PRINCIPLES OF LAW IN THE CONTINENTAL LEGAL FAMILY (PROBLEMATIC ASPECTS OF DETERMINING THE ESSENCE AND CLASSIFICATION)

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ABSTRACT
The purpose of the article is to determine the essence of the principles of law in the countries of the continental (Romano-Germanic) legal family from the standpoint of various scientific approaches, as well as the classification of the principles of law. The sources that form the basis of the study are the normative legal acts of the states that are part of the Romano-Germanic legal family. The article proposes a positivist classification of the principles of law, the criterion of which is the source of fixing the principle. This classification has not only theoretical but also practical significance, as it allows determining the place of each principle in the system of principles of the branch of law and its role in the system of legal regulation. It allows identifying the nature, advantages, and disadvantages of ways to consolidate principles in the texts of regulatory legal acts, unifying and optimizing these methods.

Keywords: Continental (Romano-Germanic) legal family. Principles of law. Positivism. Integrative legal understanding. Classification of principles of law.

PRINCÍPIOS DE DIREITO NA FAMÍLIA JURÍDICA CONTINENTAL (ASPECTOS PROBLEMÁTICOS DE DETERMINAÇÃO DA ESSÊNCIA E CLASSIFICAÇÃO)

PRINCIPIOS DE DERECHO EN LA FAMILIA JURÍDICA CONTINENTAL (ASPECTOS PROBLEMÁTICOS DE DETERMINAR LA ESENCIA Y CLASIFICACIÓN)

RESUMO
O objetivo do artigo é determinar a essência dos princípios de direito nos países da família jurídica continental (romano-germânica), do ponto de vista de várias abordagens científicas, bem como a classificação dos princípios de direito. As fontes que fundamentam o estudo são os atos jurídicos normativos dos Estados que fazem parte da família jurídica romano-germânica. O artigo propõe uma classificação positivista dos princípios de direito, cujo critério é a fonte de fixação do princípio. Esta classificação tem significado não só teórico mas também prático, pois permite determinar o lugar de cada princípio no sistema de princípios do ramo do direito e o seu papel no sistema de regulação jurídica. Permite identificar a natureza, vantagens e desvantagens das formas de consolidação de princípios nos textos dos atos normativos, unificando e otimizando esses métodos.


RESUMEN
El propósito del artículo es determinar la esencia de los principios del derecho en los países de la familia jurídica continental (romano-germánica) desde el punto de vista de diversos enfoques científicos, así como la clasificación de los principios del derecho. Las fuentes que forman la base del estudio son los actos jurídicos normativos de los estados que forman parte de la familia jurídica romano-germánica. El artículo propone una clasificación positivista de los principios del derecho, cuyo criterio es la fuente de fijación del principio. Esta clasificación tiene un significado no solo teórico sino también práctico, ya que permite determinar el lugar de cada principio en el sistema de principios de la rama del derecho y su papel en el sistema de regulación jurídica. Permite identificar la naturaleza, ventajas y desventajas de las formas de consolidar principios en los textos de los actos jurídicos normativos, unificando y optimizando estos métodos.

INTRODUCTION

The map of the legal systems of the world is characterized by a wide variety (SUHKAREV, 2003). However, it is possible to distinguish groups of legal systems that have similar characteristics. They are usually called legal families in modern comparative studies (DAVID, 1964; ZWEIGERT & KÖTZ, 2000; SAIDOV, 2003; SEREGIN, 2020). Without going into discussions about the number, composition, and name of legal families, as well as their specifics, one of the main legal families today is the Romano-Germanic or continental legal family. The main source of law in the countries of the Romano-Germanic legal family is a normative legal act.

The most important place among the normative legal acts of these countries is occupied by constitutions and sectoral codes. The basis of any normative act (as well as the entire legal regulation in general) is always based on certain initial, fundamental basic ideas. They are called principles of law in legal science. The purpose of this article is to determine the essence of the principles of law in the countries of the continental legal family from the standpoint of various scientific approaches, as well as the classification of the principles of law.

METHODS

We stand on the positions of the positivist legal understanding. Accordingly, the material for analysis was normative legal acts, namely: constitutions and branch codes of several countries that are part of the continental legal family. For this reason, the research was based on the method of formal legal analysis, which allows identifying and classifying the principles of law enshrined in the texts of normative legal acts.

RESULTS

There are different approaches to understanding the principles of law in the world scientific literature. These differences are due not only to the individual scientific approach of the researcher but also to the type of legal understanding that they adhere to. Moreover, adherence to a particular type of legal understanding, which is natural, is not determined by belonging to any country. The principles of law found a place in the framework of positivist, natural law, and integrative legal understanding.

First, it should refer to the principles of law within the framework of positivist legal thinking. In our opinion, no matter how it is criticized, the positivist legal understanding in its modern version most adequately reflects the state-legal realities. It is not abstract-philosophical but pragmatic, practice-oriented. The sign of equality between law and order makes it possible to make the law definite and understandable to the legislator, the law enforcement officer, and the population. The positivist approach to understanding the principles of law is reflected, for example, in the studies of H.L.A. Hart (1961) and J. Raz (1972). In the Soviet Union, most researchers, in terms of the principles of law, also stood in positivist positions (ALEXANDROV, 1957; LUKASHEVA, 1970). Many Russian scholars, including us, continue to consider the principles of law in the context of positivist legal thinking (FURSOV, 1999; DEMICHEV, 2014; DAVYDOVA, 2016; DEMICHEV & ILIUKHINA, 2019). In general, from the position of positivism within the framework of the continental legal family, the principles of law are only those fundamental ideas that are enshrined in the texts of normative legal acts. Later we will return to this problem, and now we will describe how the essence of the principles of law is perceived in non-positivist concepts.

In the version of the modern interpretation of R. Dworkin's theory of natural law, a certain place was also given to the principles of law. The success of law enforcement, according to the named scholar, largely depends on the judge's knowledge of the principles of law. Criticizing positivist legal thinking, he emphasized that the most important component in the principles of law is precisely moral but not normative. The latter is possible since Dworkin worked as an assistant judge in the US, and his worldview was formed within the Anglo-Saxon legal family (the Anglo-American legal family, or the "common law" family). In Dworkin's theory, there is a hypothetical figure of "legal Hercules" – an ideal judge, whose infallibility is conditioned by two factors, namely: unlimited knowledge of the principles of law and unlimited time during which they can make decisions (DWORKIN, 1986).

According to Dworkin, in contrast to legal norms, legal principles can conflict with each other and have different weight: some are more significant, others are less significant (DWORKIN, 1967).

The concept of the libertarian theory of the law of the Armenian-Russian scholar V.S. Nersesyan, who criticized both positivism and the natural-legal concept, found a clear separation of law and order. Attention was focused on the fact that principles of law in the legal system play the role of a vital force, a self-regulation mechanism, and a pivot that ensures the unity and consistency of all elements of the legal system (NERSESYANTS, 1983) and also act in as a measure of justice in law (NERSESYANTS, 2004).
The principles of law were not ignored by the proponents of integrative legal understanding (CANKOREL, 2008; DACI, 2010; ERSHOV, 2018a; ERSHOV, 2018b; SKOROBOGATOV & KRASNOV, 2020). The essence of the principles of law in the framework of integrative legal thinking is dual. Proponents of this approach mechanically mix phenomena of different orders: normative and cognitive. In their view, the principles of law are both norm-principles and guiding ideas enshrined in legislation, the form of law, the standards on which legal norms are based, and some universal legal values. Thus, along with the fact that there are principle-norms, J. Daci emphasizes "the fact that legal principles are almost the same in all legal systems of the world. This shows the very true nature of a legal principle as universal legal maxims" (DACI, 2010).

This scholar also sees legal principles as legal values outlining the foundations of a legal system: "In fact, legal values of a legal system can be identified also with the main characteristics of a legal system, as such they outline the foundations of a legal system and thus they are at the same time legal principles" (DACI, 2010). A.V. Skorobogatov and A. V. Krasnov conclude that "the legal principle as a philosophical and legal category is a conventional result of legal communication and can be presented in epistemological, ontological, and axiological aspects" and the principles "can have an external normative expression in the system of legal norms or be contained in scientific and official doctrine" (SKOROBOGATOV & KRASNOV, 2020).

Having analyzed the main approaches to the essence of the principles of law, proceeding from different types of legal thinking, we conclude that, in general, it is possible to talk about two approaches (doctrinal and positivist) to understand the principles of law.

1. **Doctrinal approach**. Proponents of this approach assume that the essential characteristic of the principles of law is that they are formulated by scholars and practicing lawyers based on analysis and interpretation of the norms of law contained both in normative acts and other sources of law. Also, the principles of law can be derived from the study and interpretation of judicial practice, as well as legal reality in general. The consequence of this is the diversity of views of scholars on the quantitative and qualitative composition of the principles of law.

In our opinion, the imperativeness of such a principle is called into question in cases where the principle is not explicitly enshrined in the text of a normative legal act. Indeed, what kind of imperative for the law enforcement officer can we talk about if one researcher considers a certain provision to be a principle of law, and another does not, and there are no clear instructions on this in the law itself? The proponents of the doctrinal approach note the presence of normative principles, but they put them on an equal footing with the doctrinal principles derived by scholars from the content of normative acts or formulated by researchers based on their ideas about legal reality.

2. **Positivist approach**. Supporters of this approach recognize as the law only what is enshrined in the sources of law officially recognized by a particular state. As for the countries belonging to the Romano-Germanic legal family, this refers to, first of all, the consolidation of the principles of law in the texts of normative acts. Thus, within the framework of the positivist approach, only such fundamental ideas that have found direct consolidation in normative legal acts are considered to be principles of law. This means that the essential characteristic of the principles of law is imperative. The imperativeness of the principles of law is manifest in the fact that they are binding on the subjects of law, and there is no need or the possibility of interpretation, whether a specific principle exists or not.

We believe that in scientific discourse, both doctrinal and positivist approaches to understanding the principles of law have an equal right to exist. From the standpoint of legal practice in the countries of the Romano-Germanic legal family, the doctrinal approach does more harm than good, since it disorients the law enforcement officer and does not allow them to have a clear idea of what principles they should be guided by when implementing the rules of law. In our opinion, there should be a direct textual indication in the texts of normative acts that a certain provision is a principle and not something else. This can be done by using the term "principle" in the title of chapters or articles of the law (as a less successful alternative—"fundamentals" or "basic principles"). It is also desirable that the legislator uses the word "principle" in the text of the articles of regulations (e.g. not "legality" but "principle of legality", not "presumption of innocence" but "principle of presumption of innocence", not "adversarial system" and "principle of adversarial principle", and so on).

The principles of law are not static – they change with society. However, the awareness of the mobility of the principles of law occurs in different ways. For the positivist, the mobility of the principles of law is directly related to the dynamism of legislation. For the supporter of the doctrinal approach, the principles of law are more static, since they express ideas that are characteristic of society as a whole and do not directly depend on the will of
the legislator. Moreover, at the level of doctrine, principles that are not already fixed or not yet fixed in the normative act can be identified and justified.

Adherence to one approach or another determines the assessment of the functional role of the principles of law. In our opinion, concerning the normative principles of law, they are more likely to express the state will and concerning doctrinal principles, they mainly reflect the political, legal, and socio-economic reality of a particular state in a certain historical period. Consequently, the normative principles of law have a regulatory function, while the doctrinal principles have an interpretative and ideological function. The latter consists in the fact that certain social strata express their attitude to the legal reality and the prospects for its change through science. Also, doctrinal principles perform a stimulating function, as they can influence the development of legislation. This function is particularly evident in periods of transition and reform when the views of individual scholars and the doctrine can influence the legislator. At this time, doctrinal principles have the greatest chances to transform into normative principles and move from the field of legal consciousness to the field of law.

Ideas that are not directly enshrined in normative acts are not legally principles of law, because they have a doctrinal nature and are not in the sphere of law, but in the sphere of legal awareness, and, therefore, are not binding on the law enforcement officer, that is, they do not have imperativeness. The relevance of the principles of law as a kind of theoretical construct to the category of legal consciousness was paid attention, for example, by E.A. Lukasheva (1970: 21), D.A. Fursov (1999: 360).

The importance of the principles of law lies in the fact that they represent the ideological core of each branch of law and the entire legal regulation. First, one or another idea arises, which is later fixed in the text of a normative legal act and then becomes a guiding principle for the law enforcement officer. The set of principles of law is an element that characterizes both individual branches of law and the entire legal system. The principles of law and their totality are a mandatory element of the branch of law. The set of principles of law is also an element that characterizes a particular branch, reflects its essence. Thus, only by a set of principles, without any additional information, it is easy to understand which branch of law is being discussed.

In jurisprudence, there are different approaches to the classification of principles of law (DACI, 2010; ERSHOV, 2018b). Without going into discussions about the existing classifications of the principles of law, we note that the most consistent with the legal realities of the modern law of the countries of the continental legal family, in our opinion, is the classification of the principles of law within the framework of the positivist approach, depending on the source of their consolidation. Thus, the principles of any branch of law can be divided into three groups:

1. constitutional principles that are not duplicated and/or specified in branch codes;
2. constitutional principles duplicated and (or) specified in branch codes;
3. the principles of the branch of law, which are fixed only in the branch codes.

The most difficult thing, in this case, is to identify constitutional principles that have not been duplicated and/or specified in branch-specific codified acts. The difficulty lies in the fact that the term "principle" is rarely used in the sense of "principle of law" in most of the constitutions of the countries of the Roman-Germanic legal family. Let us illustrate the above provision with an example of the Constitution of the Russian Federation, adopted at a national referendum on December 12, 1993. The term "principle" appears eight times in this document (preamble, part 4 of Article 15, part 1 of Article 17, Article 69, paragraphs i) and ii) of part 1 of Article 72, part 3 of Article 75, part 1 of Article 77). There is a mention (but not the disclosure of the content) about the existence of some generally recognized principles of equality and self-determination of peoples (preamble), generally recognized principles of international law (part 4 of Article 15, part 1 of Article 17, Article 69), general principles of taxation and fees in the Russian Federation (paragraph i) of part 1 of Article 72, part 3 of Article 75), general principles of organizing the system of state power and local self-government bodies (paragraph n) of part 1 of Article 72), general principles of organization of representative and executive bodies of state power (part 1 of Article 77). Thus, in the articles of the Constitution of the Russian Federation, where the concept of "principle" is applied, it is not used in the sense of "principle of law", except for the mention in three articles on the principles of international law. These principles are not listed or specified.

Another problem is that neither in the Constitution of the Russian Federation from December 12, 1993, the Constitution of the Italian Republic from December 22, 1947, the basic law of the Federal Republic of Germany from May 23, 1949, the Constitution of the French Republic from October 4, 1958, the Spanish Constitution of December 29, 1978, the Constitution of the Kingdom of the Netherlands from February 17, 1983, the Constitution
of the Czech Republic dated December 16, 1992, the Constitution of the Republic of Poland from April 2, 1997, nor in the constitutional acts of the vast majority of other countries belonging to the continental legal family, articles do not have names. Naturally, this complicates not only the allocation of the principles of law but also the formulation of their names. Thus, the name of the constitutional principles is conditional, and the allocation of a normative fundamental idea can be debatable. The names and formulations of individual principles are debatable, but not their essence, which is reflected in the constitutions.

An exception is the Constitution of the Republic of Armenia dated July 5, 1995, as amended by a referendum on December 6, 2015. Formally, the Constitution of 1995 is in force in Armenia, but a new Constitution was adopted in 2015. In its original text of 1995, as in the Constitutions of most other states, the articles had no titles. However, all articles were named in the current version of the Constitution of the Republic of Armenia. Moreover, in several cases, in the title of articles of this normative legal act, the legislator uses the term “principle”, including in the meaning of “principle of law” (Article 6 “The principle of legality”, Article 71 “The principle of guilt and the principle of proportionality of punishment”, Article 72 “The principle of legality in the establishment of crimes and the imposition of punishments”, Article 78 “The principle of proportionality”, Article 79 “The principle of certainty”). Undoubtedly, this approach makes it easier to understand what ideas the legislator considers fundamental principles of law.

Due to the limited scope of this work, we will refer the reader to previously published articles, which provide a positivist classification of the principles of various branches of the law of the Russian Federation and the Republic of Armenia (DEMICHEV, 2014; ILIUKHINA, 2018; DEMICHEV & ILIUKHINA, 2019) and restrict ourselves to just one example.

Classification of the principles of civil law of the Russian Federation.

1. Constitutional principles of civil law, not duplicated and (or) not specified in the Civil Code of the Russian Federation (part one) of 11/30/1994 # 51-FL:

1. the principle of legality (Article 15 of the Constitution of the Russian Federation);
2. the principle of respect for the honor and dignity of the individual (Article 21 of the Constitution of the Russian Federation);
3. the principle of guaranteed protection of human and civil rights and freedoms (Articles 17, 18, part 1 of Article 45 of the Constitution of the Russian Federation);
5. the principle of guaranteeing the right to receive qualified legal assistance (Article 48 of the Constitution of the Russian Federation);

2. Constitutional principles of civil law, duplicated and (or) specified in the Civil Code of the Russian Federation:

1. the principle of equality of participants in civil law relations (part 1 of Article 1 of the Civil Code of the Russian Federation). This principle is a concretization of the principle of equality before the law and the court, which is enshrined in part 1 of Article 19 of the Constitution of the Russian Federation;
2. the principle of inviolability of property (part 1 of Article 1 of the Civil Code of the Russian Federation) is a concretization of the principle of recognition and protection of various forms of ownership, enshrined in part 2 of Article 8 and Article 35 of the Constitution of the Russian Federation;
3. the principle of the inadmissibility of arbitrary interference by anyone in private affairs (part 1 of Article 1 of the Civil Code of the Russian Federation). In this case, it is possible to talk about the development in the civil legislation of Russia of the principle of inviolability of private life, guaranteed by Article 23 of the Constitution of the Russian Federation;
4. the principle of the unhindered exercise of civil rights, ensuring the restoration of violated rights, their judicial protection (Part 1 of Article 1 of the Civil Code of the Russian Federation) is a concretization of the constitutional principle of guaranteed judicial protection of rights and freedoms (Article 46 of the Constitution of the Russian Federation);

5. the principle of free movement of goods, services, and financial resources throughout the territory of the Russian Federation [part 5 of Article 1 of the Civil Code of the Russian Federation, part 1 of Article 8 of the Constitution of the Russian Federation].

3. Sectoral principles of civil law, reflected only in the Civil Code of the Russian Federation:

1. the principle of freedom of contract (part 1 of Article 1 of the Civil Code of the Russian Federation);

2. the principle of dispositiveness of civil legal relations (part 2 of Article 1 of the Civil Code of the Russian Federation);


In our opinion, the positivist classification of the principles of law has several advantages. Firstly, it allows seeing the place of each principle in the system of both the principles of the branch of law and legal regulation. Secondly, it has a practical value. It allows understanding the nature and ways of consolidating the principles in a particular normative act, optimizing their system, unifying the consolidation of the same principle in different normative legal acts. Accordingly, this classification, having clarity and concreteness, is of practical use to the law enforcement officer. Within the framework of this classification, the most difficult link is constitutional principles, since the principles of law in several constitutions of countries related to the Romano-Germanic legal family do not have names and, in many cases, clearly established formulations, but the leading role in the legal regulation of the main ideas enshrined in the constitutions is beyond doubt.

CONCLUSION

The fundamental, basic ideas that take place in the legal sphere of the life of society can be divided into two large groups: 1) ideas that have found consolidation in regulatory legal acts and have a direct impact on the regulation of public relations and 2) ideas derived by scholars and other subjects from the analysis of regulatory legal acts, from the historical and socio-political situation. The first group of ideas is the principles of law and is an element of the legal system of society. The principles of law are the basic principles, guiding ideas, directly enshrined in the text of regulatory legal acts and addressed to the law enforcement officer and other subjects of law. Normally enshrined principles of law are the ideological core of the branch of law and the entire system of legal regulation. They lie at their basis and are the matrix on which all other elements are built up.

The ideas of the second group, no matter how important they are, are not enshrined in the texts of regulatory legal acts and are outside the sphere of law, but relate to the area of legal consciousness and, accordingly, are not principles of law. Conditionally, they can be called doctrinal principles.

It is possible to classify the principles of law based on different grounds. The criterion of the most successful classification is the source of fixing the principle. Within the framework of this positivist classification, all principles of law can be divided into three groups: 1) constitutional principles, not duplicated and (or) not specified in sectoral codes; 2) constitutional principles duplicated and (or) concretized in sectoral codes; 3) the principles of the branch of law, enshrined only in branch codes. This classification is not only of theoretical but also of practical importance. It allows determining the place of each principle in the system of principles of the branch of law and its role in the system of legal regulation. It allows identifying the nature, advantages, and disadvantages of ways to consolidate principles in the texts of regulatory legal acts, unifying and optimizing these methods.

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