On shaping the constitutional principles and understanding the nature of their effectiveness in the legal life of society

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Abstract. The theory of shaping the constitutional principles as the leading principles of law in a multi-level pyramid of legal forms (in fact, the theory of the legal form of the highest level) is set forward. The dialectical approach, the method of rising from the abstract to the concrete in understanding the regular law formation processes, the theory of factors, the theory of law formation, the critical reflection method, comparative analysis, systemic and sociological-legal approaches were used as the methodological foundations of the research. Two main groups of approaches to understanding the nature of the principles of constitutional law, namely subjective-right-positivist and objective-social ones, are presented. The subjective-legal positivist approach to the problem of the emergence of the principles of law in general and the principles of constitutional law, in particular, is critically assessed. It is noted that the objective-social approach to understanding the nature of the principles of law is more true; it allows to answer the question of the unconditional effectiveness of constitutional principles in the legal life of society, despite changing market circumstances in politics, economics etc. It is argued that shaping the constitutional principles is based on the most powerful and fundamental factors in the development of social and legal life. Some examples with the principles of the priority of human and civil rights and freedoms, the rule of law, the concept of separation of powers etc. are given. It is concluded that the principles of law express the objective laws of social and legal life and this gives them inviolability and all-time practical significance.

Keywords: constitutional principles, law formation, nature of law, effectiveness of law

1 Introduction

It is extremely important and relevant to study the principles of constitutional law precisely as legal regulators (and not only subsidiary but also competing with other legal forms, as well as capable of ‘winning’ in this competition if necessary) of social relations, but it cannot be fully considered without clarification of their nature, their so-called ‘genetic’ data, and it is reasonable to do this with respect to the principles of law in general,

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especially since the principles of constitutional law are often called the most explicit expression in the legal matter of general legal principles.

The principles of law as such are a structural component of the entire legal organisation of social life; the 'core' of legal matter in the form of legal norms is based on them; they launch the legal regulation mechanism. The principles of law are the first thing that can come to assistance if a crisis situation in law arises (a legal conflict is created, a legal gap is discovered, and so on). Due to legal principles, the law enforcer or the legislator at the legislative level resolve a local legal crisis and thereby ensure stabilisation in the legal life of society not only in a specific location but society-wide. This is fully applicable to the constitutional principles of the rule of law (or the principles of constitutional law, since we consider these concepts as interchangeable in the context of this research).

However, is this really so, or are such statements about the 'power' of legal principles just an illusion of idealist jurists, but in practice everything can be completely different and the principles of law (including the constitutional law) can be ignored at any moment, and their place in resolving a legal issue will be 'taken over' by the subjective discretion of the law enforcer, who will either refuse to consider the issue for the interested parties (referring to the lack of a specific prescription in the body of laws to resolve it), or allow, on the basis of his purely subjective view of things, which for the interested parties will not only become rather useless but possibly even more harmful than 'freezing' the issue due to the lack of regulatory provisions in the existing law. It is often the case, especially at lower legal instances, and it is possible only with the efforts of the parties to the case and their legal defenders not to stop (not stall) the case and bring it to the final stage, where, to one degree or another, the true rightness and legal justice, including and largely due to the fact that in law those basic principles, that not only can but must be taken into account when solving the relevant case, will be discovered and identified. In this context, the question arises why the 'obligatoriness' effect inherent in legal principles can be so strong, why the principles of law take effect in necessary situations and can ensure their fair resolution. In our opinion, the answer to this question lies in understanding their nature and their determining foundations. But what is this nature, what is it? We will try to answer this statement in the proposed material of the article.

2 Materials and methods

The classical principles and modern methods of scientific knowledge applied from the standpoint of the transition from monistic methodology to methodological pluralism in science provide the methodological basis for studying the nature of the basic principles of constitutional law. The dialectical approach, the method of rising from the abstract to the concrete in understanding the regular processes of law formation, the theory of factors, the theory of law formation, the critical reflection method, comparative analysis, systematic and sociological and legal approaches were used as the methodological foundations of the research.

The research is based on the generally recognised (classical) principles of scientific knowledge (including, when formulating conceptual provisions, it is supposed to take into account the principle of determinism, which means that the basis of social and legal phenomena (including constitutional principles) are factors, causes, prerequisites that determine them. At the same time, it makes sense to take into account a multifactorial approach, which provides the basis for a deeper and more substantive analysis of contemporary problems of legal development. As a part of the study, it is also supposed to combine special legal concepts and categories with the categorical apparatus of other social and humanitarian sciences, since it is the synthetic scientific and methodological basis that makes it possible to more accurately reveal the original meaning of any general social and

legal phenomenon, in particular, the social nature of objective law and principles of constitutional law.

At the philosophical level of methodology, to understand the process of shaping the principles of constitutional law, the potential of dialectics as a doctrine of universal connection and development, its basic laws, is used. At the general scientific level, in addition to the traditional classical general legal and general logical methods (deduction, analysis, synthesis, comparison etc.), the principle of a systematic study of social phenomena and processes will act as a cognitive method adequate to the subject of research in the form of shaping a system of constitutional principles. Since the main issue is the study of the social foundations of law, constitutional principles, this will naturally express the application of a sociological approach to the study of law, which, in order to cover legal reality, proceeds not from formal legal provisions but directly from the very social conditions of life (social and legal life). The line of revealing the nature of the principles of constitutional law naturally suggests all this.

3 Results

In legal science (the doctrine of law), which directly or indirectly plays a very significant role in the general ideological context of the legal life of society, as well as in various legal practices (legislative, judicial etc.), there are two main groups of approaches to understanding the nature of the principles of constitutional law, such as subjective-right-positivist (subjective-legislative), whose representatives include such scientists as S.S. Alekseev, V.M. Semenov, K.P. Urzhinsky, V.I. Zazhitsky, S.N. Bratus, N.A. Chechina, O.A. Kuznetsov; from foreign ones G. Hart, J. Raz and others, and objectively social, whose supporters can be considered such scientists as N.G. Aleksandrov, E.A. Lukasheva, V.P. Gribanov, L.S. Yavich, V.M. Vedyakhin, S.V. Sarbash, E.V. Skurko, I.N. Senyakin, S.M. Shakhrai, A.A. Klishas, I.A. Umnova-Konyukhova, I.A. Aleshkova, from foreign countries R. Dvorkin, R. Aleksi and others.

Within the framework of the first approach, the opinion dominates that before something becomes a principle of law, it is necessary to obtain the sanction of the law, that is, to be enshrined in the law, without this, no matter how valuable and significant the ‘idea’ of law may be, it won’t regarded as the principle of law. This will be an idea (principle) of legal consciousness, a moral guideline, but not a principle of law, which should be governed in the legal activity processes. That is, here the principle of law can arise exclusively from the legislative form. Its strength is determined by the state coercion behind the law (in which the principle of law is defined).

In practical terms (no matter how logical the position, which recognises the need and importance of legislative consolidation of the principle of law including constitutional law, may be like), in its extreme form it will mean that the law enforcer will be ‘free’ from following those legal principles, that are not reflected in positive law, will not be governed by a legal idea that is not enshrined in legislation, the principle of law, and will decide the matter not quite the way, and maybe not at all the way this legal idea designates (for example, if the priority of the rights and freedoms of a person and a citizen, being recognised only under the condition of its legal enshrinement, would not have such constitutional enshrinement as a leading legal principle, then any conflict of interests of a person and power, a person and the state would be predominantly resolved in favour of the latter, and all hopes that this is the basic principle of relations in the civilised society for law enforcement, focused on ‘legalness’ (legal reinforcement) of the principles of law would have no effect).

The second approach sees the origins of the principles of law in the objective nature of things, only that ideological (ideological-and-practical) principle can enter the system of

principles of law, which is a 'cast model' from real social and legal processes, expresses the objective conditions for the development of certain situations, objective legal laws (take the same principle of priority of the rights and freedoms of man and citizen – that this, if not objectively 'suffered' result of the centuries-old struggle of people for their rights; the same can be said about the principle of the rule of law or the principle of separation of powers. Now trying to start ignoring this the givenness of law means dooming the social system to new trials of crises and upheavals, but it is unlikely that any state will consciously go for this by trying to arbitrarily violate this principle for the sake of only its 'public' interests). That is, in this paradigm, the principles of law have as their origin not the law but some objective basic laws, the consideration of which in legal practice is not only possible but vital; otherwise, the most unfavourable consequences may arise.

There are grounds for believing that this second approach contains the necessary foundation for building the entire pyramid of legal forms, where at the top there should be precisely the fundamental principles dictated for the legal superstructure by the most objective reality, the practice of social and legal life, and precisely in their most significant and deep manifestations (a person, his/her unchanging value, life, honour, dignity, freedom, equality, solidarity, a favourable environment etc.), i.e. everything that can allow both a person and society to exist and develop in general.

It can be affirmed that the objective nature of legal principles is a guarantee of their fundamental nature in the legal system and the legal life of society, this determines their supra-normative status, which will always be properly oriented towards the correct resolution of possible disputes, conflicts, clashes of positions etc. The principles of law, as R. Alexi asserts that there is a special world where principles have their own 'weight', 'strength' and 'authority' allowing them to rise above legal provisions [1, 2], since now, according to R. Dvorkin, they are fair, justified and correct [3, 4]. Everyone, who enters the sphere of law, will understand those peculiar 'red lines' that in no case should be crossed in both implementing a subjective legal status and applying law to other persons, because those 'lines' are drawn in the space of law by the very life of society.

4 Discussion

According to the doctrinal direction of the legal and positivist orientation, the guiding legal provisions, before receiving the status of legal principles, should be expressed in law, enshrined in its provisions, that is positive. So, S.S. Alekseev notes 'Those principles, that are not yet enshrined in legal provisions, cannot be classified as legal principles. They are only ideas (beginnings) of legal consciousness, scientific conclusions but not the principles of law' [5].

V.M. Semenov, in confirming the connection between the principles of law and their legislative enshrinement, also noted that the principles of law cannot exist outside of law, that they should be formulated quite definitely in the form of specific legislative provisions [6]. According to the above logic, if the content of the principle is not expressed textually in the law, one can only speak of the principle of legal consciousness [7].

K.P. Urzhinsky agrees with this position, 'Principles, that are not enshrined in legal provisions, do not have the quality of a legal principle and are elements of legal consciousness or principles of morality etc. Only after passing through the will of the state and having enshrined in legislation, and they become universally effective. That is why the legal method of enshrining is an integral feature of the principle of law, which distinguishes it from the principle of morality, religion, etc.' [8].

By recognising this point of view in many respects, V.I. Zazhitsky also emphasises, 'the fundamental ideas formulated by researchers and proposed as legal principles are initially reflected in draft laws, after which the legislature decides whether to recognise them as

such or not. The fundamental ideas enshrined in laws become regulatory provisions, take a state and imperious form. No scientific ideas, that have not been enshrined in law, can be considered legal principles, they cannot regulate any legal actions and legal relations" [9].

This point of view is also reflected in the branch of legal sciences. In the field of civil law, in particular, it is supported by S.N. Bratus [10], N.A. Chechina [11], O.A. Kuznetsova [12] and others. In constitutional law, M.V. Marchheim, S.A. Moskalenko [13], Yu.V. Nechipas and I.A. Poberezhnaya are not oriented towards this position [14]. In particular, in relation to the analysis of the principle of equality of rights of women and men, the literature notes that 'constitutional consolidation of the principle of equality of men and women should be immanent in any rule of law state in which a democratic and political regime is defined. According to the authors, this has a positive effect on the implementation of the principle of equal rights for men and women' [13].

Following this, a reasonable question arises, namely, if this fundamental legal provision is not expressed in legal forms, how will a statistical law enforcer look at such situations? The question is largely rhetorical. He/she will look at this a) as a situation that does not have a legally defined principle in the legislation for its resolution; b) the objective principle of gender equality can be ignored and the matter is decided according to the ordinary 'common' sense, for the sake of the values and ideas that dominate in everyday life, that a man is a stronger sex, a woman is a weaker sex, which means that the decision can be reduced to the recognition of women's rights and non-recognition of men's (for example, in relation to upbringing children after the dissolution of marriage, the division of joint property etc.). All because the principle of the sought-for equality of men and women, without being legally enshrined (in some countries, as the authors write, this principle may not be directly enshrined in legislation, including the constitutional one), will not 'signal' the law enforcement officer to solve the case taking into account the legal equality of the parties. One can only guess how such decisions will turn around.

Obviously, such a purely positivist position (despite its attractive logic) has little prospect for real social and legal practices. If the law enforcers, who leave the walls of universities and internship rooms and offices, absorb it into their consciousness, then the practice will develop according to scenarios, that are not quite favourable from our point of view. The principles of law, including the constitutional law, will never be able to compete with unfair (illegal) prescriptions of laws, and will never be able to come to the rescue in the absence of legal provisions for specific cases. However, such a situation is very disastrous for the legal system and legal life. Therefore, it is necessary (without denying the importance of the legal consolidation of legal principles) to know and understand that principles become 'principled' not because they have received legislative consolidation but because they have an objective (logical) basis for that.

In this regard, the doctrine of law has developed a different line of reasoning about the nature of the principles of law, and which seems to us more productive from all points of view and more reasoned. Principles should be principles, and not something secondary or derivative.

Thus, the prominent Soviet legal theorist N.G. Alexandrov noted, 'The basic principles ... of law are objective in their content. Firstly, this means that putting the basic principles into practice for any ... state is an objective necessity and, consequently, a policy, that deviates from them would inevitably fail, and, secondly ... the economic and political system provides an objective opportunity for consistent implementation of such principles' [15].

E.A. Lukasheva also writes, 'Principles… of law are objectively conditioned by the nature of… social relations, economic and political structure… of society and reflect the objective patterns of… social development… Legal principles are a reflection of objectively determined requirements imposed… on legal regulation [16].

According to V.P. Gribanov, 'fundamental ideas do not fall from the sky. They are a reflection of the most important aspects of social life and, above all, the objective laws and trends of social development…' [17].

In our opinion, this sounds very convincing, and it should be noted that such attitudes came in response to the general methodological programme typical of Soviet science as a whole, a materialistic understanding of social processes. F. Engels in Anti-Dühring argued that the principles 'are not applied to nature and human history but are abstracted from them; not nature and humanity conform to principles, but, on the contrary, principles are true only insofar as they correspond to nature and history. This is the only materialistic view of the subject' [18].

Lawyer L.S. Yavich writes about this, 'Principles of law are such beginnings and thought-starters of its being, which express the most important patterns and foundations of a given socio-economic formation, are of the same order with the essence of law and constitute its main content, possess universality, supreme imperativeness and universal validity; correspond to the objective need to strengthen the dominant mode of production' [19].

V.M. Vedyakhin, by analysing the principles of legal regulation of market relations, notes 'Legal principles exist objectively, they are actually laid down in law, regardless of whether they are formulated in a scientific concept or not' [20]. The legitimacy of the interpretation of the principle as an objective law is also confirmed by V.M. Syrykh [21, 22].

This approach can be also manifested in modern sector-based sciences (which is rather an exception to the general rule). In particular, a professional in the field of contract law S.V. Sarbash is inclined to consider the definition of the principles of law that has become widespread in the literature on civil law, which are interpreted as fundamental principles enshrined in law, as suffering from excessive normativism in the part in which it is asserted that these principles are enshrined in law [23].

In the modern theory of law, such an opinion is shared by V.V. Ershov. The author, in particular, notes that the 'principles of law are primary in relation to the rules of law. The principles of law make it possible to make law enforcement and law-making processes more specific. The principles of law are the most abstract, less certain than the rules of law, the primary means of legal regulation of social relations and objectively existing elements of the system of law' [24].

A correct observation in connection with the problem of objectivity of the 'basic principles of law' is given by E.V. Skurko, 'On the one hand, in practice it would be adequate to rely on positive norm principles. However, on the other hand, it is wrong to ignore the course of social development, which gives rise to new requirements, already established practices and habits, and, consequently, the corresponding principles of organising the social and legal reality, which have not yet had time to receive their normative consolidation' [25, 26].

This position, as well as the other positions cited above, can be used to confirm the thesis that at the heart of any principle of law (if it is really a legal principle) there are some objectively generated (under the influence of a complex of law-forming factors) behavioural models (principled attitudes) that already exist, a certain matrix of legal proceedings, a reference point for following those guidelines in practice and a model for resolving legal issues. A legal professional cannot but know about them, this is the essence of his/her professional attitude to the case.

5 Conclusion

The idea to connect legal principles and the objective laws of social development is in itself of high cognitive interest, since it suggests the possibility of explaining why a legal principle is not some particular rule, but the main and leading principle in law; it makes it possible to substantiate the known stability of legal principles in comparison with the relative variability of legal provisions; finally, this idea provides an objective criterion for identifying and explaining the legal principles of a given system, branch or institution of law [27].

This idea makes it possible to understand the true (deep) nature of the principles of law and explain their fundamental and ground-breaking nature, including in relation to the principles of constitutional law (constitutional principles). At the same time, it is gratifying that in those works of constitutionalists, that were subjected to analysis to study the problem under consideration, there is precisely such a conceptual line, within which the focus is on the objectivity of the principles of constitutional law.

Therefore, in particular, the authors of the textbook on constitutional law S.M. Shakhrai and A.A. Klishas rightly note that a principle is such a beginning, a guiding idea in which objective laws and needs of social development are manifested [28].

Interesting and noteworthy from a doctrinal point of view in her article on the principles of constitutional law, the definition of the principle of constitutional law is given by I.A. Aleshkova, 'The principle of constitutional law is a formally stable authoritative imperative, that determines the vector of development of law, containing legal information generated on the basis of generalisation of patterns and experience of legal and individual regulation, which is reliable and socially significant for the regulation of public relations in the field of constitutional law' [29].

Therefore, the role and effectiveness of the principles of constitutional law (constitutional principles) cannot be seriously questioned by anyone, since they express the deepest and fundamental principles of public life [30], conflict with such principles would mean nothing else as an entry into conflict with the objective order of things, and hardly for any state, for any system of state structure, such 'resistance' would be appropriate and promising.

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