

SIGNS AND CRITERIA FOR DETERMINING THE PRINCIPLES OF CRIMINAL LAW

Olena Oliinyk, Kyiv National Economic University named after Vadym Hetman

Davydenko Valerii, Interregional Academy of Personnel Management

Yusupov Volodymyr, National Academy of Internal Affairs

Dordiai Volodymyr, Uzhhorod National University

Krotiuk Andrii, National Academy of Internal Affairs

ABSTRACT

Description: The article analyzes the nature, features and properties of the basic principles of criminal law.

Methodology: Research methods are chosen based on the object, subject and purpose of the study. The study used general scientific and special methods of legal science, namely the method of analyses, historical and legal method, dialectical method, comparative and legal method and sociological method.

The Result of Study: The features of the main principles of criminal law are revealed, general theoretical criteria for their determination are substantiated. The main features of the principles of criminal law are outlined.

Practical Implications: The criteria for determining the principles of criminal law are identified. It is stated that the principles of law in general and criminal law in particular, overlap with the criteria for their definition.

Value/Originality: It is emphasized that the principles of criminal law need not be enshrined in criminal law, because, in our opinion, their effectiveness is directly related to the possibility of their dynamic development.

Keywords: Principles of Criminal Law, Signs of the Principles of Law, Criteria for Determining the Principles of Criminal Law.

INTRODUCTION

Significant socio-political changes are taking place in Ukraine today against the background of European integration processes. These changes have a corresponding impact, inter alia on the development of criminal law. This is especially true of international legal relations in the sphere of ensuring the life of society as a whole and in a particular state.

Law is a supreme, universal, integrative, state-protected regulator, which expresses political and social justice in the system of principles and formally defines norms, precisely defines the range of subjects of law and legal relations, their legal rights, obligations and guarantees to ensure social progress. And law, in turn, is based on certain provisions and principles. Such provisions (principles) are formed through certain complex processes that occur directly in politics, economics, morality, ideology and in the social life of any society. These

processes depend not only on social phenomena, but also on geographical location of the country, the mentality of the population, the situation on the international arena, etc.

The principles of modern law are quite numerous and varied, which requires to conduct their hierarchical classification. Legal science characterized all the principles as general, cross-sectoral and sectoral. This unit has both theoretical and practical meaning, since it emphasizes their subordination and sectoral affiliation.

MATERIALS AND METHODS

Various scientific methods were used in the process of writing the article, taking into account the goals and objectives of the research. The method of analyses allowed setting the tasks of the research and determining its main directions. Historical and legal method was used in the study of the historical formation and development of the principles of criminal law. Dialectical method was the basis for establishing the system of principles of criminal law of Ukraine. Comparative and legal method was applied to compare the systems of principles of criminal law both in time and space. Social determinants of formation, functioning and development of specific criminal law principles were identified through the use of sociological method, which involves the analysis of social conditions and factors, in accordance with which criminal law exists and operates.

A number of domestic and foreign scientists such as: Dudorov (2017), Kelina & Kudryavtsev (1988), Klenova (1997), Filimonov (2002), Fisenko (2016), and others devoted their works to the study of the nature of individual principles of criminal law, their characteristics, features and properties, their implementation in the Constitution of Ukraine and in the law of criminal responsibility.

For example, Klenova (1997) classified the principles and gave them a brief description. Kelina and Kudryavtsev (1988) thoroughly studied the issues of general and special principles of criminal law, but during Soviet period. Fisenko (2016) investigated some specific principles of criminal law and gave them a description. Dudorov and Mazur (2017) conducted comparative characterization of individual principles and studied their nature.

At the same time, the aforementioned authors did not systematically investigate the question posed by us, nor did they determine the criteria by which certain provisions acquire the properties of basic provisions, cross-cutting ideas, i.e. the proprieties of principles of criminal law. Therefore, there is a need to investigate this issue in detail.

RESULTS AND DISCUSSION

Forming the main content of law, legal principles take over all its properties and functions. And this means that:

1. They are regulatory, universal, binding, objectively predetermined, historical and ideological-political categories;
2. Their social function is to regulate and protect public relations;
3. They are an independent legal category, that is, they are separate from all others.

Thus, from the legal norms they are separated by their imperativeness and unconditionality, concentrated reflection in them of the most important laws of a given society.

The principles of law bring uniformity to the whole system of legal norms and ensure the unity of legal regulation of social relations, cement all components of the legal superstructure. The principles of law also have an independent influence on public relations. But in this case we are interested in the features and criteria of determining the principles of criminal law (Kolodii, 2012).

General principles of law are its basic ideas, initial provisions or, as it is commonly believed, they lay down the process of formation and functioning of all rules, institutions and branches of law (Yavich, 1978). They are referred to as general, cross-cutting ideas, ideals on which the entire legal system is based in the theory of State and Law. Justice, equality, humanism, democracy, unity of rights and responsibilities, a combination of persuasion and coercion, law, justice are among the general principles of law.

Principles of law, like principles in general, are the product of human activity. They are social phenomena, both in origin and content: their emergence is conditioned by the needs of social development and reflects the patterns of social life. The principles of law exist as modified and adapted to the legal sphere, some general social principles that are in dialectical unity. The main sources of these principles are politics, economics, morality, ideology, social life.

The principle (lat. principium—beginning, basis) is interpreted in academic dictionaries as the basic starting point of any theory, doctrine, science, worldview, political organization, etc. (Ozhegov & Shvedova, 1993; Yartseva & Arutiunova, 1998). This understanding is shared by most legal scholars, who also define the principle through the category of ideas (the most general idea, the beginning, forming the element, etc.); This category concentrates and formulates the meaningful side of the legal institute, its essence. Krieger (1981) believes that the principles of law

“Derive from socio-economic nature, social order and are entrenched in law as ideological, political and moral principles (guiding ideas), have a regulatory and protective function and determine the nature, grounds and scope of application of State coercion and other measures of influence”. “The principle in law is a guiding idea, the main principle that reflects the essence of socio-legal reality and establishes the basic philosophical, moral, ethical and socio-legal provisions, on which the legal doctrine is based and formed, lawmaking, law enforcement practice and human behavior (Sundurov, 2016)”

The Constitution of Ukraine currently enshrines the following principles, which are also reflected in the Criminal Code of Ukraine (Law of Ukraine, 2001):

Legality

This means that no one can be held responsible for acts that at the time of their commission were not recognized as an offense by law. Art. 3 of the Criminal Code of Ukraine states that the principle of legality in criminal law means, in particular, that: (1) no law other than the Criminal Code can determine which is a crime; (2) application of law on criminal liability by analogy is prohibited;

Retroactivity

Retroactivity of the criminal law, which means that laws and other normative legal acts have no retroactive effect, except for cases when they mitigate or cancel the responsibility of a

person (Part 1 of Article 58 of the Constitution of Ukraine, Article 5 of the Criminal Code of Ukraine);

Ne Bis In Idem

Which means that that no one may be prosecuted twice for one and the same offence (Part 1 of Article 61 of the Constitution of Ukraine, Part 2 of Article 7 of the Criminal Code of Ukraine);

Individual Nature of Legal Liability

Part 2 of Article 61 of the Constitution of Ukraine, Part 2 of Article 11, Articles 29, 30 of the Criminal Code of Ukraine;

Presumption of Innocence

A person is presumed innocent of committing a crime and cannot be subjected to criminal punishment until his (her) guilt is legally proved and established by a court judgment (Part 1 of Article 62 of the Constitution of Ukraine, Part 2 of Article 2, Art. 23 of the Criminal Code of Ukraine);

Any restrictions of the convict's personal and civil rights is based on law or a court judgment (Part 3 of Article 63 of the Constitution of Ukraine, Part 1 of Article 50 of the Criminal Code of Ukraine);

Prohibition on cruel, inhuman and degrading punishment (Part 2 of Article 28 of the Constitution of Ukraine, Parts 2, 3 of Article 50, Article 51 of the Criminal Code of Ukraine).

Filimonov considers the principles of criminal law as expressed in the criminal law requirements for lawmaking, law enforcement and citizens' behavior, determined by the instructions of international legal acts on human rights, the Constitution, as well as the tasks for combating crime, and which make provisions that determine the content of significant set of legal norms and integrate them into a single criminal law system (Filimonov, 2002).

Sabitov attributes to the basic features of criminal law principles:

1. Normativity;
2. Conditionality of human activity;
3. Scientific validity;
4. Ideological expression;
5. Versatility;
6. Imperativeness;
7. Political validity;
8. Systematicity (Sabitov, 2012).

Other authors also draw attention to the close relationship and interdependence of principles (Yashin & Gorelova, 2006).

Many authors point to such a feature of the principles as their stable character (inviolability). Meanwhile, the "stability" of the principles is very relative and limited, which is due primarily to the socio-economic, ideological and political conditionality of the latter. Attention is drawn to the fact that due to the change of the social order, a number of principles of

criminal law, such as internationalism, public participation in the fight against crime, comprehensive protection of the conquests of the workers, etc., have lost their relevance (Dolotov & Lopashenko, 2014).

For the same reasons, recognition of the universal nature of legal (including criminal law) principles is unjustified. “*Inviolability*” and “*universality*” appear rather as variable, optional characteristics of the principles, since their content—even if the name is unchanged—can change dramatically even within a relatively short period of time (principles of democracy, personal responsibility).

Moreover, even current, generally recognized, legally enforced criminal principles are often interpreted not only in a non-uniform manner, but also mutually exclusive (principles of justice, humanism). The latter is largely due to cultural characteristics not only at the individual level, but also at the level of social groups, and even more so at the global level (national, state, interstate). The latest research clearly distinguishes a number of criminal categories, reflecting the relationship between culture and criminal law, the most rich cultural features. These categories include criminal law principles (Bibik, 2015). “*Universality*” and “*inviolability*” of the principles in this regard appear to be highly conditional, even ephemeral. *So, the principles:*

1. Indicate the direction in which criminal law should be developed and improved (e.g. protection of human and citizen’s rights and freedoms, protection of interests of the individual, society and State, etc.);
2. Determine the content of integration influence on the norms of criminal law, concentrating them on the protection of the most important of socially significant objects;
3. Ensure the unity of criminal law by presenting all requirements of its constituent legal norms.
4. Determine the limits of the interference of legal norms in the personal and social life.

Filimonov (2002) perceives the role of the principles of criminal law in being a link between the criminological reality and the whole set of legal norms that make up the system of criminal law of the State. The principles act as a mediating function between the existing framework and the direct enforcement process. So, firstly, the principle is embodied in the rules enshrined in other legal rules. Secondly, the principle is specified in other legal norms. Thirdly, in a number of cases the principle is expressed in a rule that is private in relation to a more general rule and yet, because of its importance, constitutes one of the initial legal provisions.

In this case, many scientists recognize the known declarative principles. For example, Maltsev (2004) regretfully states that:

“The legislator did not undertake the obligation to be guided in the law-making activity by the same proclaimed principles, to abolish or change any norm that contradicts these principles”.

Let us turn to the question of determining the criteria according to which certain provisions, developed in the course of public activity of a person, acquire the qualities of general principles, basic ideas, i.e. principles of criminal law.

Note that “*the criterion*” (from the lat. *critērium*, which is reduced to the greek. *Criterion*—the ability to distinguish; the means of judgment, the criterion associated with the greek. *Christina Ba*—divide, distinguish) is the requirement, test for determining or evaluating a person, objects, phenomena; a sign taken as a basis for classification.

Thus, in our opinion, one of the criteria for determining the fundamental principles of criminal law is the stability, inviolability of such a provision. That is, a provision must be

resistant to changes occurring both in society as a whole and in the legal system. For example, the principle of legality in criminal law means that all the provisions underlying a person's criminal prosecution, the imposition of a sentence, the dismissal, or other criminal consequences must be formulated solely in law as the supreme law, an act of the legislature.

For example, the principle of legality is embodied in Art. 9 of the Constitution of Ukraine (Law of Ukraine, 1996), according to which "*international treaties in force, consented by the Verkhovna Rada of Ukraine as binding, shall be an integral part of the national legislation of Ukraine*". Besides, the Declaration of State Sovereignty of Ukraine (Legislation of Ukraine, 1990) points to the priority of universally recognized norms of international law over those of domestic law of Ukraine.

At the same time, it should be noted that all regulations adopted by the legislature of any state can change, but the essence and meaning of the principle of legality can not.

The next criterion is the certainty of such a provision, i.e. the ability to clearly articulate a request that motivates, calls on the parties (participants) of the relationship to act in a certain way, which will minimize conflict between them. Thus, the principle of legal certainty has finally taken its place in the system of the principles of criminal law. It is one of the defining principles of "*good ordering*" and "*good administration*" (establishing the procedure and its observance), partly coinciding with the principle of legality (clarity and predictability of law, requirements for the "*quality*" of law). The essence of the considered principle in the aspect of the legislation on criminal liability absolutely rightly puts forward to legal norms, the law requirement to be qualitative, clear, and judicial decisions in the case-final.

Thus, the Constitutional Court of Ukraine emphasized the importance of the requirement of certainty, clarity and ambiguity of the legal norm, since otherwise it cannot ensure its uniform application, does not exclude the unlimited interpretation in law enforcement practice and inevitably leads to arbitrariness.

Note that contrary to the view expressed in the literature, we are convinced that the principles of criminal law should not be directly transposed into legal rules. This can hamper the manifestation of dynamism in the development of the entire legal system. For example, Ukraine today has taken a course on current European integration. This process is also carried out by making some changes to the legislation on criminal liability. To date, one of the principles of criminal law is the principle of personal responsibility in domestic law. At the same time, after signing and ratification of certain international conventions related to environmental protection, the Ukrainian legislator may be faced with the question of establishing criminal liability for legal entities that commit socially dangerous encroachments related to environmental damage. In this case, the principle mentioned by us will lose its relevance and essence, and legislator will have to amend criminal law again.

Objective Conditionality

Objective conditionality as a criterion for determining the principles of criminal law means that their character of social relations corresponds to the economic, political, ideological processes that take place in society. These processes may, in turn, depend on such factors as: mentality of the population, geographical location of the country, and so on. After all, the principles of law directly link the content of law with its social foundations-the laws of social life, on the basis of which legal system is built and which it establishes, regulates, protects. This

dependence determines the nature of lawmaking, the content of legal rules, means and methods of implementation of law. Thus, the principles are formed (formulated) almost independently, regardless of the will of the legislator or other subjects of legislative initiative. And that, in our opinion, is correct.

Realism

Realism as one of the criteria for defining the principles of criminal law is set aside in order to emphasize that the principle of legal (legal) certainty will not work, no matter how perfect it may seem, if the latter does not correspond to the realities of today. That is, according to this criterion, fundamental principles of criminal law should not be only ideals (ideal behaviors), as is often emphasized in the scientific literature, but also realistically determine the way to resolve the conflict of interests of participants in legal relations.

We also add that realism as a criterion for determining the principles of criminal law in this case acts as a contradiction to such a quality of legal norms as declarative nature. It is no secret that the numerous norms contained in the basic laws (constitutions) of the states are declarative.

For example, Constitution of Ukraine proclaims that:

“Everyone has the right to housing. The State creates conditions (stated in the Basic Law) under which every citizen will be able to build a house, buy it for rent or rent it out and that “everyone has the right to a sufficient standard of living for himself and his family, which includes adequate nutrition, clothing, shelter”.

Therefore, the State grants such rights to every citizen as enshrined in the Basic Law. At the same time, as evidenced by practice and objective reality, these rights are predominantly declarative and virtually unassigned.

In turn, with respect to both the principles of general law and the principles of criminal law, declarative character as a criterion for determining the latter can only work to diminish (or even destroy) the authority of the latter, which negatively affects the justice of both society as a whole and justice of individual citizens.

The essence of such a criterion as historical validity (conditionality) in our view, lies in the history of objectively existing reality, which includes: certain political processes that take place over a period of time; political will (including the will of the legislature in decision-making (e.g. criminalization and decriminalization of certain acts); events of different nature (e.g. epidemic or pandemic of disease, change of economic course of the country, etc.); a given direction (for example, taking a course on NATO). All the above processes and phenomena affect the present and of course the future in one way or another, so how successful will the combination of legislative harmonization with the prospects of development in connection with one or other historical events can be considered historically conditioned.

We have also defined such a criterion as the ability to regulate, adjust, protect public relations, which influence them in one way or another. This criterion is distinguished by us, as opposed to such quality as the declarativity discussed above. But in this case, we state that the principles that proclaim, emphasize, or define certain provisions as fundamental without having an applied nature or proper character should not be qualify as those, which are against the these

principles of law. We are convinced that the principles should be automatically applied when such a need arises (in case of conflict between members of public relations).

CONCLUSION

Thus, according to the results of our study, the main features of the principles of criminal law should be outlined:

1. Regulatory;
2. Internal unity, which is reflected in the system-structural internal balance, consistency, integration and at the same time differentiation into numerous species;
3. Objective conditionality, which means compliance with the principles of law of the nature of public relations, economic, political, ideological processes occurring in society;
4. Ideological, which means that principles, like law in general, are a form of social consciousness capable of exercising an ideological, informational and educational influence of a general nature;
5. Materiality in law;
6. Historicity, that is, the principles are determined by the historical conditions of development of society and the state: they are such as the epoch, people, their needs, way of life, social relations, etc.

The criteria for determining the principles of criminal law are:

1. Stability (inviolability of position);
2. The certainty of such a provision (i.e. the ability to clearly state the claim);
3. Objective conditionality of the latter;
4. Realism;
5. Historical validity;
6. The ability to regulate, adjust, and influence social relations.

That is, principles according to the specified criterion should be included and worked as a mechanism of conflict resolution, which offers at once a certain algorithm of actions to the participants of the latter and the like.

Thus, we can see that the signs (properties) of the principles of law in general and criminal law in particular, overlap with the criteria for their definition. However, in our opinion, this is the way it should be, because these concepts are in one line.

It should be carried in mind that the principles of law bring uniformity throughout the legal system, while ensuring the unity of legal regulation of social relations, consolidating all components of the legal superstructure. The principles have the following functions and properties that are necessary for this, namely: they are regulatory, universal, binding, objectively conditioned, historical and ideological-political categories; the essence of their social function is to regulate and protect social relations; they are an independent legal category.

At the same time, the principles of criminal law need not be enshrined in criminal law, because, in our opinion, their effectiveness is directly related to the possibility of their dynamic development.

REFERENCES

- Bibik, O. (2015). *Cultural dimension of criminal law and criminological studies: Theoretical and practical aspects*. Published PhD dissertation. Ural State Law University.
- Dolotov, R., & Lopashenko, N. (2014). *Russian criminal law. General and special parts*. Moscow: Yurlitinform.
- Dudorov, O., & Mazur, M. (2017). Implementation of the principles of rule of law in the application of law on criminal liability: Problem statement, international and foreign experience. *Legal Scientific Electronic Journal*, 5(1), 129–140.
- Filimonov, V. (2002). *Principles of criminal law: Monograph*. Moscow: JurInfoR Center.
- Fisenko, D. (2016). Special principles of criminal law. Published PhD dissertation. Omsk Academy of the Ministry of Internal Affairs of the Russian Federation.
- Kelina, S.G., & Kudriavtsev, V.N. (1988). *The principles of Soviet criminal law*. Moscow: Nauka.
- Klenova, T.V. (1997). The principles of criminal law and the principles of codification in criminal law. *State and Law*, 1(1), 54–59.
- Kolodii, A. (2012). *Principles of law: Genesis, concepts, classification and implementation*.
- Krieger, G. (1981). The place of the principles of soviet criminal law in the system of principles of law. *Soviet State and Law*, 2(1), 102–107.
- Law of Ukraine. (1996). *Constitution of Ukraine of June 28, 1996 no. 254к/96-VR*. Retrieved July 23, 2020 from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>
- Law of Ukraine. (2001). *Criminal code of Ukraine of April 05, 2001 no.2341-III*. Retrieved July 23, 2020 from <https://zakon.rada.gov.ua/laws/show/2341-14/ed20201016#Text>
- Legislation of Ukraine. (1990). *Declaration of state sovereignty of Ukraine of July 16, no. 55-XII*. Retrieved July 23, 2020 from <https://zakon.rada.gov.ua/laws/show/55-12#Text>
- Maltsev, V. (2004). *Principles of criminal law and their implementation in the law enforcement activities*. St. Petersburg: Law Center Press.
- Ozhegov, S., & Shvedova N. (1993). *An explanatory dictionary of Russian language*. Moscow: Az.
- Sabitov, T. (2012). *The system of criminal law principles*. Moscow: Prospectus.
- Sundurov, F. (2016). *Criminal law of Russia: General part*. Moscow: Statut.
- Yartseva, V., & Arutiunova, N. (1998). *Great encyclopedic dictionary*. Moscow: Great Russian Encyclopedia.
- Yashin, V., & Gorelova, G. (2006). System of principles of criminal law of the Russian Federation as a guarantee of legality of law enforcement activities. *Investigator*, 3(1), 5–7.
- Yavich, L. (1978). *The right of a developed socialist society*. Essence and principles. Moscow: Legal Literature.