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SIGNIFICANT HARM AS A CRITERION OF CRIMINALIZATION OF A DEED

The article is dedicated to the issue of significant harm as a criterion of criminalization of a deed. It is stated that significant harm as a criterion of criminalization of a deed consists in: 1) encroachment on social relations that are protected by means of criminal law compulsion, regardless of any historical conditions; 2) infliction of grave consequences; 3) encroachment on social relations that acquire a particular sense during a certain period of existence of humanity and state.

Keywords: criminalization of a deed, significant harm, criteria of criminalization of a deed, crime.

Problem statement. The topicality of the subject of the research is determined by the fact that the harm inflicted by the crime does not have its own terminological meaning within the science of criminal law and is used, first of all, as a terminological instrument while defining and characterizing another notions, for example, the criteria of criminalization of deeds, social danger, socially-dangerous consequences of the crime, insignificance of the deed, etc. At the same time, the notion “harm” acquires various senses in the scientists’ works depending on the subject of their scientific research. Such an approach blurs the sense of the notion “harm inflicted by the crime”, attaches a multiple-valued character to it in criminal law and criminal legislation.

Analysis of recent researches and publications. Harm as a criterion of criminalization of a deed is permanently highly attended in special-purpose juridical literature. It was studied by soviet scientists, scientists-criminalists of Russia and Ukraine: P. P. Andrushko, M. I. Bazhanov, Iu. V. Baulin, D. M. Bakhrakh, Ia. M. Brainin, A. M. Bieliakova, N. D. Durmanov, V. A. Klimienko, O. V. Kobzieva, M. I. Korzhanskiy, V. I. Kofman, V. M. Kudriavtsev, N. F. Kuznietsova, Iu. I. Liapunov, V. V. Maltsev, P. S. Matyshevskiy, A. S. Mikhlin, M. I. Melnyk, O. I. Murzinov, V. O. Navrotskiy, B. S. Nykyforov,

B. D. Ovchynnikov, M. I. Panov, O. O. Piontkovskiy, V. S. Prokhorov, V. V. Stashys, Ie.L. Streltsov, V.Ia. Tatsiy, H. V. Timeiko, A. N. Trainin, T. V. Tsereteli, S. D. Shapchenko, M. D. Sharhorodskiy, O. F. Shyshov, V. P. Yemel'ianov and others.

At the same time, the scientists' works were mostly dedicated to studying of other institutions of criminal law, so that significant harm as a criterion of criminalization of a deed was studied only fragmentarily.

Paper purpose. The purpose of the article is to study the significant harm as a criterion of criminalization of a deed.

Paper main body. M. I. Khavroniuk points out in his works that the only reason for criminalization of deeds is the level and character of their social danger. They become apparent in the capability of deeds to inflict significant harm to the objects of criminal law security [1, p. 55]. Apart from the reasons for criminalization of a deed, M. I. Khavroniuk considers expedient to distinguish also the reasons and conditions of criminalization that have to be applied in aggregate, systematically. The scientist relates to the reasons of criminalization, for example, the execution of obligations concerning international treaties, the necessity of providing implementation of norms of the Constitution of Ukraine, the dynamics and prevalence of the deed, etc., and conditions of socially-psychological, criminological, generally-legal and of criminal law character – to the conditions of criminalization.

Not underestimating the importance of scientific concept of M. I. Khavroniuk, we consider the significance of harm that was inflicted to social relations to be the base of criminalization, so that it is possible to define the level of social danger of the deed that is criminal.

In due time, B. S. Nikiforov expressed the same opinion. He assigned that the significance of harm depends: firstly, on the importance of social relations which the deed encroaches on; secondly, on the particular significance of one or another side of social relations; thirdly, on the gravity of consequences that were inflicted;

fourthly, on the relative prevalence or particular intolerance to certain infractions [2, pp. 7–8].

Generally supporting the opinion of B. S. Nikiforov on significant harm as a criterion of criminalization of a deed, it is impossible to entirely agree with the meaning of the concept that the author intended. We believe that the significance of harm as a criterion of criminalization of deeds must not depend on the “particular intolerance to certain infractions”. As the aforesaid, the legislator during the legislation is guided by not only objective, but also by subjective factors. At the same time, the combination of both the first and the second is important. If the legislator takes only the subjective factors as the basis of criminalization of a deed, then it will be necessary to claim such a negative fact in the lawmaking field as “subjectivism”.

B. S. Nikiforov considers that the relative prevalence of a deed also influences the significance of harm that was inflicted. However, the widespread (mass) deed that encroaches on certain social relations must objectively (because of historical conditions, political situation, etc.) endanger the normal existence of society and state functioning, so that it inflicts significant harm. The peculiarity of such deeds consists in the fact that the less prevalent they are in the society, the less is the rate of their social danger. This is confirmed by the changes that are periodically made in the Criminal Code of Ukraine (further – the CC of Ukraine). For example, the CC of USSR of 1960 contemplated liability for calumny and offence. The new CC of Ukraine of 2001 excluded those articles from the special part. At the same time, the legislator has taken into account the objective reasons because the base of the acknowledgment of such deeds as criminal and punishable in the CC of 1960 was the prevalence (mass character) of the deeds that used to inflict significant harm to social relations in those historical conditions. After the historical conditions had changed, these illegal deeds lost the increased social danger level, so that the legislator decriminalized calumny and offence while preparing and accepting the new CC of Ukraine. Today these socially dangerous deeds do not inflict significant

harm to social relations and the questions of legal liability for such deeds are solved in the course of civil legal procedure.

Thus, the only criterion of recognition of the deed as criminal is the significance of harm inflicted to social relations. Due to the fact that we consider this criterion to be the base of criminalization of a deed, it may be named as “criminal law harm”. In other words, criminal law harm is the significant harm inflicted to individual or juridical person, society or state as a result of committing a socially dangerous deed and which allows to talk about an increased social danger level and, as a fact, about the necessity of the establishment of criminal law protection.

Our conclusion is also confirmed by the regulations of CC of Ukraine that allocates in Para. 2 of Art. 11 that an action or inaction even formally containing the show of any deed, provided by the CC of Ukraine, but not constituting social danger because of the insignificance is not a crime. In other words, it is the deed that did not inflict and could not inflict significant harm to individual or juridical person, society or state.

The analysis of the CC of Ukraine in force allows us to make the following conclusion. The significant harm as a criterion of criminalization of a deed becomes apparent in the following.

First of all, in the encroachment on social relations that, regardless to any historical conditions, are always protected by means of criminal law compulsion. For example, it concerns the fundamentals of national security of Ukraine. In spite of the priorities that have been formed in democratic states of the world recently, particularly the priority of human rights and liberties in the activity of the state (Art. 3 of the Constitution of Ukraine), we must acknowledge the fact that during all the periods of its existence, the state used the law as a means of protection and defence of national (state) interests. Thus, the application of criminal law compulsion arrangements was contemplated for committing the deeds directed at forcible change or subversion of constitutional (state) regime, in the CC of Ukrainian SSR of 1927 (Art. 54-1), in the CC of Ukrainian SSR of 1960 (Art. 56-

1) and in the CC of Ukraine of 2001 (Art. 109) [3; 4; 5]. The same is also observed against the following crimes: high treason (Art. 54-1 of the CC of Ukrainian SSR of 1927; Art. 56 of the CC of Ukrainian SSR of 1960; Art. 111 of the CC of Ukraine of 2001) and espionage (Art. 54-6 of the CC of the Ukrainian SSR of 1927; Art. 57 of the CC of the Ukrainian SSR of 1960; Art. 114 of the CC of Ukraine of 2001).

Life and health of the person also has always been the objects of criminal law protection. For example, willful murder and willful grievous bodily harm were provided by the norms of the CC of Ukrainian SSR of 1927 (Art. 139, 146), the CC of the Ukrainian SSR of 1960 (Art. 94, 101) and agreeably contain in the CC of Ukraine of 2001 (Art. 115, 121). The relations of property also relate to those that always need criminal law protection. Thus, theft, robbery and brigandage were defined as crimes in the CC of 1927 (Art. 170, 173, 174), in the CC of 1960 (Art. 81, 82, 86) and in the CC of Ukraine of 2001 (Art. 185, 186, 187).

Consequently, social relations that, regardless of the historical conditions, always need criminal law protection are: 1) those ones that have a particular significance for the state (high treason, sabotage, espionage, etc.); 2) those ones that are connected with inviolability of the property rights (theft, robbery, brigandage); 3) those ones that are connected with providing inviolability of person (murder, causing grievous bodily harm, rape, etc.).

Secondly, the significant harm as a criterion of criminalization of a deed becomes apparent in the encroachment on social relations that acquire a peculiar significance in a certain period of existence of humanity and state. That is why they need the criminal law protection. Here it is necessary to pay attention to two moments. The first is the fact that social relations are neither static nor unchangeable. They are improving, getting complicated, altering – this testifies their dynamics. This leads to occurrence of the absolutely new social relations that were not known before. The encroachment on such relations testifies an increased social danger level. The legislator realizes the significance of harm that is inflicted by that group of deeds – that is why he recognizes them criminal. Criminal

legislature has recently established criminal liability for infection by human immunodeficiency virus or other incurable disease (Art. 108-2, 108-3 of the CC of Ukrainian SSR of 1960, Art. 130, 131 of the CC of Ukraine of 2001). There also appeared an article that provides liability for steal, appropriation, extortion of computer information or its abstraction by means of fraud or abuse of duty position (Art. 362) in the CC of Ukraine of 2001 for the first time.

The second moment is the fact that certain social relations on modern step of development acquired peculiar importance for the state and society that is the reason for its peculiar criminal law protection. For example, to such kind of encroachments the following relate: gross violation of labor agreement (Art. 173 of CC of Ukraine); compulsion to striking or precluding taking part in a strike (Art. 174 of CC of Ukraine); violation of right to education (Art. 183 of CC of Ukraine); violation of right to free medical aid (Art. 184 of CC of Ukraine) and others. Significant harm as well as the increased social danger level of these delinquencies consist in their prevalence and mass character which designates on the common level of law order and legality in the state. The peculiarity of such kind of socially dangerous deeds consists in decreasing the level of social danger in case of changes in historical conditions, state political and legal regime that will lead to the decriminalization of these deeds.

Thirdly, significant harm as a criterion of criminalization of a deed becomes apparent in causing grave consequences. In this case the consequences of a socially dangerous deed that designate the increased danger level are contemplated. Further the legislator takes it into account during the criminalization of this deed. Thus, he allocates the socially dangerous consequences of crime as an obligatory feature of objective elements of a crime by allocating the construction of a concrete corpus delicti. For example, the violation of the requirements of legislature on labor security is recognized as a crime only in case of causing grave consequences such as doing harm to health of the affected party (Para. 1 of Art. 271 of the CC of Ukraine) or death of people, or other grave consequences (Para. 2 of Art. 271 of the CC of Ukraine). The violation of legal requirements of fire safety is recognized

as a crime if it caused the rise of fire which inflicted harm to health of people or property harm of a big size (Para. 1 of Art. 270 of the CC of Ukraine).

Grave consequences may become apparent in the form of creating a threat of infliction of real (factual) harm. For example, breaking the rules aimed to prevent epidemiological and other contagious diseases and striving against them is recognized as a crime if these actions knowingly could cause the extension of these diseases (Art. 325 of the CC of Ukraine).

Conclusions. While characterizing the criminal law harm it is necessary to note once more that it is the significant harm that is the base of the recognition of a socially dangerous deed as a crime, in other words, inadmissible of the view of the criminal legislature. The existence of criminal law harm entails the recognition and legal allocation of a socially dangerous deed as a crime, committing of which provides criminal liability. Thus, the Constitution of Ukraine as the Main Law of the State contains the main state values. All these values are regulated and protected by the state. All the branches of law, each according to its purposes, targets, methods, etc. “participate” in this process. All the delinquencies, including crimes, do encroach on these values. Depending on the significance of harm that was inflicted, its importance for the society the legislator defines the sphere of state compulsion arrangements that are provided by the applicable branch of law. Criminal law harm is a kind of criterion of criminalization of a socially dangerous behavior and decriminalization of crimes as it is taken into account when it is necessary to recognize a socially dangerous deed as a crime or vice-versa, when the unlawful deed does not inflict and cannot inflict a significant harm and because of that is recognized as a misdemeanor.

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