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THE PRINCIPLE OF LEGALITY IN THE CRIMINAL LAW OF UKRAINE AND THE FEDERAL REPUBLIC OF GERMANY (ON THE EXAMPLE OF CERTAIN NORMS ON ECONOMIC CRIMINAL OFFENSES)

Abstract. The article states that today in Ukraine, the principle of legality in criminal law is directly related to criminal law regulation and its mechanism, influencing its "work" in the regimes of violation and observance of criminal law prohibitions. Some of these features do not have a clear understanding in the criminal law of Ukraine. You can find out some of these features by referring to the relevant provisions of the German criminal law.

It is noted that when determining the criminal-legal content of the principle of legality, one should take into account the normative guidelines enshrined in the Constitution, acts of criminal, criminal procedural, etc. legislation.

The authors of the article conduct a consistent analysis of the provisions of the Constitution of the Federal Republic of Germany and the Criminal Code of the Federal Republic of Germany with the aim of clarifying the relevant provisions of the criminal law of the Federal Republic of Germany on the content, structure and application of the principle of legality in order to explain the specific features of the "components" of this principle and its "work" in the criminal law of Ukraine.

The article discloses general and special legal provisions relating to the content and structure of the principle of legality in criminal law, as well as to define the structure and "components" of this principle.

Attention is drawn to the fact that the specified understanding of the principle of legality (its components), which is based on the norms of the Constitution, the Criminal Code, the Code of Criminal Procedure, etc. legislative acts, allows you to determine the specifics of the application of this principle in criminal law.

It is noted that the regulatory guidelines for the researched issue are "presented" primarily in Art. 103 par. 2 of the Constitution of the Federal Republic of Germany and § 1 of the Criminal Code of the Federal Republic of Germany. Thanks to the "work" of this principle, the so-called "guarantee function of criminal law" is ensured in the criminal law of the Federal Republic of Germany.

The structural elements of the principle of legality are defined, which directly affect the "work" of this principle in criminal law. Points of consideration of the principle of legality are determined when comparing the sources of criminal law.

Key words: the Criminal Code of the Federal Republic of Germany, the principle of legality in criminal law, analogy of the law, retroactive effect of the criminal law, gaps in criminal law, conflicts in criminal law

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Introduction and problem statement. In criminal law, the principle of legality is directly related to criminal law regulation and its mechanism, influencing its "work" in the regimes of violation and observance of criminal law norms-prohibitions. Such an influence is due to the peculiarities of the "components" of this principle and their consideration in the specified modes of "work" of the mechanism of criminal law regulation. Some of these features do not have a clear understanding in the criminal law of Ukraine. You can find out some of these features by referring to the relevant provisions of the German criminal law.

Therefore, the purpose of the article is to clarify the relevant provisions of the criminal law of the Federal Republic of Germany on the content, structure and application of the principle of legality in order to explain the specific features of the "components" of this principle and its "work" in the criminal law of Ukraine. To achieve this goal, it is necessary to disclose general and special legal provisions concerning the content and structure of the principle of legality in criminal law, as well as to define the structure and "components" of this principle.

Research results.

1. General and special legal provisions. The principle of legality means that only the Criminal Code determines the types of actions that "fall" within the scope of compliance with its prohibition norm or violate it, and the criminal legal consequences applied for such an action. In a narrow sense (only in relation to such a type of "criminal-legal anomaly" as a criminal offense), this principle expresses the meaning of the precept "nullum crimen, nulla poena sine lege". That is, exclusively in the criminal law as a supreme act of the legislative power, provisions must be taken into account, on the basis of which an act is recognized as being committed in compliance with or violation of a criminal law prohibition, as well as the criminal law consequences that arise [Berzin 2019].

When determining criminal-legal content of this principle, one should take into account the normative guidelines established in the Constitution, acts of criminal law, criminal procedural law and other legislation. Thus, in the Constitution of Ukraine they are connected with the provision that "only the laws of Ukraine determine ... actions that are crimes ... and responsibility for them" (clause 22, part 1, art. 92). In the Criminal Code of Ukraine, these guidelines are "presented" first of all in parts 1, 3, 4 art. 3, part 2 of art. 4. In the end, the presence of these normative guidelines means the prohibition to apply retroactive effect of the criminal law in time to establish the criminal illegality of the committed act, as well as to increase the punishment for the previously committed act. Therefore, the principle of legality extends both to the recognition of the committed act as a criminal offense of a certain type (that is, to the establishment by the legislator of the criminal illegality of the act), and to the establishment in the Criminal Code of a specific type and amount of punishment for its commission (punishment for it), as well as to the appointment of a punishment by the court [Berzin 2019]. In addition, the criminal law content of the principle of legality is affected by the requirements of art. 9 of the Criminal Procedural Code on: the duty of officials of state authorities to strictly comply with the requirements of the Constitution, the Criminal Procedural Code, international treaties, the binding consent of which has been given by the Verkhovna Rada of Ukraine, other legislative acts (part 1); a comprehensive, complete and impartial investigation of the circumstances of the criminal proceedings, the discovery by pre-trial investigation of the circumstances that expose and exonerate the suspect, the accused, as well as the circumstances that mitigate or aggravate his punishment, providing such circumstances with a proper legal assessment and ensuring the adoption of legal and impartial procedural decisions (part 2); the impossibility of applying legislative acts that contradict the Criminal Procedural Code (part 3); application of provisions of international treaties of Ukraine (part 4); application of criminal procedural legislation taking into account the practice of the ECHR (part 5); application of the general principles of criminal proceedings (see part 1, art. 7 of the Criminal Procedural Code) in the event that the provisions of the Criminal Procedural Code do not regulate or ambiguously regulate issues of criminal proceedings (part 6).

In the criminal law of the Federal Republic of Germany, the principle of legality is explained as "no punishment without the law", and its normative guidelines are "presented" primarily in Art. 103 part 2 of the Constitution of the Federal Republic of Germany and § 1 of the Criminal Code of the Federal Republic of Germany. Thanks to the "work" of this principle, the so-called "guarantee function of criminal law" is ensured in the criminal law of the Federal Republic of Germany. Thus, Art. 103 part 2 of the Constitution of the Federal Republic of Germany stipulates: "An act is punishable only if the punishment was established by law before the act was committed" [Berzin 2021; Khellmann 2021]. § 1 of the Criminal Code of the Federal Republic of Germany, which is entitled "There is no punishment without the law", provides: "An act is subject to criminal punishment only if the punishment was established by law before the act was committed" [Uholovnoe ulozhenye (Uholovnyy kodeks) Federatyvnoyi Respubliky Nimechchyna 2010; Holovenkov 2021].

On the basis of Art. 103 of the Constitution and § 1 of the Criminal Code of the Federal Republic of Germany four requirements of the principle of legality are formulated in the criminal law of the German Federal Republic: 1) Lex scripta (written law): exclusion of customary law for determining punishment and severity of punishment; 2) Lex praevia (prior law): prohibition of retroactive effect – action in time – principle of "benevolence"; 3) Lex

certa (certain law): the requirement of certainty and the prohibition of indeterminate criminal law; 4) Lex stricta (limited/restrictive law): prohibition of analogy, which should be separated from interpretation [Gropp 2015; Renhir 2019; Schmidt 2019; Berzin 2021].

2. About the structure and "components" of the principle of legality. Constituent elements of the principle of legality are the following.

2.1. Prohibition of "customary law", which means the presence of a formally defined ("written") rule of law (lex scripta), which defines an act related to the observance or violation of a rule-prohibition, as well as specifies its criminal legal consequences. Thus, the application of customary law norms or other "unwritten" norms (jus non scriptum) is excluded, since their content is not recorded clearly enough in the "unwritten" norms to tie the intended purpose and application of measures of state coercion (influence) to abstract norms that depend from a specific case (its circumstances) [Frister 2013].

Customary law is formed due to long-term practice of law based on generally known legal beliefs. However, the criminal legal consequences of an act may be established only by written legislative acts. Therefore, as a general rule, it is forbidden for customary law to establish new criminal acts (for example, illegal smoking) or new sanctions for such acts (for example, punishment in the form of caning). However, a more complex issue in German criminal law is the extent to which the common law prohibition also applies in the General Part. After all, the General Part of the Criminal Code provides for norms with similar actions (for example, § 19, 20, 22, 30 of the Criminal Code of the Federal Republic of Germany). Therefore, it is considered fundamental that the principle of legality protects citizens and prohibits the "direction" of customary law against the interests of a person who commits a punishable act [Renhir 2019].

At the same time, in German criminal law there is an approach of recognizing customary law as a source of law. This can be excluded in the case when the justification of punishment is affected by the provisions of the General and Special parts of the Criminal Code. However, even in this case, some German scholars allow the spread of the provisions of customary law regarding the punishment of the committed act, in particular, when there is a need to clarify the elements of the composition of the act (der Tatbestand) and circumstances that exclude illegality (die Rechtfertigungsgründe), in connection with the definition of relevant concepts taken from other branches of law. In the presence of such an approach, punishment can be extended. This applies, for example, to the recognition by customary law of animals as hunting and industrial (eines Tieres als jagdbar) in the provisions on poaching (die Wildereivorschrift) [Gropp 2015].

Formulation by the German legislator of actions with certain objects can be considered as another example, which are peculiar violations of customs in the field of circulation and are included in the provisions on punishment (Strafvorschriften) according to the law on the circulation of medicinal products (Gesetz über den Verkehr mit Arzneimitteln). Thus, in § 95 of this law, several alternatively worded actions are provided, which constitute a violation of the prohibitions and requirements regarding the circulation of medicinal products defined in this law: 1) introduction into economic circulation of "dubious" medicinal products (storage for the purpose of sale, offer for sale, offering for sale, sale, as well as transfer) [Budziewicz-Guźlecka, Drożdż 2022; Drab-Kurowska, Drożdż 2021; Pająk, Kvilinskyi, Fasiecka, Miśkiewicz 2017; Miśkiewicz, 2019; Lyulyov, Vakulenko, Pimonenko, Kwilinski, Dzwigol, Dzwigol-Barosz 2021; Drożdż, Mróz-Malik, Kopiczko 2021b; Drożdż, Szczerba, Kruszyński 2020b; Drozdz, Marszalek-Kawa, Miskiewicz, Szczepanska-Waszczy-

na 2020a; Drozdz, Miskiewicz, Pokrzywniak, Elzanowski 2019; Drożdż, Mróz-Malik 2017; Drożdż 2019]; 2) the introduction of medicinal products into the economic circulation [Dzwigol, Trushkina, Kwilinski 2021; Dzwigoł, Dzwigoł–Barosz, Zhyvko, Miskiewicz, Pushak 2019; Dzwigol 2021a; Dzwigol 2021b; Dzwigol 2018; Dzwigol 2015; Drożdż, Mróz-Malik 2020], which is prohibited by the relevant bylaws; 3) introduction into economic circulation [Lewicki, Drozdz 2021; Kwilinski, Lyulyov, Dzwigol, Vakulenko, Pimonenko 2020; Kharazishvili, Kwilinski, Dzwigol, Liashenko 2021b; Kharazishvili, Kwilinski, Sukhodolia, Dzwigol, Bobro, Kotowicz 2021a] of medicinal products for the purpose of their use in sports as doping; 4) introduction of radioactive or ionizing medicinal products, etc. into economic circulation. [Esakov 2019].

2.2. Prohibitions relating to the retroactive effect of certain sources of criminal law, namely: a) limiting the scope of the punishment of an act by prohibiting the retroactive effect of the criminal law regarding the punishment of an illegal act; b) retroactive increase (increase in the duration of such an action) of the statute of limitations (for example, for serious violent crimes of the National Socialists);

c) retroactive change of the necessary requirements with the statement of punishment in the statements of private prosecution cases; d) recognition as a guiding provision and application of § 2 of the Criminal Code of the Federal Republic of Germany, in accordance with par. 1 of which punishment and its additional consequences are determined in accordance with the law in force at the time of the act [Renhir 2019].

It is important that in the criminal law of the Federal Republic of Germany, the prohibition of retroactive effect applies to "burdensome laws", which is justified by the need for legal certainty, the protection of trust in the predictability of the legal system and the implementation of the relevant provisions of Art. 103 par. 2 of the Constitution of the Federal Republic of Germany. In the additional criminal law of Germany, these provisions are also basic, but there are some exceptions. For example, in tax criminal law, two types of retroactive effect are distinguished: real (echte Rückwirkung) and imaginary (unechte Rückwirkung). True retroactive effect occurs when the legal norm "interferes" with the already "completed state" of actual circumstances. Therefore, the legal consequences must be applied to the factual circumstances that were already established before the legal norm came into force. The imaginary type (its use is also constitutionally permissible in the tax criminal law of Germany) means that there is a legal norm that applies to “current” (those that have already “begun”), and not “completed” factual circumstances, and subsequently in the process of existence these actual circumstances change the norm. An example of the imaginary type is cases when a legal norm "includes" aggravating legal consequences after the moment of its entry into force, but in fact their application is caused by already existing factual circumstances (those that have begun). For example, when a legislature subsequently modifies a pre-existing (one that has already arisen and/or is being performed) obligation. The criterion for the admissibility of an imaginary retroactive force is in this case the necessity of a legal norm to achieve the goal of the legislative act, and if, in such a change to the existing order, its (change) reasons are within reasonable limits – to be justified by special public interests that justify such a change [Änderungen im Steuerrecht – und die Rückwirkung].

2.3. Prohibition of indeterminate criminal law (requirement of definiteness of criminal law) [Renhir 2019].

2.4. Prohibition of application of Criminal Code norms by analogy, i.e. prohibition of the so-called "analogy of the law" (analogia legis). This prohibition is directly indicated in part

4 of Art. 3 of the Criminal Code of Ukraine. In addition, the legal guidelines for the content of the prohibition of analogical application of the norms of the Criminal Code of Ukraine are provided for in part 2 of Art. 4 of the Criminal Code of Ukraine demands of definition of criminal illegality and punishment, as well as other criminal legal consequences of an act only by the Criminal Code. Therefore, the norms of the General and Special parts of the Criminal Code of Ukraine, which determine the specific type of criminal offense, its varieties, types and sizes of punishments and other measures of a criminal law nature, cannot be applied to similar factual situations that are not provided for by these norms of the Criminal Code of Ukraine. Thus, precisely those provided for in part 2 of Art. 4 of the Criminal Code of Ukraine, legal guidelines limit the content of the analogy of its application prohibited in the Criminal Code of Ukraine and "narrow" to its specific norms, which determine the criminal illegality, the punishability of the act and its other criminal-legal consequences [Berzin 2019].

In other words, prohibition of the application of the Criminal Code by analogy prevents the "creation" of a new legal (normative) basis for criminal illegality and punishment of the act, as well as its other criminal legal consequences. On this ground, according to part 2 of Art. 4 of the Criminal Code only specific norms of the Criminal Code of Ukraine are recognized. On the other hand, if the current Criminal Code of Ukraine did not prohibit analogy in the application of its provisions, then there would be at least two legal grounds, taking into account which actions, which are not directly provided for by the Criminal Code of Ukraine as a criminal offense, would be recognized as a specific type of criminal offense or its separate variety and would attract the application of a certain type of punishment or other criminal-legal measures.

Relevant norms of the Criminal Code of Ukraine would be recognized as the first such ground, which determined a specific type of criminal offense or its separate variety and established the type and amount of punishment or other measures of a criminal law nature for its commission, and the corresponding order authorizing the application of the norms of the Criminal Code by analogy would be considered the second legal basis (such a prescription would actually mean the possibility of establishing the criminal illegality and punishment of the act, as well as other criminal-legal consequences in similar situations, which are not provided "within the limits" of the first ground). Therefore, the prohibition of analogy when establishing the criminal illegality and punishment of an act and its other criminal legal consequences should apply both to the norms of the Special Part of the Criminal Code and to the provisions of the so-called "regulatory laws" and subordinate legal acts, if the norms of the Special Part of the Criminal Code have blanket dispositions and provide for the use of the provisions of such "regulatory laws" and subordinate legal acts .

The prohibition of analogy also occurs in the criminal law of the Federal Republic of Germany [Berzin 2021]. It refers to the prohibition on the recognition of new punishable acts based on a comparison of similarities. Moreover, a distinction is drawn between a prohibited analogy and a permissible interpretation, in which, if there is a gap in the law, there is a permissible analogy in favor of the person who committed the act. The following example is an illustration. According to the legislation of the Federal Republic of Germany, electricity is not a physical object and a thing, and therefore the theft of electricity cannot be punished on the basis of

§ 242 par. 1 of the Criminal Code of the Federal Republic of Germany, which provides for punishment for theft, as it refers to a case comparable to the theft of an item. In order to

eliminate the previously existing gap in the punishment of electricity theft, the German legislator developed a special provision on punishment back in 1900, and in 1953 this provision became part of the Federal Criminal Code as § 248 par. [Renhir 2019], which provides for the punishment for theft of electric energy [Uholovnoe ulozhenye (Uholovnyy kodeks) Federatyvnoyi Respubliky Nimechchyna 2010; Holovenkov 2021].

2.5. The presence of a rule of law that was in effect at the time of the commission (lex praevia) of the act (part 2 of Art. 4 of the Criminal Code of Ukraine) does not allow the legislator to impose punishments for previously committed acts by a person and prohibits in certain cases the retroactive effect of the criminal law in time (see parts 2-4 of Art. 5 of the Criminal Code of Ukraine). That is, these prescriptions of the Criminal Code of Ukraine "express" the limitations of state coercion and "oblige" the legislator to establish the punishment of the act before the moment of its commission. In the criminal law of the Federal Republic of Germany, this component of the principle of legality is based on the provisions of par. 2 Art. 103 of the Constitution of the Federal Republic of Germany and §1 ("There is no punishment without law") of the Criminal Code of the Federal Republic of Germany the principle of "nulla poena sine lege", namely: an act (Tat) attracts punishment only if its criminality (Strafbarkeit) was determined by law (gesetzlich) before the act was committed (par. 2 of Art. 103 of the Constitution of the Federal Republic of Germany). In §1 of the Criminal Code of the Federal Republic of Germany, this component of the principle of legality is expressed as "an act is punishable only when its criminality was determined by law before the act was committed." In the German educational literature, to illustrate the above, the provision of par. 1 §242 of the Criminal Code of the Federal Republic of Germany, which provides for liability for theft (Diebstahls) (in particular, it is indicated that the composition of the act of theft in §242 of the Federal Criminal Code of the Federal Republic of Germany is provided for in the following provision: "A person who takes a movable thing from another person with the intention of illegally appropriating it for himself or transferring it to another person") [Henrikh 2010].

An illustration is the decision of the Federal Supreme Court of November 27, 2013 (3 p. 5/13), according to which when determining the signs of manipulation on the stock market, which is punishable on the basis of § 38 par. 2, § 39 par. 1 and other law on trade in securities (Gesetz über den Wertpapierhandel), the stock market price of a financial instrument, which is determined according to various versions of this law, as well as the determination of the sale of shares at a pre-agreed price, the purchase price of shares, changes in the market price, etc., should be taken into account [Bundesgerichtshof im namen des volkes urteil 2013].

The specified understanding of the principle of legality (its components), which is based on the norms of the Constitution, the Criminal Code, the Criminal Procedural Code and other legislative acts, allows you to determine the specifics of the application of this principle in criminal law, which is primarily related to its consideration when:

1) overcoming conflicts in criminal law, when this principle acts as a legal guideline in the correlation of various sources of criminal law and directly "influences" such correlation. Thus, when comparing the "generally recognized principles and norms of international law" (part 1 of Art. 3 of the Criminal Code of Ukraine) and criminal law norms, the latter on the basis of part 5 of Art. 3 of the Criminal Code of Ukraine "must comply with the provisions stipulated in current international treaties." The need for such a correlation arises in connection with the recognition in part 1 of Art. 9 of the Constitution of Ukraine and part 1 of

Art. 19 of the Law of Ukraine "On International Treaties of Ukraine" of June 29, 2004 of the current international treaties as a part of national legislation. Therefore, in the process of law enforcement, the following most typical variants of the correlation of generally recognized principles, norms of international law and criminal law norms should be taken into account:

a) there is a certain priority of the provisions of international treaties over the norms of the Criminal Code, in connection with which the provisions of international treaties are subject to independent application without taking into account (application) of the relevant norms of the Criminal Code. Thus, according to Art. 25 of the Constitution of the Federal Republic of Germany "generally recognized norms of international law are an integral part of federal law. They have priority over laws and directly generate rights and obligations for persons living in the territory of the Federation" [Osnovnyy zakon Federatyvnoyi Respubliky Nimechchyny];

b) such international treaties and the corresponding norms of the Criminal Code have the same meaning as sources of criminal law, in connection with which they are subject to parallel application;

c) the norms of the Criminal Code have priority over current international treaties, in connection with which only the norms of the Criminal Code can be applied independently, and the provisions of international treaties are not applied at all. An example of this are cases when, according to the requirements of the current law on extradition in force in the Federal Republic of Germany, it is allowed to extradite a person who has committed a criminal offense to another state, but such a person is not extradited [Holovenkov 2021].

Taking into account the principle of legality in each of the specified options depends on the content of the norms of the Criminal Code and the provisions of the current international treaties, in connection with which:

a) the priority of the provisions of international treaties over the norms of the Criminal Code will take place primarily when taking into account the scope of the state's international legal obligations established in such treaties (for example, in the implementation of certain forms of international cooperation during criminal proceedings, some of which are provided for in Art. 10 of the Criminal Code of Ukraine, as well as in the law on international legal assistance in criminal cases (Gesetz über die internationale Rechtshilfe in Strafsachen) in force in Germany);

b) the same meaning of the norms of international treaties and the norms of the Criminal Code, when they determine the signs of an act committed within the limits of compliance with a certain norm-prohibition, or its violation, as well as the criminal consequences of such an act (an example can be the provisions of part 1 of Art. 8 of the Criminal Code of Ukraine);

c) the priority of the norms of the Criminal Code over the current international treaties takes place when determining the signs of the criminal illegality of an act, its punishment and other criminal legal consequences, which is directly provided for in part 3 of Art. 3 of the Criminal Code of Ukraine;

2) overcoming gaps in criminal law, when taking into account the principle of legality prohibits the use of such a method as "analogy of law" when "filling in" the content of provisions that are completely or partially absent in the sources of criminal law, which would regulate relevant life situations (factual circumstances). In other words, the "analogy of law" contradicts the principle of legality in criminal law and, based on its relevant normative guidelines, cannot be used to bridge the gaps. At the same time, if we compare certain "fragments" of the principle of legality and the principle of the rule of law, which influence

bridging the gaps in criminal law, then the contradiction (collision) of these general legal principles in criminal law is obvious. That is, when comparing such "fragments" of these principles, which are associated with bridging gaps by the method of "law analogy", their contradiction (inconsistency) is revealed – the principle of legality directly prohibits the use of this method of bridging gaps in criminal law, and the principle of the rule of law, on the contrary, allows.

Conclusions.

1. The principle of legality includes the following structural elements that directly affect the "work" of this principle in criminal law: a) establishing the prohibition of "customary law"; b) the presence of retroactive effect of certain sources of criminal law; c) provision of the prohibition of an indeterminate criminal law; d) prohibiting the application of the norms of the criminal law by analogy;

e) application of the rule of law that was in effect at the time the act was committed.

2. The principle of legality has a direct impact on the application of criminal norms that provide for responsibility for economic criminal offenses. This influence is specific, but does not change basic constitutional guidelines that provide for the functioning of the constituent elements of this principle.

3. The principle of legality in criminal law acts as a legal guideline in the correlation of sources of criminal law and should be directly taken into account when: a) overcoming conflicts and b) bridging gaps in criminal law.

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