PRINCIPLES OF LAW IN MODERN CRIMINAL LAW OF CHINA: HISTORICAL AND LEGAL ANALYSIS

The article looks into the evolution of the concept of “the principles of criminal law” in the legislation of the People’s Republic of China during the second half of the twentieth century. The principles of law are recognized as the normative foundations of law, which determine the general scope, main peculiarities and the most significant features of legal regulation. The article studies a number of definitions offered by some Chinese scientists who dealt with the theoretical and legal problems.

The People’s Republic of China was created on October 1, 1949 against the background of destroyed economy, demoralized society, prevailing chaos and the unstructured nature of public authorities. In that period, no codified criminal law was in place. Some criminal acts of that time showed that any fundamental principles were included in the system of criminal legislation either.

The first Criminal Code of the People’s Republic of China of 1979 did not mention any principles of law, whereas the Criminal Code of 1997 provided for three fundamental principles, which became the subject of our analysis. These are the principle of legality, also known as the principle of no punishment for doing something that is not prohibited by law (nullum crimen, nullum točka sine lege), the principle of equality of citizens before the law, the principle of conformity of criminal-legal measures to the nature and circumstances of crime. It is these principles that have been reflected in the current criminal code. Despite the amendments of criminal law introduced over the last few decades, the principles of law have remained unchanged.

The conclusion to the publication makes a suggestion to introduce the general principle of humanism into in the General Provisions of the Criminal Code of China. The scholar believes that this principle should be recognized as the key principle of the criminal law of China, and will aim to ensure the democratic nature of Chinese criminal law.

Key words: principles of criminal law, the People’s Republic of China, codification, principle of equality of citizens before the law, principle of conformity of criminal-legal measures to the nature and circumstances of crime, principle of legality.

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Introduction. Ukrainian and Chinese legal scientists have long and quite effectively studied the legal phenomenon called “the principles of law”, but no unified approach has been found yet, unfortunately.

The principles of law are nothing but the basic ideas, starting points, the guiding principles that form, develop and ensure functioning of law. They are reflected in the norms of law, permeate the entire legal existence of the people and the legal system of a state, and define not only the essence but also the scope of law. On the one hand, the principles of law manifest the internal structure of law, so its static condition, and on the other hand, they support the law enforcement process and so ensure the dynamics of law. It is the principles of law that have a huge impact on drafting laws, codes and other regulations, as well as on their adoption, publication, and, ultimately, on the establishment of guarantees of legal compliance.

The principles of law are objectively determined by the social, economic and spiritual state of social relations that have developed in a country. They depend on the nature of the state, its political regime, the fundamental principles of development of both the society and the state.

The scope of this publication is to study the transformation of the concept of “principles of criminal law” in the legislation of the People’s Republic of China beginning with the middle of the twentieth century and up to the present time.

Presentation of basic material. Having analyzed the scientific literature of Ukraine dedicated to the principles of law, we may claim that among the variety of scientific definitions of the term “principles of law”, there are two basic approaches exist, which we described in one of our former publications. In the first case, the principles of law are recognized as fundamental ideas, initial (guiding) principles, and in the second – as the normative principles of law, which determine the general direction, main peculiarities and the most essential features of legal regulation [1, p. 71].

The development of general principles of law has formed the basis for the work of many Chinese researchers. Chinese legal theorists devoted much of their attention to the notion of “principles of law” either. It should be noted that their understanding of the principles of law pretty much coincide with the definitions given by Ukrainian scholars. Some of recent definitions provided for by the Chinese legal literature are:

- Liu Fengjing in his work “Structure and functions of legal principles” sees the principles of law as complex basic provisions or starting points that contain legal fundamental truths, rules, and provide a basis or origins for other elements of law [2, p. 67];
- Han Bin in the monograph “Practical application of legal principles in the analogy of law”, published in 2014, believes that the principles of law are complex steady basic provisions and rules that can act as a regulation for the ideological and political bases [3, p. 32];

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– Shu Goin under the principles of law sees the complex, instructive criteria or standards of values that provide the legal norms with a certain foundation or initiate their origins. In addition, the author considers the principles of law as certain norms of procedural actions, legal procedures or legal decisions [4, p. 52].

Thus, the definition of “the principles of law” in the legal doctrine of China has no significant difference from the legal doctrine of Ukraine. Such similarity can be explained by the fact that both legal systems have long existed under the rigid political regimes focused on the advantages of the values of socialism.

Given the subject of our current investigation, there is a need to bring the clarification to the concept of the principles of law, but for a separate branch of law. Under the sectoral principles of law, scholars understand the most general and steady requirements inherent in a particular branch of law, which determine its nature and directions for further development. In our case, we deal with the definitions of “the principles of criminal law”, which are reflected either in legislation, or in legal ideas, or in the scientific heritage of Ukrainian and Chinese researchers of mid-XX – early XXI centuries, or in all three dimensions at once.

It should be noted that the problem of the principles of criminal law of foreign countries in general, and of China in particular, is covered very superficially in the legal literature of Ukraine. The situation is even worse with the analysis of the principles of criminal law of Ukraine in the scientific literature of contemporary China. Such situation is caused by the objective reality, because the principles of criminal law is rather a category of legal awareness, so not every state put them in text in its criminal law. In this regard, researchers distinguish two ways of expressing the principles of law: enshrining them directly in the texts of regulations or deriving them from the idea and scope of regulations. While the principles of law quite often find their textual reflection in Chinese legislation, the Ukrainian law refer to them not always.

Thus, performing of the historical-comparative study of the principles of criminal law is a big challenge. Given that, we will attempt to provide the analysis of the principles of law reflected in constitutions, codes, laws and other regulations, as well as in the national theoretic heritage of researchers of the People’s Republic of China.

On October 1, 1949, the People’s Republic of China was a decentralized state with ruined economy, demoralized society, prevailing chaos and unstructured government. Such socio-economic situation did not contribute to the development of an efficient comprehensive criminal code. The criminal legislation policy of China was focused on enshrining criminal norms in certain acts, such as the “Regulations on Punishment for Counter-Revolutionary Activities” of February 10, 1951, “Provisional Regulations on Punishments for Undermining the State System” of April 12, 1951, “Regulations on Punishment for Corruption in the People’s Republic of China” of April 21, 1951, “Provisional Rules for the Supervision of Counter-Revolutionary Elements” of April 27, 1952, etc.

They attempted to fill the gaps in criminal legislation with the provisional resolutions, by which the state authorities tried to promptly respond to the criminogenic situation. The scope of adopted acts covered only a limited area of legal relations, therefore it was a little chance to comprehensively fight against crime in the mid-1950s from legal perspective. In order to effectively fight against crime the drafting of new Criminal Code began to be adopted only on July 1, 1979 and to enter into force on January 1, 1980. Despite the fact that the People’s Republic of China was created in 1949, the country’s first criminal code was adopted only in 1979.
Basing on the necessity to conduct comparative study of the historical and legal past of China, we should refer to one very rational opinion on two criminal codes adopted in the second half of the twentieth century. “Comparative analysis of the Criminal Code of the People’s Republic of China of 1979 and of 1997 allows us to state that the current Code corresponds to the main political, economic and social realities of the relevant period of historical development of China” [5, p. 160]. According to legal comparatists, those criminal codes became a real reflection of the socio-economic situation in China at the time of their adoption, which was embodied in Article 1 of the Criminal Code of the People’s Republic of China of 1997 to include two key aspects, “specific experience in combating crime and real situation in China” [6, p. 15]. The real situation in the country was such that the Criminal Code of 1979 enshrined the dominant ideology of Marxism-Leninism and emphasized the unique nature of Chinese socialism. In the current Criminal Code of China of 1997, one can also find ideological norms to show that China continues to stick to the guidelines for building socialism through the people’s democratic dictatorship (Article 3). We consider irrelevant the ideologization of the criminal code, particularly in so that both codes retain the original source of criminal law, which referred to in Article 12 of the Criminal Code of 1997 as “political attitudes”. Therefore, the decisions of the Communist Party of China still remain to be the source of law, and not only criminal, in contrast to Ukraine, where the communist party is prohibited by law.

It should be mentioned that the Criminal Code of 1997 softened the ideological component of many norms and provisions. Some articles of the Code abandon the excess “propaganda rhetoric” of the previous criminal code [7, p. 129]. To be convincing, we present the wording of Article 1 of the Criminal Code of 1979, which is missing in the current legislation, “The Criminal Law of the People’s Republic of China, which takes Marxism-Leninism-Mao Zedong Thought as its guide and the Constitution as its basis, is formulated in accordance with the policy of combining punishment with leniency and in the light of the actual circumstances and concrete experiences of the people of all China’s nationalities in carrying out the people’s democratic dictatorship, led by the proletariat and based on the worker-peasant alliance, that is, the dictatorship of the proletariat, and in conducting the socialist revolution and socialist construction.” [8]. The current Code of 1997 somehow constrains the political content, but not completely abandons it. Article 2 of the Code, for example, states that one of the purposes of the criminal code is to “protect the power of the people’s democratic dictatorship and the socialist system.” The term “people’s democracy” is not literary correct, because “democracy” means the power of the people itself. At the same time, the Code of 1997 lacks a legislative imperative which concerns the identity of the people’s democracy with the dictatorship of the proletariat.

The period between the adoption of first and second criminal codes in China was quite rich in introducing additional norms and emergence of new corpus delicti. According to Russian researcher Sergei Medvedev, a number of laws had been passed that time to improve criminal law. Among them, he mentions 25 laws which regulated the legal relations exclusively in the area of criminal law, and 107 laws aimed to regulate other areas of public relations interspersed with the rules of criminal law [9, p. 58–59]. All of them were in force until the adoption of the new criminal code in 1997.

Analysis of the first Chapter of the Criminal Code of 1979 and the same chapter of the current Criminal Code of 1997 showed that such fundamental principles as the principle of legality, also known as the principle of no punishment for doing something that is not prohibited by law (nullum crimen, nullum točka sine lege), the principle of equality of citizens before the
law, the principle of conformity of criminal-legal measures to the nature and circumstances of crime have been provided for only in the current criminal code.

As a rule, the criterion for establishing these principles in the current code is that: 1) all of them are specific to the criminal law, but their use is not limited to the criminal branch of law only; 2) they permeate criminal law as a whole, and form the basis for all of its norms, determine the context of both the entire criminal law and its individual institutions [10]. These three principles are equally regarded as fundamental not only in the Criminal Code, but also in the criminal law of the People’s Republic of China.

In contrast to the Criminal Code of 1978, which contained the principle of analogy, the Criminal Code of 1997 abandons it. Article 79 of the Criminal Code of 1978 provided that in case of application of the analogy, the final decision must be approved by the Supreme People’s Court of China. It should be stated that the principle of analogy had been in force in China since 1951. It was enshrined in the Law on Counter-Revolutionary Crimes in the People’s Republic of China and had been used to prosecute a suspect on the grounds of only this type of crime [11, p. 32].

The essence of the principle of analogy or legality in criminal law is that it is applied to an unlawful act not provided by the norms of criminal law at the time of its commission, and to which the criminal liability for a crime most similar in nature and character should by applied. Theorists of criminal law consider the principle of analogy as unacceptable, because when giving the classification to acts not considered to be crimes, both in Ukraine and in China, they applied similar articles of the Criminal Code to quite commonly prosecute a person unjustifiably, thus abusing the rights and destroying human destinies. According to modern Chinese scholars, the prohibition of analogy in Chinese criminal law by the Criminal Code of 1997 “brought Chinese criminal law closer to the world standards” [10]. In addition, the new Code expanded the list of crimes, ensured a clear and understandable interpretation of its provisions, and constrained procedural arbitrariness. In our opinion, the value of the principle of legality is that it acts as a precautionary measure in the arbitrary classification of a crime to objectively prevent the violation of human rights.

With regard to the principle of equality, it is to be stressed that it was not immediately enshrined in the criminal law of China. Initially, and so it is logical, it was provided for in the Criminal Procedure Code of the People’s Republic of China of 1979, Article 4 of which stated, “All citizens are equal in the application of the law. No privileges are permissible before the law” [11, p. 32]. In the early 1980s, the principle of equality before the law became a constitutional principle in China. Thus, Article 5 of the Constitution of the People’s Republic of China of 1982 states: “No organization or individual may enjoy the privilege of being above the Constitution and the law” [12]. The current Criminal Code recognized later on that its provisions were applied equally to everyone without giving anyone any privilege to be above the law (Article 4 of the Criminal Code of 1979).

Equality before the law had not long been recognized by the Maoist ideology as a principle of socialist law, and therefore had not been reflected in the legal system of China. After a certain liberalization of China’s political life, the principle of legality in law had found its place in legal system to form the basis for the current criminal legislation of the country.

It should be noted that Chapter I of the Criminal Code of 1997, “Tasks, Basic Principles, and Scope of Application of the Criminal Law”, contains only 12 articles and put no emphasis on the terminology, characteristics and definitions of the principles themselves. Researchers can speculate on them based solely on the written content of the Code. Guided by the same
approach, we should claim that the Criminal Code of 1997 might include other principles of
law either. In our opinion, one may single out the principle of humanism, which can be seen
in the current Criminal Code judging from the content of Article 63. By the rules existing in
many legal systems of the world, including the Ukrainian one, the legislature provides judges
with the discretion to impose a sentence below the minimum limit set by law. So, this article
stipulates, “Where the circumstances of a criminal element are such as to give him a mitigated
punishment under the stipulations of this law, he shall be sentenced to a punishment below the
legally prescribed punishment.” [13, p. 123].

Conclusions. So, the vertical analysis of modern principles of Chinese criminal law reveals
that the current criminal legislation contains three fundamental principles: the principle of no
analogy or the principle of legality, the principle of conformity of criminal-legal measures to the
nature and circumstances of crime. Their enshrinement in the Criminal Code of 1997 testifies to
the democratic changes taken place in China in recent decades, beginning with the creation of
the People’s Republic of China itself to present time. We consider rational the position of some
Chinese researchers concerning the necessity to include the general principle of humanism to
the General Provisions of the Criminal Code of the People’s Republic of China, on the basis that
humanism (from the Latin humanus – human, humanistic) is defined as the system of views which
recognize the value of human as a person, his/her right to freedom, happiness, development and
implementation of his /her skills and abilities. The principle of humanism as a comprehensive
principle must be recognized as a key principle in China’s criminal law. The introduction of the
principle of humanism will ensure the democratic nature of Chinese criminal law.

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X. Шань X. Принципи права в сучасному кримінальному праві КНР: історико-правовий аналіз

У статті йдеться про еволюцію поняття «принципи права» в законодавстві Китайської Народної Республіки впродовж другої половини ХХ ст. Принципи права визнаються нормативними зasadами права, що визначають загальну спрямованість, основні особливості і найсуттєвіші риси правового регулювання. Наведено низку визначень, здійснених окремими китайськими вченими, що безпосередньо досліджують теоретико-правові проблеми.

Створення КНР 1 жовтня 1949 р. співпало з руйнацією економіки, деморалізацією суспільства, пануючим хаосом та неструктурованістю органів державної влади. У цей період галузь кримінального права не була кодифікована. В окремих кримінальних актах того періоду не знаходимо підтверження про включення засадничих принципів у систему кримінального законодавства.

Перший Кримінальний кодекс КНР 1979 р. також не містив жодних згадок про принципи права, натомість у КК 1997 р. знайшли відображення три основоположних принципів, які нами й були проаналізовані в роботі. Йдеться про такі принципи, як принцип законності або його ще називають принципом відсутності аналогії в кримінальному праві (nullum crimen, nullum poena sine lege), принцип рівності громадян перед законом, принцип відповідності заходів кримінально-правового впливу характеру злочину і обставинам його здійснення. Саме ці принципи знайшли своє відображення в чинному Кримінальному кодексі. Незважаючи на зміни, що відбулися в кримінальному законодавстві за останні кілька десятиліть, принципи права залишилися незмінними.

У висновках до публікації висловлена думка про необхідність запровадження в кримінальне законодавство загального принципу гуманізму до Загальної частини КК КНР. Цей принцип, на думку дослідника, має бути визнаний ключовим принципом кримінального права КНР, запровадження якого забезпечить демократичний характер китайському кримінальному закону.

Ключові слова: принципи кримінального права, Китайська Народна Республіка, кодифікація, принцип рівності громадян перед законом, принцип відповідності заходів кримінально-правового впливу характеру злочину і обставинам його здійснення, принцип законності.

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