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THE EDITORIAL DIRECTIVE OF NON-REPETITION OF REGULATIONS – SELECTED THEORETICAL AND PRACTICAL ISSUES ON THE EXAMPLE OF ARTICLE 5 OF THE CIVIL CODE AND ARTICLE 8 OF THE LABOUR CODE

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Abstract. The principles of legislative technique are directives that regulate the purposeful, rational and knowledge-based formulation of normative acts. Their primary purpose is to ensure the coherence and completeness of the system of law and the transparency of the texts of normative acts. Representatives of the literature on the subject, as a rule, unanimously emphasise that this objective is disturbed by unjustified repetitions. However, the practice of lawmaking shows that, on occasions, the legislator decides to shuffle repetitions in the texts of normative acts. Notable instances of such repetition are the provisions of Article 5 of the Civil Code and Article 8 of the Labor Code. The issues addressed in the article constitute interesting research problems due to the general prohibition of repetitions, resulting from the content of para. 4 of the Principles of Legislative Techniques.

Keywords: lawmaking; principles of legislative technique; directive on non-repetition of provisions; Civil Code; Labour Code.

INTRODUCTION

Paragraph 4 of the Regulation of the Prime Minister of 20 June 2002 on Principles of Legislative Techniques[1] introduces the directive of non-repeatability of provisions. Meanwhile, the legislator, who should meet the requirements of rational lawmaking, for some reason decides to use repetitions in the texts of normative acts. An example of such repetition is the wording of Article 8 of the Labour Code,[2] which is an exact repetition

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[1] Regulation of the Prime Minister of 20 June 2002 on Principles of Legislative Technique, Journal of Laws of 2016, item 283 [hereinafter: PLT].

[2] Act of 26 June 1964, the Labor Code, Journal of Laws of 2023, item 1465 as amended [hereinafter: LC]. Article 8 stipulates that "One may not make a use of one's right that would be contrary to the social and economic purpose of that right or the principles of social intercourse. Such an act or omission of the right holder shall not be considered an exercise

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of Article 5 of the Civil Code.[3] This constitutes an interesting research issue not only in view of para. 4(1) PLT, but also in view of Article 300 CC, which opens up a normative possibility to appropriately apply the provisions of the Civil Code to matters not regulated by the provisions of the labour law to the employment relationship, if they are not contrary to the principles of the labour law. It should be pointed out that *de lege lata* Article 5 CC and Article 8 LC is the only case of such repetition between the two codes. Both codes regulate two, completely different, spheres of social relations. The peculiarities of civil and labour relations and the axiological attitudes of these branches of law are different.

As a subsidiary matter, it should be pointed out that the issue is an interesting one also due to other threads, which, due to the scope of the publication, will not be analysed for the purposes of this article. These issues include the fact that the analysed provisions relate to the issue of abuse of rights and determine the limits within which it is permissible to exercise subjective rights (in civil law and labour law respectively), which have been determined by the principles of social co-existence and socio-economic purpose of the right. The principles of social co-existence and the socio-economic purpose of the right are general clauses, which by their nature are undefined. The construction of a general clause is one of the typical means of legislative technique, serving to make the drafted normative act, as well as the process of applying the law, more flexible.[4] Both the provisions of Article 5 CC and Article 8 LC are found in the essential (general) parts of the codification, which significantly extends their scope of application to

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of the right and shall not be protected."

[3] Act of 23 April 1964, the Civil Code, Journal of Laws of 2024, item 1061 [hereinafter: CC]. Article 5stipulates that "One may not make of his right a use that would be contrary to the social and economic purpose of that right or to the principles of social intercourse. Such an act or omission of the right holder shall not be considered an exercise of the right and shall not be protected."

[4] According to the author, the concept of a clause should be understood in two ways – legislative and decisional. In the first view, the general clause is an element of the process of lawmaking (or rather, lawmaking, which in the Polish legal order is the primary way of creating law). It is an undefined phrase contained in a legal provision, referring to gradings, values, extra-legal norms. The legislator formulates the criterion of the general clause in a general form, without specifying what is included in its content. In decision-making terms, the general clause is an element of the process of applying the law (the normative basis of the decision to apply the law). This is a construction included in the applicable legal provision, or more precisely, forming a part of this provision, which authorizes the entity applying the law to base a specific decision to apply the law on the extra-legal criterion indicated in the body of this provision. The role of the authority is to decode and determine the content of the clause, and incorporate it into decision-making processes. The content of the clause is supposed to reflect the gradations, values and norms that are generally accepted from the point of view of a given society or social group.

the remaining institutions of the Code (and the general clauses contained therein should be regarded as the so-called meta-clauses). Moreover, common to the provisions in question is the fact that the principles of social co-existence and social and economic purpose of law have been recycled into the Polish legal order from the Soviet legal order. During the People's Republic of Poland (PRL), the provisions in question constituted, together with the content of Article 4 CC and Article 7 LC[5] it was tool for the ideologisation and politicisation of the processes of law application. Despite the profound change in social axiology that took place after the collapse of the People's State, the Polish legislator did not decide to abandon clauses with a Soviet connotation. These clauses continue to function to this day in the new democratic legal order.

In view of the above, the basic research question posed in this paper is therefore whether the literal repetition in the Labour Code (Article 8 LC) of a provision of the Civil Code (Article 5 CC) is an unnecessary repetition or a deliberate and conscious legislative effort?

The research methods used in this thesis are adequate in relation to the research assumptions adopted. It is the formal-dogmatic method, the method of terminological and conceptual analysis and the method of analysis of justifications of court decisions.

1. LEGISLATIVE TECHNIQUE AND RULES

The Polish legal order belongs to the culture of established law. When using the term culture of law, the Author has in mind the meaning of this notion accepted in the literature on the subject, understood as „a set of features of legal orders, usually occurring on a relatively separate territory, but transcending the borders of individual states and the validity of their legal systems" [Korybski, Leszczyński, and Pieniążek 2005, 57]. The culture of statute law is distinguished from common law culture first and foremost by the fact that in this culture, the state is the primary law-making act [Maroń 2011, 121]. The result of the lawmaking process is a normative act, which is a set of legal rules in which patterns of behaviour are expressed, forming the content of legal norms. Lawmaking takes place in a strictly defined procedure and form, and this process is clearly separated from the process of its application in accordance with the principle *Iudicis est ius dicere, non dare* (It is the judge's job to judge, not to legislate). On the other hand, the basis

[5] The regulations expired on the basis of two amendments: the Act of 28 July 1990 on Amendments to the Civil Code (Journal of Laws No. 55, item 321) and the Act of 2 February 1996 on Amendments to the Labor Code and Amendments to Certain Laws (Journal of Laws No. 24, item 110).

for the recognition of the norms in question as binding is theoretical justification (the legal norm was formulated in accordance with the applicable procedure by a competent authority). An important role in the law-making process is played by the legislative technique, which includes issues of a substantive, editorial and technical nature concerning the correct elaboration and editing of the content of a normative act [Leszczyński 2003, 18; Korybski, Leszczyński, Sobczak, et al. 1993, 36].

It should be explained that legislative technique is an element of the rational lawmaking model. Based on the assumption of the rationality of the legislator's actions, various models of rational lawmaking have been constructed [Wronkowska 1982, 16; Wróblewski 1989, 45-66; Leszczyński 2003, 40]. In the model approach, the need for a legislative technique arises when the legislator chooses the legal means which, in its opinion, under specific conditions will best serve the achievement of its stated objectives. The means chosen by the legislator must be transformed into a form of legal regulation, in the form of a legal rule, a set of legal rules or a normative act. Weaknesses or mistakes in the formulation of normative regulations may render the objectives pursued by the legislator impossible, even depriving them of their intended effectiveness. A poorly edited text may lead to interpretation problems in the process of applying the law. This is why it is so important for the legislator, when creating the law, to implement the directives arising from the principles of legislative technique. The issue of legislative technique is one of the most topical issues concerning legislation. A significant contribution to the development of legislative technique was made by representatives of legal theory, such as L. Petrażycki [Petrażycki 1959; Idem 1968], J. Wróblewski [Wróblewski 1989], S. Wronkowska [Wronkowska 1982] or M. Zieliński [Zieliński 1993].

In the history of Polish law, sets of directives on legislative technique were issued in the form of annexes to normative acts. The first such act was Circular of the Minister of Internal Affairs No. 99 of 2 May 1929 on the set of rules and forms of technical drafting of laws and regulations,[6] to which the annex was the "Collection of Principles and Forms of Legislative Technique". The next act was Order No. 55-63/4 of the Prime Minister of 13 May 1939, which was published in the form of the book publication "Principles of legislative technique."[7] The third act is Ordinance No. 238 of the Prime Minister of 9 December 1961 on "Principles of Legislative Techniques," which, like the previous principles, was published in book

[6] Interpretive Note of the Minister of the Interior No. 99 (OL. 2048/2) of 2 May 1929 on a set of rules and forms for the technical drafting of laws and regulations, Official Gazette of the Ministry of the Interior No. 7, item 147.

[7] Principles of Legislative Technique (applicable to the legislative work of the government according to the Order of the Prime Minister of 13 May 1939, No. 55-63/4, Warszawa 1939).

form.[8] Another collection was the resolution of the Council of Ministers on the principles of legislative technique, which was published in the official ministry journal.[9] This act was an internal act which, after the entry into force of the 1997 Constitution of the Republic of Poland, was in force without legal foundation.[10] It was also the first act referred to by the Constitutional Court and the ordinary courts. The normative acts cited above were binding only on the Council of Ministers and the bodies subordinate to it. The currently binding 'principles of legislative technique' are addressed to all bodies authorised to create legal regulations and should be observed at the stage of drafting and editing normative acts.

De lege lata, the principles of correct drafting of normative acts are the subject of normative regulation of the principles of legislative technique, which constitute an annex to the Regulation of the Prime Minister of 20 June 2002 on "Principles of Legislative Technique." The Annex to the Regulation is the fifth official set of legislative technique directives in the Polish legal system. The principles of the legislative technique have been, on the basis of the statutory authorisation set forth in Article 14, paragraph 4, item 1 of the Act of 8 August 1996 on the Council of Ministers.[11] They regulate issues concerning the drafting and editing of draft laws, draft executive acts (regulations), draft normative acts of an internal nature (resolutions and orders), draft acts of local law and typical measures of legislative technique. To date, the Principles of Legislative Technique have been amended once, i.e. by the Ordinance of the Prime Minister of 5 November 2015 amending the Ordinance on "Principles of Legislative Technique."[12]

They have been defined in the literature as "directives governing the deliberate, rational, knowledge-based formulation of normative acts" [Wierczyński 2010, 16]. Attention is drawn to their praxeological [ibid., 25], technical [Wronkowska 1990, 7] and intentional character [Gromski 2007, 4-5, Wronkowska-Jaśkiewicz 2004, 15]. The legal definition of the Principles of Legislative Techniques has been standardised in Article 14(5) of the Acts on the council of ministers. According to this definition, the Principles are "elements of the methodology of preparation and the manner of editing drafts

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[8] Principles of Legislative Technique, Warszawa 1962.

[9] Resolution No. 147 of the Council of Ministers of 5 November 1991 on principles of legislative technique, "Monitor Polski" of 16 December 1991, No. 44, item 310.

[10] This resolution ceased to be in force by virtue of Article 75(1) of the Act of 22 December 2000, amending certain statutory authorizations to issue normative acts and amending certain acts (Journal of Laws No. 120, item 1268). The resolution brought Polish legislation into line with the requirements of the 1997 Constitution of the Republic of Poland.

[11] Act of 8 August 1996 on the Council of Ministers, Journal of Laws of 2024, item 1050 [hereinafter: CM].

[12] Ordinance of the Prime Minister of 5 November 2015, amending the Ordinance on "Principles of Legislative Technique" (Journal of Laws, item 1812).

of laws and regulations and other normative legal acts, as well as the conditions to which the justifications of drafts of normative legal acts should correspond, as well as the rules of conducting amendments to the system of law" (Article 14(5) CM). Their application should "ensure, in particular, the coherence and completeness of the legal system and the clarity of the normative texts of legal acts, taking into account the acquis of legal science and the experience of practice" (Article 14(5) CM). Given the literal formulation of this provision, it should be noted that the purpose of the principles of legislative technique is to ensure the coherence and completeness of the legal system and the clarity of the texts of normative acts.

While the representatives of the subject matter agree on the technical character of directives resulting from the Principles of Legislative Techniques, doubts are expressed as to their normative character [Wierczyński 2010, 25]. S. Wronkowska indicates that they are only "a collection of rules indicating how to correctly construct normative acts" and not "a set of rules for validly performing acts of lawmaking" [Wronkowska-Jaśkiewicz 2004, 11]. A similar view was expressed by the Supreme Administrative Court in its decision of 25 September 2018,[13] on the issue of principles of legislative technique in the context of assessing the validity of the law in force. The Supreme Administrative Court pointed out that the principles of legislative technique "[…] are a set of directives addressed to the legislator (or more precisely to the legislators) indicating how to correctly express legal norms in legal provisions and how to group them in normative acts [...]."[14] In this ruling, the Supreme Administrative Court determined that the Principles could not be used to assess the legitimacy of the law in force, basing itself, at the same time, on another well-established line of jurisprudence, according to which "a breach of the legislative principles set out in the annex to the regulation does not constitute grounds for declaring a normative act invalid."[15]

In the author's opinion, the problem of sanctions for violation of the Principles of Legislative Techniques is properly raised in the literature and case law. In fact, neither the Act on the Council of Ministers, nor the Principles of Legislative Techniques, nor any other normative act in force *de lege lata* in the Polish legal system, provide for the possibility to declare a normative act invalid on the grounds that the legislator misapplied the directives arising from the Principles of Legislative Techniques. One has to agree with G. Wierczyński, who notes that they are "not classical

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[13] Judgment of the Supreme Administrative Court of 25 September 2018, ref. no. I OSK 127/18, Lex no. 2565952.

[14] Ibid.

[15] See: judgment of the Supreme Administrative Court of 22 March 2012, ref. no. II OSK 22/12, Lex no. 1145573, and judgment of the Supreme Administrative Court of 18 October 2017, ref. no. II OSK 2705/16, Lex no. 2406421.

directives of a normative nature and even establishing them in the form of a normative act does not change this" [Wierczyński 2010, 25]. They are largely norms of an instructive nature.

2. EDITORIAL DIRECTIVE TO AVOID PROVISIONS

Paragraph 4 PLT introduces the directive of a general prohibition of repetition. This principle is divided into several specific directives.[16] For the purposes of this article, it seems appropriate to focus consideration only on para. 4(1) PLT, which provides that a statute may not repeat provisions contained in other statutes.

It should be explained that repetitions contained in a statute may have the character of external repetitions (in different statutes) and the character of internal repetitions (within the same statute). The prohibition of internal repetitions is provided for in para. 21 and 23 PLT.

It is commonly indicated in the literature that the repetition of a provision is "the exact repetition of the same content" [Wronkowska and Zieliński 2004, 32-33]. Repetition, on the other hand, is not "the inclusion of almost the same content but where, in a manner affecting that content, one or more words or punctuation marks are changed, added or omitted" [ibid.]. G. Wierczynski postulates that the legislator "must avoid unnecessary repetitions, otherwise the bodies applying the law will try by way of interpretation to give these repetitions a new normative meaning, different from the meaning of the provision being repeated, and legal transactions will find provisions expressing not only what the legislator intended" [Wierczyński 2010, 67]. According to this author, a different interpretation of repetition by the authorities applying the law may lead to a provision repeating another provision being regarded as an unnecessary statutory *superfluum* [ibid.].

S. Wronkowska and M. Zieliński, on the other hand, consider that repetitions are justified only in such normative acts as statutes or regulations. According to the authors, these acts are the primary source of information for certain circles of the public and, therefore, it is justified to strive "to make the information as complete as possible, which may require repetition of the provisions of the act" [Wronkowska and Zieliński 2004, 34].

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[16] Para. 4 PLT reads as follows: "1. A law shall not repeat provisions contained in other laws. (2) A law shall also not repeat provisions of international agreements ratified by the Republic of Poland and directly applicable provisions of normative acts established by international organizations or international bodies. (3) A law may refer to the provisions of the same or another law and to the provisions referred to in paragraph (2); it shall not refer to the provisions of other normative acts. (4) A law may not contain provisions prescribing the application of other normative acts, including the agreements and acts referred to in paragraph (2)."

In the context of the above-mentioned considerations, attention should be drawn to the innovative research conducted by M. Suska on a group of legislators, which showed that exact repetition can, in certain situations, increase the communicability of a law [Suska 2023, 188]. More precisely, the results of his research indicate that deviations from the directive to avoid repetition in practice meet with approval. Respondents to the above-mentioned author's research advocate that repetition, especially external repetition, is defended by the desire to create a comprehensive law providing the addressees with the fullest possible information about the applicable legal norms [ibid.]. Furthermore, respondents to the above-mentioned author's research also point to "the need to make the regulation make logical sense", "to improve its communicability", or that it would be "difficult for the addressee to know that it is necessary to refer to yet another act" [ibid.]. Examples of this are the following statements "Indeed, with Statutory Acts, in order to better assemble the act, [...] the provisions of the Act are repeated" or "Generally it is not allowed to repeat the provisions of the Act, but sometimes it is worth doing so" [ibid.].

In view of the above, it should be stated that in fact the use of unnecessary repetitions by the legislator may give rise to the risk of giving them a different normative meaning. In a model approach, the legislator, wishing to avoid the accusation of incoherence, incompleteness, illegibility or, finally, vagueness of legal provisions, should avoid using repetitions. On the other hand, on the other hand, repetitions may, in certain situations, increase the communicability of the law, in particular given that their addressee is the ordinary citizen.

3. CIVIL CODE VERSUS LABOUR CODE

Returning to the issue of repetition that occurs between Article 5 LC and Article 8 CC, it must be emphasised that both codifications – the Civil Code and the Labour Code – regulate two, completely different, spheres of social relations. The peculiarities of civil and labour relations and the axiological attitudes of these branches of law are different.

The branch of civil law is undeniably the broadest branch in the legal system. According to the pandect systematics, its division into: general part, property law, obligations, family law, inheritance law is accepted. Civil law, in doctrinal terms, can be defined as a branch of law that encompasses a set of rules regulating property and non-property relations between autonomous subjects on the basis of their equivalence [Safjan 2007, 30].

The Civil Code regulates civil law relations, i.e. the creation, content, cessation and protection of subjective rights and civil obligations to which all

subjects of civil law are entitled. A party to a civil relation may be any natural person and a legal person, equipped with legal capacity and, in general, with the capacity to perform legal acts (unless it follows from the wording of the provisions that they apply only and exclusively to a certain group of subjects). As a general rule, each of these entities may act as a person entitled or obliged under a civil law relationship governed by the law of property, contract law or the law of succession.

Civil law relationships are, as a rule, of a pecuniary nature, but may also be of a non-pecuniary nature. The recognition of a social relationship as a civil law relationship results in the application of civil law, its interpretation and fundamental principles to that relationship. The guiding principle of civil law is the principle of party autonomy and equality of parties.

The axiological foundations of civil law are the basic principles of this branch of law. A. Wolter, I. Ignatowicz, K. Stefaniuk distinguish among the principles of civil law the following: the principle of protection of a human being, the principle of equality of subjects before the law, the principle of subjective rights, the principle of autonomy of will of the parties, the principle of protection of good faith, the principle of mitigating the strictness of legal regulations, the principle of equal protection of each property, the principle of civil liability for obligations, the principle of liability for damage, the principle of full protection of family, the principle of inheritance, the principle of civil law protection of rights on intangible goods, the principle of protection of civil rights by independent courts [Wolter, Ignatowicz, and Stefaniuk 2020, 33-34].

Labour law, on the other hand, in doctrinal terms, is a distinct branch of law encompassing all the legal norms regulating the employment relationship and other social relations closely related to the employment relationship [Liszcz 2024, 17]. In addition, the Labour Code uses a normative definition according to which "labour law is the provisions of the Labour Code and other laws and regulations defining the rights and obligations of employees and employers, as well as the provisions of collective bargaining agreements and other collective agreements based on the law, regulations and statutes defining the rights and obligations of the parties to the employment relationship" (Article 9 LC).

The characteristic elements of the employment relationship are: voluntariness, personal provision of work, payment for work performed, subordination of the employee, obligation to act diligently, risk of the employing entity.

The freedom to establish the employment relationship, the choice of employer and employee and the content of the employment contract are also guaranteed by the labour legislation, but these principles operate in a completely different normative dimension. It must be stated that the principle of autonomy and equality of the parties to a certain extent only applies until

the employment relationship is established. An employment relationship is a social relationship between an employee and an employer. An employee can only be a natural person.

The normative shape of the employment relationship, as well as of labour law as a whole, is designed to protect the broadly understood welfare of the employee, the welfare of the employer, as well as the common good. The content of the legal relationship is influenced by the protection of the employee as the weaker party to the employment relationship, the broadly protective aspect of labour law, the socio-political aspect (labour law as an instrument of state policy), the special characteristics of labour law as a hybrid branch of law (combining elements of civil law and administrative law [Koman 2020, 841-53]. The purpose of labour law is to protect the professional and social interests of employees, the financial interests of the employer, the welfare of the employer and to guarantee the proper course of work. Labour law performs specific functions, which include a protective, organising, irenic and distributive function [Baran 2022, 45].

CONCLUSIONS

It should be concluded that the repetition occurring between Article 5 CC and Article 8 LC is a justified and intended legislative action. This repetition makes it possible to give a different normative meaning to equal general clauses, setting the limits of abuse of rights in the process of judicial application of the law. Normative acts such as the Civil Code and the Labour Code are extensive in nature. The broad normative approach of these acts determines the necessity of repetition, so that in the practice of law application there are no doubts as to the scope and manner of application of this construction.

Despite the construction of Article 300 LC, the repetition of Article 8 LC is justified due to the fact that this provision is significant for the entire labour law system. It should be stated that the repetition of a *stricti iuris* provision, which specifically regulates a pattern of behaviour for the addressees of the provision, is different from the repetition of a provision which is, like Article 8 LC, a vehicle of a general clause.

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