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Correlation of the principles of criminal law in the conditions of the introduction of martial law

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Abstract

The purpose of the research was to consider the essence of the principles of criminal, administrative law and the peculiarities of their application in conditions of war, considering the case of Ukraine invaded by the Russian Federation. It has been substantiated that the main idea of the existence of the principles of administrative criminal law consists in their systematic, balanced and comprehensive implementation in relation to the subjects of criminal and administrative legal relations. The mentioned principles are used as a support for the elaboration and application of the law, both in peacetime and in wartime. The methodological basis of the research was presented as comparative-legal and systematic analysis, formal-legal method, method of interpretation, hermeneutic method, as well as methods of analysis and synthesis. A conclusion has been reached on the necessity of observing human rights norms in the criminal prosecution of persons who have committed crimes against humanity and have been involved in such crimes. Consequently, the civilized world must comply with international standards and ensure security through legal and legitimate means.

Keywords: administrative law; principles of criminal law; just punishment; European legal values; war crimes.

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Correlación de los principios del derecho penal en las condiciones de la introducción de la ley marcial

Resumen

El objeto de la investigación fue considerar la esencia de los principios del derecho penal, administrativo y las particularidades de su aplicación en condiciones de guerra, pensando en el caso de la Ucrania invadida por la federación rusa. Se ha fundamentado que la idea principal de la existencia de los principios del derecho penal administrativo consiste en su implementación sistemática, equilibrada e integral, en relación con los sujetos de las relaciones jurídicas penales y administrativas. Los principios mencionados se usan como soporte para la elaboración y aplicación de la ley, tanto en tiempo de paz como en tiempo de guerra. La base metodológica de la investigación se presentó como análisis comparativo-legal y sistemático, método formal-legal, método de interpretación, método hermenéutico, así como métodos de análisis y síntesis. Se ha llegado a una conclusión sobre la necesidad de observar las normas de derechos humanos en el enjuiciamiento penal de las personas que han cometido crímenes de lesa humanidad y han estado involucradas en tales crímenes. En consecuencia, el mundo civilizado debe cumplir con los estándares internacionales y garantizar la seguridad a través de medios legales y legítimos.

Palabras clave: derecho administrativo; principios del derecho penal; castigo justo; valores jurídicos europeos; crímenes de guerra.

Introduction

Despite international documents aimed at the protection of human rights, norms of national legislation, diplomatic relations and agreements, the Russian Federation have begun active hostilities on the territory of Ukraine.

Any senses in a person's life must be implemented in compliance with the principle of humanity. It is so since humanity is a feature of a person that distinguishing humans from animals. According to V. Frankl when implementing a sense, a person realizes himself/herself. And by means of realizing a sense contained in suffering, we realize the very human in a person. It is where we are helpless and hopeless, unable to change the situation, that is where we are called to change ourselves and we feel the need to change.

A person always decides whether he/she wants to realize a certain sense. Implementation of a sense always involves making a decision (Frankl, 1946). At the same time, V. Frankl notes that a person is a being who can always say “no” to his/her passions and who should not always say “yes” to such passions. When a person says “yes” to his/her passions, it is always performed only by means of identifying himself/herself with these passions (Frankl, 1946).

Currently, the matter of expediency of legislation and international treaties arises more than ever before. That is the matter of value of such documents, value of scientific research in this sphere, the matter of value and purpose of criminal law, as well as value of its principles.

1. Literature review

The issue of criminal law principles was studied by many scientists. In particular, V. O. Gatselyuk carried out a comprehensive research concerning implementing the principle of legality of the criminal law of Ukraine; in her research, N.A.Orlovska covered the problems concerning construction principles of criminal sanctions; P. Pogrebnyak considered the issue concerning meaningful characteristics of the fundamental principles of law (Tuliakov, 2020). V. O. Tulyakov investigated peculiarities of the principle of legality in the practice of the ECHR M.I. Khavroniuk investigates principles of criminal law in the context of its reformation (Khavroniuk, 2020).

In addition, certain issues of theoretical understanding and development of humanism in the sphere of criminal law were researched by modern Ukrainian researchers Halaburda Nadiia, Leheza Yevhen, Chalavan Viktor, Yefimov Volodymyr, Yefimova Inna investigated (Halaburda *et al.*, 2021). However, the procedure of understanding principles of criminal law and particularities of their implementation under conditions of war have not been covered by the scientists.

2. Materials and methods.

This research is based on works of foreign and Ukrainian researchers regarding methodological approaches to understanding principles of criminal law and their specific implementation under conditions of war, etc.

With the help of the epistemological method, ways of protecting rights of individuals in administrative proceedings, etc., has been clarified; thanks to the logical-semantic method, the conceptual apparatus has been deepened, principles of criminal law have been defined alongside with peculiarities of

their implementation under conditions of war etc. Thanks to the existing methods of law, we have managed to analyze the essence of criminal law principles and peculiarities of their implementation under conditions of war, etc.

3. Results and discussion

The principle of presumed knowledge of the law provides that every person must know what criminal liability is. This is one of the requirements of the “social contract” (J. J. Rousseau). Violation of “agreements” must inevitably lead to liability. It is for this purpose that international treaties and conventions on the protection of fundamental human rights have been adopted (Kobrusieva *et al.*, 2021).

The concepts of crime and punishment are conditional. They change over time. The main idea is that the list of crimes and respective punishments for these crimes should be clearly and unambiguously formulated in the legislation. Everyone should be able to know what criminal liability is provided for in the state, to understand the essence of what criminal liability is provided for. *The presumption of innocence principle* is not that a person should guess what the legislator was thinking when adopting this or that norm, what he had in mind and why the norm was not properly communicated to the citizens through the relevant official sources. The legislator must establish the norm clearly and comprehensibly.

The approach of the classical school of criminal law “punishment for crime” is also related to this. It is based on the fact that the state reacts with criminal legal means precisely to the committed act, which is provided as a crime in the current criminal law. No one can be punished for thoughts, for feelings, for thinking as such. Goethe noted in “Faust” that thought cannot create and act, hence the beginning of existence and objective reality is in action.

Only a person who has committed a criminal act (defined as a crime in the criminal law of the state) can be held criminally liable. She must clearly and unambiguously know about such liability. And if a person has already committed a crime, then he/she should be held liable in accordance with the law. In modern criminal law *the principle of certainty* is one of its main principles. Part 2 of Art. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 provides that this article is not an obstacle to the judicial punishment of any person for any act or inaction, which at the time of their commission constituted a criminal offense in accordance with *the general principles of law, recognized by civilized countries*.

The principle of humanism is expressed in the fact that a person who commits a crime, including a war crime, or a crime against humanity, is still a person with his/her rights and freedoms (Timofeieva, 2020). A person who broke the law. The state must respond to human actions. But such “response” should not turn into a crime. We also hope to correct the law breaker by the means provided for by the criminal law. This is the purpose of punishment according to Art. 50 of the Criminal Code

No person shall be subjected to torture, inhuman treatment or treatment degrading human dignity (part 3 Art. 50 of the Criminal Code). Torture and inhumane treatment are expressly prohibited by Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

The same principle has also become the basis for provisions of Art. 3 of the Geneva Convention relative to the Treatment of Prisoners of War dated 12 August, 1949. According to it persons who do not actively participate in military activities, in particular those from the Armed Forces who have ceased hostilities, as well as those who have stopped participating in military activities in connection with illness, injury, detention or for any other reason should be treated humanely in any circumstances, without any discrimination on grounds of race, color of skin, religion or beliefs, sex, origin or property status or any other similar criteria (Geneva Convention on the Treatment of Prisoners of War, 1949).

Participants of armed hostilities in Ukraine must strictly adhere to current norms of international humanitarian law. And although it is difficult to talk about justice and expediency of war and bloodshed, it is the observance of preliminarily known rules and agreements that puts the parties within relatively clear norms.

No person has the right to commit crimes within the jurisdiction of the International Criminal Court, including Ukraine (where these horrific events are taking place) and citizens of that country. Ukrainians often show dissatisfaction with the humane attitude to prisoners, their feeding, maintenance of hygienic norms, provision of necessary clothes and medicines. But if Ukrainians treat them with cruelty, Ukraine will also be violating international norms, in particular the Geneva Convention ratified by Ukraine.

Also, a great number of problems emerge if requirements of the Geneva Convention are followed because the budget is not sufficient for this. However, the prohibition of torture cannot be deviated from under any circumstances. In the context of inhuman treatment with its interpretation expanded from time to time and taking into account the dynamic nature of the Convention, it is necessary to ensure provision of necessary medical care, nutrition, hygiene items.

It should also be taken into account that, in fact, servicemen of the Russian Federation commit a criminal offense provided for in Article 332-2 of the Criminal Code “Illegal crossing of the state border of Ukraine”. That is, they can be brought to criminal liability under this article and this will not violate any of the principles of the criminal law, and this will ensure *implementation of criminal legal response inevitability*. In addition, it is necessary to approach such liability *individually*, in compliance with *the principle of fault-based individual responsibility and guarantees of protection*.

The principle of inevitability of criminal liability. The whole world is horrified by the atrocities that took place in Bucha, rapes in plain view of children, rapes of children. Some eyewitnesses and victims of these atrocities have survived. And Putin and the Russian leadership insist that this did not happen.

The whole world is horrified by the destruction of Kharkiv, Kherson and Mariupol as well as by brutal crimes committed in Bucha, rapes and tortures of citizens. Kharkiv, its architectural and cultural heritage have been irreparably destroyed. The people who remained in the city were forced to live in the subway.

On 11 April, 2022, information regarding the use of chemical weapons in Mariupol was confirmed. On 23 April, 2022, on the eve of Easter, missile attacks were made at Odesa, one of the missiles hit a residential building. As a result, 9 civilians died, including a three-month-old baby, and citizens' apartments were destroyed. On 24 April 24 (Easter Day), Donetsk and Luhansk regions were also shelled, churches were shelled. On 09 May, a missile hit a shopping center in Odesa. Due to the curfew, there were security guards on the territory who were injured, windows were blown out by the blast wave in residential buildings near the shopping center. None of the attacks has been recognized by the aggressor.

International institutions and the state must properly respond all these crimes. On 28 February, 2022, the Prosecutor's Office of the International Criminal Court began an investigation into the situation in Ukraine. On 13 April, 2022, the prosecutor of the International Criminal Court visited “Bucha” in the Kyiv region as a place where war crimes had been committed. But the Russian Federation government continues to insist that all these corpses in “Bucha” were staged by the United States.

It is important that each action and the actions of each person shall be qualified separately. These are not the crimes of Putin alone, not only those of the commanders who gave the orders. Each act has its own characteristics, so it must be evaluated individually and in compliance with *the principle of fault-based individual responsibility*. According to the current Criminal Code of Ukraine, there is no collective responsibility. Each action is committed by a specific person (Zhukova *et al.*, 2023).

Human behavior depends on both external (for example, an order) and internal factors. Internal (subjective) factors include presence of guilt, i.e., an ability to be aware of the criminal wrongfulness of an act, foresee the consequences and wish for them to occur; purpose, motive, emotional state (Leheza *et al.*, 2022).

In accordance with Law No. 2108-IX dated 03 March 2022, criminalization of collaborative activities (Article 111-1 of the Criminal Code) also does not contradict this principle, since a person must be aware that such activities contribute to the commission of war crimes initiated by the aggressor country. Criminal liability for collaborative activity is provided for in the criminal legislation of other countries, in particular the Criminal Code of Lithuania.

When determining the degree of punishment for a war crime, the Court must obligatorily take into account that any punishment should first of all “reflect the guilt of the convicted person”. At the same time, in addition to the guilt and gravity of the crime, the Court shall take into account the following: the degree of damage to the victims and their families; the nature of “illegal conduct” and means used to commit the war crime; “degree of intention”; factors related to the method, time and place of the crime; age, level of education, social and economic status of the person found guilty; mitigating and aggravating circumstances (Tylchuk *et al.*, 2022).

According to the Law “On Amendments to the Criminal and Criminal Procedural Codes of Ukraine on Ensuring Counteraction to the Unauthorized Dissemination of Information on the Dispatch, Transfer of Weapons, Arming, and Military Supplies to Ukraine, Movement, Transfer, or Placement of the Armed Forces of Ukraine or Other Military Formations Formed in Accordance with the Laws of Ukraine, committed under conditions of martial law or a state of emergency” No. 2160-IX dated 24 March, 2022.

The Criminal Code was supplemented with Article 114-2 “Unauthorized dissemination of information about sending, transfer of weapons, armaments and war supplies to Ukraine, movement, transfer or placement of the Armed Forces of Ukraine or other military formations formed in accordance with the laws of Ukraine, committed under conditions of war or a state of emergency.”

Features of the information age are related to the simplification of recording and transmission of information. Therefore, many “bloggers” began to post relevant photos and videos of such movements, air defense operations, explosions, etc. Information war and information defense in the modern realities of criminal law of Ukraine has received a completely updated content (Matviichuk *et al.*, 2022).

Persons who have certain cooperation with the Russian Federation have access to social networks and other communication channels, which highlight relevant photos and videos. That is, such actions do not help the state and law enforcement agencies, because they correct actions of the enemy. They provide the enemy with information about relevant locations, the situation in the city, etc. (Villasmil Espinoza *et al.*, 2022).

Conclusions

Therefore, existence of right and law is valuable. When the law is codified, structured, understandable and clear, a person can compare his/her behavior with this law. If a person chooses to commit a crime, he/she does this taking into account the awareness of illegality of such an act and presence of an appropriate punishment or measure of a criminal law nature determined for such an act. Therefore, the government in such a case has all the moral and legal grounds to prosecute such a person.

The main idea, essence and value of criminal law is to protect basic rights and establish a fair punishment for violation of these rights. A fair punishment must comply with the principles of criminal law. The Sense of criminal law is expressed through its principles. They include principles of humanism, legality, proportionality, individualization and differentiation of criminal responsibility.

The main idea of the existence of criminal law principles consists in their complex and balanced implementation in relation to subjects of criminal legal relations. This requirement applies to the level of law-making and law enforcement, both in peacetime and in wartime.

Determined is the necessity to observe standards of human rights standards in criminal prosecution of persons who have committed war crimes and other crimes against humanity and have been involved in such crimes. The civilized world must meet civilized standards and ensure security through civilized means.

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