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Principles of the Criminal Process: Legality v. the Rule of Law

An important factor in the development of society in modern conditions is participation in the processes of integration and globalization. Not an exception in this aspect is neither Ukraine nor the Republic of Belarus. In particular, we recall that in 1995 Ukraine became the 37th member of the Council of Europe. «Belarus takes full participation in the seven governing committees of the Council of Europe ..., as well as in a number of other committees of the Council of Europe as an observer. ... The Republic of Belarus is interested in developing pragmatic cooperation with the Council of Europe and its constituent bodies, including the further expansion of participation in the legal instruments of the European Union» [1].

At the same time, the indicated interaction includes, in particular, the harmonization of national legislations, the introduction of international standards (which often appear in the form of principles). Among the latter, an important role is played by the rule of law

Although the rule of law is not directly enshrined in Section 2 of the Code of Criminal Procedure of the Republic of Belarus, this normative act contains provisions that partly reflect the content of the rule of law principle. This, in particular, Art. 10 of the Criminal Procedure Code of the Republic of Belarus (Ensuring the protection of the rights and freedoms of citizens), as well as Art. 8 (Legality in the criminal proceedings). Although relative to the latter, it should be indicated the following.

One of the components of the rule of law is legal certainty, the need for public authorities to comply with human rights, which determine the content and direction of the activities of the state. Thus, the general, formally determined rules of conduct, which are accepted (authorized) by the state and are protected by it, constitute a system of legislation, which should comply with the "quality of law", that is, the rule of law principle. This is explicitly mentioned in the judgment of the European Court of Human Rights in the case of Volokhy v. Ukraine: «The Court would reiterate its opinion that the phrase" in accordance with the law "does not merely refer back to domestic law but also relates to the" law "of quality, requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble of the Convention ... This implies – and this follows from Article 8 object and purpose – that domestic law must be a measure of legal protection against arbitrary government authorities' rights safeguarded by paragraph 1 ... Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident ...» [2].

Thus, not every law (as a normative legal act that has a higher legal force) must be implemented (I will mention the laws of Nazi Germany for the activities that were

carried out by the leaders of the national socialist state), but only the one that corresponds to the principle of the rule of law.

Ronald Dvorkin described a similar situation. This is primarily the case of Riggs v. Palmer, which was considered in the United States of America in New York in 1889, in which the court had to decide whether the heir named in the will of his grandfather could obtain an inheritance under this will, even if the heir had killed his own grandparent for the purpose of obtaining this heritage (it should be noted that civil law at that time did not provide for a provision according to which «a person who has unlawfully deprived the life of the testator can not be the heir"). The court began its reasoning with the following assumption: "It is correct that the legislative acts regulating the drafting, approval and execution of wills, as well as the transfer of property, with their literal interpretation and taking into account the impossibility to control and change their force and effect under no circumstances, are ordered give this property to a killer». However, the court further noted that «the effect and power of all laws, as well as all treaties, may be controlled by the fundamental principles of common law. No one is allowed to take advantage of a fraudulent way, to benefit from an offense committed by him, to justify a claim on his own wrongdoing or to acquire ownership through a crime». The killer did not receive his inheritance [3, p. 44].

«The order is the order», the soldiers are emphasized. «The law is the law,» says a lawyer. But at the same time, the duty of the soldier to obey ceases to act if he finds out that the purpose of the order is a crime or offense. Lawyers, however, after a century after being among the founders of natural law among them, there are no such exceptions to the law and the submission of law-abiding citizens to them. The law acts because it is a law, and this is a law if its force is recognized in most cases» [4, p. 225]. However, such an understanding of the law and its power (which occurs within the limits of the positivist understanding of law), according to G. Radbruch, has made all, including lawyers, defenseless against arbitrary and criminal laws. Such an understanding of law identifies law with power: only there is law where power is present.

Note, Professor M. A. Gredescule, covering issues of understanding law, begins that, in his opinion, it has become traditional in legal science, according to I. Kant, that lawyers are still seeking their definition of law with which he fully agrees, since from the time of I. Kant and he himself, and many other authors, both lawyers and non-lawyers, have given a whole series of definitions of law, which not only are not similar to each other, but often contradict each other. For example, M. A. Gredescule refers to the paper of the famous Belgian lawyer Edmond Pikar «Le droit pur», in which the author gives a fairly significant number of definitions of the law of various authors: lawyers, philosophers, scholars, writers (in particular, Victor Hugo: «Le droit, c`est le juste et le vrai». At the same time, E. Picard in a peculiar French style pathetically remarks:" And think it's possible to continue without stopping. I have specially assembled names here quite different in essence, but they are still known. It seems that this is a kind of competition in antagonistic riddles. What is imbroglio?

What a Babylon Tower it is! Indeed, the mind tends to encounter something other than these secret inscriptions than those foggy figures that can be taken at the time of the frescoes in the half-deck. To define law, as well as to distinguish its most characteristic feature, all this is not suitable» [5, pp. 9–10].

Under such conditions, legal practice within the state should proceed from the postulate of non-distinction of a law and law, incorrect understanding of law as prescriptive texts, the prevalence of not a law, but law. However, for this purpose it is necessary to understand: what constitutes law. And here I can not but point out that to this day not only the domestic law but also the world legal opinion has not found the answer to this question (although it would be correct to note that within the various cultures a proper understanding of what law is is made). Specified allows to speak about the relevance of the topic of understanding of law.

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