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On the Lawmaking Policy, Discretion and Importance of the Rule of Law Standards

O polityce tworzenia prawa, swobodzie decyzyjnej i wadze standardów praworządności

SUMMARY

The paper attempts to provide a comprehensive description of the problem of legislative discretion. The study employs two approaches to the issue, traditional and holistic. The former considers the legislative process in its essence, as decisions of legislative bodies, and their discretionary power being determined by the constitutional norms and legal regulations adopted within the lawmaking process. The latter, broader perspective on the legislative process involves other stages (including the pre-legislative stage), thus implying that the discretionary power should encompass various decision-makers. Following this approach, the scope of legislative discretion is determined not only by the legal provisions but also the principles of a democratic state of law. While the degree of (non-) compliance with the standards in question is evidently different from the violation of the rules of law, it does have a significant impact on the passed laws and the functioning of the entire legal system. It also constitutes a challenge to the courts and affects the use of discretion by judges.

Keywords: discretionary legislative power; lawmaking policy; rule of law standards

THE PROBLEM

The scope of consideration belongs to the problem of multidimensional relations between the legislative and judicial authorities. This contribution focuses on issues legislator's discretionary power arising from and correlated with the lawmaking policy. The undertaken analysis points to two different approaches to the problem of lawmaking and the discretionary power of the legislator. Traditional, positivist approach in which the legislature has sovereign powers and the scope

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of discretionary power is determined by the principle of legalism. However, this is not a complete picture of the lawmaking process, lawmaking policy, and scope of discretionary power. We will obtain a full picture of lawmaking and the real dimension of the legislator's discretionary power by analyzing various stages of this process and limits; in addition to applicable legal regulations, standards commonly recognized in the rule of law principle.

Taking up the problem of the legislative policy and the decisions defining the scope of legal intervention, as well as subsequent decisions undertaken in the legislative phase, includes analysis of the organization and procedures of the lawmaking process. The organization of the lawmaking has a constitutional basis and the provisions governing the legislative process. In the analysis of the legal regulations concerning the creation of law, the emphasis is placed on the regulations contained in the internally valid legislation, because they are fundamental to the undertaken decisions in the lawmaking process. But beyond the complex of legislative procedures, the lawmaking process is in each country embedded in the political and legal culture. Cultural substrate has an impact not only on the adopted organizational solutions but also, and perhaps above all, on the lawmaking practice. It is emphasized in the cultural characteristics of the legislation, and it is further indicated that this relationship can take many forms. The cultural aspect of the lawmaking organization is combined with important issues of the standards of legislation, which are the basis of actions and postulate the relatively high level of their fulfillment. The concept of such type of standards refers to the patterns and, at the same time, constitutes a kind of ideological reference point of the undertaken actions. Such ideological reference points are visible in the rule of law standards and in the preferred particular lawmaking models.

The analysis of the basics of the lawmaking process, proposed in this paper, refers to the last of above-mentioned aspects, stressing the role of the rule of law standards. It is beyond dispute that the quality of the legislative process and its effects, in the form of the created laws, depends on the degree of realization lawmaking standards. The legislative standards in the state under the rule of law are the important elements of the normative space influencing lawmaking process and creating new conditions of limit and control lawmaking decisions.

Narrowing the topic of my paper I would like to present the idea of the influence lawmaking standards in the modern democratic state under the rule of law at the limitation of discretionary power. From this point of view, standards of lawmaking may also be of interest as a reference point for the characteristic of the legislator discretionary power. This also creates relationships between lawmaking policy and the independent judiciary in the statutory law order. The preliminary thesis is that low level respect of the rule of law standards by legislator give opportunity (or even is a kind of obligation) for wider use of discretionary power through the judges. In this context worth to remark is the auxiliary thesis, according to which

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the degree of realization lawmaking standards plays an important role, both in the justification of the legislator actions and in the justification of judicial activity and the scope of the discretion.

In my considerations related to the creation of law in the continental system, I refer to examples from the legal system in Poland, with features specific to the continental system, but at the same time, typical problems occur with particular sharpness.

LEGISLATIVE POLICY OR LAWMAKING POLICY?

The question posed is associated with difficulties but at the same time is necessary the need to clearly identify the entities involved in the lawmaking process, and their decisions making powers at the stages of lawmaking. In the concept of legislative policy, the emphasis is on the activities of a systemically separated entity (legislative body), deciding on the introduction of applicable legal acts into the legal system. In such dimension concept "policy" is very close and even identical with the concept of politics of law, where the emphasis is on the content and functions of the created laws. In the concept of lawmaking policy, the subjective scope, status of individual entities and their authority are much broader and allow a more complete analysis of the lawmaking process. The concept of lawmaking policy is the same like equivalent term of regulatory policy used in official OECD documents.

> Regulatory policy may be defined broadly as an explicit, dynamic, and consistent "whole of government" policy to pursue high quality regulation. A key part of the OECD's 2005 Guiding Principles for Regulatory Quality and Performance is that countries adopt at the highest political level broad programmes of regulatory reform that establish principles of "good regulation", as well as a framework for implementation[1].

The lawmaking organization, institutional framework, legal regulations of a lower rank than legal acts and undertaken decisions, play a key role in the lawmaking process. They also enable discussion on the existence and scope of discretionary powers of legislative institutions that go beyond the traditional approach to the legislative authority and policy of law. The term "policy of law" and the problem discussed is very complex, and there are no agreed positions in the literature on the scope of terms used, which in a sense is a derivative of difficulties in translation, but also the ambiguity of the English-language terms "politics" and "policy"[2]. Another issue is the distinction between legislation and lawmaking in the

[1] *Better Regulation in Europe: An OECD Assessment of Regulatory Capacity in the 15 Original Member States of the EU*, www.oecd.org/gov/regulatory-policy/44952994.pdf [access: 10.01.2020].

[2] I discussed the issue extensively in: T. Biernat, M. Zirk-Sadowski, *Politics of law and legal policy. Introduction*, [in:] *Politics of law and legal policy. Between modern and post-modern juris-*

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institutional dimension, as J. Waldron points out, "A legislature is a particular kind of lawmaking institution. What are its distinctive features? The first feature – and a very significant feature – is that a legislature is an institution publicly dedicated to making and changing law"[3].

This makes the parliamentary form of lawmaking attractive.

What makes legislation an attractive mode of lawmaking? You may ask: "Attractive, compared to what?". Attractive compared to lawmaking by judges and lawmaking by decree or executive agencies (though in a broader inquiry, we might contrast it also with lawmaking by treaty and also lawmaking by custom)[4].

In this approach, everything, especially the issue of the legislator's discretion, seems relatively simple. The Parliament as the legislative body, is the supreme representative authority, has the broadest limits to manifest discretionary power in the legal acts implementation process.

That is the case today, because everyhy Parliament has the freedom to exercise its powers almost unlimited. The legal limit of this freedom is shaped only by the constitutional principles applicable to the legislative activity and the mechanism for controlling the constitutionality of laws[5].

Parliament's sovereignty is emphasized:

The need to legislate in a particular matter, the choosing of enactment timing, the choosing of the timing for implementation of the law by fixing by the legislator of the date of application of the law, revising of previous legislation, which may not restrict and compel the activity of future Parliament, limitations of the social activities from the free and uncontrolled way of carrying out and their subjecting to law rules and sanctions, the contents of the legislative act, etc. prove the sovereign and discretionary appreciation of the legislative body's function[6].

Position of the legislative state authority, correlated with the sovereignty idea, means that discretionary power could be questioned only by the violence of the principle of legality, as a dimension of the lawful state. But not all decisions of the legislature which satisfy the legality conditions are justified sufficiently. Such activities that comply with the formal legality, but is generating discriminations or privileges

prudence, eds. T. Biernat, M. Zirk-Sadowski, Warszawa 2008; T. Biernat, *Law making policy*, [in:] *Politics of law and legal policy…* This issue is also discussed by M. Zamboni (*The Policy of Law. A legal Theoretical Framework*, Oxford 2007).

[3] J. Waldron, *Representative lawmaking*, "Boston University Law Review" 2009, Vol. 89(335), p. 336.

[4] *Ibidem*.

[5] M. Andreescu, *The Limits of State Power in a Democratic Society*, "Journal of Civil & Legal Sciences" 2016, Vol. 5(6), DOI: http://dx.doi.org/10.4172/2169-0170.1000213, p. 4.

[6] *Ibidem*.

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or unduly restricts the exercising of some subjective rights, or is not appropriate to the situation in fact, raise doubts. For this reason, apart from respecting legality, we demand something more, argumentation and justification; some form of legitimacy.

LEGISLATIVE POLICY AND THE NEED FOR LEGITIMACY

The need for legitimacy is so characterized:

> In a democratic regime is not necessary to demonstrate the legitimacy of power as such because the axiom according to which "the holder of power is the people or nation" does not require demonstration, being a prerequisite for the entire political and legal construction of the state organized society. Instead, any democratic government must find ways through which the exercising of power, in other words, the phenomenality of power is legitimate and lawful. Such legitimacy is achieved when between essence (power in itself owned by the people) and forms of exercising (the phenomenon of power) there are no irreconcilable contradictions[7].

In this case, it is about the exercising of power, resulting from the actions of the legislator, which to a large extent includes discretionary power. Her effective legitimacy is an important element determining the attitude towards her, but also to the created law, which is important for the exercise of judicial power.

The legitimacy of the legislator's legislative activities is a supplement to the legal framework defining the limit of his discretion. The key problem, associated with the legitimization of the legislative process, results from its "dual nature", its double roots – in the political and legal reality. Crucial problem lays on the ways proposal to complement and to strengthen the democratic legitimacy of the legislator aims at defining the conditions of legitimizing the key decisions of the legislator adopted in the lawmaking process. The assumed standpoint does not mean that democratic legitimization of the authority, including legislative authority, is questioned. What is questioned is that the scope of such legitimization is a kind of carte blanche for the activities of the authority, is perceived. In a democratic system, voluntarism of the activities of legislative authority is prevented by constitutional norms, human rights – broadly understood limits of authority.

Democratic legitimacy does not prevent taking such lawmaking decisions which rise opposition. As S. Wronkowska writes:

> Law is an expression of need and some people claim that it is the necessity of arranging social life and subjecting it to certain rules in such way as to allow the existence and proper functioning for particular people and communities, which they create, in order to make their life more secure and foreseeable, as far as relations with other people, having various aspirations and being directed by different interests,

[7] *Ibidem*.

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are connected. In modern states it is expected that in order to realize this task, those who make law will themselves respect given principles, particularly the principle which assumes that even a democratically chosen legislator is not authorized to shape the content of binding legal acts in discretionary way, treating it as an instrument for reaching political goals which he arbitrarily determines[8].

The legitimacy of law's creation is very much connected with the issue of legitimacy of law. A number of studies about the legitimacy of law particularly highlight the relationship that exists between the approach to law, its legitimization and position of the legislator. The positivist approaches replace legitimacy with the concept of legality or with other similar ones.

Positivists certainly have a point in insisting that law needs to be made by competent lawmakers. However, they are wrong in maintaining that these lawmakers are not bound by any other norm than the legal norms issued by higher legal authorities. Their theory does not account for legal values and principles, as a basis for criticizing legislation and legal decisions like judicial decisions, for lawmakers are bound by legal principles. Therefore, besides the concept of legality we need the concept of legitimacy to explain the authority of law and the citizens' duty of obedience to the law[9].

In the approaches that differ from positivist ones, legitimacy of law is treated as a necessary element. The reconstruction of Dworkin's position presents this issue as follows. "In Dworkin's account validity, if it plays any role in his account at all, is the least important of the four: validity for him is the *conclusion* of the inquiry"[10], not its starting point. On this view the starting point for the inquiry is legitimacy, for our concern is to distinguish between law and non-law, and for Dworkin the basis is the distinction between legitimate and illegitimate use of force. All aspects of the law, from identification of sources to, most centrally, questions of interpretations are built around the question of legitimacy. Rather than (potential) legitimacy being the product of norms having the right content, legitimacy is the central element in determining the content of legal norms[11].

In general, legitimization is understood as facing the arbitrariness, as the attempt to explain the paradoxes and contradictions and to justify the adopted course of action[12]. However, the justification is the part of the legitimacy, although, the

[8] S. Wronkowska, *What Does a Good Legislation Consist In?*, "Legislative Review" 2002, No. 1, p. 10.

[9] J.L.M. Gribnau, *Legitimacy of the Judiciary*, "Electronic Journal of Comparative Law" 2002, Vol. 6(4), www.ejcl.org/64/art64-3.html [access: 10.01.2020].

[10] D. Priel, *The Place of Legitimacy in Legal Theory*, "McGill Law Journal" 2011, Vol. 57(1), https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2127&context=scholarly_works [access: 10.01.2020], p. 22.

[11] *Ibidem*, p. 24.

[12] See T. Biernat, *The Complexity of Contemporary Legal Systems – Dilemmas and Paradoxes of Law's Legitimacy*, [in:] *Towards Recognition of Minority Groups. Legal and Communication Strategies*, eds. M. Zirk-Sadowski, B. Wojciechowski, K.M. Cern, Abingdon 2014, pp. 261–266.

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understanding the term "legitimacy" differs significant, and not always justification is a constitutive element[13]. Regardless of which form of legitimacy is being emphasized, the entire process takes place at two levels: epistemological and axiological. A crucial remark about legitimacy is contained in the following statement: "Legitimacy is a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions"[14].

The relationships outlined above cause that the answers to the questions about the legitimacy are extremely difficult for two reasons. First, because proposed answers often based on arbitrary interference into "the chain of legitimacy relationships". When referring to law, for example to the constitution, as a form of legitimizing state authority, we break this legitimacy chain without any justification. We do not attempt to sufficiently justify the "moment of entering" this holistic structure of legitimization. Second, because of the fundamental difficulty in resolving dilemma of legitimizing the authority by means of law or legitimizing law by means of authority.

The above-mentioned difficulties in determining what "true legitimacy" is cause that distinguishing between the proper use of the discretionary powers of the legislative body and the justification of the decisions taken is impossible. In this situation, it seems more useful and methodologically justified to examine whether and how activities of the lawmaking entities' are compliance with the standards of legislation, generally recognized as characteristic of a democratic state and the rule of law, allows identifying the abuse of their discretionary power.

LAWMAKING POLICY AND THE STAGES OF THE LAWMAKING PROCESS

The fact that legitimization cannot justify the proper use of the discretionary power of lawmaking institutions also results from the complex process of lawmaking. In practice, the complex lawmaking process involves different phases, and the decision of an authorized legislative body is formally the most important, but it does not determine the shape of the lawmaking policy. Decisions taken at various stages are key elements.

A critical analysis leads to more thorough characteristics of lawmaking as a special kind of decision-making process in relation to its various phases and stages. What seems most important is the separation of two phases: pre-legislative and legislative.

[13] L.J. Wintgens, *Legisprudence. Practical Reason in Legislation*, Farnham 2012.

[14] M.C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, "The Academy of Management Review" 1995, Vol. 20(3), DOI: https://doi.org/10.2307/258788, p. 574.

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The first includes those activities, which involve making political decisions initiating the creation of law, as well as the actions leading to the development of draft legal act. The second, in turn, includes the actions aimed at the enactment of a normative act. A more extensive proposal characteristic of lawmaking process, which consists of several stages, is present in typical schema: a) identification of the conflict/problem to be solved; b) articulation of goals and courses of action; c) determination of the scope of legal intervention – a draft of legal act; d) legislative initiative and conducting legislative procedure; e) publication of the act of law; f) assessment of the constitutionality.

The nature of the decisions depends on the stage of lawmaking process, and therefore, the differentiation of the various stages orders the typology of lawmaking decisions, facilitates their reconstruction and analysis. An important and widely discussed issue concerns the decisions made at the prelegislative stage. Who makes decisions at this stage? At this stage, it is resolved which of the politically set goals will be realized with the use of legal instruments. The outcomes are often the result of succumbing to social pressure, the media influence; they do not have much in common with a rational political choice. An example might be the phenomenon of "penal populism". The identification of problems/conflicts in social, political and economic matters is a political action. Politicians, performing a specific role and holding specific positions within the political system, are entities that determine the occurrence of the legislative impulse.

The next step in the lawmaking process, within the prelegislative phase, are the decisions defining the scope of the legal intervention. The transformation of the lawmaking impulse into the target and determining the courses of action proceeds this key decision-making moment, namely the choice of the means for achieving the objectives in the form of the draft of specific legal act. The decisions related to the scope of legal intervention are the decisions involving the choice of the legal act and the preparation of its draft. The decision-making process, especially at these early stages, is very complex; the undertaken decisions, as presented above, should be considered as basic. They are accompanied, as a rule, by many auxiliary/complementary decisions.

Various entities are responsible for making decisions at the above-mentioned stages and determining the scope of their discretionary power is difficult. The solution in this regard may be to emphasize not what is the subject of legal regulations, but how and to what extent there are restrictions in the way of making decisions. In this approach, the various degree of formalization of the particular decision-making mode can be examined. The formal framework of actions and decisions taken at individual stages of the lawmaking process are defined by law and standards. Due to the hypothesis formulated and approach to the issues analyzed, further considerations focus on the lawmaking process standards result from the rule of law principle, principle of proper legislation, and are strongly associated with discursive lawmaking model.

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LAWMAKING STANDARDS

The concept of "standard" has many meanings. The standards set the manner of conduct, the course of action. They are, similarly like rules a type of directives and share all problems characteristic to that phenomenon, but they are clearly differentiated by the broader dimension of standards. The rules and standards comparison is the interesting starting point of characterization of the fundamental meaning of standards in the following way:

> Thus far I have been pretending that the meanings of "rules" and "standards" are self-evident. Before defining these terms, a little background is necessary. It is possible to look at positive law (constitutions, statutes, judicial opinions, and administrative orders) as a series of directives. The formula for a legal directive is "if this, then that". A directive thus has two parts: a "trigger" that identifies some phenomenon and a "response" that requires or authorizes a legal consequence when that phenomenon is present […]. Corresponding to the two parts of a directive, there are two sets of oppositions that constitute the rules v. standards dichotomy: The trigger can be either empirical or evaluative, and the response can be either determined or guided. The paradigm example of a rule has a hard empirical trigger and a hard determinate response. For instance, the directive that "sounds above 70 decibels shall be punished by a ten dollar fine", is an example of a rule. A standard, by contrast, has a soft evaluative trigger and a soft modulated response. The directive that "excessive loudness shall be enjoyable upon a showing of irreparable harm" is an example of a standard[15].

The comparison of rules and standards indicates the dual nature of the standard. Standard can be changed to norm by incorporate to the legal provisions, or act independently while retaining directive function elements that allow for its gradual evaluation.

> Indeed, our dissatisfaction with both rule-oriented and standard-oriented approaches is reflected in the tendency of rules to evolve or degenerate, depending upon our perspective, into standards, and standards to evolve or degenerate into rules. This tendency towards refinement or entropy occurs *via* some routine patterns: 1. Standards tend to become concretized by means of specific rules. (The meaning of a general standard is found in its specific applications.) 2. Rules tend to yield specific exceptions that are generated by appeal to other standards. (The meaning of a general rule is found in the standards limiting its application.)[16].

The dual nature of the standards is clearly perceived in the concept of lawmaking standards. Standards, being an element of normative space determine the creation of law. They are (sometimes) more influential than legal provisions directly related to the creation of legal acts and have decisive meaning in the justification of lawmaking activity. In the fundamental dimension lawmaking standards are expressed by provisions in the legally bindings acts. In the broad context lawmaking

[15] P.J. Schlag, *Standards*, "UCLA Law Review" 1985, Vol. 33(379), p. 381.
[16] *Ibidem*.

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standards are the normative statements which obligate acting actors to fulfillment in the most proper way and at the high level the subject of activity. Taking up the problem of the role of standards in lawmaking I would like to discuss both aspects. In the first dimension, standards of lawmaking are the parts of legal acts related to the organization of the lawmaking process. Specify and importance of this dimension is strongly connected to the rule of law principle. In this situation, the precise definition of the content of the rule of law principle is of particular importance. The problem of understanding the concept of the rule of law was underlined in the Resolution of Council of Europe:

> The Parliamentary Assembly draws attention to the fact that in some recent democracies in eastern Europe, the main trends in legal thinking foster an understanding of the "rule of law" as "supremacy of statute law" […]. Such a formalistic interpretation of the terms "rule of law" and *État de droit* (as well as of *Rechtsstaat*) runs contrary to the essence of both "rule of law" and *prééminence du droit*. Certainly in these cases there is an inappropriate lack of consistency and clarity when translating into the legal terms used in member states[17].

Taking as a background Resolution the Venice Commission elaborated report, with a consensual definition of the rule of law, which may help international organizations, and both domestic and international courts, in interpreting and applying this fundamental value. The Commission has assumed that this definition should, therefore, be of a nature that allows of practical application. For that reason, the part of the report was "checklist" for evaluating the state of the rule of law in single states. The next, developed by the Venice Commission Rule of Law Checklist, was adopted at its 106th Plenary Session[18]. The idea of the checklist was inspired by the observation that the notion of rule of law has not been developed in legal texts and practice as much as the other pillars of the Council of Europe, human rights and democracy. Human rights are at the basis of an enormous corpus of constitutional and legal provisions and of case law, at national as well as at international level. Democracy is implemented through detailed provisions concerning elections and the functioning of institutions, even if they often do not refer to this concept. Legal provisions referring to the rule of law, both at national and at international level, are of a very general character and do not define the concept in much detail.

The presented checklist is intended to build on these developments and to provide a tool for assessing the rule of law in a given country from the viewpoint of its constitutional and legal structures, the legislation in force and the existing

[17] Council of Europe Resolution 1594 (2007) – The principle of the Rule of Law Text adopted by the Standing Committee, acting on behalf of the Assembly: November 23, 2007.

[18] European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist Adopted by the Venice Commission at its 106th Plenary Session (Venice, March 11–12, 2016), CDL-AD(2016)007.

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case law. The checklist aims at enabling an objective, thorough, transparent and equal assessment. The checklist is mainly directed at assessing legal safeguards. However, the proper implementation of the law is a crucial aspect of the Rule of Law and must, therefore, be taken into consideration. That is why the checklist also includes certain complementary benchmarks relating to the practice. The checklist consists of three parts: the introductive part, the second part (II "Benchmarks"), the third part (III "Selected standards"). The second part is the core of the checklist and develops the various aspects of the rule of law identified in the 2011 report: legality, legal certainty, and prevention of abuse of powers, equality before the law, non-discrimination and access to justice. The third part lists the most important instruments of hard and soft law addressing the issue of the rule of law. From the point of view discussed topic, the most important is the second part of the checklist with benchmarks: A. "Legality" point 5 "Law-making procedures"[19], and B. "Legal certainty" point 1 "Accessibility of legislation"[20].

Lawmaking standards are the normative statements which obligate acting actors to fulfillment in the most proper way and at the high level the subject of activity. Such dimension and the role of legal standards in the lawmaking process depend on contextual elements and put our attention to the standards in different meaningas. This was also highlighted in the Venice Commission report as follows:

> The contextual elements of the Rule of Law are not limited to legal factors. The presence (or absence) of a shared political and legal culture within a society, and the relationship between that culture and the legal order help to determine to what extent and at what level of concreteness the various elements of the Rule of Law have to be explicitly expressed in written law. Thus, for instance, national traditions in the area of dispute settlement and conflict resolution will have an impact upon the concrete guarantees of fair trial offered in a country. It is important that in every State a robust political and legal culture supports particular Rule of Law mechanisms and procedures, which should be constantly checked, adapted and improved[21].

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[19] Content of point 5: "Is the process for enacting law transparent, accountable, inclusive and democratic?

i. Are there clear constitutional rules on the legislative procedure?

ii. Is Parliament supreme in deciding on the content of the law?

iii. Is proposed legislation debated publicly by parliament and adequately justified (e.g. by explanatory reports)?

iv. Does the public have access to draft legislation, at least when it is submitted to Parliament? Does the public have a meaningful opportunity to provide input?" (CDL-AD(2016)007).

[20] Content of point 1: "Are laws accessible?

i. Are all legislative acts published before entering into force?

ii. Are they easily accessible, *e.g.* free of charge via the Internet and/or in an official bulletin?" (CDL-AD(2016)007).

[21] CDL-AD(2016)007, point 42.

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The role of standards is stressed also in the OECD's documents. "Experience across the OECD suggests that an effective regulatory policy should be adopted at the highest political levels, contain explicit and measurable regulatory quality standards, and provide for continued regulatory management capacity"[22].

The principle of proper legislation also allows including in the discussed problem the standardization of lawmaking on the basis of the directives for lawmaking technique contained in the Regulation of the Prime Minister on the "Principles of legislative technique". First of all general directives, which, by their contents, refer to the concept of rational lawmaking, play important role[23].

The implementation of the canon of a correct/proper legislation and ensuring a relatively high quality of the created laws require at least such level of adjustment in which not only the adopted organizational solutions will guarantee the postulated mode of action, but also respecting standards designated by the above-mentioned regulations and adopted theoretical models. The quality of the legislative process and its effects in the form of the created laws depend on the degree of standards realization, elaborated and derivative also from the proposed models of lawmaking. First of all, this concerns the standards contained in the strongly preferred discursive model and in the practice of preparing draft laws. In this case, what proves to be of importance is the form of the participation of social actors involved in the lawmaking process. The broadest forms of participation of the social actors in the lawmaking process are consultations. They take various forms; they have different status in the organization of lawmaking, which is also manifested in the legal basis for their implementation.

[22] *Better Regulation in Europe…*

[23] "§ 1. 1. The decision to prepare a bill shall be preceded in particular by:

1) designation and description of the state of social relations in the field requiring the intervention of authorities public and an indication of the desired directions of their change;

2) analysis of the current legal status, including European Union law, international agreements, which The Republic of Poland is associated, including agreements in the field of human rights protection, and the legislation of international organizations and bodies of which the Republic of Poland is a member;

3) determining the possibility of taking intervention measures of public authorities, alternative to adopting the law;

4) a description of the anticipated social, economic, organizational, legal and financial effects of each of the considered solutions;

5) consultation of entities covered by the scope of intervention of public authorities" (Notification of the Prime Minister of 29 February 2016 on the announcement on the uniform text of the Regulation of the Prime Minister on the "Principles of legislative technique", Journal of Laws 2016, item 283).

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LAWMAKING STANDARDS, DISCRETION OF LAWMAKING ENTITY AND IMPACT AT JUDICIARY

According to the thesis of this paper, I would like to stress that beyond the legality all the lawmaking decisions are/or should be confronted with the proper standards. Since the scope of the legislator's discretionary power is very wide (it is determined by the generally formulated constitutional legal framework) and in the other provisions, e.g. contained in the regulations of the Sejm's work, the regulations of the work of the Council of Ministers, solutions giving the possibility of wide range alternative choice dominate, the question of standards plays such an important role. What is more, standards have a dual role. On the one hand, they limit, in the specific way the decision-making scope of the legislator and the scope of his discretionary power, on the other hand, the degree of their fulfillment is a measure of justification of actions taken and effects in the form of created law. The degree of respect for standards is a very important signal for the court to apply the law adopted in this mode.

Attributing a special role to the standards of the democratic state ruled by law allows a different perspective on the essence of the discretionary power of the legislator. In the case of essence of the discretionary power, I would like to stress, that beyond other problems, from the point of view of my considerations and arguments in favor of the main thesis, two features of the discretionary power are important: discretionary power is gradual and its use need justification. What does it mean that discretionary power is gradual? I understand this issue not in such sense like in the public administration theory, with distinction between total and limited discretionary. Total discretionary concerns not only the content of the decision, but also the very fact of its issuing – the authority may issue a decision, but it does not have to (e.g. apply the law of grace). Limited discretionary concerns of the content of the decision, but the authority has no choice as to the fact of its issuance – the decision must be issued. In the scientific discussion, leading positions indicate division between form of discretionary power and its sources. G. Christie, in his essay on discretion, refers to the M. Rosenberg's and R. Dworkin's important and useful deliberations on discretionary:

> Rosenberg distinguishes between primary discretion and secondary discretion. Primary discretion arises when a decision maker has "a wide range of choice as to what he decides, free from the constraints which characteristically attach whenever legal rules enter the decision process". Rosenberg contrasts the primary form of discretion with "the secondary form", [which] has to do with hierarchical relations among judges. Similarly, Dworkin distinguishes discretion in "stronger sense" and two forms of discretion in "weak" sense[24].

[24] G.C. Christie, *An Essay on Discretion*, "Duke Law Journal" 1986, No. 5, DOI: https://doi.org/10.2307/1372667, pp. 747–748.

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Referring to these considerations, two types of institution's discretion power lawmaking can be pointed out – in the primary and secondary dimensions. In the primary dimension, the legislator's discretionary power concerns the freedom to choose the purpose and scope of legal intervention. Beyond of sovereignty and democratic elections (or the myth of sovereignty), in a democratic parliamentary system, position of the political power and the state of political obligations has the decisive meaning.

In the second dimension, it concerns the freedom to choose how to achieve the objectives. While the discretionary authority of the legislator in the primary dimension and the decisions taken are justified by the democratic legitimacy and exercise of power, in the secondary dimension, lawmaking entities, which use discretionary powers the manner of achieving the objectives and decisions taken in this respect, is subject to a more complicated process of setting boundaries for their activities. In that cases character of the action is free in the outlined by law area, but such action is also limited by functioning standards and can be more or less execute.

Respecting the rule of law and the rule of law standards is good form of justification discretionary power in that dimension but also narrows the scope of discretion. Important question is whether the overarching principle rule of law and the rule of law standards narrow the scope of discretion in such dimension that it can be assumed that he eliminates discretionary power. J. Waldron emphasizes:

> How far should it be the mission of the Rule of Law to eliminate or reduce the amount of discretion in the way a society is governed? Some jurists, like Dicey (1885) and to a lesser extent Hayek (1944) insist that official discretion is inherently antithetical to the Rule of Law. Others, like Davis (1969), condemn this as an extravagant position, arguing that discretion is ineliminable in the modern administrative state. The principle of the Rule of Law is not to eliminate discretion, but to ensure that it is properly framed and authorized[25].

The Rule of Law principle is the foundation of the legal regulations which sets the impassable limits of the discretionary legislative, judicial and executive authority (public administration)[26].

But if we look at the content and functioning of this principle in a wider dimension, taking into account the fact that this principle is not only set of rules but also standards, we can talk about the potentially gradual use of discretionary power. Discretionary power of the lawmaking entity limited by standards is gradual and can be more or less used and implemented. This means that in practice discretion may occur to a greater or lesser extent and in such extent can be abused. The extent of the abuse depends on the degree of compliance with the standards. In contrast to

[25] J. Waldron, *op. cit.*

[26] A. Szot, *Swoboda decyzji w stosowaniu prawa przez administrację publiczną*, Lublin 2016, p. 177.

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legal regulations, which set the discretionary actions of the legislative authority yes or no (e.g. the obligation to obtain an opinion or no such obligation), the standards in the directive dimension indicate that the authority may, to a greater or lesser extent, use the form of consultation in the lawmaking process. In other words, in a democratic state of law, power and freedom to legislate can be, and are, confronted not only in the context of legal regulations, but also in respect of standards. In the case of standards, we can talk about their fuller or weaker implementation by the authorities, and in extreme cases about ignoring them. The latter case is particularly important from the point of view of the content of the created law, as well as the challenges facing the courts applying such created law.

A special situation is related to ignoring standards, primarily those related to the rule of law standards; an obligation of transparency and collegiality, manifested in the accepted principles of arrangement, assessment and cooperation, integrity, professionalism and openness, manifested in complex possibilities of consultations. The drafts submitted by the deputies, due to the solutions within the organization of law-making, are not subject to such rigors, which would suggest taking decisions in the mode that allows the implementation of the demands resulting from the standards. One decision, usually saying "we let it go through the parliamentary group" reduces, by a very definition, a more sensible legislative path.

Such, at least recently quite common situation is the reason for critical comments on the state of rule of law in Poland, formulated by the Venice Commission. Already in the opinion of March 11 stated:

> Finally, it is obvious that the Resolutions of 25 November and 2 December 2015, as well as the amendments of 17 November and 22 December 2015, were adopted in a rushed way without sufficient scrutiny in Parliament. This hasty adoption often did not even allow for adequate consultation with the opposition and civil society. Institutional legislation, like that on the Constitutional Tribunal, needs thorough scrutiny and the opinions of all relevant stakeholders should be considered. Even if Parliament is not obliged to follow their views, this input can avoid technical errors, which can defeat the purpose of the legislation[27].

Similar comments were contained in the 2017 opinion:

> The Venice Commission recalls that one of the benchmarks of the rule of law is the legality principle, which requires that the process of enacting a law is transparent, accountable, inclusive and democratic. Particularly, the proposed legislation should be debated in depth by Parliament and adequately justified and the public should have a meaningful opportunity to provide input[28].

[27] Opinion No. 833/2015 CDL-AD(2016)001-e. Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016).

[28] Opinion No. 892/2017 CDL-AD(2017)028. Or. Engl. European Commission for Democracy through Law (Venice Commission) Poland opinion on the Act on the Public Prosecutor's Office as amended.

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A particularly critical assessment of legislative work and non-compliance with standards was expressed in the opinion No. 977/2019. The content of this opinion includes point (No. 18) in which attention was paid to gross violation of the standards.

> As the rapporteurs were told during the visit, the draft Amendments were introduced in an expedited procedure, as a private bill (i.e. by some MPs belonging to the majority, and not by the Government). The Sejm had less than 24 hours to discuss them. The Venice Commission has previously criticized the practice of using an accelerated procedure for adoption of acts of Parliament regulating important aspects of the legal or political order. The accelerated procedure provided for private bills should not be used in order to avoid meaningful public consultations. As explained to the rapporteurs, the bill was introduced and adopted without consultations even with the main stakeholders – judges and judicial bodies[29].

Taking into account the above remarks, we can distinguish the situations in which legislative power, creating law, formally observes the regulations, respects the constitutional and legal framework – uses discretionary power, often bypassing the applicable law. The authorities do not respect standards, but violates them. In relation to the legislative power activity pointed here, a phenomenon appears that can be described as a "specific source of discretionary judicial power and its increase". From the judge's point of view, the situation outlined and his entitlement (obligation) to use discretionary power will fall within the type of freedom that L. Leszczyński derives from the specificity of the lawmaking process, in contrast to those resulting from the use of special constructions in the lawmaking process (e.g. general clauses)[30].

Faced with the choice of the scope of discretion in the situation outlined above, the judge has the support and justification in the rule of law. Thus, the mission of the rule of law is not to eliminate or reduce the amount of discretion in the way a society is governed, but its proper use.

CONCLUSION

The presented idea, which can be initially called "the fluctuation of discretionary power", isn't easy to defend, but the indicated reasoning can be the basis for conducting empirical research. The verification of compliance with standards allows for empirical studies confirming the hypothesis of how the ignoring law-

[29] Opinion No. 977/2019 CDL-PI(2020)002. Or. Engl. European Commission for Democracy through Law (Venice Commission) Poland joint urgent opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe.

[30] L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Kraków 2001, p. 43.

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making standards abuse of discretionary power legislative, impact at the scope of discretionary court decisions. The empirical research showing the extent to which judges use discretionary power when they face the problem of applying the law, which was passed without taking into account the standards contained in the rule of law, can be interesting.

The problem to what extent judges may exercise discretion in the face of the application of a law that has been adopted without taking into account the rule of law standards is not illusory. An example would be the legal regulation contained in the amendments to the laws on the judiciary, passed by the Polish Sejm on 20 December 2019 and its consequences, so characterized in the opinion of the Venice Commission.

> Judges have a duty of restraint and discretion in cases where the authority and impartiality of the judiciary are likely to be called in question. In principle, it is appropriate for the law to limit the political activity of judges and to prohibit them from being "involved in public activities that are incompatible with the principle of judicial independence and the impartiality". On the other hand, as the ECtHR held in the case of *Baka v. Hungary*, "questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10 […]. Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter […]"[31].

The compliance of the legislator's activities with the standards of proper legislation, strictly speaking, the degree of implementation of these standards when drafting the Act or their complete ignoring, in correlation with the court's decisions when applying this Act, allows empirical studies verifying the hypothesis of fluctuation discretionary power and the extension of discretionary judicial decisions.

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[31] Opinion No. 977/2019 CDL-PI(2020)002. Or. Engl. European Commission for Democracy through Law (Venice Commission) Poland joint urgent opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe.

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STRESZCZENIE

W artykule dokonano charakterystyki dyskrecjonalnej władzy ustawodawczej. Autor zanalizował problem w ujęciu tradycyjnym (proces legislacyjny sprowadza się do decyzji organów ustawodawczych, a zakres ich dyskrecjonalnej władzy wyznaczają normy konstytucyjne i regulacje prawne przyjęte w ramach organizacji procesu tworzenia prawa) oraz w oparciu o propozycję szerszego ujęcia procesu tworzenia prawa. W tym ostatnim ujęciu proces tworzenia prawa obejmuje wiele etapów (również przedlegislacyjnych), w konsekwencji analiza władzy dyskrecjonalnej powinna dotyczyć różnych podmiotów podejmujących decyzje. Z punktu widzenia przedstawionej charakterystyki zakresu władzy dyskrecjonalnej istotne są nie tylko wyznaczające jej granice przepisy prawa, lecz także standardy demokratycznego państwa prawa. Stopień (nie)respektowania standardów stwarza sytuację ewidentnie różniącą się od naruszenia reguł prawnych, ale mającą istotny wpływ na tworzone prawo i funkcjonowanie całego systemu prawnego. Ponadto stanowi on również wyzwanie dla sądów i wpływa na korzystanie z dyskrecjonalnej władzy przez sędziów.

Słowa kluczowe: dyskrecjonalna władza ustawodawcza; polityka stanowienia prawa; normy praworządności