

Regulatory Impact Assessment (RIA) and Rationality of Law – Legal Aspects

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Abstract

Purpose: The fundamental aim of this article is to verify an assumption according to which the proper Regulatory Impact Assessment (RIA) is a key factor in the rationality of law. Rational law is a law which is effective and able to realize and achieve social, economic and environmental aims determined and established by the lawmaker.

Methodology: The scope of this paper – which determines its structure – encompasses the definition of RIA, including its specific (but non-legal) forms such as benchmarking and evaluation. As far as we are concerned, these methods can provide – as a kind of Regulatory Impact Assessment – a significant tool for measuring the rationality of regulations. Furthermore, the usefulness of benchmarking and evaluation has been recognised by representatives of jurisprudence. We will also explain the concept and the assumptions of the rationality of law on the grounds and in the light of the case law of the Polish Constitutional Tribunal and the Supreme Administrative Court. This should allow to countercheck the main thesis of this paper. The methodology encompasses primary legal methods such as literature, case law and legislation analysis.

Findings: An indispensable condition of the rationality of law is actual elimination of irrational regulations which were not subjected to the Regulatory Impact Assessment.

Practical implications: Although RIA is a problematic issue (in terms of its practical application), it is necessary to carry it out in order to assure the rationality of law. A good and desirable complement to Regulatory Impact Assessment are non-legal methods such as benchmarking and evaluation.

Originality: Originality and value of this survey lies in taking into account the case law of the Polish Constitutional Tribunal and the Supreme Administrative Court. Additionally, this paper is original in that it considers non-legal methods in the examination of the rationality of law.

Keywords: regulatory impact assessment, rationality, law, benchmarking, evaluation

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Introductory Remarks

An elementary function and purpose of law (i.e. a system of legal norms) is effective regulation of social, economic and environmental processes. However, it is only rational law that is capable of reaching aims that are both desirable and established; hence the rationality of law constitutes both a criterion and a prerequisite to its efficacy. At the same time, Regulatory Impact Assessment (RIA) is an essential element and necessary condition of the rationality of law, however disputable as the practical application and actual impact of such an instrument may be on the quality of the norms thus created. This assumption, as formulated above, is a general thesis of this paper.

Rationality in the legal sense – i.e. rationality of law – is an essentially artificial notion and as such does not coincide with rationality, or efficacy, as adopted in social sciences³. This does not mean, however, that it is an artificially abstracted construct and a category of legal-theoretical character only, which is attested by the case law of the Polish Constitutional Tribunal, and also – to a lesser degree – of the Supreme Administrative Court. For rationality of law is recognised here from the perspectives of both legislation and application of law.

The key aim of this paper is to discuss – in the context of law and legal theory – the manner in which the rationality of law is understood in both its legislative and interpretative aspects, and further to verify the above mentioned assumption that a (proper) RIA is fundamental to the rationality of the law being enacted. For the sake of precision, it must be stated that – as shall be discussed later – rational law is one that efficaciously achieves the aims assumed by the legislator.

The conception of rationality of law – as mentioned above – is particularly interesting and visible in the case law of the Polish Constitutional Tribunal, as the so called ‘trial over the law’, whose jurisdiction entails regulatory control of the legal norms incorporated in the statutory and secondary legislation (i.e. ensuring compliance of such norms with the Constitution and international agreements). Therefore, a detailed analysis shall be made herein of the rulings of the Tribunal which bear directly on the issue of rationality of law. The issue of rationality of law also emerges in the case law of the Supreme Administrative Court, which has been vested with regulatory control over the ordinances of local government (i.e. the so called ‘local legislator’). This entails that the basic research methods adopted herein shall be: the legal-theoretic and legal-dogmatic methods. For the research shall cover, not only an analysis of the

³ The very presence of a formalised legal framework is a primary capital-attracting factor. So: Bingham (2011, p. 38).

literature and views of legal theorists, but also the generally binding law (in particular, constitutional provisions) and case law.

The scope of the subject matter of this paper, which determines its structure, comprises a definition of RIA, including its particular (albeit extralegal) forms which we deem to be benchmarking and evaluation. In our opinion, they may serve – as *sui generis* appraisals of the regulatory impact – as an important instrument for measuring the purposefulness (rationality) of regulation and legal solutions, with their repeated use for improving the quality and rationality of statutory law being recognised by the jurisprudence.

Furthermore, the issue of rationality of law is of essential character to the text of the present paper. Therefore, it will be necessary to elaborate upon the conception and assumptions to rationality of law in the context of the views of jurisprudence and the Polish Constitutional Tribunal (as well as Supreme Administrative Court) case law, which in turn will enable us to verify the initial proposition. This presentation is not of exhaustive character; rather it sets out – in the intention of the authors – to be a contribution to a juridical debate over the influence exerted by RIA upon the issue of rationality of law in the context of enactment thereof.

RIA – Conception and Types

RIA is usually defined – in a comprehensive approach – as systematic, mandatory and coherent assessment of the effects of various legal solutions (statutes, other legal instruments, governmental policies) and appraisal of the impact thereof (benefits and costs) from a social, economic or environmental perspective (Rogowski and Szpringer, 2007, p. 8–9).

A fundamental question which arises in RIA so defined is whether the regulation has met the assumed expectations of the legislator himself, where the notion of the legislator is intended to extend to any entities vested with law-making prerogatives. This refers not only to the Sejm (Polish National Parliament) (collaborating in the course of the legislative procedure with the Senate and President), but also to other bodies capable of issuing and enacting secondary legislation, such as regulations (executive acts) or ordinances. In the latter case, the local legislator, as mentioned in the introduction, is referred to.

The above mentioned expectations of the legislator must *ex definitione* be rational. This, however, poses a problem – for how such rationality is to be understood is itself

subject to change over time. Under the traditional law-making paradigm, the rational legislator undertook legislative action where there were rational motives to do so. This ensues primarily from Art. 22 of the Constitution of the Republic of Poland according to which economic freedom may be restricted where it is justified by an important public interest. Public interest is, by its very nature, a category founded upon rationality. A legislator who fails to adduce concrete circumstances evidencing the existence of a public interest must refrain from action. Furthermore, in an account of constitutional regulations that are of immense impact upon the shape of statutory and secondary legislation (i.e. the legal system *in genere*), Art. 31 (3) of the Constitution must be mentioned, which only allows restricting constitutional freedoms by way of a statute, and only where such restrictions are necessary in a democratic state for its security or public order, or for the purposes of protecting the environment, health and public morality, or freedoms and rights of others. At the same time, such restrictions must not go to the essence of freedoms or rights. Any interference with citizen's (i.e. constitutional) rights or freedoms must – according to the Polish Constitutional Tribunal – entail a choice, from among possible courses of action – of a course of action that is the least cumbersome to the entities affected by it, or a choice of measures which are not cumbersome to a degree higher than that which is necessary for the achievement of the goal desired⁴. This means that the law-maker (here, the legislator) must, in drafting any provisions which may restrict public legal rights of individuals, take into consideration and respect the principle of proportionality and only undertake statutory intervention where it will enable the achievement of the goal desired. In evaluating the compliance of individual rights restrictions with the Constitution, the Polish Constitutional Tribunal verifies whether: 1) the proposed statutory regulation serves, and is necessary, to shape the legal order in a given area of social relations; 2) the goal intended by the legislator is capable of being reached without violating the basic legal standards embodying the essence of the rights it concerns; 3) the statutory regulation is necessary for the protection of an interest or constitutional value with which it is connected; 4) the effect of the proposed regulation is proportionate to the burdens imposed by it upon the citizen (Banszak, 2012). Therefore, compliance with the principle of proportionality under Art. 31 (3) of the Constitution of the RP requires that the impact of regulation be analysed and hence ensures the rationality of proposed legislation.

Whereas, currently, not only do the authorities undertake regulatory actions in the absence of adequate knowledge of the causes and effects of the various phenomena under regulation, but it is the very ignorance that constitutes a condition for regulation. An example is provided by the regulations on exploration and production of shale

⁴ Cf. Polish Constitutional Tribunal judgment of 25 February 1999, K 23/98, OTK 1999, No. 2, item 25.

gas. The European Union adopted an initial legislative initiative in the form of Recommendation for Member States concerning on minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high volume hydraulic fracturing issued on 22 January 2014 (C(2014) 267/3). In this recommendation the Commission admits that the acts of European Law referred to therein were enacted at the time when the technology of high volume hydraulic fracturing was not in use. The areas in which the law has become obsolete on account of the current technological expertise include – according to the European Commission – strategic planning, underground risk assessment, well integrity, baseline and operational monitoring, capturing methane emissions and disclosure of information on chemicals used by the high volume hydraulic fracturing. In admitting that the currently binding provisions were drafted with a level of knowledge which was lower than today, the Commission indirectly recognised the validity of the arguments presented in the British business task force report of October 2013 entitled *Cut the EU red tape*⁵. In the opinion of the authors of the report, there is no need for new legal acts where the current state of technology and scientific knowledge are subject to rapid and fundamental changes. Regardless of such doubts, the Commission issued provisions of the *soft law* status containing a threat that in the event of failure to comply therewith a Union directive would be adopted.⁶

A policy of ignorance-based law-making affects the regulatory impact assessment, and thus results in the law being non-rational while exerting significant adverse effect upon the issue of efficacy of the aims of regulation, which – as it will be remembered – provide a legitimisation of the very existence and creation of legal norms embodied in legal instruments. A lack of rationality of legal solutions (regulation) may result from two fundamental factors. Firstly, non-rational regulation is one which has never been subjected to RIA, or the RIA was carried out improperly (e.g. hastily, without consideration given to all aspects of the impact the legal act, or any amendments thereto, may have upon entering into force). This in essence implies wilful misconduct. Nevertheless, there are circumstances where adequate and reliable RIA may be considerably obstructed or even at times rendered impossible on account of the complexity of the social, economic or environmental relations, or complexity of the subject matter of regulation itself. Here, a lack of rationality does not result from wilful misconduct or omission, but is determined by factors that are beyond the control of the law-maker.

⁵ *Cut the EU red tape. Report from the business task force*, <https://www.gov.uk/government/publications/cut-eu-red-tape-report-from-the-business-taskforce>.

⁶ A similar instance of paradigm shift can be seen in the ban on shale gas production in the state of New York. Its governor admitted that ignorance of the environmental impact of production is the reason for regulation. *New York bans fracking: Why shale is off-limits across state*, The Christian Science Monitor, Dec. 17, 2014, <http://www.csmonitor.com>.

This is particularly evident in trade law, where the RIA (and thus the rationality of regulation) may be seriously restricted by the processes of globalisation of law and trade relations. International trade and investment protection treaties, hereinafter called ‘globalisation treaties’, overlap in the same sectors and territories thus forming an unintelligible mosaic. The global number of the very bilateral international treaties (BITs) has exceeded 2500. Poland is signatory to over 60. As a result, the same particular transaction is subject to simultaneous evaluation by the multiple international law acts, belonging to diverse legal regimes based on different axiologies. Interpretative problems are supplemented by inconsistent lines of rulings⁷. A comprehensive and consistent RIA, therefore, requires that the impact of case law be taken into consideration in addition to abstract rules of conduct. Globalisation treaties may facilitate investment protection, but their effect is to obstruct RIA, in particular in the event of regulations concerning investment and finance. Where the assets of an enterprise or investment fund are being sold and listed on stock exchanges on several continents at the same time, with their value at a given moment not being susceptible to precise determination due to ongoing fluctuations, then under such circumstances even short-term analyses of regulatory impact are impossible and may only indicate overall development trends rather than an actual state of affairs.

In conclusion of this part of our considerations, it should be noted that RIA may be analysed from the points of view of different social sciences, each using its own specific methodology (e.g. economics or management studies). This is of interest inasmuch as the conclusions and proposals put forward by these disciplines, not being part of legal studies, may serve as an important factor in the considerations by the jurisprudence of RIA, and also as an instrument in enhancing the quality of law in the decision-making process (law and policy making). In the present context two aspects are worth mentioning, viz. benchmarking and evaluation as peculiar RIA forms.

A comparative analysis (in which reference to a benchmark is made), of which benchmarking is an example, in the past neglected as unnecessarily wasteful of resources, today has gained popularity as a standard instrument both in business (Lianos and Geraaadin, 2013, p. 133; Henry, 1993–1994, p. 483) and legislation. In contrast to classic RIA methods, which set out to assess regulatory impact in absolute categories, benchmarking evaluates the functioning of legal systems adopting a relativistic approach. What matters is not what has been achieved by a given regulation, but whether it was achieved more efficiently than in the regulations of other countries. Practice indicates

⁷ We do not share the view that vesting judges with a role comparable to law-making is compatible with the rule of law. Different views are presented in Veitch, Christodoulidis and Farmer (2007).

that this method is more suitable to business (commercial) law than to other legal areas, at least on account of the fact that it has not yet been widely used outside the context of business regulatory assessment. Such analysis is carried out by rating agencies (Moody Agency, Standard & Poor's, and others) and international institutions such as the World Bank and transnational bodies such as the European Commission.

The World Bank evaluates legal and economic systems in 9 categories: 1) credit availability, 2) level of legal protection of the investor, 3) international trade, 4) contract enforceability, 5) procedural barriers to closing a business, 6) procedural barriers to property registration, 7) regulations concerning starting a business, 8) tax collection efficiency and 9) permits and concessions. As can be seen, 7 out of 9 criteria refer exclusively to comparative regulatory impact.

The European Commission gathers information on the legal regimes in Member States with the view to comparing the levels of EU law implementation in accordance with the methodology adopted (Ioannou et al., 2008, p. 22–28). Other institutions carrying out regulatory impact assessment by means of benchmarking include The Global Competitiveness Index operated by The World Economic Forum, World Competitive Yearbook developed by the International Institute for Management Development, the Heritage Foundation and the Wall Street Journal. The assessment carried out using this method has an advantage over ordinary RIA in that it has an inherent regulation improvement element. Legal systems assessed as less investor-friendly and more red-tape encumbered become less attractive for investors. Poland entering the EU has strengthened the impact of benchmarking. Following the judgment of the European Court of Justice in *Centros*⁸, many businesses have emigrated from Poland, but also from Germany, to the United Kingdom which offers cheap and straightforward business formation procedures. The scale of businesses moving offshore is an indirect instrument of RIA.

Benchmarking also creates positive stimuli for reforms: 1) countries obtain ready-made models positively verified in other jurisdictions, 2) costs are avoided of implementing potentially disadvantageous legislative conceptions, and 3) shortly after obtaining favourable ranking against competitive legal systems foreign investment may be attracted and economic growth stimulated.

⁸ The judgment no. 212/97 in *Centros* enabled businesses to register in a country other than that where the actual business is conducted. This enabled 'forum shopping' in the search of a jurisdiction offering cheaper and simpler registration. As a result of this judgment a considerable number of firms from Poland and Germany moved to the United Kingdom.

The other interesting issue is that of evaluation, by which should be understood “a diverse set of methods and activities aiming at critical reflection upon the value and quality of public interventions – both the processes of their implementation and their effects” (Olejniczak, 2008, p. 19). The above interventions regard all kinds of procedures, policies, plans, programmes and other (public) activities, therefore, as far as we are concerned, there is no reason why evaluation could not be applied to (potential) regulatory impact undoubtedly being covered by the concept of public intervention. Furthermore, evaluation analysis inherently involves not only an initial and ongoing intervention structure assessment, but also – which is of particular importance from the viewpoint of the present analysis – a verification and estimation of actual implications and impact of a given intervention (Olejniczak, 2008, p. 19–20). Therefore, particularly on account of the latter of the above mentioned aspects, evaluation may be perceived as a special kind of RIA, or perhaps its complement using different, due to the non-legal character of the institution, methodologies, criteria and measures.

At the same time – as has been pointed out by jurisprudence – one of recommended evaluation methods is stakeholder consultations, which play a vital role in the processes of making and assessing any public decisions (including law-making). It has been emphasised that a key assumption of the stakeholder consultation method is determination of the utility of a given solution, since the method – particularly when coupled with the so called expert panel – allows to determine whether the proposed solutions achieve their respective goals (Stachowiak-Kudła, 2014, p. 60–62). Thus, as far as a decision-making process such as law-making is concerned, stakeholder consultations “(...) may serve to rationalise the law being made, and also become an instrument of merit-based and objective verification of its quality” (Stachowiak-Kudła, 2014, p. 63).

RIA and Rationality of Law – Case Law Analysis

In general, rationality is an open category, not capable of complete explication (Paździora, 2010, p. 235). This is not to imply, however, that no general meaning may be attributed – within the framework of the theory of law itself – to it. Rational law is that which is prudent, effective (efficacious) and carefully deliberated in terms of its social and economic impact (implications). What is meant here is not only that law should be enforced and applied in a rational manner by courts and public administration bodies, but also, and perhaps more importantly, that it is rationally created.

A key prerequisite to the rationality of established law is, in our opinion, regulatory RIA. For it is a practice which allows to “(...) determine, as precisely as possible, all

consequences – both benefits and costs – of the proposed state intervention. It ought to be applied as early as at the preliminary stages at which the conception of the regulation, as well as its goal and form, are developed. It is to precede the potential drafting of a bill” (Osiecka-Chojnacka, 2008, p. 1) and, as a result, establish the reasonableness of the proposed legislation. However, it is essential for the efficacy of RIA, and as a result of the effectiveness of the legal provisions and norms, that non-rational normative instruments, i.e. those which had not been subjected to regulatory impact assessment, be subjected to genuine and lasting sanctions. What is meant here is particularly the case law of the Polish Constitutional Tribunal vested with the power to exercise control and – as a result of such control – eliminate legal norms incompatible with the norms (provisions) of a higher order. The key question to be asked in this context is: can the Polish Constitutional Tribunal eliminate from the legal system non-rational regulations?

Chronologically, the first stage in the methodology of RIA is the so called problem analysis, i.e. a determination whether a given problem actually requires legislative intervention (Zubek, 2007, p. 3). This aspect is part of a broader issue of the general principle of minimal legislative intervention which states that “(...) the law as a means to achieving an end is to be considered only after other ways to achieving it have already been analysed. Where such other solutions (other means) are rejected on the grounds of principles (e.g. when they are found detrimental) or for instrumental reasons (e.g. as too expensive) and legal regulation is contemplated as a means to achieving an end, the total merit of such a solution must be evaluated” (Jabłońska-Bonca, 1999, p. 81). In this context law may be considered as a set of instrumental directives aiming to effectively (efficaciously) attain the goals adopted (Morawski, 1988, p. 29). Hence – as it has been pointed out by legal theorists and philosophers of law – “law is a technique of rationally (...) manoeuvring and managing social processes. Rationality of law means rationality of an instrument which offers efficient and effective solutions to social problems” (Morawski, 1988, p. 29).

Rationality of law may be considered on several basic levels, of which the primary two include law making and law enforcement, with the law-making level being subdivided into two further levels. The first of these encompasses rationality of law in its most general sense (as ascribed to it in the previous paragraph), i.e. the rationality of instrumental directives being the most effective means serving to attain the ends specified and desired by the law-maker. Whereas the other level (aspect) of rationality of law making concerns the technological rationality, i.e. where the law-making body articulates provisions in a clear, precise manner, arranges them in a system with clear

and unambiguous preferences, and where the provisions drafted incorporate practical knowledge of social processes (Morawski, 1988, p. 34).

Whereas, as regards rationality of law in the context of enforcement and application, of primary importance is the conception of the so called rational legislator, which – put in the maximally synthetic form – is applied in the process of legal construction (i.e. interpretation and explanation of the meaning of legal provisions and norms by a court or administrative body) and assumes that each law-making entity is rational and hence all its actions are rational (deliberate, wilful and purposeful) too. Therefore, any (perhaps unintended) mistakes in the very provisions of the law, and the non-rationality of either certain specific provisions or entire normative acts (i.e. setting objectives incapable of being achieved or applying inadequate means (Stawecki and Winczorek, 2003, p. 158)) are often deemed, by having recourse to the theory of the rational legislator, as correct (for a rational legislator *ex definitione* may not act non-rationally) and consistent with both the other provisions of the same normative act and with the entire legal system as well.

Such (dichotomic) approach to the rationality of law is particularly evident in an established line of rulings of the Polish Constitutional Tribunal. It will be noted here that criteria for controlling the constitutionality of law comprise the contents of such provisions (material criterion), the power of a competent body to issue such provisions (competence criterion) and whether the prescribed procedures were followed in enacting a given legal instrument or entering into and ratifying an international treaty (procedural criterion) (Florczak-Wątor, 2006, p. 42). As the Polish Constitutional Tribunal has pointed out, this means that it is not “empowered to exercise control over purposefulness, rationality or efficacy of the solutions adopted by the legislator. The choice of values to give direction to the specific legislative solutions rests with the legislator (law-maker), with the limits to such freedom of choice being the constitutional principles and provisions. The Polish Constitutional Tribunal may only intervene where the legislator has exceeded its regulatory leeway in a manner so gross that the violation of constitutional clauses becomes evident”⁹.

Nevertheless, to a certain degree contrary to the Polish Constitutional Tribunal’s literal pronouncements, it’s scope of interest frequently includes the very question of rationality of law, understood not only as the rationality of the legislator, but also as the rationality of law itself (Morawski, 2000, p. 36); and rationality of law is closely related

⁹ Polish Constitutional Tribunal judgment of 31 March 1998, K 24/97, OTK ZU No. 2/1998, item 13.

to the goals which a given regulation is to achieve, and further with the questions of whether such regulations function properly in the legal framework and whether they are justified. Whereas a special gauge and instrument for the verification of the above aspects is provided by RIA.

In light of the above a fundamental question arises about the bearing of RIA upon the issue of rationality of law. For it is evident that RIA itself may not be subjected to the jurisdiction of the Polish Constitutional Tribunal as it falls outside the scope of statutory control criteria. Moreover, the Tribunal itself has consistently emphasised that outside such criteria are purposefulness, rationality and efficacy of regulation, which in essence means abstention from controlling the grounds for legislative acts, including regulatory impact assessment (Jakubiak-Mirończyk, 2007; Błachut, Gromski and Kaczor, 2008, p. 6). Yet it is the very issue of rationality of law that remains subject of many pronouncements and judgments of the Polish Constitutional Tribunal.

It was indicated above that rationality of law should be inherent in both application and making of the law. As regards application of law (its enforcement by the authorised entities such as courts, including the constitutional court and administrative bodies), the conception of its rationality takes the form of the above mentioned theory of the rational legislator.

The Polish Constitutional Tribunal is of the opinion that the law enacted is rational by its very nature, since all actions of the legislator result from a comprehensive and in-depth consideration of a problem requiring regulation and from a mature decision having rational grounds. In a broader perspective this means that – in the sole judgement of the Polish Constitutional Tribunal – the ultimate basis of the system of legal norms and provisions is the adoption of a legal fiction of rational actions of the legislator¹⁰. The assumption of rationality of the legislator is necessary from the viewpoint of ensuring a proper functioning of the state and public authority, while challenging this conception “(...) would result in a possibility of challenging certain legal acts and refusing to comply therewith, which in turn would threaten to loosen all the legal and social ties. If rationality of the legislator (and the ensuing rationality of particular legal regulations) is adopted as a premise, then rationality of the enacted law must be deemed a component of decent legislation. In other words: non-rational legislation, in a democratic state with a rule of law, must never be deemed ‘decent’, even if it should meet all formal criteria of correctness (e.g. as regards the form of the act or the procedure

¹⁰ Polish Constitutional Tribunal judgment of 17 May 2005, K 6/04, OTK ZU No. 5/A/2005, item 50.

for its enactment or publication)”¹¹. The considerations of the Polish Constitutional Tribunal quoted above merit attention for at least two reasons.

Firstly, undoubtedly the assumption that the legislator always acts rationally is one of the central aspects of regulatory control exercised by the Polish Constitutional Tribunal¹². However, this view does not enjoy full approval. A critical position has been clearly expressed by the jurisprudence, which *inter alia* has challenged the theory of the rational legislator as obsolete (which results from the conviction that the assumption of the rationality of the legislator is not necessary for the optimal construction of the legal provisions), or on the grounds that by having recourse to the conception every legislative error may be justified (Morawski, 2000).

Secondly, a remark should be noted made by the Polish Constitutional Tribunal which essentially identifies rationality with the so called decent (correct) legislation principle, which thus brings us to the issues of rationality as inherent in the law-making process. In its rulings, the Polish Constitutional Tribunal, as has already been mentioned, indicates that outside the scope of its regulatory control fall the evaluation of the rationality of the legislator’s decisions as regards the specific legislative activities, and the choice of legislative technique adopted by the legislative entity. At the same time, according to the Tribunal, the assessment of rationality of given provisions is not identical with an assessment of whether the principles of rationality were observed in the course of their enactment¹³.

One may consider the provisions being enacted as rational where they meet the requirements of decent legislation which encompass the requirement of definiteness, logical and linguistic correctness¹⁴, and also – which is of paramount importance – the requirements comprising “also fundamental from the point of view of legislative procedure stage at which the goals are established which are to be achieved by the enactment of a given legal norm. They form the basis for the evaluation of whether the legal provisions ultimately formulated embody correctly the norm expressed therein and whether they are capable of achieving the goal intended”¹⁵. One the integral and basic elements of the principle of correct legislation is enactment, by an entity so authorised, of a regulation which will be capable of achieving the aims intended. Therefore, aimless

¹¹ Ibidem.

¹² Cf. Polish Constitutional Tribunal judgment of 22 June 1999, K 5/99, OTK ZU No. 5/1999, item 100.

¹³ Polish Constitutional Tribunal judgment of 14 July 2010, Kp 9/09, OTK-A 2010, No. 6, item 59.

¹⁴ Polish Constitutional Tribunal judgment of 11 January 2000, K 7/99, OTK ZU No. 1/2000, item 2.

¹⁵ Polish Constitutional Tribunal judgment of 24 February 2000, K 28/02, OTK ZU No. 2/A/2003, item 13.

regulation, i.e. such that at the time of entering into force does not and cannot have application (so called empty norms) is in violation of this requirement¹⁶. Violation of the principles of decent legislation – which the Polish Constitutional Tribunal has emphasised from time to time – may serve a basis for finding a provision unconstitutional¹⁷.

It follows unambiguously from the above considerations that the first step in designing new legal solutions is to establish whether the introduction of a given regulation is actually necessary (minimal legislative intervention). A further stage – yet still preceding the choice of legislative technique (regulatory form) – should involve RIA understood as the totality of its, foreseeable and potential, social and economic implications. For it goes without proof that each, however minor, regulatory intervention affects (very significantly at times) either the society at large (or its selected groups), or the economy (or perhaps its selected sectors, industries, segments, etc.), while frequently – both of them simultaneously. Inherent element of RIA is prior verification whether the regulation in question will achieve the aims intended by the legislator. It is both an essential element and prerequisite for the rationality of law, i.e. rationality of law enacted (created) rather than its subsequent enforcement (application of law). A legal instrument is rational where it is capable of achieving the aims intended by its legislator. Therefore, non-rational acts (i.e. destitute of ability to achieve their aims) ought to be eliminated from the legal system (permanently removed or modified), which results from the regulatory control by the Polish Constitutional Tribunal. Admittedly, the jurisdiction of the Tribunal does not include RIA control or the choice of regulatory form (legislative technique); however, the Tribunal is in a position to evaluate the rationality of legal provisions (including the principles of correct legislative procedure). Undoubtedly, RIA may play an important role in this aspect, provided it is carried out reliably and skilfully. For both RIA and the Polish Constitutional Tribunal control take into consideration whether a regulation is capable of achieving the aims for which it has been created. It ought to be remembered here that the legislator need not, and in fact does not, always act rationally, which is abundantly evidenced by certain regulations (legal acts) still in force; not only are they contrary to the conception of the rationality of law, but they are even in gross violation of it¹⁸. Furthermore, a prerequisite to ensuring rationality of regulation is to eliminate non-rational legal acts, i.e. not only those which are inefficient, ineffective or aimless (empty norms),

¹⁶ Polish Constitutional Tribunal judgment of 12 January 2012, Kp 10/09, OTK-A 2012, No. 1, item 4.

¹⁷ *Ibidem*.

¹⁸ An example of such an action was the amendment of 2001 of the act on environmental protection which resulted in a breakdown in the development of the national park network in Poland, which in turn was the effect of a disastrous modification of the procedure of establishing such legal forms of environmental protection. So: Sześciło (2014, p. 119).

but also those which are non-rational in the sense of not having been subjected, or subjected to incorrect, regulatory impact assessment.

Our considerations have hitherto primarily focused on the case law of the Polish Constitutional Tribunal as the “trial of the law”, and even statutory law. However, rationality of law – which should be at least signalled here – in the present perspective (i.e. rationality of law-making and application of law) also finds its expression in the case law of the Supreme Administrative Court. Also here, the adjudicating panels have had recourse to the theory of the rational legislator in application of the law. Moreover, as this Court has argued and emphasised, rationality of law is a prerequisite to the local legislator enacting law¹⁹. Whereas the Supreme Administrative Court has consistently held that RIA is an inherent element of and condition for rational law, since in a number of its rulings it has pointed out that it is necessary to assess the legislator’s actions “(...) through the prism of the element of rational law-making process which is foreseeing social implications of its creation and being operational, i.e. in other words through the prism of regulatory impact assessment”²⁰.

Final Conclusions

As has been indicated in the RIA literature, most research shows that availability and use of the information derived from the regulatory impact assessment process has led to better law-making and an improvement in its quality. Furthermore, RIA is expected to strengthen and increase the responsibility and legitimisation in the processes formulation of policies and law (Staronova, 2010, p. 117). As far as we are concerned, RIA is a key factor determining the rationality of the law enacted, since the use of the method “(...) allows to improve the quality of regulation by strengthening the role of argument in the law-making process” (Zubek, 2007, p. 33).

However, a prerequisite to the rationality of law is actual suppression of non-rational acts, which have never been subjected to regulatory impact assessment or whose assessment was carried out improperly. This regards equally enactment of entirely new regulations and amendments to existing ones. By suppression is meant elimination from the legal system of legal acts of the statutory level (and secondary legislation) or parts thereof as a result of regulatory control (preventative or subsequent) exercised

¹⁹ Cf. e.g. Supreme Administrative Court judgment of 23 May 2014, II OSK 1009/14, CBOSA; Supreme Administrative Court judgment of 8 January 2013, II OSK 2376/12, CBOSA; Supreme Administrative Court judgment of 2 February 2011, II OSK 132/10, CBOSA.

²⁰ Supreme Administrative Court judgment of 20 August 2014, II OSK 869/13, CBOSA. Cf. also: Supreme Administrative Court judgment of 30 October 2013, II OSK 865/13, CBOSA; Supreme Administrative Court decision of 21 June 2012, II FW 1/12, CBOSA.

by the Polish Constitutional Tribunal, as well as legal acts enacted by the so called local legislator (ordinances issued by the law-making bodies of the local government) subject to the Supreme Administrative Court's control. Admittedly, neither the Polish Constitutional Tribunal, nor Supreme Administrative Court has been vested with the power to exercise regulatory control over legal acts in the scope of RIA; nevertheless, which particularly regards the Polish Constitutional Tribunal, the court may eliminate non-rational instruments, i.e. such that fail to implement or achieve the social, economic or environmental aims. Whereas RIA allows to anticipate whether the aims underlying a given regulation (amendment) will ever be achieved.

It should also be noted that "(...) a regulatory impact assessment, if carried out properly, may support the Polish Constitutional Tribunal in the process of full, comprehensive interpretation of a legal regulation, which is prerequisite to handing down a correct ruling on the constitutionality or otherwise of the legal act in question" (Maczak and Pawłowski, 2007, p. 175). Furthermore, RIA is particularly useful in the analysis and examination of the necessity and "depth" of intervention (the constitutional proportionality principle), and plays an important role in the process of construction of legal provisions. For it allows to reconstruct the aims desired by the legislator which may determine the manner of the interpretation of a legal text.

Admittedly, regulatory impact assessment is an attempt to prepare an evaluation of impact or effects of legal solutions based on analytical data; however, the ultimate shape of regulation – particularly on a statutory level – is affected by political factors and determinations (Kopijkowski-Kożuch, 2010). Nevertheless, such analytical data exert considerable influence on a regulation and may be reinforced or significantly supplemented – also in the law-making sphere – by application of non-legal analyses, i.e. benchmarking and evaluation. In the latter case, a key role is played by the method of stakeholder consultations. The above mentioned methods complement the examination of the quality and impact of legislation both through comparative analyses aiming at *inter alia* selecting the optimal shapes of legislative intervention, and regulatory efficacy analyses.

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