

# G PRINCIPALS OF CRIMINAL LAW: INTERNATIONAL LEGAL ASPECT

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## ABSTRACT

*Defining the concept and the essence of the general principles of criminal law is important for the international law, since such definitions allow laying down the international general principles of the criminal law that should be embodied in the national criminal law. The purpose of this research is to define the essence and significance of the principles of criminal law at the national and international levels, as well as to work out the issue concerning their regulation by the current criminal law of Ukraine. Since the principles of criminal law are important for drafting the most effective criminal regulations, while the very criminal law requires a constitution to be extended to the matter and an enhanced globalization process, we consider it necessary to settle a separate international criminal law establishing the concept and the essence of the principles of criminal law. In particular, we propose to extend the European Convention for the Protection of Human Rights and Fundamental Freedoms with a separate law establishing the general principles inherent in the practice of the European Court of Human Rights. This recommendation is universally applicable, so it may be realized in the national criminal law, including the Criminal Code of Ukraine. This change will contribute to more effective international and national criminal law enforcement, will bring the law enforcement protection to a new level and will open new prospects for further research in the field of criminal law science, particularly on shaping the universal principles of criminal law that would fit both international and national criminal law.*

**Keywords:** General Principles of Criminal Law; Principle of Legality, Principle of Personal Responsibility, Principle of Equality, Principle of Ne Bis in Idem, Constitutionalization of Criminal Law, Globalization of Criminal Law.

## INTRODUCTION

The principles of law, in particular the criminal law, are the general principles grounding the criminal law development in general and the development of each specific rule in particular. These principles are also the basic provisions establishing the criminal law application by the executive bodies (Murphy, 2010). The principles of criminal law are to enforce and protect the human rights and freedoms, constitutionalized in the majority of foreign countries, including Ukraine. This aspect is reflected through the general principles outlined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Reid, 2011) and the EU Law in general (Willem, 2009). Thus, the problem of determining ways to implement the constitutional provisions on principles existing in the criminal law, including the Criminal Code of Ukraine, becomes a pressing one.

The principles of criminal law should be studied deeply in order to clarify its main content and to determine the essence of related legal mechanisms and development areas. This work should be done also to draw conclusions about the effectiveness of criminal law application and about the prospects for its improvement. Besides, one should understand the goals, objectives and methods of criminal law application (Landin, 2017), including its application at the international level (Beth, 2007). The latter is a real practice, as evidenced by the recommendations made on the application of the general principles of criminal law in the practice of the European Court of Human Rights (ECHR, 2013a) (Guide on Article 6: Right to Fair Trial). After all, adherence to the principles of criminal law obliges the legislator to decide whether the type and/or amount of penalty correspond to the character of a crime and the level of public danger sparked (Polyakov, 2017).

The problem of regulating the principles of criminal law must be solved as soon as possible. Researchers believe that their regulation will make the criminal law more effective. This, in turn, will promote the observance of constitutional rights, freedoms and interests of a person and citizen when applying criminal regulations (Landina, 2017).

As the general principles of criminal law are in tune with constitutional principles to secure the rights, freedoms and interests of an individual and a citizen that are enshrined in the constitutions of the vast majority of countries, these principles are not only of theoretical, but also of practical importance both at the national and the international levels. This proves the relevance of our research.

In criminal law science, some challenges in defining the system of principles are left aside. These are the essence issues and the problem of illuminating the significance of such principles for the national and international law enforcement practices, as well as for the globalization of criminal law.

Based on the above, we tend to define the essence and significance of the principles of criminal law at the national and international levels, and to solve the problem of their regulation (including the regulation by the current criminal law of Ukraine).

This research area has potential not only at the national, but also at the international level. Thus, this research on the concept and the essence of the general principles of criminal law will be important for international law, since it will allow defining international general principles of criminal law that should be anchored in national criminal law.

## **LITERATURE REVIEW**

Analysing the principles of criminal law by comparing the related provisions of the theory of criminal law, enshrined in the legislation of foreign countries, is also of great importance (Skakun, 2007). For example, there was a separate research on the principles of international criminal law with some of it devoted to the analysis of general principles running in this area, their essence and role in shaping international criminal law (Werle & Florian, 2014). Modern approaches to understanding the general principles of criminal law are being currently studied (Feshchenko, 2013). The basic attitudes towards the understanding of the concept and the essence of the principles of criminal law and criminal justice have also become an object of research (Zedner and Roberts, 2012). In the research on humanism, considerable attention was paid to the general definition of the concept and the system of principles of criminal law (Reznik,

2016). The principle of non bis in idem enshrined in the criminal law of Ukraine is also worth considering (Ignaty, 2013). The principle of legality is also carefully studied under the assumption and it will contribute to the effectiveness of the international criminal law (Nicholson, 2017). Aside from them, the theory of sentencing impacting criminal norm identification was investigated for compliance with the principle of legality what resulted in a conclusion that this theory does not contradict the principle only in absence of abuse of judicial discretion, violation of balance between crime and punishment, or other regulations (Xi-Zhao, 2015). Whether it is reasonable to enshrine the principle of democratization of criminal law into criminal legislation was analysed from the perspective of a chance that too much democracy may negatively affect the fight against crime (Paul, 2017). Particular attention was paid to the principle of harm in Anglo-American criminal law, which is recognized as one of the leading means to protect citizens freedom of self-development and meeting own needs (gaining profit for themselves) (Jiang, 2016). The general principles of criminal law were analysed in the context of other problems existing in the criminal and other branches of law. They were analysed as those that guarantee the respect for the rights of the crime committer (Landin, 2017).

They are considered more specifically in the context of criminalization process, initiated in relation to corruption offences in the Indonesian criminal justice system, with regard to the essence of the principles of humanity, inevitable punishment and ne bis in idem (Arofa et al., 2015). They are also considered in the context of an idea of balanced criminal law development in Indonesia with a focus laid on the principles of legality, correspondence between deed and punishment and the principle of the presumption of innocence (Santoso, 2015). The principles of criminal law are studied also in the context of co-relation between religious, moral, ethical and doctrinal principles of criminal law established in the countries of Muslim tradition (Syria, Oman), where the main source of law is the Koran (Manna et al., 2018). Frankly, principles of Islamic criminal law are to eliminate conflicts between international European and Islamic regulations, thereby speaking well to parallels between principles of Islamic criminal law and the European criminal law (justice, respect for human rights, non-impunity) (Malekian, 2011). According to some studies, principles of criminal law are also important for determining the general principle of criminalization (Peršak, 2018) or for analysing the principles of criminalization in general with the proposal to include the principle of restorative justice into the system of principles of criminal law (Poama, 2017). These principles are analysed as one of the main aspects of responsibility (including criminal responsibility) issues established in the international criminal law (Jackson, 2016). Particular attention was paid to the significance of general principles restoration in a case involving one of the Sudan states-Darfur. Researchers revealed that the International Criminal Court (ICC) is unable to adhere to the principles of legality and individual criminal responsibility because of gaps in the statute (Fletcher & David, 2005). The general principles of criminal law are also investigated in the context of a problem of executing prison sentences, imposed in third countries, namely-this problem is about recognizing and enforcing a decision made by the competent judicial authority that is not part of the European Union. The researcher, who paid attention to this aspect, pointed out that in order to make the fight against transnational crimes more effective, the government has to establish an effective legal framework for preventing and overcoming such crimes (Rusu, 2015).

There were researchers, who paid attention to the principle of *ne bis in idem* in the context of international criminal law (Kaiafa-Gbandi, 2017), as well as to the significance of the principles of legality, justice and correspondence between deed and punishment for the international criminal law (Hafetz, 2017). Some researchers paid attention to the significance of the principle of legality for the ECHR practice (Murphy, 2010), as well as to the need in singling out the principles of criminal law into a separate branch of the EU Law (Paul & Julia, 2017). Therefore, the problem of extending national criminal legislation with a law on the principles of criminal law opens prospects for developing the international criminal legislation and for Ukraine's integration with other European countries. The latter process is part of the globalization processes being lately of particular interest for researchers (Garth, 2008).

## RESULTS

Legal principles animate regulations established in a particular branch of legislation and determine the content of its most important provisions. This is applicable also to the criminal law. Criminal law, like any other branch regulating all spheres of public life, cannot be detached from generally accepted principles. Therefore, it is shaped under the influence of general principles.

These principles, however, must comply with certain rules-in particular; they must not contradict the legal character of the branch or the history of the national legislation development. That is why the principles of each branch of law are taken as a factor that brings the order into the branch. General principles of any branch of law are being established before the basic legal concepts and categories. Thus, legal character of a particular phenomenon can be determined by principles, since they ground the law creation and enforcement. General principles of law (including the criminal law) are to shape a certain ideal, which the specific branch of law has to reach. At the same time, certain fundamental idea can be transformed into a principle only if the legislator finds that regulation must be in tune with this idea, that it should be legalized as permitted by law.

Based on the above, essence of the principles of criminal law is generally that these principles channel the law making and ground the content of certain regulations. Secondly, these principles are the starting point for allocating the legislation development articles. Thirdly, these principles are not only the doctrinal, judicial and legislative basis for criminal legal relations, but they a moral and ethical one. Fourthly, they reflect the history of social relations, regulated by this branch of law. Besides, principles of criminal law fulfil an important function: they guarantee the respect for fundamental rights, freedoms and interests of a person and a citizen, enshrined in the constitutions of foreign countries (including Ukraine), in the process of law-making and law enforcement.

Principles of a particular branch of law (including the criminal law) are not disconnected with the principles of other branch. They solidify the general principles and portray (not concretizing) the essence of the subject of regulation. The principles are directly or indirectly enshrined in legislation: such principles may be either outlined in separate special regulations or ground some of the regulations, regardless of whether there is a direct reference to them in the act or not. Therefore, we can assume that general principles of criminal law are certain ground rules applied on a constant basis for regulating public relations by means of criminal law.

Each principle of criminal law has an independent meaning, although all of them are interrelated and interdependent. Criminal law cannot adhere selectively to one or several principles-it is based on all of them. Principles of criminal law (including the criminal law of Ukraine) usually include the principle of legality, the principle of equality before the law, the principle of individual legal responsibility, the principle of guilt, indirectly covered by the procedural principle of the presumption of innocence, the principle of justice and the principle of humanity (Landina, 2017).

International criminal law scientists paid a lot of attention to the principles of law (including the criminal law), studying the general issues regarding the general principles of criminal law, the specific principles and their significance for international criminal law, certain aspects of criminal law application etc. A clear understanding of the essence of the principles of criminal law, their system and significance (in particular for promoting the respect for constitutional rights, freedoms and interests of a person and a citizen) has contributed to a situation, when a sufficiently large number of international criminal codes contain regulations on the general principles of criminal law. Foreign lawmakers tend to believe that general principles of criminal law should be enshrined in the national criminal law, since they establish the necessary restrictions and grounds that promote the draft of the most effective (kind of ideal) criminal legislation (Skakun, 2007).

In the international criminal codes, general principles of criminal law are usually constitutional in character, in other words-they are enshrined in the constitution (as it is in Ukraine). Therefore, these principles are enshrined in separate paragraphs regulating the constitutional principles of criminal law.

A number of general principles ground the international criminal law: EU Law, majority of the legal acts adopted by the ECHR etc. Principle of legality is one of them, establishing that human rights should be respected for in accordance with the international criminal law. This principle is regarded as a guarantee of the ex post facto principle not being applied within the framework of respect for human rights in the context of national criminal prosecution (Shane Darcy, 2016). Principle of legality is also analysed from the point of its main component-the principle *nulla poena sine lege* (no penalty for what is not prohibited by the law)-with regard to how the ECHR understands it. At this point, such analysis is based on the ECHR experience in applying provisions of the international criminal law (Khyliuk, 2014).

Shaping the general principles of criminal law is an objective listed within the main goals of modern national criminal policy. Besides, modern criminal policy should take into account the need in anchoring the constitutional principles in all branches of law (both international and national). Such a constitutionalization will contribute to a unification of the conceptual legal (including criminal) framework. One of its aspects is the enshrinement of general principles of international law that have arisen in the light of globalization processes. The problems of globalization (including those that have arisen in the field of law) were touched in the 80s of the 20th century (Garth, 2008). Currently, they are considered with particular attention as a transnational legal structure with regard to extensity, intensity, velocity and impact on processes occurring at the national and international levels (Halliday & Osinsky, 2006). Based on a common understanding of the essence and of the specific aspects of globalization of law (Michaels, 2013), we assume that globalization of criminal law is a fusion of national criminal

law into a single international system through the spread of common models of criminal law enforcement. General principles of criminal law should ground this process.

International legal acts define the general principles in a different manner, but their essence remains. This can be seen from the table below.

<b>Table 1 INTERNATIONAL LEGAL ACTS</b>			
	<b>Principle of Legality</b>	<b>Principle of Individual Legal Responsibility</b>	<b>Principle of Equality before the Law</b>
<b>Criminal Code of Australia</b>	<i>“The only offences against laws of the Commonwealth are those offences created by, or under the authority of, this Code or any other Act.”</i> (Article 1.1)		<i>“The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of the Commonwealth. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created”</i> (Article 2.1)
<b>Criminal Code of the Republic of Poland</b>	<i>“Penal liability shall be incurred only by a person who commits an act prohibited under penalty, by a law in force at the time of its commission”</i> (Article 1.1)	<i>“Penal liability shall be incurred only by a person who commits an act prohibited by a law in force”</i> (Article 1.1)	
<b>Criminal Law of the People's Republic of China</b>	<i>“Any act deemed by explicit stipulations of law as a crime is to be convicted and given punishment by law and any act that no explicit stipulations of law deems a crime is not to be convicted or given punishment”</i> (Article 3)		<i>“Everyone is equal before the law in committing crime. No one is permitted to have privileges to transgress the law”</i> (Article 4)
<b>Criminal Code of the French Republic</b>	<i>“No one may be punished for a felony or for a misdemeanour whose ingredients are not defined by statute, nor for a petty offence whose ingredients are not defined by a regulation”</i> (Article 111-3)	<i>“No one is criminally liable except for his own conduct”</i> (Article 121-1)	
<b>European Convention for the Protection of Human Rights and Fundamental Freedoms</b>	<i>“No punishment without law”</i> (Article 7)		<i>“Right to a fair trial”</i> (Article 6)

## DISCUSSION

Research on the issues of general principles of criminal law revealed that these issues are little studied in domestic criminal law science. Thus, there are no case-specific studies aimed at establishing the significance of these principles in law enforcement practice and for the unification of domestic criminal law regulations with the international criminal law. However, such a weak background opens the prospects for further draft of regulations that will regulate the principles of national criminal law in accordance with the generally accepted principles of international criminal law. This will contribute to the intensive globalization and integration of Ukraine with the international community of criminal law.

In cases when scientists analysed certain aspects of the principles of criminal law established in the EU criminal law and in the ECHR practice, issues regarding the globalization significance of general principles of criminal law was ignored (Khyliuk, 2013). Such an attitude is unacceptable and should be reconsidered through a more in-depth study of the general principles of national criminal law as the international general constitutional principles. After all, there are studies pointing to the Article 51 of the Partnership and Cooperation Agreement between the European Communities and their Member States and Ukraine (14.06.1994), *“according to which Ukraine shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community”* (Sannikov, 2017). This applies to criminal legislation protecting the most important spheres of public life.

In the light of specific application features peculiar to general principles applied in criminal law and criminal justice, general principles of criminal law can be considered as principles of a particular branch only on conditional basis. At this point, research analysing the major penal policies contains a thesis that an optimal model design for this sphere requires the general principles (principles of legality, justice and equality before the law, etc.) to be in power (Halilov & Bakulin, 2016).

Providing a legislative framework on the general principles of criminal law for international and national criminal legislation is one of those issues that cannot be questionable when it comes to practice (this applies to Ukraine). The principles of criminal law should be a reliable basis for creating an agreed system of criminal law regulations that will protect the criminal law from contradictions (Timoshchuk, 2014).

The majority of continental countries have constitutions containing regulations that establish the general principles of law: principle of legality, principle of individual criminal responsibility, principle of humanity, principle of equality before the law, principle of *ne bis in idem* (no legal action can be instituted twice for the same cause of action). Combined principles of legality and individual criminal responsibility as the general principles of all branches of law are enshrined in the constitutions of the Republic of Bulgaria (Article 5), Republic of Estonia (in 23), Iceland (Article 69), Cyprus (Article 12), Malta (Article 39), Romania (Article 15), Republic of Turkey (Article 15), Republic of Croatia (Article 17), Republic of Slovakia (Article 49), Kingdom of Sweden (Paragraph 10 of Chapter 2), Greece (Article 7), Republic of Moldova (Article 22), Republic of Poland (Article 42), Portuguese Republic (Article 29), Spain (Article 25), Republic of Lithuania (Article 7), French Republic (Article 7) and etc.

The existence of special regulations enshrined in the constitutions of foreign countries that recognize the general principles of law (including the criminal law) is not a guarantee that

these principles are also recognized in the international criminal law regulations. This is the case of the Australian Commonwealth Criminal Code, in the Criminal Code of the Republic of Austria, the Criminal Code of the People's Republic of China, the Criminal Code of the Republic of Lithuania, the Criminal Code of the Republic of Belarus, the Criminal Code of the Republic of Moldova, the Criminal Code of the Republic of Poland, the Criminal Code of San Marino, the Criminal Code of French Republic and etc.

The Article 2 *Basic Provisions of Criminal Liability* of the Criminal Code of the Republic of Lithuania, for example, states the following:

*“A person shall be held liable under this Code only when the act committed by him is forbidden by a criminal law in force at the time of commission of the criminal act (Part 1). Ignorance of the law shall not release a person from criminal liability (Part 2). A person shall be held liable under a criminal law only when he is guilty of commission of a criminal act and only if at the time of commission of the act the conduct of the person could have been reasonably expected to conform to the requirements of law (Part 3). Only a person whose act as committed corresponds to a definition of a body of a crime or misdemeanour provided for by a criminal law shall be liable under the criminal law (Part 4). Penalties, penal or reformatory sanctions and compulsory medical treatment shall be imposed only in accordance with the law (Part 5). No one may be punished for the same criminal act twice (Part 6).”*

The European Convention for the Protection of Human Rights and Fundamental Freedoms establishes a number of fundamental principles that guide the European Court of Human Rights (2013b) in its activities: Right to a fair trial (principles of justice and equality before the law) (Article 6); No punishment without law (principle of legality) (Article 7); Right to an effective remedy (principle of justice) (Article 13) etc. As such regulations are enshrined in line with other principles in the national legislation of the majority of European countries, we suggest is worth supplementing this Convention with a regulation on the general principles guiding the ECHR (for example, by taking the Article 2 of the Criminal Code of the Republic of Lithuania as a basis).

Reason for the unification of general principles of criminal law is that a fair and lawful trial is impossible without a clear understanding of the essence of the general principles of judicial procedure, as these principles can be interpreted in any way (Fletcher & David, 2005). The wrong or debatable interpretation of the general principles of criminal law (principle of legality, principle of individual criminal responsibility, etc.), in turn, may lead to the violation of human rights, enshrined at the international level in the European Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, general principles should undergo unification at the international level in order to avoid mistakes in their interpretation. This also applies to national legislation, at which level the unification is required to avoid violations of constitutional principles that secure the respect for human rights during the improper application of the national criminal law.

Due to the amendments brought about by the Lisbon Treaty this tendency will be even stronger in future. The European institutions making criminal policy decisions on a large scale have failed to acknowledge criminal policy as an autonomous European policy. As a consequence they do not follow a coherent concept of criminal policy. The Manifesto Group is convinced that Europe needs a balanced and coherent concept of criminal policy based on a number of fundamental principles (The Manifesto on European Criminal Policy, 2011).



The list of principles may vary depending on the specific features of historical and cultural development of countries, but their fundamental principles coincide with one another more often than not. These are the principle of legality, the principle of humanity, the principle of individual criminal responsibility and the principle of equality before the law. For example, such minor differences were found during the comparison of some criminal codes (including the US Code and the Criminal Code of Egypt), but these differences apply mainly to the name of the principle, but not to its content (Akmal, 2017). In other words, these principles coincide with the general principles enshrined in the Constitution of Ukraine and are defined in domestic criminal law.

Fundamental principles of EU criminal law are the principle of legality, the rule of law principle, the principle of *ne bis in idem*, the principle of the presumption of innocence etc. A careful attention is paid to the principle of legality, most significantly to one of its components—*nulla poena sine lege* aimed at protecting the one suspected in committing a crime. This principle is as a guarantor of justice, humanity and respect for rights, freedoms and interests of a person and a citizen (Dana, 2009). However, general principles of criminal law should be considered as a single set in order to determine their significance, since they are equivalent, interrelated and interdependent. Manifesto on European Criminal Law Policy of 2011 show convinced that criminal law legislation must adhere to the highest standard of democratic legitimacy and the rule of law (*Rechtsstaatlichkeit*) and that the future of European security can only be safeguarded within a system based on the concepts of democracy, freedom and fundamental legal principles. This Manifesto reflects the dynamics of European integration, calling attention to the fact that substantive criminal law and criminal procedure law are increasingly becoming the focus of European legislation. At present, European legal instruments used for the harmonisation of criminal legislation already exert influence on the existing national legal frameworks of substantive criminal law and criminal procedure law (The Manifesto on European Criminal Policy, 2011).

Their significance is an argument being brought in favour of anchoring them in the criminal law of the European Union (Peršak, 2018). Researchers believe that general principles of law should be anchored in the modern legal system (codes adopted for separate branches of law) of particular countries (Smirnov & Strus, 2015). This also applies to domestic criminal law.

Based on the researches on the EU criminal law and the ECHR practice, we consider it necessary to consolidate the constitutional principles, guiding the legislative and law enforcement practice, at the international level. In the point of fact, the European Convention for the Protection of Human Rights and Fundamental Freedoms should be extended with a separate regulation establishing the fundamental principles guiding the European Court of Human Rights. This recommendation is universal; therefore, we propose to extend the criminal legislation of Ukraine by adding a separate regulation, establishing the general principles of criminal law and disclosing their essence.

## CONCLUSIONS

Thus, research conducted on certain aspects of the general principles of criminal law allowed determining their significance as grounds for drafting regulations of international and national criminal law, including the criminal law of Ukraine.

Since the principles of criminal law are important for drafting the most effective criminal regulations, while the very criminal law requires a constitution to be extended to the matter and an enhanced globalization process, we consider it necessary to settle a separate international criminal law establishing the concept and the essence of the principles of criminal law. In particular, we propose to extend the European Convention for the Protection of Human Rights and Fundamental Freedoms by adding a separate regulation establishing the fundamental principles that guiding the European Court of Human Rights. This recommendation is universally applicable, so it may be realized in the national criminal law, including the Criminal Code of Ukraine.

This will contribute to more effective criminal law enforcement at the national and international levels, including the level of Ukraine. This will also secure the respect for constitutional rights, freedoms and interests of a person and a citizen, and will open new prospects for further research in national and international criminal law science, most significantly on the most universal principles of criminal law, which will be applied by international and national criminal law enforcement.

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