АКТУАЛЬНІ ПРОБЛЕМИ ПУБЛІЧНОГО ТА ПРИВАТНОГО ПРАВА УКРАЇНИ

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CRIMINAL POLICY OF UKRAINE AT THE PEAK OF DOCTRINAL RECONSIDERATION

Contemporary criminal policy of Ukraine is significantly influenced by global trends towards humanization of criminal liability and protection of rights in the sphere of criminal law application. One of initial questions is the concept of criminal offence, and interrelation of offences with other violations of law. Criminal infraction in its essence is a result of foremost view at contemporary realia of Ukrainian legislation.

Development of public law worldwide is substantially stipulated be lingering state of global economic crisis. Legal system of Ukraine is not an excluding from this general rule, taking in account existing risks for budgetary sphere created by shadow economy, corruption etc. All of manifestations, created by global economic crisis, to certain extents, produce reflections at the scopes of legal systems. It engraves existing global challenges, stipulated by transnational organized crime, ethno-national and religious terrorism and others.

Such challenges do require appropriate responses in the sphere of public law, particularly – criminal law. To give a global response – is a task of the European Community. But the burden «local» reactions to existing situation is assigned at law enforcement bodies of states, and even in greater extent – is within the scope of their legislation bodies.

Criminal lawyers of nowadays while trying to conceptualize the essence of criminal justice in contemporary world argued whether the modern system of criminal justice is suitable to administer justice, i. e. not only appropriate to improve the protection of human rights, but also to promote justice and peace in general (Anne Kindt). Merchandising criminal practices, hate crimes, corruption and organized criminal activity actually have no borders and limits. Marginalization of immigrants does not contradict the widespread misuse of law on international and national level but lead to criminal behaviors worldwide. Deviance and misuse of law became the features of modern way of life, of society's existence. The same we could say to crime phenomena.

That is the fact that usually crime is increasing in scope and intensity (US crime tendencies are exemption of this rule). Due to criminologists' opinion crime threatens the safety of citizens around the world and hampers countries in their social, economic and cultural development. Globalization has provided the environment for a growing internationalization of criminal activities. Multinational criminal syndicates have significantly broadened the range of their operations from drug and arms trafficking to money laundering. Typically, strengthening the capacity of governments to reform legislation and criminal justice systems; establishing institutions and mechanisms for the detection, investigation, prosecution and adjudication of various types of crimes; upgrading the skills of criminal justice personnel are the basic elements in modern criminal policy worldwide (see Stanford Law School notions).

The implementation of the provisions of Lisbon Treaty in the sphere of securing the stability, safety and rule of law zone and the global protection of human rights in European countries have been sequentially leading to the necessity of unification of legislation on ordinary crimes and offences. This is what the modern action plans of the parliaments and legal committees of different countries of Europe operating in the framework of implementation of Stockholm Protocol 2009 are aimed at. This is what the activities of Ukrainian parliamentarians are aimed at as well. The approximation of Ukrainian legislation to the European norms and standards has also touched the sphere of criminal regulation.

One of the modern trends harmonization of criminal law policy of Ukraine with the European Union is making the provisions of the Criminal Code of Ukraine compliant to the European Court of Human Rights practice. Certainly the European Union and the Council of Europe are different supranational entities, bringing criminal policy of Ukraine in compliance with the acts of the institutions of the Council of Europe indirectly leads to harmonization with the legal policy of the European Union.

The ways harmonization of the Criminal Code of Ukraine with the Court practice in criminal law doctrine is seen in different ways: as a mitigation of sanctions of criminal law or as the division of criminal acts into crime and criminal misdemeanor. The last method of the direction of penal policy being investigated was fixed in the Criminal Justice Reform Concept. In this regard, the study of the Court practice as one of the factors behind the introduction of a criminal misdemeanor and its implications for criminal law doctrine of Ukraine determine the relevance of selected research topics and can be used in establishing criteria distinguishing criminal offense of administrative offenses and crimes.

The issues of harmonization of criminal law legislation in the countries of continental Europe and the Court practice were studied by V. A. Tulyakov, P. L. Fris, M. I. Khavroniuk [1, p. 187-189] O. Tolochko, V. P. Tychyi and other scientists. However, the impact of the Court practice as a factor of the division of criminal acts to crimes and criminal misdemeanors was not studied fully. In its decisions the Court notes that the acts which shall be punished with arrest, no matter what types of acts it belongs to under national law, are criminal by their nature. The Code of Ukraine on Administrative Offences provided for such a type of penalty as administrative detention for a number of offenses. We propose to transform the acts of these categories that have a significant degree of public danger into criminal offenses. To prove this position, let's examine the position of the Court with respect to acts for which arrest serves as penalty, as well as the significance and the nature of the Court practice for Ukraine, the list of offenses for which the Code of Ukraine on Administrative Offences of Ukraine provides arrest, and determine the legal nature of these offenses.

It is a common knowledge that the New Criminal Procedure Code 2012 passed by the Parliament of Ukraine has established the extended approach to construction of criminal offense approved in most European countries, embracing both a crime and a criminal misdemeanor. Being a purely procedural category in the context of the mentioned law, the phenomenon of a criminal misdemeanor has given rise to quite a big controversy in the environment of substantial law experts.

First, the current criminal legislation of Ukraine doesn't stipulate the division of criminal offenses into crimes and misdemeanors.

Second, the extended construction entails uncertainties in the law enforcement practice, increases the dark figure of crime, and fundamentally shifts the notions of structure and dynamics of deviance and methods of its analysis.

Third, assigning gravity of an act based on type sanctions imposed for its commitment as a classification criterion doesn't fully correspond with

the realia, taking into account the amendments made to article 12 of the Criminal Code of Ukraine in the course of humanization of the current legislation.

To address these deficiencies and to form new concept, of the President of Ukraine with his Decree № 98/2012-rp has formed a working group on the issues of reforming the legislation on administrative offenses and introduction of criminal misdemeanors in Ukraine. The theoretical model of the concept of criminal misdemeanors is also developed at the Department of Criminal Law of the National University «Odessa Law Academy». [2]

So, if a lesser act is not a crime, then we obviously have to speak about another offense which is similar to a crime. This can be a criminal, administrative or disciplinary offense. For example, petty theft and disorderly conduct have a certain degree of public danger, but this danger is negligible, since it cannot cause substantial harm to legally protected social relations, property or public order respectively. Therefore, the legislator classifies them not as crimes but as other offenses; according to the current legislation they are administrative infractions (offenses). Though having formal similarity to a crime, such an act by its legal nature is an official misconduct.

The traditionalist Criminal Code of France 1810 contained a threemerous classification of criminal acts (violations of the criminal law), distinguishing «criminal misdemeanors» and «criminal offenses» along with the actual crime. Punishability of the act served as the criterion of distinction for the legislator. Hereat, as L. Golovko rightly pointed out, criminal offenses were minor criminal infractions punishable only with «police penalties», primarily a fine, the cases on which were considered by the so-called «police courts»; criminal misdemeanors were more serious violations of the criminal law punishable with so-called «corrective punishment» including more stringent penalties up to imprisonment for several years, cases of which were considered by the so-called «corrective courts» consisting of a number of professional judges; and crimes – the most dangerous criminal infractions, punishable with called «criminal penalties». [3]

A criminal misdemeanor as a form of criminal offenses is distinguished from a crime by the fact that though having external similarity with a crime, its public danger is negligible, since it is not able to cause substantial harm to relations protected by law. When defining the concept of a criminal offense, one should pay attention to its elements and the legal effects of recognition of a socially dangerous act as a criminal misdemeanor. The main difference between a crime and a criminal misdemeanor is the degree of public danger. Criminal misdemeanor has an insignificant degree of public danger; it cannot cause substantial harm to legally protected

relations. In addition, a criminal misdemeanor shall not be punished with penalty involving imprisonment or limitation of liberty. Also, a significant feature of a criminal misdemeanor distinguishing it from crime is that the conviction of a person for a criminal misdemeanor shall not entail such a negative legal effect as a criminal record.

The criminal legislation of Ukraine is in the position of subjective imputation. Therefore, if actions of an individual were aimed at causing substantial harm to legally protected social relations, but the actual damage was insignificant or did not come at all for reasons independent of the perpetrator, the act should be classified as an inchoate crime (a preparation or an attempt), i. e. intent is the focus. The lack of «significant harm» or the threat of such harm eliminates criminality, but it can still be considered a misdemeanor.

With changes in the regulation of misconduct taking administrative measures in Eastern Europe and the dyadic division of criminal offenses in its central part, this model in one way or another effectively manifests itself in combating crime. Therewith, deviant behavior has become a norm for the biggest part of the population. What is at issue is criminal practices hiding in borderline dark figure, what is at issue is everyday crime having become mass due to their subjective «everydayness», not even speaking about palled systematic acts of corruption.

Meanwhile, the increase of criminal offences is on the rise, being dependant on the level of anomie in the society and the norm awareness of the citizens. And following this, we accumulate the experience of naming and punishing them respectively. Now the members of the Presidential Commission are making an attempt to unify non-managerial administrative delicts, disciplinary offenses, and some civil offenses into a single category of a criminal offense. A tendency of over-criminalization emerges and is clearly seen as the methods criminal law are considered to be one of the basic and essential ones for use in the country when controlling deviations.

However, the subjectively explained selectivity of choice of acts caused by the procedural and administrative unprovability of specific infringements will lead to social injustice, when the poor are sent to jail, while the powers that be buy off. In the view of introduction of the new Criminal Procedure Code we will face a situation where after enactment of a criminal law provision the professionals will have to wait for months for clarifications regarding the peculiarities of classification of an act and enforcement of a norm to offenders. This will really lead to systematic violations of human rights, to the formation of social groups stigmatized as potential criminals, deformation of stereotypes and ideals of law and justice.

Hence, first, over-criminalization leads to «desiccation» of preventive and punitive function of criminal prohibition.

And second, amorphism of criminal norm is a precondition of mass violations of human rights and controllable judicial discretion.

From our point of view, the main criterion for the criminalization of acts is defined in Part 2 of Article 11 of the Criminal Code of Ukraine (an act of inflicting significant damage to an individual person or legal entity, society, state).

The paradox of modern public law doctrine is the gradual smearing of publicity, the return of presuming of primacy of the individual, the private over the state, the public, the social. It can be clearly traced in the criminal works. The task of criminal law in utilitarian, legalistic sense is the protection of constitutional norms and principles. As a matter of fact, a Criminal Code is a Constitution with sanctions. Incompleteness of the process of constitutional reform and instability of regulation of relations will lead to inefficiency and palliative nature of criminal law recodification novels, the formation of a new set of temporary «dead» norms.

Criminal regulation should be not so much a tool to protect the state from encroachments on its sovereignty and security as an instrument of protection of the rights and freedoms of an individual and a community.

The emphasis on the community justice, the justice of the involved is particularly important when reorienting the vector of criminal law protection, not upon words but upon deeds.

One may lingeringly talk about the «smearing» of the object of criminal regulation until the state policy not in words but in reality turns its attention to the victims of a crime and the approval of humanistic social values as a priority of criminal protection. We have already had an occasion to write that recodification is not possible without the change of the idea.

This means that there's a need for a new Theoretical Model of the Criminal Code of Ukraine designed for the stable development of relations of nation-building and utmost protection of the rights and legitimate interests of individuals.

Thus, it was suggested that the constitutional conditioning of penal prohibition, the connectivity to the norms of the Constitution of the state and the internationally recognized principles and fundamental freedoms of a human and a citizen be present in the preamble to the future Criminal Law. Among the participants of criminal relations (an offender – the state – a victim – a third person) a central place should be occupied by a victim.

Only penalty should serve as the essence and the substance of liability, while the restoration of rights of the victim should be assigned to other mandatory measures of response to a criminal act.

The legal support of protecting the rights and freedoms of a crime victim should become the main purpose of the new Criminal Code. In this regard, any Criminal Code is built with justification of prohibition of infringements against a person, property, society and state, as well as against a range of moral values declared as the basic ones for the society and supported by it.

Other acts should be decriminalized, passed over to the category of criminal misdemeanors, or instituted on the claim of victims (including the state and other social entities).

At the same time, the extension of the system of private prosecution should lead to the expansion of alternative ways of responding to a crime.

This involves describing the issues related to the imposition of not only punishment, but also other measures of criminal law (security, social protection, restitution, compensation) to the offender in the General Part of the Criminal Code. Here it is necessary to append a description of «ne bis dem idem» principle with a reference to the fact that serving a sentence does not relieve from a responsibility of an offender to a victim.

The consistent formalization of the doctrine of a crime and a criminal misdemeanor with the new classification and taxonomy based on the concept of criminal law in the broad sense is mandatory. For example, in Engel v Netherlands (1976) 1 EHRR 647 cases and the Benham v United Kingom (1996) 22 EHRR 293 case, the Court indicated that delinquencies for which such a penalty as arrest is provided, no matter what types those delinquencies are considered to be under national law, are criminal acts. The specified position has also found reflection in the Court's decision in p.55 of 06.09.2005 case following the complaint N 61406/00 «Gurepka against Ukraine» [4]. With the adoption of the Law of Ukraine 17.07.1997 «On ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the first protocol and protocol number 2, 4, 7, 11 to the Convention» (hereinafter – the Law «On ratification of the Convention») the Parliament of Ukraine gave consent to bound our state with these treaties. According to Art. 32 of the Convention as amended by Protocol number 11, the question of the interpretation and application of the Convention and its Protocols is within the competence of the Court. Ukraine has recognized the indicated jurisdiction, as it was clearly stated in the law «On ratification of the Convention».

Interpretation of the Convention and the Protocols is done by the Court when considering specific cases in their rulings. Using the provisions of the Court by the judicial authorities of Ukraine, including

the Constitutional Court of Ukraine, the interpretation of the Convention and the Protocols thereto is required under subparagraph «b», § 3, p. 31 of the Vienna Convention on the Law of Treaties as the next practice of treaty appliance. By ratifying the Convention, Ukraine made commitment to implement the convention and practices at the international level. According to § 1 of Art. 17 of the Law of Ukraine «On Implementation and application of the European Court of Human Rights» 23.02.2006 (hereinafter – the Law) Ukraine consolidated obligation to implement the Court's judgments and application of the Convention in national legislation of Ukraine. Thus, the practice of the Court on the application of the Convention is a source of law in Ukraine.

M. I. Khavroniuk analyzing the criminal provisions of the laws of continental Europe concludes that the crimes include acts of two categories: acts that were acknowledged as crimes at all times of existence Eurasian civilization and which impinge on the most important values; violations which commitment indirectly infringes the most important values and are «de-jure» recognized as crimes, but «de-facto» are not crimes. The category of acts M. M. Khavroniuk calls quasi-crimes that «as-if offenses» [1, p. 187-189]. These minor offenses which were recommended by the Council of Ministers to be excluded from the category of crimes and are is quasi-criminal offenses by their nature should be transformed into criminal misdemeanors. This category of acts must also include dangerous misdeeds for which Code on Administrative Offences of Ukraine provides a penalty of arrest. With the introduction of these changes in the Criminal Code of Ukraine and the Code on Administrative Offences of Ukraine, on the one hand individual institutes of administrative and criminal legislation of Ukraine will be brought into line with the Court's practice of the Convention, and on the other hand, to a certain extent peculiarities of the national criminal law of Ukraine will be taken into account.

Otherwise, if we classify all the offenses for which the possible penalty according to the current Code on Administrative Offences of Ukraine is arrest as criminal offenses, as proposed in the draft law «On amendments to the Criminal Code of Ukraine regarding the introduction of criminal misdemeanors» from 03.03.2012, № 10146 [5], essential criminalization of administrative offenses will take place, which will be in conflict with the requirements of The Concept of Reform of Criminal Justice.

Thus, the criteria for the classification of offenses in national law, the characteristics of the legal nature of offenses having regard to the prevalence of the legal treatment of the nature of an anti-social act in the States parties of the Convention, the nature and character of gravity of penalties

and other sanctions applied are, according to the practice of application of Article 6 by the ECHR, the grounds for attributing certain acts to criminal offenses, regardless of how and in what way these acts are classified by the national legislation.

Naturally, the emphasis on the publicity of these criteria reduces the quality of legal guarantees of the right to privacy under Art. 6 of the Convention, taking into account the sovereignty of the construction and implementation of criminal policy concepts of each separate country.

As a result, the expansion of the limits of formalization of criminal prohibitions in the practice of the ECHR requires the gradual development in the sphere of subsequent formalization of characteristics of privacy protection level, strengthening legal guarantees of rights and freedoms of citizens.

The issue of the protection of relations in the area of the acts decriminalized in future, in our view, should be resolved in terms of forming the mechanisms of public-social justice and in the sphere of private regulation. In this context, there's a need for the structural improvement of the doctrine of criminal law in terms of a clearer description of the forms and types of criminal pressure, principles, sources, jurisdictional powers, the grounds of liability, the peculiarities of non-institution and discharge of criminal liability, approximation rules, criminal law thesaurus.

This cycle of works includes addressing a range of problems of doctrinal nature, from multi-track criminal pressure to the utmost formalization of the grounds non-institution to liability (immunities and privileges in criminal law) and toughening the liability of habitual criminals in order to protect the public interest.

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Сучасна кримінальна політика України значною мірою підлягає впливу тенденцій розвитку ідей гуманізації кримінальної відповідальності та забезпечення захисту прав особистості. Однією з головних проблем є проблема розробки концепту кримінального правопорушення у контексті співвідносин злочинів та інших порушень кримінального закону. Зроблено висновки щодо можливості реалізації цього концепту в українському законодавстві.

Современная уголовно-правовая политика Украины в значительной мере подвержена влиянию тенденций к гуманизации уголовной ответственности и обеспечению защиты прав личности в сфере правоприменения. Одной из насущных проблем является концепция уголовного правонарушения в контексте соотношения преступлений и иных нарушений закона. Идея уголовного проступка является передовой в современных реалиях украинского законодательства.

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СПЕЦІАЛЬНІ КРИМІНАЛЬНО-ПРАВОВІ ЗАХОДИ

Досліджуються основні юридичні характеристики кримінально-правових заходів, передбачених санкціями окремих статей Особливої частини Кримінального кодексу України. Визначаються суттєві та змістовні особливості спеціальних кримінально-правових заходів та вносяться пропозиції відносно оптимізації їх нормативного визначення та практики застосування.

Кримінальне право сучасного стану свого розвитку характеризується пошуком допустимих та ефективних заходів впливу на поведінку осіб в умовах виникнення та існування різних форм кримінальних практик, так як злочини, кримінальні проступки, об'єктивно протиправні діяння, які вчиняються неосудними або малолітніми особами, зловживання правом та інші. В системі заходів кримінально-правового впливу, до яких може бути віднесені покарання з судимістю,