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ROZWÓJ SPOŁECZNY I MORALNOŚĆ SPOŁECZNA: PROBLEMY KRYMINALIZACJI

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Adnotacja. Artykuł bada antropologiczne podstawy polityki karno-prawnej w zakresie zapewnienia bezpieczeństwa moralności w procesie rozwoju współczesnej doktryny prawnej. Koncepcja kryminalno-prawnej ochrony moralności publicznej podkreśla, że przestępstwa przeciwko moralności publicznej z powodu dużej liczby narracji sieciowych na temat wolności interakcji muszą zostać zmienione w taki sposób, aby zdekryminalizować niektóre przestępstwa przeciwko rozprzestrzenianiu się przemocy i pornografii. Przeanalizowano badania kryminalno-prawnej ochrony moralności społecznej i moralności jednostki jako uwarunkowanego społecznie i historycznie zjawiska antropogenezy. Ideologia sprawiedliwości społecznej jest najwyższym celem regulowania przestępstw przeciwko moralności w zakresie narzędzi i mechanizmów współczesnej antropologii prawnej.

Słowa kluczowe: moralność publiczna, ochrona kryminalno-karna, polityka karna, przestępstwa przeciwko moralności publicznej, antropologia karna, pornografia.

SOCIAL DEVELOPMENT AND PUBLIC MORALS: PROBLEMS OF CRIMINALIZATION

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Abstract. This issue is a study of the anthropological foundations of criminal law policy to ensure the security of morals in modern legal doctrine development. A concept of criminal law protection of public moralist is stressed that crimes against public morals due to overwhelming of net narratives on freedom of interaction should be changed in a way of decriminalization of some offences against distributing of violent and pornography issues. The study of criminal law protection of public morals and individual morality as socially and historically determined phenomenon of anthropogenesis is analyzed. The ideology of social justice is the highest goal of regulating criminal law counteraction to crimes against morals in terms of tools and mechanisms of modern legal anthropology.

Key words: public morals, criminal law protection, criminal policy, crimes against public morals, criminal anthropology, pornography.

СОЦІАЛЬНИЙ РОЗВИТОК ТА СУСПІЛЬНА МОРАЛЬ: ПРОБЛЕМИ КРИМІНАЛІЗАЦІЇ

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Анотація. У статті досліджуються антропологічні основи кримінально-правової політики щодо забезпечення безпеки моральності в процесі розвитку сучасної правової доктрини. У концепції кримінально-правового захисту суспільної моралі підкреслюється, що злочини проти суспільної моралі через велику кількість мережових оповідей про свободу взаємодії повинні бути змінені таким чином, щоб декриміналізувати деякі правопорушення проти розповсюдження насильства та порнографії. Проаналізовано дослідження кримінально-правового захисту суспільної моралі та моральності індивіда як соціально та історично обумовленого явища антропогенезу. Ідеологія соціальної справедливості є найвищою метою регулювання кримінально-правової протидії злочинам проти моралі з точки зору інструментів та механізмів сучасної правової антропології.

Ключові слова: суспільна мораль, кримінально-правовий захист, кримінальна політика, злочини проти суспільної моралі, кримінальна антропологія, порнографія.

Introduction. The study of criminal law protection of public morals as a socially and historically determined phenomenon of anthropogenesis is a complex process of analyzing of the social preconditions for criminalization of such crimes, features of the modern concept of criminal law protection and prospects for improving the relevant

norms. The presence of numerous scientific positions, which are sometimes contradictory on certain debatable issues regarding the regulation of criminal law protection of morality in times of cultural relativism, indicates both the urgency of the issue and significant complications in the qualification of crimes that encroach on relevant objects. The study of morals protection depends on development of informational society and communication issues.

Main part. Devaluation of traditional spiritual foundations in the form of religious and moral ideals, positive legal consciousness creates an environment of heightened social tensions at all levels of socio-cultural relations in society, which contributes to the new judicial practice regarding crimes against morals. Thus, improving of the legal mechanisms to regulate social relations that arise in the spiritual sphere should become a priority of public policy (including criminal policy) in the field of morality and spiritual security of the individual, society and the state.

The implementation of such a policy requires, in particular, an improving the existing system and legal features of the *corpus delicti*, as well as the development of new *corpus delicti* (taking into account the specifics of both criminal responsibility and spiritual life) and the inclusion of relevant legal norms in the current Criminal Code of Ukraine. But moral norms *strict sensu* could not be the primary basis for the formation of criminal law prohibitions, but only partially complement the streamlined systems of criminal liability for violations of the rules of society.

Morality in the criminal sense is a social relationship that is formed and developed in society, to ensure respect for some people to others, shyness, respect for universal values established in society, non-compliance with which a person leads to public condemnation and affects the level of cultural and spiritual development of her as a person.

Under criminal law protection there exist measures to ensure the security of certain social relations and interests and deter citizens from criminal encroachments by defining in criminal law harmful to the individual, society and the state offenses. It should be analysed through different dimensions. As V.Tulyakov noted: «Modern criminal law has traditionally implemented in such areas as: fundamental theory of criminal law, which describes the crime and punishment phenomenon doctrinally; criminal law in practice and dynamics (sources related standards at the international, supranational and national legal regulation). Additive nature of criminal law in practice, the formation of a criminal prohibition involves not only constitutional rules and processes connectivity, but also categorical and regulatory dependence on a lot of different kinds of processes. Being partially closed homeostatic system; criminal law seeks to regulate entropic nature and types of mass crimes and abuses of law manifestations committed in certain spatial-economic and political circumstances that depend on sustainable development process. Global and regional, political, social and cultural imbalances and conflicts, communication stuffing affecting the Rule of Law, disorganize it and create a situation where essentially stable criminal legal form has to be in a dissonance with developing public and social relations and processes. For this reason, in modern social democratic societies criminal justice system reflects organizing and stimulating role of deviations control. In totalitarian and fundamentalist systems it performs a role of citizens' resistance suppression, neutralizing opponents' political activity» (Tulyakov, 2015: 15)

From the point of view of the theory of criminalization sensual concept (Hörnle, T., 2012), this may be due to the dominance of the classical methodology of positive legal research. On the other hand, the progress of knowledge in the field of established scientific disciplines, with their history of development, theoretical and methodological support, definition of subject-objective area, classification characteristics, long-term goals and objectives, largely depends on ways to transform this knowledge under the influence of new concepts, theories, teachings and directions. Thus, the statement of the possibility of using the subjective characteristics of the individual and the tolerance of its assessment in the information society as a basis for criminalizing acts against public morals is of great interest to modern criminal theory.

We argue that the improvement of mechanisms for regulating public relations arising in the spiritual sphere should become a priority of public policy (including criminal policy) in the field of moral and spiritual security of the individual, society and the state. The implementation of such a policy involves, in particular, improving the existing system and legal features of the crimes, as well as the development of new crimes (taking into account the specifics of both criminal responsibility and spiritual life) and the inclusion of relevant legal norms in the current Criminal Code of Ukraine. Thus, the policy in the field of combating crimes against morals is a system of political and legal measures aimed at reducing the level and dynamics of criminal offenses by all political, economic measures and legal means (punishment, other criminal measures, measures to treat offenders), taking into account on the main characteristics of the development of society and moral values in it.

Criminal protection of public morals and individual morality is an important element in the development of the modern rule of law. Moral prohibitions on negative actions condemned by society are primary in determining what is punishable, but the logic of social development shows a certain inconsistency of modern criminal laws. The state must punish the duty for the sake of social peace, but this duty is leveled by a whole bunch of restrictions and balances of executive and legislative power and people's attitudes. It is classically reflected at victimization's dualism when people (especially at victimless crimes or businesses) should possess simultaneously the role of the victim and offender (Tulyakov, 2001: 97)

The criminal law norm is not conditioned by social needs and internal necessity, which leads to a conflict between the public consciousness (or the attitudes of individuals) and criminal law prohibitions, leads to mass anomie, genocide, legal nihilism. To our opinion anthropological knowledge in criminal law appears as a result of fixing new connections between signs and objects that have developed in the system of legally significant activities, operations and procedures to ensure the security of the individual, society, state by specific methods of criminal law. So legal norms in the criminal-legal and political sense receive anthropological interpretation due to the need

for new activities based on humanistic principles, the need to increase the effectiveness of criminal-legal protection of the population from crimes against morality.

That is why the anthropological analysis of the criminal law norm is a humanitarian examination of legal documents, mainly related to its assessment from the standpoint of relations between the subjects.

The purpose of anthropological analysis of crimes against morality is to determine the degree of compliance with the conditions of normal development of man and society using the methods of criminal law. This assessment stems from the belief that criminal law is a form of collective adaptation of the community to its place of existence.

Criminal law in the anthropological sense of today is analyzed as a system of interrelated obligations, considered as a right on the one hand and recognized as a duty on the other to ensure the security of the individual, society, state, protect them from criminal offenses. Accordingly, the anthropological analysis of the criminal law norm in the process of studying the genesis and state of the norm should reveal the amendment of the norm, its compliance with the ideology of the criminal law, the adequacy of the legal form and the effectiveness of restrictions.

Thus, crimes against public order and morality are exclusively anthropological in nature and development. Such a return to the origins of the formation of law, which is culture in various forms of its existence, provides the formation of a new, modern level of legal understanding, able to satisfy both the theory and practice of law.

The anthropological dimension of crimes against public morals requires modern researchers to focus not only on the issue of dogmatic analysis of the norm (purely criminal law approach) or axiological assessment of the existence and existence of the norm (criminological or sociological approach), but also integrative dynamic analysis of the essence and existence concerning various participants of criminal legal relations. The structure of the policy of ensuring the security of relations of public morals and morality as an object of criminal law protection includes:

1) security (preservation) of historical and cultural heritage as a set of the most important material carriers of spirituality, which is the result of organizational, legal and other measures aimed at preventing the destruction, destruction or damage of cultural property, their illegal circulation in the form of illegal transfer of ownership;

2) security of the moral foundations of society as a system of protection against the destruction of the national mentality of the Ukrainian people in the form of the moral foundations of the nation, traditions and customs based on them, ideas of justice, goodness and equality, etc;

3) religious security of the individual and society as a state of political and legal protection and social stability of religious relations, including freedom of conscience and religion, non-interference of the state and anyone in church affairs, inadmissibility of spreading destructive cults in Ukraine, totalitarian sects, etc.

To determine this, we have carried out a theoretical and methodological analysis of scientific research on the state of use of a modern anthropological approach to criminal law phenomena. The methodology of anthropological research of criminal offenses has been improved as the study of anthropological algorithms and technologies for the formalization of criminal law. It is stated on the need of the formation of legal anthropology as a relatively independent scientific field in modern criminal law as through the promotion of new scientific paradigms, as through new methodologies of legal activity (lawmaking, interpretation of law, application of law, etc.), as well as at the logical level - by providing new meanings or concepts.

Thus, the anthropological approach to the protection of public morals in criminal law is implemented in a specific methodology of legal activity (lawmaking, interpretation of law, application of law in criminal law) in relation to human-centered security of the individual, society, state by specific methods of criminal law.

According to that the purpose of the anthropological analysis of crimes against public morality as determination of degree of observance of conditions of sustainable development of the person and a society by means of methods of criminal and legal influence has to be defined. Anthropological analysis of the criminal law norm in the process of studying the genesis and state of the norm should reveal its compliance with the ideology of the criminal law, the adequacy of the legal form and the effectiveness of restrictions. On the one hand, public morality and morality must be reflected in the provisions of criminal law. On the other hand, morality describes certain taboos and universal prohibitions, which are implemented in a broader informational sense than criminal law.

We argue that the criminal law norms that protect public morality have received a modern anthropological interpretation as a result of the human-centered practice of the European Court of Human Rights to protect the rights of victims of abuse of power. These needs in the new ideology of criminal law protection are based on the humanistic principles of development of the information society, the need to increase the effectiveness of criminal law protection of the population from crimes against public morality.

From this point of view the main tasks of anthropological analysis of draft Criminal law development are related to: obtaining empirical data on the legal living conditions of human activities and organizations that may affect the nature of the regulation of the problem. In the field of criminalization / decriminalization of crimes against public morality, the issues of anthropological analysis of the norm of the Special Part of the Criminal Code of Ukraine should include:

- resolving the issues of compliance with the rules of adequacy with ECtHR practices (ECtHR, 2020, 7);
- the meaning and possibility of the destruction of interpersonal relations as a result of the application of legal norms to protect public morality.

For example, how does freedom of information on the Internet affect the virtualization of paid sexual relations; whether the normative text promotes personal self-identification; what feelings, emotions and evaluations such a text of law can evoke; whether the prohibition of prostitution promotes human self-realization, activity and freedoms, or whether such a prohibition is unnecessary.

The nature of criminal offenses against public morals and morality in which public morals are the main direct or additional direct object of encroachment have to be identified. We argue that public morality is a complex regulator in the system of modern social control, which ensures the mutual responsibilities of the state, society and the individual for their normal functioning. Along with this, the right to revolt, the right to deviate, the right to personal deviations from public stereotypes are not always supported by the prevailing system of norms in society.

It is established that the definition of public danger in crimes against public morality is socio-political in nature, taking into account the determining component of the subjective element. The limits of state interference in private life, the characteristics of responsibility for deviant behavior, guarantees of rights, freedoms, responsibilities, security of the individual, society and the state are determined by the prevailing moral values and political guidelines in society (Cheryl Mattingly, Jason Throop, 2018,490).

The features of the anthropological characteristics of the genesis of the criminalization of acts against public morality and morality and the direction of its protection should be determined in proper way too. The implementation of such a policy involves, in particular, improving the existing system and legal features of the corpus delicti, as well as the development of new corpus delicti (taking into account the specifics of both criminal liability and spiritual life) and the inclusion of relevant legal norms in the current Criminal Code.

This vision of criminal law anthropology, is in contrast to the established ideas in this field, linking its existence with the positivist methods as a private criminal law theory that studies the relationship between personality and criminal law, personality as an object of action rights and its requirements to the law, the structure of personal values and criminal law as a means of embodying these values in public life, human rights and their legal protection by criminal law.

Thus criminal-legal prevention of crimes is characterized as an effect of the criminal law as a whole, and not exclusively of its separate norms and institutions. Implementation of protective and preventive criminal-legal relations insists on the need to differentiate the amount of state coercion depending on the characteristics of the subjects of such influence (individuals, social communities, the state), the degree of influence on the characteristics of the perpetrator; its criminality; the severity of the crime; the needs of the victim, third parties, the state, the international community). The methodology of anthropological research development of the criminal law of the General Part of the Criminal Code of Ukraine will be based on the use of knowledge about the subject of criminal liability to attract and individualize liability. The methodology of anthropological research of the criminal law of the Special Part of the Criminal Code of Ukraine is related to resolving the question of whether the disposition of the crime and its sanction corresponds to the human-centered approach, officially expressed in the established list of fundamental human rights and freedoms and the case law of the European Court of Human Rights

Conclusions. It is concluded that the regime of implementation of criminal law development in the field of protection of public morality is directly proportional to the level of both legal culture and general culture.

Dysfunctions of sustainable development of society in the field of natural and civil rights and freedoms are catalysts for activating the right to privacy, freedom of expression and economic activity, ranging from partial legalization of begging to prostitution. If an adult in difficulty places his or her images on a website or adult platform for a fee, it is only an art form that, in the event of a conviction, has a chance to be justified given the right to privacy (Article 8 of the European Convention of [rotecting of human rights), the right to freedom of expression (Article 10), ownership of copyright products (Article 1 of the First Protocol to European Convention).

The possibility of using the subjective characteristics of the individual and the tolerance of its assessment as a basis for criminalization of acts against public morality, sentencing, release from punishment and its serving, decriminalization and depenalization are of great impact at the developmental theories. Not only social danger, but also network permissibility and support of individual deviations makes it possible to recognize an act as socially dangerous or, conversely, socially neutral, strengthens or limits the social reaction to it.

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