

Legislation in European Countries

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Introduction: Law, Legislation and Legisprudence

Laws are the main instruments of governance in a democratic state based on the rule of law. The Constitutional State pursues security, stability and social objectives. Legislation as a tool for regulation brings together policy concepts, regulatory choices, legislative interventions and evaluations (BE, UK). Laws are general abstract norms as opposed to decisions in particular cases.

Legisprudence is a field within legal studies, dedicated to researching and teaching about the theory and practice of legislation. Legisprudence, firstly, is a theoretical science. It is descriptive and applies the methodology of humanities. It serves the drafting and interpreting of legal texts. It also uses empirical methods of social and political sciences, the better to understand processes of legislation. Secondly, legisprudence is a practical science. It is prescriptive and normative. It wants to direct actions and support good legislation. The volume of legislation and its ongoing growth as well as the decreasing quality of laws give permanent rise to criticism and debate in most OECD- and EU-countries (FI, SL). Reducing the quantity and improving the quality of legislation are targets within programmes for “Better Legislation”, “Good Government” both in the European Union and national jurisdictions. This is where legisprudence can be of some help. Analysing effective procedures in government and parliaments, assisting in properly developing contents and the form of drafts, as well as standards for evaluation and controlling: these are the fields of work of practical legisprudence.

As generally in constitutional democracies, laws are the dominant instruments of policy-making and governance in the European States. Consequently, the functions of law as well as the legislative process are of central importance in every jurisdiction. However, both function and management are undergoing significant changes. These are primarily caused by the development of a multi-layer system with an increasing importance of the European level. Comparative legisprudence and converging procedures and styles of legislation can be observed. SE and RO law are influenced by DE legislation (SE, RO) and SK adjusts its drafting contents and procedures to EU-law for enhancing integration . There can be no

doubt that there is a revival of legisprudence, induced by a comparative view of legislation in legal education and research. One result of even global comparison of “Better Law-Making” is a cross-national fertilization.¹

This chapter intends to shed light on the following topics of contemporary legislation and legisprudence in European countries:

Section 1. *Law-making in the Constitutional State;*

Section 2. *Analysis of law: what is the law in the hierarchy of regulations?*

Section 3. *Procedural legisprudence: who legislates and how? Actors, organizations, procedure;*

Section 4. *Substantial legisprudence: policy, objectives and instruments of legislation, evaluation;*

Section 5. *Formal legisprudence: Language, structure, techniques of law-drafting;*

Section 6. *Teaching legislation: how to teach and learn professional legislation.*

This chapter concludes by noting some trends and perspectives of legislation and legisprudence.

As a theoretical and practical approach to legislation and legisprudence, this book tries to contribute to “better legislation”. All country reporters – in very broad terms – deal with the following points:

- the constitution of the country as the institutional frame as well as guiding principle of all legislative action;
- the law is one instrument – although the most prominent – of governance and regulation;
- the process of legislation must be transparent and participative;
- the ultimate target of law-making should be the good, just, and fair norm;
- instruments of the law must be effective and proportionate;
- the form of law must be well structured, clear, and understandable;
- legisprudence should be a practical science, directed not only at scholars and students, but drafters as well.

¹ I Bar-Siman-Tov, ‘The Global Revival of Legisprudence: a comparative View on Legislation in Legal Education and Research’ in AD Oliver-Lalana (ed), *Conceptions and Misconceptions of Legislation* (Switzerland AG ,Springer ,2019)275,288

1. Law-making in the Constitutional State

1.1. Procedural and substantial principles of the Constitution

The system and standards of law-making are essential elements of the Constitutional State, which is imprinted by democracy and rule of law. The Constitutional State is attached “to the principle of liberty, democracy, respect of human rights, fundamental freedoms, and the rule of law” (Preamble of the Treaty on European Union, TEU).

The Constitution of a state is the *frame of government* (Art. 13 TEU), which is exercised by the people and *institutions* representing the branches of government. One of the cornerstones of the division of powers is access to an independent judiciary. Governmental may be conferred upon territorial tiers of the state. The constitution also contains directives as guiding principles for state actions, aims and objectives, e.g. public welfare, social rights, ecological goals, and others (Art. 13 TEU). All European States are rule-of-law-pluralistic and liberal democracies. Understanding legislation and legislative processes is, however, dependent on the political system and political culture of that given country.² Next to principal similarities of the constitutional and political frame there are important differences which affect the functioning of the law, organisations, and the process of **legislation**.

The constitution regulates the main structures of governance of the state, including the form of government, the separation of powers and institutions thereof with their respective competences, and – finally, if there are – layers of governance, territorial subunits, and municipal governance.

All European States have on the central level an executive which is split into government and Head of State (either monarch or president). Almost everywhere the *parliamentary democratic type of government* prevails. Some states have a (constitutional) court system, where judges have the competence to review the constitutionality of law, be it *ex ante* or *ex post* – or only the latter. The United Kingdom is a parliamentary (rather than constitutional) monarchy. Perhaps as a result of the parliamentary sovereignty there has never been a fully codified constitution. However, it would be inaccurate to say that there is no constitution at

Commented [aa1]: You could possibly be more explicit. Even though each of the countries in this book has its own political structure, they all at least aspire to democracy, the rule of law, the separation of powers and the independence of the judiciary.

² W Ismayr, 'Gesetzgebung in den Staaten der Europäischen Union im Vergleich', in W Ismayr (ed) *Gesetzgebung in Westeuropa, EU-Staaten und Europäische Union* (Wiesbaden, VS Verlag für Sozialwissenschaften, 2008) 9, 9

all (*Magna Charta* 1275 et al) – the UK has a written constitution, spread across many documents, but does not have a codified constitution. The CH Constitution underlines democratic and territorial principles: the confederation is formed by the “people and the cantons”. In AT the basic principles of the constitution (democracy, republic, federal structure, rule of law (“Rechtsstaat”) and ordinary constitutional law are divided. The “Nordic Legal Tradition” (SE) stresses democracy and maximizes the delegation of government to the individuals. This particularity and the pragmatic approach of policy has a significant impact on legislation.

There have been – mostly on a sub constitutional level – many changes in view of legislation, evaluation of laws, instruments of enhancing better legislation. In France, as a good example and more recently, procedural and substantial jurisprudence have rapidly developed in practice, for some of its principles and tools were enshrined in the constitution or in secondary constitutional legislation. As in many other legal systems, in France, substantial legislation has focused mainly on evaluation techniques for the preparatory phase of a bill, not ignoring, though, *ex post* legislation steps. BE describes its governmental system as a parliamentary republic with elements of semi-presidentialism, a unitary form of territorial distribution of power and for rule of law, democratic welfare state, political pluralism and sovereignty as main constitutional principles. DK is a constitutional monarchy. PL is a semi-presidential system. The president is elected by the people but does not have legislative or executive powers. PL also has a single chamber for the making of legislation.

Most national constitutions in Europe as well as the Treaties of the EU include guiding *principles, values, and directives*. Values can be defined as broad preferences, concerning appropriate courses of actions or outcomes. A principle is a standard to be observed, not because it will advance or secure a political, economic or social situation deemed desirable, but because it is a requirement of justice or fairness, or some other dimension of morality.³ Guiding principles impose on all organs of government, namely legislature, an affirmative duty to see that they are realized in practice.⁴ Principles may be explicitly mentioned or read into the constitution (social state/Germany, political pluralism/Spain) “by interpretation”. Art 2 TEU reads as follows: “The Union is founded on the values of

³ K-P Sommermann, *Staatsziele und Staatszielbestimmungen*, (Tübingen, Mohr-Siebeck, 1997) 360.

⁴ D P Kommers and R S Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3rd edn (Durham and London, Duke University Press, 2012) 57.

respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights ... These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.” As an example of interpretation: The German Constitutional Court⁵ confirmed the general right to personality in some human rights of the constitution, which is not a shorthand expression of the other guaranteed rights.

Statute Law in FR was once considered to be the ultimate expression of *rationality*. Since at least the 18th century the quality of legislation has predominantly produced law that is uniform, rational, general, and stable (FR “legicentrisme”). In the 1980s new requirements of good and efficient legislation came up. This observation is true for almost all European states and not only these. A well-accepted view was that the increasing number of laws was leading to a rapid deterioration in their quality (FR): too technical, sometimes too general, non-binding. The opinion was spreading that laws are generally poorly drafted, to the detriment of economy and society (HU: “junk law”).

In the 1980s and 1990s, policy required “Better Regulation”, which is less quantity and more quality. Legisprudence assisted in re-discovering the notion that rationality should be the first legitimation of law-making. Of course rationality should be as an essential element of the common weal, democracy, and rule of law (BE, FR, HU)?⁶ Law-making should follow the route of

- legal rationality: accordance and consistency with constitution and legal system;
- procedural rationality: discursive and participatory rationality, as well as judicial review;
- substantial rationality: effectively reaching the targets with most practical instruments;
- formal rationality: applying best style and language of the law.

1.2. Fundamental Rights

All jurisdictions, presented in this book, are liberal democracies based on rule of law. The fundamental mandate of the EU, as expressed in European legislation, is to create an area

⁵ Federal Constitutional Court, 35 BVerfGE 202, 221 (1973) (Lebach).

⁶ K Messerschmidt and D Oliver-Lalana, On the “Legisprudential Turn” in Constitutional Review: An Introduction in K Messerschmidt and D Oliver-Lalana (eds), *Rational Lawmaking under Review* (Switzerland, Springer AG, 2016) 6 ff. U Karpen ‘Efficacy, Effectiveness, Efficiency: From Judicial to Managerial Rationality’ in K Messerschmidt, this n, 295, 300

of freedom, security, and justice. The Preamble of TEU para 2, reads: “Drawing inspiration from ... the inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.” *Human dignity* must be respected and protected (Art 1 Charter of Fundamental Rights (CFR)). All fundamental rights sections of European countries explicitly protect the *freedom and liberty* of persons (CH). SE mentions “maximization of delegation of sovereignty to the individual” as a guiding principle of its jurisdiction. “Everyone is equal before the law” (Art 20 FR). “In all activities the Union shall observe the principle of *equality* of its citizens” (Art 9 TEU). People can only be equal before a general law (subch. 2). The law is a necessary guarantee of freedom, equality and democracy. Law-making is a core of rule of law. (Constitutional) Courts are the watchdogs of freedom and equality. Democracy is based on free and equal voting. “Every citizen shall have the right to participate in the democratic life of the Union” (Art 10 TEU).

As an effect of individual’s dignity- and freedom-rights, as well as solidarity and social state’s directives, everyone is entitled “to social security benefits”, including the right ... to social ... assistance so as to ensure a decent existence ...” (Art 34 TEU). This provision and national constitutional regulations are the basis for social security policies, which make up for large parts of legislation in European countries.

1.3. Democracy

The representative democracy is in the European tradition (Preamble, para 7, Art 10 TEU). Voting systems make the difference in states. The UK has a relative-majority voting system, all the other jurisdictions have proportional voting. In most countries the representative democratic principle is supplemented by direct democratic decision-making procedures. These are mainly referenda in case of amendments of the constitution or in cases of statutory legislation (IE, DK, EE). Referendum-procedures are anchored in the constitution (as in IE and most countries) or lack this basis (UK, BE). Plebiscitary procedures have a legitimising function, as they make a political decision visible to the people and put it in the hands of the voters. Referenda decide in a conflicted matters (AT, ES). They are important tools to tame party-democracy. Referenda in European countries are of very diverse kinds. Switzerland has far-reaching participatory rights of the people.

Some observers call it a “half-direct democracy”.⁷ Referenda may be consultative, suspensive, assertive, or amending. The main types are referenda on the basis of peoples initiatives (FR, IT, SI, LT, HU, RO), facultative (EE), on proposition of parliament (EE) or head of state, or obligatory (DK, IE). As far as statutory laws are concerned, the people are called upon to decide on important problems, like electoral reform, same-sex marriage, abortion, climate change, etc. (IE).

1.4. Rule of Law

Next to human rights and democracy, rule of law is the third pillar of the Constitutional State in Europe. Rule of law is based on the idea of the just state and provides means to safeguard against the arbitrary use of governmental power (BE). The terms “état de droit”, “stato di diritto”, “Rechtsstaat”, “estado de derecho”, “estado don direito”, and “rule of law” have slightly differing connotations. The main principles, however, have been accepted in all European countries. These are legality of all state’s activities, separation of powers, security under the law and trust in law, freedom and fundamental rights, the equality-principle, proportionality of government actions, due process⁸ and more. These principles are explicitly listed in European law and state constitutions or traditionally interpreted (CZ) from the general *Rechtsstaats*-/rule of law clauses (Preamble TEU, paras 2 and 4, Arts 5, 7, Art 2 ECHR, Arts 47-50 CHR).

For legislation procedures the most important notion of rule of law/*Rechtsstaat* is the *division of powers*. Legislative, executive, and judicial functions are divided and assigned to separate organs or groups thereof (for instance, two houses of parliament). Division of powers enables mutual control and avoids misuse of powers (Arts 14, 17, 19 TEU). Parliament, executive and courts represent the branches of government. Parliament, executive, and courts are bound by the constitution. The law takes precedent over acts of executive and judiciary (priority of the law, *priorité de la loi, privista delle legge*).⁹ Under the principle of parliamentary reservation all actions of the state are based on – or limited by – parliamentary law (LT, CH, FR, CZ) (*réserve de loi, riserva di legge*). This is essential in particular for regulations which set limitations on fundamental rights and freedoms.

⁷ A Weber, *Europäische Verfassungsvergleichung* (München, Beck, 2010) 123

⁸ L H Tribe, *American Constitutional Law* Vol 1, 3rd ed. (New York, Foundation Press, 2000) 4

⁹ Art 20 para 3 of the Basic Law of Germany (the Constitution): “The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.”

Furthermore, under the rule of law and separation of powers-principle everybody has access to an independent judge.

In the parliamentary system of government, the legislative power is divided between parliament and government. Parliament has dominance in making laws and is supported by parliamentary majority, as a result of elections. Parliament may be of uni-cameral or bi-cameral systems. In the first type the nation is represented in one chamber. NO has a unitary chamber with functional bi-cameralism (*Odelsting* and *Lagting* in the *Storting*). In the bicameral system the second chamber (Senate, as in CZ, IT, RO, DE) may represent the territorial subunits (AT, DK, EE) or corporate representations of interests (IE, SI, PL, CZ). The House of Lords (UK) is the largest second chamber in Europe. The second chamber may be equal (symmetric, CH, BE, IT) or less important (asymmetric, FR, AT, ES, NL, UK) than the first chamber. The Constitution may demand consent of the second chamber or just give it competence to veto first chamber's decisions (both, depending on type of legislation, DE).

In Europe, the parliamentarian system of government prevails. In contrast to presidential systems (like FR), government is dependent on the confidence of parliament; not only in capability to take actions but also in its existence. It requires permanent cooperation with majority in parliament, not only in governmental primary area legislation, but in other areas of decision-making as well. The executive power is the Head of State, and the Government as Prime Minister, Ministers, and Cabinet. Cooperation of parliament and government may be of the type of majoritarian competitive democracy (of the Westminster System) or coalition – or even minority – democracy, as in most European states. Most initiatives for legislation in all European states originate in government.

One may consider (*Constitutional or Supreme*) Courts not only part of the judicial system, but also part of the legislative system.¹⁰ Many European countries established Constitutional Courts in their constitutional order (BG, DE, SI, EE). Typically, they decide in procedures of interpretation of the constitution, constitutionality of statutory law (*ex ante* or *ex post* or both), the constitutionality of international treaties, and other constitutional issues. Applications may be filed by head of state, government or a certain number of deputies. Constitutional Courts are guardians of the constitution, bound only by

¹⁰ D. Grimm, 'Legislation and Constitutional Courts in U. Karpen (ed) *Legislation in European Countries* (Baden-Baden, Nomos, 1996) 473

its provisions. Constitutional Courts in judicial review procedure can annul laws (DE), which is a sort of “negative legislation”. But judicial review may be “positive legislation” in the sense, that it has become more common for some (Constitutional or Supreme) Courts to explicitly establish new general rules (SE, DE). Some courts are, pointedly formulated, activist as “norm givers” Of course questions are raised, whether in view of parliament judicial review and finding of new law by constitutional interpretation is consistent with the demand for democratic legitimacy in legislation (SE, DE, CZ). In cases of *ex ante*-review of laws the court can be an “independent semi-political actor” in the law-making process (PL). In DK Courts have the competence to review the constitutionality of laws only *ex post*. In FR it is the *Conseil Constitutionnel*, which reviews laws and led to a constitutionalization of law (“fundamentalization of law”). Also in the UK judicial review of national and European law has gained space. The “supervisory jurisdiction” before the High Court has its basis in common law, although no UK court has the power to declare primary legislation void.

Of course, jurisdiction of ECJ and ECHR constitutes a source of constitutional case law.

1.5. Legislation in multi-layered systems

Multi-layered constitutional systems of states are characterized by territorial allocation of legal, executive, and judicial competences of government. The exercise of authority on central level, on regional/federal and local level enhances cultural freedom and autonomy, as well as democratic participation and vertical separation of powers. Particularities of economic and social development and political legitimacy bottom-top are promoted under the principle of subsidiarity. The Constitutions of AT, DE, CH, BE, ES, IT and – after devolution – the UK contain multi-layered systems. In Europe, tendencies of Unitary systems in ethnically and socio-culturally comparatively homogenous states face administrations imprinted by decentralization, regionalization and federalism. This is true in particular in states with ethnic-cultural and/or socio-economic divisions.

Legislation is distributed between the central state and the regional subunits. There are various models of assigning competences:

- exclusive legislative competences either of the centre and the territorial units;
- concurrent or additional competences, with priority of the centre;

- and framework competences of the centre with residual competences of the lower level, with presumptions for the centre or lower layer.

Under a national constitution, of course, procedures and guidelines of subnational legislation are more or less homogenous. In what follows, this book focuses, for that reason, on central legislation. The lower units usually participate in central legislation, be it in uni-cameral or bi-cameral systems. Multi-layered systems of legislation are in permanent dynamic development. Tension forces pull the regionalized and federal state into unitary state (as in AT, DE) or the unitary state into forms of decentralization or autonomy (like in ES – Catalonia, or in the UK – Scotland, Wales, and Northern Ireland).

In unitary states, executive powers are usually deconcentrated to territorial corporations (NO, SW, IE, HU, GR). Competences are delegated from the centre and authorities are subject to systematic hierarchical monitoring as legal and opportunity control. *Decentralized* unitary systems provide autonomous regulation-authority to the subunits (PL-*województwo*, NL-provinces, DK, FN, PT). In FR territorial corporative entities (*département*, governed by a *préfet*) in a process of decentralization in the 1980s have gained some new powers. The national parliament, however, is the only lawmaker. The NL are a decentralized unitary state as well, with the provinces and municipalities enjoying legislative power. Central government has the authority, however, to declare null and void any act by a lower authority. *Regions* are governmental units in-between decentralized and federal layers in a state, like in IT, ES, CZ, PT, UK. In Italy the powers of the state are listed in the constitution, as exclusive or concurrent; the rest goes to the regions, with a presumption for their powers. In ES and IT the Senate as the representation of territorial subunits is the second chamber. The UK is not a single jurisdiction. The processes and styles of legislation differ substantially in the devolved jurisdiction of Wales, Scotland, and Northern Ireland. It is an asymmetric decentralization. There is a parliament in Scotland, an Assembly in Northern Ireland, and a National Assembly in Wales, all with restricted legislative authorities.

CH is a *confederation*, AT, BE, DE are *federations*. In CH the cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the confederation. CH regards subsidiarity as a key principle. In a hierarchical manner the people precede the cantons and these are preceding the central government. CH is a model of concordance-democracy. The Second Chamber of the

confederal parliament is the State Council (*Ständerat*), next to the National Council. As significantly varying from CH as “decentralized”, the AT federation is very much “unitary”. The states (*Länder*) are oriented towards the central government. The major areas of legislation are assigned to the competence of the Federation, the procedure of legislation does not significantly differ from that of the Federation. Courts are exclusively Federal ones. BE is a Federal State, consisting of Flanders, Wallonia, and Brussels. Complex areas of legislation are dealt with on both levels.

DE is a Federal State, with explicit fields of legislation resting with central layers of government, all the others remaining for the states (*Länder*). The federal legislature has exclusive and concurrent competences. The presumption of legislative areas is for the states. The strong-point of legislation rests with the federal level; administration is to a larger extent a matter of the states. In difference to the CH the country is not a “concurrent”, but rather a “competitive” federation. The Constitution, however, in the concurrent area of legislation provides that the establishment of equivalent living conditions throughout the federal territory as well as the legal or economic unity must be guaranteed. That is an important restraint of competition among the states and pulls towards harmonization. The “Second House” of the legislature is the Federal Council (*Bundesrat*), which consists of members of state governments. In some areas it must consent with the House of Representatives (*Bundestag*), in most fields it may just enter an objection, which can be overridden by the Federal Council. In all Federations, as described, the states – in following the unification trend – conclude agreements on substantive matters (like education legislation) or organization and procedures of administration. This creates an intermediate level of government, located somewhere between (con-)federal and state (cantonal) level. In fact, in federal states there is an even more multi-layered legal system: the five-fold division of competences is European law, federal law, interstate law, state law, communal law.

European legislation is legitimized by the member states. The Union is a multi-layered system, inspired by federal ideas. It is neither a confederation nor a federation, but rather a “states’ composite.” It is one form of “open statehood” which is a canal that allows sovereign states to let supranational or international law flow into national legal orders. The constitutions of member states of the EU authorize governments and parliaments to

integrate into the Union and therefore transfer parts of sovereignty to Brussels (IT, FR, DE, SI; the position of EU law within the hierarchy of laws is discussed under 2.2.).

In the following this book restricts itself mainly to national procedural and substantive legislation, although a very high percentage of legal acts in the member states originate from EU sources.

2. The Law

2.1. Laws and other types of regulation

Laws as subject of legisprudence are general, abstract norms, as opposed to individual decisions in a particular case. Norms, as a rule, apply to many cases. They are abstract and thus apply to many addressees: they are general. The general law guarantees freedom and sets boundaries of it. The law must be abstract in content to assure that addressees/people can be equal. The general and abstract norm makes the legal system consistent. The law is the primary and central instrument of government in a liberal and democratic rule-of-law state. The law regulates organisation and procedure of governmental institutions, protects individuals' rights and serves as the single and most important instrument to distribute and allot social services. Usually, the budget of the state is decided by parliamentary law. In general, the hierarchy of laws in European jurisdictions is the following:

- Constitutional laws
- *lois organiques*
- parliamentary statutory laws
- delegated laws and ordinances
- other sources of law.

PL includes into its constitution a precise and exhaustive list of laws.

This chapter will mainly focus on statutes of central government; only when directly relevant, will decentralized legislation come into the picture.

In HU, the constitution is not considered as “law”, but instead as the “foundation” of the legal system that shall be binding on everyone. There are “Cardinal Acts”, which require two-third majority of parliament, although they are not higher in hierarchy than a statute, but have a content of great importance. The UK chapter is limited to Westminster and UK

Public Acts, although reference is made to devolved and local acts and delegated legislation for the purpose of detailing the sources of law. Private, local and personal acts which apply to specific people and places may also be adopted by Westminster Parliament. The same is true for church measures. FR has a highly codified system of laws. The perception is living: “the law is the ultimate expression of the “general will” (French: “légicentrisme”). The second level in the hierarchy of laws, below the constitution, are “lois organiques”. In French legislation since the new constitution of 1958 three facets of legislation can clearly be observed. First of all the constitutionalization of law, by the activity of the “Conseil Constitutionnel”. This development gains room in other jurisdictions as well, like in DE. Second, the globalization of laws under the influence of International and European law. This trend towards the greater units and the globe is also not a French particularity. And the latter is true for a third observation of French jurisprudence: the expansion of sub-statutory and soft law. NL has a clear hierarchy of laws as well. There are the constitution and acts of parliament as primary level, royal decrees as second level, and ministerial decrees as third level. Parliamentary law is “wet in formele zin”. SK differentiates between the constitution and constitutional law, laws adopted by parliament and generally binding regulations of municipal and higher territorial units (self-government). All these three categories are counted as primary legislation. Semi-primary laws are governmental regulations for approximation of law of the country with EU law. Secondary legislation covers subordinate legislation, government regulations, and norm contracts.

2.2. Constitutional law

The Constitution is the fundamental law of the country, regulating the organisation and procedure of branches of government, territorial structure, human rights and freedoms, and principles of “preferred ways of life”. European countries mostly have written constitutions, except the UK (with a few exceptions), (partly) the NL, and MT. All authorities are bound by the constitution, the executive and judiciary in addition to law and justice. This fact is the principle of a hierarchy of norms, which constitutes the legal system. The repeal of a constitutional act or the abrogation of a fundamental right regularly requires special procedures in parliament and – in some constitutions – observance of material barriers. Usually, a two-third majority in parliamentary voting is required. This normally requires inclusion of the opposition. In addition, in some countries a referendum

is required to give legitimacy from the people. A further hurdle may be a constitutional court. Some constitutions (CZ, DE) contain a so-called “material core” which prohibits any changes in the essential requirements of the rule-of-law state, fundamental rights and freedoms, and the unity or territorial structure of the country. AT has no constitution in the formal sense, instead, there are various constitutional acts and a high number of so-called “constitutional provisions” in statutory law. There used to be more than a thousand of these provisions which initiated a huge project of “clearing up the constitution”. The Dutch constitution is a very lean document. The latest general revision (of 1983) specifically aimed at giving the legislator as much room as possible for shaping the law of the land. Some countries have very detailed and long constitutions (PL, BG, HU).

2.3. Organic law

Organic laws are laws which carry out the constitution, although they are neither formal nor in their substance amendments of the constitution. They do concretize the constitution (FR – *lois organiques*; ES – *leyes orgánicas*). This special function of a law could be underlined by a special procedure of enactment or a special rank in the hierarchy of laws. The former is true for EE, where an organic law must be adopted by a majority of the members of parliament; the latter for NO, where this type of legislation enjoys superiority to statutory law and de facto ranks in-between the constitution and statutory legislation. Organic laws regulate on fields of fundamental importance for the state. Sometimes the enactment of such areas is expressly stipulated in the constitution (like FR, RO, PT):

- electoral law;
- organisation, functioning, financing of political parties;
- referenda;
- government organisation;
- public service;
- protection of minorities.

In HU, a rank higher than ordinary statutes is attributed to statutory law as a supplement to the constitution (cardinal acts). This applies to laws for local government, prosecutors, etc. In LU the chamber decided to create (in the constitution) an intermediate category of legislation, between constitution and ordinary law, similar to the organic law in FR.

Altogether, it can be established that organic laws within the hierarchy of sources of laws plays an extraordinary and – in practice of legislation – important role.

2.4. *Statutory law*

Statutory laws are the primary and central instruments of democratic governance, much more so than any other form of regulation. Statutory laws take precedence over all lower types of general and abstract norms. The rule-of-law principle requires a reservation of parliamentary law for any restriction of fundamental rights and freedoms as well as important orders for organisation and procedures of authorities. The CH constitution demands – even wider as the mentioned notion of reservation of law – that “all activities of the state are based on or limited by parliamentary law”. It is not sufficient that non burdensome regulation like delivering public services or other benefit management is based on the “social state” principle of the constitution only. PT and DE apply parliamentary law, which is not necessarily of a general and abstract character, like urgent planning decisions in infrastructure. In all countries the adoption of the budget and transformation of international treaties by parliamentary acts in the form of a statutory law may be mentioned in this context (NL). The Constitutional Court of BE finds that an individual act in form of a statute is contrary to the constitution, if its purpose is to circumvent the usual guarantees in the administrative regulation procedure or hinder judicial review. In FI one main goal of the reform of the constitution in 2000 was to widen and ensure the role and significance of the law enacted by parliament, on the costs of decrees and other lower level regulation.

2.5. *Statutory instruments, ordinances*

Subordinate legislation, delegated laws, ordinances, secondary legislation are general – abstract – norms, issued by administrative bodies and authorized by parliamentary law. Pieces of secondary legislation by far outnumber parliamentary statutes in all European countries. Reasons for that increase are temporal pressure of government, technicality of the matter, flexibility of norms, and exceptional situations (CH, AT, FR). Organs which may authorize secondary legislation may be the cabinet, a minister, state governments (in federations) or subordinate authorities. In some countries, there is a graduation of statutory instruments (BE, DE, ES, LU). Important ordinances require the consent of cabinet or even of the second chamber (UK, DE, FR – *Conseil d'État*). A legislative act may delegate to

the European Commission the power to adopt non-legislative acts of general application to supplement and amend certain non-essential elements of the legislative Act. The objectives, content, scope, and duration of the delegation of power shall be explicitly defined in the legislative act. The essential elements of an area shall be reserved for the legislature and accordingly shall not be the subject of a delegation of powers (Art 290 TFEU). Similar provisions are to be found in national constitutions (DE, AT, CH, IT, EE, PT, SE, PL). This restriction of empowerment of the executive allows for parliamentary control *ex ante* and *ex post* as well (UK, FR, IT, ES). In some countries, government may release emergency ordinances without enabling law (RO); some of them are debated in an emergency procedure in parliament. This has a curtailing effect on the rule of law (RO). In the UK, in general, delegated legislation is looked at as a constitutional anomaly in that it allows the executive to legislate in contradiction with the principle of separation of powers. However, it is legitimized by the advantages of speediness, flexibility, and efficiency.

In FR, in the frame of “rationalized parliamentarism” secondary legislation plays a different role. Statutes shall determine the rules only in areas as listed in the constitution. Matters other than those falling under the scope of statutory law shall be matters for executive regulation. This is a non-delegated, original competence of government. Furthermore, in order to implement its programmes, the government may ask parliament for authorization, for a limited period of time, to take measures by ordinance that are normally the reserve of statute law. This regulation resembles delegated legislation in other jurisdictions. In the NL the involvement of parliament may be secured in a special manner. The statutory act which authorizes a Royal Decree may add the provision, that the proposal is sent to parliament, thus enabling both houses of parliament to discuss the matter with the responsible minister.

2.6. Other sources of law

Regulations by autonomous bodies (*bye-laws*) are adopted by local authorities (municipalities, counties), universities, chambers (of commerce etc.), for the area of their responsibility (CH, NL, IT). There are regulations by non-state-actors, e.g. *collective labour agreements*, which could be declared as generally binding for employers and employees. The adoption of the *budget* as a calculation of public funds and the *integration of international treaties* are particular regulatory functions based on a formal, but not substantive law of parliament. Policy rules of administrative bodies, written as general

rules, are acts of “quasi legislation” (IE), not legislation. They guide administrative practice, inter alia, the interpretation of legislative provisions (PT, SI). They have a limited scope of application. Finally, there are different types of *soft law*, like corporate governance codes, which in SE are compiled by the Corporate Governance Board and apart from the private business sector’s self-regulation. It complements the SE Companies Act and other regulations. Usually, the compliance with soft law is not mandatory but voluntary. The European Economic and Social Committee (EESC) welcomes the EU Commission’s new policy communication, which mainly proposes measures of a soft law-nature, one to their subsidiarity and proportionality-qualifications.

2.7. European law

Although this chapter does focus on European countries’ legislation, not on EU legislation, a few remarks on EU regulations in the hierarchy of norms are required (1.5.). Under the principle of conferral, the EU is to act only within the limits of competences, which are explicitly conferred upon it by the member states in the treaties, to attain the objectives set out therein (Art 45 TEU). The EU, making use of its competences, is bound by the principles of subsidiarity and proportionality (Preamble, para 13). Regulations of the EU enjoy a directly binding effect on the member states’ institutions and citizens. Directives have to be transformed and detailed by national law (Art 288 TEFU). There is no consistent opinion on the issue of which rank EU regulations have in national laws’ hierarchy. The ECJ in *Costa/Enel*¹¹ held, that EU legislation precedes not only national statutory law, but also national constitutional law. This opinion, however, is only supported by few constitutional texts and not shared by the majority of national Constitutional and Supreme Courts.

The IE Constitution clearly joins the ECJ in directing, that no provision of the national constitution invalidates laws as enacted, acts done or measures as adopted by the member state, before on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligation of membership of the EU (similarly NL, BE, LU, AT). SK is of the opinion that legally binding acts of the EU shall have primacy over the Laws of the Republic. In BG EU law has absolute primacy over domestic legislation. It is not clear whether it has primacy over the constitution. The BE Constitutional Court implicitly suggests that EU law

¹¹ Flaminio Costa v ENEL (1964) Case 6/64.

has the rank of international treaties and thus primacy only over sub constitutional legislation, but not over the constitution. The EE constitution declares that the state may belong to the EU, provided that the fundamental principles of the constitution are respected (“protective clause”). This also is the opinion of the DE Constitutional Court. The Court held that EU regulations are directly applicable and have precedence over national laws on the basis of an unwritten norm of primary Union’s law. In principle, this is true in view of national constitutional law as far as limits of transferable competences of the sovereign state authority are not exceeded. This is a clear safeguard of the intangible core of the constitution, which are fundamental rights and freedoms, and the federal parliamentary democracy.

3. Legislative Process

3.1. Legislation in the regulatory cycle

The question is: who is the legislator, how is the legislator organized, and what is the procedure for making legislation? Laws are made on the supranational level, in the EU, on the national level, and – in some states – on the subnational level, like the states in federations or the cantons in CH, the regions in ES, or other autonomous levels. This may be looked at as a vertical separation of powers. This chapter focusses on legislation on national central processes. EU legislation is dealt with in a separate chapter, and for subnational legislative procedures, roughly the same rules apply as for procedures of legislation on the national level. This is well understandable according to the principle of homogeneity of law in the Constitutional State (AT, DE).

On the national level, all three branches of government are actors in legislation: legislative, executive, and even (constitutional) judiciary, if it has the competence to review, amend, or even nullify laws. The latter is described as “juridification progressive des règles de method legislative”.¹² Participation of all powers may be considered as a notion of rule of law: a (horizontal) separation of powers.

Laws are enacted in a procedure in which all constitutional organ-groups participate, namely parliament and government. The main steps of this procedure are:

¹² CA Morand (ed), *Légistique Formelle et Matérielle, Formal and Material Legistics* (Aix-en-Provence, Presses Universitaires D’Aix-Marseille, 1999), 39.

- impulse as a request to legislate on a subject;
- analysis of the social problem, policy-setting;
- definition of targets and instruments of regulation;
- drafting;
- bringing the bill to parliament;
- deliberation of the draft in the house(s);
- adoption;
- implementation;
- monitoring;
- and – if needed – amendment.

Here a new regulatory cycle starts. The basic structures of law-making are part of the constitution. Details are regulated on in Rules of Procedure of Parliament and Government. Governments have established directives of good government to check the facts in detail, to make a sound prognosis, to balance the interests at stake, carefully to assess and monitor the impact of legislation, and to induce amendments. This catalogue is applied in every modern legislation (subch. 4).

This procedure of legislation may be roughly divided into three stages: the preparatory phase (3.2.), the parliamentary phase (3.3.), and the post-parliamentary/implementation phase (UK, DE). Special procedures are prescribed by constitutions for participation of the people in law-making, as referenda (3.4.) or amendments of the constitution, laws to implement international treaties and the budget (3.5.).

3.2. Initiatives for legislation – the executive phase.

Legislation is the primary responsibility of parliament. The competence for *initiating* a bill rests with the government (FR, DE, PL), the state president (PL, LT, HU, not in FR), a certain number of deputies or political groups in parliament (DE, AT, ES), single members of parliament (UK – private members bills), the second chamber (IT, FR, DE), the people

(subch. 3.4.), or representatives of stakeholders (RO, EE, IT (*Consiglio nazionale per economia e lavoro*)).

Most initiatives for legislation originate in *government*. Government is the “Lord of Legislation” (IT). Much – if not all – legislative work is vested in government in the pre-parliamentary phase. “It is rare that parliament makes any significant changes in the bill” (NO). In the parliamentary system, the role of government is central (LU, BE, NL, DE, UK). Even in practice the role of parliament in some countries can be described as reactive to governments’ activities (FI). Government, however, is based and dependent of the majority of parliament. The pre-parliamentary phase of legislation, therefore, is an “executive phase”.

Requests for legislation (*impulses*) are put forward by government commissions, expert groups, lobby groups, civil service, and decisions of courts. In many cases, the result of some incident, which led to media attention, is inducing legislative activity of government. Parliamentary oppositions may use these channels. Many initiatives are produced by EU directives.

For each parliamentary session, some governments have a parliamentary agenda, which has been agreed before the session starts (UK, similarly SK). This agenda lists the bills which government intends to bring to parliament. It is agreed at cabinet level and “is a mixture of political choices, needs, and affordability” (UK). The line ministers submit proposed bills to the cabinet (SE, DE).

The *drafting process*, which is the next step of the legislative procedure (which is, in turn, part of the *policy process*) begins, when the drafter receives a request to draft a bill (UK). This request originates in government departments. The relevant ministry will usually assign a bill-team, to coordinate the work of policy-officers, including specialists in the subject matter at hand. Drafting work is either centralized or decentralized. An example of the former is the UK. The drafting process, in practice, is a responsibility of the Office of Parliamentary Counsel. It takes over after the bill team has analysed the social problem, collected data and information. In close contact with the administrators in the relevant department the counsel writes the text of the draft. Both sides should be familiar with the problem and possible solutions. Most European countries prefer a decentralized drafting system. The bill is drafted in relevant ministries (CH, DE, FI, SE). The ministry in charge

starts a *circulation procedure*. All ministries which have a say in the field of drafting that bill may contribute their opinions. This always includes the ministers of finance and justice. The lead minister organizes assessment of the draft and hearings with expert bodies, stakeholder associations (DE). This decentralized procedure close to the addressees is preferred since domain knowledge and practical experience can easily be assessed at all stages of the drafting progress (CH). Even if a bill is formally prepared by a parliamentary committee, the administration is usually tasked with the actual drafting of the text (CH). In PL the drafting process in ministries is supported by a “good legislation center” of the government. In SK, a legislative council of the government which is composed of experienced lawyers and chaired by the minister of justice, coordinates and directs the activities of the ministries and other bodies concerning the preparation of the bill.

Before the bill can be submitted to the council of ministers for formally initiating it in parliament, it is reviewed in the ministry of justice or legislative councils or ministerial committees (NL, SE, PL, DE) on its *legal quality*. In FR oversight bodies are included to assist the government to initiate finally a good law. This is the Council of State, which acts as advisor to the government, the Secretariat General du Gouvernement (SGG), namely its *Service de la Legislation et e la Qualité du Droit*. During the preparatory phase of legislation, the draft is *presented to the public*. The public is thereby informed about the government’s intention to bring new legislation in the field, and relevant social bodies, committees, institutions, and stakeholder associations take oral and written evidence about the bill and the possible need to revise it before it is submitted to parliament (SE, DE, FI, PL, FR, NO). In CH, in theory, everyone can participate in this process; in practice, political parties and special interest groups submit their opinions. The administration in all countries analyses the responses and summarises them in a report.

The *final text of the bill* is formally voted upon by the government (cabinet). Any disagreements are traditionally ironed out already at this point. The whole executive phase usually takes some time, depending on how controversial the proposal is. In particular, the need for consenting opinion is time-consuming in coalition governments. At this final point, the text of the draft is accompanied by an explanatory memorandum, advisory opinions, e.g., of the Council of State, the RIA Board, a synopsis (at least in case of amendments, which is the major part of legislation) and the government’s reaction to these documents (SE, AT, NL, DE). Finally, the draft is introduced into parliament.

3.3. Debate and adoption of the law – the parliamentary phase

The procedure the bill goes through before it becomes law, is different in parliamentary systems, either with one or two houses. SE, NO, FI, SI, EE and others have unicameral parliaments; other countries have bi-cameral systems (House of Lords/UK, Senate/BE, Council of States-*Ständerat*/CH, *Bundesrat*/DE, AT, moreover IT, NL, EE). Participation of these second houses may be symmetrical with that of the chamber of deputies – consent is required for the adoption of a bill (CH) – or asymmetrical – veto- or objection-rights (RO) – or mixed – partly consent requirement or a right to objection (DE). The law must indicate, which procedure it passed (“with consent of the second house ...”).

The parliamentary process in the first house has *several stages*. In principle, law-making follows the *Westminster model* in European parliaments. The procedure starts with the *first reading*. This is the introduction of a bill to parliament, a formal stage without any form of discussion (UK). The *second reading* is the first debate on the main principle of the proposed legislation. The government will make the case for the bill and the oppositional parliamentary group(s) will respond. No amendments can be made at this stage, but the main areas for debate are identified. At the end of the second reading there is a vote which in parliamentary government-systems is usually consent to the draft and transmission to the committee(s) for close line-by-line scrutiny. *The committees* consist of members as nominated by the parliamentary groups according to majority relationship in the house. In all parliaments the major part of law-making work is done in committees. The area of responsibility of a committee usually mirrors that of a ministry. Next to these standing committees there may be set-up select or sub-committees for dealing with particular legislative problems or controlling government. One important – or the most important – body is the budget committee. Preparatory work for discussions in the committees or plenary debates is done in working groups of parliamentary groups of the parties. Amendments of the bill are introduced, by opposition and government-supporting groups. The committees are the arenas of “bargaining and compromising”.

Then the bill is sent to the *plenary* for debating. This is the third reading. The debate deals with the whole legislative project, details of the draft, and requests for amendments. “Technical details” of amendments to adapt laws pass without discussion. Debates in general don’t want to change the views or opinions of opposition-members of parliaments or convince them, but are mainly to the public and may serve as an instrument to

strengthen identity of the parliamentary groups. Debates in plenary are different in style and rhetoric's in consensus-oriented (CH, SE, NO, FI) or conflict-influenced cultures (UK, DE, IT, FR). Often motions for amendments, which have been rejected by the majority in committees, are tabled again in plenary to give the requesting group a basis for discussing basic political opinions of the draft. Finally, the bill is adopted.

In IT and ES a final decision may be taken in the committee. In FR, UK, IE, ES government may shorten the debate before a final decision is reached (closure, guillotine, kangaroo). The strongest instrument in "rationalized parliamentarism" (FR) has the prime-minister, who may push through a bill without a parliamentary final approval. After having passed through the first chamber of deputies the draft is transmitted for second chamber deliberations. This stage exists in bi-cameral legislatures and may involve its own set of stages, e.g., first, second reading, etc. To have this second house may strengthen the subnational units' influence on a central level (AT, CH, DE, BE, ES). In decentralized unitary jurisdictions (UK, IE, IT, NC) the second chamber brings into the law-making process a distance to party-politics; it works as a "deliberative body" or a "chamber of reflection". In some constitutional systems the chamber is obligatorily participating in all legislative procedures (UK, BE), in others it has just the power to suspend/veto first chamber decisions. In all bi-cameral systems the second chamber must be included in all legislation-procedures to amend the constitution. In some jurisdictions the competences of the second chamber are very restricted (IE, AT, ES). If procedures in view of the matters or prolonged deadlines are complex, the weight of the second chamber may grow (FR, UK, ES).

The Federal Council (*Bundesrat*) of DE may be counted as a "second chamber" with strong reservations only, since it is composed by government members of the states. Its importance in legislation is significant. Without majorities in Bundestag and Bundesrat, government cannot put through an important legislative project. In IT, a bill is initiated either in the chamber of deputies or the Senate. A bill must be approved by both houses. In BE, the powers of the Senate are multi-faceted. Legislative procedures are uni-cameral: the Senate is not involved at all. In others, it acts as an asymmetric organ: it has the right to discuss or bring in an amendment. Finally, symmetric participation is required: the Senate has equal power as the House of Representatives. In CH the Council of States (*Ständerrat*) as a representation of cantons, has exactly the same rights and duties as the first chamber,

the National Council. In the NL the second chamber, which – according to the constitution is the “First Chamber” – is elected by the provincial governments and has asymmetric rights. It does not have the competence to table amendments to bills; it is expected to take a less political stance. The PL Senate is entitled to veto bills or initiate amendments. As in most asymmetric bi-cameral systems, the veto may be overridden by the (absolute) majority of the house of deputies. The interventions of the Senate are (currently) rare, since deputies and senators are members of the same party.

If in bi-cameral systems, like CH and DE (with reservation), there are differences between first and second chamber, a *conciliation committee* composed of select members of both chambers, is appointed. This committee is tasked with proposing a compromise motion that eliminates the remaining differences in their entirety. If this compromise motion is rejected by either of the chambers, the bill is abandoned.

3.4. Enactment and promulgation – the post-parliamentary phase

The bill becomes a law and takes effect when it is *certified* and promulgated. This final act of the legislative process is done by the head of state (King/Queen or President) or by the chair of parliament. In FR, EL, IT, PT this organ has a suspensive veto-right. In case of a veto, the bill is remitted to parliament, which may override the veto (with an enlarged) majority of votes (PL, SI, CZ). Some countries report that the veto right is just a right on paper (UK, NO). In FR, PT, IT, DE, AT the state president may examine the constitutionality of the draft in formal and substantive perspective. In DE the president may refer the case before the constitutional court. After signature, the law is *promulgated*. In AT electronic promulgation has replaced the prior paper publication; in many other countries both techniques are applicable. In the UK a “good law” project is undertaken by the National Archives in cooperation with the Office of Parliamentary Counsel, partnered with the Sir William Dale Centre for Legislative Studies at the University of London. The survey demonstrated that the free electronic database of legislation in the UK is used much more heavily than initially thought. 60 % of the users are non-lawyers. It is a chance to talk on law to users directly, without intermediaries.

The description of the legislative process would not be complete without accentuating the role of the constitutional court. It has the right to amend statutes *ex post*, if they are in

conflict with the constitutional rule (SE, DE). Since the legislative act is annulled *ab initio*, SI addresses the court as a “negative law-maker”.

3.5. Plebiscites

The term “direct democracy” stands for plebiscitary participation of the people in the initiation of drafts, referenda of laws, and other votes (namely on important political issues). Plebiscites are complementary to parliamentary decisions; they add to legitimacy of decisions, without shaking representative democracy. Forms of direct democracy on a central level of states in general is not provided for in Europe. In CH, however, many issues are decided by the people, so that one may call this jurisdiction a “half-direct” democracy. The fact that the CH people have the right to be consulted, to veto, and even to initiate legislation has had a substantial impact on its political institutions as well as on its legislative process and techniques. Parties work together and CH is the classic “consensual democracy”. The density of people’s direct participation in this country has been adopted by other jurisdictions only in a very restricted manner (IT, AT, DE, ES, FI). In all these countries, peoples’ initiatives are counted as an innovative element of law-making. If obligatory or facultative referenda follow, they have mostly a slowing-down effect. Obligatory referenda may be held to adopt laws on important issues. Obligatory votes may be necessary, e.g., to transform international treaties or joining international associations. Referenda may be required by the constitution to amend or totally replace the constitution (CH, DK, IE). Referenda may be set by the people or on demand of parliament, president, or government (FR).

Citizens may initiate matters in parliament (BG). Parliament may invoke a referendum, which may be binding or consultative (RO, EE). Referenda on legislative texts or specific questions are put to the people by a law in order to give guidance for the legislator (LU). Referenda are held, even if the constitution is silent (BE) or there is no tradition of direct democracy (UK, bill 1975 – EU-Accession; bill 2017 – “Brexit”). In detail, plebiscitary democracy presents a broad range of effects, of only consultative and suspensive, confirming, amending, and otherwise binding nature.

3.6. *Special categories of law*

Constitutional law in almost all European countries takes *precedence* over other laws. No statutory law or other legal act may contradict the constitution. Amendments of constitutional law in all European countries – with the exception of the UK – have to pass a significantly more difficult legislative procedure, require qualitative majority – mostly two-thirds – in the respective parliament, and hence are based on consensus. In addition, a positive referendum is necessary in CH, DK, IE. In some countries the core-principles of the constitution are intangible (DE, PT, EL).

International and supranational treaties are integrated (in monistic systems) or transformed into national law (dualistic systems) in the form (and procedure) of statutory law. The same is true for transferring sovereign powers (DK, SE, DE), although a two-thirds majority is required.

According to its central political importance the *finance-bill (budget)* in all European countries is adopted by parliament, generally in the form of a statutory law. However, there are some differences to general law-making procedure. Government is the only organ which initiates the budget. The ministers of finance have an outstanding position. All line ministers cooperate closely. The parliamentary debate of the budget is a general discussion of government's activities. The draft budget is dealt with in detail in the budget- and specialist-committees. Finally, the budget is adopted. In IT and DE consent of the second chamber is also required.

4. Values and goals of laws, good legislation, and evaluation

4.1. *Quantity and quality of laws – substantial legisprudence*

Up to this point considerations dealt with *procedural theory* of legislation; some reflections on formal issues will follow in subchapter 5. In these contexts, the constitution is a binding frame for *organisation, procedure, and structure of the bill*. Constitutionalism in the 19th century and positivist thinking of the 20th century designed and interpreted constitutions as a mundane and practical document which kept far from “bombastic principles”, values, goals of laws, intents, prescriptions for “good legislation” (BE). The traditional

methodology of legislation in Commonwealth jurisdictions – and content-wise also on the continent – was introduced by Garth Thornton.¹³ It consists of five stages (UK):

- understanding the proposal;
- designing the law;
- composing and developing the draft;
- verifying the draft.

Legisprudence addressed rather formal aspects of the legislative circle, while issues, such as goal-setting and *ex ante* as well as *ex post* evaluation were – if discussed at all – left to the scholars.

This changed after in the middle of the 20th century, when amended and new constitutions were drafted – namely, but not only – in Central and Eastern European States,¹⁴ and particularly in the treaties of the European Union. According to the normative theory of legisprudence, the constitution is understood as a system of values to be realized in guiding principles for policy, goals, and instruments of the law, the effects of which could be evaluated by assessment and monitoring. Constitutional texts, juridical doctrines, enriched by scholarship, are interpreted as yardsticks for legislation. These values are “the well-being of the people” (Art 3 Sect 1, Art 13 TEU), “peace”, security” (Preamble para 11, Arts 3 Sec 2, 5, 42 et seq. TEU, Art 23 CPR, Art 1 ESCR), “human dignity” (Preamble para 2 TEU), “rule of law” (Art 2 TEU), and economical and financial goals (Preamble para 8, Art 3 Sec 4 TEU). The latter one shall be deemed substantial and material in many respects. Social policy is an outstanding principle in European treaties and national constitutions (Preamble para 5, Art 2 TEU, Art 151 TFEU). Developed as a welfare state in the Nordic States (SE and others) it was highly impacted by Scandinavian Legal Realism.

Culture, education, and science are important tenets in the treaties and in national as well as subnational constitutions (Preamble para 2, Art 3 Sec 3 TEU, Art 167 TFEU). All countries protect and promote culture and support access of the people to cultural assets. In recent years, new aims gained interest, like environmental and consumer protection (Art 3 para 3 TEU, Art 169 TFEU, CH, PT), gender equality, children’s rights, solidarity between generations, youth promotion (BE), etc.

¹³ H Xanthaki, *Thornton’s Legislative Drafting*, 5th ed. Thornton’s Legislative Drafting, 5th ed, (Hayward Heath, West Sussex, Butterworth, 2013).

¹⁴ Nóra Chronowski, Tímea Drinóczi, Tamara Takács (eds), *Governmental Systems of Central and Eastern European States*, (Warszawa Oficyna-Wolters-Kluwer, 2011)

This value approach to constitutional texts has never been undisputed, neither in general nor in detail. It is argued that a structural method is missing to clarify the legislative goals position, perspective, and visibility. Moreover, there is no proper way to balance the elements in a mix of goals and effects (SI). Constitutional courts, however, apply value-loaded norms and scholars encouraged judges to follow. Normative principles by integration into constitutional texts do not lose their character as broad and open terms. At least, they are valuable for purpose-oriented interpretation. The first interpreter is the law-maker, the second and final the judge, if there is judicial review of laws. Details of parliamentary interpretation of value-oriented constitutional texts are to be found in statutory laws.

Until four decades ago, not much attention was being paid to the instrumental quality of legislation. The economic recession of the 1980s changed that. In most European Countries *deregulation* became a major topic, resulting in national policies of “good governance”, which obviously means “good and better regulation/legislation”. The new policy consists of a systematic analysis of draft legislation on regulatory impact and costs for businesses. This was, at first, laid down in a *checklist*, which had to be worked off when drafting legislation. The result of this check had to be counted for in the explanatory note of the bill. Later on, evaluation as *Regulatory Impact Assessment* (RIA, *ex ante*) and monitoring of laws (*ex post*) was extended to analysis of impacts on citizens as addressees of laws, and the bureaucracy itself (“Cutting Red Tape”).¹⁵

“Good legislation” is a first-ranking element of “good governance/government”. The World Bank declares: “We define governance as the tradition and institute by which authority in a country is exercised for the common good. This includes (1) the process by which those in authority are selected, monitored, and replaced, (2) the capacity of the government to effectively manage the resources and implement sound policies, (3) the respect of citizens and the state for the institutions that govern economic and social interaction among them.”¹⁶

Art 13 TEU reads: “The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of citizens and those of

¹⁵ OECD, *Cutting Red Tape* – National Strategies for Administrative Simplification, Paris, 2006; (EU-)Highlevel Group on Administrative Burdens, *Cutting Red Tape in Europe*, Brussels, 2014.

¹⁶ <http://go.worldbank.org/MKOTR258VO=2009-10-25>, more in detail U Karpen, ‘Good Governance’ (2010) 12 *European Journal of Law Reform* 16.

Member States, and ensure the consistency, effectiveness, and continuity of its policies and actions.” It is important for the legislator successfully to follow the principles and guidelines of the constitution, to assess the effects and side-effects of the draft, and to monitor the impact of the law. This practical side of legislation, namely the policy elements of planning and decision-making in legislation and evaluation of effectiveness and efficiency of drafts have been neglected for a long time. It is obvious that legitimation of laws does not come from social, economic, or fiscal rationality, but rather from democratic sources. Parliament and government as legislators need majority support of the people. At its best, rationality and majority coincide as a solid basis for implementing the law. If this is not the case, majority vote in politics takes precedence. The lack of jurisprudence’s interest in policy-making as the first step of legislation as well as evaluation is one of the reasons why practitioners and scholars in recent years are more interested in a broader approach to “good government” and “better regulation”: better policy.¹⁷ Some scholars and, to a certain extent, also constitutional courts held that there is a right of the people to a good and effective law (EE). On the other hand, there is the opinion that all the legislator owes to the public is a law.¹⁸ It is, however, obvious that all legal acts shall, for example, guarantee protection of fundamental rights or meet the rule of law-principles. This says little about what and how the legislator should regulate the matter at stake. The latter is a question of coherent and proper legislation: policy and planning, drafting as well as controlling the effects and subsequent results, which is “good legislation”.

The constitutional duty of the legislator to make not only a law, but also a “good law” requires a multi-criteria evaluation. A “good law” is a law which is needed and appropriate to solve the problem at stake. The legislator – first – must make a law which is necessary. There must be a constitutional or legal stipulation for a law. This is – not at least – a question of the *quantity of laws*. Furthermore, the law-maker must assess (*ex ante*) the *quality of the draft* in view of its legal, social, and economic impacts of the law, when implemented, as well as the availability of the financial resources. The legislator – second – must *retain* a good law by *monitoring (ex post)* and *maintaining* its quality, including possible amendments. These questions will be dealt with in the following analysis.

¹⁷ OECD-Series *Better Regulation in Europe*, Country-Studies, Paris, 2010.

¹⁸ K Schlaich, *Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen*,³⁹ Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer(Berlin, de Gruyter 1981) 95,109.

4.2. Deregulation and evaluation

Much has been written on the *quantity* of modern legislation. There are, as an example, 150,000 legal acts of European secondary and tertiary law,¹⁹ and perhaps half or more EU member states' rules now come from Brussels.²⁰ The *European Acquis Communautaire* is shaping whole regulatory regimes. In addition, there are about 10,000 judgements of the ECJ and more than 4,000 international agreements. The reasons for this deluge of laws may be the increase of public tasks in welfare- and intervention-states, technology, and juridification in all areas of life. Undoubtedly, excessive legislation is a criterion for deficits in law-making, for laws which one cannot know or does not understand cannot be effectively implemented. The acceleration of legislative process produces “junk laws” (HU). To avoid proliferation, complexity, and unintelligibility of law, deregulation is needed (SE, EE, FI, UK, DE). There is a saying attributed to Montesquieu: “If it is not necessary to make a law, it is necessary to make no law.” The author never wrote that directive, but it certainly – in brief – catches his ideas.²¹ Consolidation and codification of existing laws and one-in-one-out standards (UK) for new law-making are instruments to reduce the body of law.

Next to keeping the body of law “small and smart” and placing emphasis on transparent and accessible legislation, goals and instruments of law-making should be evaluated against three main criteria: *conformity with the constitution* and the entire legal system, *effectiveness* and *trust*. The law-first- must stay within the frame of the constitution and fit into the *legal system of the jurisdiction*. In last decades and today mainly economic, “managerial” rationality – as effectiveness and efficiency – are perceived as important quality criteria, not at least in view of budget constraints. A law is effective (CH) if the impact of action comes closest to the legislative intent. Laws must be *effective*, in that they are assumed to be used in practical legal life (SE), and instruments of the law must be *efficient*, that is appropriate and proportional. A means is *appropriate* if and insofar as the objectives of the proposed action cannot sufficiently be achieved by other instruments of government. “The Union shall pursue its objectives by appropriate means,

¹⁹ Frankfurter Allgemeine Zeitung, 02.01.2017.

²⁰ OECD, *Regulatory Policy and Governance*, Paris, 2011, 93.

²¹ Montesquieu, *De l'esprit des lois* II, pres. Par Victor Goldschmidt, (Paris, G F Flammarion, 1979,) Livre XXIX, Ch. XVI: „Lorsque, dans une loi, les exceptions, limitations, modifications, ne sont point nécessaires, il vaut beaucoup mieux n'en point mettre. ... Il ne faut point faire de changement dans une loi, sans une raison suffisante ... Comme les lois inutiles affaiblissent les lois nécessaires celles qu'on peut éluder affaiblissent la législation.“

commensurate with the competences which are conferred upon it by the Treaties.” (Art 3 para VI TEU). The instruments of the law must be *proportionate*. “Under the principle of proportionality, the content and form of Union actions shall not exceed what is necessary to achieve the objectives of the Treaty.” (Art 5 para IV TEU).

Proportionality is cost-effect-rationality: the benefits of actions must outweigh the cost. Proportionality tries to reach an end-means optimum. Effective law-making, finally, is built on *trust*. Trust is an important resource of stability that prevents frequent amendment to enacted legislation. Trust is in contrast with a “motorized legislator”. Undoubtedly, reduction of “legalization” in all European states is a mandate of the time. Fighting the volume of legislation is not at least an aim of de-bureaucratization. Instruments of New Public Management, devolution, decentralization, co-regulation, all sorts of participation, contribute to that end.

Quantity and quality, deregulation and “better legislation” are the essence of many EU member states’ programmes for good governance, “Red Tape”, and drafting guidelines. In the Union, remarkable milestones are the “Governance Initiative” (2000), the Report of the “Mandelkern-Group” (2001), the “Agreement on Better Law-making” (2003), SMART (2007), the REFIT-Programme (2012), Better Regulation Package (2015), and the Agreement on Better Law-making (2016). The PT programmes “Legislar melhor” and Simp Legis were able to introduce innovating and cutting-edge policies. BE is working on a better legislation policy, and EE developed an “Estonian Regulatory Oversight Model”.

Less quantity and more quality are the guidelines for making good law, including Regulatory Impact Assessment,²² and ensuring good legislation, including initiatives for amending laws, and thus starting a new circle of legislation.²³

4.3. Making good law: Policy - goals - instruments

Good legislative drafting is required, equating to a number of steps and devoting sufficient time to assessing or even consultative activities included. Without a decided policy, clear goals, and applicable instruments, it is impossible to evaluate the project, which means to assess the draft and monitor the law (IT, BE, UK, PL). The first step for a draft is a *policy decision*. Experiences in all jurisdictions show that strong political support is needed for

²² See below, 4.3.

²³ See below, 4.4,

Commented [aa2]: Perhaps just explain what a motorized legislator is (I don't know what it is).

the whole legislative process. Government must “stand behind the project”. Policy is “that kind of a standard that sets out a goal to be reached, generally an improvement of some economic, political, or social feature of the community”.²⁴ Policy usually follows pressing needs or free choice. Policy must start by answering three questions:

- Is it necessary to make a law at all? Or are other types of regulations sufficient to solve the problem, like economic incitements, self-regulation, voluntary agreements, informal arrangements?

- Why and what and how to draft (SE, BE)?

-Which are the impacts and consequences of a law? (NO,FI,NL,UK,DE,CH).

A constitutionally based argument for drafting a statutory law is the necessity to limit fundamental rights of the addressees. The policy -decision usually is based on a problem and content-oriented, a functional-rational decision. Strategic intentions, however, may prevail, the more controversial and politically essential the problems at stake are. Some member states’ governments present to parliament and public an outlook of draft-projects for the whole legislature (The FI “outlook” for four years). However, this is not really a comprehensive political programme, but usually simply endorses the legislative intentions proposed by individual ministers. In the UK, the Prime Minister shall render an account of the general state of the country and of the measures proposed by the government and thus will be made subject to a general debate. The Prime Minister will mention bills and propositions for a legislative programme for the coming session.

The *objectives, targets, and goals* of the draft are formulated by government and the drafters. They are detailing constitutional yardsticks (like “social” or “ecological” policy-perspectives) for the law and the political decision, which has been taken. The objectives should be SMART, i.e. specific, measurable, achievable, relevant, and timed. The opinion reaches out that in the participatory and transparent rule of law-state there is a constitutional duty to give reasons for legislative acts. In some states (CH, LT), it is a key element of the legislative process to report the reasons why legislation is considered necessary. The purpose of that piece of legislation is usually more clearly stated in such texts than in the legislative text itself. Even in countries where a statement of the purpose of the act in one of its provisions is traditionally atypical (like in SE) it becomes somewhat

²⁴ R. Dworkin, *Taking Rights seriously*,(Cambridge (Mass.),Harvard Univ.Press ,1977)24.

more common. In other law-making systems, with a long-standing tradition of an explanatory note preceding the legal text, it is quite the use to explain the intent of the law in an opening article, which may read as “the purpose of this act is to regulate ...” (DE). An enunciation of the principles provides a firm and intelligible structure of the statute. It helps to clear the understanding of the legislators, provides guidance to politicians and officials in the executive, assists the courts and finally-and most important-explains the law to the public.

Instruments for implementing laws are quite diverse. First, they could be imperative, inductive, or contracting. Imperative means impose obligatory duties: to do something or not to do something. They are a tool of government by prescription, in the shadow of punishment, civil damages, or penalties. Incentives, on the other hand, are tools of government by objectives, such as recommendations, information, benefits stimulations, warnings, rewards, auto-regulation, etc. (UK). They count on the cooperation, appreciation, persuasion, and understanding of the addressees. Finally, there are instruments of government by arrangement, like contracts, accords, and conformance. Soft-law and voluntary compliance add to a new participation-oriented implementation of laws. The principles of subsidiarity and proportionality are important guidelines for using the tools (Arts 3 para VI, 5, para I, para IV TEU). Legislative tools should reflect the goals and values, priorities in EU Treaties (BE). Effective instruments must have regard to the resources and means available in the country: affordability and feasibility of legislation are basic quality factors.

4.4. Evaluation of drafts :Regulatory Impact Assessment(*ex ante*)

RIA is a set of activities and procedures carried out to ensure the legal, economic, social, and financial quality of drafts, before enacted (*ex ante*) (RO). This policy instrument is advocated by the OECD and used by the EU and member states. In the meantime, the opinion is widespread that, to make a thorough *ex ante* evaluation of a draft is part of the law-makers duty to make a good law (FI, FR, BE, AT, DK, DE). Checking the impacts of new law is important, particularly in view of new technical developments, like in ecology, information technics, nuclear energy, biotechnology, genetics, and health service. RIA is applied to avoid “gold plating” of EU directives in member states. CH is the first country in Europe to have introduced RIA into the constitution: “The Federal Parliament shall

ensure that the efficacy of measures taken by the confederation is evaluated.” BG followed with a provision in the “Normative Acts Act. “

RIA is generally accepted and certainly a valuable tool for increasing the quality of law-making, but its usefulness should not be overrated, because of tremendous methodological and even political constraints, and – to keep in mind – that RIA never has to judge whether the policy is fit for purpose. Some critics raise doubts, whether RIA led to a significant decrease of numbers of statutory and secondary legislation.²⁵

There are quantitative and qualitative methods of RIA.²⁶ The former ones are the cost-benefit-analysis and economic as well as economic and financial prognoses. The latter ones are comparative and interdisciplinary studies. In detail, analyses are measuring certain “dimensions” of impact, starting with costs for (small and middle-size) businesses, citizens, and administrative agencies, and are extending over costs for children and youth and de facto gender equality (AT). In some states drafts must – when being initiated in parliament – not only be accompanied by arguments, but by a presentation of RIA results. The consequences of non-compliance with rules of good legislation, including RIA requirements, are different. In HU there are no consequences, in FR bills can be discarded by the *Conseil d’État*. If (constitutional) courts measure drafts or laws against substantial standards – like effectivity or proportionality – they certainly refer to RIA results as proof of constitutional and good law-making (DE).

RIA’s organization and procedures are quite diverse. The NL is the role model for RIA bodies in Europe and beyond. It has been so successful, that the question arose whether all states are “going Dutch”. This appreciation is mostly owed to the effectiveness of the “Advic College Toetsing Administrative Lasten” (ACTAL), which was established in 2011 as an independent and external advisory body that advises government and parliament on minimizing regulatory burdens. Its mandate terminated in 2017, but the work of assessing bills is continued by a special legislative reviewing unit within the Ministry of Justice and Security. The results of review are noted in a memorandum as submitted to the Council of Ministers. Similar to ACTAL independent advisory boards have been established in FI, DE, NO, SE, CZ, and UK. These independent bodies as a network “Regulatory Watch Europe” collaborate to achieve their own expertise, strengthen the EU approach on better

²⁵ Ismayr (n2),15.

²⁶ Alexandre Flückiger, (*Refaire la loi*, (Bern,Stämpfli ed., 2019) 479 ff

regulation, inform other (European) countries on the added value of external and independent scrutiny of RIA and advise their *governments* on the quality of EU -RIA. Regulatory Watch Europe's "Joint Statements" to vital points and upcoming problems of legislation addressed to European institutions as well as "Joint Reactions to European Consultation" belong to the best offerings on the "legislative and jurisprudence market": short, topical, and always up to date. Not at least following the trend in national legislatures, in 2015 the European Commission established the independent Regulatory Scrutiny Board (RSB). In many European countries councils of state advise governments in better law-making (IT, BE, RO, LU, FR, SI).

Parliaments also seek to assess drafts on their own initiative. They use different institutions to do that. First of all, they use the expertise of Parliamentary Research Services. Furthermore, parliamentary advisory councils, governmental reports (as requested), hearings, questions enrich expertise of the houses (SE, DK). In DE, an Office of Technology and another for Sustainable Development have been established. In BE 12 members of the House and 11 senators form the Parliamentary Council of Evaluation of Legislation.

Next to parliaments as democratic representations, the *people themselves* should contribute to attaining best assessment of legislative impacts and quality of drafts. "The institutions shall ... give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action" (Art 11 para 1 TEU). Stakeholders and interest groups may best know the impacts in their fields of society's activities. They participate formally and do informal "lobbying" in all phases of the drafting process, predominantly in ministries and then in parliament. At the European level, the High Level Group of Independent Stakeholders on Administrative Burdens in 2014 delivered a remarkable report on reducing bureaucracy in the Union's and member states' administrations. Next to informal contacts there are formal Economic and Social Councils (PT, SE, LU, NL). In CH, a process of broad consultations ("Vernehmlassungsverfahren") has to be conducted. "Concerted Actions" and other forms of nearly "neo-corporatistic" structures and procedures are characteristic for "concordance democracies" (AT, SE, DK, FI, PT, SI). Since the drafts have to be published (DE, NL), the media do participate in their analysis. Where such a broad involvement of stakeholders and the public is recommended and used in the law-making process, this no longer or not only

highlights an improvement in representative democracy but is also inspired by a desire to strengthen participatory or deliberative democracy.

In jurisdictions with *constitutional courts*, there may be access to assessing the bill *ex ante*. In PL the President of the Republic (instead of vetoing a bill directly) can demand a court decision. It may declare the bill unconstitutional in part or as a whole. In RO, *ex ante* control of constitutionality is possible by notification by the President to one of the presidents of the two chambers, the government, or the High Court of Cassation and others.

4.5. Evaluation of law: Monitoring and ensuring quality of laws (*ex post*).

There is a law-makers constitutional duty to *monitor* the effectiveness of a law, to *revise* it (if necessary), and to *maintain* its quality. Monitoring laws looks at the intended consequences and the unintended impacts of positive legal action. Although of high interest to the legislature as well as the executive bodies (and performed in the latter's domain), monitoring is sporadic in many countries. Evaluation of legislation rather takes the form of impact assessment of new legislation than monitoring and amending existing law (RO, LT, NL, CZ). Main goals of *ex post* evaluation are managing the flow of new norms in the context of the existing law, the codification and simplification of the stock of law, and the harmonization of national law regarding EU legislation (FR). Indeed, *ex post* monitoring may be looked at as the crowning of the regulation feedback loop (SI). The task of *monitoring* consists of looking into the case law, dealing with that particular piece of legislation, as well as following the administrative practice, the scholars' discussion, and public debate (DK, NO). Usually, monitoring is done in *ministries*. In FR, there are administrative oversight bodies in the general inspectorates. Often groups of experts or individuals are mandated (LT). The reports of the Audit Courts are an invaluable source of monitoring the effects of a law (DE). *Parliament* has diverse means to monitor efficacy of its products, to tackle uncertainties, to collect information on the implementation of the law, and to improve prognostic abilities. It may add express provisions to the law demanding reports of the government on a particular date after the implementation of the law. It may write "sunset clauses" ("guillotine clauses") insofar as the law is expiring at a given date, if it is not renewed in the existing form or as amended. Some parliaments make use of "policy experiments" in that they legislate on a given matter – sometimes in addition to the already existing regulation – and limit the validity of the new legislation to evaluate

its effects. Parliamentary committees, in practice, are involved in monitoring the quality of legislation (NO). This is considered a necessity to allow for a more independent evaluation and particularly strengthen the role of parliament (FR).

A strong instrument of monitoring the quality of laws is *judicial review*. This is done by national (constitutional or supreme) courts, the CJEU, and the ECHR (DE, BE, IT, AT, SI, LU), as opposed to jurisdictions practising a diffuse judicial review of norms. A SE court does not need to apply a provision which it finds to be contrary to the constitution. The CH Federal Supreme Court may exercise very limited constitutional review: it may not declare a statutory law as void. The country wanted to prevent a situation where a court declares unconstitutional what the people considered in keeping with the constitution. Therefore, only secondary legislation and cantonal law may be brought before the Supreme Court. The Supreme Court of the UK hears cases of the greatest public or constitutional importance, affecting the whole population (for example prorogation of Parliament²⁷). Procedures before a Constitutional/Supreme Court may be the abstract or concrete standards control and even individual constitutional complaints (DE). The main problem of constitutional review – as observed in all countries with access to constitutional review – is to draw an often fine line between jurisdiction and policy. Furthermore, it is essential to secure the political independence of judges and to avoid the risk of having judges, who act as replacement legislators. Given the wide and open substantive and value-terms of national constitutions and European Primary Law, some of them advanced to master-keys in the hands of judges. This is true, for example, for “proportionality”.

“Legal Systems can be likened to public gardens. They work best when they are properly kept and maintained, and this allows them to be easily used” (IT). A proper “law-making housekeeping” allows for legal certainty, creative compliance, and effective implementation (AT). This includes, of course, sweeping out anachronistic and unnecessary legislation and bringing about amendments. Doing so, the legislator closes the circle of legislation and opens up a new one.

5. Formal Legisprudence: Structure, Language, Techniques of Law –Drafting.

²⁷ *R (Miller) v The Prime Minister* [2019] UKSC 41.

The analysis of formal jurisprudence in European jurisdictions has shown that, although drafting legislation is very much a matter of national eccentricity, within Europe drafting styles increasingly converge.

Most jurisdictions introduce rules of legislative drafting that bind the professional drafters.²⁸ Austria,²⁹ Belgium,³⁰ Bulgaria,³¹ Croatia,³² the Czech Republic,³³ Cyprus,³⁴ Denmark,³⁵ Estonia,³⁶ Finland,³⁷ France,³⁸ Germany,³⁹ Greece,⁴⁰ Italy,⁴¹ Latvia,⁴² Luxembourg,⁴³ the Netherlands,⁴⁴ Poland,⁴⁵ Portugal,⁴⁶ Romania,⁴⁷ Spain,⁴⁸ and the UK⁴⁹

²⁸ For the synthesis of national drafting conventions in this chapter, see H Xanthaki and C Stefanou, “Drafting for Transposition of EU Criminal Laws: the EU Perspective” [2003] *European Current Law Review* xi-15.

²⁹ See *Legistische Richtlijnen*, 1990, <https://www.justiz.gv.at/web2013/home/verfassungsdienst/legistik/e-recht-und-legistische-richtlinien/legistische-richtlinien~2c94848a60c158380160e4e3747c0c33.de.html>.

³⁰ See *Principes de technique législative - Guide de rédaction des textes législatifs et réglementaires*, Conseil d’Etat, http://www.raadvst-consetat.be/?page=technique_legislative&lang=fr, which replaces the *Traité de légistique formelle*, Circular of the Prime-Minister of 23 April 1982.

³¹ See Law on Normative Acts, Promulgated, State Gazette No. 27/3.04.1973, amended and supplemented, SG No.65/21.07.1995, supplemented, SG No. 55/17.06.2003, effective 18.12.2003, amended and supplemented, SG No. 46/12.06.2007, SG No. 34/3.05.2016, effective as of 4.11.2016, <https://www.legislationline.org/documents/id/22269>.

³² See Croatian Guidelines for Legislative Drafting, June 2015.

³³ See Resolution of the Government no. 188, 19 March 1998, <https://www.vlada.cz/cz/ppov/lrv/dokumenty/legislativni-pravidla-vlady-91209/>.

³⁴ See Legal Service of the Republic, *Guidelines for the drafting of national and transposition legislation*, March 2017.

³⁵ See Zahle, Dansk forfatningsret I (2001) 263 an Zahle (4).

³⁶ See Regulation 279, Regulatory Rules on draft Normative Acts, RT 1, 1999, 73, 695; 2004, 10, 61.

³⁷ See *Bill Drafting Instructions* (2006, Ministry of Justice publication 2006:3, Helsinki), <https://oikeusministerio.fi/en/bill-drafting-instructions>.

³⁸ See *Circulaire relative à la codification des textes législatifs et réglementaires*, Circular of Prime Minister of 30 May 1996, JORF n°129 du 5 juin 1996 page 8263, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000742705&categorieLien=id>; also see *Circulaire relative aux règles d’élaboration, de signature et de publication des textes au Journal Officiel*, Circular of the Prime Minister of 2 January 1993.

³⁹ See *Handbuch der Rechtsförmlichkeit*, 1991 and 2008 (revised), https://www.bmjv.de/DE/Themen/RechtssetzungBuerokratieabbau/HDR/HDR_node.html.

⁴⁰ Manual for the procedures of Inter-ministerial coordination of the Greek Government, June 2018, <http://www.ggk.gov.gr>.

⁴¹ See N Jotti e Camera dei Deputati, “Formulazione tecnica dei testi legislative” [1986] 109 *Il Foro Italiano* 139 and 147; also see *Regole e suggerimenti per la redazione dei testi normativi*, 1992 and 2007, <http://web.consiglioveneto.it/qualita/manuale%20drafting.pdf>; also *Istruttoria legislativa nelle commissioni*, 1997, https://www.senato.it/1057?testo_generico=28&voce_sommario=62.

⁴² See *Normatīvo aktu projektu izstrādes rokasgrāmata*, <https://tai.mk.gov.lv/book/1/chapter/178>.

⁴³ See M Besch, *Traité de légistique formelle* (2007, Service Central de Législation, Luxembourg).

⁴⁴ See *Aanwijzingen voor de regelgeving or Ar*, 1992, <https://www.kcwj.nl/kennisbank/integraal-afwegingskader-beleid-en-regelgeving/verplichte-kwaliteitseisen/aanwijzingen-1>; also see C. Borman (ed.), *Aanwijzingen vor de Regelgeving* (1993, Zwolle, the Netherlands).

⁴⁵ See Regulamin Pracy Rady Ministrów, Regulamin RM, Law on Normative Acts, Promulgated, State Gazette No. 27/3.04.1973, amended and supplemented, SG No. 65/21.07.1995, supplemented, SG No. 55/17.06.2003, effective 18.12.2003, amended and supplemented, SG No. 46/12.06.2007, SG No. 34/3.05.2016, effective as of 4.11.2016.

⁴⁶ See Assembleia da República, *Regras de Legística a Observar na Elaboração de Actos Normativos da Assembleia da República*, <http://ialorg.wpengine.com/wp-content/uploads/2018/02/RegrasLegistica-AR.pdf>;

have introduced texts that include some guidelines or standards of quality for national drafters. For the rest of the jurisdictions drafting principles derive from their legislative traditions. These guidelines and principles are applicable to all national texts, irrespective of their role as implementation documents of purely national policy or as transposition documents. Clarity, simplicity, precision, accuracy and plain language are common standards of good quality of legislation both in the common and in the civil law drafting styles.⁵⁰ Consideration of the circle of persons which are the main users of the legislative texts,⁵¹ consideration of any interpretative problems arising from the text,⁵² the need for consistency with existing legislation, avoidance of irrelevant provisions and the use of uniform terminology are all rules of drafting that are common in the legislative guidelines of European jurisdictions.⁵³

Legislative action as a means of regulation must be selected only if it is an essential and effective means of ending legal uncertainty. This is expressly the case in Belgium, France, Germany and Portugal.⁵⁴ However, even elsewhere this principle would apply as it is ensuing to the principle of proportionality: only proportional measures are necessary and efficient means of attaining the aim of the law and, consequently, only proportional measures may fulfil the imposed national tests of necessity and efficiency.

The principle of legality is expressly introduced in Germany and Portugal.⁵⁵ Elsewhere the other Member States the principle is consequential to the hierarchy of sources of law,

also see Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects for normative acts.

⁴⁷ See Law No. 24 Of 27 March 2000 On The Rules Of Legislative Technique For The Preparation Of Normative Acts (LEGE nr. 24 din 27 martie 2000 privind normele de tehnică legislativă pentru elaborarea actelor normative), <https://www.global-regulation.com/law/romania/3071730/-lege-nr.-24-din-27-martie-2000-privind-normele-de-tehnic-legislativ-pentru-elaborarea-actelor-normative.htm> Law 24/2008.

⁴⁸ See Directives on the form and structure for the schemes of projects of laws, 1991; also see Norms on the consultation regime of the *Congreso de los Diputados e del Senado*, 1989.

⁴⁹ See Consolidation of Enactment (Procedure) Act 1949, 41 *Statutes* 741; also see Statutory Instruments Act 1946, 41 *Statutes* 717; Interpretation Act 1978, 41 *Statutes* 899.

⁵⁰ See G. C. Thornton, *Legislative Drafting* (1996, Butterworths, London/Dublin/Edinburgh), pp.52-54; also see R. Pagano, *Introduzione alla legistica: l'arte di preparare le leggi* (1999, Giuffrè Editore, Milano), pp.26-30.

⁵¹ See M. Aimis, *La legge oscura* (1997, Laterza, Bari), p.103.

⁵² See V. Fronsini, *Lezioni di teoria dell' interpretazione* (1993, Bulsoni, Roma), p.1993; also see W.A. Leitch, "The Interpretation Act: ten years later: 16 *Northern Ireland Legal Quarterly* (1958) 215, at 236-237.

⁵³ See R. Pagano, 1999, *op.cit.*, pp.37-39.

⁵⁴ See the French Circular of 2nd January 1993 on the rules for the elaboration, signature and publication of texts in the Official Journal and to the coming into force the particular procedures of the Prime Minister, art.2.1.1.1.; German *Gemeinsame Geschäftsordnung der Bundesministerien*, 15 October 1976 as modified, art.40; German Manual of judicial formalities, 1991, para.26-28; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.1a.

⁵⁵ See the German Manual of judicial formalities, 1991, para.31-32; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.4.

which invariably place EU and the Constitution or constitutional laws higher than laws or executive decrees.

Drafting for a circle of users is reflected in the Austrian and German appreciation that legislative texts are mainly used by lay persons whose lack of legal knowledge does not allow for complicated, specialised texts full of legal terminology,⁵⁶ as well as in the German requirement for the clear determination of the new duties and rights introduced by the legislative text.⁵⁷ An expression of this rule can be found in the common rule for plain language and unambiguity.

Clarity of legislation is a principle expressly introduced in Austria, Belgium, France, Germany, the Netherlands, Portugal, Spain and the UK.⁵⁸ Unambiguity is required from Belgian, German, Italian, Portuguese, Spanish and UK drafters.⁵⁹ Simplicity is a rule of drafting in Austria, Belgium, Germany, Portugal, and Spain.⁶⁰ In the UK simplicity is also pursued but not to the detriment of certainty.⁶¹ Plain language, as an expression of the rule for the consideration of the language accessible by the lay persons who will be the main

⁵⁶ See Austrian *Legistische Richtlinien*, 1990, art.9; also see the German *Gemeinsame Geschäftsordnung der Bundesministerien*, 15 October 1976 as modified, art.35; German Manual of judicial formalities, 1991, para.34.

⁵⁷ See the German Manual of judicial formalities, 1991, para.59.

⁵⁸ See Austrian *Legistische Richtlinien*, 1990, art.7; Belgian *Circulaire de Premier Ministre*, 23 April 1982, art.1; German *Gemeinsame Geschäftsordnung der Bundesministerien*, 15 October 1976 as modified, art.35; German Manual of judicial formalities, 1991, para.33-39; Italian *Regole e suggerimenti per la redazione dei testi normativi*, 1991, art.2; Dutch *Aanwijzingen Voor de Regelgeving*, 1992, art.218; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.7c; Spanish Guidelines on the form and structure of projects of laws, 1991, approved by the Decision of the Council of Ministers of 18 October 1991, OJ of 18 November 1991, no 276, disposition 27774, pp.37235-37, at 37235; also see L. Neville-Rolfe, "Good regulation: weighing-up the risks", in A. Kellermann, G. Ciavarini-Azzi, S. Jacobs and R. Deighton-Smith, *Improving the Quality of Legislation in Europe* (1998, Kluwer Law, The Hague), pp.245-249; G.C. Thornton, *op.cit.*, pp.53-54.

⁵⁹ See Belgian *Circulaire de Premier Ministre*, 23 April 1982, art.1; *Gemeinsame Geschäftsordnung der Bundesministerien*, 15 October 1976 as modified, art.35; German Manual of judicial formalities, 1991, para.37; Italian *Regole e suggerimenti per la redazione dei testi normativi*, 1991, art.2; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.7c; Spanish Guidelines on the form and structure of projects of laws, 1991, approved by the Decision of the Council of Ministers of 18 October 1991, OJ of 18 November 1991, no 276, disposition 27774, pp.37235-37; for an analysis of ambiguity under British law see Black, *The Labyrinth of Language* (1972, Pelican Press, London), p.107.

⁶⁰ See Austrian *Legistische Richtlinien*, 1990, art.1; Belgian *Circulaire de Premier Ministre*, 23 April 1982, art.1; German *Gemeinsame Geschäftsordnung der Bundesministerien*, 15 October 1976 as modified, art.35; German Manual of judicial formalities, 1991, para.33; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.7c; Spanish Guidelines on the form and structure of projects of laws, 1991, approved by the Decision of the Council of Ministers of 18 October 1991, OJ of 18 November 1991, no 276, disposition 27774, pp.37235-37.

⁶¹ See *The Preparation of Legislation – Report of a Committee appointed by the Lord President of the Council* (Renton Report) of May 1975, ch.XI, art.14.

users of the particular legislative text is expressly introduced in the Netherlands, Portugal and the UK.⁶²

The requirement of the use of the same term when referring to the same concept is an expression of the principle of unambiguity and is expressly introduced in Austria, Belgium, Italy, the Netherlands and Portugal.⁶³ On the basis of the same principle of unambiguity, unnecessary abbreviations are to be avoided in Germany and Italy.⁶⁴ As an expression of the need for clarity and unambiguity, lack of pointless repetitions of existing provisions which is often followed by the use of different terms to reflect the same concept is to be avoided not only under the Austrian, Italian and Dutch guidelines.⁶⁵ Long sentences must be avoided in Austria, Germany, and Italy.⁶⁶ It is noteworthy that the UK does not introduce a general rule against long sentences; nevertheless, a similar result is achieved through restrictions in the use of subordinate sentences (especially before the subject of the phrase or between the subject and the verb of the sentence)⁶⁷ and against long sentences which are not split into paragraphs.⁶⁸ Moreover, imprecise references to other legal texts are expressly prohibited in the Austrian, German, Italian, Dutch, and Portuguese guidelines.⁶⁹

⁶² See the Dutch *Aanwijzingen Voor de Regelgeving*, 1992, arts.54 and 218; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.7a; for the UK see M. Faulk and I.M. Mehler, *The Elements of Legal Writing* (1994, Macmillan Press, London).

⁶³ See Austrian *Legistische Richtlinien*, 1990, art.31; Belgian *Circulaire de Premier Ministre*, 23 April 1982, art.3a; Italian *Formulazione tecnica dei testi legislativi*, 1986, G.U., no. 123 of 29 March 1986, Ordinary Supplement, no. 40, art.16a; Italian *Regole e suggerimenti per la redazione dei testi normativi*, 1991, art.16; Dutch *Aanwijzingen Voor de Regelgeving*, 1992, art.58; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.7a.

⁶⁴ See *Gemeinsame Geschäftsordnung der Bundesministerien*, 15 October 1976 as modified, art.34; Italian *Formulazione tecnica dei testi legislativi*, 1986, G.U., no. 123 of 29 March 1986, Ordinary Supplement, no. 40, art.9.

⁶⁵ See Austrian *Legistische Richtlinien*, 1990, art.3; Italian *Regole e suggerimenti per la redazione dei testi normativi*, 1991, art.19; Dutch *Aanwijzingen Voor de Regelgeving*, 1992, art.78.

⁶⁶ See Austrian *Legistische Richtlinien*, 1990, art.18; German Manual of judicial formalities, 1991, para.51; Italian *Regole e suggerimenti per la redazione dei testi normativi*, 1991, art.1.

⁶⁷ See The Preparation of Legislation – Report of a Committee appointed by the Lord President of the council (Renton Report) of May 1975, art.16.

⁶⁸ See The Preparation of Legislation – Report of a Committee appointed by the Lord President of the council (Renton Report) of May 1975, art.8.

⁶⁹ See Austrian *Legistische Richtlinien*, 1990, art.56; German Manual of judicial formalities, 1991, para.97-109; Italian *Regole e suggerimenti per la redazione dei testi normativi*, 1991, art.55; Dutch *Aanwijzingen Voor de Regelgeving*, 1992, art.78; Portuguese Deliberation of the Council of Ministers of 8 February 1989 on the approval of the general principles for the elaboration of projects of normative acts, art.6c.

In parallel to these, there still are EU standards to be observed, and these offer great guidance to transposition drafters. From the point of view of composition, the EU has a rich set of rules. In their purity these drafting rules bind the EU and its institutions. However, as early as in 1998 the Commission in its *Better Lawmaking Report 1998: A Shared Responsibility*⁷⁰ the role of Member States in the process of improving the quality of EU legislation was fully established. The correct transposition of EU Directives was one of the eight main guidelines for action introduced by the Report.⁷¹ Transposition legislation must be clear⁷², unambiguous and simple. Clarity includes the use of plain language and the avoidance of too many cross-references, and political statements without legislative character.⁷³ Unambiguity covers the use of the same term throughout the text, lack of unnecessary abbreviations, and lack of pointless repetition of existing provisions. Simplicity incorporates lack of jargon, long sentences and imprecise references to other legal texts.⁷⁴ In principle, national transposition laws must be capable of leading to effectiveness of national and, as a member of the implementing collective⁷⁵, to effectiveness of EU regulation.

Finally, gender neutrality and its successor gender inclusivity are gaining ground as tools of clarity⁷⁶. Gender-neutral language (GNL) refers to language that includes all sexes and treats women and men equally. Gender-Inclusive Language (GIL) language takes the argument further. Gender inclusivity is prevalent in the UK but its seeds are evident in Germany with the use of the asterisk at the ending of words, in France with support to the third plural, in Spain and in Italy with a number of innovations attempted at the local level.

6. Teaching Legislation: How to teach and learn professional Legislation.

⁷⁰ See COM (1998) 715 final.

⁷¹ See Bulletin EU 5-1998, point 1.8.3.

⁷² When it comes to transposition, individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and duties and, where appropriate, to rely on them before the national courts: see C-49/00 Commission of the European Communities

v. Italian Republic, [2001] ECR I-8575.

⁷³ See Opinion of the Economic and Social Committee of 5 July 1995 on plain language, OJ 1995 C 256/8.

⁷⁴ See Resolution of the EP of 4 July 1996 on the report of independent experts on simplification of Community legislation and administrative provisions, COM(95)288 fin.; see also A-4 0201/96, OJ 1996 C 211/23.

⁷⁵ See L J O'Toole Jr, 'Multi-organizational Policy Implementation: Some Limitations and Possibilities for Rational Choice Contributions' in F W Scharpf (ed.), *Games in Hierarchy and Networks: Analytical and Empirical Approaches to the Study of Governance Institutions* (Frankfurt am Main/Boulder, Colo., Campus Verlag/Westview Press, 2003) 27.

⁷⁶ See H Xanthaki, "Gender-inclusive legislative drafting in English: A matter of clarity", in : Alexandre Flückiger (éd.), *La rédaction administrative et législative inclusive, la francophonie entre impulsions et résistances* (2019, Berne) 57.

Most European jurisdictions are beginning to realise that legislative drafting is a separate discipline of law, which requires training alongside mentoring on the job. However, there remains a diversity between common and civil law jurisdictions.

In the former, formal legisprudence tends to be taught in dedicated courses of an academic or professional nature. The oldest and still leading academic programme teaching formal legisprudence is the MA in Drafting legislation, regulation, and policy at the Sir William Dale Centre of the Institute of Advanced Legal Studies of the University of London. Professional courses at the Sir William Dale Centre, and the King's Inns in Dublin are dedicated to this issue. But of course most Universities offer elements of formal legisprudence in the form of courses in Statutory Interpretation, mostly at undergraduate level.

In civil law jurisdictions emphasis is on mentoring on the job, whereas the distinction between experts in the substantive field of law and legisprudence is quite foggy. Most Universities offer courses that study legislation.

Although the image painted here seems rather disheartening, the future for legislative studies is anything but. Legislation is at the forefront of the regulatory debate and, with the EU at the leading role, there is increasing focus on formal legisprudence and legislative quality.

Trends and Perspectives of Legislation and Legisprudence

The comparative analysis of the rich chapters offered in this work confirms that the problems associated with legislation are very similar: multitude of legislation, bad legislation, and unapproachable legislation.

These problems continue despite the lengthy promotion and application of RIA in most countries. This comes as little surprise to experts in legislation, who have always felt that legislative scrutiny should go hand in hand with attention to legislation as a product. And this is the value of this work, much more so as a follow-up to the first volume in legislation in the EU. Focus is now beginning to turn from pre and post legislative scrutiny to the

actual legislation. And here there is a lot of work to be done. Legislation requires attention on itself rather than just the legislative environment, the legislative process, and legislative scrutiny.

There is a need to focus on common legislative failures, and to search for common legislative solutions. The EU is and can be the catalyst of legislative reform. Its Better Regulation agenda can expand to a more focused better legislation agenda, looking to identify who legislation is speaking to, and how its messages can be clearly heard by its peoples.

Identifying who legislation is addressed to, and who uses it, is the first step towards a new legislative strategy. In an era of direct information via the internet, users are searching legislative texts in order to find the information that they need directly, and without intervention from professionals. This can only be viewed as a challenge, and an invitation for a new relationship between law-makers and citizens.

Viewing legislation as a direct channel of communication between the state and its citizens can be used to explain the rationale behind regulatory action, the benevolent goal of the legislation, the precise action that citizens are asked to undertake, and the results that are sought.

Revolutionising legislation and its drafting in this manner can promote compliance to the law, not by means of what we now know to be ineffective punishment but by means of instigation of participation in the joint regulatory effort for the achievement of beneficial long term change.

This can enhance citizen participation in regulatory efforts, thus promoting efficacy of regulation and subsequent achievement of the desired regulatory results. But it can go much much further. By taking citizens with us in regulatory effort, drafters can instil loyalty and trust of the citizen to the state. Populist voices can be hushed, and a new relationship with legislation, based on voluntary commitment, can come to the fore, bringing with it an end to the current aversion to power and a new era of trust and collaboration between the state and its peoples.

This global change to legislation and legislating has started within Europe. It is hoped that this book, and its first volume, can facilitate the cross-fertilisation of innovation and best practice in Europe and beyond.