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## **HUMAN RIGHTS PROTECTION: FROM POPULISM TO THE EVIDENCE – BASED POLICY MAKING**

*Triggered by the golden question: “What works?”, policy makers around the world are struggling to find solutions that make a real change/impact in a subject area. Their struggle is as greater as the more important the subject of the protection is. The same goes for the possible positive or negative impact that a subject policy can have on the beneficiaries. Finally, the perceived consequences in terms of the political accountability of the decision makers for the impact made by the public policy influence their attitudes when create a public policy to the great extent. Being of the crucial importance, human rights protection as a subject of the public policies opens the floor for the significant variations of those attitudes, from the evidence-based policy making, as an ideal approach, to the populism driven policy making, as the hidden monster which undermines the basic values in the contemporary world, presenting itself as a modern hero and the protector of ordinary people. Taking into account these strongly opposed approaches, the author is looking for the main material and procedural elements that makes a public policy based on evidence. With this aim, the author analyses the very nature and diversity of evidence, the sources where they can be found, but also the mechanisms to incorporate them into the public policies, against the idea of choosing the most popular solutions. Within this context, the author also analyses recent practices in penal policy, with the focus on the penal legislation and the policy planning in the process of the transposition of the international standards on the fundamental rights.*

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## **1. Human rights protection as a never-ending task of decision makers**

“All human beings are born free and equal in dignity and rights” (UN, 1948), sounds so loud, clear and simple, only to the point where you are the policymaker in charge and tasked to ensure this in practice. As the contexts and the modalities of the human rights violation evolving through the time, the same trend should be followed in taking efforts to protect those rights at the international and the national level. The second one is to some extent preconditioned by the first one, since the international law, whether through the universal or the regional instruments frames and shapes the national legislation. However, a need to make those frames applicable in various contexts around the world, usually require leaving them vague enough to fit “various sizes”. At the same time, this lives enough space for the national legislators to fill that space with the provisions of the national legislation in order to establish, more precisely, legal and institutional guaranties to protect a human right in practice. A way a legislator will do that is defined, to the significant extent, by its dedication to address the real needs of citizens and to do that in a way which guarantees the maximum possible impact on the protection of their human rights, but also to achieve an ideal balance in the protection of the (potentially confronted) rights of various social groups. Contrary to this approach, the legislator can opt to follow completely different approach, namely, to disregard the real needs and to put the human rights protection in service of following the “vox populi” aimed at personal promotion in the political market through the fight against “constructed enemies”. While the first approach is more demanding in terms of the procedures to be followed and mechanisms to be established, its outcome, even being beneficial for citizens and the society as whole, can lead to the loose of political points for the policy makers who applied it. Contrary, *ad hoc* interventions of populist leaders ensure them fast and easy political points regardless the impact-less or sometimes even harmful consequences they have on the human rights protection.

Given like this, it is impossible to avoid the question: Whether and how we can identify which policy is made based on evidence and which one is result of the populist intervention? To answer this question there is a need to identify the main elements of both approaches. Namely, to see what make a policy evidence-based or populist.

## **2. Evidence based policy making**

The narrower meaning of the term *public policy* comes down to the activities of the state that are a response to the needs and interests of the citizens in terms of achieving their needs and exercising their rights. In contrast to this mainly formal and institutional

approach, the public policy has a broader dimension related to social values and their allocation. (Kambovski, 2021, p. 36)

Kambovski considers the value as a criterion distinguishes the notion of public policy from the policy of the state in decision-making, performing its functions in power (regulatory, repressive, defense, etc.). That distinction, in which (according to *H. Lasvel*) policy is understood as “an activity that deals with questions - who gets something, when and how”, does not place these two notions in terms of mutual exclusion, but points to a higher principle of democratic governance. (Kambovski, 2021, p. 37) The government does have the ultimate decision-making and funding power, but there are many other factors that contribute to public policy. (Goodin & Moran, 2013, p. 890)

Undoubtedly, the main purpose of a policy development and implementation is to produce change/impact, namely, to ensure that the policy “works”. Therefore, evidence-based policy is dominated by one question: “What works?” (Pawson, 2006) A more illustrating, an issue of evidence-based policy making has been perceived by Cartwright and Hardie like- from “It worked there” to “Will it work here?” (Cartwright & Hardie, 2012) So, the first step when thinking about what can work is to learn what works somewhere, which means to find evidence on that. Furthermore, there is a need to explore whether it would work there.

This brings us to the evidence as a buzzword of the whole issue- to understand what evidence is and how to it to develop a public policy. The term ‘evidence-based policy’ is based around two sets of related assumptions, ‘one referring to the way in which policy is made, the other to the evidential nature of social science itself’ (Marston & Watts, 2003). Therefore, there is a question whether it is appropriate to consider ‘evidence-based’ and ‘evidence-informed policy’ as synonyms. It seems the answer is negative, having in mind that evidence informed process of developing policies does not necessary mean that policy makers will develop an evidence-based policy. Some authors even arguing that policymaking is inherently political and prefer the term ‘evidence-influenced’ or ‘evidence-aware’ as a more realistic view of what can be achieved. (Nutley, et al., 2002) For Latham, evidence-based policy represents tool or metaphor for going beyond political ideology. He treats evidence-based policy as a neutral concept where ‘hard facts’ will speak for themselves in addressing ‘human tragedy’ and politicians and policy makers will act accordingly based on the best available evidence. (Marston & Watts, 2003) As well recognized by Davies, evidence is not a single one to influence the policy. It competes with a political expediency, effectiveness, resources, values and a policy context, choice of goals, side effects and costs & benefits. (Cartwright & Hardie,

2012) In its more extreme form, knowledge-driven (really expert-driven) policy examples the abdication of political choice. In the problem-solving model, in contrast, research follows policy, and policy issues shape research priorities. From the point of view of government, the expert is (Laski again) 'on tap', but not on top. (Young, et al., 2002) The interactive model contrasts sharply with both in positing a much more subtle and complex series of relationships between decision makers and researchers. It portrays research and policy as mutually influential, with the agenda for both research and policy decision shaped within 'policy communities' which contain a range of actors (Young, et al., 2002)<sup>1</sup>

The late XX and early XXI century brought on the table an intensive discussion and the growing interest in evidence-based policy-making mostly in the United Kingdom, but also in USA and Australia (Marston & Watts, 2003) It could be said that the biggest steps and the main moves forward were made in this regard in the field of health care<sup>2</sup>. However, as of the second half of 20<sup>th</sup> century, many states also decided to establish and/or to engage scientific institutes specialized in various field in order to get evidence-based inputs to feed their policies. One of such steps was made in former Federal People's Republic of Yugoslavia in 1960 through the establishing of, among others, the Institute of Criminological and Sociological Research (hereinafter: Institute, ICSR).<sup>3</sup> The aim of establishing the Institute was to ensure a comprehensive and clear inputs in public policies the field of social sciences, namely in the field of prevention and combating the crime and social deviation. This approach is grounded on the application of scientific approach/methods in developing and monitoring penal policies.

What is the purpose of such an approach? There are two main forms of evidence required in this approach to improving governmental effectiveness. The first is evidence to

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<sup>1</sup> There is also the concept so called "knowledge brokering" which explains initiatives needed to facilitate interaction between researchers and policy-makers to foster greater use of research findings and evidence in policy-making and to narrow the "know-do" gap. (Van KammenI, et al., 2006) Characteristics of knowledge brokering • Organizing and managing joint forums for policy-makers and researchers • Building relationships of trust • Setting agendas and common goals • Signaling mutual opportunities • Clarifying information needs • Commissioning syntheses of research of high policy relevance • Packaging research syntheses and facilitating access to evidence • Strengthening capacity for knowledge translation • Communicating and sharing advice • Monitoring impact on the know-do gap. (Van KammenI, et al., 2006)

<sup>2</sup> E.g. in the early 1990s with the establishment of the Cochrane Collaboration, with a centre in the UK, to bring evidence from reviews of the effects of healthcare interventions to bear upon decision making. In 1999 this initiative was emulated in the fields of social and educational policy with the launch of the Campbell Collaboration (Sanderson, 2002)

<sup>3</sup> The Institute of Criminological and Sociological Research (in the further text the Institute) founded by the Regulation the Federal Executive Council No. 112 from 31. 05. 1960. (published in the Official Gazette – "Sluzbeni glasnik FNRJ" - No. 24 from 15th of April 1960). See more at: <https://www.iksi.ac.rs/>, last accessed on August 20th 2022.

promote accountability in terms of results – evidence that government (and their policies) are working effectively. The second is evidence to promote improvement through more effective policies and programmes – evidence of how well such policies and programmes ‘work’ in different circumstances.

Therefore, the evidence-based policy making should be perceived as the only way to properly address the objective issues and the real needs as well as to define appropriate, achievable goals to be achieved through the relevant activities, in realistic deadlines, supported by adequate resources, accompanied by the observation of risks and ways to address them by proper remedies.

The major benefits of the evidence-based policy making are associated as to the policy content as to the quality of the process of how a policy has been developed. Among others, this is the way to achieve that:

- Ensure inclusiveness of the process for all relevant actors
- To go beyond political ideology and avoid populist driven and populist-based policing
- Prevent abuses and favouritism of the individual/group interests
- Ensuring that a progress is measurable, based on the clear, precisely identified starting benchmarks

Evidence matters for public policymaking, but the misuse of evidence matters as well since there is a risk of the potential for cherry-picking, obfuscation or manipulation of pieces of evidence, done to serve political goals. (Parkhurst, 2017)

This leads to the always-living debate on various understandings of what the evidence-based policy means, but also to what extent an evidence can influence the policy. The above-mentioned trend has expanded from the scientific circles to the international organizations and national authorities, resulting in the several main questions: What kind of findings/data/information can be considered as evidence, especially in social sciences? Consequently, this opens an issue of the relevant sources of evidence, including possible hierarchy among available evidence and their sources. Finally, of the appropriate and the most efficient mechanism to collect and take them into account.

So, what the evidence is? As interpreted by Maston and Watts, whether a naturally occurring phenomena or a research artifact, the stuff of the world only becomes

‘evidence’ when ‘it’ is constituted and inserted into a research practice and then deployed in the framework of an argument.<sup>4</sup> In determining what is to count as evidence and the ‘discovery’ or selection/presentation of evidence, assumptions about the nature of the social world play a fundamental role. (Marston & Watts, 2003) It is interesting that the same authors question the objectiveness of the evidence in social sciences, pointing out that no evidence claim underpinning evidence-based policy arguments can be considered detached, value free, and neutral. They argue that not all empirical social scientific argument is ‘empirical’ in the conventional sense of the word, in which ‘empirical’ mean a knowledge claim that refers to whatever is real. (Marston & Watts, 2003) We cannot agree upon this approach since it undermines the value of the scientific research methods in social sciences, inherently claiming that scientific evidence in natural science are kind of non-human and therefore perfect products. Obviously, humans accompanied with all their values and prejudice were perfect enough to build labs, computers and other machines, and to interpret findings collected using them, but not good enough to conduct empirical research in social sciences.

In terms of the variety and the potential hierarchy of evidence, it could be useful and interesting the classification given by the UK Cabinet Office, which sees evidence as: Expert knowledge; published research, existing research; stakeholder consultations; previous policy evaluations; the Internet; outcomes from consultations; costings of policy options; output from economic and statistical modelling (1999, p. 33) (Marston & Watts, 2003) In terms of the hierarchy, the priority question is (non)existence of formal hierarchies in policy communities. Namely, a formal hierarchy can be established through the law or other legal act aimed at ruling the policy making process. Even in the absence of such formal hierarchy, some authors, like Marson and Watts considers ministerial advisers, senior public servants, and other ‘insiders’ or ‘policy elites’ to have greater access and authority in decision-making processes than members of the public or service users/policy beneficiaries (Marston & Watts, 2003). However we would rather call evidence coming from them “hierarchy based” or “hierarchy originated” than to consider them as a formally and naturally superior over the other evidence.

In 2001 the European Commission recognized and expanded the ground for use of the evidence-based policymaking, underlining that scientific and other experts play an increasingly significant role in preparing and monitoring decisions. From human and

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<sup>4</sup> Marston & Watts with a certain dose of irony ask: whether the evidence is the text of a poem, the files of a newspaper, the data from a carefully designed psychology experiment or clinical trial, or a massive data base assembled from a social survey. (Marston & Watts, 2003)

animal health to social legislation, the institutions rely on specialist expertise to anticipate and identify the nature of problems and uncertainties that the Union faces, to take decisions and to ensure risks can be explained clearly and simply to the public. (European Commission, 2001)

### **3. Populism-driven policy making**

Despite all theoretical developments, clear benefits from it and the positive proven experiences in practice, it seems that evidence-based policy making is still struggling for predominance over the completely opposite concept- populism-driven policy making.

In 21<sup>st</sup> century it is expected to have the growing appreciation of the authorities both for the quest to derive reliable social knowledge to guide policy action and for approaches to governance. However, it seems that economically, culturally or religiously driven populist backlash, which is still widely present across the world, including Europe, devaluing an importance of such an approach in a policy making. Resistant to any kind of an evidence, populist policy making ignores and even sometimes despises scientific and professional evidence, perceiving it as a politically derived product of social elites. Deaf for the voice of the academic community and professionals they strive to construct the imaginary world driven by *vox populi*.

There've been lot of attempts to define populism itself and therefore populism-driven approach in developing public policies. In order to do that, the authors actually tried to start from the conceptual departure from an ideal model of policy making in liberal democracies, as in terms of the policy content/substance as in relation to the procedural aspects of policy making. Therefore, this approach is based on the "ideal type" as conceptualized by Max Weber. Weber himself wrote: "An ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct..." (Stanford, 2017)<sup>5</sup>

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<sup>5</sup> See more in Stanford Encyclopedia of Philosophy, Max Weber, at: <https://plato.stanford.edu/entries/weber/#IdeTyp>, last accessed on February 27<sup>th</sup> 2021. An ideal type is formed from characteristics and elements of the given phenomena, but it is not meant to correspond to all of the characteristics of any one particular case. It is not meant to refer to perfect things, moral ideals nor to statistical averages but rather to stress certain elements common to most cases of the given phenomenon. It is also important to pay attention that in using the word "ideal" Max Weber refers to the world of ideas (German: Gedankenbilder, "mental images") and not to perfection; these "ideal types" are idea-constructs that help put the seeming chaos of social reality in order.

According to Barth et. al. (Bartha, et al., 2020, p. 72) one implicit assumption of policy making models in liberal democracies is that relatively coherent system of ideas shape policy positions: ideas play a key role in the policy content and ‘can explain crucial aspects of policy development’ (Béland, 2009a: 704). At the same time, though majoritarian preferences have a pivotal role, they are substantively constrained by the protection of minority rights. In addition, policy content is heavily influenced by area-specific technocratic expertise (Weible, 2008; Lundqvist and Petersen 2010) and mainstream policy paradigms (Hall, 1993) that tend to create policy monopolies (Baumgartner et al., 2009). As a result, the content of policies is mostly stable and policy changes are mainly incremental (Hayes, 2006) (Bartha, et al., 2020, p. 72)

The main elements of the populist policy making in terms of the policy content are that this kind of policy is ideologically multifaceted and diverse; presence of the heterodox policy elements with frequent policy innovations challenging mainstream policy paradigms; policy content reflecting majoritarian preferences, hostility against unpopular minorities and radical and paradigmatic policy reforms. (Bartha, et al., 2020, p. 75)

In terms of the populist policy process, the same authors identify the following main elements: Circumventing established institutions and downplaying veto players; Limiting participation of technocratic policy experts, opposition parties and civil society actors while directly communicate with the electorate.

Finally, in terms of the populist policy discourse, (Bartha, et al., 2020, p. 75) there is an extensive use of discursive governance followed by tabloid, highly emotional communication style, recurrent crisis framing and Dominance of Manichean discourses.

### ***3.1. Populism in penal policy: (re)humiliation of victims***

As the more important is object of the protection and as much as high the gravity of the violation, as serious are the consequences of the populist driven policies.

Therefore, one of the most sensitive fields, (together with economy, social policy and family life) is penal policy. As Andrew well notices, today, some of the good examples on the evidence-based policy making debate could be found also in the field of the penal policy related issue, as from the legislative point of view (...) as in terms of the enforcement of penal sanctions. (Andrew, et al., 2016) These debates are frequently associated to populist, *ad hoc* intervention in penal policy.



Law-and-order punitive measures in criminal justice policy, negation of extending LGBTQ rights (Pappas, et al., 2009) or perceiving gender equality as jeopardizing the idea of the traditional family (Korkut & EslenZiya, 2011; Szikra, 2019) can be deduced from right-wing nationalism of the respective political parties and not from their populism.

The same goes for criminalization of activities of human rights defenders, who are frequently marked as enemies or kind of social evil which hampers traditional national values.

Life prison, limitation (or exclusion) of parole, enormously high sentences for particular groups of crimes, (Jovanović, 2021) like sexual violence (especially when committed against children) (Kolaković-Bojović, 2021) are also frequently used by populist leaders to gain an additional support, especially during pre-election campaigns and/or for the purpose of covering and bridging different types of political crisis e.g. affairs associated to high corruption, abuse of public resources etc. Presenting their own actions like a victim oriented, but also themselves like those who speak on behalf of the victims, populists don't hesitate of media exposure of the victims' suffer. (Kolaković-Bojović, 2020) (Kolaković-Bojović, 2018) This leads to disrespectful treatment of victims and their stigmatization, revictimization and humiliation, directly violating their right to dignity and privacy, (Kolaković-Bojović & Grujić, 2020) which is of the particular importance for child victims. (Kolaković-Bojović, 2017)

Above-mentioned populist actions are frequently associated to media demonization of expert and/or academia members who are struggling not just to criticize, but to explain the content of the policy and/or the procedure of its development. This make an atmosphere where everyone is forced to "choose the side", namely, to support populist regime/leader as a great protector of the nation/people or to be declared as "one who support enemies"- therefore, to choose the side of evil. This atmosphere constitutes an environment where fear and pressure cumulate a silence of those who should provide the milestone of the public policy- to provide evidence. This practice is especially harmful for judges, prosecutors and law enforcement agents who need to apply those policies in practice. Formally independent in performing judicial and prosecutorial functions, obliged to comply with the Constitution and laws, they are struggling to create as much as possible adequate jurisprudence as a corrective to the bad or wrong penal policies of the legislators. See: (Kolaković-Bojović, 2017) (Kolaković-Bojović & Tilovska Kechegi, 2018)

#### **4. The Guidelines for evidence-based policymaking: how it should work in practice?**

Having in mind an ideal model of the evidence-based policy making as defined by (Bartha, et al., 2020, p. 73) assumes the policy content which is embedded into a relatively coherent system of ideas where there is a central role of mainstream policy paradigms supported by area-specific policy expertise. In addition to this, majoritarian policy preferences constrained by the protection of minority rights Incremental policy changes dominate. With regard of the policy process, the same authors emphasize the role of formal and informal institutions, plurality of participating actors in each stage of the policy process, but also the involvement of the public discussion on proposed policy alternatives. (Bartha, et al., 2020, p. 73) Finally, the policy discourse should include the limited use of discursive governance, but also competing discourses and policy frames. It also involves dominant policy discourses with high and mainly positive valence.

Starting from this ideal model, if we attempt to translate it into the practical guidelines on how to develop an evidence-based policy, it is of the great importance to address following issues:

- The possible sources of information/evidence
- The procedural modalities and forms of analysing and digesting evidence to make it a proper input for future policy
- Inclusion of relevant stakeholders in the process of developing the policy
- Utilisation of evidence through their incorporation in the policies

While addressing the each and every of the following points, there is a need to take into account the specific contexts which frames the human rights policy making. Namely, the need for transposition of the relevant international standards, especially when the policy making process is conducted in order to fulfil international obligations in the process of achieving the membership international organisations or in accessing European Union, which is highly relevant for Serbia<sup>6</sup> and other countries recently went through the transition. (Ciolan, 2006)

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<sup>6</sup> For more on the EU accession processes in Serbia see: Kolaković-Bojović, Milica (2018) *Organizacija pravosuđa u Republici Srbiji: reformski okvir i EU standardi*. Institut za kriminološka i sociološka istraživanja, Beograd; Kolaković-Bojović, Milica and Petković, Bojan (2020) *Položaj pravosuđa u Srbiji - između vladavine prava i samovlašća*. Institut za kriminološka i sociološka istraživanja, Beograd.

Therefore, in terms of the potential sources of evidence <sup>7</sup>

- The variety of perspectives needs to be ensured (historical, comparative, normative, institutional, administrative capacities, economic, etc)
- All relevant sources should be collected, made available to all relevant stake holders, discussed, and analysed
- In case of contradiction between available evidence, the decision to give the advantage to one over the other(s) must be supported by explanation.

Considering above presented principles, the main role in informing policy documents play ex-post and ex ante analyses.

The main objective of the ex-post analysis is to comprehensively assess the impact of public policies in the previous period.

Contrary to the ex-post analysis, the very purpose of ex-ante analysis is to assess the current state of play in a field which is subject to the regulation by the planned policy. This assessment is not limited to the impact of the previous policy (if any previously existed in the field), but rather aims to provide for a clear, comprehensive picture on the situation in the field, to identify the positive developments, the main issues, gaps and challenges, but also to give the overview of the possible solutions already applied elsewhere, including estimation of their applicability in the domestic context concerned.

Finally, ex-ante analysis should identify different approaches to addressing identified issues and to compare their estimated impact on the following aspects: Effectiveness , efficiency, coherency, sustainability and coordination level.<sup>8</sup>

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<sup>7</sup> As previously discussed, there is a variety of evidence that could be used to inform public policy: Expert knowledge (through the direct interaction with an expert or based on the published research); reports of the various treaty bodies and specialised institutions/organisations, whether with universal or regional competence; reports on work of the relevant institutions; stakeholder consultations; previous policy evaluations; outcomes from consultations; comparison of policy options; output from economic and statistical modelling, etc.

<sup>8</sup> Effectiveness – the extent to which the general goal is achieved; Coherency – the extent to which the Government’s policies are mutually consistent, i.e. which option contributes to the highest level of consistency among the Government’s policies; Implementation costs – what are the costs of implementing the option; Sustainability – the probability of the selected model resulting in sustainable progress; Coordination level – the efficiency of monitoring the implementation, i.e. which option provides the best coordination mechanism.

As an outcome, ex-ante analysis should inform the policy makers as on the main issues to be addressed, the possible approaches to do so, as on the most suitable form of policy to be developed and adopted.

In terms of the quality of the consultative process,<sup>9</sup> this process shall precede the work on drafting the policy document.<sup>10</sup> It shall provide for opportunity for all interested parties to submit their analysis and proposals to the authority which coordinates the policy making process. It is of the great importance to ensure inclusiveness and the transparency of the consultative process. In this sense, the following issues need to be addressed:

- The composition and the role of working group
- The role of external experts
- The role of civil society
- Transparency of the consultative process

The size/inclusiveness composition of the working group in charge of drafting the policy document affects the quality of the document and the process itself to the great extent. Aware of this, the institution in charge of coordination of the preparation of the policy

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<sup>9</sup> The notion of consultative process is being frequently misunderstood and misinterpreted, especially in those countries with not so long tradition of inclusiveness and transparency of the policy making processes. Usually, this notion is perceived as a synonym to the public debate, which is strictly ruled, official procedural stage aimed at discussion of the final draft of a public policy. Differently, consultative process is broader concept, and it includes collection of inputs starting from the early stage of the process, prior to drafting any text of the policy. Its very purpose is to comprehensively inform the policy makers on the relevant perspectives of the expert community, various interested parties and the general public.

<sup>10</sup> In terms of the timeline/schedule of the consultative process, the two main scenarios are possible: 1) To initiate the consultative process based on the earlier prepared ex-ante analysis (usually prepared by the independent experts); 2) To initiate consultative process as the first step in conducting ex-ante analysis, in order to ensure the comprehensiveness of the situation overview and to provide variety of inputs of the ex-ante analysis. Both approaches have their own weaknesses and advantages. Previously prepared ex-ante analysis helps to streamline the inputs within the consultative process and to make the other inputs better structured and more focused on the priority issues. However, the second approach is usually associated with the number of not-so-good-structured inputs but enables the expert(s) in charge of the preparation of the ex-ante analysis the more comprehensive (and/or in some issues, the more in-depth approach). In addition to this, the second approach enables them to analyse, digest and incorporate inputs in the ex-ante analysis. Differently, within the first approach the integral version of the proposals received in the consultative process are just submitted to the working group in charge of drafting the policy documents, which significantly hampers the efficiency of its work.

document should involve the representatives of all the institutions that have a predominate/significant, but also specific competences in the field.<sup>11</sup>

Beyond the involvement of the institutions, specific attention should be paid to the involvement of the external experts and professionals coming from the academic community, NGOs and professional associations. Inclusion of the external experts is of the prerequisites to ensure evidence-based policy making approach, with the particular attention to the stage of their involvement,<sup>12</sup> the level of their influence,<sup>13</sup> and the compensation for the work done.<sup>14</sup>

Considering the potential, comprehensiveness and the importance of their expertise, experts from academia should be included in the policy assessment and policy development processes from the early beginning. They should be granted with the decision-making potential at least equal to those granted to the representatives of the institutions. If not included in conducted ex-ante analysis, namely if ex-ante analysis was prepared exclusively by institutions, experts need to be included in the working group in order to do the cross-check and kind of validation of the ex-ante analysis, but also to

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<sup>11</sup> The level of the representation is always challenging issue since there is a need to ensure both: specific expertise in the field and the authorization of the decision makers. Depending on the concrete situation, this could mean two scenarios: a) To involve the high-level decision maker who is going to accompany him/herself with a professional who is in charge for the specific issue(s) in the institution; b) To directly involve a professional who is in charge for the specific issue(s) in the institution who is going to consult a decision maker prior to give his/her inputs to the working group.

<sup>12</sup> In terms of the procedural stage of the expert involvement, it is of the great importance to involve the experts at the earliest point, namely in conducting ex-ante analysis. In this sense, the institution in charge of coordination of the development of the policy document, can invite/engage/hire the external expert(s) to produce ex-ante analysis as an input for the work of the working group (the starting point of their work). Their involvement in the process can stop here, but it is preferable to have them involved in the entire process. This is important for the several reasons: 1) This ensures that findings of the ex-ante analysis are properly understood and addressed, including avoiding a malicious misinterpretation of findings and their abuse in political purposes. 2) This also ensures a better matching between issues identified and measures planned to address them.

<sup>13</sup> This also raises the second issue- what is the nature/role/influence of the external experts in the working group? This can vary from the full fledge membership and voting hand by hand with the representatives of institutions to the only consultative role, while their opinion and/proposal(s) are equally valued as any other inputs received in the consultative process.

<sup>14</sup> Namely, pro bono engagement could sometimes demotivate the high quality experts to take part in working groups, due to the time-consuming nature of such engagement and the obvious income lost while working on the policy document. At the same time, providing financial compensation to external experts from the state budget can put their impartiality (but also the choice of particular expert) under the question. Finally, when the possibility to support the external expert work through the donor projects/programmes, this can ensure double benefits: 1) High quality experts (due to the clearly defined standards for their selection); Impartiality from the authorities; Competitiveness of the process based on the compensation offered/possibility to engage international and/or the most experienced local experts.

provide additional inputs for the development of the policy document. They should be also properly compensated for their work.

Beyond the role of particular experts mostly coming from academia, or individual consultants, civil society in a broader sense plays an important role in consultative process and contributes to the quality of the policy. A following issues appear to be relevant when it comes to the inclusion of CSOs in development of new policies:

- Who should be perceived as CSO?<sup>15</sup>
- What are the modalities of their inclusion?
- What is the time frame of their inclusion?

Civil society is widely understood as the space outside the family, market and state (WEF, 2013). In this space, citizens follow, discuss, and address a various topic of the common interest for the community as a whole or for the particular subcommunities. This activism can be individual or through the associations. Therefore, CSO comprises of the variety of organisations and individual activists. Some of them possess a significant expertise in a filed, while some are just interested in particular issues, but their expertise does not go beyond the activism. Being in continuous and direct contact with citizens, some CSOs can provide policy makers with specific evidence on how the previous policy has worked in practice, but also to make them aware of the newly appeared issues that need to be addressed by a new policy.

In terms of the modalities of CSO inclusion, the two main modalities are possible:

- direct participation in working groups- although potentially more fruitful in terms of the possibility to explain and discuss, it raises two concerns, namely, how to select CSO participants in the working group among all interested parties and how to ensure confidentiality of the process in those stages when document

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<sup>15</sup> Civil society roles include: service provider (for example, running primary schools and providing basic community health care services); advocate/campaigner (for example, lobbying governments or business on issues including indigenous rights or the environment); watchdog (for example, monitoring government compliance with human rights treaties); building active citizenship (for example, motivating civic engagement at the local level and engagement with local, regional and national governance); participating in global governance processes (for example, civil society organisations serve on the advisory board of the World Bank's Climate Investment Funds). (Cooper, 2018, p. 2)

is not mature enough to be public or e.g. when the working group deals with some confidential inputs.<sup>16</sup>

- participation through the public calls to submit suggestions and proposals which ensures the wider inclusion of CSO and ensures comprehensive inputs for working group. However, without possibility to discuss those proposals, they may be wrongly interpreted or disregarded by policy makers.
- combined model based on written proposals and the periodical debates/consultations - corrects the weaknesses of the second one through the inclusion of the elements of direct participation.

When it comes to the procedural stage in which CSO needs to be included, the same arguments stand as for the inclusion of experts- therefore at the earliest convenience.

The public debate as the final stage of the consultative process which directly preceding the adoption is largely dependent from the quality of the previous consultative process. Namely, if all relevant interlocutors have been consulted on time and their inputs properly addressed, the public debate is usually reserved for the so-called fine tuning of the document, in order to improve its technical aspects, to correct the factual mistakes etc, prior to get an official consent of the main institutions to submit the policy document for the adoption.<sup>17</sup>

Timely prepared, comprehensive, detailed and publicly available reports on the results of the public debate are one of the milestones of the transparency. They should include at least:

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<sup>16</sup> The first question can be properly addressed through the definition of the clear criteria that CSO organization needs to fulfil in order to be directly included in the working group. Those criteria should be published together with the call for the expression of interest for participation on the working ground they need to refer as to the general track record and the capacities of the organization as to the specific expertise in the field. Upon receipt of the application, they need to be reviewed by the commission of the mixed composition, to ensure the integrity of the process. The results of the evaluation should be made available to any of applicants upon their request. The issue of confidentiality is more sensitive, but the possible solutions depend on the level of confidentiality. In principle, for *limite* it is possible the problem is not so big, and it can be overcome through the signing the confidentiality statements, but for the higher levels of confidentiality, e.g. "secret" this cannot be done.

<sup>17</sup> Contrary, if the document has been prepared in the absence of the consultative process or that process was failed to include the relevant actors or their inputs have not been taken into account and/or properly addressed, there is a serious concern that the major weaknesses of the draft policy documents are going to show up during the public debate, therefore at the very late procedural stage when any major interventions appear to be extremely complicated and time consuming.

- Information on the working group (the date of establishing, composition, and the number of the meetings)
- Information on the process, including step by step description, dates, participants (including all inputs received during the public debate publicly available together with the report)
- Point by point report on which proposal, to what extent and in which way have been addressed (for those proposals that are not accepted, the reasons should be given)

All above-mentioned information should be available on the website of the authority in charge of the coordination of developing public policy document and/or the institution in charge of coordination of public policies. This finalizes the whole process as fully transparent, strengthening the trust in institutions and the decisionmakers.

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