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КРИМІНАЛЬНЕ ПРАВО ТА КРИМІНОЛОГІЯ

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LEGALITY AND LEGAL CERTAINTY IN CRIMINAL LAW: THE ISSUES OF DIFFERENTIATION

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In this article, the author addresses the issue on the differentiation of legality and legal certainty principles in the field of criminal law. Review of the main scientific positions, decisions of the European Court of Human Rights on the application of Article 7 European Convention on Human Rights, as well as decisions of the Constitutional Court of Ukraine on the constitutionality of several articles of the Criminal Code of Ukraine, allows us to conclude the debatability of this issue. Despite the positions of several scholars and decisions of the Constitutional Court of Ukraine, the main thesis is that legality and legal certainty do not set a similar scope of requirements in the field of criminal law. The legal certainty requirement to the content of law and its application are more general than the requirements established by the principle of legality. But the legality principle as a part of the general legal principle of legal certainty sets up more specific provisions to the process of creation, adoption, and application especially criminal statutes than the previous one. To this conclusion the author came after a retrospective analysis of the philosophical and historical grounds for these principles.

Keywords: rule of law, quality of laws, application of criminal law.

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Introduction. The quality of law is an integral prerequisite for predictability and certainty in their application. A person's ability to predict the consequences of his/her behavior is (at least should be) a determining factor in choosing their behavior. In case if the criminal statute does not comply with the requirements of certainty in their provisions or predictability in its application the person's ability to predict the consequences of his behavior is under extreme threat. This idea is commonly recognized as a ground of the legality principle in criminal law.

The abovementioned requirements for the creation and application of legal provisions are also established by the principle of legal certainty. The content of these principles in criminal law is normatively uncertain not only in acts of national law but also in acts of international law. Therefore, there is no unambiguous position in the works of scholars and law enforcement practice on the content of these principles. There is a particularly striking difference between the case law of the Constitutional Court of Ukraine (on declaring certain articles of the Criminal Code of Ukraine unconstitutional) and the European Court of Human Rights (on applying the provisions of Article 7 of the European Convention on Human Rights).

Consequently, the main purpose of this article is to differentiate these principles in the field of criminal law.

A few scientific works have been devoted to the distinction between the principles of legality and legal certainty in criminal law. This was done by Y. Baulin, M. Panov. S. Pogrebnyak, Y. Matveeva paid much more attention to these principles in their research in the field of a general theory of law.

In this regard, it seems necessary to analyze the law enforcement acts of the above judicial institutions, doctrinal sources, and acts of international bodies to determine the reasons for the similarity of the requirements of the principles of legality and legal certainty in criminal law, and, if it is possible, to mark the line of distinction.

I. International establishment of the legality and legal certainty principles.

First of all, the necessary elements of the rule of law, according to the Report of Venice Commission, are (1) legality, including a transparent, accountable and democratic process for enacting law; (2) legal certainty; (3) prohibition of arbitrariness; (4) access to justice before independent and impartial courts, including judicial review of administrative acts; (5) respect for human rights; (6) non-discrimination and equality before the law. The legality principle requires that the public officials shall be authorised to act and that they act within the powers that have been conferred upon them. Also, it requires that no person can be punished except for the breach of a previously enacted or determined law and that the law cannot be violated with impunity and law should be enforced. At the same time, the principle of legal certainty requires that the state must make the text of the law easily accessible and it has also a duty to respect and apply, in a foreseeable and consistent manner, the laws it has enacted. Retroactivity also goes against the principle of legal certainty, at least in criminal law. Legal certainty also means that undertakings or promises held out by the state to individuals should in general be honoured (the notion of the 'legitimate expectation') [3, p. 10–11].

We turned to the Rule of Law Checklist, adopted by the Venice Commission on the 106th plenary meeting, which contains selected standards of hard and soft law for each of the components of the rule of law.

Under that Checklist, the legal certainty standards are reflected in Articles 6.1, 7, 8.2, 9.2, 10.2, and 11.2 European Convention on Human Rights (further in the text – Convention). These articles, in general, contain a reference to the requirement that the human rights restrictions must be «established by law». Besides, Article 7 of the Convention is entitled «No punishment without law», which indicates the scope and nature of its application. That is a hard law act. Article 11 of the Universal Declaration of Human Rights and Fundamental Freedoms (which establishes, in general, the presumption of innocence and *nullum crimen, nulla poena sine lege*) is the act of the soft law, which, on the point of view of the Checklists' authors, contains the standards of legal certainty, included in Article 11 of the Universal Declaration of Human Rights and Fundamental Freedoms [28 , p. 61].

The legality standards are contained in the same provisions of hard and soft law acts. Also, these standards are reflected in Articles 14.1, 15, 18.3, 19.3, 21, 22.3 of the International Covenant on Civil and Political Rights (Article 15 is an expression of the maxim *nullum crimen, nulla poena sine lege*); Article 22 of the Rome Statute of the International Criminal Court, entitled «Nullum crimen sine lege» [28, p. 59].

What does this scope of acts mean? At least these principles in the field of criminal justice are intertwined and cannot be distinguished. The close connection between the requirements for the definition of a crime and punishment only by the law, as well as the

requirements for the quality of this law, is indeed a cornerstone in the scientific research of scholars who have paid attention to the principles of law, including criminal law.

II. Legality and legal certainty in the scholars' opinions.

Application of the principles of legality and legal certainty was the topic of research in different contexts. The most popular is international criminal law application. But the national criminal law is also not deprived of scientific research on these principles.

The existence of supranational elements of a crime established by the European legislators in 24 languages provokes an issue of the interpretation of criminal law provisions with different meanings in different languages. Scholars who research this topic tell us about a violation of the principle of legality in that case [21, p. 120]. The studies on the principle of legal certainty in EC law pointed out that the principle of legal certainty is intertwined with the principle of legality as well. The European Court of Justice in the case of interpretation Article 220 EC Treaty (Maastricht consolidated version) in the context of the application of the ECHR in the field of EC law has not expressly referred to legal certainty in its judgment, but stated that this Article related to the principle of legality, which requires that the law be observed [26, p. 99]. Legality in the substantive dimension implies also a complex set of substantive lines of conduct: the prohibition on retrospective legislation (*lex praevia*), the obligation to define crimes precisely and clearly (*lex certa*), as well as the obligation to interpret the statutory offence strictly (*lex stricta*). Continental lawyers tend to translate this protective role of legality in terms of 'legal certainty', because legal certainty is defined in terms of maximum predictability of the officials' behavior. Anglo-American scholars often explain the relation between legal certainty and legality in terms of a citizen's ability «to organise his affairs in such a way that he does not infringe the law», or of having the right to an adequate warning from public officials that engaging in certain types of behavior will result in criminal liability [20, p. 92–93].

As we can see, in different scholarships there is no clear differentiation between the meaning of the principle legality and legal certainty in criminal law, except explanation this originating from different legal systems.

Andrew Ashworth and Jeremy Horder (professors at Oxford University) states that the connotations of the principle of legality are so wide-ranging that it is preferable to divide it into three distinct principles—the principle of non-retroactivity, the principle of maximum certainty, and the principle of strict construction of penal statutes [1, p. 86]. Dana Shahram (Professor at Griffiths University, Australia) pointed out that nulla poena sine lege and its counterpart, nullum crimen sine lege, serve as the bedrock of the principle of legality. They protect one of the most treasured individual rights of all-the right to liberty. Another interest protected by nulla poena is legal certainty. There are four attributes of nulla poena sine lege (two threshold requirements on the quality of criminal law and two prohibitions on its application) - lex scripta (punishment must be based on written law), lex certa (the form and severity of punishment must be clearly defined and distinguishable), lex praevia (the prohibition against retroactive application) and lex stricta (the prohibition against applying a penalty by analogy) [29, p. 861, 864]. Gabriel Hallevay (Professor of ONO Academic College, Israel) is convinced that the principle of legality has four main aspects, expressed by its four secondary principles – relates to the sources of the criminal norm, relates to the applicability of the criminal norm in time, relates to the applicability of the criminal norm in place, relates to the interpretation of the criminal norm [22, p. 5–7]. Beth van Schaack (Professor at Stanford University) states that nullum crimen sine lege, nulla poena sine lege in its simplest translation, asserts the ex post facto prohibition. More broadly, the maxim is also invoked

in connection with corollary legislative and interpretive principles compelling criminal statutes to be drafted with precision (the principle of specificity), to be strictly construed without extension by analogy, and to have ambiguities resolved in favor of the accused (the principle of lenity or *'in dubio pro reo'*) [30, p. 121]. Thomas Rauter understood that nullum crimen sine lege praevia contains the prohibition of retroactivity, nullum crimen sine lege stricta entails a prohibition of constitutive or aggravating crime analogy, nullum crimen sine lege certa requires the law to be precisely defined so that foreseeability of the punishment and accessibility of the concrete penal norms can be established for individuals and nullum crimen sine lege scripta requires that the applicable law is laid down in written form, thereby rendering inapplicable any unwritten law, such as customary law [27, p. 20].

The above positions (specifying the authors' position to understand the legal system referred by the author) also confirm that the principle of legality not only require that the crime and punishment must be prescribed by law but also requirements the quality of this act, as well as the rules of its application.

As for the principle of legal certainty, the authors differ formal and substantive understanding. Formal legal certainty implies that laws and, in particular, adjudication must be predictable: laws must satisfy requirements of clarity, stability, and intelligibility so that those concerned can with relative accuracy calculate the legal consequences of their actions as well as the outcome of legal proceedings. Substantive legal certainty, then, is related to the rational acceptability of legal decision-making. In this sense, it is not sufficient that laws and adjudication are predictable: they must also be accepted by the legal community in question [24, p. 1469]. There are widely accepted German concept that legal certainty is particularly associated with reliability, predictability, and recognizability: (1) the obligation to publish legal acts; (2) the requirement of definiteness and clarity; (3) the adoption of court rulings; (4) the finality of rulings; (5) the limitation of retroactivity; (6) the self-binding rules of community institutions; and (7) the protection of confidence [19, p. 152].

In the national doctrine, there is a well-established position that the main requirements of the principle of legal certainty divide into two sets – requirements to the legal provisions and the requirements to its application. The first set includes related to the content of legal norms - clarity (accessibility), consistency and full settlement of social relations, preventing the existence of gaps; procedural requirements for legal provisions - publication of laws, the prohibition of retroactive effect, reasonable stability of law, consistency of lawmaking, providing sufficient time for changes in the system of legal relations caused by the adoption of a new law. The second set includes the enforceability of legal provisions; the practice of clarifying the content of legal provisions; uniform application of the law; *res judicata* principle [7, p. 23].

Another scholar expresses the opinion that one of the most important aspects of the principle of legal certainty and the rule of law is the principle that punishment is established exclusively by the law and court cannot, by any motives, impose a punishment not defined by the law [4, p. 65]. This researcher fully supports the previous one that the idea of legal certainty reflects one of the most famous principles - nullum crimen, nulla poena sine lege [7, p. 23].

Abovementioned positions of the scholars are related to the general theory of law, but even in the field of national criminal law doctrine, we cannot find positions differentiating legality and legal certainty.

M. Panov states that one of the most defining and fundamental problems of criminal law related to the principle of legal certainty is the quality of the criminal statute. He

emphasizes that the certainty of law means the actual implementation in law and justice of the fundamental principle nullum crimen sine lege, nulla poena sine lege, and the prohibition of the law by analogy [16, p. 10, 15–16].

Y. Baulin, concerning the opinion of the Venice Commission, to the requirement of the legality principle, refers: a) strict compliance with the rules of criminal law in activities that restrict the rights and freedoms of the perpetrator; b) no crime and no punishment without law; c) prohibition of analogy; d) fulfillment of the obligations of the state under international law. To legal certainty he refers a) the highest level of the Criminal Code of Ukraine in criminal law related matters; b) prohibition of unreasonable amendments to the criminal statute and clear, precise, understandable, unambiguous, consistent, concise, easily accessible criminal law provisions; c) ensuring of the legitimate expectations of perpetrator that he will be accused according to applicable criminal law, prohibition of the retroactivity except lex retro agit in mitius; d) strict compliance with the criminal legislation in the criminal justice field, effective application of criminal law and consistent, reasonable, logical judicial practice [1, p. 110–111].

These positions allow us to make an intermediate conclusion that the rule of law in the field of criminal law is realized especially through the principles of legality and legal certainty which are closely related. Both principles require the quality of legislation and the process of its application. This necessitates an analysis of the practice of jurisdictions regarding the requirements for the quality of criminal law.

III. Case law of the Constitutional Court of Ukraine.

There are two decisions the national body of constitutional justice related to the quality of criminal law provisions. The common issue in both is the reason for the unconstitutionality - the uncertainty of their wording.

Thus, in decision No. 1-r / 2019 the Constitutional Court of Ukraine concluded that Article 368-2 of the Criminal Code of Ukraine does not meet the requirement of legal certainty as a component of the constitutional principle of the rule of law. Norms were not formulated clearly enough and allow for ambiguous understanding, interpretation, and application [22]. In its decision No. 7-r / 2020, the Constitutional Court of Ukraine stated that Article 375 of the Code contradicts the principle of the rule of law, especially its element such as legal certainty. Article 375 of the Code does not set criteria for determining, which sentence, decision, ruling, or the resolution of the judge (judges) is «unjust», and the meaning of the combination of words «knowingly unjust» is not disclosed, which allows an ambiguous understanding of the crime, which is qualified under this rule [8].

It seems that such a formulation of the grounds for the unconstitutionality of the above provisions arose because of the lack of a clear distinction between the principles of legality and legal certainty in criminal law. After all, the decisions of the Constitutional Court of Ukraine are formed by coordinating every Justice's position. Justices' positions are mostly formed by applying their notions of the rule of law and its content to specific factual circumstances (or to specific legal provisions in the case of the Constitutional Court of Ukraine, as the latter is a court of law, not a court of fact) under consideration. The idea of the rule of law and its content is formed in the doctrine, which is honed over the years and becomes a proven source in hard cases.

IV. Case law of the European Court of Human Rights.

According to the Rule of Law Checklist, the act of a hard law which contains standards of legal certainty and legality is Article 7 of the Convention. So, we decided to turn to the case law of the ECHR on an application of that Article. This method of studies based on the Josef Raz statement, that legal principles, like other laws, can be enacted or

repealed by legislatures and administrative authorities. They can also become legally binding through the establishment by the courts. Principles are not made into law by a single judgment; they evolve rather like a custom and are binding only if they have considerable authoritative support in a line of judgments [23, p. 848].

There is a generally accepted position in ECHR decisions that the guarantee enshrined in Article 7 is an essential element of the rule of law [13, § 34]. And that Article 7 § 1 of the Convention goes beyond the prohibition of the retrospective application of criminal law to the detriment of the accused. It also sets forth, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege). It follows that offences and the relevant penalties must be clearly defined by law [14, §§ 93–94].

By the way, there are not so many decisions where it was stated, that Article 7 of the Convention is the reflection of the legality principle in criminal law. We give here the formulations from a certain part of them. «The Court fails to see how punishing a defendant whose trial has not resulted in a conviction could be compatible with Article 7 of the Convention, which provision sets out the principle of legality in criminal law» [16, § 61]; «a legislative framework which does not enable an accused person to know the meaning and scope of the criminal law is defective not only on the grounds of the general conditions of 'quality' of the 'law' but also in terms of the specific requirements of the principle of legality in criminal law» [15, § 117]; «the above situation, which was acknowledged by the domestic courts as well as the Government, contravened the principle of legality, by which the requirement that a penalty must be clearly defined in law is an essential part» [12, § 56].

Significantly fewer decisions applying Article 7 of the Convention use the term «legal certainty». «The Court considers that where a person is, as in the instant case, convicted as a recidivist pursuant to new legislation, the principle of legal certainty dictates that the statutory period for the purposes of recidivism, determined in accordance with the principles of law, in particular the principle that criminal statutes are to be strictly construed, should not already have expired under the previous legislation» [10, § 50]; «when an accused is charged with a continuing offence, the principle of legal certainty requires that the acts which go to make up that offence, and which entail his criminal liability, be clearly set out in the bill of indictment» [17, § 33]; «limitation periods are a common feature of the domestic legal systems of the Contracting States and serve several purposes, including that of ensuring legal certainty» [11, § 39].

An analysis of the above provisions suggests that the ECHR operates 'legal certainty' in the context of Article 7 in cases involving time limits for criminal prosecution. In cases where there was a lack of clarity of criminal statutes, the ECHR used the wording 'the legality principle'.

V. Historical and philosophical grounds as distinguishing features of the legality and legal certainty principles in criminal law.

Christina Peristeridou pointed that the principle of legal certainty has replaced some functions of the legality principle in non-continental systems because the continental version of the 'legality principle' was strongly linked to the prevalence of the legislature in criminal matters, something that was not the practice in England until well into the 20th century, as common law had been developing for centuries via judicial decision-making. In common law, the principle of legal certainty may have been more central in the absence of a 'legality principle'. The principle of legal certainty has been considered an umbrella concept for the principle of legality [25, p. 61].

This position was the forcing point to use the historical method for distinguishing the principles under consideration.

Y. Matveeva consistently takes the point that the foundations of the principle of legal certainty were laid in ancient times on the grounds that laws should be general rules formulated in clear and understandable terms. The Age of Enlightenment in continental Europe distinguished that most European countries had adopted written codes and constitutions. The main idea was that a precise wording could protect people from arbitrariness [5, p. 10–11].

Our study of the historical development of the principle of legality in criminal law can conclude, that the provisions that are the grounds of a modern understanding of the legality principle were crystallized much later than the idea of the principle of legal certainty. First, philosophers spoke about the need to clearly predict the limits of permissible human behavior in the general sense, and not only in the context of criminal law. There were no written requirements that a person could be prosecuted only under written law in continental Europe before the Declaration of the Rights of Man and of the Citizen in 1789. Moreover, the maxim «nulla poena nullum crimen sine lege» was proposed to denote the principle of legality only in the 19th century by Paul Anselm Feuerbach [2, p. 224].

The requirement that a crime and the punishment was established by written law is indeed related to the foundations of the principle of legal certainty that a person must predict the consequences of his conduct with due certainty. Therefore, the process of adopting the law and its application must also be predictable. The predictability of potential criminal law is ensured by the promulgation and public discussion of draft laws. Also, the scope of the principle of legality includes the promulgation of the text of the criminal law (accessibility requirement). At the same time, the requirement of consistency and predictability of amendments to criminal law further specifies the principle of legal certainty. The application of criminal law by the judiciary must also be consistent and predictable, ensured by compliance with the rules of interpretation of the criminal law provisions (prohibition of analogy and others) and the rules of application of criminal law in time (prohibition of retroactivity with exceptions).

The principle of legal certainty requires: res judicata principle, justification the court decisions by the relevant legal community (substantive requirement of legal certainty), and strict compliance with criminal and criminal procedure law.

Conclusions. The common ground of the legality and the legal certainty principles in criminal law is the protection of legitimate expectations of a person not to be prosecuted for actions that were not criminally punishable in the moment of their commission. That is why it is hard to make a clear delineation of the content of these principles in the field of criminal law.

The principle of legality, which is expressed by the maxim «nullum crimen, nulla poena sine lege», elaborates with requirements to the quality of law, that define the crime and punishment, as well as the requirements for its application. The case law of the ECHR on the application of the provisions of Article 7 of the Convention sufficiently substantiates this statement.

The principle of legal certainty covers broader standards for the process of adoption of legal norms, their quality and promulgation, and subsequently for the application of their provisions. The principle of legality in criminal law, details and reveals the content of these provisions. To be more concrete, its answers questions why the law should establish criminal law prohibitions, what should be the requirements for the adoption and discussion of draft amendments to criminal law, the requirements for interpretation of

criminal law and its application. This specificity of the principle of legality in criminal law is based on the fact that criminal law may legitimately restrict the most important rights of the individual, and therefore the standards for legislation providing such a restriction, as well as their application are higher than in other areas.

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ЗАКОННІСТЬ ТА ПРАВОВА ВИЗНАЧЕНІСТЬ У КРИМІНАЛЬНОМУ ПРАВІ: ПИТАННЯ РОЗМЕЖУВАННЯ

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Основною тезою цієї статті є те, що принципи законності та правової визначеності у кримінальному праві підлягають розмежуванню. Ця позиція є дискусійною, оскільки Конституційний суд України та окремі науковці озвучують вимоги, які звично асоціюються з принципом законності, вимогами принципу правової (юридичної) визначеності. Особливо дискусійним питанням є вказівна на те, що латинська максима «nullum crimen, nulla poena sine lege» є висловом на позначення принципу правової визначеності. Основним завданням є, за можливості, розмежування вказаних вище принципів.

Національна та міжнародна судова практика, правова доктрина, історичні та філософські засади розвитку допомогли розмежувати принципи законності та правової визначеності за основною ознакою – сфера застосування їхніх вимог. Позиція, що кримінальне право дає змогу легітимізувати найбільш серйозне втручання у права людини є беззаперечною, відтак, вимоги до створення кримінальних законів та їх застосування повинні бути значно вищими, ніж у будь-якій іншій сфері правового регулювання.

У випадку, якщо ми ведемо мову про принцип неможливості оскарження та виконуваності остаточного судового рішення (res judicata), то питань щодо того, до якого з принципів ця вимога належить не виникає. Водночас, якщо ми говоримо про вимогу точності застосовуваного права, то внаслідок різноманітності поглядів на принципи законності та правової визначеності чітку відповідь на питання розмежування отримати досить важко.

Один із чинників, що ускладнює диференціацію вищевказаних принципів, є різноманітність правових систем. Як зазначає автор, принцип законності в розумінні континентальної правової системи тривалий час був невідомим англо-американській правовій системі, здебільшого, через те, що встановлення злочинів через судову правотворчість вважалося нормальною практикою, яка не порушувала права людини.

Основним методом, який допоміг авторові знайти відповідь на питання, ключове у цій статті, є історичний метод. Вимоги до якості права (доступність, передбачуваність) відомі людству зі стародавніх часів. Ці вимоги не стосувалися конкретно кримінально-правових положень та не називалися принципом законності. Законність як невід'ємний принцип кримінального права сформувався на континентальній Європі в епоху Просвітництва під впливом прогресивних ідей Англії.

Досвід видатних філософів та юристів допомагає підкріпити тезу про те, що законність у кримінальному праві формує більш спеціалізований перелік правил до створення та застосування кримінально-правових положень з єдиною метою – запобігти свавіллю держави у карному процесі.

Ключові слова: верховенство права, якість закону, застосування кримінально-правових норм.

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