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Technical tools of effective law making

Introduction

The understanding of the nature of legislation can help us to construct a really effective legislative system even in countries where several artificial elements have been parts of the law making procedures, worsening the overall performance of the legislative system. Between the levels of substantial characteristics and grammatical/editorial features of a law, there are several opportunities to improve the effectiveness of a legislative product.

After an introduction of the playing field of the application of legal theory in Hungary, the presentation tries to give an interpretation of the realization/effectiveness of law in the first part, and mention real examples of the technical tool categories of effective law making in the second part.

The concept of Better Regulation

Since the first years of the 21st century, the idea of ‘Better Regulation’ has been a core element of any EU strategies concerning regulatory reforms.² The economical character of the Community Law emphasizes the approaches of business sphere, growth, competitiveness etc. of course, but some rather important theoretical directions can also be involved in pilots and strategic reform activities.

The scope of Better Regulation covers different aspects of a sophisticated law making framework, the highlights of which are

- Regulatory Impact Assessment

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² Refer to (e.g.): Communication from the Commission: Action Plan „Simplifying and improving the regulatory environment”) – European Commission, 2002; Communication from the Commission: Better regulation for Growth and Jobs in the European Union – European Commission, 2005

- Legislative simplification and
- Stakeholder consultation.

The Union-wide wave of radical improvement in the field of regulatory procedures supported to start some changes of the Hungarian legislative system.

The characteristics of the Eastern European legislative systems³

The Hungarian law is based on the continental type positive law with marginal role of analogies and case law. The legislative system is solid, institutions and procedures are laid down in the Constitution⁴ and other major laws.

The rather similar basics of legislation can be discovered easily when observing Eastern European systems from Russia to Hungary (or considering some elements even to Austria), and from the Baltic states to the Balkan. The continental law roots were developed further during the communist era in each affected country. Some important inter-relating features of such orders are as follows.

- Rule of positive law

The entirety of legislation and jurisdiction is based on the absolute primacy of written norms.⁵ The justice can be derived from texts and there is a very small opportunity of the application of complementing tools beyond the strict law. That leads to a rather comprehensive and composite mass of laws. The education of civil servants (predominantly lawyers) is also based on the respect of legal texts: the highly reputed graduate had to memorize the important acts for the success during the academic years. The most appreciated output of a legislative preparatory activity is the well designed, grammatically and logically perfect text, even if there is no evidence for the use of it.

- Separation of law from real life

³ Source: Zsombor Kovácsy: Regulatory reform changes in Eastern Europe in 'Publicna Administratsiya', Sofia – 1/2005.

⁴ Act No. XX of 1949 on the Constitution of the Republic of Hungary

⁵ Antal Visegrády: A jog hatékonysága. (Effectiveness of law) Unió, Budapest, 1997.

The logic of positive law allows creating a complete system without direct junctions to the society. Rules don't have to descent from really justified needs of social problem solving. Both legislation and jurisdiction have their own character that is very strange for ordinary people and the advocates knowing the rules of the game can be even more useful than searching for justice.⁶

- Decision making patterns

In the Eastern-European societies there can be observed a high respect for the doubtless, strong decision making manner while sophisticated argumentation is suspicious even if based on evidences. When somebody asks a doctor for the chances of healing, a strict answer like "You will be healthy in a week!" is more beneficial than an analysis like "There is 60% probability of a successful treatment within one week, but in 40% of the cases there can be complications that result in a longer recovery". The doctor wins 60% and loses 40% of the games in the first case while likely much less than 60% of the patients is happy with the honest description saying "Why are you the doctor if you don't know what will happen?"

- Transitory legislation

During the 1990s radical economic and political changes emerged in the countries of the region that led to an excessive need for the revision of existing legislation: new structures and processes (even the constitutions of new sovereign countries in some cases), rights and duties had to be laid down by the legislative authorities. This wave of reforms has not allowed reaching the situation of steady state so far. The EU accession of the majority of countries in question has meant a new big challenge for quantitative legislative performance.

⁶ Gunther Teubner: El derecho como sujeto epistémico: Hacia una epistemología constructivista del Derecho. Cuadernos de Filosofía del Derecho. Departamento de Filosofía del Derecho. Universidad de Alicante, 1989. <http://publicaciones.ua.es/LibrosPDF/0214-8676-25/16.pdf>

Practical consequences

The characteristics above result in a legislative system with several factors undermining the opportunity of the development in the direction of a modern law making system.

There are detailed rules on legislation, with appointing the responsible institutes of state and describing the official processes of how to produce, bring in force, apply and eliminate a regulation. Procedures predominantly focus on the inside coherence of the legislative system while stakeholder involvement remains secondary.

The legislative processes mostly exclude interdisciplinary evidence: the co-operation between experts in specific fields and legislators is artificial, influenced by the conservative working mechanisms of public administration, and is strongly subordinated to political will. Activities related to impact assessment occur accidentally and are performed on a false way, in order to highlight the positive effect of the planned legislation.

Opposed reforms

Proposals for radical change of the situation described above can mostly emerge from international co-operation (when having learned international experiences and modern law making tools) or from the side of stakeholders or scientists. In some fortunate moments a brave regime can introduce the up-to-date methods of law making.

Unfortunately, neither the politicians, nor the civil servants are likely the supporters of such reform initiatives. Politicians want to turn their party and governmental programs into legislation on the fastest way possible, without any superfluous sophistication, and additionally, long-term impacts often remain outside the goals of the governing forces.

Civil servants feel themselves in security within their well learned and stable framework of positive law. Their training excludes interdisciplinary considerations and knowledge on the phenomena that are to be regulated. Working processes are designed for the fast serving of

politicians' wishes.⁷ In Hungary, whenever a substantial change of the ancient patterns is proposed, there is a strong opposition with predominant argumentation based on the lack of trained personnel, time and monetary background. The opposition of reforms sometimes tries to undermine the rationality of initiatives by questioning their evidences and referring to marginal failures of international developments.

The playing field

As visible, there is a rather visible gap between the considerations of the most important actors and regulatory reform goals. However, there are some opportunities to intervene.

Policy decisions are frequently criticized by the actual opposition based on different data on consequences than the official ones. These are originally debates of much more professional than political character but they win political importance right because of the lack of doubtless scientific evidences. Governments may understand that they could avoid professional critiques if elaborating impact assessments.

The structure of stakeholder organizations is getting more solid after the relative anarchy in this field following the collapse of state socialist institutions. It is more profitable for the governments even in short term to get supporters than to send them to the arms of the opposition.

For young civil servants there is a great opportunity to work within or in co-operation with institutions of international organizations like the European Union or the OECD. After having the working methods of such entities learned, they can serve as the crystallizing core of a new age administration in their countries.

⁷ Zsombor Kovácsy – Krisztián Orbán: A jogi szabályozás hatásvizsgálata. Dialóg-Campus, Pécs-Budapest, 2005.

Fig. No. 1.: SWOT – analysis: Better regulation features in Hungary

<p>Strengths</p> <ul style="list-style-type: none"> • Solid legal system. • Regulated procedures of legislation. • Impact assessment approach is part of recent Act on Legislation. • Programmed technical simplification is present. • Regulatory quality unit established. • Postgraduate educations started. • Active participation of some ministries within isolated Better regulation projects. 	<p>Weaknesses</p> <ul style="list-style-type: none"> • One-sided positive law rule within lawmaking processes. • The education of civil servants is emphasizing the execution of political decisions and the grammatically and technically high quality drafting while analysis of consequences remains excluded. • Functions are determined by structure. • The law-making wave since the transition does not ensure enough time for analyses. • No satisfactory financial resources available for BR development. • Several ministries believe that BR is a superfluous activity in contrary with general EU tendencies.
<p>Opportunities</p> <ul style="list-style-type: none"> • Better regulation program of the EU irradiates the national legislation. • Ongoing development of several sciences enriches the armory of IA. • The requirement of economic growth and the business actors themselves urge rational law-making. • Universities are ready to start new curricula on BR knowledge. 	<p>Threats</p> <ul style="list-style-type: none"> • Politicians tend to misuse scientific methods in order to justify the benefits of their intentions and/or believe that IA is a useless tool that inhibits the fast realization of programmes. • The mid and long term nature of initiatives does not allow BR to be put on the top of governmental agendas.

The imperfect nature of rules

The fundamental problem of legislation refers to the conflict between the extreme diversity of real life phenomena and the necessary simplification performed by strict law. It is extremely difficult to find the compromise between lawfulness and normative regulation. Defects of lawfulness lead to incomplete realization of social and economic intentions and poor satisfaction from the losers' side while an over-sophisticated way of legislation leads to excessive costs of implementation. The two theoretical margins are 'uniform regulation for all' on the one side, and 'personal rules for each subjective' on the other.

A multi-level approach of law realization

For the definition of law realization the following multi-level approach shall be considered.

Fig. No. 2.: A multi-level approach of law realization

Level of realization	Manifestation of realization	Example: regulation of the personal income tax
Tool – in primary terms	Keeping the law	Payment of the prescribed taxes
Tool – in general terms	Utilization of opportunities	Selection from alternatives offered by the law
Goal	Success of the intention	Balance of State Budget, equity of sacrifice
Goal and its context	Intended and other impacts	Savings, inflation, social problems

1. Successful realization of the tool in primary terms purely means that the facts and the behaviour of affected entities are lawful. The situation is either legal or not. Poor legality has no different stages in contrast with the infringement which can be weighed.
2. Realization of the tool in general terms exceeds the prescription of legality including the selection from alternatives offered by the law and several qualitative and quantitative characteristics concerning the application of the legal frameworks.
3. Realization of the goal practically means the success of the lawmaker's intention. This level is the scene of the examinations concerning the effectiveness of the regulation.
4. The goal and its context represent the area of inquiry in which the arsenal of Regulatory Impact Assessment is needed. The approach can be used for the evaluation of the legislation in the broadest term by quantification or at least characterization of its costs and benefits of several natures with the inclusion of external effects.

The importance of the figure above beyond the theory can be felt when considering the fact that Hungarian law making procedures hardly include the broader vision of realization when creating the framework for a new law.⁸

The concept of effective law making has to include the latter, broadest level of realization.

Tools of effective law making

The effective realization of a legislative product can be ensured by measures of diverse nature:

1. 'Substantial' tools

⁸ In 71% of the proposals to the Government containing draft acts, there is no referral to any information based on scientific evidences in the background ('impact assessment') material. [Zsombor Kovácsy, J.D., M.D., M.Sc.: IMPACT ASSESSMENT RELATED ACTIVITIES WITHIN THE GOVERNMENTAL LEGISLATORY PROCEDURES IN HUNGARY (Presentation, 2005)]

The details of the idea behind the legislative intentions, the rights and duties to be laid down by the legislation represent the hardcore of the lawmaking.

2. ‘Technical’ tools

The medium level which mostly represents the tools of the translation of legislative intentions into a text can have vital impacts depending on the adequate application of the single features.

3. Grammatical, editorial tools

The proper grammar and user-friendly style can improve the compliance of legal subjects.

The rest of the presentation is dealing with the level No. 2.

Technical tools⁹

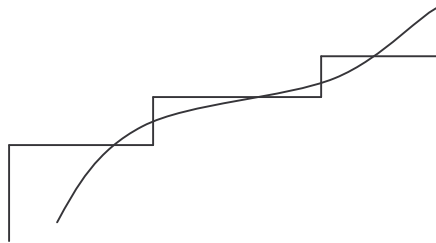
Even this level contains a plenty of opportunities to make legislation better. In the following section there are some examples that represent this ‘medium’ level of law making tools and can be used in the real life frequently.

1. Setting intervals

The most direct way to find the compromise between simplicity and lawfulness is to find out how many categories we set for the phenomenon affected by the rule. If we give e.g. two values to all potential real life cases only, we will have a simple situation that may not be acceptable for all. On the other hand, if we create too many categories, the administrative costs and other burdens of the regulation will rise, and at the end, such ‘rules’ lose the character of rules because of the loss in terms of abstraction.

⁹ Source: Zs. Kovácsy- K. Orbán: A jogi szabályozás hatásvizsgálata (Regulatory Impact Assessment) Dialóg-Campus, Budapest, 2005, pp. 141-155.

Fig. No. 3.: The simplification of real life situations within the legislation



The curve on the figure above represents the diversity of real life situations and the steps following the curve are to picture the character of the regulation.

In the case of quantitative categories there is the opportunity to apply a formula instead of creating a plenty of categories. When setting solid intervals, dealing with marginal values is one of the more sensitive problems. The ones just out of a supported group ‘due to’ a tiny difference from the matching terms will feel to be treated unequally.

2. Simultaneous setting of several terms

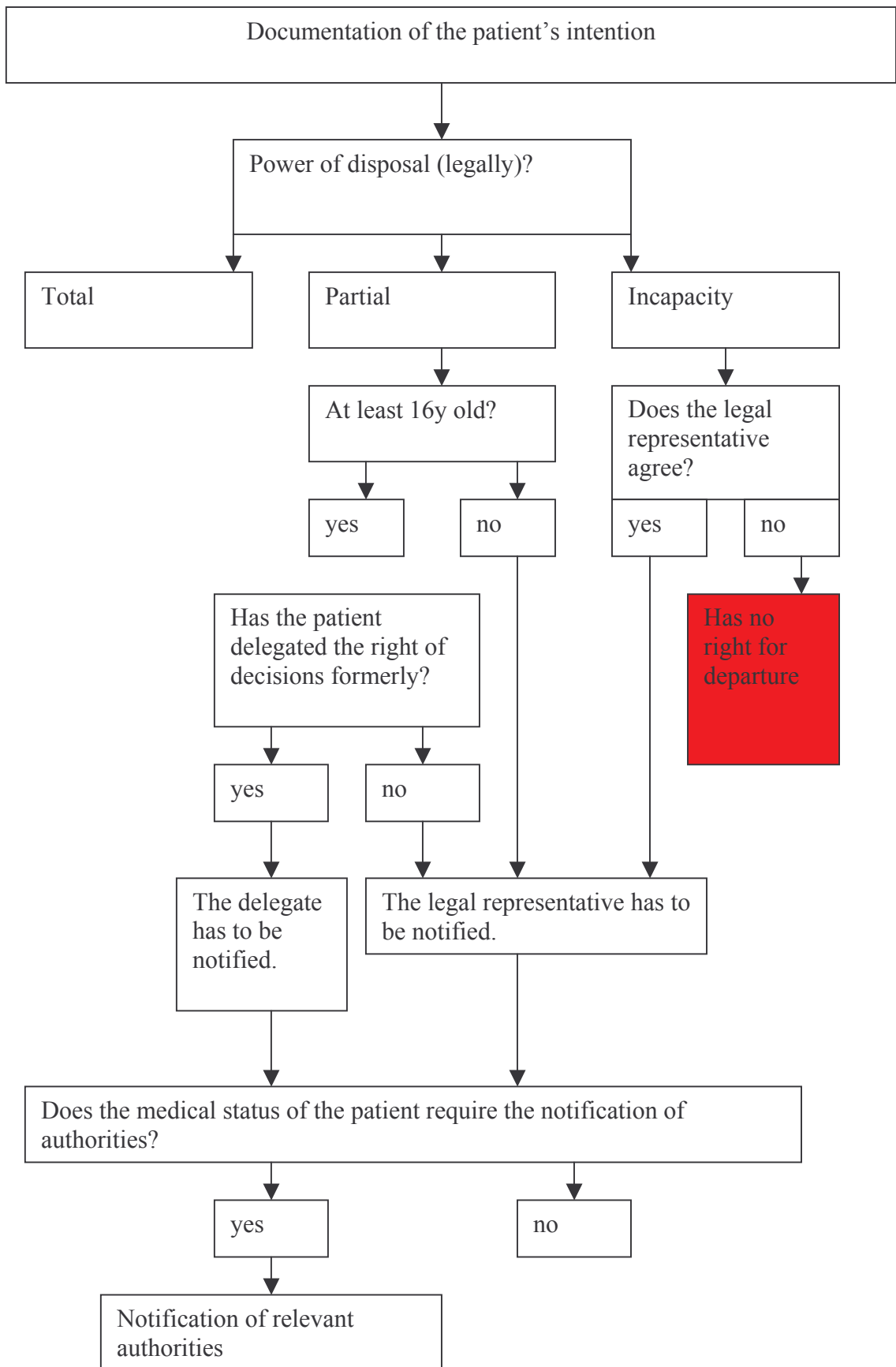
When conditions of several dimensions formulate the direction of consequences, a graphical approach (e.g. containing ‘and’ and ‘or’ relations) enables us to take each possible option into consideration. Failures in the structure of conditions may undermine the success of the regulation.

A graph can improve both the perfect design of the law and the application with user-friendly IT solutions. Instead of reading hardly understandable texts, an interactive portal can give information on relevant legal issues to the public if the law is translated into algorithmic form.

Figure 4.: Example for the algorithmic form of a rule: What to do when a patient wants to leave the hospital before the end of treatment?

(simplified)¹⁰

¹⁰ The rules laid down by the Act No. CLIV of 1997 on Health.



3. Optional or alternative consequences

In order to soften the strict nature of law, there is the option of multiple consequences to consider. The choice has to be real and each solution offered must serve the effectiveness of law.

The right of consideration can be given to the state authorities or judge, but in other cases the subject of the law or even a perpetrator of a crime can be the one to decide.

4. Equity

In several legislative systems there can be an explicit mechanism of equity or equal law making can also be embedded in the entire law order. Concerning the side channels of jurisdiction the threats of discretionary rights have to be taken into account.

5. Durable conditions

The long-term effectiveness of a rule requires the application of several tricks in order to ensure sustainability. First, the estimation of the future changes of conditions is necessary. The application of anchor values can avoid frequent amendments of monetary regulatory elements.

6. Replacement of hardly measurable factors

It can happen frequently that the decision on the fulfillment of legislative conditions can be based on sophisticated activities (registration, monitoring, etc.) only. The adequate substitution of such conditions with ones that can be approached simply can improve the compliance and reduce administrative burdens of the regulation.

Summary

The success of a regulation can not be judged by primary realization; intended consequences and the ones beyond the law making agenda reflect the real regulatory performance. Additionally to the characteristics of the content of the legislation, there are several more or less technical tools and choices within the dimension of total freedom to strict law that can enable the administration to adjust the legislative products to the requirements of effective regulation.