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On Norms and Principles in the Criminal Law in the Europe (In the Light of Polish Theory of Statutory Interpretation)

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Abstract: European Jurisprudence (theory of law), part of which is Polish law study, worked an interesting and original concept of law interpretation and legal principles, separate from influential today Anglo-Saxon achievements. It is easy to notice that norms are distinguished from principles under certain theoretical assumptions. These assumptions are presented in the first part of the paper. The concept of principles are discussed in the context of the so called principles of the criminal responsibility. Jurisprudence (the so called legal doctrine) in the Europe, that involves also Polish legal theoreticians, can formulate and develop complete and original (ie separate from influential Anglo-Saxon achievements) concept (or concepts) of the legal interpretation and legal principles. Moreover, according to the European legal tradition, the principles of criminal responsibility provide the one of the most important example of functions or roles of the principles in the legal system. It is needed to note that principles of criminal law are nothing more or less than principles of criminal liability (responsibility), and the "criminal responsibility" is the central concept in the criminal law studies.

Keywords: Criminal Responsibility, Legal Principles, Norms, Rules, Legal Interpretation, Polish Theory of Law, European Jurisprudence

1. Introduction

The aim of this paper is to outline issues related to the definition and the functioning of legal principles in relation to criminal law. However, these principles will be analysed from a general theoretical perspective, not in respect of their content. This paper consists of two parts. The first part presents general information about how norms and principles are defined in the Polish legal doctrine. The second part discusses the problems which arise in criminal law in relation to the concept of legal principles.

Discussed is the concept of the criminal liability. It seems that in European tradition it is the system of criminal liability that determines the boundary between the principles and norms, i.e. regulations directly concerning responsibilities having the primary character. By that, they can be perceived as principles. In this sense, the principles of the criminal law will be the principles of the criminal liability. Indeed not every regulation from the field of criminal law (e.g. regulations or provisions specifying criminal catalog or temporary regulations) is the principle of criminal liability.

Speaking generally, legal principles are broadly analyzed in the contemporary legal theory. However there are many theoretical issues related to the concept of principles [1]. The problem of the clarification of the concept of the legal principles is particularly relevant because of their importance as one of the most important sources of law. Moreover, it can be easily seen that principles are recognized, emphasized and described as the special source of law, but also as the special kind of rules (norms), or the element of the legal system, or its foundation. It leads legal theoreticians to the problem of functions of the legal principles, and also to the problem of the role of the principles in the criminal law in the context of European (or Civil Law) tradition [2].

2. Principles and Ordinary Norms

Issues related to legal principles are important for the theory of law, which is reflected in the fact that they are still fiercely debated and are the subject of numerous works. Legal principles are defined in various ways in the science of law, including the Polish science of law. Ronald Dworkin's or Robert Alexy's concepts are particularly important [3]. They

are not alien to the Polish theory or philosophy of law, even though they do not come from the Polish theoretical and legal tradition. None of these approaches corresponds to the terminology of the Polish legal language.

It is worth outlining Dworkin's and Alexy's approaches. According to Ronald Dworkin, the legal system comprises only rules (if there are two contradictory rules, one must be invalid; they are valid or invalid at a certain time, in a certain legal system) and principles which in fact are values, requirements to comply with certain values. In Dworkin's theory, rules are in some way normative incomplete statements because they need to be interpreted. On the other hand, according to Robert Alexy, principles are optimization requirements. They can be fulfilled only to some extent (while norms can be either fulfilled or not) [4].

In the Polish science of law, the term "legal principle" has two meanings [5]. First, principles are defined in a descriptive way. In this sense, the legal principle is a model for developing a legal system, a legal branch or a legal institution (e.g. the trias politica principle). In the other sense, i.e. in the prescriptive one, the legal principle is a legal norm that is valid in a legal system, is somehow superior to other norms and plays a special role in that system; that role differs from the ones assigned to the other norms in the system. Distinguishing norms-principles from ordinary norms is, therefore, typological.

It is easy to notice that norms are distinguished from principles under certain theoretical assumptions; two of these assumptions are fundamental.

First, law is defined as a system, i.e. a set of elements which have specific structural characteristics (coherence, order, completeness). It is a set of norms, but it is not a set of norms and other elements (which are not norms). Norms-principles are not, therefore, different from the ordinary norms in the structural (i.e. the structure of the legal system), semiotic or logical approach [6].

Secondly, a legal provision differs from a legal norm. The legal provision is a sentence in the grammatical sense; it is usually separated as an article, a paragraph, etc. The legislative text (a normative act) is an organised set of legal provisions adopted by a competent authority and identified by a specific name. On the other hand, the legal norm is an expression that orders or forbids a certain party a certain behaviour in a sufficiently explicit way, in certain circumstances. The norm is, therefore, an expression that is sufficiently explicit. Syntactically, it consists of a specific addressee, specific circumstances, a phrase that determines whether it is an order or a prohibition (a normative order: you must do something, or you are forbidden to do something) and specifies the behaviour (which is the subject of the obligation determined by the norm). This model assumes that law is created by adopting legal provisions (legislative texts) which specify norms of conduct, rather than directly in the form of norms of conduct. As a result, only during the process of interpretation legal provisions are read out and law is then treated as statements which directly order or forbid the addressee to act in a certain way, in certain circumstances. Interpretation of the law involves reconstructing norms from provisions, according to the rules of interpretation adopted by the legal doctrine [7].

In this respect, you can already notice that Dworkin's theory of rules and principles does not correspond to the Polish science of law. In the Polish theory of law, legal principles are also norms. In relation to Alexy's concept, it is enough to say that in the Polish science of law *nullum crimen sine lege* is unquestionably a principle, while according to Alexy it would be an ordinary rule.

In the descriptive sense, principles are used by the legislator or rather by legislative bodies as a reference point for developing certain legal institutions and regulating various social institutions by using legal norms. Thus, it is a non-prescriptive approach. The principle defined in that way is a model for determining some issues. For example, when determining criminal responsibility, legislators usually base its conditions on the perpetrator's guilt (rather than the risk, etc.) [8].

Resuming the description of norms-principles in the Polish science of law, it must be emphasised that principles are not superior to ordinary norms in the prescriptive approach. The superiority of legal principles to the other norms in the legal system is reflected in the fact that they are formulated in superior acts such a constitution or a law. In addition, principles defined in this way have a particularly wide scope of use and regulation, which affects how they function.

A specific feature of legal norms-principles is that they are relatively rarely specified in a legislative text fully. Legal principles usually cannot be reconstructed from a single legislative text (sets of legislative texts or even the entire law system must be analysed to do so). But they can be interpreted based on the regulation contained in many provisions that have already been interpreted in some way.

The source of the validity of principles is very often the fact that they are commonly accepted in a legal culture, and specific historical, praxeological and axiological arguments are in favour of their adoption.

One can assume that principles fulfil special roles in the legal system. Above all, they help create the law since they set the objectives of law-making activity by bringing together ordinary norms. Principles also determine the borders of the legislator's freedom, which is important in respect of criminal law. In regard to the interpretation of law, principles provide conditions of evaluative nature and are an axiological criterion for choosing the right interpretation. As for the application of law, principles determine how judicial discretion (i.e. giving reasons in favour of one of the determinations) will be used.

3. Principles in Criminal Law in the Light of European Law Tradition

Prima facie, principles have been properly analysed by the theory of law. But in fact legal principles raise a range of doubts, and their functioning is extremely eclectic. The

analysis of criminal responsibility, both in terms of legal regulations (in the Penal Code) and literature concerning this matter, provides some examples of problems related to the term "principle" in criminal law.

One may say that the array of the principles of criminal responsibility is universal in the legal culture of Europe. Undeniably, the way of developing the principles of criminal responsibility, with the principle of subjectivity at the top of that, is a result of the moral evolution of penological thought, a form of cultural achievements of the European people. It is so at least in the classic (retributive) or liberal approach as the classic, post-Enlightenment principles of responsibility of course do not correspond to the 20th-century humanitarianism from the perspective of the social defence movement (Filip Grammatic, Marc Ancel, partially Enrico Ferri) or social rehabilitation (in particular in Barbara Wotton's radical approach) [9].

The question then arises: What are the principles of criminal responsibility? In this context, it is worth asking which of the norms that define criminal responsibility determine the identity of modern criminal law.

It is interesting which of the norms concerning criminal responsibility affect the assessment of criminal law, its justice, validity, or compliance with the standards of modern, liberal and democratic societies. For this purpose, a different method of defining principles must be used. Legal principles, as a concept, in criminal law can be interpreted in a way that refers to their non-prescriptive definition, to a less or greater extent. Legal principles may be understood as models for developing criminal law and the main institutions (regulations) of criminal law, in particular the regulation of criminal law. Thus a question about main principles-models in criminal law and their capability to set the directions of policy for developing criminal law arises. This is a special approach to principles in criminal law [10]. This issue can be analysed based on the general principles of criminalisation (e.g. *in dubio pro libertata*) [11], even though they will be the result of adoption of some models for developing criminal law (i.e. principles in the descriptive sense) [12].

In addition, it must be emphasised that when a regulation becomes effective, principles – in the descriptive sense i.e. models for developing legal regulations – are reflected in principles-norms. Each principle-model can have an equivalent in a principle-norm. That is the way in criminal law. Thus, it can be concluded that in criminal law the principle-model will be a complex model for developing a legal and penal institution (responsibility, guilt, necessary defence, etc.) in one or many aspects. Thus, it is difficult to overlook that these models (i.e. principles in the descriptive sense) for developing criminal law depend on the vision of criminal law. Therefore, there are different models or variants. If criminal law (institutions of criminal law) is based on the rehabilitation model, it will be developed in a different way than the criminal law that refers to the classic or retributive model. However, before starting legislative work, the legislator should have as many such variants or models as possible to be able to choose the most effective solutions in a significant aspect (in this sense, it poses a penal and political problem).

When choosing the sets of principles concerning the shape of criminal law, coherence is also important. Practice is, however, different and legislative actions are often related to short-term political objectives (e.g. resulting from various election games). From the perspective of the axiology of criminal law, it is important that principles-models should be well thought out. The information about which norms related to criminal responsibility or criminal law must be treated as norms-principles must be identified based on the knowledge about the principles-models. Thus, it must be noted that, e.g., *nullum crimen sine cuplae* is not a principle in the model of criminal law based on the ideas of the sociological school or social defence, or a descriptive principle, or a principle-norm specified in a legislative text. It would be different in the retributive model of criminal law (the principle of guilt would be fundamental). On this basis, various types or variants of penal models can be constructed, with appropriate sets of norms-principles.

4. Conclusions

An analysis of the legislative material (texts of contemporary European criminal legislations) allows formulating the proposition of the criteria to distinct criminal law regulations. It has to be assumed that the tradition of the criminal law in Europe refers to, on the one hand, warranty function of this law, and on the other hand, to strictly determined boundaries of criminal liability. Thus, the question appears of how to understand the criminal liability.

Today legal doctrines in Europe assume that the crucial to studying criminal responsibility is the tradition that criminal responsibility shall be incurred only by a person who commits an act prohibited under penalty by the law in force at the time of commission of the criminal act. It can be concluded that under the principle of criminal responsibility a person is subject to this principle only if he/she commits an act prohibited under penalty by the law which is in force at the time of commission of such an act. But this definition concerns the conditions of criminal responsibility rather than the definition of criminal responsibility.

It can be assumed, that the regulations of criminal law (both descriptive, and directive) will be norms or models concerning criminal responsibility perceived by each of its most important aspects. It should be noted that they will also relate to the situation in which the entity is liable for this responsibility (sanctioned), as well as to the range of entity's actions (sanctioning the perpetrator of criminal activity). The problem will appear when the classical model of criminal liability will be declined. It seems that in such a case, the principles of the criminal law will not be discussed since, under the European traditions, criminal law principles are in fact the principles of criminal liability. This also constitutes an individual model for creating law reaction, as declining the responsibility (as the institution of the criminal law) leads to the model based on social danger and social defense,

referring more to the experts, doctors or psychologists, than courts or prisons.

Criminal responsibility provides for that if the perpetrator has committed a criminal act, he/she is held responsible for all the consequences of that act. That act burdens the perpetrator with a responsibility. Criminal responsibility has two fundamental characteristics: (1) it is a form of an obligation; and (2) it involves suffering some negative legal consequences of such an act. Criminal law emphasises the role of the authority which has the right to prosecute the perpetrator by law: the right to prosecute by law is emphasised. Taking this approach, criminal responsibility can be defined as the obligation of a competent state authority (de facto court) to respond to the committed crime and to take appropriate measures provided for under law against the person who is bearing responsibility for the committed crime. When prosecuting a person, the competent authority (court) should in particular determine the grounds for prosecution. The prosecuting authority should demand an answer to the question about a specific act. Detailed obligations of the prosecuting authority are determined by procedural provisions, but it is difficult to develop criminal proceedings in a manner that would not be focused on prosecuting the perpetrator of a crime in such a way. The objective is to determine whether the prosecuted person bears responsibility or not. As a result, the court either relieves the prosecuted person from criminal responsibility or prosecutes and punishes such a person [13].

European Jurisprudence (theory of law), part of which is Polish law study, worked an interesting and original concept of law interpretation and principles, separate from influential today Anglo-Saxon achievements. This concept is precious. It also seems modern, as long as we use the assumptions concerning the system of law. In the context of such approach, a multifaceted problem analysis is possible from the area of criminal law study (and other dogmatic studies such as civil law). Among these problems, there is the aspect of the principles of law in the criminal law, which shares a similar tradition for the European law culture. A part of this tradition is centrally locating criminal liability institution and recognizing the rules of criminal law as equivalent with rules of criminal liability [14]. Currently, an understanding of criminal liability is the basis to formulate the criteria for distinguishing the criminal law rules (and criminal law model) from standard legal and criminal norms.

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