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GOOD LAW-MAKING IN POLAND: PROBLEMS AND CHALLENGES

Dear Readers,

It is with great pleasure that we present a new issue of the *Studia Iuridica* journal, a product of research coordinated by the Regulatory Impact Assessment Centre, established in 2022 at the Faculty of Law and Administration of the University of Warsaw.

The Centre is financed under the ‘Science for Society’ Programme of the Ministry of Science and Higher Education.¹

The Centre provides scientific and expert support of scholars affiliated with the University of Warsaw who, collaborating within interdisciplinary research groups, conduct studies comprising regulatory impact assessments, where they undertake to anticipate the consequences of the adoption of particular legislative solutions and identify their social and economic costs and benefits. A regulatory impact assessment understood this way is to be equated with the ‘legal policy’² ideal postulated a hundred years ago by one of the leading Polish lawyers, Leon Petrażycki. Furthermore, it is an apt and fitting response to the demands of the economic analysis of law (also called law and economics) trend,³ the recommendations of international organizations (e.g. OECD, European Union, World Bank) and the experience of Anglo-Saxon and Western European countries that have invested in improving the quality of legislation and implemented the policy of ‘better regulation’. The Centre cooperates closely with the Department of Law and Economics of the University of Warsaw.

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² Leon Petrażycki, *Wstęp do teorii prawa i moralności* (Warszawa 1930) 3.

³ Małgorzata E Stefaniuk, ‘The Category of Efficiency of Law in Leon Petrażycki’s Views’ (2019) 62(2) 246 *Zeszyty Naukowe KUL* 7.

The objectives of the Centre are: to foster the improvement of the national law-making process by elevating and bolstering the substantive component and, in particular, assessment of the effects of regulations; to develop new areas of cooperation in a three-way scenario between the government (public authorities and state institutions), the University and business (entrepreneurs, companies, economic/industry organizations); to implement policies conducive to better regulations, evidence-based regulatory policy and reduction of regulatory burdens; to involve the University of Warsaw in closer cooperation with external stakeholders (non-governmental organizations, entrepreneurs, trade unions, business organizations, etc.); to provide a new scientific stimulus in the fields of research devoted to jurisprudence (the theory and practice of law-making), economic analysis of law, assessment of the effects of regulations, public choice theory and behavioural analysis.

The Centre engages a group of close to 30 experts who collaborate on a permanent basis – both lawyers practicing and theorizing in various fields of law (including criminal, civil, tax, banking, constitutional, administrative, commercial and family law) as well as researchers representing other social sciences (including economics, sociology, psychology, political science) and quantitative sciences (like mathematics, computer science, physics).

In addition, the Centre has established international contacts with other analytical centres conducting regulatory impact assessment (including: the Regulatory Policy Committee in London, the Regulatory Scrutiny Board of the European Commission in Brussels, public authorities in Belgium, the Netherlands and Israel) and has concluded cooperation agreements with domestic entities, agencies and authorities involved in the law-making process (including ministries, Government Legislation Centre, District Medical Chamber in Warsaw, NGOs, business organizations and employers' associations).

The efforts of the Regulatory Impact Assessment Centre of the University of Warsaw are a response to the problems and shortcomings of Polish legislation as described below.

I. GOOD LAW-MAKING IN POLAND: HOPES, INSPIRATIONS AND DISAPPOINTMENTS

It has been more than thirty years since principles of a democratic-liberal state started to find their way into the Polish legal system. These are, in particular, separation of powers, free parliamentary elections, local self-government, freedom of economic activity and civil society. The fall of communism inspired hope not only for the actualization of civil liberties, political freedoms, economic rights, integration with international organizations of the free world, but also for

improving the quality of state governance, in particular with regard to better public services, fair and objective courts, effective administration and better law.

Although there is no single universal definition of good law, it is generally associated with, *inter alia*, good legislation reflected in stability, predictability, respect for principles and constitutional axiology, as well as the legislative technique and rational solutions expressed in a proper and clear legal language.⁴ Ideally, laws should be enacted in a bespoke procedure, without haste, in consideration of the voice of stakeholders and experts, but with respect for the common good and the interests of various social groups, taking into account many economic and social circumstances.⁵

Notwithstanding the practice of the Polish People's Republic (1945–1989), which was permeated with undemocratic procedures, lack of scrutiny of the constitutionality of law, and new bureaucratic obligations continuously imposed by state authorities, a belief persisted that the postulates and directives of Polish legal theory relating to legislation would be implemented successfully. These entailed, *inter alia*, academic achievements in the field of logical and linguistic research of the Lviv–Warsaw School,⁶ the ‘legal policy’ concept of Leon Petrażycki,⁷ a long analytical tradition of domestic legal theory,⁸ the assumption (axiom) of a rational legislator and the rationality of the legislative process (which is one of the most frequently discussed topics in Polish academic legal literature),⁹ findings on the influence of pressure groups in a pluralistic society

⁴ On ‘good law’ and ‘good regulation’ see: Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation. Theory, Strategy and Practice* (Oxford University Press 2012) 26; Stanisław Kasiewicz, ‘Spór wokół kategorii “dobra regulacja”’ (2016) 98 *Studia Prawno-Ekonomiczne* 237, 242; Jadwiga Potrzyszcz, *Bezpieczeństwo prawne z perspektywy filozofii prawa* (Wydawnictwo KUL 2013) 276.

⁵ Irena Lipowicz, ‘Dobro wspólne’ (2017) 3 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 17–31.

⁶ See: Zygmunt Ziemiński, ‘The Methodological Problems of Theory and Philosophy of Law: A Survey’ in Zygmunt Ziemiński (ed), *Polish Contributions to the Theory and Philosophy of Law* (Amsterdam 1987) 40; Kazimierz Opalek, ‘Normativism against the Background of Methodological Inquiries in Polish Legal Thought’ in Zygmunt Ziemiński (ed), *Polish Contributions to the Theory and Philosophy of Law* (Amsterdam 1987) 16; Zygmunt Ziemiński, ‘Two Concepts of Rationality in Legislation’ (1985) 8 *Rechtstheorie Beiheft* 139, 140.

⁷ See: Andrzej Kojder, ‘Legal Policy: The Contribution of Leon Petrażycki’ (1994) 106 *Polish Sociological Review* 155–63; Radosław Zyzik, ‘Czy Leon Petrażycki był prekursorem behawioralnej ekonomicznej analizy prawa?’ (2017) 1(39) *Forum Prawnicze* 21–33; Marek Zubik, Krzysztof Koźmiński and Krzysztof Szczucki (eds), *Leon Petrażycki i jego dzieło* (2018) 74 *Studia Iuridica*.

⁸ Robert Alexy, ‘Aleksander Peczenik: In Memoriam’ (June 2006) 19(2) *Ratio Juris* 245, 246.

⁹ Urszula Kosielińska-Grabowska and Andrzej Grabowski, ‘Logic and the Directives of Legislative Technique: Some Logical Remarks on the Polish “Principles of Legislative Technique”’ in Michał Araszkiewicz and Krzysztof Pleszka (eds), *Logic in the Theory and Practice of Lawmaking* (Springer 2015) 205.

and the possibilities of limiting them.¹⁰ The hope was that the legislation of post-communist Poland would repeat the success of interwar Poland (the Second Polish Republic of 1918–1939), when national codifications were assessed as a model worth imitating also by foreign lawyers (including French, Austrian and German).¹¹

However, this has not come to fruition, and from the perspective of 2023 and in hindsight, i.e. given the record of ten terms of the Sejm (parliament), various governments and many ongoing reforms of the law-making system, Poland continues to be plagued by problems known to other Western European countries and the Anglo-Saxon common law culture in the form of legislative inflation.¹² One must come to terms with the fact that two decades after the ‘political transformation’, we are still experiencing a state of legal overregulation, juridification of social life and the statization of the national economy – dysfunctions typical of the socialist regime.¹³ Attendant and related problems had manifested themselves

¹⁰ Stanisław Ehrlich, *Pluralism on and off Course* (Pergamon Press 1982); Stanisław Ehrlich, *Grupy nacisku w strukturze politycznej kapitalizmu* (PWN 1962); Stanisław Ehrlich, *Władza i interesy: Studium struktury politycznej kapitalizmu* (PWN 1974).

¹¹ Kazimierz Grzybowski, ‘Reform and Codification of Polish Laws’ (1958) 3 *The American Journal of Comparative Law* 393–402; Fryderyk Zoll, ‘A Civil Code outside of Reality: The Polish Codification of the Year 1964, its Origin, Development and Future’ in Wen Y Wang (ed), *Codification in International Perspective* (Springer 2014) 125–37; Wojciech Dajczak, ‘The Polish Way to a Unified Law of Contract: Local Curiosity or Contribution to the European Debate Today?’ in Christian Bar and Arkadiusz Wudarski (eds), *Deutschland und Polen in der europäischen Rechtsgemeinschaft* (Otto Schmidt/De Gruyter 2012); Krzysztof Koźmiński, ‘Polish Legislative Technique against the European Background: Tradition and Experiences’ in Franciszek Longchamps de Berier, Piotr Grzebyk and Su Chen (eds), *Theory and Practice of Codification: The Chinese and Polish Perspective* (Social Sciences Academic Press 2019) 58–79.

¹² On legislative inflation see: René Savatier, ‘L’inflation législative et l’indigestion du corps social’ (1977) 100 *Il Foro Italiano* 173–84; Philippe Gérard, Michel van de Kerchove and François Ost (eds), *Fonction de juger et pouvoir judiciaire: Transformations et déplacements* (PUSL 1983) 471; Svein Eng, ‘Legislative Inflation and the Quality of Law’ in Luc Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing 2002) 65; François Ost and Michel van de Kerchove, ‘Constructing the Complexity of the Law: Towards a Dialectic Theory’ in Luc Wintgens (ed), *The Law in Philosophical Perspectives* (Springer 1999) 146; Jean-Pierre Duprat and Helen Xanthaki, ‘Legislative Drafting Techniques’ in Ulrich Karpen and Helen Xanthaki (eds), *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (Bloomsbury 2017) 112; Łukasz Folak, ‘Zasada proporcjonalności w tworzeniu prawa administracyjnego’ (2017) 79(4) *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 57, 66; Sylwester Zawadzki, ‘Inflacja prawa oraz problemy podnoszenia jego jakości’ (1989) 2–3 *Studia Prawnicze* 347, 349; Dariusz Kijowski and Patrycja Suwaj (eds), *Kryzys prawa administracyjnego? Tom II: Inflacja prawa administracyjnego* (1st edn, Wolters Kluwer Polska 2012).

¹³ Elżbieta Łojko and Anna Turska, ‘Kryzys prawa i spadek jego prestiżu’ in Bolesław Banaszekiewicz and others, *Kultura prawna i dysfunkcjonalność prawa*, vol 2 (Uniwersytet Warszawski 1988).

long before the COVID-19 epidemic.¹⁴ Similarly to other countries affected, also in Poland corrective actions were taken to prevent the deterioration of the quality of laws with regulatory impact assessment procedures being a primary and especially efficient instrument to this end.

II. LEGISLATIVE CRISIS IN POLAND: EXPERIENCE OF THE THIRD POLISH REPUBLIC

By and large, the following have been the impediments faced by Polish legislation and law-making for many years:

- adoption of regulations inconsistent with the Constitution, including such that violate individual rights and freedoms guaranteed at the constitutional level (including property rights, personal data, secrecy of correspondence, the right of free movement, the right to a fair hearing as well as the principles of equality before the law, proportionality, freedom of economic activity and social market economy);
- enactment of provisions inconsistent or contradictory with European Union law (or other international obligations of the Republic of Poland);
- poor quality of legalese (linguistic errors, faulty definitions, inconsistent terminology, unintelligible wording);
- a deficit of legal stability and long-term legislative planning¹⁵ (constant short-lived amendments, episodic and fleeting ad hoc regulations, sometimes hastily changed or repealed after merely several days of being in force, an increasing spate of special acts, i.e. legislative interventions aimed at resolving one pressing problem at the expense of the completeness and cohesion of the legal system);
- deterioration of the role of codes and other general laws (*leges generales*) in favour of specific provisions (*leges speciales*), termed as the phenomenon of decodification;¹⁶

¹⁴ Krzysztof Koźmiński and Jan Rudnicki, ‘The COVID Crisis as a Sample Tube with Contemporary Legal Phenomena’ (2020) 1(2) Central European Journal of Comparative Law 105–21.

¹⁵ Janusz Kochanowski, ‘Deregulacja jako pierwszy etap reformy systemu tworzenia prawa’ (2005) 3(1) *Ius et Lex* 216.

¹⁶ Susanne Genner, *Dekodifikation: Zur Auflösung der kodifikatorischen Einheit im schweizerischen Zivilrecht* (Helbing & Lichtenhahn 2006); Reinhard Zimmermann, ‘Codification: History and Present Significance of an Idea’ (1995) 3(1) *European Review of Private Law* 95, 98ff; Maria Luisa Murillo, ‘The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification’ (2001) 11(1) *Journal of Transnational Law and Policy* 163ff; Franciszek Longchamps de Bérier (ed), *Dekodyfikacja prawa prywatnego* (Wydawnictwo

- scarce discussion between decision-makers, on the one hand, and society and stakeholders on the other: consultations reduced to mere fiction, expert opinions being ignored or overlooked, ostensible social dialogue, declining position of expert bodies and representatives of the business community;¹⁷
- loopholes¹⁸ in the legal system;
- excessive politicization of the law-making process and instrumentalization of legislation, i.e. hyperactivity of politicians in the decision-making process, paucity of social trust, the objective of changes in law steering away from solving real socio-economic problems in favour of maintaining the support of the electorate and achieving the current purely political goals;¹⁹
- adoption of regulations which are impossible to implement and enforce, irrational, transgressing the limits of statutes, adoption of regulations in isolation from the costs associated therewith, without regard to any assessment of their effects;
- the assessment of the effects of regulations treated as a ‘propaganda tube’ (i.e. designed solely to produce a persuasive effect²⁰) for the government’s concepts, instead of serving an actual, reliable prediction of the socio-economic consequences of changes in the legal status of a given area;
- neglect for the pre-legislative work on a bill;²¹
- defective lobbying regulations, the effect of which is the dearth of open involvement of interest groups in the legislative process;²²
- ‘wild lobbying’, the collapse of public ethics, corruption-prone regulatory environment: influence on law-making exerted by informal groups close to the ruling party, the importance of behind-the-scenes efforts to influence decision-makers, the role of ‘unofficial back channels’ and contacts with representatives of the ruling party;

Sejmowe 2017); Jan Rudnicki, *Dekodifikacja prawa cywilnego w Polsce* (Od Nowa 2018); Jacek Kaczor, ‘Koniec ery kodeksów?’ (2020) 120(1) *Acta Universitatis Wratislaviensis* 55.

¹⁷ *Polski Bezład Legislacyjny. Rządowy i parlamentarny proces legislacyjny w pierwszych dwóch latach IX kadencji (15 listopada 2019–15 listopada 2021). XIV raport Obywatelskiego Forum Legislacji* (Fundacja im. Stefana Batorego 2022) 8.

¹⁸ Ewa Skorczyńska, *Luka w prawie: Istota zjawiska oraz jego znaczenie dla prawa administracyjnego* (CH Beck 2017).

¹⁹ Maciej Borski, ‘O potrzebie reformy polskiego systemu stanowienia prawa’ (2016) 4(32) *Przegląd Prawa Konstytucyjnego* 223, 225.

²⁰ Krzysztof Koźmiński and Mateusz Ciechomski, ‘Ocena skutków regulacji: Instrument racjonalnej polityki prawa czy manipulacja projektodawcy?’ in Piotr Grzebyk (ed), *Prawo w epoce populizmu* (Scholar 2023) 219ff.

²¹ Jarosław Szymanek, ‘Udział czynnika eksperckiego w procesie ustawodawczym’ in Wojciech Brzozowski and Adam Krzywoń (eds), *Leges ab omnibus intellegi debent: Księga XV-lecia Rządowego Centrum Legislacji* (Wydawnictwo Sejmowe 2015) 425.

²² Michał Jabłoński and Krzysztof Koźmiński, ‘10 Years of the Polish Act on Lobbying Activity – 10 Years of Disappointments’ (2019) 68 *Studia Iuridica* 105–23.

- violation of the *lex retro non agit* principle ('the law does not apply retroactively', i.e. the prohibition of retroactivity of law);
- flouting or ignoring the *vacatio legis* standard, i.e. the time lapse from the date of promulgation of a legal act until its entry into force: provisions coming into force on the day of promulgation or on the following day (too short *vacatio legis* or absence thereof altogether in respect of newly passed regulations);
- violation of protected acquired rights and respect for interests in progress;
- contravention and ignoring of the principles of legislative technique;
- introduction of excessive administrative and bureaucratic burdens, stifling initiative, the market and economic potential;²³
- inconsistency, coupled with excessive stringency and inflexibility of regulations;²⁴
- drafting of regulations with the view to solving short-term problems without taking into account long-term effects and a wider context;²⁵
- the problem of 'gold-plating',²⁶ i.e. a faulty legislative technique used in connection with the transposition of EU directives, which sidesteps, inter alia, the principle of subsidiarity, and is partly due to errors of the Polish legislator;²⁷
- introduction of ineffective regulations, questionable in light of their declared goals and needs indicated by the draft initiator, resulting in negative socio-economic effects, with a negative balance of costs and benefits;²⁸
- frequent, dynamic and unforeseen legal changes;²⁹
- unclear reasons for proposed bills, which obscures the *ratio legis*;
- increased role of soft-law acts and other *fontes iuris novi*, sources of law unknown to the constitutional system, including interpretative CJEU judgments, which radically change the understanding of statutory provisions (including codes);

²³ On this topic see, e.g.: Aleksandra Jurkowska, 'Uwarunkowania regulacyjne prowadzenia działalności przez banki spółdzielcze w Polsce' (2018) 72(3) *Bezpieczny Bank* 54, 80.

²⁴ Ewa Miklaszewska and Krzysztof Kil, 'Skuteczność rozwiązań i mechanizmów stabilizujących banki systemowo ważne w krajach Unii Europejskiej w okresie pokryzysowym – próba oceny' (2019) 50(2) *Bank i Kredyt* 173.

²⁵ Stanisław Kasiewicz and Lech Kurkliński (eds), *Szok regulacyjny a konkurencyjność i rozwój sektora bankowego* (Warszawski Instytut Bankowości 2012) 14.

²⁶ Michał Jabłoński, 'The Danger of So-called Regulatory "Gold-Plating" in Transposition of EU Law – Lessons from Poland' (2017) 71 *Studia Iuridica* 73–90.

²⁷ See Kasiewicz and Kurkliński (n 25) 16. On gold-plating see more broadly see, e.g.: Jabłoński, 'The Danger' (n 26) 73ff; Kevin Kaczor, 'Gold-plating – problem nadtranspozycji dyrektyw unijnych do krajowego porządku prawnego' (2022) 11(1) *Folia Iuridica Universitatis Wratislaviensis* 76–98.

²⁸ Kasiewicz and Kurkliński (n 25) 18.

²⁹ Lech Morawski, *Główne problemy współczesnej filozofii prawa: Prawo w toku przemian* (LexisNexis 2000) 65–66.

- abandoning of the ‘limits of law’ (external boundaries of law or legislative boundaries), such as morality, ethics, economics, and physics.³⁰

The list of defects of the law-making process in Poland is long enough, however, it could be continued. Moreover, without doubt during the COVID-19 pandemic, the state of legislation deteriorated even further, and the aforementioned issues were only exacerbated. This has been met with pessimistic assessments, according to which Polish legislation has achieved the label of ‘pathologisation’ and was faced with an unprecedented legal crisis.

III. REGULATORY IMPACT ASSESSMENT (RIA) AS A STEP TOWARDS THE PRINCIPLE OF GOOD LAW

Despite its Anglo-Saxon origin³¹ and roots in the law and economics trend, also called legisprudence,³² the notion of rational law-making, implicating a balance of costs and benefits (cost-benefit analysis) as well as the selection of ‘most appropriate solutions’ by the legislator to tackle the social problem at issue (in accordance with the principle of proportionality), has long been at the forefront of attention of the Polish legal scholars. Some commentators have even go so far as to claim that law-making issues have been a peculiar ‘specialty of Polish legal theory for many years’.³³ ‘Is RIA a new legal institution in Poland? ... When I recall university lectures, I can say that in the books of professors: Opalek, Wróblewski, Ziemiński and other experts in the theory of state and law, there were

³⁰ Wojciech Łączkowski, ‘Granice prawa’ (2015) 77(4) *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 5–7.

³¹ Edward P Fuchs and James E Anderson, ‘The Institutionalization of Cost-Benefit Analysis’ (1987) 10(4) *Public Productivity Review* 25–33; Thomas O McGarity, ‘Regulatory Reform in the Reagan Era’ (1986) 45(2) *Maryland Law Review* 253ff. In the Polish literature see, for example, Jarosław Adamowski, ‘Instytucje oceny skutków regulacji w Stanach Zjednoczonych i Unii Europejskiej w kontekście negocjacji nad TTIP’ (2015) 2 *Stosunki Międzynarodowe* 258–69.

³² Krzysztof Koźmiński, *Technika prawodawcza II Rzeczypospolitej* (Scholar 2019) 8. See also: Luc Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing 2002); idem, ‘Legisprudence as a New Theory of Legislation’ (2006) 19(1) *Ratio Juris* 1–25; idem (ed), *The Theory and Practice of Legislation: Essays in Legisprudence* (Routledge 2005); Julius Cohen, ‘Legisprudence: Problems and Agenda’ (1983) 11(4) *Hofstra Law Review* 1163; Luc Wintgens, *Legisprudence: Practical Reason in Legislation* (Ashgate Publishing 2012); idem (ed), *Legislation in Context: Essays in Legisprudence* (Routledge 2016).

³³ Mateusz Pękała, *Pole decyzyjne ustawodawcy* (WAM 2016) 195.

elements attaching to the purpose, means, directives of legal policy and directives of legislative technique'.³⁴

Polish discussions on improving the quality of law and reforming the law-making process date back to at least the 1970s. A large number of valuable publications from that time are noteworthy (especially by Jerzy Wróblewski, Zygmunt Ziemiński, Kazimierz Opalek, Adam Podgórecki, Stanisław Ehrlich, or Józef Nowacki). In the period of the Polish People's Republic, there was also a lively discussion on the need to adopt a statute governing the process of law-making.³⁵

In the second half of the 20th century, academic writers argued at length about the quality and method of drafting law. Research activity in this area was particularly intense during the period of academic dispute regarding the state of legislation of the Polish People's Republic and related works on the Law-Making Act. The abundant research on legislation encouraged the development of a theoretical model of a rational legislator and – most importantly – concepts of law-making principles closely related to this model. Due to the huge amount of research material on the issue of law-making accumulated during the period under analysis, it is not possible or advisable to characterize here all the theoretical views of that time on the shape of the principles of law-making ... the research studies of theorists, along with the development of the rational legislator model, were discontinued and then resumed by many researchers.³⁶

It should be emphasized that a legal basis and a framework for improving the economic analysis in the process of law application and law-making can be found in numerous laws currently in force, many of which have been a foundation of the legal order for many years, including the Constitution of the Republic of Poland,³⁷

³⁴ Włodzimierz Szpringer, 'Metodologia oceny skutków ekonomiczno-społecznych zmiany prawa' in *System stanowienia prawa w Polsce: Zielona Księga* (Kancelaria Prezydenta Rzeczypospolitej Polskiej 2013) 47.

³⁵ See, e.g.: Jerzy Wróblewski, 'Ustawa o tworzeniu prawa a pojęcie prawa i prawoznawstwa' (1977) 8–9 *Państwo i Prawo* 17ff; Sławomira Wronkowska and Jerzy Wróblewski, 'Projekt ustawy o tworzeniu prawa' (1987) 6 *Państwo i Prawo* 3ff; Sławomira Wronkowska, 'Z historii ustawy o tworzeniu prawa' in Maciej Kłodawski, Alicja Witorska and Mariusz Lachowski (eds), *Legislacja czasu przemian, przemiany w legislacji: Księga jubileuszowa na XX-lecie Polskiego Towarzystwa Legislacji* (Wydawnictwo Sejmowe 2016); Andrzej Bałaban, 'Ustawa o tworzeniu prawa' in Ryszard Balicki and Małgorzata Masternak-Kubiak (eds), *W służbie dobru wspólnemu: Księga jubileuszowa dedykowana Profesorowi Januszowi Trzcieskiemu* (Wydawnictwo Sejmowe 2012); Maciej Klonowski, 'O braku kompleksowej ustawy o tworzeniu prawa i wynikających z tego problemach związanych z pracami legislacyjnymi dotyczącymi kodeksów: Uwagi na przykładzie Kodeksu postępowania cywilnego' (2018) 3(105) *Przegląd Legislacyjny* 23–44.

³⁶ Tomasz Zalasinski, *Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego* (Wydawnictwo Sejmowe 2008) 27.

³⁷ See, for instance, the provision of Art 118(3) of the Constitution of the Republic of Poland of 2 April 1997, which formally requires that a bill be accompanied by reasons encompassing the financial consequences of its implementation.

the Standing Orders of the Sejm of the Republic of Poland,³⁸ the Principles of Legislative Technique³⁹ and the Bylaws of the Council of Ministers⁴⁰.

What is the cause of failure of applicable procedures and the legal framework expounded above? The question that can be asked is why the system of regulatory impact assessment in Poland ‘functions defectively and the assessments made do not reach their goal’.⁴¹ According to commentators:

A weakness of the Polish law-making process is the assessment of the actual financial and organizational effects of legislation. Bill drafters can claim with impunity – despite evident facts to the contrary – that the draft in question will not bring about financial consequences. Parliament rarely questions such claims. The Chancellery of

³⁸ Article 34 of the Standing Orders of the Sejm of the Republic of Poland specifies obligations of the drafter, pointing out that the statement of reasons in favour of a bill should include, inter alia: an explanation of the need and purpose for the bill, a description of the actual situation in the field that is to be regulated, a presentation of the difference between the current and the proposed legal status, an account of the expected social, economic, financial and legal effects, an indication of sources of financing if the bill involves a burden on the state budget or the local government budgets.

³⁹ According to § 1 of the Polish Principles of Legislative Technique: ‘The decision to prepare a bill is preceded in particular by ... determining and describing the state of social relations in the field requiring an intervention by public authorities and indicating the desired trajectory of change ... , the analysis of the current legal status ... , determining the plausibility of undertaking interventions by public authorities, an alternative to the adoption of a statute ... , ascertaining the expected social, economic, organizational, legal and financial effects of each of the solutions under consideration ... , seeking opinions of entities (persons) within the purview of public authorities’ intervention Where a decision to draw up a bill has been reached, provided that it is not being prepared on the basis of a statement of purpose, it is necessary, in particular ... to determine the effects of the existing legal regulations in force in a given field ... , to specify the objectives that are to be achieved by adopting the statute.’

⁴⁰ § 28 of the Bylaws of the Council of Ministers:

‘The RIA includes in particular:

1) an indication of entities (persons) affected by the proposed normative act;
2) information on consultations conducted before the development of the bill, as well as on the scope of public consultations and opinion gathered on the draft, including the obligation to seek the opinion of defined entities as mandated by specific laws;

2a) results of analyses concerning the plausibility of achieving the draft’s objective using alternative means;

3) results of the analysis of the impact of the proposed normative act on entities (persons) referred to in para 1, and the impact of the bill on significant areas affected, in particular on:

- a) the public finance sector, including the state budget and local government budgets,
 - b) the labour market,
 - c) the competitiveness of the economy and business, including the operation of entrepreneurs, especially micro, small and medium-sized entrepreneurs,
 - d) the economic and social situation of families, as well as of disabled and elderly people;
- 4) indication of sources of financing, especially if the draft imposes a burden on the state budget or local government budgets.’

⁴¹ Wojciech Rogowski and Włodzimierz Szpringer (eds), *Ocena skutków regulacji – poradnik OSR, doświadczenia, perspektywy* (CH Beck 2007) 9.

the Sejm is not at all supported by a professional analytical team capable of assessing the effects of a parliamentary bill.⁴²

There are probably several reasons for the system's shortcomings, including circumstances that burden decision-makers as well as objective, universal weaknesses of RIA.

First of all, the real effects of regulations are difficult to anticipate, and due to the numerous unknowns and variables as well as the dynamics of the attendant socio-economic reality, an attempt to estimate costs and benefits is more akin to drawing alternative possible scenarios (in pessimistic-moderate-optimistic variants) or even 'fortune-telling' rather than a prediction based on a rational and methodologically correct calculation model.⁴³

'The incompleteness and often uncertainty of the information and predictions that an expert can provide in the law-making process means that his/her role as a representative of "exact and certain" knowledge can be relatively modest'.⁴⁴ On occasion, especially in the case of complex economic issues or long-term processes, cost-and-benefit calculations are simply impracticable, as it proves unreliable to try and predict the behaviour of people, entrepreneurs and future socio-economic situations. In practice, it appears that actors do not behave like a rational *homo oeconomicus* (an assumption often made in RIA), but are driven by impulses, their judgments and attitudes are malleable, and they are influenced by stereotypes and habits.⁴⁵ On a separate note, one should remember that RIA is not a source of certain, proven knowledge – expert analyses and interdisciplinary studies attempt to predict the future based on rigid patterns and assumptions. It is, therefore, necessary to avoid succumbing to the illusion that theoretical assumptions, scientific methodology, the competence and sincere intentions of experts guarantee an accurate estimate of the real consequences of normative solutions coming into force.⁴⁶

Notwithstanding the above, it is sometimes the case that RIAs are implemented carelessly, only formally and superficially, and are treated as a necessary and onerous step in the law-making process, without the actual will to foresee the consequences of a new regulation. 'Today, in most cases, the body that proposes a new law does not properly prepare the relevant costs-and-benefits analysis. Such a mistake can be expensive'.⁴⁷ Currently, ex-ante RIAs, conducted at the begin-

⁴² Irena Lipowicz, 'Uwagi o polskim systemie stanowienia prawa' (2012) 67(7) Państwo i Prawo 5, 18.

⁴³ Krzysztof Koźmiński, 'Ograniczenie handlu w niedziele – przewidywanie skutków regulacji czy wróżenie z fusów?' (2018) 78 Studia Iuridica 212–31.

⁴⁴ Sławomira Wronkowska, 'Ekspert a proces tworzenia prawa' (2000) 9 Państwo i Prawo 3, 13.

⁴⁵ Robert Cooter and Thomas Ulen, *Ekonomiczna analiza prawa* (CH Beck 2011) 607.

⁴⁶ Koźmiński, 'Ograniczenie handlu' (n 43) 229.

⁴⁷ Marcin Matczak and Tomasz Zalasinski, '5 grzechów głównych procesu legislacji: Jak nie przegrać, wprowadzając nowe ustawy?' (2009) 1 Think-Tank Magazine 108.

ning of the legislative process when the legislation in question has not yet taken effect, are commonplace in Poland. Ex-post RIAs and implementation of RIA procedures at the local level, related to local law-making, are hampered by the absence of necessary institutions and infrastructure.⁴⁸

Finally, one can note cases where regulations should not be ‘recalculated’ for various reasons. For example, changes in criminal law are difficult to justify with reference to the ‘price’ of a given crime (all the more so in the case of crimes such as murder or rape), because they are accompanied by too strong an emotional and moral burden.⁴⁹ Moreover, ‘too much analysis’ can lead to paralysis and waste of public resources.⁵⁰

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Real-life experience gained during more-than-a-year operation of the Regulatory Impact Assessment Centre confirms that Polish RIAs are notoriously misleading, unreliable, and even have a populist-propagandist nature, for they aim to persuade the reader rather than present the results of objective studies, facts or doubts. It is also admittedly the truth that RIAs may rely on outdated figures, information selectively chosen and out of context, or with no regard to socio-logical, economic, or technological data. Instead of presenting evidence-based research conclusions, a proponent of a bill would make unsupported blanket assurances along the lines of ‘the proposed regulation will not have an impact on the labour market’, ‘a positive effect on entrepreneurs is anticipated’, ‘the law is compliant with European law regulations’, ‘similar solutions are already in force in other European Union countries’, etc.

To conclude, the Polish legal system does not provide for any institution whose task would be to verify the correctness of RIAs, which in practice means that the author of the RIA (who is unnamed and unknown to the public) does not bear any consequences and responsibility for its content.

REFERENCES

- Adamowski J, ‘Instytucje oceny skutków regulacji w Stanach Zjednoczonych i Unii Europejskiej w kontekście negocjacji nad TTIP’ (2015) 2 *Stosunki Międzynarodowe* 258
- Alexy R, ‘Aleksander Peczenik: In Memoriam’ (June 2006) 19(2) *Ratio Juris* 245

⁴⁸ Michał Dulak, ‘Uwarunkowania w projektowaniu oceny skutków regulacji na poziomie lokalnym’ in idem (ed), *Ocena skutków regulacji w gminach* (Klub Jagielloński 2020) 36.

⁴⁹ Szpringer (n 34) 48.

⁵⁰ Claudio M Radaelli, ‘Regulatory Impact Assessment’ in Phil Harris and others (eds), *The Palgrave Encyclopedia of Interest Groups, Lobbying and Public Affairs* (Palgrave Macmillan 2020) 7.

- Baldwin R, Cave M and Lodge M, *Understanding Regulation. Theory, Strategy and Practice* (Oxford University Press 2012)
- Bałaban A, 'Ustawa o tworzeniu prawa' in R Balicki and M Masternak-Kubiak (eds), *W służbie dobru wspólnemu: Księga jubileuszowa dedykowana Profesorowi Januszowi Trzczańskiemu* (Wydawnictwo Sejmowe 2012)
- Borski M, 'O potrzebie reformy polskiego systemu stanowienia prawa' (2016) 4(32) *Przegląd Prawa Konstytucyjnego* 223
- Cohen J, 'Legisprudence: Problems and Agenda' (1983) 11(4) *Hofstra Law Review* 1163
- Cooter R and Ulen T, *Ekonomiczna analiza prawa* (CH Beck 2011)
- Dajczak W, 'The Polish Way to a Unified Law of Contract: Local Curiosity or Contribution to the European Debate Today?' in Ch Bar and A Wudarski (eds), *Deutschland und Polen in der europäischen Rechtsgemeinschaft* (Otto Schmidt/De Gruyter 2012)
- Dulak M (ed), *Ocena skutków regulacji w gminach* (Klub Jagielloński 2020)
- Duprat J-P and Xanthaki H, 'Legislative Drafting Techniques' in U Karpen and H Xanthaki (eds), *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (Bloomsbury 2017)
- Ehrlich S, *Grupy nacisku w strukturze politycznej kapitalizmu* (PWN 1962)
- — *Władza i interesy: Studium struktury politycznej kapitalizmu* (PWN 1974)
- — *Pluralism on and off Course* (Pergamon Press 1982)
- Eng S, 'Legislative Inflation and the Quality of Law' in L Wintgens (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing 2002)
- Folak Ł, 'Zasada proporcjonalności w tworzeniu prawa administracyjnego' (2017) 79(4) *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 57
- Fuchs EP and Anderson JE, 'The Institutionalization of Cost-Benefit Analysis' (1987) 10(4) *Public Productivity Review* 25
- Genner S, *Dekodifikacja: Zur Auflösung der kodifikatorischen Einheit im schweizerischen Zivilrecht* (Helbing & Lichtenhahn 2006)
- Gérard Ph, van de Kerchove M and Ost F (eds), *Fonction de juger et pouvoir judiciaire: Transformations et déplacements* (PUSL 1983)
- Grzybowski K, 'Reform and Codification of Polish Laws' (1958) 3 *The American Journal of Comparative Law* 393
- Jabłoński M, 'The Danger of So-called Regulatory "Gold-Plating" in Transposition of EU Law – Lessons from Poland' (2017) 71 *Studia Iuridica* 73
- — and Koźmiński K, '10 Years of the Polish Act on Lobbying Activity – 10 Years of Disappointments' (2019) 68 *Studia Iuridica* 105
- Jurkowska A, 'Uwarunkowania regulacyjne prowadzenia działalności przez banki spółdzielcze w Polsce' (2018) 72(3) *Bezpieczny Bank* 54
- Kaczor J, 'Koniec ery kodeksów?' (2020) 120(1) *Acta Universitatis Wratislaviensis* 55
- Kaczor K, 'Gold-plating – problem nadtranspozycji dyrektyw unijnych do krajowego porządku prawnego' (2022) 11(1) *Folia Iuridica Universitatis Wratislaviensis* 76
- Kasiewicz S, 'Spór wokół kategorii "dobra regulacja"' (2016) 98 *Studia Prawno-Ekonomiczne* 237
- — and Kurkliński L (eds), *Szok regulacyjny a konkurencyjność i rozwój sektora bankowego* (Warszawski Instytut Bankowości 2012)
- Kijowski D and Suwaj P (eds), *Kryzys prawa administracyjnego? Tom II: Inflacja prawa administracyjnego* (1st edn, Wolters Kluwer Polska 2012)

- Klonowski M, 'O braku kompleksowej ustawy o tworzeniu prawa i wynikających z tego problemach związanych z pracami legislacyjnymi dotyczącymi kodeksów: Uwagi na przykładzie Kodeksu postępowania cywilnego' (2018) 3(105) *Przegląd Legislacyjny* 23
- Kochanowski J, 'Deregulacja jako pierwszy etap reformy systemu tworzenia prawa' (2005) 3(1) *Ius et Lex* 216
- Kojder A, 'Legal Policy: The Contribution of Leon Petrażycki' (1994) 106 *Polish Sociological Review* 155
- Kosielińska-Grabowska U and Grabowski A, 'Logic and the Directives of Legislative Technique: Some Logical Remarks on the Polish "Principles of Legislative Technique"' in M Araszkiwicz and K Pleszka (eds), *Logic in the Theory and Practice of Lawmaking* (Springer 2015)
- Koźmiński K, 'Ograniczenie handlu w niedziele – przewidywanie skutków regulacji czy wróżenie z fusów?' (2018) 78 *Studia Iuridica* 212
- — 'Polish Legislative Technique against the European Background: Tradition and Experiences' in F Longchamps de Berier, P Grzebyk and S Chen (eds), *Theory and Practice of Codification: The Chinese and Polish Perspective* (Social Sciences Academic Press 2019)
- — *Technika prawodawcza II Rzeczypospolitej* (Scholar 2019)
- — and Ciechomski M, 'Ocena skutków regulacji: Instrument racjonalnej polityki prawa czy manipulacja projektodawcy?' in P Grzebyk (ed), *Prawo w epoce populizmu* (Scholar 2023)
- — and Rudnicki J, 'The COVID Crisis as a Sample Tube with Contemporary Legal Phenomena' (2020) 1(2) *Central European Journal of Comparative Law* 105
- Lipowicz I, 'Uwagi o polskim systemie stanowienia prawa' (2012) 67(7) *Państwo i Prawo* 5
- — 'Dobro wspólne' (2017) 3 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 17
- Longchamps de Bériér F (ed), *Dekodifikacja prawa prywatnego* (Wydawnictwo Sejmowe 2017)
- Łączkowski W, 'Granice prawa' (2015) 77(4) *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 5
- Łojko E and Turska A, 'Kryzys prawa i spadek jego prestiżu' in B Banaszkiwicz and others, *Kultura prawna i dysfunkcjonalność prawa*, vol 2 (Uniwersytet Warszawski 1988)
- Matczak M and Zalaśiński T, '5 grzechów głównych procesu legislacji: Jak nie przegrać, wprowadzając nowe ustawy?' (2009) 1 *Think-Tank Magazine* 108
- McGarity TO, 'Regulatory Reform in the Reagan Era' (1986) 45(2) *Maryland Law Review* 253
- Miklaszewska E and Kil K, 'Skuteczność rozwiązań i mechanizmów stabilizujących banki systemowo ważne w krajach Unii Europejskiej w okresie pokryzysowym – próba oceny' (2019) 50(2) *Bank i Kredyt* 173
- Morawski L, *Główne problemy współczesnej filozofii prawa: Prawo w toku przemian* (LexisNexis 2000)
- Murillo ML, 'The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification' (2001) 11(1) *Journal of Transnational Law and Policy* 163

- Opalek K, 'Normativism against the Background of Methodological Inquiries in Polish Legal Thought' in Z Ziemiński (ed), *Polish Contributions to the Theory and Philosophy of Law* (Amsterdam 1987)
- Ost F and van de Kerchove M, 'Constructing the Complexity of the Law: Towards a Dialectic Theory' in L Wintgens (ed), *The Law in Philosophical Perspectives* (Springer 1999)
- Petrażycki L, *Wstęp do teorii prawa i moralności* (Warszawa 1930)
- Pękala M, *Pole decyzyjne ustawodawcy* (WAM 2016)
- Polski Bezład Legislacyjny. Rządowy i parlamentarny proces legislacyjny w pierwszych dwóch latach IX kadencji (15 listopada 2019–15 listopada 2021). XIV raport Obywatelskiego Forum Legislacji* (Fundacja im. Stefana Batorego 2022)
- Potrzeszcz J, *Bezpieczeństwo prawne z perspektywy filozofii prawa* (Wydawnictwo KUL 2013) 276
- Radaelli CM, 'Regulatory Impact Assessment' in P Harris and others (eds), *The Palgrave Encyclopedia of Interest Groups, Lobbying and Public Affairs* (Palgrave Macmillan 2020)
- Rogowski W and Szpringer W (eds), *Ocena skutków regulacji – poradnik OSR, doświadczenia, perspektywy* (CH Beck 2007)
- Rudnicki J, *Dekodifikacja prawa cywilnego w Polsce* (Od Nowa 2018)
- Savatier R, 'L'inflation législative et l'indigestion du corps social' (1977) 100 *Il Foro Italiano* 173
- Skorczyńska E, *Luka w prawie: Istota zjawiska oraz jego znaczenie dla prawa administracyjnego* (CH Beck 2017)
- Stefaniuk ME, 'The Category of Efficiency of Law in Leon Petrażycki's Views' 62(2) 246 (2019) *Zeszyty Naukowe KUL* 7
- Szpringer W, 'Metodologia oceny skutków ekonomiczno-społecznych zmiany prawa' in *System stanowienia prawa w Polsce: Zielona Księga* (Kancelaria Prezydenta Rzeczypospolitej Polskiej 2013)
- Szymanek J, 'Udział czynnika eksperckiego w procesie ustawodawczym' in W Brzozowski and A Krzywoń (eds), *Leges ab omnibus intellegi debent: Księga XV-lecia Rządowego Centrum Legislacji* (Wydawnictwo Sejmowe 2015)
- Wintgens L (ed), *Legisprudence: A New Theoretical Approach to Legislation* (Hart Publishing 2002)
- — (ed), *The Theory and Practice of Legislation: Essays in Legisprudence* (Routledge 2005)
- — 'Legisprudence as a New Theory of Legislation' (2006) 19(1) *Ratio Juris* 1–25
- — *Legisprudence: Practical Reason in Legislation* (Ashgate Publishing 2012)
- — (ed), *Legislation in Context: Essays in Legisprudence* (Routledge 2016)
- Wronkowska S, 'Ekspert a proces tworzenia prawa' (2000) 9 *Państwo i Prawo* 3
- — 'Z historii ustawy o tworzeniu prawa' in Maciej Kłodawski, Alicja Witorska, Mariusz Lachowski (eds), *Legislacja czasu przemian, przemiany w legislacji: Księga jubileuszowa na XX-lecie Polskiego Towarzystwa Legislacji* (Wydawnictwo Sejmowe 2016)
- — and Wróblewski J, 'Projekt ustawy o tworzeniu prawa' (1987) 6 *Państwo i Prawo* 3
- Wróblewski J, 'Ustawa o tworzeniu prawa a pojęcie prawa i prawoznawstwa' (1977) 8–9 *Państwo i Prawo* 17

- Zalasiński T, *Zasada prawidłowej legislacji w poglądach Trybunału Konstytucyjnego* (Wydawnictwo Sejmowe 2008)
- Zawadzki S, 'Inflacja prawa oraz problemy podnoszenia jego jakości' (1989) 2–3 *Studia Prawnicze* 347
- Ziemiński Z, 'Two Concepts of Rationality in Legislation' (1985) 8 *Rechtstheorie Beiheft* 139
- — 'The Methodological Problems of Theory and Philosophy of Law: A Survey' in Z Ziemiński (ed), *Polish Contributions to the Theory and Philosophy of Law* (Amsterdam 1987)
- Zimmermann R, 'Codification: History and Present Significance of an Idea' (1995) 3(1) *European Review of Private Law* 95
- Zoll F, 'A Civil Code outside of Reality: The Polish Codification of the Year 1964, its Origin, Development and Future' in WY Wang (ed), *Codification in International Perspective* (Springer 2014)
- Zubik M, Koźmiński K and Szczucki K (eds), *Leon Petrażycki i jego dzieło*, (2018) 74 *Studia Iuridica*
- Zyzik R, 'Czy Leon Petrażycki był prekursorem behawioralnej ekonomicznej analizy prawa?' (2017) 1(39) *Forum Prawnicze* 21