COMBATING CRIME: CRIMINAL-LEGAL, CRIMINOLOGICAL, CRIMINAL-PROCEDURAL, FORENSIC, TACTIC AND INFORMATION ASPECTS

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THE PRINCIPLE OF PUNISHMENT FAIRNESS

Костянтин Марисюк. ПРИНЦИП СПРАВЕДЛИВОСТІ ПРИЗНАЧЕННЯ КРИМІНАЛЬНОГО ПОКАРАННЯ. Принципи призначення покарання є окремою категорією кримінального права. Думки науковців щодо визначення поняття принципів призначення покарання та їхніх видів різняться. Конкретний вичерпний перелік видів таких принципів сформулювати неможливо. Їх може бути безліч. Проте в кримінально-правовій літературі всі дослідники проблеми призначення покарання до видів принципів призначення покарання обов'язково відносять принцип справедливості.

Принцип справедливості призначення покарання – одне з найважливіших вихідних положень, закріплених у нормах кримінального закону, яке вимагає забезпечення мети покарання через урахування судом усіх обставин, що стосуються кримінального правопорушення та особи, яка його вчинила.

Не залишається сумніву, що в Україні принцип справедливості в судочинстві та праві загалом посідає одне з найважливіших місць і тісно пов'язаний із такими категоріями, як «верховенство права», «рівність усіх перед законом» тощо. Він є критерієм чесного вирішення справи, ідеалом, до якого треба прагнути та яким потрібно керуватися одночасно із законом.

Принцип справедливості відіграє важливу роль у правовому регулюванні різних сфер суспільних відносин, проте найтісніше він пов'язаний з інститутом призначення покарання.

Особливість принципу справедливості полягає в тому, що він органічно входить до змісту всіх інших принципів призначення покарання – законності, гуманізму, рівності перед законом, відповідальності за вину, індивідуалізації – та зводить їх до певної системи. Питання правового механізму реалізації принципу справедливості призначення покарання було і продовжує залишатися таким, що потребує наукового дослідження.

Реалізація принципу справедливості в покаранні повинна проявитися відповідно до злочину та покарання. Кримінальний закон повинен відображати таку відповідність. У цьому випадку кримінальний закон буде справедливим – і це залежить від правотворчої діяльності, а реалізація принципу справедливості у меті покарання залежить від правозастосовної діяльності. Недотримання принципу справедливості у правотворчій діяльності тягне за собою його порушення у процесі застосування норм кримінального права.

Ключові слова: *справедливість, принцип, покарання, правопорушення, кримінальне право, кримінальний закон.*

Relevance of the study. Punishment is an important and necessary mean of protection of public relations from criminal offenses and an effective mechanism for their prevention. Since ancient times, the legal system of each state has paid great attention to the types of punishment and the rules of sentencing.

As a measure of state coercion, punishment must meet certain requirements and be im-

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posed in accordance with the relevant principles. It should not be cruel, it should be used only as a last resort to ensure the legality, it should be used only for the crime committed and meet other legal requirements and moral principles of society. The effectiveness and legality of sentencing, as an important element of the court's activities in criminal proceedings, depends on compliance of the relevant principles of its imposing.

The principles of sentencing are a separate category of criminal law. Views of scholars on the definition of the principles of sentencing and their types differ. It is impossible to formulate a definite exhaustive list of types of such principles. There could be a lot of them. However, in the criminal writing, all researchers of the problem of sentencing necessarily include the principle of justice to the types of principles of sentencing.

In the process, we turned to a number of methods of scientific cognition, including: the dialectical method, which provided the objectivity, comprehensiveness, complexity and specificity of cognition; method of systematic analysis, which allowed to determine the place of the principle of justice in the system of principles of sentencing. Different types of interpretation of legal norms were used in the research process.

Recent publications review. Research on the principles of criminal punishment has been carried out by many researchers, for example, V. Poltavets, K. Klymenko, O. Zagursky, O. Kuchynska and others.

The article's objective is to study the essence of the principle of fairness of criminal punishment in the theory and practice of criminal law of Ukraine.

Discussion. The term «principle» comes from the Latin word «principum», which means the most general initial provision, which defines the nature and social essence of the phenomenon, its meaning and the most significant features. In explanatory dictionaries, the principle is defined as «the inner conviction of man, the view of things», «the basic starting point of any theory, provision, doctrine, science, worldview and so on» [1, p. 7]. The word «principles» expresses a guiding commencement, a guiding provision of a particular idea or theory [2, p. 118].

In clarifying the legal meaning of the term «principles», it should be noted that they reflect the legal nature of law. Guided by the relevant principles, the state performs its functions, including pursuing a purposeful criminal policy. Principles of law – are expressed in the law guidelines that characterize its essence.

The concept of the principle of law does not coincide with the generally accepted concept of law, as the most important normative regulator of social relations, which is created and provided by the state. The principles of law, as its fundamental ideas, arising from the law, constitute its essence, are directly part of its content. They are framed in law in the form of norms, actually expressed and enshrined in them. Legal principles are specified in the Constitution of Ukraine, as well as in other regulations [2, p. 94].

In the legal system of Ukraine, the principle of justice plays a special coordinating and unifying role. Justice is an instrument for achieving a balance between the rules of natural law and positive (state) law. The principle of justice substantiates other principles of law in certain historical conditions.

The decision of the Constitutional Court of Ukraine of November 2, 2004 №15-rp/2004 states that justice is one of the basic principles of law, is decisive in defining it as a regulator of public relations, one of the universal dimensions of law. Justice is usually considered as a feature of law, expressed, particularly, in the equal legal scale of behavior and in the proportionality of legal responsibility to the crime committed.

The analysis of justice from the point of view of law presupposes, at least, its interpretation through the comprehension of the content of at least the categories «law as the embodiment of justice» and «justice as a moral determinant of legal relations» [3, p. 46].

The principle of fairness in law enforcement is important, which is, particularly, the court's sentencing activities. The implementation of legal norms is the adoption of decisions on the basis of the norms of law in specific cases. From the point of view of formal logic, it is a process that aim at bringing a specific life case under a general legal norm, as well as the adoption on this basis of a special act – an act of application of legal norms. Law enforcement is one of the means of ensuring social justice, which, in its turn, is a mean of expressing the social value of legal norms and without taking it into account, the law will not be able to effectively perform its regulatory function. For example, unjust court sentences cannot be considered as justice.

The principle of justice is the basis of all law-enforcement agencies. The implementation of the principle of fairness in law enforcement ensures not only the equality of participants

in the process, under the law and law-enforcement agencies, but also the correspondence between the rights and responsibilities granted [4, p. 12]. In particular, it is important to ensure the choice of punishment within the statutory sanction, taking into account the nature of the act and personal qualities of the actor, as well as the correct ratio of law and morality, which are implemented in law enforcement.

The question of the appropriateness of punishment for a crime is a separate manifestation of the principle of justice in law enforcement. In the field of law enforcement, justice is manifested, particularly, in the equality of all before the law, the conformity of crime and punishment, the goals of the legislator and the means chosen to achieve them [5, p. 100].

The principles of law are reflected in the principles of sentencing.

S. Veliyev believes that the principles of sentencing are the basic ideas that are enshrined in the criminal law or arise from its interpretation, which determine the whole nature of the punishment system and which use the courts in sentencing in a particular criminal case [2, p. 113].

In legal science, there are also other definitions of this concept:

- according to L. Prokhorov, the principles of sentencing are «guiding ideas that embody one or another characteristic feature of all the norms of the Criminal Code governing the procedure of sentencing»;

- M. Bazhanov under these principles, understood those initial, most important provisions enshrined in the norms of criminal law, which determine all the activity of courts concerning the application of punishment to persons, which are guilty of a crime. The principle of fairness of sentencing is related to guaranteeing a person the right to a fair trial. Ensuring the right to a fair trial is an important prerequisite for the establishment of the judiciary as an effective and just mean of protecting human rights and freedoms.

The right to a fair trial take a central place in the system of global values of a democratic society [6, p. 129]. Article 10 of the Universal Declaration of Human Rights requires that independent and impartial tribunal should comply with all requirements of justice. In its judgment of 30 January 2003 №3-rp / 2003, the Constitutional Court of Ukraine stated that justice is essentially recognized as such only if it meets the requirements of justice and ensures effective restoration of rights.

In Ukraine, it is necessary to comprehensively reform the judiciary in order to ensure the sepremacy of law, to achieve a fair, independent, efficient and accessible judiciary in accordance with international norms. At the heart of the reform must be the individual and his or her right to a fair trial, not the interests and desires of the various authorities [7, p. 179].

The system of elements that form the right to a fair trial consists of:

1) organic elements that ensure the effective usage of this right and its implementation (the right to access to justice and the right to enforce court decisions);

2) institutional elements that form the criteria with which must comply the judicial system of the state as a whole and each judicial institution separately (creation of a court and formation of its staff on the basis of law, sufficient term of office of judges and their immutability during the term of office, independence and impartiality of judges);

3) procedural elements that ensure the real participation of an individual in the process, the adversarial nature of the process, the equality of the parties at all stages of the trial and a reasonable time for proceedings;

4) special elements that are additional guarantees for the criminal process (presumption of innocence, the right to defense, the right to an interpreter, etc.) [8, p. 8-9].

The real ensuring for an individual the right to a fair trial contributes to the implementation of the principle of fair sentencing. On the contrary, if the sentencing is unfair, the person cannot be considered to have fully implemented his or her right to a fair trial.

The content of justice as a principle of sentencing, or the assessment of the fairness of the court decision, covers the attitude to the sentence of the convict, victim, population, etc. Convicts feel when they are given a just punishment and have a positive attitude towards that. Unjust punishment they perceive negatively [2, p. 311]. Failure to comply with the principle of justice in sentencing always causes dissatisfaction and results in quashing of sentences [1, p. 25].

The principle of justice is reflected in the sanctions established by law for a particular type of crime. The legislator, establishing sanctions, means the nature of the public danger of the act, the damage caused by the crime, the prevalence of this act, the typological features of the offender. All individual features – both the circumstances of a particular crime and the identity of the perpetrator must be taken into account by the court when preparing a sentence [9, p. 182]. The fairness of sentencing should not be understood as the exact correspondence of

the measure of punishment to the damage caused, but as the sentencing within the limits established by law and taking into account the circumstances established by law, that is, it's relative [10, p. 167].

According to the judge of the Constitutional Court of Ukraine V. Ivashchenko, justice in the criminal law consists, first of all, in the restoration of the violated rights of the victim and the inevitability of an adequate (fair) punishment of a person whose guilt has been legally proved and established by a court conviction.

The principle of justice is directly manifested in the recognition of the essence of punishment as a measure of coercion, in the proclamation of penalty as one of the components of the purpose of punishment, in determining the type and size of punishment depending on the gravity of the crime, stages of crime, recidivism and etc. [1, p. 25].

Thus, taking everything into consideration, it can be concluded that the principle of fairness of punishment is one of the most important starting positions enshrined in criminal law, which requires ensuring the purpose of punishment by taking into account by the court of all the circumstances relating to the criminal offense and the person who did it.

There is no doubt that in our country the principle of justice in the judiciary and law in general occupies one of the most important places and is closely related to such categories as «supremacy of law», «equality before the law» and so on. It is a criterion for a fair decision, an ideal to be pursued and guided simultaneously with the law.

The principle of justice plays an important role in the legal regulation of various spheres of public relations, but it is most closely related to the institution of sentencing.

The principles of sentencing are guiding ideas and all legal norms, which regulate sentencing, should comply with them. These principles form a certain system and interact with each other.

S. Veliyev believes that the principles of sentencing are divided into general principles and a special principle, which is derived from the general ones. Such a special principle is the individualization of punishment. Thus, the system of general principles of sentencing includes: 1) legality; 2) justice; 3) humanism; 4) equality before the law; 5) liability for fault; 6) individualization of punishment [2, p. 124].

Since all the principles of sentencing are in a unified system, they have a common purpose – to establish the basis, conditions, procedure, nature and scope of application of penalties by the court in accordance with its purpose and tasks of criminal law. The principle of justice in this system is interrelated with other principles of punishment.

V. Maltsev notes that justice is a set of two principles: equality and humanism. He substantiates this statement by the fact, that, in justice the principles of equality of citizens before the law and humanism are combined as elements. The first of them is expressed in the exact correspondence of responsibility to the public danger of the crime. The second one, in a more humane approach to the perpetrators of crime, whose socio-individual characteristics preclude the application of a single scale of responsibility. Legislative definition of the principle of justice can be made through normative definitions of the principles of equality and humanism. Its expression through the content of these principles, as the experience of socio-philosophical and legal doctrines shows, is the most effective way to convey the idea of justice to its perception in the public consciousness [9, p. 184].

A. Nikitin notes in his study that the Criminal Code of Ukraine does not say anything about the principles of sentencing, but they can be formulated independently, based on the provisions of the section of the Criminal Code of Ukraine on sentencing; In addition, many researchers, along with the common grounds of sentencing, identify a number of principles of sentencing, including the principle of justice, which is, first of all, that punishment should correspond to universal values, moral principles of society, convince citizens of the correctness of criminal policy, in general [11, p. 189-190].

The principle of equality before the law, which is associated with the principle of justice, according to the judge of the Constitutional Court of Ukraine V. Ivashchenko, means that the imposition of a penalty on persons for wrongdoing cannot be made on the basis of race, color, political, religious or other beliefs, sex, ethnic or social origin, property status, place of residence, language or other characteristics. Moreover, the same norm of criminal law must be applied to a certain (defined by law) circle of persons without any discrimination.

The principle of justice is closely linked to the principle of individualization of punishment.

Correlation between justice and the individualization of punishment consists in:

- justice is a moral and legal category, and individualization – a legal category;

- justice is a broader concept, because it covers other rules;

- if the principle of individualization indicates what should be taken into account when sentencing, the principle of fairness shows how these factors should be taken into account [2, p. 308].

The individualization of punishment has its limits, determined by the sanctions of the articles of the Special Part and the provisions of the General Part of the Criminal Code of Ukraine. The principle of fairness will be observed if a circumstance concerning the nature and degree of public danger and identity of the accused is either positive or negative, as neutral circumstances do not matter in the individualization of punishment. In addition, the same circumstances cannot be both positive and negative individual characteristics.

The decision of the Constitutional Court of Ukraine of 2 November 2004 №15-rp / 2004 states that in the field of law enforcement justice is manifested, particularly, in the equality of all before the law, the conformity of crime and punishment, the legislator's goals and the means chosen to achieve them. A separate manifestation of justice is the question of the conformity of punishment to the crime committed; the category of justice presupposes that the punishment for a crime must be commensurate with the crime. Fair application of legal norms is, first of all, a non-discriminatory approach, impartiality. This means not only that the statutory corpus delicti and the scope of punishment will be commensurate with each other, but also that the punishment must be in fair proportion to the gravity and circumstances of the offense and the person of the perpetrator. The adequacy of punishment for the severity of the crime follows from the principle of the rule of law, from the essence of constitutional rights and freedoms of man and citizen, particularly, the right to liberty, which can not be limited, except, as provided by the Constitution of Ukraine.

Since a crime is a socially dangerous culpable offence, an important principle of sentencing is responsibility for guilt.

Understanding the concept of guilt contained in article 23 of the Criminal Code of Ukraine, and which is based on the psychological theory of guilt, extended by the provisions of article 62 of the Constitution of Ukraine – «A person is presumed innocent of committing a crime and cannot be subjected to criminal punishment until his guilt is proved in a lawful manner and established by a court conviction». In this context, guilt is understood more broadly.

The presumption of innocence is a fundamental principle of criminal justice, which is a continuation of the principle of criminal justice. Any reasonable doubt in the evidence must be interpreted in favor of the accused [10, p. 235]. The presumption of innocence should be expressed both in the statements of officials appearing in the course of the trial, and in the actions of the judge during the trial, and in the treatment of the person after the acquittal or termination of the proceedings.

Some scholars emphasize the need to establish in criminal law the presumption of rightness and priority of the rights of the victim, which will be contrary to the constitutional principle of the presumption of innocence.

The legal definition of guilt obliges to establish in any corpus delicti the presence of a person's mental attitude to the consequences of his actions, although the construction of the relevant corpus delicti does not provide for any consequences of the offense as a mandatory feature of the latter [12, p. 144].

The peculiarity of the principle of justice is that it has a complex nature, accumulates all other principles. If they are violated, the principle of justice is violated [9, p. 180].

It will be unfair to impose a sentence if the requirements for sentencing provided by the norms of the criminal law are not complied with; if sentencing violates a person's right to honor and dignity, it will also be unfair; if a person is punished based on his or her political beliefs or social status, it is also unfair; sentencing a person who has not committed a crime is a violation of the principle of justice; if the sentencing does not take into account the identity of the defendant, mitigating or aggravating circumstances and other mandatory factors – in this case, in addition to violating the principle of individualization of punishment, also violates the principle of justice.

Conclusions. From the above it can be concluded that the principle of fairness of punishment is one of the most important starting points enshrined in the criminal law, which requires ensuring the purpose of punishment by taking into account by the court all the circumstances relating to the criminal offense and the perpetrator.

There is no doubt that in Ukraine the principle of justice in the judiciary and law in general occupies one of the most important place and is closely related to such categories as «rule

of law», «equality of all before the law» and so on. It is a criterion for an honest decision of the case, an ideal to be pursued and guided by the law.

The principle of justice plays an important role in the legal regulation of various spheres of public relations, but it is most closely related to the institution of sentencing.

The peculiarity of the principle of justice is that it is organically included in the content of all other principles of sentencing – legality, humanism, equality before the law, responsibility for guilt, individualization and reduces them to a certain system. The question of the legal mechanism for the implementation of the principle of fair sentencing has been and continues to be in need of scientific research.

The implementation of the principle of justice in punishment must be manifested in the conformity of crime and punishment. Criminal law should reflect such compliance. In this case, the criminal law will be fair – and it depends on lawmaking, and the implementation of the principle of justice for the purpose of punishment depends on law enforcement. Failure to comply with the principle of justice in lawmaking entails its violation in the application of criminal law. However, the existence of a fair criminal law does not mean that the principle of fair sentencing will not be violated in the process of its application. This principle is most often violated in the law enforcement activities of state bodies and their officials.

In law enforcement, the principle of justice, first of all, is manifested in the optimal ratio of general and special criminal law. The person who committed the crime should be sentenced to ensure that the convict is corrected to prevent new crimes. Only in this case can the punishment be considered fair.

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Abstract

The principle of punishment fairness is one of the most important starting points enshrined in the criminal law, which requires ensuring the purpose of punishment by taking into account by the court all the circumstances relating to the criminal offense and the perpetrator.

The implementation of the principle of justice in punishment must be manifested in the conformity of crime and punishment. Criminal law should reflect such compliance. In this case, the criminal law will be fair – and it depends on lawmaking, and the implementation of the principle of justice for the purpose of punishment depends on law enforcement. Failure to comply with the principle of justice in lawmaking entails its violation in the application of criminal law. However, the existence of a fair criminal law does not mean that the principle of fair sentencing will not be violated in the process of its application. This principle is most often violated in the law enforcement activities of state bodies and their officials.

Key words: *justice, principle, punishment, offense, criminal law, criminal law.*

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Валерій Марчук, Ольга Богатирьова. ЗАПРОВАДЖЕННЯ ПЕНІТЕНЦІАРНОГО ПРОКУРОРА В УКРАЇНІ. Розглянуто питання щодо впровадження в Україні інституту пенітенціарного прокурора. Здійснено порівняльний аналіз діяльності пенітенціарного прокурора у зарубіжних країнах. Зроблено висновок, що введення інституту пенітенціарного прокурора до органів прокуратури України, має на меті забезпечити на високому професійному рівні дотримання в установах виконання покарань норм кримінально-виконавчого законодавства, включаючи і міжнародні правові акти у сфері захисту прав засуджених та ув'язнених та персоналу місць несвободи.

Зазначено, що у зарубіжних країнах термін «Пенітенціарний прокурор» законодавчо не закріплений, хоча його діяльність у кожній країні має свою видову характеристику. Здійсненене авторами

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