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ON THE STANDARDS OF LAW-MAKING IN CRIMINAL LAW: A POLISH EXAMPLE

Abstract

This paper delves into the standards of law-making in criminal law, emphasizing the significance of these standards within the legal system. The text explores the importance of maintaining constitutional and non-constitutional standards in criminal law and investigates the complexity of defining clear and unambiguous principles for lawmakers. It discusses the dual meaning of the standard of law-making, encompassing both substantive and formal aspects, and how these standards play a crucial role in shaping legal norms. The paper also highlights four key law-making standards in criminal law: legal certainty, adherence to proper legislative procedure, the effectiveness of the law and the adequacy of the language of the law. It raises essential issues regarding the impact of these standards on the quality and trustworthiness of criminal laws.

KEYWORDS

law-making, standard, criminal law

SŁOWA KLUCZOWE

stanowienie prawa, standard, prawo karne

I. INTRODUCTION

Criminal law is a branch of law that exerts the most significant impact on the lives of individuals when applied to them. Its doctrine primarily focuses on the analysis of existing regulations and deriving specific legal norms from them.¹ In this process, the analysis of a given issue is usually accompanied by *de lege ferenda* proposals. Significantly less attention is devoted to the structural aspect of criminal law, or in other words, to how criminal law provisions should be created.²

In recent years, it has repeatedly been emphasized that constitutional standards should be maintained both in the enactment and application of criminal law.³ However, it is difficult to require that all of these standards, particularly in light of the imprecise formulation of the principle of the democratic rule of law expressed in Article 2 of the Constitution of the Republic of Poland of 2 April 1997,⁴ be set forth in a clear and unambiguous manner, allowing for their straightforward and unambiguous practical application in the process of law-making. Moreover, these may not be the only standards that the legislator, or even the drafters who formulate provisions in this branch of law, should adhere to.⁵

The aim of this paper is to answer the question of what are the standards of law-making, and then to identify some of the most important standards that

¹ See Jacek Giezek, 'O możliwości naukowego uzasadnienia zmiany modelu odpowiedzialności karnej' (2017) 2 Państwo i Prawo 3, 5, who suggests that in this regard it is appropriate to talk about the dogmatics of criminal law.

² Cf. *ibid* 6, based on which these issues are no longer dealt with by dogmatics but by the theory of criminal law, which should precede the introduction and existence of individual provisions. For more on the theoretical and legal approach to the issue of law-making, see Sławomira Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa* (Ars boni et aequi 2003) 26–31.

³ See: Piotr Kardas, 'Prawo karne w świetle standardów konstytucyjnych' (2022) 10 Państwo i Prawo 91ff; Włodzimierz Wróbel, 'Prawo karne a standardy konstytucyjne' in Marek Mozgawa, Piotr Poniatowski and Krzysztof Wala (eds), *Aktualne problemy i perspektywy prawa karnego* (1st edn, Wolters Kluwer Polska 2022) 13ff; Aleksandra Kardas and Piotr Kardas, 'Zasada równości w prawie karnym (zarys problematyki)' (2019) 1 Czasopismo Prawa Karnego i Nauk Penalnych 7ff; Przemysław Cychosz, *Konstytucyjny standard prawa karnego materialnego w orzecznictwie Trybunału Konstytucyjnego* (KIPK 2017). All translations presented in this paper were prepared by the authors. Any translated materials or texts from external sources are accurately attributed.

⁴ JoL [Journal of Laws] 78/483 as amended.

⁵ See Antoni Rost, *Instytucje polskiego prawa konstytucyjnego* (1st edn, Wydawnictwo Naukowe UAM 2013) 19ff.

might be postulated in the Polish criminal law. This task is achieved by carrying out a formal and dogmatic analysis of normative acts introducing changes to the Penal Code of 6 June 1997.⁶ Furthermore, the currently applicable standards are exemplified and presented in selected groups, and their relationship with the law-making models is also outlined.

In section II the idea of standards of law-making is defined, and some further remarks are made on the nature and practical impact of these phenomena. In section III a few potential candidates for standards of law-making in the field of criminal law are supplemented and briefly characterised. Although these standards, for the sake of clarity of the argument, are not analysed in detail, it is possible to draw differences between them, outline their fundamental elements and compare them. In section IV the proposed standards are juxtaposed in order to show the possible conflicts between various standards within a certain model of criminal law and the methods of coordinating them. The idea of meta-standards of law-making is introduced. This way, the general overview of the way in which criminal provisions ought to be enacted is provided.

II. STANDARDS OF LAW-MAKING AND THEIR (DUAL) MEANING IN THE CONTEXT OF CRIMINAL LAW

In order for the argument to be comprehensible, it is necessary to explain what is the standard for law-making and what is its significance, especially for criminal law, which is a branch of law that has the most profound impact on the life of individuals.

According to the dictionary definition, a standard is ‘the level that is considered to be acceptable, or the level that someone or something has achieved’.⁷ Therefore, a standard is a concept with a positive connotation, and as a consequence, adhering to it must be regarded as beneficial, while failure to apply it should be criticised. In principle, law is understood as a system of norms, which are linguistic expressions and are cognized through their understanding.⁸ From the perspective of law-making, it must be perceived even more objectively and essentially reduced to provisions from which, based on language-appropriate methods,

⁶ (Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny) consolidated text [2022] JoL 1138 as amended (Penal Code).

⁷ *The Longman Dictionary of Contemporary English* <www.ldoceonline.com/dictionary/standard> accessed 20 December 2023.

⁸ See Sławomir Żółtek, *Znaczenie normatywne ustawowych znamion typu czynu zabronionego. Z zagadnień semantycznej strony zakazu karnego* (Wolters Kluwer 2017) 23.

the norms constituting the legal system are derived.⁹ Consequently, in the most tangible sense, law-making is nothing more than the formulation and adoption of provisions. However, in a broader sense, the norm derived from a given legal provision through interpretation becomes part of the system, which is the law. Furthermore, such an approach confirms the frequent situation in practice when, despite the immutability of the content of a legal provision, there is a change in its interpretation, resulting in a change in the legal norm, and hence, a change in the law.¹⁰ In such cases, it is difficult to speak of law-making. Therefore, it can be stated that in the context of this work, the standard for law-making is a norm specifying the basic requirements for newly created legal provisions. It should be noted at this point that the standard for law-making can be both substantive and formal. A substantive standard pertains to the content of enacted legal provisions, including the values that are to be realized as a result of its application. Formal standards, on the other hand, concern the techniques and procedures for creating legal provisions.

The content of an individual law-making standard is rarely defined in a manner that would not be subject to further interpretation. For this reason, the concept of a meta-standard of law-making, understood as a norm specifying the basic requirements for law-making standards within a given model of law-making, is introduced. The meta-standard is adopted at the political stage when the trajectory of criminal law development and its intended purpose as a specific tool are determined. The political projection defines how criminal law should be structured and, consequently, determines the law-making model adopted at a given time and within a specific political system.

The model of criminal law-making should be understood as a schema representing the legislative process and its outcome when applying a governing set of standards.

With a clear understanding of the semantic meaning of the concept of the law-making standard, it is worthwhile to consider its role or importance, seen as the consequence generated by such standard.

The primary consequence of establishing the content of a specific law-making standard is the creation of objectified criteria by which both the created regulations and the legislative process can be assessed.

As a result of identifying a standard, it is possible to enhance the quality of created laws by formulating specific requirements regarding the elements considered in the legislative process, directed towards lawmakers and drafters who will apply them. Standards of criminal law-making, when understood broadly, can provide support not only in the literature-referenced debate related to the determi-

⁹ For further discussion on the difference between a legal norm and a provision, see *ibid* 32–34.

¹⁰ See Włodzimierz Wróbel, *Zmiana normatywna i zasady intertemporalne w prawie karnym* (Zakamycze 2003) 311–15.

nation, justification, and limitation of criminalization¹¹ but also from an axiological perspective, considering the tension between positive¹² and critical morality¹³. This, in turn, means that adhering to law-making standards can contribute to mediating widely accepted moral norms through constructed legal norms.

To conclude the discussion of preliminary issues, it is worth adding that when creating or amending criminal law, lawmakers should first consider which part – general or special – the provisions will apply to. While some principles related to law-making are not dependent on the specific part of the Penal Code being created, some will be more closely associated with or even exclusively tied to a particular group of regulations. For example, the principle of subsidiarity¹⁴ is inherently linked to typifying provisions than to the general part of the Penal Code.

It seems that apart from occasional remarks concerning how specific provisions should be shaped, it would be also valuable to develop theoretical frameworks for discussion of models of law-making, especially in the field of criminal law. Unfortunately, this text does not provide space for such extensive considerations. However, to at least initiate the discussion on this topic, it is worthwhile to highlight what the standards of criminal law-making are or should be like.

III. LAW-MAKING STANDARDS IN CRIMINAL LAW

1. FOCUS ON LEGAL CERTAINTY

Ensuring legal certainty as a material standard for criminal law-making should be considered a component of the constitutional principle of the democratic rule of law.¹⁵ As stated in the literature: ‘The subject to which the law refers (the addressee of the norm, citizen, taxpayer) can predict the legal consequences

¹¹ Cf. Kardas, ‘Prawo karne’ (n 3) 96. For criminalization and related standards, see Lech Gardocki, *Zagadnienia teorii kryminalizacji* (PWN 1990) passim.

¹² See HLA Hart, *Law, Liberty and Morality* (Stanford University Press 1963) 20ff; by positive morality is meant ‘the morality actually accepted and shared by a given social group’.

¹³ See ibid 82; cf. Magdalena Budyn-Kulik, *Aksjologiczne podstawy kryminalizacji w społeczeństwie ponowoczesnym* (Wydawnictwo UMCS 2022) 172. Critical morality can be framed as a set of moral values and norms for evaluating other values and norms. Critical morality thus constitutes the criteria by which legal norms, among others, are assessed.

¹⁴ See Sławomir Żółtek, *Prawo karne gospodarcze w aspekcie zasady subsydiarności* (Wolters Kluwer 2008) 245–303.

¹⁵ See judgment in SK 6/09, 20 October 2009 Polish Constitutional Tribunal, OTK-A 2009/9/177.

of facts (states of affairs), including their own and others' actions and omissions'.¹⁶ When applying the above observations to discussions within the scope of criminal law-making techniques, it is worth noting that the following can be derived from the standard of ensuring legal certainty: (1) the obligation to avoid too frequent and ill-considered changes in the content of legal provisions; (2) the obligation to clearly define the prerequisites for actions taken by authorities; (3) the obligation to adequately formulate legal penalties.¹⁷

In the context of criminal law-making, it is worthwhile to refer to the concept of 'qualification certainty', defined as follows: '[L]aw is qualitatively certain if minor changes in the factual situation do not lead to significant changes in the legal qualification of a particular behaviour'.¹⁸ The obligation to create criminal law that realizes the standard of legal certainty in terms of qualification certainty imposes on the legislator the duty to establish legal norms whose effects of application are predictable from the point of view of the addressee of the law.

The consequence of not adhering to the specified standard is a state of legal uncertainty or instability, which can be succinctly described as the negation of the characteristics of the standard of legal certainty. The primary consequence of this is the limitation of the law's protective function through criminal law.¹⁹ Equally important is additionally limited trust in the legislator.

An excellent example of the breach of these standards are the provisions implementing the Act of 7 July 2022 amending the Penal Code and some other acts.²⁰ Despite stipulating the date of its entry into force in the act, the legislator later, after the legislative process had been concluded, decided that it should come into effect much later. Consequently, under the Act of 26 January 2023 amending the Code of Civil Procedure and some other acts,²¹ the period of *vacatio legis* was extended to 1 October 2023. Such actions of the legislator, considering the procedure for amending transitional provisions, raised doubts among the criminal law commentators about whether the amendment to the Penal Code had come into force.²²

¹⁶ Hanna Filipczyk, *Postulat pewności prawa w wykładni operatywnej prawa podatkowego* (1st edn, Wolters Kluwer Polska 2013) 21.

¹⁷ Prior to further reasoning, it is worth signalling a kind of synergy between the standard of care for legal certainty and the standard of adequacy of the language of law.

¹⁸ Bartosz Brożek, 'Pewność prawa jako stabilność strukturalna' (2011) 6 *Forum Prawnicze* 23, 26.

¹⁹ See Katarzyna Banasik, 'Stabilność prawa karnego jako wartość' in Tadeusz Biernat (ed), *Stabilność prawa w kontekście wartości, instytucji i funkcjonowania systemu prawnego* (Oficyna Wydawnicza AFM 2016) 38.

²⁰ (Ustawa z dnia 7 lipca 2022 r. o zmianie ustawy Kodeks karny oraz niektórych innych ustaw) [2022] JoL 2600 as amended.

²¹ (Ustawa z dnia 26 stycznia 2023 r. o zmianie ustawy Kodeks postępowania cywilnego oraz niektórych innych ustaw) [2023] JoL 403.

²² See Mikołaj Małecki, *Niezmieniony Kodeks karny. Niekonstytucyjność vacatio legis nowelizacji Kodeksu karnego z 7 lipca 2022 r. i jej konsekwencje prawne* (Krakowski Instytut

2. ADHERENCE TO THE PROPER LEGISLATIVE PROCEDURE

Since criminal law is generally contained in provisions of a statutory rank, the standard for the adoption of these provisions in the course of proper legislative procedure is particularly important. This is a standard of constitutional nature, since its basic assumptions are included in Articles 118–123 of the Polish Constitution. A legislative act adopted in contravention of this procedure cannot be called a law, and what is more, it can constitute a kind of non-act.²³ The Constitution, however, contains only a rough description of the legislative procedure, while the details are left to be determined by ordinary legislation.²⁴ Although, as indicated, the constitutional regulation is of rudimentary nature, it is impossible not to specify in some detail the most important points of the legislative procedure. Among these, the requirement to justify a bill deserves special attention. On constitutional grounds, it is only necessary to present to the Sejm of the Republic of Poland the financial consequences of the implementation of drafters' intentions after the law enters into force. Subordinate legislation provides for much more far-reaching requirements in this regard. The practical importance of the obligation to justify a bill is expressed, among other things, by the fact that, in the framework of teleological interpretation, judicial authorities often reach for such justifications in order to decode the meaning of the law (*ratio legis*).²⁵ Moreover,

Prawa Karnego 2023). It should be pointed out that even if the author's doubts are shared that the amendment, for reasons of unconstitutional change of *vacatio legis*, did not enter into force, the effect of interpretation was that it was known earlier and, consequently, it entered into force on the original assumed date. The allegation of retroactivity of the law in such a case is not correct, since by way of interpretation it is not indicated that from now on the amendment is considered to have entered into force earlier, but by way of interpretation it should have already been so stated at that point. Thus, there is no retroactivity, or at least retrospection, here. However – regardless of the discussion, which is more academic than practical – the example of the amendment under consideration shows that the legislator sometimes fails to comply with the standard of attention to legal certainty, and such a failure can have far-reaching consequences.

²³ See Sebastian Gajewski and Aleksander Jakubowski, 'Nieakt w prawie administracyjnym' (2013) 6 Zeszyty Naukowe Sądownictwa Administracyjnego 73, 84. The authors argue that 'A non-act can be defined as a factual phenomenon not directed at producing any legal effect, which cannot be attributed to a public administration body, but which creates in the external sphere the appearance that an administrative act exists'.

²⁴ Detailed requirements for draft justifications of normative acts are specified, among other things, in Art 34 of the Resolution of the Sejm of the Republic of Poland of 30 July 1992: Regulations of the Sejm of the Republic of Poland (consolidated text [2022] MP 990 as amended) and § 27 of the Resolution No 190 of the Council of Ministers of 29 October 2013: Rules of Procedure of the Council of Ministers (consolidated text [2022] MP 348). In addition, the obligation to prepare a statement of reasons applies also to drafts submitted under the legislative initiative procedure of citizens, see Art 11(1) of the Act of 24 June 1999 on the legislative initiative of citizens (consolidated text [2018] JoL 2120).

²⁵ For further discussion of this topic, see Maciej Dybowski and Verena Klappstein (eds), *Ratio Legis: Philosophical and Theoretical Perspectives* (Springer 2018).

a clear statement of the legislator's intended purpose is a prerequisite – discussed later in this paper – for evaluating the legislative process as ensuring the effectiveness of the law.

Only a legal act that has been drafted in accordance with the constitutionally specified legislative process can come into force and be called a law. A legal act that is not adopted in the correct legislative procedure will not become a law, and no criminal law norms can be derived from it. In other words, a breach of the legislative procedure as defined in the Polish Constitution will result in the provisions being only seemingly adopted, and there will be no normative change in the realm of criminal law. Due to the formal nature of this standard and its extremely precise definition in the Constitution, the assertion of its violation will be evident and easily noticeable, making it highly unlikely, though not impossible.

The legislative procedure, or more precisely its determination, does not end with what is stated in the Polish Constitution. However, a violation of standards of non-constitutional nature will have different consequences. In such cases, the enacted criminal law will be consistently treated as a criminal law statute but may be burdened with a procedural defect that could, for procedural reasons, lead the Constitutional Tribunal to decide on its unconstitutionality.²⁶

From the perspective of legislative procedure, the issue of *vacatio legis*, or the period during which a law remains inactive, is significant. This matter is regulated in two pieces of universally applicable law. The first, as a kind of good practice, is a regulation issued by the Prime Minister on 20 June 2002 concerning the Principles of Legislative Technique.²⁷ The other is addressed in the Act of 20 July 2000 on the announcement of normative acts and some other legal acts.²⁸ In the legal and criminal context, a too short *vacatio legis* period can be a significant obstacle to distinguishing prohibited actions from permissible ones. A question remains as to the possibility of considering a perpetrator's potential mistake regarding the elements of a crime as justified in such circumstances.²⁹

²⁶ Such a situation occurred quite recently on the occasion of the Act of 13 June 2019 on amendments to the Act: Penal Code and some other acts, which – as a result of the judgment in Kp 1/19, 14 July 2020 Polish Constitutional Tribunal OTK-A 2020/36 – for procedural reasons, did not come into force. See Wróbel, 'Prawo karne a standardy' (n 3) 20; Lech Gardocki, 'Ocena możliwych kierunków zmian prawa karnego z punktu widzenia teorii kryminalizacji' in Marek Mozgawa, Piotr Poniatowski and Krzysztof Wala (eds), *Aktualne problemy i perspektywy prawa karnego* (1st edn, Wolters Kluwer Polska 2022) 76.

²⁷ (Rozporządzenie Prezesa Rady Ministrów z dnia 20 czerwca 2002 r. w sprawie Zasad techniki prawodawczej) consolidated text [2016] JoL 283 (ZTP).

²⁸ (Ustawa z dnia 20 lipca 2000 r. o ogłaszaniu aktów normatywnych oraz niektórych innych aktów prawnych) consolidated text [2019] JoL 1461. See Art 4 which indicates a basic *vacatio legis* period of 14 days.

²⁹ All the more so, since it is generally accepted that even a normative change, occurring despite the absence of a change in the content of the law, can justify the invocation of a mistake as to unlawfulness under Art 30 of the Penal Code. See Sławomir Żółtek and Aleksander

3. STRIVING TO ENSURE THE EFFECTIVENESS OF THE LAW

The issue of the effectiveness of the law is multifaceted and complex. A reason for considering the effectiveness of a law as a standard for law-making may be the observation, which rightly raises doubts in legal literature, that despite the intensification of legislative work over the decades, empirical research does not confirm the claim on increased legal effectiveness.³⁰

Starting from the natural language indications, it can be emphasized that 'effective' means something that is 'successful, and working in the way that was intended'.³¹ Thus, the concept emphasizes the praxeological value (stressing the achievement of the intended result) and the teleological value (the intended result essentially serves as the goal of intentional action by the subject). When referring to the praxeological evaluation, one considers the degree to which the intended result has been achieved. Therefore, actions can be characterized as dysfunctional, partially realized, or eufunctional with regard to the adopted goal.

Applying these general considerations to the context of effectiveness of criminal law in the legislative process, it can be understood as the creation of norms that bring about changes in the realm of regulated social relations in line with the objective envisaged by the legislator. Two aspects of the standard can be distinguished: (1) ensuring the creation of eufunctional norms (the positive aspect), and (2) avoiding dysfunctional norms (the negative aspect).³²

Sometimes, it is also pointed out that an element of legal effectiveness is the limitation of side effects (both eufunctional and dysfunctional) of enacted legal norms.³³ Furthermore, as emphasized in the literature on the sociology of law: '[T]he general problem of legal effectiveness and the factors that limit this effectiveness consist of four specific issues: (1) the effectiveness of law-making; (2) the effectiveness of law promulgation (publicity); (3) the effectiveness of law enforcement; and (4) the effectiveness of the validity of the law. The first and third issues are undoubtedly the most important'.³⁴

Leszczyński, 'Prawnokarna kwalifikacja błędu wywołanego nieświadomością treści znamienia technicznoprawnego i normatywnego' (2022) 93 *Studia Iuridica* 318, 326.

³⁰ See Marek Derlatka, 'Perspektywy skuteczności prawa' (2021) 31 *Studia Paradyjskie* 305, 307–08.

³¹ *The Longman Dictionary of Contemporary English* <<https://www.ldoceonline.com/dictionary/effective>> accessed 20 December 2023.

³² See Andrzej Kojder, 'Ograniczenia skuteczności prawa' in Tomasz Giaro (ed), *Skuteczność prawa. Konferencja Wydziału Prawa i Administracji Uniwersytetu Warszawskiego, 27 lutego 2009 r.* (Liber 2010) 43–45.

³³ Andrzej Kojder, 'Skuteczność prawa' in Andrzej Kojder and Zbigniew Cywiński (eds), *Socjologia prawa: Główne problemy i postacie* (Wydawnictwa Uniwersytetu Warszawskiego 2016) 435.

³⁴ *ibid.*

Following the insights from the sociology of law, it can be highlighted that: '[T]he limitations of legal effectiveness in its creation are mainly caused by three factors: inadequacy of legislative axiology with regard to the social sense of justice; errors in the legislative technique; errors in the codification technique'.³⁵

Already at this point, however, an important caveat must be made about the limits in striving to ensure the effectiveness of a law. When creating a law, it must be remembered that one has no direct influence on the reality, one can only reconstruct it correctly or incorrectly. However, another thing is deciding on the evaluation – and before that on its criteria – of the previously decoded reality.³⁶ Consequently, the legislator decides what behaviour to criminalize. Still, when formulating the right legislation, it must render a reality that corresponds to the behaviour in question with the use of adequate linguistic structures.

Failure to meet the standard of legal effectiveness represents the anti-standard of instrumentalization of the law.³⁷ According to this anti-standard, the law becomes a means to an end, disregarding (intentionally or unintentionally) the limits of legal effectiveness included in the legislative process. It is used as a tool to achieve immediate, often profound, and arbitrary changes in the regulated social relations.³⁸ In other words, legal norms are established that, in the abstract, may not raise doubts about the true intentions of the legislator. However, these norms, especially when viewed in the context of law enforcement, serve explicitly or implicitly to achieve specific ideological goals.

Therefore, the key distinction between the pursuit of legal effectiveness and the instrumentalization of the law lies in the rationality of selecting legal means and the goals that the created law aims to achieve. In the context of criminal law, this issue is particularly evident in proper criminalization.

As an example, one can point to the departure by the legislator from the commonly accepted practice of setting statutory penalties in the form of 'ranges'. Furthermore, this issue, along with raising the statutory penalties, serves as an example of both the instrumentalization of criminal law and legal populism.³⁹

³⁵ *ibid.* A thesis can be posed here, although it will not be further substantiated in this paper, that sociology of law presumably identified significant challenges to law-making models earlier than criminal law jurisprudence. See Adam Podgórecki, 'Skuteczność działania prawa' in Adam Podgórecki, *Zarys socjologii prawa* (PWN 1971) 451–73.

³⁶ See Giezek (n 1) 9.

³⁷ For further comments on the difference between the instrumentalization of the law and the instrumental use of the law, see Artur Kotowski, 'Instrumentalizacja prawa i instrumentalne użycie prawa a jego wykładnia' (2016) 4 *Studia Prawnicze* 39, 49.

³⁸ Figuratively speaking, following the anti-standard of instrumentalization of the law, the legislator treats the law in a subservient manner, ignoring its essence and the limitations arising from it.

³⁹ See Gardocki, 'Ocena możliwych kierunków' (n 26) 75.

4. ADEQUACY OF THE LANGUAGE OF THE LAW

Criminal law, as a regulator of social life, affects addressees primarily through criminal penalties. These, in turn, function on the basis of established norms. A characteristic feature of legal norms is their establishment in a linguistic form. Therefore, the significance of the standard of adequacy of the language used to formulate law should not surprise.

First, it is necessary to explain why the adequacy of language is to be considered a standard for the enactment of criminal law. According to the dictionary definition, 'adequate' means something that is 'enough in quantity or of a good enough quality for a particular purpose'.⁴⁰ In the context of the language of enacted criminal law, adequacy should be measured against the purpose and functions of criminal law.

It is the language used by the law that serves as the primary method of communication between the legislator and the addressees of the norm.⁴¹ The issue of enacting criminal law is part of a broader discussion on the communicative nature of normative acts. On the one hand, there is a desire to achieve maximum precision in describing reality. On the other hand, the legislator must base legal language on concepts used in everyday language.⁴² The fundamental source of contention is the tension between two values achieved by the standard of language adequacy for reality: the precision of the created norms and their comprehensibility.

This aforementioned conflict is also embedded in the criminal law. It is worth noting that the legislator should criminalize only those acts for which criminalization can be defined in a credible manner; otherwise, it would be disloyal to society.⁴³ Historically, two tendencies in terms of the specificity of criminal law provisions have been in conflict over the centuries. According to the first tendency, criminal law provisions should present potential violations as exhaustively as possible. This approach led to casuistry.⁴⁴ However, there has been a departure from this trend in favour of a synthetic approach to criminal provisions,⁴⁵ with the current view that syntheticity is the standard for formulating criminal provi-

⁴⁰ *The Longman Dictionary of Contemporary English* <www.ldoceonline.com/dictionary/adequate> accessed 20 December 2023.

⁴¹ See Katarzyna Nieciecka, 'Kilka uwag o problematyce komunikatywności tekstów prawnych' (2014) 16 *Studenckie Prace Prawnicze, Administratywistyczne i Ekonomiczne* 107, 108.

⁴² *ibid* 109.

⁴³ Lech Gardocki, 'Kilka uwag na temat języka ustawy karnej' (2022) 93 *Studia Iuridica* 94, 96.

⁴⁴ See the Prussian Landrecht, the Tagancev Code, or the (Russian) Code of Main and Correctional Penalties.

⁴⁵ What follows is an increase in the scope of discretionary slack in the process of applying the law.

sions correctly.⁴⁶ Nevertheless, syntheticity does not necessarily eliminate future ambiguities in interpreting the provisions. As it is often pointed out, there are no criminal provisions that do not raise any doubts.⁴⁷ A perfect example in this regard could be, once again, Article 148 § 1 of the Penal Code. This provision is highly synthetic and widely understood. However, it has given rise to problems discussed in legal writings and jurisprudence concerning the question when human life begins and ends.⁴⁸ A person can be killed only from the moment they begin to exist until their life comes to an end.⁴⁹

Although, as previously indicated, the synthetic approach seems to be favoured, it is not always used in practice. To realize this, one can have a look at the draft amendments related to so-called ‘hate crimes’, where attempts are made to expand the catalogue of reasons that lead to hateful behaviour subject to criminalization under Article 257 of the Penal Code.⁵⁰ However, this expansion is only apparent. In reality, the reasons that are attempted to be explicitly introduced into criminal law provisions are already covered in broader terms in Article 216 of the Penal Code. The official motive for such actions does not matter. They should be assessed as incorrect. The argument that this is meant to highlight the inappropriateness of being guided by specific reasons does not withstand criticism, either. Since a certain idea has already been synthetically included in a specific provision, it is not only unnecessary but it is also incorrect to add a casuistic approach to it. Furthermore, doubts are raised about why other ideas included synthetically have not received similar casuistic treatment. However, if the cata-

⁴⁶ Gardocki, ‘Kilka uwag’ (n 43) 97–98 and previous contributions by this author, see Lech Gardocki, ‘Probleme der Tatbestandstechnik und der Sprache der Strafgesetzbung’ in Raimo Lahti and Kimmo Nuotio (eds), *Criminal Law Theory in Transition: Finnish and Comparative Perspectives/Strafrechtstheorie im Umbruch. Finnische und Vergleichende Perspektiven* (Finnish Lawyers’ Publishing Company 1992) 294–96.

⁴⁷ Gardocki, ‘Kilka uwag’ (n 43) 99.

⁴⁸ See Rajnhardt Kokot in Ryszard A Stefański (ed), *Kodeks karny: Komentarz* (5th edn, CH Beck 2020) 931–32.

⁴⁹ For the sake of completeness, it is worth noting that if a similar act but committed on human remains rather than a living person at the time of the act will still be classified as a criminal offense. Depending on the subjective aspect, it may be an unsuccessful attempt to commit the offense of murder (i.e. a crime under Art 13 § 2 of the Penal Code in conjunction with Art 148 § 1 of the Penal Code) or the crime of desecrating human remains (i.e. a crime under Art 262 of the Penal Code) committed as a completed act. See Tomasz Sroka in Michał Królikowski and Robert Zawłocki (eds), *Kodeks karny. Tom I. Część ogólna. Komentarz do art. 1–116* (5th edn, CH Beck 2021) 438.

⁵⁰ See legislative draft of the Act amending the Penal Code of 12 December 2019, parliamentary print no 138; legislative draft of the Act amending the Penal Code of 10 June 2020, parliamentary print no 465; and the Committee’s draft of the Act amending the Penal Code of 23 September 2020, parliamentary print no 924.

logue mentioned in Article 257 of the Penal Code is to be consistently expanded, it should be done in a much more synthetic way.⁵¹

The division of the clarity of the legislator's expression into formal and material aspects is widely accepted.⁵² A provision is formally clear when the communication contained in the normative act can be read by its addressees without distortion at the level of understanding the linguistic content of the provision. Material clarity of a given legal norm can be discussed when the addressees of the norm are able to decode its axiological content. In other words, material clarity is the intelligibility or transparency of moral presuppositions of any given provision. To ensure material clarity, the legislator should, therefore, refer to a universally accepted catalogue of moral norms, the realization of which is also guaranteed by criminal penalties. For this reason, essential characteristics of the adequacy of the language of the enacted criminal law must include a requirement to use simple and acceptable language in line with the existing catalogue of social norms.

It can be noted that only the application of both of the above criteria of intelligibility allows decoding the content of a legal norm. For example, two main obligations arise from the content of Article 148 § 1 of the Penal Code: the order to prosecute and punish perpetrators who realize certain elements of the criminal act (linguistic aspect) and the prohibition of homicide (axiological aspect).⁵³

What is more, there are important guidelines regarding legal language. The enactment of criminal law should be in line with the principles of proper legislation applicable to every branch of law. These principles, at least in terms of ensuring the linguistic effectiveness of legal norms, are defined in the ZTP. There can be no doubt that the legislator, when adopting provisions, and the proposer of the draft should fully comply with the general principles in this regard.⁵⁴ However, it should be noted that a detailed analysis of the ZTP allows concluding that it also contains provisions specifically applicable to criminal law.⁵⁵ It is significant that legal scholars and commentators,⁵⁶ as well as the judges of the Constitutional

⁵¹ For example, the postulated provision could read as follows: 'Whoever insults a group of people or an individual person or violates their bodily integrity because of their characteristics or personal conditions shall be punished ...'.

⁵² See Robert Zawłocki, 'O komunikatywności języka prawnego' (2013) 13 *Comparative Legilinguistics* 69, 76.

⁵³ See Kamil Siwek, 'O wykorzystaniu derywacyjnej koncepcji wykładni prawa w rozwiązywaniu problemów prawa karnego' (2021) 15(4) *Ius Novum* 73, 79–80.

⁵⁴ What can happen in the event the legislator does not comply with these rules could be observed by analysing the 2011 amendments to Art 67 § 3 of the Penal Code. For further comments, see Sławomir Żółtek, 'Liczne zmiany art. 67 § 3 kodeksu karnego a standardy poprawnej legislacji' (2011) 1 *Przegląd Legislacyjny* 122, 128–29.

⁵⁵ See § 28, 75–81a, 117 ZTP.

⁵⁶ See Grzegorz Wierczyński, *Redagowanie i ogłaszanie aktów normatywnych: Komentarz* (2nd edn, Wolters Kluwer Polska 2016) 32.

Tribunal and the Supreme Administrative Court,⁵⁷ have expressed the view that the principles of legislative technique drafted in the form of regulations constitute a *superfluum* of constitutional regulation, which in turn provides grounds for holding the legislator accountable for violating these principles.⁵⁸

IV. A FEW REMARKS ON META-STANDARDS OF LAW-MAKING IN CRIMINAL LAW

The application of a law-making standard sometimes requires interpretation of its content. For example, the effectiveness of the law requires the legislator to rationally select legal instruments to ensure that rationally chosen goals are achieved. The indicated standard, however, is not intended to resolve which goals are rational and according to which criteria the legal instruments designed to achieve those goals should be evaluated within a given law-making model. This role is performed in law-making models by meta-standards.

Furthermore, in relation to certain law-making standards, both constitutional and non-constitutional in origin, a conflict is possible between individual standards within the law-making model.⁵⁹ For example, the standard of attention to legal certainty may conflict with the standard of adequacy of the language of the law when provisions are formulated in an overly synthetic rather than casuistic manner. This conflict may be resolved primarily by: (1) rejecting one of the standards to more fully achieve the other, (2) optimizing the application of each standard.

It seems that there are no criteria to prejudge the superiority of one of the two presented solutions. With regard to the first, it turns out to be necessary to determine the hierarchy of standards justifying the way of resolving the conflict. In the case of the other method, among other things, there is a problem of determining the manner and limits of reconciling of the various standards. This does not mean, however, that there are no – detailed later in this paper – rationales of intra-model nature that seem to speak in favour of the second of the discussed groups of meta-standards.⁶⁰

⁵⁷ Instead of many, see the judgment in P 15/05, 12 December 2006 Polish Constitutional Tribunal (Trybunał Konstytucyjny) OTK-A 2006/11/171; judgment in II OSK 1392/20, 16 May 2023 Polish Supreme Administrative Court (Naczelny Sąd Administracyjny) LEX 3588948.

⁵⁸ Including the sanction of repealing a specific normative act.

⁵⁹ Of course, the standards in question may also interact with each other in other ways. These issues, however, due to the constraints of space cannot be fully discussed in this paper. Nevertheless, it is worth noting the topic can be explored.

⁶⁰ A question that arises is how one can justify the selection of one among potentially many meta-standards without finding a binding directive for higher-level selection (which could lead to

First of all, methods for resolving conflicts between standards need to be discussed. An extreme example of implementing the first of the methods would be a model in which one or a small group of standards are treated as an unquestionable dogma. Such would be the authoritarian model of law-making characterized, among other things, by: the imposition of a set of values protected and implemented by criminal law, as well as a low level of transparency in the norms constituting the legislative process.⁶¹ In addition, it exhibits such features as arbitrariness and lack of coherence in the selection of legal decisions made, as well as a low level of legal certainty.

Regarding the second method of conflict resolution, one of the potentially many proposed actions of lawmakers is to use the balancing mechanism during the process of making criminal law. This involves weighing the benefits of adhering to individual standards to maximize the protection of legal interests. This directive of preferences, which closely resembles the principle of utility⁶² applied to the context of legislative technique, seems to remain in the realm of unfulfilled demands made on lawmakers.

The chosen meta-standard of 'legislative utilitarianism', which significantly values the importance of the consequences of legislative actions, pushes proponents of this theory towards an understanding of the standard of law effectiveness in which the intrinsic overarching goal above specific intentions of the legislator becomes the well-being, often worldly, of individuals, groups, communities, or society. Consequently, the content of the standard of law effectiveness will depend on the adopted criteria of 'good' or 'happiness'. A model of law-making based on the meta-standard of legislative utilitarianism, at least in terms of legislative technique in criminal law, is thus susceptible to the charge of relativism and can lead to extremely different practical conclusions that nevertheless find equally strong support in light of the adopted law-making meta-standard. On the one hand, this observation illustrates the size of potential impact of meta-standards on the content of standards and, on the other hand, exemplifies the shortcomings of law-making models based solely on one standard or, at the very least, overvaluing one of the standards. In addition, it points to the possibility of transforming law-making models depending on changes in understanding of individual stand-

regressus ad infinitum). It seems that in the scientific context this regress is harmless, since it can be interrupted at any stage by a researcher's conventional decision. Of course, the researcher can also take a 'step backward' in this reconstruction, if he or she deems it useful for the scientific endeavour at hand.

⁶¹ Wronkowska (n 2) 26–27.

⁶² Jeremy Bentham, *Wprowadzenie do zasad moralności i prawodawstwa* (Bogdan Nawrockiński tr, PWN 1958; *An Introduction to the Principles of Morals and Legislation*, 1st edn 1789, Clarendon Press 1907) 17ff.

ards, also due to the legislator's axiological preferences. Therefore, a desirable feature of law-making models seems to be the pluralism of adopted standards.⁶³

V. CONCLUSIONS

The discussion allows us to propound the thesis that in the legislative process one should take into account not only the principles of criminal law expressly stated in the Constitution of the Republic of Poland but also its functions.⁶⁴ As accurately pointed out in the literature: 'Criminal law ... is treated as a paradigmatic example of legal regulations whose interpretation is not possible without a profound understanding of the philosophical, theoretical, and criminal-political assumptions underlying their development'.⁶⁵

The above statement can be further emphasized with the caveat that not only the interpretation but also the formulation of criminal law norms requires a broad understanding of various disciplines of knowledge. A practical application of this postulate is helped by a thorough reflection on the functioning of standards within the law-making models. In this study, the following criminal law-making standards have been presented: (1) ensuring legal certainty; (2) compliance with the proper legislative procedure; (3) striving for the effectiveness of the law; and (4) adequacy of the language of enacted law. These exemplify, respectively: (1) constitutional material standards; (2) constitutional formal standards; (3) non-constitutional material standards; (4) non-constitutional formal standards.

Next, it has been pointed out that while the standards have a clear content, deriving practical conclusions from them does not take place directly. There is a set of rules or meta-standards that further specify the content of individual standards, thus integrating the law-making models.

What does the above analysis of legislative standards and meta-standards demonstrate? Firstly, it highlights the interaction between legislative standards of different levels. The same standard can be achieved in various ways, depending on the meta-standards present in specific law-making models. Secondly, it clarifies the link between sets of specific legal standards and legislative models. In

⁶³ Similar comments can be made about other standards. For example, two meta-standards pertaining to the adequacy of language can be mentioned here: casuistry and regulatory syntheticity.

⁶⁴ The function of criminal law is a subject of numerous introductory studies to the subject of substantive criminal law. Therefore, this issue is not exhaustively discussed in this paper. For a brief summary, see Lech Gardocki, *Prawo karne* (CH Beck 2021) 7–8.

⁶⁵ Piotr Kardas, 'Współczesne koncepcje ujmowania podstaw odpowiedzialności karnej oraz ich wpływ na stanowienie i stosowanie prawa' in Marek Mozgawa, Piotr Poniatowski and Krzysztof Wala (eds), *Aktualne problemy i perspektywy prawa karnego* (1st edn, Wolters Kluwer Polska 2022) 56–57.

particular, this suggests the possibility of developing a methodology for creating law-making models,⁶⁶ and as a consequence, a typology of both observed and only postulated models. Thirdly, it is worth emphasizing in this context that there are interconnections between standards of the same level, which help make the content of the standards in a particular model more specific. For example, the standard of ensuring legal certainty will place certain requirements on the standard of adequate legislative language, and at the same time influence the legislative procedure by limiting the possibility of interference in the already adopted normative act.⁶⁷ Fourthly, even the example of the relationship between the standard of legal effectiveness and its negation – instrumentalization of the law – clearly shows that a qualitative change of a standard and its anti-standard may consist of disregarding the already mentioned perspective of critical morality. However, one should not lose sight of the fact that this assessment is not made in isolation of other elements of the legislative model, including the assumed meta-standards.

The above findings suggest that the provided framework for law-making standards seems to be applicable to a wide range of possible scenarios. These include not only different legal systems, comprising those in which the rule of law is not a fundamental value, but also different branches of law.

In this sense, the Polish criminal law serves as an example which helps to track certain standards in a selected normative context. While the given set of standards (and the meaning of each standard) does not need to be necessarily universal,⁶⁸ the proposed analysis might also, apart from distinguishing and comparing these standards, serve as an invitation to broadening the knowledge on different legal systems.

One might argue that the presented set of standards is not exclusive to criminal law. While it is undeniable that the given standards might also be discussed from the perspective of other branches of law, and the flexibility of the provided framework definitely allows that, it is suggested here that in the context of various branches of law, even the same standards might yield different requirements for newly created legal provisions. Because of this, a specific area of law has been chosen in order to establish a starting point for further discussion. This choice was dictated by the nature of criminal law which, as it involves the most intrusive measures against one's rights, requires the highest attention to the standards that the created norms must meet.

Finally, the presented study indicates that legislating in criminal law is a more complex and multifaceted process than it may appear. Therefore, it is crucial for the legislator to make conscious and reasoned decisions while deliberating on

⁶⁶ It consists, at least in its outline, in an appropriate selection of standards of criminal law-making and methods for resolving conflicts between them in the legislative process.

⁶⁷ In a sense, the remark made can be read as an intra-system argument in favour of law-making models that seek to implement multiple standards simultaneously.

⁶⁸ However, this problem requires further inquiry, which is beyond the scope of this paper.

the shape of adopted provisions. This involves paying attention not only to the linguistic correctness of the provisions but also to their axiological determinants. Adhering to consistent law-making standards that align with the adopted legislating model can contribute to achieving the established goal.

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