

# THE PRINCIPLE OF LEGAL CERTAINTY AS A FUNDAMENTAL ELEMENT OF THE FORMAL CONCEPT OF THE RULE OF LAW

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Volume 110, Number 2, September 2008

URI: <https://id.erudit.org/iderudit/1045553ar>

DOI: <https://doi.org/10.7202/1045553ar>

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Publisher(s)

Éditions Yvon Blais

ISSN

0035-2632 (print)

2369-6184 (digital)

[Explore this journal](#)

Cite this article

KORDELA, M. (2008). THE PRINCIPLE OF LEGAL CERTAINTY AS A FUNDAMENTAL ELEMENT OF THE FORMAL CONCEPT OF THE RULE OF LAW. *Revue du notariat*, 110(2), 587–605. <https://doi.org/10.7202/1045553ar>

# **THE PRINCIPLE OF LEGAL CERTAINTY AS A FUNDAMENTAL ELEMENT OF THE FORMAL CONCEPT OF THE RULE OF LAW**

**Marzena KORDELA\***

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## 1. FORMAL AND SUBSTANTIVE FORMULATION OF LEGAL PRINCIPLES. DISTINGUISHING CRITERIA

**1.1.** The conception of the rule of law from the moment of becoming methodologically mature enough to be not only the subject matter of legal dogmatics but also of legal theory as a separate branch of legal sciences has made it possible to systematically demonstrate its formal and substantive aspects.

Even a small dose of precision in presenting the catalogue of features, values and principles<sup>1</sup> which have been given constitutive status in particular doctrines of the rule of law allows it to be divided into two groups: substantive and formal (respectively: features, values and principles). A vast majority of publications, not only text-

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1. The three terms: features, values and principles, refer to three different dimensions of law, which are intrinsically included in the construction of theory of law. "Features" refer to the factual layer, and on linguistic level they are grouped in propositions in a logical sense, thus in expressions which may be qualified as either true or false. This category encompasses first and foremost descriptions of institutional decisions occurring in given legal systems, and seen as forms of practical realization of the principle of the rule of law, e.g. varying position of the organ acting as constitutional tribunal in legal systems in Germany or France. "Values" in turn refer to the axiological layer and are applied to qualify certain states of affairs as either 'good' or 'bad' within a definite axiological system, such as for example system of values of the legislator. And "principles" are characteristic for a normative layer and constitute a particular category of legal norms, different from usual norms by their greater importance and extremely powerful axiological justification (as for the notion of principle see: more general: J.L. BERGEL, *Théorie Générale du Droit*, 3rd ed., Dalloz, 1999, pp. 91-96; also: R. ALEXY, *On the Structure of Legal Principles*, *Ratio Juris*, 2000, No. 3, pp. 294-304; R. DWORKIN, *The Model of Rules* (in:) *Philosophy of Law*, ed. by J. FEINBERG and H. GROSS, 3rd ed., Wadsworth, 1986, pp. 149-166). Unlike propositions in a logical sense, neither evaluative statements nor principles can be qualified as true or false (as for distinction between these three categories of statements see e.g. Z. ZIEMBINSKI, *Practical Logic*, PWN-Warszawa and D. Reidel Publishing Company – Dordrecht and Boston, 1976, pp. 122-130). Since these three types of statements concern the same subject, certain functional correlations may occur among them. Principles of law frequently aim to protect certain values such as human dignity or certainty. Therefore it is possible to relevantly discuss both the principle of certainty of law as well as the value of certainty of law. Principle viewed as a normative category and value as axiological category both possess the quality of "legal". Therefore parallel to the principle of rule of law there exists "formal rule of law values" (R.S. SUMMERS, *A Formal Theory of the Rule of Law*, *Ratio Juris*, 1993, Vol. 6, p. 136).

books<sup>2</sup> but also judicial decisions, mostly of courts of highest instances<sup>3</sup> make use of this possibility. The most characteristic element in qualifying certain principles of the rule of law as formal or substantive is the decisiveness of this act. It seems to stem from a dual source.

**1.1.1.** Firstly, there is a doctrinal *communis opinio* as to formal or substantive character of certain principles. No one argues that the principle of generality of law belongs to the formal order whereas the principle of human dignity belongs to the substantive order. However, beside such principles there are those which are not determined in opposition of formal to substantive, e.g. the principle of the right to court.

**1.1.2.** Secondly, the analysis of a principle in either a formal or substantive perspective is frequently instrumental in the process of law application. A principle qualified as substantive is often used as a potent persuasive measure to adopt a certain decision if a counter proposal is justified “only” in a formal value. In developed legal systems, which function in non-extremely exceptional circumstances, this line of argumentation may only be justified in the superficial layer; in a deep layer it is practically unholdable as it is based on a false, albeit quite common, assumption that in an axiological hierarchy a set of formal legal values is subordinate to a set of substantive values, therefore all conflicts between any formal value and any sub-

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2. See e.g. R. ALEXY, *A Theory of Constitutional Rights*, trans. by J. RIVERS, Oxford University Press, 2002, p. 82; L. GARLICKI, *Polskie prawo konstytucyjne. Zarys wykładu (Polish Constitutional Law. A Lecture Outline)*, 5th ed., Warszawa, 2001, p. 60-62; M. ZMIERCZAK, *Współczesna dyskusja nad pojęciem państwa prawa we Francji (in:) Studia z historii państwa, prawa i idei (A Contemporary Discussion on the Concept of the Rule of Law in France (in:) Studies in History of State, Law and Ideas. A Book Dedicated to Professor Jan Malarczyk)*, A. KORBOWICZ and H. OLSZEWSKI (eds.), Lublin, 1997, p. 505.

3. In reference to the Polish Constitutional Tribunal, see: L. GARLICKI, *Materialna interpretacja klauzuli demokratycznego państwa prawnego w orzecznictwie Trybunału Konstytucyjnego (in:) Zasada demokratycznego państwa prawnego w Konstytucji RP pod red. S. WRONKOWSKIEJ (Substantive Interpretation of the Clause of the Democratic Rule of Law in Judicial Decisions of the Constitutional Tribunal (in:) The Principle of the Democratic Rule of Law in the Constitution of the Republic of Poland*, S. WRONKOWSKA (ed.), Warszawa, 2006, p. 123-139; M. KORDELA, *Formalna interpretacja klauzuli demokratycznego państwa prawnego w orzecznictwie Trybunału Konstytucyjnego (in:) Zasada demokratycznego państwa..., (Formal Interpretation of the Clause of the Democratic Rule of Law in Judicial Decisions of the Constitutional Tribunal (in:) The Principle of the Democratic Rule of Law in the Constitution of the Republic of Poland*, p. 140-157).

stantive value should be resolved to the benefit of the latter. Quite apart from the fact that if such relation of general preference between classes must be determined, formal values should take precedence over substantive values, each **actual** collision between substantive value and formal value should be subsumed within the individual case given, in a special procedure of balancing, which may be put into action after precisely listed conditions have been indicated, and which follows a precisely determined schedule<sup>4</sup>.

**1.2.** Rationally justified certainty as to substantive or formal character of a principle ultimately appears to be a certainty of not absolute feature: being substantive or formal but of their degree. The element which decides how a principle will be categorised is the feature with which the given principle is “saturated” to a greater degree. Such characteristic of principles stems from the fact that in **each of them** both formal as well as substantive element may be indicated. Thus, what in the linguistic order may be precisely distinguished and separate, in the real order is made up of two aspects of exactly the same object: principle (also: value, rule or provision). The occurrence of both aspects and their characteristic correlation may be analysed with reference to all principles.

Even such a classic substantive principle as the principle of protection of human dignity shows a formal reflex in the fact that it is a principle, therefore a highly formalised structure of a norm of conduct, additionally distinguished by features which give it a status of being “principal”. On the other hand, the principle of *lex retro non agit*, although categorised as formal, is justified by substantive principles such as: legal security or protection of acquired rights<sup>5</sup>. Finally, there are principles voluminous enough to contain elements so independent that they in themselves become a base on which separately functioning principles can be construed, both formal as well as substantive. In this category of principles we can place the principle already mentioned in this context, that of right to court. Defined by constitutional law as substantive<sup>6</sup>, it is composed of

4. The procedure of balancing was best presented in the theory of Robert Alexy – see e.g. *A Theory...*, pp. 48-56; *ibid.*, *On the Structure...*, pp. 295-298; *ibid.*, *On Balancing and Subsumption. A Structural Comparison*, *Ratio Juris*, 2003, No. 4, pp. 436-448.

5. See: e.g. Decision of May 28, 1986 (U 1/86) OTK 1986, pos. 2, p. 46; see also J.L. BERGEL, *op. cit.*, p. 121.

6. Zob. np. R. ALEXY, *A Theory...*, p. 188; M. WYRZYKOWSKI, *Zasada demokratycznego państwa prawnego* (in:) *Zasady podstawowe polskiej Konstytucji*, pod (à suivre...)

three principles: principle of accessibility of court, principle of right to due process of law and principle of right to final decision. The first and third principles are of a clearly formal character, whereas the second principle combines both substantive and formal aspects.

Analysing principles of law from formal and substantive perspectives makes it possible to build a specific scale of principles rather than two clearly separate classes. At extreme ends of this scale there are principles whose affiliation to either formal or substantive category raises no doubts. However, the further away we move from these extremes, the more elements of the opposite characteristic we can find. In the centre there are principles which, combining in equal proportions substantive and formal elements, create a third category. However, in practice it is not referred to as functioning independently. The reason for this seems obvious. When agencies applying law use the distinction “formal – substantive” then in the case of principles “saturated” with both these elements to an equal degree they select only one of them – the one which they treat as decisive for their settlement. In such situation the principle “becomes” unequivocally either formal or substantive. However, from the standpoint of the entire system of law its proper description must contain both elements.

**1.3.** What appears to be most surprising in this matter is the fact that firm and clear division of formal and substantive principles in legal science, even those without any reservations as to their characteristics albeit common and consistent, in fact is not based on any separate theoretical conception. In many cases the qualification seems to be based on a specific type of intuition, whose result becomes accepted largely rather due to the authority of the creator of a given qualification than to its rational justification. Moreover, the lack of rational argumentation does not necessarily signify that such an operation is faulty. On the contrary, a considerable number of principles characterised as either substantive or formal without reference to any earlier determined and justified criteria really possess such features.

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(...suite)

red. W. SOKOLEWICZA, Warszawa, 1998, p. 69; Cf. e.g. R. ALEXI, *A Theory...*, p. 188; M. WYRZYKOWSKI, *Zasada demokratycznego państwa prawnego (The Principle of the Democratic Rule of Law)* (in:) *Zasady podstawowe polskiej Konstytucji* pod red. W. SOKOLEWICZA, (*Fundamental Principles of the Polish Constitution*), W. SOKOLEWICZ (ed.), Warszawa, 1998, p. 69; L. GARLICKI, *Materialna interpretacja...*, pp. 129-130.

Despite the lack of a theoretically developed distinction between substantive and formal principles, several groups of criteria may be identified to serve as basis for such distinction:

- 1) If the principles regulate the content matter of the law, then with high probability they will be qualified as substantive. Any settlements outside their content matter, especially connected with procedure in the broader sense, including legislative process, will be labelled as formal<sup>7</sup>. Division of law into substantive law and procedural law is based on this idea.
- 2) Principles which acquire the form of measures indispensable for achievement of defined goals are qualified as formal because they are instrumental. The principles protecting non-instrumental specific goods, goods in themselves, that is those which are the only justification to formulate the principles of the first category, compose a substantive class.
- 3) In a wider perspective anything connected with the goals of the state is substantive, e.g. the principle of social justice and what refers to the methods of state activity as well as its limits is of formal character, e.g. the principle of legality<sup>8</sup>.
- 4) A formal approach is frequently connected with so-called negative values (in the linguistic form of negation, e.g. the value of non-retroactivity and correspondingly principle of non-retroactivity) or of non-arbitrariness and substantive – with positive (e.g. the value of human dignity). Anything connected with human dignity and human rights, freedom, common good, justice, has the character of positive substantive values; on the other hand, anything that decides about non-arbitrariness of activity of public authorities shaping the very

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7. W. LANG, *Prawo i moralność (Law and Morality)*, Warszawa, 1989, p. 145; K. DZIAŁOCHA, *We wnętrza hierarchia norm konstytucji w orzecznictwie Trybunału Konstytucyjnego (w:) Państwo. Ustrój. Konstytucja*, Lublin, 1991 (*Internal Hierarchy of Constitutional Norms in Judicial Decisions of the Constitutional Tribunal (in:) State. Political System. Constitution*), p. 52; also the opinion of the Tribunal: "The legislator's freedom in shaping law 'is [...] balanced by the existence on legislator's side the duty of respecting procedural aspects of the principle of the Rule of Law, and in particular respecting the principles of proper legislation." (in:) Decision of June 14, 2000 (P. 3/00), OTK ZU 2000, No. 5, pos. 138, p. 691.

8. Compare: "The formal aspect concerns the power to set limits, its form and procedure," (in:) R. ALEXY, *A Theory...*, p. 189.



essence of the principle of the rule of law composes the catalogue of mostly negative values.

- 5) Principles with a clearly axiological justification, mainly those protecting values of profound importance, belong to the realm of classical substantive values. And it is this type of principles that most often functions as the standard deciding about the status of a rule studied from this perspective – as substantive. This type of criterion needs to be supplemented with an extremely important element. Within its framework formal values are not distinguished, or not even considered. Here value is always of “high” character connected with the essence of the object under study, e.g. the principle of respect for human dignity, the principle of justice, the principle of right to privacy.
- 6) Formal values are frequently considered to be synonymous with the certainty of qualification of the state of affairs that they protect. If this qualification has a mechanical character, because the features of objects under its jurisdiction are precisely described and can be referred to the particular elements of the contents of the name of the principle, then there is high probability that such a principle is of formal character, np. the principle of non-retroactivity, the principle of *nullum crimen sine lege*.

All the above-mentioned criteria applied to make a distinction between formal and substantive principles do not make up a closed catalogue, and in all likelihood such a catalogue will never be created. Although clearly different in their essence, in extreme cases they may overlap. Neither do these criteria give us absolute certainty as to the result of their application because in many situations they act indirectly – being rather of an indicative character than acting as teleological directives firmly leading to an anticipated goal, which is to firmly classify a given principle as either formal or substantive.

**1.4.** The introduction to a given legal system of the principle of the rule of law as a binding principle brings about laying out a certain perspective for creation, interpretation and application of law. This is done mostly by deriving from this principle other principles, understood as logical or instrumental consequences of the rule of law. Conceptions such as German *Rechtsstaat* or English *rule of law* always create catalogues of basic principles whose legal force is assumed as a prerequisite for fulfilling the requirements of the rule

of law. These catalogues usually differ in volume and in the type of elements they include, but certain principles seem to be present in nearly all these conceptions, e.g. the principle of constitutionalism, respect for human dignity, division of powers, right to court, legality as well as certainty of law.

The above criteria of distinguishing between formal and substantive aspects are also applied to the principle of the rule of law. Principles of law understood as elements of the formal conception of the rule of law are isolated as instrumental principles from the catalogue of all principles of the rule of law accepted in a given doctrine by means of at least one of these criteria, such as for example the principles of proper legislation. (point 2).

## **2. MODEL OF CONSTRUCTING A SYSTEM OF PRINCIPLES OF LAW DERIVED FROM A FORMAL PRINCIPLE OF THE RULE OF LAW**

**2.1.** Formal interpretation of the clause of the rule of law enables us to infer a certain set of formal principles. This class shows such a high level of ordering that it stops being just a simple multiplicity of elements – a class in the logical meaning of the word – but it takes on at least partially the form of a system. The systematicity of this set is principally due to the fact that it is possible to distinguish a group of principles which play a specifically superior role in relation to the rest<sup>9</sup>. Among them the principle of legal certainty is of fundamental character.

**2.2.** Granting a certain principle the status of being superior due to the logical criterion of giving it position in the system modelled – as far as possible – on deductive system leads to two types of consequences as far as establishing consecutive elements of this system, which are not superior principles.

Firstly, accepting certain principles as superior excludes certain principles from the system (negative aspect).

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9. The term 'superior role' here is understood differently than in the theory of law where it is applied to principles particularly important. Here it singles out principles as superior from the standpoint of the theory of construction of deduction systems. The quality of 'being superior' in the system is granted to such a principle (principle-premise) which serves as base on which other principles of the system are to be inferred (logical aspect) and which justify the validity of principle-consequence (legitimizing aspect).

Secondly, each superior principle is a base which decides about deducing from it certain principles – principles-consequences – a necessary condition to realise this superior principle as a principle-premise (positive aspect).

Both these aspects build two spheres of logical certainty about the construction of the system: certain principles will not be included in it, e.g. the principle of racial discrimination if the principle of equality in law<sup>10</sup> has been accepted, whereas certain principles will have to find themselves there, e.g. the principle of non-retroactivity towards validity of the principle of legal security. Beside these two areas there is a collection of principles whose contents will not be determined directly by the superior principle, but which should meet a minimal condition of being noncontradictory to the very superior principle. Noneliminable contradiction with the superior principle will decide about its non-validity.

The legal certainty as the superior principle of the system of formal principles of the rule of law justifies the legal validity of a defined group of values<sup>11</sup>. If a certain aspect of this principle – aspect qualified as valuable from the standpoint of one of these values – is clearly distinguished and also due to its operativeness starts acting as a standard for ruling about compliance of a given legal norm with the requirements of the certainty of law, then it is highly likely that this aspect will become a base for evolution of an independent principle of a character of subprinciple of the certainty of law in itself. Usually such a principle is first recognised and named by judge-made law and doctrine, then later many of them are introduced into texts of normative acts including the constitution.

Detailed principles of the general legal certainty principle can be ordered on two levels: on the level of the system of law and on the level of its application.

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10. Compare argumentation in this case in: R. ALEXI, *The Argument from Injustice. A Replay to Legal Positivism*, B. Litschewski Paulson and S.L. Paulson (trans.), Clarendon Press, Oxford, 2002, p. 78.

11. Ex.g. nonretroactivity, correct legislation, nonarbitrariness, and many others, which in general correspond to valid rules of law, such as principle of nonretroactivity. Compare e.g. J.L. BERGEL, *op. cit.*, p. 121; M. KORDELA, *Principles of Law as a Theoretical Category – Remarks on the Background of the General Principles of Community Law* (in:) *The Emerging Constitutional Law of the European Union. German and Polish Perspectives*, A. Bodnar, M. KOWALSKI, K. RAIBLE, F. SCHORKOPF (eds.), Springer, Berlin-Heidelberg-New York, 2003, p. 582.

The certainty of both the system of law and its application may be analysed **pragmatically** and **apragmatically**. The first approach refers to: 1) a group of actions leading to the creation of an ordered collection of legal norms, or in other words constitutes certainty as to legislative procedures<sup>12</sup>, 2) rules for constructing particular normative acts and 3) rules for construction of the entire system. The apragmatical approach concerns the products of these actions, so it determines: 1) the certainty of its wording and contents of legal provisions, 2) their place in the systematics of the normative act and 3) certainty that all these elements together make up a whole, properly called a system.

On the level of application of law naturally the pragmatism approach dominates<sup>13</sup>, although without the apragmatical aspect as visible in the principle of permanence of final decisions, adequate characterization of this area would be impossible.

### **3. PRINCIPLE OF CERTAINTY OF LAW AS A FORMAL PRINCIPLE. ITS COMPONENT PRINCIPLES**

**3.1.** All these remarks on the legal certainty principle have almost exclusively methodological and not substantial dimension, based more on its intuitive meaning rather than meaning determined by a clear definition. Characteristically, any attempts to show a commonly accepted definition of the certainty of law are doomed to failure. Such definition does not exist and most likely will never come into being as a semiotic status of the phrase "certainty of law" excludes the possibility of such definition which would meet rigorous conditions formulated by logical theory of definition<sup>14</sup>.

12. Which procedures by their nature belong to formal order. Cf. N. MACCORMICK, *Why Law Makes No Claims* (in:) *Law, Rights and Discourse. The Legal Philosophy of Robert Alexy*, G. PAVLAKOS (ed.), Hart Publishing, Oxford and Portland, Oregon, 2007, p. 61.

13. Such principles are for example principle of due process or principle of procedural justice. Cf. G. GUNTHER, *Constitutional Law*, 12th ed., The Foundation Press, Westbury, New York, 1991, pp. 411-431; H. WECHSLER, "Toward Neutral Principles of Constitutional Law," (1959) 73 *Harvard Law Review* 1, 18-19; G.P. FLETCHER, *Basic Concepts of Legal Thought*, Oxford University Press, New York, Oxford, 1996, p. 13.

14. C.f.: "Legal certainty is by its nature diffuse, perhaps more so than any other general principle, and its precise content is difficult to pin down." (in:) T. TRIDIMAS, *The General Principles of EC Law*, Oxford EC Law Library, Oxford University Press, Oxford 2000, p. 164.

The lack, however, of a precise definition does not need to signify the lack of linguistic criteria for deciding whether the object (legal provision, normative act, system of law, procedure) analysed for its adherence to the principles of legal certainty really fulfils such conditions.

Determination of the semantic field usually starts with accepting a broadly general determination of the principle of legal certainty as the one that “expresses the fundamental premise that those subject to the law must know what the law is so as to be able to plan their actions accordingly”<sup>15</sup>.

Next step is to further specify this notion by demonstrating cases which openly violate the requirements of certainty, e.g. ambiguity and instability of law, its frequent changes, retroactivity, deprivation of acquired rights.

The third stage of this procedure is to conceptualise the state of affairs in opposition to distinguished typical cases of uncertainty of law and granting them the status of subprinciples of the principle of legal certainty. Thus the collection of valid positive principles of law encompasses the principle of clarity and stability of law, non-retroactivity or protection of rightly acquired rights.

Finally, the principle of legal certainty is viewed as a so-called collective principle, made up of numerous detailed principles and defined by these principles<sup>16</sup>. This does not mean, however, that a simple sum of these component principles covers the entire area of the general principle and it is impossible to distinguish any other aspect of law that would be protected by the value of certainty. The detailed principles may cover the most important elements of the principle of legal certainty, but only in the context of law analysed at a given moment. Changes in law itself and in its environment may reveal new situations, which will have to be covered by activity of requirements of certainty, which is very well illustrated by the his-

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15. *Ibid.*, p. 163.

16. This operation is sometimes similar to so-called non-classical normal definitions in which the denotation of the defined term (*definiendum*) and the sum of denotations of terms in the defining parts (*definiens*) have the same extension. Cf., The principle /the principle of legal certainty – MK/, which is of the widest generality, has been applied in more specific terms as: (a) The principle of legitimate expectations. (b) The principle of non-retroactivity.” (in:) J. STEINER, L. WOODS, *Textbook on EC Law*, London, Blackstone Press, 2001, p. 116.

tory of emergence and consolidation of the principle of protection of interests under way<sup>17</sup>.

**3.2.** Currently the certainty of the system of law in pragmatical aspect is most strongly pronounced in the category of detailed principles known as the principles of proper law-making. It is made up of, especially, the principle of non-retroactivity, principle of proper *vacatio legis*, principle of proper application of intertemporal regulations, principle of promulgation.

Retroactivity of law – which is the obligation to apply the norms of new law to states of affairs in the past, which in the past were not linked to such legal effects as may emerge when the new law is applied – is in classical opposition to the certainty of law. It is one of few principles formulated negatively, which decides about an exceptionally high level of disapproval of the legislator to the violation of the value protected by it. The prohibition of retroactivity is aimed to protect addressees of law against deterioration of their situation. Therefore the clause of *lex retro non agit* does not refer to retroactivity of law which would bring about changes beneficial to the subjects interested. This principle is of absolute character in criminal law and is present under two principles: *nullum crimen sine lege* and *nulla poena sine lege*. It is only slightly less powerful in tax law. In other branches of law exceptions from it are accepted, under the condition of extraordinary circumstances.

The legislator protects the security of law addressees not only by rejecting the possibility of retroactivity of law but also by setting definite requirements for prospective legal provisions. A sufficiently long period of *vacatio legis* should be the rule so that addressees can acquaint themselves with the content matter of the new law as well as to undertake measures to adjust to it, especially in the long-term economic activity. The element helpful in the least troublesome transition between the two orders – old and new – should be the technique of intertemporal regulations applied with due diligence.

The principle of promulgation as a prerequisite for coming into force by generally valid law is so strong that it seems to have the

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17. The process of emerging of not only new spheres covered by the principle of certainty but also of values close to it is quite clear, as in „the interrelated virtues of reliance, predictability, and certainty” (in:) F. SCHAUER, *Playing by the Rules. A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Clarendon Press, Oxford, 1991, p. 137.

function of an analytical and not factual element in determining the certainty of law.

**3.3.1.** The apragmatical aspect of the certainty of the system of law stresses the value of effects of the legislative process: 1) legal provisions as editing units of the normative text, present in the form of grammatical sentences, 2) legal norms as statements constructed on the base of provisions using methods of interpretation and 3) normative system viewed as a construct analysed with methods of logic.

Functioning in the above order and recreated by the doctrine and the judge-made law, the catalogue of the principles of law linked analytically and instrumentally with the principle of certainty of law is doubtless the most extensive.

The first and foremost principle here is the principle of trust of individuals in state and the law proclaimed by it. One of its canonical formulations is that this principle “is expressed by such law-making and application of law so as not to make a specific pitfall for the individuals so that they can organise their affairs with confidence that they do not run the risk of exposing themselves to legal effects which could not have been predicted at the moment of taking decision and undertaking steps and in realization that their activity undertaken in agreement with the existing laws will be also in future accepted by law. New norms proclaimed by the legislator must not surprise their addressees who should be granted time to adjust to the changed provisions and to safely decide about further steps”<sup>18</sup>.

In particular such protection should be extended to undertakings commenced by the unit spread over time and whose time limitations were accounted for by the very provisions (the principle of protection of interests under way)<sup>19</sup>.

The principle of trust also safeguards the protection of trust in such understanding of the contents of law as has been determined by courts, in particular by the Supreme Court, and which is expressed in the characteristic phrase: “uniformly established position of the judicature”<sup>20</sup>.

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18. Decision of 15 September 1998 (K. 10/98), OTK ZU 1998, No. 5, pos. 64, p. 407.

19. Decision of 25 June 2002 (K 45/01), OTK ZU 2002, No. 4, pos. 46, p. 680.

20. Decision of April 13, 1999 (K. 36/98), OTK ZU 1999, No. 3, pos. 40, p. 242.

The component of the principle of trust is the principle of protection of acquired rights. Its standard formulation “prohibits arbitrary annulment or limitation of subjective rights of an individual or other private bodies active in legal order”<sup>21</sup>. This principle covers the area of public as well as private rights, not only in their final formulations but also as expectations maximally formulated<sup>22</sup> (the principle of protection of legitimate expectations). The principle of protection of acquired rights is not absolute, however, its limitation may only occur in exceptional cases and additionally the principle of proportionality must be applied.

Despite a distinctly substantive justification, the very principle of trust in the state and the laws proclaimed by it as well as its most characteristic component – principle of protection of acquired rights – at the level of their formulation have the shape of formal provisions, which serves as base for qualification of a given situation from a perspective of their projected models without using qualifying elements.

Although the principle of trust in the above meaning is most commonly called in judicial decisions with reference to the system of law and its elements as completed results of legislative activity its force spreads to other remaining aspects of the certainty of law. Moreover, its linguistic shape and the methods of its justification by allowing substantive interpretation cause this principle to be closely connected to a positively determined political philosophy underlying every legal system.

**3.3.2.** Another principle of the apragmatical aspect of the system of law is connected with requirements that the language of legal provisions and norms should fulfil. The characteristics of linguistic formulation of law is above all subordinate to the principle of definiteness of provisions<sup>23</sup> which “must be formulated correctly, precisely and clearly”<sup>24</sup>. The more intensively legal provisions enter the

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21. Decision of June 22, 1999 (K. 5/99), OTK ZU 1999, No. 5, pos. 100, p. 536.

22. *Ibid.*

23. Decision of November 10, 1998 (K. 39/97), OTK ZU 1998, No. 6, pos. 99, p. 558; Decision of October 17, 2000 (SK 5/99), OTK ZU 2000, No. 7, pos. 254, p. 1217; Decision of February 18, 2000 (P 21/02), OTK ZU 2004, No. 2, pos. 9, p. 171; Decision of April 2, 2007 (SK 19/06), OTK ZU 2007, No. 4, series A, pos. 37, p. 381.

24. Decision of January 11, 2000 (K. 7/99), OTK ZU 2000, No. 1, pos. 2, p. 20, recalling opinion of L. Garlicki.



realm of individual rights, liberties and duties, the stronger the need for precision of normative text becomes<sup>25</sup>.

The most radical demands are present in criminal law. The principle of definiteness of forbidden actions under penalty (*nullum crimen sine lege, nulla poena sine lege*) may even take on constitutional dimension whereas “definiteness” here is qualified as “maximal”<sup>26</sup> and in accordance with the rule which states that “substantive elements of an action qualified as criminal must be defined in the statute (according to the constitutional principle of exclusivity of the statute) in a way that is complete, precise and unequivocal”<sup>27</sup>. The charge of faulty legislation will also be justified in the case of improper application of standard techniques resulting for instance in referral when there are “no grounds for using the referral technique, in cases of multiple referral, especially in several legal acts which would make it significantly difficult to construct a legal norm, in particular such a norm that is addressed to a majority of population or their unspecified group”<sup>28</sup>.

Similarly, provisions which limit other spheres protected by constitution, like for instance the sphere of independence of self-government authorities, will be deemed justified only when they are included in the statute and will be characterised by “sufficient degree of precision and completeness of its formulations”<sup>29</sup>. These requirements are to prevent the application of extensive interpretation.

This last requirement is a particular example of the application of the interpretation rule *exceptiones non sunt extendendae*. This

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25. In further Decisions the Polish Constitution Tribunal defines the requirement of definiteness as the one from which it is clear that “each legal provision should be correctly constructed linguistically as well as logically – only meeting this criterion allows for its evaluation in view of other criteria. The requirement of clarity is equal to the dictate of creating provisions that are clear and understood by its addressees who expect the rational legislator to proclaim legal norms which do not raise doubts as to their contents and rights granted. Precision of a provision inherent in its clarity should demonstrate itself in the definiteness of duties imposed and rights granted so that their contents is evident and allows for its execution”. Decision of March 21, 2001 (K. 24/00), OTK ZU 2001, No. 3, pos. 51, p. 312.
26. Decision of February 20, 2001 (P. 2/00), OTK ZU 2001, No. 2, pos. 32, p. 195; Decision of May 11, 2007 (K 2/07), OTK ZU 2007, No. 5, series A, pos. 48, p. 556.
27. Decision of April 26, 1995 (K. 11/94), OTK 1995, part I, pos. 12, p. 131.
28. Decision of January 11, 2000 (K. 7/99), OTK ZU 2000, No. 1, pos. 2, p. 23.
29. Decision of May 4, 1998 (K. 38/97), OTK ZU 1998, No. 3, pos. 31, p. 184.

rule serves the certainty of law by drawing an impassable borderline for the acts of its interpretation. Other commonly accepted methods of interpretation have a similar function, among others requiring that isomorphic expressions of a legal text should have the same meaning whereas diversiform expressions should have different meanings (exclusion of synonymous and homonymous interpretations), giving precedence to the meaning established in a legal definition before other meanings, excluding meanings inconsistent with principles of the system or constitutional norms.

**3.3.3.** The final element mentioned within the apragmatical aspect, which is subject to qualification in the perspective of the certainty of law, is the very system of law. Encompassed within the so-called principle of correct construction of the system it must meet one minimal formal requirement, present in two versions – positive and negative: coherence and non-contradiction. The stipulation for coherence<sup>30</sup> and non-contradiction<sup>31</sup> allows for exclusion of such a result of interpretation of the normative text that would be incompatible with the accepted legal models and the accepted methods of cancellation of such conflicts, e.g. collision rules, give precedence to the model already existing.

The formal approach of the system is supplemented with the assumption of its completeness and thus assumption of the lack of gaps in law.

Non-contradiction and completeness of the system of law as logical criteria are supplemented consistently with further formal criteria. The certainty of the system is additionally safeguarded by the requirements of clarity of its construction, which is achieved by the principle of hierarchy of the system and a group of fundamental principles connected with it: supremacy of constitution, primacy of the statute, exclusivity of the statute, non-contradiction with constitution and statutes of acts of a lower legal rank.

Any normative system in order to efficiently rule the behaviour of its addressees should pay special attention to the permanence of its models. Law inconsistent with the model of a law relatively stable,

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30. Understood as “substantive and logical” or “systemic” (in:) Decision of October 10, 2000 (P. 8/99), OTK ZU 2000, No. 6, pos. 190, p. 1040.

31. Provision of March 21, 2000 (K. 4/99), OTK ZU 2000, No. 2, pos. 65, p. 294; Decision of May 8, 2000 (SK 22/99), OTK ZU 2000, No. 4, pos. 107, p. 516.

frequently altered in directions unpredictable to addressees<sup>32</sup> – negates the very idea of law<sup>33</sup>.

**3.4.** On the level of the application of law – both in pragmatism as well as in non-pragmatic aspects – the value of certainty as a component of the formal conception of the rule of law is protected first and foremost by two elements: the principle of procedural justice and institutional guarantees, out of which the principle of the right to court and the principle of the independence of judiciary are the ones that are most strongly emphasised.

The above-mentioned general principles in the practice of judicial decisions are called in a more detailed fashion, e.g. the principle of court accessibility or the principle of the permanence of final judicial and administrative decisions<sup>34</sup>. However, an extreme multi-layer quality of the value of the certainty of law application<sup>35</sup> allows for construction of not only further detailed principles but also for accepting different perspectives, causing alterations not in the number but in the quality of principles qualified as aspects of legal certainty<sup>36</sup>.

**3.5.** The principle of certainty of law legitimizes or at least co-legitimizes validity of an extensive catalogue of principles-consequences listed as constitutive features of the idea of the formal rule of law. However, the value of certainty also has a substantive dimension. In one of its decisions the Polish Constitutional Tribunal stated that “the question [...] is not about that aspect of certainty of law which refers to relative stability of legal order in connection with the principle of legality but about the certainty of law understood as certainty that on the base of valid law the citizen may shape his life. In the latter sense certain law (legal certainty) also means just law”<sup>37</sup>.

32. Cf “the principle of certainty (predictability) of law” (in:) Decision of May 1, 2007 (K 2/07), OTK ZU 2007, No. 5, series A, pos. 48, p. 564.

33. L.L. FULLER, *The Morality of Law*, New Haven and London, Yale University Press, 1969, pp. 79-81; J. RAZ, “The Rule of Law and its Virtue,” (1977) 93 *The Law Quarterly Review* 199.

34. Decision of April 8, 1998 (K. 10/97), OTK ZU 1998, No. 3, pos. 29, p. 162; Decision of February 22, 2000 (SK 13/98), OTK ZU 2000, No. 1, pos. 5, p. 71.

35. L. LESZCZYŃSKI, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa (Problems in the Theory of Law Application. Doctrine and Theses of Judicial Decisions)*, Zakamycze, 2004, p. 52.

36. *Ibid.*, pp. 48-54.

37. Decision of June 14, 2000 (P. 3/00), OTK ZU No. 5, pos. 138, p. 691.

Thus in a definite act of law application Radbruch's idea of law is visualised, where three indispensable values of law – legal certainty, public good and justice – remain closely interconnected<sup>38</sup>, which allows law on the plane of “occurring” to transfer from the realm of formality to the realm of substantive. The transition from formal to substantive rule of law is not always harmonious and is connected with tensions. But that is another story.

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38. G. RADBRUCH, “Five Minutes of Legal Philosophy” (in:) *Philosophy of Law*, J. FEINBERG and H. GROSS (eds.), Wadsworth Publishing Company, Belmont, California, 1986, p. 109.