

THE PRINCIPLE OF DETERMINACY OF LEGAL RULES AS AN ELEMENT OF THE PRINCIPLE OF COMPETENT LEGISLATION

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Abstract: The Constitutional Tribunal and legal science derived the principle of competent legislation from among numerous principles stemming from the concept of a democratic legal state (article 2 of the Constitution of 1997). This principle consists of a range of detailed elements, the normative content of which constitutes the principle of the citizen's confidence in the state and the law established by it, legal certainty and legality. The major components of this principle are as follows: the principle *lex retro non agit*, the principle *vacatio legis*, the principle of the protection of acquired rights, the principle of determinacy of legal rules. Additionally, the following principles have been distinguished: the principle *pacta sunt servanda*, the prohibition of changes in the tax law during a tax year, the requirement to protect the interests in progress as well as the requirement to specify the guidelines concerning the content of a regulation. The subject of this article consists of the analysis of the principle, which directly relates to the linguistic aspect of law - the principle of determinacy of legal rules. To be an effective means of communication between a legislator and those subject to established norms, legal language must be subject to certain requirements, which stem from the described principle. The essence of the principle of determinacy of legislation consists in the obligation to create laws with correct, precise and clear content. Due to the limited space of this study, I will confine myself to the problem of substantiating the binding force of the discussed principle, its content, exemplification of its violation by a legislator, factors affecting the level of determinacy in a particular case as well as the scope of unconstitutionality of legal rules that do not comply with the established requirements.

NAKAZ OKREŚLONOŚCI PRZEPISÓW PRAWNYCH JAKO ELEMENT ZASADY PRYZWOITEJ LEGISLACJI

Abstrakt: Wśród wielu zasad wywodzonych z koncepcji demokratycznego państwa prawnego (art. 2 Konstytucji z 1997 r.) Trybunał Konstytucyjny i nauka prawa wyprowadziły zasadę przyzwoitej legislacji. Zasada ta składa się z szeregu szczegółowych elementów, których treścią normatywną jest realizacja zasady zaufania obywateli do państwa i stanowionego przez nie prawa, pewności prawa oraz zasady legalizmu. Głównymi składowymi zasady są: zasada *lex retro non agit*, zasada *vacatio legis*, zasada ochrony praw nabytych oraz zasada określoności przepisów prawnych. Dodatkowo wyodrębniono: zasadę *pacta sunt servanda*, zakaz dokonywania zmian

w prawie podatkowym w trakcie roku podatkowego, nakaz ochrony interesów w toku oraz nakaz określania wytycznych dotyczących treści rozporządzenia. Przedmiotem artykułu jest analiza zasady odnoszącej się bezpośrednio do językowego aspektu prawa – zasady określoności - przepisów prawnych. Język prawny, aby był skutecznym środkiem porozumiewania ustawodawcy z adresatami stanowiących norm prawnych musi podlegać określonym wymogom, których źródłem jest opisywana zasada. Istota zasady określoności przepisów prawnych wyraża się w obowiązku tworzenia przepisów, których treść powinna być poprawna, precyzyjna i jasna. Z uwagi na okrojone ramy niniejszego opracowania ograniczam się do omówienia problemu uzasadnienia obowiązywania omawianej zasady, jej treści, egzemplifikacji naruszeń przez prawodawcę, czynników rzutujących na poziom określoności w konkretnym przypadku oraz zakresu niekonstytucyjności przepisów niespełniających stawianych wymagań.

In legal theory, the process of legislating is considered as an organised set of actions, accomplished in established forms, the course of which is substantially defined by binding legal standards. The beginning of this process constitutes “making an intention by a given entity to make a change in social life by means of legal norms,” and the subsequent stages constitute preparation and consideration of the draft of a legislative act and making it effective (Wronkowska and Ziemiński 2001,128). Legislation is an organised and deliberate process, guided by specified legal principles.⁵⁸ The principles of legislation shall mean directives with a large degree of generality directed to entities creating law, which specify how legislators should settle particular problems arising during legislation and guide the process of making the law so that these problems might be properly resolved⁵⁹ (Michalska and Wronkowska 1983, 55). It should be stressed that these principles do not directly indicate the features of the law, but how to enact it so

⁵⁸ The concept of legal principles has not been unequivocally specified yet. One of the divisions developed in the doctrine (to which I will refer further in this study) is the division into principles of the directive and descriptive meaning. This dichotomy relates to expressions of such nature distinguished in science. Directive expressions specify an order or ban to behave in a particular way in certain circumstances, they are justified ethically (they are compulsory, because they are established by the entity that wields authority over those subject to the order or ban) or axiologically (the code of conduct is binding because it is preferred or negated due to certain values). Alternatively, descriptive expression is represented by means of statements of a logical definitive sense. Accordingly, legal principles in a directive sense include norms of conduct, which have thetic or axiomatic justification of its validity. Norms included in these principles are considered to be norms of a given system, they are to some extent superior to other norms. Among the directive principles one may distinguish the principles of a legal system construction (II degree) and substantive principles concerning particular legal institutions, rights and obligations of the subject of law etc (I degree). These principles are legally valid. Legal principles of descriptive meaning (beyond directive sense) have educational purposes and they are intended to form the description of a legal system, indicating functional relations between norms as well as presenting the social role of a given norm, institution or branch of law (more: Wronkowska et al.1974, 28-72.)

⁵⁹ The issues concerning legislation are described in details in i.a. (Bafia 1980; Bałaban et. al, 1986; Wróblewski 1989).

that it may comply with certain requirements concerning its content and form (Bafia 1980, 86-94). Among the entirety of legislative principles one may distinguish those that are based on the text of a normative act (so-called principles – legal criteria) and those without any normative character (so-called principles – postulates in legal doctrine)⁶⁰.

The distinctive feature of the concept of legislative principles developed in the Polish legal science is its broad understanding. They embrace the principles of editing legal texts, aiming at implementation of the rationality postulate of a legislator, and, at the same time, legal certainty and legal safety (which will be described broadly hereinafter), the principles intended to stabilise of the political system as well as those concerning the legislative procedure (Zalasiński 2008, s.28).

According to the classification of legislative principles performed by A. Michalska and S. Wronkowska, one of these groups constitutes the principles, which stipulate the optimal text formulation of normative acts (more: Zalasiński 2008, 55-69). According to the formulated recommendation, the text of the act should be unequivocal, concise and perspicuous to its readers. The complement to this group of principles constitutes the postulate demanding the comprehensive regulation of the domains of social life, avoidance of casuistry as well as direct repealing of hitherto valid regulations by a new statute. It should be mentioned that since the Constitutional Tribunal commenced jurisdictional activity, many of the legislative directives formulated hitherto in the doctrine have obtained the status of constitutional legal principles⁶¹, which, with

⁶⁰ According to the concept of legislation developed in the doctrine, this division concerns the principles understood in a directive way. Jerzy Wróblewski is an author of the concept of division of legal principles (more: Wróblewski 1959, 255-260). The principles – legal norms, which are based on a legal text, are of fundamental importance for teaching and practising law. In order to portray the scope of the subject optimally, it should be mentioned that there are different stances on the doctrine concerning the validity of legal principles. J. Wróblewski distinguished valid principles of a legal system (based on legal norms or interpreted by means of inferential conclusions) as well as non-valid postulates of a legal system (not based on legal texts). According to the evolutionary predominant stance, the validity of principles may stem from the system of uniform axiomatic or praxeomatic substantiation for the principles of a given group of norms. (more: Wronkowska et al. 1974, 55-64)

⁶¹ The essence of a constitutional principle of law amounts to understanding it as a directive statement, being a legal norm, included directly in the constitution or resulting from it, which significant meaning consists in determining the direction of the interpretation of all the norms of the legal system. (More: Zalasiński 2004, 22-29; Zalasiński 1997, 58-76) The superior role of constitutional principles in respect of other norms of the legal system results not only from the fact that they are included in the act of the highest validity in the hierarchy of legal sources (which implies the prevention of their repeal by the norms of a lower range and for the non-contradiction of these norms with them), but also from the fact that they determine the formal legislative basis (because they indicate competence to establish norms) and they determine the

the jurisdiction of the Constitutional Court developed with time, have made a great impact on the form of the principle of competent legislation.

One of the results of the implementation of the Act of 29.12.1989 on the change of the Constitution of the People's Republic of Poland⁶², formally including the concept of the legal state of the Polish legal system⁶³, was the introduction of values related to this concept (mainly owing to the jurisdictional activity of the Constitutional Tribunal). One of these values, which directly affect the principle of competent legislation, is the principle of the citizen's confidence in the state and the law established by it as well as legal certainty⁶⁴. The Constitutional Tribunal has repeatedly stressed the significance of competent legislation in numerous judgments stating that in a democratic legally based state it is one of the fundamental principles determining the relationship between the state and citizens (the judgment of the Constitutional Tribunal with file reference number P 3/00, OTK ZU No. 5/2000). The aforementioned principle is based on the value of legal certainty (Zieliński 1996, 43-58), which in the jurisdiction is defined as a set of elements features aiming at providing the individual with legal safety. Furthermore, the most fundamental objective of legal safety is to provide citizens with the possibility of deciding upon their own conduct on the basis of knowledge of the actions of state authorities and the legal consequences of these actions (Zieliński 1996, 43-58). Legal certainty so understood is, according to the Tribunal, the basis and guarantee of the citizens' confidence in the state and the law established by it (judgment with file reference number P 14/03 OTK ZU Nr 7/A/2004 item. 62). The state has a number of obligations resulting from this principle. The main responsibilities are as follows: formulating the law so that it does not restrict the liberties of citizens, an obligation to grant rights to individuals and simultaneously to guarantee the possibility of fulfilling them, an obligation to make the law coherent and comprehensible for citizens and not to enact legal rules retroactively - in compliance with the principle *lex*

substantive direction of legislation (they indicate the objectives which are to be fulfilled as a result of legislation). (More: Wronkowska et al. 1974, 64-65).

⁶² Dz. U. 1989, Nr 75, poz. 444.

⁶³ *Rechtsstaat* was the model concept of a legally based state; it was developed in the German legal doctrine and consisted of: the principle of the division of power; the principle of fundamental rights protection, the principle of subjecting the legislative power to the Constitution and the judicial and executive powers to the statutes; the principle of legal protection when actions of public authorities are against the law as well as the principle of legal safety. The Constitutional Tribunal interpreted the principles in relation to the achievements accomplished in this field by the German juridical doctrine. (More: Spyra 2003, 55-56, and the literature quoted here).

⁶⁴ These principles before making amendments to the Constitution by the aforementioned Act were connected to the article 8 sec.1 of the Constitution (by the principle of substantive lawfulness). Then it was recognised by the Constitutional Tribunal as the directive directly resulting from the principle of a state based on law. This stance established itself after the Constitution of 1997 came into force (More: Zalasiński 2008, 35-41)

retro non agit (judgment with file reference number K 27/01 OTK ZU No. 7/2001, item 209, quoted in: Potrzeszcz 2007, 217).

It should be stressed that the confidence of citizens in the state and the law established by it as well as legal certainty (including the assurance of legal safety to the individuals) is of great significance for the implementation of human rights. The predictability of the individual's own actions and legal consequences constitutes the realisation of liberty whereas respect of the legal order towards the individual as a rational and autonomous being means respect for the individual's dignity (more: Potrzeszcz 2007, 217-256).

Among many elements constituting the principle of the citizen's confidence in the state and the law established by it and legal certainty, which stems from the concept of a democratic legal law (which the Constitution of 1997 included as article 2⁶⁵), legal science and the Constitutional Tribunal introduced the principle of competent legislation⁶⁶. This principle consists of a number of detailed elements, the normative content of which is the implementation of the principle of legalism. The component directives of the principle constitute the system of guidelines directed to the legislator, specifying how the law may be changed. The principle of competent legislation consists of four main elements: the principle *lex retro non agit*⁶⁷, the principle *vacatio legis*⁶⁸, the principle of the protection of acquired rights (more: Zalański 2008, 106 and subsequent), as well as the principle of the determinacy of legal rules. The additional principles, which add more details to the aforementioned, are as follows: the principle *pacta sunt servanda*, the prohibition on making changes in the tax law during a tax year, the injunction to protect the interests in progress, the order to specify the guidelines concerning the content of a regulation⁶⁹.

The subject of this article is the analysis of the principle related to the linguistic aspect of law – the principle of determinacy of legal rules. Legal language is perceived as a means of communication between the legislator and the subjects of established norms. In order to become an effective tool, this means must be subject to certain

⁶⁵ The article 2 of the Constitution of 1997 reads: "The Republic of Poland is a democratic legal state implementing the principles of social justice".

⁶⁶ I.a. the judgments with file reference number 24/00 OTK ZU Nr 3/2001, item 51; K 13/01 OTK ZU No. 4/2001 item 81; U 1/01 OTK ZU No. 8/2001, item 247. The principle of proper legislation, including the principle of the determinacy of legal rules belongs to the so-called formal content of the principles of a legal state (more: Morawska 2003, 221-229).

⁶⁷ The essence of the principle manifests itself in the prohibition of evaluation of the facts, which occurred during the validity of superceded statutes (more: Lang 1962, 234).

⁶⁸ The term *vacatio legis* In jurisprudence is defined as the period between publishing the law (or enacting it – in the case of statutes not requiring publication) to the time of its implementation (more: Seidler et al. 2001, 180; Myślińska 2009, 6 – 9).

⁶⁹ The last of the established injunction was discussed i.a. in: Salitra 2003, 49-52.

requirements, which stem from the principle of the determinacy of legal rules (Wronkowska 2006, 684). Its essence amounts to the obligation of enacting laws, which have correct, precise and clear content. The quality, which differentiates the principle of determinacy from other principles – elements, of the principle of decent legislation – is its absolute nature⁷⁰. Due to the limited scope of this study, I will restrict myself to the selected issues, namely to the problem of substantiating the effective validity of the discussed principle, its content, exemplification of its violation by the legislator, factors affecting the level of determinacy in a particular instance as well as the scope of unconstitutionality of legal rules that do not comply with the established requirements.

Formulating the content of the principle of determinacy of legal rules in the initial period (prior to the jurisdictional activity by the Constitutional Tribunal) remained the domain of legal doctrine. The injunction of sufficient clarity of a legal text had two meanings at this time: material and formal. The material meaning consisted in forming the legal system ensuring comprehensibility and transparency for the subjects - citizens. On the other hand, the formal meaning consisted of formulating the legal rules, which enabled establishment of unequivocal legal norms. According to such an understanding of the injunction, the content of a legal rule shall be precise, coherent and with no internal contradictionsⁱ (Zalasiński 2008, 183).

The other directive constituting the discussed principle, the term “legal determinacy,” was adopted in Poland from the German legal doctrine, where it was treated as an element of the concept of a law based state - *Rechtsstaat*. In accordance with its narrow definition, the content of a legal rule should be precise to such an extent that a legal norm could be established from it. Broad understanding of the postulate, which predominated in the German legal doctrine, imposed on the legislator an obligation to make legal rules transparent and comprehensible for individuals⁷¹. With the adoption of the concept of a law based state to the Polish legal order, the hitherto predominating term “clarity” was replaced with the term of narrower scope – “determinacy” of legal rules, which essentially amounted to the injunction requiring law that is comprehensible for the citizens (Zalasiński 2008, 185).

Constitutional adoption of the discussed principle was a complex process. It originated from the concept of a state based on law, which was consolidated in the Polish legal order, the evolution of the constitutional system as well as the jurisdiction of the Constitutional Tribunal⁷². It should be stressed that this process has not yet been completed. Both in the doctrine and the jurisdiction of the Polish Constitutional Court

⁷⁰ Some exceptions to the rest of the aforementioned principles might be allowed.

⁷¹ Broad understanding of the order predominates currently in the jurisdiction of the Constitutional Tribunal.

⁷² The determinacy principle of legal rules was not acknowledged as a legal principle until the beginning of the 1990s.

there are unequivocal stances for the discussed principle and for limits of its content. Before the official adoption of the concept of a law based state, the Constitutional Tribunal established the requirement to create clear, comprehensible and precise legal rules from the principle of the citizens' confidence in the state and the law established by itⁱⁱ (I.a. the judgment TK K 7/89, OTK 1989/1/8.). After its introduction, the Constitutional Court started to perceive the order as a norm of making the legal rules of criminal law, which was based on the principle of determinacy of prohibited acts under penalty (*nullum crimen, nulla poena sine lege*) as well as the prohibition of retroactive validity of the statute introducing or increasing criminal responsibility (*lex severior retro non agit*)ⁱⁱⁱ. These principles, similarly to the principle of excessive interference as well as the principle of citizens' confidence in the state and legal certainty, were realised in article 1 of the Constitution of the People's Republic of Poland, amended by the Act of the 29th of December 1989 quoted above. The established regulation was acknowledged with time as the constitutional basis for the principle of determinacy of legal rules.

After implementing the fundamental law, which is currently in force, as a result of incorporating the basis of principles previously derived from article 1 in its other regulations, some discrepancies concerning the constitutional source of the determinacy of legal rules appeared in the jurisdiction of the Constitutional Tribunal. The Constitutional Tribunal based it on the principle of proportionality specified in article 31 sec. 3 of the Constitution⁷³, the principle of legal safety (article 2) as well as the principle *nullum crimen sine lege* (article 42). According to the currently predominating stance (although it is not unequivocal) the grounds for the principle of determinacy of legal rules constitute the principle of a law based state described in article 2 of the Constitution, more precisely – the principle of citizens' confidence in the thus resulting state^{iv} (I.a. judgment TK 24/00 (OTK 2001/3/51); SK 70/06 (OTK 2007/9A/103); more: Spyra 2003, 53.

According to T. Zalasinski (the view expressed with T. Spyra) the sense of the remaining principles, which derived from the article 2 of the Constitution, constitutes an additional substantiation of the validity of the discussed principle in relation to the specific, ensuing state of affairs^v (Zalasinski 2008, 192). The content of the principle of the determinacy of legal rules from the beginning of the judicial activity of the Constitutional Tribunal has not been unequivocally determined to this day. Firstly, it embraced only repressive legal principles (especially those of criminal law), which

⁷³ The Constitutional Tribunal currently emphasises that the principle of determinacy should be related to the article 31 sec. 3 of the Constitution especially when a regulation formulated by the legislator concerns the protection of constitutional rights and liberties of man and citizen, i.a. in the judgment K 19/99 (OTK 2001/2/30).

interfere directly with the rights and liberties of an individual⁷⁴. The control of requirements imposed by the legislator, which stem from the determinacy principle, amounted then to the study of stipulations included in the legal rule in respect of violating the principle of proportionality and statutory exclusion. With time, the determinacy principle encompassed all the legal rules, and its content was extended by the legal clarity postulate. It was emphasised that any legal text not only should have precise content, but it should also be comprehensible to its subject recipients^{vi} (Zalasiński 2008, 195).

At the current stage of development, the determinacy principle of legal rules is defined by the three following features: correctness (in semantic respect – the use of proper words, including correct use of so-called under specified expressions and blanket clauses), precision (unequivocalness of meaning) and clarity (related to its comprehensibility to the subject recipients), (Zalasiński 2008, 198). The essence of the discussed principle in its current form was expressed by the Constitutional Tribunal in the judgment with file reference number K 24/00, which states “each regulation shall be formed correctly in linguistic and logical aspects.” Further in the judgment, the Court explained that the clarity of a regulation shall mean “an injunction to form regulations that are transparent and comprehensible for its subject recipients, which may expect from a rational legislator legal norms which raise no doubts in respect of imposed obligations and granted rights. The precision of a regulation, related to the clarity, should be manifested in the exactness of imposed obligations and granted rights so that their content is clear and enables their enforcement”^{vii} (judgment with file reference number OTK 2001/3/51; quoted in: Zalasiński 2008, 198).

The study of the constitutionality of a regulation in respect of its compliance with the determinacy principle of legal rules (and thus with the principle of competent legislation resulting from the article 2) starts with examining the level of its correctness. It includes the correctness of the rules of spelling, formal logic, and the rules of the proper form of legal texts included in the annex to the regulation of the Council of Ministers of the 20th of July 2002 – The Principles of Legislative Technique⁷⁵. The next stage is the analysis of a regulation in respect of its precision and clarity. The study of precision consists in examining if it is sufficiently unequivocal to prevent too broad and discretionary application of a legal norm included in it (it is related to its flexibility)⁷⁶,

⁷⁴ Due to such a form of the principle, it was called “the principle of determinacy of criminal legal rules” In the first half of the 19th century (More: Zalasiński 2008, 187).

⁷⁵ Journal of Laws of 2002, No.100 entry 908.

⁷⁶ To find more information about flexibility of a legal text see in: Wronkowska and Zieliński 1993, 103- 114. The authors regard adequacy as the most fundamental and, at the same time, necessary quality of a legal text. Adequacy ensures the appropriate level of flexibility and precision (unequivocalness) of a text. Flexibility of a text serves two fundamental functions. The

(Zalasiński 2008, 201). The clarity of a regulation is connected with the material aspect of the determinacy principle of legal rules discussed above. Its essence amounts to the study of the regulation's content with regard to the comprehensibility of included legal norms for the recipients. It should be stressed that a legal text should be sufficiently comprehensible so that "an average citizen," who does not know any professional methods of analysis of the language of normative acts, could interpret properly the legal norms included in it^{viii} (Morawska 2002, 370).

The doctrine stipulates that each assessment of the constitutionality of a regulation (edited not in conformity with the principle of determinacy of legal rules and thus with the principle of competent legislation) should be made taking into consideration the developed guidance on legal considerations. The presence of discrepancies in the judicature in relation to the same case may suggest the indeterminacy of the applied regulation and thus it might be deemed unconstitutional. In the case of uniformity of the jurisdiction the Constitutional Tribunal should in turn check if this state ensures the sufficient level of legal certainty (especially if interpretation of the law enables the recipient to have an adequate knowledge of his/her legal situation). T. Spyra emphasises the fact that "the assessment of legal certainty must be of a comprehensive nature and it must embrace a number of additional factors, such as: the actual level of the availability of jurisdiction or professional legal help in the society"⁷⁷. Additionally, one must determine the degree of the legislator's fault in introducing a given set of legal rules to the system. The legislator's mistake may be manifested, for instance, in referring to a concept or regulation that does not exist. A gross error of a legislator, which violates the determinacy principle, is a factor suggesting the unconstitutionality of a normative act including a flawed regulation. Furthermore, the Tribunal should each time examine the effects of its removal from the legal system. Moreover, the refusal to state unconstitutionality due to the negative effects of the rejection of a legal rule from the legal system may occur only exceptionally^{ix} (Spyra 2003, 74).

first one consists in the necessity of prediction and taking into account by the legislator of the changeability of a regulated situation at the moment of the text creation. The other function consists of the necessity of the edition of a legal text in such a way that expressions could encompass ensuing situations in the future. Underspecified expressions and blanket clauses ensure the flexibility of a legal text. The use of underspecified expressions is possible only when it is efficient – which each time requires indicating the subject, that decides upon the use of fuzziness and defining the criteria of determining the limits of this fuzziness. The additional means to ensure the flexibility of a legal text is determining in this text the limits of freedom of the decision made by the legislator, for instance by determining limits of jurisdiction in particular cases;

⁷⁷ When constitutionality verification is performed after a short period of the law being valid, its indeterminacy does not signify the possibility of deeming it unconstitutional. In such a case, the potential possibility of decreasing the legal uncertainty by jurisdiction is unimportant (Spyra 2003, 73).

Taking into account the so far considerable judicial achievements of the Constitutional Tribunal concerning the principle of competent legislation, one may distinguish some flaws in legal acts, which lead to the violation of the determinacy principle of legal rules. One of the most frequent flaws is the use of unclear terms by the legislator, which are legally indeterminate and their interpretation brings divergent results. Inaccurate, unclear and highly indeterminate edition of a legal rule, which excludes the possibility of determining the precise content of the legal norm included in it, evokes uncertainty among its subject recipients in respect of granted rights and imposed obligations⁷⁸ (judgment with file reference number SK 42/05). The defectiveness of a legal act may lead to the violation of the determinacy principle as well as the lack of adequate terminological precision⁷⁹. The problem is caused mainly by the violation of the directive included in §10 of the annex to the regulation of the Prime Minister of the 20th of June 2002 concerning the Principles of Legislative Technique, according to which “identical terms are used for identical concepts, and various concepts may not be named with identical terms”^{80, 81}. Such a state of affairs may lead to conditions violating the individual’s rights. The additional consequence of the lack of terminological precision may be the preclusion from applying regulations with

⁷⁸ source: <http://www.trybunal.gov.pl/index2.htm>

⁷⁹ The issue of unequivocalness and precision of words in a legal text more: Malinowski 2006, 18 – 42. On the other hand, Sławomira Wronkowska and Maciej Zieliński stress that a text is terminologically precise when it is without any syntactic and lexical ambiguities. This ambiguity of expressions is considered as an editorial error irrespective of the type of language in which it occurs (the same mistake may be ambiguous in respect of ethnic language, but unambiguous in respect of legal language). Lexical ambiguity may be avoided by introducing some legal definitions into a legal text or by placing ambiguous words in context so that ambiguity may be avoided. Definitions included in legal texts – so called legal definitions – may occur in different forms (these are, for instance, equational classical and non-classical definitions, partial definitions (more: Wronkowska and Zieliński 1993, 115 – 138). By placing legal definitions of some ambiguous expressions, a legislator explicitly specifies how it should be understood within a legal act, in which the definition was included and within executive deeds to the act, in which it was placed. The broader scope of the use of legal definitions relates to the situation, when they are placed in acts of a fundamental nature for a given domain of social relations, for instance in codes. In such cases definition determines a proper understanding of an ambiguous expression in the act belonging to the same domain of social relations (Choduń 2007, 128).

⁸⁰ Dz. U. z 2002, Nr 100, poz. 908

⁸¹ The issue of the lack of precision of the terms used by a legislator was examined by the Tribunal e.g. in the judgment with file reference number K 14/03 (OTK 2004/1A/1), in which it stated the unconstitutionality of the Act of the 23rd of January 2003 on general insurance in National Health Fund (Journal of Laws of 2003, No. 45 entry 391 with later amendments). According to the Tribunal, a legislator formed the institution “in the form which precludes its reliable and efficient work” due to the lack of precision of regulations. ” (Quoted in: Salitra, *Zasady przyzwoitej legislacji w 2003*, 47).

such terms⁸², especially, when "the regulation allows for too much freedom (or even arbitrariness) of interpretation for the bodies applying this regulation. In effect, it leads to the situation when the bodies applying the law are forced to stand in for the legislator, who regulated the issues necessary for the settlement in an unclear and incomprehensible way." The Constitutional Tribunal emphasised the fact that leaving too much freedom for the bodies applying the law may not lead to arbitrariness in defining the objective and subjective scope of the content of regulations (i.a. judgments with file reference numbers K28/02, K 4/06 and K 44/07)⁸³. It must be explained that the determinacy principle resulting from the constitutional principle of a legal state does not mean that the legislator may not use under specified terms. The legislator is required to meet one condition in this respect, namely designations must be precisely determined. According to the Tribunal, the sense of under specified terms in a given situation cannot be arbitrarily determined, their use demands the presence of special procedural guarantees, which would ensure the transparency and easy assessment of the practice of providing some vague terms with actual content (I.a. judgments with file reference numbers SK 30/05 and K 4/06,)⁸⁴.

The next example of a flaw occurring in normative acts, which result in the violation of the determinacy principle of legal rules is incorrect or excessive number of references within one legal act (or the whole legal system). Multiple references placed in legal acts constitute another frequent phenomenon - a regulation has numerous inexact references included by a legislator (Działocha and Zalasinski 2006, 11)⁸⁵. The Tribunal emphasised the fact that formulating legal definitions, which contain successive references, especially when defining the prohibited act, is inadmissible. The logical mistake of explaining the unknown by the unknown (*ignotum per ignotum*)⁸⁶ violates the principle of legally based state (i.a. judgments with file reference numbers: K 41/02 and K 14/03)⁸⁷.

The frequent cause of the violation of the objective principle is also making amendments to legal acts by change/addition of legal rules "which do not comply with other legal rules of a given legal act," and also by making amendments frequently and

⁸² I.a. judgments with file reference numbers K 44/02 (OTK 2003/5A/44), K 19/99 (OTK 2001/2/30). (Quoted in: Salitra 2003, 47).

⁸³ source: <http://www.trybunal.gov.pl/index2.htm>.

⁸⁴ source: <http://www.trybunal.gov.pl/index2.htm>.

⁸⁵ The issue of multiple references was examined by the Constitutional Tribunal i.a. in the judgment with file reference number K 20/03 (OTK 2004/7A/63) concerning regulation of the Act of the 23rd of November 2002 on the amendment to the Act on local government of a commune and amendments to some other acts (Journal of Laws Dz. U. z 2002, Nr 214 poz.1806).

⁸⁶ This mistake consists of explaining (defining) of the meaning of a defined expression by means of an expression which is incomprehensible to the recipient of the definition, more: Nawrot 2007, 88-89).

⁸⁷ source: <http://www.trybunal.gov.pl/index2.htm>.

without uniformity. Introduction of any changes violating the legislative techniques certainly has a negative impact on the level of legal clarity and transparency. In effect, the regulations of material law become distorted and the institutions of formal law do not operate properly (Działocha and Zalasinski 2006, 13). In the judgment with file reference number K 53/02 (OTK 2003/8A/83)⁸⁸, the judges of the Tribunal expressed their disapproval of “the way of indicating successive changes in the content of regulations by the sequence of legislative actions uncoordinated with one another, which results in gross ambiguities and requires taking excessively complicated interpretative measures” (OTK 2003/8A/83).

The legislative correctness denotes also establishing legal rules consistently and logically, taking into account system-wide principles and axiomatic norms. Contradiction of the determinacy principle of legal rules will result in establishing in the legal system those regulations, which will make inconsistent law that cannot be explained in accordance with other legal rules. Purpose and correctness of enforcing regulations do not justify making law incidental and chaotic way. Such arbitrariness of enforcing the regulations constitutes a violation of the principle of correct legislation (judgment with file reference number P 28/07)⁸⁹.

The directives of editing the legal rules, which result from the principle of correct legislation and concern the amendments to regulations, should be strictly adhered to, especially in the case of amendments to a code. The Tribunal has emphasised the fact that a legislator should refrain from making amendments in codes in an indirect way. It may result in a seemingly unchanged text being, in fact, substantially modified as far as its content is concerned by provisions of detailed acts. Avoidance of this problem is even more essential when an amendment concerns the norms of a fundamental nature, which regulate the main areas of particular legal institutions of a given branch of law (judgment with file reference number K 5/07)⁹⁰.

It should be stressed that depending on the subject of a given regulation, diversity in the levels of clarity, precision and correctness of legal laws is admissible. It mainly concerns the necessity of introducing specialist terminology (e.g. IT or medical terminologies) to the language of legal texts. In such a situation, the precision of a legal text may be ensured at the expense of its clarity (more: Zalasinski 2008, 213). According to T. Spyra, the higher the level of complexity of the regulated social relations, the lower the demand for determinacy should be, as he rightly stated (Spyra 2003, 68). Concluding the deliberations concerning the monitoring of the constitutionality of regulations due to the violation of the determinacy rule, attention

⁸⁸ The Tribunal states in the judgment the unconstitutionality of the Act of the 23rd of November 2002 on the amendment to the Act on harbours and marine ports.

⁸⁹Source: <http://www.trybunal.gov.pl/index2.htm>.

⁹⁰Source: : <http://www.trybunal.gov.pl/index2.htm>.

should be paid to the currently prevailing position, according to which a regulation may be deemed unconstitutional due to violation any of the aforementioned features (especially limiting clarity or its precision) only when these "infringements" cannot be removed by means of the basic methods of the interpretation of the law (especially that performed by courts in the process of making law), (more: Zalański 2008, 212-214).

In the jurisdiction of the Constitutional Tribunal it has been stressed many times that the determinacy principle becomes especially important in relation to legal rules which directly relate to the legal status of an individual (Judgments with file reference numbers K 28/02 (OTK 2003/2A/13), K 37/02 (OTK 2003/9A/96), K 45/02 (OTK 2004/4A/30). To assess the compliance of a regulation with the principle of competent legislation, the Tribunal explains that each regulation, which makes laws and imposes obligations on citizens, should unequivocally indicate the subject recipient and circumstances to which it applies. The method of formulating the regulation should ensure uniform interpretation and application. The scope of its application should include the situations, which unequivocally indicate the purpose of the establishment of the regulation limiting the exercise of constitutional liberties and rights by a rational legislator (I.a. judgments with file reference numbers K 33/00 (OTK ZU 2001/7/ 217), K 47/04 and K 36/06)⁹¹.

The strictness of adherence to the determinacy principle of legal rules is dependent on the branch of law and the range of its subject recipients. The highest level of discipline in the legislator's adherence to the objective principle is applied the regulations of a repressive nature (of criminal law), fiscal law, customs law, the regulations determining the scope of power of public authorities as well as those regulations that the subject recipients of which naturally have a limited ability to understand the legal content (Salitra 2003, 48) Regulations, which apply to the last category of people are mainly those concerning national insurance. The Constitutional Tribunal emphasised in the judgment with file reference number U 11/97 that the recipients of this branch of law are mainly elderly people, with limited possibilities in life, for whom the retirement and disability benefits are often the only source of income. That is why the violation of the discussed order constitutes "the determination of their rights in an unclear manner, with numerous and vague references, which prevents them from understanding the content of valid laws in this field and, at the same time, they exclude to a large extent control over the national insurance bodies" (judgment with file reference number: U 11/97 (OTK ZU 1997/5-6/67), quoted in: Salitra 2003, 48).

With reference to repressive regulations, the precision and determinacy norms concerning regulations must be obeyed in the most restrictive manner in the branch of criminal law *sensu stricto*, especially those laws, which affect directly the fundamental liberties and rights guaranteed by the fundamental law (judgment with file reference

⁹¹ Source: <http://www.trybunal.gov.pl/index2.htm>.

number P 50/07)⁹². According to the Tribunal, more freedom should be given to the regulations concerning offences, but the highest degree of freedom should be given in the branch of disciplinary law. The norm of criminal law in compliance with the determinacy principle should indicate in a consistent and unequivocal manner the subject recipient of a ban, features of a prohibited act and the type of penalty sanction for committing a breach of the prohibition. The Tribunal stressed many times that “the material elements of a criminal act must be defined in the law in a complete, precise and unequivocal manner” (judgments with file reference numbers K 2/02 (OTK 2003/1A/4), SK 13/05 (OTK 2005/8A/91), SK 42/05 (OTK 2006/10A/148), quoted in: Zalasinski 2008, 199). The rule of determining the content of the regulations of criminal law in a precise and accurate manner is especially important in the face of the valid article 42, sec. 1 of the Constitution of the Republic of Poland, according to which only a person, who perpetrated a prohibited act under penalty by the law valid at the date of its perpetration is subject to criminal responsibility. Nevertheless, this principle does not exclude the possibility of punishment for an act, which constitutes a crime in accordance with the regulations of international law (judgments with file reference numbers SK 13/05 and P 50/07). The regulation states that the recipient of the norm of criminal law should know whether of his/her conduct and in which circumstances is subject to criminal responsibility. As far as the regulations of tax law are concerned, the Tribunal stated that they must ensure the highest responsibility and predictability in the decisions taken by the fiscal authorities (i.a. judgments with file reference numbers P 13/02 (OTK 2002/7A/90), K 7/05 (OTK 2006/8A/107), quoted in: Zalasinski 2008, 199). Based on the tax law, the discussed order is even more important in the face of the valid article 84 of the Constitution. The established regulation stipulates that everybody is obliged to bear burdens and public benefits including the taxes stipulated in the act. The normative content of this act stipulates that the legislator has an obligation to establish the tax regulation in such a way that the legal norms determining the obligatory conduct of a taxpayer are precise and do not raise any doubts. Additionally, the obligation of the legislator is specified the article 217 of the Constitution, which imposes on the legislator the duty of determining in the act the essential elements of a tax obligation, which should be understood as the necessity of being extremely precise while determining the subject and object of taxation and tax rates (judgment with file reference number SK 39/06)⁹³.

A lower level of determinacy might be allowed in the normative acts including the regulation concerning private law, but within this scope a higher level of determinacy should characterise the regulations concerning the statue of limitations,

⁹² Source: <http://www.trybunal.gov.pl/index2.htm>.

⁹³ Source: <http://www.trybunal.gov.pl/index2.htm>.

expirations, indemnification liability, sanction of nullity as well as limitations of the freedom of contract (more: Spyra 2003, 13).

The determinacy principle of legal rules constitutes the directive directed to the legislator, imposing on him the obligation to make law in compliance with "the canon of legislative works" binding in a legally based state. Currently in Poland the regulation of the Prime Minister of the 20th of June 2002 concerning "the Principles of Legislative Technique" is of such nature^{94, 95}. The annex to this act includes a set of directives of a technical nature (and also partly of a didactic nature) specifying the ways in which the drafts of normative acts, especially laws and ordinances, should be edited in terms of logic and language⁹⁶. The necessity of the legislator's adherence to directives included in the regulation was aptly expressed by D. Salitra⁹⁷, according to whom "the consistent application of these rules by all entities which enact law (...) ensures a considerable degree of uniformity of formulating the normative acts, and this in turn facilitates the interpretation of legal texts and contributes to the development of the state of legal certainty and legal safety of citizens" (Salitra 2003, 47). Due to the fact that the act is a part of the system of legal sources, the edition of a legal rule contrary to the directives included in the discussed annex to the regulation may lead to the legislative incorrectness of the normative act in which it was included. In consequence, this incorrectness may lead to the lack of precision and clarity of regulations, and in effect to the violation of the determinacy principle of legal rules. Such a situation may result in the violation of the principle of competent legislation and the regulation may be deemed to be against the principle of a legally based state specified in article 2 of the Constitution and removed from the legal system (Wronkowska 1990, 7).

To sum up the deliberations concerning the determinacy principle of legal rules it should be stressed once again that its content does not have any limited scope and it is still being developed. The latest jurisdiction of the Constitutional Tribunal indicates the extension of understanding of the principle beyond the procedural aspect of making laws. It results in establishing the postulate, which stipulates that the determinacy principle of legal rules may constitute the basis for the constitutional control of purpose and rationality of the legislator's actions (judgments with the file reference numbers K 14/03 (OTK2004/1A/1), K 28/02 (OTK 2003/2A/13), quoted in: Zalasinski 2008, 208-209).

⁹⁴ Dz. U. 2003, Nr. 100, poz. 908

⁹⁵ An interesting discussion on the impact of the violation of directives included in the Principles of Legislative Technique on the constitutionality of a legal act was caused by the article by Wojtczak 2005, 97 and subsequent. More discussion i.a.: Wronkowska 2005, 89 and subsequent; Wierczyński 2005, 89 and subsequent; Zalasinski 2005, 94 and subsequent.; Bąkowski 2006, 92 and subsequent. Quoted in: *Zalasinski 2008, 204.*

⁹⁶ The detailed description of the directives included in the enacted regulation: Wronkowska and Zieliński 2004, .

⁹⁷ Referring to Wronkowska 2000, 81; Wronkowska – Jaśkiewicz 2000, 11.

The judgment no. K 28/02 is an example here, and the Constitutional Tribunal emphasised in it that the principles of proper legislation, apart from the requirement for clear, precise and correct formulation of regulations, include also “the fundamental, in respect of the legislative process, stage of formulating the objectives which are to be achieved by the establishment of a particular legal norm. They constitute the basis for evaluating if the ultimately formulated legal rules properly specify a given norm and if they will be useful for the accomplishment of the intended objective” (quoted in: Działocha and Zalański 2006, 13). In the judgment P 6/04 (OTK 2003/2A/13) it is stipulated that if the assumption of the legislator’s rationality constitutes a point of departure, especially the rationality of particular legal norms, then the rationality of the established law should be deemed to be “a component of competent legislation.” Here it should be stressed that broader understanding of the principle of competent legislation does not meet with full approval in the doctrine. The Tribunal is subjected to criticism for the extension of its authority to control the constitutionality of the legislator’s actions for rationality and purpose (which is not confirmed in the Constitution) as well as for the negative consequences of treating the objective principle as a blanket clause referring to “the principles of competency” (Działocha and Zalański 2006, 14).

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