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On Theoretical Aspects of the Concept of Rational Lawmaker: Between Optimization and Idealization of the Legislation*

O teoretycznoprawnych aspektach koncepcji racjonalnego prawodawcy. Między optymalizacją a idealizacją ustawodawstwa

ABSTRACT

The concept of the rational legislator plays an important role in the theory and philosophy of law, both in its historical-doctrinal and contemporary dimensions. It occurs in two main versions. The first one is associated with optimization models, which define the conditions for treating the legislative practice as a rational activity and the legislator as a rational actor. The second version, associated with the so-called Poznan Theoretical School, expresses itself in the assumption of the legislator's rationality, which is a-factual in nature, both in terms of subject matter and objects of activity. It plays an important role in the process of legal interpretation, which is particularly evident in relation to the operative (judicial) interpretation. The study shifts the scope of the assumption of rationality of the legislator from the subjective point to the result of legislative actions in the context of expanding the set of sources (carriers) of law beyond legal regulations and binding it to a broad category of the legal order, including the actions of the judiciary and expanding the set of carriers of law to include court rulings and extra-legal criteria used in the processes of law application. This gives the idealization

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assumption about the rationality of legal order a real dimension, a potential element of which is the judicial "correction" of the results of legislative activity.

Keywords: rationality; lawmaker; optimization model; idealization assumption; legal order

INTRODUCTION

The study seeks to analyze the concept of rational lawmaker (legislator) that plays an important role in legal theory and philosophy in the context of two aspects thereof. The first involves optimization models setting out the conditions allowing us to consider legislative practice as a rational activity and the legislator as a rational lawmaker, while the second involves an idealization assumption of the lawmaker's rationality, which is an a-factual assumption but plays an important role in the process of legal interpretation (especially operative interpretation). The analysis results in an attempt to shift the scope of the assumption of legislator's rationality from the subjective perspective of his actions to the outcome of these actions in the context of the extension of the set of legal sources (carriers of law). As a result, apart from the categorial shift of the assumption from the system of legal provisions to the legal order, it also extends the subjective aspects of the assumption by covering both the legislature and the judiciary and, without changing the essence of the model of rational lawmaking, gives a real dimension to the idealization assumption of rationality of the legal order.

LEGAL THEORY AND THE ISSUES OF LAWMAKING

The issues of lawmaking hold an important place as a subject of analyses and generalizations conducted within the theory and philosophy of law. This applies in particular to the theory of sources of law, the theory of normative act and legal provision, the properties of the legal language, the law-making process and legislative policy (or, more broadly, the policy of law). This group of issues also includes the problems of rationality of law and rationality of lawmaking (legislation), which are discussed herein. This is noticeable both in historically important treatises (an example of which can be the studies by Leon Petrażycki), as well as in the works of modern legal theorists, without noticing the importance of which it is impossible to perform an analysis in the light of the juxtaposition of perspectives pointed out in the subtitle of this study.

It should also be noted that the area of lawmaking as a whole is "shared" in legal sciences by the legal theory and philosophy and the legal dogma. In the latter context, the leading role is played by the science of constitutional law (where

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Wojciech Orłowski devoted a lot of effort to the issue of creation of law and bodies related to that process[1]) and, to a specific extent (in relation to making executive law and local law[2]), the science of administrative law.

It cannot be overlooked that less attention, in the theoretical-legal perspective, is paid to the institutions involved in the process of drafting normative acts (their legislative competences and procedures) and more to the very legislative process as a decision-making process. Importantly, if one were to link this attention with the observation of the achievements of Polish legal science, the re-profiling of the former theory of the state and law into the theory and philosophy of law at the faculties of law and administration of Polish universities has intensified this tendency. The strengthening of the philosophical perspective has led to a certain weakening of the interest in including in the subject of research the questions of the relationship and dependence between law and state and its agencies. This means that the problem of parliamentarism and the role of parliament in the lawmaking does not generally have an independent character in the theory and philosophy of law, appearing there mainly when statements related to systemic and constitutional matters are expressed.

The above-mentioned question of the presence of the problem of rationality of lawmaking in the theory and philosophy of law is related to two separate aspects of it: optimization and idealization. They are completely different in nature, they relate to different types of statements and play different roles in shaping and creating the image of law.

RATIONALITY OF LAWMAKING AS AN OPTIMIZATION ASSUMPTION

The optimization assumption regarding rationality of legislation involves treating the requirement of rationality as a general precondition for correct legislation and the constructing of a set of detailed requirements relating to specific types of activities in this process, the fulfillment of which would determine the rationality of these activities on the one hand, and of the entire legislative process on the other.

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[1] Cf. W. Orłowski, *O potrzebie optymalizacji procesu ustawodawczego w Polsce*, "Studia Iuridica Lublinensia" 2014, vol. 22, p. 479 ff.; idem, *Sejm i Senat w świetle dotychczasowej praktyki stosowania Konstytucji z 1997 roku*, [in:] *Problemy stosowania konstytucji Polski i Ukrainy w praktyce*, eds. M. Granat, J. Sobczak, Lublin 2004, p. 106 ff.; idem, *Stare i nowe problemy procesu ustawodawczego*, [in:] *Konstytucja w państwie demokratycznym*, eds. S. Patyra, M. Sadowski, K. Urbaniak, Poznań 2017, p. 163 ff.

[2] Cf. R. Mastalski, *Tworzenie prawa podatkowego a jego stosowanie*, Warszawa 2016, especially pp. 26–96; K. Sikora, *Istota i charakter prawny aktów prawa miejscowego w zakresie ich sądowoadministracyjnej kontroli*, Lublin 2017, especially pp. 103–228; or the study (one of the most comprehensive studies on the topic) by D. Dąbek, *Prawo miejscowe*, Warszawa 2020, passim.

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The construction of these conditions has a long doctrinal tradition. It mainly concerns the order of positive law, as it essentially refers to legislative activity as a manifestation of the enactment of normative acts, which are the basic source of law in this order (sometimes recognized as the sole carrier of legal content).

1. For the sake of comparative historical and doctrinal study, one can, for example, point to the approaches to rationality of lawmaking and related issues in the concepts of Jeremy Bentham, Friedrich von Savigny, Roscoe Pound, and Leon Petrażycki. They focus on various specific problems, but each of them assumes the possibility of setting general conditions for the rationality of legislation. Although the above set of these concepts is of only a representative nature, it reflects the importance attached in legal thought to the requirement of rational lawmaking.

The earliest of these concepts, i.e. Bentham's, falling within the philosophical concept of utilitarianism, considers legislative activity as the art of managing human beings in the context of "delivering" happiness to as many people as possible. The lawmaker should by no means be unlimited in it. He should use social norms, "cooperating" with private ethics, i.e. socially formed moral attitudes, especially in the form of the so-called indirect legislation affecting these attitudes.[3]

The concept proposed by von Savigny, developed in the early 19th century, does not go that deep into the question of rationality of lawmaking. However, opposing both the voluntarism of pure positivism and the classical doctrines of the law of nature that required the discovery of moral ideas, it refers in a sense to Bentham's concept, because by bringing the essence of law closer to a spontaneously developed language, it authorizes the lawmaker not for legislation in a political sense (imposing models of behavior) but for legislation in the technical sense (the formulation of norms developing in social life).[4]

On the other hand, the concept devised in the first half of the 20th century by Pound, who was the only author in this group building his statements on the basis of the legal order of the Anglosphere, the basic component of which is common law, exceeded to some extent the limitations resulting from this fact. His concept of social engineering by law created a framework in which he assigned to the legislator the function of a rational transformation of social relations and society itself, which, however, was to occur in the context of taking into account the "cooperative instinct of man".[5]

Petrażycki, working in the same period, approached the issue of the rationality of legislation differently. He went far beyond the approaches briefly presented

[3] Cf. J. Bentham, *Theory of Legislation*, London 1914, especially p. 10 ff., 79 ff.; idem, *Wprowadzenie do zasad moralności i prawodawstwa*, Warszawa 1958, especially p. 58 ff.

[4] Cf. F.C. von Savigny, *O powołaniu naszych czasów do prawodawstwa i nauki prawa*, Warszawa 1974, especially p. 68 ff.

[5] Cf. R. Pound, *Social Control Through Law*, New Haven 1942, especially pp. 16–20, 24–25.

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above, building the concept of legal policy as a practical science intended to serve rational lawmaking. It consisted in "scientifically justified prediction of the consequences to be expected in the event of the introduction of certain legal provisions and in the development of the principles, the introduction of which into the applicable legal system by means of legislation (…) would cause (…) the desired effects".[6] There are five theses at the core of this "program": about the social ideal, the ethical progress, the educational role of law, the legal psychology, and the methods of legal policy.[7] Each of them, while defining the dimension of rationality, constitutes also the basis for limiting legislative voluntarism. Importantly, legal policy, as perceived by this author, is not a form of conscious activity of the lawmaker, but a practical science indicating the conditions of correct legislation. This author thus initiated the distinction of this group of sciences, which later found expression in the separation of praxeology and social engineering, being more general practical sciences than Petrażycki's understanding of legal policy.[8]

The examples of concepts[9] indicated above show the importance of the issue of rational legislation in the history of legal thought. Each of them emphasizes, however, that the model of such action should take into account socially developed values and norms, which are embodied in different ways in individual concepts, but everywhere in a certain context, limiting the legislator.

2. Models of rational lawmaking are also built in contemporary Polish legal theory. They have a number of common components, although they differently distribute accents in defining their role as conditions for the rationality of the legislative process.[10] These include, presented in more detail than in the concepts presented above, different types of reasoning and action, which can be presented "collectively" in the form of successive phases of the decision-making process understood in a broader or narrower sense.

The first phase, let us say a preparatory one, would consist of three types of action (conditions). The first is the requirement for the actors in this process to use a fair description of the social reality within which the subject of the regulation is

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[6] L. Petrażycki, *Wstęp do nauki prawa i moralności*, Warszawa 1959, pp. 13–14.

[7] Idem, *Wstęp do nauki polityki prawa*, Warszawa 1968, p. 25 ff.

[8] Cf. T. Kotarbiński, *Traktat o dobrej robocie*, Wrocław 1975, especially pp. 7, 11–16, 350 ff.; A. Podgórecki, *Zasady socjotechniki*, Warszawa 1966.

[9] This group may be complemented with, e.g., the concepts of L.L. Fuller (*Anatomy of Law*, New Haven 1968, p. 16 ff.), H.L.A. Hart (*The Concept of Law*, London 1965, pp. 190–194), E. Ehrlich (*Fundamental Principles of the Sociology of Law*, New York 1965, pp. 134, 372 ff.).

[10] Cf. the models presented by Z. Ziembiński, *Teoria prawa*, Warszawa–Poznań 1974, p. 104 ff.; J. Wróblewski, *Model racjonalnego tworzenia prawa*, "Państwo i Prawo" 1973, no. 11; idem, *Teoria racjonalnego tworzenia prawa*, Wrocław 1985, pp. 132–278. Cf. A. Podgórecki, *Założenia polityki prawa*, Warszawa 1957, passim; E. Kustra, *Racjonalny prawodawca. Analiza teoretycznoprawna*, Toruń 1980, passim; J Wróblewski, *Zasady tworzenia prawa*, Łódź 1981, pp. 57–89; S. Wronkowska, *Problemy racjonalnego tworzenia prawa*, Poznań 1982, passim.

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situated. It is intended to decide both on the need for regulation and on detailed solutions for further phases of the decision-making process. The second type of condition is a correct description of the existing regulation (either overall or partial) and the social effects caused by it. Both of these components of the process are based on the use of knowledge of both a sociological and juridical nature. It is supposed to lead to a third type of action, essential for the entire legislative process, namely the decision on the need for a new regulation and determination of its scope (including anticipation of the extent of changes made by it).

The second phase, already of a decision-making character, is the result and the continuation of the last activity of phase one. The first activity as part of this phase is to formulate the operationalizable objectives of the new regulation and its basic orientations and principles (values), based on juridical and political knowledge, although it is the axiologically determined political will that is decisive (hence this phase can be called the legislative policy phase).

The determination of these regulation components then introduces the whole process into juridical operation, referring to knowledge about the existing regulations, consisting in identifying the optimal content and scope of legal measures for achieving the objectives of the new regulation. These operations are technical in a certain sense, but the scale of this "technical nature" differs and depends mainly on the subject matter of the regulation, but in each case it is a matter of appropriate linguistic formulation of the legal provisions and systematizing them within the framework of the normative act (which in Polish law is the subject of a separate regulation[11]). Legal knowledge, especially that concerning the branch of law being regulated, supplemented by linguistic and sociological knowledge, must be of paramount importance here. Sociological knowledge contributes to making predictive statements about the expected but also unintended and side effects of the new regulation, which affects its future effectiveness. This implies taking into account the social and institutional realities in which the regulation will work and the general social preferences that influence attitudes towards the law, internalization of norms and compliance with them.

RATIONALITY OF LAWMAKING AS AN IDEALIZATION ASSUMPTION

The assumption of rationality of the lawmaker and the result of his actions is at least an a-factual assumption, or rather a counterfactual assumption. This is so, because in relation to each legislative action it is possible to analytically identify some irrational elements (for example attributable to the course of the decision-making process, the intellectual and axiological basis of action or the content of the

[11] Cf. Regulation of the President of the Council of Ministers of 20 June 2002 on "Rules of legislative technique" (Journal of Laws 2002, no. 100, item 908).

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regulation from the point of view of its effects). This is the case even if this action and its very effect can be considered wholly rational (meeting a kind of minimum of rationality) in the context of the requirements indicated above.

1. It seems that the views formulated within the so-called Poznan Theoretical School are typical of the characteristics of the assumption about legislator's rationality.

The first was formulated by its forefather, Professor Zygmunt Ziembiński, who described the legislator's rationality assumption in the law theory textbook of 1972[12] as follows: "Representatives of legal dogmatics, when referring to the 'lawmaker', rarely refer to a specific person or one of the persons formally or technically involved in the process of lawmaking, but rather to a 'rational lawmaker', which they assume is guided by specific knowledge and a specific system of assessments they attribute to the 'lawmaker'."[13] And further he continues: "It is therefore assumed that the lawmaker is guided by a particular system of assessments (…), that each provision is adopted purposefully (…), that provisions do not establish radically mutually contradictory norms, or norms that are not attainable at all (…), that the provisions adopted do not contain norms that are radically incompatible in praxeological terms (…), etc.".[14]

This perspective formed a basis for the later approach by Sławomira Wronkowska and Zygmunt Ziembiński in another law theory textbook, from 1987 (first edition).[15] The essence of the view expressed here is to emphasize that the rational lawmaker theory is a theory "based on the assumption that a set of legal provisions applicable in a given country constitute rules established and not repealed by a rational lawmaker who, when adopting those rules, was consistently guided by certain coherent knowledge and structured assessments, with the aim of establishing, in the form of those rules, a set of norms designed to bring about the state of society that would be optimal according to his assessment and knowledge".[16]

Despite some differences, both views contain a number of common assumptions. First of all, they are based on the conclusion that the lawmaker is guided by knowledge and assessments that are either "only" specific knowledge or specific assessments (the first perspective) or are coherent knowledge and arranged assessments (the second perspective).

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[12] This assumption had been signalized by Z. Ziembiński even before. See Z. Ziembiński, *Teoria państwa i prawa*, part 2: *Zagadnienia teorii prawa*, Poznań 1969., p. 150.

[13] Idem, *Teoria prawa*, Warszawa–Poznań 1972, p. 100.

[14] *Ibidem*, p. 101. This approach was reiterated in subsequent editions of the textbook by Z. Ziembiński, but editions from 1974 onwards contain a subunit on the model of rational lawmaking decision in the meaning of building the conditions for lawmaking so defined (cf. idem, *Teoria prawa…*, 1974, pp. 104–105).

[15] See S. Wronkowska, Z. Ziembiński, *Zarys teorii prawa*, Warszawa 1997.

[16] *Ibidem*, pp. 162–163.

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It is essential for the analysis of the first perspective to pay attention to those elements thereof that involve linking this assumption with representatives of legal dogma (as it seems, in the sense of both scholars and practitioners in the field), with limited personal identifiability of the lawmaker and indication of various ways of participating in the lawmaking process. This approach, which emphasizes the subjective aspect of participation in the lawmaking process, refers to the lawmaker as a "model" rather than a specific entity, although the author weakens this assumption by using the word "rarely". Instead, he expands the concept of lawmaker, speaking of the lawmaker not as a person, but as individuals participating in the lawmaking process, in both formal and technical terms.

In the second approach, on the other hand, noteworthy is the strong connection of the concept with the set of legal provisions in force, which are the result of the lawmaker's actions, the combination of the intellectual and axiological bases for lawmaking activities (obtaining here the features of consistency of knowledge and systematization of judgments), and the attribution to the lawmaker of the intention to establish norms that optimally serve society. This approach is, it seems, a more object-oriented approach (pointing, in two aspects, to the result of the lawmaker's actions).

Both of the above approaches should be contrasted with Leszek Nowak's concept from 1973,[17] contemporary, in a sense, to the first approach by Ziembiński. The rational lawmaker assumption is clearly linked here to the theory of legal interpretation through the following statement: "The thesis that legal interpretation is a humanistic interpretation of the lawmaker's actions requires only one thing for its justification: to show that lawyers apply the principle of rationality to explain the lawmaker's behavior".[18] This principle focuses on the intellectual and axiological foundations on which lawmaking activity is based. According to this approach, rational is a lawmaker who "recognizes knowledge that is 1. not mutually contradictory, 2. a system (i.e., contains its logical consequences) and (…) has preferences that are 3. asymmetric and 4. transitive".[19] The author treats this principle as an idealization law, which can be, and sometimes is, fulfilled. But moreover, he distinguishes, apart from the concept of rational lawmaker, the concept of perfect legislator, from which he additionally requires, on the part of knowledge, to meet the condition of encompassing all the rules of the language in which the rules are formulated and the condition of the best justification from the point of view of the

[17] This concept was mentioned however in an earlier study by L. Nowak, *Koncepcja racjonalnego stanowienia norm*, "Studia Metodologiczne" 1966, vol. 2, referred to by Z. Ziembiński in the study titled *Teoria państwa* (Warszawa–Poznań 1969, p. 151).

[18] L. Nowak, *Interpretacja prawnicza*, Warszawa 1973, p. 39.

[19] *Ibidem*.

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current state of science, and on the part of preferences – that the judgments that delineate them be a system of morally right judgments.[20]

Of course, the above requirements for both the rational and perfect lawmaker can be linked to the various phases as listed above, but nevertheless, in Nowak's view, they are autonomous. The author links these requirements to legal interpretation, which makes this concept, on the one hand, a sort of an optimization model (especially in the context of linking these conditions to the taking of such an action from among the possible actions, which certainly leads to the highest preferred state of affairs[21]), but on the other hand – an idealization assumption, adopted by lawyers in the course of legal interpretation.

2. The assumption of lawmaker's rationality does not seem to have been successfully questioned in the Polish legal literature. Although views have appeared that downplay its usefulness in the context of the methodology of legal sciences, including in particular the theory of law, they have not changed the general trend so far.

Marek Zirk-Sadowski questions the usefulness of this assumption in the perspective of his vision of lawyers' participation in culture, considering this assumption, especially if it is based on instrumental rationality, as an obstacle to basing legal discourse on the assumptions of communicative rationality.[22] He notes this especially with regard to European law.[23] Among other things, he points to the non-empirical nature of the assumption itself, but he does not rule out its usefulness in general. Instead, he requires that the assumption become part of the so-called communicative competence underlying the legal discourse.[24]

Lech Morawski perceives this assumption in a different way, as he links it to the model of rational lawmaking, doubting the prediction and planning capabilities of social sciences using knowledge of the regularities of social life.[25] According to this author, the assumption of lawmaker's rationality, as an idealization and counterfactual assumption, is unnecessarily a common basis for rulings of Polish courts, because acceptance of this assumption, placing emphasis on the author-text relationship instead of the text-interpreter relationship, excludes the important role of judicial interpretive practice, making it impossible to correct erroneous, and therefore essentially irrational, legislative practice.[26]

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[20] Cf. *ibidem*, pp. 53–54, 164–166.

[21] Cf. *ibidem*, p. 39.

[22] Cf. M. Zirk-Sadowski, *Prawo a uczestniczenie w kulturze*, Łódź 1998, p. 81 ff., especially pp. 89–90.

[23] Cf. *ibidem*, p. 92 ff.

[24] Cf. *ibidem*, p. 81.

[25] Cf. L. Morawski, *Co może dać nauce prawa postmodernizm?*, Toruń 2001, p. 55 ff., especially pp. 58–59.

[26] Cf. *ibidem*, pp. 60–89.

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FUNCTION AND SCOPE OF THE IDEALIZATION ASSUMPTION

1. Interpretative usefulness of the idealization assumption

There is no doubt that the essence of the above-mentioned assumption about rationality of the lawmaker is its usefulness in the practice of legal interpretation. This qualification applies in some sense to each of the types of legal interpretation, since it makes it possible to determine a point of reference even where the interpretation does not lead directly to practical effects, although this assumption is relatively loosely linked to doctrinal interpretation. Its effect (and sometimes also an intention behind it) may be precisely to demonstrate the irrationality of the very legislative action or its result in the form of normative acts.

However, there are types of interpretation in which the above-mentioned feature of usefulness is transformed into the feature of necessity. This applies to the operative (decision-making) interpretation undertaken in processes of application of the law (particularly in the judicial decision-making type) in the context of the procedural imperative to make a decision. The purpose of the operative interpretation is not so much to understand or clarify (although those objectives form part of operative interpretation) the content of a provision (or other law-carrying medium) as to achieve an interpretation which is sufficient for a decision (substantive or procedural) to be taken. Such an obligation of the operative legal interpreter is the essence of the interpretation according to the so-called internal point of view.[27] Within the framework of this point of view, a court or administrative authority which adopts decisions on the application of the law must place its decision "within the law", which, in the context of the counter-factual nature of the assumption of lawmaker's rationality, often leads to the "rationalization of the irrational".

It seems that Ziembiński meant "decision-makers" when speaking about legal dogma specialists. Although the representatives of particular disciplines of legal sciences (so-called legal dogma) are "closer" to the legal text and legislative structures than the legal theorists, they represent established scholarly opinion and do not present this internal point of view in this context. Moreover, they are more connected to theoreticians than to those applying the law. This is somewhat complicated by the quite frequent fact of legal dogma specialists and legal theoreticians combining their professions with working as decision-makers (especially judges), but it does not alter the basic assumption about their different approaches to rationalizing the lawmaker's actions.

The idealization nature of the assumption of lawmaker's rationality allows for "rectifying" (i.e. "rationalizing") the actual results of lawmaking activities, regardless of the scale of their irrationality. The operative interpreter has at his

[27] H.L.A. Hart, *op. cit.*, p. 99 ff.

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disposal a whole range of rules of interpretation, including conflict-of-law and inference rules, which make extensive use of some aspect of the legislator's actual irrationality (actual contradiction or incompleteness of the rules). However, all other rules of interpretation are also suitable for this role, including not only functional and axiological, but also systemic and linguistic and even teleological, which directly appeal to the will of the rational lawmaker. However, an operative interpreter who, despite the irrationality of certain legislative measures, would like to refer to teleological rules may also apply an adaptive (dynamic) version of those rules which allows taking a hypothetical approach to that intention, "detached" from the historical lawmaker and accepting the hypothesis of current lawmaker who would be supposed to regulate the matter in question at the time the operative interpretation is being done.[28]

These measures would not have been possible without the idealization assumption of lawmaker's rationality. Nor would the outcome of the interpretation be certain without that assumption, in the sense of both certainty of the law application decision based on that interpretation and certainty of its content.

The foregoing remarks also apply to those other types of legal interpretation which are characterized by a certain degree of practicality. A certain degree of operability in the context of authentic interpretation and in the context of official delegated interpretation, which, although not aimed at resolving a specific case directly, but are intended to indicate how to resolve a practical legal problem pointed out under a given normative regulation In a sense, this also applies to the legislative interpretation, which refers to the determination of the normatively defined competence and procedural bases for the entities involved in the lawmaking process and, which combines the idealization assumption with the optimization model, the substantive-law bases (in the context of determining the need and scope of amending the existing normative regulation).

2. Subjective and objective scope of the assumption

Rationality as the core of the idealization assumption is neither subjectively nor objectively clearly defined as part of it.

In the subjective context, this assumption, according to the above-discussed approaches, is limited to the understanding of the lawmaker as the legislator, thus emphasizing the stronger relationship of this assumption with the creation of legal provisions (primarily at the statutory level). Despite such a specific reference, it does not bring the concept closer to the identification of a complete and certain set of people that make up this subjective category. It is counterfactually assumed that

[28] Cf. L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Kraków 2001, pp. 134–136.

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there is someone who can be unequivocally identified as a legislator expressing his will, which is an additional idealization aspect of the very assumption. The procedural identification of this concept with the body "endorsing" the result of the process does not change the fundamental thesis, referring to the formal side of the last phase of the legislative process. On the other hand, assigning the real legislative will in the context of qualifying the actions as rational to an entity or entities operating in the political power centre(s) makes this classification real, but also simplifies it, because it still does not exhaust the real set of such entities. Subjective idealization is not changed by the possible inclusion in the concept of the legislator of all actual entities participating in the legislative process, the number of which increases as the political system in which laws are made becomes more and more democratic (in this context it is paradoxically easier, which does not mean reliably, to identify as a person the legislator in an authoritarian system).

The subjective context may, however, also expand in another dimension. For if the concept of lawmaker is referred to the emergence of various sources of law or law carriers, which constitute the basis for actions in the processes of applying the law, the idealization nature of the assumption changes its character. It includes in the set of lawmaking entities also the courts of law, operating under the conditions of discretion margin, based on various sources, including natural ones, i.e. independent of the legislator. Through their actions, the "non-regulatory" carriers of law enter the legal order, in fact shifting the essence of the assumption from the subjective to the objective context. Thus, this assumption may refer not only to the actions of specific entities, but also to the result of these actions. As part of it, the feature of rationality would be attributed not to the system of normative regulations, but to a broader category – the legal order, a largely polycentric structure, although formed within the culture of positive law with the decisive (but not exclusive) participation of legal provisions.[29]

This creates a mosaic of connections that directly touch the idealization model of the rationality of law as a means of organizing social life and social control. The first level creates the distinction between the lawmaker and the legislator, the second – the distinction between actions and their result, and the third – the distinction between two types of legislative results: the legal system and the legal order.

If one does not equate the concept of law with solely legal rules and norms reconstructed from them, the assumption of rationality of the lawmaker would refer, within the above relativization, to a broader category than the rationality of enacting legal provisions, that is, the creation of a system of law understood as a system of legislative regulations. The category of lawmaker in this context would detach from the concept of legislator and include all subjects involved in the creation of various carriers of law. However, the subjective aspect would not be decisive here.

[29] Cf. idem, *Zagadnienia…*, pp. 35–36.

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First of all, the scope of the concept of law would be expanded by including in the set of such sources of law also other carriers than legal provisions.[30] This applies to previous judicial decisions (especially if they become precedents, even "soft" ones[31]), extra-legal criteria (if general reference clauses authorize their use[32]), and principles of law not formulated in regulations (i.e. rooted in cultural-legal traditions). These sources do not belong to the system of law in the sense of the system of legislative regulation, creating the broader concept of legal order in the sense of a kind of *iunctim* of carriers used to build the normative basis for law application decisions (a kind of "law in the action"[33]). This also applies to the order of positive law, in which the dominant role cannot be unattributed to legal provisions, but in which they cannot have the position of the exclusive source of law.

Thus, the above relationships expand the scope of the assumption of rationality in both subjective and objective contexts. It would be decisive to approach rationality as an assumption referring to the properties of the legal order in the context of the "extended result" shaped by the actions of all the entities that make up the collective concept of lawmaker. As a result, the idealization character of understanding the subject itself and attributing to it the idealized feature of rational action would be weakened, which would at the same time emphasize the activity of rationalizing the entire legal order, carried out in the course of operative interpretation. It would include both system-building carriers and "extra-system" components in the form of the above-mentioned non-formalized principles of law, precedents and extra-legal references. On the subjective side, on the other hand, it would give the operative interpreter the real position of a participant in the process of creating the legal order, within which the reference to these "extra-legal" sources would, on the one hand, rationalize the effects of legislative action, and, on the other, would bring the idealization assumption of rationality of the legal order closer to its real dimension, by understanding it not in subjective, but implementation terms. It would also more fully take into account the factors that relativize the overall picture, such as the

[30] Which would be, to a certain extent, similar to the so-called developed concept of sources of law formulated three decades ago. Cf. Z. Ziembiński, *Teoria prawa…*, 1972, p. 77 ff.

[31] On the role of precedents in Polish law and their understanding in the Polish legal science, see T. Stawecki, *Precedens w polskim porządku prawnym. Pojęcie i wnioski de lege ferenda*, [in:] *Precedens w polskim systemie prawa*, eds. A. Śledzińska-Simon, M. Wyrzykowski, Warszawa 2010, p. 59 ff.; L. Morawski, M. Zirk-Sadowski, *Precedent in Poland*, [in:] *Interpreting Precedents: A Comparative Study*, eds. D.N. MacCormick, R.S. Summers, Dartmouth 1997, p. 219 ff.; *Precedens sądowy w polskim porządku prawnym*, eds. L. Leszczyński, B. Liżewski, A. Szot, Warszawa 2019, passim, especially pp. 21–39.

[32] Cf. L. Leszczyński, *Stosowanie generalnych klauzul odsyłających*, Kraków 2000, passim, especially p. 39 ff.

[33] In the meaning referring to the concept of American functionalism. Cf. R. Pound, *Law in Books and Law in Action*, "American Law Review" 1910, no. 14, p. 12 ff.; J.L. Halperin, *Law in Books and Law in Action: The Problem of Legal Change*, "Maine Law Review" 2011, vol. 64(1), pp. 45–76.

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type of legal culture, the type of political system and other elements of the social environment of law and, to some extent, the type of branch of law.

In fact, if, as a result of this assumption of rationality, a real rationalization of the results of legislative activity in the course of operative interpretation of the law were to be made, it would concern exactly the law as a result of the collective lawmaker's action. Thus, such an objective-and-subjective shift of the assumption of rationality of the legislator to the assumption of rationality of the legal order would fall, as it seems, within the framework of the communicative rationality mentioned by Zirk-Sadowski,[34] capturing its object in the context of the relationship between the broadly understood lawmaker and the addressees of legal norms and decisions.

OPTIMIZATION AND IDEALIZATION APPROACHES AND THE POSITION OF PARLIAMENT

Finally, getting back to the issue of the role of the institutional context in theoretical-legal approaches to legislation mentioned at the outset, it would be necessary to repeat the thesis formulated there that the problem gives way to model analyses, both in relation to building an optimization model of rational lawmaking and to considering the interpretative role of the assumption of lawmaker's rationality.

Nevertheless, also within legal theory, the analysis of the problem of lawmaking may lead to the question of the place of parliament in both approaches to lawmaking activity. A closer look at the detailed findings within the framework of optimization and idealization approaches allows us to try to answer this question in three aspects.

It first must be assumed that the optimization model does not eliminate the role of parliament as a praxeologically significant body that decides on the shape of the normative regulation and as the body "initiating" the adoption of the normative act. Although the collective composition of parliament, not defined with regard to a particular legislative process, the uneven role of its members in the content of specific regulations, the bicameral structure of parliament, entailing a potential "political conflict" between the houses of parliament (which complicates the process but in many cases rationalizes the outcome of legislation process) and the dependence of parliament on external actors (as regards the preparation and submission of bills or in the promotion and publication of an act) make it clearly difficult to identify the subject falling under the concept of legislator, but it must not lead to ignoring the legislative role of parliament.

Secondly, it should be noted that the legislative role of the parliament is not eliminated by the idealization assumption of rationality of the legal order, understood broadly as a set of different sources (carriers) of law arising through a kind of

[34] Cf. M. Zirk-Sadowski, *op. cit.*, p. 89 ff.

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co-operation (but also a kind of "rivalry" in some circumstances) of the legislator and the judiciary independent from the political authority. Importantly, this is also valid for positive law, in which the proportions of roles look differently from the common-law systems. On the other hand, this assumption actualizes the position of parliament, making it responsible for drafting laws in accordance with the constitution, while not deciding, at least not to equal extent for all various branches of law, on the very content of the law underlying individual legal decisions made or reviewed as part of the judicial type of law application.

Thirdly, it must be assumed that the certain reduction, perceived in the light of the above findings, in the parliament's role as a lawmaker whose activity is a component of the political discourse is the consequence not of a reduction in the role of the institutions, but of the broadening of the concept of law, which means that its scope goes beyond the legal provisions only. Thus, the judiciary, representing the juridical discourse, involved in determining the content of law reconstructed (in different proportions, depending on the type of legal culture) from legal provisions, other judicial decisions (precedents), open extralegal criteria indicated in legal provisions or principles of law not formulated in these provisions, would also become a lawmaker. This would not change the scale of the difficulty in identifying the lawmaker in subjective terms (even exacerbating it, in fact), but it would make it realistic the assumption of rationality of the legal order by including also the process of operational interpretation of law in the concept of lawmaking. The latter would include judicial interpretation, including the case law of the constitutional court and administrative courts, to varying degrees becoming really a "negative lawmaker" in relation to the outcome of legislative activity.

CONCLUSIONS

In the context of the above, the idealization assumption of rationality of the legal order would kind of circle back. Being an interpretative assumption, it would contribute, as a result of the inclusion of operative interpretation (mainly judicial), into the actualization of that assumption through the interpretative use of the above-mentioned "non-statutory" elements of the legal order, for the interpretative rationalization of the entire legal order, not only of the system of legislative regulations an. Consequently, the idealization assumption would, in a sense, acquire the status of law itself as an element of the optimization model, relating to the participation of the operative interpreter in the process of forming the legal order. Of course, this would only be feasible if the two subjective components meet the essential starting conditions for the proper performance of the designated roles. Briefly speaking, it is the case when, while respecting the requirements of the rule of law, Parliament has democratic legitimacy and the courts enjoy independence.

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ABSTRAKT

Koncepcja racjonalnego prawodawcy odgrywa ważną rolę w teorii i filozofii prawa, zarówno w jej wymiarze historyczno-doktrynalnym, jak i współczesnym. Występuje w dwóch zasadniczych wersjach. Pierwsza z nich wiąże się z modelami optymalizacyjnymi, określającymi warunki umożliwiające traktowanie praktyki legislacyjnej jako działalności racjonalnej, a ustawodawcy jako prawodawcy racjonalnego. Natomiast wersja druga, kojarzona z tzw. poznańską szkołą teoretycznoprawną, wyraża się w założeniu o racjonalności prawodawcy, które ma charakter afaktyczny, zarówno pod względem podmiotowym, jak i przedmiotowym. Pełni przy tym istotną funkcję w procesie wykładni prawa, co przejawia się zwłaszcza w odniesieniu do wykładni operatywnej (sądowej). W opracowaniu dokonano przesunięcia zakresu założenia o racjonalności prawodawcy z ujęcia podmiotowego na rezultat działań ustawodawczych w kontekście rozszerzenia zbioru źródeł (nośników) prawa poza przepisy prawne i związania go z szeroką kategorią porządku prawnego, obejmującą także działania sądownictwa oraz poszerzającą zbiór nośników prawa o orzecznictwo sądowe i kryteria pozaprawne, wykorzystywane w procesach stosowania prawa. Nadaje to założeniu idealizacyjnemu o racjonalności porządku prawnego wymiar realny potencjalnym elementem, którym jest sądowa „korekta" rezultatów działalności ustawodawczej.

Słowa kluczowe: racjonalność; prawodawca; model optymalizacyjny; założenie idealizacyjne; porządek prawny