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Legislative Intent of Act in Estonia

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It is in the interests of both the legislator and society that the law should be effective. In order to be effective, there are rules established for legislative drafting in Estonia, set forth in corresponding regulations.

Rules for Good Legislative Practice and Legislative Drafting (*hea õigusloome ja normitehnika eeskiri*, abbr. HÖNTE) provide for important steps in the legislative process to ensure a higher quality and efficiency of laws. Among other things, these rules introduced the legislative intent for drafting process, and the concept of draft Act, as well as the obligation to assess the impact and demonstrate corresponding results in the explanatory memorandum to the draft Act. This also expanded the scope of the interest group participation in the various stages of the legislative process.

Keywords: law making, legislative intent, stakeholder groups, effective law.

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Introduction

The need for legislation grows out the emergence and occurrence of social relationships requiring legal regulation. It is in the interests of both the legislator and society that the law should be effective. However, to be effective, it is essential that the law should be based on social realities, and it should be understandable to those it addresses. In order to achieve this, there are rules established for

legislative drafting in Estonia, set forth in corresponding regulations – Technical Rules for Draft Legislation Submitted for Legislative Proceedings of the *Riigikogu*¹ established by the Board of the *Riigikogu*, *Riigikogu* Rules of Procedure and Internal Rules Act² and Rules for Good Legislative Practice and Legislative Drafting³, a Regulation of the Government of the Republic targeting government agencies, which entered into force in 2012.

The objective of regulation is to ensure that both legislative drafting and legislative changes are justified and comprehensible; this is achieved by conducting comprehensive impact assessment and consultations with target groups. It is important to achieve the correlation between laws and social reality, correspondence with vital needs and the clarity of regulation for those it addresses. The specific goal is to make the process of norm drafting more understandable for stakeholders. The purpose of this article is to analyze specific regulations and use that to draw conclusions on the possibilities of social orientation of legislative drafting in Estonia.

1. Law-Making Principles by Rules for Good Legislative Practice and Legislative Drafting

One of the most important innovations introduced by HÕNTE, is the comprehensive regulation of legislative intent. Section 1(1) of the rules set out the criteria that must be reflected in the legislative intent:

- 1) the field or the problem to be addressed and the target group;
- 2) the purpose;
- 3) possible policy options of resolving the issue, comparison of the options and the preferable option;
- 4) compatibility of the selected policy option with the current legal system;
- 5) policy option of resolving the issue in countries with a social order and legal system similar to Estonia;
- 6) description and structure of the planned legal instrument, including determination of the level of regulation, estimated date of completion of the draft and recommended validity period of the legal instrument;
- 7) which significant impact, based on the frequency and scope of the impact, the size of the target group and the risk of undesirable impact, may accompany the implementation of the Act;
- 8) how will the accompanying significant impact be analyzed and the reasons why certain accompanying impacts will not be analyzed;
- 9) action plan for further preparation of the draft Act;
- 10) other circumstances relevant to the resolution of the issue.

These requirements testify to the fact that it is not possible to tear the drafting of legislation from its social context and the needs of those it addresses to drafted legislation. Moreover, in addition to state organizations, the legislative process

¹ Riigikogus menetletavate eelnõude normitehnika eeskiri [Technical Rules for Draft Legislation Submitted for Legislative Proceedings]. Available: <https://www.riigikogu.ee/wpcms/wp-content/uploads/2014/11/Riigikogus-menetletavate-eeln-ude-normitehnika-eeskiri.pdf> [last viewed 02.05.2018].

² Riigikogu kodu – ja töökorra seadus [Riigikogu Rules of Procedure and Internal Rules Act]. *RT I*, 28.06.2016, 22.

³ Hea õigusloome ja normitehnika eeskiri [Rules for Good Legislative Practice and Legislative Drafting]. *RT I*, 29.12.2011, 228.

should include the target groups for drafted regulations, since legislative drafting is a co-operative process of many state bodies and social legislative forces.

2. Involvement of Stakeholder Groups in Law-Making

The first stage of legislative drafting is the analysis of the problem: the formulation of the problem, the assessment of the extent to which regulation is needed and what will be the objectives of the regulation. This is when various approaches are considered and the most proportionate measures chosen. “The successful functioning of the legal order can only be based on reliable and adequate sources.”⁴

At this stage, it is important to identify the relevant interest groups – their involvement will in most cases lead to a solution that closest to the objective.

According to HÖNTE § 1(5), interest groups shall be involved in the preparation of a legislative intent, concept and draft Act and coordination carried out in compliance with the provisions of the Rules of the Government of the Republic and the Good Practice of Involvement established on the basis of subsection 4(2)⁵ of the Rules of the Government of the Republic. The Good Practice of Involvement⁶ provides, inter alia, that interest group consultations should take place at all stages of policy making – problem definition, setting objectives, analyzing solutions and decision drafting. This allows the interest groups to highlight different facets and factors of influence, thus ensuring the most adequate understanding of the subject of regulation. At the same time, it must be considered that such organization depends largely on the initiative of the interest group and its ability to chart the situation, which in turn may lead to gaps in problem description. This may result in regulation that does not fully meet its purpose or leads to new issues.

As a rule, the legislative activity of state bodies is triggered by the ‘outside’ impulses, the clash of interest between different social groups. Thus, the internal organization of interests and the conflict and sanctioning capabilities of the group as a whole are important factors in the legislative process.

The chance to advance their interests depends on the internal discipline of the organization. Opposing interests are harmonized within the organization, focusing solely on the interests representing social needs of a given group.

In addition to the organizational capacity of the interests established by legislative drafting, this also requires the conflict capacity of interested parties, which is often lacking in socially weak groups (e.g. unemployed, pensioners, homemakers, etc.). Due to their lack of organization and almost non-existent resources, they do not have the necessary power and authority, and thus do not have any sanction options, when their interests are not considered to a sufficient extent. Often, they have difficulties even with legislative information, because it is not uncommon that persons become aware of a new law only when it has already come into force or when they come into contact with it. Thus, the legislative drafting does not depend so much on the actual state of the interests of the people or on their

⁴ Narits, R. Seadusloome regulatiivse ja õigusliku mõju hindamine [Legal and Regulatory Impact Assessment of Legislation]. *Riigikogu Toimetised*, No. 4, 2001, p. 98.

⁵ Vabariigi Valitsuse reglement [Rules of the Government of the Republic]. *RT I*, 29.12.2011, 233.

⁶ Kaasamise hea tava [The Good Practice of Engagement]. Available: <https://riigikantselei.ee/et/kaasamise-hea-tava> [last viewed 02.05.2018].

relationship, but instead on how successfully these interests can be established in the parliament and society.⁷

The challenge for the relevant interest group involvement is that these groups can be difficult to identify. In 2010–2012, Estonia had an e-solution KYPO,⁸ a statistical profile of Estonian civil society, which compiled public data collected in the registers. While this is no longer available on the web, the problems that were topical during its creation continue to be relevant today:

- the quality of public data in the non-profit associations and foundations register is low;
- updating data on citizen's associations in the national register and the access to data for state authorities and their partners is legally and technically complicated, time-consuming and often costly;
- government officials have an obligation to involve the target groups of the national development plans and legislation in the decision-making process, but they do not have a tool for mapping and involving citizen associations;
- the public records of the registers and the organization for involving interest groups in the decision-making process by the ministries (including inclusion plans) are not connected, there is no register-based infrastructure for involvement nor common understanding of how to organize involvement as quickly as possible;
- Due to the relatively small size of Estonian society and the market, a registration-based involvement infrastructure of civic associations as an IT-development and marketing, is unlikely to be sustainable without a support from the state budget;
- the state statistics related to civic associations, the cross-usage of registers and the development of e-services is complicated by the number of state authorities involved and the need for political co-operation between ministers. The government does not have a clear division of labor and responsibility.⁹

It is definitely necessary to improve the availability and quality of the data of non-profit associations and foundations register. Why not do so by creating a portal of civic associations similar to KYPO? The premise for such a portal is that it would be convenient for all parties and the information would be quickly accessible. It would definitely help to improve the situation, if it were unambiguously clear, who was responsible for organizing interest group involvement in case of shared areas.

3. Initiation of Draft Legislation and Requirements for Formulation of Legal Provisions

A draft law may be launched in a number of ways. The most common practice is to use the guidelines outlined in coalition agreements or guidance documents by the government. Additional impetus may come from the opinions of the Chancellor

⁷ Kaugia, S. *Õigusteadvuse olemus ja arengudeterminandid* [Essence of Legal Consciousness and Determinants of Development]. Tartu: Tartu Ülikooli Kirjastus, 2011, p. 66.

⁸ Kodanikuühiskonna portree [A portrait of civil society]. Available: <http://www.delfi.ee/archive/kodanikeuhenduste-andmed-koondati-portaali-kypo?id=63964323>; www.kypo.ee [no longer available].

⁹ Kasemets, A., Dsiss, M., Lepp, Ü. Eesti kodanikuühiskonna statistilise portree ja kaasamistaristu idee [The idea of the statistical portrait and involvement of Estonian civil society]. *Riigikogu Toimetised*, No. 25, 2012, p. 123.

of Justice and the Auditor General, initiatives of the members of the parliament or the need to implement an international convention. The starting points for the initiatives stem from a wider social debate. A proposal for amending a specific legal act is usually submitted by the ministry concerned through the initiative of the minister, the senior officials of the ministry or the initiative of the author of the amendment proposal.

The regulation for the drafting of an act is set out in HÕNTE Chapter 1, section 1, which contains the substantive requirements for the draft act, the structure of the draft and descriptions of the various types of regulations. In accordance with § 2, a draft act is prepared for legal regulation of social relationships of the same type, if there is no legal regulation or it is insufficient or not up to date. At this point, it is worth noting that the act is justified, when it is intended for legal regulation of the same type of social relationships. The coordination of the draft act is subject to the involvement obligation described in subsection 1(5) above.

The objective of HÕNTE is to contribute to the consideration of the vital needs and social reality in legislative drafting. The comprehensibility of regulation to those it addresses is heavily influenced by the text of the act, its format and structure. "Legal texts must be comprehensible and clear for those they address, in order to act as a medium for moral standards. This includes the language of the law, the structure of the norm and also the structure of the law. It should be noted that the language of the law, as the language of instruction, should be more precise than general language and such precision is provided to the legal language by specialist terminology".¹⁰ The relevant requirements are set out in Chapter 2, section 2, of the HÕNTE. Paragraph 15(1) establishes a general requirement to comply with the Estonian Literary Standard. Paragraph 2 lays down a fundamental principle: the use of languages must be clear, unambiguous and precise. In essence, this stipulates that the norm must be understandable to those addressed, and it must follow the legal style, which, among other things, should ensure simplicity, the accuracy, the uniform interpretation and the correct emphasis. This is a relevant requirement, which, nevertheless, is difficult to achieve. Simplicity comes with the risk of excessive generalization or the use of imprecise terms. At the same time, uniform interpretation and accuracy are often achieved through very complex wording. However, only the fulfillment of both requirements can ensure that those who are required to observe and comply with the norms, can also unequivocally understand them.

Additionally, it is also important a provision should be worded in compliance with the structure corresponding to the type of the legal provision. The corresponding requirement is also laid down in § 16 of the HÕNTE. The structure of the provision plays an important role in interpreting the provision, when it is necessary to determine whether it is an imperative provision or a discretion provision. As a general rule, provisions with prescriptive, binding, justifying, prescriptive, and prohibitive wording are imperative. At the same time, one must take into account the purpose, the subject and how strict is the imperative to be expressed by the provision. In case of discretion provisions, it is important to clearly express the discretionary power of those addressed, and whether it

¹⁰ Narits, R., Merusk, K. Õiguse olemusest ja seaduse võimalustest [On the Essence of Law and Possibilities of Legislative Acts]. *Riigikogu toimetised*, No. 2, 2000. Available: <http://www.riigikogu.ee/rito/index.php?id=11645> [last viewed 02.05.2018].

is discretion of decision or of choice. Discretion of decision allows choosing whether to apply a consequence or not, whereas discretion of choice allows for a greater decision-making power, that is, two or more legal consequences that the implementer of the provision can choose from, depending on the situation. In addition, the HÕNTE provides for a number of other provisions that contribute to the comprehensiveness of the texts of the law. For example, the requirement to avoid synonyms and different expressions for rendering one and the same idea (§ 15(2)), regulations for the use of terms, loanwords (§ 17), abbreviations, brackets and symbols (§ 19), and requirements for the use of the word form in various cases. Thus, it can be said that HÕNTE provides a quite detailed regulation to ensure that a legal text would be comprehensible to its addressees.

State authorities responsible for the initial drafting of legislation should focus on transparent legislative drafting and develop opportunities for citizens, non-governmental organizations and other interest groups to participate and influence the legislative process. The use of social information should continue to be promoted in legislation.

Social statistics, the results of economic information and sociological studies are a part of the information that can help the people involved in the legislative drafting process to take the comprehensive view of society as well as oblige the political elite to have considerations for the state and needs of the members on the lower levels of society.¹¹

4. Adoption of Legislation and Feedback to Legislative Drafting

Adoption of the legislative act is the final step in creating a legislative act. The approval of the act gives it legal force and the implementation of the act is legally formulated. In Estonia, laws are passed by the *Riigikogu*, and minor legislative acts by other state and local government agencies. The adopted law shall be signed by the President of the *Riigikogu* and then submitted to the Office of the President by the Chancery of the *Riigikogu* for proclamation and final entry into force. Usually, the President proclaims the law, then the law is published in *Riigi Teataja*. Providing a good reason, the President of the Republic may decide to not proclaim the law passed by the *Riigikogu* and send it back to the *Riigikogu* for a new debate and decision. In case the *Riigikogu* passes the law returned by the President unchanged, the President shall either proclaim the law or request the Supreme Court to review the constitutionality of the law. The Supreme Court has the right, upon consideration of the President's request, to refrain from enforcing the law, otherwise the President must proclaim the law. The law enters into force on the tenth day after its publication in the *Riigi Teataja*, unless the law provides for a different term.

Feedback to legislative drafting should provide information on the success level of set objectives. On the one hand, it is reflected in social statistics (which societal changes actually took place as a consequence of these decisions; whether the decision was justified or not) and on the other hand, in public opinion, which describes the subjective reaction of society to what is happening. Negative reaction is mostly due to the fact that the objective may not have been in line with the

¹¹ See more at *Kenkmann, P. Sotsiaalne informatsioon seadusloome edendamise teenistuses: olukord ja ettepanekud* [Social information at the service of law enforcement promotion: situation and suggestions]. *Riigikogu Toimetised*, No. 1, 2000, p. 139 jj.

expectations of the people, and was instead put in place on the basis of one party's program or the perceptions of the group of officials who drafted the decision.¹² Therefore, the reactions of the public should not be gauged post-production, and a structural and continuous research into society's expectations should be carried out instead. The interests of the stakeholders should be taken into account from the initial stages.

Various institutions and interest groups are involved in the legislative drafting process and an impact analysis is carried out to measure the relevant economic, administrative, environmental and social impacts. Documents prepared as a result of this assessment are a part of the draft and therefore must be included in the draft.

Aside from the natural aim to use politics to maximize their power for as long as possible, the ex-ante, during and ex-post impact assessment is an effective tool for quickly spotting vulnerabilities.¹³ It is, of course, natural that problems come to light quicker in the areas that receive more attention, which is why it is expedient to start looking for the problem areas, which could affect the selected approach negatively, already in the initial phases of the process. Clear and up-to-date legislation reduces costs for both the state and other entities, reducing bureaucracy and the number of court cases. Therefore, good legislation must be directed towards the right subject, consistent in time and generally understandable.

The deeper purpose for legislative drafts is to maintain or change the social behavior of the parties in desired direction. Therefore, it is important that the substantial objectives and impacts of the law are discussed as openly and publicly as possible, and the impact of the law on the public interests is assessed. The draft acts under debate in the *Riigikogu* are accessible to the public mainly through the media, and therefore the quality of draft acts affects the work of the *Riigikogu* as well as the attitudes towards the law and also the media coverage.¹⁴

The *Riigikogu* also has the right to put a draft Act or other national issue on a referendum. In such case, a decision is taken by the majority vote of the votes cast, and the President is obliged to promptly proclaim the law and the decision is binding to all state bodies. The last sentence of the provision, however, creates a controversial situation – if the draft act submitted to a referendum does not receive a majority of votes cast, the President must call of extraordinary elections. It has been argued that this requirement severely inhibits the willingness of the *Riigikogu* to submit draft acts for a referendum.¹⁵ History has also confirmed this opinion and after our restoration of independence, the only referendums we have had have been on the issues central to statehood. The referendum on independence was held on March 3, 1991, the Constitutional referendum on June 28, 1992, and the amendment of the Constitution on 14 September 2003 in connection with joining the European Union. The *Riigikogu* has used referendum only for issues predicted to receive the majority vote and avoided the need for extraordinary elections.

¹² Avatud Eesti Ühiskonna Instituut. Demokraatia ja rahvuslikud huvid. Eesti ühiskond – 2005 [Estonian Institute for Open Society Research. Democracy and national interests. Estonian society – 2005] (Project report). Tallinn: Avatud Eesti Fond 2006, p. 65.

¹³ Radaelli, C. M. Regulating Rule-Making via Impact Assessment. *Governance*, Vol. 23, Issue 1. Wiley Periodicals: Hoboken, 2010, p. 91.

¹⁴ Kasemets, A. Seadusloome kvaliteedi ja mõjude hindamise probleeme [Legislative quality and impact assessment problems]. *Riigikogu Toimetised*, No. 4, 2001, p. 102.

¹⁵ Annus, T. Riigiõigus [Constitutional law]. Tallinn: Juura, 2006, pp. 56–57.

As citizens of the European Union, Estonians have the opportunity to participate in the European Citizens' Initiative.¹⁶ It is an invitation to the European Commission to make legislative proposals in areas where the European Union has legislative competence (e.g., the environment, agriculture, transport or public health). The citizens' initiative must be supported by at least 1 000 000 citizens of the European Union residing in at least 7 Member States out of 28 Member States. The minimum number of signatories is required for all 7 Member States. Citizens' initiatives cannot be organized by organizations and associations. However, organizations can support initiatives, provided that they are conducted in a transparent manner.¹⁷ An official register of European Citizens' Initiatives has been set up for the management of initiatives and applications, which brings the information comfortably to the user through the online environment. In Estonia, the right to petition is regulated by the recent Response to Memoranda and Requests for Explanations and Submission of Collective Addresses Act¹⁸ and the *Riigikogu* Rules of Procedure and Internal Rules Act.¹⁹

The HÕNTE provides for cases where the legislative intent is not required. Paragraph 1(2) specifies the implementation of EU law, conclusion, amendment or termination of an international agreement, and the State Budget Act. It also defines the situations in which the legislative proceedings of the draft need to be urgent with good reason and no significant legislative changes or any other significant impact occurs when the draft act is passed as an act (paragraphs 1 and 5, respectively). If the first cases are specific, the latter are clearly discretionary decisions.

In addition to the previously covered legislative intent, the HÕNTE also regulates the preparation of the concept of a draft act. The corresponding regulation is in paragraph 1(3) of the Rules and provides that if the content of the planned draft act is of fundamental significance in the Estonian legal system, the ministry concerned will, after the approval of the legislative intent and before laying down the provisions of the draft act, prepare the concept of the draft act, indicating the legal options. According to the memorandum, the concept is similar to the memorandum, which has explained the problem in great detail and assessed the impacts. The difference is that the concept is prepared before the draft and the explanatory memorandum, and this will prevent a situation where the fundamental disputes begin only at the draft proceedings stage.

However, what deserves attention in this precept, is the definition of 'fundamental significance'. The explanatory memorandum of the HÕNTE does not contain a description on how to determine when the changes have a fundamental significance and when they do not. It may be assumed that this refers to drafts, which bring about changes affecting target groups. In any case, it is on the discretion of the ministry concerned, as the initiator of the process.

¹⁶ Regulation of the European Parliament and of the Council No. 211/2011, February 16, 2011, on the citizens' initiative.

¹⁷ The European Citizens' Initiative. Basic facts. Available: <http://ec.europa.eu/citizens-initiative/public/basic-facts> [last viewed 02.05.2018].

¹⁸ Märgukirjale ja selgitustaotlusele vastamise ning kollektiivse pöördumise esitamise seadus [Response to Memoranda and Requests for Explanations and Submission of Collective Addresses Act]. *RT I*, 25.10.2016, 16.

¹⁹ Riigikogu kodu- ja töökorra seadus [*Riigikogu* Rules of Procedure and Internal Rules Act]. *RT I*, 28.06.2016, 22.

It is important to emphasize that the Government of the Republic cannot establish rules of legislative drafting for the *Riigikogu*. Therefore, if a draft act is, pursuant to clause 90(1) 1)–3) of the *Riigikogu* Rules of Procedure and Internal Rules Act, introduced by a member of the *Riigikogu*, a faction of the *Riigikogu* or a committees of the *Riigikogu*, then such introduction procedure is subject only to the Technical Rules for Draft Legislation Submitted for Legislative Proceedings and the requirements of the *Riigikogu* Rules of Procedure and Internal Rules Act. The HÕNTE requirements for thorough ex-ante and ex-post analysis, inclusion, development of legislative intent or concept, are not applicable.

It is the opinion of the author that this regulation is problematic. If the rules on the lawmaking activities of government institutions (especially ministries) are established to help ensure the effectiveness of the law to be introduced through more in-depth preparation and involvement of the parties, then draft legislation initiated by members, factions or committees of the *Riigikogu* does not guarantee the equivalent quality at the regulatory level.

The problems arise, at least theoretically, for any legislative acts processed in the *Riigikogu*. If the draft submitted to the *Riigikogu* by the Ministry is prepared as thoroughly as possible, the justification or the impact assessment requirements are not applicable for the amendments made by the *Riigikogu* pursuant to the § 99 of the *Riigikogu* Rules of Procedure and Internal Rules Act. It is also likely that such amendments will not be properly explained in the explanatory memorandum, which may make it difficult to interpret them in the future.

Summary

To sum up, developing as fair and as effective legislation at a national level presupposes that the legislative drafting is targeted at society: before the legislation is written down and proclaimed, the legislators need to be familiar with the nature and needs of society, to analyze in depth to whom and why these laws are written. Only this will help to overcome the alienation between the people and the state and to increase the effectiveness of the law and increase the security of society.

The regulation of the Government of the Republic of Estonia on the Rules of Good Legislation and Legislative Technique (*Hea õigusloome ja normitehnika eeskiri* – HÕNTE), which applies to government agencies, establishes quite thorough rules on the preparation of draft legislation: the preparer of the draft has a duty to prepare a development plan, to carry out an impact analysis, to involve the affected target groups, to create a concept of the law. However, the Technical Rules for Draft Legislation Submitted for Legislative Proceeding of the *Riigikogu* contain only the language, structure and normative requirements for the draft. Thus, if a draft is initiated by a parliamentary faction, members, or a committee, there is no obligation to go through the preparation process described in HÕNTE.

In answering the question on whether today's Estonian law-making process and related requirements ensure the comprehensibility of law, and its compliance with social realities, and thus support the the effectiveness of the law, it can be argued that the rules established by HÕNTE help to achieve the above-mentioned objective, emphasizing not only the valid normative side, but also the discussion between the parties and the impact analysis. The rules of legislative technique also ensure at the level of government agencies and the *Riigikogu*, that the text of the law is understandable and subject to certain rules.

However, as there are no such obligatory preliminary actions for drafts initiated by the *Riigikogu* members, factions or committees, it is unfortunately possible that laws prepared using the legislative process, in part will not coincide with social reality or the attitudes of society. According to the author, it is important to continue to improve the co-operation between social scientists and the legislator in order to prevent such cases by having the legislator collect social information and using it for the purpose of lawmaking, with the aim of creating laws that take social needs into account.

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