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SOCIAL ISSUE OF CRIMINAL OFFENCE AND THE PRINCIPLE OF FAIRNESS

The article makes the case for considering the principle of fairness from the objective standpoint of the society and subjective positions of personality. The author suggests that social and personal significance of criminal offence in their legislative regulation and enforcement practice be included as components in such estimation categories of fairness as the guarantee of human rights and the trend of criminal justice.

Keywords: *fairness, criminal offence, evaluation in criminalization, social significance, personal significance, significance of an offence for the victim, significance of offence for the perpetrator.*

The modern constellation of legal definitions of justice and its enforcement in criminal law of various law schools contains statements seeking humanization of criminal liability, maintenance of proper criminal law's treatment and providing reasonable protection of all generations of human rights by criminal regulation. All the transformations of this kind involve the declarative principle of fairness, which loses its primary meaning due to suppression of the rule of law principle by the rule of legislation principle, reducing enforcement of criminal norms to technological constructs. Under such conditions, the general proclamation of the justice principle loses its initial meaning, forcing international and internal criminal policy to seek the ways of introduction of «justice» on the level of derogation and situational infusion of new constructs into current criminal norms.

As outlined by professor V. Tulyakov (2015), some centuries ago the concept of personal vengeance in criminal law changed to fair state coercion that is appropriate to the needs and aspirations of the population, reflecting the natural and legal

form of spreading kinds and forms of personal needs fair treatment.¹ Indeed, the change of concepts is unlikely to lead to fair treatment or enforcement of the principle of justice in general for each case of application of criminal liability if we fail to evaluate social significance of a criminal offence at specific time and scene.

The norms of most modern European and post-soviet criminal codes are not only enforced but are also designed based on assessing and determining objective attitude towards *actus reus* embodied in the law, as well as an individual and their «subjective» attitude towards an act.

There are a number of situations when assessment of the same act affects social as well as personal significance of an act in different ways due to heterogeneity of victims, unequal social and intellectual level of perpetrators, different relevance of criminogenic environments etc.

For instance, larceny of property of the same value from a magnate and from a pensioner will lead to the same qualification in case only objective and subjective elements of *corpus delicti* are considered, hence necessity to choose penalty within the limits of a respective sanction. That is to say, robbing a helpless old person and robbing a millionaire are virtually equated in their significance, which is fully demonstrated by the same qualification.

In much the same way, identical acts of a person driven into a corner by the low level of life and an outraging celebrity will be qualified in the same way, and, therefore, will entail the same penalty.

It is hard not to point out that an example of commitment of identical acts towards heterogeneous [tentatively non-victim-prone] victims would look cynical. Deprivation of life of a single person or, alternatively, a sole wage earner in a long family has different social significance. Even though human life is always equally important and requires penalty regardless of status and financial security, social consequences for minor children of the killed are substantially more serious than

¹ Tulyakov V. A. Criminal law and development / V. A. Tulyakov // Международное право развития: современные тенденции и перспективы : материалы междунар. науч.-практ. конф. (г. Одесса, 17 июня 2015 г.) ; НУ «ОЮА» ; Кафедра междунар. права и междунар. отношений. – Одесса, 2015. – С. 14–19.

those in case of deprivation of life towards a person who is not depended on by a big number of the alive.

Nevertheless, can such an approach be considered fair? Does soulless assessment reflect the real role of an offence in a society and on an individual level?

Being reflected in the reality, the significance of any act affects the society on the micro-, meso- and macro level. Along with objective and subjective elements of a criminal offence, certain elements of significance of an act for the society and an individual affect assessment of an act. However, not all of them do, for only those elements that are reflected in the normative formulations have such an effect. For the most part, they literally concern extenuating or aggravating circumstances. For example, committing a crime towards an expectant mother or a minor aggravates penalty, while a concatenation of trying family circumstances which account for crime commitment extenuate penalty. Some of such circumstances are directly attributed to the grounds for exemption from liability: acts under extreme necessity, necessary defense etc. The significance of an act is minimized with the change of conditions or reconciliation of the offender with the victim.

One could hardly find either the offender's or the victim's counsel who would agree that all possible circumstances of the social and personal significance of an offence can be institutionalized separately. All the spectrum of circumstances affecting significance of an offence is inexhaustible, all the way from a family crisis to the revolutionary events in the state.

They depend on a range of external and internal factors that predetermine significance variability under various circumstances, e.g. the environment, criminality of a scene or victimhood.

Let us try to distinguish two types of significance of a criminal offence:

- 1) social significance, i.e. objective significance of an act for a society;
- 2) personal significance, i.e. subjective significance of an act for the victim and the perpetrator.

Social Significance of Criminal Offence. We define social significance as public attitude towards a committed act measured in negative and positive values (possibly measured in points in the future). *Social significance is the effect of an act and its consequences on the social attitudes the way it is reflected in the social consciousness at a certain point of space and time.*

This category can correspond with the category of objective elements of *corpus delicti*, since it characterizes the effect of an act on social attitudes, as it is reflected in the society, causing public rejection or acknowledgement. The criterion of social significance can perform one of the most important doctrinal missions in criminal law, since it can become the way of defining the interrelation of the categories of lawfulness and justice – the accordance of a requital and an offence.

The gradation of social significance can be either positive or negative. Based on the statements of Pitirim Sorokin and his followers, we would like to note that both a feat and a crime are deviations, the only difference being the sign attributed by a society, either «+» or «-», and the choice of the polarity is marked by a society, with either reward or punishment. Essentially, social significance can be a measure of good and evil in the society and, therefore, a criterion for defining the criminal and the heroic, the penal and the praiseworthy.

Negative and positive aspects of unlawful conduct can merely reflect its social significance objectively since only the latter can demonstrate the impact of a deed on social attitudes at a certain point of space and time. For instance, the act of resisting police in a stable society is criminal. However, resisting the police protecting the dictator from people's wrath under the conditions of popular revolution gains positive significance and is appraised as a feat.

Speaking about social significance, it is worth assuming that this notion, as already noted, corresponds to the objective elements of *corpus delicti*.

Within the system of objective elements of *corpus delicti* and, therefore, in the qualification formula, social significance of an act may correspond to a target of crime and *actus reus*.

The question logically arises as to whether the social significance can be included in the system of objective elements of a crime. The answer to this question is in the comparison of the functional load of such notions as «objective elements of an offence» and, accordingly, «social significance». The latter may be commensurable with such categories as «social danger», «harm», «damage» etc., and in a certain sense arises from them. After all, social danger, harm and damage are the reference points of social significance: societies form their attitude towards an act by assessing harm and danger. However, the category of social significance cannot substitute for the features of an act and its consequences in the construction of objective elements, as it doesn't literally define the criteria of the criminal, but it can reflect the core reaction of the society to a particular an act.

Therefore, *social significance carries out a function of «defining the sign» for the construction of any non-legal action, defining unlawful deed as positive or negative, harmful or socially useful for the society at a particular point of time and space*. We also suggest that social significance among other things may serve as a criterion not only for defining the criminal and the non-criminal but also for demarcation of criminal offences and crimes. As a matter of fact, it can reflect the degree, the intensity, the level of rejection or acceptability of certain forms of deviations.

For instance, there might exist a scale of a negative social significance. It would be assumed that such a scale is filled with socially significant objective criteria of assessing a deed by the society according to a number of parameters that define the relation of a deed to the categories of either criminal offences or crimes.

It must not be ruled out that social significance of a deed in case of establishing a regular positive social evaluation may lead to decriminalization, which in turn would disburden the criminal legislation of post-totalitarian states of inquisitive criminal norms.

Personal Significance of Criminal Offence. Personal significance of an offence is the other side of deed evaluation. This fact was explicitly and implicitly observed by our colleagues Tulyakov (2014)² and Baulin (2012)³ One could say that since it reflects the individual's attitude, it should correspond with the subjective elements of *corpus delicti*. Nevertheless, let us examine the alternatives of personal significance of a deed for participants of a criminal offence: the victim and the perpetrator.

Personal significance of an offence for the victim is the reflection of the victim's attitude (or the reflection of attitudes of the individuals recognized as injured by a certain criminal offence in case of victim's death or loss of ability to express their attitude) towards a committed act.

The modern doctrine of criminal law contains a number of institutions that demonstrate the role of personal significance of an act for the victim with a certain level of objectivity when imposing criminal liability. As a rule, their description is made by the medium of a the victim's attitude towards post-criminal behavior of the perpetrator. These include the perpetrator's reconciliation with the victim as a basis for exemption from criminal liability, which is the most demonstrative in this case: the victim's decision to forgive the perpetrator is basically the reflection of a positive attitude towards post-criminal behavior: compensation, repentance etc. Still, would representation of personal significance be complete with such an approach? After all, a deliberate criminal offence assumes a number of stages of its commitment, and the victim's representation of crime goes beyond receiving apologies and compensation of caused harm. A reckless crime also exists at a certain

² Tulyakov V. O. The Criminal Law of Nowadays: Renaissance of C. Beccaria's Ideas / V. O. Tulyakov // On Crimes and Punishment: the Evolution of Criminal Law Doctrine : Materials of International Scientific and Practical Conference dedicated to 250 anniversary of Cesare Beccaria's treatise (Odessa, 2014) / MES of Ukraine; NU OLA; Southern Regional Center of National Academy of Legal Sciences of Ukraine; Odessa Office of Civic Organization «The All-Ukrainian Association of Criminal Law». – Odessa : Yurydychna literatura, 2014. – pp. 13–28. – p. 27.

³ Baulin Yu. V. The Significance of Public Opinion and Interests of the Victim When Modelling Modern Criminal Law Policy // Yu. V. Baulin // Modern Criminal Policy: in Search of Optimal Model : The Materials of the Fourth Russian Congress of Criminal Law (31 May – 1 June 2012). – Moskov : Prospect, 2012. – pp. 581–584.

point of space and time coordinates where it «resides», and the victim goes along these coordinates along with the perpetrator.

Therefore, the victim personal significance of an act must reflect all the stages of an act, as well as pre- and post-criminal behavior of the perpetrator. However, it cannot be limited to that.

It must be highlighted that the factor of victim-proneness of the victim's behavior must be included in the scope of personal significance for the victim of a criminal offence. Thus, provocative, immoral or unlawful actions of the victim must be taken into account as elements of victim's personal significance of a crime along with evaluation of the very act and post-criminal behavior of the perpetrator, since only their constellation demonstrates a complete scheme of the victim's attitude towards an act.

The criteria of victimhood must correspond with objective elements of *corpus delicti* and affect not only the determination of personal significance, but also be reflected in the characteristics of the victim when determining the target of crime and *actus reus*. Obviously, the victim's personal significance of an act must be viewed alongside the target of a crime, *actus reus* and social significance of a crime as an independent category that includes the elements of victim-proneness having affected the commitment of a criminal offence.

Personal significance of an act for the perpetrator, in turn, cannot be understood apart from the issues of sanity and culpability. Therefore, it corresponds with the categories of subjective elements of a crime. However, it is directly linked to the perpetrator's awareness of the real social significance of their act and its personal significance for the victim. The perpetrator's attitude towards these two categories allows to optimize the answers to the questions «why has such an offence been committed [by the perpetrator]?» and «Is this actually a crime [in the victim's mind]?».

It is reasonable to define personal significance of an act for the perpetrator as the perpetrator's conscious attitude towards social significance of an act and its personal significance for the victim when committing a criminal offence.

Савінова Н. Соціальна сутність кримінального правопорушення і принцип справедливості

Наводяться аргументи на користь розгляду принципу справедливості з об'єктивних позицій суспільства і суб'єктивних позицій особистості. Пропонується включення в оціночні категорії справедливості, як гарантії прав людини і тренду кримінальної юстиції, включати дві складові: соціальну та персональну значимість кримінального правопорушення при законодавчій регламентації та практиці застосування.

Ключові слова: справедливість, кримінальне правопорушення, соціальна значимість, персональна значимість, значимість для потерпілого, значимість для винного.

Савінова Н. Социальная сущность уголовного правонарушения и принцип справедливости

Приводятся аргументы в пользу рассмотрения принципа справедливости с объективных позиций общества и субъективных позиций личности. Предлагается включение в оценочные категории справедливости, как гарантии прав человека и тренда уголовной юстиции, включать две составляющие: социальную и персональную значимость уголовного правонарушения при законодательной регламентации и практике применения.

Ключевые слова: справедливость, уголовное правонарушение, социальная значимость, персональная значимость, значимость для потерпевшего, значимость для виновного.