

ON INSTABILITY AND OTHER DEFICIENCIES OF LAW IN GENERAL AND EXEMPLIFIED BY POLISH CRIMINAL PROCEDURE LAW

MARIA ROGACKA-RZEWNICKA *

Legal security, i.e. a state that aims to protect citizens against the consequential negative results of such phenomena as incoherence of law, its frequent amendments and excessive amount, a lack of a stable vision of law and its overall perception, lawmakers' submission to political and spontaneous needs, or law ambiguity with the result that the addressees misunderstand it, is an inseparable attribute of law. It must be pointed out that the indicated threats inseparably accompany enactment and application of law and are not only a characteristic feature of our times,¹ although the scale certainly exceeds the examples of historical legislation. It is at the same time typical that most of these threats were known even in ancient times. Since law became a subject matter of scientific analysis, which started in the Roman times, it has not only been a collection of rules and solutions without, as before, mutual logical links and logical systematics.² In Rome, law was systematised for the first time. The conception of law based on the search for deeper logical links between particular provisions and formulation of general and abstract principles of law was developed in this process. The search was accompanied by the awareness of threats reflected in the opinions of Roman thinkers. Most of them are still valid today. It is enough to remind that already then it was known that numerous laws are enacted in the most "corrupt" state. The most outstanding historian of ancient times, Publius Cornelius Tacitus (AD 56–AD 120)³ formulated the famous truth about a state's decomposition because of an excess of law: *Plurimae leges, corruptissima respublica*. It

* dr hab., profesor na Wydziale Prawa i Administracji Uniwersytetu Warszawskiego

¹ Ch. Guy-Ecabert, A. Flückiger, *La bonne loi ou le paradis perdu?*, *Législation & évaluation* 2015, Vol. 26, No. 1, p. 21, see also: <https://archive-ouverte.unige.ch/unige:73929/ATTACHMENT01>.

² G. Cuniberti, *Grands systèmes de droit contemporains. Introduction au droit comparé*, LGDJ 2015, p. 35.

³ Tacitus, *Annales*, III, 27.3.

seems to be especially accurate and true today. There is another Roman saying: *Ubi ius incertum, ibi ius nullum*, meaning: "Where the law is uncertain, there is no law". Referring to the present time experiences, one can add that such a situation inspires to non-compliance with the law, not to speak about such attitudes as disregard and contempt for law. In the ancient times, the need for concise law was expressed, inter alia, in a statement that law should be brief so that it may be more easily understood by the unlearned (*Legem brevem esse oportet, quo facilius ab imperitis teneatur*). On the other hand, the saying *Lex prospicit, non respicit*, meaning "The law looks forward, not backward", expressed another condition of legal security. The cited examples prove that modern perception of law was accompanied by the awareness of threats in the process of law enactment and enforcement. Referring to the opinions of Roman jurists and in accordance with G. Guniberti's claim that modern law was born in Rome,⁴ one should be accurate and add that Greek philosophers had previously noticed the importance of law stability and dangers resulting from its instability. In his *Politics*, Aristotle wrote: "The mere establishment of a democracy is not the only or principal business of the legislator, or those who wish to create such a state, a far greater difficulty is the preservation of it (...). The legislator should, therefore, endeavour to ensure a firm preservation of the state and guard against destructive elements (...)."⁵

The ancient cult of law finished with the collapse of the Roman Empire in 476. The first stage of the Middle Ages brought a deep crisis of law. The first symptoms of a revival occurred in the early 11th century when Roman law gradually started to be taught again, first in Italy, then in France and German territories, and finally elsewhere. Slowly but gradually, the knowledge of Roman jurists' works was acquired again in Western Europe. However, it was not until the Enlightenment that law regained its real significance and its modern cult started. This way, history, which is not the main subject matter of the article, took a very long and roundabout route. It must be added that many outstanding figures, including, inter alia, T. More (1478–1535),⁶ M. Luther (1483–1546),⁷ Descartes (1596–1650)⁸ and F. Bacon (1561–1478)⁹, had discussed the issue of law imperfectness in their works in the period before the Enlightenment.

⁴ G. Cuniberti, *Grands systèmes de droit contemporains...*, p. 35.

⁵ Aristotle, *Polityka* [Politics], Polish translation by L. Piotrowicz, [in:] *Dziela wszystkie* [Collected works], Vol. 6, Wydawnictwo Naukowe PWN, Warsaw 2001, Book III, p. 290.

⁶ In his most famous work entitled *Utopia*, he complained about the excessive number of acts and wrote they were so that nobody could ever read and understand them.

⁷ M. Luther, *Lettre à Philippe de Hesse, 1527*, [in] J. Carbonnier, *Essais sur les lois*, Defrénois, Paris 1995, p. 298.

⁸ R. Descartes, *Discours de la méthode pour bien conduire sa raison et chercher la vérité dans les sciences, plus la dioptrique, les météores et la géométrie qui sont des essais de cette méthode*, Leyde 1637, Part II, p. 19 (citation after Ch. Guy-Ecabert, A. Flückiger, *La bonne loi...*, p. 44).

⁹ F. Bacon, *Oeuvres philosophiques, morales et politiques de François Bacon*, translation by J.A. Buchon, Paris 1838, Vol. VIII, Chapter III, p. 246 (citation after Ch. Guy-Ecabert, A. Flückiger, *La bonne loi...*, p. 44).

In the Enlightenment, the indispensability of law was emphasised. J. J. Rousseau wrote that laws refer justice to its object¹⁰ and this motivation was often present in deliberations on law. The Enlightenment's universal definition of law (*ius*) assumes that it is "everything that seems to be reasonable, just and right as well as to comply with the art of what is *aequi et boni* (...). The essence of law is expressed in these three principles: be honest, do not harm anybody and give to each his/her own".¹¹ The similarity of these expressions to ancient terminology defining law, including the famous statement that it is *ars boni et aequi*¹², is meaningful although it is well known that the Roman law doctrine did not work out a uniform definition of law.¹³

Despite the dominant position of the idealistic vision of law in the Enlightenment, there are examples of threats realised in connection with law enactment and application. This awareness resulting from the significance of the role and importance assigned to law in individual and community life was the consequence of negative experiences with the functioning of law in the former period. The postulates of the Roman jurists were to be a remedy, which is in accord with the general ideological attitude of the Enlightenment to ancient times. The philosophical and legal works of the Enlightenment contain calls for enacting law that is clear, complete, precise, indispensable and understandable to everyone. We can find a lot of those directives in C. Beccaria's (1738–1794) work *On Crimes and Punishments* of 1764. This famous Italian author and humanitarian argued that there was a need for developing clear laws and rigorous observance of the letter of the law, without comparing it to its interpretation. He wrote: "If the power of interpreting laws be evil, obscurity in them must be another, as the former is the consequence of the latter".¹⁴ M. Robespierre's (1758–1794) approach to interpretation of law was similarly critical. In his famous speech in the Court of Cassation given on 18 November 1790, he said: "*ce mot de jurisprudence (...) doit être effacé de notre langue*" ("the word jurisprudence must be erased from our language").¹⁵ As far as this aspect is concerned, it is different from the opinions of Roman jurists. The latter spoke about the necessity of jurisprudence and emphasised that it was the only knowledge about the institution of law, which requires not only the knowledge of acts and customs but also what makes it possible to adjudicate cases in accordance with justice and equitability.¹⁶ On the other

¹⁰ J.J. Rousseau, *O umowie społecznej* [The Social Contract], Polish translation by M. Starzewski, Warsaw 2002, Book II, Chapter VI, p. 67.

¹¹ Quotation after: G. Bałtruszajtys, J. Kolarzowski, M. Paszkowska, K. Rajewski, *Wybór źródeł do historii prawa sądowego czasów nowożytnych* [Selection of sources for the modern history of court law], Liber, Warsaw 2002, p. 18.

¹² A Roman jurist, Publius Iuventius Celsus (the first century AD), is the author of the saying *ius est ars boni et aequi*, but another Roman jurist, Ulpian (170–223), made it commonly known, which sometimes causes that the authorship of this significant saying is wrongly attributed to him.

¹³ G. Hanard, *Droit Romain*, Vol. I, *Notions de base. Concept de droit. Sujets de droit*, Brussels 1997, pp. 14–15.

¹⁴ C. Beccaria, *O przestępstwach i karach* [On crimes and punishments], Polish translation by E.S. Rappaport, Wydawnictwo Prawnicze, Warsaw 1959, p. 66.

¹⁵ *Archives parlementaires*, Vol. XIX, *Du 23 octobre au 26 novembre 1790*, p. 516.

¹⁶ Quotation after: G. Bałtruszajtys, J. Kolarzowski, M. Paszkowska, K. Rajewski, *Wybór źródeł...* [Selection of sources...], p. 19.

hand, the ideology of legalism requiring rigorous institution of law supported the disapproval of the interpretation of law expressed in the 18th century. As Beccaria wrote: “These are the means by which security of person is best obtained”,¹⁷ and “The disorders that may arise from a rigorous observance of the letter of penal laws are not to be compared with those produced by the interpretation of them”.¹⁸ He also wrote: “There is nothing more dangerous than the common axiom: the spirit of the laws is to be considered. (...) The spirit of the laws will then be the result of the good or bad logic of the judge, and this will depend on his good or bad digestion; on the violence of his passions; on the rank and condition of the abused, or on his connections with the judge; and on all those circumstances which change the appearance of objects in the fluctuating mind of man. Hence we see the fate of a delinquent changed many times in passing through the different courts of judicature (...)”.¹⁹ It must be added that the reason behind this common criticism of law interpretation was an undisguised dislike of judges.²⁰ In the Enlightenment, they were assigned the task to examine actions and assess whether they were legal or illegal.

Montesquieu (1689–1755), the most famous French jurist of the Age of Enlightenment, in his works, especially in *(On) The Spirit of the Laws*, presented an instruction in enacting laws in which he also described inappropriate techniques. He wrote about the need to enact clear, concise and equally understandable laws like the Law of the Twelve Tables and other Roman foundations of law. He recommended avoiding exceptions to general legal rules because, in his opinion, they only provoke successive exceptions. He called for maintaining legislative moderation and wrote: “As useless laws debilitate such as are necessary, so those that may be easily eluded weaken the legislation” (“*Comme les lois inutiles affaiblissent lois nécessaires, celles qu’ont peut éluder affaiblissent la législation*”).²¹ On the other hand, in *Pensées divers* (1717–1755), Montesquieu presented an opinion that what can be done through customs should not be done through laws (“*Il ne faut point faire par les lois ce que l’on peut faire par les moeurs*”), supporting the limitation of the matters of law to the necessary scope that cannot be filled with other rules of adequate procedure.

Other great jurists of the Age of Enlightenment, J.J. Rousseau (1712–1778), J.-E.-M. Portalis (1746–1807) or G. Filangieri (1753–1788), expressed similar opinions, however, it is not possible to present their views in detail. On the other hand, the 19th century, which in the field of penal law distinguished itself by looking for model legal concepts and creating great juridical theories, was not free from the risks of legislative activities. Such 19th century authors as F.-R. Chateaubriand

¹⁷ C. Beccaria, *O przestępstwach...* [On crimes...], p. 65.

¹⁸ *Ibid.*, p. 64.

¹⁹ *Ibid.*, pp. 62–63.

²⁰ M. Porret, *Beccaria et sa modernité*, [in:] M. Porret (ed.), *Beccaria et la culture juridique des Lumières (Actes du colloque européen de Genève 25–26 novembre 1995)*, Librairie Droz, Geneva 1997, p. 16.

²¹ Ch.-L. de Montesquieu, *O duchu praw* [(On) The Spirit of the Laws], Polish translation by T. Boy-Zeleński, Warsaw 2002, Vol. 29, Chapter XVI, p. 614 ff.

(1768–1848),²² L.-M. de Lahay Cormenin (1788–1868),²³ P.J. Proudhon (1809–1865),²⁴ R. von Ihering (1818–1892),²⁵ H. Capitant (1865–1937)²⁶ and others drew attention to those risks. Their dominating opinions concern poor quality of law enacted in their times resulting from the excessive number of statutes, lack of diligence in designing law and insufficient legal competence. H. Capitant described the sum of these disadvantageous facts as legislative decadence. Possibly, the cause of the problems is that the 19th century – as it was written – was the epoch in which “much is reformed, little is codified” (“*on réorme beaucoup et on codifie peu*”).²⁷

The issue of negative consequences of law enactment was also noticed in the common law system. F. Bacon (1561–1626) wrote about the excessive amount of statutes, mainly penal ones, and incomprehensible language of law and its bad expression.²⁸ J. Bentham (1748–1832) pointed out a general deprivation of style in English statutes. He regretted that the language used by English jurists differed from the common language, which did not give positive results.²⁹

According to Ch. Guy-Ecabert and A. Flückiger, there is no golden epoch of legislation³⁰ and this synthetic statement probably accurately diagnoses the reality of law functioning, although there are many aspects of it in the history of legislation. Apart from the extreme periods: vulgarisation of law on the one hand, and on the other hand the times when law was called the art (of the good and justice) and this ideal was chased, intermediate reality dominates legislation. Perhaps because of archetypal inclinations people have to overestimate negative phenomena in the surrounding world and insufficiently appreciate the positive ones, pessimistic assessment of legislation dominates in some periods and it constitutes an exemplary but authoritative confirmation of the statements made by well-known jurists and philosophers of different epochs.

²² F.-R. Chateaubriand emphasised the lack of diligence in enactment of law, which he thought to be the main defect of legislation (*Mélanges politiques*, [in:] *Oeuvres complètes*, Vol. V, Paris 1836, p. 138).

²³ L.-M. de Lahay Cormenin wrote about fear for new acts, which he called *légomanie*. He vividly stated: “*malheureusement nous sommes mordus du chien de la légomanie*” (*La légomanie*, Paris 1844, p. 5).

²⁴ P.J. Proudhon wrote in a similar spirit: “*Les lois, les décrets, les édits, les ordonnances, les arrêtés tomberont comme grêle sur la pauvre peuple*”, which means “Acts, decrees, edicts, ordinances, judgements fall down like hail on poor people” (P.J. Proudhon, *Idée générale de la révolution au XIXe siècle – choix d’études sur la pratique révolutionnaire et industrielle*, Paris 1851, p. 147).

²⁵ R. von Ihering spoke about the lack of sufficient intellectual strength on the part of the legislators, necessary to formulate a logical quintessence of the sum of rules (*L’esprit du droit romain dans les diverses phases de son développement*, Bologne, Vol. 1, translation by O. de Meulenaere, Paris 1880, p. 42).

²⁶ H. Capitant wrote about the decadence of legislation based on the example of civil legislation he knew very well (“*Malheureusement l’art des faire les lois est en pleine décadence et jamais le législateur n’a apporté moins de soin*”, [in:] *Comment on fait les lois aujourd’hui*, Revue politique et parlementaire 1917, Vol. 91, p. 307).

²⁷ B. Dubois, T. Le Marc’Hadour, *Un code pour la notion. La codification du droit pénal au XIXe siècle: France, Belgique, Angleterre*, Centre d’Histoire Judiciaire, Lille 2010, p. 69.

²⁸ F. Bacon, *Oeuvres philosophiques...*, Vol. VIII, Chapter III, p. 246, No. 53 and p. 248 No. 66 (citation after Ch. Guy-Ecabert, A. Flückiger, *La bonne loi...*, p. 44).

²⁹ *The works of Jeremy Bentham*, (ed.) John Bowring, Edinburgh 1843, p. 241.

³⁰ Ch. Guy-Ecabert, A. Flückiger, *La bonne loi...*, p. 21.

Whatever the approach to the issue is, the level of contemporary legislation is far from perfect and its original sin is the legislators' objective and instrumental attitude to law. In their hands, law is a too easy and too common an instrument for tailoring reality for which other measures might prove to be more efficient or at least more adequate. In addition, there is a conviction that legal norms play a causative and definitive role in solving complicated individual and social situations. Similar thinking can be seen in the sphere of penal legislation. On the other hand, it was already well known in ancient times that law had its limits, which was not an obstacle to believe that the commands of the law were more powerful than the commands of men (*imperia legum potentiora quam hominum*). The importance of other regulators of reality was also noticed. It was known that there were values more important than law such as justice (*aequitas sequitur legem*), customs (*mos pro lege*), contracts (*pacta sunt servanda*) or promises (*quod iuratum est, id servandum est*). There was no recognition of the need to codify these values due to their power *de facto* and their self-contained executive power.

Diagnosing the state of contemporary legislation is a complicated task but it is certain that there are many causes of the present crisis. Objective reasons such as the complexity and multi-dimensional character of contemporary reality may also be the source of that. The crisis of traditional values, including the sphere of social relations, may be another sociological factor. The former factor is demonstrated in compulsive creation of law and results in its overproduction. The latter, on the other hand, influences the quality of law connected with insufficient determination of the system of values it is to express.

The weakness of contemporary law results in its concentration on temporary individual and detailed problems, which should be solved within the general rules and directives of the system, rather than within particular regulations. The phenomenon denotes not only a casuistic increase in the number of normative acts but, first of all, a decrease in the quality of law in the situation where the role of quantity dominates, and in the addressees' perception – a decrease in the power of its imperative influence. The phenomena result in progressive devaluation of law. These, of necessity, general diagnoses presented above require specification taking into careful consideration particular branches of law.

In case of criminal law, it is evident that lawmakers are looking for a new conception of regulating the reality resulting from occurring crime. Contemporary systems follow a new philosophy of imposing punishment based on the idea of re-establishing social links broken by the commission of crime. This has resulted in a deep reconstruction of criminal law in both its substantive and procedural content. The new axiology of adjudicating criminal cases assumes re-establishment of relations between the accused and the victim and allows a dialogue between them in the conditions of diversification of conflict resolution measures and simplified and de-formalised procedure laid down in the legal systems. While in the two previous centuries the process of humanisation of criminal law was the main engine of its development and the most important axiological mode, after the achievement of this aim in general, criminal law was based on new aims and new philosophy. It seems that the clearly marked stability of the present directions of criminal law

development should have positive legislative consequences. Based on the example of Polish criminal law, it can be stated that that this kind of dependence is not so obvious and unambiguous.

The estimation of threats accompanying the process of law enactment and institution discussed so far is exemplary but depicts reality of a broad spatial range.³¹ Referring this statement to present times, it is necessary to emphasise the universal character of law destruction with respect to the used forms of its expression as well as its substantive content. M. Delmas-Marty summed this reality up in the following way: “what dominates the legal landscape in the early 21st century is imprecision (*imprécis*), uncertainty (*incertain*) and instability (*instable*)”.³² The above-mentioned dangers are too often present in the contemporary legal systems and are a typical “*signum temporis*”.³³ In the circumstances of such a huge process of law deformation and its contemporary internationalisation, the randomness of this phenomenon should be excluded. It is colloquially called “law debasement” but it is more complex than the old practice of coinage debasement by lowering the noble metal content and the reduction of its weight.

The category of “legal security”, apart from juridical meaning, also has its axiological context. J. Kochanowski wrote: “An individual’s legal security is connected with certainty of law, thus it makes it possible to predict state bodies’ activities and forecast one’s own activities. It is not just a manifestation of callous legalism but a necessary condition of a citizen’s freedom in the state. Predicting and making choices based on reliable knowledge of the law in force enables an individual to organise their life and take responsibility for their own decisions. In a way, legal security is also correlated with an individual’s dignity because it constitutes the manifestation of respect of the legal order for an individual as an

³¹ V. Malabat, B. de Lamy, M. Giacomelli (ed.), *Droit pénal: le temps de réformes. Colloques & débats*, LexisNexis 2011.

³² M. Delmas-Marty, *Les forces imaginantes du droit*, Vol. II, *Le pluralisme ordonné*, Paris 2006, p. 7.

³³ In France, the regulations of the labour law are most often quoted as an example of excessive laws as it has over 10,000 articles while, in comparison, its Swiss equivalent has only 50 articles. Additional data concern the number of contracts based on labour law. While in France there are 38, in England there is only one form of contract. In relation to the example of Switzerland, it must be noted that many negative examples of legislation are observed; for more on that issue, see: Ch. Guy-Ecabert, A. Flückiger, *La bonne loi...*, p. 22 and the following. It should be added that the French Code of criminal procedure might also be an example of a very abundant act. Its legislative part only accounts for 935 articles. The French *Code de procédure pénale* of 2013, 25th edition, published by LexisNexis, has 2,196 pages providing the basic criminal procedure regulation and related matters with short commentaries. In the 16th century, M. de Montaigne wrote that the French had more statutes than the whole world altogether (*De l'expérience. Essais*, Book III, Chapter XIII, 1588). Even if the assessment is exaggerated, it rightly highlights the extraordinary wealth of French legislation. According to the statistics of Légifrance (2013), there are 64 codes in France, 10% of which are amended every year. Henri Altan commented on this situation this way: “Complexity is an order a code does not know” (“*La complexité est un ordre dont ne connaît pas le code*”). Apart from that, there are over 11,500 statutes, 280,000 decrees, and many other legal acts. The cost of legislative bureaucracy is estimated at 100 billion euros.

autonomous and rational entity”.³⁴ The imposed framework of the article does not allow elaborating on the issue but it does not disappear from the field of vision and interest.

In the context of the title, the concept of “legal security” has a conventional meaning, i.e. a group of characteristic features of appropriate legislation being a condition for citizens’ sense of security resulting from simplicity and clarity of law, its predictability and comprehensive logics, moderation in indispensability of regulations, existence of general and unquestionable norms, clear and unambiguous communication of rights and duties and other similar attributes. At present, the concept of “legal security” constitutes one of the most common and, at the same time, basic individual and social needs connected with the functioning of law. Striving to give law adequate content and form in accordance with classical directives defining this category focuses on this need. It must be highlighted that the idea of “legal security” originates from the 19th century German juridical tradition,³⁵ but it was a commonly recognised condition of the state of law and a factor ensuring the quality of law in the 20th century. In France, “legal security” was classified as a constitutional value derived from the constitutional category of security (Article 2 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789) belonging to the sphere of natural rights inalienable in the same way as liberty, property and the right of revolution.³⁶ At present, the clause is perceived similarly, but emphasis is placed on the necessity to re-activate the values that form its content. This pursuit has the strength of one of the most important calls addressed at lawmakers in the face of the prevalence and accumulation of negative phenomena in the process of law enacting and institution.

The concept of “legal security” is rich in theory and abundant judgements at the level of both domestic and international systems. It has been developed by the European Court of Human Rights, which identifies this category with conditions constituting the conception of a fair trial. The fundamental character of the principle of “legal security” was emphasised in the ECtHR judgement of 6 April 1962.³⁷ The Court of Justice of the European Union, on the other hand, in its judgement of 14 July 1972³⁸ precisely defined the attributes of legal security identifying the principle with the requirement of clarity and precision of a legal act, a condition of communicating it to the addressee, and readable and unambiguous specification of the addressees’ rights and obligations resulting from it.³⁹ Then the category was developed in numerous successive judgements. It has been also referred to in many judgements of the Polish Constitutional Tribunal.⁴⁰

³⁴ Speech given at the conference on the language of Polish legislation: <https://www.rpo.gov.pl/pliki/1165502902.pdf>.

³⁵ P. Jestaz, C. Jasmin, *La doctrine*, Dalloz 2004, p. 139 ff.

³⁶ Déc. CC No. 99–421 of 16 December 1999.

³⁷ Case *Kledingverkoopbedrijf de Geus en Vitdenbogenrd v. Robert Bosch GmbH*, 13/61, ECLI:EU:C:1962:11.

³⁸ *ICI v. Commission* 48/69, ECLI:EU:C:1972:70.

³⁹ J. Molinier, *Les principes généraux du droit*, Répertoire de droit européen, October 2014.

⁴⁰ Inter alia, the rulings of 30 November 1988 (K 1/88); 2 March 1993 (K 9/92); 5 January 1999 (K 27/98).

It must be emphasised that different forms of law destruction have been very well diagnosed and described.⁴¹ Thus, there is no need to present them and analyse again. In fact, all the defined factors having a negative impact on the quality of legislation are revealed in the regulations of particular areas of law although their share may be different in each case. The first criterion for differentiation results from the division of law into the private and public ones. Disciplines belonging to the sphere of public law are characterised by a relatively lower level of security. They are more exposed to threats connected with legislative populism or temporary political needs, which is shown by the examples of numerous amendments to substantive and procedural law. In case of many of them, striving to implement particular ideas, in isolation from objective and rational arguments, is revealed. Most often, the political majority parity is a factor legitimising this type of legislative choices. The problem of demagoguery in law-enacting is as old as mankind. Aristotle perfectly described it in *Politics* based on examples of specific legal solutions (e.g. concerning the use of confiscation and fines or tax surplus).

Particular branches of law provide individual typical proofs of the reality of contemporary threats to law enactment and institution. In the part of the article that follows, the main attention will be focused on criminal procedure law, which is characterised by greater legislative mobility and susceptibility to amendments because of the general necessity to ensure functionality of criminal procedure. The requirement to ensure efficient course of the proceedings and regard to its pragmatism and economy usually constitute justified grounds for legal change. Aiming at simple and utilitarian solutions where they are in adequate balance with the sphere of the rights of the parties to the proceedings is usually approved of. Basically, in case of amendments introducing constructive improvement of the procedure logics and rationality, one can assume that they will be approved of. Many amendments to the criminal procedure regulations of 6 June 1997 were evidently aimed at the indicated objectives. There were also chaotic and totally unconsidered reforms.

All in all, from 1 September 1998 when the Criminal Procedure Code (CPC) entered into force until the end of 2016, there were 120 amendments to this Act, which means that seven of them were passed annually on average. In some years, the number was higher. 2011 was a record year with 12 amendments to the CPC. In 2009 there were 11 and in 2008 and 2006 there were 10 each year. 37 amendments concerned only or mainly (first of all) the CPC regulations, in other 50 amendments the CPC regulations took the second or subsequent place. The changes marked on the margin of the CPC take two pages although they are only publication references to successive amendments. It is really difficult to list the CPC regulations changed from 1 September 1998 until 31 December 2016. It is a little easier to sum up changes resulting from the adaptation of the European Union criminal procedure solutions, although the reason indicated has had its substantial statistical share in the

⁴¹ R. Piotrowski presented an abundant diagnosis of the phenomenon in *Uwagi o stanowieniu prawa* [Comments on law-making], [in:] *Rozwój kraju a jakość stanowionego prawa. Materiały i opinie* [Development of a country versus the quality of enacted law. Materials and opinions], Warsaw, 16 April 2012, pp. 15–25, <http://www.kongresbudownictwa.pl/pliki/rozwoj%20kraju%20a%20jaksosc%20stanowionego%20prawa.pdf>.

transformation of the criminal procedure since Poland's accession to the European Union on 1 May 2004. The legal transformations introduced as a result are generally justified, although one can also point out examples of unconsidered changes.

Finally, the third factor of the transformation of criminal procedure regulations is connected with the recognition of unconstitutionality of the provisions in force. Since the Criminal Procedure Code entered into force, the Constitutional Tribunal has issued 33 judgements on the Act's conformity with the Constitution of the Republic of Poland of 2 April 1997, adjudicating unconstitutionality of the challenged provisions 22 times, including two provisions of the CPC simultaneously three times. In 10 cases, the Constitutional Tribunal judged that the challenged provisions were partially constitutional and partially unconstitutional. In one case, unconstitutionality concerned two criminal procedure provisions at the same time. In total, in the period the CPC was in force, the Constitutional Tribunal adjudicated unconstitutionality of 36 CPC provisions, which means that there were two such judgements annually on average. 2008 was a record year as the Constitutional Tribunal examined the CPC provisions six times and judged the breach of the Constitution five times. Although the Constitutional Tribunal issued the highest number of judgements (eight) in 2004, most of them recognised constitutionality of the challenged provisions. The activeness of the Constitutional Tribunal exceeded the average in 2006 and 2012 (five judgements issued each year).

Going on with statistical data, it must be said that Polish Criminal Procedure Code contains 673 articles, however, the number does not represent the real abundance of the Act. Most articles are divided into smaller editorial units, which extends the scope of the regulation considerably. Some provisions cover two A4 format pages (e.g. Article 237 CPC). Where all the letters of the alphabet have been used to mark the subsections, double-letter or triple-letter marking is used. It especially concerns provisions of Part XIII CPC – International Relations Procedure. For example, the provisions of Chapter 66d – European Union Member State's motion to execute forfeiture ruling are marked as Article 611fu to Article 611fzu. Although §57(5) of the Regulation of the President of the Council of Ministers of 20 June 2002 on the rules for law-making techniques⁴² envisages such a situation, its real occurrence is rightly criticised. Since the Code that is in force now was passed, there has been a tendency to extend its volume. 111 executive acts have been added to the basic criminal procedure regulation. Some of them were repealed or recognised as repealed but most of them are still binding.

The information presented above makes it possible to form opinions on the state of the Polish criminal procedure legislation but the knowledge of the successive amendments must have even greater influence on them. The considerable number of those amendments makes even cursory presentation of them all impossible. Thus, the facts mainly indicating the instability of Polish criminal procedure law will be selectively presented in the final part of the article.

The data presented so far are certainly not grounds for optimism from the perspective of the value of the stable and reliable law. Undoubtedly, they indicate

⁴² Journal of Laws [Dz.U.] of 2016, item 283, uniform text.

destabilisation of the Polish criminal procedure law but are only formal proofs of the phenomenon. The real scope of particular changes and their complex character show its actual limits and progress rate. Some of the 120 amendments to the Criminal Procedure Code in force introduced systemic changes that cause considerable reconstruction of the former legal conceptions. Their list given below is just exemplary and covers the most important instances of the criminal procedure reform. Let me present them in a chronological order: the change of the original model of cassation introduced in the Act of 20 July 2000 amending Act: Criminal Procedure Code, the Act on regulations instituting Criminal Procedure Code and the Act on penal law concerning offences against the Treasury;⁴³ the introduction of mediation and structural changes at the stage of the preparatory proceedings resulting from the Act of 10 January 2003 amending the Act: Criminal Procedure Code, Regulations instituting Criminal Procedure Code, the Act on turning state's evidence and the Act on the protection of classified information;⁴⁴ as a rule, the elimination of lay judges from Polish criminal courts in accordance with the Act of 15 March 2007 amending the Act: Code of Civil Procedure, the Act: Criminal Procedure Code and some other acts;⁴⁵ changes in the stage of the preparatory proceedings introduced in the Act of 29 March 2007 amending the Act on Public Prosecution, the Act: Criminal Procedure Code and some other acts;⁴⁶ changes in military courts competence introduced in the Act of 5 December 2008 amending the Act: Criminal Procedure Code and some other acts;⁴⁷ fundamental and multi-directional model changes introduced in the Act of 27 September 2013 amending the Act: Criminal Procedure Code and some other acts;⁴⁸ restitution of the Minister of Justice competence to lodge the extraordinary cassation in accordance with the Act of 10 October 2014 amending the Act: Criminal Procedure Code and some other acts;⁴⁹ the continuation of changes initiated in the Act of 27 September 2013 in the Act of 20 February 2015 amending the Act: Criminal Code and some other acts;⁵⁰ the changes reversing the direction of reforms introduced on 1 July 2015 in connection with the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts;⁵¹ restitution of a social representative in accordance with the Act of 10 June 2016 amending the Act: Criminal Procedure Code, the Act on the profession of a physician and a dentist and the Act on patients' rights and the Children's Ombudsman⁵².

In the period of over 18 years of the Polish Criminal Procedure Code being in force, the reform introduced in the Act of 27 September 2013⁵³ was of crucial

⁴³ Journal of Laws [Dz.U.], No. 62, item 717.

⁴⁴ Journal of Laws [Dz.U.], No. 17, item 55.

⁴⁵ Journal of Laws [Dz.U.], No. 112, item 766.

⁴⁶ Journal of Laws [Dz.U.], No. 64, item 432.

⁴⁷ Journal of Laws [Dz.U.], No. 237, item 1651.

⁴⁸ Journal of Laws [Dz.U.], item 1247.

⁴⁹ Journal of Laws [Dz.U.], item 1556.

⁵⁰ Journal of Laws [Dz.U.], item 396.

⁵¹ Journal of Laws [Dz.U.], item 437.

⁵² Journal of Laws [Dz.U.], item 1070.

⁵³ Journal of Laws [Dz.U.], item 1247.

importance. Although its provisions were in force only between 1 July 2015 and 15 April 2016,⁵⁴ they cannot be called episodic because of their scope of influence on the former conception of the criminal proceedings and multidirectional legal transformations. According to the legislator's declaration expressed in the Bill, the reform aimed to remodel juridical proceedings towards contradictoriness, which created the best conditions for establishing the substantive truth and best serves respect of the rights of the parties to the proceedings. To that end, it was assumed that it was necessary to: (1) remodel the preparatory proceedings within the limits adequate to the needs of building a model of an adversarial trial, especially the objectives the proceedings want to achieve; (2) improve and accelerate the proceedings by creating legal frameworks for broader use of consensual ways of concluding criminal proceedings and use of the idea of remedial justice in a broader way also thanks to the institution of mediation; (3) eliminate seeming proceedings by specifying a new way of proceedings based on abandoning a series of activities that do not serve establishing the truth during the trial and respecting guarantees for the parties to the proceedings and the principle of just repression; (4) develop new grounds for the use of preventive measures in a way preventing their excessive use in the procedural practice and ensuring the achievement of their basic objective, i.e. ensuring the appropriate course of the proceedings, as well as better safeguarding the suspect's procedural guarantees, and broader than present possibility of claiming damages and compensation for damage and harm caused by the institution of these measures during the proceedings; (5) limit the excessive length of proceedings by re-shaping the model of the appellate proceedings in the way allowing reformatory adjudication, and thus limiting a remand procedure that contributes to the lengthening of the criminal proceedings; (6) lighten the workload of judges, presidents of courts and heads of departments by constituting a possibility of taking decisions on keeping order and technical matters (as well as less significant judicial decisions) by judicial officers, which would let judges use their time more efficiently; (7) achieve full conformity of statutory solutions with the standards revealed in the light of judgements of the Constitutional Tribunal and the European Court of Human Rights; (8) repeal defects of the regulations in force that are obvious and revealed in court judgements.

The most important conception of the reform introducing a fully adversarial criminal proceedings in Poland was abandoned after eight months of being in force before it was actually used in the court practice. Regardless of the attitude toward the reform of 1 July 2015, just the decision to abandon it laid down in the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts⁵⁵ is astonishing. The dynamics of this event went beyond the former legislative reality in the sphere of criminal procedure and showed that the change of law is a matter of adequate motivation and determination on the part of the legislator. Substantive

⁵⁴ In accordance with Article 28 of the Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts (Journal of Laws [Dz.U.], item 437), the Act was to enter into force on 15 April 2016, with the exception of Article 1(5), (81) and (109), which was to enter into force on 1 January 2017.

⁵⁵ Journal of Laws [Dz.U.], item 437.

assessment of implemented reforms is of secondary importance. What matters is how easy it is to take decisions on an act that is a code. The idea of ensuring that acts-codes are more stable is implemented with the use of a special legislative mode envisaged for enacting and amending this type of acts, as stipulated in Articles 87–95 of the Resolution of the Sejm of the Republic of Poland of 30 July 1992 – Rules and Regulations for the Sejm of the Republic of Poland.⁵⁶ However, it proves to be a relative solution.

The conclusions will be mainly pessimistic. Firstly, according to Ch. Guy-Ecaber and A. Flückiger's diagnosis, there was no golden era of legislation in history. The ancient Roman law, in spite of many positive examples, was not ideal. According to M. Jońca, rightly praised for its insight and clarity, it never achieved the level of dogmatic clarity and consistency from the linguistic perspective.⁵⁷ The conditions for appropriate legislation were well diagnosed in the Enlightenment but the ideal was not reached, neither at that time nor in the next epochs, which is confirmed by outstanding figures' critical opinions on the state of law enacted in their times. Regardless of the period in history, the articulated weaknesses of law are standard and cause the same resentment. With respect to this, the contemporary reality is not extraordinary, although its characteristic feature certainly is the existence of a much broader scope of disadvantageous phenomena in the field of law functioning. The criminal procedure law is a branch that, unfortunately, expressively confirms this observation.

BIBLIOGRAPHY

- Aristotle, *Polityka* [Politics], Polish translation by L. Piotrowicz, [in:] *Dzieła wszystkie* [Collected works], Vol. 6, Wydawnictwo Naukowe PWN Warsaw 2001.
- Bacon F., *Oeuvres philosophiques, morales et politiques de François Bacon*, translation by J.A. Buchon, Paris 1838.
- Bałtruszajtys G., Kolarzowski J., Paszkowska M., Rajewski K., *Wybór źródeł do historii prawa sądowego czasów nowożytnych* [Selection of sources for the modern history of court law], Liber, Warsaw 2002.
- Beccaria C., *O przestępstwach i karach* [On crimes and punishments], Polish translation by E.S. Rappaport, Wydawnictwo Prawnicze, Warsaw 1959.
- Capitant H., *Comment on fait les lois aujourd'hui*, Revue politique et parlementaire Vol. 91, 1917.
- Chateaubriand, F.-R., *Mélanges politiques*, [in:] *Oeuvres complètes*, Vol. V., Paris 1836.
- Cuniberti G., *Grands systèmes de droit contemporains. Introduction au droit comparé*, LGDJ 2015.
- Delmas-Marty M., *Les forces imaginantes du droit*, Vol. II, *Le pluralisme ordonné*, Seuil, Paris 2006.

⁵⁶ Monitor Polski of 2016, item 1178. The Speaker of the Sejm takes a decision on the form of a code. In accordance with the Rules and Regulations of the Sejm, special (ad hoc) committees are appointed. MPs have to get acquainted with the code within 30 days. In the course of work, a standing expert committee is appointed. Facultative expert committees may be appointed. Their function is usually advisory. A group of at least five MPs of the committee is entitled to propose amendments. On the second reading, amendments may be proposed only in writing with justification by at least 15 MPs.

⁵⁷ M. Jońca, *Codex i kodeks* [Codex and code], *Temidium* No. 4 (87), 2016, p. 82.

- Descartes R., *Discours de la méthode pour bien conduire sa raison et chercher la vérité dans les sciences, plus la dioptrique, les météores et la géométrie qui sont des essais de cette méthode*, Part II, Leyde 1637.
- Dubois B., Le Marc'Hadour T., *Un code pour la notion. La codification du droit pénal au XIXe siècle: France, Belgique, Angleterre*, Centre d'Histoire Judiciaire, Lille 2010.
- Guy-Ecabert Ch., Flückiger A., *La bonne loi ou le paradis perdu?*, *Législation & évaluation* 2015, Vol. 26, No. 1.
- Hanard G., *Droit Romain*. Vol. I. *Notions de base. Concept de droit. Sujets de droit*, Brussels 1997.
- Ihering R. von, *L'esprit du droit romain dans les diverses phases de son développement*, Bologne, Vol. 1, translation by O. de Meulenaere, Paris 1880.
- Jestaz P., Jasmin C., *La doctrine*, Dalloz 2004.
- Jońca M., *Codex i kodeks* [Codex and code], *Temidium* No. 4 (87), 2016.
- de Lahay Cormenin L.-M., *La légomanie*, Paris 1844.
- Luther M., *Lettre à Philippe de Hesse*, 1527, [in:] J. Carbonnier, *Essais sur les lois*, Deffrénois, Paris 1995.
- Malabat V., de Lamy B., Giacomelli M. (ed.), *Droit pénal: le temps de réformes. Colloques & débats*, LexisNexis 2011.
- Molinier J., *Les principes généraux du droit*, *Répertoire de droit européen*, October 2014.
- de Montesquieu Ch.-L., *O duchu praw* [(On) The Spirit of the Laws], Polish translation by T. Boy-Żeleński, Warsaw 2002.
- Piotrowski R., *Uwagi o stanowieniu prawa* [Comments on law-making], [in:] *Rozwój kraju a jakość stanowionego prawa. Materiały i opinie* [Development of a country versus the quality of enacted law. Materials and opinions], Warsaw, 16 April 2012 <http://www.kongresbudownictwa.pl/pliki/rozwoj%20kraju%20a%20jaksosc%20stanowionego%20prawa.pdf>.
- Porret M., *Beccaria et sa modernité*, [in:] M. Porret (ed.), *Beccaria et la culture juridique des Lumières (Actes du colloque européen de Genève 25-26 novembre 1995)*, Librairie Droz, Geneva 1997.
- Proudhon P.J., *Idée générale de la révolution au XIXe siècle – choix d'études sur la pratique révolutionnaire et industrielle*, Paris 1851.
- Rousseau J.J., *O umowie społecznej* [The Social Contract], Polish translation by M. Starzewski, Warsaw 2002.
- Tacitus, *Annales*, III, 27.3.

Legal regulations

- Kodeks postępowania karnego* [Criminal Procedure Code] of 1 September 1998, *Journal of Laws* [Dz.U.] of 1997, No. 89, item 555, as amended.
- Act of 11 March 2016 amending the Act: Criminal Procedure Code and some other acts, *Journal of Laws* [Dz.U.] of 2016, item 437.
- Regulation of the President of the Council of Ministers of 20 June 2002 on the rules for law-making techniques, *Journal of Laws* [Dz.U.] of 2016, item 283, uniform text.

ON INSTABILITY AND OTHER DEFICIENCIES OF LAW IN GENERAL AND EXEMPLIFIED BY POLISH CRIMINAL PROCEDURE LAW

Summary

The article discusses the issue of cardinal deficiencies of legislation from a broad historical perspective. It is an attempt to demonstrate that the sphere of enacting law is burdened with many risks and, regardless of the epoch, there are threats the number of which has been continually increasing in history. The considerations lack optimism, which is already suggested by the title, but also the presented reality. The current level of imperfection of law exceeds the level of historical examples and results in dangerous consequences such as social depreciation of law. The criminal procedure law is used in the article to serve as an example of disadvantageous phenomena in the sphere of legislation.

Key words: law, legislation, instability of law, law depreciation, criminal proceedings (trial)

O NIESTABILNOŚCI I INNYCH WADACH PRAWA OGÓLNE ORAZ NA PRZYKŁADZIE POLSKIEGO PRAWA KARNEGO PROCESOWEGO

Streszczenie

Niniejsze opracowanie podejmuje problematykę kardynalnych wad legislacji w szerokiej perspektywie historycznej. Jest ono próbą wykazania, że sfera stanowienia prawa jest obciążona wieloma ryzykami i bez względu na epokę występują zagrożenia, których liczba nieustannie w historii narasta. W tych rozważaniach brak jest miejsca na optymizm, co sugeruje już sam tytuł, ale przede wszystkim opisywana rzeczywistość. Obecny poziom niedoskonałości prawa przewyższa skalą historyczne przykłady, prowadząc do groźnego skutku, w postaci społecznej deprecjacji prawa. Za egzemplifikację niekorzystnych zjawisk w sferze legislacji posłużył przykład prawa karnego procesowego.

Słowa kluczowe: prawo, legislacja, niestabilność prawa, deprecjacja prawa, proces karny