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Significance of Some Legal Principles at the Stage of Creation of Criminal Legislation

The modern scientists' approaches to the question of importance of some principles of criminal law at the stage of the creation of criminal legislation are studied. The article substantiates the provision that all principles of criminal law are closely interrelated, the exclusion of one of them leads to a violation of the functioning of the entire criminal justice system. Particular attention is given to such principles as justice, stability and dynamic development. The idea of the appropriateness of consolidating the principles in certain articles of the Criminal Code of Ukraine is supported. All the principles of criminal law are at the core of criminal law-making and criminal law enforcement, therefore their compliance with criminal law should be considered on two main levels – law-making and the use of punishment or other criminal-legal measures. It is proved that criminal legislation requires a thorough and system monitoring as well as a comprehensive study of its improvement. The analysis of the changes introduced into criminal legislation and the preconditions for their adoption allows to distinguish several factors that influenced the legislator, in particular: 1) the legislator's desire to fill the gaps in criminal legal regulation and to protect public relations violated in the course of law enforcement; 2) the adopted changes reflect excessive expectations of criminal legislation as a mean of solving social conflicts, ignoring the regulatory capacity of other branches of law; 3) it is not uncommon that the changes introduced are aimed at strengthening the sanctions of current criminal legislation. The author's vision is that the appearance of a number of bills is dictated less as by urgent need to bring the legislation on criminal responsibility in line with the requirements of rapidly changing living conditions of modern society and the state, than as a desire to respond to each more or less «resonance» event or a case by creating a new norm of the Criminal Code. It seems that the legislator tries to solve the overwhelming majority of those difficult life situations that arise primarily due to the volatile socio-economic situation in the country by the simplest and at the same time hardly effective way – through measures of criminal legal repression. It is proved that the situation with legislative changes is in no small measure due to the shortcomings in the mechanism of drafting, discussion and adoption of legislative acts, which amend the Criminal Code of Ukraine. It is considered expedient to undertake an in-depth study of the entire mechanism for the adoption of criminal legislation and to develop substantiated proposals based on real scientifically proved grounds (with a harmonious combination of principles of justice, stability and dynamism) on all stages of elaboration and adoption of the law. In this regard, it is important to have a rational balance between dynamism, stability and justice, not only during the implementation of criminal legislation, but also at the time of its creation.

Keywords: principles; general principles; justice; the principle of stability; the principle of dynamic development; the principle of justice; lawmaking, criminal law; creation; objectivity.

Problem statement. Principles play an important role in legal regulation. The term «principle» comes from the Latin word «principium» and is translated as «basic (guiding) rule of conduct (activity), basis, starting point of science». In other words it is fundamental scientific or moral ambition which does not retreat from and which serves as a direct regulator of individuals in each particular situation. The main significance of any principle lies in its regulatory function, the realization of which is possible with proper legal formulation as a general rule.

Analysis of recent research and publications. Questions of the study of the principles of criminal law were the subject of research of such criminal law scientists as P. Andrushko, Ya. Bezpala, P. Berzin, I. Gnatov, A. Gorelik, O. Kvasha, M. Korzhansky, O. Kostenko, P. Matyshevsky, I. Mihalko, A. Molodtsov, V. Maltsev, V. Navrotsky, S. Pirvagidov, Yu. Pudovochkin, O. Skakun, N. Storchak, P. Fris, M. Havronyuk, S. Shapchenko and others. However, the issue of the importance of some legal principles at the stage of creating a criminal law so far has not received proper coverage.

Therefore, *the purpose of the article* is to study the significance of some principles of law at the stage of the creation of criminal legislation, as well as the substantiation of position that their observance in criminal law should be considered on two main levels – law-making and the use of punishment or other criminal-legal measures.

Presentation of main material. All principles, in particular in criminal law, are closely interconnected, the exclusion of one of them leads to a violation of the functioning of the entire criminal justice system. In the doctrine of criminal law, despite the supposed clarity, there is a difference in opinion of scientists about the semantic content of understanding the principles of law and forms of expression.

All the principles of criminal law are at the core of criminal law-making and criminal law enforcement. Their compliance with the criminal law should be considered at two main levels: 1) law-making; 2) the use of punishment and other criminal-legal measures.

One of the important principles of criminal law is the principle of justice, which is not limited to punishment – the scope of its application in criminal law should be much wider and therefore requires a clear definition; ideally it would be normative consolidation.

Perhaps, harmonious combination of stability, on the one hand, and dynamic development (in accordance with the requirements of the present), on the other, should be recognized as the most significant prerequisite for the effectiveness of criminal law. Thus, the law that is not stable and undergoes constantly an excessive number of changes (and consequently transformation) cannot be considered as effective

protective mechanism. Nor can an effective law, which does not meet existing social requirements, cannot be considered effective, as it does not provide an adequate protection of social relations that are developing or changing in one way or another. Accordingly, the criminal law should be a kind of harmonious balance between stability, which would ensure clarity of this law, its simplicity and dynamics of its development. In addition, the dynamics of criminal legislation development is stipulated by attempts to bring domestic legislation in line with European and international requirements.

In support of trend of excessive changes to the Criminal Code of Ukraine, V. Tatsii, V. Borisov and V. Tiutiugin pointed out that as of 2010 198 articles of the mentioned Code were amended and supplemented, accounting for more than 44 % of those articles that were in it at the time of adoption and entry into force. Accordingly, scientists raise a completely logical question: «What kind of stability of criminal law can be discussed at such an urgency of updating its regulations?» [1, p. 12]. Advocating this point of view, we will only add that over the course of 2010–2018 the trend towards excessive amendments to the criminal legislation has only intensified and has, in essence, become of a real problematic nature.

In these conditions, the rational balance between the dynamics and stability of criminal legislation is important. Accordingly, the criminal law requires a thorough system monitoring and a comprehensive study of its improvement.

A. Kozhemyakin, analyzing the current trends in the development of domestic criminal law, describes them as negative and indicates, in a concrete form, such tendencies are: an increase of norms with blanket dispositions, an unjustified increase in criminal legal repression, which alternates with mass decriminalization, etc. All this compels to acknowledge the violation of the principle of legal certainty. Thus, in today's conditions, it is difficult to avoid blankness in criminal law, but legislators and the scientists should provide law enforcement bodies with clear and distinct recommendations for the application of such norms [2, p. 45–46].

Analysis of the changes that were introduced into the criminal law and the preconditions for their adoption allows us to identify several factors that, in our opinion, have affected the legislator. Firstly, the legislator's desire to fill the gaps in criminal-legal regulation and to protect public relations violated in the course of law enforcement. Secondly, the adopted changes reflect excessive expectations of criminal legislation as a mean of solving social conflicts, ignoring the regulatory capacity of other branches of law.

Third, it is not uncommon that the changes introduced are aimed at strengthening the sanctions of current criminal legislation.

In addition, the dramatic changes in the political situation that took place in early 2014 also led to introduction of numerous changes to the Criminal Code, many of which are completely ill-considered, counterproductive and, in fact, create additional obstacles to law enforcement.

As an example, one can recall the Law of Ukraine of February 21, 2014 «On Amendments to the Criminal and Criminal Procedural Codes of Ukraine on the Implementation of the Provisions of Art. 19 of the UN Convention against Corruption», which amended the Art. 365 of the Criminal Code of Ukraine and narrowed the circle of possible subjects of this crime. The reasons and preconditions for the adoption of this law are well known, but the introduction of these changes has in reality led to difficulties and non-compliances with regard to legal qualification of the relevant acts of officials. In particular, by introducing these changes, the legislator violated the concepts of «abuse» and «excess», which greatly complicated the qualification of acts that consist of overreaching the powers granted to a certain official.

In this context, it should also be recalled that Verkhovna Rada of Ukraine initially adopted a law on amendments to the Criminal Code of Ukraine, but consequently cancelled it. For example, this applies to the Law of Ukraine of June 11, 2009 «On Amendments to Certain Legislative Acts of Ukraine Regarding Responsibility for Corruption Offenses», which was repealed by the Law of Ukraine of December 21, 2010 «On Recognition of Certain Laws of Ukraine Concerning Corruption Prevention and Counteraction To Have Lost Their Force».

Attention is drawn to the fact that the appearance of a number of bills, in our opinion, is dictated less as by urgent need to bring the legislation on criminal responsibility in line with the requirements of rapidly changing living conditions of modern society and the state, than as a desire to respond to each more or less «resonance» event or a case by creating a new norm of the Criminal Code. It seems that the overwhelming majority of those difficult life situations that arise primarily due to the volatile socio-economic situation in the country by the simplest and at the same time hardly effective way – through measures of criminal legal repression. However, in the recent past society has already passed this path, which is known to have proved its complete failure [1, p. 12].

It is logical that this situation with legislative changes is not least due to the shortcomings in the mechanism of drafting, discussion and adoption of legislative acts, which amend the Criminal Code of Ukraine.

The principle of justice is playing an important role at the stage of criminal legislation drafting. According to the dictionary under S. Ozhegov and N. Shvedova word «justice» means «fair treatment of anyone; impartiality; a sense of justice; to do justice, to give justice to somebody; to acknowledge something-not-nothing-worthless, right, worthy» [3, p. 225]. The socially-defined understanding of justice finds expression in the word «truth», which means that it «corresponds to reality, truth, moral, ethical and legal norms; the right, objective, impartial attitude to someone, something» [4, p. 1180]. The range of interpretations of justice is wide enough from the objective social ideal to subjective assessment, «just what meets my expectations is fair».

Given the versatility and ramification of the application of justice, it is difficult to find a concise universal definition of justice itself and the principle of justice, which clearly corresponds to the law and does not lead to artificial inflation of its norms. It should be borne in mind that each era and the social system invest its understanding in the content of the principle of justice.

The category of justice is manifested in the criminal law in various aspects, which is the correspondence between the act, its social consequences and their respective assessment. That is, justice in criminal law is an appraisal category that requires the interests of the individual, society and the state to be catered of.

Of course, *nulla lex satis commode omnibus est* (there is no law that is convenient for everyone). The principle of justice can be clearly defined in the text of the law, and simultaneously not be formalized, but in the other case this does not mean that all legal norms are fair, or vice versa.

That is, the contents of the principle of justice laid the aspects of influence not only to the subject of crime, but also to the punishment, to the peculiarities of the manifestation of the rights and responsibilities of the participants in the criminal process, taking into account the equality of all before the law and fulfillment of obligations to compensate for the damage. The interest in paying attention to the category of justice is also due to the crisis state of social morality [5, p. 236]. Its compliance should ensure a compromise between the parties of legal relations, the latter being fundamental to the determination of justice since it is subtly responding to changes in both law and legislation, and with the development of society and state, law and legislation, as well as to the transforming of system of moral values adopted in society to the unstable conception of every human being about what is right and what is not. In other words, so far, there is no legal definition of these concepts.

The concept of social justice in criminal law is interpreted through the principle of justice, which means adequacy of severity of punishment to person's guilt and actions committed by this person. Justice is one of the most important backbone principles of law.

The category of justice should have clear formal definition in the law (this will provide an expression in the legal consciousness, legal norms and legal relations), but it is very difficult to find a universal expression of the concept, which would reflect all possible variants of its manifestation and application, and at the same time would be concise and clear, not leading to «inflating» the rules of the law.

As to the legislative consolidation of the principle of justice, an example can be called from foreign experience, in particular Art. 6 of the Criminal Code of Russian Federation, according to which penalties and other measures of criminal law applicable to a person who committed a crime should be fair, that is, to conform to the nature and degree of public danger of the crime, the circumstances of his commission and the guilty person [6]. According to Russian criminal legislation, principle of justice (at Part 2 of Art. 6) also refers to implementation of inadmissibility of double incrimination; in addition, one of the ways of expressing justice in criminal proceedings is the principle of presumption of innocence, enshrined in Art. 14 of the Criminal Procedural Code of Russian Federation. In fact, the principle of justice has a relatively declarative character.

Taking into account the defects of the legislative formulations of the principle of justice, the principle of justice in criminal law has two aspects – the validity of the criminal law and the justice of the punishment imposed by the court for committing a crime or refusing him.

The principle of justice in the doctrine of criminal law is considered at various levels, in particular, Russian scientists Yu. Pudovochkin and S. Pirvagidov formulate the principle of justice at the following levels: 1) criminalization and penalization of the act must be objective; 2) every person who is responsible under the Criminal Code in case of a crime should be prosecuted; 3) no one may be convicted of a crime for which he was previously prosecuted or released from responsibility; 4) punishment and other criminal-legal measures applicable to the perpetrators must be fair, that is, must correspond to the nature and degree of social danger of the crime, the circumstances of his commission and the person guilty [7, p. 140]. Of course, a very controversial position is regarding the determination of the objectivity of criminalization and the imposition of penalization to the observance of principle of justice in criminal law during law-making; rather it can be attributed to criminal policy. It should also be noted that not all individuals who have committed a crime are prosecuted; sometimes

they are released from responsibility in case of committing a small or medium crime for the first time.

The principle of justice in general should be reflected in the current legislation, both at constitutional level and in sectoral laws (taking into account the peculiarities of regulated social relations). Despite the fact that justice is a complex and multifaceted category, however, the refusal of it will complicate the formation of the basic concepts of criminal law.

Despite the lack of a clear formal expression of justice as an underlying principle, it is unquestionably present in the norms themselves, as evidenced by law enforcing practice, positions of the highest judicial authorities. Although it would be expedient to consolidate the principle of justice in the Criminal Code independently (not in conjunction with any other principle) and to have its clear definition and criteria, this will facilitate practical application and the subject of legal relationships will not have to prove each time at first (addressing to the comments, explanations of the higher courts, which are not always clear) that a certain category is the very principle.

Conclusions. On the basis of the foregoing, one can state that the law-making activity of recent years has in many aspects non-systemic, sometimes even chaotic, character. The drafts submitted to the parliament are occasionally far from adequate scientific expertise. All this reduces the effectiveness of preventive function of the criminal law, adversely affects law enforcement activities and leads to non-enforcement of the law.

In some cases, proposals for amending the Criminal Code are more extensive and concern the possibility of separating from it a number of norms and the formation on the basis of a new normative act. In particular, the introduction of the institute of criminal offenses [1, p. 13].

In general, all this suggests that existing problems of law enforcement are to some extent conditioned by the imperfection of the law itself, which in turn is the result of non-compliance with the basic rules, methods and principles of drafting, discussion and adoption of the bill, which amends the Criminal Code of Ukraine.

Thus, it is justified to carry out an in-depth study of the entire mechanism for the adoption of criminal legislation and to develop substantiated proposals on real scientific support for all stages of the development and adoption of the law on criminal liability on this basis. It is this scientific basis that will enable harmonious combination of the principles of criminal law, among which the priority should be justice, stability and dynamism in the reform of criminal law.

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Бабаніна В. В. – кандидат юридичних наук, доцент, докторант наукової лабораторії з проблем розслідування злочинів навчально-наукового інституту № 1 Національної академії внутрішніх справ, м. Київ

Значення деяких принципів права на стадії створення кримінального законодавства

Досліджено сучасні підходи науковців до питання про значення деяких принципів кримінального права на стадії створення кримінального законодавства. Доведено, що всі принципи в кримінальному законодавстві тісно пов'язані між собою, а неврахування одного з них призводить до порушення функціонування кримінально-правової системи загалом. Особливу увагу зосереджено на таких принципах, як справедливість, стабільність і принципі динамічного розвитку. Аргументовано положення стосовно доцільності закріплення принципів в окремих статтях Кримінального кодексу України. Усі

принципи кримінального права слугують підґрунтям кримінальної правотворчості та кримінального правозастосування. Їх дотримання в кримінальному законодавстві слід розглядати на двох основних рівнях: правотворчості та застосування покарання чи інших заходів кримінально-правового характеру. Доведено, що кримінальне законодавство потребує поглибленого системного моніторингу та комплексного дослідження питань його вдосконалення. Аналіз змін, які було внесено до кримінального законодавства, та передумов їх прийняття дає змогу виокремити декілька факторів, які вплинули на законодавця, а саме: 1) прагнення законодавця заповнити прогалини в кримінально-правовому регулюванні й охороні суспільних відносин, які порушуються в процесі правозастосування; 2) у прийнятих змінах відображаються надмірні сподівання на кримінальний закон як засіб вирішення соціальних конфліктів за ігнорування регулятивних можливостей інших галузей права; 3) унесені зміни нерідко мають на меті посилення санкцій, діючих кримінально-правових норм. Висвітлено авторське бачення стосовно того, що поява низки законопроектів, на нашу думку, зумовлена не стільки нагальною потребою приведення законодавства про кримінальну відповідальність у відповідність до мінливих умов життєдіяльності сучасного суспільства й держави, скільки бажанням відгукнутися, відреагувати на кожну більш-менш резонансну подію чи справу шляхом створення нової норми кодексу. Доведено, що ситуація із законодавчими змінами обумовлена саме недоліками в механізмі розроблення, обговорення та прийняття законодавчих актів, якими вносяться зміни до Кримінального кодексу України. Аргументовано доцільність поглибленого дослідження всього механізму прийняття кримінального законодавства та вироблення на цій основі обґрунтованих пропозицій щодо реального наукового забезпечення (за гармонійного поєднання принципів справедливості, стабільності й динамічності) всіх етапів розроблення та прийняття закону про кримінальну відповідальність.

Ключові слова: принципи; загальні засади; справедливість; принцип стабільності; принцип динамічного розвитку; принцип справедливості; правотворчість; кримінальне законодавство; створення; об'єктивність.