Implementation of Better Regulation Measures in the Internal Security Draft Legislation

The Case of Estonia

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Abstract

The article analyses the implementation of better regulation measures in the internal security (IS) strategies, draft legislation and administrative routines of the Estonian Ministry of the Interior. The article includes the results of five substudies: (a) the research problem emerged from the studies of the explanatory memoranda of draft laws 2004-2009 according to which the Ministry has some deficiencies in fulfilling the better regulation requirements; (b) mapping of better regulation and internal security policy concepts; (c) content analysis of Estonian IS strategy documents; (d) systematization of Estonian IS laws; and (e) sociological e-survey of officials. Theoretical framework integrates the concepts of institutional theory, discursive democracy, realistic legisprudence and the adaptive strategic management.The main conclusions drawn by the article are as follows: the analysis of the knowledge of draft legislation and the excessive amount of laws in the IS field gives evidence of a lack of systematic regulatory impact assessment (IA); the concept of better regulation is not integrated into IS policy documents (insufficient planning and budgeting of IA); and a sociological e-survey of the officials of the Ministry indicates discontent with the management of the IA of policies and draft legislation. According to institutional analysis, this shows readiness for changes in the context of risk society challenges and adaptation with budgetary contractions.

Keywords: better regulation, internal security policy, impact assessment, participation, Estonia.

A. Introduction

Security is a basic public good, and it is difficult to overestimate the importance of internal security (IS) in society and the quality of its policy design and the law behind it. On the other hand, there are only a few academic articles available where the vital connections between better regulation measures (*e.g.* impact assessment, consultations, simplification) and internal security policy are discussed.

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This article gives a brief overview of the general context and theoretical approaches and then analyses the implementation of better regulation guidelines in the IS policy on the basis of substudies. It includes a pre-study, normative content analysis of the explanatory memoranda of draft laws; a methodology design and literature overview, a content analysis of strategic IS policy documents; a systematization of Estonian IS law in the framework of European Union security law and a sociological e-survey of officials working in the Estonian Ministry of the Interior. Finally, a synthesis with integrated conclusions is added, asking how to learn from the past and to optimise and compensate the limited resources with the help of better regulation in a small state like Estonia.

B. Context, Theoretical Framework and Study Design

The general context of the article is related to the institutionalisation of the Organization for Economic Co-operation and Development (OECD) and European Union (EU) good governance and better regulation concepts, and also to the recent impacts of financial crisis to the state budget and strategic planning of public policies (hard structural reforms, budgetary cuts and adaptation agenda since 2008).

Since the beginning of the 1990s, the OECD has played a leading role in enhancing the principles of better regulation and quality standards for regulation, collecting experiences and research data from its member countries, on the basis of which the OECD has formulated programmes, recommendations and policy guidebooks for the successful adoption and implementation of regulatory impact analysis/assessment.[1]

In the EU, the subject matter of better regulation began to be considered more intensely after the OECD member states' regulatory reforms in the 1990s[2] and the EU Lisbon Summit, where the high-level advisory group chaired by M. Mandelkern was formed. The Mandelkern Group Report with policy recommendations serves as the first agreement aimed at better regulation on the EU level.[3]

Estonia joined the third wave of regulatory reforms in OECD countries, and in many respects this wave is still on the way.[4] Many critical observations can be found in recent writings on transitional problems of the Central and Eastern

1 OECD Recommendations, 1995-2013, available at <www.oecd.org/regreform/regulatory-policy/recommendations-guidelines.htm> accessed on 15 January 2014; also M. Ben-Gera, 'Impact Assessment: Role, Procedures, Methods and Good Practices in OECD and CEE Countries', *in* A. Kasemets *et al.* (Eds.), *Society, Parliament and Legislation*, Riigikogu Kantselei, Tallinn, 1999, pp. 27-35; J. Tala, 'Better Regulation Through Programs and Quality Standards – Are New Perspectives Needed?', 2010 *Legisprudence*, p. 197; C. Radaelli, 'Regulating Rule-Making via Impact Assessment', *Governance*, Vol. 23, No. 1, 2010, p. 90.

2 OECD, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance*, OECD, Paris, 2000.

3 Mandelkern Group on Better Regulation, 2001, <http://ec.europa.eu/governance/better_regulation/documents/mandelkern_report.pdf>, accessed 8 October 2012.

4 A. Kasemets, 'The Institutional Preconditions for Knowledge-Based and Sustainable Policy-Making in Estonia', *Riigikogu Toimetised* (*Journal of Estonian Parliament*), Vol. 14, 2006, pp. 152-160 (in Estonian).

European countries, and in most cases they also apply to Estonia. For example, Paul Blokkers' argumentation based on Jürgen Habermas' ideas of a 'catching-up revolution' and a 'rewinding revolution': "[...] for the former communist countries, 1989 signified a kind of rewinding revolution that allowed them once again to catch up with the West, after the interlude of the failed modernizing project of communism. This meant that these societies were to adopt traditions of the *Rechtsstaat* as well as those of capitalist market economies *à la* the West."[5] A similar viewpoint on regulatory policy was expressed by Claudio Radaelli, who noted "[...] the emulation perspective, which is concerned with the imitation of OECD templates for regulatory oversight by legitimacy-seeking governments."[6] Matt Andrews explores the OECD good governance programmes from another point of view. He shows that a one-size-fits-all approach to effective models of good governance does not exist. Often, models with similar names mean different things in different countries, because "variation is one of the world's core characteristics, manifest in our abilities to categorize things on the basis of uncountable variables and in the many manifestations of global inequality".[7] In brief, the evolution of democracy in Central and Eastern Europe over the past twenty years has offered scholars an opportunity to observe the effects of different institutional choices on political behaviour and democratic governance. The scholars making comparative studies and policy recommendations must know the context.

Estonia started the developmental activities to build up preconditions for better regulation and regulatory impact assessment in collaboration with the OECD in the mid-1990s. Considering the experience of the OECD (*e.g.* EU) member states, there was no reason to think that better regulation and other good governance practices would start to function without political commitment in regulatory policy, guidelines, systematic training and surveillance mechanisms. To answer those challenges the Concept of Regulatory Impact Analysis was developed by the Ministry of Justice in 2007-2009 and a Development Plan for Legal Policy until 2018 was adopted by the Riigikogu (Parliament) on 23 February 2011.[8] In this context this article offers an overview of the long transition process, institutional problems and some research ideas for the comparative studies of regulatory governance in the field of internal security.

Theoretical approaches behind the substudies (*e.g.* the concepts of the rule of law, discursive democracy, good governance and better regulation, realistic legisprudence, risk society, internal security policy and adaptive strategic management in the broader framework of institutional theory) make it possible to evalu-

5 P. Blokker, '1989, Democracy, and Social Theory: A Return to Normality?', *European Journal of Social Theory*, Vol. 12, No. 3, 2009, pp. 307, 309. Similar 'habermazian' approach: M. Lauristin *et al.*, Return to the Western World. Cultural and Political Perspectives of the Estonian Post-Communist Transition, Tartu University Press, Tartu, 1997, pp. 77-84.

6 Radaelli, 2010, at 90.

7 M. Andrews, 'Good Governance Means Different Things in Different Countries', *Governance*, Vol. 23, No. 1, 2010, pp. 7–35, at 7.

8 The Estonian Ministry of Justice, 'General Description of Impact Assessment System', 2008, <www.just.ee/41314>; Estonian Development Plan for Legal Policy until 2018. State Gazette (RT III, 7 March 2011) (in Estonian).

ate the connections between the invisible system of values, better regulation concept, terms and routines dominant in policy design and its materialisation in strategies and laws. Those theoretical concepts are related to different social science subdisciplines analysing the relations of society, power and law. Some examples given here focus on discursive democracy and institutional theory.

The authors argue that some liberal constitutional principles such as freedom of information (as a right), access to public sociolegal information (*e.g.* explanatory notes of draft laws) and the quality of this public information can be observed as universal principles in political theory and there are no remarkable tensions between different left-right ideologies (Habermas, Rawls, Hayek, etc.). This is a common ground of universal human rights. On the other hand, one of the few issues on which both scholars of sociology of law and public administration agree in theory is the centrality of the moral issues. Jürgen Habermas' late-modern theory of communicative action and democratic discourse[9] differentiates the imperative demands of the system from the rationality of the person's everyday *lifeworld* in order to analyse the integration of the changing social and law systems. He also sees a mental danger in many social welfare programmes that have a tendency to colonise our everyday life with their pre-care. The goal of Habermas' *communicative ethics* is a society made up of the dialoguing subjects and striving to achieve a consensus acceptable to the majority. If the legal act functions as an instrument of some elite/lobby group, the market or state interests, the *lifeworld* of the people has been colonised because of the systematically *distorted communication*.[10]

The model of discursive democracy has clear moral requirements – persons should be treated not merely as objects of legislation, as passive subjects to be ruled, but as autonomous agents who take part in the governance of their own society. In the market area concerning legislation and public services the extent of biased, *asymmetric information* should be reduced. This also means that the impact assessment (IA) of political options in economic, social, ecological and cultural terms will be more important – if the political objectives and IA are not clear and measurable, we cannot speak about rationality, responsibility and communicative ethics. The quality of public information, a guaranteed equal access to the results of IA and the possibility to participate in lawmaking are deeply related to human rights.[11]

The political institution, its legitimisation and the behaviour of politicians, officials and ordinary citizens are a part of cultural subsystems. The legal system

9 J. Habermas, *The Theory of Communicative Action: Reason and the Rationalisation of Society*, Polity Press, Cambridge, 1984; J. Habermas, *Between the Facts and Norms. Contributios to the Discourse Theory of Law and Democracy*, Polity Press, Cambridge, 1996.

10 Habermas, 1996; also B. Carlsson, 'Communicative Rationality and Open-Ended Law in Sweden', 1995 *Journal of Law & Society*, pp. 475-503.

11 Habermas, 1996, at 4-6, 183; also G. Verschraegen, 'Human Rights and Modern Society: A Sociological Analysis From the Perspective of System Theory', *Journal of Law and Society*, Vol. 29, No. 2, 2002, pp. 258-281, at 259; B. Dorbec-Jung, 'Realistic Legisprudence: A Multidisciplinary Approach to the Creation and Evaluation of Legislation', *Associations*, Vol. 2, 1999, pp. 211-237; and Appendix.

(culture) is largely made up of informal norms, including upbringing values, customs and moral traditions, socio-economic relations, and also the government procedure, the actual court decisions, and the behaviour of the police. In this context the wide-ranging translation/implementation of foreign legal systems is not possible too quickly, the massive transposition of international regulations and insufficient public debate can increase the level of 'systematically distorted communication' and harm the institutional mechanisms of social cohesion.[12]

In Denis Gallighan's interpretation a central idea in Hart's *Concept of Law* (1961) is that law is a system of rules that officials accept. Acceptance means that they regard the rule as creating obligations. The activity of interpretation is also the acceptance of the requirements of law and lawmaking rules in the daily affairs of officials. According to Gallighan, the central question of *law and society* studies is why an official recognises the normativity of obligations, because a legal system exists when the officials as a whole accept the validity of the rule of recognition.[13]

The institutional theory provides various opportunities for the explanation of politico-administrative behaviour of individuals and organisations dealing with regulatory governance issues. Institutional theory may also explain why actors who identify in policy documents and better regulation guidelines the opportunities to improve regulatory management may be unwilling to do so in practice.[14] W. Richard Scott asserts that "Institutions are social structures that have attained a high degree of resilience. Institutions are composed of cultural-cognitive, normative, and regulative elements, that, together with associated activities and resources, provide stability and meaning to social life." Since institutions do not exist empirically, we have to look for instances where they 'materialise'. Scott identifies four types of institutional carriers: *symbolic systems* (rules, laws, values, expectations, terms, categories, etc.); *relational systems* (governance systems, regimes, authority systems, structural isomorphism, identities, etc.); *routines* (protocols, standard operating procedures, jobs, roles, etc.); and *artefacts* (objects complying with mandated specifications, objects meeting standards, etc.).[15] Institutions operate at different levels of jurisdiction, from the world system to localised interpersonal relationships (see Table 1).

In most European countries, the analytical information on social, budgetary, economic, environmental, security and administrative objectives and impacts of proposed legislation has to be given in an explanatory memorandum (note, letter) accompanying a draft law. The explanatory memorandum of the draft law is (has to be) a normatively structured legal document, which includes the results of pub-

12 R. Cotterrell, 'Law in Culture', *Ratio Juris*, Vol. 17, No. 1, 2004, pp. 1-14; also A. Kasemets, *Sociological and Public Opinion Polls as Reflection to Parliament and Civil Society*, *in* The annual conference of the European Sociological Association 'Ageing Societies, New Sociology', Murcia, Spain, 22-27 September 2003, <www.um.es/ESA/papers/St9_61.pdf>, accessed 8 October 2012.

13 D. Galligan, *Legal Culture or How to Take Law Seriously?*, University of Oxford, Centre for Socio-legal Studies, Seminar Series, Legal Cultures, Working paper, 2005.

14 OECD, 2000, at 70-73.

15 W.R. Scott, 'Institutions and Organisations', Sage, Thousand Oaks, CA, 2001, pp. 40, 48, 77.

Table 1 Levels of institutional analysis

Level	Examples
World system	OECD and EU countries: *values, concepts, rules, norms, routines, etc.*
Societal	Estonia: *values, concepts, rules, norms, routines, etc.*
Organisational field	The public sector (e.g. Government, Parliament, State Audit Office, National Court, ministries, etc.): *values, concepts, rules, norms, routines, etc.*
Organisational population	Politicians and civil servants, contractual experts
Organisation	Ministry
Organisational subsystems	Ministerial departments and agencies

Source: Adopted from Scott, 2001, at 77, 85 by Kasemets, 2006.

lic consultations.[16] In other words, the explanatory memoranda of draft laws are documented 'materialisation' of politico-administrative behaviour, a 'policy window', to show the dominant values, norms, terms and thinking routines in policy/lawmaking 'black boxes'.

The research problem of Estonian internal security regulatory policy emerged from the normative content analysis of the explanatory memoranda of draft laws proposed by the Cabinet to the parliamentary proceedings in 2004-2009, according to which the Ministry of the Interior has remarkable problems with observing the better regulation requirements in the draft legislation (see Table 2 and Appendix).[17] This pre-study reflects the problem of selective obedience to rules of draft legislation, showing that the quality of public information on impact assessment and involvement of stakeholders in the explanatory memoranda of draft laws is questionable and the preconditions for knowledge-based (also responsible, moral) internal security political debate are not sufficiently fulfilled.

In addition, the aforementioned problems with quality of draft legislation included the following political, legal and/or social problems: (a) the principles of the rule of law and good governance (*e.g.* legality, equality, transparency, accountability) are not followed to the required level; it also means that the preconditions for the evaluation of the validity of constitutional rules and the quality of law (*e.g.* proportionality, necessity) are not fulfilled[18]; (b) Estonia, like other CEE countries, may have a quite well-structured normative basis for regulatory impact

16 A. Kasemets, 'Impact Assessment of Legislation for Parliament and Civil Society: A Comparative Study of 22 Countries', *in* A. Kasemets (Ed.), *Legal and Regulatory Impact Assessment of Legislation*, Proceedings of ECPRD seminar, Riigikogu Kantselei, Tallinn. 2001, pp. 47-104.

17 A. Kasemets, 'The Gap Between Law-Making Norms and Facts 1998-2009 in the Field of Impact Assessment and Civic Engagement', *Riigikogu Toimetised (Journal of Estonian Parliament)*, Vol. 19, 2009, pp. 104-115 (in Estonian).

18 Even more, if the target groups and impacts on their lives are not specified in the memoranda the EU better regulation principles cannot be applied. The Mandelkern Group Report, 2001, describes the EU approach with a set of seven core principles: necessity, proportionality, subsidiarity, transparency, accountability, accessibility and simplicity. In Estonia those principles are further supplemented by legality, legal certainty, openness and responsibility (The Estonian Ministry of Justice, 2008). The same applies *a fortiori* to internal security regulations. On the other hand, the Ministry of the Interior (*e.g.* Police) has a special role in law enforcement.

assessment and draft legislation, but it is not yet fully internalised in organisational norms and routines of the ministries; (c) access to the regulatory impact assessment information is not guaranteed to stakeholders; (d) lack of impact assessment information decreases the effectiveness of parliamentary debates and may create different administrative, budgetary, social and even legal or security problems in the implementation stage of adopted laws.

Table 2 *The analysis of explanatory memoranda to draft laws 2007-2009. Accordance with normative requirements on impact assessment, references and involvement of stakeholders (%)*

Responsible ministry and the number of draft laws analysed (*n*) (two opposite examples and average)	**Link with EU laws**	**The presence of specific required impact assessment (IA) information in the explanatory memoranda of draft laws (bills)**					**References to information sources used (studies, etc.)**	**References to civic engagement and public participation**			**SUM average fulfilment of requirements**
Categories of information and analysis	**1.0**	**2.1**	**2.2**	**2.3**	**2.4**	**2.5**	**2.6**	**2.7**	**2.8**	**2.1–2.8**	
		Social impact	**Economic**	**Environmental**	**Administrative**	**State budget**	**(Transparency of analysis)**	**Public sector**	**NGOs'**		
The Ministry of Social Affairs ($n = 15$)	80	80	47	13	100	100	60	100	60	**70**	
The Ministry of the Interior ($n = 18$)	33	39	6	6	94	89	28	94	28	**48**	
Cabinet – ten ministries (average, $n = 170$)	61	**31**	**32**	**16**	**91**	**96**	**35**	**97**	**49**	**55**	

Source: Kasemets, 2009, at 109 (excerpt).

The Ministry of the Interior had a similar 'persecutors' position also in an earlier study (2004-2005), where an average sum of the Estonian Cabinet was 52%, and the sum of the Ministry was 47%.[19]

As high-quality legislation is the means of achieving the political aims of the state, and the planning and budgeting of regulatory impact assessment in the state takes place through strategic policy documents, the following statement became the *research hypothesis*: the reason for the problems connected with the quality of legislation is that in the concepts, aims and measures of the Estonian internal security policy documents, the guidelines for better regulation (*e.g.* impact assessment, consultations) have not been taken systematically into account (in other words, there has been a lack of systematic politico-administrative support to implement the better regulation measures).

To analyse preliminary research problems and test the research hypothesis a combined research methodology was designed with related research questions (see Table 3).

Table 3 Methodological design and research questions

Aim, methods, period and data	Main research questions
General aim: to investigate and find evidence on why the Ministry of the Interior may have difficulties in the implementation of better regulation requirements for draft legislation?	Why does the Estonian Ministry of the Interior have difficulties in meeting the requirements of better regulation (e.g. impact assessment, public consultations, simplification) in the lawmaking process?
1. Analysis of literature/policy documents Aim: clarification of key definitions and concepts **Period:** 2010-2011 **Method:** mapping, analysis and systematization **Data:** bibliographical databases (social sciences)	What definitions of better regulation and internal security policy are more common in the academic literature and international reports? How the concepts (e.g. definitions) of better regulation and internal security policy are (and/or would be) integrated according to literature?
2. A content analysis of strategic internal security policy documents **Method:** content analysis. Special codification guidelines are based on the better regulation key areas (e.g. impact assessment, consultations) and descriptions of policy process.[1] **Period:** 2010-2011 **Data:** internal security policy documents (4)	How systematically are the elements of better regulation (e.g. terms, impact assessment, consultations, etc.) implemented in the strategic planning of internal security policy? What kind of connections can be identified between the Ministry of the Interior strategic planning processes and better regulation? To what extent is the national legal policy strategy related to internal security strategy?

19 K. Staroňová, Z. Kovacsy & A. Kasemets, 'Comparing Experience of Introducing Impact Assessment Requirement to Draft Legislation in CEE: The Case of Slovakia, Hungary and Estonia', *in* K. Staroňová, W.N. Dunn & S. Pushkarev (Eds.), *Implementation – the Missing Link in Public Administration Reform in Central and Eastern Europe*, NISPAcee, Bratislava, 2006, pp. 165-197.

Table 3 (continued)

Aim, methods, period and data	Main research questions
3. Mapping and systematization of internal security law in Estonia **Method:** comparative legal analysis based on the Estonian IS policy documents and the categories of EU IS law (see Box 1) **Period:** 2010-2011 **Data:** Estonian database eLaw (eÕigus)	How does the system of EU internal security policy and related internal security law look? How does the system of Estonian security law look and how many separate laws and other regulations can we find in it? Can we see the 'rise of regulatory state' and overregulation? What kinds of regulatory management problems and solutions can be identified on the basis of current Estonian internal security law?
4. A sociological e-survey of the Estonian Ministry of the Interior officials **Methods:** The e-questionnaire had about 500 closed and 33 open questions, e.g. ca 50 questions were related to the better regulation issue. **Period:** 21 February 2011-8 March 2011 **Data/sample:** *n* = 104 officials, general sample ca 160 officials with socio-demographic variables	What kinds of connections can be identified between ministerial regulatory management practices and organisational values and norms? How are the adaptive strategic management processes related to the better regulation measures, and in what way are the answers of respondents reflecting the problems in regulatory management? What are the key problems and solutions to develop internal security policy design and IA routines? To what extent is the Ministry ready for the institutionalisation of better regulation principles? (To what extent do the officials' attitudes and free answers reflect the readiness for change?)
5. Conclusions and synthesis with proposals **Period:** Spring 2012 **Data:** substudies 1-4	Which legal (e.g. better regulation) policy implementation problems need further comparative studies and discussions, and why? How to integrate better regulation and internal security policy measures in an effective way (the case of Estonian Ministry of the Interior)?

[1] Mandelkern Group, 2001; Radaelli, 2010; T.A. Birkland, 'An Introduction to the Policy Process: Theories, Concepts, and Models of Public Policy Making', M.E. Sharpe, Armonk, NY, 2001.

This combined complementary research methodology enables one to study the better regulation, implementation and institutionalisation complexity issues from different perspectives.

C. Results of Substudies

The implementation and institutionalisation of better regulation measures in the internal security policy processes have got little attention in the academic literature. The general aim of the four substudies is to investigate and find evidence on why the Ministry of the Interior may have difficulties in implementing better constitutional regulation requirements for draft legislation. To answer this question, first, we have to clarify the concepts and definitions.

I. Mapping the Concepts of Better Regulation and Internal Security Policy

Analysis of *better regulation* and *internal security policy* literature and mapping of definitions and research problems open the complexity and structural variability of both concepts and 'umbrella' terms. Also, it is important to emphasise that the

better regulation measures are seen as the instruments of quality management and input for effective internal security policy.

1. *The Concept of Better Regulation*

During the last few decades governments in most developed OECD countries have made increased efforts to improve the quality of legislation through various better regulation programmes.[20] Better regulation as a concept lacks a universal definition and therefore acts as an umbrella term to cover a myriad of initiatives, such as improving the quality of impact assessment and reducing the quantity of legislation. According to Radaelli, better regulation is a *process* dealing with the whole life-cycle of the regulations, laying down general rules for determination, assessing, enforcing, implementing and *ex post* assessment of legal rules. Consequently, the guidelines for better regulation may embrace a vast array of measures, including simplification of administrative procedures, consolidation of legal acts, alleviation of the administrative burden, use of market-friendly alternatives, risk-based review, funds allocated for rule-making, standards for consulting interest groups, assessment of the sustainability of the existing as well as of the new regulation, and *ex post* review of the impacts. Among the elements of the better regulation 'package', the regulatory impact analysis (RIA) has to be regarded as the most important.[21]

RIA is a set of procedures to be followed for the appraisal of regulation. It can be used both *ex ante* (*i.e.*, at the stage of policy formulation, to appraise proposals) and *ex post*. It typically revolves around the steps of problem definition, the identification of options, consultation, the classification of costs and benefits, a plan for monitoring, and the choice of an option on the basis of decision-making criteria such as cost effectiveness, minimization of administrative burdens, cost-benefit analysis ratios, or thresholds.[22] The fact that RIA has been considered the most important element of better regulation programmes could be explained by the strong instrumental view on legislation, which is the predominant way to understand the role and functions of regulation for politicians, within governmental bureaucracies, and also for most stakeholders.[23] It also has a strong potential in terms of evidence-based policy, accountability and transparency of policy formulation.

The Mandelkern Group Report serves as the first agreement on the EU level, including six recommendations with the aim of achieving better regulation: (1) policy implementation options; (2) impact assessment; (3) consultations; (4) simplification; (5) access to regulation; (6) effective structures.[24]

20 OECD, *Policy Recommendations on Regulatory Reform. Regulatory Impact Analysis: Best Practices in OECD Countries*, OECD, Paris, 1997; OECD, *Building an Institutional Framework for Regulatory Impact Analysis: Guidance for Policy Makers*, OECD, Paris, 2008; Radaelli, 2010, at 90; Tala, 2010, at 193.

21 Radaelli, 2010, at 90.

22 *Ibid.*, at 90-91.

23 Tala, 2010, at 203-204.

24 Mandelkern Group, 2001, at 7, 13-52.

2. *The Concept of Internal Security Policy*

Defining internal security (as a policy area) itself has proven to be a difficult task. It traditionally referred to the territorial state and its geographic border beyond which 'inner' should become 'outer' and where security is traditionally one-dimensional, military security. Brenninkmeijer states that security priorities have shifted. They encompass the prevention of crime, of illegal transnational trafficking and smuggling, the control of clandestine migration and the fight against urban juvenile delinquency.[25]

The European Security Research and Innovation Forum (ESRIF) stated: "the ESRIF took a holistic approach to security, taking the widest definition of security and examining how that can be achieved regarding society itself and the freedoms we want to maintain or enhance."[26] The EU Internal Security Strategy (2010) gives an overall definition: "In this context EU internal security means protecting people and the values of freedom and democracy, so that everyone can enjoy their daily lives without fear." The strategy also emphasises the importance of a wide approach: "The concept of internal security must be understood as a wide and comprehensive concept which straddles multiple sectors in order to address these major threats and others which have a direct impact on the lives, safety, and well-being of citizens, including natural and man-made disasters such as forest fires, earthquakes, floods and storms."[27]

Defining internal security through threats posed to people and measures taken to avoid these threats is quite common. All of the Estonian internal policy documents take this approach. Internal security is not precisely defined; rather, a number of threats, activities or actors are listed and analysed.[28]

The notion of security, particularly in regard to the expression "internal security", has also become increasingly diversified in the sense of both the overall security that the state offers to society and the feeling of personal safety of the citizen. It contrasts with what used to be major security concerns of both state and citizen, namely external aggression by a foreign power, and is now considered to encompass such diverse issues as economic security, the prevention of all forms of crime and violence as well as social security.[29]

The vice chancellor of Estonian Ministry of the Interior, Erkki Koort, categorises "a problem as being part of internal security if a certain act brings with it danger to people's life and health".[30] In today's Europe those acts are considered to be terrorism, organised crime, drug trafficking, cyber-crime, trafficking in

25 O. Brenninkmeijer, *Internal Security Beyond Borders: Public Insecurity in Europe and the New Challenges to State and Society*, Peter Lang Pub. Inc., 2001, pp. 30-31; also L. Zedner, 'The Concept of Security: An Agenda for Comparative Analysis', *Legal Studies*, Vol. 23, No. 1, 2003, pp. 153–175.

26 ESRIF, *European Security Research and Innovation Forum. Final Report*, ESRIF, 2009, pp. 11-12.

27 Council of the European Union, *Internal Security Strategy for the European Union*, Brussels, 25 February 2010, 6870/10 (Presse 44).

28 *Ibid.*; also A. Talmar, R. Narits & A. Kasemets, 'Applying the Concept of Better Regulation in Internal Security', *Juridica International*, Vol. XVIII, 2011, pp. 35-43, at 39, where the aspects of systematisation of IS law are discussed.

29 Brenninkmeijer, 2001, at 42.

30 E. Koort, 'Security or Homeland Security', *in* L. Tabur (Ed.), *Internal Security Policy 2010*, Estonian Academy of Security Sciences, Tallinn. 2001, pp. 39-43 (in Estonian).

human beings, sexual exploitation of minors, child pornography, economic crime, corruption, trafficking in arms and cross-border crime.[31] Many of those cannot be considered merely internal threats. This might be one of the reasons why it is so hard to separate the "internal" from the "outer" security and give a clear definition to both. As the EU Internal Security Strategy action plan states, "Internal security cannot be achieved in isolation from the rest of the world, and it is therefore important to ensure coherence and complementarity between the internal and external aspects of security."[32]

3. *Problems in the Application of Better Regulation in the Internal Security Policy*

But why should politicians, civil servants and different stakeholders be interested in better regulation? One potential function of better regulation programmes and quality standards for legislation, based on the positivist and realistic legisprudence approach, could be that following them increases the legitimacy and acceptance of the proposed rules.[33] These, in turn, are preconditions for a state based on the rule of law. The legitimacy of rules is especially sharp in internal security policy because here the rules are directly constraining the constitutional rights of people.[34] Another approach, based on the political economy framework, emphasises that the system of better regulation has mainly two roles in OECD countries – political control over bureaucracy and minimisation of uncertainty.[35]

We can state here that the minimisation of uncertainty and related legitimate expectations are central for both realistic legisprudence and political economy approaches.

It is worth mentioning here that many of the Estonian internal security policy documents described below emphasise, in general, both the importance of the rule of law and the importance of cost-effective regulations. Therefore if a cap exists between the rule of law principles and actual better regulation measures it indicates serious problems in governance, because without impact assessment information it is difficult to talk about knowledge-based and responsible lawmaking or public administration.[36]

To sum up, in this article the better regulation key measures are seen as tools for the effective and sustainable internal security policy cycles and lawmaking.

31 Council of the European Union, 2010.

32 European Commission, 'The EU Internal Security Strategy in Action: Five Steps Towards a More Secure Europe', Brussels, 22 November 2010, COM(2010) 673 final.

33 OECD, 2000, at 70-71; Tala, 2010, at 207; Dorbec-Jung, 1999, at 212-214.

34 D. Bigo *et al.*, 'The Changing Landscape of European Liberty and Security', *International Social Science Journal*, Vol. 59, 2008, pp. 283-308.

35 According to Radaelli, 2010, at 91-92, ex ante, mid-term and ex post RIA can function for the government as a 'fire alarm'.

36 The rule of law, *i.e.*, legal certainty and predictability of administrative actions and decisions, which refer to the principle of legality as opposed to arbitrariness in public decision-making, and to the need for respect for the legitimate expectations of individuals. Openness and transparency, accountability and efficiency are also specified as common standards for action within public administration – OECD Sigma, *Preparing Public Administration for the European Administrative Space*, Sigma No. 23, OECD, Paris, 1998.

The authors are interested in structural connections between better regulation measures and internal security policy.

II. Better Regulation and Internal Security: a Content Analysis of Strategy Documents

To analyse the extent of integration of better regulation and internal security policy, the content analysis of the Main Guidelines of Security Policy of Estonia until 2015 and the Development Plan for the Ministry of the Interior government area for 2011-2014 was made. In the view of the authors, better regulation is especially important in the internal security policy. Rules concerning people's security, their rights and obligations towards a state and infringements on their constitutional rights must be very clear and thoroughly analysed. We will now turn to some of the Estonian key policy documents of internal security to find out whether or not they embrace the concept of better regulation. Policy documents are analysed because they form the basis for ministerial activities in internal security – including policy design, planning and allocation of resources (experts, budget) and legislation; if better regulation measures (*e.g.* impact assessment, consultations, simplification) are not included on that level, it cannot be transformed to knowledge-based draft legislation routines, adequate laws and/or effective law enforcement, *e.g.* internal security services.

The analysis of two policy documents focuses on whether and to what extent better regulation measures are related to the concept of internal security policy, its objective and measures.

The importance of a government based on the rule of law is also emphasised, but the policy process, better regulation measures and regulatory management are not mentioned in the document.

The Main Guidelines of Estonia's Security Policy Until 2015 develops this policy further and "specifies the standard principles, vision, directions and long-term objectives of the security policy – principles which must be adhered to, and objectives which must be facilitated by the public sector, non-profit sector and the private sector." Three policy planning phases are described in the definition of security policy – development, improvement and implementation of legal acts, development plans and activity plans with the aim of preventing threats to public order; and in case of a suspected threat, ascertaining and eliminating them.[37] This is amended by the definition of security:

> [...] a social state of affairs which is created with the help of many, which allows individuals to feel protected, and which ensures a truly safe living environment by reducing the probability of hazardous situations as well as enhancing the ability to react to threats and alleviate the damage caused by realisation of the threat.

37 Eesti turvalisuspoliitika põhisuunad aastani 2015 (Main Guidelines of Estonia's Security Policy Until 2015). State Gazette (RT I 2008, 25, 165), in English, <www.siseministeerium.ee/29744/>, accessed 8 October 2012.

The generally accepted principles of involvement of stakeholders and public consultations are also stressed as a method for preventing deviant behaviour, which is a positive step towards better regulation. Some guidelines for impact assessment, involvement and better regulation are specified in the implementation parts of the policy document, but their emphasis remains on the implementation of the said policy itself, not its quality as a whole (in short – the results of content analysis are showing the lack of ex ante IA and public participation in policy design).

The Development Plan for the Ministry of the Interior for 2011-2014 states that the field of internal security includes the creation of internal security policy that includes crisis management, rescue, migration, border guard, law enforcement and criminal justice policies and the internal security education.

The better regulation concept is not included in the body of this document in spite of the fact that more "effective and transparent processes" are foreseen as one of the objectives of the Plan. However, some elements of the concept, *e.g.* consultations, risk analysis and analysis of administrative burdens (use of standard cost model) are mentioned in the annexes ("Overview of the current situation") of the policy document.[38]

The analysis of the given internal security policy documents confirms that better regulation measures (*e.g.* guidelines for draft legislation) are not yet systematically integrated in the concept or development measures (action plan) of Estonian internal security policy. Some elements of better regulation are, however, occasionally mentioned in annexes or background information. Unlike many other ministries in Estonia, the Development Plan of the Ministry of the Interior does not include a special part for organisational development measures where better regulation measures usually belong.

III. Systematisation of Internal Security Law in Estonia

Estonia became a member of the EU in 2004 and of the Eurozone in 2011, and is meeting all formal criteria pertaining to membership, but is still faced with many informal regulatory management capacity problems in terms of implementation of better regulation principles in the day-to-day work of ministries.

The main functions of the democratic parliament and government are similar in different countries, and in this context the existential question of smaller parliamentary democracies as in Estonia (population ca 1.3 M) has been *how to optimise the regulatory management and how to compensate for the limited resources of regulatory governance in the ministries and in the parliament?* In the 1990s the question was frequently answered within the framework of New Public Management (NPM) Theory,[39] and after joining the EU, within the framework of good governance and better regulation.

38 Siseministeeriumi valitsemisala arengukava 2011-2014 (The Development Plan of the Ministry of Interior 2011-2014) (in Estonian).

39 A. Kasemets, *Implications of New Public Management Theory in Parliamentary Research Services, in* IFLA Proceedings: Section of Parliamentary Libraries and Research Services; Jerusalem, Israel, 2000, No. 073-98(WS)-E, <http://ifla.queenslibrary.org/IV/ifla66/papers/073-98e.htm>, accessed 8 October 2012.

The tools for rationalisation and democratisation of public policy, provided by better regulation measures, are quite variously interpreted in most European countries and also on the level of different ministries of the same country.[40] We also know that not only is the great interaction between different policy domains characterising the legal framework for internal security in the EU, but also that the large variety of national practices and the diversity across the EU member states in translating and implementing EU rules into national law contribute significantly to the complexity of internal security regulations.[41] To improve the understanding of the state of play for all ministries and their regulatory agencies and also for all non-governmental stakeholders in specific security-related situations, it is important to have an overview of all EU and national regulations and their interaction related to internal security.

Authors mapped both EU and national internal security law on the basis of a vision that a database with legislation in force might contribute to this understanding and would facilitate the national process of identifying potential better regulation gaps, conflicts, adverse effects of the rules and regulations in use. According to ESRIF (2009, at 198), the EU internal security law includes twenty sub-categories (see Box 1).

Box 1 General structure of the European Union internal security law

1. Dual use, export control
2. GATT, WTO rules
3. International public law
4. Space law, law of the sea
5. Air transport law
6. Road transport regulations
7. Handling of dangerous items, sensitive materials
8. Intellectual property rights
9. Liability, *e.g.* contractual liability, product liability and absolute liability
10. Insurance issues
11. Classification of documents and information
12. Public procurement
13. Data protection, privacy rules
14. State aid law
15. Competition law
16. Citizen's rights, loss of privacy, infringement of liberty
17. Digital evidence, electronic signatures, litigation
18. Criminal law
19. Technical standards, safety regulations
20. Art. 296 EC Treaty

40 Staroňová *et al.*, 2006.

41 ESRIF, 2009, at 197-199, EU problem is a variety and fragmentation of national practices in the context of global risk society.

The mapping and systematisation of Estonian regulations in the field of internal security reveals that there are roughly 150 laws in force today. This is an overwhelming amount, considering that almost all of those laws have lower (implementing) acts as well. We call this bulk of laws and regulations the internal security law. This situation is not new or recently developed.

For example, a case of the EU–Russia border area and crossing points regulations in Estonia to analyse the optimisation of the work processes of border police officers (Ministry of the Interior) and customs officials (Ministry of Finance) shows that there are over fifteen laws, bylaws and EU-level regulations or codes.[42]

This case gives just one example of internal security regulatory management subsystems and illustrates that every different subcategory of the law branches out into almost innumerable laws, bylaws, decrees, EU codes, and so on. All in all, the wide definition of internal security law encompasses well over 150 laws and regulations, many of which are overlapping, some even contradictory.

As a French scholar, Elisabeth Catta, states, many deficiencies exist in the laws of virtually every state today. Among them are overabundance (usually it is uncertain how many laws there are in a state); pile-up of laws (usually the legislature does not summarise former laws nor abolish the contradictory, excessive or expired and thus useless texts); and instability (many laws or even paragraphs are changed many times in a year).[43] All of these deficiencies seem to hold true in Estonian internal security law.

Problems like these can be solved through better regulation instruments enumerated above. Along with these instruments, Catta suggests a few practical steps: (1) compilation – the grouping of texts by subject fields or in a chronological order; (2) consolidation – amendments are inserted to the initial law to achieve a uniform and up-to-date text; (3) codification – this uses the two aforementioned solutions to classify norms and integrate them by areas of law.[44]

The Development Plan of the Estonian Ministry of the Interior for 2011-2014 and the Main Guidelines for Estonia's Security Policy until 2015 foresee the codification of crisis management areas, but it is of vital importance to map out the whole internal security area before work is started on codifying a specific part of it. If an overall analysis is not conducted the codification will probably have gaps in it.[45]

IV. A Sociological e-Survey of the Estonian Ministry of the Interior Officials

The questionnaire of the sociological e-survey of the Ministry of the Interior includes the most important elements of strategic and regulatory management, *e.g.* planning, objectives, processes, organisational culture, values, expectations,

42 The analysis was carried out by the Estonian Ministry of the Interior in May 2012.

43 E. Catta, 'The Importance of Proper Codification and Systematization of the Law', *Juridica*, Vol. 9, 2002, pp. 588-589 (in Estonian).

44 *Ibid*., at 589; also Mandelkern Group, 2001.

45 Talmar *et al.*, 2011; R. Narits, 'Systematization of Objective Law in Estonia: From Codification to Reformation of Law', *Riigikogu Toimetised* (Journal of Estonian Parliament), Vol. 12, 2005, pp. 71-79 (in Estonian).

motivation, roles, leadership, hierarchy, participation, workload, training needs, career, media, reputation. (n = 104, see Table 3).[46] The following brief overview is focused on regulatory management issues.

The implementation of better regulation measures in the Ministry of the Interior is observed mainly via two theoretical frameworks, *e.g.* institutional theory and the adaptive strategic management theory.[47]

We are considering the organizational strategic management options of the Estonian Ministry of the Interior in the international context of regulatory reforms because on the one hand the EU, NATO and OECD membership calls all Estonian ministries to implement the principles of good governance and better regulation. On the other hand, there is a period of complicated financial cuts and all public sector organisations must adapt with the budgetary, human resource and other restrictions. Among other things, this means that the Ministry often has to make contradictory choices despite earlier promises on good governance, etc. (Many policy documents, developed before 2008, are not valid in practice because of lack of human and financial resources.)

The additional role of the sociological e-survey was/is to provide for the Ministry as a learning organisation a clear reflection and policy recommendations on how to improve the regulatory management. The e-survey helps to explain current organisational problems and find answers to the question of why the Ministry has had difficulties in the implementation of better regulation principles and regulations of draft legislation (Table 2). Also, it helps to explain why both legal/regulatory policy and internal security policy tend to fail if they are not systematically integrated (*e.g.* lack of political support, budgetary resources). Thus, on the basis of the aforementioned theoretical framework and the dynamic changes of the external environment, there are two interrelated research questions. First, what are the main obstacles for the Ministry of the Interior to implementing the knowledge-based policy design and better regulation measures? Secondly, how are the patterns of officials' values, expectations, working routines and proposals related to implementation of better regulation principles and how can the nature and the officials' readiness for change be assessed?

1. *Some Results Related to Better Regulation Principles and Key Areas/Measures*

The officials' satisfaction with the main processes of regulatory management (*e.g.* planning) in the Ministry is quite low (n = 104, examples): (a) "law drafting process, *e.g.* consultations, legal act design, drafting, implementation and plans of ex post impact assessment" (35% very + mostly satisfied); (b) "informing the stakeholders and general public about the initiatives, works and results of the Ministry of the Interior" (31%); (c) "the annual updating of The Development Plan for The Ministry of the Interior, *e.g.* design, discussion, impact assessment and budget-

46 A. Kasemets, E. Orumaa & L. Tabur, 'The Sociological Family Photo of Ministry of the Interior 2011: Readiness for Changes', *Proceedings of Estonian Academy of Security Sciences*, Vol. 10, 2011, pp. 90-109 (in Estonian).

47 Scott, 2001; L.E. Paarlberg & W. Bielefeld, 'Complexity Science – An Alternative Framework for Understanding Strategic Management in Public Serving Organizations', *International Public Management Journal*, Vol. 12, No. 2, 2009, pp. 236-260.

ing" (19% mostly satisfied); (d) "ex ante and ex post impact assessment of policy documents and draft laws in the field of social, economic, environmental, security and other impacts" (19% mostly satisfied); (e) "the assessment of personnel and training needs and its planning" (12% satisfied). In all aforementioned cases we can find the "owner" of the process.

From the other side, satisfaction with the quality of decision-making (*n* = 104, examples): (a) "decisions made are mostly understandable for the stakeholders and the public" (56% fully + mainly agree); (b) "for the preparation of important policy documents and draft laws the impact assessment and public participation methods are used" (24% agree)[48]; and (c) "in the definition stage of the policy problem the seminars and trainings with external experts are usually organised" (12% agree).[49]

Box 2 Organisational culture and human resources: some reflections (n = 104, % agree + mainly agree)[50]

- I can understand how my work objectives are linked to the goals of the Ministry (61%)
- I have enough information to fulfil my duties (54%)
- My work is well planned (planned vs. 'fire-fighting' activities) (38%)
- Top management involves ministry staff in the preparation of important decisions (35%)
- I have enough time to perform my duties (27%)

There are a sufficient number of officials to implement the political strategy documents (14%)

The adaptive strategic management approach emphasised the importance of participation and flexibility – many questions tested the dominant attitudes and practices related to participation. Here are some examples:

A large proportion of respondents (42%) felt that in today's Ministry managerial relations is dominating the operational command culture, 33% thought that there were an open participation culture and an operational command culture more or less balanced. Secondly, according to the OECD,[51] the framework of civic engagement consists of three components – information, consultation and participation. With work-related information flow are satisfied 58% (often + always) of respondents, with consultations 36% and with possibilities to partici-

48 Free responses show that depending on the unit, the routines of consultations vary in the Ministry. As we know from the pre-study (Appendix), most of the consultations are not documented in the draft laws explanatory memorandum (lack of transparency and accountability).

49 According to European Commission Impact Assessment Guidelines (2005, 2009), it is the second stage of impact assessment planning process. See <http://ec.europa.eu/smart-regulation/impact/commission_guidelines/commission_guidelines_en.htm>, accessed on 15 January 2014.

50 A. Kasemets, E. Orumaa & L. Tabur, 'The Sociological Family Photo of Ministry of the Interior 2011: Readiness for Changes', *Proceedings of Estonian Academy of Security Sciences*, Vol. 10, 2011, at 98 and 103 (in Estonian).

51 OECD, *Citizens as Partners. OECD Handbook on Information, Consultation and Public Participation in Policy-Making*, OECD, Paris, 2001.

pate in the decision-making process 25%.[52] There were a variety of free responses (29 answers), including "I would recommend to top managers and politicians take into account the opinions of experts", "There is no time to be involved" or "Democratic thinking is missing".

Ratings of the Ministry of the Interior on training and information services are predominantly negative, *e.g.* only 18% of the respondents were satisfied with ordering and use of statistics, commissioned applied research and analyses in the decision-making process (lack of strategic data gathering).

This sociological e-survey indicates discontent with the organisation of the impact assessment of policy documents and draft legislation. One general question of institutional analysis is, on what level are the reasons precluding the implementation of better regulation principles in internal security policy? E-survey clarified that (1) there are no international or national political obstacles or regulatory restrictions to apply better regulation principles in the Ministry of the Interior; and (2) the application of better regulation principles depends greatly on the choices made by vice chancellors and departments, their values, work routines and understandings of how to implement the better regulation measures (*e.g.* impact assessment, participation, simplification) in the context of policy-making interactions and budgetary limitations. Hence, it is first and foremost a question of ministerial strategic management, priorities and political will, and then the question of officials training system, motivation and institutionalised working routines and regulations.

D. Conclusions and Synthesis

The case of the Ministry of the Interior shows that better regulation principles and measures are not systematically integrated with the internal security policy design and draft legislation.

The general hypothesis of the study was confirmed in three substudies (Table 3): the reason for the problems connected with the quality of draft legislation in the Ministry of the Interior is that in the internal security policy documents, related action plans and public administration routines, the guidelines for better regulation have not been taken systematically into account.

The following are some conclusions from the internal security policy reflection (learning) and comparative follow-up studies:

- A gap exists between the rule of law principles and actual better regulation key activities, and it indicates serious problems in governance, because without impact assessment and participation information it is difficult to talk about knowledge-based and responsible policy debate, lawmaking and public administration. The selective compliance of law-drafting requirements reflects the informal understanding about 'rules of the game' in the context of recent regulatory reforms before and after joining the EU. To sum up the

52 Statement: "I feel that I am sufficiently involved and my knowledge, skills and experience find application".

moral statement, while constitutional institutions, the parliament and ministries (*e.g.* the Ministry of the Interior) do not observe better regulation principles (*e.g.* current regulation of law-drafting) and thereby violate the principle of the rule of law (*e.g.* lawmaking), there is no reason to wonder that the awareness of citizens with respect to law issues is comparatively poor, that we have problems with professional loyalty of IS officials, that the general public does not consider legal protection legitimate enough, that many social groups do not believe in the words of politicians nor in their own possibilities to affect political decision-making on a national or local level (this situation may create risks for internal security).

- The aforementioned results of substudies can also be interpreted as "mimetic behaviour," often undertaken by organisations when regulatory management performance measures are ill defined in the strategy documents. Organisations like the Ministry of the Interior can and do deviate from (inter)national institutional norms (Table 1), although the stronger the institutional pressures (*e.g.* policy research, negative publicity) the less frequently will deviation be observed.
- The planning and budgeting of regulatory impact assessment in the ministries takes place through strategic documents: one reason for the problems connected with the quality of draft legislation is that in the internal security policy documents, the guidelines for better regulation have not been taken systematically into account. In addition – we cannot provide the 'negative' evidence of internal security law enforcement capacity problems here, but according to former studies, it is obvious that *ex ante* regulatory impact assessment information with stakeholders' expectations and proposals provides a rich basis for formulation of policy implementation and evaluation guidelines, design of service delivery system, civil servants training programmes, public service marketing campaign, etc.
- Another research problem worth mentioning is the absence of a consistent definition of internal security policy that probably precludes effective communication between the political-administrative and operational management and also affects the consultations with target groups.
- The selective obedience to rules of draft legislation in the Ministry shows that the quality of public information on impact assessment and consultations in the explanatory memoranda of draft laws is weak and the preconditions for evaluating the validity of constitutional legislative rules and the quality of law (necessity, proportionality, etc.) are not fulfilled.
- The mapping of Estonian regulations in the field of internal security reveals that there are roughly 150 laws in force today. This is an overwhelming amount, considering that almost all of those laws have lower (implementing) acts as well. In the context of both risk society and budgetary cuts this kind of fragmentation and overregulation can create new regulatory management problems. The analysis of the quality of draft legislation and the excessive

amount of laws in the internal security field gives evidence of a lack of systematic *ex ante* and *ex post* regulatory impact assessment.[53]

- A sociological survey of the officials of the Ministry of the Interior indicates a remarkable discontent with the organisation of the impact assessment of policy documents and draft legislation. The officials working in the Ministry of the Interior emphasised the lack of human and budgetary resources, and on the other hand, most of them are critical and dissatisfied with the strategic and regulatory management practices (*e.g.* planning, use of studies, impact assessment) and training systems. According to analysis, this shows readiness for changes in the context of risk society challenges and adaptation with budgetary contractions and structural reforms.

It is thus too early to speak about systematic implementation of better regulation guidelines in the internal security policy design. Some significant improvements have been made in recent years, but the importance of quality and sustainability of the whole policy process is still not emphasised enough.

One question of institutional analysis is, on what level are the reasons precluding the implementation of better regulation principles in internal security policy? In connection with Estonia three observations could be made: (1) there are no international obstacles nor national regulatory constraints, the better regulation programmes apply to Estonia; (2) Estonia took a step closer to the leading countries of OECD by approving the Development Plan for Legal Policy on 23 February 2011 (*e.g.* guide for impact analysis); (3) the application of better regulation principles depends greatly on the choices made by vice chancellors and departments, their values, work routines and understandings of the better regulation policy.

It thus seems that political commitment is one of the most important preconditions for introducing the better regulation measures such as impact assessment. To be useful, impact assessment should be institutionally linked to decision-making and the creation of laws. According to the White Paper on European Governance (2001), "Carrying these actions forward does not necessarily require new Treaties. It is first and foremost a question of political will."[54]

Appendix: The method of normative content analysis of draft laws explanatory memoranda

The methodological concept proceeds from the thesis that the problems of legitimacy and administrative capacity of public policy often arise from the shortcom-

53 In addition, the fragmentation of internal security regulation has a structural nature in a broader context. The OECD analysis of public governance of Estonia 'Towards a Single Government Approach' (2011) shows that fragmentation is the greatest problem. The governance of Estonia is built on relatively independent ministries that are responsible for their area of government. All this makes setting and realising common goals (such as better regulation) complicated for the Government.

54 European Commission, 'European Governance. A White Paper'. Brussels, 25 July 2001, COM(2001) 428.

ings of impact assessment and law-drafting. This concept for reflective sociolegal studies of draft legislation was developed in 1997 to measure the gap between normative requirements of draft legislation and facts of fulfilment of those requirements that must be documented in the explanatory memoranda of draft laws before the parliamentary proceedings. The guidelines of method are proceeding from the structure of regulatory impact assessment-related requirements for the draft legislation in Estonia (The Cabinet adopted "The rules of the normative technique of drafts of legislative acts" in 1996. The Board of the *Riigikogu* adopted "The Rules for Draft Legislation in the Legislative Proceedings of Riigikogu" in 1993. The rules are established on the basis of constitutional laws), also general recommendations of the OECD (1995, 1997)[55], and academic literature (Galligan, 1995; Korhonen 1997; Tala, Korhonen & Ervasti 1998; Dorbeck-Jung, 1999, etc.).[56]

The starting idea of this method for the quality control of sociolegal information required in the explanatory memoranda of draft laws was the reason that sociolegal information in the explanatory memoranda of a draft law is an input for informed parliamentary/public debate; and secondly, a critical reflective analysis functions as "informal sanction" (negative publicity) for learning. The guidelines (*e.g.* checklist) of studies include the legal/normative basis, criteria for preliminary selection of draft laws, description of information categories for the content analysis and comments.

Aim: to explore and reflect the gap between constitutional rule-making norms and sociolegal information in draft legislation.

Method(s): normative content analysis

Sociolegal information categories of content analysis:

1.0. References to EU directives and international conventions (transposition and harmonisation of laws) as a background information

2.1. Social impact assessment, *e.g.* identification of target groups and their socio-economic situation, demographic behaviour

2.2. Economic and Business impact assessment, *e.g.* analyses based on cost-benefit, standard cost model, etc. methods

2.3. Environmental impact assessment, *e.g.* issues of sustainable development (*"no direct impact" was codified "yes")

2.4. Organizational and administrative changes and impacts, *e.g.* reorganization of work, action plans, training plans, etc.

2.5. Fiscal & budgetary impact on state and local authorities level (*clear statements "no additional costs" was codified "yes")

55 OECD Recommendations, 1995-2013,available at <www.oecd.org/regreform/regulatory-policy/recommendations-guidelines.htm>, accessed on 15 January 2014.

56 D.J.Galligan (Ed.), 'Socio-Legal Studies in Context: The Oxford Centre Past and Future', *Journal of Law and Society Special Issues*, 1st edn, Wiley-Blackwell, 8 June 1995; J. Korhonen, 'Finland's System of Assessing Regulatory Impacts', *in: Public Management Forum*, Vol. III, No. 1, Phare/OECD Sigma, Paris, 1997; J.Tala, J.Korhonen & K. Ervasti, 'Improving the Quality of Law Drafting in Finland', *The Columbia Journal of European Law*, Vol. 4, No. 3, 1998, pp. 629-646; B. Dorbec-Jung, 'Realistic Legisprudence: A Multidisciplinary Approach to the Creation and Evaluation of Legislation', *Associations*, Vol. 2, 1999, pp. 211-237 .

2.6. References to studies, analyses, expert opinions, reports, official statistics, etc. on impacts related to impact assessment

2.7. Consultations with public sector, *e.g.* names of ministries, executive agencies, unions of local authorities, experts, etc.

2.8. Consultations with private and third sector, names of representatives of interest groups, NGOs, researchers, etc.

SUM 2.1.-2.8. in numbers (number of draft laws × 8 categories/results of content analysis) and % (see Table 2).

Period: 1998-2009 (seven studies), in given article 2004-2009 (Estonia became a member of the EU in 2004)

Data: The overall number of draft laws (bills) submitted by the Cabinet to the proceedings of the Riigikogu (Parliament) during the seven periods of study was 1,131. According to the criteria of selection, the number of draft laws requiring the impact assessment was 907, *e.g.* in the sixth period (2004-2005) 86 draft laws and in the seventh period (2007-2009) 170 draft laws.

Main research questions: (1) To what extent do the initiators of draft laws follow the lawmaking requirements reflecting the social, economic and environmental impact analyses, references to social science studies and involvement of NGOs? **(2)** How are the constitutional collective decisions about rules governing and regulation of draft legislation internalised in practice? What is the extent of selective legal behaviour in lawmaking in different ministries? **(3)** To what extent are the lawmaking practices of the Estonian legislation in line with the declared better regulation principles, if examined through the lenses of normative content analysis? **(4)** To what extent has the information on impacts been made available for the public, and can we talk about informed participants as a precondition for the discursive democracy?

Source: A. Kasemets & M.-L. Liiv, 'The Use of Socio-legal Information in the Explanatory Memoranda of Draft Acts: A Precondition for Good Governance', *in* G. Janey *et al.* (*Eds.*), *Institutional Requirements and Problem Solving in the Public Administrations of the Enlarged European Union and Its Neighbours*, NISPAcee, Bratislava, 2005, pp. 142-165.