evidence."

[24] § 105, para. 1 StPO has the following wording: "Searches shall be ordered by the judge only and, in exigent circumstances, also by the public prosecution office and officials assisting it (§ 152, Courts Constitution Act). Searches pursuant to § 103 para. 1, second sentence, shall be ordered by the judge; the public prosecution office shall be authorized to order searches in exigent circumstances."

[25] *See* Knut Amelung, *supra,* note 5, 335.

guidelines of art. 13 para. 2 GG[26] into the criminal procedure law. Therefore, § 105 para. 1 StPO is supposed to have an exclusively regulative character. On the other hand, § 258 para. 1 StPO,[27] which gives the prosecutor and the defendant the right to present their arguments, is a constitutive rule. Although it also implements a constitutional guideline (see GG art. 103 para. 1),[28] nonetheless, it is a guideline only for procedural law. There are no material interests, only interests that are unthinkable without a court proceeding.

III. Consequences

What consequences does this distinction have for the criminal proceeding? More precisely: What consequences does the breach of procedural rules have for the judgment? Abiding by rules, which do not deal with material interests, is constitutive for the existence of the judgment.[29] In contrast, the violation of regulative rules does not automatically cause the defeasibility of the judgment. The "sanction" takes place, first of all, outside of the process, it is namely the unconstitutionality of the intervention[30] and, as the case may be, the punishability of the acting police constable. More important, at least in the context discussed here, is the question of what consequences the violation of regulative rules has for the proceeding. This issue is highly important because the prosecution authority normally gains information by a search or a seizure, even if the prosecution violates regulative rules and, in doing so, acts illegally. These circumstances demand procedural norms, which tell us how to deal with such information and show how the judge must reason and interpret in order to arrive at the judgment (as a "level" of proceeding). Those rules are, therefore, constitutive rules. They govern the transfer of information, which results from the violation of regulative rules (a non-procedural aspect), into the criminal procedure. One can call them "transfer-rules". Such rules are mostly unwritten and derived from abstract principles (for example

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[26] Art. 13, para. 2 GG has the following wording: "Searches may be authorized only by a judge or, when time is of the essence, by other authorities designated by the laws, and may be carried out only in the manner therein prescribed."

[27] § 258, para. 1 StPO has the following wording: "After the taking of evidence has been concluded, the public prosecutor and subsequently the defendant shall be given the opportunity to present their arguments and to file applications."

[28] Art. 103, para. 1 GG has the following wording: "In the courts every person shall be entitled to a hearing in accordance with law."

[29] Nevertheless, note the characteristics of constitutional rules in context of criminal proceeding (Sec. C. II., *supra*).

[30] The unconstitutionality is, of course, not a sanction in a literal sense, *see, supra,* note 8.

the so-called exclusionary rules[31]). However, an elementary and very demonstrative example of a "transfer rule" regulated by law can be found in § 136a StPO:

> "(1) The accused's freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception or hypnosis. Coercion may be used only as far as this is permitted by criminal procedure law. Threatening the accused with measures not permitted under its provisions or holding out the prospect of an advantage not envisaged by statute shall be prohibited.
> (2) Measures which impair the accused's memory or his ability to understand shall not be permitted.
> (3) The prohibition under subsections (1) and (2) shall apply irrespective of the accused's consent. Statements which were obtained in breach of this prohibition shall not be used, even if the accused agrees to their use."

§ 136a paras. 1 and 2 StPO limit contraventions of constitutional rights, in the context of the examination of the defendant. Therefore, they are regulative rules. § 136a para. 3 sent. 1 StPO prohibits specific methods of examination, even if the defendant consents. For this reason it is a regulative rule, too. However, § 136a para. 3 sent. 2 StPO shows a change in the legislature's perspective. The norm deals with the consequences of the proceeding; if the prosecution violates § 136 paras. 1 or 2 StPO, the information that has been obtained shall not be used, even if the defendant agrees to its use. This is a constitutive rule.

IV. The Relationship Between Regulative and Constitutive Rules

As mentioned previously, the question of whether or not a regulative rule can be a constitutive one as well is not easily answered.[32] In the system of procedural rules explained above, there is no "janus face" of rules. A rule cannot be both regulative and constitutive. This is the conclusion of the previous paragraphs: Whether or not the adherence to a regulative norm is constitutive in the context of the proceeding is namely to be answered by the so-called "transfer-rules," which are constitutive in character.[33]

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[31] *See* for further information Knut Amelung, *Prinzipien der strafprozessualen Verwertungsverbote*, *in* GEDÄCHTNISSCHRIFT FÜR ELLEN SCHLÜCHTER 417 (Duttge *et al.*, eds., 2002).

[32] Sec. B., *supra.*

[33] Sec. C. III., *supra.*

Even though regulative rules cannot be constitutive ones, there are at least interconnections between these two kinds of rules. The formalism of criminal procedure law (by means of constitutive rules) traces back to material interests. This is the concept of *"Grundrechtsschutz durch Verfahren"* (protection of constitutional rights through a proceeding).[34] As far as the judgment intervenes in constitutional rights, criminal procedure law by itself is obligated to protect these constitutional rights. Consequently, constitutional rights as regulative rules can create guidelines as to content and interpretation of constitutive (procedure) rules. Proceeding with the content of constitutive rules is in service of the substantive law. Thus, constitutive rules have an instrumental function.

V. Benefit of the Distinction

The benefit of the distinction between regulative and constitutive rules in the context discussed is somewhat marginal because it does not state the content of abstract principles and "transfer-rules". However, the distinction clarifies that different kinds of norms work in different ways. Moreover, the breach of regulative rules has different consequences from the breach of constitutive rules. The consequences in the context of "search and seizure" are that the violation of constitutional rights does not lead inevitably to the defeasibility of the judgment. This correlation is ignored if one extracts an exclusionary rule exclusively from the violation of a constitutional right,[35] even though it is the constitutional decision to reserve the authorization for the intervention to a judge (GG art. 13 para. 2).[36] After all, the distinction between regulative and constitutive rules could contribute to clarify the *status quo* of the German doctrine of criminal procedure law (especially the doctrine of exclusionary rules).

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[34] *See* Erhard Denninger, *in* HANDBUCH DES STAATSRECHTS vol. 5 § 113, annotation 8 (Josef Isensee & Paul Kirchhof eds., 1992); *see also* MARTIN BÖSE, WIRTSCHAFTSAUFSICHT UND STRAFVERFAHREN 39 (2005) and in context of administrative law, *see* DANIEL BERGNER, GRUNDRECHTSSCHUTZ DURCH VERFAHREN 109 (1998).

[35] For an approach in this direction, *see* Detlef Burhoff, *Durchsuchung und Beschlagnahme – Bestandsaufnahme zur obergerichtlichen Rechtsprechung*, STRAFVERTEIDIGER FORUM 140 (2005), similarly, for arbitrary violations of constitutional rights, *see* Ulrich Schroth, *Beweisverwertungsverbote im Strafverfahren – Überblick, Strukturen und Thesen*, JURISTISCHE SCHULUNG 969, 976 (1998).

[36] For the specific procedural consequences, *see* Knut Amelung & Matthias Mittag, *Beweislastumkehr bei Haussuchungen ohne richterliche Anordnung gemäß § 105 StPO*, NEUE ZEITSCHRIFT FÜR STRAFRECHT 614 (2005).