

THE EUROPEAN MODEL OF LAWMAKING – ASSUMPTIONS AND POLICIES*

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1. European concept of lawmaking

The concept of lawmaking covers a number of activities. It is frequently identified with decision making procedures which result in new legal standards. Neither procedural nor jurisdictional issues, however, are the subject under consideration in this article, but rather a reflection on the nature of lawmaking. This legal aspect of European Union (EU) law has been the subject of special attention on the part of the EU's institutions, indicating not only the growth in its importance but also the fact that it determines the implementation of a specific policy type. Moreover, the progressive institutionalization of lawmaking has led to the emergence of a number of new concepts. Their character points towards the strong influence of economic terms on legal language, which constitutes a new phenomenon for legal jurisprudence.

The issues of lawmaking are a separate object of interest on the part of the European institutions, which stems from an awareness that:

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European law is at the heart of what makes the European Union special (...). Today's Europe moves quickly. To face up to the challenges we face inside and outside Europe, policies, laws and regulations need to adapt to the fast pace of technological change, to foster innovation, to protect the welfare and safety of Europeans. Public administrations need to be effective, flexible and focused¹.

Creating policies in this area requires taking into account the regulatory environment while also pursuing implementation of EU objectives in accordance with accepted regulations. In this context, we can observe the particularization of the primary assumptions concerning effectiveness and communicativity by formulating procedural guidelines until specific tools are developed and defined. There is a strong tendency, based on the Europe 2020 Strategy, to integrate previous assumptions with the remaining EU operating principles, especially with the principles of subsidiarity and proportionality. From the standpoint of the theory of law, changes in the character of legal language are of special interest. The tendency to adopt specialist terms from the economic sciences can be observed. This tendency is most likely due to the leading criterion of law and adopting an impact-assessment methodology along with a cost and benefit analysis, both qualitative and quantitative methods. Lawmaking as part of the legal sciences is described by legal and juridical concepts. The range and nature of the concepts used in EU documents requires separate research.

The character of the EU and the method of using policy and legal development as tools for the implementation thereof is very interesting from the theory of law viewpoint. Lawmaking models in national orders have evolved based on changes in culture, history, and the development of societies. In the case of the EU, the shape and character of legal institutions are principally the result of a consensus between the representatives of its member countries. The discursive mode of forming attitudes in all areas of EU activity necessitates their implementation on a national basis. Civil law systems tend towards integrity, so that the national legislature is forced to act with a two-fold result—implementing EU standards and preserving completeness and non-contradiction of the national legal system in accordance with the constitution. An analysis of this area indicates that the current mandatory model has resulted from a process of long-term evolution. However, it is possible to define milestones such as the Better

¹ Jose Manuel Barroso [in:] *Better Regulation — simply explained*, European Communities, 2006, p. 1.

Regulation reform. At the same time, an EU politician's assessment displays a tendency towards simplification and non-contradiction of the law.

2. First regulation and polices

Efforts to improve the regulatory environment were engaged in the early 1980s. For example, simplification was seen in 1985 as a prerequisite for completion of the single market. The Edinburgh European Council of 1992 made the task of simplifying and improving the regulatory environment one of its main priorities. In 1993, the Maastricht Treaty gave new prominence to the principles of subsidiarity and proportionality and an annual report from the Commission to the European Council on better lawmaking was introduced to monitor developments (Declaration 39 on the quality of the drafting of community legislation, annexed to the Final Act of the Amsterdam Treaty, 1997).

The procedures of lawmaking in the EU were, for obvious reasons, the object of treaties; the demand to simplify legislative procedures appeared in the Amsterdam Treaty of 1997 along with a declaration on the quality of EU legislation and in the Interinstitutional Agreement of 22.12.1998 on common guidelines for the quality of community legislation (1999/C 73/01). In those documents, key character was granted to the quality of EU editorial legislation in the context of its correct implementation and understanding. The above conclusions were formulated earlier by the EU Presidency of the European Council in Edinburgh on the 11-12.12.1992, as well as the resolution of the Council concerning the quality of EU legislation presented on the 8.6.1993 (EU OJ C 166, 17.06.1993 p. 1). It was acknowledged that the three institutions taking part in the EU lawmaking process (the European Parliament, the Council, and the Commission) should provide guidelines with respect to the editorial quality of the above mentioned legislative acts. The importance of law accessibility and codification was emphasized. At that stage, the adopted declarations constituted rather minimal standards in the context of pragmatic law simplicity, rather than specific policies in the area of law making. This is demonstrated by the following formulation, "Community legislative acts shall be drafted clearly, simply and precisely"².

² Point 1 (General Principles) of the Inter-institutional Agreement of 22.12.1998 on common guidelines for the quality of drafting of community legislation (1999/C 73/01).

Moreover, the multilingual nature of the addressees was insisted upon. The guidelines also contain a series of technical indications as to how legal texts, including particular types of regulations, should be formulated.

The main principle stated that, “Acts shall take account of the persons to whom they are intended to apply, with a view to enabling them to identify their rights and obligations unambiguously, and of the persons responsible for putting the acts into effect.” At this stage, two essential criteria were emphasised: reference level to the situation of the recipients and the possibility - not yet effectiveness - of implementation. The problem of multilingualism was resolved in a particular way, “Throughout the process leading to their adoption, draft acts shall be framed in terms and sentence structures which respect the multilingual nature of Community legislation; concepts or terminology specific to any one national legal system are to be used with care”³. As a result, the institutions that merely participate in creating lawmaking policies, as well as those that actually create EU law, were obliged to develop concepts that were non-existent in the languages of member countries.

3. What’s changed the “Better regulation”?

In 2000, the Union set itself a new goal for the decade: to prepare the transition to a competitive, dynamic, and knowledge-based economy. As part of what became known as the Lisbon Strategy, the European Council asked the Commission, the Council, and the member states—each in accordance with their respective powers—“to simplify the regulatory environment, including the performance of public administration.” The SLIM programme (Simpler Legislation for the Internal Market), which had operated since 1997, was extended and proposed a number of sectors for simplification⁴. The turning point in the lawmaking paradigm was the Better Regulation program. In November 2000, a Group for the quality of legislation, presided over by D. Mandelkern, was established. The Mandelkern Report was adopted in November 2001⁵. The main idea of the reform was

³ *Ibidem*, point 5.

⁴ See SEC(2001)575 for the adopted methodology.

⁵ http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_for_2001/MandelkernGroupOnBetterRegFinalReport.pdf.

presented in The Lisbon Strategy (2000)⁶. The Mandelkern Report identified six main aspects of a successful better regulation programme: policy implementation options, regulatory impact assessment of new measures, consultation, simplification of existing legislation, access to regulation, effective structures and a culture of better regulation.

Further relevant documents are EU communications including the action plan “Simplifying and Improving the Regulatory Environment”⁷, the communication from the Commission to the Council and European Parliament “Improving the Regulatory Environment in the Area of Economic Growth and Employment in EU”. The main concept is that regulation is a tool for delivering policies and meeting citizens’ expectations. In designing policies, laws, and regulations, governments are looking to do better—to make sure that they are using the right tools to get the job done, that benefits are maximized while negative effects are minimized, and that the voices of those affected are being heard.

The focus on the need to rationalize the legal decision-making process resulted in demands to simplify the regulatory environment and the application of impact assessments. These postulates were based on the assumption that the intervention of public authorities in legal regulations should be restricted only to indispensable and effective actions. Their implementation caused a broadening of the concept of legal quality by adding the criteria of necessity, effectiveness, and proportionality⁸. Taking into consideration such criteria requires that the process of adopting regulatory

⁶ 5 e.g. White papers on Governance in EU COM(2001) 727 of 25.6.2001: *Recommendations of the Group for the quality of legislation established in November 2000 by the minister in charge of public administration presided by D. Mandelkern* (the Mandelkern Report was adopted in November 2001), Annual report “Better law-making” of 12.12.2003.

⁷ COM(2002) 278 final of 5.6.2002.

⁸ Adopted by the member countries in *Better regulation* – see.: COM(2001) 428 final p. 18, European Governance white paper; cf. also: Sutton, *Technology and Market Structure*, Cambridge 1998; Kaufmann, Kray & Zoido-Lobatani, *Governance Matters* ‘World Bank Policy Research Working Paper’ 1999, no 2196; Hall and Jones, *Why do Some Countries Produce so Much More Output Per Worker Than Others?* ‘Quarterly Journal of Economics’ 1999, at pp. 83–116; Nicoletti *et al.*, *Summary Indicators of Product Market Regulation with an Extension to Employment Protection* ‘OECD Economics Department Working Paper’ 1999, no 226; Scarpetta and Tresselt *Productivity and Convergence in OECD countries: Do Regulations and Institutions Matter?* ‘OECD Economics Department Working Paper’ 2002, no 342; Nicoletti and Scarpetta, *Regulation, Productivity and Growth: OECD Evidence*, ‘OECD Economics Working Paper’ 2003, no 347.

decisions be based on economic and social analyses—especially cost analyses of different options.

The concept of “better regulation” was introduced together with the accepted criteria of clarity, understanding, profitability, and feasibility guaranteed by the obligation to undertake public consultations. Better regulation as a concept lacks a universal definition and therefore serves as an umbrella term to cover a myriad of initiatives, such as deregulation, reducing the administrative burden, improving the quality of impact assessments, reducing the quantity of legislation, and simplification⁹. Simplification and a reduction of administrative burdens in legislative areas, significant due to economic competition, were assumed with a goal of reducing the burdens imposed on enterprise. European Economic and Social Committee’ opinion on better lawmaking (OJ C 24 of 31.01.2006 p. 39 para 1.1.2 Daniel Retureau) states, “To make law in a better way means first of all to put oneself in the situation of a legal standard user, hence the need for participatory attitude including prior consultations taking into account the representative nature of civil society and social partners.”¹⁰. Thus a pragmatic criterion was introduced which emphasizes social actors as the recipients of legal regulations.

The analyses and recommendations of the Organization for Economic Cooperation and Development and the World Bank were not without significance for the adopted criteria, including the thesis that one of the most important factors determining the economic success of a country is the quality of institutions and the characteristics of its so-called “regulatory environment”. The catalogue of legal criteria comprises consistency and balance between competitive politicians, stability and predictability of regulatory requirements, ease of management and supervision, transparency and openness at the level of political and public opinion, honesty and reliability of implementation, and ability to adapt to changing circumstances. The following standards for regulatory instruments were also specified:

- users’ standards such as transparency, simplicity, and accessibility for individuals and enterprises;
- creative standards such as flexibility and cohesion with other regulations and international standards;

⁹ L. Clapinska, *Post-Legislative Scrutiny of Legislation Derived from the European Union* ‘European Journal of Law Reform’ 2007, at p. 343.

¹⁰ Opinion of European Economic and Social Committee on: “Proactive Approach to Law: Another Step to Better Law-Making in EU”, OJ C 175, 28.7.2009, p. 26.

- legal standards such as structure, order, clear elaboration, and terminology along with clear performing competences for authorities;
- efficiency standards such as appropriate and clear identification of problems and real conditions;
- economic and analytical problems such as determining the ratio of costs to profitability and measuring impact on business, competitiveness, and trade;
- executive standards such as practicality, feasibility, social acceptance, and access to the necessary resources¹¹.

New legal solutions need to balance implementation costs and social approval, which means that the expected benefits must outweigh the implementation and operation costs of those legal regulations¹². The criterion of effectiveness also refers to the legal system as a whole, and in this context the phenomenon of legislative inflation is a serious threat¹³. The profit and loss analysis, which is regarded as necessary at this level, forms the grounds for the currently accepted assumptions for making decisions based on facts and knowledge.

As regards the determination of proper lawmaking criteria it is important that, besides codification, consolidation, reduction, and the recasting of legal texts with respect to clarity and understanding, the simplification of EU lawmaking procedures and the simplification of legislative procedures in the member states should be given significant attention. It has been accepted that legal solutions must find a balance between implementation cost and social satisfaction, which means that the expected benefits must outweigh the costs of implementation and operation. The criterion of effectiveness also refers to the legal system as a whole, in this respect to the phenomenon of legislative inflation. It is fundamental that this criterion was accepted with the view of social actors because it will lead to adopting and then developing social consultations, initially as a support and then constituting the proper lawmaking process.

¹¹ *Law Drafting and Regulatory Management in Central and Eastern Europe*, Sigma Papers 1997, no 18, OECD Publishing, p. 12. Accessed via <http://dx.doi.org/10.1787/5kml618wrlg7-en>.

¹² C. M. Kerwin, *Rulemaking: How Government Agencies Write Law and Make Policy*, Washington 2003, pp. 93–94.

¹³ S. Eng, *Legislative Inflation and the Quality of Law* [in:] L. Wintgens (ed.), *Legisprudence: A New Theoretical Approach to Legislation*, proceeding of the Fourth Benelux – Scandinavian Symposium on Legal Theory, Oxford – Portland Oregon 2002, pp. 65–66.

4. Proactive law and smart regulation

While analysing lawmaking policies, the term proactive law has to be taken into consideration. On the 17th of January 2008, the European Economic and Social Committee decided, pursuant to article 29 para 2 of the Internal Regulations Act, to draw up an own-initiative opinion on “the proactive law approach: a further step towards better regulation at EU level.” This document not only defines the concept of proactive lawmaking and its practical implications, but it also applies directly to the theory of law. In accordance with the quoted document, “[a] proactive Law approach can favour better regulation by providing a new way of thinking: one which takes as its starting point the real- life needs and aspirations of individuals and businesses, rather than legal tools and how they should be used”¹⁴.

This idea is based on the assumption of an active society in which “The law is made by legal entities, individuals and enterprises with their participation and for them. It is based on the idea of a society in which individuals and enterprises are aware of their rights and duties, know how to exploit the opportunities offered to them by the law, know their legal obligations and thus can, where possible, avoid problems and resolve unavoidable disputes at an early stage, using the most suitable methods”¹⁵. The proactive law approach assumes moving away from formalism towards the determination and consistency of goals and searching for all possibilities, including non-legal options, to achieve such objectives. Such an approach is consistent with the assumptions of Better Regulation. In terms of practice, apart from better regulation tools, new areas of contractual freedom, self-regulation, co-regulation, and model regulations were introduced¹⁶.

The principles of law making, including its quality, goals, desirable methods and tools, are the subject of both the Lisbon Strategy and Europe 2020. An analysis of the relevant documents allows one to formulate the thesis that there has been a consistent and deliberate development of initial criteria – effectiveness, conceived as the proper ratio of tools to goals and communicativity the need to take into consideration the interests and

¹⁴ Opinion of European Economic and Social Committee, “Proactive Approach to Law: Another Step to Better Law-Making in EU”.

¹⁵ Opinion of European Economic and Social Committee, “Proactive Approach to Law: Another Step to Better Law-Making in EU, para 6.9.

¹⁶ Opinion of European Economic and Social Committee, “Proactive Approach to Law: Another Step to Better Law-Making in EU, para 1.5.

viewpoints of the future recipients. These two assumptions underlying the idea of the proper lawmaking initially determined the way of thinking about procedures and prospective effects of lawmaking. It is also significant that the Deminag Cycle has been adopted within the management sciences.

The requirements presented in the Europe 2020 Strategy have both material and formal character, in addition to determining the policies related to the expected law characteristics. Smart regulation can be viewed as a further improvement on better regulation. There are two clear cases where this term has been officially used: 1) Canada, in 2003–2004, sought “more effective, responsive, cost-efficient, transparent and accountable” regulation. 2) The European Union—building on its Better Regulation policy in force since 2002 and the criticism that it had been too geared towards reducing administrative obligations on business, the Barroso Commission proposed a revised policy for its second term. The policy is also applicable to the 27 member states and is characterized by a “life-cycle” approach covering design to ex-post evaluation, and the parallel pursuit of economic objectives (competitiveness, growth) and the preservation of quality of life or the social model¹⁷.

In September 2009, President Barroso published political guidelines for his second mandate. Among other political signals, this document offers a “chart” of smart regulation; it was the first time the concept was put forward in the Commission, and as such must be read carefully. The main points of this document are¹⁸:

- continuing to build the framework of social, environmental, and technical regulation that make markets work for people;
- rules must ensure transparency, fair play, and ethical behaviour of economic actors, taking account of the public interest;
- smart regulation should protect the consumer;
- public policy objectives should be delivered effectively without strangling economic operators such as SMEs or unduly restricting their ability to compete;
- and the ex-ante assessment of the first Commission must be matched with an equivalent effort in ex-post evaluation, to guarantee efficient policy implementation, removing bureaucratic processes and unnecessary centralisation.

¹⁷ C. H. Montin, *Smart Regulation: A Global Challenge for Policy Makers*, ERRADA, Newsletter April 2012, accessed via <http://smartregulation.net>.

¹⁸ *Ibidem*, p. 12.

Practical steps would include a major review of existing legislation, to remove “bureaucratic processes and unnecessary centralisation” and the extended use of impact assessment. Smart regulation is about the whole policy cycle—from the design of a piece of legislation, to implementation, enforcement, evaluation, and revision¹⁹.

Special attention was given to consultations as tools of communication between lawmaking institutions and stakeholders. This issue has a permanent place in the method of operation of the EU’s institutions. The dialogue between the Commission and interested parties takes many forms, and methods for consultation and dialogue are adapted to different policy fields. The Commission consults through consultation papers (green and white papers), communications, advisory committees, expert groups, workshops, and forums. Online consultation is commonly used. Moreover, the Commission may organize ad hoc meetings and open hearings. Often, a consultation represents a combination of various tools and takes place in several phases during the preparation of a policy proposal²⁰. However, in Better Regulation, consultations were stipulated as a part of impact assessments, while in the Europe 2020 Strategy they are treated as an individual separate criterion. From a practical point of view, such a change seems unimportant, but it indicates a change in the rank of this policy.

Furthermore, a serious problem exists with the content; the claimed objectives of policies are neither clear nor appropriate, and conflicting policies co-exist. Better regulation must extend beyond visible effects, achieve more than simplification and reducing red tape. It must address the substance of the policies to deliver smart results. Such an approach indicates an effort to undertake a complementary approach in place of the recasting and simplification of selected areas. New legal actions should be coordinated with all other existing and planned legislation, to avoid duplicative or inconsistent rules²¹. It would indicate a desire to achieve the essential goals of the national legal systems’ characteristics of cohesion and non-contradiction. Another aspect is to organize tools relevant to the assumed objectives and lawmaking policies. The EU documents use terms related to this area, including such fundamental concepts as “intelligent regulations” as well as a number of terms such as road maps, minimal standards, efficiency verification, accordance tables, or “gold plating”. These

¹⁹ *Ibidem*, p. 17

²⁰ C. H. Montin, *Smart Regulation in the European Union*, 2012, p. 10.

²¹ *Smart Regulation in the European Union* COM(2010) 543, p. 2.

tools are of a very technical character. Special attention should be paid to correlation tables, which document specifics about member states, showing the link between the provisions in directives and national rules. This is a method of monitoring the transposition process, and they are the primary tool used for the EU non –contradiction policy and the national legal systems.

Another activity at the draft stage was publication of the Regulatory Fitness communication, which refers to the Regulatory Fitness and Performance Programme (REFIT). This programme builds on its experience in evaluating and reducing the administrative burden by identifying burdens, inconsistencies, gaps, and ineffective measures. Attention will be paid to possible regulatory burdens concerning how EU legislation is implemented at the national and sub-national level. The REFIT Programme builds upon a broader approach to policy evaluation piloted through “fitness checks” launched in 2010²². Further insight regarding the area of law in the view of management will be of great interest; the Commission uses the term “managing the stock of legislation”²³. The analysis of this document indicates that the assumed procedures of action in the regulation area are identification, operation assessment, impact assessment, and consultations. The existence of smart regulation sharpening performance was also assumed.

5. The influence of European lawmaking policy on Polish lawmaking policy

In Poland, the law paradigm has evolved from academic viewpoints through to the attempt to elaborate a consensus on the principles of legislative technique, and it is also the subject of Constitutional Tribunal jurisdiction. Recently, it also became the subject of criticism and analysis in the context of EU requirements and the search for standards and best practices. Under national law, beyond normative considerations there are expectations in relation to the law and its quality resulting from legal culture. They have been shaped in a lengthy process of discourse between

²² *Ibidem*, pp. 3–4.

²³ *Ibidem*, p. 4.

various social institutions in which theoreticians and philosophers of law have participated in a conscious and deliberate manner.

In Poland, the Polish Academy of Sciences Conference in 1996 was accepted as the starting point for such analysis, where the attempts to define requirements under the law were taken. In this context, the technical aspects of forming legal regulations were considered, such as legal linguistic characteristics and the formation of normative acts. These criteria are formulated within the framework of the preferable features of legal systems such as cohesion, completeness (understood as the absence of actual gaps), the non-contradiction and uniformity of standards in lower ranking acts with those in higher ranking acts. On the legal plane, requirements are imposed as regards efficiency, rationality, and effectiveness²⁴. The idea of good law encompasses not only fairness but also the creation of an efficient regulator of social relations. The efficiency postulate is connected with the implementation of rational lawmaking demands. On the axiological plane, “law is perceived as good when it corresponds to the adopted standards of justice and equity”²⁵. These standards are in a specific normative order as defined in the constitution. In modern democracies, the adopted legal values of a state governed by the rule of law, such as protection of specific areas of legal operation and the freedom of the individual, are connected with a resignation from the direct imposition of moral ideas. At present, the values of procedural justice play an important part on this plane. The term “state governed by the rule of law” does not refer to its goals but to the manner and character of their implementation²⁶.

Maintaining legal quality standards at the systemic-formal and functional levels results in adopting laws that will give a sense of confidence and

²⁴ A. Bierć, *Racjonalna procedura prawodawcza jako podstawa dobrego prawa* [Rational legislative procedure as the basis for good law], ‘Studia Prawnicze’ 2005, no 4 (166), Warszawa 2006, at pp. 5, 7–10; S. Wronkowska, *Kryteria oceny prawa* [Criteria for Evaluation of the Law] [in:] E. Kustra (red.), ‘Przemiany polskiego prawa (lata 1989 – 1999)’ [Transformations of Polish Law (1989-1999)], ‘Studia Iuridica Toruniensia’, Toruń 2001, at p. 33; A. Zoll, *Kryteria stanowienia dobrego prawa* [Criteria for a Better Lawmaking], Nauka 2000, no 4, p. 157 *et seq.* and literature quoted therein; M. Kordela, *Zasady państwa prawnego w wystąpieniach Rzecznika Praw Obywatelskich* [Principles of the Rule of Law in Presentations by Polish Ombudsman] [in:] S. Wronkowska, ‘Polskie dyskusje o państwie prawa’ [Polish Discussion on the Principle Rule of Law], Warszawa 1995, p. 121.

²⁵ S. Wronkowska, *Polskie dyskusje o państwie prawa* [Polish Discussion on the Principle Rule of Law], *op. cit.*, p. 50.

²⁶ *Ibidem* p. 14.

stability to prevailing rules. Such law should be pragmatically clear in three dimensions: qualification, orientation, and systematization. The effect of maintaining each type of clarity is to avoid doubt as to the content of the law in the process of its application, in the situation of subordination and in its dogmatic analysis²⁷.

The quality of the law in force is testified by the quality of regulatory decisions, the quality of a draft statutory text, and the quality of the law-making process. The text of a normative act is subject to changes in the context of the lawmaking process, and consequently there are fundamental differences in practice between a draft statutory text and an adopted act. This justifies the need to refer to both the draft and to the adopted act. In theory, two extreme situations are possible in which a positively evaluated draft is not amended during parliamentary procedures, or a negatively evaluated draft is amended to form a high-quality statute. Still, if the lawmaking procedures allow draft texts to be amended, in so far their objective is not to improve them especially in the context of legislative technique. The widely discussed issue of how to ensure the quality of law within the framework of legislative procedures is reflected in the practice of so-called fair or good legislation, adopted by the member countries' parliaments in the form of normative acts regulating individual stages of work, parliamentary codes, or parliamentary codes of ethics²⁸.

In view of the above, a necessary relationship between the quality of a draft statutory text and the quality of the adopted act must be assumed. Give objections to the lawmaking procedures, the draft act quality is a pre-condition and not a guarantee of the normative act quality²⁹. The quality of a legal text depends not only on the regulatory decision in the context of substantive and functional requirements, but also on the quality of the legal draft text and the existing text (already in force or properly issued). An essential role is played by material and formal criteria. The criteria of quality, analysed in Polish literature, correspond to its test plane in broad

²⁷ J. Wróblewski, *Pragmatyczna jasność prawa*, 'Państwo i Prawo' 1988, no 4, at pp. 6–7.

²⁸ M. Bąk, P. Kulawczuk, A. Kulawczuk, A. Poszewiecki, A. Szcześniak, *Praktyki rzetelnej legislacji gospodarczej. Doświadczenia światowe i możliwości adaptacji do warunków polskich* [*Practice of Reasonable Economic Legislation. International Experiences and Possibilities of their Adaptation in Polish Conditions*], Warszawa 2007, pp. 7–44.

²⁹ S. Eng, *op. cit.*, pp. 66–68. K. H. Goetz, R. Zubek, *Stanowienie prawa w Polsce. Reguły legislacyjne a jakość ustawodawstwa* [*Lawmaking in Poland. Rules concerning Legislation and the Quality of Law*], Warszawa 2005, pp. 51–52.

terms. On the axiological plane, there are material criteria; on the systematically-formal plane, there are formal criteria; and on the functional plane, there are functional criteria³⁰.

The formal criteria referring to the legislative technique that comprises providing recipients with legal provisions, including appropriate *vacatio legis* as a condition of publishing law, non-retroactivity of law; formulating law in a comprehensible way, including the transparency of law (the legal language and text structure) and communication skills; non-establishment of mutually conflicting legal norms, including cohesion and consistency of the system; avoiding standards that are beyond the recipients' comprehension; the durability of the law; making law in accordance with the law, including ensuring appropriate standards of implementing act³¹. The functional criteria assume that good law corresponds to the condition of adequacy of the adopted legal measures to achieve active goals, especially the reality of the adopted solution or feasibility test³². These assumptions are reflected in the Principles of Legislative Technique, the Parliamentary Code, and the Constitutional Tribunal's principles of sound legislation³³.

The Principles of Legislative Technique refer to the manner of adopting a regulatory decision, the manner of expressing the decision in legal language, legal text editing and the interpretation of legal texts. The requirements of regulatory decisions regarding rationality of the decision and selection of appropriate measures are in accordance with the Lisbon Strategy assumptions, simplification of the regulatory environment, and the assumption of best legislative practice developed by Organization for

³⁰ S. Eng, *op. cit.*, p. 69.

³¹ A. Łopatka, *Kryteria jakości prawa [Criteria of Law Quality]* [in:] *Jakość prawa [Quality of Law]*, Warszawa 1996, pp. 29–35; S. Wronkowska, *Kryteria oceny prawa, op. cit.*, p. 34 – 44, J. Nowacki, *Rządy prawa. Dwa problemy [The Rule of Law. Two Problems]*, Katowice 1995, pp. 33 – 37, 55; J. Oniszczyk, *Zasady kardynalne państwa prawnego w orzecznictwie Trybunału Konstytucyjnego [Fundamental Principles of the Rule of Law in the Jurisprudence of Polish Constitutional Tribunal]* [in:] 'Studia i materiały', vol. I, Warszawa 1995, pp. 112–113, 144.

³² E. Łętowska, J. Łętowski. *Prawo w systemie funkcjonowania państwa [Law in the System of the Functioning of the State]* [in:] A. Wasilowski (ed.), *Jakość prawa [The quality of Law]*, Warszawa 1996, pp. 12–13.

³³ S. Wronkowska, *Zasady przyzwoitej legislacji w orzecznictwie TK [Principles of Reasonable Lawmaking in the Jurisprudence of Polish Constitutional Tribunal]*, [in:] M. Zubik (ed.), *Księga XX – lecia orzecznictwa Trybunału Konstytucyjnego [Book on 20th anniversary of Polish Constitutional Tribunal]*, Warszawa 2006, pp. 671–689.

Economic Co-operation and Development (OECD). They oblige legislators to a detailed analysis of objectives, resources, and costs and to specifying different options for regulatory solutions. Preceding the final decision with an analysis of the current status seeks to ensure that the best solution is chosen. In particular, it is indispensable to justify the need for legal regulation and to establish that the chosen means is the best way to achieve the intended goal³⁴.

The Constitutional Court has often commented on legislation, claiming that implementation of the principles of a democratic state requires that the legislator should observe the rules of sound legislation³⁵. The rules of sound legislation are associated with the principle of citizens' trust in the state, which underlies many articles of the constitution, and with the rule of material law and order, which is the basis of specific responsibilities in the sphere of state actions. In particular, these rules impose the obligation to establish the law in a way that does not restrict the rights of citizens, by constructing a system of law that is clear, coherent, and comprehensible and that ensures stability. The principle of trust in the state requires that the adopted legal standards cannot be retroactive³⁶.

The principles of sound legislation formulated in the decisions of the Constitutional Tribunal contain material criteria expressed in the rule that requires legal changes to be adopted in such a manner as to enable the recipients to become acquainted with changes in law by maintaining an appropriate *vacatio legis*³⁷: the principle of acquired rights³⁸, the rule of respecting interests in progress³⁹, non-retroactivity of law, and the rule of making law to enable the eligible subject to take advantage of the

³⁴ Scarpetta and Tressel, *Productivity and Convergence in OECD countries: Do Regulations and Institutions Matter?* 'OECD Economics Department Working Paper' 2002, no 342; Nicoletti and Scarpetta *Regulation, Productivity and Growth: OECD Evidence*, 'OECD Economics Working Paper' 2003, no 347.

³⁵ S. Wronkowska, *Zasady przyzwoitej legislacji...*, p. 671.

³⁶ Judgment of the Polish Constitutional Tribunal 8.11.1989, K 7/89 (OTK 1986-1995/t2/1989 issue 8).

³⁷ Judgment of the Polish Constitutional Tribunal of 15.9.1998, K 10/98 (OTK ZU 5/1998, issue 64).

³⁸ Judgment of the Polish Constitutional Tribunal of 22.6.1999, K/5/99 (OTK ZU 5/1999, issue 100).

³⁹ Judgments of the Polish Constitutional Tribunal of 25.6.2002, K 45/01 (OTK ZU 4/A/2002, issue 46), 28.1.2003, SK 37/01 (OTK ZU 1/A/2003, issue 2).

powers conferred on them (non-establishing the apparent law)⁴⁰. The rules of sound legislation define the formal criteria for the quality of law. They result mainly from the rules of cohesion and definite character of the law—legal acts must be correct, precise, clear, and understandable. The rules of plausibility⁴¹, coherence, and completeness of the system of law generate the requirements that legal acts must be formulated in a logical, compact way and that they may not result in gaps or internal contradictions within the system of law⁴².

The aforementioned rules do not *per se* function the control model for reviewing the constitutionality of the law; they merely play a specific role in it. The Constitutional Tribunal emphasizes in its decisions that it has not been appointed to control the purposefulness, rationality, and effectiveness of legislative solutions, which denotes non-supervision of the justification of legal acts⁴³. The above rules, in the interpretation of the Tribunal's decision, do not constitute a closed catalogue and it is possible in the future to elaborate new rules, which will allow for the effective implementation of the principles of the democratic state of law. They are of a conditional obligation nature, and are focused on achieving the goal. The above presented considerations should be taken into account by ordinary legislators, responsible for performing and specifying constitutional normalizations. The adopted solutions should form a definite, coherent, and functional system; the created jurisdictions should aim not only at legislative correctness but also to strike a reasonable and fair balance of interests of the affected social groups⁴⁴. The above rules face the criticism of being ambiguous, but detailed guidance can be found in the Principles of Legislative Technique and in academic literature.

⁴⁰ Judgment of the Polish Constitutional Tribunal of 30.11.1988, K 47/01 (OTK 1988, vol. I, issue 6), judgment of the Polish Constitutional Tribunal of 9.6.2003, SK 5/03 (OTK ZU 6/A/2003, issue 50).

⁴¹ Judgments of the Polish Constitutional Tribunal of 11.1.2000, K 7/99 (OTK ZU 1/2000, issue 2), 21.3.2001, K 24/00 (OTK ZU 3/2001, issue 51), 27.7.2006, SK 43/04 (OTK ZU 7/A/2006, issue 89).

⁴² Judgment of the Polish Constitutional Tribunal of 10.11.2004, Kp 1/04 (OTK ZU 10/A/2004 issue 105).

⁴³ Judgment of the Polish Constitutional Tribunal of 31.3.1998, K 24/97 (OTK ZU 2/1998, issue 13).

⁴⁴ Judgment of the Polish Constitutional Tribunal of 23.5.2006, SK 51/05 (OTK ZU 5/A/2006 issue 58).

A breach of the principles of legislative technique, in the context of a normative act fulfilling the legal standards required in a state governed by the rule of law, does not constitute a ground for the Constitutional Tribunal adopting a decision on its unconstitutionality. Violation of the principles of legislative technique forms the grounds for such a decision. The grounds for such a decision is a breach of the principle of the democratic state of law. The Court is of the opinion that the construction of normative acts which infringe the principles of legislative technique leads to the defectiveness and incorrectness of the act, but not to its unconstitutionality *per se*. At the same time, violating many principles in one act may result in such a degree of defectiveness that it can be deemed to infringe the standards to be expected in a state governed by the rule of law.

A different opinion has been presented by the Polish Supreme Administrative Court, which treats the violation of legislative technique as a violation of the basic rules governing the carrying out of legal action, and constitutes grounds for considering the adopted act illegal⁴⁵. Nevertheless, taking into consideration the fact that the extent to which the legal technique principles are violated is of tremendous significance, these principles indisputably become determinant of interpretative and validative rules⁴⁶. There is a clear textual relationship⁴⁷ between the interpretative rules and the principles of legislative technique; however, it should not be understood as co-identification of legislative technique principles with interpretative rules. This correlation results from the fact that the legislator must, during the lawmaking process, take into consideration mechanisms of law enforcement⁴⁷. Since the interpretation is based on the principle of the primacy of language interpretation, it is logical to conclude that legal texts should be formulated clearly and precisely.

In the context of the correlation of principles and lawmaking interpretations, essential meaning is given to the syntax rules which function in a particular legal system. The existing relationship does not directly

⁴⁵ S. Wronkowska, *O meandrach skuteczności nowych zasad techniki prawodawczej* [Meander of Efficiency of New Rules concerning Lawmaking], 'Przegląd Legislacyjny' 2004, no 4 (44), at pp. 19–21.

⁴⁶ *Ibidem*, p. 26.

⁴⁷ S. Wronkowska, M. Zieliński, *O korespondencji dyrektyw redagowania i interpretowania tekstu prawnego* [On the relations of the directives of drafting and interpreting of a legal text], 'Studia Prawnicze' 1985, no 3–4 (85–86), at pp. 301–326; J. Wróblewski, *Tworzenie prawa a wykładnia prawa* [Lawmaking and interpretation of the Law], 'Państwo i Prawo' 1978, no 6, at pp. 5–16.

affect the context of the normative quality of law and can only serve as an additional justification in the view of the desirable feature of law; in other words, the fact that it can be “applied” from the perspective of the practice of the Constitutional Tribunal, the Supreme Court, and the Chief Administrative Court⁴⁸. In this respect, the directives of language interpretation, both systemic and functional, are recognized as essential—together with the fact that the process of interpretation is based on legal conclusions. The relationship between the rules of interpretation and the principles of legislative technique indicates the fact that the criteria of intention in the specific legal system’s quality of law are a constant component of interpretation rules and thereby an established part of the legal culture.

By virtue of its affiliation with the OECD in 1996, Poland assumed an obligation to adopt the recommendations of the OECD Council of March 1995 on improving the quality of legal regulation. More than a dozen OECD countries, including Poland, committed to reform their regulatory environment, which is still carried out under the cooperation of OECD and the EU, the SIGMA program (Support for Improvement in Governance and Management). Due to the implementation of the Lisbon Strategy, the Council of Ministers adopted the impact assessment system. The impact assessment guidelines define the principles for a cost-benefit assessment of government drafts. Their content corresponds to the requirements of the Legislative Technique principles, by clarifying them and introducing a series of practical guidelines illustrated by examples.

Entities involved in the preparation of draft laws are obliged, first of all, to take into account the material and functional criteria. The main functional criteria which result from an impact assessment are efficiency and proportionality. It has been assumed that “the legislative and non-legislative solutions, adopted by state, should accomplish maximum economic, social and environmental goals at minimum burden for business entities and the society”⁴⁹. If the requirements of rational regulatory decision making were maintained, it could be presumed that legal amendments would be necessary. Adopting restrictions in the method of regulatory decision making is a tool designed to restrict the legislative inflation phenomenon, especially inflation of the burdens imposed on citizens vis-à-vis

⁴⁸ E. Łętowska, J. Łętowski, *Prawo w systemie funkcjonowania państwa* [Law in a System of functioning of a State], [in:] A. Wasilowski (ed.), *Jakość prawa, op. cit.*, pp. 12–13.

⁴⁹ *Wytyczne do Oceny Skutków Regulacji* [Guidelines Regarding the Evaluation of the Consequences of Regulation], Ministerstwo Gospodarki, Warszawa 2006, p. 3.

state administration bodies. The obligation to justify draft acts, introduced within the framework of the Polish Parliamentary Code, results in incorporating the criteria of regulatory decision quality into the criteria of draft act assessment. The Government Legislation Centre published *Guidelines for Legislative Policy and Legislative Technique. Securing Observance of the EU Law in Polish National Legislation and Good Legislative Practices*⁵⁰. There is a specific duality in the present legal status, in which the legislator, maintaining the requirements formulated in the Principles of Legislative Technique and the Parliamentary Code, simultaneously declares the adoption of better regulation guidelines and implementation of the Europe 2020 Strategy. On the 22.1.2013, the Council of Ministry adopted a resolution to approve the Better Regulation 2015 program, the purpose of which is to “provide systemic and organisational solutions necessary for the formation and evaluation of law, based on analytical evidence, directed to solving real, social and economic problems, including reducing the costs of performing economic activity and increasing competitiveness of Polish economy”. The three most important issues of this program were: transparent lawmaking that can effectively solve real problems, continuous improvement of the regulatory environment, and improving communication with stakeholders. In order to implement these assumptions, the following tools were suggested: modified forms of regulatory text, input assessment, and Regulatory Impact Assessment ex-post.

6. Summary

Lawmaking policy in the EU has evolved from OECD assumptions through the Lisbon Strategy assumptions and finally to the Europe 2020 Strategy. The present paradigm is based on the pragmatic assumption that the law is a tool of balanced development; it is a tool that is subject to continual review. The adopted assessment criteria can be divided into two groups – those affecting the recipient’s situation together with the necessity to conduct public consultations and cost analyses, which necessitates cost-benefit compensation resulting from the regulation. Given the nature of EU law, it is possible to discuss the creation or more continuous creation of the lawmaking model. Clearly visible pragmatic visions of law

⁵⁰ http://www.rcl.gov.pl/079_Wytyczne_v04_2009.pdf.

and the manner of lawmaking - which assumes discourse with social actors, incorporating a clear tendency to base the decision on expert cost-benefit analysis - corresponds to reflexive change characteristics. The role of public consultations in the context of a reflexive theory of modernity seems to confirm one of the main theses of this theory. Since the degree of modernization of the society is connected with the ability to influence the social conditions of their own existence and the creation of such a possibility by active entities, the change is the meaning and importance of public consultation in lawmaking processes becomes further evidence of social modernization in this area⁵¹. In Polish legal culture, greater importance is attributed to tradition and legal discourse with the participation of legislators, the Constitutional Tribunal and academic writing. Changes in the concerned area result from the adopted commitment to implement the European Strategies. Their full implementation would require changes at the normative level, which still remain declarations⁵².

The changes resulting from the discourse of many actors with a diverse range of responsibilities and authority constitute changes at an institutional level which affect the level of structural principles and practical awareness. The relationship between institutional assumptions of procedural lawmaking and practice forms part of the Deming cycle, where policies and assumptions affect practice, which in turn affects policy changes and assumptions. Such a perception exhibits a duality phenomenon of the structure of social systems, where structural characteristics governing the continuity of transformations are both the medium and the outcome of transformation⁵³. Since the European legislator leaves open the conceptual ideas in smart regulation, the role of practical awareness is exposed. The practice of implementing the adopted guidelines, including the practice of the EU's conduct towards national legislators (especially in the areas covered by harmonization), will have a dominant influence on the final result in the sense of the realization of changes in the approach to lawmaking.

⁵¹ U. Beck, A. Giddens, S. Lash, *Odpowiedzi i krytyka [Responses and critique]*, [in:] U. Beck, A. Giddens, S. Lash, *Modernizacja refleksyjna, op. cit.*, p. 225.

⁵² A. Jakubiak-Mirończuk, Z. Springer, *Uwagi dotyczące Oceny Skutków Regulacji (OSR) – zasięganie opinii zainteresowanych stron [Comments regarding the Evaluation of the Consequences of Regulation]*, 'Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu' 2007, no 3 (15) 2007, at pp. 269–280.

⁵³ A. Giddens, *Stanowienie społeczeństwa [The Constitution of Society]*, Warszawa 2003, pp. 64–65.