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THE ROLE OF THE PRINCIPLE OF JUSTICE IN THE ASPECT OF DEVELOPING THE RULE OF LAW

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The article is devoted to the study of the question of determining the role of the principle of justice during the development of the rule of law. The author also examines the international experience of the development of the legal system and the influence of the principles of law, in particular the principle of justice, on the formation and development of the rule of law. It was determined that the appearance of a whole series of interesting and meaningful scientific studies of the phenomenon of the rule of law does not remove from the agenda the relevance and significance of the problem of scientific understanding of the fundamental ideas and provisions that underlie the model of the rule of law and the process of its formation and development. The study of the development of the legal system based on the principles of law in the rule of law plays an important role in determining the directions of development,

including modern legislation on criminal liability. In a number of ECtHR decisions, we find the interpretation of justice as a criminal law principle. Yes, the Court in the case "Kraska v. Switzerland", (Applicationno. 13942/88), 19.04.1993, determined that the effectiveness of a fair trial is achieved when the parties to the process have the right to present to the court those arguments that they consider important for the case. At the same time, such arguments must be heard, that is, carefully considered by the court. In other words, the court has the duty to conduct a thorough consideration of submissions (motions), arguments and evidence submitted by the parties. According to the results of the research conducted by the author of the article, it is proved that in order to achieve a positive result in the process of building the legal state, active state activity in the aspect of raising legal awareness is necessary not only the legislator, but also the entire population, that is, on the scale of the entire country. At the same time, one should not forget that "law and justice are not (and should not be!) the subject of unlimited discretion of the legislator.

Keywords: principles of justice, international experience, legal system, rule of law

Introduction. According to the provisions of the Basic Law (Article 1): "Ukraine is a sovereign and independent, democratic, social, legal state." [1]. In the aspect of our research, we are most interested in the content of the concept - "rule of law". On the one hand, a separate branch of science deals with the study of the concept of "rule of law" - the theory of the state and law. Of course, scientists in this field have derived their own understanding and meaning of this term. According to him, the legal state is a sovereign political, territorial organization of power that can exist only in a civil democratic society, and is based on the basis of social and just law. On the other hand, the importance of this concept for various branches of law is difficult to overestimate. It is also key for criminal law, it is mandatory to take into account during the formation of any branch of law and legislation.

The appearance of a whole series of interesting and meaningful scientific studies of the phenomenon of the rule of law does not remove from the agenda the relevance and

importance of the problem of scientific understanding of the fundamental ideas and provisions that underlie the model of the rule of law and the process of its formation and development. Inconsistencies and miscalculations in the activity of the Ukrainian state in this area often give grounds to talk about its "illegal nature", about the distortion of the content of the principles of the rule of law [2].

Analysis of the results of recent studies. Such domestic and foreign scientists as: P.S. Berzin, V.O. Gatselyuk, I.M. Hnativ, O.P. Gorokh, O.O. Dudorov, Yu.L. Dyatlova, M.A. Zalygina, S.G. Kelina, V.N. Kudryavtsev, M.A. Malyhina, M.V. Mazur, V.V. Maltsev, V.O. Navrotskyi, A.E. Skakun, L.Yu. Timofeeva, V.I. Tyutyugin, V.D. Filimonov, D.Yu. Fisenko, E.E. Cherednichenko, K.V. Shundikov and many others.

The mentioned scientists studied the nature and main features of the general principles of criminal law. The authors did not investigate the impact of individual principles of law on the development of the rule of law.

For example, P.S. In his studies, Berzin systematized the principles and gave them a concise description, and also raised the issue of the history of the emergence and formation of fundamental principles in different historical periods. O.O. Dudorov and M.V. Mazur carried out a comparative characterization of individual principles and studied their nature. D.Yu. Fisenko studied special principles of criminal law and gave them a description. The purpose of this article is to study the practical aspect of the influence of certain principles of law on the development of the rule of law in Ukraine, taking into account international experience.

Presentation of the main material. When raising the issue of individual constituent elements of the general model of the rule of law, one cannot ignore their implementation and ensuring them in practice. Such a study of the issue of the development of the legal system based on the principles of law in the rule of law state plays an important role in determining the directions of development, including modern legislation on criminal liability. But still, to begin with, it is necessary to find out the theoretical definition of the concept of "rule of law."

In the most general form, according to the provisions of the theory of the rule of law, the law must be uniform for all - both for the state and for citizens, and at the same time have a legal character, i.e. meet high moral principles, requirements, ideas. In this case, laws should also meet the requirements of morality, humanism, democracy and justice and should not be aimed only at the protection of state power. Despite the fact that Ukraine was declared a constitutional state back in 1996 by the Constitution, we think that in reality, given today's events, our state is pushed back to the very beginning of the path to its recognition as a constitutional state, to our great regret. Thus, the legal sign of the state is not only the adoption of the Basic Law, its proclamation of high values, but also the observance of the latter, the direct perception by the legislator of the will of the people of the country, the embodiment of the values of modern society in the norms of law.

European countries in their constitutions sometimes indicate the special determining role of justice, the principle of justice in the creation of laws. After all, as we noted earlier in our studies, it was precisely for the implementation of the principle of justice that law was invented by society and defined as its main regulator of social relations.

Thus, in one of its first decisions, the Constitutional Court of the Czech Republic stated: "Given the concept of the constitutional state on which the Czech Constitution is based, law and justice are not the subject of the unlimited discretion of the legislator, are not even the subject of the law, because the legislator is limited by certain basic values, which the Constitution declares inviolable. For example, the Czech Constitution provides in Part 2 of Article 9 that "changes to the essential requirements of a democratic legal state are inadmissible." Thus, the founding principles of a democratic society within the framework of the Constitution are above the legislative power and the Parliament has no powers in relation to them. A constitutional state will stand or fall with these principles. To get rid of any of these principles in any way – be it by a majority decision or even a unanimous decision of the Parliament – means nothing more than the abolition of the constitutional state as such" [3].

Note that the general and unconditional point of all modern concepts of justice is the idea of human rights, i.e. recognition of equal treatment of people and refusal of privileges and immunity related to national and religious characteristics [4].

The principle of justice, or as it is also called the principle of social justice, is based on the recognition of justice as a feature of law. In criminal law, for example, it means compliance of the types of "criminal law anomaly" and other acts that are taken into account in the content of the relevant elements of the mechanism of criminal law regulation, provided for their implementation with criminal law consequences. It is really not directly formulated either in international legal acts or in the Constitution of Ukraine.

At the same time, Art. 10 of the Universal Declaration of Human Rights establishes: "Every person, in order to determine his rights and duties and to establish the validity of a criminal charge brought against him, has the right, on the basis of full equality, to have his case heard in public and with respect all requirements of justice by an independent and impartial court" [5]. Article 14 of the International Covenant on Civil and Political Rights states: "Everyone has the right to a fair and public hearing in the consideration of any criminal charge brought against him, or in the determination of his rights and obligations in any civil process by a competent, independent and impartial court established on the basis of the law" [6]. A requirement similar to the above is contained in Art. 6 of Protocol No. 6 to the European Convention on the Protection of Human Rights and Fundamental Freedoms [7].

As for the specification of the investigated question in the practical plane, the courts of Ukraine in criminal cases, for example, often refer to the principle of justice in a complex with other principles of law, in particular criminal law. In the decision of the panel of judges of the Third Judicial Chamber of the Criminal Court of Cassation of the Supreme Court dated March 4, 2020, it was stated that the court proceeds from the "principles of justice, proportionality and individualization", therefore, "the punishment must be adequate to the nature of the committed actions, their dangerousness and data about the person of the guilty, which are subject to mandatory consideration". At the same time, the court interprets the

meaning of the term "manifestly unfair punishment", under which it proposes to understand "not any possible difference in the assessment of the type and amount of punishment from the point of view of the court of appeal or cassation instance, but a difference in such an assessment of a principled nature." The court also concluded that "the punishment complies with the principles of legality, individualization and justice, and therefore sees no reason to consider such a punishment clearly unfair due to leniency." In addition, the court noted that "based on the principles of reasonableness and justice, the local court considered that the amount of moral damage claimed by the victim was excessive and reasonably reduced it to UAH 500,000." At the same time, the court's conclusion regarding the settlement of the civil lawsuit is consistent "with the principle of reasonableness, balance and justice, corresponds to the nature and extent of the moral suffering of the victim, established by the court when examining all the circumstances of the case" [8].

In another case, the decision of the panel of judges of the Second Judicial Chamber of the Criminal Court of Cassation of the Supreme Court dated February 18, 2020 indicated the following: "Based on the specified goal and principles of justice, proportionality and individualization, the punishment should be adequate to the nature of the committed actions, their dangerousness and data on the identity of the culprit". In addition, the court specifically emphasized that "the circumstances of this criminal proceeding correspond to the principles of legality, individualization and justice when imposing punishment" [9].

In a number of ECtHR decisions, we find the interpretation of justice as a criminal law principle. Yes, the Court in the case "Kraska v. Switzerland", (Applicationno. 13942/88), 19.04.1993, determined that the effectiveness of a fair trial is achieved when the parties to the process have the right to present to the court those arguments that they consider important for the case. At the same time, such arguments must be heard, that is, carefully considered by the court. In other words, the court has the duty to conduct a thorough review of submissions (motions), arguments and evidence submitted by the parties [10].

According to the decision of the ECtHR in the case "Ponomaryov v. Ukraine", dated 04/03/2008, the very possibility of the existence of two points of view on the same subject is not a reason for a new review. The right to a fair trial by a court, which is guaranteed by paragraph 1 of Article 6 of the Convention, should be understood in the light of the preamble of the Convention, in the relevant part of which it is stated that the rule of law is a common heritage of the High Contracting Parties [11].

On returning to the question raised by us above, which is more extensive in its content, I would like to note that the declaration of the principle of justice (the principle of social justice) as the Basic Law of the state, the definition of this principle, the understanding of its essence, its use in practice, etc. are different things, sometimes even significantly (dramatically) differ.

The point in this case is that the understanding and attitude to the system of legal principles, to the moral principles and values of society at different times was different. If in ancient times the principle of "an eye for an eye, a tooth for a tooth" prevailed, which is more similar in its purest form to the manifestation of the principle of justice, then today the dominant place in the hierarchy of legal principles is occupied by the principle of humanism, according to which, as stated in the Political Dictionary, the last constitutes "forms of life practice, systems of people's thinking, worldview principle, which are based on the conviction that a person is the highest social value, on confidence in a person's ability for unlimited development and self-realization of all his essential powers, abilities and talents; the idea of humanism is one of the central ones in human culture and the history of civilization, the content core of which is determined by humanity, which is understood as humanity, philanthropy, respect for human dignity" [12, p. 160]. In the Literary Dictionary-reference, it is defined ethically as "a moral principle based on the belief in the limitless possibilities of man and his ability to improve, the demand for freedom and protection of the dignity of the individual, the idea of the human right to happiness" [13, p. 171–172].

In our opinion, if one of the listed principles is given a decisive place, an imbalance may occur in the construction of not only the system of legal principles, but also in the system of moral foundations of society. That is why the principle of justice should act as an arbiter in situations where there are certain contradictions between other principles [14, p. 7-13].

But, as can be seen from the provisions of the Constitution of the Czech Republic, the mentioned state, first of all, defining itself as an authorized subject of power as a constitutional, and not as a legal state, is what the emphasis is on in Ukraine. Secondly, due to the basic law, even the ability to shift the emphasis in the formation of the state policy of the country in the field of law-making, if this goes against the understanding of justice (the principle of justice), has been removed from the legislator. This attitude to justice is decisive and significantly shortens the path to the recognition of the legal state and the emergence of a civil society in such a state. At the same time, taking legal norms (laws) into perspective, one must remember that the principles, like the norms themselves, do not remain unchanged, just as the principles themselves are dynamic in nature and can change, sometimes quite significantly.

Conclusions. Therefore, in our opinion, the determining factor for the recognition of a legal state is the compliance by its state bodies, as well as other institutions of the state and private form of ownership of the regime of legality, which is built on compliance with the principles of law, which in turn represent a smoothed and ordered system. To achieve a positive result and to arrive at a moment from which the level of legal awareness depends not only on the legislator himself, but also on the population of any country in general. And as written in the Constitution of one of the European states: "law and justice are not (and should not be!) the subject of unlimited discretion of the legislator, are not even the subject of the law, because the legislator is limited by certain basic values that the Constitution declares inviolable." Thus, a state governed by the rule of law can be called a state where justice reigns, that is, fair laws are in force, justice is carried out by fair courts - and all this takes

place on the basis of the principle of justice, which stands above all other fundamental principles, which are the basis of the organization and existence of the system of state power, the whole society and an individual person. At the same time, the understanding and attitude towards this principle should be maximally unified, understandable and acceptable for everyone who considers or wants to consider himself a member of such a society.

Literature:

1. Constitution of Ukraine Bulletin of the Verkhovna Rada of Ukraine (VVR), 1996, No. 30, Art. 141 <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text>
2. Rule of law in Ukraine: issues of theory and practice of implementation // Proceedings of the conference: No. 18, September 2010 <https://veche.kiev.ua/journal/2191/>
3. Constitution of the Czech Republic dated December 16, 1992 https://www.wikiwand.com/uk/Constitution_of_the_Czech_Republic
4. Philosophical problems of man and society in the realities of the 21st century: within the framework of the program of the Ministry of Education and Culture of Ukraine All-Ukrainian training "Know Yourself", (March 13, 2020). Kyiv, 2020. 450 p. URL: http://library.nlu.edu.ua/POLN_TEXT/4%20KURS/4/2/47Chast2Rozd7Tema1Paragraf3.htm
5. The Universal Declaration of Human Rights: adopted and proclaimed in Resolution 217 A (III) of the UN General Assembly dated December 10, 1948 Verkhovna Rada of Ukraine: [site]. URL: https://zakon.rada.gov.ua/laws/show/995_015#Text
6. International Covenant on Civil and Political Rights: adopted by GA OO