The Use of Socio-Legal Information in the Draft Acts’ Explanatory Memoranda: A Precondition for Good Governance

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Abstract
In Estonia as in other EU countries, the analytical information on legal, budgetary, social, economic and administrative objectives and impacts of proposed legislation has to be given in an explanatory memorandum accompanying a draft Act. In 1997 the method for normative content analysis of explanatory memoranda in 6 categories of socio-legal information was worked out on the basis of Estonian legal requirements for the draft legislation and OECD recommendations. In 1998-2003 5 normative follow-up studies of 651 draft Acts and several qualitative case studies were carried out. The main objective was to gain an empirical overview in what extent the initiators of draft Acts follow the requirements in information categories which are reflecting the impact analyses, involvement of NGOs and harmonization of national and EU laws. From the normative point of view, the quality of draft Acts’ explanatory memoranda has been comparatively uneven - a lot of draft Acts initiated by ministries or MP-s did not comply with the legal requirements adopted by the Government and Parliament. These studies show also some achievements, but most of the work for establishing better institutional framework related to legal state and knowledge-based policy, lies ahead. In authors opinion Estonia needs a minimalist policy program on law-making and regulatory impact analysis.

Chapter 1. General context and practical reasons of studies
The quality of socio-legal information offered in the explanatory memoranda of draft Acts (by way of public service) is an important precondition for knowledge-based policy debate, participatory democracy and administrative capacity. Contrary, the lack of systematic regulatory impact analysis [RIA], transparency and parliamentary surveillance, have, in their turn, created favourable conditions for the initiation of draft Acts which may involve high social risks. These 5 empirical normative studies and complementary qualitative case studies, carried out in 1998-2003, clearly address the importance of parliamentary and academic control over quality of draft Act’s proposed to the parliamentary proceedings and public debate.

The present paper proceeds from a simple thesis that the problems of administrative capacity and legitimacy of the public policy often arise from the shortcomings of law-drafting. Considering the experience of OECD and EU Member States in 1990-ties, there is no reason to think that good law-making and governance practices will start to function without political commitment in regulatory policy, methodological guidelines, systematic training and surveillance mechanisms. It takes time.

In 1995, starting the institution-building of the parliamentary research services in Estonia, we faced with different political, administrative, scientific, educational etc. challenges. For example - the parliamentary information environment cannot be homogeneous in pluralistic democracy and in this context the socio-legal information offered in explanatory memoranda of draft Acts cannot be considered as a frame-neutral input into policy discourse. There are usually a lot of actors and factors, a conflict of various interests, information overload, political competition, lack of resources etc.³ In view of this list of actors and factors, the main role of explanatory memoranda to draft Acts is to present balanced and well-structured information about the political goals and any legal, budgetary, social, economic and organisational changes related to the implementation of the Act. This information has to assist Members of Parliament (MPs) in fulfilling their parliamentary functions, e.g. impact assessment of policies, control over executive and informing the public. The limited resources often place the parliamentary research services in the position of mediators and interpreters of the results obtained by social scientists, because they have to be ready to support parliamentary committees and MP-s in improving the quality of legislation.⁴ In many cases, this is related to checking explanatory memoranda (e.g. RIA) carried out by Government agencies or experts behind the political parties.

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⁴ It is related to the realisation of the constitutional principle of separation of powers. See also W.H.Robinson ‘Knowledge and Power. The Essential Connection Between Research and the Work of Legislature’ – ECPRD,
Chapter 2. Some theoretical frames and discourses

2.1. Moral discourse: knowledge, democracy, law and human rights

Democracy entails a political community in which there is some form of political equality among the people. The use of socio-legal knowledge in the political discourse and legislation serve as the preconditions for participatory democracy and reasonable decision-making. In the context of the constitutional state and democratic values, we should in the ideal case have an informed parliament and an informed general public.

J. Habermas’ writings on democracy, communicative action, ethics and rational debate in the public sphere have inspired many discourses. J. Habermas’ late-modern theory of communicative action differentiates the imperative demands of the system from the rationality of the person’s everyday lifeworld in order to analyse the integration of the changing social and law systems. The increase of procedures in the legislation is a response to the change in the lifeworld, but the legislation can colonise the communicative structures of the lifeworld. Habermas sees a mental danger in many social welfare programs that have a tendency to colonise our everyday life with their pre-care. The goal of Habermas’ communicative ethics is a society made up of the dialoguing subjects and striving to achieve a consensus acceptable to the majority. If the legal Act and its explanatory memoranda function as an instrument of some elite/lobby group, the market, or state interests, the lifeworld of the people has been colonised because of the systematically distorted communication.

In the market area concerning legislation and public services the extent of biased, asymmetric information should be reduced. This means that the measurement of the impacts of political choices in economic, social and also cultural terms will be more important, because if the political objectives are not clear and measurable in draft Acts, we cannot analyse the impacts. When we make an effort to achieve the win-win culture in EU, the argument applies to EU common policies and reaches far beyond a question of formal harmonisation of legal Acts.

U. Beck (1992) has observed that we are experiencing a transition to a ‘risk society,’ where ‘more and more social conflicts are no longer treated as problems of order but as problems of risk’. According to Hillyard (2001) the sociological studies needs to focus more on the materiality of everyday life, and, in particular, the growing inequalities in the world and the role that law and legal institutions play in the structuring of these inequalities. Scholars ‘have to stand against unfair and unjust distribution of resources’. In other words - to be a moral/responsible participant in policy-making, the empirical studies are needed because the cost of failure in the field of societal experiments can be too high.

The aim of institutional mechanisms of accountability and transparency is to support the moral foundations of democracy. In order to promote the choices of citizens and increase responsiveness in public service, Stirton and Lodge (2001) are providing a complex toolbox of four transparency mechanisms – information, choice, representation and voice. Accordingly, transparency can be understood to serve two separate but related functions in the socio-political interaction. First, to ensure that public service provides respect the positive/negative rights of individuals. The second purpose relates more directly to democratic theory, which values participation. Transparency, on this view has moral value because it enhances individual autonomy by involving citizens directly in the process of making decisions which affect their lives.


8 ibid Habermas 1996: 107; also B.Carlsson Communicative Rationality and Open-ended Law in Sweden - J. of Law and Society, 1995: 475-503;


Traditional accountability mechanisms (e.g., parliamentary surveillance) are one part of complex networks. The range of values for which accountability is rendered can be placed in three categories: economic values (e.g., financial probity), social and procedural values (such as fairness, equality, and legality), and continuity values (such as social cohesion, universal service, and safety). To sum up, one of the few issues on which both, scholars of sociology of law and public administration, agree in theory is the centrality of the moral issues. The quality of socio-legal information, legally guaranteed equal access to the results of RIA of draft Acts, possibility to participate in the public debate etc, are deeply related to the human rights. In this context the development of knowledge based policy and law-making is first of all a moral issue and only after that a political, economic or legal issue.

2.2. Use of social science information in public policy and law-drafting

Many social scientists have attempted to understand the interrelated mechanisms of political decision-making and the use/impact of social science information. In recent decades, despite a tremendous growth of attention to the importance of social science information in the political and administrative decision-making, most of studies generally indicate that there is a ‘great divide’ between the community of scientists and the community of policy-makers and that the policy-makers rarely utilise social science information. Typically, the gap between two communities is expressed in terms of a few factors: a) there is great distrust between the two communities; b) researchers, bureaucrats and politicians operate under substantially different conceptions of time and worldview; c) it is asserted that researchers need to be more concerned with the information needs of policy-making and the relevance of research to these needs.

The studies by Oh and Rich (1996) demonstrate that information utilisation in the political decision-making is affected by a variety of individual, organisational, contextual etc factors and their linkages, not dominated by one set of factors (e.g. trustworthiness of information source or format of reports) defined by a single perspective (e.g. the communications perspective or the organisational interest). The communications perspective studies explain little use of social information in terms of the lack of interaction between decision-makers and researchers. Researchers need to understand that policy-making at national and EU levels is not a simple process - the findings of research are only one of the elements in the complex process of policy-making.

The studies, based on the organisational interest perspective, assume that organisational rules, norms and structures are essential for understanding information acquisition and utilisation in governmental agencies.

Sometimes the key question seems to be Why? and For What? the use of socio-legal information is needed and required in the explanatory memorandum of a draft Act? In authors’ opinion, the socio-legal information provided in a transparent way to the parliament and the public, creates preconditions for a reasonable political debate and accountability, additional impact analysis, comparison of interests and possible strategies, competition between ideological frames etc, in sum, to support the resolutions of policy controversies in public interest. In addition, there are some other types of ‘outcomes’ which information use may be associated with include: helping in the formulation of guidelines and secondary legislation, designing a service delivery system, developing possible strategies or marketing campaign, informing the public about a particular problem, designing incentive systems and other specific activities.

Schon and Rein (1994) advocate a communicative approach to policy design, which emphasises the virtues of self-reflection by parties involved in controversy. Inspired by Habermas’ theory, they stress the need to develop institutionalised norms and fora of interaction and debate that will facilitate the transformation of confrontation into dialogue and collective learning. According to Schon and Rein, the use of advanced strategies will happen only in appropriately situated controversies, e.g.: a) participants are strongly motivated to ‘get something done’; b) a rich information reservoir is available, that participants may design innovative solutions.

To overcome the problem of relativism, many analysts and organisations have tried to formulate more specific and systematic checklists of points a complete policy argument must contain. Checklist in hand, a critical reader can probe the adequacy of any policy objective with its empirical justification, if it is available. But of course, theoretical relativism can still surface when the conflict about value-based human rights or the unity of moral, legal and economic questions comes to political debates.

In authors’ opinion we can analyse the political and administrative practices of law-making using ‘open zones of inquiry’, where the actual behaviour of decision-makers is documented as the outcome of the law-drafting process. The explanatory memorandum of a draft Act is one of the open ‘policy windows’.

2.3. Negotiatory state, civic knowledge and political socialisation

The rationalisation and legitimisation of political, legal and economic institutions of social order has been an important issue in last decades. To integrate societies, we need educated citizens and political participation. Without adequate knowledge and skills the citizens cannot follow public discussions on policy issues and participate in policy-making, they cannot assess the impacts of draft Acts to their lifeworld and they are less accepting the democratic policy debate and adopted legal Acts. Competent citizens, NGOs and other target groups of draft Acts, need not be the experts of public policy and legislation, but there is a level basic knowledge below which the ability to make a full range of reasoned civic judgements is impaired. It can be generalised that without the institutional support of business and civic organisations, legislators cannot reproduce public debate and achieve common objectives. Participation is one of the critical elements to establishing legitimacy and political reliability of knowledge and secure the support of key actors in an organisations environment. These ideas have translated into major social conventions and institutional reforms. Hart and Kleiboer (1995) argue, there has been a growing awareness of the increasingly complex mutual inter-dependencies and one development in this respect has been the rise of the negotiatory state framework. In the negotiatory state, the myth of the unitary administration has given way to a pervasive recognition of governmental pluralism which is compounded by societal pluralism. The policymakers and bureaucrats of the negotiatory state are faced by multiple groups of well-organised, intelligent and often resourceful societal actors, be they business enterprises, trade unions, or environmental lobby groups. Like their counterparts within the constitutional institutions, each of these actors has its competences, interests, and policy preferences. Despite the apparent enthusiasm for participation, it is not as easy to achieve as it might seem. The strategic decisions in public sector organisations are often politically charged, the studies also find that in difficult decisions, which are subject to public scrutiny, managers will be influenced by a restricted set of experts and interactions. According to Hart and Kleiboer (1995) there are two pervasive biases in public policy-making in the context of negotiatory state. First, policy elites use their power to limit the number of participants in a policy arena, or they may limit the range of politically acceptable arguments. The second bias may appear if a policy problem becomes defined as an issue of maximizing economic benefits and/or minimizing public expenditures.

In sum, given that the impact analysis presented to the parliament with draft Acts is accessible to the public via Internet, its quality also affects the essence of discussions amongst NGOs and the press and, as a final result, also the attitude towards Acts and their observance.

2.4. Diversity of legal cultures and the need for standardisation of lawmaking practices

The OECD and EU institutions are developing new good lawmaking standards, which are less dependent on national legal culture and socio-economic differences. During the last decade the standardisation of law-making and RIA practices has been widely discussed at both the EU and national level to increase the effectiveness of international co-operation and harmonise good lawmaking requirements in EU institutions and Member States. It should also be noted that discussions on RIA are only beginning to rise from a governmental to a parliamentary level as far as parliamentary functions, such as representation, legislation and supervision over the executive power, are concerned. EU institutions are facing many challenges related to the pluralism of national legal cultures - the legal regulations can be quite similar in different European countries, but informal regulations and institutional networks differ in their traditions, organisational culture etc. According to R.Narits (2001), the integration into the EU is mainly achieved by legal means and the situation is made more difficult for Estonia as well as for many other CEE countries by the fact that legal and other reforms started in the last decade have not been brought to a conclusion yet. Moreover, as social life becomes more sophisticated, social processes will also increase in complexity. From the legal point of view this means a need for more complete legal legislation, but there is a level basic knowledge below which the ability to make a full range of reasoned civic judgements is impaired.

18 W.A.Galston ‘Political Knowledge, Political Engagement and Civic Education’ - Annual Rev. of Political Sciences 4: 2001: 217-34
In the EU, the pluralism of political controversies has sometimes created deadlocks in the policy-making. If so many actors have obtained *de facto* veto power then major social and economic policy conflicts between the EU countries can have negative effect on the policy process in the rapidly changing world. Accordingly, in the White Paper on European Governance (2001) we can find five political principles - openness, participation, accountability, effectiveness and coherence - but also: ‘Carrying these actions forward does not necessarily require new Treaties. It is first and foremost a question of political will’.23

It takes time, because only since the middle of the 90’s the search for a better quality regulation took a more systematic form and a series of initiatives on improving the quality of regulation were adopted at both national and European level. One of the most important and systematic documents in this field is the Mandelkern Group Report on Better Regulation (2001), including the definition of common method of evaluating the quality of regulation and detailed implementation procedures.24

To support the preconditions for subsidiarity, efficiency, accountability, transparency and undistorted communication in European governance, politicians as well as the NGO-s must be provided with adequate information in explanatory memoranda of draft Acts. In coming years the EU Member States should agree new institutional framework with common standards for good law-making & governance.25

Chapter 3. Study design and methods of normative content analysis of draft Acts’ explanatory memoranda.

3.1. Study design.

Most past studies assume that the availability and use of socio-legal information leads to changes in the outcome of policy-making and should improve the efficiency and legitimacy of any policy/law-making system due to the factual efficiency provided by adequate information. In Estonia the law-making process includes 6-12 screening stages and the explanatory memorandum of a draft Act is one of the few public documents, which must include normatively structured information about policy objectives, reasons of the Act, use of socio-economic analyses, consultations with interest groups etc. On the other hand, the logically structured socio-legal information in the explanatory memorandum of a draft Act is the ‘input’ for parliamentary and public debate.

In 1997, proceeding from the structure of RIA-related requirements for the draft-legislation in the Estonia,26 general recommendations of OECD and EU Member States (1995, 1997),27 and academic literature, the methodological guidelines for normative content analysis of explanatory memorandum of draft Acts were worked out.28 The guidelines include the normative basis (3.2), criteria for preliminary selection of draft Acts (3.3), description of six information categories for the content analysis (3.4) and multiple comments related to different draft Acts. In addition, some methods for qualitative case studies (e.g. interviews, focus groups) were suggested in 2000.

Based on earlier studies and insider observations, the main hypothesis was that the majority of draft Acts (e.g. explanatory memoranda) are not in accordance with the normative requirements for draft Acts that structure information on the use of social science information, consultations and the comparative analysis of both national and EU legislation. This hypothesis included the following meanings: a) the principles of legal state and good governance (legality, equality, transparency, accountability etc) are not followed in required level; b) Estonia may have a quite good and well-structured normative basis for draft legislation, but these good drafting principles are not yet fully internalised in organisational norms; c) access to the socio-legal information on impacts of draft Acts is not guaranteed to MPs and interest groups [role occupants] of draft Acts; d) lack of information on RIA decrease the effectiveness of parliamentary work and public debates and may create different administrative, budgetary, social and even legal or political problems in the implementation stage of adopted Acts.

The empirical study of explanatory memoranda of draft Acts has four practical objectives. First, to measure in what extent the initiators of draft Acts follow the normative requirements for draft legislation in six information categories, reflecting directly/indirectly the use of RIA models, interaction of researchers and policy-makers, publicness of information sources, consultations with NGOs, and EU integration. Second, to assess the availability of social information for the parliament and for the public.

26 Appendix A/12 - Estonia: Rules for Draft Legislation in the Legislative Proceedings of Riigikogu - in Legal and... www.riigikogu.ee/ecprl_ria01.htm - points 11, 43, 49, 50, 51 and 53 are related to given studies.
27 Ibid. - for comparison see also Appendices A/1 (OECD); A/10 (Denmark); A/15 (Netherlands); A/17 (UK); also J.Tala, J.Korhonen, K.Ervasti ‘Improving the Quality of Law-drafting in Finland’ - Columbian J. of European Law - Vol. 4, No. 3. 1998: 629-46; J.Korhonen ‘Finland’s System of Assessing Regulatory Impacts’ - in Public Management Forum Vol III, No 1, Sigma, 1997
Third, to create an empirical overview as a platform for different qualitative socio-legal analyses and in this way to promote the public debate on regulatory policy. Fourth, to inform the MP-s and Riigikogu standing committees about the results of the empirical study and to make proposals for the improvement of law-drafting practices and parliamentary surveillance.

Since 1998, in cooperation with students from different universities, five follow-up studies were carried out. The operational stages of studies have been as follows:

I. Preliminary selection of all draft Acts, proposed to the parliamentary proceedings, to find out the sample of draft Acts for the normative content analysis (see 3.3).

II. Normative content analysis of draft Acts’ explanatory memoranda. The fulfillment of normative requirements in six categories is measured by comparing, guidelines in hand, the formal norms with actual information offered in explanatory memoranda (see 3.4). 31

III. Case studies - in-depth analyses of some categories and/or some draft Acts or specific policies using relevant methods (questionnaires, interviews etc).

3.2. Normative basis of content analysis of draft Acts’ explanatory memorandum

A. Constitution of Estonian Republic, e.g. § 1 (the supreme power belongs to the citizens); § 44 (freedom of information), §-s 59-76 (tasks of the parliament).


D. Pre-accession agreement between European Communities and Estonia in 1995.

E. Memorandum of Cooperation Between 10 Estonian Political Parties and 10 Third Sector Umbrella Organisations (1999). 30

3.3. Criteria for the preliminary selection of draft Acts

Draft Acts and resolutions proposed to parliamentary proceedings have the status of a legal document. The main purpose of the first operational stage of analysis is to select out draft Acts with purely juridical nature, small socio-economic impacts to the society or very limited regulation area. The sample of draft Acts for the second stage was selected according to the six criteria which evidence assumes the existence of related analytical information in the explanatory memorandum. 31

The overall number of draft Acts, submitted to the proceedings of the Riigikogu during the five periods of study from 1998 to 2003, was 875. According to the above-mentioned criteria the number of draft Acts requiring the impact assessment was 651 (Table 1). 32

3.4. Six information categories for the normative content analysis.

The main method of the given empirical analysis is a comparison between the normatively required informativeness of explanatory memoranda of draft Acts and the actual informativeness in the six interrelated categories (F-K):

F. The impact of a draft Act on the state budget and/or local government budgets in a 1-3 years period (public expenditures, distribution of resources – in Riigikogu’s requirements to the draft Acts proposed to the parliamentary proceedings: § 11, § 50);

G. The impact of a draft Act on organisation of the work of state and local government institutions (e.g. changes in structure, functions and public services, in the number of employees, delegation of tasks, responsibility and accountability of agencies - § 49,1/4);

H. Impact on the socio-economic situation, everyday life and opportunities of target groups [role occupants] (e.g. which socio-economic groups are going to profit or lose? How this is expressed in legal, economic or social terms? - § 49, 1/1);

I. Informing and involvement of parties influenced/concerned by implementation and impact of a draft Act (one of the preconditions for participatory democracy - § 53);

J. References to research data, official statistics and special literature used; also authors that have discussed the problem to be regulated (sources of knowledge-based policy, transparency of argumentation and authorship - § 49, 2/1);

29 There is no commonly agreed definition of what the ‘use’ of socio-legal information in legislation means and when the extent of such information (e.g. statistics or clarity of statement) is satisfactorily documented. We decided that the positive evaluation (1-yes) of each category is reasoned, when some empirical data, quotations from information sources and/or clear political statement (i.e. ‘the implementation of draft Act has no impact on state budget’) are provided. The latest means that political responsibility is fixed for the future analysis and assessment if it is needed.


31 See Appendix A/12 - Estonia: Rules for Draft Legislation: www.riigikogu.ee/rva/ecprd/html/appendix_A

32 In this selection 268 (41%) of the draft Acts had been initiated by Riigikogu structures (committees, political factions, MPs) and 383 (59%) by the government. Among the adopted Acts the proportion between governmental and Riigikogu acts has been 64% : 36% last years – see also www.riigikogu.ee/rva/ecprd/html/part_II.html
Chapter 4. Results of normative content analysis of draft Acts’ explanatory memoranda.

In order to get a general overview of the preparation process of draft Acts and the extent of required socio-legal information in the explanatory memoranda, the focus of normative content analysis was on impact assessment (e.g. see categories F, G, H and J).

To sum up the normative analysis of 651 draft acts, we can see that the possible budgetary impacts (category \(F\)) are analysed in quite good level (see Table 1; Figure 1). The average result of ministries (71%) is comparable with OECD average.\(^{34}\)

Table 1. Results of the analysis of explanatory memoranda to draft Acts. Follow-up 1998-2003. Accordance with normative requirements: positive evaluation of draft Acts in categories F-K

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<td>Ministries (n=383)</td>
<td>272</td>
<td>198</td>
<td>180</td>
<td>86</td>
<td>99</td>
<td>284</td>
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<tr>
<td>Positive evaluation - %</td>
<td>71%</td>
<td>52%</td>
<td>47%</td>
<td>24%</td>
<td>26%</td>
<td>74%</td>
</tr>
<tr>
<td>Parliament (n=268)</td>
<td>91</td>
<td>48</td>
<td>113</td>
<td>16</td>
<td>27</td>
<td>34</td>
</tr>
<tr>
<td>Positive evaluation - %</td>
<td>34%</td>
<td>18%</td>
<td>42%</td>
<td>6%</td>
<td>10%</td>
<td>13%</td>
</tr>
<tr>
<td>Total (n=651)(^{35})</td>
<td>363</td>
<td>246</td>
<td>293</td>
<td>120</td>
<td>126</td>
<td>318</td>
</tr>
<tr>
<td>Positive evaluation - %</td>
<td>56%</td>
<td>38%</td>
<td>45%</td>
<td>18%</td>
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\(^{33}\) In some cases the classification (yes/no) was problematic. Such cases were discussed in research group on the basis of methodological guidelines and empirical evidence of category in the explanatory memorandum.


\(^{35}\) To sum up: 10 ministries from the Government and 10 committees, 6 factions and n MP-s from the Riigikogu.
In addition, the legal impacts related to EU integration (category K) are analysed quite well, because the accession to the EU has been Estonia’s foreign policy priority since 1993. The research also showed, as expected, that usually only legal regulations were described without mentioning policy objectives and/or socio-economic reasons for initiating these EU acts by Commission. On the other hand, the law-drafting requirements related to category I (informing and involvement of interest groups) and category J (references to studies etc information sources used) were usually not fulfilled (Table 1 and Figure 1). The given five studies of explanatory memoranda focused mainly on the formal existence of RIA related information.

**Chapter 5. Case studies**

In addition to the normative content analysis, K. Mikk made an in-depth analysis of category G focusing on problems of administrative capacity. 36 M.-L. Liiv made an in-depth analysis of category I selecting out three draft Acts for qualitative case studies to compare formal information about involving of interest groups in real consultation process (see example). 37 and K. Kasmets made an in-depth analysis in category J, focusing on the use of social information in law drafting. 38 Fourth related study was initiated as a reflection to results analysing the ministerial activities in category J. A special questionnaire with cover letter from MPs from coalition and opposition parties was sent to ministers to get an overview of budget funded surveys commissioned between 1999-2001, e.g. the area of studies, costs, authors and the relationship of studies to legislation. 39 Fifth socio-legal study focused on the utilisation of memoranda’s information in the analytical work of the Supreme Court of Estonia. 40 In addition, sixth related study was the 3rd opinion poll of Estonian MP-s and parliamentary officials in 2001. The questionnaire included the section ‘Law-Making and the Quality of Legislation’ dealing with research services, priorities of RIA and ‘political will’. 41

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**EXAMPLE. The Extent of the Participatory Democracy in the Legislative Process. The Case Analyses.**

The purpose of the study and the case analyses was to understand the characteristics and the extent of interest group participation in the legislative process. For that reason three separate legislative acts were chosen and in-depth oral or written interviews with the interested parties were carried out. Those case studies were preceded by the examination of 541 explanatory memoranda of draft Acts in different years (1998-2001). As the formal requirements of the explanatory memoranda of draft Acts are often not followed precisely enough by the civil servants, the study of these only might turn out to be superficial in order to draw reasonable conclusions on the level of participation, and that is why a more deep study is needed.

Two substantial definitions were used throughout the study.

Firstly, the definition of "interest group" or "stakeholder", which has the meaning of an interested party on whom the draft legislation has a rather straight impact.

The second definition is a “participatory democracy”. It bears the meaning of transparent legislative process, which means that the executive and legislative bodies must be open to discussion, and do everything from their part in order to inform and consult different interest groups, not only the selected ones. This doesn’t mean that they have to do the undone homework of stakeholders. What they can do is to make the different interest groups facing each other, and perform as a mediator, if needed, being still the co-ordinator and bearing the full responsibility of the quality of legislation.

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37 M.-L. Liiv ‘The Participatory Democracy in Estonia: Participation of Interest Groups in the Legislation’ - BA thesis. University of Tartu, Faculty of Social Sciences, Department of Sociology (in Estonian) 2002

38 K. Kasmets ‘The Use of Social Information in Estonian Legislation’ - BA Thesis, Tallinn Pedagogical University, Faculty of Social Sciences, Dep. of State Sciences (in Est) 2003


40 V. Saarmets ‘Use of material pertaining to legislative process in the judicial review process’ – in Riigikogu Toimetised 7, 2003: 104-112 (Summary in English: www.riigikogu.ee/rva/toime10ed/ito7/artiklid/summaries.htm )

41 OÜ Saar Poll (2001) Riigikogu liikmete ja ametnike küsitlus - Riigikogu Kantslei, MSI (in Estonian) - e.g. 57% of MPs answered ‘Yes’ – There is a need for a national regulatory policy program’.

42 The current example is based on the Bachelor Thesis of Mari-Liis Liiv, defended at the University of Tartu, at the Department of Sociology and Social Policy in 2002. The full text in Estonian with summary in English can be found in Riigikogu’ web site: http://www.riigikogu.ee/msi_arhiiv/korg_tood/LiivBA.html.
Participatory Democracy According to the Normative Content Analysis
The extent of consulting the stakeholders in the matters of the substance of the laws is an immediate indicator of participatory democracy in the society. This extent is expressed in the category “I” and partly in “J”, which respectively attempt to find out the degree of informing and consulting interested parties, and considering the opinions of experts and studies.

According to the explanatory memoranda of draft Acts (available on the Riigikogu’ Web-page www.riigikogu.ee) the interest groups were not consulted systematically. Very often there was hardly to find any information on harmonization of the draft with different stakeholders. Thus, although there might have been consultations with different interest groups (which actually was the case), this information was not made public. Of the 541 explanatory memoranda analysed only 69 could satisfy the requirements of the category “I”, which makes it less than 13%.

Often the representatives of the interest groups are participating in the preparatory meetings of the draft Acts. In those cases it is sometimes rather ambiguous whether they have been invited there as experts or as the representatives of a certain group. As a rule, one representative is chosen to the working group, and this is thought to satisfy the variety of stakeholders. The homogeneity of interest groups hardly exists in reality, therefore including one but missing the other, can be discriminative. Thus the consulting and publicity should be a rule, not a recommendation.

According to normative analysis only 17% of the explanatory memorandas cited some study or expert opinion. Often they were rather abstract referrals to the researches (e.g. “according to the studies” etc). The relationship of studies and opinions of interest groups raised as an issue in the course of the research. Informal note that each draft doesn’t need a research, and sometimes the consultations with interest groups suffice. Although the lack of one, and the existence of another one are understandable, the absence of both is not justifiable in any terms.

The following three draft Acts were chosen and analysed separately:
1). The Act of Changing the Youth Work Act;
2). The Act of Changing the Pollution Charges Act;

The main basis of the selection of the cases was the existence and easy detection of the interested parties, and the conflict of interest concerning the legislative act. Two of the drafts (the Act of Changing the Pollution Charges Act, the Act of Changing the Social Benefits for Disabled Persons Act) had been adopted in the time of the interviews, and one (the Act of Changing the Youth Work Act) was in the middle of parliamentary proceedings.

Three stakeholders were interviewed: the representative of the Culture Commission of the Riigikogu; the head of the Estonian Youth Association Co-Operation Project; and the representative of the Sun Club.

The initiative of changing the existing Act came from the youth organisations, and their aim was to widen the criteria for applying for the financial support from the state. The existing Act allowed aid only for these youth organisations, which had more than 500 members, but in practice only some youth associations had over 500 members. In other words, the youth organisations aimed at finding some additional resources from the state budget in order to retain the existing level of appropriations for the existing organisations and at the same time rendering support for smaller organisations.

According to the “I” and “J” category analysis the draft got negative results – there were no referrals to consultations with interest groups neither to studies or expert opinions. Yet, it was the so-called grass root level initiated act. The interviews ascertained the readiness of both parties to the open discussion. Note that not all of the interest groups were active despite of the appeals of the umbrella organisation. Besides the arguments of the youth organisation were supported by the study of the size and needs of the youth organisations. Not so positive about the case was that the interest group in question was rather big, and not all of the youth organisations belonged under the umbrella institution, thus the interests of the smaller ones were supposedly not represented.

Case 2. The Act of Changing the Pollution Charges Act.
Five different parties (six persons) were interviewed, among which were three different interest groups: the Estonian Nature Fund, the Estonian Employers’ Confederation, and the Federation of the Estonian Chemical Industries. The other two were from the parliament and the Ministry of Environment.

The draft was originated by the Ministry of Environment, and caused a lot of turmoil between the state and the private sector, because the rate of the pollution charges increased remarkably due to the Act.

From the analysis of the explanatory memorandum the draft Act got positive results in both categories. In practice most of the interest groups were not satisfied with the level of participation. The representative of the Federation of the Estonian Chemical Industries found that some very important opinions were dismissed. The representative of the ministry opposed the argument and stressed that the debate was sufficient and all possible opinions were taken into consideration.

There is a great variety of interest group organisations in Estonia, some of them are more active, some less. The same applies to the ministries – some of them are more open and co-operative, the others less.
It occurred that the openness of the ministry is dependent upon the governing minister – in the current case the interest groups were quite dissatisfied with the minister. Although there existed at least formal participation, the whole process took place still under the veil of secrecy and bustling according to the interest groups. Note that not considering some of the opinions in the final draft doesn’t mean the lack of participatory democracy. What matters is an open discussion.

The interest groups were rather active in the current case, not regarding the environmental organisations, whose passiveness admitted all the parties in question, including the Estonian Nature Fund itself. It seems that the functional interest groups (e.g. like the Federation of the Estonian Chemical Industries) are more active in Estonia than the interest groups fighting for the public interest (e.g. the Estonian Nature Fund).

**Case 3. The Act of Changing the Social Benefits for Disabled Persons Act**

Four parties (five persons) were interviewed of whom two belonged to the Ministry of Social Affairs, one to the Riigikogu, one to the Fund of Estonian Disabled Persons, and one to the Estonian Society of Family Doctors. The initial hind to the need to change the Act came from the Estonian Society of Family Doctors. The aim of the new Act was to clarify the rules of determining the level of disablement and the conditions to the entitlements of social subsidies.

The explanatory memorandum of draft Act got negative results on both, “I” and “J” categories. Thirteen experts participated in the working group, and most of them were the officials of the Ministry. The Fund of Estonian Disabled Persons was represented in the commission as well – this organisation is situated in the same building with the Ministry of Social Affairs.

There were two main interest groups concerned – the disabled and the doctors. The former was satisfied with the level of participation, the latter was not. The officials found that they had hard times finding their way to disabled persons, because disabled lacked professional cadre in Estonia who could join in constructive discussions. It seems that in reality there didn’t exist a discussion. The family doctors were not considered and the organisations of disabled persons were passive. This opinion was shared by the head of the Fund of Estonian Disabled Persons, who claimed that one of the weaknesses of the Estonian civil society was the passiveness of organisations and people. What seems to be characteristic to the Estonian interest group and state relation is a kind of preference policy - some interest groups seem to be more legitimate than others. It means that they are consulted in the first order (e.g. the Fund of Estonian Disabled Persons).

**Chapter 6. Conclusions and discussion**

The main objective of the given five studies was to gain an empirical overview in what extent the institutional initiators of draft Acts follow the normative requirements for draft legislation in six information categories, which are reflecting directly or indirectly the use of socio-legal and -economic research, transparency of information sources, involvement of interest groups and legal preparations for EU integration.

Looking from the normative perspective, the law-drafters and initiators of draft Acts, both politicians and civil servants, are responsible and accountable before the parliament and the public. Contrariwise, the results of studies show us that most of the explanatory memoranda of draft Acts have not been in accordance with the observed requirements for legislative drafting adopted by the Board of the Riigikogu and the Government.

Assessing the results in the framework of four main discourses (2.1-2.4) and the hypothesis (3.1), the main conclusion should be that Estonian legislators may have quite a good and well-structured normative basis for draft legislation, but due to different reasons these good law-drafting principles have not yet been internalised in the political culture and organisational norms. Most of the draft Acts proposed to the parliamentary proceedings in 1998-2003, which had remarkable budgetary, socio-economic and administrative impacts, have not been equipped with relevant public information. It means, the access to the information on impacts of draft Acts (as a part of problem definition and solution) is not guaranteed on equal basis to the MPs and target groups of draft Acts (e.g. leaders of local communities who are dealing with provision of public services and information). In sum, we can see the lack of moral, political and administrative preconditions important for the implementation of good law-making principles and knowledge-based political debate.

Among the six information categories two, one related to the analysis of budgetary impact (F) and another to legal accordance with EU laws (K), have been described at a more satisfactory level. One the other hand, information related to the socio-economic impact on the role occupants (H), administrative changes (G), references to information sources (J) and consultations with interest groups (I), have been unsatisfactorily described.\(^{43}\) Additional case studies and observations show that ministerial law-drafters

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43 If the studies are not used sufficiently in the making of new Acts, it means also that the public information on studies conducted with limited state budgetary funds, seldom reaches the general public.
and MPs generally use more research information and consult more with interest groups than is documented by them in the explanatory memoranda of draft Acts. This finding leads us to argue that many initiators of draft Acts are usually not interested in explaining policy problems and solutions in an analytical and transparent way or they have ‘nt relevant socio-legal studies. The selective fulfillment of law-drafting requirements reflects the informal understanding about ‘rules of the game’ in the context of ongoing reforms.

The moral, political, legal, economic and administrative aspects of information acquisition, dissemination and use are closely related in parliamentary functions in law-making. We can analyse and interpret the results of given studies from normative, organisational interest, communications and other perspectives (see 2.2.). In this paper we focus first of all on the moral and normative aspects of socio-legal information use (see 2.1.–2.2) in the institutional framework, because the gap between the legal ‘rules of the game’ and actual behaviour of law-drafters seems to us the most important problem to start discourses on good law-making and governance.

In general, since 1992 the institutional framework and supportive system of juridical analysis of draft Acts have quite well been established in Estonia, but having analysed the required informativeness of explanatory memoranda of draft Acts in budgetary, economic, social, administrative or civic terms on five periods since 1998, only a slight improvement can be observed, especially in some ministries.

As noted earlier (2.2), if legislators perceive the policy-making process as a political activity, then they are more likely to communicate with researchers and use social science information available. One of the problems is that legislators lack legislation-related and well-structured information (e.g. RIA) for parliamentary and public debate. If so, then the legislators may run the ‘wrong problem’ wasting both time and public money. The lack of impact analysis, accountability and transparency in the pre-parliamentary stage of legislation has, in its turn, created favorable conditions for distorted public communication and initiation of draft Acts which may create different problems and risks. We can also presuppose what kind of budgetary, economic, administrative etc. problems it creates for public managers during the implementation stage of the Acts. In addition, for civil servants and especially for MP-s it is not easy to explain the purpose of such draft Acts, to interested groups and media, especially when the question of possible impact of the draft on certain social groups, or on programs and public services covered by state and local government budget will be raised.

To sum up the moral statement - while constitutional institutions, the parliament and governmental agencies do not observe legislation regulating law-drafting and thereby violate the principle of the rule of law, there is no reason to wonder that the awareness of citizens with respect to law issues is comparatively poor, that the general public does not consider legal protection legitimate enough, that many social groups do not believe in the words of politicians nor in their own possibilities to affect political decision-making on national, regional or local level.

In the context of negotiatory state and civil society discourse (see 2.3) the result in category I was very surprising, because in addition to the normative requirements for draft legislation, based on the Riigikogu Rules of Procedure Act, all political parties signed the Memorandum of Cooperation Between Estonian Political Parties and Third Sector Umbrella Organisations (1999), whereby they promised to inform and to involve the related NGOs and citizen groups into the process of law-making. On the other hand it means that NGO networks have been quite passive in the law-drafting and are not observing the implementation of the Memorandum signed with politicians in 1999. Scholars argue, that the reasons of low level of political participation are related first of all to the ‘organisational interest’ of policy-makers (e.g. asymmetric information from RIA), and on the other hand, to the mistrust and ignorance, what in combination with lack of civic knowledge and skills increase the degree of alienation among the citizens. Ignorance is the father of fear, and knowledge is the mother of trust.

The fourth discourse of this paper focused on international challenges in the field of co-legislation, standardisation of regulatory policy and impact assessment requirements (see 2.4). On the level of EU institutions and Member States we can see the growth of political will and commitments to find common standards of evaluation of law-making and governance practices. Political agreements, acts and reports on the quality of legislation show that impact assessment is becoming one of the tools for improving the

46 In 1990’s the constitutional institutions responsible for the ex post impact assessment of (draft) Acts (e.g. President, Legal Councillor, State Audit Office, Supreme Court) analysed the legal/juridical accordance of legislation, not the political, socio-economic, financial or administrative objectives and issues of the Acts adopted by the Riigikogu.
47 The Report to the Constitutional Committee of the Riigikogu (21.II.2001) by A.Kasemets, has been based on the 1st and 2nd study (see Figure 1) and OECD reports on regulatory reform (1995, 1997).
50 In addition, based on this Memorandum, the Estonian Parliament passed with political consensus ‘The Estonian Civil Society Development Concept’ in 12.XII.2002: www.emv.ee/alusedokumendid/concept.html
51 To move forward, there are many initiatives, e.g. The Riigikogu Chancellery has organised regular seminars in co-operation with NGOs, Estonian Law Centre started the Legislative Drafting Project Themis in 2002 with the goal to develop the co-operation of legislative drafting between Estonia's public sector (ministries, parliament) and third sector actors: www.etc.ee/english/ etc.
quality of legislation and legitimacy of legal institutions on both national and international level. In given five studies the results of category K first of all express the capacity of ministries to assess legal accordance between national and EU regulations. The problem is that usually the legal aspects were described without mentioning policy objectives (e.g. public benefits for the citizens of EU) or economic and social reasons for initiating these EU acts.

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From past studies we know that there are several reasons and justifications for this situation, which are related to the following key words: dynamic institution-building and many parallel reforms (by now ca 15), deficit of resources (staff, time, budget), ad hoc law-drafting, complexity of legislation in the era of globalisation, political and social controversies, ‘selective’ legal behaviour of decision-makers, lack of qualification and political commitment, lack of administrative capacity, lack of guidelines and special training, lack of legislation-related monitorings (ex post RIA) etc.

Considering the experience of OECD and EU Member States, there are eight interrelated preconditions to create a systematic and sustainable quality framework for good law-making and governance (e.g. RIA):

1. Political commitment in regulatory policy agenda
2. Legal/normative basis for legislation and RIA
3. Good coordination and clear division of work between ministries
4. Methodological guidelines (e.g. criteria for using of RIA methods)
5. Data collecting strategies for ex ante and ex post RIA (e.g. socio-legal monitorings)
6. Systematic consultations with interest groups and NGO-s
7. Regular training of civil servants and other interested parties (e.g round tables)
8. Basic surveillance mechanisms and control of RIA requirements.

The problems are always opportunities for improvement. At present we can agree that the first and the second precondition are fulfilled in Estonia, but most of the work for development of other institutional preconditions lies ahead. During the last three years many debates with MPs and ministerial and parliamentary civil servants showed that Estonian public administration is ready for a ‘qualitative jump’ towards good law-making and governance. Since 2001 we have been able to observe some changes in political attitudes and agreements in Estonia, e.g. 3rd Opinion Poll of Estonian MPs and Parliamentary Officials (2001), Developmental Concept of Civil Society (2002), The Coalition Agreement (2003), and last but not least, Constitutional Committee and Legal Committee of the Riigikogu decided to prepare the parliamentary hearings on quality of legislation and RIA in 2004.

To be useful, RIA should be institutionally linked to policy planning and law-drafting on national and EU level. The authors argue that Estonia needs a minimalist regulatory policy program on the quality of legislation and RIA to support the development of knowledge-based (=responsible/moral) law-making in European legal and administrative space.

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49 For example The Estonian Education Act has been changed 13 times in 1993-2003. The problems of ad hoc policy initiatives and law-drafting have been emphasised also in EU countries (Korhonen 1997; Kasemets 2001a)
50 The problem of ‘selective legal behaviour /awareness’ became a topic of discussions in the CEE countries after comparison of civil servant’s legal values in Western and Eastern side of Germany in beginning of 90′ties