ЗАКОНОДАВЧЕ ВРЕГУЛЮВАННЯ ПРАВОЗАСТОСУВАННЯ

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MODERN CRIMINAL LEGISLATION OF UKRAINE: STATE AND FUTURE DEVELOPMENT

The questions relating to the state of modern national criminal legislation are considered in a complex in the article. The changes and amendments that were made to the Criminal Code of Ukraine are analyzed. The author's position on the prospects of development of criminal legislation of Ukraine is voiced.

Keywords: Criminal Justice; Criminal Code of Ukraine; amendment.

Розглянуто питання щодо стану сучасного національного кримінального законодавства. Проаналізовано зміни й доповнення, що були внесені до Кримінального кодексу України. Висловлено авторську позицію стосовно перспектив розвитку кримінального законодавства України.

Ключові слова: кримінальне судочинство; Кримінальний кодекс України; зміни та доповнення.

Рассмотрены вопросы, касающиеся состояния современного национального уголовного законодательства. Осуществлен анализ изменений и дополнений, внесенных в Уголовный кодекс Украины. Высказано авторскую позицию относительно перспектив развития уголовного законодательства Украины.

Ключевые слова: уголовное судопроизводство; Уголовный кодекс Украины; изменения и дополнения.

Modern criminal legislation of Ukraine is the combination of systematic and specific legislative acts that define the bases and principles of criminal responsibility, sentencing, relief from responsibility and punishment,

and also criminality and punishability of actions. A characteristic feature of criminal legislation of Ukraine is that it is actually represented by the norms of the Criminal Code of Ukraine (hereinafter – CCU, adopted 05.04.2001 and entered into force 01.09.2001) [1]. It should be noted that the regulations that currently exist in the CCU significantly differ in nature and content, both in qualitative and quantitative aspect, from those in effect at the time of adoption of this legal act. Despite significant improvements in the field of law-making and enforcement, the criminal legislation of Ukraine is still far from its ideal form as along with many positive achievements it also has several flaws. Relevant appears also defining (outlining) the ways of the criminal legislation of Ukraine that define its pace in the future. In our view, all of the mentioned above will be surely interesting from the scientific point of view and also for English-speaking audience of specialists in the field of criminal law. So, the purpose of this article is the comprehensive review of the state and prospects of development of modern criminal legislation of Ukraine.

In our opinion the current criminal legislation of Ukraine is democratic and humane (in particular, through the absence of death penalty as a type of punishment, existing of multiple alternative sanctions with priority orientation to assignment fines, decriminalization of a series of offenses, for instance in sphere of economic activity, the responsibility for which can occur outside the CCU, etc.), such that, on the one hand, is called to meet challenges of modern crime and requirements of international conventions (in particular, through the criminalization of torture, human trafficking, computer fraud, terrorist act, a number of offenses related to activities of relevant officials – illicit enrichment, abuse of influence, etc.), and on the other – follows the tradition of the past (particularly, the first place in the system of priorities of criminal protection is taken by the basics of the national security of Ukraine, but not the rights, freedoms and interests of a person, besides, for example, tax and military crimes are subjected to the CCU only, but not to separate tax or military codes that usually appears a characteristic feature of international experience, including European), such that includes General and Specific parts, at this not covering norms connected with criminal misdemeanor (nowadays such issues are partially solved under the administrative legislation subjected to the Code of Ukraine on Administrative Offenses – CUAO) and procedural issues (solved under the separate Criminal Procedural Code of Ukraine – CPCU), focuses on the normative regulation of provisions on crime, punishment and responsibility for certain groups of crimes.

As reflected in the CCU, the national criminal legislation is structurally divided into General and Special parts. General Part of the CCU (15 sections, articles 1-108) combines the norms that determine: the tasks of criminal legislation and basic criminal-legal institutions; the grounds of criminal responsibility; operation of the law on criminal responsibility in space and time; the concept of crime and its types; sanity and insanity; forms of guilt; complicity in a crime; multiplicity of crimes; circumstances excluding criminality of act; relief from criminal responsibility; punishment and its types; procedure of assignment of certain punishments and rules of assignment; relief from punishment and its serving; cancellation and removal of record of conviction; compulsory measures of medical character

and compulsory treatment; peculiarities of criminal responsibility and punishment of minors.

Special Part of the CCU (20 sections, articles 109-447) specifies the scope and content of criminal responsibility for each of the crime. Overall the Special Part contains the following twenty groups of crimes (a criterion of differentiation is the generic object of encroachment): against the basics of national security of Ukraine; against life and health; against freedom, honor and dignity; against sexual freedom and sexual integrity of a person; against electoral, labor and other personal rights and freedoms of a man and citizen; against property; in sphere of economic activity; against environment; against public safety; against safety of production; against safety of traffic and operation of transport; against public order and morality; in sphere of turnover of narcotic means, psychotropic substances, analogues thereof, or precursors and against health of population; in sphere of protection of state secrecy, inviolability of state boundaries, ensuring call-up and mobilization; against authority of agencies of state power, agencies of local self-government, and associations of citizens; in sphere of use of electronic computer machines (or computers), systems and computer networks and telecommunications; in sphere of employment activity and professional activity related to the provision of public services; against justice; against established procedure for performing military service (military crimes); against peace, security of mankind, and international legal order.

There exists close and indissoluble connection among norms of both parts of criminal legislation, since it is practically impossible to apply the norms of Special part without the rules set forth in the General Part. Their inseparable unity is defined by single content. The provisions of the General Part play the role of a kind of penal matrix, as they are fundamental, such that define the whole system of criminal legislation and the structure of its Special Part, a range of its institutions and a list of actions recognized by the crimes.

It is known that nowadays the state of criminal legislation of any country of the world, including Ukraine, is directly dependent on different circumstances of social life. At this, periodic changes in criminal legislation is an objective necessity, a reaction to the development of criminality as a complex socio-political phenomenon that undergoes constant changes, mimicries, adapts to real economic, political, legal and other conditions [2, p. 7]. Tendencies to improve existing criminal legislation are not just important and necessary, but revolutionary [3]. Currently, there are over a hundred laws that have made amendments and additions to the existing CCU. Along this certain provisions of the Code were judged unconstitutional by several decisions of the Constitutional Court of Ukraine.

Analysis of the existing legal practice of improvement of CCU affords to distinguish several main factors influencing the legislative process, including: 1) international-legal; 2) constitutional-legal; 3) trial; 4) economic; 5) political; 6) criminological; 7) social-legal; 8) normative. Overall making amendments to criminal legislation of Ukraine is primarily dependent on the need of democratization of public life, reforming criminal-legal policy of our country, implementation of the signed and ratified by Ukraine international conventions, use of advanced foreign experience, needs to combat "new

wave" crimes, humanization or, vice versa, toughening of criminal responsibility for certain crimes, the need for further criminalization and decriminalization of acts, etc. [4, p. 147]. And on the way along with progressive lawmaking accomplishments there were also unsystematic steps that can not be subjected to logical explanation. All the abovementioned will be described further in details.

Within the CCU amendments to its General Part were mostly connected to humanization of criminal responsibility and, first of all, related to the following provisions: operation of law on criminal responsibility (in particular, in time and with respect to crimes committed by foreigners and stateless persons); classification of crimes (that is, from now its base is not punishment of imprisonment, but the amount of punishment in the form of fine); subject of crime (in particular, there appeared a certain definition of "an official"); complicity in crime (in particular, the number of members of organized groups and criminal organizations increased); relief from criminal responsibility (in particular, grounds and conditions for such exemption have become more loyal); certain types of punishment (in particular, concerning the size of fine) and its assignment, as well as relief from punishment and serving thereof; record of conviction (particularly, in the context of its legal consequences and periods for cancellation); peculiarities of criminal responsibility and punishment of minors (particularly, in terms of reducing their repressiveness). Along with it, the Law of Ukraine "On the liability of legal entities for corruption offenses" was approved but at once, for several reasons, abolished (actually it worked a few days in early January 2011). However, such a step proves that the issue of criminal responsibility of legal entities (corporations) in Ukraine remains quite relevant.

However, one can hardly state that all changes to the General Part of the CCU were optimal and observed humanity. Thus, in view of a new classification of crimes (art. 12 of the CCU) some of them that earlier had little severity, have became grave or especially grave crimes (such as engaging in gambling – art. 203-2 of the CCU). Concerning art. 53 "Fine" of the CCU, the legislator, basing on the content of part 2 of this article, actually uses "talion law" when notes that for the crime for which the envisaged fine (as a major punishment) of over three thousand of untaxed minimum incomes is applied, the sum of fine appointed by the court shall not be less than the amount of property damage caused by the crime or derived from crime income, regardless of the maximum amount of fine under the sanction of an article (the sanction of a part of an article) of the Special Part of this Code (at this, installment payment of fines decreased, taking into account a person's property, in particular one to three years which should also not be assumed as positive).

In the Special Part of the CCU changes were more significant and related both comprehensive review of the content of entire sections and their names, and also reforming of certain provisions of criminal responsibility for specific crimes. For example, new titles were obtained by sections XVI ("Crimes in sphere of use of electronic computer machines (or computers), systems and computer networks and telecommunications") and XVII ("Crimes in sphere of employment activity and professional activity related to the provision of public services"), that now include doubled

amount of acts prohibited by the law as compared to its primary amount. A significant number of crimes in sphere of economic activity minimized, which has become a significant step towards humanization of criminal responsibility. Crimes against electoral rights of citizens, against public safety, against justice etc. have undergone great changes and additions. Modifications also affected the corpora delicti of intentional homicide, bodily injury, torture (including by reference to the commission of them with racial, ethnic or religious motives). There also appeared a certain number of rules with annotations (e.g., articles 150-1, 188-1, 194-1, 223-1, 223-2, 270-1, 298-1, 376-1 of the CCU). Besides, sanctions in many rules (including by expanding their alternative kinds) have obtained more humane nature. Simultaneously criminal responsibility (particularly with regard to specifying the object of the crime, increase and defining of aggravating circumstances and toughening of sanctions) was strengthened for crimes against special victims that advocated child (underage person), crimes against morality, crimes related to narcotic means, psychotropic substances, analogues thereof, or precursors and other crimes against health of population, and more.

At the same time, in modern terms, to our mind, unresolved remain criminal issues related to: a) further gradation of criminal offenses for criminal misdemeanors (in particular, they are directly referred to in the new CPCU 2012, while CCU and CUAO do not use them) and crimes; b) the necessity of a legislative defining of important terms and notions (e.g., principles of the law on criminal responsibility, qualification of crimes, incident, criminal activities and other important criminal legal terms and concepts); c) extension of reference to the special victims of certain crimes; d) improvement of the list of circumstances that excluding criminality of act (e.g., by reference to as follows "the realization by person of his(her) rights", "performance of professional functions", "consent of the victim to injury" etc.), as well as a list of criminal punishments (e.g., through the introduction of prospective criminal restitution or forfeiture of substitutive property); e) the introduction of institute of safety measures, which, in addition to compulsory medical measures, compulsory treatment and compulsory measures of educational character can include remote surveillance or house arrest, deportation, informing public about the criminal, deprivation of additional benefits and privileges, etc.), f) criminalization of obvious by its public danger acts (such as human cloning or conducting genetic experiments on human ovules, sexual harassment, telemarketing fraud, creation of financial pyramids, raiding, environmental terrorism, etc.) and, vice versa, decriminalization of offenses the responsibility for which could be established by administrative or financial sanctions (for instance, it concerns, first of all, certain economic and environmental crimes) and others.

In our view, closer attention in the practice should be given (along with the protection of persons and property) to criminal-legal protection of environment, public safety, sphere of use of computers, sphere of turnover of narcotic means, psychotropic substances, analogues thereof. Moreover, it is time for legislator to consider annual increase of amount of tax benefits that lays the basis for the calculation of the amount of non-taxable income

in the process of qualification of crimes (as, inter alia, it stated in the Tax Code of Ukraine). It is our belief that by constantly increasing benefits of this type the state allegedly provides more and more "bonuses" for criminals ("steal more as the punishment will not change"), which, of course, is unacceptable from the point of view of logic and fairness. So, the abovementioned issues seem to become promising directions of criminal legislation reform in Ukraine.

In theoretical terms, it is important to note appearance in recent years of new doctrinal concepts with regards to the most controversial issues of criminal law (for example, object of crime, causation, dangerous consequences, motives and motivation of crimes, criminal-legal policy, legal entity as perpetrator of crime, probation, etc.). Moreover, methodology of criminal-legal researches was modified, while comparative-legal and synergistic methods play significant role in it nowadays. Besides, one of positive achievements appear the use of new technologies in teaching criminal law (e.g., using multimedia systems, electronic textbooks, tests of different levels of complexity, that in particular, have been successfully implemented by the National Academy of Internal Affairs, Kyiv, Ukraine). Particular attention should certainly be paid to the application of criminal legislation, i.e. qualification of crimes [5]. In addition, this Academy includes special subjects of criminal-legal cycle into its curriculum while its academic staff publish necessary textbooks and study guides, which are recommended by the Ministry of Education, Science, Youth and Sports of Ukraine. For example, in 2011 a study guide "Qualification of the crimes under investigation by the internal affairs bodies", under general edition of Doctor of Law, Professor, Corresponding Member of the National Academy of Legal Sciences of Ukraine Valentyn Kovalenko and under the scientific edition of Doctors of Law, Professors Olexandr Dzhuzha and Andrii Savchenko [6] was issued, and in 2012 a textbook "Theory of qualification of crimes" was written by Vitalii Kuznetsov and Andrii Savchenko [7].

Thus, on the basis of the above, we can conclude that in general the state of modern criminal legislation is satisfactory. Its characteristic features are democracy, stability and simultaneously dynamism. However, under present conditions it is essential to ensure that national criminal legislation remains more pragmatic, accurately and quickly responds to various challenges of modern crime, appears effective in the issues of combating socially dangerous encroachment, provides the implementation of not only repressive measures, but also compensative, preventive and educational mechanisms. One of the most important tasks for the national criminal legislation in the near future should be clear separation of socially dangerous acts that belong to the category of criminal misdemeanors, but such a step will inevitably entail major changes in its system in its turn. Despite this fact, in our view, the criminal legislation of Ukraine should be ready for non-standard (non-traditional) steps and various reform measures that are sometimes rather fleeting as our social life itself.

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