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## THE PECULIARITIES OF LEGAL CERTAINTY IN CRIMINAL PROCEEDINGS: THEORETICAL AND LEGAL ASPECTS

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**Abstract.** Based on the analysis and generalization of scholars' scientific standpoints and the ECHR case-law, the author justifies the peculiarities of legal certainty in criminal proceedings. The article proves that in criminal proceedings, legal certainty implies predictability and clarity of its procedure and consequences as well as the legal status of its participants and other persons whose rights and legitimate interests are affected. Taking into account the principle of legal certainty, the general requirements to be met in criminal proceedings include the compliance of criminal procedural legislation with the requirements of legal methods; absence of conflicts; ensuring legal unambiguity and confidence in the legal consequences of the proceedings; finality of the decision of the case. Certainty is evident at all stages of the criminal procedural activity (pre-trial investigation, trial, appeal and review of sentences, execution of court decisions), with the special formal requirements made for each of them. Prohibition of double jeopardy (non bis in idem) is an important procedural rule, which is directly related to the principle of legal certainty.

**Key words:** Criminal proceedings, human rights, legal certainty, legal uncertainty, law enforcement, case law, ECHR judgements, court decisions.

### **Introduction**

The rule of law and justice in the country largely depends on the quality and effectiveness of law-making and law enforcement activities, which, among other things, constitute the principle of legal certainty. The dynamic nature of public relations and progressive legal development require legal certainty, on the one hand, as well as flexibility and effectiveness of legal regulation, on the other hand. The relevance, practical and theoretical significance of the study is also reinforced by Ukraine's political and legal development being oriented towards European integration, approximation to the European legal space as well as its need to comply with international legal standards. All the above stated determines the general context of the study and consideration of the ECHR practice.

The spread of the COVID-19 pandemic, combined with other global challenges and threats, has resulted in the weakening of the rule of law in more than half of the countries of the world, which is confirmed by the data provided in the Rule of Law Index 2021 (World Justice Project Rule of Law Index). According to it, 84.7% of the world's population (6.5 billion people) live in the countries where the rule of law is declining. The problems can be traced primarily in such areas as restrictions on the powers of governments, public participation, freedom of thought and expression, freedom of assembly, equality of rights and non-discrimination. The number of delays in carrying out administrative, civil and criminal proceedings increased in 94% of the countries covered by the given Index (World Justice Project (WJP), 2021).

**Under such conditions,** the study of theoretical and legal aspects of legal certainty in criminal proceedings has acquired particular importance and relevance, with practical and theoretical significance.

### **The analysis of recent research and publications**

The principle of legal certainty has been an issue to research by domestic and foreign scientists over the past decade. The principle of legal certainty was most thoroughly studied within the framework

of the theory of state and law, in particular in the context of the principles of law (V. Horodovenko, S. Holovaty, S. Pogrebnyak, Yu. Matvieieva, M. Mahrelo, S. Serohin, G. Ogneviuk); legislative definitions (A. Khvorostiankina); judicial law-making (Yu. Matvieieva, A. Pryimak). Considerable attention was paid to the principle of legal certainty within the framework of constitutional law (M. Hultai, S. Rabinovych, I. Kyianytsia).

In its practice, the Constitutional Court of Ukraine focuses on the problems of implementing legal certainty in the field of law-making. In particular, in the Decision of the Constitutional Court of Ukraine No. 5-rp/2005 dated September 22, 2005, para 5.4 reads that the requirement of legal certainty follows from the constitutional principles of equality and justice and means clarity and unambiguity of a legal norm, since otherwise its uniform application cannot be ensured, unlimited interpretation in law enforcement practice cannot be excluded, which inevitably results in arbitrariness (The Constitutional Court of Ukraine (CCU), 2005). The Constitutional Court standpoint is that legal certainty is an important tool for ensuring the inviolability of constitutional human rights and building a fair rule of law.

A similar opinion is set out in the Decision of the Constitutional Court of Ukraine No. 17-rp/2010 dated June 29, 2010, which says that “One of the elements of the rule of law is the principle of legal certainty which states that restriction of the fundamental human and citizens’ rights and implementation of these restrictions are acceptable only on condition of ensuring predictability of application of the legal norms established by these restrictions. In other words, restriction of any right should be based on the criteria which provide a person with the possibility to distinguish lawful behaviour from unlawful behaviour, and to foresee legal consequences of his/her behaviour” (CCU, 2010).

Certain aspects of legal certainty were considered in the context of EU law (L. Bogacheva, T. Vavrynychuk, P. Huivan, V. Muraviova, V. Kernz, V. Opryshko, R. Petrov, O. Streltsova, A. Tatham, T. Hartley).

Within the framework of the philosophy of law, the issues of legal certainty were addressed in the context of the principle of justice (R. Pozner, F. A. von Hayek). The historical and legal aspect of legal certainty was studied by V. Pankratov, Ye. Orach, and I. Rekhtina.

As far as sectoral legal sciences are concerned, legal certainty is studied in the light of its subject. Thus, in administrative law, legal certainty is analysed in the context of state authorities’ activities (I. Tesar).

The analysis of scientific sources shows that certain issues and aspects of legal certainty with regard to the features of legal certainty in law enforcement, in particular in criminal and civil proceedings, have not been studied sufficiently. The limited size of the given paper only enables us to focus on understanding the features of legal certainty in criminal proceedings. Thus, the issues of legal certainty in civil proceedings shall be the topic of a separate scientific research.

The purpose of the paper

The paper aims to substantiate the peculiarities of the principle of legal certainty in criminal proceedings as a premise for ensuring human rights based on ECHR decisions.

Materials and methods of the research

The study uses subject-based philosophical and ideological approaches, in particular, civilizational and axiological ones, in order to understand the role and significance of legal certainty in protecting human rights and ensuring justice. Among the general scientific methods used, there was a dialectical method, which provided an opportunity to consider the principle of legal certainty in development as well as interrelation with the principle of the rule of law; a structural and functional method, which was used to clarify the essence, content and features of the principle of legal certainty; a doctrinal method, which was applied in interpreting the content and correlation of the principles of the rule of law and legal certainty; a statistical method, which was used for the analysis and generalization of the problems of legal certainty in criminal proceedings. The paper also uses the methods of analysis, synthesis, generalization, systematization, and comparison.

The normative and empirical basis of the research is the legislation of Ukraine, judicial practice of the Constitutional Court and the ECHR, international legislation, statistical data, and scientific sources.

### **Results and discussion**

The provision, according to which legal certainty is considered in an indissoluble connection with the principle of the rule of law, is common both in the legal doctrine and judicial practice. This is confirmed by the results of the study conducted by the Venice Commission, which, in its Report on the Rule of Law dated March 25-26, 2011, came to the conclusion that the core elements of the principle of the rule of law are as follows: 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; 5) respect for human rights; and 6) non-discrimination and equality before the law. According to para 44 of the report, the principle of legal certainty is of extreme importance for ensuring confidence in the judicial system and respect for the Rule of Law (European Commission for Democracy through Law (Venice Commission), 2011, April 4).

In the Ukrainian legal science, the principle of legal certainty is considered in both narrow and broad senses. In a narrow sense, it implies a set of requirements for a legal norm, which include its clarity, unambiguity, and simplicity. In this sense, legal certainty is often limited to law-making. Therefore, the opinions of those researchers who adhere to a broader approach to the interpretation of legal certainty seem more appropriate. Thus, L. Bogacheva (2013), comparing the principle of legal certainty in the European and Ukrainian law, considers it as a set of requirements for the procedures of law-making and law enforcement (p.1); S. Pogrebnyak (2009) clearly identifies two groups of requirements within legal certainty: 1) requirements for the norms of law (normative legal acts); 2) requirements for their application (p. 32); A. Pryimak (2010) emphasizes that the principle of legal certainty is advisable to consider in a broad sense, which provides for a set of requirements not only for law-making but also for law enforcement (p. 53-54). In the context of the above-mentioned, A. Pryimak's reasoning for identification of the requirements, which follow from the principle of legal certainty, is of relevance as well. He identifies the three groups of requirements, namely:

1) requirements for the certainty of legislation, which provide for unambiguous formulation of legal norms, mandatory publication of normative legal acts, absence of unpredictable changes in legislation and stability of legal norms;

2) requirements for the certainty of authorities, which provide for efficient distribution of authorities between the branches of state power, availability of a special-permissive type of legal regulation of state bodies' activities, a clear definition of the discretionary powers' limits and exclusive legislative embodiment of executive bodies' authorities;

3) requirements for the certainty of court decisions, which provide for the impossibility of cancelling a final court decision that has entered into force, and the requirement to ensure the execution of court decisions (p. 54–55).

Yu. Matvieieva (2019) took even a more thorough approach to the requirements of legal certainty by distinguishing between the requirements for law-making and law-enforcement activities. According to Matvieieva, the requirements for law-enforcement activities consist in "strict compliance with the norms of laws and other normative legal acts, individual action acts; consistency of law-enforcement acts adopted in similar cases; validity of law-enforcement acts, in particular, court decisions; consistent compliance with legal positions formulated by higher courts; strict execution of court decisions" (p. 5).

It should be noted that the views on the essence and purpose of legal certainty in civil and criminal proceedings also differ. We share the opinion of those scientists who believe that it is limited and incorrect to exclusively identify legal certainty with regulation stability and consequences of a final court decision, since the result of criminal proceedings is not always associated with issuance of a judicial act. In addition, in criminal proceedings, the need for certainty always arises before the

trial on the merits, in particular, during the pre-trial investigation, which is a mandatory stage of the criminal proceedings. We believe this position is fair, taking into consideration the specifics of criminal proceedings, which are not exclusively limited to trial but include various forms of procedure with special formal requirements established. Violation of a form of procedure entails the purposelessness of criminal proceedings as a whole, so the uncertainty of the criminal adjective legislation, unpredictability of the exercise of rights, obligations, and powers in the implementation of proceedings should be minimized.

In his treatise *On Crimes and Punishments*, C. Beccaria (1995) wrote with regard to the issue considered above: “When the rule of right, which ought to direct the actions of the philosopher as well as the ignorant, is a matter of controversy, not of fact, the people are slaves to the magistrates” (p. 78). Thus, we can conclude that legal certainty in criminal proceedings implies predictability and unambiguity of the procedure, outcomes, and legal status of its participants in so far as it affects their rights and legitimate interests.

Reflecting on the specifics of legal certainty in criminal proceedings, we should take into account the criteria (indicators) of the Rule of Law Index 2021. As a combined indicator, it is made on the basis of data obtained from expert sources and public opinion polls in 139 countries and covers eight key factors: 1) Constraints on Government Powers; 2) Absence of Corruption; 3) Order and Security; 4) Fundamental Rights; 5) Open Government; 6) Regulatory Enforcement; 7) Civil Justice; 8) Criminal Justice. When measuring Criminal Justice (factor 8), the following sub-factors are considered: 8.1 Criminal investigative system is effective; 8.2 Criminal adjudication system is timely and effective; 8.3 Correctional system is effective in reducing criminal behaviour; 8.4 Criminal justice is impartial; 8.5 Criminal justice is free of corruption; 8.6 Criminal justice is free of improper government influence; 8.7 Due process of the law and rights of the accused (WJP, 2021, p. 19).

According to the Rule of Law Index 2021, Ukraine has the worst indicators in terms of Criminal Justice along with the Absence of Corruption (0.37 and 0.33, respectively). As far as the other factors are concerned, the index of Constraints on Government Powers makes up 0.47, while that of Open Government is 0.57; the factor of Fundamental Rights accounts for 0.61, of Order and Security – 0.75. The following two factors show lower indicators: 0.44 for Regulatory Enforcement, and 0.54 for Civil Justice respectively (WJP, 2021, p. 168). This, among other things, indicates the problems of legal certainty in criminal proceedings as well as the need to take into account the legal standards and legal provisions established, particularly in the ECHR case-law.

The analysis of scientific sources and the ECHR case-law has enabled us to make several generalizations and conclusions regarding the principle of legal certainty in criminal proceedings, which includes the requirements that follow:

- compliance of the criminal adjective legislation with the requirements of legal methods: this general rule is particularly important for the criminal procedural field, since most national legal systems assume that legal regulation of such legal relations should take place on the basis of the criminal adjective legislation exclusively. Despite the fact that this principle is mainly seen in law-making, it is also important for law-application, as the legal uncertainty of the criminal procedure form makes it impossible to carry out effective and fair criminal proceedings, adversely affects the legal status of citizens and can have negative consequences for their rights and legitimate interests;
- absence of conflict: contradictions in criminal procedural norms are unacceptable, since they result in complication and excessive bureaucratization of the proceedings, increased number of unintentional errors on the part of proceedings participants, and may also lead to abuse of rights and powers by subjects, which is contrary to the proceedings’ objectives and principles. Among the methods of combating conflicts, researchers distinguish regulation and alteration of laws, judicial interpretation of conflict rules, direct application of generally recognized fundamental principles of law, and resort to the rules regulating settlement of conflicts. The use of the latter method in criminal

proceedings is debatable: some scientists do not recognize the possibility of using legal analogy and inference from general principles of law in criminal proceedings due to the fact that their use is clearly prohibited in criminal law. However, it is obvious that resolution of all situations within investigation at the legislative level is impossible, given the complexity and specifics of the criminal proceedings. In this case, it is advisable that the General Criminal Procedure norms, including the principles of Criminal Procedure, should be adapted to the specific situation in practice;

- ensuring legal unambiguity and confidence in the legal consequences of the proceedings: this requirement covers ensuring the pre-trial significance of the judicial act, proper execution of the sentence, occurrence of the legal consequences established in the decision taken, proper implementation of the rights and requirements of the law during the pre-trial investigation and criminal proceedings as a whole.

In addition, we believe it would be appropriate to group the requirements of legal certainty in criminal proceedings depending on the stage of proceedings into the requirements for pre-trial investigation (grounds and procedure for opening criminal proceedings, legal status of participants in pre-trial investigation, procedure for determining jurisdiction, requirements for evidence, process of proof, terms of pre-trial investigation, requirements for investigative actions, grounds and procedure for closing proceedings), the requirements for trial (stability and finality of court decision, content requirements, enforcement of sentences and other judicial acts), requirements for appeal and review of judicial acts.

The relevance and significance of the legal certainty issues are also reinforced by anticorruption-oriented activities of some newly established anti-corruption bodies in Ukraine, legal uncertainty and fragmentation of their powers in many cases. Thus, despite the status of specialized anti-corruption body, the National Bureau is not a body of exclusive jurisdiction in corruption proceedings. Moreover, pre-trial investigation of those crimes is carried out by the National Police, the Security Service of Ukraine, and the State Bureau of Investigation. In addition, a prospective creation of the Financial Investigation Bureau as a special law enforcement agency for investigation of economic crimes will also raise the issue of dividing powers in this area. Such legal uncertainty and fragmentation of powers adversely affects anti-corruption activities, since it leads to numerous interagency conflicts and complicates the conduct of pre-trial investigations in criminal proceedings. In our opinion, it is more appropriate to concentrate the powers for investigation of corruption crimes within one body with the mandatory provision of necessary material resources and employees of proper qualifications.

In the context of compliance with the principle of legal certainty in criminal proceedings, the problem of repeated prosecution (*non bis in idem*) is of considerable interest as well. Thus, Article 4 para 1 of the Protocol No.7 to the Convention for the Protection of Human Rights and Fundamental Freedoms establishes that “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State” (Council of Europe, 2003). As follows from the above definition, in international practice, the *non bis in idem* rule is considered as a criminal law principle specific to the branch.

A broader view of the concept under consideration has been formed in the scientific literature. Thus, G. Ogneviuk (2019) emphasizes on the need to include the principle of inadmissibility of a person’s repeated prosecution into the idea of legal certainty, since the latter is closely related to it: in particular, variability of liability types and unpredictability of their application do not allow a person to realize the offense severity, predict the scope and nature of negative consequences to be incurred, and therefore creates a threat of uncertainty (p. 113). However, today the principle of double jeopardy inadmissibility is mainly considered as specific to the branch, which has resulted in the unjustified narrowing of its essence and scope of application.

We share the opinion of those scholars who consider the category of *non bis in idem* in two aspects: 1) material, that is prohibition to determine the same criminal act under several articles of the criminal

law simultaneously, in case the norms contained in it relate to each other as the general and special or part and the whole; prohibition of double consideration of the same circumstance simultaneously when qualifying a crime and determining the type and measure of liability by court; 2) procedural, that is, prohibition of repeated criminal prosecution of a person for a crime, for which this person has already been convicted or acquitted. In this sense, the *non bis in idem* rule partially coincides with the principle of court decision stability that has entered into legal force, since it is aimed at guaranteeing and ensuring the stability and certainty of the legal status of the person concerned, and therefore should be considered a content component of the principle of legal certainty.

The issue of applying the principle of *non bis in idem* in cases where a person's act covers several offenses that can be classified under different articles of the law is of importance for ensuring legal certainty. The analysis of the European judicial practice on this issue enables us to conclude that it is contradictory. Thus, in para 338 of the Judgment in the case 'Aalborg Portland A/S and Others v Commission of the European Communities', the Court of European Communities declares that application of the principle *ne bis in idem*, which is recognized as one of the fundamental principles of Community Law, is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected (Commission of the European Communities (CEC), 2004).

The opposite position was held by the Court of European Communities in several judgments given in criminal proceedings, according to which the *non bis in idem* principle is based on the sole criterion – identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together in time, in space and by their subject-matter (European Court Reports, 2007). On the other hand, a subjective link between acts is not a basis to regard them as the "same acts", whereas the application of the double jeopardy principle is either irrespective of the legal classification given to acts or the legal interest protected.

To resolve the issue of the legality of applying liability measures in such cases, the judicial practice of the European Court of Human Rights has provided several approaches to determining the identity of committed offenses:

- *idem factum*: this position focuses on the concept of "the same acts", irrespective of the legal classification given to them. Thus, in the case "Gradinger v. Austria", the applicant was convicted of causing death by negligence and fined for driving under the influence of alcohol. Based on the results of the given case examination, the court found that, despite the fact that the provisions in question differed not only as regards the designation of the offences but also as regards their nature and purpose, there occurred double prosecution, since the decisions in both cases were based on the same acts committed by the applicant (European Court of Human Rights (ECHR) 1995, October 23);
- *concorrs ideal d'infractions*: the acts of the perpetrator, of which he has been convicted, are the same, but constitute various offences that can be considered within different proceedings (Oliveira v. Switzerland, Goktan v. France). In this case the fact that separate offences, even if they are all part of a single criminal act, are tried by different courts is not decisive;
- concept of *essential elements* of an offense: criminal prosecution is allowed in case various offenses are based on a single criminal act (Franz Fischer v. Austria). The court emphasizes that it is necessary to additionally establish whether the offences in question differ in their essential elements being the aim, intent, or nature of the act (action or omission), severity of offenses, and their consequences (ECHR 2001, May 29). This approach is also applied when deciding on classification of offenses committed as a single criminal act, in the case of competition of criminal law norms. In the already mentioned case "Franz Fischer v. Austria", the ECHR stressed that in the competition of general and special norms, the qualification of an offense and criminal prosecution for only one of them is sufficient.

Thus, the ECHR proceeds from the fact that the decision on double jeopardy in each specific case should be taken, given the actual circumstances of the case, their analysis in terms of identity,

inextricable links between them as well as their proof. As for the legal qualification of an offense, given the differences in the legal systems of states that fall under the jurisdiction of the Court, its application should not be a priority, since this approach significantly restricts human rights.

Another debatable issue directly related to the implementation of the requirements of legal certainty in criminal proceedings is the problem of compliance with the principle of prosecution solely on the basis of law (*nullum crimen sine lege*) in proceedings based on peremptory international norms (*jus cogens*), in particular, the principles of international law and norms with regard to international crimes. Thus, Article 7 of the Convention prohibits criminal punishment of a person on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed (Council of Europe, 2003). Similar provisions are embodied in Article 22 of the Rome Statute of the International Criminal Court, which additionally requires that the definition and interpretation of a crime shall be strictly construed. These provisions actually prohibit the application of criminal law by analogy and accept a clearly formulated provision of the relevant law as the only legal basis for criminal punishment (International Criminal Court, 2011).

However, Article 7 para 2 of the Convention contains a reservation that *nullum crimen sine lege* notion shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations (Council of Europe, 2003). It is obvious that such offenses include violations of peremptory norms and principles of international law, which infringe on the international legal order and security, cause concern to the entire international community and are recognized as international crimes.

For the first time, the list of such crimes was defined by the Charter of the Nuremberg Tribunal in 1945, which became a significant contribution of the International Military Tribunal to the development of both the institution of international criminal liability and international law in general. According to Article 6 of the Charter, crimes for which there shall be individual criminal liability are as follows:

- crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, or participation in a common plan or conspiracy for the accomplishment of any of those actions;
- war crimes: namely, violations of the laws and customs of war;
- crimes against humanity: namely, murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime (United Nations, 1949). With regard to this category of offenses, the Charter emphasizes that such actions are recognized as crimes whether or not in violation of the domestic law of the country where perpetrated, which provides for classifying the given provisions as norms for direct action subject to immediate application.

Thus, criminal liability for international crimes, which represent major violations of generally recognized principles of international law and fundamental human rights, directly follows from international law. However, the construction of the relevant legal provision contains an element of uncertainty, which allows for a broad interpretation of this category. In addition, taking into account the peculiarities of international law and the international legal system, when implementing the provisions, the relevant issues are exposed to risk of excessive politicization, which shall adversely affect the legal status of persons whose interests are affected, and the rule of law in general. Nevertheless, despite the said risks, we consider such a deviation from the principle of legal certainty to be appropriate, since an increased number of armed conflicts, further expansion of international terrorism and expansionism, transformation of forms and methods of conducting military conflicts necessitate the proper legal response.

### **Conclusions**

In criminal proceedings, legal certainty implies predictability and clarity of the procedure, outcomes, legal status of its participants as well as of other persons whose rights and legitimate

interests are affected. Taking into account the principle of legal certainty, the general requirements to be met in criminal proceedings include the compliance of criminal procedural legislation with the requirements of legal methods; absence of conflicts; ensuring legal unambiguity and confidence in the legal consequences of the proceedings; finality of the decision of the case. Certainty is evident at all stages of the criminal proceedings (pre-trial investigation, trial, appeal and review of sentences, execution of court decisions), with the special formal requirements made for each of them. Prohibition of re-holding a person liable for the same actions (non bis in idem) is an important procedural rule, which is directly related to the principle of legal certainty.

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