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Constitutional conditions of the legislative process in Poland - theory vs. practice

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In the period of over thirty years of the Constitutional Court's activity, the case law related to the issues of the lawmaking process has been very rich and constituted a significant reference. Statements of the Constitutional Court regarding the lawmaking process relate to both legally substantive and procedural issues, among others to maintaining the procedure for adopting laws specified in legal regulations (in the Constitution, laws and rules). According to the well-established case law the scope of the Constitutional Court's control with respect to legal acts extends not only to examining the compliance of the provisions of a legal act with the Constitution, but also with the procedure for their adoption[2], regardless of the fact whether the request, legal question or constitutional complaint contains such a charge. Procedural charges are examined by the Constitutional Court first. If they lead to the conclusion that the provision was enacted in violation of the procedure set out in the Constitution and laws, it becomes a sufficient premise for the recognition of its unconstitutionality and there are no grounds to adjudicate on the substantive content therein[3].

From the principle of a democratic state of law, whose system is based on the principle of separation of powers, it follows that lawmaking belongs to the legislative authority. The legislator has considerable freedom in shaping the applicable law. However, it is not unlimited. Its limits are set by constitutional norms. Commenting on the issue of the legislator's obligation, the Constitutional Court stated that the legislator is obliged to establish substantive norms relating to the protection of constitutional values. The legislator should also specify how to enforce such norms by designing procedures for their enforcement and determining the legal consequences of non-compliance; while the legislator is required to shape the provisions so as to ensure sufficient protection for protected legal interest[4].

The case law of the Constitutional Court relating to the issue of the legislator's freedom to legislate in correspondence to political and economic goals is also significant. The concept of freedom of legislative power is relative in nature since

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2 Decision of the Constitutional Court of 11 February 1992, K 14/91

3 Judgment of the Constitutional Court of 24 June 1998, K 3/98.

4 Judgment of the Constitutional Court of 9 October 2012, P 27/11.

the limits and scope of the legislator's freedom cannot lie outside the standards of a democratic state of law specified in the Constitution. The solutions introduced by the legislator cannot lead to a violation of the essence of constitutional rights. The choice of specific solutions in resolving conflicts of constitutional values must take into account the basic values set out in individual norms of the Constitution[5]. As the Court emphasized, lawmaking, and thus also the selection of the most appropriate legislative options, (...) remains within the political freedom of the parliament, for which it bears responsibility before the electorate[6]. Lawmaking in correspondence to the assumed political and economic goals as well as adoption of legal solutions that, in the legislator's opinion, will best serve the achievement of these goals fall within its competence[7]. The Constitutional Court also emphasized that (...) the parliament has, in principle, regulatory freedom, the limits of which are set by constitutional norms, international agreements ratified with the consent expressed in a legal act, and the law of international organizations provided it results from the ratified by the Republic of Poland agreement that constitutes the international organization. The assessment of the advisability of introducing amendments to a legal act always falls within the competence of the parliament. The Constitution does not preclude the introduction of amendments to a legal act in (...) case when a previously adopted amendment to the same legal act is the subject of proceedings before the Constitutional Court. Adopting a different position in this regard would significantly limit the legislative power of the Polish Parliament [Sejm] and stand in conflict with Art. 10 and 95 (1) of the Constitution[8]. Moreover, effective protection of constitutional values often requires swift legislative action to promptly establish necessary legal regulations. For this reason, the occurrence of particular situations in which the constitutional requirement to ensure the protection of specific values implies the need for immediate subsequent amendment of the legal act during proceedings on the preventive control of an earlier amendment act regarding the same provisions cannot be ruled out[9].

In a democratic state of law, which the Republic of Poland is, the norms of applicable law must be adopted in accordance with the procedure set out in the Constitution. Each state authorities, not excluding lawmaking bodies, may undertake sovereign activities only on the basis of legal provisions. In the case of sovereign activities involving the adoption of laws the fundamental legal basis is formed by constitutional provisions specifying the competences of the bodies participating in the legislative process as well as the legislative procedure. Any violation of competences or procedural irregularities in legislating, in relation to the superior norms of the constitutional rank regulating the legislative procedure, must be

5 Judgments of the Constitutional Court of 9 April 2002, K 21/01; 23 April 2002, K 2/01; 21 May 2002, C 30/01; 25 June 2002, K 45/01; 29 September 2003, K 5/03 and 24 February 2004, K 54/02.
6 Judgment of the Constitutional Court of 19 July 2007, K 11/06.
7 Judgment of the Constitutional Court of 29 May 2012, SK 17/09.
8 Judgment of the Constitutional Court of 12 July 2012, SK 31/10.
9 Judgment of the Constitutional Court of 14 July 2010, Kp 9/09.

assessed in the same way as the non-compliance of the content of the provisions with norms of constitutional rank[10]. The provisions of the Constitution do not regulate the legislative procedure in a comprehensive manner. Pursuant to the principle of the Polish Parliament's autonomy these matters were left to be regulated in its Rules and Regulations and the Constitution only formulates certain general principles and predetermines solutions in matters deemed to be of particular importance. These principles include the principle of three readings formulated in Art. 119 (1) of the Constitution. This provision sets out the constitutional model of intra-parliamentary conduct but does not regulate all its elements. It is a constitutional order that every bill should be adopted by the Polish Parliament after three readings and it would be unacceptable to reduce their number by a regulation[11]. The principle of the autonomy of parliamentary works cannot, however, be construed as allowing the Polish Parliament to disregard constitutional norms that set the framework for these works. Each public authority, including the Polish Parliament, is subject to the obligation to act on the basis and within the limits of the law[12].

Adherence to the legislative procedure regulated in the provisions of the Constitution is a condition for the legal act to take effect. Competences of individual authorities in this process are strictly determined and non-legal actions are excluded. The creation of law, and thus establishing relatively stable and sanctioned rules of conduct, is the kind of activity of public authorities that interferes - often deeply - into the sphere of freedom and rights of individuals (groups). Such interference in a democratic state of law requires special legislative legitimacy, usually constitutional, requires axiological grounds and can be implemented in special proceedings. It is subject to certain legal requirements. Therefore, the granting of powers to public authorities to legislate (legislative power) is simultaneously accompanied by a specific system of control, primarily to the legality of activities in this respect. A possible declaration of unconstitutionality of the legislative procedure, which led to the establishment of the challenged provisions, eliminates them from legal circulation and makes substantive control irrelevant[13].

The establishment of ordinary act rank provisions is unconstitutional if it occurs in breach of the legislative procedure in relation to the constitutional norms, in which the entities participating in the legislative process introduce specific regulations in the wrong legislative procedure or at the wrong stage of the legislative procedure[14]. Violation of the elements of the procedure can always be considered in terms of a simultaneous violation of Art. 7 of the Constitution as this provision imposes on all public authorities an obligation to act on the basis and within the limits of the law[15]. However, not every violation of the Rules and Regulations may

10 Judgment of the Constitutional Court of 9 January 1996, K 18/95.
11 Judgment of the Constitutional Court of 23 March 2006, K 4/06.
12 Judgment of the Constitutional Court of 23 February 1999, K 25/98.
13 Judgment of the Constitutional Court of 19 September 2008, K 5/07.
14 Judgment of the Constitutional Court of 9 January 1996, K 18/95.
15 Judgment of the Constitutional Court of 24 June 1998, K 3/98.

be considered a violation of the Constitution. Such violation may be referred to when breaches of Rules and Regulations lead to violations of constitutional elements of the legislative process or occur with an intensity that prevents Members of Parliament from expressing opinions on individual provisions and the entire legal act in the course of committee works and plenary sessions. Failure to comply with the regulatory convening of a committee meeting may also not be automatically determined as a violation of the law resulting in the unconstitutionality of the procedure. A way of convening a meeting, which in effect would lead to a particular group of Members of Parliament not participating in it could have such nature[16].

The constitutional legislator consciously and rationally balanced the scope of constitutional competences that are reserved to the Polish Parliament *in pleno*, and which can be realised by its internal bodies (e.g. consideration of amendments to draft bills by committees Art. 119 (3)). The choice made using such criteria should reasonably be linked to the assumption that the power granted to the Polish Parliament (and not to the committee) will be exercised in accordance with the principle of political pluralism, representativeness of decisions and respect for the rights of the parliamentary minority including ensuring the possibility of influencing the content of the legal act defining the matter entrusted to the committee of inquiry also to non-attached Members[17].

In the light of the analyzed case law of the Constitutional Court, the provisions of generally applicable law should correspond to recognized rules of legislative proceedings (they should be properly structured, contain clear and understandable content and should be put in the appropriate place of the normative act). These rules were included in the directives codified in the Regulation of the Prime Minister of June 20, 2002 on "the Principles of legislative technique" (Journal of Laws, No. 100, item 908). According to the established line of the case law of the Constitutional Court, the legislator, without important reasons, should not depart from the rules contained therein, because in this legal act the generally recognized rules of legislative proceedings have been codified[18]. The principles of legislative technique are a kind of canon that should be respected by the legislator of a democratic state of law. According to these principles the provisions of a legal act should be drafted so that they express the legislator's intentions accurately and in a comprehensible manner for the recipients of the norms contained, and thus are precise, communicative and adequate to the intention of the legislator[19].

The pace of the proceedings on many draft laws in the Sejm of the 8th office term not only does not favour a high-quality legislative level but also detracts from the dignity of the Parliament. Legislative proceedings are often carried out under time pressure or late at night with no chance for MPs or any potential recipients of

16 Judgment of the Constitutional Court of of 23 March 2006, K 4/06.
17 Judgment of the Constitutional Court of 22 September 2006, U 4/06.
18 Judgments of the Constitutional Court of 3 December 2002, P 13/02; 26 November 2003, SK 22/02 and 29 October 2003, K 53/02.
19 Judgment of the Constitutional Court of 21 April 2009, K 50/07.

the new law to get to know the draft laws in depth. For instance, in the first year of the 8th office term of the Sejm, the legislative process in the Sejm lasted an average of 38 days, including 17 days[20] in the first quarter of the first year. In the second year of work of the current Sejm, the average working time was 65 days and then 80 days in the third year.[21] The average duration of proceedings in the Senate is currently 14 days. In the first year of the 9th office term of the Senate, the working time was 11 days, and, in the first quarter of the first year, it was three days. However, if one takes into consideration the fact that there were parliamentary holidays during the period in question and that the meetings of the Sejm and Senate usually do not coincide, it turns out that the actual time of work for senators concerning the laws being adopted in the Sejm lasted two or three days at most. For instance, only one day was enough for senators to state the relevant considerations about the Act Amending the Act – the Law on the Structure of Common Law Courts and Certain Other Acts. The majority of the Senate, meeting at night, rejected all of the opposition's amendments[22].

In this regard, one should be rightly alarmed by the very rapid handling of some important draft laws, which are often complex and of high public concern. During the last four years it has happened in the cases of amendments to the Act on the Supreme Court or deputies' amendments to the provisions introducing the Act of 30 November 2016 on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal and the Act of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal, as well as the Law on the Organization of Common Law Courts. It is significant that these important constitutional laws were amended by deputies' bills and presidential bills, that is, without consultation, opinions, or an impact assessment of these draft laws. The time taken to proceed from the first publication of a draft law to the moment of signing it by the President was often shorter than a month.

The work on the amendment of the Act on the Institute of National Remembrance has become the instrumentalisation symbol of the role of the Parliament, which is, in fact, subordinate to and at the disposal of an external political centre. The amendment was made, including the signature of the Head of the State, who was paying a visit abroad at that time, within only a few hours. That draft law was submitted to the Sejm at 8:00 A.M. on 27 June 2018. After an hour and a half, the first reading began. The members of the Parliament were allowed to have only one minute of time for their comments. Then, without any further discussion, the second and third reading took place. After two hours, at 11:29, the act was adopted.

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20 'The 9th Statement of the Citizens' Legislation Forum on the Quality of the Legislative Process Based on Observations in the Period from 11 September to 10 December 2016' (*The Stefan Batory Foundation*, p 7), on-line access: http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Komunikat%20z%20IX%20obserwacji.pdf.

21 'The 7th Statement of the Citizens' Legislation Forum on the Quality of the Legislative Process Based on Observations in the Period from 16 May to 15 November 2018, Summarizing the Legislative Activity of the Government and the Parliament in the Third Year of Their Ruling' (*The Stefan Batory Foundation*, p 13), on-line access:http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/XII_Komunikat_OFL.pdf

22 ibid 16.

The work of the Senate lasted less than five hours. The opposing senators left the meeting room protesting against the limitation of the senators' speech time to only five minutes during the plenary. The legislative process was completed at about 6:00 P.M. when the President of the Republic of Poland, paying a visit in Latvia at that time, placed an electronic signature on it[23].

Undoubtedly, the excessively fast pace of introducing changes affects legal certainty negatively and visibly limits the possibility of submitting comments for draft laws in proceedings, both in the cases of minor legislative defects and in the matters of fundamental importance for the State. It often happens especially in the cases of extensive, complex draft laws that regulate the matter with a high degree of complexity. It should be emphasized that the accelerated pace of work cannot be used to deliberately deprive all of the parliamentary minorities of the opportunity to refer to the draft law and propose alternative solutions. Furthermore, it also cannot be used to deprive other state institutions and non-governmental organizations of the opportunity to become familiar with the draft law and to caution against any faulty solutions. Consultation procedures, even if they are perceived by the general parliamentary majority as burdensome or time-consuming, build up a certain early warning mechanism, making it possible to detect and remove any draft law defects at the appropriate stage of the legislative process when these defects are not yet able to cause irreparable damage.

Unfortunately, the course of proceedings on numerous draft laws in the current parliamentary term suggests that the opposition's inability to get acquainted with the content of a draft law and to provide alternative solutions is not merely a side effect but the rule and the intended purpose of this law making method. This dangerous tendency also includes entrusting the Presidium of the Sejm with the competence to determine the number of questions raised during the first reading of draft laws and resolutions, a provision that was introduced by the amendment to the Regulations of the Sejm on 28 February 2018.

We also note that the opinion of legislators is accepted when it concerns a matter of legislative technique. Substantive comments are often omitted. One of the consequences of such an attitude is the adoption of defective legal acts, which must be amended quickly and frequently. In this context, it is worth mentioning that the Presidential Bill of 8 December 2017 in the Supreme Court was amended seven times in 2018. The committee work on that presidential draft law of the Supreme Court continued in a very nervous atmosphere. The meetings of the Justice and Human Rights Commission on 28-30 November and 6 December 2017 were attended by representatives of the National Council of the Judiciary, the Ombudsman, the Helsinki Foundation for Human Rights, the Polish Judges' Association IUSTITIA, and the National Social Rescue Network. On the whole, they all formulated critical

23 Cf. G. Makowski, 'The Amendments to the Act on the Institute of National Remembrance and the Seven Deadly Sins of the PiS State' (*The Stefan Batory Foundation*), online access: http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Grzechy_PiS_nowelizacje_IPN.pdf.

opinions about that draft law, claiming it was contrary to the fundamental principles of the Polish political system. However, this had no impact on the content of the draft law or on the conduct of the Commission proceedings. The aforementioned opinions were ignored, and they were even subjected to verbal attacks from deputies representing the parliamentary majority. During the fourth meeting of the Sejm on 6 December 2017, a representative of the National Council of the Judiciary was denied the opportunity to speak a number of times[24]. In that case, the Sejm experts did not have the opportunity to join the legal dispute and to give substantive comments. Their participation was marginal and limited only to amending the technical kind of aspects.

Therefore, at present, "law" in Poland is often created in secret, with undue haste, and without reliable and substantial reflection subject to public debate. All attempts to reflect on legislative actions in such a way will likely be completely ineffective despite the fact that at their disposal, the members of the government have considerable achievements of the study of constitutional law and other disciplines of law in Poland spanning the last twenty-five years. Opinions of the legislative offices of the Supreme Court the Sejm and the Senate, or social entities, such as the Stefan Batory Foundation and the Helsinki Foundation for Human Rights, are ignored if they are negative or if they include arguments against the passing of specific legal acts. This means that the ruling group does not wish to enter any kind of dialogue, not to mention agree to any political compromise. No one from the ruling group wants to acknowledge that such a law made to be applied on a 'political order is merely an appearance of law'. To put it differently, in the words of the ancient Romans: 'law does not arise from injustice' (*Ex iniuria ius non oritur*). In this way, a certain 'benchmark of indecent legislation' is being created[25].

24 'The transcripts from the meeting of the Justice and Human Rights Committee', on-line access: http://www.sejm.gov.pl/SQL2.nsf/poskomprocall?OpenAgent&8&2003.

25 Cf. M. Wyrzykowski, *The Defense of the Polish Constitution*, "Kwartalnik o prawach człowieka" 2017, v. 3-4, p. 9.