

Copyright © 2015 by Academic Publishing House *Researcher*



Published in the Russian Federation  
Zhurnal grazhdanskogo i ugovnogo prava  
Has been issued since 1871.  
ISSN 2409-4528  
Vol. 3, Is. 1, pp. 23-26, 2015

DOI: 10.13187/zngup.2015.3.23  
<http://ejournal22.com>



UDC 34

## **Criminal Policy of Ukraine through EU Dimensions**

Vyacheslav A. Tulyakov

National University Odessa Law Academy, Ukraine  
LL.D., Professor

### **Abstract**

The article deals with the aspects of the current criminal legislation of Ukraine. The author outlines a new Theoretical Model of the Criminal Code of Ukraine. The main attention is given to the approximation of Ukrainian legislation to the European norms and standards.

**Keywords:** EU; criminal policy of Ukraine; a new Theoretical Model of the Criminal Code of Ukraine; criminal liability.

### **Introduction**

The implementation of the provisions of Lisbon Treaty [1] in the sphere of securing the stability, safety and rule of law zone and the global protection of human rights in European countries has 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.

### **The new Criminal Procedure Code of Ukraine**

It is a common knowledge that the new Criminal Procedure Code 2012 [2] 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 a theoretical model of the concept of criminal misdemeanors was developed at the Department of Criminal Law of the National University "Odessa Law Academy".

### **The theoretical model of a new Criminal Code of Ukraine**

The traditionalist Criminal Code of France 1810 [3] contained a three-merous 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. 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. 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 [4] (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 (CC of Spain [5], Preamble). 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 approximation of Ukrainian legislation to the European norms**

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. There are known court rulings of the European Court of Human Rights (for instance, the *Ozturk v. Germany* case – the Judgement of 21 February 1984 [6], the *Gurepka v. Ukraine* case – the Judgement of 6 September 2005 [7]), which prescribe that any “administrative offenses” remain a part of criminal matter (*matière pénale*) in the broad sense. Accordingly, in the *Putz v. Austria* Judgment of 22 February 1996 [8], as most criminologists believe, the ECtHR on the basis of interpretation of the European Convention on Human Rights and Fundamental Freedoms has developed the doctrine of “criminal matters”, which covers criminal law, criminal procedure and a part of administrative relations, particularly relations associated with the use of administrative penalties. The assignment of a certain relation to “criminal matters” is made, in the opinion of L. Golovko, considering both formal (the position of the national lawmaker) and substantial criteria (nature of an offense and severity of a sanction imposed).

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.

Hence, when forming of the concept of criminal offenses and distinguishing the category of misdemeanors that comply with the European standards and requirements of harmonization of national legislation, it is necessary:

- to carry out systematic analysis of offenses and acts referable to the criminal ones;
- to clearly indicate the significance of harm to personal and public interest, state sovereignty for criminalization in national law (the social contract in supranational criminal law)

and sequential decriminalization and depenalization of **all** the other acts based on the *criminal matter* principle;

- to allocate the institute of a victim in the system of the General Part, to form the norm establishing that criminal misdemeanors are acts cases on which are instituted only upon a victim's claim.

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.

### **Conclusion**

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 [9, 10].

### **References**

1. [http://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri= CELEX: 12007L/TXT](http://www.eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12007L/TXT)
2. <http://www.google.ru/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&sqi=2&ved=OCBwQFjAA&url=http%3A%2F%2Fwww.en.pravo.org.ua%2Ffiles%2FCriminal%2520justice%2FCPC.pdf&ei=QREqVfT9KuvhywOstoGADA&usg=AFQjCNFHqyoY2WTO256k6MKneXetNOlyVQ&bvm=bv.90491159,d.bGQ&cad=rjt>
3. Code pénal de 1810 // [http://www.ledroitcriminel.free.fr/la\\_legislation\\_criminelle/anciens\\_textes/code\\_penal\\_de\\_1810.htm](http://www.ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/code_penal_de_1810.htm)
4. [http://www.kodeksy.com.ua/ka/ugolovnyj\\_kodeks\\_ukraini.htm](http://www.kodeksy.com.ua/ka/ugolovnyj_kodeks_ukraini.htm)
5. <http://www.sanchezcervera-abogados.com/en/2012/06/25/the-ministry-of-justice-publishes-a-translation-into-english-of-the-spanish-criminal-code/>
6. Ozturk v. Germany case – the Judgement of 21 February 1984 // <http://www.hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57553>
7. Gurepka v. Ukraine case – the Judgement of 6 September 2005 // <http://www.hudoc.echr.coe.int/sites/eng/pages>
8. Putz v. Austria Judgment of 22 February 1996 // <http://www.hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57982>
9. Section 225 of the UK Criminal Justice Act 2003 // <http://www.legislation.gov.uk/ukpga/2003/44/contents>.
10. ECHR Chamber judgment in the case of James, Wells and Lee v. the United Kingdom // ECHR 340 (2012) of 18.09.2012.