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Is a Comprehensive Reform of the Law-Making Process Necessary in Poland? : A Voice in the Discussion

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IS A COMPREHENSIVE REFORM OF THE LAW-MAKING PROCESS NECESSARY IN POLAND? A VOICE IN THE DISCUSSION

INTRODUCTION

There have been proposals in the public debate to improve the process of legislation and law-making in Poland. These demands are extremely important given the fact that only a stable, understandable and transparent law can be a guarantee of social and economic order. It seems that the weakness of the legislative system in Poland results mainly from the lack of a professional background for political and strictly legislative activities, lack of institutional order in the law-making process and low-quality legal regulation of this process. In addition, a serious problem is the level of participation, which does not allow civilization of the law-making process. As rightly noted by G. Kopińska 'one of the inalienable features of this process, more and more commonly accepted in democratic countries, is its transparency and participation¹.

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¹ See G. Kopińska, *Najważniejsze wnioski i rekomendacje*, [in:] G. Kopińska, G. Makowski, P. Wałowski, M. Wiszowaty, *Tworzenie i konsultowanie rządowych projektów ustaw*, Warsaw 2012, p. 7.

Transparency can be ensured through the creation and observance of clear procedures, the publication of all documents and the disclosure of all decision-makers during the preparation of a law, while participation means inclusion of citizens in the decision-making process². In the law-making process, this means that all interested parties can participate at every stage of the creation of a law. It must be remembered that it is not only about simply seeking opinions, but about the possibility of actual participating in a dialogue between the governing and the governed. As M. Grosicki rightly observes, the foundation of the idea of participation is the assumption that an enormous number of good ideas for solving public problems arises outside the administration (or at its lower levels), because the citizens have the greatest knowledge about the sources of social problems³.

It is well known that the more discussions and consultations are in the process of creating assumptions for legal acts, the greater the chance of avoiding mistakes and the chance that the citizens will approve the existing legal system and observe the law. Therefore, the government should care about, except in exceptional cases, the widest possible consultation. A comprehensive draft consultation gives the government an important argument in favor of maintaining specific institutions, which are often modified in the course of parliamentary battles.

Below an attempt was made to subjectively identify four phenomena and elements of the law-making process which, according to the author, require a quick change. At the same time, solutions were indicated that could significantly contribute to improving its quality. Of course, one must be aware of the fact that the problem of the quality of lawmaking is much more complex and can not be exhausted in such a short text. Perhaps, however, this text will be an incentive for further research, in which other phenomena and elements of the law-making process that require repair will also be raised.

THE PHENOMENON OF LAW INFLATION

There is no doubt that in our country we are currently dealing with legislative inflation - an excessive number of new or amended legal acts, disproportionate to the real needs of the state, economy and citizens. I share the opinion of the former president of the Constitutional Tribunal, J. Stępień that 'the source of over-activity in legislation lies in the distrust of everyone to everyone. It seems to us that if we precisely define all possible measures, we will prevent fraud, circumvent of prohibitions, and ignoring

² An in-depth analysis of the participation idea can be found in: D. Długosz, J.J. Wygnański, *Obywatele współdecydują*, Warsaw 2005.

³ See M. Grosicki, *Konsultacje społeczne jako forma partycypacji obywateli w procesie stanowienia prawa*, [in:] T. Stanisławski, B. Przywora, T. Jurek, *Reformy ustrojowe w Polsce 1989-1998*, Lublin 2014, p. 178.

orders⁴. Such excessive casuistry undoubtedly contributes to the inflation of the law. This phenomenon is also strictly, in my opinion, related to over-activism of deputies. Democracy does not expect deputies to write law but to legislate. Nevertheless, deputies themselves, in groups, commissions, and even in the plenary session, make provisions regarding matters that they most often have no idea about. This causes that very often the original draft has little to do with the adopted content of the law.

The reasons for excessive inflation of law in Poland are often indicated by socio-economic changes after 1989, the adoption of a new Constitution in 1997 and the need to adapt Polish law to European law in the context of Poland's membership of the European Union. It seems, however, that these factors are clearly overestimated. Despite the passage of more than 10 years from the date of Poland's accession to the European Union, the number of new law is not decreasing, but on the contrary - it is growing. In addition, putting the blame merely to the membership in the European Union seems to be an unconvincing argument if we look at the experience of other EU Member States. For example in the Czech Republic in 2014 six times less normative acts were adopted than in the same period in Poland, and in the Federal Republic of Germany – twenty-four times less⁵. Currently, the differences are even greater considering the fact that in recent years (2014-2017) the number of adopted legal acts (only laws and ordinances) has grown drastically: while in 2014, 25634 pages of various normative acts were adopted, in 2015 – 29843, in 2016 - 31906 in the first half of 2017 it was already 17440, i.e. 36% more than in the same period of the previous year⁶.

As J. Kochanowski rightly pointed out, 'it is significant that the tendency of the legislator to create new normative acts gains strength in the years in which the elections take place. Then, legislation never falls back to the previous level, but the tendency to regulate further increases. Often, this is connected with the need to amend the previously adopted *bad law*⁷. A clear pathology is that even laws that have not yet come into force are subject to amendments, as exemplified by the history of the Penal Code in 1997⁸. Thus J. Kochanowski rightly pointed out that 'extremely frequent changes to amending acts actually prevent any stabilization of practice and jurisprudence. In practice, there are even doubts about the content of the applicable legal status'⁹.

So what causes this peculiar *legislative diarrhea*? There are at least several causes. It seems that the most important of them is the low quality of the law. It is the im-

⁴ J. Cipiur, *Od inflacji cen gorsza jest inflacja prawa – wywiad z prof. Jerzym Stępnem*, <http://www.obserwatorfinansowy.pl/forma/rotator/od-inflacji-cen-gorsza-jest-inflacja-prawa> [access: 03.09.2017].

⁵ Quoted from: Barometer of stability of the legal environment in Poland - <http://barometrprawa.pl/#p4> [access: 03.09.2017].

⁶ Ibidem.

⁷ J. Kochanowski, *Deregulacja jako pierwszy etap reformy systemu tworzenia prawa*, [in:] *Wymiar sprawiedliwości i legislacja*, „Ius et Lex” nr 1, Warsaw 2005 p. 216.

⁸ During the 18 years of its validity, this Act was amended almost 70 times.

⁹ J. Kochanowski, *Jak powinno być tworzone prawo w Polsce? Reforma procesu stanowienia prawa – Rada Stanu*, <http://www.rpo.gov.pl/pliki/12087762480.pdf> [access: 03.09.2017].

perfection of the law that makes it necessary to change it frequently. The reasons for this low quality include: too fast proceeding during law-making¹⁰; improper cooperation between entities involved in it¹¹, excessive modification of draft laws during the legislative process consisting, for example, in far-reaching changes introduced to government drafts at the commissioning stage, often distorting their sense; lack of due diligence in the consultation procedures being undertaken; lack of due diligence of the regulatory impact assessment.

Another extremely important reason is too frequent changes of legal provisions. Very often lawmakers recognize that the only remedy for imperfection of legal provisions is their change. It is worth noting that the correction of regulations should take place only when it is really necessary and cannot be avoided. Often a similar effect could be obtained by applying the legal provisions accordingly¹². Small changes that are not necessary seriously hinder the lives of recipients of legal provisions. Meanwhile, the analysis of the structure of laws passed in the last terms of the Sejm clearly indicates a continuous increase in the number of amending laws.

While in the 4th term of the Sejm they constituted 61% of all adopted laws, in the 5th term of office it was 65.10% in the 6th term – 77% in the 7th term of the Sejm the percentage was as high as 81.27%. This flood of amending laws means that transparency and stability of the law become only wishful thinking.

A certain problem is also a kind of ‘omniscience’ of legislators. Often they cannot fully imagine the practical consequences of the changes being introduced, which causes them to depart from the realities of regulating often very specialized areas of socio-economic life. It seems that these problems could be easily avoided by listening carefully to the voice of representatives of different environments. The role of consultations seems to be extremely important in this context. Also excessive bureaucracy is of great importance expressed in the fact that lawmakers often try to excessively interfere in social and economic life, regulating even those issues that do not require it. It seems that this kind of approach results from the fact that those responsible for law-making often do not realize what consequences from the point of view of the transparency of the legal system entail the regulation of a new (so

¹⁰ Research carried out by Grant Thornton shows that in 2016 the average time of work on the bill from the moment the bill was submitted to the marshal's council to be signed by the president was only 77 days against 122 in 2015 and 201 in 2000-<http://barometrprawa.pl/#p4> [access: 03.09.2017].

¹¹ Especially in recent times, there is evident marginalization of the Senate's position in the course of legislative proceedings. In 2016, as many as 67% of the Act came into force without any amendments of the Chamber of the second Polish Parliament while in 2010 it was only 42% and in 2005 - 30%. Similarly, in the case of the president, there is a tendency to sign laws more quickly. In 2016, on average, only 11 days passed from receipt of the act to the moment of signing. Even in 2010, it was 19 days and in 2000 - 25 days. Of course, a quick signing of the law by the president can also have its good sides, but from the point of view of the quality of the law, the president and his expert base are the last instance that can still catch legislative and substantive errors in the laws.

¹² M. Borski, *O potrzebie reformy polskiego systemu stanowienia prawa*, „Przegląd Prawa Konstytucyjnego” 2016 no.5, p. 228.

far unregulated) issues¹³. The last, by far the least important reason for the increase in the amount of law is a noticeable tendency for the government and parliament to harmonize the texts of the most important normative acts. However, this cause should not be overestimated. In 2014, the parliament adopted a total of 907 pages of uniform texts¹⁴ which, taking into account the scale of the new law, is a drop in the sea, slightly exaggerating the statistics.

There is no simple remedy for improving this state of affairs. First of all, one should start with a thorough analysis of the regulatory impact assessment not only at the level of submitting a bill, but also at further stages of the legislative procedure. This should be followed by a change in the rules on public consultation. Other objections often arise from the solution of modifications undertaken by the applicants as part of the reform of a given act and other acts. In these conditions, apart from the amendment of one main law, we have 'by the way' changed provisions of many acts, sometimes of key importance from the point of view of public finances. It seems that such solutions do not lead to the overriding objective that the legislator should have - transparent law, and at the same time effectively solving citizens' problems. Certainly worth considering in the doctrine for some time is the postulate to restore the Constitutional Tribunal's competence in the field of universally binding interpretation of law. In order to improve the legislative process, the legislator should consider the postulate to amend the Constitution of the Republic of Poland and explicitly allow the basic law the possibility to proceed with a law draft at the first reading of the committee¹⁵.

It seems that such a solution would rationalize the process of legislating by increasing the role of Sejm committees in it¹⁶ as currently a significant part of the activity aimed at implementing EU legal acts into the Polish legal system constitutes a major part of the legislative activity of the Sejm¹⁷.

¹³ Ibidem.

¹⁴ Quoted after: Barometer of stability of the legal environment in Poland - <http://barometrprawa.pl/#p4> [access: 19.11.2015].

¹⁵ See also: A. Poglódek, B. Przywora, *Glosa do wyroku Trybunału Konstytucyjnego z dnia 7.11.2013 r. (K 31/12) w sprawie oceny konstytucyjności trybu uchwalenia ustawy z 18.08.2011 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw*, „Krajowa Rada Sądownictwa”, Warsaw 3 (24) /2014, p. 9.

¹⁶ This postulate seems to be all the more justified since in recent years the substantive work of MPs in the Sejm committees has been an increasingly overlooked stage in legislative proceedings. In 2016, in the case of as much as 46% of the acts after the first reading, the second one immediately followed (no committee work) or the work (until the report on the committee's work was prepared) lasted only one day. After the second reading, most often the third reading followed (without additional committee work). It was as much as in 85% of the cases. This tendency seems very dangerous, because the lack of deeper reflection at the Sejm committee meeting may further reduce the quality of the law. In this way, the possibility of analyzing the adopted regulations is limited not only by the members themselves, but also by the experts and legal services of the Sejm.

¹⁷ Ibidem.

PROBLEMS WITH THE PRACTICAL APPLICATION OF THE PROCEDURE OF REGULATORY IMPACT ASSESSMENT (OSR)

Article 3 § 2 point 4 of the Rules of Procedures of the Sejm, requires the applicant to present the expected social, economic, financial and legal consequences. The effects of the proposed regulation should therefore be estimated before submitting the draft law in the Sejm. It is worth noting that the above provision is correlated with § 1 Section 1 point 3 'Principles of legislative technique'¹⁸, according to which the decision to prepare a draft law is preceded by the determination of the expected social, economic, organizational, legal and financial effects of each of the solutions considered. As one can see the provisions of 'Principles of legislative technique' still require the determination of organizational effects, which the Rules of the Procedures of the Sejm do not mention. The requirement to present the aforementioned effects is carried out by the Council of Ministers through the development of regulatory impact assessment (OSR). The OSR is therefore an obligatory element of the justification for the governmental draft law. Unfortunately, justifications for draft laws prepared by other entities having a legislative initiative (including groups of deputies) do not have to include this important element.

It is worth emphasizing that in the OSR the legislator focuses only on the financial consequences that the proposed regulations will cause in the public sphere. It completely ignores the private sphere. This seems to be the greatest weakness of this important institution. It is worth noting that no regulations (including the rules resulting from the 'Better Regulations 2015' program) in the least extent oblige to make any, even preliminary estimates of benefits or financial costs, which relate to private entities. In practice, the reader of the OSR and the justification for the draft law does not know which private entity and what financial benefits should be paid under the new regulation nor who should bear the costs and what costs should be incurred. Taking this into account, it is impossible to resist reflection that such a state of OSR regulations is a targeted procedure that serves to conceal from the public the real game of interests in the legislative process¹⁹.

It is also a serious problem to determine the effects of these draft laws that have been amended at subsequent stages of the legislative procedure. Following these changes - in current solutions - there is no update of the effects of the proposed regulation. Consequently, this means that the costs of implementing the law in the form ultimately adopted by the Sejm of the Republic of Poland may significantly differ from those that were planned in the draft at the time of its submission. Under

¹⁸ Regulation of the Prime Minister of June 20, 2002, regarding the Principles of legislative technique (unified text Journal of Laws of 2016, item 283).

¹⁹ For more information see M. Borski, R. Głajcar, B. Przywora, *Postępowanie ustawodawcze w Polsce – prawo, zwyczaje i praktyka*, Kraków – Sosnowiec – Katowice 2015.

such conditions, it is difficult to plan the total costs associated with the implementation of the passed law. This state of affairs is absolutely unacceptable²⁰. It is clearly visible that the adopted regulatory impact assessment model applies only to a draft submitted to the Sejm, and not to the adopted law. Therefore, it seems reasonable to introduce changes by imposing on the applicant a draft the obligation to update the final costs in the case of amendments and submit the total costs before the adoption by the Sejm. The introduction of such a solution is necessary to illustrate both positive and negative consequences, in particular the forecasted effects of the introduced amendments for the state budget and budgets of local government units.

It is also very important to pay attention to whether all draft justifications contain a complete list of entities with whom the draft was to be consulted and whether, and if so, to what extent the draft affects the public finance sector, including the state budget and the budgets of local government units, the labor market, competitiveness of the economy and entrepreneurship, including the functioning of enterprises, regional situation and development²¹. In this respect, the services assessing the draft are of key significance. The services should precisely analyze the submitted drafts whether they meet formal requirements, and in the case of irregularities, return them to be completed. It would also be reasonable to introduce an obligation to assess the impact of regulation *ex post*. Such a solution would improve the quality of the law and its order by eliminating unnecessary regulations²².

The compulsory part of the OSR is the presentation of the results of consultations conducted with all key stakeholders. Preparation of reliable regulatory impact assessments (OSR) is not possible without the participation of citizens and entrepreneurs, in other words, widely conducted social consultations. Common public consultations guarantee high quality of law. Listening to the opinions of a wide range of representatives of the society, one can check whether in practice the policy in a given field functions properly. As rightly noted by G. Kopińska 'in most cases of draft regulations, regulatory impact assessment (OSR) contains an incomplete list of entities with whom the project should be consulted and information that the draft regulation will have no impact on the public finance sector, including the state budget and budgets of local government units, the labor market, competitiveness of the economy and entrepreneurship, including the functioning of enterprises, regional situation and development'²³.

²⁰ M. Borski, *Kilka uwag na temat słabości polskiego systemu stanowienia prawa*, [in:] M. Paździor, B. Szmulik, *Fundamentalne wartości i zasady ustrojowe. Model konstytucyjny a praktyka ustrojowa w Polsce*, Lublin 2016, p. 28.

²¹ Ibidem.

²² M. Borski, R. Głajcar, B. Przywora, *Postępowanie...*, p. 223.

²³ See G. Kopińska, *Słabości polskiego systemu stanowienia prawa – obraz sytuacji z punktu widzenia organizacji pozarządowej*, https://www.prezydent.pl/download/gfx/prezydent/pl/defaultopisy/2411/2/1/01kopińska_grazyna_slabosc_systemu_diagnoza.pdf [access: 03.09.2015].

There is no doubt that there may be serious barriers in the consultation process that adversely affect the legislator's desire to consult. First of all, attention should be paid to the lack of will to conduct consultations justified by the legislator by having a democratic mandate. Obtaining it means the right to exercise power, but also creates a kind of obligation to be accountable to the electors. Of course, always the final decision belongs to those who have such a mandate, but this should not undermine the value of consultation processes and authorize to claim that victory in the election exempts from consultation.

A great 'sin' of consultation processes is also their apparentness. This is always the case when consultations are conducted in a situation where one cannot or does not intend to introduce any changes to the planned activities under the influence of their results. A common impediment in conducting consultations is also the fear of creating unrealistic expectations, launching a kind of 'concert of wishes' or the transformation of consultations into conflict. Such conflict becomes inevitable, for example, when it is necessary to devote the interests of individual groups to a broader public interest. Experience, however, teaches that abandoning consultation processes does not remove conflicts, but only shifts them in time and makes them often even more violent.

The common problem is also the common misunderstanding of the nature of consultations. They are often confused with negotiations, which means that the legislator starts from the erroneous assumption that only those entities that have the value of representativeness can participate in them. It is also very common to confuse the openness of the legislative process with its participatory nature. By way of example, the insertion of documents in the BIP (the Public Information Bulletin PIB) satisfies the first, but it is not a sufficient condition to talk about the consultation processes. Equally frequent is the identification of public opinion polls with consultations. Research of this kind may support decision-making, but they generally lack the basic feature of consultation, which is the reference to the comments. The essence of consultation is communication, and this is missing in public opinion research.

Taking into account the experience of non-governmental organizations often consulting the most varied normative acts drafts, there is no doubt that there are problems with the practical application of the consultation procedure. G. Kopińska draws attention to this, showing a pretty depressing picture. According to her 'The ministries behave passively, expect that interested parties will make comments themselves. Most ministries do not go beyond their established list of partners. In order to send comments to draft laws under the consultation, an extremely short time is set, often a few days. The rule is that the ministries do not refer to the comments they have sent to the draft laws. Therefore, the opinion on drafts for non-governmental organizations is rather an action to mark their position - with the feeling that there is no impact on the shape of the draft at this level'²⁴.

²⁴ Ibidem.

So what should be done to increase the importance of consultations - as an important tool of social participation in the law-making process?

First, it seems reasonable to introduce a second phase of the consultation process that could take place before the third reading begins. This would only apply to those projects that have been amended. The fact that the original shape of the draft (subject to public consultation) may significantly differ from the one being voted on in the third reading confirms the example of one of the amendments to the law on the system of common courts. In May 2009, the Ministry of Justice submitted a draft amendment to the Act of 27 July 2001 on the Law on the System of Common Courts. This project has been subject to extensive external consultations. At the time of the government's adoption (October 2010), it differed significantly from the original shape. Therefore, in the course of the public hearing (11 January 2011), there was a charge from the First President of the Supreme Court that the draft was not presented to him for consultation in accordance with statutory requirements. The Ministry of Justice, however, claimed that these allegations are unfounded, as the draft was presented to the First President of the Supreme Court. The problem was that the First President of the Supreme Court consulted the original project, not the one that was created in the course of further work²⁵. Although the case concerned the stage before the implementation of the legislative initiative, it seems that it would be just as easy to talk about these problems with respect to the relation original draft - the draft after the amendments.

There is no doubt that it is justified to develop a single and coherent model of conduct for consultations, especially those projects for which amendments have been made. It is necessary to create a uniform 'consultation base', from which one could get information on the subject of one's comments on an ongoing basis. One can consider in this respect the improvement of solutions already adopted in the government's public consultation portal: <http://www.konsultacje.gov.pl/>. On the other hand, public consultations regarding drafts for which amendments were submitted could take place on a website specifically opened for this purpose, for example on the websites of the Government Legislation Center or the Sejm of the Republic of Poland.

It is important that the scope of public consultations is as wide as possible (in particular, invitations to participate in consultations should be addressed to those whose planned solutions are to be addressed) and that all interested parties should be able to express their opinion in a simple way. Therefore, the adopted procedural

²⁵ The first President of the Supreme Court indicated that the Supreme Court received letters from the Minister of Justice of May 20, 2009 and October 13, 2009, for which answers were given. However, according to the First President of the Supreme Court, these letters were to be considered as assumptions for the draft, not the final draft. The first President of the Supreme Court said he had not received the final draft before its adoption by the Council of Ministers. See the letter from the First President of the Supreme Court to the Marshal of the Sejm of January 19, 2011, available at: [http://orka.sejm.gov.pl/Druki6ka.nsf/0/1C381EF804225410C125782B00369BA7/\\$file/3655-001.pdf](http://orka.sejm.gov.pl/Druki6ka.nsf/0/1C381EF804225410C125782B00369BA7/$file/3655-001.pdf).

solutions in this respect must be maximally deformed. Otherwise, it may discourage you from participating in the consultation. If the legislator specifically invites certain institutions for consultation, the list of these institutions and the justification for their choice should be public. It seems necessary to create a coherent system for conducting public consultations, which will clearly indicate what conditions should be fulfilled by consulting a given draft, in particular regarding the taxonomy, i.e.: precise definition of the reviewing entity, the act to which remarks are made, then detailed legal and factual justification, finally defining the person representing the entity (drawing up the opinion), etc.

The solutions regarding the timing of consultations and the rules for the applicant to inform about their implementation remain to be changed. Above all, the deadlines that applicants set for consultants are too short. The introduction of the solution adopted in Article 19 § 2 of the Trade Unions Act, pursuant to which the organs of government administration and local government bodies direct the assumptions or legal acts drafts within the scope of trade union tasks to the appropriate statutory authorities of a union, specifying the date of submission of opinions not shorter than 30 days. This deadline can be shortened to 21 days due to important public interest. It is worth noting here that the argument about prolonging the legislative process caused by seeking additional opinion seems to be completely misguided²⁶. Considering the fact that despite a significant shift of legislative competence on the EU legislator, the amount of law established by the Polish parliament has not only decreased, but inversely increased, it seems reasonable to postpone the extension of the law-making process, which will result in a longer time to think about specific solutions and fewer reckless legislative decisions.

It is also necessary to specify precisely the period to which consultations may be carried out. The following solution can be considered: the first stage of consultations up to the end of inter-ministerial consultations, while the second stage, e.g. within 14 days from the second reading. The last stage of consultations – currently marginalized and often overlooked – should be the stage of post-legislative consultations. The stage should start around 2-3 years after the entry into force of the legislative solution and should involve the examination – by, for example, consultations in the expert group – whether the implemented law achieves the objectives set for it or whether it has negative effects. A very good idea seems to be the codification of consultation regulations. Currently, these provisions are scattered in acts of varying rank, they are insufficiently clear and transparent to citizens, which in practice often makes consultations illusory. Especially at the governmental stage of legislative work, there is a lack of precise procedures and institutions guaranteeing social participation

²⁶ M. Borski, *Konsultacje jako narzędzie partycypacji społecznej w procesie stanowienia prawa – wybrane aspekty*, [in:] T. Stanisławski, B. Przywora, Ł. Jurek (ed.), *Bodźce prawno-finansowe w prowadzeniu działalności gospodarczej. Zachęty i utrudnienia*, Lublin 2016, p. 24.

and consulting the direction of legislative work with interested parties. Therefore, the legislator should take consideration all regulations concerning the process of social consultations, scattered in various legal acts and place them in one act of a statutory rank, while technical and organizational issues could be accommodated in subordinate status files.

Such a solution could have a positive impact on the quality of law-making in Poland. By the way, it could be linked to the constitutional law postulated for at least 30 years in the creation of a law on the creation of law, the emergence of which could increase the rank of the law-making process in Poland and fundamentally remodel the process of creating and legislating²⁷.

INSUFFICIENT USE OF INSTITUTIONS OF PUBLIC HEARINGS

The basic principle of public hearing is that everyone can participate in it. Its purpose is to provide the legislator in a given case with the arguments and opinions of various entities and to balance the conflicting interests of the parties. It is therefore, what G. Makowski and J. Zbieranek pay attention to, 'a mechanism for representing and promoting specific interests, as well as a method of influencing the decisions of public authorities'²⁸.

The legal basis for a public hearing institution is included in the act on lobbying in the law-making process²⁹ and in the Rules of Procedures of the Sejm in Chapter 1a of Section II introduced by the Amendment of February 2006. It seems that the legislator's decision to include the institution of public hearing in the law on lobbying activities was unfortunate. Public hearing is after all an instrument of civil dialogue and implementation of the constitutional right of petition, and not a tool for practicing lobbying. Thus, it seems that instead of artificially emphasizing the anti-corruption character of public hearing by placing this institution in the act of lobbying, it should be included in another legal act, perhaps even creating, as G. Makowski and J. Zbieranek want, a separate law on civil dialogue³⁰. To this act, it would be possible to include provisions on consultations currently scattered across various normative acts.

Practice shows that the institution of public hearing is used extremely rarely and only partially fulfills its task - creating a platform for a clear presentation of the interests of all parties interested in influencing the shape of the procedural regula-

²⁷ Ibidem, p. 25.

²⁸ G. Makowski, J. Zbieranek, *Lobbying w Polsce – żywy problem, martwe prawo* - <http://www.isp.org.pl/files/5907360310779548001197980856.pdf> [access: 20.11.2015].

²⁹ Act of July 7, 2005 on lobbying in the law-making process (Journal of Laws No. 169, item 1414, as amended).

³⁰ See G. Makowski, J. Zbieranek, *Lobbying...*, <http://www.isp.org.pl/files/5907360310779548001197980856.pdf> [access: 10.09.2017].

tion³¹. Since the entry into force of the provisions on the hearing, until the end of the work of the Sejm of the 7th term (i.e. for more than 9 years), the Sejm committees conducted only 28 hearings on draft bills. Considering the fact that around 1800 laws were passed during this period, this number is not impressive. Moreover, given the fact that the deputies are not obliged to respond to the opinions, public hearings are usually a place for raising objections rather than for a partner-like discussion³².

Therefore, it seems that in order to strengthen the participation of citizens in the process of law-making already at the stage of the legislative process, it is worth considering strengthening the role of the institution of public hearings. This instrument could, to a certain extent, be an additional form of consultation. However, this is not supported by the solution adopted in the Rules of Procedures of the Sejm that a resolution to conduct a public hearing may be taken within a strictly defined period, i.e. only 'after the first reading of the draft and before its detailed consideration' (Article 70 § 4 of the Rules of Procedure of the Sejm). One should consider introducing the possibility of holding a hearing already at the stage of preparing the draft by the entity applying with the legislative initiative. It seems that the draft consulted in this way could be 'more mature' and more responsive to social needs, and at the same time it would be faster to spot possible errors or inaccuracies. Very often the drafts are deeply changed during parliamentary work. It happens that their original version seriously deviates from the final version, which is forwarded to the President's signature. Therefore, it would be justified to create the possibility of holding at least one hearing also at further stages of the legislative procedure, even before the adoption of a given act, and even after its adoption already at the stage of works in the Senate. The solution to the problem is that 'due to premises or technical reasons the presidium of the committee may limit the number of entities participating in the public hearing', and 'this limitation should be made on the basis of a justified criterion applied uniformly to all entities' is also disputable (Article 70d of the Rules of Procedure of the Sejm).³³ It should be stated, therefore, that the freedom of the presidium of the committee to limit the scope of the public hearing was left in this respect. Such solutions do not serve the idea of direct democracy.³⁴ In addition, it also seems that an increase in interest in this institution would be favored by specific educational activities among deputies.

³¹ See also: M. Borski, R. Glajcar, B. Przywora, *Postępowanie ...*, p. 101-106 i 223-224.

³² See M. Borski, *Wysłuchanie publiczne – ważna, chociaż niedoceniana instytucja demokracji partycypacyjnej*, „Annals of Administration and Law Theory and Practice”, year 16(1), Sosnowiec 2016, p. 40.

³³ This rule was practically used during the proceedings on the unabridged public hearing on the Act amending the Act on electoral law to councils, counties and regional assemblies or the act on the direct election of the commune head, mayor and president.

³⁴ M. Borski, *Wysłuchanie publiczne ...*, p. 42.

POOR EFFECTIVENESS OF CIVIC LEGISLATIVE INITIATIVES

As statistics show, interest in the mechanism of legislative initiative among citizens is increasing every year. From the moment of its introduction to the end of the 7th term of the Sejm, one hundred and thirty-five notifications about the creation of citizens' legislative initiative committees were submitted. Unfortunately, however, the vast majority of these committees were not able to submit a draft law. Only 53 committees managed to effectively bring their draft to the Sejm sessions. A key problem seems to be the poor effectiveness of citizens' legislative initiatives. In this regard, one can see the difficulties appearing both at the initial stage (registration of the committee) and later, especially too short (3-month) deadline for collecting the required signatures for the prepared draft law. The statistics quoted above show that the institution is relatively ineffective in its current form, so we should consider how to change the existing legislation to strengthen the effectiveness of the civic initiative, so that the normative construction of a civic legislative initiative actually serves to trigger efficient and effective legislation and increase the impact citizens on the legislative process. In my opinion, legislative changes should go in several directions.

First and foremost, state bodies should be required to assist the committees in preparing the justification for the draft law, in particular regarding the impact of regulation. Citizen committees do not have a proper, professional office apparatus, like other applicants: e.g. the Council of Ministers, or the President of the Republic of Poland³⁵.

Changes in the scope regarding the principle of discontinuation in relation to civic projects also require considerations. Although the legislator decided that the draft law, in respect of which the legislative proceedings were not completed during the term of office of the Sejm in which it was filed, is examined by the Sejm of the next term without the need to re-submit the bill, but it seems that this solution is not sufficient. If the Sejm of the next term of office (i.e. following the term in which the project was submitted) also does not finish work on the draft, the citizen legislative initiative 'disappears' - the Sejm of the next term has no obligation to continue work on the draft. Thus, the exception to the principle of discontinuation only works in the term immediately following the term in which the civic project was filed. The high importance that the legislator attaches to the issue of a civic legislative initiative should in my opinion be reflected in a more categorical and total exclusion of the application of the principle of discontinuation in relation to these drafts. The proceeding with the civic law should therefore be continued not only in the nearest term after the draft has been submitted to the Sejm, but also in successive terms without any restrictions.

³⁵ See M. Borski, *Inicjatywa ludowa jako instytucja dialogu społecznego*, [in:] A. Kamińska, E. Kraus, K. Ślęczka (ed.), *Jak możliwy jest dialog?*, Sosnowiec 2014, p. 275.

The next changes should go towards extending the deadline for collecting required signatures for a prepared law, for example up to 6 months. There is no doubt, as the practice suggests that the 3-month deadline is too short to collect 100,000 signatures and does not allow citizens to effectively take legislative initiative. It is also worth considering, in my opinion, the amendment to the Act on Citizens Legislative Initiative going towards the collection of signatures under the civic bill through the Internet (online collection system)³⁶. This would deformalize the current somewhat anachronistic solution requiring a handwritten signature on the list together with the first and last name, place of residence and PESEL number in the place where signatures are being collected, in which the bill is presented. At the same time, the requirement to collect 99,000 signatures within 3 months would not be so difficult to achieve. This solution would undoubtedly increase the dynamics of social processes and would have a positive impact on increasing the pressure of citizens on the legislator.

CONCLUSION

In the assessment of both social organizations and experts, the quality of the law-making process deteriorates year by year. The law-making process in Poland is increasingly moving away from the requirements of a rational legislator. Along with the ongoing process of law inflation, declining legal system clarity, its transparency for citizens and predictability of legal regulations, the democratic deficit is also growing. It is perceived and increasingly articulated by citizens. It manifests itself primarily in marginalizing the participation of civil society organizations in the law-making process. Numerous voices indicate that public consultations of laws or public hearings³⁷ already in parliament have recently become an illusory process, aimed at the legislator to fulfill very limited obligations in this area, and not to ensure effective civic participation, in line with the principle of democratic state of law and civil society. It is also difficult to speak about the high quality of the law-making process without the use of a sophisticated analysis of the economic benefits and costs of each proposed regulation or analysis of the effects of applying existing regulations.

The shortcomings in this respect have a very negative impact on the economy of the Polish state, which is exposed to uncontrolled increase in regulations causing

³⁶ In-depth reflections on this subject can be found in the expert opinion prepared by P. Wagłowski, commissioned by the Institute of Civil Affairs, titled. *Elektroniczne poparcie inicjatyw obywatelskich*, Warsaw 2015 - <https://inspro.org.pl/ekspertyza-elektroniczne-poparcie-inicjatyw-obywatelskich/> [access: 12.09.2017]. See also M. Borski, *Inicjatywa ludowa instrumentem presji na prawodawcę? „Przegląd Prawa Publicznego”* 2016, no. 7-8, p. 64.

³⁷ In the eighth term of office of the Sejm, over two years (as of September 10, 2017), only two public hearings were held.

unreasonable costs of economic activity and impeding the development of entrepreneurship. It should be remembered that the quality of the legal system is a common good, which is why it is necessary not only on the part of public authorities, but also citizens and their organization to reflect on the legislative practice and rationality of the law-making process. It is worth quoting the words of S. Wronkowska, who draws attention to the fact that 'shaping the rational legislative procedure of the modern state should take into account the following values: ensure the lawfulness of the legislative process, determine ways of reaching a socially acceptable set of values on which the law has to resist (axiology of law), ensure social legitimization of legislative decisions, minimize the risk of making incorrect legislative decisions, promote the economic course of the legislative process'³⁸.

Bibliography

Borski M., *Inicjatywa ludowa instrumentem presji na prawodawcę?*, „Przegląd Prawa Publicznego” 2016, no. 7-8.

Borski M., *Inicjatywa ludowa jako instytucja dialogu społecznego*, [in:] A. Kamińska, E. Kraus, K. Ślęczka (ed.), *Jak możliwy jest dialog?*, Sosnowiec 2014.

Borski M., *Kilka uwag na temat słabości polskiego systemu stanowienia prawa*, [in:] M. Paździor, B. Szmulik (ed.), *Fundamentalne wartości i zasady ustrojowe. Model konstytucyjny a praktyka ustrojowa w Polsce*, Lublin 2016.

Borski M., *Konsultacje jako narzędzie partycypacji społecznej w procesie stanowienia prawa – wybrane aspekty*, [in:] T. Stanisławski, B. Przywora, Ł. Jurek (ed.), *Bodźce prawno-finansowe w prowadzeniu działalności gospodarczej. Zachęty i utrudnienia*, Lublin 2016.

Borski M., *O potrzebie reformy polskiego systemu stanowienia prawa*, „Przegląd Prawa Konstytucyjnego” 2016, no. 5.

Borski M., *Wysłuchanie publiczne – ważna, chociaż niedoceniana instytucja demokracji partycypacyjnej*, „Roczniki Administracji i Prawa. Teoria i Praktyka” 2016, rok XVI (1).

Borski M., Głajcar R., Przywora B., *Postępowanie ustawodawcze w Polsce – prawo, zwyczaje i praktyka*, Kraków – Sosnowiec – Katowice 2015.

Cipiur J., *Od inflacji cen gorsza jest inflacja prawa – wywiad z prof. Jerzym Stępnem*, <http://www.obserwatorfinansowy.pl/forma/rotator/od-inflacji-cen-gorsza-jest-inflacja-prawa/> [access: 03.09.2017].

Długosz D., Wygnański J.J., *Obywatele współdecydują*, Warsaw 2005.

Grosicki M., *Konsultacje społeczne jako forma partycypacji obywateli w procesie stanowienia prawa*, [in:] T. Stanisławski, B. Przywora, T. Jurek (ed.), *Reformy ustrojowe w Polsce 1989-1998*, Lublin 2014.

Kochanowski J., *Deregulacja jako pierwszy etap reformy systemu tworzenia prawa*, [in:] *Wymiar sprawiedliwości i legislacja*, „Ius et Lex” nr 1, Warsaw 2005.

Kochanowski J., *Jak powinno być tworzone prawo w Polsce? Reforma procesu stanowienia prawa – Rada Stanu*, <http://www.rpo.gov.pl/pliki/12087762480.pdf> [access: 03.09.2017].

³⁸ S. Wronkowska, *Tworzenie prawa w Polsce – ocena i proponowane kierunki zmian*, Report of the Legislative Council to the Prime Minister, „Przegląd Legislacyjny” 2006, no. 1, p. 10.

Kopińska G., *Najważniejsze wnioski i rekomendacje*, [in:] G. Kopińska, G. Makowski, P. Wałgowski, M. Wiszowaty, *Tworzenie i konsultowanie rządowych projektów ustaw*, Warsaw 2012.

Kopińska G., *Słabości polskiego systemu stanowienia prawa – obraz sytuacji z punktu widzenia organizacji pozarządowej*, https://www.prezydent.pl/download/gfx/prezydent/pl/defaultopisy/2411/2/1/01kopinska_grazyna_slabosc_systemu_diagnoza.pdf [access: 03.09.2015].

Makowski G., Zbieranek J., *Lobbing w Polsce – żywy problem, martwe prawo* - <http://www.isp.org.pl/files/5907360310779548001197980856.pdf> [access: 20.11.2015].

Poglódek A., Przywora B., *Glosa do wyroku Trybunału Konstytucyjnego z dnia 7.11.2013 r. (K 31/12) w sprawie oceny konstytucyjności trybu uchwalenia ustawy z 18.08.2011 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw*, „Krajowa Rada Sądownictwa” 2014, 3 (24).

Wałgowski P., *Elektroniczne poparcie inicjatyw obywatelskich*, Warszawa 2015 - <https://inspro.org.pl/ekspertyza-elektroniczne-poparcie-inicjatyw-obywatelskich> [access: 12.09.2017].

Wronkowska S., *Tworzenie prawa w Polsce – ocena i proponowane kierunki zmian*. Raport Rady Legislacyjnej przy Prezesie Rady Ministrów, „Przegląd Legislacyjny” 2006, no. 1.

Summary: The law-making process in the reception of many entities participating in it or monitoring its course is not very transparent and unsatisfactory as far as the level of civic participation is concerned. The authorities should care about civilizing the law-making process. The more discussions and consultations are in the process of creating assumptions for legal acts, the greater the chance of avoiding mistakes and the chance that citizens will approve the existing legal system and abide by the law. In this publication, the author has attempted to make a subjective indication of these elements of the law-making process that require rapid change. At the same time, he pointed to solutions that could significantly contribute to improving its quality.

Keywords: legislative process, law-making, consultations, inflation of law, public hearing, civic legislative initiative

Czy kompleksowa reforma procesu stanowienia prawa w Polsce jest potrzebna?

Głos w dyskusji

Streszczenie: Proces stanowienia prawa w odbiorze wielu podmiotów w nim uczestniczących lub monitorujących jego przebieg jest mało przejrzysty oraz niesatysfakcjonujący, jeśli chodzi o poziom partycypacji obywatelskiej, a przecież władzom powinno zależeć na tym, aby uspołecnić proces stanowienia prawa. Im więcej dyskusji i konsultacji w trakcie tworzenia założeń do aktów prawnych, tym większa szansa uniknięcia pomyłek oraz szansa na to, że obywatele będą aprobowali istniejący system prawny i przestrzegali prawa. W opracowaniu tej autor podjął próbę subiektywnego wskazania tych elementów procesu stanowienia prawa, które wymagają szybkiej zmiany. Jednocześnie pokazał na rozwiązania, które mogłyby przyczynić się znacząco do poprawy jego jakości.

Słowa kluczowe: proces ustawodawczy, stanowienie prawa, konsultacje, inflacja prawa, wysłuchanie publiczne, obywatelska inicjatywa ustawodawcza