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Improving the Quality of EU legislation in Europe and Effects on the Approximation of Laws including a case study on EU- Israel relations.

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Introduction

Our Paper for the UACES conference consists of two Parts.

A. Quality of EU Legislation: Communications, conclusions and documents 1998 - 2014

B. Case-study : EU - Israel relations after 1998 - approximation of laws and quality of legislation

We are focusing in these sections on all documents and Communications produced since 1998 to 2014 on improving the quality of EU legislation, with exception of regulations and documents at the National level (A) . Further we are reviewing all the documents and agreements produced since 1998 concerning approximation of national laws to the acquis communautaire (European Neighbourhood policy) especially actions with respect to in EU – Israel relations (B).

Finally we added as an ANNEX to our paper a text which we drafted in 1998 as a contribution in a book written on Israel 's 50th Anniversary (1).

As the Conclusions, Communications and Reports referred to in this text, are now, 15 years later, still of interest and in force, we included this text as an ANNEX to the UACES paper.

A. Quality of EU Legislation: Communications, conclusions and documents 1998 - 2014

Over the last decade the interest in improving the quality of EU legislation has surged due to serious threats to the effectiveness of the legislation.The importance of the quality of legislation cannot be overstated. In the EU the concern for the quality of legislation has been designated a policy item because of the consequences of regulation for the freedom of citizens, the order of society and removing barriers to businesses and its policy aim of growth and competitiveness.

EU legislation suffers still poor quality of legislation and has been critized for being unclear as a result of a complicated legislative procedure based upon compromises between Member States. (2).

In our contribution in 1998 (see ANNEX) , we made an inventory of the policies and instruments that have been put into place to improve the quality of EU legislative instruments and assess their character, orientation and effectiveness. In the first place we considered all proposals, and initiatives at Community level till the European Council held in 1997 in Amsterdam.

Afterwards an overview of EU projects concerning the improving of the quality of legislation at National Level in the Netherlands, Germany, France, United Kingdom and Israel (pp 249 – 258) was presented (see ANNEX).

In the years following the European Council of Amsterdam of 1997 many new policy papers and policies, notably the White paper on European Governance (COM (2001) 428 final) and conclusions of the Laeken and Lisbon summits were elaborated and distributed.They underpin the present EU legislative policies. Their impact also resonates in the work of (3)

1.the Mandelkern Group (4)

2.the Better lawmaking initiatives and instruments of 2002 (5)

3. the Better regulation strategy of 2006. (6)

***The Requirements to be met when drafting, enacting and implementing legislative acts* as selected and concluded from the new Communications and Documents are, since the entry into force on 1 December 2009 of the Lisbon Treaty:**

A. Legality: the limits of the legislative attribution of the EC Treaty and EU Treaty , sufficient legal basis, not contravening superior or already existing legislation of treaties with due regard to the unwritten legal principles.

B. Due procedure and consultation:proper procedure, coordination between the three legislative institutions (Commission, Council and European Parliament),wide consultation, transparency throughout the legislative process enabling maximum accessibility etc. (7)

C. Subsidiarity and proportionality (including overall effectiveness and efficiency),consideration of Communication actions in view of these principles and overall impact assessment, simplification, codification, consolidation etc..

D. Choosing the right instrument (directive, framework directive or regulation).

E. Implementation and transposition: careful consideration of the implementing powers for the Commission and the Member States, consideration of entry into force, monitoring implementation and evaluation.

F. Enforceability: due consideration of enforcement and assessment of compliance, effective inspection and sanctioning

G. Technical quality : clear, simple and precise language, due consideration of multilingual contaxt of the EU, overall accessibility and readability.

The EU legislation has the following quality defects (8):

1) The dynamics of EU legislative processes: insufficiënt consultation to a lack of ex-post evaluation due to lack of time and lack of knowledge about implementation in the national legal orders.

2) The EC legislative file is often believed to be too voluminous.The excess of detail and the resulting administrative burden (“red tape”) can however impede economic growth. A problem

specific to EU legislation is the cost involved in the translation of legislation sinc e we have now 28 Member States and 24 official languages. A simple decrease of the number of pages of the legislative file will save a substantial sum of money. This element of quantity, especially after 2004, creates a burden of prime political concern.

3) Lack of readability and comprehensibility of legislative texts due to vague or ambiguous language.

4) EU legislation is not always available and access is difficult. Since the arrival of EUR-LEX (9) this has been improved.

Most of these defects as well as conclusions and Communications on the quality of EU legislation are not new and have been studied, developed and discussed also before 1998. (10)

Therefore my contribution on the quality of legislation in Europe and Israel (11) should still be consulted.

However since 1998 and therefore not included in the ANNEX, there are some new developments that have an impact on the quality of EU legislation. What is new? 1) More official EU languages. Since 2004 there are 24 official languages which is a burden of primary concern 2) The arrival of EUR-LEX. 3) Since 2003 the systematization of IMPACT ASSESMENT.(12)

In November 2007 the European Commission stepped up the Better Lawmaking programme, launching the Better Regulation strategy. Better regulation is a broad strategy to improve the regulatory environment in Europe – containing a range of initiatives to consolidate, codify and simplify existing legislation and improve the quality of new legislation by better evaluating its likely economic, social and environmental impacts (13).

The Commission plans to deal with poor application of Community legislation in four different ways:

a. Increased attention to implementation

b. Efficient and effective response to poor application

c. Improvement of internal working methods.

d. Enhancing dialogue and transparency between the European institutions and improving information for the public.

The EU's Better Lawmaking initiative (2002- 2006) seems to reflect and emphasize the constitutional, democatric, bureaucratic and instumental functions of EU legislation.

The Better Regulation initiative (2006-2007) seems to favour the instrumental and political functions.

On 1 December 2009 the Lisbon Treaty entered into force. One may expect that the Treaty on European Union (TEU) and on the Functioning of the EU (TFEU) may have an impact on the attention for the Quality of EU legislation.

For example the role of the National Parliaments. Article 12 TEU mentions that National Parliaments will contribute in the good functioning of the Union by monitoring for example the principle of subsidiarity.

Secondly the new procedures for the adoption of acts (article 293 -294 TFEU)might involve the Members of the European Parliament , Council and Commission more intensively with the drafting of legislative texts and will draw attention to the quality of legislation.

B. Case study : EU - Israel relations after 1998 - approximation of laws and quality of legislation.

We will discuss hereafter two milestons in EU-Israel relations.

Firstly Approximation of laws under the Association Agreement of June 2000.

The topic of Approximation of Laws between Israel and EU was laid down in Article 55 of the Association Agreement in force since 1 June 2000 "The Parties shall use their best endeavours to approximate laws in order to facilitate the implementation of this Agreement ". (14)

Since the EU has become one of its largest trading partners of Israel, EU legislation is of interest for Israel and therefore by improving the quality of EU legislation, it will be easier to understand the *acquis communautaire* **which is needed for approximation of laws as required in the Euro-Mediterranean Agreement that creates an association between the European Communities and their Member States on the one part and Israel of the other part, concluded in 2000. It is clear as a bell that the activities to improve the quality of EU legislation by reducing the quantity of legislation will have a positive effect for approximation of laws. It will then be easier to understand and find the respective legislation.**

The Association Agreement which entered into force on 1 June 2000, following ratification by the EU Member States parliaments, the European Parliament and the Knesseth, replaces the earlier Cooperation Agreement of 1975.The Agreement established two main bodies for the EU-Israel dialogue: The EU-Israel Association Counil (held at Ministerial level) and the EU-Israel Association Committee (held at the level of senior officials). The relations between the EEC/EC/EU and the State of Israel are long-standing and multifaceted. Recently, both the EU and Israel have expressed their mutual interest in enhancing these relations.

The EU has concluded many International Europe (EA), Association (AA), Stabilisation (SAA) and Partnership and Cooperation(PCA) Agreements with many candidate countries and third countries all over in the World. In most of these agreements approximation of laws or in other words the transposition and implementation of the *acquis communautaire* is a condition sine qua non for EU membership or participation in the EU Internal market.

Adapting as well as implementing the acquis is mentioned as legal approximation and this is necessary for the free movement of goods, freedom of establishment and the freedom to provide services and capital. These are topics more or less regulated in the Euro-Mediterranean Agreement

that creates an association between the European Communities and their Member States on the one part and Israel of the other part. Approximation (or harmonisation) of laws may be defined as the process of making different domestic laws, regulations, principles and government policies the same of substantially similar.

Approximation of laws was highly relevant in the realm of EU enlargement, as acceptance of the acquis in its entirety is an important demand the EU has placed on acceeding states. This Phenomenon is not confined to the Member States but is now treated by EU as an intrinsic part of its foreign policy. The exportation of laws and norms mentioned in the acquis is extensively used by the EU in its external relations. The approximation of laws emphasizes that the EU is including approximation of laws beyond the contexts of membership and accession. Now also with regard and towards other neighbours. For example as of the 1990, the EU-Med relations include a component of approximation of laws. Every Euro-Med Association AGreement provided a general legal basis for the approximation of laws.

Since the conclusion of the EU-Israel Association Agreement Israel has moved in the direction of EU legislation in certain areas, including standards, competition law, environmental law, animal protection, and money laundering legislation

Secondly. Approximation of laws initiated by the European Neighbourhood Policy" (ENP) since 2004.

In 2004 the European Commission proposed a new foreign policy for the EU – the "European Neighbourhood Policy" (ENP), a Framework policy to cover the eastern and southern neighbours. (15). The EU's motivation in proposing such a policy is its interest to in being surrounded by stable and prosperous neighbours.For the EU, supporting the political and economic development of its neighbours is the best guarantee for peace and security and long-term prosperity.

The European Neighbourhood Policy is a special Framework applying to the EU's relationship with its immediate neighbours to the East and North, sixteen countries which do not, or do not currently have a perspective of eventual EU Membership: ALgeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, the Palestinian Authority, Syria, Tunesia and Ukraine. (16)

The policy aims to promote good governance, economic and social development, modernisation and reform based on democracy, human rights and the rule of law. The ENP Works by partnership and joint ownership of the reform process. Therefore jointly agreed partnerships for reform –ENP Action Plans – are identified across a wide range of activities including Trade related issues, Market and Regulatory reform, cooperation on Justice, Liberty and Security.

New EU-Israel partnership perspectives under the European Neighbourhood Policy are for example a) The opportunity to explore the possibility of approximation of economic legislation, the opening of economies to each other, and the continued reduction of trade barriers which will stimulate investment and growth;

b) Targeted support (by TAIEX-Technical Assistance Information Exchange) and advice in certain areas where a need to align Israeli legislation with EU norms and standards has been identified and agreed upon.

The Action Plan of December 2004 between Israel and EU within the Framework of The *European Neighbourhood Policy*, under the Heading "Cooperation in Justice and Home Affairs ",is one of the special objectives "to identify the scope for Israel to participate in relevant EU programmes", and in this context to identify the scope for legislative approximation, where required by the relevant programme. The various Actions Plans, signed under the aegis of the ENP with the Neighbouring Countries, serve in that respect as a template for approximation, accentuating the call upon the NCs to approximate their laws and converge their policies and regulatory schemes with those of the EU. The EU-Israeli Action Plan, for example , statest that the"convergence of economic legislation" and "legislative and regulatory approximation"on the part of the State of Israel is linked to further economic and political integration. The same legislative agenda is embedded in other Action Plans signed under the ENP.

It is submitted that the implementation of the concept of approximation of laws by the NCs may provide various positive outcomes for both the EU and the NCs. One of the underlying paradigms of international and regional trade is that proximity between the provisions of two legal systems may facilitate reciprocal trade relations, while significant differences between legal norms may constitute a barrier to trade.

Let us take for example the sector of Financial services EU- Israel. Israeli service providers are keen to have a stronger foothold in the European Market. For that to happen, a more liberal legal regime is required in order to regulate reciprocal trade in financial services. The EU will not subscribe to such a regime under ENP before it is satisfied that the Israeli legal regime pertaining to the provision of Financial services and to the regulation of such sector, is similar to that of the EU. Approximation of Israeli legislation by the EU standards on prudence, stability, accountancy and supervisory issues should be seen as a requirement.

Another example of the link between approximation of laws and market access is the export of Israeli electronic goods to the EU .(17)

Israeli exporters enjoy a certain competitive advantage in this sector, and it is only natural that they would want to realize such an advantage in the European market.Therefore Israeli producers must firstly comply with EU environmental standards. Such compliance may result, in turn on the incorporation of EU –based standards in the Israeli municipal legislation.

In conclusion, in various areas of commerce, aligning one' s legislation wih that of the EU constitute a prerequisite for the grant of improved accessibility for Neighbouring Countries undertakings to the Internal Market. Approximating Israel 's laws with those of the EU may assist by providing Israeli policy makers with ready-made, high-quality legislation.

Israel is also an OECD member and hence it aligns its standards to that of the OECD too. Approximating the national laws with those of the EU may therefore be seen as an evolutionary step towards meeting Multi country and multilateral benchmarks.

The Hague, 10 July 2014

ANNOTATIONS

(1) (Israel among the Nations, Kluwer Law International, pp. 241 – 263): "The Quality of Legislation in Europe and in Israel ".

(2) See A.E. Kellermann in Improving the Quality of Legislation in Europe", Kluwer Law International 1998; and Erasmus Law Review 2009, Vol.02, Issue 1, Prof. Wim Voermans p. 59 – 95 "Concern about the quality of EU Legislation: What kind of Problem by what kind of standards?"

(3) (in Erasmus Law Review 2009 Vol.02. Issue 1 pp. 71 – 95

(4) (Mandelkern Group on Better Regulation , Final Report 2001),

(5) (Communication *Better Lawmaking,* Com (2002)275 final*, followed by the Action Plan for simplifying and improving the regulatory environment* COM (2002) 278 final*).*

(6) (COM (2006) 689 final).

(7) (see for instance *Interinstitutional Agreement on Better Law-making* of 31 December 2003, OJ 2003 C231/02).

(8) (in Erasmus Law Review 2009 Vol.02. Issue 1 pp. 74 – 79

(9) (http://eur-lex europa eu/en/index.htm)

(10) See A.E. Kellermann, "The Quality of Community Legislative Drafting", in Institutional Dynamics of European Integration, Essays in Honour of Henry Schermers.

(11)) pp. 241 -261, "in Israel among the Nations" (see ANNEX)

(12) In 2003 the Commission introduced a system of integral Impact Assessment (IA), replacing and integrating all existing sector assessments of direct and indirect impact of proposed measures. It required all items included in the Commission's Legislative and Work Programme(CLWP) to undergo a Preliminary Impact Assessment (PIA). Based on the PIA, the College of Commissioners decided whether an Extended Impact Assessment (ExIA) was necessary.

13) (Communication from the Commission *A strategic review of Better Regulation in the European Union* COM (2006) 689 final)

(14) OJ 2000 L 147/3

(15) The European Union and its Neighbours. A legal appraisal of the EU's policies of stabilisation, partnership nand integration, Steven Blockmans & Adam Lazowski (editors), T.M.C. Asser Press 2006 - Israel and the Palestinian Authority by Wybe Douma, pp,433-463

(16) The European Neighbourhood Policy and Israel, Delegation of the European Commission to the State of Israel, Vol 4, 2007

(17) WP5/24 Search Working Paper Approximation of Laws under the European Neighbourhood Policy: A Typology of the Challenges and OPbstacles that lie Ahead, Guy Harpaz, June 2013, p. 16

ANNEX

Kluwer Law International, pp. 241 – 263: “The Quality of Legislation in Europe and in Israel “.

THE QUALITY OF LEGISLATION IN EUROPE AND IN ISRAEL

by Alfred E. Kellermann*

1. INTRODUCTION AND GENERAL REMARKS

The importance of the quality of legislation cannot be overstated. A 'model' legislative text should be clear, consistent, comprehensible, accessible, transparent, accurate, effective and enforceable. The improvement of the quality of legislation requires, *inter alia,* the assessment of draft legislation, which includes an analysis of its expected impact, the simplification of existing legislation, and the strengthening of technical quality. Within the European institutions, as well as in many Member States of the EU and the OECD, action has already been taken with regard to some of these items.

The EU legal system may, to a certain extent, be compared with the Israeli legal system, since the roots of both are based on a variety of national legal traditions. As Israel's 50th anniversary marks a time for reflection over its past and future legal developments, we shall investigate in this contribution how far the problem of quality of legislation is also an item in Israel.

We shall first give an overview of the proposals and initiatives concerning the quality of legislation proposed by the EU and the OECD. We shall then review the initiatives, guidelines and instructions concerning legislation in four Member States and especially focus on the legislative procedure and guidelines in Israel. We shall investigate in how far the criteria for quality of legislation which we discovered in Europe are also applied in Israel.

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This article was largely inspired by a research project carried out by the author in cooperation with other researchers at the T.M.C. Asser Institute on behalf of the Ministry of Justice in the Netherlands in 1995 and 1996. T. Heukels, A.E. Kellermann, J.J.M. Sluys, V.P. Verkruissen (eds.), *Achtergrondstudies Algemeen Wetgevingsbeleid, Kwaliteit Communautaire Wetgeving*, Deel 6 (A.A.W.), Ministerie van Justitie, April 1996.

As a follow-up to the project an international conference was proposed and held on 23-25 April 1997 on 'The Quality of European and National Legislation and the Internal Market'. The conference was organised on behalf of the Netherlands Ministry of Economic Affairs, the Ministry of Justice and the European Commission, by the T.M.C. Asser Instituut in The Hague on April 23-25 1997, during the Dutch Presidency. The conference proceedings were published in: A.E. Kellermann, G. Ciavarini Azzi, S. Jacobs, R. Deighton-Smith (eds.), *Improving the Quality of Legislation in Europe,* Kluwer Law International 1998.

A.E. Kellerman et al., eds., Israel among the Nations

2. PROPOSALS, CONCLUSIONS AND INITIATIVES FOR THE COMMUNITY LEVEL

2.1 Quality of Legislation in the EU

The concern for the quality of legislation has been designated a policy item because of the consequences of legislation for the freedom of the citizens, the order of society and the economic dynamics. Whereas the quality of legislation is a problem both at the European level and at national levels, EC legislation suffers more than national legislation from poor quality legislation. Community texts have been criticised as being unclear, for example, by legal scholars as well as by the *Conseil d'Etat* and the *Assemblée Nationale* (Parliament).[1] The terminology used thereby forms a less extensive problem than does the complexity and coherence thereof. The *Conseil d'Etat* has issued a report requiring that extra attention be given to the uniform interpretation of legal concepts from different legal systems.

Three key points should be stressed:

– the content and structure of European legislation derive from different traditions and sources. Those include the influence of the legal systems of the Member States and that of public international law. EC legislation in turn has influenced the legal systems of the Member States, because it must often be implemented by national legislation;

– the European system is relatively new and has not yet acquired a legislative tradition with distinctive features; and

– EC rules are often made following laborious and complicated decision-making procedures, which may result in vague or, alternatively, very detailed texts, the result of compromises between Member States.

The review of EC legislation could be made by existing bodies or institutions, new institutions, or informal groups of experts. Centralisation has the advantage of uniformity of quality of legislation, whereas decentralisation has the advantage that, according to the subsidiarity principle, different traditions of the Member States are better able to be taken into account.

[1] See especially the '1992 Report - Rapport Public, Republique Française', *Journal Officiel*, Circulaire du 2 Janvier 1993 relative aux règles d'élaboration, de signature et de publication des textes au Journal officiel et à la mise en oeuvre de procedures particulières incombant au Premier ministre (*Journal Officiel* (lois et décrets) of 7 January 1993, Annex 5).

2.2 Recommendations made for the European Council (Amsterdam 16/17 June 1997)[2]

– The most important factors to be considered are: subsidiarity; proportionality; effectiveness; enforcement; quality of drafting; accessibility; accelerated consolidation and codification; establishment of common guidelines; preference for directives; and simplification;

– concern for legislative quality requires an ongoing policy, both at the national and at the EU level, that would pay regard not only to the working chosen but would also assess its likely effects, which include an economic analysis. This assessment should be carried out alongside the decision-making process, by a small number of highly qualified legislative experts and be initiated at the earliest possible stage;

– since Member States carry a major share of the responsibility for high quality legislation, it is advisable to appoint legal experts to the delegations sent to the Council;

– it is further advised to create legislative units in the various Directorats General (DGs) of the European Commission, in charge of drafting the legislative text;

– technical guidelines are required for the enacting of legislation and administrative regulations and procedures;

– national and Community initiatives should be coordinated; and

– the results of the assessment of proposed legislation and of consultations, as well as the opinions of the Council concerning the quality of legislation, should be published.

2.3 Relevant Articles, Protocols and Declarations of the Draft Treaty of Amsterdam[3]

The above recommendations were discussed in the Internal Market Council and Intergovernmental Conference (IGC) in preparation for the European Council of Amsterdam (16/17 June 1997), where the representatives of the governments of the Member States concluded the Draft Treaty of Amsterdam. The Draft Treaty recalls earlier proposals for improving the quality of Community legislation. The

[2] Cf., the reports and proceedings of the Conference (see author' note), and in the main Conference findings which were presented by the Dutch State Secretary for Foreign Affairs, M.M. Patijn, as a follow-up of the conference, to the attention of the Internal Market Council and IGC.

[3] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (97/C 340/01), OJ No C 340/1 and following of 10 November 1997.

Amsterdam Treaty documents reiterate most of the recommendations mentioned above.[4]

2.4 Overview of EU Projects concerning the Quality of Legislation since 1992

The following proposals, conclusions and initiatives concerning the improvement of the quality of Community legislation have been put forward since 1992:[5]

The Sutherland Report,[6] requested by the Commission, concluded that every new proposal for Community action should be assessed on the basis of five criteria (the need for action, the choice of the most effective form of action, the proportionality of the measure, consistency with existing measures, and wider consultation of the circles concerned during the preparatory stage), and on the recommendation that existing legislation be systematically consolidated.

The Edinburgh European Council[7] adopted an overall approach to the application of the subsidiarity principle and Article 3b of the EC Treaty. It asked for new Community legislation to be clearer and simpler, and for guidelines to be adopted for improving the quality of drafting of Community legislation.

The official codification of Community acts should make existing legislation more accessible. As a follow-up to the Conclusions of Edinburgh, the Council adopted, in June 1993, a resolution on the quality of drafting of Community legislation.[8] In October 1993 the European Parliament, the Council and the Commission adopted an inter-institutional agreement on subsidiarity, followed by an Inter-institutional Agreement in December 1994 on an accelerated working method for the official codification of legislative texts.[9]

In June 1995, the Molitor Group,[10] a working party of experts set up by the Commission, submitted its report on legislative and administrative simplification, which followed the Sutherland Report in recommending that work on the con-

[4] Part two, Art. 6; Part Three, Art. 12.1; Protocol on the Application of the Principles of Subsidiarity and Proportionality; Declarations adopted by the Conference (39. Declaration on the quality of the drafting of Community Legislation; 42. Declaration on the Consolidation of the Treaties).

[5] Cf. J.-C. Piris, 'The Quality of Community Legislation: The Viewpoint of the Council Legal Service', in: *Improving the Quality of Legislation in Europe* (see author's note), pp. 25-38; C.W.A. Timmermans, 'How to Improve the Quality of Community Legislation: The Viewpoint of the European Commission, ibid., pp. 39-59.

[6] SEC (92) 2044; See also the Commission communication of 16 December 1993 on the follow-up to the Sutherland Report: legislative consolidation to enhance transparency of Community law in the areas of the internal market (COM(93) 361 final).

[7] See Presidency conclusions, *EC Bulletin* 12/1992, pp. 9 et seq.

[8] OJ No. C 166, 17 June 1993, p. 1. See commentary of Prof. R. Wagenbaur in 23 *Europäische Zeitschrift für Wirtschaftsrecht* (EuZW) (1993) p. 713, where the author is of the opinion that the Resolution of 8 June 1993 also has a bearing on the European Parliament and the Commission.

[9] OJ No. C 293, 8 November 1995, p. 2.

[10] *Molitor Report 1995* (Legislative and Administrative Simplification), (COM)(95) 228.

solidation of legislation should be speeded up, that all new legislation should be tested against a set of criteria and that existing legislation should be simplified.

Finally, in May 1996, the Commission launched the SLIM[11] pilot project, designed to simplify certain areas of the Community's internal market legislation. The Commission's views on legislative policy are clearly summarised in a short memorandum, adopted in early 1996, on general guidelines for legislative policy to be applied by the Commission's services.[12] These guidelines aim to ensure that legislative texts are of the proper quality and consistency, that the drafting process is open, planned and coordinated, and that the monitoring and evaluation procedures are more thorough. Reference is made to the various existing tools. To ensure that these guidelines are properly applied, five actions are suggested: consistency; rationalisation and modernisation of assessments of the impact of proposals; systematic monitoring of legislation as to its effectiveness and possible secondary effects; wider external consultations; and finally, the preparation of a legislative checklist.

In addition to the Commission Guidelines for Drafting and Presentation, the following instruments, directly related to these objectives of Community rule-making, are noteworthy:

– the internal manual for legislative drafting (*Règles de technique législative*), 3rd edition, 1997, published by the Commission's Legal Service;

– the *Manual of Operational Procedures* released by the Secretariat-General of the Commission. In setting out working methods and internal procedures, this document also contains some rules on drafting and presentation of texts;

– the 1996 Legislative Checklist; and

– specific instructions communicated to the Commission services by the Secretary-General and the Director-General of the Legal Service, regarding particular issues, for example, the legal basis for the conclusion of international agreements and the repeal of obsolete provisions.

2.5 Dutch Projects Concerning the Quality of EC Legislation

In 1995, a working group was established within the framework of the Legislative Projects Review Committee to make recommendations for improving the quality of EC legislation. The Working Party was chaired by T. Koopmans and most of its members were senior civil servants regularly involved with the establishment and implementation of EC legislation. It operated under the aegis

[11] COM(96) 204 final of 8 May 1996. See also Council Resolution of 8 July 1996 on legislative and administrative simplification in the field of the internal market (OJ No. C 224, 1 August 1996, p. 5) and the Commission's report on the SLIM pilot project (COM)(96) 559 final of 6 November 1996).

[12] SEC (95) 2255; See Report of the Commission to the Dublin European Council 'Better Lawmaking' 1996 (CSE (96)).

of the civil service committee and the ministerial committee for market forces, deregulation and the quality of legislation.

The Koopmans Working Group[13] addressed possible general measures to improve legislation and focused, in particular, on judicial quality. The objective was to suggest ways of improving the quality of Community and national legislation with respect to better legal protection, decision-making and implementation, taking away and preventing unnecessary restrictions, and introducing straightforward legislation in the Internal Market. Based on the Koopmans Working Group, the Dutch Government has presented a proposal to the IGC to promote the quality of legislation. In 1995, the Working Group had already proposed a draft set of general guidelines for the quality of European legislation, which was to be binding on all European institutions. In order to monitor the quality of EC legislation, the Working Group was of the opinion that it would be worthwhile to institute a permanent committee, consisting of a small number of independent legal experts, to review EC legislation at the earliest possible stage of the drafting process, referring among other things to the guidelines formulated for this purpose, and to set out the results of this assessment in a public report.

Further to the Koopmans Report, a research project was carried out in 1995 and 1996 by the T.M.C. Asser Institute, on behalf of the Ministry of Justice of the Netherlands.[14] The intention of this project was to find out whether any new ideas were submitted on behalf of the Member States for the improvement of the quality of European legislation, and whether the suggestions of the Koopmans Working Group would be supported. Many examples, national experiences and recent initiatives on the improvement of the quality of legislation in the EU and in the Member States were discussed. Experts from the European institutions and the Member States presented their national experiences and made suggestions for changes on the following items:

a. Consolidation, coordination and codification
b. Transparency, accessibility and publication
c. National and European institutions for reviewing the quality of legislation
d. National v. European guidelines
e. Enforcement and effectiveness
f. Fraud prevention
g. Deregulation and simplification v. administrative costs
h. Expected costs and benefits
i. Implementation of EC legislation

[13] The report by the Quality of EC Legislation Working Group was released in the Spring of 1995. The Working Group was chaired by Dr. T. Koopmans, Advocate-General of the Supreme Court, The Hague. *Report of the Working Party on the Quality of EC Legislation.* Netherlands Parliamentary Papers, II 1994/1995, 23 900 VI no. 30.

[14] Cf., *supra* author's note.

2.6 French Recommendations Concerning EC Legislation

The *Conseil d'Etat* has suggested that a legal body be set up at the European Commission and the Council, that is charged with monitoring the quality and coherence of Community legislative proposals.

Article 88, section 4, of the French Constitution (1992) empowers the French Parliament to adopt resolutions concerning proposals for EC legislation. The Delegation of the French Parliament (*Assemblée Nationale*) has established that either the Commission is too late in sending proposals, or the proposals are incomplete. Often the (draft) texts have not yet been translated and are hastily accepted so that the required deadlines are not thereby exceeded.

2.7 United Kingdom Recommendations Concerning Quality of EC Legislation

In the United Kingdom, attention has been given to the limitation placed upon the quantity of community legislation by a review of the principle of subsidiarity. The principle is employed pragmatically as an instrument for improving efficiency. This problem is frequently debated in the House of Commons and in the House of Lords. Thereby, in the House of Lords the possibilities for providing criteria for issuing directives and regulations have been investigated. Moreover, complaints have been voiced in both Houses about the quantity and supposed poor quality of European legislation. As far as a system of enforcement is concerned, the House of Lords argues that this should be transparent, fair, speedy and deterrent.[15]

In the United Kingdom all legislative bills must be checked, as regards the costs of application and enforcement, against the Guide to Compliance Costs Assessment. A striking feature is that there are special regulations for European legislation contained in Appendix I thereof. Furthermore, it should be noted that, since 1986, the European Commission has employed a similar system of judicial review for legislative proposals as that which exists in the United Kingdom.

3. OECD PROPOSALS, CONCLUSIONS AND INITIATIVES

The starting point is the OECD Council Recommendation of 9 March 1995 on improving the quality of government regulation, including the OECD Reference Checklist for Regulatory Decision-Making.[16]

[15] See House of Lords, session 1993-1994, Select Committee on the European Communities, Enforcement of European Competition Rules. See also Steenbergen, 'The House of Lords and the enforcement of competition law', *Sociaal-Economische Wetgeving* (SEW 3/1996), p 97 et seq.

[16] Recommendation adopted 9 March 1995.

The Checklist contains the following ten questions about regulatory decision-making which can be applied at all levels of decision-making and policy-making:

1. Is the problem correctly defined?
2. Is government action justified?
3. Is regulation the best form of government action?
4. Is there a legal basis for regulation?
5. What are the appropriate level, or levels, of government for this action?
6. Do the benefits of regulation justify the costs?
7. Is the distribution of effects across society transparent?
8. Is the regulation clear, consistent, comprehensible and accessible to users?
9. Have all interested parties had the opportunity to present their views?
10. How will compliance be achieved?

These questions reflect principles of good decision-making which are used in OECD countries to improve the effectiveness and efficiency of government regulation by upgrading the legal and factual basis for regulations, clarifying options, assisting officials in reaching better decisions, establishing more orderly and predictable decision processes, identifying existing regulations that are outdated or unnecessary, and making government actions more transparent.

In June 1997, the OECD published its Report on Regulatory Reform. The recommendations of this Report constitute a plan of action. The Ministers welcomed this Report and agreed to work towards the implementation of its recommendations in their countries. The Ministers asked the OECD to conduct reviews of regulatory reform efforts in Member Countries beginning 1998, based in part on self-assessment, and noting that further work would be carried out in sectorial and policy areas.

Regulation refers to the instruments by which governments place requirements on enterprises, citizens, and government itself, including laws, orders, and other rules issued by all levels of government and by bodies to which governments have delegated regulatory powers. Regulatory reform aims at improving regulatory quality, whether it is the revision of a single regulation or of regulatory institutions, or the improved processes for making regulations and managing reform.

The recommendations on regulatory reform are drawn from OECD country experiences, as elaborated in the sectorial and thematic background reports that form the basis of its Report. The recommendations, which should be viewed as an integrated package, apply broadly across sectors and policy areas. Their implementation in countries will vary, depending on differences in public policies, policy trade-offs, reform priorities and needs, and legal and institutional systems.

At the meeting of the OECD Public Management Service (PUMA), held in Paris on 29-30 June 1998, regarding the improving of the quality of new regulations as well as upgrading the quality of existing regulations, the following

28 member countries were present: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Mexico, New Zealand, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States. Only Luxembourg was absent. OECD country draft reviews with policy recommendations of the United States and the Netherlands were discussed.

As Israel's 50th anniversary marks a time for considering its future developments, joining the OECD efforts could be a viable option.

4. PROPOSALS, CONCLUSIONS AND INITIATIVES FOR THE NATIONAL LEVEL

This chapter will focus on four EU Member States: the Netherlands, Germany, France and the United Kingdom, and one third country: the State of Israel.

4.1 The Netherlands

There has been a growing awareness in the Netherlands that the quality of the drafting of legislation should be improved.[17] The problem has received special attention in three official documents. The first of these is the so-called Deetman Report, named after the Chairman of the Parliamentary Committee which drafted it, W.J. Deetman, who was also President of the Lower Chamber of Parliament at the time.

The second document is a policy memorandum published in March 1991 by the Ministry of Justice, entitled *Zicht op Wetgeving* [Legislation in Perspective]. In this document, six sets of criteria are listed with the help of which the quality of legislation should be maintained:

a) lawfulness and the realisation of the principles of justice
b) effectiveness and efficiency
c) subsidiarity and proportionality
d) feasibility and enforceability
e) coordination and
f) simplicity, clarity and accessibility.

The third document is a study prepared by the Governmental Committee for the Assessment of Legislation Projects. The document discusses the various par-

[17] See A.E. Kellermann, 'The Quality of Community Legislation Drafting', in *Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers* (Dordrecht, Kluwer 1994) pp. 251-262; See also J.H. van Kreveld, 'The Main Elements of a General Policy on Legislative Quality: Dutch Experiences', in: *Improving the Quality of Legislation in Europe*, see *supra*, author's note, pp. 85-100.

ameters and criteria to be used in making choices as to whether legislative intervention is justified and if so, what its form and substance should be.

The 1992 Dutch Instructions on legislation, or directives on legislative quality, are an important instrument.[18] They are not only intended for civil servants charged with drafting legislation, but also for public servants engaged in policy-making.

What are the main differences between the Dutch Instructions of 18 November 1992 and the EU Council Resolution of 8 June 1993? From the text of the Resolution we can read that the guidelines contained in it are not binding; they are only recommendations to the Legal Service of the Council. The Dutch Instructions, however, are binding on the Ministers, Under-secretaries and the persons under their authority. Another important difference is the fact that the Council Resolution contains no prescriptions for the enforcement of Community legislation. The Instructions, on the other hand, stipulate that a rule which cannot be enforced may not be drafted. In the Dutch Instructions special rules are given for the implementation of Community legislation, whereas in the Council Resolution no instructions are given for the implementation of Community legislation in the national legal orders.

The Council Resolution provides only one page consisting of ten guidelines for the quality of Community legislation drafting, whereas the Dutch Instructions – 346 of them – cover 112 pages. Even though the Dutch Instructions are more extensive, we found similar criteria in the Council Resolution.

4.2 **Germany**[19]

In Germany, initiatives for the improvement of the quality of legislation exist at the federal and state levels.

4.2.1 *Federal Level*

1. In 1983, the Federal Government has already made it its objective to simplify the law and to abolish over-regulation. An independent Commission for the Simplification of Law and Administration *(Unabhängige Kommission für Rechts- und Verwaltungsvereinfachung)* was established, which has presented expert opinions on this topic.

[18] Decision by the Minister-President of 18 November 1992, No. 92M008337, published together with accompanying memorandum in *Nederlandse Staatscourant* No. 230, 26 November 1992, p. 13. The full text of the instructions is published in C. Borman, ed., *Aanwijzingen voor de regelgeving* (Zwolle, 1993).

[19] Cf., P.-C. Mueller-Graff, 'The Quality of European and National Legislation: The German Experiences and Initiatives', in: *Improving the Quality of Legislation in Europe*, see *supra*, author's note, pp. 111-128.

2. In 1984, a checklist, called *Blaue Prüffragen* [Blue Checklist], was issued by the Federal Government. This list contains 48 specific and detailed questions. These questions were grouped under ten main questions that should be answered prior to the enactment of any legal measure:

1) Should anything be done at all?
2) Do alternatives exist?
3) Is there a need for an action by the Federation?
4) Is there a need for the enactment of a statute?
5) Is there a need for an action now?
6) Is the scope of the proposed project necessary?
7) Is it possible to put a time limit on the regulation?
8) Is the regulation understandable and acceptable to citizens?
9) Is the regulation practicable?
10) Can costs and benefits be considered to be in an adequate relation?

It should be noted that the so-called 'Blue Checklist' issued by the Ministries of Home Affairs and Justice also contains ten guidelines, most of which are similar to the ten guidelines in the OECD Checklist.

3. In the wake of the debate on deregulation, a temporary Commission on deregulation was established. The final report, *Markteröffnung und Wettbewerb*, was presented in 1991. It contains a long list of statutes considered to constitute unnecessary restrictions of economic freedom and prosperity in seven areas.

4. In 1989, the Federal Government adopted a new programme to strengthen its policy to improve legislation in general. The programme, binding on the Federal ministerial departments, comprises not only measures for the reduction, structuring, order and examination of administrative regulations, and for the training of staff, it also contains a handbook of all relevant regulation decisions and recommendations for the preparation of legal rules, as well as recommendations for a uniform structuring of drafts.

5. In order to reinforce this programme, a permanent group of experts was established by the Federal Government, called the *Schlanker Staat* meaning 'Lean State' or 'Slim State', whose task is to develop concepts and initiatives to cut down state activities in general.

4.2.2 *State Level*

1. By 1984, Bavaria had already created binding guidelines, in particular for the organisation of the introduction of a strict and detailed binary yes/no-checklist. It established a special institution for checking drafts *(Normprüfungsausschuss)*.

2. In Baden-Württemberg, the state ensures that the ongoing, federally-financed work on guidelines for a cost compliance assessment for legal rules (*Gesetzesfolgenabschätzung*) is continued.

4.3 France

Over the past few years, there have been various analyses and initiatives aimed at simplifying legislation and improving its quality. Mention must be made of the systematic monitoring of the application of laws undertaken by Senate committees, as well as analyses made in 1995 in the National Assembly. One of the proposals is the creation of a parliamentary office for the evaluation of legislation. Composed of 15 deputies and 15 senators, this office is in charge of 'gathering information and carrying out studies to assess whether legislation corresponds to the situation it governs.'[20]

The national guidelines for legislation are laid down in a Circular of 30 January 1997 by the French Prime Minister. In these guidelines, requirements are provided regarding the drafting, alteration, repeal, codification and publication of legal texts. Moreover, regulations are given which apply to procedures before Parliament and the *Conseil d'Etat,* as well as the judicial review by the Constitutional Council (the *Conseil Constitutionnel*).

4.4 United Kingdom

The following institutional arrangements influence the quality of primary and subordinate legislation in the United Kingdom:[21]

– professional legal drafters are employed by the Government to draft primary legislation and important or complex subordinate legislation;
– there are separate drafting offices for the United Kingdom as a whole (including Scotland and Northern Ireland);
– Government legislation is prepared within the privacy of the Government machine, which tends to give those responsible for preparing it more room to explore solutions than might otherwise be the case;
– a Cabinet Committee is charged with giving final clearance to legislation before it is introduced;
– other than in the case of emergency legislation, the parliamentary process is long (at times lasting many months) and draft legislation is submitted to close scrutiny, both by the members of each House and by outside parties;
– the Law Commission and the Scottish Law Commission make a steady

[20] See Comments by D. Hochedez in: *Improving the Quality of Legislation in Europe,* see *supra,* author's note, pp. 73-78.

[21] See Comments by E. Caldwell in: *Improving the Quality of Legislation in Europe* see *supra,* author's note, pp. 79-84.

stream of recommendations for substantive law reform in those areas of the law which are within their remit; and

– committees of both Houses of Parliament are charged with the duty of scrutinising certain subordinate legislation and Community legislation.

In the United Kingdom, attention has explicitly been paid to the cost aspect of legislation, where cost means the cost to users, that is, business enterprises.[22]

4.5 Israel

The State of Israel was established in 1948, following approximately thirty years of British Mandate over the Land of Israel (*Eretz Yisrael*). In order to prevent a legal vacuum, the Knesset enacted the Law and Administration Ordinance, 5708-1948, which provided that the law which existed in Palestine under the British Mandate immediately preceding the founding of the State would remain in force, in so far as it was not repugnant to that Ordinance or to other laws enacted by the Provisional Council of State, and subject to such modifications as might result from the establishment of the State and its authorities.[23]

4.5.1 *Guidelines and instructions during the British Mandate*

During the British Mandate, the applicable rules were those included in the Royal Instructions dated 1st January 1932. Those obliged the High Commissioner for Palestine to follow guidelines for legislation (Nrs. XVI and XX):[24]

> 'XVI. In the enactment of laws the High Commissioner shall observe, as far as possible, the following Rules:
> (1) All laws shall be styled "Ordinances" ...
> (2) All Ordinances shall be dinstinguished by titles, and shall be divided into successive clauses or paragraphes, consecutively numbered, and to every such clause there shall be annexed in the margin a short summary of its contents. The Ordinances of each year shall be distinguished by consecutive numbers, commencing each year with the number one ...
> (3) Each different matter shall be provided for by different Ordinance, without intermixing in one and the same Ordinance such things as have no proper relation to each other; and no clause is to be inserted in or annexed to an Ordinance which shall be foreign to what the title of such Ordinance imports; and no perpetual clause shall be part of any temporary Ordinance.

[22] *Checking the cost to Business. A Guide to Compliance Cost Assessment.* Department of Trade and Industry. This Guide has been distributed since 1985.

[23] Law and Administration Ordinance No.1 of 5708 – 1948, *LSI (Laws of the State of Israel)* Vol. 1, p. 7.

[24] Mr. J.C. Al, member of the Board of the Dutch Section of the International Association of Jewish Lawyers and Jurists has forwarded us these Instructions after his visit to Israel. He was also one of those who suggested the idea of a publication on Israel's 50th anniversary.

XXIV:
(1) All Ordinances, Proclamations, Rules of Court and Regulations shall be published in the Official Gazette of Palestine.
(2) At the earliest practicable period at the commencement of each year, the High Commissioner shall cause a complete collection to be published for general information, of all ordinances, Rules of Court and Regulations enacted during the preceding year.

XXIX. The High Commissioner shall punctually forward to us from year to year, through our Principal Secretaries of State, the annual book of returns or reports, commonly called the Blue Book, relating, i.a. to Legislation, Civil Establishment, ... Imports and Exports, Agricultural Produce, Manufactures, the immigration of Jews and the welfare of the Arab population ...'

These rules have not been applied since the establishment of the State of Israel.

4.5.2 *Guidelines and instructions since the establishment of the State of Israel*

The legislative process is not regulated in parliamentary legislation.[25] There are, however, Attorney General directives that treat this matter.[26] The following directives apply:

- Directive no. 60.012 of 1.11.1985 regarding the enactment of regulations (76 pages);
- Directive no. 60.013 of 1.4.1986 regarding administrative guidelines (26 pages); and
- Directive no. 60.010 of 1.10.1968 regarding draft bills (15 pages).

Directive 60.012 relates, *inter alia,* to the proper relationship between primary and secondary legislation; the authority to enact regulations; delegation of the authority to enact regulations; the duty to enact regulations; statutes for the implementation of which no regulations have been enacted; initiating regulations; administrative procedure; consulting; naming regulations; the source of the authority; prior publication of draft regulations; approval of the regulations by another authority; publication of the regulations; the amendment and revocation of regulations; the edited version of regulations; and revocation of effective

[25] For an analysis of the legislative process cf., G. Deshe, 'The Legislative Procedure in Israel', student seminar paper, the Israeli Centre for Academic Studies affiliated with the University of Manchester (in Hebrew).

[26] The Attorney General is appointed by the Government on the recommendation of the Minister of Justice. The qualifications for the position of Attorney General are the same as those for eligibility to be nominated a justice of the Supreme Court. The Attorney General has a dual role: The first – giving legal advice to the Government, Ministers and the State authorities, guidance to the State legal service and the preparation of legislation that the Government wishes to promote. The second – representation of the State before the courts.

regulations. An annex is attached with a checklist to be used by the legal advisor of the regulating authority.

Directive 60.013 deals with the substance of administrative guidelines; the lawfulness of administrative guidelines; the duty to decide each case separately and the possibility of deviating from the guidelines; amendment and revocation of the guidelines; and the publication of the guidelines.

According to Directive 60.010, the Legal Advisor of the initiating ministry has to prepare a draft bill that includes:

a) the name of the proposed law
b) the main provisions of the law
c) the purpose of the proposed law and the reasons for its necessity
d) the effect of the proposed law and law on existing legislation
e) budgetary implications for the manpower required in the ministry designated to supervise its implementation and other pertinent ministries and authorities.

The proposed draft has to be circulated among designated government ministries and authorities for comments. In particular, the Attorney General has to prepare a report on whether the proposed draft is acceptable and point out his reservations. All comments must be sent to the Legal Advisor of the initiating ministry. The draft should include the Attorney General's comments, the comments of the Officer in Charge of the Budget in the Ministry of Finance regarding the budgetary implications, as well as reservations made by the government ministries, to the extent that such were made. The Officer in Charge of Drafting in the Ministry of Justice is responsible for ensuring that the bill will be drafted clearly and precisely.[27]

In practice, the functioning of this procedure is limited because of the private bills initiated without limit by individual Members of Knesset (MKs). There is no provision in Israeli law granting MKs the right to initiate legislation. The origin of the right is to be found in the Knesset Rules of Procedure *(Takkanon Ha-Knesset).* Since an MK cannot be expected to prepare a draft in accordance with all the above rules, some rules have been made to check his or her right.[28] However, there is no mechanism similar to the procedure applicable to government draft bills. Article 81 of the *Takkanon* supposedly limits the number of private bills proposed by each MK, but the limits are disregarded.[29]

Unlike the rules regarding government bills, the *Takkanon* does not rule that private bills must include their economic implications. Article 39A of the

[27] Attorney General Directive 10.010, sect. 6.

[28] *Takkanon Ha-Knesset,* arts. 134-135.

[29] Z. Inbar, 'The Legislative Procedure in the Knesset', 1 *Hamishpat* (1993) pp. 91, 95 (in Hebrew).

Budgetary Principles Law, 5741-1985, provides that private bills submitted to the Knesset, which entail expenditure or budgetary commitments, or a reduction of state revenues, must designate, in the draft or in the explanatory notes, the means of funding the expenditure of the reduction. However, this provision is not applied to the first submission of the draft.[30] Furthermore, in a petition brought to the Israeli Supreme Court, presiding as a High Court of Justice (HCJ), the Supreme Court rejected the claims of the petitioners that the legislative process was faulty for not complying with this provision. The Court declined to intervene in the legislative procedure.[31]

A plethora of populist bills has therefore been introduced, designed to benefit a variety of interest groups at the expense of the rest of population.[32] The magnitude of the problem is immense, since during the session of the previous Knesset more than 4,000 private bills were submitted, and since the past elections, more than 2,000. Furthermore, Knesset Committees have also initiated bills, with no pertinent rules of procedure, even in the *Takkanon.* Again, the High Court of Justice rejected a petition that the Knesset Committee was not authorized to submit draft bills.[33] Such bills are not subject to any rules of procedure.

All bills are submitted to the Knesset. Private bills must first undergo two pre-submission stages:

a) The Chairman of the Knesset and his deputies must verify whether the private bill is properly structured and has a proper legislative framework, whether it creates a norm rather than iterate facts and if its text is not offensive. In particular, it may not be racist or deny the existence of Israel as the State of the Jewish People.[34]

b) Private bills must undergo a preliminary debate held by the Knesset Committee.[35] The MK has to explain the reasons for drafting the bill, and the Government presents its position. The presentation of the Government's position entails much preparation, as it is subject to the Attorney General Guideline 60.016 of 10 February 1986, requiring that the private bill should be sent by

[30] Inbar, ibid.

[31] HCJ 984/92 *Bank Leumi* v. *The Chairman of the Knesset* (not yet reported). Similarly, the Court declined to intervene in HCJ 4562/94 *Zandberg* v. *The Broadcasting Authority* (not yet reported).

[32] A. Rubinstein, *The Constitutional Law of the State of Israel*, 5th ed. (Tel-Aviv, Schoken 1996) pp. 643 et seq., 673 (in Hebrew). The author cites as an example the Law for the Absorption of Veteran Soldiers, 5754-1994, initiated as a private bill initiated by MK Ran Cohen, the cost of which has been estimated at 1.5 – 2 billion NIS; cf. also N. Munin and N. Raziel, 'Private Bills Initiated by Mks', *Israeli Tax Quarterly* 24 (95) (1997) p. 68 (in Hebrew).

[33] HCJ 410/91 *Blum* v. *The Chairman of the Knesset* 46(2) P.D. (Piskei Din, Collection of Judgments of the Israeli Supreme Court) 201.

[34] For an interpretation of these rules see HCJ 742/)84 *Kahana* v. *The Chairman of the Knesset* 39(4) P.D. 85, 93.

[35] *Takkanon Ha-Knesset*, Art. 135(a).

Knesset Secretariat to the Government Secretary and be distributed to all Ministries. The Finance Ministry should check the budgetary implications of the bill and prepare a written report within two weeks. In practice, the overwhelming number of private bills has made it impossible to fulfil these requirements, and the bills are passed on without scrutiny for their budgetary implications.

The Knesset Committee in charge of preparing the bill for first reading is authorised to prepare it accordingly, or recommend to the Knesset to remove the bill from the agenda.[36] Following the first reading, Parliament decides whether the bill is to be passed to one of the Knesset Committees for continuing the legislative process. The debate in the Committee should be an important stage in the drafting and checking of the legal, budgetary and social implications. The legal advisors of the pertinent government ministries and authorities may participate in the Committee's debates. The Attorney General and his staff must provide any assistance needed in drafting the provisions, reservations and proposals for amendments.[37] The Committee may summon experts and representatives of interest groups. However, it is not obliged to hear them.[38] The Committee may introduce amendments as it may deem fit, insofar as such amendments do not exceed altogether the bounds of the subject-matter dealt with by the law. If the bill proposes to amend an existing law, the Committee may introduce amendments to other articles not mentioned in the original bill. The Committee finally puts every article of the bill to a vote. In practice, the procedure is deficient for two main reasons.[39] First, in the absence of any minimum quorum being required for the Committee's meetings, attendance is sometimes very poor indeed. Secondly, even when experts are invited, they are all too often hardly given the opportunity to state their opinion. It is also uncommon to interrogate the experts regarding their opinion. These problems could be rectified by the preparation of a detailed procedure to be followed by the Committees.

During the second reading, the draft prepared by the pertinent committee is submitted to the vote. The vote is made for each article separately and the reservations to each article are also put to a vote. Immediately thereafter, the draft is put to a third reading whereby the law as a whole is put to a vote. Again, apart from a few exceptions, there is no required quorum for the Knesset's sessions. Private bills proposed to rectify this problem (one requiring a quorum of only 10 per cent of the MKs) were not adopted.

[36] Ibid, Art. 138.
[37] Ibid, Art. 118.
[38] HCJ 975/89 *Nimrodi Land Development Ltd.* v. *The Chairman of the Knesset* 45(3) P.D. 154.
[39] Cf., Deshe, *supra* n. 25.

5. CONCLUSIONS

5.1 Political Agenda

The quality of legislation and regulation is part of the political agenda in the EU Council and OECD Council meetings as well as in the respective Member States. The political agenda in Israel has other priorities, *inter alia*, the security problems. However, even in this context, the poor quality of the texts of the Oslo Agreements is regrettable and shows all the more how important the interest for the quality of legal texts should be. A rule which cannot be enforced may not be drafted. As Israel's 50th anniversary marks a time for considering its future developments, participating in the EU and OECD studies concerning the improvement of legislation could be a viable option.

5.2 EU Legislation is of interest for Israel

Since the Community has become one of the largest trading partners of Israel, Israeli lawyers like, any other third country lawyers, can no longer afford to possess only a limited knowledge of Community law-making processes. For private and business lawyers, Community competition and trade law are of great importance. Today, the European Community's harmonisation of health, safety and technical standards as well as banking, securities and company law, environmental and consumer protection measures and agricultural and social policy represent matters of practical concern for Israeli government lawyers. By improving the quality of EU legislation, it will be easier to understand Community law.

5.3 Different Legal Traditions and Cultures

Different legal traditions and cultures influence national guidelines and instructions relating to the quality of legislation. Some countries have a broad scope and pay more attention to cost-benefit analysis, *fiche d'impact* and efficiency and effectiveness, whereas other countries focus more on legislative drafting techniques.

The concrete elaboration and approach relating to quality of legislation varies throughout the Community, although we found similar criteria and goals in all the Member States and in Israel. In Israel, emphasis is also placed on cost-benefit considerations but, due to the enormous number of private bills, this analysis does not function in practice. There are EU Member States who refer to both aspects. As regards the cost and benefit analysis, the Maastricht Treaty's Declaration No. 18 on estimated costs under Commission proposals should be noted.

Similar criteria apply in the Council Resolution of 8 June 1993, the OECD Council Regulation of 9 March 1995 on improving the quality of government

regulation, including the OECD Reference Checklist, as well as in the guidelines, checklists and instructions of several Member States.

Criteria requiring that legislation should be clear, simple, transparent and comprehensible are also stated by the Court of Justice in joint cases 212-217/80 *Amministrazione delle Finanze dello Stato* v. *Salumi*.[40]

It is worthwhile noting that these criteria are as clear as crystal and similar, although they are to be found in different legal traditions and cultures!

5.4 Guidelines, Checklists, and Blue Lists

With respect to EU legislation, the role of national parliaments varies; some Member States have scrutiny committees, whereas others have a mechanism through which proposals for new EU legislation are submitted to the national parliaments.

As parliaments are legislative bodies, it seems natural and desirable that the guidelines and instructions for the quality of legislation should pass through the parliaments. However, there is not enough awareness in any national parliaments of the guidelines and recommendations concerning legislation.

5.5 Preparation and implementation of Community laws

The Member States have different ways of implementing EC legislation, due to differences in legislative systems, procedures and techniques. We have noted that the Council, in its Resolution, did not provide criteria for the implementation of Community legislation in the national legal orders, whereas some national guidelines and instructions contain detailed criteria for implementing Community legislation.

Joint consultation of national legislative experts during the legislative process at Community level can contribute to a better and more effective implementation of EC legislation at a later stage. This conclusion was already put forward in an Asser Colloquium held on 23 March 1972, in The Hague. This conclusion is still relevant and of interest.

In short, improving the quality of Community legislation will have no effect, as long as the corresponding national legislation is cumbersome and complicated.

5.6 Ensuring implementation of guidelines

At the EU level, one view is that an independent consultative body (that is, a committee, etc.) comprised of national legal experts should be created. Other views prefer to make use of the structures of the institutions themselves and give them more responsibility.

[40] (1981) ECR 2735.

At the national level, independent bodies like councils of state, parliaments and special committees should review new legislative proposals in accordance with the respective guidelines. The existence of guidelines in the sense of a uniform cross-sectional checklist for legislative projects has proven to be an indispensable requirement for the quality control of legislation. Institutions at different levels are a key component in the quality control process. They should combine internal and external control, as well as *ex-ante* and *ex-post* control.

5.7 Legal Protection and National Courts

According to the settled case-law of the EC Court of Justice and the Court of First Instance, the point of departure is that legal certainty entails that Community legislation must be clear and predictable for those who are subject to it. For example, the Court of Justice in joined cases 212-217/80 *Amministrazione delle Finanze dello Stato* v. *Salumi* stated the following:[41] 'This interpretation ensures respect for the principles of legal certainty and the protection of legitimate expectation, by virtue of which the effect of Community legislation must be clear and predictable for those who are subject to it.'

National courts are the victims of low quality legislation. They have to deal with many problems on interpretation, and often lack proper information and references about the background and intended purpose.

Lawyers, solicitors, barristers, etc. may take advantage of low quality legislation because litigation is increasing as the texts are not clear and understandable.

As national courts will increasingly assume a greater role in interpreting Community legislation, it will be vital to have clear provisions, drafted to enable the national court to understand the text in its own language without being required to examine a dozen different versions.

5.8 Criteria for testing the quality of legislation

Since the Community introduced the subsidiarity, proportionality and efficiency test for newly proposed legislation, the number of regulations has decreased, demonstrating that quantity is as much a problem as quality. Comprehensive restatement of existing law by frequent consolidation is an important objective.

With the increasing quantity of legislation, both at Community and national levels, it will become increasingly difficult to assess the effect of new legislation and to translate and publish the texts in eleven languages.

Since 1993, the Commission has adopted measures to simplify existing legislation considerably, and in 1996, a new method involving all concerned was launched for the Single Market (SLIM).

[41] Ibid., recital 10.

We found in the Israel Attorney General Directives similar criteria as in the Guidelines, Checklists and Instructions of the OECD, the EU and the EU Member States. However, the large number of private bills submitted in the Knesset (last year: 2,000) forms an obstacle for the legislative procedure and for the clear and precise legislative drafting.